

QUESTIONS OF CANON LAW CONCERNING THE ELECTION AND CONSECRATION OF A BISHOP FOR THE CHURCH OF UTRECHT

THE CASUS RESOLUTIO OF 1722

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I. Introduction

In 1723 the Chapter of Utrecht, established in 1633 under the name of the Vicariate¹, elected Cornelis Steenoven (1662-1725) as archbishop of Utrecht². The following year Steenoven was consecrated by the French missionary bishop Dominique Varlet (1678-1742), who in 1721 had settled permanently in Amsterdam. This electing and consecrating of Steenoven was an episode of major significance in the wavering relations between two groups of catholics in the Northern Netherlands, i.e. those supporting the secular clergy who defended the rights of the local Church, and those supporting the regular clergy in favour of a stronger influence of Rome, or even of a submission to the Roman authorities. This division had existed since the middle of the seventeenth century. Steenoven's election and consecration evoked a reaction from Rome³, heralding the definite separation of the two groups. The Catholic Church, already in

¹ The Vicariate was founded in 1633 by Vicar Apostolic Philip Rovenius (1575-1651), because from the year 1615 onwards only protestants could be appointed in the five Chapters of Utrecht. The Vicariate was meant to be a continuation of these Chapters, especially of the Cathedral Chapter. In the course of time it increasingly entitled itself the Metropolitan Chapter of Utrecht. We simply speak about the Utrecht Chapter.

² The election, on 27 April 1723, actually took place because the Chapter had some doubts about a previous election, namely that of 17 November 1722. See J.Y.H.A. Jacobs, *Joan Christiaan van Erckel (1654-1734), Pleitbezorger voor een locale kerk*, Amsterdam 1981, p. 318-319.

³ The breve *Qua sollicitudine* (21 February 1725) of Benedict XIII (1649-1730), addressed to the catholic faithful in our territories. The text is reproduced in C.P. Hoyneck van Papendrecht (1686-1753), *Historia Ecclesiae Ultrajectinae*, Malines 1725, p. 173-174 and in *Historia de rebus Ecclesiae Ultrajectensis*, Colog-ne/Brussels 1725, p. 178-180. See also A.J.M. Polman, *Romeinse Bronnen voor de kerkelijke toestand der Nederlanden onder de Apostolische Vicarissen IV* [RGP, 97], The Hague 1955, n. 851, p. 701-702.

a weak position under the Reformed secular authorities, was hereafter torn apart by, on the one side, the *Cleresie*, who remained faithful to Steenoven and the Chapter, and, on the other side, the so-called Dutch Mission, which submitted itself unconditionally to the Roman Pontiff.

II. The *casus resolutio* of 1722

The Utrecht Chapter had not acted precipitously or without considerable forethought. There were many thorny questions which had to be resolved, before the Chapter could proceed to the election of a bishop. The most weighty and important justification for steps taken was provided by a scholarly treatise, signed in December 1722 by three Louvain professors, the *Casus Resolutio de Misero Statu Ecclesiae Ultrajectinae*, a solution for the case of the widowed Church of Utrecht⁴. Before discussing the specific questions of Canon Law dealt with, it is appropriate to sketch in the historical context as well as the genesis of the work.

III. The historical context

What, now, was the position of the Church of Utrecht, that gave rise to these problems? As already stated, the Church of Utrecht was widowed, she had lacked a bishop since 1710. This unfortunate situation was not a product of the Reformation. After all, since 1592 the Church of Utrecht had been administered by Vicars Apostolic, who – except for Rovenius during the first years of his administration – had received episcopal consecration. Especially during the first half of the seventeenth century the Vicars Apostolic regarded themselves not merely as titular bishops exercising administration in name of the Pope, but also as diocesan bishops of Utrecht⁵ and, although the title of

⁴ *Status miserus* was a technical term, indicating a diocese whose see had fallen vacant. At the time more writings appeared justifying the election and consecration of a bishop for Utrecht. See, for example, [J.C. van Erckel], *Samen-spraak tusschen Pieter Regthart en Joan Waermond*, Delft 1722. The *casus resolutio* has a more scholarly character and aims at justifying the election in conformity with Canon Law, whereas the *Samen-spraak* was aimed at winning over public opinion.

⁵ See about this distinction [Anthony Slicher], *Beredeneerde waarschouwing over het tolereren der Roomschegezinde kerkdiensten in de Vereenigde Nederlanden, mitsgaders hetgene in aanmerking komt, omtrent de verschillen, die tusschen de priesters van die kerk al van over lange geweest zijnde, nu voor eenige weinige jaren tot groote heevigheden onder hen onderling zijn uytgeborsten, door een liefhebber des vaderlands*, Amsterdam 1719. The author holds the view (nr. XXX, p. 56-57), that a bishop for Utrecht can be created in two different ways. The Pope could appoint a titular bishop as Vicar Apostolic, or he could, as happened in 1602 and 1620, make him also bishop of Utrecht, so as

archbishop of Utrecht was prohibited by the secular authorities, they had entitled themselves thus. However, during the course of the seventeenth century their ordinary power (*potestas ordinaria*) to administer the Church, was increasingly queried by the Roman authorities, although in their capacity as Vicars Apostolic they also derived such ordinary jurisdiction from the *ius commune*⁶.

In 1704, the Pope deprived the Vicar Apostolic, Petrus Codde (1648-1710), of his office, but without giving him notice of the deposition. For this reason, Codde was naturally convinced that he was still the lawful administrator of the Church. However, from that time until his death in 1710 he did not perform any official acts. In 1705, Gerard Potkamp (1641-1705) was appointed to replace Codde, but shortly afterwards he died. In 1707, Adam Daemen (1649-1717), a Cologne canon, was appointed Vicar Apostolic, but he was not accepted by the Utrecht Chapter. In 1709 he was banished by the States of Holland and from 1713 until his death in 1717 he was no longer concerned with the Netherlands.

The Utrecht Chapter supported Codde in his opinion that after 1704 he remained the lawful administrator. As a consequence the Chapter was of the opinion, that after the death of Codde in 1710 the see had fallen vacant, and, *sede vacante*, the Chapter itself was entitled to administer the Church⁷. However, official acts reserved to episcopal consecration could not be performed by the canons. This implied, that the Sacrament of Confirmation could no longer be administered, the Holy Oil had to be collected from abroad every year and the ordination of clerics was dependent on the co-operation of foreign

to have authority over the regular clergy. Anthony Slicher († 1745), justice in the Court of Holland, was a protestant, but on friendly terms with the Cleresie. It is historically incorrect to maintain that in 1602 and 1620 a diocesan bishop of Utrecht was created. In these years the Vicar Apostolic received his episcopal consecration. Subsequently the Spanish authorities were requested to grant them the title of archbishop of Utrecht. From that time Sasbout Vosmeer (1548-1614) and Rovenius have indeed used the title of archbishop of Utrecht.

⁶ Especially from provisions in the *Liber Sextus* (1298) such as VI 1.8.4 and VI 1.6.42. See J. Hallebeek, *De 'wondere afscheidspreekens' van Pater Daneels, Oudewater 1705* [Publicatieserie Stichting Oud-Katholiek Seminarie, 31], p. 28-29.

⁷ The Utrecht Chapter was of the opinion, that it was also entitled to exercise certain competences of the Metropolitan in the suffragan dioceses, especially in the Harlem diocese. In 1716 van Espen seems to have endorsed the view that, *sede vacante*, the vicar-general of Utrecht could, after consulting the Chapter, appoint a vicar for the diocese of Harlem; see the letter by Johan Opstraet (1651-1720), also on behalf of van Espen, to van Erckel, dated 27 September 1716, reproduced as *Epistola CVIII in Supplementum ad varias collectiones operum Z.B. van Espen*, Tom. II, Naples 1769, p. 73.

bishops. On this latter question, the Chapter in 1717 had sought advice. After the death, in 1715, of the great enemy and adversary of Jansenism, Louis XIV (1638-1715), France became more accessible. Therefore the Chapter decided to invoke the help of those French bishops who had appealed against the bull *Unigenitus* to a General Council and to induce them to ordain priests for the Church of Utrecht. As a matter of fact, the dean could deliver dimissorial letters on behalf of the Chapter, but this would be ineffective if the French bishops queried the rights of the Chapter⁸, for instance on the grounds that in 1703 Clement XI (1649-1721) had announced to the Catholics in the Northern Netherlands that the Chapters had no ecclesiastical jurisdiction whatsoever⁹. Consequently the dean of the Chapter, Joan Christiaan van Erckel (1654-1734), decided to consult Zeger Bernard van Espen (1646-1728) about the rights of the Chapter regarding the delivery of dimissorial letters. In 1717 van Espen, professor of Canon Law at Louvain, advised the Chapter by means of the so-called *Resolutio doctorum Lovaniensium*¹⁰, a document also signed by four other Louvain scholars¹¹. The *Resolutio doctorum* clearly pronounced upon three questions. In the first place as regards her rights and jurisdiction the Church of Utrecht had not perished after the Reformation. Secondly, episcopal rights resided in the Vicariate, also called the Metropolitan Chapter¹². In the third and last place, the Louvain scholars maintained that this Vicariate, founded in 1633 by Rovenius, was a continuation of the old Chapters and should exercise all rights which, *sede vacante*, fall to the Cathedral Chapter¹³.

⁸ The competence to issue *sede vacante* dimissorial letters (*litterae dimissoriales*) was based on VI 1.9.3. According to the Council of Trent (1545-1563) this was not allowed within a year after the see fell vacant (Sessio VII *De reformatione* c.10); see A.J. van de Ven, *Over den oorsprong van het aartsbisschoppelijke kapittel van Utrecht der Oud-Bisschoppelijke Clerezij*, Utrecht 1923, p. 136.

⁹ See the breve *Illius vices* of 7 April 1703, reproduced in C.P. Hoynck van Papendrecht, *op. cit.*, p. 138-140 and in *op. cit. (Historia de rebus)*, p. 143-146. See also A.J.M. Polman, *Romeinse Bronnen voor de kerkelijke toestand der Nederlanden onder de Apostolische Vicarissen* III [RGP, 94], The Hague 1952, p. 698 (n. 918).

¹⁰ In full *Resolutio doctorum Lovaniensium data 25 maii 1717 in favorem iurium capituli Ecclesiae Ultrajectensis*, published under the title *Casus positio cum quinque iuris doctorum Lovaniensium responso, signato anno 1717* (i.a. in *op. cit. (Supplementum)*, p. 193-203).

¹¹ Viz. Jean-Antoine Brenart de Corbeek (1672-1730), professor of civil law since 1701 and Canon Law since 1710, Laurent Hacquius (1672-1740), professor of civil law since 1710, Jean Antoine Goedenhuysse († 1719), professor of civil law since 1694 and Amand Bauwens (1674-1724), professor of civil law since 1710.

¹² After all, the bishop is no *caput essentiale*, from where authority is handed down to the lower clergy, but a *caput ministeriale*, the first servant of the Church, who together with the lower clergy exercises *ministerialiter* the spiritual authority which belongs to the Church herself.

¹³ The question where jurisdiction *sede vacante* resides, was disputed among the theologians and canonists. For the idea, that jurisdiction *sede vacante* does not devolve unto Rome, the *Resolutio*

Thus, the fact that after 1710 the Chapter had asserted jurisdictional competences was legitimized by the Louvain professors. However, the question of electing and consecrating a bishop, even without papal confirmation, was a totally different issue. The *resolutio* of 1717 had not addressed this problem.

IV. The genesis of the *casus resolutio*

It was probably in 1719 that the question of electing and consecrating a bishop for the Church of Utrecht arose. That year the French bishop Varlet stayed for some time in the Northern Netherlands. He was not ill-disposed towards the Chapter and at their request he several times administered the Sacrament of Confirmation. A few years later the desire to elect a bishop had apparently taken more definite shape. To aid their decision the Utrecht canons sought a scholarly, Canon Law, legitimation. They decided to approach van Espen again. In mid-July 1722 the so-called *casus positio* was composed¹⁴ in the Northern Netherlands. It contained a statement of the actual situation of the Church of Utrecht, and posed four questions of a Canon Law nature: (i) Has the Chapter of Utrecht the right to elect a bishop? (ii) Can the elect be consecrated even if the Pope refuses to confirm the election? (iii) Would one consecrator suffice for a valid consecration if it should be impossible to find three bishops? (iv) Are nearby bishops in good conscience obliged to help the Church of Utrecht in her difficult situation?

