Clio@Themis
Revue électronique d'histoire du droit

Isidore of Seville and the construction of a common legal culture in early medieval Europe

Isidore de Séville et la construction d'une culture juridique commune au début de l'Europe médiévale

Abstract: This paper explores Isidore of Seville's definitions of legal terms and Roman law concepts during the early Middle Ages. While Isidore was not a lawyer, he played a crucial role on the development of both legal theory and more technical aspects of the law such as legal procedure. Combining elements of Roman and Jewish-Christian traditions, Isidore's definitions were of the utmost importance during the long period leading to the dawn of the School of Bologna.

Résumé : Dans ce papier sont explorées les définitions que donna Isidore de Séville au début du Moyen Âge des termes juridiques et concepts de droit romain. Sans être juriste, Isidore joua un rôle cucial dans le développement des théories juridiques et d'aspects plus techniques du droit comme la procédure juridique. Combinant des éléments de traditions romaine et judéo-chrétienne, les définitions d'Isidore furent d'une importance maximale durant la longue période qui conduisit à la naissance de l'École de Bologne.

Keywords: Isodore of Seville – School of Bologna – roman laws concepts – Jewish-Christian tradition

Mots-clés : Isidore de Séville – École de Bologne – concepts de droit romain – tradition judéo-chrétienne

I. Teaching law with Isidore in the hand. The Carolingian season

1. The ms. O.I.2 of the Archivio Capitolare of Modena is a precious and justifiably famous code. Variously dated between the second half of the ninth century and the end of the tenth, it represents one of the only two known testimonies of the important collection of *Leges barbarorum* which Lupo (abbot of Ferrières between 842 and 862) send to Everard, Marquis of Friuli, around 845[1]. Among the features present only in the version contained in the Modena manuscript, the presence of a number of extracts of the *Origines* or

1 The manuscript has been carefully studied: G. Russo, *Leggi longobarde nel codice O.I.2 della Biblioteca capitolare di Modena* (1978), now in Id., *Scritti di storia del diritto e di storia della Chiesa*, Milano, 1984, p. 35-48; P. Bonacini, "Le leggi germaniche raccolte nei codici dell'Archivio capitolare di Modena", in *Atti e Memorie della Deputazione di storia patria per le antiche province modenesi*, s. XI-17, Modena, 1995, p. 35-56; P. Golinelli, "Il Codice delle leggi della Cattedrale di Modena. Descrizione", and esp., G. Nicolaj, "Il Liber Legum di Everardo e altre storie", both in *Leges salicae, ripuariae, longobardorum, baioariorum, Caroli Magni. Archivio del Capitolo della Cattedrale di Modena. Ms. O.1.2. Commentario all'edizione in facsimile*, Modena 2008, p. 17-35 and 75-117. On the *Liber* of Lupo, see H. Siems, "Textbearbeitung und Umgang mit Rechtstexten im Frühmittelalter. Zur Umgestaltung der Leges im Liber legum des Lupus", in *Recht im frühmittelalterlichen Gallien*, H. Siems, K. Nehlsen-von Stryk, D. Strauch (ed.), Köln–Weimar–Wien, 1995, p. 29-72 and more recently O. Münsch, *Der Liber legum des Lupus von Ferrières*, Freiburg, 2001.

Etymologiae of Isidore of Seville is especially striking. On folios 2r-4r, we find the second part of chapter 5 and nearly the entire sixth chapter of book nine of the *Etymologiae* (*Etym.* IX.5.11-IX.6.28: both chapters deal with the degrees of kinship). On folio 4v we find the *arbor cognationum* or *consanguineitatis*, which forms the second *stemma* (diagram) of *Etym.* IX.6.28 (also concerning kinship). On folio 9r, we may recognize the first three chapters of book V, *De legibus* (*Etym*. V.1-3)[2] with the list of legislators and some basic legal distinctions. Finally, on folios 10v-11r, we encounter something similar to a school exercise. Focusing on this more last extract, we can imagine the medieval schoolteacher addressing his students. He (*interrogans*) asks a number of questions about legal concepts and definitions: the answers (*responsiones*) are given, repeating almost literally some Isidorian passages[3].

2. The Modena manuscript is certainly not an isolated case. Another example may be found in a singular collection of legal rules and definitions compiled during the Carolingian age and known under the name of *Interrogationes seu interpretationes de legibus divinis et humanis*[4]. We are no longer in Italy but in the Frankish Kingdom. The author is especially interested in church (i.e. Roman) rules and much less in the secular laws of the new kingdoms. Once again, however, we are dealing with an anthology of Isidorian passages concerning law and related matters. And we find the same scholarly scheme: an *interrogatio* on the correct meaning of a legal term or issue, followed by an answer repeating the corresponding passage of Isidore's *Etymologiae*. Passages from book V in particular are considered here, more rarely from books II and XVIII.

3. The Modena manuscript and the Carolingian anthology show exactly the same method at work; both provide an important – and, moreover, concordant – testimony on the transmission of legal knowledge before the advent of the school of Bologna at the beginning of the twelfth century. They give the impression of a somewhat basic teaching, focused principally on mnemonic learning. This is hardly surprising. Admittedly, we know very little about the organization and functioning of schools during the early Middle Ages in the West. What we do know, however, clearly shows that the tendency of explaining technical concepts through their etymology (regardless of the specific subject or *ars*) is typical of medieval culture, and it is an important legacy of the late-Roman world[5]. Reference to Isidore of Seville's work must have been common practice among teachers in the schools of medieval Europe[6]. Legal education was clearly no exception: early medieval learned people saw in the *Etymologiae* the key to understand any legal text irrespectively of the tradition – Romano-canonical or barbarian – to which it belonged[7].

4. Even considering this broad and *longue durée* picture, we have sufficient reason to believe that reference to Isidore's works became increasingly frequent precisely during the so-called Carolingian Renaissance[8].

2 G. Russo, *Leggi longobarde* (nt. 1), p. 44.

3 A transcription of this part of the Modena code is in G. Russo, "L'insegnamento del diritto a Modena nel sec. IX" (1977), now in Id., *Scritti* (nt. 1), p. 175-6.

4 A recent edition of the text is in A. Bühler, "Capitularia relecta", *Archiv für Diplomatik*, 32, 1986, p. 474-482. On the vast circulation of that reworking of Isidorian passages, see M. Conrat, *Geschichte der Quellen und Literatur des römischen Rechts im frühen Mittelalter*, Leipzig, 1891 (=Aalen 1963), p. 315-6.

5 P. Riché, *Éducation et culture dans l'Occident barbare. VI-VIII^e siècle*, Paris, 1962 (1995[4]); B. Englisch, *Die Artes liberales im frühen Mittelalter (5.–9. Jh.). Das Quadrivium und der Komputus als Indikatoren für Kontinuität und Erneuerung des exakten Wissenschaften zwischen Antike und Mittelalter*, Stuttgart, 1994; M. C. Díaz y Díaz, *Enciclopedismo e sapere cristiano. Tra tardo-antico e alto Medioevo*, Milano, 1999, p. 125-142. For a more legally-focused study see also: U. Gualazzini, "Trivium e quadrivium", *Ius romanum medii aevi*, I, 5a, Milano 1974.

6 More or less in the same period, we find for example the same system of a sequence of questions and answers drawn from Isidorian *Etymologiae* in the so-called *Collectio Sangermanensis* (Monastery of Corbie, France, end of VIII^th century) in relation to the rule of the clergy and monks. On this collection see H. Siems, "Die Collectio Sangermanensis XXI titulorum – Kanonensammlung oder Unterrichtswerk?", *Deutsches Archiv für Erforschung des Mittelalters*, 65, 2009, p. 1-28 (here 14-7 and 23-4). Siems thinks that the collection was aimed at teaching. In general, on the wide spreading of Isidorian encyclopaedia, see M. Reydellet, "La diffusion des origines d'Isidore de Séville au haut Moyen Âge", *Mélanges d'archéologie et d'histoire de l'École Française de Rome*, 78, 1966, p. 383-436.

7 See M. Conrat, *Geschichte* (nt. 4), p. 153; U. Gualazzini, *Trivium* (nt. 5), p. 38-40; G. Russo, *L'insegnamento a Modena* (nt. 3), p. 147-8 and 171-6.

8 Beyond the *Etymologiae*, the same monastery of Corbie where the *Collectio Sangermanensis* (nt. 6) was probably composed, possessed also other Isidorian works, such as the *Sententiae* and the *De ecclesiasticis officiis*: H. Siems, *Die Collectio* (nt. 6), p. 8. On the figure and the work of Isidore of Seville in the Carolingian age see J. Fontaine, "La figure d'Isidore de Séville à

Both the above examples, as we saw, belong to that period. Moreover, when dealing with legal concepts, references to Isidorian definitions were not limited to basic teaching: in this period, it would seem that any approach to legislative texts had to start with – or refer to – Isidore. Learned people – hardly numerous in this period – who continued to consult legal books even after concluding their studies habitually considered Isidore a trustworthy guide, an indisputable authority. Occasionally, the lawmaker himself quotes Isidore, and several Isidorian passages were inserted in manuscripts containing legislation and other legal writings from the ninth and tenth centuries[9]. This is exactly what happens in many manuscripts of the *Breviarium Alaricianum*[10] or of the *Epitome Iuliani*[11], both texts embodying in a unique fashion the *Lex Romana* in the medieval West, in particular outside Italy.

5. Some – men of great learning but not, strictly speaking, jurists – shared the same attitude towards the huge Isidorian stock of knowledge. In this sense, it is important to note how book V of the *Etymologiae* (*De legibus*) was included – copied in full but as a separate item – in manuscripts otherwise containing no legal material[12]. This would again confirm that Isidore was generally considered the most reliable and authoritative cultural guide. Such, at least, is the impression from the works of learned and influential people like Jonas of Orleans (c. 780-843/4)[13] and above all Hincmar, the powerful archbishop of Reims (806-882)[14].

6. The picture does not change if we turn our attention to Italy. A good example is the northern Italian ms. Paris, BN, lat. 12448 (dating from the late ninth or, more probably, the early tenth century). It contains the text of the *Lex Romana Canonice Compta* or, as some prefer to call this wide anthology of Justinianic law, the *Capitula legis Romanae*[15]. Its bulk comes from the *Epitome Iuliani*, smaller portions are taken from Justinian's Code, and vary few passages from the Institutes. Whether or not this collection derives from a larger collection of Justinianic texts now lost (the elusive *Lex Romana* sometimes evoked by early medieval writers[16]), its content appears of clear Italian origin. Along with the chapters taken from Roman law, however, there are several quotations (mainly as marginal glosses) from Isidore's works, in particular from book V of the *Etymologiae* (V.24.23-24; V.25.13; V.25.19) and from the *Sententiae* (2.31)[17]. If

l'époque carolingienne", in *L'Europe héritière de l'Espagne wisigothique*, J. Fontaine, C. Pellistrandi (ed.), Madrid, 1992, p. 195-211. On the Carolingian legislation on schools and instruction see T. Kouamé, "La réception de la législation scolaire carolingienne dans les collections canoniques jusqu'au Décret de Gratien (IX^{e}-XII^{e})", in *Universitas scolarium. Mélanges offerts à Jacques Verger*, Genève, 2011, p. 3-13.

9 For instance, we can easily believe that the drafter of Pipin's *capitulare* of 787-788 inserted in the *Capitulare italicum* (*Placuit inserere, ubi lex deest, praecellat consuetudo, et nulla consuetudo superponatur legi*, ed. in MGH, *Capit. Reg. Franc.*, I, n. 95 § 10) kept in mind *Etym.* II.10.2 (*Consuetudo autem... pro lege suscipitur, cum deficit lex*).

