# Inquisitorial process and plenitudo potestatis at the Council of Constance (1414–1418)

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Certainly the inquisitorial processes related to the *causa fidei* celebrated during the Council of Constance (1414–1418) have been a subject of great interest for historians, theologians and canonists. Clear evidence of this can be found in the numerous studies and books reviewed by Ansgar Frenken[1] and Jürgen Miethke,[2] who are particularly concerned with the inquisitorial processes for heresy against John Wyclif, Jan Hus and Jerome of Prague. While Wyclif's case did not pose a great problem, as his condemnation had already been pronounced by English authorities at two previous synods celebrated in London (1382 and 1396) and by the Council of Rome (1412), the cases against Hus and Jerome of Prague were more pressing in that the Bohemian reformers' activities were considered to be influenced by and derived from Wyclifite teachings at the University of Prague. Indeed based on the actions taken by Council of Constance, we can try to understand how its members viewed the problem of the *causae fidei.*

At the Eighth Session, held on 4 May 1415, Wyclif's forty-five theses which had been previously censored by the University of Paris were finally condemned by the council. However, more pressing concerns forced the council members to postpone the reading of the remaining 260 theses until the following session.[3] After taking the relevant procedural steps and, as nobody spoke in defence of Wyclif's memory, witnesses were summoned to prove that Wyclif had never been punished for his heretical views and consequently, it was ordered that his remains should be exhumed because a heretic could not be buried among the dead.[4]

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1 See: Ansgar Frenken, "Die Erforschung des Konstanzer Konzils (1414–1418) in den letzten 100 Jahre", *Annuarium historiae conciliorum* 25 (1993) 245–291.

2 See: Jürgen Miethke, "Eresia dotta e disciplinamento ecclesiastico. I processi contro gli errori teologici nell'epoca della scolastica," *Pensiero medievale* 1 (2003) 81 n. 51.

3 Walter Brandmüller, *Das Konzil von Konstanz (1414–1418)* (Paderborn, 1991) 299: "Die Verlesung der 260 Artikel wurde auf Intervention Fillastres auf die nächste Sitzung verschoben."

4 Giuseppe Alberigo et al. Edd., *Conciliorum Oecumenicorum Decreta* [hereafter: COD] (Basil, 1962) 391–392: "Propterea instante procuratore fiscali, edictoque proposito ad audientiam sententiam ad hunc diem, haec santa synodus declarat, definit et sententiat eumdem

The order in which these processes were carried out is highly eloquent and follows a logical structure. According to the council fathers, far from being brushed aside, Wyclif's ideas were taking hold among his Bohemian followers, driven by Hus and the reform movement. While the ties between Oxford University, where Wyclif had taught, and the Charles University of Prague are undeniable, it would be dangerous to be mislead by conciliar sources presenting Hus as a true *Wyclif redivivus.*[5] Although their ecclesiologies overlap to some extent, most scholars agree that their theological thinking cannot be fully assimilated.[6] Nevertheless, it should not be forgotten that the Council of Constance's *sententia* was articulated around the *reductio ad unum* of Wyclif's and Hus's heresy.[7] Finally, for the council fathers the case of Jerome of Prague[8] was quite straightforward as he was considered a faithful disciple

Ioannem Wicleff fuisse notorium haereticum, pertinacem, ac in haeresi decessisse, anathematizando ipsum pariter, et suam memoriam condemnando. Decernitque et ordinat, corpus et eius ossa, si ab alliis fidelium corporibus discerni possint, exhumari, et procul ab ecclesiastica sepultura iactari, secundum canonicas et legitimas sanctiones."

5 COD, 403: "…nihilominus tamen quidam Ioannes Huss in hoc sacro concilio hic personaliter constitutus, non Christi, sed potius Ioannis Wicleff haeresiarchae discipulus, post et contra damnationem et decretum huiusmodi ausu temerario contraveniens, errores eius plures et haereses, tam ab ecclesia Dei, quam etiam a ceteris olim reverendis in Christo patribus, dominis archiepiscopis et episcopis diversorum regnorum, et magistris in theologia plurium studiorum condemnatos, dogmatizavit, asseruit, et praedicavit…"

6 The idea that the theological thought of Hus would be a mere copy of Wyclif was openly defended by Johann Loserth at the end of 19th century see: Johann Loserth, *Hus und Wyclif. Zur Genesis der husitischen Lehre* (Prague-Leipzig, 1884). About these historiographical problems see: František Šmahel, *Die Hussitische Revolution,* Monumenta Histoirae Germaniae, Hahnsche Buchhandlung (Hannover, 2002) (3 vv.) I: 41. On the relationship between Wyclif and Hus see: HHR 7–35. See also Olivier Marin, *Le archevêque, le maître et de dévot. Genèses du mouvment réformateur pragois (1360–1419) (*Paris, 2005). Even if they are written from a confessional point of view, the works of Dom De Vooght are important. See: Paul De Vooght, "Jean Hus à l'heure de l'oecuménisme", *Irénikon* 36,3 (1969) 193–313; ibid., "Universitas praedestinatorum et congregatio fidelium dans l'ecclésiologie de Jean Hus", *Ephemerides Theologicae Lovanienses* 32,3–4 (1956) 487–534; ibid., *Husiana* (Louvain, 1960); ibid, *Jean Hus au Symposium Husianum Pragense,* Istina, (Paris, 1965–1966); ibid., *L'hérésie de Jean Hus* (Louvain, 1960). On the same issue see: Alexander Patschovsky, "Ekklesiologie bei Johannes Hus," in: Hartmut Boockmann, Bernd Moeller, and Karl Stackmann edd., *Lebenslehren und Weltenwürfe im Übergang vom Mittelalter zur Neuzeit. Politik-Bildung--Naturkunde-Theologie* (Göttingen, 1989) 370–399, Bernhard Töpfer, "Lex Christi, dominium und kirchliche Hierarchie bei Jan Hus im Vergleich mit John Wyclif" HENC 157–166 and Enrico Selly Molnár, "Wyclif, Hus and the problem of Authority" HENC 167–182. On the *Universitas Carolina* see: František Šmahel, *Die Prager Universität im Mittelaler,* (Leiden, 2007).

7 On the process against Wyclif see: Edith C.Tatnall, "The Condemnation of John Wyclif at the Council of Constance," in: G.J. Cuming, and Derek Baker, *Councils and Assemblies* (Cambridge, 1971) 209–218.

8 About the process against Jerome of Prague Cf. Renee Neu Watkins, "The Death of Jerome of Prague: Divergent Perspectives," *Speculum,* 42,1 (1967) 104–129 and Paul P. Bernard, "Jerome of Prague, Austria and the Hussites," *Church History* 27,1 (1958) 3–22; For an extended bibliography on Jerome see: František Šmahel, *Konstanzer und Prager Begegnungen. Zwei Vorträge Alexander Patschovsky gewidmet,* (Constance, 2007) 13–44.

of Hus. By virtue of this *reductio ad unum* operation and Hus's appearance before the council, the process against him has aroused the interest of most scholars. Now it should be pointed out that this process has been largely studied from a theological perspective and that research has been mainly focused on determining whether Hus's views were heretical or not and if they could ultimately be fully assimilated with Wyclif's teachings.[9] Similarly the differences between the "predestinarian" ecclesiologies held by Wyclif and by Hus on the one hand, and the juridical ecclesiology held by most members of the council on the other hand have been repeatedly pointed out.[10] Thus both from a Roman Catholic and from a Protestant point of view – both being more-or-less apologetic – and from a "national" Czech perspective, the traditional question which has rightly preoccupied historians has been: Was Jan Hus in fact a heretic?[11] While this interest is absolutely reasonable since Hus's sentence was largely based on his refusal to retract from theses he maintained he had never supported, we nevertheless believe this approach poses serious problems insofar as it tends to project ontologically a set of clearly historical categories such as orthodoxy and heterodoxy.[12] Without

