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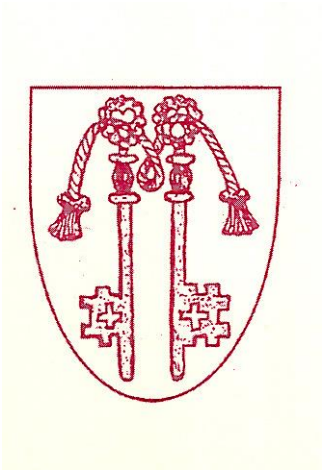

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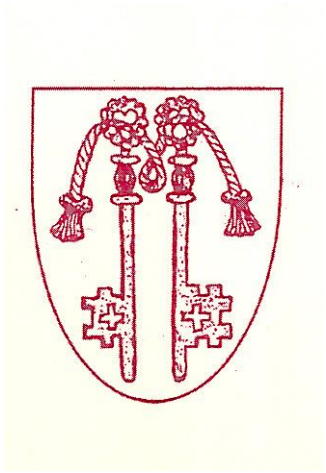

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Abbreviations

The following sigla are used without further explanation:

ACA	*Archivo de la Corona d'Aragon/Arxiu de la Corona d'Arago*
AHC	*Annuarium historiae conciliorum*
AHDE	*Anuario de Historia del Derecho español*
AHP	*Archivum historiae pontificiae*
AJLH	*American Journal of Legal History*
AKKR	*Archiv für katholisches Kirchenrecht*
ASD	*Annali di storia del diritto*
BAV	Biblioteca Apostolica Vaticana
BDHI	*Bibliothek des Deutschen Historischen Instituts in Rom*
BC	Bibliotheca/Archivio capitolare, capitular, chapter, kapitoly etc.
BEC	*Bibliothèque de l'Ecole des Chartes*
BIDR	*Bullettino dell'Istituto di Diritto Romano*
BISM	*Bullettino dell'Istituto Storico Italiano per il Medio Evo e Archivio Muratoriano*
BL	British Library
BM	Bibliothèque municipale, Stadtbibliothek, Biblioteca comune, Landesbibliothek, civica, etc.
BMCL	*Bulletin of Medieval Canon Law, New series*
BNF/BN	Bibliothèque nationale de France / Biblioteca nazionale
BSB	Bayerische Staatsbibliothek
BU	Bibliothèque universitaire, Universitätsbibliothek, Biblioteca di Università, etc.
Cat. gén.	*Catalogue général des manuscrits des bibliothèques publiques de France* (*Départements*, octavo series, unless otherwise indicated)
CC/CCL	*Corpus Christianorum/Corpus Christianorum, Series latina*
CCCM	*Corpus Christianorum, Continuatio mediaevalis*
CHR	*Catholic Historical Review*
Clavis	E. Dekkers, *Clavis patrum latinorum*, ed. 2
Clm	Codices latini monacenses-Bayerische Staatsbibliothek Munich
COD	*Conciliorum oecumenicorum decreta*, ed. Centro di Documentazione... (COD^3: ed. 3)
COGD	*Conciliorum oecumenicorum generalium-que decreta*, 2.1*: The Oecumenical Councils of the Roman Catholic Church*: *From Constantinople IV to Pavia-Siena (869-1424);* 2.2*: From Basel 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: Mulino, 2013)
DHEE	*Diccionario de historia eclesiástica de España*
DHGE	*Dictionnaire d'histoire et de géographie ecclésiastiques*
DMA	*Dictionary of the Middle Ages*
Du Cange	Du Cange, Favre, Henschel, *Glossarium mediae et infimae latinitatis*
EHR	*English Historical Review*
GC	*Gallia christiana*
HLF	*Histoire littéraire de la France*
HMCL 2	*The History of Medieval Canon Law in the Classical Period, 1140-1234*: *From Gratian to the Decretals of Pope Greogry IX*, edd. Wilfried Hartmann and Kenneth Pennington (Washington DC 2008)
HMCL 3	*The History of Courts and Procedure in Medieval Canon Law*, edd. Wilfried Hartmann and Kenneth Pennington (Washington DC 2016)
HQLR 1-2	*Handbuch der Quellen und Literatur der Neueren Europäische Rechtsgeschichte*, 1: *Mittelalter (1100-1500)*: *Die Gelehrten Rechte und die Gesetzgebung*, ed. Helmut Coing (Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte, München 1973-1977)
HRG	*Handwörterbuch zur deutschen Rechtsgeschichte*
HZ	*Historische Zeitschrift*
IRMAe	*Ius romanum medii aevi*
JEH	*Journal of Ecclesiastical History*
JH^1, JH^2, JH^3	Jaffé, *Regesta pontificum romanorum* ... ed. tertiam curaverunt Nicholas Herbers et al. (JH^1 A S. Petro–604), (JH^2 604-844), (JH^3 844-1024)
JK, JE, JL	Jaffé, *Regesta pontificum romanorum* ... ed. secundam curaverunt F. Kaltenbrunner (JK: an. ?-590), P. Ewald (JE: an. 590-882), S. Loewenfeld (JL: an. 882-1198)
JTS	*Journal of Theological Studies*

Kéry	Lotte Kéry, *Canonical Collections of the Early Middle Ages (ca. 400-1140): A Bibliographical Guide to the Manuscripts and Literature* (Washington DC 1999)
LMA	*Lexikon des Mittelalters*
Mansi	Mansi, *Sacrorum conciliorum nova et amplissima collectio*
MEFR	*Mélanges de l'École française de Rome: Moyen âge – Temps modernes*
MGH	Monumenta Germaniae historica
• Auct. ant.	Auctores antiquissimi
• 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
MIC	Monumenta iuris canonici
• Ser. A	Series A: Corpus Glossatorum
• Ser. B	Series B: Corpus Collectionum
• Ser. C	Series C: Subsidia
MIÖG	*Mitteilungen des Instituts für österreichische Geschichtsforschung*
ML	Monastic Library, Stiftsbibliothek, etc.
NA	*Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde*
NCE	*The New Catholic Encyclopedia*
ÖNB	Österreichische Nationalbibliothek
PG	Migne, *Patrologia graeca*
PL	Migne, *Patrologia latina*
Potth.	Potthast, *Regesta pontificum romanorum*
QF	*Quellen und Forschungen aus italienischen Archiven und Bibliotheken*
QL	Schulte, *Quellen und Literatur*
RB	*Revue bénédictine*
RDC	*Revue de droit canonique*
REDC	*Revista español de derecho canónico*
RHD	*Revue historique de droit français et étranger* (4^{e} série unless otherwise indicated)

RHE	*Revue d'histoire ecclésiastique*
RHM	*Römische historische Mitteilungen*
RIDC	*Rivista internazionale di diritto comune*
RIS^2	Muratori, *Rerum italicarum scriptores: Raccolta degli storici italiani*, nuova edizione…
RQ	*Römische Quartalschrift für christliche Altertumskunde und Kirchengeschichte*
RS	Rolls Series (Rerum Britannicarum medii aevi scriptores)
RSCI	*Rivista di storia della Chiesa in Italia*
RSDI	*Rivista di storia del diritto italiano*
SB	Staatsbibliothek/Stiftsbibliothek
SCH	*Studies in Church History*
SDHI	*Studia et documenta historiae et iuris*
Settimane	*Settimane di studio del Centro italiano di studi Spoleto sull'Alto Medioevo*
SG	*Studia Gratiana*
SMCL	*Studies in Medieval and Early Modern Canon Law*
TRG	*Tijdschrift voor Rechtsgeschiedenis*
TUI	*Tractatus universi iuris* (18 vols. Venice 1584-1586)
Vat.	Biblioteca Apostolica Vaticana
ZKG	*Zeitschrift für Kirchengeschichte*
ZRG Kan. Abt.	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Kanonistische Abteilung
ZRG Rom. Abt.	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Romanistische Abteilung

The Proceedings of the International Congresses of Medieval Canon Law will be referred to as (e.g.): *Proceedings Boston 1965*. Older standard works will be cited only as short titles, e.g. Maassen, *Quellen*, Schulte, *Quellen*, Savigny, *Geschichte*, Kuttner, *Repertorium*.

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.

Mém. Acad. Inscr.	*Rendic. Istit. Lombardo*
Proceed. Brit. Acad.	*Sb. Akad. Wien*

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NOTES

REVIEWS

L'elezione di Maurizio Burdino (Gregorio VIII), il concilio di Reims e la scomunica di Irnerio (1119)[*]

Orazio Condorelli

Il concilio di Reims (1119)

'Isti sunt excommunicati in concilio Remensi': così si apre la scarna lista di nomi, tramandata da un codice di Oxford, che Walter Holtzmann pubblicò nel 1935.[1] La lista ha portato all'attenzione degli studiosi un nodo fino ad allora sconosciuto della evanescente biografia dell'uomo che i giuristi medievali consideravano il padre degli studi giuridici nel diritto civile, di colui che Odofredo, esprimendo una consapevolezza che era

[*] Relazione presentata al Convegno *Diritto e politica fra XI e XII secolo: Irnerio e l'Europa*, Alma Mater Studiorum – Università di Bologna, Dipartimento di Storia Culture Civiltà, 21-22 novembre 2019. Ricerca condotta nell'ambito del Progetto di ricerca di rilevante interesse nazionale (PRIN 2017) dal titolo 'Precetto religioso e norma giuridica: Storia e dinamica di una dialettica fondativa della civiltà giuridica occidentale (secoli IV-XVII)'.

[1] Walther Holtzmann, 'Zur Geschichte des Investiturstreites (Englische Analekten II.)', NA 50 (1935) 247-319, in particolare il n. 4: 'Eine Bannsentenz des Konzils von Reims 1119', 301-319. Alle pp. 319-320 la lista degli scomunicati al Concilio di Reims (30 ottobre 1119), edita dal manoscritto Oxford, St. Johns College, cod. 149, sec. XII, fol. 192v: 'Isti sunt excommunicati in concilio Remensi: Henr(icus) rex Teutonicorum, Burdinus (Burdunus *ms*.) apostolice sedis invasor, abbas farfensis, Ptolomeus, Iohannes Maledictus, Iordanis Terdonensis ecclesie persecutor, Augustensis ecclesie occupator, Argentinensis, Eistetensis (hesternensis *ms*.), Osnabrugensis, Warmaciensis, Albero Metensis ecclesie oppressor, hii omnes et fautores (factores *ms*.) eorum; Godefridus palatinus comes, dux Fredericus, comes Berengarius, comes Willelmus de Lucelburc, Agnes ecclesie Quetiliburgensis (Cuctiliburgensis *ms*.) dissipatrix et fautores eius, Segifridus de Burgo sancti Donnini, Albertus de Brierio et fautores eius, Gwarnerius Bononiensis legis peritus, Stephanus Oschitanus episcopus, Philipus Ravennatis ecclesie invasor, Hugo Brisiensis, Frisiensis, Egilo Novariensis (novalriensis *ms*.), Lisiardus, Bernardus Grosus, Odo de Palumbario, Simon et Milo, Reienelmus et sui, Franco et filii eorum'.

comune al suo tempo, individuava come il 'primus illuminator scientie nostre'.[2] 'Gwarnerius Bononiensis legis peritus', infatti, compare entro la serie di trentadue nomi che si apre con 'Henricus rex Teutonicorum' e 'Burdinus apostolice sedis invasor', cioè con Enrico V e Maurizio Burdino, l'antipapa Gregorio VIII che l'imperatore aveva fatto eleggere a Roma nel marzo 1118.

La serie degli scomunicati appare abbastanza eterogenea, ciò che rende difficile comprendere cosa tenga insieme numerosi personaggi ecclesiastici e laici appartenenti sia all'ambiente tedesco che a quello italiano, ai quali si aggiunge uno spagnolo

[2] Ritengo utile e doveroso richiamare la più importante letteratura che, in tempi recenti e meno recenti, si è occupata di Irnerio anche con attenzione ai temi trattati in queste pagine: Enrico Spagnesi, *Wernerius Bononiensis iudex: La figura storica d'Irnerio* (Accademia Toscana di Scienze e Lettere 'La Colombaria', Studi 16; Firenze 1970); Idem, 'Irnerio', *Enciclopedia Italiana di scienze, lettere ed arti. Il contributo italiano alla storia del pensiero. Ottava Appendice, Diritto*, a cura di Paolo Cappellini, Pietro Costa, Maurizio Fioravanti, Bernardo Sordi (Roma 2012), disponibile in rete: http://www.treccani.it/enciclopedia/irnerio_%28Il-Contributo-italiano-alla-storia-del-Pensiero:-Diritto%29/; Idem, *'Libros legum renovavit'. Irnerio lucerna e propagatore del diritto* (Pisa 2013); Ennio Cortese, 'Irnerio', DBI 62 (Roma 2004) 600-605; Idem, 'Irnerio (sec. XI-XII)', DBGI, dirr. Italo Birocchi, Ennio Cortese, Antonello Mattone, Marco Nicola Miletti (Bologna 2013) I 1109-1113; Gero Dolezalek, 'Irnerius', HRG 2.439-441; Peter Landau, 'Irnerius (um 1070-um 1129/30)', HRG^2 2.1303-1306; Andrea Padovani, 'Roberto di Torigni, Lanfranco, Irnerio e la scienza giuridica anglo-normanna nell'età di Vacario', RIDC 18 (2007) 71-140; Idem, 'Matilde e Irnerio: Note su un dibattito attuale', *Matilde di Canossa e il suo tempo*: *Atti del XXI Congresso Internazionale di studio sull'alto medioevo in occasione del IX centenario della morte (1115-2015), San Benedetto Po, Revere, Mantova, Quattro Castella, 20-24 ottobre 2015* (Spoleto, Fondazione Centro Italiano di Studi sull'Alto Medioevo, 2016) 204-232; Idem, 'Alle origini dell'università di Bologna: L'insegnamento di Irnerio', BMCL 33 (2016) 13-25; Idem, 'Irnerius (ca. 1055 to ca. 1125)', *Law and the Christian Tradition in Italy: The Legacy of the Great Jurists*, edd. Orazio Condorelli, Rafael Domingo, foreword by John Witte, Jr. (Law and Religion, general editor Norman Doe; Abingdon – New York 2020) 25-40; Kenneth Pennington, 'Odofredus and Irnerius', RIDC 28 (2017) 11-27; Idem, 'Per un *Corpus Irnerianum*', RIDC 30 (2019) 29-43. Nonché le relazioni di Kenneth Pennington, Andrea Padovani e Luca Loschiavo, in questo Convegno.

(Stefano vescovo di Huesca). Tanto più che la lista appare scandita, all'ingrosso, almeno in due gruppi, poiché dopo i primi dodici nomi, tra i quali non vi è ancora Irnerio, una clausola intermedia afferma 'hii omnes et fautores eorum', prima che l'enumerazione prosegua, ulteriormente scandita da clausole che sembrano definire gruppi e situazioni differenti ('et fautores eius'; 'et filii eorum'). All'identificazione dei personaggi menzionati nella lista si è applicato Walter Holtzmann, alle cui preziose pagine è necessario rinviare, con risultati rispetto ai quali nulla è possibile aggiungere in questa sede.[3] È però necessario tentare di comprendere per quali ragioni Irnerio si trovi all'interno del gruppo degli scomunicati. La risposta più immediata e ovvia porta a ritenere che la condanna ebbe causa nell'opera di sostegno teorico prestata da Irnerio al momento della elezione di Maurizio Burdino—è un punto centrale sul quale mi soffermerò in seguito—; ma più in generale si può pensare che la condanna sia la conseguenza della fedele e perseverante adesione di Irnerio all'azione di Enrico V, una vicinanza nella quale il giurista era associato ad altri personaggi menzionati nella lista come per esempio l'abate dell'abbazia imperiale di Farfa e Tolomeo conte di Tuscolo.

[3] Oltre che nel citato saggio di Holtzmann, la lista è discussa da Stefan Weinfurter, 'Reformidee und Königtum im spätsalischen Reich. Überlegungen zu einer Neubewertung Kaiser Heinrichs V.', *Reformidee und Reformpolitik im spätsalischen-frühstaufischen Reich: Vorträge der Tagung der Gesellschaft für Mittelrheinische Kirchengeschichte vom 11. bis 13. September 1991 in Trier*, ed. Stefan Weinfurter (Quellen und Abhandlungen zur mittelrheinischen Kirchengeschichte 68; Mainz 1992) 1-45 a 23 nota 110; anche in Idem, *Gelebte Ordnung, gedachte Ordnung: Ausgewählte Beiträge zu König, Kirche und Reich*: *Aus Anlass des 60. Geburtstages* herausgegeben von Helmuth Kluger, Hubertus Seibert und Werner Bomm (Stuttgart 2005) 289-334 a 311 nota 110; Georg Gresser, *Die Synoden und Konzilien in der Zeit des Reformpapsttums in Deutschland und Italien von Leo IX. bis Calixt II. 1049-1123* (Konziliengeschichte, Reihe A: Darstellungen; Paderborn, München, Wien, Zürich 2006) 462-465. Un'attenta analisi della lista, con particolare attenzione alla presenza di Irnerio, si legge in Giuseppe Mazzanti, 'Irnerio: contributo a una biografia', RIDC 11 (2000) 117-181 a 117-122.

La lista del manoscritto di Oxford integra, confermandole, le notizie che sul concilio di Reims pervengono principalmente attraverso la *Relatio* dello scolastico Hesso di Strasburgo, nonché da altre cronache medievali.[4] Il concilio, svoltosi sotto la direzione di papa Callisto II, si aprì il 20 ottobre 1119 e si concluse dieci giorni dopo con la solenne scomunica inflitta, in primo luogo, a Enrico V e all'antipapa Maurizio Burdino.[5] Il concilio era la sede in cui il pontefice auspicava di dare sanzione agli accordi sulla materia delle investiture ecclesiastiche che i delegati papali stavano parallelamente negoziando con Enrico V.[6] Prima ancora dell'apertura del concilio, Guglielmo di

[4] *Hessonis Scholastici Relatio de Concilio Remensi*, edidit W. Wattenbach, in MGH, Ldl 3.21-28.

[5] Sulle trattative fra Callisto II ed Enrico V e il concilio di Reims v. Stanley A. Chodorow, 'Ecclesiastical Politics and the Ending of the Investiture Contest. The Papal Election of 1119 and the Negotiations of Mouzon', *Speculum* 46 (1971) 613-640; Uta-Renate Blumenthal, *La lotta per le investiture*, presentazione di Giovanni Vitolo, appendice bibliografica di Matteo Villani (Napoli 1990) 221-223 [traduzione italiana di *Der Investiturstreit* (Stuttgart 1982), successivamente tradotto in lingua inglese, *The Investiture Controversy. Church and Monarchy from the Ninth to the Twelfth Century* (Philadelphia 1988)]; Gresser, *Die Synoden* 451-467; Beate Schilling, *Guido von Vienne, Papst Calixt II.* (Schriften der MGH 45; Hannover 1998) 412-426; Giovanni Miccoli, 'Callisto II', *Enciclopedia dei Papi* (Roma 2000), consultato in rete:
http://www.treccani.it/enciclopedia/callisto-ii_%28Enciclopedia-dei-Papi%29/;
Nicolangelo D'Acunto, *Una rivoluzione medievale: La lotta per le investiture (998-1122)* (Roma 2020).

[6] Per un profilo di Enrico V e una valutazione storiografica della sua figura si vedano il citato lavoro di Weinfurter, 'Reformidee und Königtum'; Gerd Althoff, 'Heinrich V. (1106-1125)', *Die deutschen Herrscher des Mittelalters: Historische Portraits von Heinrich I. bis Maximilian I. (919-1519)*, edd. Bernd Schneidmüller-Stefan Weinfurter (München 2003) 183-200; i saggi raccolti in *Heinrich V. in seiner Zeit. Herrschen in einem europäischen Reich des Hochmittelalters*, ed. Gerhard Lubich (Forschungen zur Kaiser- und Papstgeschichte des Mittelalters 34; Wien-Köln-Weimar 2013): qui il saggio di Florian Hartmann, 'Heinrich V. im Diskurs Bologneser Gelehrter' 191-214, contiene un breve cenno alla partecipazione di Irnerio all'elezione di Maurizio Burdino 191-192. Su Enrico V e più in generale sui temi qui trattati rinvio

Champeaux, teologo e vescovo di Châlons-en-Champagne, e Ponzio di Cluny avevano incontrato Enrico V a Strasburgo, 'acturi cum eo de pace et concordia inter regnum et sacerdotium'.[7] Toccò a Guglielmo impostare il piano delle trattative, cosa che egli fece con chiarezza e senza ambiguità: 'Se desideri una vera pace, signore re, occorre che tu abbandoni del tutto l'investitura degli episcopati e delle abbazie'.[8] Ma tale schiettezza, che agli occhi dell'imperatore rischiava di sconfinare nell'insolenza, si accompagnava a uno sforzo persuasivo nel quale Guglielmo di Champeaux si giovava della sua personale esperienza. Il vescovo francese attestava di non avere ricevuto alcuna investitura dal re di Francia né prima né dopo la sua consacrazione, e che non di meno si comportava come fedele servitore del proprio sovrano nel pagamento dei tributi, nel servizio militare, più in generale in tutte le prestazioni relative ai beni che anticamente spettavano alla 'res publica', ma che i re cristiani avevano poi donato alla Chiesa. Guglielmo voleva così persuadere Enrico V che non avrebbe patito alcuna 'deminutio' delle proprie prerogative se avesse rinunciato all'investitura nel proprio regno. I fatti successivi sono noti, ed è sufficiente richiamarli in breve. Inizialmente sembrò che Enrico si fosse convinto. In un incontro tenutosi tra Verdun e Metz (17-19 ottobre) fu redatto uno 'scriptum concordiae' nel quale l'imperatore sembrava cedere su tutti i fronti (dimitto omnem investituram omnium ecclesiarum), ma in quella sede si convenne che l'accordo sarebbe stato approvato in un successivo

anche alla relazione di Nicolangelo D'Acunto, 'Il contesto storico-politico fra XI e XII secolo', in questo Convegno.

[7] *Hessonis Scholastici Relatio* 22.

[8] Ibid. 22: 'Si veram pacem, domne rex, desideras habere, investituram episcopatuum et abbatiarum omnimodis dimittere te oportet. Ut autem in hoc nullam regni tui diminutionem pro certo teneas, scito me in regno Francorum episcopum electum, nec ante consecrationem nec post consecrationem aliquid suscepisse de manu regis; cui tamen de tributo, de milicia, de theloneo, et de omnibus quae ad rem publicam pertinebant antiquitus, sed a regibus christianis ecclesiae Dei donata sunt, ita fideliter deservio, sicut in regno tuo tibi episcopi deserviunt, quos huc usque investiendo, hanc discordiam immo anathematis sententiam incurristi'.

incontro da tenersi a Mouzon alla presenza di Callisto II. L'incontro, svoltosi a concilio ormai aperto (24 e 25 ottobre), fu però infruttuoso. Enrico V dapprima negò di avere promesso quanto la delegazione papale aveva riportato nello 'scriptum concordiae', poi cominciò a chiedere tempo, sostenendo di non potere rinunciare all'investitura senza aver prima convocato un 'generale colloquium' con i principi del Regno.[9] Il clima dell'incontro non era stato sereno. Il cardinale Giovanni da Crema avrebbe poi raccontato ai vescovi riuniti a Reims che la delegazione papale si sentiva minacciata dall'esercito imperiale, e che grande era il timore che Enrico, 'imperator dolosus', volesse addirittura catturare 'fraudulenter' Callisto II, come già aveva fatto con Pasquale II a Roma.[10]

La delegazione pontificia tornò a Reims, dove i lavori conciliari ripresero in vista della deliberazione di alcuni canoni di riforma su alcune delicate questioni di disciplina ecclesiastica. Callisto II propose all'assemblea una serie di cinque canoni che rispettivamente condannavano la simonia, l'investitura laica, l'invasione o la sottrazione dei possedimenti ecclesiastici, la trasmissione di dignità e benefici ecclesiastici 'quasi hereditario iure', gli illeciti rapporti di coniugio o concubinato di presbiteri, diaconi e suddiaconi (concubinarum et uxorum contubernia).[11] Il

[9] Ibid. 26: 'Tunc rex iratus iterum coepit inducias querere, donec generale colloquium cum principibus regni posset habere, sine quorum consilio investituras non audebat dimittere'.

[10] Così nel discorso riportato da Orderico Vitale: 'Imperator dolosus per diversas ambages cavillabatur, fraudulenter nobiscum loquebatur; sed presentiam Pape, ut eundem caperet, summopere operiebatur. Sic totum diem inutiliter exegimus; sed patrem patrum ab oculis eius solerter occultavimus, memores quam fraudulenter idem ipse Romam intraverit, et ante aram in basilica sancti Petri Apostoli, Paschalem Papam ceperit.' (Orderici Vitalis Angligenae, coenobii Uticensis monachi, *Historiae ecclesiasticae libri tredecim*, ed. Augustus Le Prevost, 4 [Paris 1852] XII.21 p. 384).

[11] *Hessonis Scholastici Relatio* 27. Sul contenuto e sulla trasmissione dei canoni deliberati a Reims si veda Robert Somerville, 'The Councils of Pope Calixtus II: Reims 1119', *Proceedings Salamanca 1976* 35-50, ora in Idem, *Papacy, Councils and Canon Law in the 11th-12th Centuries* (Collected Studies 312; Aldershot 1990) n. XII, che in appendice, pp. 49-50, dà

decreto che condannava l'investitura suscitò vivaci reazioni negative sia da parte ecclesiastica che da parte laica, tanto che Callisto decise di riformularlo e temperarlo in modo che potesse essere approvato con l'unanime consenso, ciò che avvenne il 30 ottobre.

Il concilio, che negli auspici avrebbe dovuto celebrare la concordia tra Callisto II ed Enrico V—o tra 'sacerdotium' e 'regnum', come aveva prefigurato Guglielmo di Champeaux—si risolse in un insuccesso. L'ultimo atto fu la cerimonia della scomunica solenne, che Hesso racconta con dettagli scenografici.[12] Furono portate nell'assemblea quattrocentoventisette candele, ciascuna delle quali fu consegnata ai vescovi e agli abati presenti, ai quali fu ordinato di stare in piedi tenendo il pastorale e le candele accese. In tale scenario furono recitati i nomi di molte persone (multorum nomina) che il papa aveva proposto di scomunicare. Per primi furono nominati 'rex Heinricus et Romanae ecclesiae invasor Burdinus', ciò che corrisponde, anche per la qualifica di 'invasor' attribuita a Burdino, a quanto è tramandato dalla lista di Oxford. Hesso non offre ulteriori particolari, se non che l'imperatore e l'antipapa furono solennemente scomunicati 'prima di tutti gli altri e insieme a molti altri', dopo di che il pontefice sciolse i sudditi dai vincoli di fedeltà giurata al sovrano.

Era stata dunque persa una preziosa occasione per giungere a una pacificazione sulla materia delle investiture ecclesiastiche, anche se il concilio di Reims segnò una tappa decisiva nel

l'edizione di cinque canoni che non corrispondono a quelli comunemente noti (dal Paris, BNF lat. 9631 fol. 48v-49r).

[12] *Hessonis Scholastici Relatio* 28: 'Allatae sunt denique candelae quadringentae viginti septem et accensae datae singulae singulis, tenentibus baculos, episcopis et abbatibus, iniunctumque est eis, ut omnes candelas tenentes assurgerent. Cumque astarent, recitata sunt multorum nomina, quos praecipue excommunicare proposuerat domnus papa. Inter quos primi nominati sunt rex Heinricus et Romanae ecclesiae invasor Burdinus, et prae ceteris et cum ceteris multis solemniter excommunicati. Absolvit etiam domnus papa auctoritate apostolica a fidelitate regis omnes, quotquot ei iuraverant, nisi forte resipiscerent et ecclesiae Dei satisfacerent'.

processo che avrebbe condotto alla stipulazione del concordato di Worms nel 1122. Ma era stata persa una preziosa occasione anche per porre fine allo scisma che dal marzo del 1118 tormentava la Chiesa. A ben guardare, tutta la storia del concilio di Reims mostra come l'imperatore non si curasse di ciò che la sua creatura, Gregorio VIII, stesse pensando o facendo a Roma. Anzi, l'avere intavolato trattative con Callisto II mostra come l'imperatore ritenesse che il successore di Gelasio II fosse non solo un interlocutore affidabile, ma anche l'interlocutore necessario col quale rapportarsi nel processo diretto a restaurare la concordia tra Chiesa e Impero. Insomma, è evidente che Enrico V era prontissimo a sacrificare Gregorio VIII sull'altare di un conveniente accordo con Callisto II: si può pensare che, se l'accordo fosse stato concluso, l'imperatore avrebbe indotto Gregorio VIII a tirarsi indietro.[13]

Vi è un altro fatto da tenere in considerazione. Sia Enrico V che Maurizio Burdino erano entrambi già scomunicati al tempo in cui il concilio di Reims si svolgeva.[14] Alcune lettere di Gelasio

[13] Una spregiudicatezza alla quale Enrico V non era nuovo. Al riguardo possiamo ricordare che già 'nella primavera del 1111, dopo il fallimento dell'accordo di Sutri sulla questione delle investiture e la mancata incoronazione imperiale di febbraio, Enrico V utilizzò verosimilmente anche Maginolfo (l'antipapa Silvestro IV) come mezzo di pressione nelle trattative con Pasquale II': Andrea Piazza, 'Silvestro IV, antipapa', DBI 92 (Roma 2018), consultato in rete:
http://www.treccani.it/enciclopedia/antipapa-silvestro-iv_(Dizionario-Biografico)/.
Sul rapporto fra Enrico V e questi due antipapi v. le considerazioni di D'Acunto, 'Il contesto storico-politico fra XI e XII secolo', in questo Convegno.

[14] Questo induce Mazzanti, 'Irnerio: contributo a una biografia' 122, a escludere che la scomunica inflitta a Reims riguardasse la partecipazione degli scomunicati alle vicende relative all'elezione di Maurizio Burdino. È in qualche modo seguito da Spagnesi, 'Irnerio' (2012), secondo il quale 'le vicende romane del 1118 . . . precedettero ma forse non furono la causa diretta della scomunica fulminata nel 1119'. A mio modo di vedere, per quanto attiene a Enrico V e Irnerio è difficile sceverare la condotta tenuta nel 1118 da quella relativa alle trattative di pacificazione fallite nell'anno successivo: agli

II—il precedecessore di Callisto II, morto a Cluny nel gennaio 1119—risalenti al 1118 sono assolutamente trasparenti a questo riguardo. Gelasio parla di Maurizio arcivescovo di Braga come di un suo 'familiaris', che in precedenza aveva svolto funzioni di legato presso Enrico V 'super tractanda pace'.[15] Senza dare ulteriori precisazioni, Gelasio riferisce anche che Maurizio era stato scomunicato da Pasquale II nel concilio tenuto l'anno precedente a Benevento (aprile 1117).[16] Secondo gli *Annales Palidenses*, in quell'occasione Maurizio sarebbe stato scomunicato niente meno che per l'accusa di negromanzia: deposto dall'ufficio, avrebbe poi ottenuto il perdono e *dispensatorie* sarebbe stato tollerato.[17] Rimane incerto se Burdino abbia svolto funzioni di legato presso Enrico V prima o dopo la scomunica del 1117, ma è verosimile che nell'occasione dello svolgimento di tale funzione sia maturata la sua solidarietà con le posizioni dell'imperatore. In lettere indirizzate a vari destinatari, inoltre, Gelasio rende nota la scomunica che aveva inflitto a Enrico V e a Burdino dopo gli eventi romani del marzo 1118, allorché l'imperatore aveva promosso l'elezione scismatica di Gregorio VIII.[18] Il 7 aprile 1118, Domenica delle Palme, nel sinodo tenuto

occhi di Callisto II il loro comportamento dava conferma di un atteggiamento pervicacemente colpevole che meritava la riproposizione della scomunica.

[15] Gelasio II, Epistola al clero e al popolo romano (JL 6632, 10 marzo 1118; PL 163.487B): 'Audivimus etiam, quondam [quoniam] ille amicus noster dominus imperator, familiarem nostrum Mauritium Bracarensem archiepiscopum, antea sibi super tractanda pace legatum, in nostram Ecclesiam ingesserit'. Cantarella, *Pasquale II e il suo tempo* (Napoli 1997) 179-180.

[16] Gresser, *Die Synoden* 427-428.

[17] *Annales Palidenses* MGH, SS 16, ed. Georgius H. Pertz (Hannoverae 1868) 76: 'Tempore Paschalis pape quidam Hispanie archiepiscopus Mauricius, cognomento Burdinus, apud ipsum apostolicum de nigromancia accusatus fuit et convictus. Secundum iustitiam ergo depositus, inpetrata venia dispensatorie toleratus est'. Gelasio II menziona la scomunica del 1117, senza indicare la causa, in una lettera del 16 marzo 1118 (cfr. la nota seguente).

[18] Gelasio II, 'archiepiscopis, episcopis, abbatibus, clericis, principibus et caeteris per Galliam fidelibus' (JL 6635, 16 marzo 1118; PL 163.489): 'Ille statim, die videlicet post electionem nostram quadragesimo quarto, Mauritium Bracarensem episcopum, anno praeterito a domino praedecessore nostro

a Capua Gelasio II aveva inoltre scomunicato 'regem ipsum cum idolo suo':[19] Enrico V con il 'burattino' da lui comandato. Sul fronte papale, specularmente, la precendente scomunica di Enrico V non sembrava rappresentare un ostacolo formale tale da impedire le trattative in vista di una successiva riappacificazione, e non consta che Callisto abbia rimesso la scomunica inflitta all'imperatore prima di condurre le trattative.

La *Relatio* di Hesso sul concilio di Metz ha il pregio di essere scritta da un autore che fu testimone delle vicende raccontate, ma le sue informazioni possono essere integrate con le notizie che provengono da altre cronache medievali, alle quali accennerò per ciò che più direttamente riguarda la vicenda della scomunica.

Simeone di Durham conferma che l'azione di Callisto II aveva trovato opposizioni nel seno dello stesso concilio, ma non offre ulteriori informazioni sulla scomunica, alla quale il

Paschali papa in concilio Beneventi excommunicatum, in matris Ecclesiae gremium [*al*. invasionem] ingessit'.

[19] Gelasio II al cardinale Conone di Preneste (JL 6642, 13 aprile 1118; PL 163.492): 'Sane nos cum fratribus nostris et episcoporum collegio in praeterito Palmarum die Capuae regem ipsum cum idolo suo excommunicavimus'. Cfr. la *Chronica regia Coloniensis*, anno 1118: 'Iohannes electus apostolicus Beneventum secedit; imperatorem cum idolo suo—hoc enim nomine quem ipse substituit vocatus est—omnesque huic parti consentientes excommunicavit' (MGH, *Scriptores Rerum Germanicarum in usum Scholarum* XVIII, *Chronica Regia Coloniensis*, ed. Georgius Waitz [Hannoverae 1880] 58). L'immagine trasmessa dalla lettera di Gelasio II piacque agli autori contemporanei. Cfr. Pandulfus, *Vita Gelasii*, in *Le Liber Pontificalis. Texte, introduction et commentaire*, ed. Louis Duchesne, II (Bibliothèque des Écoles Francaises d'Athènes et de Rome, Paris 1892) 311-321, in particolare 315: 'Nobis vero sic iam quomodolibet respirantibus, supervenere qui dicerent quod Gaietae etiam per susurrum primitus senseramus, Henricum illum barbarum quendam Mauritium nomine, Bracharensem episcopum, quasi novum simulachrum in loco papae struxisse et illum sic intrusum papam suum Gregorium nominasse . . . Quod Henricus praesentiens infecto negotio ab castello remotus est et via ipsa qua venerat, irato sibi Domino, Alemanniam rediit, ydolo quod plasmaverat intra Urbem relicto'. Cfr. inoltre il passo di Ekkehard di Aura citato sotto, nota 37. Cfr. Gresser, *Die Synoden* 435.

pontefice si era determinato dopo aver guadagnato l'unanime consenso dei membri del concilio.[20]

Informazioni utili ci sono invece fornite da Orderico Vitale. Interessante è l'aggettivo 'moerens', con cui lo storico rappresenta Callisto II che giunse alla soluzione estrema della scomunica con animo afflitto e rassegnato per l'infelice conclusione delle trattative. Nel racconto di Orderico, Callisto scomunicò anzitutto 'Karolum Henricum, Imperatorem Theomachum, et Burdinum, pseudo-Papam, et fautores eorum', associando loro nella condanna 'aliosque scelerosos qui manifeste sepius correpti, sed inemendabiles perdurabant'.[21] Le scomuniche inflitte nel concilio di Reims giungevano alla fine di un lungo tempo di crisi, durato un anno e mezzo, che era iniziato con l'elezione scismatica di Maurizio Burdino, era proseguito con le promettenti trattative di pacificazione svolte parallelamente al concilio di Reims, ma si era concluso con un fallimento, a giudicare dalle cronache coeve, per la mancata disponibilità della parte imperiale.

Se, a mio parere, non vi sono dubbi sul complesso delle ragioni che giustificarono la conferma della scomunica di Enrico V e Burdino con i rispettivi fautori (fra i quali si trovava Irnerio), è da pensare che Callisto II abbia approfittato della solenne conclusione del concilio per associare ai primi altri 'malvagi' ('scelerosos') autori di crimini ecclesiastici (per esempio l'illegittima occupazione di sedi episcopali, o la dissipazione di beni ecclesiastici) che si erano dimostrati 'inemendabili'. Quanto

[20] Simeonis Dunelmensis *Historia de gestis regum Anglorum*, in Roger Twysden, *Historiae Anglicanae Scriptores*, X… *ex vetustis manuscriptis nunc primum in lucem editi* (Londini, Typis Jacobi Flesher, Sumtibus Cornelii Bee, 1652) 241: 'Talia sermocinante Apostolico, illico omnes in eundem cum ceteris consensum reducti, in Imperatorem Henricum excommunicationis sententiam iaculantur'.

[21] Orderici Vitalis *Historiae ecclesiasticae libri tredecim*, 12.21, ed. cit., 390-391: 'Tunc Papa Karolum Henricum, Imperatorem Theomachum, et Burdinum, pseudo-Papam, et fautores eorum moerens excommunicavit, aliosque scelerosos qui manifeste sepius correpti, sed inemendabiles perdurabant, illis associavit, parique anathematis percussione usque ad emendationem multavit'.

al ‘Gwarnerius Bononiensis legis peritus’, scomunicato insieme a tutti gli altri, occorre approfondire le ragioni della sua presenza nella lista dei condannati, ragioni che mi pare debbano collegarsi, in generale, all’appoggio che Irnerio aveva dato alla politica imperiale. Appare seducente l’ipotesi che Irnerio abbia seguito Enrico V nel suo ritorno in terra di Germania nel 1118. Se così fosse, la vicinanza del giurista bolognese all’imperatore, ampiamente attestata negli anni della discesa in Italia di Enrico V, avrebbe avuto una prosecuzione in Germania: una vicinanza che poteva essere pertanto visibilmente constatabile anche da Callisto e dalla sua delegazione nel corso trattative parallele al concilio di Reims.[22] Occorre però passare dal piano delle ipotesi all’analisi dei fatti, e quindi esaminare l’unica fonte che offre una testimonianza inequivocabile dell’esistenza di un ‘triangolo’ costituito da Enrico V / Maurizio Burdino / Irnerio, cioè testimonianza di quella connessione che, allo stato delle conoscenze, rimane la più plausibile giustificazione dell’associazione di Irnerio alla scomunica fulminata sui due capofila della serie.

L’elezione di Maurizio Burdino (Roma, marzo 1118) nella testimonianza di Landolfo Iuniore

La partecipazione di Irnerio alle procedure che condussero all’elezione di Maurizio Burdino è tramandata, come è noto, esclusivamente nella *Historia Mediolanensis* di Landolfo Iuniore, opera che fu completata appena dopo il 1137.[23] Lo storico, che scriveva a pochi anni di distanza dagli avvenimenti narrati, ha lasciato un resoconto molto dettagliato di ciò che accadde a Roma dopo la morte di Pasquale II, quindi il suo

[22] Mazzanti, ‘Irnerio: contributo a una biografia’ 123-124, ritiene che Irnerio fosse presente accanto all’imperatore durante le trattative condotte con Callisto II. Anche Cortese, nelle due voci su ‘Irnerio’ nel DBI e nel DBGI, ritiene probabile che Irnerio avesse seguito Enrico V oltralpe. Spagnesi, *Wernerius Bononiensis iudex* 138-143, ha pensato che Irnerio fosse invece ritornato a Bologna.

[23] Paolo Chiesa, ‘Landolfo Iuniore’, DBI 63 (Roma 2004), consultato in rete, http://www.treccani.it/enciclopedia/landolfo-iuniore_(Dizionario-Biografico)/.

racconto richiede una attenta considerazione. In particolare, è opportuno rapportare il racconto di Landolfo con le informazioni trasmesse da altre cronache più o meno coeve, perché è necessario comprendere quale fu il quadro giuridico nel quale Irnerio offrì il suo sostegno teorico all'azione con cui Enrico V promosse l'elezione di Maurizio Burdino in contrasto con la precedente elezione di Gelasio II.

Alla morte di Pasquale II (21 gennaio 1118) il voto degli elettori si indirizzò su Giovanni da Gaeta, monaco benedettino, cardinale e cancelliere della Chiesa Romana, che assunse il nome di Gelasio II.[24] La scelta mostrava l'intendimento di garantire la continuità col precedente pontificato: Giovanni era stato un fedele collaboratore di Pasquale II, la cui politica aveva difeso nel concilio Lateranense del 1116. Le vicende pregresse potevano far temere che Gelasio potesse essere accondiscendente verso le pretese dell'imperatore (era vivo il ricordo del

[24] I profili biografici dei tre papi e antipapi in questione sono un necessario orientamento nel complessissimo groviglio degli eventi che si concentrano nel tempo di un paio d'anni: Carlo Servatius, *Paschalis II. (1099-1118): Studien zu seiner Person und seiner Politik* (Stuttgart 1979); Glauco Maria Cantarella, 'Pasquale II, papa', DBI 81 (Roma 2014), consultato in rete:
http://www.treccani.it/enciclopedia/papa-pasquale-ii_%28Dizionario-Biografico%29/;
Idem, *Pasquale II e il suo tempo*; Stephan Freund, 'Gelasio II', *Enciclopedia dei Papi* (Roma 2000) consultato in rete:
http://www.treccani.it/enciclopedia/gelasio-ii_%28Enciclopedia-dei-Papi%29/;
Cristina Colotto, 'Gregorio VIII, antipapa', DBI 59 (Roma 2002), consultato in rete:
http://www.treccani.it/enciclopedia/antipapa-gregorio-viii_(Dizionario-Biografico)/.
Su Burdino rimane sempre utile Carl Erdmann, 'Mauritius Burdinus (Gregor VIII.)', QF 19 (1927) 207-261. Il recente lavoro di Francesco Renzi, '*Imperator Burdinum Hispanum Romanae sedi violenter imposuit:* A Research Proposal on the Archbishop of Braga and Antipope Gregory VIII, Maurice 'Bourdin' ', *Imago Temporis: Medium Aevum* 12 (2018) 211-235, presenta i dati per una rivalutazione storiografica di Maurizio Burdino, ma, per quanto riguarda i nostri fini, non conosce il lavoro di Holtzmann e non si occupa della scomunica nel concilio di Reims.

'pravilegium' che Enrico V aveva estorto a Pasquale II negli accordi del Ponte Mammolo nel 1111), ma gli accadimenti successivi mostrano che il neoeletto pontefice si muoveva con autonomia di giudizio e non era affatto prono di fronte alla volontà dell'imperatore. Gelasio e i cardinali, infatti, decisero di lasciare Roma e rifugiarsi a Gaeta alla notizia che Enrico V scendeva a grande velocità dall'Italia settentrionale verso Roma. Su questi eventi si innesta il racconto di Landolfo, secondo il quale l'imperatore si trovava dalle parti di Torino quando lo raggiunse la legazione dei Romani, che verosimilmente comunicava, oltre che la morte di Pasquale II, la rapida elezione, tre giorni dopo, di Gelasio II.[25] Enrico V si affrettò a dirigersi

[25] Landulfi de Sancto Paulo *Historia Mediolanensis*, edentibus Ludowicus C. Bethmann et Philippus Jaffé, MGH, SS 20 (Hannoverae 1868) 40 n. 45 (trascritto con le relative particolarità grafiche): 'Pascalis papa, ad quem religio et remisio peccatorum tunc spectabat, post hoc coloquium et tempus terre motus non ultra decem menses et dimidium vixit. In tempore cuius mortis imperator, audita legatione Romanorum, a Taurinensium partibus Romam adire festinavit. Ex qua urbe simul cum Romanis 4. Nonas Martii misit Gagetas legatos, legando Iohanni Gagetani, ellecto in papam, cardinalibus quoque et episcopis, qui cum ipso erant Gayetis, uti Romam redirent, et in ecclesia beati Petri hoc, quod faciendum erat de papa substituendo, una cum ipsis iuste et catholice facerent. Sed 7. Idus eiusdem Martii in ecclesiam beati Petri, presente imperatore Henrico, et populo Romano cleroque astante in aliquo, illud responsum, quod legati imperatoris Romanorum vel cum eligentibus a prenominato ellecto audierunt et susceperunt, quodam modo relatum est, videlicet: quod in proximo Septembri ipse cum cardinalibus et episcopis provinciarum Mediolani vel Cremone esset, et tunc Romani et imperator, quid agendum sit de se in papam ellectum, vel allium substituendum, per doctrinam cardinalium et episcoporum sufficienter cognoscerent. Romani vero non intelligentes, hanc responsionem fore suffitientem et legibus et canonibus atque suis petitionibus convenientem, comoti clamaverunt: "Numquid honorem Rome volunt illi transferre Cremone? Absit. Set ut ubique valeamus astutias eorum opprimere, qui a nobis exierunt et Caietas fugierunt, secundum auctoritatem legum et canonum eligamus nobis papam prudentem et bonum". Iuxta istam vel consimilem formam verborum Romanorum magister Guarnerius de Bononia et plures legis periti populum Romanum ad eligendum papam convenit; et quidam expeditus lector in pulpito Sancti Petri per prolixam lectionem decreta pontificum de substituendo papa explicavit. Quibus perlectis et explicatis,

verso Roma, dove però non trovò il neoeletto, che aveva appena lasciato la città. Il 4 marzo l'imperatore inviò i suoi legati a Gaeta, invitando il papa eletto, i cardinali e i vescovi che erano con lui a tornare a Roma, affinché nella Chiesa di San Pietro essi compissero 'iuste et catholice' gli adempimenti che erano richiesti all'atto di una nuova elezione papale (quod faciendum erat de papa substituendo, una cum ipsis iuste et catholice facerent). Gelasio rispose prontamente, e la sua risposta, trasmessa dai legati imperiali, fu solennemente riferita in San Pietro il 9 marzo, alla presenza dell'imperatore, del clero e del popolo romano. Gelasio comunicava che nel successivo mese di settembre sarebbe stato presente a Milano o Cremona coi cardinali e i vescovi delle rispettive province, e in quell'occasione i Romani e l'imperatore avrebbero appreso quanto i cardinali e i vescovi avrebbero deciso o sulla sua conferma come papa, o sulla necessità di una nuova elezione (quid agendum sit de se in papam ellectum, vel allium substituendum). All'udire questa riposta i Romani—racconta

tantus populus elegit in papam quendam episcopum Yspanie, qui ibi aderat cum imperatore. Quem ellectum imperator duxit in pulpitum, ubi ipse ellectus interrogantibus de nomine suo dixit: "Meum nomen est Burdinus; set quando papa Urbanus ordinavit me episcopum, nominavit me Mauritium". Tunc quidam de indutis habitu ecclesiastico de pulpito ad populum tertio clamavit: "Vultis dominum Mauritium in papam?" Qui tertio respondentes et clamantes dixerunt: "Volumus". Tunc ipse cum ceteris astantibus clericis, aperto libro super hunc ellectum et manto coopertum, sublimi voce clamavit dicens: "Et nos laudamus et confirmamus dominum Gregorium". Facta igitur ellectione ista ad hunc modum, imperator hunc papam suum Gregorium promovit, et per castrum Sancti Angeli in palatium Laterani perduxit. In quo iste pontifex, si fas est dicere, cathedram sedit et prandium sumpsit et pernoctavit. Altera vero die, nullo mediante, idem papa eundem imperatorem ad ipsum palatium suscepit, et cum ipso ad ecclesiam sancti Petri rediit; ante cuius et super cuius altare de clero coram imperatore et pluribus Romanis in eadem die ad ordines promovit et missam cantavit. Ibique per quot dies et menses habitavit et fidelitatem suscepit, atque splendide de lege Dei et ecclesiasticis consuetudinibus predicavit absque ullo rancore, pacem regno et sibi et suum papam Gaietano Iohani (*sic*) in papam ellecto exclamavit, donec imperator iterum ad Germaniam rediens, ipsum Gregorium suum papam in Sutrina civitate quasi securum fecit'.

Landolfo—si alterarono, poiché ritenevano che tale comportamento non fosse conforme alle ‘leges’ e ai ‘canones’, né alle richieste che essi avevano trasmesso all’eletto. Forse Gelasio e i suoi seguaci volevano trasferire a Cremona l’onore che spettava a Roma? Inaccettabile era la proposta di Gelasio, come inaccettabile era stata la sua fuga a Gaeta: i Romani affermavano di avere pertanto il diritto di eleggere, secondo le ‘leges’ e i ‘canones’, un papa buono e prudente.

Un confronto con altre fonti, nel tentativo di ricostruire gli eventi

Questa prima parte del racconto di Landolfo merita di essere confrontata con altre fonti coeve, per sottolinearne i punti che trovano in esse riscontro e per stimare il grado di affidabilità della testimonianza offerta dal cronista milanese. Al di là delle ragioni politiche che potevano giustificare l’opposizione di Enrico V a Gelasio II (il timore che il nuovo pontefice non fosse un’agevole interlocutore sulla irrisolta questione delle investiture ecclesiastiche), è necessario valutare quali fatti potessero condizionare, agli occhi dei contemporanei, la validità dell’elezione di Gelasio II. In altre parole, occorre valutare quale fosse il quadro formale che poteva consentire, come di fatto avvenne, il disconoscimento dell’elezione di Gelasio II e la successiva elezione, per volontà di Enrico V, di Maurizio Burdino. Fu solo un atto di forza e di prepotenza? Come vedremo, il racconto di Landolfo mostra che l’elezione di Burdino fu accuratamente preparata dai consiglieri dell’imperatore sotto il profilo giuridico formale. Il che corrisponde a un tratto distintivo che era stato notato da cronista contemporaneo, Ekkehard di Aura, ossia che Enrico V era attento a circondarsi di uomini colti (litterati viri) che fossero capaci di rendere ragione dell’operato dell’imperatore.[26]

[26] Ekkehard von Aura (Ekkehardus Uraugiensis), *Ekkehardi Chronicon*, ed. Georg Waitz, in MGH, SS 6, ed. Georgius H. Pertz (Hannoverae 1844) 243, all’anno 1110, quando Enrico si accingeva a scendere in Italia: ‘Providerat autem rex, nulli a seculo regum in omni providentia secundus, sciens

Come si può ricavare dalla biografia di Gelasio II scritta da Pandolfo e tramandata nel *Liber Pontificalis*, l'elezione di Gelasio aveva seguito lo schema del decreto emanato da Nicolò II nel sinodo lateranense del 1059. Cardinali dell'ordine dei vescovi, dei presbiteri e dei diaconi, insieme ad altri membri del clero romano e ad alcuni membri eminenti di condizione laicale (senatori, consoli e membri della milizia pontificia a cui apparteneva lo stesso Pandolfo), avevano unanimemente eletto il cancelliere Giovanni da Gaeta.[27] Il decreto del 1059, come è noto, faceva salvi il 'debitus honor' e la 'reverentia' del re e futuro imperatore Enrico IV e di coloro, fra i suoi successori, che come Enrico avrebbero ottenuto 'personaliter' tale prerogativa dalla sede apostolica.[28] La clausola era ambigua: quale diritto

Romanam rem publicam olim non tantum armis quantum sapientia gubernari consuetam, se non solum armatis sed etiam litteratis viris necessario muniri, paratis scilicet ad rationem omni poscenti reddendam'. Nella formulazione di Ekkehard mi sembra di sentire l'eco della costituzione *Imperatoriam maiestatem* premessa alle Istituzioni giustinianee: 'Imperatoriam maiestatem non solum armis decoratam, sed etiam legibus oportet esse armatam, ut utrumque tempus et bellorum et pacis recte possit gubernari et princeps Romanus victor existat non solum in hostilibus proeliis, sed etiam per legitimos tramites calumniantium iniquitates expellens, et fiat tam iuris religiosissimus quam victis hostibus triumphator'.

[27] Pandulfus, *Vita Gelasii* 311-321, in particolare 312-313: 'Interim autem Paschale papa defuncto, venerabilis pater domnus Petrus, Portuensis episcopus, qui primatum post papam per longa iam diutius tempora detinuerat, cumque eo omnes presbiteri ac diaconi cardinales de eligendo pontifice, et in commune communiter et singulariter singuli, pertractare ceperunt'. Pandolfo prosegue elencando coloro che parteciparono alla *tractatio*, fra i quali vi erano anche laici: '... de senatoribus ac consulibus aliqui praeter familiam nostram' (313). Pandolfo non dice nulla al riguardo di una comunicazione dell'elezione all'imperatore.

[28] Detlev Jasper, *Das Papstwahldekret von 1059: Überlieferung und Textgestalt* (Beiträge zur Geschichte und Quellenkunde des Mittelalters 12; Sigmaringen 1986) alle pp. 98-119 edita su due colonne la 'echte Fassung' e la 'verfälschte Fassung' del decreto. Di seguito trascrivo i passi della versione autentica rilevanti ai fini del nostro discorso: '[101] . . . decernimus atque statuimus, ut obeunte huius Romane universalis ecclesie pontifice inprimis cardinales episcopi diligentissima simul consideratione tractantes [102] mox sibi clericos cardinales adhibeant, sicque reliquus clerus et populus ad

costituiva in capo all'imperatore? Forse egli doveva limitarsi a prendere meramente atto della scelta operata dal clero? O forse l'imperatore poteva negare il proprio consenso al nuovo eletto? In ogni caso, per fare salvi l'onore e il rispetto dell'imperatore si esigeva che l'elezione gli fosse notificata.

Sebbene il decreto parli di una prerogativa concessa 'ad personam' dalla Sede Apostolica, le fonti mostrano che l'esigenza di rispettare e riverire l'imperatore era costantemente presa in considerazione, ciò che trovava espressione nella pratica di notificargli l'elezione di un nuovo pontefice.

Pier Damiani, un autore che non può essere sospettato di essere accondiscendente alle prepotenze del potere imperiale, aveva dato un'interpretazione del decreto che riempiva di contenuti concreti la clausola regale. Nell'elezione papale, ai

consensum nove electionis accedant, ut, nimirum ne venalitatis morbus qualibet occasione [102] subripiat, religiosi viri praeduces sint in promovendi pontificis electionem reliqui autem sequaces. Et certe rectus atque legitimus hic electionis ordo perpenditur, si perspectis diversorum patrum regulis sive gestis, etiam illa beati praedecessoris Leonis sententia recolatur: *Nulla*, inquit, *ratio sinit ut* [103] *inter episcopos habeantur, qui nec a clericis sunt electi, nec a plebibus expetiti, nec a comprovincialibus episcopis cum metropolitani iudicio consecrati*. Quia vero sedes apostolica cunctis in orbe terrarum praefertur ecclesiis atque ideo super se metropolitanum habere non potest, cardinales episcopi proculdubio metropolitani vice funguntur, qui videlicet electum antistitem ad apostolici culminis apicem provehunt. Eligant autem de ipsius ecclesie gremio, si repperitur idoneus, vel si de ipsa non invenitur, ex alia assumatur, salvo debito honore et reverentia dilecti filii nostri Henrici, qui [105] inpresentiarum rex habetur et futurus imperator Deo concedente speratur, sicut iam sibi concessimus, et successorum illius, qui ab hac apostolica sede personaliter hoc ius impetraverint. Quod si pravorum atque iniquorum hominum ita perversitas invaluerit, ut pura, sincera, atque gratuita electio fieri in urbe non possit, cardinales episcopi cum religiosis clericis catholicisque laicis, licet paucis, ius potestatis optineant eligere apostolice sedis pontificem, ubi congruentius iudicaverint. [106] Quod si quis contra hoc nostrum decretum, synodali sententia [107] promulgatum, per seditionem vel praesumptionem aut quodlibet ingenium electus aut etiam ordinatus seu intronizatus fuerit, auctoritate divina et sanctorum apostolorum Petri et Pauli perpetuo anathemate cum suis auctoribus, factoribus, sequacibus, a liminibus sancte Dei ecclesie separatus, subiciatur, sicut antichristus et invasor atque destructor totius christianitatis'.

cardinali spetta il 'principale iudicium'; in secondo luogo il clero presta il suo assenso; in terzo luogo il popolo manifesta il suo 'favor'. A questo punto la procedura deve essere 'sospesa', finché l''auctoritas' dell'altezza regale non sia consultata. La sospensione non ha luogo, precisa Pier Damiani, solo quando una condizione di necessità imponga di accelerare la procedure.[29] Le parole usate da Pier Damiani hanno un peso: egli parla di sospensione, e traduce il vago onore e la vaga reverenza del decreto in una parola, 'auctoritas', che richiama una superiore istanza di legittimazione o validazione di tutta la procedura.

Per ragioni differenti ma convergenti, è particolarmente significativa l'opinione che sul decreto di Nicolò II espresse il cardinale Deusdedit nel *Liber contra invasores et symoniacos* (1095/97). Deusdedit riteneva anzi tutto che il decreto fosse stato tanto contaminato dalle aggiunte o modifiche operate dai Ghibertini (i seguaci di Ghiberto, l'antipapa Clemente III imposto da Enrico IV) da circolare in versioni quasi mai tra loro concordanti, e perciò inaffidabili.[30] Ma, a parte questo, Deusdedit riteneva che il decreto di Nicolò fosse invalido (nullius momenti) e inefficace perché il pontefice non avrebbe potuto concedere alla 'regia potestas' un potere che la tradizione canonica aveva

[29] Pier Damiani, Epistola a Cadalo (antipapa Onorio II), marzo/aprile 1062 PL 144.243; ora anche in Kurt Reindel, *Die Briefe des Petrus Damiani* (4 vol. MGH, *Die Briefe der deutschen Kaiserzeit*; München 1988) 2.526 n.88: 'nimirum cum electio illa per episcoporum cardinalium fieri debeat principale iudicium, secundo loco iure prebeat clerus assensum, tertio popularis favor attollat applausum; sicque suspendenda est causa, usque dum regie celsitudinis consulatur auctoritas, nisi, sicut nuper contingit, periculum fortasse immineat, quod rem quantocius accellerare compellit'.

[30] Deusdedit, *Liber contra invasores et symoniacos*, in particolare I.10-13. Ed. Ernst Sackur, MGH, Ldl 2 (Hannoverae 1892) 310 n.11: 'Preterea autem prefatus Guibertus aut sui, ut suae parti favorem ascriberent, quaedam in eodem decreto addendo, quaedam mutando, ita illud reddiderunt a se dissidentes, ut aut pauca aut nulla exemplaria sibi concordantia valeant inveniri. Quale autem decretum est, quod a se ita discrepare videtur, ut quid in eo potissimum credi debeat, ignoretur?'. Sul *Libellus* si vedano le indicazioni date da Harald Zimmermann, 'Deusdedit', DBI 39 (Roma 1991) 504-506. Sul giudizio di Deusdedit e Pier Damiani circa il decreto del 1059 v. Jasper, *Das Papstwahldekret* 55-57.

costantemente negato.[31] Deusdedit si applicava così a dimostrare che il decreto era contrario non solo alle leggi della Chiesa ma persino alle leggi del secolo, da lui individuate in alcuni passi del diritto romano. In particolare, Nicolò non avrebbe potuto modificare il can. 22 dell'ottavo concilio di Costantinopoli (869/870), che vietava ai principi laici e ai potenti di ingerirsi nelle elezioni ecclesiastiche, una norma che era stata promulgata col consenso dei cinque patriarchi.[32] Ai fini del nostro discorso, importa constatare che Deusdedit moveva da una interpretazione del decreto di Nicolò secondo la quale la 'notificatio' fatta all'imperatore aveva lo scopo di consentire una conferma dell'elezione papale.[33]

Ora, il biografo Pandolfo, che fu personalmente partecipe delle vicende dell'elezione di Gelasio II, omette qualsiasi

[31] Ibid. 311 n.13: 'His itaque decursis, patet prefatum decretum nullius momenti esse nec umquam aliquid virium habuisse'.

[32] Ibid. 308-309 n. 10: 'Ecce ex his et prefato capitulo [octavae synodi] patentissime colligitur, iuxta priscam consuetudinem prefatos pontifices electos fuisse. Sed quia nullatenus promoveri patiebantur, cum in alterius electione prefectus vice Romanorum Mauricii, in alterius vero populus Valentiniani legitur [309] auxilium expetisse, patet profecto iuxta capitulum octavae synodi, ecclesiam saeculares potestates in sui adiutorium invitasse; easque non imperio, sed obedientia tunc usas fuisse'. Il riferimento di Deusdedit al sinodo VIII è al concilio di Costantinopoli dell'869/870, c. 22 [COD, edd. Giuseppe Alberigo – Giuseppe Dossetti –Périklès-P. Joannou – Claudio. Leonardi – Paolo Prodi, consulenza di Hubert Jedin, ed. bilingue (Bologna 1996) 182-183], intitolato *De summorum sacerdotum electione atque decreto*, dove si dice: 'neminem laicorum principum vel potentum semet inserere electioni vel promotioni patriarchae, vel metropolitae, aut cuiuslibet episcopi... praesertim cum nullam in talibus potestatem quemquam potestativorum vel ceterorum laicorum habere conveniat, sed potius silere ac attendere sibi, usquequo regulariter a collegio ecclesiae suscipiat finem electio futuri pontificis...'. E Deusdedit prosegue, 309 n.11: 'Sunt quidam qui obiciunt Nicolaum iuniorem decreto synodico statuisse, ut obeunte apostolico pontifice successor eligeretur et electio eius regi notificaretur; facta vero electione et, ut predictum est, regi notificata, ita demum pontifex consecraretur'. Il discorso prosegue al fine di dimostrare che il decreto del 1059 è invalido e inefficace per le ragioni che ho sommariamente indicato nel testo.

[33] Cfr. il passo tratto dal n.11 del trattato, citato alla fine della precedente nota.

riferimento a una notificazione dell'elezione fatta a Enrico V.[34] Dopo aver narrato dell'elezione, dell'aggressione di Cencio Frangipane, che imprigionò Gelasio e gli elettori in un suo palazzo, dell'intervento del popolo romano che procurò la liberazione dei prigionieri, della successiva pacificazione della situazione, Pandolfo passa subito alla notizia del minaccioso avvicinarsi a mano armata dell'imperatore, che indusse il papa e i suoi fedeli a fuggire verso Gaeta.[35]

Di una legazione dei Romani a Enrico V, come abbiamo visto, parla genericamente Landolfo Iuniore, anche se non si evince con certezza che si trattasse della legazione incaricata di portare all'imperatore l'ufficiale notificazione dell'elezione di Gelasio.

Le fonti cronachistiche non offrono informazioni univoche su cosa in effetti sia accaduto. A mia cononoscenza, gli *Annales Romani* sono la fonte che più esplicitamente afferma che da Roma partì una delegazione (inviata dai 'consules') incaricata di comunicare all'imperatore, che allora si trovava all'assedio di Verona, l'elezione di Gelasio[36]. Secondo gli *Annales*, Enrico V

[34] Al tempo dell'elezione di Gelasio II Pandolfo faceve ancora parte della milizia pontificia, successivamente entrò nello stato clericale: Stefania Anzoise, 'Pandolfo da Alatri', DBI 80 (Roma 2015), consultato in rete, https://www.treccani.it/enciclopedia/pandolfo-da-alatri_%28Dizionario-Biografico%29/

[35] Pandulfus, *Vita Gelasii* 314-315.

[36] *Annales Romani*, MGH, SS 5, ed. Georgius H. Pertz (Hannoverae 1844) 478-479: 'Consules vero miserunt nuntios ad imperatorem, qui tunc in obsidione morabat Verone, et notificaverunt ei omnia que acciderant per litteras. Ille vero nichil moratus est, cum festinatione Romam petiit cum paucis militibus, die Veneris ante quadragesima misit nuntios ad consules ut exirent oviam (*sic*) ei, sabbatum vero ante quadragesima ingressus est porticum Sancti Petri. Mox ut electus pontifex de suo adventu audivit, egressus est de patriarchio Lateranensi, et venit in regione Sancti Angeli, in ecclesia beate Marie que sita est super fluvium Tiberis, ubi fideles eius erant, et mansit ibi tota die sabbati. Rex vero misis nuntios ad eum, ut finem litis inponeret. Ille vero hoc audito nocte navem ascendit, secessitque patria sua Gaieta cum episcopis et cardinalibus atque diaconibus. Imperator vero cum talia audisset, consilio habito cum suis fidelibus perrexit ad basilicam beati Petri, ut inveniret consilium quid ageret. Illi vero consiliaverunt eum, ut

giunse a Roma in tutta fretta, ma non incontrò personalmente l'eletto, al quale inviò dei nunzi al fine di trovare una pacificazione. Ma Gelasio e i suoi fedeli preferirono fuggire nottetempo per Gaeta. A questa notizia, l'imperatore si consigliò con i suoi fedeli, che gli suggerirono di eleggere un altro papa.

Stando al racconto di Ekkehard di Aura, invece, Gelasio II sarebbe stato eletto senza che l'imperatore ne avesse notizia[37].

pontificem ordinaret. Tunc elegerunt Mauricium, archiepiscopum Hispaniensem de civitate Bragana, et consecraverunt eum Romanum antistitem in die Veneris de quattuor tempora que sunt de mense martio. Cui posuerunt nomen Gregorius'.

[37] *Ekkehardi Chronicon* 253-254, all'anno 1118: 'Domnus apostolicus Paschalis secundus, diutina purificatus aegritudine, presentem in Domino vitam finivit. Pro quo Iohannes Caietanus, vir prudens et venerandus [et] in Romana semper aecclesia inreprehensibiliter eidem apostolico collaborans, eligitur et cunctorum catholicorum unanimi consensu rite consecratur... Heinricus imperator, dum Paduanis regionis immoraretur audito transitu apostolici, Romam properavit, et primo quidem in electione domni Iohannis, qui et Gelasius II. dictus est, assensum prebens, postea vero eodem a se communione subtrahente, non sine quorundam Romanorum favore alterum quendam Burdinum, ex Hispania supervenientem, apostolicae sedi imposuit; sicque scisma, quod iam sperabatur emortuum, crudeliter revixit. Nam eodem Romanae kathedrae libere potito, Gelasius cum his qui secum abierant cardinalibus caeterisque catholicis quos congregare poterat, apud Capuam, iuxta quod litterae ab ipso circumquaque transmissae testantur, caesarem una cum ydolo suo dampnavit. Hinc per Campaniam cum suis ad Burgundiam transmigravit, ac Viennae synodum congregari constituit'. In un'altra versione, indicata come 'E', si legge: '... non sine quorundam Romanorum favore alterum quendam Mauricium, ex Hispania supervenientem, apostolicae sedi imposuit; sicque scisma, quod iam sperabatur emortuum, crudeliter revixit. Nam eodem Romanae kathedrae libere potito, Gelasius cum his qui secum abierant cardinalibus ceterisque quos congregare poterat catholicis, apud Capuam, iuxta quod literae ab ipso circumquaque transmissae testantur, caesarem una cum papa suo dampnavit'. Come si vede, le cronache discordano circa il luogo in cui Enrico V si trovava nel momento in cui ricevette la notizia dell'elezione di Gelasio II. Gerold Meyer von Knonau pensa che Enrico si trovasse in qualche luogo della pianura a settentrione del Po: *Jahrbücher des Deutschen Reiches unter Heinrich IV. und Heinrich. V.* VII. *1116 (Schluss) bis 1125* (Leipzig 1909) 60; a questo autore è necessario rinviare per un più ampio panorama delle fonti cronachistiche nonché per precisazioni sulla successione cronologica degli eventi (60-68).

Enrico V, che al momento dell'elezione si trovava nei pressi di Padova, sarebbe giunto a Roma dopo avere appreso della morte di Pasquale II, e avrebbe dapprima consentito alla scelta di Gelasio II, ma poi avrebbe cambiato idea risolvendosi ad eleggere Maurizio Burdino.

Secondo la *Chronica monasterii Casinensis*, l'elezione di Gelasio 'giunse alle orecchie di Enrico', locuzione che sembrerebbe riferirsi non a una notificazione ufficiale, ma piuttosto a una notizia ricevuta informalmente.[38] L'imperatore avrebbe condizionato il suo assenso all'impegno di Gelasio di rispettare gli accordi che Pasquale II aveva stipulato con Enrico (sembrerebbe trattarsi degli accordi di Ponte Mammolo), altrimenti avrebbe scelto un altro pontefice. Ma la fuga di Gelasio a Gaeta fece sfumare tale possibilità, così che Enrico fu indotto a promuovere l'elezione di Maurizio Burdino.

Due autori, invece, si distaccano con nettezza da quanto affermano le fonti appena menzionate. Secondo Orderico Vitale, Gelasio II, eletto papa, fu consacrato 'contradicente impera-

[38] *Chronica Monasterii Casinensis (Die Chronik von Montecassino)*, MGH SS 34, ed. Hartmut Hoffmann (Hannoverae 1980), IV.64, 525-526: 'Similiter et iam dictus papa Paschalis a Benevento Romam regressus duodecimo kal. Febr. vita decedit, et Iohannes cancellarius huius Casinensis cenobii a pueritia monachus a clero, senatu populoque Romano in Gelasium papam eligitur. Talia dum Heinrici imperatoris venissent ad aures, festinus Romam advenit nuntiosque ad eundem electum transmittere studuit, per quos ei direxit, quod, si finem (*sic: rectius* fidem?), quam papa Paschalis cum imperatorem fecerat, observaret et conventiones, que inter Romanum imperium et sedem apostolicam statute fuerant, firmaret, imperator confestim fidelitatem eidem electo et Romane ecclesie faceret, sin alias, alium pontificem in Romana ecclesia inthronizaret. Videns igitur idem electus rationes suas cum rationibus imperii convenire non posse, per fluvium Tiberim mare ingressus unacum episcopis et cardinalibus aliisque clericis Romane ecclesie nec non et prefecto Romane urbis multisque aliis nobilibus Romanis advenit Cagetam. Hoc ubi imperatori nuntiatum est, evestigio Mauricium Bracariensem archiepiscopum a papa Paschali depositum invasorem Romane ecclesie constituit. Supradictus autem electus Cagete remorans in quadragesima presbiter ordinatus et ab eisdem episcopis et cardinalibus in papam Gelasium consecratum est'. La cronaca fu iniziata da Leone Marsicano, poi continuata da Guido fino al 1127, e da Pietro Diacono fino al maggio 1138.

tore'.[39] Nella più tarda cronaca di Romualdo Salernitano leggiamo che Gelasio 'disdegnò' di richiedere l'assenso imperiale e di porsi in 'comunione' col sovrano (ma non è chiaro se qui Romualdo riferisca un fatto o faccia un commento).[40]

Dal complesso delle fonti si ha la sensazione che il conflitto che portò alla successiva elezione di Burdino sia stato alimentato dalla fuga di Gelasio a Gaeta. Da un lato, la precipitosa discesa verso Roma dell'imperatore in armi era stata interpretata come una minaccia; sull'altro fronte, il rifiuto di Gelasio di intavolare trattative con l'imperatore fu interpretato come rifiuto di prestare

[39] Orderici Vitalis *Historiae ecclesiasticae libri tredecim*, XII.1, 310: 'Defuncto Paschali Papa, Johannes Caietanus, Romanorum Pontificum antiquus cancellarius et magister, in Gelasium Papam electum est, et, contradicente Imperatore, a Romano clero canonice consecratus est. Tunc etiam Burdinus, Bragarum archiepiscopus, qui suis a fautoribus Gregorius VIIIus vocitatus est, Imperatore connivente, in Ecclesiam Dei intrusus est. Tunc gravis inde dissensio inolevit, saeva persecutio inhorruit, et catholicam plebem vehementer perturbavit'.

[40] Romualdi Salernitani *Chronicon* [A.m. 130 - A.C. 1178], a cura di Carlo A. Garufi (RIS 7.1; Città di Castello 1914-1935) 209: 'Qui (Gelasius) priusquam ordinaretur, propter Henrici Alamannorum imperatoris adventum, qui tunc Romam festinus aduenerat, metum (*sic*) ipse Gelasius in civitate Gaieta secessit, ibique a cardinalibus qui eum sequuti sunt ordinatus est et consecratus; spreverat enim predicti imperatoris assensum eiusque communionem. Imperator autem hoc uidens, conuocato populo Romano cum quibusdam clericis, iussit eligi in ordine summi pontificis quemdam Burdinum nomine, cui nomen impositum est Gregorius papa seditque in ecclesia beati Petri. Hic autem Burdinus prius in Toletana ecclesia Hispanie archidiaconus fuit, de qua postea assumptus fuit episcopus in civitate Conimbro, et imposuit sibi nomen Mauricius; dehinc mortuo Bracarensi archiepiscopo, effecus est ipse ciuitatis eiusdem archiepiscopus, Paschali papa in hoc assensu prebente, non parui muneris gratia ab eo sibi collati. Hinc etiam nonnullis decursis temporibus mortuo Tolletano archiepiscopo, Burdinus ipse largita prefato Romano pontifici auri copia petiit ab eo sibi eundem Tolletanum archiepiscopatum. Paschalis autem accepta pecunia in honore petito assensum non prebuit. Unde Burdinus ipse Bracarensem archiepiscopatum omnino dimittens, imperatori Alamannorum adhesit. Paschalis itaque, post quam ei mandauit ut in archiepiscopatum sibi commissum rediret et ipse eius iussioni acquiescere nollet, eum ab omni sacerdotali ordine deposuit. Postea uero idem papa Paschalis excommunicauit eum pro eo quod contra suam iussionem in ecclesia beati Petri missam celebrauit'.

al sovrano il dovuto onore e rispetto, o come dispregio dell'assenso che l''auctoritas' imperiale avrebbe dovuto dare al neoeletto, o come la certificazione dell'impossibilità di giungere a un accordo sulle questioni che stavano a cuore a Enrico V. Alla possibilità di una pacifica composizione della vicenda sembra alludere, nel racconto di Landolfo, la proposta che gli ambasciatori di Enrico portarono a Gelasio e ai cardinali che erano con lui a Gaeta: ritornare a Roma, affinché si compisse 'iuste et catholice', alla presenza dell'imperatore, 'quod faciendum erat de papa substituendo'.[41] Sia detto incidentalmente: Landolfo è attento a utilizzare un linguaggio giuridico appropriato. Il verbo 'substituere' compare ben tre volte in questa pagina della *Historia Mediolanensis*. Era appunto il verbo ricorrentemente usato nella tradizione canonica quando si discuteva dell'elezione di un nuovo vescovo o papa alla morte del precedente, o quando erano esaminate le ipotesi in cui fosse legittimo che un nuovo vescovo subentrasse nel posto di un vescovo ancora vivente.[42]

[41] Testo citato sopra, nota 25.

[42] Il verbo 'substituere' è parola frequentissima nella tradizione canonica, usata quando si tratta di eleggere o nominare un successore di un defunto (papa, vescovo, abate, priore, re, etc.). L'altra espressione tradizionale è 'tractare', o 'tractatum habere'. Quanto all'antichità dell'espressione, cfr. per esempio Leone I, JK 411, c.33 (anno 446?; PL 54.671): 'In civitatibus quarum rectores obierint, de substituendis episcopis haec forma servetur'. Il verbo 'substituere' ricorre frequentemente nei canoni raccolti da Graziano nel *Decretum* per le cui citazioni utilizzo l'edizione di Emil Friedberg. A titolo esemplificativo e senza pretesa di completezza: D.64 c.6, testo (Gelasio I, 496); C.7 d.p.c.1: 'Quidam longa inualetudinem grauatus episcopus alium sibi substitui rogauit...'; C.7 q.1 c.4, rubrica; C.7 q.1 d.p.c.11; C.7.q.1 c.17, testo (Zaccaria, 743); C.7 q.1 d.a.c.34; C.7 q.1 d.p.c.41; C.7 q.1 d.p.c.42; C.7 q.1 d.p.c.49: 'Multorum auctoritatibus apparet, quando uiuentibus episcopis alii possint substitui, et quando non'; C.12 q.2. c.38, testo ('substitutus antistes', concilio di Lerida, 546); C.15 q.6 c.3, testo (Gregorio VII a Ermanno da Metz, 1081, JL 5201; qui si parla di 'substitutio' a proposito della carica regale: 'Alius item Romanus Pontifex, Zacharias scilicet regem Francorum non tam pro suis iniquitatibus, quam pro eo, quod tantae potestati erat inutilis, a regno deposuit, et Pipinum, Karoli inperatoris patrem, in eius loco substituit); C.16 q.7 c.43, rubrica. Etc.

Vi è un altro punto in cui Landolfo si mostra testimone pienamente attendibile, ossia quando riferisce la risposta che Gelasio diede ai legati che Enrico aveva inviato a Gaeta. Il racconto di Landolfo collima perfettamente (con l'eccezione di un dato cronologico) con quanto lo stesso Gelasio afferma in una lettera inviata al clero, ai fedeli e ai principi secolari della Francia[43]. La fuga a Gaeta—dice il papa—era stata dettata dal timore sorto poiché l'imperatore era sceso a Roma 'furtive et inopinata velocitate'. Le proposte di pace che l'imperatore aveva trasmesso a Gaeta attraverso i suoi legati erano condite da minacce e intimidazioni. Gelasio aveva compreso che Roma non era un luogo sicuro. Questo spiega—come leggiamo nel frammento di lettera diretta all'imperatore inserita nella lettera ai francesi—per quale ragione Gelasio decise di rimandare ogni decisione ad un sinodo che si sarebbe riunito a Milano o Cremona per la festa di san Luca (18 ottobre; là dove Landolfo parla di settembre). A prendere alla lettera le parole di Gelasio, sembra che egli avesse effettivamente lasciato impregiudicata non già la questione della validità della sua elezione, bensì la 'controversia quae inter Ecclesiam et regnum est'. Nella lettera inviata a Enrico V, infatti, il papa dichiarava che avrebbe prestato acquiescenza o a una convenzione eventualmente stipulata con l'imperatore, o alla decisione dei suoi 'fratelli' (vescovi e cardinali), 'poiché essi sono i giudici stabiliti da Dio, e senza di loro questa causa non può essere trattata'.

[43] Gelasio II, 'archiepiscopis, episcopis, abbatibus, clericis, principibus et caeteris per Galliam fidelibus' (JL 6635, 16 marzo 1118; PL 163.489): 'Siquidem post electionem nostram dominus imperator furtive et inopinata velocitate Romam veniens, nos egredi compulit. Pacem postea et minis et terroribus postulavit, dicens quae posset se facturum, nisi nos ei iuramento pacis certitudinem faceremus. Ad quae nos ista respondimus: "De controversia quae inter Ecclesiam et regnum est, vel conventioni, vel iustitiae libenter acquiescimus, loco et tempore competenti, videlicet Mediolani, vel Cremonae, in proxima beati Lucae festivitate, fratrum nostrorum iudicio, quia a Deo sunt iudices constituti in Ecclesia, et sine quibus haec causa tractari non potest. Et quoniam dominus imperator a nobis securitatem quaerit, nos verbo et scripto eam promittimus, nisi ipse eam interim impediat. Alias enim securitatem facere nec honestas Ecclesiae, nec consuetudo est".'

