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Public Authority and Right to Kill in the 'Petit' and 'Falkenberg Affairs' at the Council of Constance (1414–1418)*

The years of the Great Western Schism (1378–1418) represent one of the periods in the history of pre-modern Europe that proved most fruitful for the elaboration of theories on authority, power, and the right of resistance.[1] The first sphere within which these theories arose and grew was, undoubtedly, that of ecclesiology. For three decades, Latin Christendom was divided into two factions headed by two pontiffs, one residing at Rome and the other at Avignon; the Council of Pisa (1408–1409), convened with the aim of restoring the unity of the Western Church, resulted rather in adding a third line of 'obedience' to the picture, thus further aggravating the divisions. Within this framework, the attempts at healing the schism could not but challenge an absolutistic view of the Petrine primacy, giving rise to debates on the nature and limits of the papal fullness of power, on the authority of the general council, as well as on the power of the latter to judge and depose a pontiff, if found lacking, for the common good of the *ecclesia*.[2] The conciliar solution was eventually endorsed and applied at Constance (1414–1418), where the council fathers successfully reunited the

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1 Among the many studies on the history of the Great Schism, see at least VALOIS, Noël: *La France et le Grand Schisme d'Occident*, 4 vols. Paris: Picard 1896–1902; DELARUELLE, E./LABANDE, E.-R./OURLIAC, Paul: *Histoire de l'Église depuis les origines jusqu'à nos jours. L'Église au temps du Grand Schisme et de la crise conciliaire 1378–1449*, 2 vols. Paris: Bloud et Gay 1962–1964; KAMISKY, Howard: *Simon de Cramaud and the Great Schism*. New Brunswick, N.J.: Rutgers University Press 1983; and IZBICKI, Thomas M./ROLLO-KOSTER, Joëlle (eds.): *A Companion to the Great Western Schism (1378–1417)* (= Brill's companions to the Christian tradition 17). Leiden: Brill 2009.

2 On conciliarism, it remains fundamental TIERNEY, Brian: *Foundations of the Conciliar Theory: the Contribution of the Medieval Canonists from Gratian to the Great Schism* (= Cambridge Studies in Medieval Life and Thought n.s. 4). Cambridge: Cambridge University Press 1955. See also OAKLEY, Francis: *The Conciliarist Tradition. Constitutionalism in the Catholic Church 1300–1870*. Oxford: Oxford University Press 2003; and BELLITTO, Christopher M./CHRISTIANSON, Gerald/IZBICKI, Thomas M. (eds): *The Church, the Councils, & Reform: The Legacy of the Fifteenth Century*. Washington: Catholic University of America Press 2008.

Western Church under one guide by deposing the three claimants to the Holy See and electing Otto Colonna, who took the name of Martin V.[3]

Alongside the negotiations for achieving the reunion (*causa unionis*) and reformation of the Church (*causa reformationis*), the third mission of the Council of Constance—namely, the eradication of heresy (*causa fidei*)—likewise furnished grounds for discussion concerning the nature of authority. During the trial procedures against the doctrines of John Wyclif (d. 1384), Jan Hus, and Jerome of Prague, for instance, the council fathers examined and finally condemned the propositions that "nobody is a secular lord, a prelate, or a bishop while he is in mortal sin" and that "people can correct their sinful lords at their discretion."[4] The idea that the rightful holding of a dignity of power was rooted in the moral worth of the holder was indeed regarded as a risky exhortation to unjustified disobedience and a threat to legitimate religious, social, and political bonds.[5]

Additionally, contemporary political events also gave rise to debate concerning the legitimacy of acts of rebellion against a usurper or an unjust ruler, and as well as the question to determine who was entitled to perform such acts. Two cases, in particular, came to the attention of the Council of Constance and were then included within the conciliar discussions on the matters of faith.

The first regarded the assassination of Louis, Duke of Orléans, on the instruction of the Duke of Bourgogne, John the Fearless, on 23 November

[3] On the Council of Constance, one must mention FRENKEN, Ansgar: *Die Erforschung des Konstanzer Konzils (1414–1418) in den letzten 100 Jahren* (= Annuarium historiae conciliorum: internationale Zeitschrift für Konziliengeschichtsforschung 25.1–2). Paderborn: Schöningh 1993; BRANDMÜLLER, Walter: *Das Konzil von Konstanz* (= Konziliengeschichte. Reihe A: Darstellungen), 2 vols. Paderborn: Schöningh 1991 and 1997 (rev. ed. of vol. I, 2000); ALBERIGO, Giuseppe: *Chiesa conciliare: Identità e significato del conciliarismo* (= Istituto per le scienze religiose di Bologna. Testi e ricerche di scienze religiose 19). Brescia: Paideia 1981, esp. 134–256; STUMP, Phillip H.: *The Reforms of the Council of Constance (1414–1418)* (= Studies in the history of Christian thought 53). Leiden: Brill 1994; NIGHMAN, Chris L./STUMP, Phillip: *A New Bibliographical Register of the Sermons and other Speeches Delivered at the Council of Constance (1414–18)*, in: Medieval Sermon Studies 50 (2006) 1, 71–84.

[4] The two propositions are the fifteenth ("Nullus est dominus civilis, nullus est praelatus, nullus est episcopus, dum est in peccato mortali") and the seventeenth ("Populares possunt ad suum arbitrium dominus delinquentes corrigere") of the forty-five Wycliffite theses condemned during the eighth session of the Council of Constance, opened on 4 May 1415 (see MANSI, Gian Domenico [ed.]: *Sacrorum conciliorum nova et amplissima collectio.* Venice: Zatta 1784, repr. 1960, XXVII, 633).

[5] On the Wyclif and Hus trials at Constance, see TATNALL, Edith C.: *The Condemnation of John Wyclif at the Council of Constance*, in: CUMING, Geoffrey J./BAKER, Derek (eds): *Councils and Assemblies* (= Studies in Church History 7). Cambridge: Cambridge University Press 1971, 209–218; KELLY, H.A.: *Trial Procedures against Wyclif and Wycliffites in England and at the Council of Constance*, in: Huntington Library Quarterly 61 (1998), 1–28; VOOGHT, Paul de: *L'Hérésie de Jean Huss* (= Bibliothèque de la revue d'histoire ecclésiastique 34). Louvain: Publications universitaires de Louvain 1960; and ŠMAHEL, František/PAVLÍČEK, Ota: *A Companion to Jan Hus* (= Brill's Companions to the Christian Tradition 54). Leiden: Brill 2015, especially the contributions authored by the two editors.

1407, which the theologian Jean Petit (ca. 1360–1411), in the famous speech *Justification du duc d'Orléans*, described as a licit tyrannicide, executed for the safety of the king and kingdom of France.[6] In the *Justification*, Petit claimed that a private individual has the right to kill a tyrant even when the two were bound to each other by an oath—as was the case with John the Fearless and Louis of Orléans—, thus describing tyrannicide as a legitimate and praiseworthy act that falls outside both the divine precepts *Non occides* (Ex. 20:13) and *Non perjurabis* (Lev. 19:12).[7] Jean Gerson (1363–1429), chancellor of the University of Paris, harshly criticized Petit's defense and tried persistently to obtain its condemnation.[8] Nine assertions extracted from the *Justification* were declared heretical by the Council of the Faith of Paris in 1414,[9] and then were submitted, one year later, to the examination of the Council of Constance.

[6] The fundamental study on the 'Petit affair' remains COVILLE, Alfred: *Jean Petit: la question du tyrannicide au commencement du 15e siècle*. Paris: Picard 1932. See also GUENÉE, Bernard: *Un meurtre, une societé. L'assassinat du duc d'Orléans 23 novembre 1407*. Paris: Gallimard 1992; FIOCCHI, Claudio: *Una teoria della resistenza: Jean Petit e la Justification du Duc de Bourgogne*, in: Rivista di Storia della Filosofia 55 (2000) 2, 161–186; and TURCHETTI, Mario: *Tyrannie et tyrannicide de l'Antiquité à nos jours*. Paris: Presses universitaires de France 2001, 319–332. The historical context is well presented by VAUGHAN, Richard: *John the Fearless*. London: Longmans 1966; and FAMIGLIETTI, Richard C.: *Royal Intrigue: Crisis at the Court of Charles VI, 1392–1420*. New York: AMS Press 1986.

[7] The issue of the prohibition of perjury in the Petit affair is treated in GUENÉE, Bernard: *'Non Perjurabis'. Serment et parjure en France sous Charles VI*, in: Journal des savants 3–4 (1989), 241–257.

[8] On Jean Gerson's contribution to the debate on tyrannicide, see, for instance, FLANAGIN, David Zachariah: *Tyrannicide and the Question of (Il)licit Violence in the Fifteenth Century*, in: IZBICKI, Thomas M./ALEKSANDER, Jason/DUCLOW, Donald: *Nicholas of Cusa and Times of Transition. Essays in Honor of Gerald Christianson* (= Studies in the History of Christian Traditions 188). Leiden: Brill 2018, 48–63; and MAZOUR-MATUSEVICH, Yelena: *Jean Gerson's Assessment of the Issue of Religious Zeal in the Context of the Tyrannicide Controversy*, in: The Medieval History Journal 16 (2013) 1, 121–137. Among the most recent general studies on Gerson, see MCGUIRE, Brian P.: *Jean Gerson and the Last Medieval Reformation*. Philadelphia: Pennsylvania State University Press 2005; ID. (ed.): *A Companion to Jean Gerson* (= Brill's Companions to the Christian Tradition 3). Leiden: Brill 2006; and HOBBINS, Daniel: *Authorship and Publicity before Print: Jean Gerson and the Transformation of Late Medieval Learning*. Philadelphia: University of Pennsylvania Press 2009. On Gerson's ecclesiological and political thought, see at least MORRALL, John B.: *Gerson and the Great Schism*. Manchester: Manchester University Press 1960; PASCOE, Louis B.: *Jean Gerson: Principles of Church Reform* (= Studies in Medieval and Reformation Thought 7). Leiden: Brill 1973; POSTHUMUS MEYJES, Guillaume H.M.: *Jean Gerson – Apostle of Unity: His Church Politics and Ecclesiology*, trans. J.C. Grayson (= Studies in the History of Christian Thought 94). Leiden: Brill 1999; and, most recently, SÈRE, Bénédicte: *Les débats d'opinion à l'heure du Grand Schisme. Ecclésiologie et politique* (= Ecclesia militans 6). Turnhout: Brepols 2016.

[9] The Council of the Faith took place from 30 November 1413 to 23 February 1414 and consisted of an assembly of the doctors and masters of the University of Paris—mostly belonging to the Faculty of Theology—gathered to consult on the orthodoxy of Petit's doctrine, which had been denounced as erroneous and contrary to the faith; see COVILLE: *Jean Petit*, 439–501. Among the rare studies dedicated to the Council of the Faith, one must mention

The second case dealt with the conflict between the Poles and the Teutonic Order. The latter was conducting military campaigns in northeastern Europe using the pretext of christianization even after the conversion of the formerly pagan Lithuania to Catholicism and its union with Poland. The marriage between Jadwiga of Anjou, heiress of Poland, and the Grand Duke Jogaila of Lithuania (Jagiełło, in Polish; Władysław, according to his new Christian name)—occurring together with the baptism of both Jagiełło and his cousin Vytautas (Witold), who succeeded him as Grand Duke—had indeed fulfilled the missionary task of the Teutonic knights in the Baltics, and rendered their raids illegitimate.[10]

The Polish-Lithuanian union defeated the Order in the battle of Grunwald in 1410, but the territorial disputes were still alive in the halls of the Council of Constance.[11] In particular, the tone of the quarrel heated up late in 1416, when the existence of a ferocious text, the *Satira contra haereses et cetera nefanda Polonorum et eorum regis Iyagyel fideliter conscripta* by the Dominican Johannes Falkenberg (ca. 1364–ca. 1429), came to the attention of the council fathers. This text defended the military activity of the Teutonic knights as a crusade for the protection of Christendom, advocating the idea that it was a right and a duty of both Christian princes and their subjects to kill Jagiełło—accused of false conversion as well as connivance with pagans and heretics—and to slay the entire population of Poland.[12]

KAMM, Carl: *Der Prozess gegen die 'Justificatio ducis Burgundiae auf der Pariser Synode': 1413–1414*. Rom: Armani Stein 1911.

