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1 The decree Haec Sancta approved by the Council of Constance at its 5th Session (6th April 1415) helped the Council fathers to put an end to the scandalous schism which since 1378 had divided the Latin Church between rival lines of claimants to the papal office. It did so by claiming and exercising an authority superior to that of the Pope in certain circumstances. However, the interpretation of this decree has been a source of disagreement between historians, theologians and canonists. It is not our intention to propose in this presentation a new interpretation, but only to point out that since the Vatican I Council the origin of these divergent perspectives has usually been rooted in a priori theological or canonical attitudes or criteria. We think that the proper interpretation of this text can only be made through a careful reconstruction of the immediate context in which the decree was conceived. Finally, at the end of this presentation we will try to suggest that the judicial practices (trials and depositions) at the Council of Constance, though usually disregarded, are a very helpful element to reconstruct the true meaning of the decree Haec Sancta.

2 When John XXIII, the Pope who had convoked the Council of Constance, realized that he could not manipulate it through the numerical majority of Italian religious leaders, he decided to leave the assembly and escaped to Schaffhausen where he started to work for the dissolution of the assembly. The response to this event was the approval of the Haec sancta. The decree tried to answer the following questions: was it possible to celebrate a Council without the papal support or even against his will? If it was possible, what was the origin of the conciliar authority? During the 3rd session celebrated on 26th March of 1415 the Council decided to fight against any intention of dissolution and restated its decision of resolving the issues of causa unionis, fidei et reformationis 1. The next session took place three days later and the cardinal Francesco Zabarella was in charge of reading
a text that had been written with the scope of justifying the conciliar authority. However, when the cardinal Zabarella proceeded to do it, he omitted an important fragment affirming the power of the Council to enact without papal support the reform *in capite et membris* 2. After some new negotiations, the sentence was finally included in the decree approved at the 5th session affirming that the Council held its power immediately from Christ 3. From this moment onwards the text of the decree has been a major object of controversy 4 (For the text of the *Haec sancta* see Appendix).

As we mentioned before, our first aim here will be to show how theological and canonical criteria influenced and conditioned the hermeneutical activities since the times of the Vatican I (1870). The affirmation of papal infallibility and primacy proclaimed by the Vatican Council I turned the Council of Constance and in particular the text of the *Haec sancta* into a highly conflictive issue that should be forgotten instead of studied 5. During this period the historiography credited the old and polemical idea of Juan of Torquemada according to which the origin of conciliar thought should be searched in the heretical teaching of William of Ockham and Marsilius of Padua 6. Thus, the text of the *Haec sancta* was bluntly brushed aside from the catholic tradition. Even such a perceptive and skilled historian as J. Hefele who had been working on his monumental *Conciliengeschichte*, fell victim of this intellectual climate and affirmed that the question of the decree should be solved on canonical terms 7. Nevertheless, in the work of some of the most important scholars of medieval political thought, as for example, O. Gierke, F. Bliemetzrieder, H.-X. Arquillière and W. Ullmann we feel a great unrest about the supposedly heretical origins of conciliar thought. In fact, most of them started to suggest that its real source might be searched in the corpus of canonical texts regulating the life of ecclesiastical corporations during the xii and xiii centuries. However, none of them made a systematical study about this corpus 8.

Although the decree *Pastor aeternus* approved by the Vatican Council I had created a context particularly opposed to conciliar studies, during this period the specialized historiography started to increase the conciliar collections of sources of J. D. Mansi and H. Van der Hardt. Few years after the Vatican Council I, H. Finke started the publication of the *Acta Concilii Constantiensis* 9.

Anyway, conciliar thought continued to be considered as something essentially alien to the catholic tradition. F. Oakley has studied how these theological criteria distorted the historical vision of the conciliar tradition since most of the *instrumenta*, theological Dictionaries and Catholic Encyclopedias tended to create a *vacuum memoriae* between the Council of Vienne (1311-1312) and the Council of Florence (1439-1445) 10. In the same sense, the publication of the *Codex iuris Canonicis* affirmed without restrictions on its canon 1556 the principle of the *Prima Sedes a nemine iudicatur* 11. Even as late as 1947, Angelo Mercati, the *Prefect of the Vatican Library* published a list of popes in which against all historical criteria the popes of the Pisan line were considered as anti-popes while the Roman ones were considered legitimate 12.