10 For instance, the mss. Città del Vaticano, BAV, Vat. reg. 1023; Paris, BN, lat. 4413 and 9652 and, in particular, the mss. Città del Vaticano, BAV, Vat. reg. 1048 and 1128; Paris, BN, lat. 4409 and n. acq. 1631; Montpellier, UB Méd. H 136; see M. Conrat, *Geschichte* (nt. 4), p. 241, 249-51 and D. Liebs, "Die im spätantiken Gallien verfügbaren römischen Rechtstexte", in *Recht im frühmittelalterlichen Gallien* (nt. 1), p. 22-3 and Id., *Römische Jurisprudenz in Gallien (2. bis 8. Jahrhundert)*, Berlin, 2002, p. 110 nt. 104 and 105.

11 M. Conrat, *Geschichte* (nt. 4), p. 153. Besides the Vercelli code (on which we will soon back), see the ms. Leipzig, UB, Hänel 6 on which W. Kaiser, *Die Epitome Iuliani. Beiträge zum römischen Recht im frühen Mittelalter und zum byzantinischen Rechtsunterricht*, Frankfurt am Main, 2004, p. 146-53.

12 Mss. Paris, BN, lat. 4414 and lat. 4415; see M. Conrat, *Geschichte* (nt. 4), p. 316 ntt. 3 e 4 and P. Riché, "Enseignement du droit en Gaule du VI^{e} au XI^{e} siècle", *Ius romanum medii aevi*, I, 5 b bb, 1965, p. 16-7.

13 At the beginning of his political treatise *De institutione regia* (composed in 831 according to J. Reviron, *Les idées politico-religieuses d'un évêque du IX^{e} siècle: Jonas d'Orléans et son* De institutione regia. *Étude et texte critique*, Paris, 1930, p. 56; edition of the text at p. 132-94) quotations from Isidore's writings (the *Etymologiae* but principally the *Sententiae*) are continuous (although implicit, as normal in this period).

14 On the juridical knowledge of Hincmar it remains very useful J. Devisse, *Hincmar et la loi*, Dakar, 1962. The influence of the bishop of Seville on Hincmar was surely deeper than the little number of explicit quotations could suggest to us.

15 E. Cortese, *Il diritto nella storia medievale*, I. *L'alto medioevo*, Roma, 1995, p. 243-5 and W. Kaiser, *Die Epitome* (nt. 11) p. 493-522 (on the ms. and on the name of the collection, see p. 493-503).

16 See however W. Kaiser, *Die Epitome* (nt. 11), p. 562-79.

17 See C. G. Mor, *Lex Romana canonice compta. Testo di leggi romano-canoniche del sec. IX pubblicato sul ms. parigino Bibl. Nat. 12448*, Pavia, 1927, p. 115 (at c. 170.3); H. Siems, *Handel und Wucher im Spiegel frühmittelalterlicher Rechtsquellen*, Hannover, 1992, p. 301-2; W. Kaiser, *Die Epitome* (nt. 11), p. 513.

compared with the coeval French texts, then, this manuscript highlights a new element: Isidore is now used as a complement to Justinian, in both the authentic and the epitomized versions.

7. We can here recall the very significant case recently highlighted by Anna Bellettini of the famous Isidor of Malatesta (ms. Cesena, Bibl. Malatestiana, S.XXI.5). The text of the *Etymologiae* – copied around the middle of the ninth century in the Po Valley (maybe at Nonantola) – presents a set of marginal glosses and inserts added by a scribe from northern Italy working between the tenth and eleventh centuries. The hand sought to integrate and explain the chapters of the Isidorian *Liber de legibus* (fol. 57v/58r). Of particular importance is the presence of some constitutions taken from Justinian's Code and accompanied by complete inscriptions. Even more surprisingly, some of these constitutions belong to C. 11.48 (*De agricolis censitis vel colonis*): this is surely among the earliest evidence we have about the knowledge of the *Tres libri* (the last three books of Justinian's Code) in the Middle Ages[18]. Isidore would be used in this way for a long time thereafter.

II. The Isidorian inheritance at the beginning of the legal revival in the eleventh century

8. The century-long Carolingian crisis affected all of Europe; it inevitably signaled a cultural regression, in particular for legal practice. The political and economic rebirth began during the tenth century, with the accession of the Saxon Henry I. (a. 919), the final defeat of the Magyars and, lastly, with the *restauratio Imperii* of Otto I. (a. 962). But for the cultural revival, we have to wait until the second half of the eleventh century. The first stirrings of this revival are visible in the world of judges, lawyers and notaries. Indeed, we may well trace the origins of the professional lawyer to this period[19].

9. Once again, manuscripts are a good indicator. We can start with two of the principal testimonies of the tradition of the *Epitome Iuliani*. The first is a manuscript that once belonged to Gustav Hänel, now held in the University Library of Leipzig (Hänel 6, *antea* 3503)[20]. It was probably copied in southern Italy (Monte Cassino Abbey?) and should probably be dated to the second half of the eleventh century[21]. As it is often the case, the *Epitome Iuliani* is here accompanied by a series of appendices and additions: the texts of some Justinianic Novels (reproduced verbatim), the mysterious *Dictatum de consiliariis* and an Edict of the emperor Conrad II on perjury (1027/1039). Here we have another example of the renewed interest for Roman law during the half-century that paved the way to Irnerius and the school of Bologna. In the guise of an introduction of sort, the manuscript commences with four folios, which in fact reproduce the whole book V of Isidore's *Etymologiae*. Just as the Carolingian era, then, this new cultural "renaissance" started within the reassuring Isidorian framework.

18 *Biografia di un manoscritto. L'Isidoro Malatestiano S.XXI.5*, A. Bellettini, P. Errani, M. Palma, F. Ronconi (ed.), Roma, 2009, esp. p. 37-8 and 45-7. On the medieval tradition of the last "Three books" of the Code, see E. Conte, *Tres Libri Codicis. La ricomparsa del testo e l'esegesi scolastica prima di Accursio*, Frankfurt am Main, 1990. Almost so as to confirm what are we saying, the "Malatestian code" (today the ms. Marcianus, lat. II.46) was integrally copied in the eleventh century.

19 The just mentioned case of the "Malatestian Code" (with its addition of Ottonian age) should be a good indicator. In general, see M. Bellomo, "Una nuova figura di intellettuale: il giurista", in C. Violante, J. Fried (ed.), *Il secolo XI: una svolta?*, Bologna, 1993, p. 237-56 (= in Id., *Medioevo edito e inedito*, Roma, 1997, II, p. 3-21).

20 How this manuscript did arrive in Germany is an interesting story in itself: see F. Patetta, "Come il manoscritto udinese della così detta *Lex romana Retica Curiensis* e un prezioso codice sessoriano siano emigrati dall'Italia", (first edition 1911), now in Id., *Studi sulle fonti giuridiche medievali*, Torino, 1967, p. 963-6 and R. Helssig, "Der Erwerb des Codex Utinensis und einen anderen Julianhandschrift durch Gustav Hänel", *Zentralblatt für das Bibliothekwesen*, 29, 1912, p. 110-4.

21 A punctual description of the code may be found in W. Kaiser, *Die Epitome* (nt. 11), p. 146-153. To trace both the date and the place of composition of the manuscript, see Ch. M. Radding, A. Ciaralli, *The* Corpus Iuris Civilis *in the Middle Ages. Manuscripts and Transmission from the Sixth Century to the Juristic Revival*, Leiden-Boston, 2007, p. 41 and 86.

10. Even more interesting is the second case, the manuscript 122 of the Chapter Library of Vercelli[22]. The text was copied in Italy, probably near Rome, around the middle of the eleventh century, and it brings together several texts among which legal materials greatly predominate. In particular, the manuscript contains some texts of the Roman legal tradition: the *Epitome Iuliani*, the *Collatio legum* or *Lex Dei* (of which this manuscript is one of the only three testimonies), the *Dictatum de consiliariis* and also some fragments of Justinian's laws (taken from the Code, in the summarised version of the *Summa Perusina*, from the Institutes [*Const. Imperatoriam*], with some exegetical attempts, and from the Novels, in an unabridged Latin version different from that of the *Authenticum*). The manuscript contains also laws from the Frankish tradition (i.e. from *Epitome Aegidii* and *Lex Salica*). Finally, we find extracts from Isidore's *Etymologiae* (V.10, 15, 24, 25, 27 with the *stemma cognationum* of IX.6.28) and (in a later hand) from Isidore's *Sententiae* (II.3.6; II.13.14-5 e 18). Here as well, just as in the case of the Modena manuscript and the Carolingian collection, the passages taken from *Etymologiae* are assembled after the didactic scheme of question and answer (*interrogatio – responsio*).

11. Comparing the Modena and Vercelli manuscripts, and considering the way in which both use Isidore, one could be forgiven for thinking that almost two hundred years have passed in vain[23]. However, while the teaching method might appear the same, on closer scrutiny one may note some important changes. Isidore is now used as a mean of understanding and interpreting the "new" law of Justinian: apart from the quotation from Justinian's Code in the first *interrogatio*, there are several references – though often implicit – to the *Etymologiae* in the glosses reproduced on folios 5v-6r, which are also comments on the Code of Justinian[24].

12. It would seem important that this manuscript belonged to a certain *Ambrosius iudex*, probably a Lombard. He personally copied in the manuscript a chapter of Rothari's Edict on kinship (c. 153, *Omnis parentela*). This is surely no accident: he was a judge and this manuscript served him as a working tool. Unlike in northern Europe, in eleventh-century Italy the rebirth of the legal culture and the return to prominence of Justinian's law influenced the world of legal practice from the outset. Once again, this transition was facilitated and partially carried out through the authority of Isidore. Very often now legal definitions taken from Isidore appear in contexts far away from contemporary schoolrooms. Thus, especially in the second half of the century, it is quite common to find Isidore quoted in records of judicial proceedings and in notarial documents. Thus, the handbook character of *Etymologiae* now begins to be clearly visible in legal practice.

13. Some examples will help to clarify this. We may look first at the figure of Petrus, a notary from Arezzo, who was one of the principal players in the re-discovery of Roman law in this period. Thanks to the recent studies of Giovanna Nicolaj[25], today we know something more about this interesting and mysterious man. His colleagues respectfully called him *legis doctor*; more poetically, he called himself *legis amator*[26]. His activity as a notary is attested for the period between 1075 and 1114. There are two striking features in the documents he drafted: the introduction of new graphic models and the very early and conscious use of Justinianic law (from both Code and Institutes). His hand was identified in two glosses at the words

22 For a description of the content, see W. Kaiser, *Die Epitome* (nt. 11), p. 122-146; for the dating and possible place of composition, while M. Radding and A. Ciaralli, *The Corpus* (nt. 21), p. 21-2 and 85-6, suggest the eleventh century (second half) and the region of Rome, H. Hoffmann, "Italienische Handschriften in Deutschland", *Deutsches Archiv für Erforschung des Mittelalters*, 65, 2009, p. 65-6, thinks of the tenth century.

23 About the continuity between the Carolingian era and the Reform of Gregory VII, see T. Kouamé, *La réception* (nt. 8).

24 Edition of the glosses in F. Patetta, "Contributi alla storia del diritto romano nel Medio Evo. III. Glosse e somme di costituzioni del Codice giustinianeo nel ms. vercellese dell'Epitome Iuliani", *Bullettino dell'Istituto di diritto romano*, 4, 1892, now in Id., *Studi* (nt. 20), p. 126-31 and in Id., *Adnotationes Codicum domini Justiniani (Summa Perusina)*, *Bullettino dell'Istituto di diritto romano*, 12, 1900 (= Firenze, 2008), p. 292-93. We can recognise quotations from *Etym.* II.10, II.11, V.3, V.9, V.13 e IX.4; see M. Conrat, *Geschichte* (nt. 4), p. 314-5 and W. Kaiser, *Die Epitome* (nt. 11) p. 145.

