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Ernst Kantorowicz, un historien pour les juristes ?

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Theological or Legal Fiction? Opposing conceptions of fiction in Ernst H. Kantorowicz and Yan Thomas

In his famous article on the *Sovereignty of the artist*, published in 1961 in a collection of Essays in honor of Erwin Panofsky, Ernst Kantorowicz saw in the attribution of extraordinary powers to the pope during the 13th century the origin of the radical emancipation of medieval thought from the domination of nature and divine will. The ability of "creating from nothing" assigned to the pope by canon law round 1220 and the comparison of this capacity to the instrument of legal fictions in Roman law, played, according to Kantorowicz, a decisive role in arriving at a new conception of creativity: a creativity finally free from the constraints in which medieval thought had confined it for centuries.[1]

At the conclusion of his work on *fictio legis*, in 1995, Yan Thomas criticised the main thesis of the article by Kantorowicz, considering his debt to canon law science to be excessive. In the view of Thomas, the fiction in Roman law, exhumed by civilists during the 13th and the 14th centuries, would have contributed to questioning Christian domination of nature of medieval thought to a far greater extent than the theological and canon law stimuli called into question by Kantorowicz. According to Thomas, the study of the Justinian texts and the knowledge of the Roman legal technique of fiction, consisting in the continual denial of the truth, would have transmitted to medieval jurists the most subversive spirit of classical jurisprudence. Only by force of this subversive spirit, medieval civilists would have arrived at daring formulations such as that coined by the famous lawyer of Bologna, Azo, in the first decades of the 13th century, according to whom interpretation and fiction of the law were synonymous.[2]

Almost thirty years after the words of Yan Thomas, and more than sixty after those of Ernst Kantorowicz, it seems interesting to return to this fascinating debate, which today can be partly renewed thanks to the results achieved by two lines of research that have prospered in recent decades: a historiographical one, which has deepened the relationship of Kantorowicz with political theology and the role of fiction within it; and a historical-legal research line on canon law sources, which allows a better understanding of the meaning of fiction in the thinking of medieval

[1] E. H. Kantorowicz, "The Sovereignty of the Artist. A note on legal maxims and renaissance Theories of Art", in *De artibus opuscula XL: Essays in Honor of Erwin Panofsky*, M. Meiss (ed.), 2 vol., New York, New York University Press, 1961, I, p. 267-279.

[2] Y. Thomas, "Fictio Legis. L'empire de la fiction romaine et ses limites médiévales", appeared in *Droits. Revue française de théorie juridique*, 21, 1995, pp. 17-63, now included in Y. Thomas, *Les opérations du droit*, M.-A. Hermitte et P. Napoli (dir.), Paris, Seuil/Gallimard, 2011, p. 133-186.

jurists of the 12th and early 13th century. I will therefore devote a first short section of my text to the fundamental role played by fiction in the thought of Kantorowicz, briefly recovering the positions expressed by Thomas himself and other scholars in this regard. I will then employ the remaining larger part of the article to expose a new analysis of the sources that inspired in Kantorowicz the theories that he expressed in *Sovereignty of the Artist*, focusing in particular on the two main points on which was based the criticism of the theses of Kantorowicz made by Yan Thomas: a re-examination of the most salient statements of the canonists of the first half of the 13th century in which, according to Kantorowicz, appear the words that inaugurate a new sense of man's creativity; and a reflection on the reason why the great Italian civilist Azo, starting around 1210, argued that interpretation and fiction were two synonymous terms.

I. On the role of fiction in the thought of Ernst Kantorowicz

Literary fiction and legal fiction were notoriously linked in the thinking of Kantorowicz, since they qualified an idea of political and artistic sovereignty that marked an important turning point in late medieval thought. In the words of Kantorowicz, the purpose of his contribution, in *Sovereignty of the Artist*, was therefore:

> to demonstrate that certain current views of later theoreticians were foreshadowed by the writings of the jurists, and that there existed, to say the least, some strong analogies between the poetico-artistic theories of the Renaissance on the one hand and the professional doctrines of medieval jurists on the other. There was, in the first place, a whole cluster of interrelated problems which vexed the Renaissance artists and poets and to which their attention was drawn over and over again. Was art supposed to imitate nature, or should it surpass nature and proceed beyond imitation to new invention? Was there fiction involved, and how did fiction refer to truth? [...][3]

The importance assigned to fiction by Kantorowicz goes however far beyond this specific historical function and pervades his entire way of thinking. In the words of Alain Boureau, fiction was the keystone of the political theology of Kantorowicz, who intentionally contrasted the exaltation of nature by the Nazi jurists with a model inscribed *"dans le langage de la rationalité, inspirée du modèle intellectuel, et non substantiel de la religion"*.[4] It is especially from some pages of *The King's Two Bodies* that transpires the enthusiasm of Kantorowicz for the artificial component of law, which would have played a liberating function in his thinking, allowing him to assign to the dualistic nature of the figure of the king the importance of an institutional, rather than a sacred dimension of sovereignty.[5]

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[3] E. H. Kantorowicz, "The Sovereignty of the Artist", art. cit., p. 268.

[4] A. Boureau, *Kantorowicz. Histoires d'un historien*, Paris, Les Belles Lettres, 2018 [1990], p. 110. For a critical discussion of the book of Boureau and more generally of the reception of Kantorowicz by French historiography, see P. Schöttler, "Ernst Kantorowicz in Frankreich", in *Ernst Kantorowicz, Erträge der Doppeltagung, Institute for Advanced Study, Princeton, Johann Wolfgang Goethe-Universität, Frankfurt*, R. L. Benson, J. Fried (ed.), Stuttgart, Franz Steiner Verlag, 1997, p. 144-161.

[5] E. H. Kantorowicz, *The King's Two Bodies. A Study in Mediaeval Political Theology*, Princeton, Princeton University Press, 1957.

According to Kantorowicz, it was the rationality of law that enabled the late mediaeval jurists to emancipate themselves from the organological interpretation of the *corpus mysticum* proposed by the theologians, to which the jurists placed alongside, or counterposed, the theory of the *corpus fictum*, "the corporate collective which was intangible and existed only as a fiction of jurisprudence".[6] Following this path, the intellectuals of the 12th and 13th centuries detached themselves from the conception of a mystical state as part of the divine plans: "The state or, for that matter, any other political aggregate, was understood as the result of natural reason."[7] The inextricable link between rationality and fiction, through the progressive familiarity that medieval jurists developed with the most artificial components of law, was thus, in the view of Kantorowicz, the main instrument by which "jurists and political writers gained a new possibility to compare the state as a *corpus morale et politicum* with, or to set it over against, the *corpus mysticum et spirituale* of the Church".[8] In this perspective, fiction played a highly positive role, having nothing adulterous or deceptive in the eyes of Kantorowicz, because it subtracted nothing from the immaterial *corpus* that it redesigned. Indeed, the very word 'fiction', "was not necessarily derogatory".[9]

Establishing the fictitious nature of the *corpus politicum*, avoiding any possible coincidence with collectivities of mortal components historically identifiable in political communities of chosen and superior persons, Kantorowicz came to write some of the most original pages of his production. In particular, the idea of the corporation as a collectivity resulting from the projection in time, perpetuated by the replacement of individuals, the mechanism that allowed medieval jurists to speak of one *populus romanus* through the principle of "identity despite changes or within changes".[10] The projection in time instead of in space, that is, the identification of a people in the succession of individuals, instead of in the abstraction of all living components into a single individual – essentially proposed by theology in the doctrine of the *corpus mysticum* – represents, for Kantorowicz, the essential contribution of medieval legal science, which thus enables a complete emancipation of the abstract community from the still organic metaphor of the theologians. This prevalence of the vertical plurality of individuals over a horizontal vision of plurality that includes all simultaneously living individuals in a *corpus*, is precisely what makes it possible, for Kantorowicz, to dismiss the spatial dimension of the collectivity and to definitively rescind any connection of it with nature. And it is the fundamental role played by fiction that prevents any form of identification of power with specific political bodies existing in time and space:

> [...] a body corporate whose members were echeloned longitudinally so that its cross-section at any given moment revealed one instead of many members—a mystical person by perpetual devolution whose mortal and temporary incum-

[6] *Ibid*, p. 209-211.

