

HISTORICAL ASPECTS ON THE RIGHT TO DUE PROCESS IN THE CHURCH FROM THE PERIOD OF CHARLEMAGNE TO THE CIC/1917

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For various reasons, Semitic law had no influence on the development of canon law. Therefore, this can be ignored here. However, from a legal point of view the Carolingian reform is based on legal traditions dating back to Roman law. The *Lex duodecim tabularum* (LDT)¹ from 451 BC provides the first source of reference. Table 1 LDT deals with issues of procedural law in formal trials. One of the fundamental ideas of Roman procedural law was to avoid a formal trial, if at all possible. It was considered to be preferable for the conflicting parties to come to an agreement out of court, rather than to start a trial the outcome of which was uncertain². This idea can be found in its modern form in can. 1446 §2 CIC/1983: *“Whenever the judge perceives some hope of a favourable outcome at the start of litigation or even at any other time, the judge is not to neglect to encourage and assist the parties to collaborate in seeking an equitable solution to the controversy and to indicate to them suitable means to this end, even by using reputable persons for mediation.”*

As far as we can see, the remaining fragments of the LDT deal with a wide range of aspects of the law, including procedural law. However, the standards are not as developed as we would expect nowadays. Table 2 LDT contains a number of provisions on the value of evidence, as well as on the rights and obligations of parties and witnesses. It was a fundamental tenet of Roman law that the exact reproduction of words and deeds had legal consequences. Intention was not so relevant. The Romans acknowledged that there could be witnesses to deeds and words, but not as to the parties' intentions. Roman civil law showed great flexibility when it came to integrating new ideas or foreign legal traditions found throughout the Roman Empire. Without replacing older laws, the Romans developed alternative forms of trials that allowed for greater fairness.

¹ Latin text fragments in: S. Riccobono (Ed.), FIRA (Fontes Iuris Romanis Antejustiniani), Bd. 1: Leges, Florenz 1968, S. 23-75. Online text provided at: <http://www.hs-augsburg.de/~harsch/leges.html>. (reviewed: 15.03.2012)

² Cf. LDT 1, 6: “Rem ubi pacunt orato”

The Roman tribune Gaius M. Aclius fundamentally reformed Roman procedural law with the *Lex Acilia Repetundarum* (123 BC)³, named after him. The idea was to replace the corrupt class-based justice system with a system that would provide the accused with a fair trial, irrespective of his social background. The core of this reform consisted in appointing judges from lower social ranks. Plutarch and Livius described various versions of how judges were appointed following this reform⁴.

In Roman law, since the times of the early Republic, the **accusatorial procedure** had become the dominant form of public trial; this became the standard for all private and public legal disputes. It should be pointed out that, at the time, trials were not yet strictly divided into private, public and criminal. The accusatorial procedure provided for a series of legal procedural institutions that enabled the litigious parties to successfully pursue their relevant legal interests from a procedural point of view. Despite several legal achievements, such as the judge freely considering evidence⁵, it proved to be inadequate for heresy trials due to the objective of such trials. Essentially, the accusatorial procedure followed the private law principle: “Where there is no plaintiff, there is no judge”. Furthermore, the private law principle applied, according to which only a person whose subjective rights had been harmed, had a right to bring a claim. The *inscriptio* (application) was an essential prerequisite to starting a trial. From a procedural point of view, the accusatorial principle presupposed a public plaintiff who also bore the burden of proof of his accusations. If, during the procedure, it was not possible to prove that the accused was guilty, the plaintiff became liable to the talion. This meant that, due to the unproved *accusatio*, the plaintiff was liable to see the same punishment inflicted on him than would have been meted out to the accused. Under Roman procedural law, which made no distinction between public, private and criminal proceedings, the plaintiff took a high risk when it came to initiating proceedings. Given this background, it becomes clear that, e.g., the persecution of heretics on the basis of the Edict of 380 did not appear very promising, despite the sliding-scale penalties provided for such crimes.

³ Cf. A. H. M. Jones, *De legibus Iunia et Acilia repetundarum*, *Proceedings of Cambridge Philosophical Society* 56 (1960), 39-42.

