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The sources of the procedural roman-canonical law before Clemens V

Javier Belda Iniesta

Michela Coretti

Universidad Católica de Murcia (UCAM)

Abstract

The re-elaboration of late-ancient procedural law, regulated in Justinian's *Corpus*, has engaged the schools of law during various centuries, ever since the Late Middle Ages. In the 12th century, the Roman law represented, for civil law experts, both a resource from which norms and institutions can be obtained and the impassable border of legal reflection. The intense normative activity of the Roman Pontiff, universal legislator of the *ius commune*, has considerably accelerated the renewal of the procedural law *in utroque*, also thanks to the fruitful collaboration of Peter's successor with the most eminent professors of the European Universities. The aim of this study is to define the role of the canonical legislator in the procedure of elaboration of the Roman-canonical process, with particular attention to the normative interventions that led to the emergence of the summary procedure.

Keywords

Medieval procedural law, roman-canonical law, ordines iudicarii, verba diminuentia iuris ordinem, clementines.

SUMMARY: 1. The role of the church in the creation of medieval procedural law. 2. The sources of the procedural roman-canonical law: the *Ordines iudicarii* and the interventions of the canonical legislator. 2.1. The *Ordines iudicarii*. 2.2. The interventions of the canonical legislator and the canonistic doctrine. 3. The *verba diminuentia iuris ordinem* in the pontifical decretals written before the clementines. Bibliography

1. The role of the Church in the creation of medieval procedural law

Starting from the 12th century, the training of the jurists revolves around the *Corpus iuris*, historical consequence of the ancient wisdom and irreplaceable manual for the study of law. The Bologna School, however, arises and develops in an environment that is ready to receive its product, which consists in a cultured doctrinal law, completely aimed – at least initially – at a deferential re-elaborated version of the Justinian work.

The school of the glossators, which flourished starting from the 12th century, sets itself a decisively practical objective; the one of converting the *Corpus iuris* from an ancient law into a law in force at universal level. For this reason, the doctors of the Bologna School work hard to elaborate a system of mediation between the ancient *ratio scripta* and the judicial practice of their era. Nevertheless, the work of the jurists of Bologna goes far beyond the mere “explanation” of Justinian's text aimed at the practical implementation, because the activity of mediation between Roman law and practice soon evolves into a flourishing activity that creates jurisprudential law, which responded to the requests of the medieval society that were unknown when the *Corpus* was written¹.

¹ Cfr. Cavanna, A., *Storia del diritto moderno in Europa. Le fonti e il pensiero giuridico*, I, Milano, 1982, pp. 116-117. For an in-depth analysis about the so-called Legal renaissance, see also Cortese, E., *Il rinascimento giuridico medievale*, Bulzoni, Roma, 1992, in particular pp.19 ss. The jurists of Bologna must, on the one hand, give a support of validity to their own scientific activity (hence the need for the constant references to the *Corpus*); on the other hand, they must give effective answers to the Medieval society, in which the large majority of the institutions of the Late Roman Empire can no longer operate, because they are anachronistic: regarding this, cfr. Grossi, P., *L'ordine giuridico medievale*, Nuova Ed., Laterza, Roma-

The historian Charles Lefebvre² has observed that the Roman-canonical judicial law, developed in the universities, could have had an influence on the practice of the tribunals to the extent it has found an environment ready to receive it: the ecclesiastical world of the 12th century constitutes the preferential channel through which the teaching of the Doctors concerning the process starts to permeate the practice of the tribunals in Italy, France, Spain and England. At first, the cultural turmoil of Bologna affects the practice of the ecclesiastical tribunals, while the effect on the activity of the civil tribunals takes place more slowly and sometimes with a few difficulties: “*nombre de pays n’ont pas atteint le degré de maturité requise à cette reception*”³.

The so-called Roman-canonical procedural law is characterised precisely by its dual nature: on the one hand, it is a law that has an academic origin, based on the doctrinal teachings that derive from the cultured environments of the Italian and European universities; on the other hand, it is a law applied in the practice of the ecclesiastical and civil tribunals.

This judicial law arises and develops mainly around two elements: on the one hand, we have the systematic works of the writers of treatises of the 12th-15th centuries (called *Ordines iudicarii*), which, through the elaboration of the Roman and canonical sources, expose the doctrine of the process and its execution, from the introduction of the litigation through the delivering of the libellus until having recourse to the remedies against the sentence pronounced by the judicial authority⁴. On the other hand, we find the accurate interventions of the canonical legislator, prompted by concrete needs of justice that derive from the practice. These interventions gradually modify the *ordo*, until they mould a new type of process – the summary process – which is different from the ordinary solemn one⁵. The pontifical decretals are accompanied by the local regulations such as the municipal statutes or the royal measures.

Therefore, the Roman-canonical procedure uses the terminology, the institutions and the categories inherited from the *Corpus* of Justinian and filtered through the work of the experts of law (in this sense, it is a *Roman* process); nevertheless, it is permeated by the canonical legislation and by the spirit of good faith and equity that characterise the law of the Church (in this sense, it is a *canonical* process)⁶.

Bari, 2006, pp.160-162. The author underlines that the situation of the jurists of Bologna “*è comune [...] a tutti gli uomini di cultura medievale che si richiamano ai dati offerti dalla riflessione antica, alla loro autorità, e sono, nello stesso tempo, consapevoli dell’esigenza di superarli per andare innanzi. È una delle più grosse antinomie della cultura medievale, ed anche una non lieve difficoltà per il suo percorso*”, *ibid.*, p. 161.

² Lefebvre, Ch., “Juges savants en Europe, XII-XVI siècle. L’apport des juristes savants au développement de l’organisation judiciaire”, *Ephemerides iuris canonici*, 22 (1966), p. 76-77.

³ *Ibid.*

⁴ Stickler, A.M., v. “Ordines iudicarii”, in *Dictionnaire de droit canonique* (R. Naz, ed.), vol. VI, Paris 1965, pp. 1134 ss.

⁵ Campitelli, A., “Gli interventi del legislatore canonico in tema di processo”, *L’educazione Giuridica*, VI – *Modelli storici della procedura continentale, t. II – Dall’ordo iudiciarius al codice di procedura*, Pubblicazioni dell’Università di Perugia, Napoli, 1994, p. 30.

⁶ Cfr. Salvioli, G., “Storia della procedura civile e criminale”, *Storia del diritto italiano* (P. Del Giudice, ed.), vol. III, p. I, Milano, 1927, pp. 151 ss.; Cavanna, A., *Storia del diritto moderno in Europa. Le fonti e il pensiero giuridico*, I, Milano, 1982, p. 86.

This Roman-canonical process consists in a series of rationally ordered steps and they are frequently crystallised into acts that are written⁷. The written form constitutes a tool that protects the justice since it presents itself as an insurmountable wall placed between the judge and the parties. Furthermore, various and detailed norms provide for the most disparate possibilities that can occur in front of the judge and they provide the solution in advance⁸.

Based on the *extra ordinem* procedure of the Late Roman Empire, the judicial procedure shows the usual distinction between *in ius* part and *in iudicium* part, divided by the *litis contestatio*⁹.

The trial starts with the proposal of a *libellum*, a short written act in which the petitioner specifies the personal information of the respondent, the *petitum* (the subject matter of the action, meaning the provision that is requested to the judicial authority) and the *causa petendi* (meaning the synthetic exposition in fact and in law of the reasons underlying the *petitum*). Sometimes, the local costumes require to specify of the specific action to be carried out.

The judge schedules a first hearing of the parties, for the “joinder of the issue” or *litis contestatio* to take place: each party must express the *animus litigandi*, meaning the intention to judicially resolve the litigation, and the reasons that justify their pretensions. Therefore, the parties offer the *iusiurandum calumniae* and they promise solemnly to behave in good faith during the entire duration of the procedure and they offer, if needed, an adequate guarantee to ensure the compliance with the regulations of the tribunal¹⁰.

⁷ Cfr. Padoa-Schioppa, A., *Storia del diritto in Europa. Dal medioevo all’età contemporanea*, Bologna 2007, pp. 141-142.

⁸ Cappelletti, M., *Processo e ideologie*, Bologna, 1969, pp. 302 ss.

⁹ The solemn canonical procedure has always preserved the institution of the *litis contestatio* as an essential moment of the trial, in which the judge establishes the limits of the litigation based on the requests submitted by the parties involved in the case. Cfr. Lefebvre, Ch., v. “Procédure”, *Dictionnaire de droit canonique* (R. Naz, ed.), t. VII, Paris, 1965, pp. 285 ss., where the Author traces the history of the Medieval procedure and, in particular, the history of the *ordine iuris servato* canonical procedure and underlines the numerous contact points with the procedure used in the civil tribunals. In particular, he highlights, in the field of the canonical process, the elements that derive from the Roman tradition, those that derive from the Germanic tradition, the contribution of the Medieval customs and, lastly, the typical peculiarities of canon law. For example, the Roman law offers to the judicial procedure observed in the ecclesiastical tribunals a big number of terms and institutions. The predominance of the territorial criterion to distribute the jurisdiction is typical of Roman law (unlike Germanic law, which prefers the personal criterion); furthermore, the citation is carried out by the judge, like in Roman Law, and not by the petitioner, in compliance with the Germanic procedure. The means to challenge a sentence that has the force of *res iudicata* are inherited as well from Roman law: from the *querela nullitatis* to the *restitutio in integrum*. Instead, the theory of the evidence is highly influenced by the Germanic law: if, on the one hand, Canon law adopts the Roman principle of the free assessment of evidence by the judge, on the other hand, it also adopts the Germanic system of the legal evidences, *plenae* or *semi plenae*, and it ascribes great value to the presumptions (*iuris tantum* presumption, if it admits evidence to the contrary, *iuris et de iure* presumption if it doesn’t admit it). Lastly, the canonical process has some original traits: e.g. The new figures of the auditor (in charge of instructing the case), the promoter of justice (who was originally in charge of suppressing the delicts), the lawyers of the poor. Some institutions, already known in the civil world, are seen as particularly positive: this is the case of the conciliation and arbitration procedures.