[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*, p. 306: "That this corporate person was fictitious detracted nothing from its value, especially its heuristic value; besides, the word fiction itself was not necessarily derogatory."

[10] *Ibid.*, p. 294.

> bent was of relatively minor importance as compared to the immortal body corporate by succession which he represented.[11]

In connection with these lines, Thomas has acutely noted that in such an effort of abstraction, Kantorowicz still has the aspiration to substantialise the fiction. The identification of the *universitas* with the continuity in time of a community reveals, for Thomas, a conception that presupposes the 'truth' of fiction, the essence of which would be time itself, and that instead ignores the artificiality of time which in the words of the medieval jurists is neither natural nor ontological, but juridical.[12]

More recently, Victoria Kahn has theorised the explicit desire of Kantorowicz in the mid-1950s to assign to *The King's Two Bodies* not only the task of redemption from the accusations against his *Frederick II* – a work he composed in the late 1920s and which easily lent itself to forms of exaltation of totalitarian power[13] – but also the expression of his clear opposition to the theses of Carl Schmitt and Ernst Cassirer, expressed by the former in *Political Theology* and by the latter in *Myth of the State*.[14] To the solution of Schmitt, who attacked liberal thought for having caused the separation of a "formal political authority from the idea of personality", reviving the model of ecclesiastical transcendent power that identified the pope as the vicar of Christ not in a merely abstract sense, but as a "concrete personal representation of a concrete personality",[15] Kantorowicz opposed an idea of a legal personality and a political body that was entirely artificial, shaped by fiction and distant from any prospect of embodiment in a concrete model. Fiction also played a crucial role, according to Kahn, in the departure from the perspective of Cassirer, because it replaced the position occupied by the myth, central to the work of this author.[16]

Recalling some positions in the historiographical debate of the last three decades seemed important to highlight the general agreement on the importance Kantorowicz attributed to fiction in order to distance himself from the tragic German experience he left behind after moving to the United States. Certainly, *Sovereignty of the Artist* belongs to this same phase (it was written four years after *The King's Two Bodies*) and it strengthens the drive towards artificiality and abstraction by virtue of its parallelism with art, assigning to late medieval legal science a disruptive function in abstract theories of papal sovereignty which would have shortly allowed Western thought to completely detach itself from the tyranny of nature.

The critique of Thomas only partially invested this point, that is to hold Kantorowicz responsible for a persistent connection with nature, as opposed to artificial-

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[11] *Ibid.*, p. 312.

[12] Y. Thomas, *Les opérations du droit*, *op. cit.*, p. 308, nota 91.

[13] E. H. Kantorowicz, *Kaiser Friedrich der Zweite*, Berlin, Georg Bondi, 1927; for an analysis of the political and cultural context and of the reactions to the publication of this volume, M. A. Ruehl, " 'In This Time without Emperors': The Politics of Ernst Kantorowicz's Kaiser Friedrich der Zweite Reconsidered", *Journal of the Warburg and Courtauld Institutes*, 63, 2000, p. 187-242.

[14] V. Kahn, "Political Theology and Fiction in The King's Two Bodies", in *Representations*, 106, 2009, p. 77-101; *id.*, *The Future of Illusion: Political Theology and Early Modern Texts*, Chicago, University of Chicago Press, 2014, p. 55-81.

[15] V. Kahn, "Political Theology and Fiction", art. cit., p. 82.

[16] *Ibid*, p. 88-91.

ity. The central point of his critique was rather another one, namely the identification of the cultural matrix of that innovative drive, which Kantorowicz would have mistakenly placed, according to Thomas, in the pages of the canon lawyers rather than in those of the civil lawyers of the early 13th century, thus establishing an improper debt of the Renaissance towards theological-canon law thought, rather than towards the great classical heritage transmitted to medieval civil law experts by the *Corpus iuris*. Establishing, ultimately, a Renaissance debt to a component of legal thought that was more medieval than ancient. Indeed, Thomas stated:

> [...] bien avant que les canonistes n'eussent défini la « plénitude de la puissance », et particulièrement celle de la puissance pontificale, comme un pouvoir de faire advenir ce qui n'existe pas, ou d'abolir ce qui existe, les romanistes de la fin du XIIe et du commencement du XIIIe siècle, comme on le voit clairement dans les *Brocards* d'Azon, avaient défini déjà le pouvoir de l'interprète comme pouvoir de dire, par la « fiction, c'est-à-dire l'interprétation », *fictio, id est interpretatio*, que « quelque chose existe qui n'existe pas », *aliquid esse quod non est*, ou que, à l'inverse, « quelque chose n'existe pas qui existe », *aliquid non esse, quod est*. De sorte que, contrairement à ce que l'on croit souvent, ce n'est pas aux théologiens que les canonistes empruntèrent directement cette formule de la toute-puissance comme puissance de faire et de défaire, mais bien aux civilistes, dans leur théorie de l'interprétation, fondée sur et assimilée à la *fictio iuris*.[17]

The multiplication of editions and debates on late medieval doctrine in recent decades has greatly complicated the image we had of these sources, rendering it almost impossible to distil classical legal thought from later developments, and making a rigid contrast of opposing cultural camps appear outdated today. One point is becoming increasingly evident: the classical legal heritage did not travel unchanged and impermeable for centuries, but was profoundly reinterpreted, transformed and re-proposed in terms radically different from the original ones both by canon and civil law lawyers from the beginning of the 12th century onwards.

Today, it is possible to contextualize the sources around which the indirect debate between Kantorowicz and Thomas took place in a broader framework of both canon and civil law works. From this broader background, we will see that, on the one hand, canon law sources cited by Kantorwicz can be interpreted more deeply, on the other, that words such as *fictio* or *interpretatio*, under a patina of classical terminology, hide actually meanings very different from those we would be led to attribute to them.

Starting from these premises, I will attempt in the following pages to reconstruct the history of a vexed, extraordinarily important text that has justifiably aroused the interests of some of the most prominent intellectuals of the 20th century: the gloss of Tancred to a decretal of pope Innocent III.

II. The text glossed by Tancred around 1220: the decretal *Quanto personam* of Innocent III

It is necessary to start from the text to which the gloss refers, namely the decretal *Quanto personam* of Innocent III dating back to his first year of pontificate (1198).

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[17] Y. Thomas, *Les operations du droit*, *op. cit.*, p. 161-162.

Together with other slightly later decretals, this text testifies to the extreme importance given by Innocent to the issue of the transfer of bishops, a difficult subject throughout the 12th century given the weight of the investiture controversy in the conflict between the Papacy and the Empire at the turn of the 11th and 12th centuries, and the exponential growth of episcopal transfers in the second half of the 12th century, particularly after 1170.[18]

As Christopher Cheney has explained,[19] it was through the claim of exclusive power in the field of episcopal transfers that Innocent III inaugurated a different policy from his predecessors based on the centralisation of ecclesiastical power in the hands of the pontiff and on the exaltation of the papal figure and his role. Still throughout the pontificate of Alexander III, transfers of bishops could be authorised by the pope, but also be decided elsewhere and then simply ratified. The claim by the pope to an exclusive power in this field may have been an established custom at the end of the 12th century, but it was not sanctioned in official terms by any canon.

The research of Cheney, continued and deepened by Kenneth Pennington,[20] provides an initial supplementary element to the original interpretation by Kantorowicz, who paying great attention to the *words* used in the decretal to define the pontifical powers (*Dei vicem*), had not attached particular importance to its *content*: the subject on which the decretal intervenes, namely the transfer of bishops, is however of extreme importance in the policy of Innocent III for the affirmation of the new extraordinary powers he claimed. In the first years of his pontificate, the decretal was in fact part of an overall strategy which aimed at making the depositions, renunciations and transfers of bishops a papal monopoly.

