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A CONCILIAR THEORY OF THE THIRTEENTH CENTURY

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It is nearly seventy years since Gierke wrote: "Too little attention has hitherto been paid to the influence on political theory of the work done by the Legists and Canonists."[1] Nevertheless there remains something of a penumbra over that area of mediaeval thought where juristic concepts and political theories interpenetrated and profoundly modified one another. Some further investigation of this area of thought seems especially desirable as a preliminary to any adequate analysis of the origins of the various theories on Church government put forward in the fourteenth century.

The most original of these theories, that of Marsilius of Padua, rested on a radical re-statement of the mediaeval doctrine that all lawful political authority should be based on the consent of the governed. For Marsilius, the governing body of a state, which he calls the *pars principans*, is a mere 'executive instrument,' established by the whole body of the citizens, and subject to correction if it transgresses the laws laid down by the *civium universitas*.[2] The idea that ultimate authority in any society must rest with the whole body of its members was again a fundamental element in the thought of other well-known publicists such as John of Paris[3] and William of Occam,[4] and in the

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[1] Otto Gierke, *Political Theories of the Middle Age* translated by F. W. Maitland (Cambridge, reprint, 1938), p. 101, n. 1.

[2] Marsilius, *Defensor pacis* ed. C. W. Prévité-Orton (Cambridge, 1928), I, 12, 49; I, 15, 68; I, 18, 96.

[3] John of Paris maintained that the dominion of church property was vested in the whole Church as a corporate body, and that the Pope controlled it merely as *dispensator*. So, too, spiritual authority ultimately rested with the whole Church, and only a general council was competent to define articles of faith. Cf. his *De potestate regia et papali* in Goldast's *Monarchia*, ii, 113, 139. Cf. also R. Scholz, *Die Publizistick zur Zeit Philipps des Schönen und Bonifaz VIII* (Stuttgart, 1903), pp. 275-333; S. Riezler, *Die literarischen Widersacher der Päpste zur Zeit Ludwig des Baier* (Leipzig, 1874), p. 145, and especially J. Rivière *Le problème de l'église et de l'état au temps de Philippe le Bel* (Paris, 1926), pp. 281-300.

[4] On the political thought of Occam cf. E. F. Jacob, *Essays in the Conciliar*

writings of the conciliarist authors at the end of the fourteenth century.

Since, however, the conciliarists were not concerned to destroy the whole substance of papal authority, but rather to reform the Papacy and to re-establish it as a center of Christian unity, the theories of Church government they evolved were more moderate in tone than those of Marsilius. They usually recognized the divine origin of papal authority but nevertheless held that, since the Roman Church was only one member of the body of the Church Universal, it was subject in the last resort to a general council representing the whole community of the faithful.[5] The Church, as a *societas perfecta,* could not be without the means of curing its own disorders even if this involved taking action against the Pope himself. Moreover, since the conciliarists were especially interested in the reform of the papal curia, they were frequently led to consider the constitutional position of the cardinals, and writers like Gerson and D'Ailly advocated for the Church a "mixed constitution" in which Pope, cardinals, and general council should all play a part.[6]

Ideas such as these have often been presented as a growth typical of the fourteenth century, a reaction against the excessive papal centralization of the preceding hundred years, and a reflection in the ecclesiastical sphere of the constitutional experiments that had been taking place in various countries. Rivière wrote of John of Paris that, in claiming for a general council superiority over the Pope in the definition of articles of faith, "il s'écartait par là de la grande tradition théologique et canonique du moyen âge où la *determinatio fidei* fut unanimement réservée au pape en dernier ressort."[7] And Figgis maintained that the decree setting forth the claims of the Council of Constance was "the most revolutionary document in the history of the world."[8]

Epoch (Manchester, 1943, pp. 85-106; C. C. Bayley, "Pivotal Concepts in the Political Philosophy of William of Ockham," *Journal of the History of Ideas,* X (1949), 199-218; M. A. Shepard, "William of Occam and the Higher Law," *American Political Science Review,* XXVI (1932), 1005-1023, and *ibid.,* XXVII (1933), 24-39.

[5] Cf., e.g., Dietrich of Niem, *De modis* ed. K. Heimpel, (Leipzig, 1933), p. 15 and Gerson *Opera* ed. E. du Pin (Antwerpiae, 1706), II, 205. Occam had expressed the same thought at the beginning of the fourteenth century, *Dialogus* V, 24 (in Goldast's *Monarchia* II, 494).

[6] Cf. D'ailly *De ecclesiae et cardinalium auctoritate* in Gerson, *Opera,* II, 946.

[7] Rivière, *op. cit.,* p. 298. In fact, on this point John of Paris was following closely the opinion of Johannes Teutonicus who composed the *glossa ordinaria* to the *Decretum* c. 1215 [J. F. v. Schulte, *Die Geschichte der Quellen und Literatur des canonischen Rechts* (Stuttgart, 1887), I, 172-175]. Cf. gloss *ad*

Yet in fact very many of the characteristic ideas of the fourteenth-century publicists had already been put forward, analyzed, and even defended by the canonists of the preceding century. The fact that these writers consistently supported the extreme claims of the Papacy as against the Empire has led perhaps to an undue neglect of the subtleties of their thought where purely internal problems of Church government were concerned. Indeed, one of the most distinguished of all the thirteenth-century canonists not only put forward a theory of the structure of corporations that seems to have a close affinity with the political ideas of Marsilius, well over a half a century later, but also showed how this theory could be made the basis of a coherent system of Church government in which one may well detect the germs of the later conciliarist theories.

This was Hostiensis (Henricus de Segusio), known as "iuris utriusque monarcha, Subalpinae regionis splendor."[9] He studied Roman and canon law at Bologna, lectured at Paris, and then spent some time in England as adviser to Henry III.[10] He was sent by this king on an embassy to Innocent IV and subsequently became chaplain to the Pope, and then in turn Bishop of Sisteron, Archbishop of Embrun, and Cardinal-Bishop of Ostia and Velletri (1261). He died in 1271.[11]

Dist. 19, c. 9, *s.v.* 'Concilio': "Videtur ergo quod Papa tenetur requirere concilium episcoporum quod verum est ubi de fide agitur, et tunc synodus maior est Papa."

[8] N. Figgis, *From Gerson to Grotius* 2nd ed. (Cambridge, 1916). p. 34.

[9] Franciscus Balbus, quoted in G. Panciroli, *De claris legum interpretibus* (Lipsiae, 1721), p. 420.

[10] F. W. Maitland, *Roman Canon Law in the Church of England* (London, 1898), p. 115, referring to Matthew Paris, *Chronica Majora* (Rolls), IV, 33, 286, 351, 353.

[11] Schulte *op. cit.,* II, 123-129, C. Eubel, *Hierarchia Catholica* (Monasterii, 1913), I, 8, "Ex claris juris pontificii scriptoribus," in *Jus Pontificium,* VIII (1928), 91-96, and A. van Hove, *Prolegomena in Codicem Juris Canonici,* 2nd ed. (Malines, 1945), pp. 476-477. There is some doubt as to the exact date of Hostiensis' death. *Jus Pontificium, loc. cit.,* gives the date as November 6, 1271, but Schulte, Eubel, and van Hove say that he died October 25, 1271. Eubel gives the date of his cardinalate as May, 1262, but the other authorities cited all give it as 1261. The works upon which the great fame of Hostiensis rested were the *Summa titulorum* (called *Summa aurea),* composed between

It is especially interesting to trace in Hostiensis' work the roots of some of the conciliar ideas of the next century since he has been regarded usually as an extreme papalist, typical of the canonists of Innocent IV's generation. And certainly, in discussing the relations of spiritual and temporal power, he put forward far-reaching claims for the Papacy. It is his account of the distribution of authority within the Church, and the theory of corporations upon which that account is based, that are of interest for the present enquiry. It will be convenient to consider first his views on the structure of corporations and the relationship between these views and the ideas of Marsilius, and then to describe the system of Church government that Hostiensis erected on the basis of this theory of corporations.