¹⁰ Belda Iniesta, J., Coretti, M., “Dispendiosam y Saepe contingit: El proceso sumario a la luz del utriusque iuris”, *GLOSSAE, European Journal of Legal History*, 13 (2016), p. 30.

The petitioner and the respondent are represented in the trial by the procurator, who mainly has the role of the party's representative and is functionally different from the defender, who is in charge, instead, of the technical defence.

Later, each party identifies in writing the requests, or *positiones*, that must be addressed to the counterparty: this practice constitutes one of the peculiarities that are typical of the process in the *ius commune*. The counterclaim, the exceptions and the majority of the typical acts of the instructing phase of the process are written: for example, the declarations of the witnesses are gathered by the notaries in the minutes, which are filed in the acts and that are evaluated by the judge. Once submitted the defences of the parties and the *consilia*, meaning the opinions of the experts, the judge can pronounce the sentence, which can be appealed by the losing party. The sentence becomes definitive if it is not appealed within the deadline, meaning before the conclusion of the second grade of the trial. In case of non-compliance with the *res iudicata*, a procedure of forced execution is foreseen, which consists in the estimation and sale of the goods of the defaulting losing party, up to the value of the condemnatory sentence¹¹.

Therefore, this is the essential scheme of the process, as it is outlined since the 12th century. It ends up including the two doctrines, the civil and the canonical one. Cavanna notes that although a big part of the civil and criminal procedure, which gradually emerged as a complex rational structure of rules and institutions from the 12th century, was built with “lively” materials of the Roman *ordo iudiciorum*, its perfected realisation constitutes a merit which can be attributed in great part to an intelligent and innovative pontifical legislation (*decretales*) and to a refined work of doctrinal development carried out in the most part by the Italian canonistic science (*summae* and treatises) collective works among which the internationally famous *Speculum iudiciale* by the jurist-bishop Guillaume Durand excelled in the 13th century¹². The work in synergy of the experts of both laws has led to the elaboration of an instrument, the Roman-canonical process. Which has a “*utroquistic*” cultural nature. Both in the ecclesiastical and in the secular tribunal, it allows to have an idea of the deep bond - typical of every aspect of life and of the Medieval culture - between the secular world and the Church, and therefore between the civil and the canonical law, to such an extent that it seems impossible to understand the lay legal science by neglecting the ecclesiastical one.

In fact, ever since its origins, the judicial activity in the ecclesiastical tribunal¹³ was held by using the “tools of the trade” provided by the Roman law and by the scholars of

¹¹ Cfr. Padoa-Schioppa, A., *Storia del diritto in Europa*, pp. 139-140.

¹² Cavanna, A., *Storia del diritto moderno in Europa. Le fonti e il pensiero giuridico*, I, Milano, 1982, p. 85.

¹³ Regarding the origins of the ecclesiastical tribunal and the competences reserved to it, read the text by Salvioli, G., “Storia della procedura civile e criminale”, *Storia del diritto italiano* (P. Del Giudice, ed.), vol. III, p. I, Milano, 1925, pp. 102-126. At the origins of the power of judgement of the Church there's the teaching of the Paul the Apostle, by virtue of which Christians should avoid arguments, bear with one another and forgive one another: “*as the Lord has forgiven you, so must you also do. And over all these put on love, that is, the bond of perfection*” (Colossians 3, 13-14). In case of discord, Christians must address the presbyters, and not the pagan judges (1 Cor 6, 1-4). Normally, the peace-building activities of the members of the ecclesial communities is a responsibility of the leader of the community, which is the bishop. This authority is later recognised by the Emperor Constantinus (the so-called *episcopalis audientia*). Biondi, B., *Il diritto romano cristiano*, I, Milano, 1952, pp. 435 ss.; Vismara, G., *Episcopalis audientia*, Milano, 1937. With reference to the way to proceed of the bishop when he carries out the role of judge, see the study of Belda Iniesta, J., “El ministerio judicial del obispo hasta el surgimiento de la lex christiana (ss. I-IV)”, *Anuario de derecho canónico*, 4, 2015, pp. 387-401, in particular pp. 395 ss. The bishop, of course,

Justinian *Corpus*. Nevertheless, since in the religious tribunal the trial is carried out with a view to the *salus animae*, the use of the above-mentioned tools, far from aligning with the directives of rigorous application that derived from the lay doctrine and jurisprudence, is always based on the principles of *aequitas*, *benignitas* and *indulgentia*.¹⁴ The accurate interventions of the canonical legislator regarding the process aim at the celerity without overlooking a careful investigation concerning the truth of the facts, thus demonstrating a strong interest of the Church for the correct and fast administration of justice: justice, of course, does not accept excessive procedural lengthiness.

The considerations set out above allow us to understand why the Church has represented (in certain aspects even more than the secular world) the driving force of the modification of the procedural discipline in the *ius commune*. As Teacher of justice, the Church feels obliged to re-adapt the inheritance received by the Roman law to the concrete needs of the life of the faithful that rely on its tribunals, since it can't just assist the elaborations of the cultured doctrine of civil law, which are, sometimes, distant from the needs for justice that derive from the practice.

2. The sources of the procedural Roman-canonical law: the *Ordines iudicarii* and the interventions of the canonical legislator

The main common sources of the Medieval procedural law are, therefore, the doctrine, which expresses itself through the new literary genre of the *Ordines iudicarii*, and the interventions of the canonical legislator, prompted by the concrete problems of administration of justice emerged in the practice. Nevertheless, it is important to point out that the two matrixes of the procedural law, which are described separately in this text, always function jointly in reality, and it is impossible to draw a strict distinction between them. The future jurists, in fact, study on the texts written by the experts of both laws, and they will become judges in the tribunals (the ecclesiastical and the civil ones), or they will become men of the Curia or great Popes: this was the case of Alexander III, Innocent III; Gregory IX, Boniface VII and many others. They obtain concepts and institutions from the only, “*utroquistic*”, theory of the Medieval process, gathered in the *Ordines*, and they put them in their normative provisions.

2.1. The *Ordines iudicarii*

By *Ordines iudicarii* we refer to those systematic works or treatises, written from the end of the 12th century that have the aim of describing the doctrine and the execution of the process in its whole, from the submission of the *libellus* until having recourse to the means of challenge which can be used to obtain the reform of the sentence pronounced by the judicial authority. This is a product of the medieval legal science. Whether they concern the civil law or canon law, the *Ordines* can be divided into two different

can only apply an evangelical justice, which takes into account the constant invitation from Christ to forgiveness, according to the Sacred Texts.

¹⁴ Cfr. Regarding this see Cavanna, A., *Storia del diritto moderno in Europa. Le fonti e il pensiero giuridico*, I, Milano, 1982, p. 84. Among all the above-mentioned principles, the one of *aequitas* has a particular relevance in the canonical legal system. In fact, equity is not only a general principle of the canonical legal system, but it is also one of its fundamental institutions and a formal source of law. Cfr. Grossi, P., *L'ordine giuridico medievale*, Nuova Ed., Laterza, Roma-Bari, 2006, p. 212.

categories: some have an entirely theoretical nature, some other have a mainly practical nature¹⁵.

The texts that belong to the first category are drawn up for school and they aim consists in disseminating the knowledge of law, in providing the interpretation of law and in organising the laws systematically. These treatises stem from elements which can be obtained from teaching and the liberal arts and from a specific construction that finds its premises and limitations in the didactic tradition¹⁶. On the other hand, the works that have a more practical nature aim to simplify the application of law, by defining a procedural scheme that, without overlooking completely the teachings of the school, goes beyond its models¹⁷. The *Apparatus glossarum* and the *Summae* belong to the *iuris theorica* works; on the other hand, the texts regarding some aspects that are particularly important in the practical application of law, such as the works on marriage and all the works regarding the process, its forms and institutions, belong to the *iuris practica* works.

These last works, especially because of their object, obtain very soon a relevant role in the literary scene ever since the 12th century and they are written in a larger number. They gather, first of all, the jurisprudence, which is soon connected to the text of the law as an element that explains it and that constitutes an integral part of it. Secondly, the *iuris practica* works include *iuris theorica* contents whenever a systematic description of the legislative text is needed¹⁸, which aims at the correct application of law and at the precise compliance with the forms provided for by the law. Lastly, these handbooks of the judicial practice contain the scientific reflections that are essential for the correct interpretation of the procedural law, although the formal and technical elements always have a prominent position: in fact, the works under examination mostly contain formularies¹⁹.

Although the structure of the *Ordines* is variable, there are some essential characteristics which are more or less shared by all the works that belong to this literary genre. With reference to the division of the topics, they have three sections, which trace the organization of the process: the first one is dedicated to the preparatory and the introductory acts; the second one is dedicated to all the acts through which the proceeding takes place, from the joinder of the issue until the sentence; the third part, eventually, concerns the final acts of the process: the sentence, its execution and the remedies that can be used both against the sentence and against acts that execute it. Some works also include a fourth section, which deals with the persons that are actively or passively entitled to participate in the process²⁰.

¹⁵ This distinction is introduced by Stickler, A.M., v. “Ordines iudicarii”, *Dictionnaire de droit canonique* (R. Naz, ed.) vol. VI, Paris, 1965, pp. 1132 ss.

¹⁶ Campitelli, A., *Accertamento e tutela dei diritti nei territori italiani nell'età medievale*, Torino 1990, p. 68.

¹⁷ Stickler, v. “Ordines”, p. 1132; Campitelli, *Accertamento e tutela*, p. 68; Nörr, K.W., “Ordo iudiciorum und Ordo iudiciarius”, *Studia Gratiana*, 11, 1967, pp. 327-343.

¹⁸ Campitelli, *Accertamento e tutela*, p. 69. Regarding this, the author says that “*le opere relative allo svolgimento e alla conoscenza dell'attività processuale furono dunque determinanti non soltanto nella produzione letteraria dell'insegnamento del diritto, ma anche rilevanti nell'attenzione che sollecitarono da parte di coloro che dovevano svolgere un'attività legata alla pratica stessa del diritto, perché nell'attività applicativa, sempre nell'ambito della vita giuridica a qualunque livello di giurisdizione, il testo legislativo si presentava come l'indispensabile strumento per rintracciare la regola da osservare*”.