10 See, for instance, CHRISTIANSEN, Eric: *The Northern Crusades: the Baltic and the Catholic Frontier 1100–1525*, London: Macmillan 1980. For the relation between Poland and the Teutonic Order in the fourteenth century, see KNOLL, Paul W.: *The Rise of the Polish Monarchy. Piast Poland in East Central Europe, 1320–1370*. Chicago: University of Chicago Press 1972.

11 See WÜNSCH, Thomas: *Konziliarismus und Polen. Personen, Politik und Programme aus Polen zur Verfassungsfrage der Kirche in der Zeit der mittelalterlichen Reformkonzilien* (= Konziliengeschichte. Reihe B: Untersuchungen). Paderborn: Schöningh 1998; and KWIATKOWSKI, Stefan: *Der Deutsche Orden im Streit mit Polen-Litauen: eine theologische Kontroverse über Krieg und Frieden auf dem Konzil von Konstanz (1414–1418)* (= Beiträge zur Friedensethik 32). Stuttgart: Kohlhammer 2000. On the role of the University of Cracow at the council, see KNOLL, Paul W.: *"A Pearl of Powerful Learning": The University of Cracow in the Fifteenth Century* (= Education and Society in the Middle Ages and Renaissance 52). Leiden: Brill 2016, 220–254.

12 For a recent account of the 'Falkenberg affair' and a discussion of the most relevant Polish scholarship on this matter, see GRAFF, Tomasz: *Servants of the Devil or Protectors of Christianity and Apostles among Pagans? Shaping the Image of Poland and Poles in the Context of Steps Taken by Wladyslaw II Jagiello's Diplomacy against "Satira" by John Falkenberg*, in: Folia Historica Cracoviensia 23 (2017) 1, 143–176. On Johannes Falkenberg, see BESS, Bernhard: *Johannes Falkenberg O.P. und der preußisch-polnische Streit vor dem Konstanzer Konzil*, in: Zeitschrift für Kirchengeschichte 16 (1896), 385–464, and BOOCKMANN, Hartmut: *Johannes Falkenberg, der Deutsche Orden und die polnische Politik* (= Veröffentlichungen des Max-Planck-Instituts für Geschichte 45). Göttingen: Vandenhoeck und Ruprecht 1975.

Falkenberg's *Satira* was attacked by the rector of the University of Cracow, Paulus Vladimiri (Paweł Włodkowic, in Polish; ca. 1370–1435), who attended the Council to defend the rights and reputation of Poles and Lithuanians against the defamatory propaganda spread by the Order.[13] But the issue also inflamed the spirit of council fathers who did not belong to the *natio germanica*. In particular, it caught the interest of many of the key personalities involved in the 'Petit affair', who then actively participated in the deliberations as to whether or not the *Satira* was heretical by transferring to this new subject of discussion part of the dossier of biblical and patristical *auctoritates*, as well as some of the theological, philosophical, and legal arguments that they had employed in the other case.[14]

The theoretical issues at stake in the 'Falkenberg affair' extended far beyond the discussion on tyrannicide generated by Petit's *Justification*, touching upon themes such as just war, the juridical and property rights of the pagans, and international law.[15] Nonetheless, as Anna Lisa Merklin Lewis remarked, the two cases had much in common.[16] Most notably, both the *Justification* and the *Satira* supported the idea that private individuals have the right and the moral duty to defend themselves and their community against a usurper (or, a would-be usurper), and that they are entitled—for

[13] Among the editions and studies of Paulus Vladimiri's work, one must mention BEŁCH, Stanisław: *Paulus Vladimiri and his Doctrine Concerning the International Law and Politics*, 2 vols. London: Mouton 1965; EHRLICH, Ludwik: *Pisma wybrane Pawa Włodkowica—Works of Paul Wladimiri (A Selection)*, 3 vols. Warszawa: Instytut wydawniczy Pax 1966–1969; WOŚ, Jan Władysław: *Dispute giuridiche nella lotta tra la Polonia e l'Ordine Teutonico. Introduzione allo studio di Paulus Wladimiri* (= Studia historica et philologica 9. Sectio slavica 3). Firenze: Licosa 1979; and KNOLL: *"A Pearl of Powerful Learning"*, 429–466.

[14] The dossier of acts of the Council related to the two cases can be found edited in JEAN GERSON: *Opera Omnia, Novo ordine digesta et in V. Tomos distributa*, ed. Louis Ellies du Pin. Antwerp 1706 (henceforth, DP), V; and FINKE, Heinrich (ed.): *Acta concilii Constanciensis*. Münster im W.: Regensberg 1928 (henceforth, ACC), IV, 237–432. See also the collections of acts in MANSI (ed.): *Sacrorum conciliorum nova et amplissima collectio*, XXVIII, 731ff., and VON DER HARDT, Hermann: *Magnum oecumenicum concilium Constantiense*, 6 vols. Frankfurt a.M./Leipzig 1692–1700.

[15] In particular, see RUSSELL, Frederick H.: *Paulus Vladimir's Attack on the Just War: A Case in Legal Polemics*, in: LINEHAN, Peter/TIERNEY, Brian: *Authority and Power. Studies on Medieval Law and Government Presented to Walter Ullmann on His Seventieth Birthday*. Cambridge: Cambridge University Press 1980, 237–254. For these themes in Francesco Zabarella, former teacher of Vladimiri and influent cardinal at the Council of Constance, see MORRISSEY, Thomas E.: *Natural Rights, Natural Law and the Canonist: Franciscus Zabarella, 1360–1417*, in: ID.: *Conciliarism and Church Law in the Fifteenth Century* (= Variorum Collected Studies Series 1043). Farnham: Ashgate 2014, 727–750.

[16] LEWIS, Anna Lisa Merklin: *Tyrannicide: Heresy or Duty? The Debates at the Council of Constance*, Ph.D. Diss. Cornell University 1990. Lewis provides a good outline of the debates dealing with the Petit and Falkenberg affairs in Constance. For her account of how previous scholarship understood the connection between the two cases, see LEWIS: *Tyrannicide: Heresy or Duty?*, 3–7. For instance, cf. BOOCKMANN: *Johannes Falkenberg*, 239–240; FINKE: *Die Verhandlungen über den Tyrannenmord auf dem Konzil. Einleitung*, in: ACC, IV, 237–254, and COVILLE: *Jean Petit*, 533–534.

that purpose and in certain circumstances—to use violence against him without a previous legal trial and without the explicit authorization of a public authority. By doing so, they both questioned the range of application of the divine precept against killing, and, in particular, the Augustinian principle that the only exceptions to the *Non occides* are the acts committed by someone obeying God's order or with a public mandate.

This article investigates how some of the main characters involved in the discussions over the orthodoxy of the *Justification* and the *Satira* dealt with the problematic relationship between public authority, individual action, and the right to kill. In particular, it considers how the conciliar fathers understood a series of passages in Augustine concerning the exceptions to the prohibition to kill (most notably, *De civitate Dei* 1:21 and *Decretum* C. 23 q. 8, attributed to *De civitate Dei* 1) in order to discuss whether a tyrant or heretical king could be legitimately slain by any private individual acting without a public mandate.

First, I will give an overview of Jean Petit's position as expressed in his *tertia veritas*—i.e. the first of nine propositions under the scrutiny of the Council of Constance (I). Next, I will present how, within the deliberations for and against the condemnation of the *Justification* for heresy, the opposers and supporters of the Burgundian party understood the precept *Non occides* and dealt with the passages from Augustine rejecting the legitimacy of killing without *publica auctoritas* (II). I will then consider Johannes Falkenberg's involvement in the Petit affair and the deliberations of the conciliar fathers regarding his *Satira* (III). Finally, I will return to Jean Gerson's position on the right of resistance and draw some conclusions (IV–V).

I. Killing tyrants without a public mandate: Jean Petit's *tertia veritas*

A tyrant can be lawfully and meritoriously slain; Louis of Orleans was a tyrant; thus, Louis of Orleans could be lawfully and meritoriously slain. The first part of the *Justification*—delivered on 8 March 1408 before the royal family, the representatives of the University of Paris, and members of the aristocracy and the Parisian bourgeoisie—aims to demonstrate the major premise of the syllogism on which Jean Petit grounded his apology of Jean the Fearless.[17]

Petit's defense of tyrannicide begins by defining *cupiditas* as the root of all evil and the crime of *lése majesté* (against God or against the legitimate

[17] The text of the *Justification du duc d'Orléans* is edited in Douët-d'Arcq, Louis (ed.): *Chronique d'Enguerran de Monstrelet en deux livres, avec pieces justificatives: 1400–1444*. Paris: Joules Renouard 1857, I, 177–244. One can find some extracts of the text, corrected according to MS Paris, BNF, Fonds Fr., 5733 (henceforth, P), in Coville: *Jean Petit* and Guenée: *Un meurtre, une société*; the manuscript is available online at <https://gallica.bnf.fr/ark:/12148/btv1b525122918/f1.item>.

human ruler) as the worst of crimes.[18] From this perspective, tyranny can be defined as a crime of *lése majesté* against the body of the legitimate sovereign, of his family, or of the state, generated by cupidity for honor and riches.[19] Since *lése majèste* is a crime punishable with death, then killing a tyrant is licit:

> [First truth:] Every subject or vassal that by cupidity, trickery, sorcery and evil machinations schemes against the health of his king and lord sovereign in order to subtract him his noble and high lordship, he sins gravely and he commits a horrible crime, as this is a crime of *lèse majesté* against the king or of first degree, and therefore he is worthy of a double death, namely both the first [corporeal] death and the second [spiritual] death.[20]

Thus, it follows that:

> [Third truth]: It is lawful to any subject, without any particular mandate or order from anyone, but according to the moral, natural and divine law, to kill or to get killed such disloyal traitor and tyrant; and this is not only lawful, but honorable and meritorious, especially when the latter is so powerful that justice cannot be executed by the sovereign himself.[21]

[18] On the crime of *lèse majesté* and high treason, see, for instance, SBRICCOLI, Mario: *'Crimen laesae majestatis'. Il problema del reato politico alla soglie della scienza penalistica moderna* (= Per la storia del pensiero politico moderno 2). Milan: Giuffrè 1974; CUTTLER, Simon H.: *Law of Treason and Treason Trials in Later Medieval France*. Cambridge: Cambridge University Press 1981; CHIFFOLEAU, Jacques: *Sur le crime de majesté*, in: *Genèse de l'État moderne en Méditerranée. Approches historique et anthropologique des pratiques et des representations* (= Collection de l'École française de Rome 16). Rome: École française de Rome 1993, 183–313; CONTAMINE, Philippe: *Inobédience, rébellion, trahison, lèse-majesté: observations sur les procès politiques à la fin du Moyen Âge*, in: BERCÉ, Yves-Marie (ed.): *Les procès politiques (XIV^e-XVII^e siècles)* (= Collection de l'École française de Rome 375). Rome: École française de Rome 2007, 63–82.

[19] Petit defines tyranny primarily as a crime of *lèse majesté* against the sovereign. In the nine corollaries of the fourth article, however, he also describes a tyrant as someone who commits a series of unjust and abusive deeds, such as maintaining armed men who despoil the country and harm its inhabitants, stealing the taxes they collect, making alliances with the enemies of the state, and so on (cf. JEAN PETIT: *Justification*, ed. Douët-d'Arcq, I, 222; P, f. 55r–v). Thus, to a certain extent, Petit understands the tyrant both as a usurper or a potential usurper (*tyrannus ex defectu tituli*), and as the despot who abuses his power (*tyrannus ex parte exercitii*), bringing together the two typologies of tyranny distinguished by the medieval tradition. Louis of Orléans was indeed accused of both scheming against the king in order to illegitimately usurp his power, and of committing despotic acts towards his direct subjects. On this point, see SPOERL, Johannes: *La teoria del tirannicidio nel Medioevo*, in: Humanitas 8 (1953), 1019–1020, discussed by FIOCCHI: *Una teoria della resistenza*, 170.

[20] JEAN PETIT: *Justification*, ed. Douët-d'Arcq, I, 203; P, f. 31r: "tout subject universel [tout subject et vassal, *P, f. 31r*] qui par convoitise, barat, sortilege et malengin, machine contre le salut de son roy et souverain seigneur, pour lui tolir et soubztraire sa très noble et haulte seigneurie, il pèche si griefment et commet si horrible crime, comme crime de lèse-majesté royale ou premier degré, et par conséquent il est digne de double mort, c'estassavoir, première et séconde."

