3

Law of the Germanic Kingdoms

3.1 The Origins

For centuries the Germans had had their own laws, in part common to all and in part specific to each clan. Tacitus clearly described the notable aspects in his well-known *Germany* written at the end of the first century, a fascinating text no less so for its brief and synoptic form. Three centuries later, on the eve of migration to the West, these features were still mostly unchanged. Germanic clans were made up of a corresponding number of nomadic tribes, unaccustomed to stopping for long in the same place and the reason why intensive agriculture was not practised, their primary source of subsistence being hunting and the spoils of war.[1] Ownership of property was unknown, as in Tacitus' time the fields were still distributed annually on the basis of social status.[2] It was a population of warriors, for whom fighting and bravery in battle constituted core values: Tacitus had written that 'for them it seems a sign of indolence to get by means of the sweat of their brow what they can procure for themselves with blood'.[3]

The armed militia was the fundamental and only public organisation. Upon entering the army after puberty, boys attained the status of adults, independent of parental authority. Only in the most critical of phases did they grant themselves a king, whereas it was usually the most influential men, military leaders belonging to the most respected families, who proposed decisions at the assemblies, the approval of which was shown by the striking of shields with a spear.[4] It was therefore a military and civilian system based on military assemblies, which in any case did not constitute an egalitarian society [Much 1967]: Tacitus in fact mentions

[1] Cesar had already written with regard to the Germans: '*vita omnis in venationibus atque in studiis rei militaris consistit [. . .]; agri culturae non student*' (*De bello gallico*, 6. 21–22).
[2] Tacitus, *Germania*, 26 (see Much, 1967; Thompson, 1969).
[3] Tacitus, *Germania*, 14.
[4] Tacitus, *Germania*, 11: '*Rex vel princeps audiuntur auctoritate suadendi magis quam iubendi potestate. Si displicuerit sententia, fremitu aspernantur, sin placuit, frameas concutiunt*'.

the *nobilitas* of the lineage and the authority of the *principes*.[5] The family – which was extensive and included all descendants of a common founder, therefore with many family units that formed a closely knit clan united in every sense, including the disposition in battle formation[6] – was in turn characterised by commonly held property: most of all domestic animals, which were essential to a nomadic society. Wills were unknown as only legitimate succession was in force.[7] Grazing land was held in common by the entire population. Women, though profoundly respected and carefully safeguarded, had no rights of their own nor could they act without the assistance of their fathers or brothers as long as they were unmarried and otherwise of their husbands. Marriage consisted of the sale of the bride to the groom's family, with various rituals which invariably involved the exchange of property so as to provide the new family with the necessary resources, respectively in the form of a dowry on the part of the family of the bride and of a marriage gift on the part of the groom.[8]

Reparation for any personal offence involved legitimate recourse to private reprisal (*faida*) – the ties of friendship or enmity between clans were indissoluble[9] – therefore in general without intervention on the part of the community. But at the time of Tacitus it was already possible to pay amends for offences, even of the gravest sort such as homicide, with a payment calculated mostly in heads of livestock.[10] Justice was administered by elected army leaders.[11] Part of the dues went to the family of the offended party and part to the king or the community.[12] The few trials inflicted on traitors or deserters were held in public and inflicted the death penalty,[13] and were mostly founded on the trial by ordeal, hence by invoking the intervention of God in establishing guilt or innocence. These were also the grounds for judicial duels and oaths [*La Giustizia* 1995]. For a society that believed in the supernatural, the ordeal could be anything but ineffectual at determining guilt or innocence: this is clearly shown in early medieval judicial practice when, as a condition for issuing

[5] Tacitus, *Germania*, 7: '*Reges ex nobilitate, duces ex virtute sumunt*'; cf. *Germania* 25.
[6] Tacitus, *Germania*, 3; 7.
[7] Tacitus, *Germania*, 20.
[8] Tacitus, *Germania*, 18.
[9] Tacitus, *Germania*, 21: '*suscipere tam inimicitias seu patris seu propinqui quam amicitias necesse est*'.
[10] Tacitus, *Germania*, 21 '*luitur enim homicidium certo armentorum ac pecorum numero recipitque satisfactionem universa domus*'.
[11] Tacitus, *Germania*, 20.
[12] Tacitus, *Germania*, 12: '*pars multae regi vel civitati, pars ipsi qui vendicatur vel propinquis eius exsolvitur*'.
[13] Tacitus, *Germania*, 12.

a judgement in his favour, the judge invited one of the parties to swear under oath, at which point sometimes the party declared not to 'dare': '*ausus non fuit iurare*'.[14] The trial was then decided in favour of the other litigant.