¹⁹ Stickler, v. “Ordines”, p. 1133.

²⁰ *Ibid.*

All the considerations set out above regarding the *Ordines iudicarii* are valid both for the works concerning the process in the civil tribunals and for those that concern the process in the ecclesiastical tribunals.

According to A. M. Stickler²¹, who has been the first one to conduct a detailed study on the literary genre under examination, the two legal systems, the civil one and the ecclesiastical one, are always formally distinct, also in the procedural field. In fact, the Medieval experts in civil law and canon law state frequently in their works that their fields of study are independent. Furthermore, as observed by the famous historian of law, the two tribunals, the civil one and the ecclesiastical one, are independent and they exercise their jurisdiction in different fields; after all, each tribunal has its own magistrates, who apply the procedural law of the legal system they belong to²². Even the origin and the compulsoriness of procedural civil law have a different source than those of procedural canon law.

Nevertheless, in spite of the independence between the two legal systems stated by the medieval experts of law, the modern historiography unanimously believes that in the field of procedural law itself, even more than in any other field of law, there's an interpenetration between civil and canonical legal system²³. On the one hand, the Roman law, as it is re-elaborated by the science of civil law, provides various procedural rules that can also be applied to the ecclesiastical forum, because they are compatible with the principles and the tradition of the Christian religion; on the other hand, in the field of canon law, various aspects of the procedure are completed, refined and, later, adopted by the civil forum.

In his analysis, Stickler notes that the Church gathers, little by little, the procedural rules of the Roman civil law and it adopts them in the ecclesiastical tribunals, since initially it doesn't have its own rules adequate to bring about a scientific improvement in the discipline of the process²⁴. Therefore, when the canonical legal science as such flourishes in the Church (after the writing of Gratian's *Decretum*), the canonistic doctrine has already absorbed a lot information from Roman law, including many terms, norms and institutions related to the process. Progressively, the Church elaborated its own peculiar doctrine and its own legislation also in relation to the topic of the process, so it partially frees itself from the Roman heritage. The Church adds its own rules to the ones obtained from civil law, in order to complete them or attenuate them, in this way permeating the whole process with its particular spirit of justice and equity. In turn, the novelties deriving from the ecclesial world will be adopted by the civil legal system of that era, as is the case of the summary process. The *Ordines iudicarii* accurately reflect this evolution. The first *Ordines*, in fact, are full of quotes taken from Roman law; later there will be a constant increase of the quotations from fragments that belong to the collections of canon law in the works of the jurists. This can be seen both in the works written by the civil law experts

²¹ *Ibid.*, p. 1134; Nörr, "Ordo iudiciorum", p. 327 ss.; Campitelli, *Accertamento e tutela*, p. 75.

²² The discipline of the process in the canonical legal system includes elements of originality if compared with the one of the civil process. The aspects already describe in note 9 are combined with the different regulation of the appeal. According to the Roman legal system, in fact, the appeal comes after the sentence, both logically and temporally. The canonical procedural law, instead, foresees the possibility of appealing also before the first sentence, preventing it, with a view to a reduction of the procedural lengthiness and in order to improve the speed of justice. Lefebvre, v. "Procédure", p. 293.

²³ Stickler, v. "Ordines", p. 1134; NÖRR, "Ordo iudiciorum", pp. 327 ss.; CAMPITELLI, *Accertamento e tutela*, p. 75.

²⁴ Stickler, v. "Ordines", p. 1134.

and in those that are written by the canonists. It is even possible to state that *les Ordines* “*pouvainent indifféremment servir dans les deux fors, ceux des légalistes chez les canonistes et inversement, car le même droit processuel se trouvait rapporté dans leurs ouvrages respectifs*”²⁵. The impression of the famous Austrian academic, in the light of his investigations, is that the treatises of the civil law experts and of the canonists are so similar that the same manual and, therefore, the same theory of the process, the same general principles can be equally used by the operator of the civil tribunal and of the canonical tribunal, since the whole topic of the process ends up constituting a true area of intersection between the two legal systems. Probably, the *Ordines iudicarii* are considered as works that belong to both laws ever since the 13th century, and their authors are doctors in *utrumque ius*.

In the interests of a more complete exposition of the topic of the Roman-canonical process, it is important to make some more considerations regarding the *Ordines iudicarii* and, in particular, regarding the concept of the process, which emerges in the works that belong to this literary genre.

The constant effort to penetrate the *Corpus* of Justinian, which aims at recomposing a *ordo* in the rule²⁶, allows the doctors, who are the protagonists of the legal Renaissance, to outline the process as a series of legal acts that are logically and temporally organised. This new logical structure differs from the process as it was defined in the previous centuries, and it distributes in a different manner the powers and faculties between its protagonists.

These changes are due to the maturation of a new conception of the procedural tool. In the Late Roman Empire and throughout the Early Middle Ages, the judge is not a part of a well-organised system of justice, divided into degrees of jurisdiction. He carries out an almost inactive function of presence: he is a keen observer of the behaviours adopted by the parties and he is present during the cross-examination and especially during the *litis contestatio*²⁷. The decision that the judge takes in the light of the allegations of the parties aims at concluding the litigation and bringing back the order and the peace in the community.

The horizon in which the procedural activity is immersed starting from the 12th century is definitely broader: this activity is no longer limited to the mere *overcoming* of the conflict between the parties through the intervention of the judge, who pronounces the sentence. The process becomes a method to *resolve* the litigation, meaning a rational instrument that aims at finding a solution to the contrast between the parties (who are mutually antithetical, but who are still willing to find the truth). And the above-mentioned solution of the controversy is to be found in the reality compared with the norm²⁸, always in compliance with the need to serve truth and justice.

²⁵ Ibid.

²⁶ Campitelli, *Accertamento e tutela*, p. 72.

²⁷ The *litis contestatio* affects the successive procedural phase, meaning the evidentiary stage. It consists in a “*scena rappresentata e vissuta del contrasto tra l’attore e il convenuto*” and it constitutes the reference point in the election of the evidences that the parties must display to support their own claims or to resist to the claims of the counterparty. *Ibid.*

²⁸ Ibid.

Lastly, let's make a conclusive reflection. The successful literary genre²⁹ of the *Ordines iudicarii* starts in the second half of the 12th century with Bulgarus work - titled *Excerpta legum edita a Bulgarino causidico* and which consists in a brief analysis of the judicial procedure until the appeal³⁰ - and it reaches its climax with the writing of the *Speculum iudiciale* by Guillaume Durand³¹. The *Speculum* can be considered as the product of all the treatises written before and as the source that inspires all the works written after it³². It exposes the theory and the practice of the Medieval process in its entirety; it is a treatise characterised both by the scale and the precision; in fact, the success of the work during the following years and centuries has earned to the famous canonist the epithet of *Speculator*. Since the late 12th century, as well as during the following centuries, the canonists are those who mainly deal with the procedural matters. For this reason, the Roman-canonical organisation is mainly constituted by canonical works: these works exercise their influence on the legislation and on the practice³³.

2.2. The interventions of the canonical legislator and the canonistic doctrine

Gratian's Decree³⁴ (circa 1140) recalls the procedural norms contained in the *Hispana*, in the *Libri synodalibus causis* by Regino of Prüm, in Bruchard's *Decretum*³⁵ and in Ivo's *Decretum*. These norms are reproduced in the second part of Gratian's *Concordia*, which analyses the Roman procedure used in the ecclesiastical tribunals and modified and

²⁹ Various jurists have adopted the literary genre of the *Ordines iudicarii* throughout the 12th-15th centuries: Ugo di Porta Ravennata, Giovanni Bassiano, Ottone da Pavia, Simone da Bisignano, Riccardo Angelico and Tancredi are among the first ones who did so (cfr. Stickler, v. "Ordines", p. 1135-1141). Apart from the glosses, which constitute the ordinary commentary to the Roman texts, the special treatises (at least the first ones) might have had an influence on the writing of the decretals regarding the process, which are written since the pontificate of Alexander III. Cfr. Lefebvre Ch., "Juges savants en Europe, XII-XVI siècle. L'apport des juristes savants au développement de l'organisation judiciaire", in *Ephemerides iuris canonici*, vol. XXII, 1966, p. 79.

³⁰ Stickler, v. "Ordines", p. 1136. According to the author, Bulgarus work has been written before 1141.

³¹ Gulielmus Durandus, *Speculum iuris Gulielmi Durandi episcopi Mimatensis [...] cum Jo. Andr. Baldi de Ubaldis aliorumq. aliquot praestantiss. Iurisc. Theorematis. Nunc denuo ab innumeris, quibus antea scatebat, erroribus atq[ue] mendis summa industria, et labore repurgatum*, Venetiis, 1585.

³² Stickler, v. "Ordines", p. 1138. The first version of the text was written in 1272, the second one in 1287.

³³ Cfr. Lefebvre, CH., *Juges savants en Europe, XII-XVI siècle. L'apport des juristes savants au développement de l'organisation judiciaire*, in *Ephemerides iuris canonici*, vol. XXII (1966), pp. 79.

³⁴ *Decretum divi Gratiani, universi iuris canonici, Pontificias constitutiones et Canonicas brevi compendio complectens, una cum glossis et thematibus prudentium doctorum suffragio comprobatis [...]*, Lugduni 1554; Kuttner, S., "Graziano, l'uomo e l'opera", *Studia Gratiana*, 1 (1953), pp. 15-29; Kuttner, S., "De Gratiani opere noviter edendo", *Apollinaris*, 21 (1948), pp. 118-128; Rambaud-Buhot, J., "L'étude des manuscrits du Décret de Gratien conservés en France", in *Studia Gratiana*, 1 (1953), pp. 119-145.

