MIGRATION FLOWS IN EUROPE IN THE EARLY MIDDLE AGES[1]

[ITA] *MOVIMENTI MIGRATORI IN EUROPA NELL'ALTO MEDIOEVO*

Fecha de recepción: 25 enero 2020 / Fecha de aceptación: 29 febrero 2020

CLAUDIA STORTI
Università degli Studi di Milano
(Italia)
claudia.storti@unimi.it

Abstract: The origins of "our" Europe can be traced back to when the barbarian peoples settled in Romanized Europe between the 5th and 8th centuries. As is well known, this led to both a clash and an integration of profoundly different identities, cultures and societies. As these "fluid" communities came to coexist, everyday life came to be defined by respect for diversity and a two-way cultural exchange in the name of peace and order. And this was not just everyday practice—it was also reflected in the work of legislators and judges of the time.

Keywords: migration; roman; barbarian; peace; justice; order.

Sommario: Le origini della "nostra" Europa possono essere fatte risalire a quando le popolazioni barbare si stabilirono nell'Europa romanizzata tra il V e il VIII secolo. Com'è risaputo, questo portò sia allo scontro che all'integrazione di identità, culture e società profondamente differenti. Con la convivenza di queste comunità "fluide", la vita quotidiana iniziò ad essere contraddistinta dal rispetto per la diversità e da uno scambio culturale bilaterale in nome della pace e dell'ordine. Non si trattava semplicemente di una pratica quotidiana, ma si rifletteva altresì nel lavoro dei legislatori e dei giudici dell'epoca.

Parole chiave: migrazione; romani; barbari; pace; giustizia; ordine.

[1] This publication of my talk features the addition of the footnotes; for a longer text on this topic, cf.: STORTI, C., «Legislazione e circolazione di idee e modelli giuridici nei regni germanici», in *Le migrazioni nell'alto medioevo*, Atti della LXVI settimana del Centro Italiano di Studi sull'Alto Medioevo, Spoleto 2019 (forthcoming).

1. MIGRATION FLOWS IN PAST AND MODERN TIMES

Migration flows from the Middle East and Africa have been triggered and continued to be fueled by hunger, poverty, war, and persecution on account of race, religion or politics. In Italy and in Europe, it is an issue that has defined our times.

At the same time, a narrative has emerged - largely for political gain - against the "danger" of migrants. They are seen as the most serious threat to security in our society, accused of being criminals or terrorists; they have also been blamed for destabilizing the economy. This narrative is not so much reflecting a fear of foreigners as it is fomenting it. It has now reached a point at which foreigners, or at least a majority of them, are considered "enemies" of the state, and that every ill that befalls our citizens can be blamed on them.

As we know well, citizenship was one of the principal shapers of European law starting in the early Middle Ages, approximately between the 11th and 12th centuries. The legal concept of citizenship had been inherited from the Roman Empire's *jus civitatis* and adapted to political systems that had not existed under Roman law: first and foremost, the city-states (known as communes). In the communes' "constitutions", only citizens were allowed to exercise legislative, executive and judicial powers through election of their representatives, whose duty it was to ensure "peace", "justice" and "security" within their system. As clearly stated in the sources of law from that time, all these advantages could be extended to "useful" foreigners if so desired. And that did in fact occur, above all in communes whose wealth was based on trade: "useful" foreigners in those cases included merchants, above all. But as is well known, aid programs were also devised in the Middle Ages and early modern period to help poor foreigners (*miserabiles personae*) [2].

[2] Cf. § 4.

Medieval kingdoms followed this same model, and early modern states used citizenship as a key tool to control their subjects.

I will not delve into this further, as other colleagues will examine the late Middle Ages and early modern period more in depth - I will focus on late antiquity and the early Middle Ages.

I will just limit myself to pointing out one thing: citizenship was an "artificial" shaper of medieval and modern law, further strengthened by the "monopolist" state of the 19th century with the emergence of the concept of equality before the law; similarly, the recent distinction between foreigners and migrants - at least in Italy following the immigration act of 1998[3] - is just as artificial, or just as much a superficial construct, if you will. The same applies to the subsequent distinction made between documented and undocumented migrants, with variables that depend on changing legislation (sometimes documented migrants even become undocumented - rarely does it work the other way around)[4]. Undocumented migrants are also defined as "illegal" (or "clandestine" in Italian): a negative label that is purely political in nature and itself the product of an ideology. At the same time, legislative measures are giving rise to a special criminal law for migrants - and political deals have been struck between Europe and Turkey and between Libya and Italy to set up detention or internment centers that seem like concentration camps outside Italian/European borders, with the goal of reducing migration flows[5].