[9] See: František Šmahel, *Die Hussitische Revolution,* II: 793: "Am meisten jedoch erfreute sich Hus am Gedanken an die verkrümmten Gestalten der deutschen Professoren, denen Wyclif die Grundlagen ihrer nominalistischen Lehre zerstört hatte. Glossen vom Typ 'Ha, ha, Deutsche, haha' dokumentieren überzeugend den nationalen Unterton, der von Beginn an die in Prag ausgetragenen Kämpfe um Wyclif begleitete." On the reception of Wyclif's thought at the *Universitas Carolina* see: František Šmahel, *Verzeichnis der Quellen zum Prager Universalienstreit 1348–1500,* MPP 25, (1980); Vilém Herold, "Zum Prager philosophischen Wyclifismus," in: František Šmahel ed., *Häresie und vorzeitige Reformation im Spätmittelalter* [Schriften des Historischen Kollegs, Kolloquien 39] (Munich, 1998) 133–146; ibid., *Pražská univerzita a Wyclif* [The Prague University and Wyclif] (Prague, 1985); František Šmahel, *Die Prager Universität im Mittelaler,* (Leiden, 2007) 515–525.

[10] This thesis has been supported by Matthew Spinka, *John Huss at the Council of Constance*, (New York, 1963) and ibid., *John Hus' Concept of the Church*, (Princeton NJ, 1966).

[11] This has been the traditional question most scholars have tried to answer. See among others, Walter Brandmüller, *Das Konzil von Konstanz,* 324: "Orthodoxie oder Häresie: das war viel mehr die Frage die das Konzil bewegte." see also Paul De Vooght, *Husiana,* and ibid., *L'hérésie de Jean Hus*. About the revision of the process against Hus see: Jerzy Misiurek, "Zur 'Rechtssache Hus' " in: HENC 243–252 and Jaroslav Polc, "Johannes Hus zu rehabilitieren? Eine quaestio disputata" *Annuarium Historiae Conciliorum,* 15 (1983) 307–321; Jiří Kotyk, *Spor o revizi Husova procesu,* (Prague, 2001) and the acts of the Symposium organized at the University of Lateran between 15–18 December 1999 see: Miloš Drda, František Holeček, and Zdeněk Vybíral edd., *Jan Hus na přelomu tisíciletí,* HT Supplementum 1 (2001).

[12] See on the subject the *Relatio de Concilio Constantiensi* in FRB 8 (1932) 13: "Post modicum tamen, deo ut puto, desponente, omnes suas hereses et errores fuit libere confessus, dicendo, quod nollet abiurare articulos contra ipsum prolatos triplici ex causa: Primo ne lederet suam conscienciam, 2° ne incurreret periurium et tercio ne populus scandalizaretur, qui multus et plurimus foret, cui opositum predicasset. Cetera require in fine libri." See also the *Relatio de Magistro Johanne Hus* written by Peter of Mladoňovice in ibid., 103: "Et magister Johannes inter multa hinc inde per alios cribrata et collata dixit: 'Reverendissime pater! Ego paratus sum humiliter obedire concilio et informari. Sed rogo propter deum, quod michi laqueum dampnacionis non velitis inponere, ut non cogar mentiri et abiurare

denying that there may have been theological differences between the council fathers and Hus, our proposal rests on the belief that heresy is basically a political fact whose configuration is often closely related to a redefinition of the roles within the power apparatus of ecclesiastical *politia*.[13] In this presentation our interest will focus on the study of the logics of power involved in the inquisitorial process which makes a potentially heterodox doctrine to be defined as heretical. In this regard it seems appropriate to point out that in recent years the study of the relationship between judicial practices and the consolidation of both political and ecclesiastical power has yielded significant results. Judicial practices and particularly the gradual adoption of the procedural form of the *inquisitio* have been studied in terms of the consolidation of different instances of power. While Robert Moore's[14] work has been devoted

illos articulos, de quibus teste deo et consciencia michi nichil constat, et testes contra me deponunt, que nec in cor meum umquam ascenderunt, et presertim de isto quod post consecrationem in sacramento altaris remaneat panis materialis. Illos autem, de quibus constat nichi et quos in libris meis posui, docto de oposito, volo humiliter revocare. Sed quod ego omnes articulos michi impositos abiurarem, quorum multi michi deo dante false ascripti sunt, laqueum michi dampnacionis menciendo preparem, quia abiurare, ut in Katholicon me legisse memoror, est errori prius tento renunciare. Sed quia multi michi articuli ascripti sunt quos numquam tenui, nec in cor meum ascenderunt, ideo videtur michi contra conscienciam illos abiurare et mentiri." This chronicle of the trial possesses a great deal of interpretative complexity since it was written by one of Hus's closest collaborators. Although the tone of the text is clearly apologetic and describes Hus's 'martyrdom', it also offers a radically different point of view from that of the judicial sources, and this is precisely what renders it particularly interesting since it allows the reconstruction of some process events which are missing in the proceedings. The text bears a significant place in the history of the Reformation. Already in 1528 in Nüremberg under Luther's influence the Latin text was published for the first time in Germany and a year later the first translation into German appeared. The text began to circulate mainly in some Calvinist sectors in Geneva when Jean Crespin published it, together with Hus's correspondence, in *Le livre des Martyrs* (1554). Two years later under the title of *Acta martyrum* (1556) Claude Baduel translated Crespin's work into Latin. After its publication in Geneva, the text also began to circulate in French speaking countries and was translated into several languages (Dutch, German and Polish). Cf. Catharine Randal Coats, "Reconstituting the Textual Body in Jean Crispin's *Histoire des* martyrs (1564), *Renaissance Quaterly,* 44,1 (1991) 62–85. When John Foxe, fleeing Marian persecutions, settled on the Continent he came into contact with this text, which he would later include in his edition of the *Book of Martyrs* (1554), reissued in 1561 in Basel. It has been also published by Palacký in *Documenta* 237–326. The critical standard edition is in Novotný, FRB VIII. In the 1960's, and perhaps in agreement with the prevailing ecumenical climate at the time, two translations of the text were published, one into English and the other into German. See respectively: Matthew Spinka, *John Hus at the Council of Constance*, op. cit. and Josef Bujnoch, *Hus in Konstanz. Der Bericht des Peter von Mlanodiowitz* [Slavische Geschichtsschreiber 3] (Graz-Vienna-Cologne, 1963).

13 Cf. Lester E. Kurtz, "The Politics of Heresy," *American Journal of Sociology* 88,6, (1983) 40–70. Although the author examines the late nineteenth century "modernist controversy" the study is interesting from a methodological point of view in that it inquires into the institutional conditions which gave rise to the establishment of orthodoxy and heterodoxy.

14 Robert Moore, *La formación de una sociedad represora. Poder y disidencia en la Europa occidental, 950- 1250* (Barcelona, 1989) and ibid., "Heresy, repression, and social change in the

to studying the relations between papal power after the Gregorian Reform of the eleventh century and the persecution of religious dissidents, the works of Massimo Vallerani and Mario Ascheri among others have focused on formulating and explaining the link between inquisitorial judicial practices and the consolidation of communal power in Italian cities.[15] Jacques Chiffoleau on the other hand has looked at the links between the great political processes of the late fourteenth and early fifteenth centuries and the consolidation of monarchical power.[16]

Based on these authors' investigations and taking advantage of many of their ideas, we believe it can be similarly claimed that in the case of the inquisitorial processes led by the Council of Constance a close association can be ascertained between inquisitorial practices and the consolidation of conciliar authority within the ecclesiastical *ordo iudicarius.* This subject is worthy of study and remains to be explained in detail. Although many authors have at least pointed out this association, they have not examined it closely. Indeed Brian Tierney had already suggested in the late 1960's the presence of certain links between the enactment of the *Haec sancta* decree and the *causae fidei.* [17]

For his part, Phillip Stump, known for his study of the reforms which took place during the Council of Constance, has also pointed out the close temporal association between the enactment of the *Haec Sancta,* the beginning of the deposition process against John XXIII and the expedited procedures for the remaining inquisitorial processes for heresy against Wyclif, Hus and Jerome of Prague.[18] Although the author stresses this association, his interest

age of Gregorian Reform" in Scott L. Waugh, and Peter Diehl, edd., *Exclusion, Persecution and Rebelion. Christendom and its Discontents* (Cambridge, 1996).