At the end of August van Espen wrote a letter to van Erckel¹⁵. This was a preliminary answer. Van Espen had no doubts that everything possible had to be done to elect and consecrate a bishop, even although it might be impossible to observe all provisions of modern Canon Law. For, if necessity or charity force us to act, that which is introduced by positive law has to stand aside. There was no doubt, that necessity and charity demanded that a bishop be consecrated for the Northern Netherlands.

doctorum refers to the theologian Louis Thomassin (1619-1695). Cf. L. Thomassin, *Vetus et nova Ecclesiae disciplina circa beneficia et beneficiarios*, Tom. I, Lyons 1706, p. 634-638 (Part. I, lib. 3, cap. 7). The resolution was promptly printed and distributed. The theologians and jurists of Paris sent many expressions of approval.

¹⁴ The *casus positio* was drawn up by van Erckel and Nicolaus Broedersen († 1762); see Jacobs, *op. cit.*, p. 299 and note 106 on p. 531, referring to a letter of Thierry de Viaixnes (1659-1735) to Ernest Ruth d'Ans (1653-1728), dated 23 July 1722, which can be found in RAU, APR (15), inv. nr. 1610.

¹⁵ The letter is dated 26 August 1722. The original can be found in RAU, OBC (24) inv. nr. 789-1. The letter is reproduced in [G. Dupac de Bellegarde], *Recueil de témoignages*, Utrecht 1763, p. 163-164 and as *Epistola CXV*, in *op. cit. (Supplementum)*, p. 82.

From the older literature we know that the final answer to the questions as presented in the *casus positio* (the *casus resolutio*) had already been drafted in the Northern Netherlands¹⁶. Willibrord Kemp († 1747) indicated ‘those of the Chapter’ (*die van het kapittel*) as the authors¹⁷. Also according to Gabriel Dupac de Bellegarde (1717-1789) the text was not composed by van Espen himself, but by a theologian of the Church of Utrecht. Dupac did not mention a name. In modern literature Thierry de Viaixnes is sometimes said to be the author. This French benedictine monk had settled in Amsterdam in 1722. Possibly he collaborated with persons such as van Erckel, Steenoven and Varlet¹⁸. Van Espen made several improvements and additions in the first version of the text¹⁹.

It is unlikely that as early as July van Espen had received the draft of the *casus resolutio*. In his answer of 26 August he merely spoke about the questions put to him. At the end of his letter he announced that he would deal with these questions subsequently. This preliminary answer may have disappointed the Utrecht canons. Or they were rather impatient? Anyhow, they themselves started to compose a draft of the *casus resolutio* and in October, when van Espen’s answer had still not materialised, van Erckel and the other members of the Chapter decided to put the same questions to another scholar²⁰. At the end of October they enlisted the help of Pieter Paradaens (1655-1728), abbot of the Benedictine abbey at Vlierbeek near Louvain²¹. At the beginning of November Paradaens sent a comprehensive and well documented answer to Utrecht²². It contained many useful arguments, substantiated

¹⁶ This seems the most likely, i.a. in view of the extensive quotation from the ancient, hand-written Statute of Utrecht Cathedral.

¹⁷ W. Kemp, *Kort Historisch verhael van ‘t gene de kerke van Utrecht wedervaren is*, Amsterdam 1725, Part II, p. 63.

¹⁸ M. Nuttinck, *La vie et l’oeuvre de Zeger-Bernard van Espen, Un canoniste janséniste, gallican et régalien à l’Université de Louvain (1646-1728)*, Louvain 1969, p. 509 and note 53.

¹⁹ [G. Dupac de Bellegarde], *Vie de M. van Espen*, Louvain 1767, p. 594.

²⁰ Not so much because they were still doubting van Espen’s reply (cf. Jacobs, *op. cit.*, p. 303), but rather because the detailed advice, as announced, had not materialised.

²¹ Literature on Paradaens: [La Belle], *Nécrologe des appellans et opposans à la Bulle Unigenitus de l’un et de l’autre sexe, avec des pratiques et des prières à chaque article*, [s.l.] 1755, p. 376-384, [Dupac de Bellegarde], *Mémoires historiques sur l’affaire de la bulle Unigenitus dans les Pays-Bas Autrichiens principalement depuis son arrivée en 1713 jusqu’en 1730*, Part 3, Brussels 1755, art. XII (p. 1-36), *Nouvelles Ecclesiastiques* 1728 08/07, 15/07, 10/08, 18/08, 10/10, 17/10 en 30/10 and A. Smeyers, *De abdijs van Vlierbeek*, Vlierbeek 1955, p. 119-157.

²² The letter is addressed to van Erckel and the other members of the Chapter and dated 4 November 1722. The original can be found in RAU, OBC (24) inv. nr. 789-1. The text is also reproduced in Dupac, *op. cit. (Recueil)*, p. 164-167. Paradaens was probably also prepared to assist at a possible consecration. See *op. cit. (Samenspraak)*: ‘een aenzienlijk gemytert persoon uyt een nabuurig landschap,

by references to the sources. Paradaens wrote that he responded to the *tria capita* on which the Utrecht canons asked him to advise. On analysis these three chapters appear to match with the chapters I, III and IV of the *casus resolutio*. The first deals with the question whether a bishop is necessary for the Church of Utrecht (the later *caput* I). The second investigates the problem whether papal confirmation is a requirement for the consecration (the later *caput* III). The third discusses the question whether the consecration may be performed by one bishop, if there are no other bishops willing to assist (the later *caput* IV). The term ‘*tria capita*’ may indicate that the Chapter had not merely presented three questions, but actually a draft text of three chapters of the *casus resolutio*. The second and fifth chapters seem to be lacking. However, the second chapter deals very specifically with the history of the Church of Utrecht and her rights, whilst the fifth was probably not yet in an advanced stage. It was to this fifth chapter that van Espen would later add an important passage. A great deal of the material Paradaens brought up, appears eventually to be embodied in the text of the *casus resolutio* as signed in December at Louvain. If the advice of Paradaens was indeed used for drafting the text, the Utrecht theologians must have worked fast. Paradaens’ answer is dated 4 November, while the new draft, consisting of five chapters, must have been compiled and sent to Louvain in such a short time, that van Espen could make corrections and additions before it was signed on 12 December²³. For this reason, the opinion already found in the older literature, viz. that not one, but a number of persons were involved in composing the draft text of the *casus resolutio*, seems to be plausible.

V. The *casus resolutio* (12 December 1722)

The *casus resolutio*²⁴, an advice addressed to the Chapter of Utrecht²⁵, is dated 12 December 1722 and signed by three Louvain scholars, viz. the canonists

een sterk aenrader der bewuste inwydinge, liet onlangs aen den Deeken van ons Kapittel boodschappen, dat hy bereyd was den wydende bisschop in die verrigtinge te verzellen’ (p. 51).

²³ Dupac de Bellegarde speaks about two additions. See Dupac, *op. cit.* (*Vie*), p. 495.

²⁴ The title reads in full *Casus resolutio de misero statu ecclesiae ultrajectinae mediisque quibus illi succurrendem est*; two copies in manuscript are preserved in RAU, OBC (24) inv. nr. 789-1; one is entitled *dissertatio de misero...* the other *Approbatio clarissimorum J.U. Doctorum Lovaniensium dissertationis de misero...* A French translation in manuscript, dated 26 January 1724, can be found in RAU, OBC (24) inv. nr. 789-2. In later years the text appeared also in print, i.a. in *op. cit.* (*Supplementum*), p. 217-251.

²⁵ Literature: Jacobs (*op. cit.*) p. 299-306; G. Leclerc, *Zeger-Bernard van Espen et l'autorité ecclésiastique* [Studia et textus historiae juris canonici, 2], Zürich 1964, p. 99-100; Nuttinck, *op. cit.*, p. 509 ff.

van Espen and Bauwens²⁶ and the theologian Verschuren (1660-1723)²⁷. In Utrecht it was decided to publish the text as a *dissertatio*, preceded by a historical introduction²⁸. However, the first edition of the *casus resolutio* appeared without historical introduction under the title *De misero statu Ecclesiae Ultrajectinae*. This edition was intended to be distributed among foreign theologians in order to obtain as many declarations of approval as possible²⁹. Only in February 1724³⁰ was the *casus resolutio* published (this time under the title *dissertatio de misero statu Ecclesiae Ultrajectensis*) in an edition which could be distributed more widely. It was preceded by a historical introduction, the *Historia brevis* written by van Erckel³¹, and included with the *resolutio* of 1717 and some relevant correspondence. The title of the entire volume read *Causa Ecclesiae Ultrajectinae*³². In this edition names of authors or signatories of the *casus resolutio* were lacking. The entire volume was edited by van Erckel. The text of the *dissertatio de misero statu* matches the later editions of the *casus resolutio* which do contain the names of the signatories³³. It is clear that the *casus resolutio*, provided with van Erckel's introduction, was only published in February 1724. By that stage the election of Cornelis Steenoven as archbishop of Utrecht had already taken place (27 April 1723). His consecration was still to come (15 October 1724).

²⁶ The same Bauwens, who had previously signed the *Resolutio doctorum* of 1717.

²⁷ Franciscus Verschuren was from 1693 onwards president of the college Alticollense. See F. Smit-J.Y.H.A. Jacobs, *Van den Hogenheuvel gekomen, Bijdragen tot de geschiedenis van de priesteropleiding in de kerk van Utrecht, 1683-1723* [Scripta van het Katholiek Documentatie Centrum en het Katholiek Studiecentrum te Nijmegen, 6], Nijmegen 1994, p. 113-138.

²⁸ See the letter of Cornelis Johannes Barchman Wuytiers (1692-1733) to Willem Frederik van Dalenoort († 1738) in Dupac, *op. cit. (Vie)*, p. 596.

²⁹ According to Dupac, *op. cit. (Vie)*, p. 596; an edition from 1722 is also mentioned by L. Willaert, *Bibliotheca Janseniana Belgica*, Part II, Namur/Paris 1950, p. 648 (n° 9232). According to Nuttinck this edition does not exist. See Nuttinck, *op. cit.*, p. 513 note 72. See for the declarations of approval Dupac, *op. cit. (Vie)*, p. 596-604 and Leclerc, *op. cit.*, p. 99-100.

³⁰ Thus more than one year after signing and not just a few months as stated in Nuttinck, *op. cit.*, p. 510.

³¹ *Historia brevis, praefationis loco praemissa*. See about the *Historia brevis* Jacobs, *op. cit.*, p. 366 and note 227 on p. 542.

³² [J.C. van Erckel], *Causa Ecclesiae Ultrajectinae, historice exposita per enarrationem brevem, praefationis loco praemissam; juridice confirmata per duas scriptiones...*, Delft [1724].

³³ And yet this text in the *Causa Ecclesiae Ultrajectinae* is sometimes said to be composed by Broedersen. See Jacobs, *op. cit.*, p. 367 and p. 542 note 228, referring to a letter of van Erckel to Thierry, dated 29 January 1724, which can be found in RAU, APR (15) inv. nr. 3849.

VI. The five questions of the *casus resolutio*

The *casus resolutio* is sub-divided into five chapters, each of them dealing with a different question³⁴. The five chapters are well documented and contain many quotations and references to authoritative sources and authors³⁵. The *casus resolutio* is concluded by a *judicium doctorum*, the final judgement of the three signatories³⁶.