I

Hostiensis and the *pars principans* of Marsilius.

Marsilius is the most enigmatic, as he is the most original of the fourteenth-century publicists. He has been described as "the prophet of modern times . . . the most modern of mediaeval thinkers,"[12] and also as "a product of his age, a mediaeval Aristotelian."[13] Different scholars have found in his work the seeds of Hobbesian absolutism, the first stirrings of democratic radicalism, or merely an expression of "the normal judgment and practice of the Middle Age . . . the assertion of traditional principles."[14] The presentation of his theory is indeed such as to leave the way open for differences of interpretation. He holds that ultimate authority in any society should rest with a *legislator* comprising all its members, and that the will of this *legislator* is accordingly expressed by the *civium universitas*, or, when there is not unanimity, by its *valentior pars*. The *pars principans* is established by the *legislator*, which it represents *quasi instrumentalis vel executiva*, and its function is to regulate the civil and political

1250 and 1253 (cf. S. Kuttner, "Decretalistica"; *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistiche Abteilung*, XVI [1937], 461), and the *Lectura*, finished between June, 1270, and April, 1271, (cf. S. Kuttner, "Wer war der Dekretalist Abbas Antiquus?" *ibid.*, p. 468, n. 3).

[12] C. W. Prévité-Orton, "Marsiglio of Padua," *English Historical Review*, XXXVIII (1923), 1-18, and especially p. 2.

[13] A. P. D'Entrèves, *The Mediaeval Contribution to Political Thought* (Oxford, 1939), p. 87.

[14] R. W. and A. J. Carlyle, *A History of Mediaeval Political Theory in the West* (London, 1936), VI, 9.

activities of the citizens in accordance with the fundamental laws laid down by the *legislator*.[15] If the *pars principans* itself transgresses these laws it is subject to correction and even to deposition.[16]

In considering the form of the *pars principans* Marsilius follows closely the classification of Aristotle, and seems to prefer a system of limited monarchy,[17] a conclusion commonplace enough. It has been suggested, therefore, that the novelty of his position lies, *inter alia*, in the creation of his abstract theory concerning the structure of the State, in his definition of a necessary relationship that should exist between the *pars principans* and the *legislator* whatever the particular form of government adopted.[18] Yet it is precisely in his account of this relationship that Marsilius seems most tantalizingly reticent. The *pars principans* is one of the six 'parts' which together make up the *civium universitas*, and so presumably must have some say, together with the other 'parts,' in shaping the decisions of the *legislator*. Those decisions are in practice to be determined by the *pars valentior* of the community, and it is now generally agreed that Marsilius intended the quality of the citizens to be taken into account as well as their numbers in estimating the *pars valentior*.[19] But he offers no explanation as to how their quality is to be assessed,[20] and, in particular, no ac-

[15] Marsilius, *op. cit.*, I, 12, 49, and I, 15, 68.

[16] *Ibid.*, I, 18, 96.

[17] *Ibid.*, I, 8, 28.

[18] A. P. D'Entrèves, *op. cit.*, p. 55, referring to Gierke. On Marsilius' conception of the relationship between *pars principans* and *legislator* cf. G. de Lagarde, *La naissance de l'esprit laïque au declin du moyen âge* (Paris, 1934), II, 183-189.

[19] Marsilius, *op. cit.*, I, 12, 49: "Valentiorem inquam partem considerata quantitate personarum et qualitate in communitate."

[20] Marsilius' concept of the *pars valentior* is much more akin to the *maior et sanior pars* of a cathedral chapter required in episcopal elections (e.g., *Decretales*, I, 6, 22; I, 6, 29; I, 6, 57), than to the modern idea of a merely numerical majority. Marsilius was also typically mediaeval in leaving the meaning of his phrase *pars valentior* somewhat vague, for the canonists never worked out a precise definition of their term, *pars sanior*. Cf. A. Esmein, "L'unanimité et la majorité dans les élections canoniques," *Mélanges Fitting* (Montpellier, 1907-1908), I, 355-382. The resemblance between canonistic theory and the ideas of Marsilius on this important matter has often been pointed out. Cf. H. Rehm, *Geschichte der Staatsrechtswissenschaft* (Leipzig, 1896), pp. 190-191, C. H. McIlwain, *The Growth of Political Thought in the West* (New York, 1932), p. 303; G. de Lagarde, *op. cit.*, II, 196, and W. Ullmann, *Origins of the Great Schism* (London, 1948), pp. 197-198.

count of the weight to be attached to the opinions of the *pars principans*, considered for the moment as a constituent part of the *civium universitas* as well as its executive agent. This point seems of fundamental importance for determining whether Marsilius' thought can be described as, in any real sense, 'democratic' in temper.

Since, however, it is at least clear that Marsilius "is not thinking in terms of modern individualism . . . but has in mind the *populus* as a mediaeval *universitas*," [21] it is possible that an analysis of some earlier mediaeval ideas on the structure of a *universitas* may contribute to the understanding of his thought.

In the thirteenth century it was natural that the canonists should be particularly interested in the analysis of the structure and essence of corporations, since many of their day-to-day problems dealt with the affairs of corporate bodies—such problems, for instance, as the definition of the powers of a chapter during an episcopal vacancy, the determination of whether a sentence of excommunication could be valid against a corporation, the investigation of the precise obligations implied by the relationship between a bishop as *caput* and his canons as *membra* of one *universitas*. Moreover, once an adequate theory had been evolved to deal with such matters, there arose the possibility that it might be applied to the *universitas* comprising the whole Church, thus providing a new basis for theories of ecclesiastical government.[22]

Already in the *Commentaria* of Innocent IV there are hints of such an approach. When he makes use of the standard imagery depicting the whole Church as a *corpus* the word has begun to acquire a technical flavor,[23] and he does not hesitate to apply the language of corporation law to the Pope himself.[24] But the theory of the structure of corporations that Innocent put forward was simply that all the powers of a corporation resided in its rector:

[21] McIlwain, *op. cit.*, p. 303.

[22] The description of the Church as a single organism, a mystical body of which Christ was Head, is as old as St. Paul (Ephesians 4). The earlier mediaeval publicists were content to use the concept as a piece of anthropomorphic imagery along with other allegories that sought to depict the unity-in-diversity that was believed to characterize the Church. Gierke, *op. cit.*, p. 103 n. 7, gives numerous references. It was left for the canonists to elaborate the concept into a formal legal doctrine by applying to the Church the rules that Roman law suggested for governing the affairs of other corporations.

[23] Innocent IV, *Commentaria super libros quinque decretalium* (Francofurti, 1570), II, 12, 4, fol. 222, col. 1.

. . . est notandum quod rectores assumpti ab universitatibus habent jurisdictionem, et non ipsae universitates. Aliqui tamen dicunt quod ipsae universitates, deficientibus rectoribus, possunt exercere jurisdictionem . . . quod non credo.[25]

Thus, he could view with equanimity the application of the rules governing the affairs of corporations to all levels of Church government, while at the same time making the most extreme claims for papal supremacy.

Hostiensis adopted a more subtle view of the structure of corporations. He cites the opinion of Innocent quoted above, and then explicitly rejects it, ". . . quod reprobat verius est, licet difficilius." [26] For Hostiensis the authority of a corporation resides in all its parts, and, if the head is lacking, the jurisdiction of the whole devolves to the members: "Sede vacante jurisdictio penes capitulum residet, sicut universitas, sicut collegium licitum"[27]—or to such of them as survive.[28] When a corporation has a rector, he indeed has the exercise of its jurisdiction,[29] but not by his own virtue. Rather he is to be regarded as a proctor acting on behalf of the whole corporation: ". . . praelatus sit procurator generalis ad negotia . . . et liberam administrationem videatur habere."[30]

The expressions *procurator generalis ad negotia* and *libera administratio* are technical terms which define the precise degree of authority committed to a prelate by the corporation of which he is head.[31] A

[24] Innocent IV, *op. cit.*, I, 35, 4, fol. 161, col. 4: "Publica persona est papa."