³⁵ The *Hispana* is a collection of conciliar canons and pontifical decretals written in Spain around the seventh century. Regino's work (Regino Abbas Prumiens, *Libri duo de synodalibus causis et disciplinis ecclesiasticis*, F.G.A. Wasselschleben, ed., Lipsiae 1840) was written at the beginning of the 10th century. It is composed by two books and, like the majority of the works written since the second half of the 9th century, it aims at the systematic and rational organisation of the legislative material of the Church, which has been produced throughout the centuries. Bruchard, on the other hand, writes the *Decretum* during the first years of the 11th century: his work constitutes one of the main sources used by Gratian in order to write the *Concordia*. For an in-depth analysis of this and other sources of canon law, see Erdö, P., *Storia delle fonti del diritto canonico*, Venezia, 2008.

adapted based on the needs emerged from the practice³⁶ already during the first centuries of life of the Church³⁷. Nevertheless, the procedural matters are not analysed in a systematic and complete way: Gratian simply reproduces the rules of the process without using a specific order³⁸. The need to recompose systematically the norms of the judicial procedure induces the canonical science to deal with the procedural topic, with a view to a more complete elaboration of this branch of law.

In this context, characterised by a strong interest in the rules of the Roman process by the on the part of the canonistic doctrine, the Church is encouraged to write its own legislation regarding this topic, by adding some rules to those that it had already absorbed from Roman law in order to complete it, to adapt it, to attenuate it so that the entire process of the ecclesiastical tribunal can be directed towards its particular spirit³⁹. Therefore, since the second half of the 12th century, the canonical legislator participates actively in the elaboration of the discipline of the process, paying attention both to the needs of the practice and to the suggestions that derive from a lively and participating doctrine⁴⁰. The popes do not develop a new general and abstract regulation of the procedural steps but, prompted by the practice, they take decisions that provide a demonstration of authority, not an abstract order⁴¹. These accurate intervention are all directed towards the same direction: the simplification of the discipline of the process through the reduction of the procedural formalities and the reduction of the duration of the cases, especially the beneficial ones.⁴² The principle of procedural economy, nevertheless, is never applied to the detriment of the full cognizance of the cases.

³⁶ About the procedural practice in the tribunals of the Church, see Padoa-Schioppa, A., “Il diritto canonico come scienza nella prospettiva storica: alcune riflessioni”, *Le ragioni del diritto. Scritti in onore di L. Mengoni*, III, Milano, 1995, pp. 2065 ss.

³⁷ Campitelli, A., “Gli interventi del legislatore canonico in tema di processo”, *L’educazione Giuridica*, VI – *Modelli storici della procedura continentale*, t. II – *Dall’ordo iudiciarius al codice di procedura*, Pubblicazioni dell’Università di Perugia, Napoli 1994, p. 28; Kuttner, S., “Graziano, l’uomo e l’opera”, *Studia Gratiana*, 1(1953), pp. 15-29.

³⁸ Regarding the discipline of the process in the *Decretum* see Della Rocca, F., “Il processo in Graziano”, in *Studia Gratiana* 2 (1954), pp. 281-303.

³⁹ Campitelli, *Gli interventi*, pp. 28-29.

⁴⁰ *Ibid.*, p. 29.

⁴¹ *Ibid.* The Author underlines that, in the historical era that we are examining, the Pope exercises the power of regulation not by means of an abstract and universal legislation, but through *mandata* and *responsa*, in line with the Roman imperial tradition. The value that must be attributed to the decretal letters is a matter of discussion between the experts of canon law of the 12th century. Nevertheless, since the publication of the *Breviarium* (also known as *Compilatio prima* of the *quinquae compilationes antiquae*) written by Bernardus Papiensis around 1190, the general applicability of the decretal letter is no longer questioned. Nevertheless, the modality of intervention of the canonical legislator doesn't change: he always gives answers which aim at giving a solution to the specific cases brought to his attention. Innocent III (1195-1216) is the first Pope who specifies which decretals issued during his pontificate must be considered as having a general nature.

⁴² The beneficial cases are those regarding the appointment of ecclesiastical roles and of the patrimonies connected to them. Given the sensitivity of the issue, these cases require a fast solution by the ecclesiastical judicial authority. Mollat, G., v. “Bénéfices ecclésiastiques”, *Dictionnaire d’histoire et de géographie ecclésiastiques en Occident*, 7 (1934), pp. 1237-1270; Mollat, G., v. “Bénéfices ecclésiastiques en Occident”, *Dictionnaire de droit canonique*, 2 (1937), pp. 406-449; Prosperi, A., “Dominus beneficiorum: il conferimento dei benefici ecclesiastici tra prassi curiale e ragioni politiche negli stati italiani tra ‘400 e ‘500”, *Strutture ecclesiastiche in Italia e in Germania prima della Riforma*, (P., Prodi, P., Johanek, eds.), Bologna, 1984, pp. 51-86; Santangelo Cordani, A., “Aspetti della procedura sommaria nella prassi rotale trecentesca”, *Proceedings of the Eleventh International Congress of Medieval Canon Law*, (M. Bellomo, O. Condorelli, eds.), Città del Vaticano, 2006, pp. 699-713, especially in p. 701, where the Author comments on the complexity of the beneficial cases, not only because of the uncertainty of the procedural discipline, but also because of the important of the economic and political interests involved. In

The overall results of the pontifical legislation consist in a new procedure, which is different from the ordinary one and that we know with the name “summary or planary process”. This process is the result of a slow accumulation of successive decisions of the popes, which frequently use expressions such as “*simpliciter*”, “*de plano*”, “*sine strepitu et figura iudicii*”, which all see to reduce the duration of the process and the procedural formalities.

The above-mentioned clauses appear in the decretals of Alexander III, Innocent III, Honorius III, Gregory IX and Boniface VIII. Nevertheless, only Clement V (1305-1314), with the famous *Dispendiosam*, defines an actual abbreviated procedure, which is intended to deal with specific controversies, especially spiritual ones⁴³, and that is extended to the appeal cases. Successively, the constitution *Saepae contigit*, by Clement V, sheds light on the solemnities that must be omitted in the new procedure.

The gradual emergence of the summary process continues even after the publication of the Clementines. In the second half 1300, in fact, the Tribunal of the Roman Rota orders to the judge-instructors to proceed not only *simpliciter*, *de plano*, *sine strepitu et figura iudicii*, but also *terminis non servatis, sola facti veritate inspecta*. For some cases, among which are included the beneficial ones, the mere formalities are abolished and the solemnities that have a substantial nature are preserved, since they are necessary for the correct investigation of the material truth. This further simplification of the judicial procedure is the result of a legislative intervention made by Urban V (1362-1370)⁴⁴. The procedural rules contained in the provision of the Pope are clarified and re-defined by the Roman Rota, through a *ordinatio* issued on 7 January 1380. This ordinance has some peculiarities: in fact, it does not simply report the decision of Urban V, but it also orders to apply it both to the beneficial cases (to which the abbreviated procedure was already applied in compliance with the *ius commune*) and to the profane case. To summarise, we are facing an intervention, so to speak, that is semi-normative, issued by the supreme tribunal of the papal curia, which defines a previous provision of the Pope, because the ordinance of the Rota reforms in an exquisitely jurisprudential way the formal and solemn *ordo iudiciarius*, through a simplification of the procedures⁴⁵.

The canonistic doctrine deserves a particular consideration, since it elaborates its own scientific speculation regarding the new rules of the process introduced by the pontifical decretals.

fact, after the year one thousand, “*il sistema beneficiale non tardò a diventare il principale punto di riferimento della politica perseguita dai papi che attraverso di esso cominciarono a sottrarre progressivamente alle diocesi una parte cospicua della loro iniziale indipendenza economica e amministrativa e ad accrescere così l’influenza politica e le risorse finanziarie della corte pontificia. La straordinaria frequenza con cui la Rota veniva chiamata a dirimere le controversie sorte intorno ai vari aspetti del regime di questo istituto non è, del resto, che lo specchio fedele della complessità dei problemi giuridici coinvolti e della gravità degli scontri che gli interessi confliggenti alimentavano all’interno delle gerarchie ecclesiastiche*”.

⁴³ The summary procedure is applied mostly in the beneficial cases and in the matrimonial ones. Cfr. Santangelo Cordani, “Aspetti della procedura”, p. 702.

⁴⁴ The provision of Urban V is reported in a *Decisio* which is contained, in turn, in an ancient collection of *Decisiones* of the Apostolic Tribunal of the Roman Rota: It consists in *Decisio* 33, cited by Professor Santangelo Cordani in her work, that we have already mentioned various times. Pope Urban V introduces a new and shorter modality to proceed so that the cases can be solved more rapidly, *ne lites fiant immortales, et partes fatigentur laboribus et expensis*. Rota Romana, *Decisiones Novae et Antiquae*, Venetiis 1508, fol. 9v.

⁴⁵ Santangelo Cordani, “Aspetti della procedura”, p. 707.

The glossators of the *Corpus iuris civilis*, at least initially, write a commentary that is as faithful as possible to the Roman texts, as they understand them⁴⁶. The decretists, in turn, comment with the same fidelity the *Decretum Gratiani*, taking into account both the vocabulary, the institutions and the rules of Roman law, and the techniques of the scientific reasoning provided by the work of the glossators of civil law. Nevertheless, the canonists must also deal with a “living” source of law, meaning the decrees issued by the popes: they must be taken into account by the law scholars.

Consequently, the canonistic science starts a work of re-elaboration of a cultured law and, at the same time, that is strictly related to the needs of the ecclesiastical community of that era. The Roman Curia frequently notifies to the judges of the ecclesiastical tribunals (who, in turn, are experts of law) the rule that must be applied to solve the specific case. These accurate interventions of the Curia, studied by the experts of law, allow the commentators to elaborate a doctrine that preserves a strict connection with the practice of the tribunals. The doctrinal elaboration of canon law has, at least regarding the procedural law, “*un caractère réaliste et aussi adapté que possible aux difficultés à trancher par les juges*”⁴⁷: precisely because of this adherence to reality, the teaching of the canonists is aimed at a wide dissemination, that goes beyond the ecclesiastical field. In other words, the canonistic doctrine continues to be strongly adherent to the practice of the tribunals due to the nature of the provisions adopted by the legislator, around which it develops its own scientific construction: in fact, the decretals, as we have mentioned various times, are issued by the Pope with the intention of solving a specific case or a specific problem that impedes the correct administration of justice in the tribunals of the Church.