⁴ Cf. Livy O. cit., pp. 36-38, see especially p. 35 n. 5; Plutarch, C. GR., m5, 2f.; Cf. E. Badian, *Lex Acilia Repetundarum*, in: *The American Journal of Philology* (75) 1954, 374-384, 376.

⁵ Cf. Max Kaser, Karl Hackl (Bearb), *Römisches Zivilprozessrecht*, 2. Edition Munich 1996, P. 278

The **synodal court** was a judicial development in the Church of the 9th century that had its origin in bishops' visitations⁶. The term synodal is based on the word "synod" and refers to the (spiritual) morals courts that were regularly held. The procedure was based on the (Frankish) *Rüegericht*, a form of public criminal trial⁷. In this procedure, it was no longer the party harmed who brought the claim, but rather a publicly appointed person. Initially, the procedure did not result in criminal sanctions, but rather in the perpetrator being morally exposed, which would stigmatise him socially and thus prevent recurrence⁸. However, by as early as the end of the 8th century, the judges also resorted to corporal punishment, not excluding the death sentence⁹. The bishops' synodal court adopted the procedural classification of this type of procedure. The two books of the synodal manual of the Abbot Regino of Prüm provided the legal source: "*De causis synodalibus et ecclesiasticis disciplinis*"¹⁰. Claims and complaints that were lodged with these publicly held synodal courts, especially *delicta minora*¹¹ were judged by the bishop or his representatives. The bishop was the highest authority over the synod of the archdeaconry and the official *Delicta graviora*¹² also fell within his remit and these included crimes against the clergy and heresy. *Delicta minora* included: swearing, blasphemous talk, debauchery, carousal, card games, extra-marital relationships and children born out of wedlock, as well as disregard of Sunday rest through work in the fields and meadows. To judge capital offences, including heresy, in a synodal court seemed inappropriate from a procedural point of view, as the evidence didn't deal

⁶ Cf. Hans Erich Feine, *Kirchliche Rechtsgeschichte Bd. 1 Katholische Kirche*, Weimar 1955, P. 195.

⁷ Cf. Eike von Repkow, *Sachsenspiegel Lib. I Art. 2 §4*, in: *Des Sachsenspiegels erster Theil. oder das sächsische Landrecht nach der Berliner Handschrift v. J. 1369*, hg. von C. G. Homeyer, Berlin 1835, S. 29; zur Geschichte: Rudolf Quanter, *Die Folter in der deutschen Rechtspflege einst und jetzt*, Dresden 1900 (unchanged reprint Kevelaer 1998), P. 31-35.

⁸ Cf. Martin Scharfe, *Zum Rügebrauch*, in: *Hessische Blätter für Volkskunde* 61, 1970, P. 45-68.

⁹ Cf. Rudolf Quanter, a.a.O., P. 32; *Kapitular von Herstal (779)*: „(...) *Et si per odium aut malo ingenio, nisi per iustitiam faciendam, hominem defecerit*. (...)“; Text from: Karl Kroeschell, *Deutsche Rechtsgeschichte, Bd. 1 Opladen* 11999, P. 77 (my underlining).

¹⁰ *Reginonis Abbatis Prumiensis Libri Duo de Synodalibus Causis et Disciplinis Ecclesiasticis*, ed. F. W. A. Wasserschleben (Ed.), Leipzig 1840. New edition: Wilfried Hartmann (Hg.), *Das Sendhandbuch des Regino von Prüm, Dt.- Lat.*, (FSGA, A., Bd. 42), Darmstadt 2004.

¹¹ This is equivalent, in modern understanding, to an administrative offence or a minor breach of the law.

¹² This refers to capital crimes such as offences against life and limb and lese-majesty.

with events, but with the accused's *credibilitas*¹³. The charges were brought, not so much because the accused had committed a punishable offence, but rather because he had breached the peace and thus had offended the community. Evidence to the contrary was therefore not provided by proof of facts, but by an oath of purgation in which the accused swore that he was innocent of having breached the peace. As further evidence, the accused would try to bring more compurgators than the plaintiff¹⁴. This procedure of providing evidence had an obvious weakness. It was easier for influential people to provide such oaths of purgation than for people of lower social standing. The synodal courts privileged the higher classes. If a sufficient number of witnesses were willing to testify to the accused's honour, the claim was dropped; otherwise the accused was liable to church sanctions ranging from penitence to excommunication.