[21] JEAN PETIT: *Justification*, ed. Douët-d'Arcq, I, 206; P, f. 34r; here as in COVILLE: *Jean Petit*, 440: "[*tertia veritas*] il est licite à ung chascun subjet sans quelconques mandement ou

This conclusion—displayed in the *Justification* as the third of eight *veritates* in which Petit summarized his theory of resistance—represents the core of his position on tyrannicide: (i) killing a tyrant (especially when the latter is a man of high rank) is lawful according to the moral, natural, and divine laws; (ii) not only is this act permitted, but it is also noble and laudable; (iii) it can be committed by any subject, in whatever way, and without any particular mandate from a public authority.

In order to prove this claim, Petit finds support in a series of pagan, scholastic, and literary authorities, examples of tyrannicide taken from the Scriptures, and three cases of murder allowed by the civil law regarding self-defense or the killing of deserters.[22] To those who would object that homicide is prohibited by divine, natural, moral and civil law, Petit answers that it is not killing in an absolute sense which is to be prohibited, but only unjust killing.[23] Indeed, a literal interpretation of the prohibition to kill would condemn tyrannicide; but one should distinguish between "la sentence textuale" of a law and "la cause pour quoy on la faict faire"—namely, the intention of the lawgiver. Positive laws only provide general directives, since they cannot foresee all possible circumstances; for this reason, one should consider case by case, interpreting the law according to the end for which it was created. It is therefore necessary to resort to the Aristotelian virtue of *epikeia* or equity (*Eth. Nicomac.* 5.10, 1137a32–1138a3) tempering the law in the light of the arrangements required by the particular situation to which the law applies ("epiqueier la dicte loy à l'entente de la fin").[24] If instead of relying on the pure *littera* one applies the principle of *epikeia*, it appears clear that killing a potential tyrant who was threatening the life of the sovereign does not involve breaking the law, but rather obeying its truest intention, "c'est assavoir l'onneur, bien et conservacion du prince."[25]

commandement, selon la loys morale, naturel ou divine, de occire ou faire occire ycellui traitre desloyal et tyrant, et non pas tant seulement licite, mais honorable et meritoire, maismement quant il est de si grand puissance que justice ne peut bonnement estre faite par le souverain."

[22] Namely, among the *doctores sacrae theologiae*, one finds Peter Lombard, John of Salisbury, Richard of Mediavilla, Alexander of Hales, Henry of Segusio; among the *philosophi morali*, Aristotle, Cicero and Boccaccio; as biblical examples, Petit cites Moses' killing of the Egyptian (Ex. 2:11–15), Phinehas slaying of Zimri (Num. 25), and Michael defeating Lucifer and casting him to hell. Concerning civil law, Petit reports the following cases: (i) slaying a deserter; (ii) killing for self-defense a thief who breaks into one's house at night; (iii) the traveler who kills in self-defense a bandit who threatens him in the forests.

[23] JEAN PETIT: *Justification*, ed. Douët-d'Arcq, I, 210; Cf. P, f. 39r.

[24] See, for instance, D'AGOSTINO, Francesco: *La tradizione dell'epikeia nel Medioevo latino: Un contributo alla storia dell'idea di equità* (= Pubblicazioni dell'Istituto di filosofia del diritto dell'Università di Roma. 3ª serie 15). Milano: Giuffrè 1976.

[25] JEAN PETIT: *Justification*, ed. Douët-d'Arcq, I, 211–214; P, f. 40r–43v. Alongside the principle of *epikeia*, Jean Petit appeals here to II Cor. 3:6 (*Littera enim occidit, spiritus autem vivificat*). The claim that "toujours tenir le sens litteral en la sainte Escriture est occire son

The *tertia veritas* is one of the points of the *Justification* that markedly caught the attention of his contemporary critics. Indeed, one can find it at the top of the two lists of theses allegedly maintained by Petit and suspected of heresy that were submitted, in 1413–1414, to the judgement of the Council of the Faith in Paris, and then, one year later, to the Council of Constance.

The first list was drafted by Jean Gerson in the sermon *Rex in sempiternum vive*, preached before the king and court on 4 September 1413, two years after Petit's death.[26] Here Gerson reported and rejected seven assertions—presented without naming their author—which were (more or less accurately) drawn from the *Justification*.[27] The first proposition consists of a radical reformulation of the *tertia veritas* (Text A, below). In this version, it is maintained that "any tyrant can and ought to be killed": not only usurpers or potential usurpers but all tyrants, including those with a legitimate title to rule. Petit's text, on the other hand, referred mainly to those who conspire against the sovereign. More importantly, Petit only claimed that tyrants *may be killed*, but not that *they ought to be*.

The discrepancy between the text of the *Justification* and Gerson's version of it was noted by the commissars of the Council of the Faith gathered in Paris to deliberate on the orthodoxy of Petit's doctrine. Hence, the commission prepared a new list, composed of nine assertions, which was closer to the original; the first assertion of this list reported the text of the *tertia veritas*, combined with the *prima veritas*, without the tricky shift that Gerson had inserted in his version (Text B).

The nine propositions were declared heretical by the Council of the Faith on 23 February 1414, but none of them was censured by the Council of Constance, which ultimately even annulled the sentence of Paris as invalid for procedural reasons. The only proposition concerning tyrannicide that received an official censure in Constance—without any explicit mention to Jean Petit or the *Justification*—was the *Quilibet tyrannus* (Text C),

âme" constitutes the eighth of the nine assertions condemned at the Council of the Faith of Paris in 1414, and then re-examined at the Council of Constance. On this point, which certainly deserves further attention, see FOELICH, Karlfried: *"Always to Keep the Literal Sense in Holy Scripture Means to Kill One's Soul." The State of Biblical Hermeneutics at the Beginning of the Fifteenth Century*, in: MINER, Earl: *Literary Uses of Typology from the Late Middle Ages to the Present*. Princeton, NJ: Princeton University Press 1977, 20–48.

[26] JEAN GERSON: *Rex in sempiternum vive*, in: *Œuvres complètes*, ed. Palémon Glorieux, 13 vols. Paris: Desclée de Brouwer 1960–1974 [henceforth, Gl.], VII**, 1005–1030, here at 1020–1023.

[27] For a comparison between the seven propositions and the text of the *Justification*, see COVILLE: *Jean Petit*, 440–441. It is worth noting that, in the framework of Jan Hus' trial, Gerson similarly drafted and then presented to the Council twenty articles allegedly selected from Hus' *De ecclesia* which did not correspond with the author's actual claims. See MARIN, Olivier: *Orgueil et Préjugé? Jean Gerson face à Jean Hus*, in: DOLEŽALOVÁ, Eva/HRDINA, Jan/KAHUDA, Jan (eds): *Pater familias. Sborník příspěvků k životnímu jubileu Prof. Dr. Ivana Hlaváčka*. Prague: Scriptorium 2002, 381–399.

condemned during the fifteenth session, on 6 July 1415. This proposition merely consisted of a Latin translation of the first of the seven assertions drafted by Gerson (Text A), which the commissars of the Council of the Faith had already excluded from the debate as not reproducing Petit's argument correctly.

(A) First of the seven assertions ascribed to Jean Petit by Jean Gerson (JEAN GERSON: *Rex in sempiternum vive*, Gl. VII**, 1020)	(B) First of the nine assertions condemned by the Council of the Faith of Paris on 23 February 1414 (*Chartul. Univ. Paris.*, IV, 278, n. 20122)	(C) Article condemned during the 15th session of the Council of Constance, on 6 July 1415 (MANSI [ed.], *Concilia*, XXVII, 765)
Chascun tiran doit et peut estre louablement et par merite occis de quelconque son vassal ou subjet et par quelconque manière, mesmement par aguettes ou par flatteries ou adulations nonobstant un quelconque jurement ou confédérations faites envers lui, *sans attendre la sentence ou mandement de juge quelconque.*	*Il est licite* à un chacun subject *sans quelconque mandement ou commandement*, selon les loys naturel, moral et divine, d'occire ou faire *occire tout tirant qui par convoitise, barat, sortilege ou mal engin, machine contre le salut corporel de son roy et souverain seigneurie, pour luy tollir sa très noble et très haulte seigneurie*, et non pas seulement licite, mais honnorable et meritoire, mesmement quant il est de si grande puissance que justice ne peut bonnement estre faicte par le souverain.	*Quilibet tyrannus potest et debet* licite et meritorie occidi per quemcumque vassallum suum vel subditum, etiam per clanculares, insidias et subtiles blanditias vel adulationes, nonobstante quocumque praestito iuramento seu confoederatione factis cum eo, *non expectata sententia vel mandato judicis cujuscumque.*

The philological ambiguities with which the *Justification* was quoted and commented on by the council fathers—as well as the decision of the Council to condemn a proposition, which was questionably attributable to Petit—caused the endless continuation of debates in Constance on this matter. On the one side, Gerson and his allies (the so-called *Gersonistae*) asked the Council to explicitly condemn the nine propositions or to recognize that they were implicitly contained in the *Quilibet tyrannus*. On the other hand, the Burgundian embassy—headed by Martin Porée (d. 1426),

bishop of Arras—denied that the *Quilibet tyrannus* was consonant with Petit's position and that the *Justification* was heretical.[28]

II. "*Non occides* (Ex. 20:13)—de ta proprie authorité": Augustinian echoes in the Petit affair

Leaving aside the debates on the differences between the *Quilibet tyrannus* and Petit's *Justification*, it is worth considering how the council fathers of the two opposing parties dealt with the passage of the *tertia veritas*—reported quite consistently in all the above-mentioned formulations—concerning the possibility for the tyrant slayer of killing "sans quelconques mandement ou commandement". The problem of the correct understanding of the precept *Non occides* with respect to private individual action occupied a notable part of the discussions on the orthodoxy of Petit's thesis.

In the *Rex in sempiternum vive*, Gerson argued that the proposition at hand was erroneous and against the Christian doctrine and morals, since it violated the commandment *Thou shall not kill*, which should be more precisely understood as "*Thou shall not kill*, by your own authority". Invoking the principle of the slippery slope, Gerson remarked that the acceptance of that thesis would lead to the complete subversion of public life. If everyone was entrusted with the right to kill without a public mandate, all kinds of evil would occur: fraud, violence, and the total destruction of the bond of *fides* that was the basis of the relation between the lords and their subjects.[29]

Gerson's objection relied on the traditional idea, supported by Augustine and included in the *Decretum* by Gratian, that one should distinguish between a private and a public use of violence, and that in a Christian society only the latter could be fully accepted.

[28] For a short biography of Martin Porrée and an account of his contribution to the Council, see Vallery-Radot, Sophie: *Les Français au concile de Constance (1414–1418): entre résolution du schisme et construction d'une identité nationale* (= Ecclesia militans histoire des hommes et des institutions de l'Eglise au Moyen Âge 5). Turnhout: Brepols 2016, 235–238.

[29] Jean Gerson: *Rex in sempiternum vive*, Gl. VII**, 1020–1021: "Cette assertion [...] est erreur en nostre foy et en doctrine de bonnes moeurs, et est contre ce commandement de Dieu: *non occides* (Ex. 20:13), de ta proprie authorité; et: *Omnes qui gladium acceperint*, glossa: propria authoritate, *gladio peribunt* (Mt. 26:52). Item cette assertion tourney a la subversion de toute chose publique et d'un chascun roy ou prince. Item donne voye et licence a plusieurs autres maux, comme a frauds, a violences de foy et de sermnent, et a trahisons et mensonges et deceptions; et generalment a toute inobedience de subjets a son seigneur et a toute deloyauté et defiance des uns aux autres, et consequamment a pardurable damnation."

A collection of some relevant Augustine quotations embracing this principle can be found gathered in the *schedula* delivered by Henricus, bishop of Nantes, within the acts of the Council of the Faith in Paris:[30]

(I*) *De civ. Dei* 1(?)* (*Gratianus, *Decretum*, C. 23 q. 8 c. 33): Qui vero sine aliqua publica amministratione, maleficum, furem, sacrilegum, adulterum et perjurum, vel quemlibet criminosum interfecerit, aut trucidaverit, vel membris debilitaverit, velut homicida iudicabitur, et tanto acrius, quanto non sibi a Deo concessam potestatem abusive usurpare non timuit.

