

## From Gratian's *Decretum* to its Gloss

Bartolus was the last of the main civil lawyers to defend the position of the Gloss on the *lex Barbarius*. After him, much changed. The change was mainly due to the progressive influence of canon law on civil lawyers. To make sense of this influence, and in particular of its application on our subject, we should now turn our attention to the canon law side of things, focusing in particular on the development of the concept of toleration in a jurisdictional context.

By and large, toleration means forbearance. Applied to jurisdiction, however, the concept of toleration came to acquire an increasingly technical meaning: the validity of the jurisdictional acts despite the wanting legal position of the person who issued them. In turn, this concept of toleration as 'jurisdictional forbearance' underwent another crucial change with pope Innocent IV, who interpreted it in terms of legal representation. The wanting position of the person issuing the jurisdictional deeds could be tolerated because he is not the source of those deeds. Their source is the office exercised by that person. Thus, focusing on the relationship between representative and office meant looking at the physical person in a different way: no longer as an individual, but as the legal representative of the office. From this perspective, the defects in the person become less important – especially if not visible or otherwise not known.

Innocent IV's notion of toleration plays a crucial part in our story. But Innocent did not invent this concept, he transformed it. Hence this chapter will provide a summary of the previous development of toleration during the twelfth and early thirteenth centuries, from the *Decretum* of Gratian to its Ordinary Gloss. In this period many ecclesiological concepts progressively crystallised into legal ones. Toleration was one of them: from a Christian forbearance of sinners it became justification for the validity of jurisdictional deeds. This increasingly jurisdictional meaning, in its turn, is itself the product of a much broader (and far more complex) change taking place in the same period: the progressive separation of jurisdictional and sacramental spheres. The subject is extremely complex, and we will limit our analysis to what is strictly functional to our subject. This means that some fundamental canon law concepts, which would require several chapters in their own right, will be mentioned only briefly.

In the *Dictionarium iuris* of Albericus de Rosate there are two entries at the entry 'occultum'. The second is about the impossibility of proving something. The first deals with toleration: 'Occultum est quod ab ecclesia toleratur'. This

statement may be read in more than one sense. Albericus himself accompanies these words with two references. One concerns the admissibility of testimonial evidence given by heretics in inquisitorial proceedings, and therefore deals with the problem of ascertaining occult crimes. The other deals with the sacraments administered by a fornicating priest, and it provides a different solution depending on whether the sin is occult or notorious.<sup>1</sup> It is on this second sense of the term that we must focus our analysis: the problem of the validity of the acts done by someone who could not perform them validly if his sinful condition were publicly known. It may be noted that Albericus' reference points to sacramental issues (the sacraments celebrated by the sinner), whereas we are more interested in the jurisdictional ones. As we will see, the concept of toleration stretched both to sacramental and jurisdictional acts. The distinction made between the jurisdictional and the sacramental spheres was not immediate; it took a considerable time to fully develop. This also meant that the emersion of a specifically jurisdictional notion of toleration was itself a slow and complex process.

The concept of toleration is nowadays typically studied in relation to religious tolerance, although in medieval canon law sources it is attested more often in association with occult crimes.<sup>2</sup> While the two subjects (at least in the early stages of their development) are deeply interrelated,<sup>3</sup> in the analysis of a large part of contemporary scholarship – especially that of scholars of the history of ideas – the latter tends to be downplayed, if not ignored altogether.<sup>4</sup> This subject has thus mainly remained the precinct of canon law scholars. Among them, the accent has tended to be more on the distinction between prosecutable and non-prosecutable crimes, and on that – often overlapping – between internal and

1 *Alberici de Rosate ... Dictionarium Iuris tam Civilis, quam Canonici ...*, Venetiis, apud Guerreos fratres, et socios, 1572, s.u. 'Occultum': 'Occultum est quod ab ecclesia toleratur, extra de coha(itatione) cleri(corum) c. Nostra lib.vi. [sed 'Vestra', X.3.2.7] per Archi(diaconum), et de haereticis, c. in fidei fauorem [VI.5.2.5, on the admissibility of testimonial evidence brought by heretics in inquisitorial proceedings]. Cf. Morin (2014), p. 107. The concept of notoriety has been widely studied, but it is mentioned here only for very specific (and narrow) purposes. A more general discussion would risk shifting the focus of these pages. On the subject see e.g. Brundage (1987), pp. 319–320, and more recently Vitiello (2016), pp. 89–113, where ample literature is listed. On the progressive distinction between reputation (*fama*) and notoriety (*notorietas*) in the decretists and early decretalists see the classical study of Migliorino (1985), pp. 49–57, Migliorino (2011), pp. 15–20, and Vitiello (2016), pp. 89–96, where further literature is mentioned.

2 Marzoa Rodríguez (1985), pp. 134–135.

3 Cf. M. Condorelli (1960), pp. 21–22.

4 For a recent critique of this approach see Morin (2014), pp. 105–106.

external forum.<sup>5</sup> With a few exceptions,<sup>6</sup> the specific and different problem of the jurisdictional powers of the heretic – and in particular of the occult heretic – has received considerably less attention.

## 6.1 Sacramental and jurisdictional powers

To begin this short excursus, it is necessary to touch briefly on a fundamental distinction, that between sacramental and jurisdictional powers. In Gratian's times the problem of theologians and canonists alike (provided that this distinction can really be made so early) was not to distinguish between validity and liceity, but rather to describe the powers of the clergy.<sup>7</sup> The point is important because, by and large, it was only from the second half of the twelfth century that canon lawyers started to elaborate specific legal principles on the jurisdictional powers of the clergy as opposed to their sacramental ones.<sup>8</sup> In the *Decretum*, on the contrary, it is difficult to find more than a few hints at what would become the distinction between the sacramental sphere (*ordo*) and the jurisdictional one (*iurisdictionio*).<sup>9</sup> Such a distinction would acquire practical

5 To mention only a few works written in different periods and from different standpoints, see Kuttner (1936), pp. 236–242; Kelly (1992), pp. 414–419, with further literature; Chiffolleau (2006) pp. 367–381 and 412–458.

6 Mainly, the works of Zirkel (1975) and of Lenherr (1987), which will be both often be quoted in this part of the work, especially that of Lenherr. Although the focus is more on simony and not on heresy, mention should also be made of Heitmeyer (1964), esp. pp. 124–166, and of Weitzel (1967), esp. pp. 134–148.

7 Villemin (2003), p. 60.

8 The concept itself of *iurisdictionio* took some time to be neatly defined. This also accounts for the remarkable terminological variety used among the decretists: see e.g. the list in Van de Kerckhove (1937), pp. 421–425. The term *iurisdictionio* appears with increasing frequency from the early decretists, as the author himself notes.

9 See esp. Villemin (2003), pp. 70–72, and Gaudemet (1985–1986), pp. 84–90. On the use of the term *iurisdictionio* in Gratian see Nasilowski (1969), pp. 165–175; Ryan (1972), pp. 316–317, text and esp. note 877, and p. 340; Landau (1995), esp. the brief but sharp observations at pp. 87–88. Most recently see also Wei (2016), p. 238. More literature in O. Condorelli (1997), p. 9, note 6. During the twentieth century, canon lawyers devoted much effort to confuting the last work written (and published posthumously) by the German canon lawyer Rudolph Sohm (1918), pp. 536–674. At the time it was published, Sohm's study was nothing less than a frontal attack on the *credo* of any self-respecting canon lawyer. Canon law, he argued, remained exclusively focused on sacramental law until the twelfth century; until then the Church governed itself on the basis of the same ecclesiological principles that informed the early Church in the first centuries. What attracted most criticism was that Sohm considered Gratian as the last of the old theologians, not the first of the new lawyers. In Sohm's view,

relevance (prompting in turn more accurate discussions) only from the end of the twelfth century, after some important jurisdictional tasks – especially the power to excommunicate – were entrusted to papal legates who were not always priests.<sup>10</sup>

The distinction between validity and grace in sacraments celebrated by priests who were outside the Church was already present in Gratian's main source on the subject, the *Liber de misericordia et iustitia* of Alger of Liège (c.1060–1131). In Alger, the validity of a sacrament is a matter wholly different from its grace: an unworthy priest within the Church always confers a valid sacrament, whereas no sacrament conferred by a priest who lies outside the Church may be valid. At the same time, however, for Alger the sacrament produces its effects on the recipient (i. e. it bestows grace) only if he is worthy of it.<sup>11</sup> Gratian probably found Alger's stance on the subject too broad<sup>12</sup> and opted for a somewhat different approach, based on the separation of the sacrament (whose conferment is irrevocable) from its effects (which on the contrary might well cease to operate).<sup>13</sup> By emphasising this separation Gratian laid the basis for the distinction between *potestas* (the power to confer) and *executio* (the validity of the conferment). It is important to acknowledge the sacramental context within which this distinction took place – we will see how its application on a strictly legal level proved remarkably complex.

the *Decretum* was the final act of the 'old' sacramental Church, and not the beginning of the 'new' legally minded one. An obvious corollary of Sohm's thesis was that the *Decretum* knew nothing of the distinction between *ordo* and *potestas*. While perhaps Sohm's view was somewhat extreme, it is true that many canon lawyers studied the *Decretum* on the basis of categories that do not really belong to it, and this has sometimes resulted in an exceedingly legalistic interpretation. Many difficulties that one encounters in seeking to distinguish jurisdictional from sacramental powers in the *Decretum* may well derive, at least in part, from our legally minded viewpoint more than from Gratian's ambiguity. There is little point in providing references on the long-lasting debate on (and mostly, against) Sohm's views. As to the critics (i. e. almost anyone) see for all Landau (1995), pp. 70–79; as to the few scholars who somehow followed (or at least did not fully reject) Sohm's approach see Chodorow (1972) (in effect, the first to agree with him after more than half a century), pp. 7–10.

10 See esp. Fransen (1970), pp. 212–213.

11 Kretzschmar (1985), pp. 141–155. Cf. Merzbacher (1980), pp. 245–255; Maccarini (1991), pp. 23–25.

12 With specific reference to Gratian's use of Liège in his discussion of the ordinations by simoniacs (C.1, q.1) see Zirkel (1975), pp. 10–20, and Wei (2016), pp. 235–238.

13 Gilchrist (1993), pp. 220–221.

While sufficiently articulated, the distinction between *potestas* and *executio* is hardly consistent in the *Decretum*.<sup>14</sup> Gratian stated clearly that *ligare* and *solvere* occur through the intervention of the Holy Spirit, Who does not operate outside the Church.<sup>15</sup> But the problem was ultimately to reconcile theological language with legal rules. From a legal perspective, it was no easy task stating with precision when one lay outside the Church, and even less easy to ascertain as much. It was clear enough with excommunication brought about judicially or applied *ipso iure* on those who openly sided with an already condemned heresy. But in other situations the issue was more complex. On the one hand, a line of thought could well be declared heretical only after being pursued for some time; on the other, and moreover, it was quite possible for an heretic to pretend to be orthodox and keep his heresy to himself.<sup>16</sup> This last case, that of the occult heretic, will be of great importance to our subject.

By distinguishing between *potestas* and *executio* Gratian managed to avoid clashes with some Church Fathers, notably with Augustine's *De Baptismo*. When allowing the validity of baptism performed by schismatics, Gratian reasoned, surely Augustine had in mind just the *potestas* but not also its *executio*.<sup>17</sup> While

- 14 In the words of the classic study of Saltet, 'une masse ... inextricable', Saltet (1907), p. 292. As recently observed by Wei, sometimes Gratian seems to think of *potestas* as precondition for the actual validity of the sacrament, while other times he refers to *potestas* only as to the liceity of the sacrament, thereby seemingly implying its valid conferment also when the power to do so is vitiated. Wei (2016), pp. 238–239. On the subject see further the fundamental study of Zirkel (1975), pp. 154–160.
- 15 See esp. Gratian's lengthy passage in C.24, q.1, p.c.4. Cf. Gilchrist (1993), pp. 226–227, Villemin (2003), p. 53, and esp. Winroth (2000), pp. 40–43.
- 16 On the subject, Gratian's ambiguities are very clearly described by Huizig (1955), pp. 285–286.
- 17 See esp. C.1, q.1, p.c.97: '... Sed ne Augustinum in hac sententia penitus reprobemus, intelligamus aliud esse potestatem distribuendi sacros ordines, aliud esse executionem illius potestatis. Qui intra unitatem catholicae ecclesiae constituti sacerdotalem uel episcopalem unctionem accipiunt, offitium et executionem sui offitii ex consecratione adipiscuntur. Recedentes uero ab integritate fidei, potestatem acceptam sacramento tenus retinent, effectum suae potestatis penitus priuantur ... De his ergo, qui accepta sacerdotali potestate ab unitate catholicae ecclesiae recedunt, loquitur Augustinus, non de illis, qui in scismate uel heresi positi sacerdotalem unctionem accipiunt ...' On the problems of this text see Saltet (1907), pp. 294–296. Cf. also C.24, q.1, p.c.37 ('... Sed aliud est potestas offitii, aliud executio. Plerumque offitii potestas uel accipitur, ueluti a monachis in sacerdotali unctione, uel accepta sine sui executione retinetur, ueluti a suspensis, quibus administratio interdicitur, potestas non auferitur ...'), and C.24, q.1, p.c.39 ('Sed istud Augustini intelligitur dictum non propter sententiam, cuius potestas nulla est extra ecclesiam, sed in detestatione criminum, que in hereticis, sicut in catholicis, eque sunt punienda. Potest tamen illud

Gratian managed to give a clear and direct answer on baptism, with other sacraments he opted for a more cautious approach. This caution, however, led him to take an unclear position that included mutually contradictory passages. The case *par excellence* was that of ordinations performed by schismatics and heretics, an issue bound to remain greatly controversial for a long time after the *Decretum*. Gratian's solution was to distinguish between sacraments of necessity and sacraments of dignity. Only the first (*sacramenta necessitatis*) could be validly conferred by heretics and schismatics, as they would remain true both 'as to their form' (*quantum ad formam*) and 'as to their effect' (*quantum ad effectum*).<sup>18</sup>

This distinction, which echoed Alger's division between *forma* and *gratia*,<sup>19</sup> was however not applied systematically. This left Gratian's text open to different interpretations. Gratian's ambiguity is particularly evident in the context of reordinations, especially with regard to ordinations to priesthood performed by simoniac bishops.<sup>20</sup> Some scholars have interpreted such ordinations in the

Augustini de potestate baptizandi intelligi, non ligandi, aut soluendi, uel cetera sacramenta ministrandi. Baptisma namque siue ab heretico, siue etiam laico ministratum fuerit, dummodo in unitate catholicae fidei accipiatur, non carebit effectu. Alia uero sacramenta, ut sacri corporis et sanguinis Domini, excommunicationis uel reconciliationis, si ab heretico uel catholico non sacerdote ministrentur, uel nullum, uel letalem habebunt effectum. Unde et ab hominibus fidelibus nullatenus sunt recipienda'.

18 C.1, q.1, p.c.39: 'Si ergo sacramenta in modum lucis ab immundis coinquinari non possunt, si in morem puri fluiui per lapideos canales ad fertiles areolas perueniunt, patet quod symoniaci sacramentum unctionis sibi quidem inutiliter et perniciose habent, aliis autem utiliter et salubriter eandem unctionem administrant. Sicut ergo sunt uera sacramenta hereticorum quantum ad formam, ita sunt uera et non inania quantum ad effectum. Sed notandum est, quod sacramentorum alia sunt dignitatis, alia necessitatis. Quia enim necessitas non habet legem, sed ipsa sibi facit legem, illa sacramenta, que saluti sunt necessaria, quia iterari non possunt, cum sint uera, auferri uel amitti non debent, sed cum penitentia rata esse permittuntur. Illa uero sacramenta, que sunt dignitatis, nisi digne fuerint administrata ita ut digni digne a dignis prouehantur, dignitates esse desinunt, non ut minuatur ueritas sacramenti, sed ut cesset officium ministrandi, uel loco, uel tempore, uel promotione.' For the ambiguity in the text see Ryan (1972), p. 331. Cf. also C.1, q.1, p.c.42.

19 See esp. C.1, q.1, p.c.97. There, Gratian replaces Alger's *gratia* with *effectum*. While Alger said that the sacraments of the simoniacs are 'vera quidem quantum ad formam sed tamen inania quantum ad spiritualem gratiam', Gratian states that they are 'uera et rata esse quantum ad se, falsa uero et inania quantum ad effectum'. Zirkel (1975), p. 14; see further *ibid.*, pp. 88–114.

20 See esp. C.1, q.1, c.43: 'Si qui episcopi talem consecrauerint sacerdotem, qualem esse non liceat, etiamsi aliquo modo dampnum proprii honoris euaserint, ordinationis tamen ius ulterius non habebunt, nec illi umquam sacramento intererunt, quod inmerito prestiterunt.' Cf. Gratian's *dictum post* c.43 (C.1, q.1, p.c.43): 'Ecce cum honoris periculum euadant, ut cetera sacramenta sacerdotum

*Decretum* as valid although unlawful.<sup>21</sup> Others (relying mainly on C.1, q.1, p.c. 97 and C.9, q.1, p.c.1) concluded that Gratian's distinction was between the schismatic bishop ordained within the church and the one ordained outside it. The former, having fallen in the schism only after his canonical ordination, may himself validly ordain new priests. Both positions are debated among scholars.<sup>22</sup> We are not interested in solving the issue, only in briefly mentioning it. Because it is mainly there that the decretists discussed the exercise of invalid jurisdiction and the limits of its toleration.

This last point is useful for introducing a rather obvious but – for our purposes – crucial concept: toleration does not refer to *ordo* but only to *iurisdictio*. This is because *ordo* may never be revoked: sacraments are indelible. Someone who has been validly consecrated never loses his consecration, and so retains *ordo*. But only those who lie within the Church may exercise their powers validly. So the heretic or schismatic retains *ordo* even after his full separation from the Church, but loses his *iurisdictio*. Although toleration is referred to the person, therefore, its object is only the validity or invalidity of his deeds. The distinction between *ordo* and *iurisdictio*, however, becomes more complex when looking at the validity not of jurisdictional acts, but of sacramental ones – just like the problem of schismatic ordinations mentioned above. We have seen how Gratian paved the way for the distinction between *potestas* and *executio*. This

liter administrare permittantur, ab hoc solo non modo pro heresi uel qualibet maiori culpa, sed etiam pro negligentia remouentur. In quibus omnibus sollicitè notandum est, quod sacramentum sacerdotalis promotionis pre ceteris omnibus magis accurate et digne dandum uel accipiendum est, quia nisi ita collatum fuerit, eo desinet esse ratum, quo non fuerit rite perfectum. Cetera enim sacramenta unicuique propter se dantur, et unicuique talia fiunt quali corde uel conscientia accipiuntur. Istud solum non propter se solum, sed propter alias datur, et ideo necesse est, ut uero corde mundaque conscientia, quantum ad se, sumatur, quantum ad alios uero non solum sine omni culpa, sed etiam sine omni infamia, propter fratrum scandalum, ad quorum utilitatem, non solum ut presint, sed etiam ut prosint, sacerdotium datur.’ See also C.24, q.1, p.c.37, *supra*, this paragraph, note 17. It might be that the ambiguity is mainly in the eyes of the lawyer. More than ambiguity, a theologian contemporary to Gratian might have thought of complexity, arising from the dialectic between theological and ecclesiological considerations: Chodorow (1972), p.199. See also C.1, q.1, p.c.107: ‘Sed hoc [*scil.*, the 1060 pronouncement of Nicholas II against simony] intelligendum est de his, qui ordinantur a symoniaciis, quos ignorabant esse symoniacos. Hos facit symoniacos non reatus criminis, sed ordinatio symoniaci.’ Cf. Gilchrist (1993), pp. 231–233.

21 Esp. Chodorow (1972), pp. 197–198. See however the harsh critique of Villemin (2003), pp. 40–41.

22 To mention only a few scholars writing in different periods see e.g. Saltet (1907), pp. 293–296; Ryan (1972), pp. 350–352; Villemin (2003), pp. 45–48, where further literature is mentioned.

separation would later lead to the clear distinction between sacramental and jurisdictional spheres (*ordo* and *iurisdictio*), but also to another within the sacramental sphere, that between the state of being consecrated and the power to consecrate others – *ordo* and *executio ordinis*. As *executio ordinis* consists in the exercise of a power, it was often discussed with relation to the toleration principle. As a result, despite the concept of toleration applying only to jurisdictional acts, it is far from infrequent to find it discussed also in relation with sacramental ones.<sup>23</sup>

## 6.2 Toleration in the *Decretum*

The concept of toleration is not particularly elaborated in the *Decretum*. Gratian typically used it in a broad and general sense, not in a legal one.<sup>24</sup> Special mention however deserves the first of the two *causae haereticorum*, causa 23, and especially its fourth *quaestio*, mainly devoted to the toleration of the evildoers. There, the concept of toleration is clearly explained in terms of public utility, and public utility is discussed within an ecclesiological and sacramental context.<sup>25</sup> The subject is extremely complex and it may not be discussed here. For the moment, it is sufficient to highlight the link between toleration and *utilitas*

23 This closeness between toleration and *executio ordinis* was however progressively downplayed with the increasing refinement of the distinction between *ordo* and *iurisdictio* – or perhaps, with the increasingly legalistic approach to ecclesiastical and sacramental issues and the resulting crystallisation of that distinction. This allows us to avoid embarking in complex discussions on the relationship between *executio ordinis* and *executio potestatis* and the precise boundaries between the exercise of *ordo* and the exercise of *iurisdictio*. The discussion will therefore only focus on *iurisdictio* and omit – insofar as viable – references to *ordo* and *executio ordinis*.