15 Massimo Vallerani, *La giustizia pubblica medievale* (Bologna, 2005) and Mario Ascheri, "Introducción," *Tribunali, Giuristi e Instituzioni. Dal Medioevo all' Età moderna* (Bologna, 1995) [Revised edition of the 1989 original] 7–22 and more recently Mario Ascheri, *La città--Stato* (Bologna, 2006). By no means do we intend to provide a comprehensive bibliography of either authors but cite only their latest works devoted to the problems of the relationship between justice and politics. On the subject of justice see: Diego Quaglioni, *La giustizia nel Medioevo e nella prima età moderna* (Bologna, 2004).

16 Jacques Chiffoleau, "Dire l'indicible. Osservazioni sulla categoria del 'nefandum' dal XII al XV secolo" in Jean-Claude Vigueur, and Agostino Paravivini Bagliani, edd., *La parola all'accusato* (Palermo, 1991) 42–73.

17 Brian Tierney, "Hermeneutics and History. The Problem of the Haec sancta" in: Thayron Adolph Sandquist and Michael R. Powicke, edd., *Essays in Medieval History presented to Bertie Wilkinson* (Toronto, 1969) 365: "The claim to obedience in matters of faith had to be made, not only because of the possibility that a charge of heresy might be framed against John XXIII, but above all because of the impending trial of John Hus. (*Haec sancta* enacted at the fifth session of the council on 6 April; the comission to investigate Hus was set up at the sixth session on 17 April)." The text of the decree reads as follows: "*…obedire tenetur in his quae pertinent ad fidem et extirpationem dicti schismatis, ac reformationem dictae ecclesiae in capite et in membris.*"

18 About the temporal associations see: Phillip H. Stump, The *Reforms of the Council of Constance (1414–1418),* (Leiden, 1994) 24–26: "The council did not begin formal deliberation of reforms until after decisive actons had occurred in both areas: the deposition of John

in other matters dealing with the reforms during the council prevents him from studying this subject in further detail. Similarly Thomas Morrisey has stressed the importance of the temporal relationship between the assertion of conciliar authority, the deposition process against John XXIII and the rest of the *causae fidei.* In that sense, in the opinion of the author the strong conciliar reaction in relation to the latter remains an unsolved matter.[19] From the field of *studia hussitica*, the link between the enactment of the *Haec Sancta* and the events around the process against Hus has been also highlighted. From a rather polemical point of view Matthew Spinka has argued that accepting the validity of the process against Hus implied accepting the validity of the *Haec Sancta* decree.[20] The Belgian Benedictine Paul De Vooght also referred to this controversial issue when he claimed that the validity of the Council of Constance's actions between the papal depositions and Martin V's election was ratified by the subsequent papal approval expressed in the bull *Inter cunctas* dealing with what had been previously decided *conciliariter*.[21] Recently this problem has been studied in similar way by Jiří Kejř in his

XXIII (May 29), the resignation of Gregory XII (July 4), the departure of Sigismund for megotiations with the adherents of Benedict XIII (July 18); the condemnation of the heretical theses attributed to Wyclif (May 4) and the trial and death by burnig of Hus (July 6) […] If the council could condemn abuses of papal power in a reigning pope, it could presumably also take action to prevent those abuses by limiting the exercise of papal power in the future. This concept was of fundamental importance for reform at the council. It was based in turn on the idea that the council represented the universal church. As much as this idea apears to forshadow later secular ideas of representative, parliamentary government, we must also note its unfortunate close connection with the idea of combating heresy. The canonists who had argued that the council has power to judge and depose a pope for maladministration based this power on an extension of the council's power to judge a pope for heresy. *This connection was made very visible at Constance, when during the spring of 1415 the condemnation of John XXIII proceeded in tandem whith the condemnation of the Wicliffite and Hussite teachings.*"

19 Thomas Morrissey, "*After* Six Hundred Years: The great Western Schism, Conciliarism, and Constance," *Theological Studies* 40,3 (1979) 506 n. 21: "The pesonal hostility of some people present at the Council towards Hus seems to have gone beyond *odium theologicum* and requires further explanation and motivation. In the vilification of John XXIII, who had also threatened to undermine their hopes and work, they showed some restraint, however limited this restraint was…"

20 Matthew Spinka, *John Huss at the Council of Constance*, 76: "Thus only a person who accepts the principle of *Sacrosancta* [*Haec sancta*] can claim that Hus was tried by a legitimate Council."

21 For the text of the bull *Inter cuntas* see: Mansi XXVIII, col. 590–593. The shift in De Vooght's position can be seen in the following texts cf. Paul De Vooght, "Le conciliarisme aux conciles de Constance et Bâle: compléments et précisions," *Irénikon* 36,1 (1963) 64 : " Le 22 avril 1418, à la dernière session du Concile de Constance, Martin V a déclaré qu'il aprouvait tout ce qui avait été décidé *conciliariter,* j'ai pris argument de la déclaration de Martin V pour affirmer qu'il avait aprouvait le conciliarisme. Je ne retire rien de ce que j'ai dit là--dessus, mais je pense qu'il y a lieu de préciser le *genre* d' aprobation donné par Martin V en cette circonstance. " Some time later the same author commented on the subject ibid.,"Thr Results of Recent Historical Research on Conciliarism," *Concilium* 4,7 (1971) 152: "The

book on the juridical issues involved in the trial against Hus.[22] What Spinka's, De Vooght's and Kejř's positions evidence is the close relationship between the consolidation of conciliar authority after John XXIII's flight and the development of the heresy trials. Yet in our view the nature of that association is much more significant than has been usually admitted. This would not be solely a random and fortuitous temporal coincidence nor would it be related to subsequent papal approval; this would rather be a relationship that in short should be understood within a wider "political" or ecclesiological context of institutional redefinition of the ecclesiastical power instances possessing the *clavis scientiae* and the *clavis potestatis* which involved both conciliar and episcopal powers as well as the power of the university corporation.[23]

After the enactment of the *Haec sancta* it was nearly impossible to deny that ecclesiastical power somehow resided in the council. However the major problems and debates appeared when trying to determine how this happened. From a moderate "conciliarist" view represented by Cardinal Pierre D'Ailly, a council had greater authority than a pope acting on his own and disregarding conciliar authority; however the leadership of the pope in the council was also stressed. At the same time D'Ailly claimed that the authority of a whole (in this case, the Council) was greater than that of one of its parts.[24]

However this view failed to settle the matter of what ecclesiastical instance should be obeyed if a disagreement between the pope and the council arose.

question of whether or not Martín Vgave his assent to the decree *H[aec] s[ancta] s[ynodus]* then becomes of secondary interest …."

22 Jiří Kejř, *Die causa Johannes Hus und das Prozessrecht der Kirche,* (Regensburg, 2005) 131–135 = ibid. *Husův Proces,* (Prague, 2000) 142–145].