All of this is happening - and we thought that the end of World War II had brought us great victories such as the Universal Declaration of Human Rights

[3] On Law n. 4 of 6 marzo 1998 *Disciplina dell'immigrazione e norme sulla condizione dello straniero*; cf. PANNARALE, L., «I diritti limitati. Riflessioni a margine di una ricerca sui CIe in Puglia», in AUGUSTI, E., MORONE, A. M., PIFFERI, M. (eds), *Il controllo dello straniero. I "campi" dall'Ottocento a oggi*, Roma 2017, pp. 195-211.

[4] Law n. 132 of 4 October 2018, in *Gazzetta Ufficiale* 3/12/2018 n. 281.

[5] PINELLI, B., «Confini d'Europa e scivolamenti nella forma campo. Pervasività e opacità nel controllo dei rifugiati», in AUGUSTI, E., MORONE, A. M., PIFFERI, M. (eds), *Il controllo dello straniero* cited in fn. 3, pp. 175-194.

adopted by the United Nations General Assembly in 1949, or Articles 2 and 10 of the Italian Constitution, not to mention the acts of the European Union.

All of that said, we cannot but limit ourselves to analyzing the problem's historic roots for the moment. And we must start from the categories that Pietro Costa described so well in years past. In other words, the issue of migration flows continues to revolve around the citizen/foreigner dyad, and even more so around the foreigner/enemy dyad. Perhaps now, however, is the time to adopt a different, more intense way of dealing with foreignness and difference. First and foremost, our current situation is forcing us to verify - and if necessary, shift - how we balance our interests with those of others. We need to identify a new balancing point to resolve the conflict between "us" and "them", and then we need to define the legal instruments required to actually strike that balance. As Pietro Costa himself pointed out (and I hope that I do not trivialize his thoughts in summing it up this way): while it is true that the roots of the dyads mentioned above might be anthropological in nature, and that they constitute - or might constitute - a "*distinctive trait of the human race*", the "*onus*" is on historians to "*meticulously reconstruct the [human race's] countless variations*" so as to capture both "*the continually changing forms of life*" and "*the continual return of issues engrained in the circle of a bare and «primal» humanity*"[6].

2. European migration flows in late antiquity

As is well known, different communities (military groups, families, communities that were themselves made up of different ethnic groups) began to migrate to the Roman Empire in the third century. They came from the north and the

[6] Costa, P., «La costruzione del nemico interno: una costante storica?», in *Ius peregrinandi. Il fenomeno migratorio tra diritti fondamentali, esercizio della sovranità e dinamiche di esclusione*, ed. Meccarelli, M., Palchetti, P., Sotis, C., Macerata 2012, p. 287.

northeast, and they were called barbarians (i.e. foreigners)[7]. Conversely, the term "Germanic peoples" has been challenged by today's most authoritative historiographers, especially because of the enormous differences in the way migrant groups were organized and composed[8].

I have no intention of intruding on my Romanist colleagues, who certainly know much more about these issues than I do. As a historian of medieval and modern law, I will limit myself to commenting on what I believe were the consequences of different peoples living together on the concept of law and on the long-term (i.e. beyond the end of the Roman Empire) organization of social and legal relationships.

I examined this issue between the fifth and eighth centuries, which corresponds to when the "multiethnic" "barbarian" kingdoms consolidated their rule. In the words of Adriano Cavanna, it was a time in which "*the fate of Europe was at stake: not only medieval Europe, but our Europe*", which is the product of the "trials" of those centuries - an "*original product of history*"[9].

It was an apocalyptic scenario, and in no way could it seem pertinent to what is happening or could happen today - nor do I wish to think that anything similar might happen again in the future. However, as I hope you will agree by the time I finish my presentation, it does raise questions. And if we take a close look at our society today, with its many cultural facets and ideals, those questions might actually correspond to contemporary issues. After all, we really know very little about what goes on outside the spheres of our everyday lives and work. Personally, I only have to look at what is happening in Italy to confirm that I have understood nothing about

[7] On the many meanings of the word 'barbarian' cf. CRACCO RUGGINI, L., «I Barbari in Italia nei secoli dell'Impero», in *Magistra Barbaritas. I Barbari in Italia*, Milano 1984, pp. 3-51.
[8] GOFFART, W., *Barbarian Tides. The Migration Age and the Later Roman Empire*, Philadelphia 2006, in part. p. 234.
[9] CAVANNA, A., «Diritto e società nei Regni ostrogoto e longobardo», in CAVANNA, A., *Scritti (1968-2002)*, Napoli 2007, vol. I, pp. 513-574, especially pp. 516-517.

the society in which I live, and my only consolation is that I am not the only one to have - and to suffer - this feeling.

