

Infallibility and the "Prima Sedes a nemine iudicatur" principle - legal-historical perspective

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I. INTRODUCTION

The Catholic Church is finding itself in a crisis lasting now for over five decades.¹ There is a great amount of doctrinal and moral confusion.² One of the peculiarities of this uncertain time is that the faithful and the clergy, trying to manage through this crisis, often use the doctrine of infallibility as a kind of “security blanket... clinging to the... Magisterium³ for stability...”⁴, which creates a perception that all magisterial utterances and documents, practically everything that a pope and the bishops say or write, is unconditionally infallible, *i. e.*, entirely free of any error⁵, fostering in that way a mentality of “Magisteriocentrism” and “unhealthy papal-centrism”⁶.⁷ In more recent times, this was especially evident during the COVID crisis and the vaccination campaign, during which one of the motivations of the faithful and the clergy to take the vaccine was the fact that pope Francis supported the campaign.⁸

¹ For more on post-conciliar crisis in the Catholic Church see: Shaw, R., *A Tale of Two Crises*, 2.10.2022, <https://www.thecatholicthing.org/2022/10/02/a-tale-of-two-crises/>, (accessed 21.2.2023); Rorate Caeli.blogspot.com, *De Mattei explains the post-Conciliar crisis*, 19.10.2011, <https://rorate-caeli.blogspot.com/2011/10/de-mattei-explains-post-conciliar.html> (accessed 21.2.2023). Athanasius Schneider, auxiliary bishop of Astana, is talking about four great crises in the Church: the Arian crisis, the crisis of *saeculum obscurum* (for more see *infra* IV.6.), “Avignon Exile” (for more see *infra* V.3.1.) and current *crisis of religious relativism and indifferentism* which in his opinion is the deepest and the most dangerous because “...it expresses itself in a denial of the constant validity of any truth: dogmatic, moral and liturgical...” (Schneider, A. in conversation with Montagna, D., *Christus Vincit - Christ's Triumph over the Darkness of the Age*, Angelicus Press, New York, 2019, p. 154).

² For more see: Martin, R., *A Church in Crisis: Pathways Forward*, Emmaus Road Publishing, Steubenville, Ohio, 2020.

³ By the term “Magisterium” we mean the teaching office of the church, which has been entrusted to *the pope* and to *the bishops* in communion with him. For more see: The Catholic Telegraph, Fernandes, E., *What is the Magisterium?*, 17.6.2010, <https://www.thecatholictelegraph.com/the-catholic-moment-what-is-the-magisterium/1665>, (accessed 21.2.2023).

⁴ Dougherty, M. B., *Pope Francis Is Diminishing the Papacy. Good*, 29.8.2017, <https://www.nationalreview.com/2017/08/pope-francis-papacy-diminished/> (accessed 21.2.2023).

⁵ That is, perception that the infallibility is “monolithic”, absolute and that does not depend on any conditions. For more see: de Silveira, A. X., *Monolithic Infallibility & Differences among Anti-progressivists*, 15.2.2013, https://www.traditioninaction.org/HotTopics/f068_Silveira_2.htm (accessed 21.2.2023). Pope Benedict XVI (2005-2013) himself was warning against this kind of mentality: “[T]he Pope is not an oracle, he is infallible on the rarest of occasions, as we know.” See *Meeting with diocesan clergy of Aosta – Address of his holiness Benedict XVI*, 25.7.2005, https://www.vatican.va/content/benedict-xvi/en/speeches/2005/july/documents/hf_ben-xvi_spe_20050725_diocesi-aosta.html (accessed 21.2.2023).

⁶ As regards to the papal-centralism, its roots can be traced to the movement of ultramontanism from the period before and during Vatican I. For more on ultramontanism see: Chessman, S., *Ultramontanism: Its life and Death*, 1.7.2022, <https://rorate-caeli.blogspot.com/2022/01/ultramontanism-its-life-and-death.html> (accessed 21.2.2023).

⁷ Terms taken from bishop Schneider, meaning that “the human and administrative elements were put at the center of the life of the Church and above the constant tradition of the Church” (Schneider, A., *op. cit.* in fn. 1, p. 128). The teaching of the Church is, in fact, contrary. In dogmatic constitution *Dei Verbum* from Vatican II we read: “[The Magisterium] is not above the word of God, but serves it, teaching only what has been handed on, listening to it devoutly, guarding it scrupulously and explaining it faithfully in accord with a divine commission and with the help of the Holy Spirit...” (*DV*, 10 in: *The Word on Fire* (ed.), *Vatican II Collection*, The Word on Fire Institute, Park Ridge, Illinois, 2021).

⁸ For example, see: Večernji List, *Teolog: U hrvatskom društvu događa se nešto čudno, neljudski i nekršćanski*, 2.12.2021, <https://www.vecernji.hr/vijesti/teolog-u-hrvatskom-drustvu-dogada-se-nesto-cudno-neljudski-i-nekrscanski-1543899> (accessed 21.2.2023); Glas Koncila, *Hrvatski bioetičar Tonči Matulić »S cijepljenjem kao*

In an effort to elucidate the legal foundations forming background to these tendencies, and the concept in general, first part of this thesis will try to resolve some misconceptions regarding infallibility while expounding its theology and legal framework. In the first chapter we will explain the doctrine of infallibility, as understood by the Catholic theology and then we will elaborate, according to its subject, different types of infallibility. In the second chapter, we will expound how the theology of infallibility is translated into the 1983 Code of Canon Law. We will see the extent of infallibility, *i. e.*, its object and the type of assent binding the faithful to adhere to a particular infallible statement. Moreover, we will look into the specific crimes that can be committed against the infallibility and punishments which can be incurred from those crimes.

In connection with crimes and punishments, second part of this thesis will respond to another tendency, visible during the second half of the 20th century till today. It has been claimed, by certain individuals, that after the death of Pius XII (1939-1958) the papal succession was broken and that all the popes after him (*i. e.*, John XXIII (1958-1963), Paul VI (1963-1978), John Paul II (1978-2005), Benedict XVI (2005-2013) and Francis I (2013-) are anti-popes due to their teachings which, according to these individuals, are considered heretical, so therefore “...either the Popes were public heretics before being elected (and thus were never validly elected to begin with) or became public heretics after their election (and consequently lost their office at that time)...”⁹ In either case, for them “the See is vacant”, so they referred to themselves as “Sedevacantists”.¹⁰ Furthermore, in the third chapter we will explore whether it is possible for a pope to lose his office. In doing so, we will consider a constant principal of the legal tradition of the Church, expounded in the current Code of Canon Law, *i. e.*, “*Prima Sedes a nemine iudicatur*”, *i. e.*, “*The First See is judged by no one.*” Afterwards, we will enter into the juridico-

činom ljubavi stavljeni smo pred najteži ispit kršćanske savjesti», 22.11.2021, <https://www.glas-koncila.hr/hrvatski-bioeticar-tonciu-matulic-s-cijepljenjem-kao-cinom-ljubavi-stavljeni-smo-pred-najtezi-ispit-krscanske-savjesti/> (accessed 21.2.2023); Archdiocese of Chicago, *Statement on Behalf of Cardinal Blase J. Cupich, archbishop of Chicago, on the Need for Continued Pandemic Vigilance and Vaccination*, 7.1.2022, <https://www.archchicago.org/statement/-/article/2022/01/07/statement-on-behalf-of-cardinal-blase-j-cupich-archbishop-of-chicago-on-the-need-for-continued-pandemic-vigilance-and-vaccination> (accessed 21.2.2023). For detailed examination of influence of Francis’ messages on vaccination rate see: Gawel, A. *et al.*, *Effects of Pope Francis’ Religious Authority and Media Coverage on Twitter User’s Attitudes toward COVID-19 Vaccination*, *Vaccines*, vol. 9, no. 1487, 2021 (accessed 21.2.2023).

⁹ Salza, J.; Siscoe, R., *True or False Pope: Refuting Sedevacantism and other Modern Errors*, STAS Editions, Minnesota, 2015, p. 3.

¹⁰ For more on history and ideology of Sedevacantism see: *Sedevacantism*, New World Encyclopedia, <https://www.newworldencyclopedia.org/p/index.php?title=Sedevacantism&oldid=1097878> (accessed 21.2.2023). Things in the Sedevacantist camps also got heated up with the resignation of pope Benedict XVI and election of pope Francis where certain voices started to develop that Benedict XVI is still the pope and Francis is antipope, theory known as “Benevacantism”. For more see: Feser, E., *Benevacantism is scandalous and pointless*, 14.4.2022, <https://www.catholicworldreport.com/2022/04/14/benevacantism-is-scandalous-and-pointless/> (accessed 21.2.2023).

historical development of the principle and whether any exceptions to it were ever recognized in the legal tradition of the Church. In the analysis of the development of this principle, we shall try to determine if there existed influences from Roman law, taking into account the fact that Roman law was an important element in the renaissance of Canon law during the Gregorian reform and following the preparation of *Decretum Gratiani*. Also, the similarity between the canon law principle “*Prima Sedes a nemine iudicatur*” and the Roman law “*Princeps legibus solutus est*” gives an additional argument to investigate the possibility of such an influence. Finally, in the last chapter, due to the fact that Sedevacantists willingly quote great theologians and saints to support their position¹¹, we will give a brief overview of theories that deal with the possibility of papal heresy and a consequent papal loss of office, as proposed by four great theologians and canonists of the Church. In the conclusion, the main points of the research will be presented.

¹¹ Sedevacantists are especially keen on St. Robert Bellarmine, e. g., Speray, S., *Definitive Proof that St. Robert Bellarmine Supports the Sedevacantist Position*, 24.9.2014, <https://stevensperay.wordpress.com/2014/09/24/definitive-proof-that-st-robert-bellarmino-supports-the-sedevacantist-position/> (accessed 21.2.2023); Cekada, A., *Did Bellarmine Condemn Sedevacantism?*, *Sacerdotium*, vol. 2, 1994, <http://www.traditionalmass.org/articles/article.php?id=25> (accessed 21.2.2023).

II. THEOLOGICAL PERSPECTIVE OF THE INFALLIBILITY

1. DEFINITION OF INFALLIBILITY

Infallibility is considered to be one of the essential attributes of the Catholic Church.¹² To be infallible means to be free from the possibility of error.¹³ Only God, the Eternal Truth, is absolutely infallible. However, it could be said that He is sharing His infallibility with the Church he had constituted.¹⁴ In Catholic theology, infallibility is defined as “... a supernatural assistance of the Holy Ghost, where [the certain organ of infallibility (*e.g.* pope, council etc.)] is preserved free from error, whenever he defines a doctrine that belongs to faith or morals.”¹⁵ It means that Holy Spirit Himself guarantees, gives certitude that the certain proclaimed doctrine on faith or morals is true. Although it is often confused with, infallibility is not the same as *gift of inspiration* or *gift of impeccability*. First of these is a gift by which one would be able to receive some new revelation or truth about God. The Church’s constant teaching is that after the death of the last Apostle, there is no new public revelation.¹⁶ Nor does the infallibility means that one is unable to sin.¹⁷ While impeccability is a gift of the will given to an individual person for its own good, as it is permanently and perfectly opened to God’s

¹² “The Church as a society instituted to perpetuate the mission of Christ on earth, must be endowed with *certain qualities* necessary for the proper performance of that work.” Those qualities are unity, sanctity, catholicity, apostolicity, perpetuity, indefectibility, visibility, and *infallibility*. First four manifest themselves externally and are known as *properties*. Others are not externally evident and are called *attributes*. See Berry, S., *The Church of Christ: An Apologetic and Dogmatic Treatise*, B. Herder Book Co., St. Louis, Missouri; London, 1927, p. 55.

¹³ *Ibid.*, p. 434.

¹⁴ “In no sense is pontifical infallibility absolute, because absolute infallibility belongs to God alone, Who is the first and essential truth, and Who is never able to deceive or be deceived. All other infallibility, as communicated for a specific purpose, has its limits and its conditions under which it is considered to be present.” (Connor, J. T., *The Gift of Infallibility: the official relatio on infallibility of Bishop Vincent Gasser at Vatican Council I*, St. Paul Editions, Boston, 1986, p. 49).

¹⁵ Brandi, S. M., *When Is the Pope Infallible?*, The North American Review, vol. 155, no. 433, 1892, p. 652.

¹⁶ The First Vatican Council teaches: “For the Holy Spirit was promised to the successors of Peter not so that they might, by his revelation, make known some new doctrine, but that, by his assistance, they might religiously guard and faithfully expound the revelation or deposit of faith transmitted by the apostles.” (First Dogmatic Constitution *Pastor Aeternus* on the Church of Christ, in: Denzinger, H. (ed.), *The Sources of Catholic Dogma*, translated by Deferrari, R. J. from the Thirtieth Edition of Denzinger’s *Enchiridion Symbolorum*, Catholic University of America, Washington D. C., 1955, 1836) and the Second Vatican Council in *LG*, 25 restates: “The Roman Pontiff and the bishops... by fitting means diligently strive to inquire properly into... revelation and to give apt expression to its contents; but a new public revelation they do not accept as pertaining to the divine deposit of faith.” Of course, this does not exclude the possibility of private revelation. For more see: Agius, G., *Tradition and the Church*, The Stratford Company, Boston, 1928, p. 337-340.

¹⁷ Dominican theologian Domingo de Soto (1494-1560) claims: “[T]hough some masters of our time sustain that the Pope cannot be a heretic in any way, the common opinion is however the opposite one. For though he might not be able to err as Pope – that is, he could not define an error as an article of faith, because the Holy Spirit will not permit it – nevertheless as a private person he can err in faith, in the same way that he can commit other sins, because he is not impeccable.” (Soto, *Comm. in IV Sent.*, *dist.* 22, q. 2, a. 2, p. 1021. as quoted in: Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 192). The Church has never taught that a Pope is impeccable and there are historical examples of popes who have indeed taught errors and been condemned by the Church. See *infra* II. 2. 2.

grace¹⁸, infallibility is a gift of the understanding, which is given in certain cases for the good of the universal church.¹⁹

Moreover, infallibility as an assistance of Holy Ghost is given "... only for a purpose of preserving, explaining, defending the revelation..."²⁰, so it is possible for a pope or a bishop to mistake in other areas of work, *e.g.*, as a private theologian in conversations, politics, government *etc.* The gift of infallibility has two aspects: positive and negative. By the negative aspect it is meant the preservation from error. As regards to the positive aspect, infallibility was given to the Church also so it can learn the truth.²¹ One that is endowed with infallibility has the "...authority to declare true propositions that accurately convey the teaching of divine Revelation and must be believed."^{22, 23} All subjects endowed with infallibility by a divine promise and recognized by the Magisterium are known as organs of infallibility. Accordingly, there are five separate types of infallibility. We can distinguish between two active, *i. e.*, infallibility divinely bestowed upon the Apostles and their successors, due to their function as the Magisterium, so they can transmit the truth about God: a) the papal infallibility, and b) the episcopal infallibility; and three of them pertaining to the category of passive infallibility (in the broader sense), *i. e.*, infallibility in receiving of magisterial teaching: the unanimous consensus of the c) Church Fathers and d) Theologians in matters of faith and morals, and e) *sensus fidelium* or passive infallibility²⁴ in the narrower sense.²⁵

¹⁸ For example, Jesus Christ was impeccable, *i. e.*, free from original and personal sin. He was physically and morally incapable of sinning. More in: Ott, L., *Fundamentals of Catholic Dogma*, Roman Catholic Books, Fort Collins, Colorado, 1954, p. 168-169.

¹⁹ Brandi, S. M., *op. cit.* in fn. 15, p. 653.

²⁰ *Ibid.*

²¹ "But when he, the Spirit of truth, is come, he will teach you all truth" (Jn 16:13). All Bible quotes in this thesis are taken from *The Holy Bible Douay-Rheims Version*, Saint Benedict Press in association with TAN Books, Charlotte, New Carolina, 2009

²² Gherardini, B., *Canonization and Infallibility*, in: Kwasniewski, P. A. (ed.), *Are Canonizations infallible? Revisiting a disputed question*, Arouca Press, Oxford, 2021, p. 128.

²³ "The Holy Ghost preserves the bearer of the supreme teaching office from a false decision (*assistentia negativa*), and leads him, where necessary, by external and internal grace to the right knowledge and correct statement of the truth (*assistentia positiva*). (Ott, L., *op. cit.* in fn. 18, p. 287).

²⁴ Ott distinguishes between *infallibility in teaching (infallibilitas in docendo)*, *i. e.*, "... the infallibility that belongs to the pastors of the Church in the exercise of their teaching office..." and *infallibility in believing (infallibilitas in credendo)*, *i. e.*, "... faithful as a whole in its assent to the message of faith..." (Ott, L., *op. cit.* in fn. 18, p. 297).

²⁵ Fr. Tanquerey distinguishes between *the solemn Magisterium of the Church* where he puts all the infallible activities of popes and councils and *the ordinary and universal Magisterium of the Church* where he puts: the preaching and proclamations of the corporate body of bishops (*ordinary and universal episcopal Magisterium*), universal custom or practices associated with dogma, the consensus or agreement of the Fathers and of the Theologians and the common or general understanding of the faithful (*sensus fidelium*). See: Tanquerey, A., *A manual of dogmatic theology vol. I*, Desclee Co., New York, 1959, p. 174-177.

²⁵ Berry, S., *op. cit.* in fn. 12, p. 457.

2. THE PAPAL INFALIBILITY

2.1. When is the Pope Infallible?

After centuries of doctrinal development the infallibility of the Roman Pontiff was finally and solemnly defined as a dogma at the First Vatican Council in 1870, in chapter 4 of *Pastor Aeternus*, First Dogmatic Constitution on the Church of Christ: “Therefore, faithfully adhering to the tradition received from the beginning of the Christian faith²⁶, to the glory of God our savior, for the exaltation of the catholic religion and for the salvation of the Christian people, with the approval of the sacred council, we teach and define as a divinely-revealed dogma that when the Roman Pontiff speaks *ex Cathedra*, that is, when, in the exercise of his office as shepherd and teacher of all Christians, in virtue of his supreme Apostolic authority, he defines a doctrine concerning faith or morals to be held by the whole Church, he possesses, by the divine assistance promised to him in blessed Peter, that infallibility which the divine Redeemer willed his Church to enjoy in defining doctrine concerning faith or morals. Therefore, such definitions of the Roman Pontiff are of themselves, and not by the consent of the Church, irreformable.”²⁷ The same doctrine is repeated at the Second Vatican Council in 1964, in *Lumen Gentium*, Dogmatic Constitution on the Church.²⁸

Definition laid out at the Vatican I sets clear limits and conditions to the charism of papal infallibility. Before we go deeper into the conditions for infallibility, we have to resolve some common misconceptions. Firstly, we can see that the pope is not infallible always, but only under certain conditions. As we have already pointed out, some in the Church treat all papal statements as infallible. However this “...is not the mind of the Church...”, moreover, it “is proximate to heresy because it rejects the precise formulation of the conditions of infallibility as laid out by Vatican I... by essentially saying that the pope is infallible regardless of conditions.”²⁹ Outside of conditions proscribed by the Vatican I, we do not have the same degree of certitude about the truth of a pope’s statement.³⁰

²⁶ As regards to the controversies whether the infallibility of the Roman Pontiff was recognized from the beginning see *ibid.*

²⁷ Translation according to the Ripperger, C., *Magisterial Authority, Sensus Traditionis* Press, 2014, p. 4-5. See also: Denz., 1839.

²⁸ “And this is the infallibility which the Roman Pontiff, the head of the college of bishops, enjoys *in virtue of his office*, when, *as the supreme shepherd and teacher of all the faithful...* by a definitive act he proclaims a doctrine of faith or morals. And therefore his definitions, *of themselves, and not from the consent of the Church*, are justly styled *irreformable...*” (LG, 25, in: The Word on Fire, *op. cit.* in fn. 7).

²⁹ Ripperger, C., *op. cit.* in fn. 27, p. 5.

³⁰ In fact, most of the magisterial statements are non-infallible. For more see: LG 25; Ripperger, C., *op. cit.* in fn. 27, p. 32-41.

Secondly, a fact that some doctrine is not solemnly proclaimed by the pope as infallible does not mean that it is not infallible. Infallible proclamations are a pretty rare event in the Church. Majority of theologians are sure of two: one found in encyclical *Ineffabilis Deus* by Pius IX in 1854 that defined the Immaculate Conception³¹, and one in the apostolic constitution *Munificentissimus Deus* by Pius XII in 1950 that defined the Assumption^{32,33}. But the Pope sometimes can simply confirm some teaching emanating from the ordinary universal magisterium³⁴, as was the case in the encyclical *Humanae Vitae* by St. Paul VI regarding the inseparability of the unitive and procreative dimensions of conjugal acts³⁵, encyclical *Evangelium Vitae* by St. John Paul II regarding sanctity of human life, abortion and euthanasia³⁶ and with an apostolic letter *Ordinatio Sacerdotalis* on the question of female priesthood^{37,38}.

Thirdly, although most of the speeches and papal documents are not infallible, it does not mean that they are automatically erroneous. In contrast with those who treat all papal statements as infallible, there are those who would treat as true and give their assent only to the statements of the pope that are infallibly proclaimed.³⁹ Infallible statement is a true statement for which is

³¹ See: *Definition of the Immaculate Conception of the B. V. M.*, Denz., 1641.

³² See: *The Definition of the Assumption of the Blessed Virgin Mary*, Denz., 2331- 2333.

³³ There is not unanimous consensus of theologians as to which papal utterances bear the true marks of infallibility. The list of all *ex cathedra* decisions does not exist. Theologians as infallible utterances consider: the last sentence of bull *Unam Sanctam* of Pope Boniface VIII in 1302: “Furthermore, we declare... define and proclaim to every human creature that they by necessity for salvation are entirely subject to the Roman Pontiff.” (Denz., 469) and the Bull *Unigenitus* of Clement XI in 1713 condemning Jansenism (Denz., 1351 *et seq.*). Contradictory opinions and arguments have been put forward as to the infallible or non-infallible character of various papal pronouncements, such as *The Tome* of Leo the Great, *The Syllabus* of Pope Pius IX in 1864 (Bull *Quanta cura*, Denz., 1700- 1780), the Bull *Apostolicae curae* of Pope Leo XIII in 1896 concerning Anglican Orders (Denz., 1963-1966); *The Syllabus* of Pope Pius X in 1907 (Decree of the Holy Office, *Lamentabili Sane*, Denz. 2001-2061) *etc.* See more in: Burn-Murdoch, H., *The development of the papacy*, Faber & Faber Limited, London, 1954, p. 396- 397.

³⁴ See *infra* II.3.1.2. For more also see: CDF, *Doctrinal Commentary on the Concluding Formula of the Professio fidei*, 29.6.1998, https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_1998_professio-fidei_en.html, pt. 9 (accessed 21.2.2023).

³⁵ Paul VI, *Humanae Vitae*, 25.07.1968, https://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae.html (accessed 21.2.2023). See also: encyclical *Casti Connubii* by Pius XI, Denz., 2239- 2240.

³⁶ John Paul II, *Evangelium Vitae*, 25.3.1995, https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html (accessed 21.2.2023).

³⁷ CDF, *Responsum Ad Propositum Dubium concerning the teaching contained in Ordinatio Sacerdotalis*, 28.10.1995, https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19951028_dubium-ordinatio-sac_en.html (accessed 21.2.2023).

³⁸ There is a big theological discussion whether the teaching of *Ordinatio Sacerdotalis* is to be treated as a papal *ex cathedra* statement or a teaching set forth by ordinary and universal magisterium. For more see: Lowery, M., *Infallibility in the Context of Three Contemporary Developments*, Faith & Reason, vol. 23, no. 3 & 4, 1997-1998, p. 230-235. We would use this opportunity to thank Frano Bešlić, SDB for generous help in providing and acquiring this article, as well as some other important articles used in the preparation of this thesis.

³⁹ For example, dissenting from *Humanae Vitae* teachings is very common till this day. (Aldrich, L., *Doctrinal Deviations of a “parallel” Magisterium*, 30.5.2006, <http://www.clerus.org/clerus/dati/2006-05/31-13/09MPin.html> (accessed 21.2.2023)). For critique of this kind of thinking see: CDF, *Instruction Donum Veritatis*

certain that it does not contain any error, but that does not mean that other non-infallible statement cannot contain a true statement regarding faith and morals. “[A]ll things taught or defined infallibly are true, but not *vice-versa*... Infallibility signifies not whether or not something is true, but rather a particular weight of authority which the Church places behind various truths⁴⁰ that she teaches.”⁴¹ Therefore, one cannot simply dismiss a non-infallible papal statement, but should assess it and give his assent to it according to the principles for discerning non-infallible statements.⁴²

2.1.1. Conditions for Papal Infallibility

For a statement to be infallible, the Roman Pontiff should:

a) *speak ex Cathedra*. *Cathedra*⁴³, seat, chair, since the second century⁴⁴ is a symbol of bishop’s, magisterial, teaching function.⁴⁵ Therefore, when he is proclaiming something infallibly, the Bishop of Rome is speaking from *Cathedra Petri*. He speaks *ex Cathedra* when all the conditions set by the Vatican I are verified. By speaking *ex Cathedra* he “...enjoys supreme, ordinary, immediate, and full jurisdiction over the entire Church and over each of her faithful, including the pastors⁴⁶, in matters of faith and morals... [and] not without disciplinary repercussions and effects.”⁴⁷

b) *in the exercise of his office as shepherd and teacher of all Christians*. For a proclamation to be infallible, the pope has to speak as the Supreme Head of the Church and the Supreme Teacher

on the Ecclesial Vocation of the Theologian, 24.5.1990, https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19900524_theologian-vocation_en.html, pt. 33 (accessed 21.2.2023).

⁴⁰ Here is a convenient place to mention *theological notes* “a forgotten pre-Vatican II tradition that was dropped in the post-conciliar era” (Hausotter, J., *Part II.3: The Theological Notes and the Hermeneutic of Continuity*, 30.1.2022, <https://www.lenouvelesprit.com/vatican-ii-articles/theo-notes-and-continuity> (accessed 21.2.2023)). To see what they are and some examples, see: Ott, L., *op. cit.* in fn. 18, p. 9; Flanders, T. S., *The Meaning of Catholic: Theological Notes*, 22. 8. 2019, <https://meaningofcatholic.com/2019/08/22/the-meaning-of-catholic-theological-notes/> (accessed 21.2.2023).

⁴¹ Lowery, M., *op. cit.* in fn. 38, p. 239.

⁴² For more on assent owed to non- infallible statements see: Ripperger, C., *op. cit.* in fn. 27, p. 32-41; CDF, *op. cit.* in fn. 34, pt. 10.

⁴³ The Greek word *cathedra* is used to designate office or authority. For example, Christ also used it in this sense when he said: “The scribes and the Pharisees have sitten on the chair [*cathedra*] of Moses. All things therefore whatsoever they shall say to you, observe and do...” (Mt 23:2-3).

⁴⁴ Firstly, referenced to by St. Cyprian. See Burn-Murdoch, H., *op. cit.* in fn. 33, p. 130. For medieval beginnings of the specific meaning of teaching *ex cathedra* from Leo IX and Humbert de Silva Candida see the works mentioned in fn. 353.

⁴⁵ That is why every *cathedral* contain *cathedra* – chair symbolizing bishop’s authority to teach and govern. See Berry, S., *op. cit.* in fn. 12, p. 474.

⁴⁶ Maybe the most famous example of a priest that thinks that he is not bound with infallible statement is Hans Küng. See: Smeeton D., *Hans Küng: architect of radical Catholicism*, Themelios, vol. 7, no. 2, 1982, p. 21-24.

⁴⁷ Gherardini, B., *op. cit.* in fn. 22, p. 131.

of all the faithful. This excludes statements the pope gives while he is speaking as a private theologian or in his other functions.⁴⁸ Therefore, there is a big difference when the pope speaks by the virtue of his office and when he speaks as a private person.⁴⁹

c) *in virtue of his supreme apostolic authority*. This is the formal reason for pope's infallible and universal teaching. "[D]ue to the... apostolic succession⁵⁰ from Peter... all that Christ had given to Peter, by reason of the office and not of the person, belongs to each of his successors on the 'Roman chair'."⁵¹ The pope can invoke a different kinds of authority, *e.g.*, he can speak as the Bishop of Rome, Sovereign of the State of the Vatican City, Patriarch of the West *etc.*⁵² While he is speaking infallibly he invokes the highest possible level of authority as a pope. Furthermore, infallible proclamation can be made by word or in written; in an encyclical, constitution, syllabus, apostolic letter, *etc.* It is only important that the pope states that he speaks in virtue of the apostolic power given to him.⁵³

d) *he defines*. The entirety of pope's intervention must manifest his will to "... define a truth as something directly or indirectly revealed, or to settle a disputed question *de fide et moribus*."⁵⁴ He must intend to *define* or dogmatically *declare* a certain teaching.⁵⁵ Clearly, the act is not infallible when the pope makes a statement without defining it. Although it could be true, it would not have the certitude of an infallible statement.

⁴⁸ Tanqueray, A., *op. cit.* in fn. 25, p. 128.