The *Ordines iudicarii*, for their part, gather the results of the scientific speculation of the jurists of both laws since the 12th century. These are the manuals studied by the future professionals of law, or the practical texts, which include many forms and examples, which constitute the main instruments of the trade of the professionals of that era. The *Ordines*, in turn, which are frequently written by the experts of the law of the Church, exercise a strong influence not only on the practice of the tribunals, but also on the “lively” source of law itself: the legislator. This is the case of the Clementine *Saepe contigit* by Clement V, which was issued by the Pope following the requests of clarification coming from a doctrine that is very attentive to the needs of the practice. After all, the great jurists of that era are frequently called to carry out the function of judge, and to apply those principles that they teach through their scientific works⁴⁸. Therefore, the Roman-canonical procedural law is doctrinal and it adheres to the practice: in this sense it is a “lively” law, not only because of the interventions of the legislator that adapt it to the changing needs of the practice, but also because the exponents of the

⁴⁶ The historians of law Mor and Lefebvre consider that the comprehension of the Roman texts by the glossators isn't always correct: sometimes the medieval jurists misinterpret the ancient Latin texts. Cfr. Mor, C.G. *Storia del diritto italiano. Le Fonti*, Milano, 1956, pp.137 ff.; Lefebvre, *Juges savants en Europe, XII-XVI siècle. L'apport des juristes savants au développement de l'organisation judiciaire*, in *Ephemerides iuris canonici*, 22 (1966), p. 80; ID., *Les origines romaines de la procédure sommaire aux XII et XIII s.*, in *Ephemerides iuris canonici*, 1(1956), pp. 149-197. Lefebvre considers that the meaning attributed to the *erba diminuentes iuris ordinem* by the doctrine of both laws is the result of an incorrect comprehension of the Roman texts, which gave a different meaning to the clauses, that were going to pass through the canonical legal system and the civil legal system with a new meaning.

⁴⁷ Lefebvre, *Juges savants*, p. 81.

⁴⁸ *Ibid.*, p. 82-83.

doctrine that elaborate the manuals and the texts for the professionals of law are judges in the tribunals themselves. For these reasons the Roman-canonical process will be present in the cultured treatises written by the university professors and in the practice of the ecclesiastical and civil tribunals⁴⁹.

3. The *verba diminuentia iuris ordinem* in the pontifical decretals written before the Clementines

The origins of the expressions *summatim*, *de plano* and of the other *clausolae diminuentes iuris ordinem* are to be found in Roman law⁵⁰. The glossators, precisely by exercising their activity which consists in commenting the Roman texts, highlight the following expressions, which modify the ordinary judicial procedure. The clause that derive from the scientific speculation are used in the texts of the pontifical decretals.

The decretals issued from the second half of the 12th century, furthermore, are answers to the questions that are addressed to the Pope by the whole Christian community. They take into account the thousand-year canonical tradition regarding the process which is interpreted, however, in light of the Roman principles, as they are understood and re-elaborated by the doctors of law⁵¹.

The objective of the popes, as we have said various times, consists in reducing the procedural formalities of the process without sacrificing truth and justice. The Christian tradition regarding the procedural topic, which has established itself in the *forma canonum* and in the *instituta Patrum*, constitutes, in this sense, a counterbalance to the

⁴⁹ We have already underlined in the first paragraph of this chapter that, according to the famous historian of law Ch. Lefebvre, the Roman-canonical process, at first, is assimilated by the practice of the ecclesiastical tribunal and, only later, by the practice of the civil tribunals. The Author asks himself the reason why the assimilation of the Roman-canonical procedural law, developed by the doctrine, took place before in the ecclesiastical forum and he assumes that the reason of the “delay” in the civil tribunal should be attributed to the following reasons. First of all, Lefebvre notes that the Roman texts, due to their antiquity, can’t be immediately applied by the institutions of the 12th century. The Curia, with its successive interventions, obtains the principles from the ancient Roman texts and from the doctrine, it re-elaborates them and it makes them suitable to be applied by the ecclesiastical tribunals. Secondly, the Gregorian Reform, which strengthens the connection between the Church’s peripheries and its centre, allows a more homogeneous reception of the Roman-canonical process by the religious tribunals. In fact, the States of Christian Europe, except from England under the kingdom of Henry II, due to the lacking internal organisation, can’t benefit from the principles made available to them by the *Corpus* and those who comment it. Lastly, the glossators, at least initially, seem mainly concerned with finding the original meaning of the rediscovered Roman texts, and they don’t give much importance to the adaptation of the Roman law to their era. *Ibid.*, p. 83.

⁵⁰ Fairén Guillén, V., “Algunos fragmentos romanos sobre el *summatim*”, *Estudios jurídicos en homenaje al Profesor Luis Díaz-Picazo*, A. Cabanillas Sánchez (ed.), vol. 4 (Derecho civil: derecho de sucesiones, otras materias), Madrid, 2003, pp. 6231-6245; Lefebvre, *Les origines romaines*, pp. 149-197. In particular, Fairén Guillén distinguishes the concept of *verdadera sumariEDAD* from the one of *sumarización* in a broad sense. The first one consists in a procedure characterised by a cognizance which is not simply faster, but rather incomplete, because the allegations or the evidences are limited, with consequences that affect the sentence. According to this Author, the Clementine *Saepe contigit* does not introduce the actual *verdadera sumariEDAD* in the canonical legal system but it imposes a merely formal acceleration of the procedure, because it doesn’t affect a big number of means of prosecuting and defending and this causes the lengthiness of the trial, a problem that remained unsolved. Therefore, according to Fairén Guillén, the intention of the Pope to make a change inspired on the principle of procedural economy was unsuccessful. (Cfr. p. 6231).

⁵¹ Lefebvre, *Juges savants en Europe*, p.80.

arbitrium porcedendi that the judge has, once relieved from the constraints caused by the various formalities of the solemn procedure.

Let's verify in which occasions the popes take the clauses *simpliciter*, *de plano*, *sine strepitu et figura iudicii* from the doctrines of both laws in order to use them in their legislative texts. Alexander III (circa 1100 -1181) is the first Pope who introduces the clauses *diminuentes ordinem* in one of his decretals, the *Dilecti filii*:

*“Dilecti filii nostri prior et clerici de Guisenburnen. contra Eboracensem archiepiscopum apostolicae sedis legatum gravem admodum et difficilem nobis quaerimoniam transmiserunt. Provideatis attentius, ne ita subtiliter, sicut a multi fieri solet, cuismodi actio intentetur, inquiratis, sed simpliciter et pure factum ipsum, et rei veritatem secundum formam canonum et sanctorum Patrum instituta investigare curetis”*⁵².

The Pope orders, in the case brought to his attention, not to proceed *subtiliter* – meaning in compliance with all the detailed procedural formalities provided for by the solemn procedure – as happens in the civil forum, regardless of the case; on the contrary, he orders to investigate *pure et simpliciter* the fact that is the object of the procedure, searching for the material truth, in compliance with the form of the canons and the institutions of the Holy Fathers. The expression “*simpliciter*”, which obliges to reduce the procedural deadlines and to omit some formalities of the solemn procedure, will be used again in the following interventions of the canonical legislator.

But we can find the frequent use of these expressions, that will definitely guide the canonical practice towards new directions, mostly in the decretals of Innocent III. In the decretal *Novit*, the Pope orders to the archbishop of Bourges, constituted as his legate, to proceed *de plano* in the assessment of the facts that constituted the object of the charge presented by John Lackland against Philip Augustus, king of the House of Capet. In particular, Innocent III orders:

*“...ut idem abbas et venerabilis frater noster archiepiscopus Bituricensis de plano cognoscat, utrum iuxta sit querimonia, quam contra eum proponit coram ecclesia rex Anglorum, vel eius exceptio sit legitima...”*⁵³

In this very famous decretal - whose in-depth analysis goes beyond the framework of this study - Innocent III confirms the principle by virtue of which the secular issues must be submitted to the jurisdiction of the Church whenever the fact that is the core of the controversy implies a grave sin⁵⁴. Regarding the emergence of the summary procedure, it is important to underline that, since it is a useful tool, it is immediately applied by the tribunals of the Church, which feels called to judge *ratione peccati*⁵⁵ also the issues that are not merely spiritual.

⁵² X. 2.1.6. (*Corpus Iuris Canonici. Decretalium Collectiones*. Editio Lipsiensis Secunda, Lipsiae 1879, p. 241).

⁵³ X. 02/01/2013 (*Corpus Iuris Canonici. Decretalium Collectiones*. Editio Lipsiensis Secunda, Lipsiae 1879, p. 244).

⁵⁴ For an in-depth analysis regarding the topic of the relation between the ecclesiastical jurisdiction and the civil one in the era of Innocent III, see the text of Hagender, O., *Il Sole e la Luna. Papato, impero e regni nella teoria e nella prassi dei secoli XII e XIII*, M.P. Alberzoni (trad.), Milano 2000, and the copious bibliography quoted by the Author.

⁵⁵ «Non enim intendimus iudicare de feudo, cuius ad ipsum spectat iudicium, nisi forte iuri communi per speciale privilegium vel contrariam consuetudinem aliquid sit detractum, sed decernere de

In the *Quoniam frequenter* of 1209, the Pope himself orders to use the abbreviated procedure for the possessory cases⁵⁶, while the “*de plano*” clause appears, one more time, in the decretal *Quum in tua* of 1212, in which we read:

[...] *Ad quod taliter respondemus, quod, si persona gravis, cuius fides sit adhibenda, tibi denunciaret, quod hi, qui sunt matrimonium copulandi, se propinquitatem contingunt, et de fama vel scandalo doceat, aut etiam per te ipsum possis certificari de plano, non solum debes iuramenta parentum sponte oblata non recipere, verum etiam eos, qui sic contrahere nituntur, si moniti induci nequiverint, compellere, ut a tali contractu desistant, vel contra famam huiusmodi secundum tuae discretionis arbitrium iuramenta exhibeant propinquorum*⁵⁷.