Let us return, then, to the barbarians of antiquity. After decades and centuries of migrations, they began to form monarchical governments based not only on the strength of arms (to defend themselves from neighboring "political entities"), but also on consensus among the many ethnicities living in their kingdoms[10].

More recent, authoritative historiographers tend to play down the clear contrast between Romans and Barbarians that was typical of 19th-century analyses (despite some dramatic evidence in both Christian and pagan literature at the time of the invasions)[11]. Nonetheless, the distinctive traits of early medieval "*barbarian civilization*"[12] cannot be ignored, nor can the fact that some of the conquerors and some of the conquered were still deeply attached to their traditions. Indeed, barbarian rulers had no choice but to take this attachment into account when making laws - regardless of whether those laws maintained distinctions or were, conversely,

[10] WICKHAM, CH., «Consensus and assemblies in the Romano-Germanic Kingdoms», in EPP, V., MEYER CH., (eds.), *Recht und Konsens im Fruehen Mittelalter*, Ostfildern 2017 [Vorträge und Forschungen, 82], pp. 389-426, especially pp. 416 e 423. For a general reconstruction of the history of these centuries, cf. WICKHAM, CH., *Framing Early Middle Ages, Europe and the Mediterranean, 400-800*, Oxford 2005.

[11] I will limit myself to citing the following works: PADOA SCHIOPPA, A., «Discorso conclusivo», in *La giustizia nell'alto medioevo (secoli V-VIII)*, (Settimane di studio del Centro Italiano di Studi sull'Alto Medioevo (= C.I.S.A.M.), XLII), t. II, Spoleto, 1995, pp. 1241-1276, especially pp. 1248-1249; VON FALKENHAUSEN, V., «I barbari in Italia nella storiografia bizantina» and CILENTO, N., «La storiografia nell'età barbarica», in *Magistra Barbaritas* (cited in fn. 7), respectively pp. 301-316 and 317-350; AZARA, C., *L'ideologia del potere regio nel Papato altomedievale (secoli VI-VIII)*, Spoleto 1997 (Testi Studi Strumenti, 12), pp. 43-44; and DE GIOVANNI, L., «Imperatori, corti, attività legislativa nella antichità», in *Le corti nell'alto medioevo* (24-29 aprile 2014), Spoleto 2015 (Settimane di studio del C.I.S.A.M., LXII), t. I, pp. 357-384, especially pp. 361-362.

[12] CAVANNA, A., «La civiltà giuridica longobarda. I L'editto di Rotari e la penetrazione del germanesimo nella tradizione giuridica medievale», in CAVANNA, A., *Scritti* cited in fn. 9, pp. 359-438, especially p. 360. In addition, we should not forget the Gian Piero Bognetti's fundamental studies on this period, reprinted in BOGNETTI, G. P., *L'età longobarda*, Milano 1966 and POHL, W., «Gregorio Magno e il Regno dei Longobardi», in AZARA, C. (ed.), *Gregorio Magno, l'Impero e i "Regna"*, Atti dell'incontro internazionale di studio dell'Università degli Studi di Salerno (20 settembre-1 ottobre 2004), Firenze 2008 pp. 15-28.

common to both fellow barbarians (including their "followers") and conquered peoples.

From the first point of view, it is undeniable that every barbarian political order settled and established itself on top of a "*much earlier ancient cultural substrate*"[13]. At this point, we might ask ourselves: which cultural substrate? In terms of Italy, we might ask ourselves: was it the Roman one or the Gothic one? We could ask the same question for other settlements in other European territories, first and foremost that of the Visigoths and the Burgundians in the "Romanized" territories of Gaul before the Franks' conquest.

It is certainly even more difficult to reconstruct what cultural or identity-making substrate the Germanic peoples had to give up during their migrations - despite the differences within single Germanic groups, which has raised doubts as to whether it is even appropriate to use the term "Germanic" at all[14]. Similarly, we cannot know what "new" and different substrate was waiting for second-, third- and fourth-generation barbarian migrants when they arrived in territories that had already been occupied (though perhaps not yet settled) by different peoples at an earlier date[15].

