

**THE *HAEC SANCTA SYNODUS* DECREE:  
BETWEEN THEOLOGY, CANON LAW AND HISTORY.  
JUDICIAL PRACTICES AND *PLENITUDO  
POTESTATIS***

SEBASTIÁN PROVVIDENTE  
(CONICET)

**Introduction**

The *Haec Sancta* decree approved by the Council of Constance at its 5th session (6th April 1415) tried to put a final end to the schism which since 1378 had divided the Church between three rival obediences. John XXIII's flight from the Council prompted the discussion of several issues: was it possible to hold a council without papal support and even against the pope's will? And if possible, where would conciliar authority and legitimacy stem from?

While these events prompted the most important theologians and canonists to look for a solution regarding the authority of the Council —now without a Pope— John XXIII continued to work towards its dissolution from Schaffhausen. Despite the Council fathers' continuous efforts to negotiate the return of the Pope through several embassies, once the Pope tried to escape through the Rhine, the Council decided to start the formalities of the deposition process. During the 3rd session celebrated on 26th March 1415, the Council openly opposed any attempt of dissolution and as it had done during the 1st Session, expressed its decision of resolving the issues

of *causa unionis, fidei et reformationis*<sup>1</sup>. The following session, chaired by cardinal Corsini, took place three days later and produced a highly significant text. Cardinal Zabarella was in charge of the public reading of the document and caused a great commotion when he omitted a passage affirming the power of the Council to enact without papal support the reform *in capite et membris*, which apparently had been already accepted<sup>2</sup>. On Saturday 6th April, after Easter, it was decided to call a new Session, at which the previous decree was rewritten

<sup>1</sup> Giuseppe ALBERIGO *et al.* (eds.), *Conciliorum Oecumenicorum Decreta (COD)*, Basel, Herder, 1962, p. 383: “Item quod istud sacrum concilium non debet, dissolvi, nec dissolvatur usque ad perfectam extirpationem praesentis schismatis, et quousque ecclesia sit reformata in fide et in moribus, in capite et in membris”.

<sup>2</sup> COD, p. 383: “Et primo declarat, quod ipsa in Spiritu sancto legitime congregata, generale concilium faciens, et ecclesiam catholicam militantem repraesentans, potestatem a Christo immediate habeat, cui quilibet cuiuscumque status vel dignitatis, etiamsi si papalis existat, obedire tenetur in his quae pertinent ad fidem et extirpationem dicti schismatis”. Some sectors inside the College of Cardinals, whose most important representative was Zabarella, did not want to accept the fact that the Council possessed legitimate authority to enact reform without the papal head. On the role played by Cardinal Francesco Zabarella cf. Thomas MORRISEY, “The Decree ‘Haec Sancta’ and Cardinal Zabarella. His Role in its Formulation and Interpretation”, *Annuario Historiae Conciliorum*, 10/1 (1978), 145-176; Thomas MORRISEY, “Cardinal Zabarella and Nicholas of Cusa. From Community Authority to Consent of the Community”, *Mitteilungen und Forschungsbeiträge der Cusanus-Gesellschaft*, 17 (1986); Thomas MORRISEY, “Ein Unruhiges Leben. Franciscus Zabarella an der Universität von Padua (1390-1410)”, *Mitteilungen und Forschungsbeiträge der Cusanus-Gesellschaft*, 24 (1998); Thomas MORRISEY, “The Call for Unity at the Council of Constance: Sermons and Adresses of Cardinal Zabarella, 1415-1417”, *Church History*, 53/3 (1984), 307-318; Michiel DECALUWE, “Three Ways to Read the Decree *Haec Sancta* (1415). The Conciliar Theories of Franciscus Zabarella and of Jean Gerson and the Traditional Papal View on General Councils”, in Gerald CHRISTIANSON, Thomas M. IZBICKI and Christopher M. BELLITTO (eds.), *The Church, the Councils and Reform: The Lessons of the Fifteenth Century*, Washington, Catholic University of America Press, 2008, pp. 129-139.

and the problematic sentence about the reform was finally included<sup>3</sup>.

As a result of this session the decree known as *Haec sancta synodus*<sup>4</sup> was produced; the document established that

<sup>3</sup> COD, p. 385: “Et primo declarat, quod ipsa in Spiritu sancto legitime congregata, generale concilium faciens, et ecclesiam catholicam militantem repraesentans, potestatem a Christo immediate habet, cui quilibet cuiuscumque status vel dignitatis, etiam si papalis existat, obedire tenetur in his quae pertinent ad fidem et extirpationem dicti schismatis *ac generalem reformationem dictae ecclesiae Dei in capite et in membris*”. The absence of Zabarella and other cardinals in this session is significant. Nevertheless, evidences do not exist to question the ecumenical character of the session. About this subject cf. Giuseppe ALBERIGO, *Chiesa conciliare: Identità e significato del conciliarismo*, Brescia, Paideia, 1981, pp. 150-165; MORRISEY, “The Decree ‘Haec Sancta’...”; DECALUWE, *op. cit.*; Brian TIERNEY, *Foundations of Conciliar Theory. The Contribution of the Medieval Canonists from Gratian to the Great Schism [enlarged new edition]*, Leiden, Brill, 1998, pp. 199-214 and Walter ULLMANN, *The Origins of the Great Schism*, Connecticut, Archon Books, 1972, pp. 191-231.

<sup>4</sup> For the text of the *Haec Sancta* we will use the version proposed by Michiel DECALUWE, “A new and disputable text-edition of the decree *Haec Sancta* of the Council of Constance (1415)”, *Cristianesimo nella storia*, 32/2 (2006), 417-445. The author indicates that although the edition of the COD is in general reliable from a philological point of view, however it does not offer the best version of the decree since it is based exclusively on the edition of the text of Van der Hardt who used slightly reliable manuscripts (from the German libraries of Wolfenbüttel’s cities, Vienna, Leipzig, Gotha, Erfurt and Berlin). The author also mentions that the Council of Basel (1431-1449) created a commission to re-edit the Acts of the Council of Constance. This commission used as source the text *Liber* of Brogny’s Cardinal (Bronchiaco) handed to the Council in 1442. When the cardinal died in 1426 the text finished in the hands of the Genevan Francisco de Meez, who authorized the commission to use it. The proposal of the editor is to use as a base text the one published by Pierre CRABBE, *Concliorum Omnium tam Generalium quam Particularium*, I-III, Coloniae Agripinae, 1551, II, pp. 1080 y 1020. This text reproduces Hieronymus of Croatia’s manuscript *Acta situ dignissima doteque concinnata Constanciensis concilii celebratissime* (1490) on which Johannes Rynmann based his first printed edition of the Acts in 1500. Most of the later editions will be based on this text. The author confronts it with a large amount of XVth century manuscripts from the Vatican Library — Pal. Lat. 595, Reg. Lat. 981, Reg. Lat. 1031, Rossianus 1064, Vat. Lat. 1335 (1423), Vat. Lat. 4173, Vat. Lat. 4174, Vat. Lat. 4175, Vat. Lat. 4176, Vat. Lat.

even without a papal head the Council had sufficient authority to restore the union of the Church. The competence of the Council rested on Christological grounds since the Council held its *potestas* immediately from Christ. Even the Pope was subject to this *potestas*. The text explicitly added that those who disregarded this authority would be punished, including the Supreme Pontiff.

*Et primo (declarat), quod ipsa in spiritu sancto legitime congregata concilium generale faciens, et ecclesiam catholicam repraesentans, potestatem a Christo immediate habet, cui quilibet cuiuscumque status vel dignitatis, etiam si papalis existat, obedire tenetur in his quae pertinent ad fidem et extirpationem dicti schismatis, ac reformationem dictae ecclesiae in capite et in membris.*

*Item, declarat, quod quicumque cuiuscumque conditionis, status, dignitatis, etiam si papalis (fuerit), qui mandatis, statutis seu ordinationibus, aut praeceptis huius sacrae synodi et cuiuscumque alterius concilii generalis legitime congregati, super praemissis, seu ad ea pertinentibus, factis, vel faciendis, obedire contumaciter contempserit, nisi resipuerit, condignae poenitentiae subiiciatur, et debite puniatur, etiam ad alia iuris subsidia, si opus fuerit, recurrendo.*

While the enactment of *Haec Sancta* set the basis for the final resolution of the Schism, the explanation of the meaning of the decree has given rise to conflicting interpretations by historians, theologians, and canonists. As has been pointed

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4178, Vat. Lat. 4179, Vat. Lat. 4942 (1438), Vat. Lat. 4943 (after the Council of Basel), Vat. Lat. 4984 (from the end of the XVth century), Vat. Lat. 5597, Vat. Lat. 5598 (1421), Vat. Lat. 7297—.

out by a number of scholars, this arises from certain ambiguity in the wording of the text. This ambiguity would by no means be the product of careless writing but quite the opposite, it appears to have been carefully intended to reach a certain degree of consensus between the different positions held at the Council<sup>5</sup>. Nonetheless, it should be remembered that many of the divergent interpretations tend to be rooted in *a priori* theological or canonical criteria with a clear metahistorical content. Consequently, we will first try to explain how since the Vatican Council I and until the 1960's some of these criteria, had significant influence on the main interpretations of the *Haec sancta*. Secondly, we will focus on the analysis of certain problems posed by one of the main lines of interpretation of the text, the so called *Notstandstheorie*. Finally, we will try to state the importance of a methodological approach reappraising the judicial practices as a source for better understanding of the meaning of this decree. In the last part of this text, an attempt will also be made to study in greater detail the relationships between the consolidation of conciliar authority and the *causae fidei* inquisitional processes, particularly the one against Czech reformer Jan Hus.

<sup>5</sup> Brian TIERNEY, "Hermeneutics and History. The Problem of the *Haec sancta*", in Thayron A. SANDQUIST and Frederik M. POWICKE (eds.), *Essays in Medieval History presented to Bertie Wilkinson*, Toronto, 1969, pp. 354-70. According to his view the text would have been deliberately ambiguous about the meaning of general council. While the first part of the *Haec Sancta* should be interpreted as the council acting without the Pope, the second part of the text would refer to the council acting together with the Pope. In any case Brian Tierney emphasizes the ambiguity of the important term *concilium*. Cf. MORRISEY, "The Decree 'Haec Sancta'...", p. 159. The author affirms that the council never solved what would happen in the case of disputes between the authority of a legitimate council and a legitimate pope; DECALUWE, *op. cit.* More than its ambiguity, Michiel Decaluwe emphasizes the importance of the text wording as an instrument to generate consensus between the different positions about the authority of the council in the absence of the Pope.

## 1- The *Haec sancta synodus* Decree: Between Theology, Canon Law and History

According to Brian Tierney, far from embodying the numerous ideas present in a supposedly *medieval papalist tradition*, the declaration of papal infallibility and Roman primacy expressed by the Vatican Council I in the 1870 *Pastor aeternus* decree introduced a significant disruptive element in this tradition<sup>6</sup>. Undoubtedly, the affirmation of the *magisterium* and of the Roman primacy turned the Council of Constance and the *Haec Sancta* in particular in subjects more worthy of oblivion than of analysis. In that regard, the Roman curia promoted

<sup>6</sup> On papal infallibility and its origins cf. Brian TIERNEY, *The Origins of Papal Infallibility 1150-1350*, Leiden, Brill, 1988; Brian TIERNEY, *Rights, Law and Infallibility in Medieval Thought*, Norfolk, Variorum, 1997. Cf. *Pastor aeternus*, COD, p. 812: “Docemus itaque declaramus, iuxta evangelii testimonia primatum iurisdictionis in universalem Dei ecclesiam immediate et directe beato Petro apostolo promissum atque collatum a Christo domino fuisse [...]. Atque uni Simoni Petro contulit Iesus post suam resurrectionem summi pastoris et rectoris iurisdictionem in totum suum ovile, dicens: *Pasce agnos meos: pasce oves meas*”; COD, p. 813: “Quapropter apertis innixi sacrarum litterarum testimoniis, et inhaerentes tum praecessorum nostrum Romanorum pontificum, tum conciliorum generalium disertis, perspicuisque decretis, innovamus oecumenici Florentini definitionem, qua credendum ab omnibus Christi fidelibus est, sanctam apostolicam sedem et Romanum pontificem in universum orbem tenere primatum, et ipsum pontificem Romanum successorem esse beati Petri principis apostolorum, et verum Christi vicarium totiusque ecclesiae caput, et omnium christianorum patrem ac doctorem existere; et ipsi in beato Petro pascendi, regendi ac gubernandi universalem ecclesiam a domino nostro Iesu Christo plenam potestatem tradita esse; quemadmodum etiam in gestis oecumenicorum conciliorum et in sacris canonibus continetur. Docemus proinde et declaramus ecclesiam Romanam, disponere Domino, super omnes alias ordinariae potestatis obtinere principatum, et hanc Romani pontificis iurisdictionis potestatem, quae vere episcopalis est, immediatam esse: erga quam cuiuscumque ritus et dignitatis pastores atque fideles, tam seorsum singuli quam simul omnes, officio hierarchiae subordinationis, veraeque obedientiae obstringuntur, non solum in rebus, quae ad fidem et mores, sed etiam in iis, quae ad disciplinam et regimen ecclesiae per totum orbem diffusae pertinent; ita ut custodita cum Romano pontifice tam communionis, quam eiusdem fidei professionis unitatis, ecclesia Christi sit unus grex sub uno summo pastore”.

and favored indifference towards the conciliar tradition. In the field of historiography, great credit was given to Juan de Torquemada's idea, which was overtly polemical and contended that conciliarism was a byproduct of the heretical teachings of William of Ockham and Marsilius of Padua, and should therefore be brushed aside<sup>7</sup>. Early in the century Joseph Hefele, who was working on his monumental *Conciliengeschichte*, was openly pressed to accommodate a version of the Council of Constance and the *Haec Sancta* to the prevailing climate at the time<sup>8</sup>.

<sup>7</sup> Cf. the papal bull of Eugenius IV of April 20, 1441 in which he affirms: "Fuerunt impietatis alii dyabolici fundatores: Marsilius de Padua, Johannes de Ganduno, Guillermus Ocham alique nonnulli, qui non tantum sui temporis, sed eciam futuri seculi homines venerarunt" (*Concilium Florentinum*, Ep. Pont. I n. 248 28, 7-9) and the text of Juan de Torquemada's *Summa*, cap. C, II, Venetiis 1561: "Ubi non parum admirandum adversarios basilenses tanta caligine mentis involutos et execatos malitia, ut in materiis fidei diffiniendis et declarandis maluerunt sequi homines ab ecclesia Dei in doctrina sua damnatos: sicut fuit Marsilius de Padua, Ockham, cum complicitibus suis, ex quorum doctrina extracta sunt pro magna parte decreta illa praefata Basiliensia et quosdam alios novellos doctorellos praefati Ockham et aliquorum fraticellorum opiniones erroneas renovantes...". Both texts are quoted by ALBERIGO, *Chiesa conciliare*, p. 18, n. 16. It is very interesting about this topic the text by Thomas IZBICKI, "Paplist Reaction to the Council of Constance: Juan de Torquemada to the Present", *Church History*, 55/1 (1986), 7-20. About the bull cf. Remigius BÄUMER, "Die Stellungnahme Eugens IV. zum Konstanzer Superioritätsdekret in der Bulle 'Etsi non dubitemus'", in August FRANZEN and Wolfgang MÜLLER (eds.), *Das Konzil von Konstanz. Beiträge zu seiner Geschichte und Theologie*, Friburgo, 1964, pp. 337-354.