24 See e. g. D.38, c.12; D.41, c.4; D.100, c.8; C.1, q. 1, c.85; C.2, Q. 6, c.11. Cf. Fabritz (2010), pp. 102–105. A more specific meaning of toleration is to be found in D.19, c.3, where Gratian relies on it to emphasise the duty of obedience to the Holy See.

25 C.23, q.4, esp. c.1–6, c.10, c.37 and c.39. At the risk of stating the obvious, it should be noted that this was hardly a novelty introduced by Gratian. Toleration for the sake of the common good (mostly, for the *utilitas ecclesiae*) was a concept so widespread that it may be found in even the most uncompromising writers, such as the cardinal Humbert de Silva Candida (Humbert of Moyenmoutier, d.1061, better known for having triggered the Great Schism of 1054), who applied it for anything save simony. Humbert of Silva Candida, *Libri Tres Adversus Simoniacos* (Golden Robison (ed., 1972), III.32, ll.58–61, p. 375): ‘Quapropter in ministris modo quo dictum est promotes vel post promotionem in aliquod crimen lapsus acceptus honor perdurat, quamdiu eorum culpas Ecclesia aut ignorat aut dissimulat et propter utilitatem aliorum sub spe poenitudinis talium tolerat.’



*ecclesiae*, to which we will come back. The sacramental context is also important for a different reason: as we shall see, it is there that the most interesting discussions on the concept of toleration among the decretists are to be found.

When discussing toleration Gratian did not mention the case of Barbarius, but he did refer to that of the slave-arbiter. He did so in a *dictum*, the *dictum Tria* that would soon acquire a fundamental importance on the subject, because it merged two important Roman law passages that we have already encountered when examining the Gloss: Dig.5.1.12.2 and Cod.7.45.2. Gratian's *dictum Tria* is found after C.3, q.7, c.1. It reads:<sup>26</sup>

Three are the kinds of impediment that prevent one from being judge: nature, such as the deaf, the dumb and the incurably insane; law, for those expelled from the senate; customs, for women and slaves, not because they lack judgment but because it is established that they cannot discharge public offices. If however a slave was delegated to render a judgment during the time he was believed to be free, and was brought back to servitude after having pronounced the judgment, there is no doubt that his judgment retains the strength of *res iudicata*.

It is easy to see how the first part of the text is a readaptation of Dig.5.1.12.2, while the second part follows Cod.7.45.2 very closely. It is through this last text

26 C.3, q.7, p.c.1: 'Tria sunt, quibus aliqui inpediuntur ne iudices fiant: Natura, ut surdus, mutus et perpetuo furiosus, et impubes, quia iudicio carent. Lege, qui senatu motus est. Moribus, feminae et serui, non quia non habent iudicium, sed quia receptum est ut ciuilibus non fungantur officiiis. Verum, si seruus, dum putaretur liber, ex delegatione sententiam dixit, quamuis postea in seruitutem depulsus sit, sententia ab eo dicta rei iudicatae firmitatem tenet.' In his edition of the *Decretum*, Friedberg identified several possible sources which Gratian might have combined together in his *dictum Tria*: the *Decretum* of Ivo de Chartres (V.248 and VI.331), *Panormia* (IV.78), *Tripartita* (II.24.7), *Pauli Sententiae* (I.1A.11), and *Polycarpus* (V.1.24). Friedberg (1959), vol. 1, col. 524; the point is also noted in Zendri (2007), p. 240, note 40. If the sources of *Tria* were effectively only those listed in Friedberg, that would highlight the contribution of Gratian: those sources make up for just a small part of the text. As to the content of *Tria* see the observations of Creusen (1937), pp. 186–188. Cf. also Jacobi (1913), p. 245, and more recently (but only in passing) Brundage (2008), p. 143, note 58. The text is quoted in some *ordines iudicarii*, such as the Bambergensis (ch.17). On the point see recently Brasington (2016), pp. 253–254. *Tria* has been studied more with regard to the incapacity of the woman to serve as judge than to the incapacity of the slave. See esp. Minnucci (1989), vol. 1, pp. 114–120 (on Huguccio's position), and (1994), vol. 2, pp. 23 (on the *Summa Tractaturus Magister*), 32 (on Sicardus), 53 (on the *Summa De iure canonico tractaturus*), and 98–100 (on the *Summa Bambergensis*). With specific regard to the incapacity of the slave, *Tria* is analysed in Miaskiewicz (1940), pp. 46–49, although the author perhaps overstates its relevance for the elaborations of twelfth-century decretists on the *lex Barbarius*. Miaskiewicz even finds a direct connection between such elaborations and the decretal *Intelleximus* of Lucius III (X.5.32.1), *ibid.*, p. 47, note 4, although that might appear somewhat doubtful.

that Barbarius' case entered into canon law. As just said, in the *Decretum* there is no mention of Dig.1.14.3, but Gratian followed the same interpretation of Cod.7.45.2 as the Gloss: not a freedman made slave again after rendering a judgment, but a slave sitting in judgment while he was wrongly believed to be free.

In spite of their similarities, there was an important difference between Cod.7.45.2 and Dig.1.14.3: in the first case the slave is delegated to pronounce a single judgment; in the second he is vested with the office and so exercises ordinary jurisdiction. Nonetheless, from the second half of the twelfth century the growing knowledge of Roman law sources possessed by many canon lawyers allowed them to see the connection between Gratian's *dictum Tria* (C.3, q.7, p.c.1) and the *lex Barbarius*, and to mention the latter with increasing frequency.

Shortly after *Tria*, Gratian moved to the problem of the validity of the judgments rendered by the wicked judge. After a lengthy argument, Gratian argued for their validity: so long as the wicked judge is tolerated by the Church, his deeds are valid.<sup>27</sup> The two cases were not necessarily similar: the slave in Gratian's *Tria* was simply delegated to perform his task, whereas the wicked judges to whom Gratian referred (Ahab, Saul, David and Salomon) were all anointed kings of Israel who later fell into a sinful state. But it did not take long for the decretists to make a connection between the validity of the decision of the (legally incapable) slave and the validity of the judgments of wicked kings. The link is already present in the first *Summa* on the *Decretum*, that of Paucapalea.

Paucapalea's *Summa* (probably written in the late 1140s)<sup>28</sup> contains a few statements that would be of crucial importance to the development of the concept of toleration, but took a considerable time to be fully accepted. Paucapalea distinguishes between the wicked office holder whom the Church deposes and the one whom the Church tolerates. In both cases the accent is on the office, not on the person: if the Church takes away the office, the person who exercised it is no longer tolerated and may not serve as judge. If on the contrary the Church leaves him in office, although he is wicked he may still judge. The concept of toleration is therefore referred to the person not as an individual, but

27 See the last lines of C.3, q.7, p.c.7: 'Hinc liquido constat, quod mali pastores, dum sententia iusti examinis aliorum crimina feriunt, sibi ipsis nocent, dum sine exemplo suae emendationis aliorum uicia corrigere curant; subditis uero prorsus, si, eorum increpatione correcti uel sententia coerciti uitam suam in melius commutare didicerint. Ac per hoc, dum ab ecclesia tollerati fuerint, eorum iudicium subterfugere non licet.' Cf. Vodola (1986), pp. 116–117.

28 Weigand (1980) pp. 10–11, text and note 34, including further literature.

as the holder of an office. And the validity of the deeds derives directly from the ‘dignity of the office’ (*dignita[s] officii*), despite the *indignitas* of its holder.<sup>29</sup>

This explanation of the concept of toleration would have a crucial importance for our subject, but it would be questionable to credit it specifically to Paucapalea, who was probably thinking in ecclesiological terms, not in strictly legal ones (i. e. of legal representation). Moreover, only few decretists seem to have followed him on the point.<sup>30</sup> This might also be due to Paucapalea’s ambiguity on the subject, as he did not explain when the wicked was to be deprived of his office, nor what was the scope of the concept of toleration itself. These were the two crucial questions that needed to be answered. Paucapalea’s association of the concept of toleration with occult heresy would prove more successful: although not all secret heretics are tolerated by the Church, says Paucapalea, the fact that their heresy is secret leaves the Church with the choice of tolerating them.<sup>31</sup> This concept, however, was only briefly sketched in Paucapalea. To better appreciate the development of concept of toleration in canon law, we must review the most important decretists preceding Teutonicus’ Ordinary Gloss to the *Decretum*.

- 29 Paucapalea’s *Summa*, ad C.3, q.7, p.c.1, § *Inf(amis) pers(ona) n(ec) procurator pot(est) esse* (Schulte [ed., 1890], p. 66): ‘... Sed hoc de illis intelligendum est, qui ab ecclesia officio sunt privati et infamia notati. Alii vero, qui ab ecclesia licet criminosi tolerantur, pro sui tamen dignitate officii et agere in causa possunt et iudicare.’ On the concept of *dignitas* see *infra*, esp. pt. III, §11.1.
- 30 In particular, Johannes Faventinus, ad C.3, q.7, p.c.2, § *Item in euangelio* (Madrid, BN 421, fol. 101vb): ‘Indignum est de merito uite tamen quamdiu tolerat eum ecclesia quamdiu non est dampnatus ex officio suo potest maiorem et minorem travem deducere et loquitur de dampnatis.’ See the *Summa Parisiensis*, ad C.3, q.7 pr, § *quod iudex* (McLaughlin [ed., 1952], p. 121): ‘Septima quaestio sequitur, quia quaeritur an iudex possit esse qui simili culpa vel majori tenetur. Dicimus ergo quoniam de merito vitae non potest, sed dum ab ecclesia toleratur, propter dignitatem quod iudicaverit erit ratum. Et sumpta hac occasione ostendit Gratianus plures lege quae impediunt ne aliquis sit iudex. Verum, quia in supposito decreto sit mentio de procuratore – procurator vero dicitur advocatus – ostendit quae impediunt ne aliquis possit esse advocatus, ut per contrarium intelligamus quis esse possit.’ See also the *Summa de Iure Canonico Tractaturus* (Weigand, Landau and Kozur [eds., 2010], tom. 2, p. 84, ll.1–3), ad C.3, q.7 pr, § *Quod iudex*: ‘Hic queritur an criminosus possit iudicare. Et uerum est quod potest de officio non de uite merito, si adhuc toleratur. Precisus autem neutro modo potest.’ Cf. *ibid.*, ad C.3, q.7, c.4, § *Iudicet – quod – condempnet* (*ibid.*, p. 86, ll.1–2): ‘Is solus potest. Quod uerum est de uite merito, criminosus potest de officio dum toleratur.’
- 31 Paucapalea, ad C.24, q.1 (Schulte [ed., 1890], p. 104): ‘Multis auctoritatibus declaratum est in superiori causa, quod mali ad bonum cogendi sunt, et haeretici nihil nomine ecclesiae possidere debent. Sed quia haeticorum alii manifesti, alii occulti inveniuntur, quorum alii ab ecclesia damnantur, alii tolerantur, ut sunt occulti, nonnullis venit in dubium, utrum post mortem cognita haeresi aliqui

### 6.3 The decretists and the concept of toleration

The increasingly legally minded attitude of the decretists led to the progressive crystallisation of statements found in the *Decretum* into legal rules. During this process many of the ambiguities left (or introduced) by Gratian had to be solved. To appreciate the position of early decretists on the problem of toleration, it is important to keep in mind the initial lack of clear boundaries between the jurisdictional and sacramental spheres. This lack of boundaries – one might even say, this ecclesiological unity – had clear repercussions for the very idea of toleration, which was typically discussed first with regard to sacramental issues and then in relation to their jurisdictional consequences.

#### 6.3.1 From Rolandus to Huguccio

One of the earliest and important applications of the toleration principle in both sacramental and jurisdictional contexts may be found in the *Summa* of Rolandus (written in the late 1150s).<sup>32</sup> As with Gratian, sometimes Rolandus refers to the concept of toleration in rather a general, non-legal sense.<sup>33</sup> On occasion he mentions the toleration principle with regard to the good of the Church, both in case of necessity<sup>34</sup> and with regard to the risk of scandal.<sup>35</sup> But Rolandus also uses the same concept in a more technical sense. Commenting on the issue of the priest ordained by a simoniac, and following Gratian's distinction on the subject, Rolandus contrasts strictness of the law and its equitable dispensation.

excommunicari mereantur?' (emphasis added). The importance of this passage is also acknowledged in Maceratini (1994), p. 372, note 32.

32 Weigand (1980), pp. 19–22; Weigand (1990) pp. 137–138.

33 E. g. *Summa Rolandi*, ad C.23, q.4 pr (Thaner [ed., 1874], pp. 89–90): 'Quarto quaeritur, an vindicta sit inferenda. Quod autem vindicta inferenda non sit, probatur. Ait enim Augustinus: Tolerandi sunt mali etc. (C.23, q.4, c.1), idem: Tu bonus tolera etc. (C.23, q.4, c.2), idem: Quid ergo voluit Dominus noster etc. (C.23, q.4, c.3), Quod ergo, inquit etc. (C.23, q.4, c.4), idem: Recedite, exite inde etc. (C.23, q.4, c.4 and c.9), idem: Quam magnum etc. (C.23, q.4, c.10) idem: Forte in populo Dei etc. (C.23, q.4, c.11) caus(a) ead(em) qu(aestio) ead(em) cap. I, II, III, IV, IX, X et XI (C.23, q.4, c.1–4, 9–11). Idem ratione probatur. Si omnia hic punirentur, locum divina indicia non haberent iuxta illud Anacleti: Si omnia in hoc saeculo etc. caus. VI. qu. I. cap. VII (C.6, q.1, c.7).'

34 Id., ad C.25, q.1, c.7, § *Quod pro remedio ac necessitate* (*ibid.*, p. 105): '... Item generaliter institutum fore cognoscitur, ne quis episcopus praeter conscientiam metropolitani ordinetur, quod si secus actum fuerit in irritum devocetur. Talis vero ordinatio instante necessitate ab ecclesia toleratur iuxta illud Hilarii.'

35 Id., ad C.32, q.4 c.4, § *Tolerabilior* (*ibid.*, p. 171): 'quia minus malum est occulte peccare quam manifeste, quoniam minori scandalo ex privato quam manifesto laeditur ecclesia.'

As a matter of principle, the priest who was ordained in good faith by a simoniac (i. e. unaware of the simony of his ordainer) ought to be cast away from the Church (*de juris rigore eiiciantur*). Nonetheless, setting aside the *rigor iuris*, it is possible to tolerate this priest within the Church rather than requiring a second (and proper) ordination (*ex dispensatione tolerantur*).<sup>36</sup> Later on, Rolandus applies the same criterion to the ordinations done by the excommunicate: if the recipient of the sacrament was unaware of the excommunication of the bishop who consecrated him, his ordination may be tolerated out of mercy (*ex misericordia tolerari potest*).<sup>37</sup>

The toleration of ordinations made by heretics or simoniacs appears again in Rolandus' remarks on the jurisdictional powers of the heretic. There, Rolandus sums up what he already said. This time, the emphasis is more on compliance with the requirements for a valid ordination and less on the good faith of its recipient: if the ordination follows the Church's requirements (*forma ecclesiae*), the priest ordained may be tolerated within the Church. This time, and unlike the previous cases, Rolandus does not simply exclude the necessity of a second ordination. Instead, he makes clear that the priest who is tolerated within the Church retains valid jurisdictional powers:<sup>38</sup>

36 Id., *ad C.1*, q.6 pr (*ibid.*, p. 15). Cf. Weitzel (1967), p. 64.

37 *Summa Rolandi*, *ad C.9*, q.1 pr (Thaner [ed., 1874], p. 23): 'Hic primum quaeritur, an ordinatio facta ab excommunicatis rata haberi possit. Excommunicatorum quidam nominatim excommunicantur, quidam non. Item eorum, qui ordinantur ab excommunicatis, alii ex ignorantia, alii ex contumacia. Ordinatio ergo ab excommunicatis facta, si ab eo, qui eum excommunicatum ignorabat, fuerit suscepta, ex misericordia tolerari potest. Si vero contumaciter ab eo, quem scit excommunicatum, ordinem susceperit, huius ordinatio de iure tolerari non poterit.'

38 Id., *ad C.24*, q.1 pr (*ibid.*, p. 100): '... haeticorum alii sunt ordinati ab his, qui habent potestatem consecrandi ut episcopi, alii non. Item eorum, qui ordinantur ab habentibus potestatem alii ordinantur in forma ecclesiae, alii vero minime. Item ordinatorum ab habentibus potestatem in forma ecclesiae alii tolerantur ab ecclesia, alii reprobantur. Ordinati igitur ab his, qui potestatem ordinandi non habuerunt vel ab his, qui habebant, sed in forma ecclesiae minime ordinabant, alios ligare vel solvere non valent. Reliqui vero dum ab ecclesia tolerantur, possunt; reprobati vero non possunt.' The reference to *forma* is to be read within the opposition *forma/vita*. Rolandus' *summa* on C.24, q.1 continues as follows (*ibid.*, pp. 100–101): 'Vel dicamus haeticos non catholicos ab haeticis, si tamen culpabiles fuerint, esse ligndos iuxta illud Augustini: Quisquis etc., Subdiaconus etc. caus(a) ead(em) qu(aestio) ead(em), cap. XXXVIII et XXXIX (C.24, q.1, c.38–39). Sed obiicitur, quod quemadmodum sacramenta ab haeticis in forma ecclesiae ministrata effectu carere non possunt, sic ligatio et solutio ab eis celebrata non minus quam catholicorum suum sortientur effectum. Ad quod dicimus, aliam sacramentorum et aliam ligationis esse rationem. In sacramentis siquidem non uita sed forma, non iurisdictio sed ordo requiritur.'

among the heretics some are ordained by those who have the power to consecrate, such as bishops, others are not. Among those who are ordained by those with the power [to consecrate], some are ordained in accordance with the church's requirements (*forma ecclesiae*), others are not. As to the ordained by those who have that power and according to the church's requirements, some are tolerated by the church, others are condemned. They who are ordained by those who lacked the power to ordain or by those who did have such power but did not [exercise it] in accordance with the church's requirements, therefore, cannot bind or loose others. The others can, so long as are tolerated by the church, but they cannot if [the Church] rejects them.

This passage would have remarkable success: it may be found for instance in the nearly contemporary *Summa Sicut uetus testamentum*,<sup>39</sup> in the *Summa Cum in tres partes*,<sup>40</sup> in the *Summa Coloniensis*,<sup>41</sup> in the *Distinctiones Monacenses*,<sup>42</sup> in the

- In ligatione uero uel solutione etiam uita spectatur.' Cf. Lenherr (1987), pp. 195–196.
- 39 *Summa Sicut uetus testamentum*, ad C.24, q.1 (Firenze, Conv. Sopp. G.IV.1736, fol. 35v, transcription in Lenherr [1987], p. 268, ll.61–67): '... hereticorum alii sunt ordinati ab his qui habent potestatem consecrandi, alii uero non. Item eorum qui ordinantur ab habentibus potestatem alii ordinantur in forma ecclesie, alii non. Item ordinatorum ab habentibus potestatem et in forma ecclesie alii (*sic*) tollerantur ab ecclesia, alii reprobantur. Ordinati ab his qui potestatem ordinandi non habuerunt uel ab eis qui potestatem habuerunt, set in forma ecclesie non ordinabant alios soluere uel ligare non possunt. Reliqui uero, dum ab ecclesia tollerantur, possunt, reprobati uero non possunt ...'
- 40 *Summa Cum in tres partes*, ad C.24, q.1 (BNE, Lat. 16540, fol. 67r–v, transcription in Lenherr [1987], p. 276, ll.37–41): '... Huius autem questionis ex hiis que in causa simoniacorum dicta sunt patet solutio: Ordinati enim ab his qui potestatem ordinandi non habuerunt uel ab his qui habebant, set in forma ecclesie minime ordinabant alios ligare uel soluere non ualent. Reliqui uero, dum ab ecclesia tolerantur, possunt, reprobati non possunt ...'
- 41 *Summa 'Elegantius in iure divino' seu Coloniensis* (Fransen and Kuttner [eds., 1978], tom. 2, pt. 4, ch. 64 p. 28, ll.1–4): 'Solutio vera auctoritatibus confirmata in qua hoc dicitur quod ordinati extra ecclesiam ab his qui intus potestatem acciperunt per misericordiam tolerantur, ordinati extra ab his qui extra per dispensationem reordinantur.' This *Summa* was likely composed in 1169/70: see Fransen and Kuttner (eds., 1969), tom. 1, xi. For a short introduction see Weigand (2008), pp. 183–184.
- 42 *Distinctiones Monacenses*, ad C.1, q.1, c.1 (Sorice [ed., 2002], *Distinctiones 'Si mulier eadem hora' seu Monacenses*, p. 79, ll.63–68): 'Hereticorum alii occulti, alii manifesti. Manifestorum alii sunt *infra* ecclesiam, alii seipsum abscondunt ab ecclesia, alii iudicio ecclesie eieci sunt. Item eorum qui iudicio ecclesie precisi sunt alii sunt simpliciter excommunicati, alii depositi uel degradati. Ordinati ab heretico occulto uel ab alio quem sustinet ecclesia ueros ordines suscipiunt et quicquid tales fecerint qui sunt in ecclesia ratum erit.' Unlike most other texts mentioned in the main text, and despite the broad statement ('quicquid tales fecerint ... ratum erit') the *Distinctiones Monacenses* referred the toleration only to the sacraments of necessity: *ibid.*, p. 81, ll.98–106.