In the first decades of the 13th century, the decretal *Quanto personam* together with other decretals of Innocent III on the episcopal transfers converged first in the *III Compilatio* (1209/10) and then in the *Liber Extra* (1234), where they came to form the entire section dedicated to the subject of the *translatio* of bishops. Of these decretals, the *Quanto personam* was the most relevant both for the density of its ideological arguments and for its historical importance, testified by the approximately twenty letters subsequently sent by the pope to obtain submission to the decision contained therein.

The decretal condemned the behaviour of Conrad of Querfurt, bishop of Hildesheim, who, after having been elected by the canons of Würzburg to their episcopal see, had left Hildesheim and moved to Würzburg without papal permission. The bishop Conrad had worked at the highest levels of imperial politics, as chancellor of Henry VI, something that probably urged the pontiff to assert his utmost authority precisely with regard to the German dioceses, where episcopal autonomy could prove particularly risky a few decades after the conclusion of the investiture controversy. The use of high-sounding terms and expressions was probably intended to compensate for a predictably limited submission to the orders of Innocent from

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[18] K. Pennington, *Pope and Bishops. The Papal Monarchy in the Twelfth and Thirteenth centuries*, Philadelphia, University of Pennsylvania Press, 1984, p. 90-95.

[19] C. R. Cheney, *Pope Innocent III and England* (Päpste und Papsttum 9), Stuttgart, Anton Hiersemann, 1976, p. 71-74.

[20] See K. Pennington, *Pope and Bishops, op. cit.*, chap. 3: *Episcopal Translations, Renunciations, and Depositions: Innocent III, Master Huguccio, and Hostiensis*, p. 75-114.

the German prelate, who was in fact continually called back to obedience in the following years.[21]

But let us stop for a moment at the decretal of 1198 where an extraordinarily important argument appears, which – as the main studies on Innocent III have pointed out – marks a profound distance from previous pontificates: the qualification of the pontiff as *vice Dei* and *vicarius*, and as such the holder on earth of semi-divine powers.[22] As the by now classic studies of Maccarone have demonstrated,[23] the title of *vicarius*, although sporadically attested even in previous centuries, had an unprecedented diffusion in the documentation produced by Innocent. By qualifying himself as the vicar of God rather than of a man, denying that he was a substitute for Peter or other apostles and reconnecting his office directly to Jesus Christ, Innocent laid the foundations for the exercise of exceptional powers by the pope, who from this moment on became authorised to intervene in areas traditionally precluded from the sphere of competence of his predecessors. One of these was that of marriage, a bond notoriously unbreakable by humans and on which Innocent instead claimed unprecedented competence precisely because of his role as the representative of God on earth. The reference to this example was far from accidental in the *Quanto personam* decretal, which emphasised the assimilation between the spiritual marriage of the bishop with his diocese and the carnal marriage between a man and a woman. The unauthorised abandonment of the diocese by a bishop was thus equated to the wrongful dissolution of a marriage by a spouse, a sphere reserved only to God and over which, by analogy, the pontiff now claimed absolute and exclusive competence. Also in this case, the equation of the relationship between bishop and diocese to marriage had already made its appearance in previous centuries, but had never been claimed with such emphasis and systematicity.

III. The sources of the gloss of Tancred on the decretal *Quanto personam*

Thanks to the studies of Kenneth Pennington, we have a clearer view today of the glosses preceding the one composed by Tancred around 1220 for commenting the words *Dei vicem*, used by Innocent in the decretal *Quanto personam*.[24] Kantorowicz focused his analysis on the gloss of Tancred and followed its development in later canon law, through the works of Bernard of Parma, author of the *Glossa ordinaria* to the *Liber Extra* of Gregory IX (c. 1245), of Hostiensis, in his *Summa aurea* of 1250-1253, of Gullielmus Durante, in the *Spe-culum iuris* of 1271-1276, up to the transfer of the innovative words used by these canonists to the secular field, made by the French jurist Guido Papa in the 15th century, who applied the concept

[21] K. Pennington, "Innocent III and the Divine Authority of the Pope", in *Popes, Canonists, and Texts 1150-1550*, Aldershot, Variorum, 1993, III, p. 1-32, 3-4.

[22] In addition to the text of the decretal *Quanto personam*, see the letter addressed in the same year (1198) by Innocent III to Bernardo Balbi, reproduced in K. Pennington, *Pope and Bishops*, *op. cit.*, p. 77-78.

[23] M. Maccarrone, *Vicarius Christi, Storia del titolo papale*, Roma, Pontificia Università Lateranense, 1952.

[24] K. Pennington, "Innocent III and the Divine Authority of the Pope", art. cit.

of *plenitudo potestatis* to the emperor, and by translation to sovereigns.[25] The projection forward of the investigations by Kantorowicz responded to his need of demonstrating the basic thesis he presents in his article *The Sovereignty of the Artist*, that is the great contribution of early medieval legal science to Renaissance artistic creativity. In other words, Kantorowicz was much more interested in the future of the gloss of Tancred than in its past. However, for the central issue of this article, that is understanding how much there is of theological and how much of 'classical' in the innovative theories of the late medieval jurists, the past history of the gloss of Tancred is of great importance, because it allows us to connect the new approaches of 13th century canon law lawyers with the important debates on fiction of the second half of the 12th, which developed first in the canon and then in the civil law field.

We know today that the gloss of Tancred analysed by Kantorowicz, and which had previously attracted the attention of Walter Ullmann, Gaines Post, Michele Maccarrone and Brian Tierney,[26] re-elaborates material produced by earlier canon law lawyers, supplemented with some examples. Among the most innovative subjects introduced by Tancred in his description of the semi-divine powers of the pope, there are three in particular: I) the principle that the pope is able to create something out of nothing; II) the idea that the pope can turn a just thing into an unjust thing by correcting and changing the law; III) the idea that the pope has plenitude of power in ecclesiastical affairs and can dispense from the observance of the law.

As Pennington has shown, the original core of this gloss can be traced back to Laurentius Hispanus, who is the source for the second of the themes quoted, while the first and the third can be traced back to the apparatus to *Compilatio III* drafted by Johannes Teutonicus between 1213 and 1218, later replaced, in the early 1220s, by the *Glossa ordinaria* to the same *Compilatio* by Tancred, which is precisely the text quoted by Kantorowicz.[27] Tancred thus merged the glosses of Laurentius and that of Johannes Teutonicus, both showing an intense relationship with the canon law debate on fiction, certainly known to these two famous ecclesiastical lawyers.

Let us start with the personality of Laurentius and try to understand how he came to theorise such original propositions.

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[25] E. H. **Kantorowicz,** "The Sovereignty of the Artist", art. cit., p. 270-279.

[26] W. Ullmann, *Medieval Papalism: The Political Theories of the Medieval Canonists*, London, Methuen and Company, 1949, p. 52; G. Post, "Review of the book of Ullmann" in *Speculum*, vol. 26, 1951, p. 230-231; M. Maccarrone, *Vicarius Christi: Storia del titolo papale*, p. 120; B. Tierney, *Foundations of the Conciliar Theory, The Contribution of the Medieval Canonists from Gratian to the Great Schism*, New York, Cambridge University Press, 1955, p. 88.

[27] See the information provided by Kenneth Pennington in the introduction to the volume he edited, *Johannis Teutonici Apparatus glossarum in Compilationem tertiam*, Monumenta iuris canonici. Series A, Corpus glossatorum, vol. 3, Città del Vaticano, Biblioteca Apostolica Vaticana, 1981, p. XI-XIII.

