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LOOKING AT THE EDICT OF ROTHARI
Between German Ancestral Customs and Roman Legal Traditions

ABSTRACT. *The essay takes up the debate on the nature of the most ancient Lombard legislation (whether it is really 'Germanic' or influenced by the Roman legal tradition). After more than two hundred years of discussion, a satisfactory solution is still waiting to be found. The research of the last decades on the early medieval Europe has deeply changed the perspective from which to look at the ancient norms. Legal historiography can no longer ignore the contribution of the studies of ethnogenesis and not even how much we know about the complex phenomenon of vulgar Roman law. Through some examples especially related to criminal law and the trial, these pages intend to show how useful it is to address the subject according to a different approach. Particurarly strong seems to be the imprint of the late Roman military law on the Longobard legislature.*

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1. Framing Lombard law

How far do Lombard laws – and especially the Edict of Rothari – reflect the ancestral customs of that Germanic people and how far do they reveal, on the contrary, the influence of Roman legal traditions? This question is a 'classic' theme of debate for legal historians (in Germany and Italy in particular). Other questions are traditionally connected to it: did an earlier Lombard law book exist prior to the initiative of King Rothari in 643? What did writing down the ancient customs in Latin really mean? Was

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the Edict of Rothari a 'personal' law code (*i.e.*, for Lombards only) or was it thought of as a 'territorial' one? After more than two hundred years of discussion a satisfactory solution is still waiting to be found. This is certainly not the place to go over the whole series of contributions of scholars who have taken part in this long debate. It is however necessary briefly to remind ourselves of the principal efforts in the past to answer such questions.

First, there were the German scholars who – during the nineteenth century – began to study the Lombard heritage. It was precisely at this time, at the end of a long process, that the modern German state was being formed: these scholars were seeking the original roots of the common juridical culture of that state. They felt it was their duty to provide a historical foundation for the construction of a new, national, German law. In their opinion, such common roots could be found in the Middle Ages. In particular, they thought that they would be able to recognize what they called an *urgermanisches Gemeinrecht* in Salian law (the *Pactus legis Salicae*) and in Lombard legislation.[1] So German scholars looked at Lombard law with the idea that it reflected (perhaps better than the Salian *Pactus* itself) the *incunabula* of ancestral German law (immediately arguing amongst themselves whether or not the Lombards belonged to the east or west group).[2] With as much erudition as imagination, they involved themselves in studying Lombard norms. It is no surprise that they were not at all interested in words or concepts taken from Roman law. Such an approach was reinforced by the flattering judgment of

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1   See G. GAUDIAN, 'Gemeindeuthsches Recht im Mittelalter?', *Ius Commune* 2 (1969), pp. 33-42, and now the volume of L. F. SHÄFER, *Juristische Germanistik. Eine Geschichte der Wissenschaft vom einheimischen Privatrechts* (Frankfurt a. M., 2008).

2   It will be sufficient to remember here scholars like M. A. v. BETHMANN-HOLLWEG, in *Der Civilprozeß des gemeinen Rechts in geschichtlicher Entwicklung* IV.1 (Bonn 1868 [= Aalen, 1959]), pp. 293-294, especially p. 296: "*Die Langobarden mehr von ihrer ursprünglichen Verfassung und Sitte als die genannten Völker* [Vandals, Burgundians, Goths] *in die neue Wohnsitze mitbrachten*;" J. FICKER, 'Das langobardische Recht und die skandinavischen Rechte', *Mitteilungen des Instituts für österreichische Geschichtsforschung* 22 (1901), pp. 1-50); and above all H. BRUNNER, in *Deutsche Rechtsgeschichte* I (Leipzig 1906²), pp. 529-538. Earlier literature can be found in A. SOLMI, 'Diritto longobardo e diritto nordico', *Archivio Giuridico* 61 (1898), pp. 509-510. More recently, the prevailingly Nordic character (be it Scandinavian or Saxon) of Lombard law has been defended by M. SCOVAZZI, *Le origini del diritto germanico* (1957, now in Id., *Scritti di storia del diritto germanico* I, Milan 1975), pp. 57-60; F. BAYERLE, *Leges langobardorum. Einleitung*, (Germanenrechte, N. F., Witzenhausen 1962), pp. 11-12 and H. CONRAD, *Deutsche Rechtsgeschichte. I. Frühzeit und Mittelalter* (Karlsruhe 1962²), p. 65.

an 'authority' like that of Heinrich Brunner who recognized in the Edict of Rothari the implementation of a clearly designed project with remarkable juridical consciousness.[3] This way, ideas about the authentic 'German' substance of the Edict became embedded in the historiography of the subject. They appear for example in text-books of the period 1950-1970, such as those of Conrad in Germany and Calasso or Astuti in Italy.[4]

The nineteenth century was not yet over when Italian scholars too began debating the question about how closely or not Lombard laws followed 'German' models.[5] However the approach to the problem was a quite different one. Italian scholars were also not free from a certain spirit of nationalism, but – as opposed to their German colleagues – they had as main goal the identification of the so-called 'sources' of the Lombard Edicts. Apart from a noteworthy exception about which more will be said later, most of them concentrated on recognizing what in Lombard laws was taken from the Roman juridical tradition. In practice, they assumed that it was their duty to demonstrate how the barbarians – although the winners – at the moment of giving themselves a legal system (albeit primitive) had to accept models of the 'beaten but superior' Latin civilization. We may take as an example an essay by Nino Tamassia, who in 1889, with infinite patience and every sort of textual comparison, tried to show how most of the chapters of the Edict of Rothari were composed by selecting terms, phrases and concepts from at least three great juridical traditions: Roman (both from pre-Justinianic law and from the *Corpus Iuris Civilis*); Gothic (that is both the Visigoths and the Ostrogoths) and finally ecclesiastical.[6]

Tamassia's essay developed ideas previously raised by Nani (1877) and Del Giu-

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3   BRUNNER, *Deutsche Rechtsgeschichte* (n. 2), p. 531.

4   CONRAD (n. 2) p. 65; F. CALASSO, *Medio Evo del diritto* (Milan 1954), for example p. 108; G. Astuti, *Lezioni di storia del diritto italiano. Le fonti* (Padova 1953 [repr. with *addenda*1968], pp. 86-103; 'Spirito del diritto longobardo: il processo ordalico' (1973), now in Id., *Tradizione romanistica e civiltà giuridica europea* I (Roma 1984), pp. 83-104.

5   Note C. NANI, *Studi del diritto longobardo. I. Le fonti del diritto longobardo* (Turin 1877); and P. DEL GIUDICE, 'Le tracce di diritto romano nelle leggi longobarde' (1885-7), in Id., *Studi di storia e diritto* (Milan 1889), pp. 362-470.

6   N. TAMASSIA, 'Le fonti dell'Editto di Rotari' (1889), in Id., *Scritti di storia giuridica* II (Padua 1967), pp. 181-260, especially p. 185.

dice (1886-7),[7] and in the years to come, it was followed by a series of successors up to the end of the 1960s: von Halban, Giardina, Besta, Vismara, Cavanna, Paradisi.[8]

Different and quite exceptional, even unique, was the approach to Rothari's legislation by Gian Piero Bognetti. For more than thirty years (1931-1963) he investigated the world of the Lombard people, deeply convinced of the need to study the Lombard question as a whole. His work is today collected in four thick volumes devoted to the Lombard period.[9] In his opinion, normative items – such as the *Edicta* – can be understood only by considering Lombard history and civilization in all their complexity. Bognetti underlined the importance of their settlement in the Pannonian region at the beginning of the sixth century in the foundation and development of Lombard civilization. During those decades, the Lombards came repeatedly into contact with Byzantium, by becoming *milites foederati*. Lombard institutions – to start with one of the most typical of them, the *fara* – would thus be adapted on a Byzantine military model. Over and above purely formal similarities, however, the most significant loan from Roman law was the adoption of Roman military models, which influenced many areas or aspects of Lombard public law. Rules regulating relations between private citizens, on the contrary, reflected rather traditional Germanic customs.

2. Re-starting the debate

Apart from Bognetti (to whom we shall return), both the 'Germanistic' and the 'Romanistic' approaches leave us unsatisfied. In fact, looking at the first, it cannot be

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7   See n. 5 above.

