What exactly is the forum confessionis? Secrecy and Scandal in Church Governance (12th-14th centuries)
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WHAT EXACTLY IS THE FORUM CONFESSIONIS?
SECURITY AND SCANDAL IN CHURCH GOVERNANCE
(12th-14th CENTURIES)

First of all, let us establish the difference between secrecy and privacy. In Latin, *secretum* comes from *secernere* which means to isolate, to distinguish or to put something aside. According to this etymology, «secret» or «secrecy» refers to institutions and governance, since the verb *secernere* indicates the sovereign gesture of hiding something or reserving it for a small group of individuals. Does not the piece of furniture we call a «secretaire», whose drawers contain objects and papers we do not want to be visible, remind us of the gesture of hiding or concealing? In the same way, the office of «secretary» refers to the political function that consists in working in the shadow of a public authority.

Policy secrets or confidential information are not topics we will deal with here, even though they are obviously related to the growth of the modern State in the West. Among the many forms of institutional secrecy – spying, torture, judicial instruction, denunciation – I will focus here only on one, that of confession, which is at the same time specific and paradigmatic of the way Roman Church used secrecy as a tool for the judgement and government of Christians in the Middle Ages.

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already existed, as monastic rules of the 5th and 6th centuries and Penitential Books of the 7th and 8th centuries can attest. During the 12th century then, confession clearly achieves a sacramental value in penance theories, of which many, such as those of Pierre Lombard, stress the sacerdotal power to absolve and forgive sins. Meanwhile, confession becomes a fundamental part of civil and criminal procedures and also the core of inquisitorial procedure.

The word *confessio* itself can be found everywhere when dealing with the documentation of a more «administrative» nature. In the letters and the letter formularies of the Apostolic Penitentiary – a papal office which arises at the beginning of the 13th century, but whose activity and jurisdiction are obscure since it responds to supplications addressed to the pope, but also «receive[s] confessions» from pilgrims and penitents, —, «confession» often defines the oral way by which a request is introduced, as it was the case in Roman procedure. This was carried out in the presence of the Cardinal Penitentiary or of one of the members of his staff, largely composed of Friars. We easily find some examples of the word «confession» bearing this meaning in the first known letter formulary of the Apostolic Penitentiary. This formulary has been attributed to the magister and papal vice-Chancellor Thomas of Capua, but it more likely written between 1230 and 1270.

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When a supplicant applies to the pope through the penitentiaries, the sacramental nature of his *confessio* remains therefore uncertain. In any case, during the whole of the 13th century, the separation between the sacramental absolution and the breaking of an excommunication is all the less explicit and the *a jure* or *ipso facto* excommunication, which proceeds from the sin itself and not from a judicial sentence, contributes to the interference between the sacramental sphere of judgment and the administrative or judicial sphere of judgment. Moreover, we know that at the beginning of the 14th century the pope delegated to the Friars the power to absolve sin and excommunication at the same time. Therefore, we cannot always know if the *absolutio* we find in the letters formularies of the Apostolic Penitentiary consists of remitting a sin or lifting an excommunication.

In these sources, the word *confessio* occurs also frequently in the genitive case, related to the word *forum* (*forum confessionis*). *Forum* is a deeply polysemic word, which can be translated as territorial jurisdiction (either ecclesiastical or civil), according to its use in the Roman law. However, more largely, it can also mean, at the beginning of the 13th century, a sphere of judgment «in which a case, a power and a rule meet each other». The different names of the *fora* we find in the canonical and theological sources of the 13th century suggest that many spheres of judgment coexisted, which were neither equivalent nor completely disconnected: *forum conscientiae, forum poenitentiae, forum confessionis, forum Dei, forum spirituale, forum animae, forum exteriorius, forum iudiciale, forum contentiosum, forum Ecclesiae, forum exterioris Ecclesiae, forum publicum et publice, forum contentiosae iurisdictionis* etc. The distinctions among all these *fora* did not refer to a practical border, since matters, procedures and sentences were often common to them. Besides, an institution like the Penitentiary was able to choose, depending on the case, one *forum* or another.

The purpose of this paper is to describe what characterizes the *forum confessionis*, which is also called *forum conscientiae* or *forum poenitentiae* in the letter formularies of the Penitentiary, and to explain its connection with secrecy.

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What struck me during my dissertation research was that the forum of the confession is not only mentioned in cases of secret confession or sacramental absolution of sins, as we might expect, but also in cases of dispensation (*dispensatio*). Dispensation is a measure which suspends the legal rule in a single case and which generally consists in authorizing somebody to accomplish an action or get a status that the law theoretically forbids him given his situation. It is not rare to see such dispensations granted in secret, at the *forum confessionis* or *conscientiae*.