23 See among other authors: Peter R. McKeon, "*Concilium generale* and *Studium generale:* The Transformation of Doctrinal Regulation in the Middle Ages," *Church History* 35,1 (1966) 24–34; Joseph Koch, *Kleine Shriften,* v. 2 (Rome, 1973); Allan E. Bernstein, *Pierre D'Ailly and the Blanchard Affaire* (Leiden, 1978); William A. Courtenay, "Inquiry and Inquisition: Academic Freedom in Medieval Universities," *Church History,* 58,2, (1989) 168–181; Douglass Taber, "The teaching Authority of the Theologian" *Church History,* 59,2 (1990) 163–174; B.J. Caiger, "Doctrine and Discipline in the Church of Jean Gerson" JEH 41,3 (1990) 389–407; Jürgen Miethke, "Papst, Ortsbischof und Universität in den Pariser Theologenprozessen des 13. Jahrhunderts" in Albert Zimmerman, ed., *Die Auseinandersetzungen an der Pariser Universtität im XIII. Jahrhundert* (Berlin, 1976) 52- 94; Jürgen Miethke, "Eresia dotta e disciplinamento eclesiástico. I processi contro gli errori teologici nell'epoca della scolastica," *Pensiero politico medievale* 1 (2003) 61–96; Louis B. Pascoe, *Church and Reform. Bishop, Theologians and Canon Lawyers in the Thought of Pierre D'Ailly* (Leiden, 2005).

24 See : Mario Fois, "L'eclesiologia di emergenza stimulata dallo Scisma" in *Genèse et débuts du Grand Schisme d'Occident (1362–1394),* (Paris, 1980) 623–636 ; Pierre D'Ailly, *Tractatus de potestate eclesiastica,* Louis-Ellies Du Pin ed., *Joannes Gersonii… Opera omnia*, 6 vv. in 4 : II, col. 757: "… Non est vera, scilicet quod papa est maior et superior concilio generali, licet sit maior et superior in concilio, cum sit caput omnium membrorum… quia omne totum sua parte maius est… Sed papa est pars concilii sicut caput pars corporis: ergo totum concilium maius est papa, et per consequens authoritas totius concilii maior authoritate papae." Text quoted by Brian Tierney, "Divided Sovereignty at Constance: a Problem of Medieval and Early Modern Political Theory", *Annuarium Historiae Conciliorum* 7 (1975) 246.

A heated debate on the matter ensued towards the end of 1416 in a polemic between the Dominican Leonardo Statius de Datis, who supported a papalist position, and an anonymous conciliar representative with a radical position in favour of the Council.[25] Although the debate took place after the heresy trials studied here, we believe it accurately reflects the ecclesiological problems which arose when trying to define conciliar authority after John XXIII fled the assembly. The polemic revolved around the possibility of dividing the *plenitudo potestatis.* According to the Dominican author, the supreme power of the church could not be divorced from the church in terms of *iurisdictio* but could be separated from it in terms of its exercise. As for the pope the *plenitudo potestatis* could be separated both in terms of jurisdiction and of its exercise. The two claims may have been embraced by a moderate conciliar thinker, but the Dominican went beyond acceptable limits when he claimed that the exercise of the *plenitudo potestatis* lay exclusively with a pope who legitimately presided over the council, thus excluding the possibility that the council may exercise it. According to this last statement, only the pope and definitely not the council could establish what should be approved or rejected by the church. However after the enactment of the *Haec sancta,* it was nearly impossible to deny that the council retained some degree of residual power in case of an emergency arising from a pope's illegitimacy or incompetence. The reason for this stemmed from the premise that the *plenitudo potestatis* could in a way lie simultaneously with the pope and the council representing the *ecclesia universalis*.[26]

[25] The debate has been studied by Brian Tierney, "Divided Sovereignty at Constance,". Concerning Statius see also the sermons examined by Thomas Michael Izbicki, "Reform and Obedience in four Conciliar Sermons by Leonardo Dati O.P." in Thomas Izbicki and Christopher M. Bellitto, *Reform and Renewal in the Middle Ages and the Renaissance. Studies in Honor of Louis Pascoe, S.J.* (Leiden, 2000) 174–192. The texts are only available as manuscripts and are currently being edited. In this regard some passages quoted by the author are of interest. See: MS. Lübeck SB [LB], f. 109vb: "Gladii spiritualis suprema potestas est in papa legittime presidente et residente totaliter quoad executionem ipsius gladii, et nullomodo, ec casu, in concilio generali." It is also interesting the following passage from the manuscript in which the author seems to hesitate between the *ipso facto* deposition theory and the need of a *process.* Cf. LB, f. 109vb: "Ista patet quoniam papa illegittimato vel deposito utraque caret, ut in casu patet."

[26] See Brian Tierney, "The Idea of Representation in the Medieval Councils of the West", *Concilium* 187 (1983 25–30; Georges de Lagarde, "Les Théories représentatives du XIVème--XVème siècle et L' Église," in : *Études présentés à la Commission Internationale pour l'histoire des Assemblées d' États* (Rome 1955) 65–75; Hasso Hofmann, *Rapresentanza--Representatione. Parola e concetto dell'antichità all'ottocento,* Giuffrè, Milano, 2007 [ For the first German edition see: Hasso Hofmann, *Repraesentation. Studien zur Wort- und Begriffsgeschichte von der Antik bis ins 19 Jahrhundert* (Berlin, 1974)]; Albert Zimmermann, *Der Begriff der Repraesentation im Mittelalter: Stellvertretung, Symbol, Zeichen, Bild,* (Berlin, 1971); Francis Oakley, "Natural Law, the *Corpus Mysticum* and Consent in Conciliar Thought," *Speculum* 56 (1981) 786–810; Walter Brandmüller, "*Sacrosancta synodus universalem representans ecclesiam.* Das Konzil als Repräsentation der Kirche," in: ibid., *Papst und Konzil im Großen Schisma (1378–1431). Studien und Quellen,* (Paderborn, 1990) 157–170.

However the anonymous conciliarist rival was ready to reveal certain logical contradictions inherent to the division of the *plenitudo potestatis.* In the first place he argued that it was absurd to claim that a single power could lay simultaneously with the pope and the council, as it would exist between two actors who would often oppose each other.[27] In the second place, if both powers were identical then the pope would dispose of all ecclesiastical property (and this was not the case). If both powers were different *in specie,* the *ecclesia universalis* could depose a pope (its minister) at any time (and this had been expressly denied by Statius).[28] In the third place, if the *plenitudo potestatis* lay with the universal Church *in habitu* but not in *in actu,* this again posed certain logical problems as this limitation to its actions was inconsistent with the *plenitudo* of power.[29] Finally the anonymous conciliarist author argued that Statius's theses went against the council actions in relation to John XXIII's deposition process. In the Dominican's view, the council had only pronounced a *sententia declarativa* with no need for a public process of deposition since the pope had already lost his office *ipso facto* on account of his heretical behaviour. The anonymous author explicitly stated the problem that would arise in that case since a legitimate pope could be charged and deposed by his enemies without a deposition process. Moreover Statius's position would imply going against the actions of the

[27] *Acta Concilii Constanciensis* (ACC) Heinrich Finke et al. Edd., (Münster, 1896–1928) II: 705: "Et primo cierca primam et secundam queritur: Utrum ista suprema potestas sit eodem numero in ecclesia militante et in papa vel diverso? Si eodem, quomodo potest esse in diversis subiectis adequate et non solum diversis, ymmo eciam aliquando contrariis ac intendentibus eodem tempore penitus contraria…" For an analysis of the quoted texts see: Brian Tierney, "Divided Sovereignty at Constance: a Problem of Medieval and Early Modern Political Theory".