8   A. VON HALBAN, *Das römische Recht in den germanischen Volksstaaten* II (Breslau 1901), pp. 74-80; C. GIARDINA, 'L'Editto di Rotari e la codificazione di Giustiniano' (1937), now in Id., *Storia del diritto* I (Palermo 1963) pp. 9-61; E. BESTA, 'Le fonti dell'Editto di Rotari', in *Atti del I Congresso internazionale di studi longobardi* (1951) (Spoleto 1953), pp. 51-59; G. VISMARA, 'Cristianesimo e legislazioni germaniche. Leggi longobarde, alamanne e bavare' (1967), now in Id., *Scritti di storia giuridica* I (Milan 1987) pp. 451-511; A. CAVANNA, 'Nuovi problemi intorno alle fonti dell'Editto di Rotari' (1968), now in Id., *Scritti (1968-2002)* I (Napoli 2007), pp. 3-110; B. PARADISI, 'Il prologo e l'epilogo dell'Editto di Rotari' (1968), now in Id., *Studi sul medioevo giuridico* I (Roma 1987), pp. 189-220.

9   G. P. BOGNETTI, *L'età longobarda* I-IV (Milan 1966-8); for a thoughtful recent reconsideration of the figure and the work of Bognetti, see P. DELOGU, "Giampiero Bognetti, storico della civiltà", in Id., *Le origini del medioevo. Studi sul settimo secolo* (Roma 2010), pp. 365-381.

denied that the development of modern fields of research (archaeology, anthropology, ethnography, etc.) has in recent decades demolished a large part of the basis on which those scholars depended. Today, we know that the supposed original unity of the Germanic tribes never existed. We know that the migration processes of barbarian peoples almost always consisted of the transfer of tribal groups held together by a temporary common interest, but not necessarily with any shared ethnicity. We also know that the relationship between barbarian peoples and the Roman world into which they moved into was not normally a conflictual one. On the contrary, there was a very fluid situation with continuous opportunities for experiencing new and different forms of coexistence.[10] Consequently, many earlier certainties are now disputed.

On the other hand, if we consider the studies which concentrated on searching for the sources of each of the Edict's chapters, they leave us dissatisfied too. Although based on the solid ground of textual criticism, such works only tell us about 'formal' or 'external' aspects of the Edict. They lack, in other words, any effort to reach the core of the problem, which remains the understanding of the formation of a new civilization.

Anyway, earlier German and Italian historiography present the same fallacious starting point: Lombard law was studied in the misleading framework of a 'collapse of civilization.' Such a perspective conditioned the whole debate, quite apart from the ideological influences which created an intellectual barrier between the two groups of scholars. It is probably not by chance that interest in our theme has diminished since the end of the Second World War, even though no generally accepted conclusion has been reached.[11] In Italy, at least, questions about German or Roman prevalence in Lombard legislation seem today to have been abandoned by legal historians and become in practice a field for 'pure' historians.

But in recent years, quite unexpectedly, the debate has been re-opened, the 'det-

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10   See, especially, W. Pohl (ed.), *Kingdoms of the Empire. The Integration of Barbarians in Late Antiquity*; and H. W. Goetz *et al.* (eds), *Regna and Gentes. The Relationship between Late Antique and Early Medieval Peoples and Kingdoms in the Transformation of the Roman World*, both in the series 'The Transformation of the Roman World', nos. 1 and 13 (Leiden & Boston 1997 and 2003); and the essays now collected in W. Pohl, *Le origini etniche dell'Europa* (Rome 2000) (especially on Lombards, essays 6 and 8).

11   So Cavanna (n. 8), p. 16.

onator' being the publishing, during the 90s of the last century, of important works by Ennio Cortese and by Maurizio Lupoi. Both these scholars have tried to put the whole question in new terms, transferring their attention from the mere textual datum to the problem of juridical relationships.

In a number of recent works,[12] Cortese, picking up an earlier, detailed and still important study,[13] has repeated his criticism of a too simple opposition between a Romanistic and a Germanistic vision, as also of research which concentrates exclusively on recognizing normative (or purely linguistic) loans in chapters of the Edict of Rothari. Much more interesting to him are the wide perspectives opened up by discovering – through the primitive formulations contained in the Edict – Vulgar Roman practices widespread in both the eastern and the western empire. Such practices must have provided the context in which the Lombards came to terms with the Roman empire and with its inhabitants. Cortese has reached that opinion by studying a number of legal forms generally believed to be genuinely Germanic. In contrast to Bognetti, he has paid particular attention to private law.

Lupoi, in his volume entitled *The Origins of the European Legal Order*,[14] paints a picture of the whole of the legal society of early medieval Europe. Drawing on his comparatist training and accepting the now well established research perspective of *The Transformation of the Roman world*, Lupoi has tried to identify the outlines of 'a common European legal system' over and above obvious regional or national specificities. Created after the collapse of late imperial Roman institutions, such a system would have served both old and new inhabitants of the Roman world.

In this context and despite the existence of other peoples who founded kingdoms, the Lombard experience, in the overall view of Lupoi, shows some peculiarities: the Lombard people imposed themselves in Italy outside the system of *hospitalitas* and

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12   'Thinx, gairethinx, thingatio, thingare cum gaida et gisil. Divagazioni longobardistiche in tema di legislazione, manumissione dei servi, successioni volontarie' (1988); 'In margine alla ristampa di G. G. ARCHI, L'"Epitome Gai"' (1991); 'Il processo longobardo tra romanità e germanesimo' (1994), now all in Id., *Scritti* I (Spoleto 1999), and, above all, *Il diritto nella storia medievale* I (Rome 1995), pp. 125-172.

13   E. CORTESE, 'Per la storia del mundio in Italia' (1955-6), now in Id., *Scritti* I (n. 12), pp. 3-154.

14   English translation (Cambridge 2000), of the original *Alle radici del mondo giuridico europeo* (Rome 1994).

maintained a position of outright rejection of Roman imperial models and the institutions of the Church. This rejection – as Lupoi nevertheless emphasizes – was however of Roman 'socio-political' models. On the other hand, the Lombard people had an open mind *vis-à-vis* the 'rules regulating Roman society' and some of the principles of Roman legal culture. In conclusion, there should be valid for the Lombard people also Lupoi's general idea that "'Germanic' law did not exist, but Roman law no longer existed either. What did exist was an oral culture which was moving towards writing, and a written culture that was moving towards orality" (p. 25).

As already mentioned, the interventions of Cortese and Lupoi have re-opened the debate. In particular, an answer as rapid as it is polemic has been given by some contemporary scholars of German law; with the declared intention of reacting against what he considered a radical, but not always justified, questioning of traditional views about the ancient Germanic world, Gerhard Dilcher has asked the following, provocative question:[15] "did Germanic peoples have a law?," organizing a meeting among many of the most important scholars of the *leges barbarorum*.[16] Tracing the conclusions of that meeting, Dilcher clearly appreciates in general the scale of Lupoi's enterprise, and in particular the attention paid to the return to an oral culture, but does not accept the absolute denial of the existence of a German law. On the contrary, he rejects the thesis of Cortese on the role played by Vulgar Roman legal practice.

3. The mystery of the gairethinx

It is clearly not a coincidence that Dilcher chose the Lombard figure of the *gairethinx* as the theme for his paper at that meeting. It is indeed to the *gairethinx* that Cortese pays particular attention in his analysis of the Edict of Rothari.

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15   G. DILCHER, 'Leges – Gentes – Regna. Zur Rolle normativer Traditionen germanischer Völkerschaften bei der Ausbildung der mittelalterlichen Rechtskultur: Fragen und Problemen', in G. DILCHER & E.-M. DISTLER (edd.), *Leges – Gentes – Regna. Zur Rolle von Germanischen Rechtsgewohnheiten und lateinischer Schrifttradition bei der Ausbildung der frühmittelalterlichen Rechtskultur* (Berlin 2006), pp. 15-42, at p. 22. Note also the other contributions by Dilcher, and those by Jürgen Weitzel and Karol Modzelewski.

16   The proceedings are now collected in the last mentioned volume. It is possible to recognize similar approaches in some of the papers of the earlier volume edited by J. WEITZEL, *Hoheitliches Strafen in der Spätantike und im frühen Mittelalter* (Cologne etc. 2002).