25 "Storie di vescovi e di notai ad Arezzo fra XI e XII secolo", in *Il notariato nella civiltà toscana. Atti di un convegno (maggio 1981)*, Roma, 1985, p. 149-70 and Ead., *Cultura e prassi di notai preirneriani. Alle origini del rinascimento giuridico*, Milano, 1991, p. 79-89.

26 E. Cortese, *Il rinascimento giuridico medievale*, Roma, 1996², p. 7-9.

locatio[27] and *mutuum*[28] respectively (both in *Inst.* 1.2.2) in the famous manuscript of Poppi: they repeat almost verbatim the relevant Isidorian definitions in *Etym.* V.25.12 e V.25.18[29].

14. A second and no less significant example comes from the very elusive figure of *Pepo*. A very ancient tradition saw in him the predecessor of Irnerius at the dawn of the Bologna school. For a long time, historians knew about Pepo only what could be derived from the fragmentary and confusing words of Azo and Odofredus. As such, scholars used to think of him as a phantom or a legend. Only recently has the real figure of Pepo been brought to light, at least partially. Today we know that one *Pepo* or *Pepone* (a colloquialism for *Petrus* or *Petrone*) did actually live at the end of the eleventh century. He certainly had a strong reputation as *iuris peritus* or legal expert (an expression which at that time meant an expert in Roman law).

15. Around one hundred years later, *Radulfus Niger* – an English theologian and moralist, friend of Thomas Becket and for that reason exile in France – speaks of Pepo, calling him *aurora surgens* of the renaissance of Roman law (Irnerius would have been simply a "propagator" of that movement). According to Ralph, Pepo enjoyed great authority and held lessons on both the Code and the Institutes of Justinian, although he appears not to have known the Digest. Many confirmations can be brought in support of Radulfus' story. A *Pepo legis doctor* is actually mentioned in a couple of judicial reports in Tuscany between 1072 and 1079[30]. We can also be sure of his knowledge of both Code and Institutes and about his teaching activity. The earliest medieval *summa* on the Institutes (the *Summa 'Iustiniani est in hoc opere'* – compiled in Provence around 1125 according to Legendre) mentions our Pepo when providing the definition of loan (*mutuum*)[31]. As to Justinian's Code, Pepo is cited in a gloss on the word "embolam" of C. 1.2.10.pr., the same gloss appearing with minor differences in three twelfth century manuscripts[32].

16. Both references to Pepo (in the *Summa Institutionum* and in the gloss to the Code) date to the twelfth century (i.e. to the *ius commune* or *droit savant* period). Both show the same characteristics: the author first recalls the definitions of the two technical terms given by Pepo and then rejects them in favour of other, much more recent, definitions inspired by deeper legal knowledge. In both, however, the explanation attributed to Pepo is taken word by word from Isidore's *Etymologiae*. A third and final source – to be discussed shortly – confirms how characteristic it was of Pepo to approach the texts of Justinian through Isidore's definitions. If it is by now certain that Pepo was truly a teaching lawyer, it is equally beyond doubt that he taught holding Justinian in one hand and Isidore in the other. If we keep this in mind, we may better appreciate how great is the distance separating Irnerius from everything we usually term "proto-Irnerian".

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27 "Locatio est res ad usum data cum diffinitione mercedis" (V. Crescenzi ed., *La Glossa di Poppi alle Istituzioni di Giustiniano*, Roma, 1990, p. 34).

28 "Mutuum id quod a me tibi datur et ex meo tuum fit" (Crescenzi ed., *La Glossa* [nt. 27], p. 35). The probable source of Isidore (*Mutuum appellatum est quia id, quod a me tibi datur, ex meo tuum fit*) could be here recognised in Gai, *Institutiones*, III.90 (= Iust., Inst., 3.14.pr): "Unde etiam mutuum appellatum est quia, quod ita tibi a me datum est, ex meo tuum fit".

29 G. Nicolaj, *Cultura e prassi* (nt. 20), p. 93 e sg.

30 In 1072 Pepo is in Calceraki near Chiusi defending the Monte Amiata monastery; in 1076 he is in Marturi (today Poggibonsi) near Siena participating in the very famous *placitum* where, after five centuries, the Digest reappears. In 1078 he is in Puntiglo, again near Chiusi and again defending the same monastery. Finally, in 1079, we find him in Ferrara pleading for Pomposa Abbey; see for all E. Cortese, *Il diritto nella storia medievale*, II. *Il basso medioevo*, Roma, 1995, p. 33-36.

31 P. Legendre, *La Summa Institutionum* Iustiniani est in hoc opere, Frankfurt am Main, 1973, p. 91: "Queritur quare *mutuum* solum *dicitur ab eo quod ex meo tuum fit*, cum in pluribus aliis contractibus eueniat idem quod ex meo tuum fit. Solutio: propter usum frequentiorem quod generale est specialiter attribuitur huic sub nomine mutui, licet mutuum in certis contractibus dici posset. Et hoc secundum Peponem. Nos tamen aliter diffinimus...".

32 Ms. Paris, BN, lat. 4517 (sec. XII.1), f. 8rb, *ad vv.* "*felicem embolam*" in C. 1.2.10.pr.: "Secundum Pep(onem) dicitur embola supercrescens iuventus alio propter hoc transvehenda, sicut dicitur embolismus annus, idest superscrescens. G. vero dicit eam gentem aliter uti hoc verbo et sic exponit: 'ante f(elicem) embolam' idest cuiusvis rei transvectionem a publico faciendam"; see L. Loschiavo, " 'Secundum Peponem dicitur... G. vero dicit'. In margine ad una glossa etimologica da Pepo ad Ugolino", *Rivista internazionale di diritto comune*, 6, 1995, p. 233-49.

III. The twelfth and thirteenth Centuries

17. Despite that, Pepo should not be seen as the last representative of an old tradition about to fade away. Even if the "Bolognese" method did in fact represent a rupture with the past, the long-established custom of explaining legal terms or texts with the help of Isidore was not suddenly abandoned. Quite the contrary. The habit of referring to Isidore's encyclopaedia on legal matters (not just in the schoolrooms, but also in court) persisted for some time. Once more, manuscripts offer precious contribution to our understanding. In particular, we should consider the ms. Vatican City, BAV, lat. 8782, which brings us to Italy, probably around the middle of the twelfth century[33]. Here, a gloss to Inst. 1.2.9 gives the definition of *mos* (a central concept in the construction of the medieval theory of customary law). Once more, the definition is taken directly from *Etymologiae* (in particular V.3.2)[34]. Even famed masters of the glossatorial method such as Placentinus[35] and Johannes Bassianus[36] – both active in the late twelfth century – reveal the persistence of Isidore's works in the reading of twelfth-century lawyers. Isidore is still clearly visible in the mid thirteenth century (though probably in a more indirect way) in the works of Accursius and Odofredus[37].

18. Many more examples could be brought for Italy, but it might be more interesting to look at other parts of Europe. We can start with France where, around 1160, the ms. Torino, BN, D.V.19[38] was probably compiled. Along with a series of other pieces, the manuscript reproduces virtually the whole of Isidore's *Liber de legibus* (*Etym.* V.1-27). Around the same years, the author of the *Epitome Exactis regibus* – we are now in the north of France (Normandy) or maybe in England – clearly kept Isidore constantly in mind[39]. Moving now for sure to England, a teacher during the last decades of the twelfth century, – probably from the school of Johannes Bassianus – wrote for his students a *Lectura* on the *Institutiones*. In his introduction (*materia*), he inserted the entire first chapter of book V of the *Etymologiae*[40]. Even later, Bracton began his reflections on the concept of *publica utilitas* with the famous Isidorian definition: "rex a regendo et recte agendo"[41].

19. If we leave the world of civil (Roman) law for that of the canon law, the influence of Isidore appears, if anything, even more pronounced[42]. It is sufficient to look at the *Concordia discordantium canonum* of

33 On this ms. see F. Patetta, "Contributi alla storia del diritto romano nel Medio Evo. II. Nota sopra alcuni manoscritti delle Istituzioni", *Bullettino dell'Istituto di diritto romano*, 4, 1891, now in Id., *Studi* (nt. 20), p. 57-60 and 110-116; G. Dolezalek (L. Mayali), *Repertorium manuscriptorum veterum Codicis Iustiniani*, Frankfurt am Main, 1985, I, p. 434-435; F. Macino, *Sulle tracce delle Istituzioni di Giustiniano nell'alto medioevo. I manoscritti dal VI al XII secolo*, Città del Vaticano, 2008, p. 111-2 e 156-60 (according to whom the ms. was drafted in a urban centre of the North of Italy).

34 Edited by F. Patetta, *Contributi* (nt. 33), p. 110, n. 3.

35 E. g., when he traces – in his *Summa Institutionum* (Muguntiae 1535; repr. Torino 1973) – the complex relationship between *ius* and *lex* using a pretty metaphoric figure; see E. Cortese, *La norma giuridica,* II, Milano 1964, p. 34.

36 It may be recalled Bassianus' use of Aristotelian categories to introduce his students to the Justinian Code and, in particular, to show them the different *interpretationis genera*. Certainly, the source is weather Aristotle not Boethius, but even the *Etymologiae* of Isidore (II.6); see L. Loschiavo, *Summa Codicis Berolinensis. Studio ed edizione di una composizione 'a mosaico'*, Frankfurt am Main, 1996, p. 60.

37 See, for instance, the definition of *iustitia* that we can read in Odofredus, *Lectura in Dig. 1.1.10 'De iustitia et iure', l. 'iustitia' n. 2*; see E. Cortese, *La norma* (nt. 35), vol. 2, p. 18 nt. 39.

38 A. Gouron, "Le 'grammarien enragé': Aubert de Béziers et son œuvre (ms. Turin, Bibl. Naz. D.v.19)", *Index*, 22, 1994, p. 447-71 (repr. in Id., *Juristes et droits savants: Bologne et la France médiévale*, Aldershot-Brookfield, 2000, n. XVIII). For a description of the ms., see Macino, *Sulle tracce* (nt. 33), p. 107-8 e 137-46.

39 H. Lange, *Römisches Recht im Mittelalter.* I. *Die Glossatoren*, p. 421 ff. (here p. 425) and A. Gouron, "Un grand ancêtre anglo-normand: l'*Epitome Exactis regibus*", *Initium*, 7, 2002, p. 79-98 (repr. In Id., *Pionniers du droit occidental au Moyen Âge*, Aldershot, 2006, nr. X).

40 *Lectura Institutionum*, F. de Zulueta, P. Stein (eds.), in *The Teaching of Roman Law in England around 1200*, London, 1990, p. 1.

41 In *Etym.* I.29.3 and IX.3.4 and again in *Sent*, III.48.7. See also the next § 22.

42 See, for instance, R. Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Theutonicus*, München, 1967, p. 126-30.

Gratian (ca. 1130-1140). Here, at the beginning, we find an almost literal copy of most of the legal chapters (20 out of 27) of book V of the *Etymologiae*. The "decretists" examined these passages with great attention[43]. A good example is the Isidorian passage on *privilegia* in *Etym.* V.18[44], which became canon 3 of Gratian's Distinction III as well as the occasion for an important *dictum* (*post* C. 25 q. 1 *pars* II.2 *in fi.*). In turn, this last *dictum* became the obligatory starting point for any Canon lawyer on specific laws and privileges[45]. The success of the Isdorian definition is also visible in its use in the title *De verborum significatione* of Gregory IX's *Liber Extra* (c. 23 X, 5.40) (1234)[46].