⁴⁹ This is very important to emphasize due to the flourish of social communications technology in the last six decades. Since Pius XII and especially through the last three pontificates the Church has been seriously invested in embracing and using new media technologies for religious and spiritual purposes. For more see in: Campell, H. A.; Vitullo, A., *Popes in Digital Era Reflecting on the Rise of the Digital Papacy*, Problemi dell'informazione, vol. 44, no. 3, 2019, p. 420-442. Popes in the past were not keen on giving "... 'private' interviews speaking as theologians because such activities too readily confuse the faithful..." (Ripperger, C., *op. cit.* in fn. 27, p. 7). Today private interviews are one of the usual ways of papal expression, and in experience some of them had known to cause the confusion among the faithful, *e. g.*, BBC, *Pope Francis: Who am I to judge?*, 29.7.2013, <https://www.bbc.com/news/world-europe-23489702> (accessed 21.2.2023); VOA, *Pope Francis: Homosexuality Not a Crime*, 25.1.2023, <https://www.voanews.com/a/pope-francis-homosexuality-not-a-crime-/6933125.html>, (accessed 21.2.2023).

⁵⁰ Berry, S., *op. cit.* in fn. 12, p. 406-407.

⁵¹ "This is why it is less correct to say *the pope's personal infallibility* than to say *papal infallibility*." See Gherardini, B., *op. cit.* in fn. 22, p. 132.

⁵² Berry, S., *op. cit.* in fn. 12, p. 474.

⁵³ Brandi, S., M., *op. cit.* in fn. 15, p. 654.

⁵⁴ *Ibid.*

⁵⁵ "This does not require the use of a set of formula; any words may be used that will sufficiently indicate the definitive nature of the decree." Berry, S., *op. cit.* in fn. 12, p. 475.

e) *a doctrine concerning faith or morals*. An object of infallible statement has to be a certain doctrine on faith⁵⁶ or morals⁵⁷, directly or indirectly contained in the Divine Revelation⁵⁸. Any statement on other issue cannot be infallible.

f) *to be held by the whole Church*. Infallible statements are intended to bind the whole Church, not just, *e.g.*, the Latin Church or the Eastern Churches.⁵⁹ The Pope somehow has to manifest that his statement is addressed to the whole Catholic world, or, *e. g.*, if he is addressing some particular bishop or a church⁶⁰, he has to speak so "...that all may know what it is that every Catholic is bound to hold, retain and profess".⁶¹

g) *by the divine assistance*. As we have already said, supernatural assistance of the Holy Ghost is the source of every infallibility.⁶² That does not mean that the pope in the name of the Holy Ghost can infallibly proclaim whatever he wants. The assistance of the "Spirit of Truth"⁶³ is guaranteed only to those statements which are "...in harmony with [already] revealed truths⁶⁴ and manifest what the Christian, as such, must believe and put into practice."⁶⁵ Furthermore, we said that divine assistance does not mean revelation or inspiration. Therefore, the use of natural means of knowledge is presupposed.⁶⁶ In that sense, it is said: "Before issuing a definition of faith the Pope must diligently inquire into the matter to be defined, for otherwise he would be forcing God, as it were, to give supernatural assistance where natural means are sufficient."⁶⁷ Fr. Berry thinks that if he neglects to make due investigation, he would be guilty of sin, but his decree would be protected from error.⁶⁸

2.2. Why was it Necessary to define the Papal Infallibility?

⁵⁶ *Ibid.*, p. 504.

⁵⁷ *Ibid.*, p. 24.

⁵⁸ *LG*, 25: "[T]his infallibility... is co-extensive with the deposit of divine revelation, which must be religiously guarded and loyally and courageously expounded..."

⁵⁹ For example, disciplinary norms, that can be found in the Code of Canon Law and Code of Canon Law for the Eastern Churches, are not covered by the infallibility, which does not mean that two Codes do not contain some of the infallible statements, from some prior infallible teaching, *e.g.* c. 749, art. 1 of Latin Code that expounds the dogma of papal infallibility. See Ripperger, C., *op. cit.* in fn. 27, p. 9-10.

⁶⁰ "[I]t is not necessary that the pope directly address all the faithful, or even all the bishops, when defining a doctrine *ex cathedra*. Theologians commonly hold that such a decree might be issued directly to one bishop only, provided it is evidently intended for the whole Church." Berry, S., *op. cit.* in fn. 12, p. 475.

⁶¹ Brandi, S. M., *op. cit.* in fn. 15, p. 654.

⁶² See *supra* II. 2.

⁶³ See Jn 14:17; 15:26.

⁶⁴ How the Magisterium is bound by the teachings of prior Magisterium and by Scripture and Tradition see *infra* II.2.3.

⁶⁵ Gherardini, B., *op. cit.* in fn. 22, p. 132.

⁶⁶ Ott, L., *op. cit.* in fn. 18, p. 287.

⁶⁷ Berry, S., *op. cit.* in fn. 12, p. 475-476.

⁶⁸ *Ibid.*

The First Vatican Council put an end to the centuries' long discussion on papal infallibility. Besides historical-political reasons to define it⁶⁹, there were also three theological reasons. Firstly, due to the different levels of magisterial authority. As we have already said, not everything the pope says is infallible. There are different levels of magisterial authority which require a different kind of assent.⁷⁰ Secondly, due to the diversity and quantity of Church's documents.^{71, 72} Thirdly, there are historical examples of popes who committed theological errors in their statements while being popes.

Through some historical examples we will show how it is possible for a pope to teach error, but never when the conditions for the infallibility are fulfilled. First example obtained from the Scriptures is saint Peter himself, firstly when he denied Christ three times⁷³ and secondly over

⁶⁹ For more see Schatz, K., *Papal Primacy From its Origins to the Present*, Liturgical Press, Collegeville, Minnesota, 2016, p. 128-161; Butler, C., *The Vatican Council, 1869-1870: based on Bishop Ullathorne's letters*, Newman Press, Westminster, Maryland, 1962.

⁷⁰ See *supra* fn.

⁷¹ "The level of magisterial authority pertaining to each type of document... is [not] always self-evident. A Church document may (and almost always does) contain statements of different levels of authority commanding different levels of assent, or even observations which do not require assent as such, but still should command the respect of the faithful." (CatholicCitizens.org, *Levels of Papal Authority in the Roman Catholic Church*, <https://catholiccitizens.org/views/60999/levels-of-papal-authority-2/>, 19.6.2015 (accessed 21.2.2023)).

⁷² Official documents of the Catholic Church have evolved and differentiated over time, but commonly we can divide them in four groups:

a) *papal documents* (issued directly by the Pope under his own name): *decretal letters* (a most solemn form of proclamation, used for dogmatic pronouncements and proclamation of saints), *encyclical letter* (papal act in a form of a letter, very common from the 19th century till now, used for explanation and instruction of the faithful on some doctrine), *apostolic letter* (issued by popes to address administrative questions, such as approving religious institutes, but have also been used to exhort the faithful on doctrinal issues, cannot define laws), *apostolic constitution* (most solemn form of legal document issued by the Pope, it deals with doctrinal or disciplinary matters), *motu proprio* (the most common source of canonical legislation after the Code of Canon Law, cannot define doctrine), *apostolic exhortation* (a formal instruction issued by the pope to a community, urging some specific activity, cannot define doctrine or law), *allocutions* (all the papal homilies, audiences, telecommunication messages etc., pastoral in their nature).

b) *conciliar documents* (issued by ecumenical councils of the Church and promulgated under the Pope's name): *constitution* (the fundamental conciliar document, usually *dogmatic*, from Vatican II can also be *pastoral*), *decree* (document addressing the specific issue in the life of the Church), *declaration* (policy statements giving the teaching of the Church on certain more controverted matters).

c) *curial documents* (issued by offices of the Holy See, authorized by the Pope): *decree* (documents used in administrative, legislative and judicial matters), *instruction* (explains or clarifies documents issued by a Council or decrees by a Pope), *declaration* (interpretation of existing law or facts, or a reply to a contested point of law or doctrine), *recognitio* (the acceptance by the relevant office of the Holy See of a document submitted to it for review by a local conference of bishops, it gives a legislative effect to the document), *responsum ad dubium* (official response to questions, *dubia* of bishops addressed to the Holy See seeking clarification on statements of doctrine or discipline) etc.

d) *bishop's documents* (issued either by individual bishops or by national conferences of bishops): *pastoral letter* (explains how to put into effect the Church's teaching in the relevant country), *decrees* (legislative documents made by bishops' conferences or synods).

Categorization and explanation for each of the documents taken from Smith, R., *A Resource for Evaluating Levels of Authority in Church Teaching*, 2007, <https://www.chausa.org/docs/default-source/hceusa/112fcb5b75d4c0bbbeba53044bc03461-pdf.pdf?sfvrsn=2> (accessed 21.2.2023) and Morrissey, F. G., *Papal and Curial Pronouncements: Their Canonical Significance in Light of the 1983 Code of Canon Law*, Jurist, vol. 50, no. 1, 1990, p. 102-125.

⁷³ Lk 22:54-62; 14:69-70; Mt 26:73-75; Jn 18:13-27.

the issue of circumcision^{74,75}. Allegedly⁷⁶, Pope Liberius (352-366) in the 4th century signed a heretical formula of faith drawn up by the Arians.⁷⁷ Vigilius in the 6th century⁷⁸, under the pressure from emperor Justinian, firstly had condemned the Three Chapters⁷⁹ as heretical, afterwards withdrew the condemnation and at the end condemned it again.^{80,81} In his letter to Sergius, the Patriarch of Constantinople in year 634 pope, Honorius I (625-638) was teaching the Monothelite heresy^{82,83}. Due to his negligence⁸⁴, he was condemned as a heretic by the Third Council of Constantinople (680-681) and later by Second Council of Nicea (787) and Constantinople IV (869-870).⁸⁵ Pope Nicholas I (858-867) held that aside from the Trinitarian formula one could simply baptize “*in nomine Christi*”⁸⁶ although this stands against the words of Christ, constant tradition and teachings of previous popes, e.g. Pelagius I.⁸⁷ Paschal II at the beginning of the 12th Century was accused of propagating heresy by promoting lay investiture⁸⁸ against the testimony of tradition and the explicit teaching of his immediate predecessor.⁸⁹ Pope Celestine III (1191-1198) and pope Innocent III (1198-1216) were disagreeing on issue of

⁷⁴ “But when Cephas was come to Antioch, I withstood him to the face, because he was to be blamed. For before that some came from James, he did eat with the Gentiles: but when they were come, he withdrew and separated himself, fearing them who were of the circumcision.” (Gal 2:11-12).

⁷⁵ “The fact that these conditions are even seen playing themselves out with St. Peter... is a sign that God, who is the Author of Scripture, wants to affirm that while Peter and his successors are infallible, they are so only under certain conditions.” (Ripperger, C., *op. cit.* in fn. 27, p. 12).

⁷⁶ See Berry, S., *op. cit.* in fn. 12, p. 496-497.

⁷⁷ St. Athanasius, although not on very friendly relations with Liberius, justifies him, saying that he only succumbed after two years of exile and affliction, and under fear of death: “[H]e supported me as long as he had free choice.” See Burn- Murdoch, H., *op. cit.* in fn. 33, p. 160-161.

⁷⁸ On the influence of Justinian’s wife Theodora who had leaned towards Monophysitism see *ibid.*, p. 284.

⁷⁹ Writings of Theodoret of Mopsuestia, Theodoret of Cyrus, and Ibas of Edessa which explicitly condemned Monophysitism, but were under suspicion for Nestorianism. Emperor Justinian wanted to achieve union with monophysits, so he urged for their condemnation. See Schatz, K., *op. cit.* in fn. 69, p. 52-53.

⁸⁰ *Ibid.*; Berry, S., *op. cit.* in fn., p. 498.

⁸¹ All this had also caused crisis in the Western Church. North Africans excommunicated the pope, the provinces of Milan and Aquileia broke communion with Rome, Gauls and Spaniards raised the objections. See Schatz, K., *op. cit.* in fn. 69, p. 53.

⁸² „Hence, we confess one will of our Lord Jesus Christ...” (Epistle *Scripta fraternitatis vestrae*, Denz., 251). It is the last great Christological heresy. It proclaims that Jesus, although he had two natures, one of God and one of man, had only one will. It was already condemned at the Lateran Council invoked by Martin I (which did not achieve the ecumenical status) and later at the Sixth Ecumenical Council (the Third Council of Constantinople).

⁸³ “Under the ancient Law, the High Priest did not wear the Rational except when he was vested with the pontifical robe and was entering before the Lord. Thus we do not say that the Pope cannot err in his private opinions, as did John XXII; or be altogether a heretic, as perhaps Honorius was.” Francis de Sales, *The Catholic Controversy*, TAN Books and Publishers Inc., Charlotte, North Carolina, 1986, p. 305-306.

⁸⁴ Pope St. Leo said that this was the reason to condemn Honorius: “Theodore, Cyrus, and Sergius were punished by eternal condemnation... along with Honorius, who did not repress the flame of heretical doctrine... but favored it by negligence.” (Berry, S., *op. cit.* in fn. 12, p. 500.)

⁸⁵ For more see: Salza, J., Siscoe, R., *op. cit.* in fn. 9, p. 214-221; Schatz, K., *op. cit.* in fn. 69, p. 54-55. For peculiar *prima sedes* case of judging pope John XII see *infra* IV. 6. 2.

⁸⁶ Denz., 335.

⁸⁷ Denz., 229.

⁸⁸ For more see *infra* IV. 9. 2.

⁸⁹ Salza, J., Siscoe, R., *op. cit.* in fn. 9, p. 213.

Pauline privilege.⁹⁰ John XXII (1316-1334) taught that the souls of the blessed departed do not see God until after Last Judgment.^{91, 92} None of these cases satisfy all of the conditions for the *ex-cathedra* statement. Therefore, it is taken that the pope can err, but never in the *ex-cathedra* teaching.

2.3. Qualities of Infallible Statements

Infallible statements possess certain qualities that result in practical consequences. Firstly, infallible statements give us the greatest certitude regarding the matter of faith. Secondly, as Vatican I had declared they are of themselves, and not by the consent of the Church, irreformable⁹³; they are not subject to reformulation, change, alteration in regards to the understanding of the original formula.⁹⁴ Thirdly, they are not subject to revision by anyone and no one may lawfully pass the judgment upon it.⁹⁵ Fourthly, they are final and irrevocable, *i. e.*, a later pope and council cannot change them. Fifthly, further development of a doctrine is possible but only within the confines of the original understanding of the infallible judgment. Finally, any person who denies an infallible statement cannot claim to be Catholic.⁹⁶

3. THE EPISCOPAL INFALLIBILITY

3.1. When are the Bishops Infallible?

After Vatican I, which revolved around the question of papal primacy and infallibility, the Second Vatican Council has tried to resolve the question of collegiality⁹⁷, *i. e.*, relationship of

⁹⁰ Letter *Quanto te magis* from Innocent III to Hugo, Bishop of Ferrara (Denz., 406). See also Dulau, P., *The Pauline Privilege: Is It Promulgated in the First Epistle to the Corinthians?*, The Catholic Biblical Quarterly, vol. 13, no. 2, 1951, p. 146.

⁹¹ Ripperger, C., *op. cit.* in fn. 27, p. 10 – 11.

⁹² “I say: If by the Roman Church you mean its head or pontiff, it is beyond question that he can err even in matters touching the faith. He does this when he teaches heresy by his own judgment or decretal. In truth, many Roman pontiffs were heretics. The last of them was Pope John XXII († 1334)...” (*IV Sentent, Quaestio de confirm.* quoted by Bossuet (d. 1704) in his *Oeuvres complètes*, tome 26, Adrien Le Clère, Paris, 1841, p. 686).

⁹³ Vatican I answered to the Gallicans who claimed that the decrees of the Roman Pontiff are not infallible unless accepted by the whole Church. See *The Four Gallican Articles, Declaration of the Church of France* (March 19, 1682, in: Degert, A., *Gallicanism*, in: *The Catholic Encyclopedia*, vol. 6., Robert Appleton Company, New York, 1909, <https://www.newadvent.org/cathen/06351a.htm> (accessed 21.2.2023).

⁹⁴ Ripperger, C., *op. cit.* in fn. 27, p. 13.

⁹⁵ *LG*, 25: “... [Definitions proclaimed by the Roman Pontiff] need no approval of others, *nor do they allow an appeal to any other judgment.*” Therefore, *even subsequent popes and councils* are bound by the infallible judgment.”

⁹⁶ Ripperger, C., *op. cit.* in fn. 27, p. 13.

⁹⁷ For more on collegiality discussion at Vatican II see O’ Riordan, S., *The Second Vatican Council: The Pope, the Curia and the Bishops*, The Furrow, vol. 14, no. 12, 1963, p. 735-743. For a critique of misinterpretation of collegiality and its danger see: National Catholic Register, *The ‘Pastoral Council’ and the Collapse of the Catholic*

bishops (between themselves and with the pope) in ruling over the Church and infallibility exercised by the episcopacy. In *Lumen Gentium* (ch. 22) it can be read: “Just as in the Gospel, the Lord so disposing, St. Peter and the other apostles constitute one apostolic college, so in a similar way the Roman Pontiff, the successor of Peter, and the bishops, the successors of the apostles, are joined together... [I]t is evident... that the power of binding and loosing, which was given to Peter, was granted also to the college of apostles, joined with their head... In it, the bishops, faithfully recognizing the primacy and pre-eminence of their head, exercise their own authority for the good of their own faithful, and indeed of the whole Church, the Holy Spirit supporting its organic structure and harmony with moderation.”⁹⁸ It is stated further (ch. 25): “Although the individual bishops do not enjoy the prerogative of infallibility, they nevertheless proclaim Christ’s doctrine infallibly whenever, even though dispersed through the world, but still maintaining the bond of communion among themselves and with the successor of Peter, and authentically teaching matters of faith and morals, they are in agreement on one position as definitively to be held. This is even more clearly verified when, gathered together in an ecumenical council, they are teachers and judges of faith and morals for the universal Church, whose definitions must be adhered to with the submission of faith... The infallibility promised to the Church resides... in the body of Bishops, when that body exercises the supreme magisterium with the successor of Peter.”⁹⁹

Before we examine the cases in which the bishops are infallible, a few issues have to be resolved. Firstly, in contrast to the pope, an individual bishop does not enjoy the charism of infallibility by the virtue of his office. Vatican II explicitly states that “...the individual bishop does not enjoy the prerogative of infallibility”^{100, 101} Therefore, infallibility pertains to the body of bishops as whole, not to every individual. Secondly, that does not mean that the teaching of individual bishop or of some non-universal community of bishops, *e.g.* episcopal conference, cannot be true and should not be obeyed. Vatican II states: “Bishops are preachers of faith... And they are authentic teachers, that is, teachers endowed with the authority of Christ... In matters of faith and morals, the bishops speak in the name of Christ and the faithful are to accept their teaching and adhere to it with a religious assent.”¹⁰² Bishops are, as fr. Berry puts it, the

Faith in the Netherlands, 1.2.2023, <https://www.ncregister.com/news/the-pastoral-council-and-the-collapse-of-the-catholic-faith-in-the-netherlands> (accessed 21.2.2023).

⁹⁸ *LG*, 22.

⁹⁹ *LG*, 25.

¹⁰⁰ *Ibid.*

¹⁰¹ “The history of the Church shows that individual members of the Episcopate, for example, Photinus, Nestorius, have fallen into error and heresy. In order to preserve the teaching of faith handed down by Tradition, in its purity, the collegiate infallibility of the whole Episcopate suffices.” See Ott, L., *op. cit.* in fn. 18, p. 300.

¹⁰² *LG*, 25.

divinely constituted teachers and judges of the faith in their diocese.¹⁰³ Furthermore, they are authentic teachers of faith, but only if they are in communion with the Apostolic See and adhere to the general teaching of the Church.¹⁰⁴ Consequently, the faithful should adhere to their teaching with a religious assent.^{105, 106} Thirdly, if any doubt arises on the authenticity of bishop's teaching, it must be decided by superior authority, *i. e.* the pope, not by the faithful.¹⁰⁷ Fourthly, Vatican II states that, aside from the pope, "... the infallibility promised to the Church resides... in the body of Bishops, when that body exercises the supreme magisterium with the successor of Peter."¹⁰⁸ Here it is important to emphasize that the infallibility does not pertain to the college of bishops alone, but to the college of bishops together with the pope.¹⁰⁹

3.1.1. Extraordinary Episcopal Magisterium (Ecumenical Councils)

Lumen Gentium (ch. 25) teaches that when the bishops are "...gathered together in an ecumenical council, they are teachers and judges of faith and morals for the universal Church, whose definitions must be adhered to with the submission of faith..." There are those who think that everything said at the ecumenical council is infallible and that if a Catholic does not assent to every word of it, he is no different "...than Protestants who follow their own judgment in matters of religion".¹¹⁰ However, that is not the mind of the Church. Certain conditions are established so that the college of bishops assembled in the council can exercise their infallibility:

a) As Vatican II states: "A council is never ecumenical unless it is confirmed or at least accepted as such by the successor of Peter...[I]t is prerogative of the Roman Pontiff to convoke these councils, to preside over them, and to confirm them."¹¹¹ As we have already pointed out, the

¹⁰³ Their duty is: "... to teach and interpret the truths of revelations and to decide controverted points, when necessity requires." (Berry, S., *op. cit.* in fn. 12, p. 470- 471).

¹⁰⁴ Ott, L., *op. cit.* in fn. 18, p. 300.

¹⁰⁵ A few examples of bishop's non- infallible teachings: a single bishop appealing to a state official to not use the death penalty (*e. g.* <https://www.usccb.org/resources/letter-gov-richardson-bishop-murphy-urging-repeal-new-mexicos-death-penalty-march-16-2009>) or same in episcopal conferences (<https://www.usccb.org/resources/bishops-statement-capital-punishment-1980>).

¹⁰⁶ "[The bishops] might refer to items that are infallibly taught or defined, but their teaching as a whole is not infallible." See Lowery, M., *op. cit.* in fn. 38, p. 426.

¹⁰⁷ See *Code of Canon Law*, 1983, https://www.vatican.va/archive/cod-iuris-canonici/cic_index_en.html, c. 1405 *et seq.*; "[O]rder and unity in the Church demand that the bishop's judgment be respected until final decision has been made." (Berry, S., *op. cit.* in fn. 47, p. 471.)

¹⁰⁸ *LG*, 25.

¹⁰⁹ *LG*, 22: "But the college... of bishops has no authority unless it is understood together with the Roman Pontiff..."

¹¹⁰ Comparison taken from Ripperger, C., *op. cit.* in fn 27, p. 24.

¹¹¹ *LG*, 22. See also: *CIC/1983* c. 338 *et seq.*

bishops enjoy infallibility only in their corporate capacity and therefore, they cannot exercise it independently of the Roman Pontiff. That is why it is important that he convoke the council.¹¹²

Personally, or by his representative he should preside over the council and all definitions made there should bear his confirmation. If any of these conditions are missing, the teachings proposed cannot be infallible.¹¹³

b) *gathered together in an ecumenical council*. Virtually all the bishops should be present¹¹⁴, however the presence of each and every bishops is not necessary "...for if such were the case, the willful or enforced absence of one bishop would frustrate the will of entire body."¹¹⁵ Furthermore, it is clear that the bishops cannot exercise infallibility at the diocesan, provincial or regional council, but only at the ecumenical.

c) *whose definitions*. As in the case of papal infallibility, for some doctrine to be infallible, the bishops have to define it. As regards to the form, "...no set formula is necessary; it is sufficient to mention the doctrine as an article of faith, a dogma of faith, a Catholic dogma, a doctrine always believed in the Church, or a doctrine landed down by the Fathers. Anathema pronounced against those who deny a doctrine is also sufficient evidence of a dogmatic definition."¹¹⁶ Therefore, a large majority of council statements are not infallible.¹¹⁷ Is it necessary that every bishop present consent to the proposed definition? Berry answered that "[it is not] necessary... for since the bishops individually are fallible, false opinions will almost invariably find some supporters among them..."¹¹⁸ If the bishops in a council are divided regarding some question,

¹¹² "The first eight General Councils were summoned by the emperor, who also, as a rule, assumed a presidency of honor or outer protection. The Second and the Fifth General Council were held without the co-operation of the Pope or of his representative. According to the manner in which they were convened, their composition and their direction, they were plenary councils of the Orient, but achieved ecumenical validity by the subsequent supplementary recognition of their doctrinal decrees by the whole Church." (Ott, L., *op. cit.* in fn. 18, p. 300).

¹¹³ For example, "Robber Council" of Ephesus (449) and iconoclastic "Mock Council" of Hieria (754) were condemned by the Council of Chalcedon (451) and Second Council of Nicea due to their material and formal ignoring of the Roman bishop. As regards to Hieria, Roman delegate John the Deacon explains that it was invalid: "... because neither the Roman pope nor the bishops around him cooperated in it, either through delegates or letter, which is the law of councils." (Mansi, G. D. (ed.), *Sacrorum Conciliorum Nova et Amplissima Collectio*, vol. 13, Florence, 1767, , p. 208-209 (translation according to the Schatz, K., *op. cit.* in fn. 69, p. 57). Patriarch Nicephoros of Constantinople, who later established the validity of Nicea II and the invalidity of Hieria, said: "Without them [the Romans] no dogma can receive definitive approbation... for they preside over the episcopal office and they have received this dignity from two leading apostles." (Schatz, K., *op. cit.* in fn. 69, p. 57).

¹¹⁴ Church councils in the first millennium had simply been assemblies of bishops, usually with emperor presiding. Then medieval councils were constituted not only of bishops, abbots and members of the cathedral chapters with the representatives of the nations of Christendom with pope presiding. See more in Schatz, K., *op. cit.* in fn. 69, p. 96-97. For present state see Tanquerey, A., *op. cit.* in fn. 25, p. 155.

¹¹⁵ Berry, S., *op. cit.* in fn. 12, p. 457.

¹¹⁶ *Ibid.*, p. 458.

¹¹⁷ Doctor of the Church, St. Robert Bellarmine, stated: "Neither the discussions which precede a dogmatic decree, nor the reasons alleged to prove and explain it, are to be accepted as infallibly true. Nothing but the actual decrees are of faith, and these only if they intended as such." (Cardinal Bellarmine, *De Conciliis*, I, 17. as quoted in: Berry, S., *op. cit.* in fn. 12, p. 459).

¹¹⁸ *Ibid.*, p. 457.

the same author stated: “[Then] truth must lie with the party whom the Roman Pontiff supports, since no definitions have any force unless confirmed by him.”¹¹⁹

d) *of faith and morals*. Like papal infallibility, if a council would teach on something else, *e.g.* politics¹²⁰, that teaching would not be considered infallible.

e) *must be adhered to with the submission of faith*.¹²¹

3.1.2. Ordinary and Universal Episcopal Magisterium

Already Pope Pius IX (1846-1878) in 1863 in his letter *Tuas Libenter* has stated: “[S]ubjection which is to be manifested by an act of divine faith... would not... be limited [only] to those matters which have been defined by express decrees of the ecumenical Councils, or of the Roman Pontiffs and of this See, but would have to be extended also to those matters which are handed down as divinely revealed by the ordinary teaching power of the whole Church spread throughout the world...”¹²² First Vatican Council teaches: “All things are to be accepted by divine and Catholic faith, which are contained in the written or traditional word of God and set forth by the Church as divinely revealed, whether this be done by solemn decree or by the ordinary and universal teaching authority.”¹²³ Second Vatican Council reaffirms this teaching. Therefore, bishops are not infallible only when they define some doctrine, but when the collectively teach it also. By the nature of the case it will often be difficult to determine what are the infallible teachings of the ordinary magisterium.¹²⁴ Moreover, as the exhaustive study has to be made to see which teachings have met those conditions necessary to be considered infallible, the tendency is to “... undervalue the Ordinary Magisterium as a source in ascertaining the infallible nature of a dogmatic truth.”¹²⁵

A few clarifications should be made here. Firstly, *ex cathedra* papal definitions and definitions made by ecumenical councils are extraordinary manifestations of magisterium, while teachings made by ordinary and universal magisterium are ordinary manner in which the Church is exercising its infallibility.¹²⁶ Thus, besides infallible definitions, the faithful are also obliged to

¹¹⁹ *Ibid.*, p. 458.

¹²⁰ For example, see *Declaration on Religious Freedom Dignitatis Humanae*, https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html (accessed 21.2.2023) from Vatican II.

¹²¹ See *infra* III.4.

¹²² Denz., 1683.

¹²³ Dogmatic constitution *Dei Filius* concerning Catholic Faith, *ibid.*, 1792.

¹²⁴ O’Connor, J. T., *op. cit.* in fn. 14, p. 106.

