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The origins of *Ius commune*: glosses and glossaries from the tenth and eleventh centuries

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Abstract

The paper contains an analysis of tenth and eleventh-century glosses and glossaries of Italian texts which precede, in terms of legal methodology, the establishment of *Ius commune*. This is followed by a comparison with examples developed during the same period in Hispanic territories. Glosses of legal texts from the era discussed in this article provide valuable evidence of contemporary knowledge of legislative and doctrinal interpretation of seminal legal authorities in the past. Glossaries consist of collections of glosses organized for ease of handling in a continuous series, usually alphabetically. Typically, they provide brief definitions and analytical summaries of the content of each entry, an approach that reflects the teaching methods of the late Roman Empire and the High Middle Period.

Resumen

Se analizan las glosas y glosarios de Italia de los siglos X y XI, precedente, en cuanto a la técnica jurídica, del nacimiento de la ciencia del Derecho del *Ius commune*, y se compara con las glosas y glosarios que en esa misma época se desarrollaban en los territorios hispánicos. Las glosas jurídicas constituyen un testimonio histórico para el conocimiento de la interpretación legislativa y de consideración doctrinal en torno a diferentes autoridades del pasado, y suponen un breve resumen analítico y definatorio del contenido de cada voz. Por su parte, los glosarios son una recopilación de glosas reunidas en series continuas, generalmente ordenadas alfabéticamente para facilitar su manejo, y reflejan el método de enseñanza de las épocas bajoimperial y altomedieval.

Keywords

Glosses, Glossaries, Italy, Hispanic territories, High Medieval Ages

Palabras clave

Glosas, Glosarios, Italia, Territorios hispánicos, Alta Edad Media

Summary: 1. Glosses and glossaries: their relevance to the History of Law. 2. Legal glosses in the tenth and eleventh centuries. 3. The Italian gloss tradition during the early development of *Ius commune*. Bibliographical appendix

1. Glosses and glossaries: their relevance to the History of Law

The importance allocated to glosses written by the School of Bologna in the early twelfth century with regards to the emergence of *Ius commune* has led many legal historians, apart from a small number of studies relating to the tenth and eleventh centuries¹, to overlook the glossary tradition prior to Irnerius. Although French and Spanish glossaries have indeed been studied by philologists and linguists, with the

¹ Among the works that can be considered classics are Savigny, C. von, *The history of the Roman law during the Middle Ages*, Westport, Conn., 1979. Original title in German: *Geschichte des Rechts im Mittelalter römischen* (1822); Vinogradoff, P., *Roman Law in Medieval Europe*, London & New York, 1909; repr. New Jersey, 2003; Koschaker, P., *Europa und das Römische Recht*, München, 1947; Wieacker, F., *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung (Jurisprudenz in Einzeldarstellungen)*, Göttingen, 1952; Calasso, F., *Medio evo del diritto. I. Le fonti*, Milano, 1954.

exception of some generalized studies² and analyses of certain specific sources³, such glosses and glossaries have been of little interest to historians of law. This article will undertake a survey of legal glosses and glossaries prior to the twelfth century and will identify their sources in order to provide a deeper understanding of the precedents of *Ius commune*.

Glosses of primarily French-Carolingian and Hispanic origin, and particularly Latin glossaries, have been partially published, although important questions have raised regarding their origins, dating and the manner in which they were compiled by Georg Goetz and Wallace Martin Lindsay⁴. The *Liber glossarum*, written around the year 700, was widely circulated in Europe during the eighth and eleventh centuries, as evidenced, for example, by early Catalan codices. Noteworthy among these codices is Fragment 6 in the Diocesan Archive of Barcelona, copied around the year 900, which corresponds to some *excerpta* of the *Liber glossarum*⁵. Important also are the glossaries of the kingdoms of Pamplona and Castile, which were identified in detail in the critical edition of the glossary contained in the *Codex Aemilianensis 31* from the Spanish Royal Academy of History⁶.