[25] Innocent IV, *op. cit.*, I, 2, 8, fol. 4.

[26] Hostiensis, *Lectura in quinque decretalium Gregorianarum libros* (Parisiis, 1512), I, 2, 8, fol. 7, col. 2.

[27] Hostiensis, *Summa aurea super titulis decretalium* (Coloniae, 1612), *De officio ordinarii*, col. 299, n. 3.

[28] *Summa, loc. cit.*, "Mortuo ergo praelato et etiam mortuis omnibus de capitulo excepto uno jus totius corporis, cujus praelatus caput est et canonici membra, in ipsum recidit et per ipsum retinetur."

[29] *Summa, loc. cit.*, ". . . sede autem instituta habet exercitium praelatus."

[30] *Summa, De his quae fiunt ab episcopo*, col. 800, n. 1. Cf. also *De treuga et pace*, col. 317, n. 6, ". . . . si dicatur episcopus pater est tamen procurator," and *De procuratoribus*, col. 337, n. 1, ". . . episcopus dominus non est sed procurator."

[31] For an analysis of the significance of the terms *libera administratio* and *plena potestas* in the mandates of mediaeval proctors, cf. Gaines Post, "Plena potestas and Consent in Mediaeval Assemblies," *Traditio*, I (1943), 355-408, especially 356-364.

procurator generalis ad negotia was appointed, not merely for some particular case, but with authority to act in any suits that might arise during his proctorship, and Hostiensis adds that, in his view, such a general mandate empowers the proctor to act in administrative as well as purely judicial affairs.[32] There were, however, certain powers that a general mandate alone did not confer. For instance, it was necessary for a general proctor to obtain a special mandate from his principal to alienate property, to remit debts, or to 'transact' (i.e., to make a compromise agreement with the opposing party). But when the mandate for a general proctor was strengthened by the formula conceding to him *libera administratio,* he could do all these things without further reference to his principal.[33]

There was, however, one most important limitation to these extensive powers. No delegation of authority to a proctor could confer on him a right deliberately to act in a manner prejudicial to the interests of the corporation that he represented: "Per haec verba [liberam administrationem] non datur potestas male administrandi . . . bene datur potestas aliquid conferendi . . . sed non conceditur perdere . . . ergo nihil alienabit in ecclesiae detrimentum."[34] This was the normal doctrine of both civil and canon law. Moreover, when a principal doubted the good faith of his proctor, the powers of the proctor could be revoked.[35]

[32] *Lectura, De procuratoribus,* I, 38, 9, fol. 173, col. 4, ". . . quamvis lex videatur distinguere inter procuratorem ad judicia et negotia . . . tamen eo ipso quod alius ad tractandum omnia negotia constituitur procurator hanc potestatem habere videtur"

[33] *Lectura, loc. cit.,* "(procurator) non habet potestatem transigendi . . . nec pignus remittendi . . nec alienandi . . . nisi ei generalis et libera administratio sit concessa."

[34] *Lectura, De electione,* I, 6, 19, fol. 41, col. 2.

[35] *Lectura, De procuratoribus,* I, 38, 4, fol. 171, col. 3, ". . . in tali casu potest procurator indistincti revocari." Cf. also *Summa, De his quae fiunt ab episcopo,* col. 800, n. 1, ". . . praelatus nomine suo et capitulo . . . et agit et defendit . . . nisi contra ipsum orta sit suspicio."

This does not mean, though, that the canons alone could depose a bishop, which would be entirely contrary to canon law. The right to revoke a proctor's powers rests with the whole corporation. But the bishop himself is part of the corporation and the canons could not act in such an important matter without his approval. Therefore, a deadlock would result, and it would be necessary to refer the case to higher authority. Special difficulties would arise if it were desired to prefer charges against the Pope himself, since there was no individual superior to whom his case could be referred. Hostiensis' treatment of this problem is discussed below.

This idea of the prelate as proctor, which reappears in certain canonistic writings of the early fourteenth century,[36] seems closely akin to Marsilius' conception of the *pars principans* as the 'executive instrument' of the society which it governs. In the writings of Hostiensis there is even a verbal parallel, for in his *Lectura* he describes the prelate of an ecclesiastical corporation as the *principalis pars* of his church.[37] While, however, Marsilius showed himself particularly vague in defining the relationship between his *pars principans* and the whole *civium universitas,* Hostiensis embarked on a detailed analysis of the mutual obligations subsisting between a bishop, as the *principalis pars,* and the chapter over which he presides.

When a prelate acts on behalf of his church as proctor he exercises a wide but essentially derivative jurisdiction. In the theory of Hostiensis, however, a bishop is assigned a dual rôle. He is not only the proctor of his chapter but an integral part of it, with an important share in the shaping of its decisions: "Episcopus et canonici faciunt unum capitulum."[38]

The weight that the vote of a bishop carries in the deliberations of his chapter depends upon the type of business being discussed. When the matter is one that concerns the canons alone the bishop has a voice *ut canonicus,* but his vote is only equal to that of each of the other canons.[39] When, however, the matter is one that concerns the whole corporation, affecting both bishop and canons, he sits in the chapter *ut praelatus,*[40] and then his voice is "pregnans et auctoritabilis." In-

[36] Cf. Guido de Baysio (the 'Archdeacon'), *Super Sexto decretalium commentaria* (Venetiis, 1577), II, 10, 2, fol. 66, col. 3, and Joannes Monachus, *Glosa aurea super sexto decretalium* (Parisiis, 1535), glosses *ad* II, 14, 3, fol. 222, and *ad De regulis juris,* fol. 442. Guido's commentary was composed between 1298 and 1304 (J. F. v. Schulte, *Quellen,* II, 188) and the gloss of Joannes Monachus probably in 1308 (J. F. v. Schulte, *Quellen,* II, 192, but cf. also W. Ullmann, *Origins of the Great Schism,* p. 205, n. 3.)

[37] *Lectura, De his quae fiunt a prelato,* III, 10, 4, fol. 44, col. 3, ". . . ergo prelatus est principalis pars ecclesiae."

[38] *Lectura, De excessibus prelatorum,* V, 31, 1, fol. 70, col. 2.

[39] *Lectura, De excessibus prelatorum, loc. cit.,* ". . . quando habet vocem tanquam canonicus consideratur vox sua singularis tanquam canonici, quando vero ut prelatus, consideratur pregnans et auctoritabilis."

[40] *Lectura, De concessione prebendae,* III, 8, 15, fol. 41, col. 4, ". . . hoc est de jure communi quo ad communes tractatus habendos in his quae ad episcopum et capitulum pertinent communiter quod episcopus habeat vocem in capitulo tanquam prelatus, unde in talibus unus nihil debet facere sine reliquo."

deed, in these circumstances the vote of the bishop is considered as equal to those of all the canons together, so that the canons cannot act without the approval of the bishop, nor the bishop without the consent of the canons.[41] Joannes Andreae attributed to Hostiensis the view that, since the vote of the bishop was equal to those of all the canons, the bishop with one canon would form a clear majority for any business;[42] but Hostiensis makes it clear that he accepts this view only in those cases where a bishop is consulting his canons on a matter that belongs by law to his personal jurisdiction.[43] Where the well-being of the whole corporation is at stake he cannot proceed without the consent of all the canons or at least of their *maior et sanior pars*.

Hostiensis approaches this same question from a somewhat different point of view in several discussions of the significance of the terms *de consilio* and *de consensu*. Two decretals of Alexander III, included in the *Gregoriana*, laid down that in conducting the affairs of his church a bishop should not proceed without the 'counsel' of his canons.[44] It was therefore necessary for the canonists to determine how far this necessity for consultation limited the freedom of action of a bishop in cases where he disagreed with his chapter. The general conclusion of Hostiensis is that, although a prelate is bound by law to seek the advice of his chapter, he is not always legally bound to accept the advice tendered. Some writers, he remarks, regard *de consilio* and *de consensu* as identical terms, but for himself he rejects

[41] *Lectura, De excessibus prelatorum,* V, 31, I, fol. 70, col. 2, ". . . in his in quibus episcopus habet vocem tanquam prelatus requiritur tam consensus episcopi quam capituli, ita quod unus sine reliquo nihil potest."

