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List of Abbreviations

AKKR	– Archiv für katholisches Kirchenrecht
BMCL	– Bulletin of Medieval Canon Law
CCL	– Corpus Christianorum *Series Latina*
CIC 1917	– Codex Iuris Canonici 1917
1983 CIC	– Codex Iuris Canonici 1983
CorpIC	– Corpus Iuris Canonici
CSEL	– Corpus Scriptorum Ecclesiasticorum Latinorum
DACL	– Dictionaire d'archéologie chrétienne et de liturgie
DDC	– Dictionnaire de droit canonique
DHGE	– Dictionnaire d'histoire et de géographie ecclésiastiques
EK	– Encyklopedia Katolicka
LDG	– The Lublin *Decretum Gratiani*
LThK	– Lexikon für Theologie und Kirche
LXX	– The Septuagint
MGH	– Monumenta Germaniae Historica
MGH LL	– Monumenta Germaniae Historica Leges
MThZ	– Münchener Theologische Zeitschrift, St. Ottilien
NDB	– Neue deutsche Biographie
NNDI	– Novissimo digesto italiano
NT	– The New Testament
OT	– The Old Testament
PG	– Patrologia Graeca
PL	– Patrologia Latina
RDC	– Revue de droit Canonique
RE	– Paulys Realencyklopädie der classischen Altertumswissenschaft
RHD	– Revue Historique de Droit Français et Étranger
RHE	– Revue d'histoire ecclésiastique
RHLR	– Revue d'histoire et de littérature religieuses

SCh	– Sources Chrétiennes
SDHI	– Studia et Documenta Historiae et Iuris
SG	– Studia Gratiana
TRE	– Theologische Realenzyklopädie
ZRG KA	– Zeitschrift der Savignystiftung für Rechtsgeschichte Kanonistische Abteilung
ZRG RA	– Zeitschrift der Savignystiftung für Rechtsgeschichte Romanistische Abteilung

Others

AD	– Anno Domini
ad v.	– ad verbum
a.	– anno
a. de	– apostasy
Anseg.	– Ansegisus' collection
Ans.	– Collectio Anselmi Lucensis
b.	– book
BC	– before Christ
Brev. Hipp.	– Breviarium Hipponense
C.	– Causa
c./can.	– canon
cann.	– canons
cap.	– capitulum
cap. superadd.	– capitulum superadditum
cf.	– compare
ch.	– chapter
C. I.	– Codex Iustinianus
Cod. Bamberg.	– Codex Bambergensis
Cod. Darmstadtens.	– Codex Darmstadtensis
Cod. lat.	– Codex latinus
Cod. Sangallens.	– Codex Sangallensis
col.	– column
Coll. Hisp.	– Collectio Hispana
Compil. I	– Compilatio I (prima)
Conc. Agath.	– Concilium Agathense
Conc. Anc.	– Concilium Ancyranum
Conc. Antioch.	– Concilium Antiochense
Conc. Arelat.	– Concilium Arelatense
Conc. Arelat sec.	– Concilium Arelatense secundum
Conc. Aurel.	– Concilium Aurelianense
Conc. Carth.	– Concilium Carthaginense
Conc. Chalc.	– Concilium Chalcedonense

Conc. Clippiac.	– Concilium Clippiacense
Conc. Epaon.	– Concilium Epaonense
Conc. Ephes.	– Concilium Ephesinum
Conc. Hipp.	– Concilium Hipponense
Conc. Illiber.	– Concilium Illiberitanum
Conc. Laodic.	– Concilium Laodicense
Conc. Massil.	– Concilium Massiliense
Conc. Matiscon.	– Concilium Matisconense
Conc. Meld.	– Concilium Meldense
Conc. Neocesar.	– Concilium Neocesarense
Conc. Nicaenum	– Concilium Nicaenum
Conc. Ravenn.	– Concilium Ravennense
Conc. Tolet.	– Concilium Toletanum
Conc. Trecass.	– Concilium Trecassense
Conc. Tribur.	– Concilium Triburiense
Conc. Trosl.	– Concilium Trosleianum
Conc. Trull.	– Concilium Trullanum
Conc. Turon.	– Concilium Turonense
Conc. Vas.	– Concilium Vasense
Conc. Venet.	– Concilium Venetianum
Conc. Wormat.	– Concilium Wormatiense
C. Th.	– Codex Theodosianus
c. ult.	– canon ultimus
de cons.	– Tractatus de consecratione (the third part of Gratian's *Decretum*)
de poenit.	– Tractatus de poenitentia (C. 33 q. 3)
de reform. matr.	– de reformatione matrimonii
d.	– dictum
d. a. c.	– dictum ante canonem (in a sentence)
d. p. c.	– dictum post canonem (in a sentence)
Dictum a. c.	– Dictum ante canonem (beginning a sentence)
Dictum p. c.	– Dictum post canonem (beginning a sentence)
Dig.	– Digesta
D.	– Distinctio
ed.	– edition/editor/edited by
eds.	– editors
Ed. Rom.	– Editio Romana
ep.	– epistula
et al.	– and others
Eth. Nicom.	– Ethika Nicomacheia
Ferrandi Brev. Can.	– Ferrandi Breviatio Canonum
f.	– folio
ff.	– and the following
fn.	– footnote

hom. – homily
Hugoccio/Huguccio – Summa Hugoccionis
ibid. – ibidem
i. e. – id est
in Clem. – in Clementinis
in Extravag. Comm. – in Extravagantibus Communibus
In VI° Reg. Iur. – Regulae Iuris in Liber Sextus of Boniface VIII
Instit. – Institutiones
lib. – liber
m. – mensis/metre
ms. – manuscript
n. d. – no date of publication
no. – number
n. p. – no place of publication
op. cit. – opus citatum
Orat. ad Caes. – Oratio ad Caesarem
Philipp. – Philippicae
p. – post
p. – page
pp. – pages
Proe. – Proemium
pt. – part
q. – quaestio
r. – recto
Reg./reg. – Regula/regula
Rufinus – Summa Rufini
saec. – saeculum/saeculo
sc. – scilicet
Sess. – Sesssio
S. s. – Spiritus sanctus
s. v. – sub voce
tit. – titulus
v. – verso/verbum
vol. – volume

Introduction

The history of universal canon law encompasses ecclesiastical legislation from the beginning of the Church up to the present time. The material sources of canon law were Councils, synods, popes and bishops, and additionally, norms of secular law were also adopted. The resulting legal norms were included in collections and in this way passed on to successive generations of the clergy and laity in the Church.

§ 1. Gratian's *Decretum* – the Author and His Work

Especially prominent among the collections of universal canon law was Gratian's *Decretum*, which can be regarded as a monument to legal literature.[1] In the edition of Ae. Friedberg of 1879, Gratian's *Decretum* encompasses 3945 canons. It constitutes the most extensive collection of canon law, and its compilation initiated the teaching of canon law. The *Decretum* is authored by Gratian,[2] who according to present knowledge is supposed to

[1] The canonists, emphasizing the importance of Gratian and his *Decretum* in the history of universal canon law, refer to Gratian and his work as follows: "dessen Werk eines der einflussreichsten Gesetzbücher aller Zeiten geworden ist," see P. Hersperger, *Kirche, Magie und >Aberglaube<. Superstitio in der Kanonistik des 12. und 13. Jahrhunderts*, (further cited as *Kirche*) Köln · Weimar · Wien 2010, p. 43.

[2] The date of his birth remains unknown. He is supposed to have been born in Chiusi in Tuscia or in Carraria near Orvieto. His death is presumed to have occurred before the Third Council of the Lateran of 1179; he may have died before 1160. Rufinus in his *Summa decretorum*,

have been a Camaldolese monk teaching at the monastery of St. Felix and Nabor in Bologna, which is also where the *Decretum* is known to have been written.[3] The question of whether the *Decretum* was composed by Gratian himself or other people participated in its compilation has not been fully resolved in scientific research.[4] Many years of research on the *Decretum* have led legal historians to the conclusion that it was compiled and written around[5] the year 1140. The purpose of Gratian's work was to reconcile contradictory canons, which is well expressed in the name given to it by Gratian himself – *Concordia discordantium canonum*.[6] The view held by P. Hersperger[7] that after the Concordat of Works of 1122, when the investiture controversy was brought to an end, there was a need for "gemeingültigen kirchlichen Rechtsordnung," does not seem to be acceptable, if only for the reason that Gratian's *Decretum* had always constituted a private collection and the legal value of its norms was such as had been granted to them by

which he completed around 1164, refers to Gratian as "ille magne memorie." It is also assumed that he died before 1150, see P. Landau, *Quellen und Bedeutung des Gratianischen Dekrets*, SDHI 52 (1986), p. 220ff.; E. Seckel, *Über neuere Editionen juristischer Schriften aus dem Mittelalter*, ZRG RA, vol.. XXI, 1900, p. 327; A. van Hove, *Commentarium Lovaniense in Codicem Iuris Canonici*, vol. I, *Prolegomena*, (further cited as *Prolegomena*), Mechliniae-Romae 1928, pp. 160-161; for more on the discussion concerning Gratian, see A. Winroth, *The Making of Gratian's Decretum*, (further cited as *The Making*) Cambridge 2000, pp. 5-8, ibid. pp. 175-192; F. Schulte, *Die Geschichte der Quellen und Literatur des canonischen Rechts vom Gratian bis auf die Gegenwart*, vol. I, Stuttgart 1875, p. 47, fn. 1; S. Kuttner, *Gratien*, in: DHGE 21 (1986), col. 1235ff.

[3] A. van Hove, *Prolegomena*, p. 161; P. Racine, *Bologne au temps de Gratien*, RDC 48/2 (1998), p. 281; P. Hersperger, *Kirche*, p. 45. There are, however, some doubts concerning the question whether Gratian belonged to this monastery, see J. T. jr. Noonan, *Gratian Slept Here: The Changing Identity of the Father of the Systematic Study of Canon Law*, "Traditio" 35 (1979), pp. 148-155.

[4] A. Winroth, *The Making*, pp. 175-192 suggests that Gratian was the author of the first collection, but has doubts regarding the second collection and finds it difficult to imagine that "one man's attitudes, orientation, and style would change so much;" P. Hemperek, W. Góralski, *Komentarz do Kodeksu Prawa Kanonicznego*, vol. I, pt. 1, *Historia źródeł i nauki prawa kanonicznego* (further cited as *Komentarz*), Lublin 1985, p. 79; A. Vetulani, *Dekret Gracjana w świetle najnowszych badań*, "Polonia Sacra" 1 (1948), issue 3-4, p. 240; P. Hersperger, *Kirche*, p. 44.

[5] J. Werckmeister, *Les études sur le Décret de Gratien: essai de bilan et perspectives*, RDC 48/2 (1998), pp. 363-364; A. Winroth, *The Making*, pp. 136-145 claims that the *Decretum* was compiled in Bologna in 1139 (the first version) and before 1158 (the second version), as he maintains that there existed two recensions of the *Decretum*.

[6] Some other names are also known, such as *Discordantium canonum Concordia* and *Nova collectio*, but Gratian's work was commonly referred to as *Decreta* and *Decretum*, and it is the latter name that was accepted and is currently in use, A. van Hove, *Prolegomena*, p. 161; F. Heyer, *Der Titel der Kanonessammlung Gratians*, ZRG KA 2 (1912), pp. 336-342; A. Winroth, *The Making*, p. 5; S. Kuttner, *Graziano: l'uomo e l'opera*, "Studia Gratiana" 1 (1953), p. 18.

[7] P. Hersperger, *Kirche*, p. 43.

legislators. It is nevertheless true that, as the *Decretum* gained widespread recognition, it was used both in the teaching of law and in judicial practice. However, it is doubtful that Gratian began his work on "harmonizing discordant canons" (Concordia discordantium canonum)[8] in response to such demand.

The question of the division of the *Decretum* constitutes a moot point, with different authors taking quite disparate stances. While some maintain that the division was made by Gratian,[9] others attribute it to the early decretists.[10] There is no definite answer as to who divided the first and third parts into *distinctiones* and the second part into *quaestiones*.[11] Some manuscripts of the *Decretum* begin with *Introductiones*, which specify the content of the individual parts of the *Decretum*.[12] The subsequent manuscripts no longer include *Introductiones*.

In the edition of Ae. Friedberg, the *Decretum* is divided into three parts. The first part, which is a kind of introduction to the *Decretum*, includes 101 *distinctiones*, further divided into *capitula* or *canones*.[13] Among these, *distinctiones* 1-20 constitute – in Gratian's words – *principium* or *initium*, and are devoted to the sources of law. Gratian quotes material sources of law, natural law, customary and statutory law, then the canons of Councils and synods, papal decretals, the writings of the Church Fathers and secular laws. *Distinctiones* 21-80 comprise the legal norms relating to the clergy, their rights and obligations, the qualities of candidates for ordination, the impediments and irregularities as well as the celebration and ministers of ordination. This part is therefore labelled by Gratian as *tractatus ordinandorum*. Distinctions 81-101 concern qualities required from bishops, material

[8] Ibid.

[9] A. Vetulani, *Z badań nad pierwotnym tekstem Dekretu Gracjana*, offprint, Lwów 1936, pp. 7-8 asserts that it is certain that "Gratian made only two formal divisions of his work [...] he divided (it) into three parts and only in the the second part did he make the division into 36 *Causae*; each of which he divided into *quaestiones*."

[10] F. Gillmann, *Einteilung und system des Gratianischen Dekrets nach den altesten Dekretglossatoren bis Johannes Teutonicus einschlieslich*, AKKR 106 (1926), pp. 472-574; A. van Hove, *Prolegomena*, p. 162 claims that Gratian did not make any general division of his work.

[11] H. Singer, *Die Summa Decretorum des Magister Rufinus*, Paderborn 1902, pp. XCI-XCVII maintains that it was done by Gratian. However, the division C. 33 q. 3 occurs for the first time in Rufinus' work, whose *Summa* was compiled about 1157-1159. A. Vetulani expresses the opposite view and claims that it was not done by Gratian, but by Gratian's pupil Paucapalea, see the author's work *Z badań nad pierwotnym tekstem Dekretu Gracjana*, offprint, Lwów 1936, p. 8, fn. 18.

[12] A. Vetulani, *Z badań nad pierwotnym tekstem Dekretu Gracjana*, p. 9.

[13] A. van Hove, *Prolegomena*, p. 162, claims that these units of the *Decretum* are "antiquius capitula, capita, hodie canones vocatae."

support of the clergy, concern for the poor and relations between ecclesiastical and secular power. These distinctions conclude the first part of the *Decretum*.

The second part is comprised of 36 *causae*. These are real or fictitious court cases which require legal resolution. *Causae* begin with *quaestiones* or questions including a legal problem, which will subsequently be solved in individual *quaestiones*. The solution of a legal problem is provided in canons including a rubric and an *auctoritas*. A rubric[14] is a short sentence at the beginning of a canon, most often comprising a short legal norm or a legal principle.[15] *Auctoritates* are source texts constituting conciliar, synodical and papal norms as well as texts of the Church Fathers, which are supposed to confirm the content of a legal norm or a legal principle contained in a rubric or Gratian's *dictum*. *Dicta* are texts written by Gratian himself[16] and introduced at the beginning of a given *quaestio*, before or after an *auctoritas*, where Gratian includes his own explanations of legal problems. They mark the birth of the teaching of canon law. In this part, causa 33 quaestio 3 is entitled *Tractatus de poenitentia*. The Treatise on Penance is divided into 7 *distinctiones*, which are in turn divided into canons.[17]

The third part is divided into 5 *distinctiones*, which are, as in the first part, divided into canons. Owing to the fact that the first *distinctio* contains the legal material concerning the consecration of a church, this part of the *Decretum* is called *tractatus de consecratione*. Apart from that, it includes the regulations regarding the Eucharist, baptism, confirmation, feast days, sac-

[14] From Latin ruber – red, as this sentence is written in red in the manuscripts. Rubrics come from Gratian, see A. van Hove, *Prolegomena*, p. 162.

[15] As A. Vetulani's research shows, rubrics were edited by the decretists, who later included them in the collection; it may also have been done by the author of the abridged version of the *Decretum*, which is the manuscript of Gdańsk, see P. Hemperek, W. Góralski, *Komentarz*, p. 85. At present, only the part of A. Vetulani's research that concerns Roman law in the *Decretum* is commonly accepted, see A. Winroth, *The Making*, p. 14.

[16] It is where Gratian fully shows himself as a lawyer "The dicta in Gratian's Decretum bring the reader closer to its author than any other part of the text," see A. Winroth, *The Making*, p. 187.

[17] It is now held that it comes from another author and constitutes a later addition to the *Decretum*, see P. Hemperek, W. Góralski, *Komentarz*, p. 82; K. Wojtyła, *Traktat o pokucie w Dekrecie Gracjana w świetle rękopisu gdańskiego Mar. F. 275*, "Roczniki Teologiczno-Kanoniczne" 4 (1957), issue 1, pp. 31-71. The author of the division of the Treatise on Penance into distinctions was probably Rufinus, see A. Vetulani, *Über die Distinktioneneinteilung*, ZRG KA 12 (1933), p. 356; the same author, *Z badań nad pierwotnym tekstem Dekretu Gracjana*, "Collectanea Theologica" 17 (1936), p. 75, offprint, Lwów 1936, p. 8; the same author, *Dekret Gracjana w świetle najnowszych badań*, "Polonia Sacra" 1 (1948), issue 3-4, p. 235.

ramentals and fasts. The researchers of the *Decretum* maintain that the third part was added to the *Decretum* at a later time.[18]

Gratian, in accordance with his assumption included in the title of his work, harmonized discordant canons. He took into account the already-known methods of harmonizing legal texts developed by Bernold of Constance,[19] Yvo of Chartres[20] and Alger of Liége.[21] The *Decretum* does not only contain purely legal material. It also covers texts pertaining to moral and dogmatic theology. A number of them concern sacraments, penance, extreme (as it was understood at that time) unction, ordination, marriage and conferring sacraments by heretics. Gratian did not shun theological subject matter. It was understandable in the situation, as at the time the subject matter concerning moral and dogmatic theology was closely connected to canon law, which was treated as external moral theology (theologia moralis externa).[22]

Gratian included in the *Decretum* texts from the Bible, conciliar and synodical canons, papal decretals, excerpts from the works of the Church Fathers[23] and writers of the Church, texts from penitentials and liturgical books, from the Ordines Romani, Liber Diurnus Romanorum Pontificum, Pontificale Romanum, from capitularies of Frankish kings as well as texts of Roman law and Germanic laws and others.

The sources from which he obtained his texts were mainly the collections of canon law which had been written before him.[24] Only infrequently did he

[18] J. Rambaud-Buhot, *L'étude des manuscrits du Décret de Gratien conservés en France*, "Studia Gratiana" 1 (1950), pp. 129-130; the same author, *Le legs de l'ancien droit: Gratien,* in*: L'âge classique 1140-1378*, G. Le Bras, Ch. Lefebvre, J. Rambaud, *Histoire du droit et des institutions de l'Eglise en Occident*, vol. VII, 1965, pp. 90-99; A. Winroth, *The Making*, p. 12.

[19] *De excommunicatis vitandis, de de reconciliatione lapsorum et de fontibus iuris canonici*, PL 148, col. 1181-1265; MGH, Hannoverae 1891-1897, vol. II, pp. 1-168.

[20] *De consonantia canonum*, PL 161, col. 47-60.

[21] *Liber de misericordia et iustitia*, PL 180, col. 857-968.

[22] A. van Hove, *Prolegomena*, p. 165; P. Hemperek, W. Góralski, *Komentarz*, p. 86.

[23] There are 979 texts in total, including 366 texts of Augustine and 133 texts of Jerome (without De poenitentia and De consecratione), see J. Gaudemet, *Les sources du Décret de Gratien*, RDC 48/2 (1998), p. 249; J. Rambaud-Buhot, *Le legs de l'ancien droit: Gratien,* in: *L'âge classique 1140-1378*, G. Le Bras, Ch. Lefebvre, J. Rambaud, *Histoire du droit et des institutions de l'Eglise en Occident*, vol. VII, 1965, p. 51.

[24] These texts were included by Ae. Friedberg, *CorpIC*, Pars I, *Prolegomena*, XLII-LXXV, Lipsiae 1879-1881. P. Landau, conducting research on the collections used by Gratian, came to the conclusion that the majority of the canons were derived from five collections, *Collectio Anselmi Lucensis*, *Collectio Tripartita* (which, as shown by the latest research, is not authored by Yvo of Chartres, for example according to M. Brett, *Urban II and the collection attributed to Ivo of Chartres*, in: *Proceedings of the Eighth International Congress of Medieval Canon Law*, MIC Subs.

refer to original texts. In the *Decretum* there are interpolations introduced into the text at a later time.[25] These texts were called *paleae*, after Gratian's pupil Paucapalea.[26] The number of *paleae* is essential, as it makes it possible to establish which manuscript is closest to the original recension of Gratian's *Decretum*.[27] Gratian did not, however, avoid making various errors in historical inscriptions. He also included in the *Decretum* a number of texts from forged collections, especially from *Decretales Pseudo-Isidorianae* from the mid-9th century.

The texts of the *Decretum* were used both in the papal office, by Alexander III (1159-1181), Clement III (1187-1191) and Celestine III (1191-1198), and in synodical legislation;[28] both at schools and in the judiciary.[29] Nonetheless, the *Decretum* had always constituted a private collection,[30] and its norms were of such value as had been granted to them by respective legislators. Nothing changed in this respect after the publication of the *Decretum* in *Corpus Iuris Canonici* of 1582. The *Decretum* is not characterized by the kind of semantics typical of the classical teaching of canon law or contemporary jurisprudence.[31] Still, the legal material is organized in a relatively cogent way, which reveals Gratian's legal aptitude and his enormous contribution to the teaching of canon law. Despite the fact that theological issues can still be found in the *Decretum*, Gratian separated the subject matter regarding *forum externum* from speculative theology, thus providing a basis for the development of the strictly juridical method of teaching canon law.

9, Citta de Vaticano 1992, pp. 27-46), *Panormia* of Yvo of Chartres, the *Polycarpus* of Cardinal Gregory of S. Grisogono and the *Collection in Three Books* (which comes from the period 1111-1140 and has not been published to date).

[25] A. Winroth, *The Making*, p. 11 calls the authors of these interpolations "the masters of Bologna" and claims that they added over 150 texts to Gratian's text; Ae. Friedberg, *CorpIC*, Pars I, *Prolegomena*, pp. XIII-XVIII provides the number of 166; A. Vetulani, *Z badań nad pierwotnym tekstem Dekretu Gracjana*, offprint, Lwów 1936, p. 7, fn. 17 claims that C. 16 q. 6 c. 7 is also a *palea*. This gives 167 texts added to Gratian's text.

[26] It happened because the glosses that Paucapalea had written in the margins were later introduced into the text of the *Decretum* and rewritten in the manuscripts as Gratian's texts, see F. Schulte, *Die Paleae im Dekret Gratians*, Sitzungsberichte der Philosophisch-Historischen Classe der Wiener Akademie der Wissenschaften, vol. LXXVIII, Wien 1874, p. 302ff.

[27] F. Schulte, *Die Paleae im Dekret Gratians*, Sitzungsberichte der Philosophisch-Historischen Classe der Wiener Akademie der Wissenschaften, vol. LXXVIII, Wien 1874, p. 302; T. Lenherr, *Fehlende „Paleae" als Zeichen eines überlieferungsgeschichtlich jüngeren Datums von Dekret-Handschriften*, AKKR 151 (1982), pp. 495-507.

[28] W. Holtzmann, *Die Benutzung Gratians in der päpstlichen Kanzlei im 12. Jahrhundert*, "Studia Gratiana" 1 (1953), pp. 325-327.

[29] A. van Hove, *Prolegomena*, p. 166; P. Hersperger, *Kirche*, pp. 58-59.

[30] P. Hersperger, *Kirche*, p. 61.

[31] H. E. Feine, *Gliederung und Aufbau des Decretum Gratiani*, "Studia Gratiana" 1 (1953), p. 353.

His work became the first textbook on canon law and the subject of glosses, *summae* and commentaries. It gave rise to the development of canon law as an autonomous science and initiated the period of the classical teaching of canon law.[32] By virtue of his epoch-making work, Gratian is referred to as the "father of the teaching of canon law."[33]

As a result of this special interest in the *Decretum*, a number of copyists made its copies in their workshops. Even in our age, as it is supposed, about 600 manuscripts exist in the world.[34] The *Decretum* appeared in print for the first time in 1471 in Strasbourg. The next editions were drawn up in 1500 and 1503 by A. Chappuis and W. de Thebis, in 1547 by A. de Mouchy, in 1554 and 1559 by C. de Moulin and in 1570 by A. Le Conte. In 1582, as ordered by Pope Gregory XIII, a new corrected edition was prepared by the Roman (Correctores Romani). In this edition, Gratian's *Decretum* was the first of the six collections comprised in *Corpus Iuris Canonici*. In 1687, the *Decretum* was edited by P. and F. Pithou, and the edition of E. L. Richter appeared in 1839. The latest critical edition was published by Ae. Friedberg in 1879. This edition was reissued with the application of the anastatic method in Graz in 1959.

Owing to the fact that it gained practical significance and was used as the textbook for students of canon law, the *Decretum* became the subject of numerous commentaries. The commentators initially accounted for the meanings of individual words and thus created interlinear glosses (glossae interlineares), as these explanations were included between the verses of the text. Glosses or meaning explanations which were written in the margins were in turn called *marginales* (glossae marginales).[35] Subsequently, meaning explanations were supplemented with explanations regarding specific legal issues. The first commentators of the *Decretum* were called decretists. The most important of these were Paucapalea, Gratian's pupil, who wrote the *Summa* on the *Decretum*, which was a collection of glosses with a historical supple-

[32] A. M. Stickler, *Historia Iuris Canonici Latini*, vol. I (*Historia Fontium*), Torino 1950, p. 201.

[33] A. van Hove, *Prolegomena*, p. 165 "pater fuit scientiae canonicae." Pope Pius XII in his speech to delegates present in Rome at the international congress for the 800th anniversary of the *Decretum* on 20th April 1952, quoting Sarti, said the following words about Gratian: "quasi parens et auctor iuris canonici deinceps habitus est," "Studia Gratiana" 1 (1953), p. XXV. This name is included in the title of S. Kuttner's article, *The Father of the Science of Canon Law*, "The Jurist" 1 (1941), pp. 2-19.

[34] J. Werckmeister, *Les études sur le Décret de Gratien: essai de bilan et perspectives*, RDC 48/2 (1998), p. 379.

[35] For more information on the decretists' work and glosses, see P. Hersperger, *Kirche*, pp. 62-66.

ment, Rufinus, Stephen of Tournai,[36] who was bishop of Tournai in the years 1192-1203,[37] Ioannes Faventinus († 1190), Bazianus († 22nd February 1197) and others.[38] A systematic commentary on the *Decretum*, which was commonly accepted and used in schools and courts, was called the *Glossa ordinaria*. The first one was edited by Ioannes Teutonicus[39] († 25th April 1245 or 1246), alias Zemeca, shortly after the Fourth Council of the Lateran in 1215.[40] His gloss, which brought together the glosses by former authors and supplements on Roman law, encapsulated the teaching of law in short and practical form and gained widespread acceptance both in schools and courts.[41] It was updated by Bartholomeus Brixiensis after 1245.[42]

Apart from glosses, there were also *summae* or systematic commentaries on the *Decretum*. The most important of these were the *Summa* of Paucapalea,[43] edited in the period from 1145 to 1148, the *Summa* of Magister Rolandus, called *Stromma*,[44] Rufinus' *Summa*, edited in the period from 1157 to 1159, the already-mentioned *Summa* of Stephen of Tournai, Huguccio's *Summa*,[45] edited before 1188, and others.[46]

From the very beginning, the *Decretum* became of interest to scholars. Over the following centuries, both the *Decretum* and the relevant decretists' works were researched in a more or less intensive way. The literature on the *Decretum* is so vast that it is impossible to include in the present work and besides, it would be pointless to do so. It seems sufficient to focus on the latest studies devoted to the *Decretum*. Among the authors researching the *Decretum*, to mention only a few, are J. Gaudemet, F. Gillmann, S. Kuttner, P. Landau and T. Lenherr. Linguistic issues concerning the *Decretum* are

[36] He was probably born in 1128 or 1135 in Orléans, see F. Schulte, *Die Summa des Stephanus Tornacensis* (further cited as *Summa Stephani*), Giessen 1891, p. XXII.

[37] His *Summa* is based on Rufinus' *Summa*. Stephen wanted to supplement it. It was probably written before 1171, see F. Schulte, *Summa Stephani*, p. XXI.

[38] A. van Hove, *Prolegomena*, pp. 223-224, where he enumerates many other glossators.

[39] For more on Ioannes Teutonicus, see S. Kuttner, *Johannes Teutonicus*, in: NDB 10 (1974), pp. 571-573.

[40] P. Hersperger, *Kirche*, p. 215 defines it as "Standardkommentar" and presumes that it was written in 1216/17.

[41] F. Schulte, *Summa Stephani*, p. XXII.

[42] A. van Hove, *Prolegomena*, p. 225.

[43] F. Schulte, *Die Summa des Paucapaleas über das Decretum Gratiani*, Giessen 1890.

[44] Roland, born in 1105 in Siena, professor of law in Bologna, in the years 1159-1181 Pope Alexander III. His *Summa* was edited before 1148, see F. Thaner, *Die Summa Magistri Rolandi*, (further cited as *Summa magistri Rolandi*), Innsbruck 1874, p. XLI.

[45] He was bishop of Ferrara in the years 1190-1210.

[46] See A. van Hove, *Prolegomena*, pp. 226-228.

discussed in the works of L. Löfstedt, C. Larrainzar,[47] J. Rambaud-Bouhot, F. Schulte, A. Vetulani, J. M. Viejo-Ximenez, R. Weigand[48] and A. Winroth. Many of these studies will be referred to in the present work,[49] although they do not directly pertain to *sacrilegium*.

§ 2. The Subject and Aim of the Study

Research on the *Decretum* has been conducted along many directions. A significant part of it is devoted to determining the original version of the *Decretum*. Another subset focuses on certain legal institutions, the most notable of which is *sacrilegium*. This term can be found in 112 canons of the *Decretum*, where it occurs 131 times. *Sacrilegium* in Latin or sacrilege in English is a crime that is committed directly or indirectly against the holiness of God. Such an understanding of sacrilege is shared by a number of civilizations. In the Jewish civilization it was known as *maʿal*,[50] in the Greek civilization it was called ἱεροσυλία and in the Roman civilization *sacrilegium* meant the theft of *rei sacrae*.[51] It was also known in the Hittite civilization.[52]

If regarded as a religious crime in many civilizations, sacrilege is of special significance in the *Decretum*, especially as the work includes the norms of canon law from almost twelve centuries. Thus, detailed research on this crime has been undertaken. The present work, *Sacrilegium in Gratian's Decretum*, aspires to provide a comprehensive and exhaustive study of the issue.

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[47] He came up with the hypothesis, based on his research on the manuscript of Sankt Gallen, that it may constiute the text of the original recension of the *Decretum*, and also proposed the thesis that the process of editing the *Decretum* had consisted of four stages, see C. Larrainzar, *La formación del Decreto de Graciano por etapas*, ZRG KA 87 (2001), p. 80. This precipitated a lively discussion on the process of editing the *Decretum* and its origin; the authors and articles are included in P. Hersperger, *Kirche*, p. 54, fn. 91.

[48] For this author's bibliography mainly concerning the *Decretum*, see C. Wolfensberger, *Bibliographie Rudolf Weigand*, AKKR 167 (1998), pp. 125-149.

[49] The latest study devoted to the *Decretum* seems to be the present one, and the previous studies are included in P. Hersperger, *Kirche*, p. 43, fn. 19.

[50] J. Milgrom, *The Anchor Bible, Leviticus 1-16, A new Translation with Introduction and Commentary*, New York · London · Toronto · Sydney · Auckland 1991, p. 345.

[51] A. Dębiński, *Sacrilegium w prawie rzymskim*, Lublin 1995, p. 195.

[52] J. Milgrom, *The Anchor Bible*, p. 354.

Sacrilegium is understood in canon law as a crime committed directly or indirectly[53] against the holiness of God and for this reason it is treated as "the crime of all crimes" (cumulus omnium criminum)[54] and as "the most impious and the most criminal" (nefandissimum esse)[55]. *Sacrilegium* can be understood *in sensu stricto* and *in sensu lato*. We can speak of *sacrilegium* in the strict sense when a criminal directly offends God.[56] In the broader sense, *sacrilegium* is committed indirectly by dealing irreverently with persons, things and places[57] that are concecrated to God or even simply serve as sacred objects dedicated to the worship of God.[58] The essence of *sacrilegium* is "the violation of what is sacred" (violatio sacri)[59] or "the theft of sacred things" (sacrarum rerum furtum);[60] thus, as a consequence, a sacrilegist is defined as a person who violates what is sacred or steals sacred things: "sacrilegus dicitur qui sacra violat, vel qui sacra furatur."[61] *Sacrilegium*, owing to its gravity, has always been placed among major crimes (inter maiora delicta).[62]

In the legal collections used by Gratian there were different kinds of *sacrilegium*. The aim of the present work is to give a detailed account of the ones that appear in Gratian's *Decretum*, considering both the subjective and objective

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[53] Some historians of canon law maintain that each *sacrilegium* offends God in an indirect way, see A. Ludwig, *Geschichte des Sakrilegs nach den Quellen des katholischen Kirchenrechts*, AKKR 69 (1893), p. 250, fn. 1.

[54] I. S. F. Böhmer, *Dissertatio iuris ecclesiastici prior de variis sacrilegii speciebus ex mente iuris canonici* (further cited as *Dissertatio*), Halae, Magdeburg 1726, p. 3, where the author justifies his view with the words "cetera quidem crimina *laesionem hominum* contineant, hoc vero sit cumulus omnium criminum, quae *in Deum ipsum* committuntur."

[55] Ibid., p. 2; ed. G. Kittel, *Theologisches Wörterbuch zum Neuen Testament*, vol. III, Stuttgart 1950, p. 225.

[56] J. Syryjczyk, *Kanoniczne prawo karne*, Warszawa 2003, p. 57.

[57] R. Naz (ed.), *Dictionnaire de droit canonique*, vol. VII, Paris 1965, s. v. *sacrilège*, col. 830-834; I. S. F. Böhmer, *Dissertatio*, p. 5 mentions things and persons "Est ergo sacrilegium vel rerum vel personarum, quando vexantur vel res ecclesiasticae vel sacerdotes contra legem."

[58] I. S. F. Böhmer, *Dissertatio*, p. 2; J. Syryjczyk, *Kanoniczne prawo karne*, p. 57.

[59] Dictum p. c. 20 q. 4 C. 17 "Sacrilegium ergo est quotiens quis sacrum uiolat, uel auferendo sacrum de sacro, uel sacrum de non sacro, uel non sacrum de sacro."

[60] Isidorus Hispalensis, *Etymologiarum sive Originum libri XX* 5, 26, 12 "Sacrilegium proprie est sacrarum rerum furtum."

[61] I. S. F. Böhmer, *Dissertatio*, pp. 3-4, where he quotes the words of Isaac, bishop of Lingonensis ecclesiae: "sacrilegi dicuntur, qui ea, quae domino offeruntur, et consecrantur auferunt, vel in aliud transferunt [...] Christum et ecclesiam unam personam esse, non nescimus. Et ideo quae ecclesiae sunt Christi sunt; et quae ecclesiae offeruntur, Christo offeruntur; et quae ab ecclesia tolluntur, procul dubio Christo tolluntur;" J. Harduin, *Acta Conciliorum et epistolae decretales ac constitutiones Summorum Pontificum*, Paris 1714-1715, vol. V, tit. 7, c. 1, p. 439.

[62] Ibid.

aspects. The main research problem will be to explore *sacrilegium* in its nature and forms that existed within the twelve centuries of the history of universal and particular canon law and that were, in the majority of cases, included in Gratian's *Decretum*. An important part of examining the source texts will relate to exploring the relationship between canon and secular law in relation to this crime. In order to show the value of the manuscript of Gratian's *Decretum* from the University Library of the John Paul II Catholic University of Lublin, it will be essential to establish the number of *paleae* containing the texts on *sacrilegium*. Doing so will make it possible to determine whether the manuscript, with reference to the texts concerning *sacrilegium*, covers the text that is close to the original recension of the *Decretum* composed by Gratian.

In the literature dealing with research on the *Decretum*, however vast it is, the author of the present study, despite his best efforts, has not been able to find any work devoted to *sacrilegium* in the *Decretum*. This provided the main impetus for undertaking the survey and seems to justify the need for doing so. Even though in contemporary canon law in the Code of Canon Law of 1983 there is only one canon (1367) that strictly concerns the crime of sacrilege and punishes throwing away, taking or retaining the Eucharist for a sacrilegious purpose,[63] both for canonists and other people, as well as in the language of canon law, there exists the concept of sacrilege[64] as the violation of anything that is sacred, extending to all kinds of vile treatment of sacred things.

§ 3. Sources and References

Among the works treating of *sacrilegium* and referring to several relevant canons of the *Decretum* is the dissertation of I. S. F. Böhmer[65] of 1726,

[63] 1983 CIC, can. 1367 "A person who throws away the consecrated species or takes or retains them for a sacrilegious purpose incurs a *latae sententiae* excommunication reserved to the Apostolic See; moreover, a cleric can be punished with another penalty, not excluding dismissal from the clerical state;" J. Syryjczyk, *Kanoniczne prawo karne*, pp. 48-52.

[64] J. Syryjczyk, *Kanoniczne prawo karne*, p. 134 "sacrilegious confession," p. 108 "1983 CIC in order to protect the sacraments does not want to allow selling them, which would be the sin of sacrilege," p. 48 "the crime of sacrilege," p. 48 "for a sacrilegious purpose," p. 50 "in order to perform sacrilege."

[65] I. S. F., Böhmer, *Dissertatio iuris ecclesiastici prior de variis sacrilegii speciebus ex mente iuris canonici*, Halae, Magdeburg 1726.

where the author gives a sixty-one-page account of the types (species) of *sacrilegium* and quotes the texts of individual, often synodical, legal norms. Also P. Hinschius,[66] when discussing specific crimes, devotes four pages to "s. g. sacrilegium."[67] He treats *sacrilegium* as "s. [o] g. [enanntes]" or "so-called *sacrilegium*," as in his opinion, which will be criticized in the present work, *sacrilegium* does not exist as a separate crime, but the term is rather used to denote different kinds of punishable acts. Among a number of canons, he limits himself to enumerating some canons of the *Decretum* which pertain to the specific kinds of *sacrilegium*. This can hardly be regarded as any kind of account of the issue. Given the length of Hinschius's work, it is nevertheless understandable. The most extensive is the study of A. Ludwig,[68] who undertook to present the history of *sacrilegium* according to the sources of Catholic canon law. His work, however, is very superficial and provides only some of the sources. In his five-page account he enumerates some canons of Gratian's *Decretum* concerning *sacrilegium*, which include, as *auctoritates*, the norms of law that had been adopted before. The form of the study is too short for the author to be able to thoroughly investigate the subject. Apart from the surveys mentioned, the author of the present book could find no other monograph or articles concerning *sacrilegium* in Gratian's *Decretum*. Considering the fact that the literature of the subject is so modest, undertaking research on the issue seems even more justified.

In view of the foregoing, the research on *sacrilegium* in Gratian's *Decretum* will mainly be based on the sources and the work will make use of the source texts. Many of the surveys indicated in the references to the book will be of help in discussing *sacrilegium* as a crime. To this end, monographs and articles on canonical penal law will be used. In the historical dimension, it will be the works of P. Hinschius[69] and M. Myrcha,[70] containing a substantial amount of material on what is called "the old law," understood as the one dating to Gratian's *Decretum*. There are also some chapters where the law of decretals is called in the same manner by M. Myrcha. A number of A. Myrcha's articles will also be cited, which will be indicated in the footnotes.

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[66] P. Hinschius, *System des katholischen Kirchenrechts mit besonderer Rücksicht auf Deutschland*, vol. V, Berlin 1893, pp. 226-228.

[67] Ibid., p. 226.

[68] A. Ludwig, *Geschichte des Sacrilegs nach den Quellen des katholischen Kirchenrechts*, AKKR 69 (1893), pp. 169-252.

[69] P. Hinschius, *System des katholischen Kirchenrechts mit besonderer Rücksicht auf Deutschland*, vol. IV, Berlin 1888; vol. V, Berlin 1893.

[70] M. Myrcha, *Prawo karne. Komentarz do Piątej Księgi Kodeksu Prawa Kanonicznego*, vol. II, *Kara*, pt. 1, (further cited as *Kara*), Warszawa 1960.

More contemporary criminal law is included in the works of J. Syryjczyk.[71] Despite considerable efforts, it has not been not possible to find any articles that would directly concern the crime of *sacrilegium* in Gratian's *Decretum*.

The main source text for the present study is Gratian's *Decretum* in Ae. Friedberg's edition in the Corpus Iuris Canonici[72] of 1879. The second and extremely important source is the manuscript of the *Decretum* from the University Library of the John Paul II Catholic University of Lublin,[73] together with its *Glossa ordinaria*.[74] Moreover, some other sources of canon law will also be used, including glosses and *summae* of the decretists, collections of conciliar and synodical canons, CIC 1917 and 1983 CIC, the writings of the Church Fathers and writers of the Church, texts of Roman law and Germanic laws as well as texts of some ancient Greek and Roman writers from the first centuries of the history of the Church.

The research aim of the present book will be to present a comparative analysis of the texts relating to *sacrilegium* from the *Decretum* in Ae. Friedberg's edition, which is currently considered the standard text of the *Decretum*, and the manuscript of the *Decretum* from the University Library of the John Paul II Catholic University of Lublin, whose text has not been any subject of scientific consideration to date.[75]

The manuscript of the *Decretum*[76] from the University Library of the John Paul II Catholic University of Lublin, entitled *Discordantium canonum concordia*,[77] dates back to the end of the 13th century and comes from the cir-

[71] J. Syryjczyk, *Kanoniczne prawo karne*, Warszawa 2003; the same author, *Sankcje w Kościele*, Warszawa 2008.

[72] *Corpus Iuris Canonici*, 2nd ed., Pars I, instruxit Ae. Friedberg, Lipsiae 1879-1881; the author will also use the edition of *Corpus Iuris Canonici*, Graz 1959, which is the anastatic reprint of Ae. Friedberg's edition and does not include any changes.

[73] *Concordia discordantium Canonum*, the University Library of the John Paul II Catholic University of Lublin, Lublin, ms. 1.

[74] *Glossa Ordinaria Decreti, a Ioanne Teutonico post a. 1215 confecta et a Bartholomeo Brixiensis circa a. 1245 retractata*, in: *Concordia discordantium Canonum*, the University Library of the John Paul II Catholic University of Lublin, Lublin, ms. 1.

[75] A. Vetulani described and presented the state of the copy of the manuscript in his article *Les manuscrits du Décret de Gratien et des oeuvres des décrétistes dans les bibliothéques polonaises*, "Studia Gratiana" 1 (1953), pp. 255-259; A. Adamczuk studied the miniatures of this manuscript in the book *Prawo i obraz w miniatorstwie średniowiecznym. Iluminowany rękopis Concordia discordantium canonum Gracjana w zbiorach Biblioteki Uniwersyteckiej KUL*, Lublin 2009.

[76] *Discordantium canonum concordia*, the University Library of the John Paul II Catholic University of Lublin, Lublin, ms. 1.

[77] This title appears in the Latin text on the endpaper of the front cover of the manuscript *Decretum seu Discordant. Canonum Concord.* The same endpaper provides some information in Polish and the title *Decreta seu Concordia discordantium Canonum*, see K. Burczak, *Rękopis Dekretu*

cles of Toulouse[78] in southern France. It was probably brought to Poland,[79] to the Benedictine monastery on Łysa Góra,[80] in the 15th century. The exact history of the manuscript as well as the way it became part of Piotr Moszyński's collection remain unexplained.[81] Count Jerzy Moszyński, whose father Peter was a well-known bibliophile and had the relevant manuscript, bequeathed it under his will to the University Library of the John Paul II Catholic University of Lublin on 25th May 1923, and since then it has resided in the collection of the Library under the catalogue number of ms. 1.

§ 4. Terminological and Methodological Issues

The book is excerpted from the more extensive work in Polish entitled *Sacrilegium w Dekrecie Gracjana* (Sacrilegium in Gratian's Decretum), ISBN 837702104-8. The extended version of the work includes Polish translations of the texts of the *Decretum* under analysis. All translations were made by the author of this book, including the legal texts that had not been translated into Polish previously, those coming from the works of the Church Fathers, Augustine, Jerome or Ambrose, as well as the texts from

Gracjana z Biblioteki Uniwersyteckiej KUL, "Studia Prawnicze" 2 (34) 2008, p. 82. The Gdańsk abbreviation of the *Decretum* is entitled *Discordantium Canonum Concordia*. The authors, however, tend to favour the view that the original title was *Concordia discordantium canonum*, see F. Heyer, *Der Titel der Kanonessammlung Gratians*, ZRG KA 2 (1912), pp. 336-342; A. Winroth, *The Making*, p. 5.

[78] A. Adamczuk, *Prawo i obraz w miniatorstwie średniowiecznym. Iluminowany rękopis Concordia discordantium canonum Gracjana (ms. 1) w zbiorach Biblioteki Uniwersyteckiej Katolickiego Uniwersytetu Lubelskiego*, Lublin 2009, pp. 202-203, 205-206. The author rejects the previous findings on the Rhineland origin of the manuscript presented by A. Vetulani, *Les manuscrits du Decret de Gratien et des ouvres des decretistes dans les bibliotheques polonaises*, "Studia Gratiana" 1 (1953), p. 257; the manuscript from the University Library of the John Paul II Catholic University of Lublin does not include *Introductio*, that is the introduction with the table of contents of the first two parts of the *Decretum*, which constitutes evidence for the later origin of the manuscript. *Introductio* was prepared by the school in order to facilitate finding regulations, see A. Vetulani *Z badań nad pierwotnym tekstem Dekretu Gracjana*, offprint, p. 9; F. Maassen, *Beiträge zur Geschichte der juristischen Literatur des Mittelalters, insbesondere der Decretisten-Literatur des zwölften Jahrhunderts*, Sitzung Berichten der Philosophisch- Historischen Classe der Wiener Akademie der Wissenschaften, 12 (1857), p. 12.

[79] A. Vetulani, *Les manuscrits*, p. 257.

[80] For more information on the way in which the manuscript might have appeared in the monastery on Łysa Góra, see A. Adamczuk, op. cit., pp. 23-29.

[81] The same author, pp. 28-29.

Roman law. It was necessary owing to the fact that the texts contained in the *Decretum* often depart from the original texts. Thus, they were translated in their versions from the *Decretum*. In addition, the Greek texts invoked but not quoted in the Latin text were also translated. In the manuscript, single Greek words are written in Latin transcription. The reason for this situation will be indicated in the course of analyzing particular texts, and the research conclusions will be presented in the chapter summaries and conclusion to the book. The Latin source texts are included in the work in the same way as they are given in the sources. A number of texts contain spelling variants, and the texts from the manuscripts often do not incorporate diphthongs. Any incorrect spelling encountered in the source texts will be indicated in the footnotes.

In principle, the author will adopt the dogmatic legal method and historical legal method for the purposes set out in this book. Employing a strictly historical method, in its original assumptions, will not be possible due to the fact that a number of norms relating to *sacrilegium* come from *Decretales Pseudo-Isidorianae*. Even though they imply a much earlier origin, they in fact date back to the mid-9th century. Thus, it will not be possible to demonstrate the chronological evolution of *sacrilegium*. For this reason, among others, the factual layout will be adopted in the book, presenting *sacrilegium* from the perspective of substantive and procedural canonical penal law. At the same time, historical elements will be emphasized in accordance with the historical-critical method based on the schema embracing origin, presentation and assessment. Moreover, on account of the translations of the texts, the book will include some elements of the philological method. The comparative method, in turn, will be adopted for the purposes of comparing the texts of the *Decretum* in Ae. Friedberg's edition and the manuscript from the University Library of the John Paul II Catholic University of Lublin. The layout of the text in the manuscript generally corresponds to that of Ae. Friedberg's edition.[82] Any disparities, especially concerning the number of *paleae*, will be indicated in the book. This element, though it is of secondary importance to the main subject of the book, is relevant in the course of research on the *Decretum*, as the number of *paleae* determines how close a given manuscript is to Gratian's original recension of the *Decretum*.[83]

In order to locate a given canon within this vast collection, abbreviations that are currently in common use in research will be adopted. For

[82] A. Vetulani, *Les manuscrits du Decret de Gratien et des ouvres des decretistes dans les bibliotheques polonaises*, "Studia Gratiana" 1 (1953), p. 256.

[83] A. Vetulani, *Z badań nad pierwotnym tekstem Dekretu Gracjana*, offprint, p. 12.

example, the abbreviation (D. 81 c. 1) represents the following: the capital D. 81 stands for Distinctio 81, and the small letter c. 1 means canon 1. Such abbreviations will apply to the first part of the *Decretum* comprising 101 *Distinctiones*. The abbreviation (C. 17 q. 4 c. 20) means: the capital C. 17 stands for Causa 17, the small letter q. 4 refers to quaestio 4 and the small letter c. 20 applies to canon 20. These abbreviations pertain to canons from the second part of the *Decretum* divided into 36 *Causae*. Causa 33 quaestio 3, which refers to *Tractatus de poenitentia*, is itself divided into seven *Distinctiones*. As for the abbreviations within the Treatise, the abbreviation (D. 3 c. 5 de poenit.) means: the capital D. 3 stands for Distinctio 3, the small letter c. 5 applies to canon 5 and the abbreviation de poenit. denotes *Tractatus de poenitentia*. Gratian's *dicta* will be referred to as follows: d. p. c. 30 q. 4 C. 17 means dictum post canonem 30 quaestionis 4 Causae 17, while d. a. c. 1 D. 1 de poenit. stands for dictum ante canonem 1 Distinctionis 1 Tractatus de poenitentia. When it is necessary to indicate some places in the *Glossa ordinaria* and others, a word from the text of the *Decretum* which is discussed in a given gloss will be provided. The manuscript of Gratian's *Decretum* from the University Library of the John Paul II Catholic University of Lublin will be cited as LDG (the Lublin *Decretum Gratiani***)** with a folio number (f.) and the information about the kind of page – recto (r.) or verso (v.). In a similar fashion, citation of the *Glossa ordinaria* included in the manuscript will involve a reference to *sigla* present on a given folio of the manuscript.

The subject will be investigated in six chapters. The analysis presented in each chapter will be recapitulated in respective summary sections. To a large extent, this layout of the book is motivated by the fact that, at the time covered by the book, canon law was established in the casuistic style. Gratian brought together the legal norms from approximately twelve centuries (from the 1st to the 12th century). He did not, however, work out a clear system of arranging the legal material in the *Decretum*. The norms concerning *sacrilegium* can be found in differents parts of the *Decretum*. Each of them is a separate case (casus). Thus, it will not be possible to establish any system of scientific research of the crime of *sacrilegium* in the *Decretum*. Each case (casus), which in this book will correspond to a type of *sacrilegium*, has to be considered on its own. It will only be possible to group these individual cases and present them in the classical order adopted for crimes, considering the subjective and objective perspective, guilt and punishment as well as the application and cessation of penalties. The method adopted has sometimes resulted in repetitions, as separate analyses concerning particular cases are conducted with respect to the subjective and objective perspective as well as guilt and penalties. In principle, the full source texts

will be analyzed and translated in the second and third chapters. In chapters four, five and six, the author will refer to the source texts using the abbreviations adopted.

§ 5. Organization of the Book

The book consists of six chapters. The first chapter provides a more theoretical discussion of the etymology of the word *sacrilegium* as well as the concept and nature of *sacrilegium* as a crime of canon law. It also depicts the way *sacrilegium* was understood in the Hittite, Egyptian, Jewish, Greek and Roman civilizations and, in a special way, in the Christian religion and among the canonists. Also the testimonies of the Church Fathers and writers of the Church present in their words will be of help in understanding *sacrilegium* in the life and discipline of the Church. Moreover, the chapter also comprises the definitions of *sacrilegium* from both normative texts and Gratian's *dicta*.

Chapter two develops a typology of subjects committing *sacrilegium*, as included both *in genere* and *in specie* in rubrics and *auctoritates*. These will be both clerics of all grades and laypersons.

The third chapter presents the objective aspect of *sacrilegium*. It includes an analysis of canons containing the already-mentioned *casus* or individual specific cases of *sacrilegium* with regard to the objective aspect. Despite the fact that each case is distinct, they will be grouped into categories respectively relating to the Church's goods, religion and unity of the Church, ordination and ecclesiastical offices, violence towards the clergy, crimes against spiritual and secular power, unlawful relationships, relations with Jews and magic.

The fourth chapter deals with the subjective aspect of the crime of *sacrilegium*, which was not as fully developed at the time referred to in the book as it is in contemporary canonical penal law. Nevertheless, the chapter presents the issue of the guilt of an individual subject, accomplices and the guilt of a community.

Chapter five discusses criminal sanctions for the crime of *sacrilegium* contained in criminal norms. It puts forward the tripartite division into censures, which were not clearly distinguished at the time, expiatory penalties and canonical penances.

The sixth chapter reviews the kinds and ways of imposing penalties for *sacrilegium*, which are different in the case of *latae sententiae* penalties and

ferendae sententiae penalties. It discusses the bodies imposing ecclesiastical penalties – popes, bishops and synods. In addition, the chapter presents the ways of imposing penalties for *sacrilegium* by secular authority, as the texts of Roman law included in the *Decretum* contain sanctions for *sacrilegium* in Roman law. Finally, it also deals with the legal procedures involved in the cessation of penalties, such as absolution on the usual conditions and in danger of death, and also discusses some other ways in which penalties cease to apply.

The conclusion summarizes the findings that emerge from the analyses of the source texts conducted in the previous chapters.

It is hoped that the present study of the crime of *sacrilegium* in Gratian's *Decretum* will add yet another contribution to the process of researching this monument to legal literature.

Chapter I

The Concept and Nature of *sacrilegium*

1.1. The Etymology of the Concept of *sacrilegium*

The concept of *sacrilegium* comes from the adjective *sacrilegus*, which was derived as a result of the combination of the Latin words *sacer* and *legere*.[1] The word *sacer* meant devoted to a deity, holy, sacred, worshipped, pertaining to worship.[2] The word *legere,* as the second element of the compound, meant to gather, take off, tear off, take out, pull out, steal and rob.[3] The word *sacrilegium* was used to refer to robbing a temple, and the perpetrator of this act was defined as *sacrilegus* or committing sacrilege and, as a noun, he who robs a temple or steals an object from a temple.[4] The word *sacrilegium* is a Latin calque of Greek ἱεροσυλία (=ἱεροσύλησις). The Greek word was derived from the compound consisting of ἱερός, which meant filled with divine power, holy, sacred,[5] belonging and closely related to the divine sphere,[6] and

[1] *Dictionnaire Encyclopédique Quillet*, Paris 1970, vol. VII, s. v. *sacrilège*, p. 5993; M. Plezia, *Słownik łacińsko-polski*, vol. V, Warszawa 1999, s. v. *sacrilegium*, p. 6; F. Gnoli, *Sacrilegio*, in: *Enciclopedia del diritto*, vol. XLI, Varese 1989, p. 213; J. F. Delany, *Sacrilege*, in: *The Catholic Encyclopedia*, vol. XIII, New York 1913, p. 321.

[2] M. Plezia, op. cit., vol. V, s. v. *sacer*, p. 3. *Sacrum* was distinguished from *profanum* already in the antiquity, the evidence of which can be found in Horace's text from *Ars poëtica* 397 "Sacra profanis secernere." Hence the prohibition *Ne misceantur sacra profanis*, see Cz. Michalunio, *Dicta. Zbiór łacińskich sentencji, przysłów, zwrotów, powiedzeń*, Kraków 2005, [5157].

[3] M. Plezia, op. cit., vol. III, s. v. *lego*, p. 339.

[4] The same author, op. cit., vol. V, s. v. *sacrilegus*, p. 6.

[5] O. Jurewicz, *Słownik grecko-polski*, vol. I, Warszawa 2000, s. v. ἱερός, p. 461.

[6] Ed. G. Kittel, *Theologisches Wörterbuch zum Neuen Testament*, vol. III, Stuttgart 1950, s. v. ἱερός, p. 223.

συλάω, meaning to strip, denude, despoil, rob, take away and kidnap.[7] There is no difference in content between Greek ἱεροσυλία and Latin *sacrilegium*. Both refer to taking away a sacred object or an object from a sacred place. In accordance with this, three kinds of *sacrilegium* are distinguished – personal sacrilege (personale), real sacrilege (reale) and local sacrilege (locale). Personal sacrilege refers to dealing irreverently (violatio) with persons consecrated to God. It may be committed by laying violent hands on these persons, offending them, or by any sin against the vow of chastity.[8] Real sacrilege is the theft of sacred things. Local sacrilege is the desecration of a sacred place.[9]

1.2. *Sacrilegium* in the Greek Civilization

Initially ἱεροσυλία denoted the theft of a sacred thing from sacred places. In the Greek, Roman and Egyptian world it was considered one of the gravest crimes,[10] for which, just as in the case of murder, no amnesty could be granted. More serious, according to Kittel, was only high treason, though as maintained by Suda, these crimes were treated on a par.[11] They were punished by exile and denial of the right of burial in one's homeland.[12] Later, the word ἱεροσυλία was used not only in reference to robbing a temple, but it was also extended to mean any sacred crime and unlawful act pertaining to religion

[7] O. Jurewicz, op. cit., vol. II, s. v. συλάω, p. 331; likewise, F. Gnoli claims that just as Latin *sacrilegium* is derived from the words *sacrum* and *legere*, the Greek ἱεροσυλία consists of ἱερός and συλάω, see *Enciclopedia del diritto*, p. 213; R. Popowski, *Wielki słownik grecko-polski Nowego Testamentu*, Warszawa 1995, s. v. (4673) συλάω, p. 574, where the author provides the example of the use of this verb in 2 Cor 11, 8 "ἄλλας ἐκκλεσίας ἐσύλησα" (I robbed other churches).

[8] J. F. Delany, *Sacrilege*, in: *The Catholic Encyclopedia*, vol. XIII, New York 1913, p. 321.

[9] R. Naz (ed.), *Dictionnaire de droit canonique*, vol. VII, Paris 1965, s. v. *sacrilège*, col. 830-834.

[10] G. Kittel, op. cit., p. 254.

[11] M. J. Suda, *Theologische Realezyklopädie*, vol. XXIX, Berlin 1998, p. 49 claims that robbing a temple (ἱεροσυλία) in Athens was treated on a par with high treason. It was punished by forfeiture of property to the state and the person could not be buried in Attica (Xenophon, *Hellenica* I, 7, 22 "ὅς ἐστιν ἐπὶ τοῖς ἱεροσύλοις καὶ προδόταις, ἐάν τις ἢ τήν πόλιν προδιδῷ ἢ τὰ ἱερὰ κλέπτῃ, κριθέντα ἐν δικαστηρίῳ, ἂν καταγνωσθῇ, μή ταφῆναι ἐν τῇ Ἀττικῇ)."

[12] Ibid., p. 255; Plato in his Phaedo puts together numerous murders and numerous and great temple robberies, as well as numerous crimes for which one was sent to Tartarus, Plato, *Phaedo* 113 e "ἢ ἱεροσυλίας πολλὰς καὶ μεγάλας ἢ φόνους ἀδίκους καὶ παρανόμους πολλοὺς [...] πίπτει εἰς τὸν Τάρταρον."

in general.[13] Thus, ἱεροσυλία was mutilating a statue of Zeus, counterfeiting money, committing an offence during a torch race held in honour of Demeter or desecrating a grave. All these delicts fell under τιμωρία ἱεροσυλίας or retaliation for sacrilege. Sacrilege was considered such a grave crime that it was not possible to imagine anything more wicked.[14]

1.3. *Sacrilegium* in the Roman Empire

In the Roman state, in the classical period of Roman law, *sacrilegium* was a special kind of *furtum*. By analogy to *peculatus*,[15] or misappropriation of things belonging to the state, it constituted one of the crimes of criminal law. In the post-classical period of Roman law, the term *sacrilegium* referred to the whole complex of crimes against the emperor and religion. It was part of criminal law as well, but it also belonged to administrative law and religious legislation. It had always been an institution of public law.[16] In the period when the Roman state recognized Christianity as *religio licita*, the concept of *sacrilegium* underwent a transformation. It now constituted an act of unrighteousness against the Christian religion protected by civil law.[17]

1.4. In the Old Testament

In the Old Testament there is a legal term to describe an unlawful act – the word *maᶜal*.[18] It occurs 44 times and is used to refer to *sacrilegium*. *Maᶜal* is a kind of unlawful act that is at the same a sin against God and should be

[13] G. Kittel, op. cit., p. 255; J. F. Delany, *Sacrilege*, in: *The Catholic Encyclopedia*, vol. XIII, New York 1913, p. 321.

[14] G. Kittel, op. cit., p. 225.

[15] T. Mommsen, *Römisches Strafrecht*, 3rd ed., Leipzig 1899 (Nachdruck, Graz 1952), p. 761.

[16] R. Maceratini, *Ricerche sullo status giuridico dell'eretico nel diritto romano-cristiano e nel diritto canonico classico. (Da Graziano ad Uguccione)*, (further cited as *Ricerche*) Padova 1994, p. 55.

[17] A. Dębiński, *Sacrilegium w prawie rzymskim*, pp. 195-199; R. Maceratini, *Ricerche*, pp. 51-52.

[18] J. Milgrom, *The Anchor Bible, Leviticus 1-16, A new Translation with Introduction and Commentary*, New York London Toronto Sydney Auckland 1991, p. 345.

distinguished from evil done to a person.[19] However, the cultic legal texts do not contain a clear definition of this word. It is used to refer to two important types of evil – *sacrilegium* against a sacred place and breaking the oath of the Covenant. The type of *sacrilegium* that is relevant to the present work, that is the one against a sacred place, is mentioned only in the Book of Chronicles. King Uzziah committed *sacrilegium*, because he entered the temple of God and burnt incense upon the altar.[20] According to the law of the time, this could only be done by priests. The king was immediately punished for this act, as leprosy appeared on his forehead. Also Ahaz committed *sacrilegium* (maᶜal) when he robbed the Lord's temple and presented the stolen things to the Assyrian king Tiglath-Pileser, after which he took the furnishings from the temple, cut them in pieces, shut the doors of the temple and set up altars in different places in Jerusalem.[21] Also the leaders of Judah, the priests, and the people committed *sacrilegium* (maᶜal), as they defiled the temple of the Lord.[22]

The religious crime of *sacrilegium* appeared in Israel as late as in the post-exile period. It can be found in biblical books in different variants of *maᶜal* used as general terms for describing a sin. The fear of the desecration of holy places was a crucial factor of thought and legislation of ancient people in general. The early biblical tradition was preoccupied with the danger of unworthy contact with a temple. A stranger entering a temple was to be punished with death.[23] Punishment for sacrilege was inflicted on Korah and all his followers.[24] The early tradition speaks of *sacrilegium* (maᶜal) of Ahaz versus *hērem* of Jericho. *Hērem* underlay the full and complete devotion of something to God or the imposition of excommunication. It was forbidden to appropriate or even touch anything, as Achan did at Ai, for which he was stoned and died with his all family.[25] This incident shows that appropriating anything that has been dedicated to God constitutes *maᶜal* (sacrilegium).[26] It did not matter if the prohibition of touching *hērem* was breached accidentally or deliberately. No distinction was thus made between *dolus* and *culpa*. The crime against *hērem* comprises three levels:[27] stealing, concealing and

[19] Ibid., p. 346.
[20] 2 Chr 26, 16-18.
[21] 2 Chr 28, 19-25.
[22] 2 Chr 36, 14.
[23] Nm 1, 51; 3, 10, 38; 18, 7.
[24] Nm 16-18.
[25] Jo 7, 1-26.
[26] J. Milgrom, op. cit., p. 346.
[27] It is indicated by Jo 7, 11b "they have stolen, they have lied, they have put them with their own possessions."

putting the thing among one's belongings. Committing *sacrilegium* (māᶜal maᶜal) meant committing it against a temple. Another, closely connected, type of *sacrilegium* pertained to breaking the Covenant. Although this kind of *sacrilegium* remains outside the scope of the present work, it is worth noting, however, that these two categories of *maᶜal* (sacrilegium) are one reality in the sense that both these acts of sacrilege are against God:[28] "Both acts of sacrilege are against the deity."[29] Just as in the case of the desecration of the Lord's temple by Ahaz, all Israel was accused of breaking the Covenant.[30] In addition, the affinity between these two kinds of *maᶜal* is highlighted by the fact that they were labelled with the term *mered*, that is "rebellion against the Lord," in the case of violating the holy tabernacle[31] and breaking the Covenant.[32] These two kinds of *maᶜal* (sacrilegium) are not only sins committed against God's property or the name of God, but they also require the same satisfaction. At the same time, it is typical of all biblical literature that both kinds of the crime of *sacrilegium* entailed arousing God's anger against the family and community to which the perpetrator belonged.[33]

The Israelites adopted the whole content of the concept of *maᶜal* from the peoples of the Middle East. Classical Middle Eastern literature, especially that of the peoples of Mesopotamia, abounds in examples of divine punishment for violating the sanctity of sanctuaries and breaking an oath.[34] The Hittite texts indicate that these two kinds of *maᶜal* were the reason for the fall of the Hittite kingdom. Its collapse was perceived as divine punishment for sacrilege. Also in the Sumerian civilization the deity destroyed Agade, because king Naram-Sin had plundered Ekur, the temple of Enlil.[35] No constitutive element of *maᶜal* in reference to sacrilege committed against a temple is defined in any codex of the Bible, except for fact that *sacrilegium* is mentioned in the prohibition of exchanging first-born animals offered to God[36] and using them for work.[37] The rabbinic sources can be a little more helpful in this respect. It is surprising to find that the definition included in

[28] It will also be a constitutive feature of *sacrilegium* in Christianity, where the nature of this crime is that it is committed directly or indirectly against God (in Deum and contra Deum).

[29] J. Milgrom, op. cit., p. 348.

[30] Jo 7, 11, 15.

[31] Jo 22, 16, 18.

[32] Ez 17, 15.

[33] J. Milgrom, op. cit., p. 349.

[34] For the examples and analyses, see J. Milgrom, op. cit., p. 349.

[35] J. Milgrom, op. cit., p. 350.

[36] Lev 27, 9-14.

[37] Deut 15, 19.

one of these sources is the following: "*maᶜal* denotes change."[38] This change pertains to the change of state from *sacrum* to *profanum*. According to the rabbinic sources, *sacrilegium* occurs when sacrifical animals are eaten, given or presented to God in parts (He who divides it shall be killed).[39] *Sacrilegium* is also committed when sacrifical animals are slaughtered, eaten, taken away or yoked, that is used for work, sold or exchanged. According to the Hittite "Instruction," offerings handed over to a temple, such as gold, silver or bronze, could not be sold or employed for secular use by being turned into ornaments for wives and children. Those on duty in a temple were supposed to determine the kind of offerings, weigh them, provide the date and confirm the receipt of offerings and, finally, in today's sense, sell them in a bank. The form of *sacrilegium* that could only be determined by those on duty in a temple was the public and private rite of worship practiced at a wrong time. This kind of *sacrilegium* was punished with death. If the criminal was arrested, the punishment was administered by people, if not – by gods. In the case of farmers and shepherds, *sacrilegium* was the unlawful treatment of the fruit of their work. A farmer committed *sacrilegium* when he delayed the delivery of corn, when he stole it or changed his field, for which all his harvest was consficated, or when he appropriated cattle through consumption or sale. If he was proved guilty, he was punished with death.[40] A shepherd committed *sacrilegium* when he delayed the delivery of sacrifical animals, eating or selling them, giving them even to his superiors or exchanging a good animal for a bad one. Also in this case, when guilty, he was punished with death.

The Hittite sources (Instructions) shed considerable light on the biblical categories of the desecration of a temple, though they do not render the full biblical meaning of *maᶜal*.[41] Trespass or defilement of something sacred constitutes one kind of *sacrilegium*. Some additional information on biblical *maᶜal* can be obtained by analyzing the system of punishments in the Hittite texts.[42] They indicate that temple officials committing *sacrilegium* were punished by gods, while their servants – by people. Apart from the perpetrator of *sacrilegium*, their whole family also received punishment.

[38] It is change because an object changes its status of belonging. It used to be God's property, and belonged to *sacrum*, whereas after the crime of employing it for secular use, it belongs to *profanum*, see J. Milgrom, op. cit., p. 351.

[39] *Sipra* 1, 59; J. Milgrom, op. cit., p. 353.

[40] J. Milgrom, op. cit., p. 353.

[41] Ibid., p. 355.

[42] They are included in a separate table by J. Milgrom, op. cit., p. 354.

In the Bible *sacrilegium* committed against a temple was punishable with death by God.[43] It especially concerned collective guilt. It never used to be a function of human jurisprudence.[44]

In conclusion, it ought to be stated that each act of *maᶜal* implies *sacrilegium* against a temple or the name of God. This act may cause the destruction of the community as well as of the criminal. *Sacrilegium* against the name of God pertains to breaking the Covenant. This kind of *maᶜal* is sufficiently attested in the Bible. It is different in the case of the desecration of the holy tabernacle, as there is no definition or clear illustration in the Bible. The Hittite texts of "Instructions for Temple Officials" provide the relevant answer. However, they only deal with the subject committing the crime. It can be clearly seen from the way the unlawful act was punished. When the perpetrator is caught and imprisoned by people, it is only this person that is punished with death, and if they are accused by gods, a trial or an oracle, the whole family is sentenced. The law of the Israelites, for its part, concerns two conflicting demands. According to the first one, a sin committed against God is not punished by man. The second one pertains to the exclusive right of God to collective punishment, which can never be usurped by man.[45]

In the Jewish legislation of the later period the rabbis did not have any specific legal definition for robbing a temple.[46] They used two words to refer to holiness, *qadōš* and *hērem*. The latter was based on the root *hrm*, which meant to detach or separate: to separate from ordinary use and employ solely for sacred use.[47]

Whether intentional or careless, the violation of sacred things was treated as *sacrilegium*. When the Mishna was developing, a number of behaviours against holiness were included in Tractate *Keritot*, where they were punished with excision (karet).[48] The Torah ordered the penalty of "karet" for everyone who deliberately derided the holiness of a temple.[49] Also even the slightest departure from the laws and rituals connected with

[43] J. Milgrom, op. cit., p. 355.

[44] Ibid., p. 356.

[45] Ibid., p. 356.

[46] In the Greek version of the Bible, robbing a temple is rendered as ἱεροσυλέω 2 Mc 9, 2; Rom 2, 22; ἱερόσυλημα in the sense of robbing a temple, 2 Mc 4, 39; ἱεροσυλία in the sense of robbing a temple, 2 Mc 13, 6; ἱερόσυλος in the sense of a sacrilegist, 2 Mc 4, 42; Acts 19, 37, see F. Rehkopf, *Septuaginta-Vokabular*, Götingen 1989, p. 114.

[47] A. Di Nola, *Sacro/profano*, in: *Enciclopedia*, vol. XII, Torino 1981, s. v. *sacro/profano*, p. 328.

[48] M. J. Suda, op. cit., p. 53.

[49] *Encyclopedia Judaica*, vol. XIV, Jerusalem 1972, s. v. *sacrilege*, col. 616.

serving at a temple was punished. The gravity of sacrilege was reflected in killing Nadab and Abihu for offering unauthorized fire before the Lord.[50] Also disrespectful treatment of some difficult parts of the Torah was considered to be the crime of *sacrilegium*.[51] *Me'ilah*, the word used in the Talmud, stood for any unholy treatment of sacred things. The content of this word corresponds to the reality of Greek ἱεροσυλία and Latin *sacrilegium*.

Monotheism demanded that Jews would destroy pagan gods, so the destruction of any pictures of pagan gods did not constitute any crime for Jews. According to the order included in the Book of Deuteronomy, they were supposed to burn the carved images of other gods. They were forbidden to take any gold and silver from these images, "lest they be ensnared by it,"[52] and moreover, it was under a curse (hērem). Jews treated robbing a temple as a contravention of the ban, which did not constitute any particular religious delict. It was punished by flogging, which was sufficient reparation. It was punished less severely than murder. The punishment for the violation of holiness rested with God.[53] Some similar elements can be found in the understanding of *sacrilegium* in Christianity, which, however, contributed its own unique legal elements.

1.5. *Sacrilegium* in the Christian Religion

The Christian religion has its root in the teaching of Jesus Christ. The Apostles' multiple experience of the divinity of Christ strengthened their conviction about his Divine Sonship and holiness. Christ himself acted in defence of the sanctity of the temple when he drove the traders and money changers out of that temple.[54] Christianity based its awareness of God's holiness and the human attitude towards it on the oral teaching of the Apostles and the writings of the New Testament. The shaping of Christianity in the Jewish, Greek and Roman environment led to taking over a number of institutions that had already been known in their social, legal and religious

[50] Lev 10, 1-2.

[51] *Encyclopedia Judaica*, op. cit., col. 616.

[52] Deut 7, 25ff.

[53] G. Kittel, op. cit., p. 255: "Todesstrafe durch Gott." Also in ancient Greece and Gaul, see J. M. Suda, op. cit, p. 49.

[54] Jn 2, 14-16.

systems.[55] One of these concepts was *sacrilegium*.[56] Christianity did not come up with a new concept for robbing a temple and desecrating sacred places or doing violence to people consecrated to God, but it gave it a specifically Christian meaning.[57] Since the language of Christians was initially Greek in the form of *koine* and then Latin, the Greek and Latin concepts of ἱεροσυλία and *sacrilegium* became the Christian words for the violation (violatio) of the holiness of a person, place and object.

1.5.1. The New Testament

In the New Testament the expression τὰ εἴδωλα ἱεροσυλεῖς[58] (you rob temples) was used to refer to robbing a temple, which corresponds to Latin *templa spolias* or *sacrilegium facis*.[59] Saint Paul reproached Jews for robbing pagan temples, even though they found idols repulsive. In the latter case the expression was used in the adjectival form, where the city clerk quietened men of Ephesus who were incited by Demetrius the silversmith with the words οὔτε ἱεροσύλους οὔτε βλασφημοῦντας τὴν θεὸν ἡμῶν[60] (neither are they sacrilegists nor they blasphemed our goddess), in Latin *neque sacrilegos neque blasphemantes deam nostrum*.[61] These are the two uses of the word ἱεροσυλέω in the New Testament to refer to robbing a temple.

[55] I. S. F. Böhmer, *Dissertatio*, p. 2.

[56] A. Ludwig, *Geschichte des Sacrilegs*, p. 169.

[57] I. S. F. Böhmer, *Dissertatio*, p. 2.

[58] Rom 2, 22 in the edition of *Das Neue Testament Griechisch und Deutsch*. Stuttgart 1986; the same in *Grecko-polski Nowy Testament*, interlinear edition with grammatical codes, translated by R. Popowski, M. Wojciechowski, Warszawa 1994, where s. v. ἱεροσυλέω (2406) the following meanings are provided: to rob a temple, to plunder a temple, to rob sacred places and to commit sacrilege.

[59] Rom 2, 22 in the edition of *Novum Testamentum Latine*. Stuttgart 1992, the critical apparatus to Rom 2, 22 provides the information that three editions include the expression "sacrilegium facis," in W (I. Wordsworth, H. I. White, H. F. D. Sparks, Novum Testamentum Domini nostri Iesu Christi Latine secundum editionem S. Hieronymi, Oxonii 1889-1954), S (Biblia Sacra iuxta Vulgatam versionem, adiuvantibus Bonifatio Fischer OSB, Iohanne Gribomont OSB, H. F. D. Sparks, W. Thiele, recensuit et brevi apparatu instruxit Robertus Weber OSB, editio tertia emendata quam paravit Bonifatius Fischer OSB cum sociis H. I. Frede, Iohanne Gribomont OSB, H. F. D. Sparks, W. Thiele, Stuttgart 1983) V (Novem illae XV. vel XVI. saeculi editiones <sc. G, Co, E, Wi, St, L, P, Si, C> dummodo omnes uno eodemque modo a Novae Vulgatae textu discrepent).

[60] Acts 19, 37 in the edition cited above, *Das Neue Testament Griechisch und Deutsch*.

[61] The critical apparatus to Acts 19, 37 includes the information that the editions W S V (indicated above) contain the word *vestram*, not *nostram*.

In yet another case the word συλάω[62] was used, where Saint Paul reminds the Corinthians, "I robbed (ἐσύλησα) other churches by receiving support from them so as to serve you.[63] Thus, in the first two cases the meaning of the word ἱεροσυλέω is identical with the meaning used by Greeks and Romans. In the third case of ἄλλας ἐκκλεσίας ἐσύλησα (Other (assemblies) I did rob),[64] the word being only the second part of the compound ἱεροσυλέω, that is συλάω, was used in the figurative sense. Saint Paul did not rob other Churches, but wanted to convince the Corinthians that he had received support from other Churches in order to be able to serve them at no cost. The New Testament attests the use of the word ἱεροσυλέω in the primitive Church with the same meaning as used by Greeks, as well as of the word *sacrilegium* used by Romans. It ought to be noted that the words ἱεροσυλέω and *sacrilegium* were used to refer to sacrilege also in the Greek translation of the Old Testament.[65] These words, however, denoted merely a misdeed rather than a crime.

1.5.2. The Church Fathers and Writers of the Church

Initially, the nature of the concept used to be explored more by the theologians than the canonists, who used it in a slightly limited sense.[66] I. S. F. Böhmer quoted the distinction between three categories of *sacrilegium*, as formulated by Passerinus, that is "sacrilegium proprium vel improprium seu quasi sacrilegium."[67] According to Böhmer, the Church Fathers overused the term *sacrilegium* in that they often applied it in the theological, and not always juridical, sense.[68] This extended meaning of *sacrilegium* was reflected in the writings of the Church Fathers. A. Ludwig distinguishes two periods in the writings of the Church Fathers in relation to the crime

[62] 2 Cor 11, 8 "ἄλλας ἐκκλεσίας ἐσύλησα" (Other (assemblies) I did rob), *Grecko-polski Nowy Testament*, interlinear edition with grammatical codes, translated by R. Popowski, M. Wojciechowski, Warszawa 1994.

[63] 2 Cor 11, 8.

[64] The translation of 2 Cor 11, 8, in *Grecko-polski Nowy Testament*, interlinear edition with grammatical codes, translated by R. Popowski, M. Wojciechowski, Warszawa 1994, p. 869.

[65] See F. Rehkopf, *Septuaginta-Vokabular*, Götingen 1989, s. v. ἱεροσυλέω p. 114, ἱεροσυλέω, 2 Mc 9, 2; ἱερόσύλημα in the sense of robbing a temple, 2 Mc 4, 39; ἱεροσυλία in the sense of robbing a temple, 2 Mc 13, 6; ἱερόσυλος in the sense of a sacrilegist, 2 Mc 4, 42.

[66] F. Gnoli, *Enciclopedia del diritto*, vol. XLI, Varese 1989, s. v. *sacrilegio*, p. 216.

[67] I. S. F. Böhmer, *Dissertatio*, p. 7.

[68] Ibid., p. 8.

of *sacrilegium*. The first one covers the time from the mid-2nd century, when *sacrilegium* is conceived of in narrow terms, as in classical Roman law, as a qualified form of *furtum*, or robbing a temple. The second one spans the time from the beginning of the 4th century, when the meaning of *sacrilegium* shifts from "furtum rei sacrae" towards "violatio sacri,"[69] even though the first meaning still continues to be used.

In the writings of Augustine the word *sacrilegium* occurs 74 times in the nominative paradigm. Augustine, writing in defence of the purity of faith, uses the term *sacrilegium* to refer to idolatry.[70] Most often, he regards schism as *sacrilegium*.[71] Schism is more serious than other types of *sacrilegium*.[72] The *sacrilegium* of schism constitutes a grave crime (crimen).[73] *Sacrilegium* is a greater sin insofar as it can only be committed against God.[74] This is where the gravity of the crime was. Augustine gave the example of evil acts which were evil in themselves, and there was no need to forbid them by law. Among them he included *sacrilegium*.[75] Augustine puts *sacrilegium* in the catalogue of major crimes and sins: *adulterium*, *homicidium*, *sacrilegium* and labels them as *gravis res*, *grave vulnus*, *lethale*, *mortiferum*.[76] At another place: *adulterium*, *furtum*, *homicidium*, *sacrilegium*;[77] *homicidium*, *adulterium*, *sacrilegium*, *aliud scelus*.[78]

Origen described unlawful acts which were revelead in the community of the Church as *delicta*, for which the leaders of the Church and people in power excluded one from the community of the Church.[79] They were different from *peccata simplicia*, for which no ecclesiastical penalties were

[69] A. Ludwig, *Geschichte des Sacrilegs*, pp. 179-180.

[70] Augustinus, *Epistulae*, ep. 51, 2, 1, CSEL 34, p. 145 "idolatriae sacrilegium;" the same author, *Speculum* 30, 202 "qui abominaris idola, sacrilegium facis?;" the same author, *Contra Faustum* 6, 5 "idolatriae sacrilegium."

[71] Augustinus, *Contra epistulam Parmeniani* 2, 5, 10, PL 43, col. 56-57; ibid. 2, 9, 19; 2, 10, 20; 2, 17, 36; 3, 1, 3; the same author, *De baptismo* 1, 1, 2.

[72] Augustinus, *De baptismo* 2, 7, 11, PL 43, col. 258.

[73] Augustinus, *Contra litteras Petiliani* 1, 27, 29 "sacrilegium schismatis crimen;" the same author, *Epistulae*, vol. XXXIV.2, ep. 51, 3 "pro immanitate tanti sacrilegii [...] hoc crimen est."

[74] Augustinus, *Contra Cresconium* 4, 10, 12, CSEL 52, pp. 512-513 "sacrilegium vero tanto est gravius peccatum, quantum committi non potest nisi in Deum."

[75] Augustinus, *Contra Iulianum opus imperfectum* 6, 41, PL 45, col. 1604; CSEL 85/2, p. 458 "Quod ergo per se prauum est, uerbi gratia parricidium, sacrilegium, adulterium, et malum esse etiam sine lata lege dignoscitur."

[76] Augustinus, *Sermo* 352, PL 39, col. 1558.

[77] Augustinus, *Enarrationes in Psalmos*, Ps 106, 5, CCL 40, pp. 1572-1573.

[78] Augustinus, *De civitate Dei* 21, 11, CCL 48, p. 777.

[79] Origenes, *Homiliae in librum Iudicum* (secundum translationem Rufini) 2, 5, SCh 389, p. 90.

imposed.[80] However, Origen stated that the word *delictum* was often used in the Bible in the sense of *peccatum*, but in some cases *delictum* was in fact used to refer to a crime.[81] Origen perceived the attitude of Jews towards Christ as *sacrilegium*.[82]

Tertullian condemned the Marcionite sect, calling it *sacrilegium Marcionis*.[83] Unlawful acts, being mortal sins and external infringements of criminal law, he treated as crimes that deserved to be punished.[84]

Jerome used the term *sacrilegium* 26 times in his writings. He considers Judas' betrayal of Christ as *sacrilegium*.[85] In the "catalogue" of the gravest crimes threatening the community of the Church: *furta*, *homicidia*, *adulteria*, *periuria*, *hereseos adinuentio*, he also enumerates *sacrilegium*.[86] In another work the layout of the "catalogue" of the gravest crimes is similar: *adulterium*, *homicidium*, *sacrilegium*. These three crimes are defined by Jerome as *maiora crimina*.[87] He also labels perjury (periurium) as *sacrilegium contra Deum*.[88] Employing sacred vessels designated for divine worship for secular use was treated as the crime of *sacrilegium*.[89] This is how this crime will be conceived of in the texts of Gratian's *Decretum*. In the Middle Ages it was expressed in the following legal principle: *Semel Deo dedicatum non est ad usus humanos ulterius transferendum*.[90] Jerome's writings, just as the writings of other Christian authors, capture the important element of *sacrilegium* which is its being committed against God. It is rendered by the expressions "contra Deum commisit sacrilegium"[91] and "sacrilegium in

[80] G. Michiels, *De delictis et poenis*, vol. I, p. 60.

