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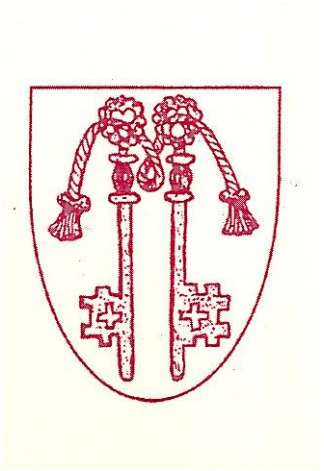

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Abbreviations

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
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*

ABBREVIATIONS

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 et alii (2 vols. Bologna 2013)
DHEE	*Diccionario de historia eclesiástica de España*
DHGE	*Dictionnaire d'histoire et de géographie ecclésiastiques*
DMA	*Dictionary of the Middle Ages*
Du Cange	Du Cange, Favre, Henschel, *Glossarium mediae et infimae latinitatis*
EHR	*English Historical Review*
Fowler	*Linda Fowler-Magerl*, *Clavis Canonum: Selected Canon Law Collections Before 1140* (Hannover 2005): https://beta.mgh.de/databases/clavis/db/
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 (Veröffent-lichungen des Max-Planck-Instituts für Europäische Rechtsge-schichte, 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*

ABBREVIATIONS

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
• Capit.	Capitularia
• Conc.	Concilia
• Const.	Constitutiones
• 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
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.
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* (4e 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*

ABBREVIATIONS

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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Irnerius: The State of the Question

Charles Donahue, Jr.

I can claim no particular expertise in Irnerius studies. I was, however, called upon to produce an entry on him for the Bio-Bibliographical Guide to Medieval and Early Modern Jurists (MEMJ) and had the occasion to review some of the recent literature on the topic.[1] The editor suggested that that review might be of interest to the readers of the *Bulletin*.

As Ennio Cortese notes at the beginning of his article on Irnerius in DBI, Irnerius is better known for the insoluble problems that his biography presents than for the number of datable facts about his life.[2] Or, as Jean Gaudemet put it more than fifty years ago: 'L'extrême rareté des sources laisse la porte ouverte à bien des hypothèses, que l'on veuille décrire les formes premières de l'enseignement bolonais ou préciser l'apport d'Irnerius à cette renaissance.'[3]

By the middle of the thirteenth century much could already have been legend. Odofredus (†1265), commenting on Dig. 1.1.6, describes Irnerius:[4]

> Or signori, dominus Yrnerius fuit apud nos lucerna iuris, fuit enim primus qui docuit iura in civitate ista. Primo cepit studium esse in ciuitate ista in

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[1] https://amesfoundation.law.harvard.edu/BioBibCanonists/Report_Biobib2.php?record_id=c000. The entry began with that of Ennio Cortese, 'Irnerio', in DGI (2013) 1.1109-1113, and then exploded. A fuller bibliography than that given in the notes here may be found in the Literature section of the MEMJ entry. A list of manuscripts that have been used for editing texts of Irnerius may be found in the Manuscripts section of the MEMJ entry.

[2] Ennio Cortese, 'Irnerio', DBI (2004) 62.600-605.

[3] Jean Gaudemet, 'Review of E. Spagnesi, *Wernerius Bononiensis iudex*', RHD 48 (1970) 653-654.

[4] Critical edition by H. Kantorowicz in Hermann Kantorowicz and Beryl Smalley, 'An English Theologian's View of Roman law: Pepo, Irnerius, Ralph Niger', *Mediaeval and Renaissance Studies*, 1 (1941 [1943]), 238, adopting the reading of ed. Lyon 1570, fol. 7rb, and Firenze, BN Magl. XXIX, fol. 27f, for the last phrase of the penultimate sentence ('forsan rectius' in K's apparatus) and that of ed. Lyon for the last sentence, which K. did not edit.

> artibus, et cum studium esset destructum Rome, libri legales fuerunt deportati ad ciuitatem Rauenne et de Rauenna ad ciuitatem istam. De hoc studebantur in artibus libri legales, qui a civitate Ravenne fuerunt·portati ad civitatem istam. Quidam dominus Pepo cepit autoritate sua legere in legibus, tamen quicquid fuerit de scientia sua nullius nominis fuit. Dominus Irnerius docebat in civitate ista in artibus, cepit per se studere in libris nostris, et studendo cepit velle docere in legibus. Et ipse fuit maximi nominis et fuit primus illuminator scientie nostre, et quia primus fuit qui fecit glosas in libris nostris ipsum lucernam iuris nuncupamus. Unde dominus Yr. lucerna iuris super lege ista scripsit glosam interlinearem elegantissimis verbis, et bene dicit ipse ista litera dicit 'ius ciuile est quod neque a iure naturali vel gentium in totum recedit nec per omnia ei seruit.

Although this edition has been in print since 1943, it is not often quoted, preference being given to the printed edition of 1570. In particular, the critical edition has a whole sentence that the edition of 1570 lacks, the one beginning 'De hoc'. This may turn out to be relevant when we get to the question not whether Irnerius taught but how he taught.

How much of Odofredus' account can be believed? A medieval law school in Rome shortly prior to that at Bologna is a 'phantom'.[5] If, however, we take Odofredus as referring to something that happened centuries before his time, there may be some truth to what he says. It is possible that the manuscripts that were used in the *studium* at Bologna had their ultimate origins in Ravenna.[6] That does not correspond with what we know about the migration of the Codex Florentinus,[7] but the use of that manuscript in the creation of the Bolognese version of the Digest does not seem to have come until quite late.[8] That a lawyer or legal scholar

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[5] E. Cortese, in DGI, but cf. Luca Loschiavo, 'Was Rome Still a Centre of Legal Culture Between the 6th and 8th Centuries?', RG 23 (2015) 83-108.

[6] See Giovanna Nicolaj, 'Documenti e *libri legales* a Ravenna', in *Ravenna da capitale imperiale a capitale esarcale: atti del XVII Congresso internazionale di studio sull'alto Medioevo: Ravenna, 6-12 giugno 2004*, 2 vols. (Atti dei Congressi 17; Spoleto 2005) 778-797.

[7] See Giuseppe Purpura, 'La Littera florentina', Archaeogate - IURA (2001) (online only: https://web.archive.org/web/20070310140926/http://www.archaeogate.org/iura/article/199/1/la-littera-florentina-di-gianfranco-purpura.html).

[8] See Wolfgang P. Müller, 'The Recovery of Justinian's Digest in the Middle

called ‘Pepo’ existed is certain, though little is known about him.[9] What do we know for certain about Irnerius?

Although there are those who have doubted the connection, we can probably equate him with a man who usually signed himself ‘Wernerius’. His contemporaries turned that into ‘Warnerius’, and then made Romance out of it, ‘Garnerius’ or ‘Guarneius’, with many variants that add up linguistically to the same thing. ‘Irnerius’ or ‘Yrnerius’ seems not to occur until after his death.[10] The name is obviously Germanic, and Irnerius’ own spelling corresponds—with a Latin suffix—to the more common spelling of the name among German-speakers today. That a late 12th-century *Summa quaestionum*[11] and a mid- to late-13th-century *additio* to Dig. 1.2.2 by a student of Franciscus Accursius († 1293)[12] call him ‘theutonicus’ probably does not tell us much that we did not already know. It could refer to Irnerius’ place of origin, but it need not.

What do we know about this Wernerius, Warnerius, Garnerius, Guarnerius? He was not the only person with that name who was operating in Italy in the early years of the 12th century, and distinguishing him from the others is a delicate task. In 1970, E. Spagnesi edited 14 documents that subsequent scholarship has accepted as referring to the same man, the one who could have been a teacher of law at Bologna, though no contemporary document says that he was.[13] (Landulfus *iunior* does call him

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Ages’, BMCL 20 (1990) 3-4.

[9] Ennio Cortese, DGI 2.1532-1533.

[10] Federico Patetta, ‘Delle opere recentemente attribuite ad Imerio e della scuola di Roma’, BIDR 8 (1895) 147-151 (reprinted in: idem, *Studi sulle fonti giuridiche medievali*, Guido Astuti and Maria Ada Benedetto, ed. [Torino 1967] 449-451).

[11] Knut W. Nörr, ‘Münchner Kodexhandschriften’, ZRG Rom. Abt. 82 (1965) 326-327.

[12] Giacomo Pace, ‘“Guarnerius Theutonicus” e Nuove fonti su Irnerio e i “quatto dottori”’, RIDC 2 (1991) 123-133.

[13] Enrico Spagnesi, *Wernerius Bononiensis iudex: La figura storica d’Irnerio* (Firenze 1970).

'magister'.[14]) This man appears in 1112 and 1113 as *causidicus* in pleas at Cornacervina and at Baviana (the latter presided over by Matilda of Canossa).[15] Between 1116 and 1118, a *iudex Bononiensis* of Irnerius' name was in the retinue of Henry V during his second journey to Italy.[16] In the last charter of December 1125, Irnerius continues to be called a Bolognese judge and assisted the monastery of Polirone (patronized by now-dead Matilda of Canossa) in an arbitration.[17] R. Rinaldi, the editor of *Codice polironiano*, expressed doubts about this charter, but K. Pennington has convincing arguments that it is genuine.[18]

Landulfus *iunior*, writing in the early 12th century, tells of an intervention of 'magister Guarneius de Bononia et plures iuris periti' in the election in March 1118 at Rome of Maurizio Bourdin, the antipope Gregory VIII.[19] The council of Reims excommunicated Irnerius on 30 October 1119 when he was

[14] See the next paragraph in the text.

[15] Spagnesi, *Wernerius* nos. 1-2.

[16] Ibid. nos. 3-13, a number of which contain his autograph.

[17] Spagnesi, *Wernerius* no. 14; *Codice diplomatico polironiano*, ed. Rossella Rinaldi, Carla Villani, and Paolo Golinelli (Bologna 1993) 331-335. Irnerius' role in the arbitration seems to have been to assist the monastery in presenting its case. He was not one of the arbitrators.

[18] Kenneth Pennington, 'Irnerius', BMCL 36 (2019) 107-122 at 108-111. Giuseppe Mazzanti, 'Un falso irneriano? Riconsiderazioni sul document del 1125', *Il contributo del monastero di S. Benedetto Polirone alla cultura giuridica italiana (secc. XI-XVI): Atti del Convegno San Benedetto Po, ex refettorio monastico - Piazza Matilde 29 settembre 2007*, Pierpaolo Bonacini and Andrea Padovani, ed. (San Benedetto Po (Mantova) 2009) 37-44 (I owe thanks for a copy to anonymous librarians at Harvard and the university of Zürich), supports Rinaldi's position with additional arguments, none of which are totally convincing. That a late source tells us that Irnerius retired from teaching *propter nimiam senectutem* does not help to answer this question because the late source, even if it is to be believed, does not tell us when this happened. See below text and n. 56.

[19] MGH SS rer. ger. 20, c. 45, p. 40. For a more recent edition than that in the MGH, see *Landulphi Junioris sive de Sancto Paulo Historia Mediolanensis: ab anno MXCV usque ad annum MCXXXVII*, ed. Carlo Castiglioni (RIS^2 5.3; Bologna 1934).

probably in Germany in the retinue of the emperor.[20] (In a document of August 1118 he is at Treviso, probably heading toward the frontier.[21]) The excommunication was revoked, probably when that of Henry V was revoked, and in 1125, he seems to have been in Italy again.[22]

If these references seem to be dealing with our Irnerius, other references to a man of that name are more problematic. An interpolation that Robert of Torigni made to the chronicle of Sigebert of Gembloux (†1112), sometime between the mid-1150s and Robert's death in 1186, reads under the year 1032:[23]

> Lanfrancus Papiensis et Garnerius socius eius, repertis apud Bononiam legibus Romanis, quas Iustinianus imperator Romanorum anno ab incarnatione Domini.d.xxx. abbreuiatas emendauerat; his inquam repertis, operam dederunt eas legere et aliis exponere. Sed Garnerius in hoc perseuerauit, Lanfrancus uero disciplinas liberales et litteras diuinas in Galliis multos edocens, tandem Beccum uenit et ibi monachus factus est, sicut in squentibus potest repereri.

If we take the year as being 1032 and the Garnerius being referred to as our Irnerius, this cannot be right. Lanfranc left Pavia in 1030s, which has to be before our Irnerius was born, and Lanfranc never again taught law. Ennio Cortese in DGI speculates that Robert got Garnerius confused with Gualcosius (Walcausa), a

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[20] Walther Holtzmann, 'Zur Geschichte des Investiturstreites (Englische Analekten II.)', NA 50 (1935) 319.

[21] Spagnesi, *Wernerius* no. 13.

[22] For an analysis of the entire episode and its legal implications, see most recently Orazio Condorelli, 'L'Elezione di Maurizio Burdino (Gregorio VIII), il Concilio di Reims e la Scomunica di Irnerio (1119)', BMCL (2020) 1-64. Cortese in DGI dates the revocation of the excommunication to 1120 without reference, Condorelli to the reconciliation of Henry V with Callixtus II, probably in 1122.

[23] *The Chronography of Robert of Torigni*, ed. Thomas N. Bisson (2 vols. Oxford Medieval Texts; Oxford 2020) 2.180-183. (Vol. 1 is subtitled: *The Chronicle, AD 1100-1186*. Vol. 2 is subtitled: *Related Historical Texts*. The quoted text is in a section of vol. 2 entitled 'Towards a Final Version of the Chronicle', which edits interpolations that Robert made in the chronicle of Sigebert of Gembloux. Andrea Padovani, 'Roberto di Torigni, Lanfranco, Irnerio e la scienza giuridica anglo-normanna nell'età di Vacario', RIDC 18 (2007) 127-129, posts a relationship between Robert and Vacarius, 1170-1175, that could account for the interpolation.

well-known exponent of Lombard law in the period. Andrea Padovani has argued that we need not take *socius* chronologically (we might add that *socius* does not necessarily mean 'student') and that there are connections between Irnerius and Lanfranc that we should take seriously.[24] Some support for this view may be found in the fact that Robert's text is, as T. Bisson emphasizes, an interpolation in a chronicle that is organized strictly chronologically. Robert wanted to say that Lanfranc was involved in the teaching of Roman law, and he has to put it under a date that predates Lanfranc's leaving Italy. He also wants to say that teaching of Roman law continued in Italy, and he wants to associate that teaching with Bologna and a man named Garnerius. There may be more historical truth in what Robert has to say about Irnerius, about whom he could have learned from Vacarius, than about what he has to say about Lanfranc's teaching of Roman law.[25]

The certain identifications with dates give us an account of a lawyer of the early twelfth century, a *causidicus* in 1112 and 1113, perhaps associated the countess Matilda (†1115), a *iudex* in 1116, 1117, and 1118, and still called a *iudex* in an arbitration of 1125. After the death of the countess Matilda, he was associated with Henry V and ran into a buzz saw at the council of Reims in 1119, but he seems to have been reconciled with the church, a reconciliation that we may associate with Henry's own reconciliation with Callixtus II. Irnerius' appearance at Polirone in 1125 suggests that he was also reconciled with followers of Matilda.

Can we identify this man with the Irnerius of later tradition, the founder of legal studies at Bologna, the 'lamplight' of the law? It is not easy to do so, and the difficulty of doing so has prompted some recent scholars not simply to deny the

[24] E.g., Andrea Padovani, 'Alle origini dell'università di Bologna: L'insegnamento di Irnerio', BMCL 33 (2016) 18-22.

[25] See Bisson ed., p. lvi-lvii, but cf. Ennio Cortese, 'Lanfranco di Pavia e la riscoperta del Digesto', RIDC 25 (2014) 9-24. Cortese remains of the view that Robert got Irnerius mixed up with Gualcosius, though he accepts the idea that Lanfranc was making arguments about Roman law while he was at Pavia.

connection but to argue that legal studies at Bologna did not begin until Bulgarus, the oldest of the 'four doctors'.[26] This argument has met with a strong reaction, illustrated, perhaps led, by K. Pennington and Andrea Padovani, who adhere, in different ways, to the traditional view that Irnerius did indeed teach law at Bologna, that he did so about a generation before Bulgarus and Gratian, and whether he taught them all or not, was succeeded by 'the four doctors' from whom we can trace chains of masters and students throughout the Middle Ages and even to the present day.

This is not the place to try to settle the ongoing scholarly debate. We can, however, give some sense for the arguments. Not the least of the difficulties is how to explain how a man called variously Wernerius, Warnerius, Garnerius, or Guarnerius became consistently the Irnerius or Yrnerius of the tradition. Unlike the shift from Wernerius and Warnerius to Garnerius or Guarnerius for which there are linguistic reasons if we assume that the overwhelming majority of those who made the shift were native Romance speakers, there is no linguistic reason why they should have dropped the initial consonant entirely.

The easiest explanation for the change is that the vast majority of the early manuscripts use 'y' or 'yr' as Irnerius' siglum. ('W' or 'G', sometimes with a following 'er' or 'r' is found, but in a decided minority of the citations.) But that simply raises the question where did the 'y' come from? Various efforts to show how it might have been derived from a misreading of 'W' or 'G'

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[26] R. W. Southern, *Scholastic Humanism and the Unification of Europe* (2 vols. Oxford 1995-2001) 1.279-280; Johannes Fried, *Die Entstehung des Juristenstandes im 12. Jahrhundert: zur sozialen Stellung und politishcn Bedeutung gelehrter Juristen in Bologna und Modena* (Forschungen zur neueren Privatrechtsgeschichte 21; Köln 1974) 102-103; idem, '. . . "auf Bitten der Gräfin Mathilde": Werner von Bologna und Irnerius', in *Europa an der Wende vom 11. zum 12. Jahrhundert: Beiträge zu Ehren von Werner Goez*, Klaus Herbers, ed. (2001) 173-174; Anders Winroth, *The Making of Gratian's Decretum* (Cambridge 2000) 147-148, 162-168; idem, 'Les deux Gratien et le droit romain', RDC 48.2 (1998) 285-299; idem, 'The Teaching of Law in the Twelfth Century', *Law and Learning in the Middle Ages*, Helle Vogt and Mia Münster-Swendsen, ed. (København 2006) 41-44.

are ingenious without being totally convincing.[27] Such things do happen, however; one is reminded how the 'D' for 'Digesta' got misread as 'ff' in later manuscripts and in all the early prints. Even more depressing is the suggestion that the 'y' is not a corruption of 'W' or 'G' but is a section mark or asterisk, put in to separate the base text from the gloss and found, as it frequently is, at the beginning rather the end of the gloss.[28] At the beginning of the tradition, there was no need to separate Irnerius' glosses from those of others. His were the only ones. Or—and this is what makes the suggestion depressing—is it that at the beginning of the tradition the authority of the master is not that important, and the glosses are the result of a team effort? This possibility is enhanced by the recent work of H. Jakobs who examined all the manuscripts of a particular gloss on the Digestum vetus and discovered that some of them attributed it to 'y', some to Martinus, and many to no jurist at all.[29]

All that said, we have to account for a consistent tradition that identifies Irnerius as the 'founder', at least at Bologna, of the teaching of law. He may not have been the 'Guanerius bononiensis iudex' of the documents, but Ockham's razor would suggest that it is more likely than not that he was. Otherwise, we would have to posit a man with approximately the same name who is otherwise unknown.

More problematic is whether Irnerius was doing quite the same thing as what Odofredus was doing. Odofredus does not say that he was. What Odofredus does say in the passage quoted above was that Irnerius was teaching arts before, perhaps even while, he taught law. He is more sure, perhaps too sure, of the chronology in his comment on Cod. 2.21.9:[30]

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[27] E.g., Nicholaj, 'Documenti' 795.

[28] Gero Dolezalek, 'Review of E. Spagnesi, *Wernerius Bononiensis iudex*', ZRG Rom. Abt. 88 (1971) 493-497, who adds a more elaborate argument based on the 'y's' found after Irnerius' signature, where the 'y' has to be a flourish or a section mark.

[29] Horst Heinrich Jakobs, 'Irnerius' Sigle', ZRG Rom. Abt. 134 (2017) 450-460.

[30] Ed. Lyon 1550, fol. 101va.

> Dominus Yr., quia logicus fuit et magister fuit in civitate ista in artibus antequam doceret in legibus, fecit unam glosam sophysticam que est obscurior quam sit textus.

A teacher of grammar, logic, and rhetoric fits well with many of the 'y' glosses. They focus on what we might call the philological: the meaning of obscure terms, the logic of the passage, cross-references to similar passages. They are also written by one whom we might imagine was an accomplished rhetorician, normally clear, simple, and precise. They are the work of a man who had a sense for the rhetoric of juristic texts.

Within a short time after his death authors who were not operating in the legal tradition recognized Irnerius as a teacher. Writing probably in the late 1160s or early 1170s, the third of the authors who goes under the name of Otto Morena, describing the supposed appearance of the 'four doctors' at Roncaglia sometime in the mid-1150s, tells us:[31]

> Istorum autem quatuor doctorum et quam plurium aliorum fuit dominus et magister dominus Guarnerius, doctor antiquus. Ad quem, cum in extremis laboraret, accesserunt sui scollares dicentes: 'Domine, quem vultis post mortm vestram doctorem nobis constituere?' Quibus ipse respondit per duo carmina infrascripta:'Bulgarus os aureum, Martinus copia legum Mens legum Ugo, Jacobus id quod ego.'

We need not believe that anything like this happened. The story is a reworking of a story told by Aulus Gellius about the death of Aristotle.[32] It is followed by the equally apocryphal story of the emperor Frederick Barbarossa and the jurists Bulgarus and Martinus that ends in a triple pun about the loss of a horse. What we probably should believe is that at Lodi, where the Morena operated, a hundred miles from Bologna, a generation after his death, Irnerius was regarded both as a great teacher and as the teacher of the 'four doctors'.

A decade or two later (before 1189), the English theologian and prolific author Radulfus Niger, writing in Paris, says:[33]

> Cum igitur a magistro Peppone velut aurora surgente iuris Civilis renasceretur initium, et postmodum propagante magistro Warnerio iuris

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[31] MGH, SS rer. Germ. N.S. 7.58-59.

[32] *Noctes Atticae* 13.5.1-3.

[33] Kantorowicz and Smalley 252.

> disciplinam religioso [s]cemate traheretur ad curiam Romanam, et in aliquibus partibus terrarum expanderetur in multa veneratione et munditia, ceperunt leges esse in honore simul et desiderio . . . .

That is not, of course, the comparative assessment of Pepo and Irnerius that Odofredus gives, but Niger does recognize that Irnerius 'propagated' (?taught) civil law.

The most interesting notice of Irnerius by a non-lawyer is, unfortunately, the latest. Writing probably in the late 1220s, Burchard of Biberach, provost of Ursperg, says:[34]

> Huius temporibus magister Gratianus canones et decreta, quae variis libris erant dispersa, in unum opus compilavit adiugensque eis interdum auctoritates sanctorum patrum secundum convenientes sententia opus suum satis rationabiliter distinxit. Eisdem quoque temporibus dominus Wernerius libros legum, qui dudum neglecti fuerant nec quispiam in eis studuerat, ad petitionem Mathildae comitissae [? at their meeting at Baviana in 1113] renovavit et, secundum quod olim a divae recordationis imperatore Iustiniano compilati fuerant paucis forte verbis alicubi interpositis, eos distinxit.

Burchard then goes on to describe quite accurately the four parts of what a later age will call the *Corpus Iuris Civilis*.

In the previous paragraph Burchard has just spoken of the coronation of Lothair III as Holy Roman Emperor in 1133, but the temporal reference at the beginning of this paragraph need not refer to that date. Lothair had been duke of Saxony since 1105. The following paragraph goes on to say that St. Bernard of Clairvaux (1090–1153) and St. Norbert (1075–1134) were distinguished (*claruerunt*) 'illis temporibus'.

Burchard spent some time in Rome in the late twelfth and early thirteenth centuries.[35] The story about the countess Matilda may have been circulating in Rome at the time. It certainly looks as if he had seen manuscripts of Gratian and early manuscripts of the *libri legales*. His description of Gratian's contribution—'adiugensque eis interdum auctoritates sanctorum patrum secundum convenientes sententia opus suum satis rationabiliter distinxit [in the sense of 'adorn']'—looks like a

[34] MGH, SS rer. Germ. 23.342.

[35] Mathias Herwig, in *Encyclopedia of the Medieval Chronicle*, s.n. 'Burchard of Ursperg' (Brill online).

description of the *dicta Gratiani*, whereas his description of Irnerius' contribution to the *libri legales*—'paucis forte verbis alicubi interpositis eos distinxit'—would fit well with manuscripts that had Irnerius' interlinear glosses or with short glosses set out with section marks in the text or in the margins as in the first layer of glosses in the Institutes in Vat. lat. 8782.[36]

That Burchard accurately described manuscripts that existed in his time does not, of course, mean that he got the chronology right. It is, however, interesting, and perhaps significant, that he regards Gratian and Irnerius as contemporaries, the former working on canon law the latter on Roman.

What did Irnerius write other than the problematic 'y' glosses? In the 19th and early 20th centuries what E. Cortese in DGI describes as a 'fairy-tale castle' of works were ascribed to Irnerius, such as the *Brachylogus* and the *Epitome Exactis regibus*. H. Fitting treated as Irnerius' the *Quaestiones de iuris subtilitatibus*, the *Summa Codicis Trecensis*, a brief *De aequitate*, part of a *De natura actionum*, and finally the *Summa legis Langobardorum*. G. B. Palmieri ascribed to him the *Summa Institutionum Vindobonensis* and a *Formularium tabellionum*. As early as 1895, F. Patetta cast serious doubts on most of these attributions, particularly Fitting's.[37] In 1938, H. Kantorowicz put the nail in the coffin, dismissing Fitting's attributions in the words of Mommsen, writing a half-century earlier about Fitting's work on classical Roman law, as 'somnia Fittingiana'. [38] Today, with Kantorowicz,[39] the only works independent of the glosses that we

[36] See Kenneth Pennington, 'The *Constitutione*s of King Roger II of Sicily in Vat. lat. 8782', RIDC 21 (2010) 35-54, figures 6 and 7.

[37] F. Patetta, 'Opere recentemente attribuite ad Imerio'.

[38] Hermann Kantorowicz and W. W. Buckland, *Studies in the Glossators of the Roman Law; Newly Discovered Writings of the Twelfth Century* (Cambridge 1938) (repr. Aalen 1969 with additions et corrections by Peter Weimar) 145.

[39] H. Kantorowicz, *Studies*, 59-65 and 240; 46-50 and 233-239. The argument for attributing the *Exordium Institutionum* to Irnerius and an analysis of its contents (as we have them; neither of the manuscript sources seems complete) are found in *Studies* 59-65. Kantorowicz edited the text at 240 from the only known sources: London, BL Royal 11.B.XIV, fol. 46v and London, BL Royal 15.B.IV, fol. 104v. (Error in the signature in *Studies* 230 corrected by Weimar.)

can ascribe to Irnerius are an *Exordium Institutionum*, a *Materia Codicis*, and, independent of Kantorowicz, a *distinctio* about the *actio locati* attributed to him by Roffredus[40] and, at the request of the notaries Angelo and Bonanno, a new formula for grants in emphyteusis to replace the form from Ravenna found in the old Bolognese formularies (but not the entire *Formularium tabellionum*).[41]

A gloss on *Cordi nobis* (the promulgation decree of Justinian's second Codex in 534), attributed to 'y' and taken by the later jurists who wrote about it to be by Irnerius, says that the author did not consider the text of the Authenticum to be, as it were, 'authentic'.[42] It lacked a promulgation decree; it was too disorganized and prolix in comparison with the Codex. Irnerius is supposed to have changed his mind because some, perhaps many, of the excerpts of the Novels (*authenticae*) placed at the end of the constitutions in the Vulgate text of the Codex are attributed to him (an attribution that N. Tamassia doubted[43]), but no one, and

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The argument for attributing the *Materia Codicis* to Irnerius with an analysis of its contents is found in *Studies* 46-50. The manuscript is a jumble. Kantorowicz edited the text from the only known source, London, BL Royal 11.B.XIV, fol. 61v, in parallel with the *Materia Codicis* of Bulgarus and that of the *Summa Trecencis*, at 233-239. In the process he put the text into the order of the other two works, where it fits quite well. Kantorowicz did not regard either the *Exordium Institutionum* or the *Materia Codicis* as a freestanding work of Irnerius, but 'a compilation of his glosses, clumsily arranged by an unknown lawyer or copyist' (at 37).

[40] Savigny, *Geschichte* 4.469-470. There is no particular reason to doubt the attribution, but it may not be a separate work as opposed to a gloss.

[41] E. Cortese in DGI; Giovanna Nicolaj, 'Arcana Iuris: *Il caso del* Dig. Vetus Vat. Lat. 1406', RSDI 90 (2017) 86-87 and n. 29).

[42] Savigny, *Geschichte* 3.491-499; Luca Loschiavo, '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*, Luca Loschiavo, Giovanna Mancini, and Cristina Vano edd. (Università Degli Studi Di Teramo, Collana della Facoltà di Giurisprudenza 20; Napoli 2011) 129; K. Pennington, 'Irnerius' 115-118.

[43] Nino Tamassia, *Odofredo Studio storico-giuridico* (Bologna 1894) (reprinted in: idem, *Scritti di storia giuridica*, [3 vols. Padova 1964-1969] 2.335-464) 100,

certainly not Irnerius, says that he changed his mind. In some sense, of course, the gloss on *Cordi nobis* is right. The Novels were privately, not officially, collected, shortly after the end of Justinian's reign. In comparison with the *Codex*, they are prolix, but that may be because the texts in the *Codex*, at least the later ones, were abbreviated, whereas many, if not most, of the Novels, as we now have them, are the complete text. To the extent that there is any order, it is chronological not topical. We must also remember that in the early twelfth century, the text of the *Authenticum* was fluid. The transition from the *Epitome Juliani* to the *Authenticum* to the modern *Novels* was a gradual process, and some of the texts on which Irnerius based his judgment were probably pretty bad. Be that as it may be, it seems reasonably clear that Irnerius participated in the process of adding the *authenticae* to the Codex. He may even have started the process. He seems to have regarded the text of the *Authenticum* as evidence that Justinian had made a change, but not firm evidence of what change he made. Some of what appears in the early manuscripts as an *authentica* is quite far from what we now know that the Novel says. It got closer as time went on and as the text of the *Authenticum* got better.[44]

More problematic is the identification of our Irnerius with the Guarnerius de Brigey (probably modern Briey, dép. Meurthe-et-Moselle), a functionary of the countess Matilda who was present at Guastella on 10 March 1106.[45] What makes the identification problematic is that our Irnerius is nowhere else called 'de Brigey'. In the list of the excommunicates at Reims, his name is preceded by a man who is described as 'de Brierio' (which Grässe identifies as Briel-sur-Barse [dép. Aube], but which may, alternatively, be Briey); Irnerius, however, is described as 'Gwarnerius Bononi-

repr. 2.400-401]

[44] See L. Loschiavo, 'Riscoperta'; K. Pennington, 'Irnerius'.

[45] Carlo Dolcini, 'Postilla su Pepo e Irnerio', *Lo studio di Bologna, l'impero, il papato*, ed. Giuseppe De Vergottini (repr. Spoleto 1996) 98-100; Giuseppe Mazzanti, 'Irnerio: Contributo a una biografia', RIDC 11 (2000) 158-159.

ensis legis peritus'.[46] Even more problematic is the identification of our Irnerius with the Warnerius *presbiter* who occurs in a document from Piadena of 21 May 1095 and in another of 14 May 1101.[47] According to Ennio Cortese in DGI, the rule at the time seems to have been that judges of secular tribunals, which our Irnerius clearly was, had to be laymen.

That brings us to the Guarnerius who is identified as the author of a *Liber divinarum sententiarum*, a florilegium of patristic texts, principally by Augustine. The copyist of one of the three surviving manuscripts added an interlinear gloss that identified the author as 'legisperitissimus'. The work has been known for some time. Most scholars doubted that the Guarnerius of the *Liber* was the same as our Irnerius. To base an attribution on the basis of an identification of a copyist who had, perhaps, heard of a 'Guarnerius legis peritissimus' but who may have had no idea who the Guarnerius was whose work he was copying is to rest on a pretty slender reed.[48] The identification, however, has its recent defenders in addition to Giuseppe Mazzanti, who edited the text, Carlo Dolcini, Enrico Spagnesi, and, particularly, Andrea Padovani, who has used the identification to suggest an intellectual context for the *studium* at Bologna more ecclesiastical than it is normally thought to have been.[49]

While it is possible that our Irnerius had a youthful interest in theology, we should remember that there were a number of men with his name who were operating in Italy in his period. In

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[46] W. Holtzmann, 'Investiturstreit' 319.

[47] G. Mazzanti, 'Irnerio' 155-158.

[48] For an elaborate counter-argument, see Mazzanti, 'Introduzione', in Guarnerius Iurisperitissimus, *Liber divinarum sententiarum*, ed. Giuseppe Mazzanti (Testi, studi, strumenti 14; Spoleto 1999) 1-36, 60-87. Among the arguments that he makes, we might flag one here: There are variants in the text of the *Liber divinarum* that are found in Gratian's version of the same texts and not in other possible formal sources of Gratian's texts. That does not prove that Irnerius wrote the *Liber divinarum*, but it does suggest that the work was known in Bologna in the time of Irnerius and Gratian.

[49] Dolcini (cited by Cortese in DGI without specific reference); Enrico Spagnesi, *Libros legum renovavit* (Pisa 2013) 128-149; A. Padovani, 'Alle origini' 20-21 and n. 14 (a long list of supporters), and elsewhere.

addition to the ones mentioned above whom we doubted, sometimes strongly, were the same man, a Warnerius was a judge delegate of Henry IV at Monselice in May 1100.[50] He is perhaps the same man as the one who, at an uncertain date, is referred to as a *comes*.[51] He is probably not our Irnerius. There is a *magister* Garnerius in a Sicilian charter of 1117.[52] Nothing that we know of our Irnerius would connect him with Sicily. The obituary of the monastery of Saint Victor in Paris registers, among many others, on 19 September of an unspecified year, a "magister Garnerius teutonicus de cuius beneficio habuimus quinque libros optimos glosatos."[53] To base the identification with our Irnerius on the supposition that the five books given were the five *libri legales* is hazardous. The division of the Justinianiac corpus into the five volumes as we know them did not happen until after Irnerius' time. Indeed, the creation of the *volumen parvum* postdates Accursius.[54] Many philosophical, theological, and literary works with glosses were in circulation at the time. Once we get outside of Italy, the name Garnerius becomes even more common than it is in Italy. The tenth abbot of Marmoutier was named Garnerius as was the fourth abbot of La-Croix-Saint-Euvroy.[55] They are certainly not our Irnerius; neither is likely to be the Garnerius of the obituary.

A mid- to late 13th-century *additio* to Dig. 1.2.2 tells of Irnerius' departure from teaching 'per nimiam senectutem' and

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[50] *I placiti del "Regnum Italiae"*, ed. Cesare Manaresi, (3 vols. in 5; Fonti per la storia d'Italia, pubblicate dall'Istituto storico italiano per il Medio Evo 92, 96-97; Roma 1955-1960) no. 484, p. 3.2.444-446.

[51] Spagnesi, *Wernerius* 160-162.

[52] Enrico Besta, *L'opera d'Irnerio: contributo alla storia del diritto* italiano (2 vols. Torino 1896) 1.49.

[53] Mazzanti, 'Irnerio' 128.

[54] Luca Loschiavo, 'Verso la costruzione del canone medievale dei testi giustinianei: Il ms. Oxford, Oriel College 22 e la composizione del *Volumen parvum*', *Inter cives necnon peregrinos: Essays in honour of Boudewijn Sirks*, Jan Hallebeek, Martin Schermaier, and others, edd. (Göttingen 2014) 444-445.

[55] Robert of Torigni, ed. Bisson, 1.192-193, 2.274-275 (Marmoutier); 2.264-265 (La-Croix-Saint- Euvroy).

another of his return 'ad domum suum', perhaps his transalpine homeland.[56] A death date between 1130 and 1140 is plausible, but by no means certain.

There are many collections of Irnerius' glosses in print.[57] Granted the problematic nature of the 'y' siglum, they all need to be checked in the manuscripts to make sure that they are probably his, a task made more difficult by the fact that the Bolognese professor Henricus de Baila, a contemporary of Placentinus, used the siglum 'Yr'.[58] K. Pennington has recently argued for

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[56] Giacomo Pace, 'Guarnerius Theutonicus'125-126, 131 and n.23. K. Pennington, 'Irnerius' 110, transcribes and translates the *additio* to Dig. 1.1.2 and prints an image of a manuscript version.

[57] Savigny, *Geschichte* 4.458-470. Luigi Chiappelli, 'Glosse d'Irnerio e della sua scuola tratte dal manuscritto capitolare pistoiese dell'Authenticum con una introduzione storica', *Mem. Accad. Lincei*, ser. 4, vol. 2 (1886) 184-236. (E. Cortese in DGI gives the volume number as '4.3' and the title as 'Glossae XI', but the page numbers and date match with those given here.). Gustav Pescatore, *Die Glossen des Irnerius: Festschrift zur Feier des achthundertjährigen Bestehens der Universität Bologna überreicht im Namen und im Austrage der Universität Greifswald* (Greifswald 1888) 83-111 (glosses on the Codex). Enrico Besta, *L'opera d'Irnerio: contributo alla storia del diritto italiano:* 2. *Glosse inedite d'Irnerio al Digestum Vetus* (Torino 1896). (This ed. is criticized in H. Jakobs, 'Irnerius' sigle' both for its method and its results.) Antonio Rota, *Lo stato e il diritto nella Concezione di Irnerio* (Milano 1954) 65, 72, 115f., 121. Pietro Torelli, 'Glosse preaccursiane alle Istituzioni . . . glosse d'Irnerio', in *Studi di storia e diritto in onore di Enrico Besta per il xl anno del suo insegnamento*, 4 (Milano 1939) (reprinted in: idem, *Scritti di storia del diritto italiano* [Università di Bologna, Seminario giuridico, Pubblicazioni 21; Milano 1959] 45-94). (Edits [repr. 71-87] about 50 glosses arranged by the order of the Institutes, and in a couple of places referring back to the more elaborate discussion of glosses that Accursius attributes to I.) See also K. Pennington, '*Constitutiones*' (report of 'y' glosses in Vat. lat. 8782, at 4 of the offprint); Gero Dolezalek and Laurent Mayali, *Repertorium manuscriptorum veterum Codicis Iustiniani*, 2 vols. (Ius commune. Sonderhefte 23; Frankfurt am Main 1985) (reports of 'y' glosses at 461-485, 928-929); Gero Dolezalek 'Der Glossenapparat des Martinus Gosia zum Digestum Novum', ZRG Rom. Abt. 84 (1967) 245-349 (reports of 'y' glosses at 261-263).

[58] Lange, *Glossatoren* 214. H. Jakobs, 'Irnerius' sigle', on the basis of work described in the text at n.29, offers views about what must be done. All the manuscripts must be checked. Jakobs himself has helped considerably by listing all the known manuscripts of the *Digestum vetus* that contain the 'antiqua

genuineness of at least most of the 'y' glosses.[59] It seems unlikely that they all are not Irnerius', or, at a minimum, were thought to be his at a fairly early date. Glossing is frequently connected with reading (*lectura*), and reading is frequently connected with teaching. Firm proof that Irnerius taught at Bologna is lacking, but it seems highly likely that he did.

If Irnerius taught at Bologna, when did he teach? The traditional date is that he began late in the eleventh century or very early in the twelfth. The traditional date was strongly influenced by a desire to connect the beginning of law teaching at Bologna with the 'discovery' of the *Digest*. We are now quite comfortable separating *the two. An extensive collection of excerpts from the Digestum* vetus appears in the *Collectio Britannica* (c. 1090).[60] These are the source of the quotations by members of the circle of Ivo of Chartres in the late eleventh century.[61] So far as we can tell, none of the men involved in this effort ever went near Bologna. The *Digest* also appears in eleventh-century practice documents. Dig. 4.6.26.4 is quoted in a *placitum* associated with Matilda of Tuscany in 1076.[62] Indeed, the *Digestum vetus* may have been known at Pavia as early as the 1030s. Cortese even suggests that Lanfranc is the link that connects the *Digestum vetus* with the men of the north later in the eleventh century.[63]

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glosa'. (They are listed in the Manuscripts section of the article 'Irnerius' in MEMJ [https://amesfoundation.law.harvard.edu/BioBibCanonists/Report_Biobib2.php?record_id=c000]). They must also, he insists, be checked *in situ*. Microfilm will not do. Perhaps we can relax this requirement if we can persuade the holders of these manuscripts to make modern digitized images of them. There are only 13, and the 3 held by the Vatican, unbeknownst to Jakobs, already are available in such form.

[59] Most notably in Kenneth Pennington, 'Odofredus and Irnerius', RIDC 28 (2017) 11-27.

[60] Max Conrat (Cohn), *Der Pandekten- und Institutionenauszug der brittischen Dekretalensammlung, Quelle des Ivo* (Berlin 1887) 8-11.

[61] E.g., Ivo, *Decretum* 16.74-75, 78-79, 103, 163-175, 177-184, 192-193 (preliminary ed.. https://ivo-of-chartres.github.io/decretum/ivodec_16.pdf).

[62] Müller, 'Digest' 2 and n.3.

[63] Ennio Cortese, 'Lanfranco di Pavia e la riscoperta del Digesto', RIDC 25

More to the point about Irnerius is the argument of Hermann Kantorowcz. He says of Bulgarus' teaching: "it would not be safe to assume a later date than 1115 as the *terminus post quem*."[64] He gets to that date by backing up from Bulgarus' famous letter to Aimericus, the chancellor of the Roman church, a letter that Kantorowicz assumes was written by a man who was well known as a teacher of Roman law and who must have achieved that status after long years of study. (Considering that Bulgarus and Aimericus were friends, Bulgarus may not need to have been so prominent at the time.) Assuming that the letter was written in the early 1130s,[65] back up 15 years for the long years of study, and we get to someplace around 1115. Bulgarus was taught by Irnerius. Back up at least 15 years from Bulgarus' beginning to teach, and we get to 1100, or even earlier.

The argument has some elements of Ptolemaic epicycles. In particular, it assumes that teaching involves an authoritative master and students, and that the students do not start to teach, at least in the same school, until after the master has ceased teaching. That may have been the situation later on. It does not necessarily have to have been the situation at the very beginning of the 'school'. Indeed, what may have happened is something much more informal than what we think of when we use the word 'school'.

The known dates of Wernerius, Warnerius, Garnerius, Guarnerius run from 1112 to 1125. He probably made a trip to Germany around 1119. He probably was not teaching when Henry V was in Italy between 1116 and 1118. There is nothing in the record that suggests that he could not have been teaching before that four-year period, or after it, or both.

Bulgarus died c.1166 when he is said to have been a very old man, but he may have been what we call today a 'mature student'

(2014) 9-24.

[64] H. Kantorowicz, *Studies* 69.

[65] Which it probably was, see Kenneth Pennington, 'The "Big Bang": Roman Law in the Early Twelfth-Century', RIDC 18 (2007) 49-52.

when he studied with Irnerius.[66] Martinus died c.1160, and nothing is said about his age.[67] Hugo died c.1168.[68] Jacobus de Porta Revennate died in 1178, the only one of the 'four doctors' for whom we have a firm death date.[69] If Irnerius taught Jacobus—which is not at all certain—it is hard to imagine that he did so before 1116. Indeed, the later that we extend Irnerius' teaching, the more comfortable becomes the tradition that he taught the 'four doctors', or even three out of the four of them. We need not accept in full the idea proposed by G. Nicolaj that Irnerius did all of his teaching after 1119 or 1125, though her account of Irnerius' life has considerable plausibility.[70] All we need to posit is that he did some teaching after his excommunication and absolution. Even if we have Irnerius teaching into the 1130s, that would not falsify the later tradition that he retired because of advanced age and 'went home', presumably to some place other than Bologna. Nothing in the later tradition says when that happened.

If this chronology is plausible, that would mean that Irnerius and Gratian overlapped. That would fit quite well with what we now are inclined to believe about the gradual incorporation of Roman law into Gratian's thought and text.

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[66] MEMJ:

(https://amesfoundation.law.harvard.edu/BioBibCanonists/Report_Biobib2.php?record_id=c001).

[67] MEMJ, s.n.
(https://amesfoundation.law.harvard.edu/BioBibCanonists/Report_Biobib2.php?record_id=c002).

[68] MEMJ, s.n.
(https://amesfoundation.law.harvard.edu/BioBibCanonists/Report_Biobib2.php?record_id=c005).

[69] MEMJ, s.n.
(https://amesfoundation.law.harvard.edu/BioBibCanonists/Report_Biobib2.php?record_id=c003).

[70] G. Nicolaj, 'Documenti' 775, cf. idem, 'Arcana iuris' 87-88.

There remain many difficult questions, of which we flag four:

1. The traditional birth date for Irnerius (c.1050 or c.1055) rests on little more than a desire to make him sufficiently learned and senior to have done what he did between 1112 to 1125. There is, moreover, a tension between the desire to expand his activity beyond 1125 so that he can be a plausible teacher of Jacobus and the desire to give him a career as a theologian before he turned to law. Very few men in this period lived into their late 70s or early 80s. That three of a group of five (Irnerius, Bulgarus, and Jacobus, among a group that included them and Martinus and Hugo) did so comes close to breaking the laws of probability. If we raise the date of Irnerius' probable birth by a decade, that makes the chronology more comfortable. To do so we need to abandon the notion that he had any personal contact with Lanfranc, certainly that he was in any sense Lanfranc's student. That, however, was already hard to fit in the known chronology. There were plenty of followers of Lanfranc, including Ivo of Chartres and a whole team of *anonymi*, with whom Irnerius could have been in contact or even studied.

2. The identity of Irnerius with the author of the *Liber divinarum sententiarum* is hard to prove, but the attempt to do so has raised many interesting questions about Irnerius' intellectual context. The practicing lawyer of Cortese's *Rinascimento giuridico medievale*,[71] who started to read the *libri legales* in order to help notaries, advocates, and judges do their mundane jobs, sits somewhat uneasily with Orazio Condorelli's intellectual sparkplug of the election of Gregory VIII,[72] even more uneasily with Andrea Padovani's genius who participated in the debate between Lanfranc and Berengar of Tours about transubstantiation,[73] and even with G. Nicolaj's hunter of manuscripts of

[71] Ennio Cortese, *Il rinascimento giuridico medievale*, 2d ed. (Roma 1996).

[72] See O. Condorelli, 'L'Elezione'.

[73] See, particularly, A. Padovanni, 'Matilda e Irnerio'.

what became the Corpus Iuris Civilis.[74] Perhaps it is Irnerius, the early twelfth-century humanist, the teacher of arts, who ties them all together.[75]

3. Those who are interested in the high politics of the investiture controversy tend to find Irnerius' association both with Matilda of Canossa and her party and with Henry V puzzling.[76] Lawyers may find it less puzzling: you make the best arguments available for your clients, without necessarily committing yourself to all that your clients stand for. If that is even half right, Irnerius may have been a professional lawyer before professional lawyers existed. Be that as it may be, the closer that we bring Gratian to Irnerius in time the less puzzling it is that Gratian says virtually nothing about the investiture controversy. He saw what happened to Irnerius, and he stayed away from it.

4. The more early references that we find to the *libri legales*, particularly to the *Digest*, in canonical collections, secular legislation, and practice documents, the harder it is to believe that all the men who were making the references studied at Bologna. Not all teachers in the late eleventh and early twelfth centuries taught in what we would regard as schools; certainly not all of them founded schools that lasted. Irnerius probably did found a school that lasted, though he may not have been aware that he was doing so. That, however, does not mean that the school did not change shortly after his time. While we need not—and probably should not—accept Anders Winroth's total skepticism about Irnerius' teaching, Winroth does have a point when he argues that Gratian's and Bulgarus' use of hypothetical cases turned whatever Irnerius was doing into a proper law school.[77]

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[74] See, particularly, G. Nicolaj, 'Arcana iuris'.

[75] Pace R. W. Southern, 1.279-280.

[76] Indeed, if I'm reading him right, E. Spagnesi would downplay the former association. *Libros legum renovavit* 62-80.

[77] Particularly in A. Winroth, 'Teaching of Law'.

If I may close with a personal note: It is striking how many of the participants in this debate are my contemporaries or even older. Perhaps it is time for us to turn this problem over to the next generation of scholars, men and women who are not precommitted to a particular point of view. Perhaps, too, one should focus more on the 'y' glosses themselves, and what they show about the development of legal ideas and methods rather than engaging in endless debates about who wrote them.

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Guarnerius Teutonicus nel necrologio di Santa Maria di Reno

Giuseppe Mazzanti

L'obito di Guarnerius Teutonicus nel necrologio renano

Prima dell'*Yrnerius* con il quale è rimasto celebre nei secoli—un antroponimo che risale al tardo secolo XII[1]—, i contemporanei e i posteri hanno appellato Irnerio[2] nei modi più diversi, ma prevalentemente con le forme *Guarnerius*, *Garnerius*, *Wernerius*

[1] Cfr. Enrico Spagnesi, 'Irnerio', *Enciclopedia italiana di scienze, lettere ed arti: Il contributo italiano alla storia del pensiero. Diritto. Ottava appendice* (Roma 2012) 43-46 a 43.

[2] Su questo giurista si vedano almeno i contributi Idem, *Wernerius Bononiensis Iudex: La figura storica d'Irnerio* (Firenze 1970); Guarnerius Iurisperitissimus, *Liber divinarum sententiarum*, a cura di Giuseppe Mazzanti, prefazione di Antonio Padoa Schioppa (Spoleto 1999) 1-87; Giuseppe Mazzanti, 'Irnerio: contributo a una biografia', RIDC 11 (2000) 117-181; Enrico Spagnesi, 'Irnerio teologo: Una riscoperta necessaria', *Studi medievali* 42 (2001) 325-379; Ennio Cortese, 'Irnerio', DBI 62 (Roma 2004) 600-605; Enrico Spagnesi, '"Magister Gratianus, dominus Wernerius". Le radici d'un antico accostamento', *Proceedings Catania 2000* 205-226; Enrico Spagnesi, 'Irnerio', *Enciclopedia italiana di scienze, lettere ed arti* 43-46; Ennio Cortese, 'Irnerio', DGI 1 (Bologna 2013) 1109-1113; Andrea Padovani, 'Alle origini dell'università di Bologna: l'insegnamento di Irnerio', BMCL 33 (2016) 13-25; Id., 'Matilde e Irnerio. Note su un dibattito attuale', in *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 2016) 199-242; Horst H. Jakobs, 'Irnerius' Sigle', ZRG Rom. Abt. 134 (2017) 444-490; Kenneth Pennington, 'Odofredus and Irnerius', RIDC 28 (2017) 11-27; Pierpaolo Bonacini, 'Matilde e Irnerio. Origini e persistenze di un'immagine medievale', *Studi medievali* serie terza 60 (2019) 533-570; Kenneth Pennington, 'Irnerius', BMCL 36 (2019) 107-122; Id., 'Per un "Corpus Irnerianum"', RIDC 30 (2019) 29-43; Orazio Condorelli, 'L'elezione di Maurizio Burdino (Gregorio VIII), il concilio di Reims e la scomunica di Irnerio (1119)', BMCL 37 (2020) 1-64; Luca Loschiavo, 'Irnerius and the imperial legislator, between Justinian and Henry V', TRG LXXXVIII/3-4 (2020) 367-391; Andrea Padovani, 'Irnerius (ca. 1055 to ca. 1125)', Orazio Condorelli-Rafael Domingo (curr.), *Law and the Christian Tradition in Italy: The Legacy of the Great Jurists* (Abingdon-New York 2021) 25-40.

e *Warnerius*[3] seguite talvolta da *de Bononia*, *Bononiensis* o *Teutonicus* come specificazione topica. In particolare, il giurista è indicato come *Garnerius*/*Guarnerius Theutonicus*/*Teutonicus*[4] in tre glosse,[5] in una *Summa quaestionum* canonistica del tardo secolo XII[6] e, probabilmente, nell'obituario dei canonici regolari di San Vittore di Parigi.[7] Un *Guarnerius Teutonicus* compare inoltre nel necrologio di Santa Maria di Reno, una canonica

[3] Sull'evoluzione del nome da *Wernerius*, come si firmava il giurista, a *Yrnerius* si veda Andrea Padovani, 'Il titolo *De Summa Trinitate et fide catholica* (C. 1.1.) nell'esegesi dei glossatori fino ad Azzone. Con tre interludi su Irnerio', Mario Ascheri-Gaetano Colli (curr.), *Manoscritti, editoria e biblioteche dal medioevo all'età contemporanea: studi offerti a Domenico Maffei per il suo ottantesimo compleanno* (Roma 2006) 1076-1123 a 1087-1100.

[4] Sul significato di questo appellativo in riferimento alla biografia di Irnerio si vedano Johannes Fried, 'Die Rezeption bologneser Wissenschaft in Deutschland während des 12. Jahrhunderts', *Viator. Medieval and Renaissance Studies* 21 (1990) 68; Ennio Cortese, *Il diritto nella storia medievale*, II (Roma 1995) 58; Carlo Dolcini, 'Università e Chiesa di Bologna: dall'identità originaria allo sviluppo di molteplici relazioni', Paolo Prodi-Lorenzo Paolini (curr.), *Storia della Chiesa di Bologna*, II (Bologna 1997) 273-284 a 276, 283 n. 29; Andrea Padovani, *Perché chiedi il mio nome? Dio Natura e Diritto nel sec. XII* (Torino 1997) 20 e n. 3; Mazzanti, 'Irnerio' 141-144; Johannes Fried mit einem Exkurs von Gundula Grebner, '... "auf Bitten der Gräfin Mathilde": Werner von Bologna und Irnerius', Klaus Herbers (cur.), *Europa an der Wende vom 11. zum 12. Jahrhundert. Beiträge zu Ehren von Werner Goez* (Stuttgart 2001) 171-206 a 187; Cortese, 'Irnerio', DGI 1109. Riferimenti a Irnerio tedesco si trovano già in autori di età moderna (cfr. Valentini Forsteri… *De Historia Iuris Civilis Romani, Libri Tres* (Tractatus Universi Iuris…, I; Venetiis, 1584) 54ra e Giambattista De Luca, *Il Dottor Volgare ovvero il compendio di tutta la legge civile, canonica, feudale e municipale…*, I (Firenze 1839) 23).

[5] Cfr. Giacomo Pace, ''Garnerius Theutonicus'. Nuove fonti su Irnerio e i 'quattro dottori'', RIDC 2 (1991) 123-133 e in *Miscellanea Domenico Maffei dicata* (Roma 1995) 91-101.

[6] Cfr. Knut W. Nörr, 'Zur Herkunft des Irnerius', ZRG Rom. Abt. 82 (1965) 327-329.

[7] Cfr. Mazzanti, 'Irnerio', 117-181. Sul punto non concorda Ennio Cortese, 'Irnerio', DBI 603, mentre retiene possibile l'identificaazione del *magister Garnerius Teutonicus* dell dell'obituario vittorino con Irnerio James A. Brundage, *The Medieval Origins of the Legal Profession. Canonists, Civilians, and Courts* (Chicago-London 2008) 83 n.28.

regolare fondata, come molte altre canoniche regolari in Italia e in Europa, negli anni al tramonto del secolo XI o nei primi lustri del secolo XII: i primi riferimenti nella documentazione risalgono ai privilegi dell'arcivescovo di Ravenna Gualterio, del vescovo di Bologna Enrico e di Innocenzo II, tutti del 1136 (presumibilmente quello petroniano, certamente gli altri due). Nel necrologio, in data 13 settembre, si legge:

> O. Guarnerius Teutonicus. O. magister Petrus conversus Sancte M. in Portu. A.D. M.CC.VIIII. O. domina Iulitta uxor Alberti de Turcli de qua habuimus XX. sol. bon. O. Petrus Caballus pro quo habuimus pallium unum.[8]

Se prima si scrive il calendario e poi i nomi dei defunti che si vogliono ricordare nella preghiera, tra le centinaia di mani che operano sul necrologio renano in un arco di tempo compreso tra il XII e il XV secolo,[9] la più antica è evidentemente quella che ha vergato le date e, probabilmente, otto obiti.[10] Personalmente, ritengo peraltro che quello giunto sino a noi sia il necrologio originale della comunità canonicale: l'unico necrologio renano, dalle origini fino alla copia richiesta dal beato Stefano da Siena tra

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[8] Paris, Bibliothèque Nationale, ms. lat. 10148, f. 17r [Necrologium Sanctae Mariae de Reno et Sancti Salvatoris de Bononia]. | Gallica (bnf.fr) (nel testo si sono normalizzate le maiuscole); cfr. anche *Memorie Istoriche Concernenti le due Canoniche di S. Maria di Reno, e di S. Salvatore insieme unite.* Opera di D. Gio. Grisostomo Trombelli abate di S. Maria di Reno… (Bologna, Per Girolamo Corciolani, ed Eredi Colli a S. Tommaso d'Aquino, 1752) 348.

[9] Cfr. Francesca Bocchi, 'Il necrologio della canonica di Santa Maria di Reno e di San Salvatore di Bologna: note su un testo quasi dimenticato', *Atti e memorie della Deputazione di storia patria per le province di Romagna* n.s. 24 (1973) 53-132 a 68.

[10] Gli obiti sono quelli di *Gualfredus canonicus Sancte Marie de Reno* (25 gennaio), di *Bernardus Burdone conversus Sancti Salvatoris* (13 febbraio), di *Nicolettus de Raginaldo* (24 aprile), di *Leo canonicus Sancte Marie de Reno* (27 maggio), di *Clariça* (28 maggio), di *Benencasa* (26 giugno), di *presbiter Paulus canonicus Sancte Marie de Reno* e di *presbiter Albertus canonicus Sancte Marie de Reno* (8 settembre); non si esclude tuttavia che anche qualche altro obito – per esempio, *Bonacursius filius magistri Bulgari* (21 agosto) – possa essere stato vergato da questa mano (cfr. Bocchi, 'Il necrologio' 72-73).

il 1419 e il 1433.[11] In questo caso, l'amanuense che ha vergato il calendario potrebbe aver operato sul necrologio per un certo tempo, e nello stesso periodo un'altra mano o altre mani potrebbero aver scritto uno o più obiti. La notizia del decesso di *Guarnerius Teutonicus* potrebbe perciò essere stata scritta da una mano diversa tra un obito e un altro aggiunto dalla mano del calendario oppure quella mano potrebbe aver inserito in rapida successione gli otto obiti e il ricordo della morte di *Guarnerius Teutonicus* potrebbe essere stato aggiunto a breve distanza di tempo da un'altra mano: in entrambi i casi questa mano potrebbe essere molto vicina nel tempo alla stesura del calendario. Si potrebbe anche ipotizzare che questo sia il necrologio originale e che, tuttavia, non risalga al tempo della fondazione, ma comunque ai primi lustri del secolo XII: nel caso, chi scrisse il calendario poté indicare contestualmente i nomi di tutti i precedenti morti che meritavano di essere menzionati per lo speciale rapporto intrattenuto con la canonica regolare e, in seguito, un'altra mano poté inserire l'obito di *Guarnerius Teutonicus*.

Qualora, invece, si sostenesse, come è stato fatto, che il necrologio fu preceduto da un altro, perduto, trascritto in questo,[12] bisognerebbe pensare a un primo necrologio, con meno di una decina di obiti, che si ritenne non adeguato alle esigenze dei canonici e fu perciò copiato e abbandonato: ciò che appare piuttosto inverosimile. Secondo tale ipotesi, tutte le mani che non

[11] Cfr. ibid. 78.

[12] Non si sono peraltro portati elementi convincenti a sostegno di questa ipotesi. Non mi pare, invero, che si possa inferire l'esistenza di un necrologio più antico dal fatto che la mano del calendario scrive otto o nove obiti e che un'altra mano verga decine di obiti, tra cui quello di Bulgaro, con grafia stabile e perció-si presume-in un breve lasso di tempo (cfr. ibid. 73-74). Senza elementi ulteriori a supportarle, queste affermazioni richiamano alla mente le datazioni al quarto di secolo, azzardate e persino temerarie, alle quali ci si riferisce in Giovanna Nicolaj, 'Ambiti di copia e copisti di codici giuridici in Italia (secoli V-XII in.)', *A Ennio Cortese*, scritti promossi da Domenico Maffei e raccolti a cura di Italo Birocchi, Mario Caravale, Emanuele Conte, Ugo Petronio, II (Roma 2001) 478-496 a 495.

sono quella del calendario—il cui *terminus ante quem* sarebbe in questo caso il 1141 (in data 28 maggio l'obito di *Clariça*, scritto dalla mano del calendario, è infatti collocato prima ed è dunque probabilmente anteriore a quello del cancelliere Aimerico, scritto da un'altra mano e di sicura datazione in quell'anno), e che potrebbe peraltro collocarsi anche molto più indietro nel tempo—avrebbero operato direttamente su questo manoscritto, scrivendo presumibil-mente appena giungevano le notizie dei decessi, e l'obito di *Guarnerius Teutonicus* sarebbe stato inserito, presto o a distanza di tempo, dopo gli obiti vergati dalla mano del calendario. L'alternativa, forse ancor più inverosimile, è che gli obiti del necrologio più antico siano stati trascritti da diverse mani, per quanto una sola abbia vergato in precedenza le date del calendario: lo stesso obito di *Guarnerius Teutonicus* potrebbe in questo caso essere stato copiato dal necrologio precedente oppure potrebbe essere stato aggiunto in qualunque momento dopo la trascrizione di quello. Si noti peraltro che, a parte le modalità della trascrizione dal necrologio più antico, se mai è esistito, non vi è ragione per ritenere che nel necrologio scrivesse prima un canonico, poi un altro e quindi un altro ancora, e che diverse mani non si alternassero, invece, persino per decenni. Lo straordinario numero di mani che hanno scritto obiti induce peraltro a credere che non vi fosse, in linea di massima e a parte eccezioni—penso in particolare alla mano alla quale sono riconducibili numerosi obiti, e tra questi quelli del cancelliere Aimerico, di Bulgaro e di Rendivacca di Veteraria (il primo obito datato, nel 1173)[13]—, un canonico deputato a scrivere i nomi dei defunti nel necrologio o uno che di preferenza faceva questo. Dal punto di vista paleografico, nell'ottica dell'identificazione di *Guarnerius Teutonicus* con Irnerio tutto quello che interessa è che la mano che verga il calendario sia compatibile con una datazione tra la fine dell'XI e i primi lustri del XII secolo e che la mano che scrive l'obito di *Guarnerius Teutonicus* sia compatibile con la data di

[13] Cfr. Bocchi, 'Il necrologio' 66.

morte del giurista, tra gli anni Venti e gli anni Trenta del secolo XII:[14] questo non sarebbe peraltro necessario se gli obiti furono copiati da diverse mani da un necrologio precedente in quello giunto sino a noi. In definitiva, tutte queste ipotesi, indifferentemente, possono permettere di identificare nel *Guarnerius Teutonicus* del necrologio il *primus illuminator* della scienza giuridica bolognese. Ancora, il decesso di *Clariça*, precedendo con ogni probabilità quello del cancelliere Aimerico, avvenne quando Irnerio era ancora in vita o a breve distanza dalla sua morte: una ragione ulteriore per affermare che anch'egli poteva essere ricordato nel necrologio renano.

Vi è, nondimeno, molto più che questo. Per la posizione occupata, *Guarnerius Teutonicus* è verosimilmente colui che è morto per primo tra quanti sono indicati in data 13 settembre.[15] Questo obito non ha *terminus a quo* in un defunto precedente nella stessa data, tanto meno nella memoria di qualcuno morto dopo Irnerio, e potrebbe essere davvero assai risalente: il *terminus a quo* è la fondazione della canonica regolare renana, quasi certamente anteriore—e forse anche di alcuni decenni anteriore—alla morte del giurista. Dei defunti per i quali pregare si poté peraltro tenere nota fin dal tempo della fondazione—a partire dal primo decesso di un canonico o di un amico o benefattore dei religiosi renani –, tanto più che nelle abbazie e nelle canoniche regolari si conservavadi solito un elenco dei morti in forma di necrologio o di obituario. L'obito ha peraltro un *terminus ante quem* nel 1209, anno di morte di *Iulitta uxor Alberti de Turcli*, collocata dopo *Guarnerius Teutonicus* e dopo il *magister Petrus* converso di Santa Maria in Porto. La grafia dell'antroponimo che ci interessa

[14] L'ultima indicazione certa di Irnerio in vita è la scomunica di Reims del 1119 cfr. Giuseppe Mazzanti, 'Un falso irneriano? Riconsiderazioni sul documento del 1125', Pierpaolo Bonacini-Andrea Padovani curr. *Il contributo del monastero di S. Benedetto Polirone alla cultura giuridica italiana (secc. XI-XVI)*. Atti del Convegno, San Benedetto Po, ex refettorio monastico – Piazza Matilde, 29 settembre 2007 (San Benedetto Po 2009) 37-44.

[15] L'importanza della posizione immediatamente accanto alla data è richiamata in Bocchi, 'Il necrologio' 74-75.

risale al XII secolo, potrebbe essere degli anni in cui muore Irnerio e, grosso modo, degli stessi anni della mano che scrive il calendario. La data del 13 settembre è inoltre prossima a quella del 19 settembre nella quale nell'obituario dei canonici regolari di San Vittore di Parigi si legge: *Ob. magister Garnerius Teutonicus de cuius beneficio habuimus quinque libros optimos glosatos*.[16] In ragione della distanza tra Bologna e Parigi, e considerando che ai tempi le notizie viaggiavano talvolta sulle zampe dei quadrupedi, talaltra sulle gambe degli uomini, e che accadeva che si annotasse l'obito accanto alla data in cui veniva comunicato il decesso[17] oppure secondo le indicazioni di chi recava tale notizia, questa differenza di pochi giorni tra l'indicazione della morte di *Guarnerius Teutonicus* nel necrologio renano e di *magister Garnerius Teutonicus* nell'obituario vittorino non appare un ostacolo all'identi-ficazione, ma semmai un elemento assai significativo in questo senso.[18] In altri termini, il fatto che nel necrologio dei canonici regolari renani, alle porte di Bologna, il 13 settembre si menzioni innanzitutto un *Guarnerius Teutonicus*—un elemento tanto più rilevante poiché *Guarnerius* e le sue varianti *Garnerius*, *Wernerius* e *Warnerius* ricorrono di rado nell'onomastica di questo territorio—e che nell'obituario dei vittorini di Parigi in data 19 settembre si ricordi un *magister Garnerius Teutonicus*, benefattore dei canonici in ragione di una donazione di cinque ottimi libri con glossa (*quinque libros optimos glosatos*), ci induce a ritenere che in entrambe le fonti si richiami la morte di Irnerio.

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[16] *Obituaires de la province de Sens. Tome I (Diocèses de Sens et de Paris)* publié par M. Auguste Molinier sous la direction et avec une préface de M. Auguste Longnon. Première partie (Paris 1902) 587.

[17] Cfr. *Memorie Istoriche Concernenti le due Canoniche di S. Maria di Reno, e di S. Salvatore insieme unite.* Opera di D. Gio. Grisostomo Trombelli 320, dove si nota tra l'altro che taluni facevano inserire il loro nome nel necrologio quando ancora erano in vita.

[18] In un'*additio* di uno scolaro di Francesco d'Accursio si afferma che, oramai molto avanti con gli anni, Irnerio lasciò l'insegnamento petroniano e tornò a casa sua (cfr. Pace, ''Garnerius Theutonicus'' 125). Non morì, dunque, a Bologna e potrebbe non essere morto neppure a Parigi: in una, o in entrambe le città, la notizia del decesso dovette giungere dopo un certo tempo.

Diverse considerazioni si possono peraltro proporre in riferimento all'indicazione di *Guarnerius Teutonicus* senza il titolo di *magister*, come accade del resto in tutte le altre fonti, a eccezione dell'obituario di San Vittore. Non sappiamo innanzitutto quanti siano nel necrologio i *magistri* menzionati senza appellativo: la mancanza del titolo potrebbe anche non essere inusuale. Questo documento—l'elenco dei defunti che una comunità di religiosi vuole ricordare nella preghiera—è d'altra parte a uso interno, e può prescindere da formalità e titoli che verrebbero utilizzati in un altro tipo di fonti: il modo in cui gli obiti sono segnati nel necrologio dipende essenzialmente dalla sensibilità di chi li scrive. Si potrebbe del resto ipotizzare che il giurista sia ricordato in questo modo in ragione della sua biografia cesarista molto divisiva, della scomunica del 1119, dalla quale poteva non essere stato sciolto o poteva essere stato sciolto di recente, quando giunse la morte, e perché all'interno della Chiesa, e forse nella stessa Bologna, quando infine prevalse il vescovo di obbedienza romana sul presule della *Reichskirche*, aveva nemici: è possibile, insomma, che si volesse ricordare Irnerio nella preghiera, perché era stato un amico dei canonici, ma forse con sobrietà e in tono dimesso, perché del *Guarnerius Teutonicus* del necrologio non fosse chiara l'identità se non ai religiosi renani e ben presto neppure a loro, pur continuando i canonici a pregare per la sua anima, un anno dopo l'altro. Oppure si potrebbe ipotizzare che la mancanza del titolo indichi una maggiore prossimità, una più profonda confidenza tra i canonici regolari e *Guarnerius Teutonicus*: per quanto qualcuno possa occupare un ruolo di primo piano sulla scena del mondo, e quand'anche abbia meritato titoli altisonanti e una fama imperitura, se è uno di famiglia, lo si chiama per nome. *Guarnerius Teutonicus* è indicato da una mano assai antica nel necrologio di una canonica regolare ubicata a tre miglia da Bologna; perché non dovrebbe essere Irnerio? Perché non dovrebbe esserlo, quando già altre volte, in altre fonti, *Guarnerius Teutonicus* è Irnerio?

Sono peraltro noti gli stretti rapporti di molti giuristi, e anche degli allievi di Irnerio, con i canonici regolari in generale e con quelli di Santa Maria di Reno in particolare. Nel necrologio si

ricordano per esempio la morte di Bulgaro *doctor legis*, in data 1° gennaio, e quella di Iacopo *magister et doctor legum*—Iacopo, si noti, è l'allievo che Irnerio sentiva come il più vicino a sé[19] –, in data 11 ottobre 1178.[20] Questi rapporti tra l'università e i canonici sarebbero continuati nel tempo: il 10 aprile 1235 si annota la morte di Iacopo Balduini, *summus doctor legum*, in data 22 ottobre—l'anno di morte è il 1334—quella di Uberto da Cesena (*Ubertus decretorum doctor*), priore per tre anni di Santa Maria di Reno e in seguito vescovo di Concordia. Nel necrologio si menzionano peraltro due figli e un fratello di Bulgaro (*Bonacursus filius magistri Bulgari*, *Bulgarinus filius magistri Bulgari* e *Tedericus frater magistri Bulgari*, rispettivamente il 21 agosto, il 5 ottobre e il 27 agosto) e una figlia di Iacopo (*Zugiana filia domini Iacobi leg. doctor*, il 26 agosto). Al mondo dei giuristi appartengono altresì il dottore di leggi *Bandinus Tuscus* (4 febbraio e 4 dicembre 1218), *Petrus de Fano qui reliquit nobis codicem* (8 marzo), *Bonifacius doctor legum* (19 marzo 1234), *Allamannus iudex* (10 agosto), *Adam nobis commissus qui dedit nobis par decretorum* (19 settembre), *Galvanus de Allegralcore doctor legum iudex noster amicus octimus et perfectus nostre domus* (7 novembre 1270), *dominus Bollognitus Zambonini*

[19] Secondo il racconto di Otto Morena, Irnerio si sarebbe rivolto a Iacopo con le parole: *Iacobus id quod ego* (cfr. Otto Morena, *De rebus Laudensibus*, MGH SS, XVIII (Hannoverae 1863 [rist. anast. Stuttgart 1990]) 607; si veda anche Luca Loschiavo, 'Iacopo di Porta Ravennate', DBI, LXII (Roma 2004) 84-87 a 84-85). Come il maestro, Iacopo mantenne peraltro stretti rapporti con il mondo delle arti (cfr. *ibid.* 86).