The next step in the development of procedural law was the **infamy trial**. This was based, on an *argumentum e contrario*, on **2 Cor 2, 15 and Phil 2, 25**, which provides, on the one hand, that only persons of good repute shall hold a parish office and, on the other hand, that members of the parish were also required to be of good repute. Thus, an infamy trial was instigated when a person had earned a bad reputation (*mala fama*) in respect of certain deeds (from a legal point of view), based on credible reports of others. The infamy trial presupposed a *denunciatio* of the accused. Anyone could make such a denunciation to the bishop. However, only the *publici officiales* were under an obligation to press charges¹⁵. In such cases, the relevant local bishop would usually order an investigation to be carried out, the *inquisitio famae ex officio*. This should not be confused with the heresy inquisition procedure, which is an independent kind of procedure, with a different trial objective. The sanction in this procedure was an infamy declaration. It entailed the loss of both active and passive voting rights, loss of civil liberties, and a bar on holding public offices. The accused, the so-called infamed, was able to clear his name, like in the synodal procedure, through an oath of purgation (*purgatio canonica*) with the assistance of several character witnesses. These witnesses did not testify as to the deeds, but as to the accused's

¹³ Hans Erich Feine, a.a.O., P. 197.

¹⁴ It should be mentioned as an aside that if the oath of purgation was unsuccessful, the accused could still demand a trial by ordeal, e.g. in the form of a duel.

¹⁵ Cf. Pier Aimone Braidà, Das Inquisitionsverfahren: seine Anfänge und Entwicklungen gemäß den ersten Dekretalisten, in: *Iustitia in caritate*, Festgabe für Ernst Rössler, Frankfurt am Main 1997, 77-99, P. 79.

general credibility and honourableness¹⁶. The accused was only found guilty in case of confession, i.e. an unsuccessful oath of purgation due to a lack of witnesses. However, confessions were hardly to be expected for capital offences and an oath of purgation was usually easy to produce for an influential person, such as the famous Dominican Master Eckhart (Echardus teutonicus [1260-1328])¹⁷.

The decisive legal procedural turnabout came with the introduction of the papal **inquisitorial procedure** introduced by Pope Innocent III on 26 February 1206 (1205 according to the calculation at the time). The original intention of these proceedings, as shown by the text of several relevant decretals¹⁸, was to make it easier than under previously available procedures to try church dignitaries. This type of trial had four specific characteristics:

- 1) The starting point of the procedure were the charges brought by the inquisitor in his capacity as public officer.
- 2) The *inquisitio* aims at investigating the material truth of the charges (principle of judicial investigation). The main elements of proof were witness testimonies, either as to events or, if that was not possible, as to the accused's general credibility.
- 3) The oath of purgation that originated in infamy trials was significantly less important in this type of procedure.
- 4) Especially because the adversarial party in the trial was public, the accused had a broad range of possibilities to defend himself, apart from the right to call witnesses and to answer charges. It is obvious from these procedural elements that this procedure was initially intended to be used solely within the Church to allow new forms of legal evidence.

In the decretal *Qualiter et quando*, the Pope instructs his delegates on the opening of proceedings through official action. It says: If the senior hierarchy hears about a crime "*per clamorem et famam*"¹⁹, but not from ill-intended and defamatory persons, but by level-headed and honourable

¹⁶ Cf. Stefan Esders, *Der Reinigungseid mit Helfern*, in: Stefan Esders (Hg.), *Rechtsverständnis und Konfliktbewältigung, gerichtliche und außergerichtliche Strategien im Mittelalter*, Cologne, Weimar, Vienna 2007, P. 55-78, 58 ff.

¹⁷ Cf. Winfried Trusen, *Der Prozess gegen Meister Eckhart. Vorgeschichte, Verlauf, Folgen*, Paderborn 1988.