*Summa Lipsiensis*,<sup>43</sup> in Stephanus Tornacensis<sup>44</sup> and, perhaps through him<sup>45</sup> also in Johannes Faventinus.<sup>46</sup> Moreover, Rolandus' words attest to how the toleration principle moves from *ordo* to *iurisdictionis*: the heretic may exercise valid jurisdictional powers because he was consecrated within the Church (and so validly received *ordo*) and because the Church has not rejected him yet. While the effects of toleration concentrate mainly on the jurisdictional sphere, its rationale is ultimately ecclesiological. The point is of great importance: the notion of toleration could fully emerge as a legal concept only after the full separation of ecclesiological and jurisdictional considerations.

Toleration of the consecration entails toleration of jurisdiction. Rolandus was very brief but clear on this crucial point. Yet already by Rolandus' time the argument seems to have been controversial: if the Church does not expel a manifest heretic, does this inertia amount to proper toleration? Should the solution be the same for the followers of an already condemned heresy as for

43 *Summa Lipsiensis*, ad C.24, q.1, c.1, § *Quod autem ab heretico* (Luxembourg 144, fol. 335v, transcription in Lenherr [1987], pp. 306–307, ll.1–7): ‘Notandum quod hereticorum alii sunt ordinati ab hiis qui potestatem ordinandi habent, ut episcopi, aliis non. Item eorum qui ordinantur in forma ecclesie ab habentibus potestatem alii tolerantur ab ecclesia, alii reprobantur. Ordinati ab hiis qui potestatem ordinandi non habuerint uel ab hiis qui habuerunt potestatem, set non in forma ecclesie, alios ligare uel soluere non ualent. Reliqui uero, dum ab ecclesia tolerantur, ualent ...’

44 Tornacensis, *Summa*, ad C.24, q.1 pr, § *Quod autem ab heretico* (Bruxelles 1410, fol. 118r, transcription in Lenherr [1987], p. 271, ll.1–9): ‘Notandum quod hereticorum alii sunt ordinati ab his qui potestatem habent consecrandi ut episcopi, alii non. Item eorum qui ordinantur ab habentibus potestatem alii ordinantur in forma ecclesie, alii uero minime. Item eorum qui ordinantur ab habentibus potestatem in forma ecclesie alii tolerantur ab ecclesia, alii reprobantur. Ordinati ab his qui potestatem ordinandi non habuerunt uel ab his qui habebant, set in forma ecclesie minime ordinabant alios ligare uel soluere non ualent. Reliqui uero, dum ab ecclesia tolerantur, possunt, reprobati uero non possunt.’

45 Kuttner (1937), p. 145. Maceratini (1994), pp. 449–450 would on the contrary suggest an influence of Rufinus on the point.

46 Johannes Faventinus, ad C.24, q.1, c.1, § *Quod autem ab heretico* (Madrid, BN 421, fol. 160rb): ‘Notandum quod hereticorum alii sunt ordinati ab his qui potestatem habent consecrandi ut episcopi, alii non. Item eorum qui ordinantur ab habentibus potestatem alii ordinantur in forma ecclesie, alii minime. Item eorum qui ordinantur ab ordinantur ab habentibus potestatem in forma ecclesie alii tolerantur ab ecclesia, alii reprobantur. Ordinati ab his qui potestatem non habuerunt ordinandi uel ab his qui habebant potestatem, set in forma ecclesie minime ordinabant alios ligare uel soluere non ualent. Reliqui, dum ab ecclesia tolerantur, possunt, reprobati uero non possunt ...’. Cf. Maceratini (1994), pp. 451–453, text and note 288. Faventinus' passage above is also transcribed, though from other manuscripts, in Lenherr (1987), p. 277, ll.1–9.

those adhering to a new one? These doubts may be found in the contemporary<sup>47</sup> *Summa* known as *Fragmentum Cantabrigense*, of the school of Rolandus.<sup>48</sup>

The continuity between sacramental and jurisdictional effects of toleration made it a thorny subject from the outset. Perhaps this is another reason why the subject attracted a growing interest among the decretists. Let us take the important *Summa* of Rufinus (1130–1192), written probably in the years 1157–1159.<sup>49</sup> Rufinus interprets Gratian's dictum *Tria* in a remarkably narrow sense. If the judge is *criminosus* and is suffered (*subportatur*) by the Church, there is a clash between the unworthiness of his person (*vitae merito*) and his holding of the office (*officii merito*). As a consequence (and much unlike Paucapalea), he may keep his office, but he cannot judge.<sup>50</sup> Given his stance on the *iudex criminosus*, it should not come as a surprise that Rufinus avoids even mentioning the possibility of tolerating the heretic, let alone the simoniac.<sup>51</sup> Nonetheless, his

47 Kuttner (1937), p. 129.

48 *Fragmentum Cantabrigense* (Cambridge 3321, fol. 4r–v, transcription in Lenherr (1987), p. 269, ll.6–12): 'Si uero heresis eius pateat et si aliquo casu toleretur ab ecclesia, absolueret et ligare potest secundum quosdam. Alii uero talem adhibent distinctionem, quod hereticorum alii secuntur iam predampnatam heresim, si manifesta est heresis eorum, etsi aliquo modo toleret eos ecclesia, non tamen curanda est eorum sententia.'

49 Singer (ed., 1963), lxvii, note 9; Kuttner (1937), p. 132. Cp. however Gouron (1986) pp. 68–69 (dating it around 1164).

50 Rufinus, *ad C.3*, q.7, § *Quod iudex esse non possit* (Singer [ed., 1963], p. 268: 'Sciendum quod in divina scriptura quattuor modis dicitur aliquid fieri posse: scilicet facultate nature, iuris permissione, vite merito, officii debito. Refert itaque de iudice reum iudicatur, utrum et ipse reus criminis teneatur aut innocens sit; item differentia est, utrum iudex de crimine quo tenetur sit ab ecclesia notatus vel adhuc supportatus. Si enim nullo crimine teneatur, omni modo possendi potest condemnare reum criminis, nisi forte ecclesia decepta insontem iudicem condemnasset: tunc enim ex iuris permissio et ex officii debito non valet iudicare, donec sit restitutus. Si vero crimine teneatur, tamen ab ecclesia subportatur, tunc quidem officii debito dumtaxat potest esse iudex, sed vite merito iurisque permissio iudicare non potest. Unde prohibetur tunc iudex esse aliorum, non quin subditi eius iudicium debeant expetere, sed quoniam ipse, cum sit malus, iudicando alios sibi inuenit obesse: in quo casu omnia huius questionis capitula preter primum intelligenda sunt. Si autem, quia criminosus erat, ab ecclesia notatus est, nulla nisi prima ei iudicandi possibilitas reservatur.'

51 The difference is not only due to Rufinus' divergences with Gratian on the subject (on which see Heitmeyer [1964], pp. 69–94, 101–104, 119–123, and esp. 124–150), but possibly also to his striving for accuracy. So for instance, while in the *Decretum* ordinations made by the excommunicated but received in good faith are to be accepted out of mercy ('sustinemus misericorditer', C.1, q.1, c.108), in Rufinus such ordinations 'habebuntur rate' (*ad C.1*, q.1, c.108, § *Si qui a symoniacis usque et tunc pro catholicis habebantur*, Singer [ed., 1963], p. 222).



*Summa* was sometimes interpreted in exactly the opposite sense, especially in the French milieu. In one of the two manuscripts of Rufinus' *Summa* preserved in the *Bibliothèque nationale de France*, the hand (that Singer identified with the author of the *Summa Monacensis*)<sup>52</sup> added the concept of toleration twice, once with regard to simoniacal ordinations<sup>53</sup> and the other on ordinations made by heretics.<sup>54</sup> Thus, despite his author, the toleration principle also found its way into Rufinus' *Summa*.

Similarly, while Gratian stated that those who went along with a heresy after their canonical ordination may still confer *ordo* because 'ab ecclesia misericorditer tollerantur' (C.9, q.1, p.c.3), Rufinus clarifies as much in the sense that 'ordinatio quidam facta ab eis nullo modo irrita esse poterit quantum ad sacramenti veritatem, sed erit vana quantum ad officii executionem' (*ad C.9, q.1 pr, ibid., p. 298*). Similarly, with regard to the consecrations performed by those who then revert to the Church, Gratian stated that 'seruatis propriis ordinibus misericorditer suscipi iubemus' (C.9, q.1, c.5), while Rufinus noted how 'in suis ordinibus recipiuntur' (*ad C.9, q.1 pr, ibid., p. 298*). The only time Rufinus uses the verb 'tolerare' in a positive sense is when he refers to the second marriage of a woman who believes her husband to be dead and marries again. In such a case the Church tolerates the marriage and bestows validity upon it, chiefly to recognise the offspring. *Id., ad C.27, a.q.1, § Quidam votum castitatis habens (ibid., p. 430)*: '... sciendum est quod matrimonii coniunctio dicitur legitima tribus modis: et quia contrahitur inter legitimas personas – vel que legitime ab ecclesia reputantur –, et quia habet fieri secundum legum instituta, et quia secundum morem uniuscuiusque provincie celebratur. Igitur secundum modum primum hie coniunctio legitima accipienda est, scilicet que contrahitur inter personas legitimas – vel quas ecclesia legitimas esse putat: *ideoque toleratur ipsis etiam, qui coniunguntur, se esse illegitimas personas ignorantibus ideoque sibi legitime coniungi putantibus*. Ut: si mulier, putans virum suum mortuum, nubat alii non habenti uxorem, tunc quidem legitimum erit matrimonium, propter quod et filii inde suscepti iudicabuntur legitimi' (emphasis added). In such a situation Rufinus might have felt that there was little alternative to using the verb 'toleratur'. For an in-depth analysis of the – complex and articulate – position of the heretic in Rufinus see the beautiful pages of Maceratini (1994), pp. 392–414, where ample literature is mentioned.

52 Singer (ed., 1963) p. 200, note 1.

53 Rufinus, *ad C1, q.1* (BNF Lat. 4378, transcription in Singer [ed., 1963], pp. 200–201, note 1): '... Relevantur quattuor modis: necessitate scilicet urgente; utilitate, scilicet si utilis est persona; abrenuntiatione, cum abrenuntiat; satisfactione. Sed in relevatione distinguendum est: quandoque [simonia est] in promovendo, quandoque in promotione, quandoque in promovente. Cum in promovente, nullo modo toleratur; cum in promotione – scil. data pecunia eo inscio –, post renunciationem toleratur; cum in promovendo, si probaverit se ignorare promoventem simoniacum, toleratur ...'

54 *Ad C.1 q.7 pr (ibid., pp. 232–233, note 1)*: '... § *Necessitatis intuitu*: Intuitus nec triplex est: peccantis, peccaturi et corrigentis. Peccantis, quia quandoque tanta est persona, ut, si corrigi non possit, toleratur (*em.*: toleretur) necessitate; peccaturi, ut: si etas minaretur incontinentiam; corrigentis, quia forte prelatu corrigere non valet.'

It has been observed how the important *Summa* of Stephanus Tornacensis (Stephen of Tournai, 1128–1203), probably composed in the 1160s,<sup>55</sup> diverges from Rufinus’ and bears a stronger resemblance with that of Rolandus.<sup>56</sup> This is also visible in Tornacensis’ use of the concept of toleration. As already mentioned, part of his comment on C.24, q.1, was taken almost verbatim from that of Rolandus.<sup>57</sup> The concept of toleration in Tornacensis is however both more frequent and better defined than in Rolandus. Unlike Rolandus, Tornacensis uses it very seldom in a loose moral sense.<sup>58</sup> While not all the examples of toleration in his *Summa* deal with problems of *ordo* and *iurisdictio*,<sup>59</sup> it is there that Tornacensis uses this concept the most.

When speaking of toleration, Tornacensis operates a neat distinction between ethical and legal judgments. While there is little doubt as to the moral reprobation of the person tolerated,<sup>60</sup> for Tornacensis the fact that he is tolerated entails the faculty to fully exercise his office. This is particularly clear in his comment on C.24, q.1, p.c.4. There, the *Decretum* stated that the Lord had bestowed the power of loosing and binding (i. e. jurisdictional powers)<sup>61</sup> only to the true prelates (*veris [sacerdotibus]*), not the false ones (*falsis sacerdotibus*).<sup>62</sup> Tornacensis’ gloss on *veris* reads, ‘Christians whom the Church tolerates, although otherwise they are evil’ (*catholicis quos tolerat ecclesia, licet alias sint mali*); that on *falsis*, ‘those whom the Church does not tolerate, those deprived of office or any heretic whatsoever’ (*quos non tolerat ecclesia, degradatis uel quibuslibet*

55 Kuttner (1937), p. 135 (slightly postdating its writing with respect to Schulte [ed., 1965], xx).

56 Kuttner (1937), p. 135.

57 *Supra*, this paragraph, notes 38 and 44.

58 See for instance Tornacensis’ *Summa ad C.1, q.1, c.88, § Chr(istus) q(uid) f(ecit)* (Schulte [ed., 1965], p. 137): ‘q. d. exemplum nobis tolerandi malos reliquit’. On the surface, the gloss seems to suggest only that the wicked are to be suffered. But all the other glosses both before and after this deal with the sacraments performed by heretics and schismatics.

59 E. g. Tornacensis’ *Summa ad D.12, c.12, § tolerabilior (ibid., p. 21)*.

60 See esp. Tornacensis’ *Summa ad C.1, q.1, c.33, § Nec intus (ibid., p. 129)*: ‘participationem sacramentorum, i. e. nec ille, qui adhuc toleratur ab ecclesia.’ The text upon comment (Augustine’s *De Baptismo*, 4.12) stated ‘Nec foris ergo, nec intus quisquam, qui ex parte diaboli est, potest in se, uel in quoquam maculare sacramentum, quod Christi est.’ The words ‘qui adhuc toleratur ab ecclesia’ therefore referred to ‘quisquam’ is ‘ex parte diaboli’.

61 On the reticence of some early decretists to identify the *potestas clavium* with *iurisdictio* see Van de Kerckhove (1937), pp. 440–453. The author perhaps over-emphasises the importance of the Gratian’s reference to the Power of the Keys on the separation between *ordo* and *executio*.

62 C.24, q.1, p.c.4: ‘... Ligandi namque uel soluendi potestas ueris, non falsis sacerdotibus a Domino tradita est ...’

*hereticis*).<sup>63</sup> This interpretation will be followed by other decretists, starting with the *Summa* of Johannes Faventinus (d. c.1191), composed at the beginning of the 1170s,<sup>64</sup> and the *Apparatus Ordinaturus Magister*, written in the following decade.<sup>65</sup> In both these works the distinction *veri–falsi* is entirely based on the dichotomy *tolerati–non tolerati*.<sup>66</sup> The same distinction will also be used (but, as we will see, in a narrower sense) in Teutonicus' Gloss.<sup>67</sup> The concept of toleration in Tornacensis is consistent also when the verb form is used in the negative (*non tolerari*). Not tolerating someone means denying the valid exercise of an office, and so barring the production of any valid legal effect.<sup>68</sup>

- 63 Tornacensis' *Summa ad C.24*, q.1, p.c.4, § *Veris* and § *Falsis* (Bruxelles 1410, fol. 118rb, transcription in Lenherr [1987], p. 272). It is probably in this light that the meaning of *tolerare* in other passages ought to be read. See e.g. D.32, c.5, § *Nullus* (i.e. 'Nullus missam audiat presbiteri, quem scit concubinam indubitanter habere aut subintroductam mulierem') (Schulte [ed., 1965], p. 48): 'Signatur contra *infra C.15* q. ult. C. ult. [C.15., q.8, c.5] et multa similia. Unde quidam solver volentes dicunt canonem istum esse dandae sententiae, quasi quo insinuetur, quid fieri debeat, si detur sententia in eum; nam antequam procedat sententia ex dando canone non est cavendum ab huiusodi, qui usquequo ab ecclesia tolerantur, praetextu criminis eorum officium subterfugere non licet, ut i(nfra) C.3. Q.7 paragrapho ult(imo) [C.3, q.7, p.c.7]'; D.32, p.c.6 § *non spernetur* (*sic*) (*ibid.*, p. 48): 'per damnationis sententiam. Nam quamdiu tolerantur ab ecclesia, si ab habentibus potestatem et in forma ecclesiae ordinati sunt, vera sunt eorum sacramenta, licet non quantum ad ipsos'; D.81, c.3, § *sacro nomini* (*scil.*, episcopali) (*ibid.*, p. 104): 'Quod esset, si talem ecclesia toleraret'; *De cons.* D.1 (*ibid.*, p. 261): '... Primum ergo [Gratianus] quasi ad morum informationem ostendens, qui vel quales, ad quos ordines, per quos promovendi vel non; et in his constituti, ob que delicta amovendi vel ex misericordia in eis tolerandi'. See also *ad C.1*, q.1, c.30, § *Si fuerit iustus* (*ibid.*, p. 129): '... hic loquitur de sacramentis necessitatis, quae semper habeant effectum, a quocunq; dentur, nisi culpa accipientis impediatur, ibi de sacramentis dignitatis. Vel hic agitur de haereticis vel simoniaciis ex necessitate vel coactione ab his, quos adhuc tolerat ecclesia, ordinatis, ibi de his, qui iam damnati sunt'.
- 64 Maassen's dating of Faventinus' *Summa* to 1171 (Maassen [1857], p. 31) has been widely accepted by scholars. See e.g. Kuttner (1937), p. 145, and more recently Müller and Pennington (2008), p. 138.
- 65 On the dating of this *Summa* see Stickler (1967), pp. 134–137, and Lenherr (1987), p. 238, note 91. See further Maceratini (1994), pp. 633–636.
- 66 Faventinus, *ad C.24*, q.1, p.c.1, § *Veris catholicis* (Madrid, BN 421, fol. 160rb): 'quos tolerat ecclesia, licet alias sint mali. *Falsis* quos non tolerat ecclesia.' *Apparatus Ordinaturus Magister*, *ad C.24*, q.1, p.c.4, § *potestas veris* (BSB, Clm 10244, fol. 143va, transcription in Lenherr [1987], p. 301): 'idest catholicis, scilicet toleratis ab ecclesia, siue sint boni siue mali, sicut falsi dicuntur omnes non tolerati ab ecclesia.'
- 67 *Infra*, this chapter, note 154.
- 68 E.g. Tornacensis' *Summa ad C.1*, q.1, c.18, § *Ventum* (ad) tertiam q(uaestione) [*scil.*, that he who is ordained by a heretic receives a spiritual wound] (Schulte

Similarly interested in the concept of toleration is Sichardus of Cremona (c.1155–1215), whose *Summa* (probably composed between 1179–1181)<sup>69</sup> seeks to mediate between the firm position of the *Decretum* on the invalidity of the sacraments performed by those lying outside the Church (in whom the Holy Spirit does not operate) and the more flexible Augustinian position (seeking to facilitate their reconciliation with the Church). The fruit of this mediation is a keen interest in the idea of toleration.<sup>70</sup> What is important for our purposes is that Sichardus openly links the toleration of heretics with its practical consequences in terms of the exercise of jurisdiction by the heretical office holder tolerated in his office. In so doing, Sichardus highlights the distinction between the office and the personal worthiness of its holder. So long as the holder of the office is tolerated within the Church despite his heresy, says Sichardus, he may issue valid decisions.<sup>71</sup>

Not all the main decretists, however, would rely explicitly on the concept of toleration to explain – and moreover highlight – the separation between person and office in the exercise of jurisdiction by the heretic not (yet) excommunicated. It might be the case that some authors within the Italian milieu were

[ed., 1965], p. 126): ‘... Intendit Innocentius probare, quia ordinanti ab haereticis non sunt reordinandi, nec in ordinibus ab eis susceptis tolerandi.’ See also *ad D.32, p.c.6 § Cet(erum) schismat(icorum) et haeret(icorum)* (*ibid.*, p. 49): ‘qui damnati sunt et ab ecclesia non tolerantur’; *ad D.50, c.56, § ad subdiaconum* (*ibid.*, p. 75): ‘nam si supra nec etiam ex dispensatione poterit in eo ordine tolerari.’