6.1 *caput I: does the Church of Utrecht need a bishop?*

The first chapter examines the question whether the Church of Utrecht needs a bishop of her own. The first paragraph states that according to Divine Law, it is necessary to have bishops. Christ himself introduced episcopal administration, and consequently Divine Law, the *ius divinum*, demands that the Church of Christ is administered by bishops. In order to substantiate this statement, the author refers to a number of texts from the New Testament³⁷. From these texts it follows – at least according to the author – that the Apostles appointed bishops in all places where the word of Christ flourished. The Apostolic law prescribing the appointment of bishops for all the major cities was based on the formentioned texts. Already by the time of the church father Cyprian († 254), it was considered an ancient custom for bishops to be appointed in all places with a considerable number of faithful³⁸. Several historians recall how Athanasius (ca. 295-373), understanding that the word of Christ was accepted in Ethiopia, consecrated a bishop and sent him thither³⁹.

³⁴ A concise summary in Dutch of the contents of the *casus resolutio* can be found in Kemp, *op. cit.*, part II, p. 63-77.

³⁵ For the majority of relevant quotations and references we will indicate their location in modern editions. Regularly the exact location is not mentioned in the *casus resolutio*, an obsolete numeration is used, or reference is made to spurious texts. As a matter of fact the then available editions will have been consulted. Greek canons and references to Greek Fathers and to Greek historians are reproduced in their Latin translation.

³⁶ This separate *judicium doctorum* seems to confirm the idea, that the Louvain professors themselves were not the author of the treatise; see Nuttinck, *op. cit.*, p. 513 note 70.

³⁷ Act 20,28, Act 14,22 (according to the *Glossa Ordinaria* the word *presbyterus* in this text should be understood as bishop), Tit 1,5 and Apc 2-3.

³⁸ The author refers to *Epist. 55. ult. Edit.*, the letter by Paradaens reads 52; cf. Cyprianus, *Epistula 55*, CCSL iii B 2, 1993, p. 286.

³⁹ The author of the *casus resolutio* does not speak about Ethiopia, but about India, thereby referring to three Greek historians: Socr. 1.1 c.19 (Socrates Scholasticus, † ca. 450), Theodor. 1.1 c.13 (bishop Theodoretus of Cyrus, ca. 393-ca.466) and Sozom. 1.2 c.14 (Sozomenus † ca. 450); see Sokrates, *Historia ecclesiastica*, PG 67, col. 129, L. Parmentier-F. Scheidweiler (eds.), *Theodoret*

Furthermore, the author explains why Christ introduced episcopal administration. It is the task of bishops to preserve the faith of the Church (*depositum fidei*). In the person of Timothy it was said to all bishops to 'preserve what has been entrusted to their care'⁴⁰. Moreover, it is the bishop's task to preserve unity and to maintain authority. This can much better be realized by one person, viz. the bishop, than by Chapters or vicars. The doctrine denying the necessity of bishops for particular Churches was justly condemned by the Sorbonne in the past century⁴¹. Thus, the appointment of bishops is in conformity with Divine Law. The Church of Utrecht ministering to 100.000 catholic faithful, has lacked the services of a bishop for 22 years. Therefore, Divine Law commands that a bishop be appointed, all the more since this Church, for more than a thousand years, was administered by bishops of her own. In the second paragraph the author sets out to prove that the need for a bishop not only results from Divine Law, but also from ecclesiastical law. Canon 25 of the Council of Chalcedon (451) prescribed that episcopal consecration should take place within three months after the see fell vacant⁴², for without a shepherd the flock was exposed to many dangers⁴³. For the same reason the Fourth Lateran Council (1215) under Innocent III (ca. 1160-1216), ordered

Kirchengeschichte [GCS, 44], Berlin 1954², I 23,1 ff. (p. 73-74) and J. Bidez-G.C. Hansen (eds.), *Sozomenus Kirchengeschichte* [GCS, 50], Berlin 1995², p. 83-84. The Greek texts speak about *Indoi*. This might indicate the inhabitants of Ethiopia; see the *annotationes Valesii* in PG 67 (nr. 17 in Socrates and nr. 32 in Sozomenus).

⁴⁰ 1Tim 6,20.

⁴¹ The author gives a quotation with a reference (*apud Petrum Aurelium in Vindiciis censurae Sorbonicae, titulo I de Ecclesia prop. I*); see 'Vindiciae censurae facultatis Theologiae Parisiensis'... in Petrus Aurelius, *Opera*, Tom. II, Parijs 1646, p. 2. In his letter also Paradaens mentions the opinion as condemned by the Sorbonne, and says it originates from English Jesuits. The condemned work was the *Apologia pro processione Sedis Apostolicae quantum ad gubernationem catholicorum in Anglia durante tempore persecutionis cum defensione religiosi status* by Daniel a Jesu, the English Jesuit John Floyd (1572-1649). Petrus Aurelius is the pseudonym of Jean Duvergier de Hauranne, abbot of Saint-Cyran (1581-1643).

⁴² See J. Alberigo-H. Jedin, *Conciliorum oecumenicorum decreta*, Basel etc. 1962, p. 74; this canon was also enshrined in Gratian's *Decretum*: D.75 c.2; the *casus resolutio* refers to another text in the *Decretum* with a similar purport, viz. D.63 c.35, which is canon 28 of the Second Lateran Council (1139); see for episcopal election in the *Decretum* J.B. Sägmüller, *Die Bischofswahl bei Gratian*, Cologne 1908.

⁴³ The author quotes a fragment derived from a letter of Pope Gregory the Great (ca. 540-604) as adopted in D.50 c.11, thereby referring to *Lib. 6 Epist. 39*; see Gregorius Magnus, *Registrum epistularum*, CCSL cxl, 1982, p. 503; see for this letter J.A. Eidenschink, *The election of bishops in the letters of Gregory the Great* [The Catholic University of America Canon Law Studies, 215], Washington 1945, p. 39 and note 59.

that a Cathedral Church should not be vacant longer than three months⁴⁴. Thus, it is necessary that, when a diocesan bishop dies, he be replaced within three months. This is the only way to avoid the Church suffering damage, either in material or in spiritual matters. However, the Church of Utrecht has not been widowed for three months, but for twelve years. Thus, in terms of all these provisions of ecclesiastical law, there is an urgent need that a bishop be appointed for the Church of Utrecht.

The third and last paragraph discusses the specific situation of the Church of Utrecht. The discussion hitherto was of a general character and applied to all Churches. However, there were also political and geographical circumstances, which applied specifically to the Church of Utrecht. She was unable to appeal to nearby bishops and for more than 22 years she had to invoke the help of foreign bishops, residing far away. As a consequence many of the faithful had not received the Sacrament of Confirmation⁴⁵. Moreover, candidates for holy orders had to be sent to distant places. The journeys the students were obliged to undertake did not enhance their spiritual education. Moreover, the time taken could much better be spent on contemplation and religious matters. And what would happen, if the United Provinces declare a war on a neighbouring country? What would happen if, Heaven forbid, an epidemic breaks out in one of the Provinces? In such a crisis, when nobody can leave the country to be ordained or to collect the Holy Oil, who would not see the crying need for a bishop? Moreover, as the Holy Oil, which must be collected from different regions, is subjected to the inspection of non-catholic toll collectors, it can easily be desecrated. It is the Church's duty to ensure that consecrated altar plate and other objects reserved for the liturgy will not be desecrated by the touch of infidels. According to Rovenius, it was for this reason inconvenient and dangerous to collect the Chrism and the Holy Oil every year from far-away regions, especially from regions where catholics and non-catholics are living in close proximity⁴⁶. All this leads to the conclusion of the first chapter,

⁴⁴ *Constitutio* 23, also in the *Liber Extra* as X 1.6.41; the author refers to the fifth constitution of the Second Council of Lyons (1274) under Gregory X (1210-1276), also in the *Liber Sextus* as VI 1.6.6. Emperor Justinian (482-565) had set a different deadline, viz. six months instead of three, see Nov. 123.1 (= Coll. 9.15).

⁴⁵ This sacrament should be administered to all according to the author, quoting *de cons.* D.5 c.1. Subsequently there follows a passage on the value and necessity of the Sacrament of Confirmation.

⁴⁶ The author quotes a writing of Rovenius, referring to caput 1 (caput 11 is meant). Cf. Ph. Rovenius, *Reipublicae christianae libri duo*, Antwerp 1668, Liber I, caput XI, n.7 (especially p. 72). During the first six years of his administration of the Church Rovenius was not yet consecrated bishop.

viz. that in case of the Church of Utrecht there are not only the usual factors arguing in favour of a bishop of her own, but there are also specific political and geographical circumstances which make the presence of a bishop imperative.

6.2 *caput II: has the Church of Utrecht the right to elect a bishop?*

The second chapter, subdivided into six paragraphs, deals with the right of the Church of Utrecht to elect her own bishop. First it is argued that from the time of the Primitive Church the christian faithful and clergy elected their own bishops. Because the diocese of Utrecht was founded in the seventh century, this practice was beyond any doubt accepted in Utrecht. The election was performed by the clergy and the people and not by the Pope or the Emperor, who merely confirmed the election⁴⁷. This practice, it seems, was still observed during the ninth century⁴⁸. However, from what Joannes de Beka (*saec.* XIV) and Willem Heda († 1525) wrote in their chronicles about the election of St. Fredericus († 835), the eighth bishop of Utrecht, it appears that Fredericus was chosen by the clergy alone. Furthermore, it appears in this case that the co-operation of the Emperor was required, for it was he who ordered the Church of Utrecht to elect Fredericus⁴⁹. In the course of the centuries, not only the Emperor, but also the sovereigns claimed for themselves some authority and influence in episcopal elections. However, when King Lotharius II (ca. 835-869) proposed to grant a see to a candidate unfit for the office, Pope Nicholas I († 867) wrote to all bishops in the kingdom that they should compell the king to observe the rule of Canon Law, which granted the competence to elect a new bishop to the faithful and to the clergy⁵⁰. Similarly, in the tenth century Pope Johannes X († 928) severely admonished the archbishop of Cologne, saying that the latter should observe the rule that the clergy elects the bishop and the laity merely endorses the election. The case under discussion concerned the diocese of Liège, which, like Utrecht, was a

⁴⁷ The author quotes a letter of Adrian I († 795) to Charlemagne (742-814) without further specification of its origin. See for letters of Adrian I to Charlemagne PL 98, col. 261-438.

⁴⁸ De author refers here to a letter from the year 878 of Hincmar of Reims (ca. 806-882) to bishop Hédénulf of Laon († ca. 882); see PL 126 col. 268-269; literature: J. Devisse, *Hincmar Archevêque de Reims 845-882*, Tom. II, Geneva 1976, p. 857 ff.

⁴⁹ See H. Bruch (ed.), *Chronographia Johannis de Beke* [RGP, 143], The Hague 1973, p. 41 (*caput* 24a); see for the election of bishop Frederick also R.R. Post, *Geschiedenis der Utrechtsche bisschopsverkiezingen tot 1535* [Bijdragen van het Instituut voor Middeleeuwsche Geschiedenis der Rijks-Universiteit Utrecht, 19], Utrecht 1933, p. 8 ff.

⁵⁰ A letter from the year 863; see PL 119, col. 841-842.

suffragan diocese of Cologne⁵¹. In the eleventh century it was no different⁵². During that era the same practice was still observed in Utrecht. This appears from what Johannes de Beka wrote in his chronicles about the election in 1027 of Bernold († 1054), the twentieth bishop of Utrecht. After the death of bishop Adelbold († 1027) there was serious disagreement in Utrecht. King Conrad II († 1039) was willing to mediate, whereupon the Chapter allowed him to present a candidate fit for the office⁵³.

Subsequently the concordat of Worms is cited. This agreement, established in 1122 between Pope Calixtus II († 1124) and Emperor Henricus V († 1125), put an end to the Investiture Controversy. The Pope acknowledged the right of the Emperor to attend all episcopal elections in the German Empire⁵⁴. The Emperor, from his side, abandoned all claims to investiture and granted all Churches in his Empire canonical elections and free consecration⁵⁵.

The first paragraph comes to the conclusion that the election of a bishop of Utrecht, according to generally accepted practice, was a matter for the clergy and the people, but especially for the clergy; that the Roman Pontiff claimed no rights for himself in episcopal elections, and that the Emperor had no right whatsoever to hinder free elections. This also implied, that, if the exercise of the right to elect a bishop was granted to a specific office or to a specific body, but these neglected their task, the right devolved again upon clergy and people.

