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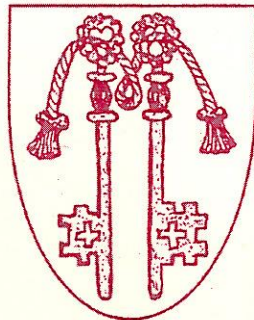
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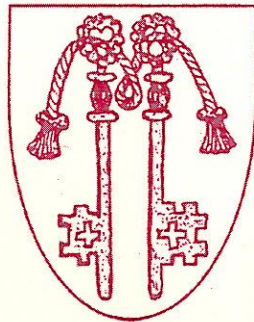
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Abbreviations

The following sigla are used without further explanation:

ACA	<i>Archivo de la Corona d'Aragón/Arxiu de la Corona d'Aragó</i>
AHC	<i>Annuario historiae conciliorum</i>
AHDE	<i>Anuario de Historia del Derecho español</i>
AHP	<i>Archivum historiae pontificiae</i>
AJLH	<i>American Journal of Legal History</i>
AKKR	<i>Archiv für katholisches Kirchenrecht</i>
ASD	<i>Annali di storia del diritto</i>
BAV	Biblioteca Apostolica Vaticana
BDHI	<i>Bibliothek des Deutschen Historischen Instituts in Rom</i>
BC	Bibliotheca/Archivio capitolare, capitular, chapter, kapitoly etc.
BEC	<i>Bibliothèque de l'Ecole des Chartes</i>
BIDR	<i>Bullettino dell'Istituto di Diritto Romano</i>
BISM	<i>Bullettino dell'Istituto Storico Italiano per il Medio Evo e Archivio Muratoriano</i>
BL	British Library
BM	Bibliothèque municipale, Stadtsbibliothek, Biblioteca comune, Landesbibliothek, civica, etc.
BMCL	<i>Bulletin of Medieval Canon Law, New series</i>
BNF/BN	Bibliothèque nationale de France / Biblioteca nazionale
BSB	Bayerische Staatsbibliothek
BU	Bibliothèque universitaire, Universitätsbibliothek, Biblioteca di Università, etc.
Cat. gén.	<i>Catalogue général des manuscrits des bibliothèques publiques de France (Départements, octavo series, unless otherwise indicated)</i>
CCL	<i>Corpus Christianorum, Series latina</i>
CCCM	<i>Corpus Christianorum, Continuatio mediaevalis</i>
CHR	<i>Catholic Historical Review</i>
CID	<i>Cuadernos informativos de derecho histórico público, procesal y de la navegación</i>
Clavis	E. Dekkers, <i>Clavis patrum latinorum</i> , ed. 2
Clm	Codices latini monacenses-Bayerische Staatsbibliothek Munich
COD	<i>Conciliorum œcumenicorum decreta</i> , ed. Centro di Documentazione... (COD ³ : ed. 3)
COGD	<i>Conciliorum œcumenicorum generalium-que decreta</i> , 2.1: <i>The Œcumenical Councils of the Roman Catholic Church: From Constantinople IV to Pavia-Siena (869-1424)</i> ; 2.2: <i>From Basel</i>

- to Lateran V (1431-1517, edd. Alberto Melloni et alii (Corpus Christianorum; Turnhout 2013)*
- CSEL *Corpus scriptorum ecclesiasticorum latinorum*
 DA *Deutsches Archiv für Erforschung des Mittelalters*
 DBI *Dizionario biografico degli Italiani*
 DDC *Dictionnaire de droit canonique*
 DGDC *Diccionario general del derecho canónico, edd. Javier Otaduy, Antonio Viana, Joaquín Sedano (7 Volumes; Pamplona 2012)*
- DGI *Dizionario dei giuristi italiani (XII-XX secolo), edd. Italo Birocchi, Ennio Cortese, Antonello Mattone, Marco Nicola Miletti (2 vols. Bologna 2013)*
- DHEE *Diccionario de historia eclesiástica de España*
 DHGE *Dictionnaire d'histoire et de géographie ecclésiastiques*
 DMA *Dictionary of the Middle Ages*
 DThC *Dictionnaire de théologie catholique*
 EHR *English Historical Review*
 HDIE *Histoire du droit et des institutions de l'Eglise en Occident*
 HJb *Historische Jahrbuch*
 HLF *Histoire littéraire de la France*
 HRG *Handwörterbuch zur deutschen Rechtsgeschichte*
 HZ *Historische Zeitschrift*
 IRMAe *Ius romanum medii aevi*
 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. 882-11*
- Kuttner, *Rep.* Stephan Kuttner, *Repertorium der Kanonistik (1140-1234) (Studi e Testi 71; Città del Vaticano 1937)*
- LHR *Law and History Review*
 LMA *Lexikon des Mittelalters*
 LThK *Lexikon für Theologie und Kirche (LThK²: ed. 2)*
 Mansi *Mansi, Sacrorum conciliorum nova et amplissima collectio*
 Mazzatinti *G. Mazzatinti (continued by A. Sorbelli et al.), Inventari dei manoscritti delle biblioteche d'Italia*
- MEFR *Mélanges de l'École française de Rome: Moyen âge – Temps modernes*
- MGH *Monumenta Germaniae historica*
- Capit. Capitularia
 - Conc. Concilia
 - Const. Constitutiones
 - Epp. Epistolae (in Quart)
 - Epp. saec. XIII Epistolae saeculi XIII

• Epp. sel.	Epistolae selectae
• Fontes iuris	Fontes iuris Germanici antiqui, Nova series
• Ldl	Libelli de lite imperatorum et pontificum
• LL	Leges (in Folio)
• LL nat. Germ.	Leges nationum Germanicarum
• SS	Scriptores
• SS rer. Germ.	Scriptores rerum Germanicarum in usum scholarum separatim editi
• SS rer. Germ. N.S.	Scriptores rerum Germanicarum, Nova series
• SS rer. Lang.	Scriptores rerum Langobardicarum
MIC	Monumenta iuris canonici
• Ser. A	Series A: Corpus Glossatorum
• Ser. B	Series B: Corpus Collectionum
• Ser. C	Series C: Subsidia
MIÖG	<i>Mitteilungen des Instituts für österreichische Geschichts- forschung</i>
ML	Monastic Library, Stiftsbibliothek, etc.
NA	<i>Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde</i>
NCE	<i>The New Catholic Encyclopedia</i>
NDI	<i>Novissimo Digesto Italiano</i>
ÖAKR	<i>Österreichisches Archiv für Kirchenrecht</i>
ÖNB	Österreichische Nationalbibliothek
PG	Migne, <i>Patrologia graeca</i>
PL	Migne, <i>Patrologia latina</i>
Poth.	Pothast, <i>Regesta pontificum romanorum</i>
QF	<i>Quellen und Forschungen aus italienischen Archiven und Bibliotheken</i>
QL	<i>Quellen und Literatur</i>
RB	<i>Revue bénédictine</i>
RDC	<i>Revue de droit canonique</i>
REDC	<i>Revista español de derecho canónico</i>
RHD	<i>Revue historique de droit français et étranger</i> (4 ^e série unless otherwise indicated)
RHE	<i>Revue d'histoire ecclésiastique</i>
RHM	<i>Römische historische Mitteilungen</i>
RIDC	<i>Rivista internazionale di diritto comune</i>
RIS ²	Muratori, <i>Rerum italicarum scriptores: Raccolta degli storici italiani, nuova edizione...</i>

RQ	<i>Römische Quartalschrift für christliche Altertumskunde und Kirchengeschichte</i>
RS	Rolls Series (Rerum Britannicarum medii aevi scriptores)
RSCI	<i>Rivista di storia della Chiesa in Italia</i>
RSDI	<i>Rivista di storia del diritto italiano</i>
SB	Staatsbibliothek/Stiftsbibliothek
SCH	<i>Studies in Church History</i>
SDHI	<i>Studia et documenta historiae et iuris</i>
<i>Settimane</i>	<i>Settimane di studio del Centro italiano di studi Spoleto sull'Alto Medioevo</i>
SG	<i>Studia Gratiana</i>
TRE	<i>Theologische Realenzyklopädie</i>
TRG	<i>Tijdschrift voor Rechtsgeschiedenis</i>
TUI	<i>Tractatus universi iuris</i> (18 vols. Venice 1584-1586)
Vat.	Biblioteca Apostolica Vaticana
ZKG	<i>Zeitschrift für Kirchengeschichte</i>
ZRG Kan. Abt.	<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung</i>
ZRG Rom. Abt.	<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung</i>

The Proceedings of the International Congresses of Medieval Canon Law will be referred to as (e.g.): *Proceedings Boston 1965*.

For the serial publications of the great academies:

Abh. Akad. ... followed by name of city, e.g. *Berlin, München*, etc. = *Abhandlungen der ... preussischen, bayerischen*, etc. *Akademie der Wissenschaften, philosophisch-historische Klasse*.

Similarly for *Mémoires, Memorie, Proceedings, Rendiconti, Sitzungsberichte*, etc. the abridged form is always understood as referring to the series covering philosophy and the humanities where several classes or sections exist in a single academy; e.g.

<i>Mém. Acad. Inscr.</i>	<i>Rendic. Istit. Lombardo</i>
<i>Proceed. Brit. Acad.</i>	<i>Sb. Akad. Wien</i>

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Annual Report 2015

Peter Landau

The Conference and Grand Opening of the Stephan-Kuttner Institute of Medieval Canon Law at the Yale Law School in New Haven, Connecticut on May 21st to 22nd 2015 has to be considered the main event of the year in our common field of medieval canon law. My talk and Greta Austin's talk at Yale are published in this volume to commemorate the event.

Many scholars in the field will remember the years from 1964 to 1970, when the Institute had moved from The Catholic University of America to Yale University under the presidency of Stephan Kuttner. When Kuttner accepted an offer to take over the directorship of The Robbins Collection at the University of California in Berkeley in 1970 the Berkeley Law School became the new home of the Institute.

During the conference at Yale Law School 2015 President Peter Landau referred to the State of Bavaria, Germany, hosting the Institute for 25 years from 1990-2015 at the Ludwig-Maximilians University, Munich. Peter Landau gave a key-note lecture on the origins of the maxim 'Quod omnes tangit, ab omnibus approbari debet' in classical canon law. The conference in New Haven, Connecticut was very successfully organized by Anders Winroth, secretary of the Institute.

The editorial work done by the Institute made some progress in 2015. The third tomos of the Summa 'Omnis qui iuste iudicat' sive Lipsiensis (C.11 - 22) was published at the end of 2014; tomos IV with the last part of the text has been sent to the Biblioteca Apostolica Vaticana for publication. Tomus V with the Registers will follow at the end of 2015. So we can expect the complete edition of the Summa Lipsiensis — the major work of the Anglo-Norman school of canon law - to be presented at the Fourteenth Congress of Medieval Canon Law in Paris in July 2016. Editorial work on early decretal collections of the twelfth century was also continued in Munich during the last few years. In 2015 Gisela Drossbach published her precise analysis of the

Collectio Cheltenhamensis combined with an interesting apparatus of early glosses, as Volume 10 of the Corpus Collectionum in the series B of the Monumenta Iuris Canonici. A preview of other editorial projects of the Institute will be given by the president in Paris 2016.

Our colleague and friend Chris Coppens, Radboud University Nijmegen, died on August 27th 2015 at the age of 68 years. Chris Coppens had worked on the critical edition of the *Summa 'Animal est substantia'* (also known as *Summa Bambergensis*) for many years and was able to finish a preliminary edition of the four manuscripts on the internet. The Institute will take care to publish a printed edition of the last important work of the Parisian school of canon law during the first decade of the thirteenth century as a volume of the Monumenta Iuris Canonici. Chris Coppens' last essay on the *Summa* suggesting the Dominican Reginald of Orléans as the possible author ends with the remark: 'S'il nous en reste le temps.'¹ It will be a nobile officium for his colleagues and friends to preserve the results of his long-lasting research for the future.

The Institute Munich could again welcome guests from foreign countries in 2015. They were Prof. T. Genka (Japan), Prof. S. Kawashima (Japan), Prof. Wolfgang P. Müller (USA).

We look forward to the International Congress of Medieval Canon Law in Paris in July 2016.

Munich.

¹ E.C. Coppens, 'L'auteur d'Animal est substantia: Une hypothèse', edd. B. d'Alteroche et alii, *Mélanges en honneur d'Anne Lefebvre-Teillard* (Paris 2009) 289-298 at 298.

**How Old was the Old Law?
Talking about Change in the History of Medieval Church
Law**

Greta Austin

Historians of medieval Church law sometimes distinguish between the ‘old law’ and the ‘new law’ of papal decretals which developed after Gratian’s *Decretum*. In the last quarter of the twelfth century, canonists began to distinguish between the ‘old law’ and the ‘new law’.¹ Scholars have traditionally interpreted this ‘old and new laws’ as referring to the material before Gratian and the ‘new’ papal decretals of the twelfth century and onward.² Historians also describe the shifts in canon law during this period by referring to the ‘classical canon law,’ or differentiating between ‘pre-Gratian’ and ‘post-Gratian’ law. Such categories are often helpful. Categories can enable us to sort through the complexities of history and to identify change. At the same time, however, the use of categories may create rigid divisions and discontinuities where none may have existed.³ This paper proposes that an over-

¹See Simon of Bisignano, *Summa in Decretum Simonis Bisinianensis* (MIC Series A 8; Città del Vaticano 2014) 50 to D.56 c.13 s.v. *Cenomanensem* usque *assumatur*: ‘Hodie tamen nouo iure filius sacerdotis genitus promoueri non poterit nisi in monasterio uel canonica regulari fuerit conuersatus ut in extra. c. Quod super his de quibus (1 Comp. 1.9.5 [=X —]). Around 1191, Bernard of Pavia wrote in his preface to *Compilatio prima*, ‘I, Bernard, provost of Pavia, compiled ‘extravagantia’ from the old and new law under titles’, ‘ego B. Papiensis prepositus extrauagantia de ueteri nouoque iure sub titulis compilauit super operis imperfectione ueniam postulans a lectore’. Bernard of Pavia, ed. Emil Friedberg, *Quinque Compilationes Antiquae* (Leipzig 1882; reprinted Graz 1956) 1, translated by Robert Somerville and Bruce Brasington, *Prefaces to Canon Law Collections in Latin Christianity: Selected Translations, 500–1245* (New Haven 1998) 231.

² See, e.g., the comment in Somerville-Brasington, *Prefaces* 219: ‘the new law is the law of papal decretals; the old law is what preceded and what was sifted and preserved by Gratian’.

³ This paper does not argue that the distinction between the new law and the old law—and then, if we follow Cardinal Gasparri’s tripartite schemata, the ‘newest law’ since the Council of Trent—is irrelevant. (‘Those laws that were laid down before Gratian (between the years 1140-1150) are called, even in our day, the

rigid reliance upon distinctions between the ‘new’ and ‘old’ or ‘post- and pre-Gratian’ poses problems for contemporary scholars and our understanding of medieval canon law, if contemporary scholars rely upon these categories too much as an explanatory device. These terms may indirectly reinforce a teleological reading of legal history that keeps us from understanding how medieval canon law worked ‘on the ground’. This paper looks at two models, those developed by Paul Fournier and Harold Berman, which explained how the ‘new law’ came into being. It argues that these two models share two flaws: their teleology and their anachronistic definitions of law, which depend upon modern expectations of law. In general, this paper points out the problems with teleological models of the history of law, which are implied in the distinction between ‘new’ and ‘old’. Teleological histories do disservices to the ‘new’ law and the ‘old law’ alike, since medieval canon law can only be a precedent to a more glorious

old law; those appearing from the time of Gratian until the Council of Trent (1545-1563) are styled the *new law*, even though they seem to us quite old; and those that came out after the Tridentine Synod are called the *newest law*. Cardinal Gasparri, Preface to *The 1917 or Pio-Benedictine Code of Canon Law*, trans. Edward N. Peters [San Francisco 2001] 1.) Nor does this paper demonstrate when and how this distinction between the new and old law developed, although those would also be worthy directions of study. Also fascinating is the question of how new law in the shape of papal decretals came to take on such authority, given that earlier canon law had often represented more recent law as having less authority, and had frequently looked to the ancient past as authoritative models. For instance, Regino of Prüm was apologetic about including recent councils in his collection. See the preface to the *Libri duo: Reginonis abbatis Prumiensis libri duo de synodalibus causis et disciplinis ecclesiasticis*, ed. F.G.A. Wasserschleben (1840; repr. Graz, 1964) 2; trans. Robert Somerville and Bruce Brasington, *Prefaces to Canon Law Collections in Latin Christianity: Selected Translations, 500–1245* (New Haven 1998) 93, translated into German with a revised Latin text by Wilfried Hartmann, *Das Sendhandbuch des Regino von Prüm* (Darmstadt 2004) 20-21. Similarly, in his *Decretum* Burchard of Worms preferred to include or invent inscriptions to popes from antiquity rather than more recent popes, as well as inscriptions (whether accurate or altered) to the Church Fathers rather than Carolingian thinkers like Hrabanus Maurus. See Greta Austin, *Shaping Church Law Around the Year 1000: The Decretum of Burchard of Worms* (Aldershot 2009) 111-114.

future.⁴ Second, this paper argues against the anachronistic project of defining law and measuring legal achievement against later yardsticks, as Berman did explicitly and Fournier implicitly, because this imposes modern standards upon earlier periods. Finally, this paper critiques a third problem with distinctions like those between the ‘old’ and ‘new law’: that such approaches tend to use the previous period as a foil, in order to emphasize the achievements of the period in question.

Finally, instead of simply complaining about the problems with this distinction between ‘new’ and ‘old,’ this article suggests that the scholarly treatment of the ordeal and its withering provides a helpful model for narrating medieval canon law as well as changes in it. The research on the ordeal has rejected the idea that Western people became more ‘rational’ and thus rejected the ordeal. Instead, historians of the ordeal have suggested that the ordeal and its decline- requires us to look at the social contexts, the fluctuations of power, the changing nature of institutions and authority, and the dynamic social structures in which law operated. This article then applies this model to the institution of episcopal visitation and episcopal courts in the central Middle Ages. By doing so, this paper proposes one alternative to Fournier and Berman as a model for describing and understanding legal change.

⁴ Peter Clarke, for instance, points out how the focus on Gratian has led scholars to focus on those collections that provided sources to Gratian: ‘This has encouraged a teleological approach to the evidence, privileging those collections that appear to presage the “classical age”’ Peter Clarke, ‘Canon Law’ *Routledge History of Medieval Christianity, 1050-1500*, ed. R.N. Swanson (London and New York 2015) 78.

Fournier and Berman: The master narratives

Historians usually describe the waves of papal reforming movements during the ‘the Gregorian Reform’ as pivotal in the history of Western law. In 1917, the French scholar Paul Fournier published an extraordinarily influential article, ‘Un tournant de l’histoire du droit 1060-1140’, which sketched out a convincing story of Western law.⁵ Fournier’s story was adapted widely. According to this narrative, there was no ‘scientific study of law’.⁶ When the Gregorian Reformers looked for legal support for their claims,⁷ they rediscovered Roman law, which taught them jurisprudence.⁸ According to this story, Ivo, bishop of Chartres, learned from the Romans in developing his jurisprudential theory in his *Prologue*, a text which explains methods for interpreting texts.⁹ For Fournier, Ivo also put the *Prologue*’s hermeneutical method into practice in his canon law collection, the *Panormia*.¹⁰ In turn, the development of interpretative methods laid the groundwork for scholasticism, Gratian’s *Decretum* and a new period of ‘classical’ canon law, one which culminated ultimately in the codification of Church law.¹¹

The most famous, although not the best-reviewed among academics,¹² deployment of Fournier’s narrative was that by

⁵ Paul Fournier, ‘Un tournant de l’histoire du droit 1060-1140’, RHD 41 (1917) 129-180, reprinted in *Mélanges de droit canonique*, ed. Theo Kölzer (2 vols. Aalen 1983) 2:373-424.

⁶ *Ibid.* 129; see also Paul Fournier and Gabriel Le Bras, *Histoire des collections canoniques en Occident* (2 vols. Paris 1931-1932) 2.5-6.

⁷ *Ibid.* 141-143; see also the overview on 150.

⁸ *Ibid.* 151-154.

⁹ *Ibid.* 155-157 and 165-156; Fournier and Le Bras, *Histoire des collections* 2.13-14.

¹⁰ *Ibid.* 157-163.

¹¹ *Ibid.* 168-169.

¹² Harold Berman, *Law and Revolution: the Formation of the Western Legal Tradition* (Boston 1983). See, e.g., the following reviews of Berman: William Chester Jordan in the *Michigan Law Review* 83 (1985) 670-681 (e.g., ‘the synthesis is neither particularly startling nor particularly effective’ 670 and ‘the reader often feels that the author is addressing old scholarship, employing outmoded methods, and reaching old-fashioned conclusions’ 676); Peter

Harold Berman, an American law professor. In reading Fournier, Berman found much of his material to fashion the argument that the Gregorian Reform caused a legal ‘revolution’ which broke with all previous conceptions of law. According to Berman, law as a legal system did not exist before the Gregorian Reform:¹³

there was no independent, integrated, developing body of legal principles and procedures clearly differentiated from other processes of social organization and consciously articulated by a corps of persons specially trained for the task.

For Berman the period before the Gregorian Reform lacked a legal system, until the Reform ‘gave birth’ to Western law.¹⁴ Since the Reform, Berman suggests, the ‘Western legal tradition’ has ‘developed continuously over generations’ and that ‘this

Landau in *The University of Chicago Law Review* 51 (1984) 937-943 (‘Berman’s survey of early medieval law simply omits to take account of a breathtaking transformation in recent scholarship’ 939 and ‘although his attempt to use varied methods and approaches is stimulating, one should read the book critically, aware that it reflects no first-hand study of the historical facts upon which it depends’ 943); Kenneth Pennington in *The American Journal of Comparative Law* 33 (1985) 546-548 (‘It would be tiresome and serve no useful purpose to point out all the errors of fact in the book. Most of them are minor, but they betray a very unsteady knowledge of the period. . . . The book is a keen disappointment’ 548); Edward Peters in the *Harvard Law Review* 98.3 (1985) 686-696 (a more favorable review, but with caveats like ‘seriously flawed’ 692). There are, however, some positive reviews: Mirjan Damaška in *The Yale Law Journal* 94 (1985) 1807-1824 (‘His account of the birth of Western law is an impressive achievement, a towering contribution to comparative legal history’ 1824); A. London Fell in *The American Historical Review* 89.4 (1984) 1040-1041 (‘From a scholarly point of view the book is not without minor weaknesses, but they often reflect its counterbalancing strengths’ 1041); and Frederick H. Russell in *The American Journal of Legal History* 29 (1985) 283-284.

¹³ Berman, *Law and Revolution* 49-50. Before the Gregorian Reform, Berman wrote, ‘legal rules and procedures...were largely undifferentiated from social custom and from political and religious institutions. No one had attempted to organize the prevailing laws and legal institutions into a distinct structure. Very little of the law was in writing. There was no professional judiciary, no professional class of lawyers, no professional legal literature. Law was not yet consciously systematized’.

¹⁴ *Ibid.* 1.

conscious process of continuous development is (or once was) conceived as a process of organic growth'.¹⁵

Fournier and Berman are useful examples to study because one came out of the civil law tradition and the other out of the Anglo-American common law tradition. Berman's definition of law specifies the presence of hermeneutical methods, institutions, and trained legal specialists.¹⁶ Berman's definition reflects his training in the common law, which focuses on institutions, professionalization, and legal methods. Conversely, Fournier looked for different changes and developments in the Gregorian Reform: a new focus on papal and papally-approved texts¹⁷; and the re-discovery of Roman law and systematization, which paved the ground for codification.¹⁸ Unlike Berman, Fournier argued for an 'evolution' of law, in which the Gregorian Reform marks a dramatic 'turning point' (as in the title of his seminal article, 'Un tournant de l'histoire du droit'). The Gregorian Reform, for Fournier, marked the rediscovery of Roman law. Its achievements eventually led to codification of the canon law. Fournier described the Code of Canon Law of 1917 as achieving the Roman work of the unification of canon law—a project in which the Gregorian Reform played a crucial role.¹⁹ Codification and Roman law—both central to European civil law—were essential characteristics of Fournier's definition of law, whereas Berman looked for legal institutions, professionals and interpretative methods.

¹⁵ Ibid. 5.

¹⁶ Ibid. 4-5. Berman looks for a legal system, which has 'legal institutions and procedures, legal values, legal concepts, legal rules'. These result in governance, they allocate rights and duties, and they resolve conflicts. Berman goes on to identify characteristics of all legal 'systems': a distinction between the legal institution and other types of institutions; the existence of specialists or legal professionals; a professional system for training jurists; and the transformation of those institutions by legal learning (7-8).

¹⁷ Fournier-Le Bras, *Histoire* 2.7.

¹⁸ Ibid. 2.357; see also 2.361.

¹⁹ Ibid. 2.360.

The problems with Fournier and Berman's definitions of law and models of legal change

In general, both Fournier and Berman implicitly defined law in the Gregorian Reform according to the contemporary legal systems they knew, be it continental or the common law. To praise whatever seems to be 'modern' and 'like us' is a somewhat narcissistic view of the past. Both Fournier and Berman seem to be influenced, at least indirectly, by modernization theories.²⁰ Berman's definition of the Western legal tradition is inherently teleological: law must inherently improve over time.

Implicit in both Berman and Fournier's models is the idea that law constantly improves and moves towards better results and greater rationality. Both share a teleological assumption that Western law has moved inexorably towards their own contemporary legal model, although they disagree upon whether that model is implicitly continental law or Anglo-American common law. Such a line of thinking implies a neo-colonial model in which only the contemporary West lives up to the highest standards of rationality and progress, and in which religion (according to modernization theories) is superseded by science's purported rationality.

Such a teleological view of history is also problematic in that the investigator tends to find what they want to find. If you anticipate an end result, it is easier to find people who 'anticipate' or 'lay the groundwork' for that particular result. Fournier and

²⁰ I am indebted to Sita Steckel's comments at the Zürich *New Discourses in Medieval Canon Law Research* conference. See Sita Steckel, 'Differenzierung jenseits der Moderne: Eine Debatte zu mittelalterlicher Religion und moderner Differenzierungstheorie', *Frühmittelalterliche Studien* 47 (2013) 307-351, and 'Säkularisierung, Desakralisierung und Resakralisierung: Transformationen hoch- und spätmittelalterlichen gelehrten Wissens als Ausdifferenzierung von Religion und Politik', *Umstrittene Säkularisierung: Soziologische und historische Analysen zur Differenzierung von Religion und Politik*, edd. Karl Gabriel, Christel Gärtner, Detlef Pollack (Berlin 2014) 134-175.

Berman stressed *different* aspects of legal accomplishment. They saw what they wanted to see in the Gregorian Reform. In this way, the Gregorian Reform (or any other period) becomes a blank slate onto which moderns project themselves.

Second, according to Fournier and Berman's definitions of law, and such a teleological model of legal change, modernity becomes the measuring-stick of progress and 'reform'. Only what seemed 'rational' and modern, and what seems to anticipate later developments, occupies the foreground. This reading flattens the complexity of history.²¹ The broader problem with the Fournier and Berman definitions of law is that they imply a triumphalist and Panglossian reading of history, in which we contemporaries live in the best of all possible legal worlds. In general, then, there are two lessons: that later and modern definitions of law should not be imposed upon earlier periods, and in general that teleological readings of the past keep us from understanding the diversity of the legal past.

The third problem is that Berman and Fournier both asserted the glory of the new period at the expense of the earlier one. The earlier period had to be denigrated in order to celebrate the later one's accomplishments. Fournier contrasted the pre-Reform period unfavorably with the Reform: although earlier thinkers collected texts, they lacked 'un art de l'interprétation des textes juridiques'.²² As Peter Landau points out in his review of Berman, Berman in particular gave short shrift to pre-Reform canon law.²³ To demonstrate the 'revolutionary' nature of the

²¹ I am indebted to the discussions in Zürich at the *New Discourses in Medieval Canon Law Research* conference, organized by Andreas Thier and Christof Rolker, although the participants have no responsibilities for any overstatements or misstatements made here.

²² Fournier, 'Un tournant' 129-130.

²³ 'Berman's book, however, provides little information about the earlier canon law tradition; the canon law of the 1100s is seen as an almost completely fresh and revolutionary body of legal texts fulfilling the program of Gregory VII's 'Dictatus Papae'. This perspective is too one-sided. Berman does not discuss the important older canonical collections that laid the basis for the twelfth-century development. The main link between old and new canon law, Gratian's *Decretum*, is treated as a revolutionary work of legal theory, whereas in fact

Reform, Berman needed to denigrate or ignore the ‘*ius antiquum*’. This problem may easily afflict other historians: setting up a previous period as a foil for the later one, in order to demonstrate the great achievements of the subsequent era. This author’s book on Burchard of Worms, for instance, sometimes underestimates the accomplishments of Regino’s *Libri duo*, in order to show how Burchard increasingly sorted through the contradictions in Regino and to demonstrate that Burchard ‘anticipated and laid the groundwork for later thinkers like Ivo of Chartres’.²⁴ In general, it is tempting for historians to downplay or even misrepresent the ‘before’ in order to glorify the ‘after’.

And similarly, for contemporary canon law scholars to reinforce repeatedly the distinction between ‘pre-Gratian’ and ‘post-Gratian’, between the ‘old law’ and ‘the new law’, may potentially be problematic in that it can posit a ‘dark ages,’ or a ‘before,’ against which the new revelation of Gratian can shine all the more brightly. But no such foil is needed. The changes of the twelfth century speak for themselves, without needing to deprecate a previous period. Contemporary scholars are not required to adapt uncritically the constructs of ‘new and old’ law, nor even those of pre-Gratian and post-Gratian.

Most broadly, of course, the terms ‘*ius novum*’ or ‘*lex nova*’ as contrasted to ‘*lex antiqua*’ immediately call to mind the Christian distinction between the New Testament and the Old Testament, and more generally the ‘new covenant’ and the ‘old covenant’ which Hebrews 8:8 and other passages deploy.²⁵ To set up a distinction between the ‘new law’ and the ‘old law’ implies a hierarchy in which the new law takes precedence over the old law.

Gratian relied on elementary distinctions that had been made by Isidore of Seville in late antiquity. Gratian cited Isidore in the beginning of his *Decretum*; his own remarks on the Isidorian texts reveal a rather limited understanding of Roman legal concepts and a partial confusion of natural law and biblical law, but no consistent modern legal theory. Landau, review of *Law and Revolution* 939.

²⁴ Austin, *Shaping Church Law* 6.

²⁵ See Jeremiah 31:31, Luke 22:20 (‘the new covenant in my blood’) 2 Cor 3:6 (‘ministers of a new covenant, not of the letter but of the Spirit. For the letter kills but the Spirit gives life’). See also discussion in Romans 3-7 of the ‘law’.

One might here object, perhaps, that, if the thirteenth-century jurists themselves distinguished between the new law of the papal decretals since Gratian, and the old law up through Gratian, we ourselves ought to honor their distinction. But I am less sure. We do not uncritically deploy the early modern distaste for the Middle Ages as the ‘dark ages’. And, in general, we do not accept uncritically everything our sources tell us. If we overvalue the significance of the ‘new law,’ then we risk misunderstanding earlier periods. The ‘*ius antiquum*’ itself, of course, never disappeared: it was included in Gratian, the decretal collections, and the *Decretals* of Gregory IX²⁶—and older collections like the *Panormia* and Burchard’s *Decretum* continued to be copied through the thirteenth century.²⁷ As the jurists of the classical canon law interpreted the texts, the ‘old law’ also continued to exercise its influence. For instance, in the case of baptism, as Richard Helmholz has demonstrated in his *Spirit of the Classical Canon Law*, Augustine’s opposition to rebaptism (since the merit of the person carrying out the baptism did not determine the validity of the sacrament) ‘was also firmly established in the consciousness of theologians and canonists’ of the twelfth century.²⁸

This article’s critique of the Berman-Fournier theses is grounded on new research on many fronts. One challenge to Fournier-Berman is the possibility that the influx of apparently new texts in canon law collections resulted from demand on the

²⁶ Book 1.2, *De constitutionibus*, of the *Liber Extra*, for instance, begins with an excerpt from a council of Melfi, then Gregory’s register, then two Augustinian texts and one from Jerome, before moving to many excerpts from the decretals of Innocent III, one from Honorius III and one from Gregory IX.

²⁷ See Lotte Kéry, *Canonical Collections of the Early Middle Ages (ca. 400-1140): A Bibliographical Guide to the Manuscripts and Literature* (History of Medieval Canon Law 1; Washington DC 1998) 134-144; Katherine G. Cushing, ‘Law and Reform: The Transmission of Burchard of Worms’ *Liber decretorum*’, *New Discourses in Medieval Canon Law Research*, edd. Andreas Thier and Christof Rolker (Zürich forthcoming).

²⁸ Richard Helmholz, *Spirit of the Classical Canon Law* (Athens and New York 1996) 207.

part of users, rather than papal reformers.²⁹ Such interest in canonical thought appears to have been on-going rather than a sudden uptick in the eleventh century. As Wilfried Hartmann has demonstrated, for instance, canon law in the ninth century was more vibrant than historians have tended to recognize.³⁰

Another question is whether the Gregorian rediscovery of Roman law played an instrumental role in bringing jurisprudential thought to the West.³¹ For instance, Roman law played a fairly limited role even in the first recension of Gratian.³² Another critique has been to sever the link which Ivo of Chartres and his *Panormia*, as the first example of a collection using the scholastic method, created between the papal Reformers and early scholastic

²⁹ See, e.g., Martin Brett, 'Canon Law and Litigation: The Century before Gratian', *Medieval Ecclesiastical Studies in Honour of Dorothy M. Owen*, ed. M. J. Franklin and C. Harper-Bill (Woodbridge UK 1995) 21-40, especially 34.

³⁰ Wilfried Hartmann, *Kirche und Kirchenrecht um 900: Die Bedeutung der spätkarolingischen Zeit für Tradition und Innovation im kirchlichen Recht* (MGH Schriften 58; Hannover 2008).

³¹ See Peters's review of *Law and Revolution* 694: 'historians of Roman law will argue that Berman fails to appreciate the importance of post-classical Roman law and dismisses the question of its continuity between the sixth and the late eleventh centuries'. A recent example occurs in Christof Rolker's comments on the role of Roman law in Ivo's thought on marriage: 'Without adopting the Roman law concept of marriage, Ivo used Roman law texts as proof texts for his position. Two key texts he introduced into canonical debate were Dig.23,1 which he quoted frequently in his letters, and the famous *Responsa* of Nicholas I' (JE 2812). As Rolker then notes, the *Responsa* (a ninth-century text) depends on Roman law concepts. Christof Rolker, *Canon Law and the Letters of Ivo of Chartres* (Cambridge 2010) 213-214.

³² Anders Winroth, 'Neither Slave nor Free: Theology and Law in Gratian's Thoughts on the Definition of Marriage and Unfree Persons', *Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington*, ed. Wolfgang Müller and Mary Sommar (Washington DC 2006) 97-109, and 'Roman law in Gratian and the *Panormia*', *Bishops, Texts and the Use of Canon Law around 1100*, ed. Bruce Brasington and K. Cushing (Aldershot 2008) 183-90. See the critique by Kenneth Pennington, 'The 'Big Bang': Roman Law in the Early Twelfth Century' RIDC 18 (2007) 43-70, in which Pennington suggests an earlier date (c. 1120s) for the first recension of Gratian and an 1140s date for the Vulgate version, whereas Winroth proposes the 1140s for the first recension.

thought. As Christof Rolker has argued, Ivo of Chartres did not fit Fournier's understanding of a papal reformer and did not compile the *Panormia*. Rolker calls for less of a focus on 'great men' and more attention to the 'plurality of interests' of 'scribes and readers'.³³ On a number of fronts, then, Fournier and Berman's models have been modified or questioned, with the overall effect of softening or erasing a hard-and-fast line between the 'old law' of the pre-Gratian period and the 'new law' of the papal decretals.

In short, the thirteenth century certainly differed from the eleventh century, and similarly the new law of papal decretals of the twelfth century and onwards differed from the 'old law' of the canon law collections. But the new law was not necessarily 'better' than the old law, and 'law' in the 'old law' should not be put in quotation marks.

The proposed solution

This last section briefly proposes one model for approaching medieval Church law, a model which does not seek to justify or understand medieval developments as anticipating modern developments or greater 'rationality'. Anders Winroth has already written about a similar issue in the most recent rendition of the *Renaissance of the Twelfth Century* volumes, the *European Transformations* volume. Indirectly applying the insights of R.I. Moore, Winroth suggests a 'dark side' to 'the legal revolution of the twelfth century'. Not every change of the twelfth century represented progress and greater rationality, Winroth points out, and he singles out the shift from the ordeal to torture as an example.³⁴

³³ Rolker, *Canon Law* 298.

³⁴ Anders Winroth, 'The Legal Revolution of the Twelfth Century', *European Transformations: The Long Twelfth Century*, edd. Thomas F.X. Noble and John Van Engen (Notre Dame 2012) 338-362. Kenneth Pennington has argued that torture had a relatively limited role in high medieval courts and that 'medieval and early modern jurists were always careful to limit torture in judicial proceedings'. See Kenneth Pennington, 'Torture and Fear: Enemies of Justice', *RIDC* 19 (2008) 203-42, here at 227.

This paper goes further and suggests that the contemporary scholarly discussions about the medieval ordeal and its eventual abolishment at Lateran IV provide a helpful example for scholarship on medieval canon law. One approach to the ordeal has been to understand its abolishment as indicating greater rationality and progress. Richard Southern and Harold Berman both viewed the prohibition of the ordeal at Lateran IV as a crucial step in Western legal thought.³⁵ Berman commented,

not only the style of the early European folklaw but also its content seems primitive by the standards of the Western legal tradition as it has developed since the eleventh and twelfth centuries—and indeed it was expressly condemned as barbaric by the later jurists. In the twelfth century and thereafter, the earlier ‘magical-mechanical’ modes of proof by ordeal and compurgation and battled were finally denounced and replaced.³⁶

Although elsewhere Berman acknowledges the more current scholarship on the ordeal,³⁷ here he appeared to agree with his twelfth- and thirteenth-century witnesses. The ordeal for Berman and Southern represented a ‘barbaric,’ ‘magical,’ or ‘irrational’ practice. When medieval people abolished the ordeal, the West moved closer to ‘rationality’ and its current legal system.

Yet most contemporary scholarship on the ordeal has started with a very different proposition: that the ordeal made sense to its users, and it was not irrational, just as medieval Europeans were not irrational. Anthropologists since at least E.E. Evans-Pritchard have critiqued, both implicitly and explicitly, teleological views of culture in which ‘primitive peoples’ lacked rationality. Brown, and then Robert Bartlett, similarly rejected Richard Southern’s teleological interpretation of the decline of the ordeal.³⁸ For Brown the ordeal was not abolished ‘as one feature of the emergence of western civilization from the ‘tunnel’ of the

³⁵ Richard Southern, *The Making of the Middle Ages* (London 1973) 97.