[81] Origenes, *In Leuiticum homiliae* (secundum translationem Rufini) 5, 4, SCh 286, pp. 222-224.

[82] Origenes, *In Leuiticum homiliae* (secundum translationem Rufini) 3, 1, SCh 286, p. 122.

[83] Tertulianus, *Adversus Marcionem*, b. IV, pt. III, CSEL 47, p. 431.

[84] Tertulianus, *De pudicitia* 19-20, CCL *Tertuliani Opera*, Pars II, p. 1323. I. S. F. Böhmer, Dissertatio, p. 11 emphasizes that the Church Fathers did not distinguish between "forum theologicum et iuridicum," and therefore frequently classified misdeeds as *sacrilegium*, even though they did not constitute *sacrilegium* in the juridical sense.

[85] Hieronymus, *Commentarii ad Isaiam* 16, 59, 7, CCL 73A, p. 682.

[86] Hieronymus, *In Hieremiam prophetam libri VI*, CCL 74, II, 34, 2, p. 77.

[87] Hieronymus, *Commentarii in euangelium Matthaei* 3, 683, CCL 77, p. 163.

[88] Hieronymus, *Commentarii in Ezechielem* 5, 17, CCL 75, p. 220.

[89] Hieronymus, *Commentarii in Danielem* 2, 5, CCL 75A, p. 820ff. This thought was also not unfamiliar earlier, in the antiquity. Horace in *Ars poëtica* 397 ordered "Sacra profanis secernere." Later there appeared the saying "Ne misceantur sacra profanis," see Cz. Michalunio, *Dicta*, [5157].

[90] *Liber VI Bonifatii VIII, Regulae Iuris*, reg. 51, in: *Corpus Iuris Canonici*, 2nd ed., Pars II, instruxit Ae. Friedberg, Lipsiae 1879-1881, col. 1123; V. Bartoccetti, *De regulis juris canonici*, Roma 1955, pp. 185-189; A. Dębiński, *Kościół i prawo rzymskie*, 2nd ed., Lublin 2008, p. 168.

[91] Hieronymus, *Commentarii in Ezechielem* 5, 17, CCL 75, p. 214ff.

Deum."[92] The ordinary *furtum*, which is considered among the laity as a minor crime or no crime at all, and in a monastery is nearly treated as sacrilege, constituted the biggest crime.[93] Jerome also proposed the definition of *sacrilegium* which is different from the ordinary *furtum*.[94]

Also Ambrose considered worshipping idols[95] as well as the Arian[96] and Manichaean[97] heresies as *sacrilegium*. He also treated Cain's lie to God as *sacrilegium*, when he said that he did not know what had happened to his brother Abel.[98] *Parricidium* was called by Ambrose a crime (scelus), to which Cain added *sacrilegium* which was his attempt to lie to God that he did not know about the death of his murdered brother. For Ambrose, *sacrilegium* is rather connected, apart from heresies, with the moral sphere, not with *crimen*.

An important element of *sacrilegium* was indicated by Cassiodorus in his writings. He claims that *sacrilegium* in the correct sense of this word is committed against God. It is like the violation of holiness or transgression of the commandments.[99] Comparing the gravity of the crimes labelled by him as *crimina*, Cassiodorus collated *furtum* with *homicidium* and *adulterium* with *sacrilegium* in order to prove that, just as murder is a more serious crime than theft, sacrilege is a more serious crime than adultery.[100] The violation of holiness (violatio sacri) constitutes the essence of *sacrilegium* also for Pope John VIII and Gratian, as will be shown in the present work.

Isidore of Seville, presenting definitions of various concepts, also defined *sacrilegium*. His definition is objective in character and is limited in its content to the type of *furtum*, as it was the case in Roman law. Isidore claims that *sacrilegium* in its correct meaning refers to the theft of sacred things.[101]

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[92] Hieronymus, *Commentarii in Danielem* 2, 5; *Commentarii in prophetas minores*, *In Osea* 3, 1. CCL 76, p. 108.

[93] Hieronymus, *Epistulae*, vol. LV, ep. 108, 20, CSEL 55, p. 336.

[94] Hieronymus, *Epistulae*, ep. 52 *ad Nepotianum*, CSEL 54, p. 439; PL 22, col. 539.

[95] Ambrosius, *Expositio evangelii secundum Lucam* 7, 536. CCL 14, p. 232.

[96] Ambrosius, *De fide libri V (ad Gratianum Augustum)*, 3, 12. PL 16, col. 633-635.

[97] Ambrosius, *Epistulae*, vol. LXXXII, 1, b. 6, ep. 28, 14.

[98] Ambrosius, *Exsplanatio psalmorum* XII, Ps 38, 3, 2, PL 14, col. 1090.

[99] Cassiodorus, *Expositio sancti Pauli Epistulae ad Romanos* 2, 425 "Sacrilegium est quod proprie in Deum committitur, quasi sacri violatio, vel praevaricatio mandatorum."

[100] Cassiodrus, *Expositio Psalmorum*, Ps 49, 18, CCL 97, p. 449 "Nam furtum ad homicidium quid est? adulterium ad sacrilegium quantum est? [...] in his duobus prohibitis, omnia crimina uetuisse uideatur;" cf. K. Burczak, *Figury retoryczne i tropy w Psalmach na podstawie Expositio Psalmorum Kasjodora*, Lublin 2004, p. 303.

[101] Isidorus Hispalensis, *Etymologiarum sive Originum libri XX* 5, 26, 12 "Sacrilegium proprie est sacrarum rerum furtum."

This cursory analysis of the texts of the Church Fathers and writers of the Church, who did not have the power to establish law, though they do bear witness to the Church discipline of those times, makes it possible to maintain that *sacrilegium* was treated in terms of crime. However, the Church Fathers did not sharply distinguish "forum iuridicum et theologicum," as claimed by Böhmer, and viewed the crime of *sacrilegium* "magis in sensu *theologico* quam *iuridico*."[102] The essence of *sacrilegium* was the violation of holiness (violatio sacri). The crime of *sacrilegium* is committed "contra Deum" and "in Deum." It was graver than other crimes, because it was committed against God (committi non potest nisi in Deum). This crime is unique in that, committed against God, it simultaneously violates the external order of the community of the Church. Each *sacrilegium* is a mortal sin, though not every mortal sin constitutes the crime of *sacrilegium*.[103] This crime is placed among *crimina maiora*, for which the authorities of the Church excluded one from the community. It was included in the catalogues of grave crimes: *furta, homicidia, adulteria, periuria, sacrilegium, hereseos adinuentio*, as well as *adulterium, homicidium, sacrilegium* and *homicidium, adulterium, aut aliqua inmunditia fornicationis, furtum, fraus, sacrilegium.*

1.6. The Canonists on the Nature of Crime and *sacrilegium*

The basis for the understanding of crime in canon law is the teaching of Christ and the Apostles, and especially of Saint Paul.[104] In canon law, crimes are those mortal sins that have the external effect of negative consequences for the community of the Church, called *scandalum* or *animarum damnum*.[105] This is why Saint Paul ordered to punish them.[106] Labelled as *crimina*, they were the following: murder,[107] blasphemy,[108] idolatry[109] and adultery.[110]

[102] I. S. F. Böhmer, *Dissertatio*, p. 12.

[103] *New Catholic Encyclopedia*, vol. XII, s. v. *sacrilege*, Washington 1967, p. 842.

[104] G. Michiels, *De delictis et poenis*, vol. I, p. 59.

[105] T. Pawluk, *Prawo kanoniczne według Kodeksu Jana Pawła II*, vol. IV, Olsztyn 1990, p. 69.

[106] J. Krukowski, *Sankcje w Kościele*, in: *Komentarz do Kodeksu Prawa Kanonicznego*, vol. IV, Lublin 1987, p. 121.

[107] Rom 1, 29.

[108] Eph 4, 31.

[109] 1 Cor 10, 14.

[110] Rom 2, 22.

Gratian's *Decretum*, D. 81 c. 1, contains Augustine's text (In Iohannis euangelium tractatus 41, 10), where he included the catalogue of crimes and cited: "*homicidium*, *adulterium*, *aut aliqua inmunditia fornicationis*, *furtum*, *fraus*, *sacrilegium*." There (In Iohannis euangelium tractatus 41, 9) he also formulated the following definition of *crimen*: "*Crimen autem est peccatum graue, accusatione et damnatione dignissimum*." This part of Augustine's treatise was referred to by J. Syryjczyk, who points to the unique character of canonical penal law, where a crime is considered to be a morally evil act, which is at the same time a mortal sin, though it does not have to be prohibited by a criminal law.[111] This act, violating divine or canon law, has to be especially grave and cause scandal. Despite the fact that it is not prohibited under pain of a criminal sanction, the principle of *nullum crimen sine lege* is applicable here, as divine or canon law has been violated.[112] To classify a given act as a crime in canon law "it is sufficient that from a moral point of view it is an evil act, that is a mortal sin, and from a social point of view it deserves to be punished owing to the social damage it causes."[113]

J. Syryjczyk remarks that the sources tend to make use of diverse terminology in referring to a crime and mentions *crimen*, *delictum*, *scelus*, *excessus*, *flagitium*, *facinus* and *maleficium*, as taken from Roman law. At the same time, he claims that the meaning of these words is identical. While this claim could be recognized as valid, it is still justified to make it more specific. Only in Augustine's writings is the term *crimen*, which clearly refers to a crime, encountered 304 times in the nominal paradigm.[114] The term *delictum*, occurring 277 times in the same paradigm, is visibly associated with the meaning of sin.[115] Augustine makes the distinction that *delictum* was to be committed unwittingly (ignoranter), so the legal guilt of the perpetrator would belong to the category of unintentional guilt (culpa). In the case of *peccatum*, committed deliberately (a sciente), the legal guilt would

[111] J. Syryjczyk, *Sankcje w Kościele*, p. 104.

[112] Ibid., p. 105.

[113] Ibid., with the reference in fn. 29 to: G. Michiels, *De delictis et poenis*, vol. I, pp. 80-88; A. Przybyła, *Zasada legalności w kościelnym prawie karnym*, "Prawo Kanoniczne" 14 (1971), no. 1-2, pp. 231-250; J. Syryjczyk, *Pojęcie przestępstwa w świetle Kodeksu Prawa Kanonicznego Jana Pawła II*, "Prawo Kanoniczne 28 (1985), no. 1-2, pp. 86-88. 1983 CIC, can. 1399 includes the canonical sanction encompassing all ecclesiastical laws, both of divine and canon law, when it was violated in an especially serious way.

[114] This meaning in Augustine's writings is emphasized by J. Syryjczyk, *Sankcje w Kościele*, p. 98.

[115] Augustinus, *Epistulae*, vol. XLIV, ep. 157, 3, PL 34, col. 681-683. Augustine made a clear distinction between *delictum* and *peccatum* in his work *Quaestionum in heptateuchum libri septem* 3, 20.

correspond to intentional guilt (dolus). Concluding his discussion on the meaning of the terms *delictum* and *peccatum*, Augustine claimed that "in most cases there is no difference" and the terms *delictum* and *peccatum* were used interchangeably. However, given the fact that canonical penal law considers the legal social order as part of the moral order, an unlawful act violating the external public order is both a crime and mortal sin.[116] If this is so, also the terms *delicta* used to describe a mortal sin refer to the reality of crime in Augustine's writings.

G. Michiels, claiming with cautious reservation (non videtur dubium quonimus[117]) that the use of the terms *crimen* and *delictum* in the sources of ecclesiastical law was basically identical (substantialiter identica), and that they were used interchangeably, quotes the legal sources starting from the Decretals of Gregory IX.[118] However, owing to the fact that it goes beyond the time-frame of the present work, it cannot be accepted as an argument for the sameness of the terms *crimina* and *delicta* for the purposes of this study. Discussing the nature of crime in ecclesiastical law, he nevertheless emphasized the external forum of an unlawful act, which was detrimental not only to the individual faithful, but also to the whole community. Such unlawful acts were defined as *crimina* and *delicta*.[119]

Sacrilegium, just as other crimes enumerated in the "catalogues," is accompanied by the attribute *mortiferum*, so this crime is classified as a mortal sin, for which the perpetrator has to be punished. The objective element of the crime of *sacrilegium*, that is criminal transgression, should be seen in the writings of these authors not so much in violating the criminal laws of canon law, but in infringing the norms of God's law. This was stressed by Augustine, who emphasized that some acts were evil because they were against God's holiness and, to punish the perpetrator for committing them, no special criminal law was necessary. The especially grave violation of God's law was detrimental to the community of the Church and gave rise to great scandal. Therefore, these authors so firmly demanded that the crime of *sacrilegium* ought to be punished. Many of them spoke in defence of the purity of their professed faith and unity of the community of the Church, when the legal norms created by Councils and synods hardly reached the

[116] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 17 (1974), no. 3-4, p. 151; J. Syryjczyk, *Pojęcie przestępstwa w świetle Kodeksu Prawa Kanonicznego Jana Pawła II*, "Prawo Kanoniczne" 28 (1985), no. 1-2, p. 89.

[117] This is a spelling mistake, it should be *quominus*.

[118] G. Michiels, *De delictis et poenis*, vol. I, p. 56.

[119] There he referred to Augustine, *In Iohannis euangelium tractatus* 41, 9, CCL 36, p. 363 "Crimen autem est peccatum graue, accusatione et damnatione dignissimum."

clergy and laity. They paid closer attention to the objective evil of an unlawful act, the crime of *sacrilegium*, than to the will of the legislator expressed in a criminal law. Origen testifies to it writing that this crime was punished "by those who preside over the Church and are in power" (per eos, qui ecclesiae praesident et potestatem habent).[120] *Sacrilegium* constituted a particularly harmful act which directly violated the legal social order of the Church, especially in the form of apostasy, heresy and schism, as well as idolatry and the theft of sacred things. The criminal transgression in the crime of *sacrilegium* committed "in Deum," constituting the violation of holiness (violatio sacri), impinged on both the moral and legal social order of the Church. *Sacrilegium* should nevertheless be understood in the juridical sense, as only in this sense it is "delictum et crimen publicum, quod absque dolo et voluntate nocendi, et contra leges agendi, committi nequit."[121]

The objective element of crime is its outwardness. Purely inward acts are not liable to ecclesiastical penalties. Sins constituting purely inward acts are subject to responsibility before God. This is expressed by the principle of Roman law, which had been present in the Church since the beginning[122] and was adopted in canon law in the 4th century, *cogitationis poenam nemo patitur*.[123] It ought to be highlighted how *sacrilegium* committed "in Deum" was externally manifested. In the Church, the legal order is part of the moral order.[124] For violating the moral order, the perpetrator of a sin is responsible before God. When they simultaneously violate the criminal legal order, the perpetrator is punished by an external authority whose role is to protect the public order in the Church. The objective element of the crime of *sacrilegium*, its external forum, could be open and secret.[125] In each case, however, a given crime was detrimental to the community of the Church. It was a public crime, as the Church had known and recognized the public legal character of crime since the beginning.[126] There exists a view that the Church was the first to do it (Ecclesia omnium prima).[127] Roman criminal law was to a large extent private in character, Germanic law was exclu-

[120] Origen, *Homiliae in librum Iudicum* (secundum translationem Rufini) 2, 5, SCh 389, p. 90.

[121] I. S. F. Böhmer, *Dissertatio*, p. 8.

[122] P. Hinschius, *System des katholischen Kirchenrechts*, vol. IV, Berlin 1888, p. 744, fn. 12.

[123] Dig. 48, 19, 18; Conc. Neocesar. a. 314-319, c. 4; D. 1 c. 14 de poenit.

[124] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 17 (1974), no. 3-4, p. 151; J. Syryjczyk, *Pojęcie przestępstwa w świetle Kodeksu Prawa Kanonicznego Jana Pawła II*, "Prawo Kanoniczne" 28 (1985), no. 1-2, p. 89.

[125] Cf. J. Krukowski, *Sankcje w Kościele*, p. 131; J. Syryjczyk, *Sankcje w Kościele*, pp. 102-103.

[126] G. Michiels, *De delictis et poenis*, vol. I, p. 61.

[127] As above.

sively private, whereas the Church emphasized the public legal character of crime.[128] It follows from the nature of the Church as the community of believers, where everything has been shared from the very beginning.[129] Robbing temples, schism, heresy, idolatry and the theft of sacred things, classified as the crime of *sacrilegium*, were external in character and harmed the good of the community of the Church. They were against God's holiness and, manifested externally, they gave rise to great scandal among believers. Considered as *maiora crimina*, adultery, homicide and *sacrilegium* also threatened public safety. Each crime violating the public legal order of the community of the Church harms the whole community rather than private persons as its members.[130]

When assessing a criminal act, the subjective element is taken into consideration besides the objective one. It is moral imputability and criminal legal imputability. In canon law, legal imputability always presupposes the existence of moral imputability. In order to be able to speak of a crime in the sense of canonical penal law, there has to exist legal guilt in the form of intentional guilt (dolus) or unintentional guilt (culpa). Thus, criminal legal imputability is necessary for a crime to occur, which at the same time presupposes the existence of moral imputability.[131]

Since the beginning of Christianity, the view had been established that moral responsibility depended on the moral guilt of the perpetrator, rather than on the effect. Moral guilt, for its part, was dependent on the free will of the perpetrator.[132] The Church Fathers and writers of the Church, relying on the religious morality based on the Gospel, fought against the pure legalism of Jews and Gnostics. It was also in keeping with the doctrine of ethical responsibility developed by Aristotle[133] and Stoic philosophers.[134] The Church Fathers claimed that moral imputability could not be grounded in an unlawful external act, but in the will of the perpetrator.[135] This is how it was understood by Tertullian, who asserted that will marked the onset of

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[128] This is emphasized in relation to Germanic law by P. Hinschius, see the same author, *System*, vol. V, p. 232.

[129] Acts 2, 42-45.

[130] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 8 (1965), no. 3-4, p. 82.

[131] J. Syryjczyk, *Pojęcie przestępstwa*, p. 91.

[132] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 8 (1965), no. 3-4, p. 80.

[133] Aristoteles, *Ethica Nicomacheia* 3, 1-8.

[134] Seneca, *De beneficiis* 1, 5-7; Cicero, *De officiis* 3, 27.

[135] G. Michiels, *De delictis et poenis*, vol. I, p. 87 ; I. S. F. Böhmer, *Dissertatio*, p. 8.

an act.[136] As was indicated by Ambrose, what determined guilt was will.[137] It was especially Augustine who markedly contributed to developing the notion of moral imputability, claiming that man's will was the decisive factor in the occurrence of a sin and in proper behaviour,[138] because when there was no decision of the will it was impossible to speak of a sin.[139] The definition of imputability and criminal legal responsibility developed at a slow pace. Until the 9th century, the Church had espoused the teachings of the Church Fathers on moral imputability, as proved by the penitential discipline at that time.[140] It was intentional guilt (dolus) that was strongly emphasized. However, besides intentional guilt, it was also the effect that constituted the source of imputability and criminal responsibility. There was objective and subjective responsibility.[141] The punishment for objective transgression was mainly administered in the case of offences that posed danger to the community, such as murder, apostasy[142] and manslaughter.[143] Responsibility for the effect was excluded in the case of the crime of simony and fornication, as well as self-mutilation, where the decisive factor was intentional guilt (dolus).[144] At that time, however, crime was still often treated as "factum anti-juridicum externum objective spectatum."[145]

In establishing the doctrine of guilt in canon law, the important moment was the synod of Worms (868), during which, in relation to considering the scope of punishment for murder, it was stated that the crime at issue could be committed "ex voluntate" and "ex negligentia" (incuria).[146] An even greater influence was exerted by the decision reached at the synod

[136] Tertullian, *De paenitentia* 3, CCL *Tertuliani Opera*, Pars I, p. 325.

[137] Ambrose, *De paenitentia* 1, 4, PL 17, col. 971-972.

[138] Augustinus, *Retractationum libri duo* 1, 9, CCL 57, pp. 25-26.

[139] Augustinus, *Retarctationum libri duo* 1, 13, CCL 57, p. 38 "Peccatum uoluntarium malum est, ut nullo modo sit peccatum, si non sit uoluntarium." *De vera religione* 14, 7, CCL 32, p. 204 "Quare aut negandum est peccatum committi aut fatendum uoluntate committi."

[140] *Poenitentiale Pseudo-Gregorii*, c. 24 "[...] omnimodo haec illusio non est timenda, quia hanc animus nesciens pertulit;" F. Wasserschleben, *Bussordnungen der abendländischen Kirche*, Halle 1851, p. 544.

[141] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 8 (1965), no. 3-4, p. 84.

[142] Conc. Nicae. a. 325, c. 10.

[143] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 8 (1965), no. 3-4, p. 85.

[144] Conc. Chalc. a. 451, c. 2; *Canones Apostolorum*, ed. F. X. Funk, c. 22, p. 571.

[145] G. Michiels, *De delictis et poenis*, vol. I, p. 89.

[146] Conc. Wormat., c. 29, J. D. Mansi, *Sacrorum Conciliorum nova et amplissima collectio*, (further cited as Mansi), Paris 1960-62, vol. XV, col. 874; D. 50 c. 49.

of Tribur[147] (895), which referred to the decision taken by Pope Nicholas I (858-867). The text was included by Gratian in the *Decretum*.[148] The pope solved the legal problem of guilt in the case of manslaughter. He did it on the basis of the case pertaining to the situation where two brothers were cutting down a tree and one called out to the other to watch himself, but he, when running away, was nevertheless crushed by the falling tree and died. The pope decided that in the circumstances the surviving brother was not guilty of his brother's blood.[149] In the explanation to the decision it is stated that the surviving brother did not commit a crime and must not be punished, as the man's death did not result from the will (non voluntate) or negligence (non incuria) of the surviving brother. Neither was it caused by consent (non consensu) or anything that could be considered as guilt (nec reatu). Simultaneously, the pope referred to the same decision in the apostolic age, which should be retained also in the future (posteris nostris sequendum transmittimus). He stated that it was a mortal sin to sentence an innocent person,[150] whereas one could speak of an undoubted crime only when it was committed entirely consciously (scienter commissum) and thus in a completely imputable way.[151] This position will be upheld in canon law in the future. The decisions with regard to *homicidium* reached at the synods of Worms and Tribur will be applied in other analogous cases. This will be reflected in the Penitential books and collections of law of the 10th and 11th centuries.[152] Nonetheless, in the Penitential books from the 9th up to the 12th century there will be norms prescribing punishment for the effect, especially for manslaughter.[153]

Gratian incorporated in the *Decretum*, as *auctoritates*, the texts including both views. There are canons where punishment is imposed for an unlawful act treated as "factum anti-juridicum externum, objective spectatum," even in cases where a crime is committed unwittingly (ignoranter) or acci-

[147] It is neither Trier, as stated by M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 8 (1965), no. 3-4, p. 94, nor Trebur in present Germany, as indicated by P. Hemperek, W. Góralski, *Komentarz*, p. 60, but the name of Tribur or Starkenbourg corresponds to present Darmstadt in the state of Hesse, see C. J. Hefele, H. Leclerq, *Histoire des Conciles*, vol. IV, pt. 2, Paris 1911, p. 697. It seems most appropriate to use the Latin name of Tribur.

[148] D. 50 c. 51.

[149] Conc. Tribur., c. 36, Mansi, vol. XV, col. 874; D. 50 c. 51.

[150] This view was expressed by the adage *Satius est impunitum relinqui facinus nocentis quam innocentem damnari*.

[151] G. Michiels, *De delictis et poenis*, vol. I, pp. 90-91.

[152] Ibid., p. 91; *Decretum Burchardi Wormatiensis*, c. 5, PL 140, col. 953.

[153] G. Michiels, De delictis et poenis, vol. I, p. 91.

dentally (casualiter), as well as canons where punishment is imposed when there is moral imputability and a given act can be considered a sin (ipsi imputari potest in culpam moralem seu peccatum).

Moral and criminal legal imputability was approached in a deeper way by the decretists. All of them assumed that moral imputability derived from the will of the perpetrator.[154] In their view, nobody can commit a sin if the deed does not follow from the perpetrator's act of will. As for criminal legal imputability, they held the attitude that it was based on the principle "pro solo peccato poena est infligenda."[155] S. Kuttner, conducting research on the understanding of guilt by the decretists, concluded that the decretists had perceived the distinction of imputability between *forum internum* and *forum externum*, which had been expressed by the principle "lex opus intendit, Deus voluntatem," but they had looked for some way to overcome this diversity. On the one hand, they emphasized that an act was grounded in the resposibility of one's free will, but on the other, they sought responsibility for an inadvertent act, taking into account accident and committing an act through negligence.[156]

Sacrilegium is a special kind of crime. Despite the fact that it functions in the norms of legal systems, including canon law, P. Hinschius puts forward the view that neither in the Church's legislation up to the 7th century nor in the period up to the 14th century, so even during the time beyond the scope of the present work, is it possible to distinguish any specific crime that is distinct from other crimes and could have its own certain meaning as *sacrilegium*. He claims that the term *sacrilegium* was used to refer to "all manner of very different punishable acts."[157] Enumerating a number of crimes, he points to many legal norms from the *Decretum* and from other sources claiming that they cannot be jointly referred to as *sacrilegium*. Even though the definitions had been developed early, it did not have an important influence on the language of the Church's legislation and was included only in the individual sources of canon law. This led him to the conclusion that, for that reason, both earlier and in the period from the 7th to 14th century, no firm and stable meaning of *sacrilegium* had been established in the doc-

[154] M. Żurowski, *Pojęcie przestępstwa ("crimen") u dekretystów*, "Prawo Kanoniczne" 8 (1965) no. 3-4, p. 150.

[155] Huguccio, *Summa in Decretum Gratiani*, ad D. 5 c. 2, ad v. "poenam vertimus ei in culpam;" *Summa Stephani*, ad. v. Est v. q. non voluntate, D. 50 c. 42.

[156] S. Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX*, Città del Vaticano 1935, p. 58ff.

[157] P. Hinschius, *System*, vol. V, p. 226 "für eine ganze Reihe der verschiedenartigsten Strafthaten gebraucht."

trine. Moreover, the term *sacrilegium*, used in reference to an ecclesiastical crime, was very rarely employed in ecclesiastical regulations at that time.[158] Much more information, besides the use of the term, was available as far as the details of this crime were concerned. *Sacrilegium* should denote only an especially serious kind of conduct that is contrary to a criminal legal norm exclusively in relation to certain existing conditions. It would concern the particularly grave violation of a person's holy orders or a consecrated object, commitments taken on when making vows, rights and duties towards the Church and reverence one should have for the sacraments.[159]

This standpoint seems quite matter-of-fact. There arises a question, however, as to why in the legal systems there exists the crime of *sacrilegium* which has the same name and a very similar structure. P. Hinschius is nevertheless not concerned with the structure of *sacrilegium* more thoroughly. He only recognizes the crime and provides the sources. For him, Gratian's *Decretum* constitutes one of the sources, as the period he deals with in his work ranges from the 7th up to 14th century. As far as *sacrilegium* is concerned, he does not indicate all the places in the *Decretum*.[160] Moreover, he reveals what appears to be the Protestant understanding of *sacrilegium*,[161]

[158] This thesis is contradicted by the fact that a number of synods passed laws introducing penalties for *sacrilegium*, see W. Hartmann, *Die Synoden der Karolingerzeit im Frankenreich und in Italien*, Paderborn · München · Wien · Zürich 1989, p. 367, at the synod of Tribur of 895 (in der Königspfalz Tribur bei Mainz), can. 6, armed entry into the porch of a church – sacrilege – a fine, also at this synod, can. 7, where the letter of Anacletus from *Decretales Pseudo-Isidorianae* was referred to, raiding churches – sacrilege, the penalty of the triple restitution of stolen goods; p. 340, at the synod of Fismes of 888, can. 6, the order to defend against sacrileges; p. 462, at the synod of Mainz of 888, can. 11, a prison sentence or banishment for sacrilegists, can. 20 of this synod, the repetition of can. 37 of the synod of Reims of 813; p. 366, at the synod of Metz of 893, kidnapping a deacon – sacrilege, a prison sentence; p. 459, at the synod of Paris after 843, the seizure of ecclesiastical goods – sacrilege; p. 213, at the synod of Meaux-Paris of 845/846, cann. 60-61, those robbing churches – sacrilegists; p. 272, at the synod of Longres of 859, can. 1, those raiding goods and estates of the Church – sacrilegists, punished by the exclusion from the Church and denial of Christian burial; p. 344, the synod of Rome of 875, can. 5, violence towards clerics and raiding ecclesiastical buildings – sacrilege, the penalty of excommunication, after three warnings to be punished as sacrilegists. P. Hinschius, *System*, vol. V, p. 189, fn. 6 mentions many of these synods, but does not notice the canons pertaining to *sacrilegium*.

[159] Ibid., p. 228.

[160] P. Hinschius raises an objection that E. Katz, *Grundriss des canonischen Strafrechts*, Berlin 1881, p. 7ff. does not provide all the places in the *Decretum*, and on page 72 he indicates the canons which do not contain the crime of *sacrilegium*, see P. Hinschius, *System*, vol. V, p. 226, fn. 3, p. 227, fn. 21.

[161] F. X. Wernz-P. Vidal, *Ius canonicum. Ius poenale ecclesiasticum*, vol. VII, 2nd ed., Romae 1951, p. 12 "qui tamen haud raro sensu protestantico et ex praeiudicatis opinionibus de iure poenali disserit."

which he considers as "s.[o] g.[enanntes] Verbrechen."[162] A. Ludwig, on the contrary, asserts that *sacrilegium*, having undergone various changes over the centuries, finally reached "seine feste, dogmatische Bestimmtheit."[163] F. X. Wernz-P.Vidal claim that the legal norms pertaining to *sacrilegium* can be found both in canon law (sacris canonibus) and in Christian emperors' laws (Ipsis legibus Imperatorum christianorum) since the beginning of Christianity (a primis saeculis religionis christianae). They express the view that Hinschius's conclusions pertaining to the crime of *sacrilegium* should not be used, concerning the reasons why there is no separate title relating to this crime in the collections of law. They provide the explanation that, for practical reasons, only some fundamental kind of crime is subsumed under its own title, as in the case of simony, which also constitutes a kind of *sacrilegium*. It is legitimate, in their opinion, for the canonists to include the chapters on *sacrilegium* into treatises on ecclesiastical penal law.[164]

Closer analysis of *dicta* and *auctoritates* in Gratian's *Decretum* reveals that *sacrilegium* was a crime committed "in Deum" or "contra Deum," which is its constitutive element. At the same time, the crime of *sacrilegium* is committed "in Deum" and "contra Deum" not directly as those committed "sive per defectum sive per excessum irreverentiam,"[165] but rather indirectly. It happens when things or persons directly consecrated to God are violated and treated unlawfully (iniuriose). In this case God is indirectly offended (mediate etiam Deo iniuria infertur).[166] Gratian uses the word *crimen*[167] to refer to crime in the *Decretum*. *Sacrilegium* is considered as a crime (crimen) in the *Decretum*, and the criminal norms of particular or universal canon law included criminal sanctions for this particular crime.

This understanding of the character of crime in canon law will be verified with respect to the crime of *sacrilegium* in the source material concerning the definition of this crime in Gratian's *Decretum* in the subsequent chapters of the present work. Specific types of *sacrilegium* will be depicted, as the crime is not homogenous in character. This follows from the casuistic formulation of law in that period of its development.

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[162] P. Hinschius, *System*, vol. V, p. 226.

[163] A. Ludwig, *Geschichte des Sacrilegs*, p. 169.

[164] F. X. Wernz-P. Vidal, op. cit., p. 500.

[165] Ibid., p. 499.

[166] Ibid.

[167] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971) no. 3-4, p. 69.

1. 7. Definitions of *sacrilegium* in Gratian's *Decretum*

In Gratian's *dicta*,[168] which represent the author's own scientific way of treating the norms of canon law, there is a doctrinal definition of *sacrilegium* developed by Gratian. The two remaining definitions included in the *Decretum* pertain to the substantive content of the crime of *sacrilegium*. Among the three definitions, two can be considered statutory definitions, as one of them is contained in the document published by Pope John VIII (872-882), while the other attained statutory rank by being included in the norms adopted at the synod of Vaison-la-Romaine.

The substantive definition of *sacrilegium* in the *Decretum* is provided by the text of can. 4 of the synod of Vaison-la-Romaine.[169] Gratian included this canon in the *Decretum* in C. 13 q. 2 c. 10. Gallic bishops decided at the synod that nobody should keep the offerings which were donated or willed to the Church by those departing from this world. Church administrators were to use those offerings to support the poor. It was thus stated that those who kept the offerings were "as if murderers of the poor" (quasi egentium necatores). The text of can. 4 adopted at the synod of Vaison-la-Romaine included the following sentence from Jerome's letters: [170]

> "Amico quippiam rapere furtum est, ecclesiae uero fraudare sacrilegium est."

The same text from Jerome's letter to Nepotianus, though in an extended version, was included by Gratian in the *Decretum* in C. 12 q. 2 c. 71:

> "Amico rapere quippiam furtum est, ecclesiam fraudare sacrilegium est; accepisse pauperibus erogandum et esurientibus plurimis illud reseruare, uel cautum uel timidum est aut, quod apertissimi sceleris est, exinde aliquid subtrahere, omnium predonum crudelitatem superat."

This is how *sacrilegium* was defined by Jerome. His definition, which was included in the text of the synodical canon, was incorporated into Gratian's *Decretum* as an *auctoritas*. In this case, the substantive content of the crime of *sacrilegium* is taking away (fraudare) the Church's property. The offerings donated to the Church by an act of will of people departing from this world had

[168] Gratian's *dicta* are defined by A. van Hove, *Prolegomena*, p. 162, in the following way: "*dicta Gratiani*, in quibus auctor difficultates proponit et solvit et *auctoritates*, quas allegat ad dicta sua explicanda vel confirmanda."

[169] The synod of Vaison-la-Romaine in the province of Arles, where ten canons were adopted, took place on 13th November, 442.

[170] Hieronymus, *Epistula* 52 *Ad Nepotianum* c. 16, CSEL 54, p. 439; PL 22, col. 539.

already become the Church's property and no one under any circumstances was allowed to keep them, since this constituted the crime of *sacrilegium*, punished with excommunication, as decided by African bishops at the synod of Carthage of 398.[171] The text of this canon, somewhat extended, was adopted by Gallic bishops at the synod of Vaison-la-Romaine of 442.[172]

According to this definition, the substantive content of the crime of *sacrilegium* was limited to the theft of the Church's goods. The definition, owing to the fact that it was included among the norms of synodical legislation, can be considered a statutory definition. It clearly distinguishes the theft of things belonging to a friend from the theft of things belonging to the Church. The gravity of criminal transgression in the case of the theft of the Church's property is underlined by the fact that it is juxtaposed with robbing a friend. Moral culpability in relation to robbing a friend is especially great because of the relationship of the deepest trust existing between friends. While this type of crime was categorized as the ordinary *furtum*, robbing the Church was classified as *sacrilegium*.

One can pose the question as to what constitutes the basis for distinguishing the two types of theft. What is the fundamental difference between *furtum* and *sacrilegium* according to this definition? The definition does not distinguish the material object of theft. In both cases the definition refers to "anything" (quippiam). The subject of the crime also makes no difference, as the definition mentions it neither *in genere* nor *in specie*. What can be the basis for distinguishing both types of theft is only social damage caused by criminal transgression. In the case of stealing anything belonging to a friend, the crime relates to private law, and in the case of stealing anything belonging to a church, the crime pertains to public law. This substantive definition of *sacrilegium* takes into account only the objective element of an unlawful act, but it does not allude to the moral or criminal legal imputability of the perpetrator of a forbidden act. The subjective element is not mentioned *explicite*, but it can be found *implicite* in the juxtaposition of subjects against whom a given criminal wrongdoing is committed. The theft of anything (quippiam) belonging to a friend suggests moral imputability. At the same time, it indicates especially serious culpability in the case of robbing a friend who places special trust in the perpetrator of the act and does not expect any danger from this person. If the perpetrator of such criminal transgression commits, according to the definition, ordinary theft (furtum), then how much more serious it is to steal anything (quippiam)

[171] Conc. Carthag. a. 398 c. 86, CCL 149, p. 352.

[172] Conc. Vas. a. 442, c. 4, CCL 148, pp. 97-98.

that has been donated to the Church and is supposed to be used to support the poor. The perpetrator of this transgression carries full responsibility, as their unlawful act is performed in full moral as well as criminal legal imputability. It follows from the fact that the theft of things belonging to the Church violates the moral order and the legal order being part of the moral order.[173] Goods offered to the Church enter the sphere of *sacrum* and constitute God's "property." [174] A bishop, being the holder of these goods, was supposed to hand them over to the poor. Taking these goods away by anyone caused great social damage. The ensuing criminal transgression and social damage constituted, according to the definition discussed, the crime of *sacrilegium* punishable with the criminal sanction of excommunication.

Another definition of *sacrilegium* was included by Gratian in C. 17 q. 4 c. 20 and this definition can be found in Gratian's *dictum*. It provides a kind of commentary on the *auctoritas*. It should thus be treated as a doctrinal definition. It can be perceived as such in formal terms, owing to its presence in the *dictum*, which constitutes Gratian's own text. In reality, however, its whole content was taken from the letter of Pope John VIII (872-882). Nevertheless, some new parts it contains, which follow from Gratian's scientific reflection, make it possible to regard it as a doctrinal definition. The method of editing the *Decretum* was that Gratian placed his *dicta*, or commentaries on *auctoritates*, either before or after a given *auctoritas*. In many cases, however, he formulated a *dictum* whose content referred to the following rubric or *auctoritas* and attached the text of a *dictum* to the text of the preceding canon with completely different content. In the case of this definition, Gratian put it in his *dictum* included in C. 17 q. 4 c. 20, but in terms of content it rather referred to C. 17 q. 4 c. 21. In order to illustrate this, below we quote the text of the *dictum* from C. 17 q. 4 c. 20 and the immediately following canon 21:

> Dictum p. c. 20 q. 4 C. 17 "Gratian. Sacrilegium ergo est, quotiens quis sacrum uiolat, uel auferendo sacrum de sacro, uel sacrum de non sacro, uel non sacrum de sacro. §. 1. Dicitur etiam sacrilegium conmittere qui uiolentas et inpias manus in clericum iniecerit. §. 2. Porro ipsum sacrilegium duplicem continet penam, pecuniariam uidelicet et excommunicationis. Pecuniaria eis persoluenda est, ad quos querimonia sacrilegii pertinet."

[173] Cf. J. Syryjczyk, *Pojęcie przestępstwa*, pp. 90-91.

[174] I. S. F. Böhmer, *Dissertatio*, pp. 3-4 referred to the argumentation proposed by "Isaac Episcopus Lingonensis," who claimed that those stealing things belonging to the Church are "sacrilegi," because: "Christum et ecclesiam unam personam esse, non nescimus. Et ideo quae ecclesiae sunt, Christi sunt; et quae ecclesiae offeruntur, Christo offeruntur; et quae ab ecclesia tolluntur, procul dubio Christo tolluntur."

C. 17 q. 4 c. 21 "De multiplici genere sacrilegii, et pena eiusdem.

Quisquis inuentus fuerit reus sacrilegii, episcopis uel abbatibus, siue personis, ad quas querimonia sacrilegii iuste pertinuerit, triginta libras examinati argenti purissimi conponat.[175] §. 1. Sacrilegium conmittitur, si quis infregerit ecclesiam, uel triginta passus ecclesiasticos, qui in circuitu ecclesiae sunt, uel domos, que infra predictos passus fuerint, aliquid inde diripiendo uel auferendo; seu qui iniuriam uel ablationem rerum intulerit clericis arma non ferentibus, uel monachis, siue Deo deuotis, omnibusque ecclesiasticis personis. Capellae, que sunt infra ambitum murorum castellorum, non ponuntur in hac triginta passuum obseruatione. §. 2. Similiter sacrilegium conmittitur auferendo sacrum de sacro, uel non sacrum de sacro, siue sacrum de non sacro. Idem: §. 3. Si quis domum Dei uiolauerit, et aliqua sine licentia illius, cui conmissa esse dinoscitur, inde abstulerit, uel ecclesiasticis personis iniuriam fecerit, donec in conuentu ammonitus legitime satisfaciat, sciat se conmunione fore priuatum. Si uero post secundam et tertiam conuentionem coram episcopo satisfacere detrectauerit, sacrilegii periculo ab omnibus obnoxius teneatur, ita, ut secundum Apostolum nemini fidelium misceatur. Idem: §. 4. Hii qui monasteria, et loca Deo dicata, et ecclesias infringunt, et deposita uel alia quelibet exinde abstrahunt, dampnum nouies conponant, et emunitatem tripliciter, et uelut sacrilegi canonicae sententiae subigantur."[176]

Gratian's dictrinal definition states that "sacrilegium ergo est, quotiens quis sacrum uiolat." This wording is absent from the text of the letter of Pope John VIII (872-882) addressed to bishops, priests and those in power "in Hispania et Gothia" in August 878.[177] Gratian's definition is the first attempt in the history of universal canon law to doctrinally define *sacrile-*

[175] This fragment of the letter of John VIII can be found in the documents of the synod of Troyes of 878. The subsequent fragment of the text, up to § 3, is of unknown origin. § 3 constitutes part of can. 5 of the synod of Ravenna of 877 and this fragment and the following ones are absent from the collections of Ivo. They can be found in Ans. V, 50 and Deusdedit III, 49. § 4 comes from the text of can. 60 of the synod of Meaux of 845, see Ae. Friedberg, *CorpIC*, Pars I, col. 819-820, fn. 202.

[176] LDG f. 177 v. contains a somewhat different text "De multiplici genere sacrilegii et de pena." In the manuscript of the *Decretum* diphthongs are spelled with one letter, as it is in this case – "pena" instead of "poena."

[177] *Regesta Pontificum Romanorum ab condita Ecclesia ad annum post Christum natum MCXCVIII*, edidit Philippus Jaffé, editionem secundam correctam et auctam auspiciis Gulielmi Wattenbach curaverunt S. Loewenfeld, F. Kaltenbrunner, P. Ewald, Tomus primus, (further cited as Jaffé-Wattenbach) Lipsiae 1885, 3180 (2398) the letter "Noveritis;" Ae. Friedberg, *CorpIC*, Pars I, col. 819, Notationes Correctorum includes the information that the words of this letter are different from those cited by Gratian and other authors of the collections, but the sense remains the same.

gium.[178] The previous definitions, both the ones adopted by Gratian in the *Decretum* and those present in other collections, were substantive in character or pointed to the substantive content of *sacrilegium*.[179] Gratian, including *auctoritates* in the *Decretum* that contained the legal norms concerning *sacrilegium*, actually grasped its essence, which is the violation of *sacrum*. Gratian must have noticed that the essence of this crime manifested in a number of types included in the individual norms in numerous collections was *violatio sacri*. The external manifestation of this crime was diverse, however, a certain unlawful act could be defined as *sacrilegium* only when the criminal transgression associated with this act was against the holiness of God, and in the social dimension, against the legal order of the community of the Church. This Gratian's definition derives from his own scientific reflection following from the content of the *auctoritas* included in C. 17 q. 4 c. 20, where he put the text of the canon of the synod of Tribur of 895. Canon 20 of this synod prohibited masters from forcibly removing their slaves from a temple in which they took shelter. In this way, the synodical law protected the right of asylum in temples. Using violence, the criminal violated the holiness of the place and committed *sacrilegium*. This made it possible for Gratian to formulate his *dictum*, which in this canon immediately follows the text of the canon of the synod of Tribur. For this reason he was able to write "Sacrilegium ergo est" (Sacrilege therefore is).

In his definition, Gratian mentioned two ways of *violatio sacri* as the cause of the crime of *sacrilegium*, that is taking something illegitimately (auferendo) and using violence towards a cleric (violentas manus in clericum iniecerit). The definition is based on the three juxtaposed types of the crime of *sacrilegium*. It occurs when the following are taken away: something sacred from a sacred place, something sacred from an unsacred place, something unsacred from a sacred place. According to the definition, the subject (quis), whenever they commit an unlawful act they violate *sacrum* (quotiens sacrum violat), they engage in a punishable wrongdoing, and thus they infinge criminal law. The object of the crime of *sacrilegium* is taking something illegitimately (auferendo). Bearing in mind the content of C. 17 q. 4 c. 20, where the object of *sacrilegium* is the forcible removal of a slave from a temple, one can conclude that taking away (auferendo) can pertain

[178] P. Hinschius treats this sentence from Gratian's *dictum* also as a definition, see the same author, System, vol. V, pp. 227-228, fn. 23.

[179] Hincmar Rhemensis cap. superadd. a. 857, c. 2, Mansi, vol. XV, col. 492 "Sacrilegium est, corpus indevote ac irreligiose propter cupiditatem a sepulcro eiicere;" Conc. Trosl., a. 909, Mansi, vol. XVIII, col. 272 "Sacrilegium est sacrae legis violatio [...] schismatis [...] blasphemi sermonis."

both to persons and objects from a temple. The crime, as indicated in the main part of the definition, concerns dealing irreverently with persons, objects as well as places.

The irreverent treatment of a sacred object is performed through taking it away (auferendo).[180] It can be done in a triple way: through taking a sacred object, as can be assumed, from a sacred place,[181] taking a sacred object from an unsacred place or taking an unsacred object from a sacred place. The constitutive element of *sacrilegium* is thus the sacred character of a place and objects. In each of the three types of *sacrilegium*, one of the elements had to include the character of *sacrum*, be it a place or an object. What is thus protected by ecclesiastical law is the sacred character of places and objects. The *sacrum* of places and objects is subject to criminal protection. Therefore, Gratian in his definition of *sacrilegium* takes into account both the subject and object of the crime, not considering the subjective aspect, but including the objective aspect instead. He says that *sacrilegium* consists in violating *sacrum* (sacrum violat) by taking a sacred object from a sacred place, a sacred object from an unsacred place or an unsacred object from a sacred place. He thus mentions the crucial circumstances of committing the crime, without taking into account the subjective aspect. Taking something away (auferendo) is not regarded as *furtum*. Neither does he mention object ownership. One can suppose that the reason for doing so is the fact that *furtum* was a crime which was committed in relation to objects and places not connected with the sphere of *sacrum*.[182] According to Gratian, the essence of *sacrilegium* was violating something sacred (sacrum). Thus, the crime of *sacrilegium* was taking a sacred thing from a sacred place on account of the act of consecration of an object and place. In this case, the essence of *sacrilegium* was not only taking a sacred object from a sacred place, but violating the *sacrum* (violatio sacri) of an object and place, which

[180] See J. Sondel, *Słownik łacińsko-polski dla prawników i historyków*, Kraków 1997, s. v. *aufero*, p. 93.

[181] Gratian pointed to the place as the constitutive element of *sacrilegium* by including the text from Roman law in D. 1 c. 19 de poenit. "§. 4. Locus facit, ut idem uel furtum uel sacrilegium sit, et capite luendum, uel minore supplicio." It is the excerpt of Claudius Saturninus's work (jurist of the 2nd century AD), *Liber singularis de poenis paganorum*, which is also included in Dig. 48, 19, 16, 1-8. For more on this distinction, see A. Dębiński, *Sacrilegium w prawie rzymskim*, pp. 78-79.

[182] In order to demonstrate the difference between *furtum* and *sacrilegium* Gratian quotes the sentence by, as he puts it, one of the Fathers (quidam Patrum), which in C. 12 q. 2 c. 10 is as follows: "Amico quippiam rapere furtum est, ecclesiae uero fraudare sacrilegium est;" see Jerome, ep. 52 *ad Nepotianum*, CSEL vol. LIV, p. 439; PL 22, col. 539.

happened when this object was taken away. Taking an object results in violation (violatio).

In the second case, *sacrilegium* is committed when a sacred object is taken from an unsacred place. This time it is an object and not a place that belongs to the sphere of *sacrum*. Nevertheless, taking this sacred object is treated as *sacrilegium* irrespective of the fact that this sacred object is located at an unsacred place.

In the third case, *sacrilegium* occurs when an unsacred object is taken from a sacred place. In this type of *sacrilegium*, *violatio sacri* is committed against a sacred place. *Sacrilegium* is perpetrated through the violation (violatio) of the *sacrum* of the place.

Gratian defines *sacrilegium* as a crime viewed from the substantive and formal perspectives. The substantive aspect of the crime of *sacrilegium*, according to Gratian's definition, pertains to illegitimately taking away (auferendo) a sacred object from a sacred place, a sacred object from an unsacred place or an unsacred object from a sacred place. As far as the formal aspect is concerned, it concerns the prohibition of a forbidden act under pain of punishment. The formal definition of the crime does not, however, elucidate the reasons for prohibiting a certain type of act under pain of punishment.[183] No subjective element of the crime is present in Gratian's definition. He explicitly refers to neither the moral nor criminal legal imputability of the subject.[184] What is more, the subject is not mentioned at all. The definition is constructed with the use of impersonal forms (sacrilegium conmittitur). What is forbidden is the violation (violatio) committed by taking away (auferendo) persons or objects that upon consecration have entered the sphere of *sacrum* from places belonging to the sphere of *sacrum*.

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[183] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warszawa 1977, p. 12; J. Syryjczyk, *Pojęcie przestępstwa w świetle Kodeksu Prawa Kanonicznego Jana Pawła II*, "Prawo Kanoniczne" 28 (1985), no. 1-2, p. 86.

[184] The first eight centuries of Christianity, and canon law therein, are characterized by paying too much attention to the objective element of crime, as a consequence of which it is quite difficult to determine the subjective element of crime, which is guilt. The introduction of harsh criminal sanctions was supposed to prevent scandal, which in turn resulted in giving more attention to the objective element and neglecting the subjective element, imputability and criminal responsibility. Up to the 9th century, the source of imputability and criminal responsibility was the intentional guilt of the perpetrator. What did not fall within intentional guilt was considered an accident. In the 6th century the concept of unintentional guilt was created (negligentia), different from an accident. This distinction was however far from clear and still "hidden" in an accident at the time. *Negligentia* was referred to with the term *ignorantia*, see M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 8 (1965) no. 3-4, pp. 92-93.

It follows from the further part of the definition that *sacrilegium* is committed also by someone who puts a violent and impious hand (violentas et inpias manus) on a cleric. Gratian has no view of his own at this place, but writes that it is said (dicitur) that using violence against a cleric also (etiam) constitutes the crime of *sacrilegium*. Thus, the constitutive elements of *sacrilegium* pertain to the *sacrum* of a place, object and person. Their violation constitutes the crime of *sacrilegium*.

The definition[185] of *sacrilegium* in this wording was included by Gratian in his *dicta*[186] in two consecutive canons[187] where he speaks of different kinds of *sacrilegium* and their respective penalties. While in the remaining cases he mentions specific types of *sacrilegium*, in this case he provides a general rule, which in view of the casuistic formulation of ecclesiastical law was an important attempt to build up the disposition of a regulation of general nature. He also generally refers to the penalty for this crime, limiting himself to claiming that it is twofold, a fine and excommunication. At the same time, a fine should be paid to those whose responsibility it is to bring an action for *sacrilegium*. Thus, from a formal legal standpoint *sacrilegium* is an act prohibited under pain of punishment. What falls under criminal protection is not the very object, place or person, but the *sacrum* of an object, place or person. For this reason, three categories are usually distinguished: the irreverent treatment of a person (sacrilegium personale), a place (sacrilegium locale) and an object (sacrilegium reale).[188] The criminal transgression associated with *sacrilegium* committed "in Deum" or "contra Deum" was directly against *sacrum*, that is to say against holiness, which is guarded by ecclesiastical law. This is what distinguished *sacrilegium* from the ordinary *furtum*.

The definitions which can be found in C. 17 q. 4 c. 21 are statutory in character, as they are included in the letter of Pope John VIII (872-882) to

[185] The definition of *sacrilegium* given by Gratian is included in his *dictum*, which constitutes an attempt at a commentary on the canons, and is thus doctrinal and not statutory in character, cf. J. Syryjczyk, *Pojęcie przestępstwa*, p. 85.

[186] *Dicta* constitute Gratian's own explanations included in the *Decretum* most often after canons, in which Gratian elaborated on the content of a canon. In many cases they are put before an *auctoritas*, which is supposed to address a legal problem raised in a given *dictum*. *Dicta*, being a kind of legal commentary, constitute Gratian's great contribution to the development of canon law, as they were an attempt to approach canon law in a scientific manner.

[187] Gratian calls ecclesiastical laws as canons Proe. D. 3 "Ecclesiastica constitutio canonis nomine censetur;" D. 3 c. 2 "Porro canonum alii sunt decreta Pontificum, alii statuta conciliorum," see A. Van Hove, *Prolegomena*, p. 29 with fn. 6.

[188] *Enciclopedia Hoepli*, vol. VI, Milano 1965, s. v. *sacrilegio*, p. 404.

bishops and abbots "per Narbonensem et Hispanicas provincias constitutes."[189] In this letter the pope ordered (praecipitur) the observance of the law against sacrilegists adopted at the synod of Troyes[190] on 18th August 878 in the presence of king Louis and fifty-three bishops.[191]

A particular difficulty is posed by the fact that only the first sentence of this document constitutes the letter, attested in other sources, of Pope John VIII (872-882). The text of § 1-3 is of unknown authorship. At the same time, the text of the papal letter is not a definition *sensu stricto* and mentions only a penalty for *sacrilegium* which is to be imposed on the perpetrator (reus sacrilegii). § 1-2 mentioned contain the substantive definition of the crime informing that *sacrilegium* is committed (sacrilegium committitur) when someone raids a church (infregerit ecclesiam) as well as houses within 30 ecclesiastical steps, ravaging them and taking anything away; also, when someone does harm to clerics and monks and robs them of anything.

§ 2 includes the definition pointing to the substantive content of the crime, without providing details of any specific object of the crime. Three types of the crime were indicated in a general manner, the crime whose constitutive element is taking (auferendo) something sacred from a sacred place, something unsacred from a sacred place and something sacred from an unsacred place. Gratian adopted these two elements from the letter of Pope John VIII (872-882) for his doctrinal definition.

§ 3-4 contain the substantive definitions of the crime of *sacrilegium*, which are the legal norms adopted during synods. These definitions are statutory in character. Adopted by synods and constituting particular law, they became universal law by being included in the papal document.

A somewhat wider scope of *sacrilegium* is indicated by the *Glossa*,[192] whose text constitutes a kind of commentary on canons 20 and 21, and

[189] Ae. Friedberg, *CorpIC*, Pars I, col. 819-820.

[190] Civitas Trecensis is Troyes, sufragania Sens, see CCL 148A, p. 418.

[191] Ae. Friedberg, *CorpIC*, Pars I, col. 819-820. The pope directed the letter both to ecclesiastical and civil, administrative and judicial authorities. This constitution, as it is what it was called, was to be included in the code of Gothic law, "in fine codicis iuris Gothici hanc Caroli principis ascribendam legem esse," Jaffé -Wattenbach, 3180 (2398).

[192] In Gratian's *Decretum*, whose manuscript is held in the University Library of the John Paul II Catholic University of Lublin under the catalogue number of Ms. 1 (further referred to as LDG=The Lublin *Decretum Gratiani*), there is the *Glossa ordinaria* authored by Ioannes Teutonicus, see A. Vetulani, *Les manuscrits du Décret de Gratien*, "Studia Gratiana" 1 (1953), p. 256. On folio 177 r. of LDG there is Ioannes Teutonicus' *Glossa* concerning *sacrilegium*. Its text in the upper and right-hand margin of f. 177 r. is as follows: "Sacrilegium. que hic sit mentio de sacrilegio quid sit sacrilegium videamus. sacrilegium magnis et variis modis describit. uno modo sic sacrilegium est sacre rei violatio sive in se sive in alio et hic appellatur sacra res sive res ipsa sacra. sive ipsa

which is included on this page[193] in LDG in the upper and right-hand margin. The author of the *Glossa*[194] points out that what *sacrilegium* is will be visible from the description made by Gratian. He does it in multiple ways (variis modis).

One of the ways in which *sacrilegium* can arise is when a sacred thing is violated (sacre[195] rei violatio).[196] This could happen in the thing itseslf (in se) or in something else (in alio). The author of the *Glossa* enumerates

persona. sive res ecclesiastica. alio modo describit sic sacrilegium est publici iuris transgressio quod autem sit ius publicum h ?e s. s. d. i. ius publicum. largius autem tamen tunc quicumque de commitendo sacrilegium disputat de iudicio principis. ut autem dies sollempnis violatum ut cum legibus sive canonibus reverentia ne impendit committit autem tribus modis sacrilegium. ut cum sacrum de sacro. ut cum sacrum de non sacro. ut non sacrum de sacro auferetur. ut id est quisquis autem impendit persona sacrilegio quem spoliavit persona si committitur [...]."

[193] LDG, *Glossa*, f. 177 r. "Sacrilegium que hic fit mentio de sacrilegio quid sit sacrilegium videamus. sacrilegium magnalis et variis modis describit. uno modo sic sacrilegium est sacre rei violatio sive in se sive in alio et hic appellatur sacra res sive res ipsa sacra. sive ipsa persona. sive res ecclesiastica. alio modo describit sic sacrilegium est publici iuris transgressio. quod autem sit ius publicum habes s. d. i. ius publicum. largius autem tamen tunc quicumque de committere sacrilegium qui disputat de iudicio principis. utcumque dies sollempnis violatum vel cum legibus sive canonibus reverentiam non impendit. committit autem tribus modis sacrilegium. ut cum sacrum de sacro. ut cum sacrum de non sacro. ut non sacrum de sacro aufertur. ut id est quisquis imponit autem pro sacrilegio quicumque spiritualiter pena si committitur et persona ecclesiastica que talis ipso iure est excommunicatus. ut idem est si quis sit si iure ecclesiastico fit sacrilegium. tunc post trinam ammonitionem est excommunicatus. ut idem est si quis est imponitur pena pecuniaria quoque maior quoque minor. ut est et quisquis et cum si quis contumax item eum est durior pena imponitur pro sacrilegio. lex Iuliam peculie sacrilegii si queras an danda sit pena que debetur pro sacrilegio dicas quod si persone facere fuit iniuria persone perstanda est. ut si clericus est verberatus ut eum de sententia est conquesti et cum parochianos. si rei facta est iniuria tunc ipsi rei perstanda sit ut id est si quis in atrio et de sanctisimo de hoc."

[194] It is the *Glossa ordinaria* (the name given to systematic commentaries on the individual words and problems from some collection of law, which were in common use in schools and courts) authored by Ioannes Teutonicus, alias Zemeca († 25th April 1245 or 1246). He was the first editor of the *Glossa* to the *Decretum*, which he compiled after the Fourth Council of the Lateran (1215). He repeatedly refers to the legislation of this Council. The *Glossa* was written in Bologna. The author collected the texts of the former glossators, especially Huguccio and Laurentius, as well as added the source texts of Roman law, see A. van Hove, Prolegomena, pp. 222, 224-225.

[195] It should be *sacrae*, but the copyist does not use diphthongs in his spelling.

[196] The way in which the copyist writes the *Decretum* ought to be taken into account. He does not use diphthongs, such as –ae and –oe, and always writes –e instead. The same is done by the copyist of the *Glossa*. It should be remarked that the *Glossa* was written with the same *littera Parisiensis* as the text of the *Decretum*. The rubrics were provided later than the text of the *Decretum*, which is evidenced by the fact that they were placed along the columns of the text, when there was no more space left between the canons. Also the division into *distinctiones*, *quaestiones* and *causae* in LDG was made at a later time. It is visible in places where the numbering is

three categories of sacred things (res sacrae), whose violation is classified as the crime of *sacrilegium*. It can be a sacred thing itself (ipsa res sacra), the very person (ipsa persona) and an ecclesiastical thing (res ecclesiastica), or in its broader sense the Church's property. Thus, the irreverent treatment of a sacred thing, person or a thing belonging to a church was classified as sacrilege. The text of the *Glossa* in LDG directly refers to the text of the *Decretum*;[197] it is a commentary on the text of the *Decretum*. The author of the *Glossa* perceives the essence of *sacrilegium* in the violation of a sacred thing (sacre rei violatio). At the same time he states that in this case (hic) a sacred thing (res sacra) is a concept naming (hic appellatur) a sacred thing itself (ipsa res sacra), a person (ipsa persona) and an ecclesiastical thing (res ecclesiastica). Thus, the *Glossa* precisely and accurately explains what Gratian's definition described in general terms.

According to the author of the *Glossa*, the second type of the crime of *sacrilegium* was the contravention of public law. The author does not explain how to understand this kind of *sacrilegium*, only refers to a place where Gratian speaks about a princely court. This is where he also explains how to understand public law.[198] In the definition he states that public law[199] concerns the activities relating to the service of God, priests and civil authorities. As a consequence, *sacrilegium* in this case would consist in the violation (violatio) of all that is connected with the service of God, priests

provided, which is given in Roman numbers in different places between the two columns of the text of *Decretum*, and sometimes in the margins.

[197] The text of the *Glossa* in LDG contains a commentary on the *Decretum* that begins with a word which is present in the main text, where it begins a sentence. These are so-called *sigla*. In the main text *dicta* are marked with a big sign typical of the medieval way of marking section signs written in blue or red ink (which resembles the letter G or D). In the text of the gloss the word being commented on also begins with a capital letter written in red or blue ink in turns. The fact that the gloss constituted a self-contained text made it possible to copy it quite separately into the text of the *Decretum*. What was particularly successful and commonly used (communi usu est recepta et in scholis ac iudiciis, see A. van Hove, *Prolegomena*, p. 222) was Ioannes Teutonicus' gloss, owing to its short commentaries. This gloss is included in LDG, cf. A. Vetulani, *Les manuscrits*, p. 256.

[198] The definition of public law is provided by Gratian already at the beginning of the *Decretum*, D. 1 c. 11 "Ius publicum est in sacris et sacerdotibus et magistratibus." This is also where the material source is given, Isidore of Seville cap III lib II *Etymologiarum* c. 8; see Ulpian's definition, D. 1, 1, 1, 2 "Publicum ius in sacris, in sacerdotibus, in magistratibus consistit;" cf. A. Dębiński, *Sacrilegium w prawie rzymskim*, p. 15, fn. 2.

[199] G. Michiels, *Normae generales juris canonici. Commentarius libri I Codicis Juris Canonici*, 2nd ed., Parisiis – Tornaci – Romae 1949, pp. 13-14 defines public law as "complexus legum quae ad bonum commune sive utilitatem publicam Ecclesiae, societatis perfectae, directe, principaliter et immediate ordinantur."

and civil authorities. *Sacrilegium* is a crime of public law. This concept of *sacrilegium* was similar to Roman law, which defined *sacrilegium* as, among other things, lack of respect towards a ruler.[200]

The third type of the crime of *sacrilegium* provided in the *Glossa* concerns the violation of a holy day (dies solempnis violatum) and disrespect for ecclesiastical and civil laws. This type of *sacrilegium* is mentioned by Gratian neither in the definition nor in these places of the *Decretum* where he enumerates the individual types of *sacrilegium*. It is possible that the copyist putting down the *Glossa* was guided by the regulations of Roman law, which ordered abstention from some activities on holy days, such as theatre performances, circus shows as well as conducting court cases.[201] The objective dimension of the crime of *sacrilegium* in the *Glossa* is then broader than the one encompassed by Gratian's own definition. Thus, the *Glossa* includes the text that significantly expands on the substantive dimension of *sacrilegium* in comparison with the text written by Gratian himself.

Even in the text of the *Decretum* the substantive dimension of the crime of *sacrilegium* is much broader than the one present in the definition. It is understandable when one takes into account the fact that before and during Gratian's epoch law was established in the casuistic[202] style. It was Gratian's main goal to provide a harmony of discordant legal norms,[203] which for eleven centuries had been assembled in the collections of ecclesiastical law.[204] The abundance of these norms, as will be shown in detail in the pres-

[200] A. Dębiński, *Sacrilegium w prawie rzymskim*, p. 120.

[201] C. Th. 2, 8, 18. For more on this subject, see A. Dębiński, *Sacrilegium w prawie rzymskim*, pp. 186-187.

[202] The casuistic (Latin casus-case, actual state) style of establishing law consisted in creating actual states or facts that took place in reality, with respect to which the legislator made a particular legal decision, or facts that did not take place but were created, without providing a general rule that would incorporate as many events as possible, cf. J. Makarewicz, *Prawo karne*, Lwów-Warszawa 1924, p. 93.

[203] This was the title of the work given by Gratian himself, *Discordantium canonum concordia*. The same title is provided on the endpaper inside the cover of LDG, though in the form of the following abbreviation: *Decretum seu Discordant. Canonum Concord.* This title is also included in the Gdańsk manuscript of Gratian's *Decretum*. It is held that it was Gratian himself that gave his work the title *Concordia discordantium canonum*, see A. Vetulani, *Z badań nad pierwotnym tekstem Dekretu Gracjana*, "Collectanea Theologica" 17 (1936), p. 74; S. Kuttner, *Graziano: l'uomo e l'opera*, "Studia Gratiana" 1 (1953), p. 18; P. Hemperek, W. Góralski, *Komentarz*, p. 81.

[204] Previously, this period of the history of canon law from the beginning of the Church up to Gratian's *Decretum* was called "ius antiquum," see G. Michiels, *Normae generales juris canonici*, vol. I, p. 15; P. Gasparri, *Praefatio*, p. XXI in: *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus praefatione fontium annotatione et indice analytico-alphabetico ab eminentissimo Petro Card. Gasparri auctus*, Typis Polyglottis Vaticanis MDCCCCXLVIII.

ent work, did not make it possible to capture all types of *sacrilegium* under one definition. A number of the types of *sacrilegium* present in the *Decretum* will either contain the substantive definition or will relate to the substantive content of the crime. Nevertheless, the attempt to define *sacrilegium* made by Gratian is immensely valuable for the history of canon law if only for the reason that no other author except Gratian did it in such a concise form and at the same time *in genere*. Neither are there many Christian authors of other than legal literature who would define *sacrilegium*[205] as a crime of public law.

Among the norms of universal law there is not much evidence relating to the crime of *sacrilegium*. The majority are papal decisions concerning this crime. Among conciliar norms there are two source texts, one from the Council of Ephesus and the other from the Council of Chalcedon. Degrading a bishop to the presbyteral order was classified as *sacrilegium*.[206]

It is interesting that in the sources there is no evidence pertaining to the legal norms concerning *sacrilegium* established by African synods. They were most often norms adopted at Gallic, Spanish and Roman synods. The legal sources show that the criminal law on *sacrilegium* was shaped in the field of particular law rather than universal law.[207]

1. 8. Summary

The concept of *sacrilegium* in Latin is a calque of the Greek word ἱεροσυλία. In both languages the word is composed of two words, ἱερός and συλάω in Greek and *sacer* and *legere* in Latin. The word was used to refer to illegitimately taking anything sacred or an object from a temple as well as to the irreverent treatment of a person that was consecrated to God through a special legal act. Thus, there are three types of *sacrilegium*: *sacrilegium reale*, *sacrilegium locale* and *sacrilegium personale*. In the Greek world they were treated as one of the gravest crimes, equal to murder and high treason, for which no amnesty was granted. *Sacrilegium* constituted a crime not only in the Greek and Roman world. It was also considered

[205] Isidorus Hispalensis, *Etymologiarum sive Originum libri XX* 5, 26 "Sacrilegium proprie est sacrarum rerum furtum." Isidore's definition has a significantly narrower objective scope.

[206] Conc. Chalc. a. 451, c. 29 "Episcopum in gradum presbyteri redigere sacrilegium est;" F. Kober, *Die Deposition und Degradation*, Tübingen 1867, p. 121.

[207] Cf. P. Hinschius, *System*, vol. V, p. 266.

as such in the Egyptian and Jewish world, where the understanding of this type of crime had been taken from Mesopotamia, from the Hittite and Sumerian civilizations. Therein the legal term defining the crime of *sacrilegium* was the word *maᶜal*, which denoted a misdeed committed against God, not against a person. No distinction was made between the conscious and unconscious violation of holiness (hērem). The crime was punished with death at the hands of man or death caused by God. The death penalty caused by God affected the perpetrator, their family and community where they belonged. Collective punishment was only within God's jurisdiction, it never belonged to man.

The essence of *sacrilegium* was that it was committed against God (in Deum or contra Deum) and even if it was directly against a person consecrated to God, or a place or thing also consecrated to God, it was still committed indirectly against God. This is also where the gravity of this crime was. Criminal transgression brought about the violation of holiness (violatio sacri). An important element was the external character of a given unlawful act. Criminal transgression in connection with outwardness constituted a vital condition for categorizing an unlawful act as a crime. Internal thoughts and intentions, no matter how grave, were not treated as the crime of *sacrilegium*. An unlawful act committed against God (in Deum) was harmful to the whole community of the Church, not to individual persons. Thus, *sacrilegium* was a crime characterized by its public legal character. In the crime of *sacrilegium*, as in any other crime, both the objective and subjective element is taken into account. While the former pertains to the criminal transgression and outwardness of an act, the latter concerns moral and criminal legal imputability. The existence of both elements in *sacrilegium* makes it a real objective phenomenon in the history of universal canon law. It is not a purely legal construct.

In canon law, every *sacrilegium* is a mortal sin, but not every mortal sin is *sacrilegium*. The Church Fathers and writers of the Church treat *sacrilegium* as a mortal sin and a crime for which the perpetrator needs to be punished. It is so because this crime constituted serious transgression of God's law, was harmful to the faithful and gave rise to great scandal. The Church had taken into account the public legal character of crime since the beginning, which follows from its nature. Crimes defined as *maiora crimina*, and these were murder, adultery and *sacrilegium*, also jeopardized public safety.

Since the beginning of the Church, the tight connection between the moral responsibility and moral guilt of the perpetrator of a crime had been emphasized. Legal imputability presupposes the existence of moral imputability. At the same time, according to canon law, there has to be intentional

guilt (dolus) or unintentional guilt (culpa) for a crime to occur. Moral imputability is grounded in the will of the perpetrator of an act. The definition of moral imputability developed by the Church Fathers had been applied in canon law until the 9th century, as attested by the sources regarding penitential discipline. What was primarily highlighted was intentional guilt, although it was the effect that was considered the source of imputability and criminal responsibility. Since the 9th century, and especially since the synod of Worms (868) and Tribur (895), the distinction had been made between crimes committed "ex voluntate" and "ex negligentia." For a crime to be regarded as certain, it had to be committed "ex voluntate," and thus in a fully imputable way. However, in the Penitential books up to the 12th century one can encounter norms prescribing also the punishment of the perpetrator of an accidental crime. Gratian's *Decretum* includes the norms of either kind as *auctoritates*. The decretists accepted moral imputability as originating in the perpetrator's will. They, however, attempted to find an explanation regarding the responsibility for an unintentional, accidental and unconscious act.

The special crime of *sacrilegium* also participated in this process of developing the understanding of crime in canon law. Its constitutive element was that it was committed "in Deum" and "contra Deum," and not against man. The Church, together with all its legislation, defended the holiness of persons, places and things that were consecrated to God in a special way. Any act of violating this holiness constituted the crime of *sacrilegium*, which could be *personale*, *locale* and *reale*.

In Gratian's *Decretum* there are definitions of *sacrilegium* that are substantive in character or include the substantive content of the crime. There exists one doctrinal definition, which is contained in Gratian's *dicta*. The majority are statutory definitions, as they are included in *auctoritates*, which are legal norms adopted by popes, Councils and synods. The essence of *sacrilegium* is, according to Gratian, the violation of holiness (violatio sacri).

The vast objective dimension of *sacrilegium* is indicated by the definitions included in the *Glossa*. For the glossators, the essence of *sacrilegium* is the violation of a sacred thing (violatio rei sacrae). At the same time, this general statement is further specified as the existence of three categories: a sacred thing itself (ipsa res sacra), the very person (ipsa persona) and an ecclesiastical thing (res ecclesiastica), which should be understood as anything that in some way belongs to the Church. According to the glossators, *sacrilegium* also constitutes the violation of public law. They defined public law as everything that pertained to the service of God, priests and public authorities. They also regarded the violation of a holy day as *sacrilegium*. However, this kind of *sacrilegium* is not mentioned by Gratian, whose defi-

nition is of a more general nature. The glossators' definitions are in turn more specific.

The substantive dimension of the crime of *sacrilegium*, whose existence is proved by the source texts comprised in Gratian's *Decretum*, is much broader than the dimension embraced by Gratian's definition. It is understandable when one takes into account the fact that law was adopted in the casuistic style at the time. No formal definition of such nature which could encompass all types of *sacrilegium* was provided then. Thus, each source text should be considered separately, as it constitutes a specific type of the crime of *sacrilegium*. It usually contains some particular substantive content of the crime, whose essence is however *violatio sacri* in each case. This essence can be manifested in various external forms, which is a prerequisite for the crime to occur, though the constitutive feature, *violatio sacri*, is always present. In order to verify this thesis, one ought to present in detail various categories of subjects committing the crime of *sacrilegium*, as they are included in the source texts contained in the *Decretum*, as well as different objective types of the crime of *sacrilegium*.

Chapter II

The Typology of Subjects Committing *sacrilegium*

2.1. The Subject *in genere*

The subject of *sacrilegium* is always the human person.[1] Only a person can be an active subject. From the substantive perspective, passive subjects can be both things and persons. From the formal point of view, it is always an individual or the moral person that is the subject of rights which can be violated by a crime.[2] The present work will discuss the subject of the crime of *sacrilegium* in its active and passive sense.

In Gratian's *Decretum* the subject of the crime is often referred to with the use of the pronouns "quis"[3] and "qui."[4] It is done so already in the definition of *sacrilegium*, where Gratian speaking of the subject of the crime says "quotiens quis."[5] No specific person is indicated, but the pronoun "quis" refers to the subject in general. Gratian speaks of the subject of the crime in a general way in reference to "Christianis et Deum timentibus hominibus"[6] and then in the same canon he also generally says "quicumque" and "hi, qui

[1] F. X. Wernz-P. Vidal, *Ius canonicum ad Codicis normam exactum. Ius poenale ecclesiasticum*, vol. VII, 2nd ed., Romae 1951, p. 55.

[2] Ibid., p. 59.

[3] C. 17 q. 4 c. 20; C. 17 q. 4. c. 21; C. 17 q. 4 c. 29; C. 17 q. 4. c. 31; C. 22 q. 5 c. 19; C. 12 q. 2 c. 5; C. 12 q. 2 c. 10; C. 2 q. 1 c. 7; C. 12 q. 2 c. 5; C. 17 q. 4 c. 13.

[4] C. 1 q. 2 c. 6; C. 12 q. 2 c. 21; C. 16 q. 1 c. 58; C. 17 q. 4 c. 3; C. 17 q. 4 c. 10; C. 17 q. 4 c. 12; C. 17 q. 4 c. 18; C. 17 q. 4 c. 20; C. 17 q. 4 c. 29; C. 17 q. 4 c. 31; C. 17 q. 4 c. 30; D. 2 c. 12 de cons.

[5] C. 17 q. 4 c. 20; C. 17 q. 4 c. 4.

[6] C. 16 q. 1 c. 57.

... iussu vel largitione pricipum vel quorumdam potentum"[7] would commit the crime of *sacrilegium*. He likewise uses other pronouns, such as "ille, qui"[8] or the plural "illi, qui,"[9] and also "quisquis."[10] Gratian also mentions the collective subject of the crime,[11] being a schismatic group of whom he speaks as "vos." [12] In other cases he defines the subject of the crime with the words "is, qui preest,"[13] and "omnis, qui."[14] These are pronouns that do not indicate any specific person so that it would be possible to speak of an individual crime, which takes place when a person (who) is mentioned together with their public function. In a number of canons, Gratian does not enumerate any additional properties of the subject and neither does he point to the properties of the subject that would influence its responsibility.[15]

Sometimes in a canon Gratian speaks of the individual and general subject referring to a social group "quis principum vel aliorum laicorum,"[16] whose member commits *sacrilegium*. Using the expression "quis principium,"[17] he makes reference to the subject exercising the highest secular power. In this case he individualized the subject. In the following expression "vel aliorum laicorum"[18] the subject is not individualized, which is why it is possible to speak of the crime in the general sense. Thus, Gratian juxtaposed two kinds of subjects within a single norm, one in the individual and the other in the general sense.

There are canons in which the disposition provided by Gratian refers to the subject with the expression "sunt qui"[19] in a general way, not specifying the subject of the crime. In another case, Gratian uses the words "sunt quidam, qui."[20] Thus, the general terms for the subject of the crime of *sacrilegium*, as used by Gratian in canons, are most often supplied in the form of pronouns.

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[7] Ibid.

[8] C. 17 q. 4 c. 12.

[9] D. 4 c. 40 de cons.

[10] C. 17 q. 4 c. 21; C. 24 q. 3 c. 22; C. 16 q. 3 c. 8.

[11] On the crime of moral persons and possibility of punishing them see F. X. Wernz-P. Vidal, op. cit., pp. 56-58.

[12] C. 23 q. 5 c. 35.

[13] C. 11 q. 3 c. 101.

[14] C. 12 q. 2 c. 3.

[15] I. Andrejew, *Polskie prawo karne*, 5th ed., Warszawa 1978, p. 163.

[16] C. 16 q. 7 c. 25.

[17] Ibid.

[18] Ibid.

[19] C. 17 q. 4 c. 3.

[20] C. 1 q. 1 c. 125.

In Gratian's *Decretum*, *auctoritates* are legal norms from the twelve centuries of ecclesiastical law. Until the 9th century crime in ecclesiastical law had been treated as "factum anti-juridicum externum, objective spectatum."[21] Less emphasis was placed on moral imputability. Since the 9th century, the following principle had been prevalent: "factum anti-juridicum tunc tantum et eatenus potest alicui imputari in poenam, quando et quatenus ipsi imputari potest in culpam moralem seu peccatum."[22] Thus, Gratian's *Decretum* reflected both these tendencies. Owing to the casuistic formulation of law, the subject of the crime was defined either in general terms or individually, but without any specification of the subjective elements in the latter case.

2.2. The Subject *in specie*

In the *Decretum* there are a number of canons which define the subject of the crime also in individual terms. Gratian clearly identifies the subject of *sacrilegium* when he refers to the public function performed by this subject. Those who committed *sacrilegium* belonged to both the clergy and laity. Where Gratian in the disposition of a canon speaks of the clergy (clerici), it should be understood as the clergy of all grades; in other cases he specifically mentions a cleric of a particular grade.

2.2.1. The Clergy

Among the subjects who could commit the crime of *sacrilegium*, one can make the simplest division into the clergy and laity. This is how the world was divided at the time, in a similar way to the contemporary world. Ecclesiastical law clearly separated the two groups, the clergy (clerici)[23] and the laity (laici).[24] The clergy could be the active subject of *sacrilegium*, but also

[21] G. Michiels, *De delictis et poenis*, vol. I, p. 89.

[22] Ibid., p. 90.

[23] In C. 12 q. 1 c. 7 Gratian quoted the definition of the clergy as developed by Jerome. Jerome, *Epistulae* 52, vol. LIV, 5, 421, 12.

[24] In C. 12 q. 1 c. 7 he also included the definition of the laity: "Aliud uero est genus Christianorum, ut sunt laici. LAOS enim est populus."

the passive subject. [25] The laity, for their part, could only be the active subject. Each instance of violence against a cleric was considered as the crime of *sacrilegium*, whereas violence against a layperson was not treated as *sacrilegium*. In the following, we shall discuss the individual grades of the clergy whom Gratian enumerates in the canons of the *Decretum* as the subjects of particular types of *sacrilegium*. It is similar when he uses the expression "multi sacerdotum."[26] After the clergy, we shall mention the laity, who are also provided by Gratian as the active subjects of the crime of *sacrilegium*.

2.2.1.1. The Clergy Using Goods Dedicated to the Poor

Ever since the Church was established, concern for the poor had been crucial to its apostolic activity.[27] Movable and immovable property granted to the Church on account of the poor used to become their property (patrimonium pauperum, egentium substantia, hereditas pauperum).[28] They were distributed via the Church and bishops, but it was God who was considered the donor.[29] Thus, if someone made illegitimate use of these goods, it was tantamount to committing *sacrilegium* and *violatio sacri*.

2.2.1.2. Bishops, Presbyters and Deacons Acting against the Power of the King

In C. 22 q. 5 Gratian included a number of norms which pertain to a lie, as well as an oath and perjury. This is why can. 19 contains the text "de eodem" (on the same) as the rubric.

The content of the canon in the disposition pertains to the laity. The last sentence[30] of this canon enumerates three other subjects of this type of *sacrilegium*, a bishop, presbyter and deacon. In the disposition of this criminal legal norm a layperson is provided as the subject, but the subsequent part also enumerates a bishop, presbyter and deacon: "Episcopus uero, presbiter, diaconus, si hoc crimen conmiserit, degradetur."[31]

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[25] See F. X. Wernz-P. Vidal , op. cit., p. 59.

[26] C. 24 q. 3 c. 5.

[27] Acts 11, 29-30; 1 Cor 16, 1-4; Gal 2, 10.

[28] R. Łukaszyk, F. Woronowski, *Dobroczynne duszpasterstwo*, in: EK, R. Łukaszyk, L. Bieńkowski, F. Gryglewicz (eds.), vol. III, Lublin 1985, col. 1386.

[29] On the charitable activity of the Church see R. Łukaszyk, F. Woronowski, *Dobroczynne duszpasterstwo*, in: EK, R. Łukaszyk, L. Bieńkowski, F. Gryglewicz (eds.), vol. III, Lublin 1985, col. 1385-1389.

[30] In Friedberg's edition it is marked as § 1.

[31] C. 22 q. 5 c. 19.

The hallmarks of this type of the crime of *sacrilegium* are specified in the disposition. They are the same for all the subjects mentioned, though the penalties varied.[32]

2.2.1.3. Bishops, Presbyters, Deacons and Other Clerics Seeking Soothsayers' Advice

In Gratian's *Decretum* there is a strict prohibition against seeking soothsayers' advice and being involved in magic practices. Gratian included in C. 26 q. 5 fourteen canons pertaining to the prohibition for the clergy both to perform magic tricks and seek soothsayers' advice. Among these fourteen canons there is can. 5, in which committing these unlawful acts is considered as the crime of *sacrilegium*.[33]

Gratian adopted this criminal legal norm from some earlier collections, presumably from Ivo of Chartres' *Collectio trium partium*. It was established during a number of synods. Ecclesiastical law prohibited the clergy of all grades from both seeking soothsayers' advice and getting involved in magic tricks. In this case, the subject of the prohibition is a bishop, presbyter, deacon and any of the remaining grades of the clergy. This canon does not make any distinctions, and pertains to all clergy alike. It is characteristic that this criminal prohibition applied only to the clergy, and not to the laity. At least they are not enumerated in this canon. Curbing pagan practices by Christianity took place through teaching[34] and the law, to the extent that the literature speaks of "Magiekanon," which punished the crime of *sacrilegium*.[35] In this way, ecclesiastical law voiced concern about the purity of belief in God, who is the only one who determines man's fate and knows

[32] The higher the rank of person, the stricter the penalty in ecclesiastical law, see Conc. Carthag. a. 345-348, c. 13 "Proinde quod in laicis deprehenditur id multo magis debet in clericis praedamnari;" c. 14 "Si quis uero statuta supergressus corruperit uel pro nihilo habenda putauerit, si laicus est communione, si clericus est honore priuetur;" C 25 q. 1. c. 4 "Siquidem maior reatu delinquit qui pociori honore fruitur, et graviora facit vicia peccatorum sublimitas peccantium." In accordance with the principle "Dignitas delinquentis peccatum auget," Damasus, *Regulae canonicae*, reg. 52, in: Azo, *Brocardica sive generalia iuris*, Basileae 1567, p. 788; K. Burczak, A. Dębiński, M. Jońca, *Łacińskie sentencje i powiedzenia prawnicze*, Warszawa 2007, p. 40; L. Halban, *Zwiększenie odpowiedzialności karnej w prawie kanonicznem z powodu wyższej społecznej godności winowajcy*, "Przegląd Teologiczny," Lwów 1928, issue 1, pp. 4-5.