[28] ACC II: 705–706 "Si sunt diverse, tunc vel tantum numero differunt vel eciam specie. Si tantum numero, sequitur, quod, sicut eclessia est principalis domina rerum ecclesiasticarum in terra, ita eciam papa; et consequens papa poterit similiter vendere vel donare aut quomodolibet alienare pro libito suo temporalia omnium ecclesiarum, quod tamen iuriste negant… Si vero eciam specie differunt, quia videlicet una est tamquam potestas domine, alii vero sicut ministri seu administratoris, tunc, sicut domina habet [potestatem] prescribere legem ministro et revocare administracionem eius, quando vult, ita poterit ecclesia facere de papa…" ACC II: 706: "Praeterea, si sunt diverse iste potestates, sive differant numero tantum sive non, tunc vel sunt equales vel inequales; si inequales, illa que est maior, est superior: ergo non est in utroque 'suprema', quod non est in utroque plenitudo potestatis, nisi dicatur, quod in utroque plenitudo sue potestatis, quod nihil est dicere… Si vero sunt equales, sequitur, quod, sicut concilium potest separare et iurisdictionem et execucionem a papa, quemadmodum factum est ab Concilio Constanciensi… ita papa potest separare a concilio sive ab ecclesia et iurisdictionem et executionem, quod est contra primam assercionem. Preterea nullo tempore sunt equales iste potestates."

[29] ACC II: 707 "Et si dicatur, quod illa potestas est in habitu, licet non in actu, respondeo, quod frustra est calceamentum, cuius non est calciator, et non posse exire in actum, defectus est potestatis. Quando, si papa potest prohibere, et ecclesia seu concilium non potest hoc de papa, manifestum est, quod maior est potestas in papa quam in ecclesia et consequenter non est in utroque suprema, quod est contra asserciones."

Council of Constance in that the council fathers had deposed John XXIII through a process and a heretical pope could only be proved guilty through its probative instances.[30]

From this line of reasoning it followed that in order to try a pope the *iurisdictio* of the council should be above that of the pope and consequently its *potestas executiva* was superior too.[31] Ultimately what the anonymous conciliarist author claimed was that the *plenitudo potestatis* was either unique and indivisible or it did not exist.[32] While it is clear that the logic of the anonymous author's arguments cannot be attributed to all the members of the council, it does offer an opportunity to analyze the *ultima ratio* – albeit not always brought to such an extreme, sometimes at the expense of some logical contradictions – justification of conciliar authority.

Indeed the debate revolved around the council's *potestas executiva* and its at least contingent consolidation as the ultimate hierarchical instance of the church in possession of the *clavis potestatis*.[33] According to the anonymous

[30] ACC II: 709 "Unde sequitur, quod nullo casu concilium potest ferre sententiam deposiciones contra papam, ita quod ippum deponat, sed solum declarationis, per quam declarat, ippum esse verum papam vel non aut esse depositum vel non, quod est contra determinata et practicata in isto concilio, in quo Johannes primo fuerit suspensus ab administratione papatus et postea depositus a papatu."

[31] About the term *iurisdictio* a fundamental study is that by Pietro Costa, *Iurisdictio. Semantica del potere politico nella republica medievale (1100–1433)* (Milan, 2002) [reedition of the text originally published in 1969] 104: "Di due parallele relazioni antonimiche, una si distaca: quella traducibile nella relazione polare 'iudicare-iudicari'. L'immagine del giudizio qualifica in maniera pregnante un semplice raporto di superiorità. Un semplice raporto di superiorità, concentrato in una posizione, per così dire, di giudicabilità del soggeto inferiore, deviene un raporto specifico, preciso: un raporto di potere." Cf. on the same concept Brian Tierney, *Religion, law and the growth of constitucional though (1150–1650)* (Cambridge, 1982).

[32] ACC II: 710 "Si autem dicatur, quod par in parem non habet imperium, tunc quero, quomodo poterit papa futurus privare concilium invitum vel separare ab eo executionem, quam nunc habet…" ACC II: 729 "Ergo absolute maior est potestas executiva concilii generalis quam pape. Consequentia patet; et antecedens pro prima parte, quia, quamvis papa potest iudicare singulos, tamen non iudicare universos, quia sic posset iudicare totam ecclesiam, quam generale concilium representat…." ACC II: 729 "Ergo absolute maior est potestas executiva concilii generalis quam pape. Consequentia patet; et antecedens pro prima parte, quia, quamvis papa potest iudicare singulos, tamen non iudicare universos, quia sic posset iudicare totam ecclesiam, quam generale concilium representat…."

[33] About the distinction between *clavis scientiae* and *clavis potestatis* see: Brian Tierney, *The Origins of Papal Infallibility, 1150–1350* (Leiden, 1988) 39–45. This distinction appears in the *Decretum,* Dist. 20, *ante,* c. 1: "Sed aliud est causis terminum imponere aliud scripturas sacras diligenter exponere. Negotiis diffiniendis non solum est necessaria scientia, sed etiam potestas. Unde Christus dicturus Petro: 'Quoodcumque ligabueris super terram, erit ligatum et in celis, etc.'prius dedit sibi claves regni celorum: in altera dans ei scientiam discernendi inter lepram et lepram, in altera dans sibi potestatem eiciendi aliquos ab ecclesia, vel recipiendi. Cum ergo quelibet negotia finem accipiant vel in absolutione innocentium, vel in condemnatione delinquentium, absolution vero vel condemnatio non scientiam tantum, sed etiam potestatem presidentium desiderant: aparet, quod divinarum scripturarum

conciliarist author, John XXIII's deposition process had been the prime example of the said exercise. After this event the council fathers had several options which were largely related to the order of the priorities in their agenda thereafter. There were many pending issues but the key was to state explicitly the order in which they would be tackled.[34] Hence the main question was to decide whether the reforms would be carried out before electing the new pope and if that would be done under the council *potestas executiva* acting without a pope. The immediate undertaking of the reforms would have unquestionably implied exacerbating the potential contradictions between the council fathers' different positions, which ranged from an extreme papalist view to a somewhat radical conciliarist view and conflicted over the council's *potestas executiva*. With its careful elaboration the *Haec sancta* decree had reached a temporary and precarious consensus between the conflicting views on the power of the council which the definition of the *potestas executiva* seemed to threaten. Advancing immediately with the reform would have undoubtedly shattered this minimum consensus and would have threatened the continuity of the conciliar assembly.[35] In turn the inquisitorial processes then appeared as an appropriate instance not only to demonstrate conciliar executive power but also to reach a minimum consensus to counteract the danger of the spread of heresy. Jean Gerson himself was well aware that the

tractatores, etsi scientia Pontificibus premineant, tamen, quia dignitatis eorum apicem non sunt adepti, in sacrarum scripturarum expositionibus eis preponuntur, in causis vero diffiniendis secundum post eos locum merentur."

34 The author points out that the *reformatio* debate only began once the processes against Wyclif and Hus had been carried out. See: Stump, The *Reforms of the Council of Constance (1414–1418)* 24.