<sup>8</sup> Cf. H. HEFELE and D. LECLERCQ, *Histoire de Conciles*, Paris, Letouzé et Ané, 1913 and J. Hefele's words quoted by Hans SCHNEIDER, *Der Konziliarismus als Problem der neueren katholischen Theologie*, Berlin/New York, Walter de Gruyter, 1976, p. 265: "Hiernach und nach dem heutigen Recht, welches die päpptliche Aprobation der allgemeinen Concilien, um sie zu solchen zu machen, für nöthig erklärt, kann es wohl keinem Zweifel unterliegen, daß a. alle Beschlüsse von Constanx, welche für das Papsttum keine Präjudiz tilden, für ökumenisch zu erachten, dagegen b. alle, welche gegen das ius, die dignitas und praeminentia des apostolischen Stuhls verstoßen für reprobirt zu halten sind". About the personal situation of Joseph Hefele, cf. Hans KÜNG, *Libertad conquistada. Memorias*, Madrid, Trotta, 2004: "Fue especialmente esta fórmula la que dio ocasión a la protesta y el abandono del concilio Vaticano de la mayor parte de los obispos franceses y

Although the institutional context was clearly unfavorable for the study of the conciliar tradition, the work of most scholars of medieval political thought seemed increasingly suspicious of the allegedly heretical origins of conciliarism. The works of Otto Von Gierke, Franz Bliemetzrieder, Henri Xavier Arquillière and Walter Ullmann at least mentioned for the first time that the source of conciliarism was not something alien to the catholic tradition. Most of these authors agree in suggesting that the actual sources of conciliarism should be sought in the *corpus* of canonical texts regulating the lives of ecclesiastical corporations during the 12th and 13th centuries. However, none of these authors undertook a systematic study of this *corpus*<sup>9</sup>.

While the Vatican Council I *Pastor Aeternus* had created an adverse institutional context for conciliar study, paradoxically it was during the late 19th century and early 20th century that specialized historiography started to produce critical editions of the main sources for the Council of Constance, thus replacing and augmenting the conciliar text collections of Johannes Dominicus Mansi and Hermann Van der Hardt. In 1896 shortly after the Vatican Council I, Heinrich Finke started the publication of his four-volume collection of *Acta Concilii Constanciensis*, which he finished in 1928<sup>10</sup>.

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alemanes ya antes de que se definiera la infalibilidad. Entre ellos, el obispo de Rottenburg y antes el historiador de la Iglesia en Tubinga y autor de una historia de los concilios en siete volúmenes, Karl Joseph Hefele luchó como nadie contra los términos de tal definición citando errores papales. Hefele fue el último obispo del mundo que —no sin haber vivido antes nueve meses de vacilaciones!— escribió una carta pastoral a su clero diciendo que ‘por la paz y la armonía en la Iglesia’ había que hacer ‘grandes y difíciles sacrificios personales’ y que por eso se sometía a la definición vaticana. Y por eso siguió siendo obispo de Rottenburg”.

<sup>9</sup> About this cf. Francis OAKLEY, “Verius est licet difficilium. Tierney’s *Foundations of Conciliar Theory* after forty years”, in IDEM, *Politics and Eternity. Studies in the History of Medieval and Early-Modern Political Thought*, Leiden, Brill, 1999, p. 75.

<sup>10</sup> Johannes Dominicus MANSI, *Sacrorum conciliorum nova et amplissima collectio*, XXVII/XXVIII, Florentiae-Venetis-Parisi-Lippiae, 1759 [reproduction typographica 1966]; Hermann VAN DER HARDT, *Magnum*



Despite the remarkable historiographical progress in terms of publication of sources, during this period conciliar thought is still regarded as a set of ideas which are basically alien to Catholic tradition. This can be seen in Francis Oakley's survey of the main *instrumenta*, theological dictionaries, encyclopedias, and Pope lists published through the early decades of the 20th century. While the *Catholic Encyclopedia* published in 1908 claimed, against all historical evidence, that the Council of Constance only became legitimate after Gregory XII, the Pope of the Roman obedience, convoked it, the *Dictionnaire de théologie catholique* published in 1911 did not include Constance or Basel in the list of ecumenical councils, thus causing a true *vacuum memoriae* between the Council of Vienne (1311-1312) and the Council of Florence (1439-45)<sup>11</sup>. Likewise, the publication of the *Codex Iuris Canonici* in 1917 upheld in its canon 1556 the *Decretum* legal maxim, which in turn had been taken from a series of texts recognized as 6th century forgeries and which stipulated that the Pope could not be judged by anyone<sup>12</sup>. These attitudes tending to impose institutional oblivion of conciliar tradition and to apply contemporary theological criteria to solve historical matters pre-

*oecumenicum Constantiense concilium*, 6 vol., Francofurti-Lippiae, 1696-1700 (Indices 1742); Heinrich FINKE (ed.), *Acta Concilii Constanciensis*, Münster, 1896-1928. About the historical work of Karl August FINK, "Zu den Quellen für die Geschichte des Konstanzer Konzils", in FRANZEN and MÜLLER (eds.), *op. cit.*, pp. 471-476 y Ansgar FRENKEN "Die Erforschung des Konstanzer Konzils (1414-1418) in den letzten 100 Jahre", *Annuario historiae conciliorum*, 25 (1993), 30-89.

<sup>11</sup> Francis OAKLEY, *Council Over Pope? Towards a Provisional Ecclesiology*, New York, 1969, pp. 122-124. In addition, the analysis proposed by the author includes other *instrumenta* with similar visions.

<sup>12</sup> *Codex Iuris Canonici*, Pii X Pontificis maximi iussu digestus Benedicto Papae XV auctoritate promulgatus (ed. Card. GASPARRI, Roma, 1918), Sectio I, Titulus I, *De foro competenti*, Can. 1556: "Prima Sedes a nemine iudicatur". Precisely, the *nisi a fide devius* conditional clause is excluded; it was usually quoted along with this text in the canonical tradition. On this phrase and its origins cf. James M. MOYNIHAN, *Papal Immunity and Liability in the Writings of the Medieval Canonists*, Rome, Gregorian University Press, 1961.

vailed until mid 20th century. In 1947 the Prefect of Vatican Library, Angelo Mercati, in an act that may be regarded as an official declaration, published in the *Annuario Pontificio* a list of popes which, against all historical evidence, described all Pisan line popes as anti-popes while affirming the Roman line legitimacy<sup>13</sup>.

This true *damnatio memoriae* campaign could not prevent that in the early 1950's Hubert Jedin included in his *Geschichte des Konzils von Trient* an introductory chapter devoted to the study of the survival of conciliar ideas even after the Council of Basel<sup>14</sup>. Shortly after, in 1955, Brian Tierney published his *Foundations of Conciliar Theory*. Applying a systematic and through analysis of the texts produced by the main 12th and 13th century decretists and decretalists, Tierney proved what had already been suggested by several scholars in previous decades. Indeed, the most important conciliarist thinkers of the 14th and 15th centuries were mainly inspired by those arguments present in canon law of previous centuries. On the one hand, interest focused on the *Decretum*

<sup>13</sup> OAKLEY, *Council over Pope*, p. 125. Cf. also *Annuario Pontificio* (Città del Vaticano, 1947) and the text quoted by the author Angelo MERCATI, "The new List of Popes", *Mediaeval Studies*, 9 (1947), 71-80. Francis Oakley explains that Angelo Mercati never used historical criteria to affirm that during the Western Schism the only legitimate line of popes was the Roman one. Although he never stated it openly, the prevailing theological criteria since the time of the Vatican Council I influenced his choice; these criteria supported the curialist position of Roman primacy. He also mentions a curious event about the decision made by the Pope in 1958 of assuming the name of John XXIII. When the Pope announced he would adopt this name, he mentioned the fact that there had been already 22 pontiffs with this name *extra legitimitatis discussiones*. Thus the Pope cautiously avoided stating his opinion about the legitimacy of the Pisan line (we have to remember that according to this line there had already been a John XXIII, deposed by the Council of Constance). Nevertheless in the official reissue of the Pope's speech in the *Acta Apostolicae Sedis* the words *extra legitimitatis discussiones* were omitted since they were not compatible with the position adopted in the *Annuario Pontificio*.

<sup>14</sup> Hubert JEDIN, *Geschichte des Konzils von Trient*, Freiburg, 1951-1975, I, chap. 1, pp. 1-7.

text and its subsequent glosses commenting the case of the deposition of a heretical pope, and on the other hand, on comments and glosses written by decretalists who interpreted the structure of the universal Church in the legal terms of an ecclesiastical corporation and which were therefore functional to the *via concilii*. Brian Tierney's analysis marked a significant turning point in conciliarism studies insofar as it proved that *pari passu* to papal absolutism, canon law had a completely different conception of ecclesiastical power which even the most fervent advocates of papal supremacy could not deny<sup>15</sup>. At the same time, his study invalidated the theses stating that conciliarism was a product of the heretical thought of William of Ockham and Marsilius of Padua. Quite the opposite, *Foundations of Conciliar Theory* showed that conciliar thought was deeply rooted in the canonical tradition of the Church, and consequently the Council of Constance and the *Haec Sancta* therein approved could not be so easily brushed aside<sup>16</sup>.

<sup>15</sup> TIERNEY, *Foundations of Conciliar Theory*, p. 240: "But side by side with this [familiar doctrine of papal sovereignty] there existed another theory, applied at first to single churches and then at the beginning of the fourteenth century, in a fragmentary fashion, to the Roman Church and the Church as a whole, a theory which stressed the corporate association of the members of the Church as the true principle of ecclesiastical unity and which envisaged the exercise of corporate authority by the members of a Church even in the absence of a collective head". On the work of Brian Tierney cf. OAKLEY, *Council over Pope*, p. 80 and especially about Tierney's thesis relevance and current validity, OAKLEY, "*Verius est licet difficilius...*", pp. 76-77.

<sup>16</sup> By no means did Brian Tierney tried to write a complete history of conciliar thought in his study. As he explicitly declared it, he was only emphasizing the contributions of canonical thought. The moderate proposal of Brian Tierney has not been recognized, especially by Remigius BÄUMER, "Die Erforschung des Konziliarismus", in Remigius BÄUMER, *Die Entwicklung des Konziliarismus: Werden und Nachwirken der conciliaren Idee*, Darmstadt, 1976, pp. 29-34. This was particularly emphasized in a book review written by M. Seidmayer in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kan. Abt.*, 74 (1957), 374-387. The most important critique of Brian Tierney's thesis can be found in Constantin FASOLT, *Council and Hierarchy. The Political Thought of William Durant the Younger*, Cambridge, Cambridge University Press, 1991, p. 19. From the quotation of certain texts proposed by Hans Joseph SIEBEN, *Die Konzilsidee des lateinischen Mittelalters (847-1375)*,

The Vatican Council II convoked in 1959 set an institutional framework much more favorable to the development of conciliar studies. Based on previous works by Brian Tierney in this context, some theologians and historians started to pay more attention to the tradition of conciliar precedents, and particularly to the Council of Constance. In the early 1960's, Paul De Vooght featured prominently among them. From a historical perspective, De Vooght pointed out the potential contradictions between the Vatican I *Pastor aeternus* and the *Haec Sancta* approved by the Council of Constance<sup>17</sup>. However, the Benedictine De Vooght did not initially focus on the theological implications of his historical conclusions. Regardless, these conclusions had already stirred a bitter response in several articles penned by Joseph Gill, Director of the Pontifical Oriental Institute of Rome and known for his studies on the Council of Florence. In these writings, Gill restated the polemical arguments claiming that the decree was a radical and invalid attempt to subvert the Church constitution desired by God. Although in his opinion the matter had to be settled in theological terms, he also contended that

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Padeborn, 1984, p. 255 affirming that the Council depended on papal summons, Constantin Fasolt saw a real assault to the thesis of Brian Tierney. Nevertheless, these statements did by no means imply the collapse of Brian Tierney's thesis, since at the same time these texts were affirming that in certain questions related to faith and to the state of the Church the Pope had to accept conciliar authority. About this polemic cf. Brian TIERNEY, "Introduction" of the last edition of *Foundations of Conciliar Theory*, p. 13 and OAKLEY, "*Verius est licet difficilium...*", p. 75.

<sup>17</sup>The first conclusions appeared in Paul DE VOOGHT, "Le Conciliarisme aux conciles de Constance et Bâle", in Bernard BOTTE, *Le Concile et les Conciles: contribution à l'histoire de la vie conciliaire de l'église*, Chevetogne-Paris, 1960, pp. 143-181; Paul DE VOOGHT, "Le conciliarisme aux conciles de Constance et Bâle: compléments et précisions", *Irénikon*, 36/1 (1963), 61-75 and Paul DE VOOHT, "Le Cardinal Cesarini et le Concile de Constance", in FRANZEN and MÜLLER (eds.), *op. cit.*, pp. 357-381. About the changes in his opinion cf. Paul DE VOOGHT, *Les pouvoirs du concile et l'autorité du pape au Concile de Constance*, Paris, Du Cerf, 1965 and Paul DE VOOGHT, "Resultados recientes de la investigación histórica sobre el conciliarismo", *Concilium*, 64 (1971), 125-131.

the lack of validity of the *Haec sancta* could be justified on historical grounds as well<sup>18</sup>.

After the debate was initiated, the first one to extract the theological conclusions about the *Haec sancta* was the Swiss theologian Hans Küng. While these conclusions were by no means intended to defend a thesis of radical conciliar supremacy over the Pope, they highlighted instead the need of a much more active role of the Council regarding papal authority in the event of papal heresy, schism or a similar event<sup>19</sup>.