IV. The ideal of the utraque lex

20. We can therefore argue that the works and teachings of Isidore played a fundamental role in building a common legal "grammar" for medieval Europe. Indeed, it would be extremely difficult to make sense of the momentous "explosion" of the legal renaissance of the twelfth century (and especially its rapid propagation across the Continent from the first decades of the same century) without the steady construction of such a specific grammar throughout the previous centuries.

21. In assessing the impact of Isidore of Seville on legal history, however, there are also other elements to take into account. The teaching of the Spanish bishop was not limited to the preservation of legal concepts and definitions throughout the Middle Ages. Although – as we have seen – Isidore was not properly a lawyer, he also made important legal contributions. If we begin with legal theory, it is surely worthy noting his efforts to realise an ideal synthesis – so typical of the late antique and the early medieval ages – between the two universal orders: the ecclesiastical one (devoted to the exaltation of the *Lex Dei*) and the secular one (whose principal component was the *Lex Romana* understood as *mater omnium humanarum legum*)[47].

22. Naturally, the value of Isidore's contribution emerges more clearly if we also consider his other works and not only his encyclopaedia. In the *Sententiae*, for instance, Isidore highligths the necessary ethical foundation of any power aspiring to legitimacy. From the premise (perhaps Augustinian) according to which *reges a regendo et recte agendo* (the term "kings" derives from reigning and acting well), Isidore concludes that kings can keep their power only if they govern with rectitude: otherwise they are destined to lose it [48]. Kings must not forget that they are mortal and called to perform a task. They have not only to respect their own laws[49]: they must also – and generally –select with the utmost care the persons to whom they delegate the administration of justice[50].

43 Nor did they avoid to consider other works of the Seville Bishop like especially the *Sententiae*; see for instance the *praefatio* to the *Summa 'Omnis qui iuste'* (Summa Lipsiensis) at Decr. D. 45 c. 10 (*Monumenta iuris canonici*, R. Weigand, P. Landau, W. Kozur (eds.), ser. A, vol. 7, Città del Vaticano, 2007, p. 1).

44 *Privilegia autem sunt leges privatorum, quasi privatae leges. Nam privilegium inde dictum, quod in privato feratur*.

45 *Summa Lipsiensis* (nt. 43), p. 1.

46 See Cortese, *La norma* (nt. 35), p. 44-6.

47 To see here F. Calasso, *Medio evo del diritto.* I. *Le fonti*, Milano, 1954, p. 224-34 and E. Cortese, *Il diritto* (nt. 15) vol. 2, esp. p. 57-8.

48 *Isidorus Hispaliensis Sententiae*, 3.48.7, P. Cazier (ed.) (*Corpus Christianorum*, SL 111), Turnholt, 1988, p. 298: "Reges a recte agendo vocati sunt, ideoque recte faciendo regis nomen tenetur, peccando amittitur". See also Isid., *Etym.* X.3 (quoted in the text). Maybe via Gregory the Great (*Mor. in Iob*, 26.28.53), Isidore could have had in mind the words of Augustine, *De civitate Dei*, 5.19 (*Corpus Christianorum*, SL 47, p. 155).

49 *Sententiae*, 3.51.1-2 (nt. 48, p. 303): *Iustum est principem legibus obtemperare suis... Princeps legibus teneri suis, nec in se posse damnare iura quae in subiectis constituunt...*

50 "It is a gross fault of the princes that of putting as head of their subjects – against the God's will – corrupted judges; indeed, as the people is responsible if bad men become princes, in the same way is a fault of the princes if they appoint unjust judges", *Sententiae*, 3.52.1 (nt. 48, p. 305).

23. Such people, for their part, will administer jurisdictional power "solely for the sake of eternal salvation" and will demand no gifts: "this way, while they refuse to obtain mundane riches illicitly and prefer to judge in accordance with justice, they earn the eternal reward"[51]. There is no doubt that the "good" sovereign is he who is able to work together with the Church, to support her works, to follow her injunctions, to become her instrument. When princes truly demonstrate their ability to use correctly the power they have received from God – and when it is necessary to keep the ecclesiastical order – they may even use their jurisdiction with respect to the Church itself. When – in other words – the priest cannot keep the ecclesiastical order by prayers alone, it must be the prince to impose it with his power[52]. It is difficult to say if such ideas were addressed specifically to the Visigothic kingdom, or they were rather expressed in a general and 'ecumenical' perspective. In either case, they emerged in all their actuality with the new Carolingian empire and continued to be relevant even after the crisis of this new political structure[53].

24. Such ideas were still a source of inspiration during the following centuries, especially when the purpose was to give practical application to the principles of the Gregorian Reform. Sometimes they even gave rise to misunderstandings and crude, even "subversive" solutions. A particularly good example in this sense may be found in the last testimony we have about the mysterious Pepo. In the same passage in which Radulfus Niger indicates Pepo as a supporter (teacher) of the Justinian Code and Institutes, he also tells us about a trial held in the presence of Henry IV, surely during one of his Italian forays between 1080 and 1090. What should be the punishment for killing a slave?[54] Most of the judges pronounced in favour of a fine according to Rothari's *Edictum*, the law in force in the Lombard kingdom, but suddenly Pepo rose up and – according to Niger – persuaded the Emperor to inflict capital punishment. Pepo's principal arguments were: a) according to divine and natural law, the killing of a man without a justification must in any case receive capital punishment; b) servile *status* cannot cancel or limit the human condition, and so it does not constitute an exception to the aforementioned principle. If the first point clearly derived from the Biblical law of retaliation, the real source of Pepo's complex argument (as we have seen in the other two testimonies of his teaching) must once again be identified in Isidore of Seville[55].

51 *Sententiae*, 3.52.3 (nt. 48, p. 305).

52 *Sententiae*, 3.51.6 (nt. 48, p. 304): "Cognoscant principes saeculi deo debere se rationem propter ecclesiam, quam a Christo tuendam suscipiunt. Nam sive augebatur pax et disciplina ecclesiae per fideles principes, sive solvatur, ille ab eis rationem exigit, qui eorum potestati suam ecclesiam credidit".

53 To see how much the eleventh century authors feel themselves close to the Isidorian ideas (even closer than that of the same Gregory I), it can be sufficient to run through the works of the mentioned Jonas of Orléans (see especially ch. 5 of his *De institutione regia* (831) [ed. in J. Reviron, *Les idées* (nt. 13)] in which Jonas repeats Isidore's *Sententiae* [nt. 48] 3.52.1-3) and Hincmar of Reims in his *De regis persona et regio ministerio* (873) (Migne PL, CXXV, col. 833-856).

54 "Cum enim coram imperatore in Lombardia convenissent iudices tocius regni, occiso servo a quodam quesitum est iudicium de homicida. ... Cum igitur multiplici allegatione iuris sui inebriarentur... pravi iudices dictaverunt sententiam in homicidam solam multa pecuniariam. Surrexit autem magister Peppo in medium tantum Codicis Iustiniani et Institutionum baiulus, utpote Pandecte nullam habens noticiam, ... enervans sententiam priorum iudicum. Quippe allegavit eum, qui exemisset hominem de grege hominum, universitati fore iniurium adeo, ut qui hominem ademisset universitati hominum, quia violasset naturale communionis consorcium, ipse pariter de medio tolleretur et homicida occideretur. Sive enim servus sive liber foret, idem ait esse iudicium, quoniam addictio servitutis delere non poterat communionem nature humane conditionis. Legibus igitur et sacris constitutionibus imperatorum firmato iudicio optinuit magister Peppo coram imperatore aliis iudicibus in confusione recedentibus" (L. Schmugge (ed.), "*Codicis Iustiniani* et *Institutionum baiulus*. Eine neue Quelle zu Magister Pepo von Bologna", *Ius Commune*, 6, [1977], p. 3).

55 So E. Cortese, *Il diritto* (nt. 15), 2, p. 37-41, who underlines the correspondence with *Etym.* V.4.1 "... Ius naturale est commune omnium nationum, et quod ubique instinctu naturae, non constitutione aliqua habetur; ut viri et feminae coniunctio... Item depositae rei... restitutio, violentiae per vim repulsio. Nam hoc, aut si quid huic simile est, numquam iniustum est, sed naturale aequumque habetur" and with *Etym.* V.27.24 : "Talio est similitudo vindictae, ut taliter quis patiatur ut fecit. Hoc enim et natura et lege est institutum, ut 'laedentem similis vindicta sequatur'. Vnde et illus est legis (Matth. 5.38): 'Oculum pro oculo, dentem pro dente'...". With regard to the possibility that the "laws and sacred constitutions" (i.e. Roman norms) which – following the words of Radulfus – Pepo should have produced to support his reasoning, they could be perhaps identified in that strange text which is the *Collatio legum Mosaicarum et Romanarum*. See L. Loschiavo, "La Legge che Dio trasmise a Mosè. Fortuna medioevale di un'operetta volgare", in *Proceedings of the XI. Congress of Medieval Canon Law (Catania, 30.7-6.8.2000)*, M. Bellomo, O. Condorelli (eds.), Città del Vaticano, 2006, p. 85-102.

25. Pepo's reading of these texts might appear somewhat crude and legally dubious, but it simply reflects a set of rules and values which had been accepted and shared for centuries in the political and legal culture of early medieval Europe. They are the same rules and values that, for example, recur in the famous words of that great figure Hincmar of Reims. In outlining his ideal model on the relationship between lay and ecclesiastical authorities, Hincmar wrote in chapter 21 of his *De ordine palatii*[56]:

> Comitis autem palatii inter caetera paene innumerabilia in hoc maxime sollicitudo erat, vt omnes contentiones legales, quae alibi ortae propter aequitatis iudicium palatium aggrediebantur, iuste ac rationabiliter determinaret seu peruerse iudicata ad aequitatis tramitem reduceret, vt et coram Deo propter iustitiam et coram hominibus propter legum obseruationem cunctis placeret. Si quid vero tale esset, quod leges mundanae hoc in suis diffinitionibus statutum non haberent aut secundum gentilium consuetudinem crudelius sancitum esset, quam christianitatis rectitudo vel sancta auctoritas merito non consentiret, hoc ad regis moderationem perduceretur, vt ipse cum his, qui vtramque legem nossent et Dei magis quam humanarum legum statuta metuerent, ita decerneret, ita statueret, vt, vbi vtrumque seruari posset, vtrumque seruaretur, sin autem, lex saeculi merito comprimeretur, iustitia Dei conseruaretur.
>
> Among the countless cares of the Palatine count, the main one was to pronounce according to justice and reason on all those legal disputes commenced elsewhere that were brought to the palace to be decided according to equity, and to bring to equity those that had been decided unjustly, so to make them pleasing to God because of justice and to men because of their compliance with the laws. Any matter not provided for in the law or sanctioned so cruelly in popular customs to go against Christian righteousness and the holy authority was brought before the wisdom of the king. The king would decide on that matter with the advice of those learned in both [*i.e.* human and divine] laws who kept divine laws in higher esteem than the human ones. Where possible, the king would decide and establish in accordance with both laws. Otherwise, he would duly limit [*i.e.* the application of] secular law so as to keep God's justice.

The archbishop of Reims was certainly one the most prominent supporters of the political and legal ideal defined by scholars with the expression *utraque lex* (both the laws). It is however clear that Hincmar was standing on the shoulders of a presence by now familiar to us, Isidore of Seville.