The term occurs more than once. On the traditional view, it refers to the army as assembly, in the form described by Tacitus, as the location for decisions. According to Cortese, it means rather a 'formal act' used to ratify and confirm certain disposition acts.[17] It is also, according to Cortese, noteworthy that some Lombard procedures are similar to typical schemas of the ancient Roman *ius ciuile*. Thus in Roth. ch. 224 we read that an owner who wished definitively to discharge a freedman had to do so three times, after as many (fictitious) sales, in the presence of *gaidos* (probably witnesses) and *gisil* (a guarantor).[18] The procedure seemed to him too similar to the three *mancipationes* in the presence of five witnesses and one *libripens*, prescribed by Gaius in emancipating a *filiusfamilias* (*Institutiones* I.132 and *Liber Gai* I.6.3-4), to be a simple coincidence. For Cortese, we obtain the same impression of the *gairethinx* as a Germanic mask of the Roman *mancipatio*, if we look at other chapters of the Edict where the *gairethinx* is mentioned.[19] Once the same legislator proposes the equation *gairethinx id est donatio* (ch. 171).[20] The problem is that a reference to the Roman *donatio* runs the risk of being misleading, since the classical *donatio* changed out of all recognition in the late Roman world. Rather, for Cortese, the passage is useful in directing our attention to the common elements that occur in every mention of the *gairethix* by Rothari. The involvement of a *gairethinx* was thus necessary in disposing of an inheritance in the absence of a son (Roth. chs. 171-4). It is, for Cortese, once more possible to recognize the *mancipatio* requested for a *testamentum per aes et libram* (and is it also possible to compare the Lombard *gisel* with the Roman *familiae emptor* of Gaius, *Inst.* II.103).

When, in a quite different contest, the king talks of having used a *gairethinx* to

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17   See, in particular, *Il diritto* (n. 12), pp. 137-142.

18   De manumissionibus. *Si quis servum suum proprium aut ancillam suam liberos dimittere voluerit, sit licentia, qualiter ei placuerit. Nam qui fulcfree et a se extraneum, id est amund, facere voluerit, sic debit facere. Tradat eum prius in manu alteri homines liberi et per gairethinx ipsum confirmit; et ille secundus tradat in tertium in eodem modo, et tertius tradat in quartum. Et ipse quartus ducat in quadrubium et thingit in gadia et gisil, et sic dicat: de quattuor vias, ubi volueris ambulare, liberam habeas potestatem. Si sic factum fuerit, tunc erit amund, et ei manit certa libertas: postea nullam repetitionem patronus adversus ipsum aut filius eius habeat potestatem requirendi. …*

19   So also CAVANNA (n. 8), pp. 100-103 on Roth. ch. 222.

20   *Si quis se disperaverit … filius non possit habere, et res sua alii thingaverit, posteaque eum contegerit filius legitimus procreare: omne thinx, quod est donatio, quod prius fecerat rumpatur … .*

confirm the promulgation of his Edict (Roth. ch. 386), it will be sufficient – says Cortese – to consider the meaning of such a promulgation to recognize that, even in this case, we have to do with something like a very important disposition deed. The king 'gives' to his people the legislation, visibly embodied in a book. Here – as in all the other cases – a *gairethinx* is necessary in order to confirm a particular disposition deed. Just like other acts of unreciprocated liberality, in a contest dominated by family relationships, these unilateral acts needed particular accompanying rituals.[21] Etymology is invoked in support of such interpretation: Cortese asks us to consider the root which connects the Lombard *thinx* to the modern German *Ding* or English *thing*.[22]

According to Dilcher, however, such a reconstruction would be meticulous in terms of individual 'legal-philological arguments,' but in fact far removed from any comprehension of German-Lombard reality.[23] In particular – continues Dilcher – Cortese's analysis fails to consider the specificity of a popular culture rooted in orality. On his part, Dilcher minimizes the 'authoritative' role of Rothari as King and stresses the pact-like nature of the Edict of AD 643. He insists on the active role played by the army in the legislative process and tries to demonstrate that the *gairethinx* mentioned in the so-called Epilogue (Roth. ch. 386) is nothing other than an ancestral rite, which had to be enacted in the context of the Germanic army as assembly. In other words, the meaning of *gairethinx* is tied to what other Germanic peoples call a *Ding*: an assembly which combines judicial and legislative functions and where not only decisions are taken, but also ethnic and religious identity takes shape.[24]

Even Dilcher has to admit other and different meanings for the same word *gairethinx* in the other cases in which it is employed in the Edict. In one such case – as

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21   CORTESE, *Il diritto* (n. 12), pp. 161-166, finds a similar logic, *i.e.*, to ensure *firmitas*, and the same affinity with Roman procedures in other typical Lombard forms, such as the *launegild* (similar to the *donatio nummo uno*) or the *wadia* (with the name and function of the *vadimonium*).

22   See again CORTESE (n. 12), p. 137.

23   "*per gairethinx secundum ritus gentis nostrae confirmantes.*" *Zu Recht und Ritual im Langobardenrecht*, in *Leges – Gentes – Regna* (n. 15), pp. 419-448, esp. p. 423.

24   DILCHER, (n. 15), pp. 22-23, here refers to the vast study of J. Weitzel of the Frankish *Ding*: *Dinggenossenschaft und Recht. Untersuchungen zum Rechtsverständnis im fränkisch-deutschen Mittelalter* I-II (Cologne 1985).

we have seen – the legislator himself proposes the (not altogether satisfactory) gloss *donatio*.[25] Anyway, neither in the chapters about inheritance nor in those about emancipation do we find any mention of the army gathered together. Moreover, it remains only a hypothesis that the obligatory presence of witnesses and *gisel*, prescribed by Rothari, takes the place of the ancient army assembly (for Dilcher the Lombard *Ding* = *Gairethinx* is represented in a famous – but disputed – image of Agilulf's majesty, used for the last time precisely for the promulgation of the Edict in Pavia in AD 643).[26]

Apparently, however, in terms of legal meaning, the conclusions reached by Dilcher are not that distant from those of Cortese: both recognize in the *gairethinx* a ritual available for a variety of transactions: it pursues the juridical goal of giving legal validity by means of public recognition. Where they differ is in defining the context in which these norms were formed and where they operated. For Cortese, the *gairethinx/mancipatio* is once more a case of the emergence of very ancient practices that had remained long in use in the post-Roman world. These practices had spread along with the military and economic expansion of Rome. The Lombard people could have got to know of them even before their arrival in Italy. And the use of such ancient legal forms was perhaps for them the easiest and most efficient way to move into the (for them) new world characterized by landed property, a developed agricultural economy, extra-familial labour, individual or extra-gentilicial relationships. For Dilcher, on the other hand, Rothari's norms presuppose a deep fracture between the late Roman world

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25   According to Dilcher, (n. 23) p. 426, where the Edict claims the publicity of the *gairethinx* (*non absconse*: Roth. c. 172) it would be outside of the schema of the Roman *donatio* and nearer to Germanic forms of publicity. One could nonetheless note here perhaps also the echo of the Constantinian constitution of the year 323 (*CTh* 8.12.1.1-2 = *CJ* 8.53.25), present in the Visigothic and Burgundian traditions (in Lex Rom.Burg. 22.4 we find for example *neque id occulte* which corresponds very well to Rothari's expression *non absconse*).

26   In an Appendix to his article, Dilcher dedicates a specific *excursus* to the meanings of the Plate of Agilulf: *Die Agilulf Platte als Zeugnis des langobardischen Gairethinx*, (n. 15), pp. 449-458. On the other hand, Dilcher's interpretation of Roth. ch. 386 is followed by K. Modzelewski, *L'Europa dei barbari* (Turin 2008), p. 55. The scene imprinted on the famous plate actually lends itself to conflicting interpretations (see, for example, K. Wessel, 'Ikonographische Bemerkungen zur Agilulfplatte', in *Festschrift J. Jahn* (Leipzig1958), pp. 61-67 and P. Delogu, 'Il Regno longobardo', in P. Delogu et al. (eds), *Longobardi e Bizantini* (Turin 1980), pp. 43-44). More recently, C. La Rocca and S. Gasparri ('Forging an early medieval royal couple: Agilulf, Theodelinda and the 'Lombard Treasure' (1888-1932)', in W. Pohl - M. Mehofer, (eds), *The Archaeology of Identity* (Wien, 2010), pp. 269-287) tend to exclude that the plate can be authentic.

and the newly created Germanic kingdoms. Such norms represent a new product of the encounter between an archaic, oral legal structure with a developed late antique legal culture, dominated by abstraction and writing. Roman models would thus have given no more than technical support: conceptual schemas and legal terms useful for a transfer of rules belonging to an oral tradition into a writing-oriented cultural world.

