WOMEN DO NOT SIT AS JUDGES, OR DO THEY? THE OFFICE OF JUDGE IN VINCENTIUS BELLOVACENSIS' *SPECULUM*

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1 Introduction

It was Charles Homer Haskins (1870-1936) who coined the expression "Renaissance of the twelfth century".[1] Before him this expression referred more specifically to the Italian Renaissance of the fifteenth century as nineteenth century Swiss historian Jakob Burckhardt put it. Nevertheless the twelfth century Renaissance of Roman law was well known among legal historians, although they used less flattering expressions for the phenomenon of the rediscovery. Rudolf von Ihering (1818-1892) opened his *Geist des römischen Rechts* by stating that Rome had three times dictated its laws to the world, first when it exercised its full power in Antiquity, secondly after the fall of Rome for the unity of the Church, and thirdly as a consequence of the reception of Roman law.[2] Johann Wolfgang von Goethe (1749-1832), who had failed as a law student, had a conversation

1 Haskins, in the preface of his influential book *The Renaissance of the Twelfth Century* (1927), stated (at p. VIIIff.) that the twelfth century in Europe was in many respects an age of fresh and vigorous life. The epoch of the Crusades, the rise of towns and the earliest bureaucratic states of the West, it saw the culmination of Romanesque art and the beginnings of Gothic; the emergence of the vernacular literatures; the revival of the Latin classics and Latin poetry and Roman law; the recovery of Greek science, with its Arabic additions, and of much of Greek philosophy as well as the origin of the first European universities. The twelfth century left its signature on higher education, on scholastic philosophy, on European systems of law, on architecture and sculpture, on the liturgical drama, on Latin and vernacular poetry. Cf. Panofsky, *Renaissance and Renaissances in Western Art* (1960); Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (2008), 76.

2 Ihering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* Vol. 1 (1907), 1.

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with Neckermann on 6 April 1829. On that occasion Goethe compared Roman law with a duck that continues to dive under and to rise again, sometimes hides itself, but never gets lost.[3] Sir Paul Vinogradoff (1854-1925) considered the problem regarding the fate of Roman law after the downfall of the Roman state as the "most momentous and puzzling problem" within the whole range of history, and he continued by describing the medieval revival of Roman law as "a ghost story" that treats of a second life of Roman law after the demise of the body in which it first saw the light.[4] The language spoken during this "Renaissance of the twelfth century" was the language of the Church (and the ecclesiastical schools), of the scholars and of the scribes. The similarity with classic Latin was obvious, but in quite a few cases this similarity was demonstrably misleading, since the instititutions hidden behind those words (mainly substantives) were new, or better: alien to Antiquity. Consequently this "Renaissance of the twelfth century" entailed the resurgence of many old substantives, however with a new sense. Friedrich Carl von Savigny (1779-1861) was the first to focus attention on the shift in meaning of the word "*iudex*".[5]

2 Status *quaestionis*

Taking Savigny's statement as our point of departure, our hypothesis is, albeit in accordance with general doctrine,[6] that it is only in the course of the twelfth and thirteenth centuries that legal practice, more specifically the office of the judge, underwent important changes and became highly professionalised. This process of professionalisation went hand in hand with a new concept of rationality which we will illustrate with the transition of the system in which judgment precedes proof to the inverse system, in which proof precedes judgment. We will then focus upon Vincentius Bellovacensis and follow his description of the office of the judge. An attempt will be made to identify his main sources.

3 The word "*iudex*"

In Antiquity, in the early days of the Republic (according to Livy), "*iudex*" stood for a higher magistrate.[7] During the classical period of the great Roman jurists the title indicated private persons, the "aristocratic volunteers", if we may borrow the description of Fritz Schulz,[8] who during the trial determined the facts and delivered the judgments. Ulpian, however, uses the word "*iudex*" for the president of the tribunal (D. 5.1.1) or even for

3 Neckermann, *Gespräche mit Goethe* Vol. 2 (1837), 109.

4 Vinogradoff, *Roman Law in Medieval Europe* (1921; repr. 1961), 13.

5 Savigny, *Geschichte des römischen Rechts im Mittelalter* Vol. 1 (1834; repr.1961), 474-475.

6 Fried, *Die Entstehung des Juristenstandes im 12. Jahrhundert. Zur sozialen Stellung und politischen Bedeutung gelehrter Juristen in Bologna und Modena* (1974), 7-44; Brundage (n. 1).

7 Titus Livius, *Ab urbe condita* III, 55.

8 Schulz, *History of Roman Legal Science* (1967), 117. On the author see: Ernst, "Fritz Schulz (1879-1957)" in: Beatson & Zimmermann (eds.), *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-Century Britain* (2004), 105-203.

the *praetor* (D. 11.7.14.1 in conjunction with D. 41.2.11). Since the days of the Emperor Constantine "*iudex*" might refer to a governor, a civil servant, as opposed to a military rank, sometimes also to those who served as advisers on the *consilia* of the magistrates (among which those with judicial duties). The effects of growing bureaucratisation became visible in the salaries of these professionally-trained officials. The borderline between salaries and bribes, however, seemed very thin and required careful legislation.[9]

Since the Carolingian era the sources give numerous expressions which contain the word *iudex* or *iudices*. Initially those magistrates functioning in the *curia regis* were called *iudices* (*iudices domini regis (imperatoris)*). From the ninth century on we find the same substantive also at the papal court (*iudices sacri palacii*). According to Fried[10] it can also be found in the cities as from the eleventh century: *iudices aule regie (imperatoris)* or *iudices civitatis*. Although there is some common core, there is no definition of the concept of a *iudex*. We should bear in mind that in the twelfth century neither the *Corpus Iuris Civilis* nor Gratian's *Decretum* provided a consistent description of procedure. The question of how a trial had to be conducted was, however, of great importance for the Church because a holder of a church-office could not be deposed without an orderly trial. There was consequently a need for specific treatises dealing with this highly important aspect of medieval society. This type of literature is known as *ordines iudiciarii* (or *iudiciorum*), the first of which seems to have been written by legists, the scholars who taught secular law, on the request of Church prelates. Until the revival of Roman law, ecclesiastical councils gave judgment in cases presided over by the bishop or pope.