¹²⁵ *Ibid.*

¹²⁶ For examples see: Lowery, M., *op. cit.* in fn. 38, p. 428.

believe or hold all that is taught by ordinary and universal magisterium. Secondly, once the doctrine is infallibly defined it does not mean that now it possesses a certitude which it did not possess while it was infallibly taught. Most doctrines defined by the pope, or pope and council, have been previously part of the infallible teaching of the Ordinary Magisterium. In that sense, there have been already given the examples of *Humanae Vitae* and *Evangelium Vitae* where the popes have just reaffirmed teachings of ordinary universal magisterium.¹²⁷ Moreover, before setting the definitions of the dogmas of the Immaculate Conception and bodily Assumption of Mary, Pius IX and Pius XII (1939-1958) had carried out consultations to determine what was already being definitively taught by the ordinary Magisterium.¹²⁸

The conditions for an ordinary and universal magisterium to be infallible are:

a) *(even though) dispersed through the world.* Bishops exercise their infallibility in an ordinary way when they "... in their dioceses, in moral unity with the Pope, unanimously promulgate the same teachings on faith and morals..."¹²⁹ The agreement of the Bishops in doctrine can be seen from the catechisms issued by them, from their pastoral letters, from the prayer books approved by them, from the resolutions of particular synods, public sermons *etc.*¹³⁰

b) *still maintaining the bond of communion among themselves and with the successor of Peter.* Pope's role is as important as it is in the case of extraordinary magisterium. His approval, either expressed or tacit, is necessary.

c) *authentically teaching matters of faith and morals.* In this case the faithful do not owe an assent to a definition like it is the case with the papal infallibility and the infallibility of the ecumenical councils, but to a certain teaching. Here it is important to emphasize that whether something is taught infallibly or defined infallibly, the matter is just as infallible. In history, some type of crisis often required a more official definition. It is always a question of prudence¹³¹ as to define a matter that is already infallibly taught by the ordinary universal episcopal Magisterium or not.

d) *in agreement on one position as definitively to be held.*¹³²

¹²⁷ For example, Vatican I states: "Catholic Church has held and holds that there is a twofold order of knowledge... natural reason [and] divine faith." (Denz., 1795). In wording we can conclude that teaching emanates from ordinary and universal Magisterium.

¹²⁸ See: Pius IX, Encyclical Letter *Ubi primum*, 1849, <https://www.papalencyclicals.net/pius09/p9ubipr2.htm>, pt. 6, and Pius XII, Apostolic Constitution *Munificentissimus Deus*, 1950, https://www.vatican.va/content/pius-xii/en/apost_constitutions/documents/hf_p-xii_apc_19501101_munificentissimus-deus.html, pt. 9.

¹²⁹ Ott, L., *op. cit.* in fn. 18, p. 300.

¹³⁰ *Ibid.*

¹³¹ For example, St. John Paul II did not proceed further in proclaiming the dogma of Mother of God *coredemptrix* due to the ecumenical concerns. For more see: University of Dayton, *Co-Redemptrix as Dogma?*, 2004, <https://udayton.edu/imri/mary/c/co-redemptrix-as-dogma.php> (accessed 21.2.2023).

¹³² See *infra* III.4.

4. ORGANS OF PASSIVE INFALLIBILITY IN THE BROADER SENSE

Fr. Tanquerey in the first part of his *Manual of dogmatic theology* teaches that, besides the bishops teaching unanimously in their corporate capacity, ordinary and universal magisterium also includes: universal custom or practice associated with dogma, the consensus of the Fathers and of the Theologians, and the common understanding of faithful (*sensus fidelium*).¹³³ The universal custom and practice relate “to public rites, formulas of prayers, feasts, sacred practices, offices instituted by the Church that are: a) connected with the dogmatic truth, b) universal or approved at least tacitly by infallible authority”.¹³⁴ Concerning the controversies, more attention will be given to the Fathers and Theologians and to *sensus fidelium*.¹³⁵

4.1. The Fathers of the Church

4.1.1. Who qualifies as the Father of the Church?

Fathers of the Church are “... those men distinguished for their sanctity and their doctrine, who in the first centuries made the Church renowned by their writings, and who received full approbation from the Church, at least in an implicit manner...”¹³⁶, e.g., Ignatius of Antioch, Polycarp, Justin, Ambrose, Augustin, Jerome *etc.*¹³⁷ Through centuries the Magisterium of the Church have expressed the importance of their teachings. The Council of Ephesus (431) declared that it would not define anything that had not already been held unanimously by the Fathers.¹³⁸ Council of Orange (529) reaffirmed the same.¹³⁹ Various synods, councils and popes were confirming orthodox doctrines and opposing to erroneous and heretical ones by invoking

¹³³ Tanquerey, A., *op. cit.* in fn. 25, p. 177.

¹³⁴ *Ibid.*

¹³⁵ Due to the neglect of Patristics in modern exegesis of Scripture and rejection of medieval theology in modern times, author of this thesis considered it important to explain who were the Fathers and the Theologians and why their consensus is binding on the conscience of the faithful. Furthermore, due to the post-conciliar confusion regarding *sensus fidelium* (where it has become perceived as a parallel magisterium or Church parliament, for more see II.4.3.), author also deemed necessary to tackle the notion.

¹³⁶ Tanquerey, A., *op. cit.* in fn. 25, p. 178.

¹³⁷ Agius, G., *op. cit.* in fn. 16, p. 231.

¹³⁸ Pallen, B. C. *et al.*, *The New Catholic Dictionary*, The Universal College Foundation, New York, 1929, p. 361.

¹³⁹ “[W]e should set forth to be observed by all... a few chapters... which were collected by the ancient fathers...” (Denz., 173b). The council was confirmed by pope Boniface II who also emphasized the importance of fathers: “... since many, and above all Bishop Augustine of blessed memory... are proved to have discussed this with such detailed reasoning that should be no further doubt in anyone...” (Epistle *Per filium nostrum* to Caesarius of Arles, 531; Denz., 200b).

the authority of the Fathers, *e.g.*, doctrine of Trinity at the Lateran synod¹⁴⁰, hypostatic union at the Roman synod in 680¹⁴¹, sacraments at the council of Trent (1545-1563)¹⁴² *etc.* Peculiarity that happened at Trent was that there was an explicit reference to *the unanimous consensus of the Fathers* regarding sacred orders¹⁴³ and Sacred Scripture¹⁴⁴.

Certain criteria are established for one to qualify as a Church Father:

a) *antiquity*. Fathers are all those who were alive and were writing in the first centuries of the Church, when the Church was still in her “youth”. Death of the last apostle is taken as the beginning of this period, but regarding its ending there is no unanimity among the theologians. “St Gregory the Great (d. 604) is generally regarded as the last Father in the West, St. John Damascene (d. 754), in the East”¹⁴⁵, but some authors prolong that period all to the twelfth century.¹⁴⁶ Therefore, “... a particular writer in the early Church could be considered a Father of the Church if he were alive from the time of the death of the last Apostle until the 1100s.”¹⁴⁷

b) *sanctity*. Simply, one should be recognized for the holiness of his life.

c) *orthodoxy*. Their teachings are to be orthodox, *i. e.*, their writings cannot contain any heresy.¹⁴⁸

¹⁴⁰ “If anyone does not confess properly and truly in accord with the holy Fathers... Trinity in unity, and a unity in Trinity... let him be condemned” (Denz., 254).

¹⁴¹ “... it follows... that [Christ] has two natures... because it is shown that the apostolic and evangelical tradition and the teaching of the holy Fathers, whom the holy, apostolic, and Catholic Church and the venerable Synods accept, have taught us this.” (Epistle *Omnium bonorum spes*, Denz., 288).

¹⁴² “For [the sacrament of penance] is the reparation of one fallen, which the holy Fathers have aptly called a second plank after the shipwreck of lost grace.” (Decree on Justification; Denz., 807), “Since, therefore, matrimony in the evangelical law, by grace through Christ, excels the ancient marriages, *our* holy Fathers... always taught that it is to be classed among the sacraments of the New Law.” (Session XXIV; Denz., 970).

¹⁴³ “Since from the testimony of Scripture, apostolic tradition, and *the unanimous consensus of the Fathers*... no one can doubt that [the sacred order] is... one of the seven sacraments of the Church.” (Session XXIII; Denz., 959.)

¹⁴⁴ “No one...shall... interpret the said Sacred Scripture contrary to that sense which is held by the holy mother Church... or even contrary to *the unanimous consent of the Fathers, even though interpretations of this kind were never intended to be brought to light...*” (Session IV; Denz., 786.) There is certain discussion among theologians whether this passage is merely *disciplinary* (and then abrogated because there is no mention of it in the last version of the Code of Canon Law) or it is a *principle that pertains to tradition* (therefore the faithful are still obliged to hold it due to the binding force of the tradition). For more see: Ripperger, C., *The consensus of the Fathers and Theologians*, Sensus Traditionis Press, 2020, p. 13-15.

¹⁴⁵ Pallen, B. C. *et al.*, *op. cit.* in fn. 138, p. 361.

¹⁴⁶ In that case, St. Bernard, who died in 1153, would be the last Father of the Church (Agius, G., *op. cit.* in fn. 16, p. 231).

¹⁴⁷ Ripperger, C., *op. cit.* in fn. 144, p. 8.

¹⁴⁸ All men that had written about the Church and its beliefs in antiquity are called the “Fathers of the Church”, but, some of them are not the Fathers in the full sense of the word due to their unorthodoxy, *e.g.*, Eusebius of Cesarea who fell into arianism, Tertullian who fell in montanism, and Origen who was suspected for heresy. See Agius, G., *op. cit.* in fn. 94, p. 231.

d) *approval of the Church*. To be Father of the Church, one should be recognized, explicitly or implicitly, by the Church. Who is considered Father and who is not ultimately is determined by the Magisterium.¹⁴⁹

4.1.2. *Unanimous consensus of the Fathers*

Throughout the Church history teachings of the Fathers were always held in high esteem¹⁵⁰, but what does it take for their teaching to be infallible. Firstly, as we have already said, the Fathers are not actively infallible, that is, they are not infallible by themselves in a way that the infallibility is divinely promised to them, but they are infallible only passively, i. e., they draw their infallibility from the infallibility of the Church. It is said: “[T]he common consent of the Fathers is infallible, because the Church itself is infallible.”¹⁵¹ They are just mouthpieces of the Church, its “most authorized representatives”.¹⁵² Secondly, not everything Fathers had said is infallible. Fr. Tanquerey makes distinction between Fathers as private doctors and Fathers as witnesses to the Church – when they are speaking as private doctors, they are speaking in a philosophical manner and are open for other opinions, while when they are speaking as witnesses, they “... teach that a doctrine has been revealed, or has been accepted by the universal Church, or that doctrine must be so held that it cannot be denied without the loss of faith...”¹⁵³ To speak as a witness of the Church, i. e., infallibly there are certain conditions that should be fulfilled:

- a) *teaching has to be on faith and morals*. As in the cases of active infallibility, doctrine taught has to pertain to faith and morals. Teaching on, e.g. science¹⁵⁴ would not be infallible.
- b) *morally unanimous consensus of Fathers*. There is no need for Fathers to be “physically” unanimous¹⁵⁵, i. e., that the every single Father in his writings consent to a particular doctrine, but a “moral” consensus suffices, meaning that some Fathers explicitly consent on a doctrine

¹⁴⁹ Ripperger, C., *op. cit.* in fn. 144, p. 9.

¹⁵⁰ See Agius, *op. cit.* in fn. 16, p. 245.

¹⁵¹ *Ibid.*, p. 231.

¹⁵² Father Ripperger argues against the opinion that infallibility of the Fathers is based upon *sensus fidelium* saying that in contrast with the Fathers, the faithful are not the authorized representatives of the Church. Therefore, although both pertain to passive infallibility in a broader sense, these two are two separated forms of infallibility. See Ripperger, C., *op. cit.* in fn. 144, p. 19.

¹⁵³ Tanquerey, A., *op. cit.* in fn. 25, p. 179.

¹⁵⁴ Lavalley, M. S., *The Early Church Defended Creation Science*, 1. 10. 1986, <https://www.icr.org/article/early-church-defended-creation-science> (accessed 21.2.2023).

¹⁵⁵ Ripperger, C., *op. cit.* in fn. 144, p. 23.

in their writings and others are doing it implicitly, by silence or not contradiction.¹⁵⁶ The same goes when there is an explicit consent either of all the Western or all the Eastern Fathers.¹⁵⁷ It is also possible for all the Fathers to implicitly consent on a doctrine taught by the one Father.¹⁵⁸ To conclude, what the Fathers unanimously teach to be of faith, is of faith (*de fide*) and what they unanimously reject as heretical, is heretical.¹⁵⁹ Their teaching is certain, decisive, irrefragable (it cannot be disputed or changed) and must be accepted as a Catholic doctrine.¹⁶⁰ In cases when the Fathers disagree, there is no common consent and one is free to form a different opinion.¹⁶¹ If the matter is later settled it must be confessed that some of the Father have erred (due to their fallibility as individuals) but in spite of it, "... their words must be treated with respect; we must not attribute error to them because they have had no knowledge of the more explicit definitions of a following age."^{162, 163}

4.2. The Theologians and their unanimous consensus

In the mentioned *Tuas Libenter* Pius IX explicitly says that besides the extraordinary acts of the Magisterium, the faithful must also submit with an act of divine faith¹⁶⁴ to the universal and constant teaching of Theologians.¹⁶⁵ But we should not confuse the Theologians with

¹⁵⁶ "[M]any Fathers offered little defense or none at all on some doctrines. Their silence was a tacit consent, a mighty approval of the action of the more eminent Fathers, an expression of the general feeling of the Universal Church..." See Agius, *op. cit.* in fn. 16, p. 244.

¹⁵⁷ "The Oriental Church professed the same Faith as the Western Church. So long as that unity of Faith remained, it was impossible that... the Greek Fathers could sustain a doctrine, which the Fathers of the Latin Church rejected. And, it was equally impossible that the Latin Fathers could ever teach a doctrine, which the Greek Fathers repudiated. 'One Faith, one Lord, one Baptism' was up to the Eighth Century, the bond of union between East and West." (*Ibid.*, p. 246).

¹⁵⁸ "Had a great part of the Church become Arian? Behold Athanasius replacing on Christ the aureola of Divinity, of which Arius divested Him. Had Nestorius denied the Queen of Heaven her most exalted title? Behold Cyrillus of Alexandria... proclaiming Mary 'the Mother of God'. Had Pelagius... so deified man as not to need God's help? Behold Augustine, like a new Solomon, magnificently illustrating, on the one hand, man's frailty, and, on the other, insisting on the necessity of God's grace. Thus, even one Father of the Church may be sufficient authority on some article of the Faith." (*Ibid.*, 248).

¹⁵⁹ Pallen, B. C. *et al.*, *op. cit.* in fn. 138, p. 361.

¹⁶⁰ Ripperger, C., *op. cit.* in fn. 144, p. 20.

¹⁶¹ Agius, *op. cit.* in fn. 16, p. 241.

¹⁶² Tanquerey, A., *op. cit.* in fn. 25, p. 180.

¹⁶³ We can take an example of St. Augustin: "Rendering... due reverence, and paying all the honor... to the peaceful Bishop and glorious Martyr Cyprian, I hold in the rebaptizing of schismatics and heretics he thought differently from what the truth proved afterwards to be; not through my own opinion, but from the doctrine of the Universal Church, which doctrine was afterwards strengthened and confirmed by the authority of a Plenary Council." (August., *De bapt.*, L. 6, C, II as quoted in: Agius, *op. cit.* in fn. 16, p. 250).

¹⁶⁴ See *infra* III.4.

¹⁶⁵ "[S]ubjection which is to be manifested by an act of divine faith... would not... be limited [only] to those matters... defined by express decrees of the ecumenical Councils, or of the Roman Pontiffs... but would have to be extended also to those matters... handed down as divinely revealed by the ordinary teaching power of the whole Church spread throughout the world... and therefore, by universal and constant consent are held by Catholic Theologians to belong to faith." (Denz. 1683).

theologians, those who just possess a degree in theology. When we say Theologians we think about specific group of men who lived after the age of Holy Fathers, in period from twelfth century until middle eighteenth century (that is, during the years of 1100 to 1750)¹⁶⁶ and belonged to various theological schools (Dominican, Franciscan, Augustinian and Jesuit...) that were erected or approved by the Holy See¹⁶⁷, and who exposed the teachings of the Fathers more richly and accurately with the help of philosophical reasoning and rendered a synthesis of them¹⁶⁸, e. g., St. Thomas Aquinas, St. Bonaventure, John Duns Scotus, Francisco Suárez, St. Robert Bellarmine, St. Alphonsus Maria de' Liguori, Melchior Cano *etc.*

As was the case with the Fathers, Theologians are also only passively infallible.¹⁶⁹ Fr. Agius summarizes teachings of Theologians in four classes:^{170, 171}

- a) When they *unanimously teach on faith and morals that something must be accepted in Catholic Faith (de fide catolica)*, such consensus is “indirectly infallible, because we may then consider them as the voice of the Apostolic Succession, under whose auspices they lived and taught”. It is *per se* heretical to reject it.
- b) When they teach something as *proximate to faith (sententia fidei proxima)* it would be erroneous to reject it. In this case, the doctrine they teach is by common consent contained in Divine Revelation, but only lacking the solemn decision of the Church.
- c) *If all proclaim some doctrine in regard faith and morals as true*, it would be temerarious to reject this doctrine.
- d) *If there is a division of opinion among the different theological schools*, there is a freedom to form your own opinion until the Church gives her decision.

4.3. Sensus Fidelium or Passive infallibility in the Narrower Sense

It has been a common teaching of the Theologians and the Fathers that the sense of the faithful is one of the organs of infallibility.¹⁷² When the whole of the faithful consent to some doctrine,

¹⁶⁶ Therefore, theologians in period from 1750 till today are excluded.

¹⁶⁷ “[I]f we reflect upon the special care, which Supreme Pontiffs and Bishops exercised upon those Schools... we cannot but see that *the constant and unanimous consent of... Catholic Theological Schools... reflects*, and corresponds to, *every consent of the whole Apostolic Succession, and consequently of the Church in all ages.*” See Agius, *op. cit.* in fn. 16, p. 220.

¹⁶⁸ Ripperger, C., *op. cit.* in fn. 144, p. 25-27.

¹⁶⁹ “[U]nder the special care and direction of the Apostolic Succession, they manifest the infallible consent and the Catholic Intellect of the same Apostolic Succession and of all the Church.” (Agius, *op. cit.* in fn. 16, p. 221).

¹⁷⁰ *Ibid.*, p. 221-222.

¹⁷¹ To understand theological notes and theological censures for each of the classes of teachings see: Ripperger, C., *The Binding Force of Tradition*, Sensus Traditionis Press, 2013, p. 36-39.

¹⁷² For the historical development of this doctrine see: International Theological Commission, *Sensus fidei in the life of the Church*, 2014,

it is to be considered as pertaining to the faith (*de fide*)¹⁷³, *i. e.*, when the whole of Catholic people believe in some doctrine, this doctrine pertains to Divine Revelation, whether contained in the Scriptures or not.¹⁷⁴ The Second Vatican Council explained and set the conditions for infallibility of the faithful: “The entire body of the faithful, anointed as they are by the Holy One, cannot err in matters of belief. They manifest this special property... when ‘from the Bishops down to the last of the lay faithful’ they show universal agreement in matters of faith and morals... It is exercised under the guidance of the sacred teaching authority...”¹⁷⁵

The elements can be explained as follows:

a) *the entire body of the faithful*. When we say that the faithful cannot err it does not mean that it is impossible for Catholics to fall away from faith. We are witnesses of individual churches, even nations, *e. g.*, the English or Scandinavian falling away from Catholicism. Furthermore, it does not mean that everything that comes from the mouth of a person who is Catholic is infallible because as individual, every Catholic can err.¹⁷⁶ What really means is that due to the Church’s indefectibility¹⁷⁷ it is impossible for the Church that the whole of faithful would fall into error, *i. e.*, “... those professing the true faith must always remain sufficient in number and in distribution throughout the world to preserve the Church truly Catholic in the unity of faith and worship.”¹⁷⁸

b) *in matters of belief*. After the Second Vatican Council there was a desire to put more emphasis on active dimension of *sensus fidelium*, *i. e.*, that through *sensus fidelium* the faithful are exercising the prophetic gift given by Christ.¹⁷⁹ A few clarifications have to be made here. This active dimension does not mean that the faithful constitute some parallel, special magisterium. Neither would be correct to attribute to the faithful some doctrine-making authority.¹⁸⁰ As it has been already explained, active infallibility pertains only to the

https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_20140610_sensus-fidei_en.html#1._Biblical_teaching, pt. 7-47.

¹⁷³ Ripperger, C., *op. cit.* in fn. 171, p. 32.

¹⁷⁴ Agius, *op. cit.* in fn. 16, p. 209.

¹⁷⁵ *LG*, 12.

¹⁷⁶ “Although theological faith as such then cannot err, the believer can still have erroneous opinions since all his thoughts do not spring from faith. Not all the ideas which circulate among the People of God are compatible with the faith. This is all the more so given that people can be swayed by a public opinion influenced by modern communications media.” (*Donum Veritatis*, pt. 35).

¹⁷⁷ See *supra* fn. 1 and Slick M., *What is the indefectibility of the Roman Catholic Church?*, 30.1.2014, <https://carm.org/roman-catholicism/what-is-the-indefectibility-of-the-roman-catholic-church/> (accessed 21.2.2023).

¹⁷⁸ Berry, *op. cit.* in fn. 12, p. 446.

¹⁷⁹ See *LG*, 35.

¹⁸⁰ At the time this thesis is being written, the Church is finding herself in Synod on Synodality which is relying heavily on the *sensus fidelium* (Vaticannews.va, *Synod on synodality: Harnessing ‘sensus fidei fidelium’*, 28.11.2022, <https://www.vaticannews.va/en/vatican-city/news/2022-11/synod-synodality-meeting-continental-stage-taskforce-interview.html> (accessed 21.2.2023)). Concerning it, on the misunderstanding and abuse of the

Magisterium of the Church. Faithful are infallible only in a passive way, that is, they are infallible in their believing. The faithful do not teach, they do not define authoritatively, but they give their belief to the teachings set by the Magisterium.¹⁸¹ That does not mean that the faithful cannot promote some devotion or that the Magisterium cannot consult the faithful on some doctrinal question. For example, in the first five centuries, the faith of faithful proved decisive in determining the canon of Scripture, the divinity of Christ, the perpetual virginity and divine motherhood of Mary, the veneration and invocation of the saints etc.¹⁸² Later they also played an important role in the maintenance of the doctrine of real presence and beatific vision. Pius IX and Pius XII had consulted the opinion of the faithful before they proclaimed infallibly dogmas of Immaculate Conception and the Assumption of Mary.¹⁸³ Even when consultations are being held, all has to proceed under the authority of the holders of active infallibility.¹⁸⁴

c) *universal agreement*. By universal agreement it is meant the consent of the faithful in totality through space and time¹⁸⁵, *i. e.*, it would not be enough for a doctrine to be infallible if there is agreement of the faithful to it only in one place, or in one age. This agreement has to be *certain, clear and unanimous*.¹⁸⁶

d) *in matters of faith and morals*.¹⁸⁷

e) *under the guidance of the sacred teaching authority*. It should be avoided the error of those who think that the Magisterium merely confirms the opinions of the faithful.¹⁸⁸ As we have already said, it is true that the faithful can be consulted in forming some doctrine, but the *sensus*

sensus fidelium in trying to change Catholic doctrine, rather than its proper understanding and use, see Knapp, D., *The Misuse of the Faithful in the Synod of Synodality*, 3.11.2022, <https://www.patheos.com/blogs/thelatinright/2022/11/the-misuse-of-the-faithful-in-the-synod-of-synodality/> (accessed 21.2.2023); Regnerus, M., *Census Fidei? Methodological Missteps Are Undermining the Catholic Church's Synod on Synodality*, 8.1.2023, <https://www.thepublicdiscourse.com/2023/01/86704/> (accessed 21.3.2023)).

¹⁸¹ Fr. Agius puts it: "If the teachers teach infallibly, their disciples, who listen to and obey what they are taught, are infallible in their belief." (Agius, *op. cit.* in fn. 16, p. 209). See also: Tanquerey, *op. cit.* in fn. 25, p. 182.

¹⁸² International Theological Commission, *op. cit.* in fn. 172, pt. 26.

¹⁸³ See *supra* fn. 128.

¹⁸⁴ Tanquerey, *op. cit.* in fn. 25, p. 182.

¹⁸⁵ "[People of God], while remaining only and one, is to be spread throughout the whole world and must exist in all ages, so that the decree of God 's will may be fulfilled" (*LG*, 13).

¹⁸⁶ *Ibid.*, p. 181.

¹⁸⁷ The faithful are infallible in believing in same area where the Magisterium is infallible in teaching, See *supra* II.2.1.

¹⁸⁸ Condemned already by Pius X in *Lamentabili*, 6 (Denz., 2006); "Thus, however much the Sacred Magisterium avails itself of the contemplation, life and study of the faithful, its office is not reduced merely to ratifying the assent already expressed by the latter; indeed, in the interpretation and explanation of the written or transmitted Word of God, the Magisterium can anticipate or demand their assent" (CDF, *Declaration in defense of the Catholic Doctrine on the Church against certain errors of the present day – Mysterium Ecclesiae*, 1973, https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19730705_mysterium-ecclesiae_en.html, pt. 2).

fidelium is not some kind of a parliament by which the faithful are manifesting their will and the Magisterium is obliged to listen to them.¹⁸⁹ The Magisterium of the Church is rendered infallible in teaching, and faithful only in believing. Hence, the belief of the faithful is like the responding echo of the teaching of Magisterium.¹⁹⁰

¹⁸⁹ Marzoa, Á.; Miras J.; Rodríguez-Ocaña R. (ed.), *Exegetical Commentary on the Code of Canon Law*, vol. III/1, Wilson & Lafleur, Montreal, 2004, p. 32.

¹⁹⁰ International Theological Commission, *op. cit.* in fn. 172, pt. 35.

III. LEGAL PERSPECTIVE OF THE INFALLIBILITY

1. INTRODUCTORY NOTE

Even though the doctrine of papal infallibility was defined at the Vatican I in 1870, we do not find any direct norm in the Code of Canon Law from 1917 that systematically lays out teaching on the infallible acts of the Magisterium.¹⁹¹ Finally, it was done after Vatican II by the *coetus de Lege Ecclesiae fundamentalis* in the Code of Canon Law from 1983 and was largely inspired by the language of *Lumen Gentium*, especially chapter 25. In the third Book of the Code, dedicated to the Teaching function of the Church¹⁹² we find 5 relevant canons: c. 749 presenting us the subject of infallibility, c. 750 presenting us the objects of infallibility, and c. 751 introducing the definitions of delicts against the infallibility: heresy, apostasy and schism; while c. 752 and 753 deal with the situations of not-infallible doctrines and teachings (hence, which will not be dealt with here as the first three).

2. SUBJECTS OF INFALLIBILITY

Canon 749 points out to the subjects of infallibility, *i. e.*, who can issue an infallible statement, where it also defines normative principles and rules of procedure for the Magisterium to exercise its infallibility. First article provides the conditions of papal infallibility in a wording of Vatican II: “By virtue of his office, the Supreme Pontiff possesses infallibility in teaching when as the supreme pastor and teacher of all the Christian faithful, who strengthens his brothers and sisters in the faith, he proclaims by definitive act that a doctrine of faith or morals is to be held.”¹⁹³ Second article, also inspired by *Lumen gentium* 25, lays down the conditions under which the infallibility is exercised by the episcopacy in ordinary and extraordinary manner: “The college of bishops also possesses infallibility in teaching when the bishops

¹⁹¹ Marzoa, Á.; Miras J.; Rodríguez-Ocaña, R., *op. cit.* in fn. 189, p. 22.

¹⁹² *CIC/1983* has abandoned the structure based on the Gaius’ distinction between *people, things and actions* (which was still followed in *CIC/1917*) but based its structure on the teachings of Vatican II on *tria munera Christi*, *i. e.*, the threefold office of the Church – *prophetic, sanctifying and ruling* (*LG*, 10-13, 31-35). Therefore, all the norms referring to the Church’s prophetic, doctrinal mission, which in the *CIC/1917* were grouped under part IV, book II devoted to things, are moved to the book III in *CIC/1983*. (Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *op. cit.* in fn. 189, p. 1-2). The first two articles of the first canon of the third book, c. 747, art. 1 and 2, express this mission of the Church: “The Church, to which Christ the Lord has entrusted the deposit of faith so that with the assistance of the Holy Spirit it might protect the revealed truth reverently...proclaim and expound it faithfully, has the duty... to preach the gospel to all peoples...It belongs to the Church always and everywhere to announce moral principles, even about the social order, and to render judgment concerning any human affairs insofar as... the salvation of souls requires it.” See Chiappeta, L., *Il Codice di diritto canonico. Commento giuridico-pastorale*, vol. 2, EDB, Bologna, 2011, p. 6.

¹⁹³ *CIC/1983*, c. 749, art. 1.

gathered together in an ecumenical council exercise the magisterium as teachers and judges of faith and morals who declare for the universal Church that a doctrine of faith or morals is to be held definitively; or when dispersed throughout the world but preserving the bond of communion among themselves and with the successor of Peter and teaching authentically together with the Roman Pontiff¹⁹⁴ matters of faith or morals, they agree that a particular proposition is to be held definitively.”¹⁹⁵

Third article states: “No doctrine is understood as defined infallibly unless this is manifestly evident”.¹⁹⁶ This article translates doctrinal obligation of a pope and bishops to define infallible teaching into legal obligation. It does not suffice for a doctrine to be “assumed or deduced or inferred to be infallible”; for a certain teaching to be infallible, it must be “clear and unambiguous, so that it does not engender confusion”.¹⁹⁷

3. OBJECTS OF INFALLIBILITY

Canon 750 in its two articles gives the objects of infallibility, *i. e.*, licit themes for every infallible statement. In article 1, inspired by chapter 3 of the dogmatic constitution *Dei Filius*; and then modified in the light of *Lumen gentium* and *Dei Verbum* we read: “A person must believe with divine and Catholic faith all those things contained in the word of God, written or handed on, that is, in the one deposit of faith entrusted to the Church, and at the same time proposed as divinely revealed either by the solemn magisterium of the Church or by its ordinary and universal magisterium which is manifested by the common adherence of the Christian faithful under the leadership of the sacred magisterium; therefore all are bound to avoid any doctrines whatsoever contrary to them.”¹⁹⁸ In article 2, which was not in the original promulgation of the Code, but was added later by St. John Paul II with the apostolic letter *motu*

¹⁹⁴ “The point that turned out to be the most difficult to express in the work of codification is how this magisterium should maintain unity with the Roman Pontiff. The authors of the current [article] perhaps influenced by the current c. 341 § 2 on the requirement that the Roman Pontiff support or freely agree to any inherently collegial act, included this sentence: ‘In this latter case, consent with the bishops’ teaching may be given in an official statement by the Roman Pontiff.’ This seemed like a good idea to some consultors, but to others it seemed unacceptable to reduce the Roman’s Pontiff’s role to that of a mere notary public that receives or declares whatever the bishops decide instead of requiring an explicit approval of the bishops’ magisterium; some thought it would be better to let the Pope handle each case at his own free will; others made the point that if explicit approval is not required, the parallelism of the required approval of an ecumenical council would be lost. The outcome of this debate was to insert the phrase ‘*una cum eodem Romano Pontifice*’...” See Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *op. cit.* in fn. 189, p. 26-27.