In the High Middle Ages, a period from which we possess hardly any doctrinal sources, glosses and glossaries, in their simplicity and precision, provide a valuable source of medieval legal thought. Despite their apparent lack of familiarity with the practice of law, legal glosses are an exceptional source for observing the development of legal vocabulary, both in terms of the number and variety of lexical entries, as for the heterogeneity and accuracy of many definitions. Law involves a technical and philosophical complexity that requires much clarification, and legal glosses provided interpretations of convoluted entries and definitions of uncommon terms that were difficult to interpret. However, the historical value of glosses transcends the merely philological, as these brief notes encapsulate interpretation and reflection instigated by the reading of a text. Medieval glosses condense legal thought reached through a process of logic and reasoning, whether it be juridical, grammatical, philosophical or theological. They provide valuable evidence of medieval knowledge of legislative and doctrinal interpretation of seminal legal authorities in the past. They also

² See the devoted to the techniques of the glosses of late antiquity and the early medieval period: Jimeno Aranguren, R., “La tradición glosística: glosas jurídicas en los siglos III al XI”, *Aemilianense*, 2 (2010), pp. 203-244.

³ Such as the one provided by Ferran Valls i Taberner concerning the glosses and glossary contained in the *Liber Iudicum Homobonus popularis* of Barcelona, preserved in the Library of El Escorial: “El Liber iudicum popularis de Homobonus de Barcelona”, *Anuario de Historia del Derecho español*, 2 (1925), pp. 200-212, repr. *Obras selectas. II. Estudios histórico-jurídicos*, Madrid & Barcelona, 1954, pp. 235-236.

⁴ Goetz, G., *Corpus Glossariorum Latinorum. V. Placidus, Liber Glossarum, Glosaria Reliqua*, Leipzig, 1894; repr. Amsterdam, 1965; Lindsay, W. M., *Glossarium Ansileubi sive Librum Glossarum*, Paris, 1926, reimpr. Hildesheim, 1965. See Dionisotti, A. C., “On the Nature and Transmission of Latin Glossaries”, J. Hamesse (ed.), *Les Manuscrits des lexiques et glossaires de l'antiquité tardive à la fin du Moyen Âge. Actes du Colloque International organisé par le Ettore Majorana Centre for Scientific Culture. Erice, 23-30 septembre 1994*, Louvain-la-Neuve, 1996, pp. 204-207.

⁵ Alturo i Perucho, J., “Fragment d'un epitom del Glossarium Ansileubi de la primera meitat del segle X,” *Faventia. Revista de Filologia clàssica*, 7 (1985), pp. 75-86; “Manuscrits i documents llatins d'origen català del segle IX,” in *Symposium Internacional sobre els orígens de Catalunya. Segles VIII-XI*, vol. 1, Barcelona, 1991, pp. 273-280.

⁶ García Turza C. and García Turza, J., *Fuentes españolas altomedievales. El código emilianense 31 de la Real Academia de la Historia. Edición y estudio*, Logroño, 2004.

propone brief definitions and analytical summaries of the contents of each term⁷. Glossaries -that is to say collections of glosses arranged in a continuous series, usually alphabetically for ease of handling— reflect a particular teaching method from later antiquity and the early middle ages, and served as important disseminators of lexical and grammatical culture.

2. Legal glosses in the tenth and eleventh centuries

The influence of Carolingian glosses spread to Catalonia in the tenth century through numerous texts annotated in the eighth and ninth centuries⁸. In terms of legal history, the most interesting Catalan codex is conserved at the monastery of El Escorial (reference number Z.II.2). The copying of at least one part of this codex, the *Liber Iudicum popularis*, was completed in Barcelona on 11 July 1011 by Judge Homobonus (*iudex Homobonus*). It constitutes a revision of the informative and critical Visigothic source and clarifies the questions raised by previous versions. Edited by Karl Zeumer⁹, it has been the subject of several studies¹⁰. This version of the *Liber Iudicum* adds Ervigio's edict of publication as justification for the revision of the Code at the beginning of Book II. It also bears witness to the influence of Roman and French-Carolingian law. Other additions could have been copied from Alaric's *Breviary*, and there is evidence of Catalan contributions to the *Liber*, in particular those introduced prior to the ninth century which appeared with the manuscripts of the Vulgate and those made by Bonhome or Bonsom¹¹, a judge and clerk in Barcelona whose first known legal document dates from 988. This lawyer had been educated in the monastery of Sant Cugat del Vallés, and had frequented the library of Ripoll¹². The codex contains about 2,300 interlinear and marginal glosses by two or three earlier hands, and a glossary that begins with *Incipit glosulam abtam ex libro iudico*, consisting of 2,114 items. Some of its entries are extremely valuable for the study of legal lexicography by virtue of the fact that a comparison of the contents of the articles in the glossary with the abundant glosses of the two legal texts that precede it indicate that there is no connection between them. Fortunately for law historians, this means it contains the largest number of existing legal glosses of any Hispanic source, although its influence does not extend to later glossaries¹³. The glossary of the manuscript Z-II-2 could have served to facilitate