¹⁸ *Licet heli* (1206), *Qualiter et quando* (1206), *Novit* (1206), *Quoniam contra falsam* (1206) printed in: Josef Wohlmuth (Hg.), *Dekrete der ökumenischen Konzilien, Band 2: Konzilien des Mittelalters*. Paderborn (u.a.) 2000, 227-271; Vgl. Winfried Trusen, *Der Inquisitionsprozess. Seine historische Grundlagen und frühen Formen*, in: *ZRGkan* 74 (1988), 168-230. Also Pier Aimone Braida, *Das Inquisitionsverfahren: seine Anfänge und Entwicklungen gemäß den ersten Dekretalisten*, in: *Iustitia in caritate, Festgabe für Ernst Rössler*, Frankfurt am Main 1997, 77-99, 99.

¹⁹ Cf. *Qualiter et quando*, a.a.O.

persons and not just once, but repeatedly, which would confirm the *clamor* and manifest the *diffamatio*, the *seniores* of the church are under an obligation to carefully investigate the matter. If necessary, the *canonica districtio* had to be applied to the delinquent. The *iudex* is not to be at the same time prosecutor and judge, but “*quasi deferente fama, vel denuntiante clamore officii sui debitum exequator*”²⁰. Innocent III provides in this connection clear indications on the procedural law to be followed, based on traditional types of procedures: the *accusatio criminalis*, aimed at *diminutio capitis*, on degrading, should never be accepted if not preceded by a legal *inscriptio*. However, if someone has been so badly defamed because of an offence, to the point that this has given rise to a general rumour that cannot be ignored without *scandalum* and tolerated without danger, then action needs to be taken, in a spirit of love and not anger, “*ad inquirendum et puniendum*”²¹. In such case, the accusation can be dispensed with, due to the obvious nature of the matter. The trial begins with the accused being summoned. If a serious offence has taken place, he should not “*ab ordine degradetur, tamen amoveatur omnino*”²².

Innocent III developed from Justinian, Frankish and canon sources the forms of trials that became compulsory for all ecclesiastical trials as from the **Fourth Lateran Council (1215/6)**. The basic idea behind this piece of legislation was that the “*publica fama*” surrounding an accusation replaced the charges and that, in such cases, it was the judge’s official duty to investigate the truth²³. The main intention of Frankish law was to fight crime and to stop perpetrators by calling witnesses to the offence. This, however, presupposed that the accused was not able to resort to an oath of purgation²⁴. *Qualiter et quando* represented, in the realm of the church, the change from disciplinary jurisdiction with sanctions to

²⁰ Ebd.

²¹ Ebd.

²² Ebd.

²³ Cf. Hubertus Zilkens, Entwicklung und Verfahren der Inquisition, in: Die Neue Ordnung (53) 1999, <http://www.die-neue-ordnung.de/Nr61999/HZ.html> (Access: 16.8.2010). Also Pier Aimone Braidà, a.a.O., 82.

²⁴ Cf. The earliest report comes from the charters of the Merovingian monarchy, here the *Decretio Childeberti* (596). From the Carolingian capitularies followed the *Capitulare de latronibus* (804-813), the *Capitulare Hludowici Pii* (815-819) and the *Capitulare Olonnense* (825). All mentioned provisions required the king’s representative to officially gather evidence: “*ut ubicumque eos repperirent diligenter inquirent et cum discretione examinent*” (*Capitulare de latronibus*). Cf. Eberhard Schmidt, Einführung in die Geschichte der deutschen Strafrechtspflege, Göttingen, 31995, 45.

systematic penal jurisdiction²⁵. From the point of view of legal doctrine, this was not a restoration of the inquisitorial procedures of antiquity (*cognitio*) but rather a modification of the infamy trials. What supports this theory convincingly is that the *denuntiatio evangelica*, based on Tit 3, 10-11, was applied mostly to heretic teachers. And the *denuntiatio* originated in infamy trials. However, as opposed to the trial forms just described, in the case of the inquisitorial procedure, it was no longer one of the parties to the conflict or a plaintiff, i.e. a promoter, who brought the charges, but a representative of the authorities who – and this is, in fact, problematic – also officiated as judge in his capacity as inquisitor.