Thus, what kind of relationships did "indigenous" populations and migrants establish each time in the different territories? How much were the rulers able - or willing - to intervene in those relationships? Was there contact between the different traditions, either by way of imitation or simply because the legal concepts and principles were similar? Some scholars have examined these questions in depth: Ennio Cortese looked at the Lombard kingdom, and Gian Paolo Massetto focused on

[13] FUMAGALLI, V., «Le vicende delle formule giudiziarie», in L*a giustizia nell'alto medioevo (secoli V-VIII*) cited in fn. 11, t. II, pp. 607-619, especially pp. 608-610.
[14] *Supra* fn. 9.
[15] On the Goths: WOOD, I., «Social Relations in the Visigothic Kingdom from the Fifth to the Seventh Century: the example of Merida», in HEATHER, P. (ed.), *The Visigoths from the Migration Period to the Seventh Century. An Ethnographic Perspective*, San Marino 1999, pp. 191-223, especially pp. 191-192.

legal practice following the fall of the Lombard kingdom up to the 11th century. They showed that there indeed was contact between the legal instruments of different traditions, indicating a more general circulation of ideas. According to Cortese, "concepts" that previous historiographers had described as "Germanic" or authentically "Roman" (for example, *thingatio* and *mancipatio*) ended up having similar effects, at least from a legal point of view[16]. He also noted correspondence and similarity between the "Germanic" *wergeld* and the "Roman" *compensatio* following an *iniuria* (in accordance with a formula that also repeatedly appeared in Salic law[17]), as well as between *sacramentum de asto* and *ius iurandum calumpniae* for what concerned initiating legal action[18]. Gian Paolo Massetto showed how notaries, when assisting parties who wanted certainty in their dealings and relationships, relied on circulating models that ended up taking little account of their ethnic roots - this was due to the "unifying" and "harmonizing" effect of custom[19]. Many other cases of models in circulation concerned trials and their adversarial or inquisitorial structure[20]. However, these observations must not (and in any case cannot) be construed to the extreme, meaning they should not be cited as evidence against the existence or continuity of a "barbarian" legal tradition - one that was

[16] CORTESE, E., «Nostalgie di Romanità: leggi e legislatori nell'alto medioevo barbarico», in *Ideologie e pratiche del reimpiego nell'alto medioevo* (16-21 aprile 1998), Spoleto 1999 (Settimane di Studio del C.I.S.A.M.), XLVI), t. I, pp. 484-510.

[17] WOOD, I., «Burgundian Law-Making, 451-534», in *Italian Review of Legal History* 3 (2017), pp. 16-17 and fn. 106, with reference to *M.G.H., Legum* s. I, *Legum Nationum Germanicarum*, t. II, p. I, *Leges Burgundionum*, ed. DE SALIS, R., Hannoverae 1892 (1973 reprint), *Forma et expositio legum – Lex Romana Burgundionum* II, *De homicidiis*; see also BRUGUIERE, M. B., «Réflections sur la crise de la justice en Occident à la fin de l'antiquité. L'apport de la littérature», in *La giustizia nell'alto medioevo (secoli V-VIII*) cited in fn. 11, pp. 165-215, especially in fn. 81, regarding criminal settlements in the Roman world and barbarian settlements.

[18] CORTESE, E., «Il processo longobardo», in *La giustizia nell'alto medioevo (secoli V-VIII*) cited in fn. 11, p. 633 with reference to Liut. 71.

[19] MASSETTO G. P., «Elementi della tradizione romana in atti negoziali altomedievali», in *Ideologie e pratiche* cited in fn. 16, t. I, pp. 511-590 and in MASSETTO, G.P., *Scritti di storia giuridica*, vol. I, Milano, 2017, pp. 5-84, especially pp. 76-84 (pp. 77 and 79 for the cited terms).

[20] LOSCHIAVO, L., *Figure di testimoni e modelli processuali tra Antichità e primo Medioevo*, Milano 2004, and on Frankish trials, see also: LOSCHIAVO, L., *L'età del passaggio. All'alba del diritto comune europeo (secoli III-VII)*, Torino 2016, pp. 184-188.

characterized by original forms of association and typically "barbarian" legal concepts [21].

One concept that did arise from a new era of more complete coexistence was that of "scandal". This term was nowhere to be found in Roman law sources; it was used in Christian texts and councils in the early centuries to indicate, first and foremost, an obstacle to community life. It represented the collective condemnation of a fact or act, to the point that it triggered a tumultuous reaction. Once it became part of the common vernacular, the term ended up being used to describe crimes of rioting and sedition as well, in certain cases corresponding to the Roman-law *crimen lesae maiestatis*[22].

Even the importance of a criminal's mental state was the result of a mixing of cultures, as penitential laws became part of/came to influence Germanic law. According to Adriano Cavanna, this was not merely a "borrowing of text" but rather an actual "*borrowing of ideas, of general principles, of new spiritual paths*"[23] - and

[21] On the difference between the Germanic *gewere* and the Roman *possessio*, cf. LOSCHIAVO, L., *L'età del passaggio* cited in fn. 20, pp. 130-133.