Il ruolo di Irnerio e del 'populus romanus' nell'elezione di Maurizio Burdino

La seconda parte del racconto di Landolfo è quella in cui risalta la partecipazione di Irnerio alla procedura di elezione di Maurizio Burdino.[44] Diversamente dalle altre fonti cronachistiche citate, la *Historia Mediolanensis* pone particolare enfasi, piuttosto che sulle manovre dell'imperatore, sul 'populus romanus' quale artefice dell'elezione di Burdino. È il popolo romano che reagisce sdegnato all'ipotesi del sinodo che Gelasio aveva programmato di tenere in Italia settentrionale. Altre cronache, invece, pongono in evidenza come l'imperatore abbia dato impulso alla nuova elezione. Gli *Annales Romani* dicono che Enrico chiese consiglio ai suoi fedeli, i quali gli suggerirono di eleggere un altro papa. E dalla storia di Landolfo sappiamo che Irnerio era tra questi consiglieri. Altrove si parla di un Burdino eletto 'Imperatore connivente' (Orderico Vitale),[45] o di un Burdino 'imposto' dall'imperatore 'non senza il favore di alcuni Romani' (Ekkehard).[46] Romualdo Salernitano coglie la sostanza degli accadimenti quando dice che l'imperatore, 'convocato il popolo romano insieme ad alcuni chierici, ordinò che fosse eletto nell'ordine di sommo pontefice un tale di nome Burdino'.[47] E d'altro canto lo stesso Landolfo parla di Burdino come 'papa suus', cioè dell'imperatore.

L'invalidità dell'elezione di Gelasio II era il presupposto senza il quale sarebbe stato impossibile procedere alla nuova elezione. Agli occhi del partito imperiale, tale invalidità non poteva che discendere dalla mancanza dell'assenso di Enrico V all'elezione di Gelasio II, una mancanza che aveva causa anche

[44] Testo citato sopra, nota 25.
[45] Testo citato sopra, nota 39.
[46] Testo citato sopra, nota 37.
[47] Testo citato sopra, nota 40.

nel rifiuto di Gelasio di confrontarsi direttamente con l'imperatore.[48]

Era peraltro necessario preparare le basi giuridiche della nuova elezione, che avrebbe dovuto svolgersi senza la partecipazione del collegio cardinalizio se è vero, come le citate fonti cronachistiche confermano (*Chronica Casinensis*, *Annales Romani*, Ekkehard), che al seguito di Gelasio erano fuggiti anche i cardinali. Nella breve biografia di Gelasio II scritta da Bosone leggiamo che l'imperatore elesse Burdino 'avendo associato a sé pochi chierici scismatici di San Pietro'.[49] In due lettere di Gelasio II questi pochi sostenitori di Enrico V e Maurizio Burdino assumono una fisionomia e un nome: si trattava di tre appartenenti al partito dei Ghibertini, precisamente gli pseudocardinali Romano di S. Marcello, Cencio di S. Crisogono e Teuzo, i quali, dice Gelasio, 'tam infamem gloriam celebrarunt'.[50] Alla mancanza del collegio cardinalizio doveva

[48] Cfr. Mary Stroll, *Calixtus the Second (1119-1124). A Pope Born to Rule* (Studies In The History of Christian Traditions 116; Leiden-Boston 2004) 52-57, in particolare 52.

[49] Bosone, *Vita Gelasii II*, in *Liber Pontificalis*, ed. Duchesne, 2.376: 'Tunc autem idem imperator levavit Mauritium Bracarensem archiepiscopuum, et adiunctis sibi paucis sancti Petri scismaticis clericis, in sede apostolica eum violenter intrusit; qui a Romano populo Burdinus est appellatus'.

[50] Gelasio II, 'archiepiscopis, episcopis, abbatibus, clericis, principibus et caeteris per Galliam fidelibus' (JL 6635, 16 marzo 1118; PL 163.489): 'In hoc autem tanto facinore nullum de Romanis dominus imperator, Deo gratias, socium habuit: sed Guibertini soli, Romanus de Sancto Marcello, Cencius, qui dicebatur de Sancto Chrysogono, Teuto (al. et Euzo), qui multo per Daciam debacchatus est tempore, tam infamem gloriam celebrarunt'. Cfr. le varianti nell'epistola al cardinale Conone di Preneste (JL 6642, 13 aprile 1118; PL 163.492): 'In hoc autem tanto facinore nullum de Romano clero imperator, Deo gratias, socium habuit. Sed Wibertini quidam, Romanus de Sancto Marcello, Centius, qui dicebatur Sancti Grysogoni, et Teuto, qui tanto per Italiam tempore debacchatus est, tam infamem gloriam celebrarunt'. Su Cencio di S. Crisogono v. Rudolf Hüls, *Kardinäle, Klerus und Kirchen Roms 1049-1130* (Bibliothek des Deutschen Historischen Instituts in Rom 48; Tübingen 1977) 178 n.10; Hans-Walter Klewitz, *Reformpapsttum und Kardinalkolleg: Die Entstehung des Kardinalkollegiums. Studien über die Wiederherstellung der römischen Kirche in Süditalien durch das Reformpapsttum: Das Ende des Reformpapsttums* (Darmstadt 1957) 70-71

supplire, secondo i consiglieri di Enrico V, il popolo romano. Fu così—racconta Landolfo—che 'il maestro Guarnerius de Bononia e molti legisperiti convocarono il popolo romano per l'elezione del papa'. Un lettore esperto e spedito (che dallo svolgimento del racconto non pare sia stato Irnerio) si fece carico di spiegare, dall'alto di un pulpito in San Pietro, i 'decreta pontificum de substituendo papa': fu una 'prolixa lectio', precisa Landolfo. Terminate la lettura e la spiegazione dei decreti, l'ampia congregazione di popolo raccolta nella basilica elesse come papa 'un certo vescovo di Spagna, che era lì presente con l'imperatore'. Fu Enrico V che condusse sul pulpito l'eletto, che così rispose a coloro che lo interrogavano su chi fosse: 'Il mio nome è Burdino, ma quando papa Urbano mi ordinò vescovo, mi chiamò Maurizio'. Una persona non meglio identificata tra coloro che erano vestiti con abito ecclesiastico (evidentemente erano pochi e si confondevano nella folla) dall'alto del pulpito per tre volte interrogò il popolo se volesse Maurizio come papa; per tre volte gli astanti risposero: 'Lo vogliamo'. Al che l'ignoto ecclesiastico, con gli altri chierici presenti, con voce sublime esclamò: 'Anche noi approviamo con lode e confermiamo il 'dominus' Gregorio'.

Il seguito della narrazione, sempre molto dettagliato, può essere qui brevemente riassunto. Enrico V condusse il 'suo papa' da San Pietro al Laterano; il giorno dopo entrambi tornarono nella basilica petrina, dove Gregorio cantò messa e celebrò alcune ordinazioni. A Roma Gregorio rimase tranquillo finché Enrico, dovendo ritornare in Germania, volle porlo al sicuro nella città di Sutri.

Il racconto di Landolfo si completa con l'interessante e speculare testimonianza offerta da Falcone Beneventano[51].

note 225-226, e 72; su Romano di S. Marcello v. Hüls, *Kardinäle* 186 n.4; Klewitz, *Reformpapsttum* 73 e 217 nota 31; su Teuzo v. Hüls, *Kardinäle* 218 n.23; Klewitz, *Reformpapsttum* 70-71 nota 225.

[51] Falcone di Benevento, *Chronicon Beneventanum: Città e feudi nell'Italia dei Normanni*, ed. Edoardo D'Angelo (Firenze 1998), disponibile nella pagina web sui *Cronisti normanni*, a cura di Edoardo D'Angelo, sul sito del *Centro Europeo di Studi Normanni* (Ariano Irpino), http://www.cesn.it/Cronisti/:

Coloro che erano rimasti fedeli a Gelasio II si lamentavano di aver perso quella libertà di eleggere il pontefice di cui fino allora avevano goduto 'secondo il lungo e antico rito dei nostri padri': forse che da quel momento in poi non avrebbero più potuto eleggere il papa 'sine regis permissu'? Mossi da questo sentimento, il prefetto e altri nobili inviarono una legazione a Gaeta, non solo per rinnovare la propria fedeltà al papa 'canonicamente ordinato', ma anche per dichiarare che essi e i loro 'amici' mai avevano dato consiglio o sostegno all'operato di Enrico V, 'iniquissimus vir'.

Alla ricerca dei 'decreta pontificum de substituendo papa'

Le modalità dell'elezione di Maurizio Burdino hanno suggerito un accostamento storiografico con l'elezione di Gregorio VII, accostamento in qualche modo ispirato anche dalla circostanza che Maurizio scelse per sé proprio il nome di Gregorio.[52] Ma vi

'O nefas, et terribile periculum: rex ille, qui Romanae Sedis et totius cattholicae Ecclesiae defensor et adiutor fieri deberet, novam heresem et mortis genera per universum orbem induxit! Romanorum igitur complures, quorum mens erga Ecclesiae Romanae fidelitatem fixa manebat, visa huiusmodi herese et cognita, aiebant: Heu miseri, cum nos ex longo nostrorum patrum vetusto ritu sine alicuius regis adventu et licentia pastorem eligebamus, consecrabamus, quem volebamus, nunc autem sine regis permissu iam amplius alium neque eligere neque consecrare ausi erimus?. Deinde prefectus et alii Romanorum nobiles, Gelasio canonice ordinato, apud Gaietam legaverunt, dicentes: Vestrae notescat paternitati, pater et domine, nos et nostros amicos consecrationi illius excommunicati viri, in pontificem scelestum constituti, nullatenus consilii et auxilii manus dedisse. Et sciatis quoniam, Deo opitulante, regis illius, viri iniquissimi, machinationes et consilia in proximo delebuntur et Vos, Deo propitio, erroris et malignitatis destructor, ad sedem propriam et locum cum letitia et honore revertimini'. Cfr. anche la vecchia edizione, *Cronica di Falcone Beneventano (Falconis Beneventani Chronicon)*, versione di Stanislao Gatti con note e comenti di Camillo Pellegrino e Giuseppe Del Re, in *Cronisti e Scrittori sincroni napoletani editi e inediti*, ed. Giuseppe Del Re, I (Napoli 1845) 174-175.

[52] Carlo Dolcini, 'Tradizione politologica dei primi glossatori', *Cultura universitaria e pubblici poteri a Bologna dal XII al XV secolo*: *Atti del 2º convegno, Bologna, 20-21 maggio 1988*, a cura di Ovidio Capitani (Bologna

sono differenze fondamentali tra l'una e l'altra elezione. Nel caso di Gregorio VII si trattò di un'elezione 'popolare' celebrata repentinamente dopo la morte di Alessandro II, nella quale il concorso di un 'magnus tumultus populi'[53] e l'acclamazione di 'una gran folla di persone di entrambi i sessi e di diversa condizione'[54] non sostituivano il consenso prestato dai cardinali e dal clero romano. Nel caso di Maurizio Burdino la presenza di *tantus populus* (parole di Landolfo) si accompagnava a pochi ecclesiastici scismatici fedeli all'imperatore, in un'elezione abilmente orchestrata dai consiglieri di Enrico V. Irnerio, l'unico nome ricordato da Landolfo, aveva avuto un ruolo di spicco nel predisporre le basi di legittimità formale della nuova elezione. Il personaggio è inequivocabilmente identificato come 'magister Guarnerius de Bononia', e accanto a lui la cronaca parla di 'plures legis periti'. La laconicità della fonte ha imposto agli storici di avventurarsi in ipotesi e congetture su quale sia stato il contributo di Irnerio e degli altri giuristi alla predisposizione delle basi giuridiche dell'elezione di Burdino: quali furono i 'decreta pontificum de substituendo papa' che il portavoce di questo gruppo di giuristi (l'expeditus lector) lesse e spiegò al popolo? Si trattava, nel 1118, di spiegare come e perché un'elezione papale potesse essere celebrata senza la presenza del collegio cardinalizio (o alla presenza di pochi cardinali, peraltro scismatici), ma con il concorso del popolo romano e dell'imperatore. Questo interesse ha condotto la storiografia a tentare di stabilire collegamenti tra gli eventi romani del marzo 1118, le norme canoniche concernenti l'elezione papale, in particolare i falsi privilegi di investitura noti come 'falsi privilegi ravennati', le dottrine irneriane in tema di 'lex de imperio' e

1990) 19-30 a 28: 'Quella operazione ha un solo, vero precededente: l'acclamazione popolare di Gregorio VII nel 1073. E infatti il vescovo Maurizio Burdino, una volta eletto pontefice, volle prendere il nome di Gregorio VIII'.

[53] Gregorio a Desiderio abate di Montecassino, *Reg*. 1.1: *Das Register Gregors VII*., ed. Erich Caspar (MGH, Epp. sel. 2.1-2; Berlin 1920) 3-4.

[54] Ibid. 1-2, protocollo ufficioso dell'elezione di Gregorio VII: 'plurimis turbis utriusque sexus diversique ordinis acclamantibus'.

sovranità, e le dottrine ecclesiologiche emergenti dal *Liber divinarum sententiarum* del 'Guarnerius iurisperitissimus' che parte della storiografia, con buoni argomenti, identifica con il giurista Irnerio. È dunque il momento di percorrere questo itinerario.

Per tentare di individuare quali siano stati i 'decreta pontificum de substituendo papa' che furono posti a fondamento dell'elezione di Maurizio Burdino, un solido punto di partenza è offerto dal *Decretum* di Graziano, cioè dalla collezione canonica che, in anni non distanti dal 1118, il padre della scienza del diritto canonico andava redigendo in un processo di composizione che durò approssimativamente fino al 1140. Il vantaggio di utilizzare il *Decretum* come porta di accesso per tale ricerca deriva dal fatto che Graziano raccolse nelle 'distinctiones' 62 e 63 tutti i testi più rilevanti che la tradizione canonica offriva sul tema delle elezioni ecclesiastiche e in particolare dell'elezione del Romano Pontefice. I materiali sono qui raccolti non alluvionalmente, ma secondo un'articolazione dialettica che mette in luce con molta chiarezza la posizione di Graziano. In questo ambito tematico la *Concordia discordantium canonum* manifesta le posizioni di un canonista ispirato dai principî della riforma gregoriana e postgregoriana, di un convinto difensore della 'libertas ecclesiae' di fronte alle ingerenze dell'autorità secolare. Preliminarmente è anche opportuno osservare che il pensiero di Graziano su questa materia appare fissato in modo sostanzialmente definitivo già nella cosiddetta prima recensione del *Decretum*, che fu redatta in anni non molto posteriori agli eventi dell'elezione di Maurizio Burdino.[55] Anzi, il nucleo degli argomenti grazianei (sia pure con una sequenza molto più breve di canoni) è già presente in quella peculiare e probabilmente primitiva forma della sua collezione tramandata negli *Exserpta*

[55] La 'prima recensione' può essere consultata in rete nell'edizione di Anders Winroth: *Decretum Gratiani*, First recension, edition in progress. © Anders Winroth, gratian.org 4/22/2019.

ex decretis Sanctorum Patrum del manoscritto 673 della Stiftsbibliothek di San Gallo.[56]

Un'esame disteso e analitico dei luoghi grazianei relativi alle elezioni episcopali richiederebbe davvero una 'prolixa lectio', per usare le parole del cronista che raccontò gli avvenimenti romani del marzo 1118.[57] Non è questa l'occasione per compiere una tale analisi. Mi limiterò invece a porre in evidenza quelle fonti che maggiormente potrebbero aver sostenuto la legittimità dell'elezione di Maurizio Burdino, e a comprendere come un canonista 'postgregoriano' contemporaneo a Irnerio si atteggiava di fronte alle pretese degli imperatori di metter voce nelle elezioni papali: in questa impresa siamo agevolati da una serie di 'dicta' grazianei che rivelano un pensiero limpido e privo di ambiguità.

Se il nucleo della posizione grazianea può essere colto nella lettura della breve D.62 e nell'ampia D.63, occorre notare che Graziano lascia fuori dalla discussione il decreto di Nicolò II sull'elezione papale (1059), che è collocato, sin dalla prima recensione, all'inizio della D.23.[58] Il testo del decreto di Nicolò II—come era noto agli stessi contemporanei (sopra abbiamo accennato alla denuncia del cardinale Deusdedit)—circolava in molteplici versioni. Graziano accolse quella autentica, ma ve ne erano altre falsificate o comunque modificate, che accentuavano il ruolo dell'imperatore nel quadro delle procedure di elezione papale. Il testo autentico collocava il 'debitus honor' e la

[56] Carlos Larrainzar, 'El borrador de la Concordia de Graciano: Sankt Gallen, Stiftsbibliothek MS 673 (= Sg)', *Ius Ecclesiae* 11 (1999) 593-666, in particolare 654 per la sommaria descrizione del luogo (*Causa* 3 *quaestio* 3) degli *Exserpta* che corrisponde alle *distinctiones* 62 e 63.

[57] Rinvio a Orazio Condorelli, *Principio elettivo, consenso, rappresentanza: itinerari canonistici su elezioni episcopali, provvisioni papali e dottrine sulla potestà sacra da Graziano al tempo della crisi conciliare (secoli XII-XV)* (I Libri di Erice 32; Roma 2003) 13-26; Brigitte Basdevant Gaudemet, 'La composition des distinctions 62 et 63 du Décret de Gratien sur les élections épiscopales', *'Panta rei': Studi dedicati a Manlio Bellomo*, a cura di Orazio Condorelli (5 vol. Roma 2004) 1.213-237, e alla letteratura ivi citata.

[58] D.23 c.1. *Decretum Nicolai Papae de electione Romani Pontificis*: è già nella prima recensione.

'reverentia' dovuti all'imperatore Enrico IV, sia pur ambiguamente, in una fase successiva all'elezione cardinalizia; la diffusa versione falsificata, invece, poneva l'imperatore all'interno della procedura elettiva: 'religiosi viri cum serenissimo filio nostro rege H. praeduces sit in promovendi pontificis electione, reliqui autem sequaces'.[59]

Altrove, come nella versione falsificata accolta in un manoscritto fiorentino, la necessità dell'assenso del sovrano nell'elezione è posta in chiara evidenza già nella rubrica del testo: 'tria sunt requirenda in electione episcopi: electio cleri, consensus populi, assensio principis'. E il testo è formulato in modo da non lasciar dubbi, là dove afferma che il papa non deve essere eletto 'absque consensu et praesentia Romani imperatoris vel nuntiorum eius'.[60]

In un altro caso, come nel testo accolto nella *Collectio XIII librorum*, composta intorno al 1135, l'abbreviazione del testo autentico è accompagnata da alcune precisazioni e aggiunte che

[59] La versione falsificata è edita accanto a quella autentica da Jasper, *Das Papstwahldekret* 101-105: '[101] . . . inprimis cardinales diligentissima simul consideratione tractantes, salvo debito honore et reverentia dilecti filii nostri Heinrici, qui inpresentiarum rex habetur et futurus imperator Deo concedente speratur, [102] sicut iam sibi mediante eius nuntio Longobardie cancellario W. concessimus, et successorum illius, qui ab hac apostolica sede personaliter hoc ius impetraverint, ad consensus nove electionis accedant. Ut nimirum ne venalitatis morbus qualibet occasione [103] subripiat, religiosi viri cum serenissimo filio nostro rege H. praeduces sit in promovendi pontificis electione, reliqui autem sequaces. [105] Quod si pravorum atque iniquorum hominum ita perversitas invaluerit, ut pura, sincera atque gratuita electio fieri in urbe non possit, licet pauci sint, ius tamen potestatis optineant eligere apostolice sedis pontificem, ubi cum invictissimo rege congruentius iudicaverint'. Secondo Jasper, *Das Papstwahldekret* 82-88, il testo falsificato sarebbe stato redatto all'inizio del conflitto tra Enrico IV e Gregorio VII (quindi non sarebbe da ricollegare agli ambienti ghibertini): scopo del falsificatori era di mettere bene in chiaro il ruolo dell'imperatore nell'elezione papale.

[60] Ibid. 126-127, forma abbreviata della versione falsificata presente nel ms. Firenze, Biblioteca Medicea Laurenziana, Cod. Plut. 23 dex. 5, fol. 191r (metà secolo XII, Italia). Si trova nel contesto di materiale canonistico che fu aggiunto al *Liber de vita christiana* di Bonizone da Sutri.

mutano sensibilmente l'assetto delle competenze previsto nel decreto autentico.[61] Il testo specifica che l'elezione deve essere subito (mox) notificata (descripta) all'imperatore Enrico IV e ai suoi successori, in modo che essi siano posti in condizione di prestare il loro assenso: questo—precisa l'ignoto autore di questa versione—deve essere fatto secondo l'esempio che, nella storia della Chiesa, è offerto dalle elezioni di Gregorio Magno e Ambrogio. Questa forma del decreto rende esplicito quello che è

[61] Ibid. 120-122, dal Vat. lat. 1361, fol. 57vb-58va (= cap. I.92 della *Collectio XIII librorum*, ca. 1135). L'autore considera il testo una forma breve del decreto autentico: 'Moxque gloriosissimo videlicet regi, qui Deo auxiliante futurus est imperator, sive successoribus descripta electio per nuncios innotescat, ipsique per paginatice sanctionis articulum ad instar Gregoriane vel etiam Ambrosiane promotionis assensum prebeant. Successoribus inquam, si tamen ista studuerint Romane ecclesie auxiliatores ad defensores existere, ut per eos in vigore sui status ecclesiastica valeat dignitas permanere. Et his tamen imperatoribus hic requiratur adsensus, qui ab hac apostolica sede necnon a clero et senatu ac populo hoc ius consensionis personaliter impetrarunt. Plane postquam electio facta fuerit atque imperialibus, ut predictum est, apicibus roborata'. Sulla collezione canonica contenuta nel Vat.lat. 1361 si vedano Paul Fournier-Gabriel Le Bras, *Histoire des collections canonique en Occident depuis les Fausses Décrétales jusq'au Décret de Gratien* II (Paris 1931) 225-226; Stephan Kuttner, 'Some Roman Manuscripts of Canonical Collections', BMCL 1 (1971) 7-29 (9-13), anche in Idem, *Medieval Councils, Decretals, and Collections of Canon Law* (Collected Studies 126; London 1980) n. II; Kéry, *Canonical Collections* 291-291; Linda Fowler-Magerl, *Clavis Canonum. Selected Canon Law Collections Before 1140. Access with data processing* (MGH, Hilfsmittel 21; Hannover 2005) 225-226; Szabolcs A. Szuromi, 'Some Observations Concerning whether or not BAV Vat. lat. 1361 is a Text from the Collection of Anselm of Lucca', *Ius Ecclesiae* 13 (2001) 693-711; Idem, 'Roman Law Texts in the "A", "B", "C" Recensions of the "Collectio canonum Anselmi Lucensis", and in BAV Vat. lat. 1361 (A Comparative Overview on the Influence of the Roman Law on Different Canon Law Collections up to the "Decretum Gratiani")', *La cultura giuridico-canonica medioevale: Premesse per un dialogo ecumenico*, edd. Enrique De León-Nicolás Álvarez de las Asturias (Milano 2003) 437-467. La *Collectio XIII librorum* si presenta come una combinazione della versione A' della Collezione di Anselmo da Lucca con la Panormia di Ivo, con uso occasionale del *Polycarpus*. Kuttner ha ritenuto che la sua composizione sia legata a una casa monastica di Bergamo o di un luogo vicino a Bergamo.

implicito nella versione autentica. Cioè che l'‘honor' e la 'reverentia' comportano che l'elezione sia notificata all'imperatore, e che questi presti assenso e consenso (il testo della *Collectio XIII librorum* usa le parole 'adsensus' e 'ius consensionis'). È vero che, secondo la medesima versione, questo diritto spetta all'imperatore a due condizioni: che egli sia un difensore della Chiesa, e che egli lo abbia personalmente ottenuto per disposizione della sede apostolica, del clero, del senato e del popolo romano (ab hac apostolica sede necnon a clero et senatu ac populo). È significativa, inoltre, la specifica menzione del 'populus' quale fonte del 'ius consensionis' dell'imperatore. Invece nella versione autentica del decreto il potere imperiale è configurato come effetto di una concessione del solo papa: 'sicut iam sibi concessimus, et successorum illius, qui ab hac apostolica sede personaliter hoc ius impetraverint'.[62]

Il decreto di Nicolò II era il più recente dei 'decreta pontificum de substituendo papa' che Irnerio e i consiglieri di Enrico V avrebbero potuto leggere (e verosimilmente lessero) al popolo nella fase preparatoria dell'elezione di Maurizio Burdino. Ed è ovvio che il decreto, soprattutto nella versione falsificata o in una versione modificata come quella della *Collectio XIII librorum*, poteva fare molto comodo nell'orchestrazione della nuova elezione, in un contesto in cui mancavano i cardinali ma 'tantus populus' era presente accanto all'imperatore. Il decreto valeva a ribadire il diritto dell'imperatore di prestare l'assenso al nuovo eletto (cosa che era mancata nel caso di Gelasio II), e ad affermare che il popolo romano era una fonte necessaria di tale diritto imperiale.

Come ho accennato, l'insegnamento di Graziano sulle relazioni tra clero, laicato e autorità politica nelle elezioni episcopali e papali è contenuto nelle distinzioni 62 e 63. Il filo dell'argomentazione grazianea, come ho detto sopra, può essere seguito attraverso una serie di 'dicta' che mostrano continuità di pensiero tra la prima e la seconda recensione del *Decretum*.

[62] Cfr. il testo citato sopra, nota 28.

Nella D.62 Graziano definisce i confini della competenza del clero e popolo dei fedeli laici: 'Electio clericorum est, consensus plebis'.[63] Come si evince da un successivo canone (D.62 c.2), il popolo dovrebbe limitarsi a prendere atto della scelta operata dal clero, anche quando tale scelta sia stata ispirata da una richiesta (petitio) popolare, poiché, come aveva detto papa Celestino I, 'docendus est populus, non sequendus'.[64] Questa rigorosa posizione, diretta a garantire la piena libertà ecclesiastica, anticipa le argomentazioni della successiva 'distinctio'. Il succo della dottrina grazianea è scolpito nel breve 'dictum' che apre la D.63: 'Laici uero nullo modo se debent inserere electioni'.[65] Il 'dictum' è presente solo nella seconda recensione, ma non fa che anticipare la rubrica del successivo c.1, che riproduce il can. 22 del Concilio di Costantinopoli dell'869/870: 'Laici electioni pontificum se ipsos non inserant'.[66] Già per Deusdedit questo canone rappresentava la fonte che più autorevolmente escludeva la partecipazione dei principi laici alle elezioni ecclesiastiche. Una serie di otto canoni dimostra l'assunto principale della 'distinctio', che Graziano sintetizza nel 'dictum' che segue D.63 c.8: 'His omnibus auctoritatibus laici excluduntur ab electione sacerdotum, atque iniungitur eis necessitas obediendi, non libertas inperandi'.[67] Conformemente alla struttura dialettica della *Concordia discordantium canonum*, Graziano non poteva certo ignorare che la tradizione canonica offriva ampia e varia testimonianza della partecipazione popolare e dell'intervento dei poteri secolari nelle elezioni canoniche. Una formula avversativa, 'Econtra uero', apre dunque una seconda serie di canoni, alcuni dei quali riguardano specificamente l'elezione del romano pontefice.[68] Il primo dei quali (D.63 c.21, non presente nella prima recensione), è così rubricato: 'Electus in Romanum pontificem non ordinetur, nisi eius decretum inperatori primum

[63] D.62 d.a.c.1.
[64] D.62 c.2 (Celestino I, JK 371, anno 429).
[65] D.63 d.a.c.1.
[66] D.63 c.1, rubrica.
[67] D.63 d.p.c.8.
[68] D.63 d.a.c.9.

representetur'. Il canone congiunge due brani del *Liber Pontificalis* tratti dalle vite dei papi Vitaliano (657-672) e Agatone (678-681), nei quali si narra che le rispettive elezioni erano state notificate all'imperatore a Costantinopoli affinché egli desse l'assenso alla consacrazione dei pontefici, una prerogativa che Costantino IV delegò all'esarca di Ravenna nel 685.[69]

Ma i testi che dovevano provocare maggiore difficoltà all'argomentazione grazianea sono i due successivi canoni (D.63 c.22 e 23, già presenti nella prima recensione), tratti dai falsi privilegi di investitura noti come 'falsi ravennati'. I due testi

[69] D.63 c.21: '*Electus in Romanum pontificem non ordinetur, nisi eius decretum inperatori primum representetur. Item ex gestis Romanorum Pontificum*. Agatho natione Siculus, cuius legatione fungens Iohannes episcopus Portuensis dominico die octaua pascae in ecclesia S. Sophiae publicas missas coram principe et patriarcha latine celebrauit, hic suscepit diualem secundum suam postulationem, per quam reuelata (*sic*: relevata *nel Liber Pontificalis*) est quantitas, que solita erat dari pro ordinatione pontificis facienda, sic tamen, ut, si contigerit post eius transitum electionem fieri, non debeat ordinari qui electus fuerit, nisi prius decretum generale introducatur in regiam urbem secundum antiquam consuetudinem, ut cum eorum conscientia et iussione debeat ordinatio prosperari. § 1. Item Vitalianus natione Signensis direxit responsales suos cum sinodica iuxta consuetudinem in regiam urbem apud piissimos principes, significans de ordinatione sua'. Il canone non sta nella prima recensione. Il testo è tratto dal *Liber Pontificalis*, ed. Duchesne, rispettivamente 1.354-355 (Agatone, 678-681) e 343 (Vitaliano, 657-672). Come nota Duchesne 1.358 nota 34, la *divalis* ottenuta dal legato di Agatone aveva abolito la tassa che doveva essere pagata nell'occasione in cui l'eletto chiedeva la conferma imperiale. A partire da papa Benedetto II (684-685), la competenza di confermare l'eletto fu trasferita all'esarca di Ravenna. Il *Liber Diurnus* contiene i relativi modelli di lettere volte a impetrare la conferma del *princeps* o dell'esarca. *Liber Diurnus*, caput II, titulus III, *Relatio de electione pontificis ad principem* (PL 105.31-33): supplica all'imperatore affinché 'concessa pietatis suae iussione, petentium desideria, pro mercede imperii sui, ad effectum de ordinatione ipsius precipiat pervenire'; caput II, titulus IV, *De electione pontificis ad exarchum* (PL 105.33-36): 'supplicamus, ut celerius, Deo operante, vestris praecordiis inspirante, apostolicam sedem de perfecta eiusdem nostri Patris atque pastoris ordinatione adornare praecipiatis, ut pote per gratiam Christi ministerium imperialis fastigii feliciter atque fideliter peragentes'.

erano già stati accolti nella *Panormia* di Ivo di Chartres, la fonte dalla quale Graziano verosimilmente li attinse.[70] Il primo (D.63 c.22) è un frammento del cosiddetto *Privilegium Hadrianum*, nel quale si legge che papa Adriano I e il sinodo romano da lui riunito 'tradiderunt Karolo ius et potestatem eligendi Pontificem, et ordinandi apostolicam sedem'.[71] Il secondo (D.63 c.23) è un brano del cosiddetto *Privilegium minus*, che Leone VIII avrebbe elargito a Ottone I sull'esempio di ciò che Adriano I aveva fatto con Carlo Magno:[72]

> per nostram apostolicam auctoritatem concedimus atque largimur domino Ottoni primo, regi Teutonicorum, eiusque successoribus huius regni Italiae, in perpetuum sibi facultatem eligendi successorem, atque summae sedis apostolicae Pontificem ordinandi.

Mi soffermerò più avanti sul problema se frammenti di queste falsificazioni possano essere stati letti e spiegati al popolo romano nell'occasione dell'elezione di Maurizio Burdino. Per ora proseguiamo nel rapido esame della trattazione grazianea.

Graziano non poteva pertanto nascondere che la tradizione della Chiesa presentasse 'exempla' ed 'auctoritates' che mostravano come i laici e in particolare le autorità secolari (principes) non debbano essere esclusi dal partecipare alle elezioni episcopali.[73] Graziano non poteva negare che le elezioni dei papi e dei vescovi erano state notificate agli imperatori, come

[70] In questo senso Claudia Märtl, 'Die kanonistiche Überlieferung der falschen Investiturprivilegien (Ivo, Panormia 8.135 und 136; D.63 c.22 und 23)', BMCL 17 (1987) 33-44.

[71] D.63 c.22, rubrica: *Inperator ius habet eligendi pontificem*; *inscriptio*: *Item ex Historia ecclesiastica* (compare anche nella prima recensione).

[72] D.63 c.23, rubrica: *Electio Romani Pontificis ad ius pertinet inperatoris*; *inscriptio*: *Item Leo Papa* (compare anche nella prima recensione).

[73] D.63 d.p.c.25 (già nella prima recensione): 'Electiones quoque summorum pontificum atque aliorum infra presulum quondam inperatoribus representabantur, sicut de electione B. Ambrosii et B. Gregorii legitur. Quibus exemplis et premissis auctoritatibus liquido colligitur, laicos non excludendos esse ab electione, neque principes esse reiciendos ab ordinatione ecclesiarum. Sed quod populus iubetur electioni interesse, non precipitur aduocari ad electionem faciendam, sed ad consensum electioni adhibendum. Sacerdotum enim (ut in fine superioris capituli Stephani papae legitur) est electio, et fidelis populi est humiliter consentire'.

nei casi di Ambrogio e di Gregorio Magno: due 'exempla' storici che erano ricorrentemente menzionati nelle fonti che trattavano tale questione, per esempio in Deusdedit[74] e nella versione del

[74] Deusdedit, *Liber contra invasores et symoniacos* 308 n. 10: 'Sunt autem quidam eorum, contra quos scribimus, qui putant se quiddam magni in sui defensionem adinvenisse, cum introducunt Gregorium et Ambrosium a saeculi principibus ad pontificatum promotos fuisse: quod quam frivolum quamque falsum sit, evidenti iudicio apparebit, collatis eorum electionibus cum capitulo octavae synodi, quod supra scripsimus'. Anche Pier Damiani conferma come questo argomento storico fosse portato nella discussione sui poteri imperiali nell'elezione papale. Pier Damiani, *Disceptatio synodalis* (scritta dopo la metà di aprile 1062), ed. Lothar von Heinemann, MGH, Ldl (3 vol. Hannoverae 1891) 1.79 (nonché in Reindel, *Die Briefe des Petrus Damiani* n. 89 2.544-546): '*Defensor Romanae aecclesiae*: Dixisti christianos principes Romanos semper elegisse pontifices. Percurre mecum aecclesiasticae antiquitatis hystorias, Romanorm presulum catalogum studiose disquire, et cum perpaucis inveneris in electione sua regium accessisse consensum, confitere te perspicuum protulisse mendacium... (*discute parecchi esempi*) . . . Quod autem beato Gregorio legitur adhibuisse Mauritius imperator adsensum, et perpauci alii principes aliis promovendis, hoc dictavit perturbatio temporum et tempestas horrenda bellorum'. È noto che Ambrogio fu eletto vescovo nel dicembre 373 da neofito col consenso dell'imperatore Valentiniano. Quanto a Gregorio Magno, il racconto di Giovanni Diacono, che si basa su quello di Gregorio di Tours, attesta in termini inequivocabili che la conferma imperiale (*assensus*, *consensus*, *praeceptum*, *iussio*) era avvertita come necessaria perché l'eletto fosse consacrato vescovo di Roma (*Vita s. Gregorii Magni*, I.39-40, PL 75.79): 'Sed pestilentia supra modum saeviente, quia Ecclesia Dei sine rectore esse non poterat, Gregorium, licet totis viribus renitentem, clerus, senatus populusque Romanus sibi concorditer pontificem delegerunt. Quem ille apicem totis viribus evitare decernens, sese indignum omnino tali honore clamitabat; videlicet metuens ne mundi gloria, quam prius abiecerat, ei sub ecclesiastici colore regiminis aliquo modo subrepere potuisset. At ubi decretum generalitatis evadere nequivit, consensurum se tandem aliquando simulavit, et imperatori Mauricio, cuius filium ex lavacro sancto susceperat, latenter litteras destinavit, adiurans, et multa prece deposcens, ne unquam assensum populis praeberet ut se huius honoris gloria sublimaret. Sed praefectus urbis, Germanus nomine, eius nuntium anticipavit, comprehensumque ac, diruptis epistolis, consensum quem populus fecerat imperatori direxit. At ille gratias agens Deo pro amicitia diaconi, eo quod locum deferendi ei honoris, ut cupierat, reperisset, data praeceptione ipsum ordinari praecepit'. Per queste informazioni Giovanni Diacono, che scrive nel secolo IX, dipende dalla *Storia* di Gregorio di Tours, 10.1, che parla di

decreto di Nicolò II tramandata dalla *Collectio XIII librorum*.[75] Ma tale partecipazione, secondo Graziano, non implica un diritto dei laici a concorrere nella scelta dei vescovi o del papa, bensì solo il diritto di prestare il consenso dopo che la scelta è stata compiuta dal clero. Un consenso che si esprime nell'acclamazione popolare della persona prescelta, eletta dal voto del clero su richiesta del popolo dei fedeli, un consenso che sanziona, alla conclusione della procedura elettorale, la concordia della Chiesa: 'Sacerdotum enim . . . est electio, et fidelis populi est humiliter consentire'.

Rimaneva però da chiarire per quale ragione la storia ecclesiastica mostrasse che tanto frequentemente le elezioni di vescovi o anche di sommi pontefici erano notificate alle autorità secolari o agli imperatori. Graziano risponde che in tal modo la Chiesa, travagliata da scismi ed eresie, voleva rafforzare la posizione dei vescovi tramite l''auctoritas' dei principi cattolici.[76] In questa funzione i principi agivano come 'devotissimi filii' protettori della Chiesa cattolica. Graziano prosegue la sua argomentazione nell'intento di dare una spiegazione delle fonti che, seguendo il flusso della storia, gli consenta di giungere plausibilmente alla conclusione enunciata all'inizio di tutta la sua trattazione, ossia che i laici non hanno alcun potere sul nucleo essenziale delle elezioni episcopali, cioè

'consensus' dell'imperatore, il quale, infine, 'data preceptione, ipsum ordinari iussit' *Gregorii Episcopi Turonensis Historiarum Libri X*, ed. Bruno Krusch (MGH, *Scriptores Rerum merovingicarum* 1.1; Hannoverae 1937) 478-479.

[75] Cfr. sopra, nota 60.

[76] D.63 d.p.c.27: 'Principibus uero atque inperatoribus electiones Romanorum Pontificum atque aliorum episcoporum referendas usus et constitutio tradidit pro scismaticorum atque hereticorum dissensionibus, quibus nonnumquam ecclesia Dei concussa periclitabatur, contra quos legibus fidelissimorum inperatorum frequenter ecclesia munita legitur. Representabatur ergo electio catholicorum principibus, ut eorum auctoritate roborata nullus hereticorum uel scismaticorum auderet contraire, et ut ipsi principes tamquam deuotissimi filii in eum consentirent, quem sibi in patrem eligi uiderent, et ei in omnibus suffragatores existerent, sicut Valentinianus B. Ambrosio legitur dixisse: 'Noli timere, quia Deus, qui te elegit, semper adiuuabit te, et ego adiutor et defensor tuus, ut meo ordini decet, semper existam' .

sulla scelta delle persone.[77] Poiché nel corso dei secoli gli imperatori sono talvolta caduti nell'eresia o hanno agito come nemici della Chiesa, questa ha deciso di proibire che essi si ingeriscano nelle elezioni ecclesiastiche, sanzionando con la scomunica coloro che siano stati eletti con il loro suffragio. Infine—ed è il traguardo conclusivo dell'argomentazione storica di Graziano—la storia ecclesiastica mostra che vi sono state elezioni dei Romani Pontefici celebrate sì alla presenza dei legati imperiali, ma senza la loro consultazione, e che gli imperatori stessi, mossi da religioso affetto verso la Chiesa, hanno infine rinunciato ai summenzionati privilegi. Lasciamo da parte ogni considerazione sulla solidità del procedimento con cui Graziano si adopera, nei successivi canoni, a dimostrare la sua conclusione. Basti ricordare che il testo su cui più direttamente è fondato l'argomento della rinuncia è il *Pactum Hludovicianum* dell'817[78]: una fonte che, sebbene possa essere interpretata,

[77] D.63 d.p.c.28: 'Verum, quia inperatores quandoque modum suum ignorantes non in numero consentientium, sed primi distribuentium, immo extermi-nantium esse uoluerunt, frequenter etiam in hereticorum perfidiam prolapsi catholicae matris ecclesiae unitatem inpugnare conati sunt, sanctorum Patrum statuta aduersus eos prodierunt, ut semet electioni non insererent, et quisquis eorum suffragio ecclesiam obtineret anathematis uinculo innodaretur... Ac per hoc magna auctoritas ista habenda est in ecclesia, ut, si nonnulli ex predecessoribus et maioribus nostris fecerunt aliqua, que illo tempore potuerunt esse sine culpa, et postea uertuntur in errorem et superstitionem, sine tarditate aliqua et cum magna auctoritate a posteris destruantur. Postremo presentibus legatis inperatorum et inconsultis electiones Romanorum Pontificum leguntur celebratae, et tandem idem inperatores religioso mentis affectu prefatis priuilegiis renunciauerunt, multa insuper donaria ecclesiae Dei conferentes'.

[78] D.63 c.30, rubrica: *Romani pontificis electio a Lodoico Romanis conceditur*; *inscriptio*: *Item pactum constitutionis Inperatoris primi Lodoici cum Romanis Pontificibus* [cfr. MGH, *Legum Sectio* II. *Capitularia Regum Francorum* I, ed. Alfredus Boretius (Hannoverae 1883) 354-355]: 'Ego Lodoicus Romanus Inperator Augustus statuo et concedo per hoc pactum confirmationis nostrae tibi B. Petro principi apostolorum, et per te uicario tuo domino Pascali summo Pontifici et successoribus eius in perpetuum, sicut a predecessoribus uestris usque nunc in uestra potestate et ditione tenuistis et disposuistis, ciuitatem Romanam cum ducatu suo, et suburbanis atque uiculis omnibus, et territoriis eius montanis, atque maritimis littoribus, et portubus, seu cunctis ciuitatibus,

nell'ottica grazianea, quale rinuncia del *Privilegium Hadrianum*, non potrebbe certo valere quale rinuncia del successivo *Privilegium minus*. Come che sia, la conclusione di Graziano è netta:[79]

> Ex his constitutionibus et pacto Lodowici inperatoris (D.63 c.30) deprehenditur, inperatores illis renunciasse priuilegiis, que de electione summi Pontificis Adrianus Papa Karolo inperatori, et ad imitacionem eius Leo papa Ottoni I. regi Theutonicorum fecerat.

Dallo svolgimento del discorso emerge con chiarezza che Graziano non dubitava dell'autenticità del *Privilegium Hadrianum* e del *Privilegium Minus*, e che per lui tali testi rappresentavano le fonti che più pericolosamente minacciavano la 'libertas Ecclesiae' nelle elezioni dei Romani Pontefici. Occorreva dunque privare tali testi della loro forza eversiva attraverso un procedimento interpretativo che faceva appello alla storia ecclesiastica e alla successione cronologica delle fonti (per la verità malamente rispettata). Una volta dimostrato che gli imperatori avevano rinunciato ai privilegi concessi da Adriano I e Leone VIII, emerge in tutto il suo vigore il decreto di Nicolò II del 1059, testo che Graziano colloca nella D.23, cioè al di fuori del confronto dialettico delle argomentazioni appena richiamate. Alla luce delle conclusioni enunciate nei 'dicta' della D.63, è evidente che per Graziano il 'debitus honor' e la 'reverentia' di cui ambiguamente parlava il decreto di Nicolò II valgono a

castellis, oppidis, ac uillis in Tusciae partibus. Idem: § 1. Quando diuina uocatione huius sacratissimae sedis Pontifex de hoc mundo migrauerit, nullus ex regno nostro aut Francus, aut Longobardus, aut de qualibet gente homo sub nostra potestate constitutus, licentiam habeat contra Romanos aut publice, aut priuatim ueniendi, uel electionem faciendi, nullusque in ciuitatibus aut territoriis ad ecclesiae B. Petri apostoli potestatem pertinentibus aliquod malum propterea facere presumat; sed liceat Romanis cum omni ueneratione et sine qualibet perturbatione honorificam suo Pontifici exhibere sepulturam, et eum, quem diuina inspiratione et B. Petri intercessione omnes Romani uno consilio atque concordia sine aliqua promissione ad Pontificatus ordinem elegerint, sine qualibet ambiguitate uel contradictione more canonico consecrare, et, dum consecratus fuerit, legati ad nos, uel ad successores nostros reges Francorum dirigantur, qui inter nos et illum amicitiam et caritatem ac pacem socient'.

[79] D.63 d.p.c.34.

esprimere la ‘roboratio’ data dall’‘auctoritas’ di un imperatore che agisca quale ‘devotissimus filius’ della Chiesa: pertanto l’assenso imperiale è atto che non può incidere sull’efficacia dell’‘electio’ fatta dai cardinali in piena libertà.

Enrico V e il popolo romano nell’elezione di Maurizio Burdino: i ‘Falsi privilegi di investitura’, Irnerio e la ‘lex regia de imperio’

A Roma, nel 1118, il maestro Irnerio da Bologna dovette avere un ruolo di spicco nel collegio dei ‘legis periti’ che prepararono l’elezione di Maurizio Burdino. La spiegazione che l’‘expeditus lector’ diede dei ‘decreta pontificum de substituendo papa’ procedette verso una conclusione opposta a quella che, non molti anni dopo, il maestro Graziano avrebbe dato nel suo *Decretum*. Lo storico non può che avventurarsi in ipotesi su quali siano stati i testi letti e spiegati al popolo romano convocato in S. Pietro. Come sopra ho notato, Landolfo era un cronista bene informato, il suo racconto trova numerosi elementi di riscontro nelle fonti coeve, e anche la terminologia giuridica che usa è conforme alla tradizione canonica. Penso dunque che Landolfo abbia usato l’espressione ‘decreta pontificum’ in senso proprio, cioè non per indicare genericamente una serie di ‘canones’, ma per qualificare testi che si presentavano come decisioni dei pontefici romani riguardanti l’elezione papale. Ritengo estremamente probabile, per non dire inevitabile, che il ‘lector’ abbia anzi tutto esposto il decreto emanato da Nicolò II nel 1059, che era la fonte più recente che regolava, in modo specifico, l’elezione del sommo pontefice. Sul decreto mi sono già soffermato in più luoghi della trattazione. Ora è solo il caso di notare che la versione falsificata, o anche una versione modificata nel senso contenuto nella *Collectio XIII librorum*, con evidenza era il testo maggiormente utile per la preparazione delle basi giuridiche dell’elezione di Maurizio Burdino. Ma la stessa versione autentica, che non scioglieva l’ambiguità relativa al ‘debitus honor’ e alla ‘reverentia’ dovuti all’imperatore, poteva prestarsi a interpretazioni tali da riconoscere all’imperatore un concreto potere di concorrere, con la sua volontà, all’elezione papale. Non era ancora giunto il

Graziano che, sulla scia di una visione postgregoriana della 'libertas Ecclesiae', avrebbe collocato la funzione imperiale ('roborare' l'elezione con la sua 'auctoritas') chiaramente al di fuori della procedura elettorale.[80] Ma vi è di più. Il senso della clausola contenuta nel decreto di Nicolò II era ancora controverso pur dopo la pubblicazione del *Decretum* grazianeo. La *Summa* di Uguccione, autore che scriveva verso la fine degli anni Ottanta del secolo XII, attesta di un contrasto di opinioni. Vi era un Cardinalis—ora identificato col canonista francese Raimundus de Arenis—il quale riteneva che far salvo l'onore del re o imperatore significasse che il papa, dopo la consacrazione, dovesse inviare i suoi legati 'per confermare la pace'. Uguccione crede invece che il decreto aveva inteso stabilire un vero e proprio privilegio, in forza del quale l'imperatore, personalmente o tramite i suoi nunzii, avesse il diritto e dovere di partecipare

[80] Questo fu un punto chiaro anche alla più risalente storiografia, allorché si poneva il problema di valutare la statura morale di Irnerio. Giacomo Cassani, *Dell'antico studio di Bologna e sua origine* (Bologna 1888) 227-271, trovò opportuno rintracciare fra i testi grazianei quelli che poterono servire come base per l'elezione di Maurizio Burdino, e concluse che 'Irnerio visse tanto sicuramente da conoscere e trovarsi di fronte a questo altro suo emulo, che in tesi generale cavava fuori gli errori da lui sostenuti in Roma nel 1118 e li combatteva, confutando insieme le esagerazioni de' suoi antichi avversari' (271). Enrico Besta, *L'opera di Irnerio (contributo alla storia del diritto italiano)* (2 vol. Torino 1896) 1.69-71, non trovava nulla di biasimevole nel comportamento di Irnerio, notando, dopo aver citato Graziano, che 'non si può far troppo carico al nostro giureconsulto se egli seguiva proprio il partito in apparenza più conforme alla storia e alle consuetudini per le quali il popolo romano stesso sceglieva il pontefice e l'imperatore approvava la scelta fatta'. Sulla stessa linea è l'opinione di Arrigo Solmi, *Stato e Chiesa secondo gli scrittori politici da Carlomagno fino al concordato di Worms (800-1122). Studio storico e giuridico* (Biblioteca dell'Archivio Giuridico 'Filippo Serafini' 2; Modena 1901) 198 nota 2: 'sarebbe . . . stato strano e contrario a un retto carattere, se Irnerio si fosse rifiutato a seguire il legittimo signore della sua città e suo; e l'aiuto prestato a favore dell'antipapa, protetto dall'imperatore, non presuppone principii contrarii direttamente alla Chiesa; ma soltanto la persuasione della preferibilità giuridica dell'elezione del pontefice, per opera del popolo e per conferma dell'imperatore, cui aderiva'.

all'elezione e prestare il suo consenso.[81] Altri canonisti, seguendo la logica del discorso grazianeo, non esitavano ad affermare che i privilegi concessi a Carlo Magno e Ottone I (D.63 c.22 e 23) fossero stati abrogati o comunque superati.[82] Anche il ruolo che il decreto di Nicolò II attribuiva ai laici nel procedimento di elezione del papa poteva essere interpretato diversamente a seconda che il decreto fosse letto in modo avulso dal complesso delle fonti concernenti le elezioni episcopali, oppure fosse interpretato alla luce dell'impostazione 'politica' e dialettica che Graziano aveva dato al tema delle elezioni nelle 'distinctiones' 62 e 63. Il decreto incorporava un pezzo di una lettera di Leone Magno in cui si diceva che i candidati all'episcopato dovessero essere 'a clericis electi' e 'a plebibus expetiti'.[83] Un ignoto glossatore della seconda metà del secolo XII notava appunto che il decreto affermava che l'elezione spettasse anche al popolo, laddove un altro capitolo grazianeo affermava il contrario, e trovava la *Concordia discordantium*

[81] Uguccione, *Summa* in D.23 c.1, München, BSB Clm 10247 fol. 22ra s.v. *salvo debito*: 'per concessionem nostram'; s.v. *honore*: 'Cardinalis dicit quod debitus est honor ut papa consecratus mittit legatos ad confirmandam pacem, ut dist. lxiii. Ego (D.63 c.30). Sed potius credo quod concessum erat ei hoc privilegium, quod debeat electioni pape interesse et consensum adhibere, vel per se, vel per per aliquem nuntium, ut dist. lxiii. Adrianus, In sinodo, Quia sancta (D.63 c.22. 23, 28)'. Su *Cardinalis* v. Rudolf Weigand, 'The Transmontane Decretists', HMCL 2.174-210 a 178-180.

[82] Köln, Erzbischöfliche Diözesan- und Dombibliothek 127 fol. 60vb, glosse a margine di Graziano, *Decretum* D.63 c.22, c. *Adrianus*: 'Huic capitulo derogatum est omnino'; e D.63 c.23, c. *In synodo*: 'Et huic capitulo derogatum est, quia pro necessitate hereticorum expellendorum permissum fuit'. Le glosse risalgono agli anni 1170 circa. Il codice, testimone della scuola coloniese, è stato descritto da Rudolf Weigand, *Die Glossen zum Dekret Gratians*. (SG 26; Romae 1991) 782-785. Più recentemente è stato preso in considerazione da Peter Landau, *Die kölner Kanonistik des 12. Jahrhunderts: Ein Höhepunkt der europäischen Rechtswissenschaft* (Kölner rechtsgeschichtliche Vorträge im Auftrag des Rheinischen Vereins für Rechtsgeschichte e. V. zu Köln, Heft 1; Badenweiler 2008) 11-12, 36-37.

[83] Cfr. il testo sopra, nota 28. Il passo di Leone Magno (JK 544, 458 o 459) è anche in Graziano, D.62 c.1.

canonum affermando che il consenso popolare interviene in una fase successiva all'elezione:[84]

> *Sub verbo* a plebibus expetiti: lxii. Docendus (D.62 c.2) contra. Ibi dicitur quod electio non spectat ad populum, hic videtur quod sic. Solutio: consensus est ex postfacto requirendus.

È su questo punto che si innesta la questione se a Roma, nel 1118, si sia anche fatto ricorso alle falsificazioni cd. 'ravennati'. I falsi privilegi—come è stato ben notato—si collegavano con il decreto del 1059 (come mostra anche la loro tradizione manoscritta) e ne chiarivano alcuni aspetti ambigui.[85] Non è un caso che essi configurino l'azione del sovrano come 'reverenda facultas' (*Hadrianum*)[86] o 'reverentiae facultas' (*Minus*),[87] e affermino che Carlo Magno e Ottone I avevano personalmente ricevuto 'ius et potestatem eligendi pontificem' (*Hadrianum*),[88] o 'facultatem... summae sedis apostolicae pontificem ordinandi' (*Minus*),[89] o 'summe sedis apostolice pontificem eligendi ac ordinandi facultatem' (*Maius*).[90]

Secondo la studiosa che in tempi recenti ne ha dato l'edizione critica, le falsificazioni furono composte in un arco di tempo che corre dalla metà degli anni Ottanta del secolo XI fino ai primi anni del secolo successivo, e la loro redazione è da

[84] Biblioteca Apostolica Vaticana, Pal. lat. 622, fol. 12vb, glossa a Graziano, *Decretum*, D.23 c.1 s.v. *a plebibus expetiti*. Il codice, risalente al terzo quarto del secolo XII, è stato descritto da Weigand, *Die Glossen* 964-966.

[85] Edizione di Claudia Märtl, *Die falschen Investiturprivilegien* (MGH, Fontes Iuris Germanici Antiqui in usum scholarum separatim editi 13; Hannover 1986). Si tratta di quattro testi attribuiti ai papi Adriano I (772-795) e Leone VIII (963-965): *Ex decretis Adriani papae Karolo regi Francorum* (= *Privilegium Hadrianum*), edito col titolo *Hadriani I. decretum de investiturис* 137-147; *Ex decretis Leonis papae Ottoni primo regi Teutonicorum*, edito col titolo *Privilegium minus Leonis VIII. papae*, 148-153; *Item decretum Leonis papae*, edito col titolo *Cessio donationum Leonis VIII. papae* 154-177; *Privilegium maius Leonis VIII. papae* 179-205. Cfr. anche Märtl, 'Die kanonistiche Überlieferung der falschen Investiturprivilegien'.

[86] Ibid. 146.

[87] Ibid. 153.

[88] Ibid. 145.

[89] Ibid. 152.

[90] Ibid. 201.

collocare nell'Italia centro-settentrionale (ma vi è stato chi ha tentato di localizzarne la redazione a Ravenna, o nella cancelleria imperiale di Bamberga, o a Treviri per il *Maius*).[91] Gli evidenti collegamenti (a partire dalla trasmissine testuale) col decreto del 1059 mi inducono a pensare che le falsificazioni non intendessero propagare l'idea che la Chiesa (Adriano I e Leone VIII) avesse ceduto 'in toto' agli imperatori il diritto di eleggere il papa, perché questa sarebbe stata una conclusione troppo dirompente e contrastante con la tradizione canonica, che comunque collocava l'elezione papale entro lo schema, variamente declinato storicamente, della 'electio cleri et populi'. Mi sembra, in altre parole, che 'ius' o 'potestas' o 'facultas eligendi' non fossero concepiti come diritti esclusivi dell'imperatore, bensì come prerogative imperiali che si collocavano all'interno della procedura elettorale, diversamente da come invece avrebbe concluso Graziano alcuni decenni dopo. La trasmissione manoscritta dei falsi privilegi insieme al decreto del 1059 nella versione falsificata[92] induce a pensare, insomma, che i falsi privilegi potessero essere utilizzati come strumento interpretativo del decreto del 1059 e contemporaneamente come fonte di legittimazione delle pretese imperiali di intervenire nel cuore nelle elezioni papali, cioè nella fase della designazione della persona. Se questa interpretazione, come penso, è plausibile, sarebbe conseguentemente verosimile che i falsi privilegi rientrassero tra le fonti lette e spiegate dall''expeditus lector'.[93] Essi, insieme al decreto del 1059 nella versione falsificata o modificata, valevano a due scopi: da un lato a dimostrare che l'elezione di Gelasio era stata illegittima a causa del mancato coinvolgimento dell'imperatore (la fuga a Gaeta aveva reso impossibile la prestazione dell'assenso imperiale all'elezione);[94] dall'altro, valevano a rafforzare la traballante

[91] Ibid. 75-96.
[92] I dati della tradizione manoscritta ibid. 96-124.
[93] Ibid. 70, Märtl ritiene che i Falsi furono letti durante l'elezione di Maurizio Burdino, in considerazione della loro circolazione insieme al decreto del 1059.
[94] Che nel mondo cristiano vi fosse un certo disorientamento quanto alla legittimità delle posizioni di Gelasio II e di Maurizio Burdino è un dato che

elezione di Maurizio Burdino, avvenuta col concorso di tre cardinali scismatici[95] ma alla presenza dell'imperatore e con la partecipazione di 'tantus populus', raccolto in S. Pietro affinché esprimesse, con triplice acclamazione, la volontà di eleggere Burdino.

L'enfasi che il racconto di Landolfo Iuniore pone sul ruolo del popolo romano nell'elezione ha da tempo ispirato l'ipotesi che vi sia un filo che colleghi le vicende romane con la circostanza che i falsi privilegi ricorrono alla *Lex regia de imperio,* come tramandata dalle Istituzioni giustinianee[96], per

emerge da alte fonti. Fu Étienne Baluze, nella *Vita Mauritii Burdini Archiepiscopi Bracarensis*, a segnalare alcune interessanti fonti a questo riguardo, Stephani Baluzii *Miscellaneorum Liber Tertius, hoc est, Collectio veterum monumentorum quae hactenus latuerant in variis codicibus ac bibliothecis* (Parisiis 1670) 471-514 a 503. Matthew Paris, per esempio, chiama Gelasio II *antipapa*: 'Anno Domini MCXVIII. Defuncto Papa Paschali, Gelasius Antipapa anno uno successit, cui successit orthodoxe Calixtus': Matthaei Parisiensis, Monachi Sancti Albani, *Chronica majora*, edited by Henry Richards Luard (7 vol. London 1874) 2.144-145. Il disorientamento della Chiesa inglese, dopo l'elezione di Callisto II in Francia, è testimoniato da Eadmer di Canterbury nel libro V della *Historia novorum*: 'Dum haec ecclesiastica ita in Burgundia disponuntur, apostolatus Romanae Ecclesiae praefato Gregorio sedi beati Petri praesidente administratur. Super his ergo multis rumoribus Anglia concussa est, aliis hunc, aliis illum, aliis neutrum Ecclesiae Dei iure praelatum asserentibus. Galli tamen et rex Anglorum cum pontifice Cantuariorum in Calixtum se transtulerunt, et eum, spreto Gregorio, pro apostolico susceperunt', Eadmeri *Historia novorum in Anglia, et opuscula duo de Vita sancti Anselmi et quibusdam miraculis ejus*, edited by Martin Rule (London 1884) 249.

[95] Cfr. sopra, nota 50.

[96] Inst. 1.2.6; cfr. Dig. 1.4.1 pr.; Cod.1.17.1.7. Il passo delle *Institutiones* compare nella tradizione canonistica già nella *Lex Romana canonice compta*, cap. 170.7, all'interno di un capitolo che riporta per intero Inst.1.2. Carlo Guido Mor, *Lex Romana canonice compta: Testo di leggi romano-canoniche del sec. IX pubblicato sul ms. parigino Bibl. nat. 12448* (Pubblicazioni della R. Università di Pavia, Facoltà di Giurisprudenza, 13; Pavia 1927) 115, ove si nota che il capitolo sta anche nella *Collectio canonum Anselmo dedicata*, vii.2; cfr. gli ulteriori dati offerti da Märtl, *Die falschen Investiturprivilegien* 144 nota 23. Sull'utilizzazione della *lex regia* nel conflitto politico del secolo XI e nelle riflessioni giuridico-politologiche medievali v. Walter Ullmann, *Principles of Government and Politics in the Middle Ages* (London 1961) 101

giustificare la concessione agli imperatori del diritto di eleggere il papa. Nel *Privilegium Hadrianum* leggiamo che la concessione fu fatta a Carlo Magno sull'esempio del popolo romano, che trasferì il suo potere all'imperatore, dato che era difficile che il popolo potesse continuamente riunirsi per la trattazione di ciascun affare.[97] Un analogo schema segue il *Privilegium maius*, nel quale però si aggiunge un'osservazione di grande interesse.[98]

e nota 3; Ennio Cortese, *Il problema della sovranità nel pensiero giuridico medievale* (Roma 1966) 92-111; Idem, *Il diritto nella storia medievale* (2 vol. Roma 1995) 2.71-74; Berardo Pio, 'Considerazioni sulla 'lex regia de imperio' (secoli XI-XIII)', *Scritti di storia medievale offerti a Maria Consiglia de Matteis*, a cura di Berardo Pio (Spoleto 2011) 573-599.

[97] Märtl, *Die falschen Investiturprivilegien* 143-145: 'Quae reverentissime celebrata est a CL tribus religiosissimis episcopis et abbatibus, adhuc etiam a iudicibus et legis doctoribus et ab universis ordinibus et regionibus huius almae urbis et a cuncto clero sanctae Romanae ecclesiae exquirentibus usus legesque et mores et quemadmodum haereses et seditiones abolere possent de apostolica sede et de dignitae patriciatus et Romano imperio, ex quibus omnibus nimius error crescebat in universo orbe. Populus itaque Romanus more solito legem condebat. Sed difficile erat pro unoquoque negotio totiens tot in unum congregare. Unde ergo suum ius et potestatem imperatori concesserunt, prout legitur: 'populus itaque Romanus concessit ei et in eum omne suum ius et potestatem'. Ad hoc quoque exemplum praefatus Adrianus papa cum omni clero et populo et universa sancta synodo tradidit Karolo augusto omne suum ius et potestatem eligendi pontificem et ordinandi apostolicam sedem, dignitatem quoque patriciatus similiter concessit'.

[98] Ibid. 181: 'Iam enim dudum populus Romanus imperatori omne sum ius et potestatem concessit, sicut in Institutionibus scriptum est: Quodcumque igitur imperator per epistolam constitui vel edicto precepit vel rescripto decrevit, constat esse legem. Quia difficile erat in unum semper tantum populum congregare universasque voces adultorum et parvulorum exspectare, idcirco uni tantum persone suum ius ac potestatem tradiderunt, quem patricium nuncupaverunt, iuxta vero quem XIIcim super alios universos constituerunt, quos senatus consultus nominaverunt'; e 201-202: 'Sic ergo populus Romanus, postquam se suo iure privarunt, numquam illut (*sic*) repetere possunt. Ideoque neque usum electionis apostolice sedis neque patriciatus vel regie potestatis eos expetere posse decrevimus, sed solus rex Romani imperii summe sedis apostolice pontificem eligendi ac ordinandi facultatem habere sanctimus (*sic*) et per nostram apostolicam statuimus auctoritatem. Consecrationem tamen ab episcopis iuxta canonicam suscipiat consuetudinem'.

Il trasferimento del potere dal popolo all'imperatore era stato irrevocabile. Analogamente—afferma Leone VIII—il popolo non potrebbe richiedere indietro l' 'usum electionis apostolice sedis', né il patriziato o la 'regia potestas'. Per decisione della stessa Sede Apostolica, pertanto, il diritto di eleggere il romano pontefice risiede ormai definitivamente nelle mani del 'solus rex Romani imperii'. In sostanza, tenendo fermo lo schema dell''electio cleri et populi', il *Privilegium maius* sostituisce l'imperatore al 'populus' nelle funzioni di quest'ultimo.

Ora, l'idea che il trasferimento di poteri dal 'populus' al 'princeps' fosse stato irrevocabile corrisponde alla concezione fatta propria da Irnerio in una glossa conosciuta sin dai tempi di Savigny: là dove la 'lucerna iuris' nega che la desuetudine abbia la forza di abrogare la legge, forza che invece essa avrebbe avuto quando il popolo ancora conservava la 'potestas condendi leges', cioè prima che la 'potestas' fosse stata trasferita all'imperatore[99].

[99] Lo stato delle nostre conoscenze è tracciato da Ennio Cortese, *La norma giuridica: Spunti teorici nel diritto comune classico* (2 vol. Ius nostrum 6.1-2; Milano 1962-1964) 2.126-127 e nota 56. La glossa su Dig.1.3.32 era stata edita da Savigny dal Paris, BNF lat. 4451, dove è chiusa dalla sigla y.: 'Loquitur hec lex secundum sua tempora, quibus populus habebat potestatem condendi leges, ideo tacito consensu omnium per consuetudinem abrogabantur. Sed quia hodie potestas translata est in imperatorem, nihil faceret desuetudo populi. y.' Savigny, *Geschichte* 4.459; F. Carlo de' Savigny, *Storia del diritto romano nel Medio Evo*, traduzione di Emanuele Bollati (3 vol. Torino 1857) 3.371 (qui con l'omissione della sigla finale)]. Ho visto la glossa in una copia microfilmata scarsamente leggibile del manoscritto, fol. 11vb magine superiore, ed effettivamente mi pare che la sigla sia y, non I. come affermò E.M. Meijers correggendo Savigny: cfr. Cortese, *ibidem*. Besta, *L'opera di Irnerio* 1.67, riporta la glossa da Savigny ma non la inserisce nella sua edizione di glosse irneriane, poiché nel ms. di Torino, BU F.II.14 (uno di quelli utilizzati da Besta) essa è anonima (anche se Besta ricorda che questo insegnamento è ricondotto a Irnerio dalla tradizione, cioè Accursio e Carlo di Tocco). Nel BAV Vat. lat. 1408, fol. 7ra, vi è la sigla az. perché la glossa è inglobata nell'apparato di Azzone. In Vat. lat. 2512, fol. 7ra, e Paris, BNF lat. 4461, fol. 5ra, vi è la sigla yr. Mi limito a osservare che la glossa meriterebbe una nuova edizione che ne segnali le varianti. Ho visto gli ultimi tre manoscritti citati, e noto che la parola finale non è 'desuetudo populi', ma 'de consuetudine populi' (Paris 4461, Vat. lat. 2512), 'de consuetudo populi' (Vat. lat. 1408)

Questa corrispondenza fa sorgere la curiosità di comprendere se si tratti di una consonanza casuale o se l'Irnerio glossatore del diritto giustinianeo abbia avuto qualcosa a che fare con la redazione dei falsi privilegi,[100] o li abbia almeno conosciuti, cosa che ritengo probabile.

La lettura dei falsi privilegi—*Hadrianum*, *Minus* e *Maius*[101]—poteva comunque convincere il popolo romano della legittimità del diritto imperiale di eleggere il Romano Pontefice, come pure poteva renderlo consapevole che nell'esercizio di tale diritto l'imperatore rappresentava il 'populus', che aveva trasferito i suoi poteri al principe. Ciò premesso, la rappresentazione sapientemente orchestrata dai consiglieri di Enrico V (nel timoroso mormorio degli oppositori)[102] si svolse secondo una procedura che mi pare discostarsi dagli schemi dei falsi privilegi. Secondo Landolfo, fu il 'populus' che elesse Maurizio Burdino (a ciò chiaramente indotto dalla designazione fatta dall'imperatore), fu il 'populus' che per tre volte lo acclamò papa dicendo: 'volumus'. Se mai la narrazione della *Lex regia de imperio* sia stata fatta in quella occasione, la contestuale presenza di 'populus Romanus' e 'imperator' dovette far passare in secondo piano, nell'unanime concordia abilmente orchestrata dai consiglieri di Enrico V, l'idea che il popolo si era ormai spogliato dei suoi poteri.

[100] Ciò che è difficile o impossibile accertare, ma che poteva avere qualche ragione di plausibilità quando si riteneva che i falsi fossero un prodotto di origine ravennate e che Irnerio avesse 'strette relazioni' con i maestri di una peraltro evanescente scuola giuridica ravennate. Besta, *L'opera di Irnerio* 1.67 postula una 'stretta relazione' di Irnerio coi 'maestri ravennati'. Sull'ambiente giuridico ravennate v. Cortese, *Il diritto nella storia medievale* 1.384-385 e 2.27-31, che mostra una giusta prudenza nel dedurre dalle scarse tracce documentarie l'esistenza di una scuola di diritto romano.

[101] Ritengo invece che durante l'elezione di Maurizio Burdino non vi fosse ragione di leggere la 'Cessio donationum', che nulla contiene in materia di elezione del Romano Pontefice. Cfr. sotto, Appendice.

[102] Cfr. la testimonianza di Falcone Beneventano citata sopra, nota 51.

'Guarnerius': il giurista e il teologo

Rimane da esaminare un'altra questione, cioè se le vicende romane del marzo 1118 possano darci qualche elemento per ragionare sui rapporti tra l'Irnerio glossatore del diritto civile—inequivocabilmente identificato da Landolfo nel 'magister Guarnerius de Bononia' che opera accanto agli altri 'legis periti'—e il teologo autore del *Liber divinarum sententiarum*, il sentenziario patristico che in un manoscritto ambrosiano è ascritto a 'Guarnerius iurisperitissimus'.[103]

Da tempo è stato notato che il c.24, *De regibus*, del florilegio contiene un passo dello Pseudo Giovanni Crisostomo che presenta un insegnamento analogo a quello irneriano relativo alla *Lex regia* e a quello contenuto nel citato passo del *Privilegium maius*. Senza riferirsi alla *Lex regia*, 'Iohannes os aureum' insegnava che nessuno può costituirsi re, ma è il popolo che crea i re con la propria elezione. Gli effetti di questa scelta però sono irrevocabili: 'così la volontà del popolo si trasforma in necessità'.[104] Il passo, come è stato utilmente notato, era stato già utilizzato nei *Libelli de lite* oltre che nel *Privilegium maius*.[105]

[103] Guarnerius Iurisperitissimus, *Liber divinarum sententiarum*, edizione critica a cura di Giuseppe Mazzanti, prefazione di Antonio Padoa Schioppa (Testi, Studi, Strumenti 14; Spoleto 1999).

[104] Guarnerius Iurisperitissimus, *Liber divinarum sententiarum*, c.24, 175: 'Iohannes os aureum: Videmus in istis mundialibus regnis quomodo in primis quidem nemo potest facere se ipsum regem set populus creat sibi regem, quem elegit: set ubi rex ille fuerit factus et confirmatus in regno, iam habet potestatem in hominibus, et non potest populus iugum eius de cervice sua repellere. Nam primum quidem in potestate populi est facere sibi regem, quem vult: factum autem de regno repellere iam non est in potestate eius, et sic voluntas populi in necessitatem convertitur', da Ps. Iohannes Chrisostomus, *Eruditi commentarii in evangelium Matthaei*, *Homilia XXXVIII ex capite XXI*, PG 56.835.

[105] Come nota Ferruccio Gastaldelli nell'*Introduzione* a Wilhelmus Lucensis, *Comentum in tertiam ierarchiam Dionisii que est de divinis nominibus*, introduzione e testo critico di Ferruccio Gastaldelli (Testi e Studi per il 'Corpus Philosophorum Medii Aevi' 3; Firenze 1983) xlvii-lix, in particolare lii e lvi-lvii. Il brano dello Pseudo Giovanni Cristostono è utilizzato nel *Liber canonum contra Heinricum quartum*, ed. Friedrich Thaner, MGH Ldl (3 vol.

Sembra quasi che l''auctoritas' del Padre della Chiesa sia servita a Irnerio (come ai redattori del *Maius*) quale chiave di interpretazione dei passi giustinianei che menzionano la *Lex regia* (Dig. 1.4.1, Cod. 1.17.1.7, Inst. 1.2.6), nei quali nulla si dice, 'expressis verbis', della revocabilità o irrevocabilità del trasferimento di poteri dal 'populus' al 'princeps'.

Al di là delle ipotesi, emerge chiaramente che l'autore del florilegio patristico nutre una concezione provvidenziale dell'impero, che ai Romani, per disposizione divina, era pervenuto dopo che esso era stato presso gli Assiri e i Persiani: così nel c.23, *De romano imperio*, attraverso una selezione di passi tratti dal *De civitate Dei* di Agostino.[106]

Ancora più evidente è l'enfasi che il teologo pone sull'idea che il re sia un ministro di Dio, idea che nel c.24, *De regibus*, è illustrata attraverso un mosaico di passi di Agostino, Ambrogio, Gregorio Magno, lo Pseudo Giovanni Cristostomo, che definiscono le funzioni del re cristiano. La sequenza contiene citazioni dei fondamentali passi neotestamentari sull'obbligo dei sudditi cristiani di assolvere il debito verso Cesare e di obbedire alle autorità costituite (Matteo 22:21, Rom. 13:1 e 13:7-8). Vi si leggono anche affermazioni come quella tratta da una lettera di Gregorio Magno all'imperatore Maurizio:[107]

Hannoverae 1891) 1.492; nella lettera dei cardinali scismatici a difesa di Enrico V, *Benonis aliorumque cardinalium schismaticorum contra Gregorium et Urbanum II scripta*, ed. Kuno Franke, MGH, Ldl 2.422; nel *Privilegium maius*, Märtl, *Die falschen Investiturprivilegien* 201 c.37. Al di là delle perplessità che la storiografia nutre sulla identificazione tra l'Irnerio giurista e l'Irnerio teologo, la connessione fra la teoria irneriana della irrevocabilità della concessione dei poteri popolari all'imperatore e l'autorità dello Pseudo Crisostomo ha colpito la storiografia: Ennio Cortese, 'Théologie, droit canonique et droit romain: Aux origines du droit savant (XIe-XIIe s.)', *Académie des Inscriptions et Belles-Lettres: Comptes rendus des Séances de l'année 2002* 146 (Paris 2002) 57-74 a 66-67 ora anche in Ennio Cortese, *Scritti: Tomo Terzo*, a cura di Alessandro Cortese-Federico Cortese (Roma 2013) 107-124; Padovani, 'L'insegnamento di Irnerio' 24.

[106] Guarnerius Iurisperitissimus, *Liber divinarum sententiarum* c.23, 170-173.

[107] Ibid. c.24, 174-178, 175 per la citazione della lettera di Gregorio Magno all'imperatore Maurizio, *Reg*. 5.36.

> Terrena potestas sacerdotibus ita dominetur, ut etiam reverentiam debitam inpendat.

Il successivo c.54, *Quid erga principes agant*, riguarda i pastori della Chiesa e i loro doveri nei confonti delle autorità secolari, e anche qui i testi scritturistici sull'obbedienza alle potestà terrene stanno alla base del discorso. In un passo tratto dal *De obitu Theodosii* di Ambrogio si legge:[108]

> Ideo te imperatorem fecit Dominus, ut non soli militares Patri, sed omnibus imperares.

A precisare che anche la Chiesa sta tra gli 'omnes' sui quali l'imperatore esercita il suo 'imperium', il successivo frammento, attribuito a Gregorio Magno, sottolinea che la Chiesa è 'sub regno terreni regis'.[109]

Se il Guarnerius autore del *Liber divinarum sententiarum* fosse l'Irnerio giurista, allora le concezioni espresse nel florilegio teologico (composto prima del 1113) avrebbero potuto offrire un'ulteriore base di legittimazione giuridica e morale dell'azione svolta da Irnerio e dagli altri 'legis periti' a Roma nel marzo 1118.[110]

[108] Ibid. c.54, 260-263, in particolare 261 per la citazione dal *De obitu Theodosii* di Ambrogio: 'Acquisivit Theodosius imperator filiis suis exercitus fide. Omnia filii (*variante* filiis) tradidit: regnum, potestatem, nomen Augusti. Quid dignius, quam ut potestatem (*sic*) imperatoris sit lex? Ideo te imperatorem fecit Dominus, ut non soli militares Patri, sed omnibus imperares'.

[109] Ibid. c.54, 260-263, in particolare 261: 'Gregorius, in epistola tali: Ad hoc divine dispositionis: Dicit ecclesia (*sic*) sub regno treni (*sic*: terreni) regis esse', con citazione estratta 'a senso' da Gregorio Magno, *Reg*. 5.59. Anche il successivo c.55, 263-266, *Ut cum celesti regno terrenum quoque venerantur* (*sic*: *variante* 'vereantur'), concerne il tema dell'obbedienza all'autorità costituita. Tra i passi ivi raccolti è significativo quello tratto da Agostino, *Enarrationes in Psalmos*, 124:7, ivi 265: 'Idem in Psalmo 124: Ordinavit sic Deus eclesiam suam, ut omnis potestas ordinata in seculo habeat honorem, et aliquando a melioribus...'.

[110] Costretti come siamo a lavorare in un terreno incerto e con indizi che non costituiscono prove certe, trovo persuasiva la lettura di Gastaldelli, *Introduzione* a Wilhelmus Lucensis, *Comentum*, quando scrive che alcuni titoli del *Liber divinarum sententiarum* 'contengono un'ideologia politica coerente con l'attività di Irnerio giurista e giudice, e ne spiegano la perfetta coerenza personale . . . È una teologia politica nettamente filoimperiale, che si

Dal piano delle ipotesi scendiamo a quello, meno scivoloso ma non privo di insidie, delle fonti giustinianee alle quali, in quegli anni, il giurista Irnerio rivolgeva il proprio studio. Vorrei soffermarmi su un testo singolare, posto proprio all'inizio del *Codex* di Giustiniano. Mi riferisco alla l. *Inter claras*, inclusa nel primo titolo *de Summa Trinitate et de fide catholica et ut nemo de ea contedere audeat* (Cod. 1.1.8). Si tratta un testo composito particolarmente interessante, poiché consta di una lettera di papa Giovanni II a Giustiniano (534), la quale incorpora una precedente missiva di Giustiniano al medesimo papa (533).[111] Il pontefice elogia Giustiniano, quale custode dell'ortodossia, per avere sottoposto una questione teologica e canonica alla Sede Apostolica, garante dell'unità della Chiesa e della retta fede. Ora, l'interesse di questa fonte, posta proprio alle soglie del *Codex*, sta nel fatto che attraverso la lettera di papa Giovanni II il tema della sovranità imperiale, scaturente dalle fonti giustianee, è innestato sul tronco della regalità biblica. La lettera papale è infatti intessuta di brani veterotestamentari che documentano l'idea della regalità sacra di diritto divino. La prima e la più eloquente delle affermazioni è quella che ricollega l'azione religiosa di Giustiniano a un passo del libro dei Proverbi (cfr. Pv 8.15):

> Patet igitur in vobis impletum fore, quod scripturae loquuntur: 'per me reges regnant et potentes scribunt iustitiam'.

inserisce nella lotta per le investiture, di cui i *Libelli de lite* sono testimonianza' (48); per concludere che, 'se Irnerio giurista è questo teologo, appare tutto logico e coerente nella sua storia, o meglio la sua storia trova spiegazione in questi testi che corrispondono a quanto conosciamo di Irnerio' (55). Questa interpretazione è accolta Mazzanti nell'*Introduzione* a Guarnerius Iurisperitissimus, *Liber divinarum sententiarum*, 5-6 e 63-64.

