Omnis jurisdictionis fons ecclesia : an eighteenth-century debate on the origin of jurisdiction

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An eighteenth-century debate on the origin of jurisdiction

I. Introduction: the origin of jurisdiction

Jurisdiction as a technical notion, indicating ecclesiastical administrative powers, usually exercised by the diocesan bishop, dates back to the twelfth century. It was derived from Roman law[1] and adopted by the canonists while interpreting and paraphrasing certain provisions from Gratian's Decretum (1139)[2]. In the Decretum itself there is no clear terminology. The fine distinction between sacramental powers on the one hand and jurisdictional competence on the other was developed by the interpreters of the Decretum, the so-called decretists[3]. There was much more clarity already in the commentary of Rufinus († 1192), while it was Huguccio (end of the twelfth century) who determined the exact distinction between *ordo* and *jurisdictio* as has been used since that time through all ages. It has to be noted, though, that during that period there was still some disagreement concerning the character of certain acts. It was disputed e.g. whether the deposition of bishops was a sacramental or rather a jurisdictional act. According to Huguccio it should be ranged under the *potestas jurisdictionis.* He stated that the bishop-elect would have administrative powers even before his consecration. The same holds good for the Roman Pontiff. Even before his episcopal consecration the Pope-elect is already in a position to depose bishops, to degrade clergymen, to excommunicate offenders of ecclesiastical laws, to grant prebendaryships, etc. But he does not yet have the power to ordain priests or to consecrate the chrism, altars and churches, etc. The first category of acts was regarded as based upon jurisdiction, whilst the second category was regarded as sacramental, which could never be per-

[1] A definition can be traced in the Accursian gloss *potest* ad D.2.1.1: (...) est enim iurisdictio potestas de publico introducta cum necessitate iuris dicendi et aequitatis statuendae (...).

[2] D.20 a.c.1.

[3] A good description of this development can be found in R.L.Benson, *The bishop-elect, A study in medieval ecclesiastical office,* Princeton 1968 and A.M. Stickler, Die Zweigliedrigkeit der Kirchengewalt bei Laurentius Hispanus, in A.Scheuermann/G.May (hrsg.), *Ius Sacrum* (Festschrift K.Mörsdorf), München/Paderborn/Wien 1969, p.181–206.

formed by persons without episcopal consecration[4]. So jurisdiction has to be distinguished from *ordo,* the bishop's sacramental competence derived from his episcopal consecration.

The idea, however, that within episcopal competence several elements must be discerned, some of them being indelible, others susceptible to changes, is much older. Alfer all, translation and dismissal of clergymen came to be accepted in earlier times. The Council of Chalcedon (451) still stuck closely to the so-called relative ordination and prohibited the *transmigratio* of ministers as well as absolute ordinations[5]. But the need for translation of clergymen remained. Marinus I was elected Pope in 882, when he was already bishop of the diocese of Caere in Etruria. In the following centuries the way was cleared for the acceptance of a more absolute ordination, i.e. one not inextricably related to a specific local church. As a consequence it had to be conceded that exertion of episcopal administration was subject to change and should be regarded as a distinct element within ecclesiastical power.

From the moment the notion *jurisdictio* was introduced in a specific technical sense as described above, there has been a dispute as regards its origin. Tierney described the different theoretical approaches during the Middle Ages[6]. According to one opinion jurisdiction would have a divine origin and was obtained directly from God the moment the episcopal consecration took place. Whoever accepted the abdication of Pope Celestine V in 1294, however, was compelled to discriminate between sacramental orders and jurisdiction and had to admit that the latter can be diminished or even lost[7]. Moreover, the learned jurists developed the doctrine that not the individuals, but the *universitas,* the entire body over which the administrative powers were exercised, could create a ruling office[8]. As a matter of fact this theory could be applied to ecclesias-

[4] The Latin text of Huguccio's commentary upon D.23 c.1 can be found in Benson, *op. cit.,* p.118 note 5.

[5] Canons 5 and 6; Cf. G. Alberigo/H. Jedin, *Conciliorum oecumenicorum decreta,* Bologna 19733, p.90.

[6] B. Tierney, *Religion, law, and the growth of constitutional thought 1150–1650,* Cambridge 1982, p.29–54.

[7] See for the abdication of Pope Celestine: M. Bertram, Die Abdankung Papst Cölestins V. (1294) und die Kanonisten, in ZSS Kan. Abt. 56 (1970), p.1–242.

[8] Cf. the Accursian gloss *priuatorum* ad C.3.13.3: puta duorum uel trium, uel etiam decem, nam secus in consensu alicuius colegii, puta cerdonum, pelliparіorum et similium, ut (...). Sed obstat quod ibi dicit, quod est confirmandus a praefecto praetorio. Sed dico, quod stati, facta electione habent iurisdictionem, sed non effectum iurisdictionis, sic et (...).

tical administration. According to Innocent IV (Pope 1243–1254) ecclesiastical administrators, who were elected by a *universitas* whilst confirmation was granted, were said to have ordinary jurisdiction[9]. So there should be a *universitas* of clergymen or conventuals, which performs the election in order to assign jurisdiction to someone. Moreover, an election should take place, because it is not possible to grant or receive spiritual jurisdiction in a different way[10].

Tierney described furthermore how each view was based upon its own specific metaphysical concept. The theocratic descending-theory, as he called it, would take mutual hierarchy between men as a premise. By creation people were unequal, one more fit for ruling than the other. As a result, ruling powers were derived from God. The new doctrine, the ascending-theory, on the other hand would take human equality as a premise. One person cannot have more knowledge than the *universitas* which includes himself. So, administrative competence should be based on the consent of all people involved[11].