The decretal under examination is a part of a group of interventions of the canonical legislator regarding the diriment impediments of marriage. In case of a denunciation filed by a *persona gravis* regarding the impediment of consanguinity between the spouses and if the fact is true by public fame (or if the judge can ascertain *de plano* the existence of the consanguinity), the oath of the relative regarding the non-existence of the impediment is not admitted. Therefore, in this case, the bishop can dissuade the parties from the decision to get married, without prejudice to the sworn evidence of the relatives against the fame.

In the interests of this study, it is important to focus on the sentence «*aut etiam per te ipsum possis certificari de plano*». First of all, the expression *de plano* is used, and it will be used again in the following legislative interventions: the *de plano* procedure is antithetical to the *pro tribunali*, and it consists in the possibility to proceed also during

peccato, cuius ad nos pertinet sine dubitatione censura, quam in quemlibet exercere possumus et debemus» (*Novit*, X. 2. 1. 13).

⁵⁶ X. 1.6.5. The decretal establishes that, in the cases regarding real estates, if the respondent fails to appear, the petitioner can obtain again the possession of the good after the *summary* handling of the issue, in this way postponing the full cognizance of the fact to the main proceeding, which must be celebrated in compliance with the rules of the solemn procedure. This is a substantial innovation compared with the Roman procedural norms. The Roman procedural rules order that the person who is deprived of a good can bring action in a trial by carrying out at the same time the petitory and the possessory trial. The first one aims at verifying the ownership of the property right; the second one, on the other hand, aims at ascertaining which party originally possessed the good and if the dispossession has occurred. The two trials, therefore, must take place at the same time. In the Middle Ages, on the other hand, the *favor spoliati* is acknowledged to the petitioner: he can request the suspension of the petitory process, which implies that only possessory trial will continue; the possessory trial is realised in compliance with the norms of the summary procedure. In this way, if the necessary conditions are fulfilled, the petitioner rapidly obtains again the possession of the good that has been taken away from him, at least provisionally, until a more in-depth verification concerning the ownership of the right of property is done.

⁵⁷ X. 04/01/2027 (*Corpus Iuris Canonici. Decretalium Collectiones*. Editio Lipsiensis Secunda, Lipsiae 1879, p. 671). The full text of the decretal is provided below: *Idem (Innocentius III) Episcopo Belvacensi Quum in tua diocesi. Sane, quia contingit interdum, quod, aliquibus volentibus matrimonium contrahere, bannis, ut tuis verbis utamur, in ecclesiis editis secundum consuetudinem ecclesiae Gallicanae, ac nullocontradictore publice comparente, licet fama privatum impedimentum deferat parentelae, quum ex parte contrahentium iuramenta maiorum de sua propinquitate, ut suspicionis tollatur materia, offeruntur, quid tibi sit faciendum in casibus huiusmodi quaesivisti. Ad quod taliter respondemus, quod, si persona gravis, cuius fides sit adhibenda, tibi denunciaret, quod hi, qui sunt matrimonium copulandi, se propinquitatem contingunt, et de fama vel scandalo doceat, aut etiam per te ipsum possis certificari de plano, non solum debes iuramenta parentum sponte oblata non recipere, verum etiam eos, qui sic contrahere nituntur, si moniti induci nequiverint, compellere, ut a tali contractu desistant, vel contra famam huiusmodi secundum tuae discretionis arbitrium iuramenta exhibeant propinquorum. Alioquin, si persona denunciata non exstiterit talis, ut diximus, vel de fama vel de scandalo non poterit edocere, ad desistendum monere poteris, non compellere, contrahentes.*

the holy days, which will reduce the duration of the process, and, more in general, it gives the possibility to omit the thorough compliance with the procedural rules of the *ordo iudiciarius*. Secondly, Innocent III leaves to the judge the possibility to choose to investigate *de plano* regarding the existence of the matrimonial impediment: the specific application of the shortest procedure is not imposed, but it depends on the free assessment of the judge. The abbreviated procedure is therefore defined as an equitable and discretionary model of trial⁵⁸, through which it is possible to accelerate the procedure only in those cases in which the non-compliance with the forms does not imply renouncing to the knowledge of the truth, which is a necessary requirement of justice.

The Fourth Lateran Council (1215), chaired by the same Pope, establishes that a reduction of the procedural formalities must be always ensured in the procedures that involve the religious, especially when the canonical penalty related to the illegal conducts ascertained consists in the removal from the administrative offices. Even if, in this case, the *clauola diminuens iuris ordinem* is not expressively mentioned, the conciliar text probably makes an indirect reference to the *de plano* procedure⁵⁹. Finally, with the intention of completing the discipline regarding the supervision of the good conduct of the clerics, Innocent III, in the decretal *Sicut olim*, orders that, on the one hand, every year a provincial council must be celebrated in which the metropolitan bishop and the suffragan bishops must deal with *de corrigendis excessibus et de moribus reformatandis*, especially in relation with the clergy. On the other hand, the Pope establishes that every diocese must elect adequate, and mostly provident and honest persons who must investigate promptly during the whole year the things that must be corrected or reformed, in order to refer the things that they have learnt during the following council. The investigation must be carried out *simpliciter et de plano* and in a completely informal way⁶⁰.

Following the example of his predecessor, Honorius III reaffirms that the inquisitorial procedure against the religious must be carried out *ad unguem* in compliance with the rules of the solemn procedure. In a decretal regarding the visits in the monasteries, the Pope uses the clause *absque iudiciorum strepitu*:

“*Quod si abbas aliquis non exemptus fuerit a visitatoribus nimis negligens et remissus inventus, id loci diocesano denunciet sine mora et per illum detur ei fidelis et providus coadiutor usque ad capitulum generale. Si autem dilapidator inventus fuerit vel alias merito amovendus, per diocesanum, postquam hoc sibi a visitatoribus denunciatum fuerit, amoveatur absque*

⁵⁸ Santangelo Cordani, “Aspetti della procedura”, p. 707

⁵⁹ X. 5.1.24 (*Corpus Iuris Canonici. Decretalium Collectiones*. Editio Lipsiensis Secunda, Lipsiae 1879, p.745-747), where we can read, in the final part: *Hunc tamen ordinem circa regulares personas non credimus usuqueaque servandum, quae, quum causa requirit, facilius et liberius a suis possunt adiminationibus amoveri*. Regarding this cfr. Lefebvre, *Les origines romaines*, p. 167.

⁶⁰ X. 5.1.25 (*Corpus Iuris Canonici. Decretalium Collectiones*. Editio Lipsiensis Secunda, Lipsiae 1879, p. 747). For the things established during the councils regarding the discipline to be objectively observed by the diocesan clergy, as says Innocent III, the metropolitan bishops and the suffragan bishops *per singulas dioecesis statuunt personas idoneas, providas videlicet et honestas, quae per totum annumsimpliciter et de plano absque ulla iurisdictione sollicitate investigante quae correctione vel reformatioe sunt digna, et ea fideliter perferant ad metropolitanum et suffraganeos et alios in concilio subsequenti, ut super his et aliis, prout utilitati et honestati congruerint provida deliberatione procedant, et quae statuerint faciant observari, publicaturi ea in episcopalibus synodis annuatim per singulas diocesis celebrandis*.

iudiciorum strepitu a regimine abbatae, ac monasterio provideatur interim administrator idoneus, qui temporalium cura gerat, donec ipsi monasterio fuerit de abbate provisum”⁶¹.

The intervention of the Roman Pontiff is requested by the civil and religious authorities of the Lombardy and the Marches, who received a notification of irregularities and abuses perpetrated by monks and abbots of those geographical areas. The text reported above concerns, in particular, the procedure that visitors and diocesan bishops must observe concerning the abbots, once it has been verified that they have distanced themselves from the due conduct. If it is proved that the abbot has adopted a conduct which is not excessively negligent, or in the case in which he proves to be submissive, the visitors must report to the diocesan bishop everything of which they have become aware, so that he can appoint a *fidelis* and *providus coadjutor*, who accompanies the abbot until the next general chapter. However, if it is ascertained that the abbot is a *dilapidator* or that he must be removed for other reason established by law, after the complaint from the visitors, the diocesan bishop must remove him from the government of the abbey *absque iudiciorum strepitu* and he must appoint for the monastery an administrator to take care of the regency for a certain period of time (*ad interim*), until there is a provision of a new abbot for the monastery.