69 Kuttner (1937), pp. 151–153.

70 Cf. Lenherr (1987), pp. 217–218.

71 Sichardus of Cremona, *ad C.24, q.1* (BSB, Clm 4555 and 11312, *fol. 56v* and *fol. 121v–122r* respectively, transcription in Lenherr [1987], p. 287, ll.12–25): ‘... Item qui non est in unitate non consecrat. Est enim consecrare simul sacrare. Item non est Christi corpus quod scismaticus conficit. Item di. xii. Nulli [Di.19.c.5?]. Econtra. quia sacramentum absorberi non ualet, unde recedentes a fide sicut nec baptisma sic nec baptizandi potestatem amittunt. Item quia dicit Aug(ustinus) excommunicatos ab hereticis non esse recipiendos a catholicis. Item quia uidemus ordinatos ab hereticis in suis ordinibus toleratos, ut ca. i. q. ult. Quod pro [C.1, q.7, c.7]. R(esp.): hereticus si toleratur, potest sententia notare de offitio, set non de iure merito; si non toleratur, nullo modo potest, nec catholicum, nec hereticum. Quod autem Aug(ustinus) dicit non esse recipiendos ab hereticis excommunicatos (*sic*), non hoc dicit approbando hereticorum excommunicationem, set inprobando criminum detestationem et facilem hereticorum reconciliationem.’ It may be interesting to note that the line ‘si toleratur, potest sententia notare de offitio, set non de iure merito’ appears only in one of the two Munich manuscripts cited above: it is present in BSB, Clm 11312, but not in the main one, BSB, Clm 4555 (*ibid.*, p. 287). The same passage is transcribed by Maceratini (1994), p. 663, note 313, from Augsburg 1, *fol. 119ra–b*, but the text does not present significant differences.

somewhat more reluctant to use it than their French counterparts, as we shall soon see. So for instance the *Summa* of Simon of Bisignano (Simonis de Bisignano, fl. 1170s)<sup>72</sup> likely written between 1177 and 1179,<sup>73</sup> does not refer to toleration, but qualifies the sentence of excommunication brought forth by the heretic as valid (*sententia eius teneat*) because the Church has yet to deprive him of his office. Bisignano makes clear that the validity of the sentence has little to do with the unworthy person of the heretic and depends only on his office, but he does not qualify the state of the heretic not yet deprived of his office as toleration.<sup>74</sup>

The great canonist Huguccio (Huguccio Pisanus, d.1210) is rather parsimonious in speaking of toleration as well, but he uses this concept in his *Summa* (written in the years 1188–1192)<sup>75</sup> on at least three occasions. The first, rather a topos, is with regard to Judas: unlike other heretics (the reference is to Achatius) who were cast out of the Church, Judas was tolerated within it. Despite his wickedness, therefore, his deeds would retain full legal validity.<sup>76</sup> The second and more important occasion is on the exercise of jurisdictional prerogatives. It is well known that Huguccio sought to separate the *potestas iurisdictionis* neatly from the *potestas ordinis*.<sup>77</sup> When discussing the *iurisdictio* of the heretics not yet

72 On Bisignano see esp. Junker (1926), pp. 327–332.

73 Junker (1926), p. 332; Kuttner (1937), p. 149.

74 Simonis de Bisignano's *Summa*, ad C.24, q.1, c.35, § *ex quo talia predicare* (Augsburg 1 and Bamberg Can.38, fol. 49rb and fol. 77rb–va respectively, transcription in Lenherr [1987], p. 286): 'Hinc uidetur innui, quod si hereticus aliquem excommunicat uel degradat, quamdiu eius heresis latet, quod sententia eius teneat, licet non possit hoc de uite merito facere, set de offitio, quo nondum est iudicio ecclesie expoliatus.' Elsewhere, speaking more in general, Bisignano said the opposite, but he did so referring specifically to the personal *dignitas* and not to the office: ad C.1, q.1, p.c.39, § *Si ergo usque alia sunt dignitatis*, *Summa in Decretum Simonis Bisinianensis* (Aimone-Braida [ed., 2014], pp. 101–102, ll.244–253).

75 Lenherr (1981), pp. 12–13; Kuttner (1937), pp. 157–158; Müller (1994), pp. 71–73.

76 Huguccio's *Summa* ad D.19, c.8, § *scribe inquit*: '... Set exempla de Iuda et scribis et phariseis non uidentur multum efficiacia, quia illi tolerabantur, iste [*scil.*, Achatius] precisus erat.' § *Secundum*: 'Tertia [*scil.*, the third reason why it is possible to ratify the deeds of the heretic condemned] est de Iuda qui, licet malus, multa tamen fecit que rata habita sunt.' (Huguccio Pisanus, *Summa decretorum*, Přerovský [ed., 2006], tom. 1, p. 321, ll.58–59, and 318, ll. 10–11 respectively). On the validity of Judas' deeds ('rata habita') cf. Rufinus' gloss ad C.1, q.1, c.108 ('habebuntur rata'), *supra*, this chapter, note 51. For a parallel with Gratian's idea of toleration of Judas see recently Moule (2016), pp. 271–272, where further literature is listed.

77 Huguccio did so through the use of another concept, that of *potestas executionis*. On the point see Ryan (1972), pp. 319–320; Benson (1968), pp. 116–133, esp.

excommunicated, he clearly states that they would not lose their power to bind and loose. In so doing, Huguccio refers to the concept of toleration, but makes sure to clarify that the validity of the act would depend on the office, not on the person. The jurisdictional acts of the wicked tolerated by the Church are valid ‘saltem ex officio suo’, for God operates through the ministry of the wicked (*per ministerium malorum*) tolerated within the Church, as well as the ministry of the righteous ones.<sup>78</sup> The third case is to be read in the light of these observations. It is Huguccio’s comment on *Tria* (C.3, q.7, p.c.1). This comment contains one of the earliest references to the *lex Barbarius* by a canon lawyer. Huguccio cites it to affirm that the prelate who received his orders or a prebend from someone who was believed to be within the Church ought not to be deprived of it when the truth finally emerged.<sup>79</sup> Huguccio continues his comment on *Tria*, applying the same rationale to legitimise the offspring of a wedding believed to be valid, thereby providing what is probably one of the first examples of the extension of the toleration principle to marriage issues.<sup>80</sup>

120; Lenherr (1981), pp. 369–372. See also Huguccio’s gloss *ad* C.23, q.1, c.4, § *Non est potestas nisi a deo, siue iubente* (Vat. Lat. 2280, fol. 244ra, transcription in Lenherr [1981], p. 36, esp. ll.1–15). Cp. however the observations of Van de Kerckhove (1937), p. 451.

78 Huguccio, *ad* C.1, q.1, c.39, § *Raptoribus, fenera(toribus)* (Vat. lat. 2280, fol. 93rb–va, transcription in Lenherr [1987], p. 297, ll.18–30): ‘Per hos intelliguntur omnes mali iam ab ecclesia precisi et extra ecclesiam positi, de hereticis enim precisus intelliguntur, non de catholicis ab ecclesia tolleratis, licet sint mali, ut *infra* ea q. Etiam corde [C.1, q.1, c.48] et xxxiii. q.i § Si autem [C.24, q. 1, p.c.4], ne littera sequens aliter congrueret, omnibus enim catholicis, siue bonis siue malis, sacerdotibus, dum tollerantur ab ecclesia conuenit, saltem ex officio suo, soluere et ligare ... hanc potestatem exercere potest, ut xxxiii. q.i Manet, Quodcumque [C.24, q.1, c.5–6]. Potest tamen dici, quod et de malis adhuc ab ecclesia tolleratis intelligitur, sicut littera precedens uidetur uelle, quia, etsi per ministerium malorum sicut per bonorum deus peccata dimittit, illud tamen non est dictum nisi bonis et propter bonos.’

79 Huguccio, *ad* C.3, q.7, p.c.1, § *dum putaretur* (Vat. lat. 2280, fol. 134rb–va, transcription in Wilches [1940], pp. 78–79): ‘arguo: illud quod fit ab aliquo, tunc cum creditur id recte facere posse, licet postea inueniatur aliter esse, non debere irritari, et hic habet locum illud generale, scilicet: plus ualet quod est in opinione quam quod est in veritate, arguo ff. de officio praetoris, Barbarius (Dig.1.14.3), et ff. de damno infecto, l. 3 § hoc autem (Dig.39.2.4.8) et C. de sententiis et intelocationibus omnium iudicium, l. si arbiter (Cod.7.45.2) et C. 1 q.1 si qui a simoniacis (C.1, q.1, c.108) et C.22, q.1 is autem (C.22, q.2, c.4) et Extra, consultationibus [comp. 1, 3.33.23(=X.3.38.19)] ergo secundum hoc ordinatus vel beneficiatus ab intruso qui credebatur esse catholicus non debet privari ordine vel beneficio.’

80 *Ibid.*, ‘et filii nati tunc cum credebatur esse matrimonium licet non esset, legitimi sunt reputandi ut i. Extra, accessit ad praesentiam [(comp. 1, 4.2.6(=X.4.2.5)].’ Cf. Albisetti (1980), pp. 194–196.

### 6.3.2 *The excommunication by the secret excommunicate*

To test the boundaries of the toleration principle perhaps the best place is C.24, q.1, p.c.39. In this passage Gratian made sure to restrict the interpretation of an Augustinian excerpt on excommunications issued by the excommunicated (epist. 35.2) by highlighting its final goal (to punish the crime: ‘in detestatione criminum’) and to bar the alternative interpretation (the actual validity of the sentence: ‘non propter sententiam, cuius potestas nulla est extra ecclesiam’).<sup>81</sup> Gratian stated clearly that the excommunication itself (thus the jurisdictional power to bind and loose) was void, for it was brought by the excommunicated heretic. But what about the excommunication inflicted by the heretic who is not yet excommunicated but who would be excommunicated soon thereafter? Would this excommunication be valid? Ultimately, the problem was to set precise boundaries to the toleration principle: should it also apply to those tolerated only temporarily, or only to those who were tolerated, so to speak, on a permanent basis? The problem was too serious to be overlooked even by those least sympathetic to the concept of toleration itself, such as Rufinus. In principle, Rufinus had little doubt as to the invalidity of the sentence of excommunication: if the heretic cannot judge, how can he excommunicate someone? At the same time, however, he was aware that the invalidity of this sentence could be ascertained only at a later stage. To solve the problem, Rufinus suggested seeking absolution in any case.<sup>82</sup> Rufinus’ solution was vague enough to duck the most intricate issues, first of all the effects of toleration itself – a term that he sought to avoid as much as possible. Among those who allowed for the toleration of the occult heretic, some (including Huguccio) preferred to avoid the problem and interpreted the passage only with regard to the heretic already excommunicated.<sup>83</sup> Others went further, stating explicitly that the toleration principle also

81 Cf. C.24, q.1, a.c.1 and p.c.3. See also Vodola (1986), pp. 117–118.

82 Rufinus, *ad C.24, q.1 pr* (Singer [ed., 1963], p. 415): ‘Si itaque heresim iam damnatam sequitur, eo ipso precisus iudicatur ideoque non potest aliquem deponere vel excommunicare; si autem novam heresim confinixerit, quamdiu per sententiam episcoporum reprobatus non fuerit, licet ipse de iure non possit aliquem solvere vel ligare, tamen eum, qui ab eo ligatus fuerit absolutionem querere oportebit, si tamen sub eius iurisdictione positus sit’ (emphasis added). The problem is whether ‘oportebit’ is to be understood in an ethical or a strictly legal sense: in the first sense see Lenherr (1987), p. 199; in the other Maceratini (1994), p. 395. While it may not be excluded that the use of *oportere* denoted a legal necessity, the opposite interpretation would seem more coherent with Rufinus’ overall position on the (non) toleration of the heretic.

83 Huguccio’s *Summa, ad C.1, q.1, c.39, § aliquis* (Vat. lat. 2280, fol. 93rb–va, transcription in Lenherr (1987), p. 298, ll.52–55); *Summa Tractatus Magister, ad C.24, q.1 pr* (BNE, Lat. 15994, fol. 71v, transcription in Lenherr (1987), p. 305, ll.8–10); *Summa De iure canonico tractatus, ad C.1, q.1, a.c.30, § Set obicitur*

applied with regard to the occult heretics who would be excommunicated later. So long as those heretics are tolerated, the validity of their jurisdictional acts is

(Laon 371bis, fol. 108vb, transcription in Lenherr (1987), p. 313, ll.6–9. Cp. however Honorius' *Summa decretalium quaestionum*, *infra*, this paragraph, note 85). Less explicit, but possibly in the same direction is the Apparatus *Ecce vicit Leo*: the gloss *ad C.24, q.1, c.39, § Penitencie recipiatur* ('Solutio est in § sequenti [C.24, q.1, p.c.39], quod scilicet ista sententia appellatur non quia ualent set in odio criminis') must be read together with that *ad C.24, q.1, c.38, § (Q)uisquis* ('... Recipiuntur tamen quandoque, quia heretici non probabant, cum nullus propter peccatum occultum debet euitari') and the one *ad C.24, q.1 pr* (on which see *infra*, this chapter, note 100) (St. Florian XI.605, fols. 93rb-95ra, transcription in Lenherr [1987], p. 324, ll.15–17, p. 323, ll.5–6, and p. 322, ll.1–15 respectively). Interpreting the first two in the light of the third (which comes first and serves as *proemium* for the whole *quaestio*), then the only logical solution would be that the gloss on C.24, q.1, p.c.39 has a narrower scope, and it refers only to those already excommunicated. See also the *Summa Animal est substantia*, *ad C.24, q.1, c.39, § Degradatus* (Liège 127.E, fol. 216va, transcription in Lenherr [1987], pp. 327–328, ll.15–19). A similar position may be found in the *Summa Coloniensis*, whose stance on the matter is interesting as it represents well the approach of many decretists in the first few decades after the composition of the *Decretum*, an approach based more on ecclesiological than legal considerations. Someone who is excommunicated cannot excommunicate, says the *Summa Coloniensis*. His sentence of excommunication would therefore be void. According to the *Summa Coloniensis*, Augustinus' words mean that, if the crimes for which such a (void) sentence was brought were true, then the effects of that sentence could be kept: 'Quod excommvnicatvs alios excommvnicare non possit. Illa etiam dubitatio silentio pretereunda non est utrum sacerdos uel episcopus excommunicatus alios excommunicare possit ... Si tamen hereticus aliquis [excommunicatus] asseclas suos pro ueris culpis excommunicauerit, tale uinculum in redeuntibus ab ecclesia non paruipendi Augustino placet ... Non potest excommunicare, idest extra communionem ecclesie facere, sic nec soluere, idest Deo et ecclesie reconciliare; potest tamen pro [ueris culpis et] iustis causis obedientem suum ita ligare ut hec uincola ad aggrauandam penitentiam in redeunte ecclesia agnoscere debeat.' *Summa 'Elegantius in iure divino' seu Coloniensis* (Fransen and Kuttner [eds., 1978], tom. 2, pt. 7, ch. 74, pp. 194–195, ll.1–3, 18–20 and 30–34 respectively). The same *Summa Coloniensis* also attests to the terminological confusion as to sacraments of *dignitas* still lingering in the early decades of the second half of the twelfth century. Its author first introduces the distinction between sacraments of necessity and of dignity speaking of *sacramenta necessitatis* and *sacramenta voluntatis* ('Sunt enim alia necessitatis, alia uoluntatis', *ibid.*, tom. 2, pt. 4, ch. 55, p. 24, ll.2–3). Shortly thereafter, when applying this distinction to sacraments performed by the heretic, he describes the second kind of sacrament as *sacramenta dignitatis* ('Mali ergo ministri, sint catholici sint heretici ut hic dicunt, uera necessitatis sacramenta conferunt, dignitatis uero sacramenta heretici nullatenus conferre possunt ... Ecce euidenter asserit quod dignitatis sacramentum hereticus conferre non ualet, necessitatis uero sacramenta uera proculdubio hereticus confert', *ibid.*, ll.11–12 and 20–21). Zeliauskas' vast study (1967), in many ways truly impressive, is unfortunately



full. It follows that the sentences of excommunication that they issued would remain valid even after their own formal excommunication. A clear example in this direction may be found in the *Summa decretalium quaestionum* of Honorius of Richmond (composed no later than c.1190).<sup>84</sup> Honorius explained clearly that the sentence of excommunication, being an application of the broader power to bind and loose, does not pertain to *ordo* but to *iurisdictio*, so that it flows from enduring participation in the Church. If one is cast away from the Church, he may no longer validly exercise it. However, so long as he is tolerated within the Church, his personal unworthiness (*secus de merito*) is no obstacle to the exercise of the jurisdictional powers flowing from his office (*possunt soluere et ligare ex officio*). This means that it is not possible to consider suddenly void a jurisdictional act that was perfectly valid when issued. As such, concludes Honorius, if someone is excommunicated by a prelate who would himself be pronounced excommunicated at a later stage because of the heretical condition in which he already was when he issued the sentence, he has to seek absolution not just for prudence's sake (as with Rufinus), but because the excommunication was legally binding.<sup>85</sup>

not of much use in the present analysis. Zeliauskas discusses briefly the excommunication levied by the heretic, but only focuses on the case of the heretic fallen in an already condemned heresy without comparing it with that of the occult heretic. The author bases his conclusions mainly upon the glosses on C.11, q.3, c.46. That was a very general text, and of course its comments could do little but deny the validity of the excommunication by the heretic. As a result, Zeliauskas could not find a single canon lawyer before Innocent IV arguing in favour of the validity of the sentence of excommunication issued by the heretic: Zeliauskas (1967), pp. 111–113. His remarkable set of transcriptions therefore does not take into account the glosses on C.3, q. 7, p.c.1 and C.24, q.1, c.1, which are the most important places where the decretists dealt with the excommunication by the occult heretic.

84 Kuttner and Rathbone (1949–1951) p. 310. See further Grimm (1989), pp. 5–9.

85 Honorius of Richmond, *Summa decretalium quaestionum* (BSB, Clm 16063, fol. 73rb–va, transcription in Lenherr [1987], pp. 314–315, ll.22–27; punctuation as in the original): ‘Ceterum conficere uel sacramenta cetera ministrare ex ordine prouenit. Vnde et ordinem habentes ea possunt expedire, secundum G. Preterea soluere uel ligare non est sacramentum dare, set diuine solutioni uel ligationi testimonium dare, quod nec apud Deum nec apud homines heretici facere possunt, ut xxiii q.iiii Ipsa (C.23, q.4, c.24), secundum C. Alii uero heretici, dum adhuc ab ecclesia tolererentur, suos possunt soluere et ligare ex officio, secus de merito. Quid ergo si in tempore (?) quo ligat suum subditum ab ecclesia tolerabantur et postea precipidunt? R(esp)onde)o: Ab aliis soluentur, quod in pluribus articulis contingit, ut xi q.iii. Si episcopus ante (C.11, q.3, c.40).’ Although the *Summa de Iure Canonico Tractatus* is also attributed to Honorius of Richmond (Weigand [1976], esp. pp. 196–198), it would appear less open to the full acceptance of the toleration principle than the *Summa decretalium quaestionum*. This may be seen in the way the *Summa de Iure Canonico Tractatus*

If we turn our attention for a moment to France and go back a few decades, we may find some *Summae* making extensive use of the concept of toleration. The most explicit on it is probably the *Summa Parisiensis* (probably written in the 1160s),<sup>86</sup> which makes overabundant use of this concept. Sometimes toleration is used to better explain a passage in the *Decretum*<sup>87</sup> or in connection with public utility.<sup>88</sup> In some occasions it denotes forgiveness,<sup>89</sup> dispensation,<sup>90</sup> forbearance,<sup>91</sup> or has a rather generic sense.<sup>92</sup> But its more interesting use is to be found in the sacramental sphere. The *Summa Parisiensis* fully accepts the distinction between sacraments of *necessitas* and of *dignitas*, a distinction mainly shaped after Gratian's restrictive interpretation of the Augustinian passages we have seen

deals with the jurisdictional implications of toleration (*supra*, this paragraph, note 83), and with the sacramental ones, on which see esp. its comment on D.32, p.c.6, § *Ad hoc uero*: '... utrum sacramenta a criminosis sint suscipienda, quia nondum sunt per sententiam dampnati nisi eorum crimina sint notoria. A quibus, etsi adhuc a prelati tolerantur, a subditis sacramenta non sunt percipienda nisi forte in morte', *Magistri Honorii summa 'De iure canonico tractaturus'* (Weigand, Landau and Kozur [eds., 2004], tom. 1, p. 111, ll.3–6). Cf. also *ibid.*, ad C.3, q.7 pr, § *Quod iudex*, and ad C.3, q.7, c.4, § *Iudicet – quod – condempnet* (both *supra*, this chapter, note 30).

86 McLaughlin (1952), xxxi–xxxiii.

87 See e.g. *Summa Parisiensis*, ad D.12, c.8, § *Nos consuetudinem* (McLaughlin [ed., 1952], p. 12): '... Unde dicit Gregorius, si sunt magnae civitates quae habent episcopos de Donatistis quos revertentes ab haeresi in episcopatu toleramus [the *Decretum* read 'permanere concedimus'], licet illae civitates debeant habere primates, non tamen volumus hos tales esse primates.'

88 *Id.*, ad D.64 c.8, § *illud generaliter* (*ibid.*, p. 57): 'Contrarium videtur quod dicitur in prima Causa (C.1, q.1, c.40), talis enim i.e. a pseudoepiscopis ordinatus, permittitur celebrare in ecclesia in qua ordinatur est. Et supra habuimus de ordinato sine auctoritate domini papae, praecepto imperatoris, qui permittitur in ordine. Sed illud est speciale, et toleratur quandoque pro utilitate vel dissensione populi, ut in ea in qua ordinatus est ministret tantum ecclesia. Istud vero generale est. Vel dicimus sic ordinatus non erit episcopus, i.e. non habebit generalem potestatem episcopi ut ubique possit exercere officium suum, sed forte ex indulgentia celebrabit tantum in ecclesia sua.'