Marsilius of Padua in particular applied this ascending-theory radically to ecclesiastical jurisdiction. In his treatise "Defensor Pacis", completed in the year 1324, he argued that Christ did not grant any ruling power to the ministers of the church[12]. The office which St.Peter and the other Apostles received from Christ, consists in teaching and administering the sacraments. The competence to excommunicate was

[9] Innocentius IV, *In V Libros Decretalium Commentaria,* Venice 1570, p.179a (ad X 1.31.3): Illos autem praelatos uel rectores dicimus ordinariam iurisdictionem habere, qui eliguntur in praelatos ab uniuersitate et confirmationem recipiunt superioris (...).

[10] Ibid. p.179b: (...) cum in ecclesia et ad hoc ut habeat iurisdictionem in clericos et ordinariam praelatus in praedictis locis, uel ecclesiis electus, oportet quod et uniuersitas quae eligit sit clericorum et religiosorum, uel alias idem praelatus iurisdictionem ab ecclesiastico praelato recipiat, et quod electus sit clericus uel religiosus, cum aliter non dare nec recipere possunt spiritualem iurisdictionem, scilicet excommunicandi, interdicendi, et consimilium. infra de iu. c.2 (X 2.1.2) de arbi. c. Contingit (X 1.43.8). According to Innocent IV bishops have jurisdiction *a canone.* Here a reference is made to C.16 q.2 c.1, C.16 q.7 c.5 and D.25 c.1 (Cf. p.180a).

[11] B.Tierney, Public expediency and natural law: a fourteenth-century discussion on the origins of government and property, in B.Tierney/P.Linehan (eds.), *Authority and power, studies on medieval law and government presented to Walter Ullmann on his seventieth birthday,* Cambridge 1980, p.167–182.

[12] Marsilius of Padua, *Defensor pacis,* ed. R.Scholz, Hannover 1932, Dictio II capitulum IV § 1 (p.158) and capitulum XVI § 1ff. (p.337).

granted on divine command to the church as the body of the faithful[13]. So Christ did not create a ruling office and as a consequence jurisdiction can merely be exercised by ministers who derive their authority from the whole of the Christian faithful. So far Marsilius of Padua, whose writings must be understood against the background of the papal claim to a *plenitudo potestatis* in the entire church, which was in its turn repudiated by episcopalistic and conciliaristic theories.

As regards the origin of jurisdiction none of the tendencies as described was to prevail till the days of the reformation. As a consequence the sources of canon law dating back to the twelfth and thirteenth centuries as compiled in the *Corpus Iuris Canonici* still contain sufficient starting-points to defend divergent theories.

II. The present-day importance of the question

The problem of the origin of jurisdiction is not without importance for contemporary ecclesiastical law. In the Old-Catholic Church of the Netherlands the question came up some ten years ago. The immediate cause was an intended modification of the Statute of the church in order to allow a number of administrative powers to be exercised not exclusively by the bishops, but by a collegiate council, consisting of both bishops and representatives of lower clergy and laity. In the further details of this proposal, especially in the rules for the unhoped case of an irreconcilable difference of opinion between bishops and council, the question came up, whether the administrative powers of such a collegiate council should be considered as its own competence or rather as a delegated one. In the plea for a collegiate council with a more autonomous character, it was argued that jurisdiction essentially rests with the church as a whole, and only *ministerialiter* with the bishop.

This doctrine, regarded as having been introduced in the sixteenth century by Edmond Richer (1560–1631), has been defended in the past, but also denied many times. The fact, though, that it was brought up in the preliminary proceedings in view of present-day ecclesiastical legislation, justified a closer look into the divergent opinions concerning the origin of jurisdiction.

[13] Cf. St.Matthew 18. 15–18, cf. also *Defensor pacis,* Dictio II capitulum VI § 12–13 (ed. Scholz p. 209–215).

III. The search for an answer

As was shown above, the mediaeval sources of canon law do not provide a clear answer to the problem just posed. Neither can the contemporary Roman codification of canon law supply a solution, because the latter takes the unlimited and universal papal jurisdiction as a starting-point[14], which is incompatible with the official Old-Catholic documents on the primacy in the church[15]. The standpoint of the renewed *Codex,* though, is not the sole view the occidental tradition of canon law has handed down.

(i) Edmond Richer

Before turning to seventeenth- and eighteenth century scholarship, it has to be noted that the approach of our ancestors was sometimes influenced by certain gallican ideas. I would like to confine myself to referring to the doctrine of Edmond Richer, syndic of the University of Paris, although he cannot be considered in all respects as representative of this gallicanism[16]. In a pamphlet, published in 1611, he compared the church with a human body. The visual faculty is granted to man as a whole, but it is exercised by a specific organ or instrument. After all, the eye exists by *(per)* the human being and because of *(propter)* the human being. Following certain medieval theories Richer argued that by founding the church Christ has in the same way granted the jurisdiction immediately and essentially to the church as a whole, rather than to St.Peter alone. Essentially jurisdiction belongs with the church. Only as regards its exercise, does it belong with the Pope and the other bishops, just as the

[14] CIC (1983) Can. 331.

[15] The "Utrecht Episcopal Declaration" of September 24, 1889 and the "Declaration on the primacy in the church" by the International Conference of Bishops dated June 29, 1970.

[16] During the Middle Ages bishops often played an important political rôle. Ecclesiastical administration was in the mean time exercised by other offices (the archdeacon, the steward, etc.). Cf. A.Stickler, Die kirchliche Regierungsgewalt in der klassischen Kanonistik, in ZSS Kan. Abt.69 (1983) p.280ff. The council of Trent tried to restore the spiritual leadership of the diocesan bishop. As a result the old 'rights' of the lower clergy *(second ordre)* were pushed aside, which in its turn evoked reactions. Against this background the statements of Richer should be read.

human being as a whole has the visual faculty, while the eye merely serves as an instrument and expedient[17].