⁷ Paradisi, B., "Le glosse como espressione del pensiero giuridico medievale", *Fonti medioevali e problematica storiografica. Atti del Congresso Internazionale tenuto in occasione de 90° anniversario della fondazione dell'Istituto Storico Italiano (1883-1973)*, Roma, 22-27 ottobre 1973, vol. 1, Roma, 1976, pp. 191-200.

⁸ Jimeno Aranguren, "La tradición glosística", Mundó, A., "Importación, exportación y expoliación de códices en Cataluña (siglos VIII al XIII)", *Coloquio sobre circulación de códices y escritos entre Europa y la Península en los siglos VIII-XIII (1982. Santiago de Compostela)*, Santiago de Compostela 1988, pp. 87-134. Miranda García, F., "Autores carolingios en los códices hispanos (siglos IX-XI). Un ensayo de interpretación", *Studia historica. Historia medieval*, 33 (2015), pp. 25-50.

⁹ Zeumer, K., *Monumenta Germaniae Historica*, Hannover-Leipzig, 1902, repr. Graz, 1973.

¹⁰ Valls i Taberner, "El *Liber iudicum popularis*", pp. 235-236; Alturo i Perucho, J. (ed.), *Liber iudicum popularis. Ordenat pel jutge Bonsom de Barcelona*, Barcelona, 2003.

¹¹ *Liber iudicum popularis*, 170-179.

¹² Cfr. Beer, R., "Los manuscritos del monastir de Santa María de Ripoll", *Boletín de la Real Academia de Buenas Letras de Barcelona*, 9 (1909), pp. 137-170 and 10 (1910), pp. 230-278, 299-320, 329-365 and 492-520.

¹³ Alturo, J., "I glossari latini altomedievali della Catalogna con alcune notizie sui Settimani", J. Hamesse (ed.), *Les Manuscrits des lexiques et glossaires de l'antiquité tardive à la fin du Moyen Âge. Actes du Colloque International organisé par le «Ettore Majorana Centre for Scientific Culture»*. Erice,

understanding of the *Liber Iudicum* in the *Trivium*, but given its specificity, it could also have been used for legal and notarial training. Composed of both interlinear and marginal glosses, the interlinear glosses were used to explain the terms of the *Liber* itself, as illustrated by the following example¹⁴:

Lib. iud. I,1,3.

Above all the object of the cause must be possible. Finally it must be demonstrated that their personal benefit is not the objective, but for the benefit of all citizens, so that it be clear that the lawmaker has correctly introduced the reinforcement and the aid of the law not for personal benefit, but for that of the entire community¹⁵.

Afterwards, it is first and foremost necessary that the objective of the cause be deemed possible. Finally, it must be shown that the cause has not been undertaken on behalf of familial necessity, but that it is useful to the people, so that it may be seen that the lawmaker introduces the reinforcement and the help of the law not for personal benefit, but at the service of all citizens¹⁶.

Lib. iud. I,1,4.

Logically it must be the lawmaker himself who places judicial and legal customs ahead of eloquence, so that his speech be highlighted more for its intrinsic value than for the eloquence of the expressions he employs, and that whatever he says be garnished more by deeds than by words, and thus fulfil what it is he intends to express before even deducing what it is that must be fulfilled¹⁷.

Then it will be the lawmaker himself who favours the legal and lawful uses, so that his sentence be noteworthy more for its value than for its expression. And so that anything he says will resonate far more for the facts of the cause than for the words he employs, and fulfil what he is going to say before declaring what it is that must be fulfilled¹⁸.