35 See: Michel Anton Decaluwé, "Three Ways to Read the Decree *Haec Sancta* (1415). The Conciliar Theories of Franciscus Zabarella and of Jean Gerson and the Traditional Papal View on General Councils" in: Gerald Christianson, Thomas M. Izbicki and Christopher M. Bellito edd., *The Church, the Councils and Reform: The Lessons of the Fifteenth Century* (Washington, 2008) 22–23. "Subsequently, it was possible to show that two important members of the council, Jean Gerson and Francesco Zabarella, and their respective ideas and positions in the council, are the key to undertand how *Haec sancta* was meant to be understood. The decree can in fact be interpretated in three different ways, and was also meant to be interpretated in these different ways. One can read it, firstly, according to the conciliarist ideas of Jean Gerson, who judged that the situation the council of Constance and the whole church were in, justified the use of epikie; secondly, according to the conciliarist ideas of Francesco Zabarella, which clearly find their origins in the canon law tradition; and finally according to a traditional papal view on general councils, that sees the pope as an essential and necessary part of any general council. This third way of reading originated from the theory that the council of Constance still had papal suport […] The council of Constance proclaimed, with *Haec sancta,* its superiority, and that of any other legitimate general council to come, to be able to work on and to end the schism, but proposed in the same decree three possible definitions of what a legitimate general council realy was. It was the product of a consensus about the diversity in thought on sovereignty in the church." I would like to thank the author for granting me access to his text before its publication.

power of the Council of Constance had to be strengthened not just potentially but mainly through its exercise. [36]

From the beginning of the Council of Constance, Wyclif's doctrinal views had given rise to a debate about the authority that would condemn them. While Jean de Maroux, the Latin Patriarch of Antioch, claimed that they should be condemned in the name of the pope with the *hoc sacro aprobante concilio* [the approval of this sacred council] since the council *nullam authoritatem habere nisi ex capite* [possesses no authority without its head], for Pierre D'Ailly, condemnation should be made in the name of the council since *concilium est maius papa cum sit totum, et papa sit pars eiusdem* [the council as a whole is greater than the pope and the pope is a part of the council]. Moreover D'Ailly stated that the council including the pope did not derive its *auctoritas* from this but immediately from Christ.[37] In this way any allusion to the opposition between the pope and the council was carefully avoided while claiming that conciliar authority was greater than that of the pope.

This debate, which took place at the beginning of the council, would become particularly relevant after John XXIII's flight. What was at stake in the Constance processes after the pope fled the council was basically the definition of the relationship between the pope and the council, which had been dutifully overlooked while the pope supported the council. For this reason the processes were a particularly suitable forum for the display of conciliar superiority in a context of significant institutional weakness. While compared with other issues the relevance of these matters of faith was minor, but at the same time they provided a background against which the main ideas regarding conciliar authority could be represented. By claiming the *plenitudo potestatis* for the council there emerged a new sphere of power which required a redefinition. Liturgical and symbolical practices, but also judicial practices appear to create and define this new sphere of power.[38] Indeed it is

[36] On the *exercitium* of the *plenitudo potestatis* in the work of J. Gerson see: G.H.M. (Guillaume Henri Marie) Posthumus Meyjes, *Jean Gerson. Apostole of Unity. His Church Politics and Ecclesiology* (Leiden, 1999) 266–268.

[37] Giuseppe Alberigo, *Chiesa concilare: Identità e significato del conciliarismo* (Brescia, 1981) 141–143. The following texts are quoted by the author J. de Mauroux. Du Pin, II, 952 A-B, and for the text of Pierre D'Ailly see: ACC III: 48–50. More recently and on the same subject see: Thomas Izbicki, "Reform and Obedience in four Conciliar Sermons by Leonardo Dati O.P.," in the previously cited manuscript LB fol. 110ra-b: "Patet modo quo ad hoc tantum viri ecclesiastici surgere habent in iudicio generalis Concilii non autoriate finalis iudicii, sed aprobatione et concilio, prout forma hactenus in Conciliis observata manifeste demonstrat, qua pontifices sive in diffinienda usi sunt, dicentes. Nos sacro aprobante Concilio etc. Et ergo viri iustissime qui iudicatis orbem, si in pacis vinculo hanc unitatem spiritus servare cupitis, perturbato res huiusmodi ordinis compescere satagats prurientes auribus adulatores imitescere faciatis."

[38] On liturgical practices Cf. Natacha-Ingrid Tinteroff, "Assemblée conciliaire et liturgie aux conciles de Constance et Bâle," *Cristianesimo nella storia* 26,2, (2005) 395–425. About the papal seal and its symbolic meaning during the Council of Constance see: Hans Schneider, "Der Siegel des Konstanzer Konzils. Ein Beitrag zur Geschichte der spätmittelalterichen

through judicial praxis that the council sought to affirm its own *iurisdictio* and demonstrate its *potestas executiva* as the ultimate instance within the church *ordo iudicarius*.[39] In a way this would help to explain why Hus's case was dealt *iudicialiter* and not *deliberative* despite unsuccessful attempts at stopping the curia's judicial machinery set in motion by his own appeal.[40]

From the moment Hus's case was treated *iudicialiter* we witness the collapse of the procedural strategy devised by Jan of Jesenice, Hus's legal advisor and personal friend, which consisted in presenting the Bohemian reformer as a man who went to Constance of his own free will to proclaim his faith.[41]

Reformkonzile," *Annuarium Historiae Conciliorum* 10,1 (1978) 310–345. On the judicial process as a symbolic ritual Cf. Antoine Garapon, *Del giudicare. Saggio sul rituale giudiziario,* (Milan, 2007) 25: "Dal punto di vista etimologico, il simbolo designa un oggetto diviso in due; il possesso di una delle due parti permette il riconoscimento. Il simbolo mostra, rendendo tangibile ciò che, per sua natura, tale non è: un valore morale, un potere, una comunità. Oggeto amputato, esso ha tuttavia la capacità di mostrare l'insieme. Il simbolo riunisce: include coloro che vi si riconoscono ed esclude gli altri, delimitando così i confini della comunità […] Il simbolo mostra, ma è indimostrabile; assimila ma è indeducibile; non producendo un senso destinato alla comprensione razionale, il simbolo, piuttosto, ci *agisce.*" [The first edition in French dates from 1997.]

39 See n. 27 above.

40 On papal (and conciliar) sources dealing with Bohemia see: *Acta summorum pontificum res gestas Bohemicas aevi Praehussitici et Hussitici illustrantia: acta Innocentii VII, Gregori XII, Alexandri V, Johannis XXIII, nec non acta Concilii Constantiensis, 1404–1417, acta Clementis VII et Benedicti XIII, 1378–1417,* ed. Jaroslav Eršil (Prague, 1980) 2 vv.

41 The strategy prepared consisted in proclaiming the following *intimatio* see: Palacký, *Documenta,* 66 and Novotný, Nr. 75–77, pp. 192–195: "Magister Joannes de Husinecz, sacrae theologiae baccalarius formatus, vult comparere coram reverendissimo patre domino Conrado archiepiscopo Pragensi, apostolice sedis legato, in convocatione proxima omnium praelatorum et clero regni Bohemiae, paratus semper ad satisfactionem omni poscenti eum de ea, que in eo est, fide et spe, reddere rationem, et ad videndum et audiendum omnes et singulos, qui erroris pertinaciam vel haeresim quamcumque sibi volerint imponere, ut se inscribant ibidem iuxta legis dei et juris exigentiam, si non erroris pertinaciam vel haeresim in eum legitime probaverint, ad poenam talionis. Quibus omnibus coram dicto D. Archiepiscopo et praelatis, et eciam in proximo generali concilio Constantiensi, cum dei auxilio vult respondere, iuri stare, ac iuxta sanctorum patrum decreta et canones suam inocentiam in Christi nomine demonstrare. Datum dominico proximo post festum sancti Bartholomaei." The Czech and German text of the *intimatio* are also published by Novotný. On the procedural strategy see: Ferdinand Seibt, "Hus in Konstanz," *Annuarium historiae conciliorum* 15 (1983) 164: "Aber daß er dabei sich immer starker in das Netz des kanonischen Prozeßwesens verstrickte, schuf die unglückliche Dynamik in dieser Entwiclung. Der Strategie dieses Prozesses aber war niemand anderer als Dr. juris Jan Jessenitz." About Jan of Jesenice's role in the process see the account written by Jan of Jesenice, *De ordo procedendi*, in Jiří Kejř, *Husitský právník M. Jan Jesenice* [The Hussite Lawyer Jan Jesenice] (Prague, 1964). On this text see: Jiří Kejř, "Johannes Hus als Rechtdenker," in HENC 224 n. 64 and Jiří Kejř, "K pramenům Husova procesu: tzv. Ordo procedendi," [Towards the sources of the Hus process: Ordo procedendi] in: Jiří Kejř, *Z počátků české reformace* [From the beginnings of the Bohemian reformation] (Brno, 2006) 132–145; Kaminsky, HHR 138. Similarly regarding the results of the strategy devised by Jan of Jesenice see Ferdinand Seibt, "Hus in Konstanz," 160: "Nicht die Rechtgläubigkeit, auch nicht der politische Gehorsam des Prager Magisters