[111] Cod.1.1.8.l. *Inter claras*. La lettera di papa Giovanni II a Giustiniano (JK 884, 534), incorpora una lettera di Giustiniano al medesimo papa del 533. Secondo Bernard H. Stolte, 'Not in the Code, nor in the *Basilica*. C.1.1.8 and its translation in the *Basilica*', *Annali del Seminario Giuridico dell'Università degli Studi di Palermo* (AUPA) 54 (2010-2011) 289-300, la l. *Inter claras* era estranea all'assetto originario del *Codex*; è tuttavia presente nella tradizione bizantina, in una traduzione integrale trasmessa da un manoscritto dei *Basilica*, anche se probabilmente non nella versione originale della raccolta.

Nell'imperatore Giustiniano si realizza dunque l'idea del re ministro di Dio e promotore della giustizia, in quanto coopera con la Chiesa nella realizzazione della 'pax ecclesiae' e della 'religionis unitas'. Immagini che trovano una rappresentazione speculare nella Novella 6 di Giustiniano—certamente nota a Irnerio[112]—là dove l'imperatore postula il concetto di 'consonantia bona', quella buona 'sinfonia' tra l''imperium' e il 'sacerdotium' intesa come alleanza idonea a portare tutto il bene possibile al genere umano.[113] La l. *Inter claras*—come, penso,

[112] In questa sede non è possibile approfondire il discorso su Irnerio quale interprete e glossatore dell'*Authenticum* (collezione di Novelle che, come è noto, egli inizialmente riteneva non fosse autenticamente giustinianea), e come autore delle 'authenticae'. Sulla questione si vedano almeno Luca Loschiavo, 'La Riforma gregoriana e la riemersione dell'*Authenticum*: Un'ipotesi in cerca di conferma', RIDC 19 (2008) 137-151; Idem, 'Il *codex graecus* e le origini del *Liber Authenticorum*', ZRG Rom. Abt. 127 (2010) 115-171; Idem, 'La riscoperta dell'*Authenticum* e la prima esegesi dei glossatori', *'Novellae Constitutiones': L'ultima legislazione di Giustiniano tra Oriente e Occidente da Triboniano a Savigny*: *Atti del Convegno Internazionale, Teramo, 30-31 ottobre 2009*, a cura di Luca Loschiavo-Giovanna Mancini-Cristina Vano (Università degli Studi di Teramo, Collana della Facoltà di Giurisprudenza 20; Napoli 2011) 111-139; Idem, 'Irnerius and the imperial legislator, between Justinian and Henry V', TRG 88 (2020) 367-391; Kenneth Pennington, 'The Beginning of Roman Law Jurisprudence and Teaching in the Twelfth Century: The Authenticae', RIDC 22 (2011) 35-53; Idem, 'Per un *Corpus Irnerianum*', tutti con la letteratura ivi citata.

[113] Giustiniano, *Novella* 6, *Quomodo oporteat episcopos et reliquos clericos ad ordinationem deduci, et de expensis ecclesiarum* (535), *Praefatio*: 'Maxima quidem in hominibus sunt dona dei a superna collata clementia sacerdotium et imperium, illud quidem divinis ministrans, hoc autem humanis praesidens ac diligentiam exhibens; ex uno eodemque principio utraque procedentia humanam exornant vitam. Ideoque nihil sic erit studiosum imperatoribus, sicut sacerdotum honestas, cum utique et pro illis ipsis semper deo supplicent. Nam si hoc quidem inculpabile sit undique et apud deum fiducia plenum, imperium autem recte et competenter exornet traditam sibi rempublicam, erit consonantia quaedam bona, omne quicquid utile est humano conferens generi. Nos igitur maximam habemus sollicitudinem circa vera dei dogmata et circa sacerdotum honestatem, quam illis obtinentibus credimus quia per eam maxima nobis dona dabuntur a deo, et ea, quae sunt, firma habebimus, et quae nondum hactenus venerunt, adquirimus. Bene autem universa geruntur et competenter, si rei principium fiat decens et amabile deo.

anche la Novella 6[114]—attrasse l'attenzione di Irnerio, se a lui devono ascriversi le glosse siglate 'I.' edite da Gustav Pescatore.[115] Ed è di qualche rilievo che uno dei passi biblici citati nella l. *Inter claras*—'cor regis in manu dei est, et ubi voluerit, inclinabit illud' (Proverbi 21:1)—fu utilizzato da Irnerio in una brevissima glossa apposta alla l. *Cunctos populos* (l'editto di Tessalonica, 380: Cod. 1.1.1), per rappresentare l'idea che l'imperatore, nel reprimere l'eresia, è un esecutore della volontà divina.[116]

Hoc autem futurum esse credimus, si sacrarum regularum observatio custodiatur, quam iuste laudati et adorandi inspectores et ministri dei verbi tradiderunt apostoli, et sancti patres et custodierunt et explanaverunt'. Sul tema, per considerazioni più ampie, rinvio a Orazio Condorelli, 'Le radici storiche del dualismo cristiano nella tradizione dottrinale cattolica: Alcuni aspetti ed esempi', *Diritto e Religioni* 12 (2011) 450-486; Idem, 'Bartolo e il diritto canonico', *Bartolo da Sassoferrato nel VII centenario della nascita. Diritto, politica, società*: *Atti del L Convegno storico nazionale, Todi - Perugia, 13-16 ottobre 2013* (Atti dei Convegni del Centro italiano di studi sul basso medioevo-Accademia Tudertina: Nuova serie 27; Spoleto 2014) 463-557, in particolare 466-477.

[114] Qualche sondaggio sui manoscritti permette di pensare che egli si sia interessato alla Novella 6. Mi limito a segnalare qualche glossa apposta a questa constituzione nel München, BSB Clm 3509, *Authenticum*, fol. 45ra-199vb (segnalatomi da Luca Loschiavo, che ringrazio), che contiene materiali risalenti almeno alla generazione dei Quattro Dottori (Martino, Bulgaro e Iacopo), ma verosimilmente anche all'insegnamento di Irnerio, a giudicare dalla presenza della sigla y. Al fol. 54ra, s.v. *illud quidem divinis ministrans*: 'N<ota> sacerdotium solis ministrare divinis'; v. *ideoque nichil sic erit studiosum imperatoribus sicut sacerdotum honestas*: 'N<ota> ad curam principis pertinere sacerdotium esse inculpabile. y.'; v. *nos igitur maximam habemus sollicitudinem*: 'quia studiosum est venerari sacerdotes imperatoribus igitur nobis'; v. *si rei principium*: 'quoniam principium est potentissima pars cuiusque rei'; glossa che riprende testualmente parole della Novella: '<B>ene autem omnia geruntur competenter si rei principium (principilis *correxit ms.*) fiat decens et amabile deo. y.'; al fol. 54rb: 'N<ota> custodiendam observationem sacrorum patrum'. Etc.

[115] Gustav Pescatore, *Die Glossen des Irnerius* (Greifswald 1888) 84.

[116] München, BSB Clm 22, fol. 3ra, a margine di Cod. 1.1.1 s.v. *quem ex celesti arbitrio*: 'Cor quippe regis in manu Dei est, et ubi voluerit inclinabit illud. y. '. (ho emendato l'errato 'indinabit' del manoscritto). Rinvio a Orazio Condorelli, 'Cattolici, eretici, scismatici, infedeli. Dinamiche della pluralità

La funzione ecclesiastica del re e dell'imperatore cristiano—che è tema comune al diritto e all'ecclesiologia[117]—al tempo del giurista Irnerio era dunque fondata sulle basi della tradizione biblica e del pensiero patristico, con le quali convergevano le stesse fonti giustinianee. Tale convergenza era un dato che indubbiamente sosteneva—indipendentemente dal giudizio che i posteri possano darne—operazioni di politica ecclesiastica come quelle che Enrico V compì a Roma nel marzo 1118, o che il padre Enrico IV aveva compiuto nel 1080 quando aveva opposto a Gregorio VII l'antipapa Clemente III.

Ma se 'il cuore del re è nelle mani di Dio', come dice il libro dei Proverbi,[118] è altrettanto vero che il mondo è nelle mani dell'imperatore. Lo sapeva l'Irnerio giurista, che nel 'corpus' di

religiosa nell'esperienza del diritto comune medievale', *Il Diritto Ecclesiastico* 130 (2019) 141-161.

[117] Il tema della funzione regale nella società cristiana trova infatti ampio spazio nelle trattazioni ecclesiologiche: Yves Congar, *L'ecclésiologie du haut Moyen-Âge* (Paris 1968) 247-317; Idem, *L'Église de Saint Augustin à l'époque moderne* (Paris 1970) 51-55 e 112-122. cfr. anche Jürgen Miethke, *Le teorie politiche nel Medio Evo*, prefazione di Roberto Lambertini, traduzione di Mario Conetti (Collana di saggistica 84; Genova 2001) 48-58, e la relazione di Roberto Lambertini, 'Linguaggi giuridici e pensiero teologico-giuridico nell'età di Irnerio', in questo Convegno.

[118] Tanto che il monaco Liutharius, amanuense del monastero di Reichenau, aveva augurato all'imperatore Ottone III, dedicatario dell'evangelario oggi conservato nella Domschatzkammer di Aachen, che Dio potesse vestire il suo cuore col Vangelo: 'HOC AUGUSTE LIBRO / TIBI COR D[EU]S INDUAT OTTO / QUEM DE LIUTHARIO TE / SUSCEPISSE MEMENTO'. I versi accompagnano l'immagine del monaco Liutharius nel foglio che precede la famosissima immagine dell'imperatore incoronato dalla mano di Dio che si protende dal cielo. L'imperatore ivi raffigurato è ora identificato con Ottone III, precedentemente con Ottone II. L'immagine è notissima e diffusa in rete; cfr. la scheda sul sito Bildindex der Kunst & Architektur:
https://www.bildindex.de/document/obj20460194.
L'immagine è stata valorizzata nelle pagine fondamentali di Ernst Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton 1957) 61-78; in tempi più recenti sull'evangelario si è soffermato Ludger Körntgen, *Königsherrschaft und Gottes Gnade: Zu Kontext und Funktion sakraler Vorstellungen in Historiographie und Bildzeugnissen der ottonisch-frühsalischen Zeit* (Berlin 2001) 178-212.

Giustiniano vedeva celebrata la sovranità universale dell'imperatore: il popolo gli ha trasmesso tutti i poteri con la *Lex regia*, e per questo tutte le cose gli appartengono (*omnia principis esse*: Cod. 7.37.3).[119] Egli è 'orbis terrarum dominus' (Dig. 14.2.9),[120] tanto che persino Federico Barbarossa,

[119] Che il tema del dominio dell'imperatore sui beni del mondo sia legato a quello della *Lex regia* e del trasferimento dei poteri dal popolo al 'princeps' è dimostrato da antiche glosse legate all'insegnamento irneriano e risalenti verosimilmente alla prima metà del secolo XII. Nel manoscritto Wien, ÖNB lat. 2267 fol. 165va, a margine di Cod. 7.39.3, l. *Bene a Zenone*, un 'notabile' a forma di triangolo col vertice verso il basso recita: 'Omnia principis esse intelligantur'. Una glossa interlineare riferita alle parole 'cum omnia principis esse intelligantur' recita: 'Quia ei et in eum omne ius populi translatum est'. Sul manoscritto viennese v. Gero Dolezalek, unter Mitarbeit von Laurent Mayali, *Repertorium manuscriptorum veterum Codicis Iustiniani* (2 vol. Ius Commune, Sonderhefte 23: Repertorien zur Frühzeit der gelehrten Rechte; Frankfurt am Main 1985) 1.449-450; Giuseppe Speciale, *La memoria del diritto comune: Sulle tracce d'uso del Codex di Giustiniano (secoli XII-XV)* (I Libri di Erice 19; Roma 1994) 31, 209, 223, 233, 338. In Berlin, SB lat. fol. 275, fol 134ra, a margine della l. *Bene a Zenone* (Cod. 7.37.3) leggiamo questo 'notabile' attribuibile a Irnerio: 'Omnia principis esse intelliguntur. y. N<ota>', e una glossa interlineare recita: 'In quem omne (omnis *ms.*) ius populi translatum est'. Su questo manoscritto v. Dolezalek, *Repertorium* 1.161-166; Speciale, *La memoria del diritto comune* 31, 183, 223, 225, 247 s. Il medesimo concetto è presente in Vat. lat. 1427, fol. 241va: 'Quia (omnia *add et cancell. ms.*) ei et in eum ius populi translatum est'. Su questo manoscritto v. Dolezalek, *Repertorium* 1.431-434; Speciale, *La memoria del diritto comune* 206-207, 223, 225, 328.

[120] È quanto aveva affermato l'imperatore Antonino: 'Ego orbis terrarum dominus (*toû kósmou kýrios*) sum, lex autem maris', in un frammento greco attribuito a Volusio Meciano (ma è stato sostenuto che si tratti piuttosto di una più tarda parafrasi greca di un brano scritto in latino). È tuttavia improbabile che Irnerio conoscesse questa espressione, perché il frammento greco non si trova nei più antichi testimoni del *Digesto*, dove fu incluso, nella traduzione latina di Burgundio da Pisa, verso la fine del secolo XII. Il passo manca ad esempio in Vat. lat. 1406, fol. 117v (compare solo l*''inscriptio'* 'Volusius Mecianus ex lege rodia'), come pure in Vat. lat. 1408, fol. 160v (anche qui solo l''*inscriptio'*). Su questo tema rinvio alle accurate ricerche di Emanuele Conte, '"De iure fisci": Il modello statuale giustinianeo come programma dell'impero svevo nell'opera di Rolando da Lucca (1191-1217)', TRG 69 (2001) 221-244, in particolare 228-233; pagine rifluite in Emanuele Conte-Sara Menzinger, *La 'Summa Trium Librorum' di Rolando da Lucca (1195-*

incuriosito di quali fossero i suoi poteri, avrebbe chiesto a Martino e Bulgaro, due allievi di Irnerio, se 'de iure' fosse veramente 'dominus mundi'.[121] L'iconografia cristiana—almeno dai tempi di Teodosio II, con una piena affermazione del tema durante l'impero di Giustiniano e, in occidente, con Ottone I—traduceva questa idea nell'immagine dell'imperatore che regge in mano il 'globus cruciger':[122] una rappresentazione che ci è confermata dalla documentazione iconografica riguardante la dinastia salica e specificamente riferita a Enrico V. Niente di nuovo sotto il sole. Al di là di ogni considerazione sulla buona o sulla cattiva fede dei protagonisti di queste vicende (giudizio che non spetta a noi dare, per la difficoltà o l'impossibilità di indagare la coscienza delle persone), il sostegno ideologico e giuridico di Irnerio al disegno di Enrico V trovava fondamento, o comunque argomenti plausibili, nel patrimonio intellettuale del secolo XII.

E, d'altro canto, le relazioni tra 'Ecclesia' e 'Imperium' nel medioevo mostrano una notevolissima fluidità nella dialettica delle posizioni, nella ricerca di un equilibrio di volta in volta accettabile tra gli interessi in conflitto. Questo equilibrio fu trovato a Worms nel 1122, con la stipulazione del concordato che pose fine alla lotta per le investiture. L'imperatore che ai contemporanei appariva come 'Ecclesiae turbator',[123] che era

1234): Fisco, politica, 'scientia iuris' (Ricerche dell'Istituto Storico Germanico di Roma 8; Roma 2012) nel capitolo di Conte su 'Rolando e il diritto pubblico nel XII secolo', lv-cxxiv, in particolare xcix-civ.

[121] Su questo episodio e sulle relative fonti v. Kenneth Pennington, *The Prince and the Law. Sovereignty and Rights in the Western Legal Tradition* (Berkeley-Los Angeles- Oxford 1993) 8-37, con la letteratura ivi citata; sul tema del 'dominium mundi' dell'imperatore cfr. Cortese, *La norma giuridica* 1.125-131; Othmar Hageneder, 'Weltherrschaft im Mittelalter', MIÖG 93 (1985) 257-278

[122] Percy Ernst Schramm: *Sphaira, Globus, Reichsapfel: Wanderung und Wandlung eines Herrschaftszeichens von Caesar bis zu Elisabeth II. Ein Beitrag zum 'Nachleben' der Antike* (Stuttgart 1958).

[123] Bernd Schneidmüller, '*Regni aut ecclesie turbator:* Kaiser Heinrich V. in der zeitgenössischen französischen Geschichtsschreibung', *Auslandsbeziehungen unter den salischen Kaisern: Geistige Auseinandersetzung und Politik,*

stato scomunicato a Capua (1118) da Gelasio II e ancora a Reims da Callisto II (1119), fu colui che riuscì a restaurare la 'pax inter regnum et sacerdotium'.[124] Alla fine di tanti conflitti—nota un cronista dell'epoca—Enrico V raggiunse la concordia con papa Callisto ('tandem domno papae Calixto concordatus').[125] Concordia che nei privilegi reciprocamente scambiati a Worms trova una incisiva manifestazione verbale: dove l'imperatore dichiara di fare le sue concessioni 'pro amore Dei et sancte Romane ecclesie et domini pape Calixti', Callisto II riconosce Enrico V come 'dilectus filius'.[126]

La pacificazione tra Chiesa e Impero comportò la remissione delle scomuniche inflitte a Enrico V negli anni precedenti. Una remissione di cui dovette godere anche Irnerio se, come pensiamo, fu coinvolto nella condanna pronunciata a Reims a causa della sua fedele, ma non immotivata, vicinanza all'imperatore.

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hg. von Franz Staab (Speyer 1994) 195-222, a 195 nota 1 ricorda un giudizio di Suger di Saint-Denis: 'Imperator ergo Theutonicus, eo vilescens facto et de die in diem declinans, infra anni circulum extremum agens diem, antiquorum verificavit sententiam, neminem nobilem aut ignobilem, regni aut ecclesie turbatorem, cujus causa aut controversia sanctorum corpora subleventur, anni fore superstitem, sed ita vel intra deperire', *Suger, Vie de Louis le Gros*, ed. Henri Waquet (Paris, Les Belles Lettres, 1964[2]) cap. 28, p. 230; già in PL 186.1321.

[124] *Chronicon s. Andreae castri Cameracensii*, ed. Ludowicus C. Bethmann, MGH SS 7, ed. Georgius H. Pertz (Hannoverae 1846), libro III c. 33, p. 547: 'Imperatur Henricus... tandem domno papae Calixto concordatus'.

[125] *Continuatio Praemonstratensis della Cronaca di Sigeberto di Gembloux* (*Sigeberti Gemblacensis Chronographia*), ed. Ludowicus C. Bethmann, MGH SS 6, ed. Georgius H. Pertz (Hannoverae 1844) 448, all'anno 1123: 'Concilio Romae celebrato, pax inter regnum et sacerdotium reformatur, et ius investiturarum episcopalium ab imperatore exfestucatur'.

[126] *Pax Wormatiensis cum Calixto II*, in *Constitutiones et acta publica imperatorum et regum.* 1.1: *Inde ab a. DCCCCXI usque ad a. MCXCVII.*, edidit Ludewicus Weiland (MGH, *Constitutiones* 1; Hannoverae 1893) rispettivamente 159-160 (*Privilegium Imperatoris*) e 161 (*Privilegium Pontificis*).

Appendice

Addendum alla nota 101

Quali testi furono letti a S. Pietro nel 1118? È inevitabile che la storiografia si sia affidata alle ipotesi, più o meno generiche, e talvolta si sia mostrata apertamente scettica. Alcune voci, senza pretesa di completezza. Per Giovanni de Vergottini, 'Lo Studio di Bologna, l'Impero e il Papato' (1956), ora in Idem, *Scritti di storia del diritto italiano*, a cura di Guido Rossi [3 vol. (Seminario Giuridico della Università di Bologna 74.2; Milano 1977) 2.695-792 a 712], nel 1118 si sarebbe fatto riferimento al decreto del 1059 nella versione falsificata e alle falsificazioni ravennati. Secondo Dolcini, 'Tradizione politologica dei primi glossatori' 25, Landolfo Iuniore 'ha tramandato aspetti interessanti, ma ancora da decifrare sul piano politologico'; 'dal racconto di Landolfo emerge la prerogativa del popolo romano, mentre rimane in ombra l'imperatore' (27), ed è verosimile una utilizzazione dei falsi ravennati (29). Per Cortese, 'Irnerio' (DBI), 'indipendentemente dal fatto che abbia tenuto o meno l'orazione preelettorale in S. Pietro nel marzo del 1118, Irnerio fornì di certo fonti e argomenti. Non è difficile immaginare ch'egli abbia fatto leva sulla *lex regia*' e sulle falsificazioni ravennati (*Hadrianum* e *Minus*). Spagnesi, *Wernerius Bononiensis iudex* 132-138, discute il probema se nei rapporti tra Irnerio ed Enrico V possa parlarsi di 'opportunismo politico' (antica accusa mossa da Muratori e Tiraboschi), e conclude per una 'impossibilità di entrare nel merito' di tale questione. Per quanto specificamente attiene alla testimonianza di Landolfo, ritiene non ci siano 'elementi sufficienti per stabilire... su quali basi Irnerio credesse di sostenere il proprio discorso sull'invalidità dell'elezione di Gelasio'. Dal passo di Landolfo, però, 'si ricava sicuramente... il ruolo di primo piano avuto dal 'popolo' di Roma nella vicenda... ed una concreta azione d'Irnerio per stimolarne l'intervento' (137-138 note 1 e 2). Nel successivo *'Libros legum renovavit'* 140-141, Spagnesi ritiene, sulla scia di Dolcini, che siano stati usati i falsi ravennati, specificamente l'*Hadrianum*, il *Minus* e la *Cessio donationium*, mentre sospende il giudizio sull'eventuale uso della *lex regia*. Per Padovani, 'Matilde e Irnerio' 242, 'quale ruolo avesse Irnerio nella scelta di quegli scritti è impossibile dire: ma non si può escludere che la sua stessa presenza, in quel frangente, al di là della fedeltà all'imperatore, si ricollegasse ad un percorso, intellettuale ed esistenziale, di antico teologo e ormai consumato giurista'. A dire di Wulf Eckart Voß, 'al fine di motivare il concorso dell'imperatore alla scelta del papa, Irnerio si richiamò, tra l'altro, ai canoni tardo-antichi, dai quali egli fece derivare la necessità dell'assenso del popolo romano, prevista anche da quelle vecchie disposizioni... Da ciò trasse poi le conclusioni per il diritto vigente al suo tempo, che giustificavano il

concorso dell'imperatore' come *caput populi* per una sorta di principio di rappresentanza politica. In conclusione, 'attraverso questa tesi . . . Irnerio fornì un esempio addirittura estremo di sagace arte argomentativa'. A prescindere dal fatto che il racconto di Landolfo non permette di discernere il ruolo di Irnerio da quello degli altri *legis periti*, l'argomentazione di Voß è contratta e lascia al lettore il compito di capire quali siano stati i 'canoni tardo-antichi' posti a base dell'elezione imperial-popolare di Burdino [Wulf Eckart Voß, 'Irnerius Rechtsberater der Mathilde. Seine Rolle und seine Bedeutung im Investiturstreit', *I poteri dei Canossa da Reggio Emilia all'Europa*. Atti del convegno internazionale di studi. Reggio Emilia - Carpineti, 29-31 ottobre 1992, a cura di Paolo Golinelli (Bologna 1994) 73-88 (83-86 e note 56-72), che cito dalla traduzione italiana contenuta nel medesimo volume, 'Irnerio, consigliere giuridico di Matilde, il suo ruolo e la sua importanza nella lotta per le investiture', ivi, 61-71].

Counsel in the Medieval Canon Law

R. H. Helmholz

Introduction

This essay deals with the place of counsel in the law of the medieval Church—counsel in the sense of consultation with others before taking action. In requiring time and place for deliberation before the enactment of legislation, the utility of prior meeting for long been understood as providing support for the growth of European representative institutions.[1] But it has also been more than that. Walter Bagehot hit upon its lasting and intrinsic importance, concluding his treatment with a lesson he perceived in history. 'No State', he wrote, 'can be first-rate which has not a Government by discussion'.[2] This essay explores this insight by examining the place of counsel in the medieval canon law. Its theme is that a requirement of taking counsel before taking action played a significant role in the government of the church. It was a requirement that mattered then—and should also matter now—in our understanding of the character of the medieval canon law.

The essay's subject has not received much attention. It has found a place in the some studies of royal government,[3] but the role that counsel occupied in administration of the law of the church has largely been lost from view. The term is conspicuously absent from the index of most accounts of the canon law, even though it provides a regular entry in the *indices rerum* of early treatises on the subject. Most substantive accounts of the place of

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[1] Michel Hébert, *La Voix du Peuple: une histoire des assemblées au Moyen Âge* (Paris 2018); John Watts, *The Making of Politics: Europe 1300-1500* (Cambridge 2009) 134-135.

[2] Walter Bagehot, *The English Constitution and other Political Essays* (New York 1906) 67.

[3] E.g., Thomas Bisson, *Assemblies and Representation in Languedoc in the thirteenth century* (Princeton, NJ 1964) 64-65, 219-20; Albert Rigandière, 'The Theory and Practice of Government in Western Europe in the fourteenth century', *New Cambridge Medieval History VI c. 1300-1415*, edd. Michael Jones et al. (Cambridge 2000) 17-41 at 33.

canon law in famous incidents in church history similarly neglect its existence.

A representative example of this neglect comes from modern accounts of one of the most famous of the contests between 'regnum' and 'sacerdotium', the early fourteenth century dispute between Pope Boniface VIII and Philip IV, King of France, which led to the famous 'Outrage at Anagni'. Historians have treated the dispute as a struggle for power,[4] and of course it did turn out to be that. However, that is not all it was. The struggle was occasioned by the Pope's summons of the French bishops to appear before him in Rome, an appearance which the French monarch sought (with some success) to prevent. Few historians have found any reason to mention anything about the stated reason for the Pope's summons. That document stated that Pope Boniface required the bishops to appear at the papal court, 'so that we might have their counsel'.[5] On the surface at least, it appears that Boniface required both their presence and their advice. Of course, at this remove it is impossible to uncover his true motives. Perhaps he was the reckless absolutist that historians have sometimes depicted, a man desirous of demonstrating the unlimited breadth of the supreme pontiff's power.[6] Even if this be so, the reason he gave for summoning the French bishops should be a part of the discussion. It should also be said that this particular reason stood in harmony with the Church's law. In the law of the medieval church, the value of taking counsel was a continuing theme. In many circumstances, it was also a necessity.

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4 Richard Kay, '*Ad nostram praesentiam evocamus*: Boniface VIII and the Roman Convocation of 1302', *Proceedings Strasbourg 1968*, 165-189. Similar are Joseph Canning, *History of Political Thought 300-1450* (London and New York 1996) 136-148, and Brian Tierney, *The Crisis of Church & State 1050-1300* (Englewood Cliffs, NJ 1964) 180-12.

5 'ut super premissis et ea contingentibus vestra possimus habere consilia'.

6 E.g., John Norman D. Kelly, *The Oxford Dictionary of the Popes* (Oxford 1986) 208-210.

Counsel in the Bible and in Roman Law

It is appropriate to begin with a look at two building blocks in the construction of a working system of canon law—the Bible and the Roman law.[7] Both were treated as sources of law by the canonists, though their method in doing so was selective. Texts from both appeared frequently in commentaries on the canon law, and both contained strong endorsements of a ruler's need for good counsel. So we find: 'The way of a fool is right in his own eyes, but he that hearkeneth unto counsel is wise' (Prov. 12.15). 'Better is a poor and wise child than an old and foolish king who will no longer take advice' (Eccles. 4:13). 'By insolence comes nothing but strife, but with those who take advice is there wisdom' (Prov. 13.10). 'No king goes to war without first taking counsel' (Luke 14.31).

There was a downside to what taking counsel could achieve, of course. It might even be the source of evil. To choose young and inexperienced advisors instead of wise men often led to disaster (1 Kings 12:1-21). And more particularly, it could even become the source of evil. Canonists recalled that 'the chief priests and elders took counsel against Jesus to put him to death' (Matt.27:1). Like the U.S. Constitution's First Amendment's right of the people peaceably to assemble, an assembly of men could take the form of a criminal conspiracy. The conspirators would be punished severely because more than one person joined together in it.[8] But even that perversion of the value of taking counsel is a recognition of the power of assembling and planning together. Thomas Aquinas stated the accepted view in describing the

[7] See, e.g., Jason Taliadoros, 'Law, Theology, and the Schools: their Use of Scripture in Ricardus Anglicus's *Distinctiones decretorum*', *Proceedings Toronto* 2016, 1045-89.

[8] The ordinary legal presumption, though rebuttable, was that counsel was good; see, e.g., Antonius Gabrielius (fl. 1555) *Communes Conclusiones* (Venice 1607) Lib. VII, concl. 2, no. 2: 'consilium quod potest esse malum et bonum, praesumitur bonum non malum'.

approved process of taking counsel as an 'act of reason'.[9]

Roman law too was treated as a storehouse of relevant legal principles, several of which testified to the vital role of counsel in the process of governing.[10] Although it is true that the specific example from the *Corpus iuris civilis* most frequently cited today by historians points in the opposite direction. That is the statement that 'what pleases the prince has the force of law' (Dig. 1.4.1). In fact, there was a great deal more than this statement about government of the Empire found in the civil law, and most of which ran in the opposite direction. The texts contained several endorsements of the need for rulers to take advice from the learned. What pleased the prince should include the fruits of wise counsel. So, for example, a text in the Codex (Cod. 1.14.8) stated that if a matter not covered by existing law arose, the problem should first be discussed by the nobles of the palace and the Senators. A solution would emerge from that consultation. Then it might be promulgated as binding law. The institution and growing importance of the 'consilium principis' under the Empire should also be mentioned as relevant to this subject,[11] and of course there is also the famous use made of the Roman law's statement that what touches all should be approved by all (Cod. 5.59.5.2). At least as it was understood by the jurists in the Middle Ages, the civil law was far from an unambiguous argument in favor of princely absolutism. The description of law making found in the *Summa* of the influential Azo of Bologna (d.c. 1230) described the process of the enactment of laws as one that designedly included sufficient delay so that learned advisers could consider its congruence with equitable principles and its likely effects in practice. In other words, although enacted law rested for its validity on the will of the prince, that will should be formed on

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9 *Summa Theologiae*, 1a.2ae, 91.4, Blackfriars edition (London-New York 1966) xxviii, 29.

10 Kenneth Pennington, 'Legista sine canonibus parum valet, canonista sine legibus nihil', BMCL 34 (2017) 249-258.

11 See John A. Crook, *Consilium principis: Imperial councils and counsellors from Augustus to Diocletian* (Cambridge 1955).

the basis of the sound counsel of others.[12]

On lowlier matters too, the necessity of taking counsel before acting was endorsed in Roman legal sources. The legal advisers who aided magistrates in performing their judicial duties were considered to be and in fact were often called 'consiliarii' (Cod. 1.51.3).[13] The function they served in litigation was to give legal advice and assistance to the judge. The Roman law of bankruptcy (cessio bonorum) also accorded special powers to the representative chosen 'by the common counsel' of the creditors in the collection and sale of the debtor's assets (Dig. 42.8.5). Similarly, in considering the choice for the education and rearing of children whose fathers had died, the praetor was instructed to act 'in the presence of the child's other relatives' (Dig. 27.2.1). What has been described as a 'family council', a group made up of older members and tied in theory to the 'patria potestas' was a feature of ancient Roman law.[14] These texts and others were available for medieval canonists to draw upon for guidance and support. And in fact they did.

The Corpus iuris canonici

First, Gratian's *Decretum*. In a series of texts that might almost have been written with the current controversy over the failure of today's bishops to correct the vices of paedophile priests in mind, the texts of *Distinctiones* 83 and 84, taken from conciliar decrees and papal letters, reproved bishops who have failed to act against erring members of the clerical order subject to their jurisdiction.[15] Not only were the bishops failing in their duty, the

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12 See Azo, *Summa Codicis* to Cod 1.14 (*De legibus et constitutionibus principum et edictis*) no. 5, s.v. *Lex qualiter fiat*.

13 See also Dig. 1.22.5-6; and *gl. ord*. to idem s.v. *consiliariis*: 'id est assessoribus'.

14 See *Dizionario epigrafico di Antichità Romane*, ed. Ettore di Ruggiero (5 vols. Rome 1895-1926) 2.608-17.

15 The parallel is also evident in Thomas Green, 'The 2004 Directory on the Ministry of Bishops: Reflections on Episcopal Government in a Time of Crisis', *Studia canonica* 41 (2007) 117-151.

Decretum added; 'What is worse', one of its canons announced, one erring bishop had 'ignored the counsel of wise men (consilia sapientium)' in doing nothing to combat his own indolence (D.84 c.1). The *Glossa ordinaria* to this text drew out this lesson: 'One who fails to follow wise counsel deserves to lose the dignity he holds'.[16] So this bishop was threatened with deposition if he failed to seek and take heed of the counsel of others. To this statement the gloss added the biblical example of Lot's wife. She, it should be remembered (Gen. 19:24-26), ignored wise counsel never to look back at Sodom and Gomorrah. She did look back, as we know, and she was turned into a pillar of salt.

The *Decretum* itself contained several texts that stood in support of the wisdom, indeed the necessity, of taking counsel before acting. For instance, one stated that the election of new bishops was also not to be made 'by excluding the advice of the most honorable men, but rather with their honest counsel' (D.63 c.35).[17] Likewise, another stated that under penalty of invalidity, bishops themselves should not hear and decide any cause that came before them without the presence of their clergy (C.15 q.7 c.6). Nor were they to be permitted to give, lend or exchange the property of their church without the counsel of other men drawn from their subordinates (C.12 q.2 c.53). Even the descendants of laymen who had founded churches were considered worthy of being consulted in disputes involving the conduct of the incumbents in them (C.16 q.7 c.31). The founder's kin possessed what could be called the 'ius consulendi'.[18] The famous decree of the Fourth Lateran Council (*Qualiter et quando*) was therefore building upon legitimate precedent when it required prelates 'diligently to make inquiry before the senior men of the church' before they took definitive action against persons suspected of

16 *Gl. ord*. to D.84 c.1 s.v. *consilia*: 'Qui enim bona consilia non acquiescit amittere debet dignitatem'.

17 Kenneth Pennington, 'The Golden Age of Episcopal Elections 1100-1300', BMCL 35 (2018) 243-253.

18 See C.16 c.7 d.p.c.30.

crimes within their jurisdiction.[19] That decree, we know, in time served as a license for aggressive inquisitors, but in its initial appearance, the caution that comes from consultation was an essential part of the procedure it called into existence.

In the *Liber Extra*, one finds this same principle stated at length and with specificity. It appears prominently in the title on the respective powers of bishops and members of their cathedral chapters (X 3.10.1-10; 3.11.1-4). Several texts in this title stated with clarity the principle that bishops should take specific action only after deliberation with their senior clergy. The most immediately arresting of them involved a metaphor, a familiar one. It described the diocese as a human body—head and members. The bishop was the head, the senior clergy the body. The head (obviously) should not seek to separate itself from the rest of the body. They should work together in harmony. Indeed, that is the only way they could work effectively. So it should be within a diocese.[20] Not just an idealized metaphor, it had consequences. When the practical question of choice of a new rector of a hospital arose, a decretal letter of Pope Alexander III stated that the choice had to be made 'with members of the community of the hospital, their counsel being required' (X 1.43.7). The *Glossa ordinaria* added that this counsel would be useful because it might move the elector to do something he would not have done by himself.[21] The principle was stated again in a decretal letter dealing with lapse—that is failure to present to a benefice within the time allotted by law. When patrons failed to act within six months, it decreed that the choice should be made by the next elector 'with the counsel of the most spiritual men' (X

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[19] See *Decrees of the Ecumenical Councils*, ed. Norman Tanner (Washington, DC 1990) I, 237; the decree was placed into the Decretals at X 5.1.17.

[20] See the relevant comments in S. T. Ambler, *Bishops and the Political Community of England, 1213-1272* (Oxford 2017) 47; Gerd Althoff, *Rules and Rituals in Medieval Power Games* (Leiden and Boston 2020) 62-65; and Kenneth Pennington, 'Representation in Medieval Canon Law', *The Jurist* 64 (2004) 361-383, esp. 365-369.

[21] *Gl. ord.* to id, s.v. *discordet*: 'Sed certe potest esse quod tale consilium sit utile quia potest movere priorem ad aliquid faciendum quod per se non fecisset'.

3.8.2).

The importance of consultation was also stated in a juridical fashion in the canon law regulating the initial choice of diocesan bishops. Ancient precedent called for the choice to be made 'per clerum et populum', but by the time of the compilation of the Decretals, the role of the laity had been reduced to that of accepting and acclaiming the clergy's choice. The resulting law on this subject was not a model of clarity, but the underlying principle—that the choice should be made by taking counsel with those to whom it mattered and to whom it belonged—was a constant theme of the texts found in Book One, Chapter Six, of the Gregorian Decretals. A ruling attributed to Pope Gregory IX invalidated an election made without seeking the advice of trustworthy men interested in the outcome, summoning them to consultation and waiting a reasonable length of time for them to appear and respond (X 1.6.52). The *Glossa ordinaria* to this decretal repeated its lesson, stressing its importance and also adding an interesting note of caution, one in which it turned out that invalidity did not follow from acting without counsel: the canon law of marriage. The gloss remarked only that 'in marriages, consultation should always come first'.[22] Good advice! Young people did not always follow it, however, and some of them paid a price.[23] For most serious matters involving right government of the church itself, however, the canon law followed the Rule of St. Benedict. It had stated this principle in the context of the duties of future abbots—'Do everything with counsel and having done so, you will not repent'.[24] This was also an oft

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[22] *Gl. ord*. to X 1.6.52, s.v. *in tractatu*: 'sicut in carnali matrimonio tractatus precedere debet'.

[23] Elisabeth van Houts, *Married Life in the Middle Ages, 900-1300* (Oxford 2019) 29-31, 57-60.

[24] See *Rule of St. Benedict*, ed. Paul Delatte (London 1921) 60. The Biblical source of this passage is found in Ecclesiasticus 32:24. See also the example from earlier canon law, found in the *Collectio Hibernensis* 1.21, in *The Hibernensis: A* Study *and Edition*, ed. Roy Fletcher (2 vols. Washington, DC 2019) 1.18.

repeated theme in the medieval canon law.[25]

Simple Advice or Legal Requirement?

Of course, not all advice is good advice. This is a sad fact of life, and the institution's inherent fallibility came as no surprise to the medieval canonists. Counsel might be mistaken. Those who gave it might even have had wicked motives for their advice. Had not the Pharisees taken counsel in order to trap Jesus in his words, and did not the chief priests take counsel as part of their design to bring about his death (Matt. 22:15; 28:12)? The theme of evil counsellors was a familiar one in medieval Europe.[26] Receipt of unsound counsel was, therefore, a possibility that required recognition. It also made a difference in the development of the canon law's treatment of the subject. Texts in the *Decretum* raised the possibility that penalties might be imposed on those who purposefully supplied evil or self-interested counsel (D.86 c.24).[27] An illustrative if difficult case was the man who advised a man facing bankruptcy to take what assets he had and flee his creditors.[28] He deserved some kind of censure whether or not his counsel had been followed. This was an example of a recognized legal principle extended to the situation where counsel was a

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[25] VI 5.12.29; see also Jason Taliadoros, 'Magna Carta and *ius commune'*, *From Learning to Love: Schools, Law, and Pastoral Care in the Middle Ages*, ed. Tristan Sharp (Toronto 2017) 362-85 at 375-77; Michel Hébert, *La voix du peuple* 173-208.

[26] Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322* (Princeton 1964), 270-274.

[27] See also X 5.31.15, and *gl. ord*. to VI 5.12.29, s.v. *excommunicatos*: 'Arg. quod quandoque magis puniuntur consiliarii quam facientes', with citations to other supporting texts. The subject of comparative guilt was debated, and the more lenient rule appears to have been the rule in practice, see Julius Clarus (†1575), *Liber sententiarum receptarum § Practica criminalis*, Quaest. 88 (Venice 1595) 223; Josephus Mascardus (d. 1588), *Conclusiones probationum omnium quae in utroque foro quotidie versantur*, concl. 419 (Frankfurt 1593).

[28] See Petrus Peckius (†1589), *Tractatus de iure sistendi*, c. 37, no. 2 (Antwerp 1679) 785-86: 'Sed quoniam non solum ipsi debitores . . . verum etiam et his qui eis subsidium, opem, consilium vel auxilium praebent'.

potential source of injustice.

The more normal problem of questionable counsel in the process of ecclesiastical administration arose, however, in cases of simple disagreement. This must have been a frequent event. The person who had properly sought the counsel of others might not agree with the counsel he received, sometimes with good reason. Counsel might have been self-interested or designed for purposes that would be evil. This possibility had to be faced. What happened then? Brian Tierney, usually a reliable guide, refers to this subject's extended treatment by the medieval canonists as 'a sort of juristic jungle', and it is true that much of what appears in their treatises does not provide a particularly elegant solution.[29] At the same time, Tierney's characterization is too harsh. Uncertainties were inherent in the solution the canonists reached, and the identity of the persons to be consulted could be uncertain. A lot could depend upon the nature of the issue and the character of the potential consultants. However, there was nothing unusual about that situation in legal practice, and in fact a workable 'communis opinio' did emerge from the efforts of the church's jurists.

Henricus de Segusio (Hostiensis) (†1271) dealt with the question, raising the subject in the context of the actions that many diocesan bishops took in the course of administering their dioceses.[30] Some of those actions required the actual consent of their cathedral chapter; some required only their counsel; and some could be taken by the bishop alone. This essay concerns the second of the three. He began discussion with a with examples that fell within this category. He did not attempt anything more in the way of formal definition, but in it he placed several subjects: property administered by the bishops of the see, questions involving the ordination, placement, and deposition of the diocesan clergy, and also criminal cases of most kinds. He then added a few more that were either more controversial or more

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[29] See his *Foundations of the Conciliar Theory* (Cambridge 1955) 110-13; I believe he saw the subject of this essay as 'only as an introduction to the real question: to define the class of cases in which . . . consent was necessary'.

[30] See Hostiensis, *Summa aurea*, Lib. III, tit. De his quae fiunt ab episcopo sine consensu capituli (Venice 1574) p. 904 nr. 2.

complicated. In all of them, he concluded that bishops should consult with others before acting. This meant the cathedral chapter in many cases, but it also meant with those trustworthy men who had a stake in the outcome and who would be affected by the action he had taken. Where, for example, the underlying controversy involved a dispute over power between the bishop and his cathedral chapter, others should be consulted.[31] Impartial advice was the goal.

The obvious question followed. What should happen if the bishop either failed to consult, or when he did consult took action contrary to the advice he had received because he did not agree with it? His cathedral chapter might be asked about a candidate for appointment to a benefice, for instance, but have disagreed with the wisdom of the bishop's choice—in other words a case of simple disagreement. The basic answer, which became the 'communis opinio' of the canonists, was that if the bishop failed to consult at all, the action had taken would be a nullity. If he did consult, however, and the members of the cathedral chapter or others whom he consulted did not agree with him, the action he took would be valid nonetheless. In other words, the bishop had the right to reject their advice. But he had first to have sought that advice and then to have considered it.[32] And, at least according to Baldus de Ubaldis, the consultation required had to be sought at an actual meeting of those he consulted. It was not enough for a bishop or other leader simple to seek the opinions of them individually. Those he consulted were required to meet together and discuss the questions put to them, rendering their advice on that basis.[33]

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[31] These disputes were far from unusual; see, e.g., Sandra Brown, 'A dispute between Archbishop Melton and the Dean and Chapter of York, c. 1336-8', *Bulletin of the Institute of Historical Research* 44 (1981) 110-112.

[32] The question of whether the consultation could come after the principal actor had made his choice was also a disputed one. On the one hand, it seemed to defeat the purpose of the requirement, but on the other hand, it would have been a needless formation to stage the process if those consulted agreed with the initial decision.

[33] Baldus de Ubaldis (†1400) *Commentaria* to post Cod. 1.2.14 *Hoc ius porrectum* (Authentica) (Venice 1599) 5.26-27 n.16.

General acceptance of this solution was built upon a decretal of Pope Innocent III (3 Comp. 1.25.4 = X 1.43.7). It stated that this same rule was to be followed in the context of the choice of the rector of a hospital. As the *Glossa ordinaria* put it starkly: 'One may be required to seek the counsel of another, but he is not required to follow it'.[34] Or as the great jurist Panormitanus later stated the identical rule in a monastic setting:[35]

> Wherever the law requires counsel, unless it is first sought, the action is a nullity, but I add that an abbot is not obliged to follow the counsel he receives. It is sufficient to have sought it and to have waited a sufficient time for it to be received.

Other canonists took the same view.[36] Indeed, this was very like the result reached in the context of 'consilia' in litigation that came before the courts of the church. A judge in these cases was not bound to follow a 'consilium' submitted to him unless the parties themselves had agreed to be bound by it as well as practical reasons were given for this result.

Formal as well as practical reasons were given for this result. Roman law distinguished a 'mandatum' from a 'consilium'. The first was an order; the second an opinion.[37] The two should not be confused. All the relevant texts used only the second of the two terms, and this usage itself meant that although consultation must be sought, it could not be decisive. It was not a mandate. All

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34 *Gl. ord*. to id., s.v. *Cum olim*: 'Item aliquis tenetur requirere consilium alterius, sed non tenetur illud sequi'.

35 Panormitanus (†1445) *Commentaria* to X 3.31.16, no. 12 (Venice 1615): 'Nam ubi requiratur a iure consilium, nisi adhibeatur actus est nullus, . . . fateor tamen quod abbas non tenetur sequi consilium eorum, sed satis est requirere et expectare responsum, tum quia hoc vult regula, tum quod hoc est de iure communi'.

36 Identical in substance were Antonius de Butrio (†1408), *Commentaria*, to X 1.6.52, nr.1-14 (Venice 1578); Silvestro Mazzoline da Prierio (†1523) *Summa Summarum* (Venice 1584) s.v. *consilium*, nr. 2, Dominicus Tuschus (†1620), *Practicarum conclusionum iuris in omni foro frequentiorum* Concl. 769, nr.1 (1605-1670), Augustinus Barbosa (†1649), *Collectanea Doctorum in Ius Pontificium Universum* to X 1.6.52, nr. 1-5 (Lyon 1716); and Didacus Covarrubias (†1586), Relectio to c.*Possessor* (Regula iuris.) § 7 nr. 10, in *Opera omnia* (Geneva 1724).

37 See VI, *Regula iuris* 5.[13] nr.62.

the relevant texts used the second of the two possible terms, and this meant that although consultation had to be sought, it could not be binding in itself. In addition, it was said that when one person held the legal power to take an action by virtue of his office—typically a bishop or an abbot—it would deprive him of the power inherent in his position if he were obliged to surrender it to any of his subordinates, even those he was required to consult.[38] This rule would have been violated had the necessity of taking counsel had been understood to require that the counsel be followed. This formal approach thus respected the power that was inherent in an office.

So a question naturally arises. Did this limitation of counsel's limited power render the requirement of prior consultation useless, even derisory in effect? Hostiensis raised and discussed it.[39] No, he concluded, it did not. The bishop might himself be persuaded as a result of the consultation. He might change his mind or at least modify his position. Those with whom he consulted might inform him of facts of which he was unaware. He might also need their help in implementing his decision, and that would have been an additional reason for seeking and paying some attention to their opinion. In any case, there would be discussion when they met together. Only then would there be action.

Hostiensus was not a man without experience in the world, and what he concluded here rings true. We academics know it from our own experience. It is the reason that deans and department chairmen should and often do seek out the opinions of their faculty. At the very least, the process of consultation requires that decision maker consider his own reasons for rejecting the counsel of those whose agreement he has sought. He would be obliged, as we might say, to 'think again'. What Robert Somerville described as the 'give and take' of discussion in what followed from the process of taking counsel is a normal result of the

[38] *Gl. ord.* to X 1.6.52 s.v. *in tractatu*.

[39] X 1.6.22.

requirement.[40] It is not meaningless, even if the counsel that is received is ultimately rejected. The preliminary step requires the deliberation that may itself lead to a better outcome.

This solution could also lead to error, no doubt, and certainly it was not fully democratic in either intent or effect. But any solution can go wrong, and the medieval church was not a democracy. It did not seek to be. Democratic government has its virtues, but inerrancy is not among them. Consultation before acting was the goal in this part of the canon law, and it was required. But no more. The canon law adopted a similar reasoning in the requirement that canonical elections be determined by the 'maior et sanior pars' of the electors, rather than by a simple majority vote.[41] In the area of the law at issue here, taking counsel was designed to serve as a brake on ill-considered exercises of power, not as a substitute for it.[42]

Indeed, it is worthy of note that this aspect of the canon law is similar to the process used in modern American administrative law. The right to comment on rulemaking by a government agency is guaranteed to those parties who have an interest in the outcome of a proposed rule, and courts will annul agency action if the agency has not taken account of the data and views the interested parties supply.[43] The final decision rests with the agency nonetheless. In this significant area of our law, citizens have a right to be heard, not a right to be counted or obeyed. In the medieval canon law, counsel was similarly required and similarly treated. It was designed to serve as a brake on ill-considered exercises of power, but no more than that. Nor was it intended to be a half step

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40 Robert Somerville, *Pope Urban II's Council of Piacenza, March 1-7, 1095* (Oxford 2011) 22; see also Gerd Althoff, *Rules and Rituals in Medieval Power Games: A German Perspective* (Leiden and Boston 2020) 61-73.

41 *Decrees of the Ecumenical Councils* 1.246; the decree was placed into the Decretals at X 1.6.42.

42 This was also the conclusion of Brian Tierney, ''The Prince is not bound by the Laws': Accursius and the Origins of the Modern State', *Comparative Studies in Society and History* 5 (1963) 378-400, at 395.

43 5 United States Code § 553(c): '[A]n agency shall give interested persons an opportunity to participate in rule making through submission of written data, view, or arguments with or without opportunity for oral presentation'.

that would, in due time, open the door to requiring the actual consent of those who were consulted.

Counsel in Practice

As what appears to us to have been a half-way measure, did the requirement of taking counsel matter in fact? How often was counsel actually sought? How often was it followed (or disregarded)? These are fair questions. Only investigation of what actually happened will answer them in a satisfactory way.[44] Because whatever consultation that did occur normally took place without publicity or recorded controversy, it is difficult to be sure about the details involving the extent of its use in practice. However, it remained the law, and later commentators on several aspects of the canon laws wrote about it as a living institution.[45] It even made an occasional appearance in hagiographic literature.[46]

Records directly related to the law's administration are emphatic on this score. Although not without exception, attending to the counsel of those affected was also treated as one of the normal ingredients in the formulation and adoption of diocesan statutes.[47] Italian examples suggest that alienation of diocesan

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[44] See the Lecture: Charles Donahue, Jr., *Why the History of Medieval Canon Law is not Written* (London: Selden Society 1986).

[45] E.g., Petrus Rebuffus (†1575), *Praxis beneficiorum*, Proem. (Paris 1623): 'vocati sunt docti non omnes', discussing the qualities that the men acting as counsellors should possess; Stefano Graziani (fl. 1615) *Disceptationes forensium iudiciorum*, c. 123, nos. 27-28 (Rome 1609), stating the traditional rule in the context of a monk acting as a testamentary executor

[46] See, e.g., *The Life of Saint Severinus by Eugippius*, trans. George Robinson Cambridge 1914) 43; *St. Odo of Cluny*, trans. Gerard Sitwell (London-New York, 1958) 28; *Garnier's Becket*, trans. Janet Shirley (London-Chichester 1975) 12-15

[47] X 3.10.4-5; Benedict XIV (†1759), *De Synodo diocesana Lib. XIII* c.1 nr. 4 (Rome 1755). For modern scholarly discussion with examples see, e.g., Richard Trexler, *Synodal Law in Florence and Fiesole, 1306-1518* (Vatican City 1971) 5-9; Christopher R. Cheney, *English Synodalia of the Thirteenth Century* (Oxford 1968) 9-10; Joseph Avril, 'L'evolution du synode diocésain, principalement dans la France du Nord, du Xe au XIIIe siècle', *Proceedings*

property, a particular difficult subject requiring balancing immediate needs against the conservation of the church's patrimony, was held to require consultation with members of the cathedral chapter when it arose.[48] In a dispute over the right to present to a benefice in the church of Messina, for example, appeal was taken because a judge, alleged to have been lacking in knowledge of the law, had failed to take counsel with men more learned than he before making his decision.[49] The outcome of the appeal is not clear, but the argument would not have been made without some support in the law itself. In another Italian case, one in which the outcome is clear, it was held that a judge could not invoke judicial torture without having first taken counsel with other experienced men.[50] That was the regular pattern of practice.

Allotting time for taking counsel was also a regular part of decision making in the English church. Accounts of the procedure adopted and followed in Convocation, the meetings of the prelates that usually included the King's representatives, certainly did.[51] The need for 'consilium' was also a regular theme of the summons issued to clergy required to attend these assemblies.[52] As we know from the recent outpouring works on the subject, the use of the 'consilium sapientis' was an institution characteristic of the work

Cambridge 1988 305-25 at 313-14; Antonio García y García, 'Asambleas Episcopales', *Proceedings Munich 1997*, 287-304, at 292-93.

48 See Guillielmus Rodano (†1574), *Tractatus de alienationibus rerum ecclesiasticarum*, Quaest. 32, nos. 21-14 (Venice 1589).

49 Giurba c. Flacconio, in Mario Muta (†1636), *Decisiones novissiamae magnae regiae curiae supremique magistratus regni Sicilie* Dec. 72 (Palermo 1620).

50 Augustino Matthaeucci (†1722), *Officialis curiae ecclesiasticae: ad praxim pro foro ecclesiastico tum saeculari* tum regulari (Venice 1760), C. 54, n. 71: 'non potest iudex ad torquendum moveri nisi de consilio et assensu definitorum et iuxta ipsorum votum debet procedere'.

51 See Dorothy B. Weske, *Convocation of the Clergy* (London 1937) 125-146.

52 See, e.g., 'Meeting of Clergy at Northampton and Coventry 1266', *Councils & Synods with other Documents relating to The English Church*, edd. F.M. Powicke and C.R. Cheney (Oxford 1964) 2.729-731.

of ecclesiastical courts.[53] Formal judicial sentences also regularly included a statement that the judge was acting after 'having taken the counsel of men learned in the law'.[54] In some cases it was required.[55] In others it was recommended.[56] For the head of a corporate body to alienate church property 'inconsulto capitulo' was a legitimate reason for seeking reversal of his action in fact as well as in theory.[57] Admission to ecclesiastical benefices, even those ordered by the pope, did not occur without consultation to discover the candidate's suitability and the actual existence of the vacancy he sought to fill.[58]

When we pass from these expressly legal sources to the documents which provide detail about the routine administration of medieval church, the regularity and apparent importance of counsel is also obvious. The English evidence, much of it found in bishops' registers, is particularly rich. It shows, for example, that

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53 See Guido Rossi, *Il Consilium sapientis iudiciale: Studi e ricerche per la storia del processo romano-canonico* (Milan 1958); *Legal Consulting in the Civil Law Tradition*, edd. Mario Ascheri, Ingrid Baumgärtner and Julius Kirshner (Berkeley 1999); Ulrich Falk, *Consilia: Studien zur Praxis der Rechtsgutachten in der frühen Neuzeit* (Frankfurt 2006); *Conseiller les Juges au Moyen Âge*, ed. Martine Charageat (Méridiennes 2007); Regina M'a. Polo Martín, *Consejos y Consultas* (Bilbao 2018).

54 E.g., Rector of Hockley c. Prior and Convent of Dodnash c. William of Bristol (1305) Lambeth Palace Library, London, MS. 244, f.35: 'communicato iurisperitorum nobis assidencium consilio'.

55 VI 5.2.12; and see Corinne Leveleux-Teixeira, 'La pratique du conseil devant l'Inquisition (1323-1329) (Counselling during the Inquisition (1323-1329)' *Les justices d'Église dans le Midi (XI-XV siècle)* (Cahiers de Fanjeaux [Toulouse] 42 [2007]) 165-198, and Martine Charageat, 'Les sentences de l'official à Saragosse et à Barcelone à la fin du Moyen Âge', idem 317-342.

56 An endorsement and example of the value of having so appears in William Durantis (†1296), *Speculum iudiciale*, Lib. II, Pt. 2, tit. *De requisitione consilii*, nr.11, giving a form for incorporating it into the sentence.

57 See the example in Walter Ullmann, 'A Forgotten Dispute at Bridlington Priory and its Canonistic Setting', *Yorkshire Archæological Journal* 37 (1951) 456-473 at 471.

58 See, e.g., Case of John Powiz' (1289), in *The Letter Book of William of Hoo, Sacrist of Bury St Edmunds 1280*, (Suffolk Record Society, No. 5, ed. Antonia Gransden 1963) 50; see also Kenneth Pennington, *Pope and Bishops: The Papal Monarchy in the Twelfth and Thirteenth Centuries* (Philadelphia 1984) 122.

the use of inquests to aid bishops in determining the capacity of aging clergy to continue in their posts was a normal part of church life.[59] Whether or not a candidate for holy orders required a dispensation because of having been of illegitimate birth was also determined by calling together a group of faithful men to inform the bishop involved of the relevant facts.[60] How otherwise would those facts be known? Questions involving the vacancy of offices in parish churches were regularly answered by taking counsel with trustworthy local men, both lay and clerical.[61] Rates of parochial taxation, an obligation of the laity to care for and repair the nave of their parish church, were not set in England by episcopal decision alone. They were determined by a process of consultation with the parishioners themselves.[62] Even a situation of a bishop's change of mind after having consulted with parishioners of one of his churches appears in a bishop's register.[63] This characteristic of the church's government is the theme of a recent book by Ian Forrest.[64] It is filled with actual cases which demonstrate

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59 E.g., In re William Trebell, rector of Lanteglos (1448) in *Register of Edmund Lacy, Bishop of Exeter, 1420-1455* (Devon & Cornwall Record Society, N.S. 13, ed. G. R. Dunstan 1968) III, 3-4. Continental examples are found in Gero Dolezalek, *Das Imbreviaturbuch des Erzbishöflichen Gerichtsnotars Hubaldus aus Pisa* (Cologne and Vienna 1969) 26-31.

60 E.g., In re Andrew Stegoun (1327) in *Register of John de Grandisson, Bishop of Exeter (A.D. 1327-1369*), ed. F.C. Hingeston-Randolph (London 1894) I, 330.

61 E.g., In re Church of Eye (1283) in *Registrum Ricardi de Swinfield, episcopi Herefordensis, A.D. mcclxxxiii-mcccxvii*, (Canterbury & York Society, Vol. 6) ed. Willam Capes (London 1909) 46-47. See also letter to Archbishop Langham (1375) in *Register of Thomas Appleby: Bishop of Carlisle 1363-1395* (Canterbury & York Society, Vol. 96), ed. R.L. Storey (Woodbridge 2006) no. 429.

62 E.g., Ex officio c. parish of Uckfield (1304), Lambeth Palace Library, London, MS. 244, fol. 24v; all the parishioners were to be cited to answer 'super contributione facienda ad fabricam ecclesie et campanile de Borsted'. .

63 In re church of Aylesbury (1412), in *Register of Robert Hallam, bishop of Salisbury 1407-17* (Canterbury & York Society, Vol. 72) ed. Joyce Horn (Torquay 1982) nr. 1145-1147.

64 *Trustworthy Men: How Inequality and Faith made the Medieval Church* (Princeton 2018). See also David Gary Shaw, *The Creation of a Community:*

consultation's regular use in the administration of English dioceses. Bishops knew the rules and have left many examples of that familiarity.[65] These examples show that taking counsel was not regarded as a sign of weakness by the church's leaders. As his book shows, consultation proved to be both a practical necessity and a source of strength.

One should not leave this subject without raising the question of the position of the papacy. That Pope Boniface VIII said that he wished to have the counsel of the French bishops at the council to be held in Rome does not prove that he could not take action without them. In fact, the evidence suggests that he did not hesitate to do so. The special place the pope occupied in the governance of the church may also suggest caution about accepting this essay's stress on the importance of counsel in the canon law. The Roman pontiff is to be judged by no man, proclaimed the *Dictatus Papae* (1075). If so, what obstacle would hinder him from taking action with no thought of seeking counsel with anyone else?

This essay has been about the day-to-day administration of the church's institutions, not about the contest between conciliarists and papalists. That makes a difference. In the ordinary life of the church, it was assumed that the supreme pontiff would have acted and would wish to have acted within the bounds of the existing law. The practice that resulted from this assumption was that the men he provided to benefices in Europe would be subjected to the same scrutiny as to age, learning, and ability as other candidates were. Routine administration required it, and it would not have been regarded as a defiance of papal power. This also meant that, like Boniface VIII and the French bishops mentioned at the start of this essay, even the most powerful of

the city of Wells in the Middle Ages (Oxford 1993) 138-140; Maryanne Kowaleski, 'The Commercial Dominance of a Medieval Provincial Oligarchy: Exeter in the fourteenth century', *Mediaeval Studies* 46 (1984) 355-384; Cecil Anthony F. Meekings, 'Martin de Pateshull of Good Memory, my Sometime Lord', *Bulletin of Historical Research* 47 (1974) 224-29, at 29.

65 See, e.g., Joel Thomas Rosenthal, 'The Training of an Elite Group: English Bishops in the Fifteenth Century', *Transactions of the American Philosophical Society* n.s. 60:5 (Philadelphia 1970) 28-32.

pontiffs customarily sought advice before acting. The functional equivalent of the cathedral chapter for the pope was the college of Cardinals, and in his *Lectura* on the *Decretals*, Hostiensis described them as 'part of the body of the lord pope'.[66] A body's head could not go it alone. The pope should not take any action to the potential detriment of the church, Hostiensis wrote, 'without the advice and consent of the other brethren', that is the cardinals themselves.[67] Of course, he was himself a Cardinal of the Roman church. Well might he have taken an expansive view of their place in the church's government.[68] This was not simply a wish on his part, however. The Welsh canon lawyer, Adam of Usk, has left us one poignant example of the process in action—not an enthusiastic one however, since it cost him the chance he desired of becoming bishop of St. David's.[69] After consultation, wiser heads pre-vailed. While recognizing that many papal actions required no such consultation, for matters of importance to the church as a whole,

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66 In his *Lectura* (Venice 1581) to X 3.4.2 s.v. *in synodo* fol. 10va nr.3: 'Sunt enim cardinales pars corporis domini pape, qui super omnes est'. See also *Die Kardinäle des Mittelalters und der frühen Renaissance*, edd. Jessika Nowak et al. (Florence 2013); David L. d'Avray, *Papacy, Monarchy and Marriage, 860-1600* (Cambridge 2015) 216; Alain Boureau, *Le pape et les sorciers: Une consultation de Jean XXII sur la magie en 1320* (Rome 2004) ix-xv.

67 Hostiensis, *Lectura* to idem: 'nec enim potest secundum quosdam aliquem de cardinalibus excommunicare, vel ei aliquod preceptum facere sine aliorum suorum fratrum consilio et consensu'.

68 A fuller investigation of this subject is found in John A. Watt, 'Hostiensis on *Per Venerabilem*: The role of the College of Cardinals', *Authority and Power: Studies in Medieval Law and Government presented to Walter Ullmann on his seventieth birthday*, edd. Brian Tierney and Peter Linehan (Cambridge 1980) 99-113. See also Patrick Nold, *Marriage Advice for a Pope: John XXII and the Power to Dissolve* (Leiden and Boston, 2009) lxxxv-lxviii; Anne J. Duggan, 'De consultationibus: The Role of Episcopal Consultation in the Shaping of Canon Law in the Twelfth Century', *Bishops, Texts and the Use of Canon Law around 1100*, edd. Bruce Brasington and Kathleen C. Cushing (Aldershot and Burlington 2008), 191-214; John A. Watt, 'Hostiensis on *Per venerabilem*: the Role of the College of Cardinals', in *Authority and Power: Studies in Medieval Law and Government presented to Walter Ullmann*, edd. Brian Tierney and Peter Linehan (Cambridge 1980) 99-113.

69 Chronicon *Adam de Usk, A.D. 1377-1421*, ed. Edmund Maunde Thompson (London 1904) 92-265.

the accepted position was that such consultation was a necessity.[70] Indeed, when one looks at the documents emanating from the papal curia, it is remarkable how standard it was for papal actions to have been taken 'with the express counsel of our brothers', the cardinals of the Roman church.[71] Only in times of stress did matters stand differently.

Conclusion

Few legal rights are absolute,[72] and the requirement of taking counsel was not one of those few. Even where it was called for in the law, emergencies might exist and make consultation impossible. More important, as has been shown, the canon law's rule was that even well intentioned counsel did not have to be followed. To write it off as unimportant on that account, however, is to ignore both the repeated approbation it received in the works of the canonists and the strong role that it appears to have played in the ordinary administration of the canon law. We should not impose modern values on the medieval and early modern canonists by treating counsel's requirement as but a half step on a path to majority rule. The medieval canonists rejected that step. Democratic government was not their goal. It would have meant rule by the ignorant. Yet, they considered counsel to be essential.

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70 See also Petrus Rebuffus (†1557), *Tractatus Concordatorum*, tit. De *approbatione conventorum* (Paris 1622) s.v. *De eorum consilio* (Paris 1622) 513: 'Et sic Papa non debet ardua explicare sine consilio fratrum, id est cardinalium'.

71 See, e.g., the examples in Michael Tangl, *Die päpstlichen Kanzleiordnungen von 1200-1500* (Innsbruck 1894, reprint 1959) 453; see also Brenda Bolton, '"A Faithful and Wise Servant"? Innocent III (1198-1216) Looks at his Household', *Religion and the Household: Studies in Church History* 50 (2014) 59-73 at 68-71; Kurt Martens, '*Curia Romana semper reformanda*: le développement de la Curie Romaine avec quelques réflexions pour une Réforme éventuelle', 41 *Studia canonica* (2007) 91-116.

72 Kenneth Pennington, 'Sovereignty and Rights in Medieval and Early Modern Jurisprudence: Laws and Norms without a State', *Roman Law as Formative of Modern Legal Systems: Studies in Honour of Wiesław Litewski*, edd. Janusz Sondel, J. Reszczyński, and P. Ściślicki (Krakow 2003) 25-36.

If seeking the opinion of informed and trustworthy men was first required and then treated honestly as setting the stage for gathering further information and thoughtful negotiation, as it normally seems to have been in practice, counsel served a praiseworthy and useful purpose. It was a guarantee of government by discussion which, many centuries later, Walter Bagehot concluded had been a requirement of all first-rate governments.

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The Authority of *communis opinio doctorum* in the Medieval and Early Modern *Ius commune* (13th-16th centuries)

Tymoteusz Mikolajczak

The intellectual climate of scholasticism is founded, in a natural way, on the idea of community of knowledge, collected cumulatively in the slow process of assimilating and commenting on the tradition. If, on the one hand, a dialectical method permits to forge and test each opinion in the fire of opposites, contributing through the process of intricate dialectical subdistinctions to the final refinement of the argument discussed, the formal corroboration of an opinion, on the other hand, is only possible through the assessment of its coherence with the 'auctoritates'. In no other discipline of scholastic knowledge, the embedment of an argument in the community of scholars past and modern, through an endless sequence of quotations, is felt as being of such paramount importance than in medieval jurisprudence. Scholastic disputation stands not only as a sort of cognitive compass, but also as a decisional touchstone in the process of a practical application of the rule.

'The opinions of the learned', remarks Calderinus in his *Repertorium* at the beginning of the fourteenth century, 'bring doubt and obscurity into the law.'[1] The proliferation of often incompatible opinions in legal scholarship, painstakingly collected and diffused in 'margaritae', 'repertoria', 'singularia', and early legal dictionaries of the time, did not cease after the eventual triumph of the Accursian Gloss to the *Corpus iuris civilis*. Medieval jurisprudence needed plausible methodology to navigate through the forest of dicta found in the 'allegationes'. The rise of 'communis opinio doctorum' as an argument, with its claim to

[1] Johannes Calderinus, *Repertorium iuris utriusque*; Würzburg, Dombibl. M.ch.f.14 fol. 287vb: 'Opiniones doctorum reddunt ius dubium et obscurum' Cf. a similar remark by Bartolus: 'Nam opiniones doctorum faciunt rem ambiguam'; see Bartolus de Saxoferrato *Commentaria* (Basel 1588) to Dig. 45.1.122 fol. 135a.

universality, may be regarded as development of an internal technique of legal discourse that purported to diminish the intrinsic vagueness and elusiveness of *Ius commune*.

The subject has enjoyed mixed fortunes in modern historiography. The most extensive studies were published in the thirties by Emilio Bussi in a preliminary study on the concept of *Ius commune*, Charles Lefebvre in a historical introduction to the can. 20 of the Pio-Benedictine Code, and Woldemar Engelmann in his 'opus magnum' on the reception.[2] While Bussi's account in a largely appreciative tone stressed the importance of the doctrine, attributing to it a decisive place in shaping the system of sources of late *Ius commune*, Franceso Calasso famously compared it to 'a plague that began to infect healthy tissues of both legal science and judicature'.[3] Calasso's critique (and a scathing attack on Bussi's work) seemed to have halted serious interest for the concept for a while.[4]

Held in disdain and synonymous with epigonism of the late medieval legal jurisprudence the idea was nevertheless reclaimed by Luigi Lombardi in his vast essay on jurists as law-shapers.[5] His

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[2] Cf. Emilio Bussi *Intorno al concetto di diritto comune* (Milano 1935) 31-56, Charles Lefebvre, *Les pouvoirs du juge en droit canonique: Contribution historique et doctrinale à l 'étude du canon 20 sur la méthode et les sources en droit positif* (Paris 1938) 262-302, Woldemar Engelmann, *Die Wieder-geburt der Rechtskultur in Italien durch die wissenschaftliche Lehre* (Leipzig 1939) 212-227. For an earlier account, see also an essay by Biagio Brugi, *Per la storia della giurisprudenza italiana e delle università italiane: Nuovi saggi* (Torino 1921) 81-96.

[3] Francesco Calasso, *Medio evo del diritto: Le fonti* (Milano 1954) 582. Calsasso's remark itself resembles strongly that of Friedrich C. von Savigny, *Geschichte des Römischen Rechts in Mittelalter* (Heidelberg 1831) 6.12-14.

[4] Cf. Calasso' critical review of Bussi' approach in: *Rivista italiana per le scienze giuridiche* 9 (1936) 328-332, reprinted in *Annali di storia del diritto* 9 (1965) 569-572. Bussi's work has been recently reappraised by Gero Dolezalek:*'Stare Decisis': Persuasive Force of Precedent and Old Authority (12th-20th Century)* (Cape Town 1989) 28 at n.53, and Adolfo Giuliani: 'Bartolo senza Bartolismo', *Conversazioni bartoliane in ricordo di Severino Caprioli*, ed. Ferdinando Treggiari (Studi Bartoliani 2; Sassoferrato 2018) 74-75.

[5] Luigi Lombardi, *Saggio sul diritto giurisprudenziale* (Milano 1967) 164-199. Around the same time another contribution on the topic saw the light of day,

study stands out as advancing the strongest thesis on the vital role of 'communis opinio', along with the rise of consilia literature, in what he describes as 'jurisprudentiality' of the *Ius commune* at the threshold of modernity. The main thrust of his argument was to regard the phenomenon as lawyers' projection of the idea of codification, making it a distinctive instance of legal positivism, crafted by jurists themselves.[6] Consequently, the phenomenon was dubbed 'a jurisprudential version of the statute'.[7]

While Lombardi's controversial but thought-provoking claim was somewhat narrowed to the late fifteenth- and sixteenth-century *Ius commune*, focusing mainly on the views expressed by the late treatise writers, the doctrine covers much larger period of time and can be traced back to the middle of the thirteenth century. There are considerable challenges in disentangling the early form of argument.[8] Though by no means scant, the reflections as to what

written from the perspective of *diritto vigente*, by the canonist Pier Giovanni Caron, *La communis sententia doctorum nel diritto canonico* (Camerino 1972) 15-106. His historical introduction, however, too often bears a strong resemblance to Lefebvre's account, both in manner of presentation and his choice of exactly the same fragments, and as such amounts at best to no more than a simple restatement of the 'status quaestionis'. See also his article, Pier G. Caron, 'Influenza del "mos italicus docendi" sulla dottrina canonistica della "communis opinio doctorum",' *Ius Populi Dei: Miscellanea in honorem Raymundi Bidagor*, edd. Urbano Navarrete and Ramon Bidagor (3 vols. Roma 1972) 1.103-118. A new spark of interest has been visible in recent scholarship, cf. Sergio di Noto Marrella, *'Doctores': Contributo alla storia degli intellettuali nella dottrina del diritto comune* (Università degli Studi di Parma, Pubblicazioni della Facoltà di Giurisprudenza, Nuova Serie, 19; 2 vols. Padova 1994) 2.296-335, Corinne Leveleux-Teixeira, 'La référence à l'opinion commune dans la pensée romano-canonique (XIIe-XVIe siècle)', *L'Europe à la recherche de son identité*, ed. Christine Villain-Gandossi (Paris 2002) 171-184, Giovanni Rossi, 'La forza del diritto: La "communis opinio doctorum" come argine all' "arbitrium iudicis" nel processo della prima età moderna', *Il diritto come forza: La forza del diritto: Le fonti in azione nel diritto europeo tra medioevo ed età contemporanea*, ed. Alberto Sciumè (Torino 2012) 33-61.

[6] Lombardi, *Saggio sul diritto giurisprudenziale* 186.

[7] Ibid. 189.

[8] Early versions of Albericus de Rosate's dictionary are of little assistance, but Calderinus' repertory sheds some light on early discussions and so does later the repertory of Petrus de Monte. To explore the mature form of the argument, as it stood in the fourteenth and fifteenth century legal scholarship, one may

makes an opinion common and what are its effects are scattered in the sources. Sometimes the remarks are perfunctory, articulated as an aside to the main thread. Other times the argument is intricately interwoven with substantive treatment of a question at hand so that it can hardly be studied separately. As a result, the study of the doctrine proves to be largely non-linear, as no fixed set of pertinent 'loci' can be satisfactorily determined, though quite understandably, the bulk of discussion was covered in the commentaries on those fragments of 'libri legales' where the general theory of sources and interpretation had been expounded.[9]

Eventually, and crucially for the modern understanding of the subject (though not necessarily with regard to the further development of the theory) late jurisprudence of 'mos italicus' was marked by two important treatises on the subject by Johannes Nevizzanus (†1540) and Antonius Maria Coratius († ca. 1623).[10]

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best consult Johannes Bertachinus' enormous *Repertorium* (1481), substantially expanded in the 16th century editions. Especially illuminating, notably with regard to Baldus' and Panormitanus' reflection on *communis opinio*, is also Petrus Ravennas' *Dictionarium aureum* (1508). As for the later development and summary of the earlier discussion Domenicus Tuscus' (Toschi) *Practicae conclusiones iuris* (1605-1608) remains the main reference.

[9] The recurrent legal texts are: *Canonum* (X 1.2.1) and *Ne innitaris* (X 1.2.5) as well as the constitutions assembled in the title *De legibus et constitutionibus* (Cod. 1.14) and *De veteri iure enucleando* (Cod. 1.17) of Justinian's *Codex*.

[10] Johannes Nevizzanus, *Sylva nuptialis* (first edition: Lyon 1516, enlarged: Lyon 1524) book 5 and Antonius Maria Coratius, *Tractatus de communi utriusque iuris doctorum opinione* (first edition: Perugia 1572; the edition cited hereafter: Cologne 1584). See Giovanni Rossi, 'Corazzi (Corazza, Corazio, Corasi), Antonio Maria', DGI 1.580-581; Antonio Giuliano Marchetto, '"Sine matrimonio respublica stare non potest": L'utilità 'politica delle nozze nella Sylva nuptialis di Giovanni Nevizzano d'Asti (1518)', *La tradizione politica aristotelica nel Rinascimento europeo: Tra familia e civitas*, ed. Giovanni Rossi (Torino 2004) 109-162. Contrary to what both Carlo Lessona, *La Sylva Nuptialis di Giovanni Nevizzano, giureconsulto Astigiano del secolo XVI: Contributo alla storia del diritto italiano* (Torino 1886) 47 and Giuliano Marchetto, 'Nevizzano, Giovanni', DGI 2.1424-1425, reported, the first edition of *Sylva nuptialis* is that of Lyon, 1516, not Asti, 1518; cf. *French Books III & IV: Books published in France before 1601 in Latin and Languages other than French*, edd. Andrew Pettegree and Malcolm Walsby (Leiden-Boston 2012)

Nevizzanus' treatise is primarily a polemical work about advantages and risks linked with marriage, revolving around the central question (an nubendum sit), betraying all along a rather strong misogynistic stance. It enjoyed undisputed popularity in the sixteenth and seventeenth centuries, reaching over twenty editions up to 1647. In the enlarged version of Nevizzanus' treatise published in Lyon in 1524, a monumental appendix was added, consisting of books 5 and 6. The new books, loosely related to the original content, form 'a treatise within a treatise', encompassing problems of legal interpretation and limits of judicial discretion. The discussion on 'communis opinio' covers the entire content of book 5, linked with the general problem of judicial decision-making when there is interpretative uncertainty (which is conveyed expressly via the subtitle from the editors: 'quomodo iudicandum in dubio'). Book 5 and 6 were later extracted and reprinted as stand-alone in one of the most ample and most successful collections of common opinions, *Syntagma communium opinionum* where the treatises of Coratius, Azzoguido and Nevizzanus form the general part, followed by a plethora of diverse common opinions arranged according to the systematic of Justinian's *Codex*.[11] As the early editions (e.g. Lyon, 1526) are

2.1229-1230; see also the full record on the Universal Short Title Catalogue, https://www.ustc.ac.uk).

[11] The collection under the label *Syntagma communium opinionum* first appeared in Philippe Tinghi's publishing house in Lyon in 1576 and saw a number of successively enlarged editions, printed by various Lyon-based typographers up to 1608. Tinghi's and S. Béraud's edition (1581), followed by that edited by Leandro Galganetti and printed in the Giunta publishing house (1595; with a parallel edition appearing in Turin in the same year), and finally the one printed by Horace Cardon (1608), all contain a series of treatises on 'communis opinio' by Nevizzanus, Coratius and Azzoguidi that provide a theoretical framework for the accompanying miscellaneous florilegia of opinions. So does a similar collection elaborated in the famous Sigmund Feyerabend's printing workshop in Frankfurt (*Thesaurus communium opinionum* 1584). For general reference on the editions, see *French Books*, edd. Pettegree and Walsby 1.484, 1.848 and the bibliographical records at the Censimento nazionale delle edizioni italiane del XVI secolo (edit 16: https://www.edit16.iccu.sbn.it), Verzeichnis der im deutschen Sprachbereich erschienenen Drucke des 16. Jahrhunderts (VD 16: https://www.bsb-

unnumbered, I will refer, for the sake of clarity, to the version included in the *Syntagma*.

Coratius' treatise is a work of a young graduate of the *Studium Perusinum*, written at the age of 23, barely five years after the beginning of his legal studies, as he self-consciously admits.[12] The work was written under the strong influence of his famous master, Giovanni Paolo Lancellotti, and is perhaps, more than thought before, fashioned after the unpublished disputation of the latter, now probably lost. Lancellotti's disputation which Coratius alluded to more or less directly on a number of occasions throughout his treatise, is first called on expressly in the preface ('in quadam sua pulchra et docta disputatione, an et quando communis opinio attendenda sit').[13] Coratius' work went through four editions up to 1584 and was subsequently integrated into the *Tractatus universi iuris*.[14]

The remaining sixteenth-century treatise on the subject was published by little-known Genovese lawyer Maccagnano degli Azzoguidi, first as a separate book and later inserted among other 'tractatus'.[15] While being an admirable exercise in antiquarian erudition, with long passages on classical authors and the whole book treating at length problems so unrelated to the main thread

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muenchen.de/sammlungen/historische-drucke/recherche/vd-16/) and the Universal Short Title Catalogue.

[12] Antonius Maria Coratius, *Tractatus de communi opinione, preface* 16 n.53.

[13] Ibid. 20 n.2.