4. New (and old) risks

The firm position taken by Dilcher has to be understood in the context of a larger project which expands well beyond the limited theme of Lombard law.[27] Along with other legal historians, Dilcher is opposed to what he sees as an attempt to minimize the contribution of the ancient German peoples in the construction of a modern European legal culture. Whether such an attempt has really been made is very difficult to say. Such a point of departure, however, appears to me to run the risk of taking research on Lombard law down a blind alley. The debate – it is true – appears today to be free from the ideological pressures typical of the period before the end of the Second World War and takes much more sophisticated forms than in the past. Wider awareness of other fields of research is also apparent, and nobody now holds ideas such as that, for instance, of the derivation of the different *Stammesrechte* (tribal laws) from a single *urgermanisches Gemeinrecht* (common ancestral Germanic law). We are all conscious of having to consider separately the laws of the different barbarian peoples.[28]

Sometimes, nevertheless, some of the arguments used are reminiscent of past discussions of an ancestral German legal system. Every rule, every form that cannot readily be traced to Roman law (or canon law) traditions tends to be linked to this *portmanteau* concept. Here and there, there even re-appear echos of the old vision of the arrival of the Germanic peoples inside the Roman empire in terms of a 'clash of civilizations.'

Especially striking is the almost total refusal to allow any role to the vulgarization of Roman law. The concept of 'vulgar law' is certainly among the most problematic

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27   G. DILCHER, *Zur Entstehungs- und Wirkungsgeschichte der mittelalterlichen Rechtskultur* (n. 15), pp. 603-637.

28   After the pioneering study of REINHARDT WENSCKUS, *Stammesbildung und Verfassung. Das Werden der frühmittelalterlichen Gentes* (2nd ed., Cologne & Graz 1977) see the introduction to Pohl, *Le origini etniche* (n. 10), pp. 1-38.

in modern historiography.[29] Nevertheless, it appears that such a refusal by some contemporary 'Germanists' derives from a not completely dispassionate view of the phenomenon.[30] Their aim appears, in fact, to be to explain the emergence in the post-Roman world of practices contrasting with official normative texts, as first and foremost the consequences of Germanic legal influence on the Roman legal system. In doing so, however, they forget that every living legal system – whether under external influence or not – is under continuous pressure to renew itself. Sometimes it may undergo very deep modifications (*praeter* or even *contra legem*) as a consequence of a dialectic that – even if particularly prominent in the late Roman world – is anyway inevitable. Rather, however, than spending too much time on what may be no more than impressions, I shall now try to introduce some new elements into the debate.

5. Ancient customs and complex ethnogenesis.

Scholars generally agree that the norms of the Edict of Rothari shall be divided into two separate large masses. The first contains ancient customs (*cawarfide*), until then handed down orally and then collected together by the king in collaboration with the *antiqui homines*. The second consists of more recent measures, that express the growth and autocratic development of the monarchy.[31] While for this second mass there is little doubt about the models which Rothari and his counsellors followed (*i.e.*, the Visigothic, Frankish and Bavarian legislations on the one hand and Roman-Byzantine traditions on the other), the debate remains open for the first one.

Some scholars think that the core of these ancient customs can only reflect Lombard ancestral law. In other words these would be the rules that the 'long bearded men' were accustomed to when they left the North to begin their peregrination through cen-

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29   On this, see P. WORMALD, 'The 'Leges barbarorum': law and ethnicity in the post-Roman West', in H. W. GOETZ *et al.* (n. 10), pp. 21-53.

30   This is not naturally valid for all German scholars: see for instance the approaches to the problem of Hermann Nehlsen or Harald Siems.

31   So already E. BESTA, *Fonti: legislazione e scienza giuridica dalla caduta dell'impero romano al secolo decimo quinto*, I-II, in *Storia del diritto italiano pubblicata sotto la direzione di Pasquale Del Giudice* (Milan 1923 = Frankfurt/Main & Firenze 1969) I, pp. 134-137. For PARADISI, (n. 8), pp. 189-190 and 218-219, the two masses correspond to two successive versions of the Edict.

tral and eastern Europe. The Lombards would thus have jealously maintained these customs by a process of oral transmission from generation to generation even after their arrival in Italy.[32]

However, we may ask ourselves how old and how large such a core might have been. We should not forget how long and how complicated the process of Lombard ethno-genesis was. During the eighty years before their arrival in Italy, a large number of Lombard tribes migrated from Noricum to Pannonia. Their numbers increased with the integration of groups of (defeated) Gepids, Huns, Sarmatians and also some Romans, already living in that province.[33] The process is not unparalleled. Modern historians describe such an ethnic structure (capable of integrating various heterogeneous groups) as having an 'open identity.' The catalyst for such a process must be considered to be the sharing of a certain number of common traditions (religious, cultural, juridical), as well as, of course, the presence of a charismatic warrior chief, foreshadowing a later monarch, but still prevalently characterized by military leadership functions.[34] In order for the integration process to be successful, however, such a common core needs to be neither too diffuse nor too particularistic. As far as sacral and religious aspects are concerned, for instance, we can observe the long co-existence, among the Lombard people, of pagan practices, along with Arianism (and later also Catholicism), even long after their arrival in Italy. As then suggested – in particular by Walter Pohl – it is also probable that the patterns of such traditions were much more 'Roman' and much less 'barbarian' than sometimes believed.[35]

When the Lombard people crossed the Alps in 568, the different tribes did not yet form an ethnic unity. Their tendency towards hetero-integration remained very ,strong even after the conquest of Italy.[36] Only after the tragic death of Alboin – which

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32   See DILCHER (n. 23), pp. 437-438 and above all Modzelewski (n. 26), pp. 54-56 and 65-70.

33   DELOGU (n. 26), pp. 3-12; see in particular p. 9: archeological escavations testify to "a cultural environment very different from that attested later in Pannonia."

34   See J. JARNUT, *Storia dei Longobardi* (Italian trans., Turin 1995), pp. 23-26; and Id., 'Gens, Rex and Regnum of the Lombards', in H. W. GOETZ *et al.* (n. 10), pp. 409-427.

35   Pohl, *Le origini* (n. 28), pp. 8-9.

36   According to DELOGU (n. 26) p. 13, at the moment of the invasion under the command of Alboin there

signals also the failure of his efforts to impose his personal supremacy on a conglomerate of heterogeneous peoples – was such a tendency replaced by a plan to unify the tribes in a single people with a clear ethnic identity.[37] The larger part of their customs surely cannot be very old, and their development surely has to be placed during the Lombard stay in the former Roman provinces of Noricum and Pannonia. Nor we can exclude the possibility that any initial core continued to expand after the Lombard settlement in Italy.

6. *Institutions and criminal law*

One must ask at this point what were the nature and origin of the customs which Lombards brought with them to Italy. Light is thrown by the afore-mentioned studies by Bognetti. The Lombard arrival in Noricum marks the arrival of the Lombards in the complex world of the new Romano-barbaric *regna*. These *regna* – as we know – were continuously in contact with Byzantium. As soon as they entered this political context, the Lombards began to collaborate with the Byzantines. They had of course their own interests: first they wished to throw off the Herulian yoke, later they aspired to subdue the Gepids. Collaboration with the emperors followed the usual bilateral pattern: military service in return for money and imperial land. Such a relationship was so deeply rooted, that groups of Lombard warriors (with their families, in the characteristic form of the *fara*) continued to act as mercenary soldiers for the Byzantines, even long after the establishment of Lombard rule in Italy.

Bognetti showed how, during their Pannonian period, Lombard institutions took forms imitating Roman military structures. Obviously, the model could not be the 'classical' Roman legion. Rather, we have to think in terms of organizational forms which barbarian bands assumed in joining together with a Roman army (either like the 'national' corps sent by German kings to act as σύμμαχοι or in the form of *farae* acting as *militiae foederatae*). The necessities of war, and overall the process of living in common

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was "a turbulent and composite mass seeking in the migration not only space and wealth but also a new unity." See also POHL (n. 28), pp. 154-156.