[22] For example, think of the various forms of *scandalum* appearing in Bavarian law and in Rothari's edicts to describe a kind of rioting: *Lex Baiuwariorum*, ed. MERKEL, I., in *Monumenta Germaniae Historica* (= *M.G.H.), Legum* t. III, Hannoverae, 1863 (reprint 1965), *Textus legis primus*, II *De ducibus et eius causis, qui ad eum pertinent*, 4, p. 283: *Si quis in exercitu, quem rex ordinavit, vel dux de provincia illa, scandalum excitaverit infra propria hoste* […] *Et ille usus erandicandus est, ut non fiat. Solet enim propter pabula equorum vel per ligna fieri scandalum, quando aliqui defendere volunt casas vel scurias, ubi foenum vel granum inveniunt* […]. On the punishment for rioting handed down by the court, see ibidem, 10, p. 286: *Si quis in curte ducis scandalum commiserit, ut ibi pugna fiat, per superbiam suam aut per ebrietatem* […] and *Edictus Rothari* in *Edictus Langobardorum*, in M.G.H., *Leges* t. IV, Hannoverae 1865 (reprin. 1965), *Edictus Rothari*, 8, p. 13: *Si quis in concilio vel in quolibet conventu scandalum commiserit* […]. See also CAVANNA, A., «Nuovi problemi intorno alle fonti dell'editto di Rotari» (1968), in CAVANNA, A., *Scritti* cited in fn. 9, pp. 3-110, especially p. 35. In this regard, I would like to thank Professor Raffaella Bianchi Riva for providing me with her forthcoming article on scandal. The term *scandalum* examined therein might correspond to the term *clamor* as used in the *Leges Alamannorum*, in *M.G.H., Leges Nationes Germanicarum*, t. V, p. 1, *Leges Alamannorum. Editio Altera*, Hannoverae 1966, hrsg. Lehmann K., Lex XXXIII, pp. 90-91: *Si quis in curte ducis pugna comiserit, et ibi clamor orta fuerit, et concursio populi facta fuerit per eius commissum* […]. *Ille autem per cuius voce vel opere haec contentio orta fuerit* […].

[23] CAVANNA, A., «Il problema delle origini del tentativo nella storia del diritto italiano» (1970), now in CAVANNA A., *Scritti* cited in fn. 9, pp. 111-270, especially pp. 259 ss.; the quote is from p. 265. For more on the subsumption of penitential laws under Germanic legislation, cf. LEHMANN, K.,

we could add that it was a sign these new spiritual paths were changing how society and social relationships were viewed, and that this new view was taking hold over time.

All of this should suffice to illustrate a two-way cultural exchange.

3. Peace and justice for conquerors and indigenous peoples

The second aspect I would like to highlight regards the roles attributed to: (a) writing laws down in legal texts (even though it is well known that written laws were not the only source of law used in everyday life and in court)[24]; and (b) the correct application of the law by judges.

According to the individual legislators at the time, almost all of the oldest texts - at least, the parts that have survived - were justified on the fact that they aimed

«Praefatio, I, De historia legum alamannorum», in *Leges Alamannorum* cited in fn. 22, pp. 9-10, which examines Alemannic laws and the case of the penitential by Theodore of Canterbury (Theodore of Tarsus). On the latter and its influence on Anglo-Saxon law, cf. Jurasinski, S., *The Old English Penitentials and Anglo-Saxon Law*, Cambridge 2015. For references to other studies, cf. Padoa Schioppa, A., «Discorso conclusive», cited in fn. 11, especially pp. 1263-1264.

[24] See also for bibliographical references Storti, C., «Le dimensioni giuridiche della curtis regia longobarda», in *Le corti nell'alto medioevo* cited in fn. 11, t. I, pp. 429-472, especially pp. 437 ss. and 452-462.

to ensure "quiet", according to the *Edictum Theodorici*[25], the *Leges Burgundionum*[26], and the *Edictum* of the Lombard King Rotharis[27], and, more broadly, peace and order: not just in a general sense, but also among different ethnic groups[28]. Writing down laws was thus attributed the role of maintaining order, or at least of limiting disorder - for example, to pacify the population after specific episodes of anarchy or war, or to prevent one half of the population from retaliating against the other, or