[20] Secondo antichi canonisti Iacopo collaborò nell'individuare le fonti dello *ius civile* da inserire nel Decreto; la sua ispirazione religiosa risulta peraltro evidente nell'orientamento a ritenere punibile la mera *voluntas* e nell'affermazione del prevalere dello *ius divinum* – ma non dei *canones* – sullo *ius civile* (cfr. *ibid.* 86-87 e Id., 'Iacopo di Porta Ravennate', DGI, I (Bologna 2013) 1103-1104 a 1104). In un altro contesto canonicale, nel 1169 Iacopo difende Guido abate di Pomposa nella lite con Monaldo priore di Santa Maria in Porto, in riferimento al possesso di alcune terre presso Ferrara, Comacchio e Bagnacavallo (cfr. *Codice diplomatico della Chiesa bolognese. Documenti autentici e spuri (secoli IV-XII)*, a cura di Mario Fanti e Lorenzo Paolini, con prefazione di Ovidio Capitani (Roma 2004) 268-272).

notarius (2 dicembre 1236), *dominus Sigizellus de Umzola iudex* (25 dicembre 1236).[21]

Come già accennato, il 28 maggio è indicato inoltre l'obito del cancelliere Aimerico—colui al quale Bulgaro dedicò la sua opera sul processo lasciò ai canonici renani *calicem magnum et siphum argenti et X. untias auri*,[22] ai canonici regolari di San Vittore di Bologna *XX uncias auri*,[23] ai vittorini di Parigi *plurimorum sanctorum reliquias, thecis argenteis honorifice conditas, et in cultu altaris casulas et pallia aliaque diversi generis ornamenta*[24]—e, con riferimento alla data del 10 giugno 1190, si richiama la morte del Barbarossa, *patronus ecclesie Sancte Marie de Reno, qui eidem ecclesie predium et alia bona contulit*: l'imperatore stendeva la sua protezione sui canonici renani[25] come pure sui maestri e sugli studenti dell'università di Bologna—si ricordi la costituzione federiciana *Habita*[26]—e allo stesso tempo i glossatori intrattenevano stretti rapporti con Santa Maria di Reno.[27]

Nel necrologio dei canonici regolari di S. Vittore di Bologna,[28] il 1° giugno 1168 si menziona altresì Ugo di Porta

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[21] In data 23 settembre si ricorda inoltre *domina Imilda mater Armanni iudicis*.
[22] *Memorie Istoriche Concernenti le due Canoniche di S. Maria di Reno, e di S. Salvatore insieme unite.* Opera di D. Gio. Grisostomo Trombelli 339.
[23] Mario Fanti, *Il Necrologio della Canonica di San Vittore e San Giovanni in Monte di Bologna (secoli XII-XV). Note su un testo ricuperato* (Bologna 1996) 66.
[24] *Obituaires de la province de Sens. Tome I (Diocèses de Sens et de Paris)* publié par M. Auguste Molinier… Première partie 561.
[25] Si veda anche Bocchi, 'Il necrologio' 98.
[26] Cfr. Giovanni de Vergottini, *Lo Studio di Bologna, l'Impero, il Papato* (Spoleto 1996) 27-41.
[27] Il ricordo della morte di Matilde di Canossa è da intendersi invece come un'annotazione annalistica inserita nel necrologio (cfr. Bocchi, 'Il necrologio' 98-99).
[28] Fanti, *Il Necrologio della Canonica di San Vittore e San Giovanni in Monte di Bologna (secoli XII-XV)* 42 nota che l'obito più antico del necrologio vittorino è quello del preposto Sighizo, in data 1° agosto 1120, mentre i riconoscimenti dell'arcivescovo di Ravenna e del vescovo di Bologna per la

Ravegnana come *causidicus, clericus et frater noster*[29] e il 13 settembre 1222 Guizzardino come *legum doctor frater noster*; assieme ai loro furono inseriti gli obiti di altri giuristi minori.[30] Già causidico con Irnerio il 28 giugno 1112 a Cornacervina,[31] e con lui presente a Governolo il 15 maggio 1116,[32] il giurista Ugo Ansaldi è testimone in un documento dell'abbazia del 1126.[33] Non vi è solo questo. Dalla documentazione dell'archivio dei canonici regolari lateranensi di San Giovanni in Monte e San Vittore emerge che l'8 ottobre 1159 Bulgaro, indicato come causidico, pronunciò la sentenza in una controversia vertente tra i canonici di San Vittore e i figli del fu Dondedeo di Domenico Cabalerio,[34] che rapporti frequenti con i canonici di San Vittore e San Giovanni in Monte ebbero i giuristi Valfredo[35]—e suo figlio Ildebrando—e Ugo di

canonica di San Vittore risalgono al 1133. Sulla base di questi elementi lo studioso ritiene di poter affermare che la fondazione di San Vittore precede quella di S. Maria di Reno e ipotizza persino che all'origine della canonica renana vi sia la scissione di un gruppo di vittorini (cfr. *ibid.* 44-50). In considerazione degli elementi richiamati e del fatto che nel giugno 1121 il vescovo petroniano Vittore rinnova ai canonici di San Vittore l'enfiteusi di tre pezze di terra (cfr. *Codice diplomatico della Chiesa bolognese. Documenti autentici e spuri (secoli IV-XII)*, a cura di Mario Fanti e Lorenzo Paolini 178-179), la fondazione della canonica deve collocarsi in anni anteriori, forse anche di molto, al 1120, ma le conoscenze attuali non permettono di affermare la maggiore antichità di questa canonica rispetto alla canonica renana – nulla esclude peraltro che risalgano entrambe agli anni a cavaliere tra l'XI e il XII secolo – e sul punto preferiamo perciò sospendere il giudizio.

[29] Luca Loschiavo, 'Ugo di Porta Ravennate', DGI 2 (Bologna 2013) 1993-1994 a 1993 nota che a Bologna il giurista intrattenne stretti rapporti anche con S. Stefano.

[30] Cfr. Fanti, *Il Necrologio della Canonica di San Vittore e San Giovanni in Monte di Bologna (secoli XII-XV) ad indicem*.

[31] Cfr. Spagnesi, 'Wernerius bononiensis iudex', *La figura storica d'Irnerio* 29-30.

[32] Cfr. *ibid*. 73-74, 77.

[33] Cfr. *Chartularium studii bononiensis*, XII (Bologna 1939) 12-13.

[34] Cfr. *ibid.* 32-33.

[35] Cfr. *ibid. ad indices*. Sugli intensi rapporti tra i giuristi bolognesi del XII secolo e i canonici regolari del territorio si vedano Giorgio Cencetti, 'Le carte del secolo XI dell'Archivio di S. Giovanni in Monte e S. Vittore', *Notariato medievale bolognese. Scritti di Giorgio Cencetti*, I (Roma 1977) 133-182 a 136-

Porta Ravegnana.[36] Si ricordi d'altra parte che il 28 aprile 1186 Isabella, vedova dello stesso Ugo, donò tutti i suoi beni ai canonici di San Vittore e di San Giovanni in Monte per la salvezza della sua anima e di quella dei suoi congiunti (*pro anima mea meorumque parentum*).[37]

Qualche riflessione su Irnerio e i canonici regolari

In un contributo di molti anni fa cercai di individuare alcuni fili che legano Irnerio e i suoi allievi ai canonici regolari, non solo del territorio bolognese.[38] La presenza di un *Guarnerius Teutonicus* nel necrologio renano, in quella data e in quella posizione, rafforza senza dubbio la mia interpretazione di allora nel senso dell'identificazione del *magister Garnerius Teutonicus* dell'obituario vittorino con Irnerio. Con due conseguenze ulteriori: per un verso, la data di morte del giurista dovrebbe essere il 13 settembre o il 19 settembre o anche una data collocabile in prossimità di queste―come detto, poteva accadere che si annotasse l'obito in corrispondenza della data in cui veniva comunicato il decesso –; per altro verso, in vita o in morte, Irnerio donò ai canonici parigini i manoscritti del diritto romano annotati

137 e Dolcini, 'Università e Chiesa di Bologna: dall'identità originaria allo sviluppo di molteplici relazioni' 278, il quale ricorda le relazioni che intercorsero «fra Bulgaro e la canonica regolare di S. Maria di Reno, Valfredo e la chiesa canonicale di San Vittore, Ugo di Porta Ravennate con la chiesa di S. Giovanni in *Monte Oliveto*, dove forse fu ricevuto fra i canonici». Per quanto meno noto dei quattro dottori, Valfredo fu un giurista di fama, giudice imperiale e *legis doctor*, e basti qui ricordare che compare in un documento veneziano del 1143 assieme a Graziano e a Mosè, futuro arcivescovo di Ravenna, come consigliere di Goizo, cardinale legato di Innocenzo II, chiamato a pronunciare una sentenza in materia di decime ecclesiastiche (cfr. Ennio Cortese, *Le grandi linee della storia giuridica medievale* (Roma 2000) 327-329; in generale, su questo giurista si veda Thorsten Behle, *Der Magister Walfred von Bologna. Ein Beitrag zu den Anfängen der Bologneser Rechtsschule* (Wien-Berlin 2008)). Potrebbe essere lui il *magister Gualfredus* ricordato in data 17 settembre nel necrologio renano.

[36] Cfr. *Chartularium studii bononiensis*, XII *ad indices*.

[37] Cfr. *ibid.* 76-77.

[38] Cfr. Mazzanti, 'Irnerio' 144-152.

con le glosse,[39] mentre non vi è notizia di suoi doni ai canonici renani, e questo nonostante nel necrologio si menzionino più volte donazioni di libri, donazioni in denaro, etc.; è però vero che, al contrario dell'obituario, il necrologio ha una finalità liturgica e che, a parte rilevanti eccezioni—per esempio, la già ricordata donazione ai canonici renani del cancelliere Aimerico, trattino lungo e senza spazi prima e dopo, solo in progresso di tempo vi si indicano anche i doni ricevuti:[40] tutto ciò per dire che è possibile che Irnerio abbia compiuto atti di liberalità nei confronti dei canonici renani e che degli stessi non vi sia traccia nel necrologio, ma è anche possibile che non sia così. Per quanto dalle indicazioni nel necrologio e nell'obituario possa dedursi la prossimità di Irnerio agli uni come agli altri, si potrebbe dunque ipotizzare una sua maggiore vicinanza ai canonici regolari parigini; ma potrebbe in realtà anche solamente trattarsi di una diversa valutazione della loro cultura rispetto a quella dei canonici renani, nonché della volontà di rendere fruibili i testi giustinianei con le glosse di suo pugno nella scuola vittorina e a Parigi, una necessità che non poteva evidentemente essere avvertita allo stesso modo a Bologna e nel suo territorio. In proposito dovrà inoltre notarsi che, avendo origine l'università di arti e teologia di Parigi dalle scuole di Notre-Dame, di San Vittore e di Sainte-Geneviève, e potendo annoverare tra le figure eminenti del suo periodo aurorale Guglielmo di Champeaux, prima arcidiacono di Notre-Dame e quindi fondatore della canonica regolare di San Vittore, da subito vi furono rapporti diretti tra gli *studia* di Bologna e di Parigi: nel suo sodalizio

[39] Le due notizie si rafforzano l'una con l'altra, con l'esito di poter ora affermare con più forza di quando ne scrivemmo la prima volta che Irnerio donò il *Corpus iuris* con glossa ai canonici vittorini e che la suddivisione del diritto romano in cinque volumi, che sarebbe stata usuale per tutta l'età del diritto comune, risale a lui (cfr. Manlio Bellomo, *Saggio sull'università nell'età del diritto comune* (Catania 1979) 12-14 e Mazzanti, 'Irnerio' 137-139 n. 43, 146 n. 62; in Cortese, 'Irnerio', DBI 603 si è in seguito sostenuto il contrario), per quanto non si possa allo stesso tempo affermare che la ripartizione del testo nei diversi volumi fosse già allora quella che si sarebbe consolidata in seguito.

[40] Cfr. Bocchi, 'Il necrologio' 77-78.

intellettuale con i vittorini, Irnerio donò infatti il *corpus iuris* con glossa—il testo sul quale si formavano gli scolari petroniani—ai maestri che insegnavano sulla riva sinistra della Senna.[41]

Irnerio ebbe senza dubbio legami assai stretti con il mondo dei canonici regolari, e lo stesso deve dirsi dei suoi allievi e dei loro congiunti. La memoria di *Guarnerius Teutonicus* nel necrologio renano e di *magister Garnerius Teutonicus* nell'obituario vittorino senza indicazioni ulteriori—non come *canonicus* e neppure come *frater*—induce a credere che egli fosse un amico dei canonici regolari, uno che si sentiva spiritualmente e culturalmente vicino a loro, ai quali poteva anche accomunarlo un *idem sentire* in riferimento alla moralizzazione e alla riforma della Chiesa—tra gli uomini dell'imperatore era, questa, un'esigenza avvertita da molti—, ma non un canonico regolare. Nell'oscurità che copre gran parte della biografia irneriana, si può per il momento ipotizzare che tale forte vicinanza ideale originasse negli anni della formazione adolescenziale, o al più della giovinezza, presso la scuola di Lanfranco di Pavia,[42] frequentata da religiosi, da laici che avrebbero professato i voti, da futuri canonici regolari:[43] la spiritualità benedettina aveva d'altra parte molti punti di contatto con la spiritualità agostiniana di questi canonici.[44]

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[41] Su Irnerio e i maestri francesi si veda Andrea Padovani, 'Intrecci inattesi: giustizia e virtù in Abelardo ed Irnerio', RIDC 33 (2022) 35-57.

[42] Si noti che Lanfranco di Pavia insegnò innanzitutto nella scuola del monastero del Bec e che nell'obituario vittorino in data 5 maggio si legge: «It. commemoratio soll. fratrum et benefactorum Sancte Marie Becci» (*Obituaires de la province de Sens. Tome I (Diocèses de Sens et de Paris)* publié par M. Auguste Molinier… Première partie 558).

[43] Cfr. Mazzanti, 'Irnerio*'* 173-178. Allievo di Lanfranco, Ivo di Chartres promosse la vita canonicale organizzando l'*ordo* di S. Quintino di Beauvais (cfr. Charles Dereine, 'Chanoines', DHGE, XII (Paris 1953) 353-405 a 388).

[44] Sull'origine e la spiritualità dei canonici regolari si vedano Id., 'Vie commune, règle de Saint Augustin et chanoines réguliers au XI^{e} siècle', RHE XLI (1946) 365-406; Id., 'Chanoines' 353-405; *La vita comune del clero nei secoli XI e XII. Atti della Settimana di studio: Mendola, settembre 1959*, I-II (Milano 1962); Carlo Egger, 'Canonici regolari', *Dizionario degli istituti di*

È d'altra parte possibile che alcuni canonici regolari frequentassero le lezioni di diritto civile di Irnerio. I canonici riuniti in congregazioni avevano scuole,[45] talvolta di straordinario rilievo—si pensi, per esempio, a quella dei vittorini di Parigi—trattino lungo e senza spazi prima e dopo, ed è noto che vi erano religiosi i quali, attratti dalla prospettiva del lucro, si dedicavano agli studi civilistici. Già negli anni Venti del XII secolo è documentata la presenza di monaci provenzali che studiano diritto in Italia[46] e nei concili di Clermont-Ferrand (1130),[47] di Reims (1131),[48] di Pisa (1135),[49] nel concilio

perfezione, II (Roma 1975) 46-63; Ivan Gobry, *Cavalieri e pellegrini: ordini monastici e canonici regolari nel XII secolo* (Roma 2000). Si noti inoltre che Irnerio scrisse un florilegio di sentenze teologiche tratte in netta prevalenza dalle opere del vescovo di Ippona (cfr. Guarnerius Iurisperitissimus, Liber divinarum sententiarum).

[45] Cfr. Bellomo, *Saggio sull'università nell'età del diritto comune* 30-31.

[46] Questa la testimonianza di un monaco di San Vittore di Marsiglia in *Epistola R. monachi S. Victoris ad B. abbatem suum*, PL 151 (Parisiis 1854) 641-642, la lettera fu in seguito pubblicata con un ampio commento, in Jean Dufour-Gérard Giordanengo-André Gouron, 'L'attrait des 'leges'. Note sur la lettre d'un moine victorin (vers 1124/1127)', SDHI 45 (1979) 504-529. Cfr. anche Ennio Cortese, 'Alle origini della scuola di Bologna', RIDC 4 (1993) 7-49 a 35-36 e Padovani, *Perché chiedi il mio nome?* 276-277.

[47] Cfr. Mansi, XXI (Venetiis, apud Antonium Zatta, 1776) 438-439.

[48] Cfr. Robert Somerville, 'The Canons of Reims (1131)', BMCL 5 (1975) 122-130 a 126 e in Idem, *Papacy, Councils and Canon Law in the 11th-12th Centuries* (Aldershot 1990) XV. Sulla base di un passo del *Draco Normannicus* di Stefano di Rouen si può avanzare l'ipotesi che Graziano fosse presente al concilio di Reims (cfr. Giuseppe Mazzanti, 'Graziano e Rolando Bandinelli', *Studi di storia del diritto*, II (Milano 1999) 97-103), ma il canone 6, in cui si vieta ai religiosi lo studio del diritto civile, non fu incluso nel Decreto: sulla questione si veda Kenneth Pennington, 'Roman Law at the Papal Curia in the Early Twelfth Century', Uta-Renate Blumenthal-Anders Winroth-Peter Landau (curr.), *Canon Law, Religion, and Politics. Liber Amicorum Robert Somerville* (Washington D.C. 2012) 233-252.

[49] Cfr. Robert Somerville, 'The Council of Pisa, 1135: A Re-examination of the Evidence for the Canons', *Speculum* XLV/1 (1970) 98-114 a 106-107 e in Id., *Papacy, Councils and Canon Law in the 11th-12th Centuries* XVI.

Lateranense II (1139),[50] nel concilio di Montpellier (1162),[51] nel concilio di Tours (1163),[52] in un altro concilio di Montpellier (1195),[53] nel concilio di Parigi (1212),[54] nel concilio di Rouen (1214),[55] in un ulteriore concilio di Montpellier (1215)[56] e, ancora, in un passo della bolla *Super speculam* di Onorio III (1219),[57] poi

[50] Cfr. COD (Bologna 1973) 198-199: «Prava autem consuetudo, prout accepimus, et detestabilis inolevit, quoniam monachi et regulares canonici post susceptum habitum et professionem factam, spreta beatorum magistrorum Benedicti et Augustini regula, leges temporales et medicinam gratia lucri temporalis addiscunt. Avaritiae namque flammis accensi, se patronos causarum faciunt; et cum psalmodiae et hymnis vacare debeant, gloriosae vocis confisi munimine, allegationum suarum varietate iustum et iniustum, fas nefasque confundunt. Attestantur vero imperiales constitutiones, absurdum immo et opprobrium esse clericis, si peritos se velint disceptationum esse forensium. Huiusmodi temeratores graviter feriendos, apostolica auctoritate decernimus. Ipsi quoque, neglecta animarum cura, ordinis sui propositum nullatenus attendentes, pro detestanda pecunia sanitatem pollicentes, humanorum curatores se faciunt corporum. Cumque impudicus oculus impudici cordis sit nuntius, illa de quibus loqui erubescit honestas, non debet religio pertractare. Ut ergo ordo monasticus et canonicus Deo placens in sancto proposito inviolabiliter conservetur, ne hoc ulterius praesumatur, apostolica auctoritate interdicimus. Episcopi autem, abbates et priores tantae enormitati consentientes et non corrigentes, propriis honoribus spolientur et ab ecclesiae liminibus arceantur».

[51] Cfr. Mansi, XXI 1160.

[52] Cfr. ibid. 1179 [= X 3.50.3].

[53] Cfr. Mansi, XXII (Venetiis, apud Antonium Zatta, 1778) 670.

[54] Cfr. ibid. 831.

[55] Cfr. ibid. 910.

[56] Cfr. ibid. 831.

[57] Cfr. Heinrich Denifle, *Chartularium Universitatis Parisiensis*, I (Parisiis 1889) 91: «Sane licet fallax sit gratia ceterarum scientiarum et vana etiam pulchritudo, cum frumentum electorum et vinum germinans virgines juxta prophetam sit bonum super omnis, et sit pulchrum, quia tamen regulares quidam claustrale silentium et legem Domini animas convertentem et sapientiam dantem parvulis, quam super aurum et topation amare debuerant, respuentes, abeunt post vestigia gregum et illicite se convertunt ad pedissequas amplectendas, que plausum desiderant populorum, contra hujusmodi presumptores, exeuntes ad audiendum leges vel physicam, felicis memorie A. predecessor noster olim statuit in Concilio Turonensi "ut nisi infra duorum mensium spatium ad claustrum redierint, sicut excommunicati ab omnibus evitentur et in nulla causa, si patrocinium prestare voluerint, audiantur. Reversi

trascritto nel *Liber Extra* (X 3.50.10), si ripetono le condanne nei confronti dei monaci e dei canonici regolari che studiano diritto romano *gratia lucri temporalis*,[58] a dimostrazione degli scarsi risultati ottenuti con questi interventi. Si noti che non si vietavano gli studi civilistici al clero regolare che perseguiva altri fini e innanzitutto, si direbbe, l'utilità della Chiesa: si accettava che i religiosi studiassero le leggi, mentre si rifiutava loro la possibilità di procurarsi denaro con le leggi. Si consideri, inoltre, che la prima condanna in questo senso si ha in un concilio del 1130 e che ci si riferisce a una situazione già consolidata—la si indica infatti come una *prava consuetudo*—e che creava scandalo nella Chiesa. Per rintracciare i primi religiosi che studiano le *leges* occorre insomma risalire nel tempo fino agli anni in cui insegnava Irnerio e individuare forse le ragioni di quell'originario interesse, oltre che nell'avidità degli uomini, dei chierici come dei laici, proprio nelle relazioni che il giurista intratteneva con i canonici regolari. Un'annotazione che verosimilmente non è da riferirsi a Ugo di Porta Ravegnana il quale, sebbene indicato nel necrologio di San Vittore di Bologna come *causidicus, clericus et frater noster*,[59] non dovette essere un canonico regolare: con '*frater noster*' ci si poteva riferire a una fratellanza spirituale[60] e sappiamo peraltro

autem in choro, capitulo, mensa et ceteris ultimi fratrum existant, et nisi forte ex misericordia sedis apostolice, totius spem promotionis amittant"».

[58] Cfr. Bellomo, *Saggio sull'università nell'età del diritto comune* 17-20.

[59] Fanti, *Il Necrologio della Canonica di San Vittore e San Giovanni in Monte di Bologna (secoli XII-XV)* 66. Sembrerebbe che non sempre valga l'alternativa tra causidici e chierici, come indicata nel documento di Cornacervina del 1112 richiamato in precedenza (cfr. anche Carlo Dolcini, 'Lo "Studium" fino al XIII secolo', *Storia di Bologna.* Direttore R. Zangheri. *2. Bologna nel medioevo*, a cura di Ovidio Capitani. Indice dei personaggi e degli autori a cura di G. Mazzanti (Bologna 2007) 477-498 a 486).

[60] Sostiene questa linea Fanti, *Il Necrologio della Canonica di San Vittore e San Giovanni in Monte di Bologna (secoli XII-XV)* 18-29. Gli studiosi si sono peraltro divisi sullo *status* di ecclesiastico di Guizzardino, ricordato nel necrologio vittorino come *legum doctor frater noster* (cfr. *ibid.* 75 e Giuseppe Mazzanti, 'Guizzardino', DBI 61 (Roma 2003) 553-554 a 553).

che il giurista era sposato[61] e che aveva un figlio di nome Alberto.[62]

Sul punto si noterà, ancora, che Bernardo di Clairvaux aveva partecipato ai concili di Clermont-Ferrand, di Reims e di Pisa e che nel *De consideratione* (1148 ca.) rappresentò in questi termini a Eugenio III la situazione della curia romana: *quotidie perstrepunt in palatio leges, sed Iustiniani, non Domini*.[63] Bernardo era in stretti rapporti con il cancelliere Aimerico, al quale dedicò il *Liber de diligendo Deo*, e lo stesso può dirsi di Bulgaro, che gli dedicò l'*Epistola de ordine iudiciorum et regulis iuris*.[64]

[61] La moglie Isabella è attestata come vedova nel 1171 (cfr. Giulia Vendittelli, 'Ugo di Porta Ravegnana', DBI 97 (Roma 2020) UGO di Porta Ravegnana in "Dizionario Biografico" (treccani.it)).

[62] Ibidem.

[63] Bernardo, *De consideratione ad Eugenium papam*, Id., *Opere*, a cura di Ferruccio Gastaldelli, I (Milano 1984) 768; si noti che l'8 luglio 1151 Bulgaro è il delegato di Eugenio III in una lite (cfr. Bruno Paradisi, 'Bulgaro', DBI, XV (Roma 1972) 47-53 a 50). In S. Bernardi *Sermones in Cantica Canticorum, sermo XXXVI*, PL 133 (Parisiis 1862) 968 si legge inoltre: «Et sunt item qui scire volunt ut scientiam suam vendant; verbi causa, pro pecunia, pro honoribus: et turpis quaestus est». Lo stesso Pietro di Blois iuniore († 1211/1212) avrebbe sostenuto in seguito che i chierici dovevano astenersi dallo studio del diritto civile (cfr. Petri Blesensis *Epistolae*, PL, CCVII (Parisiis 1855) 91-92, 233, 416-417).

[64] Sull'*Epistola de ordine iudiciorum et regulis iuris [ad Aimericum]* si vedano Emanuele Conte, '"Ordo iudicii" et "regula iuris". Bulgarus et les origines de la culture juridique (XII^{e} siècle)', Joël Chandelier-Aurélien Robert (curr.), *Frontières des savoirs en Italie à l'époque des premières universités (XIII^{e}-XV^{e} siècles)* (Roma 2015) 157-176 e Bruce C. Brasington, *Order in the Court: Medieval Procedural Treatises in Translation* (Leiden-Boston 2016) 80-111; la lettera di Bulgaro ad Aimerico giunge anche a San Vittore di Parigi (cfr. Gunnar Teske, 'Ein neuer Text des Bulgarus Briefes an den römischen Kanzler Haimerich. Zugleich ein Beitrag zum Verhältnis von Saint-Victor in Paris zur Kurie', Franz Neiske-Dietrich Poeck-Mechthild Sandmann (curr.), *Vinculum Societatis: Joachim Wollasch zum 60. Geburtstag* (Sigmaringendorf 1991) 302-313 e Mazzanti, 'Irnerio' 145 n. 59). Sulla conoscenza del diritto civile a Roma nella prima metà del XII secolo cfr. Luigi Genuardi, 'Il papa Eugenio III e la cultura giuridica in Roma', *Mélanges Fitting*, II (Montpellier 1908) 385-390 a 387-390; Johannes Fried, 'Die römische Kurie und die Anfänge der Prozeßliteratur', ZRG Kan. Abt. 59 (1973) 151-174; Giovanni Chiodi, 'Roma

Presente a tutti i concili in precedenza richiamati, da quello di Clermont-Ferrand al Lateranense II, Aimerico era certamente informato sui religiosi che frequentavano le scuole bolognesi. Dopo i ripetuti interventi conciliari nei confronti del clero regolare che si dedicava agli studi civilistici nella speranza di arricchire, con la bolla *Super speculam* Onorio III proibì l'insegnamento del diritto romano a Parigi, per evitare che gli ecclesiastici si volgessero a questi studi abbandonando teologia.[65] E tuttavia, come emerge negli scritti tardo duecenteschi di Ruggero Bacone († 1292 ca.),[66] trascorrevano i decenni, ma la questione non trovava soluzione.

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e il diritto romano: consulenze di giudici e strategie di avvocati dal X al XII secolo', *Roma fra Oriente e Occidente, 19-24 aprile 2001* (Settimane di studio del Centro Italiano di Studi sull'Alto Medioevo, XLIX; Spoleto 2002) 1141-1245 a 1206-1242 e la 'Discussione sulla lezione Chiodi' (*ibid.* 1247-1254); Pennington, 'Roman Law in the Papal Curia in the Early Twelfth Century' 233-252.

[65] Cfr. Denifle, *Chartularium Universitatis Parisiensis*, 1.90-93: 'Sane licet sancta ecclesia legum secularium non respuat famulatum, que satis equitatis et justitie vestigia imitantur, quia tamen in Francia et nonnullis provinciis laici Romanorum imperatorum legibus non utuntur, et occurrunt raro ecclesiastice cause tales, que non possent statutis canonicis expediri, ut plenius sacre pagine insistatur, et discipuli Elysei liberius juxta fluenta plenissima resideant ut columbe, dum in januis scolas non invenerint, ad quas divaricare valeant pedes suos, firmiter interdicimus et districtius inhibemus, ne Parisius vel in civitatibus seu aliis locis vicinis quisquam docere vel audire ius civile presumat et qui contra fecerit, non solum a causarum patrociniis interim excludatur, verum etiam per episcopum loci appellatione postposita excommunicationis vinculo innodetur' (=X 5.33.28). Cfr. Stephan Kuttner, 'Papst Honorius III. und das Studium des Zivilrechts', Idem *Gratian and the Schools of Law 1140-1234* (London 1983) X 79-101 a 91-92; Gérard Giordanengo, 'Résistances intellectuelles autour de la Décrétale "Super speculam" (1219)', *Histoire et société. Mélanges offerts à Georges Duby*, III (Aix-en-Provence 1992) 141-155; Ennio Cortese, *Le grandi linee della storia giuridica medievale* (Roma 2000) 368-369.

[66] Cfr. Roger Bacon, *Compendium studii philosophiae*, Idem, *Opera quaedam hactenus inedita. Vol. I. Containing I. – Opus tertium. II. – Opus minus. III. Compendium philosophiae.* Edited by J.S. Brewer (London 1859) 418-425 e Id., *Opus tertium*, *ibid.* 84-88 (riferimenti in Ph. Delhaye, *L'organisation scolaire au XII^e siècle*, *Traditio* 5 (1947) 211-268 a 264-268). Si noti, ancora,

Vorrei infine osservare che, sulla base di diversi elementi, è possibile superare le ipotesi ardite di quanti, contro una tradizione storiografica consolidata, ritengono che le origini della scuola giuridica bolognese siano da collocarsi negli anni Trenta del XII secolo, al tempo del magistero di Bulgaro.[67] A prescindere dal passo di Odofredo sulle origini dello *Studium*, accanto a considerazioni che si riferiscono alla produzione giuridica irneriana[68] e ai versi del poeta anonimo che canta la guerra di Milano contro Como del 1118-1127, e che, rispettivamente, nel 1119 e nel 1127 scrive *Docta suas secum duxit Bononia leges* e *Docta Bononia venit et huc cum legibus una*,[69] mostrando che già

che nel Convivio Dante scrive: 'Né si dee chiamare vero filosofo colui che è amico di sapienza per utilitade, sì come sono li legisti, [li] medici e quasi tutti li religiosi, che non per sapere studiano, ma per acquistare moneta o dignitade'. (Cv III, 11, 10).

[67] Cfr. Richard W. Southern, *Scholastic Humanism and the Unification of Europe. Volume I. Foundations* (Oxford-Cambridge (Mass.) 1995) 278-281; Anders Winroth, *The Making of Gratian's* Decretum (Cambridge 2000) 162-174; Fried mit einem Exkurs von Grebner, '... "auf Bitten der Gräfin Mathilde". Werner von Bologna und Irnerius' 171-201 e Anders Winroth, 'The Teaching of Law in the Twelfth Century', Helle Vogt-Mia Münster-Swendsen (curr.), *Law and Learning in the Middle Ages. Proceedings of the Second Carlsberg Academy Conference on Medieval Legal History 2005* (Copenhagen 2006) 41-62 a 41-48, 54.

[68] Cfr. Pennington, 'Odofredus and Irnerius' 26-27: 'Lastly, and most importantly, Irnerius taught law in Bologna in the early twelfth century. All the evidence we have to now substantiates that fact. Skeptics have presented no firm evidence that proves that he did not teach in Bologna. His glosses to the *Digest*, *Codex*, and *Institute* manuscripts are the first link in the chain of evidence. The "authenticae" are the second link in the chain. These texts that Irnerius took and adapted from the *Authenticum* shaped an important part of twelfth-century jurisprudence in Roman and canon law. Twelfth-century jurists thought Irnerius created the core "authenticae" texts. Other jurists follow his lead and added to them. Only a teacher would have produced this body of jurisprudence. He was a "lucerna iuris" who taught Roman law in Bologna whose light still illuminated the pages of Odofredus' manuscripts in the thirteenth century'.

[69] Anonymi Novocomensis *Cumanus, sive poema de bello, et excidio urbis comensis ab anno MCXVIII usque ad MCXXVII*, RIS, V (Mediolani MDCCXXIV) 418, 453 vv. 211, 1848; cfr. anche Francesca Roversi Monaco, ''Docta sua secum duxit Bononia leges': l'immagine di Bologna nelle cronache

in quegli anni Bologna era rinomata per la scienza delle leggi e che si distingueva per questo da tutte le altre città, è proprio il canone del concilio di Clermont-Ferrand, nel quale si indica come *prava consuetudo* quella dei religiosi che studiano diritto civile per ragioni di lucro, che permette di collocare in anni molto anteriori al 1130 le origini della scuola. Come si è notato in precedenza, una consuetudine indicata come tale in un concilio che si celebrava in quell'anno non poteva che risalire al tardo secolo XI o ai primi lustri del seguente: agli anni del magistero petroniano di Irnerio.

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cittadine bassomedievali', Giovanni Feo-Francesca Roversi Monaco (curr.), *Bologna e il secolo XI. Storia, cultura, economia, istituzioni, diritto* (Bologna 2011) 15-24.

‘A Bald Statement of a Summarist with no Axe to Grind’: The Notabilia Clericus apud civilem.[1]

Bruce C. Brasington

In memory of Paul Hyams

Collections of excerpts from Gratian’s *Decretum* are overshadowed by the more elaborate *summae* and gloss *apparatus*. Yet such *notabilia* also reveal how canon law was studied in the late twelfth century.[2] One example is *Clericus apud civilem*, (henceforth *Clericus*) preserved in Cambridge, Sidney Sussex College 101 (C) and Durham, Cathedral Library C.I.I (D).[3] Likely composed at Durham around 1170,[4] its frequently

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[1] A version of this paper was presented at the 2022 meeting of the British Legal History Conferrence. I thank Professor Melodie Eichbauer for her comments; all errors and omission remain, of course, my responsibility. Special thanks to Dr. David De Concilio for permitting me to cite various passages from his recent dissertation: *Via Brocardia: ‘The Development of Brocards and the Western Legal Tradition (c.1160-c.1215)* (University of Saint Andrews 2021).

[2] Harry Dondorp and Eltjo J. Schrage, ‘The Sources of Medieval Learned Law’, *The Creation of the Ius Commune: From Casus to Regula*, edd. John W. Carins, Paul J. Du Plessis (Edinburgh Studies in Law 7; Edinburgh 2010) 7-56 at 22, also Kenneth Pennington and Wolfgang P. Müller, ‘The Decretists: The Italian School’, *The History of Medieval Canon Law in the Classical Period, 1140-1234. From Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pennington (Washington 2008) 121-173 at 160. On knowledge of Gratian’s *Decretum* in the time of Becket, cautioning there was still ‘a considerable level of ignorance’, R.H. Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (The Oxford History of the Laws of England 1, Oxford 2004) 79. *Clericus* may well have been designed to remedy this.

[3] I thank Mr. Nicholas Rogers, archivist of Sidney Sussex College, for allowing me to examine the manuscript several years ago and then providing digital images during the pandemic.Thanks as well to the Hill Monastic Manuscript Library for images of the Durham manuscript, which also contains Gratian’s *Decretum*. Comparison of the readings in *Clericus* with this *Decretum* shows that the *notabilia’s* author often intentionally changed the text as well as excerpting it.

[4] I thank Professor Richard Gameson for information from his forthcoming work, *The Medieval Manuscripts of Durham Cathedral: A Descriptive*

reworked canons, accompanied by six *argumenta*, deserve closer attention.

For *notabilia*, we turn to the *Repertorium der Kanonistik*.[5] The term betrays its origins in marginal *notae*, 'glosses used to draw the attention of the reader to a particular point of the legal text'.[6] This may explain the following passage in *Clericus*: 'Nota puelle in domo patris in puerili etate iurantis statim ut nouit patre reclamante rumpitur ut c.xxii. q.ult. c.ult. Pueri'.[7] In most respects, *Clericus* differs little from the early *brocards*. It preserves 'normative texts', albeit frequently in altered form.[8] Its embedded *argumenta* propose 'legal concepts' supported by 'one or more texts' also intended to provoke disputation.[9] Including *argumenta* with the excerpted canons also does not surprise. Such mixture was not unusual, and a sign of 'conceptual overlap'.[10] At the same time, *Clericus* does not anticipate the *brocards'* subsequent development of an explicitly dialectical structure.[11] While we find

Catalogue. In a personal communication on 2 December 2021 he noted that the scribe who copied *Clericus* on fol. 60v-62r was responsible for the summary of the manuscript's contents on fol. 1r-13r and the list of distinctions in Gratian on fol. 13v-15v. A possession note on fol. 1r likely refers to Robert of Kelloe, monk at Durham from ca. 1328-1362. Arguing insted that the manuscript originated in Italy, Rudolf Weigand, 'Die anglo-normannische Kanonistik in den letzten Jahrzehnten des 12. Jahrhunderts', *Proceedings Cambridge 1984* 249-263 at 252 and 252-253 on the Durham manuscript. He does not discuss *Clericus.* See also De Concilio, *Via Brocardia*, 20, that D.was the earlier manuscript and agreeing with Weigand that C.probably came from Italy, though *Clericus* was written by an English hand.

[5] Kuttner, *Repertorium* 232-233.

[6] De Concilio, *Via Brocardia* 50.

[7] C.22 q.5 c.15: Item ex Concilio Eliberitano. Pueri ante quatuordecim annos non cogantur iurare.Puella quoque, si in puerili etate sita in domo patris, illo nesciente, se iuramento constrinxerit, et pater eius, ut audierit, statim contradixerit, uota eius et iuramenta irrita erunt, et facilius emendabitur.

[8] For example *Dolum*. Compare also early *brocards* as repositories of 'citations for reasoning and disputing without any systematic purpose', De Concilio, *Via Brocardia* 49.

[9] De Concilio, *Via Brocardia*, 51-52.

[10] Ibid. 53-54.

[11] Ibid. 44-46, again with some similarities to *Clericus*.

distinctions, even oppositions, among the excerpted canons, they are never presented *pro-contra* nor do we find *solutiones*.

Our understanding of *Clericus* has not progressed much beyond my title, taken from Geoffrey Barraclough's review of the *Repertorium* for the *English Historical Review*. [12] Later, Kuttner and Eleanor Rathbone noted that it 'fits nowhere better than in the climate of the Becket controversy',[13] and highlighted its treatment of criminous clerics, on which more shortly. In 1956, G. V. Scammell judged both manuscripts products of 'the Durham school', and *Clericus* inspired more by French than Bolognese jurisprudence.[14] More recently, I briefly discussed it at the 2016 *International Congress of Medieval Canon Law*, noting its selection of canons on marriage with a non-Christian, the conjugal debt, and the first *argumentum*.[15] This did not do justice to its rich contents. I have now provided an edition to enable a fuller analysis and possible comparisons with other canonistic *notabilia*. (See appendix.)

Composition at Durham would place *Clericus* during the lengthy tenure of Bishop Hugh of Le Puiset (1153-1195).[16] Who

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[12] Geoffrey Barraclough, EHR (1938) 493-494. Kuttner had been equally laconic: Kuttner, *Repertorium* 234: 'Diese Sammlung gibt ein Beispiel ausführlicherer Auszüge des Rechtsgehalts der angemerkten Dekretstellen, wordurch sie weniger regelhafte, als spezielle Rechtssätze enthält'.

[13] Stephan Kuttner and Eleanor Rathbone, 'Anglo-Norman Canonists of the Twelfth Century: An Introductory Study', *Traditio* 7 (1949-195151) 279-358 at 294, also http://legalhistorysources.com/1140a-z.htm accessed on 14 May 2022. That said, while the conflict may well be behind this excerpt and others on clerical immunity we should not there is no evidence of any response to Henry II.'s decrees of 1169. Appeals to Rome and interdict are nowhere to be found. For a succinct treatment of these decrees, Anne Duggan, *Thomas Becket* (Oxford 2004) 173-175.

[14] Geoffrey V. Scammell, *Hugh Du Puiset, Bishop of Durham* (Cambridge 1956) 69.

[15] The paper is forthcoming in the *Proceedings*.

[16] On legal study at Durham, for example the possible composition there of *ordo iudiciorum*, *De edendo*, Peter Landau, 'The Origins of Civil Procedure: Treatises at Durham during the Twelfth Century', *Canon Law, Religion, and Politics. Liber amicorum Robert Somerville*, ed. Uta-Renate Blumenthal, Anders Winroth, Peter Landau (Washington 2012) 136-146 at 138-143, also Bruce Brasington, *Order in the Court. Medieval Procedural Treatises in*

might have been the author? Two possible candidates are Roger of Howden and William of Blois, though neither likely had the necessary legal training. [17] Bishop Hugh also knew Master Vacarius through a dispute involving the presentation of the church of Eston;[18] however, it seems unlikely the Master had a hand in *Clericus*. More promising is Gervase, a cleric who studied under Gérard Pucelle at Paris and authored glosses in the *Decretum* found in the same manuscript as *Clericus*. (I have, however, not seen any connection between them and the *notabilia*.[19]) There were also ties to Lincoln, where Hugh patronized John of Tynemouth and Simon of Southwell, both more than capable of composing our work. On the other hand, their careers may well have begun later than the composition of *Clericus*.[20]

While I chose D, the earlier of the two manuscripts, as a base for collation, it is worth noting an interesting variant in C: *Filii. uel propinqui*[21] *fundatorum ecclesiarum*[22] *clericos bona illarum dilapidantes honesta conuentione compescant uel episcopis*

Translation (Medieval Law and its Practice 21; Leiden and Boston 2016) 124. Neither treats *Clericus*. It is unlikely Hugh had a hand in the work, for he was neither a scholar nor showed any interest in canon law, on which see Scammell, *Hugh Du Puiset*, 89, also 105, describing him as a 'maker….of churches, rather than books'. In addition to Scammell's monograph, chapters 2-3, see Frank Barlow, *Thomas Becket* (Berkeley and Los Angeles 1986) 139, 212 treating Hugh's work as a judge-delegate alongside Archbishop Roger of York.

[17] Scammell, *Hugh Du Puiset*, 70, 84, also Frank Barlow, 'Roger of Howden', *The English Historical Review* 65 no. 256 (1050) 352-360, 353 noting a William of Howden as well.

[18] Scammell, *Hugh Du Puiset*, 84.

[19] Scammell, *Hugh Du Puiset*, 70-71. Moreover, note also a canon selected by *Clericus*, C.6 q.1 c.3, which is omitted in the Durham *Decretum*. On this text, see below.

[20] Scammell, *Hugh Du Puiset*, 70. See also below.

[21] propinqui] pro inqvii. C

[22] ecclesiarum] criminos *add* C^{ac} *expug*^{pc}

denuntient uel regi ut c.xvi[23] *q.ult. filii.s quicumque decernimus.*[24] Gratian's canons never mention *clericos* which, modified initially by C with *criminos,* echoes of course the dispute between Becket and Henry II..[25] It also addresses a growing problem in the late twelfth century.[26]

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[23] xvi[xxvii. C[ac]

[24] C.16 q.7 c.31: 'Heredes eius, qui ecclesiam construxit, nichil aliud quam pro ea sollicitudinem gerere debent. Filii.s, uel nepotibus, ac honestioribus propinquis eius, qui construxit uel ditauit ecclesiam, licitum sit hanc habere sollertiam, ut, si sacerdotem aliquid ex collatis rebus defraudare preuiderint, aut honesta conuentione conpescant, aut episcopo uel iudici corrigenda denuncient. Quod si talia episcopus agere temptet, metropolitan eius hec insinuare procurent. Si autem metropolitanus talia gerat, regis hec auribus intimare non different'; C.16 q.7 c.32: 'Fundatores ecclesiae ordinandos in ea episcopo offerant. Item ex Tolletano Concilio. [IX. c.2.] Decernimus, ut quamdiu fundatores ecclesiarum in hac uita superstites fuerint, pro eisdem locis curam habeant sollicitam, atque rectores ydoneos in eisdem basilicis idem ipsi offerant episcopo ordinandos. Quod si spretis eisdem fundatoribus episcopus ibidem rectores presumpserit ordinare, et ordinationem suam irritam nouerit et ad uerecundiam sui alios in eorum loco (quos ipsi fundatores condignos elegerint) ordinari'; C.16 q.7 c.30: 'Fundatores ecclesiarum, si inopes esse ceperint, ab eisdem alimenta accipiant. Quicumque fidelium propria deuotione de facultatibus suis aliquid ecclesiae contulerint, si forte ipsi aut filii. eorum redacti fuerint ad inopiam, ab eadem ecclesia suffragium uitae pro temporis usu percipiant'.

[25] Examination of the *Decretum* in the same Durham manuscript at fol. 129v-130r, shows that it does not have this addition nor others in *Clericus*; its marginal glosses also do not suggest this reading. Like the remainder of the divergent readings in *Clericus*, they apparently come from the author's engagement with Gratian, unmediated by another commentary. Perhaps there is also a faint echo of the controversy in a later canon selected by *Clericus*: Curialis in episcopum electus antequam consecretur litteras absolutionis ab principe deferat ut di.lxiii lectis. (D.63 c.18). A courtier elected bishop should provide letters of absolution from his prince before consecration.

[26] Bruno Lemesle, 'The Crime of Dilapidation in the Church from the Latter Half of the 12th Century to the Beginning of the 13th Century', *Law and Disputing in the Middle Ages. Proceedings of the Ninth Carlsberg Academy Conference on Medieval Legal History, 2012*, ed. Per Andersen, et al. (Copenhagen 2013) 55-72 at 62-63, noting that accusations rose during the pontificate of Alexander III, when *dilapidatio's* older association with simony faded away and it became a crime in its own right. *Clericus'* presentation appears to reflect this view.

I must also note the brief mention of *Clericus* by Richard Fraher in his essay on canon law and the Becket dispute. He noted its first entry: [27]

> Clericus apud ciuilem iudicem conuictus ab episcopo suo degradandus est ut sic puniatur a ciuile iudice nisi ecclesiasticum sit crimen ut c.xi q.i si quis.[28]

He observed that this echoed not French, but 'Bolognese thought on clerical immunity in the years prior to 1170'. [29] It stood closer to the king's position and also found support not only in the contemporary Anglo-Norman *Summa Lipsiensis*. More recently, we have found a similar argument in an addition to two manuscripts of the *De edendo*.[30] (Given Henry II.'s concession to Cardinal Hugh Pierleone, ca. 1175-1176, that clerics would no

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[27] Richard Fraher, 'The Becket Dispute and Two Decretist Traditions: The Bolognese Masters Revisited and some new Anglo-Norman Texts', *Journal of Medieval History* 4 (1978) 347-368 at 258-359. However, he was not the first to call attention to this. See Charles Duggan, 'The Becket Dispute and the Criminous Clerks', *Bulletin of the Institute of Historical Research* 35 n. 91 (1962) 1-28 at 27 and n. 1. Despite *Clericus'* treatment of criminous clerics, on which more below, we should note that Bishop Hugh was much removed, likely intentionally so, from the conflict between Becket and Henry II.. See Scammell, *Hugh Du Puiset*, 31-35, also David Knowles, *The Episcopal Colleagues of Archbishop Thomas Becket* (Cambridge 1951) 14-15, 101.

[28] C.11 q.1 c.45.

[29] Fraher, 'The Becket Dispute', 358-359. That twelfth-century kings and their successors pressed the bishops of Durham to respect royal right, Jean Scammell, 'The Origins and Limitations of the Liberty of Durham', *The English Historical Review* 81 no. 320 (1966) 449-473 at 457-458.

[30] Fraher, 'The Becket Dispute', 359. See *Summa 'Omnis qui iuste iudicat*', ed. Peter Landau et al. (MIC.Ser. A, vol. 7; Vatican City 2014) 3.20.1-16. I thank Professor Winroth for sharing this volume with me. For another Anglo-Norman treatment of the canon, one diverging from both the *Summa Lipsiensis* and *Clericus*, compare *Magistri Honorii.. Summa 'De iure canonico tractaturus*, ed. Peter Landau, Waltraud Kozur (MIC.Ser. A. 5; Vatican City 2010) C.11 q.1 d.p.c.*Ex his*: Concludit generaliter clericum ad secularem iudicem non esse trahendum, nec in ciuili, nisi ut dictum est supra Si quis cum clerico, nisi post depositionem. Quod secundum G. non est uerum. It does not consider punishment and the cleric had to be deposed first, thus holding to the Bolognese position after 1170. On the addition to the *De edendo* in London, BL Add. 49366, fol. 107v and London, BL Harley 2355, fol. 3rb, Brasington, *Order in the Court*, 129, 171. I thank Dr. Martin Brett for calling this to my attention and generously providing his transcription and analysis.

longer 'be drawn before a secular judge for any criminal matter or trespass, save the royal forest or due lay service or fee', this also might provide a *terminus ante quem* for *Clericus*.) [31] This was the extent of his analysis. He also did not consult. the Durham manuscript.

What connections might we find with Durham? Amid confirmations of land and churches, some of Bishop Hugh's *acta* do touch on canons selected by *Clericus*.[32] We find a disputed election.[33] *Clericus* also treats the vacancy of a church, the subject of a charter to Prior Bertram and the Durham priory. However, Hugh allowed the prior to dispose of churches under his supervision. *Clericus* assigns this to the archdeacon.[34]

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[31] Anne J. Duggan, 'Henry II., the English Church and the Papacy, 1154—76', in *Henry II.. New Interpretations*, ed. Christopher Harper-Bill, Nicholas Vincent (Woodbridge 2007) 154-183 at 178-179. The translation is Professor Duggan's.

[32] We should not overlook the special status of the prince-bishop. Durham's rights were extensive thanks to its 'liberty', on which see Scammell, 'The Origins and Limitations', 454, noting that the bishop's 'honorial, seigneurial and diocesan power' guaranteed by both St. Cuthbert and royal charter, undoubtedly well-known to anyone who read *Clericus*.

[33] *English Episcopal Acta 24: Durham 1153-1195*, ed. M.G. Snape (Oxford 2002) No. 7*, July 1160 x c.1165, to Pope Alexander III, reporting that he and the abbot of Fountains have declared the prior of Bridlington innocent of incontinence and uncanonical election. Compare *Clericus* below: Si duo temeritate concertantium fuerint electi tercius ordinetur quem nouus consensus elegerit ut di.lxxviiii. si duo. Any connection is, of course, remote.

[34] *Durham 1153-1195*, No. 43, late February x 3 March 1195. The editor notes this was issued by Hugh on his deathbed, likely well after the composition of *Clericus*, which reads Cura et dispositio uacantis ecclesie archidiaconem ut di.lxiii si in plebibus. Elsewhere, *Clericus* denies, however, the cura animarum to archdeacon, archpresbiter, and dean: Archidiaconus archipresbiter decanus prepositus curam animarum non tribuunt ut c.xvi. q.vii. nullus omnino. (C.16 q.7 c.11). That archdeacons were increasingly involved in the assigning of *personatus*, as well as settling disputes over tithes, particularly when the bishop was absent, Brian Kemp, 'Archdeacons and Parish Churches in England in the Twelfth Century', in Law and Government in Medieval England and Normandy. Essays in Honour of Sir James Holt, edd. George Garnett and John Hudson (Cambridge 1994) 341-364, at 344-346, 357-364, noting that sometimes they did so without episcopal authority. This attracted the attention, for example of Pope Alexander III.

The thirteen extant papal letters to Hugh and often also Archbishop Roger of York unfortunately do not generally echo *Clericus*.[35] An exception is abuse of tithes,[36] the subject of various decretals from Alexander III, for example commanding the archbishop and bishop to ensure that Cistercian foundations were exempt from tithes, and to obey the papal command and not interfere.[37]Another possible connection is the *ius patronatus*.[38] Alexander III responded to the complaint by a patron that his presentation of a cleric to the church of Walden had been blocked by the archbishop.[39] However, like the episcopal *acta*, none of these letters can be linked convincingly to any canon excerpted by *Clericus*.[40] Nevertheless, I shall note occasionally other instances

[35] Peter Landau, 'The Origins', 142 and n. 29.

[36] For example, the fifth *argumentum*, on which see below.

[37] WH 130, http://www.kuttner-institute.jura.uni-muenchen.de/kartei/whr0145.gif concerning the exemption of Fountains abbey and admonishing Roger and Hugh; WH 38, in general, concerning the Cistercians' exemption, both accessed at https://www.kuttner-institute.jura.uni-muenchen.de/Walther-Holtzmann-Kartei%20-Stephan_Kuttner_Institute_wh_mit%20Bildverweisen.pdf and See WH 328, preserved in the *Collectio Cheltenhamensis* 18.3 and elsewhere, http://www.kuttner-institute.jura.uni-muenchen.de/kartei/whr0364.gif all accessed on 31 August 2022. On tithes, with respect to Cistercians, a 'perpetual source of friction', Scammell, *Hugh Du Puiset* 120.

[38] Lectores (Rectores) in basilicis ordinandos fundatores earum episcopo offerant c.xvi. q.ult. decerimus. In general, G.W.O. Addleshaw, *Rectors, Vicars and Patrons in Twelfth and early Thirteenth Century Canon Law* (St. Anthony's Hall Publication No. 9; London and York 1956) and Carol Davidson Cragoe, 'The Custom of the English Church: Parish Church Maintenance in England before 1300', *Journal of Medieval History* 36 (2010) 20-38, noting that by the 1170s rectors were increasingly being appointed by monasteries, which took most of the revenue and impoverished the priest. The canon in *Clericus*, not noted by this author, may reflect a desire, perhaps by Bishop Hugh, to regain control over appointments.

[39] WH 748, http://www.kuttner-institute.jura.uni-Muenchen.de/kartei/whr0364.gif% accessed on 24 August 2022.

[40] The same came be said for the archdiaconical *acta*, on which see Brian Kemp, *Twelfth-Century English Archidiaconal and Vice-Archidiaconal Acta* (The Canterbury and York Society 92, Woodbridge 2001) n. 30-31.

where there may be at least some connection, however tenuous, with Durham.

The *ius patronatus* appears to have been a special concern. [41] *Clericus* defends the rights of patrons' families.[42] A modified canon declares that they also should demand an account from princes who protect their churches: 'A principibus is rationem exiget qui ecclesiam suam eis tuendam commisit ut c.xxiii. q.v. Principes'.[43] We note that *Clericus* omits its original declaration that this account must be rendered to God, not man. It is now an

[41] That advowson disputes were heard in ecclesiastical courts early in the reign of Henry II., with his approval, Christopher R. Cheney, *From Becket to Langton. English Church Government 1170-1213* (Manchester 1956) 7. The *acta* of Roger of Worcester also support this practice: *English Episcopal Acta 33: Worcester 1062-1185*, ed. Mary Cheney et al., (Oxford 2007, reprinted 2013) lii. and n. 102-103, also Mary Cheney, *Roger. Bishop of Worcester* (Oxford 1980) 146 and Mary Cheney, 'The Compromise of Avranches of 1172 and the Spread of the Canon Law in England', *The English Historical Review* 56 no. 222 (April 1941) 177-197 at 190-191, discussing a dispute in the diocese of Worcester and its settlement by Bishops Roger of Worcester and Bartholomew of Exeter.

[42] On royal-ecclesiastical disputes over advowson during the Becket controversy, R.H. Helmholz, *The Ius Commune in England: Four Studies* (New York 2001) 227-228, also Cheney, 'The Compromise' 190-194, noting decretals protesting against lay interference and patrons ignoring any hearing before the bishop concerning ordinations. More recently, Joshua Tate, 'The Third Lateran Council and the Ius Patronatus in England', *Proceedings Esztergom 2008* 589-602.

[43] C.23 q.5 c.20: Quod sacerdotes efficere docendo non ualent; disciplinae terrore potestas extorqueat. Item Ysidorus. [lib. III. Sent. de summo bono, c.53.] Principes seculi nonnumquam intra ecclesiam potestatis adeptae culmina tenent, ut per eandem potestatem disciplinam ecclesiasticam muniant. Ceterum intra ecclesiam potestates necessariae non essent, nisi ut quod non preualent sacerdotes efficere per doctrinae sermonem potestas hoc inperet per disciplinae terrorem. Sepe per regnum terrenum celeste regnum proficit, ut qui intra ecclesiam positi contra fidem et disciplinam agunt rigore principum conterantur, ipsamque disciplinam, quam ecclesiae utilitas exercere non preualet, ceruicibus superborum potestas principalis inponat, et, ut uenerationem mereatur, uirtutem potestatis inpertiatur. Cognoscant principes seculi Deo se debere esse rationem reddituros propter ecclesiam, quam Christo tuendam suscipiunt. Nam siue augeatur pax et disciplina ecclesiae per fideles principes, siue soluatur, ille ab eis rationem exigit, qui eorum potestati suam ecclesiam credidit.

entirely secular context. Perhaps this echoes Henry II's ongoing legal reforms concerning advowson, for example protecting a patron's right from claims made by rival clerics.[44]

Dilapidation comes up again in a reworked canon denying a priest's restoration before trial: 'Pro dilapidatione rerum ecclesie deiectum sacerdotem ante cognitionem non esse restituendum ut causa iii. q.ii. Quia'.[45] Gratian's canon had not referenced dilapidation. Denial of restoration prior to trial also appears to challenge the widely-held *exceptio spolii*..[46]

Hereditary priests also attracted our author's attention.[47] We find an unmodified canon prohibiting any hereditary claims to ecclesiastical offices or prebends.[48] Such claims at Durham, for example concerning the church of Howden, often conflicted with counterclaims by the priory. These attracted the bishop's attention, along with Roger of York and Pope Alexander III.[49]

At one point, *Clericus* refers to the civil law:[50]

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[44] Paul Brand, 'Henry II. and the Creation of the English Common Law', in *Henry II.. New Interpretations*, 215-241 at 221.

[45] C.3 q.2 c.9: 'Ab administratione remoueatur qui res ecclesiae male uiuendo dispergit. Quia ea, que de fraudibus Maximiliani flebili ad aures nostras suplicum relatione uenerunt, non facile secundum ueritatem agnosci potuerunt, nisi facultas ecclesiae, quam in usus suos male conuertendo dispersit, ab eius potestate, donec causa cognoscatur, seponatur: idcirco uos eum a supradictae ecclesiae patrimonio uolumus interim submouere, et in uestro discussionis ipsius tempora moderamine detineri'.

[46] Mary Cheney, 'Possessio/proprietas in Ecclesiastical Courts in mid-twelfth-century England', *Law and Government*, 245-254, more recently Dafydd Bened Walters, 'Spoliation and Disseisin: Possession under Threat and its Protection before and after 1215', *Vergentis* 1 (2015) 21-70. Contrast this with the *Ordo Bambergensis*, Brasington, *Order in the Cour*t, 207.

[47] In general, Cheney, *From Becket to Langton*, 14.

[48] Nullus prebendas preposituras capellanias uel aliqua ecclesiastica beneficia hereditario iure audeat uendicare ut causa viii q.i apostolica. (C.8 q.1 c.7)

[49] Barlow, 'Roger of Howden', 147-148, 355.

[50] Nov. 17.7 (*Coll. III*, tit. 4; *Ep. Theod*. 17; Auth. 4,3; *Iul const.* xxi) in *Corpus juris civilis romani: Authenticae seu Novellae constitutiones D. Iustiniani sacratissimi principis*, ed. Dionisius Gothfredus, vol. 4 (Venice 1844) 158: *Ut termini sanctorum homicidii.s etc., non prosint*: Neque autem homicidii.s, neque adulterii.s, neque virginum raptoribus delinquentibus terminorum custodies cautelam, sed etiam inde extrahes, et supplicium eis inferes. Non enim talia delinquentibus parcere competit, sed hoc patientibus: ut non talia a

> Publicum latronem de ecclesia uel atrio eius impune extrahi ut c.xvii. q.iiii. Sicut.[51] Idem est de homicidis et huiusmodi scelerosis ut infra aut. coll.iii. de manda. principum § Neque autem homicidis.

Pairing an excerpt from Gratian with an *Authenticum* obviously demonstrates legal training.[52] At present, I do not know the formal source indicated by the *infra*, nor have I found a decretist who drew upon this *Authenticum*. Given Durham's status as an important sanctuary, this may have had particular significance for a local audience. Interestingly, while elsewhere *Clericus* defends the ecclesiastical forum from secular intrusion, there is no immunity here.[53] This ran contrary to canonistic theory and practice concerning sanctuary, even regarding known felons.[54] On the other hand, as Professor Hudson has noted, some serious offenses 'were excluded from sanctuary'.[55] We also note that *atrium* appears in neither the *Authenticum* nor in Gratian's canon.[56] This addition by our author is interesting. In English law, penalties for breach of sanctuary were graded, with violation of

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presumptoribus patiantur. Deinde templorum cautela non nocentibus, sed laeses, datur a lege: et non erit possible utrumque tueri cautela sacrorum locorum, et laedentem, et laesum.

[51] C.17 q.4 c.6: Excommunicetur qui confinia ecclesiae frangere temptauerit. Item Nicolaus omnibus Episcopis. II.. Pars. §. 1. Qui autem confinium eorum confringere temptauerit, aut personam hominis, uel bona eius inde subtraxerit, nisi publicus latro erit, quousque emendet, et quod rapuerit reddat, excommunicetur.

[52] The *infra* must refer to his formal source. The *Authenticum* is not in Gratian.

[53] Giuseppe Speciale, 'Fures, latrones publici, decocti fiadulenti': il 'confugium' per I falliti da Innocenzo a Benedetto XIII', in *Proceedings Syracuse 1996* 431-462 at 450. For *hostis publicus* in the classical Roman law, Arrigo D. Manfredini, 'Voleurs, brigands et légitime défense en droit romain', RHD.74 (1996) 505-523

[54] Helmholz, *The Ius Commune*, 64-69, though largely treating a later period and 69-81 for the influence of the *ius commune* on the common law, also noting the reluctance of royal officials to violate sanctuary. See also Cheney, *From Becket to Langton*, 33-34.

[55] John Hudson, *The Oxford History of the Laws of England, 871-1216* (Oxford 2012) 397. He does not consider the case of the 'public thief'.

[56] It is, however, in the next canon, c.7: Si quis in atrio ecclesiae, referring to any violation, including homicide, taking place there, and requiring any fine to be paid to the altar of that church. Perhaps our author found it applicable in his excerpting of c.6.

the *atrium* (precinct) less than the interior of the church itself.[57] *Clericus* departs from this: there is no breach of sanctuary regardless of location. Finally, we also note that *Clericus* omits the canon's passage declaring that the thief should emend himself by restoring goods nor to excommunication. What remains is punishment, entirely secular.[58]

Our author also considers procedural canons apart from the question of ecclesiastical and secular jurisdictions or dilapidation. On example is perjury. C.22 q.1 c.17 is reduced to:

> Talem de periurio penitentiam imponi qualem de adulterio et homicidio ut c.xxii. q.i c.ult.[59] The same sort of penance for adultery and homicide should be imposed for perjury. Even intent to perjure makes one guilty: Qui paratus est iurare antequam deiurauerit periurus est ut c.xxiii. q.u qui paratus.[60] A perjurer may not be a witness or testify in his own or another's case: Semel periurus nec testis nec in sua nec in aliena causa iurator accedat ut c.xxii. q.ult. paruuli.[61] Hostile and litigious parties are also barred: Inimicii.s studentes uel facile litigantes ad accusationem uel

[57] Hudson, *The Oxford History*, 397 and n. 79, referring to Richard of Hexam.

[58] For later canonistic treatment of the public thief in a decretal of Innocent III, Helmholz, *The Ius Commune* 174 and n. 81, citing X 3.49.3 (actually X 3.49.6).

[59] C.22 q.1 c.17: XVII. 'Fidelium consortio careat qui penitenciam periurii. agere noluerit. Predicandum est etiam, ut periurium fideles caueant, et ab hoc summopere abstineant, scientes hoc grande scelus esse, et in lege, et in Prophetis, et in euangelio prohibitum. Audiuimus autem, quosdam paruipendere hoc scelus, et leuem quodammodo periuris penitenciae modum inponere; qui etiam nosse debent, talem de periurio penitenciam inponi debere, qualem et de adulterio, de fornicatione, et de homicidio sponte conmisso, etde ceteris criminalibus uicii.s'.

[60] Cf. C.22 q.5 c.13: 'Ante, quam aliquis iuret, peierat, si contra conscientiam iurare parat. Idem. Qui periurare paratus est, ante, quam periuret, iam periurus uidetur, quia Deus non ex operibus iudicat, sed ex cogitationibus et ex corde'. We note the unusual verb 'deierare' in *Clericus*.

[61] C.22 q.5 c.14: 'Ante annos rationabiles aliqui non cogantur iurare. Paruuli, qui sine etate rationabili sunt, non cogantur iurare. Et qui semel periuratus fuerit, nec testis sit post hec, nec ad sacramentum accedat, nec in sua causa uel alterius iurator existat'.

> testimonium non admittentur ut causa iii. q.u Suspectos[62] simili[63] nullus.[64] There are also various excerpted canons treating oaths. A particularly interesting example is Iuramentum ab episcopo prestandum ut causa ii. q.i. In primis.[65]

Our author again has modified the canon, for nowhere does it declare that a bishop must take an oath.[66]

Clericus pays little attention to the ecclesiastical hierarchy. Rome appears only a few times, for example:

> Apostolicam incurrit offensam clericus qui excessus sui episcopi quos uiderit romano pontifici non detulerit ut causa iii. q.vii. Quapropter.[67]

Like dilapidation, this topic was timely. From the pontificate of Innocent II. onwards, papal letters increasingly exhorted clerics to denounce wayward bishops.[68] Especially well-suited for

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[62] C.3 q.5 c.6: 'Qui non possunt esse accusatores uel testes. Item Pontianus sanctae et uniuersalis ecclesiae Episcopus. [epist. II.. omnibus Christianis] Suspectos, aut inimicos, aut facile litigantes, et eos, qui non sunt bonae conuersationis, aut quorum uita est accusabilis, et qui rectam non tenent et docent fidem, accusatores esse et testes antecessores nostri apostoli prohibuerunt et nos eorum auctoritate submouemus atque temporibus futuris excludimus'. On this common stipulation derived from the civil law, see the *De edendo*, Brasington, *Order in the Court,* 153.

[63] Cf. C.3 q.5 c.10: 'Suspecti aut gratiosi ad accusationem non admittantur. Item Iulius Papa. [in rescripto ad Orientales, c.33.] Similiter in prefixa sinodo est decretum, ne suspecti, aut infames, aut criminosi, aut gratiosi, aut calumpniatores, uel affines, aut scelerati, aut facile litigantes suscipiantur accusatores, sed tales, qui careant omni suspicione'.

[64] C.3 q.5 c.11: 'Qui inimicitii.s studet et facile litigat, nec accusator nec testis esse potest. Item Felix Papa. [II.. epist. I. c.14.] Nullus seruus, nullus libertus, nullus infidus, nullus criminibus inretitus, nullus calumpniator, nullus, qui inimicitii.s studet, nullus frequenter litigans, et ad accusandum uel detrahendum facilis, nulla infamis persona, uel omnes, quos ad accusanda publica crimina leges publicae non admittunt, permittantur episcopos accusare'.

[65] C.2 q.1 c.7. Given the length of this canon, I have not reproduced it here. Its only reference to taking an oath concerns the witnesses who would be called to testify against Bishop Ianuarius.

[66] On the voluntary oath by the judge, though not specifying a bishop, which cannot be rescinded nor open to questions concerning perjury, see the De edendo, Brasington, *Order in the Court* 157 and Helmholz, *The Ius Commune* 129.

[67] C.2 q.7 c.47.

[68] Bruno Lemesle, 'Corriger les excès: L'extension des infractions, de délits et des crimes, et les transformations de la procedure inquisitoire dans les lettres

disputation also would be the canon declaring that disposition of the apostolic see was granted to the emperors: *Dispositio sedis apostolice imperatoribus fuit concessa ut d. lxii. Adrianus in sinodo*. This canon's The canon's relevance, provocatively so, would have been obvious to both sides in the conflict between archbishop and king. *Clericus* only treats the archbishop a single time, in the disputed episcopal noted above.[69] Legates and judges-delegate are absent.

The religious life is also treated sparingly. We do find some canons concerning monks and monasteries, in the case of the latter, their exemptions from exactions.[70] Regular clergy, however, never appear.[71] The same is true for the new orders, interesting given

pontificales (milieu due xii.e siècle-fin du pontificat d'Innocent III', *Revue historique* 313.4 (2011) 747-780 at 761-762.

[69] 'Si forte uota eligantium in duas se partes diuiserint is obtineat iudicia metropolitani qui maioribus iuuatur studii.s ac meritii.s ut di.lxiii. Sponte. Sponte] si uero C: D.63 c.36: Cum uota eligentium in duas se diuiserint partes, quis sit preferendus alteri. Si forte, quod nec reprehensibile, nec inreligiosum iudicamus, uota eligentium in duas se diuiserint partes, is metropolitani iudicio alteri preferatur, qui maioribus iuuatur studii.s et meritis; tantum ut nullus detur inuitis et non petentibus, ne plebs inuita episcopum non optatum contempnat, aut oderit'.

[70] 'Monasterii.s cathedratici et aliarum exactionum immunitas concessa est ut C.x. q.ult. Inter cetera. (C.10 q.1 c.14)'. Compare also a complaint about the abuse of *cathedraticum*, *Summa in Decretum Simonis Bisinianensis,* ed. Per Aimone-Braida (Vatican City 2014): C.10 q.3 c.5, d.p.c.5: 'Non accipiant episcopi tertiam, nisi dirutas ecclesias reparare uoluerint <…> ut citra ipsas tertias nullus Episcoporum quippiam pro regii.s inquisitionibus a parrochitanis ecclesii.s exigat, nichilque de predii.s ipsarum ecclesiarum cuiquam causa stipendii. dare presumat…Hinc uolunt quidam colligere quod ex quo soluit subditus quod tenetur dare prelate, de cetero uero cum regem uel apostolicum uult. uisitare et aliquid dare compellitur. Quod tamen non approbo maxime cum pro utilitate ecclesie episcopus Romanam uel regiam curiam proponit adire; uel cum episcopus regem transeuntem per prouinciam uel legatum tenetur in eundo et redeundo recipere'. On abuse by archdeacons, Kemp, 'Archdeacons and Paris Churches' 352 and Cheney, *Becket to Langton* 151, 153-154.

[71] Interesting given Bishop Hugh's involvement in disputes concerning secular clergy, for example the canons of Kirkham, on which see Scammell, *Hugh Du Puiset* 119.

Bishop Hugh's patronage of the Cistercians and his periodic involvement in their disputes both as judge and judge-delegate.[72]

We turn to the six *argumenta* scattered throughout *Clericus*, whose only treatment to date was my very brief discussion of the first in 2016. It declares that the Britons are not part of the Gallic kingdoms: *Argumentum quo britanni non*[73] *sunt de regno gallicanorum ut c.xxv q.ii. in gallica*.[74] Omitting reference to papal authority, the point of the canon since it concerns the granting of the *pallium*, strengthens the secular nature of *Clericus'* reading.

What might have prompted this? Perhaps it reacts to Henry II.'s meeting with Louis VII. at Montmirail-en-Brie in February 1169, where peace between the monarchs was restored through homage, but not indicating vassalic status. Henry II. swore to keep faith, but neither knelt nor offered clasped hands.[75] This *hommage de paix* indicated equal status, not subservience.[76] It is not unlikely, however, that some had read it that way, thus prompting the *argumentum* to refute any French claims on England.

The next concerns infamy*: Argumentum quod auctoritate sacerdotali possit infamia aboleri ut c.ui q.i cap. iii*.[77] Gratian's canon had commanded bishops to exhort or compel the infamous

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[72] Scammell, *Hugh Du Puiset*, 74-80.

[73] Non *add supra* C^{pc}

[74] C.25 q.2 c.3: 'Priuilegio suae dignitatis aliquis ecclesiam exvere non debet. Item Gregorius Augustino, Anglorum Episcopo. [respons. 9.] In Galliarum episcopis nullam tibi auctoritatem tribuimus, quia ab antiquis predecessorum nostrorum temporibus pallium Arelatensis episcopus accepit, quem nos priuare auctoritate percepta minime debemus. Si ergo contingat, ut fraternitas tua ad Galliarum prouincias transeat, et aliquid ex auctoritate agendum fuerit, cum predicto Arelatensi agatur episcopo, ne pretermitti possit hoc, quod antiqua Patrum institutio inuenit. Brittannorum uero omnes episcopos tuae fraternitati conmittimus, ut indocti doceantur, infirmi persuasione roborentur'.

[75] John Gillingham, 'Doing Homage to the King of France' *New Interpretations* 63-84 at 73-76.

[76] Gillingham, 'Doing Homage' 76.

[77] C.6 q.1 c.3: 'Infames sunt qui regnum Dei consequi non ualent. Item Fabianus Papa. [epist II.. Episcopis orientalibus] Illi, qui illa peccata perpetrant, de quibus Apostolus ait: 'Quoniam qui talia agunt regnum Dei non consecuntur', ualde cauendi sunt, et ad emendationem, si uoluntarie noluerint, conpellendi, quia infamiae maculis sunt aspersi, et in barathrum dilabuntur, nisi eis sacerdotali auctoritate subuentum fuerit'.

to undergo penance. *Clericus* omits this and, instead, selects the end of the canon to assert that sacerdotal authority can remove it.[78] In contrast, the *Summa Honorii.* and *Summa Lipsiensis* only refer to penance; they do not discuss the bishop. *Clericus* highlights his power.