37   So, among others, DELOGU, *Il Regno* (n. 26), pp. 14-28 and 34-39 and POHL (n. 28), pp. 162-165, esp. p. 164.

with other units of the imperial armies, enforced the acceptance of a number of rules.[38]

Roman military regulations certainly marked the first contact of the Lombards with written law. As Bognetti showed, a number of Rothari's chapters come without any doubt from these regulations.[39] Bognetti's examples concern in particular the institutional framework and the criminal law. It cannot be denied that the structure of military units (*ducati* or, with a germanic term, *farae*), even the titles of the highest ranks of the *populus/exercitus* (*dux, comes, centenarius, decanus*) derive from Roman patterns. It would be possible to add here the supplementary example of the *sculca*. This is a military group with specific scouting, vanguard, and espionage functions in support of the rest of the army. It is mentioned by Rothari (ch. 21) and later by Rachi (ch. 13), but sources from the East testify to its existence (and actually its name) in the Byzantine army already in the sixth century AD.[40]

It is in military regulations also that we can find the origins of a number of criminal law norms.[41] They concern, in particular, military offences: treason, desertion, espionage for the enemies, disobedience to a commander's orders, sedition.[42] To the

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38   Following BOGNETTI, JARNUT, 'Gens' (n. 34) p. 425, writes: "we may conclude that the Lombards … were influenced by late antique cultural forms even before their entrance into Italy." Along the same lines, N. EVERETT, 'Literacy and the law in Lombard government', *Early Medieval Europe* 9 (2000) pp. 93-107.

39   G. P. BOGNETTI, 'L'influsso delle istituzioni militari romane sulle istituzioni longobarde del secolo VI e la natura della "fara"', (1953) and 'Frammenti di uno studio sulla composizione dell'Editto di Rotari', now both in Id., *L'età longobarda* (n. 9) III, pp. 1-46 (esp. pp. 43-45), and IV, pp. 583-609 (esp. pp. 593-594).

40   O. BERTOLINI ('Ordinamenti militari e strutture sociali dei Longobardi in Italia', in *Ordinamenti militari in Occidente nell'alto Medioevo* [XV Sett. di studio del CISAM, Spoleto 1967] I, pp. 429-580, esp. pp. 494-496) thinks that the origin of the term was rather a German (Gothic) one and that the Byzantines later adopted it. But it seems more plausible that the borrowing was the other way round if we consider that the same institution (*scolca*) appears in medieval Sardinian: the island, as we know, remained substantially immune to German influence: see L. LOSCHIAVO, 'Ordinamento giudiziario e sistemi di giustizia nella Sardegna medievale', in I. BIROCCHI & A. MATTONE (edd.), *La Carta de Logu nella storia del diritto italiano* (Roma & Bari 2004), pp. 125-128.

41   E. OSENBRÜGGEN, *Das Strafrecht der Longobarden* (Schaffhausen 1863 = Aalen 1968).

42   For some decades the criminal law of Germanic people has been a matter of debate for legal historians. The interest has developed from the publication of Hermann Nehlsen's essay, 'Entstehung des öffentliches Strafrecht bei den germanischen Stämmen', in K. KROESCHELL (ed.), *Gerichtslauben-Vorträge. Freiburger Festkolloquium zum 75. Geburtstag von H. Thieme* (Sigmaringen 1983, pp. 3-16), stimulating many further works. Among the most recent must be mentioned G. Dilcher, 'Fehde, Unrechtsausgleich und Strafe im älteren langobardischen Recht. Eine Skizze', in J. WEITZEL (ed.), *Hoheitliches Strafen in der Spätantike und in frühen Mittelalter* (Cologne etc. 2002), pp.

cases mentioned by Bognetti, one may add the interesting case of Roth. ch. 260:

> If someone finds in the street gold, clothes or anything else and he lift it up above the knee and does not report it or declare it to the authority, he will have to re-pay it nine-fold.[43]

The strongly German flavour of this norm is more apparent than real, since even in this case it is easier to believe in the application of a Roman military rule. It's not difficult to note similitudes within ch. 10 of the so-called *Lex militaris ex Ruffo*.[44] We have also to remember that – since the earliest times – as soon as the camp had been built, each soldier had to swear not to steal inside the camp and also to give within three days to his commander every object of value that he had found near the camp.[45]

The case can be compared with Roth. ch.16. The matter at issue here is the appropriation of clothes or other objects from an abandoned corpse.[46] This norm has not

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27-45. See also – albeit regarding a later period – Ch. MEYER, 'Auf der Suche nach dem lombardischen Strafrecht. Beobachtungen zu den Quellen des 11. Jahrhunderts', in H. SCHLOSSER & D. WILLOWEIT (eds), *Neue Wege strafrechtlicher Forschung* (Cologne etc. 1999), pp. 341-388.

43   *Si quis aurum aut vestis seu qualibet rem in via invenerit et super genuculum levaverit et non manefestaverit aut ad iudicem non adduxerit, sibi nonum reddat.*

44   With this title – or, more frequently, as *Nómos stratiotikós* – it is usually named a greek collection of criminal-disciplinary rules, inserted in the appendix of the Ecloga of Leo III the Isaurian (AD 726); see G. FAMIGLIETTI, *"Ex Ruffo leges militares"* (Milan 1980), pp. 1-16 (edition and translation at pp. 18-29; Ch. 10 is at pp. 20-21): "If a soldier, having found an animal or anything else, no matter how small or large, does not show them and give them to his commander, he will punished as for theft. And along with him will be punished whoever else knew of the matter but chose to remain silent."

45   Our sources are Polibius (*Hist.* 6.33.1) and Aulus Gellius (*Noct.Att.* 16.4.2), with the words of the oath: *... in exercitu decemque milia passuum furtum non facies dolo malo solus neque cum pluribus pluris nummi argentei in dies singulos; extraque hastam, hastile, ligna, poma, … si quid ibi inveneris sustulerisve, quod tuum non erit, quod pluris nummi argentei erit, ... tu ad ... consulem ... proferes ….* For similar norms in other barbarian legislations, see F. BAYERLE, *Das Entwicklungsproblem im germanischen Rechtsgang*, (Heidelberg 1915), pp. 401-403; and L. LOSCHIAVO, *Figure di testimoni e modelli processuali tra antichità e primo medioevo* (Milan 2004), pp. 197-199. It could be objected that all organized armies must have rules along these lines. Actually, if we belive to Procopius, when Lombards got in touch with Romans and began to serve in the Roman army as *foederati* (AD 548 or before), they were not yet an organized army. Rather, they looked like bands of bandits pratically without any rules at all.

46   "If someone finds a dead man in a river or in the countryside, and takes his clothes and hides the body, he shall repay 80 pounds to the relatives. If he finds and strips it and immediately reveals it to his neighbours and it is known that he acted for a reward and not to steal, he shall he give back the goods he has taken and he shall suffer no further ac-

remained unnoticed by historians.[47] Someone thought of a possible derivation from the Bible (*Deut.* 22.3).[48] Much more evident and significant, however, appears the analogy with a couple of passages of Ulpian in the Digest.[49] Beyond words, what really strikes in this last Rothari's Chapter – in respect to each other German/Barbarian law – is the attention for the mental element (*animus furandi vel non*).

7. Excursus: Roman military justice and 'German' judges

The Roman Empire forced *foederati* to observe Roman military discipline in any military operation. As regards other aspects of social living, on the other hand, barbarian soldiers were left free to rule themselves according to their own customs (*ius speciale*).

According to a pattern which corresponds more to military logic than to any possible Roman or Germanic inspiration, commanders were expected to act as judges between their own soldiers. It is easy to hold, with Bognetti, that such officials (or more probably their assistants) provided themselves for that function with handbooks generally similar in kind. The characteristic *forma siquata* (from the recurrent *incipit Si quis* … = "If someone")[50] also – typical of Romano-barbarian legislation and in particular of the Salic and Lombard codes – could in fact descend from such handbooks.[51] And

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cusation," (*De rairaub. Si quis hominem mortuum in flumine aut foris invenerit aut expoliaverit et celaverit, componat parentibus mortui solidos octoginta. Et si eum invenerit et expolivarit et mox vicinibus patefecerit et cognoscitur quod pro mercedis causa fecit, nam non furandi animo, reddat spolia quae super eum invenit et amplius ei calumnia non generetur*).