³⁶ Berman, *Law and Revolution* 76-77.

³⁷ *Ibid.* 57-58.

³⁸ Peter Brown, ‘Society and the Supernatural: A Medieval Change’ *Daedalus* 104 (1975) 133-151; Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Process* (Oxford 1986).

Germanic Dark Ages and of the progress of rationality'.³⁹ Rather, just as Evans-Pritchard sought to understand how oracles and witchcraft 'worked' for the Azande,⁴⁰ Brown and Bartlett work to understand how the ordeal functioned for its medieval users.⁴¹ 'People did not abandon the ordeal because it became irrational,' Bartlett wrote, '. . . it became irrational because they abandoned it'.⁴² Both identify the changes in the authority of lords and clergy, and especially of the learned elite, as forcing the demise of the ordeal.⁴³ Brown understands the decline of the ordeal as resulting from a shift from 'consensus to authority'. Although Bartlett questions the extent to which the ordeal generated 'consensus,' he too looks to an increasingly hierarchical nature of authority and the rise of powerful institutions as marking the late twelfth and the thirteenth centuries.⁴⁴

³⁹ Brown, 'Society and the Supernatural' 308-309.

⁴⁰ E.E. Evans-Pritchard, *Magic, Oracles and Witchcraft among the Azande*, abridged edition (Oxford 1976). See, e.g., the discussion of Azande understandings of causality at 109, or his comment at 222 that 'I hope that I have persuaded the reader of one thing, namely, the intellectual consistency of Zande notions'.

⁴¹ For Brown, 'Society and the Supernatural' 311-315 the ordeal provided 'flexibility' and interpretative discretion and allowed for conflict negotiation in small face-to-face communities. Bartlett pointed out that the ordeal could also provide the staging ground for the raw exercise of power by lords.

⁴² Bartlett, *Trial by Fire and Water*, 86.

⁴³ Brown, 'Society and the Supernatural' 323 argues that the ordeal made sense in one context and then came to make sense less as the structure of society became more complex and as rulers became more authoritarian and needed less consensus — 'the gallows could speak for itself without mystification'.

⁴⁴ Brown, 'Society and the Supernatural' 326 suggests that the rise of a clerical elite with the Gregorian Reform resulted in a decreased role of the supernatural: 'the cliff face of an ill-defined notion of the holy is cut down to size, in order to become the mounting block from which the clerical elite (in theory at least) climbed into the saddle of western society'. R.I. Moore, *The Formation of a Persecuting Society: Authority and Deviance in Europe, 950-1250* (Oxford 1987) 138-140, builds on Brown's insight, in his discussion of the relationship between the Church's 'new elite 'bureaucratic regime' and the growth of oppressive institutions. As Moore points out, this elite created new legal procedures and mechanisms, such as canonization and inquest, and caused canon law to grow. To the legal elite of the late twelfth and early thirteen centuries, the growth of law seemed to represent the 'victory of reason over

In all this, there are multiple lessons. First, we as modern historians should not measure medieval canon law against later standards or our own standards of ‘law’. Second, the job of the legal historian is to understand how law functioned in particular contexts for its users in that particular time and place. As Bartlett and Brown demonstrate, laws and practices work in ways that make sense to their later users. Historians should follow their lead and view with suspicion those explanations which posit ‘a growth of rationality’. Perhaps social contexts changed, or institutions and the clergy acquired more authority and used texts and methods as means of asserting that power (as Brown and Moore and Bartlett suggest in different ways). Both the students of the new law and the old law alike, then, should work to understand that particular law in all its complexity—not as always moving inevitably towards some more perfect, contemporary outcome, but as functioning in particular times and places, and as being shaped by the dynamics of power and the changing nature of institutions.

This model for studying medieval canon law could be applied, for instance, to the practices of episcopal visitation and episcopal courts, the *Sendgericht*, which Wilfried Hartmann has argued developed in the ninth century and took their definitive form in the tenth century.⁴⁵ Episcopal visitation had its origins in the Carolingian period. The bishop traveled around his diocese, heard evidence from upstanding witnesses (in a sense, the forerunner of the modern jury), and issued judgments based on canon law and penitentials that affected both clergy and laity.⁴⁶ The *Sendgericht* developed during ‘a Europe of the bishops’, as Timothy Reuter has called the tenth and early eleventh centuries.⁴⁷

superstition’. But in fact, Moore writes, ‘it was the dark side of the revival of the twelfth century’.

⁴⁵ Wilfried Hartmann, ‘Sozialdisziplinierung’ und ‘Sündenzucht’ im frühen Mittelalter? Das bischöfliche Sendgericht in der Zeit um 900’ *Jahrbuch des Historischen Kollegs* (Munich 2006) 95-119, especially 98-99.

⁴⁶ Hartmann, *Kirche und Kirchenrecht um 900* especially 243-246.

⁴⁷ Timothy Reuter, ‘Ein Europa der Bischöfe: Das Zeitalter Burchards von Worms’, *Bischof Burchard von Worms, 1000-1025*, ed. Wilfried Hartmann (Quellen und Abhandlungen zur mittelrheinischen Kirchengeschichte, 100; Mainz 2000) 1-28, here at 1.

It makes sense that episcopal courts and episcopal visitation played central roles during this period. Hartmann also suggests that the Carolingian concern for social morals was seen as linked to social stability, especially in the wake of non-Christian attacks. Episcopal visitation provided one way to ensure greater moral purity.⁴⁸ Thus, the social contexts of the ninth and tenth centuries are essential to understanding how the rise of these practices and institutions. And in turn episcopal visitation and episcopal courts explains other phenomena, such as the creating of many legal collections, which Hartmann has scrupulously documented.⁴⁹ Regino's *Libri duo* of the early tenth century and Burchard's *Decretum* from about a century later both include long lists of questions that might be asked in such visitations.⁵⁰ Episcopal visitation continued and still continues to exist;⁵¹ but it also provided one building block for the inquisitorial process of subsequent centuries.⁵² The story of the episcopal visitation and of episcopal courts is not necessarily a growth of rationality or a positive teleological story. Not all contemporary observers would see the rise of inquisitorial procedure as a more 'rational' improvement upon the episcopal visitation or episcopal courts, nor would they view the increased use of torture, after the ordeal declined, as a commendable change.⁵³ At the same time, legal growth can also have positive results, since the 'rule of law' is

⁴⁸ Hartmann, 'Sozialdisziplinierung' 114-115.

⁴⁹ See Hartmann, *Kirche und Kirchenrecht um 900*. In addition, the pontifical ('the book type which was to the bishop as the ritual was to the priest: a compilation of liturgical materials broadly appropriate to that clerical rank') was also a product of this period: see Henry Parkes, *The Making of Liturgy in the Ottonian Church: Books, Music and Ritual in Mainz 950-1050* (Cambridge 2015) 9.

⁵⁰ See Regino, *Libri duo*, questions before canon 1.1 and again in 2.5. In Burchard's *Decretum* see the list of questions in 19.5.

⁵¹ See the *Code of Canon Law* of 1983, 2.2.396-398, available online at <http://www.vatican.va/archive/ENG1104/INDEX.HTM>.

⁵² Hartmann, *Kirche und Kirchenrecht um 900* 245-260; Edward Peters, *Inquisition* (New York, 1988) 37-39.

⁵³ *Ibid.*

often a stabilizing force in many societies.⁵⁴ This paper only warns against flattening the story of law into a purely teleological and triumphalist one.

In conclusion, we need categories, just as we need stories. I am not suggesting here that we entirely abolish the distinctions between ‘new law’ and ‘old law,’ nor pre- and post-Gratian. I simply here caution against over-reliance upon these categories as intellectual tools. Although the New Testament for Christian theologians abrogates the previous ‘covenant’ of the Hebrew Bible, we contemporary scholars ought not to read the relationship between the medieval canon law’s ‘new law’ and the ‘old law’ in the same way. Similarly, Fournier and Berman both provided narratives which help modern readers sort through the messiness of history. Yet both defined law in contemporary terms and measured medieval law by those standards. Their teleological readings of law as ‘improving’ in this period also posit a dark ‘before’ to which the glorious triumphs of the ‘after’ can be contrasted, whereby the ‘before’ becomes a dark screen against which the ‘after’ can shine all the more brilliantly. An alternative model for thinking about medieval law and legal change can be found in the research on the medieval ordeal, research which works to understand and define law as its users defined it, to pay attention to how law functioned in various contexts for its users, and to avoid explanations of greater ‘rationality’. The historian’s job — whether we study the old law or the new law — is to understand how medieval canon law worked in all its complexities and its particularities of location and contexts. Hopefully, this article has now answered the rhetorical question of the title of this article: ‘How old was the old law?’ The answer was already embedded in Justinian’s text, which indirectly inspired the conference title, *Rem non novam*, celebrating the opening of the Stephan Kuttner Institute at Yale University in 2015. Justinian decreed, ‘We are not introducing anything new or unaccustomed,

⁵⁴ See Kenneth Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley 1993) 1-2 on definitions of the rule of law as applied to the Middle Ages.

but only what the legislators of old had established'.⁵⁵ How old was the old law? The old law was never really 'old'.

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⁵⁵Cod. 3.1.14: 'Rem non novam neque insolitam adgredimur, sed antiquis quidem legislatoribus placitam'.

The Origin of the Regula iuris ‘Quod omnes tangit’ in the Anglo-Norman School of Canon Law during the Twelfth Century

Peter Landau

Introduction

Among the 88 Regulae iuris of Canon Law at the end of the *Liber Sextus*, promulgated by Pope Boniface VIII in 1298, and created in a papal commission led by the Bolognese legist Dinus Mugellanus, we find as rule 29: ‘Quod omnes tangit, debet ab omnibus approbari’ (=Q.o.t.). Probably this regula became the most important rule of canon law in the medieval world and in modern times influencing secular law in many countries of Europe and America. I want to mention only two examples of its application on the American continent.

‘Quod omnes tangit’ in America

When Bartholomé de Las Casas dealt with the question of legitimizing the Spanish rule over American Indians in his book *De Thesauris in Peru* around 1545, he considered submission of the Indians to Spanish rule by force would be a servitude contrary as well to natural law as to human reason. According to Las Casas ‘a free people or community accepting a burden had to give their free consent; all whom the matter touched should be called.’ Las Casas combined the legal maxim ‘Quod omnes tangit’ with the idea of a natural right of liberty shared by the Indians.¹

In 1708 the Synod of Saybrook, Connecticut, declared consociation in the churches to be founded in a precept of

¹ Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150-1625* (Atlanta 1997) 272-284

fraternal union being supported by the universally acknowledged principle of ‘quod omnes tangit’.²

In 1758 the Consociation of New Haven refused to accept the ordination of a liberal minister in Wallingford, Connecticut. This decision was justified by the principle of ‘quod omnes tangit’. The maxim was also employed in the conflict about the legitimacy of taxation in the American colonies by the British Parliament in 1775. These sources have been investigated by Bruce Brasington in a fundamental paper on ‘Quod omnes tangit in Anglo-American Thought to the Ratification of the Constitution’ a few years ago. Brasington is concluding his study:³

Q.o.t provides yet another link to the past read by defenders of the status quo and their opponents in both the seventeenth and eighteenth centuries. Embedded in the Common Law and Protestant theology, this romano-canonical maxim served both as shield of state power and weapon in the hand of radicals. It reminds the modern student of English and American constitutionalism that the Constitution, both Ancient and American, has roots in canon and civil law of the Middle Ages.

Previous research on ‘Quod omnes tangit’

The sentence ‘Quod omnes tangit’ was formulated for the first time in Roman private law for the special case of terminating the joint tutorship of several tutors - all tutors had to give their assent for the end of their responsibility. It can be found in the title ‘De auctoritate praestanda’ of Justinian’s Code as a formulated law dating from September 1st 531 (Cod. 5.59.5): ‘necesse est omnes suam auctoritatem praestare, ut, quod omnes similiter tangit, ab omnibus comprobetur’. This sentence never became a general legal maxim in Roman law of antiquity but was discovered by canonists after Gratian during the second half of the twelfth

² Bruce Brasington, ‘A Divine Precept of Fraternal union: The Maxim Quod omnes tangit in Anglo-American Thought to the Ratification of the Constitution’, *Bridging the Medieval-Modern Divide*, ed. James Muldoon (Farnham 2013) 205-223 at 215.

³ Brasington, ‘Divine Precept’ 223.

century. In the thirteenth century the maxim found its way into papal legislation since Pope Innocent III as well as into English common law, first in Bracton's treatise on the Laws of England;⁴ it was quoted by King Edward I of England, the so-called English Justinian, in a famous writ to the archbishop of Canterbury in 1295 ordering him to summon representatives of the clergy. The king substantiated the necessity of the summons with the common danger for the realm of England, thereby transforming 'Quod omnes tangit' from a mere legal maxim into a great and constitutional principle according to the evaluation given by William Stubbs.⁵ Three years later in 1298 Q.o.t. found its way into the *Regulae iuris* of Pope Boniface VIII at the end of the *Liber Sextus*.

Much research had been done during the last century on the question how and when the sentence in Justinian's code was transformed into a legal maxim that could be applied equally in private and public law. Theologians, canonists and legal historians contributed to a detailed discussion.⁶ Today there exists a general agreement the text was taken from its Roman source, but that its use as a maxim was the achievement of canonists. Is it possible for us to discover the period of its first use as a maxim and the first application of it in special areas of medieval law or even find a specific canonist to be credited with the discovery of the maxim in the enormous mass of texts delivered by medieval canon law to posterity? I will try to deal with this issue and to present a new solution.

⁴ Gaines Post, 'A Romano-Canonical maxim, quod omnes tangit in Bracton and in Early Parliaments', *Traditio* 4 (1946), 197-251; also in Idem, *Studies in Medieval Legal Thought* (Princeton 1964) 163-238.

⁵ See Post, *Studies* 167 n. 8.

⁶ Cf. the survey given by Orazio Condorelli, '*Quod omnes tangit, debet ab omnibus approbari*: Note sull' origine e sull' utilizzazione del principio tra medioevo e prima età moderna', *Ius canonicum* 53 (2013) 101-127 with a comprehensive bibliography.

Gratian in his *Decretum* never referred to ‘Quod omnes tangit’ in his arguments.⁷ But in the last decade of the twelfth century Bernard of Pavia dealt with corporate decision-making in ecclesiastical chapters in his *Summa decretalium* and said:⁸

in his quae in capitulo fieri vel ordinari debent omnium consensus est requirendus, ut quod omnes tangit, ab omnibus approbetur.

This text was discovered by Gaines Post in 1946.⁹ Bernard wrote his *Summa* as bishop of Faenza between 1191 and 1198. It soon circulated outside Italy. The late André Gouron found a quotation of Bernard’s sentence in a transaction between a chapter near Montpellier and the Ordre of the Temple in July 1200 with the clause:¹⁰

rationi fuit consentaneum ut quod omnes tangebatur, in ecclesiae capitulo ab omnibus comprobaretur.

But even prior to the *Summa* of Bernard of Pavia Brian Tierney found a quotation of Q.o.t in an anonymous *Summa* to the Decretum with the incipit: *Reverentia sacrorum canonum*, written around 1187 and preserved in only one manuscript in Erfurt.¹¹ Amplonius Ratinck, one of the first rectors of Cologne University at the end of the fourteenth century, donated it to the library.¹² We have circumstantial evidence that this *Summa* was written by a pupil of the canonist Gérard Pucelle in Cologne after Gérard’s departure in 1182 — so I could consider the *Summa* as

⁷ André Gouron, ‘Aux origines médiévales de la maxime Quod omnes tangit’, ed. Jean-Louis Harouel, *Histoire du droit social: Melanges en hommage à Jean Imbert* (Paris 1989) 277-286 at 277; also in idem, *Droit et coutume en France au XII^e et XIII^e siècles* (Collected Studies; Aldershot 1993) no. XIII.

⁸ Edited by Ernst Adolf Theodor Laspeyres, *Bernardi Papiensis Summa Decretalium* (Regensburg 1860, reprinted Graz 1956) 75 at *Summa* 3.10 § 1.

⁹ Post, ‘Studies’ 173.

¹⁰ Gouron, ‘Origines médiévales’ 282.

¹¹ Brian Tierney, ‘Pope and Council: Some New Decretist Texts’, *Mediaeval Studies* 19 (1957) 197-218 at 16; also in idem, *Church Law and Constitutional Thought in the Middle Ages* (Collected Studies; London 1979) no. II.

¹² The manuscript is Erfurt, SB Amploniana quart. 117, fol.116r-140v. An edition of this *Summa* is prepared by John Wei.

the last major work of the Cologne school of canon law between 1170 and 1190.¹³ We read the author's following commentary:¹⁴

Si summus pontifex a fide deviaret, numquid metropolitanus vel episcopus alius in eum animadvertere posset? Quod forte videtur quia heresis omnes ecclesie iudices tangit, et quod omnes similiter tangit ab omnibus, sicut si bonum est, debet comprobari, ita si malum est improbari, ut colligi potest ex eo quod dicitur in C. de auctoritate l. ult.' (Cod. 5.59.5).

The *Summa Reverentia sacrorum canonum* has also a second reference to Q.o.t. at D.66 c.1 where the author explicitly is quoting the sentence from Justinian's *Codex* that mentioned decision-making among tutors.¹⁵ When I read the commentary of *Reverentia sacrorum canonum* in Tierney's edition,¹⁶ I concluded that Gérard Pucelle probably had been the first canonist who formulated Q.o.t. in his lectures in Cologne around 1180.¹⁷ I can now offer a new answer to solve the riddle of the origin of Q.o.t. in medieval legal science.

Q.o.t. in Medieval Roman law

Before presenting arguments for my new solution I want to discuss once more whether we should assume at all a canonist having coined the maxim of Q.o.t.. It could also be possible to guess a civilian as the man developing a legal maxim from a quotation found in the Code. This question was rarely discussed by recent legal historians — Gouron wrote in 1989:¹⁸

¹³ Peter Landau, *Die Kölner Kanonistik des 12. Jahrhunderts* (Kölner rechtsgeschichtliche Vorträge, H.1; Badenweiler 2008) 22. See also Peter Landau, Gerard Pucelle und die Dekretsumme *Reverentia sacrorum canonum*: Zur Kölner Kanonistik im 12. Jahrhundert', *Mélanges en l'honneur d'Anne Lefebvre-Teillard*, edd. Bernard d'Alteroche e al. (Paris 2009) 623-638.

¹⁴ Erfurt SB 117, fol. 125ra.

¹⁵ *Reverentia sacrorum canonum* Erfurt SB 117, fol. 131rb ad D.66, c.1 s.v. *ab omnibus*: 'vel saltem a pluribus, si pauci ex eis interesse non possunt. Et est hoc constitutum ad similitudinem tutorum ut quod omnes similiter tangit, ab omnibus comprobetur ut in Codice de auctoritate prestanda, l. ult.'

¹⁶ Tierney, 'Pope and Council' 216.

¹⁷ Landau, 'Kölner Kanonistik' 34.

¹⁸ Gouron, 'Origines médiévales' 278.

Du côté des civilistes, aucune recherche semble avoir été menée; le fait est d'autant plus regrettable qu'il y a très peu de chances, à notre avis, pour qu'une Somme due à un canoniste français des années quatre-vingt ait directement emprunté aux compilations justiniennes.

Gouron himself refers for that question to a short remark by the glossator Pilius in his so-called *Questiones sabbatinae*, dealing with the oath of calumny: 'item negotium omnes tangit, ergo omnes jurare debent vel maior pars'.¹⁹ This short quotation can prove the use of the sentence in the *Codex* by Pilius, but it can scarcely form in its meaning a general maxim as in the application by the canonists. The *Quaestiones sabbatinae* are now unanimously dated between 1186 and 1195²⁰— the quotation by the glossator in Modena and the one by the canonist in Cologne were written nearly at the same time. My question still was to find out whether there could possibly be an earlier reference to Q.o.t. in the legal literature of the late twelfth century.

The Summa Lipsiensis.

Among the commentaries on the *Decretum Gratiani* in the second half of the twelfth century, the most important one, written about 1188, undoubtedly is the *Summa* by the Bolognese canonist Huguccio, later bishop of Ferrara. Prior to Huguccio many 'summae' on Gratian had been published — some without any mention of an author. Among them the most important is the so-called *Summa Lipsiensis*, discovered and first described by Johann Friedrich von Schulte in 1870, who had found a manuscript in the University Library of Leipzig. The codex had been donated to the Dominicans of Leipzig in 1239 by a citizen of Halle and had been written in the first years of the thirteenth

¹⁹ Ibid. quotation in Ugo Nicolini, *Pilii Medicinensis Quaestiones Sabbatinae: Introduzione all'edizione critica* (Pubblicazioni della Facoltà di giurisprudenza della Università Modena 54-55; Modena 1933, reprinted Modena 1946) 5 q.1.

²⁰ Cf. Hermann Lange, *Römisches Recht im Mittelalter*, 1: *Die Glossatoren* (München 1997) 132 and 234.

century.²¹ The *Summa* shows a remarkable knowledge of Bolognese decretist literature and also of early glossators of Roman law. It is undoubtedly the most important work of the school of Anglo-Norman canonists at the end of the twelfth century, first described by Stephan Kuttner and Eleanor Rathbone in a famous study of 1951.²²

Kuttner evaluated this *Summa* as ‘the most elaborate of all commentaries on Gratian prior to Huguccio’.²³ We can conclude from a formula in this *Summa* that the commentary had been finished around 1186.²⁴ Kuttner also found a second manuscript of the *Summa* in the Rouen, Bibliothèque municipale E.74(743).²⁵ Both manuscripts of Leipzig and Rouen were written in northern France at the beginning of the thirteenth century.²⁶ Besides these two manuscripts there are fragments of the *Summa Lipsiensis* to be found in three other additional manuscripts.

1. Luxembourg, BN 144, where fragments of the *Summa Lipsiensis* are used to supplement the *Summa* of Huguccio; the manuscript was written in the Cistercian monastery of Orval in Belgium.²⁷

²¹ Johann Friedrich v. Schulte, *Die Summa Decreti Lipsiensis des Cod. 986 der Leipziger Universitätsbibliothek* (Sb. Akad. Wien 18; Wien 1871) 37-54 at 37.

²² Stephan Kuttner-Eleanor Rathbone, ‘Anglo-Norman Canonists of the Twelfth Century’, *Traditio* 7 (1949-1951) 279-358, also in: Stephan Kuttner, *Gratian and the Schools of Law 1140-1234* (Collected Studies; London 1983) no.VIII.

²³ Kuttner-Rathbone, ‘Anglo-Norman Canonists’ 295-296.

²⁴ Schulte, *Summa Decreti Lipsiensis* 51.

²⁵ Kuttner, *Rep.* 196.

²⁶ Cf. *Summa ‘Omnis qui iuste iudicat’ sive Lipsiensis*, edd. Rudolf Weigand-Peter Landa-Waltraud Kozur (MIC, Ser. A, 7.1; Città del Vaticano 2007) xii and xviii.

²⁷ For the contents of Luxembourg, BN 144, cf. Gérard Fransen, ‘Les manuscrits de l’Abbaye d’Orval’, *Aureavallis: Mélanges historiques réunis à l’occasion du neuvième centenaire de l’Abbaye d’Orval* (Lüttich 1975) 111-132; also in Gérard Fransen, *Canones et Quaestiones: Évolution des doctrines et système du droit canonique* (2 vols. Bibliotheca Eruditorum 25; Goldbach 2002) 1.413-434; *Summa ‘Omnis qui iuste iudicat’ sive Lipsiensis* (MIC Ser. A, Vol. 7.3; • ittà del Vaticano 2012) xxvi.

2. Laon, Bibliothèque municipale 371 bis. This Codex contains the Apparatus *Ecce vicit Leo* on Gratian's *Decretum*, written by the canonist Petrus Brito in the first years of the thirteenth century.²⁸

3. And in the *Summa* written by the master Honorius of Kent with the Incipit 'De iure canonico tractaturus', shortly after the *Summa Lipsiensis*.²⁹ In between the text of Honorius' *Summa* we find fragments from the *Summa Lipsiensis*, mainly the commentary to *De consecratione* of Gratian. The manuscript comes from the Cathedral Notre Dame in Laon.³⁰ The *Summa* 'De iure canonico tractaturus' has been edited in three volumes in the series 'Corpus Glossatorum' of the 'Monumenta Iuris Canonici' as Volume 5 of Series A between 2004 and 2010 by Waltraud Kozur and myself.³¹

The provenance of the manuscripts transmitting the *Summa Lipsiensis* or parts of its text points to Northern France and Germany. On the other hand the *Summa* was already known in Italy to Huguccio around 1188.³² The *Summa Lipsiensis* was definitely a very successful book at the end of the twelfth century.

The first edition of the *Summa Lipsiensis* is on the program of the group of canonists working in Würzburg, Germany under my direction. The project has been supported since more than 20 years by the Deutsche Forschungsgemeinschaft. Three volumes of the edition were published in

²⁸ For the Laon, BM 371bis, cf. *Magistri Honorii Summa 'De iure canonico tractaturus'* xiv-xx. For Petrus Brito as author of *Ecce vicit Leo* cf. Anne Lefebvre-Teillard, 'Petrus Brito, Auteur de l'Apparat *Ecce vicit Leo*', *Proceedings Esztergom 2008* 117-135.

²⁹ The author Honorius was discovered by R. Weigand - cf. R. Weigand, *Bemerkungen über die Schriften und Lehren des Magister Honorius*, in: S. Kuttner/K. Pennington (ed.), *Proceedings Salamanca 1976*, 195 – 212.

³⁰ R. Weigand†-P. Landau-W. Kozur, edd. *Magistri Honorii Summa, De iure canonico tractaturus*, 1: (MIC Series A 5;Citta del Vaticano 2004) xv.

³¹ *Summa, De iure canonico tractaturus*, 2-3, edd. P. Landau-W. Kozur (MIC Series A 5; • ittà del Vaticano 2010) with Registers.

³²Odon Lottin, *Le droit naturel chez Thomas d'Aquin et ses prédécesseurs* (2nd. ed. Bruges 1931) 21.

2007, 2012 and 2014 - the fourth and finally the fifth volume with the complete registers can be hopefully presented to the Fifteenth International Congress of Medieval Canon Law 2016 in Paris.

In 2006 I developed a hypothesis about the identification of the author who probably wrote the *Summa* between 1180 and 1186. Rodoicus Modicipassus was an English canonist who came from Lincoln and taught in Paris and in Bologna between 1190 and 1200. He became afterwards praecentor in the cathedral of Sens, where he died ca. 1204.³³ He was knowledgeable in theology and Roman law. André Gouron proved in 2003 that this man had written an *Ordo iudiciarius* on civil procedure with the Incipit *Olim edebatur* around 1180-1185.³⁴ Close relations exist between the *Summa Lipsiensis* and the apparatus *Et est sciendum* to the *Decretum Gratiani*, written in Sens also around 1185. I could conclude from my research that *Et est sciendum* and the *Summa Lipsiensis* must have had the same author, most probably Rodoicus Modicipassus.

Q.o.t. in the Summa Lipsiensis

The author of the *Summa Lipsiensis* was certainly a creative canonist. He must have been the first to distinguish between *potestas ordinis* (power of consecration) and *potestas iurisdictionis* (power of jurisdiction) in canon law, a fundamental distinction of two concepts.³⁵ We also find in his *Summa* the use of Q.o.t. as a maxim. Rodoicus was probably responsible for the first introduction of this rule into canon law. In my following

³³Landau, 'Rodoicus Modicipassus - Verfasser der *Summa Lipsiensis*?' ZRG Kan. Abt. 92 (2006) 340-354.

³⁴ André Gouron, 'Qui a écrit l'ordo, *Olim edebatur*', *Initium* 8 (2003) 65-84; also in idem, *Pionniers du droit occidental au Moyen Age* (Collected Studies; Ashgate 2006) no. XIII.

³⁵ For the distinction between *potestas ordinis* and *potestas iurisdictionis* in the *Summa Lipsiensis* cf. the excellent study by Laurent Villemin, *Pouvoir d'ordre et pouvoir de juridiction: Histoire théologique de leur distinction* (Paris 2003) especially 75-90.

statements I will present the passages where I found Q.o.t. in this Anglo-Norman *Summa*.

D.63 of the *Decretum Gratiani* deals with the election of bishops. Gratian excludes laymen from being entitled to participate actively in the formal election. They have only the right to add their consent to a previous election by the clerics: ‘Electio clericorum est, consensus plebis’ (D. 62, pr.). Election of bishops belongs to the clerics of the cathedral chapter and additionally to other religious men in the city (‘alii religiosi’).

This rule with the limitation of the electoral college he found in the canons of the Second Lateran Council of 1139 and inserted it in the second recension of his *Decretum*.³⁶ An election without the participation of ‘religiosi viri’ should be invalid.

Gratian does not define the category ‘religiosi viri’ as participants in episcopal elections. But there can be no doubt that the abbots of monasteries within the episcopal diocese belong to this group.

The *Summa Lipsiensis*, however, restricted the number of electors among the ‘religiosi viri’ to mean only those who live in the city, not those in the whole episcopal province (diocese).³⁷ If somebody had not submitted to the power of the episcopal church but rather was exempt of it, he should be excluded from the election. The *Summa* presents two examples of exempt monasteries: The abbots of Saint-Germain and of Saint-Denis in Paris — a hint for the Parisian connections of the author.³⁸ Then the *Summa* continues:³⁹

³⁶ D.63 c.35: ‘ne canonici de sede episcopali ab electione episcoporum excludant religiosos viros, sed eorum consilio honestam et idoneam personam in episcopum eligant. Quod si exclusis religiosis electio facta fuerit, quod absque eorum consensu et conniventia factum fuerit, irritum habeatur et vacuum’. Cf. Anders Winroth, *The Making of Gratian’s Decretum*. (Cambridge 2000) 202.

³⁷ D.63 c.35 s.v. *consensus*, ed. cit. 300: ‘Item queritur, an omnes religiosi de provincia interesse debent. Et dicunt, quia hoc difficile esset et ideo illi soli qui sunt in civitate’.

³⁸Ibid.: ‘Item quid si aliquis fuerit exemptus de potestate ecclesie episcopalis ut abbas Sancti Germani, abbas Sancti Dionisii, an debeat interesse. Et dicunt

Et dicunt quod non (i.e. no participation), quia quod omnes tangit, ab omnibus debet expediri. Set eos non tangit hoc negotium, ergo nec ab eis approbari.

Here we can see a transfer of Q.o.t. into the jurisprudence of elections in the Church.

The next use of Q.o.t. is found in the commentary of the *Summa Lipsiensis* to D.66 c.1, taken from the Pseudo-Isidorian letters.⁴⁰ There Gratian deals with the ordination of archbishops and formulates the rule:

Archiepiscopi autem ab omnibus quae provinciae episcopis debent ordinari (Archbishops are to be ordained by all bishops of their province)

The *Summa Lipsiensis* commented on ‘ab omnibus episcopis’ as follows:⁴¹

si convenire possunt. Et nota quod omnes tangit, ab omnibus debet expediri, ut hic et xcvi. Ubinam (D.96 c.4) et xxiii. q.i. Pudenda (C.24 q.1 c.33), supra lxiii. Obeuntibus (D.63 c.35).

The text means that all suffragan bishops should come together for the election. The participation of all bishops of the province is justified by the principle of Q.o.t., and the author refers also to other examples for the application of the maxim.

There is a third reference to Q.o.t. in the text of the *Summa Lipsiensis* for D.96 c.4 on Gratian’s *Decretum*. Gratian is quoting a letter of Pope Nicholas I sent to the Byzantine Emperor Michael in 865.⁴² The pope dealt with the question whether the emperors should be present at a universal council of the church. Commenting the sentence ‘ad omnes omnino pertinet Christianos’ referring to a council dealing with questions of the Christian faith, the author writes: ‘Quod omnes tangit, ab omnibus debet approbari et expediri’.⁴³ Questions of the faith are relevant for all Christians, so all of them should participate in the

quod non, quia quod omnes tangit, ab omnibus debet expediri. Set eos non tangit hoc negotium, ergo nec ab eis approbari’.

³⁹ Ibid.

⁴⁰D.66 c.1: Ep. Annicii c. 2. Decretales Pseudo-Isidorianae, ed. Paul Hinschius (Leipzig 1863, reprinted Aalen 1963) 120.

⁴¹ D.66 c.1 s.v. *Archiepiscopus usque ab omnibus* ed. cit. 306.

⁴² JE 2797.

⁴³ D.96 c.4 s.v. *ad omnes*, ed. cit. 399.

decision - making, even laymen. This quotation of our maxim is on the same line as the text in the *Summa* 'Reverentia sacrorum canonum' I quoted above, about the application of Q.o.t. in questions of heresy.

Finally I refer to a fourth quotation of Q.o.t. in the *Summa Lipsiensis*. It is found in the fourth volume of the edition, not yet published but hopefully this volume will be printed in a few months. It is commenting a letter of Pope Pelagius I.⁴⁴ The Pope refers to the old custom that the archbishops of Milan and Aquileia consecrated each other mutually after being elected for their archdiocese:⁴⁵

Mos erat inter Aquilegensem et Mediolanensem, ut altero illorum decedente alter mutuis vicibus eius successorem consecraret.' In this letter we find a passage: 'ut ordinandi electio a presenti ordinatore ex consensu universalis, cui preficiendus erat, ecclesiae melius ac facilius potuisset agnosci' (that the election by the present ordaining archbishop could be recognized through the consent of the universal church).

The expression 'universalis' is explained by the *Summa*:⁴⁶

Quia quod omnes tangit ab omnibus debet expediri seu probari, ut supra d. lxiii. Obeuntibus, supra d. lxvi. c.i.

Here the *Summa* refers to two other quotations of Q.o.t. I have already mentioned. The author thought that the rule is obviously a principle to be applied to very different institutional structures within the church.

The *Summa* does not yet use the later common formula 'debet ab omnibus approbari' in the *Liber Sextus* but instead either 'ab omnibus debet expediri', or 'ab omnibus debet approbari et expediri' or 'ab omnibus debet expediri seu probari'. So we can conclude that the *Summa Lipsiensis* does not yet use a standard formula for the maxim, but applies somewhat different linguistic forms. Nevertheless, the mutual references show an understanding as a special maxim with different meanings. 'Expediri' used in the *Summa Lipsiensis* means 'settle' and 'accomplish' and is even stronger than 'approbare' = approve.

⁴⁴ JK 983 = C.24 q.1 c.33.

⁴⁵ C.24 q.1 c.33.

⁴⁶ *Summa Lipsiensis* ad C.24, q.1 c.33.

For the author of the *Summa Lipsiensis* Q.o.t. meant not only a later consent, but participation from the beginning.

Other Early Uses of Q.o.t.

It is difficult to conclude with certainty that the *Summa Lipsiensis* was the first canonistic work where we can find Q.o.t. as a general maxim. Many texts from early decretists of the twelfth century have not yet been edited. But among the edited commentaries the *Summa Lipsiensis* seems to be the first work to use Q.o.t. as a general maxim. I checked texts of the summae written by Rufinus, Stephan of Tournai, the *Summa Parisiensis* and Simon of Bisignano. Nowhere I could find Q.o.t. in the commentaries written by these authors for those chapters on Gratian, where Q.o.t. is used in the *Summa Lipsiensis*. In the *Summa 'De iure canonico tractaturus'* that has been recently edited, we find one quotation of Q.o.t. in the commentary to D.66 c. 1:⁴⁷

Hinc arg. Quod omnes tangit ab omnibus debere expedire, similiter Di. xcvi. Ubinam.

This Summa was written by Honorius of Kent ca. 1188-1190 under the influence of the *Summa Lipsiensis*. The unique text in Honorius's *Summa* was certainly copied from the *Summa Lipsiensis*.

Just recently Jasmin Hauck found a very early quotation of Q.o.t. in a collection of notabilia with the incipit 'Argumentum a minori' in a manuscript in Fulda.⁴⁸ The text reads:⁴⁹

Argumentum a maiori, quod omnes tangit, ab omnibus est comprobandum, D. lxvi. Archiepiscopus ab omnibus (D.66 c.1), D. lxi. Nullus in vitis (D.61 c.13), D. xcvi. Ubinam (D.96 c.4), C. xii. q.ii. Sine exceptione (C.12 q.2 c.52), C. de auctoritate prestanda l. ult. in fine (Cod. 5.59.5).

⁴⁷ D.66 c.1 ad s.v. *Hoc ab omnibus*, ed. cit. 204.

⁴⁸ Fulda, Hessische Landesbibliothek, D.10, fol.86rb.

⁴⁹ Jasmin Hauck, 'Quod omnes tangit, debet ab omnibus approbari - Eine Rechtsregel im Dialog der beiden Rechte', ZRG Kan. Abt. 99 (2013) 398-417 at 405 n.26.

This collection of notabilia can be dated around 1190, since it quotes some decretals, the latest by Pope Urban III (1185-1187).⁵⁰ It did not yet refer to *Compilatio I*. Two examples given in the notabilia for the application of Q.o.t. are identical with those in the *Summa Lipsiensis*. The origin of the notabilia seems to be Northern France.⁵¹ The author of these notabilia was probably already influenced by the *Summa Lipsiensis*.

Huguccio and the Summa Lipsiensis

In the extensive discussion on the tradition of Q.o.t. in canon law Huguccio's *Summa* on the *Decretum Gratiani* has not yet been mentioned. Could it be possible that the greatest canonist in Bologna at the end of the twelfth century did not use this maxim at all? Looking at the Huguccio manuscript in Munich, Staatsbibliothek Clm 10247 = M I found several quotations of Q.o.t. Commenting s.v. *ab omnibus episcopis* at D.66 c.1, fol.74rb Huguccio wrote:

Quod enim omnes tangit, ab omnibus debet approbari', arg. viii. q. ii. c.ii. (C.8 q.2 c.2) et di. lxi. Nullus (D.61 c.13) et viii. q.iii. Nullus primas (C.9 q.3 c.7), et di. xcvi. Ubinam, (D.96 c.4) et viii. q.i. Licet (C.8. q.i. c.15) et xxiii. q.i. Pudenda (C.24 q.1 c.33).

His commentary is nearly identical with the *Summa Lipsiensis*. At D.61 c.13, M fol.67va s.v. *liberum iudicium* we find in Huguccio's *Summa*:

et est arg. quod qui omnibus debet prefici, ab omnibus debet approbari, arg. di. lxxvi. c.i. (D.66 c.1) et viii. q.ii. Dilectissimi (C.8 q.2 c.2).

D.61 c.13 is the famous decretal *Nullus inuitis* issued by Pope Celestine I, one of the most remarkable texts on free elections of bishops dating from late antiquity (JK 369, anno 428). This papal letter had not yet been quoted by the *Summa Lipsiensis* to apply the maxim Q.o.t. At D.96 c.4 s.v. *omnium communis*, M fol. 96rb, Huguccio wrote:

et est arg. quod omnes tangit, ab omnibus debet tractari et approbari, arg. di. lxxvi. c.i. (D.66 c.1).