The *Codex's* marginal glosses are characterized by their broad definitions, and therefore offer a greater degree of legal information. These glosses and glossary display a clear dependence on the *Liber glossarum* and point towards an amalgamation of various manuals, grammars and texts, such as the *Etymologiae* of St. Isidore. However, the *Liber Iudicum popularis* goes even further. If we accept the affirmation of Manuel C. Díaz y Díaz that a high medieval glossary is “a living book, which changes according to the needs of the time, but can also develop in a particular way in a particular direction, according to the materials available and the interests of the community”¹⁹, then arguably the glosses of *Liber Iudicum popularis* contain unique contributions by the Catalan scribes, although it is true that they only serve to outline a few shallow

23-30 septembre 1994, Louvain-la-Neuve, 1996, p. 111; García Turza C. and García Turza, J., *Fuentes españolas altomedievales. El Códice emilianense 46 de la Real Academia de la Historia, primer diccionario enciclopédico de la Península Ibérica*, Logroño, 1997, p. 87.

¹⁴ Alturo, “I glossari latini”, pp. 111-112.

¹⁵ “Tunc primum requirendum est, ut id, quod inducitur, possibile credatur. Nouissime hostendendum, si non pro familiari compendio, sed pro utilitate populi suadet, ut apareat eum qui legislator existit, nullo priuati comodo, sed omnium ciuium utilitati comonimentum presidiumque oportune legis inducere”.

¹⁶ “*Deinde* primum requirendum est, ut *hoc*, quod inducitur, possibile credatur. *Ad ultimum* hostendendum, si non pro familiari *necessitate*, sed pro utilitate populi *intimetur*, ut apareat eum qui *iudex* existit, nullo priuati *lucro*, sed omnium ciuium utilitati comonimentum *audiitoriumque conueniens* legis inducere”.

¹⁷ “Erit consequenter idem legislador iuris ac legis mores eloquiis anteponeus, ut contio illius plus uirtute personet quam sermone. Sicque quod dixerit amplius factis quam dictis exornet priusque promenda compleat, quam implenda depromat”.

¹⁸ “Erit *postmodum ipse* legis dator iuris et legis *usus* eloquiis *preferens*, ut *sententia* illius plus uirtute personet quam sermone. *Et sic* quod dixerit amplius factis quam dictis *perornet* priusque *dicenda* compleat, quam implenda *narret*”.

¹⁹ Díaz y Díaz, M. C., *Las primeras glosas hispánicas*, Barcelona, 1978, p. 9.

disquisitions on the technical and doctrinal knowledge of lawyers trained in the glossary tradition of the *trivium*.

On the other hand, the late adoption of the Benedictine Rule in Hispania — with the exception of Catalonia— meant that no glossing occurred in the monasteries of the kingdom of Pamplona and the adjacent Castilian territory until the tenth century. The Rule of St Benedict was first annotated by a monk, as in Catalonia, from the monastery of San Pedro de Cardeña in Burgos late in the eleventh century, perhaps sometime around 1082 (National Library of France, *N.a.l.*, 1296)²⁰.

In addition, from the perspective of monastic institutional and legal history we must highlight the glosses that clarify different codices collected in the *Colaciones* of John Cassian. This was one of the most widely-disseminated books in the monastic libraries of the north of the Iberian Peninsula due the esteem in which its author was held among the Benedictines, including St. Benedict of Nursia himself. Probably copied in Silos in the Burgos region in the first half of the tenth century, and held in the French National Library, Manuel C. Díaz y Díaz has noted that some of the numerous annotations of Codex *Nouv.acq.lat.* 2170 are simple equivalences, while others are more complex, often consisting of explanations of definitions. The glosses were compiled by several authors, and would have been produced from the late tenth century to well into the eleventh. The other two Cassian codices are kept in the library of the Spanish Royal Academy of History. Codex no. 32 from the ninth century contains later glosses from both the beginning of the *Colaciones* as well as the first collation, although they generally are mere equivalent terms. They are the work of several authors. Codex 24, copied in the tenth century, contains few glosses and does not coincide with those present in other codices²¹.

The glosses of the Albeldense or Vigilano Codex (Biblioteca Monasterio de El Escorial, ms. D12) are essential for the study of the history of law. This manuscript from the kingdom of Pamplona and completed in the year 976, consists of three main parts: the *Liber Canonum*, the *decretals Epistolae* and *Liber Iudicum*. Let us examine the glosses, edited and studied by Claudio García Turza in a superb critical edition that provides concordances with all the legal sources from which it draws²². Paleographic analysis has led to the conclusion that the glosses were written by the same hands that copied the basic text, i.e. by Vigilano and his colleague Sarracino, around the years 976-978. The 140 glosses are located in very specific sections of the manuscript. With reference to the present author's previous work, a legal and institutional explanation for the distribution of these glosses in the Codex can be understood²³.