47   See F. CALASSO, *Il negozio giuridico*, (2nd ed., Milan 1967), pp. 117-120; also I. BIROCCHI & U. PETRONIO, 'Responsabilità contrattuale (diritto intermedio)', in *Enciclopedia del diritto* 39 (Milan 1988), p. 1061.

48   *Similiter facies de asino et de vestimento et de omni re fratris tui, quae perierit. Si inveneris eam, ne negligas quasi alienam*: so TAMASSIA, *Le fonti dell'Editto* (n. 6), pp. 243-244.

49   *Dig.* 47.2.43.4-9: *Qui alienum quid iacens lucri faciendi causa sustulit, furti obstringitur, sive scit cuius sit sive ignoravit … si neque fuit neque putavit [derelictum esse], iacens tamen tulit, non ut lucretur, sed redditurus ei cuius fuit, non tenetur furti. Proinde videamus, si nescit cuius esse, sic tamen tulit quasi redditurus ei qui desiderasset vel qui ostendisset rem suam, an furti obligetur – et non puto obligari eum – solent plerique etiam hoc facere, ut libellum proponant continentem invenisse se et redditurum ei qui desideravit: hi enim ostendunt non furandi animo se fecisse.*

50   The expression seems to be used for the first time by the medieval jurist Odofredus (so BESTA, *Fonti* [n. 31] pp. 135-136); see F. BAYERLE, 'Über Normtypen und Erweiterungen der Lex Salica', in *ZSSt. GA* 44 (1924), pp. 394-419 and D. DAUBE, *Forms of Roman Legislation* (Oxford 1956), pp. 43-46.

51   BOGNETTI, *L'influsso* (n. 39), pp. 42-43. Perhaps too confidently, J. DURLIAT in his recent large-scale synthesis of early medieval Europe, *De l'Antiquité au Moyen Âge: l'Occident de 313 à 800* (Paris 2002) wrote: "*Les lois*

this could explain better than other theories a general correspondence between different Romano-barbarian codes, notably when individual legislators come from different ethnic groups:[52] a good example might be the *lex data* which Aetius, around 445, gave to the Britons of Armorica, traces of which have been recently recognised by Soazick Kerneis in the so-called *Canones Wallici* (an ethnic and military law at the same time).[53]

When then the late antique empire was still alive and functioning, during peaceful periods, the *militiae foederatae* were certainly in contact with the local populations (*i.e.*, the *provinciales*). As was to be expected, from these contacts there developed both commercial relationships and the inevitable related disputes. Beginning with Constantius, Roman emperors – usually inclined to favour their troops – began to allow military judges to resolve disputes in which soldiers and civilians were involved and the subject-matter was not military at all.[54] In the provinces in particular – where military and civil rank often coincided – it became usual to delegate judicial functions to local commanders. Dukes, counts but also – especially in the countryside – simple *centenarii* often assumed the role of *iudices dati*.

This had important repercussions, for instance, in procedure. In tribunals composed of such judges it seemed certainly reasonable to admit a simpler and more relaxed procedure in comparison with what was in force in normal courts. It is easy to suppose, for example, that in front of military judges the procedure should be more oral, and that it was this model of justice that barbarian peoples discovered as they came into contact with Rome, and to which they progressively became accustomed.[55]

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germaniques sont donc des codes militaires pour juger les fautes commises par des militaires." For a recent and updated contribute on the influence of the Roman military models on the Law of the Roman-barbarian kingdoms, see now S. ESDERS, 'Late Roman Military Law in the Bavarian Code', in *La forge du droit. Naissance des identités juridiques en Europe (IVe-XIIIe siècles)*, Clio@Themis 10 (2016), http://www.cliothemis.com.

52 See von HALBAN, *Das römische Recht* (n. 8), pp. 94-95.

54 S. KERNEIS, 'L'ancienne loi des Bretons d'Armorique. Contribution a l'étude du droit vulgaire', *RHDFE* 73 (1995) pp. 175-199 and Ead., '"Morte moriatur". La peine capitale chez les Bretons d'Armorique á la fin de l'Antiquité', *RHDFE* 79 (2001), pp. 331-345.

54 See *CTh* 2.1.2 (AD 355) and *CJ* 3.13.6 (AD 413).

55 See *Nov. Th.* 4 (AD 438) and *CJ* 3.1.17 (AD 531), with W. E. VOẞ, 'Vom römischen Provinzialrecht der Spätantike zum Rechtsgang des frühen Mittelalters', in H. Siems et al. (eds), *Recht im frümittelalterlichen Gallien.*

When then, in the West, the Empire came to an end and new political structures (the Romano-barbaric *regna*) grew up and the barbarian kings assumed governmental responsibilities, they did not aim to impose new and different patterns. On the contrary, they perpetuated – insofar as they were able – the administrative techniques to which they had become accustomed since their first contacts with the Roman world. So they were in general barbarian commanders who assumed jurisdiction in the mixed disputes (barbarian *vs.* Roman, and, in the majority of cases, soldiers *vs.* civilians).[56]

8. 'Germanic' procedures: a new approach

The excursus has given us the opportunity to pay attention to a further important aspect of Lombard law, *i.e.*, the settlement of disputes and procedure. In considering legal historiography (in particular Continental), we observe with some surprise how far discussion of this theme continues to be influenced by ancient theories about the specific nature of ancient 'common' Germanic law. Legal history handbooks reflect still today a vision of a 'Germanic' trial in opposition to Roman models. Frankish-German and Lombard legal procedure was thus dominated by communally-based oral procedures, by rituality and formalism, by the centrality of the litigants in comparison with the judge, and, finally, by the habit of considering each dispute – no matter the question actually at issue – in the conceptual framework of personal injury.

In particular, Germanic and Lombard procedure was characterized both by the single aim not of revealing which party was right or wrong, but of ending the dispute without resorting to feud, and by a very distinctive approach to evidence. The approach – precisely in order to settle somehow the dispute – was substantially irrational. The personal right of the accused 'to purge himself' is supposed to have made impossible any discussion based on a rational approach to evidence, such as documents and witnesses. The mentality (*Geist*) of the Germans will have imposed, on the contrary, irrational approaches such as ordeals, duels and (multiple) oaths. Such kinds of proof will

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Spätantike tradition und germanische Wervorstellungen (Cologne 1995), pp. 73-108, esp. pp. 79-80 and 90-97; also Loschiavo (n. 45), pp. 83-88.

56   The best example remains that of the Ostrogothic king Theodoric: see P. WORMALD, (n. 29), pp. 25 and 35.

have been able to show unequivocally the moral or physical superiority of the accused and of his clan. An unconditional faith in divine intervention (leading to the outcome of the 'proof') will have been placed above a rational search for the truth. The judge will be left with the simple task of deciding on the 'proof' designed to reveal such superiority, and of checking on the regularity of its delivery.[57]

Although very widespread, such a view is in fact very weakly based: it suffices to recall how, using the same sources, Jakob Grimm was able to affirm – in complete disagreement with the later prevalent opinion – that the original Germanic trial knew not one procedure, but two: one for civil actions and one for criminal cases. The principal difference between the two was inherent in the approach to evidence: witnesses and charters for the first, oaths and duels for the second.[58]

Moreover, historians – especially Anglo-American – have shown in the last three decades how the picture of the systems of dispute-settlement in use in the new *Regna* is really much more varied and complex than previously supposed. Great importance is to be attributed to two collective volumes published during the 1980s, inspired by earlier essays by Rebecca Colman and Simon Roberts.[59] The first, edited by John Bossy, underlined how important in the western legal tradition were alternative procedures such as arbitration, mediation, compromise and transaction.[60] The second, coordinated by Wendy Davies and Paul Fouracre, moving from a critique of the standard view of

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57   The 'classical' outline is that of KARL AUGUST ROGGE in 1820 (*Über das Gerichtswesen der Germanen – ein germanistischer Versuch* [Halle 1820]). The explanation of the way in which during the Middle Ages the Germanic element modified Roman procedure was later taken for granted by M. A. VON BETHMANN-HOLLWEG (*Der Civilprozeß des gemeinen Rechts in geschichtliche Entwicklung*, I-VI [Bonn 1864-1874 = Aalen 1959]). On the ideological basis of Rogge's work and on its impact on German legal science in the nineteenth century, see K. NEHLSEN-VON STRYK, 'Zum «Justizbegriff» der rechtshistorischen Germanistik', in *Ius Commune* 17 (1990), pp. 189-222, esp. p. 194, and J. M. MOEGLIN, 'Le "droit de vengeance" chez les historiens du droit au Moyen Âge (XIXᵉ-XXᵉ siecle)', in D. Barthélemy *et al.* (eds.), *La vengeance 400-1200* (*Bibliothèque des Écoles Françaises d'Athènes et de Rome* 357, Rome 2006), pp. 101-148.