(II*) *De civ. Dei* 1.26 (C. 23 q. 5 c. 13): Miles, cum obediens potestati, sub qua legitime constitutus est, hominem occidit, nulla civitatis suae lege reus est homicidii; immo, nisi fecerit, reus imperii deserti atque contempti est. Quod si sua sponte atque auctoritate fecisset, crimen effusi humani sanguinis incidisset. Itaque unde punitur, si fecerit iniussus, inde punietur, si non fecerit iussus.

(III*) *Epist. 153, Ad Macedonium*, 6.17 (C. 23 q. 5 c. 19): Cum homo ab homine occiditur, multum distat, utrum fiat nocendi cupiditate, vel iniuste aliquid auferendi (sicut fit ab inimico, sicut a latrone), an ulciscendi vel obediendi ordine (sicut a iudice, sicut a carnifice), vel evadendi vel subveniendi necessitate, sicut interimitur latro a viatore, hostis a milite.

(IV*) *Epist. 47, Ad Publicolam* 5 (C. 23 q. 5 c. 8): De occidendis hominibus ne ab eis quisquam occidatur, non mihi placet consilium, nisi forte sit miles, aut publica functione teneatur, ut non pro se hoc faciat, sed pro aliis vel pro civitate, ubi etiam ipse est, accepta legitima potestate, si eius congruat personae.

(V*) *Quaest. In Ex.* 49 (C. 23 q. 5 c. 14): Cum minister iudicis occidit eum quem iudex iussit occidi, profecto, si id sponte faciat, homicida est, etiamsi eum occidat, quem scit occidi a iudice debuisse.[31]

To these, one should add another passage, often quoted in the deliberations against Petit in Constance:

(VI*) *De civ. Dei* 1.21 (C. 23 q. 5 c. 9): His igitur exceptis, quos vel lex iusta generaliter vel ipse fons iustitiae Deus specialiter iubet occidit, quisquis hominem vel se ipsum vel quemlibet occiderit, homicidii crimine innectitur.[32]

Three passages come from the *De civitate Dei—verbatim*, in the case of II* and VI*; *ad sensum*, in the case of I*[33]—, two from the *Epistolae*—to Mace-

[30] This is the first *schedula* of the *Sententia LXXXIX magistrorum de schedula ad eos missa, continente propositiones Joannis Parvi*, DP V, 81–88. On the context of this series of deliberations, see COVILLE: *Jean Petit*, 465–466.

[31] Here and below, the quotations are reported as they appear in GRATIANUS: *Decretum*, in: FRIEDBERG, Emil (ed.): *Corpus iuris canonici*. Leipzig: Tauchnitz 1879 [reprint Graz 1955], I, 932–936, 965. For a fuller account of patristic and scholastic *auctoritates* brought in support of Petit's condemnation by the *Gersonistae*, see JEAN GERSON: *Contre le VII assertions. Mémoire et dossier*, Gl. X, 181–206 (cf. DP, V, 97–121).

[32] See, for instance, DP V, 755, 788, 920, 941, 971, 990.

[33] In the acts of the Council of the Faith and of the Council of Constance, I* is referred to as being drawn from the first book of *De civitate Dei*—third book, according to the bishop

donium (III*) and to Publicola (IV*), respectively—, and one from the *Quaestiones in Exodum* (V*). These quotations are all included in the *Causa* 23 of the *Decretum* and it is presumable that both the bishop of Nantes and the council fathers who reported these passages in their deliberations drew them from there, rather than first-hand from Augustine's works. The *Causa* 23, the first of the so-called *Causae hereticorum* (23–26), represented indeed the *locus classicus* for discussions on warfare, coercion, capital punishment, and, more generally, on the regulation of the use of force in a Christian society.[34]

Passages I*, II* and VI* were originally developed in the context of a discussion of the (il)liceity of suicide. In the first book of the *De civitate Dei* (1.17–27), when considering the moral dilemma of those Christian women who preferred suicide over being victims of rape, Augustine treated the problem of voluntary death within the broader issue of the possibility for an individual to dispose of human life—his own or of another. Augustine's argument was that if it is not allowed for a human being to kill a criminal on the basis of a merely personal power, even more so is it not

of Nantes in DP, V, 82. However, it cannot be found in the *De civitate Dei* in this exact form; it is rather taken from *Decretum*, C. 23 q. 8 c. 33 (cf. GRATIANUS: *Decretum*, I, 965). Thomas Aquinas quoted this passage in the *sed contra* of a *quaestio* of the *Summa theologiae* discussing whether it is lawful for a private individual to kill a man who has sinned, and on this occasion he also reported it as being taken from the first book of the *De civitate Dei*: "Sed contra est quod Augustinus dicit, in I de Civ. Dei: *Qui sine aliqua publica administratione maleficum interfecerit, velut homicida iudicabitur, et tanto amplius quanto sibi potestatem a Deo non concessam usurpare non timuit*. Respondeo dicendum quod, sicut dictum est, occidere malefactorem licitum est inquantum ordinatur ad salutem totius communitatis. Et ideo ad illum solum pertinet cui committitur cura communitatis conservandae, sicut ad medicum pertinet praecidere membrum putridum quando ei commissa fuerit cura salutis totius corporis. Cura autem communis boni commissa est principibus habentibus publicam auctoritatem. Et ideo eis solum licet malefactores occidere, non autem privatis personis" (THOMAS AQUINAS: *Summa theologiae*, IIa IIae, q. 64 a. 3, in: *Opera omnia iussu impensaque Leonis XIII P.M. edita*. Rome: Typ. Polyglotta S.C. de Propaganda Fide 1897, t. IX, 69).

[34] For a thorough discussion of the scholarship on the *Causa* 23, see EICHBAUER, Melodie H.: *Rethinking Causae 23–26 as the Causae hereticorum*, in: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte 132. Kanonistische Abteilung 101 (2015), 86–149. See STICKLER, Alfonsus M.: *De ecclesiae materiali apud magistrum Gratianum*, in: Salesianum 4 (1942), 97–119; SCULLY, Sally Anne: *Killing ex officio: The Teachings of 12th and 13th Century Canon Lawyers on the Right to Kill*, Ph.D. Diss. Harvard University, 1975; and BRUNDAGE, James A.: *The Hierarchy of Violence in Twelfth- and Thirteenth-Century Canonists*, in: The International History Review 17 (1995) 4, 670–692. For the influence of Augustine on the *Causa* 23 and on the medieval theories of just war, see RUSSELL, Frederick H.: *The Just War in the Middle Ages* (= Cambridge Studies in Medieval Life and Thought. Series 3.8). Cambridge: Cambridge University Press 1975; and DE PAULO, Craig J.N./MESSINA, Patrick: *The Influence of Augustine on the Development of Just War Theory*, in: DE PAULO, Craig J.N./MESSINA, Patrick/TOMPKINS, Daniel P. (eds): *Augustinian Just War Theory and the Wars in Afghanistan and Iraq. Confessions, Contentions, and the Lust for Power*. New York: Peter Lang 2011, 30–34. More generally, on Augustine's political thought, see DEANE, Herbert: *The Political and Social Ideas of St. Augustine*. New York: Columbia University Press 1963.

permitted to those who are innocent to kill themselves. Suicide is but an act of self-murder, which therefore falls within the precept *Non occides.*[35]

Within this framework, in *De civitate Dei* 1.21 (IV*), Augustine indicated two exceptions to the prohibition of homicide. The first is when God commands a particular person at a particular time to slay another—as with the case of Abraham, willing to sacrifice Isaac (Gn. 22), or Jephthah who had to sacrifice his own daughter in order to satisfy his vow (Jdg. 11), or Samson who killed himself together with his enemies by divine inspiration (Jdg. 16). The second exception is when the killing is sanctioned by a general law and performed by a person who acts in a public capacity. This is the case of the minister carrying out the sentence given by a judge or a soldier who kills the enemy in battle without any spirit of personal revenge but simply fulfilling his duty.[36] In that case—as Augustine remarks also in *De civitate Dei* 1.26 (II*)—the soldier or the executioner have no responsibility over the murder, but are rather mere instruments of a superior authority which they must obey.

The quotation taken from the *Epistola 153* to Macedonium (III*) also remarks that the intention and the modality with which the killing is performed are decisive in order to evaluate the legitimacy of such an act. It is one thing to commit a murder out of the desire to hurt the other; it is another to kill while following the command of a superior authority and with the aim of defending someone else, and thus acting within an ordered sys-

[35] On the problem of suicide in Augustine, see BELS, Jacques: *La mort volontaire dans l'œuvre de saint Augustin*, in: Revue de l'histoire des religions 187 (1975) 2, 147–180 and MURRAY, Alexander: *Suicide in the Middle Ages*, vol. II: *The Course on Self-Murder*. Oxford: Oxford University Press 2000, repr. 2007, 101–121. The theme of voluntary death connected to rape is treated, for instance, by MILES, Margaret R.: *From Rape to Resurrection: Sin, Sexual Difference, and Politics*, in WETZEL, James (ed.): *Augustine's City of God: A Critical Guide* (= Cambridge Critical Guides). Cambridge: Cambridge University Press 2012, 75–92; and WEBB, Melanie: *'On Lucretia who slew herself': Rape and Consolation in Augustine's 'De civitate dei'*, in: Augustinian Studies 41 (2013) 1, 37–58.

[36] Here the entire passage: "Quasdam vero exceptiones eadem ipsa divina fecit auctoritas, ut non liceat hominem occidi. Sed his exceptis, quos Deus occidi iubet sive data lege sive ad personam pro tempore expressa iussione, (non autem ipse occidit, qui ministerium debet iubenti, sicut adminiculum gladius utenti; et ideo nequaquam contra hoc praeceptum fecerunt, quo dictum est: *Non occides*, qui Deo auctore bella gesserunt aut personam gerentes publicae potestatis secundum eius leges, hoc est iustissimae rationis imperium, sceleratos morte punierunt; et Abraham non solum non est culpatus crudelitatis crimine, verum etiam laudatus est nomine pietatis, quod voluit filium nequaquam scelerate, sed oboedienter occidere; et merito quaeritur utrum pro iussu Dei sit habendum, quod Iephte filiam, quae patri occurrit, occidit, cum id se vovisset immolaturum Deo, quod ei redeunti de proelio victori primitus occurrisset; nec Samson aliter excusatur, quod se ipsum cum hostibus ruina domus oppressit, nisi quia Spiritus latenter hoc iusserat, qui per illum miracula faciebat). His igitur exceptis, quos vel lex iusta generaliter vel ipse fons iustitiae Deus specialiter occidi iubet, quisquis hominem vel se ipsum vel quemlibet occiderit, homicidii crimine innectitur" (AUGUSTINE: *De civitate Dei* 1.21, ed. Bernhard Dombart, Alphonsus Kalb [= Corpus Christianorum Series Latina 47]. Turnhout: Brepols 1955, 23.

tem of retribution—such as the judge, the executioner, and the soldier normally do.[37]

From this perspective, as summarized in C. 23 q. 8 c. 33 (I*), "a man who, without exercising public authority, kills an evil-doer [...] must be judged guilty of murder and all the more, since he has dared to usurp a power which God has not given him". According to the bishop of Nantes, who reported this passage as the first of his list of *auctoritates*, this argument alone would suffice to show that Petit's proposition was erroneous.[38]

The passages I* *Qui vero sine aliqua publica administratione* (C. 23 q. 8 c. 33) and VI* *His igitur exceptis* (*De civ. Dei* 1.21; C. 23 q. 5 c. 9) are among the most frequently cited *auctoritates* in the discussions over public authority and the right to kill concerning the Petit (and Falkenberg) affair(s) at the Council of Constance. One point, in particular, provided matter for discussion. In *De civ. Dei* 1.21, Augustine stated that the *persona gerens publicam potestatem* is the only one allowed to slay a human being. But what did Augustine actually mean with "person carrying the public power"? The examples of the soldier or of the executioner who do not act *sua sponte atque auctoritate* but carry out the orders of a superior authority seem to imply that only those who receive a direct command or officially hold a public function can lawfully kill a criminal or an enemy. The formulation reported by Gratian in C. 23 q. 8 c. 33, which forbids homicide for those *sine aliqua publica administratione,* also gives the impression of alignment with this legalistic reading. Augustine's position, however, left room for less strict interpretations. John von Heyking remarked that, by *persona gerens publicam potestatem*, Augustine "referred primarily to the authority of a virtuous human being and secondarily to an officeholder."[39] Considered within the Roman framework in which it was conceived, the

[37] For the case of the judge and the executioner, cf. V*. In III*, Augustine seems to also admit the liceity of killing another by necessity while trying to escape a life-threatening danger, as when a robber gets killed by the traveler he attacked. In the *Epistola 47* to Publicola (IV*), however, Augustine displays his disapproval for the case of murder for self-defense when this is committed by private individuals with the aim of defending their own lives. The act is instead justified when the one who kills happens to be a soldier or a public functionary acting, not for himself, but in defense of others or of the community, if he is lawfully authorized and if he acts conformably to his office.

