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Magic and Law at the Border
The Early Medieval *Leges*

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Abstract

This article focuses on the concerns of the authorities as shown in the provisions on witchcraft and magic contained in the Romano-Germanic laws enacted from the sixth century (*leges*). These provisions shed light on what was prohibited and what was designated as magic; however, the attitude of the authorities towards magic and witchcraft was not univocal, mainly because of the religious and ethnic bipolarism underlying early European legislation on magic. Early medieval laws allow observing the formal expression of areas through which public concerns over the practice of magic operated. In most *leges* the use of magic was not punished as a religious offence, but rather for its destabilizing aspect regarding the social order. Moreover, the Church's attitude towards magic was not monolithic: the official Church coexisted with local magical customs. The early medieval *leges* confirm that magic is a category dependent on the perceiver, encompassing practices and beliefs that border on other features of human experience, such as religion and law itself.

Keywords: Early Middle Ages, Family-Based Society, Kingship, Magic, Romano-Germanic Laws

Beginning in the 6th century, the Germanic peoples who established kingdoms in the western parts of the old Roman Empire enacted several law codes (*leges*). The codes, composed in Latin, were partly influenced by Roman law (Dilcher and Distler 2006), and for this reason the specifics of the Germanic tradition in relation to magic cannot be easily deduced from the *leges* (Haid and Dillmann 2007). The early medieval decrees tell us what was prohibited and what was designated as magic, while disclosing some practices like divination (Herbers and Lehner 2021, 7-22), storm raising, the use of ligatures and *veneficium*. However, the decrees do not always indicate the contexts of these forbidden acts.[1] This article will not focus on

[1] On magic in the Middle Ages, Kieckhefer 1989 and Jolly 2002 are preparatory. See also Flint 1991, who establishes an emotional continuity be-

magical beliefs and practices in the Early Middle Ages but rather on the perception of the authorities, both secular and religious, as it emerges in the *leges*. The attitude of the authorities towards magic and witchcraft as it transpires in the laws is far from univocal. This is due to several reasons: the laws are partly contradictory because they show both the transition from paganism to Christianity and the move from a family-based society to the slow development of kingship. Religious, social and ethnic bipolarism constitutes the background of the early European legislation on magic. Moreover, these legal forms in transition should not only be understood in a merely diachronic fashion, but also in a synchronic sense; nor should the secular and ecclesiastical institutions be understood as monoliths.

According to the specific concern and scope of the various legislations, be it the wholeness and integrity of the person and his property, be it the establishment of kingship and the control of society, the legal sources showed different ways of looking at magic and the inconstant boundary between a skepticism related to the supposed power of the agents of magic and the condemnation of the demonic elements of magic and witchcraft. Furthermore, we will see that the Church's attitude towards magic was not one-sided: the official Church that commonly distinguished between superstition and religion coexisted alongside local beliefs associated with non-Christian magic. The evidence of the *leges* shows also that magic is a category that depends on the perceiver because it includes practices and beliefs that are on the border with other features of the human experience like religion, medicine[2] and law itself. Indeed, over the last decades, the possibility of keeping the distinction between magic and religion, for instance, has been challenged as untenable (Kahlos 2015).

1. The Visigoths and the Others: Magic with and without the Roman-Christian Influence

Based on the Codex Euricianus, a concise redaction of Roman law for use in the Visigothic Kingdom of Toulouse, the Visigothic king Leovigild (568/569-86) drew up a new codification for his consolidated kingdom. His successors extended the text, so that a revised version came into being in the mid of 7th century.

Three of twelve constitutions issued by Theodosius and devoted to divination and magic are incorporated into the *Lex Visigothorum*, as promulgated by Chindasuinth (642-53) in the second year of his rule. In the laws of the Visigoths that were strongly influenced by Roman law, the theme of magic is dealt with in an articulated way in title 2 (*De maleficis et consulentibus eos adque veneficis*) of Book VI (Di Cintio 2013, 131-43). Here both the penal reference and the *modus exponendi* follow the path of Roman legislation. The Visigothic compiler, while absorbing instances from Roman law, synthesizes them in a practical way that takes neither an explicitly religious nor ethical perspective. However, the tone is that of someone who wants to impose an ideology, and magic is prohibited as willfully harmful injury.

As can be understood from the initial paragraph, *Si ingenuus de salute vel morte hominis vaticinatores consulat*, which prohibits divination on the basis of Roman law, the Visigoths

tween magic and Christian religion, according to which the missionaries adapted and selectively adopted the magical beliefs and practices of the converts. In relation to Flint's work: Kieckhefer 1994 shifts attention to the rationality of magical phenomena, and Murray 1992 provides a social context of an ecclesiastical environment for magical-religious syncretism. Wood 1995 offers an analysis of the historical sources between Christianity and paganism that form the background to magical practices. The deconstructivist point of view of Hen 2015 concerns the inadequacy of the Christian historical sources of the Early Middle Ages as evidence of magical beliefs and practices.

[2] This aspect, not developed here, has been broadly dealt with in Niederhellmann 1983, 92-119.

stigmatize magic not only as being harmful to the physical integrity of the victim but also as an autonomous occult power, elusive to the central authority (Di Cintio 2013, 104; Scherer 2021).[3]

Since the early Principate, Roman emperors had wanted to restrain private soothsaying, which they believed to be connected with conspiracy and treason. By using magic as a political weapon, the imperial government aimed to control knowledge of the future (Kahlos 2015, 161). Divination was a dangerous practice from the royal point of view because prophecies about the health or future fate of the ruler might easily lead to disaffection within the kingdom.[4] As a consequence, Chindasuinth's legislation provided that both the client and the diviner should suffer whipping, forfeiture of property and enslavement if they were freemen, or sale overseas after punitive torture if they were slaves.