These few examples are perhaps sufficient in showing the nature of juridical relations among the Germanic people during the historical phase that preceded their dislocation towards the West. Legal norms and customary norms were the same, nor could it be otherwise as writing was unknown to them. The rules were not for this reason less cogent. It was again Tacitus who wrote that customs were respected more among the Germans, than were proper laws by other peoples.[15]

There is therefore evidence of some fundamental common features in the Germanic laws and customs beginning in an era that preceded migration to the West. Nevertheless the idea of a unified whole, which scholarship in the past has sustained, is not supported by the sources. In fact there were differences and these were significant [Kroeschell 1980]. The comparative analysis of the laws of the different populations between the sixth and the ninth centuries demonstrates that there were exchanges and contacts. Often these differences and influences were revealed in legal practice more than in the laws themselves. For example God's judgement being a constant feature of primitive Germanic trials; for centuries, the Lombards' preference was for the judicial duel, whereas the Anglo-Saxons' custom preferred trial by ordeals with fire and water.

The recurrent and unremitting incursions on the part of innumerable clusters of migrants from the Germanic clans within the confines of the Roman Empire constituted one of the reasons for its crisis and fall in the West. Once the newcomers had, with or without imperial consent, permanently established themselves in many of the regions of the Empire and created many new dominions – the Germanic kingdoms – the entire legal system assumed different characteristics. The historical consequences of these changes were profound and permanent. It is not by chance that many of the regions of Europe, from Bourgogne to Bavaria, from Lombardy to Saxony, but also entire kingdoms such as France and England – as well as Germany itself – derived their modern names from the peoples who populated them at the end of antiquity.

[14] This happened often. See, e.g., the trial in Spoleto of the year 777, in *Codice diplomatico Lombardo*, IV/1, ed. C. Brühl (Rome, 1981), n. 29, p. 86.

[15] Tacitus, *Germany*, 19: '*plusque ibi boni mores valent quam alibi bonae leges*': with a critical allusion to the Roman customs of his time.

3.2 The Personality of the Law

The Visigoths who took possession of southern Gaul and later of a part of the Iberian Peninsula,[16] the Burgundians who occupied the region between Geneva and Lyon,[17] the Franks who settled in northern Gaul beginning in 481, the Lombards who descended into Italy in 568, the Angles and the Saxons who landed in England in the sixth century and the other Germanic tribes, having thus become masters of vast territories, found themselves governing a population who until then had been living under Roman law, whereas the victors practised completely different customs, as we have seen.

The radical change caused by the new settlements and the creation of independent kingdoms therefore posed the complex problem of the conquerors being a minority in control of occupied territories with vastly more numerous native populations. It also posed the problem of how to retain the legal traditions to which each of the Germanic races was so strongly tied, and which for centuries had symbolised their identity and the values they shared. The presence in the conquered territories of such a different, complex and sophisticated legal system as that established by Roman law created constant justification for confrontation with the new rulers. This explains the choice of keeping the law of the victors and that of the vanquished quite distinct. The German peoples kept their own national juridical traditions alive as much as possible. The rest was allowed to continue to regulate legal affairs in line with their Roman tradition but in any case subordinate to the authority of the newcomers. Thus the legitimate existence was recognised within single kingdoms of a plurality of laws, each of which was applicable to a specific ethnicity; it was the beginning of the personality of the law, a fundamental feature in this historical phase. This was also possible because the juridical relationships between the ethnicities – in the first place between the victors and the vanquished: mixed marriages, contracts, trade agreements – were for a time almost non-existent.