[42] Joannes Andreae, gloss *ad Sextus,* II, 15, 11.

[43] *Lectura, De concessione prebendae,* III, 8, 15, fol. 41, col. 1. ". . . quando episcopus vocem habet in capitulo ut prelatus solus episcopus tantam videtur habere vocem per se quantam omnes alii . . . idem in hoc casu dummodo habeat de capitulo secum duos vel unum saltem maiorem partem habet . . . sed et hoc intelligi debet quo ad collationes beneficiorum et institutiones de quibus loquuntur dicta capitula et alia quae de jure communi ad ipsum solum spectat, nam in alienationibus et similibus necesse est quod totum capitulum consentiat, vel maior et sanior pars ipsius." For Hostiensis the *maior et sanior pars* is always the more numerous part except where the less numerous part can bring forward and sustain a specific canonical objection against the opinion of the majority. Cf. *Lectura, De his quae fiunt a prelato,* III, 10, 5, fol. 45, col. 1.

[44] *Gregoriana,* III, 10, 1, and III, 10, 2.

any such interpretation.[45] He holds that the affairs in which actual consent is required cannot be defined precisely, since this depends partly on the customs of individual churches, and "in diversis ecclesiis diversae sunt consuetudines."[46] But in discussing the subject of alienations he arrives at the general principle that consent should be required normally in cases where the actions of a prelate might injure the interests of his church: "Quia si praelatus sine consensu capituli alienare posset, onerosum et periculosum esset ecclesiis."[47] The situation in this case is the same as that considered above when a prelate sits in chapter *ut praelatus* to consider a matter affecting the well-being of the whole corporation.

It has been noted, however, that Hostiensis includes the right to alienate among the powers conferred upon a proctor who has received a mandate of *libera administratio*. He seems to take the view that, while a prelate cannot of his own authority alienate his church's property, he can act on behalf of the church in cases where loss of property might be involved without a special additional mandate. In putting forward this opinion he rejects the view of Bernardus Parmensis who had held, more consistently perhaps, that "qui non potest alienare non potest rem in judicium deducere."[48] Hostiensis, indeed, is disposed to allow to a prelate the greatest possible freedom of action in the normal conduct of day-to-day business. He understood very well that the restraints necessary to prevent abuses of power must not be allowed to hamper the operations of a governing body to such an extent as to destroy its effectiveness, and in this showed himself wiser than some of the theorists of the fourteenth century. Nevertheless, the most significant element in his analysis of the distribution of authority within a corporation is the conclusion that, from whatever point of view one regards the head of a corporation, whether in his

[45] *Summa, De his quae fiunt ab episcopo,* col. 802, n. 1. Cf. also *Lectura, De arbitriis,* I, 43, 7, fol. 191, col. 4., *De his quae fiunt a prelato,* III, 10, 3, fol. 44, col. 3, III, 10, 4, fol. 44, col. 4, III, 10, 5, fol. 45, col. 1, and *De excessibus prelatorum,* V, 31, 1, fol. 70 col. 2.

[46] *Lectura, De his quae fiunt a prelato,* III, 10, 6, fol. 45, col. 3.

[47] *Lectura, De procuratoribus,* I, 38, 1, fol. 170, col. 1.

[48] Bernardus Parmensis, gloss *ad Gregoriana,* I, 38, 1, *s.v.* "legaliter." Bernardus composed the *glossa ordinaria* to the *Gregoriana* between 1234 and 1266. For dates of the various recensions cf. S. Kuttner and B. Smalley, "The Glossa Ordinaria to the Gregorian Decretals," *English Historical Review,* LX (1945), 97-105; also the late Van Hove, *op. cit.,* p. 473.

rôle as prelate or as proctor, his office can never confer upon him any legal right to act on his own initiative in a manner prejudicial to the interests of his corporation.

It seems clear that the resemblance between the *principalis pars* of Hostiensis and the *pars principans* of Marsilius is more than a merely verbal one. For Marsilius, as we have seen, the *pars principans* (or *pars judicalis*) exists to govern a society within the framework of laws established by the *universitas civium,* which it represents *quasi instrumentalis vel executiva.* Hostiensis defines the position of the *principalis pars* of a corporation as that of a proctor exercising judicial and administrative authority on behalf of the whole body. In both theories the powers of a ruler are restricted so as to prevent him acting against the interests of the community that he governs. Marsilius, however, was content to stress the subordination of the *pars principans* to the *legislator* without enquiring very closely into the relationship between them. Hostiensis, on the other hand, perhaps because he was expressing his thought in technical legal terms to which it was necessary to give a precise definition, was led to a detailed consideration of the relationship between the *principalis pars* and the rest of the corporation. When one considers the intricate analysis of all aspects of this relationship that Hostiensis undertakes, it seems not unreasonable to suggest that the obscurity of Marsilius on the subject arises, not so much from any 'astounding subtlety' in his thought, as from a tendency to excessive over-simplification.

II

Hostiensis on Church Government

The theory concerning the structure of corporations that has been outlined forms the basis of Hostiensis' approach to various problems of ecclesiastical authority. However, when one turns from considering the fundamental concepts upon which he based his theories to the actual details of his system of Church government, it is the writers of the conciliar age rather than the publicists of the generation of Marsilius whose views seem most in harmony with his own. The general attitude of Hostiensis is closely akin to that of moderate conciliarists like Gerson and D'Ailly who emphasized the rôle of the cardinals as an important element in the government of the Church, and who sought to defend the divinely instituted primacy of the See of Rome, while subjecting individual popes to the correction of a general council.

The system of Hostiensis rests on the basic principles that no office confers upon its holder the right to injure the corporation he represents, and that the members of a corporation lacking a rector are competent to exercise the jurisdiction of the corporation. A careful elaboration of all the implications of these two principles, when applied to the Roman See and to the Church as a whole, enables him to formulate solutions of several problems concerning the nature and limits of papal authority that had remained unresolved in the work of his predecessors.

Earlier canonists had especially shown hesitancy in defining the limits of papal authority where decisions on articles of faith were involved. On this point Gratian himself presented two quite divergent points of view without any attempt at reconciling them. Certain canons of the *Decretum* maintained that ultimate authority in matters of faith rested with the Apostolic See,[49] and that the Pope, as successor to St. Peter, was the supreme judge upon earth, and himself subject to the judgment of no one.[50] But it was also maintained in the *Decretum* that a Pope should not take important decisions in cases involving articles of faith, "sine concilio episcoporum vel presbyterorum et clerici cunctae ecclesiae Catholicae," [51] and that the decisions of a general council in such matters must be preserved inviolate.[52] Moreover, whatever the hypothetical integrity of the See of Rome in matters of faith, it was clearly conceded that a Pope who was in fact a heretic should be accused of this crime and deposed.[53] If, therefore, the canonists were to construct a consistent system of Church government on the generally accepted premises of the time, it was necessary for them to evolve a theory of the structure of the Church which would recognize the divine origin of papal authority, while at the same time ensuring that any action of a Pope tending against the well-being of the Church, such as a promulgation of false doctrine, would be lacking in validity. A really comprehensive theory would also need to explain the relationship between Pope and cardinals on the one hand, and between the cardinals and the Universal Church on the other. All this was attempted in the system of Hostiensis.