[25] *Edictum Theoderici*, in *Magni Aurelii Cassiodori Variarum libri XII*, Parisiis, 1579 (reprint of *Edictum Theoderici Regis Italiae*, a cura di FALASCHI, L., Milano 1966), inc. [...] *Nos tamen cogitantes generalitatis quietem, et ante oculos habentes illa quae possunt saepe contingere* […]. As is well known, historiographers long debated the authorship of this text. The debate was reconstructed by Giulio Vismara, who added arguments in support of the thesis that it was not Theodoric the Great but rather Theodoric II, the Visigoth king of the Kingdom of Toulouse, who was the author (among the various works on this topic, cf.: VISMARA, G., «Edictum Theoderici (1955-1967) », in VISMARA, G., *Scritti di Storia giuridica*, 1, *Fonti del diritto nei Regni germanici*, Milano 1987, pp. 3-338, especially pp. 40 and 326-338, and VISMARA, G., «Le fonti del diritto romano nell'alto medioevo secondo la più recente storiografia (1955-1980)» (1981), in VISMARA, G., *Scritti di storia giuridica*, 1, pp. 515-546, pp. 522-529. For a summary of the historiographical debate, see CAVANNA, A., «Nuovi problemi intorno alle fonti» cited in fn. 22, especially pp. 17-31, and for an analysis of specific laws see, for example, p. 51 ss.; CAVANNA, A., «Diritto e società nei regni ostrogoto e longobardo», cited in fn. 9, pp. 526 ss. For more recent debate and new arguments to support attributing authorship to Theodoric the Great, see LOSCHIAVO, L., «Insediamenti barbarici e modelli di coesistenza nell'Italia altomedievale: il Regno degli Ostrogoti», in *Immigrazione e integrazione* dalla prospettiva globale alle realtà locali; I, a cura di RIMOLI, F., Napoli 2014, vol. I, pp. 317-348 especially pp. 338 ss.

[26] *Leges Burgundionum* cited in fn. 17, *Liber Constitutionum, prima Constitutio*, 1, pp. 29-30: *Vir gloriosissimus Gundobadus rex Burgundionum. Cum de parentum nostrisque constitutionibus pro quiete et utilitate populi nostri inpensius cogitemus, quiid potissimum de singulis causis et titulis honestati, disciplinae, rationi et iustitiae conveniret, et coram positis obtimatibus nostris universa pensavimus, et tam nostram quam eorum sententiam mansuris in evum legibus sumpsimus statuta praescribi*.

[27] *Edictus Rothari* cited in fn. 22, *Incipit prologus* p. 2: […] *quatinus liceat unumquemque salva lege et iustitia quiete vivere et propter opinionem contra inimicos laborare, seque suosque defendere fines*. For a particular focus on issues straddling the Lombard and Carolingian kingdoms, see also STORTI, C., «Città e campagna nello specchio della giustizia alto medievale», in *Città e campagna nei secoli altomedievali*, Spoleto, 2009 (Settimane di studio del C.I.S.A.M., LVI), t. II, pp. 293-336, especially pp. 306-313.

[28] In the case of the Franks, the expression *pro tenore pacis* appeared in the legal framework of the kings Chilperic I and Chlothar I. This framework was made up of laws dictated by each of the two kings for their own legal system and then extended to the *communes provincias* through a treaty; the treaty also included additional obligations concerning guard services/watchkeeping and judges. The laws of Chilperic and Chlothar tended to regulate cases that might have occurred in the two legal systems in the same way (for example, the treatment of thieves), thereby avoiding clashes (M.G.H., Legum s. II, *Capitularia regum Francorum*, t. I, ed. Boretius A., Hannoverae, 1883 (reprint 1984), cap. 16-18, p. 4).

even to prevent legal injustices and bias in trials in which the parties belonged to different ethnic groups[29].

This social pacification role continued to be a permanent feature of public justice in the centuries to follow, up until the late Middle Ages[30].

Lest we forget another essential aim of those legal texts: ensuring peace and order was fundamental to extending and strengthening the population's approval of the royal court - in such "fluid" communities, this was the only way for the king to reinforce his power over his subjects and reestablish trust in public justice. Indeed, justice had been in crisis during the Roman Empire - at least in the provinces - and society did not trust judges, who were considered biased and corrupt[31].

We might even add that early medieval legislators harbored just as much suspicion, if not distrust, of judges as those they were governing[32].

[29] WOOD, I., «Burgundian Law-Making, 451-534», in *Italian Review of Legal History* 3 (2017), pp. 8-10 text at fn. 43, with reference to *Liber Constitutionum* cited in fn. 17, cap. XXII, p. 60 *De removendis in negotio Romano patrociniis barbarorum*. In 501, immediately after defeating his adversary and brother Godegisel, Gundobad enacted laws to pacify his subjects, especially to avoid heavy retaliation on the part of the Burgundians againsts the Romans (who had supported his adversary). He also wanted to prevent injustice and bias on the part of Goths in legal proceedings that involved Romans as parties. On subsequent measures concerning appeals under Burgundian law, see PADOA SCHIOPPA, A., *Ricerche sull'appello nel diritto intermedio*, Milano 1967, vol. I, pp. 127-133.