Other glosses produced by the scribes of Pamplona and Castile in the High Middle Ages do not discuss legal issues, not even those based on the *Sententiae* of St. Isidore (Manuscript 10067 from the National Library, Madrid), a work that essentially sums up questions of faith and morals. An exception should be made for a few Emilian glosses and others produced in Silos, in which hagiographic or liturgical matters

²⁰ Edited and analyzed by Vivancos Gómez, M. C., “Glosas de algunos manuscritos visigóticos españoles”, *Archivum latinitatis medii aevi* 53 (1995), pp. 153-186.

²¹ *Cfr.* Díaz y Díaz, *Las primeras glosas hispánicas*, pp. 19-21.

²² García Turza, C., *Las glosas del Códice Albeldense*, Logroño, 2003.

²³ Jimeno Aranguren, “La tradición glosística”, pp. 219-222.

emerge²⁴, and to which must be added the abundant number of glosses related to the penitential catechesis of Silos (BL, Add. 30853). Note that the manuscript *Aemilianensis* 60 comprises of accounts of the lives of saints, a brief Office of Litanies, a Passion, a Mass of Saints Cosmas and Damian, a book of Judgments, and some of St. Augustine's sermons. The glosses found in the manuscript of Silos (British Museum Add. 30852) contain some homilies drawn from the works of the Fathers, and the aforementioned Penitential, and are very interesting from the perspective of canon law²⁵.

Let us turn our attention to glossaries. The Codex of the National Library, Madrid (case 14-5), probably written by Munius in the mid-eleventh century, contains, among other material, a complete copy of the *Fuero Juzgo* (Judgment Charter) (fols. 12-148v.) and an unpublished glossary comprised of some 3,600 glosses (fols. 159V-186)²⁶.

The glossary of Codex 24 at the Royal Spanish Academy of History, of unknown origin, derives largely from the *Liber glossarum*²⁷. Its nearly 800 glosses, including most of those that are Isidoran, are of no legal interest. The glosses of this codex have been identified as being related to the glossaries of Codices 31 and 46 of the Spanish Royal Academy of History²⁸, critically edited by Claudio and Javier García Turza²⁹. Another glossary, the Emilian 31 also at the Spanish Royal Academy of History, consists of 15,000 glosses and was copied in the monastery of San Millán late in the tenth century or the first half of the eleventh. Like Codex 24 at the Royal Academy, it draws mainly from the *Liber glossarum*, although it differs in that it draws from a greater range of sources. A number of these are notable for their legal interest, for example those drawn from the *Etymologiae* of St. Isidore, as in the case of “*incest: called on account of unlawful carnal knowledge, for incastus (not chaste); as in the case of one that raped a consecrated virgin or a close relative*”³⁰, as well some from the *Synonima Ciceronis*, for example, Law: “*laws, domain, condition, Empire, offensive and defensive weapons; launched, assaulted, carried, transported, transferred*”³¹. The glosses based on biblical authorities in the Emilian 31 do not appear in other European glossaries; these should be framed in the field of patristics and, except in very specific cases, they lack canonical interest.

²⁴ Ruiz Asencio, J. M., “Las glosas emilianenses y silenses. Transcripción”, *Las glosas emilianenses y silenses. Edición crítica y facsímil*, Burgos, 1993, pp. 189-254; *Ibid.*, “Códices pirenaicos y riojanos en la biblioteca de Silos en el siglo XI”, *Silos. Un milenio. Actas del Congreso Internacional sobre la Abadía de Santo Domingo de Silos. II. Historia*, Santo Domingo de Silos 2003, pp. 177-210.

²⁵ Ed. Ruiz Asencio, “Las glosas emilianenses y silenses. Transcripción”, pp. 189-254.

²⁶ García Turza, C., “La aportación de los glosarios hispanos altomedievales a la Historia de la lengua española”, *Actas del VII Congreso Internacional de Historia de la Lengua Española (Mérida, Yucatán, 4-8/9/2006)*, Madrid, 2008, pp. 72-73.

²⁷ García Turza, and García Turza, *Fuentes españolas altomedievales. El Códice emilianense 46*, pp. 51-61; “El glosario latino del código emilianense 24 de la R.A.H.”, p. 114.