[33] In LDG this canon is on f. 226 v. and contains the same text as in the edition of Ae. Friedberg; two words are different "auruspices" and "auriolos."

[34] The Christian authors and apologists opposed magic in their writings, which they connected with paganism, cf. N. Zeddies, *Religio et sacrilegium. Studien zur Inkriminierung von Magie, Häresie und Heidentum (4.-7. Jahrhundert)*, Frankfurt am Main 2003, p. 38.

[35] Ibid.

the future of every person.[36] The legal norm prohibited seeking advice from haruspices, sorcerers and soothsayers. These were the most dangerous forms of pagan magic, performed especially among Christians living in villages, and also by the clergy.[37] The prohibition of seeking advice from augurs, fortune-tellers and others dealing with similar magic practices was strengthened by the word "certe"[38] (even) in the canon. It was probably done because augurs were "official" Roman priests explaining the will of gods primarily on the basis of bird flights or weather phenomena. Despite the fact that peoples inhabiting the Roman Empire adopted Christianity, pagan beliefs[39] included in the ancient Roman religion still survived. Synods responded to these manifestations of pagan practices and imposed severe penalties for carrying them out. The penalties of five years of penance which were introduced by the Synod of Ancyra in 314 extended to all Christians during the Lateran synod summoned by Pope Martin around the year 650. The synod of Laodicea in 375 introduced this prohibition for the clergy.

Among the fourteen canons in C. 26 q. 5 containing the prohibition of seeking fortune-tellers' advice and dealing with magic, only four canons pertain to the clergy as the subject: can. 4 adopted by the synod of Laodicea[40] (sacris offitiis deditos uel clericos), can. 5 adopted by the fourth synod of Toledo[41] (episcopus, aut presbiter, siue diaconus, uel quilibet de ordinibus clericorum), can. 6 adopted by the synod of Agde[42] (aliquanti clerici, here also laici) and can. 9 adopted by the synod of Orléans[43] (clericus, here also monachus uel secularis). Among these four canons included in Gratian's *Decretum*, only can. 5 states that the clergy who seek advice from haruspices, sorcerers, soothsayers, augurs, fortune-tellers or anyone else dealing with similar practices commit the crime of *sacrilegium*.[44]

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[36] This argumentation is provided by Gratian in his *dictum* at the beginning of proe. q. 5 C. 26 "Futura enim prescire solius Dei est."

[37] N. Zeddies, op. cit., pp. 306-307.

[38] C. 26 q. 5 c. 5.

[39] J. Daniélou, H. I. Marrou, *Historia Kościoła*, vol. I, translated by M. Tarnowska, Warszawa 1984, p. 226.

[40] It took place in 375, can. 36 (ed. Turner), Gratian cites it as c. 30.

[41] It took place in 633, can. 29 (ed. Vives), Gratian cites it as c. 30.

[42] It took place in 506, can. 42 (ed. Munier, in CCL 148, pp. 210-211), Gratian cites it as c. 38.

[43] It took place in 511, can. 30 (ed. C. de Clercq, in CCL 148A, p. 12), Gratian cites it as c. 32.

[44] In the edition of Vives, p. 203, Conc. Tolet IV, c. 29 at the beginning of the list there is also magos, then aruspices and then the list continues in the same way as in Gratian's *Decretum*.

However, the *Glossa ordinaria* in the commentary on C. 26 q. 5 c. 5 includes the text which prohibits bishops from both seeking soothsayers' advice and performing magic tricks.[45]

2.2.1.4. The Presbyter

Presbyters as the subject of the crime of *sacrilegium* can be found in Gratian's *Decretum* more frequently than bishops. It was often connected with the misappropriation of the material assets of the Church committed by presbyters.[46] A presbyter is enumerated as the subject of *sacrilegium* with regard to breaking the oath to the king and planning to kill him.[47] Presbyters who turned out to be unfaithful and defiant, or those who were promoted to a higher order by heretics and forced to make sacrilegious offerings also indirectly committed *sacrilegium*.[48] Priests who admitted that they imposed punishment guided by God's zeal[49] committed *sacriulegium* owing to imprudence and zealotry. In the *Decretum* there is the expression "multi sacerdotum."[50] Presbyters who seek maguses' and haruspices' advice.[51] Priests should not receive the Body of Christ without the Blood.[52] In the rubric there is the term "sacerdos."[53] Presbyters (nec non presbiteros) as well as bishops, deacons, subdeacons and monks were forbidden to take care (tutela) of the juvenile, the mentally ill, the dumb, the deaf and others for whom guardians were provided under the old laws. When they provided the care (tutela), they ought to be punished as sacrilegists (sacrilegos). They were punished with overseas exile for the rest of their life.

[45] LDG, f. 226 v. "Si quis episcopus notandum est pro solo consilio puniri sive faciat artem illam sive pro sola vocatione punitur qui vocat clericum ad iudicium imperatoris ut (Honori) q. i. Placuit." It may be that in this case it is about the Constitution of Honorius and Theodosius of 11th December 412, C. Th. 16, 2, 41 "Clericos non nisi aput episcopos accusari convenit [...]."

[46] D. 50 c. 22.

[47] C. 22 q. 5 c. 19.

[48] C. 1 q. 7 c. 1.

[49] Ps 36, 33 "Dominus autem non derelinquet eum in manus eius nec damnabit eum cum iudicabitur illi."

[50] C. 24 q. 3 c. 5.

[51] C. 36 q. 5 c. 5.

[52] D. 2 c. 12 de cons.

[53] Ibid.

2.2.1.4.1. Priests Receiving Only the Body of Christ during Holy Mass

Canon law required that the matter of the Eucharistic celebration be only bread and wine mixed with a little water.[54] Transubstantiated into the Body and Blood of Christ during the consecration, they constituted the sacrament of the Eucharist. It was Pope Gelasius I (492-496) who spoke in defence of the *integrum* of the Eucharist. Gratian, referring to the authoritative decision of Pope Gelasius which he had given in the letter to Bishops Maioricus and John, included in the *Decretum* the text forbidding priests to receive only the Body of Christ during Holy Mass.

Gratian accepted Pope Gelasius' decision as valid and included it in his *Decretum*.[55] D. 2 c. 12 de cons. contains the obligation for a priest to receive the Body and Blood of Christ, and not only the Body of Christ. Pope Gelasius wrote a letter to Bishops Maioricus and John in which he said that he had discovered that some priests, when celebrating the Most Holy Eucharist, did not receive the Blood of Christ. At the same time, he expressed his ignorance (nescio) about the superstition (qua superstitione) which made priests abstain from the Blood of Christ. The decision of the supreme legislator of the Church was unequivocal. Those priests should either receive the whole sacrament or abstain from the whole sacrament. Pope Gelasius decided that receiving the Body of Christ and abstaining from the Blood of Christ brought about the separation of one and the same sacrament. This division he called great sacrilege (grande sacrilegium). The pope's decision could be based on the fact that the reception of Holy Communion under one kind by priests might be misleading to the faithful. Moreover, the pope considered it as a kind of superstition (superstitio) of which he suspected those priests. Nevertheles, he regarded the separation of the Body and Blood of Christ in Holy Communion received by a priest as great sacrilege (grande sacrilegium).

2.2.1.4.2. Priests and Deacons Returning from Heretics

Gratian included in the *Decretum* a canon which contained the legal regulation of the situation of priests and deacons, ordained in the Catholic Church, who turned out to be unfaithful and who fought the Church escaping to her-

[54] *Breviarium Hipponense*, c. 23, CCL 149, pp. 39-40 "Vt in sacramentis corporis et sanguinis Domini nihil amplius offeratur quam ipse Dominus tradidit, hoc est panem et uinum aquae mixtum;" *Registri ecclesiae Carthaginensis excerpta*, c. 37, CCL 149, p. 184; *Breviatio Ferrandi*, c. 213, CCL 149, p. 304 "Vt in sacrificio absque pane et vino nullus offerat" (Concilio Carthaginensi, tit. 32); D. 2 c. 1 – 6 de cons.

[55] In LDG, f. 289 v.

etics. This canon is a slightly modified version of the legal decisions taken by the synod of Carthage which took place in the spring of 256. Gratian included the canon in the *Decretum*, quoting Cyprian and his letter to Pope Stephen I (254-257). In the *Decretum*, in d. a. c. 1 q. 7 C. 1, he indicates Cyprian's letter[56] as the *auctoritas*, in which he sent the synodical canons to Pope Stephen.[57]

In q. 7 Gratian poses the following question: "Should a bishop who renounces his heresy be received in his dignity or not?"[58] Canon 1 is a legal norm containing the disposition pertaining not to bishops, but to presbyters and deacons. They turned out to be unfaithful and escaped to heretics. There they could be ordained to higher orders, a presbyter to a bishop and a deacon to a presbyter. There they were also forced to make offerings which were false and sacrilegious. Making a sacrilegious offering constitutes sacrilege. For the law of the time it was irrelevant that they merely attempted to do it (conati sunt).[59] An attempt was tantamount to completing a given act.[60] The subject of the forbidden act, in this case a presbyter and deacon, returning to the Catholic Church, was degraded to the laity (communicent laicis) by the law.

2.2.1.4.3. Priests and Deacons Selling Liturgical Vessels

Service at a temple involved using liturgical vessels, which belonged to the Church. Liturgy was celebrated by presbyters and deacons, who were obliged by the law to take care of all liturgical equipment. They were not allowed to sell these vessels,[61] as this unlawful act was treated by the law as the crime of *sacrilegium*. As the *auctoritas*, Gratian included in the *Decretum* such a legal norm which is among the Statutes of the Synods held by the Eastern Fathers (Capitula ex orientalium Patrum synodis a Martino Episcopo ordinata atque collecta),[62] collected and translated into Latin by

[56] Cyprianus, ep. 72, PL 3, col. 1083-1090 or 1046-1050; CCL 3c, pp. 523-528; Mansi, vol. I, col. 897-900; A. Baron, H. Pietras, *Acta Synodalia ann. 50-381*, vol. I, Kraków 2006, p. 26.

[57] In LDG, f. 89 v.

[58] Proe. q. 7 C. 1.

[59] M. Myrcha, *Kara*, p. 724.

[60] G. Michiels, *De delictis et poenis*, vol. I, pp. 250-252.

[61] Ecclesiastical law prohibited such actions, see *Marcin z Bragi, Dzieła*. Bilingual series Ad Fontes, W. Seńko (ed.), vol. VI, Kęty 2008, pp. 320-321, can. 14 (further cited as *Marcin z Bragi, Dzieła*); Conc. Agat. a. 506, c. 7, CCL 148, p. 195.

[62] The Latin texts of these statutes can be found in the latest editions: C. W. Barlow, *Martini episcopi Bracarensis Opera omnia*, New Haven 1950; J. Vives, *Concilios visigóticos e hispano romanos*, "España Cristiana." Textos 1, Barcelona-Madrid 1963; G. Martínez Díez, F. Rodríguez, *La colección canonica Hispana*, 1-, Madrid-Barcelona 1966-1981. Polish translation: M. Rola in: *Marcin*

Martin of Braga. Gratian in the case of a number of canons refers to Pope Martin I (649-655) as the author of the *auctoritas*. Ae. Friedberg, for his part, acknowledges only two canons, D. 50 c. 2 and D. 50 c. 12, as being authored by Pope Martin I.[63]

In D. 50 Gratian included a number of legal norms in the rubrics which were supposed to answer the question posed in d. a. c. 1 D. 50, as to whether the clergy, having done penance, were to remain in their orders or could be promoted to higher orders. Further in his *dictum* he claims that those entangled in numerous crimes are to be deprived of the possibility to perform activities following from ordination and should not be promoted to higher dignities.[64]

Among a number of rubrics that contained the legal norms pertaining to the clergy after doing penance, Gratian included in c. 22 a rubric which he called "de eodem"[65] (on the same), because the preceding can. 21 contains the following legal norm: "The clergy who have reformed through penance should receive their order and dignity."[66] The content of the *auctoritas*[67] quoted in can. 21 includes the law established at the synod of Agde,[68] ordering bishops to make defiant priests reform and subsequently restore them to their own orders and dignities. The content of can. 22 is completely different from can. 21. Gratian may have entitled the rubric of can. 22 "de eodem"[69] (on the same) because in both cases a bishop is supposed to decide whether the clergy previously removed from their orders should be reinstated in them and in this sense the content of the following canon is the same.[70]

Gratian, formulating the legal principles contained in the rubrics of D. 50, pertaining primarily to the clergy, wanted to emphasize the signifi-

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z Bragi, Dzieła, pp. 310-351. The comprehensive introduction to this edition together with the presentation of the life history, works, editions and treatises: M. Starowieyski, pp. 9-104. Other Polish translations of the two synods in Braga and Capitula Martini: M. Rola, M. Starowieyski, WST 2 (1984), pp. 79-121.

[63] Ae. Friedberg, *Prolegomena*, col. XXX. It is possible that Gratian made use of the collection *Hispana* and used the expression "ex Concilio Matini Papae" taking into account Martin of Braga as an archbishop, who was often referred to as *papa*. In D. 50 c. 2 and D. 50 c. 12, where Pope Martin I is meant, Gratian uses the expression "Item Martinus Papa," who wrote a letter to Bishop Amandus and this is what the two *auctoritates* were taken from.

[64] Dictum a. c. 1 D. 50.

[65] D. 50 c. 22.

[66] D. 50 c. 21.

[67] Conc. Agat. a. 506, c. 2, CCL 148, p. 193. The content of the canon, as above.

[68] It took place on 10th September 506 in the city of Agde belonging to the metropolis of Narbonne.

[69] D. 50 c. 22.

[70] In LDG, f. 38. The text of canon 17 in *Capitula Martini* in: *Marcin z Bragi, Dzieła*, p. 320.

cance of penance as reparation for the crimes committed. *Capitula Martini* includes a canon which was presumably[71] written at the synod of Ancyra in 314. It was decided there that if a presbyter or deacon sold any ecclesiastical vessels, through this unlawful act he would commit sacrilege (sacrilegium commisit).[72] Vessels (ministeria)[73] which are used in the Church are designated for divine worship. The text uses the term "ministeria,"[74] that is, as in another text, sacred vessels,[75] which were most often vessels used in the celebration of Holy Mass and sacraments. It was connected with the fact that they were connected with the service of God, rather than any activities related to daily life. The subject of the crime in this type of *sacrilegium* was a presbyter or deacon.

2.2.1.5. Subdeacons and Deacons Breaking Celibacy

In D. 26 Gratian included 17 canons which pertain to the possibility or impossibility of contracting marriage by the clergy beginning from subdeacons. Among these canons there is can. 5, where the decisions of the second synod of Toledo are provided as the *auctoritas*,[76] and which includes the obligation for subdeacons and deacons to maintain sexual abstinence.[77]

Ecclesiastical law obliged the clergy from subdeacons to keep celibacy.[78] Gratian included in the *Decretum* the text of the first canon adopted at the

[71] In *Marcin z Bragi, Dzieła*, p. 320 it was indicated in fn. 19 that the text of this canon was written at the synod of Ancyra (314) as can. 14 with the reference to A. Baron, H. Pietras, *Acta Synodalia*, vol. I, p. 66, where the text of this canon is supposed to be included. However, there is the Greek text and the Polish translation of can. 15 there (and not, as indicated, can. 14), which contains the norm concerning the prohibition of selling ecclesiastical goods by presbyters during the vacancy of the episcopal see.

[72] D. 50 c. 22.

[73] Ibid.

[74] Ibid.

[75] C. 12 q. 2 c. 2. "Sacrata vasa" and "ministeria" are two different words used to denote the same thing. "Sacrata vasa" were consecrated vessels and thus they were treated as sacred, *sacratus* – sacred, consecrated.

[76] *Auctoritates* were texts included in Gratian's rubrics whose purpose was to explain or confirm legal principles generally formulated in *dicta* and contained in rubrics. Most frequently they were disciplinary rulings of Councils and synods as well as legal decisions taken by popes and bishops, cf. A. van Hove, *Prolegomena*, p. 162.

[77] In LDG, f. 20 v.

[78] A. Szafrański, W. Wójcik, *Celibat*, in: EK, vol. 2, F. Gryglewicz, R. Łukaszyk, Z. Sułowski (eds.), Lublin 1985, col. 1399-1403: in the western Church the first attempt to transform the voluntary practice of celibacy was the synod of Elvira (305-306), can. 33, which ordered bishops, priests, deacons and all clerical students to abstain from living with wives on pain of degradation;

second synod of Toledo, according to which subdeacons and deacons were obliged to maintain celibacy, and breaking the oath of abstinence taken before the subdiaconate was treated as the crime of *sacrilegium*, punishable with excommunication.[79]

In this case, the subject of *sacrilegium* are subdeacons and deacons, who were obliged to keep celibacy under ecclesiastical law. According to the ecclesiastical law established at the second synod of Toledo,[80] the age of eighteen was the right moment to take a decision concerning one's life in chastity or in marriage. This age was adopted by Gratian in the *Decretum*. After taking their decision and swearing a solemn oath (spondeo)[81] to live in chastity, they were supposed to undertake the ministry (ministerium) of subdeacon.[82] After the subsequent five years, when they had been impeccable at keeping celibacy and if they were considered worthy by a bishop, the law ordered that they should be promoted (promoveri debent) to the office of deacon (offitium diaconatus). The law did not require deacons to renew the oath of sexual abstinence. The one taken before the subdiaconate was considered valid. However, if both subdeacons and deacons[83] broke the oath of sexual abstinence, they committed *sacrilegium* (sacrilegii rei).[84] The oath could be broken by contracting marriage or by secret concubinage.

Pope Siricius (384-399) extended this law to the whole West. The law was confirmed by Pope Innocent I (401-417), Pope Leo the Great (440-461) imposed the obligation of celibacy also on subdeacons in 446 and Pope Gregory the Great (590-604) – in 591. It was also adopted by the synods in Africa (Carthage 390, Telepte 418), in Spain (Toledo 400, Girona 517, Lerida 524, Toledo 531 and 597, Huesca 598), in Gaul (Arles 314, Orange 441, Arles 443, Agde 506, Clermont 535, Orleans 538, Tours 567), and in Italy (Turin 398). In the 11th century the synods of Pavia (1022) and Bourges (1031) ordered the clergy to divorce their wives. This order was repeated by other popes, starting from Pope Leo IX (1049-1054), and Gregory VII (1073-1085) forbade the faithful from participating in the services celebrated by the clergy who lived in marriage. The Second Council of the Lateran in 1139 considered major orders to be an impediment to marriage.

[79] I. S. F. Böhmer, *Dissertatio*, p. 24.

[80] It took place in 527.

[81] D. 28 c. 5.

[82] Subdeacons were obliged to maintain sexual abstinence by Pope Leo the Great in 446.

[83] LDG, f. 20 v. in the *Glossa ordinaria* there is the following text: "subdiaconi continentiam tenentur et idem probat de diacono et sacerdote." Cf. *Summa Stephani*, ed. J. F. Schulte, p. 43, Stephen, in the commentary on D. 28 where he makes reference to the canons beginning from the first one, emphasized the obligation to keep chastity starting from subdeacons, and when he comments on c. 3 "Quando presb." he adds "Idem hodie in subdiaconibus." In reference to the criminal sanction "habeantur extranei" he adds the commentary "separentur ab uxoribus propter votum solenne."

[84] In LDG, f. 20 v. in the middle margin separating both columns of the text there is a miniature of a hand with its index finger pointing to the text "ut sacrilegii rei." It can be

The concept of attempting to contract marriage did not exist at the time. Holy orders did not constitute a diriment impediment to marriage.[85] The contracted marriage was thus valid. This crime was punished with excommunication (ab ecclesia habeantur extranei).

2.2.2. The Laity

Whereas the clergy are most often enumerated as participants of a particular grade of ministry or orders, the laity committing the crime of *sacrilegium* are typically referred to in a general way. It is different in the case of emperors or others in power, for example princes, when they are enumerated as the subject committing *sacrilegium*. The laity as the subject of *sacrilegium* can be found in Gratian's *Decretum* much more frequently than the clergy. Any unlawful interference in the sphere of *sacrum* on their part is considered as *sacrilegium*. It pertains to both material and spiritual matters. The present study will indicate them as the subjects of *sacrilegium* where they are provided in the *Decretum expressis verbis* as *principes*, *laici*, *saeculares* or *personae saeculares*.

2.2.2.1. Keeping Tithes

Ecclesiastical law prohibited the laity from possessing tithes, which were only for the support of the clergy. Quaestio 7 C. 16 contains a number of canons regulating the legal relations between the laity and the clergy in reference to offices, churches as well as material goods belonging to the Church. There is can. 1 among them, which includes the prohibition against the laity possessing tithes. Gratian refers to the Roman synod in this canon, which was summoned by Pope Gregory VII in 1078.[86]

considered as evidence that somebody who prepared interlinear glosses in the manuscript wanted to draw readers' attention to the significance of this text.

[85] Such a rule of ecclesiastical law will be introduced at the Second Council of the Lateran in 1139, when major orders were considered to be an impediment to marriage. At the turn of the 12th and 13th centuries major orders began to be regarded as a diriment impediment to marriage, see A. Szafrański, W. Wójcik, *Celibat*, in: EK, F. Gryglewicz, R. Łukaszyk, Z. Sułowski (eds.), vol. II, Lublin 1985, col. 1400.

[86] Jaffé-Wattenbach, after 5084 (3820). The synod took place on 19th November 1078. The text is c. 7 in lib. VI of the Regesta of Gregory VII, as was indicated by Gratian, see Ae. Friedberg, *CorpIC*, Pars I, col. 799-800, in Notationes Correctorum.

A tithe as a payment, most often in kind, made for the support of priests had already been known in ancient Egypt, Greece and Rome. Also in the Jewish religion people paid tithes to Levites. In the Church of the apostolic age donations were made for the support of the Apostles.[87] In the post-apostolic Church and in the subsequent centuries a tithe became institutionalized, which led to the legal regulation of this form of donation for the support of the clergy by papal decisions[88] and synods.[89] Gratian included in the *Decretum* the canon containing the strict prohibition against keeping tithes by laymen.

2.2.2.2. Killing the King

In q. 5 C. 22 there begins Gratian's *dictum* where he poses a doubt to be resolved. It concerns an archdeacon taking an oath, which in itself was permitted, but he was forced to do so by a bishop. Is a bishop forcing an archdeacon to perjure himself accused of perjury (reus periurii)[90] or not? Gratian further states in his *dictum* that if those consenting to a criminal act (consentiens)[91] are punished equally with the perpetrator of the crime, then how much more the one who forces somebody is considered as accused of committing the crime.[92] In the canons following this *dictum* Gratian includes a number of canons in q. 5, which constitute the *auctoritates*, where he presents specific cases containing the crime of perjury (periurium) together with the accompanying criminal sanctions. Among these canons there is can. 19, included by Friedberg in the *paleae*,[93] which constitutes the case of a layperson breaking the oath sworn to the king and contains the relevant punishment.[94]

[87] 1 Tim 5, 17-18; Acts 4, 32.

[88] Pope Damasus I (366-384) hedged the obligation to pay tithes with the penalty of anathema at the Roman synod.

[89] The synod of Tours of 567 prescribed paying tithes with the aim of placating God's wrath; the synod of Mâcon of 585 hedged the obligation to pay tithes with the penalty of excommunication; for more on tithes see J. Dudziak, *Dziesięcina*, in: EK, vol. IV, R. Łukaszyk, L. Bieńkowski, F. Gryglewicz (eds.), Lublin 1985, col. 600-603.

[90] Proe. q. 5 C. 22.

[91] Ibid.

[92] Dictum a. c. 1 q. 5 C. 22.

[93] Ae. Friedberg, *CorpIC*, Prolegomena, col. XVII-XVIII. Among all 166 *paleae* which are provided by Friedberg in his compilation, this canon is one of the three canons that concern *sacrilegium*. These are D. 88 c. 12; C. 22 q. 5 c. 19; C. 24 q. 3 c. 22. Other canons that contained the norms pertaining to *sacrilegium* were included in the original text of Gratian's *Decretum*.

[94] In LDG, f. 193 r.

The subject of the crime of *sacrilegium* is in this case a layperson (laicus). At first, *sacrilegium* is committed by breaking the oath sworn to the king. When it is broken, it is consequently violated (violatio). The next stage is wicked and deceitful treatment of royal power, which results in machinations (aliquo machinamento) aimed at an assassination attempt on the king. By laying violent hands on the king, a layperson commits *sacrilegium*. It is *sacrilegium* because they venture to hurt the Lord's anointed one. The king becomes anointed through the act of coronation. Power as such comes from God. To kill the Lord's anointed one means to violate the sancitity (sacrum) of the power derived from God.[95]

2.2.2.3. Taking Away Property and Privileges

Causa 16 contains seven *quaestiones* in which Gratian included canons pertaining to the right of ownership of ecclesiastical possessions, churches, privileges and prescription. In d. a. c. 1. q. 1 he presented a legal difficulty which he solved in the subsequent *quaestiones*, referring to the rulings of Councils and synods as the *auctoritates* in the canons.

An abbot had a church, which he entrusted to a monk so that he would perform the service of God. He had possessed this church for forty years, and in the end the clergy of the church that had the right to administer baptism brought an action against the abbot in regard to him possessing a church which was in the diocese to which this church belonged. This became a point of departure for Gratian, who in seven *quaestiones* solved the legal problems of jurisdiction and possession. Quaestio 3 pertains to the problem which Gratian included in the question (quaestio) "Tertio, an iura ecclesiarum prescriptione[96] tollantur?"[97] In d. a. c. 1 q. 3 he stated "Quod

[95] I. S. F. Böhmer, *Dissertatio*, p. 3.

[96] Gratian's claim "prescriptione temporis omnia iura tollantur" was connected with referring to the *auctoritates*, which were the rulings of the Council of Chalcedon, Pope Gelasius and the synod of Toledo. Gratian did not refer to Roman law, which had developed the legal norms pertaining to acquisitive prescription, but only to the *auctoritates* from ecclesiastical law. The legal norms on acquisitive prescription were also adopted at Gallic synods. However, no specific number of years was indicated. It might have been connected with the fact that it was only the emperor Justinian who introduced extraordinary acquisitive prescription in 528, the so-called *longissimi temporis praescriptio*, in which the time period was extended to 30 and 40 years, see A. Dębiński, *Rzymskie prawo prywatne. Kompendium*, 2nd ed., Warszawa 2005, p. 229. Gallic synods prohibiting the acquisitive prescription of possessions belonging to the Church are Conc. Aurel. a. 511, c. 23, CCL 148A, p. 11. In this canon, the reference to *lex saecularis* concerns the Constitution of the emperor Theodosius of 14th September 424, C. Th. IV, 14, 1. *Praescriptio* does not pertain to ecclesiastical goods, and it is not allowed to refer civil law or royal power either.

autem prescriptione temporis omnia iura tollantur, probatur auctoritate Calcedonesis Concilii et Gelasii Papae,[98] et Tolletani Concilii."[99] In can. 8 he included as the *auctoritas* the decisions taken at the eighth Roman synod,[100] which took place in 869, pertaining to the Church's ownership of possessions and privileges for thirty years.[101]

Since the beginning, the Church had received various donations and privileges either from rulers or, as it was put in the text of the canon, from "other worshippers of God."[102] It was resolved at the Council of Constantinople that possessions and privileges granted to the Church by emperors and other worshippers of God belonged to the Church.[103] Thus, it was recognized that they were not only possessed by the Church (possessio),[104] but were its property (proprietas).[105] Moreover, it was clearly stated in the canon that they had been donated to the Church in writing (in scriptis donate). Churches had a legal basis for ownership, which they could always prove

It was so in Conc. Epaon. a. 517, c. 18, CCL 148A, pp. 28-29. A similar law was also adopted by Conc. Clipp. a. 626-627, c. 2, CCL 148A, p. 292. On *praescriptio* see A. Dębiński, *Rzymskie prawo prywatne*, pp. 227-229.

[97] Proe. a. q. 1 C. 16.

[98] Proe. q. 3 C. 16; C. 16 q. 3 c. 1, Gelasius, ep. 2 ad Siculos, a. 494, Jaffé -Wattenbach, 637 (392), in which Gelasius wrote "ut ultra triginta annos nulli liceat pro eo appellare." It concerned the Church's goods. No privileges were mentioned in it; Ae. Friedberg, *Prolegomena*, col. XXVIII.

[99] C. 16 q. 3 c. 3, Conc. Tolet., a. 633, c. 35, Gratian cites it as c. 34, Friedberg, *Prolegomena*, col. XXII.

[100] Ae. Friedberg, *CorpIC*, Pars I, col. 791-792, fn. 108 indicated that this text is can. 18 of the eighth Roman synod, which took place in June 869, and which was chaired by Pope Adrian II (867-872). In the manuscripts of the *Decretum* the text is attributed to Gelasius.

[101] In LDG, f. 172 r. the copyist consistently writes "sancte et magne" instead of the diphthongized *sanctae et magnae*.

[102] C. 16 q. 3 c. 8.

[103] It is so also in the Decree of Ivo of Chartres, cap. 297 (111), where princes are mentioned, see J. Wojtczak-Szyszkowski, *O obowiązkach osób świeckich i ich sprawach, część szesnasta Dekretu przypisywanego Iwonowi z Chartres*, wstępem poprzedził, na język polski przełożył Jerzy Wojtczak-Szyszkowski, Warszawa 2009, p. 145.

[104] C. 16 q. 3 c. 8.

[105] The distinction between possession and ownership was emphasized in Roman law, see Dig. 43, 17, 1, 2 "Fieri enim potest, ut alter possessor sit, dominus non sit, alter dominus quidem sit, possessor vero non sit: fieri potest, ut et possessor idem et dominus sit." On *possessio* and *proprietas* see A. Dębiński, *Rzymskie prawo prywatne*, pp. 212-218; 221-245. The privileges granted to the Church were also forbidden to be withdrawn in Roman law on the basis of the constitution of Constantine and Julian ad Leontium of 10th September 357, C. Th. 16, 2, 13 "Ecclesiae urbis Rom(ae) et clericis concessa privilegia firmiter praecipimus custodiri;" also on the basis of the constitution of the emperors Arcadius, Honorius and Theodosius of 15th September 407, C. Th. 16, 2, 38.

by producing a deed of gift. Goods or provileges were supposed to belong to the Church on the basis of long custom (ex longa consuetudine). In Gratian's *Decretum* the decision of the Fourth Council of Constantinople was adopted, according to which the period of time for possession on the basis of custom was thirty years. Thus, when churches had been in possession of donated goods or privileges for thirty years, they could not be deprived of them.[106] Ecclesiastical law prohibited laymen (quecumque persona secularis) from taking back donations belonging to churches. They were not allowed to use power (per potestatem) in order to deprive churches of goods and privileges and to usurp power over them. They were also forbidden to use any evidence (argumenta) to justify taking away goods or privileges from the Church.

2.2.2.4. Usurpation of Power over Ecclesiastical Property

Laypersons claimed the right to power over ecclesiastical possessions, or they wanted to manage them. Ecclesiastical law forbade it. Such a legal norm was also adopted by Gratian in the *Decretum*. He put it in q. 7, where in d. a. c. 1 he included the following statement: "Generaliter enim tam ecclesiae quam res ecclesiarum in episcoporum potestate consistent."[107] It was similar to the case of tithes. In order to confirm his own judgement, he referred to the decision of Pope Gregory VII (1073-1085) from the Roman synod of 1078, can. 7. In the case of can. 25 he referred to the decision of Pope Calistus II (1119-1124), who in the dispute with the emperor Henry V was a staunch defender of sovereign episcopal power with regard to churches and ecclesiastical possessions. At the First Council of the Lateran, which took place in 1123, this decision of the pope was included in can. 9, which Gratian contained in the *Decretum* as the *auctoritas*.[108]

It was decided in this canon that if any of princes (quis principum) or other laypersons (aliorum laicorum) would claim the right to manage (dis-

[106] *Summa Stephani*, ed. Schulte, pp. 224-229. The author of the *Summa* in the commentary on C. 16 q. 3 stated the following: "Quoniam in hac q.[uaestione] de praescriptionibus multa dicuntur, ab his, qui iuris habent prudentiam venia impetrata, legum expertibus morem geram de praescriptionibus pauca breviter perstringens." He recognized, however, that in that case it was not necessary to speak of *praescriptio* in detail, how this institution looked in Roman law, and he only discussed it in terms of what was necessary in his opinion.

[107] Dictum a. c. 1 q. 7 C. 16.

[108] LDG f. 175 v. contains a slightly different text: "Si quis principum uel aliorum dispositionem seu donationem siue possessiones ecclesiasticarum rerum sibi uendicauerit ut sacrilegus iudicetur."

positionem) ecclesiastical goods or aspire to have control over them or possess them, they were to be tried as sacrilegists. Such aspiration on the part of laypersons was treated as a crime by ecclesiastical law.

D. 96 concerns the relationship between imperial and papal power, and especially the choice of a pope and the influence of laypersons on matters concerning the Church. In d. a. c. 1 D. 96 Gratian included a claim that the emperor's power could not have any influence on the choice of a pope and generally on all matters regarding the Church. Gratian asserted, as can be read, that what had been decided by the emperor Honorius on the choice of a pope did not have any significance, since laypersons had not been granted any influence not only on the choice of bishops, but even on the decisions about any matters concerning the Church. Therefore, no emperor's decisions regarding ecclesiastical regulations could have any legal significance.[109] He referred to the decisions of Pope Symmachus taken at the synod of Rome in 502. Canon 1 D. 96 is a record of the course of the synod. Among a number of legal norms established at the synod there were those concerning the choice of a pope, the prohibition of declaring anathema by laypersons and using ecclesiastical possessions, as well as the alienation of goods donated to the Church for the poor. Any contravention of the prohibition was treated in the same way as *sacrilegium*.[110]

2.3. Summary

Gratian's *Decretum* contains Gratian's *dicta*, that is the understanding of ecclesiastical law from the mid-12th century supported by *auctoritates*, or legal norms established by Councils, synods, popes and bishops of the previous centuries. Thus, this work is a compilation of ecclesiastical legal norms. As a result of such a way of collecting legal material it is difficult to track the development of ecclesiastical law in respect of the subject and object of the crime of *sacrilegium*. The subject of *sacrilegium* is defined in Gratian's *Decretum* both in the general and individual sense. It is done through the use of the following pronouns and expressions: "quis," "aliquis," "quidam,"

[109] Dictum a. c. 1 D. 96.

[110] A similar decision was taken at the First Council of the Lateran of 1123, where in can. 8. or 12 in other editions it was ruled that "Si quis principum aut aliorum vel laicorum dispositionem, vel donationem rerum sive possessionum ecclesiasticarum sibi vindicaverit, ut sacrilegus iudicetur." I. S. F. Böhmer, Dissertatio, p. 42 incorrectly cites the date of 1122.

"qui," "vos," "is qui preest," "omnis qui," "quis principum vel aliorum laicorum," and "quotiens quis." This way of defining the subject of *sacrilegium* does not individualize it. It can be understood that in this case the subject of criminal transgression can be anybody who commits an act forbidden in the disposition. It can be both a cleric and a layperson. In one case the individual subject "quis principum" is included together with the general subject "vel aliorum laicorum" in one norm. Gratian adopted as the *auctoritates* the legal norms which divide the subjects of the crime into laypersons and clerics. The same type of *sacrilegium* committed by a layperson and a cleric is not punishable with the same criminal saction. However, in both cases the punishment is the most severe for each group. For laypersons it is excommunication or anathema, and for the clergy it is degradation. Among the clergy, all grades are enumerated as the possible subject of *sacrilegium*, but the main ones are bishops, presbyters, deacons and subdeacons. Other grades are generally referred to as "quilibet de ordinibus clericorum." The canons sometimes contain some description of the subject, which is how it becomes individualized. However, it is not specified whether the subject is imputable or not and neither is the age or gender indicated. Nevertheless, the division into the laity and clergy is made. Among the laity, a ruler "princeps, rex" is separated from "aliorum laicorum" or "saecularium." It is emphasized that the higher the office of the subject of the crime of *sacrilegium*, the heavier the punishment.

Chapter III

The Object of *sacrilegium*

Sacrilegium is a public legal crime. The definition of *sacrilegium* which was included by Gratian in the *Decretum* points to two constitutive elements of this crime. One is that committing *sacrilegium* is the external[1] violation of what is sacred (violatio sacri). The other is that *sacrilegium* is committed by breaking a legal norm. This crime leads to scandal in the community of the faithful and violates its legal order. The objective dimension covers a number of events which, as prescribed by the cases present in Gratian's *Decretum*, should be punished as *sacrilegium*. The general definition, according to which it is committed by taking (auferendo) something sacred from a sacred place (sacri de sacro), something unsacred from a sacred place (non sacri de sacro), something sacred from an unsacred place (sacri de non sacro), requires the presentation of its specific types through the analysis of the canons.

3.1. Material Goods of the Church

The Church as the community of the faithful aims at fulfilling its main goal, which is the salvation of its members.[2] This supernatural goal is however realized by the earthly community. As any earthly community, also the Church needs material support in order to be able to effectively conduct

[1] G. Michiels, *De delictis et poenis*, vol. I, pp. 60-61; J. Syryjczyk, *Sankcje w Kościele*, p. 101, where he refers to the principle "nullum crimen sine actione."

[2] F. X. Wernz-P. Vidal, op. cit, pp. 32-33.

its mission. The right to possess material goods is the innate right of the Church.[3] Thus, material goods supposed to serve the realization of supernatural goals belonged to the sphere of *sacrum* and became the Church's and Christ's property.[4] The unlawful treatment of material goods constituted the crime of *sacrilegium*.

3.1.1. Selling Ecclesiastical Possessions

Cause 17 incorporates the greatest number of passages concerning *sacrilegium*. At its beginning, Gratian raises the following legal problem to be solved. Some presbyter suffering from an illness said that he wanted to become a monk. He renounced a church and benefice to an official. Soon afterwards he recovered and said that he did not want to become a monk and claimed his church and benefice back. Gratian raised four legal difficulties (quaestiones)[5] to be solved. We are interested in the fourth one, which is as follows: "if he left without the abbot's consent, should the abbot return his things to him?"[6] In d. a. c. 1 q. 4 C. 17 Gratian answered that immovable property and things donated to the Church could in no way be alienated by an abbot or anyone else.[7] According to his own way of arguing, he quoted *auctoritates* to support his opinion. Among them there is C. 17 q. 4 c. 5 pertaining to this prohibition.[8]

Gratian included in the *Decretum* a legal principle which prohibited the alienation of immovable and movable property donated to the Church. Nobody was allowed to do it, an abbot or anyone else. Only a bishop had full power over ecclesiastical property.[9] One can suppose that the presby-

[3] S. Dubiel, *Uprawnienia majątkowe Kościoła katolickiego w Polsce w świetle Kodeksu Prawa Kanonicznego z 1983 roku Konkordatu z 1993 roku i ustaw synodalnych*, Lublin 2007, p. 27.

[4] C. 12 q. 2 c. 1 "Ecclesiae pecuniam auferens uelut homicida dampnatur. Qui Christi pecunias et ecclesiae aufert, fraudat et rapit, ut homicida in conspectu iudicis deputabitur."

[5] Dictum a. q. 1 C. 17.

[6] Proe. q. 4 C. 17.

[7] Dictum a. c. 1 q. 4 C. 17 "Sed possessiones et res ecclesiae traditas quolibet modo alienare nec abbati, nec alicui licet." Similar laws were established by African synods: (adopted on 25th May 419 at the synod of Carthage) Canones in causa Apiarii, c. 26, CCL 149, p. 109 "Placuit etiam: Vt rem ecclesiae nemo uendat [...];" ibid., c. 33; ibid., c. 39; Conc. Hipp. a. 427, c. 9a and b, CCL 149, pp. 252-253. Also Gallic synods: Conc. Agat. a. 506, c. 22, CCL 148, p. 203; Conc. Aurel. a. 538, can. 26 (23), CCL 148A, p. 124.

[8] In LDG, f. 177 r.

[9] *Canones Apostolorum*, c. 41, ed. F. X. Funk, p. 577 "Praecipimus, ut episcopus potestatem habeat rerum ecclesiasticarum [...]." This canon was included by Gratian as the *auctoritas* in C.

ter mentioned by Gratian became a monk, gave his goods for a monastery and left without the abbot's consent. Then the legal problem arose whether the abbot should give back all that had belonged to the presbyter (sua).[10] Among a number of *auctoritates* to which Gratian referred in the *Decretum*, there was the letter of Pope Lucius I (253-254) to all bishops. All pillagers (raptores) and alienators (alienatores) of ecclesiastical possessions were to be judged as sacrilegists.

3.1.2. Seizure of Ecclesiastical Possessions

Gratian in q. 2 C. 12 included a legal problem which he provided in the following question (quaestio): "Now a question is posed, if one found out that priests had given away some ecclesiastical things, will they permanently belong to those who had taken them? The fact that ecclesiastical things can in no way be dispersed and possessed as such is confirmed by a number of legal regulations."[11] After this *dictum* there are canons which constitute legal decisions of popes, which are called *auctoritates* by Gratian in his way of presenting the law, and which are supposed to prove the rightness of a legal solution provided by Gratian in his *dictum*. He claimed that things belonging to the Church can in no way (nullo modo)[12] be dispersed (distrahi).[13] Neither can they be accepted with the intention of being possessed. Therefore, priests are not allowed to give away ecclesiastical things and those who accept them cannot be certain (aliqua firmitate) of possessing them. Employing things belonging to the Church for secular use constitutes sacrilege. This was pronounced by Pope Pius I (circa 140/142-155), whose letter to the bishops of Italy[14] was included by Gratian in the *Decretum* as the *auctoritas*.[15]

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12 q. 1 c. 24; Conc. Antioch. a. 341, c. 25 "Episcopus ecclesiasticarum rerum habeat potestatem ad dispensandum erga omnes, qui indigent; cum summa reuerentia et timore Dei." The Latin text of this canon together with its Polish translation in: *Marcin z Bragi, Dzieła*, pp. 318-320. The Greek text of the canon together with its Polish translation in: A. Baron, H. Pietras, *Acta Synodalia*, vol. I, p. 142.

[10] C. 17 q. 4 c. 5.

[11] Dictum a. c. 1 q. 2 C. 12 "I Pars. Nunc queritur, si sacerdotes aliqua de rebus ecclesiae dedisse noscuntur, an his, qui eas acceperunt aliqua firmitate constabunt? Quod res ecclesiae nullo modo distrahi possunt et distractae possideri, multis auctoritatibus probatur."

[12] Proe. q. 2 C. 12.

[13] Ibid.

[14] Jaffé -Wattenbach, † 44 (XLI), "Scitis, fratres, quia."

[15] In LDG, f. 148 r. The text of this canon comes from *Decretales Pseudo-Isidorianae* c. 7-8, see P. Hinschius, *Decretales Pseudo-Isidorianae*, p. 118.

Donating anything to the Church resulted in dedicating these things to the Church's use as its property. Those things were set aside for sacred use. Even if it was immovable property, such as land, all that it yielded, so all the return obtained from it, as well as the land itself, was supposed to serve the sacred sphere. Thus, Gratian included a claim in the rubric, recognized by the contemporary lawyers, that someone who unlawfully used immovable property belonging to the Church committed the crime of *sacrilegium* (sacrilegii crimen incurrit).

3.1.3. Seizure of Ecclesiastical Property

The Church was ravaged by those who robbed and plundered ecclesiastical possessions and treasuries. Gratian in C. 17 q. 4 c. 12 included the text of the letter of Pope Pius[16] to the bishops of Italy, in which he equated robberies of ecclesiastical possessions and treasuries with assaults on priests. This is the content of the rubric, that is the legal principle provided by Gratian. Both the rubric and *auctoritas* were included among a number of canons in q. 4 C. 17, and were intended to prove that the crime of *sacrilegium* is all unlawful seizure of ecclesiastical property.[17]

Gratian, referring to the letter of Pope Pius, wanted to obtain, through this papal decision, the confirmation that the legal principle formulated by him in the rubric was correct. Ravaging a church of God (ecclesia Dei) and assaulting priests (sacerdotes insequitur) is the crime of *sacrilegium*. Ravaging a church is performed through robbing and plundering ecclesiastical possessions and treasuries. All those unlawful acts are the crime of *sacrilegium*. He who commits them becomes (fit) a sacrilegist. Those acts are equated with assaults on priests. It is somewhat surprising that the text contains the comparison according to which sacrilege is a more serious sin than fornication. In the text which is quoted as the *auctoritas*, the comparison of *sacrilegium* and *fornicatio* is only a small part of the wider disquisition of the author of the text in *Decretales Pseudo-Isidorianae*.[18] Further reasoning

[16] Ae. Friedberg, *Prolegomena*, col. XXVI indicates that it is Pius I (142?-157?); M. Gryczyński, op. cit. p. 219, Pius I (circa 140/142-155); Jaffé -Wattenbach, p. 7 mentions Pius I (140?-155?). Ae. Friedberg, *CorpIC*, Pars I, col. 817-818, in fn. 113 indicates that the text comes from *Decretales Pseudo-Isidorianae* c. 8; P. Hinschius, *Decretales*, p. 118; Jaffé -Wattenbach, †44 (XLI).

[17] In LDG, f. 177 v.

[18] P. Hinschius, *Decretales Pseudo-Isidorianae*, p. 118, where the texts of the 7th and 8th chapters refer to the improper treatment of ecclesiastical goods as well as assaults on priests, the 9th chapter, which contains the comparison between *sacrilegium* and *fornicatio*, includes the warnings

seems to be very logical. It uses the comparison that since a sin committed against God is graver than the one committed against man, it is worse to commit *sacrilegium* than to be involved in fornication. It ought to be remarked that the letter of Pope Pius quoted points to the external violation of law. Someone who robs and plunders ecclesiastical possessions and treasuries, as well as someone who assaults priests becomes a sacrilegist.

In the version of the text in LDG, f. 177 v. "in hominem," an unlawful act is commited against man. A logical effect of Gratian's reasoning is the claim that it is worse to commit *sacrilegium* than to be involved in fornication. One can suppose that the basis for this reasoning of Gratian is the relief that it is worse to act against God than against man. It might have been the reason why Gratian made such a distinction of the moral weight of *sacrilegium* and *fornication*; it was supposed to show the gravity of the crime of *sacrilegium*.

3.1.4. Taking Away What One Has Donated to the Church

Among the legal principles included by Gratian in C. 17 q. 4 which pertain to material goods of the Church, there is the prohibition of taking away what one has donated to the Church. This act was counted by Gratian among the crimes of *sacrilegium*.

In the rubric[19] Gratian formulated the legal principle which stated that someone who had given something to the Church without careful thought and later thought it should be withdrawn, fell into the crime of *sacrilegium*. This legal principle is tightly connected with the legal problem raised by Gratian in his *dictum* at the beginning of C. 17, where he mentions a presbyter who, suffering from a serious illness, decided to become a monk and renounced his possessions, and when he recovered he abandoned his intention and claimed his possessions back. In this case it is similar. Gratian included in the *Decretum* as the *auctoritas* part of the work of Ambrose, bishop of Milan, *De poenitentia*.[20] The text quoted by Gratian refers to those who

directed to Christians against becoming involved in fornication. This is why the juxtaposition of *sacrilegium* and *fornicatio* seems to be somewhat puzzling. What can be clearly seen, however, is the way in which forged legal texts were compiled in *Decretales Pseudo-Isidorianae*, as well as the fact that they were most probably copied by Gratian from other collections and their content was not confronted with the original sources.

[19] In LDG, f. 177 r. this rubric and the following ones are written down in different handwriting. This proves that not all rubrics were written by one copyist.

[20] Ambrosius, *De poenitentia* 2, 9, 31-36.

rashly and without deeper thought (tumultuario mentis impulsu),[21] and not making an irreversible decision in perpetuity (iudicio perpetuo),[22] donated something to the Church and later wanted to take it back. In the text of *De poenitentia* directly preceding the passage quoted by Gratian, Ambrose stated[23] that there were those who gave their possessions away, flaunting their generosity, so that others could see that they left nothing for themselves. He further warns that those who seek earthly reward do not earn their reward in the future world, and because they have received their reward here, they cannot expect any in the future world.

Donating goods to the Church should come from the bottom of one's heart, and be based on one's careful thought. It ought to be an irreversible decision. Otherwise, someone who takes back goods donated to the Church falls into the crime of *sacrilegium*.

3.1.5. Theft of Ecclesiastical Money

The Church, carrying out its redemptive mission, uses material goods, including money, in its earthly existence. Gratian included in C. 17 q. 4 a number of rubrics concerning the way of treating ecclesiastical money. Among them there is c. 18, in which it is stated that taking away ecclesiastical money constitutes the crime of *sacrilegium*.

The legal principle formulated by Gratian in the rubric was an obvious consequence of the whole contemporary legal trend, which treated all ecclesiastical property as God's property.[24] It was believed that what was once consecrated would be most holy to the Lord (sanctum sanctorum erit Domino) and belonged to the right of priests. Thus, anybody who stole ecclesiastical money was a sacrilegist. Gratian referred to the decision of Pope Anacletus as the *auctoritas*,[25] who distinguished taking away money from

[21] C. 17 q. 4 c. 3.

[22] Ibid.

[23] Ambrosius, *De poenitentia* 2, 9, 26-28.

[24] C. 12 q. 2 c. 3.

[25] The Pseudo-Isidorian Decretals were recognized as authentic until the 16th century. Also Gratian contributed to their popularization, as he contained a number of the texts in the *Decretum*. In Spain the Pseudo-Isidorian Decretals were rather unknown before the *Decretum*. Gratian treated the Pseudo-Isidorian Decretals as an authentic collection. They were often used by Popes Leo IX (1044-1058) and Gregory VII (1073-1085). The forgery of the Decretals was proved by the Centuriators of Magdeburg in their work *Historia ecclesiastica*, Basileae 1559, *Centuria* II, cap. 7, see A van Hove, op. cit., p. 146.

one's neighbour and from the Church.[26] Taking away money from one's neighbour he described as injustice (iniquitas).[27] Taking away money and things belonging to the Church he described as sacrilege (sacrilegium).[28] The object of this type of *sacrilegium* is taking away ecclesiastical money.

3.1.6. Misappropriation of Things Handed Over to Places of Worship

Setting aside certain things for sacred places could occur for similar reasons as today. The main reason in such cases is faith, which governs the act of will to donate some things to sacred places. The expression sacred place (sacris locis)[29] may refer to temples, chapels and sanctuaries. Gratian formulated a legal principle in the rubric[30] according to which someone who would keep such things with the intention of making profit from them committed *sacrilegium*.

This type of *sacrilegium* is a kind of special abuse. Objects granted to sacred places, when they were placed there, started to belong to the sphere of *sacrum* and became God's property. Due to this, they became the Church's property in the dimension of their earthly use for the purposes of the salvation of the faithful. These goods were administered by priests, mainly by bishops, who appointed presbyters or other clerics to manage them. Thus, all use of them for private purposes was tantamount to the infringement of criminal law. In the rubric Gratian included a legal norm which says that trying (contendit)[31] to keep things left (derelicta) for sacred places is committing *sacrilegium*. As the *auctoritas*, in order to confirm the legal principle he formulated, Gratian referred to part of the letter of Pope Gregory I (590-604). The pope, writing to the subdeacon Sabinus, gave a clear legal statement on the ownership of things donated to sacred places. The ownership of objects donated to these places was sanctioned by both ecclesiastical and secular laws. This is why the pope made the decision that trying to keep these things with the intention of making profit from them was primarily

[26] The same distinction can be found in C. 12 q. 2 c. 10, where Gratian quoted the sentence, as he writes, of one of the Fathers (quidam Patrum), which is as follows: "Amico quippiam rapere furtum est, ecclesiae uero fraudare sacrilegium est;" see Jerome, *Epistula* 52 *ad Nepotianum*, CSEL vol. LIV, p. 439; PL 22, col. 539.

[27] C. 17 q. 4 c. 18.

[28] Ibid.

[29] C. 17 q. 4 c. 4.

[30] In LDG, f. 177 r.

[31] C. 17 q. 4 c. 4.

sacrilege, but also a crime under secular law (contra legem).[32] This type of *sacrilegium*, as *delictum mixtum*,[33] was a crime *mixti fori*.[34]

3.1.7. Keeping Offerings of the Deceased Who Donated Them to the Church

Causa 13 is in this part[35] of the *Decretum* where Gratian included the causes and litigations in which "ecclesiastical persons" are involved. Their source were ecclesiastical estates, tithes, funarals and suchlike.[36] Three from a number of legal principles which were included in C. 13 pertained to the offerings which had been donated to the Church by the faithful before their death in the form of a vow taken or in their will. In can. 9 in the rubric Gratian contained a legal principle according to which those who refused

[32] Pope Gregory I (590-604), whose letter was quoted by Gratian, could understand leges as Lex Iulia peculatus et de sacrilegiis et de residuis in Dig. 48, 13. See also C. I. 9, 29 De crimine sacrilegii; on Lex Iulia peculatus see A. Dębiński, *Sacrilegium w prawie rzymskim*, pp. 44-50.

[33] G. Michiels, *De delictis et poenis*, vol. I, p. 125.

[34] F. X. Wernz-P. Vidal, op. cit., p. 501 "Delicta sacrilegii, nisi cum haeresi vel haeresis suspicione sint coniuncta, generatim sunt mixti fori." Also P. Hinschius, *System*, vol. V, p. 321 in the paragraph on "Das Sakrilegium im Sinne von Kirchenraub und Kirchendiebstahl."

[35] Stephen of Tournai in his *Summa*, in the commentary on C. 13, referring to the word "dioecesani" included important information in the words "Quidam volumen istud Gratiani in quatuor partes distinguunt, quarum unamquamque quartam appellant." Thus, when the *Summa* was being written (circa 1160), part of the *Decretum* had already existed (istud volumen), currently the part with 36 *causae*, which some divided into four parts at the time. The division, in Stephen's opinion (arbitror), came from writers (scriptores), and not from professors (doctores) or students (discipuli). The relevant C. 13 was included in the second one "in secunda quarta." Stephen emphasizes that Gratian in this *causa* proposed a different way of interpretation than in others, which might have been done at the request of his companions (rogatu sodalium), who wanted to learn about the course of a given case and the final resolution through argumentation. In this *causa* he puts the parties of the litigation opposite each other, and takes turns to be a solicitor of each party, each time presenting relevant evidence. In q. 1 C. 13 he considers the problem of tithes and a funeral, and in q. 2 – of prescription. In the gloss to q. 1 he included the information concerning the division of churches into diocesan and parochial. Sometimes the terms diocese and parish were interchangeably used to refer to a "baptismal church" (baptismalis ecclesia), a diocese means only a baptismal church, while parochial chapels (cappellas) are as if lower in the hierarchy. He stated that it could be better understood by those who were familiar with the customs in the Church in Italy. There are parochial churches in Italy (plebes) and there are archpresbyters there, they are also called as baptismal (baptismales). Smaller churches are called chapels (cappellas), or parishes (parochias). These explanations were presented in connection with the discussion dealing with the problem of the place of burial. See *Summa Stephani*, ed. Schulte, pp. 217-219.

[36] *Summa Stephani*, ed. Schulte, p. 217.

to give offerings made by the deceased to the Church should be excommunicated.[37] Also in can. 11 the rubric includes the excommunication order on those who would attempt to keep offerings donated or willed to the Church.[38] Among these three principles, one concerns the rejection from the Church of those considered as non-believers who do not give the Church offerings from people who donate them to the Church prior to their death.

3.1.8. Changing the Purpose of Church Offerings

Ecclesiastical possessions provided financial support for the clergy, and part of the return was supposed to be given as alms to the poor. These possessions, as the Church's property, belonged to the sphere of *sacrum* and their unlawful treatment constituted the crime of *sacrilegium*. If someone robbed them, possessed them unjustly or stayed in them in a deplorable or unjust way and did not want to leave, in accordance with the law they were supposed to compensate for it.

Immovable property donated to the Church for religious reasons, that is for the expiation of sins or for the salvation and eternal peace of souls, could not be used for any other purpose. Gratian in C. 12 q. 2 c. 21 in the rubric included a legal norm which prohibited those who would sell ecclesiastical possessions (res ecclesiasticas) from receiving Holy Communion.[39] In order to confirm this principle he quoted a text from the sixth Roman synod,[40] where it was ruled that it was dishonourable to allow those who illegitimately occupied ecclesiastical possessions or possessed them unjustly, or persisted in staying there and defended themselves in a deplorable and unjust way, to hurry to the Lord's altar (ad altare Domini properare).[41] It was decided at the synod that someone who would commit such deeds had to be punished. Before that, however, this person had to perform the restitution of these goods, as it was guarded by rightness which protected the laws (equitate patrocinante legibus). A criminal that would neglect the

[37] C. 13 q. 2 c. 9 "Excommunicentur qui defunctorum oblationes ecclesiis negant."

[38] C. 13 q. 2 c. 11 "Qui oblata ecclesiis aut testamento relicta retinere presumpserint excommunicentur."

[39] C. 12 q. 2 c. 21.

[40] The synod was summoned by Pope Symmachus (498-514) on 1st October 503, see Jaffé -Wattenbach, p. 98. The text of this canon is a passage forged by the author of *Decretales Pseudo-Isidorianae*, see Ae. Friedberg, *CorpIC*, Pars I, col. 693-694, fn. 237; P. Hinschius, *Decretales Pseudo-Isidorianae*, p. 680.

[41] C. 12 q. 2 c. 21.

restitution was to be punished, and a judge, that is a bishop in this case, would be obliged to punish this person.

3.1.9. Deceitful Theft of Ecclesiastical Things

In C. 12 Gratian included a number of rubrics concerning material goods belonging to clerics and goods belonging to the Church. Ecclesiastical law required a strict separation of goods belonging to the clergy and those belonging to the Church. In C. 12 q. 2 he posed the following question: "Can ecclesiastical things which were given by the clergy lawfully belong to those who accepted them?"[42] In q. 2 he included a number of rubrics and *auctoritates* pertaining to the treatment of ecclesiastical goods. It concerned both clerics and laypersons. Church offerings and all that was consecrated to God belonged to the Church and taking them in any way was treated as *sacrilegium*. This is why Gratian included in the *Decretum* a rubric[43] in which he contained the legal principle requiring the elevenfold[44] restitution of stolen ecclesiastical things.

This canon[45] is connected with the subsequent one,[46] and although it does not mention *sacrilegium*, it explains and supplements the content of can. 10.

Gratian in his rubric of C. 12 q. 2 c. 10 included the principle requiring the elevenfold[47] restitution of goods which had secretly been taken from

[42] Dictum a. c. 1 q. 1 C. 12 " (Qu. II) Secundo, an res ecclesiae, que ab eis datae sunt, possint constare aliqua firmitate eis, qui eas acceperunt?"

[43] The text from "Proinde" to "peniteat" is absent from the letter of Eusebius, see. Ae. Friedberg, *CorpIC*, Pars I, col. 689-690 in Notationes Correctorum.

[44] P. Hinschius in the commentary on this word pointed to the fact that it is so in the following codices: Cod. Sangallens. 670, from the 10th century, Cod. Darmstadtens. 114 from the 11th century, Cod. Bamberg. C. 47 from the turn of the 10th and 11th centuries. In *Decretales Pseudo-Isidorianae et Capitula Angilramni*, ed. P. Hinschius, Lipsiae 1863, p. 238 there is *decuplum*. Also Ae. Friedberg, *CorpIC*, Pars I, col. 689-690, fn. 99 mentions that there are codices in which there is *undecuplum*, *decuplum* and *quadruplum*.

[45] In LDG, f. 148 v.

[46] In LDG, f. 148 v.

[47] Ae. Friedberg, *CorpIC*, Pars I, col. 689-690, in fn. 99 indicates that in codices B, C and D there is the text *quadruplum*, in A *quadruplum vel decuplum* in E, G and H; in Notationes Correctorum there is the remark "C. X. Proinde: Hinc usque ad finem non sunt in epistola Eusebii, neque apud Ioannem aut Symmachum. Habentur tamen apud Burchardum et Ivonem part. 13 c. 37 et in Polycarpo." In Roman law there is no text that prescribes the elevenfold restitution of stolen things. There are texts prescribing the fourfold restitution.

a church. Such formulation of the rubric was possible for Gratian because of the content of the letter of Pope Eusebius.[48] It is an unusual curiosity. The legal tradition of the Old Testament knows the fourfold[49] and fivefold[50] restitution of stolen goods, also the New Testament is familiar with the fourfold[51] restitution, and Roman law likewise assumes the fourfold restitution in the case of *furtum manifestum*, and the twofold restitution in the case of *furtum non manifestum*.[52]

In C. 12 q. 2 there is also can. 8, in whose rubric Gratian included the order to punish invaders of ecclesiastical possessions according to secular laws. As the *auctoritas* he provided the letter of Pope Gregory the Great (590-604) to Constance, queen of the Gauls.[53] The pope encouraged the queen to care for peace in the Church. He expressed sorrow over the letter of bishop Julian, in which he had reported attacks on his villages and churches. They were plundered and set on fire during the night, as is typical of thieves (more furum).[54] Gregory mentioned the decretals of Pope Boniface, which had not however improved the situation with attacks and arsons. He also referred to civil laws, in this case the Lombard Laws,[55] according to which if an armed group (manu armata)[56] of up to four people came to a village in order to commit a crime (ad malefaciendum), the one who was the leader of the group (prior est) ought to pay nine hundred solidi for this unlawful impudence, and each of his companions – eighty solidi. If someone set something on fire, they were to perform the ninefold restitution, and in the case of stolen property the restitution was fourfold.

[48] Gratian used, among other sources, the collections of Burchard and Ivo, as well as the collection *Polycarpus*, in which there is the text "undecuplum." In LDG, f. 148 v. in *Glossa Ioannis Teutonici* there is the following commentary: "in legibus seculi in lombarda et gotica et salica nostro iure romana – quadruplum pena furti."

[49] 2 Sam 12, 6.

[50] Ex 21, 37.

[51] Lk 19, 8.

[52] Dig. 3, 2, 13, 7; 3, 6, 1; 3, 6, 5, 1; 3, 6, 7, 1; 4, 2, 9, 6; 4, 2, 14, 1; 9, 2, 27, 29; 13, 7, 22, 1; 17, 1, 31; 18, 1, 46; 21, 1, 43, 5; 25, 2, 16; 39, 4, 1, 3; 40, 12, 20; 47, 2, 53; 49, 14, 45, 14.

[53] In LDG, f. 148 v.

[54] C. 12 q. 2 c. 8.

[55] *Summa Stephani*, ed. Schulte, p. 215, "lege vulgari, i. e. longobarda, quae vulgaris dicitur, quia vulgaribus verbis est composita, vulgo nota. Lex ista non in corpore romani iuris, sed in volumine legis longobardorum." J. F. von Schulte mentions in fn. 3, p. 215 that other codices in Mainz, Berlin and Leiden contain a different text, which is as follows: "l. v. vulgo nota lex ista non est ... lombardae." In the codex of Paris "l. v. vulgo n. l. ... nostri iuris ... lombardae."

[56] C. 12 q. 2 c. 8.

3.1.10. Stealing Anything from a Church (*furtum*, *peculatus*, *sacrilegium*)

Gratian included in the *Decretum* a rubric ordering that evil people should be tolerated in the community of the Church, so that it could be possible to maintain peace in the Church. The basis for this rubric was the example of Jesus, who tolerated Judas in the circle of the Apostles. In q. 4 C. 23 Gratian included a number of *auctoritates* which were supposed to confirm his opinion that no revenge should be sought. Evil people, as he maintained, should be tolerated and not rejected, warned and not expelled.[57] Among the *auctoritates* supposed to confirm this opinion of Gratian there was the text of Augustine from the Tractates on the Gospel of John.[58]

Augustine's distinction between theft and *peculatus*[59] proves that in the consciousness of Roman society the legal treatment of these two types of crime was different. The ordinary *furtum* as the theft of private things was a crime (crimen) punishable with the smallest criminal sanction. *Peculatus* as the theft (furtum) of public property was a crime (crimen) punishable more severely than *furtum*. Augustine clearly claims that the crime of *furtum* is not judged in the same way as *peculatus*. While *peculatus* is a more serious crime than *furtum*, the gravest is the crime of *sacrilegium*. A sacrilegious thief should be judged in a much stricter way (sacrilegus fur magis vehementius iudicandus est)[60] than someone who commits *peculatus*. *Peculatus* according to Augustine was the crime of the theft of public things, which belonged to the state. *Sacrilegium* was a much graver crime than *furtum* and *peculatus*, since it was the Church that was robbed, and in this case Jesus and the Apostles.[61] Thus, anybody who takes something from the Church is compared to Judas the traitor.

3.1.11. Seizure of Anything Consecrated to God

Through the act of consecration people as well as animals and things started to belong to the sphere of *sacrum*. Gratian in the *Decretum* in C. 12 q. 2 c. 3 included a rubric in which he indicated that everything that was

[57] C. 23, q. 4 a. c. 1.

[58] In LDG, f. 195 v.

[59] For more on *peculatus* and *Lex Iulia de peculatus et de sacrilegiis* see A. Dębiński, S*acrilegium w prawie rzymskim*, pp. 44-50. *Peculatus* as a form of theft occurs in Gratian's *Decretum* only in this text.

[60] C. 23 q. 4 c. 3.

[61] Cf. I. S. F. Böhmer, *Dissertatio*, pp. 3-4.

consecrated to God entered the scope of ecclesiastical law and came under sacerdotal power.[62]

The regulation contained in the rubric of this canon says that whatever (quicquid) is consecrated, through this act of consecration falls out of common use and is transferred to the sphere of *sacrum* and, as a consequence, to the scope of ecclesiastical law. Gratian used the expression "ad ius pertinet sacerdotum," which means that all (omne) that is consecrated belongs to the right of priests. Put differently, it is either for them or they take legal care of it. Among the categories that could be consecrated, Pope Boniface I (418-422), whose text[63] was included as the *auctoritas* by Gratian in the *Decretum*, enumerated people, animals, land and anything (quicquid) that would once be consecrated (semel fuerit consecratum). Thus, whether it is a person, an animal, land or anything else, it becomes most holy to the Lord (sanctum sanctorum erit Domino).[64]

3.1.12. Appropriation of Goods Belonging to a Dying Bishop

Ecclesiastical law ordered the clergy, and especially bishops, to clearly separate their own goods from goods belonging to the Church.[65] Gratian included in the *Decretum* a rubric containing the prohibition against the clergy appropriating the goods of a dying or deceased bishop. He included this prohibition in C. 12 q. 2 c. 38, where there are a number of other canons pertaining to material goods.[66]

Bishops administered two kinds of goods, their own and ecclesiastical ones. Synods prescribed a clear separation of these goods. The expression "de rebus eius," included in the rubric, indicates that what is meant are

[62] In LDG, f. 148 r. It is similar in the *Decretum* of Ivo of Chartres, cap. 362 (394), see J. Wojtczak-Szyszkowski, *O obowiązkach osób świeckich i ich sprawach, część szesnasta Dekretu przypisywanego Iwonowi z Chartres*, wstępem poprzedził, na język polski przełożył Jerzy Wojtczak-Szyszkowski, Warszawa 2009, p. 163.

[63] Such a decree beginning with the words "Nulli liceat ignorare" was issued by Boniface in the years 418-422, see Jaffé -Wattenbach, † 357 (CLXXXIV). The text present in Gratian's *Decretum* was, via other collections (Burchard, Ivo of Chartres), taken from *Capitularia Benedicti Levitae* 2, 405, so from the collection of forged norms, see Ae. Friedberg, *CorpIC*, Pars I, col. 687-688, fn. 20.

[64] This expression is often used in the Old Testament in various books. Pope Boniface I (418-422) almost literally used the text from Lev 27, 28.

[65] It was ordered at the Synod of Antioch in 341 in can. 15 that a dying bishop could leave his things to anybody he wanted, and his own goods should not be prejudiced on account of ecclesiastical goods.

[66] In LDG, f. 150 v.

goods belonging to a bishop. The prohibition of appropriating things of a deceased or dying bishop was absolute (nichil est usurpandum). However, it is impossible to find out from the content of the rubric who the prohibition applies to. This problem is elucidated by the *auctoritas* included by Gratian in the canon. He contained in the *Decretum* can. 16 of the synod of Lerida, where it had been decided that no cleric (nullus clericorum) was in any way allowed to appropriate anything from the goods of a deceased (defuncto) or dying (in supremis agente) bishop. This prohibition concerned taking any objects from his house (de domo eius).[67] It was forbidden to appropriate anything belonging to a bishop, movable and immovable property alike. The possessions were to be administered by the successor to a dying bishop. The object of *sacrilegium* were in this case all goods, both movable and immovable, of the bishop concerned.

3.1.13. Raiding a Church and a Monastery

In C. 17 q. 4, among the canons concerning the crime of *sacrilegium*, there is can. 21, whose *auctoritas* contains the prohibition of robbing churches, houses of God and monasteries. The text of the *auctoritas* of this canon is the letter of Pope John VIII (872-882) issued to all bishops. Although the content of the rubric provides the information about various types of *sacrilegium* and their corresponding penalties, the *auctoritas* also includes the legal norms whose dispositions and criminal sanctions define specific types of *sacrilegium* and the relevant penalties. The papal letter contains the sequence of prescriptions provided by the supreme legislator of the Church and it constituted current legislation.[68]

3.1.14. Ravaging Lands in Ecclesiastical Use

Gratian in C. 17 q. 4 wanted to solve a legal problem which was expressed in the following question: "Can anyone alienate estates and things donated to the Church in any way?" That it cannot be done by an abbot or anybody else he proved throughout a number of *auctoritates*, which he

[67] This wording of the rubric does not make it possible to clearly state whether what is meant is a bishop's own house or a house where he stayed together with other clerics.

[68] In LDG, f. 177 v. contains a slightly different text: "De multiplici genere sacrilegii et de pena."

included in the 43 canons of this *quaestio*. As any goods belonging to the Church, also all lands donated to the Church were to be dedicated to the service of, as it was solemnly stated, "Heavenly secrets" (usibus secretorum celestium).[69] This expression was used in the texts of both secular and ecclesiastical law.[70] Gratian did not formulate in c. 13 q. 4 C. 17 any legal norm in the form of a prohibiton or order, but in the form of a question about the kind of punishment for ravaging ecclesiastical land.[71]

The content of this *auctoritas* falls into the subject matter of the canons of this *quaestio* pertaining to material goods of the Church. The letter of Pope Urban I (222-230) concerned the obligation to punish sacrilegists, which was imposed on all Christians. The part of the letter which is included in the *Decretum* as the *auctoritas* has the character of a legal norm. Its disposition forbade anyone from ravaging lands used in broadly understood God's service. What was meant were certainly ecclesiastical possessions the return from which was used to provide for the needs of churches, help the poor and support the clergy. The pope wrote to all bishops. As the supreme legislator he established universal law. In view of the fact that the persecution of Christians was common at the time, such a papal decision provided strong support for bishops in their concern for ecclesiastical goods. Anybody who would commit the unlawful act of raiding lands used in God's service was supposed to receive the punishment inflicted on sacrilegists. The pope did not directly decribe raiding those lands as sacrilege. However, if the one who committed the forbidden act was to be punished as a sacrilegist, the criminal transgression committed can certainly be treated as sacrilege. The object of this type of *sacrilegium* was ravaging lands the return from which was supposed to serve the needs of a particular church. It ought to be observed that the wording of this papal law coincides with that of the imperial constitution of 412.

3.1.15. Levying Extraordinary Burdens on Ecclesiastical Possessions

Goods belonging to the Church were supposed to serve three purposes: God's service, support of servants of the Church and works of love and charity. These purposes made civil legislation inclined to keep ecclesiasti-

[69] C. 17 q. 4 c. 13.

[70] C. I. 1. 2. 5 "praedia usibus caelestium secretorum dedicata;" C. 17 q. 4 c. 13 "predia usibus secretorum celestium dicta."

[71] In LDG f. 177 v.

cal goods exempt from extraordinary, to use contemporary nomenclature, tax charges. An additional difficulty of ecclesiastical law were the relations between clerics and monks also pertaining to material goods and jurisdictional competences. Gratian in C. 16, in seven *quaestiones*, included a number of legal problems which he solved in the rubrics and *auctoritates* used to confirm those rubrics. As a point of departure he described a situation which was to form the basis for further adjudication. Some abbot had a parish church, in which he put a monk who was to celebrate services for people; he had possessed the church for forty years without being sued; in the end the clergy of the baptismal church which belonged to the same diocese as that parish church brought an action against the abbot. In q. 1 C. 16 Gratian presented the following legal problem: "Can monks celebrate services for people, give them penance and baptize them?"[72] In 68 canons Gratian included the rubrics and *auctoritates* which were supposed to provide the answer to the question posed. Among these canons there is can. 40, whose rubric contains the legal norm ordering that all clerics and monks should be free from providing any care.[73]

The norms of Roman law which granted privileges to Churches were included in this canon as the *auctoritas*. Gratian, making a commentary on the constitution of the emperor Constantine in his *dictum*, stated that according to the decision of the emperor clerics and monks should be free from new burdens, encumbrances and personal services.[74] Citing imperial constitutions could serve to refer to the acquired rights in the face of secular rulers imposing extraordinary burdens on ecclesiastical possessions. Also the same aim was to be achieved by referring to the privileges granted by the emperor Constantine to the clergy, according to which no new taxes should be levied on ecclesiastical possessions. The constitution of Honorius and Theodosius comprehensively demonstrated what services Churches were to be exempt from. First of all, the law stated that the freedom from additional burdens included estates which "were dedicated to the service of Heavenly secrets." This very general expression does not make it possible to specify what kind of "service" (usibus) is meant. One can suppose that it generally concerned the purpose of those estates. Three kinds of burdens from which the estates of particular Churches were to be exempt should be considered important.

[72] Proe. C. 16.

[73] In LDG, f. 168 r.

[74] *Munera sordida* are burdens and personal services or humble services such as working in quarries, constructing roads, bridges and buildings, etc., see J. Sondel, op. cit., s. v. *munera sordida*, p. 645.

The first one pertains to the freedom from the worst encumbrances and personal services (sordidorum munerum fece). These *sordida munera* were personal services relating to people. It can be assumed that the freedom from them concerned owners of ecclesiastical possessions, that is the clergy.

The second kind of duty from which Churches[75] were to be exempt are any special burdens or extraordinary taxes. Thus, the imperial law protected Churches from reducing their goods which were used in God's service.

Finally, the third kind concerned the threat of transfer of ownership. Churches were to be immune from it.

3.2. Religion and Unity of the Church

Professing faith in accordance with the Revelation and preserving unity[76] was the constant concern of the Church as shown in its work and teaching. Gratian's *Decretum* contains *auctoritates* from the twelve centuries of the history of ecclesiastical law in the canons. A number of Councils and synods were summoned primarily with the aim of condemning heresy, in order to retain the faith according to the Revelation and prevent a schism in the Church. Apostasy, heresy and schism were treated as crimes against the faith and unity of the Church in ecclesiastical law[77] and fell under the jurisdiction of ecclesiastical courts.[78] In Gratian's *Decretum* they were considered as the crime of *sacrilegium*, which was liable to the heaviest criminal sanction of excommunication.

3.2.1. Apostasy

At the time of imperial persecution there occurred cases of renouncing one's faith in Christ under torture.[79] Novatian, who was a Roman priest,

[75] The law contains the expression "ecclesiae urbium singularum," which pertains to individual dioceses and parishes. A town church was most often an episcopal church.

[76] Jn 17, 1-26; 2 Jn, 7-11; 2 Pet, 1-3.

[77] J. Syryjczyk, *Kanoniczne prawo karne*, p. 20.

[78] P. Hinschius, *System*, vol. V, p. 312.

[79] Apostasy is defined as the voluntary, conscious and complete renunciation of faith by a baptized person (apostasy a fide), the abandonment of the clerical state after major orders (apostasy ab ordine), and the voluntary abandonment of the monastic life after perpetual

was involved in the dispute with Pope Cornelius (251-253) in the mid-3rd century concerning the fact that the latter readmitted apostates who abandoned their faith during the persecution of Christians under Decius to confession and Holy Communion. Ambrose (340-397), bishop of Milan, will write about Novatian in his work *De poenitentia*. Part of this work was included in Gratian's *Decretum* D. 1 c. 52 de poenit. as the authoritative support for the legal decision according to which nobody should be refused the grace of conversion, contrary to what was wrongly asserted by Novatian, who refused *lapsi* the grace of penance.[80]

The text of the *auctoritas* is not a faithful copy of Ambrose's original *De paenitentia*. Gratian excerpted only those parts which corresponded to his legal conception. For our purposes, it is important that Ambrose, and Gratian after him, considered rejecting one's faith and participating in pagan rituals as sacrilege.[81] This type of *sacrilegium* is, however, not homogeneous. The situation when someone renounced their faith of their own free will is judged differently from the one in which someone may have renounced it for fear of the death penalty, but still worshipped God in their heart. *Sacrilegium* in the latter case would be an external deed without internal permission. It would take place in substantive but not in formal terms. A deed performed under duress is, according to contemporary criminal law, not a criminal act.[82] Nevertheless, Ambrose, when he demonstrated Novatian's wrong reasoning, defined renouncing one's faith as sacrilege without any explanation. While Novatian thought that *lapsi* could not receive forgiveness of sins and Holy Communion, Saint Ambrose proved that it was not so. The main reason he gave was that some Christians, facing the threat of the death penalty, were induced to renounce their faith with words. Inside, they remained worshippers of God. Ambrose did not develop that idea, he considered it an obvious way of thinking. He only pointed to the difference between renouncing one's faith of one's own free will and being forced to do so.

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vows (apostasy a religione), for more on apostasy see J. Krukowski, *Apostazja*, in: EK, vol. I, F. Gryglewicz, R. Łukaszyk, Z. Sułowski (eds.), Lublin 1985, col. 796-797; J. Syryjczyk, *Problem apostazji od wiary w projektach nowego prawa kościelnego*, "Prawo Kanoniczne" 25 (1982) no. 3-4, pp. 177-185; *Apostazja od wiary w świetle przepisów kanonicznego prawa karnego*. Studium prawnohistoryczne, Warszawa 1984.

[80] In LDG, f. 257 r.

[81] Apostasy is treated as *sacrilegium publicum* also by I. S. F. Böhmer, *Dissertatio*, p. 14.

[82] See J. Syryjczyk, *Sankcje w Kościele*, p. 135 from fn. 117.

3.2.2. Heresy

Gratian in D. 4 c. 46 de cons. treats heresy as *sacrilegium*. He did it by including the norms regulating the sacrament of baptism in this *distinctio*. Abandoning the true faith also meant abandoning the community of Christians. In Gratian's *Decretum* it is labelled as heresy. Gratian described the difference between schism and heresy claiming that while heresy contains false teaching, schism after a bishop's separation of a criminal simultaneously separates from the Church. However, in the subsequent part of the canon he claims that the difference is only partial. Apart from that, as he maintains, there is no schism if someone does not invent some heresy through which they break away from the Church. Heresy constitutes, as it were, the path to schism. Augustine claimed that committing the crime of schism and persisting in it results in heresy.[83] There is a mutual relation between heresy and schism. Persisting in heresy may lead to schism, while persisting in schism gives rise to heresy.

In the *auctoritas* which Gratian included in this canon,[84] Augustine defines the heresy of the Donatists as *sacrilegium*.[85] This rubric is one of a number of rubrics in which Gratian provides the norms of ecclesiastical law concerning baptism. They especially pertain to the validity of the sacrament administered by heretics. In the rubric Gratian included a legal norm in which heretics and sacrilegists are refused to possess sacraments. Gratian's aim is to prove that sacraments belong to Christ. As a consequence, they do not belong to heretics and sacrilegists. However, Augustine, in his work *De unico baptismo*, defends the position of the Church against the wrong theses of the Donatists and claims that the sacrament of baptism belongs to Christ and, even though it is administered among heretics, outside the Church, it should be recognized by Catholics.[86]

The object of sacrilege in this type of crime is making false professions of faith which are at variance with the true faith.

The direct relationship between heresy and *sacrilegium* was indicated by Gratian in C. 1 q. 1 c. 70, where he included a rubric concerning administering sacraments outside the Church.[87]

[83] Augustinus, *Epistulae*, vol. XXXIV.2, ep. 87, 4 "neque enim uobis obicimus nisi schismatis crimen, quam etiam haeresem male perseuerando fecistis."

[84] In LDG, f. 300 v.

[85] Augustinus, *De unico baptismo* 2, 3, CSEL 53, p. 4.

[86] Augustine, *De unico baptismo* 6, 8.

[87] In LDG, f. 79 r.

Heresy is a daring abandonment of the true faith, which consequently results in the abandonment of the Church. Gratian in the rubric contained the idea pointing to the fact of administering sacraments outside the Church, but he denied their real redemptive effect,[88] which they could only gain in the community of the Church. In the case of this *auctoritas*, the text uses the general term of sacrilegist in reference to a heretic who builds an altar (ponit altare sacrilegus)[89] where he is to present sacrilegious sacrifices (sacrificia sacrilega).

3.2.3. Schism

Schism, just as apostasy and heresy, was the gravest crime against the faith and unity of the Church. The crime of schism as *sacrilegium* is referred to by Gratian in C. 23 q. 5 c. 35 of the *Decretum*.[90]

Gratian included in the *Decretum* the letter of Augustine in which he proved that the administrators of Catholic communities were right to impose penalties on those who built altars for the schismatic Donatists and performed re-baptism. The aim of those penalties was separating them from the schism and permanently including them in the Catholic community. Augustine defined the schism of the Donatists as sacrilegious (sacrilego scismate separatos).[91] The text added in LDG clearly shows that Augustine claims that they are heathens and sacrilegists (vos inpii atque sacrilegi estis). The schism of the Donatists was manifested in re-baptism (rebaptizando), blasphemy (blasphemando) and assaults (obpugnando) on Catholics.

Gratian praised in the rubric those administrators of Catholic communities who prosecuted (persequuntur) the Donatists separated by schism. He called them the most diligent administrators (diligentissimi rectores). They decided that for the great crime (pro tanto scelere) of abandoning the unity of Christianity (a Christiana unitate) they should suffer the consequences by being recalled the damages they had caused, and even by losing their places, honours and money. These severe penalties which could be incurred by schismatics were supposed to make them recognize and abandon the sacrilege of schism as well as avoid eternal damnation by returning to unity with the Church. The sacrilege of the schism of the Donatists consisted

[88] K. Nasiłowski, *Kapłańska władza niesakramentalna według Gracjana*, "Prawo Kanoniczne" 28 (1985), no. 3-4, p. 98.

[89] C. 1 q. 1 c. 70.

[90] In LDG, f. 205 v.

[91] C. 23 q. 5 c. 35.

in breaking unity with the Catholic Church. Thus, anybody who became a Donatist was considered as a sacrilegist (sacrilegus). In this *auctoritas* the object of *sacrilegium* would be breaking unity with the Catholic Church in external terms. Augustine, however, does not directly call abandoning unity with the Catholic Church as sacrilege. This abandonment he refers to as sacrilegious schism (sacrilego scismate). Thus, strictly speaking, it is schism that constitutes a crime. However, it is sacrilegious in character.