V. Towards the construction of a medieval *ordo iudiciarius*

26. The contribution of Isidore to the construction of a common legal culture for the *Respublica Christianorum* was not limited exclusively to legal theory, but it also reached much more technical issues. Without doubt, one of them was the procedure for the settlement of disputes. For centuries during the Middle Ages, those tasked with resolution of disputes and the punishment of offenders could find in the works of Isidore the guidelines for a viable *ordo iudiciarius* (to use the medieval expression). A short introduction may help.

27. It must first be emphasised that in the case of legal procedure the Roman law tradition was far less forthcoming than it was in other areas of law. Neither the Theodosian tradition nor the Justinian's *Corpus Iuris* provided a methodical, consolidated or even coherent account on trial judgment and procedure. It was only with the medieval lawyers that the task was undertaken and completed. The result of their efforts was, doubtlessly an original creation: the so-called Romano-canonical procedure[57]. We should think immediately of the works written by the early-twelfth century glossators[58]. While the effort of Canon

56 *Hincmarus De ordine palatii*, ch. 21 (*MGH*, *Leges*, *Fontes iuris Germanici antiqui*, Hannoverae, 1980, p. 3).

57 See now K. W. Nörr, *Romanisch-kanonisches Prozessrecht. Erkenntnisverfahren erster Instanz* in civilibus, Heidelberg-Dordrecht-London-New York, 2012.

58 L. Fowler-Magerl, *Ordines iudiciarii and Libelli de ordine iudiciorum*, Turnhout, 1994, p. 16-28 (esp. p. 24).

lawyers between the twelfth and fourteenth centuries is doubtlessly noteworthy, the long period before Classical canon law should also be taken into account, for its contribution ought not to be dismissed.

28. The interest of Christians and the Church in settling and composing disputes is obviously very ancient[59]; it might look like a truism, but we could well call it as ancient as the Church itself: Paul of Tarsus and other Church Fathers after him such as Ambrose of Milan and Augustine of Hippo were explicitly interested in this topic. They were concerned with the "scandal" represented by Christians in dispute with one another[60]. The main problem for these Church Fathers was to bring back to the right path those who had strayed from it. As such, it was necessary first to establish with precision the responsibilities of each person; then, the appropriate punishment or expiation. While the general goal was clear, the means to reach it were more debated.

29. During its first centuries, Christianity was deeply influenced by two different cultural roots: the Hebraic-Hellenistic tradition on the one hand and Latin culture on the other. The journey towards the creation of a proper and original model would be long and not always straightforward. The works of Isidore of Seville were an important step along the way. Using different elements from the various normative and legal traditions accessible to him, Isidore produced an original synthesis. While this synthesis did not provide a complete and detailed model of judicial process, at least it offered a broadly coherent legal framework that would be useful for the entire Christian world.

30. We can start from a fact. Probably under the influence of Augustine[61] (*Sermo* 351, *De poenitentia*) – Isidore was the first to employ the expression *ordo iudiciarius* in what would become its standard meaning[62]:

> In ambiguis Dei iudicio serua sententiam. Quod nosti tuo, quod nescis diuino committe iudicio. Non potest condemnari humano examine quem Deus suo iudicio reseruauit. Incerta non iudicamus, *quousque veniat Dominus*, qui latentia producit in lucem, *qui inluminabit abscondita tenebrarum, qui manifestabit consilia cordium* (*I Cor*. 4.5). Quamuis enim vera sint, credenda non sunt, nisi quae certis indiciis demonstrantur (*al.* comprobantur), nisi quae manifesto examine conuincuntur, nisi quae ordine iudiciario publicantur.
>
> In ambiguous matters keep the ruling of God's Judgment. Commit what you know to your judgment and what you do not to God's. You cannot condemn by means of human scrutiny what God has reserved to His own judgment. Let us not judge what is uncertain until the Lord comes, who will bring to light things hidden in the darkness and disclose the counsels of men's hearts. For although true, nothing should be believed except what has been demonstrated [*alternatively:* confirmed] by certain evidence, established through a clear investigation, made known by a correct procedure (*ordo iudiciarius*).

59 See, among many others, F. R. Herrmann, "The Establishment of a Rule Against Hearsay in Romano-Canonical Procedure", *Virginia Journal of International Law*, 36, 1995, p. 1-51; P. Prodi, *Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto*, Bologna, 2000 (esp. the first chapter, p. 21-57); J. C. Tate, "Roman and Visigothic Procedural Law in the False Decretals of Pseudo-Isidore", *Zeitschrift für Rechtsgeschichte*, Kan. Abt., 90, 2004, p. 510-519 and F. Roumy, "Les origines pénales et canoniques de l'idée moderne d'ordre judiciaire", in *Der Einfluss der Kanonistik auf die europäische Rechtskultur. 3. Straf- und Strafprozessrecht*, O. Condorelli, F. Roumy, M. Schmoeckel (eds.), Köln-Weimar-Wien, 2012, p. 313-49.

60 L. Loschiavo, "Tra legge mosaica e diritto romano. Il caso Indicia, la *Didascalia Apostolorum* e la procedura del giudizio episcopale all'epoca del Vescovo Ambrogio", in *A Ennio Cortese*, I. Birocchi, M. Caravale, E. Conte, U. Petronio (eds.), Roma, 2001, II, p. 269-284 and Id., *Figure di testimoni e modelli processuali tra antichità e primo medioevo*, Milano, 2004, esp. p. 39-74.

61 Augustinus, *Sermo* 351, De poenitentia § 10 (PL 39, col. 1546): "Quamvis enim vera sint quaedam, non tamen judici facile credenda sunt, nisi certis indiciis demontrentur. Nos vero a communione prohibere quemquam non possumus – quamvis haec prohibitio nondum sit mortalis, sed medicinalis –, nisi aut sponte confessum, aut in aliquo sive saeculari, sive ecclesiastico judicio nominatum atque convictum. Quis enim sibi utrumque audeat assumere, ut cuiquam ipse sit et accusator et judex? ". On the correct attribution of that passage – also repeated in the *Decretum Gratiani*, C. 2 q. 1 c. 18 – and on its meaning and diffusion, see now F. Roumy, *Les origines* (nt. 59), p. 318-20.

62 Isidorus Hispaliensis, *Synonyma*, II.86 (J. Elfassi ed., in *Corpus christ.*, *Series latina*, 111B, Turnhout, 2009, p. 133-134). About this work written between 595 and 631, see J. Elfassi, "Les *Synonyma* d'Isidore: un manuel de grammaire ou de morale? La réception médiévale de l'œuvre", *Revue d'études augustiniennes et patristiques*, 52, 2006, p. 167-198.

The text begins with an admonition to anyone who has the duty to judge to abstain from judgment if there is no absolute and certain evidence and, in its absence, rather to rely on God and His supreme judgment. In other words, we have to remember that all human justice is imperfect and that every human court must be always mindful of its limits. Immediately thereafter, Isidore underlines how the path to the truth cannot be improvised but must follow some necessary steps: judgment has to be based on certain evidence, verified in an indisputable way, through a verifiable process (or – if one prefers – through an *ordo iudiciarius*).

31. K.W. Nörr[63], L. Fowler Magerl[64] and now F. Roumy[65] have already shown how the expression "ordo iudiciarius" would later be repeated by the pseudo-Isidore[66] and Benedict Levita[67]. Naturally, Isidore cannot be examined in isolation from what preceded him. Just a few years earlier, Gregory the Great, in his famous letter of 603 A.D. (addressed to the *defensor* Johannes whom he instructed to settle the Januarius case in Spain) seems to have had a clear picture of the procedure to be followed by the ecclesiastical judge. Gregory does not use exactly the expression *ordo iudiciorum*: he speaks rather of a *iudicium ordinabiliter habitum*[68] (i.e. a correctly held trial).

32. Gregory's works were surely very well known to Isidore; he often took his inspiration from Gregory, and this subject is no exception. Nevertheless, we should note the two men's different approaches to the matter: Gregory seeks to give useful instructions to the ecclesiastical judges; Isidore writes with a coherent and orderly process in mind, to be used in both ecclesiastical and secular trials. It is also clear that the context in which the two churchmen operate is significantly different. Gregory moves comfortably within the structures of the Byzantine empire and would not dream of calling the imperial legal system into question – although on several occasions he does not hesitate to protest against some magistrates' behaviour[69]. By contrast, the bishop of Seville is one of the main actors in the creation of the new Visigothic Kingdom; his ideal project is to forge Christ's faithful and the King's subjects into a single and unitary *corpus*.

VI. The procedural framework sketched out in the *Etymologiae*

33. a) *The place* – It is precisely in this perspective that the verb *publicantur* used here by Isidore is to be understood. The bishop of Seville clearly wants to emphasize that any judgment – whether secular or ecclesiastical – had to be the outcome of a formalized procedure, not simply of the logical and heuristic mental process of the judge. The externalization of the judgment – or, more simply, its public nature – here appears as the first prerequisite for a correct *iudicium*. It is significant that Isidore began his thorough analysis of the elements of the legal process in his *Etymologiae* (*Etym.* 18.15) with the definition of "forus":

> De foro. <1> Forus est exercendarum litium locus... Constat autem forus causa, lege et iudice. <2> Causa vocata a casu quo evenit. Est autem materia et origo negotii, necdum discussionis examine patefacta; quae dum praeponitur *causa* est, dum discutitur *iudicium* est, dum finitur *iustitia*. Vocatum autem iudicium quasi *iurisdictio*, et iustitia quasi *iuris status*...

63 "Ordo iudiciorum und ordo iudiciarius", in *Collectanea Stephan Kuttner*, I. *Studia Gratiana*, 11, 1967, now in K.W.N., *Iudicium est actum trium personarum. Beiträge zur Geschichte des Zivilprozeßrecht in Europa*, Goldbach 1993, p. 343 (=17).

64 *Ordo iudiciorum vel ordo iudiciarius. Begriff und Literaturgattung*, Frankfurt am Main, 1984, p. 15 and Ead., *Ordines iudiciarii* (nt. 58), p. 20.

65 *Les origines* (nt. 59), p. 322-329.

66 *Decretales Pseudoisidorianae*, P. Hinschius (ed.), Leipzig, 1863, p. 18, 128, 193, 496.

67 3.259 (H. Pertz ed., *MGH*, *Leges*, II.2, Hannoverae, 1837, p. 118).

68 *Gregorii I Registrum Epsit.*, (P. Ewald, L. M. Hartmann eds., *MGH*, *Epistolae* I.2, p. 411).

69 On Gregory the Great's attitude towards the administration of justice in Byzantine Italy, see J. Richards, *Consul of God. The Life and Time of Gregory the Great*, London-Boston 1980 and more recently A. Padoa Schioppa, "Gregorio Magno giudice", *Studi medievali*, 51, 2010, p. 581-610 (esp. p. 602-4).

> On the court. A court is the place where litigation is conducted... A court consists of a cause, a law, and a judge. "Cause" is named after the event ("case") from which it originated. It is the subject matter and the origin of a proceeding before it is uncovered by the scrutiny of discussion. When it is set forth, it is the "cause", whilst under discussion is the trial (*iudicium*), when decided, justice. "Trial" is so called as if it were a "statement of the law", and "justice" as if deriving from "the legal state" (*iuris status*).

34. The forum – that is, the court – is the public place devoted to the resolution of disputes (*causae*). This resolution must come at the end of a suitable treatment (*discussio*) of the case, conducted in compliance with the law, and by the court that, at the end, pronounces its judgment with authority (*iurisdictio*). Procedure by trial, therefore, reaches a solution through justice (*iustitia*) according to that ethical equilibrium which Isidore calls the legal state (*iuris status*).