<sup>18</sup> Joseph GILL, *The Council of Florence*, Cambridge, Cambridge University Press, 1959; Joseph GILL, *Eugenius IV*, London, 1961; Joseph GILL, "The fifth Session of the Council of Constance", *Heythrop Journal*, 5 (1964), 131-147; IDEM, *Constance et Bâle-Florence*, Paris, 1965 and "Il decreto *Haec sancta synodus* del Concilio di Constanza", *Revista di storia della Chiesa in Italia*, 12 (1967), 123-130 and Joseph GILL, "Die funfte Sitzung des Konzil von Konstanz", in Remigius BÄUMER, *Das Konstanzer Konzil*, Darmstadt, 1977, pp. 229-247. His argument consisted in affirming that the Council of Constance was not legitimate since its authority depended on the previous Council of Pisa and this one had been convoked by a Pope of that obedience. Against strong historical evidence Joseph Gill claimed that the Council of Pisa had not been legitimate and consequently nor was Constance. The Council of Constance only became a legitimate assembly when Gregory XXII, the Pope of Roman obedience, convoked it on 4th July 1415. In addition, according to Joseph Gill the decree had never received papal approval since it had not been named explicitly in a bull. In order to question the validity of the decree, based on the absence of certain cardinals (particularly Zabarella) the author also denied the ecumenical character of the 5th session. Although the author thought he was debating on strictly historical terms, canonical and theological criteria permanently distorted and forced his interpretation. This is quite apparent when the author declares the illegitimacy of the Council of Pisa omitting any historical analysis.

<sup>19</sup> Cf. Hans KÜNG, *Strukturen der Kirche*, Freiburg, 1962, p 259: "Was wurde also, wenn wir das Ergebnis des Konzils für unieren Problemkreis zusammenfassen wollten, in Konstanz definiert? *Nicht* definiert wurde der konziliare Parlamentarismus (im Sinne des radikalen Konziliarismus): nach diesem wäre die gewöhnliche ordentliche Leitung der Kirche vom Papst auf das Konzil übertragen worden und der Papst zu einem untergeordneten Exekutivorgan des konziliaren Parlaments degradiert [...] *Definiert* wurde aber jedenfalls eine bestimmte Art von Superiorität des Konzils (im Sinne einer, wenigstens gemäßigten, "konziliaren Theorie"): darnach hat das ökumenische Konzil nicht nur für den damaligen Notfall, sondern auch in Zukunft die

Shortly after, and based on Hans Küng's work, Paul De Vooght finally decided to extract the theological consequences of his historical research and claimed the dogmatic validity of the *Haec Sancta* and therefore its universality as an article of faith<sup>20</sup>. According to Paul De Vooght, the dogmatic validity of the decree could be proved by Martin V's subsequent approval through the bull *Inter cunctas*, in which the Pope ambiguously accepted anything that the Council of Constance had resolved *conciliariter*<sup>21</sup>. These conclusions immediately gave rise to considerable debate. The main criticism of De Vooght's revolved around the anachronism of postulating the need of subsequent papal approval as valid criteria for conciliar decisions. In this regard, it should be noted that criticism did not only come from papal apologists but also from the pro-conciliar side. Despite criticism, De Vooght's claims had the merit of starting the debate on the dogmatic validity of the *Haec sancta*. The *Lumen gentium* decree on the Church constitution approved by the Vatican Council II did not contribute to finally settling the matter either because even though it recognized the collegial and Episcopal *magisterium* of the Church, it left the door open for administrative centralism of the Roman curia<sup>22</sup>.

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Funktion einer Art von "Kontrollinstanz" über den Papst, dessen Versagen in Häresie, Schisma usw. Grundsätzlich ja auch in Zukunft möglich war".

<sup>20</sup> On Paul De Vooght position cf. note 17.

<sup>21</sup> For the text of the bull *Inter cunctas* cf. MANSI, t. XXVIII, col. 590-593. The shift in De Vooght's position can be seen in the following texts: "Le conciliarisme aux conciles...", p. 64: "Le 22 avril 1418, à la dernière session du Concile de Constance, Martin V a déclaré qu'il approuvait tout ce qui avait été décidé *conciliariter*, j'ai pris argument de la déclaration de Martin V pour affirmer qu'il avait approuvait le conciliarisme. Je ne retire rien de ce que j'ai dit là-dessus, mais je pense qu'il y a lieu de préciser le *genre* d'approbation donné par Martin V en cette circonstance". Some time later the same author commented on the subject cf. "Resultados recientes...", p. 128: "La cuestión de si Martín V aprobó o no el decreto *Haec sancta* es, de hecho, totalmente secundaria...".

<sup>22</sup> About the decree *Lumen gentium* cf. COD (863): "Haec sacrosanta synodus, concilii Vaticani primi vestigia premens, cum eo docet et declarat Iesum Christum pastorem aeternum sanctam aedificasse ecclesiam, missis apostolis sicut ipse missus erat a Patre (cf. Io 20, 21) quorum successores,

In the opinion of Francis Oakley, the debate has not been properly solved yet with definitive arguments proposed by either theologians or historians<sup>23</sup>.

## **2- *Notstandstheorie* and *Plenitudo Potestatis***

Since the mid-1960's the focus of the debate has shifted from the dogmatic validity of the *Haec sancta* to its legal implications as positive constitutional law. Although this shift lent the debate a more solid historical ground, controversy soon re-emerged<sup>24</sup>. From then onwards, theologians and historians without refusing the validity of the decree have tried to establish its limits. Thus, a group of Church historians, led by Hubert Jedin, Walter Brandmüller and August Franzen developed a clever interpretation of the *Haec sancta* which had the merit of allowing them to strike a certain balance between their theological and historical commitments<sup>25</sup>. In fact the

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videlicet episcopos, in ecclesia sua- usque ad consummationem saeculi pastores esse voluit. Ut vero episcopatus ipse unus et indivisus esset, beatum Petrum ceteris apostolis praeposuit in ipsosque instituit perpetuum ac visibile unitatis fidei et communionis principium et fundamentum. Quam doctrinam de institutione, perpetuitate, vi ac ratione sacri primates Romani pontificis deque eius infallibili magisterio, sacra synodus cunctis fidelibus firmiter credendam rursus proponit, et in eodem incepto pergens, doctrinam de episcopis, successoribus apostolorum, qui cum successores Petri, Christi vicario ac totius ecclesiae visibili capite, domum Dei viventis regunt, coram omnibus profiteri et declarare constituit". Brian Tierney has pointed out the consequences of the overlapping of the Roman primacy constitutional principle and that of the episcopal collegiality. Especially cf. "Introduction", *Foundations of Conciliar Theory*, pp. 27-29 and Helmut RIEDLINGER, "Hermeneutische Überlegungen zu den Konstanzer Dekreten", in FRANZEN and MÜLLER, (eds.), *op. cit.*, pp. 214-238.

<sup>23</sup> Cf. Francis OAKLEY, *The Conciliarist Tradition. Constitutionalism in the Catholic Church 1300-1870*, Oxford, Oxford University Press, 2003, p. 90.

<sup>24</sup> About the validity of the decree as a constitutional positive law cf. TIERNEY, "Hermeneutics and History", p. 363.

<sup>25</sup> Hubert JEDIN, *Bischofliches Konzil oder Kirchenparlament? Ein Beitrag zur Ekklesiologie des Konzilien von Konstanz und Basel*, Basel-Stuttgart, 1965; August FRANZEN, "El Concilio de Constanza: problemas, tareas y estado actual de la investigación sobre el Concilio", *Concilium*, 7 (1965), 31-77.

main arguments of this line of interpretation had already been formulated by Johannes Hollensteiner, who in turn had drawn inspiration from certain polemical arguments by Juan of Torquemada<sup>26</sup>. The interpretation introduced by these historians, later known as *Notstandstheorie*, stated that the *Haec sancta* had been intended merely as a measure to deal with the emergency situation arising from the existence of three popes of questionable legitimacy<sup>27</sup>. In the absence of a legitimate pope, the interest of the Church as a whole had to prevail over the individual interests of the pope. Consequently, when writing the *Haec sancta* the members of the Council were dealing with a completely irregular situation and therefore, this would by no means be dogmatic definition of faith but rather a measure limited in scope to that particular context.

However, the first problem for *Notstandstheorie* advocates was how to reconcile their restricted interpretation of the decree with the sentence included in the text stating the need for conciliar obedience not just in that particular context but *cuiuscumque alterius concilii generalis legitime congregati*. According to Walter Brandmüller's interpretation, by mentioning this sentence the Council fathers may have been alluding to the potential need to celebrate a new Council in the near future in order to put an end to the Schism<sup>28</sup>. In

This article summarizes the position of the author about this matter. Cf. also the articles August FRANZEN, "Zum Vorgeschichte des Konstanzer Konzil vom Ausbruch des Schismas bis zum Pisanum"; "Das Konzil der Einheit: Einigung bemühen und Konziliaren Gedanken auf dem Konstanzer Konzil. Die Dekrete 'Haec sancta' und 'Frequens'", in FRANZEN and MÜLLER (eds.), *op. cit.*, pp. 3-35 y 69-112; Walter BRANDMÜLLER, "Besitzt das Konstanzer Dekret 'Haec sancta' dogmatische Verbindlichkeit?", *Annuario Historiae Conciliorum*, 1 (1969), 96-113; more recently Walter BRANDMÜLLER, *Das Konzil von Konstanz (1414- 1418)*, Paderborn, 1991, pp. 237-259.

<sup>26</sup> Johannes HOLLNSTEINER, "Das Konstanzer Konzil in der Geschichte der christlichen Kirche", *Mitteilungen des österreichischen Instituts für Geschichtsforschung*, 11 (1929), 395-420.

<sup>27</sup> On the *Notstandstheorie* cf. SCHNEIDER, *op. cit.*, pp. 226-234.

<sup>28</sup> Cf. BRANDMÜLLER, *Das Konzil von Konstanz...*, p. 256: "Wenn dem nun hinzugefügt wird... *et cuiuscumque alterius concilii...* dann geht es auch dabei um das Ziel von Einheit und Reform. Deshalb kann es nicht angehen,



this way, Brandmüller's clever interpretation placed special emphasis on the word *alterius* instead of *alii*<sup>29</sup>. Nevertheless, this view appeared to overlook the significance of the word *cuiuscumque*<sup>30</sup>. Aside from this objection, the main problem of the *Notstandstheorie* was related to the reconstruction of the immediate context in which the *Haec sancta* had been approved. In the opinion of Brandmüller, the existence of three lines of popes would have led to a quasi-vacancy of the papal office. Consequently, the phrase *etiam si papalis existat* should be considered as a defense of the theory of a *de iure* vacancy as the Council fathers would have followed the canonical *opinio* stating that a pope was deposed *ipso facto* for committing a heretical act<sup>31</sup>. Regarding this sentence, the author offers a completely different translation of the text from the ones ca-

wie üblich zu übersetzen: ... und eines jeden anderen Konzils... Es muß viel mehr übersetzt werden: und jedes weiteren Konzils, das bei einem eventuellen Scheitern dieses Konstanzer Konzils notwendig werden könnte".

<sup>29</sup> Cf. Walter BRANDMÜLLER, *Papst und Konzil im Grosse Schisma (1378-1431). Studien und Quellen*, Schöningh, 1990, p. 243: "Die feine, aber doch kennzeichnende Nuance, die in der Wahl von 'alterius' statt 'alii' liegt, ist dabei nicht zu übersehen. Darum wird man die Geltung dieses Passus nicht auf jedes andere, sondern nur auf jedes weitere Konzil, das sich mit der Bereinigung des Schismas etwa würde befassen müssen, ausdehnen dürfen".

<sup>30</sup> Cf. OAKLEY, *The Conciliarist Tradition...*, pp. 92-93.

<sup>31</sup> BRANDMÜLLER, *Das Konzil von Konstanz...*, p. 247: "Soll nun der Versuch einer den Ertrag der bisherigen Diskussion würdigenden Interpretation dieses bedeutenden Textes unternommen werden, so ist zunächst eine Voraussetzung von Gewicht: Kaum einer der einigermaßen informierten Konzilsteilnehmer konnte darüber im unklaren sein, daß keiner der drei konkurrierenden 'Päpste' unbezweifelt und unbezweifelbar legitimer Papst war. Deshalb bestand de iure Sedisvakanz". On the deposition process cf. *ibidem*, p. 299: "Dies aber auch aus einem noch viel gewichtigeren Grund: Johann XIII. war keinesfalls zweifelsfrei legitimer Inhaber der Cathedra Petri gewesen. Die öffentliche Meinung auf dem Konzil war sich dessen sicher. Johann XXIII hatte in seiner Obedienz de facto als Papst fungiert, de iure jedoch kaum. Wovon konnte er dann abgesetzt, wessen konnte er dann pri- viert werden? Der faktischen Verfügung über die im Bereich seiner Obedienz gelegenen *bona temporalia* der Kirche, insbesondere über den Kirchenstaat. Nicht jedoch des obersten Hirtenämtes der Kirche! Damit ist auch die Frage beantwortet, ob denn das Konzil von Konstanz gegen den Grundsatz *prima*

ried out thus far by both Giuseppe Alberigo and by Thomas Morrisey<sup>32</sup>.

Although Walter Brandmüller has been one of the few to realize the unavoidable need of working with the best edition of the *Haec Sancta* decree and his revision of both translations seems accurate, we will not adhere to the conclusion extracted from these, since a close examination of the context reveals certain shortcomings in its reconstruction. Unlike the Council of Pisa, which had been convoked *ad hoc* and to some extent *ad homines* to issue a sentence of deposition against two heretical Popes, the Council of Constance had been called by a Pope most regarded as legitimate<sup>33</sup>. The situation was therefore radically different since the absence of the Pope who had convoked the Council seriously jeopardized its continuity. Although the Council of Pisa had been convoked by both Colleges of Cardinals without papal authority, it should be borne in mind that the scope of this assembly was limited to the deposition of the Popes, dutifully overlooking any other act<sup>34</sup>.

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*sedes a nemine iudicatur* gehandelt habe. Es is zu Konstanz kein wirklicher, legitimer Papst, wirklich abgesetzt worden”.

<sup>32</sup> BRANDMÜLLER, *Das Konzil von Konstanz*, p. 300: “Daß dieser landläufig mißverstanden wird, zeigen die Übersetzungen desselben, denen man begegnen kann. Th. Morrisey übersetzt etwa so: *everyone of whatever status or dignity is bound to obey it..., even if it be the papal dignity*. Ganz ähnlich G. Alberigo: *...chiunque, di qualunque condizione e dignità, compresa quella papale*. Diese Übersetzungen, vor allem die letztere, sind eindeutig falsch. Sie geben das *etiam si ... existat* nicht nur ungenau, sondern gar nicht wieder. Dieses aber müßte übersetzt werden: selbst wenn ein Inhaber päpstlicher Würde existieren sollte”. For the translation text cf. MORRISEY, “The Decree ‘Haec Sancta’...”, p. 154 and COD, p. 409.

<sup>33</sup> This is a key premise in our argumentation and we will deal with the subject below. Nevertheless, it is necessary to emphasize that this fact has not been noted by most of the scholars. Recently, only OAKLEY, *The Conciliarist Tradition...*, p. 86 has emphasized the importance of this fact: “There is little or nothing, however, to suggest that the fathers assembled at Constance were themselves disposed to think in such a way. When they proceeded to depose John XXIII they did it so not as a doubtful claimant to the papacy but as pope who had been brought to judgement and found guilty of criminal and incorrigible behaviour”.

<sup>34</sup> ALBERIGO, *Chiesa conciliare...*, pp. 150-164.