⁵⁰ Cf. Kuttner, Rep. 235.

⁵¹ Cf. Hauck, 'Quod omnes tangit' 405 n. 26.

This commentary is equivalent to the *Summa Lipsiensis*.

To C.8 q.1 c.15 s.v. *sciunt omnes* M fol. 142vb, Huguccio comments:

quibus debet preesse. Quod enim omnes tangit, ab omnibus est approbandum, arg. di. lxvi. c.i. (D.66, c.1).

Gratian's chapter is taken from a patristic homily regarding the book Leviticus, where the presence of the whole people is required for the ordination of a priest: 'populi presentia, ut sciunt omnes et certi sint'. This commentary seems to extend Q.o.t. to a new subject, not yet found in the *Summa Lipsiensis*.

Finally we read in Huguccio's *Summa ad C.9 q.3 c.7 s.v. set quicquid de causis communibus* (sic), M fol. 146ra, Lons-le-Saunier, Archives départe-mentales du Jura 16, fol. 201vb:

scilicet secularium, id est laicorum. Nam et quedam eorum cause sunt tales, que in concilio tractari debent cum omnium consensu. Quod enim omnes tangit, omnium consilio debet tractari, arg. di. lxvi. c.i. (D.66 c.1).

The text in Gratian is taken from a Pseudo-Isidorian letter; it is dealing with the question of the right of consent of suffragan bishops to the acts of their archbishops. The use of the expression 'secularium' in this letter gives opportunity to emphasize the role of laymen in the church justified by the maxim Q.o.t..

I did not find mentioned Q.o.t. in Huguccio's commentary to C.8 q.2 c.2, although it is cited by him in D.66 c.1. Gratian's chapter is dealing with the election of a bishop and Q.o.t. would probably fit for commenting the phrase 'Pensantes ergo que cunctis expediunt' in Gratian's *Decretum*. C.24 q.1 c.33, also mentioned in the *Summa* at D.66 c.1 as a case for application of Q.o.t., was never commented by the Bolognese canonist who left a fragmentary work with a gap between C. 23 q.3 c.33 and the end of C.26.⁵²

Huguccio knew the *Summa Lipsiensis*, completed probably about two years before he finished the work on his own *Summa*. Comparing both texts I found two parallels and three new examples for application in the work of the Bolognese

⁵² Cf. Wolfgang P. Müller, *Huguccio. The Life, Works and Thought of a Twelfth-Century Jurist* (Studies in Medieval and Early Modern Canon Law 3; Washington D.C. 1994) 7 and 33.

canonist. Huguccio recognized the importance of Q.o.t. as a legal rule and extended its use as a general maxim. He obviously applied it to stress the position of laymen in the church.

Conclusion

So we can conclude nearly with certainty that Rodoicus Modicipassus, whom I could identify as the author of the *Summa Lipsiensis*, did not only discover the distinction between potestas ordinis and potestas iurisdictionis, but was the first jurist to use the Roman formulation of Q.o.t. as a general maxim in canon law. That was a remarkable juristic achievement. This new discovery might justify evaluating Rodoicus as the greatest English canonist during the Middle Ages, as I did already in an earlier essay.⁵³ Huguccio knew the *Summa Lipsiensis* that was completed about two years before he finished his own *Summa*.⁵⁴ Taken over and extended in its application by Huguccio and other canonists I am inclined to call it a legal invention.

Postscript

After my lecture at Yale University in May 2015 Pope Franciscus referred to ‘Quod omnes tangit’ in his address during the fiftieth anniversary of the episcopal synod in Rome, October 17th 2015. In his memorable speech on the topic ‘Synodality for the thrid millennium’ we find a reference to the way of the synod indicated by the sentence: ‘The headway of the synod begins by listening to the people participating in the prophetic mission of Christ according to a good principle of the Church in the first millennium: ‘Quod omnes tangit, ab

⁵³ Landau, ‘Rodoicus Modicipassus’ 341 n.6 with the formulation ‘geistig bedeutendster englischer Kanonist im Mittelalter’. We can attribute to him besides Q.o.t. and the distinction between ‘potestas ordinis’ and ‘potestas iurisdictionis’ also the concept of ‘generalis status ecclesiae’ as a general limit for the papal power of dispensation and the use of the formula ‘imperium spirituale’ for papal plenitude of power.

⁵⁴ According to Lottin, *Le droit naturel chez Thomas d’Aquin* 21: ‘a manifestement sous les yeux le texte de la *Summa Lipsiensis*’.

omnibus tractari debet'. The pope finishes his address by the sentence: 'We are halfway'.

The reference to Q.o.t. is the only quotation by Pope Franciscus of a text being found neither in the Bible nor in conciliar decrees nor in texts by former popes. In the first millennium after Christ we can find numerous examples for applying the ideas of Q.o.t. But it is not yet to be found as a formulation of a legal maxim. The change of the formulation from 'approbari debet' in the *Liber Sextus* to 'tractari debet' in 2015 is certainly worth to be noticed. The whole people of God, including the learned, should contribute to the way of the synod from the very beginning. Huguccio being a great canonist in medieval canon law is using 'tractari debet' as a formula in his *Summa* to emphasize the importance of the laity. We can see a literal return to the terminology of Huguccio's *Summa* in the newest document of the Holy See.

Munich.

A proposito della *Summa in Decretum* di Simone da Bisignano edita da Pier V. Aimone Braida

Orazio Condorelli

La prestigiosa collana dei *Monumenta Iuris Canonici* offre agli studiosi un nuovo contributo alla conoscenza della dottrina canonistica del secolo XII. La *Summa in Decretum* di Simone da Bisignano, edita per le cure di Pier Virginio Aimone Braida, rappresenta un importante capitolo nella storia delle prime generazioni delle scuole canonistiche postgraziane.¹

Il corposo volume consta di due parti: l'edizione, che si estende per 548 pagine, è infatti preceduta da una ricca introduzione (*Prolegomena* ix-ccxlii). In apertura, la presentazione (non firmata, ma di Peter Landau) pone in rilievo il valore testimoniale della *Summa* di Simone. In una pagina introduttiva Aimone Braida mostra come questa impresa scientifica – al pari di altre patrocinate dall'*Institute of Medieval Canon Law* fondato da Stephan Kuttner – abbia un carattere veramente corale, e rende merito agli studiosi che prima di lui o accanto a lui sono stati attivi nel lavoro di trascrizione di uno dei manoscritti (Terence McLaughlin) o di parziale revisione dell'edizione (Charles Munier e Jean Weckmeister).

Alla paternità del canonista calabrese la *Summa* è ricondotta dagli *explicit* presenti in due testimoni della non copiosa tradizione manoscritta dell'opera. I codici di Augsburg, Staats- und Stadtbibliothek, 1 e Bamberg, Staatsbibliothek, Can. 38, infatti, attribuiscono l'opera al 'magister Simon (o Symon) de Bisignano'.² L'edizione ora consente di verificare che l'autore ha lasciato tracce puntuali delle sue origini. Il canonista rappresenta il 'casus' di C.16 q.3 c.3 facendo riferimento alla sua Calabria:

¹ *Summa in Decretum Simonis Bisinianensis*, edidit Petrus V. Aimone Braida (MIC Series A 8; Città del Vaticano 2014) ccxlii.569 pp. con 7 tavole a colori.

² Aimone Braida, *Summa Simonis* in *Prolegomena* xv-xvi.

protagonisti del caso sono il ‘Bisinianensis episcopus’, la ‘Cosentina ecclesia’ (Cosenza) e il ‘Cosentinus episcopus’.³ Alla Calabria e più generalmente al meridione d’Italia riportano le varianti testimoniate dal ms. Paris, Bibliothèque Nationale de France lat. 3934A, ove si parla della ‘ecclesia Cassanensis’ (Cassano allo Ionio, presso Cosenza) e della ‘ecclesia Policastrensis’ (Policastro), sita nella parte meridionale della Campania al confine con la Basilicata.

Quanto alla datazione della *Summa*, nuovi dati confermano che la sua composizione avvenne nel corso degli anni Settanta del secolo XII. Simone scrisse durante il pontificato di Alessandro III (‘qui nunc est in eminenti specula disponente Domino constitutus’), quindi entro il 1181.⁴ In un altro luogo l’autore fa menzione dell’assassinio di Thomas Becket, avvenuto nel 1170: ‘In Cantuariensi ecclesia temporibus nostris pretiosus martyr Thomas est martirio consecratus’.⁵ Qualche elemento utile a circostanziare ulteriormente i termini cronologici della composizione dell’opera si ricava dalle numerose ‘extravagantes’ citate nella *Summa*. L’opera di Simone si caratterizza, infatti, per un imponente ricorso alle fonti del ‘ius novum’ (decretali e canoni conciliari), che l’autore pone a frutto per attualizzare le problematiche emergenti dal *Decretum*. Tutto questo conferisce alla *Summa* un particolare tocco di originalità, che fa di essa uno snodo importante lungo il processo di sviluppo della metodologia del lavoro dei decretisti.

La parte centrale dei *Prolegomena* (xxxvi-lxxxix) è occupata da un dettagliato studio delle ‘extravagantes’ citate nella *Summa*: qui sono approfondite e precisate le analisi che Terence McLaughlin e Walter Holtzmann avevano già dedicato alla *Summa Simonis* quale fonte per la conoscenza delle decretali del secolo XII. Simone attinse prevalentemente a collezioni

³ *Summa Simonis* in C.16 q.3 c.3 (ed. Aimone Braida 314).

⁴ *Ibid.* in C16 q.1 c.46 (ed. Aimone Braida 303).

⁵ *Ibid.* in De con.D.1 c.19 (ed. Aimone Braida 505).

‘primitive’ (cioè non sistematiche) del ‘gruppo italiano’ (ma non solo di questo) la conoscenza delle circa novanta ‘extravagantes’ menzionate in oltre centonovanta citazioni. La decretale più citata (quindici volte) è la celebre *Licet praeter solitum*, indirizzata da Alessandro III all’arcivescovo di Salerno (1176). Una sola è la citazione di un canone del Concilio Lateranense III, e forse si tratta di un’aggiunta alla *Summa*.⁶ Che Simone abbia comunque lavorato dopo il Lateranense III è dimostrato dal fatto che i canoni del concilio sono citati nelle sue glosse al *Decretum*.⁷

Oltre che dalla *Summa*, l’opera scientifica di Simone è testimoniata da numerose glosse sparse sui margini dei manoscritti del *Decretum*, sulle quali restano fondamentali gli studi di Josef Juncker⁸ e di Rudolf Weigand.⁹ Quanto alla *Summa*, la sua tradizione manoscritta è analizzata da Aimone Braida alle pagine xii-xxv dei *Prolegomena*. Si tratta in tutto di dieci manoscritti, nessuno dei quali risale al secolo XII. Alcuni sono incompleti, uno contiene soltanto un’*abbreviatio* della *Summa*, un codice viennese ne riporta solo il proemio. Il manoscritto usato come base per l’edizione è il London, British Library, Royal 10.A.III (= Lr), che l’editore ritiene essere il testimone più antico e probabilmente quello più fedele all’insegnamento dettato da Simone. Ma nell’edizione è stato necessario tenere conto di numerosissime varianti, talvolta consistenti e significative, presenti in altri codici, come il Bamberg, Staatsbibliothek, Can. 38 (testo antico ma integrato da correzioni e aggiunte), come pure del fatto che il manoscritto

⁶ 3 Lat. c.12, *Clerici in subdiaconatu* (Aimone Braida, *Prolegomena* xli).

⁷ Aimone Braida, *Prolegomena* lxxxv-lxxxvii.

⁸ Josef Juncker, ‘Die Summa des Simon von Bisignano und seine Glossen’, ZRG Kan. Abt. 15 (1926) 326-500.

⁹ Rudolf Weigand, ‘Die Glossen des Simon von Bisignano’, AKKR 61 (1992) 362-395; idem. *Die Glossen zum Dekret Gratians: Studien zu den frühen Glossen und Glossenkompositionen* (SG 25-26; Romae 1991) 2.613-614 e ad indicem.

base manca del prologo e di parte della *distinctio* 1. Pertanto la consultazione della *Summa* si rivela più fruttuosa quando si ponga attenzione all'apparato delle varianti, ciò che in qualche caso, come vedremo, è addirittura necessario per la comprensione del testo. Occorrerebbe fra l'altro riflettere se le varianti siano frutto dell'opera di qualche correttore del testo (allievi di Simone, o *scriptores*), oppure se in qualche modo possano essere ricondotte all'autore stesso (si pensi, per esempio, alle varianti geografiche in C.16 q.3 c.3, sopra segnalate).¹⁰

L'autore della *Summa* mostra una forte personalità e una considerevole originalità di pensiero. Stupisce che solo gli *explicit* di due manoscritti disvelino l'identità del canonista, al quale possono essere attribuite le glosse che sui margini dei manoscritti del *Decretum* compaiono con le sigle 's.', 'si.' o 'sy'. La sua figura storica rimane avvolta nel mistero. Si è detto che fu allievo di Graziano, il quale è chiamato 'Magister noster':¹¹ ma rimane dubbio se si tratti di un riferimento al 'maestro' per antonomasia, oppure se l'espressione sia segno di un rapporto diretto di discendenza scientifica. Se poniamo mente al fatto che Simone operò negli anni Settanta del secolo XII, la cronologia non opporrebbe ostacoli insormontabili. A me, tuttavia, sembra più verosimile che Simone si sia formato presso un allievo di Graziano: mi pare poco probabile che un allievo diretto di Graziano sia a noi noto attraverso testi che mostrano di essere stati elaborati negli anni Settanta del secolo XII. Nell'intento di sostenere un rapporto immediato tra Simone e il Padre del diritto canonico già Johann F. von Schulte aveva posto in rilievo il valore testimoniale di un passo, nel quale si sottolinea la relazione di devozione che dovrebbe intercorrere tra maestro e allievo:¹²

¹⁰ Sul punto cfr. le considerazioni che faccio sotto, nota 32.

¹¹ *Summa Simonis*, De con.D.4 c.31 (ed. Aimone Braida 540).

¹² *Summa Simonis*, C.27 q.2 d.a c.1 (ed. Aimone Braida 412). Cfr. *Prolegomena* ix-x.

Sed quoniam non est discipulus super magistrum nec debet securis contra eum qui secat gloriari timemus os nostrum in celum mittere et eum reprehendere cuius non sumus digni soluere corrigiam calceamenti.

E tuttavia lo stesso Simone non manca talvolta di prendere le distanze da Graziano. Nel medesimo passo in cui lo chiama ‘Magister noster’, Simone precisa: ‘in hoc nolumus eum imitari’. La personalità di Simone emerge ancora con decisione in un ulteriore passo:¹³

Quicquid Magister in subdito paragrapho allegando interserat, quicquid disserendo inducat, non credimus quod ueritati preiudicet. Hoc ergo circa presentem articulum tradimus, hoc dicimus esse tenendum.

Sulla biografia di Simone, in definitiva, non conosciamo altri dati oltre al toponimo che attesta le sue origini calabresi. Ma non si può escludere che indagini mirate possano portare a qualche nuovo risultato. Per parte mia, posso offrire i frutti di qualche spigolatura compiuta tra le *Carte latine di abbazie calabresi provenienti dall'archivio Aldobrandini* edite da Alessandro Pratesi. Scorrendo i documenti relativi all'Abbazia della Sambucina, cistercense, eretta verso il 1160 nella diocesi calabrese di Bisignano, incontriamo un abate Simone in alcuni documenti (permuta e cessioni di terre, una mutuo concesso dall'abbazia a fronte di pegno immobiliare) datati tra il dicembre 1178 e il gennaio 1181.¹⁴ L'abate e i monaci sono anche destinatari di una lettera di Alessandro III con la quale il Pontefice conferma al monastero il possesso della Chiesa di San Giovanni al Monticello: ‘dilectis filiis Simonis abbati et monachis Sabucinensibus’.¹⁵ Ma vi è di più: in due dei citati documenti (doc. 28 e doc. 29) incontriamo anche un ‘Simon

¹³ *Summa Simonis*, C.35 q.1 (ed. Aimone Braida 477)

¹⁴ Alessandro Pratesi, *Carte latine di abbazie calabresi provenienti dall'archivio Aldobrandini* (Studi e Testi 197; Città del Vaticano 1958): ‘Ego Simon abbas Sancte Marie de Sabucina’ (doc. 28, p.71-73, dicembre 1178); doc. 29, p.73-75, gennaio 1179; doc. 32, p.79-81, febbraio 1181.

¹⁵ Pratesi, *Carte latine di abbazie calabresi* doc. 31, p. 78 s., lettera datata da Tuscolo, 23 ottobre di un anno imprecisato, ma che può essere identificato col 1170-1172-1179, o 1180.

canonicus' (del capitolo di Bisignano) fra i testimoni degli atti. Nel secondo dei due atti egli si sottoscrive nel seguente modo: 'Canonicum Symonem producit pagina testem'.¹⁶ Dunque, in anni perfettamente compatibili con la biografia di Simone da Bisignano, nei luoghi da cui egli traeva origine troviamo almeno due persone che teoricamente potrebbero identificarsi con il canonista. Possiamo ipotizzare che il giurista sia ritornato nella sua Calabria dopo anni di insegnamento, perché eletto alla carica di abate dell'abbazia della Sambucina, oppure perché eletto canonico della cattedrale di Bisignano? Allo stato delle conoscenze nulla di più possiamo aggiungere, ma questi dati possono costituire una traccia per ricerche da compiere.

I nodi irrisolti della biografia di Simone da Bisignano si intrecciano con la questione della sua attività scientifica e della sua collocazione 'geografica' nel flusso degli interpreti del *Decretum*. L'opera di Simone è stata tradizionalmente ascritta alla scuola bolognese, ma Peter Landau ha recentemente contestato questa attribuzione e ha proposto di collocare Simone entro l'ambito della canonistica d'Oltralpe, in ambiente francese o renano. Le conclusioni di Landau, formulate in un saggio del 2008,¹⁷ sono ora sommariamente riproposte nella *Presentazione* (v-vi). L'argomento principale di questa tesi consiste nel fatto che la *Summa* di Simone mostra con evidenza di essere stata utilizzata dalla canonistica d'Oltralpe negli anni Ottanta del secolo XII. Oltre che nella *Summa 'Dubitatur a quibusdam'* e nelle *Notae Atrebatenses* (Francia settentrionale), l'opera di Simone è ampiamente messa a frutto nella *Summa Lipsiensis* di Rodoicus Modicipassus, composta verso il 1186. Una lunga sezione dei *Prolegomena* è ora dedicata allo studio delle relazioni tra la *Summa* di Simone e la *Summa Lipsiensis*.¹⁸

¹⁶ Pratesi, *Carte latine di abbazie calabresi*, doc. 29, p.75.

¹⁷ Peter Landau, 'Simon von Bisignano, Sikard von Cremona und die mainzer Kanonistik der Barbarossazeit: Zur Biographie des Simon von Bisignano und zur Forschungsgeschichte', *BMCL* 28 (2008) 119-144, in particolare 136-138.

¹⁸ Aimone Braida, *Prolegomena* xcii-cv.

Quest'ultima utilizza ampiamente l'opera del canonista italiano, del quale rivela l'identità, a quanto pare, solo in un caso.¹⁹

Un ulteriore argomento portato da Landau a sostegno della sua conclusione dipende dalle indagini condotte da Weigand sulle glosse di Simone. Da tali ricerche Weigand aveva tratto l'idea, sia pure espressa in forma dubitativa, che Simone fosse stato una figura marginale o quanto meno 'alternativa' nella scuola bolognese.²⁰ Una prova di tale marginalità starebbe anche nel fatto che le glosse di Simone non trovarono accoglimento nell'apparato bolognese *Ordinaturus magister Gratianus*.

Che la *Summa* di Simone sia stata conosciuta nella canonistica d'Oltralpe negli anni Ottanta del secolo XII è un fatto indubitabile, ma a mio parere ciò non costituisce una prova che al di là delle Alpi Simone abbia scritto la sua *Summa* o comunque lavorato come canonista. La conoscenza della sua opera in ambiente francese e anglo-normanno si spiega, a mio avviso, per i rapidissimi e intensi processi di irradiazione della scienza canonistica su base europea, dei quale abbiamo molteplici esempi. Al contrario, la lettura della *Summa* di Simone offre numerosi dati idonei a confermare l'appartenenza dell'autore all'ambiente italiano e alla Scuola bolognese. In questa direzione conducono, per esempio, i sopra citati passi nei quali l'autore rivela le sue origini riferendosi alle Chiese di Bisignano e Cosenza, Cassano o Policastro, riferimenti difficilmente comprensibili se Simone si fosse rivolto a studenti o a lettori francesi. Inoltre, la *Summa* contiene numerosi riferimenti a Bologna e a luoghi dell'Italia centro-settentrionale. Aimone

¹⁹ 'S. aliter distinguit': *Summa Lipsiensis* in C.35 q.7 *pr.*, citata da Aimone Braida, *Prolegomena* xciv nota 428.

²⁰ Weigand, 'Die Glossen des Simon' 362: 'War Simon ein starker Aussenseiter in Bologna?'. Cfr. anche Rudolf Weigand, 'The Development of the *Glossa ordinaria* to Gratian's *Decretum*', *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, edd. Wilfried Hartmann-Kenneth Pennington (Washington, D.C. 2008) 55-97: 75: 'somewhat of an outsider at Bologna'.

Braida pone in evidenza che Simone menziona una particolare consuetudine liturgica bolognese:

Et nota quod propter ministerii huius significationem, que hic ponitur, semper debet pax in ecclesia dari, quamvis Bononiensis ecclesie aliter se habeat consuetudo...,

dove però il riferimento alla consuetudine della Chiesa di Bologna nel manoscritto London, British Library Add. 24659 (= La) è mutato in 'quarundam ecclesiarum'.²¹ E ancora, un cenno al diritto particolare della Lombardia è fatto da Simone a proposito dell'obbligo di continenza del 'conversus'.²² A questi passi bisogna aggiungerne due molto significativi, nei quali Simone rappresenta i 'casus' di due canoni graziani contrapponendo, a modo di esempio, i vescovi di Bologna e di Modena. A proposito di una questione in cui si debba stabilire il foro competente:²³

Hic queritur si Mutinensis episcopus haberet ecclesiam uel predium in diocesi Bononiensi...

E a proposito degli effetti della sentenza di scomunica:²⁴

Hinc uidetur innui quod si Bononiensis episcopus excommunicauit aliquem de sua parochia et ei parochianus Mutinensis episcopi scienter communicauit...

Mi pare evidente che qui Simone parla rivolgendosi ad ascoltatori o a lettori familiari con i luoghi che menziona con intenti didattici. Nella stessa direzione conducono i diversi passi della *Summa* nella quale è richiamato il diritto longobardo. Meriterebbe ulteriori approfondimenti, che esulano da questa recensione, il riferimento alle fonti di cognizione del diritto longobardo contenuto nella *Summa* in C.11 q.1 p.c.36:²⁵

usque *qui in suis capitularibus*, non in Lombarda sed in Pandecta unde Lombarda fuit tracta. Multe enim sunt Pandecte.

²¹ *Summa Simonis*, De con.D.2 c.8 (ed. Aimone Braida 517).

²² *Ibid.*, C.27 q.1 c.40 (ed. Aimone Braida, 410): 'in partibus Lombardie'.

²³ *Ibid.* C.2 q.6 c.34 (ed. Aimone Braida 135).

²⁴ *Ibid.* C.11 q.3 c.26 (ed. Aimone Braida 225).

²⁵ *Ibid.* C.11 q.1 post c.36 (ed. Aimone Braida 214).

Ripetuti riferimenti alla *Lombarda* vertono sulle peculiarità del diritto penale e processuale longobardo. In materia di quantificazione della pena:²⁶

Et nota quod hec leges in quibus de pena undecupli agebatur abierunt in desuetudinem. Uel de Lombarda potest intelligi ubi seculares pene statute inueniuntur.

In tema di prova e giuramento:²⁷

nam secundum Lombardam, cuius est presens c., sacramentum de calumpnia non prestatur... Nam secundum Lombardam, actore deficiente, reus semper cogitur ad innocentie purgationem.

In tema punizione dell'adulterio:²⁸

inter hec uel usque mundanam legem, scilicet Romanam uel Lombardam que permittit uiro uxorem adulteram cum adultero occidere.

Sarebbe difficile spiegare tali insistenti richiami alle fonti del diritto longobardo se Simone avesse composto la *Summa* al di fuori della penisola italiana, nella quale tale diritto era diffusamente conosciuto e applicato.²⁹

Penso che i dati appena rilevati diano sufficienti elementi di prova per confermare che la *Summa* di Simone fu composta entro l'ambiente scientifico della scuola bolognese. Poche parole desidero aggiungere, in questa sede, sull'opinione che l'insegnamento di Simone sia rimasto sostanzialmente privo di ascolto in ambiente bolognese per essere recepito, invece, al di là delle Alpi. La questione mi pare molto complessa per poter giungere conclusioni decise e radicali come quelle enunciate da Landau. Occorrerebbe un'attenta analisi dei molti manoscritti esistenti per poter valutare l'incidenza degli insegnamenti di Simone da Bisignano nel flusso della dottrina bolognese. Personalmente ho

²⁶ Ibid., C.12 q.2 c.10 (ed. Aimone Braidà 243).

²⁷ Ibid., C.22 q.5 c.14 (ed. Aimone Braidà 371).

²⁸ Ibid., C.33 q.2 c.6 (ed. Aimone Braidà 468).

²⁹ Per analoghe considerazioni in materia di localizzazione della composizione di antiche glosse sul *Decretum* di Graziano cfr. Kenneth Pennington, 'The Biography of Gratian, the Father of Canon Law', *Villanova Law Review* 59 (2014) 679-706, in particolare 697, 701; Idem 'La biografia di Graziano, il Padre del diritto canonico', *RIDC* 25 (2014) 25-60, in particolare 48, 52-53.

potuto fare alcuni sondaggi sul bel manoscritto del *Decretum* conservato a Brindisi, Biblioteca Pubblica Arcivescovile Annibale De Leo, A-1: esso contiene molte glosse di Simone in un contesto prettamente bolognese costellato da glosse di Rufino, Rolando, Gandolfo, Cardinalis, Baziano, Giovanni Faventino, o che compaiono nell'apparato *Ordinaturus*, etc.³⁰ Qui, dunque, il pensiero di Simone appare perfettamente integrato entro il contesto culturale della scuola di Bologna. Tra parentesi, deve essere lasciata al margine di queste osservazioni la questione della relazione delle glosse di Simone riportate nel manoscritto brindisino con la *Summa Decreti*. Secondo Weigand le glosse sarebbero estratti (Auszüge, excerpts) della *Summa*³¹. Se tali fossero, dovremmo pensare a un allievo bolognese di Simone. Penso però che non si possa escludere l'ipotesi opposta, cioè che le glosse siano il frutto di un'attività parallela o preparatoria della *Summa* stessa. Almeno in un caso (ma occorrerebbe un'analisi più puntuale) il manoscritto di Brindisi documenta un insegnamento professato da Simone dalla cattedra, ma poi non rifluito integralmente nella *Summa*.³² Un'ultima considerazione

³⁰ Sul manoscritto v. Weigand, *Die Glossen* 2.698-707.

³¹ Weigand, *Die Glossen* 2.614 e 704-705. Il giudizio è confermato in Idem 'The Development of the *Glossa ordinaria* to Gratian's *Decretum*' 75.

³² Il confronto tra le glosse di Simone e la *Summa* offre, tra l'altro, materia per qualche considerazione circa la tradizione manoscritta della *Summa* stessa. Si veda, per esempio, la glossa al v. *deuicti misericordia* di C.11 q.3 c.103 del manoscritto Brindisi, Biblioteca Pubblica Arcivescovile Annibale De Leo, A-1, fol. 106rb. Un'unica glossa raccorda i contenuti della *Summa* ai vv. *deuicti misericordia* e *ad tempus* (ed. Aimone Braida 235-236). La glossa riguarda gli effetti della scomunica: '*deuicti misericordia*: unde uidetur quod domestici et familiares de communi iure sint excommunicati. Ad hoc dicimus quod hic non refertur ad omnes de quibus hic subditur, qui de communi iure sunt exempti, sed ad eos qui simplicitate uel ignorantia sunt communicantes excommunicatis. [Uel forte ante constitutionem presentem omnes erant indistincte excommunicati qui excommunicatis communicabant. Sed per hoc fuerant primo ab excommunicatione exempti]. Item nota quod non ideo dicit *ad tempus* quia in futuris temporibus similes persone non essent ab excommunicatione exempte, sed quia ante Gregorium omnes erant

su questo punto. L'incidenza dell'insegnamento di Simone da Bisignano sulla scuola bolognese dovrebbe essere misurata considerando anche gli autori del tempo di Ugucione e delle generazioni successive. Che Simone fosse noto a Ugucione era già stato sottolineato per un caso specifico da Josef Juncker, sulla scia di Franz Gillmann e Heinrich Singer.³³ Ma è verosimile che una lettura più distesa della *Summa* di Ugucione possa rivelare parecchie altre citazioni o dipendenze. Posso segnalare un caso relativo alla *Summa* di Simone in D.9 c.8:³⁴

Quis nesciat etc. usque et de illa dubitari et disceptari omnino non possit. Disputare quidem de hiis possumus addiscendo sed non dubitando an iustum sit quod ibi continetur, ut infra C.xvii. q.iii. § Qui autem (p.c.29).

Il medesimo concetto ricompare, sia pure nel contesto di un pensiero più ampiamente elaborato, nella *Summa* di Ugucione sul medesimo luogo del *Decretum*.³⁵ Che Ugucione abbia probabilmente attinto da Simone si può dedurre dal fatto che

excommunicati qui excommunicatis communicabant. Unde cum ipse filius esset misericordie, uoluit istos ab excommunicatione subtrahere, uel subtractos esse ostendere. Unde frater fratri excommunicato uel pater filio licite communicat, si tamen simul cohabitent. Secus forte de non cohabitantibus. Si.' Il corrispondente passo della *Summa* è più ampio ed elaborato, ma ha una tradizione con significative varianti. Alcuni manoscritti (Ba A La R P) contengono ulteriori sviluppi: in particolare riportano le parole della glossa che ho incluso entro parentesi quadre (assenti nel manoscritto base) e concludono con un 'Secus forte . . .' invece del 'Secus uero . . .' del manoscritto base accolto nell'edizione. Il che permette di concludere, fra l'altro, che le varianti attestate nella tradizione manoscritta possono comunque riflettere il pensiero autentico di Simone, come nel caso esaminato è dimostrato dalla sigla 'Si.' che chiude la glossa. Si noti che i cinque manoscritti citati appartengono a una medesima famiglia distinta da quella del manoscritto Lr che è stato scelto come testo base dell'edizione.

³³ Juncker, 'Summa' 340-343, a proposito di D.63 c.10.

³⁴ *Summa Simonis*, D.9 c.8 (ed. Aimone Braida 12). Il passo della *Summa* corrisponde a una glossa edita da Weigand, 'Die Glossen des Simon von Bisignano' 367.

³⁵ Huguccio (Pisanus male), *Summa Decretorum*, 1: *Distinctiones I-XX*, ed. Oldřich Přerovský (MIC Ser. A 6; Città del Vaticano 2006) 151-152.

l'affermazione non si legge nelle *Summae* di Paucapalea, Rufino, Stefano Tornacense, né nella *Summa Parisiensis* o nella *Summa Lipsiensis*.

Il rapporto di Simone coi giuristi che lo avevano cronologicamente preceduto è oggetto di affermazioni che rivelano la forte personalità del canonista. Egli si pone consapevolmente tra i 'moderni', che egli distingue dai 'maiores' o dagli 'antiqui' non per motivi meramente cronologici, ma in ragione del metodo. Il tratto che caratterizza i 'moderni', cioè lo stesso Simone, è la 'brevitas', come egli è solito ripetere. Al contrario, gli 'antiqui', a suo dire, si erano contraddistinti per una 'prolixitas' generatrice di confusione e oscurità che andavano a detrimento dell'utilità dei lettori. Sono affermazioni ricorrenti nella *Summa* di Simone (ciò che, fra l'altro, mi sembra un ulteriore argomento per escludere che Simone sia stato allievo diretto di Graziano):³⁶

Multi licet utilia confuse tamen et obscura circa presentem articulum legimus a maioribus esse tradita. Unde quoniam gaudent breuitate moderni sic uolumus prolixitatem illam abbreviare.

Il tema presenta interessanti variazioni:³⁷

Circa presentis articuli solutionem multipliciter laborasse leguntur antiqui et multa uisi sunt scribere que intelligentie profectui non deseruiunt nec lectorum animis inseruntur, cum enim per prolixitatis discurrerent tramitem nec propositum uoluerunt restringere nec utilitati legentium deseruire. Unde quoniam uerbum abbreviatum fecit Dominus et gaudent breuitate moderni, dicimus . . .

Il coraggio di un 'modernus' vale talvolta a dissipare il timore degli 'antiqui':³⁸

Infinita hic antiquitas assignauit contraria et multipliciter soluere nitebantur et trepidauerunt sic ubi non erat timor.

La ricerca della 'brevitas' sta alle origini di un'espressione che costituisce uno stilema ricorrente nell'opera di Simone.³⁹ In molti

³⁶ *Summa Simonis*, C.11 q.1 pr. (ed. Aimone Braidà 206).

³⁷ *Ibid.*, C.11 c.3 pr. (ed. Aimone Braidà 217).

³⁸ *Ibid.*, C.12 q.2 c.11 (ed. Aimone Braidà 243).

³⁹ Aimone Braidà, *Prolegomena civ.*

casi egli rinuncia a sviluppare possibili approfondimenti tematici: si limita a porre i problemi, lasciandone la soluzione – a suo dire – all’arbitrio del lettore, o a coloro che sono coinvolti nelle preoccupazioni mondane, o agli studenti percorsi dell’amore per la ‘lectio’. Alcuni esempi:⁴⁰

Sed quod horum sit potius lectoris arbitrio relinquimus explorandum.

O ancora:⁴¹

An uero summus pontifex possit bigamum ad sacerdotium promouere uel utrum esset sacerdos si eum ordinaret de facto, is inquirat quem mundi labor exagitat.

E inoltre:⁴²

Que autem sit diuersitatis ratio is inquirat quem lectionis amor exagitat.

Altre volte sembra che Simone voglia semplicemente rinviare ad altra occasione didattica:⁴³

Si uero nichil horum faciunt, an usuram exerceant, canon tamen dicit hoc esse turpe lucrum, infra e. q. Quicumque, nolumus ad presens diffinire.

Il quadro che ne risulta è quello di un’opera in certa misura provvisoria, tendenzialmente aperta a successive integrazioni nelle quali il lettore o lo studente devono fare la loro parte.

⁴⁰ *Summa Simonis*, C.14 q.4 c.5 (ed. Aimone Braidà 276). Cfr. anche *Summa Simonis*, C.31 q.1 c.8 (ed. Aimone Braidà 451): ‘Si uero uirginem accipit is qui iam aliam duxerit, an tales nuptie benedici debeant lector inquirat’.

⁴¹ *Summa Simonis*, D.34 c.17 (ed. Aimone Braidà 37). È questa la formula più ricorrente. *Summa Simonis*, D.74 (75) c.7 (ed. Aimone Braidà 68): ‘Utrum sit episcopus eadem ratione quod non die Dominico ordinatur uel quod non ieiunus accipit consecrationem aut non in ieiunio, is inquirat quem mundi labor exagitat’; C.5 q.2 c.2 (ed. Aimone Braidà 161): ‘quod utrum bene dicatur, arbitrio lectorum inquirendum relinquimus, quos huius mundi labor exagitat’; C.11 q.3 c.7 (ed. Aimone Braidà 221): ‘unde queritur an suspensus clericus possit priuate horas nocturnas uel diurnas cantare, quod illis inquirendum relinquimus quos mundi labor exagitat’; C.12 q.2 c.65 (ed. Aimone Braidà 253): ‘Quod tamen horum sit uerius, illis relinquimus quos mundi labor exagitat’; C.16 q.7 c.26 (ed. Aimone Braidà 324): ‘Utrum autem qui concedit omnia sua alicui uel vendit, donare uel uendere iuspatronatus uideatur, is inquirat quem mundi labor exagitat’.

⁴² *Ibid.* C.33 q.1 c.4 (ed. Aimone Braidà 466).

⁴³ *Ibid.* C.14 q.3 c.3 (ed. Aimone Braidà 276).

Un'altra questione attinente ai rapporti fra Simone e l'insegnamento dei suoi predecessori è accennata nei *Prolegomena* e in alcuni luoghi dell'apparato critico.⁴⁴ Mi riferisco alle espressioni 'in summa' e 'in summis', con le quali Simone rinvia il lettore ad altro luogo per particolari approfondimenti tematici. La questione richiederebbe un approccio analitico che non è possibile in questa sede. In teoria, potrebbe trattarsi di rinvii ai 'dicta' di Graziano, come Aimone Braida talvolta ritiene, o anche di rinvii alle 'summae' di altri canonisti. Qualche esempio. Nella *Summa* in C.16 q.7 c.26 leggiamo in tema di giuspatronato:⁴⁵

Ad hoc c. usque ad finem fere questionis de iurepatronatus Magister tractatum interserit de quo, licet multa inueniantur in summa, possumus multa proponere de quibus antiquitas nichil expressit.

Graziano pone in effetti le basi per gli sviluppi successivi dei suoi interpreti (cfr. soprattutto il *dictum post c.30*), ma forse non dice quel 'molto' a cui rinvia Simone; molto si legge invece in Rufino, al quale mi sembra più verosimile che Simone si riferisca.⁴⁶ E ancora, a proposito dei gradi di parentela e affinità leggiamo:⁴⁷

Circa consanguinitatis et affinitatis regulam nolumus noua dogmata et moras solitas adhibere, sed magistrorum uiam nostrorum sequimur et doctorum dogmata approbamus. In summis ergo reperies quid circa hec sit tenendum.

⁴⁴ Aimone Braida, *Prolegomena* cv.

⁴⁵ *Summa Simonis*, C.16 q.7 c.26 (ed. Aimone Braida 323-324).

⁴⁶ *Die Summa Decretorum des magister Rufinus*, ed. Heinrich Singer (Paderborn 1902) 368-371.

⁴⁷ *Summa Simonis*, C.35 q.2-3 (ed. Aimone Braida 478). Si noti che in questo passo Simone usa ben due volte la parola *dogma* (*dogmata*), raramente adoperata dai giuristi medievali ma di straordinaria importanza nella tradizione giuridica occidentale: Manlio Bellomo, *Elogio delle regole: Crisi sociali e scienza del diritto alle origini dell'Europa moderna* (2nd. ed. Leonforte 2015) 27-29 e passim; Andrea Padovani, 'Forma, ordine, bellezza: Variazioni su un tema', RIDC 24 (2013) 57-83, in particolare 64-66.