(ii) Zegers Bernard Van Espen

In the works of the Louvain canonist Zegers Bernard Van Espen (1646–1728)[18] traces of richerianism can certainly be found[19]. In his principal work *Jus Ecclesiasticum Universum,* published in 1700, it becomes clear in what way the words of Christ spoken to St.Peter while granting him the power of the keys, should be taken, viz. as not spoken to him personally. According to the church fathers, Van Espen remarked, the words were directed to the church in the person of St.Peter or to the college of Apostles as a representative of the church. Here he made a reference to a text from Gratian's Decretum, where a fragment of St.Augustine's commentary upon the Gospel according to St.John was quoted: the church is the body capable of excommunicating and therefore St.Peter represented the church when he received the keys[20]. And yet this text must be viewed in a wider context, where Van Espen did not deal specificly with the power of the keys, but more generally with the way the bishops have followed the footsteps of the Apostles. Christ had sent out the Apostles in the same way as the Father had sent Him viz. with authority and administrative powers. The Apostles handed over their power to the bishops[21]. For this reason one can trace

[17] Edmond Richer, *De ecclesiastica et politica potestate liber unus,* Paris 1611, p.6: Schola Parisiensis (...) docuit, Christum fundando Ecclesiam, prius, immediatus, atque essentialus, claues, siue iurisdictionem, toti dedisse Ecclesiae quam Petro: seu quod eodem redit, *Claues toti contulisse Ecclesiae, ut per unum ministerialiter exercerentur,* Quandoquidem, tota iurisdictio Ecclesiastica, primario, proprie, ac essentialiter Ecclesiae conuenit: Romano autem Pontifici, atque aliis Episcopis, instrumentaliter, ministerialiter, et quo ad exequutionem tantum, sicut facultas uidendi oculo (...). The question what according to Richer should exactly be understood by "the whole church" is put aside.

[18] See about Van Espen: G.Leclerc, *Zeger-Bernard van Espen (1646–1728) et l'autorité ecclésiastique,* Zürich 1964; M.Nuttinck, *La vie et l'œuvre de Zeger-Bernard van Espen. Un canoniste janséniste, gallican et régalien à l'université de Louvain (1646–1728),* Louvain 1969; K.Walf, *Das bischöfliche Amt in der Sicht josephinischer Kirchenrechtler,* Köln/Wien 1975, p.16–18.

[19] Without referring to Richer, however.

[20] JEU Tom.I, ParsI, Tit.XVI, Caput II.2, Cf. *Jus Ecclesiasticum Universum,* Tom.I, Louvain 1766, p.228. The quotation in Gratian's Decretum is C.24 q.1 c.6.

[21] *Ibid.* Caput I, p.226–227.

in the *Jus Ecclesiasticum Universum* the view that bishops derive from Christ a *plenaria potestas* to administer the church[22].

More clearly richerianism has left its traces in the so-called *Resolutio Doctorum Lovaniensium* of May 25, 1717, a letter of advice countersigned by four other Louvain doctors concerning the rights of the Chapter of Utrecht. In responding to the second of the three propounded problems, the question whether the Chapter of Utrecht is a genuine cathedral chapter, Van Espen argued that a chapter, representing the clergy, does not derive its rights from the bishop. Both bishop and chapter derive all their authority and jurisdiction from the church which includes this jurisdiction, immediately *(immediate),* fundamentally *(radicaliter)* and as regards its ownership *(quoad proprietatem).* It is exercised by the bishop and the chapter representing the clergy as ministers of the church at the same time. The bishop is indeed the head of his church, but not the essential head *(caput essentiale),* from whom jurisdiction and authority descends to the lower clergy. Rather he is a ministering head *(caput ministeriale),* the first and principal servant of the church[23]. Together with the lower servants he exercises the power, which is preserved in the church. So, the moment the See becomes vacant, the chapter does not obtain jurisdiction once more, but has exactly the same power at its disposal as previously exercised together with the bishop. Van Espen clearly takes a stand in a question which probably was not definitively settled by the Council of Trent, thereby allowing divergent opinions to live on. There is a different doctrine, though, viz. that competence is linked to persons as long as they hold their office, but afterwards, this competence is suspended or falls to the Pope. Apparently Van Espen opposed such visions, albeit not explicitly. It may be noted, though, that the doctrine that *sede vacante* the Ordinary's rights are exercised by the chapter is rather old, already defended by Rufinus[24]. Because Van Espen stated, moreover, that both bishop and clergy derive their jurisdiction from the church, this notion of church must be understood as applying to more than just the clergy. Unlike Richer, he therefore gives the impression, to associate it with the entire community of the faithful, consisting of clergy as well as laity, although this is not expli-

[22] *Ibid.* Caput II.3, p.229.

[23] Also the theory of the bishop as a *caput ministeriale* can be traced back in the writings of Richer. Cf. C.A.Bolton, *Church Reform in 18th century Italy (The Synod of Pistoya, 1786),* The Hague 1969, p.30–31.

[24] *Summa decretorum* ad D.23 c.1 (ed. Singer p.52) (..) cui capitulo episcopo mortuo licet etidem facere.

citly declared to be so. Subsequently Van Espen quoted John Baptist de Luca (1614–1683), a canonist from the Roman Curia, who also described the bishop as a head, albeit not the head of the church, but rather of a body consisting of both bishop and cathedral chapter. When the See becomes vacant, De Luca taught, episcopal jurisdiction and ecclesiastical administration devolve to the chapter by right, not by virtue of privilege or delegation, but in order not to be decreased *(sed ex ratione juris non decrescendi)*. As regards its nature *(habitualiter)* jurisdiction rests with the entire body, its exercise on the other hand with the head. In case this head is lacking, the jurisdiction is consolidated *(iure consolidationis)* without any decrease *(vel ex iure non decrescendi)* with the chapter as regards its nature *(in habitu)* as well as its exercise[25].