[14] TUI, Coratius, *Tractatus* 18.222ra-247ra. Its significance is attested by an abbreviation of the treatise by Denis Godefroy, *Praxis civilis*, book 1 tit. 2.9 (Frankfurt 1591) 29-30.

[15] *De communi opinione libri tres* (Turin 1562). Also printed in Maccagnano degli Azzoguidi, 'De communi opinione' *Thesaurus communium opinionum et conclusionum* (Frankfurt 1584) 33-57 and *Syntagma* editions, e.g. Lyon 1608 57-99. The great legal bibliographers of the seventeenth century, Martin Lipenius and Agostino Fontana refer to a Bolognese edition of the related work by Azzoguidi, undated, with variants of title (*Liber opinionum in iure magis receptarum* according to Lipenius, and *Communes opiniones* according to Fontana). As no extant copies are seemingly available, we may conjecture that in all probability it is either another edition of the very same treatise or a simple slip on their part. See Martin Lipenius, *Bibliotheca realis iuridica* (Frankfurt 1679) 81 and 365; Agostino Fontana, *Amphitheatrum legale* (Parma 1688) 1.52.

as 'communio' and 'societas', his account sheds actually little light on the topic.[16]

The treatises themselves can be seen as an offspring of larger monographic literature on legal interpretation seen as choice of most plausible opinion, then in vogue.[17] Though on the surface excessively pedantic, often unforgivably verbose and overburdened with references, they provide the most comprehensive and systematic treatment of all the components of the doctrine as it appeared in the course of the sixteenth century, serving also as a guide in unearthing older layers.[18] Concomitantly, the turn of the fifteenth century saw the rise of new literary genre in the form of common opinions' florilegia. This sort

[16] The relative obscurity surrounding this jurist misled Fontana and others into identifying him with his namesakes from the fourteenth and fifteenth-century Bologna, an error subsequently corrected by Mauro Sarti and Giovanni Fantuzzi. Cf. Mauro Sarti and Mauro Fattorini, *De claris archigymnasii Bononiensis professoribus*, edd. Cesare Albicinio and Carlo Malagola (2nd ed. Bologna 1888-1896) 2.352-353; Giovanni Fantuzzi, *Notizie degli scrittori Bolognesi* (Bologna 1781) 1.308. Fantuzzi pointed to an encomium to the archbishop of Genova and a dedication, partially reproduced, addressed to Emmanuel Philibert, duke of Savoy, from the Turin edition. Azzoguidi refers to 'consilia' of Marianus Socinus iunior, calling him 'praeceptor meus', and does not shy away from quoting also other jurists from the first half of the sixteenth century, like Boërius and (cited frequently) Nevizzanus. See, e.g., Azzoguidi, 'De communi opinione', *Syntagma communium opinionum* (Lyon 1608) 98. All this indicates that the work must have been written in the fifties or early sixties of the sixteenth century by a jurist from Genovese milieu, acquainted with both traditional method of 'mos italicus' and more recent humanist tradition (he may have studied under Socinus iunior either in Genova or in Bologna). On the Bolognese family of jurists, see Manlio Bellomo, 'Giuristi bolognesi del tempo di Taddeo Pepoli: Maccagnano e Tommaso degli Azzoguidi', *Inediti della giurisprudenza medievale*, ed. M. Bellomo (Studien zur europäischen Rechtsgeschichte 261; Frankfurt am Main 2011) 301-345, who at 302 distinguishes the fourteenth-century jurist from the fifteenth-century jurist with the same name.

[17] Cf. e.g. Matthaeus Matthesilanus, *De electione opinionum* (1409), Constantinus Rogerius, *De iuris interpretatione* (1463), Stephanus de Federicis, *De interpretatione legum* (1496), all treatises were included later in TUI.

[18] Cf. Lessona, *Sylva Nuptialis* 121-131, Marcella Balestri Fumagali, 'L'identità e il ruolo del giurista nel pensiero di Antonio Maria Corazzi' SDHI 46 (1980) 467-490, Giovanni Rossi, 'Forza del diritto' 44-52.

of ancillary literature addressed to judges and legal practitioners too occurs to be self-referential and besides an exhaustive assemblage of common opinions on various topics, often contains succinct presentation of the general theory.[19]

Nevizzanus' account especially excels in bringing endless anecdotal digressions and is flooded by references to sources so disparate as classical authors, scholastic thinkers, contemporary humanists (Pico della Mirandola, Erasmus), along with extensive usage of legal sources. Interestingly, his somewhat critical stance toward the clergy permitted him to cite at the same time both Pope Hadrian VI and Martin Luther.[20] Nevertheless, like the arguments in the remaining parts of the treatise and in accordance with the prevailing scholastic mode of exposition 'per regulam et fallentias' found in the later commentators within Roman law tradition, it is structured around a governing principle 'in iudicando iudex debet sequi communem opinionem', with the extensions (ampliationes) and exceptions (limitationes) to the rule.[21] Coratius' work, on the contrary, has the advantage of being clearly organized and bears similarity to a standard (albeit cautiously academic) method of exposition based on dialectical refutation of arguments.

The merit of those late compilers lies mainly in drawing all the hitherto dispersed threads of the doctrine together and assembling them into a complex theory. Coratius' treatise succeeds in structuring the narrative lucidly around both 'static'

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[19] Examples of this self-referential approach are preeminently collections of Iohannes Babtista a Villalobos (1561), Franciscus Vivius (1565), Hippolytus Bonacossa (1575), all running in the alphabetical order, treating the general theory under the heading 'opinio' or 'opinio communis', and Bernardus Henricus Ianuensis (1599) along with Hieronymus de Caevallos (1602), in the introductory sections of their compilations.

[20] Johannes Nevizzanus, *Sylva nuptialis, Syntagma communium opinionum* (3 vols. Lyon 1608) vol. 1 book 5 100 n.4: 'Hadrianus papa noster', 101 n.6, 111 n.40, referring to the *Quaestiones quodlibetales*. Martin Lurther: 11 n.4, citing his polemic with Johannes Eck and the condemnation of the canon law science; all the same the author doesn't recoil from quoting Silvester Prierias as well, e.g. 166 n.25.

[21] Ibid. 101 n.1.

and 'dynamic' elements, encompassing conditions necessary to forge a common opinion, reflection on its cogency as well as the consequences of its rejection. The present paper will by and large follow this order of exposition, while paying special attention to the question of rationale behind viewing the argument as a valid reason in the process of judicial decision-making.

Formation of communis opinio

The early theorists of 'communis opinio' begin to vest it with persuasive authority by emphasizing the contrast with 'opinio singularis', eagerly reaching out for the rhetoric of rejection and depreciation with regard to the latter. Hostiensis, formulating general prohibition to depart from a common opinion did not hesitate to summon as its rationale Solomon's exclamation: 'Vae soli'.[22]

What is widely accepted is made to stand in stark contrast to a cumbersome novelty, and thus a general and common opinion is often introduced with a nodding approval while refuting another view, deprecated as isolated and therefore unreliable. Baldus de Ubaldis styles the latter as 'opinio peregrina', referring to the fragment where an opinion held by Venuleius Saturninus was rebuked by Ulpian as not having been received among his contemporaries.[23] Henceforth the common locutions: 'singularis, peregrina, Saturnina' become extensively exploited with reference to that dichotomy, at least implicitly signalling the emergence of

[22] Hostiensis, *Lectura* (Strasbourg 1512) to X 1.2.1 s.v. *suo sensu* fol. 6ra: 'Verum communis opinio semper sequenda est, nisi notorie male dicat, vel rationabiliter convincatur. Et hoc bonus iudex et acutissimi ingenii estimabit, argumentum infra de feriis Capellanus (X 2.9.4) de appell. Cum cessante (X 2.28.60), de accus. Inquisitionis (X 5.1.21). Nam ve soli, de stat. mon. Monachi (X 3.35.20)'.

[23] Baldus de Ubaldis, *Commentaria* (Lyon 1577) to Dig. 1.9.1 fol. 49vb n.4: 'Ultimo nota contra singulares et peregrinas opiniones doctorum. Opinioni autem communi inhaeres, supra de infam. l. Athletas, in principio (Dig. 3.2.4 pr.)'. Saturninus' view concerned bestowing on mothers of former consuls (as opposed to the unquestioned privilege of their wives) the honorific title of 'consulares'.

'communis opinio' on a subject. Baldus used the phrase when speaking of Bartolus' views (which he refers to sometimes as 'insolitae fantasiae Bartoli'). Jason de Mayno quotes a case in which Bartolus argued against the commonly approved view of Accursius' Ordinary Gloss as to the proper understanding of indefinite pronoun 'unusquisque' in the Justinian's enactment stipulating unrestricted freedom of bequeathing goods for the church.[24]

At the early stage of its development decretalists especially discussed the doctrine and relied strongly on the quantitative aspect of the concept. Since the commonness of judgment seems to entail at least at some point in its formation a claim to universality, there remained a question whether genuine uniformity of opinions at one stage is a prerequisite or, should its attaining become impossible, the majority were to be deemed sufficient. Sinibaldus Fieschi, whose *Commentaria* contains first germs of the whole idea, while not using the term in a technical way, required unequivocal unanimity.[25] The argument is here

[24] Jason de Mayno, C*ommentaria* (Lyon 1582) to Dig. 12.1.14 fol. 26vb n.7: 'Ego vero (ut puto) defendo unum intellectum Bartoli, quem communiter doctores solent improbare circa l.i. C. de sacros. eccl. (Cod. 1.2.1) et dixit textus "habeat unusquisque", scilicet habilis ad testandum. Bartolus ibi contra omnes intellexit, "unusquisque", etiam inhabilis. Baldus ibi in repetitione in 2, 3, et 20 co. multum truffatur de intellectu Bartoli et dicit, quod omnes tenent cum glossa, excepto illo Saturnino, scilicet Bartolo, et quod opinio eius est truffa, et rationes eius sunt ambages. Et eum etiam reprehendit Sal. (Bartolomeus de Saliceto) . . . et Angelus . . . quod illa opinia Bartoli est reprobata ubique, et in iudiciis, et in scholis'. Cf. also a similar critical remark of Socinus Junior about Andreas Barbatia's unreliable opinions; Marianus Socinus iunior, *Consilia* (Venice 1590) cons. 128 vol. 1 fol. 229va n.48: 'Nam primo dicimus, quod dominus Andreas Barbatias in repetitione l. Cum acutissimi (Cod. 6.42.30) multas opiniones dixit, quae nihil aliud sunt, nisi opiniones Saturninae, id est numquam receptae nec approbatae, ut l.i in fine, ff. senat. (Dig. 1.9.1)'.

[25] Innocentius IV, *Commentaria* (Lyon 1577) to X 5.40.34 (Novella =VI 5.121) fol. 373rb n.4: 'Alii contrarium non dicebant, si interrogaretur a quibus audivisti, si nominat aliquos bene est, sed si dicat: "non habeo in memoria de aliquo, quia non noui de aliquo certo, quia sic communiter dicebatur", videtur valere testimonium. Videtur autem idem probare communem opinionem, et omnium opinionem, ff. de probat. Si arbiter (Dig. 22.3.28). Quia si unus solus esset in contraria opinione ductu rationis, non esset communis probatio, ut

understood broadly, and refers simply to a common conviction of the members of a given community with regard to certain disputed facts. In order to amount to the valuable evidence their statements must not be falsified by a single dissenting voice, on the assumption that the latter was duly reasoned.[26] One of the earliest treatises on the subject, Thomas de Piperata's *Tractatus de fama*, uses the terms 'fama' and 'communis opinio' interchangeably and treats the common conviction as a distinct category of evidence, opposed to both notoriety of fact (notorium facti) and simple testimonies from witnesses.[27] Such signification persists throughout the fourteenth century, with Bartolus, drawing extensively on Thomas' analysis, identifying 'communis opinio' with 'fama inter homines'.[28]

Later on, as the concept takes on its technical meaning, the commentators tend to become satisfied with majority.[29] The pattern is made more visible throughout the fifteenth century when the references to the doctrine of 'pars maior et sanior' abound in the 'allegationes', yet even Panormitanus who resorts to it

praedictum est . . . '; ibid. fol. 373va n.6: 'Et non mireris, si sufficiens reputetur a iure haec probatio communis opinionis. Indubitanter enim reputari debet, quod omnes homines communiter opinati sunt sine contradictione tanto tempore, a quo non extat memoria'. Durandus reproduces Innocent's comment with small additions, in his *Speculum*. See Durandus, *Speculum iudiciale* (Lyon 1577) Book 2 part 2 De probationibus § 1 Probare fol. 125ra n.29-31.

[26] Cf. Lefebvre, *Pouvoirs du juge* 264-272. Common opinion in that sense is thus synonymous with *fama*.

[27] See Thomas de Piperata, *Tractatus de fama* edited as an appendix to Marquard Freher, *Tractatus de fama publica* (Frankfurt 1588) fol. 122 n.1 and fol. 125 n.17-19 and in TUI 11.1 fol. 8rb-8vb.

[28] Bartolus de Saxoferrato, C*ommentaria* (Basel 1588) to Dig. 48.18.10 § 5 fol. 537-538 n.5-7). Cf. Francesco Migliorino, *Fama e infamia: Problemi della società medievale nel pensiero giuridico nei secoli XII e XIII* (Catania 1985) 65-70, David Deroussin, *Le juste sujet de croire dans l'ancien droit français* (Romanité et modernité du droit 2; Paris 2001) 338-339.

[29] Baldus de Ubaldis, *Commentaria* to Dig. 1.13.1pr. fol. 54va n.1-3: 'Item et in vers. "sane" nota, quod ubi sunt diverse magistrorum sententiae, debet stari quae plurimorum testimonio comprobatur . . . Ultimo nota, quod quis tenetur credere istud quod communiter credunt et tradunt sapientes'.

willingly is far from being clear on this topic.[30] The rationale for the quantitative component is summarized succinctly by Alciatus evoking the maxim from *Decretals* concerning episcopal elections: 'ubi maior est numerus eligentium, ibi praesumitur maior zelus'.[31]

The second criterion of opinion's universality is of qualitative character. For not only should one abide by what seems plausible to the majority but one should also consider the authority of the advocates of different magisterial opinions ('quod plures graviores habent').[32] Therefore the opinions should not solely be counted, but also weighed against each other on the merits of the 'auctoritas' of their proponents.[33] The necessity of using both criteria must have resulted in the inevitable tension between them,

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[30] Panormitanus, *Commentaria* (Venice 1588) to X 5.19.9 fol. 239va n.9: 'Et hodie potest dici quod ista sit communis opinio, cum omnes scribentes eam tenent'; idem. to X 1.29.21 De officio et potestate iudici delegati c. 21 Prudentiam (fol. 127ra n.4): 'Praesumendum esse pro pluralitate doctorum et iudicum. Unde sententia vel opinio videtur firmior, et verior, quando plurimorum iudicio est confirmata. . . . Et ex hoc infertur, qualiter sit iudicandum, quando dubium est positum in conflictu opinionum, debemus nos illam opinionem amplecti, in qua plures doctores inclinant'. For the informative sketch of Panormitanus' doctrine, see Leveleux-Teixeira, *Référence à l'opinion commune* 173-177. Her insistence on the principle 'quod omnes tangit ab omnibus debet approbari' as a rationale for the doctrine seems unconvincing, as founded on a priori grounds in particular with regard to earlier sources, referring almost indistinctly to the common opinion in an evidentiary sense of 'fama'.

[31] Andreas Alciatus, *Tractatus de praesumptionibus* (Cologne 1580) pr. 51 fol. 192 n.1: 'Ubi maior est numerus eligentium, ibi etiam praesumitur maior zelus, c. ecclesia vestra, ext. de electio. (X 1.6.57) c. Si quando eodem titulo in 6 (VI 1.6.9) Quod est verum, maxime in electione facta per viros prudentes, quia naturaliter in eis melior opinio praevalet . . . ; fol. 192 n.4: 'Et intelligo communem opinionem illam esse, non quae plures habeat autoritates simpliciter, sed quae plures graviores habeat autores, c.In canonicis, 19 distinctio (D.19 c.6, l. Divi ff. de iure patrona. (Dig 37.1418) l.penulti., C. de condi. indeb. (Cod. 4.5.10)'.

[32] The wording of this quote comes from Alciatus' treatise on presumptions but the idea is clearly present at least a century beforehand. Cf. Lefebvre, *Pouvoirs du juge* 280-284; Bussi, *Concetto di diritto commune* 43-44.

[33] Cf. Cod. 1.17.1.6: 'Sed neque ex multitudine auctorum quod melius et aequius est iudicatote . . . '.

sensed well by the fifteenth and sixteenth century jurists. Alexander Tartagnus in one of his 'consilia', while approving the view defended by the Accursian Gloss, explicitly recommended preferring the opinion founded on the authority of the most excellent doctors over a purely mechanical quantitative criterion.[34] In a similar manner, the primacy of quality over quantity was emphasized by the fifteenth-century commentator, Matthaeus Matthesilanus, the first treatise writer to address 'ex professo' the issues of the choice of opinions in the legal science.[35] The limits for taking into account the value of authorities present on one side are determined by the number of authors twice as large on the other, since in such a hypothesis one should pay attention only to the arithmetic.[36]

An attempt to reconcile the two possibly incompatible principles can be found in the conception of Martinus Azpilcueta (†1586) (Navarrus), strongly foreshadowing the emergent doctrine of moral probabilism.[37] Reflecting on the issue of

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[34] Alexander Tartagnus, *Consilia* (Venice 1610) cons. 202 vol. 7 fol. 148va n.7: 'Dicunt doctores illam esse communem opinionem et accipitur magis communis opinio: quando doctores maioris ponderis et auctoritatis sunt pro una parte non debet attendi numerus, ut doctores nostri dicunt'.

[35] Matthaeus Matthesilanus, *De electione opinionum* TUI 18 fol. 222ra n.10-11): 'Si vero de hoc favore non apparet . . . tunc forte eligenda est illa opinio, quam tenent doctores maioris authoritatis, etiam si sint numero pauciores, argumentum l. Maiorem ff. de pact. (Dig. 2.14.8) nisi forte pro alia parte esset numerus duplo maior, quia tunc illa opinio esset tendenda, c. Si quando, extra de lec. lib. 6 (VI 1.6.9), facit quod nota in c. Ecclesia, capitulo secundo, extra de elec. (X 1.6.57) . . . Si vero doctores variantes sint paris authoritate, tunc standum est opinio, pro qua est maior numerus doctorum . . . '.

[36] The requirement itself echoes discussion on canonical elections (c. Si quando VI 1.6.9), making again a case for similarity between election of persons and election of opinions in the reflection of later commentators.

[37] Martinus Azpilcueta *Enchiridion sive Manuale confessariorum ac poenitentium* (Rome 1588) cap. 27 fol. 879-880 n.289: 'Quartum, quod non videtur una opinio appellanda communis, ad effectum praeiudicandi alteri eo solo, quod plures eam sequantur, tanquam oves aliae alias, quia praecedunt sine iudicio sequentes: velut aves, quae unam volante, aliae omnes sequuntur . . . Communiorem enim ad hoc existimarem illam, quam sex vel septem authores classici rem ex professo tractantes aserent, quam probatam a 50. sola fere authoritate priorum ductis. Opinio enim communis non ex numero opinantium,

universal opinion's nature, Martinus vehemently warns against absolutizing thoughtless views, only on the grounds that they are shared by numerous authors who follow them like a herd of sheep or a flock of wandering birds.[38] While insisting on the qualitative aspect of the doctrine, he formulates the general principle of interpretation that bestows dignity of common opinion on any view whenever it is shared by six or seven 'classical' authors (authores classici), discussing an issue 'ex professo'. The consequence of adopting this perspective is an admission by Martinus of the coexistence of several incompatible common opinions on one subject.[39]

An interpretative model, much akin to Azpilcueta's idea (but forged independently) was suggested by Antonius Maria Coratius, the author of the most complete treatise on the subject in the later civilian tradition. Here, too, the innovative element of reflection was to delimit clearly the conditions which should be met for safely qualifying an opinion as commonly accepted. Coratius

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sed ex pondere authoritatis sit . . . '. On Azpilcueta as forerunner of probabilism, see recently: Stefania Tutino, *Uncertainty in Post-Reformation Catholicism: A History of Probabilism* (Oxford 2018 27-39). A classic reference remains Albert R. Jonsen, Stephen Toulmin, *Abuse of Casuistry: A History of Moral Reasoning* (Berkeley 1988) 152-153. See Wim Decock, 'Martín de Azpilcueta', *Great Christian Jurists in Spanish History*, edd. Rafael Domingo and Javier Martínez-Torrón (Cambridge Law and Christianity; Cambridge 2018) 116-132.

[38] The metaphor of wandering birds, the authorship of which is attributed to Philippus Decius, begins to circulate as a commonplace in the sixteenth century. Cf. Decius, *Consilia* (Lyon 1550) cons. 494 vol. 4 fol. 45vb n.14.

[39] Azpilcueta, *Enchiridion* 880 n.289: 'Quin et arbitror utramque ad hoc posse dici communem, quando utraque habet 8 vel 10 assertores graves et cum iudicio eam deligentes'. Note that it is far from clear whether 'assertores graves' are identical with 'authores classici', or not. The latter view has been recently advocated by Schuessler, but I am skeptical as to whether this single sentence should be understood as an alternative fixed quantitative threshold for 'doctores' of lesser authority (i.e. mainly the 'moderni'). In my opinion the text should be read narrowly and this additional rule is confined exclusively to the situation where two rivaling views may suddenly appear as equally common, by virtue of being supported by a sufficiently large number of 'auctoritates'. Cf. Rudolf Schuessler, *The Debate on Probable Opinions in the Scholastic Tradition* (Brill's Studies in Intellectual History 302; Leiden-Boston 2019) 204.

specifies that the view should be expressed by at least seven authoritative sources, among which should stand the Accursian Gloss and particularly excellent earlier commentators as Innocent IV, Hostiensis, Durandus or Bartolus.[40] The whole argument is permeated with the symbolic meaning of seven, a number manifesting perfection in all fields of human cognition; in both theology and natural science, in the history of mankind and the history of salvation. A decisive form of exoneration from possible accusation of arbitrariness is found by the author in the analogy with last will.[41] Jurisprudential science too adheres to the symbolism in order to show the solemnity of certain acts of utmost importance, such as a testament. By playing on comparisons

[40] Coratius, *Tractatus de communi opinione* book 1 tit. 3, 33 n.19-20: 'Quid ergo statuendum in hac difficili quaestione? Et quidem diu considerando in eam incidi sententiam, ut communis opinio constituatur numero septem doctorum ad minus, si inter eos sit Glossa, Inocentius, Hostiensis, Speculator, Bartolus, vel alius doctor eximiae auctoritatis, sin minus, maiori numero, secundum pondus, et auctoritatem eorum. Et ad ita tendendum, motus fui ex pluribus. Et primo, quia numerus septenarius per se dicitur esse perfectissimus, et maxima habetur in consideratione'.

[41] Ibid. 36-37 n.22-23: 'Quarto loco principaliter, et urgentissime mihi hanc sententiam suavit exemplum testamenti, nam quemadmodum in testamento requiruntur septem testes . . . ita eadem, immo maiori ratione in communi opinione constituenda debent intervenire septem doctores, qui sunt testes iuris. . . . Sed septem requiruntur, quoniam cum maxime intersit, ut voluntas testantium impleatur, ne quid falsitatis incurrat per duos testes, lex maiorem numerum testium expostulavit, ut per ampliora homines perfectissima veritas reveletur . . . At ista ratio multo maior viget in communi, quae negari non potest, quin sit maximi momenti, et praeiudicii, ut supra diximus. Et multo maior suspicio falsitatis insit in constituenda communi, quam in testamento, propterea, quod cum in quocunque actu duo cumulative requirantur, potentia videlicet, et voluntas . . . In testamento non potest intervenire falsitas, nisi in uno requisito, nempe in voluntate, cum clarum sit, quod in potestate falsum comitti nequeat, cum sensibus percipiatur, quod testator disponit. In communi vero falsitas potest intervenire ex utroque requisito, videlicet ex voluntate, et etiam ex potestate, cum ius et iustitia non percipiantur aliquo sensu extrinseco, sed in intellectu consistant, unde facilis in falsitatem est lapsus propter humani ingenii imbecillitatem. Et sic ratio, quae movit legislatores ad ita disponendum in testamento, aeque et magis viget in communi, quae pro veritate habetur. Et per consequens, quod in testamento est dispositum, in communi etiam est disponendum'.

between witnesses and learned jurists (whom he qualifies as 'testes iuris'), Coratius strives to demonstrate that the increased standards of diligence warrant in both cases the greater accuracy of the statement.

The dynamics of communis opinio and its rationale

Earlier sources seem to dwell strongly on the rhetoric side of the argument from 'communis opinio'. The obligation to follow is thus essentially a function of its default plausibility and putative rectitude of the solution it promises to furnish in hard cases. It is in this vein that Hostiensis and Johannes Andreae, in a fragment that quickly becomes a 'locus classicus' for the whole theory, go on to firmly attribute to the common judgment a value as a valid guide for action, unless it is judged to be plainly wrong, or outweighed by the strength of more compelling reasons.[42] Therefore, it effectively imposes itself on judge's conscience, limiting his discretion in deciding a case.

[42] Hostiensis, *Lectura* to X 1.2.1 fol. 6ra s.v. *suo sensu*: 'Debet ergo iudex secundum iuris conscientiam iudicare, et sic intellige iii. q.vii. Iudicet (C.3 q.7 c.2) xxiii. q.i Paratus circa medium(C.23 q.1 c.2) et xx. di. De libellis (D.20 c.1) instit. de offi. iudi. in principio (Inst. 4.17pr.) et C. de sent. et interloc. om. iud. Nemo (Cod. 7.45.13). Ergo caveas quando impetrabis iudicem in dissensionibus. Quia nemo iuste contra iuris conscientiam iudicabit. Quia si fecerit per gratiam vel per sordes in gravamen partis alterius ab executione sui officii per annum noverit se suspensum, ut extra dominus noster, de re iudicata, Cum eterni § i. et ii. (= VI 2.14.1). Verum communis opinio semper sequenda est, nisi notorie male dicat, vel rationabiliter convincatur. Et hoc bonus iudex et acutissimi ingenii estimabit, argumentum infra, de feriis Capellanus (X 2.9.4), de appell. Cum cessante (X 2.28.60), de accus. Inquisitionis (X 5.1.21). Nam ve soli, de stat. mon. Monachi (X 3.35.2) H.'; Johannes Andreae, *Novella* (Venice 1612) to X 1.2.1 vol. 1 fol. 12ra n.25-26: 'Caveat ergo sibi, secundum Hostiensem, qui in dissensione opinionum eligit iudicem. Caveat etiam iudex a poena decretalium, Cum aeterni, de re iudic., lib. 6 (VI 2.14.1). Communis autem opinio sequenda est, ubi non notorie male dicat, vel rationabiliter conuincatur, quod bonus iudex acutissimi ingenii aestimabit, infra de feriis Capellanus (X 2.9.4), nam utre (vae) soli, et cetera, de sta. mona, c.2 (X 3.35.2)'.

The potential persuasiveness of the argument is clearly demonstrated by Hostiensis in a comment on usury.[43] While the text of the papal rescript formulates a rather straightforward principle of liability of the heirs of an usurer, the gloss by Vincentius Hispanus, integrated by Bernardus Parmensis in the *Glossa ordinaria* extends liability to whomever acquired something of value from the property of the testator. The scope of the responsibility is quite predictably limited to the share of inheritance.[44] Yet, in the case of insolvency of one of the heirs, having first scrutinized the 'allegationes' potentially furnishing arguments for and against, Bernardus expressly advocates the joint liability (in solidum) of the rest. His rationale was implicitly (though by no means anywhere clearly expressed) that the aim of the claim is 'restitutio in integrum'. In the doctrine of later

[43] Hostiensis, *Lectura* to X 5.19.9 fol. 297v s.v. *cogendi* : 'Tenentur ergo filii pro parentibus, et pro hereditaria portione, et illi ad quos bona usurariorum pervenerunt, ut hic dicitur, et ff. de reg. iu. Ex qua persona (Dig. 50.17.149). Sed pone, quod unus heredum efficitur non solvendo, antequam partem eum constringentem restituerit, nunquid alter (aliter *male*) in solidum convenietur? Non videtur: ff. de fideius. Inter eos § Cum inter (Dig. 46.1.51), argumentum contra: ff. de commodati. Sed mihi, § Haeres (Dig. 3.6.3.3), ff. de fideius. Inter fideiussores (Dig. 46.1.26), et ff. de fideius. tut. <Si> fideiussores (Dig. 27.7.7). Solutio: potest dici, quod in solidum conveniatur, quia omnia bona defuncti illi cui debet fieri restitutio videntur obligata, argumentum supra eodem Cum tu § finalis (X 5.19.5). Et precipue, cum succedit in crimine, heredis enim succedentis in vicium par fortuna habenda est, C. de fru. et li. expe., l.ii. (Cod. 7.51.2), et etiam heredis ignorantia defuncti vicium non excusat, ff. de diversis et tempora. prescrip. Cum heres respon.i. (Dig. 44.3.11). Quicumque igitur succedit in bonis defuncti, sive idem crimen committat, sive non, semper tenetur restituere usuras, quas defunctus extorsit, in quantum se extendunt bona defuncti, quae ad ipsum pervenerunt. Sicut et e contrario, heres potest usuras repetere ab illo cui succedit extortas, infra eodem, Michael (X 5.19.17), secundum Vincentium. Quia vero opinio hec in conspectu multorum favorabilis est quantum ad animas et satis equa, ac ab omnibus approbata, non audeo contradicere, argumentum in eo quod legis, et notas supra de homicid. Ad audientiam, § i. vers.i. (X 5.12.12), supra de transact. c.finalis (X 1.36.11), ff. de legib. Minime (Dig. 1.3.23)'.

[44] Bernardus Parmensis Ordinary Gloss to *Decretales* (Rome 1582) to X 5.19.9 s.v. *cogendi:* col. 1738. Hostiensis faithfully incorporates Vincentius' gloss 'in extenso' into his text. His own reflections start with the statement: 'Quia vero…'.

canonists the nature of a cause of action and the very basis of heirs' liability (delictual, contractual or, widely preferred, quasi-contractual) were much disputed.[45] Bernardus and Hostiensis both advanced the arguments for both quasi-contract and actual delict in their citations of Roman law sources.[46] Though the claim is restitiutionary, not compensatory, in nature, there is at least a hint that the heirs answered for their own sin if they do not at once return the value of enrichment.[47] Since the creditor has a restitutionary claim over all the assets belonging to the usurer, the heir's liability could potentially exceed the value of his share.[48]

Hostiensis, for his part, aptly reconstructed this argument and ended up qualifying the view expressed by the gloss as a common opinion. The references to the sources reinforce its validity as a persuasive authority, for not only is 'communis opinio' a firm interpretation of the laws at hand but, anchored in equity, it also conveys a promise of a more considerate solution, salvaging the soul of the usurer who was, otherwise, inexorably damned. Still more importantly, from the standpoint of its impact on the process of rule application considered as a form of rational choice theory, it is identified as a safer opinion, and as such indistinctly preferred.[49] But whereas there appears to be some sort of temerity ('non audeo contradicere') in questioning an opinion to date

[45] See Panormitanus, *Commentaria* to X 5.19.9 fol. 239rb n.2.

[46] Ulpian's adage: 'ex qua persona quis lucrum capit, eius factum praestare debet', Dig. 50.17.149; 'heredis quoque succedentis in vitium, par fortuna habenda est', cf. Cod. 7.51.2.

[47] See Hostiensis, *Lectura* to X 5.19.9 fol. 297va s.v. *quod filii*: 'nomine suo indistincte, quia in peccatum successerunt, et non nomine parentum, nisi in fine fuerint absoluti, quo dic ut notas supra eodem capitulo, resp. i, super verbo "usurariorum" (Hostiensis, *Lectura* to X 5.19.9 in principio)'.

[48] The firm rejection of such liability 'ultra vires hereditatis' is a by-product of later development. See Panormitanus, loc. cit. fol. 239vb-240ra n.11.

[49] This can be read as alluding to the-then-prevailing doctrine of medieval tutiorism 'in nuce'. For the most thorough study, with a short analysis of legal texts included in the *Liber Extra*, see Thomas Deman, 'Probabilisme', *Dictionnaire de la théologie catholique* (Paris 1936) 13.422-455. On Aquinas as a tutiorist, see Ilkka Kantola, *Probability and Moral Uncertainty in Late Medieval and Early Modern Times* (Schriften der Luther-Agricola Gesellschaft 32; Helsinki 1994) 79-84.

unanimously approved by the gloss and the 'doctores', it does not prevent the learned canonist from expressing his doubts and reservations about the accuracy of such solution. Formal considerations alongside a call for legal cohesion are brought out, emphasizing the sharp contrast between the apparent 'aequitas' of a common opinion and 'iuris subtilitas', understood as dogmatic truth emerging from strict interpretation of the law.[50] Accordingly, the view defended by the gloss should be relaxed and the scope of liability 'in solidum' of the heirs restricted to situations in which solvent heirs did not succeed in making inventory of the estate of the deceased (and could not, consequently, avail themselves of the 'beneficium inventarii'). As for the singular successors of an usurer, their duty is confined strictly to the restitution of assets subrogated for the sums extorted by means of usury. Not surprisingly, the arguments advanced in favour of the latter interpretation stem too from concerns of equity and moral safety, for it would be unreasonable to demand others to share the fate of an usurer long deceased and bear the yoke of his sins even after the period of prescription 'longissimi temporis'.

Ultimately, try as he might in his attempts to distance himself from the view commonly approved, Hostiensis does not seek to

[50] Hostiensis, *Lectura* to 5.19.9 fol. 297vb s.v. *cogendi* (in medio): 'Considerata tamen veritate et subtilitate iuris, cum certum sit multos possidere aliqua, que notum est fuisse usurariorum, qui nunquam de usuris satisfecerunt, durum est sentire, quod omnes tales possessores ad restitutiones eorum, que possident, taliter teneantur, maxime cum forsan xl. anni vel plures elapsi sint, quod usurarii mortui fuerunt. Et gravius est tot animas condemnare. Ideo videtur quod distinguendum esset inter heredem et non heredem. Heres in solidum astringitur, si non fecerit inventarium, alioquin contra, C. de iure delib. Sancimus, § ii. iii. (Cod. 6.30.22.2-3) et sequentibus, sicut et in solidum acquirit actiones, infra eodem Michael (X 5.19.17) C. ut act. ab herede et contra heredem, inc. l. unica (Cod. 4.11.1). Is autem, qui heres non est, et ad quem alias pervenit non videretur teneri, etiam si ex causa lucrativa ad ipsum pervenisset res defuncti, ut patet C. de donationibus Heris alienis (Cod. 8.53.15 pr.) et l. Si patri tuo (Cod. 8.53.24), C. de act. hered. l.finalis (Cod. 4.39.9) ff. ad Trebellianum l. i, § Si heres (Dig. 36.1.1.16), nisi esset saltem res ex pecunia fenebri empta, quod dic, ut legis et notas supra eodem Cum tu § finalis (X 5.19.5). Nec aliquo iure cavetur, quod possessor non heres de alia re teneatur. Et iunge hoc his, quos notas supra, de sepul. parochiano (X 3.28)'.

undermine its validity ‘in extenso’ or dissuade from its application.[51] The persuasiveness of the argument from authority, itself not entirely devoid of substantial reasons, seems to prevent him from more frontal attack, and it is with caution that he provides the reader with his approach that is both more coherent within the general regime of the heirs’ liability and realistic.

While Hostiensis does, as mentioned, oppose the common opinion to ‘veritas’ and ‘subtilitas iuris’, there is nothing in the text to suggest that he may deem it an instance of an ‘opinion notoriously false’, and as such to be disregarded consequently ‘in toto’. It is only with the later development of the canonist thought that the earlier view is to be expressly discarded. The intrinsic incompatibility of the touchstones for the evaluation of the heir’s liability prescribed by the gloss (pro portione hereditaria / in solidum) is exposed in the fifteenth century by Panormitanus. The possibility of an ‘actio in rem’ (as a consequence of the rule: ‘omnia bona sunt obligata’ and a tacit general mortgage on the property of ‘de cuius’) against the enriched (be it an heir or a third person) is also plainly rejected. More importantly, from the perspective of legal argumentation, Panormitanus strives to exploit the rhetorical force of opposition between a common view held by ‘antiqui’ (communis opinio antiquorum) and a common opinion of ‘moderni’ (‘sed moderniores communiter tenuerunt oppositum’), corresponding to the adherents of Hostiensis’

[51] The contrast between a common view and a singular ‘dictum’ of Hostiensis is reinforced in the rephrasing of the discussion by Joannes Andreae, *Novella* to X 5.19.9 fol. 75ra n.3: ‘Hoc nimis est durum secundum Hostiensem, si intelligatur de non haerede, unde licet dictum glossae videatur multis favorabile, et aequum, et communiter approbetur, sibi tamen videtur, quod licet haeres, qui non fecit inventarium, teneantur in solidum, tamen non haeres, etiam si res ad eum ex causa lucrativa pervenerit, non tenetur’. The author, elaborating on ‘rationes’ raised by the gloss and summarising the position held by Hostiensis stops short of discussing at any greater detail the relation between the two opinions. Though it may well be argued that, conforming to the rule of thumb traditionally observed in excavating the final solution in the apparatus of glosses, if there is no trace of approvement (e.g. by further qualification) of any of the preceding opinions listed by the author, the last one is to be implicitly favored, the denial of an open critique of the view determined to be a common opinion is somewhat revelatory in itself.

solution. Consequently, as the more recent pattern of thought replaces the older one, the application of the latter is nevertheless not automatically disallowed, providing it is used 'favore animae defuncti'. This again pinpoints the bias towards considerations of moral security and acts as a safeguard in the hands of a prudent judge if the subsequent adoption of the decision may induce greater moral accuracy. As such it prefigures the ongoing discussion on the presumptive strength of 'communis opinio' and the catalogue of exclusionary substantial reasons precluding its mechanic application.[52]

[52] Panormitanus, loc. cit. fol. 239va n.7-10: 'Secunda conclusio glossae est quod altero haeredum effecto non solvendo, alius potest conveniri in totum, quia bona usuarii sunt obligata pro usuris restituendis. Et ex hoc ultimo posset colligi tertia conclusio. Sed si hoc ultimum esset verum, videretur etiam, quod si alter haeredum esset solvendo, posset unius conveniri in solidum, in quantum sufficiunt bona ad eum devoluta, si ageretur hypothecaria. Et incipiendo ab hoc ultimo scias, quod communis opinio antiquorum fuit illa, de qua in ista glossa, videlicet quod omnia bona usurariorum sunt tacite obligata, de quo vide glossa in c. Quamquam, eodem titulo, lib. 6 (VI 5.2) in ver. *facultas*, in fine. Sed moderniores communiter tenerunt oppositum, ut Hostiensis hic, Ioannes Andreae in dicto c. Quamquam, dicendo hanc hypothecam nullo iure probari, et Federicus (Petruccius de Senis), consilium 22, dicens quod ex quo hypotheca non est iure expressa, non debet per doctorum interpretative induci, et c. Cum tu, super eodem (X 5.19.5) non loquitur generaliter de omnibus, sed de bonis emptis ex pecunia usuraria. Nec etiam ibi probatur, ut ibi dixi, quod illa bona sunt obligata . . . Et haec opinio, ut Antonius (de Butrio) refert, fuit alias in facto servata, nec curandum de communi opinione antiquorum, ex quo iure non probatur. Nota bene hoc dictum quod licite iudicatur contra communem opinionem doctorum, et etiam glossae, quando illa opinio iure non probatur, et ita dicit singulariter Ioannes Andreae in dicto capitulo de constitutionibus (X 1.2.1), quod ubi communis opinio est evidenter falsa, non tenetur iudex illam sequi, et quod iudex acutissimi ingenii debet hoc existimare, pro hoc facit l.i. C. de vete. iu. enucl. (Cod. 1.17.1). Et ex praedictis potest inferri, quod prima conclusio glossae sit vera, ut teneantur pro hereditatis portionibus, et secunda conclusio sit falsa, tanquam fundata super opinione damnata. Si enim bona non sunt obligata, ergo alius heres non tenetur in solidum altero effecto non solvendo. Doctores tamen communiter tenent illam conclusionem, quae (ut dicit dominus Antonius, et bene) posset practicari favore animae, ut sic liberetur facilius anima defuncti ex integra satisfactione. Unde de iuris rigore non videtur conclusio vera'.

The very pattern of finding rationale through this kind of 'argumentum ad verecundiam' pervades also Baldus' style of argumentation. In a hypothetical case of testamentary substitution of a minor, survived by his relatives, the words of the provision were vague enough to raise a question as to the nature of substitution, and accordingly, the identity of a substitute.[53] The sort of substitution Baldus gives an example of, deliberately concise and omitting the express condition of direct heir's death before the age of puberty, was known to medieval jurists as 'compendious' and, if deftly crafted, was held to encompass elements of both common and pupillary substitution. Following a largely technical distinction offered in the Accursian gloss, Baldus advocates intestate succession, like in a typical case of a common substitution, yet at the same time vests in the substitute an interest 'ex causa fideicommissaria'. This obviously makes such a disposition sound much like a pupillary substitution, with a notable exception that no further restraints as to age of the deceased heir are imposed.[54]

[53] Baldus de Ubaldis, *Commentaria* (Lyon 1539) to Cod. 6.26.8 fol. 79va n.38: 'Modo ergo revocemus in dubium istum passum quod utilissimus est et sepe de facto contingit. Testator filium impuberem heredem instituit et idem substituit sub hac forma: "quandocunque filius meus decesserit, talem substituo". Tandem mortuo patre decedit impubes superstite matre vel aliis coniunctis et substituto. Queritur quis succedat impuberi, an substitutus, an veniens ab intestato? Respondet glossa, quod veniens ab intestato, quia illa substitutio est omni tempore fideicommissaria, tam in pupillari etate, quam postea. Tamen isti venientes ab intestato, sive sit mater, sive quicunque alius, tenentur restituere hereditatem, deducta tamen legitima et trebellianica, quia illa est necessaria conclusio, supposito quod substitutio sit fideicommissaria, ut in c.i. de testamentis, lib vi. (VI 3.11.1), et extra eodem c. Raynutius (X 3.26.16) et c. Raynaldus (X 3.26.18). Modo restat probare antecedens, scilicet quod ista substitutio sit omni tempore fideicommissaria. Sed hoc probatur ex verborum aptitudine et sermonis unitate, et non dividenda testatoris voluntate, et vitanda absurditate, et ex voluntate testatoris verisimilitate, exequenda humanitate, et ex rigore preferenda equitate'.

[54] The possibility of one species of substitution being transformed into another at the very moment of reaching puberty, is explicitly excluded later in the text of the commentary.

Having dispensed with this tentative conclusion, Baldus turns to investigate the soundness of the very assumption that such a substitution is indeed invariably fideicommissary. A catalogue of reasons, both formal and substantial in nature, is adduced in defence of the view presented, ranging widely from external conventional considerations, such as common use of words, coupled with a plea for internal coherence of the will, to the purely equity-based sort of argumentation. Accordingly, the opinion taking into account mother's interests is characterised as a compromise (via media), with 'mens iuris' overriding in case of ambiguity any harshness resulting from literal interpretation (rigor verborum). The final thrust of the argument, however, seems to stem from juxtaposing 'rationes' with 'auctoritates', that are due to provide thus the ultimate standard of corroboration. Such particular arrangement of arguments within the compositional structure of the fragment is devised by Baldus so as to emphasize the compelling authority of 'communis opinio', referred to as a final seal of approval, serving as a rhetorical colophon of the whole passage. By subscribing to what the commonly approved view dictates, Baldus underscores the need for aligning himself with the community of scholars, perceived as a mystical unity of generations past and living, collecting the opinions of his ancestors like the ears of grain and seeking full communion with them.[55]

Despite all that declared deference, even though invoking 'communis opinio' provides a sense of rootedness and legal security, it is by no means tantamount to definite closure of the discussion. For being a part of dialectical repertoire, it is itself to be subject to the rigorous standards of elenctic refutation.[56] Since

[55] Ibid. fol. 79vb n.38: 'Item interpretatio prudentium communiter tenet hanc opinionem, et ego, qui ea, que sunt tradita a magistris legum recito, et post terga metentium quasi spicas recolligendo vado, ut dicit Ruth, c.2 (Ruth 2:3). Ita sepe consului, me ab universitate doctorum separare non audens'.

[56] Ibid. fol. 80ra n.41: 'Quarto hoc probatur per punctum rationis. Et hoc attende, nam posito quod opinio secundum quam conului esset vera in matre, tamen in aliis succedentibus ab intestato videtur omnino falsa. Et premitto, quod substitutio compendiosa continet vulgarem quasi expressam, ergo continet tacitam pupillarem, tanquam inclusam sub vulgari. Posito ergo quod neges pupillarem expressam, non potes negare tacitam, que admittitur contra omnes,

the compendious form determines that beneath the surface of an ordinary substitution lurks a concomitant, tacit pupillary provision, it is no wonder that in case of the subsequent death of the heir it is the substitute who will be allowed to take his place directly, at the expense of statutory heirs, save for the mother alone.[57] That is why the common opinion is eventually upheld, though necessarily restricted in the scope, justified only as far as anchored in the equity-based considerations. Consequently, it clearly makes a case for 'communis opinio' to look like a probable argument, if ultimately the one always open to revision, and it is precisely the presumed substantial merits it promises to warrant that make it so temerarious to break free from its spell.

In a more pragmatic tone, the fifteenth-century commentator, Raphael Fulgosius, in a comment concerning effects of adverse possession against a minor advises his readers to adhere to the view held by the Accursian Gloss and shared by the majority of doctors, championing interruption of prescription against a minor in case of succession, in spite of his personal preference to the opposing opinion of 'doctores ultramontani', admitting only suspension.[58] The intrinsic obscurity of the question and the doubt

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preterquam contra matrem, et huic rationi non videtur responderi, nisi quis diceret quod quasi expressa vulgaris contenta in compendiosa, non continet tacitam pupillarem, quia tacitum non continet tacitum, nam essent due fictiones. Sed cum dictum sit superius, quod talis vulgaris contenta in compendiosa est potius expressa quam tacita, dicta responsio non videtur vera. Communis ergo opinio sit vera in matre, sed non in aliis succedentibus ab intestato'.

[57] In that case she will be an heir in the eyes of the law, notwithstanding her subsequent duty to satisfy the 'fideicommissum', and granted the power to withhold a 'pars legitima' as well as a quarter from *lex Falcidia*, allotted by virtue of *SC Pegasianum*.

[58] Raphael Fulgosius, *Commentaria* (Lyon 1548) to Cod. 2.40.5 fol. 113r n.3: 'Nos loquimur de impedimento differenti, non extinguenti. Nam privilegiatus succedens non privilegiato, utitur privilegio suo, quod differt, non quod extinguit. Sic dicunt isti doctores (sc. ultramontani). Sed glossa, si meministis, dixit oppositum in l.una, supra, si adversus ususcap. (Cod. 3.35.1), ubi dixit legem illam etiam hodie non corrigi per istam legem et movetur per l. Si fundum (Dig. 23.5.16). Et illam sententiam doctores nostri communiter sequuntur, ea maxime ratione: quia dicunt speciale ius poni in preallegato § Pupillari (Cod. 7.39.1), ergo in aliis ius commune sit contrarium . . . Et vos etiam hanc

that arises from it, make out a strong case for espousing a view already received in the legal scholarship, its rationale being found in the Roman 'regula iuris', according to which one should avoid all distortion whenever there is already a clear and observed line of interpretation.[59]

This kind of argument strives for taking advantage of similarities between the theory of custom, elaborated by the glossators, and the bindingness of a 'communis opinio'.[60] The similarities encompass both the formation of each phenomena (consensus plurium) and the requirement of intrinsic reasonableness, highlighted by their precarious nature face to a 'melior ratio' (in the words of Constantine: 'non usque adeo sui valitura momento, ut . . . rationem vincat', Cod. 8.52.2). In particular the problem of relation between legislation and interpretation (whether customary or juridical), with the claim for exclusivity on the part of the prince (*Inter aequitatem*, Cod. 1.14.1 and other constitutions from the title *De legibus et constitutionibus* of the Justinian's *Codex*), and the utopian vision of mechanistic juristic interpretations, deprived of creative components, imposed by Justinian in the constitution *Deo auctore* (as a foreword to the *Digest* and inserted later in Cod. 1.17.1) necessitated on the part of the learned doctors the profound reflection on the content of *Lex regia* as well as on their own role as 'iuris conditores'.

The commentators relied upon two concepts to understand the theory behind behind the interconnection between 'consuetudo' and 'communis opinio'. First, according to Baldus, the duty to adopt universally accepted interpretations of scholars in the process of adjudication sprang from the fact that they have the

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sequimini. Hec non est res ita clara, quod ut possit una pars falsa, altera vera ostendi. Atamen litere legis generalitas multum facit pro sententia ultramontanorum contra sententiam communem. Sed, ut dixi, sequimini communem, quia minime mutanda sunt que certam diu interpretationem habuerunt'. See Chiara Valsecchi, 'Fulgosio, Raffaele', DGI 1.913-915.

[59] Dig. 1.3.23.

[60] For a thorough analysis of medieval jurists' theory of custom, in particular with regard to the vexed question of customary derogation of statutory provisions by means of desuetude, see Ennio Cortese, *La norma giuridica: Spunti teorici nel diritto comune classico* (2 vols. Milano 1964) 2.104-146.

rigor of a customary rule, binding in a similar way a custom does.[61] There is then, in the observance of commonly received opinions, much more than a simple rhetorical appeal to authority and a topical usage of 'locus ab auctoritate'; the association with the custom ensures the elevation of their status to the dignity of subsidiary source of law. This is closely related to the second implication: it is the firmly observed and constant usage that corroborates a common opinion, thus providing for its validity.[62]

This point is made forcefully by Engelmann who insists on this affinity as a key element for understanding the argument's validity in the judicial practice.[63] As for his claim that, in contrast to the canonists, the argument was recognized as binding in the legists' discussion no sooner than in the course of the fifteenth century, there seems to be no convincing proof that that was really the case, as no substantial difference in treating the question of validity can be seen. Although as we have seen the first theoretical reflection was indeed offered by decretalists, the doctrine is clearly perceivable in the legists' thought. Bartolus (at least implicitly, while discussing judge's liability), Baldus and Angelus all seem to attribute to communis opinio some form of cogency.[64]

A more recent line of thought prefers playing on the analogy with the binding force of a statute. A short remark from a rather

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[61] Baldus de Ubaldis, *Commentaria* (Turin 1578) to X 1.2.5 fol. 10va n.3-6: 'Exponitur dictum Salomonis dicentis: ne innitaris prudentiae tuae, id est proprium intellectum non debes praeferre dictis sanctorum patrum et doctorum approbatorum. Quaerit Innocentius, quid si sancti patres habuerunt diversas opiniones. Dicit Innocentius, quod tunc recurritur ad propriam conscientiam, non confictam nec simulatam, ut nota in c. Cum aeterni., de re iud., lib.vi. (VI 2.14.1). Dicit Johannes Andreae, quod in diversitate opinionum debemus sequi opinionem communem. Quia opinio communis habet vim consuetudinis, ut ff. de legi., l. Si de interpretatione (Dig. 1.3.37). Item, caveant iudices, ne in dissensione opinionis eligant eam quae minimum habet rationis. Quia ratio naturalis se ipsam ostendit et veritatem occultam non sinit. Tamen non debet dici ratio nisi sit bona, ut ff. de legib. l. Non omnium (Dig. 1.3.20)'.

[62] Cf. e.g. Alexander Tartagnus, *Consilia* vol. 5 cons. 165 fol. 164va n.5: 'Loquor secundum magis communis opiniones de consuetudine approbatas, tam in iudiciis, quam in scholiis, ut aiunt doctores in dictis locis'.

[63] Engelmann, *Wiedergeburt* 213-216.

[64] For Engelmann's view, see ibid. 220.

historical standpoint by Baldus' brother, Angelus de Ubaldis, on filling the legislative lacunae by adducing jurists' opinions paved the way for understanding further implications.[65] Johannes Nevizzanus, in the beginning of the sixteenth century, does not hold back from attributing to a particularly well consolidated opinion the dignity of authentic scripture in case of deficiency of expressed legal dispositions.[66] Other late civilians also insist on ascribing to a common judgment the force of law (vis legis), urging to adhere to its rigor whenever a norm of statutory 'ius proprium' refers to a disposition found in the 'corpus iuris'.[67]

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[65] Angelus de Ubaldis, *Lectura* (Lyon 1534) to Dig. 2.1.11 fol. 26rb n.1: 'In texto ibi, "Sabino et Cassio", nota quod pro decisione dubii sufficit allegare autoritatem maiorum.' Ironically, in the source the interpretation by early classical Roman jurists on the limits of judge's jurisdiction in case of 'concursus actionum', was later confirmed by imperial rescript, substituting authentic interpretation for magisterial one.

[66] Nevizzanus, *Sylva nuptialis* book 5 103 n.24: 'Nihilominus, si legem nec rationem habeamus, sufficit nobis quod doctores communiter aliquid teneant. Et satis dicimur tunc habere authenticam scripturam. Sufficit enim nobis doctorum authoritas . . . Et sufficit, quod sit magistraliter dictum, licet non proberetur lege . . . Nec mirum, quia Iustinianus Imperator adeo restrinxit iura nostra, quod nisi supervenisset tot doctorum ingenia, infiniti casus remanerent indecisi, ut saepe dicebat Iason, inferens quod propterea fuit valde necessarium ingenium Baldi, qui tantum ius nostrum locupletavit'. This is of course a far cry from Justinian's remedy of appeal to the 'princeps' as the sole way to amend structural incompleteness of the body of law.

[67] Augustinus Beroius, *Consilia* (3 vols. Venice 1577) cons. 91 vol. 2 fol. 393a n.16-17: 'Verum ego respondeo, quod dictum statutum, dum mentionem de lege facit, debet intelligi de iure communi, sicque legis appellatione comprehendatur ius commune, quod non modo ex lege civili, et imperiali constitutionibus, sed ex aliis quoque partibus iuris, et sic ex communi opinione glossarum et doctorum, quae vim legis habere, et ius facere dicitur, quod est iudicando, et consulendo servandum, neque ab illo fas recedere, ad tradita per Ioannem Andreae, Innocentium, et alios in c. i et c. Ne innitaris, extra de constit. (X 1.2.1; X 1.2.5)'; Cataldinus de Boncompagnis, *Tractatus de syndicatu* in *Tractatus de syndicatu variorum authorum* (Venice 1571) fol. 14rb n.35: 'Opinio communis, non singularis et peregrina aliquorum doctorum tenenda est, Baldus, ff. de senatoribus l.ii. in fine (Dig. 1.9.1). Opinio magistralis in non diffinitis lege, pro lege servanda est'; Coratius, *Tractatus de communi opinione, preface* 11 n.30-33: '<D>emum decreverunt, communem ipsis lege esse aequiparandam, et eius virtutem, ac vim fortiri . . . et communem servanda esse tanquam ipsum ius . . . Quinnimo quoad hoc, ut servari debeat, communem opinionem venire

The reflection on the validity of an argument from commonly approved beliefs leads the commentators to expound on the epistemic quality of 'communis opinio'. Already an old adage of the glossators and first commentators 'opinio pro veritate habetur' drew on the relation between a commonly shared opinion and dogmatic truth.[68] In the mature form of the argument it finds its foundations in the logic of presumptions. In the state of interpretative doubt, finding a generally approved point of view serves as a guide for the very object of dialectical reasoning, that is a quest for discovery of practical truth.[69] The veracity of opinions is yet as precarious as contingent and changeable are the matters of practical discourse, part of which is jurisprudence (veritas praesumpta), and should be contrasted with the infallible truth attainable in the realm of speculative and demonstrative philosophy (veritas certa et clara).[70]

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appelatione legis in statuto de lege loquente'. See Marco Cavina, 'Berò, Agostino', DGI 1.232-233; Enrico Basso, 'Boncompagni, Cataldino', DGI 1.286.

[68] See, e.g., Durandus, *Speculum iudiciale* book 3 part 1 § 5 Sequitur fol. 21vb n.4. The maxim was forged with reference to the former meaning of the term in the sense of 'fama', and was closely related to yet another adage, 'opinio praevalet veritati', its 'locus classicus' being the famous law *Barbarius* (Dig. 1.14.3). The regula was often quoted in the thirteenth century, finding its place in Damasus' *Brocarda* TUI 18 fol. 512ra n.17. This shows the closeness and interweaving between such concepts as 'fama', 'opinio communis' and 'error communis' in the early stages of their development in medieval legal thought. On the interpretation of *Barbarius*, the doctrine of common error and the 'regulae iuris': 'plus valet quod in opinione' and the converse 'plus valet quod in veritate' in the *Ius commune* and French customary law, see Deroussin, *Juste sujet* 33-63. The most complete handling of the subject is now in Guido Rossi, *Representation and Ostensible Authority in Medieval Learned Law* (Studien zur europäischen Rechtsgeschichte, Veröffentlichungen des Max-Planck-Instituts für europäische Rechtsgeschichte 319; Frankfurt am Main 2019).

[69] Andreas Alciatus, *Tractatus de praesumptionibus,* pr. 51, fol. 192 n.2: 'Et istud facit pro communi opinione, quae in dubio praesumitur verior, ex quo est a pluribus approbata. Et propterea in iudicando iudices non debent ab ea discedere, c. Novimus, extra. de verbo. signif. (X 5.40.27), l.i., versiculum: "et sane crebrior", de offic. quaest. (Dig. 1.13.1pr)'.

[70] Coratius, *Tractatus de communi opinione,* book 2 tit. 8 152-153 n.8-10: 'Tertio iuvatur opinio ista hac ratione, nam veritas semper est una, et eadem, et

According to Coratius, the presumption of truth springs from two principal qualities attributed to the learned jurists, namely the intellectual aptitude on the one hand, flowing from their expertise in the field, and moral excellence on the other.[71] It is in this spirit that 'legum doctores' are qualified by the author by the term 'testes iuris', since in writing their advices and their magisterial works they are supposed to deposit testimonies on the arduous questions of law. The judges are, in turn, invited to discern the truth corroborated by the evidence collected by the learned. It goes

semel verum semper verum . . . Sed communis non est semper eadem, nam in una quaestione modo affirmativa, modo negativa est communis . . . Haec quoque ratio evitatur duobus modis. Primo, quia veritas est semper eadem secundum naturam, secus vero de iure, nam ius in dies mutatur secundum tempora, et personas, l. 2 § Sed quia divinae, C. de vet. iur. enucl. (Cod. 1.17.2.18), l. Exigendi, cum ibi notat, C. de procurat. (Cod. 2.12.12pr), cum similibus . . . Secundo respondeo, quod veritas est semper eadem, quando sumus in veritate certa et clara, secus in praesumpta, quae mutatur ex mutatione praesumptionis. At communis opinio non est sed solum praesumitur vera . . . Neque ista praesumptionis mutatio afferre debet admirationem, cum oriatur ex opinionibus, quae ab hominibus procedentes humanam conditione imitari debent, et sic tanquam homines nasci, pubescere, et senescere'.

[71] Ibid. preface 13 n.41-44: 'Communis enim, vel magis communis vera praesumitur . . . Quae praesumptio veritatis oritur ex auctoritate Doctorum, nam Doctor et bonus, et peritus praesumitur, unde et tanquam bonus velle, et tanquam peritus posse dicere veritatem censetur, itaque ista praesumptio tam aeque viget pro opinione parvo Doctorum numero fulcita, quam pro ea, quae maximo iuvatur, cum in unaquaque interveniat auctoritas, sed maior numerus, et consequenter maior auctoritas maiorem praesumptionem veritatis inducit, minor vero minorem praesumptionem. Unde cum magis communis opinio maiori numero, et auctoritate Doctorum roborata fit . . . sequitur ut maiorem habeat veritatis praesumptionem, cumque una praesumptio maior tollat aliam praesumptionem minorem'. This insistence on both ethical and dianoetic virtues as constituents of the doctors authority seems to echo the requirements of the 'professiones liberales' from postclassical constitutions of Julian (*Magistros*, Cod. 10.53.7) and Justinian (*Professores*, Cod. 12.151) and the subsequent discussion among legists on the reasons for precedence of 'legum doctores'. See e.g. Patrick Gilli, *La noblesse du droit: Débats et controverses sur la culture juridique et le rôle des juristes dans l'Italie médiévale* (XII^{e}-XV^{e} siècles) (Études d'histoire médiévale 7; Paris 2003) 71-81; di Noto Marrella, 'Doctores' 2.294-303; Gabriel Le Bras, 'Velut splendor firmamenti: Le docteur dans le droit de l'église médiévale', *Mélanges offerts à Étienne Gilson* (Études de philosophie médiévale; Toronto-Paris 1959) 375-383.

without saying that this presumption is even stronger when opinion is supported by several authors, since, as Panormitanus observed, truth is better sought by multitude than by a single author.[72] It follows, that what is more common, is more probable.

But just as the excellence of many prevails over that of a single doctor, one common opinion must cede when another becomes more received, by virtue of its subsequent approbation by the majority of the doctrine. The evolution of the concept is clearly visible in the fifteenth century consilia literature which starts to refer to the comparative form: 'opinio magis communis'.[73] Yet the relation between an earlier view confirmed by the majority, and the subsequent ascension to power of an opposing opinion, now predominant, is in the writings of more modern writers far more subtle than that of simple derogation. Coratius goes to great lengths in order to explain that a more common opinion does not entirely abolish the one that preceded

[72] Panormitanus, *Commentaria* to X 1.2.1 vol. 1 fol. 37-38 n.15: 'Secundo casu principali, quando dubium est positum inter opiniones doctorum, tunc si est reperire communem opinionem, non debet iudex ab illa recedere, quia vae soli . . . et communiter maior pars melius investigat veritatem.'; Ibid. to X 1.29.21 vol. 2 fol. 127ra n.4: 'Praesumendum esse pro pluralitate doctorum et iudicum. Unde sententia vel opinio videtur firmior, et verior, quando plurimorum iudicio est confirmata. Nam facilius invenitur quod a pluribus sapientibus quaeritur, ut in c. De quibus, 20 dist. (D.20 c.3). Hinc Salomon in proverbiis suis: dissipantur cogitationes, ubi non est consilium (Prov. 15:2), et ibi salus, ubi multa consilia (Prov. 11:14). Et ex hoc infertur, qualiter sit iudicandum, quando dubium est positum in conflictu opinionum, debemus nos illam opinionem amplecti, in qua plures doctores inclinant. Hoc verum, nisi illa opinio possit convinci probabilioribus rationibus'.

[73] Augustinus Beroius, *Consilia* cons. 177 vol. 1 fol. 672a n.20-21: 'Sed tamen credo opinionem Bartoli esse magis communem, tum propter auctoritate eorum, qui cum Bartolo tenent, illumque sequuntur, tum etiam propter numerum doctorum qui hoc sequuti fuerunt. Et in discernendo, quae sit communis opinio, non solum numerus, sed etiam auctoritas doctorum attendi debet.'; Alexander Tartagnus, *Consilia* cons. 202 vol. 7 fol. 149ra n.7: '<E>t accipitur magis communis opinionem quando doctores maioris ponderis et authoritatis sunt pro una parte, quia non debet attendi numerus, ut doctores nostri dicunt, et sine dubio semper mihi visum est, quod doctores maioris authoritatis sunt pro opinione dictae glossae'.

it, in the way a subsequent legal enactment or a later custom do.[74] In order to illustrate it, he aptly makes use of an 'astral' metaphor. Just as the rising of the sun does not deprive stars of their splendour, but simply render them invisible by reason of its dazzling light, so too a more received opinion, endowed with a major presumption, temporarily extinguishes the presumption of a less common one, not precluding its future fortunes. What seemed to become quite vexatious, if delicate issue, was the eventuality of an impasse between two common opinions (communes contra communes), resulting in formal undecidability for an interpreting agent, and thus potentially opening way for unbounded exercise of judicial discretion. Adopting Azpilcueta's position as to the rigid criteria of demarcation of what actually constitutes a common opinion appears to make it at least theoretically conceivable, in the way that prefigures the discussion on probabilism in the sixteenth and seventeenth-century Jesuit and Dominican moral theology.[75]

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[74] Coratius, *Tractatus de communi opinione,* preface 12-13 n.38-42: 'Eodem modo magis communis: non enim communis opinio a magis communi in aliquo differt, nisi quod quoties communis et magis communis concurrunt, servatur magis communis, ita ut in communis disposita habeant locum in magis communi, et e contra, et quoties loquimur de communi, etiam de magis communi loqui intelligimur, superveniens tanquam lex, quae posterior penitus tollit, et delet, disposita per priorem legem contrariam, ita ut nulla lex nunquam vires recuperet; abrogat et tollit communem, ut autoritates quae sunt pro communi, non possint facere numerum pro eadem opinione, si quando, ut saepius accidit, ea tractu temporis magis communis efficeretur per adhaesionem aliorum autorum. Sed solummodo magis communis superveniens praeiudicat, quod donec permanet magis communis attendenda, ac servanda est. Et id quomodo procedat ostenditur naturali exemplo, nam lumen, et splendor syderum per adventum solis non amplius nobis apparet, ac si penitus sydera lumine essent orbata, idque procedit, non quod sol abstulerit splendorem syderibus, quae tam diurno, quam nocturno tempore illum retinent, sed quia proprio lumine ac splendore longe maiori occupat, adeo superat splendorem syderum, ut nullus omnino nobis ostendatur, ita in proposito magis communis servatur, et praefertur communi contrariae non auferendo, vim et efficaciam ipsi communi, sed solummodo superando maioritate vis et roboris, nam communis, vel magis communis servatur non ex eo, quod contineat certam, et claram veritatem, sed solum quia praesumitur, quod sit vera vel verior. Communis enim, vel magis communis vera praesumitur'.

[75] For a short introduction, see James Franklin, *The Science of Conjecture: Evidence and Probability before Pascal* (2nd ed. Baltimore 2001) 83-84 and 88-

For his part, Coratius is at pains to demonstrate how to evaluate and stratify opinions between them, but even his elaborate and purportedly objective method of quantitative reduction of 'auctoritates', admits the case of failure in determining 'opinio magis communis', so that the whole elaborate edifice amounts to no more than a conjecture, ultimately leaving the final evaluation to the judge's conscience.[76]

Exclusionary reasons

By definition, the presumption of veracity remains always defeasible whenever it is possible to prove the existence of a just cause to disobey its command (iusta causa recedendi).[77] A question then arises, whether with regard to considerations of legal security and internal coherence, it is possible to formulate a typology of reasons that might limit the scope of the application of 'communis opinio'. In the sixteenth-century treatises on the

94; Rudolf Schüssler, 'On the Anatomy of Probabilism', *Moral Philosophy on the Threshold of Modernity*, ed. Jill Kraye and Risto Saarinen (The New Synthese Historical Library: Texts and Studies in the History of Philosophy 57; Dordrecht 2005) 92–111; Jonsen, Toulmin, *Abuse of Casuistry* 164-175. For a more detailed study, see Deman, 'Probabilisme' 13.457-558; Kantola, *Probability and Moral Uncertainty* 124-142; Rudolf Schüssler, *Moral im Zweifel* (Perspectiven der Analytischen Philosophie. Neue Folge, Paderborn 2003) 1.152-174 and 1.178-184; Robert A. Maryks, *Saint Cicero and the Jesuits: The Influence of the Liberal Arts on the Adoption of Moral Probabilism* (Aldershot 2008) 107-122; Schuessler, *The Debate on Probable Opinions* 60-148.

[76] Coratius, *Tractatus de communi opinione*, book 1 tit. 4 50 n.42. For an ample discussion, see book 1 tit. 4 38-50 n.1-25, and again at book 2 tit.9 Casus 32 226-230 n.164-177.

[77] Ibid. book 2 tit. 9 211-212 n.146-147 and 150: 'Vigesimusnonus casus est, quando adesset aliqua causa, per quam iudex potest adduci ad non servandam communem. Et hoc casu indistincte concludendum est, communem non debere attendi . . . Et est verissimum, nam ex causa receditur a lege, et a regula iuris . . . Quae vero est iusta causa recedendi a communi, et a lege, non insisto, quia non est praesentis indagationis . . . '. This is the very test of rationality that each common opinion should stand up to, emphasized already by Hostiensis and Johannes Andreae (nisi rationabiliter convincatur).

subject such circumstances take on the form of specific conflict rules excluding cogency of the latter.

They can be broadly divided into three categories. In the first place comes an encounter with formal or deontic authority.[78] This class includes mandatory sources of positive law, such as legal enactments or customs, as well as necessarily binding, 'authoritative' interpretation stemming from a doctrinal authority, that is the one coming from the emperor or the pope. The opinions of Fathers (dicta sanctorum) for the canon law are also encompassed within that class.[79]

The second category of circumstances that might exclude following 'communis opinio' consists of opinions grounded mainly on the prestige of their authors (epistemic authority). The most discussed example within the group occurs to be the question of the authority of the Accursian Gloss, the deference to which being so strong in the legal practice that it was once compared by Cinus to an act of idolatry (glossa idolum advocatorum).[80]

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[78] I refer here to the distinction offered by Józef M. Bocheński in his classic analytical studies on authority, Józef M. Bocheński, *The Logic of Religion* (Deems Lectureship in Philosophy Series; New York 1965) 162-173. For a concise summary of his conception, see Anna Brożek, 'Bocheński on authority', *Studies in East European Thought* 65 (2013) 115-122. The distinction between deontic and epistemic authority fits to a certain extent into the old dichotomy between *auctoritas necessaria* and *auctoritas probabilis* of the first glossators, drawing mainly on *Inter aequitatem*, Cod. 1.14.1. See Cortese, *La norma giuridica* 2.363-377.

[79] For the most ample treatment of this question, see Coratius, *Tractatus de communi opinione*, book 2 tit. 9, 217-219 n.135-137 (statute), 201-202 n.97-99 (custom), 192-194 n.76-79 (pope's and prince's 'authentic' interpretation of the law), 191 n. 69-72 (sayings of the saints). The latter category, in order to prevail over a common opinion, should be founded on the Scripture. This echoes the old problem of the status of 'dicta sanctorum' in relation to the sources of positive law, explored by decretists focusing on the D.9 c.9 and D.20 c.1 and 3. Interestingly, neither Nevizzanus, *Sylva nuptialis* book 5 116 n.66, nor Coratius alludes here to the 'loci' from *Decretum*.

[80] Cf. Cinus of Pistoia, C*ommentaria* (Frankfurt 1578) to Cod.4.10.1 fol. 202r n.4: 'Quid dicemus? Certe, cum sententia Petri <de Bellapertica> placeat. Et glossae sententia sit tenenda, propter usum idolatriae iam praescriptae per advocatos . . . .' Ibid. to Cod.8.37.8 fol. 505v n.1-2: 'Petrus dicit, quod sententia glossae est vera sicut Evangelium. . . . Item, si non moveris propter textum,

Addressing the problem of collision with a commonly approved line of interpretation, some authors like Felinus Sandeus or Philippus Decius, were of the opinion that the authority of the Gloss extended to the point where it effectively prevailed over 'communis opinio doctorum'.[81] A classic text, the advocates of this conception drew on, was a fragment taken from the commentary to *Codex* by Jacobus Butrigarius where the legist proclaimed a general prohibition to depart from the interpretation

sicut quidam faciunt, audi tu, advocate, idolum tuum . . . '. Cf. the small treatise on the subject, taking form of a compilation of quotations, by Antonius Corsetti, *De authoritate Glossae* TUI vol. 18 fol. 186vb-187ra. On the 'tyranny' of the Accursian Gloss and attempts of its rebuttal in the later legists, see Ugo Nicolini, *I giuristi postaccursiani e la fortuna della Glossa in Italia* (Atti del Convegno Internazionale di studî Accursiani; Milano 1968) 3.867-879. See also Engelmann, *Wiedergeburt* 189-202; Lefebvre, *Pouvoirs du juge* 289-292; Horst Heinrich Jakobs, *Magna Glossa: Textstufen der legistischen glossa ordinaria* (Rechts- und Staatswissenschaftliche Veröffentlichungen der Görres-Gesellschaft 114; Paderborn-München-Wien-Zürich 2006) 283-297.

[81] Philippus Decius, *Consilia* cons. 23 vol. 1 fol. 22rb n.6: 'Non obstat, si dicatur, quicquid sit de iure, communis opinio in contrarium videtur, ut attestatur Alexander in locis supra allegatis in contrarium, et a communi opinione non est recedendum. Quia responderi posset, quod ex quo constat veriorem istam opinionem, propter manifestam voluntatem testatoris. Ista potius attendi debet, reiecta communi opinione, presertim quod opinio glossae cum ista parte concurrit. Quia communi opinioni prevalet opinio, que meliori ratione fundatur, secundum Ioannem Andreae in c.i. de constit. (X 1.2.1) . . . Similiter opinio glossae attenditur etiam contra communem opinionem, ut est dictum Iacobi Butrigarii in l.i. C. qui pro sua iurisdict. (Cod. 3.4.1pr.), Baldi in l. Cum hereditas in fine, C. depositi (Cod. 4.39.9) . . . A fortiori ergo in casu nostro hoc dicendum est, ubi ista duo concurrunt, authoritas glossae et meliores rationes. Ex quibus ista opinio communi opinioni preferenda videtur'; Felinus Sandeus, *Commentaria* (Basel 1567) to X 1.2.1 vol. 1 col. 66 n.54: 'Haec limitantur primo, nisi opinio pauciorum doctorum, vel unius fundaretur subtiliori et meliori ratione: qui illa praeponitur communi opinioni, secundum Ioannem Andream et omnes hic . . . Secundo limita, nisi contra communem opinionem fit authoritas glossae, quia illa, quantum ad veritatem, praevalet, secundum vulgatam doctrinam Iacobi Butrigarii in l.unica, C. qui pro sua iuris (Cod. 3.4.1pr.)'. Baldus' commentary to which Felinus here refers, Baldus, *Commentaria* to Cod. 4.39.9 fol. 94ra: 'Quod nota, quamquam multa argumenta possint in contrarium fieri, tamen ita dicit glossa ordinaria, cuius autoritas omnes alias tollit autoritates'. Cf. also Decius' commentary to the same decretal, Decius, *Super Decretalibus* (Lyon 1559) to X 1.2.1 fol. 7vb n.28.

defended by the Gloss, mitigated only in the circumstances where the abandonment of its opinion was sanctioned by a customary rule (nisi usus sit in contrarium).[82]

Notwithstanding hesitations of the preceding commentators, later treatise writers opposed the primacy of the Gloss vigorously. Nevizzanus noted the internal incongruities of the Accursius' compilation, pointing out that the different strata were composed by various authors; a fact that turns on a fundamental difficulty in determining what is the conclusive position defended by the Gloss.[83] On the other hand, if a prevalent view taken by the subsequent commentators departs from the Gloss, there is a presumption that their interpretative choice must have been justified by some other conflicting considerations that manage to counterbalance reasons given by the Gloss.

Coratius in turn succeeded in using in favor of the 'communis opinio' the very same text of Butrigarius which

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[82] Jacobus Butrigarius, *Lectura* (Paris 1516) to Cod. 3.4.1fol. 93rb in fine: 'Ego non recederem a glossa, quia usus non est contra eam. Ubicumque ergo glossa firmat pedes, serva eam nisi usus sit in contrarium. Quia tunc recedas ab ea. Quia etiam a lege receditur propter consuetudinem contrariam, ut patet in aut.(*male*) Dos a patre (Cod. 5.18.4)'. Cf. Nicolini, *Giuristi postaccursiani* 874, and his remarks about the 'interpretative', not 'constructive' significance of the passage.

[83] Nevizzanus, *Sylva nuptialis* book 5 103-104 n.25: 'Amplia secundo praedictam regulam, quod tenenda sit comunis opinio procedere etiam, si contra communem opinionem teneret Papa magistraliter loquendo . . . Etiam si esset opinio glossae, nam licet soleamus dicere, quod est pudor allegare glossam, quando habemus legem . . . vel authoritates doctorum . . . tamen ubi textum non invenitur, sufficit glossa . . . Et glossae fuerunt compositae a diversis authoribus, qui contrariam habuerunt sententiam ad invicem. Et quia positae fuerunt prout sunt inventae, hoc est quod videtur saepius contrariari . . . Et maior est glossae authoritas, quando aliquid tenet in pluribus locis, quoniam opinio plurium glossarum vincit unam . . . In tantum quod Felinus et Decius in cap.1 de constitutionibus (X 1.2.1), post Butrigarium dicunt quod opinio glossae praeferatur communi opinioni, nihilominus hoc non puto verum. . . . Et effectualiter et realiter, consideratis considerandis, non est praesumendum quod doctores communiter moveantur tenere contra glossam, cuius noverunt quanta sit authoritas, nisi habeant legem vel rationem per quam opinio glossae convincatur, quo casu nulla opinio, quantumlibet communis est tenenda, quando convinciteur, ut infra dicam. Ergo effectualiter dicere possumus, quod opinio communis sit praeferenda opinioni glossae '.

formerly served his antagonists. If a concession is granted there to a customary rule contrary to the Gloss, it must undoubtedly be also true for the consistent interpretative practice of the learned, endowed with the force of custom.[84] The consequence of this is that the position defended by the Gloss, even if first among equals with regard to other singular opinions, must yield to a view commonly approved and already well established in the teaching and consiliary practice of the 'doctores'. This is due to the fact that 'communis opinio doctorum' relies on higher epistemic value, its presumption of veracity being in this case stronger.

Finally, there remains a host of situations where incompatibility with other competing considerations is that of substantial character, forming the third class of exceptions. This clearly provides for a number of reasons deserving special legal protection (causae favorabiles), such as the durability of marriage (favor matrimonii), respect for the will of the testator (favor testamenti), the protection of the widow's interests, or those of charitable trusts (piae causae).[85] Whereas a tendency may be

[84] Coratius, *Tractatus de communi opinione*, book 2 tit. 9 179-180 n.25-27: 'Huic quoque rationi facile possumus respondere. Tum quia dictum Butrigarii et aliorum non procedit de necessitate, sed profertur in modum consilii, nam cum veritas non facile possit reperiri, utile est accedere opinioni glossae, cuius auctoritate defendimur, et excusamur, non autem cogimur eam sequi, quia auctoritas glossae probabilis est, non necessaria . . . Tum etiam quia supradicta propositio habet locum in dubio . . . secus vero qundo sumus in claris, existente communi opinioni contraria, quod clare deducitur, quia omnes supradicti fatentur, glossae sententiam non esse servandam, quoties lex vel consuetudo est contra eam. At communis habet vim legis, et consuetudinis, et legi aequiparatur, quoad hoc, ut attendi debeat . . . Praeterea non est dubium, maiorem veritatis praesumptionem habere communem, quam habeat opinio glossae. Ex quibus concludendum est, glossam solum in casu dubio nos sequi debere, exemplo antiquorum, qui recurrebant ad responsa suorum idolorum, quando de aliquo dubitant. Nam glossa dicitur idolus advocatorum, secundum Cynum '.