The Roman concept of a trial conducted by a single judge, if necessary assisted by professionals, had the advantage of strengthening the authority and consequently also the powers of the pope and bishops. For lack of canon law provisions, the early *ordines iudiciarii* referred to the *Corpus Iuris Civilis* and thus made use of the concept of a trial conducted by a single judge who gave judgement himself. From the end of the twelfth century onwards papal decretals on procedural matters became of more importance. They might very well deviate from procedural rulings in the *Digest* or the *Codex*. The English *ordo quia iudiciorum* (1180s) was the first to list differences between Roman and Canon law in procedural matters.[11] All early *ordines* and procedural treatises are described extensively with a list of manuscripts and printed editions by Linda Fowler-Magerl.[12] Recently the Polish scholar Litewski published a German translation of his textbook on the law of procedure in the *ordines*.[13] The two volumes cover the second half of the twelfth century until approximately 1234, the year of the "publication" of the *Liber Extra*. They provide detailed information on all aspects of the law of procedure and the references to the sources are very specific. It is an indispensable tool for those who are interested in the history of the law of civil (and criminal) procedure.

9 Noonan, *Bribes: The Intellectual History of a Moral Idea* (1984).

10 (n. 6), 7-44.

11 Fowler-Magerl, *Ordo Iudiciorum vel Ordo Iudiciarius* [Ius Commune Sonderhefte 19] (1984), 105.

12 Fowler-Magerl, *Ordines Iudiciarii and Libelli de Ordine Iudiciorum from the Middle of the Twelfth to the End of the Fifteenth Century* [Typologie des sources du moyen Âge occidental 63] (1994); Fowler-Magerl (n. 11).

13 Litewski, *Der römisch-kanonische Zivilprozess nach den älteren Ordines Iudiciarii* (1999).

4 The common core of the notion of *iudex*

In these *ordines iudiciarii* the notion of *iudex* apparently encompasses numerous different duties. There is, however, also a common core. Bulgarus de Bulgarinis saw this clearly. He wrote a tract on procedure: *Tractatus de Iudiciis*.[14] It is one of the first "treatises" written by a medieval Roman lawyer. Both he and the recipient of his tract, his *carissimus amicus*, the Papal Chancellor Haimeric (who held that office from 1123-1141), must have presumed that Roman rules could be applicable to procedural issues in both ecclesiastical and secular courts. He defined a judge as the one who presides over the process, either as *praetor* or *praeses* or *praefectus urbis* or as vicar.[15] Sheriffs (*scabini, Schöffen, residentes cum iudice*) could participate in the sessions of the courts, but they were distinct from the witnesses (*testes*). The *ordines iudiciarii* attributed different and rather well-defined roles to the various participants in the procedure.

Subsequently important changes in the role of the *iudex* took place. Two of them are well-known, namely first the introduction of the principle that the judge delivers judgment on the basis of the facts brought before him through the parties: *iudex secundum allegata, non secundum conscientiam iudicat.* The German scholar Knut Wolfgang Nörr wrote an exemplary thesis about the meaning and the significance of this medieval legal principle.[16] The second change was the abolition of ordeals. I will devote a few words to this historical phenomenon.

5 From *judgment precedes proof* to the inverse: *proof precedes judgment*

It would be wrong to describe this development as a progressive rationalisation of the judicature, although elements of professionalisation were of great importance. Ordeals were certainly not considered to be irrational; it was only when the Fourth Lateran Council (1215) had effectively put an end to their availability that they became considered as irrational. It should not be forgotten that in Germanic procedure, unlike in Roman law, the courts relied upon the sworn accusations and denials of the parties, often supported by additional sworn statements by oath-helpers or compurgators who were prepared to put their immortal souls at risk by calling upon God to witness. In that context a party to a dispute had the option of proposing to resolve the matter through an ordeal. This proposition was often rather tricky: on the one hand it played a certain part in the negotiations between the parties, but on the other hand it also included an element of

14 Details in: Lange, *Römisches Recht im Mittelalter* Vol. 1, *Die Glossatoren* (1997), 7.

15 Bulgarus, *De Arbitris et Iudicibus et quae sit Differentia inter Eos*, in: Ms. Vat. lat. 8782, fol. 94v-95r: "Arbitrum itaque eum dicimus cui proprio consensu compromittentes, scilicet actor et reus, in partes committunt. Iudex uero est qui iurisdictioni preest ut pretor, preses, prefectus urbis et qui ab his delegatus est quibus hec communia sunt." Also printed as book 3 title 1 of Placentinus, *De Varietatibus Actionum* (ed. Mainz 1530).