Mi sembra evidente che qui Simone, per il consueto amore della brevità, si riferisca alle ‘summae’ dei suoi predecessori.⁴⁸ In un altro caso Simone indica al lettore dove potrà trovare la ricostruzione sintattica del testo di un canone:⁴⁹

Constructionis ordinem in summis inuenies. Unde hic sub silentio pertransimus.

In questo caso Aimone Braidà ritiene, sulla scia di Hermann Kantorowicz, che il riferimento sia fatto a un ‘dictum’ di Graziano, ma riporta anche l’opinione di Franz Gillmann secondo il quale l’espressione ‘in summa’ si riferirebbe piuttosto a glosse che contengano il sommario di un canone.⁵⁰ Nel caso riferito, mi sembra di poter escludere che Simone suggerisca al lettore di consultare Graziano per la ricostruzione sintattica del canone; la ricostruzione si legge, invece, nella *Summa* di Rufino.⁵¹

D’altro canto, la stessa tradizione manoscritta della *Summa* di Simone appare intrecciata con l’insegnamento di Rufino. Mi riferisco al manoscritto Bamberg, Staatsbibliothek, Can. 38, che all’inizio di diverse ‘causae’ presenta passi introduttivi estratti letteralmente dalla *Summa* di Rufino. Aimone considera tali passi ‘certamente estranei alla *Summa Simonis* originaria’, e pone la questione se siano frutto di una scelta del copista o piuttosto di una scelta didattica (cioè guidata da un maestro).⁵²

Alcune pagine dei *Prolegomena* (lxxxix-xcii) sono dedicate a mettere in luce svariati aspetti contenutistici della *Summa*, a

⁴⁸ Cfr. i corrispondenti luoghi delle *Summae* di Paucapalea, *Summa des Paucapalea über das Decretum Gratiani*, ed. Johann F. von Schulte (Giessen 1890) 135-137; Rolando, *Die Summa magistri Rolandi, nachmals Papstes Alexander III. Nebst einem Anhang Incerti auctoris Quaestiones*, ed. Friedrich Thaner (Innsbruck 1874) 200-207; Rufino, ed. Singer 510-516, Stefano Tornacense, *Die Summa des Stephanus Tornacensis über das Decretum Gratiani*, ed. Johann F. von Schulte (Giessen 1891) 247-249.

⁴⁹ *Summa Simonis*, C.11 q.3 c.10 (ed. Aimone Braidà 222)

⁵⁰ Aimone Braidà, apparato critico a C.11 q.3 c.10 (222 nota 122).

⁵¹ Rufino, *Summa*, C.11 q.3 c.10 (ed. Singer 316-317).

⁵² Aimone Braidà, *Prolegomena* xvi.

illustrazione di quanti spunti e suggestioni possano trarsi dalla lettura distesa dell'opera. La *Summa* è specchio della cultura giuridica dell'autore, dei problemi (giuridici e teologici) e delle pratiche peculiari del suo tempo, di un sistema giuridico che sta evolvendosi nei decenni in cui il *ius decretalium* si impose quale principale motore dello sviluppo legislativo della Chiesa. La fruizione dei contenuti è agevolata da una sequenza di utilissimi indici analitici che guidano il lettore lungo le direttive di molti itinerari di ricerca testuale: luoghi della scrittura citati nella *Summa* o nell'apparato critico (cvii-cxvii); Padri della Chiesa (cxviii-cxx); canoni di Burcardo citati nella *Summa* o nell'apparato critico (cxxi-cxxii); passi del diritto romano citati nella *Summa* o nell'apparato critico (cxxxiii-cxxv); allegazioni di passi del *Decretum* citati nella *Summa* (cxxxvi-cxci); decretali allegate da Simone, secondo l'ordine della loro citazione (cxcii-cxxiii: in totale 205 citazioni); elenco alfabetico delle decretali citate nella *Summa Simonis* (ccxiv-ccxxiv); elenco alfabetico delle decretali citate nella *Summa Lipsiensis* (ccxv-ccxxxii); bibliografia fondamentale su Simone da Bisignano (ccxxxiii-ccxxxvii); elenco delle principali edizioni dei testi dei glossatori medievali (ccxxxviii-ccxxxix); nomi e luoghi citati nella *Summa* (ccxl-ccxlii).

I più diversi interessi dell'odierno lettore nei campi del diritto, della teologia e della liturgia possono trovare soddisfazione attraverso la lettura dell'opera di Simone. Prendo spunto da alcune mie curiosità per portare qualche esempio. L'atteggiamento di Simone di fronte alle pratiche liturgiche della Chiesa greca si rivela in un paio di luoghi. Nella *Summa* in De cons. D.5 c.39 leggiamo:⁵³

ubi Grecorum dampnatur sententia, qui Spiritum Sanctum a Patre tantum procedere asserebant.

È interessante notare le varianti di alcuni manoscritti, che al posto di '*sententia*' portano '*insania*'. Ma dalle questioni

⁵³ *Summa Simonis*, De con.D.5 c.39 (ed. Aimone Braida 548).

liturgiche alle considerazioni ecclesiologiche il passo è breve, come leggiamo in un passo riguardante la celebrazione dell'eucaristia col pane azimo o fermentato:⁵⁴

Non enim ibi apponi debet fermentum, per quod corruptio designatur et ob hoc reprehensibilis uidetur esse Graecorum ecclesia que conficit in fermento. Turpis est omnis pars suo uniuerso non congruens.

L' 'universum' con cui la 'pars' (cioè la 'Graecorum ecclesia') non è conforme è identificato non con la Chiesa cattolica – nella quale convivono legittime varietà disciplinari e liturgiche – ma con la Chiesa latina, con un corto circuito tipico di un contesto ecclesiologico in cui stava maturando l'idea della 'praestantia latini ritus'. Da qui discende il giudizio che tale mancanza di conformità è 'turpis' e meritevole di essere biasimata.

Passando ad altro tema, è interessante notare come in materia di rapporti fra ordine secolare e ordine spirituale Simone professi un insegnamento dualistico, con la consapevolezza che altri canonisti si attestavano su posizioni ierocratiche:⁵⁵

per hoc non probatur quod imperator habeat potestatem gladii ab apostolico, licet hoc quidam uelint.

La posizione dualistica è coerentemente riproposta nella *Summa* in D.96 c.6 dove è rappresentata l'idea che le giurisdizioni dell'Imperatore e del Papa sono 'potestates distinctae' e reciprocamente indipendenti, perché entrambe derivanti da Dio:⁵⁶

hinc habes quod imperator non habet potestatem gladii. Distincte enim sunt hec potestates nec una pendet ex altera. Unde in huius rei figuram dictum fuit 'ecce gladii duo hic' (Lc 23.34).

In questo luogo sarebbe stato opportuno integrare l'edizione inserendo dopo 'potestatem gladii' una delle varianti presenti nella tradizione manoscritta – 'a papa', 'ab apostolico', 'a summo pontifice' – che evidentemente rappresentano il pensiero

⁵⁴ Ibid. De con.D.2 c.1 (ed. Aimone Braidà 513-514).

⁵⁵ Ibid. D.22 c.1 (ed. Aimone Braidà 19).

⁵⁶ Ibid., D.96 c.6 (ed. Aimone Braidà 85).

dell'autore e consentono di chiarire una frase rimasta monca. In questo senso è esplicito il passo di D.96 c.11:⁵⁷

Hinc collige imperatorem non ab apostolico sed a Deo potius gladii potestatem accipere et in temporalibus eo esse maiorem.

Per completare il quadro, notiamo come alla superiorità dell'imperatore in materia temporale faccia da contrappeso la superiorità del Romano Pontefice in materia spirituale.⁵⁸

ita eis dominetur. Subaudi quoad terrena in quibus etiam apostolico maior esse uidetur imperator. Usque debitam reuerentiam impendat. Subaudi quoad spiritualia in quibus imperator est minor.

Queste poche e frammentarie notazioni intendono rendere testimonianza delle straordinarie prospettive di ricerca che la recente edizione della *Summa Simonis* schiude agli studiosi del diritto canonico medievale. La figura scientifica di un importante canonista del secolo XII assume ora contorni più definiti, anche se rimane misteriosa la sua figura storica. Con l'onestà di chi conosce bene la difficoltà e le insidie delle ricerche sui manoscritti giuridici medievali, Aimone Braidà considera la sua edizione come un 'tentativo' di 'modesto valore provvisorio' (*Prefazione*). Quanti, fra i lettori, hanno familiarità con le ricerche sui manoscritti, possono bene immaginare le immense fatiche che stanno dietro un lavoro di questo genere. Ma, al di là del senso di 'provvisorietà' che può essere condiviso da coloro che si dedicano a indagare il labirinto dei manoscritti giuridici medievali, è bene riconoscere che l'edizione della *Summa* di Simone da Bisignano, con il cospicuo studio che la introduce, è allo stesso tempo un validissimo punto di arrivo di pluridecennali ricerche e una solida base per nuove indagini. All'artefice di

⁵⁷ Ibid., D.96 c.11 (ed. Aimone Braidà 86).

⁵⁸ Ibid., C.11 q.1 c.41 (ed. Aimone Braidà 215). Qui alcuni mss. aggiungono: 'et ei tenetur collum submittere, ut (supra) di. lxiii. Valentinianus (D.63 c.3)'. A testimonianza che dalla consultazione dell'apparato critico possono ricavarsi molte ulteriori interessanti notizie.

questo volume la comunità dei cultori del diritto canonico medievale non può non esprimere ammirazione e riconoscenza.

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A Twelfth-Century Treatise on Proof: *Saepenumero (uero) in iudiciis examinandis*

Bruce C. Brasington

During the second half of the twelfth century, procedural law became a dynamic aspect of the emerging *Ius commune*.¹ Building on the jurisprudence of civilians such as Bulgarus and Placentinus,² jurists began to incorporate and adapt civil-law process to the ecclesiastical forum. From comprehensive works like the Anglo-Norman Pseudo-Ulpianus' *De edendo* and *Ordo Bambergensis*,³ to concise, thematically-focused treatises,⁴ these

¹ Linda Fowler-Magerl, *Ordo iudiciorum vel ordo iudiciarius* (Frankfurt-am-Main 1984). Among many studies, Anne Duggan, 'Roman, Canon, and Common Law in Twelfth-Century England: The Council of Northampton (1164) Re-Examined', *Historical Research* 83 (2010) 379-409, Dominique Bauer, 'On the Historical Genesis of Legal Proceduralism', *Ius Brabanticum, ius commune, ius gentium: Opstellen aangeboden aan prof. mr. J.P.A. Coopmans ter gelegenheid van zijn tachtigste verjaardag*, edd. E.J. M. F. C. Broers, B.C.M Jacobs, R.C.H. en Lesaffer (Nijmegen 2006), 209-219, Kenneth Pennington, 'The Practical Use of Roman Law in the Early Twelfth Century', *Handlung und Wissenschaft. Die Epistemologie der praktischen Wissenschaften im 13. und 14. Jahrhundert*, edd. Matthias Lutz-Bachmann and Alexander Fidora, (Berlin 2008) 11-32.

² Wiesław Litewski, *Der römisch-kanonische Zivilprozess nach den älteren ordines iudicarii* (2 vols. Krakow 1999-2000), also comprehensive studies include Knut Wolfgang Nörr, *Romanisch-Kanonisches Prozessrecht: Erkenntnis-verfahren Erster Instanz in Civilibus* (Berlin 2012) and, for witnesses, Yves Mause, *Veritatis adiutor: La procédure du témoignage dans le droit savant et la pratique française (xii^e-xiv^e siècles)* (Università degli studi di Milano, Facoltà di giurisprudenza, Pubblicazioni dell' Istituto di storia del diritto medievale e moderno 35; Milano 2006).

³ Fowler-Magerl, *Ordo* 65-73. The preferred edition, though itself in need of renewed study, is *Incerti auctoris ordo iudiciorum*, ed. G. Haenel (Leipzig 1838). See André Gouron, 'Usage de l'hypothèse et reconstruction historique de la science civilistique au XII^e siècle', *La filologia testuale e le scienze umane: Atti del convegno Roma 10-22 Aprile 1993* (Accademia Nazionale dei Lincei; Rome 1994) 91-106 at 91; reprinted in *Juristes et droits savants: Bologne et la France médiévale* (Aldershot 2000) also Gouron, 'Un traité écossais du douzième siècle: l'ordo Ulpianus de edendo', *TRG* 78 (2010) 1-13, dating it no later than 1185 and placing it in Scotland. This is, however,

procedural works generally remain either unedited or trapped in nineteenth-century editions that do not take in account subsequent manuscript discoveries. The latter is the case with one of the earliest works devoted to a specific aspect of procedure: *Saepe numero (uero) in iudiciis examinandis*.

Treating proof, this brief *ordo* has received some attention, which is not always the case with the early procedural treatises.⁵ Scholars have argued that Bertram of Metz composed it, possibly while teaching at Cologne.⁶ They have also noted dependence on Rogerius' *Summa* on the *Codex*,⁷ and some connection to the anonymous author of the *Summa Monacensis*.⁸ However, to date, all scholarship has been based on Wunderlich's 1842 transcription of the Erlangen manuscript.⁹ In the following, I offer a few observations on the text based on

conjectural. On the *Ordo Bambergensis*, likely dating from the early 1190s: *Der Ordo iudiciarius des Codex Bambergensis P.I.11*, ed. Johann Friedrich Ritter von Schulte (Vienna 1872, reprinted from SB Wien 1872) 285-326.

⁴ For numerous examples, <http://faculty.cua.edu/pennington/1140a-z.htm> accessed on 29 July 2015.

⁵ Fowler-Magerl, *Ordo* 219-220.

⁶ Fowler-Magerl, *Ordo* 291: Arras, BM 271, fol 188ra-188rb, fragmentary; Bamberg, SB Can. 17, fol. 183rb-vb); Berlin, SB Preussischer Kulturbesitz, lat. Qu. 193, fol. 117ra-117va; Erlangen, UB 375, fol. 115r-115v; Munich, BSB, Clm 16084, fol. 72va-73ra). Fowler-Magerl suggests a dating after 1160. See Peter Landau, *Die Kölner Kanonistik des 12. Jahrhunderts: Ein Höhepunkt der europäischen Rechtswissenschaft* (Badenweiler 2008) also 'The School of Canon Law in Cologne during the 12th Century', *Proceedings Esztergom 2008* 433-434.

⁷ Fowler-Magerl, *Ordo* 219.

⁸ Winfried Stelzer, 'Die *Summa Monacensis* (Summa "Imperatorie maiestati") und der Neustifter Propst Konrad von Albeck: Ein Beitrag zur Verbreitung der französischen Kanonistik im frühstauischen Deutschland', *MIÖG* 88 (1980) 94-112 at 99, also Stephan Kuttner, 'The Third Part of Stephen of Tournai's *Summa*', *Traditio* 14 (1958) 502-505. On the *Summa Monacensis*, see also *Distinctiones 'Si mulier eadem hora' seu Monacenses*, ed. Rosalba Sorice (MIC Ser. A 4; Vatican City 2002). On Rogerius, see below.

⁹ Agathon Wunderlich, 'Beiträge zur Literaturgeschichte des Prozesses im zwölften und dreizehnten Jahrhundert', *Zeitschrift für geschichtliche Rechtswissenschaft* 11 (1842) 72-98 at 92-98.

collations of other manuscripts.¹⁰ It is hoped that this will draw attention to *Sepenumero* and encourage fresh study of it as well as of other procedural treatises in older editions.¹¹

Sepenumero numbers among a handful of treatises from the middle of the twelfth century that treat proof. It considers who did, and did not, have to prove. It also discusses the forms of proof, above all testimony by witnesses and their selection or rejection based on character, status, and trustworthiness. Peter Landau has commented that its author ‘must have had a good knowledge of the system of registers of proof by records’.¹² In his encyclopedic treatment of the ‘ordines iudiciorum’, Litewski highlighted its most precocious feature, whether presumption counted as proof.¹³ He also identified other places where the work treated procedural issues found in the early, Anglo-Norman ‘ordines iudiciorum’. These include ‘civil controversy’,¹⁴ settlement of a dispute by ‘transactio’ or consensus,¹⁵ and the rejection of certain types of testimony, for example, by members of the household.¹⁶ Others have highlighted its

¹⁰ Arras, BM 271, fol. 188ra-188rb. (Fragment); Bamberg, SB Can. 17, fol. 183rb-183vb; Berlin, SB lat. Qu. 193, fol. 117ra-117va; Munich, BSB Clm 16084, fol. 72va-73ra.

¹¹ Notably the many works in Ludwig Wahrmund, *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter* (5 vols. Innsbruck-Heidelberg 1905-1931).

¹² Landau, ‘The School of Cologne’ 434 and n.23, suggesting the Cologne Schreinsbücher as a possible model.

¹³ Litewski, *Zivilprozess* 2.354-356, also, generally Charles Donahue, Jr., ‘Proof by Witnesses In the Church Courts of Medieval England: An Imperfect Reception of the Learned Law’, *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, edd. Morris S. Arnold, Thomas A. Green, Sally Scully, and Stephen White (Chapel Hill 1981) 127-158 at 129-130.

¹⁴ Litewski, *Zivilprozess* 1.58 and n.139.

¹⁵ Ibid., 452, comparing the *De edendo*, and 431 and n.116, also 475 and n.351 on the treatise’s reference to ‘auctoritas rei iudicatae’, which ended a trial. This is shared with other ‘ordines’, for example the *De edendo* and the *Ordo Bambergensis* xx.

¹⁶ Ibid. 366 and n.165, comparing also the *Ordo Bambergensis* xvi also at 391 n.526, and 424 n.1015 on ‘privatae annotationes’, also treated by the contemporary procedural treatise, *Olim*. See also Jean-Philippe Lévy, *La*

allegiance to the school of Bulgarus through its inclusion of the maxim ‘Non ei, qui negat, sed ei, qui dicit, probatio incumbit’;¹⁷ additional connections to Bulgarus include how, in raising an exception, the defendant became a plaintiff: ‘item in exceptionibus dicendum est, reum partibus actoris fungi oportere and reus enim in exceptione actor constituitur’.¹⁸

I have collated the Munich, Berlin, and Bamberg manuscripts against Wunderlich’s transcription.¹⁹ These manuscripts are all securely placed in Germany and date from the second half of the twelfth century. *Sepenumero* is but one of several important legal texts in them. Bamberg transmits the important ‘Bamberg’ decretal collection.²⁰ The principal text in Berlin, originally from the cathedral library of Soest, is Stephen of Tournai’s *Summa*. The Munich manuscript transmits both the *Summa Monacensis*, and the *Distinctiones Monacenses*. Given my inability to examine the Arras fragment *in situ*, and the often very blurred quality of the online images from Munich,²¹ my edition is therefore incomplete and provisional.

hierarchie des preuves dans le droit savant du moyen âge (Annales de l’université de Lyon, 3e sér., Droit 5; Paris 1935) 78 and Mausen, *Veritatis adiutor* 548 and n.623.

¹⁷ On this see Litewski, *Zivilprozess* 2.362 and n.120-123, the maxim is shared with other ‘ordines’, for example the *De edendo*.

¹⁸ Litewski, *Zivilprozess* 2.363 and n.128, 362 and n.127, with reference to both Bulgarus and the *Ordo Bambergensis*.

¹⁹ I examined the Erlangen manuscript on microfilm at the Stephan Kuttner Institut in Munich during the summer of 2013. I thank Dr. Susanne Lepsius for permission to work in the collection. I thank the Preussische Staatsbibliothek for providing me with a copy of the Berlin manuscript and Dr. Jörg Sonntag of Dresden for facilitating its acquisition.

²⁰ Charles Duggan, ‘Gratian’s *Decretum* to the *Compilationes antiquae*’, *The History of the Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*. edd. Wilfried Hartmann and Kenneth Pennington (Washington 2008) 249.

²¹ The Munich manuscript is often very difficult to read online. It is available at <http://daten.ditale-sammlungen.de/> accessed on 1 February 2015. While I was able to examine a microfilm of the Arras manuscript at the Stephan Kuttner Institute, it is sadly in such bad condition as to be illegible.

As the *apparatus criticus* indicates, very few significant differences can be found among the manuscripts. The words inserted into the text that seem to have baffled its original editor and later medieval and modern commentators are unique to the Erlangen manuscript. They are Italicized in my edition. They are references to the words found at the beginning of the text. These lemmate were omitted in the other manuscripts that also generally lack the paragraph structure of Erlangen; they occasionally share readings suggesting a closer relationship. A second, contemporary hand in Berlin added a marginal notation to highlight when the burden of proof might pass to the accused. In two places, the copyist appears to have augmented the text. Perhaps these were intruded glosses. There may also be evidence of this in Bamberg, which does deviate occasionally from the other manuscripts.

While these collations do not dramatically change the text as transcribed by Wunderlich, I have been able to identify some of *Sepenumero's* material sources. (It is reasonable to suppose that many of these came from the *Corpus iuris civilis* as well, though some were certainly taken from Placentinus.) Wunderlich did not list any sources at all. One block is particularly interesting:

Sepenumero	Material Source
Volens admittitur, si, cum dicatur libertus esse alicuius, et ipse ultro se ingenuum probare desideret, audietur volens, nec ad hoc cogetur nolens.	Dig. 40.12.39. Cui necessitas probandi de ingenuitate sua non incumbit, ultro si ipse probare desideret, audiendus est.
§20. Forte aliquis in primo testamento per fideicommissum aliquid alicui reliquit. In secundo testamento vel abstulit vel minuit illud fideicommissum. Probatio mutatae voluntatis heredi incumbit, si fideicommissum in solidum petatur.	Dig. 22.3.3: Cum tacitum fideicommissum ab eo datur, qui tam in primo quam in secundo testamento pro eadem parte vel postea pro maiore heres scribitur, probatio mutatae voluntatis ei debet incumbere qui convenitur, cum secreti suscepti ratio plerumque dominis rerum persuadeat eos ita heredes scribere, quorum fidem elegerunt.

<p>§21. Similiter, si aliquis contra adversarium suum contendat, jure prohibitum esse a militia, vel advocacione, vel non jure emancipatum esse, ei incumbit, probatio, et lege vel constitutione id probari oportet.</p>	<p>Dig. 22.3.5 Ab ea parte, quae dicit adversarium suum ab aliquo iure prohibitum esse specialiter lege vel constitutione, id probari oportere. 1. Idem respondit, si quis negat emancipationem recte factam, probationem ipsum praestare debere.</p>
<p>§22. Item si filius neget, se in potestate patris esse, ei incumbet probatio, et ut pater exoneretur, et quia se liberum quodammodo contendit.</p>	<p>Dig. 22.3.8: Si filius in potestate patris esse neget, praetor cognoscit, ut prior doceat filius, quia et pro pietate quam patri debet praestare hoc statuendum est et quia se liberum esse quodammodo contendit: ideo enim et qui ad libertatem proclamat, prior docere iubetur.</p>
<p>§23. Qui dicit aliquid dolo factum, licet in exceptione, docere dolum admissum debet.</p>	<p>Dig. 22.3.18.1: Qui dolo dicit factum aliquid, licet in exceptione, docere dolum admissum debet.</p>
<p>§24. Item matrem tuam liberam factam, et te postea editum, ut ingenuus probari possis, ostendi convenit.</p>	<p>Cod.4.19.17: Matrem tuam consecutam libertatem ac te post editam, ut ingenua probari possis, ostendi convenit. quod enim fratribus tuis nulla movetur quaestio, ad defensionem tuam nihil prodesse potes.</p>
<p>§25. Item si contractus emtionis non est in scripto celebratus, sed alias per scripturam rei gestae veritas ostendenda, tria sunt probanda: emtionem factam esse, et pretium numeratum, et emtorem in vacuum possessionem esse inductum</p>	<p>Cod.4.19.12: Cum res non instrumentis gerantur, sed in haec gestae rei testimonium conferatur, factam emptionem et in vacuum possessionem inductum patrem tuum pretiumque numeratum quibus potes iure proditis probationibus docere.</p>

This sequence does not appear, as far as I know, in any other, contemporary civilian or canonistic work. *Sepenumero* also considered testimony given in cases of emancipation and sale. Neither Rogerius nor Placentinus treated these here.

The reference to Dig. 23.3.18.1 is worth noting. It seems to have been a rare text in the early ‘ordines’.²² While the ‘ordines’, whether essentially civilian or Romano-canonical, treated exceptions at length, they focused on categorizing their type and use, for example who might raise an exception and when, and on whom rested burden of proof. However, this text from the *Digest* raises ‘dolum’, deception or criminal intent, within the exception itself. If one declares, even during the raising of an exception, that a fraudulent act has occurred, he must prove it.

Dig. 23.3.18.1 does not seem to have made much of an impression on later jurists. For example, neither the *Ordinary Gloss* nor Durandus treat it in any depth. However, it resurfaced centuries later in the United States. In 1851 it was cited, from an early-modern treatise, before the United States Supreme Court in the case of *Gaines v. Relf*, a remarkably protracted dispute concerning the question of a child’s legitimacy whose father, Louisiana’s first representative to Congress, had been a bigamist.²³

²² Only Richardus Anglicus’ *Ordo*, significantly later than *Sepenumero*, cites it. Richardus refers to it concerning the prohibition of forced evidence: *Magistri Ricardi Anglici Ordo Iudiciarius: Ex codice duacensi, olim aquincinctino*, ed. Carolus Witte (Halle 1853) 25 lines 3-4

²³ The reference from the court, *Gaines v. Relf*, 53 U.S. 472, may be found at <https://law.resource.org/pub/us/case/reporter/US/53/53.US.472.html>, accessed on 31 July 2015: 2. ‘That the title of the possession of the status of legitimacy beign established, the proof of the vices with which they (sic) title may be infected, as to the interests of the child Henrietta, is entirely upon the opposers, for qui dolo dicit factum aliquid licet in exceptione docere dolum admissione debet’, 10 *Merlin, Questions de droit*, 49-50’. On this case, heard by the Supreme Court no less than seventeen times from the 1830s-1890s, Kristin A. Collins, ‘Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights’, *Cardozo Law Review* 26 (2005) 1762-1865 at 1815.

Authorship

Wunderlich praised *Sepenumero* as a work free from the ‘tasteless digressions of later times’.²⁴ He did not, however, hazard a guess as to its author, though he did comment on the treatise’s location in the Erlangen manuscript immediately following Bulgarus’ commentary on Dig. 50.17, *De regulis iuris*.²⁵ That this may not be accidental seems to be the case for, since the 1950s, scholars have attributed *Sepenumero* to Bertram of Metz. In his own commentary on the *regulie iuris*,²⁶ specifically Dig. 50.17.125, Bertram refers to a *summula* on proof, which would certainly suggest our *ordo* as the source.²⁷ However, we should note, by way of caution, that this apparent point of dependence occurs at a place where, as noted above, Rogerius was likely the source:

<i>Sepenumero</i>	Rogierius, <i>Summa Codicis</i> 4.19 ²⁸	Bertram of Metz, <i>De regulis iuris</i> , 50.17.125 ²⁹
§1 Quid probatio: quid probandum. Probatio igitur est dubiae rei ostensio, fidem faciens iudici per argumenta	Probatio est ostensio rei dubie, faciens fidem iudici per argumenta.	

²⁴ Wunderlich, ‘Beiträge’ 92: ‘Die klare und umsichtige Behandlung des Stoffes, frei von den geschmacklosen Digressionen der späteren Zeit’.

²⁵ On the *De regulis iuris*, see the edition, which includes commentary from Placentinus, by Friedrich Wilhelm Konrad Beckhaus, *Bulgari ad Digestorum titulum De diversis regulis iuris antiqui commentarius et Placentini ad eum additiones sive exceptiones* (Bonn 1856).

²⁶ On this, Landau, ‘The School of Canon Law’ 433-434.

²⁷ Fowler-Magerl, *Ordo* 220 n.1.

²⁸ Rogerius, *Summa Codicis*, ed. Giovanni B. Palmieri in *Scripta anecdota glossatorum* (3 vols. Bibliotheca iuridica medii aevi; Bologna 1914, reprinted Torino 1962) 1.65. On the complicated and disputed origins of the *Summa*, see Ennio Cortese, ‘Rogerius (Frogerius)’, DGI 2.1716-1717.

²⁹ Bertrandus Metensis, *De regulis iuris*, ed. Severino Caprioli, (Pubblicazioni della Facoltà di Giurisprudenza, Università di Perugia 27; Perugia 1981) 184.7-12.

<p>idonea.</p> <p>§13. Delictum equidem transfert probationem in reum: ut, si actor intendat, se indebitam pecuniam solvisse, reus vero etiam neget, se pecuniam solvisse, reus vero etiam neget, se pecuniam aliquam accepisse, si consequenter actor se probaverit solvisse, propter delictum infitiationis cogetur reus probare, se debitam pecuniam suscepisse. §14. Praesumptio similiter probationem in reum transfert, si vel ex re ipsa, vel ex rei facto certa extat praesumptio, intentioni actoris adminiculum praebens. Puta, aliquis habuerit duos tutores: aliquanto tempore post tutelam finitam alterum convenit in solido, quia alter tunc solvendo non erat. Tenere videtur intentio actoris, nisi ille, qui convenitur, probet, contutorem suum tempore finitae tutelae fuisse solvendo.</p>	<p>Delictum transfert probationem, veluti si quis dicat indebitum solvisse, hoc actor cogitur probare, si reus indebitum suscepisse negat; sed si reus negat se pecuniam suscepisse, actor autem probaverit se solvisse, propter delictum infitiationis cogitur reus probare se debitum suscepisse. Presumptio transfert probationem, si ex ea re vel facto presumptio inducatur ex qua intentio actoris tenere videatur; unde dicitur: cum quis vult tutorem unum in solidum convenire, quia alter qui amministravit nunc est non solvendo, intentio actoris tenere videtur, nisi qui convenitur probet eum qui amministravit tempore depositi officii fuisse solvendo.</p>	<p>Presumptio tamen quandoque reos onerat; et deferitur eius iuramentum a iudice; quandoque ab actore iudice approbante; quandoque etiam ex delicto infitiationis transfertur onus probationis in reum; et in aliis casibus, sicut in summula de probationibus inuenitur.</p>
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The delict of *infittiationis*, which penalized the accused who, despite knowing the plaintiff's charge was true, nevertheless

denied it,³⁰ was also treated by other procedural works, for example the *Olim edebatur actio* (§ 611).³¹ Thus, one cannot be absolutely certain that Bertram's reference to a *summula* meant *Sepenumero*. The style of *Sepenumero* also does not remind one of Bertram's commentary, which is filled with examples illustrating the *Digest* by references to classical literature and daily life.³² While this is not decisive evidence against Bertram's authorship of *Sepenumero*, it does raise some doubt.

³⁰ Adolf Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia 1953) 501.

³¹ Printed in *Scripta anecdota glossatorum* 2.245; On this 'ordo' that dates to the 1170s and produced either in the Anglo-Norman realm or Scotland, see most recently André Gouron, 'Qui a écrit l'ordo "Olim edebatur",' *Initium* 8 (2003) 65-84 at 79-80 see Litewski, *Zivilprozeß* 2.573 and n.58. Compare also *Ordo Bambergensis*, cap. viii, ed. Schulte 302-303.

³² Bertram, *De regulis iuris* ad Dig. 50.17.9 (Semper in obscuris quod minimum est sequimur) 17.20-24: 'In causis autem semper pro eo qui loquitur, siue actor sit siue reus, interpretari debemus ambigua, scilicet ut semper secundum uoluntatem dicentis interpretemur, idest secundum quod ipse intellexit, ut si dixerit "Troianos uicisse Grecos" uel aliquid huiusmodi'. This passage is likely derived from Boethius, *Anicii Manlii Severini Boethii de diuisione liber** ed. and trans. John Magee (Leiden 1998) accessed online at http://individual.utoronto.ca/pking/resources/boethius/De_diuisione.txt on 6 February 2015: 'Restat igitur ut de uocis in significantias diuisione tractemus. Fit autem uocis diuisio tribus modis. Diuiditur enim in significationes ut aequiuoca uel ambigua, plures enim res significat unum nomen, ut 'canis', plures rursus una oratio, ut cum dico Graecos uicisse Troianos'. Cf. Dig. 50.17.154: 'Cum par delictum est duorum, semper oneratur petitor et melior habetur possessoris causa. sicut fit, cum de dolo excipitur petitoris: neque enim datur talis replicatio petitori "aut si rei quoque in ea re dolo actum sit". illi debet permitti poenam petere, qui in ipsam non incidit'. Commenting on the rule, Bulgarus notes 'Sicut et de iliis dicitur, quorum uterque in uia publica habet aedificia', In his commentary on *uia publica* (204.32-35) Bertram further explains: 'Item si in *publica uia* fecimus domos; et tu conquereris quod stillicidium earum cadat super curiam tuam, non audiet te iudex, quia neutri nostrum licuit ibi domum facere, nisi forte xxx. Annis possiderim in pace', here a reference as well to prescription.

Conclusion

As noted above, the few early Romano-canonical procedural works that are edited almost always are found in old editions. However excellent their editors, these editions cannot reflect subsequent manuscript discoveries or new scholarly interpretations of their subject. Additionally, it is likely, as is the case with *Sepnumero*, that modern editors may be able to shed light on their sources. It is hoped that this preliminary re-examination of *Sepnumero* will not only have brought this treatise to the attention of specialists in the *ius commune* but also inspire similar studies. In doing so, we shall continue to labor towards fulfilling the goal set out by Professor Kuttner so many years ago, the creation of a juristic philology essential for understanding the development of medieval civil and canon law.³³

***Provisional Edition of Sepnumero: Collated against the
Wunderlich Transcription of Erlangen, UB 375 (=Er), fol.
115r³⁴***

Ba=Bamberg, SB Can. 17, fol. 183rb-183vb
Be= Berlin, SB lat. Qu. 193, fol. 117ra-117va³⁵
Ma=Munich, BSB, Clm 16084, fol. 72va-73ra.³⁶

Saepe vero³⁷ in judiciis examinandis et terminandis emergit etiam apud³⁸ peritores dubietas, cui parti onus³⁹ probationis

³³ Stephan Kuttner, 'The Scientific Investigation of Mediaeval Canon Law: The Need and the Opportunity', *Speculum* 24 (1949) 493-501.

³⁴ Wunderlich, 'Beiträge' 92-98; also mentioned by Agathon Wunderlich in his *Anecdota quae processum civilem spectant: Bulgarus, Damasus, Bonaguida* (Göttingen 1841) 129.

³⁵ Wunderlich, 'Beiträge' 92 notes that he added the numbers to the paragraph marks in the Erlangen manuscripts.

³⁶ <http://daten.digital-sammlungen.de/~db/0002/bsb00026738/images/>

accessed on 20 August 2015.

³⁷ numero Ba

³⁸ apud *om.* Ba

incumbat. Unde nos, omnem dubietatem et⁴⁰ ambiguitatem abscindere volentes, distincte dicere proponimus, quid sit probatio, et quid⁴¹ probandum, et qualiter, et cui, et cui necessitas probandi⁴² incumbat, et ad ultimum casus varios⁴³ et exempla supponere ad⁴⁴ certiore[m] totius rei manifestationem. § <1>⁴⁵ <s.v.> *Quid probatio, quid probandum*.⁴⁶ Probatio igitur est dubiae rei ostensio, fidem faciens iudici per argumenta idonea.⁴⁷ Id⁴⁸ autem probandum est, quod habet in se controversiam civilem vel criminalem.⁴⁹ Controversiam dicimus ad differentiam rei certae et⁵⁰ utriusque partis confessione, scilicet actoris et rei. Civilem etiam controversiam dicimus ad differentiam illarum quaestionum, quae publicam desiderant disquisitionem: utputa,⁵¹ de magnitudine solis, de viribus⁵² herbarum.⁵³ Civilem⁵⁴ nihilominus diximus, ne quis⁵⁵ contra legem seu constitutionum⁵⁶

³⁹ parti onus] peritiores Ba

⁴⁰ dubietatem et *om.* Ma

⁴¹ quid]sit *add.* Ba

⁴² improbandi Ba

⁴³ vario Ba

⁴⁴ *Illeg.* Be

⁴⁵ § *om.* Ba

⁴⁶ Quid—probandum *om.* BaBeMa

⁴⁷ Compare Rogerius, *Summa Codicis*, 65: ‘Probatio est ostensio rei dubie, faciens fidem iudici per argumenta’. On this, Susanne Lepsius, *Von Zweifeln zur Überzeugung: der Zeugenbeweis im gelehrten Recht von der Abhandlung des Bartolus von Sassoferrato* (Frankfurt am Main 2003) 181 n.247.

⁴⁸ § *praem.* BeMa

⁴⁹ criminialem Ba^{ac}

⁵⁰ ex BaMa

⁵¹ puta Ma

⁵² juribus Er : viribus BaBeMa

⁵³ Compare Rogerius, *Summa Codicis* 4.20.7 ed. Giovanni Battista Palmieri, *Scripta anecdota glossatorum* (3 vols. Bologna 1892-1913) 1.65, Placentinus, *Summa Codicis* (Mainz 1536; reprint Torino 1962) 3.1 See also Gerhard Otte, *Dialektik und Jurisprudenz. Untersuchungen zur Methode der Glossatoren* (Frankfurt am Main 1971) 157 and n.5,7.