¹⁹⁵ *CIC/1983*, c. 749, art. 2.

¹⁹⁶ *Ibid.*, art. 3. See Chiappeta, L., *op. cit.* in fn. 192, p. 7.

¹⁹⁷ Beal, J. P.; Coriden, J. A.; Green, T. J.; The Canon Law Society of America, *New Commentary on the Code of Canon Law*, Paulist Press, New York, 2000, p. 914.

¹⁹⁸ *CIC/1983*, c. 750, art. 1.

proprio Ad tuendam fidem,^{199, 200}, it can be further read: “Each and every thing which is proposed definitively by the magisterium of the Church concerning the doctrine of faith and morals, that is, each and every thing which is required to safeguard reverently and to expound faithfully the same deposit of faith, is also to be firmly embraced and retained; therefore, one who rejects those propositions which are to be held definitively is opposed to the doctrine of the Catholic Church.”²⁰¹ Here we will unpack each of these articles a little bit.

3.1. Truths of the Divine and Catholic faith

First article sets as the primary object of infallibility the truths of divine and catholic faith, *i. e.*, “all those things contained in the word of God, written or handed on ... at the same time proposed as divinely revealed either by the solemn magisterium of the Church or by its ordinary and universal magisterium...”.²⁰² In other words, it is the Revelation²⁰³, the Deposit of Faith, all the dogmas taken from the Sacred Scripture²⁰⁴ or Sacred Tradition²⁰⁵ and confirmed as divine by the Sacred Magisterium through time.^{206, 207} The peculiar addition, inspired by the

¹⁹⁹ It was added due to the fact that many theologians had erroneously held that only the most fundamental dogmas, or only those formally defined by the extraordinary Magisterium, required assent. See Lowery, M., *op. cit.* in fn. 38, p. 227. It was confirmed in the letter: “To protect the faith of the Catholic Church against errors arising from certain members of the Christian faithful, especially from among those dedicated to the various disciplines of sacred theology...” (John Paul II, *Apostolic letter motu proprio Ad tuendam fidem*, 18.5.1998, https://www.vatican.va/content/john-paul-ii/en/motu_proprio/documents/hf_jp-ii_motu-proprio_30061998_ad-tuendam-fidem.html).

²⁰⁰ John Paul II in *Ad tuendam fidem* refers to section 2 of the *Profession of faith* as the motivation for this article: “I also firmly accept and hold each and everything definitively proposed by the Church regarding teaching on faith and morals.” *Ibid.*

²⁰¹ *CIC/1983*, c. 750, art. 2. See Chiappeta, L., *op. cit.* in fn. 192, p. 8.

²⁰² “[V]alue [of these truths] arises from the dual foundation indicated by each of these adjectives: from having been divinely revealed—contained in the scriptures or tradition—and from being taught under the magisterium for the purpose of being known as divinely revealed. The convergence of these two factors permeates the truths of this order with maximum certainty which is inherent in the truths of dogma that provide objective, but further perfectable, knowledge of divine truths”. See Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *op. cit.* in fn. 189, p. 29.

²⁰³ To understand Revelation as the rule of Catholic faith see: Ripperger, C., *op. cit.* in fn. 171, p. 11-12.

²⁰⁴ Sacred Scripture is “... a collection of books which, written under the inspiration of the Holy Spirit have God as an author; and as such these books have been handed down to the Church”. See Tanqueray, A., *op. cit.* in fn. 25, 182.

²⁰⁵ For more on the Sacred Tradition see books by fr. Agius and fr. Ripperger quoted in fn. 16 and 171.

²⁰⁶ The Church is infallible in interpretation of Scriptures, Tradition, the laws and precepts of God and Evangelical Counsels. As regards to the form, the Church is infallible in “selecting terms suitable to convey the truths which she defines”, *i. e.*, all the creeds and dogmatic decrees issued by the Church are infallible, because “to be infallible in teaching, the Church must also be infallible in choosing words that accurately express her meaning without ambiguity”. The Church is also infallible when it determines and rejects errors that are opposed to the teachings of Revelation with its condemnations. See Berry, S., *op. cit.* in fn. 12, p. 50.

²⁰⁷ In the Doctrinal commentary on the Concluding Formula of the *Professio fidei* (quoted in fn. 34) signed by the prefect and the secretary of the CDF of that time, cardinal Ratzinger (future pope Benedict XVI) and archbishop Bertone, in pt. 11 a few examples of divine and Catholic doctrines are given: the articles of faith of the Creed, the various Christological dogmas and Marian dogmas, the doctrine of the institution of the sacraments, the foundation of the Church by the will of Christ; the doctrine on the primacy and infallibility of the Roman pontiff, the absence

teachings of Vatican II on *sensus fidei*²⁰⁸ was: “the common adherence of the Christian faithful under the leadership of the sacred magisterium”.²⁰⁹

3.2. Truths connected with the Truths of Divine and Catholic Faith

The second article as the secondary object of the infallibility lays before us the doctrines on faith and morals²¹⁰ necessary to safeguard and expound the Deposit of Faith which are definitively proposed by the Magisterium. In other words, these are all those truths which, although not divinely revealed, are necessarily connected, either historically²¹¹ or logically²¹², with the truths of Catholic and divine faith and are proposed definitively by the Magisterium.²¹³ Already among the texts prepared at the Vatican I, but not promulgated due to its rash closure due to the Franco-Prussian war, there was a canon condemning any person who stated “that the infallibility of the Church is limited only to what is contained in divine revelation and does not

of error in the inspired sacred texts; the doctrine on the grave immorality of direct and voluntary killing of an innocent human being, etc.

²⁰⁸ See *supra* II.4.3.

²⁰⁹ “The obligation that binds one to all truths of divine and catholic faith is so compelling, and the power inherent in the truth of dogma which draws all the faithful of the Church into unity is so strong that it ‘is manifested by the common adherence of Christ’s faithful under the guidance of the sacred magisterium’...” (Marzoa, Á., Miras J., and Rodríguez-Ocaña R., *op. cit.* in fn. 189, p. 30).

²¹⁰ St. John Paul II had warned against errors of “some present-day cultural tendencies... [that] would grant to individuals or social groups the right to determine what is good or evil” and trends in the modern moral theology that “have introduced a sharp distinction, contrary to Catholic doctrine, between an ethical order, which would be human in origin and of value for this world alone, and an order of salvation, for which only certain intentions and interior attitudes regarding God and neighbor would be significant.” This has led to a denial of a determined moral content in the Divine Revelation which is “universally valid and permanent”, and therefore to “the denial of a specific doctrinal competence on the part of the Church and her Magisterium with regard to particular moral norms”. (John Paul II, Encyclical Letter *Veritatis Splendor*, https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor.html, 6.8.1993, pt. 35-37). Paul VI in *Humanae Vitae* also confirmed: “No member of the faithful could possibly deny that the Church is competent in her magisterium to interpret the natural moral law.” (*Humanae Vitae*, pt. 4).

²¹¹ That is, *dogmatic facts* - historical facts, which are not revealed, but which are intrinsically connected with revealed truth, e. g. whether a particular book or a document contains heresy or true doctrine (Ott., L., *op. cit.* in fn. 18, p. 8-9; Berry, S., *op. cit.* in fn. 12, p. 507). A few more examples from the Doctrinal commentary: the legitimacy of the election of the Supreme Pontiff or of the celebration of an ecumenical council, the canonizations of saints, the declaration of Pope Leo XIII in the Apostolic Letter *Apostolicae Curae* on the invalidity of Anglican ordinations, etc. (CDF, *op. cit.* in fn. 34, pt. 11).

²¹² That is, *theological conclusions*- religious truths which are derived from two premises, of which one is an immediately revealed truth, and the other a truth of natural reason, e. g. if Christ is a true man and man is composed of body and soul then Christ has a human body and human soul; and *truths of reason*- truths which have not been revealed, but which are intrinsically associated with a revealed truth, e. g. *philosophic truths which are presuppositions of the acts of faith* like knowledge of the supernatural, possibility of proofs of God, the spirituality of the soul, the freedom of will; or *philosophic concepts, in terms of which dogma is promulgated* like person, substance, transubstantiation (Ott., L., *op. cit.* in fn. 18, p. 8-9; Berry, S., *op. cit.* in fn. 12, p. 506). A few more examples from the Doctrinal Commentary: the development in the understanding of the doctrine connected with the definition of papal infallibility, the doctrine that priestly ordination is reserved only to men, the doctrine on the illicitness of euthanasia, the teaching on the illicitness of prostitution and of fornication, etc. (CDF, *op. cit.* in fn. 34, pt. 11).

²¹³ Beal, J. P. et al., *op. cit.* in fn. 197, p. 915.

also extend to other truths that are necessarily required for the deposit of the revelation to be kept whole.”²¹⁴ At last, *Lumen Gentium* clearly states: “[T]his infallibility with which the Divine Redeemer willed His Church to be endowed in defining doctrine of faith and morals, *extends as far as the deposit of Revelation extends*, which must be religiously guarded and faithfully expounded.”^{215, 216}

4. ASSENT DUE TO THE OBJECTS OF INFALLIBILITY

When the *Professio fidei* got out in 1989 its wording²¹⁷ led some of the commentators to a conclusion that there is a difference between the assents owed to the each of the objects of infallibility. While the assent of faith is owed to truths of divine and Catholic faith, a definitive assent, not necessarily of faith, is owed to the other doctrines taught infallibly.²¹⁸ That is why the wording regarding the secondary object of infallibility added to the Code of Canon Law in 1998 by the *Ad tuendam fidem* was more precisely formulated than the wording in the *Professio*. A month later after *Ad tuendam fidem*, the Doctrinal Commentary on the Concluding Formula of the *Professio fidei* by CDF gave correct explanations of the paragraphs of *Professio*. There they had explained two kinds of the assent that can be found in the Code of Canon Law and the difference between them.

4.1. Assent due to the Truths of Catholic and Divine Faith

As regards to the assent due to the first object of infallibility, the Code of the Canon Law states that a person “must believe [it] with divine and Catholic faith”, *i. e.*, the assent of faith is required.²¹⁹ What is the assent of faith? It is the assent that binds the faithful to “place [their]

²¹⁴ Coll. Lac., VII, 577 as quoted in: Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *op. cit.* in fn. 189, p. 33.

²¹⁵ *LG*, 25. The doctrinal commission of the Second Vatican Council noted that “the object of the infallibility of the Church... has the same scope of the revealed deposit... therefore, is extended to everything and only what directly refers to the same revealed deposit, or to what is required for the same deposit to be guarded and faithfully expounded.” (*Acta synodalia* III, 1, 221, p. 252, note 1, as quoted in: *ibid.*).

²¹⁶ CDF also states: “According to Catholic doctrine, the infallibility of the Church’s Magisterium extends not only to the deposit of faith, but also to those matters without which that deposit cannot be preserved and expounded.” (CDF, *op. cit.* in fn. 34, pt. 3).

²¹⁷ “With firm faith, I also believe everything contained in the word of God, whether written or handed down in Tradition, which the Church, either by a solemn judgment or by the ordinary and universal Magisterium, sets forth to be believed as divinely revealed. I also firmly accept and hold each and everything definitively proposed by the Church regarding teaching on faith and morals.” (*Profession of Faith*, https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_1998_professio-fidei_en.html).

²¹⁸ Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *op. cit.* in fn. 189, p. 34.

²¹⁹ CDF, *op. cit.* in fn. 34, pt. 5.

intellect and will in *full obedience* to God who reveals it and to the magisterium that infallibly teaches it”²²⁰. The faithful “must give assent and follow it blindly even if [they] do not see it clearly, while still having an obligation to continue to educate [themselves] in understanding it.”²²¹ This kind of faith is “divine”, because it responds to God’s self-revelation and “Catholic” because it is “proposed by the Church as divinely revealed”.²²²

4.2. Assent due to Truths connected with the Truths of Divine and Catholic faith

As regards to the assent due to the secondary object of infallibility, the Code of Canon Law states that those things are “to be firmly accepted and held”, *i. e.*, to give it the firm and definitive assent.²²³ On the first sight, it seems that there is a difference between these two kinds of assents, but is there really? CDF clarifies it: regarding the nature of assent owed to these two kind of truths “there is no difference with respect to *the full and irrevocable* character of the assent which is owed to these teachings”.²²⁴ The only difference is in the supernatural virtue of faith²²⁵, *i. e.*, while in the case of the truths of the divine and Catholic faith “the assent is based directly on faith in the authority of the word of God (doctrines *de fide credenda*)”; in the case of the truths to be firmly accepted and held, “the assent is based on the faith in the Holy Spirit’s assistance to the Magisterium and on the Catholic doctrine of the infallibility of the Magisterium (doctrines *de fide tenenda*)”.^{226, 227} Furthermore, as regards to the truths to be firmly accepted and held, it cannot be excluded that “at a certain point in *dogmatic development*²²⁸, the understanding of the realities and the words of the deposit of faith can progress in the life of the

²²⁰ Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *op. cit.* in fn. 189, p. 30.

²²¹ Ripperger, C., *op. cit.* in fn. 27, p. 39.

²²² Beal, J. P. *et al.*, *op. cit.* in fn. 197, p. 914.

²²³ CDF, *op. cit.* in fn. 34, pt. 6.

²²⁴ *Ibid.*, pt. 8.

²²⁵ To understand the supernatural virtue of faith, see: Dogmatic Constitution *Dei Filius* concerning the Catholic Faith; Denz., 1781-1820.

²²⁶ CDF, *op. cit.* in fn. 34, pt. 8. See Chiappeta, L., *op. cit.* in fn. 192, p. 8.

²²⁷ That is, the difference is in the theological notes that pertain to each category of the truths, while the truths of the first category are *de fide divina and catolica*, truths of the second category are *de fide ecclesiastica*. For theological notes see *supra* fn. 40.

²²⁸ “[T]he doctrine of faith which God revealed has not been handed down as a philosophic invention to the human mind to be perfected, but has been entrusted as a divine deposit to the Spouse of Christ, to be faithfully guarded and infallibly interpreted. Hence, also, that understanding of its sacred dogmas must be perpetually retained, which Holy Mother Church has once declared; and there must never be recession from that meaning under the specious name of a deeper understanding.” (*Dei Filius*; Denz., 1800) For more on how to distinct *genuine development* of doctrine from *change* of doctrine see chapter 5 of saintly cardinal Newman’s *Essay on the development of Christian Doctrine* (Newman, J. H., *An Essay on the development of Christian Doctrine*, 2001, <https://www.newmanreader.org/works/development/index.html> (accessed 22.2.2023)).

Church, and the Magisterium may proclaim some of [these truths] as... dogmas of divine and catholic faith".²²⁹ Therefore, there is not any substantial difference between these two assents.

5. CANON 751 AND THE INFRINGEMENTS OF THE CANON 750 ARTICLE 1

In the article 1 of canon 750 the warning is issued to "all... to avoid any doctrines whatsoever contrary" to the truths of divine and Catholic faith.²³⁰ The Doctrinal Commentary clarifies it: "[W]hoever obstinately places [the truths of divine and Catholic faith] in doubt or denies them falls under the censure of *heresy*, as indicated by the respective canons of the Code of Canon Law"²³¹, pointing to the canons 750, 751 and canon 1364 art. 1. In canon 751 it can be read: "*Heresy* is the obstinate denial or obstinate doubt after the reception of baptism of some truth which is to be believed by divine and Catholic faith²³²; *apostasy* is the total repudiation of the Christian faith; *schism* is the refusal of submission to the Supreme Pontiff or of communion with the members of the Church subject to him."²³³

After considering the truths of divine and Catholic faith in the previous canons, the Code introduces definitions of three possible internal infringements, sins which one can commit against the infallibility. It is interesting to notice that, comparing to the corresponding canon in *CIC/1917*²³⁴, the new Code avoids to refer to any kind of particular personal situation and introduces a more objective approach to this delicate matter.²³⁵ Before Vatican II, these offenses were perceived more in a context of the errors and divisions of the Great Schism and the Protestant Reformation. After the Council, the switch happened in relations with other religions, especially other Christian denominations.²³⁶ Due to the idea that "the Christians are joined

²²⁹ CDF, *op. cit.* in fn. 34, pt. 7.

²³⁰ "[I]t must be admitted that the content of the final text of c. 750 is quite scant when it comes down to the unique obligation, of negative content, arising from acceptance of the truths of divine and catholic faith..." (Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *op. cit.* in fn. 189, p. 30).

²³¹ CDF, *op. cit.* in fn. 34, pt. 5.

²³² Objective element, matter of heresy is denial or doubt of truth of divine and catholic Faith and pertinacity is the subjective element, the form. See Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 142.

²³³ *CIC/1983*, c. 751. Chiappeta, L., *op. cit.* in fn. 192, p. 9.

²³⁴ "After the reception of baptism, if anyone, retaining the name Christian, pertinaciously denies or doubts something to be believed from the truth of divine and Catholic faith, [such a one is] a *heretic*; if he completely turns away from the Christian faith, [such a one is] an *apostate*; if finally, he refuses to be under the Supreme Pontiff or refuses communion with the members of the Church subject to him, he is a *schismatic*." (*The 1917 or Pio-Benedictine Code of Canon Law in English Translation*, Ignatius Press, San Francisco, 2011, c. 1325, art. 2).

²³⁵ "From the very beginning of its efforts, the *coetus de Magisterio ecclesiastico*, which drafted this canon, set out to correct the subjective approach taken in c. 1325 of the *CIC/1917*. The *coetus* made direct reference to heretics, apostates, and schismatics by stating that "only those who commit heresy, apostasy and schism *in bad faith* are heretics, apostates and schismatics." (Cf. *Comm. 7* (1975), p. 150, as quoted in Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *op. cit.* in fn. 189, p. 36).

²³⁶ See *LG*, 15.

together by much more than the profession of the common doctrine”²³⁷, a more “ecumenical” approach was taken even in the canon law. The terms such as heretic²³⁸, apostate and schismatic were no longer used for those born outside the visible communion of the Catholic Church²³⁹, but it could be ascribed only to those who were Catholics, baptized into or later received.

5.1. The difference between the Sin and the Offense (Crime) of Heresy, Apostasy and Schism

Canon 751, gives one objective – denial or doubt of truth of divine and catholic faith, and two subjective elements of heresy: person is baptized Catholic, and pertinacity in doubt or repudiation.²⁴⁰ Apostasy involving the same subjective factors is described as a complete abandonment of the Christian faith, not just of a given truth of dogma, like it is the case with heresy.²⁴¹ Schism is a rupture of the juridical bond and charity that links the faithful to each other and to the Roman Pontiff, which can be committed in two ways: when one refuses to submit to the authority of the Pope as head of the universal Church or denies that one has religious communion with the members of the Church that are in union with the Pope.^{242, 243}

²³⁷ Beal, J. P. *et al.*, *op. cit.* in fn. 197, p. 915.

²³⁸ As regards to the terms, the distinction can be made between a “material” and “formal” heretic. Material heretic is “a validly baptized non-Catholic who professes to be a Christian, yet who has never been a member of the Catholic Church and therefore does not submit to the Magisterium as the rule of faith. This is an objective classification in the external forum, independent of a subjective judgment of guilt” (Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 141); and formal heretic would be a baptized Catholic who commits sin or the offense of heresy as explained in this chapter.

²³⁹ “The children who are born into these Communities and who grow up believing in Christ cannot be accused of the sin involved in the separation...” (*Decree on Ecumenism Unitatis Redintegratio*, 21.11.1964, https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19641121_unitatis-redintegratio_en.html). St. Thomas also states: “Persons who separate themselves from the unity of the Church by their own decision and understanding are schismatics.” (*ST*, II-II, q. 39, a.1, all quotes from *Summa Theologiae* in this thesis are taken from: Aquinas, T., *Summa Theologiae*, Benzinger Bros., 1947, translated by Fathers of the English Dominican Province.

²⁴⁰ “The denial or doubt must be born of ‘bad faith’... with full knowledge, deliberate intent, and the understanding that [is] contrary to divine and catholic faith. The denial or doubt must be pertinacious... obstinate, defiant, and enduring, even after a process of reflection, reconsideration, dialogue, and attempted reconciliation.” (Beal, J. P. *et al.*, *op. cit.* in fn. 197, p. 916). If the person is not pertinacious in its denial or doubt, he is not in heresy, only in error (see *ST*, I-II q. 5, a. 3). Thomistically speaking, the denial or doubt of truth of divine and catholic faith is the matter of heresy and pertinacity is the form of heresy. See more in Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 142.

²⁴¹ Apostasy can be done “either *explicitly* in the form of a categorical statement or *implicitly* in the form of an openly public act implying abandonment of the faith by behavior that is radically in conflict with the Christian faith, such as approving and persistently siding with persons attacking the Church or the Pope.” (Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *op. cit.* in fn. 189, p. 37).

²⁴² *Ibid.*

²⁴³ It should be clearly distinguished from the acts of *disobedience* (see *CIC/1983*, c.1371-1372). Disobedience assumes the recognition of authority, whereas schism denies the authority (Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *Exegetical Commentary on the Code of Canon Law*, vol. IV/1, Wilson & Lafleur, Montreal, 2004., p. 445).

Legally, it is important to distinguish between sin of heresy, apostasy or schism and their corresponding offenses, because canonical punishments can be incurred only for the offenses.²⁴⁴ For offense to happen, three conditions have to be fulfilled: the person has to be baptized in the Catholic Church or received therein²⁴⁵; the act of heresy, apostasy or schism has to be perceived by someone, *i. e.*, has to be public and not occult^{246 247} and the person must be juridical-penally imputable.^{248, 249} It is insufficient to have a merely internal desire or attitude, with no external transcendence.²⁵⁰

5.2. Canonical Punishments for the Offenses of Heresy, Apostasy and Schism

Anyone committing any of these three offenses firstly incurs excommunication *latae sententiae*.^{251, 252} These offenses can also be committed with an attitude of continued contumacy if the scandal is particularly grave.²⁵³ If the offense is committed by the member of the faithful, he can also incur indeterminate *ferendae sententiae* facultative penalties²⁵⁴, and if it is

²⁴⁴ *Ibid.*, p. 439.

²⁴⁵ “Merely ecclesiastical laws bind those who have been baptized in the Catholic Church or received into it...” (*CIC/1983*, c. 11).

²⁴⁶ “An offence which consists in a declaration or in some other manifestation of will or of doctrine or of knowledge is not to be regarded as effected if no one actually perceives the declaration or manifestation.” (*CIC/1983*, c.1330), *i. e.*, both matter (denial or doubt) and form (pertinacity) have to happen in the external forum, not just in the conscience (internal forum). See Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 141, 230 *et seq.*)

²⁴⁷ *CIC/1917* recognized three kinds of crimes, *i. e.*, offenses: occult (“materially – if the delict is hidden; formally – if imputability is not known”), public (“if it is already known or is in such circumstances that it can be and must be prudently judged that it will easily become known”) and notorious (“notorious by notoriety of law – after a sentence by a competent judge that renders the matter an adjudicated thing, or after confession by the offender made in court; “if it is publicly known and was committed under such circumstances that no clever evasion is possible and no legal opinion could excuse”) (*CIC/1917*, c. 2197).

²⁴⁸ That is, reasons from c. 1322 and 1323 which exempt the person of its juridical-penal imputability must not exist: habitual lack of the use of reason, person is under the age of sixteen, inculpable ignorance of the substantive norm, physical coercion, fortuitous case, grave fear, state of necessity and grave inconvenience, legitimate self-defense and the present lack of the use of reason, other circumstance for exemption. For more see Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *op. cit.* in fn. 243, p. 278-284.

²⁴⁹ *Ibid.*, p. 444-446.

²⁵⁰ *Ibid.*

²⁵¹ “An apostate from the faith, a heretic or a schismatic incurs a *latae sententiae* excommunication...” (*CIC/1983*, c. 1364 art. 1). According to the current Code, no warning or declaration is required, *per se*. In *CIC/1917* the declaration is required “... at the request of an interested party or when so required by the common good.” (*CIC/1917*, c. 2223, art. 4).

²⁵² Critics claim that the *ferendae sententiae* excommunication would be a better canonical solution due to the fact that circumstances of the offenses are often very complex, and the alleged offenders are not easily willing to admit their offense. Practically, it would take for an offender to admit its heresy, apostasy, or schism to be automatically excommunicated which is very rare. If the alleged offender denies the offense, sanctions could be justly imposed and declared only by means of a canonical process (c. 1717-1728) which is very rarely employed (Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *op. cit.* in fn. 243, p. 440-444; Beal, J. P. *et al.*, *op. cit.* in fn. 197, p. 915). To understand the difference between *latae sententiae* and *ferendae sententiae* punishments see *CIC/1983*, c. 1314.

²⁵³ “If a long-standing contempt or the gravity of scandal calls for it, other penalties may be added, not excluding dismissal from the clerical state.” (*CIC/1983*, c. 1364, art. 2).

²⁵⁴ In these cases, *CIC* establishes criteria that judges have to follow. For more see: *CIC/1983*, c. 1343 and 1349.

committed by the member of the clergy, he can be dismissed from the clerical state.²⁵⁵ If the offender possesses some ecclesiastical office²⁵⁶, he will lose it *ipso iure* (c. 194, art. 1, pt. 2.), due to inadequacy to hold the office anymore, because of the personal juridical situation produced by the excommunication, *i. e.*, he is not part of the Church anymore, so he cannot hold any office in the Church.²⁵⁷ The removal from the office can be incurred only after the declaration from a competent authority.²⁵⁸ There are also certain facultative expiatory penalties.²⁵⁹ The offender can also be dismissed from religious community²⁶⁰, be irregular for receiving holy orders²⁶¹ or for exercising them²⁶². To the notorious²⁶³ heretic, schismatic and apostate who does not repent²⁶⁴ even ecclesiastical funeral rites can be denied.²⁶⁵ It is interesting that this kind of ruptures with the Catholic community does not deprive the sacraments received by the persons who committed them of their sanctity and integrity. According to the canon 844

²⁵⁵ For more see *ibid.* c. 290-293.

²⁵⁶ For a definition of an ecclesiastical office see *ibid.*, c. 145, art. 1.

²⁵⁷ “The following are removed from an ecclesiastical office by the law itself... a person who has *publicly* defected from the Catholic faith or from the communion of the Church...” (*Ibid.*, c. 194, art. 1). “Penal law, in order to classify the abandonment of faith or communion as criminal, requires that such abandonment be made ‘external’, therefore ‘public’ in that it be ‘susceptible to proof in the external forum’, not necessarily ‘well-known to everyone’ or ‘publicly declared’. It should be assumed that, in administrative removal *ipso iure* because of public abandonment of the faith or ecclesiastical communion, the term ‘public’ is used in this sense.” (Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *Exegetical Commentary on the Code of Canon Law*, vol. I, Wilson & Lafleur, Montreal, 2004, p. 1073.)

²⁵⁸ “The removal mentioned in n. 2... can be enforced only if it is established by the declaration of a competent authority.” (*CIC/1983*, c. 194, art. 2). “It must, however, be noted that ... the problem arises... concerning the method of incurring the penalty. Establishing an automatic penalty in c. 1364 does not appear sufficient for removal from office to be considered to have operated before the law and for it be urged under c. 194 § 2. As Arrieta comments, what is required is ‘some grade of intervention of the ecclesiastical authority so that the removal has full juridical efficacy... The act is declarative, and is made necessary, not to bring about the vacation of the office, but rather so that the removal can be juridically demanded (also the effects of c. 1381 § 2), and consequently it can bring to an end the conferral of office to a new titular (cf. c. 154).’” (Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *op. cit.* in fn. 243, p. 446-447). “The fact on which the loss of office is based does not depend on the authority’s declaration, but its effectiveness does. The officeholder remains in office, and the actions which require the office are valid, until the declaration or removal is communicated to the officeholder in writing.” (Beal, J. P. *et al.*, *op. cit.* in fn. 197, p. 288).

²⁵⁹ *CIC/1983*, c. 1336, art. 2-4.

²⁶⁰ “A member must be held as *ipso facto* dismissed from an institute who has defected notoriously from the Catholic faith.” (*Ibid.*, c. 694, art. 1).

²⁶¹ “The following are irregular for receiving orders... a person who has committed the delict of apostasy, heresy, or schism.” (*Ibid.*, c. 1041, pt. 1).