16 *Zur Stellung des Richters im Gelehrten Prozess der Frühzeit: Iudex Secundum Allegata non Secundum Conscientiam Iudicat* (1967); McNair, *The Law of Proof in Early Modern Equity*, [Comparative Studies in Continental and Anglo-American Legal History 20], (1999), 46-54.

bluff. The negotiations might lead to a settlement, but if not so, then the judge could order the ordeal to take place, for example an ordeal by water, by fire, or (since 967 when Otto I on the basis of older Germanic custom introduced the battle by the sword as an ordeal) a duel. Once the ordeal had taken place, the proof resulting therefrom was supernatural and therefore irrefutable. The ultimate judicial decision consequently related to the admissibility of the ordeal. There was no need for further questions. Motivation of judgments and sentences was superfluous, and interpretation of statutes did not play a part. The discretion of the judge came to an end once he had decided about the admissibility of the ordeal as means of proof since the outcome thereof was decisive. The English have a very sharp expression for that period: *judgment precedes proof*.[17] Already in the course of the ninth century Agobard,[18] bishop of Lyon (816-840), raised his voice against the practice, but others, like the very influential Hincmar of Reims,[19] declared their belief in this type of judicial decision-making. In 1215 the Fourth Lateran Council forbade the servants of the Church to attend ordeals and thus made the practice obsolete. From then onwards *proof precedes judgment.* Accursius remarks that some of his contemporaries deduce from D. 9.2.7.4 that the Romans themselves had accepted the duel as legitimate. According to him, however, duels conflict with the divine law since Christ himself had ordered that "[t]hou shalt not tempt the Lord thy God" (Luke 4:12).[20] For Odofredus, the illegality of the duel is no longer questionable: "The duel as a mode of proof is inadmissible according to the learned law. Only the law of the Longobards, which we do not keep, allows the duel."[21] Secular law was soon to follow the Church. Frederic II, on the ground of genuine knowledge of the law, explicitly forbade the use of ordeals and duels in the kingdom of Sicily.[22] This definitely led to a change in the role of the judge which went hand in hand with the professionalisation of the judiciary.

17 Baker, *An Introduction to English Legal History* (2002), 72f.; Pollock & Maitland, *The History of English Law* Vol. 2 (1968), 455; Neilson, *Trial by Combat* (1890); Bartlett, *Trial by Fire and Water. The Medieval Judicial Ordeal* (1986); Gaudemet, "Ordalies au Moyen Âge", in: *La Preuve* Vol. 2 *Moyen Âge et Temps Modernes.* Recueils de la Société Jean Bodin pour l'histoire comparative des institutions 17 (1965), 124; White, "Proposing the ordeal and avoiding it. Strategy and power in Western French litigation, 1050-1110" in: Bisson (ed.), *Cultures of Power: Lordship, Status and Process in Twelfth Century Europe* (1995), 89-123; Hyams, "Trial by ordeal: the key to proof in the early common law" in: Arnold *et al*. (eds.), *On the Laws and Customs of England. Essays in Honor of Samuel E. Thorne* (1981), 90-126.

18 Agobard, *Liber contra Iudicium Dei*, quoted by Bartlett (n 17).

19 Schwenter, "Die Stellung der Kirche zum Zweikampfe bis zu den Dekretalen Gregors IX", 3 (1930) *Theologisches Quartalschrift*, 190-234.

20 Accursius, glossa *Nisi domino committente* ad D. 9.2.7.4: "(…) Item faciunt contra Deum, qui dicit: *non tentabis dominum deum tuum.* Item quia et jus Lombardorum dicit: multos uidimus sub justo clypeo perire, ut in Lombarda qualiter quis se defen. pro pu. l.iii."

21 Odofredus, ad C. 4.9.1: "unde jure nostro pugna est prohibita. nam sunt certi modi probandi, sed pugna non est de illis modis et ideo lex non admittit eam ad probandum. (…) Sed jure Longobardo, quod non servamus, bene permittitur pugna."

22 *Const. Regni Sicil*. II.31: "nos qui veram legume scientiam perscrutamur …. [ordered the judges to be satisfied with] communibus probationibus … tam antiquis legibus quam nostris constitutionibus introductis. (33) Monomachiam quae vulgariter duellum dicitur … inter barones … in perpetuum

6 *Iudex ordinarius – iudex delegatus*

The Church played an important part in this respect. From the middle of the twelfth century onwards, parties with increasing frequency brought their disputes before the ecclesiastical courts. Faced with a flood of lawsuits, popes and, following in their footsteps, bishops, began to search for new methods to cope with the inundation at hand. Urban II (1088-1099) seems to have been the first to authorise cardinals and their vicars to deal with complex disputes and to make recommendations to the pope. Whereas during the eleventh century the popes increasingly *consulted* the cardinals, from the twelfth century onwards they *delegated* the work necessary to decide the cases brought before them. From consultation to delegation is but a short step, as James Brundage put it.[23] The use of assessors significantly reduced the time the pope himself needed to invest in each case. Innocent II (1130-1143) occasionally empowered his chancellor, Cardinal Haimeric (1123-1141), to hear and decide cases. The successors to Innocent II appointed more lawyers as cardinals. This rapidly increasing prominence of lawyers among the curia represented in itself a response to rather than a cause of the flood of litigation at the papal court, but reactions were mixed. Bernard of Clairvaux was not alone in condemning what he saw as the malign influence of the lawyers in the Lateran palace. Pope Innocent II (1130-1143), however, confirmed unwaveringly that the whole Church was aware of the doctrine that the pope was empowered to judge any complaint brought by anyone from any part of Christianity.[24] The pope is the *iudex ordinarius singulorum*.[25] The concept of *iudex ordinarius* as such was already known in earlier times. It occurred, for example, in the Theodosian Code, but – more importantly – also in the *Codex Justinianus* and in the *Digest* as an indication for judges in general, without any further specification.[26] In the days of Tancred and Innocent III, however, the notion of *iudex ordinarius* obtained a special meaning. Guillelmus Durantis expresses this clearly: *Iudex ordinarius* is he who holds the office of judge, be it in his own right (as opposed to the *iudex delegatus*,

volumus locum non habere, quae non tamen vera probatio quam quaedam divinatio dici potest, quae naturae non consonant, a jure communi deviat, aequitatibus rationibus non consentit."