The next treats episcopal acts:

> Argumentum quod defuncto episcopo et alio substituto renouande sint scripture et instrumenta a decessore facta alioquin reputabuntur irrita ut c.xii. q.ii. longinquitate.

The canon required all manumitted ecclesiastical *servi* to declare their status in writing to a new bishop.[79] This renewed their freedom. While a new bishop customarily confirmed charters issued by his predecessor, *Clericus* reworks the canon into a general principle. The focus is now on the bishop, not the status of ecclesiastical freedmen, who have disappeared. The bishop's

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[78] It is unclear whether *Clericus* understood the distinction between *infamia iuris* or *facti*, the latter a stated, but unproven, accusation of infamy lacking the penalties associated with infamy of law. See Antonia Fiori, 'La valuazione processuale della personalità dell'accusato: dall'infamia ala 'capacità a delinquee del colpevole', *Der Einfluss der Kanonistik auf die europäische Rechtskultur*. *Prozessrecht*, ed. Yves Mausen et al. (Norm und Struktur 4; Cologne, Weimar, Vienna 2014) 157-173 at 160-162, noting that *infamia facti* was reversible. That some canonists would later hold the position that the process of *restitutio in integrum* 'might be used to restore a person bound by a sentence of *infamia* given in a temporal court', Richard. H. Helmholz, *The Spirit of Classical Canon Law* (Athens and London 1996) 96 and n. 17, though not referring to this canon.

[79] C.12 q.2 c.64: 'Professionem suae conditionis liberti ecclesiae faciant. Longinquitate sepe fit temporis, ut non pateat conditio originis. Unde iam decretum est in anteriori uniuersalis concilii. canone, ut professionem suam liberti ecclesiae debeant facere, qua profiteantur se et de familia ecclesiae esse, et eius obsequium numquam relicturos. Unde his quoque nos adicimus, ut quociens cursum uitae sacerdos inpleuerit, et de hac uita migrauerit, mox, cum successor eius aduenerit, omnes liberti ecclesiae, uel ab eis progeniti cartulas suas in conspectu omnium debent ipsi qui substituitur pontifici publicare, et professionem in conspectu ecclesiae renouare, quatinus status sui uigorem et illi obtineant et obedientia eorum ecclesia non careat. Si autem scripturas libertatis suae intra annum ordinationis noui pontificis manifestare contempserint, aut professiones renouare noluerint, uacuae et inanes cartulae ipsae remaneant, et illi origini suae redditi sint perpetuo serui'. (VI Toledo, can. 9) On this canon, Mary E. Sommar, *The Slaves of the Churches* (Oxford 2020) 147.

independence is the point. He is not automatically bound to previous acts. Admittedly, this is speculative, but the clerics appointed by Hugh's predecessor, William of St. Barbara apparently retained considerable power and, to Scammell, 'may have restrained Puiset in his earlier years'.[80] Perhaps this lay behind *Clericus'* modification of the canon.

The next *argumentum* treats prescription:[81] *Argumentum quod nisi bona fide sit inchoata prescriptio aduersus ecclesiam non currit ut c.xvi. q.iii. si sacerdos*[82]*et cap. i*.[83] *Clericus* cites and modifies the two canons. It omits the denial of the benefit of prescription to erring clergy in the first. It also adds the stipulation of *bona fide*. Both emphasize immunity from such claims.

As we have seen, clerical misuse of the church concerned our author. The fifth *argumentum* takes up this regarding tithes and donations: [84] *Argumentum quod hii. qui decimas et ecclesiarum obuentiones percipiunt ad restraurandam fabricam*

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[80] Scammell, *Hugh Du Puiset*, 233-234.

[81] Among many studies, Brasington, *Order in the Court* 118-122.

[82] C.16 q.3 c.3: 'Vita irrite disponentis non poterit pertinere ad tricennium temporis. Si sacerdotes uel ministri, dum gubernacula ecclesiarum amministrare uidentur, contra Patrum sanctissimas sanctiones de rebus ecclesiae diffinisse aliqua dinoscuntur, non ex die, quo talia scribendo decreuerunt, sed ex quo talia moriendo diffinita reliquerunt, subputacionis ordo substabit. Nusquam etenim poterit ad tricennium temporis pertinere uita irrite iudicantis, quia status contractuum non sumpsit inicia ab origine equitatis'.

[83] C.16 q.3 c.1: 'Rusticanae parrochiae apud episcopos, qui eas possident triginta annis sine uiolentia permaneant inmobiles. Per singulas ecclesias rusticanas parrochias, permanere inmobiles apud eos, qui eas tenent, episcopos decreuimus, et maxime si eas sine uiolentia per triginta annos gubernauerunt. Si uero intra triginta annos facta fuerit de eis dubitatio, liceat eis, qui se dixerint lesos propterea, mouere apud sinodum prouinciae certamen'.

[84] Helmholz, *The Ius Commune* on tithes, 155, on mortuary gifts 137, 151-152, noting that such customary gifts to the church worried some. They might have had the taint of simony. Another customary duty, the Easter payment, *crismatis denario*, exacted by archdeacons, was condemned by the Council of Westminster of 1125 (c.2). This was repeated by Bishop Roger of Chense for his diocese in the 1160. See Cheney, *From Becket to Langton* 153 and appendix iv for the charter. Compare also C.10 q.3 c.1.

ecclesiarium tenentur ut ca. xvi. q i si monachus.[85] Again, excerpting changes the canon's meaning. Pope Innocent II. had judged concerning a monk ordained a priest, that he should be allowed without delay to use all pertinent tithes and dues (*annonae*) for the needs of his church. Rather than defending the new priest's rights, *Clericus* now obliges him to use these correctly by turning again to the end of the canon. Given that the sale of tithes at Durham, and with others 'unjustly alienated',[86] these may have influenced how *Clericus* modified Gratian's canon.

The sixth *argumentum* returns to secular jurisdiction over clerics. It provides a creative reading of Gratian's canon: 'Argumentum quod ab episcopo canonice iudicatus a principibus potest comprehendi impune ut c.xvi. q.ult. Si quis deinceps'.[87] The text from Pope Gregory VII. had nothing to do with the ecclesiastical or secular forums. It prohibits simony, warning that any ruler, from emperor to count, daring to invest a bishop or another ecclesiastical person would be punished by virtue of the office of the keys. Perhaps *Clericus* intended to provoke disputation by contrasting the pope's absolute prohibition of any secular interference in ecclesiastical offices with an equally blunt statement that a ruler had the right to seize 'with impunity'

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[85] C.16 q.1 c.22: 'Beneficii.s ecclesiasticis monachus libere perfruatur presbiter. Item Innocentius Papa. Si monachus ad clericatum promoueatur, beneficia ei pleniter, et annonae, et decimae donentur absque ulla minoratione et dilatione, ut, quanto melius possit iuxta possibilitatem quando necessitas extiterit, ad opera ecclesiastica et ipsam restaurandam ecclesiam adiutorium faciat'.

[86] Scammel, *Hugh Du Puiset* 198, 131, noting Howden as an example.

[87] C.16 q.7 c.12: 'De manu laici episcopatus uel abbatia suscipi non debet. Si quis deinceps episcopatum uel abbatiam de manu alicuius laicae personae susceperit, nullatenus inter episcopos uel abbates habeatur, nec ulla ei ut episcopo seu abbati audientia concedatur. Insuper gratiam B. Petri, et introitum ecclesiae interdicimus, quousque locum, quem sub crimine tam inobedientiae quam ambitionis ex qua scelus idolatriae cepit, resipiscendo non deserit. Similiter etiam de inferioribus ecclesiasticis dignitatibus constituimus. Item: [c.2.] §. 1. Si quis inperatorum, regum, ducum, marchionum, comitum, uel quilibet secularium potestatum aut personarum inuestituram episcopatuum uel alicuius ecclesiasticae dignitatis dare presumpserit, eiusdem sententiae uinculo se obstrictum esse sciat'.

someone canonically judged. While again I cannot prove a direct connection, perhaps this *argumentum* and the reworked canon support Professor Duggan's observation that the 'Clarendon programme' persisted up to Becket's martyrdom.[88] This might also provide more circumstantial evidence for dating *Clericus*.

While we have come to the end of the *argumenta, Clericus* continues to treat tensions between ecclesiastical and secular jurisdictions. For example, we find a reference to D.81 c.12, which supported Becket's assertion that punishment after ecclesiastical judgment would be double jeopardy: *Post depositionem aliam penam clerico non infligi quia non iudicat deus bis in idipsum ut di.lxxxi c.presbyter.*[89] We also note that it goes against the initial excerpt treated by Fraher, for here there is no reference to the exception of a clerical crime: *nisi ecclesiasticum sit crimen.* There is an even stronger defense of the ecclesiastical forum in another canon that largely, though not entirely, follows Gratian's text: Clericus pulsatus coram ciuili iudice non respondeat uel aliquid proponat ut c.xi q.i clericus.[90] Again, C*lericus* modifed the canon, omitting episcopal permission for a cleric to be brought to secular court and the prohibition of a layman bringing the charge. What matters is clerical immunity.

Conclusion

Clericus apud civilem provided more than 'bald statements' excerpted from Gratian. Our author was a creative reader. This is perhaps nowhere more evident than in those cases where an

[88] Duggan, 'Henry II. the English Church' 182.

[89] D.81 c.12: 'In crimine captus presbiter uel diaconus deponatur, sed communione non priuetur. Item ex canone Apostolorum. [c.25.] Presbiter aut diaconus, qui in fornicatione, aut furto, aut periurio, aut homicidio captus est, deponatur, non tamen communione priuetur; dicit enim scriptura: "Non iudicat Deus bis in id ipsum".'

[90] C.11 q.1 c.17: 'Episcopo non permittente apud secularem iudicem clericus pulsari non debet. Clericum nullus presumat apud secularem iudicem episcopo non permittente pulsare; sed, si pulsatus fuerit, non respondeat uel proponat, nec audeat criminale negotium in iudicio seculari proponere'.

excerpted canon does not, at least at first glance, support its presentation in the text. In addition to the sixth *argumentum* discussed above, we find a canon concerning the common life of clergy applied to marriage.[91] Another interesting example is *Clericus'* reading of C.34 q.1 and 2 c.5 dpc.5 where a married virgin unknowingly marries another man. Ignorance excuses her; otherwise, if she had known, she would have violated, through bad faith, his rightful possession. [92] *Clericus* adds *in ecclesiasticis*, changing the canon to a statement on ecclesiastical property. Perhaps these are analogies to stimulate disputation.[93]

While *Clericus* does not present a thematic program there is, I think, an obvious focus on the bishop, his clergy, and their relations with secular patrons and the crown. This reflects what Christopher Cheney called 'ways of compromise with the lay power' and the 'stricter ecclesiastical supervision' of clergy.[94] Rather than a grand *summa* viewing the canon law from the heights of Bologna or Paris, we encounter a text whose audience was local, particular. It was, however, anything but provincial. *Clericus* contributed to the 'culture of disputation' that shaped

[91] 'Coniuges communes esse debere ut c.xii. q.i. dilectissimi'. (C.12 q.1 c.2).

[92] C.34 q.1 and 2,c.5, dpc.5: 'Non est adultera uirgo, que nesciens uiro nubit alieno**.** Si uirgo nesciens uiro nupserit alieno, hoc si semper nesciat, numquam ex hoc erit adultera. Si autem sciat, iam ex hoc esse incipit, ex quo cum alieno sciens cubauerit, sicut in iure prediorum tamdiu quisque bonae fidei possessor rectissime dicitur, quamdiu se possidere ignorat alienum; cum uero scierit, nec ab aliena possessione recesserit, tunc malae fidei perhibetur, tunc iuste iniustus uocabitur. V. Pars. Gratian. Sic etiam ignorantia excusat eum, qui nesciens dormiuit cum sorore uxoris. Unde in Concilio Triburiensi legitur'. See James Brundage, *Law, Sex, and Christian Society in Medieval Europe (*Chicago 1987) 236. Such use of Gratian's many canons on sexual relations to comment on procedure also appears in the contemporary Anglo-Norman *Ordo Bambergensis,* on which see Brasington, *Order in the Court* 239.

[93] On analogical reasoning in twelfth-century study and teaching of canon law, Harald Siems, 'Adsimilare: Die Angalogie als Wegbereiterin zur mittelalterlichen Rechtswissenschaft', in Europa an der Wende vom 11. zum 12. Jahrhundert', *Beiträge zu Ehren von Werner Goez,* ed. Klaus Herbers (Stuttgart 2001) 143-170.

[94] Cheney, *From Becket to Langton* 176-177.

intellectual enquiry in the twelfth century.[95] Not merely copying Gratian, it engaged the *Decretum* in dialogue. Modified excerpts took the canons in new directions. Analogies challenged the reader and the disputant to think even more broadly and pose new questions. It is anything but derivative. For these reasons, *Clericus* and similar paratexts merit more attention in our study of the early *ius commune*.

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[95] See Alex J. Novikoff, 'Toward a Cultural History of Scholastic Disputation', *The American Historical Review* 117.2 (2012) 331-364 at 345-346

Appendix

Clericus apud civilem: Cambridge, Sidney Sussex College 101, fols. 232va-vb: Siglum: C
Durham, Cath. Library, C.IV 1, fol. 60v-62: Siglum: D

Clericus apud ciuilem iudicem conuictus ab episcopo suo degradandus est ut sic puniatur a ciuile iudice[96] nisi ecclesiasticum sit crimen ut c.xi q.i Si quis.[97] Clericos extra ecclesiam[98] sacros ordines constitutos uxores sortiri ab ecclesia stipendia accipere ut di.xxxii. c.ii..[99] Ubi concubinatus connubium uocatur ut c.xxxii. q.ii. solet queri.[100] Ex causa utendi et modo appetendi est probandum uel improbandum quod facimus ut di.xli quisquis.[101] Feminas in sacris ordinibus constitutorum a principibus mancipari seruituti uel si proprie[102] ancille fuerint ab episcopo uenundari ut[103] d.xxxii. eos[104] et lxxxi quidam.[105] Sacerdotem restitui ad honorem post peractam penitentiam ut di.l Bene.[106] Episcopum alterius parrochianum pro causa depredationis inpune[107] excommunicare ut c.vi q.iii. c.ult.[108] Ius sibi dicentem a iure suo non cadere ut c.ii. q.iii. lator Ne.[109] Post depositionem aliam penam clerico non infligi quia non iudicat deus bis in idipsum ut di.lxxxi c.presbyter.[110] Non posse quem ecclesiastico benefitio

[96] iudice] et *add.* C.
[97] C.11 q.1 c.45.
[98] ecclesiam *om.* C
[99] D.32 c.3.
[100] C.32 q.2 c.6.
[101] D.41 c.1 §1.
[102] si proprie] superiore C
[103] ut] Ff. *add expug.* C.[pc]
[104] D.32 c.10.
[105] D.81 c.30.
[106] D.50 c.23.
[107] impune] inpunire C
[108] C.6 q.3 c.5.
[109] ne] nemesion C; C.2 q.7 c.44.
[110] D.81 c.12.

propria auctoritate renuntiare ut c.ui q.iii. Denique.[111] Clericos uel sacerdotes non esse habendos qui sub nullius episcopi disciplina gubernantur ut di.iii. Nulla.[112] Coniuges communes esse debere ut c.xii. q.i. Dilectissimi.[113] Ecclesia cum augmento non recipiat ablata ut c.xii. q.ii. Fraternitas.[114] Non negandum debitum uiro uel uxori uel morbum qualemcumque ut c.xxxii. q.u si quidem[115] uxorem.[116] Monachis non licet ecclesiasticas uel seculares accusationes[117] accusare ut c.xvi. q.i. Addicimus §Ecce.[118] Qui uiduam aut uirginem inuitis parentibus a rege postulat excommunicetur ut c.xxxvi[119] q.ii. Nullus.[120] Qui[121] licentia iniquitatis eripitur utilius uincitur ut c.xxiii. q.i paratus.[122] Quantumlibet laudabiliter uiuat quis hoc solo quod a christianitate seiunctus est non habet uitam set ira[123] dei super eum manet ut c.xxiii. q.iiii. Si quis a catholica.[124] Filii. uel propinqui[125] fundatorum ecclesiarum[126] clericos bona illarum dilapidantes honesta conuentione compescant uel episcopis denuntient uel regi ut c.xvi.[127] q.ult. Filiis quicumque decernimus.[128] Lectores in basilicis ordinandos fundatores earum episcopo offerant c.xvi.

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[111] C.6 q.3 c.3.
[112] D.93 c.8.
[113] C.12 q.1 c.2. Note that *Clericus* excerpts only from the second half of this lengthy canon.
[114] C.12 q.2 c.11.
[115] quidem *om.* C
[116] C.32 q.5 c.18.
[117] acciones C
[118] C.16 q.1 c.19.
[119] xxvi^{pc} C
[120] C.36 q.2 c.6.
[121] Cui^{ac} C
[122] C.23 q.1 c.2.
[123] Ira C^{pc}
[124] C.23 q.4 c.7.
[125] propinqui] pro inqvii. C
[126] ecclesiarum] criminos *add* C^{ac} *expug*^{pc}
[127] xxvii.^{ac}
[128] C.16 q.7 cc.30, 31. Neither canon has *vel regi*, an addition by *Clericus*, an example of the author's sensitivity to royal claims concerning *ius patronatus*.

q.ult. decerimus.[129] Hereditatem ante prolis susceptionem in monasterium colatam prole suscepta restitui ut c.xvi. q.ult. c.ult.[130] Non eius[131] innocentem tradere exitio qui liberat multorum exitia cogitantem ut c.xxiii. q.iiii. est iniusta.[132] In iudiciis ab episcopis confessionem uerberibus extorqueri ut c.xxii. q.v. c.i.[133] Monachos etiam uerberibus extorqueri ut c.xx. c.ult.[134] Ob fornicationem[135] deponatur clericus set suspensus facta[136] penitentia reparatur[137] ut di.lxxxii. Presbyter.[138] Clericum inter epulas cantantem excommunicandum ut di.xxii. Clericum.[139] Talem de periurio penitentiam imponi qualem de adulterio et homicidio ut c.xxii. q.i c.ult.[140] A[141] principibus is rationem exiget qui ecclesiam suam eis tuendam commisit ut[142] c.xxii. q.v. Principes.[143] Qui paratus est iurare antequam deiurauerit[144] periurus est ut c.xxii. q.v. Qui paratus.[145] Semel periurus nec testis nec in sua nec in aliena causa iurator accedat ut c.xxii. q.ult.

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[129] C.16 q.7 c.32. The Durham *Decretum*, fol. 130r gives *rectores* instead of *lectores*.
[130] C.17 q.1 c.1.
[131] Eius] est C
[132] C.23 q.4 c.33. On this canon and selected decretist commentary, Bruce C.Brasington, 'Advice to the Judge: The Distinctio 'Delicto coram iudice manifestato' with a Note on the Question of 'Unjust Mercy', ZRG KA 134 (2017) 131-145.
[133] C.23 q.5 c.1.
[134] C.20 q.4 c.3 §1.
[135] ob fornicationem] ab fornicatione C
[136] facta] acta C
[137] reparatur] p *acc* C[ac], *expug*.
[138] D.82 c.5.
[139] C.22 q.1 c.9. Note that *Clericus* does not retain the vow. Compare also the contemporary Anglo-Norman *Ordo Bambergensis*, on which see Brasington, *Order in the Court*, 266-267.
[140] C.22 q.1 c.17: XVII.
[141] A *om* C
[142] Ut] ut *add.* C
[143] C.23 q.5 c.20.
[144] degerauerit C
[145] C.22 q.5 c.13. For *dejerare* as perjury, J.F. Niermeyer, *Mediae latinitatis lexicon minus* (Leiden 1976) 315, accessed at https://archive.org/details/Niermeyer_Mediae_Latinitatis_Lexicon_Minus/mode/2up on 3 September 2022.

Paruuli.[146] Qui percutit[147] malos in eo quod mali sunt et habet causam interfectionis minister dei est ut c.xxii q ult. c.ult.[148] Nota puelle in domo patris in puerili[149] etate iurantis[150] statim ut nouit patre reclamante rumpitur[151] ut c.xxii. q.ult. c.ult. Pueri.[152] Contra canones proterue[153] agere uel loqui genus est blasphemantium in[154] spiritum sanctum ut c.xx u q.i Generali.[155] Argumentum quo britanni non[156] sunt de regno gallicanorum ut c.xxv q.ii. In gallica.[157] Non in omnibus ecclesiasticis controuersii.s utendum est legibus imperatorum ut di.x. c.i.[158] Presbiteri cum propria uxore concubitum castitatem esse[159] ut di.xxxi § Nicena.[160] Ad maiores ordines a summo pontifice promotos ab ecclesia romana discedere non posse ut c.i q.i Latorem.[161] Iusticiam uendere est hanc pro premii. accione seruare ut c.i q.ii. Vendentes.[162] Nullus audiat missam presbiteri quem scit indubitanter concubinam

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[146] C.22 q.5 c.14.
[147] percutis C
[148] C.23 q.5 c.29.
[149] pueri C
[150] iuranti C
[151] rumpuntur C
[152] C.22 q.5 c.23 and c.15.
[153] propterue C.
[154] in *om*. C
[155] Generali] uiolatores D[ac,] *expug*[pc], uiolatores C: C.25 q.1 c.11. The initial reading of *uiolatores* by both manuscripts complicates the relation of C.to D. It also may reveal something of the Durham scribe's intent, something noted above concerning C's addition of *criminosos* to *clericos*. Cf. also C.25 q.1 c.5.
[156] Non *add supra*[pc] C
[157] C.25 q.2 c.3.
[158] ut- c.1 *add supra lin.* D; D.10 c.1.
[159] esse] essent C
[160]nullus] niscena C[ac] ; D.31 c.12.
[161] *latorem* partially above line: C.1 q.1 c.121. This canon is remote from *Clericus'* text.
[162] C.1 q.3 c.10. *Clericus* selects a canon prohibiting simony and applies it to the selling of justice. In general, James Brundage, *The Medieval Origins of the Legal Profession. Canonists, Civilians, and Courts* (Chicago and London 2008) 389 and n. 59, also John Noonan, *Bribes: The Intellectual History of a Moral* Idea (Berkeley and Los Angeles 1987) 139-144. Compare also the *Ordo Bambergensis*, Brasington, *Order in the Court*, 256.

habere ut di.xxxii. Nullus.[163] Qui abstinet ab oblatione presbiteri coniugati anathema sit ut di. xxvii. Si quis discernit.[164] Delictum ecclesie[165] non est conuertendum in dampnum ecclesie ut c.xvi. q.vi Si episcopum.[166] Iuramentum ab episcopo prestandum ut causa ii. q.i In primis.[167] Nisi causa probetur nemo excommunicetur excommunicatus tamen per se non redit ad gratiam communionis ut c.ii. q.i Nemo.[168] Oportet ab eo discere scripturas qui eas a maioribus traditas seruat ut di. xxxvii. Relatum est.[169] Propter oblationem factultatum coactum immolare in communione recipi ut di.l Presbyteros.[170] Sanctionibus patrum non obtemperantes ab inferioribus posse impeti ut c.ii. q.vi Alieni.[171] Pro dilapidatione rerum ecclesie deiectum sacerdotem ante cognitionem non esse restituendum ut causa ii. q.ii. Quia.[172] Nichil perire credimus ecclesiasticis utilitatibus si que sunt aliena reddantur di.lii. Nichil.[173] Inimiciis studentes uel facile litigantes ad accusationem uel testimonium non admittentur ut causa ii. q.u

[163] D.32 c.5.
[164] D.28 c.15.
[165] ecclesie] persone C
[166] persone C; C.16 q.6 c.2 (3): Delictum personae in dampnum ecclesiae conuerti non potest. Si episcopum (quod absit) talem culpam conmisisse constiterit, ut constet eum non irrationabiliter esse depositum, eadem eius depositio confirmetur, et omnes res suae ecclesiae que ablatae fuerant, restituantur, quia delictum personae in dampnum ecclesiae non est conuertendum. Si autem dicitur, quia Comitiolus defunctus est, ab herede eius que ab illo iniuste ablata sunt sine excusatione reddantur. The Cambridge manuscript corrects against Gratian. The variant in D.may well have been simple error; at the same time, it dramatically changes the canon's focus, from the individual to the church Herself.
[167] C.2 q.1 c.7.
[168] C.2 q.1 c.11.
[169] D.37 c.14.
[170] D.50 c.32. *Clericus* never refers to the worship of idols; the canon also does not give *coactum*.
[171] C.2 q.7 c.23: Again, the canon is remote from *Clericus'* reading. It does not treat inferiors accusing superiors.
[172] C.3 q.2 c.9.
[173]D.54 c.12 §2.

suspectos[174] simili[175] nullus.[176] Intra prouincie terminos accusatio audiatur et a comprouincialibus episcopis terminetur ut causa ii. q.ui Aliter.[177] Archidiaconus archipresbiter decanus prepositus curam animarum non tribuunt ut c.xvi. q.vii. Nullus omnino.[178] Curialis in episcopum electus antequam consecretur litteras absolutionis ab principe deferat ut di.lxii. Lectis.[179] Cura et dispositio uacantis ecclesie archidiaconem[180] ut di.lxii. Si in plebibus.[181] Dispositio sedis apostolice imperatoribus fuit concessa ut d.lxii. Adrianus in sinodo.[182] In criminalibus domestici testes reprobantur secus in ciuilibus ut c.xiiii. q.ii. Super.[183] Non uoluisse set non potuisse occurrere iudici probandum est ut c.xii.

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[174] C.3 q.5 c.6.
[175] C.3 q.5 c.10.
[176] C.3 q.5 c.11.
[177] Aliter] alium C; C.3 q.6 c.4.
[178] C.16 q.7c.11: 'Archidiaconus, archipresbiter, prepositus, uel decanus, nec offitia, nec beneficia ecclesiastica tribuat sine consensu episcopi. Item Calixtus Papa. Nullus omnino archidiaconus, aut archipresbiter, siue prepositus, uel decanus animarum curam uel prebendas ecclesiae sine iudicio uel consensu episcopii. alicui tribuat; immo, sicut sanctis canonibus constitutum est, animarum cura et pecuniarum ecclesiasticarum dispensatio in episcopi iudicio et potestate permaneat. Si quis uero contra hoc facere, aut potestatem, que ad episcopum pertinet, sibi uendicare presumpserit, ab ecclesiae liminibus arceatur'.
[179] D.63 c.18. While the canon does treat the need for an imperial letter in the confirmation of a bishop, there is no mention of a *curialis*. Perhaps this addition by *Clericus* reflects tensions between the crown and Canterbury. Certainly, Bishop Hugh was no stranger to Henry II.'s court, on which see Scammell, *Hugh Du Puiset*, 42-43, and 47-49 on his later (post 1179) role as a itinerant royal justice and a royal 'familiar'. On the *curialis* more generally, C.Stephen Jaeger, 'The Courtier Bishop in Vitae from the Tenth to the Twelfth Century', *Speculum* 58.2 (1983) 291-325, though not considering the canon law, also Ralph V. Turner, 'Changing Perceptions of the New Administrative Class in Anglo-Norman and Angevin England: The Curiales and their Conservative Critics', *Journal of British Studies* 29.2 (1990) 93-117.
[180] Archidiaconem] archidiaconi est C
[181] D.63 c.20. The canon does not refer to the governance of a church, *sede vaccante*, by an archdeacon.
[182] D.63 c.22.
[183] C.14 q.2 c.1.

q.v. in fine.[184] Apostolicam incurrit offensam clericus qui excessus sui episcopi quos uiderit romano pontifici non detulerit ut causa ii. q.vii. Quapropter.[185] Conuocatus et si ad conuentum uenerit sponte ibi non respondebit inuitus ut c.v. q ii. cap. i.[186] Diuersis[187] cruciat-ibus religiosus totor ueritatem exvere debet ut c.v. q.v. Illi.[188] In locum[189] non sufficiente archidiacono alium episcopus eligat ut di.lxxii. Episcoporum.[190] Delatori[191] lingua capuletur aut conuicto caput ampuetur ut c.v. q.vi. Delatori.[192] Ordinem quem habent non retinent qui non parent episcopis suis uolentibus[193] eos ad altiores gradus promouere ut di.lxxii. Placuit.[194] Argumentum quod auctoritate sacerdotali possit infamia aboleri ut c.vi. q.i. cap. ii..[195] Qui[196] semel deierauerit[197] semper sit in penitencia et num-quam in testimonium admittatur ut c.vi. q.i. Quicumque.[198] Quid faciendum sit cum solus episcopus nouit crimen alicuius et probare non possit et distinguitur utrum eius confessionem an aliter nouerit et quod episcopus iubetur ab eius confessione solus abstinere ut c.vi. q.ii. Si tantum,[199] Placuit.[200] Si duo temeritate concer-tantium fuerint electi tercius ordinetur quem nouus

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[184] C.4 q.5 c.1. There is nothing in the canon about an individual's unwillingness to come to court, only his inability due to a valid reason.
[185] C.2 q.7 c.47.
[186] C.5 q.2 c.1.
[187] *Illeg*. C.(in fold)
[188] C.5 q.5 c.4.
[189] *Illeg*. C.(in fold)
[190] D.74 c.5.
[191] *Illeg.* C.(in fold)
[192] C.5 q.6 c.5.
[193] uolentibus] uolentes C
[194] D.74 c.4.
[195] C.6 q.1 c.3.
[196] Qui] sciens *add* C
[197] *Illeg*. C.(in fold).
[198] C.6 q.1 c.18: Infamis efficitur qui sciens deierare presumit. Item Fabianus Papa. III. Pars. Quicumque sciens se periurauerit, quadraginta dies in pane et aqua, et septem sequentes annos peniteat, et numquam sit sine penitentia, et numquam in testimonium recipiatur; communionem tamen post hec percipiat.
[199] C.6 q.2 c.2.
[200] C.6 q.2 c.3.

consensus elegerit ut di.lxxviiii. Si duo.[201] Si diversa contigerit esse uota eligantium obtineat sentencia plurimorum ut lxxix. Si transitus.[202] Si forte uota eligantium in duas se partes diuiserint is obtineat iudicia metropolitani qui maioribus iuuatur studiis ac meritis ut di.lxii. sponte.[203] Incolumi ualerio yponensi episcopo augustinus coepiscopus datus est ut c.vii. q.i Non autem.[204] Sacerdotes prohibentur cum mulieribus conuersari excepta dumxtaxat matre et sorore et uxore que caste regende sunt ut di.lxxxi Volumus.[205] Lectores cum ad annos pubertatis uenerint aut uxorem ducere coguntur aut continentiam profiteri ut di. xxxii. Lectores.[206] Nulla datio sinit[207]alium[208] in loco alterius ordinari episcopum cum priorem necessitatis[209] infirmitatis non crimen ab offitio suo adducit nisi eo demum[210] recusante ut c.vii. q.i Quamuis.[211] Episcopi presbiteri diaconi contineant ceteri pro uarietate locorum sue ecclesie consuetudinem teneant ut di.lxxxiiii. Cum de quorumdam.[212] Etiam si uoluerit episcopus submoneri et alium sibi subrogari postulat audiendus non est ut causa vii. q i Petistis.[213]Singula ecclesiastica ministriis offitia singulis quibuslibet personis sigillatim committi ut di. xxxviiii.

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[201] D.79 c.8.

[202] Transitus]§Si trans <*illeg..*> *add supra ln*. C: D.79 c.10: Si Papa de electione sui successoris decernere non poterit. Si transitus Papae inopinatus euenerit, ut de sui electione successoris, ut supra placuit, non possit ante decernere, siquidem totius in unum conuenerit ecclesiastici ordinis electio, consecretur electus episcopus. Si uero, ut fieri solet, studia ceperint esse diuersa eorum, de quibus certamen emerserit, conuincat sententia plurimorum: sic tamen, ut sacerdotio careat, qui captus promissione non recto iudicio de electione decreuerit. *Clericus* does not specify the papacy.

[203] Sponte] si uero C; D.63 c.36.

[204] C.7 q.1 c.12.

[205] D.81 c.24.

[206] Lectores-lectores *om.* C; D.32 c.8.

[207] *Illeg*. C

[208] *Illeg*. C

[209] *Illeg*. C

[210] *Illeg*. C

[211] Quamuis] Lectores cum ad annos pubertatis uenerint aut uxorem ducere coguntur aut continentiam profiteri ut di. xxxii. lectores *add* C; C.7 q.1 c.14.

[212] D.84 c.4.

[213] C.7 q.1 c.17.

cap. i.[214] Res ecclesie secularibus uiris non committantur ut di.lxxxviiii. Indicatum.[215] Consaldus et ecclesiam et beneficium in manu aduocati refutauit et propter infirmitatem se monachum fieri permisit penitencia ductus postquam conualuit auctoritate apostolica ecclesiam et alia repetit ut ca. xvii. q.i Consaldus.[216] Nullus prebendas preposituras capellanias uel aliqua ecclesiastica beneficia hereditario iure audeat uendicare ut causa viii. q.i Apostolica.[217] Episcopus in parrochia cui est electus non admissus aut quia uetat populus[218] ob aliam causam sine suo uitio uel in ecclesia alia fit honoris et in ministerii. particeps dummodo rebus ecclesie in qua ministrat in nullo sit molestus ut di.xxii. Si quis episcopus.[219] Cuius uicem aliquis in aliquo negotio gerit tamquam eius locum tenens honoretur ut di.xxiii. c.ult.[220] Nullus presbyter alterius parrochianum commissum ad penetenciam suscipat sine

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[214] D.89 c.1: 'Uni personae duo non committantur offitia. Singula ecclesiastici iuris offitia singulis quibusque personis singillatim committi iubemus. Sicut enim in uno corpore multa membra habemus, omnia autem membra non eundem actum habent, ita in ecclesiae corpore secundum ueridicam Pauli sententiam in uno eodemque spirituali corpore conferendum est hoc offitium uni, alii. committendum est illud, neque enim quantumlibet exercitatae uni personae uno tempore duarum rerum offitia committenda sunt: quia si totum corpus oculus, ubi auditus? Sicut enim uarietas membrorum per diuersa offitia et robur corporis seruat, et pulcritudinem representat, ita uarietas personarum diuersa nichilominus distributa offitia et fortitudinem et uenustatem sanctae Dei ecclesiae manifestat. Et sicut indecorum est, ut in corpore humano alterius fungatur offitio alterum membrum, ita nimirum noxium simulque turpissimum, si singula rerum ministeria personis totidem non fuerint distributa'. Gratian is miscited.

[215] D.89 c.5.

[216] C.17 q.2 c.1.

[217] Apostolica *add supra lin.with tiemark* D; C.8 q.1 c.7.

[218] Populus] *Illeg*. C

[219] D.92 c.5: 'De episcopo ordinato, quem sua parrochia non recipit. Item ex Concilio Antioceno. [c.18.] Si quis episcopus ordinatus ad parrochiam, cuius est electus, minime accesserit, non suo uitio, sed quod eum aut populus uetet, aut propter aliam causam, non tamen eius uitio perpetratam, hic et honoris sit et ministerii. particeps, dummodo rebus ecclesiae, ubi ministrare cognoscitur, in nullo molestus existat. Quem etiam obseruare conuenit, quicquid sinodus perfecte prouinciae iudicando decreuerit'. Again, Gratian is miscited. Note that *Clericus* does not mention the provincial synod.

[220] *Illeg*. C. Cf. D.93 c.26.

consensu sui presbiteri uel excommunicare uel ordinare presumat ut c.viiii. q ii. cap. i.[221] Ab alio episcopo quam a suo ordinatos in suis ordinibus ex indulgentia permanere si uita eorum promereatur ut c.viiii. q.ii. Lugdunensis.[222] Pontifices pro cursu rerum temporalium imperatorum legibus utuntur ut di.xvi.[223] Cum ad uerum.[224] Commestiones que debentur episcopis dum uisitant parrochias non redimi ab eo qui eas debuit exhibere et ita negligi parrochianarum uisitationem ut c.x. q.i. Relata.[225] Ecclesias a laicis incastellari aut in seruitutem redigi prohibentur ut causa x. q.i. Sanctorum.[226] Monasterii.s cathedratici et aliarum exactionum immunitas concessa est ut c.x q.ult. Inter cetera.[227] Sit emptoribus ad eum recursus qui presumpserit aliquid de rebus ecclesie illicta uendicione distrahere ut ca. xii. q.ii. Vollaterne.[228] Episcopus uel abbas qui aliquid de rebus ecclesie uel monasterii. proprii. s cognatis contulerit uel aliter uendiderit deiciatur ut c.xii. q.ii. Quisquis.[229] Argumentum quod defuncto episcopo et alio substituto renouande sint scripture et instrumenta a decessore facta alioquin reputabuntur irrita ut c.xii. q.ii. Longquinitate.[230] Si episcopus de rebus ecclesie construxerit monasterium tradat illud eidem ecclesie ex cuius redditibus constructum fuit ut c.xii. q.ii. Apostolicos.[231] Quascumque res episcopus uel alius minster de

[221] C.9 q.2 c.1
[222] C.9 q.2 c.10.
[223] xvi] xcui C
[224] D.96 c.6.
[225] C.10 q.1 c.9.
[226] C.10 q.1 c.14.
[227] C.10 q.3 c.8. There is nothing in the canon about immunity from exactions.
[228] C.12 q.2 c.25.
[229] C.12 q.2 c.119.
[230] C.12 q.2 c.64.
[231] C.12 q.2 c.13: 'Vasa sacra, nisi pro redemptione captiuorum non sunt alienanda. Item ex VI. Sinodo uniuersali, [c.15.] Apostolicos et paternos canones renouans hec sancta et uniuersalis sinodus diffiniuit, neminem prorsus episcopum uendere uel utcumque alienare cimilia et uasa sacrata, excepta causa olim ab antiquis canonibus ordinata, uidelicet pro redemptione captiuorum; sed nec tradere salaria ecclesiarum in emphiteotica pacta, nec alias rusticas possessiones uenundare, ac per hoc, ecclesiasticos redditus ledere, quos ad propriam utilitatem, et ob escam pauperum et peregrinorum sustentationem esse decernimus'.

facultatibus ecclesie suo uel alterius nomine comparauerit non in propiniquorum set in ecclesie cui prefuit iura deuoluantur ut c.xii. q.ult. Fixvm.[232] Que simulauerit[233] se in proposito uirginale et non accepto uelo manere si nuptias contraxerit[234] penitenciam aget[235] ut ca. xxvii. q.i Viduas.[236] Si autem uelum assumpsit per simulationem et postea nuptias contraxit ad prius propositum licet simulatum redire cogetur ut di. xxvii. Femina.[237] Argumentum quod nisi bona fide sit inchoata prescriptio aduersus ecclesiam non currit ut c.xvi. q.iii. Si sacerdos[238] et cap.i.[239] Non expellendum sacerdotem ab ecclesia cui tempore sue ordinationis denominatus fuit ut c.xvi. q.ult. contra.[240] Ut monachi et possessionis dominus quem uite meritum commendat abbatem eligant ut c.xviii. q.ii. Abbatem.[241] Argumentum quod hii. qui decimas et ecclesiarum obuentiones percipiunt ad restraurandam fabricam ecclesiarium tenentur ut ca. xvi. q.i.[242] Si monachus.[243] Publicum latronem de ecclesia uel alio eius impune extrahi ut c.xvii. q.iiii. Sicut.[244]

Idem est de homicidis et huiusmodi scelerosis ut infra aut. coll. iii. de manda. principum § Neque autem homicidis.[245] Argumentum quod ab episcopo canonice iudicatus a principibus

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[232] C.2 q.5 c.4.
[233] Simulauerit] Simulauerint C
[234] contraxerit] contraxerint C
[235] Aget] agent C
[236] C.27 q.1 c.3. *Clericus* allows these women to remain in marriage after penance, something not in Gratian's canon.
[237] D.27 c.6.
[238] C.16 q.3 c.3. The canon denies benefit of prescription to erring clergy, something not in *Clericus*.
[239] C.16 q.3 c.1.
[240] C.16 q.7 c.29.
[241] C.-abbatem *add. supra ln C.;* C.18 q.2 c.3.
[242] I] iiii. C
[243] C.16 q.1 c.22.
[244] C.17 q.4 c.6.
[245] Nov. 17.7 (*Coll. III*, tit. 4; *Ep. Theod*. 17; Auth. 4,3; *Iul const.* xxi, (*Corpus juris civilis romani: Authenticae seu Novellae constitutiones D. Iustiniani sacratissimi principis*, ed. Dionisius Gothfredus (Venice 1844) 4.158.)

potest comprehendi impune ut c.xvi. q.ult. Si quis deinceps.[246] Quicquid sine episcopi licentia ab abbate uenditum fuerit ad episcopi potestatem uendicetur ut ca. xvii. q.ult. c.penult.[247] Abbatibus qui se sub nulli episcopo esse profitentur nullus episcoporum episcopalia iura administret ut c.xviii. Abbatibus.[248] Uxorem in adulterio deprehensam post peractam penitenciam potest quis retinere ut c.xxxi q.i c.iiii..[249] Solus apostolus paulus et barnabas mulieres sorores non circumducebant nec de euangelio uiuebant ut c.xxviii. q.i. Iam nunc.[250] Quibus temporibus pro alii.s rebus iurare non licet nisi pro concordia et pacificatione ut c.xxii. § q.ult. Decreuit.[251] Tandem curam et fidem eberet dominus uassallo[252] quam econuerso uassalus domino ut c.xxii. q.ult. de forma fideli.[253] Detractatam sententiam summorum pontificum ut xxxv. q.ix.[254] quod quis[255] apostolice §Sententia[256] Veniam.[257] Mulier de federe coniungii. inpetita sue et parentum restituenda est potestati et locus statuendus est ubi nulla uis multitudinis formidetur ut c.xxxiii. q.ii. Siue siue.[258] In[259] deo potestates concessas et propter uindictam malorum[260] gladium esse concessum ut C.xxiii. q.iiii. Quesitum.[261] Uxor non cogitur semper sequi uiri sui uoluntatem in transferendo domicilio set alii

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[246] C.xvi-deinceps *supra lin*. C; C.16 q.7 c.12. The canon prohibits simony; it has nothing directly to do with what *Clericus* presents. Perhaps it sets up a contrast to provoke disputation.
[247] C.7 q.4 c.40..
[248] C.18 q.2 c.18
[249] C.31 q.1 c.4: C.31 q.1 c.5
[250] C.28 q.1 c.8
[251] §Decreuit] ecrevit supra lin; C.22 q.5 c.17.
[252] uassallo] uallo C
[253] C.22 q.5 c.18.
[254] Ix] viiii. C
[255] C.35 q.9 c.3.
[256] Quis]§ sententia *add supra lin.* C; C.35 q.9 c.4.
[257] C.35 q.9 c.5.
[258] Siue siue] siue C; C.33 q.2 c.4.
[259] In *om.* C
[260] Malorum] noxiorum C.
[261] C.23 q.4 c.45.

non nubat[262] ut c.xxxiiii. Si quis ne.[263] In ecclesiasticis tamdiu fidei possessor quis dicitur quamdiu ignorat alienum ut c.xxxiiii. q.ii. Si uirgo.[264] Undecumque homines nascantur si parentum uitia non sectentur si dominum incolant salui erunt ut causa xxxii. q.iiii. Sicut. [265] Ut latius diffunderetur caritas in ecclesia dei inuentum est ne quis de propria cognatione uxorem ducat quasi sufficiente[266] stimulo sanguinis ad caritatem uel affectione[267] consanguineorum ut c.xxxv. cap. i.**[268]** Filii. episcoporum presbyterorum et diaconorum iure successionis capiant siue hereditatem siue aliud ut c.xv. q.ult. cap. antepenult.[269] Si uir et uxor consanguinitatem suam confessi fuerint et consentiens fama fuerit separentur ut c.xxxv. q.ui Si duo.[270] Contra prohibitionem ecclesie si quis aliquam duxerit eo tempore est illicitum matrimonium ut c.xxxv. q.ui. uidetur nobis.[271] Non tenet heretici sentencia in catholico ut c.xxiiii. q.ui. Achatius.[272] Qui mercatores nouis teoloneorum et pedaneorum exactionibus molestare presumpserit communione careat christiana ut c.xxiii. q.iii. Si quis.[273] Accusans episcopum prius deberet eum familiari colloquio admonere et non[274] ante admonitionem eum accusauerit excommunicandus erit ut c.ii. q.u. accusatio.[275] Excommunicatus sacrum misterium contigere si presumpserit absque spe restitutionis deponitur ut causa xi. q.iii.

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[262] nubat] utibat C
[263] uirgo] §-ne *supra lin*. C; C.34 q. 1, q.2 c.4.
[264] C.34 q.2 c.5.
[265] C.xxxiiii.-sicut *supra lin.* C; C.32 q.4 c.8. *Clericus* does not retain the *honesti* in Gratian's canon, thus removing any moral demands on the children of heretics.
[266] Sufficientem C[ac]
[267] Affectionem C
[268] C.35 q.1 c.un.
[269] C.15 q.8 c.3: *Clericus*' version appears to say the opposite of the canon. In general, Brundage, *Law, Sex, and Christian Society*, 251 n. 135.
[270] C.35 q.6 c.4.
[271] nobis: § uidetur nobis *add. supra lin.*; C.35 q.6 c.2.
[272] C.24 q.1 c.1.
[273] C.24 q.3 c.23.
[274] Non] si C
[275] C.2 q.7 c.15. *Clericus* draws from the second half of the canon, another example of very intentional excerpting.

cap. Si quis episcopus.[276] Clericus ex eo infamis iudicatur quod episcopo suo obedire contempnit ut c.xi. q.iii. Si autem.[277] Non debet anathematizari quis nisi cum aliter quis corrigi non potest ut c.xi. q.iii. cap. Nemo.[278] Clericus pulsatus coram ciuili iudice non respondeat uel aliquid proponat ut c.xi. q.i. Clericus.[279] Pro tribus causis quis est excommunicandus cum ad sinodum uenire non ult. cum ueniens ibi respuit sacerdotalibus obedire mandatis si ante finitam causam a sinodo abire presumit ut c.xi. q.iii. cap. Certum.[280]

[276] C.11 q.3 c.6. *Deponere* is not in Gratian's canon.
[277] § autem *add. supra lin.*; C.11 q.3 c.11.
[278] C.11 q.3 c.41.
[279] C.11 q.1 c.17.
[280] C.11 q.3 c.43.

L'évêque, suprême dispensateur de la cura animarum en droit canonique classique

Benoît Alix

Après avoir été érigé en un *ordo* particulier, au cours des premiers siècles de l'ère chrétienne, l'épiscopat forme un élément essentiel de l'architecture ecclésiastique médiévale.[1] Ses membres, chargés de pourvoir aux fonctions de gouvernement, de sanctification et d'enseignement, signe que l'épiscopat relève de la catégorie des ministères de direction.[2] À ce titre, la *cura animarum* forme un élément essentiel ressortissant à ces trois fonctions puisqu'elle implique à la fois l'exercice d'une autorité, l'administration des sacrements et, enfin, le rappel du contenu dogmatique de la foi professée. La fonction épiscopale, depuis le haut Moyen Âge, exige par conséquent de la part de son titulaire de porter une attention particulière aux comportements de ses subordonnés. L'évêque agit à leur égard comme un véritable surveillant et

[1] André Mandouze, 'Saint Augustin et le ministère épiscopal', *Jean Chysostome et Augustin. Actes du colloque de Chantilly, 22-24 septembre 1974*, éd. Charles Kannengiesser (Théologie historique 35; Paris 1975) 61-74; Jacques Fontaine, 'L'évêque dans la tradition littéraire du premier millénaire en Occident', *Les évêques normands du XI^e^ siècle. Actes du colloque de Cerisy-la-Salle (30 septembre-3 octobre 1993)*, éd. Pierre Bouet et François Neveux (Caen 1995) 41-51. Plus généralement, voir Alexandre Faive, *Naissance d'une hiérarchie. Les premières étapes du cursus clérical* (Théologie historique 40; Paris 1977).

[2] Robert Gryson, 'Les "Lettres" attribuées à Ignace d'Antioche et l'apparition de l'épiscopat monarchique', *Revue théologique de Louvain* 10 (1979) 446-453, réimpr. dans: Id., *Scientiam salutis. Quarante année de recherche sur l'antiquité chrétienne* (Bibliotheca ephemeridum theologicarum lovaniensium 211; Leuven/Paris/Dudley 2008) 21-30; Charles Munier, 'Les ministères de direction d'après les lettres d'Ignace d'Antioche', *Studia in honorem eminentissimi cardinalis Alphonsi M. Stickler*, éd. Rosalio José Castillo Lara (Studia et textus historiae juris canonici 7; Roma 1992) 541-462; Guy Jarousseau, '*Sola auctoritate*, le principat épiscopal à la manière de l'ermite saint Martin de Tours (fin IV^e^-V^e^ siècle)', *Le Prince, on peuple et le bien commun. De l'Antiquité tardive à la fin du Moyen Âge*, sous la dir. de Joëlle Quaghebeur, Hervé Oudart et Jean-Michel Picard (Histoire; Rennes 2013) 303-318.

censeur de leurs mœurs, d'après une tradition léguée par l'Ancien Testament.[3] À cet égard, le temps de la 'réforme grégorienne' prolonge, tout en la renforçant, la dimension pastorale de la fonction épiscopale dont l'essence réside dans l'*officium episcopale*.[4] Mais ce renforcement du rôle des évêques s'accompagne, dans le même temps, d'une dépendance accrue à l'égard du Siège apostolique.[5] Alors que son usage remonte aux temps les plus anciens, la définition de l'expression *cura animarum* n'est que très difficilement appréhendée par le droit canonique de l'époque classique.[6] Ce n'est finalement qu'avec la lente et progressive émergence de la distinction entre le pouvoir d'ordre et le pouvoir de juridiction que les canonistes sont en mesure de préciser l'objet et la portée de l'expression.[7] Le pape Innocent IV (1243-1254) propose une double acception de l'expression *cura animarum*. Au sens strict, elle désigne le pouvoir de lier et de délier, de sorte que, cette attribution relevant du for pénitentiel, seul celui qui est revêtu du sacrement de l'ordre, et est donc prêtre, peut l'exercer. Au sens large, la *cura animarum*

[3] Michael H. Hoeflich, 'The Speculator in the Governmental Theory of the Early Church', *Vigiliae Christianae* 34 (1980) 120-129; Claire Tignolet, 'Le modèle épiscopal carolingien au tournant du IX^e^ siècle', *Apprendre, produire, se conduire: le modèle au Moyen Âge. XLV^e^ Congrès de la SHMESP (Nancy-Metz, 22 mai-25 mai 2014)* (Histoire ancienne et médiévale 139; Paris 2015) 99-110.

[4] Ovidio Capitani, 'Episcopato ad ecclesiologia nell'età gregoriana', *Le istituzioni ecclesiastiche della 'Societas Christiana' dei secoli XI-XII. Papato, cardinalato ad episcopato. Atti della quinta Settimana internazionale di studio, Mendola, 26-31 agosto 1971* (Miscellanea del Centro di studi medievali 7; Milano 1974); Bernard Guillemain, 'L'action pastorale des évêques en France aux XI^e^ et XII^e^ siècles', *Le istituzioni ecclesiastiche della 'Societas Christiana' dei secoli XI-XII. Diocesi, pievi e parrochie. Atti della sesta Settimana internazionale di studio, Milano, 1-7 settembre 1974* (Miscellanea del Centro di studi medievali 8; Milano 1977) 117-135.

[5] John T. Gilchrist, 'Canon Law Aspects of the Eleveenth Century Gregorian Reform Programme', JEH 13-1 (1962) 21-38.

[6] Catherine Vincent, 'Naissance et développement de la cure des âmes', *Histoire des curés*, sous la dir. de Nicole Lemaître (Paris 2002) 39-152.

[7] Jean Gaudemet, 'Pouvoir d'ordre et pouvoir de juridiction', *AC* 29 (1985-1986) 83-98; Laurent Villemin, *Pouvoir d'ordre et pouvoir de juridiction: histoire théologique de leur distinction* (Cogitatio Fidei 228; Paris 2003).

désigne le pouvoir d'exclure et de recevoir dans l'Église, de corriger et de punir. En ce sens, la *cura* renvoie aux pouvoirs d'excommunier, d'interdire, de visiter—entre autres—, tous regardant la correction des mœurs.[8] Le recours à l'expression *cura animarum* pour désigner le pouvoir de lier et de délier est critiquée par Hostiensis qui estime qu'une telle analyse contrevient aussi bien au *ius* qu'à la *ratio naturalis*. Le fameux évêque d'Ostie entend clairement distinguer la *potestas* de la *cura*. La première relève de l' 'ordre' et correspond, *stricto sensu*, au pouvoir des clés dévolu à celui qui reçoit l'ordination sacerdotale, que l'évêque seul peut conférer. La *cura* en revanche relève de la 'juridiction' et doit par conséquent s'entendre de l'exercice d'un pouvoir de gouvernement. Hostiensis envisage cette distinction comme pouvant s'ordonner chronologiquement. En effet, dans un premier temps, chaque prélat, au moment de la confirmation de son 'élection' ou de son 'institution' dans une dignité ou un office donné, reçoit la *cura*. Celui qui reçoit le sacrement de l'ordre se voit ensuite conférer le pouvoir des clés.[9]

Les juristes médiévaux, et les canonistes en particulier, ont ainsi produit une vaste et complexe réflexion relative à la *cura animarum* et à ses conditions d'attribution. La question qui se *pose*

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[8] Innocentius IV, *Com.* ad X 1.23.4 *Cum satis*, s.v. *cura*: '. . . cura animarum dicitur stricte potestas ligandi et solvendi, scilicet, in foro poenitentiali, et hoc in nullo prelato est, nisi sit sacerdos . . . large dicitur cura potestas eijciendi et recipiendi in ecclesiam corrigendi, et puniendi excessus . . . sub hac cura est excommunicare, interdicere, visitare, et caetera talia, quae sunt ad correctionem morum . . . ', *Apparatus in quinque libros decretalium* (Frankurt am Main 1968 [réimpr. de Francofurti ad Moenum 1570]) fol.115ra, no. 2.

[9] Hostiensis, *Com.* ad eod. loc.: 'ego tamen hanc distinctionem non intelligo: etenim potestas ligandi, et solvendi in foro poenitentiali cura dici non potest, nec secundum ius: quia hic nullo iure cavetur, nec secundum rational naturalem: immo aliud est potestas, aliud cura . . . potestas etiam praedicta ordinis est non iurisdictionis, unde nec cura dicitur, sed potestas clavium in ordine sacerdotali recepta, quam nec sacerdos potest concedere, sed episcopus tantum . . . . Cura vero iurisdictionis est non ordinis, et hanc recipit praelatus in confirmatione . . . . Vel institutione. . . . Unde et quando talis praelatus ordinatur, non datur ei cura, quam iam receperat, sed potestas ligandi, atque solvendi animas sibi commissas, quam sine ordine non habebat . . . ', *In quique Decretalium libros commentaria* (Torino 1965 [réimpr. de Venetiis 1581]), fol.126, nos. 5-7.

avec les plus grandes difficultés est celle de savoir si d'autres que l'évêque, et sur quels fondements, ont accès à cette faculté alors que de son exercice dépend le Salut des fidèles. Aussi, après avoir été érigé en ordonnateur en chef de la *cura animarum*, l'évêque est envisagé comme son dispensateur en chef.

L'évêque, ordonnateur en chef de la cura animarum

Clé de voûte de l'architecture diocésaine, l'évêque occupe une place particulière parmi les offices ecclésiastiques.[10] Chef d'une circonscription ecclésiastique locale, il est le garant du salut des âmes de tous ceux qui y résident. Cette responsabilité, qui l'érige d'emblée en pasteur de la portion du troupeau à lui commise, suppose qu'il soit tout à la fois un surveillant et un ordonnateur.

Le surveillant

En sa qualité de chef du diocèse, l'évêque a vocation à y assurer l'unité de direction, dont la réalisation apparaît comme essentielle à la bonne administration ecclésiastique.[11] Celle-ci prend en particulier la forme d'une étroite surveillance des personnes et des biens relevant du diocèse, laquelle forme l'une des modalités du gouvernement épiscopal. Dès le second tiers du

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[10] Donald E. Heintschel, *The medieval concept of an ecclesiastical office. An analytic study of the concept of an ecclesiastical office in the major sources and printed commentaries from 1140-1300* (The Catholic University of America Canon Law Studies 363; Washington, D.C. 1956); Robert L. Benson, *The Bishop-Elect. A Study in Medieval Ecclesiastical Office* (Princeton, New-Jersey 1968). Voir, au sujet de cet ouvrage classique, le commentaire de John T. Gilchrist, 'The Office of Bishop in the Middle Ages', *TVR* 39 (1971) 85-101; Brigitte Basdevant-Gaudemet, 'Office ecclésiastique. Repères pour une histoire d'un concept', *AC* 39 (1997) 7-20, réimpr. dans: Ead., *Église et Autorités. Études d'histoire du droit canonique médiéval* (Cahiers de l'Institut d'Anthropologie Juridique 14; Limoges 2006) 271-284, no.XII; Ead. et Thibault Joubert, 'Recherches sur l'évolution historique d'une terminologie, l'office ecclésiastique', *L'Année Canonique* 49 (2007) 11-46.

[11] Kenneth Pennington, 'Bishops and their Dioceses', *Folia canonica* 5 (2002) 7-17; Bruno Lemesle, *Le gouvernement des évêques. La charge pastorale au milieu du Moyen Âge* (Histoire; Rennes 2015).

XII^e siècle, la terminologie adoptée par les juristes médiévaux, aussi bien civilistes que canonistes, assigne à l'évêque un rôle singulier dans la gestion du diocèse. Ainsi, l'auteur de la *Summa Trecensis*, composée entre 1135 et 1150 en Provence, écrit que:[12]

> C'est pourquoi, parmi les autres personnes qui se trouvent placées à la tête ou qui desservent des lieux vénérables, on trouve le très excellent évêque qui, à juste titre, est appelé guetteur (*speculator*) ou surveillant (*superintendens*), car c'est à lui qu'appartiennent le soin (*cura*) et la garde (*tuitio*) de toutes les autres maisons et personnes vénérables ainsi que, dans ces mêmes lieux, de tous ceux qui en dépendent.

Cette fonction régulatrice et ordonnatrice de l'office épiscopal est encore soulignée par l'auteur de la somme au Code de Justinien, appelée *Lo Codi*. La confection de ce texte en terre provençale, dans les années 1150-1160, constitue un enjeu majeur d'affirmation de la fonction de l'évêque, tant d'ailleurs à l'égard des agents séculiers que de ceux appartenant à la hiérarchie ecclésiastique locale.[13] L'autorité épiscopale est, en effet, susceptible d'être remise en cause tant par certains membres de la hiérarchie diocésaine locale, à l'instar de l'archidiacre, que par les corps collectifs constitués, comme les instances capitulaires ou les

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[12] *Summa Trecensis*, I.3.1 [*De episcopis et clericis*]: 'Quapropter inter ceteras personas quę venerabilibus locis presunt seu deserviunt excellentissimus habetur episcopus, qui recte speculator seu superintendens appellatur, cum ad eum cura ac tuitio omnium ceterarum venerabilium domorum ac personarum quoque ibidem suppeditantium pertineat', éd. Hermann Fitting, *Summa Codicis des Irnerius* (Berlin 1894) 8, lignes 1-5.

[13] Plus généralement, voir Martin Aurell, 'Première partie: 972-1245. Genèse de la Provence comtale', *La Provence au Moyen Âge*, dir. Martin Aurell, Jean-Paul Boyer et Noël Coulet (Le temps de l'histoire; Aix-en-Provence 2005) 53-94; Thierry Pécout, 'L'épiscopat au crible de la réforme dans les provinces d'Arles, Aix et Embrun au XII^e siècle', *Cahiers de Fanjeaux* 48 (2013) 343-392; Id., 'L'épiscopat et le pouvoir comtal en Provence, entre le XII^e et le XIV^e siècle', *Ecclesiastical and political state building in the Iberian monarchies 13^th^-15^th^ centuries*, dir. Hermínia Vasconcelos Vilar et Maria João Branco (Biblioteca-Estudos et Colóquios, Série 4; Évora 2016).

ordres religieux.[14] Après avoir relevé que les évêques sont 'les chefs de ceux qui sont au service d'une église', l'auteur du *Codi* note qu'il leur appartient tout aussi bien de prendre soin que de défendre 'toutes les personnes et tous les biens de l'Église'.[15] La terminologie en usage chez les glossateurs puise donc largement à celle des sources du droit canonique.

Cette proximité sémantique apparaît avec éclat dans les textes compilés dans le Décret de Gratien, à travers deux fragments d'origine patristique.[16] Dans le premier, inspiré des *Étymologies* d'Isidore de Séville († 636), le fameux évêque rappelle l'origine sémantique des offices ecclésiastiques relevant de l'*ordo episcoporum*, à savoir les patriarches, les archevêques, les métropolitains et les évêques.[17] À propos de l'office épiscopal (*episcopatus*), Isidore remarque que:[18]

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[14] Joseph Avril, 'La participation du chapitre cathédral au gouvernement du diocèse', *Cahiers de Fanjeaux* 24 (1989) 41-63. Plus généralement, voir les contributions réunies dans l'ouvrage: *Évêques et communautés religieuses dans la France médiévale*, éd. Noëlle Deflou-Leca et Anne Massoni (Histoire ancienne et médiévale 185; Paris 2022).

[15] *Lo Codi*, I.3.1 [*De episcopis et clericis et de rebus ipsorum*]: 'Et prius de episcopis qui caput sunt aliarum personarum que serviunt ecclesie, quia ad illos pertinet cura et deffensio personarum et omnium rerum ecclesie.', éd. Hermann Fitting, *Lo Codi in der lateinischen Übersetzung des Ricardus Pisanus* (Aalen 1968 [réimpr. anast. de Halle 1906]) 4, lignes 25-28. Version provençale: éd. Felix Derrer, *Lo Codi. Eine Summa Codicis in provenzalischer Sprache aus dem XII Jahrhundert...* (Zürich 1974) 4.

[16] Sur la présence des sources patristiques du Décret de Gratien, voir: Charles Munier, *Les sources du droit de l'Église du VIII^e^ au XIII^e^ siècle* (Mulhouse 1957); Id., 'À propos des textes patristiques du Décret de Gratien', *Proceedings Strasbourg 1968* 43-50; Jean Gaudemet, 'Les sources du Décret de Gratien', *RDC* 48 (1998) 247-261; Peter Landau, 'Patristiche Texte in den beiden Rezensionen des Decretum Gratianus', BMCL 23 (1999) 77-84.

[17] Sur cette quadripartition, voir Jean Gaudemet, *Église et Cité: histoire du droit canonique* (Paris 1994) 458-464.

[18] D.21, c.1 *Cleros*, §7: 'Episcopatus autem vocabulum inde dictum est, quod ille, qui episcopus efficitur, superintendat, curam scilicet subditorum gerens: SKOPEIN enim grece, latine intendere dicitur. Episcopi autem grece, latine speculatores interpretantur; nam speculator est prepositus in ecclesia dictus, eo quod speculetur atque perspiciat populorum infra se positorum morem et

> Le mot *episcopatus* doit s'entendre de celui qui, élevé à la dignité épiscopale, surveille, en prenant en charge le soin des subordonnés: 'skopein' en effet en grec se dit, en latin, diriger (*intendere*). Tandis que le grec dit 'les évêques', le latin comprend 'les guetteurs' (*speculatores*); car ce guetteur est établi dans l'Église aux fins de guetter et scruter attentivement les comportements habituels et la vie des populations établies sous lui.

Pourtant extrait de la fameuse encyclopédie que forment les *Etymologiae*, ce texte n'a connu qu'une diffusion limitée au sein des collections canoniques des Xe et XIe siècles, sa forme ayant d'ailleurs subi un certain nombre de variations.[19] La conception isidorienne de l'office est organisée autour du paradigme de la direction de la portion du peuple de Dieu commise à l'évêque. Néanmoins, tout en revêtant les atours d'un ministère de direction, la charge de l'évêque n'en reste pas moins un *ministerium*, c'est-à-dire un office au service de l'Église dont l'évêque n'est qu'un rouage particulier. Dans un second fragment du Décret de Gratien, le père du droit canonique, en se fondant sur l'autorité d'Augustin d'Hippone († 430), ne manque pas de témoigner de cette dimension ministérielle de l'office épiscopal. Dans ce texte, qui est un extrait de la *Cité de Dieu*, l'évêque d'Hippone déclare, en s'appuyant sur un verset de la première *Épître à Timothée* (3:1), que 'l'épiscopat' ne désigne pas le nom d'un 'honneur' (*honor*) mais d'une 'œuvre' (*opus*). Du point de vue étymologique, relève Augustin, le mot grec d''évêque' doit s'entendre, dans la langue latine, comme désignant le 'surveillant' (*superintendens*). De telle sorte que ne saurait se considérer comme évêque celui qui aime

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vitam.', éd. Emil Friedberg, *Corpus Iuris Canonici* (2 vols.; Graz 1959 [réimpr. de Lipsiæ 1879-1881]), 1.68). Voir Isidorus Hispalensis, *Etymologiae*, VII.11-12, éd. et trad. Jean-Yves Guillaumin et Pierre Monat (Auteurs latins du Moyen Âge; Paris 2012), 136-137.

[19] *Collectio IX librorum*, BAV, Vat. lat. 1346, fol.3va; *Collectio XII partium*, 1.226, Bamberg, Staatsbibl. Can. 7, fol.31ra; *Collectio V librorum*, 1.1.1, éd. Massimo Fornasari (CCCM 6; Turnholti 1970) 21-22, lignes 27-32.

'diriger' (*praesse*) sans 'se rendre utile' (*prodesse*).[20] À l'image du précédent, ce texte a assez peu circulé dans les collections canoniques réformatrices. On le retrouve néanmoins dans la collection de l'évêque Anselme de Lucques, compilée vers 1083, ou encore dans les collections en II ou XIII Livres, réalisées dans son sillage.[21] Il est en outre absent de la 'première recension' du Décret de Gratien.[22] Cette conception ministérielle de l'office épiscopal a vocation à s'appliquer également au prince des apôtres, mais encore plus généralement à l'ensemble de la hiérarchie ecclésiastique, comme le rappelle Bernard de Clairvaux à destination du pape Eugène III (1145-1153).[23] Le respect dû par le prélat à la charge qui lui a été conférée l'oblige à agir selon les prescriptions jadis promues par les pères de l'Église, conformément à l'image véhiculée par un fragment faussement attribué à Augustin. L'auteur du texte remarque que celui qui ne

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[20] C.8 q.1 c.11 *Qui episcopatum*, éd. Emil Friedberg 1.593-594. Voir Augustinus Hipponensis, *De civitate Dei*, XIX.19, éd. Bernhard Dombart et Alfons Kalb (CCL 48; Turnholti 1955) 686-687, lignes 22-40.

[21] Anselmus Lucensis, *Collectio canonum*, 6.27, éd. Friedrich Thaner (Aalen 1965 [réimpr. de Innsbruck 1906-1915]) 282; Voir Szabolcs A. Szuromi, 'The Rules Concerning Bishops in the 'Anselmi Collectio Canonum' – Sources and Discipline', *Folia canonica* 3 (2000) 173-183; Id., 'Patristic Texts in the *Collectio canonum Anselmis Lucensis* (Recensio 'A') and their correspondence with the *Decretum Gratiani*', *Folia canonica* 7 (2004) 68-109, ici 80; Id., 'Anselm of Lucca and his Canonical Collection', *Pre-Gratian Medieval Canonical Collections* (Aus Religion und Recht 18; Berlin 201) 69-81, ici 79-81; *Collectio II librorum/VIII partium*, BAV, Vat. lat. 3832, fol.87; *Collectio XIII librorum*, Berlin, SPBK Savigny 3, fol.56rb-va.

[22] Anders Winroth, *The Making of Gratian's Decretum* (Cambridge Studies in Medieval Life and Thought, 4e série 49; Cambridge 2000) 198.

[23] Bernardus Claraevallensis, *De consideratione*, 2.6.10: 'Blanditur cathedra? Specula est. Inde denique superintendis, sonans tibi episcopi nomine non dominium, sed officium', éd. Jean Leclercq et Henri M. Rochais dans *S. Bernardi opera* (Romae 1963) 3.417, lignes 17-18; trad. fr. par Pierre Dalloz: Bernard de Clairvaux, *De la considération* (Paris 2012) 52. Voir Bernard Jacqueline, 'Le pouvoir pontifical selon saint Bernard', *AC* 2 (1933) 197-201; Id., 'Le pape d'après le livre II du "De consideratione ad Eugenium Papam" de saint Bernard de Clairvaux', SG 14 (1967) 219-239.

dispose pas, en lui-même, de la qualité de bon administrateur (*ratio regiminis*), est incapable de se purger de ses fautes ou encore de corriger celles de ses fidèles, mérite d'être qualifié de 'chien impudique' plutôt que d'' évêque'.[24]

Ce modèle épiscopal, fondé sur les vocables de 'guetteur' et de 'surveillant', se diffuse largement à partir du XII^e^ siècle par des canaux aussi différents que les chartes épiscopales ou les traités de théologie. Parmi les premières, l'on trouve une charte de l'évêque de Laon datée de 1147 dans laquelle le prélat affirme devoir subvenir aux besoins des âmes et des corps de ceux qui sont au service de l'Église: 'parce qu'en raison de notre tâche de gouvernement et du nom de notre fonction nous devons veiller à surveiller, car l'évêque est appelé surveillant.'[25] Les théologiens, pour leur part, aussi bien dans leurs sermons que leurs traités, se font les chantres de ce modèle épiscopal, à l'instar du fameux maître en théologie parisien Pierre Lombard (†1160).[26] Son élève, et bientôt confrère, Pierre le Mangeur († ca.1179), remarque que ceux que l'apôtre Paul, dans son *Épître aux Galates* (6), qualifie de *maiores*—et dont la charge principale consiste à enseigner—doivent s'entendre des évêques, c'est-à-dire des

[24] C.2, q.7, c.32 *Qui nec regiminis*, éd. Emil Friedberg 1.493. L'expression *canis impudicus* se retrouve aussi à la D.83, c.2. Voir Thibault Joubert, 'La responsabilité canonique de l'Église en matière pénale: Regard historique, des temps apostoliques jusqu'à la chute de Rome', *L'Année canonique* 51 (2009) 237-252.

[25] 'Quoniam ex cura regiminis et ex officii vocabulo admonemus superintendere, episcopus enim dicitur superintendens, sicut necessitatibus animarum Deo servientium ita et corporum, in quantum prevalet, debet munificentia notra per providentiam subvenire', éd. Annie Dufour-Malbezin, *Actes des évêques de Laon des origines à 1151* (Documents, études et répertoires 65; Paris 2001) 411, no.292. Plus généralement, voir Joseph Avril, 'La fonction épiscopale dans le vocabulaire des chartes (X^e^-XII^e^ siècles)', *Horizons marins, itinéraires spirituels (V^e^-XVIII^e^ siècle)*, éd. Henri Dubois, Jean-Claude Hocquet et André Vauchez (2 vols.; Histoire ancienne et médiévale 20-21; Paris 1987) 1.125-133.

[26] Petrus Lombardus, *In epistolam I ad Timothaeum*, 3, PL192.343B.

'gardiens' ou 'surveillants' de la maison d'Israël.[27] L'évêque est encore, dit le liturgiste Sicard de Crémone (†1215), le 'gardien de la vigne du Seigneur de l'Univers'.[28] L'ordre ecclésiastique comportant, outre les évêques, les prêtres en général, Pierre de Celle (†1183), d'abord abbé du monastère Saint-Remi de Reims (1162-1181) avant de devenir évêque de Chartres (1181-1183), croit nécessaire de rappeler l'existence du principe hiérarchique. Après avoir souligné l'origine sémantique de l'office épiscopal, il remarque que les 'prêtres mineurs', tout en étant dépourvus de la 'plénitude du pouvoir', n'en sont pas moins appelés au 'partage de la sollicitude', de sorte qu'ils reçoivent, pour partie, 'la sollicitude' en matière de surveillance avec la charge de régir le peuple dont ils ont la responsabilité.[29] L'office du 'gardien' consiste à 'veiller, à discerner et à proclamer constamment, à se tenir et à siéger dans les hauteurs'.[30] Ce rappel du principe de l'ordonnancement hiérarchique irrigue la doctrine canonique médiévale, à laquelle le pape Innocent III (1198-1216) contribue largement. Ce dernier, en effet, commence par assimiler, d'une part, les évêques aux 'prêtres majeurs' (*maiores sacerdotes*), agissant à la place des apôtres et, d'autre *part, les 'prêtres' (presbyteri) aux "prêtres mineurs" (minores sacerdotes*) agissant, quant à eux, à la place des disciples.31 Le magistère exercé par l'évêque doit donc s'entendre d'un pouvoir original que, seul, il est en mesure d'user aux fins de

[27] Petrus Comestor, *Sermo XX In litania majore*: 'Ipsi enim dati sunt speculatores domui Israel, unde et praelatos nostros episcopos vocamus.', PL198.1778A. Voir: Ezechiel 33:7: 'Et tu, fili hominis, speculatorem dedi te domui Israel [...]', *Biblia Sacra iuxta Vulgatam Clementinam*, 7e éd. Alberto Colunga et Laurentio Turrado (Biblioteca de autores cristianos 14; Matriti 1985) 835.