3.3. Holy Orders and Ecclesiastical Offices

In Gratian's *Decretum* the Latin term *officium* or *offitium* most frequently means an ecclesiastical office whose assumption depended on the order received.[92] Sometimes, however, it is used to refer to a post,[93] duty or power.[94] Bishops reserved the right to granting offices and filling ecclesiastical posts with people they chose themselves. Granting an ecclesiastical office (canonical provision) was possible only when secular authority did not interfere. Each instance of such interference was treated as a form of sacrilege under ecclesiastical law. In the same way, ecclesiastical law considered attempts to receive ordination and ecclesiastical offices for money as sacrilege (simony).

3.3.1. Simony

Since the beginning of the Church, simony, or trading in spiritual things, had been countered by ecclesiastical law. At the times of persecution it was a rare phenomenon. The legal norms prohibiting simony had begun to appear more often since the time of the Council of Chalcedon in 451. It was then when it was expressly forbidden to confer orders for money, as well as to staff ecclesiastical offices that did not require having orders. In the 6th century simony grew more serious, to the extent that Pope Gregory the

[92] D. 23 c. 18 "offitium lectoris," d. a. c. 1 D. 23 "I. Pars. Breuiter que inter ecclesiastica offitia sit differentia monstrauimus," D. 37 c. 8 "episcopale offitium," D. 40 c. 1 "offitium sacerdotii," D. 50 c. 4 "offitium sacerdotale," D. 54 c. 1 "clericatus offitium," d. a. c. 1 D. 56 "I. Pars. Presbiterorum etiam filii ad sacra offitia non sunt admittendi," C. 16 q. 1 c. 31 "offitium presbiteri."

[93] D. 3 c. 3; D. 3 c. 4.

[94] C. 1 q. 1 c. 39 "offitium administrandi;" D. 38 c. 1 "docendi offitium;" C. 16 q. 1 c. 39 "offitium docendi;" D. 4 c. 125 de cons. "offitium baptizandi."

Great (590-604) condemned it as heresy. Gratian included in the *Decretum* a number of norms and *auctoritates* taken from conciliar canons and papal precepts which combatted simony. The norms prohibiting simony and containing the criminal sanctions are included in C. 1 q. 1-7.[95] Among these canons there is one, C. 1 q. 3 c. 1, which compares simony to *sacrilegium*.[96]

Simony constituted a serious problem for the Church and ecclesiastical legislation if Gratian already in the first *causa* devoted seven *quaestiones* to this crime, in which there are 201 canons. The rubric of can. 1 does not constitute a legal norm *sensu stricto*. The legal norm is the *auctoritas*, which in this case is the letter of Pope Gregory[97] to Spanish bishops. The pope writes there about "sacrorum ordinum professores," who appropriated churches or benefices by giving or accepting gifts. He expressed surprise that the bishops had not eliminated that phenomenon a long time before. He thought that in both cases every perpetrator of that act had to reform (corripiendus) and be removed (submouendus) from the threshold of the Church. The essence of simony is selling or buying God's gifts (donum Dei). The pope expressed the view (dixerim) that simony was no different from sacrilege, as God's gifts should be given for free (gratis), and their administration could not be a pecuniary transaction (sub pecuniae pactione). The bishops were ordered by the pope to reject such events (refellite) and to prohibit the ones that had already been started (prohibete), and those who would object to the bishops' orders and persist in doing so were to be punished with anathema.

Among the canons pertaining to simony there is also c. 18 q. 1 C. 1, whose rubric contains the decision that the wicked laying of the hands by somebody accused of simony does not result in consecration, but in damnation.[98]

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[95] C. 1 q. 1 – 130 canons, q. 2 – 10 canons, q. 3 – 15 canons, q. 4 – 13 canons, q. 5 – 3 canons, q. 6 – 3 canons, q. 7 – 27 canons.

[96] In LDG, f. 86 r.; Ae. Friedberg, *CorpIC*, Pars I, col. 411-412, fn. 8 claims that it is "caput incertum," indicating at the same time that Jaffé believes that the text should be attributed to Gregory VII (1073-1085). Jaffé -Wattenbach, † 5278 (3978) claims that Berardus, *Gratiani canones genuini ab apocriphis discreti*, b. II, can. 2, Taurini 1754, p. 92 denies that the authorship of this text should be assigned to Gregory VII.

[97] Jaffé -Wattenbach, † 5278 (3978) provided the information that Gratian had wrongly attributed the letter to Gregory VII. This thesis was advanced by Berardus, *Gratiani canones*, vol. II, c. 2, p. 92.

[98] In LDG, f. 75 r.

3.3.2. Episcopal Orders

Gratian in d. a. c. 1 D. 81 stated that the previous distinction had already discussed the ordaining and the ordained, as well as offices, but the qualifications of those who were to take holy orders needed to be considered at greater length (diffusius).[99] In c. 1 D. 81 he contained in the rubric the disposition prescribing that a person who was about to receive episcopal orders was to be free from any crime, including the crime of *sacrilegium*.

3.3.3. Hindering the Administration of Churches

Among a number of canons in C. 1 q. 1 concerning simony there is can. 125, in which both the rubric and *auctoritas* contain the order to punish those who prohibit the lawful administraton of churches as sacrilegists. The content of can. 125 is in direct connection to canon 124, whose *auctoritas* includes the prohibition of restoring a priest to his office for money when he was previously banned to hold it.

The content of d. p. c. 124 q. 1 C. 1 is Gratian's commentary on the decision made by Pope Gregory (1073-1085) forbidding bishops from accepting money in return for restoring priests to their offices.

Gratian, intending to move, according to the adopted taxonomy of the *Decretum*, to further legal norms prohibiting simony, formulated the rubric of c. 125 q. 1 C. 1, which contains the order to accuse those who prohibited the lawful administraton of churches of the crime of *sacrilegium*.[100] As the *auctoritas* he provided the decision of Pope Paschal II (1099-1118).

All that pertained to churches constituted the exclusive right of bishops. Thus, if anybody attempted to influence the administration of churches in any way,[101] which especially concerned laypersons, was to be judged as a sacrilegist. The verb "ordinari," used both in the rubric and in the *auctoritas*, in this case expresses the whole reality concerning churches. It embraces all cases enumerated in d. p. c. 124 q. 1 C. 1, and also other cases which are not mentioned but which are connected with churches. Pope Paschal II (1099-1118) mentions in his decretal that there are some people (sunt quidam) who, either by force or by support, do not permit churches to be administered in accordance with the law. He does not, however, spe-

[99] Dictum a. c. 1 D. 81.

[100] In LDG, f. 84 v.

[101] Cf. 1983 CIC, can. 1375.

cifically enumerate these people, perhaps because they were from higher social backgrounds. It can hardly be imagined that somebody who has no influence could use violence in order to prevent a church from being built or consecrated or could appoint some chosen person as the administrator of this church. It had to be someone wealthy and influential, who could show favour or support to somebody or provide them with some benefits, to prevent a church from being built, consecrated or granted to an unwelcome priest. In the *auctoritas* there is a legal norm of the highest rank in the form of the decision (decernimus) of the supreme legislator of the Church. Such people should be judged as sacrilegists (sacrilegos).

3.4. Violence towards the Clergy and People Consecrated to God

The clergy of all grades and people consecrated to God, through consecration, belonged to the sphere of *sacrum*. Each act of violence against them was considered as *sacrilegium* under ecclesiastical and secular law. In the *Decretum*, Gratian collected the ecclesiastical law established throughout the twelve centuries. A number of canons contain rubrics which treat using violence against people consecrated to God as the crime of *sacrilegium*.

3.4.1. Assault on Bishops or Presbyters

Holy Scripture contains the prohibition of touching the Lord's anointed ones.[102] It may have provided the direct basis for the ecclesiastical legislation prohibiting the use of violence against those anointed as priests, bishops and presbyters. In Gratian's Decretum there is c. 22 q. 3 C. 24, which does not contain a rubric, but only the *auctoritas*, which is the canon adopted at the synod of Tribur and attributed to Pope Gregory. The content of the canon is somewhat alien to the preceding and following canons. Canon 21 orders that a high and mighty person should be excommunicated for robbing a cleric, a poor person or a monk. The subsequent can. 22, interesting from our point of view, does not have a rubric, and in its place there is the text "de eodem" (on the same). Can. 22 concerns the prohibition of laying violent hands on the Lord's anointed one, a bishop and a presbyter. This

[102] 1 Chr 16, 22.

unlawful act is considered the gravest crime of *sacrilegium* (gravissimum sacrilegium).[103]

3.4.2. Violence towards Clerics or Monks

In C. 17 q. 4 there is can. 29, which does not have any rubric. It is preceded by two canons. Can. 27 contains the criminal sanctions of fines for killing a deacon, a presbyter, a bishop and a monk.[104] In can. 28, for its part, killing a monk or a cleric was punishable with lifelong service in a monastery, the prohibition of leaving a monastery and public penance of seven years. Canon 29 does not have a rubric, it is, as it were, a continuation of the rubric of can. 27 about various sums of fines for killing clerics of different grades (uarietate graduum).[105] Its content is the *auctoritas*, the decision of Pope Innocent II (1130-1143) taken at the Second Council of the Lateran in 1139 and Gratian's *dictum*.[106]

The *auctoritas* in this canon of the *Decretum* constitutes § 1 of can. 15 adopted at the Second Council of the Lateran (1139). Gratian did it in accordance with his intention of including such an *auctoritas* that pertained to *sacrilegium*. The text is a kind of sentence passed in the situation of laying violent hands on a cleric or monk. The objective dimension of this unlawful act concerned an unspecified case of using violence against the persons mentioned. I. S. F. Böhmer claims that what is meant is "iniuriam realem," and not any verbal abuse of a cleric, as in the latter case no *sacrilegium* would be committed.[107] The subjective aspect was extended to the influence on the imputability of the perpetrator by a temptation of the evil spirit (suadente diabolo), which constitutes a theological element characteristic of canon law. This type of *sacrilegium* was punished with anathema, from

[103] In LDG f. 219 r. there is a different text: "in christum et episcopum vel presbyterum quia sacrilegium grave committit. et si quis ecclesiam dei devastat aut incendit quia et hoc gravissimum sacrilegium est."

[104] C. 17 q. 4 c. 27 "Pro graduum uarietate mulctentur qui clericos occidunt. Item ex libro V. Capitularium. [c. 25.] Qui subdiaconum occiderit, CCC. solidos conponat; qui diaconum, CCCC.; qui presbiterum, DC.; qui episcopum, DCCCC.; qui monachum, CCCC. [C. XXVIII] Item ex eodem libro VI. Qui occiderit monachum aut clericum, arma relinquat, et Deo in monasterio seruiat cunctis diebus uitae suae, numquam ad seculum reuersurus, et septem annos publicam penitentiam agat."

[105] C. 17 q. 4 c. 27.

[106] In LDG, f. 178 r.

[107] I. S. F. Böhmer, *Dissertatio*, p. 32.

which the perpetrator could not be released by any bishop. Anathema was a *latae sententiae* penalty.[108] Such a crime is described as personal sacrilege.[109] The one incurring this penalty had to visit the pope to receive his order (mandatum).

3.4.3. Defiling Women Consecrated to God

Women wishing to become consecrated to God recited the words of the oath in a solemn ceremony. The oath was confirmed by a bishop on behalf of the Church. According to the words of Saint Paul, the body of such a woman became the temple of the Holy Spirit.[110] Breaking the oath taken by a woman consecrated to God by any man who defiled her body constituted the crime of *sacrilegium*. In C. 27 q. 1 c. 37 Gratian included a rubric in which those who defiled the bodies of women consecrated to God were referred to as sons of perdition, and in the *auctoritas* they were called sacrilegists.[111]

3. 4. 4. Breaking Church Asylum

The right of asylum was guaranteed in temples of the Greek,[112] Roman, Jewish and Christian religion.[113] Anybody who took refuge in a temple was protected by this right and was safe there. Nobody was allowed to take any-

[108] This is attested by the remark in *Summa Stephani*, p. 229 that Rufinus in his *Summa*, in the gloss to c. 29 q. 4 C. 17, included the text "ipso iure sunt excommunicati." See also E. Vodola, *Excommunication in the Middle Ages*, Berkeley 1986, p. 28; P. Huizing, *The Earliest Development of Excommunication Latae Sententiae*, "Studia Gratiana" 2 (1955), pp. 279-320.

[109] J. Syryjczyk, *Kanoniczne prawo karne*, p. 63.

[110] 1 Cor 6, 19.

[111] In LDG, f. 232 v. there is a slightly different text: "Sciendum est omnibus quod consecratarum feminarum corpora per votum proprie sponsionis et verba sacerdotis Deo consecrata templa esse."

[112] In the Greek religion, taking somebody by force from a temple, that is breaking the right of asylum, constituted the crime of sacrilege (ἱεροσυλία), see K. Burczak, *Prawo azylu w ustawodawstwie synodów galijskich V-VII wieku*, Lublin 2005, p. 30.

[113] On the right of asylum see A. Bulmerincq, *Das Asylrecht in seiner geschichtlichen Entwicklung beurtheilt vom Standpunkte des rechts und dessen völkerrechtliche Bedeutung für die auslieferung flüchtiger Verbrecher. Eine Abhandlung aus dem Gebiete der universellen Rechtsgeschichte und des positiven Völkerrechts*, (Neudruck der Ausgabe von 1853), Wiesbaden 1983; A. Ducloux, *Ad ecclesiam confugere. Naissance du droit d'asile dans Les églises (IV° - milieu V° siècles)*, Paris 1994; W.

body by force, irrespective of their social status and reasons for which they sought asylum in a temple. Using the right of asylum and leaving a temple was regulated by specific laws.[114] Gratian included in the *Decretum* a number of canons concerning the right of asylum in Christian temples. In C. 17 q. 4 c. 10 he included in the rubric the prohibition of entering a church by the one who forcibly took any person from a church.[115]

3.5. Crime against Spiritual and Secular Power

The pope, as the successor to Saint Peter, is the subject of supreme power in the Church. His office, with the authority granted by God, is the highest authority to resolve all doubts and disputes both in the dogmatic and disciplinary sphere. Bishops of Rome had been aware of it since the beginning and throughout the centuries they sought to gain recognition of their special power from other bishops, from the faithful and from secular power. Also Roman emperors, and later Western emperors, were aware of their supreme earthly power and issued laws that prohibited arguing with their decisions, and demanded, under these laws, absolute obedience to their decisions from their subjects.

3.5.1. Arguing with the Pope's and Emperor's Decisions

Among a number of canons of C. 17 q. 4 concerning *sacrilegium*, Gratian included, as the *auctoritas* for can. 29, can. 15 adopted at the Second Council of the Lateran (1139), which contained the prohibition of using violence against clerics and monks. Gratian in his *dictum* following this canon referred to the rules of Roman law which also proscribed the use of violence against clerics and forbade one to argue with the emperor's decisions. As in many other cases, Gratian's *dictum* includes an extension of the disposition of the norm, on which he makes a commentary in his *dictum*. The text of the *dictum* does not seem to be closely related to the text of the *auctoritas.*

Mossakowski, *Azyl w późnym Cesarstwie Rzymskim (confugium ad statuas, confugium ad ecclesias)*, Toruń 2000; K. Burczak, *Prawo azylu w ustawodawstwie synodów galijskich V-VII wieku*, Lublin 2005.

[114] See K. Burczak, *Prawo azylu*, pp. 246-248.

[115] In LDG, f. 177 v.

The text of the *auctoritas* treats using violence against a cleric as *sacrilegium*, while the text of the *dictum* quotes the rules of Roman law[116] according to which taking anybody from a church by force or hurting priests, disturbing religious worship or desecrating a church itself was regarded as *sacrilegium*. The prohibition of arguing with the emperor's decisions, as present in imperial laws, made it possible for Gratian to refer to the analogous ecclesiastical law which banned arguing with the pope's decisions.[117]

3.5.2. Murder of a Criminal

The power to punish criminals rested with civil servants. Nobody was allowed to kill or mutilate any criminal. If someone did not hold a public office which had the power to execute death sentences, they could be convicted of murder in the case of killing or mutilating a criminal.[118]

The text of this *auctoritas* is not included in Augustine's work *De civitate Dei*, as claimed by Gratian. The first sentence is taken from Jerome's work.[119] In the text of the rubric Gratian stated that the one who held no public office did not have the legal title to execute a death sentence or mutilate anybody. It follows from this that canon law left the power to punish with death or mutilate someone's limbs to secular power. Someone who did not have such power and would kill a criminal, including a sacrilegist, was to be judged as a murderer. What is more, they would be punished more severely because they committed abuse by usurping the power of punishment which they had not been granted by God. This idea contains the view that all power originally descends from God.

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[116] During the course of research on Gratian's *Decretum* there appeared various tendencies concerning the texts of Roman law it includes. A. Vetulani in several studies addressed the issue of Roman law in the *Decretum*, considering the question of whether Gratian had directly or indirectly written down the texts of Roman law, see A. Vetulani, *Une suite d'études pour servir à l'histoire du «Décret» de Gratien*, "Revue Historique de Droit Français et Étranger" 1937, offprint, p. 462; A. Winroth proposes the hypothesis in several of his works that there existed Gratian's *Decretum* in the original version, which did not contain many texts of Roman law, while its second version encompasses a wider selection of texts of Roman law, see A. Winroth, *The Two Recensions of Gratian's Decretum*, ZRG 114 Kanonistische Abteilung 83 (1997), pp. 22-31; *Les deux Gratien et le droit Romain*, RDC 48/2 (1998), pp. 285-299; *The Making of Gratian's Decretum*, New York 2000.

[117] In LDG, 178 r.

[118] In LDG f. 211 v. in the gloss to this canon there is the following text: "Sacrilegi ergo per canones et fures capite puniuntur velut homicidas."

[119] *Commentarii in Ezechielem* 3, 9.

3.6. Unlawful Relationships

Ecclesiastical law during its long period of development regulated all relations between people performing particular functions in the Church. First of all, marriages were forbidden to all in the subdiaconate and above. The prohibition specially pertained to monks and nuns, who took the vows of chastity.

3.6.1. Relationships between Men and Women Religious

Life of chastity constituted a free choice of the sanctifying path for both cenobites and eremites. The vow of chastity taken before an official witness of the community of the Church, that is a bishop, obliged one to maintain oneself in this state. Each instance of breaking the vow of chastity when a monk united with a woman, a nun with a man, and a monk with a nun, constituted sacrilege. In q. 1 C. 27 Gratian decided to prove that those who had taken the vow of chastity were not allowed to enter into marriage.[120] Among a number of canons of this *quaestio* there is can. 11, whose *auctoritas* includes the prohibition against relationships between such persons.[121]

This canon pertains to people who took the solemn oath of chastity[122] and, uniting with other people, they gave birth to children. In the text of the *auctoritas* such immoral copulation is referred to as illicit and sacrilegious (illicita et sacrilega contagione).[123] It can thus be concluded, although it is not stated *expressis verbis* in this case, that sexual copulation of persons who had taken the solemn vow of chastity constituted sacrilege. Such copulation was illicit and sacrilegious because copulation as such was permitted by the law only for spouses joined in lawful matrimony. The solemn vow of chastity made it impossible to lawfully unite persons one or both of whom were bound by this vow. Since the Second Council of the Lateran (1139), the vow of chastity had constituted a diriment impediment.[124] The

[120] Proe. q. 1 C. 27 "Quod uero uouentes matrimonia contrahere non possunt, multis auctoritatibus probatur."

[121] In LDG, f. 231 r.

[122] *Summa magistri Rolandi*, ed. Thaner, p. 120 "Impudicas etc. Hic agitur de personis sollemni voto ligatis, sive proprio sive alieno."

[123] C. 27 q. 1 c. 11.

[124] See A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. II, pp. 145-147; T. Pawluk, *Prawo Kanoniczne według Kodeksu Jana Pawła II. Prawo małżeńskie*, vol. III, Olsztyn 1984, pp. 140-141.

object of *sacrilegium* was in this case breaking the vow of chastity (transgressio voti).[125]

3.6.2. Abusing the Blessing of an Engaged Couple

Gratian in q. 2 C. 27 raised the following legal problem: "Can girls engaged to one man break up the first relationship and make a promise to another man?" (Sequitur secunda quaestio, qua quaeritur, an puellae alteri desponsatae possint renunciare priori condicioni, et transferre sua uota ad alium?).[126] Among the 51 canons[127] of this *quaestio* there is can. 50, whose rubric contains the legal norm prohibiting a man from marrying a girl who is engaged to another man. The *auctoritas* of this canon constitutes an excerpt from the letter of Pope Siricius (384-398). In the edition of Ae. Friedberg there is Gratian's *dictum* in this canon, which is absent from LDG.[128]

The whole C. 27 was quite extensively discussed by both Rolandus and Stephen in their *Summae*. This proves the deep interest of the decretists in regulating both public vows and marital contracts. Both Rolandus and Stephen pointed to the differences of opinion which could be observed between the solutions provided in the *auctoritates* in the *Decretum*.[129] Leaving aside the details of these differences, we shall focus on the definition of matrimony quoted by Gratian in proe. q. 2 C. 27: "Sunt enim nuptiae siue matrimonium uiri mulierisque coniunctio, indiuiduam uitae consuetudinem retinens."[130] Gratian in his further explanation pointed to "consensus" as the principal cause of marriage (consensus, qui est efficiens causa matrimonii). Stephen, explaining this definition in his *Summa*, stated that it was no different from the one known in Roman law.[131] He quoted the definition of a lawyer (iuris peritus) who calls engagement as marriage (nuptias mat-

[125] Cf. *Summa Stephani*, ed. Schulte, p. 234.

[126] Proe. q. 2 c. 27.

[127] Several of them are *paleae*: cann. 4, 7, 8, 18, 51.

[128] LDG, f. 236 v. Perhaps this *dictum* in the edition of Friedberg constitutes a later addition. It is also possible that the copyist of LDG had such a manuscript at his disposal from which this text was absent, as it had been removed by the glossators.

[129] *Summa Stephani*, ed. Schulte, pp. 235-237; *Summa magistri Rolandi*, ed. Thaner, pp. 126-133.

[130] Proe. q. 2 C. 27.

[131] It is difficult to determine why Stephen did not provide the source of these definitions, namely Justinian's Digest and *Institutiones*. The way of treating Roman law by Stephen may give rise to the impression that he deprecates it, and the law which he deals with is canon law, see *Summa Stephani*, ed. Schulte, p. 229.

rimonium appellans).[132] It is Modestinus' definition: "Nuptiae sunt maris et feminae coniunctio, consortium omnis vitae, divini et humani iuris communicatio."[133]

Can. 50, which is of interest to us, contains as the *auctoritas* the decision of Pope Siricius I (384-399), which constituted a reply to Himerius, bishop of Tarragona. The pope explained that if a girl had been engaged to a man, and then she married another man, such a marriage was excommunicated and such relationships were strictly banned. He also provided some arguments in support of his prohibition. At that time there was such a law in the Church according to which a priest, at the moment of engagement, administered a blessing to those who intended to get married. This blessing could not be abused by being rejected or disregarded (transgressione uioletur). Abusing this blessing was treated by the faithful, the pope wrote, as a form of sacrilege (cuiusdam sacrilegii instar).

3.7. Relations with Jews

Canon law regulated the relationships between Christians and Jews in a normative way. It forbade bishops and presbyters to celebrate Passover together with Jews. They could not participate in the Eucharist and they could only listen to the word of God.[134] It was permissible for them to adopt the Christian faith and receive baptism.[135] Christians were not allowed to enter into marriage with Jewish women and Jews were forbidden to marry Christian women.[136] They were also banned from being entrusted with public offices and participating in feasts with Christians.

3.7.1. Entrusting Public Offices to Jews

Among a number of canons of C. 17, which contain cases concerning the types of *sacrilegium*, there is a canon which includes the legal norms regulating the relations between Christians and Jews. In the rubric of c. 31 q. 4 C.

[132] *Summa Stephani*, ed. Schulte, p. 235.
[133] Dig. 23, 2, 1.
[134] *Statuta Ecclesiae Antiqua*, c. 16 (LXXXIV), CCL 148, p. 169.
[135] Conc. Agath. a. 506, c. 34, CCL 148, p. 207; D. 4 c. 93 de cons.
[136] Conc. Aurel. a. 533, c. 19, CCL 148A, p. 101.

17 there is a statement that those who entrust Jews with public offices commit *sacrilegium*. Earlier in d. p. c. 30 q. 4 C. 17, Gratian, in keeping with his method of organizing canons in the *Decretum*, referring to the analogy with the prohibition of arguing with the emperor's decisions, concluded that if it was sacrilegious to argue with the pope's decisions, then the one who entrusted Jews with public offices also incurred the accusation of sacrilege.[137]

Also in D. 54 c. 14 there is the same ruling of the third synod of Toledo,[138] which prohibits entrusting Jews with public offices. Both canons basically include the same content. The normative character of the synodical decisions constituted the obligation imposed on Christians and civil servants, who, as can be presumed, were also Christians, not to allow Jews to apply for public offices. In fact, this synodical decision was addressed to bishops and provincial judges. They had the legal power to prevent Jews from assuming and performing public functions. The text of the canon also mentions the reason why Jews were forbidden to apply for public offices. The reason was that Jews who held such offices did harm to Christians (quia sub hac occasione Christianis iniuriam faciunt). The expression "surreptiones fraudulenter relictas suspendant" used in the text of the canon points to the obligation imposed by the law on bishops and provincial judges to invalidate these deceitfully obtained offices. It can mean that there were situations when Jews managed to deceitfully acquire a public office.

3.7.2. Feasts with Jews

Ecclesiastical law considered it sacrilegious when Christians consumed food with Jews. Gratian included in the rubric of c. 14 q. 1 C. 28 the prohibition concerning clerics and laypersons against having feasts with Jews and admitting Jews to their own feasts.[139]

The text of can. 40 of the synod of Agde, which Gratian included in the *Decretum* as the *auctoritas* for c. 14 q. 1 C. 28, was extended to encompass laypersons as the subject of *sacrilegium*, as its version adopted at the synod of Cannes had taken only the clergy into account. This attests to the developmental tendency of canon law established at the synods in Gaul, where the previously adopted synodical norms were not only cited but also ex-

[137] In LDG, f. 178 v.
[138] It took place in 589.
[139] In LDG, 239 r.

tended to cover laypersons as well. The aim was to preserve the purity of the Christian faith.

3.8. Magic

Divination and other forms of magic were forbidden at the end of late antiquity and beginning of the early Middle Ages, as put by N. Zeddies, "not because of the ethnology of the classified mechanisms of their functions and their imitative and apotropaic effect, but because they were considered as *sacrilegium*."[140] The discussion concerning the concept of "magic" is so extensive that it can hardly be presented in short outline. There are a number of definitions of magic mainly in encyclopedias and ethnology textbooks. Magic is defined as "a set of activities and practices, most often symbolic and ritual in character, which are aimed at controlling supernatural forces and transforming the reality which is outside the normal sphere of human influence."[141] N. Zeddies emphasizes in her work that dealing with the legislation against paganism and magic one ought to take into account its function in exercising power. She does it because she believes that considering the normative sources requires explaining the ethos of a ruler, as magic and magic practices were crimes closely related to those in power (herrschaftsnahes Delikt).[142] This view will not be justified in our study, as when considering the normative texts of ecclesiastical law or the texts of the Fathers of the Church as witnesses of the contemporary reality we shall not take into account the influence of monarchs on these texts, because it is not attested by them. It is difficult to accept the opinion of W. Ullmann who claims that civil legislation against paganism and magic could be more effective than synodical legislation or the remedies included in *Libri poenitentiales*.[143] These authors, as historians, do not take into account the internal function of ecclesiastical law. They merely re-historicize the sources, that is

[140] N. Zeddies, op. cit., p. 29.

[141] A. Zmorzanka, *Magia*, in: EK, vol. XI, Lublin 2006, col. 794; R. Gaszyniec, *Studia do dziejów magii*, Lwów 1922; see also J. F. Thiel, *Religionsethnologie. Grundbegriffe der Religionen schriftloser Völker* (Collectanea Instituti Anthropos 33), Berlin 1984, p. 25.

[142] N. Zeddies, op. cit., p. 26.

[143] W. Ullmann, *Public Welfare and Social Legislation in Early Medieval Council*, in: *Councils and Assemblies. Papers read at the eighth summer meeting and the ninth winter meeting of the Ecclesiastical History Society*, Cambridge 1971, p. 35ff.

attempt to read them in the overall context of their time. At the same time, they do not accentuate the natural normative character of legal texts, which either prescribe or prohibit particular activities. These texts constitute reactions on the part of the ecclesiastical legislator to some reality or are normative orders or prohibitions and it is in this sense that one can speak of the relation between reality and the law, which is supposed to shape this reality.

The norms of canon law included in Gratian's *Decretum* reflect the battle of Christianity against pagan beliefs and superstitions across twelve centuries. However, P. Hersperger claims that Gratian adopted in the *Decretum* the terms used to denote the kinds of magic derived from antiquity. They were put together by Varro (116-127 BC), from whom they were adopted by Augustine, and from Augustine they were taken by Isidore of Seville. Augustine's *De divinatione daemonum* and Isidore's *Etymologiae*[144] were the sources used by Hrabanus Maurus (780-856) in his work *De magicis artibus*. Later they were again ascribed to Augustine in the literature and in this way Gratian formulated the inscriptions, incorrectly attributing the texts to Augustine.[145]

In Gratian's *Decretum*, the phenomenon which is at present called a superstition is referred to with the Latin noun *superstitio*[146] (20 times) or it is described by means of the adjective *superstitiosus*[147] (9 times). Canon law treated as *sacrilegium* any instances of addressing pagan deities,[148] worshipping creatures, divination by bird flight, witchcraft or incantations,[149] as well as seeking contact with the forces of nature. The concept embraced a variety of magic practices.[150]

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[144] The source which Gratian may have directly used was the excerpt from *Etymologiarum sive Originum libri XX* of Isidore of Seville, see P. Landau, *Gratian (von Bologna)*, TRE 14 (1985), p. 127.

[145] P. Hersperger, *Kirche*, p. 172.

[146] D. 30 c. 1; C. 28 q. 1 c. 10; C. 24 q. 3 c. 39; C. 1 q. 1 c. 37; D. 30 c. 17; D. 37 c. 8; C. 26 q. 2 c. 9; C. 26 q. 5 c. 11; C. 26 q. 2 c. 6; C. 28 q. 1 c. 5; D. 5 c. 38 de cons.; D. 30 c. 1; D. 1 c. 26 de cons.; D. 2 c. 12 de cons.; C. 26 q. 2 c. 6; D. 26 c. 2; D. 63 c. 28; C. 2 q. 7 c. 37; C. 26 q. 3 c. 1; C. 26 q. 2 c. 6.

[147] C. 2 q. 5 c. 20; D. 50 c. 28; C. 26 q. 2 c. 6; C. 26 q. 7 c. 17; C. 26 q. 2 c. 6 (3 razy); D. 41 c. 8; D. 41 c. 1.

[148] *Registri Ecclesiae Carthaginensis Excerpta*, c. 83, CCL 149, p. 205. At the Synod of Ancyra of 314, 25 canons were adopted. The prohibition against participating in pagan sacrifices was included in canons 1-9; the Greek text and the Polish translation of these canons A. Baron. H. Pietras, *Acta Synodalia*, vol. I, pp. 62-65; *Ferrandi Breviatio Canonum*, c. 97, CCL 149, p. 295.

[149] *Statuta Ecclesiae Antiqua*, c. 83 (LXXXIX), CCL 148, p. 179.

[150] In a similar way with reference to the period under discussion N. Zeddies, op. cit., p. 27.

Gratian included in the *Decretum*[151] part of Augustine's work including a kind of catalogue, obviously an incomplete one, of human behaviours and superstitions which were to be avoided by Christians, and which were referred to as *superstitiones*. Generally, the term *superstitio* encompassed all that was invented by people with the aim of creating deities (ydola) and worshipping them (colenda).

Superstitious pagan practices of parents which accompanied baptism of children were problematic for ecclesiastical law. Gratian claimed that the unfaithfulness of parents did not harm their baptized children. Such a statement he included in D. 4 c. 129 de cons. [152]

3.9. Unfair Sentence

Gratian in q. 3 C. 11 raised the following legal doubt: "Should someone who dared to perform sacred activities in defiance of a bishop's prohibition be removed from their office?"[153] In connection to this, he claimed that a bishop's judgment, whether fair or not, ought to be feared (sententia episcopi, siue iusta sine[154] iniusta fuerit, timenda sit).[155] As the *auctoritas* he quoted the words of Pope Gregory (Sententia pastoris, siue iusta siue iniusta fuerit, timenda est).[156] He also confirmed it in C. 11 q. 3 c. 27, citing in the *auctoritas* the letter of Pope Urban I to all bishops "Valde enim timenda est sententia episcopi, licet iniuste liget."[157] Among the 110 canons of q. 3 C. 11 there is can. 77, which contains a synodical decision ordering that the one who openly lies about another person as well as the one who easily gives credence to accusations should be found guilty.[158]

Gratian in C. 11 q. 3 c. 77 included in the rubric a norm being the continuation of the previous can. 76, which prohibited passing a sentence without a lawful trial. This is why can. 77 contains the instruction from the eighth synod prescribing that the one who wrongly accuses another person and

[151] In LDG, f. 225 r.
[152] In LDG, f. 304 r.
[153] Proe. q. 3 C. 11.
[154] This is a spelling mistake, it should be *siue*.
[155] Dictum a. c. 1 q. 3 C. 11.
[156] Gregorius Magnus, *XL Homiliarum in Euangelia libri duo*, 2, 26, 6.
[157] C. 11 q. 3 c. 27.
[158] In LDG, f. 142 v.

the one who easily believes accusations should be considered guilty (reus). Gratian's *dictum*, however, pertains to the behaviour of the accused who received an unfair sentence because the order of trial was not kept (sententia ex ordine iniusta).[159] Gratian claims that even if a sentence was passed for a crime that someone had not committed, that person should obey the bishop's judgment. Afterwards, Gratian was wrong in arguing that someone who received an unfair sentence had already been excommunicated for adultery before God, which was supposed to justify the unfair sentence for sacrilege which had not been committed. It was pointed to by Ioannes Teutonicus in his gloss, where he stated that Gratian misunderstood the problem (male intellexit).[160] Indeed, it would contradict the legal order, which orders that a sentence should be passed for proven and not hidden crimes. Gratian confused the internal and external order. It was possible to punish only for the proven crimes of the external transgression of law. Nobody could be punished for a crime that they had not committed. Gratian, however, in his *dictum* aspires to prove his thesis concerning the necessity of accepting a sentence, even an unfair one, and respecting the bishop's decision. At the same time, he warns bishops to be very considerate and to examine the situation well when pronouncing a sentence of condemnation or absolution. However, he demands obedience from the one who is subordinate to the bishop's power and cautions againt insolent criticism of the bishop's judgement. Pride of the accused could give rise to guilt, which had not been present before and for which they had received an unfair sentence. Today it is difficult to agree with Gratian's reasoning, as it was already Ioannes Teutonicus who noticed that Gratian had misunderstood the problem.

3.10. Summary

Summing up the fifteen points regarding the analysed canons of the *Decretum*, in which Gratian included the legal norms and *auctoritates* concerning the crime of *sacrilegium* whose object were material goods, broadly understood, one ought to conclude that it is not possible to grasp any systematisation. The relevant canons are included in the second part of the *Decretum*. It is impossible to present the evolution of *sacrilegium*, as the

[159] C. 11 q. 3 c. 77.
[160] LDG, f. 142 v.

auctoritates come from entirely different centuries. The earliest text dates from the beginning of the 3rd century, and the latest one comes from the 9th century. Moreover, they pertain to a range of fields of the Church's life. Many of them are norms of universal law, some are norms of particular law, and finally, a number of them are texts of the Fathers and writers of the Church.

In C. 12 after the 28 canons of *quaestio* 1, in which Gratian throughout six rubrics and *auctoritates* explained the problem of whether clerics were allowed to possess property, in *quaestio* 2, in 75 canons he answered the question whether things given to anybody by priests could permanently belong to those persons. Ten of these canons concern the unlawful treatment of material goods, which constitutes the crime of *sacrilegium*. It is similar in C. 17, where in q. 4 Gratian raised the legal problem in the form of the following question: "If a priest left a monastery without the abbot's permission, should the abbot return his things to him?"[161] In the 43 canons of q. 4 he contained the rubrics and *auctoritates* which were supposed to provide the answer to the above question. Among them there are seven canons whose *auctoritates* constitute papal decisions regarding the unlawful treatment of the Church's material goods as the crime of *sacrilegium*.

The object of *sacrilegium* was, according to the norms of the Church included in the *Decretum*, the seizure of possessions and all movable property belonging to the Church, as well as their unlawful alienation. It was not allowed to employ for secular use what belonged to the sacred sphere. It concerned broadly understood property of the Church, both immovable property and movable property. Any form of qualified theft was treated as *sacrilegium* by the norms of canon law. All embezzlement of the Church's property was considered as the crime of *sacrilegium*. Also taking away something that had previously been granted to the Church was regarded as *sacrilegium*. If things were given as a gift to sacred places, keeping them with a view to taking some profits from them was also treated as *sacrilegium*.

The object of this crime was also keeping goods offered to the Church by people who made such a vow before their death. Neither was it allowed to use what was granted to the Church for some other purposes. It was a bishop who exercised power over all ecclesiastical goods. Nobody was allowed to accept gifts for the Church, or to distribute them without the knowledge of a bishop or persons appointed by a bishop. All attempts of

[161] Proe. q. 4 C. 17.

secular power, irrespective of its rank, to seize ecclesiastical goods were treated as *sacrilegium* under law.

Various forms of attacks on ecclesiastical goods, such as assaults, robberies, ravaging and arson, were considered as *sacrilegium*. The theft of anything from a church was treated by canon law as a separate crime from *furtum* and *peculatus* and it was punished more severely than the types of theft mentioned. The crime of *sacrilegium* constituted the seizure of anything that was consecrated to God. Also appropriating the goods of a dying or deceased bishop by clerics was the crime of *sacrilegium*. Assaults on churches and monasteries, as well as any ecclesiastical buildings being within the distance of thirty steps (passus ecclesiastici) around a church, were regarded as *sacrilegium*. Ecclesiastical goods were to serve the poor. To take care of them was one of important obligations on the part of clerics. If someone kept goods out of fear and caution, and, what is worse, took them away, they committed *sacrilegium*.

Secular law forbade levying extraordinary taxes on ecclesiastical possessions, and it also exempted the clergy from the worst burdens. If someone offended against this law, they committed *sacrilegium*. The purpose of ecclesiastical immovable property was to donate its return for the support of the poor as well as to maintain God's service. If someone ravaged those estates, the committed *sacrilegium*.

Also crimes against the faith and unity of the Church were treated as *sacrilegium*. It was apostasy, which in Gratian's *Decretum* occurs in the special form consisting in the external renunciation of faith which is simultaneously kept in one's heart. Ambrose's text quoted as the *auctoritas* proves that such an act was considered as apostasy. In the same way Gratian treats heresy and schism. Heresy he defines as false teaching. Schism, for its part, is regarded as one's separation from the community of the Church. There is a mutual relation between schism and heresy. Both are considered as *sacrilegium*, since they do harm to the true faith. The problem of crime against faith committed by a large community is solved in such a way that it is not possible to punish a community. The community of the faithful is ordered to bewail their deed, and leave the punishment to God. Neither is there any possibility of reforming a community, contrary to an individual. Apostasy, heresy and schism constitute three gravest crimes against the faith and unity of the Church. In the *Decretum* they are regarded as *sacrilegium*, or they are described with the pejorative term of *sacrilegus*.

A key problem is validity or invalidity of baptism. *Sacrilegium* also constituted any interference on the part of secular power in the free management of the Church by the clergy. All forms of trading in spirituals things and ecclesiastical offices, that is simony, were also regarded as *sacrilegium*.

Any form of violence against clerics and monks was also treated as *sacrilegium*. It is a special kind of *sacrilegium*, defined as *gravissimum sacrilegium*. In addition, using violence against a bishop constituted *crimen laesae maiestatis*. The gravest type of *sacrilegium* was also robbing churches and setting them on fire. Breaking church asylum constituted *sacrilegium* in every case and no exceptions were made, even for people of the highest rank.

Women who took the vow of chastity were consecrated to God, so a man who copulated with such a woman committed the crime of *sacrilegium*. Likewise, marriages between monks and nuns constituted *sacrilegium*.

In the *Decretum* there are also imperial laws concerning *sacrilegium*. According to them, arguing with the emperor's decisions constituted *sacrilegium*. By analogy, Gratian teaches that arguing with the pope's decisions is also tantamount to *sacrilegium*.

Gratian holds the view that jurisdiction is necessary to exercise power. Somebody who does not occupy any public office cannot exercise power on their own. Only secular power can execute the death penalty. Killing a criminal by someone who does not hold power is treated as murder.

A blessing administered to an engaged couple who were about to get married was considered as a form of relationship and in the consciousness of the faithful breaking it up was regarded as (ad instar) *sacrilegium*. It happened when a woman married another man. The decretists had different opinions on the issue. Canon law regulated relations between Christians and Jews. It was forbidden to entrust Jews with public offices as well as eat meals with them.

The true faith was also harmed by performing all kinds of magic practices, as well as seeking soothsayers' advice. In the *Decretum* there are a number of legal norms that treated these as *sacrilegium*. Gratian presents in the *Decretum* contradictory views about accepting an unfair sentence passed by a bishop. In one case he claims that even if someone had not committed a given crime, and a bishop passed a verdict for it, they ought to submit to this sentence, as they had committed another crime, for which they were excommuncated before God. The decretists in the glosses stated that "Gratianus male intellexit." In another case, he quotes some legal texts according to which an unfair sentence is not valid.

The objective dimension of *sacrilegium* in Gratian's *Decretum* encompasses a variety of unlawful acts which do harm to, most often indirectly, the sanctity of God. They give rise to *violatio sacri*, which is why they are classified in the legal norms as a special crime. The external character of these acts, the weight of criminal transgression as well as breaking ecclesiastical laws make *sacrilegium* an actual crime in the norms of canon law

present in the *Decretum*, which was punishable with determinate and indeterminate criminal sanctions. In few cases the word *sacrilegus* is used, as a term of abuse or in the theological rather than the legal sense. It occurs most often in the texts of the Fathers and writers of the Church. However, this proves that a given act was treated as *sacrilegium* in the consciousness of the witnesses of ecclesiastical discipline at the time.

Chapter IV

Guilt

The crime of *sacrilegium*, as any other crime, should be viewed from the subjective and objective perspective. From the subjective point of view, one ought to speak of imputability, or the guilt of the subject committing a crime. Moral imputability adopted in the doctrine of canonical penal law is an important part of crime. Where there is no moral imputability in the form of a mortal sin, there is no criminal legal imputability either.[1] The present study considers the crime of *sacrilegium* from the aspect of criminal legal imputability entailing moral imputability. When a criminal law is broken externally, to be able to speak of either intentional guilt (dolus) or unintentional guilt (culpa), one needs to assume moral imputability.[2] One ought to ask the question concerning the kind of guilt in the case of the crime of *sacrilegium*, namely, whether it was committed with malice (dolus), by negligence (culpa) or by accident (casus).[3] Moreover, one should address the question of whether the contemporary law collected in Gratian's *Decretum* took into account the subjective elements in the case of the crime of *sacrilegium*, such as imputability, age, duress, fear, attempt, incitement, joint participation in a crime and others.

[1] M. Myrcha, *Kara*, pp. 356-357; J. Syryjczyk, *Sankcje w Kościele*, p. 109.

[2] *Communicationes* 8 (1976), p. 175; J. Syryjczyk, *Sankcje w Kościele*, p. 109.

[3] This distinction was introduced by Aristotle δίκημα, ἁμάρτημα, ἀτύχημα (*dolus, culpa, casus*).

4.1. *Dolus*

According to the doctrine of canon law, moral imputability is necessary for a crime to occur. What follows from it is criminal legal imputability in the form of intentional guilt (dolus) or unintentional guilt (culpa). Canonical penal law distinguishes between moral imputability and criminal legal imputability. These two types of imputability are, however, closely connected with each other. Therefore, one cannot imagine a crime in canonical penal law without both moral and criminal legal guilt. It is so in the case of C. 22 q. 5 c. 19, where Gratian provided Augustine's text classifying an armed attack on the king's life as *sacrilegium*.[4] For Augustine, the expression "dolose tractauerit"[5] meant deceitful conduct, which obviously entails conscious action and free will, which in turn are essential elements of intentional guilt.[6] It ought to be determined whether Augustine had in mind criminal legal imputability or only moral imputability. Taking into account the view adopted in canonical penal law according to which criminal legal imputability is part of moral imputability,[7] the norm formulated by Augustine should relate to both moral imputability and criminal legal imputability. The main source of imputability and criminal responsibility was malicious intent,[8] and hence intentional guilt (dolus). Intentional guilt (dolus) constituted the main source of imputability in the case of the crime of *sacrilegium*.

The expression used in the text, "dolose eius regnum tractauerit,"[9] or in another case, "dolo se tractauerit,"[10] points to deceitful conduct.[11] In the language of criminal law, such conduct was intentional action. According

[4] In LDG, f. 193 r. This text is a *palea*. Ae. Friedberg in *Prolegomena*, col. XVIII, referred to it under number 137.

[5] C. 22 q. 5 c. 19.

[6] Cf. A. Scheuermann, *Erwägungen zur kirchlichen Strafrechtsreform*, AKKR 131 (1962), p. 412; J. Syryjczyk, *Pojęcie przestępstwa*, p. 93.

[7] G. Michiels, *De delictis et poenis*, vol. I, p. 83 "nulla admitti potest imputabilitas juridica-criminalis, quae non sit simul imputabilitas moralis."

[8] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 8 (1965), no. 3-4, p. 84.

[9] C. 22 q. 5 c. 19.

[10] LDG, f. 193 r.

[11] Augustine did not use the term *dolus* in the sense of intentional guilt, but in the sense of deceit. In his work *In Iohannis euangelium tractatus* 7, 18 he defined *dolus* in the following way: "omnis qui uerba latina intellegit, scit quia dolus est, cum aliud agitur et aliud fingitur. dolus fraus est, simulatio est. quando aliquis aliquid in corde tegit, et aliud loquitur, dolus est, et

to the principle adopted in canonical penal law saying that criminal legal guilt is part of moral guilt, the expression "dolose tractauerit"[12] used by Augustine in the sense of moral guilt also constitutes criminal legal guilt. Such an understanding of the expression is all the more justified as an unlawful act which meets the criteria of the crime included in the disposition of the norm is punishable by the criminal sanction of excommunication. The evil intention was that a layperson, as well as a bishop, presbyter and deacon in the subsequent part of the norm, broke the oath and then behaved in a wicked and deceitful way with respect to the king's reign, and moreover prepared an armed attack on the king. The crime of *sacrilegium* consisted in this case in attempting to take away the king's life, which was put in the following words in the text: "sacrilegium peragit, in Christum Domini manum mittens."[13] The expression "manum mittens"[14] should be understood as the physical rather than verbal abuse of the king. The constitutive element od *sacrilegium* was the evil intention of attempting to take away the king's life. Breaking the oath as well as the wicked and deceitful treatment of the king's reign also constituted the components of *sacrilegium*. They were the component parts of the crime committed. One cannot then speak of an attempted crime. Under the then law, as claimed by G. Michiels, "nulla existebat generalis circa conatum disciplina et minus adhuc generalis ac propria teoria."[15] The core of each crime and the actual criterion of the gravity of guilt,[16] as maintained by the decretists, is contempt included in the "spiritual act of the mind."[17] Therefore, both breaking the oath and the wicked and deceitful treatment of the king constituted a crime. This kind of the three-stage process of reaching the crime of *sacrilegium* ought to be treated as one crime. Such action includes malicious intent, and thus it is based on ill will and full awareness and meets the criteria of a forbidden act committed with malice afterthought (dolus).

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tamquam duo corda habet: unum quasi sinum cordis habet, ubi uidet ueritatem, et alterum sinum, ubi concipit mendacium." Augustine's *dolus* constitutes moral and not legal guilt.

[12] C. 22 q. 5 c. 19.

[13] C. 22 q. 5 c. 19. Such an understanding followed from the awareness that the king was the Lord's anointed one and attempting to kill him constituted the crime of *sacrilegium* (sacrilegium peragit, in Christum Domini manum mittens).

[14] C. 22 q. 5 c. 19.

[15] G. Michiels, *De delictis et poenis*, vol. I, p. 252.

[16] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, p. 90.

[17] Ibid.

In D. 1 c. 52 de poenit., Gratian included a text from Ambrose's work as the *auctoritas*,[18] containing the term "dolo."[19] The word is not directly connected with the crime of *sacrilegium* in this text, which was the external renunciation of one's faith in Christ at the time of persecution while remaining a Christian inside oneself. The term is used when persecution of Christians is compared to a wrestling fight.

Following Ambrose, Gratian claimed that the guilt of someone who renounced their faith of their own free will was different from the guilt of somebody who externally and verbally renounced their faith out of fear of losing their life, but who still worshipped God in their heart. The text compared athletes fighting in front of an audience with Christians as Christ's athletes fighting with the world in order to preserve the true faith. The term "dolo" used in this text does not, however, refer to intentional guilt. It was meant to denote deceit which was used by one participant of a wrestling fight against his opponent, which consequently led to his victory. Nevertheless, there were situations, as described by the comparison included in the text, in which the opponent defeated by means of deceit (dolo) was crowned with a laurel wreath together with the winner. Ambrose wanted to show that also *lapsi* who had failed at the time of persecution could receive forgiveness for their downfall, as they had been felled deceitfully. They externally renounced their faith, but remained inwardly faithful to Christ. Nonetheless, Ambrose found them guilty of *sacrilegium*, even if it was only external apostasy. It may be because the assessment of guilt in canon law, and especially of its gravity, can be performed on the basis of the external elements of crime, which was how it was understood by the decretists Rufinus and Huguccio.[20]

Likewise, in C. 12 q. 2 c. 38 Gratian included the text of the *auctoritas* constituting can. 12 of the synod of Lerida, which forbade anyone from taking anything from the goods belonging to a dying or deceased bishop.[21] In this canon, the term "dolo" is used twice in the sense of taking something

[18] Ambrosius, *De Paenitentia* 1, 3, PL 17, col. 971-972.

[19] D. 1 c. 52 de poenit.

[20] Rufinus, ad D. 40 c. 5 "ecclesia tamen magis extrinsecis quam intrinsecis iudicat;" Huguccio, ad D. 40 c. 5: "ecclesia non iudicat nec iudicare potest de maioritate vel minoritate peccati secundum contemptum, sed inde iudicat secundum circumstantias sibi notas." Also the *Glossa ordinaria*, ad D. 40 c. 5 "ecclesiae non constat, qualiter quis peccet, an ex contemptu vel alio modo [...] ideo non potest iudicare de peccato secundum contemptum, et ideo iudicat per circumstantias." See also S. Kuttner, *"Ecclesia de occultis non judicat,"* "Jus Pontificium" 17 (1937), p. 15; M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, p. 88, fn. 14.

[21] In LDG, f. 150 v.

away in a deceitful manner, which is expressed as follows: "dolo subprimens auferens."

Also in this case the term "dolo" means "by deceit," and "with malice."[22] However, taking into account the fact that the text constitutes the norm of ecclesiastical law, one ought to suppose that the term includes the meaning of intentional guilt.[23] The disposition of the legal norm assumed in its structure that the perpetrator of this *sacrilegium* would act with the intention of illegitimately appropriating the things belonging to a bishop and therefore, it prohibited such an act. The crime of *sacrilegium* would be committed by breaking the legal norm in a conscious and voluntary way. It would be a voluntary violation of law, and thus it would constitute intentional guilt (dolus).[24] The perpetrator was aware that they committed an illegal act and used their free will to decide to be involved in the criminal transgression, which was taking a bishop's property. That the text used the term *dolus* in the sense of deceit

[22] Gratian did not adopt the terminology of Roman law to the *Decretum*. For this reason, one ought to take into account not the vocabulary itself but rather its content, see M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971) no. 3-4, pp. 69-70. The legal texts from the synod of Lerida did not use the concept of *dolus* in the sense accepted in Roman law, but they included its meaning. The study does not settle the issue of the authorship of the texts of Roman law in the *Decretum*. A. Vetulani's view about the existence of the original version of the *Decretum* which contained Roman law to a limited extent is held to be inaccurate, see J. Werckmeister, *Les études sur le Décret Gratien: essai de bilan et perspectives*, RDC 48/2 (1998), pp. 363-364. There is a vast literature available on the subject: A. Vetulani, *Z badań nad prawem rzymskim w Dekrecie Gracjana*, "Czasopismo Prawnicze i Ekonomiczne" 30 (1936), pp. 119-149; *Encore un mot sur le droit romain dans le Décret de Gratien*, "Apollinaris" 21 (1948), pp. 129-134; *Les novelles de Justinien dans le Décret de Gratien*, "Revue historique de droit français et étranger" 16 (1937), pp. 461-479 and 674-692; *Gratien et le droit romain* RHD 24-25 (1946-1947), pp. 11-48; S. Kuttner, *Additional Notes on the Roman Law in Gratian*, "Seminar," vol. XII (1954), pp. 68-74; A. Winroth, *The Two Recensions of Gratian's Decretum*, ZRG 114 Kanonistische Abteilung 83 (1997), pp. 22-31; *Les deux Gratien et le droit romain*, RDC 48/2 (1998), pp. 285-299; *The Making of Gratian's Decretum*, New York 2000.

[23] Taking into consideration the view of A. Schwarz, *Figura hominis diligentis in re culpae iuridicae*, Romae 1952, pp. 52-53 and M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971) no. 3-4, p. 70 one should conclude that despite the fact that the *Decretum* does not use the terminology of Roman law, but rather the terminology typical of canon law or, in the texts of the Fathers and writers of the Church, the one characteristic of theology and ordinary language and not Roman law, the content of these terms does include their characteristic legal meaning.

[24] Cf. J. Syryjczyk, *Pojęcie przestępstwa*, pp. 92-93, where the author compared the concept of intentional guilt in 1917 CIC and 1983 CIC. He quoted the texts of can. 2201 § 1, CIC 1917, where intentional guilt is understood as a "deliberate violation of law" (deliberata voluntas violandi legem) and can. 1321 § 1, 1983 CIC, which mentions a deliberate violation of a law or a legal precept (qui legem vel praeceptum deliberate violavit).

is proved by the expression "nichil furto, nichil dolo subprimens auferens atque abscondens." Lawlessness was to take place through appropriating, taking away and hiding a bishop's property. Such action had to be performed with malice afterthought (dolo) with evil intent. While *furtum* constituted the self-evident theft of things belonging to a bishop, which was "nichil furto" in the text, the prohibition of appropriating, taking away and hiding things deceitfully, which was referred to with the phrase "nichil dolo," meant secret, wicked and treacherous action.[25] This is attested by the expression "dolo aliquo subpressisse," used for the second time. In this case it referred to concealing, hiding or withholding something in a deceitful manner. It pertained to material goods or, in the case of money, it concerned misappropriating it in a deceitful way. Although the text of the synod of Lerida uses the term "dolo" in the sense of deceit, it ought to be assumed that it includes the meaning of intentional guilt, since deceit entails conscious and voluntary action. This is what the essence of intentional guilt associated with "contemptus"[26] is connected with, which is conveyed by the expression "ut [...] nullus clericorum [...] presumat."[27] The above-mentioned "contemptus"[28] would consist in the contempt for a legal norm established by bishops.

Gratian included in the *Decretum*, as the *auctoritates*, the texts concerning superstitions authored by, among others, Augustine. Among them there is the text which comes from his work *De doctrina Christiana*.[29]

In this text, the expression "pacta infidelis et dolosae amicitiae" contains the term "dolosae," which means deceitful and even fraudulent friendship. This is how Augustine called all human relationships with demons.

In Gratian's *Decretum*, there is the expression "per dolum," used once in C. 24 q. 3 c. 22.[30] It concerned the type of *sacrilegium* which was committed by beating a cleric.[31]

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[25] To confirm this view, we should refer to the existence of the manuscript which contains the text "nihil vi," and not "nichil furto," see Ae. Friedberg, *CorpIC*, Pars I, col. 699-700 in Notationes Correctorum up to c. 38.

[26] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, pp. 93.

[27] C. 12 q. 2 c. 38.

[28] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, p. 93.

[29] Augustinus, *De doctrina Christiana* 2, 19-21. In LDG, f. 225 r.

[30] C. 24 q. 3 c. 22. It is a *palea* and one of the three texts in the *Decretum* containing the norms on *sacrilegium* which Ae. Friedberg classified as *paleae*.

[31] In LDG, f. 219 r. there is a different text: "in christum et episcopum vel presbyterum quia sacrilegium grave committit. et si quis ecclesiam dei devastat aut incendit quia et hoc gravissimum sacrilegium est."

The text of this canon, treated by Ae. Friedberg as a *palea*, comes from Benedictus Levita's Collection and constitutes one of the three canons in the *Decretum* which include the norms on *sacrilegium* being *paleae*.[32] As this text bears a considerable similarity to Augustine's text, it may have been the case that the author of the forged norm from Benedictus Levita's Collection used Augustine's text. The expression "per dolum,"[33] as present in this norm, was primarily addressed to laypersons, in accordance with the tendency of the collection, and it may have been the reason why it was used in the meaning of intentional guilt. The expression "per dolum" entails committing a crime with the highest degree of guilt, as deceit presupposes full consciousness, free will and the additional anger of criminal transgression. The special gravity of guilt is also evidenced by the gradation of the gravity of the crime. While in other cases the legal norms treat a given crime as *sacrilegium*, without any special classification of its gravity, in this case the crime of laying violent hands on a bishop or presbyter was classified as "sacrilegium grave" (grave sacrilege).

All canons in which there are the expressions "dolo,"[34] "dolosae"[35] and "per dolum,"[36] despite the fact that they were used in the sense of deceit, include however the dimension of intentional guilt (dolus) owing to the elements of consciousness, free will and malicious intent. The legal norms point to the criminal transgression committed of one's own free will and in a treacherous and conscious way. Laying violent hands on a king with the use of a weapon (in Christum Domini manum mittens) in C. 24 q. 3 c. 22, laying violent hands on a bishop or presbyter (per dolum manum suam mittit in Christum Domini, id est episcopum uel presbiterum), as well as raiding, destroying a church and setting it on fire (ecclesiam Dei uastat, aut inpugnat, aut incendit) in C. 22 q. 5 c. 19, which constitutes an especially grave type of *sacrilegium*, meet the criteria of the subjective side indicating voluntary action (dolus). The verbs "lay violent hands," "raid," "destroy" and "set on fire" point to the full consciousness of the perpetrator and their evil intention, which is understood as actively striving for what "is forbidden by a distinct rule of law."[37] In this case, one can thus speak of *dolus directus*, which means committing a forbidden act of one's own free will and

[32] It is D. 88 c. 12, on the list of *paleae* established by Ae. Friedberg it is no. 61; C. 22 q. 5 c. 19, on Friedberg's list it is no. 137; C. 24 q. 3 c. 22, on Friedberg's list it is no. 146.

[33] C. 24 q. 3 c. 22.

[34] D. 1 c. 52, C. 12 q. 3 c. 38.

[35] C. 26 q. 2 c. 6; "dolose" C. 22 q. 5 c. 19.

[36] C. 24 q. 3 c. 22.

[37] J. Syryjczyk, *Pojęcie przestępstwa*, p. 93.

in a conscious way,[38] as is expressed in theology by direct will (voluntarium directum).[39]

In Gratian's *Decretum* there is a definition of *dolus* in which this concept is connected with perjury. C. 22 q. 2 c. 1 "In dolo iurat qui aliter facturus est quam promittit" (He who will do something different than he promises swears with malicious intent). Gratian in his *dictum* explained that "aliud est falsum iurare, aliud iurare in dolo"[40] (swearing a false oath is different from swearing with malicious intent). "Ille enim in dolo iurat, aut mendaciter promittit, in cuius mente est, non sic se esse facturum, ut promittit"[41] (For the person whose mind tells them that they will not do what they have promised is the one who swears with malicious intent or swears a false oath). Such an understanding of *dolus* includes the legal meaning of intentional guilt, whose "basis is the intellectual element, which is consciousness embracing all actual circumstances of an act, that is the whole set of statutory criteria of a given forbidden act."[42] This understanding of *dolus* in the *Decretum* is all the more justified as perjury is listed in the catalogues of the gravest crimes, as is *sacrilegium*.

In Gratian's *Decretum* there is no "strict definition of crime,"[43] but in Gratian's *dictum* in D. 25 c. 3 the element of will as a component of crime is clearly present. Will as an essential element of crime was indicated in the rubric of c. 10 q. 1 C. 15: "Nemo trahitur ad culpam, nisi ductus propria uoluntate." In D. 25 c. 3 he discusses the reasons for the degradation of clerics, where *culpa* is understood as culpability, sin, and not as unintentional guilt. He based his understanding on the text "Oportet episcopum esse sine crimine"[44] and stated that "Nomine autem criminis quodlibet peccatum intelligitur."[45] He further stated that "Criminis appellatio alias late patet, complectens omne peccatum, quod ex deliberatione procedit." At the same time, he concluded

[38] For various forms of "dolus" see G. Michiels, *De delictis et poenis*, vol. I, pp. 104-105; F. Roberti, *De delictis et poenis*, vol. I, pt. 1, Romae 1930, no. 65; Th. Gessler, *Über den Begriff und die Arten des Dolus*, Tübingen 1860, p. 157.

[39] J. Syryjczyk, *Sankcje w Kościele*, p. 111.

[40] Dictum p. c. 2 q. 2 C. 22.

[41] Ibid.

[42] J. Syryjczyk, *Sankcje w Kościele*, p. 113, after W. Wolter, *Nauka o przestępstwie. Analiza prawnicza na podstawie części ogólnej kodeksu karnego z 1969 r.*, Warszawa 1973, p. 121; M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 17 (1974), no. 3-4, pp. 166-168; V. De Paolis – D. Cito, *Le sanzioni nella Chiesa. Commento al Codice di Diritto Canonico. Libro VI*, Roma 2001, p. 140.

[43] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, p. 70.

[44] Titus 1, 7; Hieronymus, *Commentarii in prophetas minores*, *In Osee* 1, 3, CCL 76, p. 109.

[45] Dictum p. c. 3 D. 25.

from the Epistle to Titus that "crimen uocatur criminale peccatum uel criminalis infamia." He wrongly claimed that the text "Crimen est querela, id est peccatum accusatione et dampnatione dignum" came from the Epistle to Titus, providing the definition of a mortal sin, which simultaneously constituted a crime. Gratian repeated the same in D. 81 c. 1, where he formulated the following rubric: "Sine crimine id est sine graui peccato debet esse qui ordinatur episcopus." One of the requirements posed to candidates for episcopal office is that they should be "sine crimine,"[46] that is without any crime committed after baptism. Gratian in this *dictum* quoted the sentence from Jerome's letter ad Oceanum,[47] saying that it was impossible for a person to be without sin, which he expressed with the words "Res pene contra naturam est, ut sine peccato aliquis sit."[48] Therefore, it is important that a candidate does not commit a mortal sin after baptism, which would simultaneously be a conscious and voluntary crime (dolus). Importantly, it was not about sins committed "ex ignorantia uel infirmitate humana,"[49] but "ex deliberatione."

4.1.1. The Nature of Guilt in the Alienation of Ecclesiastical Goods

A number of canons that include the norms concerning *sacrilegium* treat it as a completed crime. There is no indication concerning guilt in their content. However, it may be supposed that, as in D. 50 c. 21, if a presbyter and deacon sold ecclesiastical vessels and if they were proved guilty, they were to be punished,[50] as they sold them consciously, using their free will. In the text of this canon there is no mention of compulsion or any situation of necessity or need. In this type of *sacrilegium*, *dolus* being intentional guilt is, as can be supposed, the right kind of guilt which can be ascribed to the perpetrator of the crime.

Also those clerics who could support themselves from the resources of their parents, and still made use of goods reserved to the poor, committed *sacrilegium*.[51] It is difficult to suppose that they did it unconsciously. Thus, it can be assumed that they committed this crime with malice afterthought

[46] Ibid.

[47] Hieronymus, *Epistulae* vol. LIV, ep. 69, 8.

[48] Dictum p. c. 3 D. 25.

[49] Ibid.

[50] D. 50 c. 22 "Si quis presbiter aut diaconus inuentus fuerit aliquid de ministeriis ecclesiae uenundasse, quia sacrilegium commisit, placuit eum in ordinatione ecclesiastica non haberi. [...]."

[51] C. 1 q. 2 c. 6 "Clericos autem illos conuenit ecclesiae stipendiis sustentari, quibus parentum et propinquorum nulla suffragantur. Qui autem bonis parentum et opibus sustentari possunt, si

(dolus), especially as the text of the canon contains the expression "sacrilegium profecto committunt,"[52] which means that they "certainly" (profecto) committed sacrilege. It followed from the awareness of contemporary canon law, which in many norms obliged clerics to make proper use of goods donated to the Church for the support of the poor.

Canon law required that the benefactor of the Church make a permanent decision. If someone donated something to the Church rashly and without deeper reflection, which was expressed in C. 17 q. 4 c. 3 with the words "tumultuario mentis impulse,"[53] and then they decided that it should be withdrawn, they committed *sacrilegium*. While the first decision might have been caused by emotions, the other was taken of one's own free will and in full awareness. Taking back things once donated to the Church was treated as the crime of *sacrilegium* committed with malice afterthought (dolus).

Intentional guilt was also present in the case of keeping goods donated, as was put in the text, "uenerabilibus locis,"[54] or "sacris locis,"[55] as was stated in the rubric. The constitutive element of the crime of *sacrilegium* was in this case the purpose of keeping these donated goods, which was described as "prauae uoluntatis studiis temptauerit conpendiis retinere," that is to make a profit. The perpetrator committed *sacrilegium* by the "efforts of wicked will" (pruae uoluntatis studiis). They were at the same time aware that they were breaking the law, which was implied by the expression "Sacrilegium et contra legem est." Moreover, they did it voluntarily, by which they committed the transgression *cum dolo*, as in canonical penal law intentional guilt is labelled as *deliberata voluntas violandi legem*.[56] At the same time, *deliberata voluntas* is understood as the current awareness of the lawlessness of the act, and not of its criminality.[57]

4.1.2. The Guilt of Those Who Broke the Right of Asylum

Special legal protection was granted to asylum seekers. The right of asylum in sacred places was respected by both ecclesiastical and secular leg-

quod pauperum est accipiunt, sacrilegium profecto committunt, et per abusionem talium iudicium sibi manducant et bibunt." This text is also cited by I. S. F. Böhmer, *Dissertatio*, p. 47.

[52] Ibid.

[53] C. 17 q. 4 c. 3.

[54] C. 17 q. 4 c. 4.

[55] Ibid.

[56] J. Syryjczyk, *Pojęcie przestępstwa*, p. 92. Cf. CIC 1917, c. 2201 § 1 and 1983 CIC, can. 1321 § 1.

[57] Ibid., p. 93.

islation. The prohibition of breaking the right of asylum was absolute and those who did not comply with it were severely punished, irrespective of their social status and standing. In C. 17 q. 4 c. 10 Gratian included as the *auctoritas* the letter of Gelasius to bishops, in which he provided the following assessment of the guilt of those who broke the right of asylum: "nostra etiam auctoritas [...] consentit."[58] Benenatus and Maurus, counsellors of the town of Benevento, used violence to remove an official from some church where he sought shelter. Bishop Epiphanius, and Pope Gelasius concurred with him, stated that "they insulted religion with very daring and reprehensible audacity" (in contumeliam religionis acerba nimis et plectibili contumacia prosiluisse).[59] *Sacrilegium*, which was breaking the right of asylum, was committed of their own free will and in full awareness.

Likewise, in C. 17 q. 4 c. 20 the criminal norm assumes intentional guilt for taking a slave or someone who is chased by their master from a church with the use of violence. In the text of the *auctoritas* the perpetrator was described as "contumax uel superbus."[60] Persistence and haughtiness are fully conscious behaviours and they require the will of the perpetrator of a crime. Therefore, *sacrilegium* was in this case committed with malicious intent which was consciously aimed at breaking the right of asylum.[61]

4.1.3. Apostasy, Heresy and Schism

Heresy, apostasy and schism constituted the gravest crimes against the faith and unity of the Church. In C. 23 q. 5 c. 35, Gratian included as the *auctoritas* an excerpt from Augustine's work *De unitate* Ecclesiae,[62] in which he argued that those who persecute schismatics and heretics committing *sacrilegium* were the most thoughtful administrators. Both renouncing the true faith and leaving the community of the Church to join heretics was done consciously and of one's own free will. However, there were cases when the guilt of apostasy was more complicated.

A special type of the guilt of apostasy constituted the external renunciation of faith paralleled by the retention of faith in one's heart, which was expressed in the text in the following way: "uictus suppliciis sermone neget,

[58] C. 17 q. 4 c. 10.

[59] Ibid.

[60] C. 17 q. 4 c. 20.

[61] Cf. J. Syryjczyk, *Pojęcie przestępstwa*, p. 92.

[62] Augustinus, *Ad catholicos de secta Donatistarum* 20, 55, CSEL 52, pp. 303-305.

et corde adoret."[63] Such a case is presented in D. 1 c. 52 de poen., where the question is posed whether the situation of a person who renounced their faith of their own free will (sponte) is the same as in the case of a person who was tortured to do it (tormenta). Augustine replied that it was not. Also Gratian concurred with it. Nevertheless, it ought to be decided whether one is guilty and the other is not, or whether both are guilty, and if this is so, then the question remains as to whether their guilt is the same. Augustine replied that the situation of one was different from that of the other. Thus, the following question needs to be asked: What kind of guilt can be ascribed to the one who was tortured to renounce their faith? The same Augustine answered this question in his another work. At the beginning of his discussion, he posed a somewhat different question, and provided his reasoning in order to answer it: "What are the sins of those who do not will? The same as these committed by those who do not know? Can it be rightly assumed that the sin of the one who does not will is that which he was compelled to commit? For it is commonly said that what he did in this way was done against his will. But still he willed through what he did. Just as when he does not wish to perjure himself, but he does, because he wants to live, and if he did not, he would be punished by death. So he wants to do it, because he wants to live, and therefore he does not perjure himself with free will but perjuring himself he kept his life. If so, I do not know if the sin of the one who does not will is to be called sin […] For if it is carefully considered, no one wants sin itself but sins because of something else he wants."[64] This view of Augustine is confirmed in the *Glossa*, in which the question as to whether someone doing something out of fear commits a sin as the one who wills is answered in the affirmative by the glossator. He justified it by saying that the perpetrator, although he did not directly want the sin itself, as he was forced to commit it, still indirectly wanted it through something else that he could not have without that sin.[65] Such an understanding of the

[63] D. 1 c. 52 de poenit.

[64] Augustinus, *Quaestionum in heptateuchum libri septem*, lib. 4, Quaestiones Numerorum, quaestio 24, CCL 33, p. 248. This text is somewhat different in C. 15 q. 1 c. 1; the text is referred to in the discussion of the problem of guilt by the following authors: G. Michiels, *De delictis et poenis*, vol. I, p. 201; M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, pp. 74.

[65] *Glossa Ordinaria Decreti*, a Ioanne Teutonico post a. 1215 confecta et a Bartholomeo Brixiensi circa a. 1245 retractata, Glossa ad c. 1 q. 1 C. 15, ad v. merito: "An peccatum, quod quid per metum facit, dicatur peccatum esse volentis? et respondetur, quod volentis: quia licet quis nolit directe ipsum peccatum, ad quod compellitur, indirecte tamen vult illud per aliud, quod habere non potest sine illo peccato."

influence of fear on the decision of the will was assumed by Gratian in the *Decretum*, and further developed by the decretists. However, there remains one more question as to whether torture should be treated as physical duress or rather as *metus*. Ulpian defined *metus* as "instantis vel futuri periculi causa mentis trepidatio."[66] Put differently, *metus* is understood as the effect of moral compulsion or mental pressure.[67] Physical duress cannot be accepted in this situation, as despite torture the will of the sufferer remained free. There was, however, a serious fear for one's life, as attested by the following words used in the text: "uictus suppliciis."[68] Thus, *metus* should be taken as an extenuating circumstance decreasing the imputability of the perpetrator of *sacrilegium* of this particular type, when a given Christian externally renounced their faith but kept it in their heart.

4.1.4. The Principal

Gratian holds the view that nobody is allowed to kill oneself[69] or anybody else.[70] However, if someone does it on the orders of a ruler, as a soldier or somebody who fulfils a public function and does it "non pro se [...] sed pro aliis, uel pro ciuitate, ubi etiam ipse est, accepta legitima potestate, si eius congruit personae,"[71] no murder is committed. It is the duty of kings, and broadly understood power, to get the evil under control and to help the good, which was included in the rubric of C. 23 q. 5 c. 23. In order to substantiate it, Gratian contained, as the *auctoritas*, an excerpt from Jerome's work in the canon.[72]

It is the duty of kings to show concern for law and justice. It follows from the text that if kings did not do it, injustice would spread and law would be disregarded. Jerome in his commentary speaks of Judean kings, while Gratian uses this text to remind kings who held power in states of the obligation to care about law and justice. The excerpt taken from the biblical text, which prohibited killing the innocent, provided the basis for Jerome's thesis, adopted by Gratian, that punishing murderers, sacrilegists and

[66] Dig. 4, 2, 1.
[67] J. Syryjczyk, *Sankcje w Kościele*, p. 132.
[68] D. 1 c. 52 de poen.
[69] C. 23 q. 5 c. 10.
[70] Dictum a. c. 1 q. 5 C. 23.
[71] C. 23 q. 5 c. 8.
[72] Hieronymus, *In Hieremiam prophetam libri VI*, CSEL 59, b. 4, p. 255.

poisoners[73] did not constitute the shedding of innocent blood, but rather served the laws. The text of Jerome's commentary was included by Gratian in the *Decretum* in C. 23 q. 5 c. 31, which is the full version[74] of the excerpt quoted in C. 23 q. 5 c. 23. The relevant problem of guilt would leave us with the conclusion that killing[75] a murderer, a sacrilegist or a poisoner on the orders of the king pronouncing sentences did not constitute the crime of murder, but was, as stated in the text, "legum ministerium."[76]

4.1.5. Holy Communion under One Kind

A special kind of guilt can be seen in D. 2 c. 12 de cons., where Pope Gelasius (492-496) reminded bishops to forbid priests from the incomprehensible practice of receiving Holy Communion under one kind. They refrained from drinking the Blood of Christ, which could cause scandal among the faithful. The pope ordered, which was articulated through the term "proculdubio,"[77] that either Holy Communion should be received under both kinds or one should refrain from receiving it at all. He stated that "diuisio unius eiusdemque misterii sine grandi sacrilegio non potest prouenire."[78] The guilt in this type of *sacrilegium* was obviously intentional, as priests did it consciously and voluntarily. What constituted an additional problem for the pope were the reasons for such conduct. He supposed that they were guided by superstitions, which he expressed as follows: "nescio qua superstitione docentur astringi." The guilt of priests who behaved in this way was additionally aggravated, if the pope's conjecture was right, by supersitions, which should not have taken place.

[73] Ae. Friedberg, *CorpIC*, Pars I, col. 939-934, fn. 405 indicated that in the editions Arg. [entoratensis] a. 1471 and Bas.[iliensis] a. 1471 there is the word "fenerarios," which means – usurers, see J. Sondel, op. cit., p. 377, s. v. *fenero*.

[74] Hieronymus, *In Hieremiam prophetam libri VI*, CSEL 4, 255 "Homicidas enim et sacrilegos et uenenarios punire non est effusio sanguinis, sed legum ministerium."

[75] The commentary of Ioannes Teutonicus on this canon in the *Glossa ordinaria* in LDG, f. 205 v., shows that carrying out a death sentence against the criminals mentioned did not constitute any guilt, but, as understood by Gratian, was a lawful act, ad Homicidas "hic habes quod homicide et sacrilegi et venefici capite puniuntur."

[76] C. 23 q. 5 c. 31.

[77] D. 2 c. 12 de cons.

[78] D. 2 c. 12 de cons. See I. S. F. Böhmer, *Dissertatio*, p. 19.

4.1.6. The Administration of Churches

The law prohibited any influence on the construction and consecration of churches as well as the staffing of ecclesiastical offices. Gratian in d. p. c. 124 q. 1 C. 1 enumerated a few ways in which the ordination of the clergy and the consecration of churches could be hindered. Among them were the following: "taking money by those who did not administer holy orders to those who were to be ordained, as well as by those who did not grant their seal of approval to the canonical choice or took away a consecrated stone from churches that were about to be built or consecrated, or refused the consecration itself."[79] Those were to be "accused of accepting money and considered as infamous" (infames). In order to validate his opinion expressed in his *dictum*, Gratian included in C. 1 q. 1 c. 125 the decision of Pope Paschal II (1099-1118) as the *auctoritas*.[80] The pope ordered that all those who did not allow churches to be effectively managed by using either force or benefits were to be judged as sacrilegists. The guilt in this type of *sacrilegium* was intentional.

4.1.7. Abuse of Power and Moral Complicity in a Crime

An important feature of ecclesiastical offices is their ancillary nature. They are public in character, as they are supposed to assist all the faithful in reaching the most important goal, that is salvation. The abuse of power or office can take place either in reference to the substance or the manner. In the case of the former, it occurs when an office is used for a different purpose from that for which it was originally established. The latter takes place when it is used for the illicit exercise of power.[81] The abuse of power or office is done through "precepts, orders and giving advice."[82] Such a situation takes place in C. 11 q. 3 c. 101, where there is the prohibition, addressed to superiors, against them doing what is forbidden by God's law, "quod a Domino prohibitum est fecerit,"[83] as well as ordering their subor-

[79] Dictum p. c. 124 q. 1 C. 1.

[80] Ae. Friedberg, *CorpIC*, pars I, col. 405-406, fn. 1773 refers to the codices in which there is the name of Paschasius II, which is a mistake, as there was no pope of this name. He also indicates that this text is "fragmentum Ep. incerti temporis (1099-1118)." This excerpt in Jaffé -Wattenbach, 6606 (4866), was attributed to Paschal II (1099-1118).

[81] J. Syryjczyk, *Sankcje w Kościele*, p. 175; G. Michiels, *De delictis et poenis*, vol. I, p. 230.

[82] Ibid.

[83] C. 11 q. 3 c. 101.

dinates to do it, "quod a Domino prohibitum est facere iusserit." A superior was also forbidden to overstep what constitutes a precept or a rule and to order a subordinate to do it, "quod preceptum est preterierit aut preterire mandauerit." Also, if someone forbade what is ordered by God or ordered what is forbidden by God, they would have to be considered as a sacrilegist. A superior who would order something that is against God's will, "preter uoluntatem Dei," or say or order something different from what was clearly prescribed by Holy Scripture, "in scripturis sacris euidenter precipitur," was to be "considered as a sacrilegist" (sacrilegus habeatur). If a subordinate was excommunicated for not allowing their superior to force them to commit an evil act, such a sentence "did not need to be obeyed" (non est obediendum).[84]

It follows from the general rule adopted in canonical penal law that what someone does via another person is as if they did it on their own (Qui facit per alium, est perinde, ac si faciat per se ipsum).[85] The principal is considered as the main perpetrator of a crime.[86] The source text does not contain any recommendations concerning the details of an order and the scope of its execution by the agent. J. Syryjczyk, discussing the problem of moral complicity in a crime, emphasizes that Roberti[87] holds the view that the principal is responsible for what is done by the mandatary, whereas Eltz[88] maintains that if the mandatary partially carried out the order for a crime, then if it was a killing order, and the mandatary only beat a victim, the attempted murder took place. If, however, the mandatary changed the scope of the order, against the will of the principal, then there is moral complicity on the part of the principal, though not in the form of an order. J. Syryjczyk stresses that a special form of order is a superior's precept for a subordinate to commit a crime. This is the case which takes place in the relevant text from Gratian's *Decretum*. J. Syryjczyk defines such a precept as "illicit, because nobody has the right to order criminal acts. The superior issuing an unlawful precept is responsible for the crime in the same way as the principal."[89] Such adjudication of responsibility, and hence also guilt, existed in Gratian's *Decretum* as well, in which no difference was made be-

[84] Dictum p. c. 101 q. 3 C. 11.

[85] *Regulae Iuris*, in VI°, 72, Ae. Friedberg, *CorpIC*, Pars II, col. 1124; V. Bartoccetti, *De regulis juris canonici*, Roma 1955, pp. 231-232; K. Burczak, A. Dębiński, M. Jońca, op. cit., p. 167.

[86] J. Syryjczyk, *Sankcje w Kościele*, p. 200.

[87] F. Roberti, *De delictis et poenis*, vol. 1, pt. 1, p. 216.

[88] L. A. Eltz, *Cooperation in Crime. An historical conspectus and commentary*, Washington 1942, pp. 107-108.

[89] J. Syryjczyk, *Sankcje w Kościele*, pp. 200-201.

tween the guilt of a superior who committed the same crime abusing their power and the guilt of a subordinate who received an order to commit the same crime. Both were to be punished in the same way. It can thus be concluded that their guilt was the same. It was intentional guilt (dolus).

4.1.8. *Sacrilegium* versus *fornicatio*

The specificity of guilt in the crime of *sacrilegium* was depicted in C. 17 q. 4 c. 12, where *sacrilegium* and *fornication* were juxtaposed. Although the text comes from *Decretales Pseudo-Isidorianae*, it neatly illustrates the very constitutive element of *sacrilegium* and the guilt of this crime, called *peccatum* in the text.[90] While the first part of the text includes a statement that the one who attacks a church of God (ecclesiam Dei uastat),[91] lays waste to its goods, and assaults priests (sacerdotes insequitur) becomes a sacrilegist, the second part contains a claim in § 1 that *sacrilegium* is a graver sin than fornication (grauius est sacrilegium agere quam fornicari). In the justification for this claim it was indicated that the element diversifying the gravity of these sins was a person against whom a given wrongdoing was committed. *Sacrilegium* is committed against God (in Deo),[92] while *fornicatio* is committed against a person (in hominem).

This juxtaposition of the crimes provides sufficient evidence of the understanding of *sacrilegium* and *fornicatio* as a crime, because neither of them is considered as a sin, but precisely as a crime. It is legal rather than moral guilt that is taken into account, which would be quite different of the case of a sin. If these unlawful acts were viewed as sins, one ought to speak of moral guilt before God in both cases.

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[90] M. Myrcha is right in claiming that in Gratian's *Decretum* no precise difference was made between a sin and a crime. There has to exist an external act for a crime to be pronounced. In this case it happens in an obvious way. Thus, "peccatum" should be understood in the sense of *crimen* in this text. The decretists developed the definition of crime in the sense of criminal law and required that three elements were necessary for any crime to occur: a voluntary mortal sin, an external act and scandal for the faithful. In the 12th century, so at the times of Gratian, an internal mental act (guilt) was a prerequisite of recognizing the imputability of a sin and a crime in ecclesiastical law, see M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, pp. 85-87.

[91] C. 17 q. 4 c. 12.

[92] In LDG, f. 177 v. there is "in hominem;" P. Hinschius, *Decretales*, p. 118, c. 9 "in deum committitur quam quod in hominem."

In the two crimes under discussion one should consider intentional guilt, as both *sacrilegium* and *fornication* are committed in full consciousness and of one's own free will. The classification of the gravity of guilt (grauius)[93] indicates that the blame is greater in the case of *sacrilegium*.