The publication of B. Tierney’s *Foundations of Conciliar Theory* was a serious blow for this hermeneutical paradigm that had been operating since the times of the Vatican Council I. In his study, B. Tierney proved what had been suggested previously: the real source of conciliar thought should be searched inside the catholic tradition. The sources of these ideas were on the one hand, the body of canonical texts interpreting the structure of the Universal Church in terms of ecclesiastical corporations and on the other hand, those glosses of the *Decretum* commenting the case of an heretical pope 13.
In this context, the call for the Vatican Council II created an institutional frame much more favorable to conciliar studies since now many scholars were deeply interested in recovering the conciliar precedents. Following these tendencies at the beginning of the 60’s, P. De Vooght suggested from an historical point of view the potential contradictions between the *Pastor aeternus* of the Vatican Council I and the *Haec sancta* approved by the Council of Constance. Despite P. De Vooght’s cautious conclusion, the reaction against his view soon took place under the feather of J. Gill, the Director of the Pontifical Oriental Institute who restated the old polemical arguments which considered the *Haec sancta* an heretical intent to subvert the Church constitution desired by God. Even if he thought he could justify his position from an historical point of view, once again the theological and canonical criteria conditioned the interpretation. During this early period immediately after the call of the Vatican Council II, the main topic of the debate was centered on the dogmatic validity of the *Haec Sancta*. The first catholic scholar to extract the theological conclusions from this decree was the Tübingen professor, H. Küng. Far from clamming a radical conciliar supremacy, he proposed a much more active role of the Council, but only in the cases of papal heresy or schism. According to F. Oakley’s last book about conciliar thought the debate about the dogmatic validity of the *Haec sancta* has never been definitely solved neither by theological nor by historical arguments.

The Constitutional decree *Lumen gentium* approved by the Vatican Council II did not pronounce the last word about the issue. Even if this decree recognized the collegial and Episcopal *magisterium* of the Church, at the same time left the door open for curial centralism.

Since the polemics on the dogmatic validity of the *Haec sancta* had finished in a real cul-de-sac, at the end of the 60’s the focus of the debate changed. From this moment onwards the center of the debate has been the legal validity of the decree as a positive constitutional law. Some Church historians as H. Jedin, W. Brandmüller and A. Franzen without refusing the validity of the *Haec sancta*, have been trying to establish its limits. According to their theory (later called *Notstandigtheorie*), the decree was only an emergency measure with the scope of solving merely the particular situation caused by the Schism. In fact, a similar interpretation had already been suggested by J. Hollensteiner some years before. However, the first problem of the *Notstandigtheorie* was the following: if the *Haec sancta* was only an emergency measure, how would they explain the meaning of the sentence *cuiscumque alterius concilii generalis legitime congregati?*

W. Brandmüller’s restricted interpretation affirmed that the council fathers were alluding through these words merely to the possible need of another council to put an end to the schism. Therefore, they had used the term *alterius* instead of *alii*. Nevertheless, as it has been suggested by F. Oakley, W. Brandmüller’s interpretation tended to reduce the importance of the term *cuiscumque*.

Anyway, we think that the main problem of the *Notstandigtheorie* is related to the reconstruction of the immediate context in which the decree was approved. In Brandmüller’s interpretation the existence of three lines of doubtful claimants to the papal offices created a situation of a *de iure* quasi-vacancy. Therefore, the popes had been *ipso facto* (by their own heretical act) deposed without a public process. Following this line of thought, the sentence of the decree affirming *etiam si papalis existat* should be translated in this way: ‘…selbst wenn ein Ihaber päpslicher Würde existieren sollte.’ This fragment would prove that the council fathers did not need to act through a process of deposition against the papal office. Instead they would have followed the canonical
opinio properly represented by Hugucio of Pisa’s gloss about a pope whose heretical behavior would automatically put him out of his office 26.

However, we believe that the situation that the Council had to face was radically different since the Council had been convoked by John XXIII whom most of the council fathers considered as a legitimate pope. In F. Oakley’s view, it is important to point out that he was the only pope called dominus papa in the deposition sentence. If the council fathers had followed the ipso facto theory, at the same time they would have cast doubts on the legitimacy of a Council convoked by an heretical head 27. Even if we agree with Brandmüller’s translation of the etiam si papalis existat, we tend to disagree with his conclusions. Wouldn’t it be possible to affirm that the council fathers used this sentence etiam si papalis existat to allude to the fact that although the formalities of the process of deposition had started, a sentence had not yet been asserted? We have to remember that the sentence will be read later (29th may). This might be the reason why the council fathers decided to include this phrase 28.