From the point of view of legal doctrine, this procedure still constituted progress. For the first time, the investigation of the facts of the case through rational provision of evidence was at the forefront, and not the question of the accused's general or specific repute, which may have had no connection with the accusations. Especially witness testimonies were used to investigate the facts of a case. Circumstantial evidence was also admissible. The question was what the interrogated person was able to say, and with what degree of certainty, about the accusation and the alleged offence. Evidence based on divine judgements or oaths of purgation seemed inappropriate in view of the trial's objective and were successively banned after 1216²⁶. A new development came in 1215 with can. 38 of the Fourth Lateran Council (*Quoniam contra falsam*)²⁷, which provided for a *persona publica* to keep a record of the trial. This, even today, allows us to reconstruct with a fair degree of accuracy cases such as those of Echardus Teutonicus or Joan of Arc²⁸.

In line with the mentality of the time, in which the regular confession of sins was an obligation and part of the unchallenged practice of any Christian's faith, neither circumstantial evidence nor testimonies had much value, even when made *de proprio visu*. The accused's confession in court thus became the dominant form of evidence. While evidence

²⁵ Cf. Pier Aimone Braida, a.a.O., 99.

²⁶ 1219 England; 1247 Aragon; 1260 französische Kronomäne; vgl. Susanne Lepsius, *Der Richter und die Zeugen*, Frankfurt/M. 2003, 13.

²⁷ Can. 38, 4. Lateran Council 1215: Italian text in: http://www.intratext.com/IXT/ITA0138/_P12.HTM (Access: 24.8.2010). After this, the judge had to appoint a notary or two competent men to record the proceedings. In case of disagreement on the judge's actions or the course of the trial, the truth could be established on the basis of these documents. A copy was handed over to each party to the proceedings and one was kept in the court's archives. Cf. X.2.19.11 *Quoniam contra falsam*.

²⁸ Cf. Jaques Cordier, *Jeanne d'Arc, Kriegerin, Prophetin, Märtyrerin*, Augsburg 1996, with further evidence.

collection through witness statements, aimed at investigating the material truth, became well-established in Roman-canon trials, inquisition trials used a different approach²⁹. Yet, heresy inquisitions were not really about investigating the truth. In such cases, the inquisitors considered that the offence was already sufficiently established by the denunciation. Hence, we can conclude that the aim of the inquisition was to obtain a confession from the accused, as he couldn't be found guilty of a capital crime without such court confession. "Appearances" (circumstantial evidence) and "gnarly mouth" (confession) established the accused's guilt in medieval law³⁰.

Fundamentally, in gathering evidence, a distinction was made between the general and special inquisition. The general inquisition was a pre-trial investigation carried out on the basis of the denunciation. Its main purpose was to clarify whether there were genuine grounds leading to the denunciation, in other words, whether a main trial should follow. If the initial suspicion turned out to be well-founded, the trial continued with a special inquisition. This was based on the results of the pre-trial investigation and the aim was to investigate the accusations in greater detail, following the rules of procedure. These provided for the trial questions to be split up according to the inquisition articles. Proof had to be brought in respect of each and every article; i.e. they had to be confessed to. A fixed list of questions was used. Firstly, there were questions concerning the person (name, age, marital status, place of residence, employment,.....). This was followed by questions about the circumstances of the offence according to the articles of the inquisition. The minutes, which did not record the questions, reflect this rigid structure. However, as the answers to the inquisitors' questions were often recorded formulaically³¹, it's only possible to rely with some degree of certainty on this questions-and-answers pattern in prominent cases, such as that of Master Eckhard. It isn't possible in the other two Cologne trials which we are examining here.

This structure shows that the way the fundamental principle of official examination, adopted from Justinian law, was adapted to the inquisitorial procedure bordered on the absurd: the parties' status was curtailed and the possibility of using different types of evidence, both for the prosecu-

²⁹ Cf. Susanne Lepsius, *Der Richter und die Zeugen a.a.O.*, 14.

³⁰ Heinz Holzhauer, *Beiträge zur Rechtsgeschichte*, Berlin 2000, 206.

³¹ Vgl. Susanne Lepsius, *Von Zweifeln zur Überzeugung: der Zeugenbeweis im gelehrten Recht ausgehend von der Abhandlung des Bartolus von Sassoferrato*, Frankfurt/M. 2003, S. 401 ff.

tion and the defence, was effectively abrogated. This is also obvious from Master Eckhard's trial. Neither the prosecutor, nor the accused, was parties to the trial according to the modern understanding. The task of investigating the truth lay almost exclusively in the hands of the inquisition judge, who also brought the charges. The accused was simply the object of the proceedings and had no right to be heard, in the way that we believe an accused should be entitled to, as a party to legal proceedings. The accused participated in the trial only to the extent necessary to be found guilty.