23 Brundage (n. 1), 131.

24 Cf. C.9 q.3 c.17: "Cuncta per mundum novit ecclesia quod sacrosancta Romana ecclesia fas de omnibus habeat iudicandi, neque cuiquam de eius liceat iudicare iudicio. Siquidem ad illam de qualibet mundi parte appellandum est, ab illa autem nemo est appellare permissus. Sed nec illa praeterimus, quod Apostolica sedes sine ulla synodo praecedente et solvendi, quos synodus inique damnaverat, et damnandi nulla existente synodo, quos oportuit habuit facultatem, et hoc ne mirum pro suo principatu, quem beatus Petrus apostolus Domini voce et tenuit semper et tenebit."

25 Cf. Innocentius' decretal *Quum nobis* of 1200 (3 Comp. 1.6.4; X. 1.6.19) and Tancred, *Ordo Iudiciarius* 1.1.1 and 2.1.2, which texts qualify the pope as *iudex ordinarius omnium.* Tancred's work, which he based upon notes made between 1210-1215, is edited in Bergman, *Pilii, Tancredi, Gratii Libri de Iudiciorum Ordine* (1842), 89 ff. at 91 & 127. See also Maitland, *Roman Canon Law in the Church of England* (1968), 100-131.

26 In Cod. Th. 6,26,5 and 7,10,2 and in Cod. 7.62.21: "Quoniam iudices ordinarii provocationes aestimant respuendas, placet, ut, si quis appellationem suscipere recusaverit, quae non contra exsecutionem, sed adversus sententiam iurgium terminantem fuerit interposita, triginta auri pondo cogatur largitionibus nostris inferre: triginta alia officio eius itidem soluturo, nisi ei pertinaciter restiterit atque actis contradixerit et, quid iure sit constitutum, ostenderit." D. 2.1.5-6.

who holds his office on the basis of a mandate) or by force of the Prince. This is not only so in ecclesiastical law, where the offices of primates, archbishops, bishops and other servants of the Church exist by derivation from the pope's office, but also in secular law where dukes, marquises, counts and others derive their total jurisdiction of a whole province or city from the Emperor. If only one specific case is at the judge's discretion then he is a *iudex delegatus*. The pope, however, is *iudex ordinarius* of everybody.[27] Huguccio expresses himself in the same way. The bishop is *iudex ordinarius* only in his own diocese and the bishop of a metropolitan church only in his own parish. Although he may be the *iudex ordinarius* of his bishops, the archbishop is not competent to judge in matters concerning those who are subject to his bishops. It is different in the case of the pope who is the *iudex ordinarius* of everybody, including the major and minor prelates and their subjects.[28] Bernardus Parmensis, too, devotes a passage to these facts.[29]

7 Vincentius Bellovacensis

We now come to Vincentius Bellovacensis, one of four great writers of thirteenth-century encyclopaedias. He probably died in 1264, which is also the presumed year of the death of Accursius. As Savigny correctly put it, Vincentius devoted the greater part of his life to his survey of all the sciences of his age, the *Speculum Maius*.[30] Initially he had planned to divide his work into two parts, the *Speculum Naturale* and the *Speculum Historiale*, the former devoted to the sciences and the latter to the arts. Later on, Vincentius changed his mind and inserted a third part between the other two, namely the *Speculum Doctrinale*, composed of seventeen books and 2347 chapters. The first book commences with a vocabulary, followed by grammar and logic in the second book. After the doctrine of virtues we find more practical disciplines, such as architecture and agricultural sciences. From a legal historian's point of view the work becomes extraordinarily interesting from book 7 onwards, since it is the only encyclopaedia of those days that devotes attention

27 Guillelmus Duranti, *Speculum Iudiciale* I.1 *De officio ordinario* §.1 (ed. Basel 1574, repr. 1975, 98): "Ordinarius est qui iure suo vel principis beneficio universaliter iurisdictionem exercere potest. ff. de iuris. om. iud. More maiorum (D. 2.1.5) et l. seq. (D. 2.1.6). Quod locum habet siue in ecclesiasticis, ut sunt primates, archiepiscopi, episcopi et alii ecclesiastici, qui habent iurisdictionem a papa, extra eod. Duo (X 1.31.9) xxij. dist. Omnes (D. 22 c.1), responso primo, extra de elec. Significasti (X 1.6.4), sive in civilibus ut duces, marchiones, comites et huiusmodi qui habent totalem iurisdictionem unius provinciae vel loci ab Imperatore, nam si uni causae cognitio esset commissa, talis est iudex delegatus. Dominus vero papa est iudex ordinarius singulorum, Extra de elect. Cum nobis olim (X 1.6.19), ix q.iii. Cuncta (C.9 q.3 c.17)."

28 Huguccio, summa C.6 q.2 c.3 (as cited by Onory): "Solus episcopus est iudex ordinarius in diocesi sua … metropolitanus non est iudex ordinarius nisi in parrochia sua, et licet sit iudex ordinarius suorum episcoporum non tamen illorum qui subsunt episcopis ... in papa autem speciale est qui est iudex ordinarius omnium, scilicet maiorum et minorum prelatorum et eorum subditorum." Cf. Onory, *Fonti canonistiche dell'idea moderna dello stato* (1951), 166; Tierney, *Foundations of the Conciliar Theory*. *The Contribution of the Medieval Canonists from Gratian to the Great Schism* (1968), 146.