89 E.g. *Id.*, ad D.22, c.5, § *Qua traditione* (*ibid.*, p. 22): 'Papa deposuerat Constantinopolitanum et alios per haeresim, Antiochenus et alii in pace tolerabant resipiscentes ab haeresi ...' Cf. also *Id.*, ad C.1, q.1, c.101, § *Quidquid* (*ibid.*, p. 89).

90 *Id.*, ad C.1, q.7, p.c.11, § *Pietatis* and c.13, § *Quoniam – ad veniam* (*ibid.*, p. 98); *Id.*, ad C.1, q.7, p.c.17, § *de laicis* and c.21, § *maneant in quo inveniuntur* (*ibid.*, p. 99); ad C.5, q.2, c.2, § *deportentur* (*ibid.*, p. 129); ad C.33, q.2, c.13 § *Audivimus* (*ibid.*, p. 251).

91 *Id.*, ad C.11, q.3, c.90, § *Qui – habet praemium* (*ibid.*, p. 129); C.23, q.4 pr (*ibid.*, p. 213).

92 E.g. *Id.*, ad D.38, c.12, § *Non quia*; *Id.*, ad D.41, c.3, § *Non cogantur*; *Id.*, ad D.45, c.17, § *uno peccante* (*ibid.*, pp. 36, 38 and 41 respectively).

earlier.<sup>93</sup> Only those who lie within the Church may confer the sacraments of *dignitas*. As wicked priests tolerated by the Church do lie within it, they may validly confer all sacraments.<sup>94</sup> The same solution is then applied to the jurisdictional sphere: the heretic tolerated by the Church lies within it, so he retains his full powers to bind and loose. It is with regard to the power of *iurisdictio* more than of *ordo* that the *Summa Parisiensis* uses the concept of toleration more frequently, and with more precision. The author of the *Summa* has little doubt that the occult heretic may validly exercise his jurisdictional powers to their full extent, and highlights more than most before him the full validity of the jurisdictional acts made by the heretic tolerated ('potestatem habet ligandi atque solvendi, et quaecumque geruntur rata sunt et firma'). In so doing, the *Summa Parisiensis* openly considers this validity as deriving from the office that the tolerated heretic holds. Tolerating the heretic in the Church therefore means not depriving that person of his office, and so letting him exercise it in full.<sup>95</sup>

93 *Supra*, this chapter, §6.1.

94 *Id.*, *ad* D.19, c.8, § *Secundum ecclesiae* (*ibid.*, p. 19): 'Hoc scilicet continet erroris quod falso argumentatur a simili videlicet a similitudine sacramenti necessitatis ad sacramenta dignitatis. Et argumentatur a similitudine mali non depositi ut Judae ad damnatos. Baptismus siquidem, quia necessarius est ad salutem, datum per excommunicatum, sicut daretur per paganum, non irritatur. Similiter si aliqua malus toleretur ab ecclesia, ut Judas, sacramenta etiam dignitatis data per episcopum recipiuntur in unitate.' See also *Id.*, *ad* D.32, c.5, § *Nullus* (*ibid.*, p. 31): 'Ad hoc capitulum et ad sequens opponit Gratianus ut solvat dicens quia sacramenta, sive per bonum sive per malum, non minus sunt sacramenta, ergo non debet quis abstinere a missa, etc. Sed de his diffusius agitur in prima Causa. Breviter tamen dicendum quoniam dum aliquis toleratur ab ecclesia, sacramenta sunt quae conficit. Similiter qui primo fuit in ecclesia, si se separaverit sive separaretur, non depositus, sacramenta conficit, maxime si in forma ecclesiae. Si vero depositus est, non conficit'; *ad* C.1, q.1, c.75, § *Sic Christus* (*ibid.*, p. 85): 'Hanc oppositionem determinat Gratianus dicens: quia loquitur Hieronymus de occultis haereticis qui tolerantur ab ecclesia, quia aliter sibi contrarius esset, et ad ostendendum quia mali qui sunt in ecclesia conficiant sacramenta sicut boni, inducit multas auctoritates'; *Id.*, *ad* C.1, q.6: § *Quid vero* (*ibid.*, p. 96): 'Quaestio sexta superius est terminata ubi diximus de simoniaco qui tolerantur ab ecclesia et ordinant quia rata est ordinatio. Similiter si sint extra ecclesiam propter simoniam et aliquis ignorantia rationabili ordinatur ab eis.' Cf. also *Id.*, *ad* C.24, q.1, p.c.37, § *His auctoritatibus* (*ibid.*, pp. 226–227).'

95 See esp. *Id.*, *ad* C.24, q.1 pr (*ibid.*, p. 223): '... haereticorum autem alii tolerantur ab ecclesia; alii sunt praecisi. Qui ab ecclesia sunt praecisi, omnem potestatem et ligandi et solvendi amiserunt. Quaecumque ab eis geruntur qui tolerantur ab ecclesia, si in forma ecclesiae fiant, rata sunt pro loco, pro tempore, pro dignitate, pro officio, sicut in I Causa dictum est. Dant igitur tales sacramenta etsi non de jure merito, tamen de potestate officii.' Cp. *Id.*, *ad* C.24, q.1, p.c.4 § *Haec autem* (*ibid.*): 'Multas inducit auctoritates Gratianus ad ostendendum quod qui ab

A couple of decades after the *Summa Parisiensis*, the Anglo-Norman *Summa Omnis qui iuste iudicat* or *Summa Lipsiensis* (composed shortly after 1185, possibly in 1186)<sup>96</sup> explains the toleration of jurisdictional acts in a similar fashion. Having clarified that only those who received *ordo* after the *forma ecclesiae* may be tolerated<sup>97</sup> (a point that the *Summa Parisiensis* omitted), the *Summa Lipsiensis* explains the jurisdictional consequences of the toleration principle by stressing

unitate ecclesiae praecisus est, quicumque Petri vestigia [non] sequitur, potestatem ligandi et solvendi non habet, et ita pertinent ad quaestionem quae [de] dignitate et excellentia ecclesiae dicuntur.’ See also Id., *ad C.24, q.1, p.c.37, § His auctoritatibus* (*ibid.*, p. 227): ‘... Quaeritur etiam si haereticus in Catholicum sententiam excommunicationis dictare valeat, si etiam haereticus haereticum excommunicare queat. Si forte haereticus Catholicum excommunicet nulla [causa] praecedente, sed ut haeresi suae consensiat, quia nulla causa subest, pondere caret sententia. Si vero non ut in haeresim trahat, sed ut pravitate retrahat, haereticus Catholicum excommunicet, tenet sententia, maxime dum toleratur ab ecclesia.’ To better appreciate the innovative position of the *Summa Parisiensis* on the point, it might be useful to look at another *Summa* composed about a decade later (*supra*, this chapter, note 41) in Köln. Like the *Parisiensis*, the *Summa Coloniensis* also states that the occult heretic tolerated by the Church retains his powers of *iurisdictio* (*Summa ‘Elegantius in iure divino’ seu Coloniensis*, Fransen and Kuttner [eds., 1978], tom. 2, esp. pt. 4, ch. 61, p. 27, ll.1–8). But then it tests the scope of such toleration when applied to sacerdotal ordinations. It does so by posing the case of a bishop who was received in the Church (out of mercy) despite having been ordained by an excommunicate. In principle, this bishop should be able to exercise his *iurisdictio*, and so also to confer *executio potestatis* to any new priest he would consecrate. But on this last point the *Summa* shows some uncertainties. It acknowledges the validity of the ordinations performed by such a bishop, but not as a consequence of being received within the Church. Rather, the *Summa* stresses both the large number of priests ordained by the bishop (thus, the public utility element) and the fact that the bishop himself was not only consecrated but also confirmed. Even so, however, the *Summa* leaves open the possibility that something might be found against the newly ordained priests. After all, reasons the *Summa*, this bishop was ordained by a heretic, so there is the risk that he might have passed on the same heresy to the new priests he ordained. What is particularly interesting is that the author of the *Summa* does not consider the validity of their ordination as automatically following from the fact that the bishop was accepted within the Church. The Church did accept the bishop, says the *Summa*, but it did not provide anything specifically for the priests he consecrated: ‘Set queritur si episcopus ab excommunicato consecratus per misericordiam receptus sit qui alios multos ordinavit, de quorum receptione nichil expressum fuit, an debeant et ipsi tolerari. Sane dici potest quod ipso in honore confirmato, nisi aliud aliquid aduersos eos probetur, et ipsi subsistent’ (*ibid.*, pt. 7, ch. 77, p. 196, ll.1–5).

96 Kuttner (1937), p. 197, and esp. Landau’s *Introduction* to the *Summa ‘Omnis qui iuste iudicat’ sive Lipsiensis*, Weigand, Landau and Kozur (eds., 2007), tom. 1, ix–x.

97 *Supra*, this chapter, note 43.

the relationship between the person tolerated and the office held, thereby fully distinguishing toleration in office from moral approbation of the office holder.<sup>98</sup>

By the close of the twelfth century, the idea of toleration had a sufficiently clear shape. Moving forward a few years but remaining in France, the Apparatus *Ecce vicit Leo* (probably composed in the first decade of the thirteenth century)<sup>99</sup> fully distinguishes *ordo* from *iurisdictio*, and clearly explains the jurisdictional consequences of the toleration principle:<sup>100</sup>

This is the first question, whether a cleric may bind someone with a sentence of excommunication. A distinction should be made between the heretic who follows a new heresy and the one who follows an already condemned one. A new heresy is that which has not yet been condemned by the church; an old heresy is that which has already been condemned. If [he follows] a new heresy he may excommunicate and he is to be tolerated within the church (*in ecclesia tolerandus est*), for a prelate must always be tolerated within the church until a sentence is brought against him. If however he follows an already condemned heresy he is excommunicated *ipso iure* together with those who follow it. Being excommunicated he may not excommunicate another, but he may consecrate the sacraments of the church, so long as he follows the church's requirements (*forma ecclesie*). Hence he consecrates the eucharist and confers baptism, but he may not excommunicate. And this is the reason of the difference: sacraments are administered because of *ordo* (*ratione ordinis*) and not of *iurisdictio*.

98 *Summa Lipsiensis*, ad C.3, q.7, p.c.2, § *Item in euangelio – probatur*: ‘Indignus est de merito uite, licet coletur ab ecclesia, idest quamdiu non est dampnatus ex officio suo.’ *ibid.*, § *despicitur*: ‘idest digna inspectione de solito. Ita enim solet fieri, licet hoc fieri non debeat quamdiu toleratur ab ecclesia, ut xv q. ult. c. ult. [C.15, q.8, c.5], supra xviii. d. Consulendum [D.28, c.17].’ (*Summa ‘Omnis qui iuste iudicat’ sive Lipsiensis*, Weigand, Landau and Kozur [eds., 2012], tom. 2, pp. 208–209, ll.1–3 and 3–5 respectively.

99 Kuttner (1937), p. 62. Cf. Schulte (1870), vol. 3, pp. 39–43 [59–63].

100 Apparatus *Ecce vicit Leo*, ad C.24, q.1, c.1, § *Quod autem* (St. Florian, XI.605, fol. 93rb, transcription in Lenherr (1987), p. 322, ll.1–15; punctuation as in the original): ‘Hec est prima questio, utrum clericus scilicet aliquem possit ligare sententia excommunicationis. Distinguitur ergo de heretico qui aut sequitur heresim nouam aut iam dampnatam. Noua heresis dicitur que non ab ecclesia est dampnata, antiqua que olim est dampnata. Si heresim nouam, potest excommunicare et in ecclesia tolerandus est, arg(umentum) *infra* e(adem) q. Achatius (C.24, c.1 c.3). Quod semper prelatus in ecclesia est tolerandus usque ad sententiam contra se latam, arg. supra viii q. iii Nonne (C.8, q.4, c.1). Si autem sequitur heresim iam dampnatam, ipso iure de suis sequentibus est excommunicatus, ut *infra* e(adem) q(uaestio) c. i et ii (C.24, q.1, c.1–2), unde cum sit excommunicatus, alium excommunicare non potest, ut *infra* e(adem) q(uaestio) Audiuimus (C.24, q.1, c.34?, *De cons.* Dist.1 c.30?) *infra* de cons. di. iiii Non in uobis (*De cons.* D.4, c.43), non tamen potest excommunicare. Et hec ratio differentie: Sacramenta dantur ratione ordinis non iurisdictionis.’

While *iurisdictio* (normally) presupposes *ordo*, it may not be validly exercised unless within the Church. The status of belonging to the Church, however, is not ethical but juridical. It follows that the concept of toleration is not an exercise of forbearance or an act of mercy, but a legal necessity (*in ecclesia tolerandus est*). The wicked prelate who is not yet expelled from the Church, therefore, retains full possession of his office and has the right to fully exercise his jurisdictional prerogatives. Once cast away from the Church, however, he may no longer discharge his office, and loses any jurisdictional power associated with it. The concept of toleration therefore postulates a clear distinction between *ordo* and *iurisdictio*. *Iurisdictio* is not (or no longer) just the exercise of the ministry received in the *ordo*:<sup>101</sup> its exercise requires both the valid conferment of *ordo* and the enduring belonging to the Church. The Apparatus *Ecce vicit Leo* states clearly that excommunication is a jurisdictional prerogative, and therefore toleration in office entails the power to excommunicate validly. At the same time, however, the same Apparatus bases the distinction between toleration and rejection entirely on the kind of heresy, not also on the condition of the heretic. All followers of a new heresy are to be tolerated, even if they profess it openly. By contrast, someone who secretly adheres to an already condemned heresy cannot be tolerated, even if he is widely believed to be orthodox. This division was not new: it was one of the first interpretations of the (rather unclear) position of Gratian on the subject,<sup>102</sup> which triggered debates as early as in the mid of the twelfth century.<sup>103</sup>

Dividing heretics according to whether their belief was already condemned by the Church or not could make perfect sense for other purposes, but not to clearly define the scope of toleration. For it required to invalidate all the jurisdictional acts already performed by the occult heretic when his heresy was ascertained. Narrowing the effects of toleration only to new heresies thus implicitly required to declare retrospectively void what was commonly believed to be valid. In all likelihood, many of the early decretists who refused to tolerate the person who secretly adhered to an already condemned heresy did not see the issue. The problem became progressively clearer to many canon lawyers when they started to study Roman law more carefully. It is then that the *lex Barbarius* began to play an important role on the concept of toleration, and precisely in connection with the distinction between heretics already excommunicated and heretics that should be excommunicated. This also means that canon lawyers mainly discussed the *lex Barbarius*, not in its natural *sedes materiae* (the list of impediments to render a judgment found in Gratian's dictum *Tria*, C.3, q.7,

101 See esp. Villemin (2003), p. 83.

102 *Supra*, this chapter, note 16.

103 Cf. the *Fragmentum Cantabrigensis*, *supra*, this chapter, note 48.

p.c.1), but rather in connection with the jurisdictional powers of the heretic, and so in the second *causa hereticorum* (C.24), especially its first *quaestio*.

One of the first cases where the *lex Barbarius* is used in connection with the jurisdictional powers of the heretic may be found in the *Continuatio prima* of Huguccio's *Summa* (the *Summa Casinensis*, possibly written in 1185–1186).<sup>104</sup> Its author (now considered a student of Bazianus)<sup>105</sup> reports approvingly of the position of Huguccio (and, by then, of many other decretists): the heretic who follows a new heresy not yet condemned by the Church is tolerated in office, and so retains his jurisdictional prerogatives despite his personal wickedness.<sup>106</sup> Then he looks at the validity of the acts of such an occult heretic, and concludes for their enduring validity even after his heresy is found out. To that end he relies on the *lex Barbarius* (and, interestingly, not on *Tria*). The acts of the occult heretic (and so, the heretic believed orthodox) are valid just like the acts of the slave believed free: in both cases they remain valid even after their author is removed from office.<sup>107</sup>

A more complex case involving the *lex Barbarius* may be found in the French *Summa Tractatus Magister* (probably from the years 1182–1185).<sup>108</sup> In this

104 Gillmann (1912), p. 367. See also Prosdocimi (1955) p. 367. Prosdocimi however attributed its authorship to Huguccio himself, *ibid.*, pp. 364–374, with further literature on the earlier debate surrounding the *Continuatio prima*. On the subject see now the careful analysis of Müller (1994), pp. 87–108 (specifically on its dating see pp. 92–94). Müller also found evidence to argue that what we call *Continuatio* was initially a much longer work: *ibid.*, p. 90, text and note 121.

105 Müller and Pennington (2008), pp. 153–154, text and notes 167–168, and esp. Müller (1994), pp. 100–108.

106 *Continuatio Prima* of Huguccio's *Summa*, ad C.24 pr (Montecassino 396, fols. 156vb–157ra, transcription in Lenherr [1987], pp. 289–290, ll.7–15): '... Hanc questionem Magister competenter determinat dicens, quod prelatu hereticus aut dampnatam sequitur heresim aut nouam confingit. Si iam dampnatam sequitur, quia ipso iure excommunicatus est, ut dicunt quidam, nec oportet, ut specialiter notetur per sententiam, non potest soluere uel ligare: si uero confingit nouam, quamdiu toleratur ab ecclesia, sententia in subditos sue iurisdictionis lata ligat et absoluit. Et hanc distinctionem nititur probare Gratianus. Quamdiu ergo toleratur, excommunicare potest, non tamen de merito uite.'

107 *Continuatio Prima* of Huguccio's *Summa*, ad C.24, q.1, c.35, § *Remouendum* (Montecassino 396, fol. 161rb, transcription in Lenherr [1987], p. 293, ll.9–15; cf. *ibid.*, p. 229): '... Dicas ergo remouendum, idest remotum, fecit enim aliquid propter quod remotus est, et hec expositio habetur ex sequenti cap., quia ex quo publice in dampnatam heresim incidit, non potest aliquem excommunicare, quia incidit in primum et secundum canonem huius cause (C.24, q.1, c.1–2). Set si publice non incidit, quamdiu toleratur ab ecclesia, ea que ab eo fiunt rata sunt, licet postmodum eius heresis cognoscatur, sicut de Barbario Philippo (Dig.1.14.3).'

108 Kuttner (1937), pp. 184–187.

*Summa* the concept of toleration was already briefly mentioned with regard to the *iudex criminis* in C.3, q.7,<sup>109</sup> but here the *Summa* did not look at the case of the slave who sits in judgment, and so it did not refer to the *Barbarius* case. On the contrary, the *lex Barbarius* is expressly mentioned when discussing the jurisdictional powers of the heretic (C.24, q.1). There, the *Summa* moves from the assumption that the heretic who lawfully received the power of *ordo* also retains that of *iurisdictio* so long as he is tolerated by the Church.<sup>110</sup> Although the *Summa* does not state expressly as much, it seems to imply that the validity of the acts done while the heretic is tolerated in office is not to be questioned after his excommunication. And here we find the most interesting part of the *Summa*'s reasoning on the subject. What happens in the case where a sentence of excommunication is brought on the anonymous author of a crime? This is a quintessential case of occult excommunication: no one knows of the excommunication but for the excommunicate himself. Until he is found out as the perpetrator of the crime that warranted a sentence of excommunication, it is impossible to prevent him from exercising his jurisdictional prerogatives. But are his acts valid? The author of the *Summa* does answer, but reports how both positive and negative solutions were already advanced among canonists. He does so when commenting on the words 'the excommunicated may not excommunicate':<sup>111</sup>

Hence some argue that in case of excommunication levied in general for some crime, if one excommunicates someone else between the time of the first excommunication and the moment in which he was found out as the author of that crime, the excommunication that he issued is invalid; others say the opposite [relying on] *Barbarius Philippus*.

109 *Supra*, this chapter, note 30.

110 *Summa Tractatus Magister*, ad C.24, q.1, § *Quod autem* (BNE, Lat. 15994, fol. 71va–b, transcription in Lenherr [1987], p. 305, ll.1–8): 'Hereticus ordinatus ab eo qui non habuerit potestatem ordinandi uel ab eo qui habuerit preter formam ecclesie neminem potest ligare uel soluere. Ordinatus autem ab eo qui habuerit potestatem et in forma ecclesie, quamdiu toleratur ab ecclesia, potest, viii Q.iiii Nonne (C.8, q.4, c.1), postquam precisus est, non potest, infra e(adem) q(uaestio) Audiuius (C.24, q.1, c.4) nec etiam hereticum. Alia siquidem ratio est in sacramentis, in quibus non amittit potestatem ministrandi, i q.i Quod quidam (C.1, q.1, c.97), alia in sententiis, cum iam amiserit potestatem presidendi, xv q.v Iuratos (C.15, q.6, c.5).'

111 *Summa Tractatus Magister*, ad C.24, q.1, c.4, § *Excon(municatus) excon(municare) non po(tuit)* (BNE, Lat. 15994, fol. 71vb, transcription in Lenherr [1987], p. 305, ll.1–5): 'Hinc arguunt quidam, quod excommunicatione facta etiam in generali pro aliquo crimine, si quis interim excommunicauerit aliquem et postea detectus fuerit reus criminis illius, non teneat eius excommunicatio, alii contra, de Bar(bario) Phi(lippo) (Dig.1.14.3).'