[28] Sicardus Cremonensis, *Mitralis de officiis*, 2.4, éd. Gábor Sarbak et Lorenz Weinrich (CCCM 228; Turnhout 2008) 89-90, lignes 23-29.

[29] Petrus Cellensis, *Sermo LXXXIII*, PL202.891A.

[30] Ibid., PL202.891B.

[31] Innocentius III, *De sacro altaris mysterio*, 6: 'Apostolorum itaque vices majores obtinent sacerdotes, id est episcopi; discipulorum vero minores, id est presbyteri.', PL217.777D.

l'unité de chacun des deux *ordines* du diocèse, à savoir les clercs et les laïcs. En effet, de même qu'il n'existe, selon l'image biblique, qu'une seule vigne, de même il n'y a qu'un seul diocèse, dont le 'guetteur' (*speculator*) principal est l'évêque, ainsi que le déclare Robert Grosseteste, évêque de Lincoln (†1253).[32]

À la fonction de surveillant s'ajoute, pour l'évêque, celle d'ordonnateur.

L'ordonnateur

L'évêque forme, au sein du diocèse, un facteur d'ordre dont le rôle est à la mesure de son office, lequel réside dans le maintien de l'unité du peuple de Dieu dont il a la responsabilité. Le prélat est par conséquent la source à partir de laquelle l'ensemble de la hiérarchie diocésaine s'ordonne aux fins du gouvernement et de l'enseignement des fidèles. De cette configuration, l'expression *praeordinator in cunctis*, tirée de l'un des fragments du Décret de Gratien, permet de rendre compte. Le texte est un long extrait, que l'inscription attribue à une lettre d'Isidore de Séville, dont l'objet consiste à énumérer les attributions appartenant à chacun des offices ecclésiastiques. Il s'agit en réalité d'un court traité composé, très probablement, dans l'espace visigothique, entre la fin du VII^e^ et le début du VIII^e^ siècle.[33] Après avoir évoqué les ordres mineurs—le portier, l'exorciste, l'acolyte, le psalmiste et le

[32] Robertus Grossum Caput, Ep. 127: 'speculator super totam dioecesim suam', éd. Henry R. Luards (Rerum Britannicarum medii aevi scriptores 25; London 1861) 400; 'Est autem una dioecsis sicut una vinea, cuius speculator superior est episcopus', éd. cit. 400. Cf Jean 15:5, *Biblia Sacra iuxta Vulgatam Clementinam*, éd. cit. 1058.

[33] Roger Edward Reynolds, 'The "Isidorian" Epistula ad Leudefredum: An Early Medieval Epitome of the Clerical Duties', *Mediaeval Studies* 41 (1979) 252-330 réimpr. dans: Id., *Clerical Orders in the Early Middle Ages. Duties and Ordination* (Collected Studies series 670; Aldershot 1999); no.III; Id., 'The "Isidorian" Epistula ad Leudefredum: Its Origins, Early Manuscript, Tradition, and Editions', *Visigothic Spain. New approaches*, éd. Edward James (Oxford 1980) 251-272.

lecteur—puis les ordres majeurs—le sous-diacre, le diacre et le prêtre—, l'auteur en vient à l'évêque, à propos duquel il remarque que:[34]

> La consécration des églises, l'onction de l'autel et la confection du chrême relèvent de l'office épiscopal. Ce même évêque attribue les fonctions (*offitia*) et les ordres ecclésiastiques, il bénit lui-même les vierges sacrées et, alors que chacun [des offices mentionnés] l'emporte dans son domaine particulier, l'évêque est, pour sa part, le premier ordonnateur en toutes choses (*praeordinator in cunctis*).

Alors que la diffusion du texte au cours des deux siècles suivants son élaboration est plutôt restreinte, les collections canoniques, à partir du IX^e^ siècle, lui font bon accueil mais selon des formes variables.[35] Forgé à partir du concept romain d'*ordo*, le vocable *ordinator*, en usage dans le latin classique, permet de rendre compte de la place éminente que l'évêque occupe au sein de l'odonnancement hiérarchique de l'Église.[36] Le concept même d'*ordo*, reçu de manière précoce dans le vocabulaire chrétien, connaît, dans le droit canonique médiéval, une fortune considérable.[37] Le théologien parisien Hugues de Saint-Victor

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[34] D.25, c.1 *Perlectis*, §9: 'Ad episcopum pertinet basilicarum consecratio, unctio altaris et confectio crismatis. Ipse predicta offitia distribuit et ordines ecclesiasticos, ipse sacras virgines benedicit, et, dum precessit in singulis unusquisque, iste tamen est preordinator in cunctis', éd. Emil Friedberg 1.90. Voir Donald E. Heintschel, *The medieval concept of an ecclesiastical office* 16-30.

[35] Sur le problème de la tradition manuscrite, voir les contributions précédemment citées de Roger Edward Reynolds.

[36] Jean Gaudemet, 'L'apport du droit romain à la patristique latine du IV^e^ siècle', *Les transformations de la société chrétienne au IV^e^ siècle. Miscellanea Historiae Ecclesiasticae* (Bibliothèque de la Revue d'histoire ecclésiastique 67; Louvain-la-Neuve/Bruxelles 1983) 165-181, réimpr. dans: Id., *Formation du droit canonique et gouvernement de l'Église de l'Antiquité à l'âge classique* (Strasbourg 2008) 41-54, no.1; Anne-Isabelle Bouton-Touboulic, 'Les valeurs d'*ordo* et leur réception chez saint Augustin', *Revue des Études Augustiniennes* 45 (1999) 295-334

[37] Peter Landau, 'Der Begriff *ordo* in der mittelalterichen Kanonistik', *Studien zum Prämonstratenserorden*, éd. Irene Crusius et Helmut Flachenecker

(†1141), dans son traité relatif aux sacrements de la foi chrétienne, dont la composition paraît devoir s'établir autour de l'année 1134, reprend en substance le propos du pseudo-Isidore.[38] La forme issue du Décret de Gratien, pour sa part, se retrouve chez quelques grands canonistes du XIII^e^ siècle, à l'instar de Jean de Petesella et Raymond de Peñafort (†1275).[39]

La terminologie en usage dans les textes recueillis par Gratien accrédite l'idée selon laquelle l'évêque occupe, au sein du diocèse, une place éminente. Toute l'administration diocésaine est en effet soumise à son étroite surveillance dont rendent compte les vocables de *potestas*, *ordinatio*, *provisio* et *tuitio*.[40] Aussi les décrétistes, à l'instar de l'auteur de la *Summa Lipsiensis* ou d'Honorius de Kent, insistent sur la détention, par l'évêque, d'un 'plein pouvoir de disposer' (*plena potestas disponendi*) à l'intérieur des limites de la circonscription diocésaine.[41] Huguccio, à la charnière des années 1180-1190, accentue cette tendance en conférant au chef du diocèse 'le pouvoir de gouverner

(Veröffentlichungen des Max-Planck-Instituts für Geschichte 185, Studien zur Germania Sacra 25; Göttingen 2003), réimpr. dans: Peter Landau, *Europäische Rechtsgeschichte und kanonisches Rechts im Mittel-alter* (Badenweiler 2013) 385-400.

[38] Hugo de Sancto Victore, *De sacramentis christianae fidei*, 3.12, PL176.430B.

[39] Johannes de Petesella, *Summa* ad X 1.31, BAV, Vat. lat. 2343, fol.152vb; Raymundus de Pennaforte, *Summa de iure canonico*, II.1.§.7, éd. Xaverio Ochoa et Aloisio Díez (Universa Bibliotheca Iuris 1; Roma 1975) 50; Id., *Summa de poenitentia*, 3.27.§.5, éd. cit. (Universa Bibliotheca Iuris I/B; Roma 1976) 684.

[40] Voir C.10 q.1, c.2 *Sic quidam*, 3 *Decretum* et 4 *Regenda*, éd. Emil Friedberg 1.613.

[41] *Summa 'Omnis qui iuste iudicat' sive Lipsiensis* ad C.10 d.a.c.1, s.v. *laicus quidam*: 'In superiori causa dictum fuerat quid iuris metropolitanus per universam provinciam habeat. Sed ne ex similitudines consequentia videtur intelligi quod episcopus propensius ius non habret in sua diocesi quam archiepiscopus in sua metropoli, ideo alium tractatum supponit, ubi principaliter intendit ostendere quod episcopus in sua parrochia plenam disponendi habeat potestatem', éd. Rudolf Weigand, Peter Landau et Waltraud Kozur (MIC A 7.2; Città del Vaticano 2012) 314, lignes 1-6.

et de disposer' (*potestas gubernandi et disponendi*).[42] Ce vocabulaire, loin de rester l'apanage des écoles de droit canonique, est largement relayé par les décrétales pontificales.[43] Ces dernières, dont l'essor se situe dans la seconde moitié du XII^e^ siècle, en particulier sous le pontificat d'Alexandre III (1159-1181), deviennent le vecteur d'une uniformisation des pratiques institutionnelles au sein de la hiérarchie ecclésiastique.[44] La compilation de certaines d'entre elles dans des collections canoniques leur confère une portée générale, assurant ainsi la diffusion d'un faisceau de prérogatives ressortissant à la fonction épiscopale. C'est le cas, par exemple, d'une décrétale du pape Innocent III, datée du 17 octobre 1206, dans laquelle le souverain pontife s'attache à déterminer la nature du pouvoir épiscopal. Le pape, qui commence par définir l'évêque comme l' 'administrateur et l'ordonnateur en toutes choses' (*provisor est et ordinator in cunctis*), affirme ensuite, d'après les 'statuts des sacrés canons', que le prélat détient, dans son diocèse, 'la pleine

[42] Huguccio, *Summa* ad C.11 *pr*., s.v. *clericus*: 'Episcopus habet potestatem gubernandi et disponendi', BAV Vat. lat. 2280, fol.167v, cité par Martinien Van de Kerckhove, 'La notion de juridiction chez les décrétistes et les premiers décrétalistes (1140-1250)', *Études franciscaines* 49 (1937), 420-455, ici 423.

[43] Henri Vidal, 'Le pape législateur de Grégoire VII à Grégoire IX', *Renaissance du pouvoir législatif et genèse de l'État*, éd. André Gouron et Albert Rigaudière (Publications de la Société d'Histoire du droit et des institutions des anciens pays de droit écrit 3; Montpellier 1988) 261-275; Michael Wilks, '*Legislator divinus-humanus*: the medieval pope as sovereign', *Papauté, monachisme et théories politiques. Études d'histoire médiévale offertes à Marcel Pacaut* (2 vols.; Collection d'histoire et d'archéologie médiévales 1; Lyon 1994) 1-181-195; Gérard Fransen, 'La décrétale, facteur d'évolution', *Studi Senesi* 107 (1995) 7-15, réimpr. dans: Id., *Canones et quaestiones. Évolution des doctrines et système du droit canonique*, éd. Antonio García y García (3 vols.; Bibliotheca eruditorum 25; Goldbach 2002) 2.613-622.

[44] Anne J. Duggan, 'Making Law or Not? The Function of Papal Decretals in the Twelfth Century', *Proceedings Esztergom 2008* 41-70; Ead., 'Master of the Decretals: A Reassessment of Alexander III Contribution to Canon Law', *Pope Alexander III (1159-81): the art of survival*, éd. Peter D. Clarke et Anne J. Duggan (Church, faith, and culture in medieval West; Farnham 2012) 365-418.

disposition, direction et juridiction'.[45] Aussi le prélat exerce-t-il en principe, dans les limites de l'espace diocésain, le 'pouvoir de commander' (*potestas imperandi*), ainsi que le suggère la lecture *a contrario* de certains privilèges d'exemption octroyés par le souverain pontife dès le milieu du XII^e^ siècle.[46]

L'évêque est titulaire d'un pouvoir de gouvernement dont les vocables *gubernatio* ou *regimen* soulignent le caractère supérieur.[47] Le chef du diocèse a par conséquent la charge du 'gouvernement des églises' (*regimen ecclesiarum*), comme le déclare lui-même l'évêque de Soissons Joscelin dans une charte datée des années 1139-1140.[48] Cette prérogative est doublement fondée à la fois sur le 'soin' (*cura*) et la 'sollicitude' (*sollicitudo*) auxquels l'évêque est appelé à l'égard de tous ceux qui se trouvent

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[45] Innocentius III, Ep. 170 (171) *Ecclesia Wlterana* Po. 2895 (17.X.1206): 'Iure siquidem communi hoc sibi competere proponebat, quia, secundum quod sacrorum canonum statuta declarant, in sua ecclesia dispositionem, provisionem et iurisdictionem episcopus plenam habet. Nam etsi subditorum quisquam in suo officio et honore precedat, episcopus tamen provisor est et ordinator in cunctis', éd. Andrea Sommerlechner *et alii*, *Die Register Innocenz'III* (15 vols.; Wien 2004) 9.307, lignes 2-6 = 3 Comp. 1.6.16 = X 1.6.31.

[46] Voir le privilège d'exemption en faveur du monastère de Peterborough, en Angleterre: Eugenius III, *Desiderium* JL8965 (17.XII.1146): 'Nec audeat episcopus potestatem habere imperandi, nec aliquam ordinationem quamvis levissimam faciendi nisi ab abbate loci fuerit rogatus, quatenus monachi semper maneant in abbatum suorum potestate nullusque monachum sine testimonio vel concessione abbatis sui in ecclesia aliqua teneat, vel ad aliquem promoveat ordinem', PL180.1162D. Voir encore un aute texte en faveur de l'abbaye parisienne de Saint-Germain-des-Près: Lucius III, *In eminenti* JL14549 (31.XII.1181), PL201.1088D.

[47] Michel Lauwers, ' "Territorium non facere diocesim". Conflits, limites et représentations territoriales du diocèse, V^e^-VIII^e^ siècle', *L'espace du diocèse. Genèse d'un territoire dans l'Occident médiéval (V^e^-XIII^e^ siècle)*, dir. Florian Mazel (Histoire; Rennes 2008) 26-65; Bruno Lemesle, *Le gouvernement des évêques* 108-115.

[48] 'Nos qui ex episcopali officio ecclesiarum regimen suscepimus illis precipue ecclesiis prodesse debemus quas morum gravitate vel religiones gratia preminere non dubitamus', éd. par les élèves de l'École nationale des chartes sous la direction d'Olivier Guyotjeanin, *Le chartrier de l'abbaye prémontrée de Saint-Yved (1134-1250)* (Paris 2000) 163, no.17.

établis dans les limites du diocèse.[49] L'une des dispositions contenues dans les statuts de l'évêque de Poitiers Gautier de Bruges, promulgués lors du synode de 1280, insiste sur le caractère universel, quoique borné par les frontières diocésaines, de cette double prérogative épiscopale de la *cura* et de la *sollicitudo*.[50] En sa qualité de 'médecin spirituel', d'après l'expression de Robert Grosseteste, l'évêque est défini comme 'le chef de toutes les âmes de son diocèse'.[51] Malgré les vives revendications de certains des membres de la hiérarchie ecclésiastique locale ou encore des groupes constitués, à l'instar des chapitres ou des communautés religieuses, l'évêque demeure tout au long du Moyen Âge la clé de voûte de l'architecture ecclésiastique diocésaine.[52] Aussi bien la législation synodale que la doctrine canonique, entre la fin du XIII^e^ siècle et le début du suivant, rappellent cette place prééminente. C'est le cas, par exemple, de Guillaume Durand qui, dans son traité liturgique intitulé le *Rational des offices divins*, composé entre 1286 et 1296, adopte une terminologie héritée en particulier du Décret de Gratien.[53] L'insistance avec laquelle les membres de l'épiscopat en usent témoigne du nécessaire rappel de règles souvent remises en cause par une partie au moins des membres de la hiérarchie ecclésiastique diocésaine. Ces pétitions de principe irriguent les

[49] Joseph Avril, 'La vie des paroisses d'après quelques lettres du pape Alexandre III', *Papauté, monachisme et théories politiques* 1.19-28; Bruno Lemesle, *Le gouvernement des évêques* 100-104.

[50] Can.4: 'Cum cura et sollicitudo totius diocesis nobis incumbere dignoscitur [...]', éd. Joseph Avril, *Les statuts synodaux français du XIII^e^ siècle* (6 vols.; Collection de documents inédits sur l'histoire de France, Section d'histoire médiévale et de philologie, Série in-8° 28; Paris 2001) 5.109.

[51] Robertus Grossum Caput, Ep. 127, éd. Henry R. Luards 403 et 396.

[52] Thierry Pécout, 'Les pouvoirs de l'évêque: élargissement ou restriction?', *Structures et dynamiques religieuses dans les sociétés de l'Occident latin (1179-1449)*, dir. Marie-Madeleine de Cevins et Jean-Michel Matz (Histoire; Rennes 2010) 77-84.

[53] Guillelmus Duranti, *Rationale divinorum officiorum*, 2.11, éd. Anselme Davril et Timothy M. Thibodeau (CCL 40; Turnholti 1995) 171-176.

dispositions adoptées lors des synodes diocésains dont les évêques entendent faire des lieux d'expression de leur autorité.[54] Dans les statuts qu'il fait rédiger pour son diocèse, au cours du synode diocésain de 1310, l'évêque Umberto de Bologne rappelle ainsi que doit lui revenir le quart de la valeur des biens des clercs décédés (*quarta pars mortuariorum*), autrement dit l'exercice du droit de dépouille.[55] Conformément à la terminologie classique, l'évêque se qualifie lui-même de 'chef' (*caput*) et d' 'ordonnateur en toutes choses'.[56] Pour leur part, Guillaume de Mandagoût († 1321) et Jesselin de Cassagne († 1334/5), auteurs de la glose ordinaire aux *Extravagantes de Jean XXII*, mentionnent encore l'évêque comme 'premier ordonnateur en toutes choses', détenant tout à la fois le 'pouvoir' (*potestas*) sur les églises situées dans l'étendue de son diocèse et la 'garde' (*tuitio*) des paroisses.[57]

Maître de l'administration ecclésiastique et spirituelle de son diocèse, l'évêque est le principal dispensateur de la *cura animarum*.

L'évêque, dispensateur en chef de la cura animarum

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[54] Michel Rubellin, 'Un instrument du contrôle épiscopal au XIII^e^ siècle: les statuts synodaux', *Comprendre le XIII^e^ siècle. Études offertes à Marie-Thérèse Lorcin*, dir. Pierre Guichard et Danièle Alexandre-Bidon (Lyon 1995) 121-132.

[55] Franck de Saint-Palais d'Aussac, *Le droit de dépouille (jus spolii*) (Paris 1930).

[56] Can.61: 'Ad illius unionis seu communionis ostensionem que inter cuiuslibet urbis antistitem et ecclesias ipsius civitatis et diocesis quarum omnium agnoscitur esse capud et preordinator in cunctis, condictores canonum decreverunt mortuariorum ecclesiis ipsis obveniencium, episcopo portionem canonicam persolvendam, eapropter ne nobis desidia impingatur et ne dici possimus ex taciturnitate prebere causam alicui alterius debitum retinendi, constitutione presenti statuimus et firmamus . . . ', éd. Leandro Novelli, 'Costituzioni della chiesa bolognese emanate nel sinodo diocesano del 1310 al tempo del vescoco Uberto', *SG* 8 (1962) 447-552, ici 528.

[57] Guillelmus de Mandagato et Genzelinus de Cassanis, *Gl. ord.* ad Extrav. Joan. XXII 3.1, s.v. *ordinario*, *Liber Setus Decretalium...una cum Clementinis, et Extravangatibus, earumque glossis restitutus* (Venetiis 1595) 26.

Soucieux du salut des âmes de ses subordonnés, l'évêque est appelé à porter une attention particulière tant à leurs comportements individuels et collectifs qu'au contenu de la foi qu'ils professent. Pasteur par excellence à qui est confiée la *cura animarum*, lui seul jouit en principe du pouvoir de l'attribuer à un autre. Mais l'impossible ubiquité épiscopale exige que l'évêque fasse appel à des agents inférieurs chargés de cette attribution. Toutefois, compte tenu de son caractère éminemment pastoral, le consentement épiscopal est exigé, sinon même son mandat.

Le consentement épiscopal

L'évêque, en qualité de chef de l'administration diocésaine, jouit de certaines prérogatives, au nombre desquelles se trouve la libre disposition des offices ecclésiastiques subalternes.[58] Il lui appartient en effet d'en désigner les titulaires, de sorte qu'il est en principe le seul à pouvoir délivrer la charge particulière de la *cura animarum*, autrement dit du soin des âmes. Il est notable de constater que la réflexion proposée par la doctrine canonique au cours du XII^e^ siècle est contemporaire du phénomène de territorialisation du cadre géographique de la paroisse.[59] Cette prérogative épiscopale s'inscrit plus largement dans une théorie de l'exercice du gouvernement des 'choses spirituelles', telle que les décrétistes l'élaborent progressivement à partir de plusieurs

[58] Cf. *supra* D.25 c.1 §9.

[59] Giorgio Picasso, '*Cura animarum* e parrochie in Italia nella normativa canonistica', *Pievi e parrochie in Italia nel basso medioevo (sec. XIII-XIV). Atti del VI Convegno di Storia della Chiesa in Italia (Firenze, 21-25 sett. 1981)* (2 vols.; Italia Sacra. Studi e documenti di storia ecclesiastica 35-36; Padova 1984) 1.65-80 réimpr. dans: Id., *Sacri canones et monastica regula: disciplina canonica e vita monastica nella società medievale* (Bibliotheca erudita 27; Milano 2006) 263-276. Voir la revue en ligne *Médiévales* 49 (2005) consacré à *La paroisse, genèse d'une forme territoriale*, sous la dir. de Dominique Iogna-Prat et Élisabeth Zadora-Rio; Emmanuel Grélois, 'La paroisse est-elle un territoire?', *Structures et dynamiques religieuses dans les sociétés de l'Occident latin (1179-1449)*, sous la dir. de Jean-Baptiste Matz et Marie-Madelein de Cevin (Histoire; Rennes 2010) 97-106.

canons du Décret de Gratien.[60] Les canonistes médiévaux forgent en outre les expressions de 'loi de juridiction' et de 'loi diocésaine' pour rendre compte de l'ensemble des attributions relevant de l'office épiscopal.[61] Le pouvoir d'attribuer la *cura animarum* relève, d'après les premiers décrétistes, de la 'loi diocésaine' (*lex dioecesiana*) qui confère à l'évêque le 'pouvoir' (*potestas*)—ou le 'droit' (*jus*)—de 'dispenser'—ou de 'disposer'—des 'biens spirituels' ainsi que celui d' 'instituer' et d' 'ordonner' les ministres.[62] Parmi les canons compilés dans le Décret de Gratien, qui insistent sur cette compétence exclusivement réservée au seul chef du diocèse, l'un revêt une autorité particulière, car il est l'expression du droit général de l'Église. Il s'agit en effet d'une disposition conciliaire adoptée lors du premier des quatres conciles généraux du Moyen Âge en la basilique du Latran au cours des mois de mars et avril 1123.[63] La paternité du texte, tel qu'il apparaît dans le Décret, est attribuée non pas à l'assemblée conciliaire dans son ensemble mais au seul pape—en l'espèce Calixte II (1119-1124)—qui en était par conséquent le président.[64]

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[60] Charles de Miramon, '*Spiritualia* et *Temporalia*: Naissance d'un couple', ZRG Kan. Abt. 92 (2006) 224-287.

[61] Martinien Van de Kerckhove, 'La notion de juridiction' 425-440.

[62] Rufinus, *Summa* ad C.10, q.1, c.1, s.v. *diocesiana lege*: 'Est autem lex diocesiana, qua episcopus potestatem habet dispensandi spiritualia et ministros instituendi et ordinandi', éd. Heinrich Singer (Aalen 1965 [réimpr. de Paderborn 1902]) 301; Johannes Faventinus, ibid. Paris, BN lat. 14606, fol.78vb; Stephanus Tornacensis, ibid.: 'Diocesiana lex est, que habet episcopus ius disponendi spiritualia et ministros instituendi et ordinandi' éd. Johann Friedrich von Schulte (Aalen 1965 [réimpr. de Giessen 1891]) 209. Voir Bruno Lemesle, *Le gouvernement des évêques* 115-134.

[63] Raymonde Foreville, *Les conciles de Latran I, II, III et de Latran IV: 1123, 1139, 1179 et 1215* (Histoire des conciles œcuméniques 6; Paris 2007 [rééd. de Paris 1965]) 44-68; Georg Gresser, *Die Synoden und Konzilien in der Zeit des Reformpapsttums in Deutschland un Italien von Leo IX. bis Calixt II. 1049-1123* (Konziliengeschichte. Reihe A, Darstellungen; Paderborn/München/Wien 2006) 476-490.

[64] Voir, à ce propos Brigitte Basdevant-Gaudemet, 'Les désignations épiscopales d'après les versions successives du Décret de Gratien', *Studia*

Plaçant l'évêque au centre de l'administration diocésaine, tant du point de vue temporel que spirituel, le texte déclare:[65]

> Le même pape Calixte.
>
> Qu'absolument personne, archidiacre, archiprêtre, prévôt ou doyen, n'accorde à quelqu'un charge d'âmes ou une prébende d'une église sans l'avis ou le consentement de l'évêque. Bien plus, comme cela a été établi par les saints canons, la charge des âmes et l'administration des biens ecclésiastiques demeureront soumises au jugement et au pouvoir de l'évêque. Si quelqu'un a osé faire le contraire ou s'arroger un pouvoir qui appartient à l'évêque, il sera tenu à l'écart du seuil de l'église.

La question de l'agent apte à attribuer la *cura animarum* se pose avec d'autant plus d'acuité que l'exercice de cette dernière est l'objet d'une vive concurrence entre clercs et moines à l'aube du second millénaire et dont le Décret de Gratien se fait l'écho.[66] Du point de vue de l'attribution de la *cura animarum*, les rivalités entre l'évêque et l'archidiacre, en particulier, se font toujours plus pressantes.[67] Ainsi, par exemple, au conflit opposant l'évêque de

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canonica 37 (2003) 55-98, réimpr. dans: Ead., *Église et Autorités* 133-174, no.VII, ici 159, n.50.

[65] C.16, q.7, c.11: 'Item Calixtus papa. Nullus omnino archidiaconus, aut archipresbiter, sive prepositus, vel decanus animarum curam vel prebendas ecclesiae sine iudicio vel consensu episcopi alicui tribuat; immo, sicut sanctis canonibus constitutum est, animarum cura et pecuniarum ecclesiasticarum dispensatio in episcopi iudicio et potestate permaneat. Si quis vero contra hoc facere, aut potestatem, que ad episcopum pertinet, sibi vendicare presumpserit, ab ecclesiae liminibus arceatur.', éd. Emil Friedberg, 1.804 = conc. Latran I (1123), c.4, éd. COGD 2.1.89, lignes 12-18; trad. fr. par André Duval *et alii*, *Les conciles œcuméniques*, dir. Guiseppe Alberigo (3 vols.; Le Magistère de l'Église; Paris 1994) 2.1.190, lignes 11-17.

[66] Charles Dereine, 'Le problème de la *cura animarum* chez Gratien', *SG* 2 (1954) 306-318.

[67] Brigitte Basdevant-Gaudemet, 'L'archidiacre et l'archiprêtre d'après le Décret de Gratien', Iudex et Magister. *Miscelanea en Honor ad Pbro. Nelson C. Dellaferrara* (Buenos Aires 2008) 85-107, réimpr. dans: Ead., *Église et Autorités* 177-197, no.VIII; Ead., 'L'archidiacre et le gouvernement local de l'Église d'après la législation conciliaire (milieu XII^{e}-milieu XIII^{e} siècle)',

Paris, Étienne de Senlis (†1142), à l'archidiacre Théobald, une solution est finalement trouvée en 1127, d'après une *compositio* transmise par la cartulaire de l'église Notre-Dame de Paris. L'acte prévoit qu'il revient à l'évêque d'attribuer (*committere*) au prêtre la *cura animarum*, l'archidiacre devant se borner à désigner, d'une part, l'église dont le nouvel ordonné aura la charge ainsi que, d'autre part, les biens qui en dépendent.[68] C'est à une répartition des attributions d'un autre genre que procèdent les privilèges délivrés par les pontifes, en particulier en faveur de monastères, à partir du milieu du XII[e] siècle. La chancellerie pontificale établit une clause formulaire, très largement usitée, au moyen de laquelle il est indiqué au supérieur religieux qu'il lui revient de choisir les prêtres pour les églises paroissiales dépendant de l'établissement dont il a la charge. Le candidat choisi doit ensuite être présenté à l'évêque qui, s'il le juge idoine, lui attribuera la *cura animarum*. Aussi le prêtre doit-il rendre compte à l'évêque de la gestion spirituelle de cette dernière et au supérieur de l'administration des choses temporelles regardant l'église en question.[69] Une telle

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Proceedings Esztergom 2008 477-494, réimpr. dans: *Mélanges en l'honneur d'Anne Lefebvre-Teillard*, éd. Bernard d'Alteroche *et alii* (Paris 2009) 91-108.

[68] Éd. Benjamin Guérard, *Cartulaire de l'église Notre-Dame de Paris* (Collection des cartulaires de France 4; Paris 1850) 1.28, no.8. Texte confirmé par Eugène III: Eugenius III, *Officii nostri debitum* JL9649 (1145-1153), PL180.1154C.

[69] Eugenius III, *Apostolici moderaminis* JL8918 (7.V.1146): 'Liceat etiam vobis in parochialibus ecclesiis quas tenetis, sacerdotes eligere, et dioecesano episcopo praesentare, quibus, si idonei fuerint, episcopus animarum curam committat, ut de plebis quidem cura episcopo respondeant, vobis [i.e. toujours le supérieur] vero pro rebus temporalibus debitam subiectionem exhibeant', PL180.1138A-B. Cette clause se retrouve largement dans les actes pontificaux: Id., *Desiderium* JL9032 (28.IV.1147), PL180.1208B; Id., *In generalibus conciliis* JL9240 (14.IV.1148), PL180.1338B; Adrianus IV, *Effectum justa* JL10292 (8.VI1157), PL188.1515B; Id., *Pie postulatio* (27.IV.1158), éd. Claudine Pailhès, *Recueil des chartes de l'abbaye de La Grasse* (Paris 2000) 2.41, no.39; Alexander III, *Ex injuncto nobis* JL11619 (28.IV.1169), PL200.585D; Lucius III, *Quoties a nobis* JL14509 (14.X.1181), PL201.1073A; Id., *Prudentibus* JL14542 (29.XII.1181), PL201.1083D; ID., *Religiosam vitam* JL14567 (15.I.1182), PL201.1096A; Id., *Quoties a nobis* JL14604 (8.III.1182),

répartition apparaît encore avec un éclat particulier dans un acte du 6 juillet 1173 par lequel le pape Alexandre III, s'adressant à la communauté de l'abbaye Saint-Yved de Braine, établie dans le diocèse de Soissons, reconnaît au supérieur, à propos de l'administration de l'église de Cerseuil relevant du couvent, la possibilité d'instituer trois ou quatre chanoines. L'un d'eux est cependant tenu de recevoir la *cura animarum* de l'évêque diocésain dont sont requis à la fois 'le conseil et le consentement'. Tandis que le chanoine ainsi désigné doit rendre compte de sa gestion à l'évêque en matière spirituelle (*de spiritualibus*), il le doit au supérieur en matière temporelle (*de temporalibus*).[70] Il

PL, 201.1123B; Id., *Effectum justa* JL14620 (8.IV.1182), PL201.1130D; Urbanus III, *Quoties a nobis* JL15486 (16.XII.1185), PL202.1336B; Id., *Religiosam vitam* JL15487 (16.XII.1185), PL202.1339D; Id., *Piae postulatio* JL15517 (11.I.1186), PL202.1349D; ID., *Religiosam vitam* JL15563 (15.III.1186), PL202.1376B; Clemens III, *Religiosis desideriis* JL16583 (1187-91), PL, 204.1473D; Celestinus III, *Piae postulatio* JL16884 (27.v.1192], PL, 206.944A; Id., *Quoties a nobis* JL16984 (16.IV.1193], PL206.991A; Id., *Commissae nobis* JL17011 (29.V.1193), PL, 206.1000D; ID., *Effectum justa* JL17291 (20.X.1195], PL206.1119D; Innocentius III, *Effectum justa* Potth. 174 (14.V.1198), PL214.157B; ID., *Effectum justa* Potth. 313 (15.VI-1er.VII.1198], PL214.243D; Id., *Cum sitis* Potth. 1955 (1er.VII.1203), PL215.113B ; Id., *Consuevit annuere* Potth. 1962 (8.VII.1203), PL215.132D; Id., *Religionis monasticae* Potth. 2371 (13.I.1205, PL215.500D; Id., *Quoties a nobis* Potth. 3703 (12.IV.1209), PL216.32C; ID., *Cum a sede* Potth. 3798 (3.IX.1209), PL216.113C; Id., *Religiosam vitam* Potth. 3907 (3.II.1210), PL216.182B; Id., *Cum movisses* Potth. 3926 (5.III.1210), PL216.203B; ID., *Quoties a nobis* Potth. 4010 (1er.VI.1210), PL216.278D; Id., *Quoties a nobis* Potth. 655 (5.IV.1199), PL217.43B; Id., *Religiosam vitam* Potth. 2767 (4. V.1206), PL217.158A; Gregorius IX, *Religiosam vitam* (16.VI.1228), éd. Claudine Pailhès, *Recueil des chartes de l'abbaye de La Grasse* (Paris 2000) 2.158, no.127.

[70] Alexander III, *[Horta]tur nos* (6. VII.1173): '. . . indulgemus ut in ecclesia vestra de Cersiolo liceat vobis quatuor vel tres de canonicis vestris instituere; quorum unus a diocesano episcopo curam animarum suscipiat et ei de spiritualibus, vobis de temporalibus debeat respondere. Liceat quoque vobis eosdem canonicos ad claustrum vestrum libere, cum expedire videritis, revocare et alios loco eorum substituere et illum etiam qui curam susceperit animarum cum consilio et assensu diocesani episcopi', éd. sous la direction d'Olivier Guyotjeannin, *Le chartrier de l'abbaye prémontrée de Saint-Yved* 150, no.8.

importe également de souligner qu'il revient à l'abbé, lorsqu'une église dépendant d'un monastère jouit d'un privilège d'exemption, d'attribuer la *cura animarum* en lieu et place de l'évêque.[71]

L'attribution de la *cura animarum* par l'évêque diocésain doit s'entendre de l''investiture' spirituelle. L'agent qui en reçoit la responsabilité obtient ainsi la charge de veiller, en particulier par l'administration des sacrements, à la vitalité spirituelle des fidèles. Tel est le sens d'une décrétale du pape Clément III (1187-1191) qui, tout en conservant l'esprit de la clause formulaire précédemment indiquée, use du vocable d''investiture' pour qualifier le rôle de l'évêque. Ce privilège, délivré en faveur de l'église Saint-Anschaire de Brême et adressé au prévôt et aux membres de la communauté, leur confère la seule 'libre faculté de choisir' le candidat pressenti à une dignité, une prébende ou un bénéfice ecclésiastique vacant.[72] Cette répartition des compétences, qui a vocation à ménager les intérêts propres à chaque autorité, ne saurait néanmoins occulter la prééminence de l'instance épiscopale, ou archiépiscopale. C'est tout le sens d'une lettre d'Alexandre III, adressée à l'archevêque de Sens Guillaume (1168-1176), dans laquelle le pape remarque que 'dans plusieurs églises du royaume de France, les évêques ont le pouvoir

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[71] Laurent Morelle, 'Formation et développement d'une juridiction ecclésiastique d'abbaye: les paroisses exemptes de Saint-Pierre de Corbie (XI^e^-XII^e^ siècles)', *L'encadrement religieux des fidèles au Moyen Âge et jusqu'au Concile de Trente. La paroisse, le clergé, la pastorale, la dévotion. 109^e^ congrès national des sociétés savantes, Dijon, 1984* (Actes du Congrès national des Sociétés Savantes, Section d'histoire médiévale et de philologie 109; Paris 1985) 597-620; Michel Parisse, 'Recherches sur les paroisses du diocèse de Toul au XII siècle: L'église paroissiale et son desservant', *Le istituzioni ecclesiastiche* 559-570, ici 564.

[72] Clemens III, *Ideo licet* JL16291 (22.VI.1188): 'Ad haec auctoritate vobis apostolica indulgemus ut cum praepositura seu aliae dignitates aut praebendae, sive alia beneficia ecclesiae vestra vacaverint, eligendi ad eas personas idoneas liberam habeatis de licentia sedis apostolicae facultatem; investitura tamen praedictorum dioecesano episcopo reservata.', PL204.1373D.

d'instituer les chanoines et de concéder les prébendes'.[73] Cette 'institution' se réalise au moyen de l'attribution de la *cura animarum* dont l'évêque est en principe le seul dispensateur. La sévérité du ton avec laquelle le souverain pontife s'adresse parfois à certains membres de la hiérarchie diocésaine suggère les difficultés auxquelles sont confrontés les évêques. Ainsi dans une lettre adressée à l'évêque de Londres, le même Alexandre III critique l'action de certains archidiacres qui prétendent instituer des personnes dans des églises sans avoir préalablement consulté l'évêque. Un tel acte, contrevenant à 'l'ordre du droit' (*ordo iuris*), peut être cassé par décision épiscopale, l'évêque ayant le pouvoir d'écarter ceux qui auraient été ainsi institués.[74]

À la relative simplicité des solutions formalisées dans les décrétales pontificales au cours du règne d'Alexandre III, les canonistes médiévaux répondent par la complexité de leurs élaborations doctrinales. Leurs hésitations témoignent de la difficulté à saisir la nature et la portée du consentement épiscopal en matière d'attribution de la *cura animarum*. Les tentatives de clarification des compétences au sein de la hiérarchie diocésaine auxquelles ils se livrent sont d'autant plus nécessaires qu'elles mettent en jeu la manière dont la succession apostolique s'organise ici-bas.[75] Dès la fin des années 1160, l'auteur de la

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[73] Alexander III, *Ex litteris* (26.XI.1170-1172): 'Statutum est insuper quod, sicut in pluribus ecclesiis regni Francie episcopi potestatem habent canonicos instituendi et prebendas concedendi, sic quoque rationabili et prudenti consilio id faciendi plenam habeas de cetero authoritatem.', éd. Wilhelm Wiederhold, *Papsturkunden in Frankreich. Reiseberichte zur Gallia pontificia* (Acta romanorum pontificum 7; Città del Vaticano 1985 [réimpr. de Göttingen 1910]) 504, no.54. Sur l'archevêque, voir Ludwig Falkenstein, 'Wilhelm von Champagne, Elekt von Chartres (1164-1168), Erzbischof von Sens (1168-1176), Erzbischof von Reims (1176-1202), Legat des apostolischen Stuhles, im Spiegel päpstlicher Schreiben und Privilegien', ZRG Kan. Abt. 89 (2003) 107-284.

[74] Alexander III, *Ad aures nostras* JL13992 (1159-1181) = 3 Comp. 3.7.2.

[75] Fabrice Delivré, 'Succession apostolique: autorité des évêques et pouvoir des clés dans l'Occident médiéval (fin XI^{e}-milieu XV^{e} siècle)', *La légitimité*

Summa Parisiensis relève le rôle de la 'coutume' (*consuetudo*) comme fondement juridique du pouvoir de conférer la *cura animarum*, en faveur de l'archidiacre, du prévôt ou du doyen. L'auteur constate qu'une telle pratique est manifestement répandue, de sorte que des prévôts ou des archidiacres attribuent des églises ou des prébendes sans le consentement de l'évêque. Mais cette coutume ne rencontre pas les faveurs du décrétiste qui exige de la part de l'évêque un consentement 'général' ou 'spécial'. Au titre du premier, l'exemple est celui dans lequel l'évêque a conféré à quelqu'un la dignité de prévôt, de telle sorte que l'agent est considéré 'dès le départ' (*ab initio*) comme étant autorisé à attribuer des prébendes ou des églises. Pour les autres offices, en revanche, un consentement épiscopal de type 'spécial' et 'exprès' est requis toutes les fois qu'une telle attribution de la *cura animarum* est envisagée.[76] Face à l'affermissement de la théorie juridique relative à la force de la coutume, au cours de la seconde moitié du XII[e] siècle, les décrétistes réagissent avec vigueur.[77] Ainsi l'auteur de la *Summa Lipsiensis*, rédigée vers 1186, après avoir noté que le consentement épiscopal peut être

implicite, dir. Jean-Philippe Genet (Histoire ancienne et médiévale 135; Paris/Rome 2015) 121-143.

[76] *Summa Parisiensis* ad C.16 q.7 c.11 s.v. *Nullus*: 'Praepositus animarum curam, vel presbyter, sine consensu episcopi alicui tribuat, nec archidiaconus vel decanus. Consuetudo in contrarum obtinet. Videmus etenim praepositos, archidiaconos passim sine consensu episcopi ecclesias vel praebendas dare. Sed consensus tamen requiritur vel generalis vel specialis. Si enim episcopus alicui praepositurae dignitatem dedit, ab initio videtur consensum adhibuisse ut praebendas dare posset et ecclesias, alioquin consensus requiritur specialis expressus.', éd. Terence McLaughlin (Toronto 1952) 187; *Distinctiones Monacenses* ad eod. loc., éd. Rosalba Sorice (MIC A 4; Città del Vaticano 2002) 119.

[77] Jean Gaudemet, 'La coutume en droit canonique', RDC 38 (1988) 224-251, réimpr. dans: Id., *La doctrine canonique médiévale* (CS 435; Aldershot 1994), no.III; Anne Lefebvre-Teillard, 'Custom and Law', *Proceedings Syracuse 1996* 753-766; Dominique Bauer, 'Custom in Canon Law and the Expansion of Legal Reality', *Custom: The Development and Use of a Legal Concept in the Middle Ages*, éd. Per Andersen et Mia Münster-Swendsen (Copenhagen 2009) 107-122.

'exprès' ou 'tacite', récuse l'idée selon laquelle même une 'longue coutume' pourrait attribuer à un archidiacre ou un archiprêtre le pouvoir d'octroyer la *cura animarum*. Son analyse est fondée sur la place accordée au *ius generale* comme principe d'ordre de l'architecture ecclésiastique, garantissant la prééminence de l'évêque. Tout individu qui se prévaut d'un pouvoir supérieur, relevant du 'droit général', doit en effet faire état d'un privilège lui concédant spécialement cette prérogative. Le contenu de ce 'droit général' se traduit en particulier négativement par le fait qu'il rejette la faculté pour les archidiacres d' 'instituer' (*instituere*). L'auteur de la *Summa Lipsiensis* relève en outre que la faculté d'instituer, conférée aux archidiacres, ne peut l'être, d'une part, que de l'autorité de l'évêque et, d'autre part, de manière temporaire, donc jamais perpétuelle. Ces agents n'agissent donc qu'en qualité de 'procureurs de l'évêque'. Enfin, en cas de vacance du siège épiscopal, l'attribution de la *cura animarum* ne peut se faire qu'avec le consentement du chapitre cathédral.[78] La réflexion des canonistes s'amplifie—tout en se complexi-fiant—sous l'effet des analyses proposées par Honorius de Kent vers 1188. Celles-ci reposent sur la dialectique de la *commissio* et du *ministerium* dont l'effet est de permettre de rendre compte de la qualité de l'agent se voyant conférer la *cura animarum*. À la question de savoir si l'archidiacre ou le doyen peuvent conférer la *cura animarum*, Honorius répond négativement en expliquant que celui à qui l'on attribuerait la *cura* en dispose par 'commission' (*commissio*). Or, remarque le canoniste, le pouvoir de conférer la charge des âmes est une faculté connexe à la consécration épiscopale, de sorte que seul l'évêque détient cette prérogative à titre principal. Si, dans le cas d'un évêché vacant, l'archidiacre attribue la *cura*, le nouvel institué la détient, non par commission, mais du fait du seul 'service'

[78] *Summa Lipsiensis* ad eod. loc., éd. Rudolf Weigand, Peter Landau et Waltraud Kozur (MIC A 7.3; Città del Vaticano 2014) 261, lignes 1-13.

(*ministerium*). C'est d'ailleurs sur ce dernier mode que le vicaire temporaire exerce la *cura*. Par conséquent, si certaines pratiques locales autorisent l'archidiacre—voire même des moines—à procéder à l'institution, que le siège épiscopal soit ou non vacant, seul l'évêque peut en réalité conférer la *cura animarum*. Si toutefois l'archidiacre procède à une telle institution, le nouvel institué ne détient pas la *cura* sur le mode supérieur de la 'commission', mais au contraire sur le mode inférieur du seul 'service'. Honorius insiste sur la nécessaire réprobation devant frapper toute coutume, fût-elle longue, admettant cette intervention archidiaconale au motif que la coutume, loin de diminuer le péché, ne fait au contraire ici que le majorer. À la limite, l'existence d'un privilège pontifical est seul susceptible de fonder en droit l'intervention archidiaconale en la matière.[79] Ces analyses, tout en insistant sur la place prééminente dont jouit l'évêque, n'en donnent pas moins à voir les luttes d'influence

[79] Magister Honorius, *Summa* ad eod. loc., s.v. *nullus – curam animarum – sine iudicio – episcopi*: 'Num ergo cum iudicio episcopi potest archidiaconus vel decanus curam animarum dare ? Respondeo: non ut ipse cui dat habeat eam commissione. Nam potestas sic conferendi curam animarum connexa est episcopali consecrationi. Episcopus enim solus eam principaliter habet. Solus ergo sic eam potest conferre. Set obicitur, quia vacante episcopatu archidiaconus instituit. Institutus autem curam animarum agit, nec habet eam nisi ab archidiacono. Respondeo, archidiaconus interim curam agit, ut argumentum distinctione lxiii, Si in plebibus (D.63 c.20). Institutus etiam eam habet non commissione set ministerio. Sicut est videre in persona et vicario temporali, qui habet curam a persona, set tantum ministerio non commissione. Eo ergo casu cum archidiaconus instituit sive vacante episcopatu sive non sicut in quibusdam partibus moris est, quod etiam ex hoc capitulo confirmatur, quod etiam monachis in casu licet, ut supra dictum est, eadem, q. II, in principio (C.16 q.2 d.a.c.1), in distinctione ibi posita : debet episcopus curam animarum conferre. Alioquin non continget institutum habere eam commissione. Nec se excusent alicubi archidiaconi longa consuetudine, que in illicitis non minuit set auget peccatum, etsi quandoque penam relaxet, ut xxiiii, q. i, Scisma (C.24 q.1 c.34], in extra, De simonia, Non satis (*Appendix Concilii Lateranensis*, 2.10 = concile de Tours [1163], c.6 = X 5.3.8), nisi pretendatur privilegium pape qui solus hujusmodi persone potest dare potestatem conferendi curam animarum.', éd. Rudolf Weigand, Peter Landau et Waltraud Kozur (MIC A 5.2; Città del Vaticano 2010) 286, lignes 1-21.

opposant, en particulier, les archidiacres et les institutions capitulaires à l'autorité épiscopale. Évêque lui-même, Huguccio, à la charnière des années 1180-1190, proclame avec vigueur que 'l'institution des prêtres'—autrement dit l'attribution de la *cura animarum*—n'appartient qu'au chef du diocèse. Si toutefois des archipêtres, des prévôts ou des archidiacres la conférait, cela ne pourrait avoir lieu qu'avec le consentement de l'évêque.[80] Ces pétitions de principe, formulées par la doctrine, trouvent une confirmation de nature législative, à travers les décrétales pontificales de l'extrême fin du XII^e^ siècle. Ainsi le 12 février 1196, Célestin III adresse une lettre à l'archevêque Gilles de Mayence, qui s'était plaint du fait que des archiprêtres, après son élection, avaient non seulement reçu comme prévôt de la cathédrale un certain maître Martin, mais encore des chanoines, sans l'avoir préalablement consulté. Le souverain pontife remarque que l'institution des clercs—qu'elle s'accompagne ou non de l'attribution de la *cura animarum*—appartient au seul prélat en vertu du 'droit' (*ius*) et de la 'coutume approuvée' (*consuetudo approbata*). Toute désignation réalisée en contravention de ce monopole épiscopal est réputée nulle et non avenue.[81] Parallélisme des formes oblige, une décrétale d'Innocent

[80] Huguccio, *Summa* ad C.10 q.1 c.4 s.v. *Ipse . . .previderit*: 'Argumentum quod ad episcopum pertinet institutio presbiterorum in ecclesiis ut xv, q. vii, Nullus (*corr*. C.16 q.7 c.11) et in extra, Cum satis (1 Comp. 1.15.4 = X 1.23.4). Quid ergo de archipresbiteris, et prepositis, et archidiaconis et plebanis nonne ipsi cotidie instituunt presbiteros in suis capellis de consensu episcopi fit. Aliter male fit.', Paris, BN lat. 15396, fol.158rb; *Apparatus Jus naturale* ad eod. loc., Paris, BN lat. 15393, fol.127va.

[81] Coelestinus III, *Cum ad universalis ecclesiae* JL17323 (12.II.1196): 'Pervenit siquidem ad nos ex tenore litterarum quas ad sedem apostolicam destinasti, quod licet institutio clericorum in ecclesiis tuae dioecesis ad te iure et consuetudine pertineat approbata, dilecti filii Sancti Viti et de Baisoria archipresbiteri, post electionem tuam, te inscio et penitus inconsulto, magistrum Martinum ecclesiae tuae praepositum, et quosdam alios, sicut dicitur, in canonicos receperunt, eis spretis et penitus reprobatis, pro quibus tua fraternitas intervenire curaverat, et rogare. Eapropter, venerabilis in Christo frater, tuis petitionibus annuentes, ordinationis huiusmodi in praedictis ecclesiis et aliis in

III, reprise par Rainier de Pompose dans la collection qu'il forge vers 1201, souligne que lorsqu'il est nécessaire de retirer la *cura* à un prêtre considéré comme 'inutile' ou 'indigne', il convient d'agir en justice devant l'évêque car l' 'institution' et la 'destitution' relèvent de son office.[82] Ce monopole épiscopal est réaffirmé une vingtaine d'années plus tard par Honorius III qui, dans une décrétale adressée à l'évêque d'Assise, inclut ces deux prérogatives à la liste des *iura episcopalia*.[83]

Malgré la proclamation récurrente du rôle clé de l'évêque en matière d'attribution de la *cura animarum*, la doctrine canonique, au début du XIII^e^ siècle, est forcée de constater l'existence de pratiques contraires fondées sur l'existence d'une 'coutume'. La force de cette source de droit est parfois analysée différemment selon l'agent auquel elle s'applique. Ainsi, Gautier Cornut, très probable auteur de l'apparat *Animal est substantia*, élaboré à Paris dans les années 1206-1210, admet la validité de la coutume en faveur d'un 'chapitre', fondé à conférer des 'prébendes' ou des 'dignités'. Une telle désignation exige toutefois l'intervention de l'évêque à qui il revient d'investir le candidat *in spiritualibus*, c'est-à-dire en lui conférant officiellement la *cura animarum*. Le même auteur remarque, en revanche, l'invalidité d'une telle

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quibus ius instituendi habere dignosceris, praeter tuam conscientiam attentatas omnino cassamus, et decernimus non tenere. Statuentes ut, sicut in tua dioecesi hactenus est servatum, nullus in ecclesiis quae tibi sunt dioecesana lege subiectae, praeter auctoritatem tuam in clericum admittatur, vel si admissus fuerit, talis institutio nullam obtineat firmitatem', PL206.1142B-C.

[82] Rainerius de Pomposa, *Collectio Decretalium* 12: 'Quod si forte necessitas postularit ut sacerdos, tanquam inutilis aut indignus, a cura gregis debeat removeri, agendum est ordinate apud episcopum, ad cuius officium tam institutio quam destitutio sacerdotum noscitur pertinere.', éd. Étienne Baluze, *Epistularum Innocentii III. P. M. libri undecimi* (Paris 1682) 569 = Innocentius III, Ep. 132 (141) *Cum ex iniuncto* Potth.780 (VII.1199), éd. Othmar Hageneder, Werner Maleczek et Alfred A. Strnad, *Die Register Innocenz'III* (Rom-Wien 1979) 2.274, lignes 28-31.

[83] Honorius III, *Conquerente œconomo* Potth.7728 (1216-1227) = 4 Comp. 1.16.1 = X 1.31.16.

coutume en faveur des archidiacres.[84] L'ensemble des analyses fournies par la doctrine canonique est largement nourri par la législation pontificale qui, dans la seconde moitié du XII^e^ siècle, mobilise le concept de 'mandat' afin de rendre compte de la prééminence épiscopale.

Le mandat épiscopal

La détention par un agent d'une prérogative attachée à sa fonction n'entraîne pas automatiquement le droit d'en attribuer l'exercice à un autre. En matière d'attribution de la *cura animarum*, l'existence d'un tel frein doit permettre aux membres de l'épiscopat d'exercer un étroit contrôle de l'idonéité des desservants. Le propos vaut en particulier pour les archidiacres qui, comme on sait, ont tendance à entrer en opposition avec l'évêque. Or, le III^e^ concile de Latran, en 1179, prescrit, en son troisième canon:[85]

> Que personne ne reçoive les ministères inférieurs, tels que celui de diacre, d'archidiacre et d'autres qui comportent en même temps charge d'âmes, non plus que le gouvernement

[84] *Apparatus Animal est substantia* ad D.21 c.1 s.v. *Disponit*: 'Argumentum quod episcopus debet disponere ecclesiastica beneficia et dignitates ecclesie lxi distinctione, c.I (D.61 c.1). Tamen in multis ecclesiis capitulum confert prebendas et dignitates ecclesie et approbatur ista consuetudo a concilio Lateranensi, extra, De electione et electi potestate, Cum in cunctis (1 Comp. 1.4.16 = Latran III, c.3 = X 1.6.7). Tamen debet episcopus investire in spiritualibus, scilicet curam animarum conferre xvi, questione ultima, Nullus (C.16 q.7 c.11). Nec valeat consuetudo in contrarium, scilicet si consuetudo habeat quod archidiaconus conferat curam animarum, extra, De institutionibus, capitulo ultimo (1 Comp. 3.7.2 = X—)', éd. Emile C. Coppens, 404. Sur cet apparat, voir en dernier lieu: Anne Lefebvre-Teillard, 'Qui était l'auteur de l'apparat au Décret *Animal est substantia* ?', BMCL 39 (2022) 1-17; Ead., 'Un maître parisien: Pierre Peverel. *In memoriam alii magistri Petri*', BMCL 36 (2019) 209-242.

[85] Conc. Latran III (1179), c.3, éd. COGD 2.1.129, lignes 48-51; trad. fr. par André Duval *et alii*, *Les conciles œcuméniques*, dir. Guiseppe Alberigo (3 vols.; Le Magistère de l'Église; Paris 1994) 2.1.212, lignes 19-23 = 1 Comp. 1.4.16 = X 1.6.7.

> d'églises paroissiales, s'il n'a plus de vingt-cinq ans et n'est pas recommandable par sa science et ses mœurs.

Cette disposition prévoit donc que l'archidiacre, entre autres, exerce un ministère auquel est annexée la *cura animarum*. Perçu comme suffisamment digne d'intérêt, ce fragment connaît une large diffusion par l'intermédiaire des collections canoniques antérieures à la *Compilatio prima*, avant d'y être inclus pour, finalement, être recueilli dans le *Liber Extra*, promulgué par Grégoire IX en 1234.[86] L'affirmation conciliaire de l'exercice par l'archidiacre de la *cura animarum* a dû provoquer chez certains des titulaires de la charge un surcroît d'énergie visant à se poser en concurrents de l'évêque.[87] Les analyses proposées par les canonistes de la fin du XII^e^ et du début du XIII^e^ siècle témoignent de ces luttes d'influence. Ainsi Honorius de Kent, à la fin des années 1180, fait de la stabilité de la fonction le critère permettant de rendre compte de la nature de la *cura* dont dispose l'agent. Alors que le vicaire temporaire dispose de celle-ci du fait du seul 'service' (*ministerium*), le vicaire perpétuel en dispose par 'commission' (*commissio*). Le canoniste note que certains docteurs affirment que l'archidiacre ne dispose de la *cura* que par 'service', sauf en cas de vacance du siège épiscopal. Pour sa part, Honorius estime que l'archidiacre en est plutôt titulaire par 'commission', voire même 'presque d'office' (*quasi ex officio*) et par le privilège de sa dignité.[88] Cette dernière solution paraît être

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[86] *Collectio Casselana* (ca.1180), 1.2, 3.2.3; *Collectio Bambergensis* (ca.1180), 56.2; *Collectio Lipsiensis* (ca.1185), 2.

[87] Guillaume Mollat, 'Démêlés des archevêques de Reims avec le grand archidiacre du XII^e^ au XV^e^ siècle', *Revue du Nord* 38 (1956) 161-166; Id., 'Conflits entre archidiacres et évêques aux XIV^e^ et XV^e^ siècles', RHD 35 (1957) 549-560; René Locatelli et Roland Fiétier, 'Les archidiacres dans le diocèse de Besançon (fin XI^e^-fin XIII^e^ siècle)', *Mémoires de la Société pour l'histoire du droit et des institutions des anciens pays bourguignons* 34 (1977) 51-75.

[88] Magister Honorius, *Summa* ad C.16 q.7 c.11 s.v. *Nullus – curam animarum – sine iudicio*: 'De persona etiam que habet vicarium queritur utrum habeat curam. Respondeo, persona habet eam commissione, sic et vicarius si sit perpetuus. Ille tamen principaliter, iste secundario, cui etiam debet fieri per episcopum. Si sit annuus, habet eam ministerio non commissione. Ei etiam sic

induite de la disposition conciliaire précédemment mentionnée. L'existence, au sein de la hiérarchie diocésaine, de plusieurs agents détenant un office auquel est attaché l'exercice de la *cura animarum* exige qu'en soit proposé un ordonnancement. Les décrétalistes soulignent que l'évêque est celui qui, 'en premier lieu' (*primo loco*), détient la *cura animarum*, selon les mots d'Alain l'Anglais.[89] Pour leur part, Tancrède et Vincent d'Espagne notent que l'archidiacre ne l'exerce pas 'à titre principal' (*principaliter*).[90] Un autre docteur insiste sur la distinction essentielle selon laquelle même si l'archidiacre possède la *cura animarum*, il ne peut la conférer à d'autres, réservant à l'évêque cette prérogative.[91]

Le contrôle exercé par l'évêque en matière d'attribution de la *cura animarum* prend la forme du mandat. Outil hérité du 'droit privé' romain, cette technique investit, au Moyen Âge, en particulier sous l'effet des canonistes, le champ du 'droit public'.[92]

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debet dari auctoritate archidiaconi ad maius robur. De archidiacono etiam queritur qualiter eam habeat, utrum commissione vel ministerio. Resp.: Sunt qui dicunt quod solo ministerio nisi vacante episcopatu. Michi videtur eum utrobiqui eam habere commissione quasi ex officio, quatenus privilegium dignitatis porrigitur', éd. cit. 286, lignes 21-29.

[89] Alanus Anglicus, *Gl.* ad 1 Comp. 1.4.16, s.v. *Curam*: 'episcopus primo loco curam habet animarum', Erlangen, Universitätbibl. 349, fol.3ra ; Paris, BN lat. 3932, fol.2rb.

[90] Tancredus, *Gl.* ad eod. loc., s.v. *Archidiaconatus*: 'Nota quod archidiaconus habet curam animarum sed non principaliter argumentum xvi, questione ultima, Nullus (C.16 q.7 c.11), infra, De officio archidiaconi, Cum satis (1 Comp. 1.15.4 = X 1.23.4)', Paris, BN lat. 15399, fol.3ra; Vincentius Hispanus, *App. ad* X 1.6.7, s.v. *Archidia-conatum*, Paris, BN lat. 3967, fol.16rb; lat. 3968, fol.14ra.

[91] *Gl.* ad eod. loc., s.v. *Curam*: 'Argumentum quod archidiaconus habet curam annexam quod verum est, ut alia simplex persona, sed non ita ut aliis conferre possit quia hoc percinet ad solum episcopum xvi, q. vii, Nullus (C.16 q.7 c.11), infra, De officio archidiaconi, Cum satis (1 Comp. 1.15.4 = X 1.23.4)', Paris, BN lat. 9632, fol.4rb.

[92] Les concepts hérités du droit romain forment au Moyen Âge une ressource, tant du point de vue de la technique que de la sémantique, dont le droit canonique s'est abondamment nourri, cf. Pierre Legendre, 'Le droit romain, modèle et langage: De la signification de l'*Utrumque Ius*', *Études d'histoire du*

Son emploi, en effet, permet à la fois de consolider la centralisation pontificale et de renforcer le caractère pyramidal de la hiérarchie ecclésiastique.[93] Le mandat désigne l'opération par laquelle un agent, appelé le mandant, attribue à un autre, dit le mandataire, la faculté de réaliser un certain nombre d'actes. Cette forme juridique est celle usitée en matière de délégation, un supérieur attribuant à un inférieur, pour un temps donné, la capacité de réaliser des actes qui ne relèvent pas de sa fonction. L'enjeu réside donc dans l'aptitude pour l'agent inférieur à représenter, par l'intermédiaire d'une fiction, celui dont il tire sa légitimité.[94] Le mandat, en tant que technique juridique, se révèle

droit canonique dédiées à Gabriel Le Bras (2 vols.; Paris 1965) 2.913-930. Perçu comme un 'droit romain second' (l'expression est celle de Pierre Legendre, 'Ce que nous appelons le droit', *Le Débat,* 74 [1993] 98-111, ici 103), le 'droit canonique pontifical' des XII^e^ et XIII^e^ siècles, qui trouve d'inépuisables matériaux dans les *leges,* est en mesure de modeler tout à la fois la société chrétienne mais plus encore l'architecture institutionnelle ecclésiastique, cf. Anne Lefebvre-Teillard, 'Modeler une société chrétienne: les décrétales pontificales', *Le médiéviste devant ses sources: Questions et méthodes,* éd. Claude Carozzi et Huguette Taviani-Carozzi (Aix-en-Provence 2004) 41-49. La force du droit romain est telle, à travers ses techniques juridiques, ses procédés de raisonnement et ses maximes, que son emploi a constitué un puissant facteur d'affirmation de la domination pontificale, cf. Gabriel Le Bras, 'Le droit romain au service de la domination pontificale', RHD 27 (1949) 377-398.

[93] Ibid. 391; Pierre Legendre, 'Du droit privé au droit public: Nouvelles observations sur le mandat chez les canonistes classiques', *Mémoires de la Société pour l'Histoire du Droit et des institutions des anciens pays bourguignons, comtois et romands* 30 (1970-1971) = *Études en souvenir de Georges Chevrier* 2 vols., 2.7-35, réimpr. dans: Id., *Écrits juridiques du Moyen Âge occidental* (Collected Studies 280; London 1988), no.IX; Harald Müller, *Päpstliche Delegationsgerichtsbarkeit in der Normandie (12. und frühes 13. Jahrhundert)* (2 vols.; Studien und Dokumente zur Gallia Pontificia 4; Bonn 1997).

[94] Antonio Padoa Schioppa, 'Sul principio della reppresentanza diretta nel Diritto canonico classico', *Proceedings Toronto 1972* 107-131; Laurent Mayali, 'Fiction et pouvoir de représentation en droit canonique médiéval', *Excerptiones iuris: Studies in Honor of André Gouron,* éd. Bernard Durand et Laurent Mayali (Studies in Comparative Legal History; Berkeley 2000) 421-437; Id., 'Procureurs et représentation en droit canonique médiéval', *Mélanges de l'École française de Rome. Moyen Âge* 114 (2002) 41-58; Ken Pennington,

d'autant plus riche conceptuellement que son usage est susceptible de provoquer deux effets inverses. Tantôt en effet, le recours au mandat permet un renforcement du contrôle hiérarchique d'un agent supérieur à l'égard d'un agent inférieur auquel le premier a délégué certaines de ses attributions. Tantôt, l'usage du mandat est susceptible de subvertir l'ordre hiérarchique traditionnel. L'exemple-type est celui dans lequel le pape délègue à un agent inférieur diocésain la connaissance d'une cause judiciaire. L'évêque, qui *a priori* fait écran entre le souverain pontife et cet agent inférieur, n'en est pas moins dépourvu de tout pouvoir à l'égard de ce dernier, lorsque celui-ci a agi dans les limites que lui a préalablement fixées le mandat.[95] Quoi qu'il en soit, le recours à la technique juridique du mandat est susceptible d'intéresser tous les niveaux de la hiérarchie ecclésiastique. Dans l'espace géographique du diocèse, l'évêque peut ainsi parfois souhaiter que certaines de ses attributions soient temporairement attribuées à un autre agent.

Mais on l'a dit, le recours au mandat a notamment pour effet de renforcer le caractère pyramidal de la hiérarchie ecclésiastique. À cette dernière fin, le pape Alexandre III (1159-1181) adresse à l'archidiacre d'Ély une lettre dans laquelle sont rappelées les conditions d'attribution de la *cura animarum*. Le souverain pontife, en soulignant que l'archidiacre est tenu de se munir de l' 'autorisation' (*licentia*) et du 'mandat' (*mandatum*) de l'évêque pour y pourvoir, rejette toute force donnée à une quelconque coutume contraire, au nom du respect des 'constitutions des saints Pères'.[96] L'importance du thème abordé par cette décrétale

'Repræsentatio: Mapping a Key Word for Churches and Governance' *Proceedings of the San Miniato International Workshop, October 13-16, 2004*, ed. Alberto Melloni and Massimo Faggioli (Münster-Hamberg-Berlin-Wien-London 2006) 21-40

[95] Pierre Legendre, 'Du droit privé au droit public' 29.

[96] Alexander III, *Cum satis* JL13898 (1159-1181) = 1 Comp. 1.15.4 = X 1.23.4. Sur l'autorité des *patres*, voir Jean Werckmeister, 'L'autorité des Pères dans le droit canonique médiéval occidental', *La réception des Pères de l'Église au*

explique son intense circulation dans les collections canoniques antérieures à la *Compilatio prima*, dont l'élaboration date des environs de 1192.[97] La combinaison de cette décrétale à un canon du Décret de Gratien donne à la doctrine canonique l'opportunité de préciser les modalités d'attribution de la *cura animarum*, d'après une théorie du mandat, que les canonistes forgent progressivement. Le canon auquel ils se réfèrent est un pseudo-fragment d'Isidore de Séville, passé dans le Décret de Gratien, dont le texte déclare que:[98]

> Si les archiprêtres meurent ou sont chassés de leur paroisse pour quelque crime, l'archidiare se rendra le plus tôt possible sur place et procédera à l'élection avec les clercs et le peuple, de façon à ce qu'un pasteur digne soit donné à la maison de Dieu et que, lorsqu'il aura été ordonné, le peuple soit sous sa protection.

L'hypothèse évoquée dans ce canon est interprétée par la doctrine canonique comme la possibilité pour l'archidiacre de procéder à l'institution—ici d'un archiprêtre—, par l'attribution de la *cura animarum*. Alors que l'auteur de la *Summa Lipsiensis*, qui pose la question de savoir de qui l'archiprêtre reçoit la charge des âmes, se contente de rappeler des solutions classiques, il faut attendre les réflexions d'Huguccio pour constater une inflexion dans l'analyse

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Moyen Âge: Le devenir de la tradition ecclésiale. Congrès du Centre Sèvres – Facultés jésuites de Paris (11-14 juin 2008), éd. Nicole Bériou *et alii* (Münster 2013) 515-528; Meunier, 'L'autorité des 'Pères'565-588.

[97] *Collectio Casselana* 22.2; *Collectio Bambergensis* 12.2; *Appendix Concilii Lateranensis* 24.2; *Collectio Lipsiensis* 12.2; *Collectio Brugensis* 14.2.

[98] D.63 c.20: 'Si in plebibus archipresbiteri obierint aut pro aliquo reatu exinde eiecti fuerint archidiaconus quantocius proficiscatur, et cum clericis et populis ipsius plebis electionem faciat, quatinus dignus pastor domui Dei constituatur, et, dum ordinatus, eius providentia ipsa plebs custodiatur', trad. Jean Gaudemet en coll. avec Jacques Dubois, André Duval et Jacques Champagne, *Les élections dans l'Église latine des origines au XVI^e siècle* (Institution, société, histoire 2; Paris 1979) 143. Voir Peter Landau, 'Apokrife Isidoriana bei Gratian', *Vita religiosa im Mittelalter. Festschrift für Kaspar Elm zum 7. Geburtstag*, éd. Stephanie Haarländer, Franz J. Felten et Nikolas Jaspert (Berliner historische Studien 31, Ordensstudien 13; Berlin 1999) 837-844.

doctrinale.[99] Le fameux maître de Bologne inaugure une distinction essentielle opposant, d'une part, la possibilité pour un agent d'agir de sa propre autorité et, d'autre part, celle en vertu de l'autorité d'un autre. Se demandant si l'archidiacre peut, 'de sa propre autorité' (*auctoritate propria*), attribuer la *cura animarum*, le décrétiste remarque qu'une telle action exige un 'mandat spécial' délivré par l'évêque. Toutefois, ce dernier peut octroyer initialement et spécialement cette faculté, sous la forme d'un mandat, à l'archidiacre qui est alors fondé à attribuer la *cura animarum* dès que nécessaire. En revanche, l'idée selon laquelle l'attribution de la charge archidiaconale vaut délivrance d'un 'mandat général' n'a pas les faveurs du décrétiste. Huguccio exige en effet la présence d'un 'mandat spécial' toutes les fois qu'une charge d'âmes, l'investiture d'une église ou d'une prébende doit être conférée par l'archidiacre. Ce faisant, ce dernier est considéré comme 'le porte-parole et l'instrument de l'évêque' (*organum et instrumentum episcopi*).[100] Cette analyse fait évidemment écho à celle proposée peu de temps auparavant par Honorius de Kent qui qualifiait l'archidiacre de 'procurateur'. En matière de *cura animarum*, l'archidiacre ne peut agir 'par son office' mais

[99] *Summa Lipsiensis* ad D.63, c.20, s.v. *Et dum ordinatur*, éd. Rudolf Weigand, Peter Landau et Waltraud Kozur (MIC A 7.1; Città del Vaticano 2007) 294, lignes 12-15.

[100] Huguccio, *Summa* ad eod. loc., s.v. *Faciat*: 'Sed numquid hoc potest archidiaconus sua auctoritate. Non nichil enim potest in talibus sine speciali mandato episcopi presertim ubi tribuitur alicui cura animarum ar. di. xciiii, Dictum (D.94, c.3) et vii, q.vii, Nullus omnino (*corr*. C.16, q.7, c.11) et di.xxv, c.i (D.25, c.1) et in extra, Cum satis sit absurdum (1 Comp. 1.15.4 = X 1.23.4). Si tamen episcopus instituit archidiaconus specialiter ad hoc officium credo tunc sufficere semel mandatum ab episcopo ut talia fiant per archidiaconum nec exigitur postea aliud speciale mandatum sed illud primum sic factum semper sic trahitur quasi semper specialiter ei demandaretur ab episcopo, ar. di.xxv, c.i. Aliter generale mandatum quod intelligitur quis suscipere eo ipso quod fit archidiaconus non credo sufficere. Cautius ergo agitur si semper speciale mandatum episcopi interveniat, ubi cura animarum vel investitura ecclesie, vel prebende alicui per archidiaconum tribuitur ut sic in hiis archidiaconus intelligatur organum et instrumentum episcopi.', Paris, BN lat. 15396, fol.70vb.

uniquement 'en vertu de l'autorité de l'évêque'.[101] Il n'en demeure pas moins que l'archidiacre jouit d'une situation privilégiée car il l'agent principal auquel l'évêque est tenu de déléguer la faculté de conférer la *cura animarum*. De même que l'évêque est, en cas d'aliénation des biens ecclésiastiques, dépourvu de tout 'pouvoir plein et absolu' (*potestas plena et absoluta*), de même en va-t-il de l'archidiacre qui, en matière d'attribution de la *cura animarum*, dépend de la volonté épiscopale.[102] L'exigence d'un mandat spécial délivré par l'évêque, qui a pour effet de renforcer le contrôle épiscopal, apparaît encore dans l'apparat *'Ius naturale'*, confectionné par Alain l'Anglais à la fin du XII^e^ siècle. Le canoniste dénie toute validité à un 'mandat général d'administration' que l'archidiacre se verrait conférer au moment de sa prise de fonction.[103] Le même auteur, dans ses gloses à la *Compilatio prima*, approfondit, en la dépassant, l'analyse d'Huguccio. Après avoir affirmé que l'archidiacre peut 'instituer' (*instituere*) 'par délégation' mais non en vertu 'de son droit', il remarque en outre que l'institution des clercs relève de la juridiction gracieuse. Du reste, l'archidiacre, compétent uniquement en matière d''affaires mineures' (*negotia minora*), est au contraire impuissant à prendre en charge des 'affaires majeures' (*negotia majora*), auxquelles Alain l'Anglais rattache l'institution des clercs. Enfin, le décrétiste note qu'en vertu du 'droit

[101] Ibid.: 'Cum ergo non potest archidiaconus de offitio sed ex auctoritate episcopi', Paris, BN lat. 15396, fol.70vb.