At this point we can try to draw some conclusions about the Notstandigtheorie. We think that one of the fundamental premises of this theory relies on the effort to harmonize the canonical principle of Prima Sedes a nemine iudicatur with the historical facts. This effort of course makes their supporters pay an important hermeneutical price since they are forced to adapt historical data to canonical principles.

The supporters of the Notstandigtheorie never recognized that next to Hugucio’s ipso facto deposition theory, the canonical tradition had developed another line of thought completely different affirming the need of the public process of deposition in the case of an heretical pope. This tradition had its origins in the Summa De iure Canonico Tractaturus (x11 century) and it had been later developed between others by the canonist Alanus Anglicus (x11 century) whose Apparatus Ius Naturale became a classical reference about this issue. In opposition to W. Brandmuller’s view we feel inclined to think that the council fathers decided to follow this second canonical theory since they needed to demonstrate through a deposition process that John XXIII previously a legitimate pope who had convoked the Council, had become only later an heretic. It should be remembered that during this period J. Gerson had corrected his De auferibilitate papae in which he defended the need of a public process of deposition 30. One of the most important premises of the Notstanditheorie is to affirm that the need of a deposition trial would imply to accept the fact that the council fathers would have followed a ‘radical’ conciliarism. In fact, the council fathers were far from affirming a ‘radical’ conciliarist superiority as later expressed by de Basel Council. However, we think that the fact of affirming the need of deposition process should be understood as a conservative strategy whose aim was to emphasize and strengthen the position of the Council as the most important hierarchical instance in charge of setting the limits of orthodoxy in a context of extreme institutional weakness.

At the same time, we think that the need of a process of deposition in the case of an heretical pope should be understood in relation to the rest of the causae fidei, mainly the inquisitorial processes against J. Wyclif and J. Hus and the condemnation of the thesis of J. Petit. The council fathers were aware of the potential risks that would follow, if the theory of the ipso facto deposition was projected to the rest of the ecclesiastical hierarchy and to the secular politeia. In their view this risk appeared with certain evidence in the teaching of J. Wyclif and J. Hus who with differences between them affirmed that a priest in mortal sin ipso facto would have lost his authority to administrate valid sacraments 32.
At this point it is important to remember that between the end of the xivth century and the beginning of the xvth century there had been a revival of some 'neodonatist' thesis affirming that the sinful state of a priest in possession of an ecclesiastical office affected the validity of his acts. On the one hand, these ideas weakened the entire hierarchical and sacramental structure of the Church while on the other hand, they left the door open for secular intervention of the princes when the priests did not fulfill their evangelical duties. The ipso facto deposition theory implied the recovery of another canonical principle affirming that the Pope could be deposed without a process because his own heretical act had turned him minor quolibet catholico. This principle which had been of great importance for William of Ockham in his fight against the papacy in the xivth century, became during the Council of Constance a principle that due to its anarchical implications, should be expressly rejected and avoided 33. In a similar fashion, the teaching of J. Petit about tyrannicide stating that a tyrannical prince could be deposed or killed without a due public process was a potential risk that would follow from the ipso facto theory. To counteract this risk once again J. Gerson in his De auferibilitate Papae felt compelled to state clearly that it was not possible for a subject to act against his ruler without a proper declaratione iudiciaria 34. The council fathers in Constance had to face the difficult situation of deposing an heretical pope and at the same time reconstructing the bonds of obedience from below. Therefore, the inquisitorial processes appeared as well fitted instance to do this.

Concluding this presentation, we can suggest from a methodological point of view that the synodal practices (symbolical, liturgical and also judicial) carried with them the traces of the intense ecclesiological debates that had taken place within the Council of Constance. If the study of the symbolical and liturgical practices has shed great results, the study of the judicial practices has not yet fully exploited all its potentialities since the inquisitorial processes have been studied exclusively from a theological point of view 35. If we study the judicial practices with one eye on the ecclesiological debates, this would give us a twofold advantage. On one side, we could understand better the harsh and violent response of the Constance in the causae fidei, while on the other side we could trace some indices that would allow us to discover how did the council fathers understand the conciliar authority they had affirmed in the text of the Haec sancta. Sometimes it is in the field of the practice that the actors reveal some essential trends.