⁶¹ X. 3.35.8. (*Corpus Iuris Canonici. Decretalium Collectiones*. Editio Lipsiensis Secunda, Lipsiae 1879, p. 601-602). The section of the decision of the Pope regarding the visits to the monasteries mentioned above is provided below. The procedure reserved to the investigation and to the application of the canonical punishments against the abbots is characterised by the velocity and the discretion, recommended by the Pope. The final regulations of the decretal are addressed precisely to the visitors and to the bishops in charge of the investigation and of the repression of the delicts, so that they quickly apply the regulations issued by the Pope and the act, especially in relation with the visitors, within the limits of their mandate, without perpetrating, in turn, abuses and usurpation to the detriment of the monastery. «Quod si abbas aliquis non exemptus fuerit a visitoribus nimis negligens et remissus inventus, id loci diocesano denunciet sine mora et per illum detur ei fidelis et providus coadiutor usque ad capitulum generale. Si autem dilapidator inventus fuerit vel alias merito amovendus, per diocesanum, postquam hoc sibi a visitoribus denunciatum fuerit, amoveatur absque iudiciorum strepitu a regimine abbatae, ac monasterio provideatur interim administrator idoneus, qui temporalium cura gerat, donec ipsi monasterio fuerit de abbate provisum. Quodsi forsitan episcopus hoc adimplere noluerit vel neglexerit, visitatores vel praesidentes in capitulo generali defectum episcopi apostolicae sedi non differant intimare. Haec eadem circa exemptos abbates fieri praecipimus per visitatores vel praesidentes in capitulo generali, depositione tantum ipsorum sedi apostolicae reservata, ita, ut abbate, qui amovendus videbitur, interim per visitatores vel in capitulo praesidentes ab administratione suspenso administrator idoneus monasterio deputetur. Illorum autem excessus et alia, quae visa fuerint intimanda, capitulo praesidentes nobis denunciet per fideles nuncios et prudentes, quibus de communi contributione abbatum iuxta cuiuslibet facultatem sufficienter ministrentur expensae. Sequentes autem visitatores perquirant priorum visitorum vestigia diligenter, et eorum negligentias et excessus referant sequenti capitulo generali, ut iuxta culpam publice debitam poenam portent. Idem etiam de abbatibus praesidentibus generali capitulo praecipimus observari. Praecipimus quoque, ut in nullo monasterio ad praebendas recipiant de cetero abbates et monachi clericos saeculares, nec hi, qui iam recepti sunt, locum vel vocem in capitulo, dormitorio vel refectorio seu claustro sibi vindicare contendat, seu monachorum coetibus importune se praesumant miscere, sed beneficiis sibi concessis contenti conversentur honeste, opportuna obsequia in monasteriis fideliter impeditentes, nihilque ultra in spiritualibus aut temporalibus exigant in ipsis monasteriis vel usurpent. Si qui verum talium a visitoribus inventi fuerint criminosi, per diocesanum episcopum in non exemptis monasteriis beneficiis priventur eisdem. Haec autem omnia etiam in monasteriis, quae non habent abbates proprios, se priores, nec non in monasteriis monialium, quoad articulos abbatissis et monialibus congruentes, praecipimus observari». Regarding the topic of the visits in the monasteries in the thirteenth century see the analysis of Con firerimento al tema delle visite nei monasteri nel sec. XIII si rimanda allo studio di Bruel, A., *Visites des monastères de l'ordre de Cluny de la province d'Auvergne, aux XIIIe et XIVe siècles (nouvelle série)*, Bibliothèque de l'école des chartes (series), 1 (1891), pp. 64-117 and the bibliography mentioned by the Author.

The objective of the Pontiff, in this case, is to sanction with the removal the abbots who incur in one of the cases for which such punishment is provided, limiting, however, the number of witnesses and, above all, the pleadings of the lawyers, which create a strong echo around the judicial cases, giving them excessive resonance: this is the meaning of the words “*absque iudiciorum strepitu*”, according to the teaching of the doctrine.

In the decretal *Olim*, Gregory IX (1170 approx.–1241) combines the clauses “*de plano*” and “*absque iudiciorum strepitu*”⁶². Let’s analyse the words of the Pontiff:

Ne igitur reformatio monasterii valeat retardari, mandamus, quatenus, relaxatis excommunicationum seu suspensionum sententiis, si quas idem abbas protulerit vel per quoscumque iudices promulgari fecit post inceptum negotium in eos et adhaerentes eisdem, ac eis restitutis, quos idem abbas negotio ipso pendente contra iustitiam spoliavit, in negotio de plano et absque iudiciorum strepitu procedentes [...].

In order to avoid delays in the reform of one of the monasteries affected by the complaints received by the Apostolic See during the pontificate of Honorius III, the Roman Pontiff orders that the sentences of excommunication or of suspension issued against the complainants by the abbot who was denounced, or by the judge acting in his interest, be annulled. The Pontiff also decrees that the complainant monks should be reinstated for the plundering unjustly suffered on the occasion of the lawsuits brought against them by the abbot. Gregory IX orders all this to be done by proceeding *de plano et absque iudiciorum strepitu*.

As Innocent III already did in the *Sicut olim*, Pope Gregory IX combines the *clausolae* in his normative measure. On the other hand, the summary procedure defined in the *Dispendiosam* is only the result of the sum of the *verba diminuentes iuris ordinem*, which “act together” in the famous Clementine: in this way, an abbreviated procedure is created, an alternative to the solemn process. Called upon to resolve particular and often urgent cases, the Pontiffs follow in the footsteps of their predecessors and, in the text of the decretals, repeat these *verba*, definitively crystallized in the legislation of Clement I. Their aim is still the same: the simplification of an excessively complex procedure and the reduction of procedural duration and costs, without sacrificing the full cognition of the facts.

Boniface VIII, who was Pontiff from 1294 to 1303, in the decretal *Statuta quaedam* provides that the inquisition against persons suspected of heresy can be developed in

⁶² X. 5.1.26 (Corpus Iuris Canonici. Decretalium Collectiones. Editio Lipsiensis Secunda, Lipsiae 1879, p. 747). Gregorius IX. Archiepiscopo et Priori sanctae Mariae Rothomagensis. *Olim I. V. et P. ordinis Tyronensis. Ne igitur reformatio monasterii valeat retardari, mandamus, quatenus, relaxatis excommunicationum seu suspensionum sententiis, si quas idem abbas protulerit vel per quoscumque iudices promulgari fecit post inceptum negotium in eos et adhaerentes eisdem, ac eis restitutis, quos idem abbas negotio ipso pendente contra iustitiam spoliavit, in negotio de plano et absque iudiciorum strepitu procedentes, quum talibus maxime in hoc casu non deceat Dei servos involvi, inquiratis quae circa personas et observantias regulares videntis inquirenda, corrigentes et reformantes tam in capite quam in membris quae correctionis et reformationis officio noveritis indigere, iuramentis, si qua de tacenda veritate abbas extorserat, relaxatis, proviso, ut negotio ipso pendente praefati monachi eidem abbati obediant et intendunt, ita tamen, quod per hoc prosecutio negotii non valeat impediri. Si vero testes contra eundem abbatem producti fuerint, dictorum ipsorum ei copiam faciat. Praedictis autem monachis expensas, factas propter hoc, et tribus vel quatuor ex istis, vel aliis, quos idoneos ad dictum negotium prosequendum duxeritis assumendos, faciat de bonis eiusdem monasterii, et faciendas expensas ad prosecutionem ipsius negotii necessarias, computatis, si qua propter hoc receperunt, de bonis monasterii, quum proprium non habeant, ministrari.*

summary form, that is, by means of the reduced procedure according to the *verba diminuentes iuris ordinem*:

*“Statuta quaedam felicitis recordationis Innocentii, Alexandri et Clementis praedecessorum nostrorum, quibusdam declaratis et additis, recensentes, concedimus quod in inquisitionis haereticae pravitatis negotio procedi possit simpliciter et de plano, et absquae advocatorum ac iudiciorum strepitu et figura”*⁶³.

The full text of this decretal, which regulates the way of inquiring in the procedure against a person suspected of heresy, is given in the footnote. The Roman Pontiff regulates the secrecy of some acts of the inquisitorial process, in particular the name of the accusers, the witnesses and their depositions, especially when those accused of heresy are persons capable of endangering the safety of those who collaborate with the tribunals of the Church. The names remain secret until the danger has ceased (*cessante vero periculo supra dicto, accusatorum et testium nomina, prout in aliis sit iudiciis, publicentur*). The rules on the secrecy of the procedural acts are in addition to the regulations already given by the predecessors of the pontiff concerning the fight against heresy.

With reference to the process of emergence of the summary process, Boniface VIII mentions in the text of the decretal the four *clausolae diminuentes iuris ordinem*: in the inquisition *hereticae pravitatis* it is possible to proceed *simpliciter et de plano, et absquae advocatorum ac iudiciorum strepitu et figura* (i.e. without the appearance of a process). The last clause involves the elimination of all non-substantial formalities, that is, those formalities that are not indispensable for the full cognition of the facts. Also in this intervention of the canonical legislator, as in the previous ones, the most simplified

⁶³ VI. 5.2..20 (*Corpus Iuris Canonici. Decretalium Collectiones*. Editio Lipsiensis Secunda, Lipsiae 1879, p. 1078). The text of the decretal under examination follows: *Statuta quaedam felicitis recordationis Innocentii, Alexandri et Clementis praedecessorum nostrorum, quibusdam declaratis et additis, recensentes, concedimus quod in inquisitionis haereticae pravitatis negotio procedi possit simpliciter et de plano, et absquae advocatorum ac iudiciorum strepitu et figura. Iubemus tamen, quod, si accusatoribus vel testibus in causa haeresis intervenientibus seu deponentibus propter potentiam personarum, contra quas inquiritur, videant episcopus vel inquisitores grave periculum imminere, si contingat fieri publicationem nominum eorundem, ipsorum nomina non publice, sed secreto coram diocesano episcopo, vel eo absente, ipsius vicario, quando inquisitores procedunt, quando vero procedit episcopus, coram inquisitoribus, si haberi commode possit copia eorundem, ac nohilominus, sive episcopus sive inquisitores processerint, aliquibus aliis personis providis et honestis iurisque peritis, quas hoc vocari, et eis per totum processum, super quo deliberandum est, seriose manifestari ac integraliter explicari, et de ipsum consilio ad sententiam vel condemnationem procedi volumus, exprimat, sicque, (non obstante, quod illis, contra quos huiusmodi deposuerunt, nomina ipsorum non fuerit publicata), adhibeatur ad cognitionem iudicis instruendam plena fides depositionibus testium eorundem. Et ut eorundem accusatorum et testium periculis efficacius occurratur, et cautis in inquisitionis negotio procedatur: praesentis constitutionis auctoritate permittimus, quod episcopus vel inquisitores secretum possint indicare illis, quibus, (ut praemisum est), processum huiusmodi explicabunt, et in eos, si arcana consilii seu processus, sibi sub secreto ab eisdem episcopo vel inquisitoribus patefacta, praeter eorum licentiam aliis patefecerint, excommunicationis sententia, quam ex secreti violatione ipso facto incurrant, (si eis expedire videbitur) promulgare, sic tamen, quod inquisitores episcopum, vel episcopus inquisitores non excommunicent hac de causa, sed ipsi ex iniuncto ex nunc a nobis sub virtute sanctae obedientiae districto praecepto ad secretum huiusmodi teneatur. Cessante vero periculo supra dicto, accusatorum et testium nomina, prout in aliis sit iudiciis, publicentur. Ceterum in his omnibus praecipimus tam episcopos quam inquisitores puram et providam intentionem habere, ne ad accusatorum vel testimonum nomina supprimenda, ubi est securitas, periculum esse dicant, nec in eorum discrimen securitatem asserant, ubi tale periculum immineret, super hoc eorundem conscientias onerantes. Constitutiones vero, ordinationes et mandata alia praedecessorum nostrorum, in negotio haereticae pravitatis facta, concessa seu etiam ad consulta responsa, quae constitutionibus supra scriptis, super eadem editis pravitatem, non obviant, in suo volumus robore permanere.*

procedure is not imposed on the inquisitors: it constitutes an instrument to which they can have recourse, after having evaluated the concrete possibilities of verifying the material truth.