The passage is interesting because it shows that the *lex Barbarius* was already used by canon lawyers in the early 1180s to argue in favour of the validity of the jurisdictional acts of heretics who were no longer tolerated within the Church. More than that: it was used to widen the scope of the toleration principle, so as to argue for the enduring validity of jurisdictional acts in particularly ambiguous situations. It is perhaps not fortuitous that the *Summa* belongs to the French milieu, for we have already seen how the concept of toleration was used, broadly speaking, more openly and in a more technical sense in France than in the Bolognese school. The fact that the toleration principle was already acquiring specific legal features seems to be attested by its absence from the passage above. Immediately before that passage, the author of the *Summa Tractaturus Magister* dealt with the toleration of the heretic who was not yet excommunicated. In our passage he did not wonder whether the heretic secretly excommunicated should be tolerated, for he had already given a general answer beforehand. Instead, he asked whether the acts of such a heretic should be held as valid although he was not to be tolerated in his office. It is precisely because this *Summa* understood the concept of toleration in a ‘technical’ sense (and not just as simple forbearance) that it did not use the term in this context: understood in a jurisdictional meaning, toleration entails full validity of the deeds.

A few years later, the *lex Barbarius* is used in the *Apparatus Ius naturale* to answer a different but equally interesting question. The *Apparatus* (written between the end of the twelfth and the beginning of the thirteenth century)<sup>112</sup> is attributed to Alanus Anglicus.<sup>113</sup> If that were effectively the case it would be interesting for our purposes, for Alanus had considerable influence on Innocent IV. Glossing on the all-important *dictum* of Gratian in C.24, q.1, p.c.39 (on the excommunication by the excommunicate), the *Apparatus* states that the heretic who suffered a major sentence of excommunication<sup>114</sup> would lose any *iurisdictio*.

112 Weigand (1963), p. 181, note 8. Kuttner had previously dated it slightly more broadly: Kuttner (1937), pp. 67–75.

113 Gaudemet (1993), p. 140.

114 The distinction between *minor* and *maior excommunicatio* is increasingly attested from the close of the twelfth century. For a short but clear analysis see Vodola (1986), p. 36. The ‘proper’ excommunication, entailing full separation from the Church – and so, from the whole of Christian society – was the *maior* one, whereas the *minor excommunicatio* consisted in the exclusion from the perception of the sacraments (but not from their consecration: see clearly Innocent IV, *ad X.5.8.1*, § *Irritas* [*Commentaria Innocentii Quarti Pont. Maximi Super Libros Quinque Decretalium*, Francofurti ad Moenum, 1570; anastatic reprint, Frankfurt am Main: Minerva, 1968, *fol.* 508va, n. 4]), and this is why it is often called *suspensio*. For a synthetic and lucid analysis of the difference between *maior* and *minor* excommunication see the Ordinary Gloss to the *Liber Extra*, Gloss *ad X.5.39.59* (*Decretalium domini pape Gregorij noni compilatio*) (Basileae [Johann

It follows that the sentence issued by this excommunicate has no effect. But then the author of the Apparatus asks whether a Catholic judge may ratify such a sentence, and he answers in the affirmative. In doing so, he relies on some passages of the *Decretum* inspired by mercy<sup>115</sup> or common good,<sup>116</sup> and especially on Gratian's *Tria* (C.3, q. 7, p.c.1). Right after this last passage, the Apparatus also cites the *lex Barbarius*. The reference is slightly more complex than it would appear at first sight. We have seen how in Gratian's *dictum Tria* the slave sitting in judgment exercised only delegated jurisdiction. But the Apparatus seems to go beyond that, for all the other passages it quotes would clearly presuppose ordinary jurisdiction.<sup>117</sup>

At the beginning of the thirteenth century, two authors use the *lex Barbarius* in connection with the excommunication issued by the heretic. They move from radically opposite premises but make a similar (and equally refined) use of the Roman source. They are Laurentius Hispanus (d.1248) and the anonymous author of the *Summa Animal est Substantia*.

Laurentius Hispanus' *Glossa Palatina* (composed in the years 1210–1214),<sup>118</sup> in a somewhat generous interpretation of the Third Lateran Council, moves from the assumption that any heretic is already condemned – not just when he suffers a sentence of excommunication or openly follows a doctrine that is already condemned by the Church, but also when his heresy is secret or his belief

Froben & Amerbach], 1500), § *Si quem, s.u.* 'Non tantum minori': '... cum dico excommunico illum: de maiori intelligitur. Minor enim excommunicatio remouet a communione sacramentorum ... maior excommunicatio a corpore christi quod est ecclesia, scilicet communione fidelium ... Est ergo maior excommunicatio a qualibet licita communione et legitimo actu separatio: vnde et Adam excommunicatus fuit ex esu ligni ...' Cf. also *ibid.*, ad X.2.1.10, § *Cum non ab homine, s.u.* 'Excommunicari'.

115 C.24, q.1, c.38.

116 C.3, q.6, c.10 and C.24, q.1, c.39.

117 *Apparatus Ius Naturale*, ad C.24, q.1, p.c.39, § *Set illud* (Paris Maz. 1318, fols. 297vb–298ra, transcription in Lenherr [1987], pp. 317–318, ll.1–11): 'Bene soluit Gratianus, generaliter enim est tenendum, quod apud hereticos uel alia ratione ab ecclesia per maiorem excommunicationem separatos non est aliqua iurisdictio, nec ecclesiastica, ut supra Miramur, Aperte [C.24, q.1, c.37, 36], nec ciuilis, ut xv q.vi Iuratos, Nos sanctorum [C.15, q.6, c.5, 4]. Vnde si talis aliquis sententiam aliquam protulit, siue diffinitiuam siue excommunicationis siue pereceptionis, ipso iure non tenet, nec est tenenda, ut hic, siue in causa ciuili siue in criminali siue spirituali sumptam. Set sententiam, quam ipse tulit, potest iudex catholicus cuius interest ratihabitare, firmare et perinde erit ac, si ab ipso promulgata esset, arg(umentum) supra e(adem) q(uestio) Quisquis, Subdiaconus [C.24, q.1, c.38–39], iii q. vi Hec quippe [C.3, q.6, c.10] et q. vii § *Tria* [C.3, q. 7, p.c.1], De Barbario Philippo [Dig.1.14.3].'

118 Kuttner (1937), pp. 81–92; Stickler (1966), pp. 543–545.

has not yet been condemned as heretical.<sup>119</sup> It follows that, when such a heretic excommunicates someone, his sentence is void.<sup>120</sup>

Laurentius, an excellent lawyer, clearly realised that his statement led to a difficult problem: if the heretic is occult, by definition his heresy is not known. As such, the heretic still has the full exercise of his jurisdictional powers. *De iure* such powers are invalid and their exercise void. But *de facto* they continue to produce their full effects. If such an occult heretic excommunicates a priest, therefore, the sentence is *de iure* void, but it is advisable for the latter to celebrate mass secretly, lest he would aggravate his position.<sup>121</sup> Although in truth void, the sentence of excommunication is widely believed to be valid. Seeking absolution is therefore not necessary, only strongly advisable. This way, the position of the *Glossa Palatina* closely reminds of Rufinus on the point.<sup>122</sup> Just like Rufinus, Laurentius Hispanus' *Glossa Palatina* shows little sympathy for the toleration principle. Unlike Rufinus, however, Laurentius Hispanus does not avoid speaking of toleration. Rather, he seems to use it in a non-technical way to deliberately emasculate its legal strength.

- 119 *Glossa Palatina*, ad C.24, q.1 pr, § *Quod autem ab heretico* (Pal. Lat. 658, fol. 70rb, transcription in Lenherr [1987], pp. 318–319, ll.1–9): ‘In hac questione dicunt quidam quod, si hereticum alium excommunicat hereticus, ualet, *infra* c. Quisquis (C.24, q.1, c.38). Set qualiter illud capitulum intelligatur, dicit § sequente illud c(apitulum) (C.24, q.1, c.39). Alii cum Gratiano distinguunt, an ueterem heresim iam dampnatam sequatur, et tunc non ualet, an nouam configat, et tunc potest, arg(umentum) *infra* e(adem quaestio) <c.> Achatus [C.24, q.1, c.3] et *infra* e(adem quaestio) § Si autem in prin(cipio) (C.24, q.1, p.c.4), quia adhuc tolleratur ab ecclesia. Set tu dic indistincte, quod siue ueterem siue nouam sequatur, excommunicatus est, licet sit occultus, et ideo alium non potest excommunicare, extra. de hereticis, <c.> Ad abolendam [1 Comp. 5.6.11(=X.5.7.9)].’ Writing several decades later, Guido de Baysio (c.1250–1313) considered Laurentius Hispanus as the strongest (‘maxime’) opponent of the distinction between occult and notorious heretics, ‘qui scripsit quod non credit Gratiano dicenti, quod ex quo incipit praedicare haeresim, ex tunc non potest excommunicare’, Baysio, *Rosarium super Decreto*, ad C.24, q.1, c.35, § *Ait* (Venetiis [Herbort] 1481, fol. 321r).
- 120 *Glossa Palatina*, ad C.24, q.1 pr, § *Qui uero heresim iam dampnatam* (Pal. Lat. 658, fol. 70rb, transcription in Lenherr [1987], p. 319, ll.12–15): ‘Hec distinctio [scil., between old and new heresies] hodie locum non habet, nam omnis heresis est dampnata et omnis hereticus excommunicatus, quantumcumque sit occultus, et ideo non potest alios excommunicare.’
- 121 *Ibid.*, § *Qui uero heresim iam dampnatam* (transcription *ibid.*, ll.15–19): ‘Vnde si scirem prelatum meum esse hereticum, quia nouam [scil., heresim] fingit, nec tamen predicaret, si me excommunicaret, celebrarem in occulto, set non in aperto, quia cum non possem probare eum esse hereticum et ita nec me excommunicatum deponeret.’
- 122 *Supra*, this chapter, note 82.

As we have just seen, the *Summa Tractatus Magister* avoided speaking of toleration with regard to the excommunication levied by the occult excommunicate, because it did not consider it as falling within the scope of the toleration principle.<sup>123</sup> The *Glossa Palatina* shows a similarly clear understanding of the relationship between the jurisdictional side of the toleration principle and the holding of an ecclesiastical office. Indeed, it clearly states that the sentence of excommunication is void, and yet it is to be tolerated as long as the person who issued it is himself tolerated in office.<sup>124</sup> But if tolerating a void sentence simply means postponing the acknowledgement of its legal invalidity, then the same should also apply to the toleration of the office holder who issued it. Laurentius Hispanus said clearly that the occult heretic is excommunicated, and that no excommunicate may validly exercise any jurisdiction. Just as with the sentence, tolerating the heretic in office therefore only amounts to postponing the acknowledgement of his lack of jurisdiction. As such, in the *Glossa Palatina* the legal effects of toleration are very different from those described by most decretists that we have so far encountered. Tolerating the sentence rendered by the occult heretic does not mean accepting its legal validity, only postponing its invalidity. While the *Glossa Palatina* does not clarify how this should occur, it would seem that its author is not thinking of voidability, but of *ipso iure* voidness – only, postponed invalidity. When stating that the void sentence must be tolerated (in the comment on C.24, q.1 pr), Laurentius Hispanus’ *Glossa Palatina* refers twice to Gratian’s dictum *Tria*, and so to the slave who sits in judgment.<sup>125</sup> This reference is to be read together with Laurentius Hispanus’ *Apparatus* to the *Compilatio Tertia* (roughly contemporary with the *Palatina*).<sup>126</sup> There, he observes that ‘sometimes the opinion of the collectivity [*universitas*] is to be followed more than truth itself’, and then he refers again to *Tria*, this time also adding a reference to the *lex Barbarius*.<sup>127</sup> Laurentius Hispanus wrote this last

123 *Supra*, this chapter, note 111.

124 *Glossa Palatina*, ad C.24, q.1 pr, § *Quod autem ab heretico* (Pal. Lat. 658, fol. 70rb, transcription in Lenherr [1987], p. 319, ll.9–12): ‘Alia tamen que agit tenent, dum tolleratur, arg. l.ii q.vii § *Tria* (C.3, q.7, p.c.1). Set et sententia excommunicationis quam tulit toleranda est, dum ipse est occultus, licet sit nulla, arg(umentum) predicti § (C.3, q.7, p.c.1) et extra, de iure patronatus, <c.> Consultationibus [1 Comp. 3.33.23(=X.3.38.19)]; *ibid.*, § *Qui uero heresim iam dampnatam* (transcription *ibid.*, ll.19–20): ‘Set quid de alia sententia? Idem, quia nulla est, etsi quam tulit, set tamen tolerabitur postea, arg(umentum) l.iii q.vii § *Tria* (C.3, q.7, p.c.1).’

125 *Supra*, last note.

126 McManus (1991), pp. 46–47.

127 Laurentius Hispanus, ad 3 Comp., 1.14.1(=X.1.21.4), § *opinionis sit ueritas preferenda* (transcription in McManus (1991), pp. 300–301, ll.11–13): ‘... Quandoque enim opinio uniuersitatis plus attenditur quam ipsa ueritas, supra l.iii q. vii § *Tria* (C.3, q.7, p.c.1); ff. de offic(io) pret(orum) <l.> Barbarius (Dig.1.14.3).’

statement on truth and opinion when commenting on a passage taken from Innocent III's decretal 'Nuper a Nobis' (1199), on the problem of the validity of the second marriage contracted in the mistaken but (under certain circumstances) justifiable assumption that the first spouse was deceased. In the decretal, Innocent III stated that the person who remarried believing in good faith to be widowed should not be considered as bigamous, for sometimes 'the opinion is to be preferred to the truth'.<sup>128</sup> The reference to the *universitas* in Laurentius Hispanus' *Apparatus* was therefore not in the original source (Innocent III's decretal)<sup>129</sup> but in the *lex Barbarius*, which he cited to explain the decretal. Referring to the collective but mistaken opinion was the only way for Laurentius Hispanus to avoid a logical impasse: the sentence issued by the occult excommunicate is void from the very beginning, and yet it is tolerated as if it were valid so long as the heresy is not found out. Until then, the collectivity continues to believe him as orthodox, and so his jurisdictional acts are also believed to be valid. Both the exercise of his office and the validity of his acts therefore depend on the perception of validity – which, however, does not make them valid. Perhaps this idea of perception of validity helps to better appreciate the meaning of toleration in Laurentius Hispanus, a concept lying midway between voidability and postponed (or rather, suspended) voidness.

As anticipated, the French *Summa Animal est Substantia* (*Summa Bambergensis*, probably written in 1206–1210)<sup>130</sup> moves from the opposite position. Unlike the *Glossa Palatina*, it fully accepts the distinction between old and new heresies, and maintains that the priest who has fallen in with a new heresy retains full jurisdictional powers so long as he is not judicially excommunicated, because until then he is tolerated by the Church.<sup>131</sup> His toleration entails the full validity

128 'Opinioni sit veritas praeferenda', 3 Comp., 1.14.1 (=X.1.21.4).

129 The idea that *opinio* might have more weight than *veritas* was hardly new, and is sometimes (though not often) also found in the *Decretum*, especially in C.22, q.2, c.4. Honorius for instance relied on this passage when commenting on C.3, q.7, p.c.1, and concluded that in *Barbarius*' case the opinion prevailed over the truth. *Summa de Iure Canonico Tractatus*, ad C.3, q.7, p.c.1, § *Verum si serius* (Weigand, Landau and Kozur [eds., 2010], tom. 2, p. 84, ll.3–5): 'Hinc arg. opinionem ut ueritatem ualere. Item ff. de officio pretorum l. *Barbarius* (Dig.1.14.3). Quandoque plus ualet opinio, ut arg. xxii q.ii Omnis qui mentitur (C.22, q.2, c.4).' Cf. *Id.*, ad C.22, q.2, c.4, § *melior est* (*ibid.*, p. 344, ll.5–6): 'Hinc arg. plus esse quod est in opinione quam quod in ueritate.' But Honorius saw no connection between this case and the problem of heresy. On the contrary, as we have seen, he considered the sentence of excommunication by the heretic not yet excommunicated as fully valid.

130 Stickler (1971), pp. 73–75; Kuttner (1937), p. 207.

131 *Summa Animal est Substantia*, ad C.24, q.1, c.39, § *Degradatus* (Liège 127.E, fol. 216va, transcription in Lenherr [1987], pp. 327–328, ll.15–19): 'contra. supra

of his acts, which will remain valid even after his excommunication. At this point, however, the author of the *Summa* wonders what would happen in a case where a bishop was not truly tolerated, but only appeared to be. This might happen, for instance, if he was already excommunicated, but only secretly – i. e. not publicly. The problem, in other words, was whether the solution for the occult heretic who is not yet excommunicated should apply also to the heretic occultly excommunicated. In principle, the difference between the two cases is obvious: if a heretic is excommunicated, he is already deprived of his jurisdictional powers. Nonetheless, since the excommunication is not public, he would appear to retain his office. Should his jurisdictional acts be considered valid all the same? The *Summa* goes further, and asks what happens in the case of a false bishop. The analogy is clear. Unlike the powers of *ordo*, the powers pertaining to *iurisdictio* flow only if (and so long as) the prelate remains within the Church. It follows that the bishop cast away from the Church has the same jurisdictional power as one who is no bishop at all – none. The problem therefore is to draw a line between the validity and invalidity of jurisdictional acts when reality and appearance diverge. To do so, the *Summa* openly relies on the *lex Barbarius*:<sup>132</sup>

ea. q. Audiuius (C.24, q.1, c.4), ubi dicitur, quod excommunicatus excommunicare non potest. Solutio: Augustinus approbavit, non quia ualet, set in odium instius. Vel intelligatur de istis qui adhuc tollerantur ab ecclesia, quia sententia talium ualet, viii q. iiii Nonne (C.8, q.4, c.1).’ The text of this passage should be read in conjunction with two others: *ad* C.24, q.1 pr, § *Quod autem* (‘Si autem incidit in nouam, cum non sit precisus, quamdiu tolleratur ab ecclesia, potest excommunicare et cetera facere, *infra* ea q. Achatius [C.24, q.1, c.3], nec debemus ante sententiam eum uitare, viii q. i Nonne [C.8, q.4, c.1] et haberi pro prelato’, and *ad* C.1, q.1, c.39, § *Foris* (‘quia, cum hereticus sit excommunicatus ipso iure, excommunicare non potest, xxiii q. i Audiuius [C.24, q.1, c.4], contra xxiii q. i Quisquis et Subdiaconus [C.24, q.1, c.38–39], ubi uidetur, quod teneat sententia excommunicationis lata per hereticum. Set quod ibi dicitur non fit per momentum sententiae, set in odium criminis. Vel aliter: illa sententia lata fuit a schismaticis qui adhuc tolerantur ab ecclesia et ideo tenuit’), transcription *ibid.*, p. 325, ll.18–21, and p. 324, ll.1–6 respectively.

- 132 *Summa Animal est Substantia*, *ad* C.24, q.1, c.4, § *Absoluendo* (Liège 127.E, fol. 212va, transcription in Lenherr [1987], p. 326, ll.1–17, punctuation as in the original). The case in the *Decretum* was that of someone excommunicated by an archbishop who was himself (publicly) excommunicated. The passage in the *Summa* opens by making it clear that the absolution from the excommunication issued by the excommunicate was valid only *de facto*, since *de iure* there was no need of it: ‘de facto, similiter xi q. iiii Excellentissimus [C.11, q.3, c.102] et extra. de ap(ellationibus), *Ad presentiam* [1 Comp. 2.20.22(=X.2.28.16)]. The part translated (somewhat loosely) in the main text follows immediately thereafter. The logical connection is clear: if the excommunication inflicted by the publicly excommunicated archbishop warranted only a *de facto* absolution, what would happen if the high prelate was secretly excommunicated? The text reads: ‘Set queritur: Aliquis episcopus excommunicatus occulte excommunicat aliquem,

A bishop occultly excommunicated excommunicates someone else. Should we avoid the person who is excommunicated this way? We should not do so, for the bishop, being himself excommunicated, could not excommunicate him. It follows that we must not avoid such a person. On the other hand, the church approves of whatever the bishop did, so it appears that such a person was indeed excommunicated through the church's approbation (*per approbationem ecclesiae*). It follows that he must be avoided, on the basis of the *lex Barbarius Philippus*. While in truth the bishop's decisions were void, however they retained their validity because approved by the *res publica*. I say that that person was not excommunicated and yet we must avoid him, for we believe that he was indeed excommunicated. If we were to disregard the excommunication, we would commit a mortal sin. The same applies if one were to pose as bishop of this city when he was not, but we believed him to be such. If he were to excommunicate someone, we should avoid the person excommunicated. This is not because the person who received the sentence of excommunication was truly excommunicated: he was not, for the false bishop had no jurisdiction on him. Rather, it is because we believed that he had jurisdiction on us, and so we must avoid the person thus excommunicated, lest we would fall in mortal sin.