IV. The gloss of Laurentius Hispanus on the decretal *Quanto personam*

Laurentius Hispanus is one of the leading exponents of the new generation of canon law lawyers that trained in Bologna in the first decade of the 13th century – a generation that, from an ideological and cultural point of view, marks a watershed in canonistic doctrines both for the reception of hierocratic themes and the intensity of recourse to Roman law, which often served precisely to legitimise such themes. Laurentius was one of the main interpreters of these tendencies, studying Roman law in the classrooms of the great civil law lawyer Azo in the first decade of the 13th century and subsequently teaching canon law himself in Bologna between 1205 and 1214, before finally returning to Spain. His most important works, which became a point of reference for later canonists, date back to these years: the apparatus to the *Decretum Gratiani* known as the *Glossa palatina* and that to the *III Compilatio*, containing only the decretals of Innocent III.[28]

Repeatedly reported for its innovativeness, the gloss by Laurentius Hispanus on the decretal *Quanto personam* of Innocent III perfectly matches the emphatic tones used by the pope in 1198 to define his powers when addressing the German bishoprics. However, the words of Laurentius do not merely reproduce the declarations of Innocent, but characterise papal power in very original terms. They insist in particular on the capacity of the pope to intervene on canons, changing their wording according to his own will, emphasising with particular force the transformative power held by the pontiff to turn certain things into others.[29] The pope, thanks to divine inspiration, can change "the nature of things by applying the essences of one thing to another" and turn one thing into its opposite ("he can make iniquity from justice by correcting any canon or law").[30]

Why did Laurentius insist so much on the transformative power of things to connote papal involvement in a transfer of a bishop? And why, among the allegations, did he choose a constitution of Justinian in which, modifying what was prescribed by Roman inheritance law, the emperor conferred the same essence to *legatum* and *fideicommissum*, even though they were two different acts? Were there precedents for such an innovative approach? The answer is affirmative, and to fully understand the words of Laurentius it is very useful to relate them to an important

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[28] A. García y García, Laurentius Hispanus: *Datos biográficos y estudio crítico de sus obras*, Madrid, 1956 ; A. M. Stickler, "Il decretista Laurentius Hispanus", in *Studia Gratiana*, vol. 9, 1966, p. 461-549; K. Pennington, "Innocent III and the Divine Authority of the Pope", art. cit., p. 1-32; K. Pennington, "The Decretalists 1190-1234", in K. Pennington, W. Hartmann (ed.), *The History of Medieval Canon Law in the Classical Period, 1140-1234: from Gratian to the Decretals of Pope Gregory IX*, Washington, The Catholic University of America Press, 2008, p. 211-245 and 227-230; R. Weigand, "The Development of the Glossa ordinaria to Gratian's Decretum", in K. Pennington, W. Hartmann (ed.), *The History of Medieval Canon Law*, *op. cit.*, p. 55-97, 80-86.

[29] Erreur ! Document principal seulement.L. Hispanus, 3 Comp. 1.5.3 v. Puri hominis: "*Vnde et dicitur habere celeste arbitrium, C. de summa trin. l.i. in fine* (Codex 1.1.1.1), *et o quanta est potestas principis quia etiam naturas rerum immutat substantialia huius rei applicando alii, arg. C. commun. de leg. l. ii.* (Codex 6.43.2) *et de iustitia potest facere iniquitatem corrigendo canonem aliquem uel legem, immo in his que uult, est pro ratione uoluntas, arg. instit. de iure naturali Set quod principi* (Instit. 1.2.6), *non est in hoc mundo qui dicat ei, cur hoc facis, de pen. di. iii. Ex persona* (de pen. D.3 c.21) […]": the gloss is edited by K. Pennington, "Innocent III and the Divine Authority of the Pope", art. cit., p. 8, where the author highlights the unprecedented importance given to the will of the pontiff by Laurentius Hispanus.

[30] *Ibid.*

gloss on the *Decretum Gratiani* (D.50 c.18, v. *Ferrum*) that he himself composed shortly before, and that is preserved in the so-called *Glossa palatina*. In this text, Laurentius analysed the theme of the fictions of canons, to understand which it is necessary to make a brief reference to a mysterious gloss affixed to the same canon of the *Decretum* a few decades before Laurentius.

V. The fictions of the canons (*fictiones canonum*) in the gloss of W

About forty years before Laurentius Hispanus, around 1173/74, an anonymous canonist of probable Anglo-Norman origin, of whom we only know the initial of his name, W, introduced the theme of the fiction of canons in an articulate gloss to the canon *Ferrum* (D.50 c.18) of the *Decretum Gratiani*. The canon contained a passage from the *Moralia in Iob* in which Gregory the Great (d. 604) had instituted a comparison between the iron that completely changed its appearance once extracted from the earth, and the one who, in order to embrace the Church, detached himself from earthly affairs: in this one, Gregory asserted, one should no longer look for the person he was, because he had already begun to be what he had not been in the past. The comparison with iron, dirty and opaque in the earth, but shiny and sharp once extracted, led some canonists to exalt the penitential component in this canon as a watershed between what a man had been and what he became once he repented of his sins, before entering ecclesiastical orders or resuming an office from which he had been removed. The metamorphosis undergone by the person, profound to the point of rendering useless the effort to trace in him or her the old nature, constitutes the aspect that certainly inspired in W the idea of a fiction: the aporia whereby one person was another, even though in fact he or she was still the same. The interest in this canon led W to search in the *Decretum* other canons that contained some form of fiction, and his gloss provides an extensive list of examples in which, in the many cases where there was no correspondence between intention and action, the canons pretended that events that had taken place had never taken place, or, vice versa, that actions that had never taken place had been committed (*cause propter quas canones fingunt non esse quod est vel esse quod non est*).[31]

In the examples provided by W, the transfers of bishops play an absolute central role. Providing nine typologies of cases – or *cause* – for which the canons pretended the opposite of what had occurred in reality, W devoted no less than three to episcopal transfers, depositions and nominations. Limiting to transfers, the category of fictions – or *causa* – named by W as 'perseverance' (*animi constantia*) refers to violations of prohibitions that were to be considered non-existent if they were independent from the will of the person who committed them. The only examples given for this category of fiction were precisely the transfers of bishops, which, if not motivated by personal preference but by necessity or public utility, were to be considered by the canons as never having taken place, thus absolving the bishop of any responsibility (*non mutat sedem qui non mutat mentem*).[32] The

[31] The gloss of W was edited by R. Weigand, *Die Glossen zum Dekret Gratians. Studien zu den frühen Glossen und Glossenkompositionen*, II (Teil III und IV), *Studia Gratiana*, 26, 1991, p. 636, and is at the heart of my research on canon law fictions: S. Menzinger, *Finzioni del diritto medievale*, Macerata, Quodlibet, Ius. Ricerche, 2023, p. 113-141.

[32] *Ibid*, p. 134-135.

other two typologies of fictions relating to bishops had to do with those who unworthily held the episcopal office and could therefore be considered by the canons as not being bishops (*non omnes episcopi sunt episcopi*), and with who was replacing a still living bishop in his diocese, who should not be considered as 'second in charge', but as non-existent (*post unum… non secundus ille, sed nullus est*).[33] Gratian had already stated, incidentally, that he who installed himself in the place of a bishop who had been legitimately transferred elsewhere, was to be considered as succeeding a person who was 'somehow dead', even if the bishop transferred was actually alive (*non uiuenti, sed defuncto quodammodo episcopo*).[34]

All these cases aimed to reconcile practices that were widespread in the 12th century (transferring, deposing, replacing bishops) with canon law prescriptions that, especially if ancient, insisted instead on the exclusive link between bishop and diocese and were strongly against the mobility of bishops between different sees. Council decisions of the 4th and 5th centuries prohibited such transfers, while later provisions increasingly granted archbishops or provincial councils the possibility of authorising episcopal transfers.[35] Therefore, insisting on fiction, around 1173-1174, theorising that the canons could pretend that episcopal transfers or elections of unworthy prelates had not taken place, made it possible to reconcile more antiquated provisions with divergent practices that had been intensifying precisely since the early 1170s to which the composition of the gloss in question dates back. It also allowed conflicting canons to remain unchanged, since it maintained a prohibition, but classified as offence only the cases of personal ambition.