The difference in the classification of a crime was emphasized in C. 17 q. 4 c. 18, where Gratian included, as the *auctoritas*, Anacletus' letter from *Decretales Pseudo-Isidorianae*.[94] There, the theft (rapit)[95] of money from one's neighbour was labelled as *iniquitas.* Taking (abstulerit) money or things belonging to the Church was described as *sacrilegium.* Robbing a private person is a private law crime, while taking money or things belonging to the Church is a public law crime.

4.1.9. *Sacrilegium* versus *furtum*

In C. 23 q. 4 c. 3 Gratian included as the *auctoritas* an excerpt from Augustine's commentary on the Gospel According to St. John,[96] which he significantly altered.[97] In the text Judas is described as a thief and a sacrilegist (fur et sacrilegus).[98] He is not a "common" thief (non qualiscumque fur), but a thief who steals the Lord's money (loculorum dominicorum), or sacred things (sacrorum). Christ together with the Apostles constituted a community, the early community of the Church.[99] Robbing Christ and the Apostles was according to Augustine's commentary a public law crime. The text made a distinction between the thieves of private and of public things, and it emphasized that the theft of a private thing (furtum rei priuatae)[100] is not judged in the same way (non sic iudicatur) as the theft of a public thing (quomodo publicae). The thieves of public things were ordered to be punished more severely (quanto uehementius est iudicandus sacrilegus fur) than the thieves of private things.

As included in C. 12 q. 2 c. 71, intentional guilt also concerned situations when someone kept things dedicated to the support of the poor in an unjustifiably cautious or timid way (illud reseruare, uel cautum uel timidum

[93] C. 17 q. 4 c. 12.
[94] Ae. Friedberg, *CorpIC*, Pars I, col. 819-820, fn. 175; P. Hinschius, *Decretales*, p. 73.
[95] C. 17 q. 4 c. 18.
[96] Augustinus, *Tractatus in Iohannem* 50, 10, 13, CSEL 51, pp. 177-178.
[97] Ae. Friedberg, *CorpIC*, Pars I, col. 899-900, Notationes Correctorum.
[98] C. 23 q. 4 c. 3.
[99] Cf. I. S. F. Böhmer, *Dissertatio*, pp. 3-4.
[100] C. 23 q. 4 c. 3.

est).[101] At the same time, taking secretly anything from these goods was defined as an obvious crime, which goes beyond the cruelty of the biggest plunderers (quod apertissimi sceleris est, exinde aliquid subtrahere, omnium predonum crudelitatem superat).

According to canon law, all that was consecrated to the Lord (omne, quod Domino consecratur),[102] and even more precisely, what was once consecrated to the Lord (quicquid semel fuerit consecratum), was to be the Lord's property (sanctum sanctorum erit Domino). Pope Boniface (418-422) ordered in his decree[103] that everybody should be acquainted with that law (Nulli liceat ignorare).[104] It dated back to the law of the Old Testament.[105] Currently, through the pope's decree it received its positivisation in canon law. According to the wording of the text in Gratian's *Decretum* in C. 12 q. 2 c. 3, each form of contravening this legal norm constituted the crime of *sacrilegium*.

4.1.10. *Sacrilegium* versus *parricidium*

In the *Decretum* in D. 1 c. 47 de poenit. there is an excerpt from Ambrose's work *De Paradyso*, which mentions forgivable guilt after which one's faults are confessed. In the text Eva's behaviour, who admitted her sin to God, is juxtaposed with that of Cain's, who wanted to deny committing the crime. The author stated that it was something good to be condemned for one's sin and flogged for one's crime, to be flogged with other people. Cain, for his part, who denied committing the crime, was considered as unworthy of being punished for his sin. He was sent back without punishment. The author supposes that it happened not so much due to the crime of fratricide (parricidium), as owing to the sacrilege which he committed when he lied to God, saying that he did not know what had happened to his brother, whom he had killed, and thought it was possible to lie to God. Such an understanding of guilt bears considerable similarity to the situation depicted in C. 17 q. 4 c. 12, where the author of *Decretales Pseudo-Isidorianae* in the text ascribed to Pope Pius I claimed that *sacrilegium* is a graver sin than *fornicatio*. As an argument supporting his thesis he provided another claim

[101] C. 12 q. 2 c. 71.

[102] C. 12 q. 2 c. 3.

[103] This text comes from the forged collection *Capitularia Benedicti Levitae* 2, 405, see Ae. Friedberg, *CorpIC*, Pars I, col. 687-688, fn. 20. Jaffé -Wattenbach, † 357 (CLXXXIV).

[104] C. 12 q. 2 c. 3.

[105] Lev 27, 28.

saying that "maius est peccatum quod in deum committitur quam quod in hominem."[106] From this he concluded that "gravius est sacrilegium agere, quam fornicari."[107] The basis for such theses is the fact that the consitutive element of *sacrilegium* is committing it "in Deum"[108] or "contra Deum,"[109] as was put by Jerome. The intentional guilt of the perpetrator in all cases mentioned consisted in the conscious and voluntary infringement of God's law.

4.1.11. Complicity in a Crime

Complicity was punished by civil law in various ways. In C. 12 q. 2 c. 8 Gratian included the letter of Gregory V to Constance, queen of the Gauls,[110] which cited the words from ch. 19 of *Edictum Rhotari*, which contained the prohibition of armed attacks on settlements. If a group of armed assailants, up to four people, came to a settlement in order to cause damage, then their principal (prior)[111] was to pay nine hundred solidi for the premeditated infringement of the law, while each of his accomplices (sequaces)[112] – eighty solidi. If they set something on fire they were to pay the ninefold amount, whereas pillage was to be compensated fourfold. It was a classified type of the crime of armed robbery. The source text refers to *sacrilegium*, as the object of robbery was the theft of ecclesiastical goods and setting fire to churches and buildings belonging to churches. The guilt in that case was intentional (dolus). The great diversity of penalties proves the substantial diversification of guilt. It thus follows that accomplices in a crime were punished more than ten times as little as the leader of a criminal gang under the law of *Edictum Rhotari*. Complicity in a crime requires *ex definitione* an agreement of will with regard to jointly committing this crime, and it

[106] P. Hinschius, *Decretales*, p. 119.

[107] Ibid.

[108] Hieronymus, *Commentarii in Danielem* 2, 5, CCL 75A, p. 214ff.; *Commentarii in prophetas minores*, *In Osea* 3, 1, CCL 76, p. 109.

[109] Hieronymus, *Commentarii in Ezechielem* 5, 17. CCL 75, p. 214ff.

[110] Ae. Friedberg, *CorpIC*, Pars I, col. 689-688, in the critical apparatus fn. 66 indicated that the letter of Gregory V written in 948 (Jaffé -Wattenbach, 3890 <2979> dates this letter May 998, Ad Constantiam reginam <Roberti, Francorum regis, coniugem> and claims that the letter was wrongly attributed to Gregory V) was borrowed in its initial part from the 41st letter b. V of Gregory the Great Ad Constantiam Augustam; the number of the book and chapter come from this letter.

[111] C. 12 q. 2 c. 8.

[112] Ibid.

involves a certain psychological bond between the perpetrators. Therefore, both full consciousness and an act of will that consents to commit a crime attest to intentional guilt (dolus). Complicity does not happen in the case of unintentional guilt.[113]

4.1.12. Usurpation of Ecclesiastical Goods

Among the norms regulating the proper treatment of ecclesiastical goods Gratian included C. 12 q. 2 c. 21, whose content was to have been formulated at the sixth synod of Symmachus,[114] but it was in fact prepared by the authors of *Decretales Pseudo-Isidorianae*.[115] In the text of the canon there is the expression "qui res ecclesiasticas audet inuadere aut iniuste possidere, aut iniqua uel iniusta defensione in eis perdurare."[116] At the same time, "audet"[117] (dares) clearly proves that what is meant is full consciousness and free will. For the decretists, and above all by Rufinus[118] and Huguccio,[119] the essence of guilt lies in this case in contempt (contemptus), which constitutes the core of each crime and the actual criterion of the gravity

[113] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warszawa 1977, p. 64. With regard to the responsibility of the principal perpetrator and accomplices, J. Syryjczyk, *Sankcje w Kościele*, p. 193, discussing the structure of a crime in which there is the main perpetrator and accomplices, claims that "the responsibility of accomplices … meets the same fate as the responsibility of the main perpetrator." At the same time, he maintains that such a structure of a crime belongs to the old structures. The source material examined in the present work, however, makes it possible to assert that the penalty for the main perpetrator (prior) was different from the one for accomplices (sequaces). Thus, we conclude that the guilt of the main perpetrator differed from that of accomplices. For complicity see also W. Wolter, *Nauka o przestępstwie*, pp. 289-290; J. Makarewicz, *Prawo karne ogólne*, pp. 150-151; G. Michiels, *De delictis et poenis*, vol. I, p. 300, rightly claims that the laws of the Germanic peoples distinguished between the main perpetrator and assistants (adjutores materiales) and the latter incurred a smaller penalty (mitior statuitur poena), just as it was in the case from *Edictum Rhotari* discussed above.

[114] It is so in Ae. Friedberg, *CorpIC*, Pars I, col. 693.

[115] The text of this canon is, as indicated by Ae. Friedberg, *CorpIC*, Pars I, col. 693-694, fn. 237, a compilation from the sixth synod of Symmachus, see P. Hinschius, *Decretales*, pp. 680-681.

[116] C. 12 q. 2 c. 21.

[117] Ibid.

[118] Rufinus ad D. 40 c. 5 "[...] intima causa contemptus peccati est [...] magis peccat qui magis contempnit."

[119] Huguccio ad D. 40 c. 5 "[...] ex solo enim contemptu peccatum dicitur esse maius vel minus [...];" ad C. 6 q. 1 c. 21 ad v. non audeo "[...] nullum peccatum sit maius vel minus nisi secundum maiorem vel minorem contemptum."

of guilt.[120] Thus, robbing ecclesiastical possessions (inuadere),[121] possessing them unlawfully (iniuste possidere), as well as remaining there owing to vile and unjust defence (perdurare) constituted a crime. This crime was described as "Valde iniquum et ingens sacrilegium." If, then, the purpose of goods which had been donated to the Church was changed (transferri) and reversed (conuerti), it was done consciously. The text of the canon does not mention any duress. Such conduct constituted wicked and immeasurable sacrilege.

The guilt of the one who without a bishop's knowledge and consent would attempt to distribute tithes or donations given to the Church was the same in nature. In addition, the law attributed guilt not only to the giver (dat),[122] but also to the taker (accipit). The equal penalty established by the legal norm makes it possible to accept that the guilt of both the giver and the taker was equal.

The same guilt was attributed to the perpetrators of the unlawful treatment of ecclesiastical goods, who did it on the orders (iussu)[123] or with the generous consent (largitione) of princes and magnates. The norms of this canon recognized the guilt of the physical perpetrators of the crime, whereas they did not mention any moral complicity in the crime on the part of those who ordered to commit it. Even though the text of this canon present in C. 16 q. 1 c. 57 comes from *Decretales Pseudo-Isidorianae*,[124] it is nonetheless treated as a norm of law which was then considered as true before it was identified[125] as forged in the mid-9th century. A number of parts of this canon in fact came from the sixth synod of Symmachus.

In C. 12 q. 2 c. 10 there is, as the *auctoritas*, the letter[126] of Pope Eusebius, in which both the plunderer of ecclesiastical goods (rapuerit)[127] and the one who consents (consenserit) are ordered to be judged as sacrilegists.

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[120] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, pp. 90-91.

[121] C. 12 q. 2 c. 21.

[122] C. 12 q. 2 c. 21.

[123] C. 16 q. 1 c. 57.

[124] Ae. Friedberg, *CorpIC*, Pars I, col. 779-780, fn. 552; P. Hinschius, *Decretales*, p. 681; Jaffé -Wattenbach, p. 98.

[125] It was done by the Centuriators of Magdeburg in their work *Historia ecclesiastica*, Basileae 1559, see A. van Hove, *Prolegomena*, p. 146.

[126] Jaffé -Wattenbach, †164 (CXXII), the letter of September 309 concerns robbing bishops and expelling them from their sees, and includes the order to return (redintegrentur) stolen goods to bishops. The text was taken from the Pseudo-Isidorian Decretals, see P. Hinschius, *Decretales*, c. 14, p. 238.

[127] C. 12 q. 2 c. 10.

Gratian formulated the rubric about the elevenfold restitution of stolen ecclesiastical goods, as this number is given in the letter of Pope Eusebius. Such great restitution was provided in secular laws (In legibus seculi),[128] Gratian, however, moved it to the rubric of the canon and ordered the elevenfold restitution of ecclesiastical goods (Ecclesiae rem subripiens in undecuplum restituat).[129] Both seizing somebody else's property and moving one's neighbour's borders (proximi sui) constitute conscious and voluntary action, which is emphasized by the term "presumantur." What is crucial for the concept of guilt is that the responsibility of the immediate perpetrator of the crime (rapuerit) is treated on a par with the responsibility of the one who consented (consenserit facientibus). It is difficult to determine the scope of cooperation in the crime on the part of those consenting (consentientes), as it could be consent, cooperation or arrangement. P. Hinschius claims that the term *consentientes* may denote all forms of participation in a crime except for complicity (Mittäterschaft) and abetting (Anstiftung). It nonetheless had to be some kind of overt consent to a criminal act, as nobody was punished for a purely inner act.[130] P. Hinschius, however, does not mention the canon under discussion. He points to another one, C. 17 q. 4. c. 5, in reference to which he cites the gloss ad. v. *consentiunt*, where there is the term "cooperando."[131] Just as G. Michiels, who counts the kind of participation of *consentientes* as "de variis formis concursus physici," but adds the reservation, however, that the formulas among which there is *consensus et consentientes*, "sunt maxime diversae et non omnes aeque certe."[132] In this case it was a form of participation in a forbidden act. Thus, it ought to be assumed that the expression "concenserit facientibus,"[133] present in the canon at issue, refers to the conscious and voluntary participation in a crime, which should be understood as favouring the criminal as well as accepting and approving of their unlawful act. The intentional guilt (dolus) of both the perpetrator (quis [...] rapuerit) and the person consenting (consenserit facientibus) was the same. The criminal sanction was also the same for both of them.

[128] In P. Hinschius, *Decretales*, p. 238 there is "decuplum."

[129] C. 12 q. 2 c. 10.

[130] *Cogitationis poenam nemo patitur*, Dig. 48, 19, 18; K. Burczak, A. Dębiński, M. Jońca, op. cit., p. 22, no. 46 with a commentary.

[131] P. Hinschius, *System*, vol. V, p. 937, fn. 4; LDG, f. 177 r. "Consentiunt cooperantibus."

[132] G. Michiels, *De delictis et poenis*, vol. I, p. 302.

[133] C. 12 q. 2 c. 10.

4.1.13. The Laity and Ecclesiastical Goods

Canon law recognized the ownership of goods and privileges granted to a church when they were possessed by it for thirty years. This norm adopted at the eighth synod in 869 by Pope Adrian II (867-872)[134] was included by Gratian in the *Decretum* in C. 16 q. 3 c. 8. Neither the privileges granted by emperors or pious people in writing, nor the goods were allowed to be taken by any layperson. All of them were to remain the Church's property and be managed by the administrators of the Church (in potestate ac iussu presulis ecclesiae).[135] If, then, a layperson infringed this norm of law they would commit *sacrilegium* with malice afterthought. It would be the deliberate violation of law. The perpetrator is in such a case assumed to be familiar with the legal norm which is broken by their conduct, as well as aware of the unlawfulness of the act and the criminal sanction which may be imposed for this act.[136]

Nor could laypersons demand to use, control[137] or possess ecclesiastical goods. This norm was established at the First Council of the Lateran in 1123 (c. 9).[138] Gratian included it in the *Decretum* in C. 16 q. 7 c. 25. Anybody who would contravene this norm committed *sacrilegium* with malice afterthought, as attested by the expression "sibi uendicauerit."[139]

Laypersons were not allowed to possess tithes either. Such a canon was adopted at the synod of Rome presided over by Pope Gregory VII (1073-1085) at the Lateran in 1078. Gratian included this canon in the *Decretum* in C. 12 q. 2 c. 38. The prohibition of possessing tithes by laypersons constituted a norm of universal canon law, which everybody should be acquainted with.[140] Clerics were to receive tithes "ab omni populo."[141] They were to remain "sub manu episcopi." Thus, when laypersons did not pay tithes to the

[134] Ae. Friedberg, *CorpIC*, Pars I, col. 791-792 in Notationes Correctorum provides the information that this text, commonly attributed to Gelasius, comes from the canons of the eighth Roman synod (c. 18), which took place in 869 and was presided over by Pope Adrian II (867-872).

[135] C. 16 q. 3 c. 8.

[136] J. Syryjczyk, *Pojęcie przestępstwa*, pp. 92-93.

[137] A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. II, Kraków 2004, pp. 124-125 includes the text which is present in codex B "donationem." The present study adopts the text of Gratian's *Decretum*.

[138] Jaffé -Wattenbach, after 7027 (5119). A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. II, Kraków 2004, pp. 123-125, where this norm is included in can. VIII.

[139] C. 16 q. 7 c. 25.

[140] C. 12 q. 2 c. 38 "Decimas [...] possideri a laicis apostolica auctoritate prohibemus."

[141] C. 12 q. 2 c. 38.

Church, they committed the crime of *sacrilegium*.[142] The guilt of laypersons was intentional, as they consciously violated the legal norm.

4.1.14. The Guilt of a Community

Determining the guilt of a community constitutes a difficult issue, as guilt is a reality associated with the person who, as the only one, has consciousness and free will. Moreover, a community was problematic to define in science. M. Żurowski cited the definitions of many authors[143] in his study.[144] An important link in establishing the definition of the person was Boethius' definition "Persona est naturae rationalis individua substantia."[145] Roffredus introduced this concept into the teaching of canon law and used it with reference to legal subjects. The canonists, in order to define the legal person, used the comparison with a minor, where a bishop was a guardian (ad instar tutoris) of the Church.[146] What is important for our discussion is the problem of a community committing a crime. In Roman law there was a conviction, as apparent in Ulpian's view, that an action *de dolo* could not be brought against a community.[147]

In the teaching of canon law, however, there existed the possibility of the commission of a crime by a community, and, as follows, also the possibility of guilt.[148] The decretists and decretalists claimed that a communi-

[142] Ibid. "nisi ecclesiae reddiderint, sciant, se sacrilegii crimen conmittere." This is how it is also resolved by Ioannes Teutonicus in his *Glossa*, in LDG, f. 174 r. "laici peccent si decimas possideant [...] posse pignori supponere vel vendere vel locare ad firmam earum declarationem et de decimis interdicimus [...] fructibus uti prohibentur."

[143] Ibid., pp. 10-26.

[144] M. Żurowski, *Ewolucja pojęcia kary właściwej dla zbiorowości*, "Prawo Kanoniczne" 8 (1965), no. 1, pp. 3-94.

[145] PL 64, col. 1343.

[146] M. Żurowski, *Ewolucja pojęcia kary właściwej dla zbiorowości*, "Prawo Kanoniczne" 8 (1965), no. 1, p. 24.

[147] Dig. 4, 3, 15 "§ 1: Sed an in municipes de dolo detur actio dubitatur. Et puto ex suo quidem dolo non posse dari; quid enim municipes dolo facere possunt?" Such a principle is also referred to by J. Makarewicz, *Prawo karne. Wykład porównawczy z uwzględnieniem prawa obowiązującego w Rzeczypospolitej Polskiej*, Lwów-Warszawa 1924, p. 109 "Societas delinquere non potest," who expresses the view that there is no collective responsibility.

[148] Rufinus, *Summa*, ad C. 16 q. 6 "Si vero cum consensu ecclesiae invasionem fecerit, tunc ecclesia cadet a causa;" Huguccio, *Summa*, ad C. 12 q. 2 c. 58 "nisi forte universitas tota delinquerit." Many more opinions expressing this view appeared in the post-Gratian period, among the decretalists such as Damasus, *Burchardica*, Reg. 32 "ergo ecclesia potest deliquere et etiam universitas," ibid., "nisi forte tota universitas delinquerit," for more on this issue see M. Żurowski, *Ewolucja pojęcia kary właściwej dla zbiorowości*, "Prawo Kanoniczne" 8 (1965), no.

ty could most often commit a crime by neglecting or omitting a duty that should be carried out by that community. It especially concerned malpractice in elections. They subsequently mention collective authorizations and orders to perform an unlawful act as well as the adoption and introduction of vile resolutions and statutes.[149] The source testimonies prove that a community can commit a crime with malice.[150] The decretalists claimed that a community could and should be punished when it committed a crime. At the same time, no additional explanations were required.[151] The canonists also maintained that a community might be punished for the guilt of one person belonging to that community, especially for the guilt of a superior in the form of negligence. This way of thinking on the part of the canonists was based on the examples from the Bible,[152] where the crime of one person brought punishment to everyone. In the *Decretum* such an understanding of culpability is present in D. 45 c. 17 "uno peccante ira super omnem populum uenit [...] dum uni parcunt, uniuersae ecclesiae moliuntur interitum [...] Polluitur enim ex uno peccatore populus" and C. 23 q. 4 c. 50 "'Nonne Achan filius Zare preteriit mandatum Domini, et super omnem populum Israel ira eius incubuit?" There was also the possibility of punishing the innocent from a community, when a given crime was committed by many of them, as in C. 1 q. 4 c.11, where in his *dictum* p. c. 11 Gratian quoted a number of examples from Holy Scripture in order to prove this thesis.

Gratian's *Decretum*, however, contains texts which moderate the punishment of a community. It is the special concern of canon law that the innocent should not be punished and that the harshness of punishing the guilty should not give rise to even greater evil.[153] This way of perceiving guilt and punishment is present in D. 44 c. 1, where Gratian included as the *auctoritas* Augustine's letter to Bishop Aurelius, in which he indicated that the reform of a community should be achieved "magis docendo quam iubendo, magis monendo quam minando. Sic enim agendo est cum multitutdine."[154]

1, pp. 36-37 together with the footnotes; the same author, *De punitione communitatis*, "Prawo Kanoniczne 5 (1962), no. 1-2, pp. 41.

[149] Ibid., p. 38.

[150] Huguccio, *Summa*, ad C. 12 q. 2 c. 58 "Ego credo quod universitas [...] accusari potest quia dolum committere potest."

[151] M. Żurowski, *Ewolucja pojęcia kary właściwej dla zbiorowości*, "Prawo Kanoniczne" 8 (1965), no. 1, p. 50.

[152] Num 16-18; Josh 7, 1-26; Josh 22, 20.

[153] M. Żurowski, *Ewolucja pojęcia kary właściwej dla zbiorowości*, "Prawo Kanoniczne" 8 (1965), no. 1, p. 90.

[154] D. 44 c. 1.

The text of C. 23 q. 4 c. 32 is important for the present study, as it contains the claim that the Church does not punish (ab ecclesia non punitur)[155] a large group who committed a crime or the one who committed it together with a big group, but it bewails it (defletur). Augustine's argumentation aims to prove that the reform of a big group is not possible (Non potest esse salubris a multis correctio). What is possible is the reform of an individual "qui non habet sociam multitudinem." The good, that is those who have not committed a given crime, can only suffer and bewail (dolor et gemitus) the perpetrators. When "the plague of sin" (contagio peccandi) has spread to many, "the sharp mercy of God's chastisement is necessary." In the text, the intentions of separating from the community of the Church were labelled as "vain, destructive and sacrilegious," as they were impious and supercilious (inpia et superba sunt). The crime of *sacrilegium* in the form of schism committed in this case by a large group constituted the guilt of all who left. A crowd doing injustice should receive a general warning (generali obiurgatione ferienda est). Gratian in his *dictum* following this canon quoted the evangelical precepts to love one's enemies as his argument and emphasized that they should not be understood as the consent to the impunity in doing evil (ut peccandi relaxetur inpunitas).[156] Not punishing a community was supposed to bring about its reform and to assist nature. If that failed and there was no hope of any reform, the verdict of a judge was to destroy the possibility of committing evil (malorum tollatur exercitium). The community of the Church bemoaned the doom of those who left, wanted their salvation and prayed for their reform, as well as encouraged those doing penance.

Thus, it ought to be concluded that the teaching of canon law recognized the guilt of a community, but there were two tendencies concerning the punishment for the crime committed. While one ordered that a community should be punished,[157] the other prescribed cautioning, warning and praying for its reform. If there was no reform, the verdict of a judge was to prevent the evil from being committed.

[155] C. 23 q. 4 c. 32.

[156] Dictum p. c. 32 q. 4 C. 23.

[157] The views of the decretists and decretalists for the admissibility of punishing a community were presented by M. Żurowski, *De punitione communitatis*, "Prawo Kanoniczne" 5 (1962), no. 1-2, pp. 60-64; the same author about those who did not allow for punishing a community, ibid., pp. 46-51.

4.1.15. Consecrated Persons

Canon law prohibited the marriages of persons who were already consecrated to God.[158] In Gratian's *Decretum*, in C. 27 q. 1 c. 11, there is, as the *auctoritas*, the combined text of the decree of Pope Siricius and the canon of the synod of Tribur.[159] The text includes the prohibition of breaking the vows by men and women religious and their becoming united in the manner of marriage. Such persons were labelled as shameless and damned (Inpudicas detestabilesque).[160] It concerned both monks and nuns alike. It cannot be excluded that the text refers to monks and nuns becoming united with persons not belonging to the monastic state, as well as to monks and nuns among themselves. These persons offended against the law with malice afterthought. Each such an unlawful union was called "illicita ac sacrilega contagio." Important for the issue of the guilt of these persons is the expression "in arbitrium conscientiae desperatione perductae," present in the text of the canon and referring to full consciousness and free will. "Desperatio" is in this case understood as "desperate courage," which not only does not enfeeble imputability, but it makes it even stronger, as it proves increased impudence. In this case, there is also contempt (contemptus)[161] for the sanctity of the vow taken, which was considered by the decretists, and especially by Rufinus[162] and Huguccio,[163] as the core of the crime as well as the criterion of the gravity of guilt.[164] The guilt was all the greater in this case as the act was labelled as "tantum facinus,"[165] which they were to bewail until their death.

[158] The synod of Ancyra (314), can. 19, A. Baron, H. Pietras, *Acta Synodalia*, vol. I, p. 67; the Council of Chalcedon (451), can. 16, A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. I, pp. 240-241.

[159] Ae. Friedberg, *CorpIC*, Pars I, col. 1051-1052, Notationes Correctorum, where there is the information that this text comes from the first letter of Siricius, and among his decrees it is can. 15, quoted by Burchard and Anselm; part of this text comes from the canon of the synod of Tribur (c. 6) "Si quis sacro."

[160] C. 27 q. 1 c. 11.

[161] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, pp. 90-91.

[162] Rufinus, *Summa*, ad D. 40 c. 5.

[163] Huguccio, *Summa*, ad D. 40 c. 5.

[164] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, p. 90.

[165] C. 27 q. 1 c. 11.

4.1.16. Celibacy

At the second synod of Toledo (527) it was decided that young men who were eighteen years of age were to decide whether they would live in celibacy or get married. The text of this legal norm was included by Gratian in the *Decretum* in D. 28 c. 5. Young men, when they lived two years without any transgression against chastity, could be ordained to the subdiaconate. After they were twenty-five years of age, they were to be ordained deacons. According to the law, however, if they disregarded the vow of celibacy and got married or secretly cohabited with someone, they were to be excommunicated as being "guilty of sacrilege" (sacrilegii rei).[166] The guilt in this case was intentional, as they consciously broke the vow which they had publicly taken before a bishop and the Church.

4.1.17. The Guilt of Entrusting Public Offices to Jews

In d. p. c. 29 q. 4 C. 17 Gratian included a claim that the one who entrusts public offices to Jews is also accused of *sacrilegium*. In the rubric of C. 17 q. 4 c. 30 he formulated it directly, maintaining that "Sacrilegium faciunt qui Iudeis publica offitia committunt."[167] In this canon he included, as the *auctoritas*, the legal norm (c. 64) established at the fourth synod of Toledo (633). At the synod, Jews were forbidden to apply for public offices, as holding them they inflicted damage on Christians. Provincial judges and bishops had the legal duty to invalidate deceitful applications for offices. If, however, these judges together with priests allowed Jews to hold offices that had been attained in such a way, they were to be punished as sacrilegists.[168] The guilt in this case would be intentional, as being acquainted with the legal norm and aware of the statutory criteria of the forbidden act,[169] when they would not prohibit holding offices, they would act with evil intent against the law that applied to them.

The law forbade Christians to participate in Jewish feasts. This law was established at the synod of Agde in 506 (c. 40). The prohibition concerned both the clergy and laity and it not only pertained to the participation in Jewish feasts, as Christians were also prohibited from inviting Jews

[166] D. 28 c. 5.

[167] C. 17 q. 4 c. 30.

[168] C. 17 q. 4 c. 31 "Si quis autem hoc permiserit, uelut in sacrilegum excommunicatio proferatur."

[169] J. Syryjczyk, *Pojęcie przestępstwa*, pp. 92-93.

to feasts prepared by Christians.[170] Ecclesiastical legislation reacted in this way to the conduct of Jews who, when present at Christian feasts, did not eat the food prepared by Christians. It was connected with the fact the Jews were obliged to eat kosher foods. Christians, guided by Saint Paul's teaching,[171] ate all kinds of food. Thus, when Jews did not eat the food blessed by Christians, as they regarded it as unclean, Christians[172] considered it despicable and sacrilegious to eat the food served at Jewish feasts. This norm of ecclesiastical law, although it was a precept, did not contain any criminal sanction which would apply in the case of offending against it. Therefore, it did not constitute a criminal norm. Rather, it was about ambition, so that "Christians did not begin to be more inferior than Jews,"[173] as it was literally put in the canon. It followed from the Christian conviction that Christianity was superior to the Jewish religion.[174] However, from the point of view of contemporary ecclesiastical penal law, even if a law does not contain a criminal sanction, its violation constitutes criminal transgression if it brings about scandal.[175]

4.1.18. The Guilt of Abusing the Blessing of an Engaged Person

In C. 27 q. 2 c. 50 Gratian included as the *auctoritas* the reply[176] of Pope Siricius (384-399) given to Himerius, bishop of Tarragona. The pope decided that another man could not marry an engaged girl who had been blessed by a priest together with the one she had got engaged to. The pope prohibited such marriages using the following words: "Tale igitur conubium anathematizamus, et modis omnibus ne fiat prohibemus."[177] He also justified it with the claim that abusing the blessing which the engaged couple had re-

[170] C. 28 q. 1 c. 14 "nec eos quisquam ad conuiuium excipiat."

[171] 1 Tim 4, 3-5.

[172] In the version of the synod of Agde "Catholici," see CCL 148, c. 40, p. 210. A similar canon was adopted at the synod of Vannes (461-491), can. 12, where this prohibition pertained only to clerics. In the version of this canon there is "Christianis," see CCL 148, c. 12, p. 154.

[173] C. 28 q. 1 c. 14 "ac sic inferiores Christiani incipient esse, quam Iudei."

[174] Contemporary canon law treated the Jewish religion as "superstitio," see C. 28 q. 1 c. 10, which constitutes can. 62 of the fourth synod of Toledo of 633.

[175] J. Syryjczyk, *Pojęcie przestępstwa*, p. 87.

[176] The letter is dated 11th February 385, M. Gryczyński, op. cit., p. 261; Jaffé -Wattenbach, 255 (65), dates the letter 10th February 385 and in reference to the situation of an engaged girl, under number 4, provides the content of the papal decision "sponsam a nemine, nisi a sponso, in matrimonium duci licere."

[177] C. 27 q. 2 c. 50.

ceived from a priest was treated by the faithful in the manner of sacrilege.[178] The guilt for abusing this blessing, as can be expected, was incurred by this girl engaged to another man. However, it is difficult to say whether this law was known to everybody. Nevertheless, if the bishop asked the pope about this decision, it can be supposed that he later introduced it in his diocese.[179] Moreover, the papal decision became universal law and, in accordance with the principle *nemo censetur ignorare legem*,[180] it applied to all baptized persons. In his *dictum* following this canon Gratian attempted to explain that the decision of Pope Siricius concerned such a situation when a girl who was brought in the house was wrapped in a veil and blessed together with her fiancé. Through the seperation of the couple blessed in this way "uiolatur benedictio."[181] He claims that this papal decision does not forbid a girl to get married when she was in the situation which Himerius, bishop of Tarragona, asked the pope to solve. To confirm his opinion, he also referred to the decision of Popes Eusebius (309) and Gregory (590-604).[182]

4.1.19. Simony

Since the apostolic age, and strictly speaking since the case of Simon the Sorcerer, wanting to pay money to buy the ability to empower him to pass on the Holy Spirit from the Apostles,[183] the Church had prohibited selling and buying anything that was spiritual and religious in character. Gratian additionally resolved it in such a way that he claimed that "Non solum qui spiritualia, sed etiam qui temporalia eis annexa precio accipiunt symoniaci iudicantur."[184] In C. 1 q. 3 c. 1 he included a text attributed to Gregory VII (1073-1085),[185] in which it was stated that there were those who, in order to get a church or their benefices, gave or received gifts. Both those who received and those who gave them were to reform and be removed from

[178] C. 27 q. 2 c. 50 "apud fideles cuiusdam sacrilegii instar est, si ulla transgressione uioletur."

[179] The pope ordered, however, that his responses should be announced to diocesan bishops "Carthaginensibus, Baeticis, Lusitanis, Gallicis," see Jaffé -Wattenbach, 255 (65).

[180] See K. Burczak, A. Dębiński, M. Jońca, op. cit., p. 112.

[181] Dictum. p. c. 50 q. 2 C. 27.

[182] Ae. Friedberg, *CorpIC*, Pars I, col. 1149-1150, fn. 16 claims that it is "Caput incertum," in Jaffé no. CCLXXI, which is not taken into account by Jaffé -Wattenbach.

[183] Acts 8, 18ff.

[184] Dictum a. c. 1 q. 3 C. 1.

[185] Ae. Friedberg, *CorpIC*, Pars I, col. 411-412, fn. 8.

the community of the Church. This practice was called "scelus"[186] and it was stated that "A sacrilegio quoque hoc facinus non dispar." This act was considered as *sacrilegium* and it was argued that it should happen "sponte et sacro deliberationis arbitrio gratis fieri debuit," and not "sub pecunie pactione." When considering the issue of the guilt of the perpetrator of the crime, it is important to recognize the equal guilt of both parties.[187] It can be concluded from the equal punishment incurred by the perpetrators. There is no question that both those who received gifts and those who gave them, labelled as "uterque"[188] in the text, committed *sacrilegium* with malice afterthought. Their guilt is even greater due to the fact that they were "sacrorum ordinum professores," who were well acquainted with the law. There is "contemptus" in their conduct, which is "the essence of deliberate conduct."[189] That "contemptus" is the essence of guilt in this case is also attested by the expression used by the pope "Iste quippe donum Dei emere, hic autem uendere presumit."[190] Thus, contemporary law did not differentiate guilt or punishment in the case of the crime of simony. Both parties to simony were guilty in the same way and were to receive the same punishment.

4.1.20. Unfair Sentence

In C. 11 q. 3 there are a number of canons pertaining to wrong sentences and false statements. Among them Gratian included can. 77, allegedly coming from the eighth synod,[191] in which it is stated that it is not only the one

[186] C. 1 q. 3 c. 1.

[187] M. Myrcha, *Kara*, p. 349 expresses the view that simony and *fornicatio* were the crimes in the case of which the law always required "determining guilt for criminal responsibility." He refers to Conc. Chalced. a. 451 c. 2; Conc. Trull., a. 692, c. 22; *Constitutiones Apostolorum*, ed. F. X. Funk, c. 25 "Episcopus aut presbyter aut diaconus, qui in fornicatione aut periurio aut furto captus est, deponatur, nec vero segregetur; dicit enim scriptura: *Non vindicabis bis in idipsum*; similiter et reliqui clerici."

[188] C. 1 q. 3 c. 1.

[189] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, p. 92.

[190] C. 1 q. 3 c. 1.

[191] Ae. Friedberg, *CorpIC*, Pars I, col. 651-652, in Notationes Correctorum explains that can. 28, which is also to come from the eighth synod, is absent from the canons of any eighth synod held during the pontificate of Pope Nicholas I (858-867), as well as from the one which is called the eighth synod in the pontificate of John VIII (872-882). Many canons which Gratian associates with the eighth synod are to be found in the rules of Basil and Isidore and other rules concerning monks.

who makes false accusations against another person,[192] but also the one who easily believes that someone committed a crime that should be considered as accused. In d. p. c. 77 q. 3 C. 11 Gratian claimed that even if a sentence is unfair "ex ordine,"[193] it should not be given up, because before it was passed the person had been considered guilty before God due to the kind of offence committed. In order to exemplify his thesis, he discussed the situation in which an adulterer received a sentence for sacrilege of which they did not feel accused in their conscience, as they had not committed it. In this situation, although the sentence is unfair, because the person who got the sentence had not committed the crime for which they were sentenced, Gratian believes that the sentence was rightly pronounced, because that person had been excommunicated for the crime of adultery for a long time.

Gratian's way of thinking makes it possible to state that there was the crime of adultery for which the perpetrator did not receive a *ferendae sententiae* sentence, but they received it for *sacrilegium* which they had not committed. Excommunication, and only *latae sententiae* is possible, was incurred by them by reason of adultery. Following Gratian's reasoning, it ought to be concluded that a sentence passed by a judge for a crime that was not committed, although it is unfair "ex ordine," as nobody accused the perpetrator of this crime, there were no witnesses and the person did not feel responsible in their conscience either, should nevertheless be accepted by the perpetrator, since they had already been bound by *latae sententiae* excommunication for some previous crime. This sentence was to justify the injustice of another sentence. This reasoning of Gratian with reference to a sentence for a crime not committed contradicts the whole doctrine of criminal law, including ecclesiastical penal law, which maintains that "there is no criminal responsibility without guilt."[194] Gratian, throughout his whole line of reasoning, intends to arrive at the claim concerning obedience to a shepherd, by whom he means a bishop, irrespective of the fact whether his sentence is right or not. At the same time, he warns a bishop not to sentence or acquit anybody in a rash way. A bishop's sentence should not be impudently

[192] At present it is the crime of defamatory allegation, see J. Syryjczyk, *Kanoniczne prawo karne*, pp. 142-143.

[193] Dictum p. c. 77 q. 3 C. 11. The definition of an unfair sentence was given by Rolandus, *Summa magistri Rolandi*, ad C. 11 q. 3, p. 26 "Sententiam ex animo iniustam dicimus, cum a iudice magis odii livore quam iustitiae profertur amore; iustam ex causa, cum id subest, pro quo sententia fertur; ex ordine, cum accusatore et testibus idoneis, i. e. qui manifesta causa a testimonio repelli non possunt, aliquis in iudicio convictus sententiam damnationis reportat, sive crimen subsit, sive non."

[194] J. Syryjczyk, *Pojęcie przestępstwa*, p. 92.

criticized, so that the one who is not guilty does not sin by pride. Gratian, wanting as it were to look for the arguments supporting his solution, gives the example that it sometimes happens that someone who has not even committed any crime accepts a sentence passed by a judge out of hatred or resulting from a conspiracy of their enemies. Gratian wanted to turn an error of judges into a norm. This solution put forward by Gratian is unacceptable. That he had erred in his reasoning was already noticed by the decretists, who directly stated that "Gratianus male intellexit."[195]

4.1.21. The Necessity of Jurisdiction

A special form of guilt was incurred by the one who did not hold any public office but usurped it by killing, murdering or mutilating a criminal. In C. 23 q. 8 c. 33 Gratian included in the *Decretum*, as the *auctoritas*, an excerpt from Jerome's work,[196] and not from Augustine's work, in which it was stated that if someone punished the evil and had "causam interfectionis,"[197] they incurred no guilt for it. In the rubric of this canon Gratian explicitly stated that someone who did not perform any public function and killed or mutilated somebody was guilty of homicide. The element determining the classification of a given act was possession of jurisdiction following from one's public office. If someone did it in the name of the law, having a mandate of power to do so, they did not kill or mutilate somebody but rather executed a sentence. The act of will and consciousness was decisive. They did not do it *dolo malo,* by an act of their own will, but, performing a public function, carried out a sentence against the perpetrator of a given crime on behalf of the community, out of concern for social order. This is expressed by the text of the *auctoritas*, in which the one who kills the evil and has "causam interfectionis" is called "minister Dei." However, if someone did not hold any public office and killed, murdered or mutilated "maleficum, furem, sacrilegum,[198] adulterum et periurum, uel quemlibet criminosum,"[199] they committed the crime of murder. In this situation they did it as a private person who did not have any power to punish criminals.

[195] LDG, f. 142 v., Ioannes Teutonicus, *Glossa ordinaria*, ad v. pro sacrilegio.

[196] *Commentarii in Ezechielem* 3, 9. In this way in C. 23 q. 5 c. 29.

[197] C. 23 q. 8 c. 33. The expression "causa interfectionis" should in this case be understood as the lawful entitlement to execute a death sentence on a criminal.

[198] Ae. Friedberg, *CorpIC*, Pars I, col. 965-966, fn. 421 emphasized that all codices had the term "sacrilegum."

[199] C. 23 q. 8 c. 33.

Their crime of murder was, in accordance with the text of the *auctoritas*, all the bigger as they usurped power, which was treated as abuse.

4.1.22. Personal Responsibility

The unfaithfulness of parents could not do harm to children. As long as a child did not consent to immorality on its own, nothing could harm the grace of baptism it received, including the unfaithful will of its parents. What was at issue was making sacrilegious offerings to demons by parents with the aim of healing their children. The problem of parents' guilt in such a situation was attempted to be solved by Augustine in the letter to Boniface. An excerpt from Augustine's letter with the argumentation was included by Gratian in the *Decretum* in D. 4 c. 129 de cons. A child not eliciting its act of will did not commit a crime. The crime of *sacrilegium* was committed by its parents who made offerings to gods in order to have their child healed. In this case the text under analysis does not make it possible to confirm the crime of apostasy, heresy or schism. Parents, as can be understood, besides their Christian faith professed, and probably guided by superstitions, made offerings to gods. In the text it was stated that a child did not sin, as "sacrilegia demoniorum"[200] were included by its parents "omnino nescienti." Thus, consciousness, which is an important subjective element of crime, determines whether a person commits a crime in an imputable way.[201] It is difficult to establish what situation is depicted by the expression "omnino nescienti."[202] It may refer to a child who does not know at all that its parents made offerings to gods, a child who is too small to realize what its parents did or a child who is so seriously ill that it did not know at all what its parents did. A child, in whatever situation, could not be responsible for its parents' guilt,[203] as long as it did not consent to their crime with its will.

4.1.23. Levying Extraordinary Burdens on Churches

The Church willingly used the privileges granted to it by constitutions of Roman emperors. These privileges enabled the Church to perform its vital

[200] D. 4 c. 129 de cons.

[201] J. Syryjczyk, *Pojęcie przestępstwa*, p. 92.

[202] D. 4 c. 129 de cons.

[203] Cf. C. 1 q. 4 c. 1 "Nullius crimen maculat nescientem." M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, pp. 80-81.

mission, whose essence and goal is the salvation of its faithful.[204] It is wordly goods that serve to fulfill these supernatural goals, which the Church uses to carry out its mission. In C. 16 q. 1 c. 40 Gratian included as the *auctoritas* the texts of a few imperial constitutions, among which the one issued by Honorius and Theodosius in Ravenna in 412 ordered that those who would not keep the regulations of this constitution were to be punished as sacrilegists. The thesis of the consitution contained the obligations that Churches were to be exempt from in particular cities. At the same time, the expression "ecclesiae urbium singularum"[205] ought to be understood as communities of the faithful, constituting, to use contemporary language, legal persons who owned material goods. As property owners, and this property was precisely described as "predia usibus celestium secretorum dedicata," they were exempt from extraordinary burdens. The law did not specify these burdens. The text of the constitution used the expression "sordidorum munerum fece uexentur." At the same time, "munera sordida" should be understood as simple, physical work that did not require any qualifications. It is these burdens that ecclesiastical possessions were to be exempt from. Moreover, no other special burdens or extraordinary taxes were allowed to be levied on these possessions, apart from those that were imposed by canon law. It was also required to stave off any threat of the transfer of possession or ownership of lands which belonged to the Church. It was stipulated in the hypothesis of the norm that if someone "contra uenerit," they were to receive the punishment which was imposed by the law "erga sacrilegos." In the *Glossa ordinaria* it was indicated that excommunication or "acrimonia" might be the penalty[206] which was adopted for *sacrilegium* in *Lex Iulia peculatus et de sacrilegiis*.[207] In addition, the constitution also included the penalty of life banishment.

4.1.24. Magic

Christianity, spreading among pagan peoples, had to fight a constant battle with pagan cults and beliefs. That the habit of primitive beliefs was

[204] 1983 CIC, can. 1752 "[...] prae oculis habita salute animarum, quae in Ecclesia suprema semper lex esse debet."

[205] C. 16 q. 1 c. 40.

[206] It was *aquae et ignis interdictio* and *bonorum amissio*, see A. Dębiński, *Sacrilegium w prawie rzymskim*, p. 101.

[207] LDG, f. 168 r., *Glossa ordinaria*, ad Acrimoniam, "in penam que traditur est ad lex ad Iuliam peculatus sacrilegii vel excommunicationis qua pena nulla est maior in ecclesia corripiantur et excluduntur mundum per totum."

extremely strong is attested by the writings of the Church Farthers and writers of the Church, as well as the norms prohibiting magic practices that were often repeated at synods. Many of them were included by Gratian in the *Decretum*, with a view to showing their untruth and harmfulness to the Christian faith. In D. 88 c. 12 he included, as the *auctoritas*, an excerpt from Augustine's work[208] in the canon, in which the author stated that bad and unbelieving mothers, when their children suffered from a headache, tied some objects to them and used incantations in order to relieve their ailment. The text used the expression "ligaturas sacrilegas et incantationes,"[209] which may refer to some indeterminate objects and incantations. Augustine stated that "Omnia ista hominum, non rerum peccata sunt." Therefore, he recognized the guilt of those mothers, which was obvious, since guilt as the state of consciousness and decision of the will can only be attributed to a human being. It seems that the expression "infideles matres" refers to Christian mothers who did not believe in God's power, but fell back on magic, which could not help after all, which is why those "ligaturas et incantationes" were sacrilegious. The example used by Augustine is part of his more extensive argumentation which is supposed to lead to the conclusion that it is human will rather than the objective worth of objects that is the source of evil.

4.2. *Culpa*

In C. 12 q. 2 c. 21, while the content of the first part of the canon points to the existence of intentional guilt (audet),[210] the second part mentions unintentional guilt. The commission of this type of crime with malice is proved by the words "quod si neglexerit" and "qui hec non preuiderit, et aliter quam scriptum est predia ecclesiae tradita petierit, uel acceperit, aut possederit." It may be due to the fact that the canon is structured as a compilation. However, the expression "who would not predict it" (qui hec non preuiderit), included in the disposition of the norm, attests to the existence of unintentional guilt. The subsequent text, "and in any different way to what was written down" (et aliter quam scriptum est), refers to the lack of proper concern for

[208] Augustinus, *Enarrationes in Psalmos*, ad Ps 70, 15, CCL 39, p. 952.
[209] D. 88 c. 12.
[210] C. 12 q. 2 c. 21.

what was ordered by the law. Thus, the legislator assumed the knowledge of the legal norm on the part of the perpetrator. This person, however, would turn out careless of fulfilling what it prescribed. Yet, it has to be observed that a crime would also be committed if the perpetrator was not acquainted with the legal norm. This "kind of guilt also signifies culpable ignorance of the law."[211] In such cases, ignorance is equal to inadvertence.

Gratian, however, claims that *sacrilegium* can be committed "also" (etiam[212]) in another way. And he cited the norm from the Code[213] that concerned committing *sacrilegium nesciendo* or *negligendo*. Such a way of committing the crime pertains to unintentional guilt (culpa). An important element of Gratian's opinion is the claim that *sacrilegium* is committed when the perpetrator commits an unlawful act against the sanctity of divine law (contra diuinae legis sanctitatem).[214] It captures the essence of *sacrilegium*, which in Jerome's and Augustine's writings consists in the transgression committed "in Deum" or "contra Deum."[215] The crime which is referred to in the *dictum* can be committed "also" (etiam) through ignorance (Committunt etiam sacrilegium [...] nesciendo).[216] There arises a question of how Gratian understood this type of crime committed *nesciendo*. Generally, anyone can incur guilt only by an act of will, which Gratian expressed in the rubric of C. 15 q. 1 c. 10 in the following way: "Nemo trahitur ad culpam, nisi ductus propria voluntate." As a result, the perpetrator did not incur guilt when their actions gave rise to the effects they did not want and were not aware of.[217] For this reason, Gratian adopted the conclusion[218] developed by

[211] J. Syryjczyk, *Pojęcie przestępstwa*, p. 94.

[212] Dictum p. c. 29 q. 4 C. 17.

[213] This norm was contained in the *Codex Theodosianus* and was also included in the *Codex Justinianus*, C. Th. 16. 2. 25; C. I. 9. 29. 1; C. I. 9. 29. 2.

[214] It accords with the teaching of canonical penal law, according to which an act offending against divine law, if it is grave and gives rise to scandal, constitutes criminal transgression and, despite the fact that there is no criminal sanction, its perpetrator should be held criminally responsible before authorities, see J. Syryjczyk, *Pojęcie przestępstwa*, p. 88.

[215] Hieronymus, *Commentarii in Ezechielem* 5, 17, CCL 75, p. 214ff.; Hieronymus, *Commentarii in Danielem* 2, 5, CCL 75A, p. 820ff.; *Commentarii in prophetas minores*, *In Osea* 3, 1, CCL 76, p. 109; Augustinus, *Contra Cresconium* 4, 10, 12, CSEL 52, p. 512-513 "sacrilegium vero tanto est gravius peccatum, quantum committi non potest nisi in Deum."

[216] Dictum p. c. 29 q. 4 C. 17.

[217] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, p. 74.

[218] Augustinus, *Quaestionum in heptateuchum libri septem*, lib. 4, Quaestiones Numerorum, quaestio 24, CCL 33, p. 248 "Haec si ita se habent, non sunt peccata nolentium nisi nescientium, quae discernuntur a peccatis uolentium."

Augustine and included in the *auctoritas* in C. 15 q. 1 c. 1: "Non sunt peccata nolentium, nisi nescientium." However, the law did not permit the ignorance of divine law.[219] Thus, when someone, even if *nesciendo*, transgressed "contra diuinae legis sanctitatem,"[220] they became guilty of the crime. Ignorance was culpable when someone should know what ought to be known. Ignorance, both in the *Decretum* and for the decretists, also meant a kind of negligence.[221]

The sanctity of divine law may also be violated (uiolant)[222] and offended against (offendunt) by negligence (negligendo). At the same time, Gratian's *negligentia* is understood as omitting necessary diligence,[223] only not in the sense of Roman law, as claimed by M. Myrcha, as legal guilt,[224] but rather as an accident (casus) for which the perpetrator is held responsible due to negligence (negligentia). The crime committed consciously and of one's own free will differs from the crime committed *negligendo* in that the guilt of the latter is smaller. In this case, the crime of *sacrilegium* committed "negligendo" would be something between *dolus* and *casus* as an unpunishable case.

An interesting interpretation of this text in the *Decretum* was included by A. Ludwig in his study. He paid attention to these two peculiar expressions, namely "nesciendo confundere"[225] and "negligendo violare." It is worth noting, as stressed by Ludwig, that this law in the *Codex Theodosianus* is headed "De munere seu officio episcoporum in praedicando verbo Dei."[226] Ludwig claims that the law pertains to the prescript concerning bishops, according to which they should faithfully and conscientiously care about observing divine law (lex divina) in their teaching. It is confirmed,

[219] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, p. 80.

[220] Dictum p. c. 29 q. 4 C. 17.

[221] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, p. 100.

[222] Dictum p. c. 29 q. 4 C. 17.

[223] M. Myrcha, *Problem winy w karnym ustawodawstwie kanonicznym*, "Prawo Kanoniczne" 14 (1971), no. 3-4, pp. 75-76.

[224] As above, M. Myrcha conducting a thorough analysis of the terms *ignorantia* and *infirmitas* refers to the triple division of sins which was provided by Beda, who claimed that there were sins committed out of ignorance (ex ignorantia), out of weakness (ex infirmitate) and with deliberate intent (ex deliberatione). This division was also adopted by the Church's teachings. M. Myrcha maintains that they were grouped under the category of *casus*, where the guilt of the perpetrator results from negligence (negligentia).

[225] Gratian in d. p. c. 29 q. 4 C. 17 does not use the term *confundere* but *conmittere*.

[226] It is not known which edition was used by Ludwig, as there is no such text in the edition of Krüger and Mommsen.

as Ludwig maintains, by the heading of this law in the *Codex Justinianus*, which is "Errans in articulis fidei punitur ut sacrilegus." Ludwig thinks that it clearly refers to "violatio sacri," the crime of supporting or facilitating the spread of heresy, for which a bishop is to be blamed "owing to ignorance" (nesciendo) or "with evil intent" (negligendo), as he contributes to the spread of false teaching in this way. As if in support of his line of argument, he indicates that the law was issued at the time of the development of numerous heresies in the eastern part of the Church.[227] Although Ludwig's argumentation seems logical, it can be doubted whether an imperial law would so strictly regulate bishops' duties in their concern for the purity of faith. It is much more probable that it pertained to the classification of any form of "violatio" or "offensio" of broadly understood divine law, whether by ignorance (nescientia) or negligence (negligentia), as *sacrilegium*.

4.3. Summary

Gratian collected canon law from twelve centuries, from the 1st to the 12th century. The earliest legal norm is the letter of Pope Anacletus (79-88), included in C. 17 q. 4 c. 19, even though this text comes from *Decretales Pseudo-Isidorianae* from the mid-9th century. As far as the latest one is concerned, it is can. 15 of the Second Council of the Lateran (1139), present in C. 17 q. 4 c. 29. According to the tendency of contemporary ecclesiastical law, these norms are casuistic in character. Thus, each type of *sacrilegium* constitutes a distinct *casus* and has to be considered on its own.

The analysis of the source texts pertaining to *sacrilegium* in Gratian's *Decretum* makes it possible to observe that the character of the norms of ecclesiastical law concerning the crime of *sacrilegium* is different from the character of the norms of Roman law included in the *Decretum*. While the norms of ecclesiastical law are casuistic in nature, the norms of Roman law have the character of an abstract norm embracing not one case but many.

The subjective side of the crime of *sacrilegium*, which is analyzed in this chapter, enables us to claim that there are various categories of subjects committing *sacrilegium*. Among those cited are bishops, presbyters, deacons, subdeacons, clerics in general, monks, nuns, laypersons and among them princes and masters. Among the subjects committing *sacrilegium* there

[227] A. Ludwig, *Geschichte des Sacrilegs*, p. 188.

are no indications of children, mature or immature persons and slaves. Nor are there any gender distinctions made. The norms of law most often use the expression "Si quis."

In Gratian's *Decretum* there are texts concerning *sacrilegium* which are strictly legal norms, as well as the texts of the Church Fathers, who defined *sacrilegium* in their writings and sometimes presented those texts in the form of legal norms, as was most frequently done by Augustine. Even when containing the term *dolus*, their texts do not always use it in the sense of intentional guilt. It often carries the common meaning of "deceit," as it is in C. 22 q. 5 c. 19; D. 1 c. 52; C. 12 q. 2 c. 38; C. 26 q. 2 c. 6. However, this deceitful action incorporates consciousness, free will and evil intent, which together constitute the essence of *dolus* as intentional guilt. The deciding factor in the case of guilt is human will.

In the *Decretum*, in the texts pertaining to *sacrilegium*, Gratian does not use the terms from Roman law. Thus, A. Schwarz and M. Myrcha are right in their opinion that when determining guilt one should pay more attention to content rather than words alone. Taking this into account, one should conclude that Gratian did not use the term *culpa* in the sense of unintentional guilt as omitting necessary diligence. Rather, the term had a broad meaning and denoted culpability or sin. However, there is one text in the *Decretum* which has that meaning in reference to *sacrilegium*. It was included in the *Decretum* from Roman law and can be found in d. p. c. 29 q. 4 C. 17. Some criteria relating to the commission of the crime of *sacrilegium* due to negligence are present in C. 12 q. 2 c. 21. *Sacrilegium* could be committed, according to the norms of ecclesiastical law, only with malice afterthought (dolo). There is no text saying that someone could commit *sacrilegium* accidentally (casu). Contemporary law did not know the theory of attempted crime either, but it treated *sacrilegium*, just as other crimes, as a completed crime. The legal norms pertaining to *sacrilegium* do not point to any form of duress, which would influence one's will in committing this crime.

The guilt of the perpetrators of the crime of *sacrilegium* was the same regardless of state, status and social position. There exist, however, some source texts which point to the greater guilt of persons holding high positions, as in C. 12 q. 2 c. 21. The legal material adopted in the *Decretum* is inconsistent in this regard. This is confirmed by the text of C. 12 q. 2 c. 10, where "consentientes" are as guilty as the pepetrators of *sacrilegium*.

The law of *Edictum Rothari*, which was referred to in the *Decretum*, diversified the kind of participation in crime. Greater guilt was attributed to the principal perpetrator. Accomplices were guilty to a lesser degree.

The principal perpetrator was punished over ten times more severely than *complices*.

Special guilt, under law, was incurred by those who broke the right of asylum, irrespective of their social position. If it was done to a bishop, the guilt also involved *crimen laesae maiestatis*. The gravity of guilt increased together with the high social position of the person against whom the crime was committed. The guilt in *sacrilegium* followed from the decision to violate *sacrum* (violatio sacri). In the case of apostasy, culpability was not influenced by whether it was caused by fear of one's life. The perpetrator of apostasy was considered guilty despite the fact that they renounced their faith only externally, and internally continued in the true faith. The special gravity of guilt was attributed to presbyters and deacons leaving the community of the Church. Upon their return, they were only allowed to participate in the community with laypersons and receive Holy Communion in the manner of lay people.

The one who fulfilled their superior's orders was not considered guilty. If someone killed a criminal when performing a public function and carried out a sentence on a criminal, they were not guilty of murder. If they punished a criminal when not performing a public function, they were guilty of murder.

The law attributed guilt to a superior who abused their power by forcing their subordinate to commit a crime. The guilt of the principal for moral complicity in the crime and the agent who physically performed the transgression was the same.

The norms pertaining to *sacrilegium* do not contain the subjective element of crime which is incitement.

In the source texts the guilt of *sacrilegium* is considered greater than that of *fornicatio*. The source of the heavier guilt in the case of the former is the fact of committing the crime "contra Deum." The guilt is bigger in the case of a public law crime, which is *sacrilegium*, than in the case of a private law crime, which is the theft of one's friend's money.

Canon law treated all perpetrators of the crime of *sacrilegium* equally, and their guilt was considered equal.

The law saw greater guilt in *sacrilegium* than in *furtum*. All unlawful appropriation of ecclesiastical goods by lay people, who were called "necatores pauperum," was regarded as *sacrilegium* committed with malice afterthought (dolus). The higher the rank of a layperson, the greater their guilt.

Canon law recognized the guilt of a community. However, the source texts prove that there were two tendencies. While one ordered punishment, the other prescribed cautioning, warning and praying for the reform of

a community. If that did not produce any result, a judge's sentence was to prevent the spread of evil.

Especially heavy guilt for *sacrilegium* was incurred by clerics who broke their vow of celibacy and consecrated virgins who broke their vow of chastity. An attempt to contract marriage or cohabit in a secret way was associated with the same guilt.

The guilt of *sacrilegium* was also greater than that of *parricidium*. The guilt in the commission of the crime of *sacrilegium* was thus bigger than in the case of *parricidium*, *fornicatio* and *furtum*. It was due to the fact that *sacrilegium* was committed "contra Deum."

The law regarded the guilt of simony as special. Both parties were considered guilty to the same degree. Neglecting to punish simony constituted the guilt of negligence. The higher the rank of the person who neglected punishment, the greater the guilt.

It is bizarre when Gratian, for the sake of absolute obedience to a bishop, insists on accepting a bishop's sentence for a crime that was not committed by the perpetrator. They committed another crime for which they were judged guilty by God. However, the decretists stated that in that case "Gratianus male intellexit."

Gratian acknowledges personal guilt. No guilt is incurred by children for their parents' crimes. What is crucial in the case of guilt is consciousness and the decision of the will. Ignorance of the fact did not bring about guilt in Gratian's opinion. It was ignorance of the law that gave rise to guilt.

Thus, analyzing the source texts of ecclesiastical law present in Gratian's *Decretum*, one ought to state that the crime of *sacrilegium* could only be committed with malice afterthought (dolus).

There is one text in C. 12 q. 2 c. 21 in which one can find unintentional guilt which arises out of negligence (negligentia). This possibility more evidently follows from d. p. c. 29 q. 4 C. 17, where Gratian refers to the texts of Roman law.

Chapter V

Criminal Sanctions

Criminal law takes the view that generally these crimes are punished which infringe a legal norm containing a criminal sanction. In ecclesiastical penal law, however, there is the possibility of punishing also such crimes which seriously offend against divine and ecclesiastical law and bring about or may bring about grave scandal in the community of Christians. An ecclesiastical penalty is "the deprivation of some good with a view to reforming and punishing a criminal performed by a legitimate authority."[1] This is also how penalties for *sacrilegium* should be understood. However, determining the purpose of penalties imposed for *sacrilegium* will be possible after a thorough analysis of the source texts. Accordingly, the question should be raised whether the criminal sanctions present in criminal norms were aimed at retaliation, the reform of an offender or discouraging others from committing *sacrilegium*. Taking into account the contemporary classification of penalties in canon law, we shall divide them into censures, expiatory penalties and penances, even though the division into censures as medicinal penalties, expiatory penalties as well as penal remedies and penances was not specified at the time from which the source material analysed in the present study is derived.

[1] M. Myrcha, *Kara*, p. 17.

5.1. Censures

5.1.1. Anathema

The penalty of anathema is treated as separate from excommunication owing to its presence in the source material in the *Decretum*. Contemporary canon law did not consider excommunication, interdict and suspension as censures,[2] or in their present meaning as medicinal penalties. They were simply penalties,[3] which were also vindictive in character.[4] Nevertheless, also in that period "almost all penalties were aimed" at the reform of an offender.[5] The word *censura*[6] was used to refer to a penalty in the broad sense of the term, without any regard for whether it was vindictive or medicinal in character, even though the expression most often referred to excommunication.[7] Nonetheless, both excommunication and degradation for the clergy were simply understood as penalties.[8]

Sacrilegium was most often punished by anathema and excommunication. It was done in this way both in the norms from the earlier period, until the 6th century, and later until the 12th century. The norms from this period of the history of universal canon law are contained in Gratian's *Decretum*. Since there were two kinds of penalties, there arises a question regarding the difference between them, as these two kinds of penalties were distinguished from and even opposed to each other. Anathema was understood as the separation from the Church,[9] and even as eternal death,[10] the ex-

[2] The distinction between censures and vindictive penalties was introduced into ecclesiastical penal law at a later time. Pope Innocent III (1198-1216) in 1214 clearly stated that censures were excommunication, interdict and suspension, and the precise distinction between medicinal and vindictive penalties was made in the 16th century, see J. Krukowski, *Cenzury kościelne*, in: EK, vol. III, R. Łukaszyk, L. Bieńkowski, F. Gryglewicz (eds.), Lublin 1985, col. 4-5; M. Myrcha, *Kara*, p. 124; F. Roberti, *De delictis et poenis*, vol. I, pt. 2, pp. 316-317; A. Bride, *Censures* (*Peines*), in: DDC, vol. III, col. 172.

[3] C. 18 q. 2 c. 25 "sub pena anathematis interdicimus."

[4] M. Myrcha, *Kara*, p. 39.

[5] Ibid., p. 124.

[6] In C. 1. q. 1 c. 70 "censura diuina" as God's penalty.

[7] Ibid., p. 125.

[8] *Summa Parisiensis*, ed. Mc Laughlin, ad c. 1 q. 1 C. 23, p. 212; R. Maceratini, *Ricerche*, p. 464.

[9] The synod of Fismes, a. 881, c. 5 "anathema id est alienatio a Christo et eius corpore, quae est sancta ecclesia," Mansi, vol. XVII, col. 545, see P. Hinschius, *System*, vol. V, p. 7.

[10] C. 11 q. 3 c. 41 "quia anathema eterna est mortis dampnatio," as was decided at the synod of Meaux in 845, c. 56, Mansi, vol. XIV, col. 832. In this way also E. Vodola, *Excommunication in the Middle Ages*, Berkeley 1986, p. 14, fn. 66.

clusion of an offender from the kingdom of God and their eternal damnation.[11] In addition, there were different forms of anathema. There was temporary anathema, which lasted until an offender reformed,[12] anathema *maranatha*, which was supposed to continue until the coming of Christ to the Last Judgement[13] and anathema called *perpetuum*, so the one without any specific period of time.[14] Anathema was pronounced in a solemn form, although the same form of pronouncement could also be used for excommunication.[15] Owing to the special gravity of anathema, its pronouncement by a bishop had to be preceded by the information communicated to an archbishop and other bishops. This requirement was caused by the severity of anathema, which was compared to the death penalty. The penalty of anathema was inflicted only for the gravest crimes[16] and only on those who did not want to reform in any way.[17]

Gratian in his d. p. c. 11 q. 4 C. 3 used the following words to emphasize the fact that anathema differed from excommunication: "Notandum

[11] The synod of Troslé in 909, c. 4 "Sacrilegos dei et ecclesiae contemptores percutiamus quadruplici anathematis maledicto. Sit eis clausa porta coeli, aperta ianua inferni," Mansi, vol. XVIII, col. 274.

[12] As above "donec per dignam et humilem poenitentiam et congruam emendationem laetificent ecclesiam."

[13] This expression was used by Saint Paul in 1 Cor 16, 22 "Si quis non amat Dominum, sit anathema. Marana tha!," see *Novum Testamentum Latine*, Nestle-Aland. The synod of Troslé in 909, c. 13 "sit quisque eorum (murderers) anathema maranatha id est condemnatus, donec dominus redeat," Mansi, vol. XIII, col. 302; C. 23 q. 4 c. 30 "si aliquis deinceps ullum umquam episcoporum taliter deceperit, anathema maranatha fieret in conspectu Dei et sanctorum angelorum;" Jaffé -Wattenbach, † 901 (CCIX) states that it is the letter of Pope Silverius (536-537) to Bishop Amator of 23rd November 536; there are codices which attribute the authorship of the letter to Pope Sylvester, see Ae. Friedberg, *CorpIC*, pars I, col. 913-914, fn. 504; P. Hinschius, *Decretales*, p. 709 "anathema marenata," claims that it is an apocryphal letter; C. 24 q. 3 c. 11 "sit anathema, maranatha."

[14] D. 79 c. 5 "ipsi et sibi fauentibus fiat perpetuum anatema;" D. 23 c. 1 "auctoritate diuina et sanctorum apostolorum Petri et Pauli, perpetuo anathemate cum suis auctoribus, fautoribus et sequacibus a liminibus sanctae Dei ecclesiae separatus abiciatur sicut antichristus, et inuasor et destructor totius Chrisianitatis;" C. 1 q. 1 c. 7 "Illi uero, qui hac causa munerum acceptores extiterint, si clerici fuerint, honoris sui amissione mulctentur, si uero laici, perpetuo nanthemate condempnentur;" a different name, D. 2 c. 42 de cons. "eterno anathemate dignos esse pronuncio;" C. 16 q. 1 c. 57 "perpetuo anathemate feriatur;" C 35 q. 5 c. 2 "uero gladio perpetui anathematis."

[15] C. 11 q. 3 c. 106.

[16] P. Seriski, *Poenae in iure byzantino ecclesiastico ab initiis ad saeculum XI, 1054*, Romae 1941, p. 84.

[17] The synod of Meaux of 845, c. 56, in C. 11 q. 3 c. 41. Cf. M. Myrcha, *Ekskomunika*, "Polonia Sacra" 9 (1957), no. 4, p. 187.

uero est, quod aliud sit excommunicatio, et aliud anathematization." In order to show this difference in ecclesiastical legislation, in C. 3 q. 4 c. 12 he cited, as the *auctoritas*, the letter of Pope John VIII (872-882)[18] to Bishop Liutbert,[19] in which he wrote as follows: "Hengiltrudam uxorem Bosonis noueris non solum excommunicatione, que a fraterna societate separat, sed etiam anathemate, quod ab ipso corpore Christi (quod est ecclesia) recidit, crebro percussam," which was repeated in d. p. c. 12 q. 4 C. 3: "Unde datur intelligi, quod anathematizati intelligendi sunt non simpliciter a fraterna societate omnino separati, sed a corpore Christi (quod est ecclesia)." Thus, this papal decision defined anathema not only as the deprivation of participation with the faithful, but as the separation from "the Body of Christ (which is the Church)."[20] This use of the expression would suggest that the person punished by anathema was to be deprived of the relationship with the mystical Body of Christ, which is the Church, which was understood by the decretists as the separation from the Church and the community of Christians.

Ioannes Teutonicus, in LDG, f. 110 r., in the gloss ad "notandum" defined anathema as "anathema est maior excommunicatio."[21] He also added the important information that the person once excommunicated could not be excommunicated again for the same,[22] which reflected the legal "ne bis in idem."[23] He also stated that Jews could not be excommunicated, but their legal situation was not more favourable because of that.[24] He also expressed his own view that excommunication served a double purpose, one being the exclusion of an offender from the Church, in the sense of the depriva-

[18] M. Myrcha wrongly stated in the article *Ekskomunika*, "Polonia Sacra" 9 (1957), no. 4, p. 187 that the letter had been written by Pope John VII and it was probably repeated after him by F. Wycisk, *Anatema*, in: EK, vol. I, F. Gryglewicz, R. Łukaszyk, Z. Sułowski (eds.), Lublin 1985, col. 520. Both authors quote the correct year when the letter was written (878). The pontificate of Pope John VII lasted from 705 to 707.

[19] Ae. Friedberg, *CorpIC*, Pars I, col. 513-514, in Notationes Correctorum claims that this letter of John VIII was not found, but it is possible that there was such a woman at that time. There are the sources of Pope Nicholas I and Regino which speak of anathema inflicted on her. Jaffé -Wattenbach, 3167 (2391), this letter from the year 878 was addressed to Liutbert, archbishop of Mainz.

[20] Dictum p. c. 12 q. 4 C. 3. See also E. Vodola, *Excommunication*, p. 15.

[21] Ioannes Teutonicus completed the *Glossa ordinaria* after the Fifth Council of the Lateran (1215), and the division into major and minor excommunication had already existed at the time. Anathema was called major excommunication, see A. van Hove, *Prolegomena*, p. 225.

[22] LDG, f. 110 r. "qui semel est excommunicatus amplius non potest excommunicari."

[23] K. Burczak, A. Dębiński, M. Jońca, op. cit., p. 109.

[24] LDG, f. 110 r. "iudeus non potest excommunicari tamen non est melioris conditionis."

tion of participation with the faithful, and the other consisting in keeping the person in the Church.[25] What was important was the existence of the latter purpose, which is hardly cited in the literature of the subject from this perspective, as excommunication offered hope, after the required reparation, of one's return to communion with the Church and in this sense it "kept" the perpetrator in the Church. It highlighted the medicinal character of this penalty. With regard to absolution from excommunication, he took the view that each excommunication should be remitted separately.[26]

Stephen of Tournai understood anathema as "gravior excommunicationis sententia, quae fit solemniter cum candelis, quando traditur homo satanae, a sacerdote ut spiritus salvus fiat; et iuste separatur ab ecclesia et consortio fidelium." It could thus seem that the expression "a man is handed over to satan by a priest" meant one's complete separation from the community of the Church with the aim of saving one's spirit. However, the subsequent words "Debemus abstinere ab eo in quinque: ab oris scil. salutatione, consilio, oratione, osculo, mensa" do not indicate the complete separation from the community of the Church, but only the privation of the relationship with the faithful. Thus, Christians should not greet such persons, seek their advice and give advice to them, pray with them, kiss them or eat meals with them. Stephen noticed that while some tended to understand anathema as "separation," others viewed it as "suspension," which he phrased as follows: "Interpretatur autem anathematizatio secundum quosdam separatio, secundum alios suspensio."[27] Thus, there existed certain doubts about whether anathema meant the separation from the community of the faithful or temporary suspension of rights. Anathema, therefore, should be understood as a penalty imposed in a solemn way on the perpetrator of a crime, which deprived them of their participation with the faithful remaining in the community of the Church. However, it should not be understood as the separation from the Church as the mystical Body of Christ. The internal bonds, existing from the moment of baptism between a person and Christ and His mystical Body, which is the Church, and understood as bonds of faith, sacraments and ecclesiastical governance,[28] cannot be completely severed in any way. Spiritual goods "do not belong to the scope of ecclesiastical administration. The Church has no power over

[25] LDG, f. 110 r. "ego credo quod excommunicatio duos habet effectus, unum eiciendi extra ecclesiam et alium detinendi etami."

[26] LDG, f. 110 r. "tot sunt absolutiones quot sunt excommunicationes."

[27] *Summa Stephani*, ed. Schulte, p. 195.

[28] J. Syryjczyk, *Sankcje w Kościele*, p. 215.

them."[29] This special "internal communion with the Church"[30] cannot be removed by this penalty.[31]

P. Hinschius claims that despite the fact that anathema and excommunication were distinguished from and even opposed to each other, they really had the same meaning. He also maintains that the legal effects of both penalties were the same, and those, as he calls them, "Eigenthümlichkeiten des Anathems" or "Besonderheiten" did not have any crucial legal significance for a criminal.[32] Anathema constituted the exclusion from participation with the community of the Church and brought about the loss of rights given to members of the Church, but it did not exempt one from the duties towards the Church.[33]

The same view is taken by M. Myrcha, who claims that anathema deprived one of all participation with the faithful, whereas excommunication – of partial participation.[34] He also asserts that even though these two kinds of penalties were often opposed to each other, in fact they are one and the same penalty, and the differences between them are only apparent and not substantial.[35] Also in his opinion, *anathema maranatha* is "the imposition of ordinary excommunication, and the legislator, when using it, wants to emphasize the extraordinary maliciousness of the crime for which it is inflicted [...] it does not constitute a special kind of excommunication, neither does it aggravate it, that is to say it adds nothing to the penalty of excommunication."[36]

The evolution of anathema proceeded in the direction of moderating its harshness. The penalty of anathema was not removed until satisfaction was given to the Church, especially until penance was made, or until the unlawful conduct stopped, and sometimes no definite time was provided or, in other cases, it was imposed forever.

In Gratian's *Decretum* there are norms proving that threatening and inflicting anathema should be preceded by a warning. In the opinion of P. Hinschius, it is precisely Gratian's *Decretum* that should get the credit

[29] M. Myrcha, *Ekskomunika*, "Polonia Sacra" 9 (1957), no. 4, p. 187.

[30] Ibid.

[31] F. Roberti, *De delictis et poenis*, vol. I, pars 2, p. 382, fn. 325 "Exclusio a communione fidelium descriptis bonis spiritualibus mixtis, non autem mere internis, privat; nec aufert radicalem capacitatem ad communionem baptismo acquisitam."

[32] P. Hinschius, *System*, vol. V, pp. 8-9.

[33] Ibid., p. 9.

[34] M. Myrcha, *Ekskomunika*, "Polonia Sacra" 9 (1957), no. 4, pp. 186-187.

[35] Ibid., p. 188.

[36] Ibid., p. 191.

for moderating the forms of anathema and excommunication. A number of norms which Gratian included in the *Decretum*, which taught about the requirement of *monitio canonica* before the application of a penalty, became the basis of the doctrine of criminal law in the 12th century and in the following centuries.[37]

Anathema, being a special form of excommunication, was imposed for heavier crimes,[38] though sometimes also for completely minor ones.[39] Thus, since *sacrilegium* constituted an especially grave crime, as it was committed "contra Deum," it should be determined for what types of *sacrilegium* anathema was threatened and inflicted.

The penalty of anathema could be imposed by ecclesiastical law on someone who transferred goods offered to the Church for the support of the poor to other purposes. This norm was included by Gratian in C. 12 q. 2 c. 21.[40] The law prohibited anybody from attempting to gain, accept or possess the land donated to the Church. Whoever did it committed "ingens sacrilegium."[41] The legislator decided that if anyone acted contrary to what was ordered by the law, a penalty was to be established for them, which was to be accompanied by anathema. The text expressed it as follows: "nisi se cito correxerit, quo iratus Deus animas percutit anathemate feriatur, sitque acciepienti, et donanti, uel possidenti anathema, et institutae penae contubernium assiduum."[42] Thus, this type of *sacrilegium* was punished in a very severe way, as anathema was to perpetually accompany the established penalty. The penalty of anathema was the same for each form of unlawful treatment of goods dedicated to the Church.

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[37] Ibid., p. 12. It was legally sanctioned by the Third Council of the Lateran in 1179; Ae. Friedberg, *CorpIC*, Pars II, col. 417-418, X, II, 28, 26 "Praesenti decreto statuimus, ut nec praelati, nisi canonica commonitione praemissa, suspensionis vel excommunicationis sententiam proferant."

[38] C. 25 q. 1 c. 11 "anathema fiat, et ueluti preuaricator fidei catholicae semper apud Deum reus existat, quicumque ... Romanorum Pontificum decretorum censuram in quoquam crediderit uel permiserit uiolandam;" D. 79 c. 5 "si quis ex episcopis, uel monachis, uel laicis ... in gradum filiorum sanctae Romanae ecclesiae, id est presbiterorum cardinalium et diaconorum ire presumpserit, et hanc apostolicam sedem inuadere quilibet ex supradictis temptauerit, et ad summum pontificalem honorem ascendere uoluerit, ipsi et sibi fauentibus fiat perpetuum anatema." See P. Seriski, *Poenae in iure byzantino ecclesiastico ab initiis ad saeculum XI, 1054*, Romae 1941, p. 84; M. Myrcha, *Ekskomunika*, "Polonia Sacra" 10 (1958), no. 1, p. 107.

[39] D. 23 c. 23 "Si quis ex clericis comam relaxauerit, anathema sit."

[40] The text of this canon comes from *Decretales Pseudo-Isidorianae*, see P. Hinschius, *Decretales*, pp. 680-681.

[41] C. 12 q. 2 c. 21.

[42] C. 12 q. 2 c. 21.

Laying violent hands on a cleric or monk, which was mentioned in C. 17 q. 4 c. 29, was treated by the law as the crime of *sacrilegium* and carried the penalty of anathema, which was expressed with the words "anathematis uinculo subiaceat."[43]

Likewise, a layperson who would break the oath to the king and attempt to kill him, as it is in C. 22 q. 5 c. 19, committing *sacrilegium* in this way, was to incur the penalty of anathema for laying violent hands "in Christum Domini,"[44] if they did not submit themselves to canonical penance to make reparation for the lawlesness committed.

The penalty of anathema was also ordered to be imposed on a cleric who would take anything from the things of a dying or deceased bishop. This penal legal norm was established at the synod of Lerida in 546, and Gratian included it as the *auctoritas* in the *Decretum* in C. 12 q. 2 c. 38. The penalty of anathema could be imposed on any cleric irrespective of his grade, which was conveyed by the expression "cuiuslibet ordinis [...] clericus."[45] The crime of *sacrilegium* was in this case described as "graver" (prolixioris),[46] which would confirm the thesis that anathema was inflicted for graver crimes, also for graver *sacrilegium*. Anathema in this case did not have a definite duration. If a cleric committed this *sacrilegium* and the penalty of anathema was imposed on him, he could only be admitted to "communio peregrina," which was expressed by the words "et vix ei peregrina communio concedatur."[47]

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[43] C. 17 q. 4 c. 29.

[44] C. 22 q. 5 c. 19.

[45] C. 12 q. 2 c. 38.

[46] It is so in LDG, f. 150 v.

[47] C. 12 q. 2 c. 38. Also clerics or laypersons who wanted to keep the offerings of parents donated or willed to the Church or wanted to take away what had been donated to the Church or a monastery were to be excluded from the Church as "necatores pauperum" until such time as they would return the things taken. If a cleric stole something from a church, it was decided that "peregrina ei tribuatur communio." This decision of the synod of Agde from the year 506, can. 2 (CCL 148, p. 193) was included by Gratian in C. 13 q. 2 c. 11. The expression "communio peregrina" is used in the *Decretum* in the following three canons: C. 12 q. 2 c. 38, C. 13 q. 2 c. 11 and D. 50 c. 21. It referred to the penalty, as inflicted on clerics, of receiving Holy Communion in the way exactly described as "communio peregrina," or in the way typical of "clerici peregrini." M. Myrcha, *Depozycja i degradacja*, "Prawo Kanoniczne" 2 (1959), no. 3-4, p. 226, referring to M. Lega, *De delictis et poenis*, p. 281, p. 3 explains that the expression "*A communione laicali* should be distinguished from *communio peregrina*. A cleric condemned to receiving Holy Communion in the manner of *communio peregrina* was not excluded from the clerical state, but by virtue of penance he was granted the rights of a pilgrim cleric – *clerici peregrini*. Those clerics, being unknown and not having <litteris formatis>, that is <testimonialibus>, were not admitted to participation in the holy rites." Even though Kober does not explain the meaning of the expression

All who robbed churches and alienated their possessions were anathematized in C. 17 q. 4 c. 5, excluded from the Church and condemned and judged as sacrilegists.[48] Although it is a forged norm,[49] it nevertheless provides evidence of how severely those who forged legal norms in the mid-9th century wanted to punish this crime. It reflected the whole reformist trend regarding the defence of the Church against secular influences. The same penalty was to be inflicted on perpetrators and "consentientes," which was justified as follows: "quia non solum qui faciunt rei iudicantur, sed etiam qui facientibus consentiunt. Par enim pena et agentes et consentientes conprehendit."[50] It constitutes important evidence of the existence of such awareness in the doctrine of ecclesiastical penal law that those consenting to a crime are the same perpetrators as those who commit it and that the same penalty is imposed on those who perpetrate a crime and those who

communio peregrina, but only *communio laica*, it can be supposed that priests were forbidden to offer the most holy Eucharistic sacrifice because they did not have *litterae formatae* and received Holy Communion under both kinds, outside the chancel together with lay people. F. Kober, *Die Deposition und Degradation*, p. 56ff. understands *communio laica* as Holy Communion under one kind, as the Body of Christ without the Blood of Christ, received by lay people outside the chancel, since priests and Levites received Holy Communion at the altar, while the clergy in minor orders received it in the choir and common people – outside the choir; this order was prescribed at the synod of Toledo, Conc. Tolet. IV a. 633, c. 18 "[...] corporis et sanguinis Domini sacramentum sumatur, eo videlicet ordine, ut Sacerdos et Levita ante altare communicent, in choro clerus, extra chorum populus;" at the synod of Braga lay people were prohibited from receiving Holy Communion at the altar, Conc. Brac. I, a. 561, c. 13 "intra sanctuarium altaris ingredi ad communicandum non liceat laicis, viris vel mulieribus, nisi tantum clericis." Conc. Turon. a. 567, c. 4, CCL 148A, p. 178 "Ad orandum et communicandum laicis et foeminis, sicut mos est, pateant sancta sanctorum." Kober cited Belarmine's interpretation, who explained that when a cleric was degraded, he received Holy Communion not under both kinds as priests, but "wie die Laien unter einer Gestalt." At the same time, he emphasizes that in the primitive Church lay people also received Holy Communion under both kinds when the circumstances did not make it possible to receive it under one kind; P. Hinschius, *System*, vol. IV, p. 734, fn. 5, where he has a discussion with the views of various authors and arrives at the conlusion that *communio peregrina* is a lighter penalty than deposition, it does not constitute a temporary deprivation of office, suspension or suspension depriving of a benefice, or a milder form of excommunication, but it is a milder form of deposition making it possible for a cleric to be readmitted to the clerical state with all its rights and to regain his former office. P. Hinschius, *System*, vol. IV, p. 734 claims that this penalty was applied in the 6th century and later.