[85] Cf. e.g.: Matthaeus Matthesilanus, *De electione opinionum* fol. 22vb n.4-5: 'Aut sumus in alia materia, et tunc eligenda est pars benigniori, ut l. Benignius et l. sequentis, ff.de legibus (Dig. 1.3.18-19) . . . Benignius autem dicitur esse, quod in talibus opinionibus iudicetur et consulatur potius pro dote, pro matrimonio, pro testamento, pro libertate . . . Item pro religione seu pro pia causa potius, quam contra . . . Item quod potius iudicetur pro pupillo, vidua, vel alia miserabili persona . . . Et similiter dici potest, quod iudicandum est potius

observed to curb the scope of application of 'communis opinio' whenever a judge or other person interpreting the law can avail himself of such an opinion, motivated by considerations of fairness (opinio benignior), this statement is later somewhat restricted if the opposing view is proven to be clearly and unambigously prevailing.[86]

Consequences of the breach of communis opinio

The extent of common opinion's cogency in binding judge's conscience raises inevitably the question of practical consequences that *Ius commune* associated with its violation. In the earlier commentators a controversy sparked as to whether disobeying its ruling resulted in such a blatant form of contravention that it would therefore justify the nullity of a judgment. Angelus de Ubaldis falls back on an old Roman procedural distinction between outright infringement of the law ('ius legis' or 'ius constitutionis') and lesser breach of litigant's rights (ius litigatoris), with only the former form of contravention justifying invalidity of the sentence.[87] Following Bartolus'

pro ecclesia vel alio loco pio, quam pro privato, non miserabili persona, quia omnia bona ecclesiarum et piorum dicuntur esse pauperum Christi . . . Praedicta autem intelligo, quando opinio seu dubitatio habuit originem in propria persona talium favorabilium'. For a similar overview of 'causae favorabiles', see, e.g. Lancellottus Conradus, *Tractatus de officio praetoris* (Cologne 1578) 321-322 n.24. Cf. also Lefebvre, *Pouvoirs du juge* 294-295; Bussi, *Concetto di dirtto comune* 50-51; Lombardi, *Saggio sul diritto giurisprudenziale* 177.

[86] Nevizzanus, *Sylva nuptialis*, book 5 122a n.73: 'Nono limita, quando causa contra quam stat communis opinio esset valde favorabilis et privilegiata, prout in matrimonio . . . idem pro testamento . . . Secus autem, quando clare constaret quod communis opinio est contra matrimonium, vel quod opinio singularis doctoris esset notorie falsa. Quia non debemus tantum piis causis favere, quod caeteris iniustitiam faciamus'.

[87] Angelus de Ubaldis, *Lectura* to Dig. 45.1.122 § 6 fol. 37va n.6: 'Ultimo contra hanc lecturam Hugolini oponitur: quia dicta sententia fuit lata contra ius legis, dixit ibi iudex: quasi transactum, ergo nulla . . . Solutio: non fuit error expressus, unde magis fuit contra ius litigatoris quam legis. Addit Bartolus: idem si contra ius legis, ubi est varietas opinionum . . . Unde limita quando est tanta varietas, quod nulla dictarum opinionum est communis approbata, alias: secus, exemplum in l. Dos a patre profecta (Cod. 5.18.4). Pro hoc adduco

remark, Angelus acknowledges that the presence of conflicting juridical opinions on an issue further limit the scope of the nullity sanction. Yet, according to him contradicting an emergent common opinion among doctors should be likened to an express error in rule application, and as such would render a decision void.

The outcome of Angelus' argument seemed far-fetched for subsequent authors. For Paulus de Castro, the sheer presence of different views on a subject prevents the law from being called certain and unambiguous (ius apertum de quo nulla dubitatio), leaving it ultimately to judge's discretion.[88] This holds true even in the event of deciding against a commonly received opinion which, notwithstanding a question of an eventual liability of the judge and the remedy of appeal, cannot itself be regarded as a sufficient foundation for nullity. Similar conclusions may be drawn from 'lecturae' of the canonists at the turn of the fifteenth century. Antonius de Butrio, though he faithfully sticks to the traditional view on its bindingness, is quick to admit that 'communis opinio' remains still 'ius dubium'.[89] Acting against a

dictum Innocentii in c. Ne innitaris, de consti. (X 1.2.5)'; Cf. ibid. to Dig. 39.2.4 § 8 fol. 7vb n.3: 'Et si ferretur sententia pro vel contra, non diceretur contra ius constitutionis, ut sic sit nulla, et hoc tenet Bartolus hic et in § Duo fratres (Dig. 45.1.122.6). Tu autem dic hoc verum, nisi in iudiciis aut scholiis aliqua opinio ut verior approbaretur, secundum notam per Innocentium in c. Ne innitaris, de constitutionibus (X 1.2.5)'. The terminological distinction between 'ius constitutionis' and 'ius litigatoris' comes from a late classical jurist, Aemilius Macer (Dig. 49.8.1.2).

[88] Paulus de Castro, *Commentaria* (Lyon 1585) to Dig. 45.1.122 § 6 fol. 42rb n.9: 'Vel dic secundum Bartolum et nota, quod tunc causa falsa in iure, et expresse in sententia reddit eam nullam, quando est ius apertum, de quo nulla est dubitatio . . . Secus quando essent diversae opiniones doctorum, et iudex eligeret illam, quae communiter non tenetur, quia sibi plus placet. Nam non sententia propterea est nulla, quod sit lata contra communem opinionem et approbatam'.

[89] Antonius de Butrio, *Commentaria* (Venice 1578) to X 1.2.1 fol. 10vb n.16: 'Est tamen differentia, an pronuntietur contra ius certum expresso errore in sententia, an contra ius dubium, ubi sunt opiniones contra communem opinionem, illius errore expresso. Quia primo casu sententia est nulla tunc, cum reperiatur lata contra ius notorium, secundum Innocentium. Sed ubi ius est dubium, ut quia sunt opiniones vel de casu non appareat textus expressus, sed

common opinion is an instance of express error in judgment, nevertheless as with analogy and other forms of inductive reasoning based on conjecture, it does not entail so dire a consequence as acting against 'casus legis'. The contention is put forward even more emphatically by Antonius' pupil, Johannes de Imola.[90]

The division between two camps persists among sixteenth-century treatise writers. In the mature form of the argument, expressed in the works of late theorists of 'communis opinio', Nevizzanus maintained a minority position. He advocated the actual invalidity of a judgment as stemming from two reasons.[91]

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deciditur per rationes, aut per notatione similitudinis, sententia non est nulla ipso iure, licet posset appellari. Unde non est lata sententia contra notorium'.

[90] Johannes de Imola, *Lectura* (Venice 1500) to X 1.2.1 fol. 16ra: 'Si vero licet ius sit dubium, tamen super illud erat una opinio que erat communis, tunc non debet iudicare suum sensum, prout opponit iuri communi ex eo quo prout dixit hic Ioannes Andreae, communis opinio est sequenda nisi notorie esset falsa, vel rationabiliter convinceretur, quod habebit existimare bonus iudex et acutissimi ingenii, argumentum c. Capellanus, infra, de feriis (X 2.9.4). Et facit quod notavit Bartolus in l.finalis, de pena iudicis (Cod. 7.49.2). Est tamen advertendum ut tangit dominus Antonius de Butrio, quod ubi pronunciat contra communem opinionem illius errore expresso, quod tunc non reddetur nulla ipso iure, licet secus sit quando pronunciat contra ius certum expresso iuris errore in sententia, ut supra dixi. Et idem voluit Bartolus in l. Cum prolatis, ff. de re iudi. (Bartolus de Saxoferrato, *Commentaria* to Dig. 42.1.32) et potest dici etiam esse ius dubium nedum quando super casu legis vel capituli sunt opiniones. Sed etiam quando non apparet textus expresus, sed venit decidendus per argumenta vel rationes vel similitudines'.

[91] Nevizzanus, *Sylva nuptialis*, book 5 121a n.71: 'Limita septimo, ut regula quod iudex debeat sequi communem opinionem, procedat quantum ad iniquitatem sententiae, quia sententia bene diceretur iniqua, seu iniusta. Secus autem quantum ad nullitatem, quoniam talis sententia non diceretur nullam . . . Dummodo aliqui doctores teneant contra communem, sententia in tali casu non diceretur nulla . . . Ego dubito de ista limitatione: nam sicut sententia lata per expressum iuris errorem, seu contra legem non valet . . . Et sententia lata contra consuetudinem notoriam etiam est nulla . . . Pari modo videtur dicendum, quod sit nulla, quando est lata contra communem opinionem doctorum. Nam illud, de quo apparet decisio libris appertis, ita dicitur esse indubitabile, sicut illo de quo est lex . . . Et quia non possunt omnes articuli sigillatim per leges decidi, l. Non possunt, ff. de legibus (Dig. 1.3.12) tunc communis opinio servatur pro lege . . . Praeterea manifesta iniquitas aequiparatur nullitati . . . Et nemo negat

The first one is formal. Since for him 'communis opinio' should be considered a form of sure law (ius apertum), it is therefore likened, with regard to normativity, to other sources of positive law, such as custom or statute, that should never be called into question by a judge. It follows necessarily that espousing a view against a generally accepted juridical interpretation should be regarded as a radical infringement of the law that justifies treating judgment as void. The second concern is that of substance, since it refers not so much to formal preoccupations of validity but to the very content of judicial decision, its manifest and outright injustice. That is why such a sentence ought to be treated as not being rendered at all.[92]

The soundness of both arguments was challenged by Coratius. The earlier distinction between 'ius dubium' et 'ius apertum' is now integrated into the logic of presumption around which revolves the rationale for the whole conception. It is in this spirit that Coratius stresses the difference between a judgment against absolute and certain truth (contra meram et certam veritatem), and a decision that infringes only presumptive dogmatic truth (contra veritatem praesumptam).[93] Once more then, despite formal cogency of common opinion, its relative character, grounded on

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sententiam latam contra communem opinionem esse iniquam, ergo perinde ac si esset nulla'.

[92] Caron, *Communis sententia doctorum* 79-80, noticed this fragment of *Sylva nuptialis* but paid attention only to the first few sentences, and mistook the opinions of others, which Nevizzanus later refutes, for his own, only to misunderstand wholly Nevizzanus' genuine view on invalidity.

[93] Coratius, *Tractatus de communi opinione,* book 3 tit. 12 247-249 n.11-15: 'Nam quando dicimus communem pro lege servari, debet intelligi in iis, in quibus non est diversa ratio. Sed in casu nostro non est eadem ratio, nam sententia lata contra legem est contra meram et certam veritatem, sententia vero contra communem est contra veritatem praesumptam, quae facile evanescit per contrariam praesumptionem . . . Quamobrem altera superiori contraria est opinio, ut sententia lata contra communem sit iniqua et iniusta, non autem ipso iure nulla . . . Secundo, quia communis opinio non facit ius clarum, certum, et firmum, adeo quod si contra eam sententia servatur, debeat dici contraventum formae ipsius iuris, cum plura possint adesse, quae eius robur tollere valent . . . Sed ea est sententia nulla, quae contra manifestam, certam, et claram iuris formam profertur'.

conjecture and never capable of rebutting in a definitive way the opposing view, is played upon. Moreover, presumptive veracity that accompanies 'communis opinio' may become incompatible with the presumptive plausibility of judicial judgment and the validity of judge's decision.[94] The possibility for the subsequent annulment of the sentence, as distinguished from nullity by operation of law, opens however in case of outright unfairness.[95]

In contrast to the vexed issue of the invalidity of decision rendered in violation of the 'communis opinio', a sanction most frequently ascribed for the breach of the latter was personal judicial responsibility. It took on the form of professional liability (in syndicatu) of a judge in connection with the performance of a public function, and was formally anchored in the Roman law model of liability of 'the judge who heard his own case' (iudex qui litem suam fecit).[96]

The basis of responsibility was defined by Bartolus as lack of skill stemming from ignorance of the law (imperitia).[97] He avails

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[94] Ibid. 249-250 n.16: 'Tertio, ubi duae sunt praesumptiones contrariae, licet efficacior tollat praesumtionem minus efficacem . . . tamen non adeo elidit, ut annullet penitus praesumptionem contrariam, nam cum praesumptio fiat in dubio, quo casu veritas potest esse contra praesumptionem, non debet in totum tollere actum contrarium, sed satis est, quod eo suspenso, contrarius actus praesumptione fulcitus praeferatur, et servetur. At in casu nostro sunt duae praesumptiones contrariae, altera pro communi, et ista revera efficacior, ex quo per eam attenditur communis, altera pro iudice, et sententia . . . Ex quibus omnibus remanet clara ista magis opinio, ut sententia lata contra communem sit iniusta, et iniqua, non autem nulla'.

[95] Ibid. 251-252 n.21 and n.24: 'Unde cum veritas sic praesumptam in communi, iniquitas ex ea proveniens non certa et clara, sed praesumpta esse dicetur. . . . Ex quibus concludo, sententiam latam contra communem opinionem non esse notorie iniquam et iniustam, sed solum simpiciter et praesumptive, sed nihilominus retractandam, quod ut diximus, valde est permolestum iudici'.

[96] See Engelmann, *Wiedergeburt* 394-397 and Ugo Nicolini, *Il principio di legalità nelle democrazie italiane. Legislazione e dottrina politico-giuridica dell'età communale* (1st ed. Milano 1946) 454-464.

[97] Bartolus de Saxoferrato, *Commentaria* (Basel 1588) to Cod. 7.49.2 fol. 211 n.3-5: 'Quandoque iudex iudicat male propter imperitiam, tunc tenebitur, quantum religioni iudicantis videbitur, ut in contrario. Ista autem imperitia potest esse duobus modis. Uno modo, si iudicat expresse contra casum legis, et in hoc casu distingue: aut erravit in lege difficili et obscura, et mitius punietur,

himself of the distinction between a judgment against 'casus legis' where no interpretative ambiguity is present and a 'hard case', as grounds for mitigating judge's liability. However, even in the latter set of situations, if an error in judgment consists in choosing an inadequate opinion by ignoring commonly received opinion, the judge should be held liable exactly as in the former case, and thus make up for litigant's loss in full. The adduced 'loci' from the *Digest* refer to the observance of a standard line of interpretation, again highlighting a strong link with authority of custom. Concomitantly, only the case of ambivalence between equally well grounded conflicting interpretations may justify an eventual exoneration of the judge.[98]

A major area of controversy tended to surround the problem of intentionality of infringement and the degrees of fault. According to Panormitanus, the error of a judge is attributed to negligence (culpa) in not following a generally approved opinion, insofar as the latter warranted the discovery of dogmatic truth.[99]

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aut in facili et apta, punietur plus . . . Quandoque erravit in eo, in quo fuerunt opiniones, quia elegit malam opinionem, et tunc quandoque inter omnes opiniones est una, quae ab omnibus communiter approbatur, et communiter observatur. Et tunc si elegit aliam opinionem non bonam, punietur eo modo, quo dictum est supra, quia minime sunt mutanda, et cetera, ut l. Minime, ff. de legibus (Dig. 1.3.23) et l. si de intepretatione, ff. eodem tit. (Dig. 1.3.37). Si vero sunt opiniones ita fortes, quod quandoque observatur una, et quandoque servatur alia, ut in opinione quae est in materia compendiose facta per verbum commune, tunc iudicem putare excusandum, quia erravit probabilem errorem, imo propter opinionem lex dicitur incerta'.

[98] Since the judgment against a common opinion, though unfair, was still held valid, Bussi, *Concetto di diritto comune* 34, while analyzing Bartolus' text, drew a conclusion that judges were not bound by 'communis opinio' and were at liberty to decide against it, their eventual future liability against disadvantaged party notwithstanding. But this is clearly not in accordance with the gist of Bartolus' solution, insofar as it fails to take into account the analogy with the infringement of a customary rule.

[99] Panormitanus, *Commentaria* to X 2.27.1 vol. 5 fol. 74rb-74va n.10: 'An autem possit iudex syndicari, qui male iudicaverit, quia elegit opinionem quam multi sequuntur, licet non sit bona? Bartolus in dicta l. Cum prolatis (Dig. 42.1.32) tenet, quod sic, mitius tamen debet puniri secundum eum . . . Sed Angelus de Perusio dicit in dicta l. Cum prolatis, hoc verum, quando altera opinio esset approbata, alias autem licitum est alteram partem eligere . . . Ego

Panormitanus cited Bartolus' contention in *Cum prolatis* (Dig. 42.1.32) that even choosing a view followed by the multitude of the learned does not exclude judge's liability, albeit it may restrict its scope.[100] Angelus de Ubaldis, in turn, by means of a small detour, seems to reverse the whole argument and sees the basis of responsibility precisely in contravening the opinion commonly approved.[101]

Some later authors though, as Alciatus, leaned towards presuming in the behavior of the judge an act of fraud (dolus), in accordance with Justinian's dispositions on judicial liability, provided that the general opinion was commonly followed by the courts.[102] The discrepancy between later commentators may be explained on the grounds of ambiguity left in *Corpus iuris*, especially the apparently incongruent views of Ulpian, opting for 'dolus' (Dig. 5.1.15.1) and Gaius, seemingly favoring negligence through 'imprudentia' (Dig. 50.13.6). This tendency was however

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dico, quod si opinio contraria est magis communis, procedit dictum Bartoli, quia est in culpa non sequendo communem opinionem ex quo erat vera . . . Et dicit Ioannes Andreae in c. i. de consti. (X 1.2.1) quod comunis opinio est sequenda, nisi sit evidenter falsa, vel possit probabilioribus rationibus convinci. Sed ubi tantus esset opinionum conflictus, ut non possit apparere, quae sit opinio magis communis, tunc posset procedere opinio Angeli . . . '.

[100] Bartolus, *Commentaria* to Dig. 42.1.32 fol. 365rb n.3: 'Sed quaero, an possit puniri, quod male iudicavit, quia eligit opinionem quam multi doctores tenuerunt, licet non sit bona? Dico quod sic, sed mitius punietur'.

[101] Angelus, *Lectura* to Dig. 42.1.32 fol. 44vb n.2-3: 'Dixit etiam Bartolus quod ubi intellectus legis est ambiguus, adhuc valet sententia lata super iure legis, subdistinguens quod iudex qui iudicavit adherendo opinionibus aliquorum doctorum non sane intelligentium legem, potest conveniri tempore syndicatus, sed mitius condemnatur. Adde, hoc verum, si contraria opinio erat approbata. Sed si neutra, tunc non peccat iudex qui in alteram partium inclinavit . . . '.

[102] Andreas Alciatus, *Tractatus de praesumptionibus*, pr. 51 fol. 192-193 n.6-7: 'Item intelige, quando illa opinio graviores habet autoritates, et etiam communiter observatur in practica, ita videtur intelligere Bartolus in l.fin. C. de poen. iud. qui male iud. (Cod. 7.49.2). Sed illud potest procedere quoad effectum, quod iudex faciat litem suam, quia tunc requiritur dolus . . . qui praesumitur concurrentibus duobus, et quod iudicaverit contra opinionem communiter approbatam, et etiam communiter observatam in practica. Alias non putarem illam decisionem esse veram, quia autoritas tenentium contra illam communem debet saltem excusare a dolo praesumpto'.

curbed on the basis of being not in line with the general prohibition of presuming an intention to deceive.[103] As Coratius later explained, the function of this responsibility was compensatory, not punitive, in nature, and its scope was restricted to make up for the damage suffered by the party to whose disadvantage the sentence was passed.[104] Any eventual mitigation of liability was restricted only to situations when interpretation difficulties were due to the development of other approved opinions of the learned.

Conclusion

Though by no means exhaustive, this brief overview provides us with sufficient grounds for drawing some preliminary conclusions. Immersed in the realm of probable arguments, the doctrine of 'communis opinio' challenged jurists to undertake an important exercise in meta-reflection on the authority of legal scholarship, in interpreting the law and imposing the results of such interpretation. Though initially grounded chiefly on dialectical rationale, it slowly transcended the topical reference to the 'argumentum ab auctoritate', bringing forth analogies with the sources of mandatory authority, and reclaiming the force of both customary and statutory rule. At the same time, the authority of common opinion came to be contemplated as stemming necessarily from the presumption of veracity it presupposed. Its cogency did not however entirely preclude the original relativity, resulting in a system of meticulous external limitations elaborated

[103] Lancellottus Conradus, *Tractatus de officio praetoris* 320 n.21-22: 'Iudex praecipue sequi debet communem vel magis communem ubi reperiatur, in iudicando nec ab ea recedere. Quod et in consulendo observatur est . . . Ille praesumatur per imperitiam iudicare, qui relicta communi opinione, singulari adhaeret . . . In dubio praesumendum iudicari propter ignorantiam, non dolum'.
[104] Coratius, *Tractatus de communi opinione*, book 3 tit. 12 260 n.43-45: '<S>ed iudex ferens sententiam iniquam, facit litem suam, non ratione maioris, vel minoris iniustitiae, sed solum ad resarciendum damnum parti laesae . . . Quae conclusio est vera, secundum Alciatum . . . quando intervenit dolus ipsius iudicis, secus alias . . . Sed ista restrictio mihi non placet, nam ex culpa etiam iudex iniquam senetentiam ferens, facit litem suam, cum ignorantiam inique iudicans faciat litem suam . . . et ignorantia culpae ascribitur, non dolo'.

by later writers. An even more puzzling phenomenon was the possibility of internal discrepancy between several commonly approved opinions (communes contra communes) and the discernment of an opinion judged to be more common (opinio magis communis). The theoretical discussion proved to entail important tangible consequences in setting boundaries to a judge's exercise of discretion in rule application, opening the question of invalidity of the sentence and his personal liability.

As a result, for all its 'prima facie' compelling allure, Lombardi's claim about positivization of *Ius commune* in the heyday of 'communis opinio' appears to be far-fetched. For nothwithstanding the ongoing discussion on its cogency, the concept retained invariably its original dialectical facet all along. The distinctions between the categories of sure and ambiguous law, certain and presumptive truth, elaborated by the learned lawyers in the course of the doctrine's development seem to be much more than ordinary scholastic niceties. They acknowledge the situation of epistemic uncertainty and the state of decisional ambiguity of an interpreting agent, stemming from the incompleteness and vagueness of the law itself. They also hint at the defeasibility and revision of legal reasoning, as founded necessarily on conjecture. The presumption of veracity, by definition rebuttable and open to objection, placed at the apex of the whole theory, reminds the modern reader about the Aristotelian conception of practical truth, linked by medieval commentators to considerations of equity and moral security, and the extent of certainty available in the process of legal interpretation.[105] It is also where strong parallel with moral

[105] Cf. Aristotle, Eth. Nic. 1:3 1094 b 12-13 19-28 and 1:7 1098 a 26-28. The different kind of certainty, known to medieval scholastic tradition as 'probable certainty' (certitudo probabilis) stems from a clear distinction, emphasized by Aristotle, between the domain of necessary et infallible truth, pertaining to the scientific cognition, and the domain of contingent probability, attributed to judgments based on opinions. See e.g. Ambroise Gardeil, 'La certitude probable', *Revue des sciences philosophiques et théologiques* 5 (1911) 454-481; Thomas Deman, 'Probabilis', *Revue des sciences philosophiques et théologiques* 22 (1933) 265-290; Louis-Marie Régis, *L'opinion selon Aristote* (Paris-Ottawa 1935) 185-200. For the legal reasoning as an example of

theology of late scholastic and early modern times, may be convincingly drawn. The problem of the choice in a state of moral uncertainty lies at the very heart of both legal and theological discourses of the time.[106]

All the same, there is something distinctively legal about the concept itself. More than anything, its main tenet is that a clear standard in legal interpretation, though conjectural in nature and subject to further confirmation, is nevertheless possible. Importantly, the standard comes from within juridical argumentation and can be explained from internal point of view. As such 'communis opinio' can be seen primarily as a reliable guide for judicial decisions, providing for their 'prima facie' validity, and serving as grounds for judgment. There is then a case for viewing the phenomenon not only as an instance of legal formality but also as

probabilistic (in the medieval sense of the word) reasoning, see: Alessandro Giuliani, 'L'elemento "giuridico" nella logica medioevale', *Jus: Rivista di scienze giuridiche* 15(2-3) (1964) 171-177, 187-190; Idem *Il concetto di prova: Contributo alla logica giuridica* (Milano 1961) 153-158, 124; Vincenzo Piano Mortari, '"L'Argumentum ab auctoritate" nel pensiero dei giuristi medievali', *Rivista italiana per le scienze giuridiche* 7 (1954) 464-467.

[106] This had already found reflection in the work of early theologians-jurists who wrote *Summae confessorum*, linking the legal doctrine of 'communis opinio doctorum*'* to the conceptual framework of the logic of probable, with its notions of 'certitudo probabilis' and Aristotelian concept of 'endoxa' (Top. 1:1 100 b 21-23), 'the opinions of all, the majority or the wisest' as a ground of probable arguments. See e.g. Angelus Carletus de Clavasio, *Summa angelica* (Venice 1495) s.v. 'opinio' fol. 360ra. The conflation of theological and legal perspectives gained momentum in the course of the seventeenth century, in Prospero Fagnani' vast commentary on *Ne innitaris* (X 1.2.5), an actual refutation of the probabilists' standpoint. Common opinion is here clearly presumed to be more probable (opinio probabilior) and secure, and as such imposes itself on the conscience of decision maker, unless some other opinion is proven to be more credible and safe. Cf. Prospero Fagnani, *Commentaria* (Rome 1661) to X 1.2.5 31-124 at 85 n.275-279. The importance of Fagnani's contribution and the interweaving of juristic and theological reflection on the choice of opinions at that time is attested by numerous stand-alone editions in octavo under the title: *De opinione probabili* (first edition: Rome 1665). See Diego Quaglioni, 'Fagnani, Prospero', DGI 1.814-816. For the impact of legal thought on the discussion regarding the election of opinions in later moralists, see Schuessler, *The Debate on Probable Opinions* 202-206.

an evidence of intrinsic rationality and coherence of *Ius commune*. For in the very process of weighing authorities against authorities, looking for a common opinion but making allowance for departing from it, when salient substantive reasons occur in a case, legal interpretation of the time appears nothing short of a theory of rational choice between probable arguments, in the guise of conflicting magisterial opinions. The test of rationality, to which the commentators, deferential, yet by no means transfixed by the whole idea, were constantly submitting its ruling, may sound not unfamiliar to the modern ears of common and civil lawyers alike. It is perhaps in this intrinsic elusive concurrence of authority and reason, form and substance, that the spirit of *Ius commune* reveals itself most forcefully to the modern reader.

National Library of Poland (Warsaw).

Lateran V and the Reform of the Roman Curia

Nelson H. Minnich

The bull convoking the Lateran Council set as one of its principal goals the reformation of the morals of both ecclesiastics and secular persons who by law and custom are subject to reform by a council. In his speech read at the opening session, Julius called for leading depraved morals back to a more honest state. This reform would be one in head and members and begin with the Roman Curia.[1] Popes of the previous century had studied various proposals for a reform of the Roman Curia, even drawing up bulls to regulate it, but they never promulgated them.[2] It was not until the Lateran Council that a comprehensive reform of the Curia was enacted. Scholars who have studied the conciliar reforms of the Curia by Julius II and Leo X have been dismissive of them. In the previous century, the great German historian of the Curia, Walther Hofmann, complained that Leo X's reforms dealt mostly with taxes, which for many offices he significantly raised, while claiming to moderate or limit them in comparison to their recent terrible outgrowth. Hubert Jedin repeated the claim, stating that while *Pastoralis officii* enforced a firm system of taxation, it 'also yielded to the demands of officials to such an extent that the result proved a step backwards rather than forwards'. More recently the Italian scholar of the Renaissance papacy Marco Pellegrini stated: 'Attempts to reform the system under Leo X paradoxically led to

[1] Mansi 32.667D, 680D, 687B, 753AB, 772E. Both Julius II and Leo X held that the reform should begin with the Curia—see the comments of Riario in Nelson H. Minnich, 'Concepts of Reform Proposed at the Fifth Lateran Council', *The Fifth Lateran Council (1512-17): Studies on Its Membership, Diplomacy, and Proposals for Reform* (Collected Studies Series 392; Aldershot 1993) 4.163-254*, here 247.

[2] Léonce Celier, 'Alexandre VI et la réforme de l'église', *Mélanges d'Archéologie et Histoire* 27 (1907) 65-124, and his 'L'Idée de Réforme à la cour Pontificale: des Concile de Bâle au Concile de Latran', *Revue des questions historiques* 86 (1909) 418-435.

an increase in taxes, which was primarily dictated by pressures from 'officiales' to bring a quick return on their investments'.[3]

Julian Reform Commission

To stave off criticism before the council opened, Julius II shaved off his beard and let it be known that he wanted all prelates to behave more honestly and the Church and the Roman Court to be reformed. He set up a commission to begin the reform of the Roman Curia. It consisted of eight cardinals: two cardinal bishops (Raffaello Riario, bishop of Ostia, dean of the Sacred College, and Camerarius; and Marco Vigerio OFM, bishop of Praenestina), four cardinal priests (Tamás Bakócz of the titular church of St. Martin in the Mountains; Leonardo della Rovere of the titular church of St. Susanna and Major Penitentiarius; Antonio del Monte of the titular church of St. Vitale; and Pietro Accolti of the titular church of St. Eusebius); and two cardinal deacons (Alessandro Farnese of the titular church of St. Eustachio; and Luigi d'Aragona of the titular church of St. Maria in Cosmedin). He added to the commission some prelates and two secretaries, namely Tommaso Inghirami and the unnamed secretary of the deceased Oliviero Carafa, possibly Jacopo Sadoleto). The commission apparently worked on its task for fourteen days.[4]

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[3] Walther von Hofmann, *Forschungen zur Geschichte der kurialen Behörden vom Schisma bis zur Reformation*, (2 vols. Bibliothek des königlich-preussischen historischen Instituts in Rom 12-13; Rom 1914) 1.273: 'Die grosse Reformbulle vom 13. Dezember 1513, welche in der Hauptsache nur die Taxen behandelt, bracht fast überall Erhöhungen, in manchen Amtern ganz bedeutender Art. Wenn darin so oft von Ermässigung der Taxen (moderatio, limitatio usw.) die Rede ist, sodass dies förmlich als ein Erfolg mit Genugthuung festgestellt wird, so gilt dies nur, wenn man dies auf die stärksten und schlimmsten Auswüchse der üblichen Taxforderungen bezieht'. Hubert Jedin, *A History of the Council of Trent*, trans. Ernest Graf (2 vols. London 1957-1961) 1.131; Marco Pellegrini, 'Curia: 15th Century', *The Papacy: An Encyclopedia*, ed. Philippe Levillain, (3 vols. New York 2002) 3.462-464, here 463.

[4] The report of Stazio Gadio to Isabella d'Este, Rome, 16 March 1512, Mantova, Gonzaga, Busta 860, fol. 23r: 'il p[refa]to N[ostro] S[ignore] si ha fatto tagliar

On 30 March 1512 Julius II issued the bull *Etsi Romanus Pontifex* in which he rehearsed the complaints of the faithful regarding the excessive fees they are charged by many officials of the Roman Curia for their services. Without permission and with cunning these curialists have increased their fees. Led by avarice many officials have violated the rules setting the fees they may charge in justice and equity for their services. They abused the kindness and indulgence of previous popes and their own consciences and thereby incurred excommunication. This behavior has resulted in complaints, the endangerment of souls, and the scandal and bad example that injuries the reputation of the Roman Court. The pope out of his pastoral concern for protecting his flock, the salvation of souls, and the restoration of the good name of the Roman Curia has taken on the burden of trying to remove these intolerable abuses. He has therefore set up a commission of eight cardinals to discuss and examine the problem. After mature deliberation, the pope has decided (motu proprio) to renew the rules of his predecessors Nicholas V, Calixtus III, and Paul II that set the fees for curial services. Officials are to follow these rules and receive no additional recompense, not even if freely offered. Violations incur excommunication. On the first offense a fine of 100 ducats; on the second, suspension for six month from the exercise of the office and the forfeiture to the fabric of St. Peter's Basilica of the income from the office; and on the third offense, deprivation from office. What was illegally

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la barba , et voli che tutti li prelati et preti vadino piu honestamente dil solito , voli reformare la chiesa et corte romana et gia sono electi otto cardinali dui vescovi, quatro preti, et dui diaconi, cio e S. Zorzo, Sinegalia, Strigonia, s.Vitale, Acoltis, Agenensis, Farnese et Ragona et alcuni prelati, et dui secretarii Phedra et il sec[retar]io che fu dil Car[dina]le de Napoli—tutti questi reformatarion le cose'. *Etsi Romanus Pontifex* is registered in ASV, Reg. Vat. 967, fol. 320v-323r and transcribed in Laerzio Cherubini, *Bullarium sive Collectio constitutionum hucusque editarum a Summo Domino Nostro Sixto Quinto* (Romae: Apud eosdem Haeredes [Antonii Bladii] typographarios Camerales, 1588) Julius II, Nr.14, pp.161-162. On Sadoleto as Carafa's secretary, see Francesco Lucioli, 'Sadoleto, Iacopo', DBI 89 (2017) 573-577, here 573. Hofmann, *Forschungen* 1.313 estimated the two-week work period.

received must be restored. The enforcers of these rulings are the Chamberlain, Vice-Chancellor, and the Major Penitentiary – all three cardinal relatives of Julius II.[5]

Whether the commission continued to function in its original form once the Lateran Council began is unclear. At the fourth session of the council on 10 December 1512, Julius issued with the approval of the council the bull *Saluti gregis* in which he reaffirmed a general reform of the officials of the Roman Curia and their fees (apparently a reference to *Etsi Romanus Pontifex*) and promised further action with the help of prelates from diverse nations present at the council. At the fifth session on 16 February 1513 in the bull *Inter alia necessaria* he recalled the approval at the fourth session of the reforms prepared by those deputized for the task.[6] Who were these prelates charged with reforming the Roman Curia and what did they do? According to the diary of Paride de Grassi, Julius set up a preparatory commission, initially of ten, then of nine, cardinals to advise him and manage the affairs of the council. Their names are not given, but they seem to be the same as those who advised him in preparing the bull *Etsi Romanus pontifex.* Julius initially had the whole College of Cardinals discuss questions related to the council, but then deputized a group of nine cardinals to handle questions related to the ceremonies.[7]

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[5] It is noteworthy that Julius II did not mention the rules for the Curia given by his uncle Sixtus IV who was often accused of having introduced many abuses. His relative enforcers were Rafaello Riario (cousin, Camerarius: 1483-1517) Sisto Gara della Rovere (grand nephew, Vice-Chancellor: 1508-17) and Leonardo della Rovere (cousin, Penitentiarius: 1511-20). The Treasurer General of the Church (1509-13) was Orlando della Rovere; see Hofmann, *Forschungen*, 2.70 nr.7; 87 nr.6; 90 nr.7; 91 nr.1; Tavola genealogica della familia della Rovere in: Ivan Cloulas, *Giulio II*, trans Anna Rosa Gumina (Profili 20; Roma1990/93) pp. [354-355].

[6] Mansi 32.753AB, 772E, 846A.

[7] Marc Dykmans, 'Le cinquième Concile du Latran d'après le Diaire de Paris de Grassi', AHC 14 (1982) 271-369, here 274, Nr.840: 4 'ex sacro senatu decem patres undecumque doctos, omnique virtute ac rerum experitantia consummatos elegit, qui urbis et urbanorum officiorum officialiumque reformationi intendant, omnia ad antiquum honestumque ritum, quoad pecuniarum exactionem

For substantial matters he appointed a committee of cardinals together with ten prelates elected by their colleagues from the twenty-four or -five prelates chosen by the pope.[8] That they worked on a reform of the Roman court and curia is suggested by an entry in de Grassi's diary, after that for 19 July 1512. De Grassi states that the council with the approval of the pope (motu proprio) had reformed the taxes of the office of the masters of ceremonies, listing the specific fees that could be charged for its services, what 'spolia' (vestments, candles, etc.) they could take after the ceremonies, and the bestowal on the masters of the archpresbyterate, one prebend, and one canonry in the church of

reducentes. Quod et brevi tempore factum, et per litteras apostolicas sancitum est;' 299, Nr.846: 2; 307, Nr.848: 3, 5 (in predicta novemviratus congregatione)

[8] The initial system of consultation was for the bishops to be divided into nine equal groups and to have each of the nine cardinal members of the preparatory commission meet with a separate group to discuss a measure to be approved at the next session, Dykmans, 'Le cinquième Concile du Latran' 308, n. 848: 4 sexto; for a latter system see the letter of Stazio Gadio to Alfonso d'Este, 19 January 1513, Mantova, Archivio di Stato, Archivio Gonzaga, butsa 361, fol. 10r: 'Ne la congregatione si trattò questo per quanto ho potuto intendere. Aciò, che li cardinali et prelati sapessino prima che entrassino nel concilio quale dì che si havea a trattare per potervi pensar et tra lor disputarla per entrar poi riscioluti nel concilio hanno electo deci prelati de XXV che furno proposti quali sempre entrarano in congregationi con li cardinali ove si proponerano le cose dil concilio et quelli deci prelati congregarano tutti li altri prelati ad S. Giovanni in una sala, et ivi da essi si disputara quanto nella congregatione de cardinali serrà stato proposto et in questo principio si è ragionato de la reformatione de li habiti de preti et a questo modo continuamente si seguirà'. And the letter of Stazio Gadio to Isabella d'Este, ibid. fol. 22r: 'Quel dì cardinali fecero congregatione et per quanto ho inteso, elessero deci prelati quali havessero ad entrar in congregatione dessi cardinali per intender le cosi che si hanno ad proponere nel concilio, aciò che et li cardinali et li prelati possino pensar et disputar tra loro le cose per entrar poi riscioluti nel concilio cosi li dece electi prelati congregarano in una sala a S. Giovanni et ivi disputararano tra loro le cose proposte nelle congregatione de li cardinali et con questo ordine seguirano continuamente'. In his Diary, de Grassi claimed that Julius II had chosen twenty-four prelates together with some cardinals to deliberate and consult so that things were done 'rite et iuridice' Dykmans, 'Le cinquième Concile du Latran' 338 n.968:2. See also COGD 2.2 p. 1350, lines 642-643, p. 1360, lines 998-999.

S. Celso in Rome. De Grassi found some of these reforms in many ways burdensome, but if they pleased the pope, so too they should be acceptable to him.[9] The bull *Pastoralis offici* also made mention of curial reforms already made most recently under Julius II.[10]

Leonine Reform Commission

Work on a reform of the Curia moved ahead once Leo X took charge of the council. He had the bishops choose twenty-four of their number to sit on the three conciliar deputations—a procedure Riario praised.[11] On 3 June 1513 he announced the membership in the deputations. That charged with a general reformation of the Curia and its officials consisted of twenty members: eight cardinals (Riario, Vigerio, L. della Rovere, Christopher Bainbridge, del Monte, Matthias Schiner, d'Aragona, and Marco Cornaro—five of whom had been members of the commission that prepared the bull *Etsi Romanus Pontifex*), eight prelates (Giovanni Vincenzo Todeschini-Piccolomini, archbishop of Siena; Roberto Latino Ursini, archbishop of Reggio-Calabria; Andrea Valle, bishop of Mileto; Pedro Flores, bishop of Castellamare; Vicenzo Fanzi, bishop of Segni; Simon Kožicic Begnius, bishop of Krbava/Modrus; Alessandro Guasco, bishop of Alessandria; and Giovanni Battista Pallavicini, bishop of Cavaillon); and four prelates added by the pope (Domenico Giacobazzi, bishop of Nocera dei Pagani; Ercole Azeglio, bishop of Aosta; Battista

[9] Archive of the Office of Papal Ceremonies, Vatican City, *Diarium*: 1 January 1509 to 3 March 1513 (*Tomus Tertius* of the diary of Paride de Grassi), Ms. 371 (A11) 524-528. These regulations were incorporated into the bull *Pastoralis officii*, in: *Bullarum diplomatum et privilegiorum sanctorum romanorum pontificum taurinensis editio*, edd. Francisco Gaude et al., (25 vols. Torino 1857-1872) V, 570-601, here 572-573 nr.5.

[10] E.g. *Pastoralis officii* p. 597, nr.37 regarding the recent reforms of the office of Governor and Papal Vicar, or p. 592 nr.31 regarding the reform of subdeacons

[11] Mansi 32.794C-795B; for the comments of Riario, see Minnich, 'Concepts of Reform' 252*.

Spagnoli Modover, prior general of the Carmelites; and Pietro Delfino, general of the Camaldolese).[12]

On 26 October 1513 the deputation was divided into five sub-commissions. The first consisted of Cardinals Riario and Aragona and Bishops Valle and Flores. It was charged with the reform of the clerics of the Apostolic Camera, the auditors of the Treasury, and the notaries both of the Camera and of the Curia, the reform of causes of the Apostolic Camera and of the auditor of the advocates of the fisc and of the paupers and of the procurator. Added to the sub-commission were participating protonotaries and presidents of the Apostolic Camera, the Governor and Vicar of the Pope, and the clerics of the College. The second sub-commission was composed of Cardinals Vigerio and Bernardo Dovizi. Given the absence of Bishops Fanzi and Kožicic, they asked the pope to appoint in their stead Claude Seyssel, bishop of Marseille and the ambassador of France, and Silvestro Gigli, bishop of Worcester and ambassador of England, but the pope decided instead to appoint Ugo Rangone, bishop of Reggio-Emilia, and Battista Spagnoli Modover, general of the Carmelites, if he is present. It was charged with supervising the abbreviators of the major and minor benches, and could add the guards and notaries of the Chancellery. To the second sub-commission were added the guards, the notaries, and chaplains of the Chancellery, the presidents of the Ripa, accolytes, and writers of briefs. The third sub-commission consisted of Cardinals Leonardo della Rovere and Cornaro; added were Bishops Pallavicini and Guasco. It was charged with the reform of the Rota, of the notaries and substitute advocates and procurators, and the notaries of the solicitors, of the Governor and Vicar of the Pope. Added were the solicitors of causes, couriers of offices, 'parafrenarii' of the pope and cardinals, and guards of the green gate and chains. The fourth sub-commission was composed of Cardinals Bainbridge and Lorenzo Pucci; added were Battista Buffali, bishop of Aquino, and Delfino, general of the Camaldolese. It was charged with the reform of the office of the secretaries, of writers of bulls, of solicitors, and of

[12] Mansi 32.796D-797B.

archivists. To this sub-commission were added the clerics of ceremonies, the 'cubicularii' and 'camerarii' of the pope, and the officials of the iron gate. The fifth sub-commission contained Cardinals del Monte and Innocenzo Cibo and Archbishop Ursini and Bishop Giacobazzi. It had responsibility for the Penitentiary and all its offices, the sealing with bulls and their registration, with the masters, clerics, writers, and bearded brothers. To its membership were added the apostolic sub-deacons, procurators of the Penitentiary, servants of arms, the ordaining bishop in the Roman Curia, singers of the chapel, the 'summista' of the bulls of the Camera, the 'hostiarii' of the Chancellery, the secretaries of the cardinals for drafts of the 'consistoralia', and secretaries scrutinizing the drafts of the Chancellery of the Most Reverend Vice-Chancellor. [13]

Riario was apparently the chairman of the entire reform deputation. Not only his position as dean of the Sacred College, but also the fact that he was the only surviving member of the ten-man commission set up by Alexander VI to prepare a bull reforming the Roman Curia made him the logical person for this important position.[14]

At the disposal of the commission was apparently a collection of earlier proposals for curial reform, drafts of reforming bulls never promulgated, and earlier reforms that had been the working papers of the reform commission of Alexander VI, a collection of documents that Riario could have retained or had access to as a

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[13] Carl Joseph von Hefele, *Conciliengeschichte nach den Quellen bearbeitet*, 8: *Der Fortsetzung erster Band von Josef Cardinal Hergenröther* (Freiburg im Breisgau 1887) Beitrage A: 'Roma. Deputationes Cardinalium pro reformatione' 810-812; Mansi 32.847C.

[14] Celier, 'Alexandre VI et la réforme de l'Eglise' 72-88: the commission consisted of the cardinal bishops Oliviero Carafa (†20 January 1511) and Jorge de Costa (†18 September 1508) the cardinal priests Antoniotto Gentile Pallavicini (†10 September 1507) and Giovanni Antonio de San Giorgio (†14 March 1509) the cardinal deacons Francesco Piccolomini (†18 October 1503) and Raffaelo Riario (†9 July 1521); and four consultants: Felini Sandeo of Ferrara (†October 1503) Guillaume de Perriers (†17 November 1500), Bartolomeo Flores (†23 July 1498), and Ludovico Podocatharo (†25 August 1504).

former member of that commission. These documents were copied and date from after the death of Cardinal Carafa in January 1511, suggesting that they were copied to be of service to the reform commission of Julius II, headed by Riario. The collection still exists as Vat. Lat. 3884 and a number of its documents have been published by Michael Tangl in 1894.[15] How these documents may have influenced the work of Riario's commission of 1512 and deputation of 1513 is unclear. The draft of a bull for the reform of the curia under Pius II never incorporated the stern measures recommended by Nickolaus Krebs of Kues and Domenico dei Domenichi.[16] The draft reform bull of Sixtus IV contained detailed measures, but it was opposed by many cardinals and never published.[17] The elaborate draft bull of Alexander VI for a reform of the curia was similarly never promulgated. Another document dating from 1513 is the memorial of the seasoned curialist, Stefano Taleazzi, the aged archbishop of Patras. On the urgings of Cardinal Lorenzo Pucci, he made some suggestions on how to reform the curial offices. These were very general in nature, weak on

[15] Celier, 'Alexandre VI et la réforme de l'Eglise' 88 n. 1, 97; Michael Tangl, *Die päpstlichen Kanzeleiordungen von 1200*—1500 (Innsbruck 1894) 363-366, Instructions on reformation given to the Roman legates to the Council of Basel 366-371, additional instruction to the legates 372-379, the 1464 draft for the reform of the Roman Curia of Pius II, *Pastor aeternus*, never published 379-385, the 1471 curial reform draft of Sixtus IV, *Quoniam regnantium cura*, never promulgated 386-388, report on the 1497 work of the Cardinal commission of Alexander VI on the necessary reform of the Chancellery 388-390, 1497 report to the cardinal commission from the masters of supplications on the damage done in carrying out the registration of supplications 390-397, 1497 report to the cardinal commission on the harm done and excessive taxes charged in various sections of the Chancellery for the registration of bulls 398-400, a 1497 defensive rebuttal of the masters of the register of bulls against further accusations 400-402, a 1497 complaint of the collectors of the leaden bull against the malpractices of the taxers 402-422, 1497 draft of a reform bull *In apostolice sedis specula* to be promulgated by Alexander VI.

[16] Ludwig von Pastor, *History of the Popes*, trans. F. I. Antrobus et al. (40 vols.; St. Louis 1923-1949) 3.268-275 and 397-403, the earlier proposal of 1460 calling for the observance of the constitutions of John XXII, Benedict XII, and Martin V.

[17] Ibid, 4. 406-408.

specifics. [18] Similar proposals came from various curial humanists that were more moralistic than practical in their recommendations.[19]

But the most important document relating to the work of the curial reform commission is a Latin-language proposal, addressed to cardinals (Dominationes Suae) by someone apparently not of their rank, written in the first person (dico, poscam, audio, fols. 226r, 238r), and beginning with the words *Insolite exactiones et notabiles abusus in romana curia nostris temporibus introducti circa bullarum expeditionem* [hereafter referred to as IE].[20] It surveys the various curial offices and recommends reforms. Its relationship to the bull *Pastoralis officii* will be examined below. Because the proposal mentions the death of Enrico Bruni that occurred before 1 October 1509 (fol. 226v)[21] and the curial reform

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[18] Nelson H. Minnich, 'The Reform Proposals (1513) of Stefano Taleazzi for the Fifth Lateran Council (1512-17)', AHC 27/28 (1995/96) 543-570, here 566-567.

[19] John D'Amico, *Renaissance Humanism in Papal Rome: Humanist and Churchmen on the Eve of the Reformation* (The Johns Hopkins University Studies in Historical and Political Science, 101st series (1983) nr.1; Baltimore1983) 212-240.

[20] Munich, BSB lat. 422, fol. 224r. The manuscript and the incipit of the tract is available online::
https://daten.digitale-sammlungen.de/0012/bsb00121042/images/index
.html?id=00121042&groesser=300%&fip=193.174.98.30&no=&seite=623

[21] Enrico Bruni was a cleric of the College of Cardinals (1486-1508) becom-ing archbishop of Tarento in 1498 and dying before 1 October 1509; see Thomas Frenz, *Die Kanzlei der Päpste der Hochrenaissance (1471-1527)* (BDHI 63; Tübingen 1986), 345 nr.921. IE in Munich, BSB lat. 422 fol. 226v refers to him as: 'Et hoc [no fees on churches in partibus infidelium] semper fuit observatum usque ad extremum vite Reverendi quondam Arrigoti Archiepiscopi Tarentini qui immediatus antecessor modernorum clericorum ut ipse enim peraulo [?] ante obitum exigere incepit minuta ecclesiarum vel monasteriorum ad collegium spectantium partibus reductis existentibus non secundum reductionem, sed iniusta integra et eorum medietatem pro se et forte pro collegio retinebunt et de alia autem medietate dabat computum reverendissimis Cardinalibus. Hoc quoque observant moderni clerici contra voluntatem Reverendissimorum Dominorum Cardinalium scitu qui quidem abusus plurimum reprobatur. Et Galli quibus negotium attinet nimium et quam plurimum conqueruntur'. The successor to Bruni on 21 October1509 was

of Julius II and describes Lorenzo Pucci as the former master of the seal (a position he held from 1484-1491) who is now (modernus) the datarius (a post he held from the fall of 1510 to September 1513, when he became a cardinal), it is likely that the document dates to the first part of 1513, up to September. Because of its wide and detailed knowledge of the workings of the Roman Curia, Hofmann has suggested as its author one of the former curialist members of the commission: Domenico Giacobazzi (consistorial advocate, auditor of the Rota, and referendarius) or Giovanni Battista Pallavicini (referendarius, scripter, secretary, and abbreviator) or Andrea Valle (chamberlain, scripter, regent of the Chancellery, and secretary) or Alessandro Guasco (protonotary and referendarius).[22] But also to be considered as possible candidates for authorship are the other episcopal members of the reform commission: Roberto Latino Ursini, archbishop of Reggio-Calabria (referendarius); Pedro Flores, bishop of Castellamare (jurist, referendarius, regent of the Chancellery); and Vicenzo Fanzi, bishop of Segni (referendarius beginning in 1514).[23] The extensive, detailed knowledge of the practices of the clerics of the Camera and the multiple criticisms of them suggest that the author of IE was someone who may have worked in the Camera. He was well acquainted with the fees charged for sealing bulls. He was also interested in the way the French processed provisions to protect the Pragmatic Sanction of Bourges. His glowing description of the office of auditor of the

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Francesco Armellini, with the Englishman Christopher Fischer representing the Ultamontanes; see Conrad Eubel, *Hierarchia catholica* 3.87a.

[22] The draft is preserved in the Munich, BSB lat. 422, fol. 224r-238r; portions of it have been published in Hofmann, *Forschungen* 242-248, his speculations on its author on 241. Frenz, *Kanzlei*, 345 nr.921 gives the date of before 1 October 1509 as Bruni's death and on 395 nr.1487 gives October 1510 as Pucci's starting date as datarius, while Hofmann (2. 102) suggests the spring of 1511; on the former curial posts of possible authors, Frenz, *Kanzlei*, 274 nr.69 (Guasco) 281 nr.153 (Valle) 382 nr.1334 (Pallavicini) 317 nr.596 (Giacobazzi).

[23] Frenz, *Kanzlei*, 427 nr.1885 (Florez) 439 nr.2033 (Ursini) 453 nr.2204 (Fanzi)

Rota, followed by silence on the Rota's notaries and procurators is unusual. The member of the reform commission who worked on the Rota was Dominico Giacobazzi. He was also very interested in the Pragmatic Sanctions of Bourges, writing at the time of the Lateran Council a set of arguments for denying them any validity. He is a very likely candidate for being the author of IE. [24]

The bull *Pastoralis officii* dealt with the officials of four of the principal bureaucracies of the Curia. Those of the Apostolic Camera included the clerics of the Camera, the six sub-deacons, the auditors, the notaries, the Governor and his notaries, and the papal Vicar and his notaries. The ordaining bishop in the Roman Curia seems to come under the authority of the Camera. So too apparently the masters and clerics of ceremonies and the singers of the papal chapel, the couriers, and the servants of arms The officials of the Chancellery were the solicitors of apostolic letters, the master and clerics of the register of supplications, the apostolic scripters, the protonotaries, consistorial advocates, the auditors of contradictory letters, the secretaries of briefs, the abbreviators of the major bench, the masters and scripters of the register of bulls, the masters of the leaden seal and the Bearded Brother sealers, and the correctors and writers of the archives. Those in the Sacred Rota included the auditors of causes of the Apostolic Palace, the procurators, notaries, and scripters. In its treatment of the Sacred Penitentiary, the major (or grand) penitentiary was the subject of moral exhortation, while the minor penitentiaries were given detailed rules to observe. Notable for their absence in the reform bull were the Signatures of Justice and Favor and the Datary, the latter being an important source of papal revenue, that was headed

[24] Rotraud Becker, 'Jacovacci, Domenico' DBI 62.111-116, here 114; Giacobazzi, *De concilio*, in Mansi 0.217aB (citing Torquemada's arguments). At the eleventh session Giacobazzi made his approval of the Concordat dependent on the French acceptance of the revocation of the Pragmatic Sanction. Although the Concordat reiterated many provisions of the Sanction, it differed on other points and thus could give rise to controversy if the French did not accept the abrogation of the Sanction. See Mansi 32.964E-965A: 'qui dixit quod placebant sibi contenta in bulla, dummodo Galli acceptent bullam revocationis pragmaticae sanctionis'.

by Lorenzo Pucci who sat on the reform commission and supervised the reform bull's final formulation. Silvio Passarini, who succeeded Pucci as datarius, did intervene, as noted in *Pastoralis officii*, to remove any fraud, deceit, or negligence in the registration of bulls by the masters, clerics, or scripters of the Chancellery.[25] Later with the backing of Leo X Passarini gave these officials a precise set of regulations that described their duties. To prevent delays in the registration of document due to inadequate staffing, Leo increased by four the number of scripters, giving them the same rights as the other eight scripters.[26]

In an effort to see what influence the earlier reform efforts may have had on the formulation of the measures in *Pastoralis officii*, a comparison of their prescriptions for a select number of offices from the various bureaucracies may prove helpful.

Officials of the Papal Chapel

The bull begins with the office of the masters of ceremonies. The proposed reform bull of Pius II had a section on the clerics of ceremonies. It complained about the discords that arose at solemn ceremonies over what ritual to follow, disagreements loudly voiced or using inappropriate gestures. The office should be carried out with modesty and diligence, carefully supervising everyone in the papal chapel and admonishing those who are speaking or laughing or acting improperly. If their admonition is not observed, they should refer the case to the pope. The guilty are subject to the master of the sacristy who punishes their excesses. Those attending divine services, whether cardinals, prelates, or others, should do so with reverence and devotion, with their mind fixed on God and their last days, recalling their sins for which they seek forgiveness. Let them not chat away, giving a bad example to the faithful. If they contemn these precepts, they lose the

[25] *Pastoralis officii* 593-594 nr.34.
[26] Hoffman, *Forschungen* 2.56-57 nr.249.

indulgence granted to them for attending the service.[27] These reforms do not appear in *Pastoralis officii*. By the time of Lateran V, the ritual in the papal chapel had been standardized by Agostino Patrizi Piccolomini's *Caeremoniale* (ca. 1487) and by the records of what occurred at similar ceremonies kept by Johannes Burckard and Paride de Grassi. To resolve any controversies over the ceremonies of Lateran V, de Grassi had recourse to a commission of cardinals for a decision. When his fellow master Bernardino Guttierez disagreed with him, de Grassi kept him out of the planning or went directly to the pope for a ruling.[28] The master's role in imposing silence and order on the papal chapel is also not taken up by *Pastoralis officii*.[29]

What little IE says about the masters, and that almost at the very end of the document, has to do with their attempts to raise their fees.[30]

> They currently receive as a favor from the solicitors of the pallium a stipend of two or three ducats per hundred, according to the tax on the church, but they try to get as much as they can, and if by an apostolic indult they can extract a concession, they will compel the cardinals to pay this, as I hear they have tried. They are also entitled to receive for an oath given by prelates in the curia two ducats and six carline, but now they try to get four ducats.

The issue of papal coinage is complicated, given the various coins in circulation and their fluctuating exchange rates. The Apostolic Camera denominated its fees in terms of the ducat of gold of the Camera. The worth of other coins was pegged to this ducat. The papal grosso was a large silver coin, called a grosso to distinguish it from smaller coins (minuti, piccioli) such as the denario. Ideally ten grossi were equivalent to one ducat. The grosso was also called a carlino (named after King Charles Anjou of Naples, 1285-1309). In the later fifteenth century the value of the carlino declined so

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[27] Rudolf Haubst, 'Der Reformentwurf Pius des Zweiten', RQ 49 (1954) 188-242, here 227 nrs. 137-138.

[28] Minnich, 'Diary of de Grassi' 396-409.

[29] On the papal chapel, see Brigide Schwarz, 'The Roman Curia (until about 1300)', HMCL 3.160-228 at 201.

[30] IE, Munich, BSB lat. 422, fol. 238r.

that by 1503 thirteen (no longer ten) carlini equaled a ducat. In 1504 Julius II created a new coin called a giulio to replace the devalued carlino and restored the rate of ten giulios to a ducat. This evaluation lasted until 1545 when twelve giulios now equaled one ducat. The old carlini coins continued in circulation. The grosso/giulio was divided into twelve denari. A ducat could also be divided into bolognini or its equivalent the bajocchi romani. The rate varied over time. In the fourteenth century one ducat equaled 48 bolognini, but by 1512 the rate was 97, and in 1527 the rate rose to 100 bolognini per ducat. The grosso/giulio was also divided into ten bajocchi. Under Clement VII the fiorino became a common currency, equal to the ducat of the Camera. It was divided into twenty soldi. Another coin the scudo, orignally from France, also became common under Clement VII and Paul III. In 1533 one scudo equaled 100 bolognini. In 1544 the scudo was worth between eleven or twelve giulios.[31]

That *Pastoralis officii* begins with the office of the masters of ceremonies may have to do with the reforms already having been worked out a year earlier. The bull has an extensive section on the office of the masters, setting up a college and assigning to it permanently three benefices in the church of S. Celso and what pertain to them. It established the fee to be charged for the pallium at one ducat per hundred ducat tax as found in the books of the Camera. For churches whose tax is five hundred, they may receive three ducats, five for a church with a one-thousand tax, but never more than ten ducats. For their role in the swearing of the oath in the hands of the first cardinal deacon by newly appointed bishops and abbots, they may not receive more than two and a half ducats. *Pastoralis officii* lists other fees they may receive for assisting at

[31] See Giuseppe Garampi, *Saggi di osservazioni sull valore delle antiche monete pontificie* (Rome 1766) 35-39, 45-49, 95-96, 123-124. To get some idea of what these coins are worth in today's currency, it is reasonable to consider the ducat worth about $1000. Thus, at the time of the Fifth Lateran Council and its *Pastoralis officii,* a grosso or carlino or giulio was worth close to $100, a bolognino or bajocchio romano approximately $10.

the ceremonies creating high civil and military officials and conferring the sword and rose on princes, for accompanying the pope on trips and functioning at funerals of cardinals, prelates, and ambassadors, receiving for funerals two ducats and four funeral torches, but nothing more. The masters are to assist with reverence and charity cardinals and prelates celebrating Mass, providing them what is necessary and opportune without seeking recompense. Should a master be promoted to bishop, he must vacate the office of master but can remain as president of the college, with papal permission and the agreement of the other masters. Their college should consist of two masters, one ultramontane, the other cismontane, plus two suitable substitutes who are expert in ceremonies to serve continually in the papal chapel and curia and on legations with the customary emoluments.[32] In agreement with complaints of IE, *Pastoralis officii* put notable restraints on the fees the master could charge.

Related to the office of ceremonialist was that of cantor. In the proposed reform bull of Pius II the singers of the papal chapel were urged to carry out their office with devotion, neither singing too quickly nor too slowly, to be honest, not mixing in any vain secular melodies. They should flee foul taverns and any places lacking proper propriety. Their master is to punish sharply any of their excesses. [33]

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[32] *Pastoralis officii* 572-573 nr.5; on the office of the master of ceremonies, see Nelson H. Minnich, 'Paride de Grassi's Diary of the Fifth Lateran Council', AHC 14 (1982) 370-460 at 387-406, esp. 391 and Jennifer Mara DeSilva, 'Appropriating Sacred Space: Private-Chapel Patronage and Institutional Identity in Sixteenth-Century Rome – The Case of the Office of Ceremonies', CHR 97 (2011) 653-678 at 664-668; in appreciation for de Grassi's services in managing the ceremonies of the Lateran Council, Julius II decided to promote him to commendatory abbot rather than to bishop for fear that he would lose his services as master of ceremonies since that office is below the dignity of the episcopal office; see Dykmans, 'Le cinquième Concile du Latran d'après le Diaire de Paris de Grassi' 297-298 nr.844: 38 and for his hostile assessment of the Council's reform efforts, see 369 nr.1231: 10: 'licet pleraque levia et pene utilia, ne dicam puerilia tractata fuerunt, ut supra [see supra n.8] de singulis scripsi'.

[33] Haubst, 'Reformentwurf' 227 nr.139

The papal master of ceremonies, Johannes Burckhard, in ca. 1487 described the singers as such: their master of the chapel, a chaplain or private chamberlain, chosen by the pope, should be a man of prudence and great reputation whose job it is to govern the singers. They should be honest and moderate men, no more than twelve in number, who are expert in music and have fitting voices for their tasks. Each month the master of the chapel receives ten ducats while the singers usually receive five ducats, with the stipend ranging from three to eight depending on their merit and papal favor.[34]

In the brief section of *Pastoralis officii* devoted to the singers, they are urged to live with a fitting modesty and discipline of morals, to imitate the behavior of honest priests, being subject to penalties for failing to do so. They may receive in the place of collation as remuneration for their services and labors four ducats each time from cardinals celebrating Mass; and from assistants and inferior prelates celebrating Mass, two ducats; nor are those celebrants able to give or the singers to receive more, under threat of punishment. What is stipulated in the chapter on the funerals of cardinals should be observed regarding the payments they may take in the celebration of the funerals of cardinals.[35] Who was to enforce these regulations is unclear.[36]

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[34] Richard Sherr, 'Competence and incompetence in the papal choir in the age of Palestrina', *Music and Musicians in Renaissance Rome and Other Courts* (Variorum Collected Studies Series, CS641; Aldershot 1999) XIV.607-628, at 626 Appendix 3.

[35] *Pastoralis officii* 593 nr.32

[36] Richard Sherr, 'A Curious Incident in the Institutional History of the Papal Choir', *Papal Music and Musicians in Medieval and Renaissance Rome*, ed. Richard Sherr (Oxford 1998) 187-210 that treats the question of who can discipline misbehaving singers: their master of the chapel as laid out in Pius II's proposed reform bull; or undecided as in *Pastoralis officii*; and his 'Ceremonies for Holy Week, Papal Commissions, and Madness (?) in Early Sixteenth-Century Rome', *Music and Musicians* 10.391-403 at 392 (the master was an administrator, a major composer, a teacher, and recruiter; Elzéar Genet, known as Carpentras from his birthplace was named master of the chapel by Leo X on 5 November 1513); idem, 'The Singers of the Papal Chapel and Liturgical Ceremonies in the Early Sixteenth Century: Some Documentary Evidence',

Ordaining Bishop of the Roman Curia

The next office treated by *Pastoralis officii* is that of the bishop who ordains men to sacred orders in the Roman Curia; it does not appear in many of the reform proposals. Scandals arose when men denied orders by their local bishop came to Rome and were ordained for a fee, without verifying their worthiness, by an absentee bishop residing in Rome. To prevent this abuse and set up procedures by which candidates were properly examined regarding their qualifications, the popes restricted to a specified bishop the faculty to ordain in the Roman Curia.[37] *Pastoralis officii* rescinded the faculties given to cardinals to ordain members of their own households and any other similar faculty granted by previous popes, and limited to one only bishop of outstanding morals and purity of conscience the faculty to ordain candidates in the Roman Curia. He is to be paid by the Apostolic Camera and may receive only one carline for the candles used in the ceremonies. Another archbishop or bishop is charged with examining candidates for their worthiness. He is to be assisted by a notary of the Camera who will provide a signed written deposition testifying to the examination. Both the examiner and notary each receive a salary from the Camera, plus one carline for each candidate thus served. An ordination conferred apart from this procedure incurs a penalty of two hundred gold ducats to be

Ibid. 11.249-264 at 258 (on cardinals paying singers with a meal before the ceremony and cash afterwards and the master of ceremonies, Paride de Grassi, instructing the singers to sing slowly or faster); the dean of the choir was supposed to direct the music.

[37] Guarino Pellicia, *La preparazione ed ammissione dei chierici ai santi ordini nella Roma del secolo XVI: Studio storico con fonti inedite* (Roma 1946) 23-54, 453; see also Andreas Rehberg, 'Deutsche Weihekandidaten in Rom am Vorabend der Reformation', *Kurie und Region: Festschrift für Brigide Schwarz zum 65. Geburtstag*, edd. Brigitte Flug, Brigide Schwarz, Michael Matheus, et al. (Stuttgart 2005) 277-305.

applied to the fabric of the Basilica of St. Peter. The enforcer of the decree was the Camerarius.[38]

Leo X put this decree into effect, appointing an Augustinian friar and papal sacristan, Gabriele Mascioli from Ancona, the archbishop of Durazzo, as the sole ordaining bishop and Giovanni Francesco Salvini from Florence, titular bishop of Spigant in Asia Minor, as the sole examiner of candidates. In consideration of the 'immense labors' involved in his job, Mascioli and Salvini were both each given in 1514 a monthly salary of five ducats, raised to ten ducats in 1519. When he and Salvini followed Leo X's court to Florence and then to Bologna in 1515, the pope appointed Cardinal Francesco Soderini as his legate in Rome and Jean LeFranc, bishop of Orange, as the substitute examiner and ordainer. The pope deplored the fact that Soderini had allowed someone in his entourage, Geremia Contugi from Volterra, archbishop of Krain in Albania, to ordain arbitrarily and threatened the archbishop with excommunication and a penalty of fifty ducats if he did not cease. The Chamberlain, Cardinal Riario, intervened on 2 January 1517 to suspend for a year and a half from functioning as a priest Jean de Droghet of Condom in France, whom Contugi had in a rapid series of ordinations raised to the priesthood despite his lacking the proper qualifications. In a 'motu proprio' of 1517/18 and again in a bull of 1519, Leo X insisted that the provisions of the bull *Pastoralis officii* regarding ordinations in the Roman Curia be strictly observed. On 15 February 1518, Salvini having died and Mascioli about to depart with Cardinal Egidio Antonini on a legation to Spain, Leo X appointed for life the Croatian bishop of Ottocacz, Vincenzo de Andreis from Trau, as the sole ordaining bishop in the Roman Curia of candidates for the priesthood, despite his having been credibly accused a month earlier of having tried to assault sexually his fifteen-year old nephew, Niccolò, a crime for which he apparently received no punishment (indeed, Leo praised his 'probata sinceritas' and 'bonitate et doctrina tua'), remaining examiner until his death in 1524. On 2 May 1524, Leo X's cousin,

[38] *Pastoralis officii* 573-574 nr.6.

Clement VII, put the stern disciplinarian, Giovanni Pietro Carafa, bishop of Chieti, in charge of ordinations in the Roman Curia as part of his effort to enforce the reforms of Lateran V. [39]

Apostolic Protonotaries

The third office reformed by *Pastoralis officii* is one that appears in many reform proposals, namely, the office of protonotary. The proposed reform measures of Pius II stated that altogether they were twenty-four in number, seven participating (i.e., present and functioning) and the others honorary. The participating protonotaries were to be men of good reputation who held advanced academic degrees in theology or canon law or were of noble birth. Only protonotaries, who are at least sub-deacons, may wear the rochet and exercise the office. Outside the Roman Curia they should not wear the rochet or pileum. They functioned as notaries of the Chancellery, attending meetings of the Sacred Consistory, keeping an official record of its decisions, being available for consultation, and helping to resolve doubts related to letters of justice. Only the protonotaries or clerics of the Camera or apostolic secretaries can made the official documents of the Consistory. Any records made by others have no validity, thus preventing any falsifications by notaries who might make unofficial records. The abbreviators of the protonotaries, who make the 'minutae' (drafts on the basis of which the official documents are made), are to be paid according the rules laid out

[39] Pelliccia, *Preparazione* 62-63 (Pastoralis officii) 450-451 (Drogheto) 451-453 ('Motu proprio' of 1517/18 and bull of 1519) 452-53 (de Andreis appointed ordaining bishop) 454 (salary raised to ten ducats monthly) 462-463 (appointment of Carafa) ; Alessandro Ferrajoli, *Il ruolo della corte di Leone X (1514-1516)* , ed. Vincenzo de Caprio ('Europa delle corti': Centro studi sulle società di antico regime, Biblioteca del Cinquecento, 23; Rome 1984) 37 and 133 (monthly salary) , 132-134 (Salvini) 527-531 (de Andreis); Kate J. P. Lowe, *Church and Politics in Renaissance Italy: The Life and Career of Cardinal Francesco Soderini, 1453-1524* (Cambridge Studies in Italian History and Culture; Cambridge 1993) 63 (client of Soderini) 162 (ordaining in 1515) 249 (suspicion of selling ordinations).

by Pope John XXII. The protonotaries also sign documents recording tax payments for letters of justice.[40]

The proposed reform of Alexander VI in 1497 required the participating protonotaries to attend in person in the Chancellery, not coming late or leaving early, and not exercising their office through others. Should they do so, they lose the emoluments owed them. And if in fact even with the consent of others they accept what others take, and thus not earning it on their own, they thereupon incur the sentence of excommunication. They should be content with the taxes owed them for provisions, and accept nothing for consistorial monasteries when they are reserved to those elected. Should they take an extra tax, they incur the penalties of our constitutions.[41]

IE notes that according to ancient custom the protonotaries made drafts of bulls of consistorial provision of churches and monasteries and were therefore granted for their labors fees: for the first one-hundred ducat tax a fee of five ducats, and for each additional one-hundred ducat tax an extra one ducat. And this was the only basis on which they were granted a fee. Nonetheless, today they make neither the draft of the bull, nor do they recompense the abbreviators for the drafts which are paid for separately, since these lord protonotaries should pay all the expenses. But monasteries which are expedited by way of supplication never arrive in the hands of the protonotaries because of the supplications, in which case the abbreviators make the *minutae*, thus the protonotaries should receive nothing. Nonetheless, against the ancient style they somehow took for a brief time beyond the tax on all expedited monasteries an un-owed fee according to the above-mentioned rate. They are said to be able to do this due to a mandate of Alexander VI granted to them surreptitiously. They also exact an un-owed fee on devolutions, in which they are not involved, and have their agents in the Apostolic Camera intercept the bulls and put them in the hands of the

[40] Haubst, 'Reformentwurf' 220 nr.85-91; Frenz, *Kanzeleri* 203; Peter Partner, *The Pope's Men: The Papal Civil Service in the Renaissance* (Oxford 1990) 22.
[41] Tangl, *Kanzlei* 395, 416 nr.55

protonotaries, thus slowing down the expedition of the bulls, a practice denounced by the Curia. In the time of Alexander VI, an attempt was made to have the *summista* first impose a tax by pontifical right, before the bull reached the hands of the protonotaries or collectors of the fee for the seal. Alexander VI thought this tax was dishonest and it would be more useful if applied to the writers of briefs, thinking they ought to be recompensed in some way. Having abolished the tax of the *summista*, the inconvenient system regarding bulls of devolution arose, whereby the writers of briefs tax the bull first, and then the protonotaries who intercept the bull through their agents. On churches and monasteries 'in partibus infidelium', whose taxes were reduced as a favor by the pope and consistory, the protonotaries nonetheless compute a tax as if they were not reduced and demand the full tax. A cleric of the protonotaries, who should receive nothing for consistorial activities, nonetheless for a few years now has received two 'grossi'. The protonotaries should receive nothing for bulls expedited through the consistory or by way of supplication in the Camera, nonetheless, they receive beyond their salary a fee on benefices expedited through the Camera at a rate as if they went through the Consistory, even on occasion extracting their rights two or three times over. On the basis of a mandate from the time of Alexander VI they retain monasteries for exactions, which practice has led to many complaints.[42]

Pastoralis officii set the common service fees they could charge for each ten ducats of expressed value at a part of a ducat for monasteries or churches expedited by supplication whose annual revenues were less than 200 gold ducats. They can extract the fee of a half ducat for a benefice with revenues of one- hundred ducats, and a full ducat for a value of 200. If the monastery or church has been reduced in value due to devastation or other cause, their fee is similarly reduced. The clerics of the notaries of the protonotaries may not extract a fee from the parties for the expedition, but let them be paid by the notaries whom they serve.

[42] IE pp. 246-247; Munich, BSB lat. 422, fol. 237r.

The protonotaries are to serve in the Chancellery in accordance with ancient customs and the observance of constitutions on the days designated and at convenient hours and be present until the Chancellery closes and not be represented by a substitute, but exercise their office personally with all skill and diligence.[43] Regarding their fees that they did not earn by composing drafts, *Pastoralis officii* allowed them to continue charging in a reduced manner, even for monasteries and titular churches. The reforms of the office of protonotary were weak.

Clerics of the Apostolic Camera

The next office regulated by *Pastoralis officii* was that of the clerics of the Camera. They were normally seven in number and were, under the vice-chamberlain and treasurer, the chief administrative officials of the Camera. They handled not only financial affairs, but helped to draw up and register bulls related to the consistorial provision of benefices, thus working closely with secretaries. They kept careful track of the obligations owed and paid to the Holy See, such as annates and common service fees, and they would not release the bull of provision until these were paid.[44]

IE had much to say about reforming this office. It called attention to the increasing sums of extorted money that need to be moderated by the prudence of the reformers. They should especially look at the ancient rules and the up-to-now observed customs regarding bulls of consistorial churches and monasteries expedited through the Chancellery, at the taxes in which the Vice-Chancellor and all the offices of the Chancellery participate. The reformers should see that there is no fraud in the expedition of the bulls, but that the rules are most rigorously observed. Thus, if there is mention of a resignation by the *incipit* 'Dudum siquid etc.' let there be no fraud regarding that church. The French work hard to preserve the provisions of their Pragmatic Sanction regarding

[43] *Pastoralis officii* 574 nr.7
[44] Partner, *Pope's Men* 24-25.

resignations and to take a quick possession of the benefice. And granted that the bulls thus expedited in the Chancellery are carried to the Apostolic Camera and payments for them are made commonly to the pope and sacred college and all the 'minuta' and other rights of the clerics of the Camera are honored, nonetheless the French are always accustomed to having a French bull of provision also expedited through the Camera under the same date, avoiding any mention of a restitution or resignation. The presidents of the expedition of bulls through the Camera, to avoid any fraud, always make sure there was no earlier expedition through the Chancellery, which can happen. The French expedite in this way, beginning in the Chancellery, in order to take quick possession, and once they receive the bull from the Camera, they burn the first bull from the Chancellery. They say this practice is injurious to them, but they are a slave in nothing. The clerics of the Camera, notwithstanding that they receive the 'minutae' of the Camera by all rights for the expedition of the first bull recently expedited through the Chancellery, and not withstanding that the second bull is the only one in close connection expedited under the same date for the same person for the same expedition and vacancy with the same 'cedula', nonetheless they receive the same whole 'minuta' of it, thus participating in more than one 'minuta', and they act as if the first bull was never expedited and nothing was received for it, a remarkable practice. And lest any parties contest the aforementioned bull expedited through the Camera, some are called devolutions (collations made by the papacy because the original collator failed to make the appointment in the stipulated time), but that is false because they were expedited under the same date as the first. The French are accustomed to expedite by the first bulls, so that what is expedited by the above-mentioned devolution under diverse dates, for which nothing is paid to the pope or the Sacred College, prevents the first bulls of apostolic provision from being used against the elected ones and the Pragmatic Sanction. The first bulls in the Chancellery and the subsequent ones in the Camera coincide. Nonetheless, the lord clerics expedite each devolution, even if they are many, as a single one in close

connection, and they exact their rights and 'minuta' over the above-mentioned provisions, as if they are diverse. Thus, the same provision is treated as more than one provision and taxed multiple times. This practice seems contrary to reason, something new, unheard of earlier—and these provisions are expedited fully in the briefest periods of time.[45]

Likewise among eventual things are reservations, regresses, and provisions; and for these things bulls are given with an obligation to pay a tax. But these bulls are never put into a strong effect at that time, because the lord clerics do not want them to be released unless first payments are made to them according to their rights and 'minutae', as above mentioned. This practice is in every way unjust. Likewise, should the pope in sacred consistory with the advice of his brothers reduce the tax on a church or monastery , the clerics demand a whole 'minuta' in place of the reduction; and for the above, they take five ducats per hundred of the reduction against what is owed. Should the pope with the sacred college of cardinals remit and donate the common fee and some annates regarding the whole tax or value of the benefice, nonetheless the lord clerics demand five ducats per hundred, and this they say pertains to them by vigor of the above, extraordinary concession that granted it, which is true. They should receive five per hundred, having respect for the median value of the benefice in virtue of which the pope donated the common fee and some of the annate, and not regarding the whole tax or the whole value of the benefice, for the pope never donated the whole, but gave his portion of the annates which is a half part of the value of the benefices; the clerics however demand five ducats per hundred having respect for the whole value, contrary to the force of the mandate. Likewise, for monasteries of nuns of whatever value existing, the annates not having been paid, but in place of the

[45]IE, Munich, BSB lat. 422, fol. 225r-v. The French seem to have been concerned that the pope may attempt to place a reservation or claim a devolution on a resigned benefice, practices rejected by the Pragmatic Sanction of Bourges, and hence they hurried to obtain of bull granting the person selected to fill the vacancy possession of it. See COGD 2.2 979-980.

annates are charged five per hundred for the monastic rochet of nuns whose revenues not exceeding twenty-four ducats of value are not held to pay for the rochet because they do not pay the annates. If they are of the type of payments made in the Camera also for the rochet of this kind, the clerics try to extract a fee contrary to the style and customs I could demand. Likewise for priories of conventual nuns in earlier time they did not request a rochet; now however they request and demand it indifferently. Likewise 'jocalia' were paid formerly only for the erections of churches or monasteries or dignities and for offices collated outside the City and for a few other things; now however for offices collated in the City which are bought and for such an erection also now of chaplaincies and reserving patronage rights and for any deputation of a vicar removable at will and a thousand other things as willed and almost of all things that are not common materials, to such an extent that for each bull at times they charge thirty or fifty or a hundred ducats for paying the 'jocalia' when in former times for one only bull the 'jocalia' were paid by a sum of two. This is a great abuse. Likewise for the reductions of churches or monasteries which are done in the consistory or because of wars or other urgent causes by which incomes become deficient since reductions were made from what was owed, the clerics should have nothing, but they receive five per hundred ; and also for bulls of favor, they demand their rights et 'minutae'. Likewise, they examine causes of deprivation and they exceed completely their jurisdiction in the land of the Church both regarding temporalities and spiritual things; they admit appeals from criminal cases and inhibit and impede them so that no malfeasance in the lands of the Church can be punished due to their impediments, either by a right that does not befit them or according to the form of the bull of Eugenius which does not pertain in the least to them. The pope wrote indifferently and 'ad libitum' for the state of the Church under the name of the Camerarius letters that were particularly to the contrary for every case when not overseen by the lord

Camerarius nor an integral cause. The letters pertain only to a case heard by the Camerarius.[46]

Pastoralis officii describes the seven clerics of the Apostolic Camera as our chaplains who receive an ancient and just payment that should be free of complaints and moderate as is fitting for whatever expeditions of churches, monasteries, or priories listed in the tax books of the Camera and for retentions owed to them on behalf of the 'minutae'. For devolutions, however, they receive nothing; even if there are multiple apostolic letters about them during the same vacancy for the same person, even if expedited on different dates; they should be content with a single payment. But in place of a devolution, we grant to them three ducats per hundred ducats of annates and 'communia' service fees, and in recompense for the said devolution from annates truly owed at the time of the vacancy, not however for things hoped for; but when things happening on their own, they are able to exact a fee. And we wish the same regarding other rights owed them, so that these rights to fees are not able to be sought before the event as fruits truly owed them; but the principal obligation should suffice with caution. And for the favors made as much as for the 'communia' service fees as for the annates, not more than at a rate of ten per hundred, from whatever persons of whatever quality or dignity, except for the cardinals from whom they are able to take nothing.[47]

Given the extensive criticisms of the practices of the clerics by IE, the provisions of *Pastoralis officii* are remarkably weak. They do not address the basis abuse that the clerics claim a tax on the 'minutae' which they never wrote and do not reimburse the officials who did the actual work. Also left in place are the clerics' demand for a full tax on benefices whose fees the pope had reduced or remitted. Similarly left in place was their demand for an unjustified fee for the rochet of an abbess and of the prior of a conventual monastery. Their expansion of the 'jocalia' tax was left unchallenged as was also their intrusion into criminal cases in the Papal States. While *Pastoralis officii* did forbid their practice of

[46] IE, Munich, BSB lat. 422, fol. 225v-226v.
[47] *Pastoralis officii* 574 nr.8

taxing multiple times the same provision, it ignored their holding up the presentation of the bulls to the parties until the clerics are paid. Although it affirmed that a devolution was not subject to their tax, *Pastoralis officii* granted them in its place a new tax. The Leonine reform of the important clerics of the Camera left much to be desired.