The second paragraph describes how, during the period in which the right to elect the bishop was restricted and exercised only by the Cathedral Chapter⁵⁶,

⁵¹ A letter from the year 829, see PL 132, col. 806-807.

⁵² The author here refers to letters of Gregory VII († 1085), especially book 1 nr.35 (cf. PL 148, col. 317-319) and book 5 nr. 8 (*ibid.* col. 493-494), in the edition E. Caspar, *Das Register Gregors VII.* [MGH *Epistolae selectae* II.1 and II.2], Berlin 1967³, p. 56-57 and p. 358-359.

⁵³ See Bruch (*op. cit.*), p. 81 (caput 43). The chronicle by Johannes de Beka states that Bernold, vicar at Oosterbeek, travelled to Utrecht in order to inform the king that the latter's spouse Grisela, who had stayed behind at Oosterbeek, had successfully given birth. As a reward for bringing the message, the king is said to have provided, that Bernold became bishop. The chronicle is nowadays regarded as legendary. It is historically impossible that in about 1027 the king was at Utrecht.

⁵⁴ The papal record is edited in A. Hofmeister, *Das Wormser Konkordat. Zum Streit um seine Bedeutung*, Sonderausgabe 1962, reprint Darmstadt 1979, p. 84.

⁵⁵ The imperial record is reproduced in MGH, *Constitutiones et acta publica imperatorum et regum*, Tom. I, Hannover 1893, p. 159-160. The text of the Concordat of Worms can also be found in a decree reproduced in [H.F. van Heussen], *Batavia Sacra, sive Res gestae apostolicorum virorum, qui fidem Bataviae primi intulerunt*, Brussels 1714, Part I, p. 140.

⁵⁶ See B. Schimmelpfennig, 'Het beginsel van het 'sanior pars' bij bisschopskeuzen in de middeleeuwen', in *Concilium* 1980-7, p. 21-28.

in Utrecht this right was ceded to the Chapter of the Cathedral (St. Martin) and to the Chapter of St. Saviour⁵⁷. Because the diocese of Utrecht was extensive, an election performed by all would be highly unpractical⁵⁸. With the consent of people, Pope and Emperor, the duty to perform the election on behalf of all was assigned to the two Chapters just mentioned⁵⁹. In the course of time the right to elect was also shared with the canons of the other three Utrecht Chapters⁶⁰, but the time and place of the election were still determined by the dean of the Cathedral Chapter⁶¹.

The third paragraph deals with the important question whether the present Chapter, i.e. the Vicariate, founded in 1633, is or is not an uninterrupted continuation of the old Cathedral Chapter and, as a consequence, has the right of election. It is clear that the old Cathedral Chapter was entitled to elect both by virtue of the *ius commune* and of particular law, confirmed by Pope and Emperor. It had only to be shown that the present Chapter is a continuation of the old Cathedral Chapter. The crux of the problem lay in the fact that the

⁵⁷ These Chapters were founded at the end of the seventh or the beginning of the eighth century. For some time Utrecht had a double cathedral, two bishop's churches standing next to each other, each with its own Chapter. However, since the middle of the tenth century only the Chapter of St. Martin managed to retain its status as Cathedral Chapter. St. Saviour (Oudmunster) was from that time onwards merely a collegiate church situated next to the cathedral.

⁵⁸ According to the Concordat of Worms (1122) the people would still participate in the election. However, the Second Lateran Council (1139) under Innocent II († 1139) assigned the right to elect merely to clerics; see D.63 c.35.

⁵⁹ The author quotes a record showing that King Conrad III (ca. 1093-1152) assigned the right to elect to the Chapters of St. Martin and St. Saviour (Oudmunster). He derives this quotation from *op. cit. (Batavia Sacra)*, Part I, p. 146-147, where the text is reproduced in full. In later times the record was also edited, viz. in S. Muller Fz-A.C. Bouman, *Oorkondenboek van het Sticht Utrecht tot 1301*, Part I, Utrecht 1920, p. 352-353 (no. 389). It is true that from about the middle of the twelfth century the right to elect was exercised by the two Chapters mentioned. However, the record itself appeared to be a (mediaeval) forgery. See N.B. Tenhaeff, *Diplomatische studiën over Utrechtsche oorkonden der Xe tot XIIIe eeuw*, Utrecht 1913, p. 106-114.

⁶⁰ The Utrecht custom appears to be in conformity with the practice in other (German) dioceses. There too, the other canons in the city were for the purpose of episcopal election regarded as canons of the Cathedral Chapter; see for this development in Trier and Cologne K. Ganzer, 'Zur Beschränkung der Bischofswahl auf die Domkapitel in Theorie und Praxis des 12. und 13. Jahrhunderts', in *ZSS Kan. Abt.* 57 (1971) p. 22-82 and 58 (1972) p. 166-197. The Cathedral Chapter of Utrecht, however, has time and again tried to shut out the other Chapters as much as possible.

⁶¹ This appears from the ancient, hand-written book of statutes of the cathedral. Fol. 5v of this manuscript is quoted extensively. The fragment is also edited as *annexum A* together with the text of the *casus resolutio* in *op. cit. (Supplementum)*, p. 252. The same text can be found in the later edition: S. Muller Fz., *Het rechtsboek van den Dom van Utrecht door Mr. Hugo Estinc* [Werken der vereeniging tot uitgave der bronnen van het oude vaderlandsche recht, Eerste reeks, 18], The Hague 1895, p. 11-12. The Chapters of St. Peter, St. John and St. Mary were founded in the eleventh century.

original Utrecht Chapters were not discontinued during the Reformation, for, in fact, there was a period the catholic canons were even allowed to enjoy the prebends. It is true that after 1622 catholics could not be appointed to the Chapters⁶², but the Chapters continued to exist for the sole purpose of disposing of prebends to non-catholics. In order to accomodate and preserve the Chapter's rights and jurisdiction in spiritual matters, Philippus Rovenius, the then archbishop of Utrecht, appointed his own canons by virtue of his ordinary jurisdiction as well as the special jurisdiction derived from the Pope. When Rovenius was prosecuted and sentenced by the Court of Utrecht for treason one of the charges was his actions in appointing canons⁶³. However, the result of these appointments was not, that the Church was to have again an advisory panel. Therefore archbishop Rovenius decided to institute a committee which would serve the Church as Chapter, consisting of the five remaining catholic canons from the Cathedral Chapter, and four canons from other Chapters supplemented with two priests. In this way, in 1633, he created a body to replace the old Cathedral Chapter. In 1637, this body selected three candidates from whom Rovenius could select one as his coadjutor. In 1640 it for some time took over from Rovenius the administration of the Church. After the death of Rovenius it appointed vicars, and a little later it elected a new bishop⁶⁴. All this makes it clear that the newly instituted body in every respect acted as a Chapter, but it was impossible to designate it as such, for the Reformed canons would think that the catholics were after their prebends. Hence it was termed *Vicariatum* or *Senatus Ecclesiae*. In 1658 Jacobus de la Torre († 1661) confirmed the institution of the Vicariate⁶⁵. Johannes van Neercassel (1625-1686) and Petrus Codde did the same. They considered the Vicariate to be the Metropolitan Chapter of Utrecht⁶⁶. Once it was clear that the members of the Vicariate were not after the prebends of the Protestants, but merely occupied with spiritual and ecclesiastical matters, the term 'Chapter'

⁶² 1623 is meant. In that year an earlier resolution of the States of Utrecht with a similar purport (1615) was confirmed. Also Broedersen and Dupac speak about 1622 instead of 1623.

⁶³ The author refers to the sentence as reproduced in *op. cit.* (*Batavia Sacra*), Part II, p. 80-81; literature: M.L. Hewett-J. Hallebeek, 'The prelate, the praetor and the professor: Antonius Matthaeus II and the *crimen laesae majestatis*' Utrecht (1639-1640), in *Tijdschrift voor rechts-geschiedenis* 66 (1998), p. 115-150.

⁶⁴ Here the author refers to an undated letter by Theodorus de Cock to 'a cardinal', reproduced in [Jean-Baptiste Boullenois de Saint-Martin (1681-1758)], *Mémoire pour l'Église et le clergé d'Utrecht*, Amsterdam 1722², p. 130.

⁶⁵ The document is reproduced in Boullenois, *op. cit.*, p. 208-220.

⁶⁶ The author here refers to Boullenois, *op. cit.*, p. 123 and 127-128.

was used more freely and openly. During his stay in Rome in 1688 Theodorus de Cock (1650-1720) was addressed several times as Theodorus de Cock, envoy of the Chapter of the archdiocese Utrecht (*inviato delle Capitolo delle Archidio..d'Utrecht*)⁶⁷ and on 21 June 1702 also Giambattista Bussi (1656-1726), the Cologne nuncio, addressed the Chapters of Utrecht and Harlem as *praeclara capitula*⁶⁸. Two further arguments are used to prove that the Vicariate was a continuation of the old Cathedral Chapter. According to the first, the five canons of the Cathedral Chapter, entering into the Vicariate, were by virtue of ancient law entitled to appoint a successor if and when one of them passed away. Furthermore, if there were vacancies in a Chapter, it belonged to the competence of the bishop and the remaining canons to appoint new canons. Thus, it was not necessary to bring together all remaining catholic canons. Five was sufficient. The only requirement was, that at least one of them was competent to appoint others. According to the second argument every Chapter continues to exist as long as there still is one remaining canon. In 1658 from the old, catholic canons of the Cathedral Chapter there were only two alive, viz. Jacobus de la Torre, the then archbishop, and Petrus Purmerent († 1663), who had also joined the Vicariate. These two were competent to induct new canons. In 1658 they declared the members of the Vicariate in every respect equal to the canons of the Cathedral Chapter and by doing so they accepted them as such. In short, the Vicariate represented the old Chapter and for that reason it preserved and exercised all the rights of the Chapter, including the competence to elect the bishop.

In the following paragraphs the question is brought up whether the Chapter of Utrecht could in any way have lost or lawfully abandoned its right to elect. Three historical occasions are discussed: 1528 when the superior authority in Utrecht was transferred to Charles V (1500-1558) and the latter obtained the right to appoint the bishop of Utrecht (§4), 1559 when new dioceses were founded in the Netherlands (§5) and 1648 when the king of Spain disclaimed superior authority in our Provinces (§6). According to the author, in 1528 the Chapters retained their right to elect. This right was merely restricted in the sense that only a candidate appointed by the king could be elected, for elections can be valid and legitimate, even when there is no choice of candidates. Moreover, in some way the Chapters did have the possibility of choosing between more than one candidate. They were not obliged to elect the candidate

⁶⁷ A further reference to an edition of the document is lacking.

⁶⁸ The author refers here to Boullenois, *op. cit.*, p. 125-127.

appointed by the king. The overruling factor was that they were not capable of electing a candidate not appointed by the king. In 1559, when new dioceses were founded in the Netherlands, the right to appoint bishops for all sees was granted to king Philip II (1527-1498) of Spain and his successors⁶⁹. On 9 November 1561 the Utrecht clergy raised objections to this decision on the grounds that it was in contravention of existing rights and privileges⁷⁰. The king retained his right to appoint, but the clergy did not lose their right to elect, for the king, wishing to exercise the right he had recently obtained, appointed Frederik Schenk van Tautenburg (1503-1588) as bishop. However, he proposed that the clergy of Utrecht (and not the Pope!) elect the candidate appointed⁷¹. Similarly Schenk's successors, viz. Vosmeer, Rovenius and De la Torre, were only appointed Vicars Apostolic, after being elected by the Utrecht clergy. Thus, after the foundation of new dioceses and granting of the right to appoint to the king, bishops of Utrecht were on four occasions elected by the clergy. Hence the right to elect was in no way affected by the king's right to appoint. In 1648 Philip IV (1605-1665) solemnly disclaimed his authority in these Provinces and acknowledged the States of the Provinces as the sovereign authority. Now what was the position of the Church of Utrecht? Was it from that time onwards to be considered as located *in partibus infidelium*, subject to the clementine *In plerisque*⁷²? Would her rights, consequently, devolve unto the Roman Pontiff? The clementine just mentioned speaks about "Churches, where christian clergy and people are lacking". Now, even during her most difficult periods the Church of Utrecht still had at her disposal hundreds of clerics, taking care of 100.000 catholic faithful. As a consequence the clementine just mentioned is inapplicable. From its text it follows that the right to elect resides entirely in the Chapter, for the Pope states explicitly that it is not his intention to restrict the rights of other Churches, i.e. those located outside the *partes infidelium*, and the Church of Utrecht is one of those. The Church certainly did not perish in 1648. In fact from that year onwards Catholic Worship was practiced and was progressively less disturbed, whilst the number of faithful increased. However, from 1648 the Church was treated by the Roman authorities as if she no longer

⁶⁹ See the bull *Super universas* of Paul IV (1476-1559), reproduced in G. Brom-A.H.L. Hensen, *Romein-sche bronnen voor den kerkelijk-staatkundigen toestand der Nederlanden in de 16^{de} eeuw* [RGP, 52], The Hague 1922, nr. 77, especially p. 74.