In accordance with the low involvement of popes in episcopal transfers and the sporadic occurrence of actual papal interventions still throughout the 12th century, the vast majority of canons cited in the gloss of W to justify prohibited actions or behaviour on the part of bishops, pretending that they had not occurred, do not mention the role of the pope. Only one canon, *Mutationes* (C.7 q.1 c.34), referred in the final lines to the mandatory authorisation of the Holy See for transfers or installations of bishops due to necessity or for reasons of public utility. The canon in question comes from the Pseudo-Isidorian Decretals, but it was forged in the 11th century, when the anonymous author of the so-called *74 Titles Collection* first interpolated probably the original text in two places, inserting the relevant specification that transfers were only possible "with the authority of the holy Roman see".[36] The canon, reporting the famous examples of the moves of Peter to Rome, Eusebius to Alexandria, and Felix to Ephesus, aimed at justifying episcopal transfers not motivated by personal ambition, and contained the emphatic statement that those who did not abandon their sees out of ambition or of their own free will,

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[33] *Ibid*, p. 141-144.

[34] C.7 q.1 d.p.c.41: "*Ecce in quibus casibus episcopo uiuente alius potest ei substitui, quamquam secundum rei ueritatem non uiuente episcopo talis probetur succedere. Translatus enim ab una ciuitate ad aliam desinit esse episcopus illius ciuitatis a qua transfertur, atque ideo qui huic succedit non uiuenti, sed defuncto quodammodo episcopo probatur substitui*". On the passage, belonging to the first version of the *Decretum* (A. Winroth, *The Making of Gratian's Decretum,* Cambridge, Cambridge University Press, 2000, p. 210), see S. Menzinger, *Finzioni del diritto medievale*, *op. cit.*, p. 143-144; the position expressed by Gratian in this *dictum* will be explicitly criticised by Huguccio of Pisa (K. Pennington, *Pope and Bishops*, *op. cit.*, p. 88).

[35] K. Pennington, *Pope and Bishops*, *op. cit.*, p. 75-76.

[36] *Ibid*, p. 86.

were not in fact moving from one city to another, nor from a minor see to a major one (*Non enim transit de ciuitate ad ciuitatem, nec transfertur de minori ad maiorem, qui hoc non ambitu, nec propria uoluntate facit*). For this reason, from the W gloss onwards, this canon was stably considered to contain a fiction, in the sense that it pretended that the transfer had not occurred because it was independent from the will of the bishop involved.[37]

The list of the nine categories of fictions of the canons compiled by W was very successful for four/five decades (between c. 1173 and c. 1220), and was accepted and commented on by the main canon law experts active in Italy and in the Anglo-Norman milieu, from Johannes de Faventia to Huguccio de Pisa, from Simon Bisinianensis to the author of the *Summa lipsiensis*, up to Ricardus Anglicus, Laurentius Hispanus, Johannes Teutonicus and others. All accepted the original idea of W that the canon *Mutationes* contained a fiction because it prescribed to consider as not having taken place a transfer that had actually occurred. Simon of Bisignano, around 1177, added however a very interesting annotation, stating that "the transfer of bishops was among those *cause* <of fiction> that are of exclusive competence of the pontiff, as is also the deposition of bishops".[38] Qualifying the transfer of bishops as 'fiction' – precisely because of that gap between will and result by which the canons could for W nullify an event, emptying it of meaning since it was involuntary –, and transferring this power from the canons to the pope, as Simon began to do by reserving it exclusively to the pontiff, prepared the ground for 13th century canon law thought to qualify *plenitudo potestatis* as the power to change the nature of what exists. If the bishop was *as if* he had never moved, the Pope, as *vice-Deus*, became the one who could change the qualification of behaviour and actions. Nearly a century after the gloss of W, the ability of canon law fictions to cancel what exists, or bring into existence what does not exist has become one of the essential components of the fullness of papal powers, which in one of the best-known articles of the famous Hostiensis's list (d. 1271) was qualified as the power of the pope to cancel what exists and to make exist what does not exist (*ens non esse facit, non ens fore*).[39]

But it is important to follow the stages of this process gradually.

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[37] See S. Menzinger, *Finzioni del diritto medievale*, *op. cit.*, p. 134-136, 152, 186, 188, 210-212, 224, 246, 255.

[38] *Summa in Decretum Simonis Bisinianensis,* ed. by Pier Virginio Aimone Braida, Monumenta Iuris Canonici, Corpus Glossatorum 8, Città del Vaticano: Biblioteca Apostolica Vaticana, 2014, p. 179: "Mutationes *usque* non enim transit de ciuitate, *idest non incidit in canonem ambitiose transeuntium* […]. *Et nota quod propter bona adiuncta fictione canonis dicitur aliquid non esse uel fieri quod tamen est uel fit ut hic et supra d. l. Ferrum de terra* (D.50 c.18) *et C. xxxii. q. i. Si quis* (C.32 q.1 c.4), *Apud omnipotentem* (C.32 q.1 c.10) […]. *Usque* sine sacrosancte Romane ecclesie auctoritate: *hoc ideo dicitur quia episcoporum mutatio inter eas causas connumeratur que soli summo pontifice sunt concesse, ut est episcoporum depositio, ut supra C. iii. q. vi. Quamuis* (C.3 q.6 c.7*) et questio fidei ut infra C. xxiiii. q.i. Quociens* (C.24 q.1 c.12)".

[39] H. de Segusio, Cardinalis Hostiensis, *Summa aurea*, I, § *de officio legati*, coll. 320, 326: "*Ens non esse facit*, idest de aliquo facit nihil, mutando etiam naturam rei (…) *Non ens fore*, idest de nihilo aliquid facit".

VI. The reworking of the gloss of W in the *Distinctiones Decretorum* of Ricardus Anglicus

Around the middle of the 1190s, the gloss of W was reworked by the great English canonist Ricardus Anglicus, who carried out an operation of great interest: he framed in the ten predicaments of Aristotle the many examples of fiction that had multiplied in the works of canonists since the gloss of W.[40] Ricardus Anglicus studied in Paris in the 1180s, where he probably became part of the lively circle of Anglo-Norman canonists characterised by intense relations with theology, but also with philosophy and in particular Aristotelian logic. In 1191, he moved to Bologna, where he soon became a leading figure in canon law teaching. Abandoning the genre of *summae* – that had reached its apex with the *Summa decretorum* of Huguccio de Pisa (1188/90), a text with which it was difficult to compete in terms of quality and scope –, Ricardus composed a work called *Distinctiones decretorum* that was in fact extraordinarily successful due to its summarising and schematic intentions, which served essentially didactic purposes.[41] Among the hundreds of diagrams from which the work is composed, one is dedicated to the fictions of the canons classified for the first time in the Aristotelian categories as fictions of substance, quantity, quality, relation, place, time, situation, condition, action, and passion.[42]

The new classification of Ricardus is faithfully quoted by Laurentius Hispanus in his gloss to the canon *Ferrum* of the *Decretum*, indisputable proof that Laurentius was well acquainted with the subject of canon law fictions when he composed the *Glossa palatina*, that is before he glossed the decretal of Innocent in *Compilatio III*.[43] It does not therefore seem coincidental that around 1214, Laurentius Hispanus – one of the first commentators on the decretal *Quanto personam* in which Innocent III declared that the transfers of bishops were licit, but exclusive prerogative of the pope – evoked precisely with regard to episcopal transfers the transformative power of the pope, capable of reversing the meaning of a canon or a law. To exemplify the new transformative pontifical powers, Laurentius resorted to the allegation of a Justinian constitution (*Codex* 6.43.2) in which the emperor declared that two acts that differed in Roman inheritance law were of the same essence, thus reinforcing the impression that he was drawing from the instrumentarium of fiction. This constitution had previously been identified in the civil law field by Pillius

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[40] S. Menzinger, *Finzioni del diritto medievale*, *op. cit.*, p. 229-247.

