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2 Prefaces in Canon Law Books

This chapter contributes to the study of power and the paratext by following part of the complex evolution of canon law through a chronological description of efforts to control and authenticate the law; it thus seeks to establish the importance of the prefaces of the canon law collections, beginning with the renowned *Decretum Gratiani* of ca. 1140.

Decretum Gratiani

The *Decretum Gratiani* was completed in approximately 1140.¹ Gratian's collection, regarded as the first textbook and general summary of the law, was intended to harmonize discordant canons (*Concordia discordantium canonum*). With its appearance, the basis was founded for canon law as an independent academic discipline. The implementation of canonistic studies is irrevocably related to the founding of a law school in Bologna.² The *Decretum*, as it is known to this day, is divided into three sections. The first consists of 101 divided *distinctiones* (dramatic pauses in order to view a point as a whole). The first twenty address the sources of law. Its famous first sentences can be regarded as a preface:

The human race is ruled by two things, namely, natural law and usages. Natural law is what is contained in the Law and the Gospel. By it, each person is commanded to do to others what he wants done to himself and prohibited from inflicting on others what he does not want done to himself.³

Divine ordinances are determined by nature, human ordinances by usages; and thus the latter vary since different things please different people.⁴ At the time of its conception, Gratian's *Decretum* was not an official publication or a legally binding statement by the Church. It was a private effort, neither sponsored nor promoted by any official body of the Church. The speed, however, at which it became known throughout Europe, was remarkable. The *Decretum* has maintained its legal status in the Church up to the twenty-first century. Its first sentences, referring to the two natures of the law, became famous.

Note: I would like to thank Martin Jones for his corrections on this essay.

<https://doi.org/10.1515/9781501513329-003>

The Decretists and their *Summae* on Gratian's *Decretum*

In the institutions offering studies of canon law, the Universities of Bologna, Paris, and Pavia, among many others, professors who came to be known as “decretists” studied every aspect of the *Decretum Gratiani* with relentless enthusiasm. These decretists set out to resolve contradictions by referring to similar texts and produced a summary of the entire doctrine containing the general standards of juridical knowledge.⁵

For instance, a well-known decretist, Stephen of Tournai (d. 1203), was born in Orléans in 1128. He studied there at the cathedral school, then in Bologna from 1145–50. He pursued an ecclesiastical career, first becoming the abbot of Saint-Euverte in Orléans (1167) and of Saint-Geneviève in Paris (1176), after which he became the bishop of Tournai (1192).⁶ He is known as the founder of the so-called Anglo-Norman school of canon law and founder of the French decretist works. However, his *Summa* (1165/66 and after 1170) was never published in its entirety, so even now it is unclear whether it is really one complete *Summa* or rather two different recensions of the *Decretum*; because the *Summa* has a preface, it must be considered an independent text.⁷

After 1180, Sicardus of Cremona (1150/55–1215) also used the original form of the *Summa*, and it was copied nearly eighty times.⁸ That he had a lot of students is clear from his preface, where he explains his methodical scientific approach as generally still following the plan of the *Decretum* of Gratian (ministers, discipline, sacraments). Although the preface has never been published, a German translation of it does exist.⁹ There Sicardus explains his loosening up of the formal divisions of the *Decretum* and his systematic structure that is enhanced by a use of *distinctiones* and of *quaestiones*. The latter is not the *quaestiones disputatae* as classroom exercises, but a novel arrangement into *quaestiones principales* (problems occurring as such in the *Decretum*) and *quaestiones incidentales* (problems suggested by a text). Also in his preface Sicardus indicates his opinion that a prerequisite for a functioning Church state is a secular form of justice. Even though the importance of the emperor's law cannot be questioned, canon law is a vital complement to imperial justice.

