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On the Origins of the Canonical Marriage Process. Between Bishop's Jurisdiction and Summary Process (1150-1350)

by Alessandro Recchia

Introduction

The origin and development of the Church's jurisdiction over marriage are widely discussed. The maxim *Nullum divortium sine iudicio Ecclesiae*[1] can easily sum up and represent the ideas and the claims about marriage cases which can be found in the writings of popes, councils, canonists, and theologians of the 12th, 13th and 14th centuries[2].

The question is, what does really mean the word *divortium* in the Middle Ages, and what is the right meaning of the expression *iudicium Ecclesiae*? Why Ecclesia had to express her binding *iudicium* on *divortium*? Who is the subject who issued this *iudicium?*

Needless to say, this topic has been the object of countless studies, so that not only collecting them but also writing a selected bibliography would produce a huge number of books. Most recently, the Motu proprio *Mitis Iudex Dominus Iesus*, issued by Pope Francis in 2015, brought attention again to the central role of the Bishop and the need for a simpler and quicker procedure. The Motu proprio stresses the need for the constitution of diocesan tribunals and the institution of the *processus brevior*, connecting the role of Bishop as judge and a

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1 The phrase is often attributed to St. Thomas Aquinas. I could not be able to find the exact quote. See S. Th, Suppl., q. 55, a. 9, ad 1; a. 11, ad 1; q. 62, a. 3, ad 1. See also: Salerno, F., Precedenti medievali del processo matrimoniale canonico: Il processo matrimoniale canonico. (Studi Giuridici 39) Città del Vaticano 1994, 27-100, 34.

2 See Salerno, Precedenti medievali (s. Anm. 1); Joyce, G. H., Christian Marriage. An Historical and Doctrinal Study, London u.a. 1933, 214-236; Brundage J. A., Law, Sex and Christian Society in Medieval Europe. Chicago u.a. 1987, 176-485; Reynolds, P. L., How Marriage Became one of the Sacraments. Cambridge 2011, 33-43; for a selected bibliography, 983-1089.

new, simpler, and quicker procedure, without putting aside the basic judicial nature of canonical process[3].

In this article, I will try to discuss and examine these two aspects. I will try to investigate the birth, development, and consolidation of Church's exclusive competence in marriage cases, particularly the role of the Bishop as judge in such cases, and the establishment of a quicker and easier procedure, reducing the formalities required by the so-called *ordo iudiciarius.*

The above-mentioned issues explain, at least partially, the *terminus a quo* and *terminus ad quem* of this work. Mainly, the period from 1150 to 1350 is the historical period of the higher development of *classical canon law*, starting from the completion and the widespread diffusion of the *Decretum Gratiani* (around 1140) up to the *Extravagantes Ioannis XXII* and to the death of Ioannes ANDREAE during the *Black Death* plague in 1348[4].

In addition, this is the period of the greatest development and consolidation of the doctrine of marriage as a sacrament and of the exclusive competence of the Church, from HADRIAN IV'S decretal *Dignum est* of 1148[5] up to the decretal *Dispendiosam* (1312) and the constitution *Saepe* (1314) that introduced a new, summary procedure[6] and WILLIAM OF OCKHAM and MARSILIUS OF PADUA'S works that challenged Church's competence in some marriage cases[7].

1. CHURCH'S COMPETENCE IN MARRIAGE CASES

1.1. The Church's jurisdiction over marriage gradually developed during the Middle Ages. Since the sacraments fell under the Church's purview, and marriage was closely tied to the sacrament, the Church claimed authority over

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3 FRANCISCUS, Litterae apostolicae motu proprio datae *Mitis Iudex Dominus Iesus* quibus canones Codicis Iuris Canonici de Causis ad Matrimonii nullitatem declarandam reformantur, 15.08.2015: AAS 107 (2015) 958-970, 959-960. See also RABINO, G., Ipse Episcopus iudex: ritorno alla tradizione canonica?: Stato, Chiese e pluralismo confessionale 26 (2017), www.statoechiese.it.; RECCHIA, A., L'esercizio della potestà giudiziaria da parte del Vescovo nella storia: punti nodali: Gruppo Italiano Docenti di Diritto Canonico (Hrsg.), La riforma del processo canonico per la dichiarazione di nullità del matrimonio. (Quaderni della Mendola 26) Milan 2018, 23-62.

4 ERDÖ, P., Storia della scienza del diritto canonico. Roma 2008, 37-107.

5 REYNOLDS, How Marriage (s. Anm. 2), 40.

6 See PENNINGTON, K., Introduction to the Courts: Hartmann, W. / Pennington, K. (Hrsg.), The History of Courts and Procedure in Medieval Canon Law. Washington DC 2016, 3-29, 24-29.

7 See JOYCE, Christian Marriage (s. Anm. 2), 232-234; THOMSON, K. J., A Comparison of the Consultations of Marsilius of Padua and William of Ockham Relating to the Tyrolese Marriage of 1341-1342: Archivum Franciscanum Historicum 63 (1970) 3-43.

marriage in all its aspects. This included determining the validity, establishing what rendered marriages void (to be called later „impediments"), and granting dispensations when necessary.

When Roman emperors converted to Christianity, their laws still retained the structure of the existing judicial system. Matrimonial disputes remained under the jurisdiction of civil courts. Moreover, Roman law allowed for divorce and conflicted with Christian principles. Early Christian writers emphasized this conflict, noting that imperial laws permitted actions that were contrary to the law of God[8].

This is the case of St. JEROME, who in letter 77 distinguish between God's law, and civil law[9], and St. AUGUSTINE, who in Sermon 392 judges second marriages, admitted by civil law, as adulteries according to the law of God[10].

With the institution of *episcopalis audientia*, CONSTANTINE introduced a quasi-judicial authority for Bishops[11]. Parties involved in a civil lawsuit could agree to submit their case to the Bishop's arbitration, and the Bishop's decision was final without the possibility of appeal. The privilege was confirmed by later emperors, as we find in two constitutions by ARCADIUS and HONORIUS in 398,[12]

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8 See DILIBERTO, O., Paolo di Tarso, I ad Cor., VI, 1-8 e le origini della giurisdizione ecclesiastica nelle cause civili: Studi economico-giuridici dell'Università di Cagliari 49 (1979) 181-219; VISMARA, G., Episcopalis audientia. L'attività giurisdizionale del vescovo per la risoluzione delle controversie private tra laici nel diritto romano e nella storia del diritto italiano fino al secolo nono. Milan 1937, 1-6; CUENA BOY, F., La episcopalis audientia. Valladolid 1985, 1-6; VISMARA, G., La giurisdizione civile dei Vescovi (secoli I-XI). Milano 1995, 3-7; LOSCHIAVO, L., Non est inter vos sapiens quisquam, qui possit iudicare inter fratrem suum? Processo e giustizia nel primo cristianesimo dalle origini al Vescovo Ambrogio: Bassanelli G. / Tarozzi S. / Biavaschi P. (Hrsg.), Ravenna Capitale. Giudizi, giudici e norme processuali in Occidente nei secoli IV-VIII. Santarcangelo di Romagna 2015, 67-106; RECCHIA, L'esercizio (s. Anm. 3), 26-32.

9 „Aliae sunt leges Caesarum, aliae Christi: aliud Papinianus, aliud Paulus noster praecipit": Ep. 77, 3; CSEL 55, 39.

10 „Adulterina sunt ista coniugia, non jure fori, sed jure coeli": Serm. 392, 2; PL 39, 1710.

11 See VISMARA, G., La giurisdizione civile (s. Anm. 8), 5-6; CIMMA, M. R., L'episcopalis audientia nelle costituzioni imperiali da Costantino a Giustiniano. Torino 1989, 33-75.

12 „Si qui ex consensu apud sacrae legis antistitem litigare voluerint, non vetabuntur, sed experientur illius (in civili dumtaxat negotio) arbitri more residentis sponte iudicium. quod his obesse non poterit nec debebit, quos ad praedicti cognitoris examen conventos potius afuisse quam sponte venisse constiterit. (a. 398 d. vi k. aug. mediolani honorio a. iiii et eutychiano conss. ": C. 1.4.7 (Imperatores ARCADIUS, HONORIUS).

and HONORIUS and THEODOSIUS in 408,[13] that grant competence as Arbitrators to Bishops.