[38] DP V, 82: "Ista authoritas videtur sola sufficere ad clare monstrandum praedictae propositionis erroneam falsitatem; cum tyrannus non est occidendus nisi quia criminosus etiam in authoritate cujuslibet potestatis; quinimo etiam condemnatum pro quocumque crimine non licet alicui propria authoritate perimere: quia quanto majus est et enorme ejus crimen, tanto gravius offendit ipsum perimens sine jussu; [...] quia superioris authoritatem et sui officii debitum impendit et usurpat."

[39] HEYKING, John von: *Augustine and Politics as Longing in the World*. Columbia, MO: University of Missouri 2001, 123–126, here 123. Von Hewyking contraposes Augustine's loose understanding of this expression with, for instance, the use of it in the *Policraticus* by John of Salisbury (4.2), who clearly equated the expression *gerens personam publicam* with the prince or with an officer.

expression "bearer of public power" should be understood as transcending a legalistic interpretation; it surely designates expressly authorized officers, but it may refer also to virtuous individuals, without official power, acting in the public interest of the state. This semantic ambiguity did not remain unnoticed by the council fathers, and allowed them to twist the 'wax-nose' of Augustine's *auctoritas* by explaining it in a way that was compatible with their own position.

The authority of Augustine, taken in its legalistic reading, played a central role, for instance, in the *declaratio* delivered in Constance on 8 November 1415 by Pierre d'Ailly (1351–1420), Cardinal of Cambrai and mentor of Gerson.[40] Aligned with his former pupil, the Cardinal defended the sentence of heresy issued by the Council of the Faith and advocated the official censure of Petit's *Justification* by the Council of Constance. According to d'Ailly, the nine propositions were *virtualiter* contained in the *Quilibet tyrannus*, which had been sentenced as heretical during the fifteenth session. Furthermore, they were dangerously related to (and even more deplorable than) the thesis by John Wyclif, condemned during the eighth session, according to which the commoners could correct their lords at their whim when these were guilty of a crime.[41]

In order to prove that the *pestifera doctrina* must be condemned, the Cardinal relies on a few fundamental arguments, which he defines as sufficient to solve the issue: the precepts *Non occides* ("scilicet absque authoritate iudiciaria"), *Non perjurabis* ("ubi omne juramentum jubetur observari, quod non vergit in detrimentum animae"), the principle forbidding the killing of someone by means of deception and trickeries (*Si quis per industriam occiderit proximum suum, et per insidias: ab altari meo evelles eum, ut moriatur*, Ex. 21:14), the decretal *Pro humani. De homicidio,* VI (*Lib. Sext.* V, t. 4, c. 1), and finally the Augustinian passages I* *Qui vero sine aliqua publica administratione* and VI* *His igitur exceptis*, which are consonant with the aforementioned gloss to *Non occides*.

Jordanus Morini (d. ca. 1442), supporter of Gerson in the debate, similarly indicated the two Augustinian exceptions to the prohibition of killing ("nisi in publica auctoritate vel divina inspiracione") as conforming to the

[40] For an account of Pierre d'Ailly's contribution to the Council, see VALLERY-RADOT: *Les Français au concile de Constance*, 254–260. More generally, on his political and ecclesiological thought, see GUENÉE, Bernard: *Entre l'Église et l'État: quatre vies de prélats français à la fin du moyen âge (XIII^e–XV^e siècles)*. Paris: Gallimard 1987, 125–299; OAKLEY, Francis: *The Political Thought of Pierre d'Ailly: The Voluntarist Tradition* (= Yale Historical Publications. Miscellany 81). New Haven, Conn.: Yale University Press 1964; and PASCOE, Louis B.: *Church and Reform: Bishops, Theologians, and Canon Lawyers in the Thought of Pierre d'Ailly (1351–1420)* (= Studies in Medieval and Reformation Traditions 105). Leiden: Brill 2005.

[41] DP, V, 474–475. The proposition mentioned by Pierre d'Ailly ("Populares possunt ad suum arbitrium dominus delinquentes corrigere") is the seventeenth of the forty-five Wycliffite theses condemned at the Council of Constance, see fn. 4, above.

most common sense and use of this *certum principium* of Christian religion.[42]

This gloss, however, was not readily accepted by the supporters of the Burgundian cause. While Gerson and his allies stressed that a correct use of violence needs the endorsement of a judicial authority and the fulfillment of proper legal procedures, a large number of conciliar fathers opted for a different understanding of the precept *Non occides*, by referring to the case of necessity and by drawing an analogy between the slaying of a tyrant and the killing for self-defense or within a just war.

A prime example is the position of Martin Porée, Bishop of Arras—head of the Burgundian delegation and most strenuous adversary of Gerson in Constance. Answering to Pierre d'Ailly's deliberation, Porée denied that the gloss "absque auctoritate iudiciaria" rendered correctly the true meaning of the divine prohibition of killing. For instance, this interpretation would preclude the killing of a thief who breaks into one's house at night or, more generally, to answer an attack with the use of force.[43] According to Porée, the right of self-defense gives instead someone the *auctoritas* to commit violence, although this is not a *judiciaria officiaria auctoritas*. If one reacts to a violent attack with violence and this counteroffensive causes the death of the attacker, the person who commits the murder would not be endowed with a proper judicial authority. Yet, that person would kill according to the authority of the law. In that specific circumstance, one would act as a minister of the law, even if not *ex officio*. Porée brings the example of a layman who, in case of emergency, has the authority to administer baptism even though normally he could not.[44]

[42] ACC, IV, 293–297 (4 January 1416), here 294–295: "in qualibet materia, sciencia, arte, lege vel secta debent esse principia directiva, ad que omnia debent resolvi. Item debent esse omnibus nota et communissima secundum communem sensumm, qui communiter eis datur et secundum quem in usum veniunt. [...] <actus predictus> repugnat illi precepto: 'Non occides' secundum sensum, usum et observacionem communem; ergo etc. Nam sancti doctores secundum sensum precepti dicunt quod non licet occidere nisi in publica auctoritate vel divina inspiracione." On Jordanus Morini, see VALLERY-RADOT: *Les Français au concile de Constance*, 225–227; and SULLIVAN, Thomas J.: *Parisian Licentiates in Theology, A.D. 1373–1500: a Biographical Register*, vol. II: *The Secular Clergy*. Leiden: Brill 2011, 383–385.

[43] MARTIN PORÉE: *Responsio ad deliberationem dom. Card. Cameracensis*, DP, V, 478: "Non est enim contra primum [praeceptum decalogi], cum dicitur *Non occides*, quod glosatur distorte, et aliter quam Spiritus Sanctus efflagitat, cum dicit *absque authoritate judiciaria*. Si enim ista glosa esset convertibilis cum praecepto, tunc sequeretur quod nullus posset occidere furem nocturnum; sed nec etiam vim vi repellere liceret."

[44] MARTIN PORÉE: *Responsio ad deliberationem dom. Card. Cameracensis*, DP, V, 478: "Ergo occidens, in multis casibus, non occidit judiciaria officiaria authoritate; tamen occidit authoritate legis, cuius est minister, in casu et non ex officio, ut declarat Doctor irrefragabilis Alexander de Hales, de occidente invasorem suum ad mortem: *Quem*, inquit, *occidit ut minister Legis et iustitia, non tamen ex officio.* Et dat exemplum de laico baptisante in casu necessitatis, qui baptisat non ex officio, et licite ut legis minister in casu necessitatis." Cf. ALEXANDER DE HALES: *Summa theologica* p. 2, in. 3, tr. 2, sec. 1, q. 2, tit. 5, membr. 2, c. 2, a. 2, *ad ob.* 2, ed. Quaracchi: Collegium S. Bonaventurae 1924–1948, III, nr. 358, p. 533. On emer-

Porée maintains that the precept *Non occides* should thus be understood as follows: "*Thou shall not kill*, that is the innocent, out of spirit of revenge, or by your own authority". But the tyrant is not innocent, and the tyrant-slayer is moved by the charitable desire to preserve the safety of his prince and the state, and he acts by the authority of law. If one understands *Non occides* in such a way, the Augustinian passages referred to by Pierre d'Ailly do not stand against Petit's position, but actually support it, since natural, moral, and divine law gives, to a certain extent, public authorization to the tyrant slayer.[45]

The idea of an 'implicit mandate' can be found also in the *advisamentum* by the Florentine Cardinal Giovanni Dominici (1356–1419), Archbishop of Ragusa and representative of the Roman claimant Angelo Correr (Gregory XII) at the Council.[46] According to Dominici, the tyrant-slayer would be implicitly authorized both by God, against whose will the usurper stands, and by the rightful sovereign, who would certainly give his approval, if he only were aware of the threat.[47] His position is indeed comparable to that of a private individual who, during a just war, defends his leader in a moment of danger even if not specifically ordered to do so.[48] Making use of the organic metaphor of the state, Dominici explains that just as in a real body all the limbs tend to protect the head, so in the mystical body all the

gency baptism administered by laymen, see, for instance, THOMAS AQUINAS: *Summa Theologiae*, IIIa, q. 67, a. 3, who refers to Pope Gelasius (*Epist. ad Episc. Lucan.* 7) and Isidore of Sevilla (*De eccl. off.* 2, 24). This possibility was however admitted already by Tertullian (*De bapt.* 17, PL 1, col. 1218); see BAREILLE, Georges: *Baptême d'après les Pères grecs et latins*, in: *Dictionnaire de théologie catholique*, II, col. 187–189.

45 MARTIN PORÉE: *Responsio ad deliberationem dom. Card. Cameracensis,* DP, V, 478: "Non ergo sic glosatur illud praeceptum, nec ita communiter glosatur, sed sic: *Non occides,* scilicet *innocentem, livore vindictae, aut propria authoritate.* Constat aute quod tyrannus non est innocens; nec talis subditus eum interficit authoritate propria, sed legum; non livore vindictae, sed amore conservationis principis sui et reipublicae." Ibid., 479: "Ad illud Augustini, libro *De civitate Dei*, illa auctoritas solvit se ipsam [...] quoniam lex justa naturali, moralis et divina talem occisionem generaliter authorizant."

46 On Giovanni Dominici's contribution to the discussion on tyrannicide, see MÉSONIAT, Claudio: *'Poetica theologia': la 'Lucula noctis' di Giovanni Dominici e le dispute letterarie tra '300 e '400* (= Uomini e dottrine 27). Rome: Storia e letteratura 1984, 123–146; and LEWIS: *Tyrannicide: Heresy or Duty?*, 142–145.

47 JOHANNES DOMINICI: [*Advisamentum*], ACC, IV, 280: "Non est autem dubium quod determinatus in mortem veri principis Deo resistit. Qui enim potestati resistit, Deo resistit. Preterea, si princeps est talis qui posset condere legem, quis dubitat quod legem conderet, si sciret volentem se interficere, ut quilibet posset eum impune occidere. Qui ergo talem regicidam occidit manibus vel favore, non facit auctoritate propria set mandato principis."