[30] With particular reference to the Frankish and Anglo-Saxon world from the 9th century to the early modern period: HARDING, A., *Medieval Law and the Foundations of the State*, Oxford 2002, especially p. 22 ss.

[31] The justice system was in a profound crisis in late antiquity. Flaws had been identified in ordinary justice and public justice, specifically longs delays and distrust of judges, who were seen as biased. As is well known, this was such a problem that disputes were frequently resolved by going to an arbitrator or by reaching a settlement, even in criminal matters. This practice also contributed to (among other things) distancing medieval law from 'official' Roman law and the growth of vulgar law, which I mentioned above (Bruguière, "Réflections sur la crise" cited in fn. 17, especially in fn. 83 ss.). The public's distrust of the impartiality and fairness of 'official' justice did not change with the establishment of Barbarian kingdoms in Gaul in the 5th century-in that regard, critics at the time made no distinction between barbarian judges and Roman judges. See Bruguière, "Réflections" cited in fn. 17, especially p. 167.

[32] For a wider overview and further bibliographical references cf. STORTI, C., "Legislazione e circolazione di idee e modelli giuridici nei regni germanici" cited in fn. 1, § 6.

Thus, barbarian kingdoms attempted to use justice as the linchpin of their government and the main means of obtaining approval. They did so by ensuring that the solutions to conflicts of any kind between subjects were to be in the hands of the king and his delegates (in the royal court or in decentralized courts). The exception was the Kingdom of the Franks, which we might call a "lower intensity" kingdom[33]. In short, concentrating the jurisdictional function in the hands of the king and his judges was, first and foremost, a means of "pacifying" society.

Only by winning society's trust could rulers ensure a stable government - and they did so by ensuring peace and cohesion in their population or populations (if more than one coexisted in a kingdom). From a legal point of view, the era was undoubtedly defined by a ruler's ability to gain his subjects' approval of how justice was administered. Certain legal systems even permitted some form of a right to resist judges who applied the law inappropriately - a right that would go on to play a key role as associations of citizens evolved into the communes[34].

Thus, guaranteeing peace, order and tranquility for both foreigners/conquerors and indigenous peoples was the sign of a successful government.

It is no coincidence that we find this in the chronicles of *Orderic Vitalis*, a great admirer of the Norman king William the Conqueror. It was the 11th century, after the Battle of Hastings in 1066: the foreigners were Norman invaders, whereas

[33] Though both similarities and differences could be found: CAVANNA, A., «Nuovi problemi intorno alle fonti» cited in fn. 22, pp. 109-110 and also pp. 57, 61, 75, 77, 89. According to the preface to *Edictum Theoderici* cited in fn. 20, p. 6r: *Quaerelae ad nos plurimae pervenerunt intra provincias nonnullos legum praecepta calcare. Et quamvis nullus iniuste factum possit sub legum auctoritate defendere, Nos tamen cogitantes generalitatis quietem, et ante oculos habentes illa quae possunt saepe contingere, pro huismodi casibus terminandis praesentia iussimus edicta pendere: ut salva iuris publici reverentia, et legibus omnibus conctorum devotione servandis, quae Barbari Romanique sequi debeant super expressis articuis, edictis praesentibus evidenter cognoscat*.

[34] Most recently (and for the bibliographical references), see STORTI, C., Justice, peace and political dissent from the early Middle Ages to the communal Period", in *Italian Review of Legal History* 2 (2017), nr. 1.

the indigenous were the Angles, the Saxons, the Jutes and perhaps even some Danes or Norwegians left over from previous invasions.

In his territories of the Duchy of Normandy (in Neustria), William had introduced good laws and just judgments, equity for the poor and the rich, and excellent judges and governors[35]; he had eliminated unjust tax collection[36]; he ensured peace between foreigners and the indigenous; and he expressed and inflicted severe punishment on thieves, subversives and disturbers of the peace, regardless of whether they were foreigners or indigenous[37].

4. Conclusion

It is no surprise that diversity was protected in the early Middle Ages, because it was both the bedrock and driver of early medieval society - a foreigner was not by definition an enemy.