Among cases submitted to them there were most probably marriage cases. As an example, let's consider here the case of Fortunius and Ursa, submitted to the judgment of pope INNOCENT I. This is clearly a case of exercise of the power of arbitration conferred upon the Bishops. Ursa, the wife of Fortunius, had been carried into captivity. When she recovered her freedom and came back to Rome, she found that Fortunius had taken another wife. So, she brought her complain before the Bishop of Rome, who declared the second marriage to be void under Church and civil law as well[14].

There are other texts that show how Bishops dealt with cases related to marriage in *episcopalis audientia*, but it remains unclear whether they were free to apply Christian Church teachings or bound by civil law provisions. In any case, they could not pronounce divorces, as Roman divorces were private matters executed by the parties themselves and not by judges[15].

1.2. In the wake of the decline of the Western Roman Empire, Church was the only institution that survived the upheaval. The imperial system came to an end, and its officials disappeared. Bishops, being deeply authoritative and influential, emerged as natural leaders in the disorganized society. They also came from ruling families and had a tradition of administration. So, with the collapse of the social and political order, Bishops gained even more strength and prestige[16].

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13 „Episcopale iudicium sit ratum omnibus, qui se audiri a sacerdotibus adquieverint. cum enim possint privati inter consentientes etiam iudice nesciente audire, his licere id patimur, quos necessario veneramur eamque illorum iudicationi adhibendam esse reverentiam, quam vestris deferri necesse est potestatibus, a quibus non licet provocare. per publicum quoque officium, ne sit cassa cognitio, definitioni exsecutio tribuatur. dat. id. dec. basso et philippo conss. (408 dec. 13)": C. Th. 1, 27, 2 (Imppp. ARCADIUS, HONORIUS et THEODOSIUS aaa. theodoro praefecto praetorio).

14 „Statuimus [...] illud esse coniugium, quod erat primitus gratia divina fundatum: conventumque secundae mulieris, priore superstite, nec divortio ejecta, nullo pacto esse legitimam": Ep. 36; PL 20, 602.

15 See JOYCE, Christian Marriage (s. Anm. 2), 216.

16 „Il Vescovo nella complessa vita di una *civitas* è il *pater,* non il *dominus*; è il *pater populi* che dà *salutis opem* e nella cui persona *totius populi salus consistit*. Egli è il protettore delle classi sociali deboli e povere; egli assume la *tuitio* di categorie di persone impotenti; organizza servizi annonari durante momenti di necessità e di assedio; vigila l'opera delle magistrature ordinarie; interviene e partecipa all'amministrazione della giustizia; inoltre, quando viene meno l'autorità dello Stato, giunge financo ad assumere la costruzione di opere difensive per la città, o anche la stessa difesa contro nemici esterni": MOCHI ONORY, S., Vescovi e città (sec. IV-VI): Rivista di Storia del Diritto Italiano 4 (1931), 246. See also CONDORELLI, O., Ordinare – Iudicare. Ricerche sulle potestà dei Vescovi nella Chiesa antica e altomedievale (secoli II-IX). (I Libri di Erice 18) Roma 1997, 13-44.

The newly acquired Germanic kings sought their assistance in reorganizing their domains and preserving Roman civilization. As recent converts to Christianity, these kings respected the authority of Bishops and promoted their dignity.

In the Frankish kingdoms, Bishops held an exceptional position. They regularly convened in provincial synods and used canons, many of which related to Christian marriage laws, to suggest a conduct of life to the faithful. They did not hesitate to admonish even their rulers when necessary. For instance, the Council of Tours in 567 A.D. reaffirmed the Church's prohibition of marriages among close relatives, likely as a rebuke to King CHARIBERT who had married a cousin[17].

Anyway, Bishops exercised mainly disciplinary control, not legislative power, with ecclesiastical penalties. In some cases, secular authorities intervened to enforce Church orders. The Merovingian and Carolingian kings enacted laws on marriage, mainly to support Church canons, often with civil or penal consequences for violations. In 614, after a synod of seventy-nine Bishops held in Paris, CLOTHAR II issued an edict that incorporated some of the canons from the synod and supported them with penal sanctions[18]. The 774 Soissons council reports a first list of what will be later called impediments[19].

During the Carolingian age matrimonial cases were concurrently heard before Bishops and in royal courts. HINCMAR, in his *De Divortio Lotharii regis*, discussed matrimonial matters on doctrinal grounds, emphasizing that civil judg-

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17 „De incestis vero censuemus statuta canonum vetera non irrumpi; satis enim facimus, si in hac parte statuta prisca servemus? Sed propterea fuit iterare necessarium, quia dicunt plures, quasi quod precessorum neglegentiam sacerdotum illis non fuisset apertum; sed revera mentiuntur, cum sciamus tales et tantos viros nulla. tenus huic neglegentiae subiacuisse, sed hoc, quod scripturae sanctae testantur, assiduae praedicasse. Propterea placuit etiam de voluminibus librorum pauca perstringere et in canonibus inserere, ut scarpsa lectio de aliis libris in unum recitetur ad populum": MGH Conc. 1, 131.

18 „De viduabus et puellis, quae sibi in habitu religionis in domos proprias tam a parentibus quam per se vestem mutaverint et se postea contra instituta patrum vel precepta canonum coniugium crediderint copulandas, tamdiu utrique habeantur a communione suspensi, quousque, quod inlicite perpetraverunt, emendent, aut si emendare neglexerint, communione vel omnium Christianorum convivium in perpetuo sint sequestrati [...] Incestas vero coniunctiones ab omni Christianorum populo censuemus specialiter resecari, ita ut, si quis relicta fratris, sorore uxoris, privigna, consubrina vel relicta idem patrui atque avunculi vel in religionis habitu dedita coniugii crediderit consortio violanda, tamdiu a communionis gratia segregetur, quamdiu ab inlicitis coniunctionibus sequestratione manifestissima debeat abstenere": MGH, Conc. 1, 190.

19 „Nullus laicus homo Deo sacrata femina ad mulierem non habeat nec suam parentem; nec marito viventem sua mulier alius non accipiat, nec mulier vivente suo viro alium accipiat, quia maritus muliere sua non debet dimittere, excepto causa fornicationis deprehensa": MGH, Conc. 2, 1, 35.

ments were not within Bishops' exclusive purview[20]. He argued that Bishops could not pronounce a sentence depriving someone of conjugal rights unless the crime was confessed or established in a court of law. Then he refers to a case occurred during the reign of LOUIS THE PIOUS, where a synod of Bishops referred a matrimonial case to secular judges, recognizing the competence of civil courts[21].

It should be considered also that, under the Carolingians, in every region, there were two authorities: the Bishop and the count, and they were expected to cooperate faithfully, each within his own domain, for this purpose. One should rather speak of cooperative rather than concurrent jurisdiction.

1.3. Furthermore, it is necessary to mention the so-called synodal jurisdiction, which developed particularly in France and Germany during 9th and 10th centuries. Since the capitularies of the Frankish kings, Bishops had to investigate during their pastoral visits whether crimes were occurring in their dioceses. CHARLEMAGNE reasserted the pastoral visit obligation in its first capitular[22]. Special ecclesiastical questionnaires, which guided the investigation during these visits, dealt with the religious and moral life of the diocese.

REGINO OF PRÜM'S *De synodalibus causis*, written in 906 to provide practical guidance to Archbishop RADBOD OF TREVES during his episcopal visitations, shows with outstanding evidence that marriage and marriage-related crimes were the object of this periodical enquiry[23]. Examples of questions asked include: whether any married individuals had committed adultery, whether any married couples had obtained a civil divorce and were living in that state, and whether anyone had divorced their spouse without the Bishop's sentence[24]. Parties involved in disputes were free to bring their cases before the Bishop,

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20 On HINCMAR, see JOYCE, Christian Marriage (s. Anm. 2), 218-219; GAUDEMET, J., Il matrimonio in occidente. Turin 1996, 83-84; MÜLLER, J., Hincmaro de Reims: DGDC 4, 315-318.