In the letter collection composed in 1289 by the Cardinal Penitentiary Bentivenga, we find among others examples a dispensation granted in *foro conscientie* which can help us understand the features of this *forum*. The letter is addressed to the Premonstrate abbot of Saint-Martin-de-Laon. It grants a dispensation to a monk guilty of having injured a friend with whom he used to play when he was a child, and without first obtaining absolution having then entered in a religious order and, finally, having been consecrated as a priest. So, what is at stake here is the «irregularity» of this monk (*irregularitas*). Since the decretists like Rufinus in the 1160s have defined it, irregularity refers to the status of somebody who has committed a fault or a crime barring him from holy orders, but it never qualifies the sin nor the crime itself. Consequently, irregularity does not have to be confessed nor absolved by a priest; it is only a matter of administration and clerical discipline, as the final terms of our letter show:

Cum de dicto casu scandalum nullum esset, super irregularitate quam inde contracterat, dignaretur secum misericorditer in foro conscientie dispensare. […] Noveritis igitur quod nos, auctoritate nobis commissa, dispensamus cum eodem, super qua dispensatione certos vos reddimus per presentes districte vobis in virtute obedientie, injungentes et, auctoritate ipsius sanctissimi patris et mandato, mandantes, sub pena excommunicationis quam ipso facto incurritatis si secus feceritis, quatenus, litteris ipsis perlectis, nulli communicantes easdem, ipsas totaliter lanietis.


16 C. Eubel (ed.), «Der Registerband des Card.-Grosspönitentiars Bentevenga», *Archiv für katholisches Kirchenrecht*, 64 (1890) 1-70. The manuscript is kept in Assisi, Biblioteca del Sacro Convento, Fondo antico, mss. 336.


18 Assisi, Biblioteca del Sacro Convento, Fondo antico, ms. 336, ff. 13r-13v.
This judgment in foro conscientiae does not seem to be related to a secret and sacramental confession, as we have noted that there was no sin nor fault to confess (no peccatum nor culpa). But it is characterized by the destruction of the written proofs and obviously depends on whether the case has caused a «scandal» (scandalum) or not.

I have already shown that in canon law as in judicial and administrative documentation, the word scandalum itself never qualifies the sin or the crime. It is more like a semantic landmark; what we could call, in other words, a «meta-pragmatic category»19, which overhangs the facts the Roman Church has to face and sets up a backdrop for all the qualifications and the notions describing the circumstances and the consequences of a fault, a sin or a crime20. But it also determines the way the case will be settled. In our letter from 1289, we can indeed see that it is because the fault and the irregularity have not provoked any scandal that the Cardinal Penitentiary himself uses the forum conscientiae and allows its recipient to settle the case secretly by destroying the written proof.

In the letter formulary from 1336-1338, composed by the Cardinal Penitentiary Gaucelme de Jean21, the same logic is applied to cases of consanguinity. It is once again the lack of scandal which explains that, once received, the letter shall be destroyed by the recipient and that the dispensation shall be granted in foro penitentie.

Priori vel gardiano.
Sua nobis G. lator presentione monstravit quod ipse olim cum Guillelma uxore sua matrimonium contraxit in facie ecclesie, ignorans aliquid esse obstaculum inter eos, et carnali copula subsequita prolem suscepit ex ea. Cum igitur ad ipsius notitiam nuper pervenerit quod quadam mulier, quam idem G. anteas fornicario acto cognoverat, eidem uxori sue in quarta consanguinitatis linea actinabat et hoc sit occultum et si divorcium fieret inter eos gravia possent inde scandalum exoriri, supplicavit humiliter sibi et dicte uxori sue super hoc per sedem apostolicam misericorditer provideri. Nos autem, cupientes ipsorum conjugum saluti anime provideri, et huiusmodi scandalum obviare, auctoritate etc., tue discretioni committimus quatenus, si est ita, cum dictis conjugibus, quod impedimento hujusmodi non obstante, in suo possint licite matrimonio remanere, in foro penitentie, nullis super hoc adhibitis testibus nullisque concessis litteris sed presentibus ianiasi, misericorditer dispenses, prolem exinde susceptam vel susciptiandam legitimam reputando22.