[102] Ibid.: 'Sed numquid archidiaconus confirmabit electionem archipresbiteri, aut investiet eum, aut dabit ei curam animarum. Non nisi habeat speciale mandatum ab episcopo, ut infra extra, Cum satis (1 Comp. 1.15.4 = X 1.23.4). Si ergo sine speciali mandato episcopi archidiaconus non potest ista et consimilia nullam videtur habere potestatem. Immo habet aliquam sed non plenam et absolutam sicut episcopus potestatem alienandi res ecclesie, sed non sine speciali consensu clericorum. Preterea sicut dictum est, eo ipso archidiaconus intelligitur habere aliquam potestatem in his quia episcopus non potest eam committere alii, nisi archidiacono.', Paris, BN lat. 15396, fol.71ra.

[103] *Apparatus 'Ius naturale'* ad eod. loc., s.v. *Constituatur*, Paris, BN lat. 3909, fol.12vb.

commun'—celui de l'Église—l'archidiacre ne peut procéder à une quelconque institution, sauf à jouir, comme cela est le cas dans certains lieux, d'un 'privilège spécial'.[104] À l'instar d'Huguccio, Alain l'Anglais réfute l'idée selon laquelle l'évêque pourrait attribuer à l'archidiacre un 'pouvoir général d'instituer', préférant la délivrance d'un acte spécial toutes les fois que cela est nécessaire, en particulier en cas d'absence de l'évêque, érigeant ainsi l'archidiacre au rang de vicaire.[105] Un écho de ces analyses doctrinales apparaît dans un acte de 1217, confirmé par la pape Grégoire IX en 1233, par lequel l'évêque de Brandebourg note que le prévôt, par ailleurs archidiacre du siège épiscopal, est compétent pour agir en l'absence du chef du diocèse tant pour exercer la juridiction que pour conférer les cures des églises.[106]

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[104] Alanus Anglicus, *Gl.* ad 1 Comp. 1.15.4, s.v. *Committis*: 'Infra, De officio et potestate iudicis delegati, Super eo (1 Comp. 1.21.20 = X 1.29.15) contra. Solutio. Ex delegatione potest instituere ut ibi de iure suo non, ut hic nota quod institutio clericorum est iurisdictione non contentiosa, et licet archidiaconus aliquid habeat de ista, sicut et de contentiosa, non tamen maiora sed minora tantum. Inter maiora est clericos instituere. Et ideo instituere non potest de iure communi. Secus tamen est in quibusdam locis ex speciali privilegio.', München, BSB, Clm 3879, fol.10va. Voir Damasus, *Summa de ordine iudiciario* 40: 'Voluntaria autem iurisdictio est potestas, quam exercet iudex absque aliqua causae cognitione, cum contradictione alicuius, ut est adoptio, emancipatio, manumissio, vindicta; in ecclesiasticis institutio clericorum, consecratio ecclesiarum.', éd. Ludwig Wahrmund, *Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter* (5 vols.; Aalen 1962 [réimpr. de Innsbruck 1931] 4.4.31.

[105] Alanus Anglicus, *Gl.* ad 1 Comp. 1.15.4, s.v. *Committis*: 'Sed numquid episcopis possit conferre archidiacono potestatem generalem instituendi. Respondeo non credo. Specialiter tamen bene potest in hac vel in illa ecclesia', München, BSB, Clm 3879, fol.10va.

[106] Gregorius IX, *Iustis petentium* Potth.9341 (14.XII.1233): 'Sciendum quoque est, quod dicte Brandeburgensis ecclesie prepositus, qui et episcopalis sedis archidiaconus est, totius diocesis in absentia episcopi curam in omnibus gerit, tam in iudiciis exercendis et curis ecclesiarum conferendis quam in aliis episcopalibus negotiis procurandis.', éd. Charles Rodenberg, *Epistolae saeculi XIII e regestis pontificum Romanorum selectae* (3 vols.; MGH, Epistolae saeculi XIII 1; München 2001 [réimpr. de Berlin 1883]) 1.463, lignes 18-21, no.567.

Les prétentions archidiaconales à s'immiscer dans les attributions épiscopales incitent aussi bien la législation pontificale que la doctrine canonique à affiner leurs analyses. Innocent III remarque, pour sa part, que les archidiacres ne disposent que de la seule faculté de l' 'institution corporelle' (*institutio corporalis*).[107] Une telle limitation suggère que l'investiture spirituelle relève de la seule fonction épiscopale. De leur côté, certains docteurs se contentent de formuler des principes affirmant que le pouvoir d'instituer ne relève aucunement de l'office archidiaconal, lequel ne confère pas à son titulaire, une 'autorisation générale' (*licentia generalis*) d'attribuer la *cura animarum*.[108] Au début du XIII^e^ siècle, un canoniste de l'école parisienne procède pour sa part à une distinction singulière.[109] Les bénéfices auxquels n'est pas annexée une charge d'âmes pourraient être attribués par l'archidiacre dès lors qu'une telle coutume locale existe en ce sens.[110] *A contrario*, donc, si le bénéfice ecclésiastique comporte une charge d'âmes, seul

[107] Innocentius III, *Ad haec* Potth.5031 (1198-1215) = 4 Comp. 1.11.1 = X 1.23.7.

[108] *Notabilia 'Nota per exteriora deprehendi'* ad 1 Comp. 1.23.4: 'Nota institutio ad officium archidiaconi non pertinet', Paris, BN lat. 14320, fol.127va; *Collectio Casselana*, *Gl.* ad 22.2 (= 1 Comp. 1.15.4), s.v. *Spectat*: 'Ergo non spectat ad officium archidiaconi curam animarum prebere. Non ergo habet generalem licentiam archidiaconus curam animarum dandi eo ipso quod sit archidiaconus.', Bamberg, SB Can. 18, fol.30ra.

[109] Sur l'école de droit canonique parisienne, voir en dernier lieu Anne Lefebvre-Teillard, 'L'école de droit parisienne (fin XII^e^-début XIII^e^ siècle)', *ZRG Kan. Abt.* 105 (2019) 44-54, réimpr. dans: *L'insegnamento del diritto (secoli XII-XX) = L'enseignement du droit (XII^e^-XX^e^ siècle)*, éd. Marco Cavina (Bologna 2019) 79-87; Ead., 'La lecture de la *Compilatio prima* par les maîtres parisiens du début du XIII^e^ siècle', *ZRG Kan. Abt.* 91 (2005) 106-127.

[110] *Gl.* ad 1 Comp. 1.15.4, s.v. *Committere presumas*: 'Sine speciali mandato episcopi quia hic ad solum episcopum spectat, ut xvi, q.vii, Nullus (C.16, q.7, c.11), infra, de institutionibus, Ad aures (1 Comp. 3.7.2). Frositan beneficia quibus cura animarum non est annexa conferre potest, si consuetudo illius loci talis sit', Paris, BN lat. 9632, fol.9vb. Voir Anne Lefebvre-Teillard, 'Un curieux témoin de *Petrus Brito*: le manuscrit Paris, Bibliothèque nationale latin 9632', *BMCL* 26 (2004-2006) 125-152.

l'évêque devrait être compétent. En contrepoint de l'analyse d'Huguccio, affinée par Alain l'Anglais, la voix dissidente d'un certain *Bazianus* s'élève, d'après le témoignage de Tancrède qui en a connaissance par l'intermédiaire de Vincent d'Espagne. En effet, selon *Bazianus*, dès lors qu'un archidiacre est institué dans cet office, il reçoit une 'administration générale' (*administratio generalis*), laquelle ne paraît pas devoir exiger la délivrance d'un mandat épiscopal en cas d'attribution de la *cura animarum* par l'archidiacre. De plus, l'existence d'une 'coutume spéciale', pour autant qu'elle soit 'prescrite', est susceptible de justifier l'intervention archidiaconale en la matière.[111] Une telle opinion est toutefois loin d'être unaniment partagée par la doctrine canonique, de sorte que l'autorité archidiaconale est rapportée dans des limites plus strictement encadrées. Ainsi Geoffroy de Trani, dans la première moitié du XIII^e^ siècle, dit de la juridiction archidiaconale qu'elle est 'amputée', témoignant ainsi de son caractère limité.[112] Tandis qu'Innocent IV (†1254) se contente de rapporter l'opinion d'un certain 'B.'—sans doute le *Bazianus* déjà évoqué—, certains canonistes du siècle suivant dénient à l'archidiacre l'exercice de l' 'institution' ou de la *cura animarum* 'de son propre chef' (*de iure suo*).[113] C'est dire que le *ius*

[111] Tancredus, *Gl*. ad 1 Comp. 1.15.4, s.v. *Consuetudinis*: 'H[uguccio] dicit quod archidiaconus non habet curam animarum, nisi specialiter sibi demandetur ab episcopo xvi, q.vii, Nullus (C.16, q.7, c.11). Et respondet ad omnia capitula que videntur dicere quod habeat curam animarum quod intelliguntur ex delegatione. Et ita solvitur, supra eodem titulo, Ut archidiaconus, cum suis concordantiis. Bazianus vero contradixit, scilicet quod habeat curam animarum, et eo ipso quod episcopus instituit eum dat ei generalem administrationem, pro eo facit, infra, de prebente, Referente, et supra, eodem titulo, Ut archidiaconus cum suis concordantiis. . . . ', Bamberg, SB Can. 19, fol.8va.

[112] Goffredus Tranensis, *Summa* ad X 1.23, *Summa super titulis Decretalium* (Aalen 1968 [réimpr. anast. de Lugduni, 1519]), fol.43ra, no.3.

[113] Innocentius IV, *Com.* ad X 1.23.4 *Cum satis*, s.v. *Consuetudinis*, *Commentaria super quinque libros Decretalium* (Frankfurt am Main 1968 [rérimp. anast. de Francofurti 1570]), fol.114v, no.2; Guido a Baisio, *Rosarium sive enerrationes super Decreto*, C.16, q.7, c.11, no.6 (Ius Commune 7; Frankfurt am Main 2008 [réimpr. anast. de Lugduni 1559], fol.264rb.

instituendi n'appartient en principe qu'aux seuls évêques.[114] Afin de ménager les prérogatives archidiaconales et épiscopales, Hostiensis distingue l' 'institution de fait' et l' 'institution de droit'. La première, qui correspond à l' 'institution corporelle' et qui consiste à établir sur un siège l'individu désigné dans un office particulier, appartiant à l'archidiacre de droit commun (*de iure communi*). La seconde, quant à elle, peut être dédoublée. L' 'institution de droit' équivaut d'abord à une collation et peut à la fois être réalisée par l'évêque et par un inférieur, comme l'archidiacre, en vertu d'une concession particulière, d'une coutume ou de la prescription. Une seconde forme de l'*institutio iuris* revient à concéder le droit d'administrer (*ius administrandi*), comme la confirmation de l'élection, laquelle relève du seul évêque, toute coutume contraire devant être écartée.[115]

Conclusion

Le droit canonique classique érige l'évêque diocésain en un acteur majeur au sein de l'architecture ecclésiastique locale. Tout à la fois supérieur hiérachique et agent régulateur, il jouit, à l'intérieur des limites du diocèse, d'un certain nombre de droits et prérogatives au nombre desquels se trouve, au premier chef, l'administration de la *cura animarum*. Pasteur du troupeau dont il a reçu la charge, en vertu de sa consécration épiscopale, l'évêque diocésain est en mesure de se prévaloir d'un statut prééminent qu'il peut opposer à d'autres acteurs de la hiérarchique ecclésiastique.

L'affirmation de ce statut épiscopal privilégié est d'abord le résultat d'une lente maturation, dont la genèse court tout au long du premier millénaire. La réforme grégorienne vient ensuite

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[114] Abbas Antiquus, *Com.* ad X 1.31.4: 'Ius instituendi pertinet ad episcopos', *Lectura decretalium Gregorii IX* (Ius Commune 3; Frankfurt am Main 2008 [réimpr. anast. de Strasbourg 1510]), fol.64r.

[115] Hostiensis, *Com.* in VI^{um} 5.7.1, s.v. *Cum quaestiones emergunt*, *In sextum Decretalium librum commentaria* (Torino 1965 [réimpr. anast. de Venetiis 1581]) fol.30A, no.17.

puissamment contribuer à la revalorisation de la figure de l'évêque qui doit désormais être non plus analysé comme un seigneur mais comme le pasteur local par excellence. Cette construction s'impose d'autant mieux qu'elle est sous-tendue par une ecclésiologie dont le principe directeur fait de l'épiscopat un rouage essentiel du gouvernement ecclésiastique. C'est à une analyse de ce genre que se livre Thomas d'Aquin (†1274) lorsqu'il déclare que les évêques ont, à titre principal, le soin (*cura*) de tous ceux du diocèse. Les prêtres et les archidiacres, en revanche, ne disposent que de prérogatives exercées sous la surveillance de l'évêque diocésain. Ils n'ont vocation à agir que dans la mesure où ce dernier le leur a effectivement confié une fonction particulière liée à l'administration de la *cura animarum*.[116] La permanence de ce principe permet de rendre compte du rôle éminent de l'évêque par-delà les évolutions institutionnelles, à l'instar de l'apparition des archidiaconés et des paroisses. Le droit canonique classique, qui résulte de la conjonction des élaborations doctrinales et de la législation, soutient le rayonnement de cette ecclésiologie tout au long du Moyen Âge.

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[116] Thomas de Aquino, *Summa theologica*, II[a]-II[ae], q.184, art.6: 'Ad secundum. Dicendum quod episcopi principaliter habent curam ovium suae dioecesis; presbyteri autem curati et archidiaconi habent aliquas subministrationes sub episcopis. . . . Ad tertium. Dicendum quod sicut plebani et archidiaconi non habent principaliter curam, sed administrationem quandam secundum quod eis ab episcopo committitur ; ita etiam ad eos non pertinet principaliter pastorale officium, nec obligatio ponendi animam pro ovibus, sed inquantum participant de cura' (5 vols.; Ottawa 1941-1945), 3.2338b, lignes 31-35 – 3.2339a, lignes 11-18). Plus généralement voir Yves Congar, 'Saint-Thomas et les archidiacres', *Revue thomiste* 4 (1957) 657-671.

Una impronta di Abelardo? Graziano e i precepta 'Figuralia'

Andrea Padovani

La Chiesa primitive

L'innesto del cristianesimo sull'antico tronco del giudaismo pose da subito una serie di problemi che scossero la primitiva comunità dei discepoli e dei credenti in Cristo Gesù. Lo attestano gli Atti degli Apostoli (10.9,23; 15.1,35; 21.20,25) come le epistole ai Galati e ai Romani. Le ferme e solenni dichiarazioni della Chiesa primitiva tracciano la via da percorrere, sicché già verso il 160 Giustino attesta che i cristiani, pur rispettosi della legge, la considerano, unanimemente, il riflesso di una età sorpassata.[1]

A quel tempo, del resto, il raccordo tra l'antica tradizione giudaica e il cristianesimo è reso ancor più problematico dalla predicazione delle sette gnostiche: da Valentino e, in particolare, da Marcione. Per lui, come apprendiamo da Tertulliano, tra Vecchio e Nuovo Testamento esiste un contrasto netto ed insanabile, dal momento che nel primo si rivela un Dio incostante, bugiardo, ignorante, crudele e dispotico, artefice del mondo visibile; nel secondo, il signore dell'invisibile, apparso nel suo Figlio Gesù, mite e veritiero.

Contro queste dottrine eterodosse—così come contro l'Alethès Logos del filosofo Celso che irrideva l'assurdità dei precetti giudaici—e a istruzione degli umili, semplici fedeli, Origene afferma con vigore che il Dio di Gesù Cristo è lo stesso di quello di Mosé e dei profeti. È precisamentealloscopo di rendere accettabile, soprattutto all'intelligenza dei cristiani, eventi e precetti contenuti nel Vecchio Testamento, che il dottore alessandrino—come già aveva fatto Tertulliano nell'Adversus Valentinianos—propone una loro interpetazione allegorica.

[1] Justinus, *Dialogus cum Tryphone Judaeo*, PG 471-800 a 498-99.

Travalicando il mero significato letterale—nel quale Dio è rappresentato con caratteri troppo umani—la spiegazione allegorica va al senso profondo, spirituale delle narrazioni e dei comandi, altrimenti incomprensibili. Così come, del resto, era stato affermato da Paolo nell'epistola ai Galati, 4.24, riguardo ai due figli di Abramo, avuti dalla schiava Agar e dalla moglie Sara: 'quae sunt per allegoriam dicta'.[2]

Il criterio ermeneutico indicato dai due Padri passa, ampliato, in Agostino che, nel De utilitate credendi, scrive:[3]

> Omnis igitur scriptura, quae Testamentum Vetus vocatur, diligenter eam nosse cupientibus quadrifariam traditur: secundum historiam, secundum aetiologiam, secundum analogiam, secundum allegoriam . . . Secundum historiam ergo traditur, cum docetur, quid scriptum aut quid gestum sit; quid non gestum, sed tantummodo scriptum quasi gestum sit; secundum aetiologiam, cum ostenditur quid qua de causa vel factum vel dictum sit; secundum analogiam, cum demonstratur non sibi adversari duo testamenta, vetus et novum; secundum allegoriam, non ad litteram esse accipienda quaedam, quae scripta sunt, sed figurate intelligenda.

Che gli eventi narrati nel Vecchio Testamento siano prefigurazione della nuova alleanza stabilita da Cristo è detto anche nel De Genesi ad litteram:[4]

> In libris autem omnibus sanctis intueri oportet, quae ibi aeterna intimentur, que facta narrentur, quae futura praenuntientur, quae agenda praecipiantur vel admoneantur. In narratione ergo rerum factarum quaeritur utrum omnia secundum figurarum tantummodo intellectum accipiantur, an etiam secundum fidem rerum gestarum adserenda et defendenda sint. Nam non

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[2] Henri De Lubac, *Histoire et Esprit*: *L'intelligence de l'Écriture d'après Origène* (Oeuvres complètes 16.5, Écriture et Eucharistie (Paris 2002) 92-194; idem, *Esegesi medievale*, 1.2 sez. 5. *Scrittura ed Eucarestia* 18 (Milano 2006) 8-19; Idem, *Esegesi medievale* 2.2 sez. 5. *Scrittura ed Eucarestia* 20 (Milano 2006) 161-228; Marie Dominique Chenu, *La teologia nel xii secolo*, cur. Paolo Vian, intr. Inos Biffi (Milano 1992) 215-216.

[3] Augustinus, *De utilitate credendi*, ed. Iosephus Zycha (CSEL 25.6.1; Pragae-Vindobonae-Lipsiae 1891) 6.1, 5, 7-8.

[4] Augustinus, *De Genesi ad litteram libri duodecim*, ed. Iosephus Zycha (CSEL 28.1; Pragae-Vindobonae-Lipsiae 1894) 1.1 3. Si v. anche idem, *Enarrationes in Psalmos* 141-150 ed. Franco Gori adiuv. Iuliana Spaccia (CSEL 5.5; Wien 2005) pars 5 in Ps. 148 251: 'Illa omnia in figura gesta sunt, habent veritatem suam; figurata sunt in antiquis: praesentia ostenduntur in nobis'.

> esse accipienda figuraliter, nullus christianus dicere audebit, adtendens apostolum dicentem: 'Omnia autem haec in figura contingebant in illis' (1 Cor. 10.11).

Il frequente ricorso, negli scritti appena citati del vescovo di Ippona—e in altri ancora[5]—del termine figura, come degli avverbi figurate, figuraliter e del participio figurata, dipende da Paolo che, sempre a 1Cor. 10.6, aveva scritto: 'Haec autem in figura facta sunt nostri'. In quanto figurae, gli accadimenti occorsi a Mosè, al popolo ebraico o ai profeti dovevano cedere davanti a quanto era figurato, dunque alla piena rivelazione operata da Gesù. Se 'praeterit figura huius mundi' (1 Cor. 7.13), a maggiore ragione le antiche prefigurazioni erano destinate a dissolversi. Così, ad esempio, nel passaggio del mar Rosso e nell'attraversamento della nube si allude al battesimo che verrà; la pietra dalla quale il popolo bevve (Es. 10.15_35) è annuncio di Cristo. Pressa poco negli anni nei quali opera ed insegna Agostino, Giovanni Cassiano si serve degli stessi termini per parlare degli antichi sacrifici: 'Holocausta enim matutina et sacrificia vespertina cunctis diebus in Templo, licet figuralibus, etiam ex eo probari possumus indesinenter oblata'.[6]

Nei Moralia in Job—opera destinata a larghissima diffusione per tutto il Medio Evo—Gregorio Magno limita la sua attenzione solo a tre sensi da applicare allo studio delle Sacre Scritture: storico, allegorico e morale:[7]

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[5] Augustinus, *Discorsi* 2.2 (86-116). *Sul Nuovo Testamento*. Tradz. e note di Luigi Carrozzi (Roma 1983) Sermo 74, 4 498-99: 'Facies . . . Moysi splendida figuram habebat veritatis . . . Quae figura evacuatur. Sic enim dixit Apostolus: Quae evacuantur (2 Cor. 3.13). Quare evacuantur? Quia veniente imperatore imagines tolluntur de medio'. Sull'uso del termine 'Figura' si v. *Opera omnia di Sant'Agostino* 44.2a. *Indice analitico generale* a cura di Franco Monteverde, collaborazione di Elena Passarini (Roma 2008) 748. Ma si v. anche oltre, qui, testo e nn.27 e 28.

[6] Ioannes Cassianus, *De Coenobiorum Institutis libri duodecim* PL 49.53-476 a col.123 3.3.9.

[7] Gregorius Magnus, *Moralia in Job* ed. Marcus Adriaen (CCL 143 a-b; Turnhout 1979) Epistola ad Leandrum 3,4.

> Sciendum vero est, quod quaedam historica expositione transcurrimus et per allegoriam quaedam typica investigatione perscrutamur: quaedam per sola allegoricae moralitatis instrumenta discutimus.

Se, nella lettera, talvolta 'invenimus praedicamenta operi et exempla virtutis', occorre andar
oltre, 'ad limen interius, id est ad intellectum mysticum intimae contemplationis'.[8] Tutto avviene come nella costruzione di un maestoso edificio: 'Nam primum quidem fundamenta historiae ponimus; deinde per significationem typicam in arcem fidei fabricam mentis erigimus; ad extremum quoque per moralitatis gratiam quasi superducto aedificium colore vestimus'.[9]

Arrestarsi alla sola lettera sarebbe non solo inutile per il lettore, ma addirittura occasione certa di gravi fraintendimenti nei quali erano già incorsi gli eretici. La Sacra Scrittura, infatti, 'duo limina habet, exterius et interius, quia in littera dividitur et allegoria'. I 'uerba historiae' sono da intendere 'per allegoriarum sensus': 'sed allegoriarum sensus' deve tradursi 'protinus in exercitium moralitatis'.[10] Sul punto, il consenso degli esegeti medievali sarà pressoché unanime.[11]

L'AltoMedioevo

I sensi delle Sacre Scritture tornano ad essere quattro nel De tabernaculo et vasis eius ac vestibus sacerdotum di Beda, ma con due rilevanti differenze rispetto al modello agostiniano. In luogo del significato eziologico ed analogico subentrano quello tropologico (o morale) e quello anagogico: 'Mensa tabernaculi quattuor habet pedes: quia uerba caelestis oraculi, vel historico

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[8] *Omelie su Ezechiele*, 2. *Libro secondo*, cur. Vincenzo Recchia. Intr. e indici di Vincenzo Recchia. Tradz. Di Emilio Gandolfi, *Opere di Gregorio Magno* 3.2 (Roma 1993) 2 homilia 3, n.18 86.

[9] Gregorius Magnus, *Moralia in Job*, Epistola ad Leandrum 3, 4. 'Typicus', in altri autori, sarà convertito in 'per Imaginem', 'figuram' o 'sacramentum': De Lubac, *Esegesi medievale* 1.2 sez. 5 28.

[10] Gregorius Magnus, *Moralia in Job*, Epistola ad Leandrum 1, 2.

[11] Jean Leclercq, *Cultura umanistica e desiderio di Dio: Studio sulla letteratura del Medioevo* (Firenze1983) 104-106.

intellectu, vel allegorico, vel tropologico, id est morali, vel certe anagogico solent accipi.'[12]

L'allegoria opera quando 'uerbis, sive rebus mysticis praesentia Christi et ecclesiae sacramenta designantur'. Con le parole (uerbis): come quando Isaia 11.1, scrive: 'Egredietur virga de radice Iesse et flos de radice eius ascendet'; con le cose (rebus), perché il popolo di Israele, liberato dalla schiavitù col sangue dell'agnello pasquale (Es. 12.3) prefigura la Chiesa redenta dal sangue di Cristo. Per altro verso 'Tropologia, id est moralis locutio, ad institutionem et correctionem morum siue apertis, seu figuratis prolata sermonibus respicit'. Apertamente, come si legge a 1 Joh. 3: 'Filioli mei, non diligamus verbo nec lingua, sed opere et veritate'; in figura, poiché nell'Eccl. 9.8, le vesti candide rinviano alle buone opere. L'anagogia, in fine, conduce alle realtà più alte con la promessa dei beni futuri: apertamente (Mt. 5.8) o misticamente (Ap. 22.14).

In ambiente carolingio Rabano Mauro[13]sottolinea il compito dell'allegoria precisamente nella direzione di dissipare le ombre in cui si cela la verità, sicché i 'verba sacri eloquii' debbono essere trasposti 'ab historia ad allegoriam et sub umbra in veritatem'.[14]

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[12] Beda Venerabilis, *De Tabernaculis et Vasis eius ac Vestibus Sacerdotum*, cur. D. Hurst (CCL 119a; Turnhout 1969) I 25.

[13] L'opera che, in PL 112 col.849-1088, è posta sotto il nome di Rabanus Maurus, *Allegoriae in universam Sacram Scripturam*, dev'essere datata al sec.XIII in. (Chenu, *La teologia* 224). I quattro sensi della Sacra Scrittura sono esposti alla col.849: 'Quisquis ad Sacrae Scripturae notitiam desiderat pervenire, prius diligenter consideret quando historice, quando allegorice, quando anagogice, quando tropologice suam narrationem contexet'. Se l'allegoria 'Sanctae Ecclesiae mysteria, sive praesentia, sive futura, aliud dicens, aliud significans, semper autem figmentis et velatis ostendit', la tropologia 'sicut allegoria, in figuratis, sive dictis, sive factis, constat: sed in hoc ab allegoria distat, quod allegoria quidem fidem, tropologia vero aedificat moralitatem'.

[14] Rabanus Maurus, *Commentaria in libros II Paralipomenon* PL 109 col.279-540 a col.457 3, c.4; Rabanus Maurus, *Commentariorum in Exodum libri quatuor, Commentariorum in Exodum libri quatuor* PL 108 col.9-246a. 126 3, c.2: 'Hic apparet quantum praecellet umbrae veritatis legis veritas Evangelii'.

Ben nota ai fanciulli, fin dalle prime scuole, in quanto ‘proprie de arte gramatica’, l'allegoria (che dev'essere distinta ‘a metaphora, vel ceteris tropis’) riempie gli scritti degli oratori e dei poeti pagani. Eppure, ‘Scriptura quoque divina per hanc non modica ex parte contexta est’.[15] Le antiche prescrizioni e le cerimonie del popolo giudaico acquistano pertanto un senso alla luce del Nuovo Testamento ove, appunto, si superi il mero dato letterale grazie ad una rinnovata ‘intelligentia spiritualis’.[16] Spunto già presente in Agostino (‘quamquam et in Uetere nouum lateat, et in Nouo uetus pateat’) e destinato a durevole fortuna.[17]

Tra il secolo XI e il XII

Questo, almeno nei maggiori esponenti e in sintesi—Pascasio Radberto non aggiunge nulla, al quadro, di originale—è il

[15] Rabanus Maurus, *Enarrationum in Epistolas Beati Pauli liber. In Epistolam ad Galatas, Commentariorum in Exodum libri quatuor* PL 108 col.9-246 a col.330. Haimo di Halbertstadt (Haimo Halberstatensis, *In D. Pauli Epistolas. In Epistolam ad Galatas* PL 117 col.669-700 a col.687) si esprime allo stesso modo: ‘Per allegoriam sunt dicta. Hanc habet consuetudinem beatus Paulus ut spiritalem intelligentiam allegoriam appellat. Allegoria autem proprie ad grammaticos pertinet. Est autem tropus quo aliud significatur quod dicitur’.

[16] Rabanus Maurus, *Commentaria in libros II Paralipomenon* 2 c.24 col.392: ‘De gente Judeae et figurali legis ac caerimoniorum observantia, ad veritatem Evangelii et Novi Testamenti translati sunt cultum’; idem, *Commentaria in Ezechielem* PL 110, coll.497-1084 a col.1028 16 c.17. Sulla necessità di convertire l’intelligentia in senso spirituale, morale o mistico insistono (anche sulle orme di Beda, In Samuelem prophetam allegorica expositio PL 91col.499-714 a col.639) tutti gli interpreti posteriori, da Ruperto di Deutz (Rupertus Tuitiensis, *De Sancta Trinitate et operibus eius libri X-XXVI* ed. Hrabanus Haacke o.s.b. In Exodum 581-802; In Deuteronomium 1014-1118 (CCL XXII; Turnholt 1972) a in Exodum l. 4 c.9, 759) ad Haimo di Halbertstadt, Gerhoch di Reichersberg (*Expositio in Canticum Isaie* PL 194 coll.997-1002 a col.997), Anselmo di Laon, Ugo di S. Vittore, Abelardo, Graziano, Stefano di Tournai ed Onorio. Invece di intelligentia, in precedenza s’era preferito l’uso della parola intellectum: ma il significato, in generale, era lo stesso. Cf. De Lubac, *Esegesi medievale*, 2.2 sez. 5, 87, 90-91.

[17] Augustinus, *Quaestionum in Heptateuchum libri VII: Locutionum in Heptateuchum libri VII* cur. I. Fraipont (CCL 33; Turnhout 1958) II 73. Questo passo è stato riprodotto nel c.Dei Verbum del Concilio Ecumenico Vaticano Secondo, 2, 4.16.

panorama dell'esegesi scritturale alle soglie del secolo dodicesimo.[18] Nelle Enarrationes in Evangelium Matthaei Anselmo di Laon (1050 ca.1117) fa uso continuo ed alternato di historia, allegoria e moralitas. L'allegoria ha il compito di scorgere, anche attraverso il significato dei loro nomi, la prefigurazione di Cristo nei Padri che sono ricordati nel Vecchio Testamento: Isacco, Giacobbe, Davide, Salomone, Abia, Asia, Ioram, Ozia, Acaz, Ezechia, Manasse, Iosia e qualche altro ancora. L'asino rappresenta, invece, la stoltezza degli Ebrei; Uria l'Ittita, il diavolo.[19]

La chiave morale ha lo scopo di evidenziare 'quas virtutes isti patres in nobis edificent, quia fides, spes et charitas sunt omnium fundamenta virtutum'.[20] Anselmo non pare procedere, almeno nel commento al Vangelo di Matteo, oltre queste scarne e ripetute indicazioni. Di lui e della sua scuola dovremo occuparci ancora, tra non molto, quando si tratterà di valutare il probabile influsso esercitato su Abelardo e Graziano: ma fin d'ora merita d'essere segnalato il fatto che egli non affronta, se non succintamente e di passaggio, il problema posto dalla validità, nei nuovi tempi inaugurati da Cristo, delle numerosissime norme imposte all'osservanza dei Giudei nel Levitico, nei Numeri, nel Deuteronomio. Così, ad esempio:[21]

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[18] Henri de Lubac, *Esegesi medievale* 2.1. sez. 5. *Scrittura ed Eucarestia* 19 (Milano 1996) 273-88. Pascasio insiste sul senso anagogico delle Sacre Scritture nella sua *Expositio in Evangelium Matthaei* PL 120 col.31-994 a col.382.

[19] Anselmus Laudunensis, *Enarrationes in Evangelium Matthaei* PL 162 col.1227-1500 a col.1232-1234;1238; 1244.

[20] Ibidem col.1237, 1243.

[21] Odon Lottin, *Psycologie et morale aux XII e et XIII e siècles, 5: Problèmes d'histoire littéraire: L'école d'Anselme de Laon et de Guillaume de Champeaux* (Gembloux1959) 89 n.113. Di figurae si parla anche quando il discorso verte sui dieci comandamenti: 'Lex proprie decem precepta in duabus tabulis scripta. In superiori tria de cultu Dei et inferiori septem de cultu proximi. Ad illa vero decem pertinent quecumque circa precepta de figuris sunt, ut de sacrificiis, de tabernaculo ad cultum Dei, cetera quedam ad cultum proximi' (128 n.181).

> Quaedam . . . in veteri testamento fuerunt secundum figuram que in novo non observantur [nisi] figuraliter, ut de circumcisione pro qua nos observamus baptismum . . . de animalium sacrificiis . . . de abstinentia a carne porci . . . de sabbato custodiendo, de aratione in bove et asino et similibus. Que omnia quantum ad figuram cessant; spiritualiter vero tenentur, quia veniente veritate, omnia cessare debent que erant umbra.

Da un lato, Gesù aveva riconosciuto il valore di quelle norme, come si legge in Mt. 5.17-19:

> Nolite putare quoniam veni solvere legem, aut prophetas: non veni solvere, sed adimplere. Amen qui pedico vobis, donec transeat caelum et terra, iota autunus apex non praeteribit a lege, donec omnia fiant. Qui ergo solverit unum de mandatisistis minimis et docuerit sic homines, minimusvocabitur in regno caelorum: qui autem fecerit et docuerit, hic magnus vocabitur in regno caelorum; e in Lc. 16.17: Facilius est autemcaelum et terrampraterire, quam de lege unum apicemcadere.[22]

Per altro verso è tuttavia evidente e frequentemente ripetuta l'opposizione di Cristo ad ogni tentativo di rinchiudere la vita umana entro la casistica dell'interpretazione rabbinica della legge. Il suo insegnamento è rivolto contro una comprensione ristretta del riposo sabbatico, contro la pretesa dei Farisei di imporre agli uomini gioghi che Dio non ha posto, così dimenticando la vera giustizia. Con l'avvento dei tempi nuovi e l'annuncio del Regno, creduto per fede, la Legge e i profeti hanno ormai concluso la loro parabola ascendente nella predicazione del Battista (Mt.11.13; Lc. 16.16). Sono, questi, testi notissimi e commentati da sempre che tuttavia, nella nuova temperie del secolo undecimo—e ancor più nel seguente—pongono urgenti questioni sia di fronte al pullulare delle insorgenze ereticali, sia in presenza di una più matura sensibilità di ordine teologico e giuridico.

Di tali problematiche pare essere già consapevole quel *Liber divinarum sententiarum* che oggi è ascritto—ritengo, con buone ragioni—ad Irnerio, quando ancora egli si muoveva, in Normandia, sotto l'influsso del suo maestro Lanfranco.[23] La

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[22] Secondo Origene, col termine lex si debbono intendere i precetti che, per s. Paolo, non sono da seguire alla lettera; con mandata, invece, quelli vincolanti per l'ebreo come per il cristiano, senza fare ricorso alla allegoria: De Lubac, *Esegesi medievale* 2.2. sez. 5 131-32.

[23] Cf. almeno, da ultimo, Andrea Padovani, 'Matilde e Irnerio: Note su un dibattito attuale', *Matilde di Canossa e il suo tempo: Atti del XXI Congresso*

principale autorità ripetutamente invocata nell'opera è Agostino. Non per caso, dunque, ricorrono là espressioni che richiamano quanto, nel Vecchio Testamento, è figura della nuova alleanza stabilita in Cristo. Così, a II, p. 114[24] si trova ciò che era stato scritto dal vescovo di Ippona nel *De doctrina christiana*.[25] E a 3, p.119, dal Contra Faustum:[26]

> Testamenti veteris aliqua precepta sunt vite agende, ut illud: non concupisces; aliqua vero significande, ut hoc circumcides omne masculum VIII die; oportuit enim ea que nunc patefacta sunt non tantum sermonibus, set actionibus prefigurari.

Dalla stessa opera di Agostino[27] è tratto, a 70, p. 298, il passo 'Quod antiquis de efundendo sanguine preceptum est, in figura accipendum est'. A 4, p. 126, è ripresa, ad sensum, l'epistola 55, 10 Ad inquisitiones Ianuarii: 'Sabatum quidem Iudeis observatum figura erat sanctificationis in requiem Spiritus Sancti'.[28] A IIII, p. 127, è la volta del De spiritu et littera.[29]

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 (2 vol. Spoleto 2016) 1.199-242 con ulteriore bibliografia.

[24] Irnerius Iurisperitissimus, *Liber Divinarum Sententiarum*, ed. Giuseppe Mazzanti (Spoleto1999).

[25] Augustinus, *De doctrina christiana libri IV*, ed. Klaus D. Daur (CCL 32; Turnhout 1962) 3.10.14, 86.

[26] Da 'oportuit' a 'prefigurari' sono parole di Irnerio. Augustinus, *Contra Faustum libri XXXIII*, ed. Iosephus Zycha, (CSEL 25.1; Pragae-Vindobonae-Lipsiae 1891) VI. 2 285, cita 1Cor. 10.6 così spiegandolo: 'Ostendit iam non opus esse ut, cum res ipsas manifestatas agimus, figurarum praenuntiantium celebrationi serviamus'.

[27] Augustinus, *Contra Faustum libri XXXIII* 13, 772.

[28] Augustinus, *Epistolae*, ed. Alois Goldbacher (CSEL 34.2; Pragae-Vindobonae-Lipsiae 1898) 188-189.

[29] Augustinus, *De spiritu et littera liber un*, ed. Carolus F. Urba et Iosephus Zycha, (CSEL 60; Pragae-Vindobonae-Lipsiae 1913) 21 189. Nel testo abbreviato del Liber divinarum sententiarum Agostino dice, dei sacramenta, che 'umbrae erant futurorum, sicut est circumcisio et sabbatum et aliae dierum observationes et quarumdam escarum cerimoniae et multiplex sacrificiorum sacrorumque ritus.' Altri, invece, sono i 'praecepta iustitiae, qualia nunc quoque observare praecipimur, quae maxime duabus tabulis sine figura adumbratae significationis expressa sunt, sicuti est: non adulterabis, non homicidium facies, non concupisces'.

Da Ambrogio, *De mysteriis*, è preso quanto esposto a XXXVII, p. 204: 'In Ebreorum transitu baptismi figura precessit'.[30] In Ivo di Chartres, pure lui discepolo di Lanfranco, typus, umbrae e figurae si alternano nel tentativo di mostrare 'utrorumque sacramentorum concordiam'; 'Quae autem dicturus sum ad hoc intendunt, ut mediante ecclesiastica [evangelica] veritate pateat, qualiter conveniant vetera testamenta cum novis'.[31]

Anche il quasi contemporaneo Ruperto di Deutz (1075-1129) non si discosta dalla terminologia tradizionale. Nell'Annulus—ove si confrontano un cristiano e un giudeo—dopo aver detto che gli eventi riferiti dal Vecchio Testamento sono soggetti a mystica interpretatio, egli afferma che riti e sacrifici 'praecepto suo [Deus] ordinavit, ut in illis non necessariis umbra vel figura esset necessariae rei et veritatis'.[32] Ovunque, pertanto, Ruperto si propone di trarre 'de obscura litterae . . . spelunca lucidum . . . spiritus mysterium',[33] di fare emergere il sensus mysticus o l'anagogen al di là della lettera esibita nelle antiche Scritture. Propositi non dissimilicoltiva Brunone d'Asti, che con Ruperto condivide lo slancio verso l'allegorismo:[34] 'Allegoria necessario quaerenda est, ubi littera aliquid iubet, vel quod inutile sit, vel quod omnino careat ratione',[35] consapevole che i profeti si sono espressi 'suo more per aenigmata et figuras'.[36] Il banco di prova è

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[30] Ambrose de Milan, *Des Sacraments, des Mistères*: *Nouvelle édition revue et augmentée de l'Explication du Symbole*, Texte établi, traduit et annoté par Bernard Botte (Paris 1961) 12, 162.

[31] Ivo Carnotensis, *De Ecclesiasticis Sacramentis et Officiis, ac per annum festis sermones* PL 162 coll.505-610, V a col.536. Cf. ancora V coll.543, 545, 557, 561 e III coll.521-22, 524.

[32] Rupertus Tuitiensis, *Annulus sive Dialogus inter Christianum et Judaeum*, PL 170, coll.559-610 a coll.574, 583, 596.

[33] Rupertus Tuitiensis, *De Sancta Trinitate et operibus eius libri XLII*, In Exodum 581-802; In Deuteronomium 1014-1118 (CCL 32; Turnholt 1972) a 1038 c.19. 'Historiae exempla'scrive altrove (1035 c.15) 'dimittimus, sed ex ea allegoriarum sensus in mente retinemus'.

[34] Per entrambi si v. De Lubac, *Esegesi medievale*, 2.1, sez. 5 299-324 e 294-299.

[35] Bruno Astensis. *Expositio in Pentateuchum*. *Expositio in Numeros* PL 164 coll.463-506 a col.474 c.7. Ugualmente a col.519.

[36] Ibidem col.517.

offerto, per entrambi, dalla spiegazione di Deut. 22.10-11: 'Non arabis in bove et asino' e 'Non indueris vestimento, quod ex lana linoque contextum est'. Per Ruperto il primo precetto si spiega così: 'Non sociabis in praedicationem sapientes et fatuos, ne videlicet per eum qui implere non valet, et illi obsistas qui praevalet'; e il secondo:[37]

> Vestis . . . quae ex lana linoque fit, lanam semper in faciem reddit, et linum sub ter abscondit. Quid ergo per lanam nisi simplicitas sonat? Quid per linum nisi subtilitas designatur? Et saepe homo subtilis et acutus exterius simplicitatem mansuetudinis ostendit et interius subtilitatem malitiae contegit.

Brunone afferma lo stesso riguardo a Deut. 22.10, ma capovolge l'interpretazione del passo ad esso seguente:[38]

> Animae namque vestimentum caro est, quae si casta fuerit lino texitur, lana vero, si luxuriosa. Linum enim propter candorem et castitatem, lana vero, quia de carne oritur, luxuriam significat.

Le Allegoriae in universam Sacram Scripturam, già falsamente attribuite a Rabano Mauro, ma in realtà posteriori di quasi un secolo ai due autori appena ricordati, si allineeranno all'esegesi di Ruperto.[39]

Il secolo XII: Ugo di San Vittore

Evidentemente, il ricorso all'allegoria dimostra d'essere, già in questi due casi, una tecnica tutt'altro che affidabile, esposta ad interpretazioni certo pie, ma arbitrarie. Ne è consapevole Ugo di San Vittore che—come segnalarono Beryl Smalley e Marie Dominique Chenu—schierandosi contro una allegoresi troppo

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[37] Rupertus Tuitiensis. *De Sancta Trinitate et operibus eius libri XLII*, In Deuteronomium, PL 167 coll.917-1000 a coll.936-37 c.18.

[38] Bruno Astensis, *Expositio in Pentateuchum*. Expositio in Deuteronomium PL 164 coll.505-550 a col.523.

[39] Rabanus Maurus, *Allegoriae in universam Sacram Scripturam* col.979 a Deut. 22.10: 'Non socies in praedicatione fatuum sapientipraedicatori'; a Deut. 22.11: 'Non ostendas de foris simplicitatem et intus habeas duplicitatem'. Cf. col.987: 'Non intus malitiae subtilitatem teges et sanctitatem foris ostendes,' rispettivamente alle voci 'lana' e 'linum'. Tutta l'opera, di cui qui si tratta, rientra nel genere letterario, destinato a larga fortuna, delle distinctiones: Chenu, La teologia 223-24; Leclercq, *Cultura umanistica* 99-100; De Lubac, *Esegesi medievale* 2.1, sez. 5 48-49, 556.

spesso incline ad abusi e a svolgimenti soggettivistici, rivendica il valore insostituibile della historia: dunque dei fatti storici e della littera.[40] Se poi—come sostiene Henri De Lubac—non bisogna esagerare il cambiamento di prospettiva impresso da Ugo rispetto alla tradizione, che egli viceversa avrebbe difeso (almeno nei suoi più autorevoli rappresentanti) è questione che non intendo affrontare.[41] Resta assodato che se, per il maestro vittorino, la storia è fondamento indispensabile dell'esegesi biblica, non per questo egli esclude o condanna l'allegoria, come è asserito nel *De scripturis et scriptoribus sacris praenotatiunculae* (1131-1134) ove, dopo avere parlato del senso storico, rivelato 'ex significatione verborum', così si esprime riguardo all'allegoria: 'Est autem allegoria, cum per id quod ex littera significatum proponitur, aliud aliquid sive in praeterito, sive in praesenti, sive in futuro factum significatur. Dicitur allegoria quasi alieniloquium, quia aliud dicitur et aliudsignificatur, quaesubdividitur in simplicemallegoriam et anagogen. Et est simplex allegoria, cum per visibile factum aliudinvisibile factum significatur. Anagoge, id est sursum ductio, cum per visibile invisibile factum declaratur' sicché, ad esempio, Giobbe 'Christum significat', oppure 'quemlibet iustum vel animam poenitentem'.[42] 'Et haec facta', conclude, 'ad litteram, quae repraesentant huiusmodi spiritualia, sacramenta dicuntur'. Per sacramentum, Ugo intende :[43]

> Quod foris est visibile et materiale . . . quod intus est invisibile et spirituale, re sive virtus sacramenti est: semper tamen sacramentum quod foris tractatur et sanctificatur; signum est spiritualis gratiae, quae res sacramenti est et invisibiliter percipitur.

Come, infatti, nell'uomo vi sono corpo e anima, nella Sacra Scrittura si danno lettera e senso, laddove corpo e lettera

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[40] Beryl Smalley, *Lo studio della Bibbia nel Medioevo* (Bologna 1972) 129-158; Chenu, *La teologia* 225-226.

[41] De Lubac, *Esegesi medievale* 2.1 sez. 5 458, 484.

[42] Hugo de Sancto Victore, *De scripturis et scriptoribus sacris praenotatiunculae* PL 175 coll.9-28 a col.12
III.

[43] Hugo de Sancto Victore, *De sacramentis christianae fidei* PL 175 coll.173-618 a col.317 9, 2.

costituiscono gli elementi visibili; gli altri—anima e senso—quelli invisibili.

La tripartizione dei sensi della Scrittura (storico, allegorico e tropologico o morale per cui 'id quod factum dicitur aliquid faciendum esse significatur')[44] prospettata nel *De sacramentis* (1137) e ancor prima nel *Didascalicon* (ante 1125)[45] sarà poi mutata nel più tardo *De scripturiset scriptoribus sacris*[46] dove, in luogo della tropologia, sarà posta l'anagogia: dunque la comprensione delle dimensioni ultime e celesti.[47] Se, nel giovanile Didascalicon—opera alla quale Ugo deve la maggiore notorietà—il monaco vittorino si mantiene, su alcuni punti, fedele ad affermazioni tradizionali,[48] altrove dimostra uno spirito più

[44] Idem, Prologus IV col.184.

[45] Hugo de Sancto Victore, *Didascalicon de studio legendi* PL 176 coll.770-812 a col.789 V 2.

[46] Mi attengo alla cronologia degli scritti di Ugo indicata da Damien Van den Eynde o.f.m., *Essai sur la succession et la date des écrits de Hugues de Saint-Victor* (Roma 1960).

[47] De Lubac, *Esegesi medievale* 2.1, sez. 5 446-48. Sulla preferenza verso uno schema tripartito (anziché quadripartito) in Ugo, 439, 446 e De Lubac, *Esegesi medievale* 1.2, sez. 5 348-53. Cf. Smalley, *Lo studio della Bibbia nel Medioevo 134. In generale e in particolare per Goffredo di Auxerre, Ferruccio Gastaldelli, Studi su san Bernardo e Goffredo di Auxerre* (Firenze 2001) 461. Fedele al modello quadripartito si mantiene Guibertus de Novigento, *Commentaria in Genesim* PL 156 coll.19-337 laddove, nel proemio, coll.25-26, scrive: 'Quatuor sunt regulae Scripturarum . . . historia, quae res gestas loquitur; allegoria, in qua ex alio aliud intelligitur; tropologia, id est moralis locutio, in qua de moribus componendis ordinandisque tractatur; anagoge, spiritualis scilicet intellectus, per quem de summis et coelestibus tractaturi ad superiora ducimur. Verbi gratia Hierusalem, secundum historiam civitas est quaedam; secundum allegoriam, sanctam Ecclesiam significans; secundum tropologiam, id est moralitatem, anima fidelis cuiuslibet qui ad visionem pacis aeternae anhelat; secundum anagogen, coelestium civium vitam.' Lo stesso fa Roberto di Melun (Raymond M. Martin, *Oeuvres de Robert de Melun III*, Sententie I [Université Catholique et Collèges Théologiques OP. et S.J. de Louvain, 21; Louvain 1947] l. 1 c.VI 170-73) che—pur riprendendo spunti già presenti nel maestro Ugo di S. Vittore—parla del senso storico, mistico, anagogico e tropologico. L'allegoria è compresa sotto l'anagogen. Cf. Chenu, *La teologia* 75, 87, 209.

[48] Hugo de Sancto Victore, *Didascalicon* 6.4 col.805, ove riprende l'immagine dell'edificio già proposta da

audace ed innovatore: precisamente là dove egli si serve dell'allegoria per rendere ragione del senso racchiuso negli ultimi tre libri attribuiti a Mosé—Numeri, Levitico, Deuteronomio—nei quali si tratta diffusamente delle prescrizioni e dei riti comandati dalla Legge.[49]

Vi sono colà, infatti, passi che non possono davvero essere compresi nel loro senso letterale, sicché è necessario esaminarli con grande discrezione: sia per non trascurare, con atteggiamento negligente, certi contenuti apparentemente sconcertanti, sia per non stravolgere, con zelo inopportuno, il vero significato di quei testi. Di nuovo, l'esegesi storica costituisce il fondamento e il principio della dottrina cristiana: ma per edificare la fede occorre poi accedere all'interpretazione allegorica. Da ultimo, il senso morale costituirà la guida al comportamento. Affinché, però, l'esegesi allegorica sia appropriata ed efficace si dovrà prendere in considerazione, innanzitutto, il Nuovo Testamento, nel quale la realizzazione definitiva dei fatti antichi si presenta in modo manifesto, procedendo oltre l'ombra delle antiche prefigurazioni.[50] In definitiva, la Legge deve essere interpretata non solo tramite l'esegesi storica, ma anche, necessariamente, secondo una prudente esegesi spirituale.[51]

Per comprendere il valore delle antiche norme Ugo procede stabilendo una distinzione fondamentale:[52]

> Praecepta enim legis scriptae, alia fuerunt mobilia, alia immobilia. Mobilia sunt quae ex dispensatione ad tempus sunt ordinata. Immobilia sunt quae a natura veniunt . . . ut nullo tempore possint sine culpa dimitti.

Questi ultimi precetti—gli immobili—sono dettati dalla lex naturalis, espressi in Tob. 4.16 e Mt.7.12.[53] Quanto al Decalogo, i

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Gregorio (cf. sopra, n.9).

[49] Ibid. *Didascalicon* 6.3 e 4 coll.801 e 805.

[50] Ibid. 6.6 col.805. Sul punto cf. Chenu, *La teologia* 225-235; De Lubac, *Esegesi medievale* 2.1, sez. 5 389-487.

[51] Ibid. 5.4 col.791.

[52] Ibid. *De sacramentis christianae fidei* 1, pars 12 c.4 col.351; c.5, col.352. La distinzione tra preceptiones mobiles et immobiles era già stata profilata da Ivo di Chartres nel Prologo al *Decreto* e alla *Panormia*.

[53] Converge, sul punto, Graziano, D.1 d.a.c.1: 'Ius naturale est, quod in Lege et Evangelio continetur, quo quisque iubetur alii facere, quod sibi vult fieri et prohibetur alii inferre, quod sibi nolet fieri'.

primi tre comandamenti della prima tavola 'pertinent ad dilectionem Dei'; i rimanenti dettano il comportamento da tenere verso il prossimo. Certo, le maggiori difficoltà di comprensione si pongono riguardo ai precetti mobili del Vecchio Testamento; in generale, afferma Ugo, essi furono dati, a quel tempo, o per mettere alla prova l'obbedienza e la devozione degli Israeliti o per preparare, con essi, i 'futurae veritatis signa'.[54] Così, ad esempio, il divieto di mangiare carne intrisa di sangue (Lev. 7.26; Deut. 12.13) è per noi ammonimento a desistere da ogni crudeltà; quello di nutrirsi di carne di porco (Deut. 14.3), a ritrarsi da ogni forma di immondizia; quello di 'arare in bove et asino' (Deut. 22.10) prescrive—a differenza di quanto affermato da Ruperto e Brunone—di evitare pigrizia e stoltezza. La legge del taglione (Lev. 24. 19_20), infine, vuole che non si ecceda nella vendetta e nel furore. Quanto al riposo del sabato, esso è sacramento (qui nel senso di 'mysterium', secondo l'accezione di Agostino, *De civitate Dei*, l.4, c.33, poi largamente ripresa, per esempio, da Bernardo di Chiaravalle e Guglielmo di St. Thierry)[55] di quello eterno nel quale—ecco il senso anagogico—'nullo unquam labore fatigatur'.[56] Dai precetti ad tempus fino a quelli del Nuovo Testamento si pone una progressione, così rappresentata:[57]

> Praecepta igitur ad tempus superaddita elementa fuerunt. Praecepta Decalogi, exordia. Praecepta Novi Testamenti, sermo. Prima [sc. elementa] ex institutione disciplinae, secunda ex veritate naturae, tertia ex perfectione gratiae.

Il secolo XII: Abelardo e i figuralia praecepta

Nessun interprete, prima di Ugo, s'era occupato altrettanto estesamente del valore di tante norme presenti nell'antica Legge.

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[54] Hugo de Sancto Victore, *De sacramentis christianae fidei* 1, pars 12 c.9 col.360.

[55] De Lubac, *Esegesi medievale* 1.2, sez. 5, 28.

[56] Hugo de Sancto Victore, *De sacramentis christianae fidei* 1, pars 12 c.6, col.354.

[57] Idem, 1, pars 9, c.6 col.362. Poco prima (c.11 col.361) Ugo aveva scritto che negli elementa 'sonus est,
non sensus'. Cf. Smalley, *Lo studio della Bibbia nel Medioevo* 143.

Il suo contemporaneo Abelardo, piuttosto che diffondersi su una valutazione altrettanto puntuale, si segnala per aver prospettato una distinzione di carattere generale e per l'uso di una terminologia ch'è caratteristica della sua produzione: quella che propone, appunto, i figuralia praecepta. Il primo esempio dovrebbe trovarsi nella Theologia christiana, composta tra il 1121 e il 1126 (ma successivamente rivista, senza mai raggiungere una redazione definitiva):[58]

> Si enim diligenter moralia Euangelii praecepta consideremus, nihil ea aliud quam reformationem legis naturalis inueniemus, quam secutos esse philosophos constat, cum ex magis figuralibus quam moralibus nitatur mandatis et exteriori potius iustitia quam interiori abundet.

Nel tardo Dialogus, che ritengo presumibilmente composto verso il 1136,[59] il filosofo (dietro il quale si nasconde, a quanto pare,[60] lo stesso Abelardo), dopo aver sostenuto che nel Vecchio e nel Nuovo Testamento si trovano 'naturalia precepta, que moralia [vos, sc. Christiani] vocatis', come quello di amare Dio e il prossimo, non commettere adulterio, non rubare, non uccidere, se ne trovano altri 'quasi positive iustitie' che 'quibusdam ex

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[58] Abaelardus Petrus, Opera Theologica. Theologia christiana cur. Eligius M. Buytaert o.f.m. (CCCM 12;
Turnhout 1969), 2. 44 149.

[59] Rinvio al mio 'Intrecci inattesi: giustizia e virtù in Abelardo e Irnerio', RIDC 33 (2022) 35-58 a 36 n.7; idem, 'Abelardo critico della legislazione ecclesiastica', *La riforma della Chiesa. A dieci anni dalla scomparsa di Ovidio Capitani: Atti del convegno tenuto a Bologna, 21-22 novembre 2022* di prossima pubblicazione per Sismel, Spoleto.
La datazione dello scritto ha notoriamente diviso gli studiosi: per John Marenbon, Peter Abelard, *Collationes* ed. and transl. by John Marenbon and Giovanni Orlandi, (Oxford Medieval Texts; Oxford 2001) 32, l'opera dovrebbe essere datata tra il 1123 e la prima metà del 1130. Ileana Pagani, *Abelardo ed Eloisa, Epistolario: Considerazioni sulla trasmissione del testo di Giovanni Orlandi* (Torino 2004) 71 propone gli anni 1127-1132/1137; Constant Mews, 'On dating the Works of Peter Abelard', *Archives d'Histoire Doctrinale et Littéraire du Moyen Âge* 52 (1985) 73-134 a 131, un arco di tempo compreso tra il 1125 e il 1126. Julie A. Allen, 'On the Dating of Abailard's Dialogus: A Reply to Mews', *Vivarium* 36 (1998) 135-51
ritiene che il Dialogus sia da collocare poco prima della morte (1142) di Abelardo.

[60] Si v. Padovani, 'Abelardo critico'.

tempore sunt accomodata, ut circumcisioIudeis et baptismusvobis et pleraque alia quorum figuralia vocatis precepta'.[61] Espressione, quest'ultima, che torna in diversi passi del pressoché contemporaneo commento all'epistola ai Romani:[62]

> Ex operibus legis, id est corporalibus eius observantiis, quae maxime populus ille attendebat veluti circumcisionem, sacrificia, observationem sabbati et ceterorum huius modi figuralium praeceptorum;[63] Dixi ex operibus propriis legis scriptae, idest figurativis illis praeceptis quae lex naturalis ignorat, neminem iustificari apud Deum. Sed nunc, id est in tempore gratiae, iustitia Dei, id estquam Deus approbat, et per quam apud Deum iustificamur, id estcharitasestmanifestata per evangelicam scilicet doctrinam;[64] Ille enim veraciter etiam figuralia nunc facit vel credit, quod nunc tantum illa habent figurare, non efficere, non tam sonum vocis quam sensum et intentionem attendens iubentis;[65] Hoc autem modo neque Job, neque caeteri gentiles ab Ismael vel Esau descendentes in semine Abrahae sunt aextimandi, nec ad eos quidquam vel circoncisio vel caetera legis figuralia praecepta pertinent, cum haec solummodo Abrahae et semini eius . . . iniuncta sint.[66]

Nella Solutio ai Problemata Heloissae (1137-1138)[67] Abelardo distingue tra i precetti morali, che tutti sono tenuti ad osservare per la salvezza e furono dati anteriormente alla lex scripta (amare Dio e il prossimo, non uccidere, non commettere adulterio, non mentire e simili), da un lato, e dall'altro i figuralia: comandi che, presi alla lettera, non conferiscono la giustizia per le sole opere 'sed ad tempus instituta fuerunt, ad aliquid figurandum iustitiae, ut observatio sabbati circumcisio, quorundam ciborum abstinentia

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[61] Peter Abelard, *Collationes* 135, 146. Sul significato di questa frase fraintesa, in ultimo, da Marenbon, 'Introduction' a Peter Abelard, *Collationes* 69, si v. Padovani, 'Abelardo critico' n.33.

[62] Abaelardus Petrus, *Opera Theologica*, 1: *Commentaria in Epistolam Pauli ad Romanos. Apologia contra*
Bernardum ed. Eligius M. Buytaert o.f.m., (CCCM 11; Turnhout 1969). Il suo editore, 'Introduction' XXIV, propone una data compresa tra il 1135 e il 1139.

[63] Abaelardus Petrus, *Opera Theologica*, 1: *Commentaria in Epistolam Pauli ad Romanos* 11 a Rom. 3.20.

[64] Ibidem 111 a Rom. 3.21.

[65] Ibidem 122 a Rom. 3.31.

[66] Ibidem 134 a Rom. 4.11.

[67] Abaelardus Petrus, *Heloissae Paraclitensis Diaconissae Problemata cum Petri Abaelardi solutionibus* PL178 coll.677-730. Per questo scritto Buytaert, 'General Introduction' XXIV, propone la data 1132-1135.

et hiis similia'.[68] Non a questi precetti si riferisce Cristo quando afferma 'Non veni solvere, sed adimplere', ma piuttosto a quelli morali.

Se la tradizione (e pure un contemporaneo, come Ugo di San Vittore) aveva insistito sull'uso dei sensi della Scrittura, applicandoli ai fatti, ai personaggi, alle norme del Vecchio Testamento,[69] Abelardo compie un passo innanzi. L'analisi ―certo preziosa―svolta dai predecessori gli consente ora, finalmente, di pervenire ad uno sguardo sintetico che distingue i comandi del Vecchio Testamento in due categorie: i moralia e figuralia praecepta. Certo, non eras fuggita, prima di lui, la valenza morale racchiusa nelle antiche disposizioni e nelle vicende di cui erano stati protagonisti i patriarchi e le loro donne: ma essa aveva costituito l'esito di una lettura allegorica (come in Gregorio Magno) o tropologica (come in Beda). Sui tre sensi della Genesi ('immensum habissum profunditatis', da indagare 'expositione historica, scilicet, morali et mistica')[70] il maestro Palatino si intrattiene nell'Expositio in Hexameron: opera da assegnare,

[68] Ibid. XV col.703.

[69] Cf. *Bedae Venerabilis Hexaemeron sive libri quatuor in principium Genesis* PL 91 coll.9-190 a col.149: 'Cuncta sacri eloquii series mysticis est plena figuris, nec tantum dictis et factis, sed et ipsis in quibus agitur locis ac temporibus'.

[70] Abaelardus Petrus, *Opera Theologica*, 5: *Expositio in Hexameron* ed. Mary Romig con David Luscombe (CCCM 15; Turnhout 2004) 5. Il passo è riprodotto anche nella *Abbreviatio Petri Abaelardi Expositionis in Hexameron*, ibidem 135. Ai medesimi tre sensi allude, di lì a non molto, Gerhoch di Reichersberg (Gerhous Reichersbergensis, *Commentarius aureus in Psalmos et cantica ferialia* PL 193 coll.619-1814 a col.1301 ad Ps. 30): 'Est ergo sacra Scriptura secundum historialem sensum intellecta, quasi facies Dei superficietenus considerata. Mysticus vero ac moralis intellectus absconditum est huius faciei. Intrabunt vero in illud absconditum qui diligunt internum Scripturae sensum, vitamque suam dirigunt secundum illum, semper fixum habendo cor suum iuxta hunc thesaurum suum'.

probabilmente, al 1130-35.[71] Dopo aver accennato alla funzione dell'esegesi storica, scrive:[72]

> Iuvat morali quoque ac postmodum mistica expositione nos eadem perquirere. Moralis itaque dicitur expositio Quo ciens ea que dicuntur ad edificationem morum sic applicantur, sicut in nobis vel a nobis fieri habent que ad salutem necessaria sunt bona, veluti cum de fide, spe et caritate, vel bonis operibus expositione nostra lectorem instruimus. Mistica vero dicitur expositio, cum ea prefigurari docemus que a tempore gratie per Christum fuerunt consummanda, vel quecumque historia futura presignari ostenditur.

Di nuovo Anselmo di Laon e la sua scuola

Se qui Abelardo si pone su una linea esegetica tradizionale—seppure riproposta in maniera originale, laddove l'interpretazione storica è in realtà intrisa di riflessioni tipologiche e morali—l'attenzione deve ora concentrarsi sull'uso di quel termine—figuralia—ch'è ben attestato dai passi riferiti poco sopra. Prima di lui, lo si trova nel commento di Valafrido Strabone (808/809-849) al vangelo di Lc.21.5: 'Curavit enim Deus

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[71] Così Mews, 'On dating'131. Si discosta di poco Marenbon (Peter Abelard, *Collationes* XXVII-XXXII) proponendo gli anni 1130-1136/1137. Ma per Eligius M. Buytaert, 'Introduction' a *Opera Theologica*, 1: *Commentaria in Epistolam Pauli ad Romanos* 182-88, l'opera dovrebbe essere assegnata al periodo 1137-1140, mancando in essa un riferimento alla dottrina dell'anima mundi, altrove esposta da Abelardo. Rigettò questo rilievo già Buytaert, 'General Introduction' XXIV datando l'Expositio in Hexameron al 1135-1139; da ultimo anche Alessandra Tarabochia Canavero, *Esegesi biblica e cosmologia: Note sull'interpretazione patristica e medioevale di Genesi 1.2* (Milano 1981) 100-102. Rinvii bibliografici, sul punto, in Domenica Parisi, 'De opere die prima: Esegesi, dialettica e teologia nel commento di Pietro Abelardo al primo giorno della Creazione divina', https:/www.medievalsophia.net/_fascicoli/04/art. MS4.pdf (cons. 15.11.2018) 1, n.1. Da parte sua, Gianni Dotto (Dialogo tra un filosofo, un giudeo e un cristiano cur. Gianni Dotto, tradz. Vincenza Franzone [Firenze 1991] 22) ritiene che le considerazioni di Mews siano 'in verità suggestive', ma bisognose di ulteriori conferme.

[72] Abaelardus Petrus, *Opera Theologica*, 5: *Expositio in Hexameron* 77.

civitatem et templum et omnia figuralia subvertere, ne quis post adventum Christi ad illa recurreret'[73] e in tempi più vicini, nelle Sentenze di Anselmo di Laon. Di lui, e della sua scuola, s'è già osservato l'uso prevalente di un lessico sostanzialmente tradizionale, che qui è superato a favore di una nuova terminologia:[74]

> In lege enim erant tria, moralia, figuralia, promissiones. Moralia vocamus naturalia ut: non occides; figuralia, que in figura sunt data, ut carnales observantie et circumcisio; et promissiones, ut prophetie de adventu domini. Est autem lex destructa et in parte et in toto. In parte quantum ad figuralia et promissiones. Postquam enim res est, periit figura et postquam completa est, iam non est promissio. Naturalia permanserunt . . . In figuralibus autem erat circumcisio, que fuit data ad tempus, nec ita generaliter, sicut baptismus.

Nella glossa ordinaria a Rom. 3.20, ascrivibile allo stesso Anselmo,[75] 'figuralia' è tuttavia sostituito da un termine formalmente dissimile ('figurativa'), poi ripreso—come si vedrà più avanti—da Bernardo di Chiaravalle:[76]

> Quia in operibus. Sicut abstulit gloriam de circumcisione, ita et de caeteris operibus legis vult facere. Et est nova sententia, quamvis iungatur praecedentibus per quia 'Ex operibus legis'. Opera legis dicuntur quae in lege instituta et terminata sunt, ut erant caeremonialia et figurativa.

Se Guglielmo di Champeaux, formatosi intellettualmente a Laon, preferisce, a quanto pare, insistere sempre su espressioni tradizionali, come 'umbrae' e 'figurae',[77] un altro allievo di Anselmo, Gilberto Porretano—che adotta ancora un vocabolario

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[73] Walafridus Strabo, *In Evangelium secundum Lucam* PL 104 coll.243-356 a col.334 c.21. Qui, però,figuralia non indica ancora una categoria di precetti, ma i 'velamenta litterae occultantis' per i quali 'reconditae sacramenta Ecclesiae incipiunt patescere'. All'occasione, Walafrido indica, secondo una tradizione ben nota, quali passi debbano essere intesi 'mistice' o 'moraliter'.

[74] Anselm von Laon, *Systematische Sentenzen*, ed. Franz Plazidus Bliemetzreder (Beiträge zur Geschichte der Philosophie des Mittelalters, Texte und Untersuchungen 18; Münster in Westfalen 1919) 38.

[75] Mazzanti, 'Anselmo di Laon' 6-17.

[76] V. oltre, n.92.

[77] Cf., ad esempio, Guillelmus Campellensis, *Les variations de Guillaume de Champeaux et la Question des Universaux: Ètude suivie de documents originaux*, ed. Georges Lefevre (Travaux et mémoires de l'Université de Lille, 6.20; Lille 1898) 42.

ben collaudato[78]—almeno in un paio di occasioni (ma in fine coincidenti) si serve, parlando della circoncisione, del termine 'figuralia'.[79] A quanto pare, Abelardo potrebbe avere appreso dalla sua frequentazione della scuola di Laon sia l'uso di 'figuralia', sia la distinzione operata tra i precetti della legge antica;[80] eliminando, tuttavia, dall'elenco, le promissiones. Né il Palatino può accettare l'affermazione di Anselmo secondo la quale la Legge è 'destructa et in parte et in toto'. Essa, piuttosto, è costantemente difesa nella sua interezza per la sua funzione salvifica, secondo la varietà dei tempi.[81]

Graziano e I figuralia praecepta

Volgiamoci ora all'opera di Graziano. Due sono, qui, i passi che ci interessano.

> Erat Iesus docens [Mt. 7.29] tamquam potestatemhabens, id est tamquam dominus legis, addens moralibus ea, quae de erant ad perfectionem, umbram figuralium in lucem spiritualis intelligentiae commutans (C.25

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[78] Gislebertus Pictavensis, *Die Sententie divinitatis: Ein Sentenzenbuch der Gilbertischen Schule* ed. Bernhard Geyer, (Beiträge zur Geschichte der Philosophie und Theologie des Mittelalters, Texte und Untersuchungen 7.2.3; Münster in Westfalen 1909) 129.

[79] Gislebertus Pictavensis, 'Die Sententie'145, n.10: 'Tertia causa [circumcisionis] est quia omnia figuralia ueteris legis debebant cessare, similiter et hoc;' Nikolaus M. Häring, 'Die Sententie magistri Gisleberti Pictavensis episcopi', Annales d'histoire doctrinale et littéraire du Moyen Age 45 (1978) 83-180 a 68, n.10: 'Tertia causa [circumcisionis] est quia omnia figuralia transire debeant'.

[80] Probabilmente anche l'uso dell'espressione 'ad tempus' o 'ex tempore' riferita al carattere provvisorio delle prescrizioni vetero testamentarie. Cf. Anselm von Laon, *Systematische Sentenzen* 38; Lottin, *Psychologie et morale 5*, 53, n.57. Per Abelardo cf. Abaelardus Petrus, *Heloissae Paraclitensis Diaconissae Problemata XV* col.703; Peter Abelard, *Collationes* 135 146. Negli stessi termini Hugo de Sancto Victore, *De sacramentis christianae fidei* 1, pars 12 c.4 col.351; c.5 col.352; I, pars 12 col.362 c. 6e infine Graziano, C.35 q.1 d.p.c.1.

[81] Sean Eisen Murphy, 'The Letter of the Law: Abelard, Moses and the Problem with being a Eunuch', *Journal of Medieval History* 30 (2004) 161-185 a 178-180, 182-183; idem, 'The Law was given for the Sake of Life: Peter Abaelard on the Law of Moses', *American Catholic Philosophical Quarterly* 81 (2007) 271-306 a 291-305.

> q.1 d.p.c.16); Illud autem, quod praecepta legis servanda dicuntur, quae nec in evangelicis, nec apostolicis institutis evacuata probantur, verum quidem est; sed cum omnia figuralia Apostolus probet ad tempus esse data, atque ideo veniente veritate affirmet illa non ultra esseservanda, hoc autem, ut supra monstratum est, causa sacramenti a Deo institutum esse probetur: et hoc cum caeteris figuralibus evacuatum certissime constat.

Osservo subito che, nel Decreto, appare più volte il termine 'figura' entro le auctoritates invocate da Graziano: a D.2 c.69, de consecr. (Ambrogio) e c.78 (Ilario); D.3 q.29, de consecr. (Adriano papa); C.12 q.2, c.71 (Gerolamo); C.22 q.3, c.2 (Agostino); C.23 q.4 c.41 (Agostino). In tutti questi passi i facta praeterita ricordati nel Vecchio Testamento sono presentati come anticipazioni od umbrae di quanto doveva essere pienamente rivelato nella nuova alleanza. Figuralia, invece, è espressione usata da Graziano, laddove egli interviene con i suoi dicta. Ci si può chiedere, allora, se il maestro bolognese, in quegli interventi, riprese il lessico usato da Abelardo. Questione di ardua soluzione per la divergenza di opinioni che a tutt'oggi divide gli studiosi riguardo alle fasi di composizione del Decreto e la loro datazione. Certo è che il Sankt Gallen 673—ritenuto, da me e da altri, una 'copia a buono' di un archetipo probabilmente perduto[82]—entrambi i dicta sopra riportati non figurano. Appaiono, invece, a partire dalla seconda e terza fase di composizione dell'opera riferita principalmente dal Firenze, Biblioteca Nazionale, Conventi soppressi, A.I.4020 (Fc) che, secondo Carlos Larrainzar (ma non di Winroth, per il quale esso testimonia la recensione di Graziano I), rivelerebbe due interventi successivi all'esemplare sangallese, condotti sotto la direzione dello stesso Graziano e di alcuni collaboratori.[83]

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[82] Rinvio, anche per i riferimenti bibliografici, ad Andrea Padovani, 'Sull'uso del metodo questionante: Un Contributo', BMCL 34 (2017) 61-87 a 62-63.