The principle did not in any case apply to the fundamental rules of public law, which gave the new rulers the assurance of control over the territory and of being in command: in particular with regard to rules of public order and of the judiciary. However, the relationship between the

[16] The Visigoth kingdom lasted three centuries, from 418 to 711; after defeat at the hands of the Franks in 507, the capital moved from Toulouse to Toledo; the kingdom fell with the Islamic conquest of Spain.

[17] The kingdom of Burgundy, created in 443, ended with the conquest of the Franks in 534.

new rulers and the population of the Empire within the different kingdoms was anything but homogeneous. The principle of legal personality itself was to know significant derogations, for example in the Visigoth kingdom.

In order to ensure a sufficiently uniform hold on customs, though in different times and in different ways, each of the new kingdoms came to possess written legal texts, in which the national traditions were variously explicated and supplemented with new elements, in part drawn from the law of the vanquished, in part from the one newly established by the sovereigns. It is highly significant that these laws almost always adopted the Latin language, even when their content was intended to have a strictly Germanic stamp.

3.3 Visigoth Law

The first to tackle the difficult task of legislating were the Visigoths. It is surprising that their most salient early codifications were in large measure, if not exclusively, inspired by post-classical Roman law. This goes for the Eurician Code (476–479)[18] and for the Alaric Breviary (*Lex Romana Visigothorum*, 507),[19] the latter composed exclusively of constitutions taken from the Theodosian Code, from the post-classical *Sententiae* by Paul and other minor texts, accompanied by brief summaries and commentary, also mostly pre-Visigoth: texts which were often far from official law and conforming to contemporary practices, typical of what has been defined as 'vulgar Roman law'. The Breviary was to have a long-standing influence in the territory of Gaul (which had already become the kingdom of the Franks and therefore France) and also in Italy in the early Middle Ages, two Western regions which, as we have seen, were left out of Justinian law.

It was only in a second phase that Visigoth law was to acquire greater originality. King Liuvigild revised the Eurician Code at the end of the sixth century, adding a number of laws, also retrieving elements of national Visigoth and Germanic tradition, for example with the provision of fines for certain types of offences.[20] In the seventh century Chindasvinth

[18] A. d'Ors, *El Codigo de Eurico* (Rome-Madrid, 1960).

[19] *Lex Romana Wisigothorum*, ed. G. Haenel (repr. Aalen 1962).

[20] *Leges Visigothorum* [following note], 7. 3. 3 *antiqua*. For plagiarism at the expense of the son of a freeman: the *Lex romana Visigothorum* prescribed capital punishment of Theodosian origin, whereas Liuvigild leaves the choice between killing the culprit or exacting a fine up to the offended party.

(642–653) and particularly his son Reccesvinth (649–672) – the capital of the kingdom having in the meanwhile moved to Toledo in Spain – furnished the kingdom with a text of laws (*Liber iudiciorum*, twelve books)[21] which reproduced Liuvigild's text with the addition of a set of new rules, for example concerning appeals.[22] The Code maintained the Roman imprint [Petit 2001, p. 334], but several customs of Germanic origin were also retrieved. In this form the new *Liber iudiciorum* was imposed on all subjects, without distinction of ethnical origin.[23] Mixed marriages were admitted as of the sixth century.[24]

Visigoth legislation was open to religious influence, in part inspired by the writings of the great Bishop Isidore of Seville [Thomson 1969]. Some laws of Chindasvinth and Reccesvinth – which invite the judges to 'temper a little the severity of the law'[25] or consent to the annulment of a contract entered into for fear of the king[26] – reveal an ecclesiastical influence. The *Hispana*, one of the most important collections of canon law of the late Middle Ages, was drafted during the Visigoth kingdom.[27]

Even after the year 711, when the kingdom of Toledo was crushed by the overwhelming onslaught of Islam, the *Liber iudiciorum* survived – until Christianity once again prevailed and Justinian law saw a revival in the twelfth century – as a legal text for the non-Islamic population of Spain. For some of the regions, for example Catalonia, the continuity of its application through the early Middle Ages is clearly attested to in documents [Iglesias Ferreiros 1977]. This also goes for other regions of Spain. Even with regard to the Muslim population, parts of the rules in the *Liber* seem to have been enlisted, while in turn Islamic law exercised an influence on the whole population on some matters, for example concerning water regulation and the agrarian system [Tomas y Valiente 1984, p. 133].