We can suppose that no scandal was caused by this illegal marriage – we know that this degree of consanguinity had been prohibited by the Fourth Lateran Council (1215)23 —, because the Cardinal orders the case to be judged in foro penitentie in order

21 We know seven manuscript copies of this formulary, which has never been edited, but only six have been preserved, since the ms. 594 of the Bibliothèque municipale of Tours has been destroyed by a fire in 1941. Vatican, Biblioteca Apostolica Vaticana, Vat. lat. 5959, ff. 1r-122v; Vatican, Biblioteca Apostolica Vaticana, Ottoboni lat. 333, ff. 1r-88v and ff. 137r-148v; Wien, Österreichische Nationalbibliothek, ms. 415, ff. 38r-120v; Avignon, Bibliothèque Municipale, ms. 336, ff. 1r-55v; Paris, Bibliothèque nationale de France, ms. lat. 4323, ff. 1r-104v; Frankfurt, Stadts- und Universitätsbibliothek, Barth., ms. 80, ff. 89v-222v.
22 Avignon, Bibliothèque Municipale, ms. 336, ff. 38v.
to avoid the scandal which might be provoked by a divorce (\textit{huiusmodi scandalum obviare}), but also because the mistake of «G.» and his wife is absolutely unknown (\textit{cum hoc sit occultum}).

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Actually, \textit{forum penitentie}, \textit{forum conscientiae} and \textit{forum confessionis} are frequently mentionned when the fact is said to be «\textit{occultum}». In canon law, the qualification «\textit{occultum}» was first opposed to «\textit{manifestum}» by Gratian around 1140, but then it was opposed to «\textit{notorium}» in the decreals of the 1180 and 1190s\textsuperscript{24}. Thus, at the end of the 12\textsuperscript{th} century, a distinction was established between, on one hand, «\textit{notorious}» faults, which cannot be hidden and do not require an investigation since their obviousness renders any testimony useless, and, on the other hand, secret faults, theoretically unfathomable and inaccessible to human and clerical judgment (according to the famous adage of Johannes Teutonicus «\textit{Ecclesia de occultis non iudicat}»)\textsuperscript{25}. In reality, the \textit{forum penitentie} is created at the end of the 12\textsuperscript{th} century by canonists and theologians such as Robert de Courson precisely in order to integrate occult facts into the ecclesiastical system of judgment\textsuperscript{26}. In the 1190s, the decretalist Bernardus Papiensis summarizes this position when he writes that clerical judgment can be «\textit{manifestum}» or «\textit{occultum}» (as in the case of the penance)\textsuperscript{27}.

In the first regulation of the Penitentiary, which is the \textit{Summa de dispensationibus et absolutionibus} from 1290\textsuperscript{28}, two peculiar cases reserved to the Cardinal Penitentiary (\textit{casus speciales}) must be treated in \textit{foro confessionis} precisely because the facts are \textit{occulta}:


\textsuperscript{25} S. KUTTNER, «Ecclesia de occultis non iudicat», in \textit{Acta Congressus iuridici internationalis} (Rome, 12-17 nov. 1934), vol. 3, Rome 1936, p. 225-246.


\textsuperscript{28} About this \textit{Summa}, see A. LANG, «Beiträge zur Geschichte der apostolischen Pönitentiari
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Item potest dominus cardinals dispensare in foro confessionis sine testibus et litteris super quarto gradu affinitatis cum hoc impedimentum ignorabant contraentes tempore contracti matrimonii et si erat omnino occultum. […]

Item potest absolvere falsarios litterarum domini pape qui in ipsis litteris papalis addidisset unam litteram deficeret errore scriptoris, vel rasissent unam litteram que superhabuit et ubi per ipsas litteras nullus est processus habitus nee prejudicium aliquod subsecutum. Si tamen falsatio vel rasura modica fuerit et hoc penitus sit occultum et dispensare cum eis in foro confessionis sine testibus et litteris falsificatis tamen litteris antea lineatis29.

Usually in charge of writing a letter of response to the supplications (supplicationes) and to the petitions (petitiones), the Cardinal Penitentiary seems here to judge in foro confessionis when the fact is completely secret (omnino occultum). As we have already seen, the forum confessionis means that the procedure is secret, since all the written proofs shall be destroyed and no witness shall be summoned30. But according to this rule, the concern for preserving the secret of a case and avoiding the scandal that the public knowledge of this case might cause also justifies its use.

As it is shown by a letter from Gaucelme de Jean’s formulary (1336-1338), forum confessionis refers to the frame in which the secret judgment of a fault, which is itself secret, is pronounced:

Episcopo vel abbati.
Ex parte … fuit nobis expositum quod olim M. muliere, cum qua publice contraxerat nulla secuta carnali copula, transeunte ad religionem et se in ea professionis vinculo astringeret, idem aliciam mulierem quam nunc habet, uxor die dicto M. in quarto consanguinitatis gradu attinente, tunc huiusmodi consanguinitatis prorsus ignoramus, sibi matrimonialis et copulans prolem suspetit ex ea. Quare fecit humiliter supplicari quod, consanguinitate huiusmodi non obstante, in sic contracto matrimonio licite remanere possit, secum dispensare misericorditer curaramus. Nos igitur auctoritate etc., committimus quatenus, si est ita et dictus tempore contracti secundi matrimonii impedimentum huiusmodi ignoravit, et adeo est occultum quod probari non possit aliumque canonicum non obstat, cum eo super premisis in foro confessionis sine testibus et litteris laniatis presentibus misericorditer dispensetis31.