⁵⁴ *Illeg.* Be

⁵⁵ quid Ba

⁵⁶ quis—constitutionum] qui contra sue legem constitutionem BaMa

in quaestionem⁵⁷ deducatur: verbi gratia, ut si obstet auctoritas rei iudicatae, vel, si lis per transactionem fuit⁵⁸ sopita, vel consensu partium, vel auctoritate iudicis per religionem iurisjurandi decisa. §<2>⁵⁹ Sed cum civilis est controversia, interdum est quaestio facti, interdum quaestio nominis, interdum quaestio juris, interdum quaestio actionis, interdum quaestio aequi⁶⁰ et boni.⁶¹ §<3>⁶² Quaestio facti est, ut, si dubietur, an occiderit vel⁶³ non, an⁶⁴ rapuerit, an liber, an servus an ingenuus, an cognatus,⁶⁵ et similia.⁶⁶ §<4>⁶⁷ Saepius vero accidit, ut, cum constiterit quem quid⁶⁸ fecisse, dubietur, an rapina an furtum, an sacrilegium, an alio nomine debeat nuncupari: et tunc⁶⁹ merito quaestio nominis vel de nomine appellatur. §<5>⁷⁰ Evenit etiam non nunquam, ut quis confiteatur se fecisse, et non ambigatur de nomine, sed an juste vel⁷¹ iniuste factum sit, disceptetur, et tunc quaestio juris vel quaestio generis appellatur. §<6>⁷² Contingit⁷³ etiam saepius, quod, cum de facto constet, et de nomine facti, et de justitia vel injustitia, hoc dubietur, an secundum strictum jus⁷⁴ poena sit irroganda an ex aequo et bono, sit temperanda et mitiganda: et sic in hoc et similibus quaestio aequi et boni

⁵⁷ *Illeg.* B

⁵⁸ fuerit Be

⁵⁹ § *om.* Be

⁶⁰ *Illeg.* Be

⁶¹ Compare *Brachylogus iuris civilis*, ed. E. Bröcking (Berlin 1829) 152

⁶² § *om.* Ba

⁶³ an Ba^{ac}

⁶⁴ an *om.* Be

⁶⁵ *Illeg.* Be

⁶⁶ et similia *om.* Ba^{ac}

⁶⁷ § *om.* Be

⁶⁸ Wunderlich: *Die Handschrift hat* 'qui', quem quid] aliquem aliud Be, quem

quid Ma

⁶⁹ tunc *om.* Ba

⁷⁰ § *om.* Be

⁷¹ an Ba^{ac}

⁷² § *om.* Be

⁷³ *Illeg.* Be

⁷⁴ ius strictum *tr.* BaMa

intervenire dicitur. §<6>⁷⁵ Est etiam actionis quaestio⁷⁶ quandoque, ut, cum dubitatur, quis, cui, et⁷⁷ apud quem, super⁷⁸ tali facto respondere debeat.⁷⁹ §<7> <s.v> *Qualiter*:⁸⁰ Si⁸¹ igitur facti⁸² quaestio est, per testes, per instrumenta,⁸³ et⁸⁴ per alia indicia⁸⁵ lege non reprobata fides facienda est.⁸⁶ Reprobata⁸⁷ indicia⁸⁸ appellamus domestica testimonia,⁸⁹ privatas annotationes et similia. §<8>⁹⁰ Alias autem,⁹¹ sive fuerit⁹² quaestio nominis sive juris, sive actionis, sive aequi et boni, legibus, constitutionibus,⁹³ consuetudine, legi non adversa, et certis⁹⁴ allegationum rationibus expedienda est. §<9> <s.v.> *Cui*:⁹⁵ Ecce sic dictum est,⁹⁶ quid probatio est,⁹⁷ quid probandum et qualiter⁹⁸ iudici⁹⁹ autem in examinatione causae res probanda est, et fides ei¹⁰⁰ facienda, sive adversarius velit sive nolit, sive

⁷⁵ 6 sic editionis Wunderlich

⁷⁶ questio actionis tr. Ba

⁷⁷ om. Be

⁷⁸ de Ma

⁷⁹ debent Ba

⁸⁰ om. BaBeMa

⁸¹ sic Er

⁸² facto Ba

⁸³ per instrumenta per testes *trans.* Ma, instrumentum Ba

⁸⁴ om. Be

⁸⁵ iudicta Ba

⁸⁶ est facienda tr. Ba

⁸⁷ § Reprobata Ma

⁸⁸ iudicata Ba

⁸⁹ *Illeg.* Be

⁹⁰ § om. Be

⁹¹ autem om. Ba

⁹² *Illeg.* Be

⁹³ constitutionibus] et *add.* Ba

⁹⁴ ceteris Ba

⁹⁵ § Cui om. BeMa

⁹⁶ est om. Be Ma

⁹⁷ est om. Ba, Ba

⁹⁸ Wunderlich: *Die Worte q.p.e.q. nebst dem § Zeichen stehen nach causae.*

⁹⁹ § *praem.* BeMa

¹⁰⁰ ei fides tr. Be

praesens sit sive absens.¹⁰¹ §<9>¹⁰² Jam enim¹⁰³ adversario absente in casu testes alterius¹⁰⁴ recipi possunt. §<10>¹⁰⁵ Cui autem parti onus¹⁰⁶ probationis incumbat, modo inspiciamus. §<11> <s.v.>Cui parti onus probationis incumbat:¹⁰⁷ Regulariter¹⁰⁸ proditum est, quod actori¹⁰⁹ probatio incumbat.¹¹⁰ Actor quidem dicitur, qui principaliter rem persequitur. Unde in lege: Actore¹¹¹ non probante, qui convenitur,¹¹² et si nihil praestiterit, obtinebit.¹¹³ Et alibi: Per rerum naturam negantis¹¹⁴ factum nulla est probatio.¹¹⁵ Ita equidem regulare¹¹⁶ est, quod agens probare debet:¹¹⁷ sed non est generaliter verum. §<12>¹¹⁸ Sed frequens est, ut in ipsum¹¹⁹ reum¹²⁰ transferatur onus¹²¹ probationis: vel delicto ex parte rei¹²² interveniente,¹²³ vel praemptione¹²⁴ contra eum faciente,¹²⁵ vel ratione agentis personae, cui legum favor arrideat. §<13>¹²⁶ Delictum equidem

¹⁰¹ Leipsius, *Zweifel* 181 n. 247.

¹⁰² There is no explanation from Wunderlich why this is repeated. § *om.* BaBe

¹⁰³ iam enim] nam eciam Ba, Be, Ma

¹⁰⁴ casu—alterius] causa alterius testes Ba

¹⁰⁵ § *om.* BeBa

¹⁰⁶ honus Ba

¹⁰⁷ § Cui—incumbat *om.* BeBa, Incumbat] modo inspiciamus *add.* BaMa

¹⁰⁸ § *praem.* Ma

¹⁰⁹ auctori Ba

¹¹⁰ See Dig. 22.3.2.

¹¹¹ Auctore Ba

¹¹² non—conuenitur *illeg.* Be

¹¹³ Cod. 2.1.4; See also X 2.22.6 and 2.24.36

¹¹⁴ alibi—negantis *illeg.* Be;

¹¹⁵ Cod. 4.19.1

¹¹⁶ tractare(?) Ma

¹¹⁷ debeat BaMa

¹¹⁸ § *om.* BeMa, Nota quando in reum transferatur probatio *in marg.* Be

¹¹⁹ ipsum *om.* Ma

¹²⁰ rerum Ba

¹²¹ honus Ba

¹²² Wunderlich: *die Handschrift setzt vel hinzu.*

¹²³ interueniente] ueniente uel facto rei Ba

¹²⁴ presumptio Be, presumptione BaMa

¹²⁵ eum faciente] faciente ipsum Ma

¹²⁶ § *om.* Be

transfert probationem in reum: ut, si actor intendat, se indebitam pecuniam solvisse, reus vero etiam neget, se pecuniam solvisse, reus vero etiam neget, se¹²⁷ pecuniam¹²⁸ aliquam¹²⁹ accepisse, si consequenter actor¹³⁰ se probaverit¹³¹ solvisse, propter delictum infitiationis cogetur reus probare, se debitam pecuniam suscepisse. §<14>¹³² Praesumptio similiter probationem in reum transfert, si vel ex re ipsa,¹³³ vel ex rei facto¹³⁴ certa extat¹³⁵ praesumptio, intentioni actoris¹³⁶ adminiculum praebens.¹³⁷ Puta,¹³⁸ aliquis habuerit duos tutores: aliquanto tempore post tutelam finitam alterum convenit in solidum,¹³⁹ quia alter tunc solvendo non erat. Tenere videtur intentio actoris,¹⁴⁰ nisi ille, qui convenitur, probet, contutorem suum tempore finitae tutelae fuisse solvendo.¹⁴¹ Ex facto ipsius rei inducitur praesumptio,¹⁴² ut si in propria cautione confessus fuerit, se ex certa causa debere: tenet actoris intentio, nisi evidentissimis rationibus probet reus, se indebitum promisisse.¹⁴³ §<15>¹⁴⁴ Ratio personae similiter transfert onus¹⁴⁵ probationis in reum. Veluti, si pupillus, vel alias minor, vel miles, vel agriculator, simplicitate gaudens, totam aliquam summam se indebitam solvisse dicat, cogetur reus, vel

¹²⁷ pecuniam—se *om.* Ma

¹²⁸ soluisse—pecuniam *om.* Ba

¹²⁹ reus—pecuniam *om.* Be *homoitel.*

¹³⁰ auctor Ba

¹³¹ probaverit se *tr.* BaMa

¹³² § *om.* Be

¹³³ ipsa re *tr.* Be, re ipsa] ipso Ma

¹³⁴ facto rei *tr.* Ma

¹³⁵ existat Be

¹³⁶ auctoris Ba

¹³⁷ presens Ba

¹³⁸ ut puta Ba

¹³⁹ solido Er : solidum BaBeMa

¹⁴⁰ auctoris Ba

¹⁴¹ Ex] § *praem.* Ba

¹⁴² inducitur praesumptio] transfertur probatio in reum Ba

¹⁴³ Cf. Rogerius, *Summa*, 65:

¹⁴⁴ § *om.* Be

¹⁴⁵ honus Ba

reddere, vel alii¹⁴⁶ probare se debitum suscepisse.¹⁴⁷ §<16>¹⁴⁸
 Quod ergo¹⁴⁹ dictum est, actori¹⁵⁰ probationem incumbere sic
 exaudiendum est.¹⁵¹ §<17>¹⁵² Usque adeo actori¹⁵³ probatio
 incumbit, donec ejus intentio vel¹⁵⁴ teneat, vel tenere videatur.
 Tenet autem intentio, si convictus vel confessus fuerit
 adversarius. Tenere videtur, si reus dicit se¹⁵⁵ suscepisse, et
 asserit, se solvisse. Et cum actoris¹⁵⁶ intentio consistere et tenere
 videtur, si reus exceptionem objiciat,¹⁵⁷ tenetur suam
 exceptionem¹⁵⁸ probare, quemadmodum¹⁵⁹ actor¹⁶⁰ suam
 intentionem. Reus enim in exceptione actor¹⁶¹ constituitur.
 Omnino¹⁶² enim haec ratio vicissim est servanda,¹⁶³ si mecum
 iudicio contendas: cum id,¹⁶⁴ quod pro me inducitur, constare
 videtur, tunc, quicquid ad hoc¹⁶⁵ repugnando alleges,¹⁶⁶ id
 probare necesse habes;¹⁶⁷ quoniam¹⁶⁸ aequum est in¹⁶⁹ probando
 me gravari, quo probato videar¹⁷⁰ sublevari. Unde provide in lege

¹⁴⁶ Wunderlich: *die handschrift liest* aliq; liquide BaBeMa

¹⁴⁷ See Dig. 22.3.5.1,2.

¹⁴⁸ § *om.* Ba, Be

¹⁴⁹ Igitur Ba

¹⁵⁰ Auctori Ba

¹⁵¹ Est exaudiendum *tr.* Ma

¹⁵² § *om.* Be

¹⁵³ Auctori Ba

¹⁵⁴ Intentio uel *om.* Ba

¹⁵⁵ Se dicit *tr.* Ba

¹⁵⁶ Actoris] ex auctoris Ba

¹⁵⁷ Excipiat Ba

¹⁵⁸ Suam exceptionem] eam Be, Ma

¹⁵⁹ Odii *add.* Ba

¹⁶⁰ Auctor Ba

¹⁶¹ Auctor Ba

¹⁶² Omnino] uel cum Ma

¹⁶³ obseruanda Ma

¹⁶⁴ id *om.* Ma

¹⁶⁵ *Illeg.* Ma

¹⁶⁶ allegas BaBeMa,

¹⁶⁷ habeas BeBa

¹⁶⁸ quoniam] scilicet *praem.* Ba

¹⁶⁹ eo *add.* BaBeMa

¹⁷⁰ videor Be

cautum est: Non ei, qui negat, sed ei, qui dicit, probatio incumbit. Dictum enim hoc loco accipitur, quod adminiculum causae esse possit,¹⁷¹ hoc est, quod vel petitori vel defensori valeat opitulari, Vel: ei, quid dicit, incumbit probatis,¹⁷² id est, ei, qui factum asseverat,¹⁷³ quo sua fundetur intentio, vel in pulsando alterum,¹⁷⁴ vel se defendendo. Ei vero, qui negat, subaudi factum, simpliciter nunquam incumbit¹⁷⁵ probatio. Sed secus est, si jus negat:¹⁷⁶ ut si quis dicat aliquem emancipatum, et reus emancipatum confiteatur, sed excipiendo non jure emancipatum¹⁷⁷ asseveret, tenetur probare, non jure emanipatum esse. §<18>¹⁷⁸ Ad hanc¹⁷⁹ quidem probationis necessitate¹⁸⁰ interdum cogitur quis, interdum volens admittitur. Cogitur quia¹⁸¹ eatenus, si obtinere velit, ut¹⁸² probet,¹⁸³ quod dicit. Volens¹⁸⁴ admittitur, si, cum dicatur libertus esse alicuius, et ipse ultro se ingenuum¹⁸⁵ probare desideret, audietur volens, nec ad hoc¹⁸⁶ cogeretur nolens.¹⁸⁷ Et haec quidem in civili causa consideranda sunt. § <19> Alias autem in criminali causa semper accusatori onus probationis incumbet.¹⁸⁸ Modo residuum est, ut varios casus et exempla ad totius rei evidentiam subjungamus.¹⁸⁹ §<20> Forte aliquis in primo testamento per fideicommissum

¹⁷¹ potest Be

¹⁷² probatio BeMa

¹⁷³ asseverate] aliquod adversa te *add.* Ma, aliquod *praem.* Ba

¹⁷⁴ alium BaBeMa

¹⁷⁵ directe *add. in marg. with tiemark* Be

¹⁷⁶ dicat Be^{ac}

¹⁷⁷ esse *add.* BaMa

¹⁷⁸ § *om.* Ma

¹⁷⁹ huc Ba

¹⁸⁰ necessitatem Ba

¹⁸¹ Wunderlich: *die handschrift hat quod*, quid Ma

¹⁸² ut] quod Ma

¹⁸³ probet, *obscurely corrected* Ma

¹⁸⁴ autem *add.* BaMa

¹⁸⁵ esse *add.* BaMa

¹⁸⁶ hec Ma

¹⁸⁷ Dig. 40.12.39.

¹⁸⁸ onus—incumbet] honus probationis^{pc} incumbit Ba; cf. Dig. 22.3.25.3

¹⁸⁹ subiugamus Ba^{pc}

aliquid¹⁹⁰ alicui reliquit. In secundo testamento vel abstulit vel minuit illud fideicommissum. Probatio mutatae¹⁹¹ voluntatis heredi incumbit, si fideicommissum in solidum¹⁹² petatur.¹⁹³ §<21> Similiter, si aliquis¹⁹⁴ contra¹⁹⁵ adversarium suum contendat, jure prohibitum esse a militia, vel¹⁹⁶ advocacione, vel non jure emancipatum esse, ei incumbit, probatio, et lege vel constitutione id probari oportet.¹⁹⁷ §<22> Item si filius neget, se in potestate patris esse, ei incumbet probatio, et ut¹⁹⁸ pater exoneretur,¹⁹⁹ et quia se liberum quodammodo contendit.²⁰⁰ §<23> Qui dicit aliquid dolo factum, licet in exceptione, docere dolum admissum debet.²⁰¹ §<24> Item matrem tuam²⁰² liberam factam, et te postea editum, ut ingenuus probari possis, ostendi convenit.²⁰³ §<25>²⁰⁴ Item si contractus emptionis²⁰⁵ non est in scripto celebratus, sed alias per scripturam rei gestae veritas²⁰⁶ ostendenda, tria sunt probanda: emtionem²⁰⁷ factam esse, et pretium numeratum, et emptorem in vacuam possessionem esse

¹⁹⁰ fideicommissam aliud Ba^{ac}

¹⁹¹ mutare Ba

¹⁹² solidis Ba

¹⁹³ Cf. Dig. 22.3.3: Papinianus 9 resp. Cum tacitum fideicommissum ab eo datur, qui tam in primo quam in secundo testamento pro eadem parte vel postea pro maiore heres scribitur, probatio mutatae voluntatis ei debet incumbere qui convenitur, cum secreti suscepti ratio plerumque dominis rerum persuadeat eos ita heredes scribere, quorum fidem elegerunt.

¹⁹⁴ quis Ma

¹⁹⁵ contra *om.* Ba

¹⁹⁶ vel] ab *add.* Ba

¹⁹⁷ Dig. 22.3.5.

¹⁹⁸ et ut] cum et Ba

¹⁹⁹ exhoneretur Ba

²⁰⁰ Dig. 22.3.8.

²⁰¹ Dig. 22.3.18.1.

²⁰² suam Ba

²⁰³ Cod.4.19.17.

²⁰⁴ § *om.* Ma

²⁰⁵ emptionis Ba

²⁰⁶ veritas] est *add.* Ba

²⁰⁷ emptionem Ba

inductum.²⁰⁸ §<26> Item, si possessionem aliquam ad te pertinere dicis,²⁰⁹ exigendus es probationem suscipere,²¹⁰ quia probatio et necessitas²¹¹ probandi possessionem ad se pertinere possidenti²¹² non incumbit, cum te in probatione cessante possessio apud eum remaneat.²¹³ §<27> Item in exceptionibus dicendum est, reum partibus actoris²¹⁴ fungi oportere, ipsumque²¹⁵ exceptionem velut intentionem implere utputa, si pacti conventi exceptione utatur, docere debet, pactum conventum intercessisse.²¹⁶ §<28> Item, cum quis se promisisset iudicio sisti,²¹⁷ et rei publicae casua abfuisse se dicat, et ob id non obstetisse,²¹⁸ vel dolo malo adversarii factum, quominus sisteretur, vel valetudinem sibi impedimento fuisse, vel tempestatem, probare eum id²¹⁹ oportet.²²⁰ §<29> Item sciant cuncti acusatores, eam se rem deferre debere in publicam

²⁰⁸ inductam Ba. See Cod.4.19.12: Imperatores Diocletianus, Maximianus Cum res non instrumentis gerantur, sed in haec gestae rei testimonium conferatur, factam emptionem et in vacuum possessionem inductum patrem tuum pretiumque numeratum quibus potes iure proditis probationibus docere.

²⁰⁹ dicis pertinere *tr.* BaMa

²¹⁰ Wunderlich: *fehlt in der handschrift om.* BaMa

²¹¹ probatio—necessitas] possessio necessitas Ba

²¹² Wunderlich: *fehlt in der handschrift om.* BaMa

²¹³ Cf. Cod. 4.19.2: Imperator Antoninus Possessiones, quas ad te pertinere dicis, more iudiciorum persequere. nec enim possessori incumbit necessitas probandi eas ad se pertinere, cum te in probatione cessante dominium apud eum remaneat.

²¹⁴ auctoris Ba

²¹⁵ ipsum quoque Ba

²¹⁶ Cf. Dig. 22.3.19 *Ulpianus libro septimo disputationum* pr. In exceptionibus dicendum est reum partibus actoris fungi oportere ipsumque exceptionem velut intentionem implere: ut puta si pacti conventi exceptione utatur, docere debet pactum conventum factum esse.

²¹⁷ *Se praem.* Ba, Ma

²¹⁸ Stetisse Ba

²¹⁹ id eum *tr.* Ba

²²⁰ oportet id *tr.* Ma. See Dig. 22.3.19.1 1: Cum quis promisisset iudicio se sisti et rei publicae causa afuisse dicat et ob id non stetisse, vel dolo malo adversarii factum quo minus sisteretur, vel valetudinem sibi impedimento fuisse vel tempestatem, probare eum id oportet.

notionem,²²¹ quae munitata sit²²² idoneis testibus, vel instructa apertissimis documentis, vel indiciis ad probationem indubitatis et luce clarioribus expedita.²²³ Et haec sufficiant.

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²²¹ publicam notionem] publicum Ba

²²² munitata sit] munita Ba

²²³ Cod.4.19.25.

La decretale *Maiores* di Innocenzo III e la competenza del Romano Pontefice *ratione fidei*

Jürgen Jamin

Introduzione

La preminenza della Romana ecclesia presieduta dal suo vescovo, non intesa come preminenza d'onore ma come preminenza di giurisdizione, si attua nella competenza circa le cause di maggior importanza dette semplicemente 'causae maiores'. Se da una parte i romani pontefici, a partire del IV secolo, ribadiscono detta competenza, dall'altra essi non individuano con chiarezza quali siano queste cause;¹ è grazie al contributo di decretisti e decretalisti che vengono pertanto redatti gli elenchi delle cause riservate al giudizio del Romano Pontefice in base alle decisioni concrete prese dai vescovi di Roma. Tutti questi elenchi contengono un riferimento particolare alla competenza del titolare dell'ufficio primaziale di prendere una decisione finale 'ratione fidei'.

¹ Vedasi 'pars pro toto' il canone *Rogamus* del *Decretum Gratiani* attribuito a Papa Marcello I (307-309) nella Collezione pseudoisidoriana, C.24 q.1 c.15: 'Rogamus uos, fratres dilectissimi, ut non aliud doceatis neque sentiatis, quam quoad a B. Petro apostolo et reliquis apostolis et Patribus accepistis. Ipse enim est caput totius ecclesiae, cui ait Dominus: "Tu es Petrus, et super hanc petram edificabo ecclesiam meam". Eius enim sedes primitus fuit apud uos, que postea iubente Domino translata est Romam, cui amminiculante gratia diuina hodierna praesidemus die. Si uero uestra Antiocena, que olim prima erat, Romanae cessit sedi, nulla est, que eius non sit subiecta ditioni. Nec ab eius dispositione uos deviare oportet, ad quam cuncta maiora ecclesiastica negotia diuina disponente gratia iussa sunt referri, ut ab ea regulariter disponantur, a qua sumpsere principia'. Graziano non ha inserito questo testo prima di 1140, cioè soltanto nell'ultima edizione della sua opera; vedasi Anders Winroth, *The Making of Gratian's Decretum* (Cambridge 2000) 220.

Enrico da Susa chiamato anche Hostiensis, essendo Cardinale vescovo di Ostia,² sulla scia di altri canonisti prima di lui, annovera tra gli elenchi da lui stesi detta autorità pontificia con le parole ‘articulos solvit’³ oppure semplicemente

² La vita e l’opera di Enrico da Susa sono ampiamente esaminate. Tra i tanti studi si consulti il contributo di K. Pennington, ‘Henricus de Segusio (Hostiensis)’, *Popes, Canonists and Texts 1150-1550*, ed. K. Pennington, Aldershot 1993, Titolo XVI, 1-12; anche idem ‘Enrico da Susa, cardinale Ostiense’, DGI 1.795-798.

³ Hostiensis, *Summa Aurea* (Venetiis 1574) X 1.30, *De officio legati*, n. 3 § *Quid pertinent ad officium* col. 319-320: ‘utrum tamen his quae sedis Apostolicae sibi specialiter reseruavit, propria temeritate se intromittere non debet sine speciali mandato. Que autem sint illa, consueuerunt his versibus comprehendi:

Restituit papa, solus deponit, et ipse,

Diuidit ac unit, eximit, atque probat.

Articulos soluit synodum facit generalem,

Transfert, et mutat, appellat nullus ab ipso.

Ex quibus 11 casus possunt elici. Raymundus vero in summa de casibus 24 notat: tu dic quod 60 sunt, et plures, quos his versibus comprehendes.

Si sit catholicus Papa, non iudicat ullus,

Erigit, et subiicit cathedras, diuidit unit.

Mutat vota, crucis, restaurat, et eximit ad se,

Maiores causae referuntur, legitimatque.

Promouet, appellare vetat, prohibet profiteri,

Deponit, transfert, suppletque renunciat illi.

Praesul et exemptus, simon iurans anathema,

Vel proprium vel legati, vel ex utriusque.

Nequaquam participans, et si quem sponte salutat.

Quem canon damnat: sibi soli quando reseruatur,

Soluitur a Papa, necnon quem regula damnat;

Addas suspensum casum cum fertur ad ipsum.

Rescriptum fidei, dubium quod confer bona plura.

Irritat infectum, legem condit generalem.

Approbat imperium, firmat, deponit et ungi.

Concilium generale facit, sanctit quoque sanctos.

Ens non esse facit, non ens fore pallia semper

Portat, concedit, legi nec subditus ulli.

Appellatur ad hunc medio sine, iudiciumque

Est pro lege suum, monachum reuocat renuentem.

Maius adulterio soluit, generaliter arctat,

Et laxat, quicquid sponsis nocet, ordinat extra

‘quaestio fidei’⁴. In seguito Enrico indica più precisamente come intende questa competenza del Pontefice: ‘Rescriptum fidei, dubium quod confert bona plura’.⁵

Con la scelta di questi termini, l’eminente decretalista duecentesco fa già notare le parole chiave che stanno al centro della questione:

1. La materia della ‘causa maior’ è un ‘articulus’, cioè una parte integrale della fede già proposta e verbalizzata o ‘articolata’ come tale.⁶

2. Al Pontefice compete appunto risolvere o sciogliere un ‘dubium’. Quest’ultimo può avere anche un valore positivo, portando con sé dei vantaggi da non sottovalutare (‘quod confert bona plura’) proprio perché dà all’autorità suprema l’occasione di chiarire in modo inequivocabile, qualora fosse messa in

Tempora dando sacrum, promotum promuet idem.

Ordinat, atque die consecratur, et ipse

Viventisque, locum concedit, iureque privat.

Insignit laico, sacra donat chrisma ministro.

Summa sede sedet, plenusque vicarius extat

Si sit catholicus Papa, non iudicat ullus’.

⁴Hostiensis, *Lectura siue apparatus domini Hostiensis super quinque libris Decretalium* (2 vol. Strasburgo 1512) to X 1.30.4, s.v. *Reseruata*, fol. 163rb.

⁵ Ibid. to X 5.31.8, s.v. *Subijcere*, fol. 312ra. L’edizione della *Summa* consultata in questa sede presenta la stessa frase, però, al posto del ‘confert’ usa ‘confer’ (*Summa, De officio legati*, n. 3, s.v. *Officio legati quid pertineat*, col. 319). Tuttavia, l’uso del ‘confer’ sia nel testo conservato a Monaco, SB lat. 14006, fol. 35rb sia nella la prima edizione (non foliata) stampata della *Summa* in Augusta (1477) permette di dedurre che si tratta della versione corretta.

⁶ Riguardo al termine ‘articulus fidei’ si consulti gli omonimi studi di Ludwig Hödl, ‘*Articulus fidei: Eine begriffsgeschichtliche Arbeit*’, *Einsicht und Glaube: Festschrift für Gottlieb Söhngen*, ed. Joseph Ratzinger-Heinrich Fries (Freiburg im Breigau 1962) 358-376 e di H.J. Becker, ‘*Articulus fidei* (1150-1230). von der Einführung des Wortes bis zu den drei Definitionen Philipps des Kanzlers’, *Gregorianum* 54 (1973) 517-569. esaminando il significato del termine alla luce del contesto teologico medievale, gli autori offrono un contributo fondamentale per la comprensione esatta di detto concetto, anche per una prospettiva meramente giuridica che sta al centro di questa ricerca.

questione una verità di fede, certi aspetti del ‘depositum fidei’ tramite un responso (‘rescriptum’).

Tra tutte le decretali raccolte nel *Liber extra* ve n’è una che si riferisce espressamente al discernimento autoritativo ‘super dubio fidei’ chiaramente riferita alla Sede di Pietro: la decretale *Maiores* di Innocenzo III.⁷

La decretale Maiores di Innocenzo III

All’inizio dell’autunno del 1201, Innocenzo III inviò una lettera all’arcivescovo Imberto di Arles.⁸ Il presule della metropoli provenzale, di fronte ai noti movimenti eterodossi del Duecento come i catari (nella Francia meridionale) e gli albighesi, si rivolse al pontefice, richiedendo innanzitutto una risposta pontificia riguardo a diverse questioni annesse al battesimo dei fanciulli negato dagli eretici. Il successore di Pietro accolse la supplica dell’arcivescovo in forma di un ‘rescriptum fidei’, dando cioè un responso dettagliato alle domande sottopostegli.⁹

Il fatto stesso che vi siano una richiesta da parte del metropolita francese e una risposta da parte del Pontefice conferma una prassi alla quale peraltro Innocenzo III si riferisce sin dall’inizio della sua lettera.¹⁰

Maiores ecclesiae causas, praesertim articulos fidei contingentes, ad Petri sedem referendas intelliget qui eum quaerenti Domino, quem

⁷ X 3.42.3 [= 3 Comp. 3.34.1].

⁸ Secondo il registro di Potth., la lettera è stata redatta nel settembre-ottobre del 1201 a Anagni senza però indicare una data precisa. Potth. 1479. I registri che riguardano questo arco di tempo e nei quali la lettera sarebbe stata inserita sono purtroppo andati perduti. Alano Anglico ha raccolto la decretale nella sua collezione Alan. 6.1.1 ca. 1204.

⁹ ‘Quibusdam igitur quaestionibus, quas contra catholicos haeretici moverant, nos postulas respondere’ (X 3.42.3). Potthast annota che la lettera ‘respondet ad quosdam errores quos haeretici ecclesiam impugnant contra catholicos moverant, videlicet quod baptismus non est parvulis conferendus, et ad plures articulos circa fidem’ (Potth., 1479).

¹⁰ X 3.42.3. La denominazione della lettera in base alle prime parole non è unanime. Potthast la elenca come *Maiores ecclesiae causas*; Friedberg e in seguito la letteratura canonistica la chiama semplicemente *Maiores*. In questa sede si segue quest’ultima prassi.

discipuli dicerent ipsum esse, respondisse notabit: 'Tu es Christus filius Dei vivi', et pro eo Dominus exorasse, ne deficiat fides eius.

Il giovane Pontefice quindi non soltanto ribadisce la competenza, ormai plurisecolare, della Sede di Pietro circa le 'causae maiores' in generale, ma la specifica e la conferma come modo proprio ('praesertim') per tutto ciò che concerne la fede ('articulos fidei').

Prima di entrare nel merito della decretale è interessante e allo stesso tempo doveroso notare che Lotario dai Conti di Segni appena salito al soglio pontificio coglie diverse occasioni nei primi anni del suo pontificato per rinforzare la posizione del Romano pontefice quale giudice supremo circa tutte le materie dubbie e di maggior importanza. Già il 17 settembre 1198 mandò un responso in una causa matrimoniale all'abate di San Proculo e al canonico Lanfranco di Bologna con cui afferma che 'ad hoc Deus in apostolica sede constituit totius ecclesiae magistratum, ut . . . ad eam nodi quaestionum difficiles referantur, suo recto iudicio dissolvendi'.¹¹ Pochi mesi dopo (1 maggio 1199), in un'altra causa matrimoniale riguardante il privilegio paolino, affermò in una risposta al vescovo Ugo di Ferrara:¹²

Quanto te magis novimus in canonico iure peritum, tanto fraternitatem tuam amplius in Domino commendamus, quod in dubiis questionum articulos ad sedem apostolicam recurris, quae disponente Domino cunctorum fidelium mater est et magistra, ut opinio quam in eis quondam habueras dum alios canonici iuris peritiam edoceres, vel corrigatur per sedem apostolicam vel probetur.

Con la famosa decretale *Per venerabilem* (mandata nel periodo da settembre a dicembre del 1202) Innocenzo III, in base ad una esegesi di Deuteronomio 17, 8-12, estese la competenza del pontefice su tutto ciò che è difficile e in dubbio: 'Tria quippe sunt distinguit iudicia . . . in quibus quum aliquid fuerit difficile, vel ambiguum, ad iudicium est sedis apostolicae recurrendum'.¹³ Il responso pontificio non regola soltanto il caso concreto, ma

¹¹ X 2.6.1 = 3 Comp. 2.3.1 Potth. 370.

¹² X 4.19.7 = 3 Comp. 4.14.1 Potth. 684.

¹³ X 4.17.13 = 3 Comp. 4.12.2 Potth. 1794.

diventa matrice per casi simili come risulta dalla decretale *In causis* mandata nel periodo settembre-dicembre 1201:¹⁴

In causis, quae apostolicae sedis deferuntur examini iura debent subtiliter observari quia quod in una causa per Romanum Pontificem iudicatur in aliis causis formam tribuit iudicandi.

Allo stesso modo Innocenzo III asserì la riserva pontificia sulle questioni dubbie in una lettera inviata il 28 agosto 1206 al vescovo Bertoldo di Metz, accolta nel *Liber extra* dopo la decretale *Maiores* (perché prende anche posizione riguardo al battesimo) e denominata *Debitum*:¹⁵

Debitum pastoralis officii exsolvis, quum super dubiis iuris articulis responso sedis apostolicae postulas edoceri.

In questa sede tralasciamo il contenuto delle due ultime decretali innocenziane concernenti l'amministrazione del battesimo, per entrare immediatamente nel merito della questione come risulta dal sopra citato *incipit* della decretale *Maiores*: l'illustre autore pontificio lega alla *Sedes Petri* (e non, come in altri contesti, alla *Romana ecclesia* oppure al *Pontifex*) espressamente e non per caso, la competenza esclusiva per le *causae maiores*. Egli mette così al centro della sua affermazione il principe degli apostoli: egli è tale appunto a partire dalla professione stessa di fede di Pietro e alla preghiera del Signore perché la sua fede fosse indefettibile¹⁶. Si mette così in evidenza il punto di riferimento al quale è rivolta l'attenzione dei canonisti medievali: la persona stessa di Pietro, alla quale è affidata la responsabilità per la fede.

La soliditas fidei Petri

¹⁴ X 1.6.30 = 3 Comp. 1.6.15 Potth. 1401.

¹⁵ X 3.42.4 = 3 Comp. 3.34.2. Secondo Potthast la lettera è stata divisa in due parti; la prima parte è stata annoverata nel primo libro del *Liber extra* e intitolata *Debitum officii pontificalis pastoralis* oppure brevemente *Debitum pastoralis* (X 1.21.5 = 3 Comp. 1.14.2 Potth. 2875).

¹⁶ Secondo Lc 22:32.

Nel suo opus *De sacro altaris mysterio*, lo stesso Innocenzo III riprende detta argomentazione allargandola notevolmente:¹⁷

Omnibus autem apostolis Christus unum praeposuit, videlicet Petrum, cui totius Ecclesiae principatum, et ante passionem, et circa passionem, et post passionem commisit. . . . Singulariter tamen pro Petro subjunxit: *Ego autem pro te rogavi, ut non deficiat fides tua*; statim subjunxit: *Et tu aliquando conversus, confirma fratres tuos* (*Luc. XXII*). Ad Petrum igitur tanquam ad magistrum pertinet caeteros confirmare, cuius fides in nulla tentatione defecit. Fides enim apostolicae sedis super firmam petram stabili soliditate fundata, nullius unquam errorum sordibus potuit inquinari; sed absque ruga manens et macula, pro necessitate temporum, a caeteris maculas detersit errorum. . . . Petrus enim secutus est Christum, non solum genere martyrii, sed et in ordine magisterii. Quod Christus ostendit, cum ait: *Tu vocaberis Cephas* (*Joan. XXI*). Licet enim Cephas secundum unam linguam interpretetur *Petrus*, secundum alteram tamen exponitur *caput*. Nam sicut caput habet plenitudinem sensuum, caetera vero membra partem recipiunt plenitudinis; ita caeteri sacerdotes vocati sunt in partem sollicitudinis, sed summus pontifex assumptus est in plenitudinem potestatis. Hinc etiam, quod non sine magni mysterii sacramento, cum Christus universos interrogasset apostolos. *Vos autem quem me esse dicitis?* Solus Petrus, quasi primus et potior respondit pro omnibus: *Tu es Christus Filius Dei vivi* (*Matth. XVI*).

Come nella decretale *Maiores*, l'augusto scrittore si riferisce alla preghiera del Signore per Pietro, e alla professione di fede del pescatore di Galilea come portavoce di tutti gli altri apostoli ('pro omnibus'). Tra i due riferimenti biblici il Pontefice fa risaltare la posizione preminente di Pietro rispetto agli altri apostoli: è stato il Signore stesso a preporlo a capo del collegio apostolico, pregando particolarmente per lui ('singulariter'). Il nuovo nome dato al pescatore di Galilea, Cefas, indica il suo duplice compito: egli è Petrus, cioè la roccia stabile e solida della fede, e allo stesso tempo costituito caput degli apostoli, assumendo la plenitudo potestatis per sé e i suoi successori. Non passa

¹⁷ Innocentius III, *De sacro altaris mysterio libro sex*, liber I, caput VII 'De primatu Romani Pontificis', PL 217.778-779.

inosservato che Innocenzo III menziona Pietro anche come magister che partecipa quindi alla missione del Signore vi magisterii.

La solidità di Pietro e la sua preminenza in confronto agli altri stanno al centro di un sermone di Leone Magno, tenuto in occasione di un anniversario della sua elezione al soglio pontificio. Paragonando i testi si rileva un ragionamento simile tra il Pontefice altomedievale e il suo predecessore tardo-antico attorno i termini centrali di ‘potestas, praeporre’ e ‘singulariter’, ma innanzitutto nell’etimologizzare il denominativo Petrus da petra.¹⁸

‘Qui cum dixisset: *Tu es Christus Filius Dei uiui*, respondit ei Iesus: *Beatus es, Simon Bariona, quia caro et sanguis non reuelauit tibi, sed Pater meus qui in caelis est, id est, ideo beatus es, quia te Pater meus docuit, nec terrena opinio te fefellit, sed inspiratio caelestis instruxit, et non caro nec sanguis, sed ille me tibi, cuius sum unigenitus, indicauit. Et ego, inquit, dico tibi, hoc est, sicut Pater meus tibi manifestauit diuinitatem meam, ita et ego tibi notam facio excellentiam tuam. Quia tu es Petrus, id est, cum ego sim inuiolabilis petra, ego lapis angularis, qui facio utraque unum, ego fundamentum praeter quod nemo potest aliud ponere, tamen tu quoque petra es, quia mea uirtute solidaris, ut quae mihi potestate sunt propria, sint tibi mecum participatione communia. . . . Transiuit quidem etiam in alios apostolos ius istius potestatis, et ad omnes Ecclesiae principes decreti huius constitutio comueuit; sed non frustra uni commendatur, quod omnibus intimetur. Petro enim ideo hoc singulariter creditur, quia cunctis Ecclesiae rectoribus Petri forma praepositur. Manet ergo Petri priuilegium, ubicumque ex ipsius fertur aequitate iudicium’.*

Pochi decenni prima del pontificato di Lotario dei Conti di Segni il *Decretum* annovera tra le ‘distinctiones’, che trattano l’autorità delle decretali pontificie, un altro testo di Leone Magno al cui centro sta la ‘soliditas Petri’.¹⁹

Sed huius muneris sacramentum ita Dominus ad omnium apostolorum officium pertinere uoluit, ut in beatissimo Petro apostolorum omnium summo principaliter collocaret, ut ab ipso quasi quodam capite dona sua uelut in corpus omne diffunderet, ut

¹⁸ Leo I The Great, *Tractatus septem et nonaginta* ed. A Chavassee (CCL 138; Turnhout 1973) Tractatus 4 ‘Gaudeo, dilectissimi’ 18-19.

¹⁹ Ibid.

extorrem se divini ministerii intelligeret esse, qui ausus fuisset a Petri soliditate recedere. Hunc enim in consortium individuae unitatis assumptum, id quod ipse erat, voluit nominari, dicendo: Tu es Petrus, et super hanc petram edificabo ecclesiam meam.