[83] Carlos Larrainzar, 'El Decreto de Graciano del Códice Fd (=Firenze, Biblioteca Nazionale Centrale, Conventi soppressi A.I.402): In memoriam Rudolf Weigand', *Ius Ecclesiae* 10 (1998) 421-489 a 434. Si v. ancora idem, 'La formazione del Decreto di Graziano per tappe', *Procedings Catania 2000* (MIC Ser. C 12; Città del Vaticano 2006) 103-117 a 103-107; idem, 'La ricerca attuale sul "Decretum Gratiani",' *La cultura giuridico-canonica medioevale. Premesse per un dialogo ecumenico*, curr. Enrique De León e Nicolás Álvarez de las Asturias (Pontificia Università della Santa Croce; Monografie giuridiche 22; Milano 2003) 45-88 a 79-81. Ulteriori approfondimenti sulla questione in

Ora, è ben noto agli storici del diritto che un passo, contenuto a D.63 d.p.c.34 ('sicut in generali synodo Innocentii Papae Romae habita constitutum est') ha indotto Anders Winroth e Rudolf Weigand[84] a ritenere che esso, riferendosi al c.28 del concilio laterano II, dati la recensio I a pochi anni dopo il 1139.[85] Poichè anche il Sankt Gallen riferisce quel medesimo testo, ciò dimostrerebbe che, anziché la riproduzione di un Urtext, esso sarebbe solo—a giudizio di Winroth—una abbreviatio del Decreto. Atria Larson e più di recente Kenneth Pennington hanno invece supposto che D.63 d.p.c.34 possa riferirsi non già al canone 28 del secondo concilio laterano, ma ad altro, tenuto sempre a Roma nel 1133.[86]

Può darsi che le cose stiano così: ma se la loro ipotesi vale a salvare l'antichità del manoscritto svizzero, essa non giustifica—a mio parere—la datazione dei manoscritti pre-Vulgata al 1133.[87]

José Miguel Viejo-Ximénez, '"Concordia" y "Decretum" del maestro Graciano; In memoriam Rudolf Weigand', *Jus Canonicum* 39(1999) 333-157; idem, 'La ricezione del diritto romano nel diritto canonico', *La cultura giuridico-canonica medioevale* 157-209; idem, '"Costuras" y "descosidos" en la versión divulgada del Decreto de Graciano', *Ius Ecclesiae* 21 (2009) 133-154; idem, 'La composición del Decreto de Gracian', *Mélanges en l'honneur d'Anne Lefebvre-Teillard*, Bernard D'Alteroche, Florence Dumoulin, Oivier Descamps, Frank Roumy eds. (Paris 2009) 1007-1029 (versione ampliata in *Jus Canonicum* 45 [2005] 431-485).

Ringrazio l'amico e collega José Miguel per i suoi suggerimenti nella stesura del presente contributo.

[84] Anders Winroth, *The Making of Gratian's Decretum* (Cambridge 2002) 137; Rudolf Weigand, 'Chancen und Probleme einiger baldigen kritischen Edition der ersten Redaktion des Dekrets Gratians', BMCL 22 (1998) 53-75 a 66-67.

[85] Nella recensio definitiva fu inserito il testo del c.28, cui il dictum precedente avrebbe soltanto accennato.

[86] Atria A. Larson, 'Early Stages of Gratian's Decretum and the Second Lateran Council: A Reconsideration', BMCL 27 (2007) 21-56; Kenneth Pennington, 'La biografia di Graziano, il Padre del diritto canonico', RIDC 25 (2014) 25-60 a 28-30.

[87] Per Pennington, 'La biografia di Graziano' 30, Graziano 'non completò il Decretum pre-Vulgata nel 1140 circa, ma piuttosto intorno al 1133'.

La puntigliosa ricerca di Carlos Larrainzar sul manoscritto fiorentino induce ancora a ritenere che esso esibisca una laboriosa fase di lavorazione ascrivibile tra il quarto decennio e la metà del secolo dodicesimo.[88]

Graziano tra Anselmo ed Abelardo

In un quadro così complesso—in cui si è, ancora, obiettivamente lontani da conclusioni definitive—ritengo comunque che l'esplorazione del percorso che conduce da Abelardo a Graziano (almeno nei limiti qui proposti) non possa essere abbandonata. Certo, sappiamo che il termine "figuralia" appare già nelle Sentenze di Anselmo di Laon e nel lessico di alcuni suoi allievi. Dopo le ricerche di Atria Larson e di altri ancora, che hanno rilevato alcune assonanze tra le dottrine di Graziano e quelle professate a Laon,[89] non si può escludere che il

[88] Larrainzar, 'El Decreto de Graciano' 421-489: lavoro scritto quando ancora lo studioso spagnolo riteneva (1998) che il manoscritto fiorentino rappresentasse il primo stadio della Concordia. Posizione poi riveduta dallo stesso studioso in 'El Borrador de la Concordia de Graciano: Sankt Gallen, Stiftsbibliothek MS 673 (=Sg)', *Ius Ecclesiae* 11 (1999) 593-666. Peter Landau, 'Gratian and the Decretum Gratiani', *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pennington (Washington D.C. 2008) 22-54 a 25, ha datato la stesura finale del Decreto verso il 1145.

[89] Larson, 'The influence of the School of Laon on Gratian: the Usage of the Glossa ordinaria and Anselmian Sententiae in De penitentia (Decretum C. 33, q. 3)', *Mediaeval Studies* 72 (2010) 197-244 a 197-244; idem, *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) 57, 60-61, 63, n.87, 85, 273-300. L'ipotesi era già stata prospettata da David E. Luscombe, *The School of Peter Abelard. The Influence of Abelard's Thought in the Early scholastic Period* (Cambridge 1970) 221 e avvalorata da Peter Landau, 'Gratian und die "Sententiae Magistri A.",' *Aus Archiven und Biblioteken. Festschrift für Raymond Kottje zum 65. Geburtstag* (Frankfurt am Main-Bern-New York-Paris 1992) 311-326. Conferme ulteriori in Titius Lenherr, 'Die Glossa ordinaria zur Bibel als Quelle von Gratians Dekret. Ein (neuer) Anfang', BMCL 24 (2000) 97-123 a118 e Carlos Larrainzar, 'La edicion crìtica del Decreto de Graciano', BMCL 27 (2007) 71-105 a 100. Dubbioso John C. Wei, *Gratian the Theologian* (Studies in Medieval

maestro bolognese traesse tale espressione linguistica e concettuale da quella scuola—o, almeno, da un suo eminente rappresentante come Guglielmo di Champeaux, a San Vittore di Parigi[90] anziché da Abelardo, che pur aveva frequentato le lezioni di Anselmo. A questa ipotesi, tuttavia, sembrano opporsi—a mio avviso—almeno due ostacoli: perché laddove le Sentenze di Anselmo affermano 'In lege . . . erant tria, moralia, figuralia, promissiones', Graziano si affianca ad Abelardo che, come s'é visto, esclude le promissiones. Mentre, poi, a giudizio di Anselmo di Laon, i figuralia—al pari delle promis-siones—sono destinati a perire, per il maestro del Decreto essi conservano un valore residuo quanto alla moralis (o spiritualis) intelligentia. Ai figuralia accenna un discepolo di osservanza laonense come Robert Pullen:[91]

> Lex quippevetusimo et nova tria complectitur, sacramenta cum promissis et precepta. Sacramenta futuri praesaga, ut diversa in lege sacrificia ut

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and Early Modern Canon Law 13; Washington D.C. 2016) 154 che rileva, in alcuni punti, certe dissonanze tra il pensiero di Anselmo e quello di Graziano.

[90] Che Graziano e Rolando Bandinelli (poi papa Alessandro III) studiassero assieme a San Vittore è stato segnalato da Giuseppe Mazzanti, 'Graziano e Rolando Bandinelli', *Studi di Storia del Diritto, 2, Università degli Studi di Milano, Facoltà di Giurisprudenza* (Pubblicazioni dell'Istituto di Storia del Diritto Italiano 23; Milano1999) 79-103. La scuola, avviata da Guglielmo di Champeaux, era già attiva nel 1108. Da quel momento Graziano ebbe forse la possibilità di ascoltare il già celebre Abelardo nella dispute avviate, appunto, con Guglielmo.

[91] Robertus Pullus, *Sententiarum libri octo, Sententiarum libri octo* PL 186 coll. 639-1010 a coll. 778-80 3, c. 14. Di praecepta e promissiones parla anche Honorius Augustodunensis, *Expositio in Cantica Canticorum* PL 172, coll. 347-496 a col. 467, su Cant. Cant. 7.7: 'Notandum autem quod utraque lex tria in se continet, scilicet praecepta, exempla, promissa'. Difficile dire se Onorio, qui, si richiami all'insegnamento di Robert Pullen, durante il suo soggiorno in Inghilterra, oppure alle dottrine diffuse da Laon. Un suo legame a questa scuola è ipotizzato da Robert D. Crouse, 'Hic sensilis mundus: Calcidius and Eriugena in Honorius Augustodunensis', *From Athens to Chartres: Neoplatonism and Medieval Thought. Studies in Honour of Eduard Jeauneau*, eds. Eduard Jeauneau and Haijo Jan Westra (Studien und Texte zur Gechichte des Mittelalters 35; Leiden-New York 1992) 283-88 a 286. Per il resto, Onorio si serve del lessico tradizionale, riferendosi al senso storico, all'anagogia e alla tropologia.

> circumcisionem, ut contra exteros bella. Illo jugi conflictu nostra designatur sine intermissione lucta contra spiritualia nequitiae et vitia. Sciotamen figuras, ut dictiones, alias et alias habere interpretationes, sic quoque immunditia cibi prohibetur, ut delectatio peccati fugiatur. Sacramenta igitur legis futura promittebant . . . Legalia ergo sistuntur sacramenta, quorum loco succedunt aut alia quasi maioris meriti sacramenta, ut pro circumcisione baptisma, aut significata ut pro animalium sacrificiis, sacrificium justitiae et laudis . . . Christus ergo finis legis et prophetarum in fine suo legem quoque finivit, eo pacto ut figuralia in opere cessarent, in doctrina permaneant.

L'uso del termine figuralia pare essere, comunque, la caratteristica di quanti furono legati, in qualche modo, alla scuola di Laon, a cominciare da Abelardo, che più di ogni altro pare contribuire alla sua diffusione. Fuori di quella cerchia si adotta un termine simile, ma non identico. È il caso di san Bernardo, che nel sermo 67così si esprime:[92]

> Duplex in lege veteri praeceptorum genus invenio. Sunt enim moralia quaedam, ut est: Non concupisces, non adulterabis, honora patrem tuum, et his similia. Sunt etiam figurativa et umbratilia quaedam, ut est taurorum immolatio et sanguis hircorum.

Laddove si noterà l'ulteriore distanza, rispetto ad Anselmo, data dalla riduzione a due tipi (anziché a tre) di praecepta, in parallelo a quanto affermato da Abelardo e da Graziano nei già ricordati C.25 q.1 d.p.c.16 e C.35 q.1 d.p.c.1.

L'impronta di Abelardo, secondo i decretisti

L’esistenza di due specie di precetti è ribadita a D.6 d.p.c.3 (ma solo nella versione Vulgata, come avrò occasione di chiarire più avanti):

> Sunt enim in lege quedam moralia praecepta, ut: non occides et cetera; quedam mistica, utpote sacrificiorum precepta et alia his similia. Moralia

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[92] Bernardo, *Sermoni diversi e vari. Opere di san Bernardo, IV, Sermoni/III: Diversi e vari* (Milano 2000) 422. Poiché ‘figurativa’ appariva già nella glossa di Anselmo di Laon all’epistola paolina ai Romani (sopra, testo e nota 76) ci si può chiedere se almeno la scelta del termine gli fosse suggerita dal suo stretto collaboratore Goffredo di Auxerre, già studente di Gilberto l’Universale a sua volta allievo di Anselmo di Laon. Cf. Gastaldelli, *Studi* 347, 351-52, 361, 363-65.

> mandata ad naturale ius spectant atque ideo nullam mutabilitatem recepisse monstrantur. Mistica vero, quantum ad superficiem, a naturali iure probantur aliena, quantum ad moralem intelligentiam inveniuntur sibi annexa; ac per hoc, etsi secundum superficiem videantur esse mutata, tamen secundum moralem intelligentiam mutabilitatem nescire probantur.

La coppia praecepta moralia/mistica, per quanto ne so, è nuova rispetto alla letteratura precedente. Gli aggettivi morale/mysticum erano stati usati—già in Gerhoch di Reichesberg[93]—solo per indicare la modalità di comprensione delle Sacre Scritture. Ugualmente Abelardo, sia nella Expositio in Hexameron che nell'Hymnus I proprio in riferimento alla expositio ed intelligentia dei sacri testi.[94] Quando invece si tratta di precetti, il maestro francese propone, nel Dialogus, la distinzione tra naturalia e figuralia. Al di là della diversa scelta terminologica (figuralia in luogo di mistica), esistono però sostanziali affinità tra le due classificazioni, rispettivamente di Abelardo e di Graziano. Per quest'ultimo i praecepta moralia integrano i comandi del diritto naturale[95] dal quale solo superficialmente parrebbero allontanarsi quei praecepta mistica che comandavano, nel Vecchio Testamento, l'osservanza di vari riti ormai desueti ed incomprensibili. In verità, se compresi nel loro significato, essi esprimono viceversa norme di valore immutabile. Tali riti Abelardo li vede imposti dai praecepta figuralia, estranei alla lex

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[93] Si v. sopra, n.70 unitamente ad historicum. Di mistica significatio parlerà anche Roberto di Melun, Sententie, l.1 c.1, 164. Osservo, en passant, che egli—pur soffermandosi su quanto, nel Vecchio Testamento, è figura del Nuovo—evita l'uso del termine 'figuralia'.

[94] Petrus Abaelardus, *Hymni et sequentiae per totum anni circulum ad usum virginum monasterii Paraclitensis* PL 178 coll.1765-1824 a coll. 775-776 1: 'Triplex intelligentia/ Diversa praebet fercuta/ Delitiis habundat variis/ Sacrae mensa Scripturae fertilis/ Alunt parvos historica/ Pascunt adultos mistica/ Perfectorum ferventi studio/ Suscipitur moralis lectio'.

[95] Affermazione già presente nelle Sententiae di Anselmo ('moralia vocamus naturalia'): ma rispetto al vecchio maestro di Laon, Abelardo e Graziano convergono nel rilevare che i moralia, radicati nel diritto naturale, sono stati perfezionati da Cristo. Cf. C.25 q.1 d.p.c.16 ('addens moralibus ea, quae deerant ad perfectionem'); Abaelardus Petrus, *Heloissae Paraclitensis Diaconissae Problemata* 15 col. 703 ('non veni [ego, sc. Christus] solvere, sed adimplere;') cf. anche Abaelardus Petrus, *Opera Theologica. Theologia christiana*, sopra, testo e n.58.

naturalis e pertanto ‘quasi positive iustitie. ‘Quasi’, perché di fronte ad essi non ci si deve arrestare al ‘sonum vocis’, ma occorre andare oltre, con ‘spiritali et mistica intelligentia’[96] fino a cogliere il senso e l'intenzione dei precetti che—come si legge nei Problemata ad Heloissam—intendono ‘aliquid figurare iustitie.’ Allo stesso modo, per Graziano, nei mistica la superficie delle parole va trascesa nella ‘moralis intelligentia’ che rivela, infine, il loro essere ‘annexa’ all'immutabile giustizia del diritto naturale. Qui la ‘moralis intelligentia’, applicata ai mistica, sembra replicare il legame intravisto da Abelardo, nella Expositio in Hexameron, tra ‘moralis’ e ‘mistica expositio’ volte ‘ad eadem perquirere.’[97] L'identificazione dei figuralia con i mistica (espressamente enunciata da Abelardo nel commento alla epistola ai Romani: ‘mistica locutio dicitur figurativa, quae non est aperta’)[98] se ancora velata a D.6 d.p.c.3, è esplicitata dalla glossa ordinaria: ‘mystica sunt figuralia, quae aliud significant praeter quod littera sonat’.[99] Identificazione ribadita negli stessi termini da Uguccione:[100]

> Eorum siquidem que in legecontinentur alia sunt moralia, alia mistica. Moralia sunt que mores informant, et sic intelliguntur et sic sunt

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[96] Abaelardus Petrus, *Opera Theologica*, 1: *Commentaria in Epistolam Pauli ad Romanos* 247 a Rom. 9.32. Cf. *Collationes* 180, 192.

[97] Sopra, testo e n.72.

[98] Abaelardus Petrus, *Opera Theologica*, 1: *Commentaria in Epistolam Pauli ad Romanos*, 339 a Rom. 16.25.

[99] Gl. *His itaque* ad D.6 d.p.c.3. Anche san Bernardo identifica praecepta figurativa, umbratilia e mystica: ‘Venit proinde plenus gratia et veritate Christus Dominus noster, ut ex hoc iam moralia quidem impleantur per gratiam; quae vero umbratilia et mystica fuerunt, revelata veritate deinceps non ad litteram observentur, sed secundum spiritum spiritualiter intelligantur’ (Bernardo, *Sermoni diversi, sermo 67* 422). Cf. sopra, n.92.

[100] Huguccio Pisanus, *Summa Decretorum*, 1: *Distinctiones I-XX*, ed. Oldřich Přerovský (MIC. Ser. A 6; Città del Vaticano 2006) 115 nel commento a D.6 d.p.c.3. L’uso del termine ‘figuralia’ è confermato almeno a C.16 q.5 c.2: ‘Argumentum non esse argumentandum ab exemplis ueteris testamenti . . . et hoc uerum est generaliter in illis que figuralia sunt uel ad tempus concessa, secus in aliis’ (Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Iohannes Teutonicus* (Münchener Theologische Studien 26; München 1967) 434-435 776.

> obseruandautuerba sonant, ut ‘diliges Dominum Deum tuum’, ‘non occides’, ‘honora patrem et matrem tuam’ et huiusmodi. Mistica siue figuralia sunt que aliud significant preter id quod littera sonat; horum alia sunt sacramentalia, alia cerimonialia

Lo stesso farà ancor più esplicitamente, tra il 1188-1190, il magister Honorius, in ambiente anglo-normanno: [101]

> Distinguitur ergo inter moralia que non admittunt mutabilitatem et figuralia quorum quaedam sunt sacramentalia, ut circumcisio et huiusmodi, licet mutata sint quoad uerborum seriem, immobilia tamen sunt quoad misticam intelligentiam. Cerimonialia autem penitus sunt immutata ad que pertinent obiecta.

Su questa linea interpretativa s'era già posto, circa trent’anni prima, Stefano di Tournai:[102]

> In V(eteri) namque T(estamento) sunt quaedam moralia, alia figuralia, item figuralium alia sacramentalia, alia cerimonialia. Moraliadicuntur, quae mores informant et sicut literasonat, ab omnibus et omni temporeobservaridebent, ut Diliges d(eum) d(ominum) t(uum), et: Honora patrem t(uum) et m(atrem) t(uam). Figuralia sunt, quorum obseruatio aliud significat, quasi sub figura veritatem continens. Quorum sacramentalia dicuntur, quae sacramenti alicuius causa data sunt, et potest etiam ratio assignari, quare mandata sunt, ut praeceptum circumcisionis et sabbati. Cerimonialia dicuntur, de quibus ad literam nulla ratio potest reddi. Sic: non seres agrum diverso semine, nec sarabis in bove et asino, non induis vestem ex lana et lino contextam. Moralia immutabilia sunt, figuralia mutantur secundum literae superficiem, non secundum intelligentiae veritatem.

E di nuovo, proprio a D.6 d.p.c.3 (His ita):[103]

> Soluit magister obiectionem quam fecerat in principio V. di. . . . Eorum siquidem que in lege continentur alia sunt moralia, alia mistica. Moraliasunt que mores informant, et sicintelliguntur et sic suntobseruanda, ut uerba sonant . . . Mistica sivefiguralia sunt que aliquid significant preter id quod littera sonat; horum alia sunt sacramentalia, alia cerimonialia.

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[101] *Magistri Honorii Summa ‘De iure canonico tractaturus’*, edd. Rudolf Weigand †, Peter Landau, Waltraud Kozur, adlaborantibus Stephan Haering, Karin Miethaner-Vent, Martin Petzolt (2 vols. MIC. Ser. A 5; Città del Vaticano 2004) 1.23 a D.6 d.p.c.3.

[102] Stephan von Doornick (Étienne de Tournai, Stephanus Tornacensis), *Die Summa über das Decretum Gratiani*, herausg. von Johann Friederich von Schulte (Giessen 1891) 14-15 ad D.5.

[103] Idem, 115 ad l.c.

Non diversamente si esprime, di lì a non molto, la Summa 'Elegantius in iure divino':[104]

> Lex siquidem mosayca moralia et figuralia proposuit, figuralia in sacramentalia et ceremonialia divisit. Moralia, quia de delege nature erant, permanserunt. Figuralia, qua umbra erant, ueniente ueritate exclusa sunt. Set hoc secundum litteram occidentem, manent autem secundum mysticum intellectum.

Tutto ciò rilevato, resta aperto un problema: quello della conciliazione dei dicta post C.25 q.1 c.16 e C.35 q.1 c.1, ove Graziano parla di praecepta moralia e figuralia, da un lato, e D.6 d.p.c.3 dall'altro nel quale figurano, in luogo dei figuralia, i mistica (un hapax legomenon, nel Decreto, almeno nell'accezione che qui interessa). Anche se, in definitiva, questi ultimi si risolvono nei primi (come ben intesero i commentatori del Decreto) i termini, sul puro piano linguistico, sono distinti e diversi. Spiegare la ragione di questa difformità richiede un allargamento della prospettiva, non priva, tuttavia, di elementi problematici. A differenza della versione Vulgata, nella quale la summa divisio tra i precetti veterotestamentari—moralia e mistica—appare a D.6 d.p.c.3, i manoscritti Barcellona, Archivio de la Corona de Aragón, Ripoll 78 (Bc) e Admont, Stiftsbibliothek, K 23 e 43 (Aa) la pongono al termine della sequenza D.pr, D.5 c.2, D.5 c.3 e D.5 c.4. Canoni, tutti, nei quali il discorso verte sul diritto naturale cui il dictum, di cui si tratta, intende riallacciarsi in logica e coerente connessione, come si evince fin dal suo esordio. All'apparente dissonanza ed opposizione tra quanto (D.5 d.a.c.1) 'in lege statuta sunt' e quanto 'nunc inveniuntur concessa'—sicché 'non videtur ius naturale immutabile permanere'—'His itaque respondetur. In lege et in Evangelio naturale ius continetur, non tamen quaecumque in lege et Evangelio inveniuntur, naturale ius cohaerere probatur'. Posta a

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[104] *Summa 'Elegantius in iure divino' seu Coloniensis*, ed. Gerardus Fransen adlaborante Stephano Kuttner, (4 vols. MIC, Ser. A, 1; New York 1969-1990) 1.8-9 32. 'Secondo il mysticum intellectum debbono essere intesi "bouem mactemus" dum ceruicositatem domamus, "hircum offerimus" dum petulantiam coercemus. Hoc ergo sensu etiam uniuersaliter intellecta conclusio uera, quia sic omnia legis immutabilia'.

conclusione della D.6, riguardante la polluzione notturna, la responsio, con quanto poi segue (compresa la distinzione tra precetti morali e mistici), appare lì del tutto fuori luogo, nonostante i generosi tentativi di alcuni commentatori che, evidentemente, hanno sotto mano soltanto la versio Vulgata.[105] Non così, a quanto pare, Stefano di Tournai che—pur disponendo, come gli altri, della stessa versio, scrive (forse avendo conoscenza di più antichi esemplari): 'Huic interrogationi respondetur in fine 5. dist., paragrapho His ita'.[106]

Il D.6 d.p.c.3—secondo questa attestazione—doveva dunque trovarsi, in origine, proprio nella posizione indicata da Bc e Aa. Spiegare il motivo dello spostamento poi intervenuto nella redazione definitiva del Decreto è questione assai complessa, da rimettere a studi ulteriori: anche perché, a complicare il quadro, è la vicenda relativa alla genesi della stessa D.6 che—secondo Larrainzar—fu inserita nei tardi complementos di Fc con pr., c.1 e c.3: non con c.2 e soprattutto, non col dictum che, nella Vulgata, precede il c.3 (presumibilmente perché già presente al termine della D.5).[107] D'altronde, anche l'edizione in itinere del Decreto, curata da Winroth,[108] omette l'intera Distinctio, passando da D.5

[105] Si v. *Die Summa magistri Rufini zum Decretum Gratiani* herausg. von Joh. Friederich von Schulte (Giessen 1892) a D.6 d.a.c.1: 'Facit magister in hac dist(inctione) quandam digressionem agens de naturae superfluitate, scil(icet) de nocturna pollutione'; Huguccio Pisanus, *Summa Decretorum* a D.5 d.a.c.1 s.v. *Set cum*: 'postea, sumpta occasione ex ultimo capitulo huius distinctionis, interserit de nocturna pollutione. In sequenti distinctione postea soluit oppositionem suam in illo § His ita'; *Magistri Honorii Summa* ad D.6 d.a.c.1 s.v. *Quia*: 'Sumpta occasione de menstruis que proueniunt ex naturali infirmitate incipit agere, digressionem tamen utilem faciens de nocturna pollutione que contingit similiter ex nature superfluitate'; *The Summa Parisiensis on the Decretum Gratiani*, ed. Terence P. Mc Laughlin c.s.b. (Toronto 1952) D.6 d.a.c.1 s.v. *Quia vero*: 'Ipse [Gratianus] continuat ostendens unde sumpta occasione evagatur antequam respondeat quaesioni factae'.

[106] Stephanus Tornacensis, *Die Summa* ad D.5 d.a.c.1 s.v. *Comprehensum*.

[107] Larrainzar, 'El Decreto de Graciano' 478 con riferimento a Fc, 104vb. È noto che il manoscritto fiorentino esordisce mutilo delle parti precedenti D.28 d.p.c.13.

[108] Https://gratian.gratian.org, consultato in data 4.11.2023.

a D.7. Tutto ciò considerato, si può ritenere che la stesura della D.6 costituì un'operazione complessa attuata in momenti diversi con l'uso di materiali di varia provenienza, vecchi e nuovi. L'affrettata integrazione di quei dati, irrispettosa dell'ordine logico richiesto dalla trattazione, induce a presumere l'intervento di più mani e l'assenza di una direzione scientifica accorta ed unitaria che infine controllasse l'intera operazione.

In tale confuso contesto è forse possibile spiegare il mancato adeguamento, a livello terminologico, tra D.6 d.p.c.3, da un lato, e C.25 q.1 d.p.c.16 e C.35 q.1 d.p. c.1. dall'altro. Concepiti in tempi (se non,addirittura, in luoghi) diversi, i tre dicta si aggiungono ai già molti problemi che riguardano lacomposizione del Decreto per tappe.

Comunque andassero le cose, il fatto che i decretisti interpretarono D.6 d.p.c.3 alla luce delle due causae privilegiandone (come s'è visto) la terminologia, pare un segnale eloquente della diffidenza nutritanei confronti di quel testo isolato, di formazione intricata e pressoché priva di di precedenti letterari autorevoli.[109]

Il riferimento ai praecepta figuralia ripropone allora interrogativi, di vecchio e di nuovissimo conio, relativi all'orizzonte culturale di Graziano, maturato tra Italia e Francia: quella Francia dalla quale si irradiano gli insegnamenti di Anselmo di Laon e soprattutto del grande Abelardo. Mai del tutto esorcizzato, lo spettro del maestro Palatino continua ad aggirarsi tra le pagine del Decreto. Se le considerazioni fin qui svolte avessero un plausibile fondamento, le nette affermazioni di David Luscombe, Atria Larson e John C. Wei—secondo i quali non vi sono prove che Graziano conoscesse gli scritti di Abelardo—dovrebbero essere almeno attenuate e riviste.[110]

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[109] Ai praecepta mystica accenna, di sfuggita—se non mi inganno—solo Walafridus Strabo, *Liber Josue Ben Nun* PL 114 coll. 505-510 a col.510 c.6.

[110] Luscombe, *The School* 217-218; Larson, *Master of Penance* 86; Wei, *Gratian the Theologian* 152. Lo stesso Wei rileva comunque almeno alcuni punti di contatto dottrinale tra Graziano e Abelardo 97. Delle dottrine professate da Abelardo Graziano potè avere notizia (almeno indiretta) quando partecipò al concilio di Sens del 1131. Cf. Mazzanti 'Graziano e Rolando Bandinelli' 102-103.

D'altronde, già Stephan Kuttner, in anni ormai lontani, ammise la possibilità che il maestro bolognese attingesse da Abelardo, Sermo III e commento all'Epistolaai Romani nel D.1 d.p.c.37 de poenit. e nel D.4 d.p.c.24 de poenit.[111] Per ammettere, però, tale eventualità, è necessario datare la stesura della versione pre-Vulgata almeno agli anni '40 del secolo dodicesimo, giusto in tempo che gli scritti del maestro francese potessero essere noti anche in Italia.[112] Né la condanna di Abelardo a Sens, dopo iniziali e comprensibili esitazioni, costituì un ostacolo alla diffusione del suo pensiero sia all'interno della scuola canonistica bolognese (come dimostra la produzione scientifica di Rolando e Omnebene)[113] sia in ambito europeo. Per quanto ci riguarda, la diffusione del termine figuralia, fin dagli ultimi decenni del secolo dodicesimo, diverrà generale, dentro e fuori le opere di carattere canonistico. Lo attestano le omelie di Raoul Ardens—'Omnia enim figuralia veteris testamenti ad litteram tantum intellecta, litteraoccidens sunt'[114] e su altro versante letterario, solo per fare un esempio, il Polycraticus di Giovanni di Salisbury: 'Haec ei in spiritu, aut in figura contigerunt; sed nobis, Apostolo teste,

[111] Stephan Kuttner, 'Zur Frage der theologischen Vorlagen Gratians', ZRG Kan. Abt. 23 (1934) 234-268, ora in Gratian and the Schools of Law, 1140-1234 (Ashgate 1983) III 245, n.2 253-54, 267-68. Per Richard William Southern, *Scholastic Humanism and the Unification of Europe I, Foundations* (Oxford 1995) 284 'Gratian had some knowledge of the teaching methods of the Northern French schools, and particularly perhaps of the teaching of Abelard'. A mio parere la conoscenza non si limita al metodo, ma anche a certi contenuti.

[112] La veloce diffusione degli scritti abelardiani, oltre i mari e le Alpi, addirittura fin dentro la curia romana, è denunciata con preoccupazione, prima del sinodo di Sens, da Guglielmo di St. Thierry. Cf. almeno Jacques Verger-Jean Jolivet, *Bernardo e Abelardo: Il chiostro e la scuola*. Editoriale di Costante Marabelli (Milano 1989) 160.

[113] Heinrich Denifle, '*Die Sentenzen Abelards und die Bearbeitungen seiner Theologie vor Mitte des 12. Jahrhunderts*', *Archiv für Literatur-und Kirchengeschichte des Mittelalters* 1 (1885) 402-624 a 434-469.

[114] Radulphus Ardens. *In Epistolas et Evangelia Dominicalia Homiliae, Homilia XXVI, Dominica duodecima post Trinitatem, et Evangelia Dominicalia Homiliae Ecclesiasticis omnibus animarum curam gerentibus plurimum necessaria et ante annos prope quingentos ab auctore conscriptae, nunc primum in lucem edita*e PL 155 coll. 1665-2118 a col. 2035.

figuralia serviunt'.[115] Un secolo dopo la stessa terminologia sarà fatta propria, addirittura, da Tommaso d'Aquino.

Bologna-Venezia.

[115] Ioannes Saresberiensis, *Policraticus, sive de nugis curialium et vestigiis philosophorum* PL 199 coll. 379-822 a col.668 l.7 c.13.

Self-Defense in Fifteenth-Century Church Courts: The Requirement of Acting 'with the Moderation of Lawful Protection'(*cum moderamine inculpate tutele*)*

Ludwig Schmugge

Self-defense is a frequently discussed issue in the criminal courts of modern Germany, right up to the Federal Court of Justice. The relevant provisions can be found in sections 32 to 35 of the German Criminal Code.[1] After a brief survey of legal history, the following pages examine a series of historical court decisions in which alleged acts of self-defense were under investigation. Dating from 1438 to 1516, they have been drawn from almost 300 entries in the registers of the Apostolic Penitentiary, one of the main branches of papal administration in the late Middle Ages.[2]

Documented in Roman law since the third century BC, self-defense - the right to fend off physical aggression - is granted today by many legal systems to persons who have been threatened and physically attacked through no fault of their own. Justinian's compilation of ancient laws, the Digest, transmitted the norm as belonging to the *ius gentium* to the Middle Ages. In the *Digestum vetus*, it is stated (Digest 9.2.45) that "all laws and all norms permit to defend against violence with violent means (*vim enim vi defendere omnes leges omniaque iura permittunt*)".[3] From the twelfth century onward, this Roman law passage became part of the language used by legists and canonists alike.

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* English translation of 'Notwehr in der Rechtspraxis des XV. Jahrhunderts: "Die Norm *cum moderamine inculpate tutele*",' in *Festschrift für Alexander Ignor* (Berlin 2023). I would like to thank Martin Bertram and Wolfgang Müller for *auxilium et consilium* in this matter.

[1] See www.dejure.org.

[2] These are published in the Repertorium Poenitentiarie Germanicum (abbreviated RPG), published by the German Historical Institute in Rome, 11 volumes, Tübingen/Berlin/Boston 1996-2016.

[3] Corpus Juris Civilis, ed. Fratres Kriegelii (Leipzig, Baumgärtner, 16th edition, vol. I, p. 195). Digestum vetus with the Glossa ordinaria, Venice 1581, p. 718.

In the canon law of the Middle Ages, the words from the Digest were frequently invoked, but instead of *defendere* the verb *repellere* (to repeal) was used, occurring as a textual variant in the Digest of Cassius and soon entering the textbooks of church law. As far as we know, the expression *repellere* was first introduced by Pope Alexander III (*cum vim vi repellere omnes leges et omnia iura permittant*).[4] A few decades later, Pope Innocent III also paraphrased the Digest by speaking of *quamvis vim vi repellere omnes leges et omnia iura permittant*, which he did in his detailed discussion of a case of self-defense presented to him for decision in 1209.[5] A decree Innocent IV promulgated at the Council of Lyon in 1245 also cites the norm.[6] The most comprehensive study of the concept of self-defense in twelfth- and thirteenth-century canon law has been provided by Stephan Kuttner.[7]

Pope Innocent III already emphasized the importance of proportionality in the use of means for self-defense in a decree with the opening word of *Significasti*.[8] He summarized his view as follows: *Vim vi repellere omnes leges et omnia iura permittant*, 'although this must be done with the moderation of lawful protection (*cum moderamine inculpate tutele*) and not in order to take revenge (*non ad sumendam vindictam*), but to repel injury (*sed ad iniuriam propulsandam*)'. The case presented to Innocent concerned a priest who had struck down with an iron hoe a wrongdoer (*maleficus*) intent on stealing from his church (*cum ligone in capite percussit*). According to the pope, the priest was not entirely blameless for the man's death (*non videtur idem sacerdos a poena homicidii penitus excusari*). As a result, the priest was no longer allowed to exercise his office, the pope ruled,

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[4] Decretals of Gregory IX X 5.39.3; *Corpus Iuris Canonici* (abbreviated CIC) ed. E. Friedberg, Leipzig, Tauchnitz 1881, 890.

[5] Decretals of Gregory IX X 5.12.18; CIC ed. E. Friedberg, 800-801.

[6] Innocent IV in concilio Lugdunense: *cum omnes leges omniaque iura vim vi repellere cunctisque sese defensare permittant.* Liber sextus VI 5.11.6, CIC ed. E. Friedberg, col. 1095-1096.

[7] Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX: Systematisch auf Grund der handschriftlichen Quellen dargestellt* (Studi e Testi 64; Vatican City: 1935) 334-379.

[8] Ibid. 342.

for not having acted *cum moderamine inculpate tutele*, and rather conducting himself inappropriately. The thief had been unarmed, while the priest had used against him a sharp tool in disproportionate response.[9] After receiving a wound, the man had been subsequently killed by other pursuers.

Also originating in Roman law,[10] the formulation of limits to the right of self-defense (*moderamen inculpatae tutelae*) first appeared—as Kenneth Pennington has shown—in a treatise on the *Code* written around 1150 by Guglielmo da Cabriano, a jurist educated in Bologna under Bulgarus.[11] The history of the formula does not have to be traced here, as Stephan Kuttner has comprehensively treated the canonical doctrine of self-defense in his magisterial work, just as Pennington has provided a history on how the notion entered current American debates on the right to bear arms.[12]

Moving from the theory of the *ius commune* and *ius canonicum* to practice, what cases of self-defense were heard in the medieval ecclesiastical courts? To investigate this question, the registers of the Apostolic Penitentiary have been examined for relevant case material. The Penitentiary, the fourth central institution of papal administration in the Middle Ages alongside the Chancery, the Chamber, and the Rota, developed into a veritable institution with a growing number of staff from the late twelfth century onwards. Under the direction of a cardinal known as the "Grand Penitentiary", his deputies (*regentes*), and the supervision of a legal expert called *auditor*, over 200 people served in the Roman Curia by the 1400s, drawing up, recording, and sealing documents that emanated from the office. The number of petitioners increased steadily, so that in the second half of the fifteenth century, tens of thousands of written requests (or *supplicationes*) from all corners of Christendom reached the

[9] On the canonistic implications, see Kuttner, *Kanonistische Schuldlehre* 375-379.
[10] Ibid. 340.
[11] Kenneth Pennington, 'Moderamen Inculpatae Tutelae: The Juris-prudence of a Justifiable Defense', RIDC 27 (2014) 1-32, here p. 7.
[12] Kuttner, *Kanonistische Schuldlehre* 335.

Roman pope to ask for his clemency, as only he as the *summus pontifex* and holder of *plenitudo potestatis* could help them. This is why the Roman penitentiary was also called the "well of grace" by English contemporaries.

What was the reason for the general rush? Many of the petitioners, whose Latin supplications survive in the penitentiary's registers of supplications in a largely continuous series from 1438, had violated a rule of general canon law. The petitioners considered the consequences (namely excommunication, illegitimacy, or loss of inheritance; in the case of clerics inability (*inhabilitas et irregularitas*) to exercise their office) highly problematic for their legal standing and salvation, which prompted them to appeal to the highest judge of the Church for mercy. The pope was asked to rehabilitate them, accept them back into the community of believers, and remove the threat of eternal damnation. By violating canon regulations, many supplicants were automatically excommunicated (*excommunicatio ipso facto*), that is, excluded from the *communio fidelium* and thus barred from attending church and receiving the sacraments. Only absolution by mandate of the pope could remove all spiritual, legal, and social injunctions, as only the *vicarius Christi* could perform this act of grace (based on the theory of *plenitudo potestatis*, or the pope's placement above the law). As the *summus pontifex*, moreover, he was not allowed to reject repentant sinners, in accordance with the maxim that "the Church does not exclude anyone from returning to the fold (*ecclesia nulli claudit gremium redeunti)*", *which was* frequently cited by both the penitentiary and the petitioners.[13]

Given the importance of reputation and honor especially among the nobility, as well as the generally violent nature of late medieval society, it is not surprising that the *supplicationes* also contain cases of self-defense. The petitioners were almost always clergymen who had used violence against a cleric or, more rarely,

[13] Already in Codex 1.1.35 and in Gratian (concordance s.v. *gremium*), Liber Sextus 5.2.4. For the occurrence in the penitentiary supplications, cf. for example RPG II 906, here alleged by a petitioner, and RPG IV 1635, there cited by the penitentiary.

a layperson. All cases concerned petitioners who had used violence to defend themselves against an attack and described the incident to the pope in writing to request clemency in the form of absolution or a declaration of innocence. The petitioners emphasized that they had injured their opponent unintentionally and not killed him or her on purpose. Every petitioner was expected to regret what had happened and did so explicitly in a recurring formulation which claimed that "he felt sorrow for the death and still does so presently (*in morte eius doluit prout dolet de presenti*)". [14] To heighten the sense of innocence, some petitioners emphasized "that is was suitable for good people to fear guilt where there was none to be found (*bonarum mentium est ibi timere culpam ubi culpa non invenitur*)". [15] Given that many petitioners had defended themselves with arms, it should also be remembered that clerics were actually forbidden to carry any offensive weapon (beyond a bread-knife) under canon law.[16]

Let us now look chronologically and in detail at those cases of self-defense that were sent from German dioceses and registered at the papal court.[17] It is certainly not possible to derive reliable social statistics from a total of around 300 supplications. What can be determined, however, is whether and how the decision of the penitentiary, communicated in the signature at the end of each registered item, reflects canonical discussions on killing in self-defense.[18]

Among the registered petitions surviving in a fragmentary state from the time of Eugene IV (1431-1447), there are seven requests from clergymen for a declaration of innocence due to self-defense. Each statement of fact (*narratio*) provides a very detailed account of the act of self-defense and its consequences. The

[14] For example, RPG I, 203.
[15] For example, RPG I, 203 and in the index of the RPG volumes s.v. *bonarum mentium est.*
[16] Kuttner, *Kanonistische Schuldlehre* 344.
[17] In the database of the DHI in Rome (www.romana.repertoria), the above-mentioned quotation from the *Digestum vetus* (*vim vi repellere etc.*) can be easily found in the petitions sent to Rome from the German-speaking world.
[18] Kuttner, *Kanonistische Schuldlehre* 361-379.

petitioners regularly invoke the Roman law passage on *vim vi repellere*. The Grand Penitentiary signed all supplications with the words "so be it as stated below (*fiat ut infra)*", followed by the instruction that the petition "must be signed by 'so be it', if the stated facts are confirmed and the petitioner could not avoid death in any other way (*signanda per fiat si est ita, si mortem aliter evitare non poterat*)."[19] The only criterion for the grant of mercy was the averting of imminent mortal danger. Kuttner has emphasized that "the decretals of Alexander III and Innocent III already recognized active violence as a means of self-defense".[20] Thus, the Penitentiary followed canonical doctrine as it was summarized in the Ordinary Gloss on Gratian (D. 50 c. 5) when signing cases of self-defense.[21] The supplications provide no information about the exact proof of acute mortal danger.

The sixteen relevant petitions from the time of Nicholas V (1447-1455) were signed by the Grand Penitentiary, Domenico Capranica with: "So be it by special grace (*Fiat de speciali*)". Capranica again added the condition *si ita est* or *si mortem aliter evadere non poterat* to the signature.[22] Here too, and in accordance with canonical doctrine, the penitentiary granted mercy only in the case of mortal danger, without requiring direct proof of it.[23]

Five self-defense supplications have come down to us from the pontificate of Calixtus III (1455-1458). Two clerics, from Cologne and Mainz respectively, who invoked the right of self-defense were granted clemency with the signature *fiat de speciali*; they had come to Rome in person and confessed to a Minor Penitentiary at the Curia.[24] In three supplications, the Grand Penitentiary, Capranica, granted absolution to supplicants who had claimed self-defense in accordance with the canonical doctrine of 'homicide by defense (*homicidium defensionis)*' and

[19] RPG I 203, 204, 208, 211, 688, 731, 748.
[20] Kuttner, *Kanonistische Schuldlehre* 353 and pp. 359-367.
[21] The gloss is quoted in Kuttner, *Kanonistische Schuldlehre* 361 note 2.
[22] On the avoidability and unavoidability of self-defense killing, see Ibid. 364.
[23] RPG II 28, 83, 93, 115, 185, 246, 264, 283, 795, 850, 851, 865, 877 (often with a further condition such as *si non ex percussione ipsius exponentis sed ex vulnere consocii laic. mortuus fuit*).
[24] RPG III 256, 371.

asked for dispensation without further conditions under reference to (the decretal Si *furiosus* from) the Clementines.[25] From the middle of the fifteenth century, petitioners (or, more precisely, their canonically trained proctors) frequently alleged the Digest passage (with reference to *Liber Sextus* 5.11.6), the papal decretal *Significasti*[26] with the formula *vim vi*, or the Clementine *Si furiosus,* when asserting the right of self-defense.[27]

Supplications in which the phrase "repelling force with force (*vim vi repellendo*)" was alleged, increased sharply during the pontificate of Pius II (1458-1464) to a total of twenty-five examples.[28] Under the Piccolomini pope, the procedure for signatures also fundamentally changed. The Penitentiary postponed decision-making in the case of such petitions. They were now registered under a separate heading 'On declaratory letters (*De declaratoriis*)', and called for further investigation in the locality, either by the ordinary bishop or a commissioner appointed on the occasion. The Penitentiary also ordered commissions for other matters. They can be found as early as in the first surviving volume of registers from 1410-1411; however, only officials of the Roman Curia were appointed as commissioners at the time, such as Ludovico Barbo, who was probably chosen for being the legal expert (*auditor*) in charge.[29] There are no cases of self-defense in this oldest extant register.

Beginning with the Piccolomini papacy, the signature appointed a commissioner with the words 'and it is committed to . . . (*et committatur N.N.)*', usually the petitioner's ordinary bishop or a local canon. The commissioner had to examine the facts described in the supplication, the 'truth of the *narratio* (*veritas*

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[25] RPG III 522, 544, 581 (Clementinarum 5.4.1). Kuttner, *Kanonistische Schuldlehre* 360.
[26] RPG IV 1774 (1460). CIC ed. Friedberg, vol. II. col. 800.
[27] *Clementinarum* 5.4.1 CIC ed. Friedberg, vol. II. col. 1184.
[28] See RPG IV, index s.v. *vim vi repellendo*.
[29] M. Maillard-Luypaert. *Les suppliques dela Pénitencerie Apostolique pour les diocèses de Cambrai, Liège, Thérouanne et Tournai (1410-1411)* (Analecta Vaticano-Belgica I – 34; Bruxelles-Roma 2003), Indice s.v. *committere*; on Barbo ibid. p. 49, as well as: A. Pratesi in: DBI 6 (1964) 244-249.

narrationis)', or 'that of the request (*veritas precum*)'. Only then, the *littera declaratoria*, a declaration exonerating the petitioner, could be executed as instructed by the penitentiary. Under Pius II, absolutions were only granted 'on the condition that the alleged facts have been verified (*constito de assertis*,)', and after the truth of the petitioner's statements is established by the commissioner and 'those to be summoned have been summoned (*vocatis vocandis*)' to confirm 'that the aforementioned is truthful (*premissa constiterint esse vera*)' by way of judicial and canonically sound procedure. Under the Piccolomini pope, German supplications contain for the first time a reference to relevant older decretals, such as *Significasti* of Innocent III.[30] If the insanity of an attacker was claimed, the signing official repeatedly mentioned the decretal *Si furiosus* from the Clementines.[31] If a petitioner was present at the Roman Curia, the examination could be commissioned to a Minor Penitentiary, who was to clarify the case in confession.[32] The opinion of the *auditor*, the penitentiary's legal expert, was also sought on several occasions.[33]

Under Paul II (1464-1471), the innovation introduced by his predecessor recurred in fifty-three supplications dealing with cases of self-defense.[34] The *auditor*, Antonius de Grassis, ordered that all supplications under the rubric of *De declaratoriis* be referred to the ordinary bishop, who served as commissioner undertaking a (judicial) investigation in the locality.[35]

The use of force with reference to *vim vi repellendo* is mentioned in ninety registered cases under Sixtus IV (1471-1484). In eighty-eight cases, the petitioners had requested a *littera*

[30] RPG IV 1774 (1460), but with the reading *sine crimine inculpate tutele*, CIC ed. Friedberg, vol. II. col. 800.
[31] RPG IV 1781, 1804, 1805, 1806, 1811, 1811.1, 1814, 1818, Clementinarum 5.4.1, CIC ed. Friedberg, vol. II. col. 1184.
[32] Registered in RPG IV 875, 1215 under the heading *De diversis formis*.
[33] RPG IV, 1752, 1763, 1774.1, 1790, 1797, 1806, 1820, 1824, 1825, 1836, 1840, 1842.
[34] Only one signature contains the form *cum moderamine inculpate cautele*, RPG V 2120.
[35] The numbers can be found in the RPG V index s.v. *vim vi repellere*.

declaratoria from Rome. The supplications were examined by the auditor of the office, Antonius de Grassis, and then sent to the petitioner's home diocese with the express instruction of *vocatis vocandis* for examination and decision by the local bishop. It was Antonius de Grassis who also noted the prerequisites for a declaration of innocence by the commissioner, using the following words:[36]

> Si vocatis vocandis constiterit, quod exponens vim vi repellendo et se defendendo aliter fugere seu mortem evadere non valens percussit

Innocent III's decretal is cited only once in the German supplications between 1471 and 1484; however, the pope or the *Liber extra* are not here mentioned by name.[37]

In the self-defense supplications registered under Innocent VIII (1484-1492), the text from the Digest is cited fifty-two times, while Innocent's decree *Significasti* is quoted only eight times. In all requests for a declaratory decision, the penitentiary appointed a commission with phrases akin to the ones used earlier.[38] Under the reign of the second Borgia pope, Alexander VI (1492-1503), sixty-one references to *vim vi repellere can be* found in the self-defense supplications. Forty-seven times, it is noted that the proportionality of means (*cum moderamine inculpate tutele*) had to be respected before a petitioner could be absolved.[39]

Self-defense decisions in the Registers during the pontificate of Julius II (1503-1513) present the same picture. While sixty petitioners claimed to have acted in accordance with the legal principle of *vim vi repellere* and without further specification of the means use,[40] five cases offer an additional reference to *cum moderamine inculpate tutele*.[41] The penitentiary ordered the same formal procedure in all signatures, ordering examination of the circumstances and, as a necessary condition for the granting of clemency, the verification of mortal danger, rendering the

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[36] The numbers can be found in the RPG VI index s.v. *vim vi repellere*.
[37] RPG VI 3687, from Paderborn.
[38] RPG VII index s.v. *vim vi repellere* and *moderamen.*
[39] RPG VIII index s.v. *vim vi repellere* and *moderamen.*
[40] RPG IX index s.v. *vim vi repellere*.
[41] RPG IX 1304, 1679, 1684, 1703, 1713.

petitioner 'unable to escape life-threatening risk otherwise (*aliter vite periculum evadere non posse*)'.[42]

It also became important to know exactly which instruments the petitioner had used to defend himself against an attacker. Firearms had been available for some time, which could injure and kill from a distance. Such weapons, called *bombarda*, *bombardella* or *scopeta*, now also appear in the supplications. In 1504, a monk from Tegernsee admitted that he had shot at his enemies fourteen times with a portable weapon, or 'small firearm called 'scopeta' (*cum quadam parva bombarda scopeta nuncupata)*', during the Margrave of Brandenburg's war against Nuremberg, without, however, killing anyone as it is believed (*licet ut creditur neminem interfecit*)'.[43] In the same war, a monk from Transylvania had used flame-throwing firearms (*bombardas flamiferas*) against a fortification.[44]

Noteworthy is also the report of an Augsburg priest, who had an accident while handling a *bombarda.* While trying to 'fire the device, it erupted and scattered into many parts (*bombardam incendendo ipsa in plures partes rupta et divisa fuit*)', so that a layman was killed by them.[45] The petitioner, who was present in Rome, had to report to a Minor Penitentiary; his supplication was signed by the Regens with 'so be it by special and express grace (*fiat de speciali et expresso*)' and under the condition 'that the petitioner applied all the diligence he could (*quatenus adhibuerit diligentiam quam potuit*)'.[46] The canonical requirement of due diligence also appeared in connection with this new type of weapon. A priest from Vilna had a similar accident with a firearm, which he carried with him *pro sua defensione* and out of fear of attacks by his enemies. While trying to shoot a bird, however, he hit and killed an old woman. In this case, too, the Regens quoted

[42] RPG IX 1272.
[43] RPG IX 1329.
[44] RPG IX 1768.
[45] RPG IX 1412 (1507).
[46] RPG IX 1412.

the canonical formula of *quatenus fecerit diligentia quam potuit*.[47] Kuttner has summarized the discussion of the canonists on how *diligentia* had to be observed in self-defense cases.[48]

When petitioners were present at the Roman Curia, their relevant supplications were always signed with *fiat de speciali et expresso*, indicating express papal consent.[49] This practice of the Penitentiary was often based on the circumstance that the petitioner present in Rome had previously confessed to one of the Minor Penitentiaries, who in turn had absolved from the case 'in the court of conscience (*in foro conscientie*)'.[50] This practice continued under the Medici Pope **Leo X** (1513-1521). During his pontificate, eighty-six declaratory supplications from the German Empire were registered at the Penitentiary concerning acts of self-defense, which by that time were entered under the heading of 'On various forms (*De diversis formis*)'.[51] More than a quarter (twenty-four) came from petitioners identified as 'present at the Curia (*presentes in curia*)' and reporting their case to the German-speaking Minor Penitentiary, Jacob Nagel.[52] The Minor Penitentiary, Franciscus Berthelay, bishop of Mylopotamos since 1499, frequently heard confessions by petitioners present in Rome as well.[53] Henceforth, the formula 'so be it according to form (*fiat in forma*)' was also used in such cases.

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[47] RPG IX 1447 (1507).

[48] On *negligentia* and *diligentia* see Kuttner, *Kanonistische Schuldlehre* 213-222.

[49] Thus RPG IX 1299.

[50] Cf. for example RPG IX 1304 and 1713. Both petitioners were referred to the minor penitentiary Franciscus Berthelay, cf. Conrad Eubel (ed.), Hierarchia Catholica, reprint Padua 1960, vol. III p. 244 note 2. Under Alexander VI and Julius II, Franciscus was involved in the signing of hundreds of supplications from German petitioners; see RPG VIII and IX, Index s.v. Milopotamen, ep. The high number of petitioners who went to Rome at that time with requests for self-defense is striking; see RPG IX 1478, 1495, 1513, 1528, 1533, 1534, 1548, 1558, 1565, 1588, 1589, 1593, 1610, 1614, 1653, 1710, 1713, 1883, 1884, 1912, 1916, 1932, 1939, 1943, 1964.

[51] See RPG X Index s.v. *vim vi repellere*.

[52] RPG X 515, 521, 525, 535, 604, 623, 696, 701, 758, 769, 821, 889, 922, 933, 1163, 1219, 1239, 1246, 1254, 1336, 1377, 1386, 1398, 1470.

[53] RPG X 525, 528, 548, 550, 574, 588, 647, 648, 652, 702.

The clause *ad cautelam* (with reservation) figuring in the decisions of the penitentiary also calls for an explanation.[54] The expression was common in procedural law (especially in the law of wills and obligations), whence a specific jurisprudence developed, sometimes going into exceptional depth. The so-called 'Kautelarjuristen' of the fifteenth and sixteenth centuries offer a wealth of material on the subject.[55] The *ad cautelam* clause also appears in supplications to the Penitentiary, for example in matrimonial cases and procedural law. Because it was not permitted to negotiate with excommunicated persons in court, an *absolutio ad cautelam* had to be issued before any investigation of the case itself could begin.[56]

Ad cautelam decisions occur frequently in supplications from the German-speaking world.[57] An absolution *ad cautelam* could either be requested by the petitioner, or it was granted by the office of grace in the signature. For example, petitioners who had served as judges (or just as clerks[58]) in a criminal court issuing death sentences, and wished to receive clerical ordination always asked for absolution *ad cautelam*.[59] A *declaratio ad cautelam* appears in one of the early supplications invoking self-defense, the example of the Schwerin cleric, Jacobus Leinegow. He had fatally beaten a layman with a stick who had threatened his life with a knife. In his supplication of spring 1439, he asked for a declaration stating that he could be ordained to the higher orders (from subdeacon

[54] On the history of 'Cautelarjurisprudenz' see G. Buchda, in: HRG I col. 602-603. On canon law also Kuttner, *Kanonistische Schuldlehre* 353 and 374 and there the register s.v. *cautela*.

[55] Cf. Johannes Fichard (ed.), Tractatus cautelarum, Frankfurt 1575, (online via Digizentrum der BSB München): 6 authors, foremost among them Bartholomaeus Caepolla (ca.1420-1477), who compiles no fewer than 258 cautelae.

[56] F. Sägmüller, Lehrbuch des katholischen Kirchenrechts, 1900, (online at archive.org) p. 71, also p. 693 note 12.

[57] Cf. RPG IX 123 (marriage dispensation). Also RPG I 118, 123/419, 203 and other examples. After absolution had already been granted by the competent local bishop in a case of self-defense, a petitioner would sometimes request papal confirmation *ad cautelam*, as in RPG IX 1356 (1504).

[58] RPG IX 1400.

[59] RPG IX 1256, 1283 and the index s.v. *cautela*.

upward), or at least be granted a dispensation *ad cautelam (vel saltem . . . ad cautelam misericorditer dispensari*). Jacobus apparently assumed that he was to be considered innocent. However, the penitentiary only signed under the usual condition, *si ita est, si aliter mortem evadere non poterat*.[60] This clause was always in order when there were doubts about the case in question,[61] or when important evidence regarding the course of events was not (yet) available. Such *ad cautelam* decisions were also made by episcopal courts, as the statutes from diocesan synods show.[62] It would be worthwhile to study the practice of *ad cautelam* rulings in the Penitentiary separately; they continued to increase under Julius II and Leo X, with sixty-eight German supplications registered for each pope.[63]

Finally, let us ask what findings have emerged from the above examination of about 300 registered supplications claiming self-defense and reaching the Penitentiary from German-speaking territories in the second half of the fifteenth century. Can we conclude that from around 1200, decisions by ecclesiastical courts involving the invocation of *vim vi repellere* observed the proportionality of means as expressed in the formula *cum moderamine inculpate tutele*? Was it reflected in the supplications we have examined?

Very few petitioners, that is, only clerics who had studied or were canonically trained who had submitted their petition in person used the formula; the vast majority of lay people who did not know Latin, and even the majority of clerical petitioners turned to the pope with the help of an experienced *procurator*.[64] The

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[60] RPG I, 203; see also RPG IX 1300 (1504).

[61] RPG I, 331, 334, 401, 458, 459, 485, 505, 516, 616, 626, 635, 637, 678, 734, 748,

[62] Cf. E.g. RPG I, 578; RPG X, 280 and the database of synodal statutes: Rowan Dorin, (ed.) *Corpus Synodalium: Local Ecclesiastical Legislation in Medieval Europe*, www.corpus-synodalium.com. Accessed 19/12/2022.

[63] RPG IX and X Index s.v. cautela.

[64] Cf. L. Schmugge, 'Die Prokuratoren der Pönitentiarie: Scharniere der Gnadenvermittlung (ca. 1450-1523)', *Modus supplicandi. Zwischen herrschaftlicher Gnade und importunitas petentium* (Publications of the Institute for Austrian Historical Research, 72); Vienna 2019) 13-34.

language used by these proctors in the supplications confirm that the standards of both the scholastic *Ius commune* and canon law had become known to broad sections of the population over the course of the Late Middle Ages. The principles of self-defense law handed down in Roman law and in papal decrees were disseminated through the practice of the Roman court of mercy. Not only at the papal curia, but also in the statutes of many bishoprics, the notion of *cum moderamine inculpate tutele* was applied from the thirteenth century on to acts of self-defense.[65]

The practice of the office of papal pardon continued to develop in close accordance with canon law. Around the middle of the fifteenth century, the Penitentiary no longer accepted the *narrationes* of supplications at face value, appointing instead commissions in the petitioner's home diocese to verify the information he (or his proctor) had provided. Had the petitioner truly acted *cum moderamine inculpate tutele*?

To emphasize the proportionality of means used in self-defense, the supplications contain increasingly precise descriptions of the confrontation. The weapons used to attack and defend oneself were described in ever greater detail. For example, a priest from Constance, Johann Holtzapfel, who was attacked by a highwayman with a sword (*gladio*), emphasizes that he defended himself *vim vi repellendo* only with a small knife (*quodam parvo cultello*). He further specified this by speaking in the vernacular of a Waidmesser (*vulgariter wedner nuncupato*).[66] A Münster parish priest had defended himself 'with a lance' (*cum quodam missile*).[67] If the death of an attacker who allegedly had endured from the defender only minor injuries took time to occur, the supplication often blamed the attacker's poor health regime (*ex malo suo regimine*) or claimed that he had not used the right medication.[68]

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[65] For example in Coventry, Poitiers, Mende or Quimper. Cf. Rowan Dorin (ed.) *Corpus Synodalium: Local Ecclesiastical Legislation in Medieval Europe*, www.corpus-synodalium.com (Accessed 19/12/2022).
[66] RPG IX 1478 (1507).
[67] RPG X 588 (1515).
[68] RPG X 629, 705, 1022, 1031, 1091, 1246, 1386, 1390, 1419 or 836 (*debita medela non adhibita*).

One thing is clear from the supplications examined here and describing a case of self-defense: Against the attacker, the supplicant was granted the right of *vim vi repellere*, though in accordance with the principle of *cum moderamine inculpate tutele*. Close attention is paid to the proportionality of means used in defense. While the first petitions examined here required only an unavoidable danger of death as the criterion for granting mercy, from Pius II onwards the Penitentiary ordered a commission in all cases, so that the truth (*veritas precum*) could be established at the petitioner's location, and his compliance with the norm was verified. The supplications of the Apostolic Penitentiary show how, within a few decades, the assessment of acts of self-defense became ever more precise in the sense of a thorough examination based on the requirement of *cum moderamine inculpate tutele*.

Rome.

Canonical Renewal and Innovation in Sixth-Century Gaul: The Case of the *Concilium Aspasii*

Gregory I. Halfond

The conciliar *acta* of the so-called Council of Eauze (551) abound in idiosyncrasies, even by the relatively flexible standards of Merovingian Francia.[1] These unusual features begin with the unspecified location of the meeting itself: while the council is identified frequently in the scholarly literature with the metropolitan see of its convoking prelate, Aspasius of Eauze (styled in the acts an *apostolicus episcopus*), the *acta* fail to state where within the ecclesiastical province of Novempopulana the council actually assembled. Additionally, while the acts are explicitly dated to the *Kalends* of February in the fortieth regnal year(s) of Childebert I and Chlothar I (i.e. AD 551), no other attested Merovingian-era council is known to have dated its acts to the month of February, as autumn and early summer were the preferred gathering times for Gallo-Frankish bishops.[2] As for the council's configuration, while other provincial councils are attested in the Merovingian era, with the major exception of those councils convoked by Bishop Caesarius of Arles prior to the Frankish annexation of Provence, the *concilium Aspasii* is almost

[1] Although this is the conventional name assigned to the council, both modern editions of the conciliar *acta*, by Friedrich Maassen and Charles de Clercq respectively, entitle it the *concilium Aspasii*. In the following discussion I likewise refrain from identifying the council with a specific *civitas*. For the text of this and other Merovingian-era conciliar acts, I utilize here - unless noted otherwise - the edition of Charles de Clercq, ed., *Concilia Galliae: A.511-A.695*, (CCSL 148A; Turnhout 1963). For pre-Merovingian Gallic councils, I utilize Charles Munier, ed., *Concilia Galliae: A.314-A.506*, (CCSL 148; Turnhout 1963).

[2] Gregory Halfond, *The Archaeology of Frankish Church Councils, AD 511-768* (Medieval Law and its Practice 6; Leiden 2010) 64 and 263-264. Regarding the regnal year, following the revised chronology proposed by Margarete Weidemann, 'Zur Chronologie der Merowinger im 6. Jahrhundert', *Francia* 10 (1982) 471-513, at 481-483, the fortieth regnal year for the two kings corresponds to the period from November 28th 550 to November 27th 551.

entirely unique in the survival of its acts.[3] Finally, these acts are preserved only in a single eighth-century manuscript, Munich BSB 5508, and its canons are otherwise entirely absent from both near-contemporary and later chronological and systematic canonical collections.[4] So, it is by near happenstance that the acts survive at all.

Despite or possibly due to—such idiosyncrasies, the acts of Aspasius's council rarely have been the subject of sustained scholarly attention.[5] The relative brevity of the acts, containing all of seven short canons—perhaps also has been a factor in their relative neglect. A closer look, however, reveals not simply a council significant on its own merits, but also confirmation of the

[3] C.f. Arles (554). While the acts of the Council of Autun (662/76), survive, the provincial status of this meeting is uncertain. See De Clercq, ed., *Concilia Galliae* 318-320.

[4] On the eighth-century Salzburg manuscript and its contents, see Friedrich Maassen, *Geschichte der Quellen und der Literatur des canonischen Rechts im Abendlande* (Graz 1870) 624-636; Anton Scharnagl, 'Die kanon-istische Sammlung der Hs. von Freising', *Wissenschaftliche Festgabe zum zwölfhundertjährigen Jubiläum des hl. Korbinian* (Munich 1924) 126-146 at 136; Bernhard Bischoff, *Die südostdeutschen Schreibschulen und Bibliotheken in der Karolingerzeit 2: Die vorwiegend österreichischen Diözesen* (Wiesbaden 1980) 87-89; Kéry 3-4; Klaus Zechiel-Eckes, *Die erste Dekretale: Der Brief Papst Siricius' an Bischof Himerius von Tarragona vom Jahr 385 (JK 255)* (MGH Studien und Texte 55; Hannover 2013) 48-49. The canonical collection, known as the *Collectio Diessensis*, consists of two parts, the first of which (fol. 1-130) is usually dated to the seventh century and contains the acts of the *concilium Aspasii*. The second part (fol. 131-213) consists of the *Collectio Frisingensis prima*. Rosamond McKitterick, 'Knowledge of Canon Law in the Frankish Kingdoms Before 789: The Manuscript Evidence', *The Journal of Theological Studies* 36, no. 1 (1985) 97-117, at 102, has suggested that the manuscript was fashioned as a 'practical' canon law collection for episcopal use. A search of the digital *Clavis Canonum* does not show the transmission of individual canons issued by the *concilium Aspasii*. On early publications of the conciliar acts by scholars, see Karl Joseph von Hefele and Henri Leclercq, *Histoire des conciles d'après les documents originaux* (Paris 1907-52) 3.1.165n3.

[5] Brief discussions include Hefele and Leclercq, *Histoire des conciles* 3.1.165-167; Charles de Clercq, *La législation religieuse franque de Clovis à Charlemagne (507-814)* (Leuven 1936) 73-74; Odette Pontal, *Die Synoden im Merowingerreich* (Paderborn 1986) 107-108; Halfond, *Archaeology* 227-228.

care and discretion underlying the adoption of canonical precedents by Merovingian-era Gallic councils. It has been observed that the 'renewal' of old standards by these councils in no way inhibited legislative innovation, and the council of 551 is a case in-point: although the acts are justified collectively as an act of renewal, the individual canons—which vary considerably in their originality—are built selectively upon legislative precedents that are not always the most recent nor obvious.[6]

Convocation and Configuration

Although the acts of the *concilium Aspasii* employ regnal dating, they are explicit that the meeting's convocation was a metropolitan, not a royal, initiative. At the time of the council's assembly, virtually all of Novempopulana was in Frankish hands. Eauze itself, along with Auch and Bazas, had been represented at the Council of Orléans (511), and likely represented the extent of Clovis's territorial possessions in the province as of that year.[7] In contrast, at the more recent Council of Orléans (549), the metropolitan see, Auch, Dax, Saint-Bertrand-de-Comminges, Couserans (Saint Lizier), and Lectoure all were represented.[8] Two years later, eight bishops and one clerical delegate represented nine *civitates* at Aspasius's council. Precisely which *civitates* were represented, however, is not entirely certain. While six named bishops can be securely associated with the *civitates* of Eauze, Bigorre (Tarbes), Auch, Dax, Couserans, and Saint-Bertrand-de-Comminges, the dioceses of bishops Eusepius and Marinus respectively are not immediately obvious, and nor is that of a

[6] Halfond, *Archaeology* 100-101 (with references), emphasizes that the act of renewal does not in any way inhibit legislative innovation.

[7] Orléans (511), *subscriptiones* (naming Leontius of Eauze, Nicetius of Auch, and Sextilius of Bazas), on which see Gregory Halfond, 'Vouillé, Orléans (511), and the Origins of Frankish Conciliar Tradition', in *The Battle of Vouille, 507 CE: Where France Began*, ed. Ralph Mathisen and Danuta Shanzer (Millenium Studies 37; Berlin 2012) 151-165, at 155.

[8] Orléans (549), *subscriptiones* (naming Aspasius of Eauze, Proculeianus of Auch, Liberius of Dax, Alecius of Lectoure, Amelius of Saint-Bertrand-de-Comminges, and Theodorus of Couserans [represented]).

certain Bishop Thomasus, who was represented at the council by one of his presbyters.[9]

Might we hypothesize what cities were represented at the council by Bishops Eusepius, Marinus, and Thomasus?[10] Lectoure had been represented only two years earlier at the Council of Orléans (549) by a certain Alecius (Alethius), so at the very least it seems safe to say that this *civitas* was participating in Frankish conciliar activities ca. 551. In contrast, while the names of bishops from Lescar (Béarn) and Aire-sur-Adour appear in the acts of the Visigothic Council of Agde convoked by Alaric II in 506, their attendance at Frankish councils is not attested prior to the 580's.[11] While a bishop of Bazas had attended the Frankish Council of Orléans (511), the city's next representation among conciliar subscriptions would not occur until 585.[12] As for Oloron, no bishops are attested between 506 and 573, when a bishop Licerius attended the Council of Paris.[13] The *civitas Boiatium*, named in the *Notitia Galliarum*, no longer had the status of an episcopal see by the mid-sixth-century.[14]

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[9] Also in attendance in 551: Aspasius of Eauze, Iulianus of Bigorre (Tarbes), Proculeianus of Auch, Liberius of Dax, Theodorus of Couserans, and Amelius of Saint-Bertrand-de-Comminges.

[10] No civic identifications for the men are suggested by Luce Pietri and Marc Heijmans, eds., *Prosopographie de la Gaule chrétienne (314-614)*, 2 vols. (Prosopographie chrétienne du Bas-Empire 4; Paris 2013) 1.706 (Eusepius 1); 2.1258 (Marinus 7); 1.780 (Flavius 4).

[11] Both *civitates* were represented at the Council of Mâcon (585); See Council of Mâcon (585), *subscriptiones*.

[12] Council of Mâcon (585), *subscriptiones*.

[13] Council of Paris (573), *subscriptiones*.

[14] On the question of an episcopal see at *Boiatium*, see Louis Duchesne, *Fastes episcopaux de l'ancienne Gaule*, 3 vols. (Paris 1907-15) 2.17-18. 2.89, and 2.102; Reinhold Kaiser, *Bischofsherrschaft zwischen Königtum und Fürstenmacht* (Bonn 1981) 232; and Hans Lieb and Christine Delaplace, 'Organisation de la Province', in *Province ecclésiastique d'Éauze (Novempopulana)*, ed. Louis Maurin et al. (Topographie chrétienne des cités de la Gaule 13; Paris 2004) 14. In contrast to the suggestion by Charles Munier, 'L'énigmatique évêque, 'Petrus de Palatio' du Concile d'Agde de 506', *Bulletin de littérature ecclésiastique* 69 (1968) 51-56, that the *episcopus* Petrus who subscribed to the acts of the Council of Agde (506) was bishop of *Boiatium* (and not 'de palatio'), see Ralph Mathisen, 'D'Aire-sur-l'Adour à Agde: les relations

So, if we exclude the *civitas Boiatium* from consideration, then we are left with five possibilities for the three unidentified but represented *civitates*: Lectoure, Lescar, Aire-sur-Adour, Bazas, and Oloron. While the unidentified individual bishops cannot be securely assigned to specific dioceses, nevertheless a few observations can be made: first, nine out of (likely) eleven episcopal sees were represented at the council. While it has been hypothesized that the two non-represented *civitates* were prevented from participating due to competing Visigothic territorial claims in the province, this suggestion rests primarily on certain cities' geographical proximity to the border rather than direct evidence.[15] Moreover, of those provincial *civitates* directly bordering Visigothic Iberia, Bigorre, Couserans, and Saint-Bertrand-de-Comminges all sent representatives to the council of 551. This leaves Oloron, but –

as noted above—this city was represented at a Frankish council twenty-two years later, so without additional evidence to the contrary, there is no reason to assume that the Visigoths specifically prevented its participation in 551.