First of all, the difference between *toleratio* and *approbatio* should be noted. The *Summa* does not say that the true bishop who is secretly excommunicated is tolerated by the Church, but that the Church somewhat approves of his deeds. At first sight, *approbatio* would seem stronger than *toleratio*: not merely tolerating something, but approving of it. However, it should be noted that the object of the approbation is not the person but the deeds (and, even so, only to a limited extent). The passage does not speak of toleration for two reasons. First, in relation to the exercise of jurisdictional powers, tolerating always refers to the person, not just to his deeds. It is only because the person is tolerated in office that the deeds are valid. The concept of toleration is absent because in the *Summa Animal est Substantia* its boundaries are set by the presence or absence of excommunication.<sup>133</sup> Once excommunicated (whether publicly or secretly), a prelate is no

debemusne eum uitare quem excommunicauit? Videtur quod non, quia ipse non potuit eum excommunicare, cum esset excommunicatus, ergo non debemus eum uitare. Set contra. ecclesia approbat quicquid fit ab eo nec citat (?) in eius persona licet in accusationibus earum, ergo uidetur quod iste sit excommunicatus per approbationem ecclesie et quod debeat uitari, arg. le. De Barbario Philippo, ff. de officio pretoris l. Barbarius Phil(ippus) (Dig.1.14.3), quia in rei ueritate nulle eius erant sententie et tamen, quia res publica approbavit, ualuerunt. Dico quod iste non est excommunicatus et tamen eum debemus uitare, quia credimus eum excommunicatum esse. Aliter, si contempneremus, peccaremus mortaliter. Et hoc potest uideri, si aliquis modo simularet se esse episcopum istius uille et tamen non esset, set crederemus, si excommunicaret aliquem, deberemus eum uitare et tamen non esset excommunicatus, quia ille non erat iudex suus, set hoc, ne peccaremus mortaliter, eum credamus esse nostrum iudicem.'

133 *Supra*, this paragraph, note 131.

longer tolerated in office. The validity of the deeds therefore does not flow from the exercise of office, but only from the volition of the Church. Speaking of approbation of the deeds therefore allows separation of the act from its source. The second reason the passage above does not speak of toleration is that toleration entails the full validity of the acts done by the person tolerated in office. From a legal standpoint, the excommunication brought about by the secretly excommunicated is void. This requires to interpret the concept of *approbatio ecclesiae* in a rather narrow sense. The Church's approbation of the excommunication is not referred to the person excommunicated, but only to the community of the faithful. They should behave as if the person were truly excommunicated, when he is not. The reason is simple: since they cannot know that the excommunication was void, if they ignored it they would commit a mortal sin. A justified belief in the validity of the sentence of excommunication requires compliance, irrespective of its actual validity. The sentence of excommunication produces effects, that are limited as to their scope (to use a slight anachronism, ultimately limited to the internal forum): the conscience of people who could not know that the bishop was no longer tolerated within the Church. This way, the *Summa* relies on the *lex Barbarius* but it does not apply it in full. In *Barbarius'* case, says the *Summa*, the approbation of the commonwealth bestowed full validity on something that in itself was void ('in rei ueritate nulle eius erant sententie et tamen, quia res publica approbavit, ualuerunt'). The validity of the deeds is not limited to the subjective sphere of their recipients (it would make little sense there), but is ascribed to the deeds themselves. By contrast, the *Summa* makes it perfectly clear that the jurisdictional act of the bishop secretly excommunicated would remain void in itself, so that it may not alter the status of its recipient ('Dico quod iste non est excommunicatus'). Ultimately, on the specific problem of the void excommunication that appears valid, the *Summa Animal est Substantia* comes to similar conclusions as *Rufinus*<sup>134</sup> – but through a very different and considerably more refined legal analysis.

#### 6.4 Johannes Teutonicus and the Ordinary Gloss on the *Decretum*

After this short overview of the concept of toleration among the early decretists, we should proceed to examine the position of the author of the standard Gloss to the *Decretum*, Johannes Teutonicus (d.1245). To better appreciate his thinking, we will look both at his Gloss on the *Decretum* and at his apparatus to the *Compilatio tertia*, and also occasionally to the *Compilatio quarta*. However, since

134 *Supra*, this paragraph, text and esp. note 82.



most of his remarks on toleration come from his glosses on the *Decretum*, it is important to mention (at the risk of saying the obvious) that Teutonicus' apparatus on the *Decretum* was re-elaborated by Bartholomaeus Brixiensis (d.1258). It was this new version (and not Teutonicus' own) that would become the Ordinary Gloss on the *Decretum*. When describing Teutonicus' position on the concept of toleration we will therefore seek to distinguish between his writings and Brixiensis' additions. Doing so is important to have a better idea as to the position of mainstream canonists before Innocent IV wrote his own extensive commentary on the Liber Extra.<sup>135</sup>

Examining Teutonicus' Gloss against Brixiensis' printed edition, it would appear that several cases in which the concept of toleration is invoked in general – and not with regard to a specific jurisdictional context – are not from Teutonicus.<sup>136</sup> While this does not mean that Teutonicus uses the same concept exclusively in a legal sense, the occasions where he employs it with a rather loose meaning are significantly less frequent.<sup>137</sup> More often it is possible to find references to toleration in Teutonicus with regard to occult sins (which are not

135 For Teutonicus' Gloss I relied on Pal. lat. 624, and for the printed Ordinary Gloss, on the Basel edition of 1512. Unless otherwise stated, all transcriptions follow Teutonicus' glosses in Pal. lat. 624. Because the accent in on Teutonicus, most differences between his work and the printed edition of the Gloss will be left to footnotes, unless strictly functional to the discussion of Teutonicus' own position.

136 Unlike Teutonicus, Brixiensis' Gloss uses the concept of toleration to avoid a greater evil (e. g. Gloss *ad C.23*, q.4, p.c.17, § *Hinc etiam*: 'Gratianus adhuc probat auctoritate Augus(tini) exponentis verba prophete: quod in his qui non sunt nostri iuris nequit disciplina exercei. Postea ponit alium casum in quo mali sunt tolerandi quam puniendi. s(cilicet) quando multitudo est in scelere et schisma timetur si corrigantur et ad hoc inducit sequens c. (C.23, q.4, c.18)', Basileae 1512, *fol. 272rb*; cp. Pal. Lat. 624, *fol. 196rb*), and more in general in (unspecified) cases of necessity (e. g. Gloss *ad C.1*, q.7, p.c.6, § *Necessaria*: 'Dicit hic quod propter necessitate quandoque rigor canonum relaxatur: vnde propter necessitatem ex monachis vel laicis clerici eliguntur et ordinati ab hereticis tolerantur', and *ad C.9*, q.1, c.5, § *Ordinationes*: 'hoc c. diuiditur in duas partes ... In secunda parte dicit quod illi qui receperunt ordinem a schismaticis quondam tamen catholicis episcopis ex misericordia in suis ordinibus tolerantur si boni sunt, propter necessitatem: sed cessante necessitate sacri canones proprium robur obtineant ...', Basileae 1512, *fols. 182va* and *126vb*; cp. Pal. Lat. 624, *fols. 90vb* and *133vb* respectively).

137 E. g. Teutonicus, *ad D.19*, c.8, § *Vel qualis* (*scil.*, 'A deo autem non queritur quis, vel qualis predicet'): 'hoc intellige de toleratis: alias bene queritur vt xlii di. quiescamus (D.42, c.2). Nam nemo potest predicare nisi mittatur ut xvi q. i <c.> adicimus (C.16, q.1, c.19), uel loquitur secundum antiqua tempora quando omnes poterant predicare. Jo.' (Pal. Lat. 624, *fol. 13va*; cf. Basileae 1512, *fol. 19ra*).

justiciable for lack of evidence),<sup>138</sup> in order to avoid scandal<sup>139</sup> or for both reasons,<sup>140</sup> and occasionally as an application of the *venire contra factum proprium* principle (i. e. to bar something that would contradict one's own previous conduct).<sup>141</sup>

- 138 E. g. Teutonicus, *ad C.23*, q.4, p.c.16, § *His ita respondetur*: ‘s(cilicet) auctoritatus quibus probauit malos esse tollerandos. Jo.’ (Pal. Lat. 624, fol. 196rb; cf. Basileae 1512, fol. 272ra). Brixiensis added other cases of toleration with reference to occult sins. See e.g. Gloss *ad C.2*, q.1, c.6, § *Unus ex vobis*: ‘hoc c. diuiditur in duas partes. In prima parte ponuntur verba domini ad discipulos, s(cilicet) vnus ex vobis me traditurus est. In secunda parte ponuntur verba augustini exponentis verba domini: quibus probat quod conuictus vel confessus condemnari debet: alioquin est tolerandus: et loquitur hoc c. de iuda et. c. superius scilicet nichil (C.2, q.1, c.4)’ (Basileae, 1512, fol. 129va; cp. Pal. lat. 624, fol. 93ra).
- 139 Teutonicus, *ad C.11* q.3, c.94, § *Obediebant*: ‘iul(ianus) [scil., Julian the Apostate] adhuc tolerabatur ab ecclesia ne suscitaret scandalum aduersus christianos. Jo.’ (Pal. lat. 624, fol. 147va; cf. Basileae 1512, fol. 200ra); *ad C.1*, q.1, c.40, § *Si qui a pseudo*: ‘non canonice electis toleratis tamen sic lxii di. c. i ar(gumentum) contra xii q. ii alienationes (C.12, q.2, c.37) et q. v c. ii contra (sic) (C.12, q.5, c.2). Solutio ibi propter scandalum in ecclesia ... hic in ecclesia propter scandlum cum occultum sit delictum in ecclesia cum intitulus est et no. in alia suscipitur uidetur hoc cum emit ordinem illud cum dignitatem uidetur beneficium. Jo.’ (Pal. Lat. 624, fol. 76rb; cf. Basileae 1512, fol. 108vb); See also *ad D.4*, c.6, § *Consuetudine* (Pal. lat. 624, fol. 2rb; Basileae 1512, fol. 4va); *ad D.51*, c.1 § *Remittenda* (Pal. lat. 624, fol. 41vb; Basileae 1512, § *Aliquantos*, fol. 57va). An indirect reference to toleration (in opposition to deposition) may also be found in Teutonicus’ apparatus on Lateran IV, ch. 3 (De haereticis), § *Excommunicamus ... Dampnati uero secularibus potestatibus ... relinquuntur*: ‘Alias licet sit clericus depositus pro crimine, adhuc ecclesia tuebitur ipsum, quia adhuc secundum regulam ecclesie uiuere debet, ut lxxi di. <c.> Dictum (D.81, c.8), nisi sit incorrigibilis, ut extra ii de iudic(iis) <c.> cum non ab homine [2 Comp. 2.1.3(=X.2.1.10)] ... Jo.’ (García y García ed. [1982], p. 188, ll.5–8).
- 140 E. g. Teutonicus, *ad C.23*, q.4, c.1, § *Vindicta*: ‘vindicta quandam infertur coelo ultionis: quandam infertur amore correctionis. Primo modo non est inferenda. et secundum hoc loquentur capitula que dicunt uindictae illationem prohibendam. Secundo modo licite infertur. Alii sic distinguunt crimum: quaedam sunt occulta quaedam manifesta. Super occultis non est inferenda nisi delinquens sociam habeat multitudinem: tunc enim propter scandalum tolerantur vt i(nfra) c. quidam et c. seq. et c. non potest (C.23, q.4, c.18, 19 and 32) ... Jo.’ (Pal. Lat. 624, fol. 194va; cf. Basileae 1512, fol. 270va).
- 141 In this last sense, Teutonicus referred to toleration mainly in two cases. The first is about elections: the same people who elected the unworthy with full knowledge of his condition, he says, must thereafter tolerate him. This is particularly clear in Teutonicus’ apparatus on the *Compilatio quarta*, *ad 4 Comp. 1.8.2(=X.1.14.12)*, § *reputare* (scil., ‘ad obtinendum beneficium ecclesiasticum eos debet ideoneos reputare’), *Apparatus Glossarum in Compilationem Quartam*, in *Antonii Augustini Archiepiscopi Tarraconensis Opera omnia ...*, vol. 4 (Lucae, 1769, typis Josephi Rocchii), pp. 622–623: ‘Nota, quod qui reputatus est dignus una dignitate, si

At first sight, Teutonicus' Gloss on Gratian's dictum *Tria* would suggest a rather broad notion of toleration. So long as tolerated by the Church, says Teutonicus, both the *criminosus* and the *infamis* prelate may pronounce a valid sentence. This however applies if the *infamia* is not brought about judicially. By extension, continues Teutonicus, the *infamis* appointed to an office may validly exercise it until deposed.<sup>142</sup> This idea of toleration seems based on the distinction between the office and the personal status of the office holder: the *criminosus*, says Teutonicus, may validly exercise his jurisdictional prerogatives not because of his personal worthiness (*ex vitae merito*) but rather because of the office he holds (*ex officio suo*).<sup>143</sup> Continuing to exercise his office aggravates his moral condition (for he commits a sin), but does not undermine the validity of the jurisdictional act.

postea eligitur ad alteram, tunc reputabitur dignus ... Item quid dices, si aliquis regularis, vel criminosus toleratus est in officio sacerdotali, numquid si talis eligitur in dignitatem, potest excipi contra illum ab illis, qui eum toleraverunt in officio sacerdotali? Videtur hic, quod non, quia qui eum reputaverunt dignum ordine, et beneficio reputabunt dignum ... Jo.' The second case refers to the legal capacity of the *criminosus* or the *infamis* to sue. In principle, an *infamis* could not accuse another *infamis*. But the bishop may not prohibit a *criminosus* or *infamis* from doing so, says Teutonicus, if he had so far tolerated him despite being aware of his condition. Teutonicus, *ad C.2, q.7, c.25, § Equalitas*: '... nec infamis infamem: nec criminosus criminosum accusat. vt vi q. i qui crimen (C.6, q.1, c.6) nisi prius eum tolerauit sciens eum talem ... Sed potest dici hoc esse speciale in episcopo ut non possit remouere ab accusatione sua illos quos prius tolerauit ... Jo.' (Pal. Lat. 624, fol. 104rb; cf. Basileae 1512, fol. 145vb).

142 Teutonicus, *ad C.3, q. 7, p.c.1, § Iudex*: 'hic quaer(itur) an criminosi uel infames possint esse iudices. Et quidem si non tolerantur ab ecclesia non possunt. Si tolerantur bene possunt, et tenet eorum sententia. Ipsi tamen peccant iudicando. Uel distingue an aliquis sit infamis per sententiam ut tunc non possit, an alis ut tunc possit, illud tamen certum est quod si infamia obiicitur alicui qui est electus in iudicem quod propter hoc remouetur, licet huc usque fuerit toleratus vt extra ii de rescript(is) <c.> sciscitatus [2 comp. 1.2.9(=X.1.3.13)] ex extra de exces(sis) pre(latorum) <c.> inter [3 Comp. 5.14.4(=X.5.31.11)] et ff. ad l. iul(iam) de ui priuata l. i (Dig.48.7.1pr). Criminosi ergo possunt iudicare ex officio suo, non ex uite merito. Jo.' (Pal. lat. 624, fol. 112rb; cf. Basileae 1512, § *Quod iudex, fols. 156vb–157ra*).

143 *Ibid.* Cf. *Summa Magistri Rolandi, ad C.3, q.7* (Thaner [ed., 1874], p. 18): 'Septimo loco quaeritur, an iudex esse possit, quem cum reo par inficit malitia. Ad haec: quorundam iudicum crimina sunt latentia, aliorum sunt manifesta. Quorum crimina sunt latentia, iudicare quidem possunt de officio, non tamen de vitae merito.' The same opposition between *officium* and *vita* may be found in Faventinus, but this author sought to avoid a sharp contrast by writing of *vita* and 'legal permission': 'si uite merito iurisque permissionem iudicare non potest, verum prohibetur tunc iudex esse aliorum.' (Johannes Faventinus, *ad C.3, q.7, § Quod uero iudex fieri non possit*, Madrid, BN 421, fol. 101vb).

So far, it would seem that Teutonicus follows a line of thought dating back to Paucapalea, and that, unlike decretists such as Rufinus and especially Laurentius Hispanus, he embraces a broad notion of toleration. The opposite is true. This may be seen already by comparing Teutonicus' Gloss with the printed edition. The Ordinary Gloss adds another gloss before the one we have just seen. Also this other gloss speaks of toleration, but instead of distinguishing between *officium* and *vita*, it contrasts *officium* with *ius*. This way, it seems to emphasise that the toleration principle depends on the exercise of an office, and this entails a derogation from general legal principles.<sup>144</sup> The difference between Teutonicus and the Ordinary Gloss might seem a detail, but it is a revealing one. Teutonicus avoids the juxtaposition of toleration and law on purpose: his scope of toleration was remarkably narrow. It is probably no coincidence that, in his gloss commented on above, Teutonicus seems to refer more to the *criminosus* than to the *infamis*. Tolerating the jurisdiction of the *criminosus* would create fewer difficulties. So, while he applies the concept of toleration to the *criminosus sacerdos* and acknowledges his jurisdiction,<sup>145</sup> Teutonicus appears considerably more reluctant to do as much with the *infamis*, especially in the most extreme cases (which, for our purposes, are the most interesting): the slave and the excommunicate. It is with regard to the jurisdiction of the heretic that Teutonicus sets the boundaries of the concept of toleration. But it is significant that, in so doing, he looks at the jurisdiction of the slave.

As mentioned, Teutonicus' approach to the toleration of the heretic is remarkably narrow. He makes full use of the distinction between *ordo* and *iurisdictionio*,<sup>146</sup> and applies the toleration principle to argue for the validity of the

144 Gloss, *ad* C.3, q.7, p.c.1, casus *ad* § *Quod iudex* (Basileae 1512, *fol.* 156vb): 'Hic intitulatur septima q(uaestio) q(uae) quaeritur an iudex esse possit qui pari delicto cum reo vel maiori inficitur: et quod non possit iudicare multis auctoritatibus probatur. Consuevit tamen dici quod donec iudex toleratur quod iudicare potest ex officio suo sed non de iure merito vt in e(o) § vl(timo) (C.3, q.7, p.c.1).'

145 Teutonicus, *ad* C.24, q.1, p.c.37, § *Gladio*: 'nihilominus tamen remanet prelatu: vnde dum toleratur poterit me iudicare. viii q. iiiii <c.>nonne (C.8, q.4, c.1) ... Jo.' (Pal. Lat. 624, *fol.* 218vb; cf. Basileae 1512, *cit.*, *fol.* 293ra).

146 Probably the clearest example of the distinction between *ordo* and *iurisdictionio* in Teutonicus is to be found with regard to the invalidity of the excommunication brought by an excommunicated (despite a serious oversight of the hand in the manuscript). Teutonicus, *ad* C.24, q.1, c.4, § *excommunicatus*: 'et ita excommunicatus non potest excommunicare sed suspensus excommunicatur xi q. iii § euidenter (C.11, q.3, p.c.24). Nunquid ergo non potest excommunicare? Dico referre an sit suspensus ab officio uel iurisdictione: nam et si ab officio tantum ea non poterit que officij sui sunt, puta celebrare et similia. Sed ea potuit que iurisdictionis sunt, ut dare prebendam et excommunicare, quia hac iurisdictionis, extra ii de elec(tione) <c.> transmissam [2 Comp. 1.3.7(=X.1.6.15)]. Econ-

sacraments of dignity (i. e. which required valid *iurisdictio* to be conferred) of the wicked priests so long as they remained within the Church.<sup>147</sup> Like several other decretists, Teutonicus also applies the concept of toleration to argue for the validity of the *iurisdictio* of both the heretic who received valid *ordo* and repented of his heresy<sup>148</sup> and the priest consecrated in good faith by the simoniac.<sup>149</sup> At the same time, Teutonicus denies that such a heretic would retain any jurisdictional power if cast away from the Church.<sup>150</sup> Unlike most of the decretists that

trario esset si suspenderetur a iurisdictione et non ab officio quia posset ea *que essent officii, non autem* que sunt iurisdictionis. Si autem ab utroque tunc neutrum ... Jo.’ (Pal. Lat. 624, fol. 214va). I have integrated the transcription with a few words (in italics) from the Basel edition of 1512 (fol. 288vb). In all likelihood, the contraction (and so, the logical contradiction) in the manuscript is due to an mistake of the hand.