35. b) *The enquiry* – After this swift, but central, introduction, Isidore continues until he reaches the main issue of the trial, that is, the inquiry about facts and responsibilities:

> ... Iudicium autem prius *inquisitio* vocabatur... <3> Negotium multa significat... modo actionem causae, quod est iurgium litis... <4> Iurgium dictum quasi iuris garrium, eo quod hi qui causam dicunt iure disceptent. Lis a contentione limitis prius nomen sumpsit... <5> *Causa aut argumento aut probatione constat*. *Argumentum* numquam testibus, numquam tabulis dat probationem, sed *sola investigatione invenit veritatem*; unde et dictum argumentum, id est argutum inventum. Probatio autem testibus et fide tabularum constat.

> ... Initially the trial was called the "investigation"... "Transaction" has several meanings... sometimes it means "action of a cause" as to say the debate of a legal dispute... "Iurgium" (debate) is so called almost as if to mean legal loquacity, because the parties who take part in the proceeding are disputing according to the law. "Lis" (dispute) took first its name from "contention's limits"... The cause is based either on argumentation or trial. Argumentation indeed never finds the truth by means of witnesses or documents, but only through investigation; hence it is called argumentation, that is, "clever finding". On the other hand, trial is based on witnesses and documents.

36. According to Isidore, the etymology of *iudicium* also contains the search for truth or – better – its principal tool: the *inquisitio* (inquiry). The investigation concerning the *negotium* (transaction), which is at the origin of the dispute, is two-fold. It concerns both the law, to establish the scope of the dispute (in Roman legal terminology the *quaestio iuris*) and the subject matter (*quaestio facti*). Just as the investigation has two sides, there are also two different enquiring tools. For the first kind of enquiry, the judge can use logical argumentation (*argumentum*) (Isidore does not dwell much on the point as he already dealt with it earlier[70]). For the second one, he has to avail himself of more technical types of evidence – witnesses and documents (correctly, here Isidore does not mention confession, which is not proper evidence in a technical sense[71]).

37. c) *The judge* – Isidore goes on to indicate the so-called necessary persons (*necessariae personae*): those persons, that is to say, in whose absence no process may be considered a regular *ordo*.

> <6> In omne autem iudicium sex personae quaeruntur: iudex, accusator, reus et tres testes.

> Each trial needs at least six people: the judge, the accuser (prosecutor), the accused and three witnesses.

70 *Etym.*, VI.8.14-16 and esp. II.30. On the topic of the *argumenta* and on Isidore's role in its development, see A. Giuliani, "Il concetto classico di prova: la prova come *argumentum*", in *Recueils de la Société Jean Bodin*, XVI. *La preuve*, Bruxelles, 1965, p. 357-88; G. Otte, *Dialektik und Jurisprudenz*, Frankfurt am Main, 1971 (esp. P. 20-1); M. Bellomo, *I fatti e il diritto. Tra le certezze e i dubbi dei giuristi medievali (secoli XIII-XIV)*, Roma, 2000, p. 567-627; A. Padovani, *Modernità degli antichi. Breviario di argomentazione forense*, Bologna, 2006 (esp. p. 62-3).

71 Isidore speaks indeed of the *confessio erroris* – a procedural tool which was considered (and will be considered for a long) very precious by the Church but also by the contemporary Visigothic society – in another part of his work (*Etym.* VI.19.78).

The judge, the parties and the witnesses are evoked almost as if, combined together, they formed a four-sided figure. First of all, there is the judge. Recalling what he just said in the preceding passages, once again Isidore considers the judge as the cornerstone of the whole structure. At first sight, this might seem rather self-evident. Much on the contrary, such an indication would suddenly acquire great importance if we read it in implicit opposition to the procedural pattern generally used among barbarian people. All the more since Isidore and the Church know very well that the Barbarians are the new lords of the Christian West and they are the ones they have to deal with.

38. The systems of justice used by barbarian people were in general characterized by pure "isonomy" (to use the terminology of a brilliant historian of procedural law who passed away some years ago[72]). The Church would fight tirelessly against such an approach, which – at least in the extreme version we ascribe to the barbarian legislators – confines the judge to a merely arbitral role, almost as if he had to remain a natural third party.

39. The Church never refrained from insisting on the ethical responsibility entrusted to powerful people and to stress how doing justice on earth is surely one of the main duties of the rulers.

> Iudex dictus quasi ius dicens *populo*, sive quod iure disceptet. Iure autem disceptare est iuste iudicare: *non est autem iudex si non est in eo iustitia*.
>
> The judge is so called almost as if to say "he who tells the law" to the people or because he "examines and decides according to the law in court". Examining and deciding according to law means judging according to the justice: indeed, who does not have justice in himself, he is not a judge.

In an encyclopedic work like the *Etymologiae*, after the picture described in the previous passages, Isidore does not need to linger much on the point. The second part of the passage above does not require further comments. Speaking about the "constitutive" nature of the relationship between the authority of the judge and the moral virtue of justice, Isidore is simply repeating an unquestionable true of the time. More important is the first sentence of the passage. The reference to the people, here understood as the subjects in general, is certainly striking. What we have here is a new and strong statement about the necessarily public dimension of justice.

40. Looking at the *Etymologiae*, it would seem that this is all Isidore had to say on the subject. To those readers who wanted to know something more about legal procedure, Isidore dedicates many other passages of his most mature and thoughtful work: the *Sententiae*. Many of its lines (especially in the third book) are devoted to the judge, his duties and responsibilities, his possible mistakes and the dangers he is continually exposed to[73]. Such lines would come back very often – although without explicit reference – in the works of the great authors who characterized the cultural, religious and political life of the Carolingian and post-Carolingian era (to give only a few names: Jonas of Orleans, the anonymous compilers of the pseudo-Isidorian Decretals and, above all, Hincmar of Reims).

41. Isidore begins by stressing repeatedly the serious moral duty the princes acquire when he choose the judges to whom entrusting their subjects. These judges have to be learned and wise people but, first of all, they have to be conscious of the importance and delicacy of their role. Many of Isidore's warnings are specifically directed at the judges to avoid corruption (*Sent.*, 3.52.1-9 e 11 and 3.54.1-6), to abstain from using their power (for example, by artificially delaying the resolution of disputes) to promote their own interests or, in any case, to pursue other goals beyond that of doing justice (3.53.1-2).

42. The judge, however, can also make a mistake without any malice or intent to deceive, such as when he puts his trust in greedy and rapacious assistants (*ministri*) (3.52.10), or when he lets anger prevailing over

72 A. Giuliani, "Ordine isonomico ed ordine asimmetrico: 'nuova retorica' e teoria del processo", *Sociologia del diritto*, XIII/2-3, 1986, p. 81-90 and Id., "L'*ordo iudiciarius* medioevale (Riflessioni su un modello puro di ordine isonomico)", *Rivista di diritto processuale*, 43/3, 1988, p. 598-614.

73 See especially – but not exclusively – *Sententiae*, 3.52.1-16; 3.53.1-2; 3.54.1-7 (P. Cazier ed., nt. 48, p. 305-307).

understanding (3.52.14-16) or exceeds in his technical argumentations and becomes excessively verbose (3.52.13). The judge should also abstain from considering those who appear before him according to their position in the world (which would mean falling into the *acceptio personae*)[74]. Nor shall he let his mind to be clouded and his ability compromised by any external reason[75]. A judge should never lose sight of the chief purpose of the trial[76].

43. To the modern reader, such warnings may seem confined to purely moral grounds. As such, a lawyer could be easily tempted to dismiss them too quickly. Yet another time, however, it would be a mistake not to consider the importance of this ethical dimension, as Isidore's entire treatment of justice is deeply rooted in it. Rather, it is important to read these warnings through the above definition of the judge: the ultimate purpose of the judge is to ascertain the truth through a ritually irreproachable procedure. This is the only way to restore that ethical equilibrium of which human justice consists.

44. d) *The parties* – Let us go back to the *Etymologiae*. After dealing with the judge, Isidore does not spend too many words on the parties.

> <7> Accusator vocatus quasi adcausator, quia ad causam vocat eum quem appellat. Reus a re, qua (quae?) petitur, nuncupatus, quia, quamvis sceleris conscius non sit, reus tamen dicitur, quamdiu in iudicio pro re aliqua petitur.
>
> The accuser is so called from *ad-causator* because he brings a suit against the accused. The *reus* (i.e. accused) takes his name from *res* (i.e. thing) or the reason why he has to appear before the judge. Although he may not be aware of any wrongdoing on his part, we call him *reus* so long as he has to stand accused in court.

We have already noticed how Isidore's picture does not change according to the nature of the court – ecclesiastical or secular. Nor does he make any distinction between criminal and civil trials. As we know, such a distinction – quite clear in the Roman legal sources – was lost in the transition towards the sub-roman world.

45. In the few words that Isidore devotes to the parties during the trial, there is at least one element we need to stress: the necessary presence of both parties in order to qualify the process a correctly ordered one. Isidore seems to refuse the possibility that the trial may start without one of them. Apparently, the Spanish bishop does not take much into account the complex rules about contumacy elaborated by the Romans[77]. Should we read this approach as learning toward the "German" procedural system (which considered necessary the presence of both parties)? Not necessarily. The necessary presence of both parties

74 To the topic of the *acceptio personarum*, Isidore dedicates an apposite chapter of the book III of the *Sententiae* (P. Cazier ed., nt. 48, p. 308): 53.1 *Non est persona in iudicio consideranda, sed causa; scriptum est enim: 'non accidie personam in iudicio'. Et iterum: 'Non misereberis pauperi in iudicio'. Qui enim consanguineitatis vel amicitiae favore, sive inimicitiarum odio, iudicium pervertunt, sine dubio in Christum, qui est veritas et iustitia, peccare noscuntur.* 53.2 *Iniqui iudices errant in veritate sententiae, dum intendunt in qualitate personae et exulcerant saepe iustos, dum inprobe defendunt iniquos; qui autem recte praesidere studet nec partem palpare novit, nec cohibere a iustitia didicit*. Not less significant what he had written before in his *Synonyma* (II.82; J. Elfassi ed., nt. 62, p. 129-30): *Nullum contra veritatem defendas dum iudicas. Nullius personae affectu deflectaris a vero, pauper an dives sit. Causam perspice, non personam. In omnibus veritatem custodi, Nulla ambitione vel pretio movearis... De iusto iudicio temporalia lucra non appetas, pro iustitia nullum saeculi praemium quadra, iustitiam pro sola aeterna remuneratione distribue*.

75 *Synonyma*, II.85 (J. Elfassi ed., nt. 62, p. 133): *Omnia autem primum quaere utrum iusticia definias. Nullum condemnes ante iudicium, nullum iudices suspicionis arbitrio. Ante proba et sic iudica. Non enim qui accusatur, sed qui convincitur reus est. Periculosum est de suspicione quempiam iudicare*.

76 *Synonyma*, II.83 (J. Elfassi ed., nt. 62, p. 131): *Omne enim quod nimis est, vitium est. Impia iustitia est fragilitati humanae non ignoscere. Non igitur ames damnare, sed emendare potius, et corrigere*. More systematically in *Sent.* 54.7 (P. Cazier ed., nt. 48, p. 310): *Quattuor modis iudicium humanum pervertitur: timore, cupiditate, odio, amore. Timore dum metu potestatis alicuius veritatem loqui pavescimus; cupidi tate dum praemio muneris alicuius corrumpimur; odio dum contra quemlibet adversari molimur; amore dum amico vel propinqis praestare contendimus. His enim quattuor causis saepe aequitas violatur, saepe innocentia laeditur*.