Notaries of the Apostolic Camera

The treatment of the notaries of the Apostolic Camera in both IE and *Pastoralis officii* is almost exclusively given to the fees they may charge for their services, but IE adds complaints about various abuses. The following is a comparison: the obligation on churches and monasteries is the same in each until one comes to those benefices whose revenues are over a thousand florens, at which IE assigns a fee of one florin and one Tourense 'grosso', while *Pastoralis officii* gives only one ducat; for 'restitutis' each grants the customary one 'grosso', but IE complained of a fee of two 'grossi' for those done outside of the consistory that was introduced for a short time by Alexander VI; for the examination of each witness regarding an intrusion, IE claimed that the notaries are to have one 'grosso', but they take two, *Pastoralis officii* does not address this issue. For the registration of a bull, IE grants them three or four 'grossi', but if the bull is a duplex, additional fees can be charged. IE goes on to complain that the notaries have substitutes perform various tasks; for example they have one of their 'mensarios' distribute the bull among other notaries, to one for registering, to another for making copies and extracts, to another for putting in storage the bulls on which annates are to be paid, to another for writing the 'quintantias', and to each of the others what pertains to their office according to an order constituted among them. It happens that some of the said 'mensarios' purchase by verbal agreement the fees that are assigned for distributing and registering the bulls and they then extort additional fees. *Pastoralis officii* forbad the practice of using substitute scribes, but allowed a *mensarius* to function as a

hearer in the registration of a bull. Regarding the fees for writing out bulls, *Pastoralis officii* distinguishes the length of the bull and assigns different fees accordingly: if the bull does not exceed twenty-five lines, a fee of five 'grossi', if larger, two carlines for each ten lines. IE notes that for consistorial provisions whose letter exceeds fifty lines the notaries can have one ducat, but they take at least four or more ducats that are not owed them. *Pastoralis officii* assigned them seven 'grossi' for a copy less than fifty lines, if the document exceeds two folios, one 'grosso'. Both IE and *Pastoralis officii* agree that within three days the document should be released on payment of the fees. *Pastoralis officii* takes on the issue of resigning benefices. Notaries may not record these in white (in albis) nor hold them secretly, but within fifteen day record them in the registration book of the Camera according to the mandate of Julius II, an issue ignored by IE. *Pastoralis officii* also goes into great details about the fees for other services not mentioned by IE. [48]

Pastoralis officii took seriously a reform of the notaries. It reduced significantly and assigned specific fees they could charge for their services. It also forbad the use of substitutes and took up other issues such as requiring a prompt and legible registration of resignations.

Masters of the Leaden Seal

Presiding over the fixing to a bull of the leaden seal and taxing it were officials called masters of the leaden seal. The proposed reform of Alexander VI allowed these masters of the seal to take one ducat for the biretta in a consistorial provision. If a bull was corrected due to a defect happening in the Chancellery, they could receive one carline. They could seek nothing for the consistorial provisions of monasteries.[49] IE goes into great detail on the fees they may collect: while an apostolic concession allows them one 'grosso' for sealing any document, they nonetheless demand more,

[48] IE, Munich, BSB lat. 422, fol. 227v-228r; *Pastoralis officii* 574-575 nr.9
[49] Tangl, *Kanzlei* 419 nr.67

asserting that bulls use lead and not a membrane to seal them. They nonetheless say those using membranes are to be called letters and not bulls. This practice, however, began in the time of Alexander VI, since before then they accepted only one carline for a principal execution of the task. For their 'regalia' in consistorial matters they were accustomed to have up until the time when the current datarius was master of the leaden seal, as your Most Reverend Domination well remembers, three or four or five ducats in all, according to whether the church or monastery was wealthy and the liberality of those soliciting it. Now, however, since the above-mentioned time they exact in addition a second tax, that of the protonotaries which is not according to the regulation; the lord taxers at their pleasure determine among themselves a fee not required of the parties, and exact as their 'regalia' twenty, thirty, fifty, eighty ducats and more according to the major or minor taxes on churches and monasteries; and for titular churches that have no revenues they take at least five ducats. For that reason, the price of their offices has increased, for they used to be sold for two or three thousand ducats, now however they sell for a price of five thousand ducats or more. Likewise for monasteries that are expedited through supplication, even if they were found already taxed, provided that their value does not exceed two hundred ducats, for their 'regalia' they should not receive six 'grossi', nonetheless they accept it. For the 'regalia' of retained churches and monasteries for the same reason and at their pleasure they take a fee, although not allowed, nor should they exact anything according to ancient custom. They exact for the office of scripter or abbreviator a fee, although according to custom they should have nothing.[50]

Pastoralis officii set a series of fees the masters of the seal could charge. The masters should not asked for more than two carlines; namely, for any sealing with a lead bull, one carline, according to the regulations of Sixtus IV; for any arbitration or 'regalia', they may take nothing beyond the sum listed below that was moderated by us, namely: on the taxes levied on consistorial

[50] Hofmann, *Forschungen* 2. 242-243; and IE, Munich, BSB lat. 422, fol. 230v.

churches up to 500 florins, they may not take more than six florins; up to 1,000, ten florins; up to 1,500, fourteen; up to 3,000, twenty florins; up to 4,000, twenty-five ; up to 6,000, twenty-eight florins; up to whatever sum thereafter, they may not exceed thirty-six florins; violations of this incur the penalties in the reform bull of Julius II. For titular churches, they may not take more than five ducats; for the retention of consistorial churches and monasteries where there are 'cedulae' of the proto-notaries , the same applies to them as mentioned above. For the expedition of monasteries done by supplication, if they have a value of less than two-hundred ducats, they may not take more than one ducat. For offices, they may not take more than six carlines for any bull, except for scripters for whom the ancient custom should be observed, certain customary emoluments to be paid to them, remaining as previously stated.[51] Once again, *Pastoralis officii* made significant reductions in the fees the masters could charge for their services.

The Bearded Brothers, Cistercian monks who placed the seal on bulls, were subjected to various reform proposals. The cardinal commission of Alexander VI recommended that they should have only one ducat when sealing a consistorial provision, but they now take ducats and carlines according to the tax rate. IE noted that the Brothers take for each bull two 'grossi and for doubles four 'grossi', for bulls taxed more than two ducats, they still should take only fees in the 'grossi' range. But for a principal bull they may take one ducat which is their right, but they should not have or seek more. Nonetheless they demand more and appeal 'ad libitum' for their 'regalia' and then extort as much as they can what is not owed to them. They give the bulls into the hands of their servants with whom it is necessary to fight, since they do not want to restore them to the parties unless one or two ducats are paid for them—so it is said.[52]

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[51] *Pastoralis officii* 582 nr.20

[52] Hoffman, *Forschungen* 2. 232 (Alexander VI) , 243 (IE); and IE, Munich, BSB lat. 422, fol. 230r.

Pastoralis officii has an extensive section on the fees the Bearded Brothers could charge. The vast majority of the fees were limited to one *grosso* per bull or one carline if expedited 'per forma quinterni', according to the tax rate of one carline for each ducat taxed. But on the expedition of consistorial churches and monasteries valued up to fifty ducats, they were entitled to two ducats; those valued up to a thousand, three; and then one and a half ducats for each extra thousand; on devolutions they could not exact more than one ducat; for bulls re-written because of an erasure, they cannot receive more than two carlines; for letters appointing someone to the protonotarial or other office, the number of carlines was proportional to the number of ducats paid for the office; for indulgence letters, one ducat; for bulls not taxed, four carlines; and so on. *Pastoralis officii* was very precise on what fees could be charge for what bull.[53] And once again it rolled back the fees previously exacted.

Sacred Rota

The next section dealt with the Sacred Rota. The draft reform bull of Pius II required the auditors to be conspicuous in learning, probity, and integrity, according to the constitution of Martin V. They should be careful that they receive no money or remuneration for impeding or deferring the administration of justice. The penalty for such is excommunication, dismissal from office, and a fine of one-hundred gold pieces payable to the Camera, a quarter of which is paid to the accuser whose name is kept secret. The guilty auditor is denied absolution unless he pays out to the poor of Christ as much as he received as a bribe. Cases regarding the auditors, advocates, procurators, and notaries who write under the direction of the auditors, may not be handled in the Rota. Any such judgment has no effect. As much as possible, auditors should flee any litigation on their behalf, especially in cases where they are active parties. In hearing cases they should always follow the truth, according to what has been proven in the

[53] *Pastoralis officii* 582-583 nr.21.

registers; nor should they fear the face of someone powerful nor be deflected from the correct path by any perturbation of the soul. They should expedite the cases of the poor, being careful lest the notaries receive anything for them. We have found that in the office of auditor good men and followers of what is right carry on their task justly, may it be so also in the future. Those who do not have such a reputation but act disgracefully should be ejected from office. Each year one prelate should be chosen before whom any complaints regarding the auditors can be lodged, freely heard, and a summary justice rendered. This prelate can also investigate the morals and life style of the auditors and refer their findings to the pope. He should also inquire if the advocates, procurators, and notaries have carried out their offices faithfully, taken fees more than allowed, or committed any falsity. He should punish their excesses and see that the taxes of their predecessors are assigned.[54]

Pastoralis officii did not descend into such detailed measures regarding the auditors. Instead it listed the glowing qualities the auditors were to possess. As men who hear the controversies from all over Christendom, they are to be correct, sincere, and pure, and should have an excellent reputation, no less for discernment of judgment as for a discipline and example of moral behavior. Let no one be infected by the suspicion of crime or stained with a fault, since as it is accustomed to be said by the word of all, every indication of a vice should be missing in those who are prepared to render a sentence on others. What befits an image of justice is modesty, constancy, severity, and inflexibility, not being swayed by gifts and favors and blandishments to deviate from the correct path – those with these qualities are said to be the proper ministers of the Rota. We exhort our beloved chaplain sons who reign in the tribunal of the Rota of the Sacred Palace to carry out their office of judging in a pious, holy, and incorrupt way without a spot, accurately following the constitutions and rulings of the popes regarding their office that are read by laudable custom each year at the beginning of the hearings (i.e., October 1st). May they listen to them attentively and carry them out efficaciously, with all

[54] Haubst, 'Reformentwurf' 223-224 nr. 111-117.

sagacity and industry, purity and integrity, under threat of the penalties contained in the reform measures of Julius II that can be modified if need be by the pope and Lateran Council.[55] Thus, regarding the auditors, *Pastoralis officii* made general, moralistic exhortations for proper standards of behavior, but avoided mandating any system for enforcing them.

Related to the auditors of the Rota were the offices of the procurators and notaries of the Rota. There were forty-eight notaries of the Rota, whose appointment was divided equally among the '*magister Camerae'*, vice-Chancellor, auditor, and pope.[56] The proposed reform bull of Sixtus IV made many recommendations. It prohibited the insertion into registers of the mandates of the procurators either by extension or by having them recited at length and repeatedly before or after the instrument. Similarly, they are not to pad their insertions with irrelevant materials to increase their fees. The auditors were not to hear cases involving notaries who live with them, if they receive from the notaries recompense for table expenses, unless this is truly explained, such that four notaries support the expenses of the auditor as well as of his three familiars. Should one demand more, he is to be excommunicated. If however the auditor does not receive money, but prefers that the notaries undertake themselves the expenses of the said auditor and his three familiars, let them be content with mediocre food, neither too delicate nor rustic, but in between, and not exceeding in variety. Apart from this system of expenses, no one is able to ask for more. Also none of the auditors may burden the notaries to associate with them on a continual basis, arguing that from such an absence of notaries from their homes, the litigating parties may sense a detrimental situation,

[55] *Pastoralis officii* 575-576 nr.10

[56] Hofmann, *Forschungen* 2.169; Kirsi Salonen, *Papal Justice in the Late Medieval Ages: The Sacra Romana Rota* (London 2016) 37-39. By the decree *Sicut prudens pater* of Sixtus IV in 1477 they were no longer personal assistants of an auditor whose tenure ceased with his death, but permanent employees of the Roman Curia who served the deceased auditor's successor. When a notary died or retired, whoever had appointed him had the right to appoint his successor.

unless some rational cause occurs such as the funeral of some prelate or a public consistory or something else of this kind. Likewise should it occur that one of the notaries died, the auditor should not enter into the goods of the deceased unless he was constituted the heir or executor by the will or ordered by the intestate of the deceased notary. Likewise in the case of one of the notaries dying, even if the auditor was the one who placed the notary in office, the auditor himself should not insert himself, but let the pope handle the case, nor should the auditor demand any sum of money from that notary, nor should he seem to dispose of that office by an indirect way. Also, since auditors should not have litigation with anyone, if any auditor claims he has a right to a benefice possessed by another or should someone claim a right against some auditor possessor, let the two come to some concord or have a cardinal or some prelate or a mutual friend decide the case summarily and simply, and let there be no appeal from the decision. Let us try to alleviate in a reasonable and equitable way the excessive expenses of litigants, thus limiting to one ducat per folio with twenty-five to thirty lines of writing the fee notaries may charge for their scribal services or for a copy of such a letter. For the examination of a witness in the house of an auditor or commissioner, the notary may not receive more than three *grossi*, but if at the home of the witness, not more than a half ducat. For the instrument of a definitive judgment, the notary may not charge more than two ducats, for a note of such a sentence, not more than one ducat. In the case of an inter-locutorial judgment, he may charge one ducat for the instrument, and a half ducat for the note. Formulas regarding dates should be short and precise. Notaries should do their own writing and not hire substitutes to do it. The first cardinal bishop and the eldest of the referendarii should be the enforcers of these measures. [57]

Pastoralis officii prescribed that the procurators admitted to practice in the Rota must be examined about their learning, practice, and morals and be approved both by our chaplain auditors

[57] Tangl, *Kanzeleiordungen* 383-385 nrs. 34-35 (procurators) 23-33, 36-37 (notaries).

of the very Rota and by two or three of the senior procurators or by those deputized by the college of procurators. If they are not found fitting and do not merit approval by auditors and procurators, they are to be rejected from the office and we prohibit expressly any payment for the examination. They may not undertake any case burdened by major exactions that is not to the satisfaction of all the parties, for from such arise great confusion and intricacies, burdening the parties with intolerable delays and expenses, and causing many cases to be in danger of being poorly defended. They are not to impede the giving of gratuities (the 'propina' and 'bibalia'), but are to leave the care of this to the parties or their solicitors. After the rendering of the sentence, they are able to make for the parties a summary account of the labor of the auditor, which if they had presumed to err on a second occasion, they incur a penalty and suspension from office for six months, on the third occurrence they are fully removed from the exercise of the office. Registrations, once done in the homes of the auditors, may not be further required. If the registrations are seen to be carried outside the homes of the auditors, unless with the consent of the auditor, they should not extract copies from the register, but restore these to them at a fixed time under pain of a financial penalty. They should not come to an agreement with the parties regarding the number of litigations, fruits, or expenses or other recompenses. They should offer patronage to paupers without money; and each year they should deputize from among their number a suitable 'praeceptor' from their college, giving him a competent salary. They are not to make an agreement with the notaries of the auditors or with others regarding the favors of the registers, except for the convenience and utility of the principal parties, such that it may evidently appear through a public instrument, lest to all the legitimate acts are rendered unfit or unmanageable. Procurators may not purchase notarial offices in the Rota or elsewhere before commissioners, nor may they have also any part in them under pain of the loss of that office which they also incur, if one currently holds that office or a part of it unless within two months of the publication of the present letters

they sell or get rid of it. Likewise blocked to advocates is that they permit the rendering of sentences against their principals who are absent from the Curia, in which case they are not allowed to call back something already judged, but they are held to appeal and to have the case committed, to signify to their principals and at the same time petition the prorogation of the 'fatalia'. After they assume the patronage of some cases and receive the burden of procuration, they may not dismiss undefended cases, but defend those cases with strength. Under the mark of infamy, they may not reveal to their adversaries under any pretext or cause the secrets notes of their cases.[58]

Pastoralis officii's treatment of the office of notaries of the Rota is one of the longest and most detailed of the reform bull. Notaries should be supervised and if they do not function within correct and honest terms, and having been warned by the auditors but not having emended their behavior in the opinion of the same, the fault being known among them and well discussed, they can be punished for the fault all the way to deprivation of office. No one may be admitted to the office of notary who is not experienced in writing and knows on his own how to write and function in the office. Thus, if there are currently some less fit notaries who have neither the will nor the professional skills for writing about cases or to use the writing tablet, or perhaps ignorant of letters, or because of a greater place or dignity, for this reason adept for only that greater office, let them surrender the office unless they have alienated it within three months, setting in their place some other by the auditors, not however one of their neighbors or familiars, up to the space of a semester, that having elapsed, unless it was provided opportunely, let it be in the judgment of those to whom it pertains to provide another in the office permanently, for we certainly do not wish the office to be exercised by a substitute nor to be surrendered under pain of privation, except in a case of illness or a necessary absence, as on account of the business of the Rota they are absent for other legitimate causes approved by the

[58] *Pastoralis officii* 589 nr.29; on procurators, see Salonen, *Papal Justice*, 25, 28, 40-41; on advocates, Ibid., 25, 27-28, 39-40.

auditors or with a license granted by us in which cases suitable substitutes examined and approved by the auditors may be provided.[59] Therefore, whoever currently exercises the office of notary by a substitute, unless within three months he begins to exercise the office himself, he is to be deprived of all the remunerations of the office that will be applied to the fabric of the Basilica of St. Peter, and the auditor in whose presence he writes is deputized to replace him with someone suitable, not however one of his familiars, until he exercises the office by himself or alienates it to another, and this up to six months during which he signifies his intent to sell his office to another notary who is sufficiently gifted with learning and experience. Our senior notaries who are in the City may have in their homes skilled and approved substitutes, to meet deadlines for documents written by them and following the manual of the Rota, since assiduously assisting to these ministers, they intend to be seen to do this by themselves. Notaries may not solicit or procure cases in the Rota to be heard before their own auditor under pain of penalties. No one may avail himself of two notarial offices or of part of another and if at present someone does, he must within three months get rid of the other. The auditor before whom that notary wrote should deputize another in his place by a written order.

Under threat of penalties here renewed, the constitutions of the Rota are to be accurately observed in the making of registers and copies, in remissions, compulsions, executions, notes of definitive sentences, and examinations of this kind.[60] They may receive in truth nothing for notes of interlocutorials, and the same serves for moderate solutions in copies and the publication of witnesses. They may carry out themselves the examination of witnesses, being content with receiving the customary payment from of old, namely, four carlines for each witness where there are not many articles (i.e., items of complaint). We wish to cut back on the number of interrogatories, namely, let there not be more

[59] On the qualifications for the office of notary, see Salonen, *Papal Justice* 23, 27; on their substitutes, Ibid. 38-39.
[60] On the various constitutions of the Rota, see Salonen, *Papal Justice* 21-31.

than twenty questions nor anyone of them exceed three lines. Where however there are by chance many articles, five carlines and they should be content with up to the sum of one ducat for the examination of some distinguished person. They may exact no 'bibalia' (drinking money gratuity) for the registration done in the house of the auditor or in the Rota or if it was necessary to carry it out elsewhere; nor may they take a fee except for one or two carlines at the time of the expedition of the causes, granted that the registration was carried out many times hither and thither. They are to take nothing for making relations (accounts) derogated by them to an associate.

They are to make accurately good and legible registrations containing as many number of letters as was customary before the time of Sixtus IV, namely fourteen syllables or at least twelve for each line, and twenty-six lines for each side, on good paper, not damaged, not blotted, nor involved in some previous perverse use. Let them not dare to put one word or syllable per line, and auditors who find folios written otherwise should remove them and make the notaries redo them at their own expense. If the notaries do not acquiesce in this moderation, they are to observe accurately their own constitutions and following the rules as above, they are allowed to take one and a half 'tournois' for each piece of paper. We leave to their judgment what they prefer to choose from these dispositions. They should faithfully make themselves the rubrications, such that they are not found contrary to the text, and they should not take more than their constitutions allow for this. If an interpretation of the item rubricated is necessary, on account of an idiom different from the Latin, in which case the process will be rewritten and not be in the form of the register, but the paper will contain at least part of the process regarding the parties, unless this was done with the consent of the parties.

They are not to extort, from cardinals or other curial officials or the poor or those for whom services are free, anything that is beyond what is customary and equitable. They are not obliged to give free services to the familiars of cardinals or of the Vice-Chancellor, unless up to the number of fifty so described. They are

not to insert in the registers superfluous words unless they serve a purpose and then in the briefest form. Regarding the subrogation of the jurisdictional commissions, we wish it understood that it not be done more than once and not be repeated. The same regarding the repetition of terms (deadlines) so that once for each party it was extended, that being computed, it is not further extended. Let there be omitted the registration of pre-inserted commissions which may depend on the judgment of the auditor as to whether they are registered or pre-inserted. Capital letters may be used according to the ancient custom for the effect of teaching about a censure. In ordinary cases, they are not allowed to take as payment for the registration of one-hundred folios more than eight ducats, at the rate of ten carlines per ducat.[61] In extraordinary cases, of which the multitude is great, that they may serve correctly, they are allowed to take twenty-five carlines for one-hundred folios if the registration was made according to the above-described method and not otherwise. Copies, corresponding to the current register, may bear less syllables and number of lines, because they are indeed copies. They may not solicit commissions or causes committed to the auditors. Regent notaries or assistants of commissions made to the signature of justice must give up their office within the space of a bimester or else be suspended from its remunerations. Nor are they to be bound by mutual fraud, by intervening commissions, as some do, but let them serve among themselves the ordinary and extraordinary turns. Let not agreements be made with the solicitors, advocates, or procurators for a portion of the profit of the registers or of witnesses or of copies before the cases have been committed to the auditors. Nor may they make a favorable agreement regarding the register, as in giving fifteen or twenty folios per ducat such that the persons with

[61] On the ratio between carlini and a ducat, see Garampi, *Saggi*. In the later fifteenth century the value of the carlino declined so that by 1503 thirteen (no longer ten) carlini equaled a ducat. In 1504 Julius II created a new coin called a giulio to replace the devalued carlino and restored the rate of ten giulios to a ducat. This evaluation lasted until 1545 when twelve giulios now equaled one ducat. The old carlini coins continued in circulation.

whom they deal participate in the profit, under the penalty of privation, but whatever is agreed upon after the case has been committed, let the whole benefit be ceded to the parties, and about this, let it stand firm through an instrument of the public notary.

All the poor who according to the form of the constitutions should be admitted to the oath of poverty, may also admit such by way of a procurator. And if that one on whose behalf it was sworn is not present, beyond the assertion of the notary or procurator, it is agreed to be learned about the poverty through two witnesses, such that nonetheless whoever was to be admitted, not without an oath and obligation of the proof of fortune, as is the custom, is admitted, and this unless it is evident and notorious, who wishing to swear to poverty is wealthy, in which case they are not held to admit him.

All and each of which things we order to be observed inviolably under pain of punishment about which we wish two correctors for as many years to be chosen by the aforementioned auditors from among their college to whom are to be deferred, in addition to the complaints of the defender of the notaries, also all those of the paupers and the oppressors. They should provide to all these by opportune remedies, not only lest the parties are oppressed, but also that those are punished for daring to oppress, and let this be observed exactly as above. So that however in turn there is assistance given for unjust burdens, for payment for the home of the auditor, we do not wish the unwilling to be compelled, nor also for the payment of twenty ducats to the auditor for admission to the office, nor for anything else, returning to before the unaccustomed times of Sixtus IV; and if, by the death of the auditor, the provision of something new happens to be deferred beyond a trimester, we wish that some part of these commissions be distributed by the regent through other auditors for hearing, at least for a third part, until they are provided by the subrogation of the new auditor so that he is relieved of their indemnity, they may not take the gold ducat, unless corresponding to the Chancellery,

namely twelve carline for whatever and not more.[62] These remarkably detailed rules for the notaries of the Rota aimed to preserve the reputation for rectitude of the Rota.[63]

Penitentiary

The next office treated by *Pastoralis officii* was that of the Penitentiary. The constitution of Eugenius IV, *In apostolicae dignitatis* (1433), regulated the offices and functioning of the Penitentiary until the reforms of Leo X (1513), Pius IV (1562), and Pius V (1569).[64] The proposed reform bull of Pius II divided its treatment of the office into two sections. The first dealt with the major penitentiary. He is to be a cardinal and may be removed from office at the pleasure of the pope. The office may not be committed to another who is not a master of theology or doctor of canon law or sufficiently educated and who is not more than forty years old. He should grant at least three time per week a public audience for paupers and assist favorably their necessities. Let him remove far away simony and any corruptions. He should diligently inquire into the life of the minor penitentiaries, scripters, and procurators; and punish sharply any of their excesses. Nor should he tolerate if paupers and wealthy persons are burdened by them. The second section dealt with the minor penitentiaries. They are to be taken from diverse nations and languages so that not only Italians visiting the Curia, but also Spanish, French, Germans, Hungarians, and Slavs are able to confess in their own language. Nonetheless, the minor penitentiaries should not number more than twelve. They may receive nothing from those whom they

[62] *Pastoralis officii* 589-592 nr.30; similar rules regarding the number of syllables and lines per side of a folio were laid out for the notaries of the governor, see *Pastoralis officii* 597 nr.39 .

[63] That the notaries were not carrying out their duties as prescribed, required Leo X to enact these detailed rules; see Salonen, *Papal Justice* 39.

[64] Kirsi Salonen, 'The Curia: The Apostolic Penitentiary', *A Companion to the Medieval Papacy: Growth of an Ideology and Institution*, edd. Keith Sisson and Atria A. Larson (Brill's Companion to the Christian Tradition, 70; Leiden 2016) 259-275 at 263.

absolve. If someone acts contrary, let him be anathema, excommunicated, and deprived of office, nor can he be absolved unless he gives to the poor what he received. Let those who are assumed into this office be of good name, be masters of theology or licensed or doctors of canon law, or at least adorned with learning so that they are not ignorant about what pertains to the office. Nor may they be admitted unless having been examined, nor may they have less than thirty years. They elect their prior, who functions with power for a year, and they present him to the major penitentiary for confirmation. Once confirmed, he takes care that the statutes and constitution of the office are diligently observed. The scripters and procurators of the penitentiary should be constituted in holy orders, nor may they exercise another office unless admitted to it by an apostolic dispensation. For certain, in truth, no one should be so dispensed. They may not transgress the taxes ordained by our predecessors. Should anyone accept more, on that basis they lose the office. Nor should their number be increased, but kept the same. The major penitentiary should be careful lest he exceed the power granted to him, nor may he expressly set someone free unless on behalf of paupers. If he does the opposite, he is anathema. [65]

From the papers of the 1497 commission Alexander VI appointed to reform the Curia, three documents related to the Penitentiary survive. Two of them are closely related, being descriptions of how this office functioned. One listed the various offices and their functions, beginning at the top of the bureaucracy, while the other detailed how a supplication made its way through the bureaucracy in such a manner as to avoid any fraud. It also pointed out problems needing correction. The third document criticized the current practices. [66]

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[65] Haubst, 'Reformentwurf' 215-216.

[66] Celier, *Dataires* 140-143 nr.10 (officials and their functions) ; and Emil Göller, *Die päpstliche Pönitentiarie von ihrem Ursprung bis zu ihrer Umgestaltung unter Pius V*. (2 vols. Rome 1907-1911) 2.101-106 (how a supplication is processed) 107-133 (criticisms).

The second document describes in detail the offices of the Penitentiary. The Grand Penitentiary is in charge of the Penitentiary, visiting its officials, seeing that they observe the rules, correcting errors, and punishing those guilty by excommunication or suspension or deprivation. He approves with his signature the supplications. In his absence, his regent can carry out his duties. [67] The author of the third documents is clear in his criticisms of the current Grand Penitentiary, Giuliano della Rovere (the future Julius II), whom, however, he never mentions by name. He is described as rarely taking his seat as a confessor, as not performing his office, and being ignorant of foreign languages. Instead of seeing his office as assisting in the salvation of souls, he treats it as a source of revenues by selling offices; and he creates discord and scandals.[68] For example, the minor penitentiaries have the right themselves to choose both the clerics who seal their letters and the youths who lead penitents to their feet for confession, officials whose job it is to alleviate their burdens, but the Grand Penitentiary has claimed for himself the right to appoint them, selling them the office, and forcing the minor penitentiaries to pay their salaries: the sealers at a rate of four 'bolendini' per letter, the youth two 'bolendini' for each penitent led to them, while the minor penitentiaries gets only one 'bolendino' for the testimonial letter of absolution he gives the penitent. The Grand Penitentiary at times makes false claims about a penitent's residence in Rome and then imposes a penance without the penitent first confessing his sin and receiving absolution. He is denounced for infringing on the rights and revenues of the minor penitentiaries in violation of the constitutions of Benedict XII, Nicholas IV, Sixtus IV, Innocent VIII, and Alexander VI that regulate the Penitentiary.

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[67] Göller, *Päpstliche Pönitentiarie* 2.101; according to Kirsi Salonen and Ludwig Schmugge, *A Sip from the 'Well of Grace': Medieval Texts from the Apostolic Penitentiary* (SMCL 7; Washington 2009) 90, 92, 100, other officials could make the decision, but the letters were written as if the Grand Penitentiary made it.

[68] Göller, *Päpstliche Pönitentiarie* 2.113, 126

The second and third documents provide similar descriptions of the clerics who heard the confessions of pilgrims, namely the minor penitentiaries, who constituted a college of eleven members. They were required to be men of legitimate birth, priests, at least thirty-five years of age, graduates with doctorates, men of honest life and grave morals and pacific conversation, not poor or burdened with debt, men who have proven their learning by a disputation, examined as to their doctrine by the other minor penitentiariess who vote on their admission, and approved by the Grand Penitentiary and pope. After which, they took the oath and received the 'cappa' and rochet. They were given as emolument fifteen ducats each month, but Eugenius IV changed that to a one-third share in the fees for apostolic bulls and all the fees for the registration of supplications and letters of dispensation or absolution issued by the Penitentiary. In addition, they receive twice a year twenty-five ducats for clothing. The author of the third document complained about their inadequate compensation. He noted that the Bearded Brothers, ignorant laymen, receive for sealing bulls more than all the eleven minor penitentiaries together receive, distinguished men who have the difficult task of caring for souls from around the world, men expected to appear properly attired in the papal chapel. While other papal officials receive free food in the common dining room, the minor penitentiaries receive only a loaf of bread and no mention of wine. While the pope freely grants favors to numerous officials and familiars for which the minor penitentiaries are required to provide documents with silk cords and lead seals, such favors are not extended to the minor penitentiaries and their nephews and familiars. They do not receive proper compensation and respect.[69]

This author argues that the minor penitentiaries are not subject to the Grand Penitentiary, but are directly subject to the pope. Yes, the Grand Penitentiary is a cardinal, has greater faculties, greater responsibilities, and can resolve on his own ambiguous cases, but his authority does not extend over the minor penitentiaries. If the Grand Penitentiary cannot deprive of their office the servants of

[69] Ibid. 2.104-106, 113-115.

the minor penitentiaries, surely he cannot deprive them. The Grand Penitentiary tries to confiscate the food and clothing granted to the minor penitentiaries by the pope. While the minor penitentiaries swear not to demand fees for their confessional work, they are entitled to material support as was Christ and the Apostles.[70]

The issue of who can appoint substitutes for the minor penitentiaries was hotly contested. The college of eleven minor penitentiaries has the responsibility of providing confessional services to pilgrims. When on special festivals, the pilgrims' number becomes too great to hear all their confessions, the minor penitentiaries can call upon the assistance of their continual substitutes, that is, their chaplains and associates chosen by the minor penitentiaries, men properly screened. There were two or three continual substitutes for each language, who with the permission of the prior or of the majority of the college can substitute for the minor penitentiaries of that language. This was allowed by Eugenius IV. There also existed temporary substitutes. Benedict XII gave to the Grand Penitentiary the authority to select substitutes in times of necessity once their suitability had been established, but that authority is temporary in nature. Of late, these temporary substitutes have not been properly screened and there is the danger of a layman attired as a priest hearing confessions. Some of these temporary substitutes do not take the oath against receiving anything for hearing confessions and request a fee. This is understandable because they are defrauded by the Camera from receiving the monthly allowance. The confessors in the major basilicas of Mary Major and John Lateran are not properly minor penitentiaries like those in St. Peter's. There are no three colleges of penitentiaries. Neither are those confessors in the churches of St. Praxides, San Agostino, Santa Maria del Popolo, Santa Maria di Pace, or Spirito Santo in Saxia true penitentiaries, men who claim to have faculties greater than those of the minor penitentiaries. They cannot give to pilgrims official letters testifying to absolution. These extra confessors are superfluous,

[70] Ibid. 2.116-119.

they do not have the same qualifications and are not held to the same standards as the minor penitentiaries, not prevented from frequenting taverns and having concubines, and do not take an oath against fees. To reform the Penitentiary, these "pretended" confessors cannot remain.[71]

On the question of the alms freely given the confessors, the authors of both documents warned against publicly displaying the capsule for the donations, lest the penitent feel compelled to put money in it. Indeed, some confessors tell the penitents to place in it their alms or the fines the confessors impose on them. The authors felt it better not to take alms at all. If alms are taken, however, it would be better for the confessors not to take an oath against receiving anything for hearing confessions. The next problem is how to divide the money put in the capsule without discord: should it be divided equally among all the confessors or would that not be unfair, since the Italian-language confessors have a steady stream of penitents, while the other language confessors have far less. Should there be one capsule for the regular confessors and another for the substitutes? It is better that the confessors be paid with a one-third share of the fees paid for registering and sealing the Penitentiary letters or better yet have the fifteen ducat monthly salary restored .[72]

How to resolve ambiguous cases is another problem. This can be done only by the Grand Penitentiary or pope himself. It would be good if the Grand Penitentiary consulted the minor

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[71] Ibid. 2.105-106, 120-127; the college of penitentiaries at the Basilica of John Lateran was to be reduced eventually to eleven by order of Leo X dated 23 April 1517, Ibid. 2.90 nr.19; Pius IV set the number of minor penitentiaries at the Basilica of Santa Maria Maggiore at twelve and required them to come from various nations and religious orders, but Pius V reduced their number to six, eliminated the requirement of different nationalities, and made them all Dominicans of the Roman province appointed by its provincial; see Agostino Borromeo, 'Il Concilio di Trento e la riforma postridentina della Penitenziaria Apostolica (1562-1572)', *La Penitenziaria Apostolica e il Sacramento della Penitenza: Percorsi storici, giuridici, teologici e prospettive pastorale*, edd. Manilio Sodi and Johan Ickx (Città del Vaticano 2009) 111-134 at 125-126.

[72] Göller, *Päpstliche Pönitentiarie* 2.104-106, 129.

penitentiaries, but there is the danger of revealing the identity of the person involved in the case. Because of this, penitents go instead to Mary Major or John Lateran or the Holy Spirit in Saxia for absolution. To relieve their concerns regarding confidentiality, let ambiguous cases be handled quietly by the prior or senior members of the college of minor penitentiaries.[73]

Two other offices of the Penitentiary were carefully reviewed by the second and third document and each had its own college, namely, the procurators and scripters. Procurators were organized into a college of twenty-four member presided over by the Grand Penitentiary and his three auditors. Their principal task was to help pilgrim petitioners process their supplications. Pilgrims needed quick action on their petitions; they could not afford to hang around Rome. The bureaucracy of the Chancellery was slow and burdensome, it was better for them to put their petition through the Penitentiary where the fees were lower and service quicker. The procurators were to tell the petitioner at the start what their expenses would be.[74]

The scripters formed their own college of twenty-four members. The Grand Penitentiary chose from their number two correctors (correptores) who distributed equally and in order among the scripters the petitions/supplications which the scripters put into proper form as letters, attaching to that new document the original supplication. The petitions of paupers were to be handled first. 'Minutae' were not needed at this stage, they only delayed the process. The correctors also chose six assistants from among their fellow scripters. Their task was to check draft documents for their proper Latinity, clarity of expression, and legible handwriting. It seldom happened that a flawed document made its way through the Penitentiary since it was usually handled by fourteen officials, each of whom could act as censor. The scripters chose two of their number, one to function as the distributor who assigned the scripter to compose the final document and determine its tax, and the other to act as the computer who on a monthly basis

[73] Ibid. 2.130
[74] Ibid. 2.103.

determined for each scripter an equal share in the tax money charged for letters. Once the document had been inspected, corrected, and sealed, it was put into the hand of the Grand Penitentiary or taken to the archive where a brief summary of its essential points was made and the letter was kept in the archive until the penitent paid a tax to the officials who registered and sealed the letter. These officials are not mentioned in the formulary of the Penitentiary, nor were fees paid to them in olden times. Letters issued in the name of the minor penitentiaries could be corrected and sealed by them, and they could give ambiguous cases to the 'doctores' to examine manually and the document then sealed by the minor penitentiaries. Problems could occur among the scripters if they held up having a document signed and sealed, or charged a pauper, or assigned an excessive tax. To prevent this from happening the regent and his auditors need to be vigilant and reduce fees when they are out of line. [75]

Another function of the scripters was to compose testimonial letters (litterae ecclesiae). These should be composed within one day and taken to the church where the minor penitentiaries sat and be given to the penitent. The scripters did not want to provide this service unless they could extort a fee in addition to their monthly salary. They were therefore given one carline per letter by the chaplain, not by the penitent. Once absolution has been given, the letter testifying to absolution was given to the penitent. It did not describe the sin absolved, but functioned almost as a souvenir, an expensive one at that! [76]

Pastoralis officii devoted a long section to the office of Penitentiary and the fees it could charge. It described the function of the office as censuring morals and dealing with the salvation of souls. Because its officials are said to charge taxes on the letters it expedites that are more than customary, the pope seeks to circumscribe their practices by rules. It is the duty of the Grand

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[75] Ibid. 2.102-103, 130-132; Salonen and Schmugge, *A Sip from the 'Well of Grace'* 93, 105, 115.

[76] Göller, *Päpstliche Pönitentiarie* 2107-2113; Salonen and Schmugge, *A Sip from the 'Well of Grace'* 86-88.

Penitentiary to set an example and by fitting warnings and opportune severity within the terms of honesty to supervise the regent, auditors, and other officials. Let them abstain from the non-customary practices conceded by Sixtus IV and exercise their office instead, in all cases, whether by themselves or through the regent or a lieutenant, by following the faculties granted to them by previous pontiffs.

To assist the Grand Penitentiary are various officials. The corrector should hold a doctoral degree or at least be expert in laws according to the form of the constitutions and ancient reforms. The corrector and auditor of the Penitentiary may not permit under threat of excommunication supplications on matters not permitted, unusual things conceded by senior members of the office, even if signed by the regent and bearing other signatures; also banned are all concessions that seem scandalous, unusual, and less expedient, and also the taxes on letters made outside the ancient order and our modification. Instead, let these officials hold them back or reject them, unless they were expressly seen by the Grand Penitentiary and they appear to be manifestly according to his will. And they should exact the ancient taxes from the time before Sixtus IV, as was set out by Julius II and our moderation. Other officials are the scripters and procurators. The scripters are to observe down to the fingernail the ancient constitutions and no one may be admitted as a scripter of the Penitentiary who is not a cleric or a celibate not obliged to a marriage nor having less than twenty-five years of age, unless otherwise granted an apostolic dispensation:[77]

> Let procurators of the Penitentiary be content with only the middle tax granted to them by the constitution of their office, nor should they burden the parties with anything more, nor seek to expedite prohibited or unusual matters, nor extort from the parties more than is necessary for expediting the business . . . [Violations of these rules are punishable up to] deprivation of office. And so that the expedition of matters may occur completely without any deceit, let him give a pledge by the testimony of a party regarding the price he pays to the regent for the expedition, similar to that paid by the solicitors of apostolic letters; and let him explain in writing in his own hand the true cost of the whole expedition, using such words as

[77] *Pastoralis officii* 576-577 nr.11.

> 'Expedited through me, N, the procurator'. . . And afterwards, when it is referred to the office, let him swear that it will be done accurately and without fraud, under pain of the said penalty. He is not to formulate or write supplications made contrary to the truth of the matter and to the contingencies of cases and information given by the parties, so that the business is expedited by narrating a falsehood on the insistence of a party. Transgressors of this are to be punished and they lose the office they have so unworthily performed.

Materials about which there are major abuses and much greater complaints lodged with us are to be more particularly suppressed and especially inhibited. These include: religious who claim they made profession under duress and seek to return to the world; those seeking liberation from irregularity incurred for a mutilation of their body or for homicide; absolution for simony in obtaining a benefice; licenses for ordination either outside or in the Roman Curia; dispensations from consanguinity or affinity and other impediments to marriage; commutation of vows; dispensations from illegitimacy and spurious birth in order to receive sacred orders; permissions to choose one's own confessor, have a portable altar, have religious services at a time of interdict, celebrate Mass before dawn or anywhere, transfer from one religious order to another, live outside one's monastery, enter a cloister of nuns, and be exempt from rules regarding fasting and abstinence; and on how to handle cases involving simony.[78]

Pastoralis officii is especially harsh in its treatment of the minor penitentiaries. Their negligence, fraud, and lack of skill are an open and grave danger to souls, lest together with them they rush into hell. They are to be called back from intolerable abuse and perverse license and restrained within the walls of decency and modesty. Therefore, no one of them unless plainly and sufficiently endowed with the requisite qualities according to the constitutions may certainly be received into the office and they should come from every nation. If some of the current minor

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[78] *Pastoralis officii* 576-581 nr.11-17; for the fees attached to these dispensations as practiced six years later in 1519, see Léonce Celier, *Les Dataires du XV^e^ et les origines de la Daterie Apostolique* (Paris 1910) 155-164 nr.15; for the functioning of the Penitentiary during this period, see Salonen and Schmugge, *A Sip from the 'Well of Grace'* 13-105.

penitentiaries are not such, a diligent examination by the Grand Penitentiary having been had, they are either to be removed completely, or, for some years, as long as it seems expedient, be suspended from the exercise of this office. And if afterwards it should happen that someone unfitting has been chosen, even if he has a mandate from us or our successors extorted by importunity, the Grand Penitentiary is held not to admit him, unless having first consulted with us or our successors. The penitentiaries are to abstain from vile and secular pursuits, lest while striving after money and longing for sordid lucre they stain the soul by base and unbounded avarice. Let them observe and restore the owed gravity in dress, words, and gait of their predecessors, not turn away paupers, not upset those confessing contrary to the standard, but raise up their penitents in the best hope of God's mercy, nor receive from them money for the celebration of Masses, nor seek or demand anything from them, under pain of excommunication and privation. Rather, let them be content with any alms offered to them at the end of the confession. For cases not permitted to them, let them not absolve the penitent; and in absolving penitents publicly, let them follow the ancient customs and rites. They are not to deputize substitutes except in those few cases where there is necessity due to various languages and nations or on principal feasts and Holy Week, the deputation of whom should be done a month ahead and be approved first by their priors and prelates and then by the college of penitentiaries, and finally by the Grand Penitentiary, nor should the number of substitutes exceed sixty. But should the multitude of the crowd or necessity dictate, the college of penitentiaries requiring it, the number can be increased to one-hundred by the Grand Penitentiary. From these, the penitentiaries can demand nothing, but they should be content to receive a third or fourth part of the alms, insofar as it seems to the substitutes that they were freely offered, which alms are put in a certain container for the use and necessities of the house of the Penitentiary. If they do otherwise, they are subject to penalties. Substitutes are subject to the same penalties if they engage in any of the prohibited practices. Lest they pretend ignorance, they are

to be told about these penalties when deputized. Penitentiaries are not to join the customary congregations or confraternities, but early in the morning having heard Mass, let them come together and confer among themselves about cases of conscience in such a way that they do not reveal the identity of the sinner by any word, sign, or nod. Nor may they absent themselves nor presume to hear confessions during these conferences. They should occupy the seats and places of confessors for as much time as the ancient constitutions oblige them, nor should a penitent at any time find them unprepared. The penitentiaries may choose one trusted person, even if he is not a penitentiary, so that while remaining in the office of the Sealer, he may procure for them a third part of the emoluments owed to them and keep a computation of these, since this task does not befit the penitentiaries. Processes, which are carried out by them regarding secret sins, are to be kept and guarded among themselves; they are not able to be transferred to another place, nor shown to another. Their prior, the house of the Penitentiary being a quasi-sacristy, should guard against any sordid conversation. Let him close and open the gates at the fitting hours, and exclude or not admit any suspect person. No one else is allowed to dwell in the rooms of the penitentiaries; the house should be governed with care as a religious house with fitting penalties for violators.[79] The number of penitentiaries living there is limited to eleven, according to ancient custom. And since a personal residence in the Roman Curia is greatly and necessarily required for this office, those who are currently absent from whatever nation and who remain absent for more than one or two years from the City and Curia, without legitimate cause or our license, we wish their constitutions regarding their privation to be exactly and rigorously enforced and others deputized and

[79] Pope Nicholas III (1277-80) required the minor penitentiaries to reside in a common house at the Piazza San Pietro that was placed under the authority of the Grand Penitentiary, see Johan Ockx, '*Ipsa vero officii maioris poenitentiarii institutio non reperitur*? La nascità di un tribunale della coscienza', *La Penitenziaria Apostolica e il Sacramento della Penitenza: Percorsi storici, giuridici, teologici e prospettive pastorale*, edd. Manilio Sodi and Johan Ickx (Città del Vaticano 2009) 19-50 at 34.

substituted in their place. We do not wish in any way to infringe on the faculties of the current Grand Penitentiary, Leonardo della Rovere. What the above prohibits to the regent, corrector, and auditor, he may exercise himself, when it seems fitting to his conscience and prudence.[80]

Pastoralis officii addressed most of the concerns of the earlier reform proposals and went beyond them. It was careful to prevent any hint of simony or breach of secrecy in the hearing of confession. It did allow alms, but prevented the penitentiaries from soliciting them. It seems to have sensed many abuses among the minor penitentiaries and prescribed a rigid discipline for their residence. The Grand Penitentiary is left untouched, indeed, he is given authority to ignore the reforms.

A serious reform of the Penitenzieria was apparently not impeded by its Grand Penitentiary, Leonardo della Rovere (1511-1520), but that was not the case with his successors, members of the Florentine Pucci family: Lorenzo (1520-1529), Antonio (1529-1544), and Roberto (1545-1547) who saw the Penitentiary as a source of revenues, opened the way to many abuses, and opposed various reform.[81]

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[80] *Pastoralis officii* 580-581 nr.18; della Rovere obtained dispensations from the regulations of *Pastoralis officii* from Leo X in 1518; see Göller, *Die päpstliche Pönitentiarie* 2.39-43; Leonardo enjoyed a reputation for integrity and the love of justice, plus charity toward the poor; see Lorenzo Cardella, *Memorie storiche de' cardinali della santa romana chiesa* (9 vols. Rome 1792-1797) 3.314.

[81] Filippo Tamburini, 'La riforma della Penitenzieria nella prima metà del sec. XVI e i cardinali Pucci in recenti saggi', RSCI 44 (1990) 110-140 at 116-121 (Antonio Pucci from 1536 to 1542 tried to reform Penitenzieria on his own, other reformers wanted it abolished) 124 (dates of Grand Penitentiaries); Alfons Chacon, *Vitae et res gerstae pontificum Romanorum et S. R. E. cardinalium, Ab initio nascentis Ecclesiae usque ad Clementem IX. P.M.,* rev. Agostino Oldoini, (4 vols. Rome 1670-1677) 3.337-338; Pompeo Litta, *Famiglie celebri italiane, Dispensa* 158 (Milan 1869): Pucci di Firenze, tavola 5; *Concilium Tridentinum* in: CODG 4.478: 8-14; Jedin, *History of the Council of Trent* 1.131 n.2, 420-421, 423 n. 4, 434-435; Vanna Arrighi, 'Pucci, Lorenzo', DBI 85 (2016) 563-566 at 564

The Formulation and Approval of Pastoralis officii

Having reviewed the reform proposals for offices in the Apostolic Camera, Chancellery, Rota, and Penitentiary and compared them to the provisions of *Pastoralis officii*, one may wonder how these reform proposals were handled within the various commissions deputized to make reforms. About the inner workings of the sub-commissions little is known. A report from Francesco Vettori, the Florentine ambassador in Rome, on 24 November 1513 states that the final wording of the reform decrees was the task of Cardinals Pucci and Accolti.[82] Pucci had co-chaired the reform sub-commission dealing with secretaries, writers, solicitors and archivists; while Accolti was a member of the Julian curial reform commission. Both were members of Leo X's inner circle. It is interesting to note that Pucci had until very recently been the datarius and the office of the Datary was not included in *Pastoralis officii*. In addition to Vettori's report, there survives the *Consistorialia* of Riario in which he commented on the work of reform of the curial offices in speeches to members of the commission, of general congregations, and of the sacred consistory.[83] In one of his speeches, apparently in the famous eight-hour long consistory of 13 December 1513 in which a draft of *Pastoralis officii* was discussed, Riario protested his long-standing desire to reform the fees and practices of the officials of the Roman Curia that have been a source of scandal and have brought disrepute, complaints, and detractions on the papal bureaucracy. Things have steadily declined from the regulations of our most ancient fathers:

> Almost nothing is of greater necessity and more opportune… than a certain norm for living and discipline, by which our ancestors were accustomed to establish and stabilize all of this ecclesiastical wealth which we hold.

[82] Archivio di Stato di Firenze, Dieci di Balìa, Carteggi Responsive, Nr.118, fol. 317r: 'rassecteranno anchora li uffici et molte altre cose che sono transcorse et questo attendono il Reverendissimi Pucci et Accolti'.
[83] E.g., Mansi 32.819 A, C.

The current practices and regulations need to be brought back to the norms of the ancient fathers. This reform depends on our judgment and will. We will be subject to vehement contempt if we do not restore things, but instead allow them to deteriorate further. For many years there have been various proposals for reform, but these have never been implemented. Formulating acceptable reforms has not been easy. The only way progress has been made was due to the interventions of Leo X. He personally attended and presided over the deliberations, removing difficulties and delays, and thus allowing the process to come to a sufficiently decent and convenient termination. By his zeal and perseverance in this task, he has earned eternal praise. While the final reform measures lacked the rigor Riario felt was expected and required, they were sufficient to remove the complaints of the Ultramontanes and other nations and will restore to the Church its owed venerable authority. [84]

Arriving at the final wording of the reform decree was not easy. Because the various congregations were unable to come to a timely resolution of their differences, Leo X on December 13th prorogued the eighth session for three days, from Friday December 16th to Monday the 19th.[85] Apparently at the meeting of the consistory on the 13th a decision was made not to have the bull *Pastoralis officii* read at the upcoming eighth session for the council's approval, but to issue it beforehand by papal authority. To read aloud the extraordinarily lengthy bull would have slowed the Council's proceedings and its details on the fees curial officials

[84] Minnich, 'The Diary of Paride de Grassi' 452 n.179; and his 'Concept of Reform' 244-250, 246: 'fere nihil esse magis necessarium et magis opportunum . . . quam optima quaedam vivendi norma et disciplina, in qua maiores nostri consuerunt fundandam et stabiliendam omnem hanc ditionem ecclesiasticam quam retinemus'. According to Celier, 'Alexandre VI et la réforme' 80-81, Riario was more a worldly man of politics and letters than a man of the Church, a 'cardinal-prince'who prevented a reform of the Camera in 1497; see Michele Camaioni, 'Riario Sansoni, Raffaele', DBI 87 (2016) 100-105 at 102 Riario was 'alieno da interesse spirituale'.

[85] Mansi 32.817E (8th session set for December 16th) 819AB (session moved to December 19th)

could charge for their services could lead to controversy. To avoid these problems, yet have the bull approved by the Council, it was decided to prepare for the approval of the conciliar fathers a separate conciliar bull, *In apostoilci culminis specula*. It rehearsed the efforts of Julius II and Leo X to reform the Curia and ordered that the bull *Pastoralis officii* be observed without alteration or deceit and threatened violators with immediate excommunication and suspension for six months from the exercise of their office. A second offense would result in deprivation from office. In this bull, *In apostoilci culminis specula*, Leo X promised to proceed to certain other parts of the reformation once *Pastoralis officii* had been enforced. He also claimed that the Council fathers had already approved *Pastoralis officii*, something not found in the official 'acta' of the Council. The 'acta' do record that on December 17th there was a meeting in the Sistine Chapel of the three particular congregations of faith, peace, and reformation in which drafts of the bulls to be approved at the upcoming session were read 'and this after many congregations previously held for a consultation of this kind'. Perhaps at one of these meetings the conciliar fathers learned of the contents of *Pastoralis officii* and approved it.[86] But the comments later of prelates at the eighth session indicate that they were not privy to its contents.

When the bull *In apostoilci culminis specula* was read to the conciliar fathers for their approval at the eighth session, it was greeted by a number of protests. The 'acta' record only five prelates adding comments to their votes: Archbishop Geremia Contugi of Krain complained about the 'modus schedulae'; Bishop Giacomo Nini of Potenza wished that the reforms could be seen; Archbishop Bernardo Zanni of Split could not approve the reforms until they were heard and publicized; Bishop Alexios Celadoni of Molfetta and Bishop Paride de Grassi of Pesaro wanted a general reformation.[87] The diary of de Grassi provides a fuller picture of what happened. He recorded: "The third bull was on reformation; and it absolutely did not please many, but that the

[86] Mansi 32.819C (meeting of congregation)
[87] Mansi 32.846E-847A.

reformation should be universal on the whole from the head to the feet. Which having been heard, the pope asked if there were many, and that man [the reporting scrutator of votes] responded: 'Almost a half part of the prelates who sit on the left side'. And I [de Grassi], who was present, responded in a similar manner: 'It pleases that the reformation be universal, and that the previous reformers be reformed.' Which having heard, the pope almost smiling said that he wanted some time to think about it in order to satisfy all, and thus in the next first session to deliberate that there be a reformation of everyone, both of himself and the reformers."[88] Any effort to 'satisfy all', whether arch-reformers or curialists out to maximize their investment in their offices, taxed the political skills even of a Medici pope; Leo X's reforms were calibrated to be acceptable to as many as possible.

The Great Reform Bull, *Supernae dispositionis arbitrio*, of the ninth session provided some sweeping reform measures. But regarding the curial officials and their fees, it was silent. It did put some regulations on the conferral of benefices and the qualifications for the office of bishop and the procedures for verifying them, plus measures against simony in all its forms and against 'judaizers' in the Roman Curia.[89] The bull *Regiminis universalis ecclesiae* of the tenth session put limitations on the exemptions from episcopal jurisdiction enjoyed by curial officials, such as protonotaries, when not engaged in official business.[90]

Leo X had been eager to have a reform of most of the curial offices implemented before the eighth session, and hence in the

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[88] Dykmans, 'Le cinquième Concile du Latran' 351, Nr.1039: 14: 'Tertia fuit super reformatione; et multis absolute non placuit, sed quod reformatio fieret universalis in toto a capite ad pedes. Quo audito, papa quesivit an multi essent, et ille respondit: 'Quasi media pars eorum praelatorum qui essent in latere sinistro'. Et ego, qui aderam, respondit similiter: 'Placet quod reformatio fiat universalis, et quod prius reformatores reformentur'. Quo audito, papa quasi subridens dixit velle aliquantulum cogitare, ut omnibus satisfiat, et sic in prima sessione futura deliberare quod omnium reformatio fiat, tam sui quam reformatorum'.

[89] Mansi 32.875A-877D, 883A (simony) 885A (judaizers).

[90] Mansi 32.909AB.

rush *Pastoralis officii* left some offices inadequately treated. In a series of non-conciliar bulls or 'motibus propriis' afterwards, Leo X returned to regulating the curial offices. On 12 January 1514 he allowed the sale of curial offices by their holders provided the sales were papally approved and a fee paid to the Camera.[91] By a special mandate of July or August 1516 he ordered curial officials to observe the provisions of *Pastoralis officii*.[92] On 20 February 1518 he renewed the prohibitions against unauthorized fees for the expedition of documents and threatened with punishments any official who encouraged this fraud.[93] He made adjustments to the regulations for some offices. While granting to the notaries of the Rota free expedition of bulls in their favor, he ordered them to organize internal relations among themselves, to carry out in person their tasks while allowing substitutes when necessary, requiring them to take the prescribed oath before entering office, to take over the work load left by a deceased notary whose office they had purchased, and imposing increased fines for their failure to observe the provisions of *Pastoralis officii*.[94] Leo was very generous with the scripters of the Chancellery, granting them new privileges, the status of counts of the Lateran, freeing them from the jurisdiction of their spiritual ordinary, allowing them to raise their fees, and confirming the amiable agreement reached between the scripters of briefs and the sealers of bulls on the taxes levied by the scripters on the bulls.[95] To the scripters of the register of supplications he granted the status of papal familiars with the right to dine on a rotating basis at the common table (tinellum) and increased their number by four. The masters of the register of supplication were granted new privileges and prerogatives such as those enjoyed by protonotaries and raised by one ducat the fee they

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[91] Leo X, *Bulla super societatem officiorum Romanae Curiae:* 'Romanum Pontificem in quo fidei orthodoxae fundamenta', BAV, Racc. I. IV. 961, int. 15.
[92] Hoffman, *Forschungen* 2.61 nr.260.
[93] Ibid. 63 nr.268.
[94] Ibid. 55, 57-58, 60, 63-64, nr.239, 250-51, 257, 269-70, 273; Cherubini, *Bullarium sive Collectio* 262.
[95] Hoffman, *Forschungen* 2.56, 62-63, nr. 245-47, 262, 264.

could charge on the sale of offices and absolutions.[96] The pope confirmed the privileges granted by Julius II to the solicitors to join the papal family with the rights of the cubiculars and shield-bearers.[97] Leo confirmed the jurisdictional authority of the clerics of the Camera as enjoyed under Innocent VIII and Julius II.[98] He granted to the scripters of the Archives the privileges conferred on them by Julius II and income from the revenues of the Papal States.[99] The changes he made in other curial offices were often allowing them to raise their fees and to enjoy new privileges. Leo X's reform of the Roman Curia was primarily restoring the practices and fees used before Sixtus IV, getting rid of unauthorized fees and any fraudulent practices, and putting in place a clear fee schedule. He was willing to adjust that schedule to secure the co-operation and compliance of the officials. As Riario observed, his reform was not rigorous, but it eliminated abuses and regulated practices. It was also something none of his predecessors of the previous century had managed to achieve.

Enforcement of Pastoralis Officii

Unfortunately, despite Leo X's efforts to accommodate the needs of the curial officials, they did not receive well the reforms of *Pastoralis officii*.[100] As later noted by the scholar Tomasso Tomassio Gualterutio, the attempt to implement the provision of *Pastoralis officii* 'whether with respect to the Chancellery or the Secretariat was not received, rather it was abrogated by contrary practice'.[101] A good part of the blame belongs to the three

[96] Ibid. 2.56, 61, nr.248, 259
[97] Ibid. 64, nr.271; Chreubini, *Bullarium sive Collectio* 230 nr.27.
[98] Hoffman, *Forschungen*, 2.63 nr.266.
[99] Ibid. 2.55 nr.240; Cherubini, *Bullarium sive Collectio* 176.
[100] Hoffman, *Forschungen* 1.274 n.1 where the curial reform is called 'favorabilis' to the official, but rejected by him.
[101] Hoffman, *Forschungen* 1.275 n.2: 'Fuerunt datae querelae contra collegium (secretariorum) a quibusdam sollicitatoribus super taxatione brevium et fuit tantum, ut moderaretur juxta quandam reformationem concilii Lateranensis,

cardinals whom *Pastoralis officii* put in charge of enforcing the decree: Raffaello Riario, the Camerarius, Sisto dela Rovere, the vice-chancellor, and Leonardo della Rovere, the Grand Penitentiary—only one of whom was known as a serious reformer.[102]

Leo X's cousin, Giulio dei Medici, as vice-chancellor increased the penalties in *Pastoralis officii* against anyone pretending to be a familiar of the Chancellery who fraudulently charges for a free expedition and he blocked the allowance for such practices given by the regent Battista Bini. As pope Clement VII, he concentrated his efforts on appearances, requiring clerics to wear the tonsure and clerical garb, and prelates not to go about without the rochet and pileo (felt cap), as ordered by the Lateran Council.[103] His reform bull of 21 November 1524, *Meditatio cordis nostri*, ordered the implementation of various provisions of *Supernae dispositionis arbitrio*, with no mention of those of *Pastoralis officii*. In other documents he confirmed all the decrees of his predecessors regarding the taxes that could be charged for apostolic letters, especially the rule of Leo X for moderating expeditions in the Chancellery. He allowed the scripters of the Chancellery either to raise the fee on lengthy bulls or to have the solicitors freely do the work. And in a series of decrees he confirmed the privileges of the scripters of the Chancellery, the auditors of the Sacred Palace, and the solicitors. His efforts to implement specific reforms of Lateran V, did not extend to *Pastoralis officii* and the Roman Curia.[104]

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quae tam respectu cancellariae quam secretariae non fuerat recepta, immo contrario usu abrogata'.

[102] *Pastoralis officii* 600 nr.43. Riario was considered a worldly cardinal; Sisto was both sickly and uneducated; while Leonard was expert in both laws and known for his integrity, but succeeded in 1520 by easy-going Lorenzo Pucci.

[103] Archivio Segreto Vaticano, Acta Consistorialia, Fondo Consistorialia, Acta Miscellanea, Vol. 20, fol. 13v-14r, 15v.

[104] Hoffman, *Forschungen* 2.66-67, nr.286-291; Minnich, '*Incipiat Iudicium a Domo Domini*: The Fifth Lateran Council and the Reform of Rome', *Reform and Authority in the Medieval and Reformation Church*, ed. Guy F. Lytle (Washington 1985) 127-142 at 140-142; that Clement VII appointed the notorious Lorenzo Pucci to his reform commission on 21 November 1524 raises

When Paul III set out to reform the Roman Curia in 1535 he appointed two bishops to see that the provisions of *Pastoralis officii* were implemented.[105] When designing new reform decrees, the commissions under Paul III frequently referred back to *Pastoralis officii*. [106]

Conclusion

Leo X's bull *Pastoralis officii* does not deserve the excessively negative assessment given to it by various scholars. It rolled back the fees charged by the master of ceremonies, the masters of leaden seals and Bearded Brothers, and the notaries; and it tightened the rules governing the ordaining bishop, notaries of the Rota, and minor penitentiaries—officials who were not in a position to push back. It put a limit on the fees charged by the important clerics of the Camera and protonotaries, men who had paid ever-higher fees for their offices. The bull did put an end to many abuses. The powerful heads of the bureaucracies, the Camerarius, Vice-Chancellor, Grand Penitentiary, and Datarius, however, were left virtually untouched. Leo's efforts to accommodate the concerns of all limited the reforms he would legislate, and his later actions weakened the provisons of the bull. Nonetheless, he was the only pope in almost a century to implement a general reform, and he did that with conciliar backing. The measures he legislated in *Pastoralis officii* became the firm basis for subsequent reforms, a significant accomplishment. Securing enforcement was never easy.

The Catholic University of America.

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questions about how serious he was to reform the curia; see Arrighi, 'Pucci' 565.

[105] *Concilium Tridentinum: Diariorum, actorum, epistularum, tractatuum nova collectio* (13 vols. Societas Goerresiana; Freiburg im Breisgau 1901-2001) 4.451 n.3—this collection is cited as CT in the next note.

[106] E.g., CT 4., 461: 32 and n.2; 462: 7 n. 4; 463: 10; 464: 9, 26; 466: 4-5; 467: 16 and nn. 1-2; 469 n. 3; 470: 9 and nn. 3 and 5; 471 n. 5; 475: 23-30; 476: 6, 31; 480 n.1; 481: 17.

NOTES

Gratian's *Tractatus de legibus* and Torino, Biblioteca Nazionale Universitaria D.V.19

Ken Pennington

Gratian introduced his students to basic concepts of law in his *Tractatus de legibus*. He defined *ius naturale*, *ius gentium*, Roman civil law and its terminology, custom and ecclesiastical legal norms. *Ius naturale*, which he took from Roman law, was particularly important. Except for Isidore of Seville, early medieval theologians had always used the term *Lex naturalis*, which did not have the same penumbra of meanings as *Ius naturale*.[1] Gratian place *Ius naturale* firmly into the canonical tradtion. One might argue that Gratian's *Tractatus de legibus* was his most important contribution to medieval jurisprudence. It was not, it seems, a part of the earliest versions of the *Decretum*.[2]

The first versions of the *Decretum* contained very little Roman law. This was a significant departure from other late eleventh and early twelfth-century canonical collections that had contained significant numbers of Roman law texts. There are small pieces of evidence that Gratian knew and used Roman law in the earliest recensions of his text.[3] Over time, Gratian gradually

[1] K. Pennington, "*Lex naturalis* and *Ius naturale*," *The Jurist* 68 (2008) 569-591. I am convinced that Isidore had some training in Roman law.

[2] Idest it is not in Saint Gall SB 673. The *Tractatus* and Johannes Teutonicus' Ordinary Gloss to it has been translated into English: Gratian, *The Treatise on Laws*, trans. by Augustine Thompson, James Gordley, with an introduction by Katherine Christensen (Studies in Medieval and Early Modern Canon Law 2; Washington D.C. 1993).

[3] E.g. C.2 q.6 c.28, C.15 q.3 c.1,2,3,4. Also quotations of Roman jurisprudence: Antonia Fiori, *Il giuramento di innocenza nel processo canonico medievale: Storia e disciplina della 'purgatio canonica'* (Studien zur europäischen Rechtsgeschichte 277; Frankfurt am Main 2013) 229-236 who noted a textual borrowing from Cod. 3.31.11 in the earliest recensions. Also see Pennington, 'Roman Law, 12th Century Law and Legislation', *Von der Ordnung zur Norm: Statuten in Mittelalter und Früher Neuzeit*, ed. Gisela Drossbach (Paderborn-München-Wien-Zürich 2010) 17-38 for examples of Gratian's use of the language of Roman law in his pre-Vulgate recensions at 29-35 and '"The Big

expanded the *Decretum* by adding several thousand texts in stages and among these additions were excerpts from Roman law.[4] The texts that he added to his expanded recensions seem to have circulated as appendices.[5] In his final, vulgate recension Gratian inserted over one-hundred texts taken from all parts of Justinian codification and from Justinian's later legislation, the *Novellae*. However, Gratian's most important Roman law excerpts were not from Justinian but from Irnerius' translations and adaptions of texts from Justinian's *Novellae* that were inserted into the margins of the *Institutes* and the *Codex*.[6] Irnerius had carefully crafted these texts to adapt the legislation in the *Codex* to twelfth-century society. Gratian saw that they were also very important for his project and inserted thirty 'authenticae' into his *Decretum*. Although there is no debate today that Gratian used Roman law and that the glossators of the *Decretum* had frequent recourse to Justinian's legacy, there are differing opinions on when, how and to what degree Gratian and the early canonists bowed to the authority of Roman law.[7]

Very little work has been done on the influence of canon law on Roman law in the early twelfth century. To put the question slightly differently, when did the current begin to flow in the opposite direction, when did jurists who were not canonists begin to use and cite canonical texts in their work? Two manuscripts of working jurists that contain primarily Roman law texts in Torino,

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Bang": Roman Law in the Early Twelfth Century', RDIC 18 (2007) 43-70 at 53-68.

[4] Melodie Harris Eichbauer, 'From the First to the Second Recension: The Progressive Evolution of the *Decretum*', BMCL 29 (2011-2012) 119-167; Anders Winroth, *The Making of Gratian's Decretum* (Cambridge Studies in Medieval Life and Thought, 4th Series, 49; Cambridge 2000) 133-135 had argued that the additions to the manuscripts were made after the Gratian's final recension began to circulate. Eichbauer's analysis demonstrates that they were included before not after. The most important conclusion is that there was a significant amount of time between Gratian's recensions.

[5] Three appendices have been found in Florence, BN Conv. Soppr. A.1.402 and Admont SB 23 and 43.

[6] Pennington, 'The Beginning of Roman Law Jurisprudence and Teaching in the Twelfth Century: The *Authenticae*," RIDC 22 (2011) 35-53.

[7] Pennington, 'Big Bang' 43-45.

Biblioteca Nazionale Universitaria D.V.19 and also to a lesser extent, Paris, Bibliothèque Natioanle de France lat. 4709, give us intriguing evidence that provide some answers to that question. Two other early twelfth century manuscripts, Florence, Biblioteca Laurenziana Plut. 29.39 and Biblioteca Apostolica Vaticana Reg. lat. 435 also provide proof of canonical jurisprudence's usefulness to these jurists who were primarily interested in Roman law.[8]

The Torino manuscript is especially important for gaining some insight into the interest in canon law that these jurists had in the early twelfth century. More than one hundred years ago Fitting described the manuscript as a 'highly interesting and rich' manuscript.[9] He called attention to the texts of canon law in the manuscript, but the manuscript remained of greater interest to scholars of Roman law than to historians of canon law because it contained more Roman law than canonical texts.[10] Historians of canon law did not pay much attention to it.[11] In 1895 Emil Seckel analyzed the canonical texts in the manuscript and demonstrated were taken from the canonical collection, *Panormia*, Gratian's

[8] The Florence manuscript is discussed by Emmanuele Bollati in his translation of Savigny's *Geschichte des römischen Rechts* as *Storia del diritto romano nel medio evo* (Vol. 3; Torino 1857) 105-106 and the Vatican manuscript is examined by Jacqueline Rambaud-Buhot, 'Le Décret de Gratien et le droit romain: Influence d'Yves de Chartres', RHD 35 (1957) 290-300; Rambaud-Buhot thinks the chapters came from Gratian or Ivo's *Decretum*. The *Tripartita* and *Panormia* seem to be a more probable sources. However, the text must be examined more closely.

[9] Hermann Fitting, *Juristische Schriften des früheren Mittelalters aus Handschriften* (Halle 1876) 16-24.

[10] Francesca Macino, *Sulle tracce delle Istituzioni di Giustiniano nell'alto medioevo: I manoscritti dal VI al XII secolo* (Studi e testi 446; Città del Vaticano 2008) 137-146 gives a summary description of the contents, dates the manuscript to 1160 and attributes it to a scriptorium in Southern France. I think ca.1130-1140 and Italy is a better date and location. See below and Figures 1-4.

[11] Kuttner, *Repertorium* mentioned it twice on p.265 (an unexplored abbreviation) and on p.456 (the *Tractatus* and also the list of the *Causae* discussed below. He did not notice that the author answered all of Gratian's questions).

Decretum, or from related sources.[12] It is signifcant that the *Panormia* as well as Gratian were important sources. Use of the *Panormia* is evidence that the manuscript was assembled before Gratian's *Decretum* dominated the scene.

Scholars have not been unanimous in dating or localizing the manuscript. The individual pieces of the manscript were not written in one scriptorium, but the scripts are all fairly similar and date from roughly the same time. Most scholars have dated them to the second half of the twelfth century. The diphthong 'ae' is present in all the texts, and the lower case 'd' is almost always written with a vertical ascender. The abbreviations are also characteristic of early twelfth-century manuscripts. I think that the scripts cannot be later than 1150 and some parts of the manuscript may be earlier, especially the text of the *Tractatus de legibus*.

Glosses and the format of the glosses are, however, a better guide to the date of a text than the scripts.[13] The format of all the glosses in the manuscript push the back date to the period before 1140. Justinian's *Digest* is cited as 'in digestis' and the *Decretum* as 'in decretis', which is typical of the first half of the twelfth century (see Figures 1 and 2).[14] These glosses to the book four of *Exceptiones Petri* are provided with 'frames' that are also a feature found only in very early glosses. In the Torino manuscript the glossator of the *Exceptiones* cited the *Digest* and *Codex*. He cited the *Decretum* as 'in decretis', which is the earliest form that I have found in Roman law manuscripts.[15] The gloss 'in decretis' referred

[12] Emil Seckel, 'Acten der Triburer Synode 895: Zweite Abhandlung', NA 20 (1895) 289-353 at 323-327.

[13] See Pennington, 'The *Constitutiones* of King Roger II of Sicily in Vat. lat. 8782', RIDC 21 (2010) 35-54 at 42.

[14] The format of glosses in legal manuscripts is a valuable piece of evidence for the date of a text; see Gero Dolezalek, *Repertorium manuscriptorum veterum Codicis Iustiniani* (2 vols. Ius Commune, Sonderhefte 23; Frankfurt am Main 1985) 1.461-485 at 466-468 and Pennington, '*Constitutiones*' with photos to illustrate glosses ca. 1140.

[15] E.g. in a *Codex* manuscript that is generally dated to ca. 1080, Montpellier, Bibl. univer. méd. H.82, fol. 12r: 'In decr<etis> di. liiii. Mancipia' (D.54 c.13); see Charles M. Radding and Antonio Ciaralli, *The Corpus iuris civilis in the Middle Ages: Manuscripts and Transmission from the Sixth Century to the*

to the first sentence of a Pseudo-Isidorian decretal attributed to Pope Stephen in *Exceptiones Petri* that had been included in many canonical collections, including Burchard, Anselm, Ivo, and the *Panormia*. The glossator may have meant Gratian C.3 q.11 c.1 in a pre-Vulgate recension. The Admont, Florence, and Paris manuscripts have the same wording: 'Ait enim Stephanus papa' introducing the canon.[16] The style of the gloss, would date it to ca.1130.

Figure 1. Torino, BU D.V.19, fol. 66v
'In digestis' 'In digestis'
Photo K. Pennington

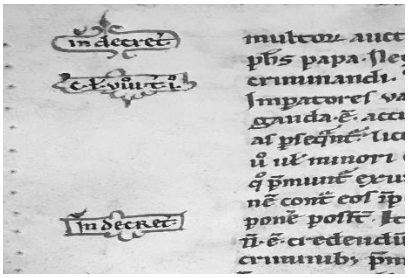

Figure 2. Torino, BU D.V.19, fol. 67v
'In decretis', C.l<ib>viii.t<ituolo>i. 'In decretis'
Photo K. Pennington

Especially striking are the glosses to the *Arbor consanguinitatis* on fol. 50r. The glosses cite the *Epitome Juliani* but not the

Juristic Revival (Brill's Studies in Intellectual History 147; Leiden-Boston 2007) 108.

[16] St. Gall SB 673 fol. 72a has 'Vnde Stephanus papa'.

Authenticum, which is evidence of the glosses' and the manuscipt's early date that must have preceded the circulation of the *Authenticum*. The same glosses are found attached to different texts in other manuscripts of the *Exceptiones Petri*.[17]

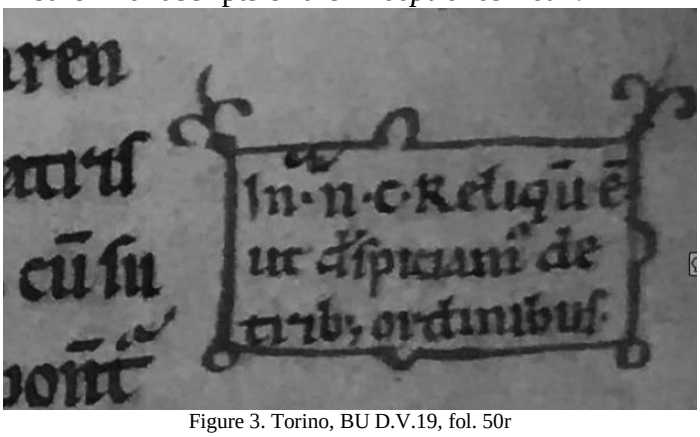

Figure 3. Torino, BU D.V.19, fol. 50r
'In n<ovella> c. Reliqu<u>m est ut dispiciamus de tribus ordinibus'
Epitome Juliani 109 (110).3
Photo K. Pennington

All the texts in the manuscript were useful for a practicing jurist. The two most important Roman law texts were Justinian's *Institutes* and the *Exceptiones Petri*. Uta-Renata Blumenthal's thorough examination of Lleida, Arxiù Capitular RC_0021 that Martin Bertram had discovered has definitively established the Lleida text as the oldest surviving text of the *Exceptiones Petri*.[18] She dates this text convincingly to the 'late 1120s or early 1130s',

[17] Torino, Biblioteca Nazionale Universitaria D.V.19 fol. 50r, s.v. *Nec deinceps ulla lateralis persona*: 'In n<ovella> c. Reliqu<u>m est ut dispiciamus de tribus ordinibus'. This is a citation to the *Epitome Iuliani* Constitutio 109 (110).3, ed. Piero Fiorelli (1996) 164, no. 395 = Authenticum 118.3; s.v. *Sed illarum rerum quae pervenerunt*: 'In n<ovella> c. Si filius descendens in testamento suo (Epitome Iuliani 36[37].31) et in C. lib. ii.(sic) tit. Ad senatus consultum Tertullianum Mater que defuncto filio' (Cod. 6.56[55].5)'. Cf. Hermann Fitting, *Glosse zu den Exceptiones legum Romanorum des Petrus aus einer Prager Hanschrift zum ersten mal herausgeben und eingeleitet* (Halle 1874) 33 for same glosses to *Petri exceptiones* 1.16.

[18] Uta-Renate Blumenthal, 'Dating the Exceptiones Petri', ZRG Rom. Abt. 132 (2015) 54-85. See also her 'The Revival of Roman Law: The Exceptiones Petri', *The Haskins Society Journal* 21 (2009) 113-124 and 'A New Manuscript of the Exceptiones legum Romanorum Petri', *Proceedings Esztergom 2008*, 291-302.

which is further proof that the Torino manuscript cannot be automatically dated to the second half of the twelfth century.[19]

The canonical texts further underlined the jurist's interest in practical problems. Folia 47r-48v contains a list of Gratian's 36 *causae* that could have been taken from either the earlier versions of Gratian's text ca.1135 or his last recension ca.1140. The case of each *causae* is omitted, but the series of questions that Gratian posed to each case are given exactly. This is odd until one sees that every question is provided with an interlinear gloss that gives a short answer to Gratian's question. Question one: 'Is it a sin to buy spiritual things?' 'Yes'. Question four: 'Is he guilty if he did not know his father had bought an office?' 'Non'. Question five: 'Is it permitted to a cleric to be in a church and to be ordained in a church which has received money from his father?' 'It is permitted if the cleric has led a good life'.[20] The answers that were probably most useful for the non-canonist were in the procedural and marriage *causae* (*Causae* 2-6 and 27-36). In *Causa* six Gratian asked: Question five: 'If the accuser fails to prove his case, must the defendant render a proof of his innocence?' 'Non.'[21] This text containing all of Gratian's questions to each *causa* is, as far as I know, unique. It provided the non-canonist with the answers to all of Gratian's questions in a format that was easy to consult.

The Torino also used Gratian's own words (dicta) to explain the complicated process of appeals to higher courts. Appeals were becoming a part of the judicial landscape in both ecclesiastical and secular courts. The rules governing appeals were nowhere laid out as clearly in the 'libri legales' of Roman law as they were in *Causa*

[19] Ibid. 66.

[20] Torino, Biblioteca Nazionale Universitaria D.V.19 fol. 47ra: 'In qua primo queritur an sit peccatum emere spiritualia (est)? Quarto, an ille sit reus criminis quod eo ignorante pater commisit (non)? Quinto, an liceat ei esse in ęcclesia uel fungi ea ordinatione quam paterna pecunia est assecutus (licet si bone uite est)?' The glosses I have placed in parathenses are interlinear.