So, if there is not strong evidence to suggest that military activities along the southern border shaped the council's attendance, might domestic regnal politics have played a role? In his classic study of the sixth-century royal partitions of the *regnum Francorum*, Eugen Ewig proposed—citing the acts of the council of 551—that Novempopulana had been divided in two between

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entre la loi séculière et la loi canonique à la fin du royaume de Toulouse', in *Le Bréviaire d'Alaric: Aux origines du code civil*, ed. Michel Rouche and Bruno Dumézil (Paris 2008) 41-50, at 49. Auguste Longnon, *Géographie de la Gaule au VIe siècle* (Paris 1878) 48 and 190n1, while suggesting that *Boiatium* had been absorbed by Bordeaux, expresses uncertainty as to whether *Boiatium* ought to be associated with La Teste-de-Buch or Bayonne (see also 606-607 on Bayonne, which is not attested explicitly as a *civitas* until the Treaty of Andelot of 587). Michel Rouche, *L'Aquitaine, des Wisigoths aux Arabes, 418-781: Naissance d'une région* (Paris 1979) carte 6 (61), simply identifies Bayonne with a note, 'pas de diocèse'.

[15] Margarete Weidemann, *Kulturgeschichte der Merowingerzeit nach den Werken Gregors von Tours* (2 vols. Mainz 1982) 1.355, suggesting that the two cities not represented were Oloron and Béarn.

Childebert and Chlothar upon the death of their father Clovis in 511, with Childebert receiving the western *civitates* in the province and Chlothar the eastern.[16] Limiting our scope to just those six identifiable *civitates* represented at Aspasius's council, i.e. Eauze, Auch, Dax, Saint-Bertrand-de-Comminges, Couserans, and Bigorre, it is notable that all with the exception of Dax were located in the eastern half of the province. The one eastern city not demonstrably represented was Lectoure, whose bishop recently had attended the Council of Orléans (549); the remainder lay in the West, i.e. in what Ewig has suggested was Childebert's portion of Novempopulana. So, if at most one additional bishop from the eastern part of the province attended the council, we are left with an attendance scheme more obviously balanced between the two *regna* than the subscription list would immediately suggest, if one likely still dominated by a slim margin by subjects of Chlothar. But if the episcopal subjects of both kings attended the council in significant numbers then it was their common provincial membership, and not their political loyalties, that ultimately determined their participation. As for those two unidentifiable episcopal sees not represented at the council, it is quite possible that ill health, alternate obligations, or even a temporarily-vacant seat might have been the cause of their failure to participate.

The council's acts are explicit that it was Aspasius himself—and not the Merovingian kings—who convoked the council ('Cum nos…Aspasius…evocatione congregasset'). While usage of the honorific 'apostolic', as applied here to the metropolitan prelate Aspasius, is not completely unheard of in the acts of Merovingian councils, its application to a presiding bishop most certainly is.[17] A possible explanation for this unusual claim might be found in the regional episcopal politics of Southern Gaul. Six years before the council assembled, Pope Vigilius had confirmed in a letter to the bishops of Childebert's kingdom the

[16] Eugen Ewig, 'Die fränkischen Teilungen und Teilreiche (511-613)', *Spätantikes und fränkisches Gallien*, ed. Hartmut Atsma et al. (3 vols. Munich 1976-2009) 1.114-171, at 1.121-122, concurring with Longnon regarding the absorption of *Boiatium* by Bordeaux.

[17] C.f. Paris (573), *epistola synodi ad Egidium*.

status of Bishop Auxianus of Arles as papal vicar, with the authority to request the attendance of bishops beyond his own province at episcopal synods.[18] While Eauze itself may have been part of Chlothar's portion of Novempopulana, regardless it is likely that at least several of the metropolitan bishop's suffragans received copies of this letter, as well as a second epistle sent the following year by the same pope, which confirmed that Auxianus's successor, Aurelianus, enjoyed the same supervisory powers as his predecessor.[19] This recent reconfirmation of the bishop of Arles' unique prerogatives, prerogatives that ostensibly extended over the metropolitan of Eauze's own suffragans, may well have rankled Aspasius, and—perhaps in conjunction with the challenges implicit in administering a province split between two *regna*—may have inspired his efforts to promote his own 'apostolic' status.

It does not necessarily follow, however, that the council he convoked in 551 assembled in his own *civitas*. Among the attested provincial councils convoked in the Merovingian era, the majority did not meet in metropolitan cities, the exceptions being several councils that met in Arles and Bourges.[20] As already noted, the conciliar acts themselves do not explicitly identify the place of assembly, so in consequence it would be imprudent to make any assumptions about the council's precise location. As for the council's agenda, we likewise must proceed with caution. According to the council's *praefatio*, a review of older canonical statutes had been undertaken, but it was found that 'some [of these] not had not been preserved intact' ('non in integrum servata constiterint'). Consequently, the council members determined that 'these things recorded (*adnoto*) among the present *tituli* must be

[18] *Epistolae Arelatenses genuinae*, ed. Wilhelm Gundlach (MGH Epistolae 3; Berlin 1892) no. 40 (59-60).
[19] *Epistolae Arelatenses genuinae* no. 43 (63-64). On the reception of the letters by bishops of Novempopulana, see Pietri and Heijmans, eds., *Prosopographie de la Gaule chrétienne* 1.1081 and 2.1539-540, although the assumption that Iulianus of Bigorre and Proculeianus of Auch specifically were subjects of Childebert is questionable.
[20] Halfond, *Archaeology* 61 n16.

observed with the greatest strictness in the future'.[21] The implication, of course, was that the present council was engaged in the act of renewal, as opposed to blazing new legislative trails. Consequently, it is necessary to evaluate whether the subsequent canons were as truly derivative as their authors claimed.

Renewal and Innovation

The neglect or forgetting (*oblitus*) of canonical standards is given as the specific reason for the council taking up the substantive issue of canon one: the moral conduct of penitents.[22] The canon's special concern is with penitents who have resumed prior marital/sexual relationships, and it threatens those who have lapsed with excommunication ('…tam a communione quam a liminibus ecclesiae uel conuiuio catholicorum se sequestratus esse cognoscant'). It is telling that *oblitus* is cited as the impetus for this proscription, as Aspasius' council not only was far from the first Gallic council to tackle the broader issue of the moral conduct of penitents, the Council of Orléans (538) had addressed it less than two decades earlier.[23] At Orléans, where none of the bishops who later would attend the *concilum Aspasii* were present, a brief *regula* was promulgated that dealt with this broad theme, but not with sexual conduct specifically: 'If anyone who has received the

[21] *Concilium Aspasii* (551), *praefatio*: '…et recensitis sanctorum uirorum patrum statutis aliqua per incuriam et longinqua tempora non in integrum seruata constiterint: quae in posterum cum summa seueritate debeant obseruari, praesentibus titulis credimus adnotandum'.

[22] *Concilium Aspasii* (551), c.1: 'Et quia nonnullus oblitus propositae paenitentiae modum excessisse perpatuit, de eo eis obseruandum esse decreuimus, ut, quicumque post acceptam paenitentiam ad thorum uxorum suarum, sicut canis ad uomitum, redisse probantur uel aliis, tam uiri quam femine, se inlicite coniunxisse noscuntur, tam a communione quam a liminibus ecclesiae uel conuiuio catholicorum se sequestratus esse cognoscant. Nam si se per dignam multi temporis paenitentiam inspirante domino sequestrati deuiasse cognouerint, qualiter communionem deo propitio mereantur, inspecta fide horum in sacerdotis sui consistat arbitrium'.

[23] E.g. Angers (453), c.5; Tours (461), c.8; Vannes (461/91), c.3; Second Council of Arles c.21; Orléans (511), c.11; Epaone (517), c.23; Orléans (538), c.28(25).

benedictio of penitence dares to return to a secular habit and arms, then he should be subjected to excommunication with the concession of the late rites'.[24]

So, if the relatively recent Orléans canon question was not the obvious inspiration for the legislation of 551, then what specific canon or canons did Aspasius and his colleagues have in mind when they claimed that older standards were not being observed in the present? Both Friedrich Maassen in his edition of the conciliar acts for the Monumenta Germaniae Historica, as well as Odette Pontal in her handbook on the Merovingian councils, identified as a possible inspiration for the *concilum Aspasii* legislation a terse canon issued in 517 by the Burgundian council of Epaone.[25] This canon, however, not only does not share any obvious linguistic parallels, arguably it lacks the specificity of both the Orléans canon and that issued by Aspasius's council in identifying problematic behavior among penitents: 'If anyone having accepted and professed penitence, reverts to worldly things, then he no longer will be allowed communion, unless the *professione* that he had forgotten be renewed'.[26]

Without completely discounting the possible influence of the Epaone canon, it is worth considering the possibility that Aspasius and his colleagues had access to more immediately inspirational canonical precedents in crafting their own legislation. Of those other Gallic canons that address the behavior of lapsed penitents, the one that shares the closest linguistic parallels to the canon of 551 appears in the acts of the Council of Tours (461):

Tours (461) c.8	Council of 551 c.1
Si quis uero *post acceptam paenitentiam sicut canis ad uomitum*	Et quia nonnullus oblitus propositae paenitentiae modum excessisse,

[24] Orléans (538), c.28(25): 'Si quis paenetentiae benedictione suscepta ad saeculare habitum miliciamque reverti praesumserit, viatico concesso usque ad exitum excummunicatione plectatur'.

[25] Friedrich Maassen, ed., *Concilia aevi Merovingici* (MGH Legum Sectio 3: Concilia, Tomus 1; Hannover 1893) 113n2; Pontal, *Die Synoden* 107.

[26] Epaone (518), c.23: 'Si quis accepta professaque paenitentia boni inmemor ad saecularia relabatur, prursus conmunicare non poterit, nisi professioni, quam inlecto praetermiserat, refurmetur'.

suuam, ita ad saeculares illecebras derelicta quam professus est paenitentia, fuerit reuersus, *a communione ecclesiae uel a conuiuio* fidelium extraneus habeatur, quo facilius et ipse compunctionem per hanc confusionem accipiat et alii eius terreantur exemplo.	perpatuit, de eo eis obseruandum esse decreuimus, ut, quicumque *post acceptam paenitentiam* ad thorum uxorum suarum, *sicut canis ad uomitum*, redisse probantur uel aliis, tam uiri quam femine, se inlicite coniunxisse noscuntur, tam *a communione* quam a liminibus *ecclesiae uel conuiuio* catholicorum se sequestratus esse cognoscant. Nam si se per Dignam multi temporis paenitentiam inspirante Domino sequestrati deuiasse cognouerint, qualiter communionem Deo propitio mereantur, inspecta fide horum in sacerdotis sui consistat arbitrium.

As this textual comparison shows, the canon of 461 shares both substantive and linguistic features with the later Merovingian-era canon, despite the latter's comparative verbosity. The quotation of Proverbs 26:11 (cited as well in 2 Peter 2:22) in reference to sexual indiscretions appears several times in the Gallic conciliar corpus, although these are the only two occasions specific to the case of lapsed penitents.[27] Although the Tours canon is less explicit about what it considers to be 'saeculares illecebras', the penalty is identical and phrased in similar terms as in the later canon. It should be noted, however, that the 551 canon's specific prohibition against excommunicates crossing the threshold (*limen*) of a church has a parallel in a canon included among the acts of the so-called Second Council of Arles, which likewise deals with the sexual indiscretions of penitents.[28] The Arles

[27] Brigitte Basdevant-Gaudemet, 'La Bible dans les canons des conciles mérovingiens', in *Église et autorité: Études d'histoire de droit canonique* (Limoges 2006) 201-212, at 203-204 (with references). This specific use of the metaphor may have its origins in Siricius's decretal of 384 (c.5); for an edition of the canon see Zechiel-Eckes, *Die erste Dekretale* 92-94.

[28] Second Council of Arles, c.21: 'Paenitens que defuncto uiro alii nubere praesumpserit, uel suspecta uel interdicta familiaritate cum extraneo uixerit,

canon's focus on remarriage, however, is unique, so the Tours canon seems a more likely direct—if not necessarily exclusive—inspiration for the text of Aspasius's legislation.

This raises the question, however, as to how the bishops of Novempopulana might have accessed the *acta* of the Council of Tours. As we have them, these acts are preserved in a handful of surviving chronological canonical collections, the earliest of which is the so-called *Collectio Remensis*, which also contains the Second Council of Arles acts in their entirety.[29] This collection is preserved in an eighth-century manuscript of Aquitanian provenance.[30] The most recent and thorough evaluation of the *Collectio Remensis* has proposed a two-stage composition—slightly after 550 and then in the early seventh century—while also hypothesizing an archetype *collectio* of conciliar acts compiled originally in a southeastern Gallic *civitas* under Ostrogothic rule.[31] The Tours canons themselves pose a problem, however, as they are detached from the main chronological sequence of conciliar *acta*, which seems to suggest that they were a later addition to the original archetype.[32] The

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cum eodem ab ecclesiae liminibus arceatur. Hoc etiam de uiro in paenitentia posito placuit obseruari'. On this collection of canons, and its ostensibly conciliar promulgation, see Ralph Mathisen, 'The Second Council of Arles and the Spirit of Compilation and Codification in Late Roman Gaul', *Journal of Early Christian Studies* 5, no. 4 (1997) 511-554.

[29] The acts of the Council of Tours (461) also are preserved in the seventh or eighth-century *Collectio Sancti Amandi*, as well as the derivative ninth-century *Collectio Bellovacensis*. On these two collections and their manuscripts, see Kéry 84-86. The canons likewise appear in the ninth-century Paris BNF lat. 1458 and Paris BNF lat. 1454, which (as Kéry notes) contain the same Merovingian canons as the *Collectio Bellovacensis*.

[30] For basic information on the manuscript (Berlin, Staatsbibliothek, Phill. 1743) along with bibliography, see Kéry 50.

[31] Michael Eber, Stefan Esders, David Ganz, and Till Stüber, 'Selection and Presentation of Texts in Early Medieval Canon Law Collections: Approaching the Codex Remensis (Berlin, Staatsbibliothek, Phill. 1743)', in *Creative Selection Between Emending and Forming Medieval Memory*, ed. Sebastian Scholz and Gerald Schwedler (Millennium Studies 96; Berlin 2022) 105-136, at 114 and 117.

[32] Eber, Esders, Ganz, and Stüber, 'Selection and Presentation' 121-122. The authors (122n64) suggest that textual differences between the Tours canons as

suggestion by Louis Duchesne that the Tours canons originally had been transmitted as part of a late fifth-century *Collectio Andegavensis*, consisting of a mere five documents, is not reflected in the manuscript evidence itself, so it is unclear in what precise form the canons were taken up by Gallic compilers.[33] Regardless, it seems probable that the Tours canons were added to a derivation of the aforementioned archetype collection, probably around the second quarter of the sixth-century, and began to circulate within Aquitaine, and thus were available both to the bishops who assembled in council in 551, and slightly thereafter to the compilers of the *Collectio Remensis*.[34]

When the council of 551 took up the related issue of the sexual indiscretions of bishops, presbyters, and deacons (c. 2), there similarly was no shortage of potentially inspirational precedents.[35] The canon itself identifies an unnamed *sancta synodus* in citing exceptions for those women forbidden from cohabitating with clerics. This reference usually has been assumed to be in reference to the Council of Nicaea (325), whose third canon had explicitly made an allowance for close familial

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preserved in the *Collectio Remensis* and *Collectio Sancti Amandi* respectively provide additional evidence that these canons were a later addition to the main (shared) chronological sequence of conciliar acts.

[33] See Munier, ed., *Concilia Galliae* 135; and Jean Gaudemet, *Les sources du droit de l'Eglise en Occident* (Paris 1985) 86-87. C.f. Duchesne, *Fastes episcopaux* 2.245-250.

[34] As tempting as it might be to associate the compilation of this canonical collection with the council of 551, the inclusion in the collection of a letter from the clergy of Milan to Frankish legates (AD 552) makes this association impossible. For this letter, see *Epistolae aevi Merowingici collectae*, ed. Wilhelm Gundlach (MGH Epistolae 3; Berlin 1892) no. 4 (438-442).

[35] *Concilium Aspasii* (551), c.2: 'Si quis uero episcopus, presbyter, diaconus se cum extraneam mulierem praeter has personas, quas sancta synodus in solacio clericorum esse constituit, habere forte praesumpserit aut ad cellarii secretum tam ingenua quam ancilla ad ullam familiaritatem habere uoluerit, deposito omne sacerdotale sacrificio remotus a liminibus sanctae ecclesiae uel ab omni conloquio catholicorum supra scripti synodi ordine feriatur'. For earlier precedents, see e.g. among Gallic canons: Angers (453), c.4; Tours (461), c.3; *Statuta ecclesiae antiqua*, c.27; Second Council of Arles, cc.3-4; Agde (506), cc.10-11; Orléans (511), c.29; Epaone (517), c.20; Clermont (535), c.16; Orléans (538), c.4; Orléans (549), c.3.

relations.[36] Without discounting this identification out of hand, it is nevertheless important to note that not only was the phrase *sancta synodus* used regularly by Merovingian-era Gallic councils in relation to councils other than Nicaea, but the acts of the council of 551 themselves use the same phrase later (in c. 4) in relation to the Council of Orange (441).[37]

So, it is necessary to at least consider alternative inspirations for the canon. The most recent relevant legislation was promulgated only two years earlier at the Council of Orléans (549), attended by no fewer than four prelates who also were present at Aspasius's synod.[38] At Orléans, bishops, presbyters, and deacons similarly were warned from associating with *extraneae mulieres*. However, at Orléans even otherwise-approved familial relations were forbidden from entering the private quarters of clerics during certain improper hours ('horis indecentibus'), and the canon is more specific regarding the duration of the excommunication than Aspasius's council would be.[39] Charles de Clercq, in contrast, saw closer linguistic and substantive parallels

[36] Nicaea (325), c.3. For this identification, see Maassen, ed., *Concilia aevi Merovingici* 113n4; De Clercq, ed., *Concilia Galliae* 163; Pontal, *Die Synoden* 107; and Jean Gaudemet and Brigitte Basdevant-Gaudemet, eds., *Les canons des conciles mérovingiens (VIe-VIIe siècles)* (2 vols. Sources Chrétiennes 353-354; Paris 1989) 1.332 n1.

[37] E.g. Clermont (535), *praefatio* and c.1; Valence (583/5), *acta*; Narbonne (589), *praefatio*; Chalon-sur-Saône (647/53), cc.9 and 17. Earlier precedents of alternative uses: Turin (398), c.6; Riez (439), *incipit* and c.2; Orange (441), *incipit*; Vaison (442), *incipit*; Agde (506), *praefatio*.

[38] Maassen, ed., *Concilia aevi Merovingici* 114n2; Pontal, *Die Synoden* 107; and Gaudemet and Basdevant-Gaudemet, eds., *Les canons des conciles merovingiens* 1.334 n2; but not De Clercq, all perceive the possible influence of the legislation of 549.

[39] Orléans (549), c.3: 'Ut nullus episcopus, presbyter et diaconus extranearum mulierum intra domum praesumat habere solacium, cui etiam pro utilitate sua aliqua familiarius regenda committat. Quod etiam et de propinquis feminis horis indecentibus similiter prohibemus, ne sub concessa sibi licentia parentali ab earum sequepedis memoratorum uita uel opinio polluatur. Quod si episcopus nunc uetita uti sub quadam praesumptione uoluerit, anno uno a metropolitano uel a conprouincialibus suis ab officio suspendatur; clerici uero a propriis episcopis modo, qui supra scriptus est, corrigantur'.

with a slightly older, and considerably longer, canon promulgated at the Council of Clermont (535):[40]

Clermont (535), c. 16	Council of 551, c. 2
Episcopus, presbyter adque diaconus ita sancte conscientiae luce resplendeant, ut effugiant probitate actuum maledicorum obloquia et testimonium in se diuinum inplere contendant, quod Dominus ait: Sic luceat lumen uestrum coram hominebus, ut uidentes uestram bonam operam glorificent Patrem uestrum, qui est in caelis. Igitur auctoritate canonica adque mansura in euum constitutione sancimus, ut fugiatur his extranearum mulierum culpanda libertas et tantum cum auia, matre, sorore uel nepte, si necessitas tolerit, habitent; de quibus nominibus, ut priorum canonum series continet, nefas est aliud, quam natura constituit, suspicari. In cubiculo etiam horum adque cellario uel familiari quolibet seruitio neque sanctimunialis ulla neque extranea mulier neque ancilla ullo modo admittatur. Quod si quis praeceptorum Dei inmemor credederit contemnendum, sciat se auctoritate canonica conmunionis sine dubio subire iacturam. Quod si antestis culpam hanc distringere in presbytero adque diacono suo canoneco rigore noluerit, ipse seueritate sententiae feriatur.	Si quis uero *episcopus, presbyter, diaconus* secum *extraneam mulierem* praeter has personas, quas sancta synodus in solacio clericorum esse constituit, habere forte praesumpserit aut ad *cellarii* secretum tam ingenua quam ancilla ad ullam familiaritatem habere uoluerit, deposito omne sacerdotale sacrificio remotus a liminibus sanctae ecclesiae uel ab omni conloquio catholicorum supra scripti synodi ordine feriatur.

[40] De Clercq, *La legislation religieuse* 74, an association repeated by Gaudemet and Basdevant-Gaudemet, eds., *Les canons des conciles mérovingiens* 332 n2.

The Auvergne canon, however, not only names those relations with whom a cleric might cohabitate, it also adds a threat against bishops who neglect their supervisory responsibilities in this matter.

Another possible parallel to the legislation of 551—heretofore unacknowledged—can be found in an earlier Gallic canonical collection, the aforementioned Second Council of Arles:

Second Council of Arles cc. 3-4	Council of 551 c. 2
3. Si quis clericus a gradu diaconatus *in solacio* suo mulierem praeter auiam, (matrem), sororem, filiam, neptem uel conuersam secum uxorem *habere praesumpserit*, a communione alienus habeatur. Par quoque et mulierem, si se separare noluerit, poena percellat. 4. Nullus diaconus, uel presbyter, uel episcopus *ad cellarii secretum* intromittat puellam, *uel ingenuam, uel ancillam.*	Si quis uero episcopus, presbyter, diaconus secum extraneam mulierem praeter has personas, quas sancta synodus *in solacio* clericorum esse constituit, *habere forte praesumpserit* aut *ad cellarii secretum* tam *ingenua quam ancilla* ad ullam familiaritatem habere uoluerit, deposito omne sacerdotale sacrificio remotus a liminibus sanctae ecclesiae uel ab omni conloquio catholico-rum supra scripti synodi ordine feriatur.

As Ralph Mathisen has noted in his study of the acts, the fourth canon can be read as a conscious elaboration of the original Nicene proscription.[41] It also parallels the comparatively stricter eleventh canon of the Visigothic Council of Agde (506), notably in the latter canon's specific reference to *ancillae* entering a cleric's *cellarium*.[42] However, the phrase 'in solacio' within this thematic

[41] Mathisen, 'Second Council of Arles' 525.

[42] Agde (506), c.11: 'Ancillas uel libertas cellario uel secreto inpendant ministerio et ab eadem mansione, in qua clericus manet, placuit remoueri'. As noted by Ralph Mathisen, 'Seething Adolescence, Suspect Relations, and Extraneous Women: Extra-Marital Sex in Late and Post-Roman Gaul', in *In Pursuit of Wissenschaft. Festschrift für William M. Calder III zum 75. Geburtstag*, ed. Stephan Heilen et al. (Zurich 2008) 303-314, at 308, the Agde

context is unique to the Arles and the *concilium Aspasii* canons, as well as to the aforementioned c. 3 of the Council of Orléans (549). To be sure, as with both the Orléans and Auvergne canons, the proscriptions of the Second Council of Arles deviate in some of their particulars from the legislation of 551, for example in their threat against the women themselves who cohabitate with clerics. But without assuming that Aspasius and his colleagues were inspired by—or limited to—a single legislative precedent in authoring their second canon—the legislation of the Second Council of Arles does seem to offer the closest parallels.

The use of the Second Council of Arles by Aspasius and his colleagues is also perceivable in canon four of the acts of the *concilium Aspasii*. Similarly focused on clerical discipline, the canon condemns those clerics who bring judicial cases before secular courts, and threatens excommunication against those who seek out lay protection against episcopal rebuke.[43] Unlike the majority of the canons promulgated in 551, canon four explicitly cites its legislative precedent, ostensibly the Council of Orange (441). However, it long has been recognized that this attribution is in error; the canon in actuality is referring once again to the Second Council of Arles (c.31).[44] Embedded in a cluster of canons that

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canon imposes stricter standards than the Second Council of Arles by disallowing aunts and converted wives as cohabitators.

[43] *Concilium Aspasii* (551), c.4: 'Sacerdotum uero uel omnium clericorum negotia, ut non apud laicos nisi apud suos conprouinciales episcopos suas exerceant actiones, sanctae synodi arausicae praecepta conuenit custodire, ea uidilicet ratione, ut, si quis supra scripta praecepta contempserit, excommunicationem omnium hac detestationem dignus habeatur; pariter ut, si quis spreto suo pontifice ad laici patrocinia fortasse confugerit, cum fuerit a suo episcopo repetitus et laicus eum defensare uoluerit, similis eos excommunicationis poena percellat'.

[44] See on this point, among others, Hefele and Leclercq, *Histoire des conciles* 3.1.166n8; Pontal, *Die Synoden* 107n16; Mathisen, 'Second Council of Arles' 520-521 and 526-527. Second Council of Arles, c.31: 'Si quis clericorum religionis negotia uel spirituales causas ecclesiae ad saecularia patrocinia, relicta synodo, transferre praesumpserit, excommunicatione omnium ac detestatione dignus habeatur. Simili modo causa quae inter clericos uertitur, ne inuito episcopo ad saeculares iudices deferatur, sed episcoporum iudicio terminetur'.

originated as legislation promulgated at Orange, cc.31 and 34 in fact constituted new additions. The adoption of this misattribution by Aspasius and his colleagues offers additional support for the suggestion that they consulted a canonical *collectio* with similar contents as the slightly later *Collectio Remensis*. Yet, despite the explicit—if confused—citation of canonical precedent, the canon of 551 is not wholly derivative. The second part of the canon, which threatens excommunication against a cleric who requests shelter and protection from a lay patron in order to avoid an episcopal summons (the patron is threatened with the same penalty), has no parallel in the earlier canon.

While not explicit about their sources, the remaining canons offer further examples of Aspasius and his colleagues crafting unique canonical policies out of existing—if sometimes surprising—precedents. Canon three, for example, targets *incantatores*, the lone appearance of this term in the entirety of the Merovingian-era conciliar corpus.[45] The canon concerns itself less with specific forms of magic, than with the appropriate penalties for enchanters: *superiores* are to be excommunicated, while unrepentant *humiliores* are subject to corporal punishment ('verberibus corrigantur').[46] In contrast, the Frankish Council of Orléans (511)—sometimes identified as the inspiration for the legislation of 551—had been more specific in condemning

[45] *Concilium Aspasii* (551), c.3: 'De incantatoribus uel eis, qui instinctu diabuli cornua praecantare dicuntur, si superiores forte personae sunt, a liminibus excommunicatione pellantur ecclesiae, humiliores uero personae uel serui correpti a iudice fustigentur, ut, si se timorem Dei corrigi forte dissimulant, uelut scriptum est, uerberibus corrigantur'.

[46] On 'enchanters,' see Allen E. Jones, *Social Mobility in Late Antique Gaul* (Cambridge 2009) 283-335, especially 293-335, who emphasizes that those of high rank could be associated with magical practices. He concurs with Yitzhak Hen, 'Paganism and superstition in the time of Gregory of Tours: une question mal posée', in *The World of Gregory of Tours*, ed. Ian Wood and Kathleen Mitchell (Cultures, Beliefs and Traditions: Medieval and Early Modern Peoples 8; Leiden 2002) 229-240, that references to magic in this period are not indicative of pagan survivals; see also Yitzhak Hen, 'The Early Medieval West', in *The Cambridge History of Magic and Witchcraft in the West*, ed. David J. Collins (Cambridge 2015) 183-206. Neither Jones nor Hen mentions the legislation of 551.

different forms of divination, while at the same time failing to distinguish magic practitioners by class.[47] Similarly, a survey of even earlier Gallic conciliar condemnations of magical practices do not suggest that Aspasius and his colleagues were interested simply in regurgitating venerable canonical precedents, but rather in clarifying appropriate penalties for those continuing to engage more generally in magical practices.[48]

Canon five is even more notably innovative. This canon requires that eight days prior to ordination the names of candidates for the offices of presbyter or deacon must be announced to the people, so that possible objections (i.e. flaws in character and action) might be raised.[49] The originality of this requirement often has been noted, and well as its grant to the *populus* a practical mechanism for involvement in clerical ordinations, even at the expense of candidates nominated by the diocesan bishop himself.[50] The placement of the canon in the *acta*, immediately following a threat of excommunication directed against lay patrons who intervene in intra-ecclesiastical disputes, is itself revealing: the people, in other words, are allowed a measure of influence over the selection of local clergy, but a line is drawn at their intervention in relations between an ordained cleric and his bishop. The important distinction for Aspasius and his colleagues seems not to have been the ceremonial act of ordination so much

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[47] Orléans (511), c.30: 'Si quis clericus, monachus, saecularis diuinationem uel auguria crediderit obseruanda, uel sortes quas mentiuntur esse sanctorum quibuscumque putauerint intimandas, cum his qui iis crediderint ab ecclesiae conmunione pellantur'. For the suggestion that this canon was a precedent for the legislation of 551, see e.g. Pontal, *Die Synoden* 107-108.

[48] C.f. Vannes (461/91), c.16; Agde (506), cc.42 and 68; *Statuta ecclesiae antiqua*, c.83.

[49] *Concilium Aspasii* (551), c.5: 'De ordinatione uero clericorum id conuenit obseruari, ut, cum presbyter aut diaconus ab episcopo petitur ordinandus, precedentibus diebus VIII populus quemquam ordinandum esse cognoscat et, si qua uitia in eum quis e populo forte esse cognoscit, ante ordinationem dicere non desistat, ut, si nullus conprobationem certam contradicturus extiterit, absque ulla hesitatione benedictionem inspectus mereatur accipere'.

[50] See e.g. De Clercq, *La législation religieuse* 74; Robert Godding, *Prêtres en Gaule mérovingienne* (Brussells 2001) 98-99, 107, and 160-161, Pontal, *Die Synoden* 107, and De Clercq, ed., *Concilia Galliae* 164n5.

as ensuring clerical discipline, a common theme in contemporary conciliar acts. The eight-week review period theoretically would help to identify in advance potentially-problematic clerical candidates, while the bishop's own supervisory responsibilities are shielded from interference that might inhibit the correction of his clerical subordinates.

While canon six is merely one in lengthy sequence of Merovingian-era canons dealing with donations to churches, it too contains several innovative features.[51] The shared underlying principal of these canons was the bishop's responsibility for the management of these donations, and a number of them address the protection of donations, including from subsequently-regretful benefactors or their heirs.[52] At the recent Council of Orléans (549), for instance, the sixteenth canon declared such persons to be murderers of the poor (*necatores pauperum*).[53] Aspasius and his colleagues, in contrast, suggested that a benefactor's wishes ought to be observed in the administration of the donation. While no rationale is provided for this unexpected change in emphasis, it might well have been the case that the bishops were attempting to preempt future disputes between benefactors and ecclesiastical recipients in which the use of the donation provided a rationale for the former to reclaim their property. This reading arguably finds support the canon's attention to the (implicit) preservation of the original written bequest ('conditio, quam qui donauerit scripserit'), which might prove crucial in any future litigation.

A second notable feature of the canon is its abrupt shift in thematic focus from honoring the wishes of benefactors to the

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[51] *Concilium Aspasii* (551), c.6: 'Si quis uero pro remedium animae suae mancipia uel loca sanctis ecclesiis uel monasteriis offerri curauerit, conditio, quam qui donauerit scripserit, in omnibus obseruetur; pariter et de familiis ecclesiae id intuitu pietatis et iustitiae conuenit obseruari, ut familiae Dei leuiorem quam priuatorum serui opere teneantur, ita ut quarta tributi uel quodlibet operis sui benedicentes Deo ex presente tempore sibi a sacerdotibus concessa esse congaudeant'.

[52] Halfond, *Archaeology* 110-117, surveying this legislation.

[53] On the adoption of this phraseology from the Council of Agde, see Sethina Watson, *On Hospitals: Welfare, Law, and Christianity in Western Europe, 400-1320* (Oxford 2020) 64-72 (with additional literature cited therein).

treatment of ecclesiastical *servi*. The canon's first half does acknowledge that *servi* might be included among those donations direct by wealthy benefactors to churches and monasteries, but there is no suggestion in the canon's second half to indicate that it is concerned solely with this subset of ecclesiastical *servi*. Instead, Aspasius and his colleagues cite *pietas* and *iustitia* as justifications for the comparatively better treatment owed to all ecclesiastical *servi*. The canon goes on to specify the reduced labor owed by these unfree persons: a one-quarter reduction in *tributa* or *opera*. Despite the obvious novelty of this specific stipulation, this second part of canon six does not necessarily deviate from existing canonical precedent in the allowance of ecclesiastical *servi*, while at the same time justifying—and arguably deemphasizing—its own originality by means of explicit reference to fundamental religious principles.

The final seventh canon offers a less obvious, but still significant, case of innovation built on selectively-chosen precedent. The canon prescribes annual conciliar attendance 'sicut patrum sanctorum nostrorum precepta declarant' by the bishops of Novempopulana, threatening a year-long excommunication against absentee prelates.[54] At the time of the council's convocation, the expectation—leaving aside the practice—of annual provincial meetings was not necessarily shared universally among Gallic dioceses, although it had been reaffirmed as recently as the Council of Orléans (549).[55] The year-long excommunication threatened by the *concilium Aspasii* had its roots in the acts of the Second Council of Arles and the Council of Agde (506), although deviated slightly from those penalties prescribed by more recent Frankish councils.[56] The Councils of Orléans (538 and 549) more narrowly had threatened bishops with

[54] *Concilium Aspasii* (551), c.7: 'Nam sicut patrum sanctorum nostrorum precepta declarant, semel in anno sanctas congregationes episcoporum per loca sua conuenire, specialiter conuenit obseruari. Quam rem si quis nostrorum fortasse contempserit, usque ad aliam congregationem sit a caritate fratrum suspensus'.

[55] Halfond, *Archaeology* 60nn12-13.

[56] Halfond, *Archaeology* 74-75 re. Second Council of Arles, c.19; Agde (506), c.35.

a ban on their performance of the mass for a full year, with the latter council even making an allowance for this right to be restored by the provincial metropolitan ('Quod si concilium faciendum quaecumque necessitas inlata distulerit, a metropolitano suo ueniam postulans ad missarum faciendarum gratiam reuocetur').[57] In contrast, the council of 551 was explicit that the excommunication only could be lifted at the time of the next council, thus reverting to the earlier standard, and even utilizing some of the same terminology as the Agde canon (i.e. 'a caritate fratrum').

An Uncertain Legacy

One could reasonably question whether Aspasius's council had much of a legacy at all, considering its near-total absence from subsequently-compiled canonical collections. While we should not dismiss the possibility that the council's decisions did circulate beyond Novempopulana in the Merovingian period, we nevertheless must proceed with caution in identifying their perceived influence. In late 567, for instance, nine bishops from the *regnum Chariberthi* assembled at Tours with the support (*coniventia*) of King Charibert I.[58] They produced by the conclusion of their meeting a canonical record remarkable by the standards of Merovingian Francia for the elaborate and lengthy style of the individual canons. Some scholars have perceived the relevancy of the second canon promulgated at the *concilium Aspasii* to the tenth and eleventh canons issued by the Council of Tours.[59] Relevancy, of course, does not necessary equate to direct influence. So, what reasons are there to think that the bishops who assembled in 567 had access to *acta* produced in Southern Aquitaine over a decade and a half earlier? Canons ten and eleven

[57] Orléans (538), c.1; Orléans (549), c.18.
[58] On the circumstances of the council's convocation see Gregory Halfond, 'Charibert I and the Episcopal Leadership of the Kingdom of Paris (561-567)', *Viator* 43 (2012) 1-28, and Gregory Halfond, 'Contextualizing the Council of Tours (567)', *Proceedings Toronto 2012* 289-301.
[59] See Maassen, ed., *Concilia aevi Merovingici* 124n5; and Pontal, *Synoden* 131.

both concern clerical cohabitation with women apart from the now-standard allowable exceptions, with the latter canon threatening excommunication against violators of this rule.[60] To be sure, the canons are grounded in the same fundamental principles embodied—but by no means introduced—by the legislation of 551. But as the Tours canons do not share any notable linguistic similarities with the earlier *regula*, it seems imprudent to assert any direct influence from the *concilium Aspasii*. Instead, the canons of 567 could just as easily be explained as novel applications of longstanding canonical tenets.

More generally, while the canons of 551 have thematic parallels with a number of later Gallic canonical pronounce-ments, direct influence is nearly impossible to prove. Nevertheless, the means by which the council's canons were preserved in the seventh-century *Collectio Diessensis* is suggestive of at least that collection's compiler's belief that they complimented other circulating conciliar canons. In that collection, the canons of the *concilium Aspasii* are nestled between an early sixth-century episcopal letter written by three Gallic bishops of Lugdunensis Tertia to two Breton priests and the *acta* of the Council of Paris (614). The epistle is primarily concerned with condemning the local practice of allowing cohabitating women (*conhospitae*) to participate in the performance of the mass. However, its episcopal

[60] Tours (567), c.10: 'De familiaritatibus mulierum licet crebrius sit in canonibus replicatum, adtamen necesse est, ut, si secta uirgulta, quae mala pollulauerant, rursus fidei falce succidantur et iam radicitus eruantur. Nullus deinceps clericorum pro occasione necessitatis faciende vestes aut causa ordinandae domus extraneam mulierem in domum suam habere praesumat. Et cum iubeamur uictum aut uestitum artificiolo quaerere et manibus propriis laborare, quid opus est in domum serpentem includere pro ueste, quae multeformis uestem non propterea deponit, ut nudetur, sed ut se gratiorem, dum renouatur, ostendat'? Tours (567), c.11: 'Nullus ergo clericorum, non episcopus, non presbiter, non diaconus, non subdiaconus, quasi sanctimonialem aut uiduam uel ancillam propriam pro conseruatione rerum in domum suam stabilire praesumat, quae et ipsa extranea est, dum non est mater aut soror aut filia, quae etiam pronior propinquauit ad culpam, dum dinoscitur subiecta dominatu. Si quis episcoporum aut presbiterorum seu diaconorum aut subdiaconorum de hac re statuta patrum uel nostra temerare praesumpserit, excommunicetur'.

authors expand their critique with a reminder that clerical cohabitation with strange women, i.e. non-familial relations, are forbidden per 'canonum sententia'. Anyone caught violating this proscription 'a sacrosanctae liminibus ecclesiae arceatur'.[61] Of course, the council of 551 in similar language ('remotus a liminibus sanctae ecclesiae') would impose the same penalty. A reader of the *collectio* surely would have noted the parallel.

Even more parallels with the acts of the Council of Paris likely also would have been recognized. Canons five and thirteen of this council, for example, similarly deal with the problem of clerics soliciting the intervention of lay patrons or *iudices*, while canons eight, nine, and twelve express concern that funds and property donated to religious institutions be used in accordance with donors' wishes.[62] No textual features necessarily suggest any direct influence of the legislation of 551 on that of 614, and there is no basis for assuming that the prelates assembled at Paris had access to the earlier *acta*; rather, these two sets of canons are complementary not simply thematically, but in their approaches to common issues of concern. So, while the council's *acta* occur in the *Collectio Diessensis* within a not-entirely chronological sequence of Gallic conciliar and epistolary material, their inclusion within this sequence seems to have been at least partly a matter of choice, due to the relevancy of its canons to the surrounding materials.[63]

So, while the legacy of the *concilium Aspasii* was by no means characterized by any degree of ubiquity, it was not non-existent either. Its acts were recognized as authoritative by the seventh-

[61] For the text, see Louis Duchesne, 'Lovocat et Catihern, prêtres bretons de temps de saint Melaine', *Revue de Bretagne et de Vendée* 7 (1885) 5-18.
[62] Paris (614), cc.5, 8-9, and 12-13.
[63] More generally on the 'local' nature of Gallo-Frankish canonical collections, and the discretion that went into their compilation, see Ralph Mathisen, 'Between Arles, Rome, and Toledo: Gallic Collections of Canon Law in Late Antiquity', *'Ilu. Revista de Ciencias de las Religiones* 2 (1999) 33-46; Ralph Mathisen, 'Church Councils and Local Authority: The Development of Gallic *Libri canonum* during Late Antiquity', in *Being Christian in Late Antiquity: A Festschrift for Gillian Clark*, ed. Carol Harrison, Caroline Humfress, Isabella Sandwell (Oxford 2014) 175-195.

century compiler of the *Collectio Diessensis*, as well as complementary to the other included materials. This recognition, in turn, may have been predicated in part on the acts' own deep roots in a pre-Frankish Gallic conciliar tradition. Although a provincial council, its attendees did not merely restate the decisions of the most recent and prominent interprovincial synods, nor was renewal for them merely a cover for legislative novelty. Rather, the bishops of Novempopulana used their knowledge of regional canon law to craft original *regulae* that very purposefully did not deviate from commonly-shared fundamental principles. In other words, they recognized canon law as a living tradition within Gaul, one with pre-Frankish roots, and one to which they had every right to contribute as members of an elite clerical *ordo* within the Church. While their contribution may have been by most measures slight, this negligibility in no way diminished its canonical legitimacy as recognized by the compiler, and possibly the users too, of the *Collectio Diessensis*.

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Vorstellung der neuen Ausgabe des Sendhandbuchs Reginos von Prüm

Wilfried Hartmann

Mit dem Sendhandbuch Reginos von Prüm wird erstmals innerhalb der MGH die kritische Edition einer Kirchenrechtssammlung vorgelegt. Diese Ausgabe sollte nicht—wie ursprünglich angedacht—als Supplement zur Reihe Concilia erscheinen; daher war eine neue Reihe erforderlich.

Es gab durchaus schon früher Versuche von Mitarbeitern der MGH, Kanonessammlungen kritisch zu edieren. So hat Ernst Perels (1882-1945) Ende der 1920er Jahre eine Ausgabe des Liber de vita christiana Bonizos von Sutri aus der Mitte des 11. Jh. erarbeitet. Sie ist aber nicht bei den MGH erschienen, sondern bei der Berliner Akademie der Wissenschaften. Der 1930 publizierte Band blieb jedoch der einzige der Reihe „Texte zur Geschichte des römischen und kanonischen Rechts im Mittelalter“ bei der (damaligen) Preussischen Akademie.

Carl Erdmann (1898-1945) hatte in den Jahren 1926 bis 1932 die Edition der Sammlung des sog. Policarpus des Kardinals Gregor von San Crisogono († 1113) weit vorangetrieben. Sie wurde um 1970 durch die Kollation weiterer wichtiger Handschriften ergänzt und kann über die Homepage der Monumenta benutzt werden. Vielleicht kann diese Edition einer großen Sammlung in nächster Zeit als Band der neuen Reihe veröffentlicht werden.

Warum Horst Fuhrmann die vorbildlich gelungene Edition der Collectio Vetus Gallica durch Hubert Mordek nicht als eigenen Band bei den MGH vorgesehen hatte, ist heute nicht mehr zu klären. Möglicherweise wollte Fuhrmann aber eben keine kanonistische Reihe bei den MGH beginnen.

Eine Ausgabe des Dekrets von Bischof Burchard von Worms ist derzeit in einem großen Akademieprojekt in Arbeit. Hoffen wir, dass dies zu einem guten Ende gerät!

Vorstellung des Sendhandbuchs: Inhalt und Zweck der Sammlung

Das nach 906 entstandene Sendhandbuch enthält 2 Fragenkataloge und 910 Kapitel, die zum großen Teil aus kirchenrechtlichen Sammlungen der Spätantike und des frühen Mittelalters übernommen wurden. Es sollte den Bischof, der bei seiner jährlichen Visitationsreise durch seine Diözese auch Gericht zu halten pflegte (über Geistliche und über Laien), das sog. Sendgericht, mit den nötigen Rechtstexten aus der Tradition ausstatten.

Verbreitung

Was die Verbreitung des Sendhandbuchs angeht, so ist festzuhalten, dass nicht nur 11 vollständige Handschriften auf uns gekommen sind, sondern dass auch vier Fragmente von ehemaligen Handschriften erhalten sind. Mindestens sieben verlorene Handschriften sind in mittelalterlichen Bibliothekskatalogen gesichert. Dazu kommen Belege für weitere Handschriften in der Rezeption der Sammlung; die wichtigste dieser rezipierenden Handschriften ist mit der Sigle K im Apparat der Edition berücksichtigt. Insgesamt sind jedenfalls deutlich mehr als 20 Überlieferungen für das Sendhandbuch bezeugt. Damit übertrifft es die Anzahl von sicher belegten 15 Codices der Anselmo dedicata, bleibt aber doch deutlich hinter den über 50 Handschriften der Dacheriana zurück. Die andere Vorlage Reginos, der Quadripartitus (4. Buch) ist nur in neun Handschriften erhalten.

Was die regionale Ausdehnung des Einflusses angeht, so kann nach dem Zeugnis der erhaltenen oder erschließbaren Handschriften sowie nach der regionalen Herkunft der rezipierenden Sammlungen gesagt werden, dass Reginos Sendhandbuch fast ausschließlich im Bereich des ostfränkisch-deutschen Reiches verbreitet war und zwar vor allem im Rheinland, in Lothringen und in Alemannien. Nach Baiern gelangte die Kenntnis von Reginos Werk anscheinend erst spät (wohl im 11. Jh.) und nach Italien überhaupt nicht.

Systematik

Die Sammlung ist systematisch geordnet; ihre beiden Bücher befassen sich jeweils mit Angelegenheiten von Geistlichen bzw. von Laien und auch innerhalb der Bücher gelten jeweils lange Kapitelreihen dem Leben und der Amtsführung der Kleriker sowie dem Eherecht oder kriminellen Vergehen der Laien.

Systematisch geordnete Kanonessammlungen, die mit dem Sendhandbuch verglichen werden können, sind die Collectio Anselmo dedicata (aus dem Ende des 9. Jh.), aber auch die Sammlung des Cresconius (7. Jh.), die Dacheriana (aus dem Beginn des 9. Jh.) sowie der Quadripartitus (Mitte 9. Jh.).

Dabei ist aber zu beachten, dass diese älteren Sammlungen nur Delikte von Geistlichen, und nicht—wie Regino—auch solche von Laien behandelt haben.

Der Cresconius bietet noch keine konsequente Systematisierung; die Abfolge seiner Kapitel (494 Kapitel sind auf 300 Titel verteilt) folgt seiner wichtigsten Vorlage, der historisch geordneten Collectio Dionysiana.

Auch im Quadripartitus ist in der Abfolge der Kapitel keine konsequente Systematik erkennbar.

Anders steht es mit der Dacheriana, deren drei Bücher dem Bußwesen, dem Prozessrecht und der Disziplin der Kleriker gewidmet sind.

Die große Sammlung der Anselmo dedicata ist in 12 Bücher aufgeteilt, die eindeutig nach inhaltlichen Gesichtspunkten gegliedert sind: Buch 1 gilt dem Papst, das

Buch den Bischöfen, Buch 3 befasst sich mit Anklage und Gericht der Kleriker usw.

Die Sammlungen des Cresconius, der Dacheriana und der Collectio Anselmo dedicata enthalten nur altes Kirchenrecht, keine zeitgenössischen Texte. Allerdings sind von den 2000 Kapiteln der Collectio Anselmo dedicata ein Viertel den um die Mitte des 9. Jh. gefälschten Pseudoisidorischen Dekretalen entnommen.

Ganz anders beim Sendhandbuch:

157 Kapitel stammen aus karolingischen Konzilien, und die Kapitulariensammlung des Ansegis aus den späten 820er Jahren sowie weitere Kapitularien aus dem 9. Jh. stellen insgesamt 150 Kapitel; das sind insgesamt 307 Kapitel. Das heißt, dass ca. 1/3 aller Kapitel des Sendhandbuchs aus der Karolingerzeit stammen.

Ich komme zu einem Vergleich der Neuausgabe mit den älteren Ausgaben des Sendhandbuchs:

Die allererste gedruckte Ausgabe des Sendhandbuchs legte der Helmstedter Professor Joachim Hildebrand (1623-1691) vor; sie erschien 1659 in Helmstedt.

Etienne Baluze (1630-1718) legte seiner Ausgabe (erschienen 1671) die Handschrift P zugrunde. Er zog auch den Druck von Hildebrand heran.

Friedrich Wilhelm Hermann (=F.G.A.) Wasserschleben (1812-1893) benutzte für seine im Jah 1840 erschienene Ausgabe als erster auch Handschriften der genuinen Version.

Eine Capitulatio, also ein Inhaltsverzeichnis, findet sich schon in nicht wenigen Handschriften; Hild. und Baluze bieten auch ein solches Verzeichnis der Rubriken. Die Capitulatio bei Wasserschleben stammt nicht aus den Handschriften, vielmehr hat er sie—mit einigen Korrekturen—von Baluze übernommen.

Die Anzahl der Kapitel in der Capitulatio bei Hild. umfasst in Buch 1: 430 cc., und in Buch 2: 447 cc., denn Hild. bietet nicht für alle gezählten Kapitel eine Rubrik (anscheinend sind die mit „De eadem re“ überschriebenen Kapitel oftmals weggelassen).

Bei Baluze enthält die Capitulato im Buch 1: 443 cc. und im Buch 2: 446 cc.

Während Hild. die Rubriken in der Capitulatio und auch im Text der Ausgabe aufgrund des Inhalts der Kapitel anscheinend selbst „formuliert“ hat, dürfte Baluze die Capitulatio aus seiner Handschrift (P) entnommen haben.

Die Capitulatio bei Wasserschleben umfasst 455 Rubriken für das erste und 454 Rubriken für das 2. Buch, d.h. sie ist an den Text seiner Ausgabe angepasst und ist offenbar nicht den von ihm herangezogenen Handschriften entnommen.

Neues über die äußere Form der Sammlung:

Zu den Rubriken, also den Überschriften der einzelnen Kapitel:

Schon bei Hild. sehen die Rubriken aus wie dann bei Baluze.

Wasserschleben hat seine Rubriken entweder aus Baluze übernommen oder dann, wenn sie bei Baluze fehlten, aus der Capitulatio ergänzt. Vermerkt hat er die Herkunft seiner Rubriken nirgends.

Auch bei den Inskriptionen, also den Angaben zur jeweiligen Quelle, ist Wasserschleben entsprechend verfah-ren.

In der neuen Edition sind die Rubriken gemäß der Überlieferung gestaltet. Wenn in den Handschriften keine Rubrik erscheint, ist die Rubrik von Wasserschleben beibehalten, aber in spitze Klammern gesetzt.

Zu den Verweisen:

Vor allem im ersten Buch des Sendhandbuchs finden sich in den Handschriften der genuinen Version Verweise, in denen ein Benutzer auf inhaltlich verwandte Kapitel verwiesen wurde. Solche Verweise, meist eingeleitet durch „Require“ oder „require retro“, finden sich fast ausschließlich in den Handschriften der genuinen Version (auch an einigen Stellen der rezipierenden Sammlung der Handschrift K sind solche Verweise vorhanden; sie sind anscheinend aus der Vorlage übernommen worden, obwohl sie in der Sammlung der Handschrift K keinen Sinn mehr machen).

Während sich in den anderen älteren Ausgaben keine Verweise finden, hat Wasserschleben solche an vielen Stellen in seine Edition aufgenommen. Diese Verweise bei Wasserschleben haben oftmals keine Grundlage in den Handschriften; anscheinend hat er sie an solchen Stellen eingefügt, an denen die Handschriften der jüngeren Version Kapitel umgestellt haben.

In der neuen Edition sind die Verweise handschriften-getreu verzeichnet.

Zur Anzahl und Reihenfolge der Kapitel:

Keine Handschrift der genuinen Version hat die Kapitel von Anfang bis zum Schluss korrekt durchnummeriert. Daher erfolgt in der neuen Edition eine neue, durchgehende Nummerierung in den beiden Büchern. Letztlich unterscheiden sich die Kapitelnummerierungen in der neuen Edition und bei Wasserschleben nur geringfügig, obwohl Wasserschleben an mehreren Stellen inkonsequent verfahren war. So ist z.B. das Kapitel 2.179 bei Wasserschleben ein Zusatzkapitel, das sich nur in der Handschrift W3 findet. In der neuen Edition trägt dieses Kapitel die Nummer 2.180a.

Es gibt weitere Zusatzkapitel:
Im ersten Buch sind es sechs: c. 117a, 133a und 379a (diese drei Kapitel finden sich in der Handschrift P); c. 44a findet sich nur in Handschrift DW3; und nur in W3 gibt es die beiden Kapitel 221a und 298a.
Im zweiten Buch sind es drei Kapitel: cc. 174a (nur in G) sowie 63a und 180a (diese beidenKapitel finden sich lediglich in der Handschrift W3).

Mit Ausnahme von c. 2.174a, das sich in G, einer Handschrift der genuinen Version, findet, stehen die übrigen Zusatzkapitel in Handschriften der interpolierten Version.

Im Text der neuen Ausgabe sind diese Kapitel rechtsbündig eingerückt; nur c. 2.174a ist linksbündig eingerückt. Was wird in der neuen Ausgabe im Vergleich mit den älteren Ausgaben zusätzlich geboten?

Alle 11 noch erhaltenen Handschriften des Sendhandbuchs wurden genau kollationiert und sind im Variantenapparat präsent. Dazu kommt eine Kollation und Berücksichtigung der Überlieferung von zahlreichen Kapiteln des Sendhandbuchs in der ältesten Rezeption (K= Handschrift Köln 124).

Dass der Text des Sendhandbuchs in zwei Versionen erhalten ist, hatte bereits Wasserschleben erkannt.

Er bezeichnete die ältere Version als „genuine Version“; sie ist in 4 Handschriften erhalten: AGLT. Dazu kommt die Rezeption

in der Handschrift K, die eindeutig dieser älteren Version zuzurechnen ist.

Die jüngere, sog. „interpolierte“ (oder besser: umgestellte) Version ist noch in 7 Handschriften erhalten: DPS1S2W1W2W3.

Die beiden Versionen unterscheiden sich hauptsächlich durch die Reihenfolge der Kapitel: Ein Redaktor hat die Verweise am Rand seiner Vorlage dahingehend verstanden, dass er die dort genannten Parallelkapitel tatsächlich umgestellt hat; so ist die umgestellte Version entstanden.

Zusätzlich gibt es nicht wenige gemeinsame Textvarianten in allen Handschriften der interpolierten (= umgestellten) Version. Damit unterscheidet sich auch der Text des Werks in den beiden Rezensionen, allerdings nicht so stark, dass die beiden Versionen im Druck getrennt wiedergegeben werden müssten.

Zur handschriftlichen Grundlage der Editionen ist zu sagen:

1. Hild. hatte für seine Edition vor allem die Handschrift (W3) herangezogen; zusätzlich wurden auch W1 und W2 berücksichtigt.

2. Baluze hatte ebenfalls eine Handschrift (P) herangezogen; zusätzlich aber den Druck von Hild. benutzt.

3. Wasserschleben zog eine (T) oder vielleicht sogar zwei (neben T auch G) Handschriften der genuinen Version heran und berücksichtigte über die Drucke von Hild. und Baluze auch 4 Handschriften der interpolierten Version (P sowie W1, W2 und W3).

Die neue Edition kennt gegenüber Wasserschleben zwei weitere Handschriften der genuinen Version: A und L,

sowie drei Handschriften der Versio interpolata: D, S1 und S2, die Wasserschleben noch unbekannt waren.

Außerdem wurde—wie gesagt—eine Handschrift aus der Rezeption berücksichtigt: Handschrift K.

Wasserschleben hatte in seiner Ausgabe eine Mischung der Textversionen von T und den älteren Ausgaben geboten. Auch seine Varianten folgten keiner eindeutigen Linie.

In der neuen Ausgabe habe ich versucht, die beiden Versionen des Sendhandbuchs auch äußerlich erkennbar zu machen. Daher wurden solche Kapitel, die in der interpolierten Version umgestellt wurden und daher nur in der genuinen Version an einer bestimmten Stelle stehen, an diesen Stellen linksbündig mit Lücke auf der rechten Seite der jeweiligen Textseite dargestellt.

Dagegen sind die Kapitel, die nur in der umgestellten Version an einer bestimmten Stelle des Textes stehen, rechtsbündig mit Lücke auf der linken Seite dargestellt.

Auf diese Weise kann die unterschiedliche Abfolge der Kapitel in den beiden Versionen, die bei Wasserschleben nur durch eine am Rand eingetragenen Kapitelnummer erkennbar war, hoffentlich leichter nachvollzogen werden.

Einen Versuch, zwei Versionen einer Sammlung im Druck zu simulieren, hat auch Roy Flechner bei seiner Ausgabe der Coll. Hibernensis gemacht. Er hat dabei unterschiedliche Drucktypen benutzt. Es ist allerdings für den Benutzer nicht leicht, bei einer raschen Durchsicht das Druckbild genau zu unterscheiden.

Ich hoffe sehr, dass das Druckbild meiner Edition die beiden Versionen des Sendhandbuchs deutlich erkennen lässt.

Zum Text:

Textversion: im Obertext steht meist die Version der Handschriften AGLT, auch dann, wenn die Vorlage einen anderen Wortlaut hat. Wasserschleben war öfter der Textversion der Vorlage gefolgt, auch wenn die Handschriften des Sendhandbuchs übereinstimmend einen anderen Text bieten.

Im Zweifel folgt unser Text den Handschriften LT, die an vielen Stellen einen identischen Text haben.

Es ist aber nicht sicher, ob diese Handschriften in jedem Fall den originalen Wortlaut Reginos bewahrt haben, denn öfter stimmen die Handschriften A und G mit der Vorlage und auch mit dem Text der jüngeren Version überein; in solchen Fällen könnten also eher AG als LT den ursprünglichen Text bewahrt haben.

Die Orthographie in meiner Edition richtet sich (meist) nach der Handschrift T, die wahrscheinlich von Reginos Urexemplar

abhängt; an manchen Stellen folgt sie der Handschrift L, die eng mit T verwandt ist.

Besonderheiten weist die Handschrift T bei den Inskriptionen auf. Diese sind nämlich in T immer wieder unvollständig, weil die Kapitelnummer der Vorlage fehlt, die aber in anderen Handschriften durchaus vorhanden (und auch richtig) ist. Das dürfte doch bedeuten, dass diese Kap.Nr. in der ursprünglichen Fassung vorhanden gewesen sein muss.

T kann also nicht die Stammmutter aller übrigen Handschriften der genuinen Version gewesen sein.

Weitere Besonderheiten der neuen Edition:
Es konnten einige bisher nicht bekannte Vorlagen Reginos bestimmt werden.

Erwähnenswert ist hier vor allem die Sammlung des Cresconius, die 1992 durch Klaus Zechiel-Eckes kritisch ediert wurde. 40 Kapitel hat Regino dieser Sammlung entnommen, die an 10 Stellen des Sendhandbuchs eingeschoben wurden. Es sind jeweils zwischen zwei und acht aufeinander folgende Kapitel.

Die meisten Kapitel, die bei Regino aus den falschen Dekretalen Pseudoisidors stammen, gehen wahrscheinlich auf eine Kurzform dieser Dekretalen in der Sammlung des sog. Ps.-Remedius zurück. Dafür sprechen vor allem die Rubriken.

Die Vorlagen der einzelnen Kapitel wurden genau (möglichst bis in die Handschriften hinein) untersucht.

Das war möglich, weil für wichtige Vorlagen Reginos jetzt (anders als noch 1840!) neue kritische Editionen vorliegen. Das gilt vor allem für die karolingischen Konzilien, und für die Kapitulariensammlung des Ansegis. Auch für den Konzilsteil der Collectio Hispana ist die Neuedition jetzt abgeschlossen und konnte benutzt werden. Leider liegen die Texte der von Regino herangezogenen Bußbücher (besonders des sog. Doppelpaenitentiale Ps.-Beda-Egbert) noch immer nicht in einer kritischen Edition vor. Daher wurde die Handschrift Köln 118 als Ersatz herangezogen.

Die Varianten der Vorlagen wurden also verzeichnet, wenn auch nicht in einem eigenen Apparat der Vorlagen.

Auch Wasserschleben hatte zwar schon an manchen Stellen die Varianten von Reginos Vorlagen genannt, jedoch ohne konsequent zu sein. In seinen Anmerkungen ist oft nicht ohne weiteres deutlich erkennbar, ob es sich bei seiner Angabe um die Variante einer Handschrift des Sendhandbuchs, um eine Vorlage oder um die Rezeption handelt.

Erst jetzt kann nachvollzogen werden, wie Regino seine Vorlagen behandelt hat; ob er sich eng an den Text der Vorlage gehalten hat oder ob er recht frei verfahren ist.

Von Interesse war es auch, Reginos Arbeitsweise in der Edition erkennbar zu machen, vor allem, ob er seine Vorlagen unverändert übernommen oder mehr oder weniger stark redigiert hat. Die Intensität der Bearbeitung konnte nur dadurch dargestellt werden, dass die übernommenen Sätze und Satzteile kursiv, die veränderten Texte aber recte gedruckt wurden. Außerdem wurde in den Anmerkungen am Beginn des jeweiligen Kapitels vermerkt, wenn ein Kapitel etwa „stark redigiert“ ist.

Zu beachten war auch, wenn Regino den von ihm rezipierten Texten mehrere Wörter oder auch ganze Sätze hinzufügt (dazu gibt es eine Tabelle auf S.XXVIIf. der Einleitung).

Wie bereits Wasserschleben erkannt hatte, gibt es im Sendhandbuch nicht wenige sog. Capita incerta, d.h. Kapitel, deren Vorlage nicht identifiziert werden konnte. Auf S.XXVIf. sind 92 derartige Kapitel zusammengestellt. Ihr Text ist jeweils recte gedruckt.

Ein beträchtlicher Teil des Textes erscheint also in der neuen Edition kursiv; vielleicht hat das zur Folge, dass der Text nicht so gut lesbar ist, aber es lässt sich eben jetzt auf den ersten Blick erkennen, wo Regino einer bekannten Vorlage folgt und wo er autark formuliert.

Zur Übersetzung nur eine kurze Bemerkung:

Als Vorarbeit wurde meine Übersetzung des Sendhandbuchs in der Freiherr-vom-Stein Gedächtnisausgabe (Darmstadt 2004) herangezogen, die aber das Werk stark gekürzt hatte. Bis dahin

gab es ja noch gar keine deutschen Übersetzungen von kirchenrechtlichen Sammlungen.

Dieser Übersetzung sind insgesamt 746 Sachanmer-kungen beigefügt (361 + 305 + 80).

Zu den Appendices:

Angehängt an den eigentlichen Text des Sendhandbuchs enthalten alle drei alten Editionen auch sog. Appendices.

Bei Hildebrand sind es zwei Appendices, wobei nach dem Ende von c. 2.456 (454), das ist bei Hild. c. 2.447, die Kapitel der App. I von Wasserschleben folgen, die als c. 448 bis c. 498 gezählt sind.

Dann folgt die App. III (Wasserschleben) und danach erst App. II (Wasserschleben)

Bei Baluze sieht es folgendermaßen aus:

App. 1 bei Baluze ist App. I (Wasserschleben), c. 1-28; es folgt App. II (Wasserschleben), c. 1-37 mit weiterlaufender Nummerierung.

App. 2 bei Baluze ist App. I. (Wasserschleben), cc. 29-58.

App. III (Wasserschleben) fehlt bei Baluze überhaupt.

Bei Wasserschleben sind es drei Kapitelfolgen, die er als App. I (mit 58 Kapiteln), App. II (37 Kapitel) und App. III (74 Kapitel) bezeichnet.

In der neuen Edition werden die Appendices entsprechend der Überliefung anders dargeboten und bezeichnet:

App. A = App. I (Wasserschleben), c. 1-20, überliefert in den Handschriften ALT sowie allen Handschriften der Versio int.

App. B = App. I, c. 21-26, vorhanden in den Handschriften AT und allen Handschriften der Versio int.

App. C = App. I, c. 27-28 vorhanden in allen Handschriften der Versio int.

App. D = App. I, c. 29-36 nur vorhanden in den Handschriften D und W3

App. E = App. I, c. 37-58 nur in W3 überliefert

App. F = 6 Zusatzkapitel aus Handschrift D

App. G = 16 Kapitel aus den Handschriften S1 und S2.

App. H = App. II (Wasserschleben) aus Handschriften PW1W2

App. K = App. III (Wasserschleben) aus Handschrift W1

Die Appendix A dürfte noch von Regino selbst oder aus seiner Werkstatt stammen, denn es wurden dieselben Vorlagen verwendet.

Ab App. B, c.1 findet ein Wechsel der Vorlagen statt.

Am Ende seiner Edition bietet Wasserschleben noch folgende Beigaben:

Eine sog. Tabula synoptica (S. 497—516): Das ist eine tabellarische Darstellung für die einzelnen Kapitel des Sendhandbuchs, in der die möglichen Vorlagen (Halitgar, Dacheriana, Hraban, Quadr. und Ans. ded.) bzw. die mögliche Rezeption (Burch., Ivo, Decr., Ivo, Pan., Anselm von Lucca und Gratian) verzeichnet sind.

Ein Quellenverzeichnis (S. 517—526)

Die älteren Editionen von Hild. und von Baluze bieten nur eine Abfolge der Rubriken (Hild.) bzw. eine Art Sachindex (Wasserschleben), der 27 Seiten umfasst.

Unsere Edition enthält:

1. Ein Quellenverzeichnis (S. 805-819)
2. Ein Initienverzeichnis (S. 820-846)
3. Ein Sachregister (in deutscher Sprache) (S. 847-862)

Auf ein Register der lateinischen Wörter und Begriffe wurde verzichtet, da schon bald auch diese Edition in den dMGH zugänglich und damit vollkommen durchsuchbar gemacht werden wird.

Wie steht es mit den Registern in den älteren kritischen Ausgaben von Kanonessammlungen des früheren Mittelalters?

1. Bonizo, Liber de vita christiana von Ernst Perels (1930)
2. 74-Titel-Sammlung von John Gilchrist (1973)
3. Collectio Vetus Gallica von Hubert Mordek (1975)
4. Collectio des Pseudo-Remedius von Herwig John (1976)
5. Cresconius, Concordia Canonum von Klaus Zechiel-Eckes (1992) und schließlich
6. Collectio canonum Hibernensis von Roy Flechner (2019)

Ein Quellenverzeichnis haben folgende ältere Editionen:
Bonizo
74-T.-S.
Vetus Gallica
Cresconius
Hibernensis

Ein Initienverzeichnis ist vorhanden bei:
Bonizo
74-T.-S.
Vetus Gallica
Ps.-Remedius
Cresconius
fehlt bei Hibernensis

Namen und Sachen

Ein Register der Namen und Sachen enthält die Edition des Liber de vita christiana Bonizos von Sutri.

Ein solches Register fehlt bei der 74-T.-S., bei Ps.-Remedius und beim Cresconius

Die kirchenrechtlichen Themen der Collectio Vetus Gallica werden im allgemeinen „Personen-, Orts- und Sachregister“ des gesamten Bandes behandelt

In der Edition der Hibernensis sind die Einträge auf die Übersetzung bezogen (die in einem eigenen Band erschienen ist).

Eine Kanoneskonkordanz (wie Wasserschleben) enthält auch die Bonizo-Edition. Aus unserer Editon sollte für die frühmittelalterliche Kanonistik vor allem gefolgert werden,

dass eine ganze Reihe von Sammlungen aus dem frühen Mittelalter dringend in einer kritischen Edition vorgelegt werden müssten.

Es sind vor allem die folgenden:

1. Sammlungen der historischen Ordnung
a. Collectio Hispana, Dekretalenteil
b. Collectio Dionysiana
2. Bußbücher

a. Doppelpaenitentiale Beda-Egbert
b. die Bußbücher Halitgars und des Hrabanus Maurus
3. Systematisch geordnete Kanonessammlungen:
a. Dacheriana
b. Quadripartitus
c. Collectio Anselmo dedicata
d. Burchard von Worms, Dekret

Handschriften von Reginos Sendhandbuch: Genuine Version

A Arras, Bibliothèque Municipale, 723 (675)
G Gotha, Forschungs- und Landesbibliothek, Memb. II 131
L Luxembourg, Bibliothèque Nationale, Ms. 29 (102)
T Trier, Stadtbibliothek, Ms. 927 (1882)

Interpolierte (umgestellte) Version

D Düsseldorf, Universitätsbibliothek, E. 3
P Paris, Bibliothèque nationale Française, Ms. lat. 17527
S_1 Stuttgart, Württembergische Landesbibliothek, HB VI 114
S_2 Stuttgart, Württembergische Landesbibliothek, HB VI 108
W_1 Wien, Österreichische Nationalbibliothek, lat. 694 (theol. 79)
W_2 Wolfenbüttel, Herzog-August-Bibliothek, Aug. 83.21
W_3 Wolfenbüttel, Herzog-August-Bibliothek, Guelf. 32 Helmst.

Früheste Rezeption des Sendhandbuchs

K Köln, Dombibliothek, 124

München.

Camphuijsen, Frans. *Scripting Justice in Late Medieval Europe: Legal Practice and Communication in the Law Courts of Utrecht, York and Paris*. Amsterdam: Amsterdam University Press, 2022. Pp. 302. €124.00. ISBN: 978-94-6372-347-4 (hardback), E-ISBN: 978-90-4855-549-9 (available by subscription through Project Muse).

Charles Donahue, Jr.

Since the title of this book is a bit opaque, it is perhaps best to begin with what it is not. It is not a study of law and society as that field is traditionally understood, though the book has reference to a number of theoretical works in that field. There is little substantive law in the book, and the societies that produced the law and within which it operated are not subjected to detailed analysis. The book is, rather, about courts, the institutions in which the law encountered the society and the society the law. As the title indicates, the focus is on three courts: that of the city council of Utrecht, the consistory court of the archbishop of York, and French king's *parlement* of Paris. The emphasis is on the ways in which those courts communicated with the society within which they were embedded, and the ways in which the society communicated with the courts.

It took this reader until the concluding chapter before the fog that normally clouds his mind cleared, and he figured out what 'scripting' in the title means. We are to think of the script of a film or a television production. The late medieval courts studied here created a script. It had a setting, the court room; directions for physical acts that the actors were supposed to perform, and a script in the narrower sense, lines that the actors were supposed to recite. Those lines, however, called for a considerable amount of improvisation, particularly by the litigants and their witnesses, people who did not normally have a role to play in the court.

The metaphor is quite apt. It does a better job, in my view, of explaining what this book is about than does some of the highly abstract social theory that the book sometimes brings to bear on its topic. That theory features prominently in the introduction to the book. The readers of the *Bulletin* might be advised to begin their reading with the first numbered chapter which gives relatively brief sketches of the three courts on which the book is largely based.

These sketches in chapter 1 are useful. That on the council of Utrecht gathers together material that is, so far as I am aware, nowhere else available in English. That on the *parlement* of Paris combines recent work with much older work (all in French) to give as clear a picture as is now possible of an institution that has left a very large collection of records that are quite difficult to control. The general sketch of the consistory court of York is somewhat disappointing. It was probably a mistake to rely much on K. F. Burns's unpublished account

of the medieval court.[1] It would have been better to rely on the Report of the Working Group on Church Court Records.[2] Chapter 2 is the main one that focuses on the communicative nature of the place where the court normally held its sessions (though there are some anticipations of this theme in chapter 1). At the most general level, there is nothing surprising about the facts. The *parlement* of Paris held its sessions in the *Palais de la Cité*, the consistory of York in the Minster (cathedral), the council of Utrecht the *Schoonhuis* (the guild-hall), with some activities taking place in front of the *Buurkerk* (the central parish church, not the cathedral), both of which were quite close to the *Plaets* (the central market square). The *Palais de la Cité* and York Minster both underwent considerable change, the *Palais* in the 14th century and the Minster in both the 14th and 15th centuries. In the case of the *Palais*, we can trace the separation of the various functions of the *parlement* from the other uses of this complex of buildings (nicely shown in plans). In the case of the Minster, the elaboration of the complex clearly served to separate the clergy associated with it from the town. It is less clear, because less well documented, whether the north transept of the Minster was the regular place of sessions of the consistory throughout the period.