On the one hand, it should be remembered that although the Council of Pisa failed to reunite the Church, most of the members of the Council of Constance considered John XXIII a legitimate Pope, at least until he fled the Council. The sentence of deposition was more than eloquent when it named John XXIII as *dominus papa*. It should be stressed that even though the existence of two other obediences was not denied, until then John XXIII had been the only legitimate head of the papacy<sup>35</sup>. On the other hand, the process against the Pope at the Council of Constance posed an urgent problem in this particular case since it was not possible to resort to the traditional legal fiction which stated that heretical behavior by a Pope would lead *ipso facto* to his deposition. It should not be overlooked that in the case of the Council of Constance, casting doubt on the legitimacy of the Pope also implied casting doubt on the legitimacy of the Council itself, since John XXIII had convoked it. Because of this the process against the Pope and its formalities were of paramount importance since the purpose was not to merely issue a declarative *sententia* of papal heresy but the deposition should be the result of a process which would establish that John XXIII, once a legitimate Pope, was no longer legitimate on account of his recent heretical behavior<sup>36</sup>. The process had to prove that John XXIII,

<sup>35</sup> John XXIII's deposition sentence refers to him as *dominum papam*. COD, p. 393: "[Sacrosancta generalis Constantiensis synodus]... per hanc sententiam definitivam, quam profert in scriptis, pronunciat, decernit et declarat, recessum per praefatum *dominum Ioannem papam XXIII* ab hac civitate Constantiensi...". On the other hand, although the Council accepted Gregory XII's convocation as a requirement of his abdication, he was not mentioned as pope. COD, p. 397: "Sacrosanta generalis synodus Constantiensis, in Spiritu sancto legitime congregata, universalem ecclesiam catholicam repraesentans, cessionem, renuntiationem pro parte illius domini, *qui in sua oboedientia dicebatur Gregorius XII*...". Finally the belated sentence of deposition against Benedict XIII also omitted to call him a pope. COD, p. 413: "Quanto magis pereat illius, qui omnes homines et ecclesiam universalem persecutus est et turbavit, *Petri Luna, Benedicti XXII* a nonnullis nuncupati, memoria?"

<sup>36</sup> The position of OAKLEY, *The Conciliarist Tradition...*, p. 86 is in open opposition to the claims made by BRANDMÜLLER, *Das Konzil von*

who had once been a *verus papa*, had only recently become a heretic. Resorting to the legal fiction of an *ipso facto* deposition would have implied questioning John XXIII's legitimacy and indirectly, the legitimacy of the Council of Constance itself, convoked by a *falsus* Pope.

At the time Jean Gerson himself revised his treatise *De auferibilitate Papae ab Ecclesia*, in which he openly attacked the thesis of *ipso facto* deposition claiming that if a Pope was named by virtue of a public process, he should be subjected to a similar process in the case of his deposal. Without a doubt the only hierarchical instance within the ecclesiastical structure with the power to do that was the general Council<sup>37</sup>. It is likely that the carefully selected language of the *Haec Sancta* particularly regarding the sentence *etiam si papalis existat* was due to the fact that although the formalities of the public process for John XXIII's deposition had been initiated, the final sentence was not enacted until some time later, on 29th May, once all the formal process requirements had been fulfilled<sup>38</sup>. Indeed, while we agree with Walter Brandmüller's

*Konstanz...*, p. 299: "Das mindert nicht das Gewicht der Tatsache, daß das Konzil mit seiner Sentenz den Anspruch, dies tun zu können, erhoben hat und realisieren wollte. Indes konnten auch jene, die die konziliaristische Auffassung nicht teilten, der Sentenz zustimmen, da sie sich ja nicht gegen einen legitimen Papst richtete".

<sup>37</sup> Jean GERSON, *De auferibilitate Papae ab ecclesiae* cons. 16 in Palémon GLORIEUX (ed.), *Oeuvres complètes*, Tournai, 1960-1963, 3, p. 308 and Louis Ellies DU PIN (ed.), *Opera omnia*, Amberes, 1706, II, 221A: "Dicamus ergo concludentes probabiliter quod sicut humana electio dat ius et titulum ad papalem dignitatem... sic per humanam destitutionem perdit illam praesidentiam et non aliter, eo invito, sive sit haereticus sive sit schismaticus". G. H. M. POSTHUMUS MEYJES, *Jean Gerson. Apostle of Unity. His Church Politics and Ecclesiology*, Leiden, Brill, 1999, p. 172; John B. MORRALL, *Jean Gerson and the Great Schism*, Manchester, Manchester University Press, 1960, pp. 92-93.

<sup>38</sup> The importance of procedural formalities has been noted by Thomas MORRISEY, "More Easily and More Securely' Legal Procedure and Due Process at the Council of Constance", in James R. SWEENEY and Stanley CHODOROW (eds.), *Popes, Teachers, and Canon Law in the Middle Ages*, New York, Cornell University Press, 1989, pp. 234- 250. According to the author,

changes to the translations of the sentence *etiam si papalis existat*, we do not agree with the consequences extracted from his *lectio* of the text.

On careful examination, one of the basic premises of the *Notstandstheorie* is trying to reconstruct the historical context in which the canonical principle *prima sedes a nemine iudicatur* is not affected by the acts of the Council of Constance. Trying to reconcile this canon law principle with the events at Constance in terms of the enactment of the *Haec sancta* principles leads its advocates to stretch their historical interpretation. Against strong evidence to the contrary, they are forced to state that the Council of Constance never questioned this principle, as the lack of legitimacy of the three popes rendered any process against them unnecessary. Indeed, the Schism would have led to an *ipso facto* deposition of the three popes with no further need of a public process. The Council fathers would have followed the canonical *opinio* which was best embodied by Hugucio of Pisa and which stated that a

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the Council of Constance always proved to be extremely cautious about legal procedure. The article also mentions that the Council fathers tried to leave a door open for a potential collaboration with John XXIII right up to the last moment. The negotiation process between the Council and John XXIII after his flight has been studied by BRANDMÜLLER, *Das Konzil von Konstanz...*, pp. 279-310. It is important to point out that the deposition sentence would only be pronounced once all the formal requirements of the process were fulfilled. Meanwhile the phrase *etiam si papalis existat* might be alluding to the fact that since the deposition process had not finished, it was not possible to affirm categorically the absence of the Pope. About the second part of the text of the *Haec sancta* the textual variable introduced by Michiel Decaluwe with “*fuerat*” is of interest. It is possible that this variable would in a way attenuate the semantic content Walter Brandmüller attributes to the verb “*existat*” in the first part. A radically different view from that of Thomas Morrissey about the Council of Constance processes can be found in Henry Ansgar KELLY, “Trial Procedures against Wyclif and Wycliffites in England and the Council of Constance”, *Huntington Library Quarterly*, 61/1 (1999), 1-28. The author lists a number of procedural violations regarding the *causa fidei* in particular. About the process against Jan Hus, cf. Jiří KEJŘ, *Die causa Johannes Hus und das Prozessrecht der Kirche*, Regensburg, Friedrich Pustet, 2005.

pope's heretical behavior put him *ipso facto* out of office<sup>39</sup>. The problems this interpretation posed to the members of the Council of Constance have already been pointed out. To act like this would have indirectly implied casting some doubt on the legitimacy of a Council convoked by a heretical Pope.

<sup>39</sup>One of the most important glosses on this issue was that of Hugucio de Pisa. This was one of the first systematic attempts at discussing the problem posed by the trial and deposition of a pope. As for the reason why a heretical pope might be deposed, this included how harmful this situation might be for the Church as a whole: "... si papa esset hereticus non sibi soli noceret sed toti mundo, praesertim quia simplices et idiote facile sequerentur illam heresim cum crederent non esse heresim". The reasoning is clear; if the Pope was heretical the simple *fideles* not versed in theological matters would tend to follow his position without knowing the heresy manifested and this would be particularly harmful for the whole Church. Hitherto Hugucio's gloss seemed to follow the text of the *Decretum*. Nevertheless, the innovation of Hugucio's text consisted in incorporating a series of crimes beyond heresy which were particularly harmful to the Church since they were committed by the Pope. These were crimes that due to their public and manifest character affected the *status ecclesiae*. Hugucio asked himself rhetorically: "Ecce, publice furatur, publice fornicatur, publice comittit simoniam, publice habet concubinam, publice eam cognoscit in ecclesia iuxta vel super altare, admonitus non vult cessare, nunquid non accusabitur... nunquid non condempnabitur, nunquid sic scandalizare ecclesiam non est quasi heresim committere? Preterea contumacia est crimen ydolatrie et quasi heresis ut di. Lxxxix si quis presbyteri, unde et contumax dicitur infidelis ut di. Xxxxviii nullus". These crimes scandalizing the Church were practically assimilated to heresy. If the Pope incurred in these public crimes, he could be deposed having been called previously to modify his conduct. The text of Hugucio's gloss has been quoted by TIERNEY, *Foundations of Conciliar Theory...*, pp. 228-229. The last edition of the text includes an important documentary appendix. Anyhow Hugucio's gloss also introduced significant restrictions since the Pope could only be accused of an already existing heresy and besides this should be affirmed publicly by the Pope in question. About Hugucio's gloss cf. also MOYNIHAN, *Papal Immunity and Liability...*, pp. 75-84. Cf. also the *glossa ordinaria* de Johannes TEUTONICUS: "*Dist. 79 c.8. Contra fas...* Sed quis erit iudex de hoc, an electio sit contra fas? Non ipsi Cardinales, quia si sic, essent iudices in proprio facto nam nullus superior potest inveniri ut *extra de elect. licet*. In fi. (c.6). Dic istud c.locum habere quando neuter est electus a duabus partibus. Vel dic, quod concilium convocabitur". Text extracted from the documentary appendix cf. TIERNEY, *Foundations of Conciliar Theory...*, p. 230.

According to the *Notstandstheorie*, there was no room for a deposition process of a Pope as this would go against the principle of *prima sedes a nemine iudicatur*.

However, another canonical *opinio* coexisted with this; its origins can be traced to the of *Magister* Honorius *Summa De Iure Canonico Tractaturus*<sup>40</sup> which had been subsequently developed and expanded by Alanus Anglicus in his *Apparatus Ius Naturale*<sup>41</sup>; this affirmed the need of a deposition process led by the Council when a Pope strayed from the true faith. In open opposition to the *ipso facto* deposition theory, these texts affirmed the need of a public process. Contrary to Walter Brandmüller's arguments we find that the Council fathers gathered in Constance clearly favored this second alternative. A longstanding prejudice rooted in *a priori* canonical principles states that the existence of a deposition process would imply acceptance of certain 'radical' conciliar intentions which were in fact alien to most of the Council fathers in Constance. Indeed, the most prominent members of the Council of Constance were far from the 'radical' claims of conciliar superiority later expressed at the Council of Basel. However, the act of affirming the need of a deposition process should be considered as a basically conservative strategy whose aim was to emphasize and strengthen the position of the Council as the most important hierarchical instance in charge of setting

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<sup>40</sup> Cf. MAGISTRI HONORII, *Summa De Iure Canonico Tractaturus*, in Rudolf WEIGAND, Peter LANDAU and Waltraud KOZUR, *Magistri Honorii Summa*, Città del Vaticano, Biblioteca Apostolica Romana, 2004. I would like to thank the anonymous peer reviewer of this text for the information about the critical edition of this text. Cf. also MOYNIHAN, *Papal Immunity and Liability...*, pp. 70-73.

<sup>41</sup> ALANUS ANGLICUS, *Apparatus Ius Naturale*, Paris, Bibliothèque Mazarine, MS 1318, fol. (this is the longer version of the text, the shorter one is Paris BN MS 3909), in MOYNIHAN, *Papal Immunity and Liability...*, pp. 94-101. Cf. also Brian TIERNEY, "Pope and Council: Some New Decretist Texts", *Medieval Studies*, 19 (1957), 197-218 and IDEM, "Ockham, The Conciliar Theory and The Canonists", *Journal of the History of Ideas*, 15/1 (1954), 40-70.

the limits of orthodoxy in a context of extreme institutional weakness.

In that sense, we believe that the need of a deposition process against a heretical pope should be considered in relation to the rest of the *causae fidei* and particularly the inquisitorial processes against John Wyclif (*post mortem*), Jan Hus and Jerome of Prague as well as the condemnation of tyrannicide theories held by Jean Petit. Most of the Council fathers were aware of the potential risks that would follow if the *ipso facto* deposition theory was projected to the rest of the ecclesiastical hierarchy or even to the secular *politica*.<sup>42</sup> According to Council fathers in Constance, these ideas were particularly dangerous in Wyclif's theories and consequently in Hus's ideas, who with certain subtle differences between them argued that only priests in a state of grace had authority.<sup>43</sup> It should be noted

<sup>42</sup> On the one hand we can see that during the 13th century the term *Corpus mysticum* stopped being used in relation to Eucharist and started being used in relation with the Church. On the other hand the term used until then to refer to the Eucharist was *Corpus Christi*. This *translatio* in the meaning of the term can only be understood taking into account that since the 12th century the most important canonists started treating the individual churches and monasteries as corporations. Cf. on the subject Henri DE LUBAC, *Corpus mysticum: L'Eucharistie et l'Église au Moyen Âge*, Paris, 1949. In fact, canonists developed the legal technicalities required by the corporations in order to behave as any individual in legal terms. In this was corporations appeared as true *personae fictae*. About the analogy between the ecclesiastical and secular *politia* cf. Francis OAKLEY, *The Political Thought of Pierre D'Ally. The voluntarist Tradition*, New Haven and London, Yale University Press, 1964, pp. 34-65 and IDEM, "Natural Law, the *Corpus Mysticum* and Consent in Conciliar Thought from John of Paris to Matthias Ugonius", *Speculum*, 56/4 (1981), 786-810.