Ugucione commenta questo canone *Ita Dominus* ponendo l'accento sulla 'soliditas fidei Petri',²⁰ ed affronta in seguito la questione su chi sia edificata la Chiesa, cioè chi sia la pietra fondamentale, se il Signore o Pietro ('vexata quaestio' molto discussa tra i decretisti).²¹ Sulla scia di una proposta fatta prima di lui da Stefano da Tournai,²² Ugucione distingue una dimensione duplice del fondamento:²³

Dominus voluit nominari, id est ab eo. *quod ipse*: scilicet Christus erat. Nam a petra dictus est Petrus. De qua petra dicitur: 'petra autem erat Christus'. *tu es Petrus*: dictus es a me, petra, *et super hanc petram*: id est super me. *edificabo ecclesiam meam*: principaliter; quasi super me principaliter et tanquam auctorem edificabo ecclesiam; non super te principaliter quasi autorem, sed secundario et quasi ministrum. Vel sic: *nominari*: id est ab eo quod ipse Petrus erat. Ipse enim firmus erat et ideo dictus es Petrus a petra, id est a firmitate; . . . *tu es Petrus*: dictus petra propter firmitatem. *et super*

²⁰ Huguccio <male Pisanus>, *Summa Decretorum*, 1: *Distinctiones I-XX*, ed. O. Pěrovský (MIC ser. A 6; Città del Vaticano 2006) 315: D.19 c.7 s.v. *Ita Dominus*: 'In hoc capitulo dicitur quod Christus prefecit Petrum omnibus et in soliditate fidei eius ecclesiam construxit et collocavit'.

²¹ Vedasi Brian Tierney, *Foundations of the Conciliar Theory: The contribution of the Mediaeval Canonists from Gratian to the Great Schism* (Studies in the History of Christian Thought 81; Leiden-New York-Köln 1998) 24.

²² *Summa Parisiensis on the Decretum Gratiani*, ed. P.T. McLaughlin (Toronto 1952) 19 ad D.19 c.7: '*Quod ipse*, ut Petrus diceretur sicut ipse *supra quam*, i.e. *supra petram secundario, super se principaliter*'. Secondo Alessandro Recchia, *L'uso della formula plenitudo potestatis da Leone Magno ad Ugucione da Pisa* (Corona Lateranensis; Roma 1999) 118: Ugucione 'si sofferma più volte a spiegare in cosa consista questa "solidità" di Pietro, ricorrendo ad una etimologia che ha le sue origini in Isidoro di Siviglia, è presente anche in Ivo di Chartres, e che, giunta a lui attraverso la dottrina decretistica precedente, identifica anche nominalmente Pietro con la pietra su cui poggia tutta la costruzione ecclesiale'.

²³ Huguccio, *Summa* 316 ad D.19 c.7.

hanc petram: id est super te secundario et quasi ministrum, et non quasi autorem. Per Christum enim fundata est ecclesia tamquam per autorem, per apostolos uero est fundata tamquam per ministros. Vel: super me, id est super fidem habitam a me et de me et id est fidem habitam a te uel de te. Et tamen dicitur ecclesia fundata super fidem Petri, quia ad instar fidei Petri saluantur omnes fideles, et quia ipse primus posuit fundamentum fidei in gentibus et quia tanquam saxum immobile ecclesiam contineat . . . eterni: id est perpetui. Quod ideo dico ne tu intelligas ecclesiam triumphantem esse fundatam super fidem Petri, cum dictum est: ‘tu es Petrus’ etc. Et est argumentum quod ecclesia numquam deficiet; arg. xxiii. q. i. Pudenda (C.24 q.1 c.33).

La soluzione è geniale: la roccia basilare della Chiesa può essere il Signore stesso oppure Pietro, se si differenzia soltanto il fondamento ‘vi originis’ e ‘vi ministerii’;²⁴ tra il fondamento principale e quello secondario ‘si stabilisce una identità non solo nominale (‘dictus a me petra’) ma anche di poteri e di funzioni’²⁵. Rientra inoltre qui la possibilità della fede professata da Pietro sulla quale il Signore edifica la Chiesa.²⁶

L’inerranza e l’indefettibilità della Romana ecclesia

Il riferimento biblico alla fine della frase iniziale della decretale *Maiores* è il locus classicus che rivela la ragione principale per la riserva pontificia circa tutte le questioni ‘ratione fidei’: la promessa della ‘fides indefectibilis’ che di nuovo pone al centro la persona di Pietro al quale il Signore si rivolge; la

²⁴ Tierney, *Foundations* 24: ‘The Rock might be either Christ or Peter or Peter’s faith, and although the Church was founded on Christ ‘principaliter et tanquam auctorem’, it could be regarded as founded on Peter ‘secundario et quasi ministrum’.

²⁵ Recchia, *L’uso della formula plenitudo potestatis* 119.

²⁶ Gli ‘articuli fidei’ sono inseparabilmente legati alla persona di Pietro e ‘via successionis’ ai suoi eredi: questi invero continuano ad essere il fondamento della Chiesa ‘secundario et quasi ministrum’, secondo l’interpretazione ugucciana. È perciò possibile supporre che Innocenzo III fosse a conoscenza, se non del contributo specifico, quantomeno del pensiero di Ugucione nella questione, essendo o no un suo discepolo. Si consulti lo studio di K. Pennington, ‘The Legal Education of Pope Innocent III’, *Popes, Canonists and Texts* 1150-1550 (Aldershot 1993) no. I, 1-10.

risposta alla ‘confessio Petri’ è la promessa che la sua fede non verrà mai meno.

Le parole del Signore sono indirizzate in modo particolare a Pietro, non però in quanto individuo ma ‘persona ecclesiae’. La fede di Pietro non è la *sua* fede esclusiva intesa come atto personale, ma è la fede della Chiesa intera il cui portavoce è il principe degli apostoli. Cristo prega quindi per la fede di tutta la Chiesa ‘in persona tantum Petri’ perché è la fede della Chiesa, professata da Pietro, che non viene mai meno.²⁷ La promessa della fede indefettibile è quindi rivolta alla Chiesa intera personalizzata da Pietro.²⁸ Nelle decisioni pontificie si ode la voce di Pietro che la ‘Romana ecclesia’ o ‘Sedes Apostolica’

²⁷ Huguccio, *Summa*, Munich, SB 10247 (=M), fol. 18v, Lons-le-Saunier, Archives départementales du Jura 16 (=L), fol. 23va, D.21 d.a.c.1, s.v. *pre omnibus*: ‘in eius enim persona universalis ecclesia significabatur, ut xxiiii q.i. Quodcumque (C.24 q.1 c.6)’ e s.v. *non deficit*: ‘. . . uel tunc in persona Petri intelligebatur ecclesia; in fide Petri fides universalis ecclesie que nunquam in totum deficit uel deficiet usque in diem iudicii, ut xxiiii q.i. Pudenda, A recta (C.24 q.1 c.33, c.9)’, citato in Brian Tierney, *The Origins of Papal Infallibility 1150-1350: A Study on the Concepts of Infallibility, Sovereignty and Tradition in the Middle Ages* (Studies in the History of Christian Thought 6; Leiden 1972) 34. Si veda anche una glossa nella raccolta di Wolfenbüttel, Helmst. 33 ad C.24 q.1 c.9, Johann F. von Schulte, *Die Glosse zum Dekret Gratians von ihren Anfängen bis auf die jüngsten Ausgaben* (Wien 1872) 11: ‘In Petro quippe significatur ecclesia, ut supra eadem questione Quicumque’. Commentando la decretale *Noverit*, Innocenzo IV riprese il paragone *Petrus-persona ecclesiae*, in base al quale il successore di Pietro gode del privilegio particolare di decidere in ultima istanza *Commentaria* (Frankfurt am Main 1570) ad X 5.39.49 s.v. *Libertatem*, fol. 558va: ‘. . . hoc enim privilegium Christus Petro in persona ecclesia concessit, tale est etiam privilegium, quod in omnibus dubiis iuris, quae per inferiores ratione iurisdictionis humanae terminari non possunt, ad ecclesiam recurratur . . .’.

²⁸ Al riguardo vedasi il dibattito tra Tierney e David’Avray, ‘A Letter of Innocent III and the Idea of Infallibility’, *CHR* 66 (1980) 417-421; Tierney, ‘Papal Infallibility: A Response to Dr. d’Avray’, *CHR* (1981) 275-277.

diffonde; perciò ‘sic omnes apostolicae sedis sanctiones accipiendae sunt, tanquam ipsius uoce diuina Petri firmatae’²⁹.

Una ‘vexata quaestio’, tuttavia, molto discussa tra decretisti e decretalisti fu il caso del ‘papa eretico’, in base al noto canone *Si Papa*³⁰. I canonisti si domandavano: in chi resta la fede integra se l’attuale successore di Pietro si dimostra colpevole di essere de fide devius? Qui rientra il concetto della ‘Romana ecclesia’ sempre salda nella fede e libera da ogni macchia di eresia³¹: ‘In sede apostolica extra maculam semper est catholica seruata religio’³².

Perciò i decretisti cominciano a distinguere tra *inerranza* e *indefettibilità* della Chiesa, rappresentata dalla ‘Romana ecclesia’ in persona del successore di Pietro, cioè del Romano Pontefice:

Non si presume che la Chiesa intera possa errare³³.

La Chiesa è quindi indefettibile, perché non può venire meno³⁴.

La competenza della Sede Apostolica *super dubio fidei* implica l’obbligo di ricorrere a tale sede, chiedendo una decisione in merito.

²⁹ D.19 c.2. Il canone successivo afferma: ‘In memoriam B. Petri apostoli honoremus sanctam Romanam et apostolicam sedem, ut, que nobis sacerdotalis mater est dignitatis, esse debeat ecclesiasticae magistra rationis’ (D.19 c.3). Vedasi pure il commento della *Glossa ordinaria* (Rome 1582) riguardo al canone *Ita Dominus* della stessa D.19 c.7, s.v. *Et super hanc petram*: ‘Per hanc dictionem non credo Dominum aliud demonstrasse, quam haec verba quae Petrus respondit Domino cum dixit: Tu es Christus, filius Dei viui, quia super illo articulo fidei fundata est Ecclesia [ergo super seipso fundauit Deus ecclesiam]’.

³⁰ D.40 c.6. Si veda in merito della questione Tierney, *Foundations* 52-61 e idem *Origins* 49-53.

³¹ Si veda C.24 q.1 cc.9-18.

³² C.24 q.1 c.11.

³³ C.24 q.1 c. 9): ‘Hec sancta et apostolica mater ecclesiarum omnium Christi ecclesia, que per Dei omnipotentis gratiam a tramite apostolicae traditionis numquam errasse probatur . . .’.

³⁴ C.24 q.1 c.33: ‘Ait enim (sc. Augustinus): “Quod si nullo modo recte dici potest ecclesia, in qua scisma est, restat, ut, quoniam ecclesia nulla esse non potest . . .’.

La presunzione dell'inerranza della Chiesa si fonda sulla speranza che Dio non permetta alla Chiesa intera di deviare dalla fede. Giovanni Teutonico infatti glossa, riguardo al canone *Quodcumque* del *Decretum*:

argumentum quod sententia totius ecclesiae praefenda est Romanae, si in aliquo sibi contradicant, argumentum 93 dist. Legimus (D.93 c. 24).³⁵ Sed contrarium credo, argumentum infra eadem Haec est³⁶ nisi erraret Romana ecclesia, quod non credo posse fieri: quia Deus non permetteret, argumentum infra eadem capitulo A recta (C.24 q.1 c.9) et capitulo Pudenda (C.24 q.1 c.23).³⁷

In questo contesto si noti, che nella decretistica la nozione 'Romana ecclesia' si riferisce sia alla Chiesa universale che alla Chiesa particolare di Roma. Mentre nel appena citato riferimento la *Glossa ordinaria* parla nello specifico della Chiesa di Roma lo stesso Giovanni Teutonico, chiosando il canone *A recta fide*, collega l'inerranza alla Chiesa intesa come 'congregatio omnium fidelium'.³⁸

³⁵ Con la celebre frase attribuita a Girolamo: 'Si auctoritas queritur, orbis maior est urbe'. Si veda in merito il paragrafo successivo.

³⁶ C.24 q.1 c.14: 'Sancta Romana ecclesia, que semper immaculata permansit, Domino providente et B. apostolo Petro opem ferente in futuro manebit'

³⁷ *Glossa ordinaria* (Rome 1582) C.24 q.1 c.6, s.v. *Reconciliat*: Il fatto che la *Glossa Palatina* commenta il canone *Quodcumque* con le stesse parole come la *Glossa ordinaria* 'dimostra la convinzione dei due più grandi decretisti, dopo Ugucione da Pisa, e perciò dei contemporanei' vede Alfons M. Stickler, 'Sulle origini dell'infallibilità papale: Riflessioni su un libro recente', RSCI 28 (1974) 583-594 à 591.

³⁸ Riguardo alle due asserzioni di Giovanni Teutonico, Tierney, *Foundations* 49-50, nota 20 osserva: 'But, since the Decretist's doctrine of indefectibility asserted only that somewhere within the Universal Church the true faith would survive, Joannes could quite reasonably maintain that it would more probably survive in the Roman church than in the others. He does seem inconsistent in asserting that God would not permit the Roman church to err, here clearly using the word *Romana ecclesia* to describe a local church. But he was careful to state also that Rome was to be followed *nisi erraret*. Joannes hoped and expected that the Roman church would not err, but there could be no final certainty on that point; it was not unusual in canonistic writings for an author

Uguccione di Pisa nella sua *Summa*, riferendosi alle due connotazioni della ‘Romana ecclesia’ — chiesa particolare e ‘congregatio omnium fidelium’ — distinse nettamente tra ‘Romana ecclesia universalis’ e ‘Romana ecclesia localis’. Commentando il canone *Quamvis universae* del *Decretum*,³⁹ Uguccione sottolineò come il termine ‘Romana ecclesia,’ da questo usato, non potesse significare altro che la Chiesa intera, indefettibile e senza macchie: ‘*Maculam . . . ergo ubicumque sunt boni fideles ibi est Romana ecclesia, aliter non invenies romanam ecclesiam in qua non sint multe macule et multe ruge*’.⁴⁰

Innocenzo III e la fides vi officii del Pontefice

Malgrado le distinzioni decretistiche Innocenzo III non esita di attribuire il ‘non permettere errare’ non soltanto in generale alla chiesa di Roma o alla Chiesa ‘congregatio omnium fidelium’ (alla stregua di Giovanni Teutonico nella Glossa ordinaria), ma alla persona del Romano pontefice stesso. In un sermone tenuto in occasione dell’anniversario della sua consacrazione episcopale (due settimane dopo esser stato eletto vescovo di Roma), il primo pontefice del Duecento paragona il legame tra ‘Romanus pontifex’ e ‘Romana ecclesia’ ad un

to envisage some dire contingency, to declare firmly that he did not believe God would allow this to happen, and then to go on to discuss the implications of the ensuing situation if it did happen after all’.

³⁹ D.21 c.3: ‘Est ergo prima apostoli Petri sedes Romana ecclesia, non habens maculam neque rugam, nec aliquid huiusmodi’.

⁴⁰ Huguccio, *Summa ad D.21 c.3*, M fol. 18vb e L fol. 23va presentato da Tierney, *Foundations* 37. Commentando il famoso decreto *In nomine Domini* di Niccolò II, Uguccione ripete, *Summa ad D.23 c.1 s.v. de gremio ipsius ecclesie* (sic), M fol. 23ra e L fol. 27ra: ‘set dicitur quod romana ecclesia non habet maculam vel rugam ut di. xxi. Quamuis (c.3) set ibi romana ecclesia intelligitur universitas fidelium’, presentato da Tierney, *Foundations* 37. Si veda anche il suo commento, Huguccio, *Summa*, ed. cit. 311 alla D.19 c.5 s.v. *postea*: ‘Vel potest dici quod id quod facit quelibet ecclesia intelligitur facere romana, cum quelibet alia ecclesia sit membrum eius . . . et cum quelibet ecclesia a romana habeat auctoritatem faciendi tali’.

sacramento, il matrimonio appunto. La chiesa di Roma può dimettere un pontefice macchiatosi di eresia a causa dell'adulterio spirituale da lui commesso; tuttavia, Innocenzo ritiene poco probabile il verificarsi di questo caso:⁴¹

Sacramentum autem inter Romanum pontificem et Romanam ecclesiam tam firmum et stabile perseverat, ut non nisi per mortem unquam ab invicem separentur . . . Propter causam vero fornicationis Ecclesia Romana posset dimittere Romanum pontificem. Fornicationem non dico carnalem, sed spiritualem; quia non est carnale, sed spirituale conjugium, id est propter infidelitatis errorem . . . Ego tamen facile non crediderim, ut Deus permetteret Romanum pontificem contra fidem errare: pro qui spiritualiter oravit in Petro: 'Ego, inquit, pro te rogavi, Petre', etc (Luc. XXII).

Una personalizzazione simile si constata anche riguardo alla 'fides indefectibilis' ossia la 'fides vi officii', quando il giovane pontefice ritiene che la preghiera del Signore sia stata esaudita non soltanto in favore di Pietro ma di tutti i suoi successori:⁴²

Nisi enim ego solidatus essem in fide, quomodo possem alios in fide firmare? Quod ad officium meum noscitur specialiter pertinere, Domino protestante: 'Ego, inquit, pro te rogavi, Petre, ut non deficiat fides tua . . .'. Rogavit, et impetravit: quoniam exauditus est in omnibus pro sua reverentia. Et ideo fides apostolica sedis in nulla nunquam turbatione defecit, sed integra semper et illibata permansit: ut Petri privilegium persisteret inconcussum.

Conclusion

Se si riferisce l'inerranza e l'undefettibilità alla 'Romana ecclesia' (come i decretisti) oppure direttamente e personalmente al Pontefice stesso (come Innocenzo III) è fuor di dubbio che le decisioni 'ratione fidei' rientrano nella 'potestas iurisdictionis' del Pontefice, poiché egli è giudice supremo della Chiesa:

⁴¹ Innocentius III, sermo 'Paronymphus ait', PL 217.664-665. Stampato anche, però, senza un apparato critico e con una traduzione italiana da Stanislao Fioramonti, Innocenzo III, *Sermoni (Sermones)* (Monumenta Studia Instrumenta Liturgia; Città del Vaticano 2006) 622-632, il testo citato su 630.

⁴² Innocentius III, sermo 'Qualis debeat esse', PL 217.656. *Sermoni* 610-622, il testo citato su 614.

subentrando quale ‘heres’⁴³ al primo degli apostoli, egli è titolare attuale di tutta la potestà conferita a Pietro dal Signore stesso per svolgere il suo ministero, pur essendo un successore indegno. Giuridicamente vale solo e soltanto il fatto di essere ‘heres Petri’.⁴⁴ Da questo fatto teologico-giuridico discende il potere propriamente giurisdizionale del Pontefice quale giudice supremo, potere, che lo esercita a guisa del principe ed imperatore dell’antico ordinamento giuridico-romano⁴⁵. Come una sentenza giudiziale diventa interpretazione autentica per le parti, dando la certezza del diritto in un contenzioso giudiziario, così la sentenza definitiva del Romano Pontefice dirime un dubbio e diventa certezza per i fedeli circa una questione controversa sulla fede.

⁴³ Un rimando con grande rilievo giuridico che sorge dai tempi dei Pontefici Siricio e Leone I. Si consulti tra i tanti studi Walter Ullmann, ‘Leo I and the Theme of Papal Primacy’, *JTS* 9 (1960) 25-51 e C. Tammaro, ‘Plenitudo potestatis’, *DGDC* 6.233-237.

⁴⁴ Come Innocenzo III stesso risalta nella decretale *Quanto personam* X 1.7.3: ‘Potestatem enim transferendi pontifices ita sibi retinuit Dominus et magister, quod soli beato Petro vicario suo, et per ipsum successoribus suis, et nobis ipsis, qui locum eius licet indigni tenemus in terris, speciali privilegio tribuit et concessit, sicut testatur antiquitas, cui decreta Patrum sanxerunt reverentiam exhibendam, et evidenter asserunt sacrorum canonum sanctiones. Non enim homo, sed Deus separat, quos Romanus Pontifex, qui non puri hominis, sed veri Dei vicem gerit in terris, ecclesiarum necessitate vel utilitate pensata, non humana, sed divina potius auctoritate dissolvit’.

⁴⁵ Come risulta dal Cod. 1.17.2.21: ‘. . . Si quid vero . . . ambiguum fuerit visum, hoc ad imperiale culmen per iudices referatur et ex auctoritate Augusta manifestatur, cui soli concessum est leges condere et interpretari’. Si noti l’applicazione alla lettera nella decretale *Per venerabilem* X 4.17.13: ‘Tria quippe sunt distinguit iudicia . . . in quibus quum aliquid fuerit difficile, vel ambiguum, ad iudicium est sedis apostolicae recurrendum’. Vedasi anche Alfred Hof, ‘Plenitudo potestatis und Imitatio imperii zur Zeit Innozenz’ III.’, *ZKG* 56 (1954-1955) 39-71 e più precisamente 64-65. Ricorda P. Grossi che nella *iurisdictio* non si manifesta «questo o quel potere [...], bensì una sintesi di poteri che non si ha timore di vedere condensata in un solo soggetto. Con questa avvertenza fondamentale: che in quella sintesi di poteri la funzione emergente e tipizzante è quella del giudicare: si è principi perché si è giudici, giudici supremi» (P. GROSSI, *L’ordine giuridico medievale*, Roma – Bari 2003, 131).

Non sono quindi decisione esplicitamente prese ‘vi potestatis magisterii infallibilis’,⁴⁶ anche se i contributi dei decretisti e decretalisti possono essere letti secondo l’implicita ammissione di quest’ipotesi: il pontefice ha la funzione sia di capo sia di portavoce della chiesa di Roma, che resta sempre fedele al Signore ed è perciò sicura garante dell’ortodossia della Chiesa universale. Saranno poi i canonisti della seconda metà del Duecento, come Pietro Giovanni Olivi (1248-1298) nella sua *Quaestio de infallibilitate Romani Pontificis*, che cominciano a parlare ‘expressis verbis’ dell’inerranza d’ufficio del Pontefice, impiegando il riferimento principale appunto alla decretale *Maiores* di Innocenzo III:⁴⁷

Item, impossibile est Deum dare alicui plenam auctoritatem diffiniendi de dubiis fidei et divine legis cum hoc, quod permetteret eum errare; de quocumque autem constat quod nullo modo permetteretur errare, ipse sequendus est tamquam regula inerrabilis; sed Romano pontifici dedit Deus hanc auctoritatem. Unde XVII^a

⁴⁶ Se il Papa erra nel decidere una questione *ratione fidei*, i canonisti ritengono che l’errore può venire corretto dal Pontefice stesso o da un suo successore (come nel caso classico di Papa Anastasio), prima che l’intera Chiesa possa fuorviare. Si veda Tierney il quale, riguardo ai canonisti del periodo 1150-1250, constata, *Origins*, 32-33: ‘They certainly insisted that the jurisdiction of the Roman See included a right to decide disputed questions concerning matters of faith; and its certainly true, that this claim of the papacy provided an essential basis for later theories of papal infallibility. In Decretist writings, however, the idea of papal jurisdiction was sharply separated from the idea of papal infallibility. So far as the medieval canonists are concerned, there can be no question of maintaining that they took the doctrine of infallibility for granted but never saw any need to articulate it because it had never been disputed. . . . The canonists did not argue that an infallible head was necessary to sustain the faith of the church. Rather they maintained that, however much the head might err, divine providence would always prevent the whole church from being led astray’.

⁴⁷ Michele Maccarrone, ‘Una questione inedita dell’Olivi sull’infallibilità del Papa’, *Romana Ecclesia, Cathedra Petri, II*, ed. Piero Zerbi et al. (Italia Sacra: Studi e documenti di storia ecclesiastica 48; Roma 1991) 952-953, reprinted from *RSCI* 3 (1949) 309-343.

distinctione, *Denique*, dicitur 'quod maiores et difficiliore questiones ad sedem apostolicam semper debere referri.

Et Innocentius Extra *De baptismo et eius effectu* dicit:

Maiore ecclesie causas, presertim articulos fidei contingentes, ad Petri sedem referendas intelligit, qui, eum querenti Domino quem discipuli dicerent ipsum esse, Petrus respondisse notatur: Tu es Christus filius Dei vivi; et pro eo Dominum exorasse ne deficiat fides eius'. Et XXIV^a questione I^a, '*Quociens fidei quo ventilatur arbitror omnes fratres et coepiscopos nostros non nisi ad Petrum, id est sui nominis et honoris auctoritatem, referre debere*'. Ibidem etiam dicit Ambrosius: 'Non turbatur navis que Petrum habet'.

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Reform in 1215: *Magna Carta* and the Fourth Lateran Council

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800 years ago, in June and November of 1215, two great events took place that have shaped our imaginations about law, reform, and constitutional and individual rights to the present day: The meeting of King John of England with the magnates of his realm on the fields of Runnymede and the great church council in which the prelates of the Church gathered around Pope Innocent III in the papal basilica San Giovanni in Laterano were focused on the the great issues of the time. Both meeting produced documents that have been interpreted by scholars, read by students, and debated by everyone.

By 1215 King John had lost almost all of his northern continental possessions. The core of the Angevin empire, Normandy, was lost. Anglo-French barons who still held lands in Normandy owed their primary allegiance to King Phillip Augustus, not to King John. The barons and churchmen who remained under his sovereignty chafed under his rule. It is clear from the document that the barons forced John to sign when they met with John on Runnymede in 15 July 1215, they intended to impose reform on the king. We might sum up their objectives as being the administration of justice and defending their customary rights in what remained of the John's kingdom.

Magna Carta was a major event in King John's reign. Because the archbishop of Canterbury, Stephen Langton, played such a significant role in the affair that took place on Runnymede, scholars have wondered about the connections canon law and its jurisprudence embedded in the *Ius commune* might have had in the minds of those who drafted the document.¹

¹ For a recent continental view of Stephen Langton's relationship to the barons and to *Magna Carta* see Daniel Baumann, *Stephen Langton: Erzbischof von Caterbury im England der Magna Carta (1207-1228)* (Studies in Medieval and Reformation Traditions 144; Leiden-Boston 2009) 159-189; John W. Baldwin, 'Master Stephen Langton, Future Archbishop of Canterbury: The

A larger question is the relationship of the *Ius commune* to English common law in the early stages of its development. Charles Donahue wanted to have a word to illustrate the relationship. He chose 'influence'. Twenty-five years ago he wrote:²

We need a word to tie the *ius commune* to the common law of England. The standard word is 'influence', and the standard meaning of the word is direct borrowing of rules and sometimes broader principles.

That may seem as if it would be a statement that would evoke little controversy in the world of legal history. Nevertheless, it has. Scholarly attempts to explore the 'influences' that the jurisprudence of the *Ius commune* might have had on English common law and *Magna Carta* have been met with criticism, some of it rather pointed.³ In this essay I will examine possible 'influences' that the *Ius commune* may have had on *Magna Carta* and the relationship and possible connections between the two most significant reform assemblies in the early thirteenth century: the king, prelates, and barons who gathered at Runnymede and the pope, cardinals, bishops, abbots, and clergy who congregated in San Giovanni in Laterano.

I begin at a strange place, neither in England nor in Rome, but in Rouen, France. A manuscript resides there that dates to the early thirteenth century and belonged to the lepers' hospital of Saint Gilles in the Norman city of Pont-Audemer. It contains documents related to the hospital and its founding but also contains the canons of the Fourth Lateran Council and cheek by jowl a French translation of *Magna Carta*.⁴ James Clarke

Paris Schools and Magna Carta', EHR 123 (2008) 811-846, especially 834-835..

² Charles Donahue, Jr. 'Ius commune, Canon Law, and the Common Law in England', *Tulane Law Review* 66 (1991-1992) 1745-1780 at 1747.

³ Richard H. Helmholz, 'Magna Carta and the *ius commune*', *The University of Chicago Law Review* 66 (1999) 297-370.

⁴ Simone C. Mesmin (later MacDougall), *The Leper Hospital of Saint Gilles de Pont-Audemer : An Edition of its Cartulary and an Examination of the Problem of Leprosy in the Twelfth and Early Thirteenth Centuries* (Ph. D. dissertation, 2 volumes, University of Reading 1978) has given a detailed

Holt had examined the cartulary and published an edition of the French text in 1974.⁵ Holt tried to explain why *Magna Carta* was translated into French and why a copy of it found its way into a cartulary of a small foundation in Normandy. He noted that the manuscript copy of *Magna Carta* had the text of a writ addressed to the sheriff of Hampshire appended to it.⁶ The writ instructed the sheriff to compel people to obey the twenty five barons who had been designated by the charter to enforce its provisions.⁷ Bishop of Winchester, Peter des Roches was appointed the sheriff of Hampshire in 1216.⁸

Bishop Peter had an unusually interesting career. Born in Touraine he rose from being the archdeacon in the diocese of Poitiers to become Lord Chamberlain under Richard the Lionheart, then was elected to the see of Winchester in 1205. King John chose him to be chief justice of the realm in 1213.⁹ He was a stubborn supporter of the king and fiercely loyal to him. In the Spring or Summer of 1215 Innocent sent a letter to Bishop Peter in which the pope told the bishop that he should prevent his court from hearing suits' belonging in secular courts. He also informed him that he would promulgate rules at the

description of the cartulary and translated the documents. She has also edited other related documents from the archives.

⁵ James C. Holt, 'A Vernacular-French Text of Magna Carta, 1215', *The English Historical Review* 89 (1974) 346-364. The text had been printed before in early modern editions. French translations of three coronation charters of Henry I, Stephen, and Henry II in British Library, Harley 458, fol. 4r-4v deserve scholarly scrutiny (my thanks to Jennifer Jahner for this information); see images at <http://www.earlyenglishlaws.ac.uk/laws/manuscripts/hl/?nb=3191&tp=s> and the rather unsatisfactory images in James C. Holt, *Magna Carta* (3rd ed. Cambridge 2015) between 234-235.

⁶ Ibid. 464: 'Johan par la grace de Deu reis d'Engleterre al viconte de Suthantesire'.

⁷ Ibid. 348.

⁸ Nicholas Vincent, *Peter des Roches: An Alien in English Politics, 1205-1238* (Cambridge Studies in Medieval Life and Thought, 4th series, 31; Cambridge 1996).

⁹ Vincent, *Peter des Roches* 89-113.

upcoming council about the issue.¹⁰ Innocent also mentioned that he asked John to send proctors to the council to defend his rights.

Holt argued that the translation of Magna Carta and the writ delivered to Odiham must have been drafted in Hampshire and that the translation was made for publication there.¹¹ Odiham was a secure royal fortress, and its ruins are still known today as 'King John's castle'. He spent time there before and after Runnymede.¹² However, John met Stephen Langton at Winchester on 20-21 July 1215.¹³ The Latin version of the writ was that sent to all the sheriffs of England on the 27th June from Winchester.¹⁴ The last line of the French writ states that John witnessed the writ at Odiham on 27 June 1215. Odiham is ca. 25 miles from Winchester. John could have been in both places on the same day. Holt does not consider the possibility that a Latin and French version of the writ might have been sent at the same time to the sheriffs of the realm and that the French translation was a product of chancery scribes in Winchester.¹⁵

¹⁰ Paris, BNF lat. 11867, fol. 37vb-38ra. The Latin text is printed and translated in *Selected Letters of Pope Innocent III concerning England (1198-1216)*, edd. Christopher R. Cheney and W.H. Semple (Nelson's Medieval Texts; London-Edinburgh-Paris-Melbourne-Toronto-New York 1953) 205-206, which was based on the earlier edition of Karl Hampe, 'Aus verlorenen Registerbänden der Päpste Innocenz III. und Innocenz IV.' *MIÖG* 23 (1902) 545-67 at 556-557.

¹¹ Holt, 'Vernacular-French Text' 348.

¹² J.C. Holt, *Magna Carta* (Cambridge: Cambridge University Press, 1965) 154-155 and (3rd ed.) 214-215.

¹³ Baldwin, 'Master Stephen Langton' 827.

¹⁴ *Ibid.* 347 for the Latin text.

¹⁵ In the new and augmented edition of Holt's *Magna Carta* edited and prepared by George Garnett and John Hudson (3rd ed. Cambridge 2015), appendix 7 deals with the French translations. It does not discuss the possible place where the translation was made or its transmission. The different scripts in the French translations of the coronation oaths of Henry I, Stephen, and Henry II found in British Library, Harley 458, fol. 4r-4v are dated to the same period. I am not sure that is correct. An analysis of the French translation's language might resolve some of the problems. For the importance of Henry I's coronation oath, see Baldwin, 'Master Stephen Langton' 828.

A larger question is how many copies of *Magna Carta* and its French translations were sent out. We know that Master Elias of Dereham, who was a first-rate administrator, played a significant role in the distribution of the Latin text of *Magna Carta*. Vincent has described how he may have accompanied Archbishop Stephen Langton to Runnymede and then was given the task of distributing four copies of *Magna Carta*. One month later Elias was given six more copies of the text to deliver.¹⁶ That much we know. There were probably more people involved in the Charter's distribution.¹⁷ The translation in Rouen must have been done and circulated about the same time. Thirteen bishops and twenty abbots witnessed the Charter. In their European-wide, ecclesiastical realm it was standard practice that significant legislation was distributed widely. A comparison to the legislation of the Fourth Lateran Council is instructive. Even though the canons were almost immediately incorporated into canonical collections that were taught in the schools and used in the courts, the canons circulated widely as separate texts. There are twenty manuscripts in all.¹⁸ Although we cannot know how the circulation of the canons was organized, we can tell from the manuscript evidence that they were all produced by professional scribes in scriptoria. In some cases they were produced with great care and elegantly decorated.¹⁹ One might presume that the bishops at Runnymede would have wanted the document that they witnessed to be distributed similarly. Their chanceries had the means to do so.

¹⁶ Nicholas Vincent, 'Master Elias of Dereham (d.1245): A Reassessment', *The Church and Learning in later Medieval Society: Essays in Honour of R.B. Dobson*, edd. Caroline M. Barron and Jenny Stratford (Harlaxton Medieval Studies 11; Donnington 2002) 128-159 at 141.

¹⁷ As Vincent as observed in the *Times Literary Supplement* February 20, 2015 there may be charters yet to be discovered whose circulation has left no trace in the records. He also points out that later charters were circulated systematically. My thanks to Richard Helmholz for this citation.

¹⁸ Antonio García y García, *Constitutiones Concilii quarti Lateranensis una cum Commentariis glossatorum* (MIC Series A 2; Città del Vaticano 1981) 21-31; seven were English.

¹⁹ E.g. Lisbon, BN 173 (Alcobaça CCCIV), fol. 1ra-9vb; García, *Constitutiones* 25-26.

Peter des Roches surrounded himself with Frenchmen in his episcopal household.²⁰ He had the bureaucracy in Winchester with the means to produce and send out these documents.²¹ Even more significantly, Winchester had the most talented scribes and professional scriptoria in England. The Winchester Bible that was produced in the second half of the twelfth century and the Cotton Psalter now in the British Library bear witness to a scriptorium of great sophistication even before Peter des Roches' arrival.²² Winchester also had a tradition of translating Latin texts into French. The Cotton Psalter is a remarkable example of the talent of translators in Winchester (presumably) before the translator of *Magna Carta*.²³ The Psalter's alternating columns of Latin and an excellent French translation is evidence of flourishing tradition.²⁴ A study of its French in comparison to the French *Magna Carta* might prove illuminating.²⁵

If the French translation of *Magna Carta* and the writ is a sole survivor of many that were sent out, then undoubtedly the Winchester chancery would have followed the practice of the papal chancery. Each individual charter would have been

²⁰ Vincent, *Peter des Roches* 32-41.

²¹ For translations in England of texts from the vernacular into Latin and Latin into the vernacular, see Bruce R. O'Brien, *Reversing Babel: Translation among the English during an Age of Conquests, c. 800 to c. 1200* (Newark 2011).

²² Claire Donovan, *The Winchester Bible* (Winchester 1993), based on the meticulous and brilliant sensitivity to style of Walter Oakeshott, *The Artists of the Winchester Bible* (London 1945) 3.

²³ London BL Cotton Nero C.IV. The entire manuscript can be viewed in great detail at:

http://www.bl.uk/manuscripts/Viewer.aspx?ref=cotton_ms_nero_c_iv_fs001r

²⁴ Some art historians are no longer certain that the psalter can be connected to Winchester; see Frances Carey, *The Apocalypse and the Shape of things to Come* (Toronto 1999) 70, with bibliography.

²⁵ Ursula Nilgen has examined the Winchester Psalter; see her 'Psalter für Gelehrte und Ungelehrte im hohen Mittelalter', *The Illuminated Psalter: Studies in the Content, Purpose and Placement of its Images*, ed. Frank Olaf Büttner (Turnhout 2004) 239-247 and 510-513, as well as her other works. She has summarized her studies in LMA 9 (2002) 227-228, with bibliography.

individually addressed.²⁶ In any case, the scribe misspelled Odiham in the last line of the writ, which was corrected in the Rouen manuscript. The scribal error of misspelling Odiham would be good evidence the writ was not drafted there. A home town scribe would not have made such an elementary mistake. A further consideration in thinking about the writs' origins might be that Odiham would have been an unlikely place to have found a highly skilled translator. The household of Peter des Roches in Winchester with its entourage of continental clerics would have had translators who were up to the task. The reader should be warned, however, that I may be pressing the evidence further than is warranted.

Holt recognized the translator's skill translating Latin into French, but the translation is far from 'mechanical'.²⁷ I would note that he had quite remarkable skill translating Latin legal terms into French.²⁸ The three chapters dealing with legal procedure are very adroitly rendered, even better in some small ways than the Latin version. Chapter 38 states:²⁹

<38> Nuls bailliz ne mette des ci en avant aucun a lei par sa simple parole, fors par bons tesmoinz amenez a ice (Nullus ballivus ponat decetero aliquem ad legem simplici loquela sua, sine testibus fidelibus ad hoc inductis). From this time forward no bailiff shall bring anyone to court on just his authority alone, unless good witnesses provide evidence.

Richard Helmholz has noted that the Latin text makes use of the language of the *Ius commune* with the word 'testis' rather than 'sectatores' that would be more fitting for English common law.³⁰ The Latin text employs an unusual adjective: 'testibus fidelibus'. No text of the *Ius commune* called for 'faithful', or

²⁶ Holt, 'French Vernacular Magna Carta' 348: 'all the evidence suggests that the translation was done to facilitate the publication of the Charter in Hampshire . . . the translation must have been made from the original letters'.

²⁷ Holt, 'French Vernacular Magna Carta' 350.

²⁸ We might also compare the translation to the other English translations of legal texts and a legal glossary, see O'Brien, *Reversing Babel* 125 and 164.

²⁹ My translations of chapters 38, 39, and 40 are taken from Holt, *Magna Carta* 327 (3rd ed.) 389.