²⁸ García Turza, and García Turza, *Fuentes españolas altomedievales. El Códice emilianense 46*, p. 57; “El glosario latino del código emilianense 24 de la R.A.H.”, p. 114.

²⁹ García Turza, and García Turza, *Fuentes españolas altomedievales. El Códice emilianense 46*, p. 57ss.

³⁰ “*Incensus: Procter Ílicita conmixtione uocatus, quasi Incastus; Sicut qui uirginem sacram uel adfinitatis sue proximam struprauerit*” (*Etymologiae*, X, 148, 45r3, 74).

³¹ “*Íus: leges, dicionum, condicionem, Imperium, arma, tela; transiecit, transiliit, portauit, transuexit, transfixit*” (*Synonima Ciceronis*, 48v1, 22).

The Emilian Codex, no. 46, which was completed around 13 June 964, contains two glossaries, the first of which consists of more than 20,520 items, many of them in Hispanic Early Romance. With the exception of the conciliar texts that appear in the manuscript (and which, like the rest, appear to be a simple copy of a Rhenish or Bavarian model), none of the glosses contained in the manuscript or its appendix are of any legal interest. From the point of view of cultural history, however, they are an eloquent example of the influence of European culture in the monastery of San Millán de la Cogolla³². The same applies to the Codex *Nouveau. Acq. Lat.* 1296 of the National Library of France, which, like the Emilian RAH 46, contains a wide range of vocabulary and is appended to a *Glosse super canones* in which some Germanic scholia are included³³. The Silos glossaries contained in the codices of the National Library of France *Nouv. Acq. Lat.* 1298 and 1297 are of no legal interest. They are closely related to the glossary of Emilian Codex 46, with the exception of some cases where the Silos codex 1297 followed the readings of 1296³⁴.

In short, the only legal glosses from the early-and-high medieval Hispanic territories are those relating to *Liber iudiciorum*, the canon law texts of the Councils, the Benedictine rule and penitentials. The *Lex Visigothorum* was annotated as constituting the legislative basis of positive law, even though this source was increasingly obsolete and insufficient, and hence could not serve as a legal basis for solving many the problems of everyday life in a changing high medieval society. The glosses made following the St. Isidore's *Hispana* or the Benedictine Rule were required to be easily understood as they provided sources for the positive law of the Church or for a monastery. They would have served some educational purpose in clarifying the content of the text for other monks, as well as serving as a commentary on catechism and penitential materials for monks more advanced in their training. However, their educational value has been questioned by Manuel C. Díaz y Díaz who refuses to accept that so many manuscripts from the point of view of content (liturgy, pastoral, monastic life) were used for the teaching of rudimentary scholarship³⁵. From the perspective of the history of law, the present author cannot share his opinion since glosses had previously been used as a teaching methodology, but above all, because they were subsequently used by secular commentators during the emergence of legal science.

Most of the glosses that have survived constitute a varied mix of knowledge of Greco-Latin culture and were compiled in glossaries apparently intended for didactic use in the *Trivium*. The glossary method would have served to deepen the understanding of the meaning of Latin words and the legal significance of terms, although, as we have mentioned, they were not useful for the formation of notaries in legal practice. The handling of forms, laws and documents detailing the application of laws were much more useful for this, as they supplied professional knowledge efficiently and accurately. However, one must not forget that written law was formulated by the same ecclesiastical scribes who wrote ecclesiastical glosses and by scribes who had been educated in the *Trivium*.

³² Díaz y Díaz, M. C., *Libros y librerías en la Rioja altomedieval*, Logroño 1991. 2nd ed.

³³ García Turza, and García Turza, *Fuentes españolas altomedievales. El Códice emilianense 46*, pp. 73-78.

³⁴ García Turza, and García Turza, *Fuentes españolas altomedievales. El Códice emilianense 46*, pp. 71-72 and 78-82.

³⁵ Díaz y Díaz, M. C., "A vueltas con las glosas", C. Hernández Alonso (ed.), *Actas del Congreso Internacional El Cid, Poema e Historia. 12-16 de julio, 1999*, Burgos, 2000, p. 294.