In this quotation De Luca is not pronouncing upon the question where the origin of jurisdiction has to be located. Apparently it is vested in a body consisting of both bishop and chapter. Van Espen stated on the other hand that both derive – he used the verb *mutuare* – their powers from the church. This premise though, was strictly speaking not necessary to show that after the death of the bishop the ordinary jurisdiction was preserved within the church. Therefore Van Espen gives the impression of taking a richerianistic stand. On this point he was criticized. That very year the French jansenist Laurence Boursier (1679–1749) applied to Paschasius Quesnel (1634–1719), the oratorian who had great influence in the Church of Utrecht. According to Boursier the use of the notion *emprunter* – the verb *mutuare* in Van Espen's text is referred to – is not correct[26]. Although the power of the keys was granted to the church as a whole and this power fundamentally *(radicalement)* belongs to the church, it is true that it was merely granted in order to be exercised by her ministers and that Christ himself grants this power directly to those ministers. So the bishops would receive their authority directly from Christ. When a bishop dies, the authority will rest *jure non durescendi*[27] with the chapter, functioning as some kind of depositary as long as the See is vacant.

[25] *Supplementum ad varias collectiones operum Z.B. van Espen,* Naples 1769 Tom. II p. 199–200. Cf. as regards the administrative competence of the chapter also VI 1.8.3 and JEU Tom. I, tit. IX, Caput IX.2 (*op. cit.*, p. 112).

[26] Letter of December 26, 1717, edited in J.A.G. Tans, *Pasquier Quesnel et les Pays-Bas,* Groningen/Paris 1960, p. 595.

[27] *jure non decrescendi?*

In the year 1718 John Opstraet (1651–1720), the vice-president of the college of Hadrian VI at Louvain, where Van Espen had his residence, wrote to Quesnel that he had spoken with Van Espen about this matter. The latter was said to acknowledge the error of his statement, that bishop and chapter derive their entire authority from the church, because he would agree that the bishop and *sede vacante* the chapter acquire their jurisdiction and authority directly from Christ and not through the medium of the church [28].

Later in the same year Van Espen lectured at Louvain on the very issue of ecclesiastical and political power. The notes he used were edited after his death, viz. from the year 1753 under the title *Argumentum et materia tractatus De Ecclesiastica et politica potestate.* One of the theses to be discussed in these lectures seems to express a plain richerianistic doctrine. It reads: all the bishops and the Pope receive their jurisdiction directly from the church, but indirectly from God[29]. The notes make clear, however, that Van Espen himself kept aloof from this statement: "I have not said this" he stated and subsequently he repeated his pronouncement from the Louvain resolution albeit in a slightly different wording: Christ has granted the power of the keys directly *(immediate),* formally and fundamentally *(formaliter ac radicaliter)* to the church – but now he adds – or to the hierarchical order *(ordo hierarchicus).* Moreover, Van Espen discriminated this time between the ownership of jurisdiction on the one hand and the use of it on the other, which distinction has quite often been applied in legal dogmatics. As regards its ownership *(quoad proprietatem)* jurisdiction rests with the church by an institution of Christ[30], but at the same time Christ wanted its use *(quoad usum et exercitium)* to be exercised by the pastors[31]. Van Espen then came to the conclusion, that bishops and Pope acquire their power and jurisdiction directly from God but through the medium of the ministry of those who elect and consecrate them in name of the church[32]. By

[28] Tans, *op. cit.,* p. 528.

[29] Pars I, Caput VI, Propositio III, *op. cit.* (Supplementum) Tom. I, p. 425–426; See about this text: Walf, *op. cit.* (Das bischöfliche Amt), p. 42.

[30] Van Espen referred here to the quotations from St.Augustine and St.Cyprian in C.24 q.1 c.6 and 18. He himself quoted the Jesuit John Maldonat (1533–1583).

[31] Here Van Espen made a reference to the just exposition of this doctrine by Alphons Tostado, which he will discuss more fully in his later Vindication of the Louvain Resolution.

[32] Itaque Episcopi uti et Papa accipiunt suam potestatem et jurisdictionem immediate a Deo; sed per Ministerium ordinantium et eligentium nomine Eccle-

doing so he gives the impression of refining his statement from the Louvain resolution and coming to the objections to it as recently raised. It should be noted, by the way, that the complex of acts, including election as well as consecration, is apparently determinative of the acquisition of jurisdiction[33].

Ten years later, Van Espen discussed the same question once again in a voluminous writing, defending the Louvain resolution of 1717. This *Vindiciae resolutionis doctorum Lovaniensium* was published anonymously at the end of the year 1727 at Amsterdam[34]. Some fragments from this apology deserve our attention. In the second *disquisitio,* where Van Espen furnished the proof that Sasbold Vosmeer (1548–1614), Philip Rovenius (1565–1651) and their successors were genuine bishops of the Church of Utrecht, the idea re-emerges that St.Peter while receiving the power of the keys has represented the church. Again Van Espen referred to the words of St.Augustine, taken from his commentary on the Gospel according to St.John, as adopted in Gratian's Decretum. Then he concluded that the church is the source of all spiritual jurisdiction[35].

A second interesting passage can be traced in the third *disquisitio.* Invoking the church father St.Cyprian, Van Espen argued that the church is both holder and possessor of the entire ecclesiastical power. The doctors were in the right, when they taught that this power rests with the church itself fundamentally *(radicaliter)* and as regards its ownership *(quoad proprietatem).* Just as in the lecture notes from 1718 Van Espen subsequently referred to the clear exposition of this doctrine by bishop Alphons Tostado of Avila (1400–1455), who is this time quoted at length. He taught that the notion of jurisdiction can be considered in two ways, viz. as regards the actual jurisdictional act and as regards its origin. For jurisdiction implies always an act like judging or administering. A community is not able to perform such acts. For this reason juris-

siae. See for this fragment also Leclerc, *op. cit.,* p.126–127 and Nuttinck, *op. cit.,* p.450.