<sup>43</sup> The idea that the theological thought of J. Hus would be a mere copy of John Wyclif's thought has been supported openly by the works of Joseph Loserth written at the end of the 19th century. Through a careful linguistic study confronting some of Wyclif's and Hus's most important texts, Loserth arrived at this conclusion. About these historiographical problems cf. František ŠMAHEL, *Die Hussitische Revolution*, Hannover, Monumenta Historiae Germaniae, Hahnsche Buchhandlung, 2002, vol. I, pp. 41. In fact, while Wycliffite influence is undeniable, nowadays scholars tend to emphasize Hus's creative and selective appropriation of some theological concepts



between late 14th century and early 15th century there had been a revival of certain 'neodonastist' theses stating that the sanctity or sin of a priest in possession of an ecclesiastical office affected the validity of his acts<sup>44</sup>. According to these views, a priest in mortal sin did not administer valid sacraments. Undoubtedly, this fact questioned the entire Church hierarchical and sacramental structure while it opened the door for secular power to intervene when the Church did not fulfill its evangelical duties. The same could be said of Jean Petit's tyrannicide theses condemned by the Council. Jean Gerson perceived the risk of claiming that a king could be deposed or killed without

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developed by Wyclif. A clear example of this attitude can be found in Howard KAMINSKY, *A History of the Husite Revolution*, Oregon, Wipf & Stock, 2004 —re-edition of the text published in 1967 by University California press—, pp. 7-35. About the differences between the thought of Jan Hus and John Wyclif, Paul De Vooght's works, written mainly during the 1960's are essential. Cf. Paul DE VOOGHT, "Jean Hus à l'heure de l'oecuménisme", *Irénikon*, 36/3 (1969), 193-313; Paul DE VOOGHT, "Universitas praedestinatorum et congregatio fidelium dans la l'ecclésiologie de Jean Hus", *Ephemerides Theologicae Lovanienses*, 32/3-4 (1956), 487-534; IDEM, *Husiana*, Louvain, 1960; IDEM, *Jean Hus au Symposium Husianum Pragense*, Paris, Istina, 1965-1966; IDEM, *L'hérésie de Jean Hus*, Louvain, 1960; Alexander PATSCHOVSKY, "Ekklesiologie bei Johannes Hus", in Harmut BOOCKMANN, Bernd MOELLER and Karl STACKMANN (eds.), *Lebenslehren und Weltentwürfe im Übergang vom Mittelalter zur Neuzeit. Politik-Bildung-Naturkunde-Theologie*, Göttingen, 1989, pp. 370-399. More recently on the same topic cf. Bernard TÖPFER, "Lex Christi, dominium und kirchliche Hierarchie bei Jan Hus im Vergleich mit John Wyclif", in Ferdinand SEIBT (ed.), *Jan Hus, zwischen Zeiten, Völkern, Konfessionen*, München, Veröffentlichungen des Collegium Carolinum 85, 1997, pp. 157-166 and Enrico Selley MOLNAR, "Wyclif, Hus and the problem of Authority", in *ibidem*, pp. 167-182.

<sup>44</sup> Jean GERSON, *An liceat* (GL. 6, 286; DU PIN, II, 305CD): "...non est verum quod papa eo facto quod cadit in haeresim praesertim latentem, sit depositus a papatu, sicut non est verum de aliis episcopis; peccatum haeresis, licet reddat unum praelatum dignum depositione, iuncta pertinacia, non tamen reddit eum depositum eo facto, sed requiritur humana dispositio". Cf. POSTHUMUS MEYJES, *op. cit.*, p. 174. Jean GERSON, *Tradidit Jesum* (GL. 5, 558; DU PIN II, 593BC): "etsi praelatus haereticus dignus est deponi, nihilominus non est eo facto depositus, sicut aliquis quantumcumque sit dignus episcopari non est eo facto episcopus, nisi per electionem divinam vel humanam manifestam"; POSTHUMUS MEYJES, *op. cit.*, p. 173.

a due public process and thus felt the need of pronouncing himself against Jean Petit's teachings<sup>45</sup>. While the aim of these processes was to obliterate the potential consequences of the *ipso facto* deposition thesis, at the same time they tried to conjure another principle of canonical tradition which in the eyes of the Constance fathers seemed potentially anarchical. The principle was related to the *ipso facto* deposition thesis and claimed that a heretical pope could be deposed without contradicting the *prima sedes a nemine iudicatur* maxim as his own heretical turned him *minus quolibet catholico*. This canonical principle which had proved extremely useful for William of Ockham in his fight against the papacy in the 14th century, by virtue of its potentially anarchical implications, had turned into something that should be expressly rejected and avoided by the Council fathers at the beginning of the following century<sup>46</sup>. Indeed the Council fathers faced the problem of deposing a heretical pope while affirming the need for ecclesiastical obedience. Therefore heresy processes appeared as a particularly suitable *forum* to rebuild the foundations of ecclesiastical obedience bonds. That is the subject we will focus on below.

<sup>45</sup> Jean GERSON, *De auferibilitate* cons. 12 (GL. 3, 304-5; DU PIN II, 217D-18C): "Sed utrum haec obedientiae subtractio... valeat per alium quam per ecclesiam vel generale concilium? Forte videtur respondendum negative, praesertim si fiat sermo de subtractione generali et auctoritativa, et quae liget omnes de ecclesia in hoc stare; secus est de subtractione particulari quoad hos vel illos et quae non fertur auctoritative; sed vel doctrinaliter et insinuativa, vel necessitatis quadam inductione". To close the affair Petit: "Quanto magis erronea et damnanda est assertio quod licet unicuique subditorum mox ut aliquis est tyrannus, ipsum viis omnibus fraudulentis et dolosis sine quavis auctoritate vel declaratione iudiciaria morti trahere; praesertim si addat haec assertio quod tyrannus ille omnis est, qui non praest ad utilitatem subditorum. Sed de hac re alibi, de qua viderint assertores"; POSTHUMUS MEYJES, *op. cit.*, p. 173.

<sup>46</sup> Michael WILKS, *The Problem of Sovereignty in the Later Middle Ages*, London, Cambridge University Press, 1963, pp. 516-523.

### 3- The *Causa fidei*: Conciliarism and Obedience

Certainly the inquisitorial processes related to the *causa fidei* celebrated during the Council of Constance have been a subject of great interest for historians, theologians and canonists. Clear evidence of this can be found in the numerous studies and books reviewed by Ansgar Frenken<sup>47</sup> and Jürgen Miethke<sup>48</sup>, who are particularly concerned with the inquisitorial processes for heresy against John Wyclif, Jan Hus and Jerome of Prague. While Wyclif's case did pose a great problem, as his sentence had already been pronounced by English authorities at two previous synods celebrated in London (1382 and 1396) and by the Council of Rome (1412), the cases against Hus and Jerome of Prague were more pressing since the Czech reformers' activities were considered to be influenced by and derived from Wycliffite teachings at the University of Prague. Indeed based on the Council of Constance behavior, we can surmise how its members viewed the problem of the *causae fidei*.

At the 8th session, celebrated on 4th May, Henry of Piro condemned Wyclif's 45 theses, which had been previously censored by the University of Paris. However, more pressing concerns forced him to postpone the reading of the remaining 260 theses until the following session<sup>49</sup>. After taking the relevant procedural steps and as nobody spoke in defense of Wyclif's memory, witnesses were summoned to prove that Wyclif had never been punished for his heretical views and consequently, it was ordered that his remains be exhumed as a heretic could not even be buried among the dead<sup>50</sup>.

<sup>47</sup> Cf. FRENKEN, *op. cit.*, pp. 245-291.

<sup>48</sup> Cf. Jürgen MIETHKE, "Eresia dotta e disciplinamento ecclesiastico. I processi contro gli errori teologici nell'epoca della scolastica", *Pensiero medievale*, 1 (2003), p. 81, n. 51.

<sup>49</sup> BRANDMÜLLER, *Das Konzil von Konstanz*, p. 299: "Die Verlesung der 260 Artikel wurde auf Intervention Fillastres auf die nächste Sitzung verschoben".

<sup>50</sup> COD, pp. 391-392: "Propterea instante procuratore fiscali, edictoquo proposito ad audientiam sententiam ad hunc diem, haec santa synodus declarat, definit et sententiat eundem Ioannem Wicleff fuisse notorium haere-

The order in which these processes were carried out is highly eloquent and follows a logical structure. According to the Council fathers, far from being brushed aside Wyclif's ideas were taking hold among many Bohemian followers, driven by Jan Hus and the reform movement which had grown stronger in Bohemia. While the ties between Oxford University, where Wyclif had taught, and Hus's University of Prague are undeniable, it would be dangerous to be misled by conciliar sources presenting Hus as a true *Wyclif redivivus*<sup>51</sup>. Although their ecclesiologies overlap to some extent, most scholars agree that their theological thinking cannot be fully assimilated<sup>52</sup>. Nevertheless, it should not be forgotten that the Council of Constance *sententia* was articulated around the *reductio ad unum* of Wyclif's and Hus's heresy<sup>53</sup>. Finally,

ticum, pertinacem, ac in haeresi decessisse, anathematizando ipsum pariter, et suam memoriam condemnando. Decernitque et ordinat, corpus et eius ossa, si ab aliis fidelium corporibus discerni possint, exhumari, et procul ab ecclesiastica sepultura iactari, secundum canonicas et legitimas sanctiones”.

<sup>51</sup> COD, p. 403: “...nihilominus tamen quidam Ioannes Huss in hoc sacro concilio hic personaliter constitutus, non Christi, sed potius Ioannis Wicleff haeresiarcae discipulus, post et contra damnationem et decretum huiusmodi ausu temerario contraveniens, errores eius plures et haereses, tam ab ecclesia Dei, quam etiam a ceteris olim reverendis in Christo patribus, dominis archiepiscopis et episcopis diversorum regnorum, et magistris in theologia plurium studiorum condemnatos, dogmatizavit, asseruit, et praedicavit...”.

<sup>52</sup> DE VOOGHT, “Universitas praedestinatorum...”, pp. 487-534; IDEM, “Jean Huss à l’heure de l’œcuménisme”, pp. 193-313. Despite some differences, in the persecution of heresy trying to associate and assimilate new heresies with previous ones was a common practice. In Hus's case these was absolutely clear for the Council fathers in view of the overt ties between Oxford and Prague universities. About this assimilation cf. Johannes BREVICOXIA, “A Treatise on Faith, the Church, the Roman Pontif, and the General Council”, in Heiko OBERMAN (ed.), *Forerunner of the Reformation: The Shape of Late Medieval Thought Illustrated by Key Documents*, New York, Holt, Rinehart and Winston, 1966.

<sup>53</sup> About the process against Wyclif cf. Edith TATNALL, “The Condemnation of John Wyclif at the Council of Constance”, in G. J. CUMING and Derek BAKER (eds.), *Councils and Assemblies*, Cambridge, 1971.

the case of Jerome of Prague<sup>54</sup> was quite straightforward as he was considered a faithful disciple of Hus. By virtue of this *reductio ad unum* operation and Hus's appearance before the Council, the process against him has aroused the interest of most scholars. Now it should be pointed out that this process has been largely studied from a theological perspective and that research has been mainly focused on determining whether Hus's views were heretical or not and if they could ultimately be fully assimilated with Wyclif's teachings<sup>55</sup>. Similarly the differences between the 'predestinarian' ecclesiologies held by Wyclif and by Hus on the one hand, and the juridical ecclesiology held by most members of the Council on the other hand have been repeatedly pointed out<sup>56</sup>. Thus both from the Catholic point of view –more or less apologetic– and from a Czech revisionist perspective, the traditional question which has rightly preoccupied historians has been: Was Hus in fact a heretic?<sup>57</sup> While this interest is absolutely reasonable as Hus's sentence was largely based on his refusal to retract from theses he maintained he had never supported, we nevertheless believe this approach poses serious problems insofar as it tends to project ontologically a set of clearly historical

<sup>54</sup> As introduction for the process against Jerome of Prague cf. Renee NEU WATKINS, "The Death of Jerome of Prague: Divergent Perspectives", *Speculum*, 42/1 (1967), 104-129 and Paul BERNARD, "Jerome of Prague, Austria and the Hussites", *Church History*, 27/1 (1958), 3-22.

<sup>55</sup> Cf. *supra* note 43.

<sup>56</sup> This thesis has been supported by Matthew SPINKA, *John Huss at the Council of Constance*, New York, Columbia University Press, 1963 and IDEM, *John Hus' Concept of the Church*, New Jersey, Princeton University Press, 1966.

<sup>57</sup> This has been the traditional question most scholars have tried to answer. Cf. among others BRANDMÜLLER, *Das Konzil von Konstanz...*, p. 324: "Orthodoxie oder Häresie: das war viel mehr die Frage die das Konzil bewegte". The question is also the center around which revolve most of the research by DE VOOGHT, *Husiana* and *L'hérésie de Jean Hus*. On the revision of the process Hus cf. Jerzy MISIUREK, "Zur 'Rechtssache Hus'", in SEIBT (ed.), *op. cit.*, pp. 243-252 and Jaroslav POLC, "Johannes Hus zu rehabilitieren? Eine quaestio disputata", *Annuario Historiae Conciliorum*, 15 (1983), 307-321.

categories such as orthodoxy and heterodoxy<sup>58</sup>. Without deny-

<sup>58</sup> Cf. on the subject *Relatio de Concilio Constantiensi* in Václav NOVOTNÝ (ed.), *Fontes Rerum Bohemicarum*, Praha, 1932, VIII, p. 13: “Post modicum tamen, deo ut puto, desponente, omnes suas hereses et errores fuit libere confessus, dicendo, quod nollet abiurare articulos contra ipsum prolatos triplici ex causa: Primo ne lederet suam conscienciam, 2<sup>o</sup> ne incurreret periurium et tercio ne populus scandalizaretur, qui multus et plurimus foret, cui opositum predicasset. Cetera require in fine libri”. Cf. also the *Relatio de Magistro Johanne Hus* written by Peter MLADOŇOVICE in Václav NOVOTNÝ (ed.), *Fontes Rerum Bohemicarum*, VIII, p. 103: “Et magister Johannes inter multa hinc inde per alios cribrata et collata dixit: ‘Reverendissime pater! Ego paratus sum humiliter obedire concilio et informari. Sed rogo propter deum, quod michi laqueum dampnacionis non velitis inponere, ut non cogar mentiri et abiurare illos articulos, de quibus teste deo et consciencia michi nichil constat, et testes contra me deponunt, que nec in cor meum umquam ascenderunt, et presertim de isto quod post consecrationem in sacramento altaris remaneat panis materialis. Illos autem, de quibus constat nichil et quos in libris meis posui, docto de oposito, volo humiliter revocare. Sed quod ego omnes articulos michi impositos abiurarem, quorum multi michi deo dante false ascripti sunt, laqueum michi dampnacionis menciendo prepararem, quia abiurare, ut in Katholicon me legisse memoror, est errori prius tento renunciare. Sed quia multi michi articuli ascripti sunt quos numquam tenui, nec in cor meum ascenderunt, ideo videtur michi contra conscienciam illos abiurare et mentiri”. This brief chronicle of the trial also possesses a great deal of interpretative complexity in that, as suggested by the name *magistro*, it was penned by one of Hus’s closest collaborators. Although the tone of the text is clearly apologetic and describes Hus’s ‘martyriology’, it also offers and radically different point of view from that of the judicial sources, and this is precisely what renders it particularly interesting since it allows reconstructing some process events which are missing in the proceedings. The text bears significant tradition in the history of the Reform. Already in 1528 in Nuremberg under Luther’s influence the Latin text was published for the first time in Germany and a year later the first translation into German appeared. The text began to circulate mainly in Geneva’s Calvinist sectors when Jean Crespin published it, together with Hus’s correspondence, in *Le livre des Martyrs* (1554). Two years later under the title of *Acta martyrum* (1556), Claude Baduel translated Crespin’s work into Latin. After its publication in Geneva, the text also began to circulate in French speaking countries and was translated into several languages (Dutch, German and Polish). It is likely that when John Foxe, fleeing Marian persecutions, settled on the Continent came into contact with this text, which he would later include in his edition of the *Book of Martyrs* (1554), reissued in 1561 in Basel. In Modern times it has published by František PALACKÝ (ed.), *Documenta Mag.*

ing that there may have been theological differences between the Council fathers and Hus, our proposal rests on the belief that heresy is basically a political fact whose configuration is often closely related to a redefinition of the roles within the power apparatus of ecclesiastical *politica*<sup>59</sup>. In this section our interest will focus on the study of the logics of power involved in the inquisitorial process which cause a potentially heterodox doctrine to be defined as heretical. In this regard it seems appropriate to point out that in recent years the study of the relationship between judicial practices and the consolidation of both political and ecclesiastical power has yielded significant results. Judicial practices and particularly the gradual adoption of the procedural form of the *inquisitio* have been studied in terms of the consolidation of different instances of power. While Robert Moore's<sup>60</sup> work has been devoted to studying the relations between papal power consolidation since the 11th century and the persecution of religious dissidents, the works of Massimo Vallerani and Mario Ascheri among others have focused on formulating and explaining the link between

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*Joannis Hus vitam, doctrinam, causam in Constantiensi concilio actam et controversias de religione in Bohemia annis 1403-1418 motas illustrantia quae partim adhuc inedita, partim mendose vulgata, nunc ex ipsis fontibus hausta*, Reproductio phototypica editionis 1869, Osnabrück, Biblio, 1966, pp. 237-326. In the 1960's, and perhaps in agreement with the prevailing ecumenical climate at the time two translations of the text were published, one into English and the other into German. Cf. respectively Matthew SPINKA, *John Hus at the Council of Constance*, New York, Columbia University Press, 1963 and Joseph BUJNOCH, *Hus in Konstanz. Der Bericht des Peter von Mlanodiowitz*, Graz-Wien-Köln, Slavische Geschichtsschreiber 3, 1963.