3. The Italian gloss tradition during the early development of *Ius commune*

Since Carl von Savigny, the study of historiography has stressed the importance of the legal training provided by liberal arts schools in the High Middle Ages. It is well known that in Western Europe there are hardly any examples of the application (nor indeed even the knowledge) of Roman law, except in certain regions of Italy where Roman traditions survived under both the Lombards and the Franks, and the Carolingian kings of the tenth and eleventh centuries. The study of Roman law perpetuated in schools first in Rome and later Ravenna. Padua, capital of the kingdom of the Lombards and seat of the *Palatium*, or the supreme court of the kingdom, was a study centre of Lombard law in the tenth and eleventh centuries, and Roman law was not unknown there. In an *Expositio* or commentary on Lombard law from the eleventh century, Roman law is referenced as often as the Common law (*lex omnium generale*). However, there were no dedicated law schools as in the days of the Roman Empire. Teaching was carried out in monasteries and cathedrals, comprising two cycles, the *Trivium* (grammar, rhetoric and dialectic) and *Quadrivium* (arithmetic, geometry, music and astronomy). The elements of law were taught in the context of rhetoric and dialectic, with an essentially practical approach. Italian schools, especially those in Ravenna, were familiar with the codification of Roman law at the time of Justinian, particularly the *Institutiones* and the *Codex*. Comments on the *Institutiones* were written in the form of glosses whose purpose transcended the merely grammatical and had a clearly legal focus.

Notable for its importance is the *Glossa Torinese* (tenth century)³⁶ which sought to achieve coherence between Roman and Canon law, as shown in the example relating to donations *mortis causa*. Book II, section VII, of *De donationibus* defines these donations as liberality prompted by the fear of imminent death, whether from illness, a lengthy journey, a voyage by sea, or by war against enemies³⁷, in clear parallel to the *Digest* (39, 6 and 35, 4). But, unlike Justinian law and other, more markedly Roman contemporary ordinances, they are not regarded as having the same status as a legacy³⁸. This *Glossa* establishes that:

“He said approximately because a young man that has a military *peculium* can certainly make a donation *mortis causa*, but he cannot make a devise; and because annual legacies give rise to unique actions each year; donations, however, are performed by a single action”³⁹.

³⁶ Alberti, A. (ed.), *La “Glossa torinese” e le altre glosse del Ms. D. III. 13 della Biblioteca nazionale di Torino*, Torino, 1933.

³⁷ “Mortis causa donatio est quae in pendente metu mortis fit, ut est valitudinis, peregrinatoris, navigationis, belli, ut adversus hostes”.

³⁸ Obarrio Moreno, J. A., “La doctrina medieval de la donatio mortis causa y su recepción en la Corona de Aragón”, *Anuario da Facultade de Dereito da Universidade da Coruña* 5 (2001), pp. 522-523.

³⁹ *Fere dixit, quia filius familias habens castrense peculium donationes quidem mortis causa facere potest, legatum vero relinquere non potest; et quia legata annalia singulas actiones singulis annis pariuntur, conationes vero una actione petuntur*. Its correlation is in the *Digest*, 39, 6, 7: *Sed qui mortis causa in annos singulos pecuniam stipulatus est, non est similis ei, cui in annos singulos legatum est; nam licet multa essent legata, stipulatio tamen una est, et conditio eius, cui expromissum est, semel intuenta est*). And the Gloss of Turin continues to define: *Differet a legato donatio causa mortis in eo quod ab ipso donatore res traditur; legatum vero non antea legato traditur quam si prius hereditas adeatur et postea a herede legato tradatur. Nota donatori necessitatem impositam rem tradendi quam donavit*.

Another glossary of particular legal interest is *the Alphabetum Papie*, or *Elementarium doctrinae rudimentum Lombard Papias* (mid-eleventh century)⁴⁰. It contains the grammatical, etymological and historical explanation of different entries, taken mainly from the *Etymologiae* of St. Isidore and the works of Donatus and Priscian. The methodological novelty of *Papias* lies in the updating of words with respect to contemporary needs, and although it is based on the *Liber glossarum*, for the first time it seeks to provide explanations and paraphrases that contribute to a better understanding of the definitions of terms, employing the *deriuatio* and the addition of data that helps to identify them⁴¹. This is exemplified by the word *Abstemious*, which the *Papias* describes as sober, one who abstains from the ingestion of wine; deriving from the verb *abstineo*, and the noun *temetum* as Quintilian liked to say. It is also used with regards to food, i.e., one who is frugal (in eating)⁴². Some of the definitions of *Papias* are famous, such as its interpretation of the term *Pandects* (“comprising both the Old and New Testaments”)⁴³.