77 See M. Kaser (Hackl K.), *Das römische Zivilprozessrecht*, München, 1996², p. 477-8, 568-9, 575-6.

appears already in the *incunabula* of the canonical trial or – even better – both in the model of trial used by the first Christian communities and, before that, in the juridical/theological Hebraic tradition[78].

46. In any case, Isidore is heavily biased against contumacy. Elsewhere in the *Etymologiae*, he condemns it as a clear expression of contempt and rebellion against the authority[79]. Such a conception continued to reflect the approach of the ecclesiastical hierarchies for a long time, as we may see from both the Decretals (in particular those of Alexander III and Urban III) and the works of the Canon lawyers. They do not hesitate to consider the "sin" of judicial contumacy as a clear violation of an order given by the religious authority and, for this reason, to condemn it with excommunication[80].

47. e) *The witnesses* – We now arrive at the core of the entire structure: witnesses and trial. We have already seen how – in the figure drawn by Isidore – the triangle formed by putting the judge and two parties at the vertices is completed by adding a fourth side, shaped by the necessary presence of three witnesses[81]. Such a scheme was destined to have great success. We know – as shown by L. Fowler-Magerl – that it was surely present to Alcuin. When explaining to Charlemagne how a trial should look like, Alcuin speaks of four people who necessarily have to be present in court. However, together with the two parties and the judge, he correctly refers to witnesses in the plural[82]. The witnesses can therefore be considered as a single person only in a figurative sense, by focusing on their unitary role within the trial.

48. Very probably it is through Alcuin that this scheme finds its way in the Frankish law first[83], then in the false capitularies of Benedict Levita (*Capitularia*, 3.339) and especially in the Decretals of the pseudo-Isidore where it appears in a letter attributed to Pope Fabianus (this letter is also mentioned by Marbod of Rennes). Finally, this four-sided figure comes back also in several pre-Gratian canonical collections, such as the 74 titles collection or in the collections in IX or V books[84].

49. Isidore had already looked at the witnesses in a previous passage of the (*Etym.* V.23)[85]. There, he just speaks of contractual witnesses, who do not necessarily have any procedural relevance. When, however, a dispute arises on the contract they witnessed, then they are obliged to intervene in the proceeding, so as to personally contribute to determine the truth (and for that reason, significantly enough, they are also called in Latin *testes alligati*). Shortly thereafter (*Etym.* V.24.5-6)[86] – still about contractual witnesses – Isidore

78 The presence of both parties is required, for example, by the author of the *Didascalia Apostolorum* (see 2.47.3; 2.49.1; 2.51.1, ed. F.X. Funk, *Didascalia et Constitutiones Apostolorum*, Paderborn, 1905 [= Torino, 1979] p. 142-3; 144-5; 148-9). Probably composed in Syria or in Palestine in around 230, the *Didascalia* offers to the bishops who acting as judges a procedural schema still very close to the models of the Jewish tradition.

79 *Etym.*, X.45: *Contumax, ab eo quod contemnat*.

80 See S. Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX.*, Città del Vaticano, 1935, p. 35; E. Cortese, "Contumacia (diritto intermedio)", in *Enciclopedia del diritto*, X, Milano, 1962, p. 454-455; W. Litewski, *Der römisch-kanonische Zivilprozeß nach den älteren ordines iudiciarii*, 2 vol., Kraków, 1999, p. 275-98.

81 The necessary presence of witnesses for speaking of a *iustum iudicium* (an idea coming directly from Jewish tradition) was already been spread between Christians in the Origen's time, as we can see in his commentary to the second letter of S. Paul to the Romans (Migne, PG 14, col. 894): *et quidem de hoc iusto Dei iudicio nos nomine capiamus exemplum, nec putemus unquam sine accusante et defendente et testibus iustum haberi posse iudicium*; see L. Loschiavo, *Figure di testimoni* (nt. 60), p. 39-61.

82 *Dialogus de rhetorica et virtutibus*, tit. *De personibus* (D. Frobenius ed., Migne, PL 101, Paris, 1851, col. 928): *Car(olus). Quot personae solent in iudiciis esse ? – Alb(inus/Alcuinus). Quattuor. Accusator causae, defensor causae, testes, iudex*.

83 Chapter 14 of the *Capitulare missorum* of Luis the Pious of the year 819 prescribes that the only necessary presences in the trial – other than the judge himself – are those of who "aut accusatus fuerit aut alium accusaverit aut ad testimonium perhibendum vocatus fuerit" and, also in the less important *placita*, those "quae centenarii tenent, non alius venire iubeatur nisi qui aut litigat aut iudicat aut testificatur" (A. Boretius ed., in *MGH*, *Capitularia regum Francorum*, I, Hannover, 1883, p. 290). The *capitulare* is also present in the Collection of Ansegis under the number 55 (*ivi*, p. 444).

84 L. Fowler-Magerl, *Ordo iudiciorum* (nt. 64), p. 37-38 and 40.

85 § 23. *Testes [sunt quibus veritas quaeritur in iudicio]. Hos quisque ante iudicium sibi placitis alligat, ne cui sit postea liberum aut dissimulare aut subtrahere se; unde et alligati appellantur. Item testes dicti quod testamento adhiberi solent; sicut signatores, quod testamentum signant.*

86 § 5. *Testamentum iuris civilis est quinque testium subscriptione firmatum.* § 6. *Testamentum iuris praetorii est septem testium signis signatum...*

recalls that ancient Roman law requested the signature of five witnesses for an ordinary will (*testamentum iure civili*) and not fewer than seven witnesses for a special will (*testamentum iure praetorio*). When he writes on these subjects, there is little doubt that Isidore is following the Roman legal tradition.

50. Let us go back for a moment to the passage where Isidore describes the *ordo* of the process. Our attention – and before us, that of Mommsen and other scholars – is attracted first of all by the punctual indication about the required number of witnesses: according to Isidore, we need three witnesses. It would seem that Isidore is intentionally deviating from a strong and millenarian tradition, whose origins may be traced back to both Roman law and the Scripture. Both required two – and not three – necessary witnesses (in agreement with each other), on whose basis the judge could pronounce his judgment[87]. As for Roman law, we should look at Ulpian in Digest 22.5.14: *Ubi numerus testium non adicitur, etiam duo sufficient...* . For the Scripture, we may recall the words *In ore duorum vel trium...* which we read in the Old as well as in the New Testament (respectively, in *Dt.* 19.15 and *Mt.* 18.16).

51. In a previous passage (*Etym.* V.24.29) Isidore referred to the Biblical principle[88]. But here (and elsewhere too[89]) he evidently preferred to be more precise. His choice about the number of witnesses was an intentional deviation from contemporary Visigothic legislation (where we read simply of no fewer than two witnesses)[90]. Yet Isidore did not betray any concern about that. We ignore the reason for such a numerical inflexibility (at least in respect to the Jewish and Roman traditions). The only explanation we find in Isidore, a theological metaphor, is hardly satisfactory. According to him, when the Bible speaks alternatively of two or three witnesses, "two" refers to the Old and New Testament, while "three" points at the Gospel, the Prophets and the Apostles. As such, the testimony of three witnesses is the highest proof[91]. I could not trace the source used by the Spanish bishop in this particular instance. The only similar passage I could find is in Origen's *Commentum in Evangelium*, where there are many criticisms about the procedure used in Jesus' trial[92] (however, it would be seriously difficult to argue for a link between Isidore and the writings of the Egyptian theologian, especially after they were declared heretical in 553).

52. While the origins of this Isidorian teaching are not entirely clear, there is no doubt about the great success it enjoyed. Several canonical collections draw inspiration from this scheme (in particular, the so-called Collections in IX[93] or V[94] Books). Importantly, the rule of the three witnesses was later confirmed

87 The originality of this Isidorian line has already been noticed since a long time; see Th. Mommsen, *Juristische Schriften*, Berlin, 1907, III, p. 520 and ff. and C. G. Bruns, "Die sieben Zeugen des römischen Rechts", in Id., *Kleinere Schriften*, II, Weimar, 1882, p. 126-7.

88 § 29. *Condiciones proprie testium sunt, et dictae condiciones a condicendo, quasi condiciones, quia non ibi testis unus iurat, sed duo vel plures. Non enim in unius ore, sed in duorum aut trium testium stat omne verbum...*

89 See both his commentary to the Deuteronomy (cf. next footnote) and the *Liber numerorum*, IV.14 *in fine* (F. Arevalo ed., Migne, PL 83, Paris, 1850, col. 183): *... coram tribus testibus actio cuncta finitur*.

90 *Lex Visigothorum*, (ed. K. Zeumer, *MGH, Leges nat. Germ.*, 1, Hannoverae et Lipsiae, 1902, p. 72 e 96) 2.1.25 *ca. fi.* (*... Unde et si duo testes non remanserint, qui digni in eodem testimonio maneant...*) and 2.4.3 *ca. fi.* (*... In duobus autem idoneis testibus, quos prisca legum recipiendos sancsit auctoritas, non solum considerandum est, quam sint idonei genere, hoc est indubitanter ingenui, sed etiam, si sint honestate mentis perspiqui adque rerum plenitudine opulenti. nam videtur esse cavendum, ne forte quisque conpulsus inopia, dum necessitatem non tolerat, precipitanter periurare non metuant*).

91 *Quest. in Vetus Testam. – In Deuter.*, XIII.1-2 (F. Arevalo ed., Migne, PL 83, col. 364): 1. *Non stabit adversus alterum unus testis sed in ore duorum aut trium testium stabit omne verbum. ... cum contra quoslibet impios vel haereticos agimus, necesse nobis est Scriptura sanctas in testimonium vocare.* 2. *Sensus quippe nostri et attestatio sine his testibus non habent fidem. Unde magis convenit ad probationem et firmitatem verbi intellectus mei ut adhibeam duos testes, Novum scilicet et Vetus Testamentum: adhibeam etiam tres, Evangelium, Prophetam et Apostulum, sicque stabit omne verbum*.

92 *Comm. in Evangelium sec. Mattheum*, § 17-18 (PG 13, col. 1755-1756).

93 Ms. Città del Vaticano, BAV, vat. lat. 1349, f. 125rb = 6.62: *In omne iudicium III (*rectius *VI) persone queruntur: iudex, accusator, reus et tres testes*.

94 Ms. Città del Vaticano, BAV, vat. lat. 1339, *sub* 1.214 in *Collectio canonum in V libris*, M. Fornasari (ed.), Turnhout, 1970, p. 132.

by pope Nicolas I in his famous letter to the kings of Bulgarians[95]. The same rule was then adopted in legal practice as it appears in many trials (*placita*) held both in Rome and its province in the Carolingian era[96].

53. Once solved the question about the required number of witnesses, Isidore moves on to provide a more detailed picture of the witness and of his role in the trial.

> <8> Testes antiquitus superstites dicebantur, eo quod super statum causae proferebantur... Testis autem *consideratur condicione, natura et vita*. <9> Condicione, si liber, non servus. Nam saepe servus metu dominantis testimonium subprimit veritatis. Natura, si vir, non femina... Vita, si innocens et integer actu. Nam si vita bona defuerit, fide carebit. Non enim potest iustitia cum scelerato habere societatem.
>
> In ancient times, witnesses were called *superstites* (those who are present), since they had to speak about the content and the nature of the litigation... As to the person of the witness, we have to consider his social condition, his nature and his behaviour. Concerning his social condition, he has to be a free man and not a servant. Indeed a servant may easily deviate from the truth for fear of his master. With regard to his nature, he must be a man, not a woman... As to his behaviour, he must be honest and forthright. Without an honest life, a man cannot be trusted. Never can justice consort with an evil person.