In 2015, Pier Aimone edited a new edition of the *Summa in decretum Simonis Bisinianensis* from ca. 1180. In his preface, Simon de Bisignano reflects on the opinions of other jurists concerning Gratian's understanding of the law of nature. For example, he writes: “Dicunt enim quidam quod ius natural nichil aliud est quam caritas per quam facit homo bonum vitatque contrarium” (Some people

are saying that the natural law is nothing else than charity for which the human being does good deeds and yet his way of life is the opposite of this).¹⁰ The *Glossa ordinaria* of the decretists, dating back to the beginning of the thirteenth century, was the most extensive textual interpretation of Gratian's *Decretum*. The German Johannes Zemeca (also known as Johannes Teutonicus, provost of Halle d. 1245) wrote his *Glossa* in Bologna between 1213 and 1217 with the intention of establishing a practical standard that would be the defining commentary (*apparatus*), replacing all others.¹¹ He based his work principally on the *apparatus* of Laurentius Hispanus, the *Glossa Palatina*,¹² the *Summa of Huguccio*,¹³ and Roman legal texts.¹⁴ Bartholomaeus Brixiensis (d. 1258) from Brescia supplemented Zemeca's *Glossa* around 1245, basing his contribution on the collection of the *Decretales* of Gregory IX.¹⁵ His revised edition was the model for all later editions. In his preface to his glosses on Gratian's *Decretum* he wrote:

Since, when new cases arise, new remedies should be sought, I, Bartholomaeus Brixiensis, trusting in the bounty of the Creator, have improved as necessary the apparatus of the *Decretum*, not by removing anything, nor by attributing to myself any glosses I did not write, but simply by remedying any defect where correction seemed necessary, either because decretals had been omitted or shortened, or because new laws had superseded others. I have also added some solutions not included by Ioannes. All this I have done for the honor of Almighty God and the Roman church, and for the common benefit of all who study canon law. Bar.¹⁶

What did he achieve? He completely amplified the *Glossa ordinaria*, so that his preface is actually a preface-gloss of a preface.

In 1578, Pope Gregory XIII (d. 1585) formally appointed a small commission of learned cardinals and other clerics, generally referred to as the *Correctores Romani*, to undertake the task of editing the *Decretum*.¹⁷ Scholars working under papal auspices had been preparing the way from at least the early 1570s. They studied the Vatican's manuscripts in detail, and then distributed letters throughout Catholic Europe, asking for copies of manuscripts of Gratian and earlier canonical collections in an effort to collect the best examples available from local churches. Responses came from everywhere, ranging from curia cardinals in Rome to remote Spanish monasteries. The *Correctores Romani* worked their way through the text of the *Decretum*, collating the manuscripts, comparing and discussing variant readings they encountered, and keeping copious notes as they chose the readings they thought most accurate for the new edition. This Roman edition, published in 1582 with Gregory XIII's letter of authorization, *Ad futuram memoriam*, as its preface, became the authoritative text within the Catholic world. Gregory wrote:

To All Christ's Faithful, Greetings and apostolic Benediction.

The correction of the decrees and texts collected by Gratian had been very advisedly taken up by certain of the Roman pontiffs who preceded us because the text had become exceedingly marred by errors and corrupt readings. Although cardinals of the holy Roman church had been appointed for this, and the task had been entrusted to the other very learned men who had been recruited, many inconsistencies have been introduced and become confused with the authors whose testimony Gratian used. Those passages where anything had been miscopied have therefore been restored, and the correction has been completed with the greatest care and brought to perfection, we thus order it to be published. Great care has been taken in this project, for this is a work of particular dignity and general utility for those who perpetuate this discipline. We command, therefore, that whatever has been corrected and reestablished should be preserved with the greatest care, and that nothing be added, changed, or omitted.¹⁸

Effectively Gregory XIII created a new edition, complete with new titles and new rubrics. He also destroyed the original text.

Thompson's English translation of the first twenty distinctions of Gratian's *Treatise on Law* attempts to create a facsimile of an ideal *Decretum*-manuscript containing the authoritative version for later canon law that Gregory XIII described in his preface.¹⁹ The layout of their book is very close to original manuscripts of the *Decretum*; this work appears inside the text of the preface and outside the layer of the *Glossa ordinaria*.²⁰

Decretal Collections: *ius novum*

My personal project in legal history deals with the genre of twelfth-century canon law sources which, within the short span of two generations after the *Decretum Gratiani* (ca. 1140), were developed and transformed as never before through the quasi-legislative activity of contemporary popes. This legal elaboration or development of the *ius novum* resulted from the mass of papal decretals or *epistolae decretales*, that is, papal writings clarifying questions regarding Church law with claims to universal validity.²¹ Most of these decretals were answers to specific questions that had been put to the popes. Borrowed originally from imperial practice, the decretal letter was a "rescript," a written answer to a question from an official or private citizen that was meant to deal with a specific problem. It was not therefore "legislative" in a modern sense but rather a statement of law elicited by an inquiry. This phase in the production and commentary of new decretal collections in the so-called decretalist period (the period of the *ius novum*) came to a close in 1234 with the publication of the *Liber Extra*, the law book of Pope

Gregory IX (d. 1241). Of the estimated two hundred private decretal collections produced during the decretalist period, just under ninety have survived, and all of them continue to await critical editions.