²⁶² “The following are irregular for the exercise of orders received... a person who has committed a delict mentioned in can. 1041, n. 2, if the delict is public.” (*Ibid.*, c. 1044, pt. 2).

²⁶³ There is no need of having a *de jure* notoriety (definitive juridical decision), but it is enough to have a *de facto* notoriety, *e.g.* notorious adherence to a heretical or schismatic sect. (Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *Exegetical Commentary on the Code of Canon Law*, vol. III/2, Wilson & Lafleur, Montreal, 2004., p. 1701).

²⁶⁴ A sign of repentance would be a request for sacramental confession, asking God for forgiveness in an express way, or other attitudes of religious respect, *e. g.*, such as insisting on the Christian formation of their children *etc.* (*Ibid.*)

²⁶⁵ “Unless they gave some signs of repentance before death, the following must be deprived of ecclesiastical funerals: notorious apostates, heretics, and schismatics.” (*CIC/1983*, c. 1184, art. 1, pt. 1).

article 2, in cases of need, the faithful may receive sacraments from non-Catholic ministers in whose Church these sacraments are valid.²⁶⁶

Here, it can be mentioned the sanction prescribed in the canon 1365 (according to the changes in force since the 8 December 2021) for the infringement of the canon 750 article 2. Said canon states: “A person who, apart from the case mentioned in canon 1364 § 1, teaches a doctrine condemned by the Roman Pontiff, or by an Ecumenical Council, or obstinately rejects the teaching mentioned in canon 750 § 2 or canon 752 and, when warned by the Apostolic See or the Ordinary, does not retract, is to be punished with a censure and deprivation of office; to these sanctions others mentioned in can. 1336 §§ 2-4 may be added.”²⁶⁷ According to the text, it is primarily focused on the clerics, however, others could be the subjects of infringements and the sanctions as well.

²⁶⁶ “However, as far as the the sacrament of penance is concerned..., St. Augustin... points out that outside of the Catholic Church, where the *potestas clavium* does not exist, no one can be bound or unbound. Only those in peace with Catholic Church can be forgiven.” (Marzoa, Á.; Miras J.; Rodríguez-Ocaña R., *op. cit.* in fn. 189, p. 38).

²⁶⁷ See also *CIC/1983*, c. 1365.

IV. *PRIMA SEDES A NEMINE IUDICATUR (NISI A FIDE DEVIUS?)* - DEVELOPMENT OF A PRINCIPLE

1. GENERAL OBSERVATIONS

In the previous two chapters we have explained what is a sin and what is a crime against the infallibility and legally important difference between them. We have also given a brief overview of the canonical punishments with which the perpetrator of the crimes against the infallibility can be punished according to the positive canon law. Now we can pass to the next concern of this thesis: what would happen if the Roman Pontiff, who should be the custodian of faith committed a crime against the infallibility, *i. e.*, if he was a heretic, apostate or schismatic?²⁶⁸ We have expounded the conditions under which the pope is infallible, but we have also emphasized that he is not impeccable. Moreover, we have given an examples of popes who committed heresies and we gave an example of Honorius who was condemned *post mortem*.²⁶⁹ Would the pope be also able to incur excommunication, loss of ecclesial office and other punishments? The current Code lays before us a centuries old principle of papal judicial immunity: “The First See²⁷⁰ is judged by no one.”²⁷¹, *i. e.*, the Holy Father cannot be tried, condemned or deposed by any secular or religious court²⁷² and no court can set aside his decisions.²⁷³

In the current and previous Code there is not any exception to the principle. Does that mean that the pope is free to do whatever he wants doctrinally and morally? Is God only instance that could judge him and if this is the case, what would that mean? Would there be any human agent

²⁶⁸ For “popes in schism” see *infra* V.3.1.

²⁶⁹ Besides the examples we will expound in this chapter see *infra*.

²⁷⁰ The expression “First See” refers only to the Roman Pontiff, Given the “the nature of things or from the context” of the provision (c. 361), it is evident that any other member of the faithful is subject to some canonical jurisdiction, even if that member has the highest sacramental or jurisdictional position (c. 1405). (Marzoa, A.; Miras J.; Rodríguez-Ocaña R., *op. cit.* in fn. 243, p. 654).

²⁷¹ CIC/1983, c. 1404. In CIC/1917 it was c. 1556.

²⁷² Beal, J. P. *et al.*, *op. cit.* in fn. 197, p. 1618.

²⁷³ Schatz, K., *op. cit.* in fn. 69, p. 73. The question of papal personal immunity should not be confused with the papal primacy of jurisdiction, but two should be now strictly separated. (It is considered that this distinction was first made by cardinal Humbertus de Silva Candida, see *infra* IV.7. For more see: Ullmann, W., *Cardinal Humbert and the Ecclesia Romana*, Studi gregoriani per la storia di Gregorio VII e della riforma gregoriana, vol. 4, Rome, 1952, p. 115). While the question of papal immunity, *i. e.*, whether is absolute or there are exceptions to it has not yet been resolved dogmatically by the Magisterium, the question of the Roman Pontiff’s primacy of jurisdiction, *i. e.*, that he is the highest authority beyond there is no appeal, was settled at Vatican I: “We teach and declare also that he is the supreme judge of the faithful, and that in all cases pertaining to ecclesiastical examination recourse can be had to his judgment... moreover, that the judgment of the Apostolic See, whose authority is not surpassed, is to be disclaimed by no one, nor is anyone permitted to pass judgment on its judgment. Therefore, they stray from the straight path of truth who affirm that it is permitted to appeal from judgments of the Roman Pontiffs to an ecumenical Council, as to an authority higher than the Roman Pontiff.” (*Pastor Aeternus*, Denz., 1830). See also: CIC/1983, c. 1366.

that would restrain him if he was to do evil or spread heresy? We will try to give an answer to it, researching the juridical development of this principle in the history of the Church.

2. THE CASE OF POPE ST. SYMMACHUS (498-514) – THE BIRTH OF *PRIMA SEDES* PRINCIPLE?²⁷⁴

After the death of Pope Anastasius II in 498 the conflict between pro-Byzantine and pro-Roman clergy occurred in Rome.²⁷⁵ Loyalists of Constantinople elected Laurentius, and Romans elected the deacon Symmachus. At the end, with the support of the king Theodoric, Symmachus was recognized as the pope. Opponents of Symmachus accused him to the king of various offences²⁷⁶ and Theodoric summoned, at the behest of the senate and the clergy, a synod of Italian bishops to decide on the accusations made against the pope.²⁷⁷

The cause of Symmachus presented a novelty because never in the history of the Church the bishop of Rome was judged by a synod of bishops. The synod convened in Rome in 501.²⁷⁸

²⁷⁴ Before 5th century we can find some traces of injudicability in spiritual-charismatic sense in the Scriptures, *e. g.*, “Touch ye not my anointed: and do no evil to my prophets.” (Ps 104:15); “But the spiritual man judgeth all things; and he himself is judged of no man.” (1 Cor 2:15). The Fathers were talking about injudicability of the bishops, *e. g.*, St. Callistus (218-222) and St. Cyprian of Carthage (c. 210-258) claimed that bishop in the mortal sin, *i. e.*, serious misconduct could not be deposed. Constantine during Council of Nicea (325) admitted incompetence of secular authorities to judge the bishops claiming that only God can judge them. In the case of pope St. Damasus (366-384), after he was accused before the emperor and substituted by the antipope, Roman Council of 378 petitioned the emperor not to subject him to public civil judgments, for if all bishops were exempt from them, he was all the more so by reason of the prerogative of the Apostolic See; and that the cause of the pontiff should be dealt with directly either by a council or by the emperor. Pope St. Zosimus (417-418), in 418 in a letter to the bishops of the Council of Carthage, affirms for the first time that, according to the tradition of the Fathers, the authority of the Apostolic See is such that no one has ever dared question its deliberations, *i. e.*, it is the highest judicial instance in the Church and based its assertion on Mt 16:19. In two letters of Gelasius (492-496) primacy of jurisdiction is also asserted: “[T]hus he judges the whole Church and himself stands before no tribunal, and no judgment can be passed on his judgment, nor can his decision be abrogated.” (Migne, J. P., *Patrologiae Cursus Completus. Series Latina*, vol. 59, Paris, 1862, p. 28; translation according to Schatz, K., *op. cit.* in fn. 69, p. 73). Fr. Schatz see the foundation of papal immunity in Gelasian texts. For more on papal injudicability before the 5th century see: Vacca, S., *Prima Sedes a Nemine Iudicatur – Genesis and historical development of the axiom up to the Decree of Gratian*, Pontifical Gregorian University Rome, Rome, 1993, p. 19-28.

²⁷⁵ “It was the time of the Acacian schism (494-519) and reign of Arian king, Theodoric (493-526) in Italy. Within the Roman Church there opposing political aspirations. For more see: Miranda, S., *Simmaco*, in Miranda, S., *The Cardinals of the Holy Roman Church – Biographical Dictionary*, 1998, <https://cardinals.fiu.edu/bios496.htm> (accessed 22.2.2023).

²⁷⁶ Offences were: that he irregularly celebrated Easter on 25 March instead of 22 April, that he alienated ecclesiastical property in a non-legitimate way, and that he had committed foul practices with women. (*Ibid.*).

²⁷⁷ The bishops insisted that the right to convene a synod pertains only to the pope. The king, replied to the bishops that the pope had given, no doubt at his request, his consent to the convocation; and for this purpose he had them deliver copies of the papal letters and acts relating to the cause. The pope also authorized the bishops present at the synod to proceed against him if they found him guilty. (Vacca, S., *op. cit.* in fn. 274, p. 34-35).

²⁷⁸ According to the place where the last session of the synod was held it is also known as the “Palmar” Synod. (Hefele, C. J., *A History of the Councils of the Church, from the Original Documents*, T. & T. Clark, Edinburgh, 1895, pg. 67).

After four sessions, bishops concluded the synod not with a judgment, but with a declaration, dismissing all the charges against Symmachus due to the fact that he is the holder of the apostolic See, and committing him to the tribunal of God²⁷⁹, thus admitting their incompetence and lack of the authority to judge him.²⁸⁰ Therefore, this was the first attempt to judge a pope and first time that his judicial immunity was admitted.

However, synod did not restore the peace in Rome. Conflicts between Laurentians and Symmachians continued often times resulting in bloodshed. Besides physical fighting, two parties also fought using means of propaganda. After Laurentians published a pamphlet where they attacked synod and the improper absolution of Symmachus, St. Enodius (c. 474-521), deacon of Milan close to Symmachus wrote in *Libellus pro synodo*: “We do not hold that St. Peter and his successors, with the privileges of the first See have also received from the Lord the freedom to sin. [St. Peter] transmitted to his successors by the inheritance of innocence the perennial dowry of his merits...God either raises to such sublimity men already illustrious, or enlightens those who are elevated to it. For He knows well and in advance who is fit to serve as the foundation of the Church, on which to rest its very bulk”.²⁸¹ Enodius built the principle of papal injudicability on the claim that the pope, as the heir of Peter, has a share in his holiness: “Let it be admitted that God willed that the causes of other men should be brought to an end by means of men, but no doubt, He willed to reserve for His judgment the prelate of this see. That is, he willed that the successors of blessed Peter to heaven should only render an account of the innocence and present to the investigation of the most subtle... Do not think that these souls, whom God, in preference to all the others, wanted to reserve for His judgment, have no fear of inquisition.”²⁸² Enodius’ booklet was the first among the documents to affirm the rigor of *prima sedes* principle. Besides Enodius, bishop of Vienna, St. Avitus in his letter to the senators of

²⁷⁹ “Pope Symmachus, bishop of the apostolic see, has been charged certain misdemeanors. Because for reasons set forth above, the whole affair has been reserved for divine judgment: as far as this affair concerns men, let him be free and without blame...Whence, according to the fundamental precepts which concede this to our power, we place back in his hands whatever of ecclesiastical jurisdiction is within or without the sacred city of and reserving the whole cause to the judgment of God... Whoever after our arrangement, which we do not think will happen, either will not admit (these things), or believes that the case ought to be reopened, let him take heed, for as we trust in God, when he shall come to render his account he shall be lightly esteemed in the divine judgment” (Townsend, W. T., *Councils Held under Pope Symmachus*, Church History, vol. 6, no. 3, 1937, p. 251-252).

²⁸⁰ With Symmachus case, the incompetence of the king to judge a pope was also admitted. During his correspondence with the bishops he said: “If it had seemed to me, or if there had been justice, that I should have heard the cause that was being dealt with, I could have dealt with the nobles of my palace and told how it would have pleased God and not been displeasing to posterity. But because it is the cause of God and of the clergy, and therefore only at the request of the senate or the clergy, I caused the antistites to assemble from different states.” (*Acta synodorum habitatum Romae*, a. 318 in: Mommsen, T. (ed.), *Auctores antiquissimi*, vol. 12, *Monumenta Germaniae Historica*, Berlin, 1984, 425, r. 2-7 (translated from Latin by the author).

²⁸¹ Enodius, *Libellus pro synodo*, in: Vogel, F. (ed.), M.G.H., *Auct. ant.*, vol. 7, Berlin, 1961, p. 60, r. 9-13 (translation according to Vacca, S., *op. cit.* in fn. 274, p. 41-42).

²⁸² *Ibid.*, p. 61, r. 32-41; 62, r. 1-7 (translation according to Vacca, S., *op. cit.* in fn. 274, p. 43).

Rome claimed that there is no law under which Palmar Synod could have discussed the faults of Symmachus and by criticizing the pope, one shakes the foundations of all the bishops and the Church.²⁸³ Among all of the documents made in literal war between Symmachians and Laurentians, one that had contributed the most to the development of *prima sedes* principle is the one which was entirely fabricated: the Symmachian apocrypha.

2.1. The Symmachian Apocrypha

In an attempt to justify the election of Symmachus and the result of the Palmar Synod, Symmachians compiled a series of forged pseudo-historical narratives presenting the popes of 4th and 5th Century in situations similar to those of Symmachus where they affirmed the papal primacy of jurisdiction and papal in judicability. First scholar to demonstrate their inauthenticity was Pierre Constant in 1721.²⁸⁴ Due to the fact that this apocrypha will be considered authentic for centuries, and thus will be quoted by popes, theologians and jurists, moreover will be included in all great canonical collections, we will briefly tell four tales from the apocrypha in connection with the *prima sedes* principle.²⁸⁵

a) *Gesta de Xysti III purgatione*. Two enemies of the pope Sixtus III (432-440), Marinianus and Bassus, allied themselves and accused the pope for rape and sodomy. Sixtus went to the basilica of St. Peter and there requested the proof of his conduct. Then, an assembly gathered in the basilica of Helena, with the presence of the senate of the city and the clergy and monks. During the assembly proceedings, ex-consul Maximus said that it is not permissible to pass sentence against the pontiff. But the pope intervened: “Since it is in my power to judge and not to judge, I order that the truth not be hidden.” The emperor Valentinian (321-375) approved Maximus’s request and entrusted the self-judgment to Sixtus.

²⁸³ “What license for accusation against the headship of the universal church ought to be allowed... [I]f the Pope of the city be put into question, not a single bishop, but the episcopate itself, will appear to be in danger. He who rules the Lord’s fold will render an account how he administers the care of the lambs he entrusted to him; but it belongs not to the flock to alarm its own shepherd, but to the judge [God].” (Mansi, G. D., *Sacrorum Conciliorum Nova et Amplissima Collectio*, vol. 8, Florence, 1762, p. 284 (translation according to Allies, T. W., *The see of St. Peter, the rock of the church, the source of jurisdiction, and the centre of unity*, Burns & Lambert, London, 1850, p. 95-96).

²⁸⁴ Before Pierre of Constant, only ones who made some criticism of its authenticity were Hincmar of Reims (806-882) in his work *De Presbyteris criminosis* where he questions the procedural norms of the *Silvestri Constitutum*, e. g., he considers that number of witnesses is too much, and that requirement that all witnesses have to have a perfect moral life is unsustainable; and Baronius (1538-1607) who questioned the Council of Sinuessa, *Gesta Xysti* and *Gesta Polychronii* due to the historical inaccuracies. For more see: Vacca, S., *op. cit.* in fn. 274, p. 71-72.

²⁸⁵ The narratives are taken from Townsend, W. T., *The So-Called Symmachian Forgeries*, *The Journal of Religion*, vol. 13, no. 2, 1933, p. 168- 173 and Vacca, S., *op. cit.* in fn. 274, p. 51-59.

b) *Gesta de Polychronii episcopi Hierosolymitani accusatione*. Polychronius, bishop of Jerusalem, claimed that his Church was the first See, while he was also accused of simony. On the incitation of bishop Euphemius, suffragan of Polychronius, pope Sixtus III convened a synod, and synodal legates ordered an inquiry to be made at Jerusalem. The synodal legates then called an assembly in Jerusalem to examine the charges. In the course of the assembly in Jerusalem, Bishop Castus pointed out that the presence of forty witnesses was necessary; and he demanded that the accusing bishop Euphemius should be absolutely condemned because he sued his superior.²⁸⁶ The anathema was issued against Euphemius, while Polychronius was removed from his office. Here we can see that Symmachians tried to justify the claim that any superior, not just the pope cannot be accused or tried by his inferiors.

c) *Silvestri Constitutum*. Silvester gathered a council in Rome, with the approval of Constantine, to examine the Arian question, and then to deal with the ecclesiastical orders. At the first synod they decided that no one can accuse a cleric of a higher order than himself, unless there is a sufficient number of witness for each grade of clerics, but it is emphasized that the supreme presbyter cannot be judged by no anyone.²⁸⁷ At the later synod it was allegedly decreed that "...no one could judge the first See, since all Sees wish to be judged by the first See. The supreme judge could be judged neither by Augustus, nor by all the clergy, nor by kings, nor by the people."²⁸⁸ These principles were subscribed to by all the synods, and, as it was written, Sylvester fixed them in the canon of the city of Rome and sent them to all the bishops.

d) *Sinuessanae Synodi Gesta de Marcellino*. Marcellinus, bishop of Rome, was forced by the emperor Diocletian to sacrifice to the gods. A synod in the city of Sinuessa was assembled to judge Marcellinus' actions, but they did not want to judge Marcellinus, saying: "Marcellinus: "You judge, and will either judge yourself or absolve yourself, we only being present:... for you are both judge and accused."²⁸⁹ Marcellinus acknowledged that he had sacrificed to the gods, and prostrated on the ground. After his confession, bishop Elciades said: "He has condemned himself, rightly, with his own mouth, and has cast anathema upon himself. For no

²⁸⁶ Leo, deacon of the Roman Church, said: "You yourself will condemn yourself, because you dared to accuse and condemn the pontiff who consecrated you coepiscop." Bishop Abundatius: "It is not permitted for anyone to accuse his pontiff, since the judge cannot be judged." (Constant, P. (ed.), *Epistolae Romanorum Pontificum, et quae ad eos scriptae sunt a S. Clemente I. usque ad Innocentium III*, Paris, 1721, p. 121 (translation according to Vacca, S., *op. cit.* in fn. 274, p. 53-54).

²⁸⁷ For more see: *ibid.*, p. 37 *et seq.*

²⁸⁸ *Ibid.*, p. 52 (translation according to Vacca, S., *op. cit.* in fn. 274, p. 56-57).

²⁸⁹ *Ibid.*, p. 30 (translation according to Townsend, W. T., *op. cit.* in fn., 274 p. 170-171).

one ever judged the pontiff, nor the prelate his priest; for the first see can be judged by no one.”^{290, 291}

Symmachian apocrypha had entered, most of the time with some modifications by the authors, into *Liber Pontificalis*²⁹² regarding its historical significance and into various canonical collections of decretals like: the collection of San Biagio, the Vatican 1342 collection and the collection of Chieti, *Gesta Liberti etc.*²⁹³, spreading the idea that the principles like total impossibility of inferiors to judge a superior and absolute papal injudicability are the axioms coming from the early Church. During Carolingian reform of 7th century²⁹⁴, it also entered in important Frankish canonical collections like: *Collectio Dionysio-Hadriana*, *Collectio Vetus Gallica*, *Capitula Angilrammi*, *Capitulars of Ansegiso etc.*²⁹⁵ But already on the verge of 7th century, two men introduced certain boundaries to the immunity of the superiors, St. Gregory the Great and St. Isidore of Seville.

3. ST. GREGORY THE GREAT (590-604) AND ST. ISIDORE OF SEVILLE (c. 560-636) – THE BIRTH OF “HERESY CLAUSE” TO THE *PRIMA SEDES* PRINCIPLE?

Gregory the Great, in his comment on the book of Job, had said: “He who suffers from a hypocritical superior²⁹⁶... has deserved to be under a perverse superior, therefore let him accuse his own faults rather than the injustice of those who govern him... Why should we despise those who have received authority over us from the wrath of God? But since *the superiors have God as their judge*, let the subjects be careful not to judge the lives of the superiors without serious reasons... Therefore, *except what touches the faith*, it is a virtuous work to put up with the superior in everything.”^{297, 298} Isidore of Seville in *Libri tres sententiarum* further developed Gregory’s idea. He claimed that bishop cannot be judged because to attempt on the life of a

²⁹⁰ *Ibid.*, p. 35 (translation according to Vacca, S., *op. cit.* in fn., p. 56-57).

²⁹¹ Peculiarity of this apocrypha is that it establishes for the first time the principle that the pope enjoys personal immunity even in the case of apostasy and heresy.

²⁹² For more on *Liber Pontificalis* see: Kirsch, J., P., *Liber Pontificalis*, *The Catholic Encyclopedia*, vol. 9, New York, Robert Appleton Company, 1910., <http://www.newadvent.org/cathen/09224a.htm> (accessed 22.2.2023).

²⁹³ For more see Vacca, S., *op. cit.* in fn. 274, p. 65-66.

²⁹⁴ For more see Lumenlearning.com, *Charlemagne’s Reforms*, <https://courses.lumenlearning.com/atd-herkimer-westerncivilization/chapter/charlemagnes-reforms/> (accessed 22.2.2023).

²⁹⁵ For more see Vacca, S., *op. cit.* in fn. 274., p. 97- 102.

²⁹⁶ “It should be noted that, both in Gregory the Great and in Isidore of Seville, the term *rectores* indicates those who stand the bishops, teachers of the faith and preachers of Christ.” (*Ibid.*, p. 80).

²⁹⁷ Gregorius Magnus, *Moralia in Iob, lib. 25, libri 23- 35*, in: Adrianen, M. (ed.), *Corpus Christianorum.Series Latina*, vol. 143 B, Turnhout, 1985, p. 1260, r. 31-36; p. 1261, r. 64-65, 72-73, 77-79; p. 1262, r. 99-106. (work unavailable, quoted in: Vacca, S., *op. cit.* in fn. 274, p. 80).

²⁹⁸ In another of his works the same Gregory writes that priests who live disorderly can never be judged by the laity. For more see Vacca, S., *op. cit.* in fn. 274, fn. 194.

bishop is to upset the divine order, since he was constituted as such by the will of God.²⁹⁹ Further he claims: “No one can judge a rector, even if he acts disorderly and does not lead a holy and irreproachable life. The bishops, therefore, are to be judged by God alone... *Only in the event that the bishop should fail in the right faith could he be accused.* But if he should live disorderly, or if he should be of bad morals, that is not the reason why he should be expelled, but rather tolerated pending conversion.”³⁰⁰

According to St. Isidore, moral failings are not enough for a bishop to be accused by his subjects, but if bishop s failing in faith, he could be judged by his inferiors.³⁰¹ Although Gregory the Great and Isidore of Seville did not speak of papal but of episcopal judicial immunity, as we will see, these arguments will be taken later to establish an exception of heresy to the *prima sedes* principle.³⁰² It is also important to emphasize how St. Isidore and Gregory influenced Pseudo-Isidorian Decretals, the great forgery of the 9th century.³⁰³

In desire to free the Church from secular interference and to strengthen the position of the bishops against their metropolitans, Pseudo-Isidore put great emphasis on the authority of Roman Pontiff.³⁰⁴ It provides us with the ancient forged letter from the 3rd century ascribed to the St. Clement of Rome which was purportedly written by him to St. James the Apostle. In the letter Roman primacy and all the powers of the Roman Pontiff are affirmed, but there is also an appendix on judicability of bishops, probably added by Pseudo-Isidore himself, inspired by St. Gregory and Isidore³⁰⁵: “Obey [bishops’] commandments in all things, even if they themselves act differently... remembering that Lord's commandment: ‘Do what they say, but do not do what they do’ (Mt 23: 3). But if the bishops themselves have deviated from these, they are not to be blamed or accused... *unless they have erred in the faith.*”³⁰⁶

²⁹⁹ For more see: Isidor of Seville, *Sententiarum Libri tres*, bk. 3, 29, 2, in: Migne, J. P. (ed.), *Patrologiae Cursus Completus. Series Latina*, vol. 83, Sirou, Paris, 1862, p. 709.

³⁰⁰ *Ibid.* (translation according to Vacca, S., *op. cit.* in fn. 274, p. 81).

³⁰¹ Gregory the Great and Isidore of Seville did not specify who would be competent to judge a bishop for a heresy. According to tradition of that time, it would be up to the metropolitan and the provincial synod, but if the accused wants to appeal wished to appeal, according to the canons of Synod of Sardica (342) he could have recourse to the highest instance, the bishop of Rome (Schatz, *op. cit.* in fn. 69, p. 24-26).

³⁰² See *infra* IV.7., IV.10., IV.11.

³⁰³ Collection of ecclesiastical laws supposedly prepared by one Isidore Mercator, written in France, around 850. (Schatz, K. *op. cit.* in fn., pg. 69.) Through the Gregorian reform the principle of papal injudicability, as presented in Symmachian forgeries will be cited under the authority of Pseudo-Isidore. (Vacca, S., *op. cit.* in fn. 274, p. 106).

³⁰⁴ Primacy of jurisdiction was asserted in a new way. Rome, contrary to canons of Sardica has become the first instance for all *causae maiores*, etc. For more see: Schatz, K., *op. cit.* in fn. 69, p. 70-71.

³⁰⁵ We can say that Pseudo-Isidore had forged a forgery.

³⁰⁶ *Epistula Clementis ad Iacobum Fratrem Domini*, in Hinschius, P. (ed.), *Decretales Pseudo-Isidorianae et Capitula Angilramni*, Leipzig, 1863, p. 40 (translated from Latin by the author).

4. THE CASE OF POPE ST. LEO III (795-816)

After the death of pope Adrian II (772-795), Leo was elected and consecrated as the pope. Roman nobility, however, tried to depose him and even to assassinate him. Due to the concern for his safety, Charlemagne took him to his court and protected him. Meanwhile, his opponents brought charges against him.³⁰⁷ In 800, Charlemagne called an assembly to examine the charges against the Roman Pontiff.^{308, 309} According to the *Liber Pontificalis* all the bishops, and abbots claimed unanimously: “We dare not judge the apostolic see, which is the head of all the churches of God. For we all, by Him and its vicar³¹⁰ are judged; but it by no one can be judged, as it has been by ancient tradition. So as the supreme pontiff himself will have canonically determined, we will obey him.”³¹¹ While *Liber Pontificalis* claims that the case was not discussed at all due to the *prima sedes* principle, Carolingian sources claim that the case against the pope was discussed, and that Leo III was found innocent, but that he nevertheless swore an oath of purgation³¹² in these words^{313, 314}: “I, Leo, Pontiff of the holy Roman Church, *without being judged or corrected by anyone*, spontaneously and voluntarily purify myself before God who knows my conscience...I declare that these crimes and wickedness that they impute to me I have not perpetrated nor do I order them to be perpetrated...This I declare *voluntarily* in order to remove all suspicion; *not that this is prescribed by the canons, nor that I wish to set a*

³⁰⁷ They had accused him for adultery and perjury. (PopeHistory.com, *Pope St. Leo III*, <https://popehistory.com/popes/pope-st-leo-iii/>).

³⁰⁸ While Carolingian sources (*Annales Laurissenses*) stress the importance of the king in this procedure, as if he were the only instance that can judge the pope, Roman sources (*Liber Pontificalis*) put more emphasis on the assembly of bishops, abbots, priests and nobility. For more see: Duchesne, L. (ed.), *Le Liber Pontificalis II*, Paris, 1892, p. 2 *et seq.*

³⁰⁹ For more on whether this assembly tried Leo or not see: Wallach, L., *The Roman Synod of December 800 and the Alleged Trial of Leo III: A Theory and the Historical Facts*, *The Harvard Theological Review*, vol. 49, no. 2, 1956, p. 123-142.

³¹⁰ In this case we can see that the West had adopted different attitude from the East. Charlemagne and Franks recognized the pope as the Vicar of Peter and thus in judicable, while this concept has never been accepted in the East, which can be seen from multiple examples of emperors and patriarchs who were condemning the popes, e. g., Constant II condemned pope Martin (649-655), Michael III condemned Nicholas I. For more see *infra* IV.5.

³¹¹ Duchesne, L., *op. cit.* in fn. 308, p. 7 (translation from Latin taken from Vacca, S., *op. cit.* in fn. 274, p. 85).

³¹² This procedure was based on a decretal of Gregory II: “[I]f any priest has been accused by the people, if there are no certain witnesses who approve the truth of the accusation, he must be sworn in the middle, and he must bring forward that witness of the purity of his innocence, to whom everything is naked and open; and thus he should remain at his proper level.” (Mansi, G. D., *Sacrorum Conciliorum Nova et Amplissima Collectio*, vol. 12, Florence, 1766, p. 245 (translated from Latin by the author)).