In the golden age of canon law, Magister Gratian of Bologna compiled a systematic collection of standards and a unified, general collection of canons in the "*Concordia discordantium canonum*" (1140), also called *Nova Collectio* or simply *Decretum*, as previously Burchard von Worms had named his legal collection. According to research, Gratian used this as a model for his own collection. The *Decretum Gratiani* later became a fundamental part of the *Corpus Iuris Canonici*. Thus began a new era in canon law. No other collection of standards was ever as broadly received as that of Gratian. While the written law held a relatively weak position until the middle of the 12th century, the situation had now fundamentally changed. Customary law became increasingly less important. With the *Decretum Gratiani*, Roman (Justinian) law had a growing influence on canon law. Gratian adopted the former Roman legal interpretation of the law, that no one should be found guilty without formal trial. He does, however, arrive at this legal interpretation through a *via negativa argumentationis*. He said: "Obvious crimes don't require charges³²." For this, he bases himself on 1 Cor 5. If we look closely at the meaning of this legal rule, we can see that in practice this could only be applied to notorious and obvious crimes. In all other cases, a formal accusation was still needed. The following canon states that the exception mentioned was only applicable if the accused's guilt was obviously established (c.2 q. 1 c.16). In such cases, witness testimony was redundant. On the other hand, this precluded any possibility of dispensing with the due steps of procedural law, should there have been any doubts as to the accused's guilt.

In later periods, glossators gave a series of interpretations of the provisions. Apart from Gratian, two canonists of the 12th century, Rufinus (1130-1192) and Stephen of Tournai (1128-1203), dealt with questions of fair trial. They commented on the *Decretum Gratiani* and, specifically,

³² "Manifesta accusationem non indigent". C.2 q.1 c. 15

on his series of six main cases of court proceedings (C.2 q. 1). In doing so, Stephen (1160/61) highlights the elements of a fair trial. He says: "*Briefly, we should realise that ordo iudiciarius means someone is charged before his proper judge, that he is legitimately cited to court three times or once peremptorily, that the accusation is solemnly reduced to writing, that admissible witnesses are produced, and that judgement is not passed against someone unless he has been convicted or has confessed. The judgement itself must be in writing, unless the litigation is short or involves lowly persons*³³." However, Stephen does not explain whether he agrees with Gratian as to the procedure for *delicta manifesta*. Rufinus, in particular, provides a clearer answer in his gloss. He defines the categories of a manifest and notorious crime: "*Sometimes the guilty person who has committed a crime [only] once thereafter denies; sometimes the evidence of the thing itself (ipsa rei evidenti) so publicizes the crime that he is able by no device whatsoever to disavow it (nullo pacto diffiteri valeat), as in the case of that Corinthian fornicator who was publicly and immorally keeping his stepmother and so Paul excommunicated him without any accuser i.e. trial. At that point the crime is not only manifest but it is even called notorious*³⁴."

Stephen of Tournai sees a second possibility of dispensing with a formal trial, if the defence agrees with the proceedings being suspended in non-publicised cases. He says: Cases "*which are done publicly so that even the one who commits them does not care to conceal the fact (celari non curat)*." And he provides an example: "*If anyone murders someone even in a crowd, but nevertheless wants to conceal it (celari vellet) and, as much as he can, denies (quantum potest inficiatur), he is not condemned without accusation*³⁵."

³³ Stephan ad C.2. q.1 c. 16: „Videndum breviter, quia ordo iudiciarius dicitur, ut apud suum iudicem quis conveniatur, ut legitime vocetur ad causam tribus edictis aut uno peremptorio pro omnibus, ut vocato legitime praestantur iudiciae, ut accusatio solemniter in scriptis fiat, ut testes legitime producantur, ut nin nisi in convictum vel confessum feratur; quae sentential non nisi in scriptis ferri debeat, nisi sint breves lites et maxime miserabilium." Cf. Ronald Gustav Knox, Rufinus and Stephan on church judgment (Diss. Yale May 1976, Xerox Microfilms Michigan 1976, 165, 286.