29 Bernardus Parmensis, ad X 1.ii.3: "Cum [apostolica sedes] sit iudex ordinarius omnium Christianorum et omnes dignitates ordinis cuiuscumque ecclesia romana constituit … idem est in sententia papae quia sicut ipse iudicat alii iudicare debent. Cf. Gratian C.24 q.1 d.p.c.16."

30 Savigny, *Geschichte des römischen Rechts im Mittelalter* Vol. 5 (1845), 434.

to legal science, first to political science and secondly to private law. He indeed makes a number of surprising remarks about the *iudex ordinarius.* In his view the *iudex ordinarius* is the man who by the sole fact that his election has been confirmed by his superior has the office of a judge in the Church, or the man who by the sole fact that the Prince has appointed him to an office in a specified territory such as a province, or the primacy of a college, has the right of jurisdiction over his subjects.[31]

8 Five requirements

Vincentius then enumerates in the form of a mnemonic distich five requirements for the judge to hold office. These relate to sound judgment, his gender, his age, his secrecy and his standing in public opinion.

> *In qualitate iudicis ordinarii considerantur ista quinque secundum iura; conditio, sexus, aetas, discretio, fama.*

This is a remarkable statement, both from a substantive and a formal point of view. In the course of the twelfth and thirteenth centuries the substantive qualities as such played an important role elsewhere too. There is some irony in the fact that pope Alexander III mentions these requirements as qualities of the accused that the judge has to consider in deciding on sentence. According to the decretal *Sicut dignum* of Alexander III (X 5.12.6) the judge should not only take into account the quantity and the quality of the felony, but also the age, knowledge and gender of the accused: *non solum quantitas et qualitas delicti, sed aetas, scientia, et sexus atque conditio delinquentis sunt attendenda.* It is paradoxical that Alexander III attributes these factors to the accused, whereas Vincentius Bellovacensis considers them as criteria for appropriateness to hold the office of judge. More important, however, is the fact that Hostiensis, in his *Summa Aurea*, also draws attention to these substantive factors.[32] This fact in itself has two aspects. First, on an

31 Vincentius Bellovacensis, *Speculum Doctrinale*, Lib VII, De iudicibus ordinariis Cap. LXIII: "Ex *Summa iuris.* Praedicti autem omnes ordinarii sunt iudices. Et dico ordinarium esse illum, qui ex eo ipso quod eligitur et confirmatur a superiore, vel eo ipso quod princeps sibi dat in aliquo territorio vel provincia dignitatem, vel super collegio primatum, iuridictionem habet super quibus est constitutus. In qualitate iudicis ordinarii considerantur ista quinque secundum iura; *conditio, sexus, aetas, discretio, fama.*
Conditio quidem, ne severus sit. *Sexus,* ne femina. *Aetas* autem ut maior sit 20 annis, vel ad minus annorum 18. *Discretio* vero ne sit indiscretus in iudicio. *Fama* quoque, ne sit infamis. Sed licet infamia faciat ne possit ordinarius de iure et merito subditos suos iudicare, sententia tamen infamis vel criminosi iudicis tenet, nec propter talia repelli potest ordinarie iudicando, quam diu sustinetur in officio suo, sed delegatus repelli potest.
Omnem autem praelatum ecclesiasticum ordinarium esse puto. Archiepiscopus quidem est ordinarius suffraganeorum suorum, sed non subditorum illorum. Officium praelati vel iudicis est, curam habere subditorum. Eiusque potestas circa tria versatur, sc. circa correctionem et iudicium et animadversionem. Igitur in correctione debet esse benevolus, in iudicio iustus, in animadversione misericors. *Isidor. lib. 9.* Iudices dicti sunt quasi ius dicentes populo, sive quod iure disceptent id est iudicent, non est enim iudex nisi sit in eo iustitia. *Gratianus, causa 3.q.7* Quod autem iudex esse non possit, quem cum reo par aut maior macula inficit, multis auctoritatibus probatur ... ."

32 Hostiensis, *Summa Aurea*, Lib. II, Tit. *De testibus,* no. 2.

earlier occasion I tried to show that it is likely that Hostiensis is one of the (until now unidentified) sources on which Vincentius drew. In a contribution to the *Festschrift* for the Cologne scholar Rolf Knütel, I attempted to prove that Vincentius Bellovacensis quoted Hostiensis in his discussion of the binding force of contracts: *pacta sunt servanda*.[33] The second aspect of the (at first glance) more or less identical enumeration of the abovementioned factors reveals the differences between the two writers. Vincentius lists five requirements for the judge to hold office. Hostiensis, however, mentions seven: *conditio, sexus, aetas, discretio, fama et fortuna, fides*. Far more important than the exact number, however, is the fact that Hostiensis' phrase does not refer to qualifications of the judge. Hostiensis enumerates these seven as grounds for disqualification of witnesses during the trial.[34] That is exactly the context where the mnemonic distich originally belongs and where it emerges in several other writings, such as the *Expositio in Boethii De Consolatione Philosophiae*, which was once ascribed to Thomas Aquinas.[35] Tancred, too, is of the opinion that the judge should test the credibility of the witnesses by applying specifically these criteria.[36]

This leads to the substantive importance of the mnemonic distich of Vincentius Bellovacensis. Unlike the other authors, he does not use the phrase in the context of the culpability of the accused or the credibility of witnesses. No, he deals with the office of the judge and refers to the necessary qualifications for someone wishing to serve as a judge.[37]

Interest in this aspect of the office of the judge is not unusual. Gratian had shown interest earlier, albeit without making use of the magnificent distich that Vincentius gives his reader. In C.3 q.7 Gratian presupposes some identity between the judge and the

33 Schrage, "Vincentius Bellovacencis und Henricus de Segusio (Hostiensis)" in: Schermaier *et al*. (eds.), *Festschrift für Rolf Knütel* (2010), 1077-1086.