21 „Sed episcoporum generalitas ad laicorum et conjugatorum eam remisit judicium. Nobilibus autem laicis sacerdotalis discretio placuit, quia de suis conjugibus eis non tollebatur judicium, nec a sacerdotali ordine inferebatur legibus civilibus prajudicium": MGH, Conc. 4, Suppl. 1, 141.

22 „Statuimus, ut singulis annis unusquisque episcopus parrochiam suam sollicite circumeat, et populum confirmare et plebes docere et investigare, et prohibere paganas observationes divinosque vel sortilegos vel auguria, phylacteria, incantationes vel omnes spurcitias gentilium studeat": MGH, Leges, Capitularia regum francorum, 1, 33.

23 See Hartmann, W. (Hrsg.), Das Sendhandbuch des Regino von Prüm. Darmstadt 2004, 3-9; DERS., Regino de Prüm: DGDC 6, 823-825.

24 „15. Si quis coniugatus cum alterius uxore adulteratus fuerit, si qua uxor cum alterius viro?"; „19. Si interveniente repudio ab invicem separantur et sic manent?"; „21. Si aliquis suam coniugem, quamvis culpabilem, sine episcopi iudicio relinquit?". *De Synodalibus Causis*, 2, 5: Hartmann (Hrsg.), Das Sendhandbuch (s. Anm. 23), 240.

whose decisions were based on Church canons rather than civil law. These decisions were considered final and not subject to appeal. This demonstrates that, during that period, Bishops had significant authority over matrimonial matters. REGINO also includes canons related to marriage that highlight the Bishops' privileged status as arbitrators, surpassing the authority granted by CONSTANTINE and his successors, while civil courts still retain concurrent competence on such cases[25].

Marriage causes were so defined *causae synodales*, meaning that had to be decided by *episcopus sedens in synodo*[26]. The Church's jurisdiction over matrimonial cases evolved gradually, even though many authors pinpoint the fact that Bishops were not in a position either to dictate how people at large got married or to prevent marriages from being dissolved. Their sphere of control over marriage, such as was, was limited to the aristocratic elite[27]. The real control over marriage emerged just gradually at the time of the Church reform, and the process was likely complete by the end of the 10th century, with episcopal courts acknowledged as the competent authority[28].

The administration of ecclesiastical justice by Bishops witnessed remarkable development, marked by the emergence of diocesan courts known as officialities and the adoption of the Roman-canonical procedure.

The previous form judgment gradually faded away by the late 12th century, making way for a new organizational structure led by the official. From the 11th century onwards, a written form of procedure became mandatory, leading each

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25 „Statutum est ut, quaecunque controversiae iudicio et auctoritate ecclesiastica coeperint agitari, nequaquam ad seculare iudicium transeant, ut ibi iterato provocent, sed ecclesiasticis sanctionibus terminentur. Nam a iudicibus, quos communis consensus elegerit, ad alios iudices non licet provocare, nisi maior auctoritas sit secundum canonicam normam. Si autem in seculari iudicio, id est in comitis placito, causa fuit prius ventilata, secundum legem mundanam finiatur, salvo ecclesiasticae legis privilegio": *De Synodalibus Causis*, Cap. 111: Hartmann (Hrsg.), Das Sendhandbuch (s. Anm. 23), 304.

26 So in GRATIAN C. 35, q. 6, c. 7, *sinodale iuramentum*; C. 4, q. 6, cc. 1-4; See also SALERNO, Precedenti medievali (s. Anm. 1), 37-39.

27 See REYNOLDS, How Marriage (s. Anm. 2), 188.

28 „The ecclesiastical synod of the Carolingian and Ottonian periods might have developed into the organized ecclesiastical courts that we see in the later Middle Ages, and in some areas there may have been a transition from the synod to the officiality without any sharp break. The evidence now available would suggest, however, that in most areas the officiality represent a new beginning. [...] The reason that a sharp break was necessary in most areas is related at once to the decline of the episcopal authority in the tenth century, to the growth of abuses that the Gregorian reformers of the eleventh century sought to eradicate, and to the development of the Romano-canonical procedure in the twelfth century": DONAHUE, CH. JR., The Ecclesiastical Courts. Introduction: Hartmann / Pennington (Hrsg.), The History (s. Anm. 6), 247-300, 253.

tribunal to employ notaries responsible for recording the proceedings and judgments, and the tribunal's location shifted from the church to the consistory, a designated place within the episcopal palace[29].

1.4. The establishment of officialities often occurred either in continuity with pre-existing synodal jurisdiction or in open rupture with tradition and prior practices. Alongside episcopal tribunals, lower-level courts were structured, presided over by archdeacons and deans, each with its officials and ministers. Papal decretals reiterated that every Bishop, in his diocese, is the *iudex ordinarius* (ordinary judge).

Church's (and Bishop's) competence was far from being homogeneous in various Europe's regions. So, in some of them, civil courts continued to exercise jurisdiction in matrimonial cases as late as the mid-11th century, reflecting the evolving social conditions of the time. They also continued to exercise for long their jurisdiction in mixed matters over causes that were not properly marriage causes but were strictly related to marriage, such as legitimation of children, the age of marriage, property division, and the return of dowry, as well as inheritance and wills[30].

1.5. In GRATIAN, a well-known *dictum* is found in C. 2, q. 3, *dictum post* c. 7:

„*Cum matrimonia hodie regantur iure poli, non iure fori [...] cum enim leges saeculi precipue in matrimoniis sacri canones sequi non dedignentur*".

The *dictum* recalls the already-cited words of AUGUSTINE and JEROME about adulteries according to the law of God, and it has often been read as the sign of the definitively established exclusive Church's competence on marriages. MOSTAZA, in the early 70', called it „el triunfo de la jurisdicciòn ecclesiastica"[31].

Anyway, it must be noted that the *dictum* is not present in the so-called first recension of GRATIANS' *Decretum*, as shown by Anders WINROTH's *work in progress* on the manuscripts of the first recension,[32] and it seems to have been added only in the second recension of GRATIAN'S masterpiece. One may question whether this could mean that there was an evolution in GRATIAN'S thought about

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29 See RECCHIA, L'esercizio (s. Anm. 4), 44. See also FOURNIER, P., Les officialités au moyen âge: Étude sur l'organisation, la compétence et la procédure des tribunaux ecclésiastiques ordinaires en France, de 1180 à 1328. Paris 1880 (repr. Aalen 1984); LEFEBVRE-TEILLARD, A., Les officialités à la veille du Concile de Trente. Paris 1973. DONAHUE, The Ecclesiastical Courts (s. Anm. 28).

30 See REYNOLDS, How Marriage (s. Anm. 2), 35.

31 MOSTAZA, A., Competencia sobre el matrimonio hasta el Concilio de Trento: Ius Populi Dei. Miscellanea in honorem Raymundi Bidagor. Roma 1972, 299.

32 See WINROTH, A., Decretum Gratiani, First Recension, Edition in Progress. gratian.org 07.03.2022, 301.

exclusive competence on marriage. Works by Anders WINROTH[33] and ENRIQUE DE LEON[34] have clearly demonstrated that there is a sharp difference about the concept of marriage in the two versions of GRATIAN'S *Decretum*. The author of the first recension has what we would call a more pastoral point of view, while the second recension stress the need for meticulous observance of procedures[35]. This could be the case also of *dictum post* C. 2, q. 3, c. 7, showing the growing attention of second recension of Decretum to the issues of competence and procedure.

In some other places, such as C. 35, q. 6, d. p. c. 6, *causae matrimoniales* are still described ad *causae synodales*, recalling the work of REGINO and stressing again the role of Bishop[36].

Anyway, many authors described the nature of *causae matrimoniales* as *causae spirituales*, paving the way to the solid confirmation of exclusive competence on this matter[37]. In a decretal issued in year 1148, pope HADRIAN IV. affirmed that

„Neither a free person nor a slave should be excluded from the sacraments of the Church, and marriages should not be prohibited in any way among slaves. Even if they are contracted against the will of their masters, they should not be dissolved by ecclesiastical judgment for this reason"[38].