3.4 Salic Law

Between the end of the fifth century and the beginning of the sixth century, Clovis, king of the Germanic Frankish people, after crossing

[21] *Leges Visigothorum*, ed. K. Zeumer, in MGH, *Legum sectio* I, vol. I (Hanover-Leipzig 1902). In this edition Liuvigild's dispositions are said to be '*antiquae*'.

[22] *Leges Visigothorum*, 2. 1. 24; 2. 1. 30 [cf. Petit, 1997].

[23] *Leges Visigothorum* 2. 1. 10, of Reccesvinth.

[24] *Leges Visigothorum* 3. 1. 1 *antiqua*.

[25] '*Severitatem legis aliquantulum temperare*': *Leges Visigothorum* 12. 1. 1, of Chindaswinth.

[26] *Leges Visigothorum*, 2. 1. 29, of Reccesvinth.

[27] Pub. Gonzales, in PL 84. 93–848 [see Martinez-Diez, 1966–1982].

the Rhine occupied the vast region between the Rhine, the Seine and the Loire and gave life to the Frank kingdom. Having then defeated the Visigoths in 507, he conquered also the southern Gaul. In the year 534 the kingdom of the Burgundians was defeated and the Franks extended their dominion to the region of the Rhône. In the years 507–511 Clovis had converted to Catholicism from Arianism through the influence of his wife, the Burgundian princess Clotilde: a crucial event not only for the religious, but also the political history of Europe. In the same years the Frankish king promoted the official approbation of a text of laws that is among the cornerstones of medieval European law, the *Pactus Legis Salicae*.[28]

For the most part the contents of the *Pactus* originated in an age far preceding the origins of the kingdom. It vividly reflects the legal customs of the Salic Franks (the other branch of the same ethnicity being that of the Ripuarians): many rules of law show this customary origin; they are in great part made up of a catalogue of pecuniary sanctions for a set of different offences. The purpose was that of substituting the original reprisal or *faida* with the legal *compositio*, imposed in monetary terms. It is worth noting that the *Lex Salica* was written in Latin, interlaced with Germanic terms where the Latin was not adequate. The source of the text is mainly customary, but it must be underlined that the customs, as formulated in the law, had in fact been established by four 'wise men' who are named in the *Pactus*, and who had made decisions on a series of cases according to rules that were subsequently put down in writing [Guillot 1998]. This had all occurred in an age preceding that of Clovis.

Salic law presupposed an economy still predominantly based on a nomadic way of life (there is very little on the possession of landed property and no rules on the illicit occupation of land) with particular attention paid to questions tied to domestic animals, as attested to by the meticulousness of the rulings to do with as many as five breeds of pigs.[29] In case of homicide the pecuniary fines are differentiated according to whether the act of killing was manifest or covert,[30] whether the victim was a man or a woman,[31] a soldier of war or a civilian, a follower of the

[28] *Pactus Legis Salicae*, ed. K. A. Eckhardt, in MGH, *Legum sectio* I, vol. IV.1 (Hanover 1962).

[29] *Pactus Legis Salicae*, 3, 4, 5, 6.

[30] *Pactus Legis Salicae*, 41 §§ 2; 4. The more severe sanction for occult crimes is typical also of other Germanic laws, such as the Lombard Edicts.