- 147 Esp. Teutonicus, *ad* D.50, c.31, § *Sub gradu*: ‘... Item obicitur si enim iste potest baptizare, ergo et sacrificare, ut dicit in c. Respondo i q. i <c.> sicut christus (C.1, q.1, c.75). Sed ibi loquitur de adhuc tolerato. Jo.’ (Pal. Lat. 624, fol. 39vb; cf. Basileae 1512, § *Baptizare*, fol. 54ra). See also Id., *ad* C.1, q.1, c.30, § *Transiens*: ‘i(nfra) c. sic populus [C.1, q.1, c.61, against the validity of the sacraments celebrated by the heretic] contra. Solutio hic de sacramentis necessitatis que semper habent effectum, nisi culpa suscipientis impediatur. Ibi de sacra(mentis) dignitatis. Uel hic de ficto ordinatis ab hiis quos ecclesia tolerat. Uel dic quod sunt polluta quantum ad illos, vt xlviiii di. c. vlt. (D.49, c.2) Jo.’ (Pal. Lat. 624, fol. 75vb; cf. Basileae 1512, § *Transit*, fol. 108ra). Cf. *ad* C.1, q.1, c.82, § *Ut euidenter* (Pal. Lat. 624, fol. 79ra; cf. Basileae 1512, fol. 112va).
- 148 The point was important to dispense the repented heretic from the requisite of reordination. Teutonicus, *ad* C.1, q.1, c.97, § *Quod quidam*: ‘Opinio est quorundam quod sacerdos uel episcopus recedens de ecclesia ad hereticos sacramentum baptismi non admittit, sed sacramentum ordinis amittit. Istud inprobat aug(ustinus) multipliciter ... secundo sic: quia consuetudo ecclesie est: quod cum tales redeunt non solent reordinari: si eos ecclesia uult tolerare. Jo.’ (Pal. Lat. 624, fol. 80va; cf. Basileae 1512, fol. 114rb).
- 149 Teutonicus, *ad* C.1, q.1, c.108, § *Si qui*: ‘hic intelligit hoc c. de precisus qui tamen nesciebantur esse precisus ab ordinatis. Nam opinio eius est quod si occultum est eum ordinatore symoniacum esse, quia tolleratur ordinatus suscipit executionem ut xv q. vi c. ult. (C.15, q.6, c.5); *dispensari*: si vero sciuerit illum simoniacum esse deponi debet ... Jo.’ (Pal. Lat. 624, fol. 82va; cf. – though not identical – Basileae 1512, fol. 116va).
- 150 Probably Teutonicus’ clearest gloss on the subject is *ad* C.9, q.1, a.c.1, § *Quod ordinatio*: ‘hic querit an ordinatio facta ab excommunicato rata sit. Excommunicatus hic dicitur precisus ab ecclesia propter heresim uel schisma uel aliquam causam. Dicit Io(hannes) Faventinus) et Rufinus quod qui recepit ultimam manus impositionem in ordinem episcopalem in ecclesia ordinem confert, sed non executionem ordinis. Si autem extra, nichil confert i(d est) nec ordinem nec executionem: cum tales nihil habeant, ar(gumentum) i q. vii <c.> daibertum (C.1, q.7, c.24) xix di. c. propter (D.19, c.10) i q. i <c.> si quis confugerit (C.1, q.1, c.52). Licet hec opinio reprobatur i q. vii <c.> conuenientibus (C.1, q.7, c.4) et i(nfra) c. ordinationes (C.9, q.1, c.5). Dicas ergo quod siue quis recipiat ultimam

we have seen so far, however, Teutonicus maintains that the heretic is severed from the Church not from the moment of excommunication, but from the very moment he embraces the heresy, irrespective of whether the heresy itself be new or already condemned.<sup>151</sup> In so doing, Teutonicus openly sides with Laurentius Hispanus' *Glossa Palatina*.<sup>152</sup>

What just said is also important to appreciate the different meaning that Teutonicus gives to other sources he uses for his apparatus on the *Decretum*. In particular, Teutonicus incorporates Sichardus' dichotomy between *veri* and *falsi sacerdotes* almost without changes,<sup>153</sup> thereby ascribing the power to bind and loose also to the wicked priests tolerated by the Church.<sup>154</sup> Crucially, however,

manus impositionem siue in ecclesia siue extra, dum tamen forma ecclesie seruet in ordinando semper ordinem confert. Sed non semper executionem: et hoc siue scienter siue ignoranter ordinetur ab eo sed in hoc solo est differentia quod ordinati ab episcopo qui recipiunt manus impositionem ultimam in ecclesia, siue ignoranter siue scienter. Si alias digni fuerit possunt tolerari vt i(nfra) e(a quaestio) c. ii et iii (C.9, q.1, c.2–3) nisi in quatuor casibus. Si sunt maculati iterata unctione ut i q. vii <c.> saluberimum in fi(ne) (C.1, q.7, c.21), uel si sunt ordinati symoniace a symoniaco ut i(nfra) c. ab excommunicato (*sic*) (C.9, q.1, c.4), uel si sunt rebaptizati vt de con. di. iiii <c.> eos (D.4, c.118 *De cons.*), uel si ad subuersionem fidei adhererit hereticis et in contemptum ecclesie uoluerunt ordinari ab eo qui extra ecclesiam recepit inpositionem si scienter nunque tolerantur. Si ignoranter et hoc probauerint tolleratur, vt i(nfra) c. ordinationes (C.9, q.1, c.5). Hec ergo si fides tua quod heretici et excommunicati et depositi uera sacramenta conferunt, et uerum corpus christi conficiunt, vt notauit i q. i <c.> dominus declarauit (C.1, q.1, c.87). Jo.' (Pal. Lat. 624, fol. 133va; cf. Basileae 1512, fol. 182rb).

151 Id., ad C.24, q.1, a.c.1, § *Quod autem*: 'In hac questione dicunt quidam quod si hereticum alium excommunicat hereticus ualet et i(nfra) c. quisquis (C.24, q.1, c.38). Set qualiter illud c. intelligatur dicit § qui sequitur illud capitulum (C.24, q.1, c.38). Alii cum gratiano distinguunt an ueterem heresim iam dampnatam sequatur et tunc non ualet an nouam confingat et tunc potest, ar(gumentum) i(nfra) c. achatus (C.24, q.1, c.1 and esp. 3) et i(nfra) § si autem, in prin(cipio) (C.24, q.1, p.c.4) quod adhuc toleratur ab ecclesia. Sed tu dic indistincte: quod siue ueterem siue nouam sequatur excommunicatus licet sit occultus et immo alium non potest excommunicare, extra de hereticis ad abolendam [1 Comp. 5.6.11(=X.5.7.9)] ... Jo.' (Pal. Lat. 624, fol. 214rb; cf. Basileae 1512, fol. 288va). Cf. Zeliauskas (1967), pp. 262–263.

152 Teutonicus' gloss on C.24, q.1, a.c.1, reported in the last note, was taken verbatim from the *Glossa Palatina* (*supra*, this chapter, note 119, and *infra* in this paragraph, note 157). Both on our subject and in general, the *Glossa Palatina* exercised a powerful influence on Teutonicus' Gloss. See for all Kuttner (1974), pp. 571–572.

153 *Supra*, this chapter, note 63.

154 Teutonicus, ad C.24, q.1, p.c.4, § *Veris (scil.* 'Ligandi namque uel soluendi potestas ueris, non falsis sacerdotibus a Domino tradita est', Pal. Lat. 624, fol. 214va; cf. Basileae 1512, fol. 289ra): 'i(d est) catholicis s(i) toleratis ab ecclesia

just as with Laurentius Hispanus – and quite unlike Sichardus himself – Teutonicus places the occult heretics not among the *veri* but rather with the *falsi sacerdotes*. Toleration, in other words, does not apply in case of heresy – any heresy.

In adopting Laurentius Hispanus' view, however, Teutonicus has to deal with the same problem faced by the *Glossa Palatina*: what happens to the sentence of excommunication issued by the occult heretic? Teutonicus has little choice but to follow the same solution as the *Palatina*: such a sentence ought to be tolerated so long as the heresy of the person who issued it remains occult. But – and here Teutonicus is very clear – the sentence itself is void.<sup>155</sup> In stating as much Teutonicus refers expressly to Gratian's *dictum Tria*, and in particular to the case of the slave sitting in judgment. While Gratian concluded in favour of the enduring validity of the sentence even after the servile condition of the judge was discovered,<sup>156</sup> Teutonicus considers it invalid and only provisionally tolerated. In stating as much he relies on the *Glossa Palatina*, to which he adheres so thoroughly as to report verbatim even its suggestion of celebrating secretly if excommunicated by an occult heretic.<sup>157</sup> Teutonicus' statement that the sen-

siue sint boni siue sint mali ar(gumentum) xi q. iii iul(ianus) (C.11, q.3, c.94).  
Jo.'

- 155 Id., *ad* C.24, q.1, a.c.1, § *Quod autem* (Pal. Lat. 624, fol. 214rb; cf. Basileae 1512, fol. 288va): 'alia tamen que agit tenent dum toleratur, ar(gumentum) iii q. vii § *tria* (C.3, q.7, p.c.1) sed et sententia excommunicationis quam tulit toleranda est dum ipse est occultus licet sit nulla, ar(gumentum) predi(ctum) § (*scil.*, C.3, q.7, p.c.1) et extra de iure pa(tronatus) <c.> consultationibus [1 Comp. 3.33.23(=X.3.38.19)].' The last reference in the gloss would strengthen the interpretation as to the voidness of the sentence of excommunication, as the text referred to (X.3.38.19) was clear on the invalidity of the *patronatus* once the *falsus patronus* is found out.
- 156 C.3, q.7, p.c.1: '... sententia ab eo dicta rei iudicatae firmitatem tenet', *supra*, this chapter, note 26.
- 157 See the text of the *Glossa Palatina* (left) and of Teutonicus text in the Gloss (right). The minimal differences (often hand's mistakes) in Teutonicus are underlined.

*Glossa Palatina*, *ad* C.24, q.1 a.c.1, § *Qui uero heresim iam dampnatam* (Salzburg, Erzabtei a.XII.9, fol. 171ra; Pal. Lat. 568, fol. 70rb, transcription in Lenherr [1987], p. 319, ll.12–20):

'Hec distinctio hodie locum non habet, nam omnis heresis est dampnata et omnis hereticus excommunicatus, quantumcumque sit occultus, et ideo non potest alios excommunicare. Vnde si scirem prelatum meum esse hereticum, quia

Johannes Teutonicus, *ad* C.24, q.1, a.c.1, § *Qui uero* (Pal. lat. 624, fol. 214rb; cf. Basileae 1512, fol. 288va):

'Hec distinctio hodie locum non habet: nam omnis heresis est dampnata et omnis hereticus est excommunicatus quantumcumque sit occultus et ideo non potest alios excommunicare. unde si scirem prelatum meum esse hereticum quia

tence, although invalid, is to be tolerated, should therefore be read in the same sense as the *Palatina*: postponing the acknowledgement of its legal invalidity.

To understand the scope of toleration in Teutonicus we have to focus on his reading of the slave-judge in *Tria*. The position of the slave, thought to be free, who issued a decision is not dissimilar from that of the secretly excommunicated prelate who sat in judgment. The decisions of this excommunicate, says Teutonicus, are void regardless of the common opinion as to the validity of his jurisdiction.<sup>158</sup> In stating as much he provides a single source attesting to the opposite – *Tria* itself.<sup>159</sup> Teutonicus acknowledges the same (and the only) obstacle when discussing the consequences of an invalid election. If the election is found to be vitiated, its invalidity would extend to any deed of the elected – except for what Gratian said in *Tria*.<sup>160</sup> It was therefore necessary for Teutonicus to deal with this text.

nouam fingit, nec tamen predicaret, si me excommunicaret, celebrarem in occulto, set non in aperto, quia cum non possem probare eum esse hereticum et ita nec me excommunicatum deponeret. Set quid de alia sententia? Idem, quia nulla est, etsi quam tulit, set tamen tolerabitur postea, arg. iiii q. vii § Tria (C.3, q.7, p.c.1). Eadem dic et de scismatico, maxime cum scisma non possit esse sine heresi nisi forte in summo pontifice, ut si duo crearentur et uterque crederet ecclesiam apud se esse.<sup>7</sup>

nouam fingit nec tamen preiudicaret: si me excommunicaret celebrarem in occulto sed non in aperto quia cum non possum probare eum esse hereticum et ita nec me nec (*sic*) excommunicetur deponeret. Sed quid de alia sententia? Idem quia nulla est sed quam tulit sed tamen tolerabitur postea ar. iiii q. vii § tria (C.3, q.7, c.1). Eadem dic et de schismatico maxime cum schisma non possit esse sine heresi, nisi forte in summo pontifice ut si duo crearentur et uterque crederet eo apud esse (*sic*) Jo.<sup>7</sup>

On the point that all heretics should now be considered as excommunicated see also Teutonicus, *ad* C.24, q.1, p.c.37, § *Testimonia* (Pal. Lat. 624, fol. 218vb).

158 Teutonicus, apparatus on *Compilatio tertia*, *ad* 5.4.1(=X.5.7.10), § *Firmitatem*: ‘Quid si ab ignorantibus ipsum [*scil.*, hereticum] esse talem eligatur et sententiam dicat? Respon(deo): tamquam a non suo iudice lata non ualet, xi. q.i. c. penult. (C.11 q.1 c.49) supra de consue(tudine) <c.> ad nostram, lib. eodem. (3 Comp. 1.3.2[=X.1.4.3]) C. si a non compet(ente) iud(ice) l. ult. (Cod.7.48.4) et extra de re iud(icata) <c.> ad probandum, lib. iiii (4 Comp. 2.11.2[=X.2.27.24]). Arg. contra iiii q. vii Tria, in principio (C.3 q.7 d.p.c.1)<sup>7</sup>, transcription by Kenneth Pennington, available online: <http://legalhistorysources.com/edit501.htm> (last accessed 6.8.2018).

159 *Ibid.*

160 Teutonicus, *Apparatus Glossarum in Compilationem Quartam*, cit., *ad* Comp. 4, 1.3.3 (=X.1.6.37, *scil.*, the person elected abbot but then found out not to be a monk), § *nullum robur*(*ibid.*, p. 616): ‘Arg(umentum) quod licet aliquis habitus fuit pro electo, nihilominus detecto postea vitio electionis, omnia per ipsum facta cassantur, arg(umentum) 12 q. 2 <c.> Alienationes (C.12, q.2, c.37), 25 q.1 <c.> Omne (C.25, q.1, c.8), supra, de haereticis, <c.> Fraternalitatis [*sed* 1. Comp. 5.6.4(=X.5.7.4)], arg(umentum) contrar(ium) 3 q. 7 § *Tria* (C.3, q.7, p.c.1). Jo.<sup>7</sup>



The situation of the slave commonly believed to be free, says Teutonicus, is different from that of the excommunicate who is widely reputed to be in communion with the Church. That is not because the common mistake is different or because it leads to the two cases having different results. The reason lies in the *lex Barbarius* itself. The judgments issued by Barbarius would remain void, if it was not for the prince who ratified them.<sup>161</sup> Stating as much, Teutonicus seeks to emasculate the strength of the *lex Barbarius* – and so, ultimately, of Gratian’s dictum *Tria* – because of the potential threat to his restrictive interpretation of the toleration of the heretic.

Teutonicus comes back to the problem of toleration – and its relationship with the *lex Barbarius* – when discussing whether a void sentence of excommunication could be ratified. Is it possible to ratify the sentence of excommunication pronounced by someone lacking jurisdiction? Teutonicus provides elaborate reasoning in a typically dialectical fashion (where the solution eventually adopted would come after the arguments invoked against it). *Prima facie* it would seem possible, says Teutonicus, since several sources allow for the ratification of something initially void – be it a mandate, an election, an adoption or even a sentence pronounced by a woman or a slave. Despite the reference to the woman sitting in judgment (which appears only in *Tria*), significantly enough Teutonicus refers only to the *lex Barbarius*.<sup>162</sup> The position

161 Teutonicus, *ad C.3*, q.7 pr (Pal. lat. 624, *fol. 112rb*; cf. Basileae 1512, § *Dum putaretur*, *fol. 157ra*): ‘Ecce quantum communis opinio operatur, sic extra i. de iure pa(tronatus) <c.> consultationibus [1 Comp. 3.36.23(=X.3.38.19)], extra i qui fi(lii) sint leg. <c.> cum int(er) [1 Comp. 4.18.2(=X.4.17.2)] et i q. i <c.> si quis a simoniaciis (C.1, q.1, c.108) et C. de testa(mentis) l. i (Cod.6.23.1); ar(gumentum) contra extra iii qui fi(lii) sint leg(itimi) <c.> per tuas [3 Comp. 4.12.1(=X.4.17.12)] et contra xxiiii di. c. ult. (D.24, c.7) xxix q. ii <c.> si quis ingenuus (C.29, q.2, c.4) et di. viii <c.> ueritate (D.8, c.4) et ff. de iudicis l. ii in prin(cipio) (Dig.5.1.2pr). Sed nunquid id est si excommunicatus facit sententiam qui publice dicitur habetur per non excommunicato? No(tatur) ut extra de re iudi(cata) <c.> ad probandum [4 Comp. 2.11.2(=X.2.27.24)] et est ratio quare aliud sit in seruo quia seruus in multis causibus habet personam standi in iu(dicio) ut xii q. ii § qui manumittitur (*sic*) (C.12, q.2, c.58). Sed excommunicatus in nullo. Uel dic quod nec sententia serui teneret nisi confirmata fuisse a principe. Jo.’ Although Teutonicus was not citing the *lex Barbarius* expressly, the last statement might allude to it: see *infra* in the main text.

162 Id, *ad C.9*, q.2, c.1, § *excommunicatio* (Pal. Lat. 624, *fol. 133va*; cf. – with some changes – Basileae 1512, *fol. 182vb*): ‘Sed queritur si unus iudex possit sententiam excommunicationis latam ab alio ratam habere, ar(gumentum) quod sic, i(nfra) c. lugdunen(sis) (C.9, q.2, c.10) et iii q. vi <c.> hec quippe (C.3, q.6. c.10) et lxiii di. <c.> salonitane (D.63, c.24). Nam factum falsi procuratoris possum ratum habere, extra iii de officio (iudicis) dele(gati) c. ult(im)o [3 Comp. 1.18.11(=X.1.29.32)], extra iii de parrochiis (*sic*) <c.> coram [3 Comp.

of this reference is probably not fortuitous either. The text cited immediately before it allowed for the ratification of a vitiated adoption – but only if this ratification came from the emperor.<sup>163</sup> In the light of what Teutonicus said with regard to the sentence pronounced by the slave, this seems no coincidence. Emperor aside, Teutonicus does not seem to believe much in the possibility of ratifying a sentence – not just a sentence so peculiar as that of excommunication, but any sentence. After the reference to the *lex Barbarius* he turns to the opposite arguments, highlighting especially a letter of Innocent III that would later be included in the *Liber Extra* (X.1.4.3) clearly stating that a sentence issued by an incompetent judge is void (‘sententia a non suo iudice lata nullam obtineat firmitatem’).<sup>164</sup> This way Teutonicus could side against the ratification of a sentence of excommunication. The ratification, he explains, would make valid what was void. So it would bestow validity on the (void) sentence from the moment that it was pronounced. But excommunication should not operate retroactively. Moreover – and crucially for our purposes – only the prince may ratify a void decision.<sup>165</sup>

3.22.1(=X.1.29.34)] ff. de iudi(cii)s <l.> licet (Dig.5.1.56), et electionem qua nulla est possum ratam habere, extra iii de elec(ione) <c.> quod sicut [3 Comp. 1.6.13(=X.1.6.28)]. Item adoptio iniusta potest confirmari ff. de adop(tionibus) <c.> adoptio (Dig.1.7.38). Item sententia femine et serui confirmatur, licet nulla sit vt ff. de off(icio) preto(rum) <l.> barbarius (Dig.1.14.3), extra iii de arbi(tris) <c.> dilecta (*sic*) [3 Comp. 1.25.1(=X.1.43.4)], et est arg(umentum) inst(itutiones) de testa(mento) mili(tari) § sed et si quis (Inst.2.11.4). Nam et per appellationem potest confirmari quod nullum est, ff. rem ra(ta) ha(beri) l. iii § falsus (Dig.46.8.3.1).’

163 Dig.1.7.38 (Marcellus, 26 dig.): ‘Adoptio non iure facta a principe confirmari potest.’

164 Teutonicus, *ad* C.9, q.2, c.1, § *excommunicatio* (Pal. Lat. 624, fol. 133va; cf. Basileae 1512, fol. 182vb): ‘... Sed contra extra iii de consue(tudine) <c.> ad nostram [3 Comp. 1.3.2(=X.1.4.3)]. Item quod meo nomine gestum non est non possum habere ratum ut ff. de nego(tii)s g(estis) <l.> si pupilli (Dig.3.5.5.2). Item cuius presentia desideratur eius ratihabitione non potest confirmare. Instit. de auct(oritate) tu(torum) (Inst.1.21).’

165 *Ibid.* (Pal. Lat. 624, fol. 133va; cf. Basileae 1512, fols. 182vb–183ra): ‘... Item si sententia excommunicationis confirmaretur retro esset quis excommunicatus, quod esset absonum. Dicas ergo quod sententia que nulla est non potest ratihabitione confirmare: quia sententia plus habet iuris quam facti, et illa lege ff. re(m) ra(ta) ha(beri) (Dig.46.8.3.1) fuit sententia lata a suo iudice sed contra ius et sufficit quod litigator credat se condempnatus ad hoc ut teneat iudicium, ff. famil(iae) herc(iscundae) <l.> cum putarem (Dig.10.2.36). Solus tamen princeps potest sententiam que nulla est confirmare, ar(gumentum) iii q. vi <c.> hec quippe (C.3, q.6, c.10), quia et ipse mutat sub alia re ... Jo.’

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To recapitulate, by the early thirteenth century the concept of toleration was sufficiently elaborated among canon lawyers, although far from uncontroversial. Something of their debate might have been used by civil lawyers, but admittedly not much. The ‘jurisdictional side’ of the concept of toleration was slowly emerging as a notion distinct from (and potentially even clashing with) its ecclesiological substratum. But this development was hardly mature enough to allow an analogical application that was wholly detached from other considerations. The great innovation of Innocent IV, as we are about to see, was to provide a consistent, refined and strictly legal interpretation of the concept of toleration that could be easily adopted by civil lawyers because they could see it as both legally coherent and – especially – self-consistent, and so also applicable outside ecclesiological matters.