[48] C. 17 q. 4 c. 5 "a liminibus eiusdem matris ecclesiae anathematizamus, apostolica auctoritate pellimus, dampnamus atque sacrilegos esse iudicamus."

[49] P. Hinschius, *Decretales*, p. 179; Jaffé -Wattenbach, † 123 (XCIII) indicates that in this letter the pope actually anathematized sacrilegists "Sacrilegos anathematizandos esse."

[50] C. 17 q. 4 c. 5.

consent to it. At the same time, this "consent" assumed the form of externally expressed approval of a given crime.[51]

Ioannes Teutonicus wrote a gloss to this canon, where he included an important testimony regarding the fact that the term "anthematizamus"[52] used in the canon was understood by the decretists as excommunication. Excommunication was *latae sententiae* excommunication[53] for "sacrilegi" and "dilapidatores,"[54] that is those who squandered ecclesiastical property. It is proved by the expression "ipso iure excommunicati" used in the text of the gloss. That the perpetrator of *sacrilegium* incurred excommunication "ipso iure" was confirmed in the further part of the gloss, where he referred to the type of *sacrilegium* which was committed by using violence against a cleric. He used there the expression "quod quoque violentiam fecit iure tali sit excommunicatus tunc dicerem quod statim efficet excommunicatus sacrilegus." Excommunication was thus inflicted "immediately" (statim). In the case of desecrating a church, *sacrilegi* were excommunicated "de sententia." Also in the case when ecclesiastical property was illegitimately granted, excommunication was imposed by a bishop's sentence as a *ferendae sententiae* penalty, which the decretist expressed in the gloss with the words "fert episcopus ecclesiasticam sententiam excommunicatis." It thus ought to be stated that excommunication was inflicted in various ways, depending on the type of *sacrilegium*. It was imposed as a *ferendae sententiae* and *latae sententiae* penalty.

5.1.2. Excommunication

Excommunication as the most frequent penalty, depriving one of participation with the faithful, underwent only minor modifications in the period from the beginning of the Church up to Gratian's *Decretum*. In the first centuries of the Church it was "the unique, indivisible and heaviest penalty."[55] It is proved by the precept issued in 222 by Pope Callixtus I (217-222), which Gratian also included in the *Decretum*, in which he prohibited any contact

[51] P. Hinschius, *System*, vol. V, p. 937, fn. 4.

[52] C. 17 q. 4 c. 5.

[53] LDG, f. 177 r., the gloss ad *omnes*: "hic quod sacrilegi et dilapidatores sint ipso iure excommunicati."

[54] By this term Ioannes Teutonicus meant those who illegitimately alienated ecclesiastical possessions, which was expressed in the canon by the words "suarum facultatum alienatores."

[55] M. Myrcha, *Ekskomunika*, "Polonia Sacra" 9 (1957), no. 4, p. 199; E. Vodola, *Excommunication*, p. 191.

with the excommunicated in spiritual and temporal matters. Those who did it knowing that they were excommunicated were to be punished by excommunication themselves.[56] Also in the subsequent centuries excommunication was considered the heaviest criminal sanction. When the excommunicated person did not reform, they should be punished by anathema. And if they also later committed the heaviest crimes they should be "given to secular authorities to be condemned to banishment or punished by another legal criminal sanction."[57] In the 4th century there appeared different kinds of excommunication depending on what goods were withdrawn by this penalty and whether they were withdrawn completely or partially.[58] Pope Sylvester issued a decree in 324, which determined kinds of excommunication and degrees in which they could be toughened. It was supposed to concern grave crimes whose perpetrator refused to reform. The pope required that a warning be pronounced before inflicting excommunication. The perpetrator was allowed to use spiritual goods for seven days, after which he was prohibited from entering a church and participating in the rites for seven days. During another two days they were not allowed to participate in the peace and community of the holy Church.[59] After another two days they were to be deported, and after one more day they were to be punished by "the sword of anathema."[60] In a similar way, Pope Gregory the Great (590-604) in the letter to Bishop Venantius ordered that it should be forbidden to administer Holy Communion to the perpetrator of a crime. They were to do penance and

[56] C. 11 q. 3 c. 17. Jaffé -Wattenbach, † 86 (LXX). It is a forged legal norm, see P. Hinschius, *Decretales*, c. 10, p. 138. E. Vodola, *Excommunication*, p. 16 claims that the prohibition of contact between both lay people and clerics and the excommunicated had been in force "since at least the 3rd century."

[57] It concerned the decision of Pope Celestine III (1191-1198) with reference to the clergy. M. Myrcha, *Ekskomunika*, "Polonia Sacra" 9 (1957), no. 4, p. 201. Also E. Vodola, *Excommunication*, p. 13.

[58] Ibid.

[59] Ibid., p. 202, M. Myrcha understands the expression "a pace et communione sanctae Ecclesiae sint suspensi" as the prohibition of administering Holy Communion to criminals, which does not seem completely right in this case. It appears that they are deprived of participation in the community of the faithful, and consequently also deprived of receiving Holy Communion. The word *communio*, which often appears in the texts of the old canon law, causes semantic difficulties in many cases. The translators of the synodical canons in A. Baron, H. Pietras, *Acta Synodalia*, vol. I, p. 50, fn. A, leave the word to the reader to interpret, translating it into Polish as *komunia*, without resolving whether it refers to Holy Communion or the community of Christians.

[60] The origin of this decree is uncertain, see Ae. Friedberg, *CorpIC*, Pars I, col. 545-546, fn. 6; Jaffé -Wattenbach, † 180 (CXXXVII); C. 5 q. 2 c. 2.

remain excommunicated for their whole life, being only allowed to receive Holy Communion as Viaticum at the moment of death.[61]

Nicholas the Great (858-867) also prescribed that those who abused and killed clerics should be punished in a similar way.[62] Thus, excommunication meant that it was forbidden to enter a church, take part in the rites and receive Holy Communion. In Gratian's *Decretum* there are other sources pointing to the kinds of excommunication, such as suspending a cleric from his office,[63] deposing a cleric and ordering him to do penance among lay people,[64] deposing a cleric with the possibility of receiving Holy Communion as a layperson[65] and excluding a bishop from participation with other bishops while allowing him to have contacts with the faithful from his diocese.[66] These partial excommunications, however, did not exclude the kind of excommunication which forbade all participation with the faitful. It always constituted the heaviest criminal sanction of ecclesiastical law,[67] as attested by the source texts included in Gratian's *Decretum*.[68]

M. Myrcha claims that in cases where the collections before the Decretals of Gregory IX contrast anathema and excommunication, it should be understood that anathema means major excommunication, while excommunication – minor excommunication.[69] He maintains, however, that until the 11th century ecclesiastical legislation imposed a *latae sententiae* sanction in the case of major excommunication, and any communication with the excommunicated person also involved incurring major excommunication.[70]

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[61] Jaffé -Wattenbach, 1321 (956), the letter of September D. 50 c. 10.

[62] Jaffé -Wattenbach, 2866 (2169), the date of the letter is uncertain, it is assumed to have been written between 861 and 867; see Ae. Friedberg, *CorpIC*, Pars I, col. 821-822, fn. 231; C. 17 q. 4 c. 23.

[63] D. 18 c. 15 "si qui episcopi uel presbyteri uel diaconi inuenti fuerint in offensa secundum rationem excommunicentur."

[64] Conc. Neoces., a. 314, c. 1, the Greek text with the Polish translation, see A. Baron, H. Pietras, *Acta Synodalia*, vol. I, p. 75; D. 28 c. 9 "extra ecclesiam abici et ad poenitentiam inter laicos redigi oportet."

[65] Conc. Agat., a. 506, c. 50, CCL 148, p. 225; D. 50 c. 7 "ab officii honore depositus in monasterium retrudatur, et ibi quamdiu uixerit laicam tantummodo communionem accipiat."

[66] D. 34 c. 1 episcpous "a uestro collegio excommunicatus abscedat."

[67] M. Myrcha, *Ekskomunika*, "Polonia Sacra" 9 (1957), no. 4, p. 204.

[68] C. 11 q. 3 c. 107; C. 24 q. 3 c. 15, 17; C. 11 q. 3 c. 33; D. 90 c. 12; D. 32 c. 6; D. 81 c. 8; C. 2 q. 1 c. 17; C. 23 q. 4 c. 30.

[69] M. Myrcha, *Ekskomunika*, "Polonia Sacra" 9 (1957), no. 4, p. 188. In this way also P. Hinschius, *System*, vol. V, p. 7; F. X. Wernz-P. Vidal, *Ius Canonicum*, vol. VII, p. 294.

[70] M. Myrcha, *Ekskomunika*, "Prawo Kanoniczne" 1 (1958), no. 1-2, p. 110; C. 11 q. 3 c. 28 "Si quis frater aut palam, aut absconse cum excommunicato fuerit locutus, aut iunctus communione, statim cum eo excommunicationis contrahat penam."

However, it ought to be remembered that the division into minor and major excommunication dates from the Decretals of Gregory IX. Until the 12th century all excommunicates had had to be avoided, since the law at the time had not yet distinguished between those with whom communication was forbidden (vitandi) and those with whom it was permitted (tolerati).[71] Excommunication as a censure depends on the will of the perpetrator. If they are willing to reform, they can always be reconciled with the Church.[72] Excommunication was instituted by the Church.[73] It does not exclude from the Church.[74] Minor excommunication (since the Decretals) forbids the reception of sacraments, while major excommunication results in the exclusion from participation with the faithful. Minor excommunication was a *latae sententiae* penalty.[75] It was an indivisible penalty and the excommunicated person had to receive all the effects, as it could not be inflicted in parts.[76] All people were punished except for the pope.[77] The effect of excommunication was that they were denied Christian burial. This decision was issued by Pope Leo the Great (440-461), and Gratian included it in the *Decretum* in C. 24 q. 2 c. 1.[78] Neither could the excommunicated person excommunicate anybody. This decision was delivered by Pope Alexander II (1061-1073) in the letter to Bishop Valerian entitled "Audiuimus."[79]

Excommunication was characterized by the deprivation of all ecclesiastical rights, and it especially deprived one of the right to participate in the Eucharist[80] and receive holy sacraments.[81] The element that tended to undergo modifications was the relationship between the excommunicated person and other faithful. The faithful were always forbidden to have contacts with excommunicates[82] both in strictly religious and other matters. It

[71] M. Myrcha, *Ekskomunika*, "Polonia Sacra" 10 (1958), no. 1, p. 81.

[72] M. Myrcha, *Ekskomunika*, "Polonia Sacra" 9 (1957), no. 4, p. 191.

[73] Ibid., p. 194.

[74] Ibid., p. 195; J. Syryjczyk, *Sankcje w Kościele*, p. 215; the same author, *Kara ekskomuniki a pełna wspólnota kościelna według Kodeksu Prawa Kanonicznego z 1983 r.*, "Prawo Kanoniczne" 33 (1990), no. 3-4, pp. 186, 194.

[75] Ibid., p. 206.

[76] Ibid., p. 208; J. Syryjczyk, *Sankcje w Kościele*, p. 214.

[77] Ibid., p. 210; P. Hinschius, *System*, vol. V, pp. 75, 277, 300, 327ff.

[78] C. 24 q. 2 c. 1; M. Myrcha, *Ekskomunika*, "Polonia Sacra" 10 (1958), no. 2, pp. 51-52.

[79] Jaffé -Wattenbach, 4624 (3442); M. Myrcha, *Ekskomunika*, "Polonia Sacra" 10 (1958), no. 1, p. 135.

[80] E. Vodola, *Excommunication*, p. 8.

[81] P. Hinschius, *System*, vol. V, p. 3.

[82] C. 22 q. 1 c. 17 "ab ecclesia repellendus est, siue a communione et consortio fidelium, ut nullus cum eo comedat, neque bibat, neque in sua domo eum recipiat." It is an excerpt from the

had to do with private life, and the situations in which contacts were prohibited were enumerated in the following verse: "os, orare, vale, communio, mensa."[83] This law was moderated by Pope Gregory VII (1073-1085), whose decision was adopted by Gratian in the *Decretum* in C. 11 q. 3 c. 103.

Stephen in the gloss ad c. 11 q. 3 C. 3 discusses various kinds of excommunication. He defines excommunication as "the rejection from the Church,"[84] and this expression should be understood as the exclusion from participation with the faithful and not as the deprivation of the internal relationship with the mystical Body of Christ, which is the Church. Another kind of excommunication was the one that prohibited receiving Holy Communion.[85] At the same time, both effects of excommunication most often occurred together. Three situations were possible at the time: the first one, when the faithful could be excommunicated "before God and before the Church," the second one, when they were excommunicated "before God, but not before the Church" and the third one, when they were excommunicated "before the Church, but not before God."

The one "who gravely sinned committing a crime is immediately considered excommunicated by God, because they are not a member of His Body, which is the Church, although they were not separated from the Church by its sentence." This kind of excommunication was a *latae sententiae* penalty, because by the very fact of committing an external penal crime, which simultaneously constituted a mortal sin, they separated themselves from God, and consequently from participation with the faithful who remained in the relationship with God. Yet, the person who committed a crime was not deprived of the possibility of being reconciled with God and the Church.

The third kind of excommunication was, as explained by Stephen, when someone "is excommunicated by the Church, and not by God, and they have unjustly and without any reason received the sentence of excommunication." This kind of excommunication was a *ferendae sententiae* penalty. Stephen did not decide whether the excommunicated person was to be obedient to the unfair sentence of an ecclesiastical judge. Gratian, for his part,

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letter of Pope Eutychian (274-283), Jaffé -Wattenbach, † 150 (CVIII); Ae. Friedberg, *CorpIC*, Pars I, col. 865-866, Notationes Correctorum includes the information that among capitula Theodulphi, c. 26, there is such a text in the old manuscript in Rome.

[83] M. Myrcha, *Ekskomunika*, "Prawo Kanoniczne" 1 (1958), no. 1-2, pp. 100-101; P. Hinschius, *System*, vol. V, pp. 4-5.

[84] *Summa Stephani*, ed. Schulte, ad c. 11 q. 3 C. 3, p. 194 "extra communionem ecclesiae depulsio," other manuscripts use the term "repulsio," that is the rejection from the Church or banishment, see J. Sondel, op. cit., s. v. *depulsio*, p. 272.

[85] Ibid. "vel a perceptione corporis et sanguinis domini prohibitio."

expressed the view in d. p. c. 77 q. 3 C. 11 that even though the crime for which a bishop pronounced a sentence had not been committed, one ought to obey it, because the person concerned was considered guilty of committing another crime before God. This view was objected to by Ioannes Teutonicus.[86]

Subsequently, Stephen defined the position of the excommunicated person from the perspective of both the effects and means. He stated that "to be excommunicated is to be deprived of Holy Communion and participation with the faithful."[87] One can be excommunicated "in their conscience, by penance and by a sentence. In their conscience, when someone considers themselves unworthy due to their crime and abstains from receiving Holy Communion or entering a church. By penance, when somebody does penance on account of the gravity of their crime and the one doing penance is forbidden to receive Holy Communion. By a sentence, when someone persists in committing their crime and is separated from the community of the faithful." In reference to the last type, Stephen claimed that it could consist of two kinds and he distinguished between excommunication and anathema. At the same time, he defined ordinary excommunication as the one "when someone is forbidden to enter a church and receive holy sacraments, but is not forbidden to have contacts with the faithful and eat food with them." Ordinary excommunication meant that those who were punished by it were in some provinces called "vetiti" and in other provinces – "interdicti." The word "vetiti," used in some ecclesiastical provinces, should be understood as referring to those who were prohibited from entering a church and receiving sacraments. In other provinces they were called as "interdicti," which had the same meaning. Stephen, as the witness to the canonical doctrine of the time, indicated in his gloss that excommunication was then distinguished in that way and those were the names for the ones who were punished. It is highlighted by the fact that he uses the word "dicitur" – it is said, it is called. The second type of excommunication was anathema, and this name was used to refer to the heavier sentence of excommunication, as discussed above.

Thus, in the consciousness of the decretists there existed the distinction between these two types of excommunication. Nevertheless, as rightly claimed by both P. Hinschius and M. Myrcha, it always was excommunication. There was ordinary excommunication, called "excommunicatio sim-

[86] LDG, f. 142 v., Ioannes Teutonicus, *Glossa ordinaria*, ad v. pro sacrilegio.

[87] *Summa Stephani*, ad c. 11 q. 3 C. 3, p. 195: "Excommunicari autem, i. e. a communione corporis et sanguinis domini et a fraterna societate separari."

plex," and "anathema," which constituted the heavier sentence of excommunication. The effects of the former pertained to the prohibition of entering a church and receiving sacraments. The effects of the latter concerned, apart from the above-mentioned, the separation from the Church and participation with the faithful as well as the prohibition of relations between the faithful and the excommunicated. It is rightly maintained by P. Hinschius and M. Myrcha that there were no significant differences between anathema and excommunication. However, it cannot be claimed that there were none. As it is proved by Stephen's commentary, some differences existed, especially with regard to the form of the infliction of a given penalty and its effects. Kober,[88] it seems, treated the texts pertaining to anathema *maranatha* and *perpetuum*[89] too literally, claiming that they mean "the permanent exclusion from the Church without any possibility of being reconciled with God and the Church."[90]

The penalty of excommunication understood in this way was inflicted for, as it was said, the gravest crimes. Thus, it ought to prompt the question of whether it also pertained to *sacrilegium* and if so, what types of *sacrilegium* this penalty was imposed for. The analysis of the canons of Gratian's *Decretum* regarding the crime of *sacrilegium* will make it possible to answer this question. However, we should first cite the opinion of E. Vodola "Until the pontificate of Alexander III (1159-81) – that is for about three decades - the *Decretum* governed the legal status of excommunicates,"[91] which proves the considerable significance of the *Decretum* to the jurisprudence of the time.

In C. 17 q. 4 c. 10 Gratian included as the *auctoritas* the letter of Pope Gelasius,[92] in which he confirmed the rightness of the decision of Bishop Epiphanius. He punished two townspeople from Benevento by the penalty of excommunication for breaking the right of asylum. The penalty concerned the prohibition of receiving Holy Communion, which was expressed by the words "merito indignos esse sacra communione."[93] Moreover, the pope wrote that if the crime was committed, the criminals, by his precept, should be forbidden entry to churches of all parishes. The penalty

[88] F. Kober, *Kirchenbann*, p. 41.

[89] P. Hinschius, *System*, vol. V, p. 7, fn. 6.

[90] F. Kober, *Kirchenbann*, p. 41 "Betroffene für immer aus der Kirche ausgestossen wird, ohne Hoffnung, je wieder aufgenommen zu werden."

[91] E. Vodola, *Excommunication*, pp. 78-79.

[92] Ae. Friedberg, *CorpIC*, Pars I, col. 817-818, fn. 89, the date of the letter is not known.

[93] C. 17 q. 4 c. 10.

was to be expiatory in character, or "vindictive"[94] in the wording of contemporary law, which was expressly stated in the text with the words: "merito consequantur pro facti sui qualitate uindictam."[95] Its purpose was reparation for the crime committed. However, this was not the only purpose of this penalty, as the pope emphasized in the letter that it was also supposed to discourage others from this type of crime, which he expressed with the words: "a tali presumptione ultionis istius timore reuocentur." The main purpose of this penalty was "to restore the disrupted social order,"[96] and the secondary purpose was to discourage others from committing the crime of *sacrilegium*, which was in that case manifested in breaking the right of asylum. This type of excommunication thus encompassed the prohibition of receiving Holy Communion and entering all churches in the dioceses to whose bishops the pope's letter was addressed. This prohibition, then, did not pertain to the whole Church, but only to the dioceses to whose bishops the letter was addressed. This penalty was *ferendae sententiae*.

In d. p. c. 20 q. 4 C. 17 Gratian stated that *sacrilegium* itself (ipsum sacrilegium) includes two kinds of penalties, a fine and excommunication.[97] A fine should be paid to those who have the right to present a libellus. In this case, this right would belong to bishops, abbots and those who are immediately concerned with an action for *sacrilegium*.[98] In the case of laying violent hands on a cleric, it pertained to those who were hurt. In the case of breaking the right of asylum, it concerned those who administered churches in which the right of asylum was broken.

What kind of excommunication for *sacrilegium* could be inflicted on a criminal was indicated in the letter of Pope John VIII (872-882), included in C. 17 q. 4 c. 21. The pope enumerated three forms of committing *sacrilegium*. The first one, when someone desecrated a church. The second one, when someone took something from a church without the permission of the administrator of this church. The third one, when someone hurt "ecclesiastical persons." The text ordered a certain procedure for inflicting penalties. The perpetrator was to be warned at a synod, which was expressed as

[94] The definitions of vindictive penalties formulated by Lega and Wernz are provided by M. Myrcha, *Kara*, p. 114, where the author also discusses these penalties in greater detail.

[95] C. 17 q. 4 c. 10.

[96] M. Myrcha, *Kara*, p. 114.

[97] Dictum p. c. 20 q. 4 C. 17 "Porro ipsum sacrilegium duplicem continet penam, pecuniariam uidelicet et excommunicationis."

[98] C. 17 q. 4 c. 21 "episcopis uel abbatibus, siue personis, ad quas querimonia sacrilegii iuste pertinuerit."

"in conuentu ammonitus."[99] The law also obliged them to make reparation for the crime committed. The expression "legitime satisfaciat" proves that it was a lawful obligation and not whatever reparation. If they did not do it, they were to be excommunicated "sciat se conmunione fore priuatum." Parts of the texts of this *auctoritas* come from the letter of Pope John VIII from the synods of 877 and 878,[100] where a fine of "thirty pounds of silver of the highest purity"[101] was levied for *sacrilegium*. The perpetrator of *sacrilegium* was thus to pay this amount of money to people who had the right to bring an action by way of reparation for the crime committed. If this person did not do it, they were to be excommunicated. In the case of this type of *sacrilegium*, the penalty had a three-stage structure: a warning, financial reparation and excommunication. Excommunication in this case was to be a kind of ordinary excommunication depriving the punished person of participation with the faithful.

Gratian holds the view that everyone should know the law regarding ecclesiastical property. In order to confirm this position, he adopted the text of the decision of Pope Boniface I (418-422) in C. 12 q. 2 c. 3. The pope stated that everyone was required to know that everything that had been consecrated to God came under the administration of priests and nobody was allowed to touch ecclesiastical property without their decision.[102] Consequently, anybody who takes, robs or damages any goods belonging to the Church commits the crime of *sacrilegium*. Since everybody had to know that law, no perpetrator could excuse themselves from the guilt and responsibility for the transgression they committed. They were to be considered as sacrilegists until such time as they reformed and made reparation to the Church. The law ordered that the perpetrator should be treated as a sacrilegist. However, the legal texts do not contain any precise definition of the legal status of a sacrilegist. It is difficult to definitively establish whether the law forbade a sacrilegist anything or it was a kind of stigmatizing the perpetrator in the community of the faithful. Certainly after committing the unlawful act this person was to be pronounced or considered as a sacrilegist, which the text expressed with the following words: "ut sacrilegus iudicetur." During that time, they were obliged to repair the damage done

[99] C. 17 q. 4 c. 21.

[100] Ae. Friedberg, *CorpIC*, Pars I, col. 819-820, fn. 202 indicates that one part of the text is the letter of Pope John VIII, included among the canons of Conc. Trecass. of 18th August 878 (Jaffé -Wattenbach, 3180 (2398), while another part comes from Conc. Ravenn. of 877, c. 5.

[101] C. 17 q. 4 c. 21 "triginta libras examinati argenti purissimi conponat."

[102] C. 12 q. 2 c. 3 "Nulli liceat ignorare, omne, quod Domino consecratur [...[ad ius pertinet sacerdotum."

to the Church as well as make satisfaction for it. If, however, they did not want to make amends for the damage they were to be excommunicated. Ecclesiastical law thus required reparation for the damage, and excommunication was the criminal sanction for those who did not withdraw from contumacy and did not want to repair the damage done. Excommunication in this case performed the function of a censure, a medicinal penalty, which was intended to break the contumacy of the perpetrator of *sacrilegium* and to force them to indemnify for the damage and make reparation.

In C. 27 q. 1 c. 17 Gratian included as the *auctoritas* can. 23 of the synod of Tribur of 895. It forbade marriage with women who had been consecrated to God and had been covered with a holy veil in the solemn act of consecration. Such relationships were called "incesta federa sacrilegaque." This crime was punished by the deprivation of the possibility of receiving Holy Communion and public penance. Those doing penance were however allowed to receive Viaticum when they departed this life. Nevertheless, if they performed public penance and it was accepted, they could be readmitted to the community. These elements of the penalty conclusively prove that it was excommunication. The law, however, did not specify the duration of this excommunication. It can be supposed that it was a confidential decision taken by a bishop.

The penalty of excommunication could also be inflicted for breaking the vow of celibacy. This legal norm was adopted at the second synod of Toledo of 527. Gratian included it in the *Decretum* in D. 28 c. 5. Those who prepared for the clerical state were, at the age of eighteen, to choose to live in marriage or take the vow of chastity. Those who took the vow of chastity and were twenty years of age were to be ordained as subdeacons. After 5 years, if they did not break the vow, they were to be ordained to the diaconate. If, however, they broke the vow of chastity at a later time and attempted to conclude marriage or cohabited with someone in a secret way, they were to be excommunicated as sacrilegists, which was expressed in the canon with the words "ut sacrilegii rei ab ecclesia habeantur extranet."[103] Excommunication for this *sacrilegium* would be a *latae sententiae* penalty completely depriving one of participation with the faithful. The text does not mention that the penalty is inflicted by an ecclesiastical judge. At that time the division into minor and major excommunication had not existed yet, as it dates from the Decretals of Gregory IX.[104]

[103] D. 28 c. 5.

[104] M. Myrcha, *Ekskomunika*, "Polonia Sacra" 9 (1957), no. 4, p. 206.

In d. p. c. 20 q. 4 C. 17 Gratian stated that "ipsum sacrilegium duplicem continet penam, pecuniariam uidelicet et excommunicationis." Thus, the penalty for laying violent hands on a cleric, treated as the crime of *sacrilegium*, was of two kinds. The one who beat a cleric was to pay money to the one who had the right to bring an action for *sacrilegium*, and that was the cleric concerned. Moreover, the perpetrator incurred the penalty of excommunication which deprived them of participation with the faithful. In c. 21 q. 4 C. 17, which as the *auctoritas* was to confirm Gratian's view, and which is the letter[105] of Pope John VIII (872-882), it was stated that if someone desecrated a church, took anything from this church or harmed "ecclesiasticis persons,"[106] that person was to receive a warning and make reparation as prescribed by the law. In the case of theft, the law required the fourfold restitution. If they caused damage in a church, they were obliged, as can be supposed, to repair it. As "reus sacrilegii," they were to pay thirty pounds of silver of the highest purity to a bishop, abbot or those who had the right to bring an action for this *sacrilegium*. If they did not do it, they were to be excommunicated, which the pope expressed with the words "sciat se conmunione fore priuatum." The sanction of excommunication which was incurred by the perpetrator was to be preceded by a warning, and the threat of excommunication was supposed to break the contumacy of the criminal in case they did not want to repair the damage caused. If they remained contumacious, and after a second and third warning before a bishop still refused to make reparation for the damage done, they were to be considered as a sacrilegist by everyone and be prohibited from communicating with the faithful. Excommunication, as the heaviest penalty,[107] was inflicted after the exhaustion of all measures of ecclesiastical law which were intended to break the contumacy of the criminal and induce them to make reparation for the damage caused.

Gratian in d. p. c. 77 q. 3 C. 11 presented what was considered by the decretists as the erroneous[108] line of reasoning. He stated that if a sentence pronounced was wrong "ex ordine,"[109] as the person at issue had not committed the crime for which they were condemned, that sentence should

[105] Only the initial part of the *auctoritas* comes from the pope's letter, up to § 1, the authors of the text § 1 and § 2 are not known, § 3 is the text of c. 5 of the synod of Ravenna of 877, see Ae. Friedberg, *CorpIC*, Pars I, col. 819-820, fn. 202.

[106] C. 17 q. 4 c. 21.

[107] M. Myrcha, *Ekskomunika*, "Polonia Sacra" 9 (1957), no. 4, p. 200.

[108] LDG, f. 142 v., Ioannes Teutonicus, *Glossa ordinaria*, ad v. pro sacrilegio "Gratianus male intellexit."

[109] Dictum p. c. 77 q. 3 C. 11.

nevertheless be accepted. He argued that in spite of the fact that the person who received an unfair sentence had not committed the crime of *sacrilegium*, for which they were condemned, they had already been excommunicated before God for another crime which they had really committed, that is to say for adultery. The situation was that the *ferendae sententiae* sentence, which was wrong "ex ordine," was to be accepted by that person, as the *latae sententiae* sentence for adultery had earlier, obviously at the moment of committing the crime, "been pronounced." It is not possible to condemn someone for a crime they have not committed. By doing so, one violates not only the legal order adopted by canon law, but also natural law, because one condemns an innocent person.[110]

As a result of one's open separation from the community of the Church considered as *sacrilegium*, the person concerned has no participation with the faithful. It used to be expressed as follows: "Neque [...] ad ecclesiam pertinent qui separationis aperto sacrilegio manifesti sunt."[111] This is how it was understood by Gratian when he formulated the rubric using the words "Et qui aperto sacrilegio, et qui peruersa uita fidelibus non sociatur, ad ecclesiam non pertinere probatur." As indicated by the decretists, the expressions "de segregatis ab ecclesia" and "separationis aperto sacrilegio," used in the *auctoritas*, refer to heretics. Their relations with the Church were presented as equal to the situation of such persons who externally belonged to the Church, but were really separated from it owing to their bad lifestyle, which the text expressed with the words "qui in eius unitate corporaliter mixti per pessimam uitam separantur." Those were called "ypocrite" by the decretists. The expression "ad ecclesiam non pertinere" should be understood in such a way that they had no participation with the faithful, and not that they were excluded from the Church.[112] Excommunication "never prohibits one from being reconciled with the Church."[113] It was aptly expressed by Gratian when he wrote in the rubric "fidelibus non sociantur."[114]

The penal sanction of excommunication was established at the fourth synod of Toledo in 633 for those who would allow Jews to hold public offices. Gratian adopted this canon as the *auctoritas* in C. 17 q. 4 c. 31. The way of inflicting excommunication, expressed with the words "Si quis autem

[110] Cf. M. Myrcha, *Kara*, pp. 242-245. For more on fair and unfair punishment, see F. X. Wernz-P. Vidal, op. cit., vol. VII, pp. 189-192.

[111] C. 24 q. 3 c. 8.

[112] Cf. M. Myrcha, *Ekskomunika*, "Polonia Sacra" 9 (1957), no. 4, p. 195.

[113] M. Myrcha, *Ekskomunika*, "Polonia Sacra" 9 (1957), no. 4, p. 191.

[114] C. 24 q. 3 c. 8.

hoc permiserit, uelut in sacrilegum excommunicatio proferatur,"[115] points to a *ferendae sententiae* penalty. The subject of this type of *sacrilegium* could be, according to the wording of the canon, provincial judges and priests (iudices prouinciarum cum sacerdotibus).[116] This kind of excommunication was to be inflicted by an ecclesiastical judge, who was usually a bishop.

No bishop was allowed to excommunicate anybody who insulted him. This prohibition is included by Gratian in d. p. c. 26 q. 4 C. 23, where he referred to the decision of Pope Gregory concerning Bishop Januarius.[117] The pope mentioned in his letter Isidore's complaints, who had been wrongfully excommunicated, and warned him against taking his revenge for his own insult by inflicting excommunication, in which case he would have to be punished himself.[118] Ecclesiastical law strictly prohibited bishops from using the sanction of excommunication to take personal revenge, by which it was emphasized that it could be employed in public law crimes. In this case, the principle "Nemo iudex in sua causa"[119] was applicable.

Anathema and excommunication were the most frequent penalties for the crime of *sacrilegium*. It followed from the fact that *sacrilegium* was considered by ecclesiastical law as one of the gravest crimes, and thus it was punishable by the most severe criminal sanction.

In the case of simony, heresy and *sacrilegium*, excommunication was a penalty binding also after one's death, and one could also be absolved from it after one's demise.[120] Excommunication did not extend to one's offspring.[121] The law prescribed personal responsibility.

5.1.3. Interdict

The penalty of interdict[122] belongs to the category of censures. In Gratian's *Decretum*, however, it is not treated as a censure, but simply as a pen-

[115] C. 17 q. 4 c. 31. J. Sondel, op. cit., s. v. *profero* – pronounce, announce, in the expression *proferre sententiam* – pronounce a sentence, p. 792.

[116] C. 17 q. 4 c. 31.

[117] It is letter 49 written in 592, see Ae. Friedberg, *CorpIC*, Pars I, col. 911-912, fn. 466; Jaffé -Wattenbach, 1201 (836).

[118] C. 23 q. 4 c. 27 "Nam si tale aliquid feceris, in te scias postea esse uindicandum."

[119] K. Burczak, A. Dębiński, M. Jońca, op. cit., p. 114 with a commentary.

[120] *Summa magistri Rolandi*, ed. Thaner, pp. 101-102; R. Maceratini, *Ricerche*, p. 376.

[121] Paucapalea, *Summa*, ed. Schulte, ad C. 24 q. 3, p. 105; Maceratini, *Ricerche*, p. 366.

[122] M. Myrcha, *Interdykt*, "Prawo Kanoniczne" 2 (1959), no. 1-2, pp. 73-296; P. Hinschius, *System*, vol. V, pp. 9-32; F. X. Wernz-P. Vidal, op. cit., vol. V, pp. 319-345; F. Kober, *Das Interdikt*,

alty. The subject of a censure, including the penalty of interdict, can only be a baptized person,[123] both a cleric and a layperson.[124] The personal interdict is similar to excommunication, but it has milder effects. J. Krukowski defines the interdict, considering its effects, as "partial excommunication."[125] The interdict as a distinct penalty appeared in canonical penal law in the 4th century,[126] and it started to be an independent penalty at the turn of the 12th and 13th centuries.[127] It was also at that time that the interdict was definitely separated from excommunication.[128] The canonists emphasize the fact that the interdict is connected with excommunication, recognizing the difference that excommunication "excludes one from the community of the faithful, while the interdict does not and it only deprives the condemned of certain goods."[129] The name of the penalty of interdict appeared in the 10th century.[130]

It was Pope Gelasius I (492-496) who ordered that the penalty of interdict should be inflicted for committing *sacrilegium*. An excerpt from the letter[131] of the pope to bishops was included by Gratian in the *Decretum*, as the *auctoritas*, in C. 17 q. 4 c. 10. Pope Gelasius classifies breaking the right of asylum as the crime of *sacrilegium*. This crime was committed by two town officials who forcibly took their official away from a church. The pope confirmed the rightness of the penalty inflicted on them by the bishop, which consisted in the prohibition of receiving Holy Communion. It could not be allowed, the pope argued, that the one who did not hesitate to commit

AKKR 21 (1869), pp. 3-45, 291-341; 22 (1869), pp. 3-53; E. Jombart, *Interdit*, in: DDC 5, 30, col. 1464; W. Rees, *Interdikt*, in: *Lexikon des Kirchenrechts*, Freiburg-Basel-Wien 2004, col. 420-421.

[123] M. Myrcha, *Kara*, p. 138.

[124] J. Syryjczyk, *Sankcje w Kościele*, p. 224.

[125] J. Krukowski, *Sankcje w Kościele*, in: *Komentarz*, p. 168.

[126] M. Myrcha, I*nterdykt*, "Prawo kanoniczne" 2 (1959), no. 1-2, p. 83 endorses this view, referring to the decision of Pope Sylvester I (314-335) of 324; however, it is not certain whether the text comes from Pope Sylvester I, see Ae. Friedberg, *CorpIC*, Pars I, col. 545-546, fn. 6, it is contained in C. 5 q. 2 c. 2 "interdicta licentia ecclesiam intrandi et omnia diuina offitia audiendi." The interdict is also dated the 4th century by F. Roberti, *De delictis et poenis*, vol. I, pt. 2, p. 416 "Poena interdicti stricte sumpta iure canonico saec. IV apparet sub specie interdicti personalia." The opinions of the canonists with regard to the time when the penalty of interdict originated are in many cases contradictory; they are cited by M. Myrcha, *Interdykt*, pp. 80-88.

[127] M. Myrcha, *Interdykt*, pp. 80-84; W. Rees, *Interdikt*, col. 420 claims that it had existed as an independent penalty since the 11th century.

[128] M. Myrcha, *Interdykt*, p. 84; F. Roberti, *De delictis et poenis*, vol. I, pt. 2, p. 416.

[129] M. Myrcha, *Interdykt*, p. 76.

[130] J. Krukowski, *Sankcje w Kościele*, in: *Komentarz*, p. 168.

[131] Ae. Friedberg, *CorpIC*, Pars I, col. 817-818, fn. 89, does not provide the precise date of the letter; Jaffé -Wattenbach, 737 (453) includes it among the letters dated 496.

sacrilegium could enter a church to make their requests there. On account of this, the pope ordered bishops to prohibit the two perpetrators of the crime of *sacrilegium* from entering all churches that fell under the jurisdiction of bishops to whom he addressed his letter. The interdict was an expiatory penalty, which was emphasized by the pope himself in the letter: "merito consequantur pro facti sui qualitate uindictam." The pope did not prescribe a prior warning, which is required in the case of censures. Thus, M. Myrcha is right in claiming that "The old canon law did not generally require any special warning in the case of <latae sententiae> censures."[132] The interdict as a *ferendae sententiae* penalty, in this case an expiatory penalty, was not connected with contumacy, which is closely related to a censure. Thus, the penalty of interdict was not a censure in the strict sense of the term at the time, since the essential purpose of censures, that is medicinal penalties, was to bring about the reform of the criminal. In this case, the particular personal interdict,[133] the prohibition of entry to a church, constituted an expiatory penalty for the crime committed, and accordingly was not a censure.[134] It was a kind of "interdictum ab ingressu ecclesiae." It however affected only the jurisdictional territory of those bishops to whom the pope addressed his letter.[135] It constituted a distinct penal measure and since it was partial and particular,[136] it had to be imposed by a special sentence.[137] The legislator did not expect the criminal to reform. The perpetrator of the crime was to make reparation for it. According to the papal precept, the penalty of interdict was supposed to provide general prevention, which was discouraging others from committing this type of *sacrilegium*. The interdict was not the only penalty in this case, as the perpetrators of *sacrilegium* had previously been punished by the penalty of excommunication by the bishop. The fact of combining these two penalties in the 11th century proves that at the time excommunication was not yet separated from the interdict. The pope confirmed that the penalty inflicted on the perpetrators was legitimate and ordered bishops to prohibit the perpetrators from entering churches. The papal precept does not use the word interdict, but the

[132] M. Myrcha, *Kara*, p. 480.

[133] J. Krukowski, *Sankcje w Kościele*, in: *Komentarz*, p. 169; it will be regulated in a different way in the future, where in CIC 1917, can. 2291 1^0 and 2^0 the legislator will not include this kind of interdict as an expiatory penalty. See M. Myrcha, *Interdykt*, p. 76.

[134] M. Myrcha, *Interdykt*, p. 255.

[135] It will be different in the future, see 1917 CIC, can. 2269 § 2 "Interdictum personale sequitur personas ubique [...]."

[136] J. Opieliński, *O cenzurach kościelnych*, Poznań 1894, p. 307.

[137] M. Myrcha, *Interdykt*, p. 256; P. Hinschius, *System*, vol. V, p. 13ff.

expression "ab omnibus parrochiarum uestrarum ecclesiis [...] prohibete." The interdict did not have the clear form of a censure at the time, but it was more an expiatory penalty than a censure. Nevertheless, the supreme legislator of the Church ordered that the existence of guilt was necessary to inflict this penalty, which was expressed by the words "si manifesta reos facit conquestio." It was fully consonant with the doctrine of canonical penal law, which considered the existence of a committed crime, which had to be grave from both subjective and objective perspectives, as the prerequisite for imposing the penalty of interdict.[138] The element which made the interdict resemble a censure was the lack of indication of the duration of the penalty. The pope did not specify in his letter the duration of the prohibition of entering churches. It ought to be assumed that the interdict as an expiatory penalty was in this case to be imposed *in perpetuum*.[139] It can be supposed that the secondary effect of the penalty could also be the reform of criminals. However, the source text does not provide any answer as to whether they were allowed to enter a church in the future.

5.1.4. Suspension

In the sources of the old canon law there is no definition of suspension or a censure,[140] which it is considered to be in contemporary canonical penal law. However, despite the absence of the definition and clearly defined terminology, the penalty did exist.[141] While the penalties of excommunication and interdict could be imposed on clerics and lay people, suspension was a penalty which was inflicted exclusively on clerics. The canonists even unanimously claim that "suspension is a censure specifically intended to punish clerics."[142] The object of suspension is the prohibition of using the power of orders and jurisdiction. The right to inflict suspension as "ius proprium et nativum" was granted to popes and bishops.[143] This law was

[138] M. Myrcha, *Interdykt*, p. 94.

[139] Ibid., p. 75.

[140] M. Myrcha, *Suspensa*, "Prawo Kanoniczne" 10 (1967), no. 1-2, p. 89; F. X. Wernz-P. Vidal, op. cit, vol. VII, p. 346.

[141] P. Hinschius, *System*, vol. V, pp. 66-74; F. X. Wernz-P. Vidal, op. cit., vol. V, pp. 345-346, in fn. 3 both include the remark regarding the erroneous criticism of Kober performed by Hinschius.

[142] M. Myrcha, *Suspensa*, "Prawo Kanoniczne" 10 (1967), no. 1-2, p. 92.

[143] M. Myrcha, *Suspensa*, "Prawo Kanoniczne" 10 (1967), no. 3-4, p. 172.

confirmed by the norms adopted at African synods.[144] At the third synod of Carthage of 397 in can. 8 it was ordered that in the situation when charges were brought against presbyters and deacons a bishop should consider their case together with five neighbouring bishops in the case of a presbyter and with two bishops in the case of a deacon. Cases of the remaining clerics were to be adjudicated and concluded by a bishop alone.[145] However, Gratian claims in his *dictum* that the expression "solus episcopus loci"[146] only means that cases of the clergy were to be adjudicated by the bishop of the place without other bishops, yet with his priests. At the fourth synod of Carthage of 398 in can. 23 it was decided that a bishop should not judge anyone without the presence of his priests.[147] These synodical norms are confirmed by the decisions of popes, who also ordered that cases of the clergy should be adjudicated at synods.[148] Especially Gregory I (590-604) in the letter to John the Defender prescribed that the procedure for judging the clergy be strictly obeyed. He also stated in the letter[149] to Domitian, metropolitan, that nobody could be sentenced without trial and that it was not allowed to disagree with a just sentence.[150]

Also in the forged text[151] attributed to Pope Damasus (366-384) there is the prohibition of judging the accused before their arrival at a synod, so that they could be present to defend themselves. Pope Stephen V (VI) (885-891) ordered Bishop Leo to decide the case of the deacon Aldericus just as "sancti canones sanciunt."[152] The pope prescribed that it should be done "non publico examine, sed coram te, et aliquantis reuerentissimis presbiteris et diaconibus tuae ecclesiae secreto iuramento se purificet." Thus, cases

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[144] Conc. Carth. a. 345-348, c. 11; Conc. Carthag. a. 419, c. 24.

[145] Berv. Hipp. 8. a) (B. F. 51 tit. 17), CCL 149, pp. 35-36 and 331.

[146] Brev. Hipp. 8.

[147] Coll. Hisp. (Conc. Carthag. IV), c. 23 (14) "Vt episcopus nullius causam audiat absque praesentia clericorum suorum, alioquin irrita erit sententia episcopi nisi clericorum suorum praesentia confirmetur." On the difference of opinion between Suarez and Myrcha as to the universal or particular scope of this norm see M. Myrcha, *Suspensa*, "Prawo Kanoniczne" 10 (1967), no. 3-4, p. 174.

[148] M. Myrcha, *Suspensa*, "Prawo Kanoniczne" 10 (1967), no. 3-4, pp. 173 and 175.

[149] Jaffé -Wattenbach, 1528 (1335), the letter was written in September or October 598, Ae. Friedberg, *CorpIC*, Pars I, col. 439-440, fn. 14 dates the letter 600.

[150] C. 2 q. 1 c. 3 "Sicut sine iudicio quemquam nolumus condempnari, ita que iuste difinita sunt nulla patimur excusatione differri."

[151] M. Myrcha does not take this fact into account and treats the text as written by Pope Damasus, whereas it comes from the mid-9th century. M. Myrcha, *Suspensa*, "Prawo Kanoniczne" 10 (1967), no. 3-4, pp. 212.

[152] C. 15 q. 5 c. 1.

of clerics were to be confidentially adjudicated by a court of a bishop together with priests and deacons. At the end of the 9th century universal canon law maintained the form of adjudicating cases of clergmen by a bishop accompanied by priests and deacons. It was a kind of collegial court which strictly adhered to the procedure.

It can be claimed on the basis of the synodical norms that until the end of the 4th century the criminal cases of bishops, presbyters and deacons were decided at synods by collegial courts. Cases of the clergy in minor orders could be adjudicated by bishops of the place together with priests. A sentence pronounced by a bishop alone, without the participation of priests in adjudicating a given case, was invalid. This practice continued as long as into the 7th century, which is attested by the synod of Seville of 619, where it was decided in can. 6 that priests and deacons could not be judged by a bishop himself, but were to be heared at a synod and the sentence was to be passed after an extensive investigation of the case.[153] The penalty of suspension could be inflicted only on clerics,[154] whereas laypersons and monks could be punished by anathema. The penalty of suspension was considered equal to excommunication.[155] The law, however, prohibited the infliction of the penalty of suspension for trivial crimes.[156] If suspension was a censure, its infliction should be preceded by a warning and citation.[157]

If canon law ordered this way of settling litigations and criminal cases concerning clerics, it ought to be asked in what way a cleric who committed the crime of *sacrilegium* was judged. Among the canons pertaining to *sacrilegium* there is one which contains the order to suspend clerics for seeking advice from those who did magic tricks.

Canon law prohibited the clergy from performing magic tricks and seeking soothsayers' advice. This legal norm was adopted at the fourth synod of

[153] C. 15 q. 7 c. 7; see M. Myrcha, *Suspensa*, "Prawo Kanoniczne" 10 (1967), no. 3-4, pp. 174-175.

[154] Conc. Chalced. a. 451, c. 2 "is, cui hoc adtemptanti probatum fuerit, proprii gradus periculo subiacebit [...] Sed sit alienus ea dignitate vel sollicitudine [...] mediator [...] si quidem clericus fuerit, proprio gradu decidat, si vero laicus aut monachus anathematizetur." A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. I, Kraków 2002, pp. 224-225. Even lectors, that is the clergy in minor orders, were suspended, Conc. Hipp. a. 393, c. 2, CCL 149, p. 20 "suspendi eos oportere a lectione."

[155] C. 7 q. 1 c. 29 "Si quis in clero constitutus [...] triennio a communione suspendatur."

[156] Conc. Agat. a. 506, c. 3, CCL 148, pp. 193-194; C. 11 q. 3 c. 8. Conc. Meld. a. 845, c. 56 "Nemo episcoporum quemlibet sine certa et manifesta peccati causa communione priuet ecclesiastica [...]." C. 11 q. 3 c. 41.

[157] M. Myrcha, *Suspensa*, "Prawo Kanoniczne" 10 (1967), no. 3-4, p. 212.

Toledo in 633 as can. 29. In Gratian's *Decretum* it is included in C. 26 q. 5 c. 5. A bishop, presbyter or deacon who sought advice from "haruspices or sorcerers or soothsayers, or even augurs or fortune-tellers, or anyone dealing with similar magic practices" committed the crime of *sacrilegium*. The criminal sanction attached to this norm ordered to suspend such a cleric from the rights and duties of the clerical state and to send him to a monastery where he would perform his penance till the end of his life. In this case, suspension deprived a cleric of "the privilege of office,"[158] so he was not able to enjoy the privileges of the clergy. He in fact became a monk, which is to say that a bishop and presbyter could not perform sacerdotal functions and a deacon was not allowed to carry out diaconal functions. Lifelong penance in a monastery did not presuppose any reform. It was supposed to consititute retribution for, as expressed in the text of the canon, "scelus admissum sacrilegii." It was not a censure in the strict sense, as the legislator did not expect a criminal to reform. Suspension can be called a censure, according to M. Myrcha, if one assumes that at that time "the word *censura* referred to a penalty in the broadest sense of the term."[159] The difference was, however, that this suspension was strictly vindictive in character. The text of the canon does not mention a warning and citation, which were obligatory in the procedure for inflicting a censure.[160] The perpetrator was to "meet retribution"[161] for *sacrilegium*.

5.2. Expiatory Penalties

5.2.1. Deposition and Degradation

Whereas the penalty of anathema and excommunication was inflicted on both clerics and laypersons, the penalty of deposition and degradation pertained only to clerics. These different penalties will be discussed together, as in the period examined in the present study the two kinds of penalties were not rigidly distinguished.[162] At that time, both these names were

[158] C. 26 q. 5 c. 5 "ab honore dignitatis suspensus."
[159] M. Myrcha, *Kara*, p. 125.
[160] M. Myrcha, *Suspensa*, "Prawo Kanoniczne" 10 (1967), no. 3-4, p. 212.
[161] C. 26 q. 5 c. 5 "soluat."
[162] M. Myrcha, *Depozycja i degradacja*, "Prawo Kanoniczne" 2 (1959), no. 3-4, pp. 126, 133.

used interchangeably to denote "one and the same penalty."[163] It was Pope Innocent III (1198-1216) who drew a clear distinction between these penalties.[164] The basic difference was that degradation,[165] contrary to deposition,[166] deprived a cleric of the rights and duties of his state and excluded a given criminal from the clerical state. Deposition deprived one of "offices and ecclesiastical benefits as well as the prerogatives of the clerical state"[167] and it also made them impossible to attain in the future.[168] The penalty of deposition and degradation was used in the Church from the very beginning.[169] It was the most severe penalty inflicted for the gravest crimes committed by clerics.[170] The sanctions of degradation[171] and deposition,[172] invoked interchangeably, were mainly established at synods,[173] and also

[163] F. Kober, *Die Deposition und Degradation*, Tübingen, 1867, p. 130 "eine und dieselbe Strafe."

[164] X, V, 20, 7: "[...] ut clerici, qui falsarii fuerint deprehensi, omnibus officiis et beneficiis ecclesiasticis perpetuo sint privati [...] postquam per ecclesiasticum iudicem fuerint degradati, saeculari potestati tradantur [...] puniendi [...] si clerici fuerint, officiis et beneficiis ecclesiasticis spolientur [...]." P. Hinschius, System, vol. V, p. 571: "so ist doch gerade durch die päpstliche Gesetzgebung Ende des 12. und 13. Jahrhunderts der Unterschied zwischen der Deposition im Sinne des neueren Rechts und der Degradation [...] aufgestellt worden."

[165] On degradation until the 13th century see P. Hinschius, *System*, vol. V, pp. 563-572, on deposition pp. 572-576.

[166] P. Hinschius, *System*, vol. V, p. 572.

[167] M. Myrcha, *Depozycja i degradacja*, "Prawo Kanoniczne" 2 (1959), no. 3-4, pp. 125-126.

[168] F. X. Wernz-P. Vidal, op. cit., vol. VII, p. 393.

[169] *Canones Apostolorum*, c. 69 "Si quis episcopus aut presbyter [...] non ieiunat [...] deponatur" and in many other places, ed. F. X. Funk, *Didascalia et Constitutiones Apostolorum*, p. 585.

[170] M. Myrcha, *Depozycja i degradacja*, "Prawo Kanoniczne" 2 (1959), no. 3-4, p. 125; P. Hinschius, *System*, vol. V, p. 563 "die härteste und schwerste Strafe" (degradation). Crimes which were punished by deposition are presented by F. Kober, *Die Deposition und Degradation*, p. 719ff. K. Nasiłowski, *Zgodność pierwszych dekretystów z opinią Gracjana o władzy kapłańskiej i o sakramentach*, "Prawo Kanoniczne" 31 (1988), no. 3-4, p. 190.

[171] In Gratian's *Decretum degradare* occurs in 18 canons. *Degradatio* does not occur at all.

[172] In Gratian's *Decretum deponere* occurs in 159 canons, while *depositio* – in 19 canons.

[173] Elvira (about 306), can. 51 "si qui sunt in praeteritum ordinati, sine dubio deponantur," A. Baron, H. Pietras, *Acta Synodalia*, vol. I, p. 57; Elvira (about 306), can. 20 "Si quis clericorum detectus fuerit usuras accipere, placuit degradari et abstinere," A. Baron, H. Pietras, *Acta Synodalia*, vol. I, p. 53; Arles (314), can. 4 (13) "ab ordine cleri amoveatur," A. Baron, H. Pietras, *Acta Synodalia*, vol. I, p. 72; Ancyra (314), can. 1 "Presbyteros qui immolaverunt [...] honorem [...] retinere [...] offerre [...] et sermonem ad populum facere, aut aliquibus sacerdotalibus offitiis fungi non liceat [...]," can. 2 "Diacones similiter, qui immolauerunt [...] honorem habere oportet; cessare autem debent ab omni sacro ministerio." D. 50 c. 32. The Greek text with the Polish translation, see A. Baron, H. Pietras, *Acta Synodalia*, vol. I, pp. 62-63. Neocaesarea (314-319), can. 1 "Presbiter si uxorem duxerit, ab ordine illum deponi debre." D. 28 c. 9. Agde (506), can.

Councils.[174] The terminology itself was precise neither in the Greek[175] nor Latin canons, which besides *deponere* and *degradare* also used other terms.[176] This penalty, labelled differently, most often concerned the deprivation of office. However, in the penalty of deposition there were some features distinguishing it from the ordinary deprivation of office. It was the incapacity of the person moved to the secular state to get any ecclesiastical office.[177] The loss of ecclesiastical office did not deprive a cleric of the privileges of the clerical state, did not result in suspension "a divinis" and did not cause the incapacity to get offices and benefices. Apart from total deposition, there also was partial deposition. It deprived one of one's ecclesiastical office, but the punished person remained in the clerical state. He could be transferred to a lower grade. A cleric could be deprived of some rights.[178] The difference between degradation and deposition is also that deposition is a distinct penalty. It was not supposed to be used for actual degradation. It did not exclude one from the clerical state and did not deprive one of

49 "Diacones uel presbyteri [...] Similiter et sacerdotes nihil de rebus ecclesiae sibi commissae [...] emutare alienare praesemant. quod si facere uoluerint, conuincti in concilio et ab honore depositi de suo aliud tantum restituant [...]," CCL 148, p. 225. This text is also in C. 12 q. 2 c. 35. Agde (506), can. 50, CCL 148, p. 225 "Si episcopus, presbyter aut diaconus crimen capitale commiserint [...] ab officii honore depositi in monasterio retrudantur, et ibi tantummodo, quamdiu uixerint, laicam communionem accipiant." Orléans (538), can. 23, CCL 148 A, p. 124 "Abbatibus, presbyteris citirisque ministris de rebus ecclesiasticis uel sacro ministerio alienare [...] nil liceat. Quod qui praesumserit, regradetur [...]." Other examples are provided by F. Kober, *Die Deposition und Degradation*, p. 130.

[174] Nicaea (325), can. 17 "[...] si quis inuentus fuerit [...] usuras accipiens [...] deiciatur a clero," A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. I, Kraków 2002, p. 42; D. 47 c. 2. Chalcedon (451), can. 2 "Si quis episcopus per pecuniam ordinationem fecerit [...] proprii gradu periculi subiacebit [...] Si quis uero mediator [...] clericus fuerit, proprio gradu decidat," A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. I, Kraków 2002, pp. 225-226; C. 1 q. 1 c. 8.

[175] Neocaesarea (314-319), can. 1 "τῆς τάξεως αὐτὸν κατατίθεσθαι." The Greek text with the Polish translation, see A. Baron, H. Pietras, *Acta Synodalia*, vol. I, p. 75. Nicaea (325), can. 17 "καθαιρεθήσεται τοῦ κλήρου." A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. I, p. 42. Chalcedon (451), can. 2 "ἔστω ἀλλότριος τῆς ἀξίας ἢ τοῦ φροντίσματος," see A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. I, p. 226.

[176] In the letter of Pope Siricius to Himerius of 385, D. 84 c. 5 "omni ecclesiasticae dignitatis priuilegio mox denudetur;" from the Council of Chalcedon, can. 27, C. 36 q. 2 c. 1 "decidant gradu proprio;" the letter of Pope Nicholas I(858-867), D. 50 c. 6 "ab offitio sacerdotali recesserit;" the letter of Pope Gregory the Great (590-604) of 594 to Bishop Januarius, D. 50 c. 9 "sacro ordine carat."

[177] M. Myrcha, *Depozycja i degradacja*, "Prawo Kanoniczne" 2 (1959), no. 3-4, p. 131.

[178] Ibid., p. 132.

the privileges of the clerical state.[179] All of it was caused by degradation,[180] which was subsequently transformed into its two kinds.

There existed solemn degradation, also called actual, and ordinary degradation, called verbal or edictal.[181] Verbal degradation consisted in issuing a sentence of condemnation by an ordinary in the presence of other bishops.[182] Solemn or actual degradation pertained to the public infliction of this penalty in front of people and in the presence of some number of bishops required by the law. The punished person had his vestments taken off, a chalice taken away, his hair cut and was handed over to secular authorities.[183] This division was introduced by Pope Boniface VIII (1294-1303). It had not yet existed in the period which is discussed in the present work.

The penalty of deposition was inflicted by a bishop. When he imposed this penalty on a cleric in higher orders he sought advice and consent from priests.[184] The African Church legally obliged a bishop to the collegial infliction of the penalty of deposition.[185] It was similar in Spain,[186] France and Germany.[187] In Italy a bishop was to seek opinion from a council of priests.[188]

[179] Ibid., p. 150.

[180] F. Kober, *Die Deposition und Degradation*, p. 60ff. points to the need to distinguish between *communio laica* and *communio clericalis* also in the sense that degradation, being "reductionem ad communionem laicam," means that a cleric was entitled to all secular rights in the Church, those which he had before his ordination, and he could also receive Holy Communion only among laypersons.

[181] M. Myrcha, *Depozycja i degradacja*, "Prawo Kanoniczne" 2 (1959), no. 3-4, p. 139.

[182] Ibid., p. 140.

[183] Ibid.

[184] F. Kober, *Die Deposition und Degradation*, p. 310.

[185] The synod of Carthage of 345-348, can. 11 "[...] si quis [...] causam habuerit [...] a tribus uicinis episcopis, si diaconus est qui arguitur; si presbyter, est a sex; si episcopus, a duodecim consacerdotibus audiatur," CCL 149, p. 8; the synod of Carthage of 390, can. 10, CCL 149, p. 17 "a duodecim episcopis audiatur et a sex presbyter et a tribus diaconus cum proprio suo episcopo."

[186] The second synod of Seville of 619, can. 6, C. 15 q. 7 c. 1 "nullus uestrum sine concilii examine quemlibet presbiterum uel diaconum deiciendum," PL 84, col. 595-596; the fourth synod of Toledo of 633, can. 28, PL 84, col. 374-375.

[187] The synod of Rouen of 1072, can. 20 "Si quis lapsus dignus depositione repertus fuerit et ad eum deponendum tot coëpiscopos, quot auctoritas postulat, scilicet in sacerdotis sex, in diaconi depoistione tres [...];" the synod of Tribur of 895, can. 10 "Statutum est in hac sancta et universalis synodo, ut nullus episcopus deponatur, nisi a duodecim episcopis, presbyter a sex, diaconus a tribus." Mansi, vol. XVIIa and XVIIIa, col. 138.

[188] D. 86 c. 23 "praesentibus ecclesiae tuae senioribus diligenter ueritas est perscrutanda." M. Myrcha, *Depozycja i degradacja*, "Prawo Kanoniczne" 2 (1959), no. 3-4, pp. 150-151; F. X. Wernz-P. Vidal, op. cit., vol. VII, pp. 399-400; F. Kober, *Die Deposition und Degradation*, p. 310.

There arises a question of whether this kind of penalty was inflicted on clerics who committed the crime of *sacrilegium*. In order to answer it, we ought to analyse the source texts from Gratian's *Decretum*.

In D. 50 c. 22 Gratian included Martin of Braga's canon based on can. 15 of the synod of Ancyra of 314, in which it was ruled that the sale of ecclesiastical vessels by a deacon or presbyter constitutes the crime of *sacrilegium*. It was decided that the perpetrator of this *sacrilegium* should be removed from the clerical state, which was expressed in the words "placuit eum in ordinatione ecclesiastica non haberi."[189] It was determined, however, that whether he was to retain his order or be moved to a lower grade ought to be left for a bishop to decide. The first part of the canon points to the degradation of a presbyter or deacon. The second one indicates the confidential decision of a bishop, who could allow a cleric to retain his order, but it was also not excluded that he could remove him to lay communion.

Canon law ordered that only such a candidate could be ordained as a bishop who had not committed a grave crime. Among these grave crimes also *sacrilegium* was enumerated.[190] This norm was formulated in the rubric of D. 81 c. 1. In the text of the *auctoritas*, which was part of Augustine's work,[191] this requirement also concerned presbyters and deacons. In the *dictum* following this canon Gratian stated that whoever committed such a crime should not be ordained. He further wrote that if a person who had already been ordained was proved to have committed such a crime, he was to be deprived of the order received. *Sacrilegium* constituted an impediment to receiving episcopal, presbyteral and diaconal orders. If the one who had already been ordained was proved to have committed such a crime before or after his ordination, he was to be deprived of the order received. Therefore, Gratian in his *dictum* included the teaching of contemporary canon law, according to which an ordained person was liable to *privatio officii*. It is difficult to unambiguously state whether it is *depositio* or *degradatio*.[192] However, Stephen in his *Summa* indicates that such a crime committed before

[189] D. 50 c. 22.

[190] D. 81 c. 1 "homicidium, adulterium, aut aliqua inmunditia fornicationis, furtum, fraus, sacrilegium et cetera huiusmodi."

[191] Augustinus, *In Iohannis euangelium tractatus* 41, 10. CCL 36, p. 363.

[192] The legal texts present in D. 81 indicate that it was *degradatio*, that is the deprivation of clerical rights, c. 7 "quo abiciendus conprobetur, depositus prouidentia episcopi bene prouiso loco constituatur, ubi peccatum lugeat et ulterius non committat," c. 8 "si autem amisso gradu seculariter uiuere uoluerint, et penitenciam agere neglexerint, ab ecclesiae communione separentur," c. 11 "a clericatus ordine depositus in monasterio [...] retrusus est," c. 13 "deponatur, et ab ecclesia proiectus inter laicos agat penitenciam."

one's ordination, and proved afterwards, could be tolerated, which means that an ordained person was not deprived of his order in the end.[193] At the same time, he distinguished the ways of interpreting the legal norm: "de rigore," that is out of severity, and "ex aequitate," that is out of rightness. The rightness of the law prescribed that an ordained person should remain in his order.

The penalty of degradation was also imposed on clerics for the crime of laying violent hands on the king. This order is included in C. 22 q. 5 c. 19, which is considered as a *palea*.[194] If a bishop, presbyter or deacon committed this type of *sacrilegium*, they were to be degraded.[195] In the text, however, there is no specification of the effects of this penalty. It thus should be understood that they would be deprived of all rights of the clerical state.

5.2.2. Canonical Sentence

Taking into account the legal form, the penalties "a iure" and "ab homine" are to be distinguished. The former is understood as a penalty defined by the legislator and included in a law. The penalty "ab homine" is always an indeterminate penalty. Its infliction is done by a judge's sentence.[196] It is also a judge who, after conducting a trial, determines the extent of the penalty in the case of committing a specific crime. In the period referred to

[193] *Summa Stephani*, ed. Schulte, p. 103, ad Quol. . .privabitur. "De rigore, nam si ante sacros ordines fornicatus fuerit, tolerabitur ex aequitate." The text of the *auctoritas* presents grave crimes which constituted an impediment to ordination. When proved after one's ordination, they were the reason for depriving the ordained person of the order received. By analogy, also *sacrilegium* committed before one's holy orders was an impediment to receiving them. If it was proved after one's ordination, it could be tolerated "ex aequitate." The solution put forward by Stephen accords with the canon legislation of a number of normative texts which prescribe degradation or deposition, using the names interchangeably, mainly for the crime of fornication after receiving holy orders, see D. 81 c. 4 "postea examinati [...] hos eccesiasticus ordo non recipit," c. 6 "in presbiterio [...] a sacerdotali remoueantur offitio," c. 13 "Si quis episcopus, aut presbiter, aut diaconus post diaconii sui gradus acceptos fuerit fornicatus aut mechatus, deponatur." A different practice was ordered by the Council of Nicaea of 325 in can. 10, where it was prescribed that "lapsi" admitted to the clerical state should be deprived of "dignities," A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. I, p. 37. See D. 81 c. 4 and 5.

[194] Ae. Friedberg, *CorpIC*, Pars I, col. 887-888, fn. 177. The text is attributed to Augustine by Burchard and Ivo. It constitutes an abridged version of can. 2 of the tenth synod of Toledo and can. 8 of the sixteenth synod of Toledo.

[195] C. 22 q. 5 c. 19 "Episcopus uero, presbiter, diaconus, si hoc crimen conmiserit, degradetur."

[196] M. Myrcha, *Kara*, p. 147.

in the present work a canonical sentence was most often issued by a bishop, and in the case of graver crimes relevant cases were adjudicated at a synod. The kind and extent of punishment for the crime of *sacrilegium* was also frequently determined by a bishop. Numerous canons present in Gratian's *Decretum* prove that, under law, the decision regarding punishment for the crime of *sacrilegium* rested with a bishop as a judge.

In D. 50 c. 22 Gratian included as the *auctoritas* can. 17 from the synod attributed to Martin of Braga,[197] which in fact was the interpretation of can. 15 of the synod of Ancyra of 314. In the text of the canon it was decided that if a presbyter or deacon sold liturgical vessels, he should be handed over to a bishop, who would decide whether he was to retain his order. The law ordered that it was a bishop who was to pronounce a sentence in the case of the one "quod de sacrosancto altario contaminatum est."[198] It was an indeterminate penalty and its kind and gravity was to be determined by a bishop. It follows from the text that the synod adopted the law ordering that the perpetrator of such a crime should be excluded from the clerical state. The final decision as to whether the cleric committing this crime was to retain his order was to be taken by a bishop. This "iudicium episcopi" was to take a decision concerning the degradation or deposition of the cleric. It is problematic whether "iudicium episcopi" pertained only to degradation or deposition or there was any other penalty for selling liturgical vessels. The penalty of degradation or deposition was a penalty "a iure" defined and included in a legal norm. "Iudicium episcopi" was to constitute a penalty "ab homine." Nevertheless, a bishop as an ecclesiastical judge was to decide whether a given cleric was to retain his order or he should be degraded. Thus, a bishop was to decide whether the perpetrator of the crime was to incur the penalty prescribed by the law or he was to be punished in another way.

Canon law ordered that all who attacked ecclesiastical possessions, took them or possessed them illegitimately should be severely punished. In C. 12 q. 2 c. 21 there is a text coming from a collection of forged norms,[199] but nevertheless prescribing that the plunderer (predonem) of ecclesiastical possessions ought to be punished in an appropriate way. The penalty was called as "sacerdotalis districtio maturata."[200] It was an indeterminate penalty, and its kind was left to the discretion of a bishop. This "established

[197] Ae. Friedberg, *CorpIC*, Pars I, col. 185-186, fn. 351.
[198] D. 50 c. 22.
[199] Ae. Friedberg, *CorpIC*, Pars I, col. 693-694, fn. 237; P. Hinschius, *Decretales*, p. 680.
[200] C. 12 q. 2 c. 21.

penalty," as it will be called in the subsequent part of the text, was to be combined with anathema.

In C. 17 q. 4 c. 21, where in the *auctoritas* a number of types of *sacrilegium* and the corresponding penalties are enumerated, there is § 4, which constitutes can. 60 of the synod of Meaux of 845.[201] In the text of the canon there are criminal sanctions for *sacrilegium*, which was committed by the one who robbed monasteries, places consecrated to God and churches and took anything from these places. Apart from the penalty of the ninefold restitution of stolen things and the threefold sum to be paid for violating a sacred place, the perpetrator as a sacrilegist was to be liable to a canonical sentence. A canonical sentence for a sacrilegist was certainly to be issued by a bishop. It was an indeterminate penalty. Its kind and quality was to be determined by a bishop. However, it is worth noting that no canon pertaining to *sacrilegium* contains any specification as to the content of a judge's sentence. It is always an arbitrary decision of a bishop as a judge.

Gratian, among a number of canons concerning the validity of a sentence, included his *dictum* in C. 11 q. 3 c. 77, where he contained the arguments which were to prove that one ought to even obey an unfair sentence. In the doctrine of canonical penal law the problem of fair and unfair punishment has always been present. The canonists unanimously emphasize that in the old canon law the distinction between fair and unfair punishment was not made. It was introduced by the teaching of canon law.[202] However, the effects of these penalties were mentioned, which is right in view of Gratian's teachings in the *Decretum*. M. Myrcha emphasizes that "before Gratian no strict doctine regarding this matter had been adopted."[203] Gratian's *dictum* is thus an essential contribution to establishing the doctrine with regard to fair and unfair punishment. Gratian began his *dictum* with the claim that if a sentence was unfair "ex ordine," the condemned person was not allowed to disobey it, because before the unfair sentence was issued, they had already been bound before God for another crime. At this place, it is worth mentioning that M. Myrcha's claim that Rolandus was the first to introduce the distinction of "unfair excommunication, deriving *ex anno, ex ordine* or *ex causa*"[204] is imprecise, as it was in fact Gratian who did it when he took into account the possibility of an unfair sentence "ex ordine." In order to validate his thesis, Gratian provided the example of an adulterer

[201] Ae. Friedberg, *CorpIC*, Pars I, col. 819-820, fn. 218.

[202] M. Myrcha, *Kara*, p. 238; F. X. Wernz-P. Vidal, op. cit., vol. VII, pp. 189-190, fn. 31, where there is a long list of the canonists who work on the issue of fair and unfair punishment.

[203] M. Myrcha, *Kara*, p. 239.

[204] Ibid.

receiving the sentence for *sacrilegium*. Such a sentence is unfair, Gratian maintains, because the crime for which that person was condemned did not occur. However, the person who received that unfair sentence was required to accept it, as they had already been excommunicated before God for adultery. In this situation it is only possible to accept the *latae sententiae* sentence of excommunication for adultery, as it was not issued by any ecclesiastical judge. Gratian referred at this place to the teaching[205] of Pope Gregory the Great (590-604), whose opinion is provided in C. 11 q. 3 c. 1 "Sententia pastoris, siue iusta siue iniusta fuerit, timenda est." In the subsequent part of the *dictum* he supplied the definition of a fair sentence.[206] The word "uocat"[207] points to the reference to the text of Pope Gregory the Great, but no such definition is present in the text of the pope's homily. Gratian, using the pope's text, formulated this definition on his own. A fair sentence, he claims in his *dictum*, is the one that was imposed for a crime which was committed. An unfair sentence, for its part, is when there was no crime and the sentence was issued. Such a sentence ought to "be feared or obeyed," because the person who received that sentence had been condemned for another crime a long time before. At this place, Gratian committed a mistake in his reasoning, as the text of Pope Gregory the Great, on which he based his arguments, contains a different idea. The pope ordered that an unfair sentence should be obeyed or feared, because otherwise the person who received an unfair sentence would, through pride and haughtiness, commit an even graver crime, that of disobedience to the sentence of a superior. Gratian adopted the earlier premise in his line of reasoning, while the pope – the later one. This mistake was noticed by the decretists, who briefly stated that "Gratianus male intellexit."[208] The subsequent part of the *dictum* contains a quotation from Pope Gregory's homily. In § 2 of his *dictum*, as if to support his reasoning, Gratian provides an example that it happened in the judiciary that a crime had not been committed, and still a sentence was issued because of a judge's hatred or a conspiracy of someone's enemies. However, this does not justify Gratian's erroneous reasoning. Nevertheless, the view that an unfair sentence should be obeyed was adopted by him from Rolandus and other decretists. They maintained that the obligation to yield to such a penalty did not follow from the power of the sentence

[205] Gregorius Magnus, *XL Homiliarum in Euangelia libri duo*, 2, 26, 6.

[206] The extensive argumentation with various definitions of *sententia iusta et non iusta* was provided by Rolandus in his *Summa* ad C. 11 q. 3 without the indication of the canons, see *Summa magistri Rolandi*, ed. Thaner, pp. 25-26.

[207] C. 11 q. 3 c. 77.

[208] LDG, f. 142 v., Ioannes Teutonicus, the gloss ad "cum ergo."

itself, but from the necessity of respecting the authority which issued that sentence.[209] A similar view was expressed by Huguccio, and this teaching was developed by Innocent III (1198-1216), while the glossators even cited arguments of a legal nature. This led to the situation that the canonists did not distinguish between a fair and unfair sentence with regard to legal power.[210] However, the irregularities in the infliction of penalties, especially excommunication, will in the future, in the 14th and 15th centuries, give rise to a change in this teaching. An unfair penalty will not have any legal value, despite the fact that a number of authors will attempt to defend their former views.[211]

However, it needs to be remarked that in d. p. c. 101 q. 3 C. 11 the same Gratian expresses quite an opposite view. He states there that if a subordinate was given the penalty of excommunication for not following their superior's orders, and that superior forced them to commit an evil act, the sentence should not be obeyed. His claim he based on the decision of Pope Gelasius (492-496),[212] according to which an unfair sentence did not bind anyone before God and before the Church,[213] which was why it should be kept neither in one's conscience nor in the external forum.[214] This proves that Gratian's teachings with reference to the issue of an unfair sentence was inconsistent. It is should come as no surprise, as in the teaching of canonical penal law there exists the view that "This issue raises numerous doubts from both a historical and legal perspective."[215]

[209] M. Myrcha, *Kara*, p. 239; in this way N. Hilling, *Die Bedeutung der iusta causa für die Gültigkeit der Exkommunikationsentenz*, AKKR, 85 (1905), p. 250ff.; F. Gillmann, Zu Gratians und der Glossatoren insbesondere des Johannes Teutonicus Lehre über die Bedeutung der "justa causa" für die Wirksamkeit der Exkommunikation, AKKR 104 (1929), pp. 5-40; G. Oesterle, *De doctrina Gratiani et Glossatorum quoad vim juridicam iustae causae ad efficaciam excommunicationis*, "Jus Pontificium" 1930, pp. 188-192.

[210] M. Myrcha, *Kara*, p. 239.

[211] M. Myrcha, *Kara*, p. 240; N. Hilling, *Die Bedeutung der iusta causa für die Gültigkeit der Exkommunikationsentenz*, AKKR, 85 (1905), p. 719ff.

[212] The regulation ascribed by Gratian to Gelasius was in fact authored by Pope Felix III (II) (483-492) In tractatu contra Acacii sectatores, see Ae. Friedberg, *CorpIC*, Pars I, col. 655-656, fn. 498.

[213] Dictum p. c. 101 q. 3 C. 11 "Nec apud Deum, nec apud ecclesiam eius, quemquam grauat iniqua sententia."

[214] Cf. M. Myrcha, *Kara*, p. 243; F. X. Wernz-P. Vidal, op. cit., vol. VII, pp. 190-191.

[215] M. Myrcha, *Kara*, p. 239.

5.2.3. Incapacity to Receive Orders

In the text of the canons concerning *sacrilegium*, this crime is treated as *crimen grave*. It is so in D. 81 c. 1, where Gratian included, as the *auctoritas*, a text from Augustine's work.[216] Among a number of grave crimes which constitute impediments to receiving presbyteral or diaconal orders, there is the crime of *sacrilegium*. In the rubric Gratian enumerated only episcopal orders. In d. p. c. 1 D. 81 he stated that "Quolibet itaque horum inplicatus ordinari non debet." Thus, whoever committed the crime of *sacrilegium* should not be ordained. It was *irregularitas iuris*, as the prohibition of administering orders to people accused of such crimes[217] was included in the legal norms, and Gratian confirmed it in his *dictum*.

The crime of *sacrilegium* constituted a legal impediment to receiving presbyteral orders, when it was committed by a deacon breaking the vows of celibacy. It was ordered by bishops at the second synod of Toledo of 527 in can. 1, and this norm was included by Gratian as the *auctoritas* in D. 28 c. 5. This crime could be committed by attempting to get married or secret concubinage. The perpetrator of the crime was to be deprived of participation in the community of the Church, obviously including the possibility of receiving presbyteral orders.

No orders could be received by heretics returning to unity with the Church. This regulation was issued by Pope Innocent I (401-417) in the letter[218] written in 415 to Macedonian bishops, and Gratian included this text in the *Decretum* in C. 1 q. 1 c. 18. The pope, somewhat sarcastically, referred to the opinion according to which a priest's blessing removed all guilt. He claimed that if it was so, then "sacrilegi, atque omnium criminum rei" should be admitted to ordination.[219] If a priest's blessing is going to have the same effect as long-term penance, then let us give up imposing penance, the pope continued sarcastically. And then he strongly emphasized: "Sed nostrae lex ecclesiae est, uenientibus ab hereticis [...] nec ex his aliquem in clericatus uel exiguum subrogare honorem." Thus, heresy, classified as the crime of *sacrilegium*, constituted *irregularitas iuris* and made it impossible to take even the lowest kind of holy orders.

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[216] Augustinus, *In Iohannis euangelium tractatus* 41, 10, CCL 36, p. 363.

[217] C. 6 q. 1 c. 2 "omnes, qui culpis exigentibus ad sacerdotium non possunt prouehi." However, it is a forged norm coming from *Capitula Angilramni*, see P. Hinschius, *Decretales*, p. 762.

[218] Ae. Friedberg, *CorpIC*, Pars I, col. 363-364, fn. 187; Jaffé -Wattenbach, 310 (107).

[219] C. 1 q. 1 c. 18.

Nobody who was considered infamous (infamis) was allowed to be admitted to orders. In C. 6 q. 1 c. 17 Gratian included the letter attributed to Pope Stephen I (254?-257),[220] which enumerates numerous categories of criminals regarded as infamous. There are also *sacrilegi* among them. They should not be admitted to their subsequent grades of holy orders, which the text expressed with the following words: "nec ad sacros gradus debent prouehi."[221] As Stephen in his *Summa* observes that a freedman ordained priest could accuse a bishop as a priest, not being able to do it as a freedman, it can be concluded that the expression "sacros gradus" should be understood as presbyteral ordination.

5.2.4. Infamy

One kind of substantive penalties which were used in canonical penal law at the time were penalties of infamy (poenae infamantes). The effect of these penalties was the loss of one's good name amongst people[222] and the lessening of one's legal position.[223] In short, this penalty is called infamy. Infamy as a penalty of canonical penal law was derived from Roman law at the end of the 9th century, although G. May maintains that the term *infamia* was introduced into canon law by the synod of Carthage of 419.[224] P. Hinschius, for his part, claims that it appeared in canonical penal law via the synodical legislation in the 9th century, and that legislation referred to the forged norms of the old sources from the Pseudo-Isidorian Decretals.[225] Since the end of the 11th century, due to the development of the knowlegde of Roman law,[226] it had also been more widely used in canon law. In the 12th

[220] Ae. Friedberg, *CorpIC*, Pars I, col. 557-558, fn. 179 with the indication that the text comes from *Decretales Pseudo-Isidorianae*, see P. Hinschius, *Decretales*, p. 182; Jaffé -Wattenbach, †130 (XCIV), where the part including the prohibition of ordaining *infames* is as follows: "qui sint infames et qui ad gradus ecclesiasticos non sint admittendi."

[221] C. 6 q. 1 c. 17.

[222] M. Myrcha, *Kara*, p. 108; P. Hinschius, *System*, vol. V, pp. 41-42, 84; G. May, *Infamie*, in: *Lexikon des Kirchenrechts*, col. 407-408; P. Landau, *Die Entstehung des kanonischen Infamie Begrifes von Gratian bis zur Glossa ordinaria*, Köln 1966; G. May, *Die Infamie im Dekret Gratians*, AKKR 129 (1959-1960), p. 389.

[223] R. Maceratini, *Ricerche*, p. 235; G. May, *Die Infamie*, pp. 389-390.

[224] G. May, *Die Anfänge der Infamie im kanonischen Recht*, ZRG KA 47 (1961), pp. 77-94.

[225] This view is contested by G. May, *Infamie*, in: *Lexikon*, col. 407, who claims that infamy started to belong to the system of ecclesiastical penal law in the 6th century.

[226] E. Vodola, *Excommunication*, p. 77 claims that the texts of Roman law concerning infamy were not included in the *Decretum* by Gratian. G. May, *Die Infamie*, p. 393.

century, it had already been in widespread use in universal and particular legislation. As a result of adopting by Gratian older norms in the *Decretum*, often from the Pseudo-Isidorian Decretals,[227] the distinction between the infamy of secular and canon law began to be introduced, and in the doctrine of canon law it was called *infamia canonica*.[228]

Among a number of crimes for which the penalty of infamy was inflicted, there was also *sacrilegium*. Gratian adopted in the *Decretum* in C. 6 q. 1 c. 17 a text from the Pseudo-Isidorian Decretals,[229] attributed to Pope Stephen I (254?-257),[230] which enumerated people considered as infamous (infames).[231] After a general statement that the infamous are those who are branded with infamy due to their guilt, the text specifically enumerates the categories of persons held to be infamous. These are: "all persons who reject the norms of Christian law and disdain ecclesiastical laws; likewise, thieves, sacrilegists and all who commit crimes carrying the death penalty; also those who desecrate graves and all who treat their parents with hostility, who are punished by infamy in the whole world; likewise, those who commit incest, kidnappers, malefactors, poisoners, adulterers, those who flee from public wars and those who attempt to keep unworthy places for themselves or illegitimately take ecclesiastical goods, those who spread slander about their brothers or accuse without proving, those who rouse anger of rulers against the innocent, all who are anathematized or rejected from the Church for their crimes, as well as all those who are pronounced infamous by ecclesiastical and secular laws."[232]

The penalty of infamy for the crimes enumerated in the text, including *sacrilegium*, brought about the incapacity to receive sacerdotal orders[233] as well as the incapacity to perform actions in civil proceedings.[234] The infamous could not accuse "summos sacerdotes," that is bishops,[235] and they

[227] Since *Decretales Pseudo-Isidorianae* infamy had been inextricably connected with procedural law, and since Gratian's *Decretum* and the decretists it had started to be handled in a scientific way, see G. May, *Die Infamie*, p. 389.

[228] P. Hinschius, *System*, vol. V, pp. 41-42.

[229] Ae. Friedberg, *CorpIC*, Pars I, col. 557-558, fn. 179; P. Hinschius, *Decretales*, p. 182.

[230] Jaffé -Wattenbach, † 130 (XCIV).

[231] G. May, *Die Infamie*, p. 395.

[232] C. 6 q. 1 c. 17. This *auctoritas* is referred to by Gratian also in d. p. 7 q. 3 C. 2.

[233] M. Myrcha, *Kara*, p. 109.

[234] G. May, *Infamie*, col. 408; the same author, *Die Infamie*, p. 400.