Appendix

Et primo (declarat), quod ipsa in spiritu sancto legiteme 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 fidelem et extirpationem dicti schismatis, ac reformationem dictae ecclesiae in capite et in membris.

Item, declarat, quod quicumque cuiuscumque ciusdemque conditionis, status, dignitatis, etiam si papalis (fuerit), qui mandatis, statutis seu ordinationibus, aut praeceptis huic sacrae synodi et cuiuscumque alterius concilii generalis legiteme congregati, super praemissis, seu ad ea pertinentibus, facitis, vel faciendis, obedire contumacter contempserit, nisi resipuerit, condignae poenitentiae subiciatur, et debite punitur, etiam ad alia iuris subsidia, si opus fuerit, recurrendo.
NOTES

1. G. ALBERIGO, et alli (éds.), Conciliorum Oecumenicorum Decreta (COD), Bâle, 1962, p. 383 : « Item quod istud sacrum concilium non debet, dissolvæ, nec dissolvatur usque ad perfectam extirpationem praesentis schimatis, et quousque ecclesia sit reformata in fide et in moribus, in capite et in membris. »


The Conciliar Theories of Franciscus Zabarella and of Jean Gerson and the Traditional Papal View on General Councils » in G. CHRISTIANSON, Th. IZBICKI y Ch. BELLITO (dir.), The Church, the Councils and Reform: The Lessons of the Fifteenth Century, Catholic University of America Press (in press). I would like to thank the author for having granted me the possibility of acceding to his text before its publication.


4. For the text of the Haec Sancta we will use the version proposed by M. Decaluwe, « A new and disputable text-edition of the decree Haec Sancta of the Council of Constance (1415) », in Cristianismo nella storia, 32, 2 (2006), p. 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 used it. The proposal of the editor is to use as a base text the one published by P. CRABBE, Concliorum Omnium tam Generalium quam Particularium, I-III, Coloniae Agrippinae, 1551, t. II, p. 1080 y 1020. This text reproduces Hieronymus of Croaria's manuscript Acta situ dignísima doteque cinnammata Constanciensis concilii celebratissime (1490) on which Johannes Rynmann based in 1500 his first printed edition of the Acts. Most of the later editions will use as base this text. The author confronts its with an important quantity of manuscripts of the XVth century 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. 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. About the ambiguity in the wording of the decree Cf. B. TIERNEY, « Hermeneutics and History. The Problem of the Haec sancta » in T. A. SANDQUIST, M. R. POWICKE (éds.), Essays in Medieval History presented to Bertie Wilkinson, Toronto, 1969, p. 354-370. According to his view the text would have been deliberately ambiguous about the meaning of the word concilium. While on the first part of the Haec Sancta should be interpreted as a council acting without the Pope, in the second part the text would refer to the council acting together with the Pope. In any case B. Tierney emphasizes the ambiguity of the important term concilium. Th. MORRISEY, « The Decree 'Haec Sancta'... » op. cit., p. 159. Th. Morrisey affirms that the council had never solved what would happen in the case of disputes between the authority of a legitimate council and a legitimate pope; M. DECALUWE, « Three Ways to Read the Decree... », op. cit. More than its ambiguity, M. 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 absence of the Pope.


12. F. OAKLEY, Council over Pope ?., op. cit., p. 125. Cf. also Annuario Pontificio (Città del Vaticano, 1947) and the text quoted by the author A. MERCATI, « The new List of Popes », Mediaeval Studies, 9 (1947), p. 71-80. F. Oakley mentions that A. Mercati never used historical criteria to affirm that during the Schism the only legitimate line of popes was the Roman one. His option for this line was based on the theological criteria prevailing since the time of the Council Vatican I. He also mentions a curious event about the decision taken by the Pope in 1958 of assuming the name of John XXII. When the Pope announced that he would adopt this name, he mentioned the fact that there had been already 22 pontiffs with this name extra legitimatis discussions. Thus, the Pope omitted with caution to give his opinion about the legitimacy of the Pisan line (we have to
remember that John XXIII had been deposed by the Council of Constance). Nevertheless, in the official reissue of the speech of the Pope in the Acta Apostolicae Sedis the words legitimitatis discussiones were omitted since they were not compatible with the position adopted in the Annuario Pontificio.