The decretal inserted marriage among *ecclesiae Sacramenta*. So did the *Glossa ordinaria*, affirming that marriage was „res sacratissima"[39], and BERNARD OF

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33 See WINROTH, A., Marital Consent in Gratian's Decretum: Cushing K. G. / Brett, M. (Hrsg.), Readers, Texts and Compilers in the Earlier Middle Ages.: Studies in Medieval Canon Law in Honour of Linda Fowler-Magerl. Aldershot 2008, 111-121.

34 See DE LEÓN, E., The Formation of Marriage according to the Sg-Codex: Dusil, S. / Thier, A. (Hrsg.), Creating and Sharing Legal Knowledge in the Twelfth Century: Sankt Gallen, Stiftsbibliothek, 673 and Its Context. Boston-Leiden 2023, 59-77.

35 See WINROTH, Marital Consent (s. Anm. 33), 119-121.

36 C. 35, q. 6, d. p. c. 6: „Hoc iuramentum, separationis non est, sed sinodale". See also c. 7: „Episcopus in sinodo residens, post congruam allocutionem septem ex plebe ... debet advocare".

37 See SALERNO, Precedenti medievali (s. Anm. 1), 39-41; 49.

38 „Neque liber, neque servus est, qui a sacramentis Ecclesiae sit removendus, ita nec inter servos matrimonia debent ullatenus prohiberi. Et si contradicentibus dominis et invitis contracta fuerint, nulla ratione sunt propter hoc ecclesiastico iudicio dissolvenda." X, 4, 9, 1. See also LANDAU, P., Hadrians IV. Dekretale „Dignum est" (X 4.9.1) und die Eheschliessung Unfreier in der Diskussion von Kanonisten und Theologen des 12. und 13. Jahrhunderts: Studia Gratiana 12 (1967) 511-553.

39 „Cum matrimonium res sacratissima sit": Glossa Ordinaria in C. 27, q. 2, c. 2, ad v. initiatur.

PAVIA, in his *Summa de Matrimonio* could easily state that marriage was „res spiritualis" and it had to be judged by ecclesiastical authority[40].

After GRATIAN, the specific jurisdiction to adjudicate marriage causes was attributed to the Bishop. RUFINUS expressed it in the following terms:

„special cognizance pertains especially to the Bishop concerning marriages and similar matters"[41].

This episcopal jurisdiction was confirmed by Ordinary GLOSS on c. *Saeculares,* which noted:

„This was once the case, for which reason marriage cases were handled by the Bishop of the province [...] Certainly, today, the jurisdiction over matrimonial cases belongs to the episcopal jurisdiction"[42].

Also, GOFFREDUS OF TRANI in his *Summa decretalium* admitted clearly that *causae matrimoniales* belonged to the Bishop's jurisdiction:

„major cases must be referred to the Bishop, as stated in Distinction XXV (c. 1), it belongs to him to take cognizance of marriage and judge it"[43].

Moreover, a decretal issued by INNOCENT III. stated that the Bishops in their dioceses had the free power to investigate, punish, and judge cases of adultery and crimes according to what the canons decreed, without hindrance from anyone[44].

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40 „Cum causa matrimonii spiritualis sit [,...] ad ecclesiasticum iudicem spectat atque per canones debet definiri": BERNARDI PAPIENSIS Summa de Matrimonio, IV: Laspeyres E. A. T. (Hrsg.), Bernardi Papiensis Summa decretalium. Regensburg 1860 (repr. Graz 1956) 305.

41 „Cognitio specialiter ad episcopum pertinet, sicut de matrimoniis et huiusmodi": C. 35, q. 6, c. 7, ad v. *episcopus in sinodo.* RUFINI, Summa decretorum, hrsg. v Singer, H., Paderborn 1902 (repr. Aalen 1963) 530.

42 „Hoc olim obtinuit: quia causa matrimonii tractabatur apud episcopos provinciae C. 35 q. 6 multorum. huiusmodi tractare potest [...] Sed certe et hodie ad episcopalem iurisdictionem cognitio matrimonialis causae spectat": C. 33, q. 2, c. 1, ad v. *comprovinciales.*

43 „Ad episcopum maiores causae sunt referende, ut XXV dist. Perlectis (c. 1) ad eum spectat cognoscere de matrimonio et iudicare". *Summa super titulis Decretalium, de divorciis, 9.*

44 „Habeant igitur episcopi singularium urbium in suis dioecesibus, liberam potestatem adulteria et scelera inquirere, ulcisci et iudicare, secundum quod canones censent, absque impedimento alicuius": X, 1, 31, 1.

In the same manner, a text from the *Liber Sextus* affirms that, undoubtedly, every Bishop had ordinary jurisdiction throughout his entire diocese, so he could sit as a judge in any place within his diocese, to hear cases[45].

Thus, the sources from the *Corpus Iuris Canonici* and from Decretists and Decretalists. But, if we turn our attention to a different kind of sources, a somehow different point of view emerges.

1.6. As recent studies demonstrated, the analysis of the miniatures in the manuscripts of the *Decretum Gratiani* allows for the acquisition of precious information about the historical context of every single exemplar[46]. The latest survey counts more than 600 textual witnesses, a substantial portion of which includes decorative elements[47]. The decorative apparatus of the *Decretum* includes miniatures corresponding to various sections, namely the *Distinctiones*, one for each

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45 „Quum episcopus in tota sua dioecesi iurisdictionem ordinariam noscatur habere, dubium non exsistit, quin in quolibet loco ipsius dioecesis non exempto per se vel per alium possit pro tribunali sedere, causas ad ecclesiasticum forum spectantes audire": VI°, I, 16, 7.

46 The reference work remains MELNIKAS, A., The Corpus of the Miniatures in the Manuscripts of the Decretum Gratiani: Studia Gratiana 16-18 (1975). It was reviewed and criticized by NORDENFALK, C., Review: Melnikas, The Corpus: Zeitschrift für Kunstgeschichte 43/3 (1980) 318-37; MORDEK, H., Review: Melnikas, The Corpus: ZRG Kan. Abt. 72 (1986) 403-11. Seminal studies were published already in the early sixties. See, as an example: SCHILLING, R., The Decretum Gratiani formerly in the C. W. Dyson Perrins Collection: Journal of the British Archaeological Association 26/1 (1963) 27-39. Subsequent studies have explored specific aspects of legal manuscript illuminations. See STICKLER, A. M., Ursprung und gegenseitiges Verhältnis der beiden Gewalten nach den Miniaturen des Gratianischen Dekrets: Studia Gratiana 20 (1976) 341-359; L'ENGLE, S., The Illumination of Legal Manuscripts in Bologna, 1250-1350: Production and Iconography. New York 2000; BERTRAM, M. / DI PAOLO, S., „Decretales pictae". Le miniature nei manoscritti delle Decretali di Gregorio IX (Liber Extra). Atti del colloquio internazionale tenuto all'Istituto Storico Germanico, Roma 3-4 marzo 2010. Roma 2012; DEL MONACO, G., Investigating the Origins of the Illustration of the Decretum Gratiani: Saint-Omer, Bibliothèque de l'Agglomération du Pays de Saint-Omer, 454: Rivista di Storia della Miniatura 20 (2020) 32-42; RECCHIA, A., Symoniaca heresis. La simonia come eresia e una miniatura del Codex Latinus Monacensis 23551: Sabbarese, L. (Hrsg.), Opus Humilitatis Iustitia. Studi in memoria del Cardinale Velasio De Paolis, 1. Città del Vaticano 2020 75-104; DERS., Immagini di una Chiesa inquieta. Considerazioni intorno ad una miniatura del Codice Vaticano Latino 2491: Bosso A. / OKONKWO E. B. O, Quis custodiet ipsos custodes. Scritti in onore di Giacomo Incitti. Città del Vaticano 2021 39-71.

47 See MURANO, G., Graziano e il Decretum nel secolo XII: Rivista Internazionale di Diritto Comune 26 (2015) 61-139, 129-139; WINROTH, A., Codices Manuscripti Operis Gratiani. Repertorium Breve: https://gratian.org/Manu-scripts%20of%20Gratians%20Decretum.doc (Stand: 15.11.2023).

of the 36 *Causae*, the *De poenitentia*, the *De consecratione*, and the 2 *arbores*[48]. So, in a complete exemplar of *Decretum*, there are 9 or 10 illuminations regarding the *Causae* from 27 to 36, the so called *Tractatus de Matrimonio*. Each of them can be interpreted and seen as a *glossa picta* to the legal text[49].