[235] Paucapalea, *Summa*, ed. Schulte, ad C. 6 q. 1, p. 71 "Sed licet infames ab accusatione episcoporum prohibeantur, non tamen isti ab huiusmodi accusatione pro[h]ibendi sunt. Haereticos namque accusare infamibus non prohibetur;" R. Macreratini, *Ricerche*, p. 367.

were not allowed to accuse anyone or act as witnesses in trials.[236] They could only accuse bishops of simony.[237] The text of the *auctoritas* constituted the answer to the question posed at the beginning of C. 6, as to whether the infamous were permitted to accuse a bishop of simony. The negative answer provided in the *auctoritas* concerns the accusation of simony. Rolandus in *Summa* grants the possibility of accusing of "laesae maiestatis et haereseos crimine" to everyone without exception.[238]

The penalty of infamy could also be incurred for *sacrilegium* which was committed by someone raiding ecclesiastical lands. This legal norm attributed[239] to Pope Urban I (222-230) was included by Gratian in C. 17 q. 4 c. 13. The one who ravaged lands the return of which was to be dedicated to religious worship was to be punished as a sacrilegist and additionally was to receive the penalty of "perpetual infamy" (perpetua dampnetur infamia).[240] Branding with infamy followed the commission of the crime which was punished in accordance with the law. Thus, infamy was not a distinct penalty. Infamy was an additional penalty whose penal effect was the incapacity to perform actions in civil proceedings.

5.2.5. Incapacity to Perform Actions in Civil Proceedings

The incapacity to perform some legal actions was connected with infamy. In the system of ecclesiastical penal law this kind of penalties was labelled as incapacitating penalties (poenae inhabilitantes).[241] Numerous synods established the legal norms which prohibited the perpetrators of certain crimes and even those who performed certain actions from acting

[236] C. 6 q. 1 c. 17 "neque [...] summos sacerdotes possunt accusare, nec ad accusationem seu ad testimonium ullatenus iuste recipi possunt." The same penalty was established at the synod of London in 1151, c. 5, Mansi, vol. XXI, col. 752.

[237] Paucapalea, *Summa*, ed. Schulte, ad C. 7 q. 1, p. 73 "criminosi et infames ad accusandum non nisi in quibusdam specialibus admittuntur criminibus. Ex quorum uno, scil. symonia, episcopum quendam a talibus superius accusatum constat;" R. Maceratini, *Ricerche*, p. 367.

[238] *Summa magistri Rolandi*, ed. Thaner, p. 21, ad C. 6 q. 1 Duo fornicatores "tam in hoc quam laesae maiestatis et haereseos crimine omnium accusatio indifferenter admittitur."

[239] Ae. Friedberg, *CorpIC*, Pars I, col. 817-818, fn. 128; Jaffé -Wattenbach, †87 (LXXI); P. Hinschius, *Decretales*, p. 145.

[240] C. 17 q. 4 c. 13. Infamy basically was "infamia perpetua," but it could be lifted by the pope and the emperor, see G. May, *Die Infamie*, p. 405.

[241] M. Myrcha, *Kara*, p. 110.

as witnesses in both canonical and secular trials.[242] It was precisely this penalty which was most often connected with infamy and established as its result.[243] It is confirmed by the norms included in Gratian's *Decretum* in which one's incapacity to act as a witness in a court follows from being considered as infamous (infamis). It also happened in the case of committing the crime of *sacrilegium*. This norm is included in C. 3. q. 4 c. 11, where the rubric contains the prohibition of accusing Christians in courts by the infamous and sacrilegists.[244] The text of the *auctoritas*, though coming from a collection of forged norms,[245] includes a strict prohibition concerning the infamous and sacrilegists (Nulli umquam infami aut sacrilego).[246] They were allowed to testify against Christians in courts in no case whatsoever. At the same time, it was emphasized that they were prohibited from doing so towards any Christian without exception, also with respect to Christians of the lowest rank, and even towards Christian slaves. This prohibition pertained not only to testifying in a court, but also to suing Christians for aything.

Stephen, however, referring in his *Summa* to the prohibition for the infamous, requires (intellige) that it should be understood in such a way that although the prohibition pertains to all cases, there are those in which the infamous are allowed to bring an accusation. These are situations which are connected with seeking justice in one's own or one's family's cases.[247] There are also some crimes, as can be supposed, in reference to which even the infamous person and a sacrilegist can bring an accusation. These are the crimes of lese-majesty, simony and heresy, of which everybody can accuse.[248] And conversely, everybody could accuse of *sacrilegium*. There were crimes of which also women, slaves, criminals and *infames* could accuse. These were precisely *sacrilegium* and heresy, *crimen laesae maiestatis* and si-

[242] Gran, 1114, can. 59, Mansi, vol. XXI, col. 1119. The synod decided that innkeepers and usurers were forbidden to act as witnesses both in ecclesiastical and secular courts.

[243] P. Hinschius, *System*, vol. V, p. 48.

[244] C. 3 q. 4 c. 11 "Infamis uel sacrilegus religiosum Christianum accusare non potest."

[245] P. Hinschius, *Decretales*, pp. 211-212.

[246] C. 3 q. 4 c. 11. This canon is included at various places in the manuscripts, see Ae. Friedberg, *CorpIC*, Pars I, col. 513-514, fn. 82. In LDG, f. 110 r. it occurs in the same order as in the edition of Ae. Friedberg.

[247] *Summa Stephani*, ed. Schulte, p. 194, ad C. 3 q. 4, "nisi suam suorumve iniuriam prosequantur vel in certis criminibus."

[248] Ibid. "ut laesae maiestatis et simoniae et haereseos, in quibus quilibet accusantes admittuntur." The same view is expressed by Rolandus in *Summa magistri Rolandi*, ed. Thaner, ad. C. 6 q. 1, p. 21, where he states that no criminal is permitted to accuse clerics, but everybody is allowed to accuse of lese-majesty and heresy "tam in hoc quam laesae maiestatis et haereseos crimine omnium accusatio indifferenter admittitur."

mony.[249] It confirms the thesis concerning the extraordinary gravity of *sacrilegium*, which was included among *crimina maiora*.

Thus, according to the wording of this legal norm, a sacrilegist was deprived of the capacity to perform legal actions, both accusing and testifying against any Christian, though not in every case. Stephen does not make any mention in his commentary that the infamous were incapable of testifying in legal proceedings. It thus follows that his commentary pertains to the whole q. 4 in a general way, whose introduction contains the problem raised by Gratian in reference to the impossibility of presenting a libellus. The impossibility of testifying in a court, which is referred to in the *auctoritas*, excluded the infamous and sacrilegists from active participation in trials.

In q. 5, in which Gratian wanted to prove that no witnesses should be taken from the families of prosecutors and that the accusations of enemies should not be taken into account,[250] there is can. 9, which contains the prohibition of accusing and testifying by the perpetrators of numerous crimes. In the long catalogue of crimes[251] which bring infamy to their perpetrators, for which reason they can neither accuse nor testify in a court, there are also sacrilegists. Another group are "domestici," who cannot act as witnesses owing to their closeness to the prosecutor. Stephen claimed in his *Summa* that such household members who valued domestic friendship more than truth could not be called as witnesses.[252] Also such household members who were subordinate to "patria potestas," who were "filiifamilias," and those subordinate to "dominica potestas," who were slaves, could not be called as witnesses. Sacrilegists could not be allowed to accuse or testify, because they became "infamis."[253] In the *auctoritas*, which comes from a collection

[249] Paucapalea, *Summa*, ed. Schulte, p. 70 "Ostensum est superius, quod illi, qui infamiam alicuius scriptura confugiunt vel crimina accusando obiciunt et probare non volent, puniendi sunt et infames efficiuntur. Sed quoniam [quaedam] crimina sunt ad quorum accusationem etiam muliere (s) ac servi, criminosi et infames, admittuntur, ut verbi gratia crimen sacrilegii, haereseos, laesae maiestatis et symoniae[...]." R. Maceratini, *Recerche*, p. 367. E. Vodola, *Excommunication*, p. 78.

[250] *Summa Stephani*, ed. Schulte, p. 196 "inimicus non est recipiendus a iudice ad accusationem vel ad testimonium, quia nec etiam iudex suspectus recipitur, sed omnino abiicitur iudicium iam dudum datum."

[251] C. 3 q. 5 c. 9 "homicidae, fures, malefici, sacrilegi, raptores, adulteri, incesti, uenefici, suspecti, criminosi, domestici, periuri, et qui raptum fecerunt, uel qui falsum testimonium dixerunt, seu ad sortilegos diuinosque concurrerint, similesque eorum."

[252] *Summa Stephani*, ed. Schulte, p. 195.

[253] C. 3 q. 5 c. 9.

of forged norms,[254] it was stated that "sunt et iuste repellendi, quia funesta est eorum uox."[255] They stained themselves (funesti) with the crime and for that reason the law considered their voice (vox) in a court as harmful and desecrated. Thus, the incapacity to perform legal actions in fact directly followed from the fact of incurring infamy. However, infamy was not a crime in itself, but it was incurred by the perpetrator of some crime which was penal in nature. Infamy was therefore caused by a penal crime and it gave rise to the incapacity to perform actions. Thus it ought to be concluded that infamy was the immediate cause of the incapacity to perform actions.

A long catalogue of persons who should be considered as infamous is contained in C. 6 q. 1 c. 17. It is, just as the two canons analysed above, the text coming from a collection of forged norms,[256] attributed to Pope Stephen I (254?-257).[257] At the beginning of the canon there is a definition of a person who is labelled as "infamis." These are such people "who are branded with infamy due to some guilt."[258] Among the infamous there are also sacrilegists. They, together with all others enumerated in the canon, could not receive orders as well as accuse bishops or be legally admitted to accusing and testifying in a court. Rolandus and Stephen in their *Summae* express the view that everybody can accuse of "crimen laesae maiestatis et haereseos."[259] The incapacity to perform actions in canon law followed from both canon and secular law, because canon law recognized those branded with infamy by one and the other legal system alike.[260] This source text from the *Decretum* confirms the above thesis that also sacrilege was the source of considering

[254] Ae. Friedberg, *CorpIC*, Pars I, col. 515-516, fn. 76; P. Hinschius, *Decretales*, p. 239, the same author, *Capitula Angilramni*, c. 67, p. 767; Jaffé -Wattenbach, † 165 (CXXIII). Ae. Friedberg indicates that the basis for this canon might have been the canons of the synod of Carthage of 419, cann. 129-131, CCL 149, p. 231. In the collections it is cited as the seventh synod of Carthage.

[255] C. 3 q. 5 c. 9.

[256] P. Hinschius, *Decretales*, p. 182. Other collections in which it is also included are provided by Ae. Friedberg, *CorpIC*, Pars I, col. 557-558, fn. 179.

[257] Jaffé -Wattenbach, † 130 (XCIV).

[258] C. 6 q. 1 c. 17 "que pro aliqua culpa notantur infamia."

[259] This view is expressed by Rolandus, in *Summa magistri Rolandi*, ed. Thaner, ad. C. 6 q. 1, p. 21, where he states that no criminal can accuse clerics, but everyone can accuse of lese-majesty and heresy "tam in hoc quam laesae maiestatis et haereseos crimine omnium accusatio indifferenter admittitur." Stephen, in *Summa Stephani*, ed. Schulte, ad C. 6 q. 1, p. 203 "tamen in hoc qum in crimine laesae maiestatis et haereseos omnium accusatio indifferenter admittitur." The texts are the same, which is stressed by Schulte, p. 203, fn. 9 "Usque huc ex summa Rolandi."

[260] C. 6 q. 1 c. 17 "omnes, quos ecclesiasticae uel seculi leges infames pronunciant." P. Hinschius, *System*, vol. V, p. 42.

someone as infamous, and *infamis* alone could lawfully (iuste)[261] neither accuse nor be a witness in a trial.

5.2.6. Exile

Among substantive penalties which were imposed for *sacrilegium* there was exile, which was also called banishment. It belonged to restrictive penalties (poenae restrictivae vel coërcitivae). Exile could be of different nature. It could constitute the complete removal of a condemned criminal from the territory of jurisdiction of an authority that inflicted the penalty. It could pertain to only part of this territory. It could take the form of indicating the territory where the condemned person was to reside and which they were forbidden to leave (relegatio). These penalties could be inflicted perpetually (in perpetuum) or for a definite period of time. A special kind of exile was banishment, which consisted in expelling the condemned person outside the borders of an authority that inflicted the penalty without specifying the duration of staying there. When one was sent into exile to overseas countries it was called *deportatio*.[262]

This penalty for *sacrilegium* was attached by the emperors Honorius and Theodosius as a criminal sanction to their constitution[263] of 412, which Gratian included in his argumentation in d. p. c. 40 q. 1 C. 16. In this constitution the emperors prohibited levying any additional civil burdens on ecclesiastical estates.[264] They threatened that if someone broke that prohibition they were to be punished as sacrilegists, after which they were to be punished, additionally as it were, by "exilio perpetuae deportationis." The penalty in this case was

[261] C. 6 q. 1 c. 17.

[262] M. Myrcha, *Kara*, pp. 102-103. Banishment in Gratian's *Decretum* is only enumerated twice and not in connection to *sacrilegium* but in reference to the law established at the synod of Erphesfurt in 932 c. 2, where secular power was prohibited from summoning Christians to court on obligatory holy days "ad placitum bannire," C. 15 q. 4 c. 2 and in C. 16 q. 1 c. 55 (the text of the forged norms from Benedictus Levita's Collection 3, 7), which mentions "bannum nostrum," see Ae. Friedberg, *CorpIC*, Pars I, col. 777-778, fn. 530.

[263] C. I. 1. 2. 5. Ae. Friedberg, *CorpIC*, Pars I, col. 773-774, in Notationes Correctorum included the explanation that the part beginning with "Si [...]" is absent from the manuscripts, which is why Correctores concluded that it had been introduced later "adeo inducta." This text is present in the *Codex Justinianus*, so it should be understood that it was included in the text of the constitution, as Gratian actually quotes this text.

[264] Dictum p. c. 40 q. 1 C. 16 "sordidorum munerum fece uexentur, nichil extraordinarium abhinc superindictumue flagitetur, nulla sollicitudo translationis signetur, postremo nichil preter canonicam illationem preter quam aduenticiae necessitatis sarcina repentina poposcerit, eius functionibus asscribatur."

double. The one who would violate the norm of the imperial law and levied additional burdens on ecclesiastical possessions was to be punished by the penalty, as it was specified in the text, of "debitae ulcionis acrimoniam." This "ultimo," or the penalty for this crime was to be "due," or "debita." It can be supposed that the emperors, knowing the earlier constitution "Lex Iulia peculatus et de sacrilegiis," had these criminal sanctions in mind which were imposed by Roman law in the case of committing *sacrilegium*. They were the death penalty,[265] exile beyond Italy[266] (aquae et ignis interdictio) and the loss of all rights, including the consfiscation of property.[267] If this "debita ultio" was to constitute the penalty for *sacrilegium*, according to the law "Lex Iulia de peculatus et de sacrilegiis," "deportation," then in the case of law no. 5, entitled "De sacrosanctis ecclesiis," "exilio perpetuae deportationis" is mentioned, which was to take place "post debitae ulcionis acrimoniam."[268] What was in this case the penalty "que erga sacrilegos iure promenda est," which is mentioned in the text of the constitution quoted by Gratian in his *dictum*? If it is the penalty known in Roman law, then the difficulty is that it is exactly the penalty of deportation. This understanding of the situation would mean that the text of the constitution referred twice to the same penalty. This interpretation is impossible to accept. Thus, it has to be assumed, as emphasized by A. Dębiński, that it was "digna poena," whose kind and size was to be decided by jugdes, who could adjudicate on the basis of two laws[269] in which it was ordered to inflict an appropriate penalty (digna poena) according to the state, age and gender of the perpetrator of *sacrilegium*. It seems, however, that this appropriate penalty was "interdictio aquae et ignis," which was connected with the loss of all rights and property, after which "deportatio" ensued.

It remains to be solved who in this case was to inflict this penalty, if Gratian quotes the rules of Roman law in his *dictum*. One ought to take into account the fact that in many manuscripts the text of the laws is a continuation of the text of the *auctoritas*, without any indication that it is Gratian's *dictum*. In other manuscripts, for their part, it is marked with G to signify Gratian's *dictum*.[270] It can be supposed that deportation, as a penalty for *sacrilegium*

[265] Dig. 48, 13, 11, 1 "Sacrilegi capite puniuntur."

[266] A. Dębiński, *Sacrilegium w prawie rzymskim*, p. 100ff.

[267] Dig. 48, 13, 3.

[268] Dictum p. c. 40 q. 1 C. 16.

[269] Dig. 48, 13, 4, 4; 48, 13, 7.

[270] Ae. Friedberg, *CorpIC*, pars I, col. 771-772, fn. 343. The problem of the texts of Roman law in Gratian's *Decretum* is debated in the literature devoted to research on the *Decretum*. E. Vodola, *Excommunication*, p. 124, referring to B. Basdevant-Gaudemet, *Les sources de droit romain en matière de procédure dans le Décret de Gratien*, RDC 27 (1977), pp. 212-213 and W. Litewski,

coming from Roman law, was not inflicted by ecclesiastical judges guided by canon law. It still needs to be resolved why Gratian included in the *Decretum* the text of this imperial constitution ordering that the perpetrators of *sacrilegium* should be punished by perpetual deportation. The solution can be found, as might be supposed, in the unsolved problem of the presence of Roman law in the *Decretum* in general. It could at most be used to show the reader the gravity of this crime and confirm their conviction that Roman law severely punished *sacrilegium*, because despite the revived interest in Roman law at the time, its norms had already had no significance then, in the 12th century, except for historical significance. It appears, however, that the researchers of the *Decretum* are quite right to indicate that the norms of Roman law were included in the *Decretum* at a later time. Its presence, for instance in the part under analysis, is clearly "strange" in character.

This text of the imperial constitution probably constituted the basis for forgers of legal norms in the mid-9th century, as Gratian included in the *Decretum* in C. 17 q. 4 c. 13 an excerpt from the Pseudo-Isidorian Decretals, where the text of the constitution was fabricated and attributed to Pope Urban I (222-230).[271] The text was extended to include "perpetua dampnetur infamia, et carceri tradatur." Thus, besides the penalty for *sacrilegium*, the perpetrator was to be announced as perpetually infamous and thrown into prison, or was to be condemned to perpetual deportation. The text constituted an attempt to transfer the norms of Roman law to canon law. Nonetheless, if Gratian included it in the *Decretum* it functioned as a norm of universal law, despite the fact that it constituted a forged legal norm.[272] Only these two texts in the *Decretum* contain the penalty of deportation in reference to *sacrilegium*. Other texts that include the penalty of deportaion also come from Roman law.[273] Thus, it can be concluded that the penalty of

Les textes procéduraux du droit de Justinien dans Décret de Gratien, "Studia Gratiana" 9 (1966), pp. 77-78, claim that the excerpts from Justinian were included in the *Decretum* when the text of the *Decretum* had already been finished.

[271] Ae. Friedberg, *CorpIC*, Pars I, col. 817-818, fn. 128; P. Hinschius, *Decretales*, p. 145; Jaffé -Wattenbach, † 87 (LXXI).

[272] The forgeries of the norms of canon law from the mid-9th century were detected by the Centuriators of Magdeburg in 1559 in *Historia ecclesiastica* published in Basel. Until that time, these norms had been considered as genuine, and their influence on canon law was differently assessed, with some maintaining that it was considerable and others regarding it as rather small, as it had already been the Gregorian reform that had increased the significance of papacy, see P. Hemperek, W. Góralski, *Komentarz*, p. 57.

[273] On the penalty of deportation in Roman law see A. Dębiński, *Sacrilegium w prawie rzymskim*, pp. 105-106 together with fn. 45; Th. Mommsen, *Römisches Strafrecht*, 3rd ed., Leipzig 1899, Nachdruck, Graz 1952, p. 975; P. Hinschius, *System*, vol. V, pp. 39-40.

deportation, being in fact a penalty of Roman law, was adopted by ecclesiastical legislation.[274]

5.2.7. Imprisonment

Just as exile, another kind of earthly penalty among substantive penalties was the penalty of imprisonment. It was a restrictive penalty (poena restrictiva). It is understood as "incarcerating a condemned person in some place."[275] The canonists claim that imprisonment was treated in the old canon law as "a safety measure rather than the penalty proper." The opposite view is expressed by P. Hinschius, who claims that imprisonment, or locking someone in prison (carcer), was imposed on the perpetrators of incest as well as those dealing with magic. At the same time, he emphasized that the synods in Carolingian times also inflicted imprisonment for depleting and violating ecclesiastical goods.[276] At this place he referred to can. 11 of the synod of Mainz of 888, which was most probably derived from *Decretales Pseudo-Isidorianae*, as proved by the very close similarity between the text of the canon of Mainz and that from *Decretales*.[277] The same text in the version from *Decretales Pseudo-Isidorianae*,[278] where it is attributed to Pope Urban I (222-230),[279] was adopted by Gratian in the *Decretum* in C. 17 q. 4 c. 13. It is the only text in the *Decretum* in which *sacrilegium* is punishable with the penalty of imprisonment.[280] In this case, the penalty of imprisonment was to be inflicted on those who violated ecclesiastical goods, for which they were to receive the same penalty as sacrilegists, and after that they were to be thrown into prison or condemned to perpetual exile. The penalty of imprisonment was thus an alternative to exile. The penalty of imprisonment was

[274] P. Hinschius, *System*, vol. V, pp. 39-40. On the example of C. 17 q. 4 c. 13 it is possible to trace this norm from Roman law to Gratian's *Decretum*. The point of departure is C. Th. 16, 2, 40, then *Capitularia Benedicti Levitae*, 2, 117, PL 97, col. 752 and *Decretales Pseudo-Isidorianae*, in the edition of P. Hinschius, p. 145, later the synod of Mainz in 888, c. 11 and probably via *Decretales Pseudo-Isidorianae* to C. 17 q. 4 c. 13.

[275] M. Myrcha, *Kara*, p. 102.

[276] P. Hinschius, *System*, vol. V, pp. 40-41.

[277] P. Hinschius, *Decretales*, p. 145, c. 5, Mainz of 888, c. 11.

[278] Ae. Friedberg, *CorpIC*, Pars I, col. 817-818, fn. 128.

[279] Jaffé -Wattenbach, † 87 (LXXI).

[280] Apart from this canon there are another 12 canons in the *Decretum* which impose the penalty of imprisonment, but for other crimes.

imposed on both laypersons[281] and clerics.[282] In this case, however, there is no clear indication of the subject of the crime. It can be supposed that such criminal sanctions were imposed mainly on laypersons who raided goods the return of which was to be dedicated to sacred purposes.

5.2.8. Flogging

The penalty of flogging belongs to substantive penalties and it is labelled as an afflictive penalty (poena afflictiva), as its infliction causes physical pain. It belongs to corporal penalties (poenae delebiles) which cause pain but leave no permanent marks on the perpetrator's body, contrary to mutilating or burning stigmata.[283] P. Hinschius regards flogging as a penalty having a secular, or literally, "worldly character" (weltlicher Charakter). Nevertheless, he claims that it was present in canonical legislation both in the previous centuries and in the period from the 7th to the 14th century. The capitularies of the Frankish kingdoms imposed it for incestuous marriages, and later for the ignorance of the Symbol of the Apostles. It was arbitrarily applied towards people of lower rank. In the later period, it was more seldom imposed also on people of lower rank, on slaves as well as – very rarely – on others regardless of their rank.[284] In Gratian's *Decretum*, there are norms containing the criminal sanction of flogging. P. Hinschius mentions five canons which refer to the penalty of flogging for clerics. He simultaneously claims that they were doctrinal rather than actual in character. None of them, however, pertains to the penalty of flogging for *sacrilegium*.

The penalty of public flogging for *sacrilegium* could be inflicted on Jews or Jews who were converts to Christanity[285] for deceitfully obtaining public offices. This norm was established at the fourth synod Toledo in 633 in can. 64, which Gratian included in the *Decretum* in C. 17 q. 4 c. 31. The legal norm prohibited priests and provincial judges from entrusting Jews with public

[281] P. Hinschius, *System*, vol. V, p. 41 writes that since the 12th century it had most often been imposed on laypersons for heresies, and apart from that it "ist die Strafe [...] gegen Laien verhältnissmässig wenig gebraucht worden."

[282] Ibid., pp. 82-84, the penalty of imprisonment for clerics was mainly to ensure the performance of penance for the crimes committed. The penalty of imprisonment was, however, seldom imposed on clerics (sehr selten angedroht).

[283] M. Myrcha, *Kara*, p. 100.

[284] P. Hinschius, *System*, vol. V, p. 36.

[285] LDG, f. 178 v. *Glossa ordinaria*, ad Constituit "qui ex iudeis; de familia ipsorum vel loquitur de iudeis de novo ad fidem conversis."

offices. If, however, they obtained them deceitfully, those priests and judges were to suspend Jews from those offices and forbid them from holding them. If they consented, however, both priests and judges were to be excommunicated. Jews who deceitfully obtained public offices were to be deprived of them and punished by public flogging.[286] Ioannes Teutonicus in the *Glossa ordinaria* explained that the penalty of public flogging was inflicted on those who did not belong to the Church.[287] It could be understandable in the case of Jews, who could not be punished with the penalty of excommunication. Such an understanding of the expression "qui ex Iudeis sunt"[288] is problematic, because if it is to be understood as people of Jewish descent "de novo ad fidem conversis,"[289] then they did belong to the Church and could be punished by the penalty of excommunication. Nevertheless, the legal norm contains the criminal sanction of flogging both for Jews and those of Jewish descent who were newly converted Christians. C. 17 q. 4 c. 31 is the only text in Gratian's *Decretum* which mentions flogging as a criminal sanction for *sacrilegium*.

5.2.9. Proscription

The crime of *sacrilegium* was also punishable by property penalties. Two kinds of property penalties are distinguished. When the perpetrator was deprived of all property, it was confiscation (bonorum publicatio seu confiscatio), and when they were punished by the depletion of only part of property, it was a mulct (mulcta).[290] The law provided both forms of punishment for the crime of *sacrilegium*. P. Hinschius expresses the view that property confiscation as a criminal sanction of purely ecclesiastical law appeared as late as the 11th and 12th centuries, where it was established at particular synods as well as Councils. Since the 13th century, being based on Roman law, it had mainly been employed against heretics.[291] In reference to the crime of *sacrilegium* it is enumerated in Gratian's *Decretum* in C. 24 q. 3 c. 22.[292] In the

[286] C. 17 q. 4 c. 31 "Si quis autem hoc permiserit, uelut in sacrilegum excommunicatio proferatur, et is, qui subrepserit, publicis cedibus deputetur."

[287] LDG, f. 178 v. *Glossa ordinaria*, ad cedibus "quod ecclesia iudicat de his que foris sunt multi et non in pena temporali sive pecuniaria."

[288] C. 17 q. 4 c. 31.

[289] LDG, f. 178 v. *Glossa ordinaria*, ad cedibus.

[290] M. Myrcha, *Kara*, p. 111.

[291] P. Hinschius, *System*, vol. V, p. 39.

[292] This text is a *palea*, which is missing from the majority of the manuscripts, see Ae. Friedberg, CorpIC, Pars I, col. 995-996, fn. 299. Ae. Friedberg, *CorpIC*, Pars I, col. 995-996, in

text of the canon the gravity of the crime of *sacrilegium* was differentiated. The one who laid violent hands on a bishop or presbyter committed "graue sacrilegium,"[293] whereas the one who raided and destroyed a church and set it on fire committed "grauissimum sacrilegium." The basic penalty for this type of *sacrilegium* was to be the public proscription of their goods. Moreover, they were to be incarcerated in a monastery and do penance till the end of their lives. It is the only text in Gratian's *Decretum* where *sacrilegium* was punishable by property confiscation. It can confirm the view of P. Hinschius that property confiscation started to appear later in canon law, between the 11th and 13th centuries.[294] The penalty of proscription was well known in Roman law, in which it was also used to punish committing *sacrilegium*.[295]

5.2.10. Financial Penalty

Besides the confiscation of all property, the law contained a financial penalty for committing the crime of *sacrilegium*. This penalty had been known in the old canon law[296] and its norms were included in the *Decretum* by Gratian. P. Hinschius emphasizes that in the capitularies of the Carolingian period there were legal norms requiring financial penalties paid to priests or churches for refusing to pay tithes. The synods from the end of

Notationes Correctorum there is the information that Burchard and Ivo ascribe this canon to the synod of Gangra, where, however, there is no such canon. It is taken into account in the present study, as it exists both in Ae. Friedberg's edition and in LDG, f. 219 r. P. Hinschius, *System*, vol. V, p. 39, fn. 2 also enumerates this text saying that the text in Benedictus Levita's Collection II, 115, 117, 394, 395, 407, mentioned by Ae. Friedberg, does not fully reflect the canon. The essential content of this canon is contained in can. 24 of the synod of Hohenaltheim of 916 (MGH, LL, 2, p. 558), from which, however, property confiscation was omitted.

[293] C. 24 q. 3 c. 22.

[294] The Third Council of the Lateran of 1179, can. 24 "[...] catholic princes and civil magistrates should confiscate their possessions [...]," A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. II, Kraków 2004, p. 201. In Gratian's *Decretum* the verb *proscribere* is used in four canons, which serves to describe a possible fact, and the noun *proscriptio* is used in seven canons, where it is provided in C. 24 q. 1 c. 32 as the criminal sanction imposed on those who "contra pacem ecclesiae sunt," as well as in D. 1 c. 8 de poenit., which contains the text of Roman law inflicting proscription for not obeying the imperial constitution.

[295] Dig. 48, 13, 3 (Ulpianus) "Peculatus poena [...] qui in eum statum deducitur, sicut omnia pristina iura, ita et bona amittit," for more on proscription for *sacrilegium* in Roman law see A. Dębiński, *Sacrilegium w prawie rzymskim*, pp. 100-101.

[296] M. Myrcha, *Kara*, p. 111, where he quotes C. 17 q. 4 c. 21 as an example, as well as four *capitula* in the Decretals of Gregory IX.

the 9th century established the penalty of the threefold or fourfold restitution for the unlawful appropriation of ecclesiastical goods. The popes of this period even ordered specific sums to be paid in the case of committing *sacrilegium*. And exactly this norm of the synod[297] of Troyes of 878 was adopted by Pope John VIII (872-882) and sent in his letter as the reply to the archbishop of Narbonne and all bishops and abbots of the province of Narbonne, as well as the bishops of Spanish provinces, since "lex Gothica" did not contain any regulations concerning *sacrilegium*.[298] Part of this letter was included by Gratian as the *auctoritas* in the *Decretum* in C. 17 q. 4 c. 21. The text in the *Decretum* is different from the one of the pope's letter, though it contains the same meaning.[299] According to the wording of the text in the *Decretum*, the perpetrator of *sacrilegium* was to pay thirty pounds of silver of the highest purity, which was equivalent to six hundred solidi. Rolandus in his *Summa* explained that "XXX libras examinati argenti" constituted "nongentos[300] solidos [...] quod idem esse potest, iuxta monetae diversitatem."[301] In the law this sum was specified as "levior compositio." In the pope's letter, for its part, the law containing the sanction of a fine of thirty pounds of silver was labelled as "lenis lex." This penalty was to be paid by the perpetrator of *sacrilegium* to a bishop or abbot. It was most probably connected with the jurisdiction of these persons, when *sacrilegium* was committed in the territory of a given diocese or abbey. Also another situation was possible, when a financial penalty was ordered to be paid to persons who were directly concerned with an action for *sacrilegium*. These could be administrators of churches in which *sacrilegium* was committed or clerics who the became passive subject of the crime.

It needs to be emphasized that the sum of thirty pounds of silver constituted the penalty for *sacrilegium* committed by forcefully taking a person from a church or its churchyard. Rolandus provided his explanations in his *Summa* with respect to C. 17 q. 4 c. 20, which includes the prohibition of

[297] Mansi, vol. XVIII, col. 351.

[298] P. Hinschius, *System*, vol. V, pp. 36-36.

[299] Ae. Friedberg, *CorpIC*, Pars I, col. 819-820, in Notationes Correctorum it is emphasized that the manuscript of the pope's letter contains the precept to obey the law against sacrilegists established by Conc. Trecass. of 878 in the presence of king Louis and 53 bishops.

[300] This sum is provided in C. 17 q. 4 c. 20, which comes from the collection of forged norms *Capitularia Benedicti Levitae* I, 337. This text was adopted in their collections by Burchard, *Decretum* III, 197 and Ivo, *Decretum* III, 114, see Ae. Friedberg, *CorpIC*, Pars I, col. 819-820, fn. 186 and 196. In the above-mentioned Collection of Benedictus Levita there is the sum of *quingentos*. Also in LDG, f. 177 r., in C. 17 q. 4 c. 20, there is the sum of "nongentos solidos episcopo componat."

[301] *Summa magistri Rolandi*, ed. Thaner, p. 61, ad c. 21 q. 4 C. 17.

forcefully taking anything from a church or a churchyard. When the perpetrator took anyone's money deposited in a sacred place, they were to compensate the aggrieved party for the loss by paying the ninefold sum of the money taken. As for the church from which the money was stolen, it was to receive the threefold sum of the money taken for violating the sanctity of the place. It ought to be emphasized that Gratian in d. p. c. 20 q. 4 C. 17, providing the definitions of *sacrilegium*, simply stated that "ipsum sacrilegium duplicem continet penam, pecuniariam uidelicet et excommunicationis." He did not include the distinction made by Rolandus in his *Summa*, who explained that the financial penalty for *sacrilegium* committed by breaking the right of asylum was different from the one imposed for taking money from a church. In conclusion, it ought to be stated that the sum of thirty pounds of silver of the highest purity is provided by all sources of canon law. The only difference pertains to the sum of solidi which was to be equivalent to thirty pounds of silver. It could respectively be five hundred,[302] six hundred[303] and nine hundred[304] solidi. It was caused, as emphasized by Rolandus, by "iuxta monetae diversitatem."[305]

Sacrilegium committed by the theft of donations given to the Church or anything that was consecrated to God had to be liable to the fourfold restitution. This sanction is included in C. 12 q. 2 c. 10. The text of the canon, however, does not specify what form it should assume. It can be supposed that the general expression pertaining to the fourfold restitution refers to the fourfold restitution of what was stolen by the perpetrator of *sacrilegium*. If church donations were stolen in the form of money, it should be understood that it would be the fourfold restitution of the stolen sum of money.

In C. 17 q. 4 c. 21 there is a criminal sanction ordering the ninefold restitution of what the perpetrators will steal when raiding monasteries, places consecrated to God and churches.[306] The threefold restitution for violating the sanctity of the place ordered in the same canon can be understood in such a way that the perpetrator of *sacrilegium* was to pay the threefold value of the stolen goods to a bishop[307] or administrator of a given church. What is

[302] *Capitularia Benedicti Levitae* I, 337, PL 97, col. 746-747.

[303] *Summa magistri Rolandi*, ed. Thaner, p. 61.

[304] C. 17 q. 4 c. 20.

[305] *Summa magistri Rolandi*, ed. Thaner, p. 61, ad c. 21 q. 4 C. 17.

[306] C. 17 q. 4 c. 21 "qui monasteria, et loca Deo dedicata, et ecclesias infringunt, et deposita uel alia quelibet exinde abstrahunt, dampnum nouies conponant." It is an excerpt from can. 60 of the synod of Meaux of 845, Mansi, vol. XIV, col. 833.

[307] In LDG, f. 177 r. the expression "pro emunitate nongentos solidos episcopo componat" is used in C. 17 q. 4 c. 20.

problematic is the difference between the expressions used in the text, "pro emunitate nongentos solidos conponat" in C. 17 q. 4 c. 20 and "conponat, et emunitatem tripliciter" in C. 17 q. 4 c. 21. Rolandus in his *Summa* was in favour of the threefold restitution to be made to a church in which *sacrilegium* was committed.[308]

5.2.11. Capital Punishment

The heaviest earthly penalty among substantive penalties is capital punishment (poena capitalis).[309] It should be explicitly stated that the Church from the beginning was in favour of seeking all other kinds of punishment to reform a criminal while avoiding the death penalty.[310] It is confirmed by the gloss ad C. 33 q. 2 c. 6 i X, V, 17, 4 "sed secundum canones haec poena non imponitur." It is proved by such texts in the *Decretum* as C. 23 q. 5 c. 1, where Gratian in d. a. c. 1 q. 5 C. 23 wrote: "nulli liceat aliquem occidere," referring to the commandment "You shall not murder."[311] And similarly, in C. 23 q. 5 c. 2: "Pena illorum [...] rogo te ut preter supplicium mortis sit [...] quia inuenit ecclesia catholica, ubi erga atrocissimos inimicos seruet atque exhibeat lenitatem." The Church in its legislation neither threatened with the death penalty nor inflicted it. It held the view that if it was necessary, only secular power was allowed and obliged to establish and execute such penalties. Clerics were categorically prohibited from performing any functions in the criminal judiciary and neither were they allowed to cooperate with it.[312] The law of the decretals will prohibit clerics from approving of executing the death penalty and being present at its execution.[313] Despite the fact that Gratian in d. a. c. 1 q. 5 C. 23 stated that no one was allowed to kill anybody, in d. p. c. 29 q. 4 C. 17, in reference to can. 15 of the Second Council of the Lateran of 1139, he cited the texts of Roman law ordering capital punishment. Can. 15 "Si quis suadente diabolo" contained the criminal sanction of anathema for the perpetrator of *sacrilegium* committed by laying violent hands on a cleric or monk. This canon punishing *sacrilegium* in canon law was used by Gratian to refer to the text of the imperial consti-

[308] *Summa magistri Rolandi*, ed. Thaner, p. 61 "tripliciter vero ecclesiae pro emunitate i. e. quia eius violavit munimen."

[309] M. Myrcha, *Kara*, pp. 100-101.

[310] C. 23 q. 5 c. 3.

[311] Ex 20, 13.

[312] P. Hinschius, *System*, vol. V, p. 50.

[313] X, V, 31, 10.

tution in the law beginning with the words "Si quis in hoc genus sacrilegii proruperit"[314] and punishing, in turn, *sacrilegium* in Roman law. Roman law, in the constitution at issue, imposed the death penalty for breaking the right of asylum in a church committed by taking anyone from this place by force as well as for committing any unlawful act in a church, desecrating the place, worship or doing any harm to priests and servers. This crime was to be punished in the same way as a public crime and the crime of lese-majesty.[315] However, it can hardly be supposed that due to this Gratian accepted capital punishment. The text of Gratian's *dictum* only cites the norms of Roman law in reference to the crime of *sacrilegium* and Gratian does not take a stand of his own. Including this text at this place appears somewhat artificial. It may have been attributable to the concept behind the layout of the material, as the subsequent text contains the norms of Roman law that treated breaking divine law and arguing with the emperor's decisions as the crime of *sacrilegium*. This induced Gratian to formulate the analogous prohibition of arguing with the pope's decisions.[316]

The same imperial constitution "Si quis in hoc genus sacrilegii inruperit"[317] is referred to by Pope Gregory the Great (590-604) in the letter[318] addressed to John the Defender, whom he sent to Spain with a view to settling the matters concerning Bishop Januarius, against whom violence was used in a church.[319] The pope wrote that if a bishop was harmed by anyone in a church then secular law (lex) punished the perpetrator with death and that person could be, as the perpetrator of lese-majesty, accused by everyone. Thus, he referred to the norms of Roman law punishing *sacrilegium* perpetrated by breaking the right of asylum. He did not, however, take a stand on this criminal sanction and only reminded that Roman law punished the crime of breaking the right of asylum with death. In this way he instructed John the Defender, to whom he addressed his letter. Enforcing the rules of Roman law fell outside his competence. Thus, there are two canons in the *Decretum* connected with the crime of *sacrilegium* which referred to the norms of Roman law ordering the death penalty for *sacrilegium*. The first text is included in Gratian's *dictum*, in which Roman law contained the criminal sanction of the death penalty for *sacrilegium* perpetrated by breaking the right of asylum, church robbery, disruption of worship as well

[314] The law of 26th April 398, in C. I. 1. 3. 10pr.
[315] C. 17 q. 4 c. 29.
[316] Dictum p. c. 29 q. 4 C. 17.
[317] C. Th. 16, 2, 31; C. I. 1, 3, 10.
[318] Jaffé -Wattenbach, 1912 (1530).
[319] C. 2 q. 1 c. 7.

as abusing priests or monks. The second text of the imperial law contained the criminal sanction of the death penalty for breaking the right of asylum. In Gratian's *Decretum* there is no text of canon law which would include the sanction of the death penalty for committing the crime of *sacrilegium*, which is consonant with the whole current of canon law, which did not know such a criminal sanction.

5.3. Canonical Penance

Generally, canonical penance constitutes satisfaction to God. It differs from sacramental penance in that it is employed in the external forum.[320] Moreover, the perpetrator of a crime needs to agree to accept and perform penance.[321] Canonical penance can be imposed as a distinct penalty or it can be a way of tightening up some penalty.[322] Public penance cannot be imposed for a secret crime. "Imposing penance is always an act of public law,"[323] as it is done by the competent ecclesiastical authority in the external forum. In the first centuries of the Church "solemn public penances" used to be inflicted.[324] Apart from them, ordinary penalties (communes) were also imposed.[325] Penance can be "inflicted only for an unquestionable crime,"[326] and its purpose was reparation for one's guilt. It is important that the perpetrator is able to perform penance, which is why it is necessary to adjust it to the specific perpetrator of a particular crime.[327]

Canonical penances were also imposed for the crime of *sacrilegium*. What types were specifically at issue will be depicted in the analysis of the individual canons of Gratian's *Decretum*.

The criminal sanction of public penance was added to can. 20 of the synod of Tribur of 895 for breaking the right of asylum, which was regarded as the crime of *sacrilegium*. This canon was included by Gratian as the *auctoritas* in the *Decretum* in C. 17 q. 4 c. 20. The law ordered that a master

[320] M. Myrcha, *Kara*, p. 116.
[321] Ibid.
[322] J. Krukowski, *Sankcje w Kościele*, in: *Komentarz*, vol. IV, p. 181.
[323] J. Syryjczyk, *Sankcje w Kościele*, p. 255.
[324] T. Pawluk, op. cit., vol. IV, p. 100.
[325] F. X. Wernz-P. Vidal, op. cit., vol. VII, pp. 425-426.
[326] Ibid., p. 256.
[327] Ibid.

should be punished for forcefully taking a slave from the vestibule or cloisters of a church,[328] where the slave took shelter for fear of punishment. The master was to pay a financial penalty of nine hundred solidi to the church administrator. The financial penalty was to constitute reparation for violating the sacred place.[329] The perpetrator, for his part, was to be punished by public penance in accordance with a sentence.[330] According to the version from *Editio Romana*, the perpetrator was to do public penance imposed by a bishop. A bishop was to pronounce a fair sentence (iusto iudicio).[331] Public penance had the character of an indeterminate penalty. Its form and duration was to be decided by a bishop. That public penance had the character of an indeterminate penalty was connected with the fact that a judge was a bishop and the law allowed him freedom in inflicting punishment.[332] It was a bishop who decided on its kind and gravity, taking into account the circumstances of the crime and the person who committed it, and more specifically, their capability to perform penance. In the 9th century public penance was treated as a form of increasing the penalty for the crime of *sacrilegium*. It was with this understanding that the penalty was adopted by Gratian in the *Decretum*. The sanction of public penance was in this case inflicted for the crime of *sacrilegium*, which also constituted a crime of public law.[333]

Public penance was also imposed on a layperson who broke the oath of allegiance to the king, and later undertook action aimed at killing the king. This sanction was imposed on the perpetrator of this type of *sacrilegium* in the text[334] which Gratian included in the *Decretum* in C. 22 q. 5 c. 19. The perpetrator was to incur the penalty of anathema if they did not undertake

[328] Ae. Friedberg, *CorpIC*, Pars I, col. 819-820, in Notationes Correctorum there is the information that the two oldest codices of the *Decretum* include the expression "de almario," while the capitularies contain the expression "de ecclesia."

[329] C. 17 q. 4 c. 20 "pro emunitate nongentos solidos conponat."

[330] Ibid. "et ipse publica penitencia iuxta iudicium mulctetur;" Ae. Friedberg, *CorpIC*, Pars I, col. 819-820, in Editio Romana the text at this place was as follows: "iusto iudicio episcopi mulctetur."

[331] As above.

[332] M. Myrcha, *Kara*, p. 143, where the author writes about indeterminate penalties, pointing to the sources since the Decretals.

[333] Cf. J. Syryjczyk, *Sankcje w Kościele*, pp. 255-256.

[334] Ae. Friedberg, *CorpIC*, Pars I, col. 887-888, in Notationes Correctorum there is the explanation that this text is absent from the better codices of the *Decretum*, and Burchard and Ivo cite it "ex dictis Augustini." This is why it is treated as a *palea*. A similar text is contained in can. 8 of the sixteenth synod of Toledo. However, it was inscribed in codex F in the margin at a later time.

penance as reparation for the crime committed.[335] Penance in the case of this type of *sacrilegium* had the character of a determinate penalty, as the synodical canon determined its kind and duration.[336] The perpetrator of the crime, according to the norm of law established at the synod, was to "leave the world, lay down their arms, go to a monastery and do penance till the end of their life." The penalty of penance was to be perpetual. The law allowed the person to be admitted to participation with the faithful at the moment of their death and to receive the Eucharist. In this case penance replaced the penalty.[337]

A similar criminal sanction was imposed for *sacrilegium* that was committed by laying violent hands on a bishop or presbyter. This text, with the information that it derives "Ex dictis Gregorii papae,"[338] is contained in C. 24 q. 3 c. 22. The text of the canon ordered that the proscription of the goods belonging to the perpetrator of the crime should be pronounced, after which the perpetrator was to be incarcerated in one place, in a monastery, where they were to do penance "for the rest of their days." It was a determinate penalty, in which its kind and duration was specified. Penance was not an independent penalty in this case, but it toughened up the penalty of proscription.

Canonical penance constituted the criminal sanction for *sacrilegium* in the text ascribed[339] to Pope Eusebius (309), which is contained in C. 12 q. 2 c. 10. The perpetrator of the crime of *sacrilegium* which was committed by taking church donations or anything that was consecrated to God was to perform the fourfold restitution and do canonical penance. The expression "canonice peniteat,"[340] used in the text, does not indicate the kind or duration of penance. It can thus be supposed that its gravity and duration was to be decided by a bishop.

Public penance constituted the criminal sanction for men and women religious attempting to get married. This decision was taken at the synod of Tribur in 895 in can. 6, and Gratian included this text as the *auctoritas* in

[335] C. 22 q. 5 c. 19 "nisi per dignam penitenciae satisfactionem emendauerit."

[336] M. Myrcha, *Kara*, p. 140.

[337] J. Syryjczyk, *Sankcje w Kościele*, p. 255.

[338] Ae. Friedberg, *CorpIC*, pars I, col. 995-996, where in Notationes Correctorum the information is provided that this canon is absent from the majority of the manuscripts of the *Decretum*, while Burchard and Ivo cite it from the synod of Gangra. There is no such canon among the canons of the synod of Gangra of circa 340. It is treated as a *palea*.

[339] Ae. Friedberg, *CorpIC*, Pars I, col. 689-690, fn. 102, the text comes from *Decretales Pseudo-Isidorianae*, P. Hinschius, *Decretales*, p. 238; Jaffé -Wattenbach, † 164 (CXXII).

[340] C. 12 q. 2 c. 10.

C. 27 q. 1 c. 11. The perpetrators of this "sacrilegious relationship"[341] were to be expelled from the monastery and to bewail their offence in seclusion. Their penance was to last till the end of their life, and at the moment of their death they could receive Holy Communion. This penalty had the character of a determinate penalty and was perpetual. It was public penance, even though it was performed in seclusion. It was caused by the fact that the crime of becoming united in an unlawful relationship and conceiving offspring had a public character.[342] The perpetrators were expelled from monastic communities and deprived of participation with the faithful. Thus, in this case penance was not an independent penalty but it increased the fundamental penalty. By this penance they were to make satisfaction to God, but also to repair the scandal created in the community of the Church.[343]

Pope Gregory (590-604), sending John the Defender to Spain in connection to Bishop Januarius, against whom *sacrilegium* was committed in that violence was done to him, ordered six months of penance in a monastery for the bishops who ordained some bishop "contra canones."[344] The letter of the pope[345] was included by Gratian in the *Decretum* as the *auctoritas* in C. 2 q. 1 c. 7. This penalty was incurred by the bishops who ordained that bishop illegitimately, as well as those who "ordinationi eius consentientes interfuerunt."[346] Penance in this case was not a distinct penalty. It increased the penalty which consisted in the prohibition of receiving Holy Communion. It was a kind of excommunication. The pope ordered that if it happened that while doing penance any penitent found themselves in danger of death, they were to be given Viaticum. An essential element of the papal decision was that it took into account the mitigating circumstances of the case. The pope demanded that it should be taken into consideration that the sentence of condemnation or the bishop's deposition could be imposed through fear of the judge by the bishops, or if they confessed to doing so of their own free will, then the penalty should be moderated.[347] Thus, the pope treated fear as a circumstance decreasing the imputability of the per-

[341] C. 27 q. 1 c. 11 "sacrilega contagione."

[342] J. Syryjczyk, *Sankcje w Kościele*, p. 256.

[343] J. Krukowski, *Sankcje w Kościele*, in: Komentarz, vol. IV, pp. 180-181; T. Pawluk, *Prawo kanoniczne według Kodeksu Jana Pawła II*, vol. IV, pp. 100-101.

[344] C. 2 q. 1 c. 7.

[345] Ae. Friedberg, *CorpIC*, Pars I, col. 439-442, fn. 34, the letter was written in 603 (ep. 45, lib. XIII), Jaffé -Wattenbach, 1912 (1530).

[346] C. 2 q. 1 c. 7.

[347] Cf. J. Syryjczyk, *Sankcje w Kościele*, pp. 269-270; M. Myrcha, *Kara*, pp. 433-434.

petrator.[348] This moderation was to consist in shortening the duration of the prohibition of receiving Holy Communion and adjusting the kind of penance to the situation.[349] At the same time, the pope did not specify any details. They were to be decided on the spot by John the Defender after investigating the case.

The penalty of perpetual penance in a monastery could also be imposed on bishops, presbyters, deacons and other clerics who sought advice from "haruspices, sorcerers, soothsayers or even augurs or fortune-tellers, or anyone dealing with similar practices."[350] This criminal sanction was added by bishops to can. 30 of the fourth synod of Toledo of 633. Gratian included it in the *Decretum* in C. 26 q. 5 c. 5. Irrespective of his grade, the perpetrator of this type of *sacrilegium* was to be suspended and was to undertake penance in a monastery, where, performing this penance till the end of his life, was to make reparation for the crime committed. Thus, it constituted an expiatory penalty. Penance in this case was not a distinct penalty either, but it toughened up the suspension of a given cleric.

5.4. Summary

Sacrilegium in the norms of canon law included in Gratian's *Decretum* is treated as the gravest crime alongside homicide and adultery and other similar crimes. This classification of the crime of *sacrilegium* resulted in the fact that the criminal sanctions included in the norms of law established mainly at particular synods and Councils constituted the strictest sanctions which the system of ecclesiastical penal law had at its disposal.

Among the most severe penalties, which are currently treated as censures, and which at that time were simply regarded as penalties aimed at expiation as well as the reform of a criminal, there was anathema. The penalty of anathema was understood as the separation from the Church, eternal death, the exclusion of a criminal from the kingdom of God and eternal damnation. Three kinds of anathema were distinguished at the time. They were temporary anathema, or the one lasting for a specific period of time during

[348] Cf. J. Syryjczyk, *Sankcje w Kościele*, pp. 136-138.

[349] C. 2 q. 1. c. 7 "tempus eis adbreuiandum est, et modus penitenciae temperandus."

[350] C. 26 q. 5 c. 5 "aruspices, aut incantatores, aut ariolos, aut certe augures uel sortilegos, uel qui profitentur artem magicam."

which a given criminal was to reform, anathema called *maranatha*, which was supposed to last until the coming of Christ to the Last Judgement, and anathema called *perpetuum*, or the one which was to last in perpetuity. Owing to its severe effects, anathema tended to be compared with the death penalty. It was inflicted only for the gravest crimes, including *sacrilegium*, in situations where a criminal at issue remained contumacious and refused to reform.

As anathema was an especially severe penalty, a bishop had to inform an archbishop and other bishops before its imposition. The law required that the perpetrator of a crime be warned three times before anathema was imposed, which in practice did not always take place. Gratian, wanting to emphasize the differences between anathema and excommunication, stated that "aliud sit excommunicatio, et aliud anathematizatio." In order to specify this difference, he included in the *Decretum* the letter of Pope John VIII to Bishop Liutbert, in which he explained that "excommunicatione, que a fraterna societate separat, sed etiam anathemate, quod ab ipso corpore Christi (quod est ecclesia) recidit." The decretists, however, treated anathema as "maior excommunicatio" and maintained that it had a double, seemingly contradictory, purpose: depriving a criminal of participation with the faithful and, at the same time, keeping that person in the Church. They taught that the person punished with anathema could not be in contact with the faithful. The faithful were prohibited from greeting this person, seeking their advice, giving advice to them, kissing them as well as praying and eating meals with them. Anathema was a strict penalty imposed in a solemn manner and it excluded a particular criminal from communion with the faithfhul. It, however, did not exclude from the Church, as the spiritual bonds formed by Baptism could not be broken by any penalty inflicted in the external forum. The canonists unanimously claim that in fact, despite the solemn character of its infliction, anathema was no different from excommunication. The legal situation of a criminal was the same in the case of both these penalties. The penalty of anathema was imposed for the following types of the crime of *sacrilegium*: transferring goods donated to the Church to other purposes than the support of the poor (C. 12 q. 2 c. 21.), accepting and distributing goods without a bishop's knowledge (C. 16 q. 1 c. 57), keeping ecclesiastical possessions illegitimately (C. 16 q. 1 c. 57), laying violent hands on a cleric or monk (C. 17 q. 4 c. 29), breaking the oath and attempting to kill the king (C. 22 q. 5 c. 19), taking away goods and privileges belonging the Church (C. 16 q. 3 c. 8), alienating ecclesiastical goods by laypersons and clerics (D. 96 c. 1), taking the goods belonging to a deceased or dying bishop by clerics (C. 12 q. 2 c. 38), abusing the blessing of spouses (C. 27 q. 2 c. 50), simony (C. 1 q. 3 c. 1) and church robberies (C. 17 q. 4 c. 5).

Just as anathema, the most frequent penalty was excommunication. Excommunication had the character of a censure, as it was imposed on the contumacious perpetrator of a crime who did not want to make reparation for that crime. The gradation of the penalty was such that if the excommunicated person did not reform anathema was inflicted on them, and when they remained contumacious they should be handed over to secular authorities who were to condemn them to exile or inflict another penalty. There also were many kinds of excommunications. These were partial and complete ones as well as those depriving of particular goods. Before excommunication was inflicted, there was a legal obligation to pronounce a warning. No bishop was allowed to excommunicate anybody for personal harm. It could only be imposed for a public crime. Excommunication could have a specific duration or be imposed in perpetuity. At the moment of death, the condemned person should be given Holy Communion. The faithful could not communicate with the excommunicated person, as when they did it they incurred the penalty of major excommunication. Excommunication was an indivisible penalty. The most frequent effect of excommunication was the complete deprivation of participation with the faithful and the prohibition of receiving Holy Communion by the excommunicated person. The analysis of the canons in Gratian's *Decretum* makes it possible to state that excommunication was inflicted for the following types of the crime of *sacrilegium*: breaking the right of asylum (C. 17 q. 4 c. 10), desecrating a church, stealing anything from a church, doing harm to "ecclesiastical persons" (C. 17 q. 4 c. 21), entrusting Jews with public offices (C. 17 q. 4 c. 31), heresy (C. 1 q. 1 c. 70), a superior's order that was contrary to divine law (C. 11 q. 3 c. 101), seizure, robbery and destruction of ecclesiastical goods (C. 12 q. 2 c. 3), breaking the vows of chastity by men and women religious (C. 27 q. 1 c. 11), attempting to enter into marriage with nuns (C. 27 q. 1 c. 17), breaking the vow of celibacy (D. 28 c. 5), laying violent hands on a cleric (C. 17 q. 4 c. 21) and the crime of schism (D. 4 c. 32 de cons.).

Another censure-like penalty was the interdict. In Gratian's *Decretum* it is simply treated as a penalty. Owing to its effects, it was regarded as partial excommunication. It had been treated as a separate penalty in the system of canonical penal law since the 4th century. Since the turn of the 12th and 13th centuries it had existed as a distinct penalty. The interdict deprived the faithful only of some goods. The penalty of interdict had been inflicted for *sacrilegium* since the end of the 5th century. The legal norms present in Gratian's *Decretum* prove that the penalty of interdict was imposed for *sacrilegium* committed by breaking the right of asylum (C. 17 q. 4 c. 10).

Another penalty inflicted for *sacrilegium* was also suspension. It was imposed only on clerics. Suspension pertains to the prohibition of using the

power of orders and jurisdiction. The penalty of suspension was considered equal to excommunication. Among the numerous types of the crime of *sacrilegium*, suspension was ordered to be imposed on those clerics who sought advice from soothsayers, haruspices, sorcerers, augurs or generally those who were engaged in magic (C. 26 q. 5 c. 5).

Sacrilegium used to be punished with a number of different expiatory penalties. Just as in the case of suspension, only clerics incurred the penalty of deposition and degradation. In the source material in the *Decretum* these two constituted in practice one penalty. They were clearly distinguished from each other in the 13th century. It was the most severe penalty for clerics. It deprived of the rights of the clerical state. The penalty of deposition or degradation was inflicted on clerics for the following types of the crime of *sacrilegium*: selling ecclesiastical vessels (D. 50 c. 22), ordaining someone who committed *crimen capitale* (sacrilegium) (D. 81 c. 1), laying violent hands on the king (C. 22 q. 5 c. 19), heresy (C. 1 q. 7 c. 1) and ordaining someone as a bishop "peruerse et contra canones" (C. 2 q. 1 c. 7).

In Gratian's *Decretum* there are a number of norms which punished the crime of *sacrilegium* by an ecclesiastical judge's sentence, who was left with the decision regarding the kind of punishment. For *sacrilegium* committed by selling liturgical vessels, a presbyter or deacon were to be brought to a bishop's court, who was to inflict a penalty (D. 50 c. 22). It was similar in the case of committing *sacrilegium* by raiding ecclesiastical possessions or taking and possessing them illegitimately (C. 12 q. 2 c. 21), or when it concerned raiding and robbing monasteries (C. 17 q. 4 c. 21). Gratian's view presented in d. p. c. 77 q. 3 C. 11 is peculiar. According to it, even an unfair sentence has to be obeyed, which Gratian exemplified with the situation when a sentence was passed for *sacrilegium*, which the perpetrator had not committed, but they had committed adultery, for which they had already been excommunicated "before God." The decretists briefly commented on this view of Gratian: "Gratianus male intellexit." This did not prevent Gratian from expressing the right opinion in d. p. c. 101 q. 3 C. 11, where he stated that one did not need to obey a sentence pronounced for disobedience to one's superior, as the superior had ordered one to commit an evil act. This proves how difficult it must have been for Gratian to keep the teaching of canon law coherent when he undertook his work on harmonizing the discordant canons (Concordia discordantium canonum) of almost twelve centuries.

Sacrilegium brought about the incapacity to receive holy orders (D. 81 c. 1). Attempting to conclude marriage or secret concubinage by a deacon made him incapable of receiving higher grades of holy orders (D. 28 c. 5).

No orders could also be administered to heretics returning to unity with the Church (C. 1 q. 1 c. 18). Likewise, *sacrilegium* in the form of simony made it impossible to receive orders (d. p. c. 18 q. 1 C. 1). Also *infamis* could not be ordained (C. 6 q. 1 c. 17).

The penalty of infamy was not a distinct penalty. It followed as a result of the whole range of grave crimes, including *sacrilegium* (C. 6 q. 1 c. 17; C. 17 q. 4 c. 3).

Infamy was also connected with the incapacity to perform legal acts. The person committing *sacrilegium* became *infamis* and could not accuse Christians in a court or act as a witness in trials against them (C. 3 q. 4 c. 11; C. 3 q. 5 c. 9).

Another penalty for *sacrilegium* was exile, also called banishment, and when it concerned being sent to overseas countries it was labelled as deportation. It could either be perpetual or last for a certain time specified by a sentence. This penalty is included in the texts of the norms of Roman law adopted in Gratian's *Decretum*. Gratian contained the imperial constitution including this criminal sanction in d. p. c. 41 q. 1 C. 16. The penalty of deportation for *sacrilegium* as an alternative to imprisonment is included in C. 17 q. 4 c. 13.

The only text in the *Decretum* which includes the penalty of imprisonment for *sacrilegium* committed by violating ecclesiastical goods is C. 17 q. 4 c. 13.

Another kind of substantive penalties for the crime of *sacrilegium* was also flogging. It could be imposed on Jews for deceitfully obtaining public offices (C. 17 q. 4 c. 31).

Among the penalties for *sacrilegium* in the *Decretum* one can also find public proscription. As a criminal sanction of purely canon law it had existed since the 11th and 12th centuries. Earlier it was applied in the system of Roman law. The penalty of public proscription was to be imposed on the one who assaulted bishops and presbyters, as well as raided and destroyed churches and set them on fire (C. 24 q. 3 c. 22).

For *sacrilegium* one could also get a financial penalty, which Gratian mentioned next to excommunication. For *sacrilegium*, the perpetrator had to pay a fine of thirty pounds of silver of the highest purity, which was equivalent to nine hundred or six hundred solidi. The differences stemmed from the content of silver in a coin. For *sacrilegium* committed by breaking the right of asylum, the perpetrator of the crime was to pay a financial penalty to a bishop, abbot, church administrator or other persons who had the right to bring an action for *sacrilegium* (C. 17 q. 4 c. 20; c. 17 q. 4 c. 21). The restitution for the damages caused by *sacrilegium* was to correspond to the

elevenfold, ninefold and fourfold value of the damage (C. 12 q. 3 c. 10). For violating the sanctity of the place (emunitas), the perpetrator of *sacrilegium* had to pay a given church the threefold amount of the damage done (C. 17 q. 4 c. 21). Taking money deposited in a church was to be compensated for by nine times (C. 17 q. 4 c. 20).

The system of ecclesiastical penal law did not include the death penalty for *sacrilegium* or other, even the gravest, crimes. In Gratian's *Decretum* there is a text of Roman law which Gratian included in his d. p. c. 29 q. 4 c. 17, where the death penalty is ordered for *sacrilegium* committed by breaking the right of asylum, desecrating the place, disrupting worship and doing harm to priests and servers.

A kind of penalty in the contemporary system of canonical penal law was public penance. It was inflicted also for *sacrilegium* committed by: breaking the right of asylum (C. 17 q. 4 c. 20), breaking the oath of allegiance and attempting to kill the king by a layperson (C. 22 q. 5 c. 19), laying violent hands on a bishop or presbyter (C. 24 q. 3 c. 22), apostasy (D. 4 c. 40 de cons.), taking church donations (C. 12 q. 2 c. 10), attempting to conclude marriage by men and women religious (C. 27 q. 1 c. 11), unlawful ordination of a bishop (C. 2 q. 1 c. 7) and seeking advice from haruspices, augurs and those engaged in magic by clerics (C. 26 q. 5 c. 5).

In conclusion, it ought to be stated that the penalties for the crime of *sacrilegium* did not essentially diverge from the penalties for other serious crimes of canon law. However, it is true that just as *sacrilegium* was included in the catalogues among the gravest crimes, the criminal sanctions which were inflicted for *sacrilegium* by the norms of canon law were also the heaviest. Among the criminal sanctions for *sacrilegium* there were those imposed only on clerics, such as deposition, degradation and suspension, and those which could be incurred by anyone who committed *sacrilegium* irrespective of their state. Since *sacrilegium* was a crime *mixti fori*, in the case of some its forms recourse was made to *bracchium saeculare* when the system of ecclesiastical penalties was ineffective. The legal norms included in Gratian's *Decretum* have a normative character. They do not describe, but determine how the perpetrator of *sacrilegium* should be punished. They have a casuistic character, hence the multitude of the types of *sacrilegium* and individual penalties for each type of *sacrilegium*. It is not possible to establish the general system of penalties for *sacrilegium*, just as it is impossible to provide the general definition of *sacrilegium*. The definitions present in the *Decretum* are specific in character. Each type has to be considered separately.

Chapter VI

The Application and Cessation of Penalties

In the system of canonical penal law there are two ways in which penalties can be applied. In one case, a penalty is imposed by an ecclesiastical judge, who may do it individually or in a collegial court. Penalties imposed in this way are called *ferendae sententiae* penalties. In the other case, penalties are imposed by laws. A penalty is contained in a law itself. These penalties are labelled as *latae sententiae* penalties. Another characteristic feature of ecclesiastical penalties is the division between censures and expiatory penalties, which differ both in their application as well as their cessation. Owing to the fact that the concept of censures in that period of the development of canon law was not sufficiently defined, and the purpose of penalties was both medicinal and expiatory, this distinction will not be emphasized. The sanctions which were to be imposed *ipso facto* or *ipso iure* will be indicated in such cases where it clearly follows from the text of a law. As will be seen, this will prove to be difficult. It is easier to differentiate *ferendae sententiae* penalties. We shall also indicate the bodies imposing penalties for *sacrilegium*, as well as the way in which these penalties cease to apply.

6.1. *Latae sententiae* Penalties

The canonists tend to hold divergent views regarding the time when *latae sententiae* penalties were established and introduced into canon law. There are authors who claim that they already appeared in the apostolic

age[1] and are contained in the texts of the New Testament.[2] This view is contested by M. Myrcha, who maintains that although these texts include the expression *ipso facto*, "the New Testament is not a code of canon law,"[3] and the text of the Gospel According to John and the text of the Epistle of Paul to Titus[4] or the Galatians[5] treat the violation of divine law as a sin and not as a crime infringing ecclesiastical law. Other authors maintain that they date back to the 4th century.[6] P. Hinschius believes that the attempt to distinguish *latae sententiae* penalties "in den ersten Jahrhunderten" is erroneous.[7] There are authors[8] who claim that they appeared in the 7th, 8th and even 9th century. The differences of opinion may stem from focusing on the essence of the very institution in one case, and on the terminology which may be the basis for claiming the existence of these penalties in another. It appears that the oldest source texts of canon law to which the beginnings of these penalties can be traced are can. 1 of the synod of Elvira of 306,[9] can. 16 of the Council of Nicaea of 325 and can. 6 of the Council of Chalcedon of 451. These texts, however, do not reliably confirm the existence of these penalties, but constitute "only some traces."[10] The text in the case of which one can certainly speak of a *latae sententiae* penalty is can. 1 of the synod of Antioch of 341,[11]

[1] J. Hollweck, *Die kirchlichen Strafgesetze*, Mainz 1899, p. 87; J. Devoti, *Institutionum canonicarum libri IV*, 6th ed., vol. IV, Bassani 1897, tit. 18, § 8; F. Kober, *Der Kirchenban*, p. 56.

[2] J. Devoti and F. Kober, as above; the basis for this view is to be the text of Jn 3, 10.

[3] M. Myrcha, *Kara*, p. 161.

[4] Titus 3, 10-11.

[5] Gal 1, 8.

[6] F. Wernz, *Jus decretalium*, vol. V, Prati 1914, p. 214, fn. 395; F. Roberti, *De delictis et poenis*, vol. I, pt. 2, p. 269, fn. 1.

[7] P. Hinschius, *Sysytem*, vol. IV, p. 761.

[8] P. Hinschius, *System*, vol. V, p. 130, where he referred to D. 2 c. 11 de cons. (the twelfth synod of Toledo, 681, can. 5) "Quicumque ergo sacerdotum deinceps diuino altario sacrificium oblaturus accesserit, et se a communione suspenderit, ab ipsa, qua se indecenter priuauit, gratia communionis anno uno repulsum se nouerit." P. Hinschius claims that in the 7th century *latae sententiae* penalties received "ihre volle Ausbildung." He does not say, however, that such penalties had not existed before; F. Bączkowicz, J. Baron, W. Stawinoga, *Prawo kanoniczne*, 3rd ed., vol. III, Opole 1958, p. 408, fn. 459.

[9] "Placuit inter eos: qui post fidem baptismi salutaris adulta aetate ad templum idoli idolaturus accesserit, et fecit quod est crimen capitale, quia est summi sceleris, placuit nec in finem eum communionem accipere," Mansi, vol. II, col. 5; the Latin text with the Polish translation, A. Baron, H. Pietras, *Acta Synodalia*, vol. I, p. 50.

[10] M. Myrcha, *Kara*, p. 164.

[11] "Omnes qui audent dissolvere decretum sanctae et magnae synodi [...] esse excommunicatos et Ecclesia eiectos statuimus [...]. Si quis autem eorum, qui praesunt Ecclesiae [...] audebit [...] Pascha cum Iudeis peragere, sancta synodus eum *ab hinc alienum* esse ab Ecclesia

which is why the year 341 can be accepted as the time when *latae sententiae* penalties started to exist. It is possible to argue that a given legal norm contains a *latae sententiae* penalty if its text includes the following terms:[12] "noverit,"[13] "sciat"[14], "ex tunc,"[15] "ipso iure,"[16] "eo ipso,"[17] "ipso facto,"[18] "latae sententiae."[19] These terms are enumerated in chronological order, which seems to be the most proper given the historical character of the present work. They do not exhaust all the expressions indicating the existence of a *latae sententiae* penalty in a given norm as used in canon law. The ones enumerated are the most typical and frequent.

Until the 10th century *latae sententiae* penalties were a rare occurrence in universal canonical legislation. The development of these penalties in universal legislation began with the First Council of the Lateran of 1123. Their fast growth took place in the 13th century.[20] Accordingly, in the source

iudicavit," Mansi, vol. II, col. 1367; the Greek text with the Polish translation, A. Baron, H. Pietras, *Acta Synodalia*, vol. I, p. 135.

[12] M. Myrcha, *Kara*, p. 168.

[13] The twelfth synod of Toledo of 681, can. 5, Mansi, vol. XI, col. 1013; D. 2 c. 11 de cons.

[14] The synod of Rome of 743, Mansi, vol. XII, col. 383.

[15] The First Council of the Lateran of 1123, can. 10 "Alioquin ex tunc eos ab ecclesiae introitu sequestramus [...]," Mansi, vol. XXI, col. 284; A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. II, p. 126.

[16] *Summa magistri Rolandi*, ed. Thaner, p. 111 "excommunicatorum quidam sunt excommunicati ipso iure, quidam non. Item eorum, qui excommunicati sunt iure ipso, alii sunt manifesti, alii non. [...] quos manifestum est ipso iure in crimen anathematis incidisse [...]." See P. Hinschius, *System*, vol. V, p. 132, fn. 1, where he points to the norms established at the synods since the beginning of the 13th century.

[17] *Summa decretorum magistri Rufini*, ed. Singer, pp. 315-31; the Second Council of Lyon of 1274, constitution II/12 "eo ipso excommunicationis sententiae subiacere," A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. II, p. 430. See P. Hinschius, *System*, vol. V, p. 132, fn. 3.

[18] The decree of Rudolf, bishop of Lovanium, circa 1166, Mansi, vol. XXII, col. 9 "ipso facto cum tota terra statim interdicto subiaceat." The Second Council of Lyon of 1274, constitution II/11 "se ipso facto excommunicationis sententia innodatos," A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. II, p. 430. See P. Hinschius, *System*, vol. V, p. 132, fn. 2, where he points to the norms from the mid-13th century.

[19] This term was probably first used by Pope Clement III (1191-1198), X, V, 39, 14 "an incidant in canonem latae sententiae interfectores clericorum [...] canone latae sententiae laici minime coercentur [...]." Stephen of Tournai uses a similar expression, "datae sententiae," *Summa Stephani*, ed. Schulte, p. 125, ad. C. 1 q. 1 c. 7 "Et nota, quoniam cap. istud est datae sententiae, quod patet ex eo verbo *condemnatum*" and p. 229, ad C. 17 q. 4 c. 29 "Hoc capitulum est datae sententiae." It is believed that the term had already been used before, but there is no earlier source evidence to prove it, see M. Myrcha, *Kara*, p. 171.

[20] J. Syryjczyk, *Sankcje w Kościele*, p. 74.

material analyzed in the current work there are only few norms containing these penalties.

The essence of a *latae sententiae* penalty is that it is included in a law and "is incurred without court intervention."[21] The legislator performs a double role in the case of *latae sententiae* penalties, that of a legislator who establishes a criminal sanction and a judge who applies a criminal sanction and pronounces a sentence.[22] Such a penalty includes, as claimed by M. Myrcha, "virtualiter" a trial and a sentence. Obviously, such a sentence differs in both temporal and personal terms from a sentence in *ferendae sententiae* penalties.[23] The difference is in the way these penalties are inflicted and enforced.[24] A *latae sententiae* penalty is more severe than a *ferendae sententiae* penalty.[25] It is a determinate penalty, which binds the perpetrator at the moment of committing a crime and cannot be moderated by a judge. This is possible only in the case of the material accummulation of penalties, when the sum total of *ferendae sententiae* penalties would be, in a judge's opinion, too big.[26]

In Gratian's *Decretum* there are norms containing *latae sententiae* penalties.[27] Among them there is the one from the twelfth synod of Toledo of 681, present in D. 2 c. 11 de cons. "gratia communionis anno uno repulsum se nouerit," which threatens the *latae sententiae* penalty prohibiting a priest celebrating Holy Mass and not receiving Holy Communion from receiving Holy Communion for a year. According to the canonists, the presence of this norm in the *Decretum* significantly influenced the adoption of this classic terminology in legislation and legal literature.[28]

Among the norms including criminal sanctions for *sacrilegium* in Gratian's *Decretum*, there are three that unambiguously indicate the existence

[21] M. Myrcha, *Kara*, p. 171.

[22] J. Syryjczyk, *Sankcje w Kościele*, p. 71.

[23] M. Myrcha, *Kara*, p. 185.

[24] J. Syryjczyk, W*ymiar kar "latae sententiae" w świetle przepisów Kodeksu Prawa Kanonicznego z 1983 roku*, "Prawo Kanoniczne" 28 (1985), no. 3-4, pp. 42-43.

[25] M. Myrcha, *Kara*, p. 187; J. Syryjczyk, *Sankcje w Kościele*, p. 72.

[26] J. Syryjczyk, *Sankcje w Kościele*, p. 72.

[27] M. Myrcha, *Kara*, p. 178 after the remark that "in Gratian's *Decretum* we will not find a special title devoted to <latae sententiae> penalties," the author states that there are criminal norms containing *latae sententiae* penalties. Among the ten norms enumerated, there is only one, C. 6 c. 1 c. 17 (*Decretales Pseudo-Isidorianae*, attributed to Pope Stephen I <254?-257>, P. Hinschius, *Decretales*, p. 182), in which this pope decides which persons are branded with infamy, and there are also "sacrilegos" among them.

[28] Ibid., p. 169.

of *latae sententiae* penalties for this crime: C. 17 q. 4 c. 29; C. 27 q. 8 c. 50; C. 17 q. 4 c. 5.

In C. 17 q. 4 c. 29 there is, as the *auctoritas*, can. 15 of the Second Council of the Lateran of 1139, in which it is decided that laying violent hands on a cleric or monk constitutes the crime of sacrilege and its pepetrator incurs the penalty of anathema (anathematis uinculo subiaceat).[29] Stephen in his *Summa* claims that "Hoc capitulum est datae sententiae."[30] It thus ought to be accepted that this type of *sacrilegium* was punishable with a *latae sententiae* penalty.[31]

Abusing the blessing of an engaged woman by her entering into marriage with another man was also treated in the manner of *sacrilegium* (ad instar sacrilegium).[32] This law was issued by Pope Siricius I (384-399) in 385, and Gratian adopted it as the *auctoritas* in the *Decretum* in C. 27 q. 8 c. 50. The pope ordered as follows: "Tale igitur conubium anathematizamus."[33] This *latae sententiae* penalty does not directly pertain to *sacrilegium*, but the infliction of anathema by the pope meant that everyone who married a woman who had received her blessing with another man would incur the penalty of anathema by the very fact of concluding such a marriage, and it also concerned the woman at issue.

A *latae sententiae* penalty is also contained in C. 17 q. 4 c. 5. It is a forged norm attributed to Pope Lucius I (253-254?).[34] The pope orders as follows: "Omnes ecclesiae raptores [...] anathematizamus, et apostolica auctoritate pellimus, dampnamus atque sacrilegos esse iudicamus [...] non solum eos, sed omnes consentientes eis."[35] The penalty of anathema will thus be incurred by anybody who occupies and sells ecclesiastical possessions, as well as by anyone who consents to it. It is a *latae sententiae* penalty. No court intervention is necessary. The legislator has already passed the sentence, which is included in a law. The perpetrator of the crime will incur the penalty at the moment of commiting this crime.

Moreover, among the words indicating the existence of a *latae sententiae* penalty in reference to *sacrilegium* in the *Decretum*, there is the word

[29] C. 17 q. 4 c. 29.

[30] *Summa Stephani*, ed. Schulte, p. 229.

[31] P. Hinschius, *System*, vol. V, p. 132, fn. 4.

[32] C. 27 q. 8 c. 50.

[33] Ibid.

[34] Ae. Friedberg, *CorpIC*, Pars I, col. 815-816, fn. 25; Jaffé -Wattenbach, † 123 (XCIII); P. Hinschius, *Decretales*, p. 179.

[35] C. 17 q. 4 c. 5.

"sciat"[36] in the expression "sciat se conmunione fore priuatum" in C. 17 q. 4 c. 21. However, it is not a *latae sententiae* penalty, as "fore"[37] refers to the future. This sanction pertains to the possibility of inflicting the penalty of excommunication in the future, as the perpetrator of *sacrilegium*, having received a warning after committing a given crime, will not make reparation in accordance with the law. The subsequent sentence in the text of the canon already refers to a *latae sententiae* penalty, as the legislator stated what follows: "Si uero post secundam et tertiam conuentionem coram episcopo satisfacere detrectauerit, sacrilegii periculo ab omnibus obnoxius teneatur, ita, ut, secundum Apostolum nemini fidelium misceatur."[38] The words "teneatur" and "misceatur" point to the penalty "already imposed" by the legislator, which will be incurred by the perpetrator if they do not do what they are obliged to do by the legislator in the hypothesis of this legal norm. However, they can also refer to a sanction which should be inflicted by a judge as a penalty. The necessity for a warning before imposing punishment suggests a *ferendae sententiae* penalty.

The word "sciant" can also be found in C. 16 q. 7 c. 1, where the legal norm established at the synod of Rome[39] contains the prohibition of keeping and possessing tithes by laypersons. In the text "sciant, se sacrilegii crimen conmittere, et eternae dampnationis periculum incurrere,"[40] there is the word "sciant," but no penalty is mentioned whatsoever. The legislator states that laypersons who keep tithes "commit *sacrilegium* and incur the danger of eternal damnation." This will happen "if they do not pay tithes to the Church." However, the expression "dampnationis periculum incurrere" does not constitute a penalty as defined by canonical penal law.

A *latae sententiae* penalty was infamy, which was also incurred by the perpetrator of *sacrilegium*. C. 3 q. 5 c. 9, which comes from *Decretales Pseudo-Isidorianae*,[41] contained the prohibition of admitting those who committed sacrilege and, for that reason, "infames sunt," to accusing and acting as witnesses in a court. The expression "quia infames sunt"[42] suggests that

[36] C. 17 q. 4 c. 21.

[37] Ibid. However, there are codices which do not use the word "fore," but "esse," which would suggest that a norm containing such a wording also includes a *latae sententiae* penalty, Ae. Friedberg, *CorpIC*, Pars I, col. 819-820, fn. 215.

[38] C. 17 q. 4 c. 21.

[39] Ae. Friedberg, *CorpIC*, Pars I, col. 799-800, fn. 2; the synod of Rome of 1078, can. 7, Gratian cites it as "in Concilio Lateranensi;" Jaffé -Wattenbach, before 5085 (3821).

[40] C. 16 q. 7 c. 1.

[41] Ae. Friedberg, *CorpIC*, Pars I, col. 515-516, fn. 76; P. Hinschius, *Decretales*, p. 239.

[42] C. 3 q. 5 c. 9.

this penalty was incurred by the perpetrators of *sacrilegium*, as well as other crimes enumerated, *ipso facto*, when they committed a particular crime. A similar norm, also derived from the same collection of forged norms,[43] is included in C. 6 q. 1 c. 17. Among "infames"[44] there are also "sacrilegos," who were forbidden from administering orders, accusing bishops and acting as witnesses in a court. "Infames," enumerated in the text, are those who "pro aliqua culpa notantur infamia." However, infamy, if its infliction was carried out in a double way, in the solemn form with all due ceremonial[45] and as a sentence, could not be a *latae sententiae* penalty. Nevertheless, actual infamy should be distinguished from legal infamy. The former consists in the loss of one's good name due to the actual or alleged crime and in fact it is not a penalty. The latter pertains to being branded by the law "for a crime clearly defined by the law."[46] Legal infamy could also be incurred *ipso facto*. Thus, if we accept that the perpetrator committing *sacrilegium* could be punished by infamy *ipso facto*, the expression "notantur infamia,"[47] used in the text of the canon, should be understood as a *latae sententiae* penalty. If, however, the expression "notantur infamia" means "are punished by infamy," this does not fully determine whether the perpetrators of *sarilegium* are punished by a court sentence or incur this penalty *ipso facto*. It appears, however, that what is meant in this case is a court sentence, and hence a *ferendae sententiae* penalty.

Also in C. 27 q. 1 c. 37 there are traces of a *latae sententiae* penalty. This norm coming from a collection of forged norms[48] orders that the one who defiles nuns "sciendum est omnibus [...] uiolatores earum sacrilegi, ac [...] filii perditionis esse noscuntur"[49] should be considered as a sacrilegist. Thus, everyone needs to know that those who defile nuns are sacrilegists and "sons of perdition."[50] The text, however, does not mention any penalty.

As shown above, in C. 17 q. 4 c. 29 the penalty of anathema is included in the very legal norm in the words "anathematis uinculo subiaceat."[51] This penalty was to be incurred *ipso facto* by the perpetrator of *sacrilegium* that was

[43] Ae. Friedberg, *CorpIC*, Pars I, col. 557-558, fn. 179; P. Hinschius, *Decretales*, p. 182.

[44] C. 6 q. 1 c. 17.

[45] M. Myrcha, *Kara*, p. 108.

[46] J. Grzywacz, *Infamia*, in: EK, vol. VII, Lublin 1997, col. 187.

[47] C. 6 q. 1 c. 17.

[48] Ae. Friedberg, *CorpIC*, Pars I, col. 1059-1060, fn. 457; *Capitularia Benedicti Levitae* II, 414, PL 97, col. 598-912; MGH Leges, vol. II, pt. 2, Hannover 1837, pp. 17-158.

[49] C. 27 q. 1 c. 37.

[50] 2 Thess 2, 3.

[51] C. 17 q. 4 c. 29.

committed by "laying violent hands" on a cleric or monk. For the same *sacrilegium*, for beating a bishop or presbyter, as well as raiding and destroying a church and setting it on fire, the synod inflicted the penalty of public proscription as well as perpetual penance in a monastery. This penal law is included in C. 24 q. 3 c. 22 "placuit sanctae synodo [...] bona eius proscriptione publicentur [...] in monasterio, inclusus peniteat omnibus diebus uitae suae."

Also in C. 22 q. 5 c. 19 the legislator decided that if a layperson broke the oath of allegiance to the king, and after that took any action in order to kill the king, they would incur the penalty of anathema (anathema sit).[52] Such an expression, however, does not make it possible to definitively state whether the infliction of the penalty happens automatically at the moment of committing the crime or the legislator treats this criminal sanction as the one that will be imposed on the perpetrator after they commit the crime.