[33] In the *Jus Ecclesiasticum Universum* other moments were still indicated as such. Jurisdiction was obtained on the moment the election was confirmed (Tom.I, Pars I, Tit.XIV, Caput V, *op. cit.,* p.188–193). Full administrative powers were obtained by virtue of the consecration: Episcopi (...) auctoritatem vi suae ordinationis accipiunt (Tom.I, Pars I, Tit.XVI, Caput I.9, *op. cit.,* p.227). See about this text: Walf, *op. cit.* (Das bischöfliche Amt), p.41.

[34] Nuttinck, *op. cit.,* p.537.

[35] Vindiciae resolutionis, disquisitio II § VII.II, *op. cit.* (Supplementum), Tom.II p.440b ff.

diction as an actual acting should be exercised by a specific person. But as regards its origin and virtue *(secundum virtutem)* it rests within the community, because all persons receive jurisdiction by virtue of *(ex virtute)* the community. Therefore Christ handed the keys over to the church as a whole. But because the entire church was not able to administer them, because the entire church is not a specific person, they were given to St.Peter in the name of the church and to the Apostles, not as individuals but rather as ministers of the church. For the church which has the keys at her disposal in a fundamental way *(radicaliter)* will never perish.

In a subsequent quotation, moreover, Tostado describes the disposition of jurisdiction as the use of it. Finally Van Espen made a reference to the French church-historian Alexander Noel (Alexander Natalis 1639–1724), who pointed out that since the time of the scholastics it is usual to speak of the keys of the church and not of the keys of St.Peter, because they were put directly under the care of the church rather than given to St.Peter[36]. In the third *disquisitio* there is another fragment in which Van Espen dealt with the origin of jurisdiction. There he argued that in the same way as the power of the keys rests with the universal church, there is also a full and undivided power of jurisdiction in the local churches. This view was supported with a number of statements of St.Cyprian as quoted in Gratian's Decretum[37], but also with some to be found in his letters[38]. The heading of this fragment in Van Espen's apology states that the jurisdiction of chapter and clergy is not derived from the Pope, but from the church. Instead of the disputed expression *mutuare,* here the verb *derivare* is used, which has a similar purport[39]. Altogether Van Espen seems eventually to have persisted in a doctrine, rather akin to the controversial teachings of Richer, viz. that jurisdiction essentially *(essentialiter)* belongs to the church, albeit that Van Espen probably did not understand the same thing by the notion of church as Richer had done in earlier times.

[36] Vindiciae resolutionis, disquisitio tertia § III.V, *op. cit.* (Supplementum), Tom. II, p. 496.

[37] C.24 q.1 c.18.

[38] Vindiciae resolutionis, disquisitio tertia § V.VI, *op. cit.* (Supplementum), Tom. II, p. 503.

[39] In the heading of § III of the third *disquisitio* the verb *mutuari* is used again to indicate that jurisdiction is derived from the church, *op. cit.* (Supplementum), Tom. II, p. 492.

(iii) Influence of Van Erckel

In the fragment from the Vindication just described Van Espen seems to be inspired by a different apology recently published. One year before he committed his Vindication of the Louvain Resolution to paper, in June 1726, were published the *Observationes prodromae,* a writing composed by the dean of the Chapter of Utrecht, John Christian Van Erckel (1654–1734)[40] and directed against Hoynk van Papendregt, canon of Malines. Also in this book the opinion of bishop Tostado is quoted minutely. The power of the keys was handed over to St.Peter as to the person chosen by the church to exercise jurisdiction. If this were not the case, i.e. if the keys were granted to him personally, Christ would be compelled to deliver them for a second time to St.Peter's successor after the Apostle's death. Subsequently Tostado made a comparison with corporative communities. The community as a whole is not capable of administration and so the government is carried out by one of the members. As regards the church, Tostado thinks that *sede vacante* all rights – sacramental powers excepted – rest with the chapter. If the rights to administer the diocese belong to the bishop personally, they would get lost at the moment he died. So jurisdiction belongs fundamentally rather to the church than to the bishop. But the church can merely possess jurisdiction when it was granted at the moment of her foundation. For the power of the keys is not like the government of a corporative community, which may be established by human laws. The power of the keys is the competence to forgive sins and only God is able to do so[41]. Van Erckel then came to the conclusion that by the church as the origin of jurisdiction we should understand the same church over which this jurisdiction is exercised. The universal church includes local churches, which at the moment of their foundation received their jurisdiction from Heaven. It is needless, Van Erckel remarked, to search for different sources[42].

[40] See about Van Erckel: J.Y.H.A. Jacobs, *Joan Christiaan van Erckel (1654–1734), Pleitbezorger voor een locale kerk,* Amsterdam 1981.

[41] Observationes prodromae in librum, qui sub nomine amplissimi domini Cornelii Pauli Hoydink van Papendregt in lucem prodiit, XXIV, in the Appendix of J.C.Erckelium, *Defensio Ecclesiae Ultrajectinae,* Amsterdam 1728, p.240.

[42] *Ibid.,* p.241: (...) per ecclesiam vero, penes quam jurisdictio praecipue residet, intelligas licet ecclesiam illam, ad quam regendam collata fuit jurisdictio. Quin non obstamus quo minus ecclesiam intelligas universalem; in quantum universalis ista ecclesia hanc peculiarum sinu suo complectitur. Hae peculiares eccle-

The French bishop Dominique Marie Varlet (1678–1742), who in the mean time had consecrated two successive bishops for the Church of Utrecht, formed a favourable opinion of the apology by Van Erckel[43]. Van Espen did the same, sending him on that occasion an outline of the almost completed Vindication of the Louvain Resolution[44].