Here again, judging in foro confessionis consists in hushing up the matter by destroying the actual and potential proofs (litteris presentibus laniatis and nullis super hoc
adhibitis testibus), but clearly it is the fact that this case of consanguinity is secret that justifies that the dispensation can be granted in foro confessionis.

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We can summarize by saying that the forum confessionis stands for a secret procedure, which is related to the secret nature of a fact, that is to say a fact which has not caused a scandal. However, this forum could also be used before the submission of a case to the Penitentiary, when the supplicant confessed his fault to a priest, a bishop or even an abbot. Let us quote a last letter from the formulary of 1336-1338:

Abbati.
Ex parte tua nobis oblata petitiio continebat quod olim frater P. tui monasterii monachus quemdam suum commonachum occulte acriter verberavit […], et cum esset omnio secratum et etiam offensum offensorem omnino ignoraret, idem frater P. tanquam simplex et juris ignarus, ne hoc in publicum panderetur, […] receptit ordines et ministravit etiam, […]. In eisdem apertis tamen intelligentie oculis hoc tibi in foro penitentie revelavit. […] Nos […] committimus quatenus, si est ita et eius excessus adeo difficilis non fuerit vel enormis, post competentem satisfactionem passo secrete si adhuc occultum existat exhibitam, ipsum a dicta sententia quam propter hoc incurrit juxta formam ecclesie absolvas, […] super irregularitate inde contracta super ipsorum ordinum executione dispenses misericorditer cum codem32.

The forum penitentie refers without any doubt, even if not explicitly, to the confessio that the monk made to his abbott. We know that, from the 12th century, the confessio becomes a fundamental stage of the penance process, as much as of the civil or penal procedure, and appears more generally to be a major tool of the ecclesiastical discipline of Christian communities at every level of the clerical hierarchy33. But I hope to have made clear that the forum confessionis is a very specific sphere of judgment which does not reflect or encompass the entirety of the penitential system of the medieval Church. As it is, the forum of the confession is used in peculiar circumstances, that is when the fact is qualified as occultum, when it has caused no scandal, and when the Church tries to avoid the inevitable scandal that would be caused by the public knowledge of the case.

The forum confessionis or conscientiae is therefore one of the spheres of judgment through which the Apostolic Penitentiary exercises his jurisdiction. It is only a fragment of the large jurisdictional field of the Church, and we can easily discern the difference between the use of confession which consists in keeping the fact hidden, on the one hand, and the many exceptions to the seal of confession that the Inquisition justifies in order to hunt heretics, on the other hand34. Nonetheless, the relationship between both uses of confession — keeping it secret or making it public, avoi-

32 Avignon, BM, ms. 336, f. 21v.
34 Chiffoleau, «“Ecclesia de occultis non iudicat” ?», particularly pp. 398-401 and 411-418.
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...ding scandal or revealing the truth – deserves more attention because the same issue of defence of the Church as institution is at stake. This is precisely what makes the famous topic of utilitas Ecclesiae, which clerical judges had to protect, a very flexible argument...35.

35 E. Cortese, La norma giuridica. Spunti teorici nel diritto comune classico, 2 vol., Giuffrè, Milan 1962-1964, t. 2, pp. 102-109 and 330-335. About the notions of utilitas communis and utilitas publica in canon law, see R. Eckert, La notion de peine en droit canonique du Décret de Gratien (1140) au concile de Latran IV (1215), mémoire de l’EPHE (supervisor: L. Mayali), Paris 2007, pp. 80-113; C. Leveleux-Teixeira, «L’utilitas publica des canonistes. Un outil de régulation de l’ordre juridique», Revue française d’histoire des idées politiques, 32 (2010) 259-276, who shows that, by canonists, «public utility» is systemically related to disciplinary issues. It may also regard the internal organization of the Church as an institution, but it can not be considered as a kind of «norme supérieure qui s’imposerait de manière absolue, quels que soient les cas de figure envisagés, mais [doit plutôt l’être] comme un élément d’appréciation relatif, qui doit être jugé par référence à une utilité dite “privée”».