The decretals mentioned so far are some of the historical antecedents of the Clementines *Dispendiosam* and the *Saepe contigit*, which complete the process of emergence of the summary procedure in Medieval Law. The decretals in which the pontiffs use the *clausolae diminuentes iuris ordinem* regulate the treatment of issues of spiritual relevance, or of causes in which clerics and religious are involved. Nevertheless, the field of action of the abbreviated procedure is meant to be expanded quickly.

In principle, in fact, the Pontiff establishes norms addressed to the ecclesiastical tribunals and to the operators of canon law. However, given the dynamics of production of procedural law and more generally of the *ius commune*, his decisions will have a much broader impact: they are in line with the development of the summary procedure, which is outlined in the only theory of the process that unites both legal systems, the canonical one and the civil one⁶⁴, within which the nascent procedure is meant to find a broader application.

Within the normative interventions of the pontiffs, the *clausolae* sometimes appear separately, sometimes are combined instead; in any case, they attribute to the judge a particularly wider role than the role entrusted to him by the ordinary procedure⁶⁵. This *arbitrium* recognised to the judge is precisely the element of synthesis of the *verba diminuentes iuris ordinem*, as well as the characteristic element of the summary procedure in general. In fact, the innumerable procedural formalities of the *ordo sollemnis* are lost as a result of the innovations made by the pontiffs, leaving the judge great discretion to manage the case, always with a view to a better knowledge of a truth which is not only formal.

Concerning the specific meaning acquired by each of the *clausolae* within the pontifical decretals, we cannot ignore the already mentioned studies of the historian of Law Lefebvre, who researched the Roman origins of the *clausolae* retracing the evolution of their meaning⁶⁶. As we have had the opportunity to observe, it is mainly since the pontificate of Innocent III that the canonical legislator prescribes the use of the abbreviated procedure, especially concerning the spiritual cases or cases in which religious are involved. On the other hand, the Church has traditionally resorted to a simplified procedure in cases concerning spiritual issues. From the end of the 12th century, it began to use expressions borrowed from Roman Law; however, “*l'apparence seule est romaine, la substance appartient au fonds canonique le plus certain*”⁶⁷: therefore, the “Romanity” of the summary or planary procedure (from *de plano*) that appears in the *ius commune* from the 12th century onwards is only apparent, since, in

⁶⁴ Cfr. Lefebvre, *Les origines romaines*, p. 150, n. 6. The Author, demonstrating the “utroquistic” nature of the Clementine decretals, highlights that Bartolus of Saxoferrato, in his famous gloss to the Constitution *Ad reprimendum* of Henry VII of 2 April 1313, mentions more than once the procedure provided for in the decretal *Saepe*. The fact that the regulatory measure come from a source of canon law does not prevent its applicability in civil law. In short, Medieval procedural law does not seem to know a clear distinction between the two legal systems, which use the principles of the same theory of law.

⁶⁵ *Ibid.*, p. 160.

⁶⁶ *Ibid.*, pp. 170.

⁶⁷ *Ibid.*, p. 192, n. 180.

essence, the procedure has connotations unrelated to the procedural culture of antiquity and definitely close to the canonical juridical sensitivity.

Thus, the words found in ancient legal texts act as containers in which, over time, jurists insert different meanings from the original ones. Once the words are emptied of their most ancient meaning, it becomes necessary the task of “filling”: hence the long doctrinal debate, which involves jurists of both Laws in the research of the new meaning to be attributed to the *clausolae*. The issue must have seemed urgent to canonists, obliged to observe the new regulations of the Curia in the celebration of trials, without knowing which are the formalities that can be omitted, with the risk of issuing a null sentence.

Let’s see, in a nutshell, how the debate in doctrine develops and what are the results. Initially, the adverb *simpliciter* is used by the decretalists to indicate a reduction of the subtlest forms of the process as it is celebrated in civil tribunals. At a later time, the expression will be used to designate the summary procedure *tout court*, often instead of the word *summarie*.

The concept of *de plano* procedure⁶⁸, on the other hand, insists on the fast, and therefore relatively superficial character of this way of proceeding: for example, the evangelical denunciation and the inquisition regulated by Innocent III in the above mentioned decretals. In these procedures, the *ordo iudiciarius* must not be observed in its entirety: as a rule, it is understood that the *libellus* and the *litis contestatio* can be omitted. In the commentaries of Vincenzo Ispano, Giovanni Teutonico and Tancredi, the *de plano* procedure acquires its own physiognomy and it becomes a different and alternative procedure concerning the solemn procedure.

This means the beginning of the problem of identifying the concrete procedural formalities and rules of the solemn procedure that can be omitted, without affecting the validity of the sentence.

Vincenzo Ispano offers an interpretation to the *de plano* clause, which is harbinger of important innovations in the process of the emergence of the abbreviated procedure. In his comment on the *Novit* decretal, the canonist explains the expression *de plano* with these words: *non cum strepitu iudicii in modum accusationis*. The expression *absque strepitu iudicii* is meant to become, from an explanatory clause, an independent clause. In his comment on the same decretal, Giovanni Teutonico uses the words *sine figura iudicii*: also in this case, the words merely explain the expression *de plano*, although in the subsequent doctrinal work and in the new interventions of the legislator, it takes on an autonomous meaning.

This last clause particularly conditions the subsequent scientific debate, involving jurists such as Giovanni Fagioli, Innocent IV himself, Hostiensis, Guillaume Durand, Giovanni D’Andrea and others. In fact, the expression introduced by Teutonico can be subject to

⁶⁸ The meaning of the expression *de plano* in Roman Law is that of a procedure conducted without “diligent inquisition”, that is, a procedure characterised by the summary cognition as such. However, in the pontifical decretals the clause refers to a reduction in the formalities of the solemn procedure that is not detrimental to the full cognition of the facts. *Ibid.*, p.177, who states that the comments of the *Compilatio Tertia* written by Vincenzo Ispano and Giovanni Teutonico are at the origin of some new elements of the summary procedure, both for the expressions *non cum strepitu iudicii* and *non in forma iudicii*, and for the meaning attributed to the expression *de plano*, which refers not only to the external form of the procedure, but also to its internal dynamics.

two interpretations: if the adjective *solemnis* is understood, that is, in the expression *non in forma iudicii (solemnis)*, the meaning that the expression takes on is a reduction of the formalities of the ordinary procedure. This is probably the meaning that the canonist wanted to attribute to the expression. On the other hand, if it is considered in its literal sense, the clause *non in forma iudicii* may mean the elimination of all extrinsic or simply procedural formalities, with the attribution to the judge of significant discretion in the management of the procedural *iter*.

The debate on which rules of the solemn procedure must be observed *ad validitatem* and which ones can be omitted for a quicker resolution of the controversy in the tribunals continues until the decisive interventions of Clement V. In any case, as a whole, the clauses allow legal experts to state that any formality is compulsory, unless it is also indispensable to ascertain the truth. Therefore, in application of the *verba*, in the canonical practice the *libellus* and the *litiscontestatio* are omitted, the dilatory exceptions are rejected and the means of proof undergo a drastic reduction, at least in quantitative terms⁶⁹.

The Clementine *Dispendiosam*, considerably expanding the number of cases likely to be treated with the abbreviated procedure, is symptomatic of a final choice of the legislator: starting from the same, in fact, the summary procedure tends to become the ordinary procedure of the canonical legal system, at least de facto⁷⁰. Therefore, the doctrine calls for a clearer definition of the meaning to be attributed to each *diminuens iuris ordinem* clause. The *Saepe contigit*, included in the title *De verborum significatione* of the definitive text of the Clementines, indicates what is to be definitively understood when the judge is entitled to hear the case according to the so-called summary procedure. After the interventions of Clement V, some other aspects concerning the solemnities that can be omitted will be clarified, in particular thanks to the lively and sometimes creative practice of the Apostolic Tribunal of the Roman Rota⁷¹. However, the essential features of the new special procedure are now outlined by the Clementines, which we have been recently studied⁷².

⁶⁹ Santangelo Cordani, *La giurisprudenza*, p. 358.

⁷⁰ Cfr. Lefebvre, *Les origines romaines*, p.190.

⁷¹ For further information on the development of the summary procedure in the practice of the Tribunal of the Roman Rota, see Lefebvre, Ch., “Un texte inédit sur la procédure rotale au XIV siècle”, *Revue de droit canonique* 11 (1961), pp. 174-191 and the aforementioned study of SANTANGELO CORDANI, “Aspetti della procedura”, pp. 357-372.

⁷² Belda Iniesta, J., Coretti, M., “Dispendiosam y Saepe contingit: El proceso sumario a la luz del utriusque iuris”, in *GLOSSAE, European Journal of Legal History*, 13 (2016), pp. 30-70; Belda Iniesta, J., Coretti, M., “Le Clementine Dispendiosam e Saepe Contigit come paradigma di sommarietà. Alcune note in chiave utroquistica”, *Monitor Ecclesiasticus* 131/2 (2016), pp. 351-413.

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