(iv) Influence of Bossuet and Le Gros

The opinions concerning the origin of jurisdiction as expressed by Van Erckel and Van Espen in the years 1726 and 1727 may not be regarded separately from the troubles the Church of Utrecht had recently found herself in. After his return from Rome in 1703 the vicar apostolic Peter Codde (1648–1710) had indeed defended his rights as an Ordinary, but had also retired from the exertion of his office. Moreover, from his death in the year 1710 the See had been vacant. During the period there was no bishop available, which lasted some twenty years, one appealed to the idea that as long as the remaining clergy and faithful would persist, the church would still be in existence and within this very church jurisdiction was preserved. As long as the church did not cease to exist, jurisdiction could not get lost, although its exercise was, *sede impedita* and later *sede vacante,* devolved to the chapter, representing the clergy. This view persisted also after the year 1723, when there was a new bishop. Possibly this was also done in view of the episcopal consecration that very year without permission of Rome. This explains why the protagonists in the legal justification of the events of 1723 give the impression of having a richerianistic outlook.

Some one or two generations later, this opinion was not predominant any longer. It was replaced by an ecclesiology which left no room for the idea that the church herself is the origin of jurisdiction. Moreover, the new teachings forced a purge from a too sweeping episcopalism which denied the Pope a universal jurisdiction. The consideration that by doing so a reconciliation with Rome would come within reach will certainly have played a part. The possibility that the French influence

siae, cum primum fundarentur, jurisdictionem proxime acceperunt a coelo; sic ut supervacaneum sit alios fontes requirere. (...).

[43] Jacobs, *op. cit.*, p. 416.

[44] Two identical copies of this letter, dated July 16, 1726, are preserved in the Utrecht State Archive (OBC inv. nr. 789–2). The letter is without the outline of the Vindication of the Louvain Resolution also reproduced in the Supplementum *(op. cit.)*, Tom. II, p. 99.

played a predominant rôle in this development cannot be excluded. During the eighteenth century the church was overflowing with French clergymen. Some came voluntarily, others had fled because of their protest against the constitution *Unigenitus* and many of them were members of the congregation of the oratorians[45]. These French have exercised influence upon the ecclesiastical life in many respects. They determined the teachings at the seminary of Amersfoort and urged to the provincial Council of 1763. All the five theologians at this Council were of French descent. One of them, Gabriel Dupac de Bellegarde (1717–1789), was closely involved in the preparatory activities and afterwards he edited the acts and decrees. With the arrival of French clergy, a number of French theological writings which were taught at Amersfoort gained increasing significance[46]. I would confine myself to discuss only one of the influential theological writings, viz. the *Exposition* of Bossuet and just one of the influential theologians, viz. one of the first professors at Amersfoort, Nicholas le Gros (1675–1751).

Already in 1677 the book of the French bishop Bossuet, entitled *Exposition of the Catholic Faith* was published. One year later it was translated into Dutch by the later vicar apostolic Peter Codde. At two moments in the history of the church it left visible traces, viz. in October 1744 when the church applied by letter to the new Pope Benedict XIV and in 1763 when the Council of Utrecht took place[47]. According to the Exposition Christ had wanted a unity in the church and therefore he had instituted the primacy of St.Peter in order to keep the church together and to unite her. Moreover, episcopal administration is an institution of Christ himself[48]. The bishop's authority establishes the unity in the particular churches just as the primacy is the communal centre of the entire Catholic unity. Such an ecclesiology left no scope any longer for the idea that the origin of jurisdiction might be located in the church herself.

[45] The oratorians came especially after the year 1751.

[46] For examples see F.Smit, *Franse oratorianen en de Clerezie in de jaren 1752–1763*, Amersfoort 1981, p.93.

[47] See for the importance of the *Exposition* for the Council of 1763: J.A.G. Tans, *Bossuet en Hollande*, Maastricht 1949, p.83–88.

[48] J.B. Bossuet, *Exposition de la doctrine de l'église catholique*, Paris 1686 (twelfth edition), p.210: (...) le gouvernement Episcopal qui est établi par Jesus-Christ mesme (...).

Also the person of Nicholas le Gros deserves some attention. From the year 1726 this Frenchman taught theology at the seminary of Amersfoort[49]. His voluminous writings include a treatise, which was spread in the shape of hand-written lecture notes under the title "Discourse on the church". Soon after his death voices were heard demanding that they should be translated into French and published[50]. In this book, which was eventually published in the original Latin version as *Tractatus de ecclesia,* Le Gros did not take the same stand as the *Exposition* of Bossuet had done on the subject of the primacy in the church. In his opinion only a General Council is in a position to judge infallibly in matters of faith [51]. Moreover, bishops receive their jurisdiction directly from Christ and not from the Pope. Also the teachings of Alphons Tostado were brought up, viz. that the ownership of the power of the keys rests with the church, but its exercise with the pastors[52]. But in the opionion of Le Gros himself, not a single trace of richerianism can be found[53]. Sacramental power and administrative power are indivisible. Bishops are not merely expected to perform ordinations and administer confirmation, but chiefly to guide the flock in their charge. Then Le Gros came to the conclusion that Christ has not only granted the bishops a *potestas ordinis,* but also the *potestas jurisdictionis*[54].

[49] In 1730 he was relieved from his task, however, by the chapter, because of his hard line in the usury question.

[50] The NNEE of February 6, 1753 writes (p. 24): M. le Gros avoit dicté à Amersfoort un beau Traité (Scholastique) de l'Eglise, en latin, dont on a pareillement tiré beaucoup de copies. (...) mais, il seroit à souhaiter, dans les circonstances présentes, qu'il fût traduit de bonne main, et imprimé en François pour être utile à tout le monde (...). A copy of such a hand-written version is still preserved in the library of the seminary at Amersfoort.