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[1] K. F. Burns, 'The Administrative System of the Ecclesiastical Courts in the Diocese and Province of York: Part I: The Medieval Courts', unpublished manuscript (1962). Burns had a tendency to read the later arrangements of jurisdiction back into the medieval period and jurisdictional arrangements from the later 15th century back into the 14th. That some 14th-century archbishops heard *ex officio* cases arising out of visitation and cases involving criminous clerks in his audience court seems clear from the episcopal registers. That the archdeacons and holders of peculiar jurisdictions, like the dean and chapter of York, heard routine *ex officio* cases, principally sexual offenses, is also clear. There is little evidence that the archbishop's consistory regularly heard cases *ex officio mero* in the 14th century. BIA, CP.E.10 (?1313-1314 or 1320) may be an exception (at issue seem to be the finances of the sacrist of a chapel), but that case may have been by delegation from the archbishop; it certainly seems to have ended up before the archbishop. The other *ex officio* cases in the 14th-century cause papers are either appeals from *ex officio* proceedings in the lower court (CP.E. 11 [1318], CP.E 82/8d/2 [1339], CP.E. 48 [1340–1342], CP.E. 225 [1397]), or proceedings in enforcement of the court's instance jurisdiction (CP.E. 69 [1351], CP.E. 229 [1397]), or *ex officio promoto* (CP.E. 73 [1351], CP.E. 51 [1369]). I have examined the fragmentary consistory court act books from the 14th century in the York Minster Library. I certainly could have missed something, but the only *ex officio* cases that I found look like a record from the dean and chapter's court in a book that contains matter from both courts.

[2] *The Records of the Medieval Ecclesiastical Courts. Part II: England*, Charles Donahue, ed. (Comparative Studies in Continental and Anglo-American Legal History 7; Berlin 1994) 109–151.

Chapter 3 concerns legal rituals, by far the most dramatic of which is the ritual of forgiveness at Utrecht, which bears a distinct resemblance to the public penances imposed by the church courts in some places. What we have for the consistory of York is less dramatic, but it does seem that the court's sentences were read aloud in public. What ordinary members of the public made of them is another story; they were written in a fairly complicated Latin, but perhaps that is not the point. That a sentence was being read would probably have been clear to someone who knew no Latin at all. In the case of the *parlement* the principal ritual mentioned is the elaborate rules that governed how the parties were to come to sessions of the court in which they were involved.

Chapter 4 concerns the records themselves and begins with the now-standard criticism of Emanuel Le Roy Ladurie's *Montaillou* and its assertion that in the depositions of witnesses we can hear the voice of the medieval peasant 'without an intermediary'.[3] This criticism is picked up later in the chapter with a discussion of the depositions in the consistory of York that emphasizes, quite rightly, the number of filters that lie between what the witness said and what appears on the parchment. Before it reaches that, however, the chapter demonstrates with graphs and statistics the great increase in documentation in all three courts from the 13th into the 16th century. This is followed by a classification of types of documents: descriptive, prescriptive, and performative.[4] The chapter then tackles the problem of translation writ large, not only the obvious translation problem of turning what a witness in the consistory of York said in Middle English to the stylized Latin of the deposition, but also the more subtle kind of translation that occurred when, for example, a man accused by the council of Utrecht agreed to beg forgiveness; the performance of this act and its consequences could vary considerably (see Appendix 1). Finally, the chapter deals with the various ways in which the three courts published their documents.

Chapter 5 attempts to tie all these disparate elements together by employing a division between the producers and consumers of justice and then focusing on the producers both as individuals and as an institution. The emphasis is on language, not only the obvious difference in language where the producers use Latin and the consumers use the vernacular, but also on how the language of the consumers, which may not be the language that they used in ordinary discourse, got translated into the specialized language that the producers used among themselves and then got translated back again as the

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[3] Emmanuel Le Roy Ladurie, *Montaillou, village occitan de 1294 à 1324* (Paris 1975), trans. Barbara Bray as *Montaillou: Promised Land of Error* (New York 1978).

[4] It might have helped in illustrating the records of the *parlement* on the civil side if the book had made use of *Les arrêts et jugés du Parlement de Paris sur appels flamands: conservés dans les registres du Parlement*, ed. R. C. van Caenegem, Serge Dauchy, and others (Recueil de l'ancienne jurisprudence de la Belgique, sér. 1; Bruxelles 1966).

producers communicated back to the consumers. In this process, the proctors and advocates, in those courts that had them (the consistory and the *parlement*) are rightly seen as key. Translation is less obvious in the council of Utrecht, but it can be seen where the court uses witnesses or in the few cases where the council worked cooperatively with the local ecclesiastical courts.

The conclusion summarizes what has already been said and ties it into the theory outlined in the introduction.

There is much about this book to like. The choice of these three courts was apt, even brilliant. Traditional legal history would not expect to find many elements of commonality among an archiepiscopal court in the north of England, an urban court in the Burgundian Netherlands, and the central royal court of the kingdom France, even if we are dealing with roughly the same time period. The traditional legal historian would probably classify the substantive law applied in the court of the council of Utrecht and in the *parlement* as 'customary' and that applied in the consistory of York as 'canon'. The traditional legal historian would probably classify the adjectival law applied in the consistory of York and in the *parlement* as variations on 'Romano-canonical procedure', and that applied in the court of the council of Utrecht as 'customary'. If the traditional legal historian undertook to make this comparison—which few would dare to do granted the command of languages and of archives that would be necessary to do it—the result would probably be a study of differences rather than of similarities.

Yet, as this book well shows, the similarities are there. They can be found in symbolic meaning of the space chosen for regular sessions of the courts, in the use of ritual in the courts' judgments and in their procedures, and in the constant shifting and translation from one form of discourse to another.

How are we to account for these similarities? Here the book frequently turns to two synchronic explanations. First, all of these courts began the fourteenth century as relatively new institutions in the sense that they were more independent than they had been in the past from the constituting authority. Second, they were in the case of the consistory and the *parlement*, and perhaps in the case of the council, in competition with other judicial institutions and in all three cases in competition with other ways of resolving disputes. The similarities, then, can be explained by the need of these courts to establish themselves as institutions in the minds of a population that they in some sense served but also over whom they exercised considerable power.

If, however, we turn to the diachronic, these explanations have considerably less power. In the Western world today, the state has an uncontested monopoly of the legitimate use of force, and it has delegated a piece of that monopoly to state-sponsored and state-staffed courts. These courts still, however, hold their sessions in spaces chosen for their symbolic meaning; they still employ ritual in their judgments and procedures, and they, and those who participate in their activities, constantly shift and translate from one form of discourse to another.

Those facts would suggest that the similarities that we find in the three courts with which this book deals are to be found in the characteristics that modern Western courts, particularly those in countries that can broadly be characterized as democracies, share with those of the later Middle Ages: a commitment not to proceed, except in extraordinary circumstances, in the absence of the parties, a commitment to allowing the parties to be heard, and a commitment to deciding cases on the basis of applying 'the law' to 'the facts', both of which are to be determined by methods deemed to be 'rational', which frequently call, on the facts side, for lay witnesses. The facts side, and even the judgment side, of the process today frequently calls for the participation of non-professionals or semi-professionals, the jury in Anglo-American system, the assessors in the Continental European system. Hence, the presence in modern Western courts of the elements of symbolic spaces, ritual, and constant shifting and translation of modes of discourse is not simply atavistic, it is functional.

The explanation that I just offered for the presence of these common elements in three widely divergent courts in the later Middle Ages is not the one that is offered in the book. The book, rather, turns to highly abstract social theory for its explanations. In some cases the theory can be made to fit; in some cases it may even be helpful. For example, John Austin's notion of performative speech does help to separate out certain kinds of court records from other kinds that may better be characterized as descriptive or prescriptive. As a general matter, however, this reader found much of the social theory, particularly that of Pierre Bourdieu, as unnecessarily complicated if one was seeking to explain the phenomena studied. That, however, may be a matter of taste.

Let me close with a couple of kudos for the university of Amsterdam Press and the author. The book is handsomely illustrated: 14 figures, including an image from a manuscript that may provide a clue as to how the *parlement* of Paris was set up, 6 maps, 5 plans, and 2 timelines, all of which are helpful, not merely decorative. (Some of the images of the documents are hard to read. With access to the copy on Project Muse, they can be downloaded and manipulated to make them more legible.) I suspect that none of those who proofread this book is a native speaker of English. There are, however, virtually no typographical errors. Would that American university presses could do so well!

Harvard University.

Kuehn, Thomas. *Patrimony and Law in Renaissance Italy* (Cambridge: Cambridge University Press, 2022). Ppp. Vi, 260. $99.00. ISBN: 978-1-366-51353-8.

Orazio Condorelli

Thomas Kuehn è un riconosciuto specialista della storia della famiglia e della società italiana tardomedievale e rinascimentale. Questo libro è una ulteriore tessera che si aggiunge al vasto mosaico che le opere dell'Autore hanno disegnato in più di quattro decenni di ricerche. Anche questo è un libro della famiglia, qui studiata attraverso lo 'specchio' del patrimonio, che caratterizza profondamente i concreti assetti sociali e la stessa comprensione della comunità familiare.

Questa prospettiva di indagine non è una astrazione storiografica, ma si basa saldamente sulle fonti storiche. L'Introduzione (1-18) prende le mosse dalla ben nota equazione enunciata da Bartolo da Sassoferrato—'familia accipitur in iure pro substantia' (*Commentaria* in D.28.2.11, l. *In suis*)—, e recepita da Alberico da Rosciate, il quale alla *substantia* accosta *memoria* e *dignitas* quali elementi caratterizzanti la famiglia. La centralità della *substantia* (concetto non meglio precisato da Bartolo in quella sede) nella definizione della famiglia è alla base di un processo di astrazione per il quale la *familia* si caratterizza come 'entity or substance enduring in time', assume un 'corporate character', si presenta come un'entità nella quale i 'corporate interests were thus perpetuated through, but also conflicted with, individual prerogatives' (2-3). Nell'interpretazione di questi fenomeni Kuehn adotta il modello di 'sharing economy', che in qualche modo rispecchia l'espressione medievale *stare ad unum panem et vinum*, traducibile come 'household mode of living'. Questo sistema era ovviamente ben differente dalla *societas*, in cui la distribuzione dei profitti e delle perdite avviene sulla base di una formula contrattuale (7). Nell'Introduzione l'Autore inquadra il percorso delle sue ricerche—che vedono Firenze come principale (ma non esclusivo) 'entry point' delle indagini—, e offre un primo quadro delle fonti utilizzate nella ricerca: non solo testi strettamente giuridici—con una particolare attenzione per i *consilia* visti come 'law in action' (14) —, ma anche libri di ricordi familiari e opere della trattatistica morale e familiare di stampo umanistico. Un posto di privilegio è riservato ai *Libri della famiglia* di Leon Battista Alberti, 'a singular monument to the care and attention, if not obsession, for family and domestic life at that time in Florence' (13). Nell'Introduzione Kuehn offre al lettore un primo assaggio di come la materia fosse estremamente difficile e complessa anche per i giuristi dell'età considerata. I problemi che si intrecciano nella definizione del *patrimonium* tra *ius commune* e *ius proprium* sono qui presentati attraverso un *consilium* di Mariano Sozzini jr, risalente agli anni 1517-1523. Il *consilium* riguarda un caso emergente dall'interpretazione dello statuto di Castelnuovo di Garfagnana, alla rubrica *De rebus communibus nisi certo modo non alienandis*

(15-18). Il caso concreto concerneva il dubbio se alcuni beni fossero soggetti al diritto di retratto familiare disciplinato dallo statuto, le cui norme però richiedevano complicati processi di interpretazione in cui i termini di *ius proprium* dovevano essere intepretati attraverso le categorie del *ius commune*: come interpretare espressioni come *res patrimonialis*, *consortes de patrimonio*, *linea patrimonialis*, *linea paterna* etc.? Se, in linea di principio, la norma statutaria era di stretta interpretazione, il ricorso ai concetti e alle categorie del *ius commune* ampliava necessariamente gli orizzonti interpretativi, senza peraltro condurre a conclusioni di assoluta certezza.

Nel secondo capitolo l'Autore valorizza il pensiero di Bartolo da Sassoferrato e la sua centralità nella formazione della concezione giuridica della famiglia medievale ('Bartolus and Family in Law', 19-41). Nel discorso giuridico la dimensione sentimentale e affettiva della famiglia medievale è sostanzialmente trascurata rispetto all'attenzione rivolta verso la dimensione patrimoniale, dal momento che "inheritance of family property was the social and economic motor of late medieval Italy" (19). *Familia* ("household") significava persone, beni (anche gli schiavi lo erano), relazioni parentali che il diritto giustinianeo definiva con le categorie di *agnatio* e *cognatio*. Il diritto canonico poneva in primo piano l'idea della famiglia formata in virtù del matrimonio, sulla base della libertà del consenso e a prescindere da ogni possibile fattuale condizionamento familiare. L'importanza dei legami di sangue e affinità è testimoniata dagli *arbores consanguinitatis et affinitatis* che costellano i libri medievali di diritto. In tale contesto, Bartolo appare una 'crucial figure in adapting medieval senses of family, property ownership, and so much more, to the realities of life in Italian communes' (21). L'equazione bartoliana tra *familia* e *substantia* ebbe una grande risonanza nella giurisprudenza medievale e della prima età moderna. Il passo del Digesto, in relazione al quale Bartolo aveva pronunciato questa lapidaria affermazione, configurava un *quasi dominium* dei figli sui beni paterni, affermando che i figli fossero *quodammodo domini* delle sostanze paterne anche durante la vita del padre (D.28.2.11). Le discussioni dei giuristi e le norme di *ius proprium* (consuetudini e statuti cittadini) testimoniano gli sforzi di bilanciare diverse esigenze: da un lato quella limitare la responsabilità del patrimonio familiare per gli atti illeciti o criminali dei figli o del padre, dall'altra l'esigenza di creare un adeguato spazio di autonomia ai *filii familias* nella vita politica, professionale, economica. La condivisione dei beni familiari durante la vita del *paterfamilias* coesisteva con la concentrazione *de iure* della proprietà nelle mani del padre. Secondo Kuehn, '*substantia* was a term suited to encompassing that paradox... *Substantia* held people together, though not necessarily strongly, it was malleable and even perishable' (26). L'Autore adduce interessanti riferimenti alla lingua volgare fiorentina: nel linguaggio del ceto mercantile sostanza (*sustanza*) era il capitale destinato agli affari, ma anche ciò che dal padre è stato trasmesso al figlio (30). L'uso del termine *substantia*, in definitiva, permetteva a Bartolo di collegare il mondo della famiglia tardomedievale e dei diritti particolari (*iura propria*) con le categorie del *ius commune* sul quale i

giuristi svolgevano la propria formazione scientifica (31). Secondo Kuehn, 'by...reifying the family as *substantia*, Bartolus "sacralized" it as an enduring institutional composite of property, as a corporate entity', un'entità analoga alla chiese, ai comuni e ad altre corporazioni e associazioni (25). In questo quadro l'Autore mette in rilievo la centralità della successione nel patrimonio familiare e degli strumenti atti a garantire la 'continuity and sharing of the underlying substance' (29). Il fedecommesso, a cui è dedicato un successivo capitolo, fu uno degli strumenti fondamentali per produrre e garantire questi effetti nel corso delle generazioni. Nella parte finale del capitolo Kuehn esamina gli effetti di queste dottrine in casi, tramandati dai *consilia*, emergenti dalla legislazione statutaria o da volontà testamentarie (esclusione della figlia dotata, responsabilità paterna per crimini del figlio, diritti di un figlio illegittimo) (34-38). La conclusione è che il termine *substantia*, buono sul piano accademico, 'had less utility in litigation' anche per colui che lo aveva utilizzato 'creatively' nei suoi *commentaria* (39).

Il quarto capitolo si concentra sulle relazioni tra padre e figli ('The Divisible Patrimony: Legal Property Relations of Fathers and Sons in Renaissance Florence', 42-72). L'utilizzazione di fonti non strettamente giuridiche—in particolare la trattatistica sulla famiglia (Leon Battista Alberti, Matteo Palmieri) e i libri di *ricordanze*—offre una interessante prospettiva complementare. Questa letteratura conferma l'immagine di una famiglia centrata sulla dimensione patrimoniale e concepita come una 'repubblica' o un 'corpo', in cui il ruolo del capo era quello di garantire l'unità e la concordia. Marsilio Ficino (1433-1499) parlava del padre come un 'secondo Dio': il suo compito è amare i figli e provvedere a loro sull'esempio del Padre celeste (45). Ciò premesso, quanto più la famiglia era concepita come una 'enduring and sharing entity', tanto più difficile era realizzare questa idea (44). Quali erano gli strumenti giuridici per operare una razionale gestione del patrimonio? Quali gli strumenti per soddisfare le giuste esigenze dei figli o per salvaguardare la famiglia dalle imprudenti decisioni dei figli e del padre? Qui come nel resto del libro, l'Autore non rinuncia a offrire un quadro istituzionale dei rapporti patrimoniali intrafamiliari, con riferimenti alla legislazione statutaria fiorentina e con l'ausilio di informazioni che provengono dal catasto fiorentino. Ad illustrazione della problematica trattata, l'Autore presenta una serie di casi esemplari, mettendo a frutto la letteratura consiliare. Un caso tipico, dibattuto da molti giuristi, era quello del figlio che lasciava la casa paterna 'discurrendo per mundum' e acquisiva proventi con il proprio lavoro e la propria operosità. Qual era la natura di questi beni? Erano qualificabili come *peculium profecticium* (nel *dominium* del padre) o *adventicium* (sul quale, di regola, il figlio aveva la nuda proprietà e il padre l'usufrutto)? Come distinguere se il guadagno risultava dalla combinazione del capitale paterno e della *industria* del figlio? Il fratello rimasto nella casa paterna aveva diritti su tali beni? Si poteva anche concludere, come in un caso trattato da Francesco di Baldo degli Ubaldi († 1426), che i guadagni erano frutto esclusivo dell'operosità del figlio industrioso (61-62). Sul tema le opinioni maturate nella tradizione scolastica

erano insufficienti a dare risposta certa, poiché, come leggiamo in un *consilium* di Angelo degli Ubaldi, la distinzione tra *peculium adventitium* e *profectitium* doveva essere determinata secondo la *consuetudo regionis* (62-63). In ogni caso, come affermava Bartolomeo Sozzini, era necessario bilanciare le ragioni della *paterna substantia* con la *ratio industriae filii* (68).

Le relazioni patrimoniali tra coniugi sono oggetto del quarto capitolo ('Property of Spouses in Law in Renaissance Florence', 73-99). A giudizio di Kuehn, la documentazione rivela che a Firenze le donne, mogli e figlie, non erano così subordinate agli uomini come la storiografia ha ritenuto, soprattutto in confronto ad altre città come Venezia. L'immagine, trasmessa da Leon Battista Alberti, di un *paterfamilias* come 'sole manager of property' (74) appare più un modello o una aspirazione che una realtà assolutamente affermata. Vi erano anche donne (mogli e soprattutto vedove) impegnate nei mercati urbani e rurali. La dote era il principale elemento che contribuiva a istituire una 'uneasy, ambiguous relationship between the separate piece of a family's patrimony and the drive or need to see the patrimonium as a shared unit subject to singular, male control' (77). Vi erano beni *in dominio mariti* (*res dotales*), beni *in dominio uxoris* ma nella *administratio* del marito (*res paraphernales*), beni in proprietà e amministrazione della moglie (*res extra dotem*). I temi dell'amministrazione e dell'alienazione dei beni dotali sono fra i problemi più spinosi di cui si occupò la scienza giuridica medievale. Le fonti rivelano una costante tensione tra l'esigenza del marito di avere mano libera nell'amministrazione dei beni dotali e, quando possibile, anche nella loro alienazione, e dall'altra l'esigenza delle mogli e delle loro famiglie di origine di difendere i beni conferiti *ad sustinenda onera matrimonii*. I problemi sorgevano più frequentemente *soluto matrimonio*. Kuehn si addentra nell'analisi della legislazione statutaria fiorentina (80-87), che mostra tutte le difficoltà del bilanciamento tra la tendenza a concentrare nelle mani del marito il controllo dei beni della moglie, e l'esigenza di garantire opportuni rimedi a protezione delle doti e dei beni acquisiti dalle mogli durante il matrimonio. Anche fonti come i libri di *ricordanze* manifestano con chiarezza 'the distinctness of spousal patrimonies and the blurred edges around them' (87). I problemi concreti sono illustrati attraverso una galleria di casi, tratti da materiali d'archivio e dai *consilia* dei giuristi, dai quali sorgevano 'differentiae et scandala' (90 nota 77). Le liti potevano nascere durante il matrimonio, quando le mogli agivano per difendere la dote di fronte ai tentativi dei mariti insolventi di usarle per pagare i propri debiti. In altri casi i conflitti sorgevano *soluto matrimonio*, quando la vedova tentava di recuperare i beni necessari al suo sostentamento. Talvola i diritti delle mogli potevano servire come copertura (anche fraudolenta) nel tentativo di sottrarre alcuni cespiti patrimoniali alle pretese dei creditori del marito (91-93).

La molteplicità degli incroci nelle relazioni patrimoniali intrafamiliari si mostra ulteriormente nella situazione trattata nel quinto capitolo ('*Societas* and *Fraterna* of Brothers', 100-136). Leon Battista Alberti ammoniva i suoi lettori di fronte ai pericoli di frammentazione del patrimonio familiare, e invitava i

componenti della famiglia a mantenere 'un corpo bene unito' (100). Uno dei campi in cui la 'sharing domestic economy' si realizzava in modo più evidente era quella dei fratelli che risiedevano nella casa comune e condividevano i beni e i proventi delle attività economiche. La *fraterna* o la *societas omnium bonorum* erano mezzi per contrastare l'erosione della *substantia* familiare. Questo istituto dovette essere costruito dalla dottrina a partire dai pochi e frammentari riferimenti contenuti nel *ius commune*. Un primo tentativo si riscontra nella *Summula de fratribus insimul habitantibus* di Iacopo Baldovini, successivamente se ne occuparono Riccardo Malombra, Oldrado e Bartolo, il quale compose un trattato sulla *materia duorum fratrum simul habitantium*, che fu completato da Baldo degli Ubaldi. Kuehn esamina la legislazione statutaria, che cercava di rendere indolori, eque e rapide le divisioni, tipico atto che suscitava conflitti e rancori. Interessanti informazioni provengono anche dai documenti del catasto fiorentino, che contengono molti esempi di dichiarazioni fiscali congiunte di fratelli coabitanti (108-112). I problemi più scottanti riguardavano la responsabilità dei fratelli impegnati in affari commerciali (108-112). A Firenze la legislazione statutaria prevedeva una responsabilità solidale per i fratelli che abitavano nella medesima casa 'in comune' ed esercitavano la medesima arte o mercanzia: tali situazioni dovevano essere accertate "secundum publicam opinionem vicinorum", come leggiamo negli statuti del 1415 (110 nota 52). Scarsa utilizzazione ebbe lo strumento della responsabilità limitata introdotto su istanza della Mercanzia nel 1408. Un'altra possibilità era quella di costituire tra fratelli diverse *societates* commerciali per diversi scopi e diversi luoghi, come fecero i Medici: 'Bankruptcies and liabilities were thus spread across several entities and did not have a systemic, catastrophic impact on family and patrimony' (111). I casi esaminati riguardano all'ingrosso due grandi problemi: la divisione della proprietà tra i fratelli e le questioni di responsabilità nascenti dagli atti compiuti da un solo fratello (111-133). Al di là di pur possibili formalizzazioni giuridiche di tale tipo di società, i giuristi individuavano gli indici in forza dei quali poteva ritenersi sussistente una *omnium bonorum societas tacite contracta*: secondo Bartolomeo Sozzini (Cons. II.192), essa sussiste quando i *fratres* vivono *in communione* nella medesima casa, gestiscono i *negotia* a nome comune e promiscuamente, condividono i guadagni senza farne conto (*lucrorum ratio*), e questa situazione permanga *longo tempore* (120 nota 95).

La conservazione del patrimonio nel corso delle generazioni era un primario obiettivo scaturente dall'equazione bartoliana tra *familia* e *substantia*. A giudizio di Kuenh, la diffusione del fedecommesso fu uno dei più evidenti effetti dell'affermazione dell'insegnamento di Bartolo (11-12). Al tema è dedicato il sesto capitolo ('Fideicommissum and Law: Consilia of Bartolomeo Sozzini and Filippo Decio', 137-163). Il fedecommesso fu uno strumento fondamentale per impedire la frammentazione della *substantia*, il fulcro delle strategie successorie delle famiglie nobili. 'There was no more powerful and concise expression of a sense of patrimonial unity and sharing than an enduring fideicommissum' (137). Nella pratica medievale e moderna il fedecommesso

prevedeva l'obbligo per l'erede o legatario di trasmettere i beni a ulteriori successori nella famiglia attraverso un sistema di sostituzioni, insieme alla proibizione di alienare i beni *extra familiam*. Il fedecommesso si collegava frequentemente alla regola della primogenitura, ma non a Firenze, dove piuttosto vi era la tendenza a mantenere il patrimonio in comune lungo le generazioni. Nella costruzione giuridica del fedecommesso, i giuristi dovettero conciliare lo spirito dell'individualismo proprietario tipico del diritto civile con l'esigenza di stabilità e prosecuzione della *familia* attraverso la conservazione della sua *substantia*. Tra i giuristi che più contribuirono alla elaborazione scientifica del fedecommesso vi furono Bartolomeo Sozzini e Filippo Decio. I trattati giunsero tardivamente, il primo sembra essere quello di Marco Antonio Pellegrini (1595). L'esame di casi pratici tratti dagli archivi e dalla letteratura consiliare (143-160) presenta al lettore situazioni tremendamente complicate, per la cui comprensione è necessario un accesso diretto alle fonti. La complessità dei fedecommessi, e dei problemi emergenti dalle molteplici sostituzioni che essi prevedevano, era direttamente proporzionale all'interesse delle parti coinvolte di essere assistiti dai pareri di molti autorevoli giuristi. Su un caso esemplare, trattato alle pagine 151-153, si pronunciarono ben dodici consulenti: Mariano Sozzini, Ottone di Lapo Niccolini, Sallustio Buonguglielmi, Andrea Barbazza, Angelo Gambiglioni, Francesco Accolti, Tommaso Salvetti, Piero Ambrosini, Benedetto di Michele Accolti, Bernardo Buongirolami, Zanobi Guasconi, Giovan Battista Caccialupi. In casi di tale complessità non vi era garanzia di soluzioni certe. Giuristi come Sozzini e Decio cercavano di bilanciare l'esigenza di rispettare la volontà dei testatori di vedere proseguire lignaggio e patrimonio, con l'esigenza di permettere a ogni generazione di usare e gestire la proprietà. Il fedecommesso, comunque, si confermava strumento essenziale per una "largely aristocratic society that projected itself as based on an unchanging patrimony (161).

Il settimo capitolo è dedicato all'inventario quali veicolo di conoscenza storica della *substantia* familiare ('Estate Inventories as Legal Instruments in Renaissance Italy', 164-199). Per introdurre il discorso Kuehn si avvale di una rappresentazione artistica compresa nel ciclo di affreschi dell'oratorio di S. Martino a Firenze, opera della bottega di Domenico Ghirlandaio. L'Oratorio era sede della Compagnia dei Buonomini (1441), istituita su iniziativa del santo vescovo Antonino Pierozzi e dedicata alla cura dei 'poveri vergognosi'. Nei decenni iniziali, fino al 1470, beneficiarie dell'attività caritativa furono primariamente famiglie di giovani artigiani, successivamente famiglie dell'élite cadute in disgrazia economica. Uno degli affreschi rappresenta la redazione di un inventario in una famiglia in cui vi erano dei minori rimasti orfani (164-166). L'inventario si colloca nella fase iniziale del processo giuridico ed economico della successione ereditaria. A Firenze, documentazione interessante si trova nei cartulari notarili e nei fondi dell'ufficio del 'Magistrato dei pupilli', che conserva centinaia di inventari a partire dalla sua istituzione nel 1388. La legislazione statutaria fiorentina era restrittiva, perché ammetteva gli inventari solo per i minori, per proteggerli sia dai creditori che dalla cattiva

amministrazione o dagli abusi dei tutori. Alcuni inventari fiorentini sono analizzati (179-186). La documentazione—riconosce l'Autore—non è del tutto trasparente e la redazione degli inventari non era immune da tentativi di frode. Nel discorso giuridico, l'inventario era concepito quale strumento a beneficio dell'erede e a limitazione della sua responsabilità. La materia era stata trattata da giuristi autorevoli (Angelo degli Ubaldi, *Tractatus de inventario*; Baldo, *Tractatus de aditione cum inventario*, 175-176), ma anche da giuristi meno noti come il padovano Francesco Porcellini († 1453 o *ante* 1474) nel *Tractatus de confectione inventarii*, o come il fiorentino Antonio Strozzi (1454-1523) nel suo glossario giuridico. La consueta galleria di casi discussi nei *consilia* rivela la permanente attualità pratica del tema (186-197).

L'ottavo capitolo conduce il lettore sul tema delle virtù del buon amministratore del patrimonio familiare ('Prudence, Personhood, and Law in Renaissance Italy', 200-221). In questo campo la trattatistica sulle virtù e sui ruoli familiari offre testimonianze di grande interesse. Torquato Tasso ne *Il padre di famiglia* allocava prudenza, fortezza e liberalità nel padre, mentre modestia e pudore erano tipiche virtù femminili. Nell'opinione comune, alla generosità degli uomini si contrapponevano la parsimonia o persino l'avarizia delle donne (*genus avarissimum*). Quanto alla prudenza, il tema circolava nei discorsi dei ceti colti e benestanti, come dimostrano *I libri della famiglia* di Leon Battista Alberti, che racchiudono precetti pratici di prudente amministrazione. Nel suo *Zibaldone quaresimale* Giovanni Rucellai (1403-1481), mercante fiorentino, elargiva precetti e consigli ai figli affinché essi fossero buoni *massai* e preservassero le *sustanze* familiari: sia il conservare che lo spendere richiedono prudenza, per evitare sia l'avarizia sia gli eccessi che mettono a rischio il patrimonio. Nella riflessione dei giuristi il tema rientrava nell'ambito della *prudentia oeconomica*, che in Bartolo si intreccia col discorso sulla *diligentia*. Nei casi esaminati attraverso la giurisprudenza consiliare (Mariano Sozzini il Vecchio, Filippo Decio, Giason del Maino), la mancanza di prudenza è presa in considerazione quando si discute dalla salute mentale di qualcuno: *mentecaptus*, *fatuus*, *furiosus*, *demens*, *prodigus*, talvolta solo *grossolanus* (211-219). Erano casi difficilissimi sotto il profilo probatorio.

Nel capitolo nono ('Addendum, A final Case', 222-227), l'Autore presenta nei dettagli un *consilium* di Floriano da San Pietro († 1444), concernente un caso in cui marito, moglie e fratello del marito avevano costituito una 'sharing household with a separation of tasks' per ben quarantasei anni, fino alla morte del marito. La presentazione del caso consente a Kuehn di concludere con un'affermazione che sintetizza tutta la tensione che circola nella materia in questione: 'The *substantia* that Bartolus attempted to see as the enduring and defining element of *familia* was in fact, as was the *familia*, fragile and tenuous, pushed and pulled between the sharing and common fellowship of kin and household, on the one hand, and the individualistic claims and assertions, even as embodied in law, which were freer to emerge when death or financial disaster threatened, on the other' (227).

La conclusione del percorso di ricerca chiude il cerchio confermando la concretezza storica dell'intuizione di Bartolo: '*familia* was *substantia* because it was hard to conceptualize one without the other' (234).

Il libro si completa con la bibliografia (235-253) e un indice analitico (254-260).

Una presentazione estesa dei contenuti del volume è stata necessaria per dare conto della ricchezza e varietà dell'itinerario di ricerca che Thomas Kuehn ha percorso e offerto ai lettori. La dimensione tutto sommato snella del libro (234 pagine senza bibliografia e indice analitico) è inversamente proporzionale alla complessità dei problemi affrontati e alla densità dei risultati, che sono presentati con un taglio sintetico e incisivo: operazione che è stata possibile all'Autore grazie alle sue profonde e analitiche conoscenze della materia trattata.

Thomas Kuehn conduce i lettori lungo un percorso affascinante in cui le fonti più strettamente giuridiche sono messe a frutto in un felice intreccio con la trattatistica economico-morale, i libri di *ricordanze*, la documentazione d'archivio (catasti, inventari), in un quadro che raccoglie anche le suggestioni artistiche. La linea maestra dell'indagine passa attraverso l'esplorazione delle opere dei giuristi del tardo Medioevo e della prima età moderna, in un adeguato contrappunto fra le opere di natura 'accademica' e quelle con destinazione pratica (*consilia*).

La ricerca muove dalla convinzione, che personalmente condivido, che gli scritti dei giuristi sono allo stesso tempo opera di 'creazione' scientifica, espressione di un determinato modo di concepire la famiglia e i rapporti sociali, negli effetti anche modelli che orientano le pratiche sociali e le forme giuridiche.

La molteplicità e la varietà delle fonti utilizzate sono lo specchio di una materia che ancora può essere utilmente indagata alla luce di fonti edite e inedite. Le possibilità di approfondimento sono praticamente inesauribili, se teniamo conto dei differenti contesti geografici e cronologici e della varia tipologia delle fonti esplorabili. In questa sede vorrei ricordare le molte decine di *quaestiones disputatae* in tema famiglia e successioni registrate da Manlio Bellomo nel suo volume del 2008[1]: esse rappresentano una fase della

[1] Manlio Bellomo, *"Quaestiones in iure civili disputatae": Didattica e prassi colta nel sistema del diritto comune fra Duecento e Trecento*. Contributi codicologici di Livia Martinoli, in Appendice (Istituto Storico Italiano per il Medio Evo, Fonti per la Storia dell'Italia Medievale, Antiquitates 31; Roma 2008). Ho raccolto un elenco di questi testi in '*Quaestiones disputatae*. Materiali per una storia della famiglia italiana nell'età dei Comuni', all'interno del volume di Manlio Bellomo, *Profili della famiglia italiana nell'età dei Comuni*, Introduzione alla nuova edizione, repertorio di *quaestiones disputatae* e bibliografia a cura di Orazio Condorelli, eds. Alessandra Casamassima e Orazio Condorelli (Biblioteca di storia del diritto 2; Roma 2022) xix-xxxvi.

giurisprudenza medievale che preparava le basi degli insegnamenti bartoliani e più in generale delle dottrine dei commentatori.

Questo libro di Thomas Kuehn è un nuovo prezioso contributo che per un verso arricchisce le nostre conoscenze sulla famiglia italiana fra Medioevo e Rinascimento, per l'altro introduce ulteriori elementi di complessità nella nostra comprensione delle relazioni tra *familia* e *substantia*. I risultati confermano che sarebbe vana ogni pretesa di tradurre tali relazioni in formule 'geometriche', ma allargano l'orizzonte delle potenziali ricerche.

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Kuskowski, Ada Maria. *Vernacular Law: Writing and the Reinvention of Customary Law in Medieval France*. Cambridge: Cambridge University Press, 2022. Pp. xviii, 412. $125.00. ISBN: 978-1-00921-787-3.

Elizabeth Papp Kamali

'Sed dominus noster christus veritatem se, non consuetudinem, cognominavit'.[1] As Ada Kuskowski reminds her readers (36), Christian theology early on identified a tension between custom and truth, as exemplified by this memorable quote from Tertullian (c. 160-230), a commentary on John 14:6,[2] from his tractate on the veiling of virgins. That practice, argued Tertullian, was founded upon truth and could not be contradicted by custom, no matter how firmly situated that custom was in time or regional practice. The custom-truth conflict represents just one of the many dichotomies in which theologians, jurists, and eventually legal historians would place custom, sometimes setting it in opposition to law, or written law in particular, or common law.[3] Tertullian's antagonism toward custom may be striking in its stridency, yet it anticipates the ambivalence with which the subject would be treated for centuries to come. On the one hand, custom has been seen as a foundational issue to be grappled with by historians of law. As Paul Vinogradoff described it, 'The historical development of law starts with custom'.[4] On the other hand, custom has sometimes been tainted by a presumption of quaintness, quirky regionalism, or outdated resistance to the inexorable ascendancy of law.

As its title suggests, *Vernacular Law* rejects the Tertullianic impulse toward opposing custom to something superior, whether truth or law. The book represents a remarkable achievement, exploring the concept of custom in the work of classical and post-classical Roman jurists, early Christian theologians, medieval canonists and Romanists, and, of course, in the book's primary field of interest: the multitude of customary law compilations produced in northern France from the twelfth to fifteenth centuries. Custom has been a grail-like object for generations of medieval legal historians, a concept that seems to appear everywhere yet remains elusive to those seeking to comprehend its

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[1] Tertullianus, *De uirginibus uelandis* 1 (Clavis 27). 'But our Lord Christ called himself truth, not custom'.

[2] 'Dicit ei Iesus, "Ego sum via et veritas et vita. Nemo venit ad Patrem nisi per me",' *The Vulgate Bible: Douay-Rheims Translation* (Cambridge 2013) 6.566.

[3] For the custom/common law dichotomy in the English context, see, e.g., N. Neilson, 'Custom and the Common Law in Kent', *Harvard Law Review* 38 (1925) 482-498; see also 'The Customs of London and the Common Law',*The Eyre of London: 14 Edward II, A.D. 1321*, ed. Helen M. Cam (London 1968) 1.lxi-lxxii.

[4] Paul Vinogradoff, *Custom and Right* (Oslo 1925) 21.

essence. What is custom or customary law?[5] Did it even ever exist in a meaningful way?[6] Kuskowski's book presumes an affirmative answer to the latter question. One seeking a singular answer to the former question in *Vernacular Law* will be disappointed, as the malleability of the concept means that it has meant different things at different times in different places to different people. Ah, the pesky complexity of history faithfully done. The legal thinkers who shaped and reshaped custom are at the heart of *Vernacular Law*, particularly the *coutumier* authors who creatively crafted a new genre of legal text for use in the practice of law. In *Vernacular Law*, the reader follows Kuskowski on her journey toward a painstakingly acquired cumulative understanding of the meaning(s) of custom and customary law in the *coutumier* literature and its historiography. It is a lengthy journey, with no singular grail at the end, but one which every legal historian wishing to understand the subject will henceforth be obliged (and, one hopes, delighted) to take.

One need only peruse a single enigmatic *coutumier* to have a sense of the labor involved in surveying so very many versions of so very many Latin and French *coutumiers* and in exploring thirteenth- and fourteenth-century manuscripts as well as the treatment of the idea of custom in texts from antiquity

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[5] For some attempts to define the various ways in which 'custom' was understood in the Middle Ages, see Fredric L. Cheyette, 'Custom, Case Law, and Medieval "Constitutionalism": A Re-examination', *Political Science Quarterly* 78 (1963) 362-390 at 382 (distinguishing between custom as 'substantive rules of law' and as 'an acquired right to have the regular use of something or to collect money from someone on given occasions'); Alan Harding, 'Political Liberty in the Middle Ages', *Speculum* 55 (1980) 423-443 at 428 (distinguishing among English customs as 'all the powers and obligations of men in the customary law of their communities', 'the heavy obligations of the serf' or *consuetudinarius*, 'a freedom from such obligations', and 'the rights of a landlord to exercise justice'); John G. H. Hudson, 'Introduction: Customs, Laws, and the Interpretation of Medieval Law', *Custom: The Development and Use of a Legal Concept in the Middle Ages*, edd. Per Andersen and Mia Münster-Swendsen (Copenhagen 2009) 1-16 at 1-5 (outlining the various ways in which 'custom' might be defined); Emily Kadens, 'Custom's Two Bodies', *Studies on Power in the Medieval World in Honor of William Chester Jordan*, edd. Katherine L. Jansen, G. Geltner, and Anne E. Lester (Leiden 2013) 239-248 (distinguishing between 'behavior-customs' and 'law-customs', the former reflecting community practices that are tacitly followed and tacitly enforced, and the latter only taking shape after a behavior-custom has been relied upon in resolving a dispute in a juridical context).

[6] In some contexts, the answer may be a qualified no, at least in terms of how later theorists have imagined an earlier world in which a supposed universal customary law shaped commercial behavior. See, e.g., Emily Kadens, 'The Myth of the Customary Law Merchant', *Texas Law Review* 90 (2012) 1153-1206.

to modernity and in wide-ranging historiography across centuries. The book will serve as a resource for historians for decades to come. Kuskowski urges adoption of a new paradigm in thinking about the nature of customary law in northern France, disavowing the regional emphasis that has reigned for centuries due in part to a failure to compare regional attributions across manuscripts (the reader learns, for example, that the same *coutumier* text can be assigned a new regional identity in later manuscript versions) and due to the dominance of political narratives that saw the local-ness of custom as a convenient counterpoint to the centralization of royal power from the thirteenth century forward, whether in comparing northern French custom with the common law of England or with the growing body of custom and law associated with the king in France. Kuskowski's new paradigm rejects facile comparisons between England and France, the former known for its early standardization of a realm-wide common law, the latter for its regional customs. Kuskowski demonstrates that the *coutumier* literature reflects to a large extent a common cross-channel moment in the history of law, one in which the authors of English texts like *Bracton* and *Fet Asaver* were similarly engaged, even if we tend to call their outputs 'treatises' instead of 'custumals' or '*coutumiers*'.[7]

Relatedly, Kuskowski strives to give *coutumier* authors their long-overdue due. 'Coutumier authors deserve to be recognized as jurists', she writes (7), meriting inclusion in scholarly treatments of the history of the legal profession and the intellectual history of law. Rather than a quaint accompaniment to the 'learned' Roman and canon laws, the *coutumiers* are, in Kuskowski's treatment, a form of learned law themselves. Here, her work has some resonance with that of Thomas McSweeney (another student of the late Paul Hyams), who in *Priests of the Law* has argued that the authors of the English legal treatise *Bracton* self-consciously imagined themselves akin to Roman jurists, both in terms of producing an extensive written compilation of law and in promoting the early use of what we today would call precedent.[8] Kuskowski, in using the term 'jurist' to describe her authors, does not suggest that they were aiming to acquire the *Romanitas* that came with adopting Roman law concepts and categories, but rather that they were creative thinkers on par with the likes of Gaius and Ulpian, and that they wielded Roman law to suit their own creative, authorial purposes. Moreover, Kuskowski's work, with its focus on northern French custom,

[7] While the book focuses squarely on northern French *coutumiers*, Kuskowski's earlier comparative work demonstrates her deep familiarity with contemporary English legal texts. See 'The Development of Written Custom in England and in France: A Comparative Perspective', *Law, Governance, and Justice: New Views on Medieval Constitutionalism*, edd. Richard W. Kaeuper, Paul Dingman, and Peter Sposato (Leiden 2013) 101-120. On the relationship between law and custom as employed in the *Bracton* treatise, see Cheyette, 'Custom, Case Law', 380-381.

[8] Thomas J. McSweeney, *Priests of the Law: Roman Law and the Making of the Common Law's First Professionals* (Oxford 2020).

requires writing against a different historiography than that confronted by McSweeney. The historiography of French custom has often lumped multiple centuries of vernacular customary legal treatises into a single, undifferentiated mass. By contrast, Kuskowski emphasizes change over time, from the earliest thirteenth-century *coutumiers* to the *Établissements* of the late fourteenth century, and also change within the tradition of individual customary law collections, which might morph both dramatically and subtly in the hands of new copyists and redactors.

This relates to one of the key arguments of the book, namely, that *coutumier* authors made important new contributions to legal culture in the specific form of a vernacular written law. Where they used Roman law, they repurposed it creatively and, in relying on the vernacular, they reshaped language, too, by developing a novel legal register. All of this had practical effects, insofar as lay people gained a new entry point into the world of legal ideas and the practice of lay courts (a long-standing practical interest for Kuskowski, as demonstrated by an earlier essay on access to justice in which she explored, *inter alia*, the *coutumiers* as a source of insight into the lives of the working poor).[9] Moreover, Kuskowski argues, *coutumier* authors were creators and makers, true authors and not simply transcribers and borrowers. The custom they inscribed was also far from simple or static, but was instead a form of living law.

As Kuskowski illustrates in her first chapter, the historiography of custom has similarly been far from simple or static, possibly helping to explain the way in which legal historians continue to play fast and loose with the language of custom and customary law in describing quite different phenomena. Custom developed its own unique history in the study of Roman law, where jurists had to determine where custom might fit within a hierarchy of proof. Even within the broad field of Roman law, custom was treated quite differently in classical law than the medieval revival of the Roman law tradition centuries later. Custom had yet another distinct history within the realm of canon law, typically drawing upon the Bible, the writings of the church fathers, and eventually the works of canonists themselves who debated how custom might mesh—or not—with the various sources of ecclesiastical law. For the canonists, for example, custom always took a back seat to truth and reason, such that a usage contrary to either had to be extirpated (44). And, of course, custom had a distinct history within secular law as practiced in lay courts run by neither university-trained Romanists nor canonists. Both within and among these traditions, custom was always a contested topic, and perhaps this is less surprising once Kuskowski walks the reader through the unique range of *coutumiers* surviving from the thirteenth to fourteenth centuries and then illustrates, later in the book, how each of these *coutumiers*, in turn, had variants as customary law texts continued to

[9] 'The Poor, the Secular Courts, and Access to Justice in Thirteenth-Century France', *Poverty and Prosperity in the Middle Ages and the Renaissance*, edd. Cynthia Kosso and Anne Scott (Turnhout 2012) 241-256.

be adapted and repurposed. Ideas of custom were always contested, and even after centuries of contestation, that 'conceptual haziness' (54) endured.

Kuskowski's first chapter concludes with what is sure to become a point of reference for future historians working on customary law: a series of encapsulations of the first *coutumiers*, beginning with the *Très ancien coutumier de Normandie* (ca. 1200-1220) and ending with *Li usages de Bourgogne* (c. late thirteenth century), identifying the tone, form, and idiosyncrasies of each of the texts in turn, and providing the reader a glimpse of the vast differences among the various texts all lumped together in discussions of a monolithic 'custom' (67-87). Later in the book, Kuskowski gestures toward points of commonality across *coutumiers*, too, comparing the treatment of the issue of 'high justice' as it appears in two inquest records and in two *coutumiers* (242). Where the former detailed the testimony of witnesses, from which one might infer the nature of the questions posed and the factors that had to be proven, the latter gave a direct definition of the concept of 'high justice,' something that the records of practice failed to do. Similarly, charters provide evidence of the outcome of particular disputes but without providing generalized guidance on how to approach that area of law. By comparison, *coutumiers* created what Kuskowski refers to as 'a conceptual law' by distilling principles and organizing disparate pieces of information from records of practice (246), thereby inferring abstract rules from particular cases (255). In short, Kuskowski both disambiguates the various customary law texts to show the diversity of approaches to drafting *coutumiers*, but also identifies *coutumiers* collectively as a distinct genre that can be contrasted with the aims of other contemporaneous types of legal materials, such as charters and trial records.

Having clarified and complicated readers' understandings of custom, Kuskowski moves on in chapter 2 to focus on the vernacularity of the customary law collections. For the authors of the *coutumiers*, the Latin language could potentially serve as a barrier to the transmission of meaning (89). At a time when Latin would have been a natural choice for legal compilations, the *coutumier* authors made a deliberate decision *not* to use Latin (an issue Kuskowski explored in an earlier article), thereby initiating a move toward the vernacular as the language of secular power.[10] Here, too, Kuskowski draws a connection between what was happening in the north of France and in England (102), although it is striking that the vernacularization of law on the whole would appear to be a significantly later phenomenon in England.[11] She also notes that the *coutumier* authors developed their expertise 'through what might

[10] See '*Lingua Franca Legalis?* A French Vernacular Legal Culture from England to the Levant', *Reading Medieval Studies* 40 (2014) 140-158.

[11] See Tom Johnson, *Law in Common: Legal Cultures in Late-Medieval England* (Oxford 2020) 224, describing a transition toward the use of English in extracurial documents by the late fourteenth century, and a trend toward the use of English in official records in the latter half of the fifteenth century.

be called a middling education combined with a knowledge of court documents and practice' (112), although some had a university education, too, as demonstrated by their facility in incorporating material from Roman and canon law. What Kuskowski does not say, but which strikes me as worth further exploration, is that this informal and practice-oriented education seems to parallel the practical training of English common lawyers through, for example, apprenticeship in the Common Bench and eventually the Inns of Court, rather than through the formal university system through which doctors of Roman and canon law received their education.[12]

Kuskowski helpfully situates the *coutumier* authors within a broader trend toward the use of the vernacular in legal texts, also found in Spain, Italy, Germany, England, and the crusader states by the latter half of the thirteenth century. This was a time that saw the translation of the Bible and of key Roman law texts from Latin into the vernacular, thereby making them accessible to anyone capable of reading or hearing the text read aloud. In a 2018 book chapter, Kuskowski previously examined an early thirteenth-century vernacular translation of Justinian's *Institutes*, highlighting editorial choices made by the translator to emphasize that the text was not current law but law from the Roman past.[13] The subtlety of changes made by translators during this period—a time not only of great legal treatises and *coutumiers* but also of Magna Carta in England and charters of liberties in other European contexts and of the monumental legal changes ushered in by the Fourth Lateran Council—provide opportunities for scholars willing to take fine scissors and scalpel to such texts in order to decipher the significance of translators' editorial decisions.

Subsequent chapters of *Vernacular Law* deal thematically with such issues as the relationship between custom and writing, memory, time, and manuscript culture. With regard to the issue of 'writtenness', Kuskowski helpfully presents a diachronic story, where other legal historians have tended to assume fixity in unwritten custom, sometimes followed by a transformation into law once written down. In contrast to the authors of such treatises as *Glanvill* and *Bracton*, who exhibit some anxiety over the unwritten nature of the English common law, Kuskowski finds that the *coutumier* authors by and large did not share this concern (140). Rather than writing down custom as a means of accessing the prestige of Roman law, *coutumier* authors wrote for practical reasons: the vernacular was increasingly the language of lay courts and, with the professionalization of law, legal practice was becoming more complicated and swiftly changing (141). Under these circumstances, writing offered an *aide-mémoire* to preserve custom at a particular moment in time. Beaumanoir, for

[12] On the training of future serjeants through apprenticeship by the late 1280s and the eventual development of the Inns of Court from c. 1340, see Paul Brand, *The Origins of the English Legal Profession* (Oxford 1992) 110, 158.

[13] 'Translating Justinian: Transmitting and Transforming Roman Law in the Middle Ages', *Law and Language in the Middle Ages*, edd. Jenny Benham, Matthew McHaffie, and Helle Vogt (Leiden 2018) 30-51.

example, poignantly explained that he was recording local customs in late thirteenth-century Beauvaisis 'because owing to memories which fade and people's life which is short, what is not written down is soon forgotten'.[14]

One of Kuskowski's key contributions—and of particular interest to this journal's readership—is to highlight the important place of canon law in the *coutumier* corpus. Here she cleverly draws upon the literary tradition of the *Roman de Renart*, which employed animal allegories to illustrate the interplay between custom, royal authority, and canon law. A camel represented the last category, playing the role of a canon lawyer dripping with *auctoritas* and boasting a close relationship with the pope himself (159). Although the camel appeared to have the ear of the king in Renart's tale, in the end his advice was ineffective, as the legal matter at issue was resolved instead by the verdict of peers (161). Kuskowski identifies the church courts, not the royal courts, as the foil to the *coutumiers*, which helps explain, for example, the space devoted by Beaumanoir to describing which cases belong to church courts and which to lay courts (167-168). In this sense, the *coutumiers* were marking the jurisdictional boundaries between lay and ecclesiastical courts, not local versus royal courts. In some instances, the lay courts took approaches fundamentally at odds with the prevailing canon law, such as in the treatment of the absent crusader, whose property might be frozen for years, even when it appeared he was unlikely to return.[15] Where the canon law leaned in the direction of protecting the interests of the absent crusader, customary law texts like Pierre de Fontaines' *Conseil* were more sympathetic to the needs of the family he left behind (169-170). Revising the prevailing historiography, Kuskowski makes the case for understanding the *coutumiers* as the product of an increasingly professionalized lay lordship, rather than as motivated by increasingly expansive royal power (177). The lay courts were not competing with royal courts, but rather 'the *coutumier* authors were seeking to order, theorize, and professionalize the lay courts generally as part of an overall strengthening of lay lordship, in competition with the ecclesiastical courts' (181-182). This is a bold new perspective on the motivation behind some of the earliest *coutumiers* and a fundamental rewriting of the prevailing narrative around the history of the northern French custumals.

Another key intervention is Kuskowski's rejection of the assumption that the direction of influence was always from the learned law—canon and Roman—to the 'unlearned', with the authors of *coutumiers* simply appropriating material from authoritative sources without 'building intellectual

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[14] F. R. P. Akehurst, trans. *The* Coutumes de Beauvaisis *of Philippe de Beaumanoir* (Philadelphia 1992) 4.

[15] On this particular dilemma, see, generally, James A. Brundage, 'The Crusader's Wife: A Canonistic Quandary', SG 12 (1967) 425-441 and 'The Crusader's Wife Revisited', SG 14 (1967) 241-251; Elizabeth Papp Kamali, 'Tales of the Living Dead: Dealing with Doubt in Medieval English Law', *Speculum* 96 (2021) 367-417 at 408-410.

monuments' (190) of their own. Relying on the old assumption, historians have graded *coutumiers* based on how much they managed to incorporate Roman law ideas. Borrowing Alain de Lille's notion that authority figures had 'wax noses' (193), Kuskowski highlights the creativity and diversity of the various *coutumiers* and their authors, who individualized their choice of sources and the arrangement and topical focus of their compilations.[16] Authors like Pierre de Fontaines, for example, took a 'critical approach' (210) when borrowing from the learned laws, using them to provide support for existing custom or as a source of inspiration for underdeveloped areas of law. The learned laws were drawn upon when pragmatically helpful, not because they were perceived to be essential sources of prestige or authority.

Challenging yet another myth regarding custom, Kuskowski takes issue with historians' tendency to attribute timelessness to custom, including the idea that once custom was inscribed in text it became permanently fixed (266). (The interplay between time and custom—and the 'myth of old law'—is an area that Kuskowski has explored in even greater depth in a recent *Speculum* article.)[17] Having consulted various manuscripts of the customary texts at issue in her analysis, Kuskowski demonstrates that custom was 'composed and re-composed' (269), with later manuscripts of the same *coutumier* sometimes showing significant alterations. Although the earliest *coutumiers* were copied over the course of centuries, they were far from static, insofar as emendation went hand in hand with the act of copying (296). In her vision of customary law as a site of innovation, Kuskowski is in good company.[18]

Kuskowski makes what some might see as a radical claim late in the book, arguing that the *coutumier* authors 'participated in the creation of the idea of a French common law' or '*ius commune* for the lay courts' (317). This is a claim Kuskowski first tentatively advanced in an earlier essay, but which she has presented even more boldly in the context of the book.[19] It is a claim that finds

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[16] 'Sed quia auctoritas cereum habet hasum, id est in diversum potest flecti sensum, rationibus roborandum est'. Alanus de Insulis, 'De fide Catholica contra haereticos', 1.30, *Alani de Insulis doctorus universalis opera omnia*, book 1 (PL 210.333) (1855).

[17] 'The Time of Custom and the Medieval Myth of Ancient Customary Law', *Speculum* 99 (2024) 143-182. For another recent treatment of 'customary time', see Esther Liberman Cuenca, 'Bad Customs, Civic Ordinances, and "Customary Time" in Medieval and Early Modern English Urban Law', *Historical Reflections* 47 (2021) 39-58.

[18] See, e.g., M. T. Clanchy, 'Remembering the Past and the Good Old Law', *History* 55 (1970) 165-176 at 172 (citing several historians, including Marc Bloch, Fritz Kern, and T. F. T. Plucknett, for the idea that customary law was inherently flexible and a source of legal change).

[19] 'Inventing Legal Space: From Regional Custom to Common Law in the *Coutumiers* of Medieval France',*Space in the Medieval West: Places,*

support in the writings of the late Susan Reynolds, who observed in *Kingdoms and Communities* that 'by the thirteenth century French lawyers (though not, oddly enough, English ones) were begining [sic] to speak in terms of a "common law" of their whole kingdom'.[20] Certainly the *Établissements de Saint Louis*, which describe setting out 'laws which we want to be put into practice in the secular courts in the whole kingship and lordship of France', presents such a vision, but Kuskowski's broader claim poses a challenge to accounts of earlier northern French *coutumiers* as mere encapsulations of distinct sets of local customs from a time in which France had nothing like the common law of its English neighbors.[21] By the time we reach this claim, we have already been nudged in the direction of persuasion of its accuracy in light of the commonalities Kuskowski has traced across the various bodies of French customary law, including evidence of authors' willingness to copy from other *coutumiers*, even when those texts originated in different regions. Does this, in the end, indicate a vision of a truly 'common' law in the sense we find it in the English context, typically described as the custom that developed around the courts of the king, or does it simply suggest *coutumier* authors' comfort with *bricolage*? Is the *métier* of the *coutumier* author more like that of the writers of *Bracton* or like the compilers of borough customs in England, who might look to a neighboring or prominent borough to borrow concepts and procedures?[22] Speaking of procedure, were *coutumier* authors primarily interested in matters of procedural or substantive law? If the former, might we see the authors of the *coutumiers* as engaged in a pursuit matched not only by English common-law treatise authors but also by the drafters of canon law procedural manuals and even local ecclesiastical statutes?[23] These are just a few of the questions raised by this insightful book which, to distort Tertullian's dichotomy, invites its readers to join the pursuit of custom's truth.

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Territories, and Imagined Geographies, edd. Meredith Cohen and Fanny Madeline (Farnham 2014) 133-155.

[20] Susan Reynolds, *Kingdoms and Communities in Western Europe: 900-1300* (Oxford 1984) 43.

[21] For this prologue excerpt, see F. R. P. Akehurst, trans. *The Etablissements de Saint Louis: Thirteenth-Century Law Texts from Tours, Orléans, and Paris* (Philadelphia 1996) 4.

[22] See, generally, Mary Bateson, *Borough Customs* (London 1904-1906).

[23] See, e.g., the insistence of the archbishop of Canterbury in 1342 on the collection 'sub scriptura' of customs to reduce the uncertainty that resulted from unwritten court procedures. F. Donald Logan, ed. *The Medieval Court of Arches* (Woodbridge 2005) xxviii and 23.

Wiedemann, Benedict. *Papal Overlordship and European Princes, 1000-1270*. Oxford Studies in Medieval European History. Oxford: Oxford University Press, 2022. Pp. 272. $105.00. ISBN: 978-01928-5-5039.

Barbara Bombi

The question of papal overlordship between the eleventh and thirteenth centuries has been investigated at length by scholars interested in questioning the nature of papal power and its interactions with secular rulers within the complex framework of feudal relationships that characterized governmental practices in Late Medieval Europe. This debate initially stemmed from well-known arguments on the nature of papal plenitude of power and papal monarchy, notably Ullmann's argument concerning papal 'hierocratic government' over the Medieval West to critiques of it, which have very much shifted the focus towards the action of papacy within organized society and the interactions between Church and State.[1] In particular, Brian Tierney demonstrated how in the twelfth and thirteenth centuries canonistic debates on papal plenitude of power served as the foundations of the fourteenth- and fifteenth-century conciliar theories that ultimately undermined and overturned the idea of papal monarchy in its core foundations.[2] Equally, Michael Wilks and John Watt have further challenged Ulmann's definition of papal 'hierocratic government', focusing on the debate among fourteenth-century political theorists and canonists. Although canonists had prominently featured in Ullmann's work, in his critics' view Ullmann had failed to outline the holistic nature of canonical debates.[3] As Watt argued, in the view of twelfth- and thirteenth-century canonists the papal monarchy was political and extended to the common welfare of the Christian world, which encompassed both the ecclesiastical hierarchy and the community of Christian kingdoms and peoples. In Watt's view twelfth- and thirteenth-century canonists therefore styled their own

[1] Walter Ullmann, *The Growth of Papal Government in the Middle Ages: A Study in the Ideological Relation of Clerical to Lay Power* (London 1965) esp. 447-457; W. Ullmann, *A Short History of the Papacy in the Middle Ages* (London 1972). See also R.W. Southern, *The Making of the Middle Ages* (New Haven 1953) 138-148; Richard W. Southern, *Western Society and the Church* (Harmondsworth 1970) 18-19; 91-133. A similar argument had already been suggested in A. C. Krey, 'The International State of the Middle Ages: Some Reasons for its Failure', *American Historical Review* 28 (1922) 1-12.

[2] Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism* (Cambridge 1955) 11-46.

[3] M. Wilks, *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy with Augustinus Triumphus and the Publicists* (Cambridge 1963) 30-43, 200-229; J. A. Watt, *The Theory of Papal Monarchy in the Thirteenth Century: The Contribution of the Canonists* (London 1965) 2, 136-137, 142.

concept of 'papal monarchy', borrowing the definition of monarchy as law-making power from Roman law and implementing the secular notion of royal sovereignty and lordship over vassals. In other words, as Oakley put it, Ullmann's approach was problematic because it rested on legal theory rather than political philosophy and thought, while often omitting to provide a convincing historical framework for his argument.[4] In line with those criticism, Kenneth Pennington has maintained that while the early Church assumed a 'monarchical' model following the structure of the Late Roman Empire, in the eighth century the Church was organized around secular rulers and bishops.[5] By the thirteenth century the papacy had become independent of secular rulers and subject to the bishop of Rome, claiming temporal authority, acting within its own legal framework, and governing through its bishops. Pennington therefore maintained that the formation of doctrines of papal monarchy in the twelfth- and thirteenth centuries rested on the developing relationships between pope and bishops. The latter was implemented through the canonical doctrines of papal plenitude of power and their implementation with regards to papal provisions to benefices, dispensations for pluralism, privileges of exemption, episcopal translations, renunciations and depositions. Challenging Ullmann's 'logical', 'coherent', and 'static' theory of papal monarchy, Pennington concluded that while the papacy was one of the first European institutions to develop a sophisticated theory of 'monarchy', the canonists were primarily responsible for "shaping the theoretical structure upon which papal monarchy rested" and accommodating the paradoxical position of the pope, who was simultaneously considered both 'vicar of Christ' and God's representative on earth (*vicarius Christi*), and servant of God's people (*servus servorum Dei*).[6] More recently, building on Pennington's argument, Meyer has maintained that by freedom of the Church (*libertas ecclesiae*) the eleventh-century reformers intended freedom from secular interferences and the construction of closer connections between Rome and the other churches.[7] By the thirteenth century,

[4] Francis Oakley, 'Celestial Hierarchies Revisited: Walter Ulmann's Vision of Medieval Politics', *Past and Present* 60 (1973): 3-48.

[5] Kenneth Pennington, *Pope and Bishops: The Papal Monarchy in the Twelfth and Thirteenth Centuries* (Philadelphia 1984) 2, 190.

[6] Ibid. 190.

[7] Andreas Meyer, 'Papal Monarchy', *A Companion to the Medieval World*, edd. C. Lansing, and E. D. English (Wiley 2009) 383-393. See also Kathleen Cushing, *Reform and the Papacy in the Eleventh Century: Spirituality and Social Change* (Manchester 2005) 55-86; Cushing, 'Papal Authority and Its Limitations', *The Oxford Handbook of Medieval Christianity*, ed. John Arnold (Oxford 2014) 515-530; Brett E. Whalen, 'The Papacy', *The Routledge History of Medieval Christianity, 1050-1500*, ed. Robert N. Swanson (Abingdon 2015) 5-17; Thomas F. X. Noble, 'Narratives of Papal History', *A Companion to the Medieval Papacy: Growth of an Ideology and Institution*, edd. Keith Sisson, Atria Larson (Leiden 2016) 17-33.

therefore, the pope was seen as a 'monarch in the Church' through the control over episcopal appointments, the implementation of canonical procedures and legislation, the dispatch of legates to the localities, the celebration of general councils and the organization of the college of cardinals and the curial apparatus.

The extent to which the 'monarchical' status of the pope was projected over secular rulers, who fell under papal overlordship and were 'vassals' of the papacy, has been the focus of further debates from the 1980s onwards. In this respect, scholars have engaged with the complex set of feudal relationships, which created the framework for papal overlordship over secular rulers, and, in line with related debates on the existence of feudalism, especially before the twelfth century, they outlined the difficulty of establishing patterns of papal overlordship vis-à-vis secular rulers. On the one hand, some German and French scholars have argued that the nature of the feudal relationships between the papacy and its secular vassals varied from case to case. In particular, Fried has maintained that since the twelfth century the kingdoms of Aragon and Portugal as well as the county of Montpellier were under papal protection (*Schutzen*) rather than feudal lordship. In his opinion during the thirteenth century this papal protection was extended to a number of secular rulers across Medieval Christendom and intertwined with the organization of crusades, which required the protection of territories especially in case of the ruler's absence due to crusading activities. Papal protection granted to secular rulers further resembled that given to monasteries: it did not however imply property rights over a fief, but the payment of a census. Equally, by the thirteenth century the papal protection of secular rulers did not differ from the protection offered by secular rulers to third parties. However, because of the universal character of papal power, there was, for Fried, a risk that secular rulers relinquished their sovereignty to the papacy by virtue of papal protection, creating papal universal rule.[8] Equally, Becker maintained that papal lordship over secular rulers was based on personal bonds of fidelity and vassalage, which guaranteed support and could be extended over the vassal's family and fiefs. This framework allowed the twelfth-century papacy to become the supreme authority, both politically and juridically, in the Medieval West through grants of legitimation and protection over secular authorities.[9] The only exceptions to this pattern, according to Fried and Becker, were the Norman kings of Sicily (1059) and the kings of England (after 1213), who were feudal vassals of the papacy in a more traditional sense, having taken an oath of fidelity that resembled feudal practices.

On the other hand, Stefan Weinfurter has argued that the papacy adopted a model feudal lordship over the kingdom of Sicily after 1120. In his opinion,

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[8] Johannes Fried, *Der päpstliche Schutz für Laienfürsten: Die politische Geschichte des päpstlichen Schutzprivilegs für Laien (11.-13. Jahrhundert)* (Heidelberg 1980).

[9] Alfons Becker, 'Politique féodale de la papauté à l'égard des rois et des princes (XI –XII siècles)',*Chiesa e mondo feudale nei secoli X–XII*. Atti della dodicesima Settimana internazionale di studio (Milan 1995) 411–446.

papal feudal lordship over secular rulers was implemented from the mid-twelfth century onwards due to stringent political circumstances or because secular rulers saw their interactions with the papacy as feudal. Meanwhile, the late twelfth-century papacy tried to distance itself from the use of feudal terminology vis-à-vis secular ruler and clarify its role, as it was the case for the notorious misunderstanding between papal and imperial representatives at Besançon in 1157. In other words, as Weinfurter puts it, 'the pope did not need to be a feudal lord to justify his preeminence in the church and the world, for there were better arguments at his disposal'.[10]

The book under review follows up on this debate. As Wiedemann points out in his introduction, he deliberately avoids engaging with the debate on papal plenitude of power, which would stretch his argument too far, while acknowledging that the issue of feudal relations between the papacy and secular rulers ought to be read in the context of the problematic definition of the word 'feudal' before the thirteenth century, as investigated in Elisabeth Brown and Susan Reynolds' works.[11] Wiedemann suggests that in the context of the relationship between the papacy and secular rulers, the term 'feudal' should be adopted only when the primary sources define a territory under secular control as *feudum* of the pope, concluding that the connotations of the word 'feudal' should be assessed on a case-by-case basis. Wiedemann therefore proceeds by means of case-studies, arranged chronologically to show how papal overlordship developed between the eleventh and thirteenth centuries. Wiedemann explores four areas that defined the relationship between the papacy and secular rulers.

First, investiture, which, especially between c.1070 and c.1100, defined the relationship between the papacy and the rulers of Norman Sicily, Aragon, Barcelona, and Melgueil, who were 'invested' by the pope, as bishops did, receiving their land and power from the pope. Between 1100 and 1122 this concept of investiture, however, opened a discussion on the actual possession of the land, monetary obligations and *regalia* that the lord had invested in the vassal, shifting the practice of investiture of kings onto archbishops, as was the case for the king of Sicily from 1130, or moving it from investiture to protection, as happened for the Crown of Aragon from the mid-twelfth century onwards.

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[10] Stefan Weinfurter, 'Die Päpste als "Lehnsherren" von Königen und Kaisern im 11. und 12. Jahrhundert?',*Ausbildung und Verbreitung des Lehnswesens im Reich und in Italien im 12. und 13. Jahrhundert*, ed. Karl-Heinz Spieß (Ostfildern 2013) 38-40.

[11] See especially Elizabeth A. R. Brown, 'The Tyranny of a Construct: Feudalism and Historians of Medieval Europe', *The American Historical Review* 79 (1974): 1063-1088; Elizabeth A.R. Brown, 'Feudalism: Reflections on a Tyrannical Construct's Fate', *Using Concept in Medieval History: Perspectives on Britain and Ireland, 1100-1500*, edd. J. W. Armstrong, P. Crooks, and A. Ruddick (Basinstoke 2022) 15-49; Susan Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford 1994).

Secondly, homage, which defined the mutual and reciprocal relationship between the pope and secular rulers without necessarily establishing a vassalage relationship, as was the case for the kings of Sicily who paid homage to popes on several occasions in the twelfth century to be legitimized in their role.

Third, protection, which was granted by the papacy, as it happened for the kings of Aragon and Portugal in the twelfth century, and exploited by secular rulers to defend their prerogatives and legitimacy in their kingdom, especially when facing succession challenges. And, finally, vassalage, which, from the thirteenth century onwards, shaped papal overlordship in England, the Isle of Man and Aragon. Yet in the case of England, Wiedemann maintains that, while in 1213 John became a fief-holder of the papacy in return for an annual census, it was the papal chancery that unintentionally introduced feudal terminology into the documentation describing papal overlordship over England and Ireland, where terms such as fief (*feudum*) and vassal (*vassallus*) were used with reference to England and its kings John and Henry III. Likewise, in Wiedemann's opinion, in 1219 feudal language was employed in the documentation concerning papal overlordship in the Isle of Man, which was referred to as a papal fief after the same papal legate, who had negotiated the surrender of England to the papacy in 1213, and curialists associated with the English court were dispatched there.

Equally, the king of Aragon was referred to as a papal vassal (*vassallus*) after 1222 through the agency of cardinals and courtiers who were familiar with the English case. Interestingly, Wiedemann observes that the English case may have set a precedent regarding the implementation of feudal terminology, which is increasingly found in the documentation after 1213 to define papal overlordship over other secular rulers and territories, as was the case for the county of Melgueil in France, defined as a papal fief (*feudum*) in 1213. Significantly, challenging Fried's previous interpretation, Wiedemann maintains that the papacy initially adopted feudal terminology in its documents, especially in the case of homage and protection, at the instigation of secular rulers rather than consciously trying to implement a feudal relationship with them. This was the case, in Wiedemann's opinion, of the count-bishops of Maguelone, who exploited the papal overlordship to control and rule over the county of Melgueil, gaining independence from any other local authority.

Likewise, Wiedemann noted that other secular rulers instrumentalized their special relationship with the pope as overlord first to legitimize their regnal power, especially in the eleventh century, and later to consolidate it vis-à-vis their subjects. This was the case for papal wardship of kingdoms during minorities, when papal wardship was strategically advocated as guardianship, duty of care towards orphans or by virtue of a special relationship between a kingdom and the papacy through petitions sent to the Apostolic See. The scope of petitioners advocating for papal wardship was to achieve papal mediations and support in their kingdoms through the dispatch of papal legates, as happened for James I of Aragon, Henry III of England and Frederick II in the first two decades of the thirteenth century. Furthermore, challenging Watt's

interpretation, Wiedemann investigates the case of the confiscation of fiefs, used by lords to depose vassals who did not fulfil their stipulated services and by popes to depose kings, as was the case for Frederick II. Interestingly, Wiedemann notes how this issue was debated by popes and canonists in the mid-thirteenth century, while it was only after 1250 that the right of deposition of kings who did not pay their census was written in the feudal contracts of the papacy with the Sicily, Aragon and Sardinia - to be distinguished from the lack of payment of the census due to the Apostolic See by virtue of protection which did not prompt a deposition.

In conclusion, Wiedemann maintains that papal overlordship and protection represented a model of trans-national sovereignty, which kings and secular rulers coopted to realize sovereignty in their kingdoms. Indeed, in Wiedemann's opinion, despite the papal claims to plenitude of power, especially from the thirteenth century onwards, the papacy implemented overlordship over secular rulers in response to their demands and as duty of service to its vassals. In this respect, thirteenth-century papal overlordship did not mean a real extension of papal power, but rather papal legitimation of royal power.

Wiedemann's book has many reasons to be praised. It moves away from the discussion of jurisprudence, which had been the focus of previous works focusing on the relationship between Church and State. Equally, within the framework of the debate on feudalism and its terminology, Wiedemann undertakes a careful examination of papal correspondence and investigates the dynamics of communication between the papal curia and the localities. Wiedemann's use of such evidence allows him to investigate papal government 'in action'; this ought to be praised. The book further contributes to our knowledge of administrative practices at the papal curia, showing the importance of investigating papal correspondence and its use of language from the angle of applied diplomatic. Arguably, the book achieves a fresh interpretation of papal overlordship and trans-national rule which moves away from a top-down approach and demonstrates the responsive nature of medieval papal government. Indeed, one hopes that the achievements and conclusions of Wiedemann's work could be further investigated in future studies which may, in turn, return once more to the canonistic literature, ultimately showing how theory and practice of papal overlordship were reconciled in the twelfth- and thirteenth-century dialogue between the schools and governmental practice.

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