While GRATIAN and *Decretals* stress the role of Bishop in marriage cases, miniatures illustrating *Causae* from 27 to 36 tell a quite different story and depicts several different kinds of judges. The vast majority of illuminations depict Pope and Bishops, represented hearing cases, but there is also a considerable number of miniatures of thirteenth, fourteenth and fifteenth century, especially from Northern France, that stress the role of civil authority, presenting civil Judges hearing cases[50]. Some of them try to combine the role of both authorities picturing a lawyer who exhibits the *libellus* to the Bishop[51].

We will examine a few of them. They are just some samples but show us how the use of iconographic sources can give a significant help in this particular field of research and how much work remains to be done.

In *Causa* 27, GRATIAN introduces the case of a man who vowed chastity and had betrothed a woman. Then she turned to another man and married him, but, afterwards, the first one sought to regain her[52].

In a manuscript from Bibliothèque Municipale of Avignon, made in Northern France around 1350, the illumination related to Causa 27 depicts a man before a Bishop, assisted by a lawyer, offering a *libellus* and asking for his wife, while on

48 See NORDENFALK, Review: Melnikas (s. Anm. 46), 319.

49 „La ricerca sui manoscritti giuridici deve poggiare sull'assunto che le opere del diritto canonico e civile e i loro commenti non sono invenzioni letterarie ma rispecchiano piuttosto una dimensione storica concreta e reale. Anche l'origine dei sistemi di rappresentazione, delle scelte iconografiche e iconologiche – commenti attraverso immagini – poggiano su questo medesimo assunto. Per la loro funzione sociale, civile e didattica, la costruzione delle immagini più significative non fu demandata ai miniatori ma fu decisa dai committenti e dipese dai rapporti che questi avevano con la Chiesa di Roma, o con l'imperatore": MURANO, G., Il Decretum in Europa nel secolo XII: BILOTTA, M. A. (Hrsg.), Medieval Europe in Motion 3: The Circulation of Jurists, Legal Manuscripts and Artistic, Cultural and Legal Practices in Medieval Europe (13th-15th Centuries). Palermo 2021 301-12, 301.

50 See MELNIKAS, The Corpus (s. Anm. 46), 864 and 916.

51 See MELNIKAS, The Corpus (s. Anm. 46), 864.

52 „Quidam uotum castitatis habens desponsauit sibi uxorem; illa priori condicioni renuncians, transtulit se ad alium, et nupsit illi; ille, cui prius desponsata fuerat, repetit eam": C. 27, dict. intr.

the right the woman and the other man are arguing (picture 1). The lawyer can be identified by the cap he is wearing and his clothes[53].

As a comparison, we can examine the illumination of the same case in ms. Geneve, Bibliothéque, Ms. 60, made in Bologna around 1320 and illustrated by the master known as PSEUDO NICCOLÒ or L'ILLUSTRATORE[54] (picture 2). The illumination depicts the case showing two moments: on the left the woman and the second man are showed embracing each other, signifying the beginning of the second relationship, while on the right the first man brings them before Bishop's authority. As one can easily see, Bishop is the only judge in the case. One can also find images of ecclesiastical judges, that can be easily recognized by the tonsure, in other manuscripts, as in Tours, Bibliothéque Municipale, Ms. 558 (picture 3), a *Decretum Gratiani* compiled in Northern France around 1288[55]. So, an ecclesiastical judge, as the Pope or a Bishop, can be found in many manuscripts made in different *scriptoria*[56].

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53 See MELNIKAS, The Corpus (s. Anm. 46), 874, fig. 21. See also Florence, Biblioteca Medicea Laurenziana, Ms. Fondo Edili 97, fol. 304v; MELNIKAS, The Corpus (s. Anm. 46), 874, fig. 22.

54 See DEL MONACO, G., L'illustratore e la miniatura nei manoscritti universitari bolognesi del Trecento. Bologna 2018, 185-188; MELNIKAS, The Corpus (s. Anm. 46), 886, fig. 42.

55 See MELNIKAS, The Corpus (s. Anm. 46), 869, fig. 11. See also Paris, Bibliothèque Nationale, Ms. Lat. 3893, fol. 282r: MELNIKAS, The Corpus (s. Anm. 46), 875, fig. 23; Olomouc, Statni Archiv, Ms. CD 39, fol. 211v: MELNIKAS, The Corpus (s. Anm. 46), 876, fig. 26; Città del Vaticano, Biblioteca Apostolica Vaticana, Ms. Vat. Lat. 1370, fol. 231v: MELNIKAS, The Corpus (s. Anm. 46), 877, fig. 27; Berlin, Staatsbibliothek Preussischer Kulturbesitz, Ms. lat. Fol. 6, fol. 228r: MELNIKAS, The Corpus (s. Anm. 46), 880, fig. 33.

56 See Siena, Biblioteca degli Intronati, Ms. G.V. 23, fol. 394r: MELNIKAS, The Corpus (s. Anm. 46), 869, fig. 11; Baltimore, Walters Art Gallery, Ms. 135, fol. 264v: MELNIKAS, The Corpus (s. Anm. 46), 870, fig. 15; Escorial, Real Biblioteca del Escorial, Ms. Ç. I.5, fol. 344r: MELNIKAS, The Corpus (s. Anm. 46), 871, fig. 16; Berlin, Staatsbibliothek Preussischer Kulturbesitz, Ms. Ham. 279, fol. 170v: MELNIKAS, The Corpus (s. Anm. 46), 872, fig. 19; Berlin, Staatsbibliothek Preussischer Kulturbesitz, Ms. Lat. Fol. 4, fol. 256v: MELNIKAS, The Corpus (s. Anm. 46), 871, fig. 20; MELNIKAS, The Corpus (s. Anm. 46), 874, fig. 22; Città del Vaticano, Biblioteca Apostolica Vaticana, Ms. Archivio della Basilica di S. Pietro A. 25, fol. 242v: MELNIKAS, The Corpus (s. Anm. 46), 878, fig. 30; Reims, Bibliothèque Municipale,. Ms. 678, fol. 237v: MELNIKAS, The Corpus (s. Anm. 46), 879, fig. 32; Cesena, Biblioteca Malatestiana, Ms. 3207, fol. 234v: MELNIKAS, The Corpus (s. Anm. 46), 881, fig. 35; Città del Vaticano, Biblioteca Apostolica Vaticana, Ms. Vat. Lat. 1375, fol. 256: MELNIKAS, The Corpus (s. Anm. 46), 882, fig. 37; Reims, Bibliothéque Municipale, Ms. 677, fol. 234v; MELNIKAS, The Corpus (s. Anm. 46), 883, fig. 38; London, British Museum, Ms. Add. 15275, fol. 70v: MELNIKAS, The Corpus(s. Anm. 46), 884-885, Pl. IV; Paris, Bibliothèque Nationale de France,

But in some other manuscripts, the case is illustrated and descripted in quite a different way. As an example, one can examine the manuscript Cambrai, Bibliothèque Municipale, Ms D. 605, written and illustrated in Northern France at the beginning of xiv century (picture 4). The man is depicted as a friar, and he is bringing his petition before a lay judge, identified by his cap and his clothes, while on the right there are the woman and his new husband[57]. The illumination suggests the idea that a marriage case, such as the one descripted by GRATIAN, could be brought before a civil court[58].

The evidence given by iconographic sources shows that throughout 12th, 13th and 14th centuries competence on marriage cases, even if formally and without doubts committed to the Bishop and his officiality, depended also in a not so small part upon local laws and customs, the specific object of the cause and the concrete attitude of cooperation or competition between Church and civil courts[59].

In this sense, it seems not so risky to assume that the opinion of WILLIAM OF OCKHAM and MARSILIUS OF PADUA was not a simple voice out of the choir[60]. OCKHAM wrote his *De iurisdictione imperatoris,* in support of emperor LUDWIG THE BAVARIAN, who had married MARGARET FROM TIROL declaring her divorce from her previous husband. While admitting exclusive competence of Church in pure spiritual causes, OCKHAM claimed the power of the Emperor, and thus of civil courts, on all the matters that *iure naturae* concern marriage causes, such as consanguinity and impotence. In this sense, one can formulate the hypothesis that his opinion was linked to ideas that were circulating during the first half of 14th century[61].