As I have demonstrated in studies and books about the *Collectio Francofurtana* and the *Collectio Cheltenhamensis*, there were many glosses in these unofficial, private decretal collections.²² It is striking that the main texts and glosses of these collections remained anonymous and circulated without prefaces. Why did this happen? Research remains to be done to explain this phenomenon.

During the last ten years of the twelfth century, the better known *Quinque compilationes antiquae* (Five Ancient Compilations) became available.²³ All of these have prefaces.²⁴ The first is by Bernard of Pavia (d. 1213),²⁵ who called his decretal collection *Breviarium extravagantium* (Compendium of Decretals Circulating Outside) because the decretals it assembled had not yet been collated. The term *extravagantes* arose in the technical vocabulary of the canonists who wished to distinguish between those decretals in Gratian's *Decretum* and those which *vagant extra Decretum*, that is, circulated outside the *Decretum*. Later canonists called Bernard's *Extravagantes* the *Compilatio prima*. It is the most systematically compiled decretal collection, following the five-book schema of Gratian's *Decretum*. Most papal decretals of the *Compilatio prima* were referred to by the *Liber Extra*.²⁶

The *Compilatio prima* is the first decretal collection with a preface written and signed by the author of the collection. It is therefore the first non-anonymous decretal collection. In his preface, Bernard explains why. In contrast to the *ius vetus* of Gratian's *Decretum*, which embraced a wide variety of sources, the *ius novum* was primarily decretal law, which was now accorded the highest authority. Bernard formulated a new structural breakthrough in his preface. He introduced a system inspired by the codification of Justinian, which divided the material into five books, briefly summarized by the phrase *judex, iudicium, clerus, connubium, crimen* (judge, trial, clergy, marriage, crime). Each book was subdivided by titles and these in turn by *capitula*, or canons. This clear system was adopted by all subsequent collections of decretals.

A New Period: The Papal Law Book of Pope Innocent III

In 1210, Pope Innocent III (d. 1216) commissioned Petrus Collivaccinus (of Benevento) (d. 1219/20) to compile the *Compilatio tertia*.²⁷ How did a pope stumble upon the idea of publishing his own decretals? One reason was the search for

textual authenticity. Since the middle of the twelfth century, the number of falsified decretals had increased to such an extent that entire counterfeiting rings had developed to produce them. At the beginning of his pontificate, Innocent III issued a series of decrees that provided guidelines for testing the authenticity of alleged papal documents and threatened draconian punishments for those who falsified papal texts, but these measures failed. It was with deep resignation that, in 1198, Innocent III admitted, “decretals were presented to him, whose authenticity he doubted.”²⁸ The source of his doubt was the distinct lack of criteria for determining the authenticity of a normative papal text. That, combined with the impossibility of surveying the large number of consolidated decretal materials, produced a state of latent legal uncertainty.

Innocent III emphasized in his letter or preface that all the decretals in the *Compilatio tertia* were also contained in the registers of the Roman curia, and therefore they were authentic. No other decretals from Innocent III’s pontificate up to 1210 were to be taken as binding, because they were not found in the registers. In contrast to the *Liber Extra* of Gregory IX, which would derogate all earlier decretal collections, the older decretal collections retained their validity after the promulgation of the *Compilatio tertia* and the compilation of a new collection without papal permission remained possible. While the function of *legem condere* (to make law) had belonged solely to the private compilers of decretal collections in the epoch before Innocent III, from the time of the *Compilatio tertia* onward, an “unknown concentration on conscious legal development [by the papacy] becomes apparent.”²⁹ But events show that the *Compilatio tertia* was not an exclusive collection, in the sense of excluding the use of all other decretal collections by the schools and courts.