[41] S. Kuttner, "Ricardus Anglicus (Richard de Mores ou de Morins)", in *Dictionnaire de Droit Canonique*, R. Naz (ed.), vol. 7, Paris, Letouzey et Ané, 1965, coll. 676–681; S. Kuttner, E. Rathbone, "Anglo-Norman Canonists of the Twelfth Century: An Introductory Study", *Traditio*, 7, 1949-1951, p. 279-358; G. Silano, *The "Distinctiones decretorum" of Ricardus Anglicus: an edition*, Ph.D. Dissertation, University of Toronto, 1981; R. Figueira, "Ricardus de Mores and his Casus decretalium: the birth of a canonistic genre", in S. Chodorow (ed.), *Proceedings of the 8th International Congress of Medieval Canon Law (San Diego 1988)*, Città del Vaticano: Biblioteca Apostolica Vaticana, 1992, p. 169-187; R. Figueira, *Morins, Richard de*, in B. Harrison (ed.), *Oxford Dictionary of National Biography*, Oxford, 2004, vol. 39, p. 180-182; R. Weigand, "The Transmontane Decretists", in K. Pennington, W. Hartmann (ed.), *The History of Medieval Canon Law*, *op. cit.*, p. 174-210, 199-201.

[42] R. Anglicus, *Distinctiones decretorum*, ms Vaticano BAV Vat. lat. 2691, 3r.

[43] L. Hispanus, *Glossa palatina* ad D.50 c.18, ms Vaticano BAV Pal. Lat. 658, 13ra, on which see *infra*.

de Medicina as an example of *fictio iuris*, in his famous work called *Libellus disputatorius*, probably composed in Modena around 1181. As one of the first civilists to compile a long list of legal fictions contained in the *Corpus iuris civilis*, Pillius created a category of fictions to enclose cases where "what was actually not said was pretended to have been said, because it was equivalent", that is, cases in which acts or situations named differently were brought together because considered equivalent from a substantial point of view.[44]

VII. Comparisons between canon and civil law fictions in the classrooms of Azo in Bologna: the gloss to the canon *Ferrum* of Laurentius Hispanus

Although it is not demonstrable that Laurentius Hispanus was acquainted with the work of Pillius, it is nonetheless certain that he was familiar with the lists of *fictiones iuris* that had begun to circulate rather intensively in the field of civil law in the early 13th century. In all probability, it was attending the lectures of Azo in Bologna that Laurentius came into contact with this material, considering that during the same years Azo published his *Summa Codicis* which opened with a long list of fictions of Roman law. What is surprising is that the copious list of fictions of law exhibited around 1210 by Azo was framed by him in the ten Aristotelian categories of being, exactly the same form in which the fictions of the canons had begun to circulate fifteen years earlier in the work of Ricardus Anglicus.[45] It is highly probable, therefore, that Azo (or perhaps Johannes Bassianus, of whom Azo was a pupil) came to frame the fictions in the *Corpus iuris civilis* in such an original form by repeating the structure of the canon law diagram devised by Ricardus Anglicus, but replacing the canon law examples of *fictiones canonum* with allegations of fictions taken from the *Corpus iuris civilis*. Attending the classrooms of Azo, due to the undisputed value that canon law studies attributed to knowledge of Roman law on the threshold of the 13th century, Laurentius apparently came into contact with the civil law translation of the *fictiones canonum* scheme previously elaborated by Ricardus Anglicus. It was in this context that Laurentius presumably ventured into that comparative exercise that had already been practised by canonists for a few decades to establish comparisons between canons and *leges*, comparing situations

[44] J. Meyer-Nelthropp, *Libellus Pylei disputatorius, Liber primus*, Dissertation der Rechtswissenschaftlichen Fakultät der Universität Hamburg, Hamburg 1958, p. 452: "*Fingitur dictum quod non est propter equipollens*".

[45] *Summa Azonis locuples iuris civilis Thesaurus,* Venetiis, sub signo Angeli Raphaelis, 1581, on which see E. M. Meijers, "Études d'histoire du droit", in R. Feenstra et H. Fischer, III, *Le droit romain au Moyen Âge*, Leyde, Universitaire Pers Leiden, 1959, p. 233-234, 237-239 and 245-257; E. H. Kantorowicz, *Studies in the Glossators of the Roman Law: Newly Discovered Writings of the 12th Century*, with the collaboration of W. W. Buckland, Cambridge, Cambridge University Press, 1938, reprinted with additions of Peter Weimar, Aalen, Scientia Verlag, 1969, p. 36-38, 44; L. Loschiavo, *Summa Codicis Berolinensis. Studio ed edizione di una composizione 'a mosaico'*, Klostermann, Frankfurt am Main, 1996, p. 57-61, 211-217; S. Menzinger, *Finzioni del diritto medievale*, *op. cit.*, p. 287-308.

in which for the canons a thing was different from what it actually was, to situations in which by law, according to Roman texts, a thing was qualified as different from what it was.[46]

Thus, to the principle enunciated by the *Moralia in Iob* of Gregory the Great, according to which whoever embraced the Church, or who repented, was so profoundly transformed that it rendered vain any search in him or her of the person he or she had been before (D.50 c.18), Laurentius freely juxtaposed a passage from the *Corpus iuris civilis* according to which a sick slave who had been cured in such a way as to return to the physical condition prior to an illness was to be considered as if he had never been ill (*Dig.* 21.1.16)[47]; to the well-known statement of Augustine (C.23 q.5 c.41) that one who kills fortuitously or in virtue of the office he holds – such as the judge who sentences to death, or the soldier who kills an enemy – should not be considered a murderer, Laurentius compared the explanation by Ulpianus and Celsus of why February was always supposed to have 28 days in the Roman calendar, because two days were to be considered as one in the leap year (*Dig.* 4.4.3.3). Among other examples of fiction from the *Corpus iuris*, mentioned by Laurentius in connection with the canon *Ferrum*, stand out the comparison between the repentant and the manumitted servant, to be considered as a "new man" (*Dig.* 34.4.27.1), or some passages of the *Digest* in which Laurentius actually mixes examples of 'absolute presumptions' and fictions, in accordance with the contamination between these two categories that occurred, it seems, for the first time in the work of Pillius de Medicina, who saw the *presumptio absoluta* as a form of fiction because it was capable of resisting contrary evidence in court.[48] Thus

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[46] Reference is here to the unpublished gloss of Laurentius to D.50 c.18, *Ferrum*, the canon that had by then become the *sedes materiae* for canon law fictions (L. Hispanus, *Glossa palatina* ad D.50 c.18, ms Vaticano BAV Pal. Lat. 658, 13ra): "Ferrum: i. vii. Q i. §§ *Cum autem, Ferrum* (C.7 q.1 c.48, §3); propugnator: *Verba ista sunt Iob. In Iob enim ita habetur 'habet argentum venarum suarum principia et auro locus est in quo conflatur; ferrum de terra tollitur <et> lapis calore solutus in es vertitur, et illa particula ferrum etc.' Exponit hic Gregorius et comparatur prelatus ferro quia fortis debet esse prelatus insurgendo a vitiis et in resistendo eisdem.* Ferrum *ar. C. de indicta viduitate l. ii. aut. ibi posito in fine* (*Codex*, Auth. Post 6.40.2), *ff. de edit. edic. Quod ita* (*Dig.* 21.1.16), *ar. contra lxi. di. In sacerdotibus* (D.61 c.2), *sed illud de rigore, vel de promovendis vel de solempn. penitente;* quod fuit*: idest qualis et hoc non est aliqua fictio canonis; et scienter fingitur verum esse quod est falsum, et est simile xxiii. q. v. Si homicidium* (C.23 q.5 c.41) *et inst de act. § Rursus* (*Inst.* 4.6.5), *et in tali casu non admittitur probatio in contrarium etiam evidens, ff. de mino. Denique § Minorem* (*Dig.* 4.4.3.3), *et potest dici quod hec sit presumptio iuris et de iure. In veritate enim propter canonis fictionem rei veritas non confunditur nec deletur, ut C. de iur. do. In rebus* (*Codex* 5.12.30), *et fingitur similiter in rebus, et fingitur similiter sicut servum manumissum, nam dicit eum novum hominem, ff. de adim. (!) leg. Servus* (*Dig.* 34.4.27.1), *et est simile et ff. de in inte. rest. Divus* (Dig. 4.1.7), *et C. de rei uxo. circa princ.* (C. 5.13.1.1a), *ff. de heredis inst. l. 1 § ult.* (*Dig.* 28.5.1.7), *ff. de his que in frau. c. l. Omnes § Lucius* (*Dig.* 42.8.17.1) […]." This long reasoned list of *fictiones canonum* and *fictiones iuris civilis* is followed in the gloss by Laurentius by the reproduction of the diagram of Ricardus Anglicus, i.e. the list of the fictions of the canons divided into the ten Aristotelian predications of being.