³⁰ Richard H. Helmholz, 'Magna carta and the *ius commune*', *The University of Chicago Law Review* 66 (1999) 297-371 at 337.

the more usual meaning ‘Christian’, witnesses. At the Fourth Lateran Council that was held in November of 1215, canon eight dealt with exactly the same issue: who could convince a magistrate and give him the authority to summon a defendant to court without an accuser? The conciliar canon’s answer was that repeated information from prudent and honest persons (providus et honestus) would give magistrates jurisdiction.³¹ Writing shortly after 1215 Tancred of Bologna noted that if the witnesses who brought information to the attention of the magistrate were to be ‘good and eminent/important’ (bonus et gravis).³² ‘Boni testes’ or ‘idonei testes’ became the standard language used by the jurists to describe the qualities of witnesses in legal proceedings of all types.³³ In any case the translator understood that the Latin ‘fidelis’ was misleading and equivocal. It could mean a Christian or simply a faithful person. In either case it was not a legal term and did not define the proper credentials that a witness should have. He translated ‘fidelis’ as ‘bon’. The same term used by the *Ius commune*.

Undoubtedly the most famous chapter in the charter is 39. It is of great consequence historically because formidable structures of legal due process and constitutional government have been built upon its words over the centuries, whether such buildings had solidity or not.

<39> Nuls frans hom ne sera pris, ne emprisonnez, ne dessaisiz, ne ullagiez, ne eissilliez, ne destruis en aucune maniere, ne sor lui n'irons ne n'enveierons, fors par leal jugement de ses pers, o par la lei de la terre (Nullus liber homo capiatur vel imprisonetur aut disseisiatur aut utlagetur aut exuletur aut aliquot modo destruat, nec

³¹ Chapter 4 of Magna Carta has this language ‘duobus legalibus et discretis hominibus’, which the French translator rendered ‘a deus leals prodes homes’. ‘Prod’ means ‘prudent’. In this case ‘discretus’ conforms more closely to the language of the jurists in the *Ius commune* than ‘prod (prudens)’. ‘Prudens’ was most often used to describe a judge not a witness.

³² 153-154 ‘Verumtamen fama precedere debet inquisitionem, non semel, set sepe, et apud bonos et graves procedure debet; aliter non debet fieri inquisitio, sicut expresse habetur, extra de accusat. Qualiter et quando (X 5.1.3)’, collated with Paris, BNF lat. 4366B, fol. 29vb.

³³ E.g. Bernardus Parmensis, *Glossa ordinaria* to X 2.19.5 s.v. *testium*. Many more examples could be given.

super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terre).

No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we move nor send against him, except by the lawful judgment of his peers or by the law of the land.

It also has the most intriguing phrase of the whole document, 'legale iudicium', normally translated 'legal judgment', which is accurate and most likely correct. What makes the phrase intriguing is the question, what is not a legal 'iudicium?' A 'iudicium' was the Latin term, taken from Roman law and incorporated into canon law, for a trial or (more rarely) a courtroom. A 'legale iudicium' is a tautology; every 'iudicium' is 'legale'. Although a legal judgment makes sense in modern English, a non-legal 'iudicium' is a concept that does not exist in the *Ius commune*. A jurist of the *Ius commune* would have smiled indulgently at the formulation.

The phrase had roots in the continental 'iura propria'. As far as I can tell, for a short time during the Carolingian period the term 'legale iudicium' was used to describe certain legal decisions. One of the most famous was the 'legale iudicium' of Charles the Bald's bishops when they excommunicated Baldwin for carrying off Charles' daughter Judith and marrying her, willingly or not.³⁴ Our French translator rendered the phrase 'leal judgement'. 'Leal' normally meant 'loyal', but a number of texts repeat the French translator's 'leal judgement', meaning 'legal judgment'.³⁵ These texts, however, gives us no evidence

³⁴ Janet L. Nelson, *Charles the Bald* (Medieval World; London 1992) 203. See also Carpenter, *Magna Carta 250-253* on the European usage of judgment by peers; also Walter Ullmann, *Principles of Government and Politics in the Middle Ages* (London 1961) 162-163.

³⁵ I am thankful that Jennifer Jahner provided me with more information about the use of 'leal' in Anglo-Norman texts: 'Leal has a wide semantic range. Like continental French, it carries a primary meaning of 'loyal', but it also has closely affiliated secondary meanings of 'true', 'law-abiding', and 'legal'. In the romance traditions (cf. Chrétien de Troyes, *Boeve de Hamptoun*, *Tristan*), it denotes a knight of exemplary trustworthiness, and this sense seems to carry over to (or borrow from) the judicial realm, where a 'leal hume' is an oath-helper or a faithful witness. The most salient example comes from the *Leis*

what a 'legal judgment' was. If we turn to literature, we do find the term used in poems composed about Aymeri of Narbonne,³⁶ William Marshal,³⁷ and the old trickster Reynard the Fox.³⁸ These poems were all written in the twelfth or early thirteenth centuries. Although the texts attest that the French translator was not mechanically translating 'legale iudicium', they do not shed light on what a 'legale iudicium' or 'leal jugement' might have been at the time of *Magna Carta*. It does show that the translator knew that the drafters of *Magna Carta* translated 'leal jugement' into Latin. In other words, the terminology is taken from secular trial practices and modes of proof.

What modes of proof did the barons demand the right to have?³⁹ A trial by their peers. But what were they rejecting?

Willelme (early to mid-twelfth century), caps. 14-16 (see Felix Liebermann, *Die Gesetze der Angelsachsen*, 1: *Text und Übersetzung* (Halle an der Saale 1903) 502-503). In c.15.1, the writer refers to 'leals humes' as oath-helpers or witnesses during ordeals. The translator of the Latin version, the *Leges Willelmi*, renders this phrase 'legales homines'. It seems that this notion of 'leal' can slide relatively easily from describing the man capable of rendering testimony to the act of peer judgment'. See the entries in the online Anglo-Norman Dictionary at <http://www.anglo-norman.net/>.

³⁶ Lines 2584-2586: 'S'or n'en fet Charles le los de ses amis Et le leal jugement de Paris, Ja des vasaux n'en estordra uns vis', *Les Narbonnais: Chanson de geste*, ed. Hermann Suchier, *Les Narbonnais: Chanson de Geste* (2 vols. Paris 1898) 1.97.

³⁷ Lines 13084-13087: 'Quer unques ne fui desleials, Quer cil malveusement s'escuse Qui leal jugement refuse. Isi avint la Mar'. *L'histoire de Guillaume le maréchal, comte de Striguil et de Pembroke*, ed. Paul Meyer (2 vols. Paris 1894) 2.107. The translation of these lines 'For I was never false; the man who refuses a fair trial puts up a poor defence of his case', is not satisfactory, e.g. *History of William Marshall: Text and Translation*, trans. A.J. Holden (3 vols; Occasional Publications 4 and 5; London 2002-2006) 2.155.

³⁸ Lines 1233-1238: 'Sire, fet Renart, entendez. Jugement de moi entendez. Au jugement me contendrai Et vostre merci atandrai. Onques ne fu nul homme ne Sanz leal jugement mene', *Le roman des Renart: Les branches additionnés*, ed. Ernest Martin, (Vol. 2; Strasbourg: K.J. Trübner, 1885) 230.

³⁹ I do not find H. Summerson's analysis of the modes of proof in c.39 convincing: H. Summerson, 'The 1215 *Magna Carta*: Clause 39, Academic commentary', *The Magna Carta Project*:

[http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_39?com=a

The answer to that question might come from a rather surprising source: the *ius proprium* of the privileges of the twelfth-century emperors. These imperial privileges offer evidence that the issues that brought the barons and King John to Runnymede had resonated widely in Europe during the twelfth century. A standard, boiler plate clause was inserted into imperial privileges that granted the recipients the right to vindicate their rights either by an ordeal or by a ‘legale iudicium’. Emperor Conrad II (1027-1039) granted Bishop Hiltulfus and his successors imperial protection of ecclesiastical property in 1037:⁴⁰

We grant to Bishop Hiltulfus that advocates which he would have selected . . . that no public magistrate may presume to demand anything from them, so that they may more diligently pursue the legal problems of the church either through the ordeal or through ‘legale iudicium’.

Privileges from emperors Henry III, Henry IV, and Frederick I Barbarossa repeated the same clauses word for word in their privileges.⁴¹ This clause was repeated in imperial privileges for over a century. Could the meaning and the terminology of ‘legale iudicium’ have crossed the Channel? I do not think it impossible, even if I cannot give a source. However, the

ca accessed 15 August 2015]: ‘But the presentation of judgment and law as alternatives, which to present-day eyes appears to be making a distinction between verdict and sentence, is arguably more apparent than real. The text is in fact speaking of judgment rather than proof, but the two formed inseparable parts of a single process, and Clause 39 must have been concerned with both’.

⁴⁰ *Conradi II. Diplomata* (MGH, DD 4; Hannover 1909; reprinted Munich: 1980) p. 322, line 7-11: ‘Concedimus autem eidem Hiltulfo episcopo advocatos quoscumque elegerit tam de suis quam de alienis liberis hominibus, qui eiusdem rerum utilitates episcopi exerceant, ita ut ab omni rei publicae functione sint absoluti, nil ab eis quisquam publicus minister exigere presumat, ut securius ac diligentius causas ipsius ecclesiae perficere possint sive per pugnam sive per legale iudicium;’ noted by Ullmann, *Principles* 162-163. Herwig Wolfram, *Konrad II, 990-1039: Kaiser drei Reiche* (Munich 2000; English translation, University Park 2010) 129.

⁴¹ *Die Urkunden Heinrichs III. 1039-1047*, H. Bresslau (MGH, Die Urkunden der deutschen Könige und Kaiser 5.1; Berlin 1926) 167 lines 10-14; *Diplomata Heinrici IV*, ed. D. von Gladiss (MGH, DD 6.2; Weimar 1959) 566 line 20-24; *Die Urkunden Friderici I. 1158-1167*, ed. Heinrich Appelt (MGH, DD 10.2; Hannover 1979) 127 line 46-128 lines 1-3.

terminology is widespread and did cross the channel, as we have seen, in literary texts. What did the listeners understand by 'leal jugement' when they heard the story of Reynard the Fox? I would argue that the phrase did not conjure up an image of the ordeal.

There can be no question a 'legale iudicium' was considered an alternative to the ordeal in the imperial privileges. What mode of proof might a 'legale iudicium' be? Henry III's privilege stated that any case impinging upon the rights of the privilege could be settled only in his palace but gave no details about the procedure that should be used.⁴² One clue might be in a privilege of 997 in which Emperor Otto III had stipulated that an ordeal could not be used to settle a dispute about the rights of an abbey but rather could be decided by oaths of 'two or three men'.⁴³

Can we conclude that in chapter 39 the English barons petitioned King John to be judged by a mode of proof that was not an ordeal? If they did, does chapter 39 preclude the ordeal? The final clause 'o par la lei de la terre (vel per legem terre)' does not permit a definitive answer.⁴⁴ The 'lex terrae' could mean the ordeal. Holt points out the French translator interpreted 'vel' as 'or' not 'and', a grammatical dispute of long-standing

⁴² *Die Urkunden Heinrichs III.* 167: 'Statuimus ut ante cuiuslibet potestatem nullatenus finiatur nisi in palacio nostro', preceded the boiler plate quoted in n. 25 above.

⁴³ *Die Urkunden Otto des III.* ed. Theodor Sickel (MGH, DD 2; Hannover: Hahnsche Buchhandlung, 1893) 655 lines 15-20e: 'Si autem quod sepiissime contingere non dubium est evenerit, ut ex rebus abbacie contentio incrementa ceperit super quibus vero cartarum auctoritas igne aut aliqua negligentie occasione consumpta in presentiarum ostendi nequiverit, convessive largimur ut licitum sit predicte abbacie nostra auctoritate ut non duello aut aliquo defensionis iudicio sed solummodo duorum vel trium hominum iuramento finiatur'. cf. Hermann Nottarp, *Gottesurteilstudien* (Bamberger Abhandlungen und Forschungen 2; Munich, Im Kösel Verlag, 1956) 140; See Dominique Barthélemy, 'Les ordalies de l'an mil', *La justice en l'an mil* (Collection Histoire de la Justice 15; Paris: Association Française pour l'Histoire de la Justice, 2003) 81-92.

⁴⁴ Helmholz, 'Magna Carta' 356-357.

among scholars.⁴⁵ The translator's choice is weighty if not conclusive evidence to the syntax of 'vel'. The meaning of 'lex terrae' will probably never be adequately explained, especially in the context of chapter 39, where the phrase might have meant the ordeal was an alternative mode of proof. In any case I do not think 'lex terrae' could mean judgment.⁴⁶

The most intriguing evidence is at the end of the charter in chapters 52 and 57, where the formula 'senz leal jugement de ses pers (sine legali iudicio parium suorum)' is stipulated for disputes over property and rights but an alternative of 'per legem terre' is not given. Holt assumes that the French translator made a mistake in chapter 52 when he wrote 'real jugement' instead of 'leal jugement'.⁴⁷ Holt made no comment about the variant. It is a simple mistake if we assume the translator worked mechanically. As we have seen, he did not. That the translator meant to write royal judgment is certainly not out of the question and has implications for our questions about procedure. Perhaps we should think about 'real jugement' a bit more. Royal judgment would certainly not be an ordeal. In the end, however, we are left with uncertainty whether the barons had misgivings about the ordeal as a mode of proof. If they did, the issue was joined a few months after Runnymede. In November 1215 the Fourth Lateran Council under Pope Innocent III definitively forbade clerics from participating in the ordeal in canon 18, *Sententiam sanguinis*. Chapter 39 applied to John's kingdom; Lateran canon 18 to every person in Christendom.

Richard Helmholz has written that chapter 40 is also 'very hard to understand'.⁴⁸ He points out that if the text is taken literally it does not make sense in the context of English law. In England and elsewhere taking a case to court was expensive. He argues that if one places the ideas of chapter 40 in the context of

⁴⁵ Holt, 'French Vernacular Magna Carta' 350. For the controversies surrounding chapter 39, see Holt, *Magna Carta* 226-228 (3rd ed. 2015) 276-278.

⁴⁶ See Summerson, n.20 above. Cf. Baldwin, 'Master Stephen Langton' 833.

⁴⁷ Holt, 'French Vernacular Magna Carta' 361.

⁴⁸ Helmholz, 'Magna Carta' 340-342.

the *Ius commune*, the chapter is in concord with the jurisprudence of the time. There are English legal historians who have criticized Helmholz' conclusions about the *Ius commune* and *Magna Carta*, but I think they have not understood his primary point.⁴⁹ Helmholz has not argued that some of the provisions of *Magna Carta* were taken directly from the *Ius commune* nor that they might not have been buttressed by the legal thought and norms of prior English law. Rather, he argued that ideas and concepts of various chapters were very much part of European jurisprudence, that is the *Ius commune*, at the time the charter was drafted. In only a few cases, as has been noted many times, did the drafters of *Magna Carta* incorporate the vocabulary of the *Ius commune* into the charter. No one disputes the fact that the charter incorporated canon law, and its language (e.g. 'libertas ecclesiae') which was a key part of the *Ius commune*. Consequently, we must not assume that the learned men who helped the barons draft *Magna Carta* left their learning aside as the charter was composed. The language that the drafters used is a clue to their sources but so are their ideas and concepts. That is the point Helmholz wished to make.⁵⁰

Chapter 40 of *Magna Carta* reads:

<40> A nulli ne vendrons, a nullui n'escondirons, ne ne porloignerons dreit ne justice (Nulli vendemus, nulli negabimus aut differemus rectum aut iusticiam). To no one will we sell, to no one will we deny or delay right or justice.

⁴⁹ John Hudson, 'Magna Carta, the *Ius commune*, and English Common Law', *Magna Carta and the England of King John*, ed. Janet S. Loengard (Woodbridge 2010) 97-119. For an even more forceful argument, which I will touch upon below, see Thomas J. McSweeney, 'Magna Carta, Civil Law, and Canon Law', *Magna Carta and the Rule of Law*, edd. Daniel B. Magraw, A. Martinez, and R. Brownell (Chicago 2014) 281-309. David Carpenter has been open to see the influence of the *Ius commune*, e.g. David Carpenter, *Magna Carta, with a new Commentary* (London 2015) 262.

⁵⁰ Richard Helmholz made that point in an email to me: '<it was a> common the habit was among English lawyers of using a different word for what was clearly a borrowing from the *ius commune*. It is something of a leit-motif in English legal history. E.g., novel disseisin for the possessory interdicts, slander for defamation'.

As Helmholz could not, I cannot solve the larger problems connected with the difficulty of understanding chapter 40. I shall concentrate on one word, 'rectum' that the French translator rendered as 'dreit'. If one had asked any translator to render 'dreit' back into Latin in another text, he would have undoubtedly have written 'ius'. No jurist of the *Ius commune* would have used 'rectum' in the way it is used in *Magna Carta*. They used the word to describe what was proper or correct, i.e. 'rectus ordo', 'rectum ius', 'rectum iudicium', or as an adverb meaning 'properly' or 'correctly'. As we have seen in chapter 38 with the word 'fidelis', the French translator knew that the correct word should be 'ius', which would be 'dreit' in French. 'Ius' and 'iustitia' were found together in ancient and medieval Roman law and in the *Ius commune* until the end of its sway. It would hardly be an exaggeration to say that the terms were inseparable in the thought of medieval jurists. The first title of book one in both Justinian's *Institutes* and his *Digest* begin 'De iustitia et iure'.⁵¹ Every person who had ever had the slightest brush with the *Ius commune* knew the famous maxim in the *Digest*, 'Justice is the constant and unbending will to render everyone his right (Iustitia est constans et perpetua voluntas ius suum cuique tribuendi', Dig. 1.2.10)'. The French translator knew it too.

To be clear, I am not arguing that the French translator took the language of 'ius et iustitia' directly from Justinian's *Digest*. Helmholz makes the point that if we look at *Magna Carta* from a European perspective we find that the same issues appear in continental law, both in the local legal systems — the 'iura propria' in the language of the jurists — and in the *Ius commune*. The influences and the borrowings may be direct or indirect — it is often difficult to determine in the age before Bracton — but they are there. A few years ago I tried to make the same point with *Magna Carta*'s chapter 9.⁵² This is how the French translator handled the rather complicated text:

⁵¹ Instit. 1.1 and Dig. 1.1; cf. Dig. 47.9.10.

⁵² Pennington, 'The *Ius commune*, Suretyship, and Magna carta', RIDC 11 (2000) 255-274.

<9> Ne nos ne nostre bailli ne seiseron terre ne rente del dettor por aucune dette, tandis com sis chatels soffisent a paier la dette, ne si plege ne seront destroit, tant dis come le chevetaigne dettor soffira a la dette paier. Et se le chevetaigne detor n'a de quei paier sa dette, respoigne li plege de la dette; e s'il volent, aient les terres e les rentes del dettor jusqu'il aient restowment de la dette qu'il ont devant paiee por lui, se le chevetaigne detor ne monstre qu'il en est quite vers cels pleges (Nec nos nec ballivi nostri seisiemus terram aliquam nec redditum pro debito aliquo, quamdiu catalla debitoris sufficiunt ad debitum reddendum; nec plegii ipsius debitoris distringantur quamdiu ipse capitalis debitor sufficit ad solucionem debiti; et si capitalis debitor defecerit in solucione debiti, non habens unde solvat, plegii respondeant de debito; et, si voluerint, habeant terras et redditus debitoris, donec sit eis satisfactum de debito quod ante pro eo solverint, nisi capitalis debitor monstraverit se esse quietum inde versus eosdem plegios). Neither we nor our bailiffs shall seize any land or rent for any debt, so long as the chattels of the debtor are sufficient to repay the debt; nor shall the sureties of the debtor be distained so long as the principal debtor is able to satisfy the debt; and if the principal debtor shall fail to pay the debt, having nothing with which to pay it, then the sureties shall answer for the debt; and let them have the lands and rents of the debtor, if they desire them, until they are indemnified for the debt which they have paid for him, unless the principal debtor can show that he is discharged of it as against the said sureties.

'Debitor' reflects the language of the *Ius commune*. Linguistically, it is a puzzle why the drafters used 'plegius' and not the technical term 'fideiussor'. Maybe the puzzle is not that difficult to solve. English legal documents before 1215 always used the term 'plegius' rather than 'fideiussor'. David Trotter has recently given us illustrated examples of the practice.⁵³ *Magna Carta* was written for the English not for Europe. The French translator did give us one very interesting piece of evidence in chapter 40. The text of *Magna Carta* specifies that the debtor was the 'capitalis debitor'. This wording is intriguing. In the *Ius commune* the adjective 'capitalis' was used in criminal law to describe a deadly or hostile enemy or very serious

⁵³ David Trotter, 'Stuffed Latin': Vernacular Evidence in Latin Documents', *Language and Culture in Medieval Britain: The French of England, c.1100-1500*, ed. Jocelyn Wogan-Browne, Maryanne Kowaleski et al. (York 2013) 153-163 at 158-159

crimes.⁵⁴ It never meant ‘principal’, as it was used in *Magna Carta*. When confronted with ‘capitalis debitor’ in *Magna Carta* chapter 40, the French translator made a revealing change that may again indicate that he knew the jurisprudence of the *Ius commune* better than the drafters of the Latin charter. He understood that he could not use a French version of ‘capitalis’ if he were to accurately convey the meaning of the phrase. Therefore he translated ‘capitalis debitor’ as ‘chevetaigne det(t)or’. ‘Chevetaigne’ meant ‘chief’, ‘lord’, or ‘principal in medieval French’.⁵⁵ In the thirteenth century, ‘Bracton’ employed ‘capitalis’ both ways. He used the term most frequently to describe a principal feudal lord, court, residence, or justiciar and less often to define a serious crime, ‘felonia’ and ‘crimen’.⁵⁶

Helmholz made two points about this chapter. First, this chapter was not included in the reissue of *Magna Carta* in 1225. We have no way to know if it was enforced between 1215 and 1225. Second, ancient Roman law permitted creditors to hold sureties responsible if the principal debtor became insolvent. A Novella of Justinian changed the norm to that adopted by *Magna Carta*. The debtor must be insolvent before the sureties could be sued for the principal’s debt.⁵⁷

Helmholz noted that the language of chapter nine showed no trace of Justinian’s Novella. The argument that he, quoting McKechnie, put forward was, since there was no precedent in English law for the rule, protecting sureties ‘found favour in

⁵⁴ ‘Capitalis’ was attached to ‘inimicitia’, ‘crimen’, ‘iudicium’, ‘causa’, ‘fraus’, and ‘delictum;’ cf. Justinian’s *Institutes* 1.25.11, 2.20.31, 3.3.11, and 4.18.2.

⁵⁵ For the use of the word in medieval French, see Paul-Friedrich Bernitt, *Lat. caput und *capum nebst inren Wortsippen im Französischen: Ein Beitrag zur französischen bzw. romanischen Wortgeschichte* (Kiel 1905) 27-31, 37, 41-42, 161-164.

⁵⁶ Bracton attached ‘capitalis’ meaning principal several hundred times to ‘dominus’, and also to ‘mesuagium (residence)’, ‘felonia’, ‘crimen’, ‘placitum’, ‘manerium’, ‘iustitarius’, and ‘curia’.

⁵⁷ Novella 4.3.1; Helmholz, ‘*Magna Carta*’ 319.

most systems of jurisprudence'.⁵⁸ I extended Helmholz' analysis and demonstrated that this equitable solution to the relationship between a principal debtor and his sureties became generally accepted in the *Ius commune* and in the various European 'iura propria'.⁵⁹

Thomas McSweeney has recently taken up the problems of chapter nine.⁶⁰ He offered this translation of the main text of Justinian's Novella:⁶¹

If anyone shall have loaned money and accepted a *fideiussor*, a *mandator*, or a *sponsor*, he should not first proceed against the *mandator* or *fideiussor*, or *sponsor*, and he should not molest the intercessors of the debtor as a negligent person, but he should come first to him who took the money and contracted the debt.

The translation has a flaw. 'He should not molest the intercessors of the debtor as a negligent person' does not make sense in English and betrays the Latin. It should be 'and the fault of the debtor may not be injurious to the sureties'. 'Intercessor' is a general word in Roman law that encompasses the various types of sureties. Sweeney assumes that Helmholz thinks the drafters of *Magna Carta* would have taken their ideas directly from Justinian's Novella. That assumption is extremely unlikely. First, Helmholz did not assert that. He said only that the rule in Justinian's Novella became a norm in the *Ius commune*. Second, the text of the Novella circulated in medieval guise as a part of the *Authenticum*, but the *Authenticum* did not circulate widely. It is very unlikely that the drafters of *Magna Carta* would have access to a copy of the *Authenticum*.⁶² If he had written about the possibility of transmission, which he did not, Helmholz

⁵⁸ Ibid.

⁵⁹ Pennington, 'The *Ius commune*, Suretyship, and *Magna carta*', RIDC 11 (2000) 255-274.

⁶⁰ McSweeney, 'Magna Carta' 287-291.

⁶¹ Ibid. 288: Nov. 4.1.1 'Si quis igitur crediderit et fideiussorem aut mandatorem aut sponsorem acceperit, is non primum mox adversus mandatorem aut fideiussorem aut sponsorem accedat, neque neglegens debitoris intercessoribus molestus sit, sed veniat primum ad eum, qui aurum accepit debitumque contraxit'.

⁶² See Hermann Lange, *Römisches Recht im Mittelalter*, 1: *Die Glossatoren* (München 1997) 82-85.

would have argued that the drafters of *Magna Carta* took the norm from the summaries of Novellae that were found in the margins of twelfth-century manuscripts of Justinian's *Codex*. These texts were attributed to Irnerius but were added to the *Codex* by many other jurists during the twelfth and thirteenth centuries. They were called 'constitutiones novae' or 'authenticae' by the medieval jurists.⁶³ Their purpose was to update the texts in the *Codex*. If we want to speculate about how the norm contained in the Novella entered *Magna Carta*, we have to examine the margins of the numerous *Codex* manuscripts that circulated widely in England that was attached to the short and cryptic constitution of the Emperor Antoninus of 213 A.D.:⁶⁴

Iure nostro est potestas creditori relicto reo eligendi fideiussores, nisi inter contrahentes aliud placitum doceatur. By our authority the power is given to the creditor of choosing sureties if he has been abandoned by the debtor, unless the contract among the parties stipulates otherwise.

This was the norm in ancient Roman law. The medieval teachers of Roman law, possibly Irnerius, summarized Justinian's legislation and placed this text next to Antoninus' constitution.⁶⁵

Presente tamen utroque non permittitur intercessorem convenire priusquam reus inventus est minus idoneus in totum sive in partem. Absente autem reo presens intercessor iure quidem convenitur; ipso tamen desiderante iudex definiet tempus intra quod deducat reum primo conveniendum, ipso in subsidium reservando. Nam transacto tempore compellitur intercessor satisfacere, cessis sibi a creditore actionibus, absque distinctione contractus sive intercessionis. If both the debtor and the sureties are present the creditor may not summon the sureties before the debtor is found to be less worthy (i.e. failed in his fiduciary responsibilities) totally or partially. If, however, the debtor is absent, a surety who is present can, indeed, be convened. Nevertheless, if the surety asks, the judge will set a time within which the debtor may be convened first, with duty of the surety being held in reserve. If that time period has passed, the surety is compelled to satisfy the debt without reference to contract or to a

⁶³ Pennington, 'The Beginning of Roman Law Jurisprudence and Teaching in the Twelfth Century: The *Authenticae*', RIDC 22 (2012) 35-53.

⁶⁴ Cod. 8.40(41).5.

⁶⁵ Stuttgart, Landesbibliothek 71, fol. 162rb, Vienna, ÖNB lat. 2267, fol. 187r, and Paris, BNF lat. 1691, fol. 185r; every twelfth-century *Codex* I have seen has this *authentica* in the margin.

veto, the creditors' court actions having been exhausted against the debtor.

This is the text that the drafters of Magna Carta would have had in mind if they were borrowing directly from Roman law. If one compares the *authentica Presente* to chapter nine, it is clear that the contents of the texts in the two documents are much more closely related to each other than the original text of the Novella in the *Authenticum*.

<i>Authentica Presente</i>	<i>Magna Carta c. 9</i>
<p>If both the debtor and the sureties are present the creditor may not summon the sureties before the debtor is found to be less worthy (i.e. failed in his fiduciary responsibilities) totally or partially. If, however, the debtor is absent, a surety who is present can, indeed, be convened. Nevertheless, if the surety asks, the judge may set a time within which the debtor may be convened first, with the surety being held in reserve. If that time period has passed, the surety is compelled to satisfy the debt without reference to contract or to a veto, the creditors' court actions having been exhausted against the debtor.</p>	<p>Neither we nor our bailiffs shall seize any land or rent for any debt, so long as the chattels of the debtor are sufficient to repay the debt; nor shall the sureties of the debtor be distained so long as the principal debtor is able to satisfy the debt; and if the principal debtor shall fail to pay the debt, having nothing with which to pay it, then the sureties shall answer for the debt; and let them have the lands and rents of the debtor, if they desire them, until they are indemnified for the debt which they have paid for him, unless the principal debtor can show that he is discharged of it as against the said sureties.</p>

I am not arguing that we can be certain the *authentica Presente* was a source for the drafters of chapter nine. I would argue that we cannot preclude the possibility.⁶⁶ However, one may justi-

⁶⁶ McSweeney, 'Magna Carta' 288-291, when comparing chapter 9 to Justinian's legislation asserts 'The format is markedly different'. His points about the differences cannot be sustained when comparing chapter 9 to *Presente*. It is particularly difficult to understand the point of his comparison of chapter 9 with Bracton and his concluding remark on p. 191 that

fiably wonder whether any of the drafters looked at an intimidating copy of a glossed manuscript of Justinian's *Codex*. There were other avenues to the text, because *Presente* circulated in England and Northern France through other sources. The most probable was through Vacarius' *Liber pauperum*, in which *Presente* was added to the margin of the Worcester Cathedral Library manuscript.⁶⁷ These summaries and adaptations of Justinian's legislation were major sources of law during the twelfth century, and their inclusion in *Liber pauperum* underlines their significance. 155 other 'authenticae' were also included in the manuscripts of the *Liber pauperum*.⁶⁸ They even circulated separately from the *Codex*. Perhaps a revealing connection of Rouen to the *Ius commune* in Norman circles is the collection of 'authenticae' that included *Presente* in a Parisian manuscript.⁶⁹ These texts were considered important guides to the twelfth-century norms on many different points of private law. Franck Roumy has conjectured that the collection of 'authenticae' was put together for Normandy by the entourage of the learned Norman archbishop of Rouen, and former bishop of Lincoln, Gautier de Coutances between 1185 and 1207, who had been acting English justiciar until 1193 when Hubert Walter was

<Bracton's text> demonstrates what Magna Carta could have looked like had it been written by the '*ius commune*'s true believers'. More on that point at the end of this essay.

⁶⁷ *The Liber Pauperum of Vacarius*, ed. Francis de Zulueta (Selden Society 44; London 1927) 271. David Carpenter assumes that Vacarius was used and read in England, see Carpenter, *Magna Carta* 267. He also assumes that 'The tendency of legal teaching in England . . . was to play down the absolutist elements in Roman law'. Although scholars still assert otherwise, the jurists of the *Ius commune* did not embrace the absolutism of texts in Roman law that would have supported it, e.g. the classic study of Brian Tierney, 'The Prince is Not Bound by the Law: Accursius and the Origins of the Modern State', *Comparative Studies in Society and History* 5 (1963) 378-400 and my *The Prince and the Law 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley-Los Angeles: University of California Press, 1993) 30-37 and passim.

⁶⁸ Ibid. lvii-lxvii. On Vacarius and his importance in England, see Jason Taliadoros, *Law and Theology in Twelfth-Century England: The Works of Master Vacarius: (1115/20-c.1200)* (Disputatio, 10. Turnhout 2006).

⁶⁹ Paris, BNF lat. 3922A, fol.209rb-fol. 210ra.

appointed justiciar.⁷⁰ This collection is one more avenue down which *Presente* could have come to the attention of those who drafted *Magna Carta*.

Comparing the French translator's work to the texts of the chapters where the drafters of *Magna Carta* used the language of the *Ius commune* yields interesting and, as we have seen, contradictory results. In chapter one, at the very beginning of the charter, the English church was granted 'her full rights and her unimpaired (or uninjured) liberties (iura sua integra et libertates suas illesas)'. These rights included 'freedom of election (libertas electionum)'. At the end of the chapter John promised that 'he granted to all free men of our kingdom, on behalf of us and our heirs, in perpetuity, all the liberties below (Concessimus etiam omnibus liberis hominibus regni nostri, pro nobis et heredibus nostris in perpetuum, omnes libertates subscriptas)'. The French translator did not have a Latin cognate in French to translate 'libertas'. 'Liberté' entered French only in the fourteenth century; it entered English about the same time.⁷¹ The proof of that generalization is the work of a gifted linguist who translated Gratian's *Decretum* into French at the end of the twelfth century. Gratian had included many texts including the word 'libertas'. The French translator of Gratian confronted the same problems as the translator of *Magna Carta*, but he never used 'liberté' or any of its cognates. In legal Latin, 'libertas' meant a right but also meant freedom. Although 'libertas' could mean 'ius' in certain contexts in the *Ius commune*, there was a significant difference between 'ius' and 'libertas' in their usual usage. A 'ius' was a right to act justly and legally, while a 'libertas' was freedom that was granted by a privilege, claim, or

⁷⁰ For other collections of 'authenticae' that circulated independently, see Franck Roumy, 'Une collection inédite d'*authenticae* compose en Normandie à fin du XII^e siècle', *Novellae constitutiones: L'ultima legislazione di Giustiniano tra Oriente e Occidente, da Triboniano a Savigny: Atti del Convegno Internazionale, Teramo, 30-31 ottobre 2009*, edd. Luca Loschiavo, Giovanna Mancini, Cristina Vano (Università degli Studi di Teramo, Collana della Facoltà di Giurisprudenza 20; Napoli 2011) 155-204, Gautier and *Presente* at 182 and 194.

⁷¹ Chaucer, *Canterbury Tales*, Manciple's Tale, line 174.

custom. Gratian had texts in which one had to distinguish between a right and freedom.⁷² Two of Gratian's most famous texts in which freedom would be the correct translation were Isidore of Seville's 'omnium una libertas' and the other was a text of Pope Urban II that quoted 2 Corinthians 3:17, 'ubi Spiritus Dei, ibi libertas'. The Gratian translator translated the first 'et que tuit soient franc', and the second 'ou il Esperiz Damedieu est, ilec est franchise'.⁷³ However, when Gratian concluded 'His omnibus auctoritatibus laici excluduntur ab electione sacerdotum, atque iniungitur eis necessitas obediendi, non libertas imperandi' the translator rendered the last clause 'et non pas franchise de commander'.⁷⁴ The translation does convey the correct meaning, but without the nuance that 'liberté' would have provided him.

The translator of Magna Carta had to deal with 'libertas' twelve times. For the rights of the English churches in chapter one he wrote: 'seront franchises, e ainet lor dreitures franchises e enterines e plenieres (they shall be free and have their free rights, entire and full)'. He translated 'ius' as 'dreit', as he had in c.40. However, instead of acknowledging John's promise to leave the liberties, that is rights, of the English church uninjured, the translator opted to write only that the rights would remain entire and full. His formulation for free ecclesiastical elections was a challenge. For 'libertas electionum' the translator settled for 'les franchises des ellections'. The reading does not convey exactly the same meaning. 'Franchise' would be a grant of a right or the freedom to elect, but 'libertas' would be the church's right to

⁷² See Charles Reid, Jr. *Power over the Body, Equality in the Family: Rights and Domestic Relations in Medieval Canon Law* (Emory University Studies in Law and Religion; Grand Rapids, Michigan-Cambridge 2004) 18-20 but especially his 'The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry', *Boston College Law Review* 33 (1991) 37-92 at 64-67.

⁷³ *Gratiani Decretum: La traduction en ancien français du Décret de Gratien*, Vol. 1: *Distinctiones*. Vol. 2: *Causae 1-14*. Vol. 3: *Causae 15-29*. Vol. 4: *Causae 30-36 et De consecratione*, ed. Leena Löfstedt (Commentationes Humanarum Litterarum, 95, 99, 105, 110; Helsinki 1992-1996) 1.5 and 3.78, Gratian, D.1 c.7 and C.19 q.2 c.2.

⁷⁴ *Ibid.* 1.143.

hold an election. The difference is significant. Finally, at the end of the chapter when John granted all freemen all their liberties (omnes libertates) in the charter, the translator rendered the phrase ‘totes les franchises’. As with ‘libertas electionum’ an explanation might be, that I put forward tentatively, a ‘franchise’ was a grant of a right, where a ‘libertas’ could be possessed independently by the person or institution. ‘Libertas ecclesiae’ had been a fundamental concept of ecclesiastical legal and theological thought since the pontificate of Pope Gregory VII.⁷⁵ Neither Gregory nor his successors thought ‘libertas ecclesiae’ was a franchise from a human ruler. It was a right, ‘libertas’ as a ‘ius’. A royalist translator who was concerned to protect royal prerogatives might very well have considered ‘franchise’ to be better suited for a translation of ‘libertas’, particularly if he were aware of the equivocal meaning of ‘libertas’ in the *Ius commune*. In any case the translator was consistent. ‘Libertas’ occurs twelve times in *Magna Carta*. The translator used ‘franchise’ to translate ‘libertas’ each time.⁷⁶ However, the translator’s linguistic choices were limited, and I do not think that we cannot draw any definitive conclusions from his choices. Ironically for the concord of liberties in the Anglo-Norman French Kingdom of England, ‘liberté’ did not yet exist in French.

Back to Rouen. *Magna Carta* and the IV Lateran canons occupy adjoining but separate quires at the end of the Rouen manuscript.⁷⁷ The first question that confronts us is: why did these Anglo-Norman monks put these two documents together?⁷⁸

⁷⁵ The literature is enormous treating ‘libertas ecclesiae’, the essays collected in the series *Studi Gregoriani per la storia della ‘Libertas ecclesiae’* (3 vols. Rome 1970-1989) are the best introduction to the subject.

⁷⁶ Chapters 1, 13, 52, 56, 59, 60, 61, 63.

⁷⁷ Rouen, BM lat. Y 200; see Mesmin (later MacDougall), *The Leper Hospital of Saint Gilles*, IV, Description of manuscript 1.162-165, IV Lateran 2.342, *Magna Carta*: 2.359

⁷⁸ I have not been able to find a connection between St. Gilles and any English institutions; cf Nicholas Vincent, ‘The English Monasteries and their French Possessions’, *Cathedrals, Communities and Conflict in the Anglo-Norman World*, ed. Paul Dalton, Charles Insley and Louis J. Wilkinson (Studies in the History of Medieval Religion 38; Woodbridge: Boydell, 2011) 221-240.