Possibly the most significant text of this era, the *Glossa di Colonia alle Istituzioni* of Padua (eleventh century)⁴⁴ is indebted, even at this late stage, to the classical authors and the themes used in the rhetorical tradition. However, it is also remarkably innovative in its use of definitions to the point of using the term *definitio*, proper to medieval methodology but unknown to Justinian sources. The gloss is used in this work as a suitable method for conveying the brief definitions and legal schemes of limited intellectual depth⁴⁵.

As is well known, the teaching methods of the Lombard school of Padua passed on to Bologna in the twelfth century. Scholars became aware of the classical legal literature collected in the *Digest* of Justinian, and began the scientific study of law. The rediscovery in Pisa of a manuscript copy of the *Digest* from the sixth century, known as *Pandectae pisanae* or *Littera Florentina*, contributed to the nascent science and to the establishment of a critical version of the *Digest*, the *Littera Bononiensis* or *Vulgata*, which became the basic source for studying *ius civile* in Europe. The School of Bologna continued to employ such techniques to explain the mechanisms of exposition and conclusion of the *Trivium*, which provided commentators with grammatical concepts and dialectic devices for use as explanatory tools. The connection is particularly clear in the case of Irnerius, a grammarian and dialectician of the School of Arts. His glosses demonstrate the well-known dialectical resources of the *Trivium*. The new method systematized the older system of the gloss as a brief explanation of a difficult word,

⁴⁰ Papias, *Elementarium doctrinae rudimentum*, Venetiis, 1485.

⁴¹ Azorín Fernández, D., *Los diccionarios del español en su perspectiva histórica*, Alicante, 2004, pp. 21-22.

⁴² “Abstemius: sorbius, astinens a temeto in vino componitur ex abstineo e temeto ut Quintiliano placet et dicitur abstemius cibi id est parcus”.

⁴³ *Pandecchtes: omnia ferentes et vetus et novum testamentum*. See Paradisi, B., “Le glosse como espressione del pensiero giuridico medievale”, *Fonti medioevali e problematica storiografica. Atti del Congresso Internazionale tenuto in occasione de 90° anniversario della fondazione dell'Istituto Storico Italiano (1883-1973)*, Roma, 22-27 ottobre 1973, vol. 1, Roma, 1976, p. 238.

⁴⁴ Conrat, M., “La Glossa di Colonia alle Istituzioni. Pubblicazione del testo con introduzione e note”, *Archivio giuridico*, 34 (1885), pp. 105-125; Fitting, H., *Die Institutionenglosse des Gualcausus und die übrigen in der Handschrift 328 des Kölner Stadt-Archivs enthaltenen Erzeugnisse mittelalterlicher Rechtsliteratur, als Entgegnung gegen Flach besprochen und neu herausgegeben*, Berlin, 1891.

⁴⁵ Paradisi, *Le glosse como espressione*, pp. 191-200.

following the earlier tradition of teaching grammar in the *Trivium*. The Bolognese lawyers extended this kind of explanation to complete sentences, and even legal texts. Over time, these explanations became increasingly long and complex, but as textual interpretations they remained limited to the exegesis of texts. Interlinear glosses were very short, written between the lines of the manuscript, although the most common approach was that when they were very long, they were placed outside the text (marginal glosses). The jurists who applied this method were called commentators, and often put their initials after their glosses (e.g., Az = Azzo; Ac = Accursius)⁴⁶. Irnerius, Accursius and the lawyers of Bologna certainly had the glossing techniques of their predecessors in mind as they worked⁴⁷.

However, the glosses of Irnerius and his school were not rhetorical-dialectic such as those of the tenth and eleventh centuries, but exegetical reflections on a complex legal construction around the interpretation of the *Corpus Iuris*. They demonstrate deeper contemplation, referencing quotes, divergent points of view, etc. The lawyers of the Bologna School were the first to study Roman law as a science. They went on to analyse the entire codification of Justinian and studied Roman law as an independent, coherent and complete legal system, proper to its time. Their art, however, was rooted in the methodology of the ancient gloss, a practice that undoubtedly marked the subsequent evolution of law.

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