[47] In this part of the gloss, Laurentius reasons by opposing contraries, contrasting the principle that a person could be completely renewed, with what was instead prescribed by the canon *In sacerdotibus* (D.61 c.2), according to which great care had to be taken in the choice of priests, because it was necessary that those who were appointed to the task of correcting others were irreproachable, giving long proof of fairness and honesty with their lives.

[48] For the differences between absolute presumption and fiction see R. Motzenbäcker, *Die Rechtsvermutung im kanonischen Recht*, München, Zink, 1958; A. Fiori, "Praesumptio violenta o iuris et de iure? Qualche annotazione sul contributo canonistico alla teoria delle presunzioni",

Laurentius refers to a case where presumption operated positively, according to which if a person was deprived of property due to an unfavourable judgement against him because he was absent, and he appeared in court shortly afterwards, it was to be presumed that his absence was not voluntary, but due to the scarcely audible voice of the crier (***Dig.* 4.1.7)**; or to another case in which it was to be implied that the words "I ordain" (*ordino*) – that a certain person was an heir – had been said, even if the word *ordino* had never been pronounced (***Dig.* 28.5.1.7)**; or to that where the presumption operated negatively, in which it was necessary to assume that the debtor who had alienated all his assets in favour of his freedmen and his natural children had intended to defraud his creditors, because he became in this way insolvent (***Dig.* 42.8.17.1)**.

These disparate cases, and others, could be grouped together for Laurentius because they all presupposed the existence of things that did not exist or vice versa the non-existence of things that did exist. As the final words of the long gloss of Laurentius to the canon *Ferrum* reveal, he has a precise aim in mind: to connect the ability to pretend of canons (or *leges*) no longer to an abstract power of ecclesiastical or civil legislation, but to the pontiff. It is not through the magical power of the canons that a repentant person becomes, like the freed slave, a new person, because – Laurentius states – he can still be accused of sins or crimes committed previously. Rather, it is the pontifical dispensation that possesses this power, that is to transform a person into what he or she was not, rendering him or her permanently not imputable.[49]

In the gloss to the canon *Ferrum*, Laurentius makes something very similar to what he will do in his commentary on the *Quanto personam* of Innocent III, shortly afterwards. Just as in the first text he sanctioned that the non imputability of violations of the rules depended on the extraordinary power of the pontiff to suspend the application of the ecclesiastical rules with the dispensation – and no longer on the power of the canons to pretend that such breaches did not exist because they were unintentional or justifiable by the context, as much of canon law doctrine had been repeating precisely on the subject of the transfers of bishops from c. 1170 until c. 1210 –, so in the second he ratified (as the decretal itself) the exclusive competence of the pontiff over episcopal transfers, which had previously been widely practised without necessarily, nor too frequently, presupposing papal involvement.

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in O. Condorelli, F. Roumy, M. Schmoeckel (ed.), *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, Bd 1: *Zivil und Zivilprozessrecht*, Köln-Weimar-Wien, Böhlau Verlag, 2009, p. 75-106; S. Menzinger, *Finzioni del diritto medievale*, *op. cit.*, p. 261-279.

[49] L. Hispanus, *Glossa palatina* ad D.50 c.18, ms Vaticano BAV Pal. Lat. 658, 13ra: "*Et quod dici incipit esse quod non fuit dic non quoad omnia, quia licet pentiverit ad hunc tamen posset de facto accusari, ar. xxxiii. q. ii. Admone.* (C.33 q.2 c.8), *lxxxi. Romanus Si quis clericus* (D.81 cc.11 et 10), *sed post dispensationem incipit esse quod non fuit, nam tunc iam non potest accusari, ar. ii. q. iii. § ult.* (C.2 q.5 c.8)".

VIII. Creating from nothing: the fascination of Justinian absolutism in early 13th century canon law

It is worth noting that in the long gloss affixed by Laurentius Hispanus to the canon *Ferrum*, he quotes an allegation that would have been of fundamental importance in the thinking of later canonists since, due to its simplicity and clarity, it would constantly be taken as an example of the creative, besides transformative, power of the pope: the constitution of Justinian in which the emperor ordered that, even if a dowry stipulation had not been made, it was to be considered implicitly present, and a fortiori a void stipulation was to be considered valid.[50] It was through this allegation that Johannes Teutonicus came to theorise the capacity of the pope to create something out of nothing, providing Tancred with the words that most struck Kantorowicz: *de nichilo facit aliquid*.[51] The ability of the Emperor to make an absent document exist seemed to Johannes an appropriate parallel, in the *Corpus Iuris*, to exemplify the divine ability to create from nothing, as only Christ and now the pontiff were authorised to do. Since it is certain that Johannes Teutonicus was familiar with the gloss of Laurentius Hispanus to the canon *Ferrum* of the *Decretum* – on which, incidentally, he modelled his own in the *Glossa ordinaria* to the *Decretum* –, it is likely that in commenting on the words *Dei vicem* of the Decretal *Quanto personam* in the *III Compilatio* he made use of the long list of Roman law fictions recalled by Laurentius in the gloss to the canon *Ferrum*, among which was the one on dowry stipulation of Justinian mentioned above. The role of Laurentius was thus decisive not only for having theorised the papal transformative power in his gloss to the *III Compilatio*, but also for having indirectly suggested the creative power of the pontiff through the long list of *fictiones iuris* taken from the *Corpus iuris* and affixed by him to the canon *Ferrum* of the *Decretum Gratiani*.

The Justinian constitution on dowries had already attracted the interest of two great Italian civilists a few decades earlier Laurentius: Placentinus had pointed to that very constitution as an admirable example of interpretation by the emperor, while Pillius de Medicina had seen in it a clear example of fiction of "something that is present even if it is missing" (*inesse quod abest*). The corpus of allegations of *fictiones iuris* cited by Laurentius, and later by many other canonists, rested by then on well-established lists of fictions put together in the last decades of the 12th century by civil law experts. So, if all the *fictiones canonum* referred to by Laurentius come from the lists compiled by W and then Ricardus Anglicus between 1173-1174

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[50] *Codex* 5.13.1.1a (Justinian): "[…] For it is agreeable to Us, since We hold that even where a stipulation has not been made it shall be regarded as implied, and all the more so that even where one is void that it shall be rendered valid". Translation from: *The Codex of Justinian. A new annotated translation with parallel Latin and Greek Text, based on a translation by Justice Fred H. Blume*, Cambridge, Cambridge University Press, 2016, vol. 2, p. 1189.