34 Helmholz, *The Oxford History of the Laws of England* Vol. 1: *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (2004), 339-340; Schnapper, "Testes inhabiles", 33 (1965) *Tijdschrift voor Rechtsgeschiedenis*, 575-616.

35 *In Boethii De Consolatione Philosophiae* (ed. Busa 1980), I.8: "Nota ad testes idoneos septem requiruntur conditiones quae his versibus continentur: aetas, conditio, sexus, discretio, fama et fortuna, fides." Busa attributes the work to William Wheatly, but mistakenly according to King, "Boethius, first of the Scholastics", 16 (2007) *Carmina philosophiae*, 26f. The edition is accessible via the internet: *http://www.corpusthomisticum.org/xbc1.html* (28 Dec 2009).

36 Tancred, *Ordo Iudiciarius* 3.6 (ed. Bergmann 1842, 225). It might very well be that from there the maxim landed in the post-1618 editions of Dalton's *Country Justice*. See Donahue, "Proof by witnesses in the church courts of medieval England" in: Arnold *et al*. (n. 17), 131; Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* (1991), 156 and 190; Shapiro, *A Culture of Fact. England 1550-1720* (2000), 14; Shapiro, "Religion and the law. Evidence, proof and 'matter of fact', 1600-1700", in: Landau (ed.), *Law, Crime and English Society* (2002), 189, n. 18.

37 We may leave aside that later on Hugo Grotius would use some of the qualifications discussed here in his *De Iure Belli ac Pacis* (III, XI, § IX, 1), when he states that women and children should be exempted from killing in the war (*Temperamentum circa ius interficiendi*): "Puerum aetas excuset, Foeminam sexus." Grotius refers to Pliny *Historia Naturalis* 8 16: "Leo ubi saevit, in viros prius quam in feminas fremit." (Transl: The lion, when enraged, falls upon men rather than women, and does not hurt children but when pressed with extreme hunger.)

cognitor. He consequently states that in principle an *infamis persona* lacks the capacity to act as an advocate or a judge (C.3 q.7 c.1). In the heading (Gratian C.3 q.7 a.c.1), it is made clear that this prohibition is not an absolute one: if the Church willingly and knowingly tolerates such a person as a judge, his judgments will be binding although he may be a sinner. If the Church does not tolerate this person, his judgements will, however, be invalid. In that context we find a reference to D. 5.1.12 where Paul states that by nature those who are mute, deaf, minor or permanently insane cannot act as a judge since their judgment is not sound. By operation of law are prohibited those whom the Senate has forbidden to act, and by custom women and slaves. The second distinction states that one who is *by nature* damned or is irrevocably sentenced to infamy will in principle be unable to hold office.

In a totally different context we find some interest in the qualifications for a judge. As far as age is concerned, Accursius (in the gloss *Impubes* to D. 5.1.12) mentions four different ages that come into consideration: *Impubes* cannot take up office as judges, nor can adults below the age of eighteen, except in two cases, namely when the Prince willingly and knowingly appoints them as such, or when the parties agree upon them. Between eighteen and twenty they may accept the duty, but they are not obliged to do so.[38]

9 Women do not qualify as judges

Among the five requirements for a judge Vincentius explicitly states that women are not allowed to act as judges: *ne femina*. This is noteworthy and deserves special attention. In the time of Vincentius this was true in Canon law, although Innocent III in a decretal of 1202 (3 Comp 1 25 1; X 1 43 3) acknowledged that a woman may act as arbiter since women may act as *iudices ordinarii* in secular courts on the basis of the *ius commune* or customary law.[39] In this instance Vincentius apparently does not follow Hostiensis who

38 Gl. *Impubes* ad D. 5.1.12: "*Et impubes*. Dic quod quattuor sunt aetates attendendae hic. Impubes ergo non, ut hic [D.5.1.12]. Item adultus usque ad decem et octo annos, non potest, nisi in duobus casibus, quando princeps facit eum ordinarium vel delegatum. Item quando partes scientes eum minorem, in eum consentiunt, ut infra de re iudi. l. Quidam consulebat (D. 41.1.57). Maior xviij. usque ad xx. potest sed non cogitur pronuntiare, ut supra tit. ij. l. Cum lege (D.4.8.41) Maior vero xx. cogitur, nisi petat restitui, ut d. l. Cum lege. Acc."

39 X 1.43.4: "Quamvis autem secundum regulam iuris civilis feminae a huiusmodi publicis officiis sint remotae, et alibi dicatur, quod, licet summae opinionis et optime constitutae exsistant, si arbitrium in se susceperint, vel si patronae inter libertos suos interposuerint audientiam, ab omni sint iudiciali examine separandae, ut ex earum prolatione nulla poena adversus iustos earum comtemptores, nullaque pacti exceptio habeatur; quia tamen iuxta consuetudinem approbatam, quae pro lege servatur, in partibus Gallicanis huiusmodi feminae praecellentes in subditos suos ordinariam iurisdictionem habere noscuntur, discretioni vestrae per apostolica scripta mandamus, quatenus praefatos Hospitalarios, ut arbitrium ipsum, praesertim quum episcoporum fuerit praesentia et consilio roboratum, sicut sine pravitate provide latum est, et ab utraque parte sponte receptum, observent, monere ac inducere procuretis, eos ad hoc, si necesse fuerit, per poenam in compromisso statutam appellatione postposita compellatis. [Testes autem etc. Dat. Lat. II. Non. Nov. Pont. nostr. Ao. V. 1202.]"

discusses the disqualification of women to testify,[40] whereas Vincentius is rather explicit in denying women the possibility to sit as judges notwithstanding the abovementioned decretal of Innocent III which acknowledges that their judgments are binding. Vincentius apparently takes his explicit denial from a work that he knows as *Summa Iuris*, but which until now has not been identified.