[51] *Tractatus Dogmaticus et scholasticus de ecclesia,* Rome 1782, Tom. I. p. 337ff.

[52] *Ibid.* Tom. II, p. 115 (...) sed etiam docent datam immediate omnibus episcopis eamdem autoritatem quae Petri successori data est, salva primatus praerogativa, atque autoritatem illam permanenter in ecclesia residere ac radicaliter; ita ut clavium proprietas sit penes ecclesiam et exercitium penes pastores; quemadmodum ex mente Theologorum Parisiensium explicant Tostatus Abulensis Episcopus, in (...) et Natalis Alex. (...).

[53] In spite of the fact that in some early pamphlets Le Gros had defended the rights of the *second ordre.* Cf. *Du renversement des libertés de l'Eglise Gallicane* (1716) and *Mémoire sur le droit du second ordre du Clergé* (1718).

[54] *Ibid.* p. 116–117. Cf. for the ecclesiology of Le Gros also J. Visser, Jansenismus und Konziliarismus: ekklesiologische Anschauungen des Nicolas LeGros (1675–1751), in *IKZ* 73 (1983) p. 212–224.

(v) The Council of Utrecht (1763)

In its appeasement policy the Church of Utrecht was prepared to make great concessions, though it never abandoned its rights unconditionally. The purge from too sweeping episcopalistic views, which should demonstrate the sound catholicity of the Church of Utrecht, persevered in the second Utrecht provincial Council of 1763. Even the Pope's universal jurisdiction was acknowledged. For the Council proclaimed that the Bishop of Rome, being the successor of St.Peter, has the same primacy according to divine law as St.Peter had at his disposal, viz. that of power and authority[55]. The origin of jurisdiction is hardly discussed, however, in the documents of the Council. Only in a discourse by the dean of the Chapter of Utrecht, Francis Meganck (1684–1775), was it asserted that according to the old theologians the powers in administering the church are received together with the episcopal consecration[56]. It is not easy, though, to judge the exact purport of this remark. After all Meganck himself had translated Van Erckel's *Observationes prodromae*[57], which certainly did not acknowledge a direct divine origin of jurisdiction. In 1763 the Church of Utrecht tried to demonstrate its conciliatoriness towards Rome by putting aside certain episcopalistic elements. With such a clean-up goes a scapegoat, found in the person of Peter le Clerc (1706–after 1787), a French subdeacon who had come to our regions. One of his writings was condemned by the Council, among other things because it taught that merely an honorary primacy is due to the Pope, that only a General Council and not the divided church could pronounce upon questions of faith and that the Eastern church may not be regarded as schismatic[58]. The remark by Meganck quoted above was also directed against certain passages in this book. For Le Clerc had asserted that there is no essential difference between priests and bishops. The episcopacy is not an institution of divine law. Christ himself would not have wanted any hierarchy between clergymen[59]. Seen against this background, the remark by Meganck may not be considered a major con-

[55] *Acta et Decreta secundi Synodi Provinciae Ultrajectensis, in sacello Ecclesiae Parochialis Sanctae Gertrudis, Ultrajecti, celebratae, Semptembris MDCCLXIII,* 1764: Decretum III, p.81–82.

[56] Acta et Decreta *(op. cit.)*, p.105: Attamen subjungebant consecrationem (...) ei (...) auctoritatem presbiterali superiorem ad ecclesiae regimen conferre (...). This *relatio VI* should probably be dated on saturday, September 17, 1763 during the eighth session. Cf. B.A. van Kleef, *Das Utrechter Provinzialkonzil vom Jahre 1763* (offprint from *IKZ* 1959/1960), p.47–48.

[57] *Vooruitgaande bemerkingen over een boek, 't welk onder den naam van den*

tribution to the debate concerning the origin of jurisdiction. Le Clerc himself had hardly discussed the issue. He rather emphasized the equal, full and unlimited jurisdiction of all bishops, which may not be subordinated to another[60]. The doctrine that one bishop, viz. the one of Rome, should have the primacy, supremacy and jurisdiction over the others, is qualified by him as "une pure fable"[61]. Dupac de Bellegarde selected a number of quotations from the book in order to submit them for denunciation before the provincial Council[62], but because the fragments do not pronounce upon the origin of jurisdiction, the Council had no cause to condemn richerianism. It is in any event doubtful whether Dupac de Bellegarde or the Council actually desired such a thing. Le Clerc was eventually excommunicated in March 1765 by the bishop of Haarlem[63]. One month afterwards Pope Clement XIII condemned the second Council of Utrecht as "not in conformity with the rules" and "without any value" on which occasion the bishops were qualified as "impious persons" and "stubborn sons of iniquity"[64]. The new official ecclesiology of the Council, based upon Bossuet's Exposition, was not in conformity with a certain interpretationof both Van Erckel and Van Espen as regards the primacy in the church. Their writings were not condemned by the Council, but nevertheless in the new doctrine there was no room any longer for the idea that jurisdiction essentially belongs with the church as a whole. Even if this was not explicitly proclaimed, the spirit of the Council was clear.

eerwaardigen heer Cornelis Paulus Hoynck van Papendregt in 't licht gekomen is (uit het latijn vertaald door F.M.), Delft 1727.

[58] *Précis d'un acte de dénonciation solemnelle faite à l'Eglise, 1° D'une multitude de Bulles, de Brefs, etc. des Evêques de Rome, lesquels renversent la Religion, et les Loix divines et humaines; 2° Des Evêques de Rome eux-mêmes et de la Cour, comme auteurs des maux et des scandales qui désolent tout dans le troupeau du Seigneur, dans le Temple et dans le Sanctuaire,* terdam 1758.