<sup>59</sup> Cf. Lester R. KURTZ "The Politics of Heresy", *American Journal of Sociology*, 88/6 (1983). Although the author examines the late 19th century 'modernist controversy' the study is interesting from a methodological point of view in that it inquires into the institutional conditions which gave rise to the establishment of orthodoxy and heterodoxy.

<sup>60</sup> Robert MOORE, *La formación de una sociedad represora. Poder y disidencia en la Europa occidental, 950- 1250*, Barcelona, Crítica, 1989 and "Heresy, repression, and social change in the age of Gregorian Reform", in Scott L. WAUGH and Peter D. DIEHL (eds.), *Exclusion, Persecution and Rebellion. Christendom and its Discontents*, Cambridge, Cambridge University Press, 1996.

inquisitorial judicial practices and the consolidation of communal power in Italian cities<sup>61</sup>. Jacques Chiffolleau on the other hand has looked at the links between the great political processes of the late 14th and early 15th centuries and the consolidation of monarchical power<sup>62</sup>.

Based on these authors' investigations and taking advantage of many of their ideas, we believe it can be similarly claimed that in the case of the inquisitorial processes led by the Council of Constance a close association can be ascertained between inquisitorial practices and the consolidation of conciliar authority within the ecclesiastical *ordo iudicarius* and that this subject is worthy of study and remains to be explained in detail. Although many authors have at least pointed out this association, they have not examined it closely. Indeed Brian Tierney had already suggested in the late 1960's the presence of certain links between the enactment of the *Haec sancta* decree, which affirmed conciliar superiority in matters of faith but at the same time mentioned the *causae fidei* explicitly<sup>63</sup>.

<sup>61</sup> Massimo VALLERANI, *La giustizia pubblica medievale*, Bologna, 2005 and Mario ASCHERI, "Introduzione", in *Tribunali, Giuristi e Istituzioni. Dal Medioevo all' Età moderna*, Bologna, Il Mulino, 1995 —revised edition of the 1989 original—, pp. 7-22 and more recently Mario ASCHERI, *La città-Stato*, Bologna, Il Mulino, 2006. By no means do we intend to provide a comprehensive list of the bibliography by both authors. We merely mention their latests works devoted to the problems of the relationship between justice and politics. On the subject of justice cf. Diego QUAGLIONI, *La giustizia nel Medioevo e nella prima età moderna*, Bologna, Il Mulino, Bologna, 2004.

<sup>62</sup> Jacques CHIFFOLEAU, "Dire l'indécible. Osservazioni sulla categoria del 'nefandum' dal XII al XV secolo", in Jean-Claude MAIRE VIGUEUR and Agostino PARAVICINI BAGLIANI (eds.), *La parola all'acusato*, Palermo, Sallerio, 1991, pp. 42-73.

<sup>63</sup> TIERNEY, "Hermeneutics and History...", p., 365: "The claim to obedience in matters of faith had to be made, not only because of the possibility that a charge of heresy might be framed against John XXIII, but above all because of the impending trial of John Hus. (*Haec sancta* enacted at the fifth session of the council on 6 April; the commission to investigate Hus was set up at the sixth session on 17 April)". The text of the decree reads as follows: "...



For his part, Philip Stump, known for his study of the reforms which took place during the Council of Constance, has also pointed out the close temporal association between the enactment of the *Haec Sancta*, the start of the deposition process against John XXIII and the expedited procedures for the remaining inquisitorial processes for heresy against Wyclif, Hus and Jerome of Prague<sup>64</sup>. However, while the author stresses this association, his interest in other matters dealing with the reforms during the Council prevents him from studying this subject in further detail. Similarly Thomas Morrissey has stressed the importance of the temporal relationship between the assertion of conciliar authority, the deposition process against the Pope and the rest of the *causae fidei*. In that sense in the opinion of the author the strong conciliar reaction in

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*obedire tenetur in his quae pertinent ad fidem et extirpationem dicti schismatis, ac reformationem dictae ecclesiae in capite et in membris*”.

<sup>64</sup> About the temporal associations cf. Philip H. STUMP, *The Reforms of the Council of Constance (1414-1418)*, Leiden, Brill, 1994, pp. 24-26: “The council did not begin formal deliberation of reforms until after decisive acts had occurred in both areas: the deposition of John XXIII (May 29), the resignation of Gregory XII (July 4), the departure of Sigismund for negotiations with the adherents of Benedict XIII (July 18); the condemnation of the heretical theses attributed to Wyclif (May 4) and the trial and death by burnig of Hus (July 6) [...] If the council could condemn abuses of papal power in a reigning pope, it could presumably also take action to prevent those abuses by limiting the exercise of papal power in the future. This concept was of fundamental importance for reform at the council. It was based in turn on the idea that the council represented the universal church. As much as this idea appears to forshadow later secular ideas of representative, parliamentary government, we must also note its unfortunate close connection with the idea of combating heresy. The canonists who had argued that the council has power to judge and depose a pope for maladministration based this power on an extension of the council’s power to judge a pope for heresy. *This connection was made very visible at Constance, when during the spring of 1415 the condemnation of John XXIII proceeded in tandem with the condemnation of the Wicliffite and Hussite teaching...*”. On the idea of representation no only in conciliar thought but also in the later secular political thought is very interesting Hasso HOFMANN, *Representanza-Representatione. Parola e concetto dall’antichità all’ottocento*, Milano, Giuffrè, 2007 —the original German edition of the text dates from 1974—.

relation to the latter remains an unsolved matter<sup>65</sup>. From the field of *Studia hussitica*, the link between the enactment of the *Haec Sancta* and the events around the process against Jan Hus has been highlighted. From a rather polemical point of view, Matthew Spinka has argued that accepting the validity of the process against Hus implied accepting the validity of the *Haec Sancta* decree<sup>66</sup>. The Belgian Benedictine Paul De Vooght also referred to this controversial issue when he claimed that the validity of the Council of Constance actions between the papal depositions and Martin V's election was ratified by the subsequent papal approval expressed in the bull *Inter cunctas* dealing with what had been previously decided *conciliariter*<sup>67</sup>. Regardless of the fact that the latter statement has been openly criticized and debated, what both Spinka's and De Vooght's positions evidence is the close relationship between the consolidation of conciliar authority after John XXIII's flight and the development of the heresy trials. Yet in our view the nature of that association is much more significant than has been usually admitted. This would not be solely a random and fortuitous temporal coincidence nor would it be related to subsequent papal approval, this would rather be a relationship that in short should be understood within a wider 'political' or ecclesiastical context of institutional redefinition of the ecclesiastical power instances possessing the *clavis scientiae* and

<sup>65</sup> Thomas MORRISEY, "After Six Hundred Years: The great Western Schism, Conciliarism, and Constance", *Current Theology*, 22, p. 506, note 21: "The personal hostility of some people present at the Council towards Hus seems to have gone beyond *odium theologicum* and requires further explanation and motivation. In the vilification of John XXIII, who had also threatened to undermine their hopes and work, they showed some restraint, however limited this restraint was...".

<sup>66</sup> SPINKA, *John Huss at the Council of Constance*, p. 76: "Thus only a person who accepts the principle of *Sacrosancta* [*Haec sancta*] can claim that Hus was tried by a legitimate Council".

<sup>67</sup> Cf. *supra* note 21.

the *clavis potestatis* which involved both conciliar and Episcopal powers as well as the power of the university corporation<sup>68</sup>.

After the enactment of the *Haec sancta* it was nearly impossible to deny that ecclesiastical power somehow resided in the Council. However the major problems and debates appeared when trying to determine how this happened. From a moderate 'conciliarist' view represented by Pierre D'Ailly, a council had greater authority than a pope acting on his own and disregarding conciliar authority; however the leadership of the pope in the council was also stressed. At the same time Cardinal D'Ailly unambiguously claimed that the authority of a whole (in this case, the Council) was greater than that of one of its parts<sup>69</sup>.

However this view failed to settle the matter of what ecclesiastical instance should be obeyed if a disagreement between the pope and the council arose. A heated debate on the

<sup>68</sup> About this issue, cf. among other authors Peter MCKEON, "Concilium generale and Studium generale: The Transformation of Doctrinal Regulation in the Middle Ages", *Church History*, 35/1 (1966), 24-34; Joseph KOCH, *Kleine Schriften*, Rome, 1973, vol. 2; Alan E. BERNSTEIN, *Pierre D'Ally and the Blanchard Affaire*, Leiden, Brill, 1978; William COURTENAY, "Inquiry and Inquisition: Academic Freedom in Medieval Universities", *Church History*, 58/2 (1989), 168-181; Douglass TABER, "The teaching Authority of the Theologian", *Church History*, 59/2 (1990); B. J. CAIGER, "Doctrine and Discipline in the Church of Jean Gerson", *Journal of Ecclesiastical History*, 41/3 (1990), 389-407; Jürgen MIETHKE, "Papst, Ortsbischof und Universität in den Pariser Theologenprozessen des 13. Jahrhunderts", in Albert ZIMMERMANN (ed.), *Die Auseinandersetzungen an der Pariser Universität im XIII. Jahrhundert*, Berlin, 1976, pp. 52- 94; Jürgen MIETHKE, "Eresia docta e disciplinamento eclesiastico. I processi contro gli errori teologici nell'epoca della scolastica", *op. cit.*; Louis PASCOE, *Church and Reform. Bishop, Theologians and Canon Lawyers in the Thought of Pierre D'Ailly*, Leiden, Brill, 2005.

<sup>69</sup> Pierre D'Ailly, *Tractatus de potestate ecclesiastica*, DU PIN, II, col. 757: "... Non est vera, scilicet quod papa est maior et superior concilio generali, licet sit maior et superior in concilio, cum sit caput omnium membrorum... quia omne totum sua parte maius est... Sed papa est pars concilii sicut caput pars corporis: ergo totum concilium maius est papa, et per consequens auctoritas totius concilii maior auctoritate papae". Text quoted by Brian TIERNEY, "Divided Sovereignty at Constance: a Problem of Medieval and Early Modern Political Theory", *Annuaire Historiae Conciliorum*, 7 (1975), p. 246.

matter ensued towards the end of 1416 in a polemic between the Dominican Leonardo Stadius de Datis, who supported a papalist position, and an anonymous conciliar representative with a radical position in favor of the Council<sup>70</sup>. Although the debate took place after the heresy trials studied here, we believe it accurately reflects the ecclesiological problems which arose when trying to define conciliar authority after John XXIII left the assembly. The polemic revolved around the possibility of dividing the *plenitudo potestatis*. According to the Dominican author, the supreme power of the Church could not be divorced from the Church in terms of *iurisdictio* but could be separated from it in terms of its exercise. As for the Pope the *plenitudo potestatis* could be separated both in terms of jurisdiction and of its exercise. The two claims may have been embraced by a moderate conciliar thinker, but the Dominican went beyond acceptable limits when he claimed that the exercise of the *plenitudo potestatis* lay exclusively with a Pope who legitimately presided over the council, thus excluding the possibility that the council may exercise it. According to this last statement, only the Pope and definitely not the council could establish what should be approved or rejected by the Church. However following the enactment of the *Haec sancta*, it was nearly impossible to deny that the council retained some degree of power in case of an emergency arising from a pope's illegitimacy or incompetence. The rationale for this stemmed

<sup>70</sup> The debate has been studied by Brian TIERNEY, "Divided Sovereignty...". About Stadius cf. also the sermons examined by Thomas IZBICKI, "Reform and Obedience in four Conciliar Sermons by Leonardo Dati O.P.", in Thomas IZBICKI and Christopher BELLITTO (eds.), *Reform and Renewal in the Middle Ages and the Renaissance. Studies in Honor of Louis Pascoe, S.J.*, Leiden, Brill, 2000, pp. 174-192. The texts are available as manuscripts only and are currently being edited. In this regard some passages quoted by the author are of interest. Cf Ms. Lübeck SB [LB], fol. 109vb: "Gladii spiritualis suprema potestas est in papa legitime presidente et residente totaliter quoad executionem ipsius gladii, et nullomodo, ec casu, in concilio generali". Also interesting is the following passage from the manuscript in which the author seems to hesitate between the *ipso facto* deposition theory and the need of a *process*. Cf. LB, fol. 109vb: "Ista patet quoniam papa illegitimato vel deposito utraque caret, ut in casu patet".

from the premise that the *plenitudo potestatis* could in a way reside simultaneously in the Pope and in the Council representing the *ecclesia universalis*.

However the anonymous conciliarist rival was ready to reveal certain logical contradictions inherent to the division of the *plenitudo potestatis*. In the first place he argued that it was absurd to claim that a single power could reside simultaneously in the Pope and in the Council, as it would exist between two actors who would often oppose each other<sup>71</sup>. In the second place if both powers were identical then the Pope would dispose of all ecclesiastical property (and this was not the case). If both powers were different *in specie*, the *ecclesia universalis* could depose a Pope (its minister) at any time (and this had been expressly denied by Statius)<sup>72</sup>. In the third place, if the *plenitudo potestatis* resided in the universal Church

<sup>71</sup> *Acta Concilii Constanciensis (ACC)*, Heinrich FINKE *et al.*, Münster, 1896-1928, II, 705: "Et primo circa primam et secundam queritur: Utrum ista suprema potestas sit eodem numero in ecclesia militante et in papa vel diverso? Si eodem, quomodo potest esse in diversis subiectis adequate et non solum diversis, ymmo etiam aliquando contrariis ac intendentibus eodem tempore penitus contraria...". For an analysis of the quoted texts Cf. TIERNEY, "Divided Sovereignty...".