54. As Isidore has stressed before, witnesses are the key element the judge has to find the truth (*Etym.* V.23: *testes sunt quibus veritas quaeritur in iudicio* – witnesses are those to whom we ask the truth in court –). They play a pivotal role in Isidore's economy. Because of their crucial importance, Isidore's chief concern is to avoid the danger of false testimony. As such, just before being heard, the witness must be carefully examined to verify his trustworthiness. He has to be a free man, male, living a blameless life. Also in this case, it is easy to trace back this model to the Roman legal tradition. It is sufficient to look at the passage of the Digest where Callistratus refers to those about to give testimony. There, he argues that their social condition must be first investigated, for surely plebeians and destitutes are not to be trusted as much as noblemen and rich people. Then, according to Callistratus, it is also necessary to enquiry about their previous conduct, so as to determine if they have already tainted themselves with some reproachable deeds[97].

55. Once more, however, Isidore shows no hesitation in deviating from that tradition. On the one hand, what for the Roman jurist was simply a sign of trustworthiness – and so left to the individual assessment of the judge – now becomes a binding prerequisite. On the other, the aprioristic exclusion of women's testimony is rather striking. On these two points, Isidore is moving away from the both of his ideal teachers: Gregory the Great, with regard to the first deviation[98], and Ambrose of Milan, as to the second

95 Nicholai I, ep. 99 (E. Perels ed., *MGH*, *Epistolae* VI, Berlin, 1925, p. 595): *... Porro cum liber homo crimine fuerit appetitus, nisi iam pridem repertus est alicuius sceleris reus,* aut tribus testibus convictus *poenae succumbit, aut si convinci non potuerit ...*; see L. Loschiavo, "Il ruolo dei testimoni e la formazione dell'*ordo iudiciarius* canonico tra VII e IX secolo", in *Solvere et ligare. Prospettive di soluzione giudiziale e stragiudiziale dei conflitti*, F. Zanchini (ed.), Milano, 2005, p. 143 and M. Schmoeckel, "Nicolaus I. und das Beweisrecht im 9. Jahrhundert", in R. H. Helmholz, P. Mikat, J. Müller, M. Stolleis (eds.), *Grundlage des Rechts. Festschrift für P. Landau zum 65. Geburtstag*, Paderborn-München-Wien-Zürich 2000, p. 61-2 nt. 60 e 66 nt. 87.

96 Three witnesses are called in a *placitum* in the Latium in the year 807 (eds. I. Giorgi, U. Balzani, *Il regesto di Farfa*, Roma, 1879, II, n. 184, p. 151). See also the *placitum* held in Rome in April 998 (C. Manaresi ed., *I placiti del 'Regnum Italiae'*, II.1, Roma, 1957, n. 236, p. 367-74), on which C. Wickham, "Justice in the Kingdom of Italy in the eleventh century", in *La giustizia nell'alto medioevo (secoli IX-XI)*, Settimane del Centro italiano di studi sull'alto Medioevo, XLIV, Spoleto, 1997, I, p. 228-229 and G. Chiodi, "Roma e il diritto romano: consulenze di giudici e strategie di avvocati dal X al XII secolo", in *Roma fra Oriente e Occidente*, Settimane del Centro italiano di studi sull'alto Medioevo, XLIX, Spoleto 2002, p. 1162-82 (here p. 1177).

97 D. 22.5.3 (Callistratus): *Testium fides diligenter examinanda est. Ideoque in persona eorum exploranda erunt in primis condicio cuiusque, utrum quis decurio an plebeius sit: et honestae an inculpatae vitae an vero notatus quis et reprehensibilis: an locuples vel egens sit ...* Isidore insists on the same point also in an other part of the *Etymologiae* (*Etym*., II.30.15 *in fi.*): *... Persona non qualiscumque est quae testimonii pondus habet ad faciendam fidem, sed morum probitate debet esse laudabilis.*

98 See L. Loschiavo, *Il ruolo dei testimoni* (nt. 95), p. 120.

one[99]. The influences and reasons behind this last point (the exclusion of the testimony by a woman) are particularly difficult to assess: Isidore only quotes old Virgil's *Aeneid* in his support. I can only think of a vein of misogyny visible in some ecclesiastical circles of his time.

56. We can now continue.

> <10> Duo sunt autem genera testium: aut dicendo id quod viderunt, aut proferendo id quod audierunt. Duobus autem modis testes delinquunt: quum aut falsa promunt, aut vera silentio obtegunt.
>
> There are two kinds of witnesses: those who report what they have seen, and those who speak about what they have heard. They break the law in two different ways too: either giving false testimony, or hiding the truth by keeping silent.

In the first part of the excerpt Isidore divides the witnesses according to the origin of their knowledge (as we have *testes de visu* and *de auditu*). Then ho moves on to the thorny problem of false testimony. Also in this case, the *Etymologiae* represent only a starting point for further discussions. For a more complete analysis, we have to look at the third book of the *Sententiae* (III.55.1-7).

57. In this work, more carefully thought than the *Etymologiae*, Isidore's elaboration becomes increasingly precise. To begin with, the reticent witness is substantially equated to the false one:

> <55.3> Unum pene crimen habent et qui falsitatem promit et qui supprimit veritatem, quia et ille obesse vult, et ipse prodesse non vult...[100].
>
> Speaking the false and omitting the truth amount to the same crime: while one wants to injure, and the latter refuses to help.

58. In the last passage, Isidore remarked the particularly negative and harmful nature of false witness.

> <55.2> Testis falsidicus tribus est personis obnoxius. Primum Deo quem periurando contemnit; sequenter iudici quem mentiendo fallit; postremo innocenti quem falso testimonium laedit.
>
> The false witness is prejudicial to three persons at the same time. Firstly towards God, to Whom he shows contempt with his perjury; secondly towards the judge, whom he deceives with his lies; lastly, towards the innocent whom he damages with his falsity.

The damage caused by a false witness has therefore a three-fold effect. The mendacious witness injures at the same time God, the judge and one of the parties. Here Isidore mentions in passim the oath that the witness has to take. Clearly, for the bishop of Seville this was a point too obvious to deserve any comment.

59. On the duty to take an oath before giving testimony, Isidore could easily rely upon a very ancient tradition adopted by the Christians (who on the point moved away from the Talmudic tradition). We should also remember that the witness' duty to swear an oath was one of the most important elements of the coeval Visigothic procedure[101]. Together with the thorough examination of every potential witness by

99 L. Loschiavo, *Tra legge mosaica* (nt. 60), p. 279.

100 It is worthy to note how close is this sentence to the *antiqua* of LV 2.4.2 *in fi.* (K. Zeumer ed., nt. 90, p. 95): ... *Quia non minor reatus est vera subprimere quam falsa confingere*.

101 See, for instance, the *Breviarium alaricianum* corresponding to C.Th. 11.14.2 (*Testes priusquam de causa interrogentur, sacramento debent constringi, ut iurent se nihil falsi esse dicturos...*) and the *antiqua* of LV 2.4.2. Also to mention is here c. 2 of the Toletan Council VIII (A.D. 653) (J. B. Mansi ed., *Sacrorum concilirum... collectio*, v. 10, col. 1212-1213): ... *Omne etiam quod testis adstipulat, id verius constat, cum id adiecto iurationis affirmat*; see L. Loschiavo, *Il ruolo dei testimoni* (nt. 95), p. 131-135.

the judge, the oath serves the purpose to avoid – and sanction – mendacity (elsewhere in the *Sententiae*, Isidore highlighted the importance of the task that the witness-to-be is about to perform[102]).

60. Isidore then suggests some measures that he considers useful to avoid false testimony on more practical grounds:

> <55.4> Testibus falsis conuinctis tarde mendacii falsitas repperitur. Quod si separati fuerint, examine iudicantis cito manifestantur. Nam sicut in unitate pravorum grandis est fortitudo, ita in separazione maior infirmitas.
>
> When the false witnesses are condemned, we find out the mendacity too late. But if the judge were to hear them separately, their lie would be discovered sooner. Just as their depravity is stronger when they are together, their weakness is greater when they are divided.

In fact – and this is Isidore's warning – we run the risk of discovering falsehood too late. The judge seeking to avoid this should interrogate the witnesses separately, and then compare their testimonies. This is a practical solution that the Roman judges knew very well and that was also used in the Jewish courts from ancient times. It is even possible that it was through Isidore that the Visigoths came to adopt it[103]. Later, and again thanks to churchmen, cross-examination was adopted by Charlemagne's judges as well as in the Italian courts during the ninth and tenth centuries[104].

61. To the same end – though surely only with regard to the secular disputes – Isidore goes as far as admitting the use of torture against the witnesses of dubious reliability. Once again, the solution is clearly inspired by practical considerations (*Etym.* II.30.16): *a tormentis fides praebetur, post quae nemo creditur velle mentiri* (trust is gained through torture, for we can be sure that nobody wishes to lie after enduring it). The tendency to extend the use of torture was already present in late Roman Empire. The *tormenta*, originally limited to servants, were by then also extended to witnesses of free condition (and not only the *humiliores*) when their testimony appeared weak or suspect[105].

VIII. Conclusions

62. In these pages, I tried to highlight the main elements on trial and procedure that a man of the Middle Ages could find reading the works of Isidore of Seville. Isidore, it must be stressed, was not a jurist. However, his work betrays remarkable legal knowledge. What really matters is not how to qualify the figure of Isidore. What we should appreciate is rather his ability to shape – in a very simple and clear way but also with a touch of originality – the specific heritage of the Christian tradition. A tradition already several centuries old, which merged together the useful elements found both in the old Scriptural experience and in the Roman Jurisprudence. Thanks to its peculiar features, the Isidorian synthesis could (and was) accepted as a clear and functional procedural scheme. In other words, it represented a model

102 *Sent.* II.31.1 and II.31.7 (nt. 48, p. 155).

103 It is what appears in fact in the *Formulae* of the seventh century and, in particular, in the Visigothic *formula* nr. 40 (K. Zeumer ed., *Formulae*, *MGH*, *Legum sectio* V, Hannoverae, 1886, p. 593/24-25): *... illum et illum, iuxta legum decreta sagaci intentione eos segregatim percontari decrevimus*.

104 So we find the separate examination of the three witnesses not only in the above mentioned *placitum* of the year 998 (*supra* nt. 96), but also in a trial held again in Rome but much earlier (a.D. 829) (*Regestum Farfense*, nt. 96, II, n. 270, p. 221-3); see Chiodi, *Roma e il diritto* (nt. 96), p. 1178-1179.

105 It is interesting to note how the use of torture seemed admissible also to Ambrose of Milan (see J. Gaudemet, *Le droit romain dans la littérature chrétienne occidentale du III^e^ au IV^e^ siècle*, Milano, 1978, p. 93). Some centuries later, the same pope Nicolas I does not seem entirely opposed to the use of torture (as he condemns only its abuse); see M. Schmoeckel, *Nicolaus I.* (nt. 95), p. 62-3.

that fitted perfectly – almost effortlessly – within the fluid and changeable judicial systems of post-Roman Europe.

63. What did ultimately ensured the enduring success of this model, however, was its presence (at least in its abbreviated form) in the most famous Isidorian work, the *Etymologiae*. Indeed, it was through the *Etymologiae*, that the scheme of the legal trial drawn by Isidore was studied and learnt by heart or (more simply) known by a vast public and for many generations to come. This way, it was able to influence the work of legislators and, above all, many legally experienced people during the centuries that preceded the renewal of Justinian *Corpus iuris* and the return to the legal science in a modern sense.

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