58   J. GRIMM, *Deutsche Rechtsalterthümer*, II (Leipzig 1899⁴), pp. 491-500. See F. PATETTA, *Le ordalie. Studio di storia del diritto e scienza del diritto comparato* (Turin 1890=1972), p. 232.

59   R. V. COLMAN, 'Reason and Unreason in Early Medieval Law', *Journal of Interdisciplinary History* 4 (1974), pp. 577-603; S. ROBERTS, *Order and Dispute. An Introduction to Legal Anthropology* (Oxford 1979).

60   *Disputes and Settlements. Law and Human Relations in the West*, J. Bossy ed. (Cambridge 1983).

medieval justice, aimed to trace a better one.[61]

The most important change is the new approach, both interdisciplinary and comparative. Just such an approach makes it possible to go beyond the old idea of a collapse of civilization and move towards a serene consideration of the mutual influences between peoples with different ethnical and cultural identities, but ready to experiment with possible forms of effective common existence. Thanks also to a new attention to practical evidence (instead of the old perspective concentrated on the normative sources), it now emerges better than how the procedures in use in the centuries at issue correlate with contemporary social and political relationships. The principal results so far obtained are: a) the study of procedures for dispute settlements in the new *Regna* cannot avoid considering and comparing other situations, including those from outside western Europe, and, in particular, systems adopted in the late Roman empire and overall in the Roman provinces; b) new elements which is it possible to recognize in the social and juridical relationships of the barbarian kingdoms are not the product of the replacement of Roman models with those brought from their homeland, but the development of new and original solutions, generally characterized by pragmatism and for that reason accepted by both the Germanic and Roman population;[62] c) the role played by the Church in this context was a central one from the first moment, long before the Carolingian 'renaissance;' d) finally, the traditional dichotomy rational/irrational is better substituted by an analysis of the greater or lesser functionality of the procedure adopted with regard to the goal to be reached. The final goal was a peaceful resolution of a dispute, but also – and often – the formalization of an agreement reached outside the court.

9. Lombard legal procedure

Without doubt, these results can be applied to the Lombard world. In the traditional vision, the Lombard trial would reflect the same logic as the 'Germanic' one

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61   *The Settlement of Disputes in Early Medieval Europe*, W. Davies & P. Fouracre (eds) (Cambridge 1986).

62   Recently W. DAVIES, in 'Local participation and legal ritual in early Medieval law courts', in *The Moral World of the Law* (Cambridge 2000), pp. 48-61, has underlined anew how 'perhaps surprisingly, given the range of cultures, the surviving records of court cases suggest that there were considerable similarities of procedure across time, space and language group' (p. 50).

and would still express clearly the original function of ending a feud between clans: the only variant would be the use of duels and oaths, but no forms of evidence from ordeal. There would thus be no role for enquiry into the facts: in the 388 chapters of the Edict of Rothari, there never appear terms like *testis* or *testimonium*, and only once is there a mention of written documents (Roth. ch. 243).

It would be wrong, however, to conclude therefrom that the Lombards did not know how to use witnesses or documents as evidence. In contrast to the chapter just cited, surviving evidence of slightly later legal practice shows that already in the seventh century *chartae* circulated in the Lombard kingdom: it was presumably possible to produce them to a judge.[63] And at the time of Rothari, even recourse to witnesses is attested between Lombards. It is in fact not difficult to recognize in the Edict figures similar to those of witnesses.[64]

We now have to ask ourselves what meaning there could have been to the intervention of persons with the function of witnesses in a judicial procedure where, maybe more than in the other Germanic systems, supreme importance is supposed to have been given to the eventual decision (determined by the formal procedures discussed above) and no attention at all paid to enquiry as to the facts.

Maybe, the indifference of Lombard judges to evidence has been over-emphasised in the past by legal historians.[65] There is rather evidence to suggest that things

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63   The first example is a *notitia iudicati* of the year 674 in the reign of Pertarit, with edition and commentary by G. P. BOGNETTI, 'Il gastaldato longobardo e i giudicati di Adaloaldo, Arioaldo e Pertarido nella lite fra Parma e Piacenza' (1940), now in Id., *L'età longobarda* (n. 9) I, pp. 234-239.

64   We must first consider Roth. chs. 16 and 260. Anyway, there are many other cases in which the presence of persons witnessing facts, in order to refer to them later before a judge, is implicit (Roth. chs. 9, 32, 42, 146, 172, 212, 227, 252, 253). That Lombards used *testes negotiales* in early times is also attested under Liutprand (*e.g.*, Liut. ch. 133, AD 733): see LOSCHIAVO, *Figure* (n. 45), pp. 195-204.

65   See for instance ASTUTI, *Spirito* (n. 4), p. 88: "*La funzione giurisdizionale si esaurisce nel giudizio ordalico, che è diretto non già all'accertamento della verità dei fatti … bensì unicamente ad un regolamento formale ….*" Other scholars, however, have noticed how, alongside formal loyalty to a pure Germanic procedure, there nonetheless emerges in Lombard trials an interest in the establishment of the facts, an interest which is however explained in terms of a progressive contamination of the Lombard institutions under the pressure of the Italian environment: see G. P. BOGNETTI, 'Un contributo alla storia del diritto penale longobardo in una comunicazione di Achille Ratti (Pio XI) all'Istituto Lombardo' (1939), now in Id., *L'età longobarda* (n. 9) I, pp. 275-339, esp. pp. 322-328; A. PADOA SCHIOPPA, *Ricerche sull'appello nel diritto intermedio* I (Milan 1966), pp. 153-157; F. SINATTI D'AMICO, *Le prove giu-*

might have been different, such as the punishment for involuntary homicide described in Roth. ch. 387.[66] Such a legal rule perhaps does not fit the 'pure' schema of a Germanic trial, in which the person accused of murder can only confess his guilt or deny the accusation as a whole, without the possibility of demonstrating that he acted without any intention of killing. On the contrary, if one considers a Lombard judge able to declare a homicide to be involuntary, it should follow that he possessed the capacity to develop a judicial enquiry based on a rational and informal examination of the facts, presumably based on the testimony of witnesses.

10. Traditional proofs and evidence of witnesses in the Edict of Rothari

To confirm that at the time of Rothari it was possible to reach a judgment equally capable to avoid a feud, even without recourse to the traditional 'proofs,' we may now consider the figure, only apparently an innovation, of the *proditor*.[67] He looks very much like our informer: he makes possible the indisputable identification of the guilty person (*per certum*) and above all – what is here of interest – without recourse to the formal 'proofs.'[68] No matter if such person is a eyewitness or (more probably) an

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diziarie nel diritto longobardo. Legislazione e prassi da Rotari ad Astolfo (Milan 1968), pp. 51-54, and, more recently, E. CORTESE, 'Il processo longobardo tra romanità e germanesimo' (1995), now in Id., *Scritti* (n. 12) II, pp. 1139-1165, esp. pp. 1153-1154 e 1156.

66   "If somebody kills a freeman accidentally and involuntarily, he will pay for composition as much as that man has been valued at and the feud will not requested because he acted involuntarily" (*Si quis hominem liberum casum facientem nolendo occiderit, conponat eum, sicut adpretiatus fuerit, et faida non requiratur, eo quod nolendo fecit*).

67   We can find a pregnant roman precedent in *C. Th. 7.18.3* (AD 380): the *temoniarius* who denounces (*prodiderit*) the deserter will receive a reward. Once again we have to do with a military norm (which should have been familiar to *milites foederati* like Lombards have been). The term comes back again in *Interpretatio* to *C.Th. 10.10.2* (= *BA* 10.5.1) where is used as synonymous of *delator*.