The situation began to change when, between the 11th and 12th centuries, citizens started forming sworn associations by taking an oath - these would become communes after the imperial privilege of the Peace of Constance in 1183 between the Lombard League cities and Emperor Frederick I of Swabia, known as Frederick Barbarossa. Peace, order and justice were thus guaranteed for these associations of citizens. In trade-intensive cities such as Pisa, this "peace" extended to certain categories of foreigners: first and foremost to merchants, "*who [came] from all over*

[35] Orderici Vitalis Angligenae, *Historia Ecclesiastica* in *Patrologiae cursus completus, Series latina*, Vol. 188, Parisiis, 1890, p. II, Liber IV, III Angli a Normannis vexantur, col. 311: *Justas leges et recta judicia ex consulta sapientum divitibus et pauperibus aeque sanxit, optimosque iudices et rectores per provinicias Neustriae constituit.*

[36] *Sacra cenobia et fundos illis datos regalibus privilegiis et tuitionibus ab injustis exactionibus liberavit.*

[37] *Omnibus tam advenis quam indigenis pacem in tota terra sua praeconis voce propalavit et super fures ac seditiosos patriaeque quietis contemptores, graves justasque ultiones rigide promulgavit.*

the world"[38]. It seems this marked the beginning of the practice of distinguishing between many categories of foreigners, which was typical of the late Middle Ages and early modern period, and which was based on the economic or political interest - if not the prestige - to be gained from having a relationship with a foreigner or foreigners[39]. The legal status of foreigners under medieval legal systems was significantly fragmented due to the various categories (of strangers) that existed, which included: professors and students; bankers and merchants; mercenaries and *condottieri*; ambassadors and representatives of other communes and countries; political and legal professionals (podestà, judges); and artisans and artists[40]. Nonetheless, even *miserabiles personae* such as preachers and pilgrims - who needed protection and assistance - were offered forms of protection[41]. But at this point I have said enough, and my time is up.

I would like to wind up my talk without drawing conclusions, but rather by raising some questions - questions about the past above all, but which could also be asked about the future consequences of the migration flows we are witnessing today.

[38] *Constitutum usus Pisanae civitatis*, § Nobis Pisanorum constituta in *I costituti della legge e dell'uso di Pisa, sec. XII. Edizione critica integrale del testo tradito dal codice Yale (ms. Beinecke library 415).* Studio introduttivo e testo con appendici a cura di P. Vignoli, Roma 2003, pp. 129-130; for bibliographical references see: SCHMITT-GAEDKE, G., *Die Constituta legis et usus von Pisa (1160). Gesetzbuch im Kosmos hochmittelalterlischer Rechtsgelehrteit*, Berlin 2009.

[39] COSTA, P., «Il "campo": un paradigma? Introduzione"», in AUGUSTI, E., MORONE, A. M., PIFFERI, M. (eds), *Il controllo dello straniero*, cit. in fn. 3, pp. 11-30, especially pp. 22-23.

[40] STORTI, C., «Motivi e forme di accoglienza dello straniero in età medievale», in CASSI, A. A. (ed.), *Ai margini della* civitas. *Figure giuridiche dell'altro tra medioevo e futuro*, a cura di Soveria Mannelli, 2013, pp. 61-77; STORTI, C., «Alcune considerazioni sul trattamento dello straniero in età medievale e moderna tra flessibilità e pragmatismo», in *Ius peregrinandi. Il fenomeno migratorio* cited in fn. 6, pp. 123-148.

[41] PIERGIOVANNI, V., «The Itinerant Merchant and the Fugitive Merchant in the Middle Ages», in MAYALI, L. and MART, M. M. (eds), *Of strangers and Foreigners (Late Antiquity-Middle Ages)*, Berkeley 1993, pp. 81-96; PIERGIOVANNI, V., «Tradizione normativa e mercantile e rapporti internazionali a Genova nel Medioevo», in *Legislazione e prassi istituzionale nell'Europa medievale. Tradizioni normative, ordinamenti, circolazione mercantile, (secoli XI – XV)*, Rossetti, G. (ed.), Napoli 2001 (Europa mediterranea, quaderni 15), pp. 355-366, especially pp. 356-357 on 12th-century commercial treaties.

If we look at the migrations of antiquity, historians have asked: in the long term, how much was society's general mentality influenced by differences in the legal aims, instruments and relationships of the original "indigenous" (largely Romanized) populations and those of the migrant "invaders"? What role did the progressive, albeit slow conversion of these "barbarians" to Christianity play in all of this?

However, if we look at the migrations of today, these "cross-cultural" influences are rarely taken into account, and when they are it is usually in a negative light - that is, they are seen as a threat to the principles and rules of Western civilization. But we need to look at this through a broader lens, and first and foremost in consideration of European legal spaces that are already witnessing the coexistence of groups of different origins, cultures and traditions. Thus, in situations in which the distinction between citizens and foreigners no longer exists, and in which different concepts of social relationships - and thus of law - come face to face in daily life (especially in the world of manufacturing and trade, or even more so in mixed marriages), the question is: what effects on "living law" are already being seen and can be imagined for the future?