We arrive *in medias res*. In order to fully appreciate the importance of Vincentius' mnemonic distich we have to say something more about the question as to whether women have the capacity to sit as judges. Brundage, following in the footsteps of Minucci, focused attention on the *Summa* of Huguccio, who, with reference to C.33 q.5 c.17, first states that women cannot do so, but then immediately asks: "What about countess Mathilde who did so, and all the others who nowadays do so daily? What eventually about Deborah, about whom we read in the Old Testament that she gave judgment? In the Old Testament women were for certain reasons allowed to judge the effeminate people, as we see in the Book of Judges. In Canon law these texts lead to the result that women in principle were not forbidden to sit as judges. In certain circumstances specific queens, duchesses or countesses may be prohibited to sit as judge, but then, it was not so much by operation of law and her gender, but on the facts of her personality."[41] It may be an intriguing question whether Huguccio exercised a decisive influence on his student Lothario de' Conti, afterwards Innocent III, or whether Huguccio simply gave an interpretation of the decision of the pope during the Second Lateran Council. But, we do know that Vincentius Bellovacensis did not follow Huguccio.

10 Bernardus Papiensis as a source of Vincentius?

Whom did Vincentius follow in his description of the judiciary? To which work does he refer when he quotes the *Summa Iuris?* I would like to draw the attention to the *Summa Decretalium* by Bernardus Papiensis (Bernard Baldi, bishop of Pavia). Let us cast a closer glance at his remarks.[42] Bernardus simply gives the common definition of the *iudex ordinarius*. Any prelate is *iudex ordinarius*. But then the similarity between

40 See also Brundage "Juridical space. Female witnesses in canon law" 52 (1998) *Dumbarton Oak Papers*, 147-156 who mentions several cases in which women were heard as witnesses.

41 Huguccio, Summa ad C.3 q.7 d.p.c. 1 v. *femine*, after Ms Bibliotheca Apostolica Vaticana Ms. Vat. Lat. 2280, at 134 rb, about which Minnucci, *La capacità processuale della donna nel pensiero canonistico* (1989), p. 114; Brundage (n. 1), p. 14: "*feminae:* Hec iudicare non possunt, ut xxxiii q.v. mulierem [C.33 q.5 c.17]. Sed quid de comitissa Matilda, qui iudicavit et de multis aliis que cotidie iudicant? Quid denique de Debor qui legitur in veteri testamento iudicasse, ut xv.q.iii § econtra [C.15 q.3 pr. § 3]; sed in veteri testamento ex causa fuit permissum ut femine iudicarent effeminatum populum, non autem prohibentur iudicare et al aliter fiat, non est de iure. Prohibentur tamen iudicare pro se, sed non per alios si sint regine vel ducisse vel comitisse."

42 Bernardus Papiensis in Laspeyres (ed.) *Bernardi Papiensis Faventini Episcopi Summa Decretalium* (Regensburg 1860; repr. Graz 1965), 1 Comp. 1.21: "§ 1. Ordinarius iudex est qui in ecclesiasticis ab Apostolico, in secularibus ab Imperatore totalem quandam habet iurisdictionem. § 2. Delegatus vero dicitur, cui ab ordinario aliqua causa committitur vel delegatur." For a complete edition of the *Summa Decretalium* see also: *http://works.bepress.com/cgi/viewcontent.cgi?article=1012&context=david_freidenreich* (28 Dec 2009).

the texts of Bernardus and the one of Vincentius becomes clear:[43] Both Bernardus and Vincentius mention the very same five requirements for an *iudex ordinarius*: *Conditio, sexus, aetas, discretio, fama.* As far as the age is concerned, both writers simply mention two possibilities: from the allegation of D. 4.8.41 (*Cum lege Iulia cautum sit, ne minor viginti annis iudicare cogitur*) it is clear that they are of the opinion that the judge should be older than twenty years, but in D. 42.2.57 they read the question as to whether a judgement pronounced by a judge younger then twenty five is valid or not (*an valeret sententia a minore viginti quinque annis iudice data*). Hermogenian thereupon answers that it is equitable to uphold the judgment (*aequissimum est tueri sententiam*), provided the judge was older than eighteen years. The similarity of the texts of Bernardus and Vincentius is striking. They do not provide reasons but merely restrict themselves to the quotations (*allegationes*) and thus only mention the ages eighteen and twenty as explanation of the word *aetas* in the verse. Similarly both writers indiscriminately state that women can impossibly hold the office of judge, a statement that is in the context of their age far too simple.

There is also a definite similarity between the two authors' descriptions of the *iudex delegatus*.[44] According to Vincentius it is the judge's duty to observe the boundaries of his mandate precisely and to listen carefully to the arguments brought forward by the parties. Bernardus states exactly the same.[45]

43 Bernardus Papiensis (n. 42) 1 Comp. 1.21: "Videamus ergo, qualis debeat esse iudex ordinarius, quid eius officium, et quae potestas; quis autem sit iudex ordinarius, quaere supra de off. iud. deleg. § 1.[Bernardus Pap. Summa Decr. § 21]. In qualitate ipsius ista considerantur: Conditio, sexus, aetas, discretio, fama. Conditio, ne sit servus, ut C.iii. q.vii. § *Tria* (Grat. C.3 q.7 a.c.2); sexus, ne foemina, ut ibidem et C.xxxiii. q. ult. c.ult. (C.33 q.5 c.17) et Dig. de reg. iur. l. ii. (D.50.17.2); aetas requiritur, ut sit maior xx. annis, ut Dig. de arbitris Cum lege (D. 4.8.41), vel ad minus xviii. annorum, ut Dig. de re iudic. Quidam (D. 42.1.57); discretio, ne careat iudicio i. e. discretione, ut C.iii. q.vii. § Tria (Gratian C.3 q.7 a.c.2); fama, ne sit criminosa vel infamis, ut C.iii. q.vii. Infamis (C.3 q.7 c.1) § Tria (Gratian C.3 q.7 a.c.2) et Dig. de iudic. Cum praetor § Non autem (D.5.1.12.2). Omnem autem praelatum ecclesiasticum ordinarium iudicem esse credo, ar. infra eod. Cum ab ecclesiarum (1 Comp. c.3; -X. c. 3.1.31) et infra de iudiciis Decernimus (1 Comp. c.2; X. c. 2. I I 1)."