48 JOHANNES DOMINICI: [*Advisamentum*], ACC, IV, 280: "Iterum in quolibet bello iusto licitum est cuilibet homini privato suum defendere ducem, ymmo tenetur eciam, si ille non mandat. Id enim est de iure militum et naturali. Nonne, qui satagit suum pium occidere regem, bellum licet occultum movet contra illum, longe periculosius publico. Ergo licet cuilibet subdito fideliter regem suum defendere eciam per mortem et necem machinantis, si aliter facere nequit."

subjects are allowed to protect their sovereign, at the expense of either their own life or of the life of the enemy.[49]

III. Johannes Falkenberg and the discussions *in materia Polonorum*

While the debates on Petit's *Justification* were animating the halls of the Council of Constance, Johannes Falkenberg was attending the event among the members of the *natio germanica* and, before the *Satira* caught the general attention, he himself had the occasion to express his opinion on the matter of tyrannicide. Around November 1415, he submitted a deliberation in defense of the *Justification* and composed three treatises in which he violently criticized Pierre d'Ailly, Jean Gerson, and the Gersonists.[50]

In the deliberation, Falkenberg describes tyrannicide as an act that follows the laws of action-reaction ruling natural things, making use of the argument—taken *verbatim* from Aquinas, *S.Th.* Ia IIae, q. 87, a. 1—that whatever rises against the order within which it is contained is put down with the same strength by that order:

> We observe in natural things that when one contrary supervenes, the other acts with greater energy, for which reason "hot water freezes more rapidly", as stated in II *Meteorology* [I, 12.17]. Without doubt, it has passed from natural things to human affairs and we find in men that, by natural inclination, one represses those who rise up against him.[51]

[49] Johannes Dominici: [*Advisamentum*], ACC, IV, 281: "Postremo naturale est ut in corpore mistico id servetur, quod ut plurimum, ymmo semper in naturali servatur: in hoc autem quodlibet membrum se exponit ad necem, ut capit defendat; quanto magis si abscinderet membrum caput. Ergo pro conservacione capitis rei publice impune quis[que] potest se exponere morti et a fortiori alterum. [...] Et quia rex est caput cuiuslibet subditi et corpus sine capite est extinctum, non video concurrentibus debitis circumstanciis mors volentis mortem inferre impune procurari non possit. Satis iustificat factum, si occisor verbo vel facto non est subditus seu inferior illo qui occiditur, qui regem volebat occidere."

[50] For the attribution of the deliberation to Falkenberg and the dating, see Gl., X, 167. The texts were edited by Du Pin: *LI Deliberatio* ("Quoniam in agibilibus humanis"), DP 5:905–918; <*Critique de Pierre d'Ailly*> (title assigned by Glorieux; incipit: "Fundatis itaque propositionibus..." henceforth TR1), DP, V, 1013–1020; *Responsio ad ea quae magister Joan. Gerson novem propositionibus ignoranter objicit* (incipit: "Quoniam enim ex testimonio Scripturae divinae"; henceforth TR2), DP, V, 1020–1029; *Responsio ad certas propositiones publice propositas* ("Considerans dissidium quod Universali possit Ecclesiae supervenire"), DP, V, 1029–1032. Falkenberg's contribution to the Petit affair has been mentioned by Bess (*Johannes Falkenberg*, 394–395) and Boockmann (*Johannes Falkenberg*, 239–242), who however do not provide an analysis of the texts; for a brief account of the Polish literature on this matter, see Graff: *Servants of the Devil*, 151–153.

[51] Johannes Falkenberg: *LI Deliberatio*, DP, V, 906: "Dum enim, sicut videmus in rebus naturalibus, unum contrarium vehementius agit, altero contrario superveniente, propterea acquae calefactae magis congelantur, ut dicitur, *secundo Metheorum*, proculdubio, ex rebus naturalibus ad res humanas derivantur, et in hominibus hoc, ex naturali inclinatione, invenitur, ut unusquisque deprimat eum qui contra eum insurgit." Cf. Thomas Aquinas: *Summa Theologiae*, Ia IIae, q. 87, a. 1.

This argument was developed by Aquinas while explaining the functioning of punishment as a consequence of sin: "because sin is an inordinate act, it is evident that whoever sins commits an offense against an order: wherefore he is put down, in consequence, by that same order, which repression is punishment."[52] Falkenberg applies this principle to the balance of powers within a political community, resorting to it in order to demonstrate the naturality of tyrannicide. The tyrant raises against the state, therefore, according to natural law, it is licit to any member of the state to counter-react and contain him—even by killing the tyrant beforehand, without waiting for him to have completed his criminal plans.[53] In line with Porée and Dominici's reasoning, Falkenberg appeals to the right of self-defense and to everyone's duty of guarding the body of the *res publica* and its head, claiming that it is not only *licitum* but also *debitum* for any citizen to kill the tyrant.[54]

Falkenberg came back to this argument in the treatise he composed against d'Ailly's deliberation of 8 November 1415, as well as the claims of Gerson and Morini, by stressing the role of law as implicit 'authorizing agent' for the tyrant-slayer. Tyrannicide is licit according to natural, moral, civil and divine laws, provided that the laws are interpreted according to the intention of the legislator and not by their mere *littera*. And it is the law itself, which is indeed a *publica auctoritas*, that gives to a private citizen, *ex necessitate*, the authority to act as a judge and executioner, and thus slay the tyrant. According to this perspective, Falkenberg claims that it is evident both to the fool and to the blindman that Petit's thesis does not go against the precept *Non occides* and is moreover conformant to the authority of Augustine (I* and VI*).[55]

52 THOMAS AQUINAS: *Summa Theologiae*, Ia IIae, q. 87, a. 1, in: *Opera omnia iussu impensaque Leonis XIII P.M. edita*. Rome: Typ. Polyglotta S.C. de Propaganda Fide 1892, t. VII, 120-121: "Manifestum est autem quod quaecumque continentur sub aliquo ordine, sunt quodammodo unum in ordine ad principium ordinis. Unde quidquid contra ordinem aliquem insurgit, consequens est ut ab ipso ordine, vel principe ordinis, deprimatur. Cum autem peccatum sit actus inordinatus, manifestum est quod quicumque peccat, contra aliquem ordinem agit. Et ideo ab ipso ordine consequens est quod deprimatur. Quae quidem depressio poena est."

53 JOHANNES FALKENBERG: *LI Deliberatio*, DP, V, 906: "Sed tyrannus contra Rempublicam insurgit [...]. Ideo, secundum legem naturae, licitum est, quod isti, omnibus subiectis unde Respublica integratur demonstratis, tyrannum deprimant, et illico occidant; dum melius est occurrere in tempore, quam post exitum vindicare."

54 JOHANNES FALKENBERG: *LI Deliberatio*, DP, V, 906: "Item sic: quilibet subjecto pro deffensione sui authoritate legis, licentiatus est tyrannum occidere. [...] Sed quoniam Rempublicam magis quilibet subjectus quam se tenetur authoritate legis deffendere, sicut videmus quod naturaliter manus se opponit ictui, absque deliberatione, ad conservationem totius corporis [...] procul dubio, authoritate legis, cuilibet subjecto licitum est, pro deffensione regis sui, quemlibet tyrannum occidere."

55 JOHANNES FALKENBERG: *TR1*, in DP, V, 1015: "Lex enim, dum in casu proposito cuilibet subdito dat authoritatem tyrannum occidere, et authoritas Legis est publica authoritas, sive

Falkenberg's position on the Petit affair certainly comes as no surprise, if one considers that he himself, in his *Satira*, defended the idea that not only Christian princes but also commoners could legitimately fight against the Poles and their king, and duly so, in this way gaining access to heaven.[56] This claim constitutes the second of eleven theses extracted from the *Satira* which were under the scrutiny of the Commission of the Faith in Constance, which included cardinals Pierre d'Ailly and Francesco Zabarella (1360–1417), former teacher of Paulus Vladimiri.[57]

According to canon law, if the king of Poland and his subjects were genuinely guilty of heresy and of threatening the *ecclesia*, the Christian princes would have indeed been justified to raise a holy war against him. What was debatable was (i) whether Jagiełło was guilty as such; (ii) whether war against the supposed heretic would have been merely licit or also mandatory; and (iii) whether not only the Christian princes but also any Christian had the authority and the duty to slay the Poles and their king.

To the Gersonists and the Burgundian ambassadors, the Falkenberg case offered a new occasion to debate on the relationship between public authority and the right to kill, and thus to return to the discussion of the meaning of the precept *Non occides* and the Augustinian quotations so often referred to in the Petit case.

This argument *ex auctoritate* plays an important role in the texts against the *Satira* composed by Paulus Vladimiri, rector of the University of Cracow and advocate of the Poles against the Teutonic Knights at the Council. During 1415, Vladimiri had contested before the Council the claim that peaceable pagans could be converted by force and deprived of their property, defending the pagan's right to legitimate dominium.[58] A fortiori, he

ad administrationem; non tantum sciolo, sed etiam coeco palpanti post parietem notum est quod haec doctrina nullo modo adversatur; sed per omnia conformis capitulis allegatis, doctrinaeque Augustini, in primo libro *De civitate Dei*, et praecepto quo dictum est: *Non occides.*" Cf. ID.: *TR2*, in DP, V, 1022: "Nullum potest occidere hominem nisi habeat praeceptum a Deo vel publicam authoritatem. [...] Sed [...] ostensum est in duodecima ratione primae propositionis et responsione ad tertium argumentum cardinalis, quod subditus, in casu proposito, occidens tyrannum, publica administratione fungitur et potestate. [...] subditus, in casu proposito, efficitur legitimus judex tyranni et superior."

[56] JOHANNES FALKENBERG: *Satira*, in: BOOCKMANN: *Johannes Falkenberg*, 352: "Et ergo indubie omnes, qui ad hereticorum exterminium ex caritate se accinxerit vitam merentur eternam. Sed Poloni et eorum rex Jaghel sunt Deo odibiles heretici et impudici canes reversi ad vomitus sue infidelitatis. Et ergo securissime omnes non solum principes seculi, verum eciam inferiores, qui ad Polonorum et eorum regis Jaghel exterminium ex caritate se accinxerit, vitam merentur eternam."

[57] ACC, IV, 411. On Zabarella, see *supra*, fn. 15.

[58] In doing so, Vladimiri sided with Sinibaldo Fieschi's (Pope Innocent IV) opinion that all human beings are entitled to lordship and property against the Hostiensis, who held that after the coming of Christ all dominium was transferred to Christ and the faithful. See, for instance, PAULUS VLADIMIRI: *Opinio Hostiensis*, in BEŁCH: *Paulus Vladimiri*, II, 864–884. For literature on Vladimiri's doctrines on the rights of the pagans and international law, see *supra*, fn. 13 and 15. For a general account of the problem of pagans' dominium, see MUL-

could not support the thesis that the Poles should be slain by any Christian without a public mandate and a proper trial.

In his first treatise against Falkenberg, Vladimiri maintains that the slaying of the Poles advocated by the *Satira* is unjust for four reasons. Firstly, homicide is unjust *per se* and is prohibited by divine, natural, and human law; negative precepts such as *Non occides* always prohibit unless an explicit concession is found in the law, which is not the case.[59] Secondly, the Poles are not at all idolatrous and heretics, as Falkenberg assumes, thus there is no *iusta causa* behind the crusade advocated by Falkenberg.[60] Thirdly, Falkenberg produced a calumny that spread uncontrolled, without the Poles being given the chance to defend themselves in a court of law, hence depriving them of their natural right of self-defense.[61] Finally, Falkenberg advocated a genocide committed by someone who had no judicial authority to kill. If a judge condemns and executes a man without following the correct legal procedure, he commits a mortal sin. Thus, even worse would be the sin of he who, not being a judge, would kill someone without *iusta causa* and without due trial. To make his point, Vladimiri referred to I* *Qui vero sine aliqua publica administratione* and VI* *His igitur exceptis*.[62]

Dealing with the Falkenberg affair, Martin Porée and his party maintained the argumentative line they drew while defending the Burgundian

DOON, James: *Popes, Lawyers, and Infidels: The Church and the Non-Christian World 1250–1550*, Philadelphia: University of Pennsylvania Press 1979; and TIERNEY, Brian: *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625* (= Emory University Studies in Law and Religion 5). Atlanta: Scholars Press 1997.

59 PAULUS VLADIMIRI: *Scriptum denunciatorium errorum Satirae Ioannis Falkenberg*, in: BEŁCH: *Paulus Vladimiri*, II, 1016–1017: "Primo: ratione homicidi in se, quod est de genere malorum et ex sui natura malum, et ergo omni iuri contrarium: divino, naturali, et humano, et ergo prohibitum. [...] Quando aliquid negative expresse promulgatur [...] semper intelligitur prohibitum, nisi inveniatur iure concessum."

60 PAULUS VLADIMIRI: *Scriptum denunciatorium errorum Satirae Ioannis Falkenberg*, in: BEŁCH: *Paulus Vladimiri*, II, 1016–1017: "Sunt etiam iniusta ratione modi, quia falsa causa subicitur, cum dicitur, quod Poloni sunt idolatrae, persecutores Ecclesiae, haeretici, etc., quae omnia falsa et erronea [sunt]. Et ideo clare constat illum dictum hic locum non habere: *Maleficos ne patieris vivere*, ubi homicidium admittitur ex iusta causa."