³¹³ “He, however, after there was no one willing to prove crimes, mounted the pulpit in the presence of all the people in the basilica of the blessed apostle, bearing the gospel; and by invoking the name of the holy Trinity, he cleared himself of the charges which had been brought against him by swearing an oath.” (*Annales Laurissenses, a. 800*, in: Pertz, G. H. (ed.), *Scriptores (in Folio)*, vol. 1, M. G. H., Hannover, 1826, p.188, r. 18-20 (translated from Latin by the author)).

³¹⁴ For a discussion on whether Leo III really took an oath of purgation see: Wallach, L., *The Genuine and Forged Oath of Pope Leo III, Traditio*, vol. 11, 1955, p. 37-63.

precedent and impose such a custom in the holy Church on my successors and on my confreres in the episcopate.”³¹⁵ We can see that according to this version, Leo recognizes the *prima sedes* principle and stresses that he do not want to change it. It is also interesting to mention that Alcuin, one of the trusted advisors of the king Charlemagne invoked Symmachian apocrypha to defend pope Leo, while, on the other hand, the accusers were charged with the crime of *laeseae maiestatis*, according to Roman law.³¹⁶

5. PRIMA SEDES PRINCIPLE DURING PHOTIAN SCHISM³¹⁷

In 865 Pope Nicholas I (858-867) wrote a letter in which we can see how the concept of the papal immunity had rooted in the Western Church. After Nicholas I had deposed Photius from the See of Constantinople, emperor Michael III (842-867) does the same with new patriarch Ignatius, moreover, he sent a letter to the pope where he expressed, in a strong manner, his disagreement with the deposition of Photius. Nicholas replied to the emperor. He asserted Roman primacy of jurisdiction and reminded the emperor of the principle of non-intervention of secular authorities into affairs of the ecclesiastics, declaring his deposition of Ignatius illegitimate.³¹⁸

To affirm the principle, Nicholas I had exhausted all Symmachian apocrypha: *Silvestri Constitutum* and *Gesta de Polychronii* to affirm the principle that superiors should not be judged by the inferiors, and *Gesta Xysti II*, *Gesta episcopi Hierosolyinitani* and *Sinuessanae Synodi Gesta de Marcellino* to affirm the *prima sedes* principle.^{319, 320} Besides apocrypha, he also used the historical cases of Gelasius, Palmar Synod and Constantin. But Orientals did not felt constrained with Nicholas’ letter and in 867 they assembled the council and deposed him. In 869, council presided by Hadrian II (867-872) passed judgment on the council of Constantinople of 867 in this words: “We read that the Roman Pontiff has pronounced judgments on the prelates od all the Churches; we do not read that anybody has pronounced

³¹⁵ *Concilium Romanum a. 800*, in: Werminghoff, A. (ed.), *Concilia Aevi Carolini*, 11,1, M.G.H., Hannover-Leipzig, 1906, p. 226-227 (translation according to Vacca, S., *op. cit.* in fn. 274, p. 90-91). The same is quoted by 11th century canonist Burchard of Worms. For more see: Vacca, S., *op. cit.* in fn. 274, p. 191.

³¹⁶ “[I] once read, if I remember rightly, in the canons of blessed Sylvester that 72 witnesses are necessary to accuse and judge a bishop... In other canons, I also read that the apostolic see may judge, but cannot be judged.” (*Alcuin’s Epistola 179* as quoted in Wallach, L., *op. cit.* in fn. 309, p. 135-136 (translated from Latin by the author). For the application of Roman law principle see: Vacca, S., *op. cit.* in fn. 274, p. 93.

³¹⁷ For more on Photian schism see: Burn-Murdoch, H., *op. cit.* in fn. 33, p. 296-299.

³¹⁸ For more see: Vacca, S., *op. cit.* in fn. 274, p. 112-113.

³¹⁹ For more see: *Proposuearmus quidem*; Denz., 330, and Vacca, S., *op. cit.* in fn. 274, p. 113-115.

³²⁰ As regards to the Pseudo-Isidore, while Vacca claims that Nicholas did not know them, Schatz claim that he knew them, but did not know that they were forgeries. (Vacca, S., *op. cit.* in fn. 274, p. 106; Schatz, K. *op. cit.* in fn. 69, p. 71).

judgment on him.”³²¹ While his predecessor did not mention any exception to the principle, Hadrian II recalled the case of Honorius: “[E]ven if Pope Honorius, after his death, was condemned by the Orientals, it was on the ground that he had been accused of *heresy*, which is *the only ground that permits subjects to oppose their superiors and reject their perverse sentiments*: but even in this case no patriarch or bishop is permitted to pronounce sentence against the pontiff of the first see, unless he first has the preliminary consent and authority.”³²² There are two interesting points in this passage. Firstly, Hadrian II recognizes heresy as only exception to the *prima sedes* principle. Secondly, invoking the example from the Sixth Ecumenical Council of Constantinople (680-681), he stated that prior authorization by the pope would be necessary for bishops to proceed any further. Pope Agatho (678-681) instructed and sent his legates to the council. So, does the pope, in the case of papal heresy, should also be the one who sets the rules of procedure?³²³

6. *PRIMA SEDES* PRINCIPLE DURING *SAECULUM OBSCURUM*

6.1. Auxilius case and the contemporaries

In 10th century local aristocracy seriously influenced the elections for bishop of Rome causing the great crisis of the papacy.³²⁴ From 920 to 1046 there were twenty-six popes³²⁵, for many of whom it is difficult to determine whether they were popes or anti- popes.³²⁶ Many of them died by violence. The Apostolic See lost much of its prestige, spiritual and moral force, but in spite of everything, the authority of the Apostolic See has always been recognized and *prima sedes* principle, although not enforced through this period, had not been forgotten.

Auxilius was ordained by Formosus (891-896), but all ordinations done by Formosus were declared invalid by Sergius III (904-911), so Auxilius had to prove the validity of his own consecration, *i. e.*, the validity of Formosus pontificate. In doing so, he also affirmed *prima sedes* principle: “The Holy Roman Church has primacy over the Churches, therefore she judges all of them, but she herself is not judged by anyone.”³²⁷ Auxilius affirmed not only that the

³²¹ Mansi, G. D., *Sacrorum Conciliorum Nova et Amplissima Collectio*, vol. 16, Venice, 1771, p. 126 (translation from Latin taken from Burn-Murdoch, H., *op. cit.* in fn. 33, p. 297).

³²² *Ibid.* (translation according to Vacca, S., *op. cit.* in fn. 274, p. 122).

³²³ See Vacca, S., *op. cit.* in fn. 274, p. 123.

³²⁴ For more see: Marshall, T., *Bad Popes and the Saeculum Obscurum*, 1.8.2017, <https://taylormarshall.com/2017/08/good-popes-bad-popes-saeculum-obscurum.html> (accessed 22.2.2023).

³²⁵ Note that from 1830 to 1958 there were only seven popes.

³²⁶ See *infra* IV.6.2.

³²⁷ Auxilius, *Infensor et Defensor*, in: Migne, J. P., *Patrologiae Cursus Completus. Series Latina*, vol. 129, Paris, 1853., p. 1088-1089 (translation according to Vacca, S., *op. cit.* in fn. 274, p. 132).

pontiff cannot be judged by anyone, but also that one cannot accuse him nor write against him.³²⁸ But Auxilius adds the possibility of not following the pope should he deviate from the Catholic faith making a distinction between the see and its occupant: “Holy Roman Church has primacy over the Churches, therefore she judges them all, but she herself is judged by no one...*Pontifical sees are one thing, their presidents another... if the presidents deviate from the faith, we must not follow them*; it is given that, when they begin to live against the Catholic faith and religion, in such cases we absolutely must not follow them.”^{329, 330} We can see that Auxilius takes into account that the pope can err in faith and in that we should not obey him, but that nevertheless we should always respect his office.³³¹

Attone, bishop of Vercelli (885-961), dedicates the first part of work *De pressuris Ecclesiasticis* to the canonical procedure of juridical trial of bishops.³³² There he also discusses the injudicability of the pope: “For [the pope] cannot be condemned by a human examination, which God has reserved for his own judgment. Even the most holy Emperor Constantine, when he saw the complaint of certain bishops brought before him in the Synod of Nicaea, said: ‘You cannot be judged by anyone, because you reserve the judgment of God alone. For you have been called by God, therefore you cannot be judged by men.’ And the Lord, showing in Exodus, said: ‘Do not detract from the gods, and do not curse the leader of your people’ (Exod. 22,28)”³³³ Raterio of Verona (890-974), who wrote a lot about injudicability of the bishops by the secular authorities due to the fact that he also had to defend himself against secular powers, in 951 in letter to pope Agapitus also confirms *prima sedes* principle.³³⁴ Both of them used Symmachian apocrypha in their works.³³⁵

³²⁸ For more see *ibid.*, p. 1099.

³²⁹ *Ibid.*, p. 1088-1089. as translated in *ibid.*, 133-134. The concept is further developed later by Augustinus Triumphus, see: Wilks, M. J., *Papa est nomen iurisdictionis: Augustinus Triumphus and the Papal Vicariate of Christ: II*, The Journal of Theological Studies, vol. 8, no. 2, 1957, p. 260.

³³⁰ Leo the Great (440-461) made earlier this distinction between *sedes* et *sedens*. For more see: Migne, J. P., *Patrologiae Cursus Completus. Series Latina*, vol. 1, Paris, 1846, p. 1088-1089.

³³¹ “One must obey the apostolic power, but not in those things which the Christian law rejects and forbids.” Auxilius, *op. cit.* in fn. 327, p. 1088 (translation from Latin taken from Vacca, S., *op. cit.* in fn. 274, p. 13).

³³² For more see: Attone, *De Pressuris Ecclesiasticis*, in: Migne, J. P., *Patrologiae Cursus Completus. Series Latina*, vol. 134, Paris, 1853, p. 55-56. It is interesting to notice the influence of *Constitutum Silvestri* in requirement of 72 witnesses to condemn a bishop.

³³³ *Ibid.*, p. 67. (translated from the Latin by the author).

³³⁴ For more see: Vacca, S., *op. cit.* in fn. 274, p. 144.

³³⁵ For more see *ibid.*, p. 139-141.

6.2. Deposition of John XII (955-964), “the worst pope in history”³³⁶

After the death of pope Agapitus (946-955), Octavian became the pope, taking the name of John XII. He was known for his immoral life, full of adultery and other misdeeds. Italy in that time was reigned by Berengar II (950-961) and Adalbert (950-961). To free himself from their influence, John asked the Emperor Otto (912-973)³³⁷ to intervene. After Otto had succeeded to drive the two from the kingdom, he received in Rome the imperial coronation and an oath from John that he would never have any relation with Berengar or Adalbert.

In 963, John XII broke his promise and established political connection with Adalbert, promising him aid against the emperor. The emperor had sent his legates to Rome. After they had returned, they testified about pope’s immoral conduct.³³⁸ So the emperor came to Italy, defeated the rebels and made it to Rome, while John had fled from Rome. Romans received Otto and renewed their oath to him, asking him to assemble the synod to discuss the Roman Pontiff’s conduct.

After very hard accusations brought up against the Roman Pontiff at the synod, Otto summoned pope John to the council, but John refused and threatened to excommunicate the bishops. Bishops replied to him: “If you decide to come to the synod and exonerate yourselves of what is objected to, we obey your authority without doubt. But if... you refuse... then *we shall take no account of your excommunication* and we shall rather retaliate against you, since, indeed, we can justly do so.”³³⁹ The pope did not heed to the request so the emperor, after he consulted with the synod on what should be done, with unanimous consent of the clergy and people of Rome deposed John XII on account of his “evil customs”.³⁴⁰

The new pope, Leo VIII (963? -964) was chosen. After unsuccessful attempt to kill the emperor and the new pope, John in 964 convoked a council and annulled the election of Leo. Otto returned to Rome, but before their clash John XII died. The Romans broke their oath to Otto again and they had chosen a new pope, Benedict V (964). Otto again came to Rome, reestablished Leo and defined Benedict as the usurper sending him to exile where he died. Till

³³⁶ According to the words of St. Robert Bellarmine. See: De Mattei, R., *Who was the worst Pope in the history of the Church?*, 4.12.2019., <https://rorate-caeli.blogspot.com/2019/12/de-mattei-who-was-worst-pope-in-history.html> (accessed 22.2.2023).

³³⁷ See: EuropeanRoyalHistory.wordpress.com, *Emperor Otto I and Pope John XII*, 20.8.2021., <https://europeanroyalhistory.wordpress.com/2021/08/20/emperor-otto-i-and-pope-john-xii/> (accessed 22.2.2023).

³³⁸ See West, J., *Pope John XII: The Youngest and Worst Pope in History*, 10.10.2022, <https://historyofyesterday.com/pope-john-xii-the-youngest-and-worst-pope-in-history/>, (accessed 22.2.2023).

³³⁹ Liudprandus, *Liber de rebus gestis Ottonis Magni Imperatoris*, in: Pertz, G. H. (ed.), SS., vol. 3, M.G.H., Hannover, p. 344., r. 33-38 (translation according to Vacca, S., *op. cit.* in fn. 274, p. 147).

³⁴⁰ *Ibid.*, p. 345, r. 23 (translation according to Vacca, S., *op. cit.* in fn. 274, p. 148).

this day it is not clear whether the election of Leo was legitimate and whether he was the pope or the anti-pope.³⁴¹

What is interesting for our subject is that in the case of the pope John there is no mention of *prima sedes* principle to defend him. Due to the quantity of John's evils it is hard to say on what grounds the synod of 963 condemned him. One interesting thing is that among all of his misdeeds there is a sin of simony³⁴², which was already from the time of Gregory the Great considered a heresy³⁴³, so, if we take the synod of 863 as the legitimate, we can speculate that the bishops of that time knew for the exception of heresy to the *prima sedes* principle, *i. e.*, so they proceeded against the pope according to the canonical tradition. We have another example of pope tried for heresy of simony in Gregory VI.

6.3. The case of Gregory VI (1045-1046)

We have another dark example of papacy in the person of Gregory VI. After simoniac abdication of Benedict IX (1032-1045)³⁴⁴, John Gratian was elected pope, taking the name of Gregory VI. At the beginning he was accepted by the emperor Henry III (1016-1056), but in 1046 the synod was convoked at Sutri where deposition of Gregory due to simony was discussed. Due to the diversity of sources it is hard to discern what really happened there. According to Bonizone of Sutri (1045-c. 1094) and Desiderius of Montecassino (c. 1027-1087) the synod first deposed anti-pope Silvester III and ratified the abdication of Benedict IX and proceeded further to the case of Gregory. At this synod, bishops invoked *prima sedes* principle declaring themselves incompetent to judge the pope, but called him to judge and punish himself: "You, *examine and judge your cause in your conscience*; judge yourself with your own mouth. It is better to live in poverty with blessed Peter, with whom you will be rich forever, than to follow Simon Magus, with whom you will be rich today, but already dead forever"³⁴⁵. The influence of pseudo-Marcellinus' procedure can be seen at this synod. Gregory VI accepted: "I, Gregory bishop, servant of the servants of God, because of the most foul venality of the heresy

³⁴¹ See also: Sts. Martha and Mary Parish, *Leo VIII – Pope or Antipope*, 3.12.2006, <http://www.stsmarthaandmary.org/popes/Leo%20VIII.htm> (accessed 22.2.2023).

³⁴² See Montefiore, S. S., *Worst Pope of All Time?*, 17.10.2018, <https://lithub.com/worst-pope-of-all-time/> (accessed 22.2.2023).

³⁴³ On simony as heresy see Leclercq, J., *Simoniaca Heresis*, Studi gregoriani per la storia di Gregorio VII e della riforma gregoriana, vol. 1, Rome, 1947, p. 523-530.

³⁴⁴ Muneera, L., *Three Strikes, You're Out: The Scandalous Life of Pope Benedict IX*, 26.11.2015, <https://manchesterhistorian.com/2015/three-strikes-youre-out-the-scandalous-life-of-pope-benedict-ix/> (accessed 22.2.2023).

³⁴⁵ Bonizone of Sutri, *Liber ad amicum*, in E., Duemmler (ed.), *Libelli de lite*, vol. 1, M.G.H., Hannover, 1891, p. 585 (translation according to Vacca, S., *op. cit.* in fn. 274, p. 160).

of simony, by which I obtained my election, I judge myself removed from the Roman episcopate.”³⁴⁶ After that the bishop of Bamberg was elected as a pope Clement II (1046-1047). So according to Bonizone and Desidurius, *prima sedes* principle was invoked and respected, and the pope abdicated by himself, without being forced by Henry III or the synod.

However, anonymous writer in *De ordinando pontifice* claimed that the principle of papal injudicability was being infringed by deposition of the pope by Henry III. According to him, Henry III did not have any right to demand a confession of the pope due to the fact that only God can judge him.³⁴⁷

7. LEO IX (1049-1054) AND HUMBERT CARDINAL DE SILVA CANDIDA (1015-1061) ON *PRIMA SEDES* PRINCIPLE

In the 11th century, when disputes arose between East and the West over liturgy, politics and theology which finally led to the Great Schism³⁴⁸, pope Leo IX wrote to the patriarch of Constantinople Cerularius a letter where he wanted to judge him because he infringed the Roman Primacy and *prima sedes* principle: “In this true madness... you condemn with anathema the supreme and apostolic See... You are so blinded by your ill-advised and imprudent arrogance... Thus you condemn without trial that See, which neither to you nor to any of mortals is lawful to judge, since the most blessed pontiff Sylvester, by divine inspiration decreed that the supreme See be judged by no one, and this decision was approved by his spiritual son, the most religious Augustus Constantine, and by the council of Nicaea. Moreover, to the see of Rome was inviolably and firmly preserved that privilege, which the emperor himself, on the fourth day after his baptism, granted to the Roman pontiff, in which it is established that the bishops of the whole world should have him for their head, just as all officials have the emperor for their head. And this decision, which is to be always and by all respected, as a norm promulgated truly by *divine inspiration*, was accepted at the other ecumenical councils.”³⁴⁹

³⁴⁶ *Ibid.*, p. 585-586 (translation according to Vacca, S., *op. cit.* in fn. 274, p. 160-161).

³⁴⁷ For more see: Vacca, S., *op. cit.* in fn. 274, p. 162-163.

³⁴⁸ For more see: Dennis, G. T., *1054 The East-West Schism*, 1990, <https://christianhistoryinstitute.org/magazine/article/east-west-schism> (accessed 22.2.2023).

³⁴⁹ Leo IX, *Epistola In terra pax hominibus*, in: Mansi, G. D., *Sacrorum Conciliorum Nova et Amplissima Collectio*, vol. 19, Venice, 1774, p. 641 (translation according to Vacca, S., *op. cit.* in fn. 274. p. 169).

We can see that Leo used *Constitutum Silvestri*, Constantine and *Donatio Constantini*³⁵⁰ to affirm the principle. Moreover he talks about it not only in the canonical terms, but in dogmatical, ascribing it divine inspiration.³⁵¹ Leo invites the East, where besides this principle, primacy of jurisdiction have never been accepted like in the West to respect it: “By passing a preceding judgment on the great See, concerning which it is not permitted any man to pass judgment, you have received anathema from all the Fathers of all venerable Councils... Peter and his successors have free judgment over all the Church, since no one should remove their status because ‘the highest See is judged by no one’.”³⁵²

Leo does not mention any exception to the principle. However, his advisor cardinal Humbert de Silva Candida knew of exception. Thus, in *De Sancta Romana Ecclesia* he wrote: “Let no mortal presume to recall the faults of the pope, for he judges all, but *can be judged by none, unless he be found out of the faith*. For his eternal position, the *universitas fidelium* prays as unceasingly as considering that his salvation, after God, is very much bound up with his safety.”³⁵³ Humbert affirms that pope possesses the immunity from accusations for his moral misdeeds, but not if he were to deviate from faith, *i. e.*, commit heresy, thereby formulating a principle in a manner that will find its place later with Gratian.³⁵⁴

One of the possible reasons, as invoked Ullmann, would be the transposition of a rule that was already established for bishops, to the pope, as one of the members of the Curia, *i.e.* the College of Cardinals in Humbert’s eyes.³⁵⁵ Among other explanations for this innovation, as explained in detail by Vacca, one can also notice that Maccarrone connects it with the Roman law, whereby Vacca stated that “[i]t is a conception of the person and office of the pope that does

³⁵⁰ Forgery from 8th century which tells a story in which emperor Constantine, after being miraculously cured from leprosy by pope Sylvester, had granted to him the primacy of jurisdiction over all patriarchies. It was also included in Pseudo-Isidore. (Burn-Murdoch, H., *op. cit.* in fn. 33, p. 324- 325).

³⁵¹ Leo also puts a legislative principle in a charismatic context: “And the head, since it is the judge of all the senses, is not judged by any of them, since it is more than sufficient to judge itself as the Apostle says: ‘The spiritual man judges of everything, and is judged by no one’ (1 Cor 2:15).” (Leo IX, *op. cit.* in fn. 349, p. 656 (translation according to Vacca, S., *op. cit.* in fn., p. 172)).

³⁵² *Epistola In terra pax hominibus*; Denz., 352-353.

³⁵³ “Here the possibility that the pope can fall into heresy is openly admitted when he says that the *universitas fidelium* prays all the more ardently for the pope's ever-lasting government... There can be no guarantee for the pope's orthodoxy, and therefore the prayers of the faithful are necessary.” (Ullmann, W., *op. cit.* in fn. 273, p. 120). Humbert de Silva Candida, *De sancta Romana ecclesia, Fragmentum A*, in: Schramm, P. E. (ed.), *Kaiser, Rom und Renovatio: Studien und Texte zur Geschichte des römischen Erneuerungsgedankens vom Ende des karolingischen Reiches bis zum Investiturstreit*, vol. 2, Leipzig-Berlin, 1929, p. 128-129 (work unavailable, quoted according to Vacca, S., *op. cit.* in fn. 274, p. 172). See also Humbert de Silva Candida: Michel, A., *Die folgenschweren Ideen des Kardinals Humbert und ihr Einfluß auf Gregor VII*, Studi gregoriani per la storia di Gregorio VII e della riforma gregoriana, vol. 1, 1947, p. 65-92.

³⁵⁴ See Moynihan, J., *Papal immunity and liability in the writings of the Medieval Canonists*, Gregoriana, Rome, 1961, p. 32-34.

³⁵⁵ On the dual stance of Humbert – “the extreme defender of the papalism, as well as of the constitutional restriction of the pope's function at least as far as his orthodoxy was concerned.”, see also Ullmann, W., *op. cit.* in fn. 273, p. 118-123, 127.

not derive from the theological and ecclesiastical tradition, but traces the ancient imperial model, renewed by Ottonians”.³⁵⁶ Although the full revival of interest for Roman law sources has not yet begun, in a manner that the canonical collections have not yet included Roman sources in a measure that will happen in the last decades of the 11th Century, it is possible that the first traces of found books could have been already felt, although it is questionable if they could have influenced Humbert in any way regarding the exception. One can certainly imagine that Humberto de Silva Candida was in a situation to be acquainted with these sorts of texts, either in Rome or in Monte Cassino, where he found the refuge for several years. As described by Radding and Ciaralli, collections of Roman sources began to surface in the south, Rome and Beneventan zone, during the 11th Century, as they were being as well found and cited in the northern Italy, zones of Pavia and Ravenna, *e.g.* where St. Peter Damiani (for whom see the next chapter) cited Justinian’s *Institutiones*.³⁵⁷

8. THE CASE OF ALEXANDER II (1061-1073) AND ST. PETER DAMIANI (1007-1072)

In 1059, pope Nicholas II reformed the papal elections. From then only cardinals could elect the pope.³⁵⁸ After his death in 1061, cardinals chose Anselmo, bishop of Lucca, as pope Alexander II. On the other side, Roman nobility with the help of the Germans chose antipope Honorious II (1061-1072)³⁵⁹ and conflict had started. Among those who supported the reform and opposed the antipope were Peter Damiani.

In 1062, a general synod had been convened at Augsburg to resolve the conflict where Alexander II was blamed for the division and an inquiry against him was opened. Already proven in his argumentation against the Ambrosian position of Church of Milan, Peter Damiani defended the pope with the following words: “You force me to publish what I was determined to keep silent out of respect for the court. But, according to the instance of your refusal, the central motive of your egregious work is proffered, which is unheard of in all ages. Yes, you, counselors of the court, in agreement with certain “holy” German bishops, conspired against the Roman Church... *the condemnation of the pope is so serious and impossible that it cannot*

³⁵⁶ See Maccarrone, M., *La teologia del primato romano del secolo XI*, in *Le Istituzioni ecclesiastiche della "Societas Christiana" dei secoli XI-XII. Papato, Cardinalato ed Episcopato*, Milan 1974, p. 121-122 (work unavailable, cited by Vacca, S., *op. cit.* in fn. 274, p. 177-178). See Ullmann, W., *op. cit.* in fn. 273, p. 118 *et seq.*; Vacca, S., *op. cit.* in fn. 274, p. 178.

³⁵⁷ Radding, C. M.; Ciaralli, A., *The Corpus Iuris Civilis in the Middle Ages*, Leiden, Boston, 2007, p. 69-80.

³⁵⁸ Miranda, S., *Nicholas II*, in: Miranda, S., *op. cit.* in fn. 275, <https://cardinals.fiu.edu/conclave-xi.htm> (accessed 22.2.2023). Michel sees this as the work of Humbert of Silva Candida. See Michel, A., *op. cit.* in fn. 353, p. 86.

³⁵⁹ *Ibid.*

*be treated with a human judgment, but only a divine one*³⁶⁰. No exception was mentioned here, but it can be easily understood. Peter Damiani was well versed in canon law, and also to a certain extent in Roman law, and his language relates that, although he has not cited the Roman sources what makes the identification of exact texts difficult, but the absence of exception is reasonably expected taking into account the audience of his letter and the fact that he defended the pope.

Later, in 1064, the council of Mantua was held, and Alexander II was accused of simony. Then Alexander II had done the same thing as his predecessor Leo III: he affirmed the *prima sedes* principle, but nevertheless swore an oath.³⁶¹

9. *PRIMA SEDES* PRINCIPLE DURING THE PERIOD OF GREGORIAN REFORM³⁶²

9.1. *Diversorum Patrum Sententiae* or The Collection of 74 Titles

One of the most influential collections during the Gregorian reform also refers to *prima sedes* principle. It is the Collection of 74 Titles or *Diversorum Patrum Sententiae*, one of the very well-known canon law collections and predecessors of Gratian's decree.³⁶³ *Prima sedes* principle is categorically stated here and supported by historical (letter of Gelasius, *Libellus apologetica* of Enodius, letter of pope Nicholas I) and ahistorical (*Constitutum Silvestri*, Pseudo-Isidore) magisterial and canonical authorities.³⁶⁴ Although no exception to the judicability of the pope is mentioned expressly, author of the Collection quotes apocryphal letter of Pope Anacletus: "But a doctor or a pastor of the church, if he deviates from the faith, will be corrected by the faithful, but for reprobate behavior he is more tolerable, because the

³⁶⁰ Peter Damiani, *Disceptatio synodalis*, in: Dummler, E., *Libelli de lite imperatorum et pontificum saeculis*, vol. 1, M.G.H., Hannover, 1891, r. 26-32; 35-36 (translation according to Vacca, S., *op. cit.* in fn. 274, p. 184-185).

³⁶¹ "[T]o [my accusers] I would not be obliged to answer, except with my own free will, for *we all know that it is not right for disciples to accuse and judge the master*. Nevertheless, that now the holy Church of God may have no occasion of scandal concerning me, I attest and swear... that I have ever stained my conscience with the heresy of simony, but by my opposition, in spite of myself, they have dragged me, and against my will consecrated me and placed me in the Apostolic See, and have done this those who, according to the ancient usage of the Romans, have care and power to choose and consecrate the pontiff..." (*Annales Althaenses maiores a. 1064*, in: De Giesbrecht, W., Ab Ofele, E. (ed.), *Scriptores Rerum Germanicarum*, vol. 20, M.G.H., Hannover, 1868, p. 814, r. 31-43 (translation according to Vacca, S., *op. cit.* in fn. 274, p. 187).

³⁶² Set of political, legal and disciplinary changes of the 11th century which aim was to revive spiritual and moral life of the Church after years of crisis. For more on Gregorian reform see: ChristianHow.com, *The Gregorian Reform: What Happened, Why It Matters*, 31.5.2022, <https://christianhow.com/gregorian-reform/> (accessed 22.2.2023).

³⁶³ Potential author could be Humbert de Silva Candida, Peter Damiani or Bernold of Constance (c. 1054-1100). See Vacca, S., *op. cit.* in fn. 274, p. 191. See also on the Roman law elements in this collection: Gaudemet, J., *Le droit romain dans la pratique et chez les docteurs aux XIe et XIIe siècles*, Cahiers de civilisation médiévale, vol. 8, no. 31-32, 1965, p. 376.