This undoubtedly lay the foundation for deploying two contrasting and completely different probative logics (theological and judicial). On one hand, Hus wanted his case to be treated basically as a scholastic *quaestio* which would be resolved through a *disputatio* with the council fathers.[42] In that sense it is

steht in dieser Verteidung zur Debatte, wiewohl beide im Gang der Konstanzer Verhöre zur Sprache kamen. Vielmehr erscheint in der böhmischer Urteilsschelte immer wieder jenes Moment, mit dem das Konstanzer Gericht unter formaljuristischen Gesichtspunten verdammt wird. Das ist ein Element der Prozeßstrategie, und gewiß nicht das mindeste Motiv für den immer wieder diskutieren Hus-Prozeß [….] War der tapfere Magister am Ende nur das Opfer einer verfehlten Prozeßstrategie? " In this text, the author returns to some ideas already developed in Ferdinand Seibt, *Jan Hus. Das Konstanzer Gericht im Urteil der Geschichte* [Vorstand des Instituts für Bayerische Geschichte an der Ludwig-Maximilians--Universität München, Vortrag gehalten an dem Mentorenabend der Carl Friedich von Siemens Stifung in München am 20. März, 1972]. Also on the strategy see: Rudolf Hoke, "Der Prozeß des Jan Hus und das Geleit König Sigmunds," *Annuarium Historiae Conciliorum* 15 (1983) 175: "Hus ließ zunächst durch öffenliche Anschläge in Prag und anderen bömischen Städten die Auffordereung bekanntmachen, wer in Böhmen von ihm eine Irrlehre kenne, der möge vor dem Prager Erzbischof gegen ihn auftreten. Als sich niemand meldete, rief Hus in einem zweiten öffentlichen Anschlag König und königlichen Hof in Böhmen zur Zeugenschaft dafür auf, daß er sich zur Verantwortung angebote habe, jedoch niemand darauf eingegeben sei, und er gab nun seinen Entschluß bekannt, nach Konstanz zu gehen, indem er gleichzeitig nochmals jeden, der eine Irrlehre von ihm kenne, aufforderte, gegen ihn aufzutreten, und zwar in Konstanz vor Papst und Konzil." In addition to the *intimatio* Hus had tried to collect the largest number of documents possible to prove his orthodoxy. On the subject see Matthew Spinka, *John Hus' Concept of the Church*, 335: "He had collected all the available evidence to be presented against the anticipated accusations and depositions of his enemies and witnesses. He had even secured a certificate of his orthodoxy from the Prague inquisitor, Bishop Nicholas of Nezero. John of Jesenice, Hus' advocate, was refused entrance into the archiepiscopal court and was thus prevented from securing Archbishop Conrad's declaration concerning Hus' faith. Nevertheless, the archbishop had declared in a plenary session of the Czech nobles that he knew of no error or heresy against the Master."

[42] The purpose of the procedural strategy was to prevent the council fathers from treating the case *iudicialiter*. This action implied a rejection of all previous measures adopted by the ecclesiastical authorities. Jan of Jesenice had already presented this juridical justification in some texts before the Council of Constance. On this subject see the text *Utrum iudex sciens testes false deponere et accusatum esse innocentem, debet ipsum condepnare* in Jiří Kejř, *Dvě studie o husitském právnictví,* [Two studies on Hussite jurisprudence] *(*Prague, 1954) 53–65: "… unde ergo dico, quod sicut se habet diffinicio in speculabilibus, sic se habet sententia in agibilibus *2° Rethoriccorum* et describitur sic secundum *Philosophum: Sententia* est universalis enunccciacio de agibilibus humanis; secundum legistas vero sic: *Sententia* est preceptum iudicantis, nature, iuri et boni moribus non contrarium, et declaratur sic: Primo quod sententia non debet esse contraria nature […] Si tunc iudex pronuncciat talia posse fieri, sententia non tenet, cum sit contra ius. Item dicit non bonis moribus contrarium; unde iudices in iudicando tenentur sequi bonos mores et sic consuetudines aprobatas […] *Sentencia deffinitiva* est sentencia, que finem controversiis pronuntiatione iudicis imponit, condempnacionem et absolucionem in se continendo. *Sentencia autem interlocutoria* est sentencia, que fertur contra contumacem, rerum absentem vel pro alia materia date questionis emergenti. Ista habentur *in canone II, q. VII, c Deffinitiva sententia* et in glosa ibidem. Istis sic notatis prima conclusio est ista: Deposicio falsorum testium non probat quidquam. Probatur: Nullum falsum probat verum; deposicio falsorum testium est falsum, ergo deposicio

no coincidence that from a formal standpoint Hus prepared both a *quaestio* and a *sermo* to be discussed and read, respectively, at a plenary session.[43]

et per consequens nichil probat; consequencia nota est et minor est de se evidens; sed maior probatur, quod id, quod nullam habet existentiam, non potest quidquam causare; sed falsum ut huius nullam habet existentiam, ergo non potest quodquam causare et per consequens nec probare […] *Et confirmatur:* Nam si deposicio falsorum testium probaret aliquid, tunc in casu // possibli testes alterando in suis probatcionibus sibi mutuo adversantes probaren duo contradictoria simul vera […] *Correlarium tercium:* Ista maxima iuris: In ore duorum vel trium testium debet stare omne verbum, intelligitur, dum veritas subest dictis ipsorum et hoc *Exo XVII capitulo.* Unde originaliter sumpta est illa regula. Nam ante eam ibidem dicitur: Cum audiens inquisieris diligenter et verum esse repereris, tunc in ore duorum vel trium testium perhibit, qui interficietur et ergo omnem deposicionem testium oportet condicionaliter intelligere, videlicet si veritati innitatur […] *Correlarium primum:* Sentencia pastoris iniusta non ligat neque solvit. *Correlarium secundum:* Sentencia pastoris iniusta, quamvis sit timenda, non tamen est observanda. *Correlarim tercium:* Non est ab eius coniunccione abstinendum, nec ab eius officio cessandum, in quo cognoscitur iniqua sentencia lata…" See also another text written by the same author and entitled *Repetitio Magistri Ioannis Iessinetz, Doctoris Iuriscanonicis, pro defensione causae magistri Joannis Hus. Scripta anno 1412. die 18. Mensis Decembris* in Ilyricus, Flacius, M., *Johannis Hus et Hieronymi Pragensis, confessorum Christi Historia et monumenta*, Norimbergae, 1558, I, pp. 328–331: "Ex quo noto et quarto, casum, specialem, in quo sententia escommunicationis ipso Iure est nulla […] Ex quo sequitur et plane habetur, quod sententia excommunicationis, suspensiones vel interdicti lata contra Scholarem seu Studentem Universitatis nostrae per Dominum Archiepiscopum Pragensem, vel suos Officiales ipso Iure est nulla et non timenda, quia est expresse contra Privilegium exemptionis ippius Universitatis, in quo fedes Apostolica irrefragabiliter statuit et ordinavit, quod nullus ex dicta Universitate, presens in ipso Studio existens, coram quocunque ordinario, etiam Legato nato, aut alio Iudice delegado, aut subdelegato, etiam authoritate quarumcunque literarum seu rescriptorum a sede Apostolica, sub quacunque nostrorum forma impetratorum […] *Condemnatio debet proportionabiliter respondere contumatiae*: Praemissa igitur ad practicam reducendo, aparebit clarissime, quod Processus nuper et nunc contra Venerandum Magistrum Ioan. Hus temerarie et exorbitanter publicati, non solum iniusti et frivoli, sed multipliciter sun nulli ipso Iure…" On this problem see: Jürgen Miethke, "Die Prozesse in Konstanz gegen Jan Hus und Hieronynus von Prag – ein Konflikt unter den Kirchenreformen?" in Šmahel ed., *Häresie und vorzeitige Reformation im Spätmittelalter,* 167; Jiří Kejř, *Die causa Johannes Hus und das Prozessrecht der Kirche,* 143; Ernst Werner, *Jan Hus. Welt und Umwelt eines Prager Frühreformators,* (Weimar, 1991) 199.