[49] *Dist.* 11, c. 9. *Dist.* 17, c. 4, C. 24, q. 1. c. 11.
[50] *Dist.* 17, c. 6. *Dist.* 21, c. 7, C. 9, q. 3, c. 10-c. 18.
[51] *Dist.* 19, c. 9.
[52] *Dist.* 15, c. 2.
[53] *Dist.* 40, c. 6, "Huius culpas istic redarguere praesumit mortalium nullus . . . nisi deprehendatur a fide devius." The view that a heretical pope could be

He defines the whole Church as a *universitas* in both his *Summa* and *Lectura*,[54] and maintains that to this corporation as a whole God gave the power of binding and loosing and the gift of unerringness in matters of faith.[55] But, in conferring such priviliges on the Church, God also established within it a center of authority, the Papacy, which was to be *caput* of the *universitas fidelium*. In the view of Hostiensis, Peter bequeathed his headship of the whole Church, not to his successors personally, but to the Roman Church over which they presided:

Urbs ista altera Jerusalem[56] intelligatur et effusione tui sanguinis qui primus meus vicarius es in terris fundetur, firmetur, et consecratur *hic locus* quem eligi mihi ut sic *haec ecclesia* sit caput et domina et princeps omnium ecclesiarum, non ab homine sed a me recipiens plenitudinem potestatis.[57]

This is illustrated by the fact that when the Pope dies the Church does not lack a head, since "Romana ecclesia . . . mori non potest."[58]

To reconcile the idea of a corporate headship of the Church with the fact that Peter was personally instituted vicar of Christ, a title which Hostiensis does not hesitate to apply to the Popes, he adopts a simple but effective line of argument. The Pope is Christ's vicar since he is Peter's successor. But he is Peter's successor precisely by virtue

tried and deposed was held by almost every canonist of note in the twelfth and thirteenth centuries, e.g., by Rufinus, Stephanus Tornacensis, Bernardus Papiensis, Huguccio, Laurentius, Johannes Teutonicus, Bartholomaeus Brixensis, Goffredus Tranensis, Bernardus Parmensis, Innocentius IV. Cf. J. F. v. Schulte, *Die Stellung der Concilien, Päpste, und Bischöfe* (Prague, 1871), pp. 253-286, and V. Martin, "Comment s'est formée la doctrine de la supériorité du concile sur le pape," *Revue des Sciences Religieuses*, XVII (1937), 121-143.

[54] *Summa, De schismaticis*, col. 1370, n. 1. ". . . schisma est illicita divisio . . . ab universitate ecclesiae." *Lectura, De sacra unctione*, I, 15, 1, fol. 103, col. 2, "Ecclesia est multitudo fidelium sive universitas Christianorum." Cf. Gratian, *De consecratione, Dist.* 1, c. 8, and C. 24, q. 1, c. 18, and also Marsilius, *op. cit.*, II, 2, 17, "Dicitur hoc nomen ecclesia . . . de universitate fidelium credentium et invocantium nomen Christi."

[55] *Summa, De decimis et primitiis*, col. 974, n. 15. ". . . nec enim ecclesia universalis errare potest . . .", and *De remissionibus*, col. 1659, n. 1.

[56] A strange reminiscence of the author of the *Tractatus Eboracensis*, who claimed that not Rome but Jerusalem should be "mother of all the churches." Cf. *Gilti (libelli de lite)*, III, 659, 661.

[57] *Lectura, Qui filii sint legitimi*, IV, 17, 3, fol. 39, col. 1.

[58] *Lectura, De penitentiis et remissionibus*, V, 38, 14, fol. 102, col. 3.

of the fact that he is bishop of the Apostolic See;[59] and the holding of episcopal office necessarily implies a certain interdependence between the Pope as bishop and the other prelates who form the *membra* of the *universitas* of which he is *caput*. Hostiensis therefore asserts that the relationship between the Pope and the cardinals is exactly the same as that between any other bishop and his chapter,[60] a suggestion that has far-reaching implications.

Some clarification of the canonical status of the College of Cardinals was long overdue. The rise of the cardinals to a position of eminence in the affairs of the Universal Church can be traced back to the appointments of Leo IX, whose nominees, ardent champions of the reform movement from abroad, were hardly chosen "for the sake of the cardinals' hebdomadary functions."[61] The increasing importance of the cardinals was confirmed by Nicholas II's decree of 1059 on papal elections,[62] and during the next century it became normal for them to act as advisers in affairs of Church government, to share in the exercise of the judicial supremacy of the Roman See, and to countersign papal decrees.[63] Alexander III's election decree of 1179 reserved the right of making papal elections entirely to the cardinals by enacting that no *exceptio* could be brought against a candidate chosen by two-thirds of them.

[59] Thus Hostiensis argues that the designation of the cardinal-bishops, in the election decree of Nicholas II, to act as metropolitans during a vacancy in the See of Rome, confers on them papal authority, since a Metropolitan of Rome necessarily *is* Pope. Cf. *Lectura, De penitentiis et remissionibus*, V, 38, 14, fol, 102, col. 4.

[60] *Summa, De officio archipresbyteri*, col. 238, n. 2, and *Lectura, Qui filii sint legitimi*, IV, 17, 13, fol. 39, col. 1.

[61] S. Kuttner, "Cardinalis; the History of a Canonical Concept," *Traditio*, III (1945), 129-214, especially p. 173.

[62] Cf. A. Hauck, *Kirchengeschichte Deutschlands* (Leipzig, 1887), III, 683, n. 4., P. Hinschius, *Das Kirchenrecht der Katholiken und Protestanten* (Berlin, 1869-97), I, 309-373, and A. Michel, *Papstwahl und Königsrecht* (Munich, 1936), pp. 345 ff.

The authority of the cardinals was augmented by the circumstances of the papal schism from 1080 to 1100, when the anti-Pope Clement found it to his advantage to strengthen their constitutional position. Cf. S. Kuttner, *art. cit.*, p. 174, and J. B. Sägmüller, *Die Thätigkeit und Stellung der Cardinäle bis Papst Bonifaz VIII* (Freiburg, 1896), pp. 235 ff.

[63] J. B. Sägmüller, *op. cit.*, p. 216 f., H. Bresslau, *Handbuch der Urkundenlehre*, 2nd ed., (Leipzig-Berlin, 1912-1931), II, 56-61, D. B. Zema, "The Houses of Tuscany and Pierleone in the Crisis of Rome," *Traditio*, II (1944), 160.

Except in the matter of papal elections, however, positive canon law was slow to concede any explicit recognition of this enhanced dignity of the Sacred College. Neither the canons of Gratian's *Decretum,* nor his *dicta,* nor the *glossa ordinaria* of Joannes Teutonicus contained any suggestion that the Pope's freedom to legislate was limited by the rights of the cardinals.[64] However, the *Gregoriana* included a letter of Innocent III, written in 1201,[65] which at last gave formal legal recognition to what had long been a matter of constitutional fact, that the proper function of the cardinals was to assist in managing the affairs of the Universal Church. Moreover, the use of the phrase "de consilio fratrum nostrorum" in several of the decrees of Gregory's collection demanded comment and interpretation. Everyone agreed that, in promulgating important legislation, the Pope normally took counsel with his cardinals, and everyone agreed that it was right and proper for him to do so. What was by no means clear was whether the Pope could, if he so chose, dispense with such counsel—whether the cardinals, for all their dignity and prestige, were in essence mere agents of the Pope, or whether, by virtue of their office, they participated as of right in the authority of the Apostolic See.[66]

[64] Bernardus Parmensis, defending the cardinals' claim to countersign papal privileges (gloss *ad* II, 20, 28), can quote only two passages from Gratian, neither of which has any real reference to the authority of cardinals (C. 12, q. 2, c. 68, and C. 35, q. 9, c. 3). However, according to the archdeacon, the view that the Pope could not establish a general law for the whole Church without consent of the cardinals was maintained in the *Glossa Palatina,* a compilation made between 1210 and 1215 and discovered by Kuttner (*Repertorium,* pp. 81-82). The archdeacon attributed this view to to Laurentius, but on the whole question cf. S. Kuttner, "Bernardus Compostellanus Antiquus," *Traditio* I (1943), 288-91, 309.

[65] A. P. Potthast, *Regesta Pontificum Romanorum* (Berlin, 1875), n. 1546.