61 PAULUS VLADIMIRI: *Scriptum denunciatorium errorum Satirae Ioannis Falkenberg*, in: BEŁCH: *Paulus Vladimiri*, II, 1016–1017: "Tertio, sunt iniusta ratione Regis Poloniae, et etiam Polonorum – qui non solum suadentur occidi sine iusta causa, sed imponitur eis iniuste, sive false, multiplex calumnia et iniusta causa, ut dictum est. Et quia hoc fit per modum scientiae et doctrinae, quae non admittit probationem in contrarium, tollit in hoc Polonis et Regis legitimam defensionem, quae fundatur in iure naturali."

62 PAULUS VLADIMIRI: *Scriptum denunciatorium errorum Satirae Ioannis Falkenberg*, in: BEŁCH: *Paulus Vladimiri*, II, 1016–1017: "Quarto, sunt iniusta respectu principum, quibus suadentur talia homicidia, et etiam respectu aliorum inferiorum. Et hoc respectu tollitur etiam iuris ordo et cognitio iuridica, quia per eum qui non est iudex, non potest servari iuris ordo. [...] Si enim peccat mortaliter [...] iudex condemnando et minister occidendo aliquem hominem reum mortis iuris ordine non servato [...] multo fortius peccaret mortaliter ille, qui non est iudex, occidendo aliquem sine causa et iuris ordine non servato. [...] *Qui sine aliqua publica administratione maleficum interficit* [...], secundum beatum Augustinum."

cause. Although they did not go as far as to absolve *in toto* the *Satira* or to approve the slaying of Jagiełło and of the nation of Poland, they refused to support the condemnation for heresy advocated by Vladimiri and the Gersonists. According to Johannes de Rocha (d. 1434), general vicar of the Franciscan order, Falkenberg's claims were indeed reckless, seditious, and injurious but not heretical nor savoring of heresy (*sapiens heresim*).[63] Falkenberg moved outrageous accusations against the king of Poland and his subjects—accusations which were most probably false, and thus scandalous. But the principle behind it—namely, the fact that anyone, under the right circumstances, could kill a notorious tyrant—was sound, and it was not heretical (though reprehensible) to falsely accuse someone of heresy as Falkenberg did with King Jagiełło.[64] Dealing with the authority of Augustine (I*, VI*) and the gloss "absque auctoritate iudiciaria" to the precept *Non occides*, Rocha solved the impasse by distinguishing two senses of *publica administratione*: on the one hand, this expression refers to the ordinary judicial trials; on the other hand, it can be understood simply as the public authority of the law. There are situations in which no judicial procedures nor official trials are possible and yet killing is allowed: for instance, in a just war between two peers where one sovereign has no authority over the other.[65]

Martin Porée similarly referred to the case of just war amongst two sovereign princes in order to argue that the gloss "absque auctoritate iudiciaria" cannot hold universally.[66] He distinguishes between four types of killing: one that is performed according to justice and the proper judicial

[63] JOHANNES DE ROCHA: *Advisamentum in materiam Prutenorum et Polonorum*, in: ACC, IV, 363–370. On Johannes de Rocha, see VALLERY-RADOT: *Les Français au concile de Constance*, 209–210.

[64] JOHANNES DE ROCHA: *Advisamentum*, 366: "Iste propositiones non repugnant illi precepto: 'Non occides', unde preceptum illud habet intelligi: 'Non occides innocentem' etiam propria auctoritate et cum determinationibus necessariis. Non enim quicumque interficit hominem agit contra illud preceptum [...] et multi casus sunt, in quibus licite potest homo interfici. Sed utrum talis sit rex Polonorum [...] non michi constat ipsum esse talem vel non talem, nec ipsum dicere talem vel non talem est hereticum et per consequens nec dicere ipsum fore a principibus seculi usque ad exterminium persequendum."

[65] JOHANNES DE ROCHA: *Advisamentum*, 367: "Si enim vocatur publica administratio tantum processus iudicis ordinarius, clarum est quod in bello iusto non est huiusmodi publica administratio, cum unus rex non subditus pugnat in alium regem non sibi subditum et subditus unius in subditus alterius; et ergo publica administratio oportet quod intelligatur vel ordine iudiciario vel legis publica auctoritate, sicut esset in proposito, si rex Polonorum esset talis sicut depingitur in secunda propositione qualificata."

[66] MARTIN PORÉE, in: ACC, IV, 381: "Ex quibus sequitur, quod incompetenter glosant hoc preceptum: *Non occides*, qui illud ita glosant, *scilicet absque auctoritate iudiciaria*. Nam hec glosa dampnat vel saltem non absolvit a transgressione divini precepti plurimos reges et principes, qui nullam inter se habent iudiciariam unus in alterum et per consequens suis officiariis non potestatem in tales commitere, qui tamen interficiunt in suis bellis homines utriusque sexus et etatis, quos condempnare de transgressione huius precepti esset temerarium et nimis grave."

order; that by necessity; that by accident; and that by evil will. Only the latter is totally forbidden. In some cases, indeed, one can kill even if the judicial order is not preserved (*iudiciario ordine non servato*), since in some cases it is necessary to punish a criminal and it is not possible to wait for an official trial and a particular sentence issued by a judge.[67] One of these circumstances is certainly the defense of one's own life—as Porée also claimed in his writings supporting Petit. This situation applies all the more when the safety of the catholic faith and peace within the Church is at stake, as in the case with heretics, infidels, and apostates menacing the *societas christiana*.[68]

In this respect, Porée shifted the focus of the debate one step further, by posing the question as to whether "any Christian *was* obliged by the profession made at baptism, without a dispensation and under the penance of damnation, to defend the Christian faith and to persecute its enemy even unto death."[69] Porrée and his allies answered this question by asserting that every Christian, even those not endowed with official public authority, has not only the legitimate right to defend himself and his community, but also the positive duty to attack pagans and heretics as eternal threats to the faith.[70]

Gerson and the Gersonists, on the other hand, held that neither the Christian princes nor their subjects had the positive duty to avenge the offense against God perpetrated by pagans and heretics. Firstly because, as also stated by Vladimiri, in Christian religion only negative precepts must be absolutely obeyed. Secondly, because the case of necessity allowing the answering of a violent attack with force only permits self-defense and not

[67] MARTIN PORÉE, in: ACC, IV, 378: "quatuor modis occisio hominis committitur. Primo iusticia dictante et iuris ordine servato, 2° necessitate et specialiter inevitabili instigante, 3° casu improviso superveniente, dum tamen detur opera rei et fuerit debita diligencia adhibita, 4° mala voluntate impellente. Et iste quartus modus est culpabilis et est prohibitus hoc preceptus"; Ibid., 381–382: "aliqua culpa potest esse tam gravis quod morte corporali debet puniri et non sempre per iudicem ordinarium possibile est fieri. [...] Et necesse est fieri ut tranquilitas in republica et presertim christiana conservetur, ergo per principes seculares, presertim christianos, iuste dicto ordine non servato potest talis pena infligi. [...] Et similiter omnes fideles pro loco et tempore debent ad hoc conferre secundum exigenciam sue facultatis, prout huiusmodi vindicte qualitas exigit et requirit."

[68] MARTIN PORÉE, in: ACC, IV, 383: "item licitum est alicui se defendendo alium occidere absque iudiciaria auctoritate [...]. Sed constat quod conservatio fidei catholice, pacis ecclesiastice et caritatis, per quas totum corpus ecclesie connectitur et vivit, est magis licita et necessaria quam conservatio proprii corporis, rerum suarum aut etiam sociorum. Ergo pro conservatione huiuscemodi licitum est hereticos, infideles et apostatas, fidei invasores in casu isto absque iudiciaria auctoritate occidere."

[69] MARTIN PORÉE, in: ACC, IV, 386: "Utrum quilibet christianus ex professione facta in baptismo teneatur indispensabiliter sub pena dampnationis eterne fidem catholicam defendere et eius adversarios usque ad mortis interitum persequi."

[70] See, for example, the answer to the *quaestio* provided by an anonymous against the Gersonists in late August 1417, in: ACC, IV, 399–402; and Johannes de Rocha's, in: ACC, IV, 402–410.

the intentional killing of another. In this case, according to Augustine's *auctoritas*, it would be a case of homicide.[71]

IV. Jean Gerson on the right of resistance

In a dossier prepared against Petit for the Council of the Faith of Paris, Jean Gerson listed eight circumstances that would allow a private individual to kill a tyrant. Firstly, the tyrant must be a notorious tyrant, and this must be proved by an official sentence—otherwise, anyone could just kill anyone under a false accusation (i). It must then be ascertained that the tyrant cannot be restrained by a superior authority (ii) or it must be improbable that any other person would be equally suitable to kill him—otherwise "thousands of people should collaborate to slay one only tyrant without any law or order" (iii). Next, there must be no elements for believing that tolerating the tyrant would be the lesser evil (iv) or that the tyrant could be corrected in other ways (v). Finally, the act of killing should not occur by deceptions or suddenly, so that the tyrant is given the opportunity to save his soul (vi), or by fake alliance or perjury (vii); nor should the tyrannicide be performed under the impulse of revenge, resentment or ambition, but only under the correct understanding of the divine and civil law and for the common good, in the right times and places (viii).[72]

In short, as remarked by David Flanagin, Gerson's criteria for a lawful tyrannicide should hold to the three principles regulating just war: it should be committed while satisfying the requirements of just cause (i, iv-v), rightful intention (vi-viii) and proper authority (i-iii).[73] In this framework, the criterion of proper authority plays a central role: Gerson speci-

[71] See the *Responsiones Gersonistarum ad predictum questionis dubium* [by Porée] *pronunciata in ecclesia beati Stephani per Jacobum Suer* (?) *clericum* on 15 August 1417 (MS. Paris, BNCF, Nat. Lat. 1485, f. 455v), in: ACC, IV, 396–397: "Deus non necessitatur coagere cuicumque actui racionalis creature nec eam ad positivum aliquem actum obligare. Primum correlarium: Nulli principes aut inferiores obligantur indispensabiliter iniuriam Dei vindicare in occisione hominum quorumcumque. Secundum correlarium: Nullum preceptum pure affirmativum et cathegorice latum est simpliciter indispensabile, sed solum negativum." Ibid., 398: "nec oportet addere casum necessitatis inevitabilis vim vi repellendo, quam sic agens non debet intendere mortem alterius, sed suam tantum defensionem; alioquin secundum Augustinum talis esset homicida." The text is also edited in Gl. X, 280–284, who ascribes it to Jean Gerson (due to a marginal gloss reading: "Gerson contra Walk.") and entitled it *Contre Falkenberg*. Brian Patrick McGuire argues that this text did not concern the Falkenberg affair, since Gerson got involved in the debates *in materia Polonorum* only later that year (*In Search of Gerson: Chronology of His Life and Works*, in: McGuire, Patrick [ed.]: *A Companion to Jean Gerson*, 27). The text, however, is clearly an answer to Porée's aforementioned question on whether it was required to any Christian by virtue of their baptism to defend the catholic faith against the pagans.

[72] Jean Gerson: *Contre les VII Assertions. Mémoire et dossier*, in: Gl. X, 190–191.