[31] *Pactus Legis Salicae*, 24: for the killing of a woman or child the sanction is tripled from 200 to 600 silver coins.

king, a Frank or a Roman, the landowner or a peasant.[32] These last distinctions are evidently tied to the recent age in which Gaul was invaded and a kingdom created, but the former significantly betray archaic customs imbued with magical elements, clearly of pre-Christian origin. They also governed family relations, for example establishing the joint responsibility of the maternal and the paternal lines for pecuniary sanctions.[33] Also the rule which excludes women from inheritance in 'Salic territory'[34] – revived centuries later when it was determined that the succession to French throne should be limited to the male heirs – comes from much earlier customs. The pattern of the dispositions in the *Pactus* is certainly archaic, although there are aspects that point to a less primitive framework, for example dealing with witness testimony. There are also normative interventions by King Clovis, who in the years following the approbation of the *Pactus* would intervene with important new rules, in the same way that his successors would intervene with other edicts.[35]

3.5 Lombard Law

Having descended into Italy through Friaul in the year 568, the Lombards – a people originally from Scandinavia, but having then lived in Pannonia, a region of modern Hungary – after a three-year siege under the guide of King Albonius, succeeded in expunging Pavia, already the capital of the Ostrogoth kingdom during the age of Theodoric. The kingdom was divided into thirty provinces under the authority of as many dukes and in time was to extend to central and southern regions of Italy, from Lombardy to Tuscany to Spoleto and Benevento. The adoption of a military term of late antiquity, *dux*, means, however, a completely different kind of authority from the Byzantine one by the same name. The Lombard duke – analogous with the Frankish count which in turn is of Roman military origin: *comes* – at once held military, civil and legal power. His status was also characterised by a high level of autonomy with respect to the king. Family and clan were the sources of his power, in accordance with Germanic tradition.

[32] *Pactus Legis Salicae*, 41 §§ 1, 9, 10: the *compositio* is of 200 silver coins for the killing of a Frank, 100 for a Roman proprietor, 62 for a Roman peasant.

[33] *Pactus Legis Salicae*, 58.

[34] *Pactus Legis Salicae*, 59 § 6: '*de terra vero salica nulla in muliere hereditas est, sed ad virilem sexum, qui fratres fuerint, tota terra pertineat*'. Women were, however, not excluded from all types of succession of property [Lévy-Castaldo 2002, p. 1106].

[35] *Capitularia* I–VI, ed. in MGH, *Legum sectio* IV.1, pp. 238–250.

Three quarters of a century would go by before the year 643 when Rothari, a Lombard king, took the initiative of codifying the customs of his people, which had until then remained unrecorded. In the same way as with the Visigoth and the Franks the language used was Latin: evidently the language of the vanquished was considered more suited to accurately express the contents, despite it having very little to do with Roman law. In the same way as the Salic law, for much of its 388 chapters, the Edict of Rothari was dedicated to specifying the amends to be inflicted for each possible illicit act.[36] Analytical computation of the sum for each fine was based on the gravity of the offence and went so far as to have different fines for the fracture of each finger of the hand.[37] Half the amends went to the offended party or his family and half to the king:[38] a sign that the system of sanctions was already partially public in character. In keeping with the principle of the personality of the law, Rothari wanted the Edict to apply only to the Lombard part of the population and not to the Roman.

Added to the main body of laws of customary origin, the Edict of Rothari also contains important dispositions established by the king to strengthen monarchic power. Capital punishment for attempting to take the life of the king,[39] a ban on internal migration,[40] impunity for killing under the order of the king[41] and other dispositions, have this origin. It is significant that in the Prologue some phrases are taken verbatim from Justinian texts[42] although in a Germanising context, which in turn contains many terms proper to the language of the Lombards: such are the terms used to name their customs (*cavarfrede*), the pecuniary fine for homicide (*wergeld*), reprisals (*faida, fehde*), the bride's dowry (*faderfio*, money of the father), the nuptial donation on the part of the groom (*morgengabe*, gift of the morning) and many others. Among the means of proof, the duel and the oath are the only ones included; those accused of an illicit act could be acquitted by taking an oath of 'purification' (*se eduniare*) with twelve 'sacramentals', five of which were chosen by the accuser and five by the accused, each adding himself to the five making six:[43] the unanimity of twelve was necessary for acquittal.[44] It is an archaic procedure that is rarely found in the judicial practice of the

[36] Rothari, *Edictum*, ed. Bluhme, in MGH, Leges IV, *Edicta regum Langobardorum* (Hanover 1868, repr. 1969). Text with Italian translation and notes: *Le leggi dei Lombardi*, pub. C. Azzara and S. Gasbarri (Milan 1992 and Rome 2004).
[37] Rothari, 114–118. [38] Rothari, 9, 13, 18, 19 and elsewhere. [39] Rothari, 1.
[40] Rothari, 177. [41] Rothari, 2; cf. Rothari, 11. [42] From Nov. 7 of Justinian.
[43] Rothari, 359 *de sacramentis*. [44] Rothari, 363.