³⁶⁴ See Vacca, S., *op. cit.* in fn. 274, p. 192-193.

teachers of the church are to be judged by God, as the prophet says: ‘God he stood in the synagogue of the gods, and in the midst he judged the gods.’”³⁶⁵; and Pope Fabianus: “*Let the sheep not dare to reproach their shepherd except when he deviates from the faith...* For only in this case can he be corrected... but he is to be tolerated for his misconduct.”³⁶⁶

Therefore, according to the Collection, immorality of spiritual superiors should be tolerated, but heresy should be corrected by inferiors. As regards to the other collections of that period, Anselmo *iunior* (c. 1036-1086) bishop of Lucca, nephew of Anselmo *senior*, *i. e.*, pope Alexander II, and faithful associate of Gregory VII, in his collection of canons, which he composed at the pontiff’s desire and which is important because of the more intensive use of Justinian’s sources, asserted *prima sedes* principle without any exception.³⁶⁷ Bonizone of Sutri also relied on *Constitutum Silvestri* and Pseudo-Clement in his collection.³⁶⁸

9.2. Gregory VII (1073-1085) and *Dictatus papae*

Following the death of Alexander II (1073), Hildebrand was elected as the pope Gregory VII, famous as one of the greatest reformers in the Church history and strongest asserter of papal primacy by far, assumed to have been also strengthened in his efforts by the idea of Roman *principatus* and the newly found Roman legal sources.³⁶⁹ Although, in this question he was mostly inspired by Pseudo-Isidore, whereby he collected all papal prerogatives related to the Roman primacy into a list of 27 sentences, list today known as *Dictatus Papae*.³⁷⁰ Under number 18, 19 and 23 we can find three sentences related to our subject: “No one must revoke [pope’s] decision, and he alone can do so with regard to that of all the others... [H]e ought to be

³⁶⁵ *Diversorum patrum sententiae sive Collectio in LX- XIV titulos digesta*, c. 74, 58 (as quoted in: Vacca, S., *op. cit.* in fn. 274, p. 193).

³⁶⁶ *Ibid.*, c. 78, 60 (Vacca, S., *op. cit.* in fn. 274, p. 193).

³⁶⁷ In doing so, he cited forgeries like *Silvestri Constitutum*, *Gesta Xysti*, *pseudo-Athenorus*, *pseudo-Anacletus*, and historical cases of *Symmachus* writings, of *Gelasius*, *Nicholas I*, etc. See Vacca, S., *op. cit.* in fn. 274, p. 195-199. For the elements of Roman law in Anselmo’s work, with further references, see Gaudemet, J., *op. cit.* in fn. 363, p. 377; while on the connection between Anselmo and Mathilde of Tuscany, in whose court the first mention of Digest is recorded, see Guerri, F., *Nihil Terrenum, Nihilque Carnale, Matilda of Tuscany and Anselm of Lucca during the Investiture Controversy*, *Storicamente*, vol. 13, no. 31, 2017, DOI: 10.12977/stor684.

³⁶⁸ For more see: *ibid.*, p. 205.

³⁶⁹ He is famous for his dispute with Henry IV over appointment of bishops, so called Investiture Dispute. See: Griffith, M., *Investiture Controversy*, *World History Encyclopedia*, 21.4.2021, https://www.worldhistory.org/Investiture_Controversy/ (accessed 22.2.2023). See more on the role and influence of Roman law in Le Bras, G., *Le droit romain au service de la domination pontificale*, *Revue historique de droit français et étranger*, vol. 26, 1949, p. 377-398.

³⁷⁰ Scholars are not sure about the precise function of this text. It has been variously seen as: a list of conditions for the reestablishment of union with the East, an outline for a Lenten Roman synod of 1075, chapter headings for a collection of texts, an outline of headings under which canonists were to seek authoritative texts etc. See Farrugia, G. E., *Vatican I and the Ecclesiological Context in East and West*, *Gregorianum*, vol. 92, no. 3, 2011, p. 452.

judged by no one... [T]he Roman Pontiff, if he be canonically ordained indubitably becomes holy through the merits of Blessed Peter; according to the witness St. Enodius, Bishop of Pavia, with many holy Fathers concurring, as is contained in decrees of Blessed Symmachus, the Pope.”³⁷¹

Gregory VII affirms papal primacy of jurisdiction and papal immunity without any exception. Peculiar is the sentence 23, invoking the principle of Petrine mysticism given by St. Enodius, that papal mistakes are in some kind covered due to the fact that he is the heir of Peter and therefore no one can judge him.³⁷² Gregory’s ideas found many proponents, but also, on the other side, one can find that Henry IV had similar defenders, founding their arguments of the emperor’s acts against the pope on the Roman law, among whom there was mentioned Peter Crassus, from Ravenna.³⁷³ It is also interesting to notice in Peter’s writing the invocation of the Digest (“*Legislator in libro Digestorum ita: ‘Qui crimen intendit, non impunitam fore noverit licentiam mentiendi, cum calumniantes ad vindictam poscat similitudo supplicii’*”), which is very significant as one of the earliest uses (supposedly in 1084), practically coinciding with the *placitum Marturi* (1076) and the *Collectio Britannica* (c. 1085-1090).

To demonstrate the atmosphere of 11th century regarding *prima sedes* principle we must also quote the canonical collection *Proprio Auctoritates Apostolice Sedis* (also known as *Dictatus* of Avranches according to the library where one of the manuscripts containing it was preserved) written after the death of Gregory VII. *Proprio Auctoritates*, as *Dictatus Papae*, enlists privileges of the Roman See, 37 of them. Four of them, 7, 8, 17 and 23 invoke *prima sedes* principle: “[P]ope by no one can be judged, *even if he were to abjure the faith* as is evident from the life of Pope Marcellinus... Who delivers a judgment against him should be deposed as Dioscorus.³⁷⁴... No one may appeal from [the Apostolic See] ... No cleric may accuse his bishop, unless he should deviate from the faith or disperse the possessions of his church, but on the pope’s order someone who withdraws from an accusation against a bishop shall be deposed.”³⁷⁵ We can see that anonymous author, invoking the forged story of Marcellinus, tried to erase even the possibility of exception to the *prima sedes* principle, exception recognized

³⁷¹ *Dictatus Papae*, in: Caspar, E. (ed.), *Das Register Gregors VII*, translated by Karl F. Morrison, F. K., Berlin, 1920-1923, reg. II, 55a: 202-08 (as quoted in: Schatz, K., *op. cit.* in fn. 69, p. 186).

³⁷² Fr. Schatz had given his interpretation of this sentence, see Schatz, K., *op. cit.* in fn. 69, p. 88.

³⁷³ See Vacca, S., *op. cit.* in fn. 274, p. 228. See also on the use of Roman texts and the invocation of laws for the defense of Henry’s position the translated texts of Peter Crassus, by Peter Llewellyn: *The Age of Gregory VII, 1073-85*, <http://legalhistorysources.com/Canon%20Law/GregorianReform/PeterCrassusTreatise.html>.

³⁷⁴ Patriarch of Alexandria excommunicated at the Council of Chalcedon (451) because he manipulated the Council of Ephesus (449). For more see: Burn-Murdoch, H., *op. cit.* in fn. 33, p. 237-244.

³⁷⁵ Mordek, H., *Proprie auctoritates apostolice sedis. Ein zweiter Dictatus papae Gregors VII.?*, Deutsches Archiv für Erforschung des Mittelalters, vol. 28, 1972, p. 105-132, translated by T. Reuter,

since the times of Gregory the Great and Isidore of Seville. However, in case of the bishops, beside heresy, other case of exception is recognized: the detraction of ecclesiastical property.

10. ST. IVO OF CHARTRES (1040-1116) ON *PRIMA SEDES* PRINCIPLE

St. Ivo of Chartres, one of the greatest canonists of Middle Ages, has left behind him three great canonical collections: *Tripartita*, *Panoramia* and *Decretum*.³⁷⁶ His collections were the greatest authority of canon law until Gratian's decree. In *Decretum* and *Panoramia* he is affirming *prima sedes* principle, invoking the authority of pope Nicholas, Gelasius and Symmachus, Pseudo Sylvester *etc.*³⁷⁷, but unlike most of the canonists of Gregorian reform he, inspired by the *Fragmentum A* of cardinal di Silva Candida, poses the possibility of reprimanding the pope in the case of heresy, although not in the case of moral faults: "If the pope, neglecting his own safety and safety of his brothers, is found unprofitable and remiss in his works, and moreover silent from good...nevertheless he leads innumerable peoples in hell with him...[n]one of the mortals presumes to reprove his faults in him, because *he himself is to be judged by no one, unless he be found deviating from the faith*, for whose perpetual state the whole of the faithful pray..."³⁷⁸

11. *PRIMA SEDES* PRINCIPLE IN *DECRETUM GRATIANI* (1141) AND IN THE WORKS OF DECRETISTS

With *Concordantia discordantium canonum*, *i. e.*, The Decree of Gratian (1141) a new era in the history of canon law began. Although that was not his initial intention, his code would become the first element of the *Corpus Iuris Canonici* and one of the greatest authority of canon law in Church history.³⁷⁹ As regards to the *prima sedes* principle, in *distinctio XXI* he, as his

³⁷⁶ For more on St. Ivo see: Ghellinck, J., *St. Ivo of Chartres*, *The Catholic Encyclopedia*, vol. 8, Robert Appleton Company, New York, 1910, <https://www.newadvent.org/cathen/08257a.htm> (accessed 22.2.2023).

³⁷⁷ For more see: Vacca, S., *op. cit.* in fn. 274, p. 247.

³⁷⁸ Ivo of Chartres, *Decretum V*, 23: "*Si papa sue et fraterne salutis negligens reprehenditur inutilis et remissus in operibus suis, et insuper a bono taciturnus, quod magis officit sibi et omnibus, nichilominus innumerabiles populos catervatim secum ducit, primo mancipio gehenne cum ipso, plagis multis in eternum vapulatuos. Huius culpas istic redarguere presumit mortalium nullus, quia cunctos iudicaturus ipse a nemine est iudicandus, nisi deprehendatur a fide devius, pro cuius perpetuo statu universitas fidelium tanto instantius orat, quanto suam salutem post Deum, ex illius incolumitate animadvertunt propensius pendere.*" (translated from Latin by the author).

³⁷⁹ To understand the significance of *Decretum Gratiani* see: Ferreria, C. D.; Sawicki, S. A., *Decretum Gratiani: The Cornerstone of Canon Law*, *The Quarterly Journal of the Library of Congress*, vol. 34, no. 4, 1977., p. 327-338.

predecessors, is affirming the *prima sedes* principle quoting the authorities like Nicholas I.³⁸⁰ Then in *distinctio* XCVI, where he talks about the separation of secular and ecclesiastical sphere, he expounds the incompetence of secular power to judge the ecclesiastics: “The pontiff cannot be absolutely dissolved nor bound by secular power. Nicholas pope. He, called god by the pious prince Constantine, it is clear that he cannot be judged by men, but by God.”³⁸¹ Gratian then in *dist.* XL took over from St. Ivo of Chartres and partially transcribed *Fragmentum A*, in essence repeating by the words “*nisi deprehendatur a fide devius*” that “The First See is judged by no one, unless he would be found deviating from the faith.”³⁸²

Therefore, in one of the greatest canonical collections in history two canonical traditions of *prima sedes* principle meet: one, supported by the Symmachian apocrypha, of unconditional immunity of the pope and other, originating from times of Gregory the Great and Isidore of Seville, developed by Humbert de Candida Silva of the conditional immunity of the pope, *i. e.*, in the case of heresy the pope can be reprimanded. Thus, it is not surprising that the decretists, *i. e.*, the commentators of Gratian’s decree³⁸³, had a basis for extending the heresy clause to the pope who was sinful, incorrigible and notorious, and therefore scandalous.³⁸⁴

Ullmann explained in detail the relationship of the pope and the emperor, stressing how the pope strove to rise above the emperor, among others, invoking also the legal terminology and arguments.³⁸⁵ Pope thus became the “celestial emperor”, to whom the Roman principle “*principle legibus solutus est*” would apply. Nevertheless, as is already visible from the clause “*nisi deprehendatur a fide devius*”, there was a limit to the application of this rule.³⁸⁶

The *dist.* XL, c. 6 was shortly commented in *Summa* by Rufinus, who also included schism with heresy³⁸⁷, as well as in *Summa Parisiensis* (“*Si papa est inutilis et negligens et taciturnus, i.e. non instruens subditos, quod prae ceteris vitiis sibi nocet et subditis, si, inquam, talis est, non idcirco minus quia papa est, et hoc est nihilominus, se et subditos ducit ad infernum. Sed tamen non est arguendus nisi in fide erret...*”).³⁸⁸ It can be also noticed that the author of *Summa*

³⁸⁰ For more see: *Decretum Gratiani, dist.* XXI, c. 7.

³⁸¹ DG, *dist.* XCVI, c. 7.

³⁸² DG, *dist.* XL, q. III, c. XI (the text is given in fn. 376).

³⁸³ See Pennington, K.; Müller, W. P., *The Decretists: The Italian School*, in Hartmann, W.; Pennington, K. (eds.), *The History of Canon Law in the Classical Period, 1140-1234*, Catholic University of America Press, Washington, 2008, p. 142-160.

³⁸⁴ For more see: Tierney, B., *Foundations of Conciliar Theory*, Cambridge University Press, Cambridge, 1955, p. 57 *et seq.*

³⁸⁵ Ullmann, W., *Medieval Papalism. The Political Theories of the Medieval Canonists*, Routledge, London, New York, 1949 (2010), p. 118 *et seq.*, 154 *et seq.* See also: Le Bras, G., *op. cit.* in fn. 369, p. 392.

³⁸⁶ See Legendre, P., *La pénétration du droit romain dans le droit canonique classique de Gratien à Innocent IV, 1140-1254*, Jouve, Paris, 1964, p. 38-39.

³⁸⁷ Singer, H. (ed.), *Rufinus, Summa Decretorum*, Aalen, Scientia Verlag, 1963, p. 96.

³⁸⁸ McLaughlin, T. P. (ed.), *Summa Parisiensis*, Pontifical Institute of Mediaeval Studies, Toronto, 1952, p. 37.

Parisiensis added simony to the heresy for which the pope could be accused, in gloss to *dist. XVII, dict. p c. 6* (“”).³⁸⁹ Moynihan delved further into later *summae* to the *Decretum*, showing how Stephen of Tournai built upon Rufinus, but also adding that the pope could be tried for “dissipating the goods of the church”, but the following several did not follow suit.³⁹⁰ Simon de Bisignano wrote only of the heresy, also in the commentary to C. 24 q. 3 c. 29 (“*Si papa, scilicet quod tunc demum potest apostolicus de heresi accusari et dampnari a subditis cum heresim in qua est lapsus predicat et defendit. Si uero paratus est corrigi, non potest de heresi accusari, ut hic et infra, secundo c.*»).³⁹¹ The similar treatment is found in Sicard of Cremona.³⁹² Especially wider elaboration can be recognized in *Summa ‘Omnis qui iuste iudicat’ vel Lipsiensis*, where one reads: “*Set queritur si posset similiter accusari in crimine simonie vel si homicida esset. Et dicunt quod heresis et schisma ipsam violant ecclesiam et fundamentum maculant fidei, cetera autem peccata non corrumpunt unitatem, licet peccantes putrida membra sint ecclesie. Alii dicunt non esse speciale quod hic dicitur, idem enim potest fieri pro quolibet peccato notorio. Et ita dicit G.*”³⁹³ Also, the author of *Summa* stated that the heresy would exist only with regard to the reiteration of old, rejected doctrine, while not when proclaiming a new doctrine, which should be preferred to the others. Stressing the notoriety of a crime, there could be also mentioned *Summa ‘De iure canonico tractaturus’* by Magister Honorius (c. 1185-1191).³⁹⁴

Similar situation with the extension of the immunity exception is in the famous *Summa decretorum* prepared by Huguccio of Pisa (*Summa*, c. 1188-1190), who claimed that the pope could be tried for notorious crimes.³⁹⁵ Huguccio is often mentioned as the one who extended the application of the rule to the most.³⁹⁶ Ullmann especially used his work in explaining the range of the exception “*nisi a fide devius*”, where Huguccio also discussed the issue if the pope can derogate and abolish the same exception. The answer was that he could not *de jure*, because it would be heresy.³⁹⁷ In connection with Roman law, it should be stressed that in the eyes of later canonists, the heresy formed a crime of *laesae maiestatis*³⁹⁸, but this has not been

³⁸⁹ *Ibid.*, p. 17

³⁹⁰ Moynihan, J., *op. cit.* in fn. 354, p. 52-56.

³⁹¹ Aimone, P. V. (ed.), *Summa in Decretum Simonis Bisinianensis*, Fribourg, online edition, 2007, p. 39, 393.

³⁹² Moynihan, J., *op. cit.* in fn. 354, p. 61.

³⁹³ Landau, P.; Kozur, W.; Miethaner-Vent, K. (eds.), *Summa ‘Omnis qui iuste iudicat’ vel Lipsiensis*, Tom. III, Biblioteca Apostolica Vaticana, Città del Vaticano, 2014, p.166-167.

³⁹⁴ Weigand, R. (ed.), *Magistri Honorii Summa “De iure canonico tractaturus”*, Biblioteca Apostolica Vaticana, Città del Vaticano, 2010, p. 130.

³⁹⁵ More details in: *ibid.*, p. 75-82

³⁹⁶ See e.g. Ullmann, W., *op. cit.* in fn. 385, p. 155.

³⁹⁷ *Ibid.*, p. 156.

³⁹⁸ Decretal of Innocent III from 1199, X. 5, 7, 10. *Ibid.*, p. 183.

mentioned specifically in analyzed texts. At the end of the period of decretists, there should be mentioned *Johannes Teutonicus* who composed *Glossa ordinaria* on *Decretum* (c. 1215-1217), finalizing the development of the teaching based on *Decretum*, *i.e.* Humbert's definition of the principle.³⁹⁹ However, it incorporated elements from Huguccio and later decretists which were much conservative concerning the crimes, but which allowed that the pope commit heresy with a new doctrine, what Huguccio rejected, so it was very ambiguous.

11. DECRETALISTS AND THE *PRIMA SEDES* PRINCIPLE

We shall briefly comment one of the works of decretalists, the commentators of *compilationes antiquae*, *Liber Extra* and the later collections of Decretals, which formed a new source of law beginning with the late 12th Century.⁴⁰⁰ One of the reasons for that is also that here we can find the expected connection between the principle *prima sedes* and the *princeps legibus solutus*, specifically in the work of Goffredus de Trani, in his *Summa in Titulus Decretalium*, at X. V, 1: “*Accusari autem non possunt aliqui propter excellentiam Dignitatis, ut Papa et Imperator, ipsi enim supra ius sunt et legibus soluti sunt. Papa enim superiorem non habet nisi solum Deum, ut 9, q. 3, c. nemo, aliorum, nisi in crimine haeresi ut 40 dist. ca. si papa*”.⁴⁰¹ Goffredus compared here pope and the emperor in the sense that both were *legibus soluti*, *i.e.* above the law, however accepting the exception of heresy.

Similar words can be found in the beginning of the 5th book of *Summa Aurea* (c. 1250-1261), by Hostiensis, Henricus de Segusio (1200-1271)⁴⁰², where he practically wrote the same words: “*propter summae Dignitatis honorem, & quia solutae sunt legibus, ut Papa et Imperat, qui super se iudicem non habent*”; continuing that the emperor can be accused for sin by the pope, and the pope can be as well judged by general council for that one crime, with the reference to the *Decretum*.⁴⁰³ It is also added that the pope can freely accept to be judged by the emperor as a lower instance (“*quia quamvis minor sit, est tamen receptum quod imperio minoris iudicis se submittere possit*”), as a way to acknowledge also the earlier practices, but with a reference to the Digest, D. 2, 1, 14 (*Ulpianus libro 39 ad edictum*): “*Est receptum eoque iure utimur, ut si*

³⁹⁹ For a detailed overview see Moynihan, J., *op. cit.* in fn. 354, p. 104.

⁴⁰⁰ See for the early generation of decretalists Pennington, K., *The Decretalists 1190 to 1234*, in Hartmann, W.; Pennington, K. (eds.), *The History of Canon Law in the Classical Period, 1140-1234*, Catholic University of America Press, Washington, 2008, p. 211-245.

⁴⁰¹ Goffredus de Trano, *Summa super titulis Decretalium*, Lugdunum, 1519 (reprint Scientia, Aalen, 1968), p. 392 (195). See more in Moynihan, J., *op. cit.* in fn. 354, p. 114.

⁴⁰² See on Hostiensis more in: Pennington, K., *Popes, Canonists and Texts, 1150-1550*, Ashgate, Aldershot, 1993, art. XVI.

⁴⁰³ Henricus de Segusio, *Summa aurea*, Coloniae, 1612, p. 1193.

quis maior vel aequalis subiciat se iurisdictioni alterius, possit ei et adversus eum ius dici.”

According to this text, although a person holds a higher position, he can submit himself to the jurisdiction of a lesser power and is bound by its decision. Thus, Hostiensis added his knowledge of Roman law, although not so much for the future benefit of papal immunity, but as a way to justify the instances in which the pope came before the imperial court.

As we will see in the next chapter, on the basis of Gratian’s decree and the works of early canonists, the theologians and the later generations of canonists developed theories on how the procedure of the deposition of heretical pope should look like.

V. THE PROCEDURE OF THE DEPOSITION OF *PAPA HAERETICUS* ACCORDING TO BELLARMINE, SUAREZ, CAJETAN AND JOHN OF ST. THOMAS

We have seen that through the history of the Church and canon law the possibility of the heresy as the exception to the *prima sedes* principle was recognized. Theologians and canonists through centuries were entertained with the idea, so they were developing theories on how the procedure of deposition of *papa haereticus* should look like, none of which have been definitively adopted by the Magisterium till this day.⁴⁰⁴ When the pope could be deposed? By whom he could be deposed? In what moment is he deposed? In this chapter we will try to make a brief summary of outlines of the procedure of papal deposition based on the writings of great theologians and canonists: Tommaso de Vio Cardinal Cajetan (1469-1534)⁴⁰⁵, St. Robert Bellarmine (1542-1621)⁴⁰⁶, Francisco Suarez (1548-1617)⁴⁰⁷ and John of St. Thomas (1589-1644)⁴⁰⁸. Inspired by the *Decretum Gratiani*⁴⁰⁹, they recognized the possibility of the deposition of heretical pope⁴¹⁰, not violating the *prima sedes* principle.

1. WARNING THE POPE

⁴⁰⁴ “Should, indeed, the pope fall into heresy, it is understood that he would lose his office. To fall from Peter’s faith is to fall from his chair. The question, however, of who or what body (probably a general council) would determine whether, in fact, the pope had fallen into heresy is unclear historically and is obviously not settled by this canon [c. 1404 of *CIC/1983*].” (Beal, J. P. *et al.*, *op. cit.* in fn. 197, p. 1618).

⁴⁰⁵ Volz, J., *Tommaso de Vio Gaetani Cajetan*, in: *The Catholic Encyclopedia*, vol. 3, Robert Appleton Company, New York, New York, 1908, <https://www.newadvent.org/cathen/03145c.htm>.

⁴⁰⁶ Smith, S., *St. Robert Francis Romulus Bellarmine*, in: *The Catholic Encyclopedia*, vol. 2, Robert Appleton Company, New York, 1907, <https://www.newadvent.org/cathen/02411d.htm>.

⁴⁰⁷ Pérez G., A., *Francisco Suárez*, in: *The Catholic Encyclopedia*, vol. 14, Robert Appleton Company, New York, 1912, <https://www.newadvent.org/cathen/14319a.htm>.

⁴⁰⁸ O’ Daniel, V., *John of St. Thomas*, in: *The Catholic Encyclopedia*, vol. 8, Robert Appleton Company, New York, 1910, <https://www.newadvent.org/cathen/08479b.htm>.

⁴⁰⁹ Cajetan: “But the pope is liable to the penalty of deposition on account of the crime of heresy, as the doctors generally say, influenced by [the canon] *Si Papa* (dist 40, ch 6).” (Thomas de Vio Cardinal Cajetan – *De Comparatione Auctoritatis Papae et Concilii*, translated from Latin in: Burns, J. H.; Izbicki, T., *Conciliarism & Papalism*, Cambridge University Press, New York, 1997, p. 102). Bellarmine: “[H]eretical Pope can be judged is expressly held in the Canon, *Si Papa*, dist. 40...” (Bellarmine, R., *De Romano Pontefice*, translated from the Latin by Ryan Grant, Mediatrix Press, 2015, bk. 2, ch. 30). John of St. Thomas: “A specific text is found in the Decree of Gratian, Distinction 40, chapter ‘*Si Papa*,’... This exception obviously means that in case of heresy, a judgment could be made about the Pope.” (John of St. Thomas, *Cursus Theologici II-II. De Auctoritate Summi Pontificis*, disp. II, art. III, *De Depositione Papae*, p. 133, translation according to the Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 336).

⁴¹⁰ Salza and Siscoe are also talking about the extreme case of the pope schismatic according to the Theologians (*e. g.*, if the pope were to abandon the Catholic Church and become Lutheran pastor). For more see: Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 280 *et seq.*

As we have already explained⁴¹¹, there is a difference between sin and crime of heresy. The common opinion of theologians is that the pope can be judged and deposed only for crime of heresy.^{412, 413} Pope would have to manifest both matter (denial or doubt of faith) and form (pertinacity) of heresy. For pertinacity to be established, Theologians, inspired by divine law⁴¹⁴, propose *the system of warnings*.⁴¹⁵ Cajetan, after reflecting on the extreme opinions⁴¹⁶ states: “Accordingly, the middle and reasonable opinion is that *a heretic pope after two admonitions must be deposed*, since the apostle Paul, determining this point, says ‘A man that is a heretic, after the first and second admonition, avoid... Therefore, a heretic pope delinquent in faith, after a first and second admonition, must be shunned by deposition... A reasonable limit is defined as a threefold offence with a twofold admonition.’”⁴¹⁷ Bellarmine, commenting on Cajetan’s view of papal deposition also proposed twofold warning: “the fourth opinion is that of Cajetan [manifestly heretical Pope is not *ipso facto* deposed, but can and must be deposed by the Church]⁴¹⁸... [T]his opinion cannot be defended. For, in the first place, it is proven with

⁴¹¹ See *supra* III.5.1.

⁴¹² For example, John of St. Thomas wrote: “The pontiff cannot be deposed and lose the pontificate unless two conditions are fulfilled together: that the heresy is not hidden, but public and legally notorious; and then he must be incorrigible and pertinacious in his heresy. If both conditions are fulfilled the pontiff may be deposed, but not without them.” (John of St. Thomas, *op. cit.* in fn. 409, p. 133, translation according to the Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 296.) Suarez say: “I affirm: if he were a heretic and incorrigible, the Pope would cease to be Pope just when a sentence was passed against him for his crime, by the legitimate jurisdiction of the Church. *This is the common opinion among the doctors.*” (Francisco Suarez, *Opus de triplici virtute theologica, fide, spe, et charitate*, published by H. M. Birckmann, 1622, *disp.* X, *sect.* VI, p. 187 *et seq.*, translation according to the Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 296.

⁴¹³ As Cajetan, explains that does not mean that to him positive canon law is applied, *i. e.* he does not *ipso facto* excommunicated: “Since every excommunication, which is an ecclesiastical censure is based on positive law, which does not have coercive power over the pope in the ecclesiastical forum, whereas excommunication implies coercion in the ecclesiastical forum, we must conclude that the pope cannot incur any censure. The doctors carry this point so far that St. Thomas says that the pope cannot confer upon anyone the power to excommunicate him. Albert the Great and Saint Bonaventure are of the same opinion, as Lord Juan de Torquemada reports of them.” (Cajetan, *De Comparatione*, translation according to Burns, J. H.; Izicki, T., *op. cit.* in fn. 409, p. 102-103.) To the pope only the divine law can be applied.

⁴¹⁴ “A man that is a heretic, after the first and second admonition, avoid: Knowing that he, that is such an one, is subverted, and sinneth, being condemned by his own judgment.” (Tit 3: 10-11).

⁴¹⁵ St. Thomas explains that the admonition of superiors is not the act of jurisdiction, due to the fact that no one in the church possess the jurisdiction over the Roman Pontiff, but the act of charity: “A subject is not competent to administer to his prelate the correction which is an act of justice through the coercive nature of punishment: but the fraternal correction which is an act of charity is within the competency of everyone in respect of any person towards whom he is bound by charity, provided there be something in that person which requires correction.” (*ST*, II-II, q. 33, a. 4.) We also have an example of Paul rebuking Peter in Gal 2:11, St. Thomas comments: “It must be observed, however, that if the faith were endangered, a subject ought to rebuke his prelate even publicly. Hence Paul, who was Peter’s subject, rebuked him in public, on account of the imminent danger and scandal concerning the faith.” (*Ibid.*)

⁴¹⁶ One opinion holds that a heretical Pope cannot be deposed for heresy even if his crime has been publicly confessed (which, as we’ve seen, would render him notorious by notoriety of law). The other opinion maintains that a Pope can be deposed for a single lapse into heresy, without perseverance. (Salza, J., Siscoe, R., *op. cit.* in fn. 9, p. 243).

⁴¹⁷ According to the translation in Burns, J. H.; Izicki, T., *op. cit.* in fn. 409, p. 102-103.