[73] Cf. Flanagin: *Tyrannicide and the Question of (Il)licit Violence*, 58–63. Aquinas' traditional formulation of the three criteria is found in *S.Th.* IIa IIae, q. 40, a. 1; cf. Russell: *The Just War*, 258–291.

fies that even if all the aforementioned circumstances occurred, it would be preferable to leave the tyrant to God's judgment rather than kill him by private authority or sedition.[74]

In the *Reprobatio novem articulorum*, delivered in Constance on 9 June 1415, Gerson offers further remarks on the necessity to anchor the acts of resistance in the juridical order, limiting the range of the appeal to the case of necessity. Against Petit's *tertia veritas*, Gerson maintains that no one can be witness, judge, prosecutor and executioner in the same case. A subject or a vassal is not a legitimate judge over his lord, and therefore cannot decide over his death if he has not been proven guilty by a judge after a trial.[75] Even a *judex ordinarius* or a king could not execute a criminal who has not been properly prosecuted and condemned.[76] One can indeed apply the principle of *epikeia* to the precept *Non occides* appealing to the case of necessity, but this case of necessity must be demonstrated juridically.[77] More generally, Gerson claims that no one should be killed by private authority if justice can be served by public authority: neither someone who is sentenced to death, nor a deserter, a nocturnal thief, a bandit, not even the enemy on a battlefield during a just war.[78]

[74] GERSON: *Contre les VII Assertions*, in Gl. X, 191: "talis tyrannus magis est judicio Dei reservandus quam per privatam auctoritatem vel seditionem occidendus". Simon of Perugia, concistorial advocate at the Council of Constance, similarly claimed that tyrannicide, as just war, should abide by the three aforementioned criteria of *iusta causa*, *iustus animus*, and *iustus ordo*. However, he seems to stress that the case of necessity might constitute an exception to the principle of *iustus ordo*. To a certain extent, necessity gives authority: if no other way is possible, killing the usurper is legitimate even without following the regular judicial procedures. Cf. SIMON DE PERUSIO: ACC, IV, 293: "Ad hoc enim, ut occisio sit iusta, tria principaliter requiruntur: iustus ordo, iusta causa et iustus animus. [...] Communis opinio est modernorum doctorum quod aliquis potest sine peccato mutilare vel occidere invadentem alium eciam extraneum, cum ex caritate naturali quasi ex debito sit adstrictus iuste occidere in casu ubi vitam ipsius extranei invasi aliter salvare non potest, dummodo ad salvacionem invasi principaliter et non ad mortem invadentis intendat." On Simon of Perugia, see: WICHEREK, Szymon: *Gli avvocati concistoriali nella prima metà del Quattrocento. Attività conciliare e curiale*, Ph.D. Diss. University of Pisa 2011.

[75] JEAN GERSON: *Reprobatio novem assertionum*, Gl. X, 209.

[76] JEAN GERSON: *Reprobatio novem assertionum*, Gl. X, 211.

[77] JEAN GERSON: *Reprobatio novem assertionum*, Gl. X, 212: "dicit assertor quia cuilibet licitum est interpretari sensum Scripturae Sacrae et divinorum praeceptorum et uti *epikeia* quando casus occurrit, sicut ponitur de hoc praecepto: *Non occides*, quod in casu necessitatis inevitabilis, volendo defendere civitatem suam vel suum regem, potest aliquis privata auctoritate invasores occidere sine agendo contra verum intellectum hujus praecepti: *Non occides*. Videamus hic primo [...] quod in solo casu necessitatis ubi non patet aliter salvatio sui regis, assertio prima haberet veritatem. [...] Dicamus consequenter quod si posset ostendere judicialiter talem fuisse casum necessitatis inevitabilis, judicaretur absolutus, immo laudetur. Sed si non vult aut non potet ostendere, tunc judex publicus debet eum sicut verum homicidam reputare et damnare, non laudare."

[78] JEAN GERSON: *Reprobatio novem assertionum*, Gl. X, 213: "nullus quantumcumque criminosus vel adversarius, debet interfici privata auctoritate si potest per publicam auctoritatem fieri justitia de eo; immo nec damnatus ad mortem potest auctoritate privata interfici

Shifting the argumentation on the ground of biblical exegesis, Gerson maintains that moral precepts that are given to man as principles to regulate their life, especially those which are of a general kind, are very clear and do not need complex interpretations. And this is the case particularly for those principles that serve the preservation of the human political community, such as the prohibitions against homicide, perjury, and killing using trickery and deception—principles that John the Fearless violated when he caused the death of the Duke of Orléans. In conclusion, according to Gerson, the precept *Non occides* should be understood according to the meaning *planum et grossum* that no man should be voluntarily killed by someone else if that person does not have public authority.[79]

Gerson did not deny the possibility of resisting the tyrant, but rejected theories that could affect the integrity of the state, maintaining that the administration of justice had to stay in the hands of the king and not in a variety of scattered jurisdictional centers. The respect of royal laws and juridical procedures is fundamental to preserve the body of the state from anarchy and uncontrolled private retaliations.[80]

This position is consistent with what Gerson maintained in his ecclesiological writings while discussing the right of resistance and self-defense of the church against the dangers caused by a tyrannical pope.[81] According to Gerson, the *ecclesia*, embodied by the general council, represented the ultimate authority for the interpretation of the literal sense of the Scripture

quin sit homicidium verum et malum. Sic diceretur de desertore militiae, de fure nocturno, de insidiatore in stratis publicis, immo de hostibus in bello justo; quia si possunt isti et similes subjugari judiciario ordine et publico, ille ordo semper est praeponendus."

79 JEAN GERSON: *Reprobatio novem assertionum*, Gl. X, 214: "Praecepta moralia, praesertim generalia, quae data sunt hominibus tamquam prima principia regulantia vitam uniuscuiuscumque habentis usum rationis, debent esse clarissima et quae non egeant difficili et varia interpretatione, et maxime illa quae conservant humanam politiam in sui firmitate et civilitate, sicut ista tria: *Non occides. Non assumens nomen Dei tui in vanum. Non occides per industriam et insidias.* [...] Praeceptum istud, *Non occides,* habet hunc intellectum planum et grossum quod nullus homo debet occidi ab alio sponte vel ex intentione, si non habeat publicam auctoritatem vel administrationem."

80 JEAN GERSON: *Rex in sempiternum vive*, in Gl. VII**, 1017: "L'authorité royale ne doit point constituer plusieurs cours souverains de sa justice en laquelle est la valeur de sa vertu dominative. Cette consideration appert par similitude du corps auquel ne doit avoir qu'un chief principal. Raison aussi avecques experience montrent que aultrement faire seroit et a été n'aguere cause de division et de toute injustice et subversion et oppression des bons"; Ibid., 1019–1020: "authorité royalle est et doit estre telle et si souveraine que nul ne peut raisonnablement mouvoir guerre ou faire port d'armes invasives encontre un ou plusieurs des subjets sans le congié du roy exprès ou entendu [...] quand selon les lois royalles justes et raisonnables aucune chose se fait au royaume, car le roy parle en ses lois. [...] Exemple familler des enfants qui sont a l'escole; si l'un fiert l'autre, l'aultre ne doit point referir, mais doit faire sa plainte au maître, ou autrement il fait de son droit tort et il est batu." On this point, see FIOCCHI: *Una teoria della resistenza*, 174–176.

81 See the literature indicated at fn. 8, as well as MASOLINI, Serena: *Unity, Authority, and Ecclesiastical Power: Augustinian Echoes in the Works of Jean Gerson at the Council of Constance*, in: The Catholic Historical Review 106 (2020) 4, 509–550.

and the determination of the truth of faith, as well as the primary keeper of ecclesiastical power and of the right to correct its members when they were wrong. Gerson believed that even if the pope's sins justified his deposition, he still remained pope until he was removed by an institution endowed with the proper authority. It was the council, as the highest representation of the *ecclesia*, that was endowed with the power to judge and, possibly, depose the pontiff.

VI. Final considerations

If one looks for a pattern linking the debates on the Petit and Falkenberg affairs, it is possible to delineate two approaches to the exegesis of the precept *Non occides* and of the *auctoritas* of Augustine. On the one side, Pierre d'Ailly, Jean Gerson, the Gersonists, and Paulus Vladimiri defended a view according to which any abuse of legal procedure was to be condemned and Christians were only required to obey negative injunctions. According to this perspective, violent defense of the faith is no responsibility of ordinary Christians and the judicial power to kill—whether in an alley in Paris or on a Lithuanian battlefield—is given only to those who exercise public power, unless God intervenes through divine revelation or special dispensation. On the other hand, Martin Porée, the Burgundian delegates, Giovanni Dominici, and Johannes Falkenberg would challenge their opponents with the following consideration: which is more important—to formally preserve the judicial order? Or, to punish criminals and protect the corporeal and spiritual safety of a Christian community?

If the supporters of the Burgundian cause and Falkenberg were inclined to choose safety and the fulfillment of justice over judicial procedures, Gerson would probably have answered by saying that one cannot properly achieve the former without the latter. Gerson's intention was not to entirely deny the subjects of their right of resistance against a tyrant; that right of resistance, however, had to be exercised according to certain rules.

Both the Petit and the Falkenberg affairs did not find a proper conclusion at Constance. The condemnation of the proposition *Quilibet tyrannus* during the fifteenth session heightened rather than moderated the debates over the orthodoxy of the *Justification du Duc d'Orléans*. The annulment of the sentence of the Council of the Faith of Paris on procedural grounds and the vote of the theologians in November 1415—which resulted in a landslide victory for the faction against the condemnation of the nine assertions—did not prevent both sides from continuing discussions and trying to convince the Council to issue an official determination in favor of their

respective positions. After his election, Pope Martin V did not wish for the case to be reopened and thus the affair remained unresolved.[82]

The ending of the Falkenberg case was likewise inconclusive, at least on the shores of the Bodensee.[83] Although several fathers shared the belief that the *Satira* had to be condemned as heretical and 'redolent of heresy', scandalous, indecent, rebellious and worthy of being burned,[84] no unanimous decision was reached and the Council as a whole never passed a resolution on this matter. On 22 April 1418, during the last plenary session of the Council, Martin V decided to not re-discuss the case. Facing the protests of Vladimiri and the Poles, who were persistently asking for a conciliar condemnation of the *Satira* as heretical, Martin V enjoined the rector of Cracow to be silent, denied the Poles further appeal, and proclaimed the general prohibition of appealing to future councils on those matters of faith that had been already established by a pontiff.[85]

This reaction reopened the question of the primacy in doctrinal and jurisdictional authority between the pope and the council and drove Jean Gerson to write a short polemical treatise, the *An liceat in causis fidei a Papa appellare*, as a manifesto against the possible abuses of a (tyrannical) pope.[86] While defending the rights of the Poles to appeal to a future council, Gerson recapitulated the conciliarist view that underpinned the decree *Haec sancta* of 6 April 1415, so as to remind Martin V that it was that very view that had allowed the Council of Constance to depose the three former claimants to the Holy See and reunite the *ecclesia* under his guide.

The debates over tyrannicide that took place at Constance were not empty essays of dialectic virtuosity, nor were they simple echoes of the political chronicles of fifteenth-century Europe. Indeed, the concerns at the core of the Petit and Falkenberg affairs provide a perspective on the labyrinthine uncertainty and the creative dynamism given by the polycentric judicial order regulating the Latin West during the Middle Ages. More deeply, they bear witness to the ambiguity, inner to the Christian tradition, concerning the use of violence—an ambiguity that left the faithful divided between a series of contradictory injunctions: being obedient subjects, on the one hand, or serving God rather than man, on the other;

[82] On the final phases of discussion on the Petit case, see the accounts provided by COVILLE: *Jean Petit*, 526–561.

[83] Martin V finally condemned the *Satira* in 1424 as "erroneous and contrary to good mores, and otherwise scandalous, seditious, cruel, injurious, impious and offensive to pious ears" (however, not as heretical), cf. BEŁCH: *Paulus Vladimiri*, I, 726. For a summary of the prosecution and ending of the Falkenberg case after the Council of Constance, see BEŁCH: *Paulus Vladimiri*, I, 717–741, BOOCKMANN: *Johannes Falkenberg*, 263–296, and GRAFF: *Servants of the Devil*, 163–169.

[84] See the draft of sentences published in: ACC, IV, 430–432.

[85] Besides the literature indicated above (fn. 83), see the account given by Gerson in *Dialogus apologeticus*, in: Gl. VI, 302–303.

[86] JEAN GERSON: *An liceat in causis fidei a papa appellare*, in: Gl. VI, 283–290.

turning the other cheek or promoting the right of self-defense, the crusades, and the execution of criminal and heretics; obeying strictly to the precept *Non occides,* leaving the use of force to the proper judicial authority, or acting—in case of necessity and for the greater good—as instruments of the will of God (or the sovereign), as did the tyrant-slayers of the Old Testament. No less, they are a chapter in the longstanding discussions on the entanglement between morality, legality, and realpolitik that is intrinsically embodied in human society of all ages.

Abstract

This article considers the use of Augustine's auctoritas within the context of the discussions held at the Council of Constance (1414–1418) concerning the orthodoxy of two texts that defended the legitimacy of tyrannicide: Jean Petit's Justification du duc d'Orléans *and Johannes Falkenberg's* Satira. *In particular, it will consider how some prominent figures at the Council referred to a series of Augustinian passages on public authority and the right to kill (most notably,* De civ. Dei *1:21; 1:26;* Decretum C. *23 q. 8, attributed to* De civ. Dei *1) in order to discuss whether a tyrant could be legitimately slain by any private individual without any previous legal trial or explicit public mandate.*