13. B. TIERNEY, Foundations of Conciliar Theory, op. cit., 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. »


From the quotation of certain texts proposed by H. J. SIEBEN, Die Konzilsdee des lateinischen Mittelalters (847-1375), Padeborn, 1984, p. 255 affirming that the Council depended on the papal summons, C. Fasolt saw a real assault to the thesis of B. Tierney. Nevertheless, these affirmations by no means made collapse his 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 the conciliar authority. About this polemic cf. B. TIERNEY, « Introduction » of the last reissue of Foundations of Conciliar Theory (1998), op. cit., p. 13 and F. OAKLEY, « Verius est licet difficilius... » op. cit., p. 75.


15. J. GILL, The Council of Florence, Cambridge, 1959 ; J. GILL, Eugenius IV, Londres, 1961 ; J. GILL, « The fifth Session of the Council of Constance », Heythrop Journal, V, 1964, p. 131-147 ; J. GILL, Constance et Bâle-Florence, Paris, 1965 and J. GILL, « Il decreto Haec sancta synodus del concilio di Constanza », Revista di storia della Chiesa in Italia, XII (1967), p. 123-130 y J. GILL, « Die fünfte Sitzung des Konzil von Konstanz » en R. BÄUMER, Das Konstanzer Konzil, Darmstadt, 1977, p. 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. Against strong historical evidence, J. Gill thought that this last council had not been ecumenical. According to this author the Council of Constance only became a legitimate assembly when Gregory XII, the Pope of the roman obedience, was allowed to convoke it on the 4th July 1415. In addition, according to J. Gill, the Haec Sancta had never received papal approval since it had not been named explicitly in a bull. In order to put in doubt...
the validity of the decree, the author denied the ecumenical character of the 5th session. From the absence of certain cardinals (especially of Zabarella) he arrived to this conclusion. Although the author thought he was debating strictly on historical terms, canonical and theological criteria permanently distorted and forced his interpretation.


22. W. BRANDMÜLLER, Das Konzil von Konstanz, op. cit., p. 256 : « Wenn dem nun hinzugefügt wird ... et ciscumque alterius concili i... dann geht es auch dabei um das Ziel von Einheit und Reform. »
Deshalb kann es nicht angehen, 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.»


25. W. BRANDMÜLLER, Das Konzil von Konstanz, op. cit., p. 255 note 64: «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: ... chianne, 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 text of the translation cf. Th. MORRISEY, «The Decree ‘Haec Sancta’ and Cardinal Zabarella... », op. cit., p. 154 y COD 409.

26. One of the most important glosses on this issue was that of Hugucio of Pisa. It was one of the first serious attempts to discuss the problem of an heretical pope. He might be deposed because his behaviour would harm the whole Church: « ... si papa esset hereticus non sibi soli noceret sed toti mundo, praesertim quia simplices et idiote facile sequentur illam heresim cum crederent non esse heresim. » The reasoning is clear; if the Pope was heretical, the simple fideles would tend to follow his position without knowing the heresy manifested and this would be particularly harmful to 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 would damage the statum ecclesiae. Hugucio asked himself rhetorically: « Ecce, publice furatur, publice fornicatur, publice comitit simoniam, publice habet concubinam, publice eam cognoscit in ecclesia iuxta vel super altare, admonitus non vult cessare, nunquid non accusabitur... nunquid non condemnapbitur, nunquid sic scandalizare ecclesiam non est quasi heresim committere? Preterea contumacia est crimen ydolatric et quasi heresis ut di. Lxxxi si quis presbyteri, unde et contumax dicitur infidelis ut di. Xxxvii nullus. » These crimes scandalizing the Church were practically assimilated to heresy. If the Pope incurred in these public crimes, could be deposed having been called previously to modify his conduct. The text of Hugucio’s gloss has been quoted by B. TIERNEY, Foundations of Conciliar Theory, p. 228-229. Anyhow Hugucio’s gloss also introduced important restrictions since the Pope could only be accused of an already existing heresy and besides this should be affirmed publicly by the Pope. About Hugucio gloss cf. also J. M. MOYNIHAN,