Gregory IX’s *Liber Extra* (1227–41): The So-called Decretals of Gregory IX

Pope Gregory IX decided to have a new, uniform, and simplified compilation defined that would contain only the current laws being enforced. For the compilation of these decretals, he appointed Raymond of Pennafort (d. 1275), a Dominican and professor in civil and canon law in Bologna.³⁰ The compilation was promulgated on September 5, 1234 with the papal letter *Rex pacificus* as its preface. Raymond of Pennafort based his compilation primarily on the *Quinque compilationes antiquae*, from which he extracted 1,756 chapters out of 2,139. To these he added 195 decretals of Gregory IX, both existing ones and ones that had been promulgated at his request. Raymond also added other texts, such as the

decretals of Pope Innocent III, ecumenical councils (particularly those of Lateran III and IV), writings of the Church Fathers, and texts by ecclesiastical writers. Gregory's introductory letter, *Rex pacificus*, shows that the *Liber Extra* was expressly intended to be the authoritative and exclusive collection of papal decretals. It formed an authentic, universally applicable collection with an exclusive value. All the texts that were included received, irrespective of their origin, the force of law (authenticity) and applied to the entire community of the Church.³¹ Any decretal which it did not include lost legal recognition. It thus became the first official publication of canon law and it remained the most important collection until the 1917 Code (*Codex Iuris Canonici*).

Following promulgation, Gregory IX sent the *Liber Extra* to the University of Bologna. It is conceivable that the work was also sent to the University of Paris. In his introductory letter, *Rex pacificus*, the pope declared that all other collections were to be deemed void and prescribed that only these decretals would be used in schools and tribunals. He forbade new compilations without the express permission of the Holy See.

Images and Preface

The layout and illustrations contained within the manuscripts soon became an underlining tool of Gregory's IX intentions.³² The new arrangement of *textus inclusus* and framing glosses in an asymmetrical form demonstrated that the decretal-text and especially the preface were the main subject, and that the accompanying legal glosses were authorized, fixed, and complete entities. In many cases, the users of the decretals did not respect these visual guidelines but instead added new layers of glosses in the margins or in the tables of contents at the beginning of the manuscripts. Miniatures in the decretal-manuscripts indicate not only the content at the beginning but also the new ranking of this legal collection in the medieval hierarchy of texts, especially in competition with texts of the *lectio divina* or liturgy. The introductory illustrations stress different themes: the papal authority or the Dominican authorship of Raymond, clerics or lawyers as receivers of the decretals, the divine origin of law, and the recipient as a pious sinner, as well as the practice of legal lectures at universities.³³

Pope John XXII's *Extravagantes*

But what happened to the papal letters and conciliar decrees that continued to appear after the *Liber Extra*? As there was still a need for a term to describe

the most recent legislation, the word *extravagantes* continued to be used in the years until 1298, when the *Liber Sextus* of Boniface VIII (d. 1303) was promulgated.³⁴ A similar change occurred after the promulgation of the *Liber Sextus* in 1298 and the *Constitutiones Clementinae* in 1317. As a result, the word *extravagantes* in the fourteenth and fifteenth centuries came to refer to those new canonical texts, by then almost exclusively papal decrees, which circulated outside the *Liber Sextus* and the *Constitutiones Clementinae*. Although some preliminary studies have been made, the general history of the transmission of these *extravagantes* has not yet been written. Jacqueline Tarrant has edited the *Extravagantes* of John XXII (d. 1334) and identified 240 manuscripts.³⁵ These *Extravagantes* were compiled by Jesselin de Cassagnes (d. 1334) in 1325 and – in distinction from the earlier papal law books – without papal assistance, but not *sine licentia papae* (without papal license) for every papal letter copied from the papal register. This may be one of the reasons why Pope John's *Extravagantes* do not have a preface.

Of the many compilations of the new papal law, Gregory IX's *Liber Extra* (1234), Boniface VIII's *Liber Sextus* (1298), the *Clementinae* (1317), the *Extravagantes Ioannis XXII* (1325), and the *Extravagantes communes*, first gathered by Jean Chappuis in 1499–1505, were particularly important.³⁶ Together with Gratian's *Decretum*, these five collections comprise what would later become known as the *Codex Iuris Canonici*.³⁷ The 1582 edition is the final example of a *Codex canonicum glossatum*, or glossed edition of the *Codex*. This is the edition which contains the authoritative preface, that is, the papal letter *Ad futuram rei memoriam* by Gregory XIII, which appeared in the printed edition of 1582.³⁸ Aside from a few sections on episcopal and marriage law, the *Codex Iuris Canonici* was replaced by the *Corpus iuris canonici* in 1917 and then supplemented again in 1963, although the substance of the *Codex Iuris Canonici* continues to live on.