Ms. Nouv. Acq. Lat., 2508, fol. 255v: MELNIKAS, The Corpus (s. Anm. 46), 850, fig. 41.

57 See MELNIKAS, The Corpus (s. Anm. 46), 878, fig. 9.

58 See also Paris, München, Bayerische Staatsbibliothek, Ms. Clm 18050a, fol. 326v: MELNIKAS, The Corpus (s. Anm. 46), 875, fig. 24. As a comparison, see also the illuminations of other *Causae*: Tours, Bibliothèque Municipale. Ms. 558, fol. 276: MELNIKAS, The Corpus (s. Anm. 46), 981, fig. 23 (Causa 31); Baltimore, Walters Art Gallery, Ms. 133, fol. 269r (Causa 32) and 277r (Causa 33): MELNIKAS, The Corpus (s. Anm. 46), 1005, fig. 9; 1037, fig. 11.

59 See DONAHUE, CH. JR., The Courts of the Ius Commune: Hartmann / Pennington (Hrsg.), The History (s. Anm. 6), 74-124, 80-83.

60 See THOMSON, K. J., A Comparison (s. Anm. 7).

61 See DOLCINI, C., Crisi di poteri e politologia in crisi. Da Sinibaldo Fieschi a Guglielmo d'Ochkam. Bologna 1988, 266-426; BATTOCCHIO, R., Ecclesiologia e politica in Marsilio da Padova. Padova 2005, 197-201.

2. PROCEDURE PARTICULARITIES AND SUMMARY PROCESS

2.1. In 12th and 13th centuries the so-called Roman-canonical process emerged and reached its full maturity[62]. This process incorporated procedural elements from both the Roman and Germanic worlds, structuring them into an original framework. Canonists referred to this procedure as the *ordo iudiciarius*, whose observance was fundamental to the validity of the process itself, emphasizing the pursuit of truth and respect for the rights of the parties. By the time of the compilation of GRATIAN'S *Decretum*, it was fully developed in all its aspects, leading to the development of extensive and articulated literature[63]. The *dictum* that GRATIAN wrote at the beginning of his *Causa* 2 clearly states that every judgment must follow the *ordo iudiciarius*[64].

The procedure for marriage cases was also characterized by several specific features that set it apart from ordinary processes[65]. These features depended upon the proper object of the cases. One can find here the answer to the question posed at the beginning of this work, the meaning of the word *divortium*. BERNARDUS FROM PAVIA distinguishes between two types of divorce. The first type is a total divorce, where husband and wife are separated in a way that allows them to marry other people, either because they are separating due to consanguinity or affinity or because only one of them is free to marry again, for example, due to a solemn vow or impotence. The second type is a specific divorce, where the separation is such that neither party is allowed to enter another marriage, for instance, in cases of adultery[66].

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62 See ROBERTI, F., De processibus. Romae 1941, 1-8; BRUNDAGE J. A. / EICHBAUER, M. H., Medieval canon law. New York 2023, 121-129; DONAHUE, The Ecclesiastical Courts (s. Anm. 29), 277-283.

63 See FOWLER-MAGERL, L., Ordo iudiciorum vel ordo iudiciarius. Begriff und Literaturgattung. (Ius commune Sonderhefte 19) Frankfurt a.M. 1984; DIES., Ordines iudiciarii and Libelli de ordine iudiciorum (from the middle of the twelfth to the end of the fifteenth century). (Typologie des sources du Moyen Age occidental 63) Turnhout 1994.

64 „Quod autem nullus sine iudiciario ordine dampnari ualeat, multis auctoritatibus probatur": C. 2, q. 1, d. a. c. 1. STEPHEN OF TOURNAI describes *ordo iudiciarius* in these terms: „Videndum breviter, quia ordo iudiciarius dicitur, ut apud suum iudicem quis conveniatur, ut legitime vocetur ad causam tribus edictis aut uno peremptorio pro omnibus, ut vocato legitimae praestentur induciae, ut accusatio sollemniter in scriptis fiat, ut testes legitimi producantur, ut nisi in convictum vel confessum feratur; quae sententia non nisi in scriptis ferri debeat, nisi sint breves lites et maxime miserabilium": C. 2, q. 1: Schulte. J. F. von (Hrsg.), Die Summa des Stephanus Tornacensis über das Decretum Gratiani. Gießen 1891, 158.

65 See SALERNO, Precedenti medievali (s. Anm. 1), 74-75.

66 „Divortium est viri ab uxore legitima separatio [...] Divortium autem aliud totale aliud particulare; totale, quo ita separantur, ut liceat ad aliam copulam convolare, sive utrique, ut ubi separantur propter consanguinitatem vel affinitatem, sive alteri tantum, ut ubi pro

BERNARDUS emphasizes that divorce cannot occur without ecclesiastical judgment and without an examination of the cause, even if the reason for divorce is evident to everyone. He states that only an ecclesiastical judge can grant a divorce[67].

It must be noted that there was a plurality of situations that could be the subject of the *postulatio judicialis,* which led to a differentiation of procedures related to the matrimonial process.

This is particularly evident in the huge number of decretals produced during this period regarding many different marriage cases[68].

2.2. The peculiarity of marriage cases reflected also upon procedure. As stated by INNOCENT III., *ordo iudiciarius* was not always observed in marriage cases,[69] and this led to several peculiarities[70]. We can summarize and point out just some of them. In GRATIAN, the maxim „*Nullus umquam presumat accusator simul esse et iudex vel testis*"[71] established a fundamental principle in proceedings, stating that no one should simultaneously assume the roles of accuser,

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voto solemni vel frigiditate; particulare divorium est ubi taliter fit separatio, ut neutri liceat aliud contrahere matrimonium, veluti pro adulterio": Summa decretalium, 4, 20, 1-3: Laspeyres (Hrsg.), Bernardi Papiensis Summa decretalium (s. Anm. 40), 187-188.

67 „Divortium fieri non potest absque ecclesiastico iudicio et sine causae cognitione [...] etiam si causa divortii sit omnibus manifesta [...] solus [...] ecclesiasticus iudex divortium facere potest": Summa decretalium 4, 20, 3: Laspeyres (Hrsg.), Bernardi Papiensis Summa decretalium (s. Anm. 40), 188.

68 See, as an example, the decretals by CELESTINUS III. *Laudabilem:* X, 3, 33, 1; ALEXANDER III.: *Quum sis preditus*: X, 3, 32, 4-6; *De diacono*: X, 4, 1, 6; *A nobis tua*: X, 4, 2, 7-8; LUCIUS III., *Consultationi tuae*: X, 4, 15, 4; CLEMENS III., *Consuluit nos*: X, 3, 32, 10. See also the unpublished decretals of ALEXANDER III. *Significatum est*, WH 958, and WH 847 – Frcf 3.23, quoted by DROSSBACH, G., Gewalt gegen Frauen. Untersuchungen zum Dekretalenrecht des 12. Jahrhunderts: Das Mittelalter 12 (2007) 1, 62-71, 64-65. I am very grateful to Gisela DROSSBACH for pointing out and suggesting me many decretals while preparing this paper.

69 „Licet ordo iudiciarius [...] in matrimonialibus causis non usquequaque servetur": X, 2, 6, 1.