The monks would have obviously wanted to have copies of the conciliar canons as soon as they were promulgated. *Magna Carta* began with a sturdy defense of the rights and freedoms of the English church. That would have pleased them. Paleographically, the two texts share interesting characteristics that shed some light on their origins. Both texts were written in professional scriptoria and were meant to be more than fair copies whose use would be temporary. The proof of that statement is that in both texts the initial letter of each canon/chapter was left blank, with space for an appropriate colored initial. In both cases none were provided. The reason was probably simple. The leper hospital did not have a scriptorium. However, both copies must have come from an institution with a sophisticated scriptorium. The IV Lateran canons were formatted as a typical legal text with two columns.⁷⁹ The text of the IV Lateran canons is in a Northern French book hand, while *Magna Carta* is written by a typical chancery hand of the early thirteenth century. A striking characteristic of the *Magna Carta*'s vernacular scribe is that he employed very few abbreviations. Minimizing the number of abbreviations would have made the document easier to read for its intended audience.⁸⁰ It would also support the assumption that many copies of the French *Magna Carta* were sent to all the recipients of the Latin text. We have only the Rouen text, but I think it is improbable that a text of its quality, both the French and the written text, would have been unique. If it were not unique, it must have been duplicated many times. Only the number of surviving copies is unique: Rouen.

⁷⁹ The Rouen manuscript omitted two canons from its text, c.56 that dealt with tithes and c.71 in which Innocent called for a new crusade. C.71 is omitted in another manuscript and shortened in 4 others. Canons are out of place in 9 other manuscripts. It is difficult to draw any conclusions about c.56 and c.71 having been omitted.

⁸⁰ Albert Derolez, *The Palaeography of Gothic Manuscript Books: From the Twelfth to the Early Sixteenth Century* (Cambridge Studies in Palaeography and Codicology; Cambridge 2003) 187, observes 'it is not surprising that vernacular manuscripts contain only a small quantity of abbreviations'.

Magna Carta and the IV Lateran canons shared a spirit of reform. Pope Innocent III sent a papal bull, *Vineam domini Sabaoth*, to every prelate in Christendom on April 19, 1213 in which he summoned them to attend a ‘general’ council in Rome during November of 2015.⁸¹ In his letter the pope had emphasized that reforms must be made in the Church and that a new crusade to the Holy Land must be launched. If we take the program in *Vineam domini Sabaoth* as a guide to Innocent’s agenda, what he wanted in 1213 was reform of the Church, combating vices and reforming mores, stamping out of heresy — settling discord and establishing peace and fostering liberty.⁸²

Magna Carta’s drafters were concerned with procedure in chapters 38-40 and so were the jurists who surrounded Innocent III. Canon 18 forbade clerics to shed blood and ordered them not to participate in ordeals. Canon eight established the rules for inquisitorial modes of proof. This new procedure offered an alternative to accusatorial procedure, which required that an accuser was essential to a criminal trial. Inquisitorial procedure granted a judge the authority to investigate wrongdoing and summon defendants to his court.⁸³ It laid out

⁸¹ The Latin text is printed and translated in *Selected Letters of Pope Innocent III* 144-147. See also Paul B. Pixton, *The German Episcopacy and the Implementation of the Decrees of the Fourth Lateran Council, 1216-1245: Watchmen on the Tower* (Studies in the History of Christian Thought, 64; Leiden-New York-Köln 1995) 1-3. A ‘generale concilium’ meant a papal council, see Atria A. Larson, ‘Early Stages of Gratian’s *Decretum* and the Second Lateran Council: A Reconsideration’, *BMCL* 27 (2007) 21-56 at 28-36.

⁸² Cheney and Semple, *Selected Letters* 145: ‘convocemus propter . . . extirpanda vitia et plantandas virtutes, corrigendos excessus, et reformandos mores . . . sopiendas discordias et stabiliendam pacem, comprimendas oppressions et libertatem fovendam’.

⁸³ Winfried Trusen, ‘Der Inquisitionsprozeß: Seine historischen Grundlagen und frühen Formen’, *ZRG Kan. Abt.* 74 (1988) 168-230; Trusen, ‘Das Verbot der Gottesurteile und der Inquisitionsprozeß: Zum Wandel des Strafverfahrens unter dem Einfluß des gelehrten Rechts im Spätmittelalter’, *Sozialer Wandel im Mittelalter: Wahrnehmungsformen, Erklärungsmuster, Regelungs-mechanismen*, ed. Jürgen Miethke und Klaus Schreiner (Sigmaringen 1994) 235-247; Richard M. Fraher, ‘IV Lateran Revolution in Criminal Procedure: The Birth of Inquisitio, the End of

the qualities that witnesses must possess similar to *Magna Carta's* chapter 38. Canon 35 dealt with the rules for appeal; canon 36 forbade appeals from interlocutory decisions; canon 37 declared that defendants should not be burdened by excessive summons of witnesses more than two days distant without the agreement of both parties; one of the most important was canon 38 that stipulated all the proceedings of a trial must be recorded in writing.

'Fostering 'libertas' was on Innocent's mind when he summoned the council in 1213, but the word appears only twice in the canons. Canon 25 warned secular authorities that they should not interfere in elections contrary to 'canonica libertas'. King John granted the same rights to the English church in chapter one. The Council warned secular rulers not to legislate against the exemptions enjoyed by ecclesiastical 'libertas'. This is a good example of the equivocal meanings 'libertas' could have. One could translate 'libertas' in this canon as right, freedom, or franchise.

To return in conclusion to Charles Donahue's 'influence' of the *Ius commune*. I have tried to demonstrate the sometimes contradictory 'influences' of the *Ius commune* and continental law on *Magna Carta*. Those scholars who have been skeptical of Helmholz' attempts to see connections and influences have tended to understand law in the early thirteenth century as being the same Balkanized systems of positive law and jurisprudence that exists today. McSweeney is the most extreme.⁸⁴ He has

Ordeals, and Innocent III's Vision of Ecclesiastical Politics', *Studia in honorem Eminentissimi Cardinalis Alfonsi M. Stickler*, ed. Rosalio Iosepho Card. Castillo Lara (*Studia et Textus Historiae Iuris Canonici* 7; Rome 1992) 97-111, was his last word on the subject; he cited his earlier essays in his notes.

⁸⁴ A much more reasoned and balanced, if negative, discussion of the issue is found in Holt, *Magna Carta* (3rd ed.) 15-25, by Garnett and Hudson. On p. 15 n.81 they record a conversation between Christopher R. Cheney and Holt as being 'particularly authoritative' since Cheney had not seen any connection between canon law and *Magna Carta*. Cheney was a brilliant historian of the Church; it does his memory no disservice to say, as he said to me more than once, that he was not a historian of medieval canonical jurisprudence. He had even less interest in the jurisprudence of medieval Roman law.

written 'If among the drafters of Magna Carta there were any of the *ius commune*'s true believers, they did not leave their mark' and Bracton 'demonstrates what Magna Carta could have looked like had it been written by the *ius commune*'s true believers'.⁸⁵ The *Ius commune* was not a religion. It did not have believers. It did have teachers, students, and practitioners. Every law school of Europe taught it, and this universal, homogeneous training is how the *Ius commune* gained its dominance over European jurisprudence. If we had a uniform system of law schools today that had the same curriculum, taught the same books, employed the same language in their books and lectures, and used the same teaching methodology, we would have the same institutional structure that produced the *Ius commune*. When law students went back to practice law in their local courts, they took their academic baggage with them. None of these trained jurists thought of the law they had studied, had taught, had written about, or had practiced was in constant opposition to any other legal system. They did think the *Ius commune* was a source for filling lacunae and shaping legal arguments. Most pernicious, perhaps, is the modern concept prevalent in the scholarship that the *Ius commune* is 'learned law': bookish, cerebral, and alien to the rough and tumble of European courtrooms.⁸⁶ It has been shown again and again that the practitioners in the courtroom and compilers of the *iura propria* took what they wanted to take from the *Ius commune* and left aside what they did not want or need.⁸⁷

Most importantly, the *Ius commune* was a jurisprudence of norms, concepts, technical terms, and principles that shaped every legal system in Europe to varying degrees from the twelfth to the seventeenth century. In the twelfth century, when another Norman-French ruler, King Roger II of Sicily, ordered

⁸⁵ McSweeney, 'Magna Carta' 287 and 291.

⁸⁶ See my rather polemical essay 'Learned Law, Droit Savant, Gelehrtes Recht: The Tyranny of a Concept', RIDC 5 (1994) 197-209 and *Syracuse Journal of International Law and Commerce* 20 (1994) 205-215.

⁸⁷ The many works of Helmholz and Donahue have been particularly relevant for illustrating the interaction of the *Ius commune* and English court decisions, e.g. Richard H. Helmholz, *The Ius commune in England: Four Studies* (Oxford 2001).

Bolognese jurists in his realm to compile a set of ‘constitutions’ in 1140 the jurisprudence of the *Ius commune* suffuses the entire work. It would have not occurred to the jurists who compiled Roger’s legislation that they were betraying Sicilian or French customary legal traditions by clothing it in the language of Roman law.⁸⁸ In England from the middle of the twelfth century, jurists trained in the schools of the *Ius commune* dominated ecclesiastical courts.⁸⁹ For a brief time during the age of ‘Bracton’ it looked as if the *Ius commune* would become a part of English common law. Its influence on statutory legislation of European cities is beyond question. Manlio Bellomo characterized the relationship between the *Ius commune* some years ago as ‘like the Ptolemaic system in which the earth lay immobile at the center of a horizontal plane while the sun in its heavens moved around it every day, illuminating and warming it’.⁹⁰ Bellomo’s metaphor is apt and fitting to define what Donahue meant by ‘influence’. John Baldwin concluded his piece on Stephen Langton and *Magna Carta* with these words: ‘Considered separately, these linkages may appear slight, but taken together they form a coherent picture’.⁹¹ Perhaps the picture in this essay is not completely coherent, but in honor of John’s memory I use his words to conclude my essay.

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⁸⁸ See my ‘The Birth of the *Ius commune*: King Roger II’s Legislation’, RIDC 17 (2006) 1-40.

⁸⁹ The literature on this point is large; most recently see James A. Brundage, ‘The Managerial Revolution in the English Church’, *Magna Carta and the England of King John*, ed. Janet S. Loengard (Woodbridge 2010) 83-98.

⁹⁰ Manlio Bellomo, *The Common Legal Past of Europe, 1000-1800* (Studies in Medieval and Early Modern Canon Law, 4; Washington D.C. 1995) 192.

⁹¹ Baldwin († February 8, 2015), ‘Master Stephen Langton’ 846.

Icelandic Church Law in the Vernacular 1275-1550

Lára Magnúsardóttir

Around the year 1480 an Icelandic bishop, Ólafur Rögnvaldsson in the Hólar diocese (1460-1495), dealt with a serious case of incest.¹ Hearsay regarding the situation had come to the attention of the bishop during a visit to the area. This prompted an inquest. The result was that a man, Bjarni Ólason, confessed to having had sexual relations with his daughter Randíður, while she was between the ages of 12 and 14. Due to the severity of the crime, Bjarni was taken into the custody of the bishop. Since the case demanded outlawry the king and Church would divide his property between them. Therefore, procedures of this church court case required the involvement of the king's sheriff and lay courts since the king's share was distributed to relevant lay parties.² Later, the legality of the methods used by the bishop to secure Bjarni's confession was challenged in an effort to upset the judgment. How are the relatively extensive, and quite detailed Icelandic sources of these cases that were dealt with by the highest ecclesiastical courts in the country to be

¹ The case goes by the name *Hvassafellsmál*. The sources for the case are printed in the Icelandic Diplomatarium, as are almost all other medieval legal cases: *Diplomatarium Islandicum: Íslenzkt fornbréfasafn sem hefir inni að halda bréf og gjörninga, dóma og máldaga, og aðrar skrár er snerta Ísland eða íslenzka menn 834-1589*, edd. Jón Sigurðsson and Jón Þorkelsson et al. (Vols. 1-16, Copenhagen-Reykjavík 1857-1972) = DI. For further publication on the sources regarding this case, see also *Morðbréfabæklingar Guðbrands biskups Þorlákssonar 1592, 1595 og 1608, með fylgiskjöllum*, ed. Jón Þorkelsson (Reykjavík 1902-1906). Lára Magnúsardóttir has studied the case, see *Bannfæring og kirkjuvald á Íslandi 1275-1550: Lög og rannsóknarforsendur* (Reykjavík 2007). (Translation of title: *Excommunication and Church Authority in Iceland 1275-1550: Law and Research Basis*) 187-217.

² See in particular DI 1.365-366.

interpreted? What were the motives of the clerical judges, the status of the laymen in face of the law by which they were judged, and what is the importance of the courts' process? These questions will not be answered without knowing the law and the institutions that represented them and the historical context in which they were made.

Church court cases from the fifteenth century

During the time Bjarni's case played out, the same bishop was dealing with lay church-owners over who should bear the costs of episcopal visitations.³ The bishop wrote to his archbishop for advice.⁴ The church courts were indeed quite busy in the late 15th century. Members of a large extended family who were all after shares of the same huge inheritance waged a war against one other in various courts of law; if one of the heirs could prove that another whose claim to inheritance preceded theirs was not rightfully the heir, that individual would come a step closer to the fortune.⁵ One method was to challenge the legitimacy of his parents' marriage on grounds of consanguinity which if proven rendered the offspring illegitimate and not proper heirs.

Although the line of succession was set forth in the secular law,⁶ the Church courts could interpose their rules as to who was

³ This debate is referred to as *hálfkirknámál* and its sources are printed in the DI. For critical research history see Magnúsdóttir, *Bannfæring* 187-217.

⁴ DI 6.404-407.

⁵ The race for this inheritance lasted much longer than the term of one bishop and took many forms, murder among them, and cases were tried in various courts of law. The different kinds of sources are printed in the DI. Although many studies have been made on specific details, the only attempt to research the case as a whole is Arnór Sigurjónsson, *Vestfirðingasaga 1390-1540* (Reykjavík 1975). In his studies the case goes by the name *erfðamál* or *erfðadeilur Vestfirðinga*.

⁶ The line of inheritance is described in considerable detail in the 'erfðatal' chapter of *Jónsbók* – law book of the king: *Jónsbók: Kong Magnus Hakonssons lovbog for Island vedtaget paa Altinget*

qualified to be in that line. In order to move oneself further up the list, reference to both the temporal and spiritual law was needed. Some couples, who were known to be related by the fourth degree, tried to secure their marital status by appealing directly to the Pope for an exception. When exceptions were granted, and possibly accepted by the king, it was still possible for adversaries to contest an inheritance claim by pointing out that although the Pope had legitimized the marriage, he had not said anything about the legitimacy of any children that had been born beforehand.⁷ There are numerous examples of such cases in the sources as well as similar ones that contain much little known information. These legal sources provide rich information not only about the people who were the subjects of prosecutions but also about the individuals who provided the gossip upon which grievances were based in the first place. These latter actively participated in legal cases as did lay and spiritual authorities from the highest to the lowest stations.

Doubts about Church Authority

Research on cases that were dealt with by Iceland's church courts in the late medieval period has been unsystematic and rare. Therefore, the significance of court cases such as those touched on above has not been fully realized. One generally acknowledged fact is that in the fifteenth century the two offices of bishops in Iceland, as other Church offices, rested on a law book from 1275, the *New Christian Law* or *Árni's Christian Law*, upon which bishops' rulings and court procedures were likewise based.⁸ Lay authority equally rested on a separate law book, *Jónsbók*, from 1281.⁹

1281, og Réttarbætr, de for Island givne retterbøder af 1294, 1305, 1314, ed. Ólafur Halldórsson (Copenhagen 1904).

⁷ Magnúsdóttir, *Bannfæring* 104.

⁸ The New Christian Law translated into Latin as *Jus Ecclesiæ Norweg*, by Árni Magnússon in *Annales ecclesiæ Danicæ diplomatici, oder nach Ordnung der Jahre abgefasset und mit Urkunden belegte Kirchen Historie des Reichs*

At the time the *New Christian Law* was put together in the late thirteenth century, Icelanders had recently entered into a contract with the Norwegian king and had been moving away from a political system without a king and central authority. There seems to be a lack of a convenient term to describe Iceland's political situation, but this was not a simple matter of submission to or integration into the Norwegian state because Icelanders insisted on having their own laws. At the time, the king was himself in the midst of shaping his kingdom into the tradition of Western governmental and legal system that included being connected to the Roman Church.¹⁰ New legislation was promulgated for Norway, and a special version was created for Iceland. The temporal and spiritual institutions promulgated their respective laws separately in both countries – there was the king's law and the Christian law.

Däultimatennemarck, ed. Erich Pontoppidan (Vol. 1; Copenhagen 1741) 786-821, and again some decades later when it was published bilingually; *Jus ecclesiasticum novum sive Arnæanum constitutum anno Domini MDCCLXXVII: Kristinnrettr inn Nyi edr Arna biskups*, ed. Grimus Johannis Thorkelín (Copenhagen 1777). It was then printed in its entirety in *Norges gamle love indtil 1387*, ed. Gustav Storm and Ebbe Hertzberg (Vol. 1; Oslo 1895; reprinted) 16-56 and published without variants in modern Icelandic: *Járnsíða og Kristinréttur Árna Þorlákssonar*, ed. Már Jónsson et al. (*Smárit Sögufélags*; Reykjavík 2005) 143-190. The most accurate diplomatic version of the over one hundred manuscripts is yet to be published, but is used here: Magnús Lyngdal Magnússon, *Kristinréttur Árna frá 1275: Athugun á efni og varðveislu í miðaldahandritum* (MA thesis, University of Iceland 2002).

⁹ *Jónsbók* has recently been translated into English: Jana K Schulman, *The Laws of Later Iceland: Jónsbók: The Icelandic Text According to MS AM 351 fol. Skálholtsbók eldri*. With an English Translation, Introduction and Notes (Bibliotheca Germanica Series. Nova 4; Saarbrücken 2010).

¹⁰ For a short overview of the importance of church and state relationship in political and legal developments see Harold J. Berman, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition*, (Cambridge, MA 2003)1-28 and 374-382.

There are generally no reservations regarding the authority of the king after 1281, but historians typically express considerable doubts about the validity and limits of spiritual authority. The idea is that the Church never managed to legitimize its authority fully but continued to push for even more than the law book granted throughout the Middle Ages. This reluctance is thought to have caused hostility and resistance on part of the laity and therefore historians tend to examine the medieval secular and the spiritual authorities, in Iceland primarily, as conflicting, and they doubt – although not entirely deny – the legitimacy of the Church as a part of government. They see the period characterized by an indecisively constituted government subject to continuous frictions that continue uninterrupted throughout the time which the *New Christian Law* was in effect. Various historians have, of course, approached documents and cases with a different point of view, but the general understanding of Icelandic history continues to be that of a medieval Church in conflict.¹¹

Historians who study the fifteenth century always have doubted the motives of the Church, questioned its general legitimacy, and interpret the motives of the laity with reference to thirteenth century politics. They see the cases, such as our incest case, as simply more evidence of the rivalry between those in power: Rather than any real legal substance, the bishop made up the charges against Bjarni for financial or other gain, and he was almost certainly cheating the lay church owners. Similarly, cases in which inheritance-seekers challenged the conclusion of clerical judges are simply expressions of a general will of the public to overthrow the corrupt Church. Such an understanding allows little space for examining the legal system as a medium

¹¹ To name some: Stephan Kuttner, 'St. Jón of Hólar: Canon Law and Hagiography in Medieval Iceland', *The History of Ideas and Doctrines of Canon Law in the Middle Ages* (Variorum Collected Studies Series; London 1980) no. VIII and Peter Landau, 'The Importance of Classical Canon Law in Scandinavia in the 12th and 13th Centuries', *How Nordic are the Nordic Medieval Laws?* edd. Ditlev Tamm and Helle Vogt (Medieval Legal History 1; Copenhagen 2005) 24-39.

for problem solving and the Church as an institution for upholding the peace. It is, on the other hand, quite as likely that the above cases arose *because* the legal system was a functional one; it went after criminals and was accessible at all levels of the hierarchy, to people and parties who saw need to pursue their cases or clarify their legal status.

Academic doubts about the nature and limits of ecclesiastical power is rooted in studies of the law-making process of the late thirteenth century.¹² Habitually, historians examine the process through the eyes of the 'Protestant Alarmist School'¹³ and doubt the validity of the *New Christian Law* citing the political upheaval at the time of its creation, which is traditionally seen as the understandable resistance on the part of locals to the Church's bid to expand power. The problem is that evidence for a general and continuing hostility between Church and the laity throughout the period of the Roman Church in Iceland does not hold. And, assumptions of the Church's uncertain status in the fifteenth century require overlooking the fact that the Church played an active role until the king formally disconnected his relationship with it by becoming a Lutheran the sixteenth

¹² Lára Magnúsdóttir has written extensively about this subject and shown that scholars have been influenced by Jens Aarup Seip's theory which accounts for massive anti-clericalism in during the period from the late twelfth century to the end of the Middle Ages. Magnúsdóttir *Bannfæring 297-399*. See also the comments of J.A. Seip, *Sættargjerdin i Tunsberg og kirkens jurisdiksjon* (Oslo 1942) 197: 'Gjennem hele tidsrummet fra 1280 til henimot 1350 kan det således påvises en fast, sammenhengende antikirkelig tradisjon, som bæres av rikets stormannsklasse i opposisjon til et presteskap med store aspirasjoner. Denne tradisjon strekker sig over flere generasjoner, og den var sterk nok til å bestemme kongedømmets politikk overfor kirkens krav på politisk innflytelse og rettslig autonomi. Riksstyrets politikk var fast og sikker, og den søkte bevisst tilknytning til gammel antikirkelig politikk under Sverre'.

¹³ Term borrowed from Richard H. Helmholz, *The Spirit of the Classical Canon Law* (The Spirit of the Laws; Athens GA-London, 1996) 369.

century. Only then was the system to which the *New Christian Law* belonged to abolished.

A different and more fruitful way of looking at things is that the two thirteenth-century law books, *Jónsbók* and *New Christian Law*, taken together combine the king's and Church's hierarchies to form one system of government with divided spheres of authority, temporal and spiritual.

A Concordat defines legal system

The view taken here is that such coordination had been established in a legitimate, orderly manner in the 1270s and was established in a Concordat between the king and the Church. A system that defined the spiritual sphere of Church authority had thus already been in existence for two hundred years by the time the Church and king divided Bjarni's property between them.

The history of the Concordat starts when an Archiepiscopal See was established in Nidaros in 1154, soon including the two Icelandic episcopal sees.¹⁴ The Church and king then made a concordat, probably in 1164, in which they agreed upon their relationship.¹⁵ That, and the subsequent developments in the relationship between Church and king can only be understood with direct references to the Lateran councils and changes that occurred on the highest levels of Church and empire in the following centuries. In 1247 the Church renewed aspects of its contract with the Norwegian king through Cardinal William of Sabena, with a focus on the Church's liberty and its judicial hierarchy, but they also agreed upon specific matters of law.¹⁶

¹⁴ DI 1.204-214.

¹⁵ This concordat was never translated from Latin: *Privilegium et iuramentum Regis Magni qui primus coronatus Nidrosiæ*, DI 1.223-230. It is frequently dated to 1164 and is certainly from the time between the years 1163-1172. *Regesta Norvegica*, ed. Erik Gunnes (Norsk Historisk Kjeldeskrift-Institut; Oslo 1989) 1.69-70.

¹⁶ *Privilegium Wilhelmi Sabinensis* dated August 16th 1247 pp. 540-553. (Version A (pp. 546-548) is in Latin, version B (pp. 548-550) is a vernacular translation of the A text. Version C – 1.,

During the legal reforms in Norway and Iceland in the 1260s and 1270s, the Church and king worked towards renewing the concordat entirely, of which the first version was published in Latin in Bergen in 1273.¹⁷ While the concordat was still being debated, the Church in Iceland promulgated the *New Christian Law* in 1275, and a law-book on temporal matters from the king had already been sent to them in 1271, *Járnsíða*. Both were built on the kind of power division that the Concordat represented. The *New Christian Law* was never revised, but the civil law book of the king took its ultimate form as *Jónsbók* in 1281. As the legislative process went on, the Concordat was also revised and a final version of it had been issued in Tunsberg in 1277. By 1281 constitutional setting for government consisted of these three things; a contract between king and church, sealed in the Concordat, *Jónsbók*, and the *New Christian Law*.

The Concordat of Tunsberg was published in Latin with a vernacular translation likely to be from the same time.¹⁸ The new Concordat agreed with the concords of 1247 and corrected errors from the 1164 Concordat. Basically Tunsberg is a revision of the 1273 Concordat with a few additions and changes. It described in clear words the role and status of the Church within the Norwegian state and echoes the words of Pope Gelasius's two swords metaphor in Gratian's *Decretum* D.96 c.10. It set limits both on Church authority and that of the king.

2. and 3., deal with specific issues regarding the liberty of Church and excommunication, with references to Pope Innocent (p. 552), the crime of rising up against the king, monasteries and church property. Other statutes connected with the Cardinal dated August 17th are printed in Latin and translations DI 1.554-568. They include exceptions from the law regarding work on holy days with reference to extreme weather conditions. There is also the king's approval of the statutes (DI 1.557). They were attested in a letter from the Pope in 1249, which was also translated: DI 1.569-574.

¹⁷ DI I pp. 100- 106. The king wrote to the Pope for approval of the concordat DI II p. 107, which he did: DI II pp. 120-123.

¹⁸ Both versions are printed in DI II pp. 139-155.

The new law books in Iceland echoed that distinction, as did the new state law for Norway (*Landsloven*) from 1274. They all included this text:¹⁹

As God's mercy sees the need for the everyday needs of abundant commonalities and various multitudes, he has appointed two of his servants to be his officials in order to keep this sacred faith and his sacred law for the protection and rights of good people, but for punishing and cleansing of evil people. *These are two, one is king but the other is bishop; the king has temporal power for temporal things from God, but the bishop has spiritual power for spiritual things and each one of the two shall support the cases of the other* for rights and legal matters and recognize that they have their power and authority from God but not from themselves.

There can be no doubt that the law secured the authority of bishops on level with the king; they were partners within the state.

There was great political opposition to articles in the Concordat and the connected legislation, which has received much scholarly attention. Still, evidence shows that the system of governance that the Concordat supported was in full force two centuries later.²⁰ But unlike the antagonism of the late thirteenth and early fourteenth centuries, the legal system in the period that followed the debate has not been examined in detail. Instead, observations on political situations from the 1170s to 1350 have become the basis for interpretation for cases through the whole time the Roman Church held privileges in the country. Those

¹⁹ *Kristinréttur Árna*, chapter 2; *Jónsbók*, 'Kristindómsbálkur' chapter 2; 'Nyere lands-lov, Christendomsbolck' 2, *Norges gamle love indtil*, edd. Rudolf Keyser and Peter A. Munch (Christiania 1848) 2.23. Italics are mine, text translated with the help of Ryan Johnson.

²⁰ This is among the main conclusions of Magnúsardóttir's study of excommunication and the authority of Church in the period from 1275-1550: Magnúsardóttir, *Bannfæring*.

interpretations have been made in the light of politics that were already obsolete.

If, on the other hand, the Concordat of Tunsberg from 1277 is regarded as the basis for the state's rule of law until the Lutheran Reformation, the old interpretation does not hold. The fifteenth-century court cases do not simply show signs of a power struggle between church and lay power. We see instead a dual judicial system that allowed authorities to render legal decisions while allowing laymen to seek their goals.

One of many things that supports the point of view that the system was functional, rather than comprised of two conflicting parties, is that the two law books perfectly respect the limits of the other's jurisdiction and the respective authority of each. The officials of the two hierarchies referred themselves directly to their superiors abroad — the ones who establish the law, the king and the Pope. The subjection to the Roman Church is clearly visible in the case already mentioned, when the bishop asked the archbishop for advice. The pope had already felt he was a party to the thirteenth century conflict, as can be seen by his letter to the Norwegian king when an attempt was made to overthrow the Concordat in 1285 — and he was listened to as an immediate translation of that letter shows.²¹ He also responded to the pleas of dispensation for the marriage of relatives in the fifteenth century, sent to him by lay Icelanders. The relationship between the Roman Church and Icelanders obviously went both ways.

These are some documents indicating that Iceland's liaison with the Norwegian king eventually included Roman Church authorities. The point being that in the fifteenth-century cases were still raised and judged according to the laws in these two thirteenth-century books show that the system of dual authority was quite stable. In fact, the cases mentioned here are known only because the law required documents. The existence of these documents is in itself proof of the presence of the institution.

The fifteenth-century documents provide clues to the establishment and integration of that system. The number of

²¹ DI 2.251-256.

copied law books rose considerably, and the *New Christian Law* was just as popular as *Jónsbók*. This fact might be connected to those men who made a career out of their specialized knowledge of the law by handling cases for others; they managed estates for individuals, took property and inheritance cases to court, and challenged undesired outcomes by using procedural rules in their arguments. In short, they were lawyers who worked for a fee and went to whichever court that suited their case, be it secular or ecclesiastical.²² In that light, the documents that show laymen accusing a bishop of having procured a confession improperly from a suspected criminal do more to verify the existence of a legal system with strict procedures than it does for showing that there was a general opinion that as a rule bishops bullied suspects.

Christian law in Iceland was the Liber Extra

One goal of the discussion up to now has been to answer an old question on the nature of the *New Christian Law*. It was not just a set of laws on religion and Church administration, but a law book that was applied to a defined sphere spiritual matters within the authority of the state. But among the reasons why the limits of Church authority in late medieval Iceland have seemed unclear is the mere existence of the *New Christian Law* itself because it was not written in Latin but in the language then spoken in the Nordic countries, one that now goes by the modern designations Old Norse and Old Icelandic – but was called ‘Norrœna’ at the time. This seems to remove the *New Christian Law* from the law of the Roman Church and indicate it was differentiated, and special – perhaps even ‘national’ in the future spirit of Luther. Norwegian historian, Sverre Bagge focused on this when he asked why the Church (in Norway and Iceland) insisted on having its own national vernacular Church law, rather

²² Magnúsardóttir, ‘Case(s) Of Excommunication’, *Liber Amicorum Ditlev Tamm - Law, History and Culture*, edd. P. Per Andersen, P. Letto-Vanamo, K. Å Modéer, H. Vogt (Copenhagen 2011) 185-197.

than be content with international canon law like most other countries.²³

Although Norway had been a kingdom for a long time when the Concordat was concluded, it was moving from a system in which the king was dependent upon his barons into one where they were simply his officials. In Iceland the change was from a system of assemblies to that of institutional government. In both cases, the transformation could not take place without the consent of the players in the old system. It means that in order to implement the new system the parliamentarians representing the old system first needed to understand their choices. Therefore the importance of translating Latin documents such as the ones mentioned above: The statutes and contracts from 1247, the final version of the Concordat and the letter from the pope in 1285. These are all documents that touch upon the core of a *system* rather than being details of legal interpretation. Similarly, the vernacular text of the *New Christian Law* can easily be seen as a general description of the main issues and processes of the law of the international Church, necessary for the general assembly in order to accept formally the Church law in its entirety.

Before Iceland made its deal with the king, Christian laws, which largely dated from the twelfth century, had mostly been presented in a special chapter of the one valid law book that has gone by the name *Grágás*.²⁴ Laws on Christianity had therefore been a part of the general law and not detached from it. And, although bishops had played an important role in government, the old law made no claim of freedom for the Church as an institution. That changed with the separate *New Christian Law* in 1275, mostly because it labelled the Church in Iceland as one

²³ Sverre Bagge, 'Kirkens Jurisdiksjon i kristenrettssaker før 1277', *Historisk Tidsskrift* 60 (1981) 133-159 at 155: 'hvorfor kirken hele middelalderen igjennom holdt fast ved den praksis å ha sin egen, nasjonale kristenrett, og ikke, som i de fleste andre land, nøyde seg med internasjonal, kanonisk rett'.

²⁴ There is an English translation of *Grágás*: *Laws of Early Iceland. Grágás*, trans. and ed. Andrew Dennis, Peter Foote and Richard Perkins (2 vols. Winnipeg 2000).

branch of the free Roman Church under the authority of the pope. It consisted of some 37-46 chapters and differs from the old law not just in being a separate collection, but also in that it is a set of laws that encompasses a system of ecclesiastical law

The chapter on Christianity in the old *Grágás* law had set out some basics of Christianity, such as feast days, rules for baptism, fasting, burials as well as administering mulcts and penance for breach. *The new Christian Law* did all that as it outlined Christian life from birth, even conception, to eternity. It also set standards for clerical life and liturgy and accounted for censures and punishments. But unlike the old law it pronounced an independent institution in a relationship with the king while it referred directly to ‘God’s law’ and ‘the law’ for interpretation and further information and interpretation.²⁵ That cannot be understood as other than a reference to the *Liber Extra*, the then still relatively new law book of the Western Roman Church.²⁶

In general, the context of the *New Christian Law* indicates strongly that it was a confirmation of the *Liber Extra* in Iceland. A full comparison is yet to be made, but existing studies indicate that the law in Iceland was in harmony with the law of the Roman Church. No inconsistencies have been found except the method by which tithe was collected, as recorded in the Hagiography of bishop Árni.²⁷ Changes and additions to the laws of the Roman Church were thereafter introduced in Iceland through the archbishop in Nidaros; never again did they pass through hands of laymen in the assembly.

What changed?

Comparisons of older Norwegian and Icelandic law articles to the newer ones in the *New Christian Law* have been made; they

²⁵ For examples see chapters 14, 16, 41 and 42.

²⁶ Additions to ecclesiastical law were later introduced by statutes that have direct references to canon law or are simply translations thereof, such as DI 1.626; DI 1.498; DI 1.511–574; DI 1.712; see Magnúsardóttir, *Bannfæring* 386-399.

²⁷ Magnúsardóttir, *Bannfæring* 407.

show that many provisions were merely transferred from the old law into the new law book. This has been taken as an indication of minimal changes from earlier local Church law. While this might be true it does not take into account that these earlier articles of law in all likelihood represented later versions of Canon Law anyway, since most of them are from the late 12th century and younger.

But there certainly were differences between the older law on Christianity and the *New Christian Law*. The essential one lies in the manner by which the *New Christian Law* describes an autonomous institution of power rather than focusing solely on regulating the Christian lives of people or running local Churches. This change was necessary because in the period leading up to the Fourth Lateran Council of 1215, the Church had undergone a structural, rather than a religious, transformation that, among other things, required redefining its role within state governance systems. The *New Christian Law* marks a very important change that has to do with governance rather than religion.

The *New Christian Law* institutionalized the Church in Iceland and transformed the mode of which it was able to execute its authority on an administrative level, as well as the judicial one. The process of the courts became tied up with the public service that the Church was not only obliged to offer, but each and every one was now legally required to accept under the threat of excommunication. One of the novelties added by the *New Christian Law* was the duty to take the Eucharist regularly, which contributed to establishing excommunication *ipso facto* as an institutionalized censure that was now supported by the king, who would outlaw anyone who would not take absolution within set time limits. Instead of being a censure that anyone could doubt because it lacked ground in the law and the legal system – as is apparent in older sources — *excommunication ipso facto* became the pillar that Church authority stood on, elaborately tied with the royal establishment. The censure had been a crucial factor in the twelfth-century institutionalization of the Roman Church, and consequently it became a major factor of court

procedures in the following ages.²⁸ The *New Christian Law* additionally secured the duty to do penance, another key to locking in the institution's authority. Thus, it completed the establishment of the new and free Church as it *had become* after the developments of the Lateran Councils.

After 1275, the bishops of Iceland therefore served in their offices according to a law book that highlighted the main points of ecclesiastical law; they communicated the Roman Church's system of operation and confirmed its authority. Iceland's bishops were not only directly a part of the Roman Church's hierarchy, but their law book was also ecclesiastical law. It was not a variant; the intent was to implement the laws of God and the Church, not to differ from them. *The New Christian Law* was more than merely a short version of canon law because if in doubt the law and offices of the Roman Church would be consulted. The main point here is that the *New Christian Law* in Iceland was *not* Icelandic law for an Icelandic Church but Roman Church Law for the Roman Church and spiritual matters for Christians *in* Iceland. It might be possible to see it as a delegated legislation or regulation that directed how ecclesiastical law functioned in Iceland, but locally it was the law through which the Church was run, according to which its officials worked, and by which Icelanders lived and were judged.

Vernacular is not necessarily vulgar

The sources connected with the *New Christian Law* are manifold. In addition to law texts, the institution produced various sources for the subsequent 275 years, much of them from the late fifteenth century, concerning cases similar to those mentioned at the beginning of this article. There are, in addition, numerous sources from the lay law that illustrate the interactions between the legal institutions and the people it ruled over. As a rule, these sources are in *Norræna*.

²⁸ Elizabeth Vodola, *Excommunication In The Middle Ages* (Berkeley-Los Angeles-London 1986) 34–35.

As the *New Christian Law* was written in the local language, it set standards for thought and language on church law in Iceland to the same extent as it ruled the institution's administration and procedures. Although the *New Christian Law* was written in the language locally spoken, it was not the 'vernacular' in the sense of being informal or vulgar. The words in Iceland's law are translations from the Church's, which makes them real legal terms with the same underlying definitions as the Latin ones. *Óhlýðni* matches the legal term *contumacia* as perfectly as *synd* does *peccatum*. Likewise, *bann af sjálfu verkinu* has the exact meaning of *excommunicatio ipso facto* much in the same way as the Icelandic version of Jesus' name has the same reference as it does in Latin. The vocabulary of the *New Christian Law* was not common or unspecific; its accurate definitions could, on the contrary, have dire consequences for politics and persons. The philosophy and theology contained in legal terms referred directly to ideas that were equally complex and important whether they were uttered in Latin or Icelandic. The law was, moreover, inseparable from the religion. Sources deriving from the medieval Church in Iceland are valuable for understanding how the Church worked and influenced life, language, and politics on the outskirts, but still inside, of the medieval Western Roman Christian world. In that sense Old Icelandic is a language of medieval ecclesiastical law in its own right.

Primary sources do not support a theory of conflict between the lay and learned as a main characteristic of Icelandic politics and government in the late Middle Ages. Rather, the country secured a place for itself within the Western religious and political system in the thirteenth century. Understanding this point requires that its history be read and interpreted in direct relation to general Western developments. That not only means that Western European sources are a necessary part of Icelandic history, but also vice versa: Icelandic sources must also be approached as a part of European history. *Norræna* as a modern academic discipline does not routinely include Latin scholarship and is only marginally connected with Christian and legal

studies. Canon law studies, it might also be pointed out, do not require knowledge of *Norræna* either. But, had the Icelandic *New Christian Law* been written in Latin would it not then be normally known by canon Law scholars and studied as a part of the history of canon law?

The Icelandic *New Christian Law* came into existence in a Norwegian context that is not accounted for in this article. But, at the same time the *New Christian Law* was written, a Norwegian version was also made. Given their interrelationship, the two cannot feasibly be studied separately. A closing recommendation would be that both sets of laws are in need of new editions published for a new generation of scholars. And, it is essential that they be translated into the language of the times: English.

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Select Bibliography of Essays and Books for 2014-2015

Compiled by Melodie H. Eichbauer

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