[51] J. Teutonici, *Apparatus glossarum in Compilationem tertiam*, *op. cit.*, p. 43: "*In hoc gerit uicem dei, quia de nichilo facit aliquid, ut iii. q. vi. Hec quippe* (C.3 q.6 c.Io), *C. de rei uxor. act. l. una, in principio* (*Codex* 5.13.1.1a). *Item in hoc quod habet plenitudinem potestatis in rebus ecclesiasticis, ut ii. q. vi. Decreto* (C.2 q.6 c.11). *Item in hoc quod supra ius dispensat, ut infra de conces. preb. non uac. c. i. ut ibi dixi* (3 Comp. 3.8.1)." **As Kantorowicz himself pointed out (*The Sovereignty of the Artist, op. cit.*, p. 274), the association of the Justinian constitution with the words *de nihilo facit aliquid* had already been produced by Johannes Teutonicus in the gloss to another canon of the *Decretum* that referred to Christ and his creative and transformative power, a power that was now, by analogy, transferred to his *vicarius*.**

and 1198, several of his *fictiones iuris* had appeared in the lists of fictions compiled by Pillius de Medicina in the *Libellus disputatorius*, or in the examples of *fictiones iuris* classified by Azo in the ten predicaments of being at the beginning of his *Summa Codicis*.[52]

It is true, however, that within this material the canonists were particularly attracted by the constitutions of the Emperor Justinian, very present among the lists of civilists and not by chance. The absolutist aspirations of this emperor often led him to deal arbitrarily with the law, adopting decisions that could in some cases force the existing legal framework in order to conform to his will.[53] His provisions were often qualified as fictions by medieval jurists because they assumed that what existed did not exist, that what didn't exist existed (*Codex* 5.13.1.1a), or, as in the case of the constitution cited by Laurentius in his glossa to *Quanto personam* (*Codex* 6.43.2), that different things were actually equivalent (a *legatum* and a *fideicommissum*).

It is natural that, in seeking to associate the transformative and creative powers of fiction with the pontiff as characteristic traits of the *plenitudo potestatis*, canonists were particularly attracted by the constitutions of Justinian, in which the examples of fiction were linked to a strong political personality who had claimed semi-absolutist powers in the late antique era. It does not seem coincidental that in a gloss by Johannes de Faventia (around 1175)[54] which has been signalled by historiography as one of the earliest premonitions of *plenitudo potestatis*, the power of dispensation was reserved to the pontiff relying on a well-known principle of Justinian according to which laws could only be interpreted by those who had established them.[55] By transferring this principle to the sphere of canons, Johannes de Faventia arrived at reserving to the pontiff the same powers that in Justinian's constitution were declared to be the exclusive competence of the emperor. Translating the original 'to interpret' into 'to dispense', the power of dispensation became the exclusive competence of the pontiff, except in rare cases where the canons provided otherwise.

Johannes compared the constitution of Justinian with a canon (C.2 q.6 c.11 of the *Decretum Gratiani*) which would later be used permanently by Johannes Teutonicus, Tancred and other 13th century canonists to support the third major pontifical claim we have seen appearing in the gloss of Tancred to the *Quanto personam*,

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[52] Thus, for example, in addition to the already mentioned *Codex* allegations 5.13.1.1a on dowries and 6.43.2 on *legati* and *fideicommissi*, also *Inst.* 4.6.5, § *Rursus* and *Dig.* 34.4.27.1.

[53] On this issue, see F. Gallo, "Fondamenti romanistici del diritto europeo: a proposito del ruolo della scienza giuridica", in L. Labruna (dir.), *Tradizione romanistica e Costituzione*, ed. by Maria Pia Baccari, Cosimo Cascione, II, Napoli, Edizioni scientifiche italiane, 2006, p. 1949 ff.

[54] Johannes de Faventia, Ms München BSB Clm 28175, 42r: "*Regulare est, ut licuit, is solus leges interpretari valet qui potest eas condere, ut C. de legibus et con.* (*Codex* 1.14.12.3), *ita solus Apostolicus et condere et dispensare canones valet, cum solus habet potestatis plenitudinem, ut infra ii. q. vii.* (!) *Decreto* (C.2 q.6 c.11), *q. vi. Se scit* (C.2 q.6 c.12) […]". For the contextualisation of these statements in late twelfth-century canon law doctrine, see E. Cortese, *La Norma Giuridica. Spunti teorici nel diritto comune classico*, Introduction by E. Conte, A. Fiori, L. Loschiavo, M. Montorzi, Rome (1964), Senate of the Republic, 2020, p. 214, n. 109.

[55] See *Codex* 1.14.12.3 (Justinian): "We therefore establish that every interpretation of the law by the Emperor […] shall be considered valid and unquestionable. For, if at present it is permitted to the Emperor alone to make laws, it is also worthy of the imperial power alone to interpret laws". Translation from: *The Codex of Justinian. A new annotated translation*, *op. cit.*, vol. I, p. 265.

analysed by Kantorowicz: namely, the power to dispense *supra et contra ius*. The assimilation of the imperial interpretative power to the transformative, creative and dispensative powers now associated with the pontiff most likely contributed to encourage an important Bolognese glossator such as Azo, to declare the terms 'interpretation' and 'fiction' synonymous.[56] This equivalence is made by Azo at the beginning of his *Summa Codicis*, before listing more than fifty examples of *fictiones iuris* taken from the *Corpus iuris*, classified in the ten predicaments of being imitating the work that in the canon law field Ricardus Anglicus had done with the *fictiones canonum* before 1198.[57]

The example of fictions shows how misleading it would be to contrast, at this time, legal traditions that were certainly distinct, but between which there were profound exchanges of different forms of framing the law. A rigidly genealogical perspective does not work for the reconstruction of medieval legal thought. There were no pure cultural roots nor a single line of development. The authors belonged to environments and environments mixed by comparison and conflict the techniques of one and the other law. The study of historical contacts between prominent personalities from different cultural and geographical backgrounds is therefore extremely important, as is the appreciation of the School of Bologna as an extraordinary crossroads of international scientific and educational experience. The proximity between Canon and Civil Law, particularly intense in Italian and French-Southern law schools, led medieval jurists to extend to Roman law questions and schemes elaborated in the theological and canon law field and vice versa. It was precisely in Bologna, the temple of civil science where the Justinian texts were restored and made accessible again to medieval Latin culture, that tacit and unexpected contaminations occurred between texts and genres of knowledge that were still profoundly distant to our eyes.

For this reason, despite the great cultural influence exerted by the rediscovery of Roman legal culture which undoubtedly overturned the way medieval jurists classified reality in their thinking, it would be misleading to see the allegations of the *Corpus iuris* as a concentrate of classical culture that in all their purity would have transmitted the most original values of antiquity to fearful medieval minds. Words were interpreted differently; legal proceedings were bent to purposes very distant from those for which they were originally created; historical decontextualisation made it possible to distort and adapt to the Christian and hierocratic Middle Ages of the 13th century ideological messages previously directed to radically different ends.

The use of the constitutions of Justinian, the visionary Byzantine emperor of the 6th century who lived more than three centuries after the legal culture we use to call 'classical' and for whom his own subjective will was often considered superior to the objectivity of the *leges*, can thus only partly be taken as proof of the influence of Roman fiction on medieval legal thought. At the same time, the ancient Roman

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[56] *Summa Azonis locuples iuris civilis Thesaurus,* Venetiis, sub signo Angeli Raphaelis, 1581, coll. 2-5: *"Omnes autem istas fictiones, sive interpretationes, in omnibus predictis et aliis ut generaliter comprehendam circa decem praedicamenta reperio, ut ex dictis et dicendis liquido poterit apparere*".

[57] The idea that 'to interpret' meant 'to pretend', for Azo, has been held by Yan Thomas as the effect on the medieval jurist of the irreverence for the nature of Roman legal culture and of the disruptive power of fiction within it: Y. Thomas, *Les opérations du droit*, *op. cit.*, p. 161-162, on which I returned in S. Menzinger, *Finzioni del diritto medievale*, *op. cit.*, p. 287-298.

fictio iuris was improperly mixed by medieval civilists with presumption – which dominated in 12th century civil and ecclesiastical procedure manuals –, and was at the same time contaminated by canon law fiction, which had its roots in the Pauline writings and Augustinian Platonism revised and corrected by Abelard in France, whose exaltation of intention led medieval canonists to devalue reality and submit it to the true, invisible meaning of events. It is only by reconstructing the interaction between these intricate cultural traditions on a case-by-case basis that we are able to understand the formation of the great medieval culture.

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