27. This is a key premise in our argumentation. Nevertheless, it is necessary to emphasize that this fact has not been noted by most of the scholars. Recently only F. Oakley, The Conciliarist Tradition. Constitutionalism in the Catholic Church 1300-1870, op. cit., 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 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. » The sententia of deposition of Juan XXIII refers to him as dominum papam. COD, p. 393: « [Sacrosancta generalis Constnatiensis synodus]... per hanc sententiam definitivam, quam profert in scriptis, pronuntiavit, decernit et declarat, recessum per praefatum dominum Ioannem papam XXIII ab hac civitate Constantiensi... ». On the other hand, although the Council accepted Gregorio’s XII convocation as a requirement of his abdication, he was not mentioned as pope. COD, p. 397: « Sacrosanta generalis synodus Constantiensis, in Spiritu sancto legiteritim congregata, universalem ecclesiam catholicam repraesentas, cesionem, renuntiationem pro parte illius domini, qui in sua oboedientia dicebatur Gregorius XII... » Finally, the sentence of deposition against Benedicto XXIII also omitted to call him pope. COD, p. 413: « Quanto magis pereat illius, qui omnes honorem et ecclesiam universalis persequutus est et turbavit, Petri Luna, Benedicti XII a nonnullis muncupati, memoria ? ». F. Oakley’s position is opposed to W. Brandmüller’s, Das Konzil von Konstanz, op. cit., 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. »

28. About the importance of the procedural formalities cf. Th. Morrissey, « 'More Easily and More Securely' Legal Procedure and Due Process at the Council of Constance » in J. R. Sweeney, and S. Chodorow, Popes, Teachers, and Canon Law in the Middle Ages, New York, 1989, p. 234-250. According to the author the Council of Constance always proved to be extremely cautious about them. The article also mentions that the council fathers tried to leave the doors open for a possible collaboration with John XXIII right up to the last moment. The process of negotiation between the Council and John XXIII after his flight has been studied by W. Brandmüller, Das Konzil von Konstanz, op. cit., p. 279-310. It is important to point out that the deposition sentence will be pronounced only when all the formal requirements of the process were fulfilled. The phrase etiam if papalis existat might be alluding to the fact that since the process had not finished, it w as not possible to affirm categorically the absence of the Pope. About the second part of the text of the Haec sancta it is interesting the textual variable of « fuerat » introduced by M. Decaluwe. This variable would attenuate the semantic content that W. Brandmüller attributes to the verb « existat » of the first part.

29. Summa De iure Canonico Tractaturus, Laon, MS. 371 bis. fol. 93 vb, s.v. nisi d(e) p)rehendatur a fide a nemine : « hec negatio notat difficultatem non impossibilitatem quia super alio potest licet difficile quie non nisi notorium fuerit ar. di. xvii concilia (D.XVII, c. 6). ibi de huius modi plenius. Set non (num ?) super nova heresi petest accusari. R. sic ut supra dictum est. Set videtur non posse quare (quia ?) quamdiu nova est sententia pape super articulo fidei, ei stabitu scilicet quousque fuerit indicio (MS= dampnabitur) et hoc postquam super utrumque commonit tur
(commonitus ?) desistere noluit ut xxiii. Q. iii (sic!) dicit (C. XXIV, q. 3, c.29). » J. M. MOYNIHAN,
_Papal Immunity and Liability in the Writings of the Medieval Canonists_, p. 70–73.