<sup>72</sup> ACC, II, 705-706: "Si sunt diverse, tunc vel tantum numero differunt vel etiam specie. Si tantum numero, sequitur, quod, sicut ecclesia est principalis domina rerum ecclesiasticarum in terra, ita etiam papa; et consequens papa poterit similiter vendere vel donare aut quomodolibet alienare pro libito suo temporalia omnium ecclesiarum, quod tamen iuriste negant... Si vero etiam specie differunt, quia videlicet una est tamquam potestas domine, alii vero sicut ministri seu administratoris, tunc, sicut domina habet [potestatem] prescribere legem ministro et revocare administrationem eius, quando vult, ita poterit ecclesia facere de papa...". ACC, II, 706: "Praeterea, si sunt diverse iste potestates, sive differant numero tantum sive non, tunc vel sunt equales vel inaequales; si inaequales, illa que est maior, est superior: ergo non est in utroque 'suprema', quod non est in utroque plenitudo potestatis, nisi dicatur, quod in utroque plenitudo sue potestatis, quod nihil est dicere... Si vero sunt equales, sequitur, quod, sicut concilium potest separare et iurisdictionem et executionem a papa, quemadmodum factum est ab Concilio Constanciensi... ita papa potest separare a concilio sive ab ecclesia et iurisdictionem et executionem, quod est contra primam assercionem. Preterea nullo tempore sunt equales iste potestates".

*in habitu* but not in *in actu*, this again posed certain logical problems as this limitation to its actions was inconsistent with the *plenitudo* of power<sup>73</sup>. Finally the anonymous conciliarist author argued that Statius's theses went against the council actions in relation to John XXIII's deposition process. In the Dominican's view, the council had only pronounced a *sententia declarativa* with no need for a public process of deposition since the Pope had already lost his office *ipso facto* on account of his heretical behavior. The anonymous author explicitly stated the problem that would arise in that case since a legitimate pope could be charged and deposed by his enemies without a deposition process. Moreover Statius's position would imply going against the actions of the Council of Constance in that the Council fathers had deposed John XXIII through a process and a heretical pope could only be proved guilty through its probative instances<sup>74</sup>.

From this line of reasoning it followed that in order to judge a pope the *iurisdictio* of the council should be above that of the pope and consequently its *potestas executiva* was superior too<sup>75</sup>. Ultimately what the anonymous conciliarist author clai-

<sup>73</sup> ACC, II, 707: "Et si dicatur, quod illa potestas est in habitu, licet non in actu, respondeo, quod frustra est calceamentum, cuius non est calciator, et non posse exire in actum, defectus est potestatis. Quando, si papa potest prohibere, et ecclesia seu concilium non potest hoc de papa, manifestum est, quod maior est potestas in papa quam in ecclesia et consequenter non est in utroque suprema, quod est contra asserciones".

<sup>74</sup> ACC, II, 709: "Unde sequitur, quod nullo casu concilium potest ferre sententiam depositiones contra papam, ita quod ippum deponat, sed solum declarationis, per quam declarat, ipsum esse verum papam vel non aut esse depositum vel non, quod est contra determinata et practicata in isto concilio, in quo Johannes primo fuerit suspensus ab administratione papatus et postea depositus a papatu".

<sup>75</sup> About the term *iurisdictio* a fundamental study is that by Pietro COSTA, *Iurisdictio. Semantica del potere politico nella repubblica medievale (1100-1433)*, Milano, Giuffrè, 2002 —reedition of the text originally published in 1969—, p. 104: "Di due parallele relazioni antonimiche, una si distaca: quella traducibile nella relazione polare 'iudicare-iudicari'. L'immagine del giudizio qualifica in maniera pregnante un semplice rapporto di superiorità. Un semplice rapporto di superiorità, concentrato in una posizione, per così dire, di

med was that the *plenitudo potestatis* was either unique and indivisible or it did not exist<sup>76</sup>. While it is clear that the logic of the anonymous author's arguments cannot be attributed to all the members of the Council, it does offer an opportunity to analyze the *ultima ratio* –albeit not always brought to such an extreme, sometimes at the expense of some logical contradictions– of conciliar authority.

Indeed the debate revolved around the Council's *potestas executiva* and its at least contingent consolidation as the ultimate hierarchical instance of the Church in possession of the *clavis potestatis*<sup>77</sup>. According to the anonymous conciliarist

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giudicabilità del soggetto inferiore, deviene un rapporto specifico, preciso: un rapporto di potere". Cf. on the same concept Brian TIERNEY, *Religion, law and the growth of constitutional thought (1150-1650)*, Cambridge, Cambridge University Press, 1982.

<sup>76</sup> ACC, II, 710: "Si autem dicatur, quod par in parem non habet imperium, tunc quero, quomodo poterit papa futurus privare concilium invitum vel separare ab eo executionem, quam nunc habet..."; ACC, II, 729: "Ergo absolute maior est potestas executiva concilii generalis quam pape. Consequentia patet; et antecedens pro prima parte, quia, quamvis papa potest iudicare singulos, tamen non iudicare universos, quia sic posset iudicare totam ecclesiam, quam generale concilium representat..."; ACC, II, 729: "Ergo absolute maior est potestas executiva concilii generalis quam pape. Consequentia patet; et antecedens pro prima parte, quia, quamvis papa potest iudicare singulos, tamen non iudicare universos, quia sic posset iudicare totam ecclesiam, quam generale concilium representat...".

<sup>77</sup> About the distinction between *clavis scientiae* y *clavis potestatis* cf. TIERNEY, *The Origins of Papal Infallibility*, pp. 39-45. This distinction appears in the *Decretum*, Dist. 20, ante, c. 1: "Sed aliud est causis terminum imponere aliud scripturas sacras diligenter exponere. Negotiis diffiniendis non solum est necessaria scientia, sed etiam potestas. Unde Christus dicturus Petro: 'Quoodcumque ligabueris super terram, erit ligatum et in celis, etc.' prius dedit sibi claves regni celorum: in altera dans ei scientiam discernendi inter lepram et lepram, in altera dans sibi potestatem eiciendi aliquos ab ecclesia, vel recipiendi. Cum ergo quelibet negotia finem accipiant vel in absolute innocentium, vel in condemnatione delinquentium, absolute vero vel condemnatione non scientiam tantum, sed etiam potestatem presidentium desiderant: aparet, quod divinarum scripturarum tractatores, etsi scientia Pontificibus premineant, tamen, quia dignitatis eorum apicem non sunt adepti, in sacrarum scripturarum expositionibus eis preponuntur, in causis vero diffiniendis secundum post eos locum merentur".

author, John XXIII's deposition process had been the most important example of the said exercise. After this, the Council fathers had several options which were largely related to the order of the priorities in their agenda thereafter. There were many pending issues but the key was to state explicitly the order in which they would be tackled<sup>78</sup>. Hence the main question was to decide whether the reforms would be carried out before electing the new Pope and if that would be done under the Council *potestas executiva* acting without a Pope. The immediate undertaking of the reforms would have unquestionably implied exacerbating the potential contradictions between the Council fathers' different positions, which ranged from an extreme papalist view to a somewhat radical conciliarist view and conflicted over the Council's *potestas executiva*. With its careful elaboration the *Haec sancta* decree had reached a temporary and precarious consensus between the conflicting views on the power of the council which the definition of the *potestas executiva* seemed to threaten. Advancing immediately with the reform would have undoubtedly shattered this minimum consensus and would have threatened the continuity of the conciliar assembly<sup>79</sup>. In turn the inquisitorial processes

<sup>78</sup> The author points out that reform debate only began once the processes against Wyclif and Hus had been carried out. Cf. STUMP, *The Reforms of the Council of Constance...*, p. 24.

<sup>79</sup> Cf. DECALUWE, "Three Ways to Read the Decree *Haec Sancta* (1415)...", pp. 22-23: "Subsequently, it was possible to show that two important members of the council, Jean Gerson and Francesco Zabarella, and their respective ideas and positions in the council, are the key to understand how *Haec sancta* was meant to be understood. The decree can in fact be interpreted in three different ways, and was also meant to be interpreted in these different ways. One can read it, firstly, according to the conciliarist ideas of Jean Gerson, who judged that the situation the council of Constance and the whole church were in, justified the use of epikie; secondly, according to the conciliarist ideas of Francesco Zabarella, which clearly find their origins in the canon law tradition; and finally according to a traditional papal view on general councils, that sees the pope as an essential and necessary part of any general council. This third way of reading originated from the theory that the council of Constance still had papal support [...] The council of Constance proclaimed, with *Haec sancta*, its superiority, and that of any



then appeared as an appropriate instance to not only demonstrate conciliar executive power but also to reach a minimum consensus to counteract the danger of the spread of heresy. Jean Gerson himself was well aware that the power of the Council of Constance had to be strengthened not just potentially but mainly through its exercise<sup>80</sup>.

From the beginning of the Council of Constance, Wyclif's and Hus's doctrinal views had given rise to a debate about the authority that would condemn them. While Jean de Maroux, the Latin Patriarch of Antioch, claimed that they should be condemned in the name of the Pope with the formula *hoc sacro aprobante concilio* (the approval of this sacred Council) since the Council *nullam auctoritatem habere nisi ex capite* (possesses no authority without its head), for Pierre D'Ailly, condemnation should be made in the name of the Council since *concilium est maius papa cum sit totum, et papa sit pars eiusdem* (the Council as a whole is greater than the Pope and the Pope is a part of the Council). Moreover Pierre D'Ailly stated that the Council including the Pope did not derive its *auctoritas* from the latter but immediately from Christ<sup>81</sup>. In this way an allusion to the opposition between the Pope and

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other legitimate general council to come, to be able to work on and to end the schism, but proposed in the same decree three possible definitions of what a legitimate general council really was. It was the product of a consensus about the diversity in thought on sovereignty in the church".

<sup>80</sup> On the *exercitium de la plenitudo potestatis* in the work of Jean Gerson cf. POSTHUMUS MEYJES, *Jean Gerson. Apostle of Unity*, p. 266-268.

<sup>81</sup> ALBERIGO, *Chiesa conciliare: Identità e significato del conciliarismo*, pp. 141-143. The texts are quoted by the author. For the text by Jean de Maroux cf. DU PIN, II, 952 A-B, for the one by Pierre D'Ailly cf. ACC III, 48-50. More recently and on the same subject cf. IZBICKI, "Reform and Obedience..." in the previously cited manuscript LB fol. 110ra-b: "Patet modo quo ad hoc tantum viri ecclesiastici surgere habent in iudicio generalis Concilii non auctoritate finalis iudicii, sed approbatione et concilio, prout forma hactenus in Conciliis observata manifeste demonstrat, qua pontifices sive in diffinienda usi sunt, dicentes. Nos sacro aprobante Concilio etc. Et ergo viri iustissimi qui iudicatis orbem, si in pacis vinculo hanc unitatem spiritus servare cupitis, perturbato res huiusmodi ordinis compescere prurientes auribus adulatores imitescere faciatis".

the Council was carefully avoided while claiming that conciliar authority was greater than that of the Pope.

This debate, which took place at the beginning of the Council, would become particularly relevant after John XXIII's flight. What was at stake in the Constance processes after the Pope fled the Council was basically the definition of the relationship between the Pope and the Council, which had been dutifully overlooked while the Pope supported the Council. For this reason the processes were a particularly suitable *forum* for the display of conciliar superiority in a context of significant institutional weakness. While compared with other issues the relevance of these matters of faith was minor, at the same time they provided a background against which the main ideas regarding conciliar authority could be represented. By claiming the *plenitudo potestatis* for the Council there emerged a new sphere of power which required a redefinition. Liturgical and symbolical practices, but also judicial practices appear to create and define this new sphere of power<sup>82</sup>. Indeed it is through judicial praxis that the Council sought to affirm its own *iusdictio* and demonstrate its *potestas executiva* as

<sup>82</sup> Regarding liturgical practices cf. Natacha-Ingrid TINTEROFF, "Assemblée conciliaire et liturgie aux conciles de Constance et Bâle", *Cristianesimo nella storia*, 26/2 (2005), 395-425 and IDEM, "The Councils and the Holy Spirit: Liturgical Perspectives", in CHRISTIANSON, IZBICKI and BELLITTO (eds.), *op. cit.*, pp. 140-154. About the papal seal and its symbolic meaning during the Council of Constance cf. Hans SCHNEIDER, "Der Siegel des Konstanzer Konzils. Ein Beitrag zur Geschichte der spätmittelalterlichen Reformkonzile", *Annuario Historiae Conciliorum*, 10/1 (1978), 310-345. On the judicial process as a symbolic ritual cf. Antoine GARAPON, *Del giudicare. Saggio sul rituale giudiziario*, Raffaello Cortina Editore, 2007 —the first edition in French dates from 1997—, p. 25: "Dal punto di vista etimologico, il simbolo designa un oggetto diviso in due; il possesso di una delle due parti permette il riconoscimento. Il simbolo mostra, rendendo tangibile ciò che, per sua natura, tale non è: un valore morale, un potere, una comunità. Oggetto amputato, esso ha tuttavia la capacità di mostrare l'insieme. Il simbolo riunisce: include coloro che vi si riconoscono ed esclude gli altri, delimitando così i confini della comunità [...] Il simbolo mostra, ma è indimostrabile; assimila ma è indeducibile; non producendo un senso destinato alla comprensione razionale, il simbolo, piuttosto, ci *agisce*".

the ultimate instance within the Church *ordo iudicarius*<sup>83</sup>. In a way this would explain why Hus's case was dealt with *iudicialiter* and not *deliberative* despite unsuccessful attempts at stopping the Curia's judicial machinery set in motion by the side that opposed the reform ideas in Prague since 1403. At the same time the process against Hus offered the Council fathers a chance to develop an idea of continuity between the ecclesiastical power exercised by the pope and that exercised by the Council, thus avoiding any potential power *vacuum* since Hus's case, which had already been addressed by Innocent VII, Alexander V, and John XXIII was now in the hands of the Council<sup>84</sup>.

From the moment Hus's case was treated *iudicialiter* we witness the collapse of the procedural strategy devised by Jan of Jesenice, Hus's legal advisor and personal friend, which consisted in presenting the Czech reformer as a man who went to Constance of his own free will to proclaim his faith<sup>85</sup>. This undoubtedly set the basis for deploying two

<sup>83</sup> Cf. *supra* note 72.