[21] Ibid. 'Quinto. Si in probatione deficit accusator an sit reus cogendus ad probationem suę innocentie? (non)'. Gratian had not constructed this *quaestio* well, and there was doubt about his conclusion. See Pennington, 'Gratian and Compurgation', BMCL 31 (2014) 253-256.

two question 6 of the *Decretum*. The jurist stitched together six of Gratian's 'dicta' to create a small treatise on appeals.[22]

Torino also contains a tract labelled 'On witnesses in court' (De testibus in iudicio). This section contained canons that were not taken from Gratian but from the *Panormia*, a pre-Gratian decretal collection that was compiled ca. 1120.[23] The little tract is interesting piece of evidence that gives us some insight into the skill and interests of the *Panormia*'s compiler. It also helps to date this part of the manuscript. All the canons in the tract are in Ivo's *Decretum* but scattered in book fifteen. The compiler of the *Panormia* pulled them together.[24] The compiler of the tract in the Torino manuscript copied them from the *Panormia* to create a separate treatise. Gratian did not use these texts when he composed his own tract on witnesses in his last recension of his *Decretum*, although the learned monk at Schäftlarn, Adalbert, enlarged Gratian's tract by inserting *Panormia* 5.20 into it.[25]

A single folio is devoted to the oaths that were to be taken by the pope, emperor, archbishops, and legates when they assumed their offices.[26] Gratian was not interested in these oaths. The

[22] Ibid. fol. 90ra-90rb; the author of this tract included one canon. The rest of the text was C.2 q.6 d.p.c.33, d.p.c.35, d.p.c.36, d.p.c.37, d.p.c.38, and d.p.c.39.
[23] Ibid. fol. 87r-87va: 'De testibus in iudicio'. *Panormia* 5.16 The first seven canons deal with witnesses; the remaining canons taken from the *Panormia* deal with a variety of issues to fol. 88r. The *Panormia* was formerly attributed to Ivo of Chartres because it was dependent on Ivo's *Decretum*. For information about the collection, see Kéry 253-260, where the collection is still attributed to Ivo; on the authorship see now Christof Rolker, *Canon Law and the Letters of Ivo of Chartres* (Cambridge Studies in Medieval Life and Thought, 4th Series, 76; Cambridge 2010) 148, 248-256, 265-284. Rolker dates the *Panormia* to ca. 1120 (p. 278-279).
[24] *Panormia* 5.16, 5.18, 5.19, 5.20, 5.21= Ivo, Decretum 16.316, 16.179, 16.316b,16.156, 16.204. These texts were taken from a variety of Roman law and capitulary sources, e.g. *Panormia* 5.21 was originally from the 'Interpretatio' of *Codex Theodosianus*, edd. Theodor Mommsen and Paul Meyer (Berlin 1905)11.39.3, p.657.
[25] C.4 q.2-3 c.3 before § 14; Munich, BSB lat. 17161 fol. 67rb. Friedberg noted the insertion in n.78. On Adalbert see Rudolf Weigand, *Die Glossen zum 'Dekret' Gratians: Studien zu den frühen Glossen und Glossenkompositionem* (SG 25-26; Rome 1991) 2.852.
[26] Ibid. fol. 89v.

Gregorian canonist Deusdedit recorded similar but different oaths in his canonical collection and stated that he took them from a *Liber diurnus* (Liber Romanorum pontificum) in the papal curia.[27] The compiler of the *Panormia* had included the oath of the Roman pontiff, but divided it into two parts.[28] None of the other 'professiones' for the emperor, however, matches these texts in the Torino manuscript. There are similar oaths in the thirteenth-century *Liber censuum* for the archbishop and legate.[29] These texts, however, are important for evaluating geographical origins of the manuscript. These texts must have been taken from materials in the Roman Curia. A transalpine source for the texts is not possible in the first half of the twelfth century.

From the perspective of the history of canon law the most important text is at the end of the manuscript. It bears the title *Tractatus de iure et eius speciebus* and had the incipit 'Humanum genus duobus regitur, naturali videlicet iure et moribus'. Hermann Fitting had first drawn attention to it. He thought the text was was a carefully constructed and unified text that described secular law and omitted most of Gratian's observations on canon law.[30] He concluded that the text was a source for Gratian's *Tractatus de legibus* and not a later abbreviation.[31] If true that would have been an extraordinary discovery. The text itself is a stitching together

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[27] Deusdedit (†1098-1099), *Die Kanonessammlung des Kardinals Deusdedit*, 1. *Die Kanonessammlung selbst*, Victor Wolf von Glanvell (Paderborn 1905) 2.110 and 3.145. See Kéry 228-233 and Hans Hubert Anton, 'Der Liber Diurnus in angeblichen und verfälschten Papstprivilegien des früheren Mittelalters', *Königtum, Kirche, Adel: Institutionen, Ideen, Räume von der Spätantike bis zum hohen Mittelalter: Dem Autor zur Vollendung des 65. Lebensjahres*, ed. Hubert Anton and Burkhard Apsner (Trier 2002) 71-94.

[28] *Panormia* 3.3 and 3.4. Ivo of Chartres had included the second part of the text in his *Decretum* 4.197. A few minor collections also included the texts.

[29] The oaths in the Paul Fabre, *Le Liber censuum de L'Église romaine* (Vol. 1; Paris 1889) 313, an oath of senator with sentences similar to the legate's oath and 417 an oath of a bishop receiving the pallium, also with similar sentences. See Steven A. Schoenig, *Bonds of Wool: The Pallium and Papal Power in the Middle Ages* (SMCL 15; Washington DC 2016) 341-347. My thanks to Steven for the references to the *Liber censuum*.

[30] Except for the parts of D.3 that he included.

[31] Hermann Fitting, *Juristische Schriften* 24.

of texts from Isidore of Seville from the first three distinctions of the *Decretum* and Gratian's 'dicta' from distinction one to distinction fifteen. Soffietti published a simple transcription of the text without a critical apparatus. He concluded that it was an incomplete abbreviation that included two texts taken from the *Summa* of Stephen of Tournai.[32] Soffietti argued that the author's borrowing from Stephen proved that the text must have been written after ca. 1165. However, a comparison of the texts demonstrates that one was not copied from the either, neither Torino from Stephen nor Stephen from Torino.[33] In fact, Justinian's *Digest* is more likely to be the source for both Torino's author and Stephen. The two texts in question deal with the Rhodian law of the sea in much more detail than Isidore or Gratian. Why were these texts added by Stephen and the anonymous compiler? The most obvious answer is that both were writing in Italy and living near port cities where the issue was important.

The main point is that the text is not an abbreviation of Gratian's *Tractatus de legibus*, incomplete or otherwise. If author did draw upon Gratian's tract, which is certainly possible, he reworked it carefully picking out the texts and the 'dicta' that fit with his purpose. He adpated the text; he did not abbreviate it. There is one text in the *Tractatus* that was only in Gratian's last recension, which is an important evidence for dating the work.[34]

The most important piece of evidence for gaining some insight into the mind of the author who wrote the tract is his analysis of the four subcategories of law after he had discussed the three principal types of 'ius': natural, civil, and 'ius gentium'. He provided a category that Gratian had ignored: private law (ius privatum) that had been a standard category of Roman law. Isidore of Seville had also ignored private law as a separate category. Gratian did call privileges 'lex privata' but not 'ius privatum'.[35]

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[32] Isidoro Soffietti, 'Il tractatus de iure et eius speciebus del codice D V 19 della Bibliotheca Nazionale di Torino,' RSDI 52 (1979) 101-112 at 104-105

[33] Ibid. 104.

[34] D.4 c.4.

[35] Isidore of Seville, *Etymologies*, ed. W.M. Lindsay (2 vols. Oxford 1911) 5.15. Cf. C.19 q.2 c.1 (Duae sunt): Pope Urban II: 'Duae sunt, inquit, leges, una publica, altera privata'.

His additions to the text demonstrate that the author knew Roman law. At places where he added to the text, he demonstrated a more sophisticated understanding of the categories of law than Gratian had.

The author's purpose was to focus on the four most important laws for secular jurists: natural law, *ius gentium*, custom, and statutes. The inclusion of Isidore's *Tractatus de legibus* on folia 75ra to 78rb of the Torino manuscript is good evidence that the compiler of these texts was also interested in the question of defining secular law.[36] It is tempting to conclude with Fitting that it might have been Gratian's first draft of his *Tractatus de legibus* or that it was a source for Gratian's *Tractatus*. Both conclusions would be, I think, pressing the evidence too far. Both conclusions are possible, but unless another manuscript copy of the text emerges from the archives, I do not think that we cannot choose either option with any confidence. The text does, however, underline the importance of natural law for jurists working in the first half of the twelfth century. One might argue that Gratian's embrace of *Ius naturale* was his most significant contributions to European jurisprudence.[37] The Torino manuscript proves that Gratian was not alone in turning to natural law and embracing its significance.

Washington, D.C.

[36] Isidore of Seville, *Etymologies* Book 5 chapter 1-27.

[37] G. Santini, '*Ius commune - ius generale*: I tre sistemi normativi generali: Diritto naturale, delle genti e romano. (Età antica e alto medioevo: Canonisti e teologi del XII secolo),' RSDI 56 (1983) 31-118.

Tractatus de iure et eius speciebus
Torino, NB D.v.19 fol. 199v-200v

Roman font: Dicta Gratiani
Bold font: Texts not in Gratian or in capitula Decreti Gratiani
Italics: Texts from Isidore of Seville and others

HVMANVM GENVS duobus regitur naturali uidelicet iure et moribus. Ius naturale est quod in lege et euangelio continetur. Quoquisque iubetur alii facere quod sibi uult fieri, et prohibetur alii inferre quod sibi nolit fieri. Vnde Christus in euangelo. Omnia quaecumque uultis ut faciant uobis homines et uos eadem facite illis. Hoc est enim lex et prophetę.[38] *Omnis lex aut diuina aut humana est. Diuina lex natura constat, humana moribus. Ideo lex humana ita discrepat quoniam alia aliis gentibus placet. Fas lex diuina est; Ius lex humana. Per alienum agrum transire fas est, ius non es*t.[39] In hoc differunt inter se lex diuina et humana, quia omne quod fas est nomine diuinę uel naturalis legis accipitur, nomine uero legis humanę mores iure conscripti et traditi intelliguntur. Ius autem generale nomen est; multas sub se continens species.[40] Lex uero species est iuris.[41] *Ius autem inde dictum quia iustum est. Ius omne legibus constat et moribus*.[42] *Lex est constitutio scripta*.[43] *Mos autem est consuetudo longa de moribus tantummodo tracta*.[44] *Consuetudo uero est ius quoddam institutum moribus quod pro lege suscipitur cum lex deficit. Nec refert an ratione an scriptura consistat, quoniam ratio legem commendat. Si igitur raitone lex constat, lex erit iam omne quod ratione constiterit, quod religioni conuenit quod discipline congruit quod saluti proficit. Consuetudo*

[38] Dictum Gratiani ante c.1
[39] D.1 c.1
[40] Dictum Gratiani post c.1
[41] Rubric Gratiiani ad D.1 c.2
[42] D.1 c.2
[43] D.1 c.3
[44] D.1 c.4

modo dicitur quia in communi usu est.[45] Cum itaque consuetudo aut scriptura aut ratione consistat, apparet quod ipsa partim in scriptis redigitur, partim moribus tantum utentium reseruatur. Que in scriptis redacta est constitutio siue ius dicitur. Que uero in scriptis redacta non est, generali nomine consuetudo appellatur.[46] **Tria autem sunt principalia iura, quasi cęterorum omnium genera: Ius naturale, ius gentium, ius ciuile.**[47] *Ius naturale commune est omnium eo quod instinctu naturę non constitutione aliqua habetur ut uiri et mulieris coniunctio, liberorum procreatio, educatio et successio, communis omnium possessio* <fol. 99vb> *et omnium una libertas; adquisitio quę cęlo terra marique capiuntur; depositę rei uel commodatę pecunię restitutio; uiolentię per uim repulsio.*[48] *Ius gentium est sedium occupatio, edificatio, munitio, bella, captiuitates, seruitutes, postliminia, federa pacis, et cętera. Ius gentium modo dicitur quia eo iure omnes fere gentes utuntur.*[49] *Ius ciuile est quod quisque populus uel quecumque ciuitas sibi proprium diuina humanaque*[50] *causa constituit.*[51] **Que minor autem iura sub hoc genere continentur: Ius publicum, ius priuatum, ius militare, ius Quiritum.** *Ius publicum est in sacris, in sacerdotibus, in magistratibus.*[52] **Ius priuatum est quod ad singulorum utilitatem pertinet.**[53] *Ius militare est belli inferendi solemnitas federis faciendi nexus egressio in hostem pugnę commissio, stipendiorum modus dignitatum gradus, premiorum honor, predę diuisio etc.*[54] Ius *Quiritum est proprie Romanorum a quirino,* ***id est Romulo dictum***[55] *quod nulli nisi Romani tenent in quo de hereditatibus*

[45] D.1 c..5
[46] Dictum Gratiani post c.5
[47] Fitting, *Libellus de verbis legalibus*, 181 l.21-22
[48] D.1 c.7
[49] D.1 c.9
[50] humana *ante correctionem*.
[51] D.1 c.8
[52] D.1 c.11
[53] Dig. 1.1.1.2: 'priuatum quod ad singulorum utilitatem'.
[54] D.1 c.10
[55] Cf. Stephan of Tournai, D.1 c.8, s.v. *ius quiritum*: 'idest Romanorum qui a Quirino, idest a Romulo Quirites appellantur'. Munich, BSB 17162, fol. 4ra

agitur, de tutelis, de curationibus, de usucapionibus, et cęteris que iura apud nullum alium populum reperiuntur, set proprie Romanorum sunt.[56] Ius igitur quiritum in quinque diuiditur, id est in legibus, in principum constitutionibus, in senatusconsultis, in plebisscitis, in prudentium responsis.[57] *Lex est constitutio quam maiores natu cum principibus et plebibus sanxerunt*.[58] *Constitutio uel edictum est quod tamen imperator uel rex constituit uel edicit*.[59] **Senatus consultum est quod senatus iubet atque constituit**.[60] *Plebisscita sunt que plebs sciscitatur et rogat ut constituantur inde dicta quod ea plebs sciat*.[61] *Responsa prudentium sunt que iurisconsulti se consulentibus respondent. Fuerunt enim quidam legisperiti arbitri ęquitatis quibus ab imperatoribus permissum fuit constitutiones ciuilis iuris condere quibus lites et controversię dirimerentur.*[62] *Leges preterea plures sunt que ab his qui eas condiderunt dicuntur ut Iulię, consulares, tribunitie, Cornelię. Papia et Pompeia lex sub Octauiano cesare lata est continens patrum premia pro sus-*<fol. 100r>*cipiendis liberis, dicta a Papiano et Pompeio consulibus. Falcidius etiam tribunus sub eodem imperatore legem fecit que a nomine eius lex Falcidia dicitur in qua constituitur ne ciuis Romanus plus in extraneis testamento legaret quam ut quarta pars heredibus eius superesset*.[63] **Rodia lex est de iactu naualium commerciorum qua constitutum est ut, si leuandę nauis gratia iactus commerciorum factus est, omnium qui in naui sunt contributione sarciatur quod pro omnibus datum est.**[64] **Rodia autem a rodo insula dicitur circa quam propter pericula maris**

[56] D.1 c.12
[57] D.2 dictum Gratiani ante c.1
[58] D.2 c.1
[59] D.2 c.4
[60] Inst. 1.2.5; Gratian D.2 c.3: 'Senatusconsultum est quod tantum senatores populis consulendo decernunt'.
[61] D.2 c.2
[62] Cf. D.2 c.5
[63] Cf. D.2 c.6
[64] Cf. Dig. 14.2.1: "Lege Rodia cauetur ut si levandae nauis gratia factus mercium factus est, omnium contributione sarciatur quod pro domnibus datum est'.

frequenter iactus de nauibus fiebat.[65] *Satira lex erat quę de pluribus simul rebus loquebatur dicta a copia rerum et quasi a saturitate. Vnde et varia poemata scribere quasi satiram est condere*.[66] Omnes autem he leges iuris ciuilis species sunt. Constitutio autem alia ciuilis alia ęcclesiastica. Ciuilis constitutio ius forense uel ciuile dicitur. Ęcclesiastica uero constitutio canonis nomine appellatur.[67] *Canon grece, regula dicitur latine.*[68] *Regula uero dicta est. Eo quod recte ducit nec aliquando aliorsum trahit. Vel regula dicitur quia normam recte uiuendi prebet et quod distortum prauumque est corrigat.*[69] Canones in duo diuiduntur. Nam alii sunt decreta pontificum, alii sunt statuta conciliorum. **Concilia bifarie distribuntur**. Nam alia sunt uniuersalia, alia prouincialia. Prouincialia alia celebrantur auctoritate Romani pontificis, Romanę ęcclesie legato presente, alia uero auctoritate patriarcharum uel primatum uel metropolitanorum eiusdem prouincię. Hęc quidem de generalibus regulis intelligenda sunt. Quedam autem priuatę legis sunt tam seculares quam ęcclesiasticę quę priuilegia dicuntur.[70] *Priuilegia uero sunt priuatorum leges dicta quod sint quasi priuatę leges. Nam priuilegium dictum quod in priuato legatur uel feratur.*[71] Officium autem legum est tam secularium quam ecclesasticarum precipere quę necesse est fieri, prohibere quod malum est fieri, **permittere quod indifferens esse uidetur**. Permittit licita, ut premium petere. Permittit quędam quę uidentur illicita, ut libellum repudii dare ne grauiora fiant.[72] *Omnis autem lex aut punit aliquid ut qui cedem fecerit, capite plectatur; Aut uetat ut sacrarum uirginum nuptias nulli petere liceat. Aut*

[65] Cf. Stephan of Tournai ad D.2 c.8 s.v. *Rodie*: 'Lex Rodia dicitur de iactu, qua cautum est ut si leuande gratia nauis iactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est. Que ideo dicitur Rodia quoniam circa Rodon insulam propter pericula frequenter contingebat fieri iactum de nauibus'. Munich, BSB 17162, fol. 4va, Munich, BSB 14403, fol. 11r, Troyes, BM fol. 3va.
[66] D.2 c.7
[67] Dictum Gratiani ante D.3 c.1
[68] D.3 c.1
[69] D.3 c.2
[70] D.3 dictum Gratiani ante c.3
[71] D.3 c.3
[72] D.3 dictum Gratiani post c.3

permittit ut uir fortis petat premium. Aut precipit ut diliges Dominum Deum tuum. Legum enim pena uel premio, uita moderatur humana.[73] Causa uero constitutionis legum est humanam coherecere audaciam et nocendi facultatem refrenare.[74] *Leges enim ideo factę sunt ut metu earum hominum audacia coherceretur tutaque esset inter improbos innocentia et in ipsis improbis formidato supplicio, audacia et nocendi facultas refrenetur*.[75] Preterea in ipsa constitutione legum maxime qualitas constituendarum obseruanda est ut contineant in se honestatem, iustitciam, possibilitatem, conuenentiam.[76] *Lex enim esse debet honesta, iusta, possibilis secundum naturam, secundum consuetudinem patrię, necessaria et utilis, loco temporique conueniens, manifesta quoque ne aliquid per obscuritatem in captione contineat, nullo priuata commodo, set pro communi ciuium utilitate conscripta*.[77] In ipsa legum constitutione ideo ista consideranda sunt, quia cum leges institutę fuerunt non erit liberum ab ipsis recedere.[78] *In istis enim temporalibus legibus quamquam de his homines iudicent cum eas instituerunt, tamen cum fuerint institutę et firmatę; non de ipsis sed secundum ipsas iudicare licebat.*[79] Leges instituuntur cum promulgantur, firmantur cum moribus utentium approbantur, abrogantur cum auferuntur. Sicut enim moribus utentium in contrarium nonnullę leges abrogate sunt hodie,[80] ita moribus utentium ipsę leges confirmantur.[81] Hęc de diuisione et conuenientia secularium et ęcclesiasticarum legum dicta sunt. Nunc de differentia naturalis iuris et cęterorum uideamus. Ius naturale inter omnia iura primatum obtinet et tempore et dignitate. Cepit enim ab exordio rationalis creaturę nec uariatur tempore set immutabile permanet. Set contra naturale ius in lege et euangelio sit comprehensum

[73] D.3 c.4
[74] D.4 dictum Gratiani ante c.1
[75] D.4 c.1
[76] D.4 dictum Gratiani post c.1
[77] D.4 c.2
[78] D.4 d.p.c.2
[79] D.4 c.4
[80] hodie abrogate sunt *post correctionem*
[81] D.4 dictum Gratiani post c.3

quedam autem contraria his quę in lege statuta sunt, nunc inueniuntur concessa, non uidetur ius naturale immutabile permanere. In lege enim precipitur ut mulier post partum pueri xl. diebus <fol. 100v> ab ingressu templi abstineat, nunc autem statim post partum ęcclesiam ingredi non prohibetur.[82] Vnde Gregorius: *Si mulier eadem hora qua genuerit actura gratias ęcclesiam intrat nullo pondere peccati grauatur*.[83] His ita respondetur: In lege et euangelio naturale ius continetur; non tamen quęcumque in lege et euangelio inueniuntur naturali iuri coherere probantur. Sunt enim in lege quędam moralia ut non occides, et cetera. quędam mystica utpote sacrificiorum precepta et alia his similia. Moralia mandata ad naturale ius pertinent atque ideo nullam mutabilitatem recepisse monstrantur. Mystica uero quantum ad superficiem a naturali iure probantur aliena quantum ad moralem intelligentiam inueniuntur sibi annexa. Ac per hoc etsi secundum superficiem uideantur esse mutata, tamen secundum moralem intelligentiam mutabilitatem nescire probantur. Naturale ergo ius ab exordio rationalis creaturę incipiens ut supradictum est, manet immobile. Ius uero consuetudinis post naturale ius[84] exordium habuit ex quo homines conuenientes in unum ceperunt simul habitare. Quod ex eo tempore factum creditur ex quo Cain ciuitatem edificasse legitur. Quod cum diluuio propter horum prauitatem fere uidebatur extinctum. Postea a tempore Nembroth reparatum siue potius immutatum esse existimatur. Cum ipse simul cum aliis alios cepit opprimere alii pro sua imbecillitate eorum ditioni ceperunt esse subiecti. Vnde legitur de eo: Cepit Nembroth robustus uenator esse coram Domino id est hominum oppressor et extinctor; quos ad turrem edificandam allexit.[85] Ius autem constitutionis cepit a iustificationibus quas Dominus Moysi tradiditur dicens: Si emeris seruum Hebreum et cerera.[86] Ius autem naturale a consuetudine et constitutione differt, nam iure naturę omnia sunt communia omnibus, quod non solum inter eos seruatum creditur de quibus

[82] D.5 dictum Gratiani ante c.1
[83] D.5 c.2
[84] ius] legem Gratian
[85] D.6 dictum Gratiani post c.3
[86] D.7 dictum Gratiani ante c.1

legitur: multitudinis credentium erat cor unum et anima una. Verum etiam ex precedenti tempore a phylosophis traditum inuenitur. Vnde apud Platonem illa ciuitas iustissime ordinata traditur in qua quisque proprios nescit affectus. Iure uero consuetudinis uel constitutionis, hoc meum est, illud uero alterius.[87] Ius autem naturale dignitate preualet consuetudini et constitutioni. Quecumque enim uel moribus recepta sunt uel scriptis comprehensa. Si naturali iuri fuerint aduersa uana et irrita habenda sint. Aduersus naturale ius nulli quicquam agere licet.[88] **Que enim contra bonos mores hominum sunt pro morum diuersitate uitanda sunt.** *Mala enim consuetudo non minus quam perniciosa corruptela abicienda est*.[89] Veritati et rationi consuetudo est postponenda.[90] Liquido igitur apparet quod consuetudo naturali iuri postponatur.[91] Quod autem constitutio naturali iuri cedat multiplici ratione et auctoritate probatur. Vnde Augustinus: Qui legibus imperatorum quę contra Dominum feruntur non obtemperat, adquirit grande premium.[92] Cum ergo in naturali iure nichil aliud precipiatur quam quod Deus uult fieri, nichilque uetetur quam quod Deus probibet fieri; denique cum in canonica scriptura nichil aliud quam in diuinis legibus inueniatur, diuinę uero leges natura consistant, patet quod quęcumque diuinę uoluntati seu canonicę scripturę contraria probantur, eadem naturali iuri inueniuntur aduersa. Vnde quęcumque diuinę uoluntati seu canonicę scripture seu diuinis legibus postponenda censentur, eisdem naturale ius preferri oportet.[93] Constitutiones ergo uel ecclesiaticę uel seculares si naturali iuri contrarię probantur penitus sunt excludendę. Constitutiones uero principum ecclesiasticis institutionibus non preminent, set obsecuntur.[94] Vbi autem euangelicis et canonicis decretis non obuiant omni

[87] D.8 dictum Gratiani ante c.1
[88] D.8 dictum Gratiani post c.1
[89] D.8 c.3
[90] D.8 c.4 rubrica Gratiani
[91] D.8 dictum Gratiani post c.9
[92] D.9 c.1 § 1
[93] D.9 dictum Gratiani post c.11
[94] D.10 dictum Gratiani ante c.1

reuerentia dignę habeantur.[95] Hec de naturali iure et constitutione et consuetudine disseruimus et differentiam qua ab inuicem discernuntur assignauimus.[96] Finis

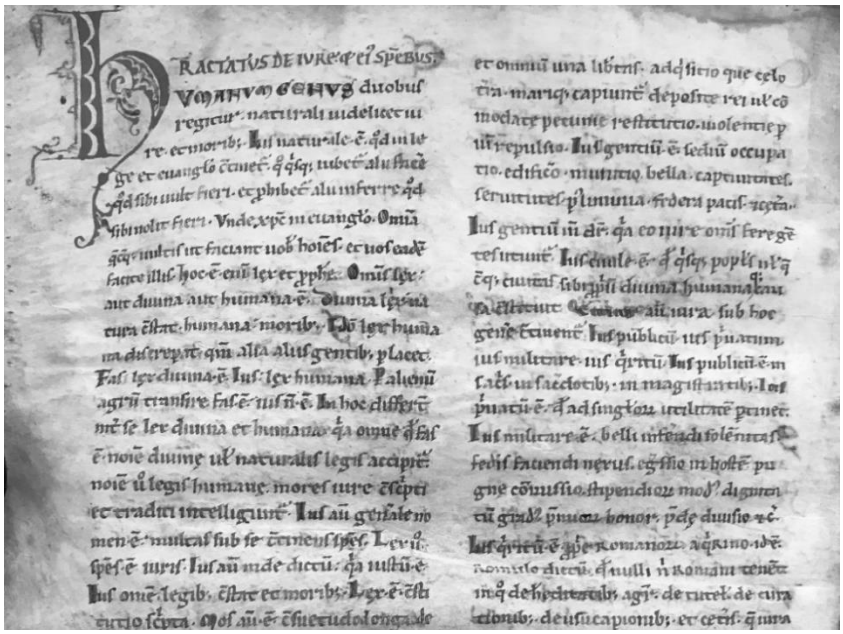

Figure 4. *Tractatus de iure*
Torino, Biblioteca Nazionale Universitaria D.V.19, fol. 99v
Photo: Ken Pennington

[95] D.10 dictum Gratiani post c.6
[96] D.15 dictum Gratiani ante c.1

Two Original Papal Letters about Diocesan Discipline in the Archiepiscopal See of Toledo

Kyle C. Lincoln

The archdiocese of Toledo was a competitive place and required significant efforts by even the most talented clerics to wrest even a modicum of control from the confraternities and parishes of the southern Castilian capital. It no surprise, then, that the cathedral chapter would send and receive letters to Rome in order to clarify any number of issues with which they were grappling (for, against, and under the nose of the archbishop.) Two such letters, hitherto unedited, from the pontificates of Innocent III and Innocent IV suggest that the practice of independent action against the archbishop and the enrollment of outsiders had become causes of concern. In the first of these letters, 'Cum omnibus Christifidelibus', the clerics of Toledo were commanded to obedience of the archbishop and were strictly warned not to contradict him. In the second letter, 'Paci et tranquilitati vestre,' the chapter was instructed that it no longer would be required, as it had been in the past, to provide prebends to papal designees without a kind of shibboleth included in the letter to signify it was an authentic papal request. It is interesting that in both cases the chapter is suggested to have acted (at least semi-)autonomously and that Rome had heard of such action.

The first letter described and edited here is marked ACT A.6.1.10 in the Toledan Capitular Cathedral Archive. The text is well-preserved in a contemporary chancery hand; the binding threads still hanging from the letter, but Innocent's seal has been lost. The 'datum' clause notes that the letter was issued at the Lateran on 28 May, 1199, a date which agrees with Innocent's itinerary generally.[1] There is no reason, either from the letter's contents or its physical state, to believe it anything but authentic.

[1] Othmar Hageneder and Anton Haidacher, edd. *Die Register Innocenz' III. 1: 1. Pontifikatsjahr, 1198/99: Texte*, (Graz-Köln 1964).

The text is brief but bears all of the standard markers of a papal rescript. The letter appears to respond to a request from Archbishop Martín López de Pisuerga for a papal scolding of the cathedral chapter who had apparently been disobedient. No records of which precise dispute prompted the letter are known, but an inscription, in a thirteenth century hand, on the dorse of the document reads 'de reinorione conspirationis clericorum// tholetanis contra archiepiscopus', suggesting that a thirteenth century 'archivero' in Toledo believed that it was a reawakening of an earlier dispute from 1182x5, commonly referred to as the 'rebellion of the clerics'. This episode, sometime during the period between the elevation of Pedro de Cardona to the Cardinalate and the appointment of Gonzalo Pérez as archbishop ca. 1184, is generally held to have been a revolt over the election of Pedro de Cardona and the financial burdens faced by Toledo in the aftermath of the conquest of Cuenca, although only circumstantial evidence supports such a hypothesis.[2] The archivist's inscription, absent any other contextual clues, is our best indicator of the cause of Innocent's letter, and it is not an unfounded supposition, given the general tenor of the archiepiscopate of Martín Lopez de Pisuerga.[3] During the twelfth century, a number of reforms of the

[2] The most recent treatment is Holndonner's: Andreas Holndonner, *Kommunikation-Jurisdiktion-Integration: Das Papsttum und das Erzbistum Toledo im 12 Jahrhundert (*ca. *1085*- ca. *1185*) (Berlin 2014) 488-489 but the work of Rivera Recio is still a kind of controlling precedent for historical treatments: Juan Francisco Rivera Recio, *La Iglesia de Toledo en el siglo xii*, (Publicaciones del Instituto español de Historia eclesiastica, Monografias 10; 2 vols. Roma 1966-1976) 2:139-140. It is likely that a second flare-up, between the bishop and local parochial clergy—perhaps in the form of a proper confraternity— is recorded in its resolution in 1189: Francisco J. Hernández, *Los Cartularios de Toledo* (Madrid 1985) 213-214; Ibid. 215-216.

[3] On Archbishop Martín Lopez de Pisuerga, see: Carlos Ayala Martínez, 'Breve semblanza de un arzobispo de Toledo en tiempos de cruzada: Martín López de Pisuerga,' edd. Beatriz Arízaga Bolumburu et al. *Mundos Medievales: Espacios, sociedades y poder: Homenaje al Profesor José Ángel García de Cortázar y Ruiz de Aguirre* (Santander 2012) 1:355-362. His role in the larger militancy of the contemporary Castilian Church has been an object of study in my other work: Kyle C. Lincoln, Beating Swords into Croziers: A Case Study of Warrior Bishops in the Kingdom of Castile, c.1158-1214', *Journal of Medieval History* (2018) 91-95; Kyle C. Lincoln, 'Mihi pro fidelitate militabat:

chapter of Toledo's finances had sought to reduce the number of prebends given out by the chapter, but the frequency of these reforms suggests that they rarely held. If the finances of the chapter were strained enough in the late 1190s after the disaster of Alarcos as they had been stressed by the Conquest of Cuenca in the late 1170s, it is not unreasonable to suggest that similar conditions provoked congruent responses.

The second letter edited and described here is marked ACT A.6.1.9 in the Toledan Capitular Archive. The text is moderately well-preserved in a contemporary chancery hand with slightly fading ink but vibrant flourishes of penmanship. The threads and lead seal are both missing, but the text itself has crisp edges and folds, suggesting generally good preservation. The 'datum' clause notes that the letter was issued on 2 January, 1252 at Perugia, a dating that fits with Innocent IV's itinerary.[4] The text is much briefer than A.6.G.1.10, but it addresses a concern of the cathedral chapter over the management of their own benefices. The letter instructs the canons not to provide anyone bearing a papal letter with a prebend, unless the letter they bear a text that is written in apostolic script and reproduces word for word (de verbo ad verbum) the text and tenor of Innocent's 'indulgence'. The letter indicates that the phenomenon, which was not terribly rare in the twelfth century, of providing bearers of papal letters with benefices and/or pensions was becoming irksome to the often cash-strapped canons of Toledo. In the archives of Toledo, we have requests for prebends for papal clerics, albeit infrequently, and in these cases we have evidence to suggest that these were

Cruzada, Guerra Santa y Guerra Justa contra Cristianos durante el reino de Alfonso VIII de Castilla según las fuentes episcopales,' *Hombres de religión y guerracruzada y guerra santa en la Edad Media peninsular*, edd. Carlos de Ayala Martínez and J. Santiago Palacios Ontalva (Madrid 2018) 26, 31.

[4] I am grateful to Ken Pennington for confirming that the letter fits with the work done by the late Prof. Peter Linehan in his forthcoming *España Pontificia*. Quintana Prieto's work showed it fits broadly: Augusto Quintana Prieto, *La Documentación pontificia de Inocencio IV (1243-1254)* (2 Vols. Monumenta Hispaniae Vaticana; Rome 1987).

clerics that Toledo already had interactions with.[5] If the fortunes of the chapter were strained by Alfonso VIII's attempts to recover Gascony, allegedly the dowry of Queen Eleanor from Henry II of England, as they had been for the conquest of Cuenca, the letter may represent another instance of the stress-cycles caused by Castilian growing pains that plagued the archdiocese in the twelfth century.[6] Evidence from the 1230s suggests, too, that Archbishop Ximenez de Rada used diocesan funds to advance a number of territorial conquests to supplement the resources of Toledo, suggesting that the stresses on the finances of the chapter were also becoming intense.[7] The letter's contents suggests that the dean of the cathedral chapter had written to Innocent in an effort to curtail such a practice, or at least to reduce the chance of fraudulent letters begetting prebends for their bearers. Previous deans of the cathedral chapter of Toledo had gone on to serve as bishops later and their capability as bishops suggest that the position was more

[5] The example of Michael, a papal nuncio, is clear on this front: Archivo Caterdalicio de Toledo. A.12.A.1.21; Hernandez, *Los Cartularios* 215-216; Daniel Berger, Klaus Herbers, and Thorsten Schlauwitz, edd. *Papsturkunden in Spanien. III. Kastilien: Vorarbeiten zur Hispania (Iberia) Pontificia* (Berlin 2020) no. 255, pp. 472-74. For more on Michael, see: Nicholis M. Häring, '"Liber de dulia et latria" of Master Michael, Papal Notary,' *Mediaeval Studies*, 33, (1971) 188-200. Maleczek does not include Michael in his prosopography of the curia, save in a footnote where he merely cites Häring's work: Werner Maleczek, *Papst und Kardinalskolleg von 1191 bis 1216: Die Kardinäle unter Coelestin III. und Innocenz III.* (Publikationen des Historischen Instituts beim Österreichischen Kulturinstitut in Rom, 1 Abt. 6; Vienna 1984) 77 n.95.

[6] Linehan proposed that Toledo financed the conquest of Cuenca, or at least the lions' share of it, and his hypothesis has generally been accepted: Peter Linehan, *History and the Historians of Medieval Spain* (Oxford-New York 1993) 287. On the shenanigans of Alfonso VIII and Leonor Plantagenet's attempts to take Gascony, see: Martín Alvira Cabrer and Pascal Buresi, '"Alphonse, par la grâce de Dieu, Roi de Castille et de Tolède, Seigneur de Gascogne": Quelque remarques à propos des relations entre Castillans et Aquitains au début du XIIIe siècle', *Aquitaine-Espagne (VIIIe-XIII siècle)*, ed. Phillippe Sénac (Civilisation médiévale 12; Poitiers 2001) 219-232.

[7] I have sketched Rodrigo Ximénez's military efforts in the era of Fernando III: Kyle C. Lincoln, '*In Exercitu loco eius pontificali exerceret:* Warrior Clerics in the Era of Fernando III', *The Sword and the Cross: Castile-León in the Era of Fernando III*, edd. Edward Holt and Teresa Witcombe (Leiden 2020) 85-104.

meritocratic than not in the period. It seems like that the current archbishop, the *Infante* Archbishop Sancho, had a similarly capable dean.[8]

These two letters, although significant records on their own merit, suggest that the financial concerns of the cathedral chapter of Toledo in the thirteenth century, as Linehan noted, were already becoming acute early in the reign of Innocent III.[9] The scolding given to the clergy of Toledo for disobeying the archbishop was no small matter, and appears to have been linked to their concern over their financial stake in the chapter. The 'indulgence' given to the canons by Innocent similarly suggests that the canons were concerned that a significant number of the prebends being paid by papal mandate were, in fact, frauds perpetrated by the beneficiaries. In both cases, the financial concerns of the chapter operating under the control of the *Primas Hispaniarum* are markers of both the growth of the chapter in the thirteenth century—dividing an ecclesiastical patrimony into smaller shares—and the of the increasing financial demands on canons in Toledo.[10] These two letters from Innocent III and Innocent IV shed more light on the development of the financial concerns of canons in the see of Toledo, and suggest that pleas of penury by chapters and clerics were more than simple 'form letters' but may have been rooted firmly in fair appraisals of the financial state of their chapter's patrimony. More study of their financial state in the twelfth century and early thirteenth is necessary, but these two

[8] Of course, his relationship to King Alfonso X ensured that there was a steady supply of capable administrators in the circuits between the royal and archiepiscopal courts: Linehan, *History and the Historians* 367-368; Tom Nickson, *Toledo Cathedral: Building Histories in Medieval Castile* (University Park 2015) 77.

[9] Peter Linehan, *The Spanish Church and the Papacy in the Thirteenth Century* (New York 1971) 101-151. Nickson has shown that the architectural record also demonstrates the acute financial stress of the chapter during the thirteenth century: Nickson, *Toledo Cathedral* 38-39, 78-80, 101.

[10] There are a number of twelfth century charters from Toledo that suggest the restructuring of benefices was a constant, but precarious, temptation for prelates, who wanted stability but were faced with rising costs and burgeoning numbers: Hernandez, *Los Cartularios* 116-117, 160-161, 236-237.

letters suggest that more data is lying in wait in the archives of Toledo.

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Letter of Pope Innocent III

A.6.G.1.10 ‘Cum omnibus Christifidelibus’
28 May 1199 Lateran

Innocentius episcopus servus servorum dei venerabilibus fratribus. . Toletani archiepiscopi et suffragenis eius salutem et apostolicam benedictionem. Cum omnibus xristifid//libus ex officio commisse nobis sollicitudinis intendere debeamus maximi viris ecclesiasticis tamquam fidei domesticus ceterisque tam dignitatis quam//ordinis honore sub vixis paterne dilectionis affectu salutaria et aequitatis consona monita nos convenit dispensare. Nobis siquidem intimatum est quod fere omnes parrochiales nostres clerici in tantam sunt perlapsi nequitiam ut nobis obedire contumiter contradicant novas et detestabiles cons//pirationes et coniurationes pretextu confratriarum adventum vos ineuntes et tali forma malignam simulantes astutiam fratrias et con//venticula statuerunt ex quibus pervenit manifesta pernities et summarum iniquitatum generantur exempla. Accedit ad hoc quod quotiens volunt con//venticula sua congregant vocatus venire negligunt interdicta vestra servare recusant et consueta et debita servitia vobis subtrahere moliuntur.//Et quam tantorum iniquitatum et persumptionum excessum non possumus nec debemus aliquatenus relinquere incorrectam prefatas confratrias que ut dicti fratres possunt verius appellares ad exemplar pie recordationes. H. et Lucii papae[11] predecessorum nostrorum

[11] This reference appears to point toward an unknown letter of Honorius II and also the 1182/1183 letter of Lucius III, ‘Cum omnibus Christifidelibus’,which Hernandez has catalogued and the recent addition to the *Papsturkunden im Spanien* volume for Castile has edited (in addition to a letter from Alexander III that seems to have gone unmentioned by Innocent): Hernandez, *Los Cartularios* 524-525; Berger, Herbers, and Schlauwitz, edd. *Papsturkunden in Spanien. III. Kastilien* no. 146, pp. 305-6, no. 216, pp 411-12. It seems likely, given the repetition of the ‘incipits’ and the similarity of their content that the letter from

auctoritate omnipotentis dei et beatorum Petri et //Pauli apostolorum eius penitus extirpamus et tam eas quam sigillum et cartas per earum inspectione confectas perpetua cassatione dampnamus praecipientes firmiter//et auctoritate apostolica prohibentes ut nullam deinceps habeant inter se sive cum laicus clericis confraterniam nec in unum audeant convenire nisi cum//a vobis vel a vicariis vestris fuerint convocatus. Si qua tamen in eis fuerint que honestate utilitatis obtentu sine vestro et ecclesiarum pruditio inderitis cole//randa ea in statu suo concedmus permanere. Consueta vero et debita servitia sicut longa consuetudo vestrorum obtinuit ecclesiarum vos a clericis vestris//exigere et ab eis vobis precipimus cum integritate persoliis. Preterea si contra instituta nostra repugnare voluerit eos auctoriate nostra remoto//appelationis obstaculo districtione anathematis confringatis quousque prenominatis instructis consentiant et vobis obedientes in omnibus predictis exi//stant. Nulli litteris obstantibus que a sede apostolica contra hec que diximus appareant impetrate. Dat Laterano//v kalendae Junii pontificato nostri anno secundo.

Letter of Pope Innocent IV

A.6.G.1.9 'Paci et Tranquilitati Vestre'
2 January 1252, Perugia[12]

Innocentius episcopus servus servorum dei. Dielcti filiis suis decanis et Capitulo Tholetanis salutem// et aposotlicam benedictionem. Paci et tranquillitati vestre paterna noscentes sollicitudine providere auctoritate nobis//presentum indulgemus ut ad receptionem nel provisionem alienus in pensibus et ecclesiasticus benefi//cius compelli per litteras apostolicas vel legatorum aposotlice sedis minime valeatis nisi littere apostolice//plenam et expressam de verbo ad verbus de hac indulgentia eiusque toto tenore fuerint mentionem.//Nulli ergo

Honorius II was of a similar persuasion, if not an outright confirmation repeating the same text.

[12] The 'fichero' in Toledo mistakenly lists this as a letter from Innocent III. It incorrectly prints the datum as 2 January, 1207.

omnino hominum liceat hanc paginam nostre concessione infringere vel//ei ausu tememno contraire. Signis autem hoc attemptare indignationem omnnipoten//ns dei et beatorum Petri et Pauli apostolorum eius se noverit incursum. Datum//Perujii IIII nonas Januarius Pontificatus nostro anno nono.

Summerlin, Danica. *The Canons of the Third Lateran Council of 1179: Their Origins and Reception*. Cambridge Studies in Medieval Life and Thought, Fourth Series. Cambridge: Cambridge University Press, 2019. Pp. xxiii, 306. $99.99. ISBN: 978-1-107-14582-5.

Atria A. Larson

This volume represents the successful transition of Danica Summerlin's dissertation, written under the direction of Dr. Martin Brett at Cambridge, into a book that should be recognized immediately as a valuable contribution to the history of the papacy, medieval canon law, and councils. Summerlin combines detailed research into manuscripts preserving copies of the decrees issued at the Lateran Council of 1179, held under Pope Alexander III (1159-1181), with considerations of broader legal developments, local concerns expressed in surviving letters, and academic debates about particular canonistic issues. Underlying the tedious research are broader questions of papal authority and the development of mechanisms of a centralized ecclesiastical hierarchy. It is precisely this kind of research that is required to answer such larger questions with any sort of historical sophistication.

Summerlin's research fits nicely into recent trends in medieval canon law scholarship. First, she concentrates not just on the papal pageantry of the conciliar event in 1179 and not just on the agenda of the pope and his curia but also on the afterlife and reception of what took place and what was promulgated. The approach is akin to a scholar examining the ur-text of an author and its usage after it starts to be disseminated. The historical impact of an event, of a text, or of a collection of decrees can only be gauged, of course, if its influence is traced. And so, for instance, the import of Burchard of Worms's *Decretum* takes on new significance when one realizes that the collection continued to be copied *after* Gratian's *Decretum* and served as a source for multiple marginal additions in copies of Gratian's work (an example referred to by Summerlin herself, 26). Similarly, the real

import of the Lateran decrees of 1179 can only be gauged with reference to the particular ways in which they were disseminated, received, and used in the years after their issuance. That scholarly focus constitutes a necessarily different perspective than one attentive merely to the stable text of canons as represented in a printed edition. Second, and relatedly, Summerlin pays close attention to each and every manuscript copy of the Lateran III decrees in terms of its identity as a unique historical artifact. The copies find their historical value not primarily as being a textual witness to be compared with other textual witnesses that will then be examined in Lachmannian fashion to determine manuscript families based on textual variants and then analyzed in a way to trace back to an ur-text. Like many scholars recently, Summerlin (implicitly) asserts that such a methodology is woefully misguided when it comes to these kinds of texts. 'Canonical compilations', she notes with reference to collections of the reform-era and of Gratian, 'were "living" texts in constant use, adapted by different clerics for varying reasons' (25); by the end of her study, it is apparent that the Lateran III canons too were neither static nor uniform. While paying attention to textual variants and similarities, Summerlin demonstrates that the scholar much more profitably turns his or her attention to understanding each copy in its place within its own codex, whether as an appendix of sorts or integrated into other material, and to investigating how these decrees fit with the purpose of the codex as a whole, whether that codex includes a chronicle or a collection of recent papal decretals. Third, Summerlin questions traditional assumptions rooted in early modern and modern taxonomies of texts and events. Sometimes longstanding categories have impeded historical perception; in this case, the naming of ecumenical councils and modern ideas of legislative processes and authority have impeded an accurate comprehension of what it meant for a twelfth-century pope to hold a council and to promulgate decrees at it. The fact that the Third Lateran Council received that designation by Bellarmine and became identified as one of the 'ecumenical councils' of the Latin Church looks increasingly strange when one realizes the large number of papal councils in the long twelfth

century alone and the fact that, for instance, Alexander's Council of Tours (1163), not designated 'ecumenical', received similar treatment to the Lateran Council of 1179 among contemporaries. Furthermore, thinking of general or ecumenical councils as legislative events can be misleading without a thorough uncovering of what it meant for a council to approve and promulgate decrees at a particular time. What the Church and papacy did at Trent in the sixteenth century or even at Lyon II in the late thirteenth century to ensure the dissemination and implementation of conciliar decrees is not necessarily what Alexander III and his curia did in the twelfth century. Fourth, Summerlin is attentive to the interplay between 'center' and 'periphery', or the interactions of a papal curia with bishops and other churchmen in their home regions with their own local challenges. In her narrative, as in other recent scholarship, the papacy is not developing a reform agenda on its own and then implementing it in the periphery; rather, churchmen in the periphery are bringing concerns to the papacy and the papacy circles around to address these local concerns in a way that can be more broadly applicable in various other regions as well. Thus, in Summerlin's narrative, this major council is just as much part of the 'responsive' nature of twelfth-century papal government as papal decretal letters, responding to particular cases and *consultationes*, are.

Summerlin structures her book in a clear way. Following an introduction, her first chapter provides a historical and historiographic survey of the Lateran Council of 1179, Alexander III's summons to it, the dates and activities of it, the state of canon law and the spread of clerics trained in canon law within the papal curia and episcopal offices in the twelfth century (which Summerlin treats in admirable detail, with numerous specific names, 19-24), canonical collections and papal letters and their survival in manuscripts, and councils of the twelfth century. Throughout, she relies on long-standing and more recent scholarship by historians such as Walter Holtzmann, Stephan Kuttner, Charles Duggan, C.N.L. Brooke, Kenneth Pennington, Anne J. Duggan, Peter Landau, Mary Cheney, Uta-Renate

Blumenthal, and Robert Somerville. The chapter illuminates the gap in scholarship that she is filling: despite attention to councils of the reform era and despite significant attention recently to Gratian and to papal decretals of the second half of the twelfth century, councils in this latter period have been understudied: what is 'the specific and practical role played by conciliar canons in both papal governance of the Latin Church and in the *ius novum* during its formation period in the later twelfth century' (43)? Put another way, 'how [did] these conciliar canons emerge from or affect legal culture and ecclesiastical government during that period' (19)?

The second and third chapters give the preceding context for the 1179 canons. They establish what persistent reform issues of the eleventh and twelfth centuries and what more immediately prior local or widespread concerns stood behind the canons (chapter 2), as well as what particular debates in the schools the canons were engaging with (chapter 3). The main source for chapter 2 is surviving Alexandrine letters. Summerlin must establish her terminology, and so she opens up the chapter distinguishing papal letters generally from decretals. She adopts Walther Holtzmann's relatively narrow definition of a decretal as 'any papal letter that appeared principally or only in a canonical context' (50). Other scholars have adopted a broader definition, thinking of decretals as any letter written in response to a query (Benson) or a letter written in response to a query involving issues of canon law (Fransen and Charles Duggan). While her analysis focuses on decretal letters proper, or 'those letters transmitted through the legal collections' (52), she also broadens her study to other letters in an attempt to understand what issues had been brought to the attention of Alexander III and his curia in the years leading up to the 1178 summons and 1179 council. She finds that Alexander was dealing with the main concerns of all twenty-seven conciliar canons in some way, and sometimes multiple times, in the 1170s. Some of these concerns represented long-standing matters of concern in the Church over the previous century, such as the denunciation of tournaments and clerical involvement in them (already denounced in 1130), and some of them were novel,

such as the privileges of military orders and for leper colonies. Consistently, Summerlin scours not just decretal collections and other collected source material for relevant letters but also engages in wider scholarly debates about the issues at hand and Alexander's role in them. The next chapter considers many of the same issues but in light of inclusion in school texts, whether Gratian's *Decretum* itself or the work of his early commentators. Although some of the connections Summerlin draws out are weak and could not be used to assert a direct influence of certain decretist glosses or commentaries on the drafters of the Lateran III canons, she nevertheless demonstrates in several instances that Alexander's decrees were participating in current discussions. In one sense, given the already-established presence of trained canonists at the curia and among the ranks of the ecclesiastical hierarchy, some of whom were present in Rome in 1179, such a conclusion is obvious or at least not surprising. Nevertheless, Summerlin's ferreting out of the places in early decretist commentaries that touch upon issues with overlap with the 1179 decrees adds to the body of scholarship on the actual content of these commentaries in relationship to issues that were of interest at the time, including, for instance, the burden of episcopal visitations, a topic of discussion in the decretist commentaries on the basis of Gratian's *Decretum* C.10 q.3 c.8. The most interesting finding of the chapter comes at its end, namely that the 1179 canons repeated material from the 1139 canons (Second Lateran Council, held under Innocent II) only in instances where those canons were *not* present in Gratian's *Decretum*. This fact seems to point to a deliberate choice to preserve material from an earlier council within a legal culture that had already accepted Gratian as a foundational, but not exhaustive, text. Could it be that Alexander III intended his decrees to supplement Gratian's text? Summerlin at least asserts that 'it is not impossible, in fact, that the 1179 canons, drafted as they must have been with an eye to Gratian, demonstrate an attempt on the part of Alexander and his curia to re-establish those canons that had fallen by the wayside and were consequently absent from a compilation that had already assumed a role as the basic textbook of canon law' (122).

Summerlin here and at the end of chapter 2 ventures into the realm of speculation, but it is welcome speculation about the intentions of Alexander III. What did he really intend to do with his 1179 canons? What did he view as his prerogative as pope in terms of issuing decrees? The basic line of argumentation in the second chapter is that, first, Alexander was dealing with the issues of the 1179 canons throughout his papacy and especially in the decade before the council; second, he chose to hold a council with prelates from throughout Christendom to reform abuses; third, he transformed his responses to particular inquiries into generally stated norms written as conciliar decrees; fourth, he avoided certain issues at the council that he seemed to prefer to handle on a case-by-case basis (above all, marriage). Therefore, Summerlin argues, it seems reasonable to attribute to Alexander an intention to issue 'wide-ranging universal law. In other words, he and his curia intended that the canons would provide a body of generally applicable statutes for the governance of the Church' (92). This is not to say that Alexander was legislating a body of laws that formed an underlying papal agenda throughout his papacy—Summerlin rejects such a view. Rather, he introduced general rules in response to particular problems that kept arising or that seemed to be arising with particular vigor in the 1170s.

Summerlin is equally clear in her assertion that 'papal intention did not automatically equate to widespread reception' (93), and such a distinction sets up the final two chapters of her book, which examine the reception of the canons. These chapters are the longest. The fourth rests on an examination of 56 different versions of the Lateran canons (listed in the appendix, pp. 249-60). The chapter includes a critical review of the editions of the canons (126-27). In this chapter, the concept of 'mechanism of promulgation' takes center stage, if only to be trampled upon by the evidence. The Lateran canons were, according to one chronicle source, 'promulgated', but how so? Summerlin reviews theories: the canons could have been copied centrally and distributed to attendees to be taken back home; bishops could have been instructed to return home and swiftly hold local synods that would re-issue the canons regionally. Although the survival of the canons

is substantial and far more extensive than for almost every other twelfth century council (for many of which one or even no canon survives), the copies' disparities in number of canons, their ordering, and, in some cases, their text across the 56 versions speak against any sort of centralized mechanism of dissemination. More than likely, bishops did take home copies in many cases, but there does not seem to have been any one official version that served as the basis for these copies. In one case, that of canons 13 and 14.1, dealing with pluralism of benefices, more than likely what we have are two different versions of what was intended to be issued as a single decree. The fact that the canons survived in dozens of manuscripts does not mean, then, that the papacy effectively distributed its agenda the way we would expect a centralized bureaucracy would. Instead, the evidence of the various manuscripts and traditions, among which legal manuscripts containing new collections of mostly papal decretals figure most abundantly, puts the responsibility of such widespread, if uneven, dissemination squarely on the shoulders of the clerics who were compiling, teaching, and studying recent canonistic material for the most up-to-date legal counsel and judicial decision-making in their locales. And this was a process over which Alexander III and his immediate successors had no control.

All the same, Summerlin's analysis confirms in her own mind that our twenty-seven canons accurately represent the material promulgated at the council itself (156), but different clerics in different places seem to have had different ideas about their authority and how and to what extent they should be used. Their use for a decade or two was haphazard, inconsistent, and sometimes involved changes based on local needs. This usage becomes the focus of chapter 5. As a whole, the text of canons was not viewed as 'set, legislative text' (181) but seemingly rather as a guide expressing general principles. The sources of chapter 5 return to those of chapters 2 and 3, namely papal letters and canonistic commentaries and collections. Summerlin's research shows that Alexander himself and subsequent popes modified or gave further specifications in relationship to certain canons; this

seemed to be necessary because inquiries from the periphery raised questions about the precise implementation of the ideas put forward in them. In other words, these post-1179 decretals 'demonstrate responsive papal government in action, but in such a way as to undermine the idea that papal conciliar canons were automatically accepted: they [the canons] became part of the same dialogue between the papacy and local clerics as papal decretals' (198-99). The strongest local usage and re-issuing of 1179 canons occurred after 1190, which seems to coincide with the time when they were more prevalently added to decretal collections and started being incorporated into different titles in systematic decretal collections, above all Bernardus Papiensis's *Breviarium*, or *Compilatio prima*. Besides her conclusion that contemporaries utilized conciliar canons in much the same way as they did papal decretals, the other interesting finding of the chapter consists in the fact that it was the canons addressing novel issues that were cited most frequently. As such, over the first few decades following their promulgation, as they were incorporated above all into copies of decretal collections, they became accepted as part of the *ius novum* side-by-side with recent papal decretals.

Summerlin's scholarship and methodology are sound. One can quibble with particular points of interpretation. For instance, when the author of the *Summa Lipsiensis* notes a divergence of contemporary papal practice on the issue of pluralism of benefices from the conciliar decree of 1179, is he really holding on principle that 'recent papal practice overruled the conciliar canon' (237), or could he simply be making an observation, perhaps with more than a hint of criticism, about the divergence? She notes that Bernardus grouped conciliar material first, prior to the decretals of Alexander III, but does this mean that he is ascribing 'greater authority to conciliar canons than to decretal letters' (239)? There seems little reason to suppose this unless Bernardus specifically stated a viewpoint asserting as much; more likely, he is simply categorizing conciliar decrees as something somehow different from papal decretals, and one can note that early medieval canonical collections routinely did the same thing on a broad scale. More problematic, Summerlin's analysis of the two overlapping

and yet different statements on pluralism in Lateran III c.13 and 14.1 seems to reach two different conclusions in two different chapters—in chapter 3, she argues that the difference reflects canonistic debate surrounding the issue, one with a view to cases in which one benefice was sufficient to support a cleric and one with a view to cases where impoverished benefices could not on their own support a cleric (107-108); in chapter 5, she argues (much more plausibly, based on the manuscript evidence) that the duplication emerged in the transmission and in fact represents two different versions (perhaps one a draft and one a final version) of what was intended to be a single decree (160). One final minor criticism is that Summerlin's book at times seems written exclusively for the specialist; she often assumes that the reader can pull the COD or COGD off his or her bookshelf to see what the canons she is referring to are addressing. She sometimes refers to canons without reminding her readers of what their actual content is, and this may be frustrating to those scholars who are less interested in particular debates about manuscript transmission and more interested in what was promulgated at Lateran III and in what ways and in what kinds of cases it had an impact on church governance.

Finally, and this is less of a criticism of Summerlin's book and more of a 'desideratum' in the field in light of her findings, there remain unanswered questions about the Lateran Council of 1179, especially, in my view, in relationship to bishops. If Alexander III intended to promulgate decrees with general applicability and if bishops in attendance did not rush home and re-issue decrees in local synods or in other surviving, broad communications within their diocese, what did the bishops think they were doing at the council? How did they conceive of their work and their participation, even before and then during the council? What did they intend to accomplish, and what did they think was their duty after the fact? In part, this is an issue of developing relations of pope and bishops within the ecclesiastical hierarchy, a subject not unstudied in the scholarship, but I think the particular subject of episcopal (and abbatial) participation in councils such as Lateran III and Lateran IV along with the

numerous other councils of the period warrant more attention. If scholars like Summerlin are re-imagining what papal councils and issuing decrees at them meant to popes and to the development of law, it begs the question what participation in papal councils and agreement to decrees issued meant to bishops in attendance. In terms of the history of Lateran III itself, the fact that it occurred after a schism is of course of great importance. It seems to me that episcopal participation might have meant an agreement and commitment to sign on to the ideals expressed in concrete terms in conciliar canons and to apply them, according to their own discretion unless complete confusion emerged, in particular cases back at home as part of a unified effort to reform the church, now recently re-united under one pope. This attitude might help explain the kind of reception and survival Summerlin has found with respect to the Lateran III decrees. In short, while bishops play a major role in her investigation, perhaps episcopal attitudes to papal councils warrant some additional consideration.

Summerlin's book overall is a major accomplishment. She has forcibly made the case that scholars of canon law should neither neglect church councils nor make assumptions equating their intent and impact. She has also demonstrated the continued value of detailed manuscript study and considering manuscripts in terms of their entire content, not simply in terms of the textual copy of the object of study. Scholars of medieval canon law will return to the book repeatedly on particular issues and for its general argument. They should also consult new publications by Summerlin. Already she is making arguments, especially about the terminology of *ius vetus* and *ius novum*, that would necessarily require adjustment to her precise wording in some places.[1] Such arguments only add to the value of her scholarship and in no way detract from the import of her book.

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[1] See her 'Using the "Old Law" in Twelfth-Century Decretal Collections', *New Discourses in Medieval Canon Law Research: Challenging the Master Narrative*, ed. Christof Rolker (Medieval Law and Its Practice 28; Leiden 2019) 145-69.

Condorelli, Orazio, Franck Roumy, and Mathias Schmoeckel, edd. *Der Einfluss der Kanonistik auf die Europäische Rechtskultur, Bd. 6: Völkerrecht*. Norm und Struktur, Studien zum sozialen Wandel in Mittelalter und Früher Neuzeit 37/6. Wien: Böhlau Verlag, 2020. Pp. 392. €79.99. ISBN: 978-3-412-51891-2.

Jessalynn Lea Bird

One of a generation of medievalists who, in the aftermath of World War II, researched and held positions with equal facility on both sides of the Atlantic, Peter Landau (1935-2019) left a powerful legacy not only of critical editions, articles, monographs, and textbooks but of scholars trained in legal history. A prolific writer who engaged not only with the medieval legal tradition (civil, canon, and natural law) but Protestant and modern law and history, Professor Landau also played key roles in associations devoted to legal studies, including the Max Planck Institute for the European History of Law and the Stephan Kuttner Institute of Medieval Canon Law. The weighty collection of essays on canon law's impact on international law under review here (in a journal co-edited by Professor Landau for decades) is therefore fittingly dedicated to his memory.

The modern world's globalized culture means that international law is more relevant than ever before, as increasingly international governance and alliances determine not merely war and peace but economies and environmental welfare. The twentieth and twenty-first centuries have thus far been dominated by the tension between residual national, ethnic, and religious loyalties and international collaboration, by Axes and Allies, the League of Nations, NATO, the Warsaw Pact, NAFTA, OPAC, the World Bank, RPEC, the European Union, and Brexit. In order to understand the expectations concerning international law which those cultures heavily shaped by European legal traditions brought and still bring to the bargaining table, a consideration of canon law's effect on medieval and early modern international law is essential. But what falls under the purview of international law and what are its bases? The Roman advocate and politician Cicero and

other Roman jurists viewed the *ius gentium* (literally: law of the peoples), as stemming from human consent, as equal in primacy to natural law, and as truly independent from civil law (*ius civile*), which applied only to individual countries.

However, as the introduction (v-xxii) and Peter Landau's article (xxiii-xxv) explain, most pre-modern canon lawyers adopted their definition of international law from Isidore of Seville's vastly influential *Etymologiae*. As a bishop, Isidore hybridized Christian morality with the Roman legal tradition and concepts of universal human obligations. He defined the *ius gentium* as an universal collection of rules originating from human nature, not legislation; international law was used by nearly all peoples to limit strife and uncertainty and therefore dealt with occupation, construction of fortifications, weapons, warfare, prisoners, slavery, the right of return, peace treaties, armistices, the inviolability of ambassadors, and the prohibition of marriage between those of different origins. Isidore's definition was incorporated into the foundational textbook for medieval canon law, Gratian's *Decretum*. His list of topics therefore provided canonists with focal points for discussion and could well serve as the table of contents for this volume, which also compares medieval concepts of international law to those of other periods (vi-vii).

Contracts Must Be Observed But Can Be Broken

The volume proper begins with Franck Roumy's investigation of the canonical origins of the *clausula rebus sic stantibus* (the ability to cease observing or to revise a contract or treaty should the circumstances under which it was originally formulated change to the significant detriment of either party). As Roumy notes, James Muldoon and many others have elucidated the ways in which rules and principles established by medieval canon lawyers influenced modern international law. The particular *clausula* discussed here was adopted by the pioneering Italian jurist Alberico Gentili (1552-1608), who argued that juridical principles governing private contracts were transferable to

conventions between powerful sovereigns. After Gentili, common opinion decreed that the *clausula* applied to every accord guaranteed by an oath. Widely accepted in both international and national laws based on the *Ius commune*, the *clausula* was nonetheless rejected by compilers of other law codes based on the principles of natural law—most ominously in codes compiled in Prussia, France, and Austria during the eighteenth and nineteenth centuries. Influenced by common law theories of frustration of contract and the practice of clauses of hardship, the English legal tradition (and modern law codes indebted to it), also rejected the *clausula*.

Nonetheless, the late eighteenth to early twentieth centuries would witness many attempts to challenge international treaties based on significant shifts in circumstances from those under which the convention had been ratified. For example, after World War I, the French and Germans cited elements of the *clausula* to escape implementing the terms of recent conventions regarding energy supplies. In response to increasing invocation of the *clausula*, the convention of Vienne (1969) sought to strictly limit its application. Article 62(1) decreed that:

> A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

This of course did not apply to treaties establishing national borders. The *clausula* has, however, recently been invoked in private law to deal with exigencies caused by Covid-19 in the cases of leases and commercial and consumer contracts.[1]

Crucially, the idea that a commitment could be reevaluated due to changing circumstances originated not in Roman contract and civil law but in theologians' and canon lawyers' considerations of the issues caused by good faith and consent as

[1] Valentin Jentsch, 'Government Responses on Corona and Contracts in Europe: A Compilation of Extraordinary Measures in Times of Crisis', *European Business Law Review* (forthcoming).

the basis for contracts (e.g. lying, perjury), some of which were incorporated into the *Decretum* and commentaries on it, conciliar canons, and other sources. In contrast, civil law and common law were late adopters of the *clausula*, which, although discussed in theory by the fourteenth century, was not implemented in practice in international law until the fifteenth century. Roumy traces the transmission of the ideas underlying the *clausula* (implicit conditions in oaths, conditional promises of marriage, stipulations attached to donations) to the cross-fertilization of law and theology in Paris in the later twelfth century. It is no accident that Innocent III invoked the principle in letters urging peace between rulers and at the Fourth Lateran Council (c. 41) at the precise moment it also first entered commentaries on the *Digest*.[2]

In contrast, Orazio Condorelli examines the origins of the principle 'agreements ought to be upheld' (pacta sunt servanda) as applied by canonists to peace treaties in the twelfth through fourteenth centuries and as transmitted, through Hugo Grotius (1583-1645), into early modern legal treatises now viewed as foundational for modern international law.[3] Isidore of Seville's definition of the *ius gentium* (set in dialogue with Justinianic texts) and a neighboring section on peace treaties in Gratian's *Decretum* provided foundational set-texts and created opportunities for medieval canon lawyers' discussion of international law.[4] Isidore viewed agreement (pactum) and peace (pax), treaty (foedus) and good faith (fides) as mutually reinforcing in peace treaties (foedera pacis). For Isidore, faith (fides) covenanted God and humankind and also contracting parties; the moral implications of this emerged in commentaries by decretists, who pondered, did the *ius*

[2] See for example, the articles by Łukasz Korporowicz and Andrea Massironi in *The Fourth Lateran Council and the Development of Canon Law and the Ius Commune*, edd. A. Massironi and Atria Larson (Ecclesia militans 7; Turnhout 2018).

[3] As Condorelli notes, his article represents a précis of a twelve-year project on the influence of canon lawyers on European legal culture. A longer version has been published as 'I *foedera pacis* e il principio *pacta sunt servanda*: Note di ricerca nel pensiero dei juristi del secoli XII-XV', ZRG Kan. Abt. 105 (2019) 55-98.

[4] D.1 c.9 *Quid sit ius gentium*; D.1 c.10 *Foederis faciendi*.

gentium apply to all? Were the norms of international law derived from natural law or another source?[5]

Realizing that Isidore's idealistic definition might not be entirely applicable to real life circumstances, decretists therefore fused Isidore's notion of the obligatory and sacral nature of the 'foedera pacis' with Augustine's assertion that 'frangenti fidem, fides frangatur eidem' (if someone has broken faith, your faith with him may be broken). Based on the authorities gathered by Gratian in Causa 23, decretists generally agreed that oaths were licit for creating peace and once made ought to be kept with both allies and enemies. However, oaths implied reciprocal obligations; civil and canon lawyers agreed that if one party violated the agreement, the other was released from their obligations, both in private contracts and in treaties. Canon lawyers drew on certain Justianic texts surrounding Isidore in the *Decretum*, so too civil lawyers drew directly on Justinian's *Corpus* to distinguish between private contracts and public conventions (conventio publica) created between military leaders (duces belli). Based on the principle of natural equity (aequitas naturalis), these pacts were congruous with human fidelity (fides humana). The obligation to keep such pacts (pacta) rested in the consent of stipulating parties, their intent, and the goal of peace (pax). From Ulpian, civil lawyers adopted the principles that agreements ought to be upheld (pacta sunt servanda) in the name of equity (pacta servari equitatis est), as universal natural law. Utilizing diverse sources and authorities, canonists and civil jurists nonetheless came to converging conclusions on the inviolability of peace treaties (foedera pacis), founded on the principles that agreements must be observed and faith pledged upheld.

Practical institutional relationships between empire, kingdoms, and city-states also contributed to international law. For example, the Peace of Constance (1183) was sealed by oaths and demanded reciprocal obligations in perpetuity from Frederick Barbarossa and the Lombard League. Practice and theory mutually informed each other—legally trained individuals served in royal, episcopal, monastic, and papal courts. The longstanding concept

[5] D.1 c.2.

that the church had jurisdiction in matters of peace (recently reaffirmed at the Third Lateran Council) was wielded with great effect by Innocent III in the 'negotium pacis et fidei' in the south of France and also in his *Novit ille* (X.2.1.13), which justified, in both theological and legal terms, papal intervention in the conflict between Philip Augustus and John of England in the name of the mortal sin of broken peace (crimen pacis fractae).[6] These rulers' violation of the accord of Le Goulet (a foedera pacis Innocent assumed was confirmed by reciprocal oaths) was described as a sin against the peace and charity (caritas) which united Christendom. Incorporated into the *Compilatio Tertia* and the *Liber Extra*, *Novit ille* became both a classic locus for the discussion of the relationship of temporal and spiritual power and an authority cited to justify ecclesiastical intervention in political affairs to promote and conserve peace. Hugo Grotius (1583-1645) similarly responded to contemporary religious and political conflicts by stressing that observation of pacts and treaties was a fundamental principle, present in natural, civil, and canon law. This principle was characterized as universal in the preamble of the Convention of Vienna (1969): 'the principles of free consent and of good faith and the 'pacta sunt servanda' rule are universally recognized'.

Conceptions of Just and Holy War

Although, as a general principle, canonists viewed just wars as those defensively waged to repel violence and create peace, this definition of just war uneasily dialogued with a long and troubled tradition of 'holy' war. Mathias Schmoeckel therefore engages with a topic long debated by historians: the origins of the First Crusade and the extent of its indebtedness and contribution to

[6] Not mentioned in the volume under review, but terribly important. See Marco Meschini, *Innocenzo 3 e il negotium pacis et fidei in Linguadoca tra il 1198 e il 1215* (Bardi 2007).

notions of salvific war and the Spanish Reconquista.[7] He begins where most histories of the crusade movement do—with Pope Urban II's speech at the Council of Clermont (1095), issued most probably as a plea to assist eastern Christians after multiple embassies from the emperor of Constantinople requested military aid following Byzantine defeat by Turkish armies at the battle of Manzikert (1071). Citing classic and recent scholarship by Dana Munro and Georg Strack, Schmoeckel analyzes the surviving reports (or perhaps more accurately, reconstructions) of Urban's speech, many of them written after the known outcome of the First Crusade as retroactive justifications for its goals and methods. These surviving reconstructions, Urban II's original letters, and the conciliar decrees of Clermont (1095) have traditionally raised as many questions as they have answered about the genesis of what became known as the First Crusade and its shifting perception, goals, and impact.[8] Was the crusade envisaged primary as an armed pilgrimage to Jerusalem or a holy war? Was Urban's call intended primarily for warriors or any devout Christian? Did participants imagine assisting the emperor of Constantinople, eastern Christians (hazily defined), or recapturing Jerusalem? What did Urban II promise when he mentioned forgiveness of sin? Was this forgiveness conditional on death as a martyr, reaching the pilgrimage site of Jerusalem, or available to those who died of disease or survived and returned, perhaps never even reaching Jerusalem? How did this forgiveness of sins intersect with and transform conceptions of justified or even sacralized warfare?

Schmoeckel focuses instead on another long-debated question. How do we reconcile the fact that during a century obsessed with curbing violence between Christians through the Peace of God and Truce of God movements, Urban II appealed for a new kind of war? Was this appeal meant to redirect the violence

[7] See also Mathias Schmoeckel, 'Vom "gerechten" zum "heiligen Krieg"? Rechtfertigung der ersten Kreuzzüge im kanonischen Recht', ZRG Kan. Abt. 105 (2019) 1-54.

[8] See, for example, the sources gathered in Edward Peters, *First Crusade: The Chronicle of Fulcher of Chartres and Other Crusade Materials* (2nd ed. Philadelphia 1998).

and ambition of Christian warriors towards external enemies of a rival religion? Was the First Crusade a new phenomenon or only the continuation of a European propensity to violence against themselves and others? Schmoeckel neatly sidesteps the somewhat violent scholarly scuffles over what precisely constituted a crusade (and when the concept of 'crusade' crystallized),[9] as well as modern internet propaganda wars where a panoply of authors claim that either Christian or Islamic forces or both possessed 'unjust motives' in waging holy war (89). He instead focuses on the ideology of just war in the eleventh century as the appropriate context for evaluating how contemporaries might have conceived of Urban II's appeal, and similarly, how the outcome of the First Crusade affected perceptions of just war in other contexts.

Any discussion of just or holy war in western theology and canon law ought to begin with Augustine, whose scattered statements about warfare were collected in Causa 23 of Gratian's *Decretum*. For Augustine, just war must be initiated by a proper authority (monarchs according to natural law), be based on a just cause (either prevention of conflict or defense), and be waged with proper motives (not out of greed, cruelty, or revenge) to restore peace and security. In other contexts, Augustine drew on Old Testament passages to argue that force could be used to compel heretics to convert; much later, these passages were invoked to justify anti-heretical and political crusades.[10] Theories of both defensive just wars and expansionist conquest also flourished under the Carolingians, who faced the 'loss' of formerly Christian Africa and Spain to Islam and the incursions of Huns and Vikings while waging expansionist wars against the 'heathen' Saxons. Authors searching for the origins of the notion of holy war have found rich but seemingly contradictory material from this period: penitentials prescribe penances for soldiers, yet Gregory I

[9] See Jonathan Riley-Smith, *What Were the Crusades?* (London 1977; 2nd ed London 1992; 3rd ed Basingstoke 2002); Christopher J. Tyerman, *The Debate on the Crusades, 1099-2010* (Manchester 2011).

[10] See the literature cited in Jessalynn Bird, 'Paris Masters and the Justification of the Albigensian Crusade', *Crusades* 6 (2007) 117-155; Norman Housley, *The Italian Crusades: The Papal-Angevin Alliance and the Crusades against Christian Lay Powers, 1254–1343* (New York 1982).

organized the *militia Christi* to defend the papal states and Leo IV promised those who died fighting Muslims they would earn eternal life. Drawing on the work of Carl Erdmann and other crusade historians,[11] Schmoeckel argues that by the mid-eleventh century, Christian rulers' struggle against Islamic forces in Spain had become common knowledge for most Latin Christians, and that practically all wars against foreign enemies could be justified as 'defensive' (ala Augustine); however, many ecclesiastics remained cautious about justifying warfare and heavily invested in limiting internal wars among Christians through the *pax Dei* and *treuga Dei*.[12]

Schmoeckel therefore depicts Urban II's representation of the war he invoked as defensive and intended to recapture 'Christian' territory (Jerusalem and eastern churches) as a tactic necessary within the context of the peace movement. However, was Urban's addition of the indulgence an innovative sacralization of just war or was it based on earlier papal precedents? Schmoeckel argues that Gregory VII had already appealed to just war concepts such as aiding eastern Christians and the defensive reclamation of formerly Christian lands in 1074. In contrast to historians who have claimed that Urban's speech established an armed pilgrimage to Jerusalem as a merciful opportunity for salvation for warriors, Schmoeckel claims that Urban instead presented himself as the true spiritual, juridical, and temporal leader of the West capable of declaring and legitimating a war in aid of the eastern emperor, although the precise term 'holy war' did not yet exist. In addition to papal pronouncements, war could be and had long been legitimated by ecclesiastics' presentation of soldiers who died in defense of the faith as martyrs and promises that their sins would be forgiven. Historians have long debated both crusading's relationship to martyrdom and what precise forgiveness of sins

[11] See note 10 above; Carl Erdmann, *The Origin of the Idea of Crusade*, trans. Walter A. Goffart and Marshall W. Baldwin (Princeton 1978).

[12] It might be noted that ironically, both were enforced through church authorities' justification of the use of violence to curb inveterately bellicose warriors undeterred by excommunication. For this, see *The Peace of God: Social Violence and Religious Response in France around the Year 1000*, edd. Thomas J. Head and Richard A. Landes (Ithaca 1992).

Urban II promised at Clermont (and in letters afterwards). The problem lies partly in the fact that while the practice of indulgences was flourishing, the theories and justification for their granting and their precise function would not be fully developed until much later by theologians and canon lawyers (although many have succumbed to retroactively applying later theories and conceptions of indulgences to the First Crusade).[13]

What is clear from the surviving versions of Urban II's speech and narratives of the First Crusade (most drafted in order to explain its success) is that questions about the nature and applicability of the putative forgiveness of sins abounded. Did this forgiveness of sins apply only to the confessed sins of those who died or to survivors? What part of sin was forgiven, the guilt (culpa) or the penances performed as penalties (poena) in the hopes of avoiding punishment in the next life (either in purgatory or hell)? Was the administration of indulgences allied to the penitential power of binding to penance and release from it (and guilt) and was this 'power of the keys' exercised equally by popes, bishops, and priests? It seems highly unlikely that Urban II conceived of his offer in the terms which have been attributed to it by critics of later papal claims and indulgences: as a blatant play for papal universal spiritual jurisdiction in this world and the next (and/or money). Although most recent histories of the crusades (and later theologians) presented Urban's offer as a forgiveness of penance (remissio poenitentiae) rather than of sin per se, Urban was clearly feeling his way in unknown territory. His letter to Flanders (1095) speaks of 'remission of sins' (remissio peccatorum), while another to Bologna speaks of 'remission of penance' (remissio poenitentiae) and the necessity for confession.[14]

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[13] See note 15 below; Herbert E.J. Cowdrey, 'Martyrdom and the First Crusade', *The Crusade and Latin Monasticism, 11th-12th Centuries* (Aldershot 1999) 45-56; and the literature cited in Miikka Tamminen, *Crusade Preaching and the Ideal Crusader* (Turnhout 2018) 169-202.

[14] For excellent surveys of the vast literature on indulgences, see Ane L. Bysted, *The Crusade Indulgence: Spiritual Rewards and the Theology of the Crusades, c.1095-1216* (Leiden 2014); Robert W. Shaffern, *The Penitents' Treasury: Indulgences in Latin Christendom, 1175-1375* (Scranton 2007).

Schmoeckel also proposes a substantial revision of Carl Erdmann's argument that Urban II's contemporaries, particularly the canon lawyers Anselm of Lucca, Bonizo of Sutri, and Ivo of Chartres, actively facilitated the shift from a pacifist to warmongering theology, a development which influenced the authorities later compiled by Gratian for his Causa 23. Erdmann's thesis has already been challenged by John Gilchrist, who noted the unsystematic and localized nature of canon law in the eleventh century and Gratian's eventual inclusion of excerpts from a wide range of positions. Moreover, Schmoeckel claims that there was a glaring disjuncture between the practice of the crusades and legal literature (much of it misrepresented by Erdmann or taken out of context or based on faulty or incomplete editions), which hardly mentioned the crusades and cannot be proven to have influenced Urban II. Schmoeckel reassesses the central canonists of the eleventh century and finds that their positions on just war were varied, complex, and ambivalent. For example, the concept that Anselm of Lucca was the progenitor of a new theory of war as an ethically justified act is not supported by the full (unedited) texts of Anselm's work. However, in his *Liber contra Wibertum*, written against the anti-pope Guibert of Ravenna (who had attacked Gregory VII as unfit for the papal office due to Gregory's legitimation of war in the East in 1074), Anselm did turn to Augustine to legitimate war under careful parameters. So too did Bonizo of Sutri, who argued that taking up arms was legitimate in defense of the church, one's own kingdom, or the kingdom of God, particularly against internal enemies (including schismatics and heretics), although external enemies must be endured or tolerated. Similarly, as James Brundage has shown, Ivo of Chartres' *Decretum* (1093-1100) incorporated many of the authorities already mentioned and probably influenced Gratian's selections for Causa 23. The Augustinian assertion that war and violence may be just and even necessary was firmly part of the western tradition, as were concerns about what constituted a legitimate war.