⁷⁰ With a reference to *op. cit.* (*Batavia Sacra*), Part II, p. 13.

⁷¹ A letter dated 20 September 1561; *op. cit.* (*Batavia Sacra*), Part II, p. 10-11.

⁷² Clem. 1.3.5.

existed. This was apparent in 1656, when the Pope appointed Zacharias de Metz (ca. 1600-1661) as coadjutor of De la Torre, without his being first elected by the clergy. This unlawful appointment came to nothing. De Metz did not survive De la Torre and did not become archbishop. The rights of the Church of Utrecht were violated for a second time, when coadjutor-bishop van Neercassel was expected to succeed De la Torre, but in his place the Pope appointed Boudewijn Catz (ca. 1601-1663). Neither did this violation of rights serve any purpose. From the day Catz was consecrated, he became mentally ill. He did not recover and after a few months he passed away. In 1663 van Neercassel, whose election by the clergy as coadjutor of De la Torre was confirmed by the Pope, succeeded Boudewijn Catz. Van Neercassel was succeeded by Petrus Codde, lawfully elected by the Chapter of Utrecht.

Subsequently the author of the *casus resolutio* himself brings up the question, whether or not it is correct to use the designation ‘bishop of Utrecht’. After all, he is speaking about the Vicars Apostolic, who were actually bishops *in partibus infidelium*. However, avoiding the title ‘archbishop of Utrecht’, just as avoiding the term ‘Chapter’, was only aimed at not offending the Protestant secular authorities. It was only for this reason, that bishops for the Church of Utrecht were consecrated as bishops of Philippi, Castoria and similar ancient sees, but they were in fact appointed to care for the Church of Utrecht and her suffragan dioceses. They guided the catholics of the Northern Netherlands as sheep entrusted to their care and exercised an ordinary jurisdiction (*potestas ordinaria*). The title ‘Vicar Apostolic’ does not exclude this possibility. The Vicars Apostolic received a special jurisdiction from the Pope, but their ordinary jurisdiction from the Church of Utrecht. After 1648 the king of Spain could not retain his right to appoint bishops in the Northern Netherlands, for in terms of the Treaty of Munster the secular authorities would not accept interference by the Spanish king in the ecclesiastical affairs in the Netherlands. As a consequence the right to elect and appoint reverted entirely to the clergy.

6.3 *caput III: is it allowed to consecrate the elect if the Pope refuses to confirm the election?*

The third chapter discusses the question whether it would be allowed to consecrate the elect in the event of the Pope refusing to confirm the election⁷³.

⁷³ Here the text deals with confirmation of the election of the metropolitan. A different question is the confirmation of the election of suffragan bishops. In 1727 van Espen answered to the question

For this question too, the author of the *casus resolutio* seeks a safe answer in the history of the Church. From the earliest times it was the bishops of the Church Province who judged whether the election had taken place according to the rules and whether the elect was fit for office⁷⁴. In later times confirmation of the election was in the hands of the metropolitan alone, and this became the principle rule of the *ius commune* as can be found in the *Liber Extra*. In the fourteenth century under Pope Johannes XXII (ca. 1245-1334) the number of reservations increased enormously. As a consequence the right of confirmation also fell more and more to the Pope. Subsequently the possibility of the Pope's appointing bishops was restricted by concordats. In the German Empire, the right to elect was assigned to the Chapters, but, just as in other territories, the Pope acquired the right to confirm elections. Thus, confirmation by the Pope is not in conformity with the law of the Early Church, but gained predominance in a period, in which many malpractices slipped into the Church. On the basis of seven arguments the author now maintained that the lack of papal confirmation is no obstacle to consecrating the elect. These are as follows.

- (i) If something is necessary according to Divine Law, it should not be overridden because of human custom or provisions of a more recent date.
- (ii) Spiritual welfare is the supreme law in the Church. If the salvation of souls can only be achieved by violating ecclesiastical law of a disciplinary nature, the latter is allowed, many a time even required⁷⁵.
- (iii) In case of emergency not only a recent rule of a disciplinary nature has to be waived, but also less recent legal rules, for in *de regulis iuris* of the *Liber extra* there is a maxim prescribing that necessity makes lawful that which is illicit according to the law⁷⁶. Apparently one may appeal to this

who should confirm the election of the bishop of Harlem, the Pope or the metropolitan. Van Espen appealed to X 1.6.44, canon 26 of the Fourth Lateran Council under Innocent III. As a principal rule metropolitans should confirm the election of suffragan bishops, the Pope only in exceptional cases. See the *Responsum Juris circa institutionem Episcopi Harlemensis* of 1 April 1727, in *op. cit.* (*Supplementum*), p. 513-527.

⁷⁴ Here a reference is made to the fourth canon of the Council of Nicaea (325); see Alberigo-Jedin, *op. cit.*, p. 6-7; this canon is also adopted in Gratian's *Decretum* as D.64 c.1.

⁷⁵ Van Espen is said to have inserted this idea in the text; see Dupac, *op. cit.* (*Vie*), p. 595.

⁷⁶ X 5.41.4: Quod non est licitum lege, necessitas licitum facit (...). This maxim, already mentioned in the letter of Paradaens, is in its turn based upon the interpretation of a text in the Gospel according to Saint Mark, in which Jesus allows to glean ears on the Sabbath and subsequently states, that the Sabbath was made for men, not men for the Sabbath; see the commentary of Beda († 735) upon Mc 2,27 in PL 92, col. 155: (...) quod licitum non erat in lege, necessitate famis factum est licitum (...).

maxim not only regarding provisions of ecclesiastical law, but also regarding the prescription of Divine Law of keeping the Sabbath. In order to make this clear, the author of the *casus resolutio* refers to the Maccabees, waging a battle on the Sabbath without any guilt⁷⁷. In an emergency case David ate the bread of the Presence, which was prohibited⁷⁸. Thus, if confirmation is withheld without any good reason, the Church of Utrecht may appeal to the necessity which makes lawful that which is illicit according to the law.

The legal rule that the elect would loose his rights, if he meddles with the administration of his diocese before his election is confirmed, can also be overridden⁷⁹. According to a decretal of Innocent III, enshrined in the *Liber Extra*, some elects are allowed to administer their Church even without confirmation, viz. those elected outside Italy in places where there is urgent need for a new bishop⁸⁰. By the term ‘elects’ this decretal understands the metropolitans in German lands, in France and in England. If these metropolitans had no *regalia* at their disposal during the period required for obtaining confirmation and the pallium from the Apostolic See, the Church would lack guidance and might suffer considerable harm⁸¹.

- (iv) For almost thirteen centuries the metropolitan was entitled to confirm the election of suffragan bishops. Where a metropolitan was elected, the suffragan bishops of the Province had the right to confirm⁸². The fifth canon of the Synod of Sardica (343) prescribed that, if in the entire Province only one bishop remained and he, despite the requests of the christian

⁷⁷ See 1 Mcc 2,41; also this example is derived from X 5.41.4.

⁷⁸ Mc 2,26 and Lc 6,3-4.

⁷⁹ With references to X 1.6.17 and VI 1.6.5 and with the remark that this holds good especially in case the elect rendered himself unsuitable for the office because of his intemperate desire to govern; for this opinion reference is made to X 1.6.12 and Nicolaus de Teudeschis (1386-1445) ad X 1.6.17 n. 8; see *Prima pars Abbatis Panormitani super primo decretalium*, [s.l.] 1521, fol. 130ra.

⁸⁰ Here the author quotes the decretal *Nihil est* X 1.6.44 i.f.

⁸¹ Here the author quotes X 1.6.28 (in the Friedberg-edition this fragment can be found just before §1). According to Innocent the Church is *sede vacante* apparently lacking its administration. The author of the *casus resolutio* would reject such a view. In his opinion the episcopal rights are *sede vacante* exercised by the Chapter. The custom that the Pope confirms the elections of metropolitans, emerged only in the twelfth century. In 1200 Innocent forbade to use the title of ‘archbishop’ as long as the *pallium* was not yet obtained. See X 1.8.3. See for the changing meaning of the *pallium* under Innocent III: K. Schatz, ‘Papstum und partikularkirchliche Gewalt bei Innocenz III. (1198-1216)’, in *Archivum Historiae Pontificiae* 8 (1970), p. 61-111, especially p. 96-97.

⁸² Here a reference is made to D.64 c.6 and D.66 c.1.

people, neglected to create bishops for the vacant sees, bishops from neighbouring Provinces were allowed to meet the people's wish by consecrating a bishop⁸³. Also in case the metropolitan had died, the joint suffragan bishops were during that period entitled to confirm elections. If confirmation was withheld without a good reason, the consecration could still take place, if this was necessary and if the people asked for it.

- (v) Subsequently reference is made to the so-called *Concordata Germaniae*. The last and most important of these dates from 1448 and is also termed the concordat of Vienna or the concordat of Aschaffenburg. This agreement between Pope and Emperor was based on the decisions of the Council of Konstanz (1414-1418)⁸⁴. In this concordat the Pope undertook to confirm all canonical elections, unless there was a clear reason for not doing so⁸⁵. But if the Pope violated the concordats by refusing confirmation without a good and clear reason, the *ius commune* would again be in force, at least according to the author of the *casus resolutio*. For the German territories this common law did not require papal confirmation⁸⁶. If the Pope withheld confirmation without a legitimate ground – and this was to be expected – the common law would at once become operative. Because the common law did not ascribe to the Pope the right to confirm, it would be lawful to proceed to the consecration of the elect without papal confirmation.
- (vi) Furthermore, the one entitled to confirm the election, was not free not to exercise this right⁸⁷. If a bishop refused to confirm the election of an

⁸³ See for the canons of Sardica C.H. Turner, *Ecclesiae occidentalis monumenta iuris antiquissima*, Tom. I.2, p. 441-544. Literature on canon 5: H. Hess, *The canons of the Council of Sardica* [Oxford Theological Monographs, I], Oxford 1958, p. 90-100.

⁸⁴ The concordat was established on 17 February 1448 between Pope Nicholas V (1397-1455) and Frederick III (1440-1493). The text can be found in E. Münch, *Vollständige Sammlung aller ältern und neueren Konkordate*, Part I, Leipzig 1830, p. 88-93 and in K. Zeumer, *Quellensammlung zur Geschichte der Deutschen Reichsverfassung im Mittelalter und Neuzeit*, Tübingen 1913², nr. 168 (p. 266-268).

⁸⁵ The text quoted can be found in Münch on p. 91, in Zeumer on p. 267; literature: W. Bertrams, *Der neuzeitliche Staatsgedanke und die Konkordate der ausgehenden Mittelalters* [Analecta Gregoriana, 30], Rome 1950², p. 135-139 and H. Raab, *Die Concordata Nationis Germanicae in der kanonistischen Diskussion des 17. bis 19. Jahrhunderts. Ein Beitrag zur Geschichte der episkopalistischen Theorie in Deutschland*, Wiesbaden 1956, p. 19-46, see especially p. 43 and note 75.