70 „Plura sunt specialia in causis matrimonialibus: quia ubi agitur de foedere matrimoni, potest agi contra contumacem lite non contestata ad diffinitivam sententiam [...] Item quia minor potest esse in causa etiam per procuratorem [...] Item confessio contra matrimonium non praeiudicat. [...] Item quia pater et mater possunt testificari tam in coniungendo quam in disiungendo matrimonio [...] Item quia sententia lata contra matrimonium ad separationem eorum qui iam coniuncti erant non transit in rem iudicatam [...] Item nec transactio ive compositio potest in matrimonio intervenire [...] Item nec arbitrium [...] item nec poena locum habet (matrimonia sive sponsalia libera debent esse ab omni coactione personae vel pecunia: et si poena fuerit apposita, non tenet promissio sive stipulatio poenae": Glossa Ordinaria in X, 2, 6, 1, ad v. *servetur.*

71 C. 4, q. 4, c. 1.

judge, and witness. This principle is typically observed, with one exception found in C. 35, q. 6, c. 1, related to marriage causes[72]. In this specific case, as noted by Rufinus, the usual *ordo iudiciarius* is not followed, as the accuser and witness are one and the same[73]. This exception arises since the oath required from the witness and the accuser is identical, blurring the traditional distinctions between these roles. Instead of the customary *iuramentum calumniae*, which was an oath against false accusations, a different oath, the *iuramentum de veritate dicenda*, was required. This oath pointed out the need to inquire about the truth rather than safeguard against slanderous claims[74].

Specific rules were established regarding testimonial evidence, highlighting its special importance in matrimonial processes compared to the discipline in other legal processes.

These rules concerned the qualities of the witnesses, the mandatory nature of testimony, the requirement for it to be from direct observation (*de visu*) rather than hearsay (*de auditu*), and the use of „seventh-hand witnesses" (*testes septimae manus*) to supplement direct observation. This was particularly used in cases of impotence, where no one except the spouses could give direct evidence of the facts[75].

The use of expertise and the role of experts is also a quite controversial matter. For instance, C. 27, q. 1, c. 4,[76] and the decretal *Causam matrimonii*[77] address the issue of experts in assessing a woman's virginity. It cautions against assuming that one can be defended by claiming that the condition of virginity can be easily inspected and proven, as both the hands of midwives and the eyes can sometimes be unreliable in making this determination. This highlights the need for additional measures, including the oaths of close relatives, to establish the truth[78].

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72 „nisi in causa matrimonii ut C. 35, q. 6, c. 1": Glossa Ordinaria: C. 4, q. 4, c. 1, ad v. *accusator*.

73 „Et notandum quia in hoc casu ordo iudiciarius per omnes articulos non servatur; idem enim est accusator et testis, quod ex eo videri potest, quia testis et accusatoris idem est iuramentum": C. 35, q. 6, c. 5, ad v. *audisti*: RUFINI, Summa decretorum (s. Anm. 41), 530.

74 See SALERNO, Precedenti medievali (s. Anm. 1), 54-56.

75 See SALERNO, Precedenti medievali (s. Anm. 1), 56-67. See also RECCHIA A., Matrimonio, impotenza e magia. Note sulla Causa 33, questione 1 del *Decretum Gratiani*: Otter J. / Walser, M. (Hrsg.), Iustitia et Ius. (FS Elmar GÜTHOFF). St. Ottilien 2023, 71-88.

76 „Nec aliqua putet se posse hac excusatione defendi, quod inspici et probari possit, an virgo sit, cum et manus obstetricum et oculus sepe fallitur": C. 27, q. 1, c. 4.

77 X, 2, 19, 14.

78 „Quia saepe fallitur et manus et oculus obstetricum [...] ideo iuramenta propinquorum requiruntur": Glossa Ordinaria: X, 4, 15, 7, ad v. *septimae manus*.

A particular case that sheds light on the role of experts in assessing impotence can be found in the historical context of England and France during the 13th and 14th centuries. During this period, „wise women" played a crucial role in impotence cases. These women were tasked with examining the husband's genitalia to determine whether the man was capable of sexual intercourse or not[79]. As Thomas CHOBHAM'S *Summa confessorum* mentions, these wise women were required to be selected as knowledgeable matrons, and they had to inspect the genital organs. The judgment in such cases would be based on the under-oath expert opinion of these matrons, who would determine whether the man had suitable organs for sexual intercourse or not[80].

2.3. The complex structure of the Roman-canonical procedure also led to the need to balance adherence to rules for ascertaining the truth with the requirements of expeditious administration of justice. From the late 12th century onward there were a series of papal pronouncements that suggested, and sometimes mandated, more summary proceedings in certain cases. Reading these papal decretals, the impression is that the strict adherence to procedural rules could sometimes hinder rather than aid the search for truth, especially in cases where the facts were evident, or a swift decision was necessary[81].

This led to the establishment of a summary procedure, initially with the decretal *Dispendiosam* in 1312,[82] and later with the constitution *Saepe* around 1314[83]. According to this procedure, certain types of cases could be decided *simpliciter et de plano*, without the noise and formalities of regular trials. These cases included matters related to the provision of ecclesiastical offices and benefits, tithes, usurious loans, and most notably, marriage causes[84]. The *Saepe* clarified the scope of the previous decretal and provided a detailed description of the

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79 See MURRAY, J., On the origins and role of wise women in causes of annulment on the grounds of male impotence: Journal of Medieval History 16 (1990) 235-249.

80 „Unde debent eligi sagaces matrone et iurare debent inspicere membra genitalia, et secundum hoc quod ille matrone dixerint, scilicet quo dille vir habeat membra idonea coeundi vel non habeat, stabit iudicium": Broomfield, F. (Hrsg.), Thomae de Chobham: Summa Confessorum (Analecta Mediaevalia Namurcensia 25) Louvain 1968, 184-185.

81 See ALEXANDER III.'s decretal *Dilecti*, X, 2, 1, 6; and decretals issued by INNOCENT III., *Novit ille*, X, 2, 1, 13 and *Cum in tua*, X, 4, 1, 27. Canon 8 of Lateran Council IV affirms that *ordo* may not be followed when removing a religious from his administration: „Hunc tamen ordinem circa regulares personas non credimus usquequaque servandum quae cum causa requirit facilius et liberius a suis possunt administrationibus amoveri": Concilium Lateranense IV, can. 8, *de inquisitionibus*: Alberigo, G. / Dossetti, G. L. / Joannou, P. P. / Leonardi, C. / Prodi, P. (Hrsg.), Conciliorum Oecomenicorum Decreta. Bologna 1991, 239.

82 Clem., 2, 1, 2.

83 Clem., 5, 11, 2.

84 See RECCHIA, L'esercizio (s. Anm. 3), 47.

steps in the summary procedure, from the initiation of the dispute to its conclusion. It set relatively strict deadlines for various phases of the process while ensuring that judges, while expediting proceedings by rejecting exceptions and reducing the number of witnesses, acquired the necessary evidence to reach the truth without infringing on the parties' right to a defense. In practice, the constitution *Saepe* marked not so much a reform of the existing *ordo iudiciarius* but the birth of the so-called summary process, which served as an alternative procedural form to the solemn process[85].

2.4. Iconographic sources can help also in this complex matter. In miniatures of *Causae* 27-36 one can find also interesting depictions of procedure, especially of proofs and evidence brought before the attention of the Judge. One can find the illuminated description of a particular procedure or peculiar images of the protagonists of the cases.

In *Causa* 33 a married woman takes a lover, whom she then also marries, because her first husband has become impotent. The husband, however, regains his virility and forces his wife to return to him. Reunited with her, he then takes a vow of chastity without his spouse's approval[86].

The manuscript Cambridge, Fitzwilliam Museum 262, depicts the case as a comic strip, from the scene of the first marriage to picture of the two lovers laying together, to the second marriage and the final scene of the petition of the first husband before the Bishop, who forces the woman to come back to him (picture 5)[87]. A precious codex from The Walters Art Gallery, Ms 133, in a well-known illumination illustrates the expertise of the wise women in the same case who, after having inspected the man's body, relate to the judges (picture 6)[88]. In this case, again, we have the judges wearing caps and clothes that identify them as civil judges, as one can easily find in some other manuscripts[89].

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85 See DESCAMPS, O., Aux origines de la procédure sommaire: remarques sur la constitution *Saepe contingit* (Clem. V, 11, 2): Mausen, Y. /Condorelli, O. / Roumy, F. / Schmoeckel, M. (Hrsg.), Der Einfluss der Kanonistik auf die europäische Rechtskultur. Bd. 4: Prozessrecht. Köln u.a. 2014, 46-63.

86 „Quidam uir maleficiis inpeditus uxori suae debitum reddere non poterat. Alius interim clanculo eam corrupit; a uiro suo separata corruptori suo publice nubit; crimen, quod admiserat, corde tantum Deo confitetur; redditur huic facultas cognoscendi eam: repetit uxorem suam; qua recepta, ut expedicius uacaret orationi; et ad carnes agni purus accederet, continentiam se seruaturum promisit; uxor uero consensum non adhibuit". C. 33, dict. ante.