Following Gerd Althoff, Schmoeckel argues that it was only *after* Urban II that the idea of not simply a just but a meritorious war gradually developed; canonists championed war as a

manifestation of peace, charity, and love for humankind, but eschewed discussions of indulgences (these and questions of penance for soldiers were treated in pastoral literature instead). But while ignored in theory by canon lawyers and theologians in the eleventh century, indulgences flourished in practice and also in association with just warfare in the Iberian peninsula and Sicily (as this reviewer might suggest, sometimes practices inspired ideas rather than ideas inspiring practices). Even when canon lawyers discussed the legitimization of war, they distinguished between internal and external foes, pagans and heretics, and critiques of war and advocates for peace unsurprisingly abounded in the age of the peace and truce of God. In what sounds like an apologetic move, Schmoeckel claims that the concept of holy war was not innate to Christian theology; Urban's 'hawkish' speech has been taken out of context and his juncture of holy war and indulgences was soon discarded, partly because the failure of the crusades weakened the holy war idea and it therefore was not incorporated into European international law. When canon law traditions influenced modern discussions of just war, they did so in an Augustinian mode (war was permitted primarily for defense), as in the case of the Kellogg-Briand Pact (1928).

Schmoeckel therefore envisages a clear distinction between Christian and Islamic theological and juristic traditions in the treatment of holy war, claiming that the concept of jihad as offensive and expansionist war was 'seen as one of the basic precepts of the Islamic faith and a duty imposed on all Muslims'. In contrast, he argues that the Sermon on the Mount, not the crusades, represented the predominant European tradition and that canon lawyers quickly delimited holy war, with the happy result that the concept of salvific war was barred from later Western international law (127-129). Here emerges one of the central weaknesses of some contributions to this volume still hewing to the old-school analysis of canon law. The transmission of ideas from legal code to legal code becomes the central focus, rather than how legal ideas were implemented in practice and how legal ideas and practices intersected with and were complemented by other forms of intellectual and cultural expression: liturgy,

artwork, theology, pastoral literature, vernacular prose and poetry, narrative history. To take a modern example, if anyone were looking at twenty-first century law codes we would find denunciations of ethnically or religiously motivated wars and terrorism and yet, if we surveyed the news and social media, nationalist saber-rattling and acts of terrorism and war based on religious, political, and ethnic differences are sadly all too prominent.

Exculpatory arguments based on holy war's inclusion in or exclusion from law codes are therefore deeply flawed. As countless historians of the crusades have illustrated, notions of both holy and just war extended back to at least the Carolingian era and were embedded in history, epic poetry, liturgy, theology, preaching, and artwork of not just the medieval but also the early modern and modern periods. Crusading became a fundamental component of Latin Christian identity and could be and was directed at internal and external foes ranging from Muslims, Greeks, pagans, Mongols, heretics and/or excommunicated political enemies. While there were pastors, theologians, and canon lawyers who sought to restrain and delimit violence, Philippe Buc has powerfully delineated how the Christian jointure of peace and war continues to inhabit, even in the twenty-first century, a teleology which culminates in the purifying violence of the Last Days. Simply put, sacral violence (holy war) is ingrained within Christianity itself, just as sacral suffering (martyrdom) is.[15]

Embargoes, Banns, Law in Wartime, and Human Rights

The consideration of actual practice rather than theoretical mandates should also inform discussions of international commerce and embargoes, the subject of an article by Nicolas Laurent-Bonne that traces the prohibition, in ecclesiastical legislation and papal letters, of commerce between Christian and Muslim states, from the Third Lateran Council (1179) to the pontificate of Gregory IX. In modern international law, an embargo can limit or forbid exports, imports, or even all financial

[15] Philippe Buc, *Holy War, Martyrdom, and Terror: Christianity, Violence, and the West* (Hanley Foundation Series; Philadelphia 2015).

relations with the goal of causing illicit behavior to cease, repairing damage, or punishing the malefactor. Such sanctions may be unilaterally exercised by one sovereign state against another, although the charter of the United Nations permits a range of coercive measures, economic sanctions, and military actions to be required of member states to maintain international peace, including full or partial interruption of economic relations. The EU similarly anticipates the use of economic sanctions as an alternative to military intervention to prevent conflicts and respond to crises (such as the recent Russian invasion of the Crimea). Such modern embargoes, however, are profoundly different to those envisaged by Roman civil law (which forbade trade in war materiel to barbarians) and by medieval canon law.

Trade and warfare enjoyed a complex relationship. Some have credited the First Crusade's establishment of the Latin Kingdom of Jerusalem and the attendant pilgrim and crusader traffic and settlement of Italian merchants in Syria and Egypt as contributing to the twelfth-century Renaissance, while others have pointed to regions closer to Latin Christendom which were also zones for conflict, cultural exchange, and commerce: North Africa, Spain, southern Italy and Sicily. Treaties and diplomatic exchanges between Christian rulers and the Almohads in Spain and Ayyubids and Mamluks in the East were commonplace.[16] Held as Saladin was rising to power, the Third Lateran Council (1179) nonetheless saw the first generalized attempt to limit commerce with Muslim rulers (c. 24), forbidding the sale of arms, iron, and timber suitable for ship-building, and serving as a captain or pilot on a Muslim-owned ship on pain of excommunication, confiscation of possessions, and penal servitude. The decree was widely incorporated into collections of canon law, although its reiteration and repeated requests for clarification by Italian trading cities perhaps suggests it was being ignored or circumvented in practice.

[16] For the debate, see Jonathan Rubin, *Learning in a Crusader City: Intellectual Activity and Intercultural Exchanges in Acre, 1191-1291* (Cambridge Studies in Medieval Life and Thought 119; Cambridge 2018).

The Fourth Lateran Council (1215), held in preparation for what would become the Fifth Crusade, extended previous restrictions to also include the excommunication of Christian traders who sold wood, iron, weapons, war machines, and ships or assisted in building or operating them (c.71, *Ad liberandam*). Arms and armor, metal and wood were typically exported by Italian traders to the Maghreb, Alexandria, and the Near East, and while threatened with excommunication, confiscation of goods, and enslavement, Christian merchants were given a loophole. As with repentant usurers, prostitutes, and other groups who earned illicit profits, merchants could donate in aid of the crusade tainted monies earned through trade with Muslim powers.[17] *Ad liberandam*'s prohibitions would, with other provisions for the crusade, be incorporated both into future councils and canon law collections.

While papal letters and conciliar canons demanded embargoes, the cities and merchants affected by such prohibitions also queried and sought to limit such restrictions through their own petitions to Rome. The Venetians protested that the embargo on ship-building materials was harming their financial standing, leading Innocent III to stress that they might trade other items to Egypt when necessary (140). There is ample evidence, too, that the prohibitions were being violated in practice, even when, with the fall of Tripoli and Acre, popes extended the embargo to all trade with Muslims. As Laurent-Bonne notes, persistent petitions also weakened prohibitions through obtaining the grant of papal relaxations justified by particular political or economic contexts; conquered by James of Aragon in 1229, Majorca was allowed to continue trading non-military items with Muslims in the Magreb. Commerce was similarly permitted if it helped to obtain the freedom of Christian prisoners, provided the materials traded did not harm Christians. Some popes also authorized bishops in specific dioceses to absolve merchants who sold war materiel to

[17] For further observations on c.71, see James J. Todesca, 'Mediterranean Trade in the Wake of Lateran IV', *The Fourth Lateran Council and the Crusade Movement*, edd. Jessalynn L. Bird and Damian J. Smith (Outremer 7; Turnhout 2018) 241-271.

the infidel, provided that they had taken the cross and assisted the crusade either in person or through subsidizing others. Contraband traders soon joined a list of other excommunicated criminal sinners such as the violent against clergy, those committing rapine, arson, sacrilege, and supporters of heretics, who might be absolved provided their offences were not heinous, they made appropriate satisfaction to their victims, and contributed to the crusade (145-146); crusade and moral reform went hand in hand.

Embargoes might be pronounced, lifted, and then reimposed in response to truces concluded (and broken) with Muslim powers. Unlike twenty-first century sanctions, medieval trade embargoes imposed by the papacy were not intended to prevent conflicts, but rather to prepare for or respond to them by weakening the enemy, and were rarely effective. As much recent work has illustrated, papal declarations of selective or sweeping embargoes were contested, subverted, and defied in practice. Medieval international relations in practice were complex: the Tunisian crusade of 1270 saw all sides involved invoking the rhetoric of holy war while also stressing the possibility of conversion, trade, and profitable treaties. Both goods and persons, despite lines drawn rigidly in canon law, crossed sides with regularity; Christian mercenaries were employed by Al-Mustanṣir and Baybars, while Muslim mercenaries were employed (or 'converted') by the Hohenstaufen, the kings of Aragon, and even Charles of Anjou and Louis IX. Further work thus needs to be done to examine how international law played out in practice—for example, in treaties between Christian and Islamic rulers and the treatment of refugees, traders, mercenaries, and pirates in the Mediterranean and elsewhere.[18]

Rosalba Sorice does precisely this for the Italian context, by using consilium XXI of the little-known jurist, Paolo di Castro (1360-1441) to examine the practice of the *bannum* in conflicts

[18] See for example, Hussein Fancy, *The Mercenary Mediterranean: Sovereignty, Religion, and Violence in the Medieval Crown of Aragon* (Chicago 2016); Michael Lower, *The Tunis Crusade of 1270: A Mediterranean History* (Oxford 2018); William Chester Jordan, *The Apple of His Eye: Converts from Islam in the Reign of Louis IX* (Princeton 2019).

between the commune-governed city-states of Pistoia, Florence, and Bologna. As each city-state sought to extend its jurisdiction to the surrounding countryside (contado), alliances or declarations of hostility were used to construct often contested and overlapping claims to identification with a particular city-state. Seeking to limit Pistoia's expansion in 1204, Florence made an accord with Bologna, declaring that all men of the city of Pistoia and the regions surrounding it who allied with Pistoia would be considered enemies of Bologna and Florence. As such they fell under the ban (bannum) issued by the allied Bolognese-Florentine governments and could be killed with impunity. The ban enabled medieval Italian society to identify a hostile political community as an 'external' enemy. It proved so useful that municipal governments soon wielded it to target people and behaviors considered dangerous for the internal cohesion of law and order.

In practice, the centuries-long rivalry between Bologna and Pistoia and the resulting bans meant that what modern readers would characterize as premeditated murders or revenge or honor killings were considered, in the eyes of jurists such as Paolo di Castro, legitimate killings of an enemy in time of war, provided the victim fell under a ban. Such cases were clearly not comparable to deaths on the battlefield, which by the norms of international and canon law, remained largely unpunished in the penitential and legal fora, provided that the war was legitimately and justly declared by a legal authority. Italian jurists turned to the principle 'bellum sub species iuris' and invoked Roman law authorities from the *Digest* to justify the killing of the banned under the conventions of war and international law. Jurists even debated if banned persons possessed the right of self-defense, both against physical attack and in court. Paolo argued that Roman law principles guaranteed both the right to kill enemies and their right to defend themselves; his discussion contained, in embryonic form, the idea that within the laws of war, the enemy possessed a juridical status and enjoyed the right to defend themselves based on natural law and principles of bilateralism and equity, an idea fully developed only in the sixteenth century.

Jurists likewise reasoned that just as it was legitimate to defend oneself against bandits, so citizens were authorized to protect the health of the commune; whomever committed a homicide in war acted in the name of and in defense of the commune, even if he killed to avenge a private injury. However, this right of defense belonged to both sides. If a ban were unilaterally issued and not agreed to by the opposite side, killings during the ban could not be considered legitimate killings in time of war, but as murders which ought to be punished. Because so many conflicts between communes were instigated by inhabitants of a 'contado' against a jurisdiction-claiming city commune, these conflicts could perhaps be considered unjust civil wars, rather than just wars declared by an appropriate authority such as the emperor. This stimulating article thus begs the question of which authorities were considered legitimate for the purposes of declaring a just war and whether this declaration could be unilateral or must, on the principle of equity enshrined in natural law, be bilateral for the rules of war to apply equally to all sides in the conflict.

David von Mayenburg further explores the conventions governing warfare (ius in bello) in canon law. He notes that both the secondary literature and many edited sources of medieval canon law appear primarily focused on the justification of war and less on the legitimacy of various forms of warfare. He therefore investigates whether canonists permitted any form of warfare provided it ensured the success of a campaign, or whether canon law contributed to attempts to restrain the impact of war which led eventually to the establishment of modern humanitarian international laws of war (such as the Geneva Convention). However, problems of anachronism quickly emerge even with the term 'ius in bello' (law applicable within an armed conflict) versus 'ius ad bellum' (the right to wage war), a differentiation foreign to most classical and medieval sources. Because most pre-modern sources debated whether an authority possessed a just cause for war, rules on specific activities in wartime proved ultimately tangential to establishing the just or unjust nature of a war. All actions of belligerents who engaged in an unjust war were not categorized as war acts but as crimes. Those examining the

concept of 'ius in bello' in canon law must therefore look for specifics rather than general principles: the prohibition of certain weapons or the mistreatment of prisoners of war or restrictions on the involvement of non-combatants.

Similarly, the nature of war changed remarkably from late antiquity to the early modern period: in theory, practice, conventions, aims, scale, weaponry, and impact on civilians. Even the assumption that 'war' is an activity separable from other armed conflicts by specific legal actions is perhaps unrealistic for eras and cultures which witnessed a spectrum of violence ranging from raiding, feud, vendetta, banditry, and piracy, to sieges, pitched battles, and crusades. Although medieval and early modern theologians and jurists tried to differentiate war from other forms of conflict, such as disputes or revolts, some scholars have objected that until the rise of modern statehood, wars and feuds were nearly indistinguishable. However, others have claimed that distinctions were in fact drawn between private disputes (faida) and conflicts conducted by associations (bellum).

As Mayenburg notes, even the application of the modern concept of international law (legal norms that apply to relations between sovereign states), to pre-modern periods might be anachronistic, as is the modern distinction between legal, ethical, and theological sources which were deeply intertwined in the pre-modern period. Patristic authors such as Augustine amalgamated ancient philosophy and biblical examples into a theology and ethics of war and these texts became legal authorities by their inclusion in Causa 23 of Gratian's *Decretum*. Theologians and lawyers drew on a shared corpus of texts (council canons, penitentials, biblical authorities, and papal letters) in order to answer questions which spanned both political and spiritual jurisdictions and concerns. Some of the most influential early decretal collections stemmed from canon lawyers adjacent to schools of theology in England, Paris, and Cologne. Simply put, the recursive and hybrid relation of theology and canon law means that scholars cannot consider one without the other. One glaring omission of this volume, then, is a deep consideration of the liturgical, theological, and penitential treatment of the limits of

even just warfare.[19] A paper by Hans-Georg Hermann treating the right of peaceful passage, whose refusal was considered grounds for just war (based on Num. 10:14-21 and 21:21-23) during the crusade of Frederick Barbarossa, might have addressed this gap, but was not included in the volume (viii).

It is also notoriously difficult to determine influence in the longue durée. Even if a specific convention in international law may be traced back to the medieval period, how does one know if this stemmed from canon law or other sources (codes of chivalry, customary law, etc)? Mayenburg therefore restricts his focus to the consideration of strategies that allowed or limited the use of armed force through reference to its usefulness (utilitas) or necessity (necessitas). Similarly, for the 'ius in bello', these principles were used to reason that belligerents should be permitted all methods that served a just war's goals, conserved their resources, and harmed the enemy the most, in order to end the war as quickly as possible and limit casualties. This context permitted certain behaviors to be defined as prohibited. But was this argument from utility typically Christian or canonical? After all, the Fourth Lateran Council repeatedly stated that the law may be changed for reasons of 'urgens necessitas' (pressing necessity) or 'evidens utilitas' (manifest usefulness). However, 'ius in bello' prohibitions or commandments could also be based on Christian theology and ethics, in particular on biblical authorities describing humankind as made in God's image and verses stressing mercy, patience, and love for one's enemies (e.g. the Sermon on the Mount) as well as the prohibition of murder in the Ten

[19] See for example, Sarah Hamilton, *The Practice of Penance, 900-1050* (Woodbridge 2001); David S. Bachrach, *Religion and the Conduct of War, c.300-1215* (Woodbridge 2003); M. Cecilia Gaposchkin, *Invisible Weapons: Liturgy and the Making of Crusade Ideology* (Itaca 2017); and more broadly, for the overlap of canonical and theological sources, Atria A. Larson. *Master of Penance: Gratian and the Development of Penitential Thought and Law in the Twelfth Century* (Studies in Medieval and Early Modern Canon Law 11; Washington D.C. 2014); Bysted, *The Crusade Indulgence*; Danica Summerlin, *The Canons of the Third Lateran Council of 1179: Their Origins and Reception* (Cambridge Studies in Medieval Life and Thought, Fourth Series; Cambridge 2019).

Commandments;[20] one might note that these authorities were also employed by dissidents and heretics to decry the use of force against the heterodox and political enemies within Latin Christendom and pagans and Muslims outside it.[21]

However, as Mayenburg stresses, there was little systematic discussion of the laws of war per se. In Causa 23 of the *Decretum*, quaestio 1 asked if the craft of war were a sin, while quaestio 2 discussed the context of a just war (bellum iustum), and quaestio 8 discussed the right of bishops and clergy to wage war. It was the Milanese canon lawyer Johannes von Legnano who perhaps wrote the first systematic treatment of war conventions in his *Tractatus de bello, de repressaliis et de duello* (c.1360), drawing heavily on previous legal tradition and Thomas Aquinas. Canon lawyers prior to Johannes wrestled with topics including bans on crossbows and the treatment of the prisoners of war, seeking to reconcile the principles of necessity and utility. Warriors in Latin Christendom had their own evolving practices and largely unwritten codes for war which dialogued with pastoral literature and canon and civil law: wealthier and high-status prisoners could be kept for ransom, while civilians and infantry could be killed, enslaved, or spared depending on the circumstances and status of those involved (Christian, pagan, Muslim, negotiated surrender or heat of battle, etc).[22] During the crusades and in the Iberian peninsula, both sides appear to have condoned the enslavement of prisoners not of the same faith during a 'just' war. Patristic sources incorporated into Causa 23 (C.23 q.1 c.3) often urged the gracious treatment of the vanquished (unless they posed a threat to peace), even and perhaps

[20] Lesley Smith, *The Ten Commandments: Interpreting the Bible in the Medieval World* (Leiden 2014) 127-135.

[21] See Bird, 'Paris Masters'; Martin Aurell, *Des Chrétiens contre les Croisades, XIIe-XIIIe siècle* (Paris 2013); Linda Paterson, *Singing the Crusades: French and Occitan Lyric Responses to the Crusading Movements, 1137-1336* (Cambridge 2018).

[22] See, for example, Yvonne Friedman, *Encounter between Enemies: Captivity and Ransom in the Latin Kingdom of Jerusalem* (Leiden 2001); James W. Brodman, *Ransoming Captives in Crusader Spain: The Order of Merced on the Christian-Islamic Frontier* (Philadelphia 2012); Richard W. Kaeuper, *Holy Warriors: The Religious Ideology of Chivalry* (Philadelphia 2009).

especially in just wars, which were meant to establish peace (mercy satisfied both utility and necessity). Although Hugo Grotius incorporated these arguments, together with those based on equity and natural law, in his work, Mayenberg concludes that the humane treatment of prisoners, a fundamental tenet of modern European international law, was not primarily based on canon lawyers' processing of key Christian texts.

What about the use of trickery and stratagems in war? Medieval theologians viewed deception and ruses as intrinsically ethically ambivalent attempts to intervene in the divinely foreordained outcome of a battle; ambushes could lead to greater enemy losses but could also reduce or even avoid pitched battles with potentially higher casualties. Canon lawyers including Gratian often considered ambushes permissible, provided the war were just, based on Augustine's reading of Joshua 6. While urging, based on the same passage, that treaties should be kept, some patristic authorities drew upon other Old Testament passages to argue that 'useful disguises' (utilis simulatio) could be used when the opportunity arose (C.22 q.2 c.21). Somewhat predictably, Mayenburg turns to Thomas Aquinas for contemporary theological treatments of the issue. How could one reconcile Augustine (C.23 q.1 c.3) with the Golden Rule (Matthew 7)? Thomas concluded that even between enemies certain rules of war and alliances (iura bellorum et foedera) had to be observed. On the other hand, there was no obligation to reveal one's intentions to the enemy unless asked. Johannes von Legnano adopted and enriched Aquinas's arguments with references to Roman law and the *Decretum*. In this instance, theological debates forced canon lawyers to tackle the use of trickery.

Perhaps the best-known example of attempted canonical regulation of weapons is the Second Lateran Council's prohibition of usage of the crossbow and other artificially enhanced arrow-like projectiles against Christians in 1139.[23] The prohibition was motivated by their 'deadly and despicable character' and probably partly by knightly concerns; neither armor nor military training protected against these weapons wielded by common soldiers.

[23] Lateran II (1139) c. 29.

Medieval canon lawyers took few pains to make the prohibition effective but objected in principle to crossbows as enabling a despicable form of homicide (perhaps a fruitful comparison could have been made with the prohibition of tournaments here). Most did not view the prohibition as a universal one applicable to 'international law' and many admitted that it was not observed in practice; some such as Hostiensis tried to limit the ban to clerics, not laypersons. Provided a war were just, however, the method of killing 'should' be irrelevant, for canonists agreed that in a just war, all means were considered permissible. Most therefore concluded that crossbows might be used in sanctioned conflicts, particularly against 'the infidel'. Citing natural law, Johannes von Legnano and Hugo Grotius actually argued *against* restrictions on weapons unless such limits were imposed by international law according to the principle of common utility. As late as the early eighteenth century, the Protestant Justus Henning Böhmer dismissed the crossbow ban as symptomatic of fantastical papal claims to regulate the use of weapons in international law. Mayenburg therefore concludes that there is scant evidence for the influence of canon law on modern European humanitarian law and war conventions, including attempts to limit weapons of mass destruction.

In contrast, Florence Demoulin-Auzary researches the origins of the only recently defined concept of laws applicable to all humankind (ius humanitatis), implied by its obverse (crimes against humanity) in nineteenth-century treaties and the Nuremberg trials (in a court claiming international jurisdiction) and defined explicitly in the Universal Declaration of Human Rights (2015). This declaration outlined six areas of applicability: the environment, development, heritage, the preservation of common goods, peace and security, and the freedom to determine one's destiny. Demoulin-Auzary finds that ideas from the Carolingian era were widely circulated by Hugo Grotius, who discussed the 'officia humanitatis', and investigates whether earlier prototypes of this concept extended to the protection of bodily integrity or prohibition of slavery.

However, there is a methodological issue raised by this paper, and other research reliant on the somewhat artificial selection of texts available not merely in printed editions but those possessing tools which allow searches for specific terms, in this case 'ius humanitatis' or 'iura humanitatis'. Unsurprisingly, her search turned up multiple texts from the classical and Carolingian eras but almost none from the period of the height of the development of canon law in the twelfth and thirteenth centuries. Her approach therefore automatically omitted any periods or source types for which materials remain largely in manuscript and discussions of similar concepts lurking under different terminology ('caritas', the Golden Rule, humankind created in God's image, debate and/or diplomatic materials aimed at non-Christian audiences) that would have enriched the reader's grasp of how the concept of 'ius humanitatis' worked in practice. What too, one might ask, were the repercussions of defining certain acts and actors as outside the 'ius humanitatis' (kidnappers, Roman persecutors of early Christians) and describing them as inhuman and bestial? Did this then justify their forfeiture of what are now regarded as basic human rights (through, for example, the exercise of torture and spectacular punishment on suspected or convicted 'criminals')? And yet rulers were meant, by their exercise of justice, to preserve the peace and the basic rights of their subjects.

Demoulin-Auzary's analysis becomes much more nuanced when drawing on discussions of almsgiving by twelfth and thirteenth century theologians and canon lawyers (based on recently published secondary literature).[24] Both groups utilized notions of justice, 'caritas', and works of mercy, rather than the 'ius humanitatis', to posit that the practices of hospitality and almsgiving extended to all humans. And while Alberico Gentili used the phrase in discussion of the laws of war, other foundational early modern treatises on international law, such as those of Hugo Grotius and his followers, did not. Instead, they stressed that the 'officia humanitatis', as the product of an imperfect natural law, could be claimed but not enforced. Demoulin-Auzary concludes that ultimately, 'ius humanitatis' was not a legal concept but a

[24] See note 26 below.

moral and rhetorical one invoked to assert the violated rights of the individual through appeals to justice or compassion. After the 'vain attempt' of medieval canonists to make almsgiving obligatory, the concept of 'ius humanitatis' was overshadowed by the development of early modern international law until its reemergence in the modern era.

Popes as International Arbiters, Citizenship, and the Roma

In marked contrast, Olivier Descamps illustrates that popes routinely claimed for themselves the ability and duty to mediate between secular rulers in order to avoid international conflict and preserve the peace, through references to scriptural authorities which vaunted the merits of 'caritas' and peace as the forces which united Christendom. This article makes refreshing and effective use of references to theology, liturgy, hagiography, ceremonial, and church councils, particularly when discussing the role of the church in peace movements which sought to restrict warfare and its effects within Christendom (220-221). The responsive development of both civil and canon law was intended, at the users' request, to limit armed conflict by providing opportunities for arbitration and legal recourse. Popes appealed to their role, as Vicar of Christ and as supreme arbiters, to mediate between princes, a principle widely espoused by canon lawyers. This intervention could range from assistance in organizing opportunities for diplomatic exchange to direct intervention as judge with fullness of power (plenitudo potestatis), perhaps most famously in the case of Innocent III's self-imposed mediation between John of England and Philip Augustus of France (Novit ille).

Naturally both civil and canon lawyers attempted to define the circumstances and modus operandi of such interventions, as occurred with Boniface the VIII's mediation between Philip the Fair and Edward I of England, a mediation conditioned by previous papally mediated peace accords and Boniface's considerable diplomatic experience. Submission to papal arbitrage allowed both sovereigns an honorable exit from conflict, as also did truces

brokered to facilitate Latin Christian crusades against 'external' foes. As did under-studied judges delegate for many legal cases, local arbitrators did the heavy lifting of hammering out mutually agreeable and equitable terms in a process well-defined in both Roman and canon law. These terms were intended to create a lasting and equitable peace and were enforceable through a mutually binding penalty clause (clausula poenalis) and reference to Boniface as supreme arbiter and wielder of the spiritual penalties for breach of compact (excommunication and interdict). An edition of the agreement, in which the kings present Boniface's intervention as that of a private person rather than the spiritual judge of Christendom, appears as an appendix (241-245). The episode reveals a pragmatic and flexible side of Boniface largely unknown to those familiar with the classical statements of papal fullness of power which emerged in the later conflict between Boniface and Philip the Fair over the church in France (*Clericos laicos* and *Unam sanctam*).

Giovanni Chiodi's fascinating piece tracks shifting concepts of citizenship (and its associated rights and duties) from Roman law to sixteenth-century jurists. Civil law glosses, including Accursius, typically defined citizens as male and citizenship as naturally and immutably derived from one's citizen father, not one's place of origin or residence, although citizenship could also be acquired through formal privileges voluntarily granted by a city-state. There were, of course, plenty of non-citizens living in cities, both temporary (advenae) and permanent residents (incolae). Jurists therefore wrestled with mobility and migration; citizens could transfer their place of residence to another city for varied reasons (marriage, commerce, war, disaster) and eventually acquire new citizenship (or forfeit their original citizenship). In addition, multiple consilia sought to outline the rights and responsibilities of citizenship. But what role did learned canon lawyers play in the circulation of concepts of citizenship and the 'ius migrandi' (law regulating movement) derived from the *Ius commune* and canon law in the later medieval and early modern periods? Interestingly, the text on which the Benedictine Panormitanus (Niccolò Tedeschi, 1386-1445) based the principle

of the ability of laypersons to change residence without requesting episcopal or secular permission was a papal letter concerning the payment of tithes by refugees in Acre temporarily exiled from their home dioceses due to Saladin's campaigns (1187-1191), although he also appealed to natural liberty. Panormitanus also distinguished between citizenship based on birth (ex natura) and that based on habitation (ex voluntate). Civil lawyers argued over whether the first was primary and possessed attached rights and obligations (jurisdiction, taxes) unaffected by where the citizen resided, although the rights and duties attached to citizenship acquired by residence typically shifted with a change of habitation.

In practice, many civil lawyers followed canon lawyers in seeing citizenship as originating through 'ius loci', as based not merely on one's birth in a particular locale, but also on one's primary residence there. But was primary residence determined by intent rather than fact? According to Panormitanus, who worked from canonical authorities discussing the status of clerical students, yes. This had ramifications for the status of permanent residents; intent to reside permanently could be manifested in the transfer of all mobile possessions and the acquisition of immobile property rather than the duration of residence. For canonists, citizens by origin retained the rights and obligations attached even when non-resident. Interestingly, this was not held to apply to female citizens who married male citizens of other cities and resided there out of 'necessity' rather than 'free will' (and so they forfeited their rights of inheritance in their natal city to male citizen relatives)(266). Did original male citizens, having emigrated and living elsewhere, enjoy the fiscal immunity granted to immigrants? Did they forfeit their original citizenship? The *Ius commune* said no, because their citizenship was immutable in nature, unless it were forfeited by evasion of taxes or military service, or exile for debts, crimes, or political reasons. Some civil lawyers pointed to cases where individuals had voluntarily renounced their citizenship, while others contemplated the 'ius migrandi' guaranteed by canon law, the *Ius commune*, and natural law. And by the early modern era, alternative theories emerged concerning the renunciation and loss of original citizenship by

those moving permanently elsewhere (in the Kingdoms of Naples, France, and the German Empire).

Similarly, Andrea Padovani explores the fluid and liminal legal status of the Gypsies or Roma who arrived in Bologna in 1422, brandishing false letters of safe conduct from the two ultimate spiritual and temporal authorities (the emperor Sigismund and the pope) asking that the bearers be 'humanely treated' (humaniter tractata) and granting them, as pilgrims, freedom of movement and judgement only by their own leaders. Local chroniclers described a multiplicity of thefts, doubts concerning the authenticity of their pilgrimage and privileges, and hostile characterizations of the Roma as 'like beasts', from Egypt or India and 'quasi negri', possessed of a strange language and religious beliefs, even as spies for the Turks, cannibals, plague-spreaders, and child-snatchers. Padovani's article seeks to fill a gap in the scholarly literature of the 'Gypsies', that is the laws, regulations, and legal acts relating to the Roma in pre-modern Europe. The privileges the Roma claimed appealed to the international protection granted to the persons and possessions of pilgrims by imperial and papal authority, protections invaluable to a people with no homeland, acknowledged overlord, or recognized law of country of origin. In civil law, the maxim in this case was: 'ubicumqu te invenero, ibi te iudicabo'—the Roma were subject to the law of the land they were in. For governments and jurists the 'Gypsies' posed a problem—they were a nomadic people estranged from their host society through language, dress, appearance and undefined juridical status. Their lack of intention to integrate with and assimilate to the local populace increased suspicions further.

Some jurists attributed the Roma's 'delinquency' to their ultimately unverifiable geographical origin, to their descendance from Cain, or to a lack of education or 'laziness' which violated the precepts of holy scriptures, ancient philosophers, and natural law. The sixteenth century saw a swell of displaced and impoverished persons due to social and economic crises. The Roma were often grouped together with other 'beggars' subjected to scrutiny, charity, and also legal regulation (poor laws) and

sometimes singled out as false mendicants and 'criminals' who stole charity from worthier recipients. Such discussions shared much with canonical and theological construction of categories of the deserving poor, which could include excommunicates, heretics, Jews and other non-Christians but not 'false' beggars.[25] Some legislators therefore recommended the expulsion of or forced employment of the Roma (and other 'undesirables') on public works projects, although such mandates were often repeated and almost certainly ineffective. Within some regional canonical-juridical contexts, the Roma's wandering lifestyle caused perceived problems with marriages with locals and with bishops from whom they received the sacraments as avowed Christians. The Roma's attributed superstitious practices, fortune-telling, theft, rapine and lying supposedly justified their reform to render them true Christians or their subjection to short stints in prison. These attitudes and proposed solutions prove eerily relevant to modern-day depictions of refugees and immigrants and debates over their legal status and access to social welfare programs.

England and Early Modern International Law

The three final chapters in this weighty volume consider the impact of canon law in England and on early modern international law. In a stunningly compact tour de force, Richard Helmholz reappraises the reception of canon law in early modern English international law (1450-1750), an investigation with wide-ranging implications, in a post-Brexit era, for the relationship of English common law to European law, both canon law and the *Ius commune*. Traditionally specialists in English common law have assumed that pragmatic English lawyers, trained on the job, possessed little patience with academic legal conversations on

[25] For the deserving poor, see Adam J. Davis, *The Medieval Economy of Salvation: Charity, Commerce, and the Rise of the Hospital* (Ithaca 2019); Sharon Farmer, *Surviving Poverty in Medieval Paris: Gender, Ideology, and the Daily Lives of the Poor* (Ithaca 2005); Spencer E. Young, *Scholarly Community at the Early University of Paris* (Cambridge 2014) 131-167.

natural and international law (false). Moreover, scholars have argued that even on the continent, the Protestant Reformation and age of exploration meant the end of the dominance of canon lawyers in discussions of international law, which of necessity was gradually freeing itself from religious constraints of canon law (also false). Historians have also assumed that with the English Reformation under Henry VIII, the study and use of medieval canon law abruptly ceased (false again). Helmholz instead finds that the English legal tradition, in theory and practice, treatises and cases, remained profoundly influenced by canon law, natural law, and international law (ius gentium), particularly in marriage, commercial, and naval law. The study of canon law remained alive and well on the continent and English writers considering questions touching the *ius gentium* drew on contemporary continental legal treatises, despite challenges presented to the jurisdiction of the church courts in practice.

Two final chapters by Cyrille Dounot and Gigliola di Renzo Vilata examine the influence of canon law on early modern individuals considered pioneers of international law. Between the canonists of the thirteenth century and the internationalists of the eighteenth, centuries of canon lawyers contributed to transmitting or augmenting doctrines. However, in a classic work on the law of war, Alfred Vanderpol pinpointed 'errors' in the canon law tradition which supposedly prevented the emergence of a truly international law: infidels could not truly possess and therefore war was always permitted against them, and either the pope or the emperor or both were 'masters of the world'. Using authors from three different countries and centuries—Honorat Bovet, Francisco de Vitoria, and Richard Zouche—Dounot asks if these errors were in fact widespread and if canon law were ever used to challenge them.

She finds that in fact canon law sources were cited to counter the notion that the papacy could justify wars against and call for the expropriation of the rightful possessions of Jews and other non-Christians simply because they were outside papal jurisdiction. Honorat restricted papal authority to those lands which had submitted to it, thereby legitimating the rule of non-

Christians over lands not 'stolen' from Christians. Drawing on canon law, Honorat also justified the position of both popes and emperor as supreme spiritual and temporal rulers, respectively, although he invoked *Per venerabilem* (X.4.17.13) and the decretal letters of Innocent III to argue that the pope had constituted French kings as subject to no temporal lord but to the pope alone (he denied the same political independence to English and Spanish rulers). While acknowledging that the pope possessed 'imperium mundi' and was superior to the emperor, he claimed that the pope exercised no direct power over infidels and Jews (only an indirect power, 'ratione fidei'). Thus far Honorat depended on canon law, but his discussion of the right of free passage was based not on the traditional right of way, but international law concepts such as equity. Drawing on a classic biblical set-text in theology and canon law (the passage of Israel through the Amorites' land)(C.23 q.2 c.3 *Notandum*), he argued that all passage without wrongdoing was justified by law and natural love. The *Decretum*'s principle of free movement becomes a 'ius humanae societatis', confirmed as partially applicable to international waters.

Bovet's contributions to international law were also based more on canon than Roman law, and James Muldoon has noted the important role played by canon law in the works of Francisco de Vitoria, regarded as one of the founders of international law for his reimagination of sovereignty and relationships between sovereigns, largely in his discussion of the legitimacy of Spanish claims to the lands and possessions of Native Americans. Combining theology and canon law with Roman law, Vitoria argued against heresy or infidelity as grounds for dispossession; the Native Americans possessed a legitimate 'dominium' over both private and public possessions and both divine and natural law mandated against the implementation of penalties before sentencing. When it came to the interpretation of Alexander VI's *Inter caetera* (1493), Vitoria allied with those who sought to interpret it as bestowing not ownership but rather zones of influence. He therefore sided with canonists who limited papal claims to temporal universal dominion; papal authority did not extend to 'barbarians' who did not recognize papal power. Popes

could therefore not declare war on them or confiscate their goods because the pope exercised no jurisdiction or 'dominium' over them.

Refusal to convert to Christianity furnished no grounds for just war, again based on canon law authorities proscribing violence against and the forced conversion of the Jews while arguing against Innocent IV's assertion, based on Innocent III's *Quod super his* (X.3.34.8), that pagans could be punished for their unnatural vices. In a treatise on temperance, Vitoria stated that:

> the Pope is not permitted to wage war on Christians on the pretext that they are fornicators, thieves or even sodomites. Therefore, he cannot confiscate their territories or give them to other princes (327).

Some Spanish jurists and theologians instead declared that human sacrifices constituted crimes against humanity, justifying Spanish intervention to stem the tyranny of unjust rulers against innocents as crimes against nature. In arguments clearly intended to counter Spanish claims to indigenous lands and possessions, Vitoria utilized canonical notions that a just war ought to be for the common good and that both princes and private individuals with the right of possession could not be despoiled as long as any doubt remained. The Englishman Richard Zouche (fl.1650), in contrast, systematically opposed ecclesiastical legal theories while establishing principles of international law, which, according to him, permitted the use of subterfuge, poison, rape, and sacrilege in time of war. Ironically, certain canon law principles and authorities enabled the pioneers of international law, particularly Bovet and Vitoria, to free themselves from imperial and theocratic conceptions.

Maria Gigliola di Renzo Villata also combats the tendency to view Roman law as the primary source for international law in the early modern period by instead highlighting the contribution of the canonical components of the *Ius comune* to the kinds of thought which in the sixteenth century helped to develop the discipline of international law. She fruitfully explores the interpenetration of the theological and legal traditions, demonstrated in particular, by an analysis of the works of Francisco de Vitoria, who wrote both legal and theological works dealing with the conquest of the Americas and drew from Aquinas the concept of an *ius gentium*

related to but distinct from natural law, based on human consensus and natural reason. War was meant to be defensive rather than offensive. The heated debates between Juan de Sepúlveda and Bartolomé de las Casas and other theologians and jurists in the early modern period on the legality of the conquest and conversion of Native Americans would remain indebted to the same interpenetrating web of theological, canon law, and civil law set-texts (united by common habits of compilation, commentary, and disputation).

This held true even for writers (such as Alberico Gentili) working in Protestant countries and indebted to the concepts of Melanchthon, among others, who continued to use canon law techniques and sources in their treatises (dialectical opposition of contrary authorities, disputation, etc). Nonetheless, Gentili's *De legatis* followed a juridical humanist style and drew heavily on citations from classical and patristic authorities while still nodding to the concept of the Isidorean *ius gentium* from the *Decretum*, a source often still cited by pioneers of international law in the early modern period. She concludes that while initially indebted to medieval techniques and texts (both canon and civil), as men of their time, dedicated to juggling theology, law, morals and the demands of politics, early modern humanist jurists turned also to examples taken from distant antiquity or contemporary civic life. This process enabled them to eventually rid themselves of medieval conceptions of a hierarchically ordered world and move towards the concept of a community 'inter gentes', an embryonic recognition of human rights which, for some, encompassed non-European peoples. Canon law's conception of the 'utrumque ius' and the juridical categories which were forged through its dialogue with civil and Roman law led to its enduring vitality and influence on both the European *Ius commune* and international law.

In conclusion, this volume makes a powerful argument for the contribution of canon law to at least some aspects of European international law, particularly in terms of what constitutes a just declaration of war, the opposing principles that treaties must be observed yet also may be non-binding if circumstances change, conceptions of migration and citizenship, and also the sovereignty

of peoples. Perhaps due to limitations of space, some subjects present in Isidore's definition were unfortunately not as fully explored (such as the inviolability of ambassadors, the regulation of interfaith marriages, and right of passage). The most convincing articles in this volume point the way to future directions in legal scholarship by exploring the delicate dance between theory and practice, local traditions and central influences, law and theology, and continuities between what are often constituted as separate historical periods (late antiquity, medieval, early modern). It is to be hoped that future discussions of the impact of canon law on other forms of law continue to investigate areas of overlap, intersection, and cross-fertilization not only within legal traditions but also within religious, cultural, and social contexts, thus enriching multiple fields of study and providing a vivid picture of law in practice.

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Helmholz, R. H. *The Profession of Ecclesiastical Lawyers: An Historical Introduction*. Cambridge: Cambridge University Press, 2019. Pp. xvii, 232. $110.00. ISBN: 978-1-10849-906-4.

Elizabeth Papp Kamali

In this pithy book, Richard Helmholz traces the profession of English ecclesiastical lawyers from its nascency in the thirteenth century through the eclipse of England's ecclesiastical courts in the late nineteenth century. Three temporalities are emphasized: the foundational early period, the crucial century or so around the English Reformation, and the era of the English Civil War, when the otherwise fallow years of the Interregnum proved to be a remarkably productive time for ecclesiastical lawyers, who suddenly found themselves with time on their hands for scholarly writing thanks to the abolition of ecclesiastical jurisdiction. Learning about this episode during the 2020-2021 pandemic, readers may find themselves lamenting that modern technology has rendered us busier somehow rather than transforming recovered commuting hours into comparable opportunities for scholarly flourishing.

This humble volume is itself the product of a career of scholarly flourishing. As Helmholz shares in his Preface, the book draws upon more than fifty years of toil in the English ecclesiastical archives.[1] It should leave some of the more junior scholars in this journal's readership, present company included, wondering just how to take, organize, and preserve those incidental archival jottings that can, over the course of a life's career, add up to a volume this impressive. It is this reliance on English ecclesiastical archives that Helmholz himself identifies as one of the two ways in which his book makes a new contribution to the history of the English ecclesiastical legal profession, the

[1] The culmination of this toil is most evident in Helmholz's masterful volume for the *Oxford History of the Laws of England* series. See R. H. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford 2004).

other being its heavy reliance on 'the legal literature of the time—the treatment of the lawyers and the legal profession that is found within the *ius commune*' (5).[2] Sometimes his archival finds are especially poignant, such as the act book of William Somner (†1669), which ceases in 1643 and then, only a half folio later, resumes on 15 July 1660, as if Somner had momentarily stepped away from his writing desk (156).[3]

A central argument of the book is that the professional world of English ecclesiastical lawyers was in a state of stability and possibly even increase in the years leading up to the English Civil War, an argument that contradicts the assumption of other historians who have posited a period of post-Reformation decline (x).[4] The book is divided into two parts, much like the profession it covers. Part I undertakes the descriptive work of introducing the reader to the world of advocates and proctors, and the educational system that grew up alongside the Inns of Court. It then situates the profession within the major historical developments of the early modern era: the English Reformation and the Civil War.[5] The choice of historical context is driven largely by past historiography, which has posited the decline and fall of the ecclesiastical profession in response to external catastrophe, an historiography that Helmholz is eager to complicate from the perspective of the

[2] In his studies of the medieval legal profession, James Brundage similarly relied on such *Ius commune* sources, including procedural manuals, treatises, and other books which would have been familiar to students of law and their teachers. See James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (Chicago 2008) 5.

[3] This, of course, is not evidence of a robust resumption of church court business. For a case study of Winchester, arguing for marked decline in the ambit of the consistory court after the Interregnum, see Andrew Thomson, 'Church Discipline: The Operation of the Winchester Consistory Court in the Seventeenth Century', *History* 91 (2006) 337-359.

[4] On the issue of post-Reformation decline, see, e.g. Charles P. Sherman, 'A Brief History of Medieval Roman Canon Law in England', *University of Pennsylvania Law Review and American Law Register* 68 (1920) 233-258 at 237, arguing that after the Reformation, canon law 'was a foreign law'.

[5] I use the term 'English Reformation' for convenience, but with some hesitation. See Peter Marshall, '(Re)defining the English Reformation', *Journal of English Studies* 48 (2009) 564-586.

archives of the ecclesiastical courts and the treatise literature produced, in part, by some of the lawyers documented in the latter half of the book.

In Part II, Helmholz carries on the tradition of coupling historical descriptions of the community of civilians in England with mini biographies, but here, too, Helmholz puts his unique spin on the practice. Where, for example, Brian Levack followed his 'collective biography' of seventeenth-century civilians in England with brief, encyclopedic-style entries on roughly two hundred lawyers, Helmholz has chosen to narrow his field to eighteen, spanning the twelfth to the nineteenth centuries and thereby reinforcing a sense of great continuity in the profession over time (95-206).[6] In some instances, Helmholz's choice of biographical subject was driven by a sense that a particular character had been neglected by past historians, sometimes because they had been employed as notaries, registrars, or the like rather than as advocates.[7] In other cases, he chose to spotlight a figure who has been widely studied but whose biography or, in many instances, bibliography, remained underappreciated or had aspects worth further exploration (127-132, 145-156, 188-193).[8]

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[6] Brian P. Levack, *The Civil Lawyers in England, 1603-1641: A Political Study* (Oxford 1973) 203-282. This emphasis on continuity was also characteristic of Helmholz's earlier book, *Roman Canon Law in Reformation England*. Some of the biographies are on figures Helmholz had studied in earlier publications. See his essays in the *Ecclesiastical Law Journal*, e.g. 'William Somner (c 1598-1669)' 19 (2017) 224-229; 'Adam Usk (c 1360-1430)' 19 (2017) 50-55; 'Thomas Bever (1725-1791)' 18 (2016) 336-342; 'Clement Colmore (1550-1619)' 18 (2016) 216-221; 'John de Burgh (fl. 1370-1398)' 18 (2016) 67-72; 'Sir George Lee (c. 1700-1758)' 17 (2015) 348-354; 'Arthur Duck (1580-1648)' 17 (2015) 215-220; 'Richard Rudhale (c. 1415-1476)' 16 (2014) 58-63; 'Sir Daniel Dun (c. 1545-1617)' 16 (2014) 205-210; 'Richard Zouche (1590-1661)' 15 (2013) 204-207; 'Roger, Bishop of Worcester (c 1134-1179)' 15 (2013) 75-80.

[7] The difficulty of piecing together the lives of notaries and other less prominent court officials is apparent in Norman Adams and Charles Donahue, Jr., eds. *Select Cases from the Ecclesiastical Courts of the Province of Canterbury, c. 1200-1301* (London 1981) 21-22.

[8] In the former category, see, e.g. Helmholz's biographies of Richard Rudhale (†1476), registrar William Somner (†1669), and Regius Professor of Civil Law Francis Dickins (†1755); in the latter, Arthur Duck (†1648).

John Baker's *Monuments of Endlesse Labours* had comparably broad temporal scope and an entirely different yet similarly eclectic collection of biographical subjects.[9] Thematically speaking, Levack's collective biography emphasized such matters as the social status of lawyers' families of origin, the occupations they pursued after earning their degree, how many served in Parliament, what wealth they amassed, their relationships with common lawyers, and the nature of their political allegiances, particularly given the reputation of civilians for sympathy toward the principle 'quod principi placuit'.[10] Helmholz is less interested in these data points than in illuminating the unique contributions of each of his chosen subjects to their chosen profession.

Daniel Coquillette's *Civilian Writers of Doctors' Commons* also foregrounded biography as a means of understanding the English civilian tradition, focusing specifically on the sixteenth through eighteenth centuries.[11] Where Coquillette examined the Roman-law tradition in England, as well as its implications for the *lex mercatoria* and modern commercial law, Helmholz's primary interest is in the influence of Roman and canon law on the practice of English church courts, and his archives are exceedingly different as a result. Other authors have set their sights on the history of civilian influence on maritime and international law, not to mention developments in diplomacy and Chancery jurisdiction, but Helmholz limits his charge precisely to ecclesiastical courts and their practitioners, building upon his earlier work in this field.[12]

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[9] John H. Baker, *Monuments of Endlesse Labours: English Canonists and Their Work, 1300-1900* (London 1998).

[10] Levack, *Civil Lawyers in England*. On this last front, Levack warns against overly simplistic assumptions of civilians relying on Roman law for their views regarding monarchical authority. Levack, *Civil Lawyers in England* 87-88.

[11] Daniel R. Coquillette, *The Civilian Writers of Doctors' Commons, London: Three Centuries of Juristic Innovation in Comparative, Commercial, and International Law* (Berlin 1988).

[12] In addition to Helmholz's contribution to the Oxford History of the Laws of England, see, e.g. *Roman Canon Law in Reformation England* (Cambridge 1990); 'Ecclesiastical Lawyers and the English Reformation' 3 (1995) 360-370; 'The Education of English Proctors, 1600-1640', *Learning the Law: Teaching*

Helmholz's book also contributes directly to the growing literature on the history of the legal profession, a topic to be explored in greater depth below.[13] This is an area of analysis that tends to captivate historically minded law professors, as exemplified by Bruce Frier's work on the rise of the Roman jurists, a development he viewed as foundational for the flowering of classical Roman law, observing:[14]

> Once law had been successfully transformed into an intellectual discipline under the control of professionals, the new form of law became effectively irresistible.

For Frier, qualifying as a legal profession revolved around several qualities, including gate-keeping, disciplined study, and the increasing complexity of law itself. Commenting on the jurists of the late Roman Republic, Frier argues that through their sophisticated treatment of legal rules, 'they deduced fundamental principles and concepts of law' which could then by applied in new rules and institutions.[15] Over time, 'the discipline of law became all but inaccessible to those not specially trained in it', and

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and the Transmission of Law in England, 1150-1900, edd. Jonathan Bush and Alain Wijffels (London 1999); 'Judges and Trials in the English Ecclesiastical Courts', *Judicial Tribunals in England and Europe, 1200-1700*, vol. 1, edd. Maureen Mulholland and Brian Pullan (Manchester 2003); 'Local Ecclesiastical Courts in England', *History of Courts and Procedure in Medieval Canon Law*, edd. Wilfried Hartmann and Kenneth Pennington (History of Medieval and Early Modern Canon Law; Washington D.C. 2016); 'Legal Authority in Canon Law: Cases from the Notebook of a Medieval English Ecclesiastical Lawyer', *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe*, edd. Frank Cranmer, Mark Hill, Celia Kenny, and Russell Sandberg (Cambridge 2016).

[13] Other contributions to this field, with a focus on the common-law context, include Paul Brand, *The Origins of the English Legal Profession* (Oxford 1992); Christopher W. Brooks, 'The Common Lawyers in England, c. 1558-1642', *Lawyers in Early Modern Europe and America*, ed. Wilfrid Prest (New York 1981) 42-64; Christopher W. Brooks, *Lawyers, Litigation and English Society since 1450* (London 1998).

[14] Bruce W. Frier, *The Rise of the Roman Jurists: Studies in Cicero's Pro Caecina* (Princeton 1985) 269.

[15] Ibid. 272.

ultimately 'law was "professionalized" by being transformed into a self-consciously autonomous field of study'.[16]

Many have weighed in on this phenomenon of professionalization in the English common-law context, too.[17] Again, one's answer as to when England had a distinct legal profession depends largely upon one's definition of a profession. For Penny Tucker, a profession is a:[18]

> distinct group, whose members enjoy a monopoly of practice within their own area of expertise and operation, or something close to it, and whose members' skills are acquired by intellectual as well as practical effort and are judged against the standards of the group.

Paul Brand, dating the advent of an English common-law profession c. 1300, observes that by that date there was a 'sizable group of men who were recognized as having specific, professional skills in the representation of litigants', a pursuit to which they devoted much of their time and from which they derived a living.[19] Moreover, Brand notes, by 1300 they were 'subject to special rules governing their personal conduct'.[20] As will be explored further below, Helmholz wades into this professionalization conversation, ultimately proposing a date for the nascent ecclesiastical legal profession approximately a century earlier than the date Brand assigns to the advent of the profession of common lawyers in England.

On the whole, Helmholz's contribution to the field is shaped by key questions, sometimes presented quite forthrightly.[21]

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[16] Ibid.

[17] Robert C. Palmer, 'The Origins of the Legal Profession in England', *The Irish Jurist* 11 (1976) 126-146 (arguing that the profession began in twelfth-century county and local courts, not in the king's courts); Paul A. Brand, 'The Origins of the English Legal Profession', LHR 5 (1987) 31-50; Penny Tucker, 'First Steps towards an English Legal Profession: The Case of the London "Ordinance of 1280",' EHR 121 (2006) 361-384.

[18] Tucker, 'First Steps' 362.

[19] Brand, 'Origins' 35.

[20] Ibid.

[21] This is a question that has been debated at least since Frederic Maitland proposed it. See, e.g. Sherman, 'Brief History of Medieval Roman Canon Law' 233, citing Maitland's *Canon Law in England*.

> Did English ecclesiastical lawyers actually follow the texts of the Roman and canon laws which defined the tasks and powers of advocates and proctors, at least as those texts had been interpreted by the Continental jurists (21)?

The short answer is yes, although English ecclesiastical lawyers adapted the civilian model creatively to suit their professional needs, and the offices of advocate and proctor took new shape in the English ecclesiastical context. 'How much did the proctors learn about the substance of the Roman and canon laws' (56)? Not as much as advocates, Helmholz informs us, but more than has been acknowledged. 'How did the ecclesiastical lawyers react to the coming of the Protestant Reformation' (59)? Helmholz's answers, including to this crucial last question to be addressed below, are often surprising, going against the grain of accepted wisdom but firmly grounded in archival evidence.

Although his home institution, the University of Chicago Law School, is admittedly not producing doctors 'utriusque juris', Helmholz finds opportunities to draw meaningful connections between his historical subject matter and the life of a twenty-first-century lawyer or law student. This was true for his recent book on natural law, too.[22] Helmholz, for example, helpfully points to parallels between the English common-law and ecclesiastical-law traditions—comparing England's barristers and attorneys to the advocates and proctors in the canon-law context—to offer readers a conceptual foundation (3-4). For example, he likens the apprenticeship-like aspects of advocates' training, such as the 'Year of Silence' during which a budding advocate would observe the proceedings in a bishop's court, to the recent trend toward greater clinical education in American law schools, which Helmholz interprets as an acknowledgment that some aspects of legal practice 'are best learned under the guidance of an experienced man who is not a professor' (29).

In some instances, Helmholz instinctively relates to the comparative impulse or scholarly reflections of one of his forebears, such as the affirmative answer given by Clement

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[22] R. H. Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge, MA 2015).

Colmore (†1619) to the question whether common lawyers' notion of the 'equity of a statute' equates with civil lawyers' concept of the 'mind of a statute', or Colmore's acknowledgement that sometimes legal texts failed to provide a clear answer to a difficult question (143). On this last issue, Helmholz concludes:

> Were Colmore alive today, it might be a comfort to him to know that something like the same situation remains common four centuries later (144).

Helmholz is nevertheless realistic about the incompatibility of early modern and twenty-first century mores, as discussed in his biography of Hugh Davis (†1694). Davis emphasized the importance of ecclesiastical uniformity and the common good over the lawfulness of resisting one's sovereign, thereby rejecting the ideas of Grotius (172-173). Helmholz acknowledges that Davis's views sit 'quite uncomfortably with accepted principles in the twenty-first century', when no one would argue against resisting Hitler or Pol Pot or fail to approve free choice in religious exercise (173). Sometimes the modern comparison is implicit, such as Helmholz's observation that, while those trained in theology tended to be open to Protestant ideas, lawyers were comparatively set in their ways, 'conservative by training and habit' and therefore less inclined to embrace radical change during the Reformation period (65-66).[23] 'For proctors and advocates', Helmholz argues, such conservatism 'meant continuing adherence to established legal practice' (67).

To take a closer look at individual chapters, in chapter 1, 'The Law of the Legal Profession: Advocates and Proctors', Helmholz situates the advocates and the proctors of the English ecclesiastical sphere within the Roman-law context, conceding the dependence of the church on the foundation of the *Corpus iuris civilis* in defining the scope of professional responsibilities and providing the language used to describe practitioners and their duties (7). Responding to the familiar truism that the sixth through eleventh centuries was 'a world without lawyers', Helmholz begins, as histories of the legal profession tend to do, with his definition of the legal profession. Although European rulers issued laws and

[23] Helmholz draws here upon the work of Lacy Baldwin Smith.

some men acquired great familiarity with them prior to the thirteenth century, it would be a leap to describe this as a legal profession in the formal sense (8). As Helmholz puts it, 'there was no group of professional lawyers if one takes the term to mean men trained in law who devoted their careers to it and made a living from its practice' (8-9). Moreover, there were not yet 'settled and enforceable rules' for dispute resolution, custom likely served as a guide, and most litigants would have 'made their way without the professional help a lawyer provides' (9). By way of comparison, James Brundage had offered this elaborate definition in his 2008 study of the legal profession, a definition that drew him to a mid-thirteenth century origin for the legal profession writ large, an origin that begins with ecclesiastical lawyers and expands thereafter to common lawyers:[24]

> In my view, the term "profession", properly speaking involves something more than simply a body of workers who do a particular kind of job on which they depend for support. A profession in the rigorous sense applies to a line of work that is not only useful, but that also claims to promote the interests of the whole community as well as the individual worker. A profession in addition requires mastery of a substantial body of esoteric knowledge through a lengthy period of study and carries with it a high degree of social prestige. When individuals enter a profession, moreover, they pledge that they will observe a body of ethical rules different from and more demanding than those incumbent on all respectable members of the community in which they live.

Helmholz situates the professionalization fulcrum c.1200, after which evidence bends toward a growing sense of a professional identity among ecclesiastical lawyers (9).[25] This is the point after which the texts of Roman law would provide the 'procedural principles and building blocks for the development of a class of professional lawyers', as evidenced by the fact that the earliest 'ordines judiciarii' would draw extensively upon Roman law texts in defining the duties and limitations on the office of advocate and proctor (9-10).

This was no mere imitation, however. Rather, Helmholz emphasizes the creativity of the medieval jurists who:

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[24] Brundage, *Medieval Origins of the Legal Profession* 2-3.

[25] Baker similarly situates the rise of the English ecclesiastical legal profession in the thirteenth century. Baker, *Monuments of Endlesse Labours* 5.

> took the material they found in the civilian texts and transformed it, using it for their own purposes and creating a new institution in the process (11).

Helmholz revisits this theme in Part II, particularly in his biography of Roger of Worcester (†1179), in which he refutes the Maitland-Brooke thesis that the English church lagged behind its continental counterparts in mastery of canon law in the twelfth and thirteenth centuries (95).[26] Drawing upon Roger's work as a papal judge delegate, Helmholz demonstrates the importance of delegated jurisdiction and the collection of decretal letters for the development of a sophisticated system of canon law in twelfth-century England (143). Creative adaptation of civil-law texts continued in later centuries, too, as exemplified by Richard Rudhale's use of an extract from a Roman law text to address a point of fifteenth-century interest that could never have occurred to the text's author (132).

Adaptation is clear in the ways in which the English ecclesiastical legal profession developed, too. For example, where the Roman advocate was particularly adept in the 'ars rhetorica', the power of persuasion, the medieval advocate was distinguished by 'his mastery of the law' (12). This would suggest more of a parallel with the classical Roman jurist than the namesake profession of advocates. And where the Roman 'procurator' worked as an agent for a Roman citizen, administering the citizen's affairs during a period of absence from Rome, the medieval proctor served a variety of roles determined, in the case of the 'procurator litis', by the document drawn up to describe the scope of his representation, but also extending in other instances to extracurial functions, such as serving as a representative in Parliament or facilitating marriage formation (13-14).[27] Helmholz describes the qualifications for entry into the profession of advocates and proctors and highlights peculiar English approaches, such as the requirement that laymen not be permitted to practice as advocates (18-19). He also documents the

[26] And see n.2 (citing Maitland, *Roman Canon Law in the Church of England* (1898) and Brooke, *The English Church and the Papacy* (1952) for the opposing thesis).

[27] On the crafting of mandates defining the duties of proctors, see 25-27.

development of regulations, or at least expectations, for the education of advocates and the organization of Doctors' Commons in the late fifteenth century (28-29).

Rounding out his first chapter is a treatment of a fundamental question: to what extent did English ecclesiastical lawyers follow the texts of the *Ius commune* in carrying out their work as proctors and advocates, particularly in light of the competing demands of England's home-grown common-law tradition (33-34)? This approach is reminiscent of Helmholz's book on natural law, which similarly aimed to understand 'how natural law was employed in courts of law' and 'the ways in which lawyers understood it and used it in earlier centuries'.[28] In this instance, Helmholz concludes that English ecclesiastical lawyers regularly reached for Continental texts as sources of authority (34).[29] Moreover, this continued to be true after the Reformation, when ecclesiastical lawyers still looked to Continental sources for guidance on such issues as marriage, divorce, and defamation (35-69).[30] Helmholz concedes that evidence of such continued reliance is more amply visible in the treatise literature and less so in the act books and cause papers of the English ecclesiastical courts, where citations to authority more rarely appear (37).

In chapter 2, 'The Education of Ecclesiastical Lawyers', Helmholz builds upon the work of James Brundage and others, who have illuminated the educational lives of advocates in

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[28] Helmholz, *Natural Law in Court* 5. It is also reminiscent of other work exploring the use of Roman and canon law by common lawyers in court practice. See, e.g. David J. Seipp, 'The Reception of Canon Law and Civil Law in the Common Law Courts before 1600', *Oxford Journal of Legal Studies* 13 (1993) 388-420, and, of course, Helmholz's own 'Continental Law and Common Law: Historical Strangers or Companions?', *Duke Law Journal* 6 (1990) 1207-1228.

[29] Donahue and Adams' work on the Court of Canterbury in the thirteenth century reaches a similar conclusion. See Adams and Donahue, *Select Cases* 54.

[30] This is an argument presented as well in Helmholz's earlier *Roman Canon Law in Reformation England*. On the continuity of involvement of church officials in legislating and adjudicating issues related to marriage in post-Reformation England, see Saskia Lettmaier, 'Marriage Law and the Reformation', *Law and History Review* 35 (2017) 461-510 at 505-507.

particular; he introduces some new evidence on the subject derived from the archives of the ecclesiastical courts. Helmholz also broadens the lens to examine the training of English proctors, an understudied subject by comparison for obvious reasons; the careers of the advocates are simply much better documented, and there has been a bias toward focusing on the more prestigious of the two professions (39-40).[31] John Baker acknowledged the disparity in historical treatment of the two branches in the opening lines of his brief biography of Francis Clarke:[32]

> It could surely give no great offence to the departed doctors of the Arches if a series devoted to famous canon lawyers were to include a passing tribute to a few members of the lower branch of the profession, the proctors.

Nevertheless beginning with advocates, Helmholz explains that a lecturer would open with the texts of Roman and canon law in order 'to fix the text in the minds of his students', which was all the more important at a time when students would not likely have owned the books themselves (41). This textually focused approach, while arguably ahistorical from our vantage point, made sense given the fact that 'the medieval *ius commune* was a closed system' (43). At the same time, however, 'it was not a static system', Helmholz observes, with the texts understood to possess a multiplicity of meanings within them (43). Disputations further reinforced students' understandings of the texts, as did the production of a thesis for those who proceeded to a doctorate in law (45). Contrary to the view that Roman law and canon law were rivals with rival faculties, Helmholz argues that Roman law was

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[31] But see Brundage's chapters on 'Pre-Professional Lawyers in Twelfth-Century Church Courts' and 'Professional Canon Lawyers: Advocates and Proctors', which treats proctors fairly extensively, although acknowledging that less is known about their backgrounds. Brundage, *Medieval Origins of the Legal Profession* 168-169, 204-211, 353-364. On what can be known about the advocates, see especially Charles Donahue Jr. 'What Could You Do with a Law Degree in Fourteenth-Century England? Archbishop Winchelsey's Statutes and the Advocates of the Court of Arches', BMCL 36 (2019) 315-329. Thirteenth-century advocates are, by comparison, more elusive to track down in the historical record, with proctors appearing more prominently on the Canterbury rolls. See Adams and Donahue, *Select Cases* 22-23.

[32] Baker, *Monuments of Endlesse Labours* 71.

rather viewed as a starting point for lawyers, a foundation upon which one could build with later study in the canon law, although some exposure to the latter would have inevitably occurred when practical topics such as marriage were treated during the period of focus on the civil law (46-47). After the Reformation, canon law continued to be studied despite the closure of the canon law faculties at Oxford and Cambridge, an observation Helmholz draws from a close study of the treatises on ecclesiastical law and the notes of Roman law lectures, which make clear that 'rejection of papal government did not require the rejection of the contents of papal decretals' (47).[33]

This argument for continuity post-Reformation ranks among Helmholz's distinct contributions, as does his persistence in piecing together information on the education of proctors from guides to court practice and proctors' notebooks, which together reveal that a significant number of proctors earned their first degree in law, that their training often included some form of apprenticeship, and that manuals provided practical guidance to them on procedural matters, whether the drafting of interrogatories or the mastery of other stages in a canonical trial (48, 51, 52-53).[34] Again testing a widely accepted thesis against the evidence of treatises, Helmholz goes on to reject the notion that proctors were not well versed in Roman and canon law. While they may not have had the depth of learning of advocates, they capably included references to the texts of the *Ius commune* in practice-oriented manuals (57). In Part II, Helmholz continues his defense of the proctorial profession, describing Henry Charles Coote (†1865), for example, as one of 'the workhorses of the ecclesiastical courts', while also crediting him with a sophisticated understanding of law despite his lack of a university degree or affiliation with the Inns of Court (201, 205).

A third chapter, 'Ecclesiastical Lawyers and the Protestant Reformation', draws upon evidence from the sixteenth-century ecclesiastical courts to attempt to answer whether the lawyers serving there reacted 'negatively to the Reformation in their

[33] See also Helmholz, 'Ecclesiastical Lawyers and the English Reformation'.
[34] See also Helmholz, 'The Education of English Proctors'.

professional lives' (60). Helmholz observes great stability in the circle of men serving as judges, advocates, and proctors during the reign of Henry VIII in the immediate aftermath of the break with the papacy, a stability found not only in the consistory courts but also in the diocesan courts, and which continued into the reigns of Edward VI and Mary (60-62).[35] Sagely observing that '[c]ourts of any sort are unlikely candidates for public enthusiasm', Helmholz downplays the importance of public complaints about church courts, although he does acknowledge a real historical rupture in the statutory prohibition on appeals to Rome (62). More surprisingly, Helmholz finds that 'by and large the advocates and proctors who had been active during the two prior reigns, including most diocesan registrars, remained in place under Elizabeth' (64).

A similarly cataclysmic historical period grounds the fourth and final chapter of Part I, 'English Ecclesiastical Lawyers before the Civil War'. Helmholz outlines the consequential changes in government and religious practice that occurred in the reign of Elizabeth but concludes that they

> made little difference in the day-to-day running of the English ecclesiastical courts and in the professional lives of the lawyers who served in them (68-69).

Jurisdiction continued to extend to marriage, divorce, testamentary matters, tithes, defamation, and so forth, and ecclesiastical courts in England continued to call upon secular authority to imprison excommunicates who remained in that state beyond forty days (69). By the end of Elizabeth's reign, however, English common lawyers did encroach further upon what had traditionally been ecclesiastical jurisdiction through an expansion of the reach of writs of prohibition (70). Helmholz finds that judges were obedient upon receipt of writs of prohibition, but that such writs were nonetheless 'construed narrowly' as 'acts of

[35] This stability is in contrast to legal innovations observed elsewhere during the reign of Henry VIII, most notably the introduction of new evidentiary rules in dealing with religious dissenters. See Henry Ansgar Kelly, 'Mixing Canon and Common Law in Religious Prosecutions under Henry VIII and Edward VI: Bishop Bonner, Anne Askew, and Beyond', *Sixteenth Century Journal* 46 (2016) 927-955.

power' rather than true signifiers of the appropriate scope of ecclesiastical jurisdiction (71-72).[36] Perhaps in contrast with Helmholz's earlier depiction of ecclesiastical lawyers as essentially conservative in practice, he finds that they adapted their practice to avert writs of prohibition through clever drafting designed to emphasize the spiritual aspects of causes brought before the consistory courts (72). Such efforts at retrenchment appear to have paid off, as Helmholz finds that the church courts showed more signs of strength than weakness from the 1590s to the 1630s, based on the amount of litigation transpiring therein, including an expansion of 'instance causes' (private disputes, including the creation of alimony and the revival of the 'causa augmentationis vicarii' for the augmentation of vicars' tithes) and in the courts' 'ex officio' jurisdiction over breaches of ecclesiastical criminal law (74, 78-81). This last area witnessed more efficient parish visitations, an expansion of the types of conduct redressed through church courts, and the prosecution of persons of relatively high status and influence (88). This growth was matched by intellectual output as well, with a marked expansion in the writing of commentaries on English ecclesiastical law (77). As the Civil War approached, Helmholz concludes, the 'ecclesiastical courts were in fact acting with energy. Their reach was expanding' (90).[37]

Having already touched upon some of Helmholz's biographies above, a few observations will suffice to give the reader a sense of his contribution in Part II. Among the unlikely

[36] This obedience to writs of prohibition reflects another point of consistency with pre-Reformation practice in the church courts. See David Millon, ed. *Select Ecclesiastical Cases from the King's Courts, 1272-1307* (London 2009) lxxxii-lxxxiv (although Millon observes that the ecclesiastical court records may fail to note instances in which a writ of prohibition was simply ignored).

[37] Contrast this with the comparatively bleak outlook on the profession of civilians generally speaking in the mid sixteenth through early seventeenth centuries in C. P. Rodgers, 'Legal Humanism and English Law: The Contribution of the English Civilians', *Irish Jurist* 19 (1984) 115-136 at 118. On the continuing operation of the consistory court in Winchester during the 1640s and 1650s despite opposition from Puritans and common lawyers, see Thomson, 'The Winchester Consistory Court' 338.

candidates for biography in a volume largely focused on advocates and proctors is Richard Rudhale (†1476), who trained in the law but pursued a career outside the courts and the universities, thereby leaving no treatises or other scholarly writings in his wake (127-128). What he did leave for posterity were his canon and civil law books, annotated in such a way as to give this reader a self-satisfied sense of justification for her at-times excessive marginal penciling. In characteristic form, Helmholz analyzes both the formal contents of these books—observing that students of the law like Rudhale studied the old (e.g. Azo, †1230) alongside the new (e.g. Ludovicus Pontanus, a.k.a. Romanus, †1439)—and the annotations, which were clearly informed by Rudhale's preoccupations in his work as an archdeacon and also revelatory of squabbles and discord within cathedral chapters (130-132).[38]

Among Helmholz's many contributions in this volume is his close analysis of the treatises and manuals produced by English ecclesiastical lawyers across these centuries. It is worth scanning the list of treatises and procedural texts in Helmholz's bibliography to get a sense of the tremendous labor expended in surveying the treatise literature, often through sixteenth- and seventeenth-century printed editions, texts that are far from easy to navigate (207-210). In undertaking this work, Helmholz recognizes the peculiar power of lawyers' extracurial writings to reveal their understanding of the nature of law itself. This is, of course, true for lawyers generally speaking. Although he was inclined to exclude procedural manuals in his history of the legal treatise in the common-law tradition, Brian Simpson commented on:[39]

> the close relation between the forms of legal literature and lawyers' ideas of what they are doing, and of the appropriate way for jurists to behave.

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[38] On the latter count, Helmholz finds precise references to Rudhale's contemporaries in marginal refutations of competing legal arguments.

[39] A. W. B. Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature', *The University of Chicago Law Review* 48 (1981) 632-679, at 633. In addition to excluding procedural manuals, Simpson limits the 'treatise' designation to substantive law texts dealing with a single branch of law. Ibid. 633-634.

As noted above, Helmholz credits the unusual downtime of the Interregnum, when ecclesiastical courts ceased operation, for the prolific writing of seventeenth-century ecclesiastical lawyers.[40] Simpson had similarly posited quite mundane reasons for English common-law treatise writing, first by practitioners and only later by academics:[41]

> More curious explanations exist with regard to why some lawyers turned to authorship. Leake apparently was encouraged to write after his deafness had ruined his legal practice. Woodfall, it is said, broke his leg.

One cannot help but wonder whether there exists a similarly down-to-earth explanation for the flowering of juristic writing in the late Roman Republic.

To return to the world of canon law, given the breadth of reading Helmholz has undertaken, he is attuned not only to the repetition of the medieval civilian literature but, more impressively, capable of noticing what is missing from the corpus of ecclesiastical treatises. 'A lot was left out', Helmholz observes, in his characteristically epigrammatic style (27). Most glaringly absent are discussions of the rules of professional conduct, guidelines for attorney-client relationships, and the relationships between advocates and proctors collaborating on litigation (27). Future scholarship may help explain these absences, which may be driven in part by the tendency toward repetition over creativity in this field of scholarship, and which may again point us back toward crediting the conservative nature of the legal profession in general.

While *The Profession of Ecclesiastical Lawyers* will no doubt appeal primarily to historians of canon law, it nonetheless has much to offer the common-law historian as well. Throughout, the careful reader will find an abundance of parallels between the

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[40] Ecclesiastical lawyers' scholarly use of newfound leisure time during England's seventeenth-century turmoil is emphasized in several of the biographies in the latter half of the book. See, e.g. Helmholz, *Profession of Ecclesiastical Lawyers* 147 (recounting the productivity of Arthur Duck (†1648) during the Civil War, a period that might have otherwise amounted to 'years of enforced idleness', 155 (discussing the scholarly production of William Somner (†1669) following the abolition of ecclesiastical courts).

[41] Simpson, 'Rise and Fall' 664.

English ecclesiastical and common-law traditions. For example, drawing upon Tancred, Helmholz observes that proctors could not advocate in criminal cases, where both the accuser and the accused were obligated to speak for themselves (11, 22-25). Historians of the common law of crime will note the similarity with the idea that defendants were not permitted to be represented by counsel in medieval English felony cases but were instead obligated to speak on their own behalf.[42] An exception was made, on the canon-law side, for cases begun 'ex officio promoto', in which proctors were permitted to represent defendants (87). Again, this is strikingly similar to the felony context, in which access to defense counsel was permitted in cases initiated by private accusation.[43] Some of the manuals that provided guidance to proctors on the language to be used in court, such as *De forma procurandi*, presented a script of courtroom dialogue, not unlike that to be found in the common-law tract *Placita corone*, not to mention the Yearbooks, with their accounts of banter between justices and counsel (53).[44] The formulary or precedent books that guided proctors on drafting the wide variety of cause papers seem to resemble in genre and abundance (measured in survival within archives) the registers of writs of the common law (55).[45]

Given the fact that the biographies undertaken by Helmholz span the twelfth through nineteenth centuries, one might have appreciated hearing more from Helmholz about the latter centuries of the English ecclesiastical courts, including his response to the debate over whether the church courts ever truly recovered during the Restoration.[46] Part I, however, closes with the Civil War, with

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[42] See Elizabeth Papp Kamali, *Felony and the Guilty Mind in Medieval England* (Cambridge 2019) 166.

[43] See ibid. 166 n.4.

[44] J. M. Kaye, ed. *Placita Corone, or La Corone Pledee devant Justices* (London 1996). For access to the Yearbooks, see the Seipp database at https://www.bu.edu/law/faculty-scholarship/legal-history-the-year-books/ (last accessed 4 January 2021).

[45] For a sampling of *registra brevium*, see Elsa de Haas and G. D. G. Hall, eds. *Early Registers of Writs* (London 1970).

[46] For a summary of this debate, see Thomson, 'The Winchester Consistory Court' 338-339.

Helmholz leaving to others the further investigation of the fortunes of ecclesiastical lawyers 'in the years immediately following the restoration of episcopy in the 1660s' (90). Elsewhere, too, historians of ecclesiastical law will find peppered throughout references to underexplored areas ripe for further archival work and analysis. For example, Helmholz observes that some of the works on the legal profession produced in the sixteenth and seventeenth centuries and listed in Martin Lipenius's *Bibliotheca realis iuridica* (Leipzig 1757) contain noteworthy treatments on the branches of the ecclesiastical legal profession, and that more remains to be discovered despite the fact that many of these treatises did not aim for originality, and much repetition can be found therein as well (17-18). Of course, some of the questions raised by Helmholz are already being answered through pathbreaking work on the ecclesiastical legal profession in England now being undertaken by scholars like Sarah White, whose work on the court of Canterbury in the late twelfth through thirteenth centuries has illuminated changes in the construction of legal arguments over time, including an increased reliance upon citations to canon and civil law sources in the thirteenth century.[47] On the common-law side, Thomas McSweeney has brought Helmholzian questions to bear on his analysis of the treatise *Bracton*, positing deliberate reliance on Roman- and canon-law ideas by treatise authors bent on fashioning the nascent English legal profession on the model of the Roman jurists.[48] Helmholz's unassuming volume, while providing an accessible introduction to the profession of English church lawyers and their collective fate during the crises of the sixteenth and seventeenth centuries, will

[47] Sarah White, 'Procedure and Legal Arguments in the Court of Canterbury, c. 1193-1300', Ph.D. Dissertation, University of St Andrews, 2018; 'Thomas Wolf c. Richard de Abingdon, 1293-1295: A Case Study of Legal Argument', JEH 71 (2020) 40-58.

[48] Thomas J. McSweeney, *Priests of the Law: Roman Law and the Making of the Common Law's First Professionals* (Oxford 2019).

no doubt continue to inspire future laborers in the English ecclesiastical archives.[49]

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[49] As he has already inspired past and present laborers. See, e.g. Troy L. Harris, ed. *Studies in Canon Law and Common Law in Honor of R. H. Helmholz* (Berkeley 2015).

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Atti dell'Anno innocenziano per gli 800 anni dalla morte di Papa Innocenzo III (1216-2016), ed. Federica Romiti (Gli archi; Rimini 2019) = *Atti dell'Anno innocenziano*

Authority and Power in the Medieval Church, c.1000-c.1500, ed. Thomas W. Smith (Europa Sacra 24; Turnhout 2020) = *Authority and Power*

Das Buch der Päpste – Liber Pontificalis: Ein Schlüsseldokument Europäischer Geschichte, edd. Klaus Herbers and Matthias Simperl (RQ 67; Freiberg-Basel-Wien 2020) = *Buch der Päpste – Liber Pontificalis*

El derecho frente a la relación del hombre con la tierra en el tránsito de la Edad Media a la Edad Moderna, ed. Emma Montanos Ferrín (Madrid 2019) = *El derecho frente a la relación del hombre*

Diocleziano: La frontiera giuridica dell'impero, edd. Werner Eck and Salvatore Puliatti (Pubblicazioni del CEDANT 16; Pavia 2019) = *Diocleziano*

Der Einfluss der Kanonistik auf die europäische Rechtskultur, Vol. 6: *Völkerrecht*, edd. Orazio Condorelli, Franck Roumy, and Mathias Schmoeckel (Norm und Struktur: Studien zum sozialen Wandel in Mittlalter und Früher Neuzeit 37.6; Göttingen 2020) = *Einfluss der Kanonistik*

Episcopal Power and Personality in Medieval Europe, 900-1480, edd. Peter Coss, Chris Dennis, Melissa Julian-Jones, and Angelo Silvestri (Medieval Church Studies; Turnhout 2020) = *Episcopal Power and Personality*

Great Christian Jurists in German History, edd. Mathias Schmoeckel and John Witte, Jr. (Tübingen 2020) = *Great Christian Jurists in German History*

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