⁸⁶ The fact that the *Concordata Germaniae* also apply to the Church of Utrecht appears for example from a letter of Charles V from the year 1548, reproduced in *op. cit. (Batavia Sacra)*, Part I., 249-250; more evidence is given in van de Ven, *op. cit.*, p. 28 and notes 2,3 and 4.

⁸⁷ Here the author quotes the decretal *Postquam* (X 1.6.3) and a fragment from a letter of Innocent III to bishop Nicholas († ca. 1200) of Mileto; see PL 214, col. 251-252 (liber 1, epistola 294).

abbot, the election was presumed to be confirmed⁸⁸. Thus the law provides the means to resolve the situation where a bishop without reasonable grounds refuses to exercise his right⁸⁹. May this line of reasoning be applied to the Pope? The right of the Pope to confirm the election of bishops is no different from the right of bishops to confirm the election of abbots. As with bishops, so too the Pope is obliged to confirm. Consequently the election of a bishop may be presumed to be confirmed and for that reason the consecration can be performed. If the Pope is requested to confirm, the lack of a valid reason to withhold confirmation may be presumed. Negligence on the part of the Pope, is remedied by Canon Law.

- (vii) The Church of Utrecht found herself in a difficult position. She had to choose between two rules of ecclesiastical law, viz. the one that prohibits the see being vacant for too long a period and the one that prohibits consecration of an elect without papal confirmation. The first rule was the oldest one. It had been observed since the first centuries, whilst the second one was of more recent date. The first rule was more durable, because it was confirmed by constitutions of several Councils and Popes, whereas the second rule was merely based on concordats and the like. The first rule was more significant, because the Churches suffered from vacant sees⁹⁰. Moreover, since all Churches, for at least thirteen centuries, had flourished without papal consecration, the first rule prevails over the second. This was also the opinion of the scholars who in the past century had advised King João IV of Portugal (1604-1656) to let the elects be consecrated without papal confirmation, when, because of political reasons Urban VIII (1568-1644) and Innocent X (1574-1655) had for twelve years refused to confirm the election of candidates presented by the king. As a consequence, of the thirteen Portuguese bishops, only one remained. According to the scholars, the right to confirm, reserved for the Pope, is merely an institution of Human Law, and therefore not compulsory in cases of extreme emergency⁹¹.

⁸⁸ Here the decretal *Statuimus* (X 1.10.1) is fully reproduced.

⁸⁹ Referring to the commentaries of Nicholas de Teudeschis and the Louvain canonist André Delvaux (1569-1636) upon X 1.10.1; see *Secunda pars Abbatibus Panormitani super primo decretalium*, [s.l.] 1521, fol. 33rb-33va and Andreas Vallensis, *Paratitla Decretalium*, Venice 1700, p. 50 (Liber I, Titulus X).

⁹⁰ Here a reference is made to VI 1.6.6.

⁹¹ Here the author refers to *Balatus ovium, Litterae a triplici Lusitaniae Ordine scriptae ad... Innocentium X*, London? 1650, p. 226. By the way, the king refused to act on the advice. For

6.4 *caput IV: would an episcopal consecration performed by only one consecrator be valid?*

The fourth chapter is dedicated to the question whether episcopal consecration can be performed by only one bishop, if it is not possible to find more bishops willing to assist⁹². Here too the author refers to the practice of the Early Church. There, it was usual that all bishops of the Province, i.e. the metropolitan and the suffragan bishops, would gather for the consecration⁹³. According to the First Council of Arles (314) the consecration had to be performed by seven bishops⁹⁴, but this sometimes appeared to be impracticable. According to the Council of Nicaea a bishop should be consecrated by all the bishops of the Province, but for reasons of urgent necessity or great distances, three bishops would suffice⁹⁵. Moreover, the actual *Pontificale Romanum* requires besides the consecrating bishop the presence of at least two other bishops. Innocent I († 417) in his letter to bishop Victricius († ca. 418) of Rouen explained, why only one bishop is insufficient⁹⁶. This is not so much because otherwise the consecration would be void, but to avoid creating impression that the office was obtained in an illicit way. Similarly Gregory the Great wrote to Augustine († 604), the apostle of the English, that more than one bishop is required, not so much because otherwise the consecration would be void, but in order that they act as witnesses⁹⁷. Another ground for the presence

political reasons the Pope had reserved episcopal nominations. This was done under pressure of the Spanish authorities, who, after 1640 when the Portuguese monarchy was restored, did not want the Pope to recognize the king of Portugal as a sovereign.

⁹² This is also the subject of van Espen's *Responsio epistolaris* of 4 June 1725.

⁹³ Here a quotation follows, taken from letter 67 of Cyprian (*S. Cyprianus Epist. 68 ad Frat. Hisp.*); the text can be found in *epistula 67* in CCSL iii B 3, 1996, p. 454; see for episcopal elections during the era of Cyprian: R. Gryson, 'Les élections ecclésiastiques au III^e siècle', in *Revue d'histoire ecclésiastique* 68 (1973), p. 353-404 and W. Telfer, *The office of a bishop*, London 1962, p. 187-211; see for episcopal elections in the letters of Cyprian: J. Speigl, 'Cyprian über das iudicium Dei bei der Bischofseinsetzung', in *Römische Quartalschrift für christliche Altertumskunde und Kirchengeschichte* 69 (1974), p. 30-45, P. Granfield, 'Episcopal elections in Cyprian', in *Theological Studies* 37 (1976), p. 41-52 and T. Osawa, *Das Bischofseinsetzungsverfahren bei Cyprian* [Europäische Hochschulschriften, Reihe XXIII Theologie, 178], Frankfurt/M 1983.

⁹⁴ With a quotation from canon 21 (canon 20 in modern editions); cf. CCSL cxlviii, 1963, p. 13 and J. Gaudemet, *Conciles Gaulois du IV^e siècle* [Sources Chrétiennes, 241], Paris 1977, p. 56.

⁹⁵ See note 74.

⁹⁶ Here the author refers to *Dist. 64 C.4* (in the Friedberg-edition it is D.64 c.5); see also PL 20, col. 469-481.

⁹⁷ Here reference is made to the words 'Tibi tanquam testes assistent' in *epistola 31* (lib. 12) of Gregory. The quotation can be found in older editions; see Mansi Vol. 10 (fragment in nr.VIII col. 408) and MGH *Epistolae* I,2 nr. 11.56 (fragment on p. 336); however, the letter is spurious and is

of more bishops is to avoid a situation where the consecration is performed on the authority of one bishop against the wish of the Church as a whole⁹⁸. These texts make clear that three bishops are not required for the consecration to be valid. The history of the Church shows many examples of consecrations by two or even one bishop without anyone doubting the validity. Pope Gelasius († 496) was consecrated by two bishops⁹⁹. De la Torre was consecrated by two bishops, whereas instead of a third bishop, Boudewijn Catz, the dean of Harlem, acted as assistant¹⁰⁰. Also Frederik Schenk van Tautenburg obtained permission from Pope Pius IV (1499-1565) to be consecrated by two bishops¹⁰¹. From the first of the so-called *Canones Apostolici* (*saec.* V-VI), it appears that two bishops can be sufficient¹⁰². The same opinion can be found in the *Constitutiones Apostolicae* (ca. 400). There it is even stated that in emergency situations the consecration by one bishop is not only valid, but also permissible¹⁰³. There are also examples from the Early Church. Bishop Paulinus of Antioch († 388) without assistance consecrated Evagrius († 393)¹⁰⁴ and bishop Philus (*saec.* IV) of Cyrene without assistance consecrated Siderius (*saec.* IV) as bishop of Palaibiske¹⁰⁵. Furthermore, the Roman

lacking in CCSL cxi-cxi A; see H.J. Frede, *Kirchenschriftsteller, Verzeichnis und Sigel* [Vetus Latina, I/I], Freiburg 1995⁴, p. 502; subsequently, for a similar argument reference is made to a letter of Anselm of Canterbury (1033-1109) to the king of Ireland (Lib.3 Epist.147, see PL 159, col. 178-180); see for the letter ascribed to Gregory also Eidenschink, *op. cit.*, p. 62-63.

⁹⁸ Here the author quotes Isidore of Sevilla (570-636), *De ecclesiasticis officiis*, lib. 2 c. 5; the text quoted can be found in CCSL xciii, 1989, p. 60 (11).

⁹⁹ Here the author refers to *Anast. Biblioth. in ejus Vita*; cf. L. Duchesne, *Le Liber Pontificalis, Texte, introduction et commentaire*, Vol. I, Paris 1955², p. 255; see for the attribution of the text to Anastasius Bibliothecaris († 879) *ibid.* p. XXXV; cf. also PL 128 col. 413-416; none of the editions makes mention of Gelasius' consecration.

¹⁰⁰ Here reference is made to *op. cit.* (*Batavia Sacra*), Part II, p 459 and to Willem Herinx (1618-1678); see Guilielmus Herinx, *Summa Theologica*, Part IV, Antwerp 1707, Disp. 10 quaest. 5 n. 61 (p. 494-495). The latter is said to mention a letter from the Pope, dated 1 February 1647, giving permission for a consecration performed by one bishop assisted by two clerics appointed for that purpose. In the literature consulted this letter is dated 8 February 1647.

¹⁰¹ Here reference is made to *op. cit.* (*Batavia Sacra*), Part II, p. 11-12.

¹⁰² See the first canon of the *Canones Apostolorum sanctorum*; see F.X. Funk (ed.), *Didascalia et constitutiones apostolorum*, Part I, Turin 1962, p. 564 (nr. XLVII).

¹⁰³ Here follows a quotation with reference to L.3 C.27; meant is L. VIII caput 27; in his letter Paradaens gives the correct location; cf. M. Metzger: *Les constitutions apostoliques*, Tom. III (Livres VII et VIII) [Sources Chrétiennes, 336], Paris 1987, p. 228.

¹⁰⁴ Here the author refers to the *Historia Ecclesiastica Theodoretii*, Lib. V C. XXIII; cf. Theodoretus, *op. cit.*, V 23,2 (p. 321-322).

¹⁰⁵ According to Philus' successor, Synesius (370-413), in his *epistola* 67 (see PG 66, col. 1413 and 1415 and also note 94 in col. 1413-1416).

Curia allows those elected in missionary territories to be consecrated by one bishop¹⁰⁶. All theologians prescribing the presence of three bishops, admit that in emergency situations one is sufficient¹⁰⁷. The Louvain theologian Christiaan Lupus (Wolf, 1611-1681) proves with many arguments and examples that the consecration performed by one bishop is valid¹⁰⁸.

6.5 caput V: should bishops hasten to help the Church of Utrecht? which bishops? and in which way?

In the fifth and last chapter it is shown that bishops have the duty to come to the aid of the Church of Utrecht. In the first place this holds good for bishops of neighbouring dioceses, but if these neglect their duty, it certainly also applies to other bishops. They have to help the Church of Utrecht not only with affection and prayer, but also by acting and rendering services. Therefore, this last chapter seems to justify the consecration of an archbishop of Utrecht as performed by Varlet, who was suspended as a missionary bishop and had settled in Amsterdam.

First it is said – with a reference to St. Jerome (ca. 347-420) – that the bishops have taken the place of the Apostles¹⁰⁹. Popes Caelestinus († 432) and Nicholas I understood this in the sense that not only they themselves but all bishops have to fulfil apostolic duties, and this not only in their own diocese, but if necessary in the entire world¹¹⁰. In the past century the French bishops

¹⁰⁶ In order to prove this a quotation is given with reference to *Fagn. ad Cap. 7 X de temp. Ord. N. 20*. The clause does require the assistance of two or three clerics. The author mentioned here, is Prosper Fagnani (1588-1678); cf. Prosperus Fagnanus, *Commentarium in primum librum decretalium*, Venice 1607, ad X 1.11.7 n. 10 i.f. (p. 366). However, the author of the *casus resolutio* presents the quotation in a more general way than can actually be read in Fagnani. There, we can only read that the clause applies to ordinations *in Indiis*. It is not said to be applicable to all ordinations *in partibus*.