³⁴ Rufinus ibid.: "Sed cum hoc est, aliquando reus, qui commisit crimen semel, postea infiniatur; aliquando ipsa evidenti rei adeo crimen publicat, ut illud nullo pacto diffiteri valdeat, sicut fornicator ille Corinthius, qui publice novercam suam apud se impudice tenebat et ideo Paulus excommunicaverit cum nullo accusante. Tunc crimen non solum manifestum sed etiam dicitur esse notorium." Cf. Knox, 286.

³⁵ Quando ergo crimen est occultum, nisi reus sponte in iudicio confiteatur, condemnatus non est. Similiter, quando ets manifestum iudici et non aliis, vel aliis et non iudici faciendum est. Si autem autem utriusque sit manifestum, ita quod ipsa evidenti rei crimen publicatum reus nulla accusante potest condemnari. (Ibid.)

One could have expected the next major step in the development of procedural law to take place with the Council of Trent. However, this focussed on the theological questions of the time. Only the 14th session (25.11.1551) is of any interest to us in this context, when the Council granted the bishop and the patron penal power. However, this concerned only substantive criminal law in the context of granting permission for consecration. Legal procedural questions, dealing with issues of fair trial, were not dealt with by this Council.

We can only find more substantial regulations again in the reforms of Pope Pius X. Particularly the possibility of ousting priests in administrative proceedings were a real innovation in church procedural law. The decree *Maxima cura* of the Holy Consistory of 20 October 1910 describes the course of an administrative trial which was adopted, with modifications, from canon law traditions of the 11th century and civil law traditions of the 18th century³⁶. The decree provides: before the bishop can oust a priest, the diocese examiners must take position. This is done either at the synod or, if it can't take place, at least by two such examiners. The accused can thus explain his version of events to both or, at least, to one of them. In such a case, one or two more priests must be appointed.

The accused priest is then to be summoned and questioned about the issue at hand. However, first he has the possibility of taking position in writing. Furthermore, he can appoint witnesses. But it is up to the Bishop to decide whether these witnesses are heard. Then the accused is heard. He has to appear at the tribunal in person. After that, the bishop and the examiners discuss his case. Finally, the decision is taken collegially. The accused is then informed of the decision and he can appeal to the Bishop *a quo*. The appeal decision is, however, final.

The administrative procedure is based on the summary criminal trial against members of the clergy and was enacted by the Bishops' Congregation of 1810³⁷. Even though this is the first time that an administrative procedure was established under canon law in modern times, it has to be critically noted that the accused is left to his own devices in this procedure, without legal assistance. We cannot assume that the examiners were overly committed to the accused's rights and position.

In view of the described historical rules, we can clearly see one thing. The canon law of 1917 largely adopted the traditions of the existing

³⁶ Franz Xaver Schmalzgrueber, *Ius Ecclesiasticum Universum*, Roma 1844, Tom. 1, Pars 3, tit. 28, Nr. 4, CApost. 5, de appell.; S.B. Smith, *Elements of Ecclesiastical Law*, Vol. I-III, New York 1893, Vol. 1 Nr. 443 f.

³⁷ Cf. *Regolamentum Congregationis Episcoporum* 11. 6. 1880, ASS 13 (1880), 324 ff.

decretal laws³⁸. The programmatic change took place with codification, in the switch from case law to normative law. It was not in the interest of the legislator of 1917 to close all *lacunae legis* of the old law. Perhaps that was not even intended; but this question cannot be answered here.

From the analysis of the historical aspects of the right to a fair trial in the church, we have seen that this is only one aspect of the law. Particularly in the 20th century, there was much criticism of the manner in which trials were held in the church. Especially the accused's rights to a defence did not seem to be properly guaranteed. Things have evolved somewhat since then. However, the CIC/1983 still leaves a lot to be desired when it comes to guaranteeing a fair trial in canon procedural law or in the various administrative procedures.

³⁸ Cf. Chas. Augustine, *The Pastor according to the New Code of Canon Law*, St. Louis 1923, XI; James A. Coriden, *An introduction to Canon Law*, Mahaw 2004, 27-28.