Lombard kingdom: in the trial records (*placita*) which have come down to us, the duel never appears and the oath does not conform exactly to that of the Edict of Rothari.[45]

The legislative discipline of the Edict is anything but primitive: for example regarding the attempt to commit a crime, it carefully distinguishes between preparatory actions, attempted and successfully committed crime, assigning a different penalty to each of the three[46], thereby distancing itself from the Roman tradition in which the author of an attempted crime was given the same penalty as one who had carried a crime out. It was a legal framework which would influence the entire course of criminal law up to the present [Cavanna 1970].

Less than a century later the edicts issued in the years between 712 and 744 by another Lombard king, Liutprand,[47] have a very different character. The king and all his subjects had converted from Arianism to Catholicism. The influence of the church – acting like leavening within the barbaric society [Vismara 1987/1 – is evident in a series of legal dispositions, among which the manumission of the servant before the altar,[48] the improvement of the position of daughters in succession in the absence of sons,[49] the recognition of the ecclesiastical right of sanctuary,[50] the inclusion of a number of impediments to marriage which belonged to canon law,[51] the simplification of the procedure for donating to the church,[52] the right to dispose of a part of one's assets in favour of one's soul through pious donation:[53] this last item for the first time opening the way to voluntary succession. Other norms in some way testify to a more direct influence of Roman law and mark an evolution from the age of Rothari: among these are those increasing the severity of sanctions against homicide[54] and the emphasis on witness

[45] See, e.g., the trial held in S. Genesio in S. Miniato (5 July 715), in which the sacramentals are not chosen in accordance with Rothari's prescription, in *Codice diplomatico Lombardo*, ed. L. Schiaparelli (Rome 1929–1933), n. 20, vol. I pp. 77–84.
[46] Rothari, 139–141.
[47] Edicts of Liutprand in MGH, Leges IV, ed. Bluhme (Hanover, 1868).
[48] Liutprand, 23: it is the *manumissio in ecclesia* introduced by Constantine.
[49] Liutprand, 1–4. [50] Liutprand, 143.
[51] Liutprand, 32, 33 (the king declared to have ruled the prohibition of marriage between cousins by express wish of the Pope), 34 (the spiritual relation of a godfather or godmother constitutes an impediment).
[52] Liutprand, 73.
[53] Liutprand, 6; later Liutprand himself specified that the donation could not damage the legitimate succession (Liutprand 65).
[54] Liutprand, 20, 65: in place of the *guidrigild*, the loss of all possessions and, for the culprit without means, the loss of liberty and surrender to the relatives of the victim.

testimony.[55] Concerning proof, Liutprand declares openly that the duel must be considered an unreliable means of proof, but did not ban it as the Lombards would not allow him to and insisted on retaining it.[56] There was also the introduction of the appeal to the king, sanctioning the judges who had made decisions contrary to the law differently from those who had made decisions which had resulted as unjust, but which had had to be taken discretionally (*per arbitrium*) in the absence of specific rules of law.[57]

Unlike Rothari, Liutprand intended to issue laws for all his subjects, not just the Lombards. An edict allowed Lombards to abandon their own national law and embrace the Roman one and vice versa.[58] This disposition is a sign of the incipient crisis of the system of the legal personality, in an age in which exchanges between Lombards and Romans were becoming ever more frequent.

A few decades later, in the year 774 with the defeat in battle of King Desiderius, the Lombard kingdom fell into the hands of the young Frank king, Charles, who had been called to Italy by the Pope, against the risks of a Lombard conquest of the papal provinces in central Italy. So it was that the Carolingian also came to power in Italy. But the legacy of the Lombard law did not disappear, as the Lombards' edicts would remain in force for centuries and would influence legal practice until the communal age of the twelfth century and beyond.