87 See MELNIKAS, The Corpus (s. Anm. 46), 1044, fig. 23.

88 See ebd., 1037, fig. 11.

89 See Città dal Vaticano, Biblioteca Apostolica Vaticana, Ms. Vat. Lat 2491, fol. 495v: MELNIKAS, The Corpus (s. Anm. 46), 1036-1037, Pl I; Escorial, Real Biblioteca del Escorial, Ms. ç I. 7, fol. 315r: MELNIKAS, The Corpus (s. Anm. 46), 1038, fig. 13; Laon,

3. Conclusion

During the period of classical canon law, there was a comprehensive structuring of ecclesiastical tribunals centered on the Bishop. He was able to adjudicate matters personally but increasingly depended on the expertise of professionally qualified aides to carry out his duties.

The analysis of different sources reveals that local circumstances were decidedly more complex, with possible concurrent or cooperative jurisdiction with civil courts on certain issues, including cases of marriage.

The procedural aspects of matrimonial causes were characterized by numerous specificities, stemming from their spiritual nature. A more effective procedure was established following the promulgation of the documents *Saepe* and *Dispendiosam*, which outlined the guidelines for summary process.

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Abstracts

Engl.: The article discusses the historical development of the Church's jurisdiction over marriage cases, focusing on the period from 1150 to 1350. It explores the role of Bishops as judges in marriage cases and the emergence of a quicker and simpler procedure. The text highlights the complexity of ecclesiastical tribunals' jurisdiction, sometimes overlapping with civil courts. It also delves into the procedural particularities of marriage cases, emphasizing their spiritual nature. The summary process, introduced with documents like *Saepe* and *Dispendiosam*, aimed at streamlining matrimonial case proceedings. Iconographic sources from the manuscripts of *Decretum Gratiani* are used to illustrate various aspects of these cases, shedding light on the roles of different judges and experts in the process.

Dt.: Der Artikel behandelt die historische Entwicklung der kirchlichen Zuständigkeit für Ehefälle und konzentriert sich auf den Zeitraum von 1150 bis 1350. Er untersucht die Rolle der Bischöfe als Richter in Ehefällen und die Entstehung eines schnelleren und einfacheren Verfahrens. Der Text betont die Komplexität der Zuständigkeit kirchlicher Gerichtshöfe, die manchmal mit staatlichen Ge-

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Bibliothèque comunale, Ms. 372, fol. 181v: Melnikas, The Corpus (s. Anm. 46), 1038, fig. 14; Città dal Vaticano, Biblioteca Apostolica Vaticana, Ms. Ross. Lat. 308, fol. 330v: Melnikas, The Corpus (s. Anm. 46), 1039, fig. 15; Città dal Vaticano, Biblioteca Apostolica Vaticana, Ms. Vat. Lat 1370, fol. 255v: Melnikas, The Corpus (s. Anm. 46), 1045, fig. 24; Paris, Bibliothèque Nationale de France, Ms. Lat. 16898, fol. 338r: Melnikas, The Corpus (s. Anm. 46), 1047, fig. 28; München, Bayerische Staatsbibliothek, Ms. Clm. 18050a, fol. 360r: Melnikas, The Corpus (s. Anm. 46), 1047, fig. 29.

richten überlappte. Es werden auch die Verfahrensbesonderheiten von Ehefällen hervorgehoben, wobei ihre spirituelle Natur betont wird. Das Zusammenfassen des Verfahrens, das mit Dekretalen wie *Saepe* und *Dispendiosam* eingeführt wurde, zielte darauf ab, die Verfahren in Ehefällen zu optimieren. Mit Hilfe ikonografischer Quellen aus *Decretum Gratiani*-Handschriften werden verschiedene Aspekte dieser Fälle veranschaulicht, um die Rollen verschiedener Richter und Experten im Prozess zu beleuchten.

Ital.: L'articolo tratta lo sviluppo storico della giurisdizione della Chiesa sulle cause matrimoniali, focalizzandosi sul periodo compreso tra il 1150 e il 1350. Esamina il ruolo dei vescovi come giudici nei processi matrimoniali e la nascita di una procedura più rapida ed efficiente. Il testo sottolinea la complessità della giurisdizione dei tribunali ecclesiastici, che talvolta entrava in concorrenza con quella dei tribunali civili. Vengono inoltre evidenziate le particolarità procedurali nei processi matrimoniali, a causa della loro natura peculiare di *cause spirituali.* L'introduzione di una procedura sommaria, attraverso le decretali *Saepe* e *Dispendiosam*, mirava a snellire i procedimenti relativi alle cause matrimoniali. Utilizzando fonti iconografiche, tratte dai manoscritti del *Decretum Gratiani,* vengono illustrati inoltre diversi aspetti di questi casi per chiarire i ruoli dei diversi soggetti coinvolti nel processo.

Images

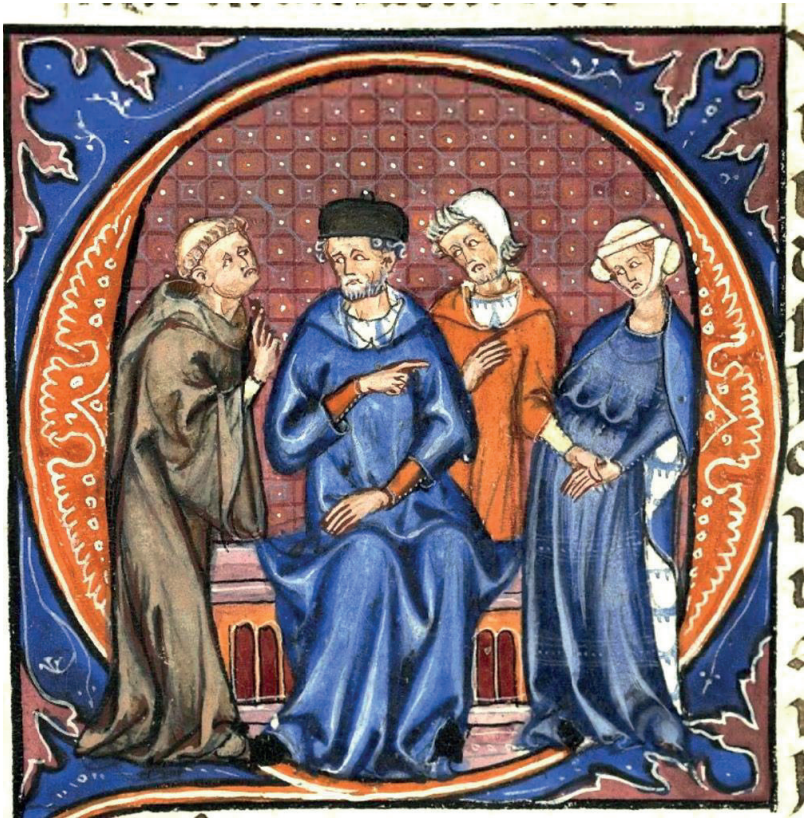
Picture 1:
Avignon, Bibliothéque Municipale, Ms. 659, fol. 265v.
Decretum Gratiani, Causa 27, Northern France, 1340-1350.

Picture 2:

Genève, Bibliothèque de Genève, Ms. Lat. 60, fol. 248r

Decretum Gratiani, Causa 27, Bologna, 1320.

Picture 3:
Tours, Bibliothéque Municipale, Ms. 558, fol. 262v
Decretum Gratiani, Causa 27, Northern France, 1288 ca.



Picture 4:

Cambrai, Bibliothèque Municipale, Ms. 605, 234v.

Decretum Gratiani, Causa 27. Northern France, XIV c.

Picture 5:
Cambridge, Fitzwilliam Museum, Ms. 262, fol. 86v.
Decretum Gratiani, Causa 33. France and England, 1300 ca.

Picture 6:

Baltimora, Walters Art Museum, Ms. W. 133, fol. 277r.

Decretum Gratiani, Causa 33. Hainaut (Belgium), 1280-1290.