[66] Both views appeared as early as the eleventh century. By then the word 'cardinal' was usually taken to be derived from 'cardo,' a hinge (cf. S. Kuttner, "Cardinalis, etc.," pp. 132-152). This made possible two quite different metaphorical interpretations of the status of the cardinals. Cardinal Deusdedit could assert that they were themselves the 'hinges' that guided and moved the whole Church (cf. W. v. Glanvell, *Die Kanonessammlung des Kardinales Deusdedit* (Paderborn, 1905), p. 268). But it could also be held that the cardinals' name was derived merely from their close dependence on the Pope, himself the 'hinge' of the Church Universal, and this it seems was what Pope Leo IX understood by the term (Mansi, *Sacrorum conciliorum nova et amplissima collectio,* XIX, 653B). St. Peter Damian called the cardinals "spirituales ecclesiae universales senatores" *(Contra Philargyriam* in Migne, *Patrologia Latina,* CVL, 540). The description of the cardinals as 'senators' recurs in the thirteenth century in the work of Innocent IV, *Commentaria,* II, 27, 23, fol. 314, col. 4.

The most distinguished of the predecessors of Hostiensis among the commentators and glossators of the *Gregoriana* seem to have been somewhat embarrassed by the necessity for reconciling the undoubted constitutional importance of the cardinals with the current theory of papal absolutism and so fell into self-contradiction or unconvincing evasions. Goffredus Tranensis states that the authority competent to found general constitutions is "papa cum fratribus suis," [67] but elsewhere, applying to the legislative authority of the Pope an old Roman adage, says, "omnia autem iura sunt in pectore papae." [68] Bernardus Parmensis asserts that the cardinals are "pars corporis domini papae,"[69] but seems to use the phrase loosely, applying it to other members of the curia as well.[70] Innocent IV declares on one occasion that the business of the cardinals is the care of all the churches,[71] but elsewhere time and again reiterates that the Pope personally has *plenitudo potestatis.*[72]

Hostiensis takes up the suggestion that the cardinals are "part of the Pope's body," and, unlike Bernardus, shows himself willing to accept all its implications. Indeed, his contention that the Roman see, like any other bishopric, is subject to the normal rules of the law of corporations, forms the basis of his analysis of papal authority, and,

[67] Goffredus Tranensis, *Summa in titulos Decretalium* (Venetiis, 1586), *De constitutionibus,* fol. 2, n. 8.

[68] *Ibid.,* fol. 3, n. 15.

[69] Gloss *ad* I, 30, 9. *s.v.* 'commissum.'

[70] Gloss *ad* II, 40, 14, *s.v.* 'fructus.'

[71] *Commentaria,* I, 5, 3, fol. 37, col. 3.

[72] The controversy concerning the status of the cardinals continued into the fourteenth century. Nicholas III defined the position of the cardinals as *coadjutores,* whose advice it was fitting for the Pope to seek; but this definition was not sufficiently precise to prevent future disagreements. Compare, e.g., the gloss of Joannes Monachus on *Sextus,* V, 3, 1, with that of the archdeacon on *Sextus,* I, 6, 3. Joannes Monachus suggests that the Pope has his administrative authority from the cardinals. The Archdeacon treats with derision the idea that the cardinals have the power of modifying a papal decree, on the grounds that they have their power only from man (i.e., from the Pope), while the Pope's power is from God alone. The status of the cardinals during a papal vacancy was clarified by the decrees *Ubi periculum* of Gregory X, in the second Council of Lyons (*Sextus,* I, 6, 3), and *Ne Romani* of Clement V (*Clem.* I, 3, 2).

especially in his *Lectura,* he returns to the point again and again. It is established first that the cardinals do in fact have the rights of a corporation, in reply to those canonists who asserted that they were to be considered only as individuals, "called from diverse parts of the world and installed in diverse churches." [73] On the contrary, says Hostiensis, they form a single body, meeting together to transact the business of the whole Church, "summum et excellens collegium super omnia alia unitum a Deo cum papa, quod cum ipso unum et idem est."[74]

This unity between Pope and cardinals is stressed again when it is maintained that the cardinals need not, like other clergy, offer an oath of obedience to the Pope since they are actually part of himself, "tanquam sibi invisceratis," and there must be a difference between the one offering and the one receiving an oath of allegiance.[75] The constitutional position arising from this unity is explained in a most significant passage:

> . . . multo magis et multo excellentius est unio inter papam et collegium Romanae ecclesiae quam etiam inter aliquam patriarcham et capitulum suum . . . et tamen patriarcha sine consilio fratrum non debet ardua expedire. . . . Multo fortius ergo decet papam consilia fratrum suorum requirere . . . *non solum papa sed et cardinales includerenter in expressione plenitudinis potestatis.*[76]

The clause "includerenter in expressione plenitudinis potestatis" defines exactly Hostiensis' view of the status of the cardinals. They form with the Pope a collegiate body that has the exercise of the *plenitudo potestatis* divinely bestowed on the Roman Church. It follows, therefore, as a necessary corollary of the theory of Hostiensis regarding the structure of corporations, that when a Pope dies the jurisdiction of this body devolves to the cardinals. This he quite consistently maintains, holding that during a papal vacancy *plenitudo potestatis*

[73] *Lectura, De Judeis,* V, 6, 17, fol. 32, col. 4, "Nota contra illos qui dicunt quod cardinales non habent jus capituli, sed potius jure singulorum censentur tanquam homines a diversis mundi partibus vocati et in diversis ecclesiis intitulati . . . sed errant evidenter."

[74] *Lectura, loc. cit.*

[75] *Lectura, De privilegiis,* V, 33, 23, fol. 85, col. 3.

[76] *Lectura, Qui filii sint legitimi,* IV, 17, 3, fol. 39, col. 1.

rests with the Roman Church, and the exercise of it with the College of Cardinals.[77]

He first proves the point by the assertion that such is the normal rule governing the affairs of corporations that lack a rector, and then goes on to adduce numerous arguments urging that the normal rule should be applied in this particular case. He argues that the cardinals exercise authority by tradition and good customs should be preserved, that Christ would not wish His Church to lack a pastor, that it is absurd and not far from heresy to hold that the Roman Church, the head of all the churches, could itself lack a head. He claims moreover that the cardinal-bishops are endowed with papal authority by virtue of the fact that they take the place of metropolitans during a vacancy in the Roman See. Clearly Hostiensis was determined to press into service every argument possible to prove his point, and the reason becomes evident at the end of the passage, "Haec scribo ad confutandos illos qui potestatem cardinalium quasi adnihilare videntur." [78] Hostiensis, a cardinal himself, was not unnaturally a zealous defender of the dignity and prestige of the Sacred College.

Even more important than this account of the status of the cardinals during a papal vacancy is the analysis of their authority in association with a reigning Pope, of the relationship between the component parts of the corporate body that exercises the power of the Roman Church. Hostiensis frequently states that the Pope should not proceed in important matters without the advice of the cardinals,[79] and

[77] *Lectura, De penitentiis et remissionibus,* V, 38, 14, fol. 102, col. 3: ". . . pone papam mortuum, quero penes quem resideret haec potestas. Respondeo utique penes Romanam ecclesiam quae mori non potest . . . sed numquid collegium cardinalium habet jurisdictionem papae et etiam exercitium ipsius . . . tu teneas quod sic." In spite of this, Hostiensis holds, rather inconsistently, that the cardinals have not the power to reject or even to modify the decree of Alexander III governing the conduct of papal elections. This was to answer those who asserted that the concession of too great authority to the cardinals might lead to schisms and the prolongation of papal vacancies.

[78] *Lectura, loc. cit.*: ". . . tunc et quia cardinales sic utuntur . . . nam et beata consuetudo est attendenda in talibus . . . tunc quia visibile est quod filio Dei placeat hic intellectus ne ecclesiam videtur reliquisse sine pastore . . . et valde est absurdum sentire quod illa ecclesia capite careat quae caput est aliarum . . . immo etiam nec est longe ab heresi . . . episcopi cardinales proculdubio vices metropolitani obtinent . . . et exponi opportet metropolitani .i. papae, qui nec alius posset esse metropolitanus Romanae ecclesiae."