Some hallmarks of a *latae sententiae* penalty are present in C. 11 q. 3 c. 101, where the legislator prescribes that a superior who says or orders something that is against God's will should be held (habeatur) as a sacrilegist. Likewise, the one who raids a church, destroying it and taking anything from it, should be judged (iudicetur) as a sacrilegist, as it is in C. 12 q. 2 c. 5. However, these are not determinate penalties. Thus, they cannot be unambiguously considered as *latae sententiae* penalties.

According to the canonists, there is no significant difference "between a particular criminal sanction in the case of *latae sententiae* penalties and a criminal measure in the form of *ferendae sententiae* penalties."[53] The difference consists in the way these penalties are inflicted and enforced. Moreover, they claim that if it does not clearly follow from a penal law that the infliction of penalty occurs at the moment of committing a crime, this sanction should be considered a *ferendae sententiae* penalty. Thus, if there are doubts whether a given sanction is a *ferendae* or *latae sententiae* penalty, it should be assumed that it is a *ferendae sententiae* penalty, as penal laws are subject to strict interpretation.[54]

Thus, in the face of uncertainties which arise in the analysis of the canons of the *Decretum* containing sanctions for *sacrilegium*, the general rule should be accepted that, apart from C. 17 q. 4 c. 29; C. 27 q. 8 c. 50; C. 17 q. 4 c. 5, there are legal norms in Gratian's *Decretum* which order punishing the crime of *sacrilegium* with *ferendae sententiae* penalties.

[52] C. 22 q. 5 c. 19.

[53] J. Syryjczyk, *Sankcje w Kościele*, p. 71.

[54] V. de Paolis-D. Cito, *Le sanzioni nella Chiesa*, p. 127; J. Syryjczyk, *Sankcje w Kościele*, p. 71, fn. 25; Wernz-Vidal, *Ius ecclesiasticum*, vol. VII, pp. 208-209.

6.2. *Ferendae sententiae* Penalties

A characteristic feature of *ferendae sententiae* penalties is that they are "penalties established in a law,"[55] and the subject that inflicts them is a judge or an ecclesiastical superior. The regulations concerning *sacrilegium* in Gratian's *Decretum* treat it as a completed crime. The criminal sanctions included in the content of laws are determinate and indeterminate. A judge is supposed to inflict a penalty in accordance with the wording of a law.[56] This view is held by Gratian, who included in the *Decretum* the *auctoritas* from Ambrose's work.[57] When inflicting a penalty a judge is to take into account both the objective criminal transgression and subjective side of a particular crime. A judge is to take into consideration both the perpetrator or perpetrators and the person against whom a given crime is committed. What was also important was the rank of the person, both the criminal and the one against whom a certain crime was committed. The higher the rank, the bigger was one's guilt and penalty.

6.3. Bodies Imposing Penalties

A number of criminal sanctions for *sacrilegium* in Gratian's *Decretum* are inflicted by the pope or are attributed to popes in forged legal norms. However, it was a bishop who most frequently acted as a judge imposing ecclesiastical penalties.[58] In some specific cases he was obliged to judge a criminal in a collegial manner. The legal norms in the *Decretum* pertaining to *sacrilegium* contain determinate criminal sanctions (poenae ordinariae) and indeterminate criminal sanctions (poenae arbitrariae). In the case of determinate sanctions, a judge was to apply them without the possibility

[55] J. Syryjczyk, *Sankcje w Kościele*, p. 70.

[56] D. 4 c. 3 "In istis temporalibus legibus [...] non licebit iudici de ipsis iudicare, sed secundum Ipsos."

[57] *Commentarium in Psalmum 118*, CSEL 62, p. 354, which includes a different text; C. 3 q. 7 c. 4 "Bonus iudex nihil ex arbitrio suo facit [...] sed iuxta leges et iura pronunciat [...] sed sicut audit, ita iudicat [...] obsequitur legibus [...] qui iudicat, non uoluntati suae obtemperare debet, sed tenere quod legum est."

[58] M. Myrcha, *Kara*, pp. 143-144; P. Hinschius, *System*, vol. IV, p. 758.

of toughening or moderating them. In the case of indeterminate sanctions, their imposition is left to the discretion of a judge.

6.3.1. The Pope

Since the 5th century, the pope had had the highest judicial power both in reference to appeal and because he was first instance in criminal cases pertaining to bishops.[59] This jurisdiction was significantly strengthened by Pope Nicholas I (858-867), who reserved the right of appeal as the supreme authority without the agency of provincial synods.[60] Provincial synods were forbidden by the pope to condemn any bishop referring to the authority of the Holy See.[61] This situation lasted for a longer period of time. The Gregorian reform had enhanced this tendency since the mid-11th century. An important role in the process of strengthening the power of appeal and the highest judicial authority of the pope was played by *Decretales Pseudo-Isidorianae*, on the basis of which it was stated that nobody could remove a bishop without the consent of the Holy See.[62] At the beginning of the 12th century this right of the pope gained widespread recognition.[63]

In reference to the crime of *sacrilegium* there are a number of canons from *Decretales Pseudo-Isidorianae*, which, consistent in realizing the reformist intentions of their authors, severely punish *sacrilegium* referring to synods which were chaired by the pope as the source of penalties.[64]

This situation is present in C. 17 q. 4 c. 12, where in the text attributed[65] to Pope Pius I (140?-155?) it is ordered that the one who destroys a church, raids ecclesiastical possessions and beats priests should be punished as a sacrilegist. The text, however, does not mention any specific penalty. It

[59] P. Hinschius, *System*, vol. V, p. 281. The example is provided by P. Hinschius, *System*, vol. V, p. 282, fn. 1.

[60] Ibid., p. 283, fn. 3; C. 2 q. 1 c. 10, where a priest wrongly condemned by a bishop appealed directly to the pope, who decided as follows: "magnopere monemus reuerentiam tuam [...] dictum sacerdotem, atque ei reddendo tua pietate, quem perdidit pristinum honorem, et nullatenus canonica instituta alicuius temeritate contempni permittas, quia facientem et consentientem par pena constringit."

[61] Ibid., p. 283.

[62] P. Hinschius, *System*, vol. V, p. 285; Leo IX (1049-1054) to Thomas, bishop of Carthage, Jaffé -Wattenbach, 4304 (3267) "non debere praeter sententiam Romani pontificis universale concilium celebrari aut episcopos damnari vel deponi;" Mansi, vol. XIX, col. 658.

[63] Ibid., p. 287.

[64] C. 16 q. 1 c. 57.

[65] P. Hinschius, *Decretales*, p. 118; Jaffé -Wattenbach, †44 (XLI).

is similar in the case of C. 3 q. 4 c. 11, where there is the prohibition of accusing and acting as witnesses against Christians.[66] The same prohibition was issued by Pope Eusebius (309),[67] where sacrilegists were forbidden from accusing and acting as witnesses in a court. Also C. 12 q. 2 c. 3 is an excerpt from a forged norm ascribed to Pope Boniface I (418-422),[68] where the one who took ecclesiastical property was to be excommunicated if they made no reparation. Also C. 12 q. 2 c. 5 is an excerpt from a forged norm attributed to Pope Pius I (140?-155?),[69] in which the pope states that the one who ravages ecclesiastical lands is a sacrilegist. The obligation of the elevenfold restitution in the rubric of C. 12 q. 2 c. 10 and the fourfold restitution in the text of the canon is imposed by Pope Eusebius (309),[70] alongside canonical penance, for the perpetrator of *sacrilegium* committed by taking ecclesiastical things. A collection of forged norms[71] is also the source of C. 17 q. 4 c. 5, in which Pope Lucius I (253-254?)[72] imposes the penalty of anathema on everybody who takes and alienates ecclesiastical possessions, as well as on those who agree with this person, deciding that an equal penalty should be inflicted on the direct perpetrator and those who consent to their actions. Pope Stephen I (254?-257) issued a decree[73] in which he decided that the perpetrators of particular crimes were *infames*. There were also sacrilegists among them. The text in C. 6 q. 1 c. 17, coming from *Decretales Pseudo-Isidorianae*,[74] contains a decision in which sacrilegists as *infames* are not allowed to receive orders, accuse bishops and act as witnesses in a court. Severe penalties for *sacrilegium* are ordered by Pope Urban I (222-230).[75] Gratian's *Decretum*, in C. 17 q. 4 c. 5, contains the version of this decree derived from a collection of forged norms,[76] in which ravaging ecclesiastical lands is punishable with a penalty for *sacrilegium*, perpetual infamy, imprisonment or perpetual exile.

Pope Gelasius (492-496) confirmed the decision of the bishops who imposed excommunication on municipal officials for breaking the right of

[66] In reference to the origin of this text and its place in the manuscripts, see Ae. Friedberg, *CorpIC*, Pars I, col. 513-514, fn. 82.

[67] Jaffé -Wattenbach, † 165 (CXXIII); P. Hinschius, *Decretales*, p. 239; the same author, Capit. Angil., p. 767.

[68] Jaffé -Wattenbach, † 357 (CLXXXIV); Ae. Friedberg, *CorpIC*, Pars I, col. 687-688, fn. 20.

[69] P. Hinschius, *Decretales*, p. 118; Jaffé -Wattenbach, † 44 (XLI).

[70] Jaffé -Wattenbach, † 164 (CXXII); P. Hinschius, *Decretales*, p. 238.

[71] P. Hinschius, *Decretales*, p. 179.

[72] Jaffé -Wattenbach, † 123 (XCIII).

[73] Jaffé -Wattenbach, †130 (XCIV).

[74] P. Hinschius, *Decretales*, p. 182.

[75] Jaffé -Wattenbach, † 87 (LXXXI).

[76] P. Hinschius, *Decretales*, p. 145.

asylum, which constituted the crime of *sacrilegium*. He ordered that an interdict should be inflicted on the perpetrators of the crime and they should be prohibited from entering any churches in their diocese, which was supposed to be their expiation for the crime and discourage others from committing such crimes.[77] Thus, the pope in this case did not impose the penalty for *sacrilegium* directly, but appointed the bishops of the place where the crime was committed. In C. 16 q. 3 c. 8, it was to Pope Gelasius that Gratian attributed the canon adopted at the eighth synod of 869 chaired by Adrian II (867-872).[78] It was decided that when laypersons took ecclesiastical estates or privileges that had been owned for thirty years, they were to be considered as sacrilegists. If they do not perform any restitution, they are to be punished with anathema.

A determinate penalty for the crime of *sacrilegium* was included by Pope John VIII (872-882) in his letter to bishops of the province of Narbonne and Spanish bishops, in which he ordered them to obey the law established at the synod of Troyes of 878. This norm was contained by Gratian in C. 17 q. 4 c. 21. The perpetrator of the crime was to pay thirty pounds of silver to bishops or abbots who had the right to bring an action for *sacrilegium*. The pope accepted this penalty established by the synod together with the participating king and prescribed (praecipimus)[79] that the law with the criminal sanction should be included in the codes of secular law. In that way, this law became universal law and, what is more, it also became civil law. In the case of committing the crime, the perpetrator was to be punished in the same way both in *forum ecclesiasticum* and in *forum mundanum*. It was possible because *sacrilegium* was a crime *mixti fori*. In the same letter, the pope referred to the norm of the synod of Ravenna of 877, in which for taking anything from a church and doing harm to "ecclesiasticis personis"[80] the perpetrator, after being warned, was to make reparation, and if they did not do it, they were to be punished with the penalty of excommunication. If they did not make reparation after the second and third warning, they were not allowed to contact anyone of the faithful. The pope decided that they were to be regarded as bound by the penalty for sacrilege. Also this norm became universal law.

In C. 17 q. 4 c. 29 Gratian included can. 15 of the Second Council of the Lateran of 1139, which began with the words "Si quis suadente diabolo."

[77] C. 17 q. 4 c. 10.

[78] Ae. Friedberg, *CorpIC*, Pars I, col. 791-792, fn. 108.

[79] "Et praecipimus, ut in fine codicis legis mundanae scribatur haec lex," Mansi, vol. XVII, col. 351.

[80] C. 17 q. 4 c. 21.

This canon will repeatedly be referred to by ecclesiastical legislation in the future. The pope ordered the penalty of anathema for the one who would lay violent hands on a cleric or monk. At the same time, he prohibited every bishop from granting absolution from anathema. It is understandable that the scope of the penalty extended to the whole Church, so no bishop was allowed to do it.

Among the canons in Gratian's *Decretum* pertaining to *sacrilegium*, in which the pope either imposes a *latae sententiae* penalty for this crime or orders that a penalty should be inflicted by a judge, eight come from collections of forged norms and seven derive from authentic papal decretals present in the collections of universal canon law. The vast majority of penalties have the character of a *ferendae sententiae* penalty. C. 17 q. 4 c. 29 has the character of a *latae sententiae* penalty.

6.3.2. Bishops and Synods

In the period which the present study is concerned with, the power to impose penalties on both clerics and laypersons rested with a bishop.[81] It pertained to people who were under his jurisdiction, that is those who lived in his diocese. A bishop was to inflict penalties for *sacrilegium* as well. The infliction of some heaviest penalties such as anathema, excommunication and deposition had a special character and a bishop was required by the law to do it in a solemn form with the participation of the clergy or even at a synod. At least, he was to inform an archbishop or metropolitan bishop.[82] It especially concerned anathema or excommunication inflicted in a solemn manner. Its description was included by Gratian in C. 11 q. 3 c. 106.[83] The very formula of excommunication is provided in C. 11 q. 3 c. 107.[84]

[81] Pope John IX (898-900), the synod of Rome of 898, c. 12 "Habeant igitur episcopi singularum urbium in suis dioecesibus, liberam potestatem adulteria et scelera inquirere, ulcisci et iudicare, secundum quod canones censent, absque impedimento alicuius;" X, I, 31, 1; Jaffé -Wattenbach, before 3519 (2703); Mansi vol. VIII, col. 226. In Gaul, also presbyters (parish priests) had the power to impose excommunication, as proved by the text coming from the synod held after 614, after the synod of Paris, Conc. incerti loci post a. 614, c. 13 "De excommunicatis placuit, si quis pro crimine suo ab episcopo uel presbytero fuerit communione priuatus, episcopus uel presbyter et facinus excommunicati et priuationem communionis uicinis ciuitatibus uel parrociis stodenat indecare." P. Hinschius, *System*, vol. V, pp. 291-292.

[82] P. Hinschius, *System*, vol. V, pp. 278-279.

[83] C. 11 q. 3 c. 106. In LDG, f. 145 r.

[84] C. 11 q. 3 c. 107. In LDG, f. 145 r.

A bishop, at the moment when priests threw burning candles to the ground, was to additionally say the words: "sicut hae lucernae de nostris proiectae manibus hodie extinguntur, sic eorum lucerna in aeternum extinguatur."[85]

As it follows from the legal sources, the solemn form of inflicting anathema and excommunication used to be the same. The legal effects for the perpetrator of a crime who was punished by anathema or excommunication were also the same, as proved by the norms of the synod of Elne.[86]

The scope of application of both anathema and excommunication extended to the whole Church, as had already been decided at the First Council of Nicaea in 325.[87] In the case of inflicting anathema or excommunication in a solemn form, bishops were obliged to inform a metropolitan bishop about it or or do it at a provincial synod, as was decided by the synod of Meaux. Gratian included this canon in the *Decretum* in C. 11 q. 3 c. 41 with slightly different wording.[88]

The obligation imposed by the law on a bishop to refer to a synod or inform an archbishop or a metropolitan bishop did not always use to be obeyed. A bishop inflicted a penalty on his own especially in the case of crimes committed by clerics.[89] Since the second half of the 9th century, popes and synods had required that a certain number of bishops should be present during the infliction of the penalty of deposition on clerics.[90] Gratian contained a number of canons pertaining to this obligation in C. 15 q. 7 c. 1-7. The fact that the norms were repeated by bishops and synods appears to prove that bishops did not exactly obey this obligation and exercised judicial power on their own. A metropolitan bishop together with a provincial synod were second instance for this power of a bishop.[91] As fas as crimes committed by bishops are concerned, the infliction of penalties was in this case reserved to provincial or national synods. In the mid-9th century, under the substantial influence of *Decretales Pseudo-Isidorianae*, the power to

[85] The synod of Rheims of 900 "as the candles thrown from our hands go out today, let their candle go out forever," Mansi, vol. XVIII, col. 184.

[86] The synod of Elne, a. 1047, Mansi, vol. XIX, col. 484. For similar decisions of other synods, see P. Hinschius, *System*, vol. V, p. 3, fn. 8, p. 8, fn. 5.

[87] Can. 5, A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. I, Kraków 2002, p. 31.

[88] C. 11 q. 3 c. 41. In LDG, f. 141 r.

[89] P. Hinschius, *System*, vol. V, p. 279, fn. 1, 3, 4.

[90] Concilium Triburiense, a. 895, c. 10, "ut nullus episcopus deponatur nisi a XII episcopis, presbyter a VI, diaconus a III," Mansi, vol. XVIII, col. 138.

[91] P. Hinschius, *System*, vol. V, p. 279, fn. 10.

inflict penalties on bishops came within the pope's jurisdiction, whose supreme judicial power over the whole Church had already been developed.[92]

This way of inflicting penalties also concerned the crime of *sacrilegium*, which was treated as *crimen capitale*. Thus, all that pertained to the way of inflicting penalties for grave crimes also concerned penalties for *sacrilegium*. The source material does not contain any special forms of inflicting penalties for *sacrilegium*. What is even more, it does not provide them at all. This makes it possible to put forward a thesis that inflicting penalties for this crime did not differ from the way which applied to other crimes of that kind. Thus, the canons of the *Decretum* ought to be analysed in detail with a view to answering the question as to who and in what way was to inflict a penalty for *sacrilegium*.

In D. 50 c. 22, the *auctoritas* constitutes can. 15 of the synod of Ancyra,[93] and in the *Decretum* it is attributed to Martin of Braga. In the text of the resolutions of the synod it was decided that a presbyter and deacon who sold ecclesiastical vessels should be degraded. However, it was stated that a bishop alone was to decide[94] whether those clerics should retain their order or not. Thus, in fact, the synod itself handed over the power to inflict punishment for this *sacrilegium* to a bishop.

In accordance with the decision of the synod of Tribur, also included by Gratian in C. 17 q. 4 c. 20, the one who broke the right of asylum was to pay nine hundred solidi and perform public penance "iuxta iudicium" for the violation of the sanctity of the place.[95] This "iudicium" constituted the penalty of public penance,[96] which was to be imposed by a bishop.[97] Public

[92] Ibid., p. 281.

[93] The content of can. 15 of the synod of Ancyra of 314 is slightly different, although it grants a bishop the power to decide "whether the buyer can recover the price paid" for ecclesiastical goods sold by the presbyter, see A. Baron, H. Pietras, *Acta Synodalia*, vol. I, p. 66.

[94] D. 50 c. 22 "Iudicio tamen episcopi dimittendus est, si in suo debeat recipi gradu, quia multociens hoc ipsum, quod de sacrosancto altario contaminatum est, in episcopi potestate dimissum est."

[95] C. 17 q. 4 c. 20.

[96] The synod of Chalons, a. 813, c. 25 "[...] si quis publice peccat, publica mulctetur poenitentia[...]," Mansi, vol. XIV, col. 98; the synod of Rheims, a. 813, c. 31 "ut qui publico crimine convicti sunt, rei publice iudicentur et publicam poenitentiam agant secundum Cannes," Mansi, vol. XIV, col. 86.

[97] A bishop laid his hands on the person who admitted to committing an evil act and imposed penance, see "sacerdos [...] auctorem facti [...] hortetur [...] ut infra XV dies ad nostram praesentiam publicus peccator [...] veniat et iuxta traditionem canonicam publicam poenitentiam cum manus impositione accipiat [...] Et si forte quis ad poenitentiam venire noluerit infra XV dies post perpetrationem peccati et exhortationem presbyteri [...] decernatur, qualiter qui peccatum

penance could be inflicted only by a bishop.[98] Penance most often constituted an additional penalty.[99]

A bishop's power over inflicting the penalty of public penance for breaking the vow of chastity by monks and nuns is emphasized by C. 27 q. 1 c. 11 and C. 27 q. 1 c. 17. These are excerpts from the canons of the synod of Tribur of 895, where bishops order that the perpetrators of such crimes should be excluded from monastic communities and be punished with public penance in solitude. This penance could only be imposed by a bishop. A bishop also inflicted excommunication that prohibited receiving Holy Communion. If a bishop considered this penance as properly performed, these persons could be readmitted to their monastic communities. If they faced the threat of death while doing penance, they could receive Viaticum. It should be supposed, although the canon does not mention it, that according to what was prescribed by the synod, men and women religious living together in the manner of marriage should be separated and should swear an oath that they would no longer live together in one place. This oath could also be received, as it seems, only by a bishop, since presbyters and deacons had no external jurisdictional power. The cases where parish priests had the autonomous power to punish in some regions of the Carolingian kingdom, which were mentioned by P. Hinschius, used to be extremely rare.[100]

Important for the infliction of anathema is the source testimony of D. 96 c. 1, which contains, as the *auctoritas*, excerpts from the third synod of Rome of 502. The text includes the question posed by Bishop Maximus, which he put to bishops gathered at the synod and which pertained to whether a layperson could inflict anathema on a bishop: "licuit laico homini anathema in ordinem ecclesiasticum dictare?, aut si laicus potuit sacerdoti anathema dicere [...] De me licuit laico legem dare? Sancta sinodus dixit: Non licuit."[101] Thus, the synod unambiguously adjudicated that laypersons could not impose anathema on a priest or have any power in ecclesiastical matters. It concerned all laypersons, also those who were in power. Ecclesiastical penalties could be imposed only by ecclesiastical authorities who had the power of jurisdiction: popes, bishops and synods.

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perpetravit et ad poenitentiam redire contemnit, a coetu ecclesiae, donec ad poenitentiam redeat, segregetur," Hincmar cap. superadd., a. 856, c. 1 , Mansi, vol. XV, col. 491.

[98] P. Hinschius, *System*, vol. V, p. 94.

[99] P. Hinschius, *System*, vol. V, p. 85.

[100] P. Hinschius, *System*, vol. V, pp. 291-292.

[101] D. 96 c. 1.

The judicial power of a bishop and the infliction of penalties are thouroughly discussed in the letter of Pope Gregory the Great (590-604), included in C. 2 q. 1 c. 7, who sent Bishop John the Defender to Spain so that he could resolve the case of Bishop Januarius. Bishop John was to decide whether the criminal was to be kept in prison by the local bishop or handed over to the pope. The bishops who unlawfully ordained the bishop were to be deprived of Holy Communion for six months and to perform penance in a monastery. This penalty was to be inflicted by Bishop John acting on the pope's orders. If they were to face death, they should receive Viaticum. He also had the power to moderate the penalty, if it turned out that the bishops' decisions were taken out of fear. In the case of Bishop Stephen, John was to pronounce a sentence stating whether he was to be restored to his bishopric or remain in exile. The bishops who had excommunicated him, if he had not committed a crime, were to be excommunicated, deprived of Holy Communion and ordered to perform penance for six months. They could receive Viaticum at the moment of death. Bishop John was to resolve the matter as in the case of Bishop Januarius. He was to conduct that case properly in order to pronounce a correct sentence: "qualiter diffinitionem tuam debeas formare possis scire."[102] The infliction of a penalty for breaking the right of asylum was to be left to the law and secular power. He was not allowed to sue Bishop Stephen against his will, and he could not be judged by the bishops of another province, as they were accused. If there was no metropolitan bishop or patriarch, he could only be judged by the Holy See. The sentence could only be pronounced by the proper judge, that is the one who had the power to judge the criminal.[103] The sentence should be passed in writing, otherwise it was not valid.

The penalty of suspension[104] and penance in a monastery for bishops, presbyters, deacons and clergy of the remaining grades was imposed by the norm of law adopted at the fourth synod of Toledo of 633 in can. 29. It was at a synod that it could be imposed on a bishop. Other clergy were to receive it from a bishop.

A bishop was also to impose excommunication on those Christian officials who would allow Jews to perform public offices, as in C. 17 q. 4 c. 31. This norm was also established at the fourth synod of Toledo in 633. Jews

[102] C. 2 q. 1 c. 7.

[103] P. Hinschius, *System*, vol. IV, p. 769.

[104] The decretists, however, speak of excommunication in this case, see *Summa magistri Rolandi*, ed. Thaner, p. 110 "sortilegos autem et divinos a praefatis superstitionibus non declinantes excommunicandos esse;" *Summa Stephani*, ed. Schulte, p. 231 "Haec quaestio nulla indiget distinctione, cum omnes sacrilegi et similes, si cessare noluerint, ab ecclesia sunt separandi."

themselves who deceitfully obtained these offices were to be punished with public flogging. This penalty could not be inflicted by clerics.[105] It had to be done by secular power.

6.3.3. Secular Power

In Gratian's *Decretum* there are the norms of Roman law which punished *sacrilegium* with the sanction of the death penalty. It is difficult to determine what legal value they had for canon law, as they are contained in Gratian's *dicta* and once in the letter of Pope Gregory the Great (590-604) to John the Defender. As has already been demonstrated, canon law did not contain the death penalty or the penalty of mutilation in its norms.[106] Such penalties could only be established and inflicted by secular power. The law prohibited the clergy from any participation in criminal legislation.[107] In some situations, there was cooperation between ecclesiastical and secular power. It happened in the case of the crime of *sacrilegium*, as it was in the Frankish kingdoms, committed by raiding settlements and setting churches on fire. Such was the reaction of Pope Gregory V (996-999), who sent Bishop Peter with the letter[108] to queen Constance. Part of this letter constitutes the *auctoritas* of C. 12 q. 2 c. 9. Bishop Peter was to summon a synod of bishops, and both the norms established at this synod and the royal law were to impose such penalties on the perpetrators of these crimes that they would never commit them again.

In d. p. c. 29 q. 4 C. 17, Gratian referred to Roman law that punished breaking the right of asylum and doing harm to priests and ecclesiastical servants with death. Such *sacrilegium* also had the character of the crime of *laesae maiestatis*, of which everybody was allowed to accuse.[109] Irrespective of the fact whether the perpetrator admittted or was proved guilty of this crime, they were to be punished with the death penalty: "capitali sententia a rectoribus prouinciae ferietur."[110] As shown in the text, this penalty was to be

[105] P. Hinschius, *System*, vol. V, pp. 36, 50.

[106] P. Hinschius, *System*, vol. V, p. 50.

[107] Ibid. C. 23 q. 5 c. 1-3; Synodus Autissiodorensis, a. 561-605, c. 34, CCL 148A, p. 269 "Non licet presbytero in iudicio illo sedere, unde homo ad mortem tradatur."

[108] Jaffé -Wattenbach, 3890 (2979) includes the remark that the letter was incorrectly attributed to Gregory V; Ae. Friedberg, *CorpIC*, Pars I, col. 688-689, fn. 66 claims that the letter was written in 948, which cannot be accepted.

[109] *Summa magistri Rolandi*, ed. Thaner, p. 21, ad C. 6 q. 1 Duo fornicatores "tam in hoc quam laesae maiestatis et haereseos crimine omnium accusatio indifferenter admittitur."

[110] Dictum p. c. 29 q. 4 C. 17.

inflicted by a provincial administrator. The same imperial constitution was referred to by Pope Gregory the Great (590-604), who sent John the Defender to Spain. The text of the letter was included by Gratian in C. 2 q. 1 c. 7. However, in the letter he only mentions the harm done to the bishop in a church, as *sacrilegium* was committed by taking this bishop from a church by force. Everybody could accuse the perpetrator of such a crime, and according to the imperial constitution, they were to be punished with death. This penalty could obviously be inflicted only by secular power. Also perpetual exile and deportation, which were imposed for *sacrilegium* committed by violating the imperial laws that prohibited levying additional obligations on ecclesiastical possessions, were to be inflicted by secular power, as in C. 16 q. 1 c 40.

The infliction of penalties concerned both determinate and indeterminate sanctions. The sources pertaining to *sacrilegium* in Gratian's *Decretum* do not include any recommendations with regard to abandoning the infliction of a determinate penalty. A judge was to impose a penalty which was included in the legal norm.[111] In the case of an indeterminate sanction, a judge, that is a bishop, was to determine the size of an imposed penalty, as it is in D. 50 c. 22. Among the canons concerning *sacrilegium* in the *Decretum* there is only one, C. 23 q. 4 c. 32, in whose rubric it is stated that if a crime is committed by a bigger community or someone who has such a community as a companion in a crime, they are not to be punished but to be bewailed by the Church, and a general warning is to constitute the form of punishment. There is no canon which mentions the abandonment of the infliction of a penalty in the case of the decreased imputability of the perpetrator of *sacrilegium*. All penalties which are perpetual contain the qualification that the one who was performing penance was to receive Viaticum at the moment of death, as in C. 22 q. 5 c. 19; C. 27 q. 1 c. 11; C. 27 q. 1 c. 17; C. 2 q. 1 c. 7.

6.4. The Cessation of Penalties

6.4.1. The Bishop's Absolution on the Usual Conditions

Discharge of a penalty can be done through clemency, absolution, dispensation, indulgence and expiation. Remission of penalties can only be

[111] M. Myrcha, *Kara*, pp. 395-396.

performed through absolution and dispensation.[112] Penalties were not subject to prescription at the time.[113] Absolution pertains to the remission of censures. Nevertheless, owing to the fact that in the period under analysis censures and expiatory penalties were not precisely distinguished, absolution, which will be discussed, was also a form of remitting expiatory penalties. The criminal, having withdrawn from their contumacy, had the right to demand to have their penalty remitted. They did not have the right to clemency. Absolution from censure-like penalties had the character of an external act which was performed under specific circumstances. It most often concerned anathema and excommunication. Absolution could be granted by the one who inflicted anathema or excommunication, that is a bishop. In the period analysed in the present work neither a criminal action nor an action to execute a penalty was subject to prescription.[114] Neither did canon law have the institution of clemency, except for some specific cases reserved to the pope and a provincial synod.[115] In the situation when it was most frequently a bishop who was a judge imposing a penalty, and the remission of penalties rests with the one who inflicts them, we should present his role in remitting penalties. Absolution was an ordinary form of remitting excommunication. If excommunication was imposed, the criminal could be released from it by a specific act called *reconciliatio* or *absolutio*, which was also labelled as *relaxatio*.[116] Absolution also had to take place in the case of the wrongful infliction of excommunication. A prerequisite to absolution from excommunication was acceptance of penance, humble disposition with a serious intention to reform and reparation for the crime committed.[117] After absolution, all effects of excommunication ceased to exist. A similar form of absolution, under the same conditions, was necessary in the case of the local interdict[118] and personal interdict,[119] as well as in the case of the suspension of a cleric.[120] Since the 11th and 12th centuries absolution became a commonly accepted act of releasing from excommunication, and as for its formula, it was part of the act of reconciliation, whose form

[112] J. Syryjczyk, *Sankcje w Kościele*, p. 292.
[113] M. Myrcha, *Kara*, p. 782.
[114] P. Hinschius, *System*, vol. V, pp. 144-145.
[115] Ibid.
[116] Ibid., p. 146.
[117] Ibid.
[118] Ibid., p. 150.
[119] Ibid., p. 151.
[120] Ibid., p. 152.

had been established at some previous synods. The formula[121] of this reconciliation, which at the same time constituted the formula of absolution from anathema and excommunication, was included by Gratian in the *Decretum* in C. 11 q. 3 c. 108.[122]

The criminal who was punished by anathema or excommunication was released from both penalties in the same way. There was no separate formula for each of the penalties. This confirms the fact that the legal situation of the criminal in the case of the infliction of both these penalties was the same. The criminal, who was brought to contrition after performing their penance,[123] had to ask a bishop for the grace of being released from anathema or excommunication and promise that they would not commit such a crime in the future.[124] The one receiving absolution was obliged to make reparation for the damage caused by their crime. From the 13th century, this requirement will be a prerequisite for obtaining absolution,[125] to the extent that Pope Alexander III (1159-1181) will issue a law containing the requirement of reparation. If the perpetrator did not make reparation, they were refused Christian burial. When the precept was subsequently given up, the pope obliged heirs to fulfil the obligation of reparation.[126] It was never allowed to claim money from the person receiving absolution, though this customary law did exist in some regions.[127]

It was a bishop who inflicted the penalty who could release from excommunication.[128] This bishop was to go out through the door of a church in the

[121] It comes from *Reginonis abbatis Prumensis Libri duo de synodalibus causis et disciplinis ecclesiasticis*, II, c. 418, ed. F. G. A. Wasserschleben, Lipsiae 1840 (the first version with three supplements); PL 132, col. 175-455 (the second version); Ae. Friedberg, *CorpIC*, Pars I, col. 673-674, fn. 1163. For other formulae of absolution from the subsequent period, see P. Hinschius, *System*, vol. V, p. 145, fn. 6.

[122] In LDG, f. 145 r.

[123] P. Hinschius, *System*, vol. V, p. 10, fn. 6, where the requirement of "satisfactio, emendatio, digna poenitentia" is confirmed on the basis of the sources.

[124] P. Hinschius, *System*, vol. V, p. 146, fn. 8 claims, referring to the same canon, that what is meant is not an ordinary promise, but rather a pledge that the perpetrator of the crime will lead a life conforming to the requirements of the Church in the future. He also cites the same view of Kober, *Kirchenbann*, p. 312.

[125] P. Hinschius, *System*, vol. V, p. 147.

[126] Compil. I, 5, 14, 7, ed. Ae. Friedberg, *Quinque Compilationes antiquae*, Lipsk 1882.

[127] P. Hinschius, *System*, vol. V, p. 147, fn. 8. Such a law will be issued at the Fourth Council of the Lateran of 1215, can. 49. A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. II, Kraków 2004, p. 289.

[128] In another case, a bishop to whose jurisdiction the excommunicated person did not belong had to obtain consent from the bishop of the excommunicated person, see *Reginonis Prumensis*, II, c. 418, Pl 132, col. 386-387.

company if twelve priests. The person obtaining absolution was to lie before the church in the act of prostration and ask for the grace of being released from excommunication. They also were to take an oath that they would not commit such a crime in the future. Then, the bishop held out his hand and, perhaps pointing to the church or holding the excommunicated person by the hand, led them to the church handing them over to the community of Christians. He simultaneously sang seven penitential psalms with the prayers the Kyrie, Our Father and Save Your Servant. At the end of absolution the bishop said the following prayer: "Lord, we ask you, grant to your servant the worthy fruit of penance, so that they, obtaining the grace granted to those who commit a crime, are given as innocent to your holy Church, whose community they have left through their sin. Through our Lord.[129]"

Subsequently, the bishop was to impose penance in accordance with the kind of guilt and send out the letters throughout his diocese, so that everybody knew that the excommunicated person was released from excommunication and readmitted to full participation with the faithful. This information was also sent by the bishop to other bishops. No bishop was allowed to release the excommunicated person belonging to another diocese from excommunication. It could be done only with the knowledge and consent of a bishop within whose jurisdiction was the excommunicated person.[130] After obtaining a lawful absolution, the criminal was exempt from excommunication and all its effects. Their contumacy was broken, so excommunication fulfilled its purpose and the criminal pledged not to commit such a crime again, to repair the damage done and to perform the penance imposed by the bishop. Thus, there was no longer any reason to refuse the criminal the due rights of all Christians. However, it ought to be emphasized that relinquishing contumacy by the excommunicated person and their reform could not bring about exemption from excommunication. This act had to be performed by the subject of the competent authority,[131] the pope, a bishop, his successor[132] or his delegate.[133] In the old law there was the principle that only the person who inflicted a censure could lift it.[134]

[129] Ae. Friedberg, *CorpIC*, Pars I, col. 673-674, fn. 1176, where he demonstrates the codices which include the text "Per Dominum nostrum Jesum Christum."

[130] *Reginonis Prumensis*, II, c. 418, PL 132, col. 386-387.

[131] J. Syryjczyk, *Sankcje w Kościele*, p. 309.

[132] C. 11 q. 3 c. 40 "A successore soluatur qui post mortem episcopi remanet ligatus."

[133] In accordance with the principle *Potest quis per alium, quod potest facere per se ipsum*, Reg. Iuris 68, in VI°; P. Hinschius, *System*, vol. V, p. 372; M. Myrcha, *Kara*, p. 532.

[134] M. Myrcha, *Kara*, p. 612. Mansi, vol. XX, col. 665; F Wernz, *Jus decretalium*, vol. VI, p. 93 "potestas remittendi poenae sive per absolutionem sive per dispensationem per se illi competit,

This principle should also be applied to the period analysed in the current work.

The bishop's power of absolution is attested by C. 27 q. 1 c. 17, which referred to can. 17 of the Council of Chalcedon of 451,[135] according to which men and women religious who concluded marriages were to be excommunicated. The Council granted the bishop of the place[136] the right to show mercy, that is to lift excommunication: "Hoc perpetrantes excommunicentur; confitentibus auctoritate episcopi misericordia largiatur."[137]

Due to the fact that in the period discussed there was no clear distinction between censures and expiatory penalties, no different ways of releasing from excommunication for both these kinds of penalties were distinguished either. Nor was there any particular way of releasing from imposed or declared penalties. The teaching of canonical penal law emphasizes that the competent authority can release an absent person from excommunication.[138] In the source material describing the form of releasing from excommunication, the excommunicated person is present and actively participates in the act of remitting excommunication. The collection which contains the description of this formula comes from circa 906.[139] Thus, it functioned as a legal measure for the cessation of the penalty at that time. In the canons of Gratian's *Decretum* concerning the crime of *sacrilegium* there are no recommendations as to the way in which the penalties of anathema and excommunication, which were imposed for this crime by the law, were to cease to apply. It ought to be assumed that all cases pertaining to the cessation of penalties for *sacrilegium* in the *Decretum* concern the remission of these penalties in the external forum, as the sources do not provide any clear recommendations regarding the internal forum. Moreover, *sacrilegium* is treated *stricte* as a crime of the external forum, so the cessation of penalties imposed for it could be done by absolution in the external forum. Thus, absolution had to be performed with the help of words and signs which externally expressed a superior's will who wanted to release a given criminal from a penalty. The written form of sending information concerning the remission of excommunication was important to the extent

qui poenam tulit, vel qui huius sit superior aut successor vel dlegatus."

[135] It is can. 16, see A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. I, Kraków 2002, p. 241.

[136] Can. 16 of the Council of Chalcedon of 451, A. Baron, H. Pietras, *Dokumenty Soborów Powszechnych*, vol. I, Kraków 2002, p. 240.

[137] C. 27 q. 1 c. 17.

[138] M.Myrcha, *Kara*, p. 564.

[139] A. van Hove, *Prolegomena*, p. 150; P. Hemperek, W. Góralski, *Komentar*z, p. 60.

that it was necessary to publicly inform the community of the Church about exempting the person bound by the public penalty for the public crime of *sacrilegium* committed against the whole community of the Church.[140] As far as the scope of absolution is concerned, in the Church there is the principle that "as many absolutions are necessary as there are censures incurred by the perpetrator."[141] This principle did not apply in the case of the remission of penalties for *sacrilegium*, as the sources do not contain any recommendations for the perpetrator to be punished with many penalties. Thus, there was no need to remit many penalties in consequence.

6.4.2. Reservation of the Right to Absolve

In canonical penal law the reservation consists in withdrawing the right to exempt from penalties by lower superiors and granting this right to higher superiors,[142] or the pope in this case. This reservation is contained in can. 15 of the Second Council of the Lateran of 1139, which Gratian included in the *Decretum* in C. 17 q. 4 c. 29. This conciliar law prohibited every bishop from absolving from excommunication or anathema which was incurred by the perpetrator of *sacrilegium* committed by beating a cleric or monk.[143] Except for cases when their life was in danger, the one who was punished with anathema had to go to the pope in order to obtain *mandatum*,[144] on the basis of which a given bishop could release this person from anathema. It can be supposed that if the prohibition of absolving from anathema concerned all bishops (nullus episcoporum),[145] after receiving the papal *mandatum* the excommunicated person could ask a bishop to whose jurisdiction they belonged to be released from anathema.[146] The pope did not reserve the power to release from anathema. It was to be done by a bishop. It was to the pope

[140] M. Myrcha, *Kara*, p. 587.

[141] Ibid., p. 588.

[142] J. Syryjczyk, *Sankcje w Kościele*, p. 295.

[143] C. 17 q. 4 c. 20 "[...] nullus episcoporum illum presumat absoluere, nisi mortis urgente periculo [...];" P. Hinschius, *System*, vol. V, pp. 361-362.

[144] C. 17 q. 4 c. 20 "[...] donec apostolico conspectui presentetur, et eius mandatum suscipiat."

[145] Ibid.

[146] M. Myrcha expresses the view that in "the old law," by which he understands the law since the Decretals, "except for an ordinary who imposed a censure, his superior, successor and delegate," nobody was competent to grant absolution, and in the case of a *sede vacante* situation this power was transferred to a chapter or capitular vicar, see M. Myrcha, *Kara*, pp. 614, 618.

that the conciliar law reserved[147] the necessity for the perpetrator of a crime to appear before the pope in order to obtain *mandatum*, which constituted a kind of papal order for a lower superior to exempt the excommunicated person from anathema. The law did not take into account the fact that it could be impossible for the excommunicated person to appear before the pope or that there existed some impediments which made it impossible to do.[148] The canon mentioned is the only canon in the *Decretum* pertaining to *sacrilegium* which reserves absolution from anathema to the pope.

6.4.3. Danger of Death

Since time immemorial, there has been a principle in the Church that "there are no reservations in danger of death or in the hour of death."[149] Thus, all priests can absolve a penitent from all censures and penalties. The essence of such a law in the Church is the concern for the salvation of man. Danger of death (periculum mortis) is a situation when it is judiciously believed that one's death may take place.[150]

The same principle applied to criminals perpetrating *sacrilegium* and serving a relevant penalty. If they started to serve their penalty and faced a life-threatening situation, all reservations ceased to apply and they should be reconciled with God and restored to all due Christian rights in the Church by being given Viaticum. This precept is included in C. 17 q. 4 c. 29, which constitutes can. 15 of the Second Council of the Lateran of 1139. As already mentioned, the conciliar law prohibited a bishop from absolving from anathema. The perpetrator of *sacrilegium* had to go to the pope to obtain his "mandatum."[151] A bishop could exempt the excommunicated

[147] For more on reserving the power to exempt from penalties to the Holy See, see J. Syryjczyk, *Sankcje w Kościele*, pp. 295-296; F. Roberti, *De delictis et poenis*, vol. I, pt. 2, p. 334; M. Conte a Cronata, *Institutiones iuris canonici*, vol. IV, p. 171; F. Capello, *De censuris*, p. 65; F. Wernz-P. Vidal, *Ius canonicum*, vol. VII, p. 275; M. Myrcha, *Kara*, pp. 200-204; P. Hinschius, *System*, col. V, pp. 367-370.

[148] On such impediments in the later law, see M. Myrcha, *Kara*, pp. 620-625.

[149] M. Myrcha, *Kara*, p. 667; J. Syryjczyk, *Sankcje w Kościele*, p. 307; V, 9, 5 in VI° "si quis deinceps in hoc sacrilegii genus irrepserit [...] nec ab alio quam a Romano Pontifice possint absolutionis beneficium obtinere, nisi duntaxat in mortis articulo constituti;" V, 8, 3 in Clem. "praeterquam in mortis articulo, nullatenus absolvendos;" 5, 7, 1 in Extravag. Comm. [...] (praeterquam in morte,) absolvi nequeat [...]."

[150] J. Syryjczyk, *Sankcje w Kościele*, p. 307; M. Myrcha, *Kara*, p. 668.

[151] C. 17 q. 4 c. 29.

person from anathema on his own only in the case when they were in danger of death: "nisi mortis urgente periculo."

Likewise, in C. 22 q. 5 c. 19 a layperson who attempted to kill the king and was punished with anathema was to do penance in a monastery till the end of their life. At the moment of death, the law required that the due rights of the community of the faithful be restored to them and that they should be admitted to Holy Communion: "Verumtamen conmunionem in exitu uitae suae cum eucharistia percipiat."[152]

Men and women religious who broke the vows of chastity and lived in the manner of marriage committed *sacrilegium* and were punished with perpetual penance. However, the law established at the synod of Tribur in 895, can. 6, which Gratian included in the *Decretum* in C. 27 q. 1 c. 11, required that at the moment of death they shoud receive Holy Communion and be reconciled with the Church: "eis ad mortem solius misericordiae intuitu per conmunionis gratiam possit subueniri."[153]

Also a man who attempted to marry a nun committed *sacrilegium*. Both of them were to perform penance. If, when doing penance, they found themselves in a life-threatening situation, they could not be refused Viaticum: "si penituerint, transeuntibus de seculo uiaticum non negetur."[154] This law, as it is in the text of the canon,[155] established by Pope Gelasius I (492-496), and contained in can. 23 of the synod of Tribur in 895, was included by Gratian in the *Decretum* in C. 27 q. 1 c. 17.

Pope Gregory the Great (590-604), in the letter addressed to John the Defender, who went to Spain to resolve the case of Bishops Januarius and Stephen, ordered that the bishops who had illegitimately administered ordination should be excommunicated for six months and, deprived of Holy Communion, they should perform their penance in a monastery. If, however, they were in danger of death while doing penance, they should receive Viaticum. This papal decision was included by Gratian in the *Decretum* in C. 2 q. 1 c. 7: "Si uero communione priuatis mortis contigerit inminere periculum, benedictio eis uiatici non negetur."

The same canon, the subseqent part of the pope's letter, includes the decision which orders excommunication for those bishops who illegitimately deposed Bishop Stephen and condemned him to exile. The excommunicated were to perform penance in a monastery for six months. Also in this

[152] C. 22 q. 5 c. 19.

[153] C. 27 q. 1 c. 11.

[154] Ibid.

[155] Ae. Friedberg, *CorpIC*, Pars I, col. 1053-1054, fn. 257.

case, if they were in danger of death during that time, they could not be refused Viaticum: "si cuiquam eorum mortis contigerit inminere discrimen, uiatici ei benedictio non negetur."[156]

If they illegitimately ordained another bishop and appointed him in place of the exiled bishop, they were also to be excommunicated and should perform penance in a monastery for six months. Also in that case, if they were in danger of death, they had the right, as in the case pertaining to Bishop Januarius, to receive Viaticum.

The quoted canons of the *Decretum* regarding *sacrilegium* demonstrate that the principle according to which Viaticum should be administered at the moment of death, existing since the beginning of the Church, was also obeyed in the case of serving penalties for *sacrilegium*. Imminent danger of death abolished all reservations and somehow "interrupted" serving the penalty for *sacrilegium*. The same rule applied to perpetual and temporal penalties. The legal sources pertaining to *sacrilegium* in Gratian's *Decretum* do not contain any situtation where after one's potential recovery one was required to resume one's penalty. In reference to this principle, no development is possible to trace in the sources. It can be supposed that it used to remain unchanged. Some development, as claimed by the canonists, can be observed only with respect to "the consequences which arose for those who recovered upon receiving absolution from the reserved censures in danger of death."[157] Such a situation cannot be observed in reference to the cessation of penalties for *sacrilegium* in the *Decretum*.

6.5. Other Ways in Which Penalties Cease to Apply

The most common way in which expiatory penalties cease to apply is expiation.[158] According to canonical penal law, when there are two ways of absolving from penalties, absolution and dispensation, while the former is applied to censures, the latter is used in the case of vindictive penalties and penances. Since in the period discussed in the present work there was no clear division between censures and expiatory penalties, this division cannot strictly be applied to the penalties of that period. Therefore, we have

[156] C. 2 q. 1 c. 7.

[157] M. Myrcha, *Kara*, p. 668.

[158] J. Syryjczyk, *Sankcje w Kościele*, p. 292.

discussed absolution as a way of exempting from anathema and excommunication, and now we should pay attention to how other penalties ceased to apply in Gratian's *Decretum* in reference to penalties for *sacrilegium*. Dispensation is understood as an act of grace and "is the remission of a penalty in the strict sense of the word."[159] While dispensation must be interpreted strictly, absolution is subject to broad interpretation.[160] Dispensation is an act of grace following from the discretion of a superior. The canons of the *Decretum* pertaining to *sacrilegium* contain, above all, the demand for punishing the crime. In some, the possibility of dispensation can be found, as it is in D. 50 c. 22, where a cleric is ordered to be degraded for selling ecclesiastical vessels and, at the same time, this penalty is left to the discretion of a bishop as a judge, who is to decide whether the criminal is to retain his order.[161] The text of the canon does not exclude the possibility of a bishop remitting the penalty. Likewise, in the text of C. 23 q. 4 c. 32 it is ordered that a community should not be punished, but bewailed. In his *dictum* following this canon, Gratian argued that it should be done in that way not because the impunity for the commission of crimes should be tolerated and relaxed (ut peccandi relaxetur inpunitas),[162] but because a helpful chance to reform should be given (sed ut delinquenti correctio et naturae ministretur subsidium). The right of dispensation was granted to bishops at the Council of Chalcedon in 451, where it was decided in can. 16 that the bishop of the place could remit the penalty of a nun and a man who married her. This canon was included by Gratian in C. 27 q. 1 c. 17: "confitentibus auctoritate episcopi misericordia largiatur." A certain kind of dispensation is mentioned in C. 23 q. 4 c. 26, which includes a text from Ambrose's work, which does not have a strictly legal character, but contains a recommendation that when Christ forbade the Apostles to cast fire on a place whose residents did not receive them, he instructed them what should be done. Namely, one should not always inflict punishment, as sometimes kindness is more helpful in the development of patience of the one who is able to punish than a penalty is advantageous to a criminal in their reform.[163] Gratian in his *dictum* following this canon puts forward the interpretation that Christ forbade to cast fire on that place as he knew that the Apostles wanted to do it out of hatred for those people.

[159] M. Myrcha, *Kara*, p. 522.

[160] Ibid.

[161] D. 50 c. 22 "Iudicio tamen episcopi dimittendus est."

[162] C. 23 q. 4 c. 32.

[163] C. 23 q. 4 c. 26 "non semper in eos, qui peccant, uindicandum, quia nonumquam amplius prodest clementia, tibi ad pacientiam, quam lapso ad correctionem."

Among the norms concerning *sacrilegium* there are also those from Roman law. Penalties they include cease to apply through expiation. When Gratian in d. p. c. 19 q. 4 C. 17 quoted the norms of Roman law ordering that the perpetrator of *sacrilegium* committed by breaking the right of asylum, violating worship and doing harm to priests and servants of the Church should be punished with death, that penalty ceased to apply through the execution of the death penalty inflicted, as it is in the law, by provincial administrators (capitali sententia a rectoribus prouinciae ferietur).[164] Also in C. 2 q. 1 c. 7, breaking the right of asylum and using violence against a bishop in a church was punished with the death penalty by the imperial law. The penalty of deportation, C. 16 q. 1 c. 40, also ceased to apply at the moment of death of the perpetrator of *sacrilegium*, as they were condemned to "exilio perpetuae deportationis."

Also other penalties imposed for *sacrilegium* by canon law ceased to apply through their expiation. The penalty of degradation, as in d. p. c. 1 D. 81, ceased to apply through depriving a cleric of his rights. He became a person having the rights of laypersons in the community of the Church. Thus, this penalty was rather permanent, as it lasted in practice till the end of one's life.

A financial penalty ceased to apply when it was paid to those who had the right to bring an action for *sacrilegium*, as in C. 17 q. 4 c. 20. The relevant penance ceased to apply after the period during which it was to be performed in accordance with a bishop's sentence. Also the financial penalty mentioned in C. 17 q. 4 c. 21, where the perpetrtor of *sacrilegium* was to pay thirty pounds of silver to a bishop, abbot or other persons who according to the law could bring an action for *sacrilegium*, ceased to apply the moment it was paid. Those raiding monasteries and churches had to return the ninefold value of stolen things, and had to pay the threefold amount for violating the sanctity of the place. In C. 17 q. 4 c. 20, for violating the sanctity of the place, the penalty of nine hundred solidi was inflicted. In both cases, the penalty imposed in a canonical sentence ceased to apply when it was paid. It is similar in C. 12 q. 2 c. 10, where the one who took church donations and ecclesiastical things was to return the fourfold value, or the elevenfold amount in the rubric, of those things and perform canonical penance.

The penalty of flogging for Jews deceitfully obtaining public offices ceased to apply after it was served, as in C. 17 q. 4 c. 31. In the case of a person who was punished with perpetual penance in a monastery for attempting to kill the king, the penalty ceased to apply at the moment of

[164] Dictum p. c. 29 q. 4 C. 17.

death, as in C. 22 q. 5 c. 19. Also the one who laid violent hands on a bishop or presbyter, C. 24 q. 3 c. 22, incurred public proscription, which ceased to apply when they handed over their possessions to the bishop's diocese.[165] For a person condemned to perpetual penance in a monastery, the penalty ceased to apply at the moment of death. The same is in C. 24 q. 3 c. 22. The penalty for breaking the vow of chastity by men and women religious also ended at the moment of their death, as they were to bewail their deed in a secluded cell until their death, as in C. 27 q. 1 c. 11. In C. 27 q. 1 c. 17, in the case of marriage with a nun, both persons were to perform penance, and when it was accepted by a bishop, they could receive participation in the community of Christians. Temporary penance, which was inflicted on bishops who unlawfully administered episcopal orders, C. 2 q. 1 c. 7, and which was to last for six months, ceased to apply after the period of time determined by a sentence. Perpetual penance for clerics seeking advice from haruspices and soothsayers, augurs and those who cast lots, C. 26 q. 5 c. 5, ended at the moment of their death. In the sources concerning *sacrilegium* in the *Decretum* there is no recommedation as to the way in which the penalty of infamy ceased to apply. If it was "infamia perpetua," as in C. 17 q. 4 c. 13, it lasted till the end of one's life. The person condemned to perpetual infamy (perpetua infamia)[166] for ravaging ecclesiastical lands, C 17 q. 4 c. 13, and thrown into prison or, as an alternative, condemned to perpetual exile (exilio perpetuae deportationis),[167] served their penalty till the end of their life.

The cessation of penalties for *sacrilegium* in the *Decretum* most often concerned the penalties established in a penal law. There are no examples of remitting penalties imposed or declared on the basis of a penal precept. Neither are there any examples of exempting from censures in cases of emergency, though there are such pertaining to danger of death. Nor are there any examples of remitting penalties out of grave fear. As for the ways in which the remission is performed, they pertain to persons who are present, and it especially concerned exempting from excommunication. Remission of a penalty has an unconditional character. There are no examples of conditional remissions or remissions "ad cautelam" or "ad effectum." As far as the form of remission is concerned, it was not obligatory to be done

[165] C. 17 q. 4 c. 22 "auctores et cooperatores tanti sceleris anathematizentur, et bona eorum ecclesiae ipsius iuri perpetuo tradantur." This text is an excerpt from the letter of Pope Alexander II (1061-1073) from the time of his pontificate, see Ae. Friedberg, *CorpIC*, Pars I, col. 820-821, fn. 225; Jaffé -Wattenbach, 4477 (9350. 3510. 3521); P. Hinschius, *System*, vol. V, p. 39, fn. 3.

[166] C. 17 q. 4 c. 13.

[167] Ibid.

in writing. A bishop who exempted from excommunication sent a letter to diocesan parishes in which he informed about the exemption of a given excommunicated person from excommunication. The same information he sent to other bishops. Finally, neither a criminal action nor an action to execute a penalty were subject to prescription.

6.6. Summary

In canonical penal law there are two kinds of penalties, *latae sententiae* and *ferendae sententiae* penalties. They differ in terms of their infliction. *Latae sententiae* penalties are already included in a penal law itself and they are incurred at the moment of committing a crime. *Ferendae sententiae* penalties are inflicted by a judge. *Latae sententiae* penalties began to appear in the 4th century. Until the 10th century they were a rare occurrence in canonical penal law. Their fast growth in universal legislation started with the First Council of the Lateran in 1123. Among the norms containing criminal sanctions for *sacrilegium* in Gratian's *Decretum*, there are three which clearly point to the existence of *latae sententiae* penalties for this crime: C. 17 q. 4 c. 29; C. 27 q. 8 c. 50; C. 17 q. 4 c. 5. In the case of other criminal norms, there exist doubts whether they are *latae sententiae* penalties or *ferendae sententiae* penalties. Penal laws are, however, subject to strict interpretation, which is why in the case of doubt the teaching of canonical penal law orders that a given norm should be assumed to contain a *ferendae sententiae* penalty. Penal laws include determinate and indeterminate criminal sanctions. The bodies that had the power to inflict penalties were popes, bishops and synods. Since the 5th century the pope had had the supreme judicial power. He was first instance in criminal cases pertaining to bishops. Throughout the following centuries, this power of the pope tended to consolidate. In Gratian's *Decretum* there are a number of canons which contain criminal sanctions for *sacrilegium* established by popes, and many of them come from *Decretales Pseudo-Isidorianae*. These are: C. 1 q. 1 c. 125; C. 1 q. 3 c. 1; C. 3 q. 4 c. 11; C. 6 q. 1 c. 17; C. 12 q. 2 c. 3; C. 12 q. 2 c. 5; C. 12 q. 2 c. 10; C. 16 q. 3 c. 8; C. 16 q. 7 c. 1; C. 17 q. 4 c. 5; C. 17 q. 4 c. 12; C. 17 q. 4 c. 21; C. 17 q. 4 c. 29.

It was a bishop who had the power to inflict penalties on both laypersons and clerics in his diocese. The infliction of penalties for the gravest crimes had a solemn external character and some forms specified by the law were used on those occasions. It pertained to the infliction of anathema

and excommunication. This power of a bishop was limited in the case of the gravest penalties of anathema, excommunication and degradation of clerics. He was obliged to inform an archbishop, a metropolitan bishop or inflict these penalties at a synod. The infliction of penalties for *sacrilegium* by bishops and synods is included in the following canons: D. 50 c. 22; C. 2 q. 1 c. 7; C. 17 q. 4 c. 20; C. 17 q. 4 c. 31; C. 27 q. 1 c. 11 and C. 27 q. 1 c. 17. In Gratian's *Decretum* there are also canons including penalties for *sacrilegium* imposed by Roman law: C. 12 q. 2 c. 9; d. p. c. 29 q. 4 C. 17; C. 2 q. 1 c. 7; C. 16 q. 1 c 40.

The infliction of penalties concerned both determinate and indeterminate sanctions. The sources pertaining to *sacrilegium* in Gratian's *Decretum* do not include any recommendations as regards the abandonment of inflicting a determinate penalty. A judge was to inflict such a penalty that was contained in a legal norm. In the case of an indeterminate sanction, a judge, that is a bishop, was to determine the size of an imposed penalty, as it is in D. 50 c. 22. Among the canons concerning *sacrilegium* in the *Decretum* there is only one, C. 23 q. 4 c. 32, in whose rubric it is stated that if a crime is committed by a bigger community or by someone who has such a community as a companion in a crime, they are not to be punished but to be bewailed by the Church, and it was a general warning that constituted the form of punishment. There is no canon which mentions abandoning the infliction of a penalty in the case of the decreased imputability of the perpetrator of *sacrilegium*. All penalties which are perpetual contain the qualification that the one who was performing penance was to receive Viaticum at the moment of death, as in C. 22 q. 5 c. 19; C. 27 q. 1 c. 11; C. 27 q. 1 c. 17; C. 2 q. 1 c. 7.

The cessation of penalties could most often take place through expiation. There are no examples concerning the cessation of a penalty through pardoning a criminal. Absolution and dispensation were frequent forms of the cessation of penalties. Absolution in the external forum was to be granted by one's own bishop. The sources provide one example where the perpetrator of *sacrilegium*, having incurred anathema, was to go to the pope to obtain "mandatum," on the basis of which their bishop was to release them from anathema, as in C. 17 q. 4 c. 29. It was a rule that the one who inflicted a penalty had the right to release from it. In the case of danger of death, no reservations were applicable. Anyone who had the power to absolve could release any person from a penalty. The power of dispensation also rested with a bishop. Dispensation is an act of grace following from the discretion of a superior. In some canons, one can discern the possibility of dispensation. It is so in: D. 50 c. 22; C. 23 q. 4 c. 32; C. 27 q. 1 c. 17; C. 23 q. 4 c. 26.

Among the norms concerning *sacrilegium* there are also those from Roman law. Penalties they contain cease to apply as soon as they are served. These are: d. p. c. 19 q. 4 C. 17; C. 2 q. 1 c. 7; C. 16 q. 1 c. 40.

Also other penalties inflicted for *sacrilegium* by canon law ceased to apply through expiation. The penalty of degradation, as in d. p. c. 1 D. 81, ceased to apply when a cleric was deprived of his rights. Other penalties also ceased to apply in this way, such as a financial penalty in C. 17 q. 4 c. 20; C. 17 q. 4 c. 21.

The penalty of flogging for Jews deceitfully obtaining public offices stopped to exist after it was served, as in C. 17 q. 4 c. 31. For a person condemned to perpetual penance in a monastery, it ceased to apply at the moment of death, as in C. 24 q. 3 c. 22; C. 27 q. 1 c. 11. Those who were condemned to perpetual infamy (perpetua infamia) for ravaging ecclesiastical lands, C 17 q. 4 c. 13, and thrown into prison or, alternatively, condemned to perpetual exile (exilio perpetuae deportationis), served their penalty till the end of their life.

The cessation of penalties for *sacrilegium* in the *Decretum* most often concerned the penalties established in a penal law. There are no examples of remitting penalties imposed or declared on the basis of a penal precept. Neither are there any examples of exempting from censures in cases of emergency, though there are such pertaining to danger of death. Nor are there any examples of remitting penalties out of grave fear. As for the ways in which the remission is performed, they pertain to persons who are present, and it especially concerned exempting from excommunication. Remission of a penalty has an unconditional character. There are no examples of conditional remissions or remissions "ad cautelam" or "ad effectum." As far as the form of remission is concerned, it was not obligatory to be done in writing. A bishop who exempted from excommunication sent a letter to diocesan parishes in which he informed about the exemption of a given excommunicated person from excommunication. The same information he sent to other bishops. Finally, neither a criminal action nor an action to execute a penalty were subject to prescription.

Conclusion

Sacrilegium constitutes a special kind of crime in canonical penal law. The research concerning this crime in Gratian's *Decretum*, which contains canon law from the first twelve centuries of the history of canon law, has allowed us to reach a number of conclusions. First of all, it should be stated that *sacrilegium* in its essence constitutes a religious crime, which is defined in a similar way in many civilizations, such as the Sumerian, Hittite, Egyptian, Jewish, Greek and Roman civilizations. Christianity adopted the name and concept of *sacrilegium* from Roman law, where it was understood as *sacrorum violatio*, and employed it for its own use. It considered pagan sanctities and offerings as sacrilege, just as the contempt and violation of the holiness of God and anything that was connected with the holiness of God. As a result, there developed the concept of *sacrilegium personale*, *reale* and *locale*. *Sacrilegium* committed *immediate* began to be distinguished, which offended God in a direct way, for which the expressions "contra Deum" and "in Deum" were used, as well as *mediate*, which was understood as offending God in an indirect way by the direct irreverent treatment of persons, places and things consecrated to God. It was defined as "cumulus omnium criminum, quae in Deum ipsum committuntur." We cannot accept the view that Christianity developed the vast scope of *sacrilegium* in order to increase the dignity and respect of the clergy and to make the high and mighty submit to their power. Those who offended against ecclesiastical law were pronounced as sacrilegists, heathen and enemies of holiness, and laypersons were subsequently excommunicated, while clerics were deposed or degraded.

Sacrilegium was always placed among *maiora delicta*. It was always a crime of public law. In this crime, there were two elements which made

a given act count as the crime of sacrilege. These were the objective element, or the criminal transgression and its external character, and the subjective element, or its conscious and voluntary commission, as a result of which it was possible to speak of moral and criminal legal imputability. The existence of these two elements makes this crime objectively present in canon law. It is not, as put by P. Hinschius, "so genanntes Vergehen." It is not a purely legal construct.

In canon law, each *sacrilegium* is a mortal sin, but not each mortal sin constitutes *sacrilegium*. The present study takes into account only the external forum of *sacrilegium* as a crime, and it does not consider the internal forum of *sacrilegium* as a mortal sin. The Church Fathers and writers of the Church, whose texts also constitute *auctoritates* in the *Decretum*, treat *sacrilegium* as both a crime and a mortal sin for which the perpetrator has to be punished. They often use the term *sacrilegium* in the theological rather than legal sense. They considered it to be the transgression of divine law, which caused harm to the faithful and gave rise to public scandal. The character of *sacrilegium* as a crime of public law followed from the nature of the Church as the community of believers. When it was committed, it caused harm to the whole community of the Church. Placed among *maiora crimina*, next to murder and adultery, *sacrilegium* violated the public order of the Church.

In the Church, the close relationship between moral guilt and moral responsibility, which suggested criminal legal responsibility, was emphasized from the beginning. For a crime to occur, there had to be intentional guilt (dolus) or unintentional guilt (culpa). In the texts concerning *sacrilegium* which are included in Gratian's *Decretum*, intentional guilt (dolus) was necessary for this crime to be committed. There are normative texts in the *Decretum* which also consider the effect to be the source of imputability, but it does not take place in the case of the crime of *sacrilegium*. Since the 9th century, since the synod of Worms (868) and the synod of Tribur (895), canonical penal law had begun to distinguish the crimes committed "ex voluntate" and "ex negligentia." In Gratian's *Decretum* there exist the texts of both kind. At the same time, those pertaining to *sacrilegium* prove that this crime could only be committed "ex voluntate," with malicious intent (cum dolo). There is one text of Roman law which indicates that *sacrilegium* could be associated with unintentional guilt and committed through negligence (negligentia). The essence of *sacrilegium* according to canon law was that it was committed "in Deum" and "contra Deum," and not against man. Even when it was directly committed against persons, things or places consecrated to God, its commission led to "violatio sacri," not "violatio" *personae*, *rei* or *loci.*

Such an understanding of the essence of this crime was adopted and presented by Gratian in his *Decretum*. In his work, he included the definitions which are either substantive in character or contain the substantive content of the crime. One definition formulated by Gratian in his *dictum* is doctrinal in nature. The majority are statutory definitions, which are included in the norms established by popes or synods, and which are contained in the *Decretum* as *auctoritates*. The essence of *sacrilegium* according to Gratian is the violation of holiness (violatio sacri). The vast objective scope is indicated by the definitions of the glossators, although the essence is the same. The essence of *sacrilegium* for the glossators is the violation of a sacred thing (violatio rei sacrae). At the same time, this general definition is specified as consisting of three categories: a sacred thing itself (ipsa res sacra), the very person (ipsa persona) and an ecclesiastical thing (res ecclesiastica), which should be understood as anything that belongs to the Church in any way. According to the glossators, *sacrilegium* also constitutes the violation of public law. They defined public law as all that pertains to the service of God, priests and civil authorities. They also treated the violation of a holy day as *sacrilegium*. This type of *sacrilegium*, however, is not enumerated by Gratian. Gratian's definition is more general in character, while the glossators' definitions are more concrete. Gratian emerged as a law teacher who was able to address the issue in a profound manner and reach its essence in a synthetic and scientific way. Gratian's definition, general in character, constituted his great achievement in the scientific treatment of the law at that time. In this way, Gratian developed the teaching of canon law. The substantive definitions of *sacrilegium* included in the *Decretum* have a broad objective dimension due to the casuistic way of establishing the law contained in the *Decretum*. No general norms of law which could encompass a number of cases were formulated at that time. Each type of *sacrilegium* constituted a distinct case. This casuistic character of the norms pertaining to *sacrilegium* required that each of them needed to be analysed on its own in the present work. However, each type includes the essential element constituting this crime called "violatio sacri" by Gratian.

The active subject of *sacrilegium* can only be a human being. In the *Decretum*, the subject of the crime has both a general and individualized character. No subjective side of crime is indicated *expressis verbis*, and neither are the features, psychological states and intentionality of the subject taken into account. Attempt crimes are not mentioned either. Crimes are considered as completed and their perpetrators should be accordingly punished. It follows from the casuistic way of establishing law, which was based on the states which actually happened or the ones that could take place. In

the norms concerning *sacrilegium*, besides general references to subjects without any specification, there are also canons which contain individualized subjects. These are clerics in general, but also bishops, presbyters, deacons and subdeacons. Other grades are not mentioned. No canon refers to the pope as the subject committing *sacrilegium*. Clerics also became the passive subject of *sacrilegium* when they were abused. A distinct category are laypersons, among whom rulers, the high and mighty, those in power, provincial administrators and civil servants are enumerated. The same type of *sacrilegium* committed by a cleric and a layperson is, however, treated differently in terms of punishment. Though the penalties for both states tended to differ, in all cases the low prescribed the strictest penalty. It was most often degradation in the case of the clergy, and excommunication in the case of the laity. It was a rule of canon law that the higher dignity of the subject was associated with the more severe penalty.

Contemporary law paid more attention to the object of the crime rather than to the subject, which followed from the casuistic way of establishing those norms. Thus, when another definition of Gratian specified that *sacrilegium* was committed "auferendo sacri de sacro, sacri de non sacro, non sacri de sacro," it generally referred to the individual types of *sacrilegium* which was also defined by Isidore of Seville as "proprie est sacrarum rerum furtum." It is exactly these categories that accounted for the differences between *furtum* and *sacrilegium*. The *sacrum* of a thing or place constituted the basis for differentiating *furtum* and *sacrilegium*. Canon law adopted the principle "locus facit, ut idem uel furtum uel sacrilegium sit" from Roman law. All ecclesiastical buildings, monasteries as well as space within the distance of "thirty ecclesiastical steps" (triginta passus ecclesiasticos) belonged to the sphere of *sacrum*. All violation of goods from this sphere constituted *sacrilegium*. At the same time, *furtum* was a private law crime, while *sacrilegium* was a public law crime. *Furtum* did not constitute a crime of canon law, but of secular law, although an ecclesiastical judge could judge it at that time, and when the crime was committed by a clergyman, it could only be judged by an ecclesiastical judge. *Sacrilegium* constituted a crime of canon law because it violated the legal order in the Church.

The individual types of *sacrilegium* included in the norms adopted by Gratian in the *Decretum* concern a much broader scope than the one limited to ecclesiastical goods, although, in comparison to others, ecclesiastical goods are in the majority. All that was donated to the Church constituted its property, be it movable or immovable goods. An act of donation, performed in any form, was irrevocable. All appropriation of such goods constituted the crime of *sacrilegium*. Thus, the law ordered great caution and

firmness when taking a decision about donating anything to the Church. It was a bishop who was the holder of those goods, as well as persons who were authorized by a bishop. They were primarily to be used for the support of the poor, which is why all those who used them illegitimately were labelled as "necatores pauperum." No other use could be made of those goods than the support of the poor or broadly understood sacred purposes. The analyses conducted prove that all unlawful violation of ecclesiastical goods, whether by clerics or laypersons, constituted the crime of *sacrilegium*. The essence of *sacrilegium* in the case of the violation of ecclesiastical goods was that after they were donated to the Church they were regarded as God's "property" and thus belonged to the sphere of *sacrum*. Their unlawful violation caused "violatio sacri." What had previously been donated to the Church was not allowed to be employed for secular use. Clerics were prohibited from appropriating goods belonging to a dead or dying bishop, as this act was treated as *sacrilegium*. Nor were clerics allowed to seek advice from persons who dealt with broadly understood magic, as it also constituted the crime of *sacrilegium*. The clergy, starting from subdeacons, were obliged to remain celibate, so any act of breaking the vow of celibacy constituted the crime of *sacrilegium* punished with excommunication.

No layperson was allowed to usurp power over ecclesiastical possessions. The same type of *sacrilegium* committed by laypersons and clerics did not carry the same criminal sanction. For laypersons, it is anathema or excommunication, while for clerics – deposition or degradation. The two kinds of penalties for *sacrilegium* were labelled interchangeably. Despite their external differences, they in fact constituted the same penalties. These were the most severe penalties for both states. The norms do not contain any elements that would enable one to provide a more extensive account of the subjective side of crime. Apart from the general or individualized description of the subject, there is no mention of the imputability, age or gender of the subject. The circumstances influencing the lessening of responsibility of the subject are not provided either. An important subjective element was that also those who consented to a given crime were considered as equally guilty as the perpetrator of that crime. They were also punished in an equal way. Consent manifested itself in any external form of acceptance of an unlawful act.

The definitions of *sacrilegium* both in the norms and in Gratian's doctrine did not exhaust all types of this crime, which are contained in the individual norms in the *Decretum*. The following were considered as *sacrilegium*: all unlawful treatment of ecclesiastical goods, raiding them, destroying, taking, pillaging, plundering, alienating, seizing possessions and setting them

on fire, ravaging and stealing ecclesiastical money, keeping things donated to the Church with a view to earning profits, keeping offerings of the deceased who donated or willed them to the Church before their death, putting to other than sacred purposes what was donated to the Church, deceitfully stealing ecclesiastical things, raiding a church or a monastery and levying extraordinary burdens on ecclesiastical possessions. *Sacrilegium* in ecclesiastical legislation is a graver crime than *furtum* and *peculatus* and should be punished more severely than other crimes. *Sacrilegium* was a graver crime than *parricidium*, *fornicatio* or *adulterium*.

Any act against the faith and unity of the Church was also regarded as *sacrilegium*. These were apostasy, heresy and schism. Apostasy was understood as the external renunciation of faith. It conforms to the doctrine of the law, which is guided by the assumption that an external declaration of will expresses its internal act. Heresy is treated as abandoning the true faith. Also simony was considered as sacrilege. It was understood as trading in spiritual matters. Laypersons were not allowed to exert any influence on the staffing of churches, their consecration and management. Beating a bishop or presbyter was regarded as an especially grave kind of *sacrilegium*, just as using violence against a cleric or monk. Also concluding marriage with a nun constituted the crime of *sacrilegium*. Marriage between a nun and a religious was treated as sacrilege as well, just as breaking the right of asylum, arguing with the emperor's or pope's decisions or abusing the blessing of an engaged couple by marrying another person than the one who was blessed. Entrusting public offices to Jews and eating meals with them was also treated as *sacrilegium*.

All manifestations of magic, being against the true faith, constituted *sacrilegium*, including dealing with magic, seeking advice from those who dealt with magic, as well as a range of other superstitious behaviours. Such behaviours were: sorcery, poisoning, superstitions, worshipping pagan gods, worshipping created things just as one worships God, consulting and communicating with demons, divination by animal entrails by haruspices, divination by bird flight by augurs, wearing bands and amulets, quackery, casting spells, dances supposed to bring about the intervention of mysterious forces, overt and clandestine symbols called *physica* from Greek, tracking stars and foretelling one's fate which was performed by *genethliaci* and *mathematici*, and pagan practices of parents at the baptism of their child.

The analyses of the source material enable us to state that *sacrilegium* is a crime of canonical penal law suggesting the existence of moral imputability and criminal legal imputability. The source of imputability is intentional guilt (dolus). The text of Roman law included in Gratian's *dictum* may sug-

gest committing *sacrilegium* through ignorance (nesciendo) or negligence (negligendo), and thus it would be associated with unintentional guilt (culpa). Gratian himself did not use the term *culpa* in the sense of unintentional guilt as omitting necessary diligence, but this term broadly referred to guilt or sin. However, under the influence of Roman law, the meaning of *culpa* as unintentional guilt also started to appear in canon law. It should nevertheless be stated that *sacrilegium*, according to the teaching of canon law, could only be committed consciously and voluntarily (cum dolo). There is no text which would make it possible to claim that it could be committed by accident (casu).

Among the subjects committing *sacrilegium*, the *Decretum* enumerates bishops, presbyters, deacons, subdeacons, clergy in general, monks, nuns, laypersons and among them princes, masters and slaves. Among these subjects there are no indications of children, mature or immature persons and, moreover, no gender distinctions are made. In the case of women, only nuns committed *sacrilegium* by concluding marriage, and women who abused the blessing when they were blessed with one man, as fiancées, and then married another. The legal norms of the *Decretum* concerning *sacrilegium* do not know the theory of attempted crime, but treat *sacrilegium*, just as other crimes, as a completed crime. The legal norms pertaining to *sacrilegium* do not point to any form of duress, which would influence one's will in committing this crime. Only in one case poverty is mentioned, which could induce the perpetrator to commit a crime, as opposed to a person who has a means of livelihood.

The guilt of the perpetrators of the crime of *sacrilegium* was the same regardless of state, status and social position. There exist, however, source texts which point to the greater guilt of persons holding high positions, as in C. 12 q. 2 c. 21. The legal material adopted in the *Decretum* is inconsistent in this regard. This is confirmed by the text of C. 12 q. 2 c. 10, where "consentientes" are as guilty as the perpetrators of *sacrilegium*. The law of *Edictum Rothari*, which was referred to in the *Decretum*, diversified the kind of participation in a crime. Greater guilt was attributed to the principal perpetrator. Accomplices were guilty to a lesser degree. The principal perpetrator was punished over ten times more severely than *complices*.

Special guilt, under law, was incurred by those who broke the right of asylum, irrespective of their social position. If it was done to a bishop, the guilt also involved *crimen laesae maiestatis*. The gravity of guilt increased together with the high social position of the person against whom the crime was committed. The guilt in *sacrilegium* followed from the decision to violate *sacrum* (violatio sacri). In the case of apostasy, culpability was not in-

fluenced by whether it was caused by fear of one's life. The perpetrator of apostasy was considered guilty despite the fact that they renounced their faith only externally, and internally continued in the true faith. The special gravity of guilt was attributed to presbyters and deacons leaving the community of the Church. Upon their return, they were only allowed to participate in the community with laypersons.

The one who fulfilled their superior's orders was not considered guilty. If someone killed a criminal when performing a public function and carried out a sentence on a criminal, they were not guilty of murder. If they punished a criminal when not performing a public function, they were guilty of murder.

The law attributed guilt to a superior who abused their power by forcing their subordinate to commit a crime. The guilt of the principal for moral complicity in the crime and the agent who physically performed the transgression was the same.

The norms pertaining to *sacrilegium* do not contain the subjective element of crime which is incitement.

Canon law treated all perpetrators of the crime of *sacrilegium* equally, and their guilt was considered equal. The secular law from *Edictum Rhotari* attributed greater guilt to the principal perpetrator.

It is bizarre when Gratian, for the sake of absolute obedience to a bishop, insists on accepting a bishop's sentence for a crime that was not committed by the perpetrator. They committed another crime for which they were judged guilty by God. However, the decretists stated that in that case "Gratianus male intellexit."

Gratian acknowledges personal guilt. No guilt is incurred by children for their parents' crimes. What is crucial in the case of guilt is consciousness and the decision of the will. Ignorance of the fact did not bring about guilt in Gratian's opinion. Ignorance of the law did give rise to guilt.

Criminal sanctions for *sacrilegium* are primarily anathema, excommunication and suspension. Currently understood as censures or medicinal penalties, at that time they were treated as penalties which aimed at expiation for a particular crime committed, but were also supposed to bring about the reform of a given criminal. Anathema and excommunication, despite their external differences which mainly manifested themselves in the way these penalties were inflicted, in fact constituted the same penalty. The legal situation of a criminal was the same in the case of both these penalties. It happens that within the text of one criminal norm these two names are used interchangeably. Before the infliction of anathema, owing to its gravity, a bishop was obliged to inform other bishops, a metropolitan

bishop or archbishop, or to do it at a synod. Anathema was only imposed for the gravest crimes and only on those who refused to reform. It was also inflicted when the excommunicated person did not want to reform. Both anathema and excommunication had different forms. They basically deprived the person who was punished of participation with the faithful, completely or partially, as well as of receiving Holy Communion. Anathema or excommunication could be inflicted for a given crime only once. The infliction had to be preceded by a warning. However, anathema did not exempt one from the duties towards the Church. Excommunication had the character of the complete or partial deprivation of participation with the faithful. With respect to the way it was inflicted, there were two kinds of excommunication, *latae sententiae* and *ferendae sententiae*. The gradation of the penalty was such that if the excommunicated person did not reform anathema was inflicted on them, and when they remained contumacious they should be handed over to secular authorities who were to condemn that person to exile or inflict another penalty. There also were many kinds of excommunications. These were partial and complete ones as well as those depriving of particular goods. Before excommunication was inflicted, there was a legal obligation to pronounce a warning. No bishop was allowed to excommunicate anybody for personal harm. It could only be imposed for a public crime. Excommunication could have a specific duration or be imposed in perpetuity. At the moment of death, the condemned person should be given Holy Communion. The faithful could not communicate with the excommunicated person, as when they did it they incurred the penalty of major excommunication. Excommunication was an indivisible penalty. The penalty of both anathema and excommunication could only be inflicted by an ecclesiastical judge, and it could never be done by a layperson.

Besides excommunication, also financial penalties were used, with a certain sum being provided in a given norm. *Sacrilegium* committed by breaking the right of asylum was also punished with an interdict. The penalties for *sacrilegium* inflicted only on clerics were deposition, degradation and suspension. A number of the norms in the *Decretum* pertaining to *sacrilegium* contain indeterminate criminal sanctions, leaving the infliction of a penalty to the discretion of an ecclesiastical judge, most often a bishop. In consequence of committing *sacrilegium*, the perpetrator incurred the penalty of infamy, which caused the incapacity to perform certain legal acts. Also the penalties of banishment, deportation, imprisonment, flogging and public proscription were used. The system of canon law did not know the death penalty. This criminal sanction for *sacrilegium* is included in the norms of Roman law present in the *Decretum*.

Conclusion

The way of inflicting penalties for *sacrilegium* did not differ from the one applied in the infliction of penalties for other crimes. *Latae sententiae* penalties were already present in the legal norm and were "inflicted" the moment when this norm was violated. *Ferendae sententiae* penalties were imposed by popes, bishops and synods. According to Gratian's doctrine, a judge was to impose a penalty which was included in the legal norm. As a rule, a judge inflicting penalties was a bishop, who independently exercised his judicial power. There were situations where the law obliged him to inflict a penalty in a collegial manner, and it pertained to the gravest crimes. The pope was the highest judicial authority and since the first centuries, alongside synods, had gradually reserved the right to adjudicate the criminal cases concerning bishops. The death penalty or the penalty of mutilation could only be inflicted by secular power. Clerics were prohibited from participating in criminal trials.

An ordinary way in which penalties ceased to apply was expiation. Medicinal penalties ceased to apply through absolution. Absolution on the usual conditions was granted by a bishop. When anathema was incurred in consequence of beating a cleric or monk, the excommunicated person had to go to the bishop of Rome in order to obtain *mandatum*. At the moment of death of the excommunicated person all reservations ceased to apply and every priest was allowed to exempt the dying person from their penalties and administer Viaticum to them. The legal norms in the *Decretum* pertaining to *sacrilegium* do not contain any recommendations as to the application or cessation of penalties. It ought to be assumed that they were applied and ceased to apply just as in the case of other crimes.

The comparative analysis between the *Decretum* in the edition of Ae. Friedberg and LDG has led us to the conclusion that among the canons containing *paleae*, and pertaining to *sacrilegium*, only two are to be found in LDG, whereas the remaining ones constitute the texts inscribed in the *Decretum* by Gratian himself. It proves that *sacrilegium* was a familiar crime to Gratian and was important in the system of canon law, and Gratian intentionally introduced so many norms concerning this crime in the *Decretum*. That there is no separate chapter devoted to this crime can be explained by the fact that Gratian did not develop any taxonomy for his huge work, and as other legal institutions are included in different places of the *Decretum*, the same is true for *sacrilegium*. It appears that this direction of research on the *Decretum*, taking into account individual legal institutions, could contribute to developing the thesis concerning the closeness of a given manuscript with respect to the original recension made by Gratian himself. In

this way, it could bring the researchers closer to Gratian's original recension of the *Decretum*.

It remains to be hoped that the analysis of the crime *sacrilegium* in the present work will constitute another step in the process of research on the *Decretum*, which, as the biggest collection of canon law, has long been the subject of scientific interest of numerous researchers.

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