[59] This opinion should be seen as another attempt to defend the rights of the *second ordre.* In its kind it is quite radical, though.

[60] Cf. *op. cit.* (Précis d'un acte), p. 87–92.

[61] *Ibid.* p. 130.

[62] Utrecht State Archive, Port-Royal inv. nr. 2603.

[63] On March 7, 1765, see also: B.A. van Kleef, Le Clerc und Pinel im Urteil der Utrechter Kirche, in *IKZ* 39 (1949) p. 69–95.

[64] In the declaration *Non sine acerbo dolore* of April 30, 1765.

(vi) The Council of Pistoia (1786)

The Council-fathers of Pistoia proceeded with more courage in the year 1786[65]. Also their decrees – some of them containing distinct traces of richerianism – evoked a condemnation. Unlike Clement XIII in 1765, Pope Pius VI also responded on the actual content of the acts and decrees. In the bull *Auctorem fidei* of August 28, 1794 he judged the teachings of Pistoia as heretic declaring that God gave power to the church, which in its turn would grant it to her pastors as her servants[66]. And yet a number of canonists assumed a sympathetic attitude towards the Council of Pistoia and its decrees. Among them was the Louvain canonist Judocus (Josse) le Plat (1732–1810), who – just like Van Espen in 1728 – once took refuge in the seminary of Amersfoort and even taught there for some years[67]. In a series of letters addressed to the Pope he defended the decrees of Pistoia. In the fourth of these letters, dated May 25, 1795, the exegesis of St.Matthew 16 is discussed. Le Plat appealed to authoritative texts, such as the commentary of St.Augustine on the Gospel according to St.John and the teachings of bishop Alphons Tostado of Avila. He also referred to one of the sermons of St.Augustine. When the holy church father there argued that the power of the keys is granted to the church by Christ and that the church as a unity has received the keys of the Kingdom in the person of St.Peter as her representative, he did not say that St.Peter was merely the representative of the college of pastors but that he was the representative of the whole of pastors and faithful laity. St.Peter, being both Apostle and Christian, had also taken the place of the latter category[68]. Subsequently Le Plat concluded that the church had received the power of the keys. If the church were capable of exercising this power herself, she would not need any servants to perform this important task. But for many reasons

[65] There are certain connections between the two Councils. The bishop of Pistoia who presided the Council, Scipio de Ricci, was e.g. on friendly terms with people at Utrecht, like John-Baptist Mouton and had corresponded for many years with Dupac de Bellegarde. The Council of Pistoia was reform-minded and defended the validity of the Council of Utrecht. Cf. also Bolton, *op. cit.*, p.20–40.

[66] Propositio, quae statuit, potestatem a Deo datam Ecclesiae, ut communicaretur pastoribus, qui sunt eius ministri pro salute animarum; sic intellecta, ut a communitate fidelium in pastores derivetur ecclesiastici ministerii ac regiminis potestas: haeretica. H. Denzinger, *Enchiridion Symbolorum,* n.1502.

[67] From 1798 till 1805. In 1806 Napoleon appointed him as professor of Roman law at Koblenz. There he later died.

[68] *Lettres d'un théologien-canoniste à N.S.P. le Pape Pie VI au sujet de la bulle Auctorem fidei,* Brussels, 1795, Tom. I. p.103–104.

she is not capable of doing so. This was furthermore supported by provisions from the Council of Trent: it is the church who received the keys; Christ gave the church the power of granting indulgences; it is the church who speaks through the Council, etc.[69].

IV. Conclusions

Summarizing we can say that in the beginning of the eighteenth century the doctrine that jurisdiction essentially rests with the church as the whole of clergy and faithful was probably quite widely accepted in the Church of Utrecht. It was defended in any case by the protagonists of the legal justification of the events of 1723, which unfortunately evoked a breach with Rome. Later in the eighteenth century the church was prepared to adjust its official ecclesiology in order to make an attempt at reconciliation. Besides, in 1794 richerianism was officially condemned by Pope Pius VI. In spite of these two circumstances the church offered hospitality to the canonist Josse le Plat, who had defended the richerianistic outlook of Pistoia. Le Plat in his turn lectured at Amersfoort and advised the bishops several times in matters of canon law. Moreover, we must be aware of the fact that the works of Van Espen had by no means lost their authority. His *Jus Ecclesiasticum Universum* even served as a major legal source in the Old-Catholic Church of the Netherlands until the promulgation of the Statute in 1950.

For this reason we nowadays realize that as regards the origin of jurisdiction the doctrine as expressed in the *Codex Iuris Canonici,* viz. that jurisdiction has a divine origin[70] and that it is directly received from God at the moment of episcopal consecration[71], is not the sole concept the tradition of western Catholicism tenders.

Therefore the eighteenth-century debate as discussed above also has a present-day significance. It displays a more differentiated approach, which can be of great interest for the way ecclesiastical administrative powers are exercised. Finally, it also allows the putting of the question of the precise scope the ecclesiastical legislator has at his disposal when attributing jurisdiction, although this is a different issue.

[69] *Ibid.* Tom. I, p. 107–109.
[70] Can. 375 § 1; see also Can. 129 § 1.
[71] Can. 375 § 2.

V. Epilogue

In 1984 the revised version of the Statute for the Old-Catholic Church of the Netherlands was promulgated. It still contains a provision describing the bishop as the head of his diocese, whilst all bishops have equal authority and the full competence to administer the part of the church consigned to their care[72]. In the meantime they do not perform their administrative power any longer exclusively by themselves, but share their ministry with representatives of lower clergy and laity, with whom they make a collegiate council. Eventually, then, the revised Statute did not separate administration and ecclesiastical office, which in fact always have been connected in the long and continuous tradition from which our present-day canon law developed.

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[72] Statute for the Old-Catholic Church of the Netherlands art. 123–124.