If we look at Lombard judicial procedure, a remarkable distance is clearly seen between the archaic rules of the Edict of Rothari and the practice that was in force in the twenty-eight surviving trials held during the two centuries of the Lombard kingdom in Italy. Also striking is the forthrightness that transpires from some documents which reveal a concrete justice which is anything but formal. From the seventh century on judges ascertained the facts regarding a dispute, by means which were very far from the ordalic procedure of the duel and oath: expert investigation and witness accounts gathered by the king's notaries in fact constituted the basis of judicial decisions. This can already be observed in the oldest Lombard trial for which documentation exists [Bognetti 1968, Vol. I pp. 214 ss.], which took place in Piacenza in the year 674,[59]

[55] Liutprand, 8, 15 (Sinatti d'Amico, 1968). [56] Liutprand, 118.
[57] Liutprand, 28 (Padoa-Schioppa, 1967)
[58] Liutprand, 91 *de scrivis*: this well-known chapter allows one to '*subdiscendere de lege*', but only for contracts.
[59] *Codice diplomatico Lombardo*, III/1, n. 6, ed. C. Brühl (Rome 1973), pp. 21–25.

and others in Siena and Pavia in the year 715.[60] Nonetheless, one can run across recourse to the Germanic procedure of oaths taken by Sacramentals (men with ties of solidarity to one litigant or another and not witness to the facts), not only in secular trials, but also in ecclesiastical ones.[61] The documents sometimes reveal how the trial before the judges delegated by the king could obtain frank witness accounts, sometimes at the witnesses' risk.[62] In an exceptional case, the bishop of Siena bashfully confesses before the king to have erred with respect to a diocese near Arezzo.[63] In other cases – for example in Benevento in 762 – it is evident how the pressures exerted on the court by a powerful litigator could be a determining factor in the dismissal of good arguments brought forth by the weaker party: when brought before the duke against a powerful abbot, the documents of manumission, dutifully procured and confirmed years before by a group of men long since freed from servitude, ultimately resulted useless.[64]

3.6 The Anglo-Saxons

England too, the southern part of which had been Romanised during the imperial age, was conquered by Germanic tribes, who subdivided the territory, giving life to up to ten different kingdoms, which in the course of time were reduced to four through war and dynastic allegiance. The Angles, the Saxons and the Jutes (the population who inhabited the territory of Kent) dominated the island from the fourth century onwards. Christianity was brought to England by the monk and then Bishop Augustine, under the auspices of the great Pope Gregory I at the end of the sixth century.[65] Many different texts of law remain which, unlike those on the continent, are written in the Germanic language and not in Latin. The oldest Anglo-Saxon text of law goes back to King Ethelbert of Kent (602–603), and the first chapter prescribes the amends for those guilty of theft of goods belonging to bishops and clerics.[66] In the

[60] *Codice diplomatico Lombardo*, I, nn. 19–20, ed. L. Schiaparelli (Rome 1929), pp. 61–84.
[61] *Codice diplomatico Lombardo*, III/1, n. 6, p. 25.
[62] *Codice diplomatico Lombardo*, I, n. 19, p. 74: a witness states that the *gastald* of Siena had cautioned him against presenting himself to the king's delegate as to the boundary of the dioceses, but that he had nevertheless decided to give his true account in favour of Arezzo.
[63] *Codice diplomatico Lombardo* III/1, n. 13, p. 61: the bishop of Siena '*statim coram omnibus inrupit in faciem*'.
[64] *Codice diplomatico Lombardo* IV/2, n. 45, ed. H. Zielinski (Rome, 2003).
[65] Bede (673–735), *Historia ecclesiastica*, I. 27.
[66] Aethelberth, 1 (*Die Gesetze der Angelsachsen*, ed. F. Liebermann (1903–1916, repr. Aalen 1960, vol. I, p. 3): the theft of objects belonging to the Church called for a fine of twelve

other ninety brief chapters, it contains a catalogue of amends for various crimes following a typically Germanic pattern of pecuniary fines named and calibrated as payment for illicit acts and offences.