44 Vincentius Bellovacensis, *De Iudicibus Delegatis* Cap. LXV *Ex Summa iuris*. "Delegatus iudex est cui a principe in saecularibus vel ab Apostolico in ecclesiasticis, vel ab alio ordinario causa committitur. Huius officium est mandati fines observare, cum exacta diligentia et a partibus convocatis, quae utrinque proponentur audire. Et si mandati fines excedat, nihil agere. In duobus tamen casibus recedere debet a forma mandati. Primus est si rationabiles exceptiones opponantur, v.g. si mandetur ut cito restituatur ecclesia, qua quis spoliatus est, et adversarius opponat exceptionem de spontanea renunciatione facta in manu praelati sui; debet absolvere reum et sic a forma recedere mandati. Secundus est si impetratae sunt literae tali falsitate suggesta, qua non suggesta literae nullatenus darentur. In quo casu si fraus et dolus intervenerit, procedet non secundum formam rescripti, sed secundum ius commune. Ad officium quoque delegati pertinet cognoscere tam super principalibus quam super incidentibus quaestionibus, sine quibus causam sibi commissam commode non valet explicare. Nam ex quo quaestio principalis ei committitur, omnia quae ad illum pertinent ei commissa intelliguntur. Et nota quod delegatus maior est omni eo cuius sibi causa delegatur."

45 Bernardus Papiensis (n. 42) 1 Comp. 1.21.3: "Officium iudicis delegati est, diligenter fines mandati observare ac partibus convocatis, quae utrimque proponentur, audire ac secundum datam sibi formam negotium terminare, nisi litterae fuerint per mendacium impetratae, quo casu non secundum datam sibi formam, sed secundum iustitiam procedere debet, ut infra eod. Intelleximus (c. 11; - Gr. n. p.) et Cod. Si contra ius vel utilitat. Praescriptione [C.1.22.2.4] Potestas eius extenditur ad omnia ea, sine

11 Conclusion

It would, however, be presumptuous to draw from these similarities the conclusion that the *Summa Iuris* to which Vincentius refers might be identified with the *Summa Decretalium* by Bernardus Papiensis. There are quite a few quotations which I have been unable to identify and which I did not find in Bernardus's work. Other more or less identical phrases are so superficial that they do not allow far-reaching conclusions. We could take as an example their statements about the concept of customary law. Vincentius defines *Consuetudo* in terms of Canon law, stating that it is regarded as prevailing law when statutes are lacking.[46] Bernardus introduces the concept of customary law with similar statements.[47] Both definitions are largely dominated by the text of Dist. I, c. 5 of the *Decretum*[48] and consequently do not permit any conclusions. This state of affairs leads to an open end: although it is quite possible, we cannot be sure that Vincentius Bellovacensis really quoted the *Summa Decretalium* when he referred to the *Summa Iuris*. Philip Thomas, however, who as a student was exposed to the famous maxim of the great nineteenth-century Dutch jurist Land, namely that there is so much uncertainty in the law that one should take care not to draw unfounded conclusions, will certainly accept that I have nothing to offer but my own uncertainty. He will no doubt appreciate this as proof of a long-standing friendship.

quibus commissa causa nequit commode explicari, ut infra eod. *Praeterea* (c. 6; - Gr. c. 5. I 29), et Dig. de iurisd. omn. iud. *Cui* [D.2.1.2]; item cum auctoritatem habeat delegantis, maior efficitur eo, cuius sibi causa delegatur, ut infra eod. *Sane* (c. 3; - Gr. c. 3.1.29). Mittere tamen in possessionem non potest, nisi sit a principe vel ab apostolico delegatus, ar.Dig. de iurisd. omn. iud. *Iubere* [D.2.1.4] et infra de dolo c. 2. 3 et 4 (Gr., c. 2-4. I I 14); item delegatus alii delegare non potest, nisi sit a principe vel ab apostolico delegatus, ut Cod. de iudic. *A iudice* [C.3.1.5]. - "

46 Vincentius, *Speculum* VIII,59: "Dicit canon, quod consuetudo pro lege accipitur, cum deficit lex."

47 Bernardus Papiensis (n. 42) I, 3, 1: "Consuetudo est ius moribus institutum, quod pro lege accipitur) cum deficit lex, ut Di. I. *Consuetudo* (c. 5)."

48 C. V. Quid sit consuetudo. [Isidor. eod. cap. 3, et lib. II, c. 10]: "Consuetudo autem est jus quoddam moribus institutum, quod pro lege suscipitur, cum deficit lex. § 1. Nec differt, an scriptura, an ratione consistat, quando et legem ratio commendat. § 2. Porro si ratione lex constat, lex erit omne jam, quod ratione constiterit, duntaxat quod religioni conveniat quod disciplinae congruat, quod saluti proficiat. § 3. Vocatur autem consuetudo, quia in communi est usu."