¹⁰⁷ Here the author refers to the oratorian Jean Morin (1591-1659) and even to the Jesuit and cardinal Roberto Bellarmino (1542-1621), who was later to be canonized; see Joannes Morinus, *Commentarius de sacris ecclesiae ordinationibus*, Antwerp 1695, Pars III, Exercitatio IV, cap. II n. 14 (p. 47) and Roberto Bellarmino, *De controversiis christianae fidei*, Tom. I, *Quarta controversia generalis*, Ingolstadt 1599, Lib. IV (*de notis ecclesiae*), cap. VIII (*nota quinta*, p. 301-310), especially p. 305.

¹⁰⁸ In the appendix to canon 4 of the Council of Nicaea. See C. Lupus, *Synodorum generalium ac provincialium decreta et canones*, Louvain 1665, p. 29-34. Paradaens quotes the fragment in his letter.

¹⁰⁹ Here the author refers to *S. Hieronymus Epist. 54*; in CSEL it is *epistola XLI*; the fragment referred to can be found in Hieronymus, *Epistulae*, CSEL liv, 1996, p. 313.

¹¹⁰ According to Dupac de Bellegarde it was van Espen who added this principle to the draft version; see Dupac, *op. cit. (Vie)*, p. 595. The author quotes Caelestinus referring to 2. part. 2. *Synodi Ephesinae*; the quotation is derived from a letter from the year 431 addressed to the Council of Ephese; the fragment quoted can be found in E. Schwartz, *Acta conciliorum oecumenicorum*, Tom. I (*Concilium universale Ephesenum*), Vol. II, Berlin 1914, p. 23; subsequently the author quotes a

understood the office and task of bishops in a similar way: for instance they transgressed the boundaries of their jurisdiction by taking care of the Catholics in England¹¹¹. Bishops should not merely pasture a part of the Lord's flock, but the whole¹¹². According to the law episcopal jurisdiction is limited within certain boundaries, but, if it is appropriate to transgress those boundaries, a bishop is free to do so. In order to elucidate this point, the author refers to the history of Epiphanius (ca. 315-403) of Cyprus, who transgressed the bounds of his jurisdiction, when he ordained the brother of St. Jerome as deacon and priest in the diocese of Jerusalem. By so doing, giving impetus to a local schism, he offended bishop Johannes II of Jerusalem († 417). However, in his crusade against the followers of Origenes (ca. 185-ca. 254) Epiphanius considered himself entitled to act, not only because this was in the interest of the Church, but also because the fear of the Lord and the love of Christ compelled him to do so¹¹³. Also the French bishops thought that episcopal jurisdiction is bound by certain limits, but the love that forces action, is not¹¹⁴. This holds good all the more, if the spiritual welfare of the faithful is not properly guarded. The author subsequently brings up a series of examples derived from the history of the Church, showing that several bishops considered it permissible to exceed the bounds of their jurisdiction, such as Cyprian¹¹⁵, Gregory of Nazianze (ca. 280-374)¹¹⁶, bishop Eustathius of Antioch († 337)¹¹⁷ and

letter of Pope Nicholas I (Epist. 42) from the year 865 addressed to the bishops of France; the text quoted (in PL 119 *epistola* LXXV) can be found in PL 119, col. 899-900.

¹¹¹ Here the author refers to a recent letter 'from the past century' of 34 French bishops to their fellow bishops. The letter is reproduced in Petrus Aurelius, *op. cit.*, Tom. I, on the unnumbered pages preceding the page numbered as one.

¹¹² The author quotes a letter of Pope John I († 526) from the year 523 to archbishop Zacharias (*saec.* VI); see PL 63, col. 529-531; the fragment quoted can be found in col. 531; subsequently the author quotes a letter of Pope Simplicius († 483) from the year 482 to patriarch Acacius († 489) of Constantinople; the quotation from this letter (*epistola* XVII) can be found in PL 58, col. 58.

¹¹³ The author gives a quotation from *Hieron. Epist. 60.*; in CSEL it is *epistola* LI; the fragment quoted can be found in CSEL liv, 1996, p. 396.

¹¹⁴ Here follows a quotations from the letter of the French bishops mentioned before.

¹¹⁵ Bishop Marcianus (*saec.* III) of Arles favoured the novatianists, but was adverse to the orthodox faithful. Cyprian wrote to bishop Stephen of Rome († 257), that he considered it their duty to hasten to help the Church of Arles. Here follow two quotations from letter 68 of Cyprian addressed to Stephen; cf. Cyprian, *Epistula* 68, in CCSL iii C, 1996, p. 463-468.

¹¹⁶ The latter praises Cyprian because of his care for other Churches as an *episcopus universalis* (with a reference to *oratio* XVIII); see for the paraphrased excerpt J. Mossay, *Grégoire de Nazianze, discours 24-26* [Sources Chrétiennes, 284], Paris 1981, discours 24,12 (p. 66).

¹¹⁷ In his opinion the task of a bishop comprises to help other Churches. The author quotes S. Chrysostomos, *Homil. de Eustat.* See Johannes Chrysostomos, *Laudatio S. Patris Eustathii Antiochiae magni archiepiscopi*, PG 50, col. 597-606. The quotation is derived from col. 602.

Ambrose (ca. 339-397)¹¹⁸. According to the fifth canon of the Council of Sardica (419) the duty to help the Church of Utrecht rests upon the bishops of neighbouring Church Provinces. An interesting example of such ‘neighbourly help’ can be found in the history of the French Church. In the Province of Bourges, besides Bourges itself, only the diocese of Clermont was still part of the Roman Empire. After the death of the archbishop of Bourges bishop Sidonius Apollinaris (ca. 432-480/490) of Clermont was the only remaining bishop of the entire Province. In creating a new metropolitan he did not want to act on his own authority. In the year 470 he requested archbishop Agræcius († 487) of Sens to assist him in creating an archbishop of Bourges¹¹⁹. In the same way Gregory the Great considered the French bishops entitled to participate in the conversion of the English¹²⁰. In that case it was a matter of preaching the faith. In the case of the Church of Utrecht it is a matter of preserving the faith. It is much easier to support an existing Church, than to found a new one. As a consequence in the case of the Church of Utrecht, bishops are by virtue of their office all the more obliged to do everything possible in order to promote the well-being of the Church.

The words ‘nearest or neighbouring bishops’ should not always be taken in a geographical sense. They can also refer to bishops, who, although more remote than others, are in a position to offer assistance quite easily. When Olaf III Skötkonung (ca. 995-1022) ruled over the Swedes, the Catholic Faith had almost perished. Although the German bishops more than any others could be considered as neighbouring, it was English bishops who came to the rescue. Archbishop Sigefrid of York († 1002?) even left his Church, went to Sweden and successfully restored the Christian Faith¹²¹.

The following passage of the fifth chapter seems to be concentrating especially on the person of Varlet. It speaks about holy bishops, expelled from

¹¹⁸ Ambrose meddled with the Church of Sirmium, which had never been subjected to Milan; the author refers in this respect to Paulinus (*saec. V*), *In vita Ambrosii*; cf. Paulinus diaconis Mediolanensis, *Vita S. Ambrosii*: A. Bastiaensen (ed.), *Vita di Cipriano, Vita di Ambrogio, Vita di Agostino* [Vite dei Santi, 3], Milan 1975, p. 66.

¹¹⁹ See A. Loyon (ed.), *Sidoine Apollinaire*, Tom. III *Lettres* (livres VI-IX), Paris 1970, p. 41-42; literature: D. Claude, ‘Die Bestellung der Bischöfe im merowingischen Reiche’, in *ZSS Kan. Abt.* 49 (1963), p. 1-75, p. 14-16.

¹²⁰ The author gives no source, but see the following two letters: MGH *Epistolae* I,1, nr. 6.49 (p. 423-424) and nr. 6.57 (p. 431-432). In his letter Paradaens does give a source, viz. Beda, *Historia Anglorum*, Liber 1 caput 27 (see PL 95, col. 68-69 in caput 28).

¹²¹ Here the author refers to the historical work of Johannes Magnus (1488-1544), archbishop of Uppsala; cf. Ioannes Magnus, *Gothorum Sveonumque Historia*, Rome 1554, Liber 17, caput 18 (p. 560-562).

their Church because of their faith and the truth. Should they be travelling or staying in the jurisdiction of other Churches, they should be regarded as neighbouring bishops, and, conversely, they should not hesitate to offer those Churches their help. This was what bishop Eusebius of Samosata († 380) did, when banished to Thrace¹²². If neighbouring bishops are negligent or reluctant, it is the task of less neighbouring bishops to offer help¹²³. All Churches are part of the universal Church, which is the bride of Christ. Which bishop, no matter how far remote, would not consider it his duty to serve the bride of Christ, if this was neglected by neighbouring bishops? Nature taught the limbs of the body to support each other mutually. In the body of Christ, the Church, this is no different. Her limbs, the particular Churches, are bound to help each other irrespective of the distance. According to Basilius († 379) bishops, even those living far away, are obliged to offer their help to Churches in distress¹²⁴. This was the attitude of Cyprian. He did not hesitate to rescue the distressed Church of Arles. Christ has one flock with several bishops, he argued, and if one neglects his office, another has to serve¹²⁵. Holy bishops have exerted themselves to assist weakened Churches in several ways according to time and circumstances: by their prayers¹²⁶, by using their powers to restore peace and unity, when Churches were torn by internal discord¹²⁷ and by ordaining clerics, such as Epiphanius did in the diocese of Jerusalem. In emergency cases also bishops were consecrated for other Churches. This was what Athanasius did, when he, returning from exile, created bishops for several widowed Churches¹²⁸. Eusebius of Samosata did the same and because of his efforts he was praised by Basilius¹²⁹ and Gregory of

¹²² Here reference is made to Theodoretus I.4 C.13; see Theodoretus, *op. cit.*, V 4,5-6 (p. 283).

¹²³ The author quotes a letter of Pope Caelestinus from the year 430, addressed to the clergy and people of Constantinople; the words quoted can be found in PL 50, col.485 (*epistola* 14); in fact the text was produced by Nestorius († 451?); see Frede, *op. cit.*, p. 350.

¹²⁴ The author quotes *epistola* 70 of Basilius the Great to the bishops of Italy and France; see Y Courtonne (ed.), *Saint Basile, Lettres*, Tome III, Paris 1966, p. 68 (in letter CCXLIII.1).

¹²⁵ See the letter already mentioned (*epistola* 68) to Stephen concerning the Church of Arles.

¹²⁶ The author produces a concise quotation from Basilius, *epistola* 61; see Courtonne, *op. cit.*, Tome I, Paris 1957, p. 195 (in letter XC.1).

¹²⁷ Without further reference the author quotes 'a decree of the Council of Africa'; the text quoted can be found in CCSL cxlix, 1974, p. 217; subsequently the author quotes *epistola* 48 of Basilius; see Courtonne, *op. cit.*, Tome I, Paris 1957, p. 158-159 (in letter LXVI.2).

¹²⁸ The author refers to Socrates lib. 25 C. 19 (see Socrates, *op. cit.*, book 2, chapter 24 (?), in PG 67, col. 261-163) and Sozom. I.3 C.20 (see Sozomenus, *op. cit.*, p. 133-135).

¹²⁹ The author gives a quotation without further reference.

Nazianze¹³⁰. At the end of the chapter the author returns to the fifth canon of the Council of Sardica, which he already mentioned in the third chapter and earlier in the fifth chapter. The conclusion is clear. The Church of Utrecht was not only widowed for a period of twelve years, but also weakened by the evil that visited her. The catholic faithful and the clergy have continuously called for a bishop. Therefore neighbouring bishops and, if they refuse to comply, other bishops further afield have the duty to support the Church of Utrecht with whatever means they can, i.e. by consecrating a bishop.