68   Roth. Ch. 255: "If someone through a *proditor*, that is through a reliable informant, discovers a theft, to him the thief shall return nine times what was stolen" (*Si quis per proditorem, id est per certum indicatorem, furtum invenerit, sibi nonum, qui furtum fecit, ei restituat*). The same figure of the *proditor* appears also in Roth. ch. 335: "Concerning an animal that has been flayed. If a wolf kills someone's animal and someone unknown to the owner flays it and hides it, and it is discovered by means of a proditor, he is to compensate ..." (*De animale excoriato. Si lupus animale cuiuscumque occiderit et aliqui eum nesciente domino excortecaverit et celaverit et per proditorem inventum fuerit, componat …*). In the Roman sources the term *proditor* appears only in *CTh* 14.18.1 = *CJ* 11.26[25].1 (*… ut eorum quidem, quos tenet condicio servilis, proditor studiosus et diligens dominium consequatur …*). Similar rules to that of Rothari also occur in the Theodosian Code (*CTh* 7.18.3 e 4), significantly in a military context. Another

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accomplice forced to denounce the theft. What is important is that the intervention of the *proditor* creates a situation similar to that created by being caught in the act or by confession.[69] In all these cases, in fact, the judge first enquires about the facts without any formalities, then inflicts the punishment directly, without awaiting the outcome of the traditional 'proof.'

It was Franca Sinatti d'Amico's intuition that the judge's role in a Lombard trial could have been much more important than usually assumed.[70] The activity of a judge, in particular, must have involved two levels: that of the *certum* and that of the *probatum*. "*Certum* is what is certain and legitimate in itself, *probatum* is what is put definitively out of any discussion by evidence."[71] Real evidence of facts on the one hand, an absolute and undisputable solution (determinated by a formal 'proof') on the other: the Edict is silent, but is clear that if it is a judge's duty to check the outcome of the 'proof,' it can be only the same judge who has to recognize the 'objective' certainty of facts and circumstances that are presented to him. Nevertheless, unable to abandon the traditional 'dogma' of the inherent indifference of Lombard trials to facts, Sinatti did not take to its logical conclusion her initial intuition. Witness evidence, according to her opinion, remained substantially extraneous to the Lombard legal system.[72]

The interest of a Lombard judge in facts and the 'automatic' decision of a case by means of the outcome of the traditional 'proofs' are in fact not incompatible. If it is true that the sentence whereby the judge assigns the 'proof' to one of the parties repre-

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possible source for the word is Isidore, *Etym.*, X.221: '*Proditor, pro eo quod detegit …*' If not the term, the function is present in Frankish law: see *Childeberti II decretio*, ch. 8 (AD 596), in *MGH*, *Capitularia regum Francorum* I (Hannover 1883) 1.7, p. 17, where the *centenarius* (*iudex*) captures the thief thanks to evidence: it is easy to recognize here an informer (*… ut audierit*).

69   It is clearly not an accident that Roth. ch. 255 follows immediately upon two other chapters which deal with cases of *flagrante delicto* (*fegangit*) in relation to a freeman (Roth. ch. 253) or a slave (Roth. ch. 254); for confession, see Roth. ch. 364: once a confession has been made, it cannot be retracted and the choice of traditional *purgatio* by oath is forever excluded.

70   *Le prove* (n. 65), pp. 38-56.

71   *Le prove* (n. 65), p. 49.

72   *Le prove* (n. 65), p. 176.

sents 'the most important act of the whole procedure,'[73] it is not true that the judge does not come to this decision *ex abrupto*, *i.e.*, passively, or automatically, after the indictment and subsequent reply.[74] On the contrary, contemporary reports of judgments show that a Lombard judge comes to his decision at the end of a cognitive process in which, without doubt, a rational evaluation of the elements produced by the parties to the proceedings played its part.[75]

Especially when the arguments advanced by the plaintiff appeared in themselves conclusive, reaching thus the objective level of what was *certum*, the judge did not reach a formal decision, but precisely in cases in which the informer made it possible to discover the thief and, more generally, in *flagrante delicto* or confession, but also in civil cases, when a dissatisfied creditor acted on a claim strengthened by a warranty (*wadia*). Nor, in such cases, was it allowed to the accused to purge himself of the charge. The judge proceeded instead directly with the imposition of the penalty or with the seizure of property (*pigneratio*).[76] Even Lombard judges were not insensitive or indifferent to the availability of evidence that was rationally convincing, when it appeared safe beyond all doubt. Like the Goths and Franks, so also the subjects of Rothari appreciated the value of a *certa probatio*, *i.e.*, of the evidence capable of appearing in the eyes of the court – but also to the surrounding community – absolutely 'clear' and 'indisputable.'

When, on the contrary, none of the conflicting claims of the parties appeared supported by real evidence and therefore the case remained shrouded in the mists of uncertainty and doubt, did it fall to the judge to break the impasse in the proceedings caused by an opposition between parties formally in a condition of equality. The judge then opened a preliminary investigatory stage, consisting in the informal hearing of

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73   *Le prove* (n. 65), p. 146.

74   For the opposite (and widespread) view, see G. SALVIOLI, *Storia della procedura civile e criminale* I (Milan 1925) (= Frankfurt a. M. & Florence 1969), p. 216: "*In qualunque atto giudiziario il tribunale assiste passivo e segue da spettatore ciò che fanno i contendenti.*"

75   SINATTI D'AMICO (n. 65), pp. 44-50, 149 and 157-159; and LOSCHIAVO, *Figure* (n. 45), pp. 209-217. An enquiry into the facts, carried out by the *sculdascius* responsible for ascertaining the discharge of his responsibilities by a duke in respect of his *exercitales*, appears in Roth. ch. 23.

76   Only when the guarantor himself (*fideiussor*) was associated with the defendant in contesting the legality of a claim (as in Roth. ch. 366), was the alleged debtor allowed to refute the charge by swearing an oath.

witnesses, in the reading of *chartae*, and also in the direct or indirect inspection of the places involved in the case. In this way, he could have formed a detailed and 'subjective' opinion about the disputed facts and about the substance of the respective claims of the parties.[77] By demanding a traditional 'proof,' the judge of course broke with the initial equilibrium between the parties. But by choosing the party from whom to demand the 'proof,' he indicated the party he considered most credible, and in fact gave to it the advantage in the case.

It remains true, however, that a trial system as essentially archaic as the Lombard one did not allow the judge to give formal and explicit expression to the logical-deductive process by which he had formed his opinion.[78] We have to remember that at the time it was absolutely necessary that the decision was accepted by both parties. Only in this way would it be possible to eliminate the temptation to return to the path of private justice once embarked in a public trial. It was therefore necessary that any decision was socially recognised and so became unassailable. Such characteristics were in fact the necessary prerequisites for the enforceability of the decision: an enforceability that the authority of the court was not sufficient by itself to impose.

For this to occur, it was necessary for the 'subjective' opinion of the judge about the case to become, in some way, an 'objective' one. It was necessary, in other words, for his decision to appear in itself 'indisputable' and 'unobjectionable' through the addition of the seal that only the outcome of a solemn and public 'proof' entailed. Archaic formalism thus overlapped with the rational examination of the facts. This, however, did not in any way imply that the Lombards were indifferent to the conclusions which the court had reached in consequence of the facts themselves.[79]

Even a Lombard trial was perhaps less 'Germanic' than has long been thought.

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77   Good examples of enquiries of this type can be found in the *inquisitio* ordained by Pertarit in AD 674: BOGNETTI, *Il gastaldato* (n. 63), pp. 224-242; also in the *iudicatum* pronounced in 742 by Gotescalc, Duke of Benevento: P. BERTOLINI *"Actum Beneventi". Documentazione e notariato nell'Italia meridionale langobarda (secoli VIII-IX)* (Milan 2002) no. 48, pp. 394-412). In this last case, the duke suspends the proceedings and orders two of his officers to conduct an *inquisitio* motivated in these terms: '*Vnde et iterum pro ampliorem agnoscendum certam ueritatem*'.

78   See SINATTI D'AMICO, *Le prove* (n. 65), p. 149.

79   For opposite opinions see SALVIOLI, *Storia* (n. 74), p. 249, and SINATTI D'AMICO, *Le prove* (n. 65), pp. 25-50, esp. p. 47.