⁴¹⁸ See *infra* V.2.2.

arguments from authority and from reason that the manifest heretic is *ipso facto* deposed. The argument from authority is based on Saint Paul (Titus, 3:10), who orders that the heretic be avoided after two warnings, that is, after showing himself to be manifestly obstinate which means before any excommunication or judicial sentence ...”⁴¹⁹ John of St. Thomas, explaining that Bellarmine and Cajetan in fact do not disagree⁴²⁰, states: “The first point of Cajetan is obvious and is not contradicted by Bellarmine... First, because the Pope, no matter how real and public may be his heresy, if he is prepared to be corrected, he cannot be deposed..., and the Church cannot depose him, according to divine law, for she cannot or should not avoid him since the Apostle [Paul] says, ‘avoid the heretic after the first and second correction’; therefore, before the first and second correction he should not be avoided, and consequently he should not be deposed; therefore it is wrong to say that the pope is deposed (*ipso facto*) as soon as his heresy is made public: he may be a public heretic, if he has not yet been corrected by the Church, and not declared incorrigible.”⁴²¹ We can see that, to establish the pertinacity of papal heresy, all three theologians propose two warnings before further proceedings.⁴²²

2. Deposition of the Pope

Bellarmino, in *De Romano Pontifice*, expounded five opinions concerning the implications of a heretical Pope.⁴²³ First opinion is: “[T]he pope cannot be a heretic”, *i. e.*, can never fall into heresy (*e.g.*, Pighius)”, while the second is: “[T]he Pope, in the very instant in which he falls into heresy, even if it is only interior, is outside the Church and deposed by God, for which reason he can be judged by the Church”, *i. e.*, the pope loses his office *ipso facto* for occult heresy (*e.g.* Torquemada⁴²⁴). Third opinion would be: “[T]he Pope is not and cannot be deposed either by secret or manifest heresy...” (*e. g.* Bouix⁴²⁵); fourth: “The manifestly heretical pope

⁴¹⁹ Bellarmine, *op. cit.* in fn. 409, bk. 2, ch. 30.

⁴²⁰ Bellarmine misunderstood that Cajetan in the first point is referring to the sin of heresy, not a crime. For more see: Salza, R.; Siscoe, J., *op. cit.* in fn. 9, p. 342.

⁴²¹ John of St. Thomas, as quoted and translated in Salza, R., Siscoe, J., *op. cit.* in fn. 9, p. 243.

⁴²² As regards to the question of who in the Church would be competent to issue this warnings, Fr. Ballerini, the eminent 18th century theologian thinks of Cardinals, the Roman Clergy or Roman Synod: “Is it not true that, confronted with such a danger to the faith [a Pope teaching heresy], any subject can, by fraternal correction, warn their superior, resist him to his face, refute him and, if necessary, summon him and press him to repent? The Cardinals, who are his counselors, can do this; or the Roman Clergy, or the Roman Synod, if, being met, they judge this opportune.” (Ballerini, P., *De Potestate Ecclesiastica, Monasterii Westphalorum*, Deiters, 1847, ch. 6, sec. 2, p. 124-125, translation according to Salza, R.; Siscoe, J., *op. cit.* in fn. 9, p. 241-242).

⁴²³ Quotes taken from Bellarmine, R., *op. cit.* in fn. 409, bk. 2, ch. 30.

⁴²⁴ For more on opinion of Torquemada see: Mirus, A., J., *On the Deposition of the Pope for Heresy*, Archivum Historiae Pontificiae, vol. 13, 1975, p. 237-238.

⁴²⁵ For more on the opinion of Bouix see: Bouix, *Tractatus de Papa*, tom. II, Lecoffre Filio Et Sociis Succesoribus, Paris-Lyon, 1869 p. 670.

is not *ipso facto* deposed, but can and must be deposed by the Church.” (e.g., Cajetan, John of St. Thomas). Finally, the fifth is: “[P]ope who is a manifest heretic, ceases by himself to be pope and head, just as he ceases in himself to be a Christian and member of the body of the Church: whereby, he can be judged and punished by the Church.” (e.g., Bellarmine, Suarez). Only fourth and fifth opinion are more widely accepted. Fourth opinion is represented by the two Dominicans, Cajetan and John of St. Thomas, while the fifth opinion is represented by two Jesuits: Bellarmine and Suarez. For better understanding we will start with the fifth opinion.

2.1. Papal Deposition according to Bellarmine and Suarez

As regards to the deposition of heretical pope, Bellarmine wrote: “The fifth opinion therefore is the true one. A pope who is a manifest heretic, automatically ceases to be pope and head, just as he ceases automatically to be...a member of the Church... [and] he can be judged and punished by the Church. This is the teaching of all the ancient Fathers who teach that manifest heretics immediately lose all jurisdiction.”^{426, 427} Suarez stated in similar words: “Therefore on deposing a heretical Pope, the Church would not act as superior to him, but juridically and by the consent of Christ, she would declare him a heretic [crime] and therefore unworthy of Pontifical honors; he would then *ipso facto* and immediately be deposed by Christ, and once deposed he would become inferior and would be able to be punished.”⁴²⁸

In general, both Bellarmine and Suarez held that after the crime of heresy has been established by the Church authorities, a heretical Pope loses his office *ipso facto* as a matter of divine law, without any role of the Church in severing the bond of man to the office of the papacy. The Church just gives the declarative sentence that the pope is guilty of the crime of heresy.⁴²⁹ At this point, God immediately severs the bond that unites the man to the office, and he falls *ipso facto* from the pontificate. The *ipso facto* fall from the pontificate could be followed by a separate declaration of deprivation, confirming that the former pope has fallen from his office due to the crime of heresy, where the former pope could be punished according to the positive canon law.

⁴²⁶ Bellarmine, *op. cit.* in fn., bk. 2, ch. 30.

⁴²⁷ He is also comparing the deposition with the election of the pope: “Jurisdiction is certainly given to the Pontiff by God, but with the agreement of men [*i.e.*, the election] as is obvious; because this man, who beforehand was not Pope, has from men that he would begin to be Pope, therefore, he is not removed by God unless it is through men. But a secret heretic cannot be judged by men...heresy, the only reason where it is lawful for inferiors to judge superiors ... in the case of heresy, a Roman Pontiff can be judged.” (*Ibid.*)

⁴²⁸ Suarez, *op. cit.* in fn. 412, n. 10, p. 189 (translation according to Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 275).

⁴²⁹ While Suarez mentioned the declaration by the Church, Bellarmine did not (used by Sedevacantists, see *supra* fn. 11), although it can be implicitly understood from the context.

2.2. Papal Deposition according to Cajetan and John of St. Thomas

After rejecting two extreme opinions regarding the deposition of the pope⁴³⁰, Cajetan considered two middle opinions, choosing the second: “The middle way too has a double aspect: one holds that although the pope, absolutely speaking, has no superior on earth, nevertheless he does have a superior on earth in the case of heresy, the universal Church. The other holds that the pope has no superior on earth, either absolutely or in the case of heresy, but that he is subject to the universal Church’s ministerial power exclusively in regard to deposition.”⁴³¹ After he rejected first middle opinion as the form of Conciliarism⁴³², choosing the second he continued: “In short, no where do I find superiority or inferiority from divine law in the case of heresy, but [only] separation. Now it is obvious that the Church can separate itself from the pope only by the ministerial power whereby it can elect him. Therefore, the fact that it is laid down by divine law that a heretic should be avoided and banished from the Church does not create a need for a power which is greater than a ministerial one. [This ministerial power] consequently is sufficient [for the separation]; and it is known to reside in the Church.”⁴³³ According to Cajetan, the Church in no case has the authority over the pope, but according to the divine law, *i. e.*, Tit 3:10 has the right to separate from heretic, even if he is the pope.⁴³⁴ In that case it can exercise its ministerial power, judging that the pope is guilty for the crime of heresy and then separating from him, by virtue of juridical act, by which it will declare to the faithful that he must be avoided.

John of St. Thomas, although he agreed with Suarez and Bellarmine that heretical pope is deprived of the pontificate immediately by Christ, after his pertinacity is declared⁴³⁵, inspired by Cajetan, claimed that fall from the pontificate occurs not when the Church establishes and declares that the pope has committed the crime of heresy, but rather when the Church issues the

⁴³⁰ “We say, therefore, that there are two extreme ways, both of them false: one is that the pope who has become a heretic is deposed *ipso facto* by divine law without human judgment; the other is that a pope, while remaining pope, has a superior over him on earth by which he can be deposed.” (Cajetan, *De Comparatione*, translation according to Burns, J. H.; Izbicki, T., *op. cit.* in fn. 409, p. 83).

⁴³¹ *Ibid.*

⁴³² For more on Conciliarism see *infra* fn. 458

⁴³³ Cajetan, *De Comparatione*, translation according to Burns, J. H.; Izbicki, T., *op. cit.* in fn. 409, p. 84.

⁴³⁴ John of St. Thomas claimed the same: “[I]t can never happen that the Church has power over the pope formally... One cannot cite any authority stating that Christ the Lord has given the Church authority over the pope. Those who were cited in the case of heresy, do not indicate any superiority over the Pope formally, but only speak of avoiding him, separating from him, refusing the communion with him, *etc.*, all of which can be done without requiring a power formally above the Pope’s power.” (John of St. Thomas, *op. cit.* in fn. 409, p. 138, translation according to Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 275).

⁴³⁵ *Ibid.*, p. 139, translation according to Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 346.

declaratory sentence and command the faithful by juridical act the man must be avoided: “The authority of the Church has for its object the application of the power of the Pope (form) to a given person (matter), by designating that person by election⁴³⁶; and the separation of this power from the person, by declaring him to be a heretic and as one to be avoided by the faithful. And so, because the declaration of his crime works like an anticipatory disposition, preceding the deposition itself, it relates to the deposition only ministerially; nevertheless, it also reaches the form itself dispositively and ministerially, insofar as it causes the disposition, and thereby indirectly (mediately) influences the form... The Church is able to declare the crime of the pontiff and, according to divine law, propose him to the faithful as one who must be avoided, according to the manner in which heretics should be avoided [Titus 3:10]. The Pontiff, however, by the fact of having to be avoided, is necessarily rendered impotent by the force of such a declaration, since a Pope who must to be avoided is unable to influence the Church as its head. Therefore, by virtue of such a power, the Church dissolves ministerially and dispositively the link of the pontificate with such a person...”⁴³⁷ Thus, although juridical act can be issued simultaneously with the declaration of papal crime of heresy, according to John of St. Thomas it is the juridical act that causes the pope to fall from the office, not just the declaratory sentence, as Bellarmine and Suarez claimed. This essential difference between the two positions is more of an academic and legal nature. From the perspective of Catholic faithful there would be no practical difference.⁴³⁸

3. WHO CAN JUDGE⁴³⁹ AND DEPOSE A POPE?

⁴³⁶ Like Bellarmine (see *supra* fn. 405) he compared a deposition to the election. “Thus by declaring a pontiff as *vitandus* [to be avoided], the Church can induce a disposition in that person (the matter) by which the pontificate (the form) cannot remain, and thus it [the union of form and matter] is thus dissolved ministerially and dispositively by the Church, and authoritatively by Christ; likewise, by designating him by election, she ultimately disposes him to receive the collation of power [directly] by Christ the Lord, and thus [the Church] ministerially creates a pope.” (*Ibid.*, translation according to Salza, J., Siscoe, R., *op. cit.* in fn. 9, p. 355).

⁴³⁷ *Ibid.*, p. 138-139 (translation according to Salza, J., Siscoe, R., *op. cit.* in fn. 9, p. 353-355).

⁴³⁸ John of St. Thomas explained how there is not real contradiction between his and Cajetan’s position (that the Church plays ministerial part in the papal deposition) and position of Bellarmine and Suarez (that the pope is *ipso facto* deposed by God once the Church judges his crime): “[According to this explanation] the provisions of the law, which sometimes affirm that the deposition of the Pontiff belongs to God alone, and sometimes say that he can be judged by inferiors in case of heresy, are in harmony. Both are true. For on the one side, the ‘ejection’ or deposition of the Pope is reserved only to God alone authoritatively and principally, as stated in the Decree of Gratian, Distinction 79 (Pars I, D 79, c. 11) and in many other places of the law, which say that God has reserved to Himself the judgment of the Apostolic See. On the other hand, the Church acts ministerially and dispositively by judging the crime and proposing him to the faithful as one to be avoided, and in this way she judges the Pontiff, as stated in the Decree of Gratian, in Dist. 40, chapter “Si Papa” (Pars I, D 40, c. 6) and in Part II, Chapter “oves” (q. 7 c. 13).” (*Ibid.*, p. 139, translation according to Salza, J., Siscoe, R., *op. cit.* in fn. 9, p. 355-356).

⁴³⁹ As we can see, Theologians by the term “judging the pope” understand establishing that he has deviated from the faith, *i. e.*, that he has committed the crime of heresy, and therefore he is already judged. Peculiar is the teaching

The unanimous opinion of theologians is that the authority of the Church has to judge whether the pope has committed the crime of heresy in the procedure of his deposition, not private individuals⁴⁴⁰.⁴⁴¹ Suarez claimed: “I affirm: if he were a heretic and incorrigible, the Pope would cease to be Pope just when a sentence was passed against him for his crime, by the legitimate jurisdiction of the Church. This is the common opinion among the doctors.”⁴⁴² John of St. Thomas wrote: “The pontiff cannot be deposed and lose the pontificate unless two conditions are fulfilled together: that the heresy is not hidden, but public and legally notorious [*i. e.*, declared by the competent Church authority]⁴⁴³; and then he must be incorrigible and pertinacious in his heresy...”.⁴⁴⁴ Commenting on St. Jerome he also said: “When St. Jerome says that a heretic separates himself from the body of Christ, he does not exclude a judgment by the Church, especially in such a serious matter as the deposition of the Pope. He refers instead to the nature of the crime, which is such *per se* to cut someone off from the Church, without any further censure attached to it – yet only so long as it should be declared by the Church;... be he ever so manifestly heretical according to private judgment, he remains as far as we are concerned a member of the Church and consequently its head.”⁴⁴⁵ But who in the Church would possess the authority to proceed against the heretical pope?

of Innocent III from 12th century: “[The Roman Pontiff] should not mistakenly flatter himself about his power, nor rashly glory in his eminence or honor, for the less he is judged by man, the more he is judged by God. I say ‘less’ because he can be judged by men, *or rather shown to be judged, if he clearly loses his savor to heresy*, since he ‘who does not believe is already judged’ (John 3:18) ...” (Innocent III, *Sermon 4: On the Consecration of Pontiffs*, in: Noble, T. (ed.), *Pope Innocent III: Between God and Man – Six Sermons on the Priestly Office*, The Catholic University America Press, Washington D. C., 2004, p. 49.

⁴⁴⁰ John of St. Thomas explains: “[A] heretic should be avoided after two admonitions legally made and with the Church’s authority, and not according to private judgment. For great confusion would follow in the Church if it would suffice that this warning could be made by a private individual, rather than by a declaration coming from the Church stating that all must avoid him... [T]he indictment of an individual does not bind, since it is not juridical, and consequently none would be obliged to accept it and avoid him. Therefore, it is necessary that, just as the Church designates the man and proposes him to the faithful as being elected Pope, thus also the Church declares him a heretic and proposes him as one to be avoided.” (John of St. Thomas, *op. cit.* in fn. 409, p. 139, translation according to Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 250).

⁴⁴¹ Already in the 9th century at the Constantinople IV there is this teaching of the Magisterium: “And does our law judge a person without first giving him a hearing and learning what he does? Consequently, this holy and universal synod justly and fittingly declares and lays down that no lay person or monk or cleric should separate himself from communion with his own patriarch before a careful inquiry and judgment in synod. (...) If anyone shall be found defying this holy synod, he is to be debarred from all priestly functions and status if he is a bishop or cleric; if a monk or lay person, he must be excluded from all communion and meetings of the church [*i.e.* excommunicated] until he is converted by repentance and reconciled” (Fourth Council of Constantinople, Canon 10, 869-870, <https://www.papalencyclicals.net/councils/ecum08.htm>).

⁴⁴² Suarez, *op. cit.* in fn. 412, p. 188, n. 3 (translation according to the Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 296).

⁴⁴³ For example, legal notoriety in *CIC/1917*: “Notorious by notoriety of law, [if it is] *after a sentence by a competent judge that renders the matter an adjudicated thing, or after confession by the offender made in court...*” (*CIC/1917*, c. 2197., pt. 2.)

⁴⁴⁴ John of St. Thomas, *op. cit.* in fn. 387, p. 133, translation according to Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 296.

⁴⁴⁵ John of St. Thomas, *op. cit.* in fn., p. 26, translation according to Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 299.

Mattheus Conte a Coronata in 17th century proposed the Cardinals: “A Pontiff, lapsed into heresy, can most justly be deposed... [H]is casting-out and new election ought to be urged by the assembly of the Sacred Cardinals.”⁴⁴⁶ But common opinion of the theologians would be that the task of handling the procedure of papal deposition would pertain to the ecumenical council.⁴⁴⁷ Cardinal Cajetan, inspired by the recent events of his time, as we will see⁴⁴⁸, stated: “[T]he pope can be deposed legitimately because, granted that power to depose the pope resides in the council apart from the pope, it must be able to assemble its scattered members, in order to depose him; otherwise, while a pope who must be deposed refused to summon a council, he could not be deposed...[I]n a case of heresy, the connection between the papacy and that particular person is subject to the decision of the Church and the universal council, so that [the heretical Pope] can be deposed.”⁴⁴⁹ Cajetan emphasized the difference between council with the pope and council without the pope, *i. e.*, as he put it, an absolutely perfect council (*perfect council*) which can define dogmas and issue decrees that regulate the Church, and a perfect council in relation to the present state of the Church (*imperfect council*) which cannot regulate the Church, but can only decide on the matter due to which it was convoked.⁴⁵⁰ According to Cajetan there are only two cases in which this kind of council could be convoked – *papal heresy* and *papal schism*: “Although human cases vary in infinite ways ... there are only two cases that have occurred or can ever occur, in which, I declare, such a council should be summoned. The

⁴⁴⁶ Conte a Coronata, M, *Tractatus Postumus*, Liege, 1677, tract 1, ch. 21, p. 80-81, n. 2, translated by Alexis Bugnolo. John of St. Thomas explained why it would not be cardinals, invoking historical examples, even a Symmachian forgery: “It must be said that the declaration of the crime does not come from the Cardinals, but from a general council. This is evident, firstly, by the practice of the Church. For in the case of Pope Marcellinus, who offered incense to idols, a synod was gathered together for the purpose of discussing the case, as is recorded in Distinction 21, Chapter 7, (“*Nunc autem*”). And in the case of the [Great Western] Schism, during which there were three reputed pontiffs, the Council of Constance was gathered for the purpose of settling that schism. Likewise, in the case of Pope Symmachus, a council was gathered in Rome to treat the case against him, as reported by Antione Augustine, in his *Epitome Juris Pontifice Veteris* (Title 13, Chapter 14); and the sections of Canon Law quoted above show that the Pontiffs who wanted to defend themselves against the crimes imputed to them, have done it before a Council.” (John of St. Thomas, *op. cit.* in fn. 409, p. 137, translation according to Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 348). Suarez also concurred: “In the first place, who ought to pronounce such a sentence? Some say that it would be the Cardinals; and the Church would be able undoubtedly to attribute to them this faculty, above all if it were thus established by the consent or determination of the Supreme Pontiffs, as was done in regard to the election. But up to today we do not read in any place that such a judgment has been confided to them. For this reason, one must affirm that, as such, it pertains to all the Bishops of the Church, for, being the ordinary pastors and the pillars of the Church, one must consider that such a case concerns them...That is the common opinion among the doctors...” (Suarez, *op. cit.* in fn. 412, p. 188-190, nn. 3-10, translation according to Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 299).

⁴⁴⁷ Bellarmine, R., *De Membris Ecclesiae*, bk. I, *De Clerics*, ch. 7, in: Fevre, J. (ed.), *Opera Omnia*; Paris, 1870, p. 428-429

⁴⁴⁸ See *infra* V.3.1.

⁴⁴⁹ Cajetan, *De Comparatione*, translation according to Burns, J. H.; Izbicki, T., *op. cit.* in fn. 409, p. 66, 94.

⁴⁵⁰ “A perfect council according to the present state of the Church can be summoned without the pope and against his will, if, although asked, he himself does not wish to summon it; but it does not have the authority to regulate the universal Church, but only to provide for the issue then at stake.” (*Ibid.*).

first is when the pope must be deposed on account of heresy; for then, if he refused, although asked, the cardinals, the emperor, or the prelates can cause a council to be assembled⁴⁵¹, which will not have for its scope the care of the universal Church, but only the power to depose the Pope. The second is when one or more Popes suffer uncertainty with regard to their election, as seems to have arisen in the schism of Urban VI and others.⁴⁵² Then, lest the Church be perplexed, those members of the Church who are available have the power to judge which is the true pope, if it can be known, and if it cannot be known, [they have] the power to provide that the electors agree on one or another of them.”⁴⁵³ At the end, to see how the theory works in practice, there will be briefly described the last imperfect council: the council of Constance.

3.1. The Great Western Schism (1378-1417) and the Council of Constance (1414-1418)

After the period of “Avignon exile”⁴⁵⁴ with its French popes, the Roman populace demanded the election of an Italian. Urban VI (1378-1389), the Italian was elected. College of Cardinals, largely French, three months later had claimed that the elections were held under pressure and they declared Urban’s election void. They elected as the new pope Clement VII (1378-1394) who established his court at Avignon.

This was the beginning of the greatest and longest papal schism in history where the Church would have two dynasties of popes, each with his cardinals, under reciprocal excommunication. In 1409 there was an attempt to resolve the Schism at the Council of Pisa. Cardinals of both obediences gathered into a council and put on trial both popes, deposing them as heretics⁴⁵⁵ and schismatics. The new pope, Alexander V (1409-1410) was elected who died very quickly and was replaced by John XXIII (1410-1415). But neither of two previous popes resigned, so now, instead of a “disreputable duo”, the Church had a “cursed trinity”.⁴⁵⁶ The Gordian knot was finally cut at the Council of Constance, convoked by the German king Sigismund of Luxembourg (1368-1437). The council issued a decree *Haec Santa* claiming: “First [the council] declares that, legitimately assembled in the holy Spirit, constituting a general council and representing the catholic church militant, it has power immediately from Christ; and that

⁴⁵¹ As regards to the question on who would be competent to convoke the imperfect council, Cajetan and John of St. Thomas claimed pretty much the same. See John of St. Thomas, *op. cit.* in fn., p. 137, translation according to Salza, J.; Siscoe, R., *op. cit.* in fn. 9, p. 348.

⁴⁵² See *infra* V.3.1.

⁴⁵³ Cajetan, *De Comparatione*, translation according to Burns, J. H.; Izbicki, T., *op. cit.* in fn. 409, p. 66, 94.

⁴⁵⁴ Vatican.com, *The Avignon Exile*, <https://vatican.com/The-Avignon-Exile/>, 22.5.2018 (accessed 23.2.2023).

⁴⁵⁵ They were declared heretics because, by refusing to resign so the union can be achieved again, they violate the article of faith that calls the Church one and holy. See Schatz, K., *op. cit.* in fn. 69, p. 106.

⁴⁵⁶ *Ibid.*

everyone of whatever state or dignity, even papal, is bound to obey it in those matters which pertain to the faith, the eradication of the said schism and the general reform of the said church of God in head and members.”⁴⁵⁷

This decree was the basis for the council to meet and put an end to the schism. The “Roman” pope Gregory XII (1406-1415) was the only who resigned voluntarily. The “Avignon” pope Benedict XIII (1394-1423) defied, but he died six years later. As regards to the “Pisan” pope John XIII, although at the beginning he cooperated with Sigismund, when he had seen that he would have also be forced to resign, he fled, but was caught, arrested and deposed by the Council. The new pope, Martin V (1417-1431) was elected and Church again, after forty years had an undisputed head.⁴⁵⁸

⁴⁵⁷ *Ibid.*, p. 187.

⁴⁵⁸ All the turmoil of the Great Schism lead to the Conciliarism, a doctrine that ascribes superiority of general council over the pope (condemned by Pius II (1458-1464), see Denz., 717). At the Council the decree *Frequens* was also issued, by which the future popes would be obliged to convene councils at regular intervals. At the Council of Basel (1431-1447) the *Haec Santa* was misinterpreted, claiming that at Constance superiority of council over pope was established once and for all. They broke off with the pope Eugen IV (1431-1447) ending up in a schism which did not last long. See more in: Burn-Murdoch, H., *op. cit.* in fn.33, p. 356; Schatz, K., *op. cit.* in fn. 69, p. 109-110. However, these events planted a seed for great conciliar movements like Gallicanism and German episcopalism. See: Schatz, K., *op. cit.* in fn. 69, p. 133-143.

VI. CONCLUSION

In this age of extreme opinions and polarizations, also within the Catholic Church there can be observed such opposing tendencies concerning the papal statements and the concept of infallibility. Often, the opinions are expressed without the deeper understanding of theological, and especially legal-historical background of the institution of infallibility and its consequences, the issue which we have tried to address in this thesis. First, as the legal and legal-historical analysis are preconditioned by the clear statement of the topic of research, it has been explained the theological meaning of infallibility. It could be seen that the infallibility of the Church has its conditions and that its real purpose is the protection of the divine Revelation and its right understanding, that differs from the common perception that it is some kind of impeccability. Infallible statements require the assent of faith (or firm and definitive assent regarding secondary object of infallibility, but there is no real difference between two of them), while other magisterial utterances possess different kind of certitude and require different kind of assent.⁴⁵⁹ Papal infallibility is exercised rarely so the picture of “oracle pope”⁴⁶⁰ is misconceived. There is also the episcopal infallibility which belongs to the bishops, but only in their corporate capacity, not as to the individuals. Furthermore, there is the unanimous consensus of the Fathers and the Theologians considered infallible as well and which cannot be neglected. Finally, one should not disregard the *sensus fidelium* as a more profound and complex institute belonging to the infallibility, and which is much more than just ordinary “Church democracy”.

Theological concept of infallibility found its legal reflection in the articles 749 – 753 of the Code of Canon Law of 1983. Among these, arts. 749 and 750 are defining the infallibility and its objects, while art. 751 regulates the infringements of the infallibility in the form of heresy, apostasy or schism. With the latter, it should be added that the sin is not enough to incur punishments according to the current Code, but offense is necessary. Internal attitude does not suffice, but external transcendence is required. In connection with this crimes, one can notice in the discussions mentioned in the beginning, specifically referenced in the Introduction, and with regard to the infallibility, the issue if the pope could commit heresy. It has been historically attested within the ambit of the application of rule “*prima sedes a nemine iudicatur*” and its legal-historical analysis is the central.

⁴⁵⁹ See *supra* II.2.1.

⁴⁶⁰ See *supra* fn. 5

Regarding the *prima sedes* principle, since 5th century and the trial of the pope Symmachus till 12th century, two canonical traditions were intermingling. First one was introduced by the Palmar Synod, affirmed by St. Enodius and Symmachian forgeries, and later asserted by St. Peter Damiani and Anselmo of Lucca in their defense of the pope from proceedings by secular authorities, of absolute papal immunity where God is the only judge of the pope. According to the other, inspired by the writings of Gregory the Great and Isidore of Seville in connection to the episcopacy, disseminated by Pseudo-Isidorian forgery, developed during the time of Auxilius during *saeculum obscurum* and affirmed by Humbert de Silva Candida, the immunity of the popes is recognized with the one exception to it: heresy. *Prima sedes* principle was taken into canonical collections: in its absolute form, into *Dictatus Papae* and *Dictatus of Avranches* during Gregorian reform; and with “heresy clause” into great canonical collections of St. Ivo of Chartres and Gratian. For later centuries crucial was the inclusion of the clause in *Decretum Gratiani*, as the first and most important, although unofficial, codification of canon law, which also formed the basis for the university teaching of canon law. From there, as *dist. XV, c. 6*, it was elaborated by decretists who furtherly extended “heresy clause” to schism, dissipating Church property, murder and any other notorious sin. With regard to these works, and those of decretalists following them as well, it can be remarked that although they have included a rising number of references to Roman law sources, testifying the rising influence of the Roman law, in this question the influence was not as strong as in other issues. The authors like Ullmann have stressed the role of Roman law in a manner that the rising scholarship on Roman law and its use in the exposition of Imperial prerogatives was reflected in the canon law, especially in comparing the pope to the Roman emperor and applying to him Roman law principle: “*princeps legibus solutus*”. However, despite the fact that this could be concluded based on factual level, in the writings this is explicitly stated by the decretalist *Henricus de Segusio*, or *Ostiensis*, in his *Summa Aurea*. On the basis of these developments, theologians and canonists of 15th and 16th century developed theories of the procedure of deposition of *papa haereticus*. At the end, we tried to reconstruct these procedures, especially according to the writings of Cardinal Cajetan, Bellarmine, Suarez and John of St. Thomas.

Finally, we could see how in the legal-historical perspective there were expounded different opinions, by eminent canonists and theologians, on the principle “*prima sedes a nemine iudicatur*”, and specifically its exception clause “*nisi a fide devius*”. They were to a certain extent influenced by specific circumstances, but their core remained the same. As we are witnesses today, there are always situations which cause doubt or polarization, and in the opinion of the author the reason, why both of the two tendencies (which are explained in the

Introduction) arose among the faithful and the clergy, is the lack of knowledge and the desire for security, *i. e.*, trying to find easy solution in the hard times of moral and doctrinal crisis. However, it takes time and dedication to gather the knowledge and raise awareness of the totality of theological, legal and legal-historical precepts and their development, which, we hope, will be helped with the research conducted in this thesis.

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