[79] *Summa, De officio legati,* col. 278, n. 2. *Lectura, De officio legati,* I, 30, 9,

even seems to imply that his proper function is merely to carry out their wishes: "Sicut papa cardinalium consilio regitur sic episcopi canonicorum regi debent." [80] But to interpret this as meaning that for Hostiensis the Pope is always and necessarily 'ruled' by his cardinals, would not only oversimplify, but would seriously distort his views. He insists on the close union between Pope and cardinals but does not forget that within this corporate unity the Pope is the 'head' to whom the cardinals are 'immediately subject.' [81] Indeed, he expressly declares that a binding law can be issued by the Pope alone.[82] This is in accordance with the principle that, when a corporation is provided with a rector, the exercise of its jurisdiction rests with him, "sede autem instituta habet exercitium prelatus sed de consilio capituli."[83]

A definition of the precise relations between Pope and cardinals must clearly turn on the interpretation of the words *de consilio*, and Hostiensis' views on the significance of this term have already been discussed. His general conclusion was that the words in themselves do not imply a necessity for consent, but that a prelate does require consent of his chapter in grave matters where the well-being of his church might be injured. The Pope and cardinals, however, form a collegiate body charged with the government of the Church as a whole, and therefore Hostiensis maintains, consistently enough, that the Pope can normally act on his own initiative—but always provided that his actions do not tend to "subvert the well-being of the Universal Church." [84]

One of the most important of the matters in which the well-being of the whole Church might be affected is the decision of cases involving disputed articles of faith, and it is in this connection, according to Hostiensis, that the residuary authority of the whole *universitas fidelium* may come into play through a general council, when the Roman Church fails to exercise adequately its function of headship.

The reintroduction of the general council into canonistic theory as an important element in the government of the Church is an even more interesting feature of Hostiensis' theory than his systematization

fol. 146, col. 1, *De Judeis*, V, 6, 17, fol. 32, col. 4, *De privilegiis*, V, 33, 23, fol. 85, col. 3.

[80] *Summa, De officio archipresbyteri*, col. 238, n. 2.

[81] *Summa, De penitentiis et remissionibus*, col. 1574, n. 15.

[82] *Summa, Proemium*, col. 8, n. 14.

[83] *Summa, De officio ordinarii*, col. 299, n. 3.

[84] *Summa, De constitutionibus*, col. 19, n. 3.

of the current views on the authority of the Sacred College. Towards the middle of the thirteenth century, the view that any council exercised an authority opposed to and limiting that of the Pope seems almost to have fallen out of currency; Bernardus Parmensis, Goffredus Tranensis, and Innocent IV hardly mention councils except to emphasize their subservience to the Pope.[85] This attitude might have been reasonable had they suggested some alternative method of restraining a Pope who was acting against the well-being of the Church, and it would at least have been consistent had they maintained that the Pope was beyond all human control. But in fact they all slavishly repeated the formula that a Pope could be accused for heresy, without even the slightest attempt to define the procedure to be adopted.[86]

Throughout the work of Hostiensis there is a renewed emphasis on the authority of councils. Where Innocent IV would usually quote a decree passed in a general council as the decree of such-and-such a Pope, Hostiensis nearly always cites it as the decree of a general council, as though this gave it additional weight. In discussions he points to the fact that his own view has been upheld by a general council as incontrovertible proof of its validity,[87] and finally he explicitly lays down that a general council is the ultimate authority in matters of faith, since it expresses the mind of the Universal Church, which cannot err: "Quis ergo magistrum contra concilium generale dicere attentabit, nam talia sunt servanda sicut quattuor evangelia, nec enim ecclesia universalis errare potest." [88]

The mention of the 'quattuor evangelia' in the passage quoted is a reference to Gratian's *Dist.* 15, c. 2, where a decree of Gregory I lays down that the first four general councils of the Church are to be respected like the four Gospels themselves. Hostiensis goes on to make the important point that the special authority attributed there to the 'four councils' belongs of necessity to all general councils since all alike represent the whole Church.[89]

[85] Bernardus, gloss *ad Decretales*, I, 6, 4. Casus: Goffredus, *Summa, De constitutionibus*, fol. 3, n. 10; Innocent, *op. cit.*, I, 9, 12, fol. 95.

[86] Bernardus, gloss *ad* I, 6, 6, *s.v. 'exceptione'*; Goffredus, *op. cit., De accusationibus*, fol. 189, n. 2; Innocent, *op. cit.*, V, 40, 23, fol. 567. In each case there is a reference to *Dist.* 40, c. 6.

[87] *Summa, De usucapionibus*, col. 1627, n. 5.

[88] *Summa, De decimis et primitiis*, col. 974, n. 15.

[89] *Summa, loc. cit.*: "Licet enim illa jura non loquantur de concilio generali praedicto, loquuntur tamen de consimili, et necesse est ut cum ecclesia generalis

Since a general council is the ultimate authority in questions of faith, it would seem that it must have in the last resort the right to decide cases where the issue is one of heresy. The procedure for handling such cases, from the lowest court to the highest, is discussed in the *Lectura*.[90] First Hostiensis suggests that in cases of this sort not only counsel but consent is necessary: "forsan hic ponitur concilium pro consensu." If, therefore, a bishop does not agree with the *maior et sanior pars* of his chapter, the case must be referred to his immediate superior, the metropolitan. If there is still no agreement between the *maior et sanior pars* and the metropolitan, it must go "ad Romanam ecclesiam." But there remains the possibility that the Pope might disagree with his cardinals and, since the issue is one where consent is required, he would be unable to proceed without them. Hostiensis does not discuss in this context the situation that would then arise, but the implication of his argument seems clear. At every stage of the process disagreement means that the case must be referred to a higher authority, and in this matter of a disputed article of faith there is an authority superior to Pope and cardinals, a general council of the whole Church (since only a general council is considered infallible in such matters).

It seems, therefore, that, when Pope and cardinals disagree on a matter of faith, the Pope has a clear duty to summon a council. Hostiensis also suggests that where there is suspicion concerning the orthodoxy of the Pope, the proper authority to deal with the case is a general council,[91] and this again seems to imply a duty on the part of the Pope to summon such a council. There still remains the problem of dealing with an obdurate Pope who might refuse to do so, for canon law laid down explicitly that a general council could be summoned only by the authority of the Apostolic See. Here again the application of Hostiensis' theory of corporations provides an adequate

illorum et istius auctrix sit, quod de uno dicitur, de altero intelligitur." The appeal to the authority of these four councils as a justification of the claims put forward for contemporary general councils re-appears in the fourteenth century. Cf. Marsilius, *Defensor pacis*, II, 20, 319, and among later writers, Conrad of Gelnhausen, *Epistola concordiae*, in Martène and Durand, *Thesaurus novus anecdotorum* (Paris, 1717), II, cols. 1200-26, especially col. 1205.

[90] *Lectura, De hereticis*, V, 7, 9, fol. 35, col. 1.

[91] *Summa, De accusationibus*, col. 1293, n. 7. "Excipitur unum solum crimen super quo papa accusari potest . . . (i.e. haeresim) . . . convocato forte super hoc concilio generali."

solution of the difficulty. The Pope normally summons a general council, but this is because he normally exercises the power of the Roman Church and, in the view of Hostiensis, there are special circumstances in which the exercise of this power devolves to others.