[43] The *sermo De pace* prepared by Hus to be read before the Council of Constance has been included in *Historia et Monumenta,* 60–71. As an example see the end of the end of the text edited in *Historia et Monumenta,* 57: "Cum ergo iuxta Prophetarum oracula, et aliorum sanctorum testimonia, ex peccato pastorum et aliorum sacerdotum Ecclesiae originatur eius coartatio, et imminutio, perturbatio augetur, exulat pax, et animarum provenit damnatio, nos qui sacerdotii fungimur officio, humiliemus nostras piissimo Domino animas, in contrito spiritu, devote dicentes: Piisime et potentissime Domine: Fiat pax in virtute tua. Fiat pax huic domui a persequente inimico. Fiat pax huic domui a schismate inicuo et fiat pax domui in gloria cum Deo patre, et filio et spiritu sancto, in saecula saeculorum benedicto, Amen." I could not yet work with the best edition of the text See: Hus, *Sermo de pace,* in Amedeo Molnár, *Řeč o míru* (Prague, 1963). On the *quaestio* see: *Historia et Monumenta,* 45: "De sufficientia legis Christi ad regendam ecclesiam (positio Magistri Joannis Hus, quam sibi collegerat: volens in Concilio Constantiensi sibi data fuisset audiencia, intntionem suam publice declarare: *Utrum Lex Iesu Christi veri Dei et veri hominis per se sufficit ad regimen*

On the other hand and on account of the aforementioned circumstances, the council fathers were inclined to treat the matter *iudicialiter.* The juridical logic of the inquisitorial process derived from this extraordinary process placed *publica fama* as the plausible narrative instance of the relevant facts which precluded any chance of dialogue between the judge and the accused.[44] In that way the discursive dialectical dimension of the *quaestio* appeared in direct opposition to the *silentio* required by the extraordinary inquisitorial process.[45] This process was the council fathers' attempt at reconstructing the bonds of ecclesiastical obedience from below, which had been quite affected by the prolonged schism and even as a result of its resolution through the *via concilii*. The only response to a conciliar power which had just affirmed its legitimacy was silence in view of its *potestas*. Indeed in conciliar terms, the *plenitudo potestatis* definition had its counterpart in the strengthening of an increasingly absolute ecclesiastical obedience.[46] Interestingly and paradoxically, many of the arguments put forward by the conciliarist author about the indivisibility of the *plenitudo potestatis* will be reintroduced by the advocates

*Ecclesiae militantis?* Arguitur quod non: Quia si sic, tunc omnes leges aliae et omnia iura humana superfluunt. Consequens falsum et magnum inconveniens. Et consequentia videtur tenere ex eo principio, quod peccatum est fieri per plura, quod aeque bene potest fieri per pauciora. Sed questionis veritas sec probatur: Lex Iesu Christi est suffucientissima, requisita ad regimen Ecclesiae militantes, cui non licet quicquam addere, vel subtrahere. Ergo ipsa per se sufficit ad regimen Ecclesiae militantis."

44 Julien Théry, "Fama : l'opinion publique comme preuve judiciaire. Aperçu sur la révolution médiévale de l'inquisitoire (XIIè-XIVè s.)," in: Bruno Lemesle ed., *La Preuve en justice de l'Antiquité à nos jours* (Rennes, 2003) 119–148.

45 Chiffoleau, "Dire l'indecible. Osservazioni sulla categoria del 'nefandum' dal XII al XV secolo," 67: "La procedura scritta, quando viene aplicata con tutto il suo rigore (e si è già sottolineato che questo caso si verificava molto raramente nella Francia del nord nel Medioevo, ma, per necessità di dimostrazione di dimostrazione ammetiamo che questa situazione limite esistesse realmente), quando passa della *informatio* alla cosidetta *inquisitio,* mediante il gioco della redazione degli articoli, delle *positiones,* uccide la voce viva dei testimoni e degli accusati. Essa penetra in un sistema di verità che non è propio più quello della narrazione ed impone il silenzio. Non propio il silenzio ingannevole che circonda l'eresia e l'indecibile, ma quello esenziale e positivo che circonda sempre i misteri, gli arcani del potere. La Maestà, e Kantorowicz l'aveva ben sottolineato a suo tempo, è sempre circondata dal silenzio. In senso stretto, a partire dal momento in cui, nella procedura straordinaria, vengono redatti gli *articuli* dell' *inquisitio* (che frazionano, rompono, ricompongono le narrazioni raccolte nell' *informatio*), non c'è più dialogo tra il giudice e l'accusato, che piaccia o meno coloro che prendono gli interrogatori degli inquisitori per inchieste etnografiche. On the *arcana* of power see: Ernst H. Kantorowicz, "I misteri dello Stato," in: Gianluca Solla ed., *I misteri dello Stato* (Milano, 2005) 187–223.

46 Chiffoleau, "Dire l'indecible. Osservazioni sulla categoria del 'nefandum' dal XII al XV secolo," 69: "A traverso l'espediente della procedura straordinaria, di cui si sa che fa dire la verità e che raggiunge le zone più intime e segrete della persona, si può dunque instaurare la Maestà nel cuore di ogni suddito." See also Chiffoleau, "Le crime de majesté, la politique et l'extraordinaire ; Notes sur les collections érudites de procès de lèse majesté du XVIIè siècle et leurs exemples médiévaux" in : *Les procès politiques (XIVè- XVIIè)* " [Actes du colloque de Rome (20–22 janvier 2003)] (Rome, 2005).

of papal absolutism, which triumphed after the brief conciliar period and also by Jean Bodin during the sixteenth century.[47]

To conclude this article, it seems appropriate to point out that the synodial practices (symbolical, liturgical and judicial) of the Council of Constance carried with them the signs and traces of the intense ecclesiological debates that had taken place in that context. While the study of symbolical and liturgical practices has produced very interesting results, we believe the study of the judicial practices has not yet fully exploited all its potentialities since the inquisitorial processes have been generally studied from a mainly theological point of view. The study of judicial practices in terms of ecclesiological debates offers a two-fold advantage. On the one hand, it provides certain clues to attempt an explanation of the violent and ardent conciliar response in the *causa fidei,* while on the other hand it also provides some discursive traces that would allow us to discern how the fathers of the Council of Constance understood the conciliar authority they had just affirmed in the text of the decree *Haec sancta.* Often it is in the field of practice that the actors reveal some essential trends.

[47] Constantin Fasolt inquired into this fact in "William Durant the Younger and Conciliar Theory" *Journal of the History of Ideas* 58,3 (1997) 385–402. He was surprised to find that in the countries where conciliar ideas had taken a stronger hold (France and Germany) there was less resistance to absolutism. Regarding the review of the conciliar argument on the indivisibility of the *plenitudo potestatis* from an absolutist standpoint in the sixteenth century see: Brian Tierney, "Divided Sovereignty at Constance: a Problem of Medieval and Early Modern Political Theory"; Thomas Izbicki, "Papalist Reaction to the Council of Constance: Juan de Torquemada to the Present,"; and Katherine Elliot van Liere, "Vitoria, Cajetan and the Conciliarists," *Journal of the History of Ideas* 58,4 (1997) 597–616.