<sup>84</sup> About the early proceedings of the process cf. *Acta summorum pontificum res gestas Bohemicas aevi Praehussitici et Hussitici illustrantia: acta Innocentii VII, Gregori XII, Alexandri V, Johannis XXIII, nec non acta Concilii Constantiensis, 1404-1417, acta Clementis VII et Benedicti XIII, 1378-1417*, edidit Jaroslav ERŠIL, Academia h.e. in aedibus Academiae Scientiarum Bohemoslovacae Praegae, 1980, 2 vol.

<sup>85</sup> The strategy prepared consisted in proclaiming the following *intimatio* cf. PALACKÝ (ed.), *Documenta*, p. 66: "Magister Joannes de Husinecz, sacrae theologiae baccalarius formatus, vult comparere coram reverendissimo patre D. Conrado archiepiscopo Pragensi, Apost. Sedis Legato, in convocazione proxima omnium praelatorum et clero regni Bohemiae, paratus semper ad satisfactionem omni poscenti eum de ea, quae in eo est, fide et spe, reddere rationem, et ad videndum et audiendum omnes et singulos, qui erroris pertinaciam vel haeresim quamcumque sibi volerint imponere, ut se inscribant ibidem juxta legis dei et juris exigentiam, si non erroris pertinaciam vel haeresim in eum legitime probaverint, ad poenam talionis. Quibus omnibus coram dicto D. Archiepiscopo et praelatis, et etiam in proximo generali concilio Constantiensi, cum dei auxilio vult respondere, juri stare, ac juxta sanctorum patrum decreta et canones suam inocentiam in Christi nomine demonstrare. Dat. Dominico proximo post festum s. Bartholomaei". The Czech text for the *intimatio* is published by Palacky following the Latin

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text. On the procedural strategy cf. Ferdinand SEIBT, "Hus in Konstanz", *Annuario historiae conciliorum*, 15 (1983), p. 164: "Aber daß er dabei sich immer stärker in das Netz des kanonischen Prozeßwesens verstrickte, schuf die unglückliche Dynamik in dieser Entwicklung. Der Strategie dieses Prozesses aber war niemand anderer als Dr. juris Jan Jessenitz". About J. de Jesenice's role in the process cf. the text by Jan of JESENICE, *De ordo procedendi*, in Jiří KEJŘ, *Husitský právník M. Jan Jesenice*, Prague, 1964. About this text Cf. Jiří KEJŘ, "Johannes Hus als Rechtsdenker", in SEIBT (ed.), *Jan Hus, zwischen Zeiten...*, p. 224, note 64 and KAMINSKY, *op. cit.*, p. 138. Similarly regarding the results of the strategy devised by Jan of Jesenice cf. SEIBT, "Hus in Konstanz", p. 160: "Nicht die Rechtgläubigkeit, auch nicht der politische Gehorsam des Prager Magisters steht in dieser Verteidigung zur Debatte, wiewohl beide im Gang der Konstanzer Verhöre zur Sprache kamen. Vielmehr erscheint in der böhmischer Urteilsschelte immer wieder jenes Moment, mit dem das Konstanzer Gericht unter formaljuristischen Gesichtspunkten verdammt wird. Das ist ein Element der Prozeßstrategie, und gewiß nicht das mindeste Motiv für den immer wieder diskutierten Hus-Prozeß [...] War der tapfere Magister am Ende nur das Opfer einer verfehlten Prozeßstrategie?". In this text, the author returns to and enlarges upon some ideas already developed in Ferdinand SEIBT, *Jan Hus. Das Konstanzer Gericht im Urteil der Geschichte*, Vorstand des Instituts für Bayerische Geschichte an der Ludwig-Maximilians-Universität München, Vortrag gehalten an dem Mentorenabend der Carl Friedrich von Siemens Stiftung in München am 20. März 1972. Cf. Rudolf HOKE, "Der Prozeß des Jan Hus und das Geleit König Sigmunds", *Annuario Historiae Conciliorum*, 15 (1983), p. 175: "Hus ließ zunächst durch öffentliche Anschläge in Prag und anderen böhmischen Städten die Aufforderung bekanntmachen, wer in Böhmen von ihm eine Irrlehre kenne, der möge vor dem Prager Erzbischof gegen ihn auftreten. Als sich niemand meldete, rief Hus in einem zweiten öffentlichen Anschlag König und königlichen Hof in Böhmen zur Zeugenschaft dafür auf, daß er sich zur Verantwortung angebote habe, jedoch niemand darauf eingegeben sei, und er gab nun seinen Entschluß bekannt, nach Konstanz zu gehen, indem er gleichzeitig nochmals jeden, der eine Irrlehre von ihm kenne, aufforderte, gegen ihn aufzutreten, und zwar in Konstanz vor Papst und Konzil". In addition to the *intimatio* Hus had tried to collect the largest amount of documents possible to prove his orthodoxy. On the subject, Cf. SPINKA, *John Hus' Concept of the Church...*, p. 335: "He had collected all the available evidence to be presented against the anticipated accusations and depositions of his enemies and witnesses. He had even secured a certificate of his orthodoxy from the Prague inquisitor, Bishop Nicholas of Nezero. John of Jesenice, Hus' advocate, was refused entrance into the archiepiscopal court and was thus prevented from securing Archbishop Conrad's declaration concerning Hus' faith. Nevertheless, the archbishop had declared in a plenary

contrasting and completely different probative logics (theological and judicial). On one hand, Hus wanted his case to be treated as a basically scholastic *quaestio* which should be resolved through a *disputatio* with the Council fathers<sup>86</sup>. In that sense it is no coincidence that from a formal standpoint Hus prepared both a *quaestio* and a *sermo* to be discussed and read, respectively, at a plenary session<sup>87</sup>. On the other

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session of the Czech nobles that he knew of no error or heresy against the Master". We are waiting for the publication of Thomas FUDGE, *The Trial of Jan Hus: Medieval Heresy and Criminal Procedure*, Oxford University Press, 2013 (Forthcoming May 2013).

<sup>86</sup>The aim of the procedural strategy was to prevent the Council fathers from treating the case *iudicialiter*. This action implied a rejection of all previous measures adopted by the ecclesiastical authorities. Jan of Jesenice had already presented this juridical justification some time ago in his defense of the Czech reformers against their enemies' accusations. On this subject cf. the text of Jan of JESENICE, *Utrum iudex sciens testes false deponere et accusatum esse innocentem, debet ipsum condepnare*, in Jiří KEJŘ, *Dvě studie o husitském právnictví*, Praha, 1954, pp. 53-65. Also relevant is a another text by the same author, entitled *Repetitio Magistri Ioannis Iessinetz, Doctoris Iuriscanonicis, pro defensione causae magistri Joannis Hus. Scripta anno 1412. die 18. Mensis Decembris*, in Matthias ILLYRICUS FLACIUS, *Johannis Hus et Hieronymi Pragensis, confessorum Christi Historia et monumenta*, Nuremberg, 1558, vol.1, pp. 328-331: "Ex quo noto et quarto, casum, specialem, in quo sententia excommunicationis ipso iure est nulla [...] Ex quo sequitur et plane habetur, quod sententia excommunicationis, suspensiones vel interdicti lata contra scholarem seu studentem universitatis nostrae per dominum Archiepiscopum Pragensem, vel suos officiales ipso iure est nulla et non timenda, quia est expresse contra privilegium exemptionis ipsius universitatis, in quo fedes Apostolica irrefragabiliter statuit et ordinavit, quod nullus ex dicta universitate, presens in ipso Studio existens, coram quocunq[ue] ordinario, etiam legato nato, aut alio iudice delegato, aut subdelegato, etiam autoritate quarumcunq[ue] literarum seu rescriptorum a sede apostolica, sub quacunq[ue] nostrorum forma impetratorum [...] *Condemnatio debet proportionabiliter respondere contumaciae*: Praemissa igitur ad practicam reducendo, aparebit clarissime, quod processus nuper et nunc contra venerandum Magistrum Ioan. Hus temerarie et exorbitanter publicati, non solum iniusti et frivoli, sed multipliciter sun nulli ipso iure...".

<sup>87</sup> Cf. about the *sermo De pace* prepared by Hus to be read before the Council of Constance. The sermon has been included in *Historia et Monumenta*, pp. 60-71. As an example, cf. the end of the *sermo De pace* in *Historia et Monumenta*, p. 57: "Cum ergo iuxta Prophetarum oracula, et

hand and on account of the aforementioned circumstances, the Council fathers were inclined to treat the matter *iudicialiter*. The juridical logic of the inquisitorial process derived from this extraordinary process placed *publica fama* as the plausible narrative instance of the relevant facts which precluded any chance of dialogue between the judge and the accused<sup>88</sup>. In that way the discursive dialectical dimension of the *quaestio* appeared in direct opposition to the *silentio* required by the extraordinary inquisitorial process<sup>89</sup>. This

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aliorum sanctorum testimonia, ex peccato pastorum et aliorum sacerdotum Ecclesiae originatur eius coartatio, et imminutio, perturbatio augetur, exulat pax, et animarum provenit damnatio, nos qui sacerdotii fungimur officio, humiliemus nostras piissimo Domino animas, in contrito spiritu, devote dicentes: Piissime et potentissime Domine: Fiat pax in virtute tua. Fiat pax huic domui a persequente inimico. Fiat pax huic domui a schismate iniquo et fiat pax domui in gloria cum Deo patre, et filio et spiritu sancto, in saecula saeculorum benedicto, Amen”. About the *quaestio* cf. *Historia et Monumenta*, p. 45: “De sufficientia legis Christi ad regendam ecclesiam (positio Magistri Joannis Hus, quam sibi collegerat: volens in Concilio Constantiensi sibi data fuisset audiencia, intntionem suam publice declarare: *Utrum Lex Iesu Christi veri Dei et veri hominis per se sufficit ad regimen Ecclesiae militantis?* Arguitur quod non: quia si sic, tunc omnes leges aliae et omnia iura humana superfluunt. Consequens falsum et magnum inconueniens. Et consequentia videtur tenere ex eo principio, quod peccatum est fieri per plura, quod aequae bene potest fieri per pauciora. Sed questionis veritas sic probatur: Lex Iesu Christi est sufficientissima, requisita ad regimen Ecclesiae militantes, cui non licet quicquam addere, vel subtrahere. Ergo ipsa per se sufficit ad regimen Ecclesiae militantis”.

<sup>88</sup> Julien THERY, “Fama: l’opinion publique comme preuve judiciaire. Aperçu sur la révolution médiévale de l’inquisiteur (XIIe-XIVe s.)”, in Bruno LEMESLE (ed.), *La Preuve en justice de l’Antiquité à nos jours*, Rennes, 2003, pp. 119 – 148.

<sup>89</sup> CHIFFOLEAU, *op. cit.*, p. 67: “La procedura scritta, quando viene applicata con tutto il suo rigore (e si è già sottolineato che questo caso si verificava molto raramente nella Francia del nord nel Medioevo, ma, per necessità di dimostrazione di dimostrazione ammettiamo che questa situazione limite esistesse realmente), quando passa della *informatio* alla cosiddetta *inquisitio*, mediante il gioco della redazione degli articoli, delle *positiones*, uccide la voce viva dei testimoni e degli accusati. Essa penetra in un sistema di verità che non è proprio più quello della narrazione ed impone il silenzio. Non proprio il silenzio ingannevole che circonda l’eresia e l’indicibile, ma quello essenziale e positivo che circonda sempre i misteri, gli arcani del potere. La Maestà,

process was the Council fathers' attempt at reconstructing the bonds of ecclesiastical obedience from below, which had been quite affected by the prolonged Schism and even as a result of its resolution through the *via concilii*. The only response to a conciliar power which had just affirmed its legitimacy was silence in view of its *potestas*. Indeed in conciliar terms, the *plenitudo potestatis* definition had its counterpart in the strengthening of an increasingly absolute ecclesiastical obedience<sup>90</sup>. Interestingly, and paradoxically many of the arguments put forward by the conciliarist author about the indivisibility of the *plenitudo potestatis* will be reintroduced by the advocates of papal absolutism, which triumphed after the brief conciliar period and also by Jean Bodin during the 16th century<sup>91</sup>.

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e Kantorowicz l'aveva ben sottolineato a suo tempo, è sempre circondata dal silenzio. In senso stretto, a partire dal momento in cui, nella procedura straordinaria, vengono redatti gli *articuli dell' inquisitio* (che frazionano, rompono, ricompongono le narrazioni raccolte nell' *informatio*), non c'è più dialogo tra il giudice e l'accusato, che piaccia o meno coloro che prendono gli interrogatori degli inquisitori per inchieste etnografiche". On the *arcana* of power cf. Ernst KANTOROWICZ, "I misteri dello Stato" in Gianluca SOLLA (ed.), *I misteri dello Stato*, Milano, Marietti, 2005, pp. 187-223.

<sup>90</sup> CHIFFOLEAU, *op. cit.*, p. 69: "A traverso l'espédiente della procedura straordinaria, di cui si sa che fa dire la verità e che raggiunge le zone più intime e segrete della persona, si può dunque instaurare la Maestà nel cuore di ogni suddito". Cf. also Jacques CHIFFOLEAU, "Le crime de majesté, la politique et l'extraordinaire. Notes sur les collections érudites de procès de lèse majesté du XVIIe siècle et leurs exemples médiévaux", in *Les procès politiques (XIVe-XVIIe). Actes du colloque de Rome (20-22 janvier 2003)*, Rome, Collection de l'Ecole française de Rome, 2005.

<sup>91</sup> Constantin FASOLT, "William Durant the Younger and Conciliar Theory", *Journal of the History of Ideas*, 58/3 (1997), 385-402 and was surprised to find that in the countries where conciliar ideas had taken a stronger hold (France and Germany) there was less resistance to absolutism. Regarding the review of the conciliar argument on the indivisibility of the *plenitudo potestatis* from an absolutist standpoint in the 15th century cf. TIERNEY, "Divided Sovereignty..."; IZBICKI, "Papalist Reaction to the Council of Constance..." and Katherine ELLIOT VAN LIERE, "Vitoria, Cajetan and the Conciliarists", *Journal of the History of Ideas*, 58/4 (1997), 597-616.

To conclude this text, it seems appropriate to point out that the synodical practices (symbolical, liturgical and judicial) of the Council of Constance carried with them the signs and traces of the intense ecclesiological debates that had taken place in that context. While the study of symbolical and liturgical practices has produced very interesting results, we believe the study of the judicial practices has not yet fully exploited all its potentialities since the inquisitorial processes have been generally studied from a mainly theological point of view. The study of judicial practices in terms of ecclesiological debates offers a twofold advantage. On the one hand, it provides certain clues to attempt an explanation of the violent and ardent conciliar response in the *causa fidei*, while on the other hand it also provides some discursive traces that would allow us to discern how the Council of Constance fathers understood the conciliar authority they had just affirmed in the text of the *Haec sancta* decree. Often it is in the field of the practice that the actors reveal some essential trends.