VII. Evaluation

- (i) As a matter of fact it would be possible to consider the contents of the *casus resolutio* from a modern point of view. For instance, which theologian would nowadays equate the notion *episcopus*, as found in the Vulgate-translation of the New Testament, with the monarchist office of bishop, without realising that the latter office was – historically – only developed in the course of the first three centuries? However, such criticism is pointless. The author of the *casus resolutio* was merely relying on an interpretation which in his days was generally accepted among catholic theologians. Likewise there is no part in reproaching the author with his appeal to chronicles, which are nowadays considered as legendary, or with his references to letters of Popes, which much later have been shown to be spurious or to a document, which only this century was proved to be a forgery.
- (ii) The opinions as defended in the *casus resolutio* are one by one substantiated with authoritative texts, derived from the church fathers, ecclesiastical historians, letters of Popes and the compilations of Canon Law. Sources of this kind are not always unequivocal. It will be clear, that the texts were selected in view of the opinions to be defended. From the same sources we may derive texts in order to defend different opinions. However, we should realize, that the *casus resolutio* was no impartial treatise. Some of the opinions it defends, were disputed within the Catholic Church, whilst the authors' purpose was to legitimize these opinions as being in conformity with the tradition of the Church and the

¹³⁰ The author refers here to *Epist. 29 ad ips.*; cf. P. Gallay, *Gregor von Nazianz, Briefe* [GCS, 53], Berlin 1969, p. 40-41.

current Canon Law. However, although the selection was made in view of a clearly preconceived aim, the texts quoted are not divorced from their original context in an unacceptable way or interpreted contrary to their original purport.

- (iii) Furthermore, it is clear that the author supports the Utrecht canons in their opinion that even after 1704 Codde was the lawful administrator of the Church. As we read by 1722, the see of Utrecht has been vacant for 12 years, that is counting from 1710, the year Codde died. The appointment of Adam Daemen as Vicar Apostolic in 1707 was apparently not relevant for the question whether or not the see was vacant¹³¹.
- (iv) What is striking is the terminology used. The author speaks about the Church of Utrecht and avoids the term Dutch Mission. The Vicariate is frequently referred to as the Metropolitan Chapter, the Vicars Apostolic as archbishops of Utrecht. In the seventeenth and eighteenth centuries objections to this interpretation were already being raised by the ultramontane side. These objections can still be found in some modern Roman Catholic literature on ecclesiastical history. Sometimes, the authors agree with the opinion of the Congregation *De Propaganda Fide*, founded in 1622, viz. that after the Reformation the Catholic Church in the Northern Netherlands had perished and for that reason the Northern Netherlands were missionary territory, that the Vicariate was no continuation of the Cathedral Chapter, and that the Vicars Apostolic were no diocesan bishops. For these reasons the Congregation arrogated to itself the administration of what they considered to be the Dutch Mission and had increasingly queried or even denied the ordinary jurisdiction of the Vicars Apostolic. The author of the *casus resolutio* takes the opposite stand. The Church had survived and did not become missionary territory. There were still hundreds of priests and 100.000 catholic faithful. The rights of the Cathedral Chapter resided in the Vicariate. The Vicars Apostolic were in fact diocesan bishops. It was only because of the prohibition by the secular authorities, that they were not appointed as archbishops of Utrecht.

¹³¹ After Daemen died in 1717 Joan van Bijlevelt († 1727) was appointed Vicar Apostolic, but he was not consecrated. After his quitting office in 1724 the Dutch Mission was administered directly by the Roman Pontiff.

- (v) From Roman-Catholic quarters it is sometimes argued that this argument, especially the qualification of the Vicars Apostolic as archbishops of Utrecht is false¹³². All in all, the continuity of the medieval Chapters into the Vicariate is a complicated matter and formally the Vicars Apostolic were no diocesan bishops. From Old-Catholic quarters, especially in the older literature, it was sometimes suggested that the Spanish authorities had granted Vosmeer and Rovenius permission to use the title archbishop of Utrecht, but the firm proof for this suggestion is lacking. Neither does the fact that they used the title (although prohibited by the secular authorities) make them diocesan bishops. And indeed our ancestors used a terminology which from a historical point of view was not one hundred percent correct. However, seen from certain ecclesiological viewpoints, it certainly was. These views, which were subscribed too by the author of the *casus resolutio*, have their roots in legal-ecclesiological Jansenism, familiar to many secular priests in the Northern Netherlands since their study years at Louvain. The college *Alticollense* had been transferred from Cologne to Louvain, where van Espen was teaching Canon Law. Although van Espen himself was not the author of the *casus resolutio*, the draft was composed by Dutchmen, who had received their theological and legal education at Louvain. As a consequence, van Espen's doctrines can frequently be found in the *casus resolutio*.
- (a) We see, for example, the ideal of the Primitive Church as a standard to be preferred over the provisions of Canon Law introduced in a period, in which many malpractices slipped into the Church. This historical method, viz. reaching back to the opinions of the Primitive Church and the church fathers, was innovative in the theology of the days. Especially in the chapter dealing with the confirmation of the election, much attention is given to the Primitive Church, whilst in the final chapter too a distinct prescriptive character is attributed to all kinds of incidents in the Early Church and to texts selected from patristic writings¹³³.

¹³² M.G. Spiertz, *Ambtelijk onbegrip, Kanttekeningen bij de breuk Utrecht-Rome*, Nijmegen 1972, p. 26-27.

¹³³ See for the Early Church as a standard also J. Visser, *Het ideaal van de 'Ecclesia Primitiva' in het Jansenisme en Oud-Katholicisme* [Publicatieserie Stichting Oud-Katholiek Seminarie, 8] Amersfoort 1980, p. 8 and J. Visser, 'Die Alte Kirche als hermeneutischen Prinzip', in *Internationale Kirchliche Zeitschrift* 86 (1996), p. 45-64.

- (b) We sense van Espen's democratic sympathies in all passages emphasizing the importance and the role of the christian people in the Early Church.
 - (c) The statement that not only the Roman Pontiff, but all bishops – as successors of the Apostles – should protect and cherish the entire Church, resounds with episcopalistic views. Van Espen himself is said to have added this thought to the draft text.
 - (d) The doctrine of jurisdiction, so characteristic of ecclesiological Jansenism, is reflected in the opinion, that the Vicars Apostolic derived their ordinary jurisdiction not from the Pope, but from the Church of Utrecht. Van Espen, followed by van Erckel, taught, that as long as clergy and christian faithful are able to maintain themselves, the Church will continue to exist and from this local Church all ecclesiastical jurisdiction had to be derived¹³⁴. This doctrine also elucidates why, in the eyes of the *Cleresie*, the several Vicars Apostolic, elected by the local clergy, had derived their authority from the local Church and, as a consequence, were actually diocesan bishops.
- (vi) However, all these ecclesiological theories, rejected by the papalists and, following in their footsteps, by the Congregation *De Propaganda Fide*, were unsuitable for pleading the case for the election of a bishop before the whole Catholic world. If expressed explicitly, they would only have made a condemnation easier. The justification had to be based on Canon Law and this provided the *casus resolutio* with its predominantly legal character, although the underlying ecclesiological principles are clearly perceptible.
- (vii) One of the most important premises of the *casus resolutio* is the idea of continuity, namely the survival of the Catholic Church in our Provinces after the Reformation. As seen above, this idea was strongly emphasized in ecclesiological Jansenism, especially in its doctrine of jurisdiction: as long as there are clerics and faithful, the Church cannot perish. One can imagine how their long tradition as Church in the Northern Netherlands provided the catholics with self-respect. The Reformation had deprived the Catholic Church of her property (churches and monasteries), her

¹³⁴ See J. Hallebeek, *Alonso "el Tostado", His doctrine on jurisdiction and its influence in the Church of Utrecht* [Publicatieserie Stichting Oud-Katholiek Seminarie, 29], Amersfoort 1997, p. 33-41.

financial income (prebends) and her visible place in social life (vicars, bishops). The Catholics were merely granted freedom of conscience. Even according to the Union of Utrecht this was to be respected. In order to survive, the Catholics clung to the idea of continuity, viz. of still being the Church founded by St. Willibrord. This continuing existence of the pre-reformation Catholic Church was ardently defended in ecclesiological Jansenism. However, in the course of the seventeenth century it was increasingly attacked by the regular clergy, supported in this respect by the Congregation *De Propaganda Fide*.

- (viii) In 1702 the States of Holland appear to be ready, at least under certain conditions, to recognize an administrator of the Catholic Church¹³⁵. This paved the way for the return of a diocesan bishop to the Northern Netherlands. In the eyes of the *Cleresie* such a development was appropriate; since the Catholic Church had managed to survive, it was obvious that an archbishop of Utrecht should take the place of the Vicar Apostolic as soon as political circumstances would allow¹³⁶.
- (ix) Finally one can question the intentions of the Church of Utrecht, when composing the *casus resolutio*. In the traditional Roman Catholic literature the work is considered a justification for going her own way, for withdrawing from Rome and enforcing a schism. It is seen as part of a preconceived plan heading for a breach¹³⁷. Obviously the Utrecht clerics have worked on the *casus resolutio* with an enormous energy and determination. There was the patent danger that the hierarchy might become

¹³⁵ This appears from the edict issued on 17 August 1702; see C. Cau, *Groot Placaet-Boek...*, The Hague, Part V, book 2, title 1 (p. 558).

¹³⁶ Therefore it is incorrect to suggest, that the opinion that the Chapters lawfully continued to exist in the Vicariate, was merely construed as a reason to restore episcopal hierarchy. Cf. A.G. Weiler, 'Hollandse missie of Hollandse kerk? Een onderzoek naar de ideologische achtergronden van de strijd tussen de cleresie en de Romeinse curie 1702-1703', in *Archief voor de geschiedenis van de katholieke Kerk in Nederland* 4 (1962), p. 185-231, especially p. 224. The underlying thought, viz. that the Church continues to exist also without diocesan bishops and that it is in this Church, that ecclesiastical jurisdiction resides, was for example already tersely formulated in 1703 by van Erckel in his work *Assertio iuris Ecclesiae Metropolitanae Romano-Catholicae per J.C.E.*, Delft 1703 (see §IX, p. 52-54).

¹³⁷ See e.g. T.W. Backhuijsen (1687-1779), *Acta Zegeri Bernardi van Espen... circa missionem Hollan-dicam*, [s.l.][s.a.], (passim); likewise van Bilsen still maintained, that the Utrecht canons in 1719 had done everything required for creating a Church independent from Rome (B. van Bilsen, *Het schisma van Utrecht*, Utrecht/Brussels 1949, p. 72); Nuttinck consequently refers to the Chapter of Utrecht as *les réfractaires* (the stubborn ones, the rebels); see *op. cit.* (passim).

extinct, as soon as Rome would succeed in strengthening its grip on the French bishops. This induced the Chapter to take immediate advantage of the presence of Varlet and his benevolence. However, a preconceived plan is quite something different. The *Cleresie* simply refused to submit itself unconditionally to Rome. This position was based on a number of grounds. The *casus resolutio* is merely concentrating on one of these. The work is dominated by one central thought, viz. that the Church of Utrecht is an uninterrupted continuation of the pre-reformation Catholic Church with all its corresponding rights. This thought may have become a complete obsession. Maybe it was no longer possible to make concessions in this respect without a loss of face. Anyhow, it is clear that great importance was attached to the defence of this claim, even at the cost of a schism. However, a preconceived plan to enforce a schism is quite something different. The legal justification for electing an archbishop of Utrecht, thoroughly substantiated and documented in the *casus resolutio*, was, by contrast, intended to establish that a possible election and consecration of a bishop for the Church of Utrecht was in every respect in conformity with current ecclesiastical law. If it resulted in a breach, the reason would be that Rome, not Utrecht refused to observe Canon Law. The schism could not possibly be laid on the conscience of the Utrecht clergy¹³⁸.

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¹³⁸ This article contains an elaborated version of a paper delivered at The Hague on 26 September 1998 at the commemoration of the election of Cornelis Steenoven. I would like to thank Martien Parmentier (Hilversum) and Dick Schoon (IJmuiden) for their useful remarks on the draft version of this paper and Margaret Hewett (Cape Town) for correcting the English.