30. **ALANUS ANGLICUS**, *Apparatus ius Naturale*, Paris, Bib. Mazarine, ms 1318, fol. (this one is longer
version of the text, the shorter one is BnF ms 3909) Long Version fol. 15 rb: « Ar. quod in
questione fidei maior sinodus quam papa, ar. d. xv. Sicut (D. XV, c. 2), et d. xvi sancta (D. XVI, c.8),
quod firmiter est tenendum, Unde accidit ex tali causa quod sinodus potest ipsum iudicare et
damnare. Unde accidit quod incidit in excommunicationem latam super heresi in sinodo ut hic,
quod non accideret si papa in hoc casu maior esset sinodo vel ipsius predecessor alius sine
c oncilio vel collegio cardinalium aliquam heresis damnasset nec ipsum nec ipsius successorum
in damnatione incidere putarem, licet eumdem errorem overet, sicut nec hodie papa verbearum
clericum incideret in canonum » _Ibid._, C. IX, q. 3, c. 17, fol. 180vb–181ra: « Set queritur cum ipse
c oncilio vel cardinalibus questionem fidei ventilat et contigit papam aliam habere sententiam,
aliae cardinales, cuius sententia prevalebit ? R. concilii vel cardinalium si omnes in concilium
opiniones concordent. Immo etiam si maior pars set si cum papa tanta pars concordaverit quanta
est que consensit, pape adhereo, et haec in questione fidei tantum. In aliis autem controversiis
iudicabilius pape sententiam omnium aliorum sententii prefero. » _Ibid._, « Set videtur contra
xxiii. q. ii sane prefetur (C. XXIV, q. 2, c. 6). ubi diescorus papa romanus excommunicatus est licet
in fide non peccasset. Set iste (?) non fuit papa istius rome set constantinopolis quo nova Roma
appellatur. Item signatur contra q. ii. q. ii non licet (C. XII, q. 2, c. 43) ubi papa successoribus
videtur legem imponere, et etiam si contra fecerint, excommunicare. Set non es tita, quoium
quod ibi dicitur ad subditos tantum refertur. Est ergo verum quod de sola heresi inuitus potest
pape iudicari ut hic dicitur. Set hoc ideo in hoc crimine quia circa ea quae ad fidem pertinent
minor est collegio cardinalium vel concilio generali episcoporum. De crime heresios tamen si
resipiscere voluerit non damnabitur inuitus ut d. xxi. nunc autem (D. XXI, c. 7). Alii autem
contra » **ALANUS ANGLICUS**, *Apparatus ius Naturale*, D. XL c. 6 BnF ms 3909, fol. 8 va, s.v. a fide :
« Set nonne damasus de adulterio est accusatus ut infra ii. Q. vii § cum balaam (C. II, q. 7, dict.
p. c.41). Item si publicus fenerator esset nunquid accusari posset ? posset secundum quosdam de
omni notorio, qui large accipiunt peccare in fide, i. (e) contra doctrinam fidei nostre sicut omnis
mortaler peccans dicitur Christianum negare ut infra xi. Q. iii. Existimant (C. XI, q. 3, c. 84). Set
secundum hoc nullum esset hic pape privilegium. Ideo dicendum quod cum iudicem non habeas
superiores inuitus iudicii non potest nisi de crimine heresios in quo propter criminis
enormitatem et comune periculum ecclesie est statutum. Set nunquid alius pape possit legem
imponere cum papa canonibus sit solutus et possit eos mutare. Forte ita est in hoc crimine quia
ibi quasi per consequiam revocatur in dubium utrum papa sit. Videtur enim quod si hereticus
est caput ecclesie non est. Si vero de alio crimine infamatur et alius vel eum accusare non (=ne)
in eo ecclesia scandalizaretur, licet cogi non possit, tamen ammonitus iudicii eligere debebit et
sube o litigare. Quamvis enim legibus solutus sit secundum leges tamen vivere debet. » J. M.

31. J. GERSON, _An liceat in_ P. GLORIEUX, _Oeuvres complètes_, Tourinai, 1960–1963, 6, 286 and DU PIN,
_Opera omnia_, Amberbes, 1706, 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 depositionem eo facto, sed requirit humana dispositio ». Cf. G. H. M. POSTHUMUS
GERSON, _Traditit Jesum_, (Gl. 5, 558; DU PIN II, 593BC) : « etsi praelatus haereticus dignus est deponi,
nihilominus non est eo facto depositus, sicut aliquis quantumcunque sit dignus episcopari non
est eo facto episcopus, nisi per eleetionem divinam vel humanam manifestam. » G. H. M.
POSTHUMUS MEYJES, _op. cit._, p. 173.


34. J. Gerson, *De auferibilitate*, cons. 12 in P. Glorieux, op. cit. 3, p. 304-305 ; Du Pin, op. cit. 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 generalis et auctoritativa, et quae liget omnes de ecclesia in hoc stare; secus est de subtractione particulari quoad hos vel illos et quae non fertur autoritative; sed vel doctrinaliter et insinuativa, vel necessitatis quadam inducione. » He makes an allusion to the Petit affair : « 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 iudiciari morti trahere; praesertim si addat haec assertio quod tyrannus ille omnis est, qui non praeest ad utilitatem subditorum. Sed de hac re alibi, de qua viderint assertores. » Cf. G. H. M. P. Osthunmes Meyjes, op. cit. p. 173.


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**INDEX**

*Mots-clés*: Haec sancta, Inquisitorial process, Conciliarism, Heresy