Such a case arises, for instance, if the whole College of Cardinals should become extinct at a time when the Roman See is vacant. Hostiensis suggests that then the Roman clergy and people have the right of electing a new Pope, or of summoning a general council to do so: "Clerus et populus Romanus debent concilium convocare, arg. opt. 65 Dist. si forte."[92] This is in accordance with his usual principle of a *universitas* exercising during a vacancy the authority normally exercised by its *caput*. If the Romans without cardinals can summon a council, still more would it seem can the cardinals do so, and this is implied in the *Summa* when it is said that the cardinals cannot alter Alexander's election decree even if they obtain consent of a council.[93]

It might appear that such cases are relevant only when the Roman See is vacant, and provide no guidance for dealing with an obdurate Pope. But, when cardinals and Pope disagree in a matter in which neither can proceed without the consent of the other, the Church certainly lacks an *effective* head, and Hostiensis seems to regard this as sufficient grounds for an exercise of the authority of the Roman See without the agency of the Pope. Moreover, *Dist.* 65 c. 9, cited as 'arg. opt.,' for proving that the Roman clergy may summon a council, refers to a case in which a council should be summoned by the clergy of a diocese, not because there is no bishop to do so, but because the bishop is negligent. The implication of this line of argument is that, when the head of a corporation refuses to fulfill his clear duties, the position is the same as if the corporation lacked a head, and the residual authority of the whole body comes into play.[94] This is entirely in accordance with the view of Hostiensis described earlier, that the authority conceded to a corporation's head can never confer on him a right to act in a manner prejudicial to the well-being of the whole corporation.

The system of ecclesiastical government that Hostiensis constructs might be described as a hierarchy of corporations. Ultimate authority

[92] *Lectura, De electione*, I, 6, 6, fol. 33, n. 3.

[93] *Summa, De electione*, 106, n. 18.

[94] Gerson argued in much the same way that when a Pope refused to fulfil a clear duty to summon a council, the council could assemble without his authority. Cf. E. F. Jacob, *Essays in the Conciliar Epoch*, p. 12.

rests with the *congregatio fidelium*, the whole body of the faithful, but the normal exercise of this authority is committed by God to the Roman Church. The Roman Church is itself a corporation, whose headship resides in a collegiate body comprising Pope and cardinals, and within this body again, primacy belongs to the Pope. The Pope as successor to the see of Peter has no individual superior on earth, but the very nature of the episcopal authority that he exercises creates binding obligations between him and the other prelates of his church, so that the cardinals are associated with him; indeed, are regarded as part of himself in the exercise of the authority of the Apostolic See. There is provision for the devolution of authority from head to members so as to provide for the continuance of effective government in the Church in nearly all foreseeable circumstances. Thus, when the Pope is dead, the exercise of his authority passes to the cardinals; if the whole college should be extinct, or in disagreement with the Pope in a matter of faith, to the clergy and people of the Roman Church. These, in turn, can summon a general council representing the *universitas* of the whole Church to deal with the situation. The working out of the details of the theory is ingenious and sometimes complex, but there is an underlying simplicity in the consistent application of the same clearly defined principles to the solution of a variety of problems.

A most impressive aspect of the achievement of Hostiensis is that, at a time when the system of papal absolutism was at its zenith, he was able to foresee and to analyze all the potential weaknesses in the constitutional structure of the Church that were to be brought to light by the historical developments of the next century. For instance, his attempt to define the constitutional status of the College of Cardinals anticipated the views put forward during the conflict between Boniface VIII and the Colonna cardinals; and Cardinal Joannes Monachus, a leading canonist of the early fourteenth century, who restated the claims of the cardinals after the Colonna troubles, merely followed point by point the opinions of Hostiensis, though usually without acknowledgement. He emphasized that the relationship between the Pope and cardinals is the same as that between any bishop and his chapter, that, therefore, the Pope cannot proceed, at any rate in important matters, without consulting the cardinals, and that the cardinals exercise the full powers of the Pope during a papal vacancy.[95]

[95] Joannes Monachus in his glosses *ad Sextus*, I, 6, 16, fol. 92; V ,2, 4, fol. 347; V, 3, 1; fol. 366. He quotes the opinion of Hostiensis regarding the powers of a Pope during a papal vacancy at V, 11, 2, fol. 399, and it seems inconceivable that he should not have been fully informed of all the claims of his great predecessor on behalf of the cardinals. The views of Joannes Monachus are discussed in W. Ullmann, *Origins of the Great Schism*, pp. 204-207. Cf. also F. Lajard in *Histoire littéraire de la France*, XXVII, 201-224.

Hostiensis not only foresaw the problems that were to arise for the Church in the next century from the type of constitutional development that was taking place in his own day, but also helped to formulate some of the concepts that were to be used by later thinkers who propounded solutions more radical than his own. The relationship between his theory of the structure of corporations and Marsilius' theory of the State has already been discussed. It might also be suggested that the doctrine put forward by Occam and John of Paris maintaining that the whole Church could continue in existence without a head, or in severance from the Roman Church, is a particular application of the general theory of corporations that Hostiensis had consistently applied.[96]

Such writers were using concepts, which Hostiensis had helped to mould, to construct theories that, in many respects, he would have rejected wholeheartedly. But later, at the time of the conciliar movement, one finds the frequent expression of opinions more completely in accordance with his own. Indeed, in the works of some of the most influential of the conciliarists, one can discern not only resemblances to the thought of Hostiensis but frequent traces of his direct influence. Conrad of Gelnhausen, whose treatise *Epistolae Concordiae* marks "a turning point in the history of the Schism,"[97] turned to him for a proof that in some circumstances a general council might be summoned without the authority of the Pope; and some of the leading ideas of Cardinal Zabarella's influential tract followed closely the arguments of Hostiensis. Zabarella maintained, e.g., that the cardinals participate in the Pope's *plenitudo potestatis* as "parts of his body," and that if disagreement arises between them and the Pope, it can be resolved only by summoning a general council representing the whole Church.[98] In putting forward these views Zabarella relied on

[96] C. C. Bayley remarks that, "in the manipulation of the texts and concepts that were the *loci communes* of canon and Roman law . . . Ockham displays an almost terrifying efficiency." "Pivotal Concepts in the Political Philosophy of William of Ockham," *Journal of the History of Ideas*, X (1949), 199.

[97] Ullman, *op. cit.*, p. 176.

[98] To prove that a council may be summoned without the authority of the Pope, Zabarella cites *Dist.* 65, c. 9, Hostiensis' "arg. opt." Cf. his *De schismate* in S. Schard, *De jurisdictione, auctoritate et praeeminentia imperiali* (Basle, 1586), p. 691.

the arguments of fourteenth-century canonists who derived their ideas from Hostiensis through Joannes Monachus.[99] Zabarella's definition of the status of the Pope as head of a corporation is, again, precisely in accordance with the theory of Hostiensis:

> . . . id quod dicitur, quod papa habet plenitudinem potestatis, debet intelligi non solus sed tanquam apud universitatem, ita quod ipsa potestas est in ipsa universitate tanquam in fundamento, et papa tanquam in principali ministro, per quem haec potestas explicitur.[100]

Moreover, the leading writers of the conciliar age, like the publicists of the early fourteenth century, had frequent recourse to the doctrines of the law of corporations in discussing such questions as the mode of assembly of councils, the rights of majorities, and the method of reckoning a majority.[101]

It is, perhaps, in his demonstration that the rules of corporation law could be applied effectively to the widest of human communities, to a *universitas* embracing the whole of Christendom, even more than in the detailed working out of his own theory, that one may discern the chief significance of the work of Hostiensis for the future. If, indeed, one were to accept Gierke's view that the application of the Romano-canonical doctrine of corporations to the broad fields of Church government and political theory represented a regrettable departure from "properly mediaeval" modes of thought, it would be necessary to cast Hostiensis for the rôle of chief villain of the piece. It seems more appropriate, though, to respect him as an unusually gifted canonist whose insight into the constitutional problems of the Church was unrivalled in his own century and, perhaps, hardly surpassed in the next.

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[99] Cf. Ullmann, *op. cit.*, pp. 191 ff., for an analysis of the canonistic background of Cardinal Zabarella.

[100] Zabarella, *op. cit.*, p. 703.

[101] Cf. Gierke, *Political Theories*, ed. cit., p. 64.

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