Conclusion

Because canon law is not a finite body of statutes, but rather consists of principles drawn from a wide range of sources, it was necessary for canonists to construct a harmonious legal system that could consistently reconcile theory with practice in order to offer a basis for jurisprudence. Private legal collections were the starting point for this process and papal law books represent the end point in the increasing textualization of law and development of the *ius novum* discernible in the Middle Ages. As the papal law books became models for secular legal works, Max Weber appropriately characterized canon law as the forerunner

for modern legal rationality – and I would add that the prefaces embody this development.³⁹ Prefaces are thus a good example of how authorized innovations in legal thinking were achieved through writings that can be considered as paratexts.

Notes

1. For an overview of the *Decretum Gratiani*, see Werckmeister 2000; Winroth 2000; and Genka 2006. For an edition, see Friedberg 1879.
2. Cortese 1993; and Murano 2015. On Gratian, see Condorelli 2013a; and Winroth 2013.
3. Thompson 1993, p. 3.
4. The second part of the *Decretum* follows the dialectical method more rigorously. It consists of thirty-six cases (*causae*). Each *causa* is divided into separate *quaestiones*. In each *causa*, Gratian put forth a hypothetical set of facts, from which he derived several questions. The final part of the *Decretum*, the shortest of the three, is called *De consecratione*. It contains various aspects of the Church's sacramental life and worship: for a very recent study, see Wei 2016. For the most recent edition of *De Penitentia*, see Larson 2016.
5. Van de Weil 1990, pp. 116–19.
6. Kalb 1983; and Müller, J. 2001.
7. An edition of the Prologue is published in Kalb 1983, pp. 113–20, and has been translated in Somerville and Brasington 1998, pp. 194–201.
8. See Riedel-Spangenberg 2003.
9. *Summa decreti*: see the translation in Schulte 1870, p. 336.
10. See the edition of Aimone Braida 2014, p. 2.
11. Kalde 2002, p. 347.
12. Kalb 2002, p. 692.
13. Müller, W. P. 1994; and Müller, W. P. 2002.
14. On legal glosses in general, see Dolezalek 1994. On paratext in Roman law, see also the chapter by Ascheri and Maffei in the present volume.
15. On the *Glossa ordinaria* to the *Decretum*, see Weigand 2008a, pp. 88–91.
16. Thompson 1993, p. 3.
17. Sommar 2009.
18. See the translation by Thompson 1993, p. 2.
19. Thompson 1993, p. 3.
20. Thompson 1993 shows at the beginning of his book a manuscript of the *Decretum* illuminated by the Bolognese artist Nicolo da Bologna in the mid-fourteenth century (Munich, Bayerische Staatsbibliothek, Clm 23552).
21. Fransen 1972, especially pp. 14–22; Nörr 1973; Landau 1979; Landau 2000, pp. 87–95; Drossbach 2008a; and Drossbach 2008b.
22. Drossbach 2000; and Landau and Drossbach 2007. See the edition in Drossbach 2014.
23. See the edition in Friedberg 1882. See also Duggan 1963.
24. See, in general, Van de Weil 1990, pp. 13–106.
25. Condorelli 2013b.

26. Bernard of Pavia also compiled a *Summa decretalium*; for an edition, see Laspeyres 1860.
27. Thier 2002; and Landau 2003.
28. Hageneder 1977, p. 329. See also Landau 2003.
29. Landau 2003, p. 176.
30. Bertram and Di Paolo 2012.
31. Bertram 2002; and Wetzstein 2006. Bertram 2015a, p. 283, n. 1, describes the difficult problem surrounding the open question of the nature of the law in the *Liber Extra* and summarizes current discussion about it.
32. I base the following on L'Engle and Gibbs 2001; and especially Wittekind 2010.
33. Murano 2005.
34. Wetzstein 2006; and Bégou-Davia 2004.
35. Tarrant 1983, pp. 67–133.
36. Bertram 2015b.
37. For an overview that is still of use, see Nörr 1973.
38. Edition viewable at <http://digital.library.ucla.edu/canonlaw/librarian?ITEMPAGE=CJC1&PAGENUM=3>.
39. Weber 1960, pp. 236–39.