Other collections are of an analogous nature. The laws of the great King Alfred (890–940) were particularly important. He conceived of the law – which he was to draft in the common language – both as a written transcription of customs and as the expression of the king's will to legislate.[67] He handed out severe penalties, including the death penalty for the more serious crimes.[68] The text essentially contains rules determining sanctions for illicit acts among which are also prescriptions which disclose the existence of a subordinate relationship between freeman and lord.[69]

Anglo-Saxon institutions have many common aspects with other Germanic populations, for example the assembly of the kingdom's grandees (*witan*) for strategically important decisions; also the subdivision of the territory into *shires*, then *earldoms*, which were in turn divided into *hundreds*, and also the participation of freemen in judicial affairs. Procedure was of an ordalic nature, as we see from a tenth-century text which prescribed obtaining evidence by means of cold water and iron to ascertain the guilt or innocence of the accused, proof being acquired in the context of a solemn religious ritual.[70]

The conquest of part of the island by a population of Scandinavian origin coming from Denmark in the first decades of the eleventh century led to the formation of a single kingdom under King Cnut (1016–1035), who for a few years united England, Norway and Denmark. Cnut was

times the value of the stolen object, for theft of things belonging to the bishop the fine was eleven times the value, for those belonging to a freeman it was three times the value, in addition to the fine to be paid to the king (Aethelberth, 1 e 9).

[67] See Hudson, in OHLE, 2012, vol. II, pp. 19–25.

[68] Alfred, Laws (871–899), in *Die Gesetze*, vol. I, pp. 15–87; e.g. in Einleitung 13 it is prescribed: '*qui percusserit hominen volens occidere, morte moriatur*' (*Die Gesetze*, p. 31; quoting from the Latin version of 1114).

[69] Alfred, 42. 6 (*Die Gesetze*, I, p. 77): '*potest homo pugnare cum germano cognato suo, si quis assaliat eum iniuste, praeter contra dominum: hoc non concedimus.*' Legitimate defence is permitted in aid of one's relatives, but not against one's lord.

[70] *Iudicium Dei*, Rituale, *Adiuratio ferri vel aquae ferventis* (850–975 ca.), in *Die Gesetze*, vol. I, p. 401–407. After the invocation and benediction the accused were thrown in water and considered guilty if they floated ('*si supernataverint*'), innocent if the body sank ('*si submerserint*') (ibid., p. 405). The effects of boiling water and incandescent iron in contact with the skin were evaluated after three nights: if intact, the accused was freed; otherwise he was considered guilty ('*si mundus est, Deo gratuletur*', or '*immundus reputetur*' (ibid., p. 407).

also to leave a body of laws,[71] testifying to the great influence of the *Dane law* on English history. The term *law* itself is of Scandinavian origin.

With Edward the Confessor (1043–1066), the island returned to being an isolated kingdom and at the death of the king it was to be another branch of Scandinavian origin, that of the Normans coming from northern France, that was to conquer England. The Normans had populated the northern part of France, later called Normandy, a century before. Another throng of Norman warriors was moving towards conquering southern Italy, whereas yet another Scandinavian race, that of the Rus, gave origin to Russia, and was to adopt the Slavic language.

Under the guidance of William the Conqueror the Normans were able to take command of the island. The Norman kingdom of England thus came into existence and with it a new law, the *common law*. Even so, in the course of the first century of Norman dominion, some important collections of law texts reflect the laws and customs which predated the Normans: as in the case of the so-called *Leges Henrici Primi* that went back to the second decade of the twelfth century[72] and prevalently contained customs that antedated the conquest, and the *Laws of Edward the Confessor*,[73] collected in order to exalt the English tradition in contrast to the new sovereign's.

[71] *Instituta Canuti* (1095–1135), in *Die Gesetze*, vol. I, pp. 612–619.

[72] *Leges Henrici Primi*, ed. L. I. Downer (Oxford 1972).

[73] *Leges Edwardi Confessoris*, in *Die Gesetze*, vol. I, pp. 627–670.