Qui de salute vel morte principis vel cuiuscumque hominis ariolos, aruspices vel vaticinatores consulit, una cum his, qui responderint consulentibus, ingenui si quidem flagellis cesi cum rebus omnibus fisco servituri adsocientur, aut a rege cui iusserit donati perpetuo servitio addicantur. (Zeumer 1902, 257)[5]

Another aspect of magic dealt with in the *Lex Visigothorum* is poisoning (title §2). The juxtaposition of the *maleficium* with poisoning in the *leges* follows the path of Roman law (Di Cintio 2013). In the following paragraph, as in Roman law, poisoning in the broad sense, that is even the mere preparation and administration of poison, is equated with actually killing by poisoning. Unlike the other *leges*, the Visigothic legislation imposes a death penalty in the case that the victim died and shows a sadistic tone in the description of the physical penalties inflicted (Kimmelmann 2011, 55-56):

De veneficis. Diversorum criminum noxii diverso sunt penarum genere feriendi. Hac primum ingenuos sive servos veneficos, id est, qui venena conficiunt, ista protinus vindicta sequatur, ut, venenatam potionem alicui dederint, et qui biberit mortuus exinde fuerit, illi etiam continuo subpliciis subditi morte sunt turpissima puniendi. Si certe poculo veneni potatus evaserit, in eius potestate tradendus est ille, qui dedit, ut de eo facere quod voluerit sui sit incunctanter arbitrii. (Zeumer 1902, 259)[6]

That poisoning could be looked at and dealt with in a different way in early medieval law is shown by the provisions made in *Pactus Legis Salicae* ch. 19, 1-2 (Elsakkers 2003, 251-57).[7]

[3] In this context, the classic division between white and black magic has no relevance. This classification reflects a perspective that is not that of the legislator: divination, for instance, considered as white magic, was condemned as a form of power in competition with the authority of the sovereign. Indeed, both Schneider 2004 (564) and Petzoldt 2001 (147) are critical of this classification.

[4] For conciliar condemnation of inquiry into the fate of the king V Tol. 4, VI Tol. 17 (King 1972, 147).

[5] Trans.: Freeborn people who consult diviners, enchanters or soothsayers about the health or death of the king or of any other man, together with those who give replies to people consulting them, shall be scourged, handed over to serve the fisc with all their property and be assigned in eternal servitude to whomever the king orders. Unless otherwise stated, all translations are mine.

[6] Trans. by Scott 1910, 204: "Concerning poisoners. Different kinds of crimes should be punished in different ways; and, in the first place, freemen or slaves who are guilty of preparing, or administering poison shall be punished in like manner; as for instance, if they should give poisoned drink to anyone and he should die in consequence; in such a case those who are guilty shall be put continuously to the torture, and be punished by the most ignominious of deaths. But if he who drank the poison should escape with his life, the party who administered it shall be given up into his power, to be disposed of absolutely as he may desire".

[7] The law book of the Salian Franks is attributed to Clovis (482-511), the founder of the Frankish Kingdom in Gaul. *Lex Salica* is transmitted in eight different versions (A, B, C, D, E, K, S, V). The *Pactus Legis Salicae* survives in the A and C recensions. While version A is considered to be a work of Clovis, and version C also originated in the Merovingian period, the other versions were compiled in the 8th and the 9th century.

Here the model of criminal justice in question changes and even homicide by poisoning is punished with a compensation equal to that due for the murder of a free man. If the attempt to kill with poison has no lethal results, the monetary penalty is lower.[8]

Si quis alteri maleficiis fecerit aut herbas dederit bibere ut moriatur, et ei fuerit adprobatum, mallobergo touuer(f)o sunt, denarios VIIIM qui faciunt solidos CC culpabilis iudicetur. Si quis alterum maleficium fecerit et ille cui factum fuerit evaserit, auctor sceletis, qui admisisse probatur vel conuictus fuerit mallobergo seolandouefa hoc est, MMD denarios qui faciunt solidos LXII semis culpabilis iudicetur. (Eckhardt 1962, 81-82)[9]

The terse parataxis of the Salic legislator contrasts with the emphatic hypotaxis of the Visigothic law, which is rich in adjectives; the neutral tone of the paragraphs shows that the Salic lawgiver neither legislated out of an ideology nor in continuity with Roman law. He also uses, in the case of witchcraft, the traditional method of dealing with offences: composition. The absence of capital and corporal punishment still reflects the practical concerns of the migration period. In relation to the interaction of Germanic law with a converted Christian order, it shows that the influence of Christianity that marked a turning point in developing notions of crime and punishment is still superficial in the area under Salic rule.

2. The Tension between the Desire of the Authority and the Local Reality

The permeation of Christian-Roman procedure into the laws of Chindasuinth introduces the question of the effectivity and actuality of Visigothic legislation. Did Visigothic written laws regulate contemporary behaviour or were they simply conventional repetitions of earlier material (Peters 2002, 188-89; Nehlsen 1977)? Indeed, written law in the Early Middle Ages represented royal desires; although there was no obvious demand for it in normal legal procedure, the inspiration could be ideological rather than practical in origin (Wormald 1977, 125).

The tension between the desire of the authority and the contemporary local reality can be investigated with regard to title §2 of the Visigothic laws, *De maleficis et consulentibus eos*. The last clause legislates against anyone who has committed a *maleficium* against human beings, animals, or natural assets such as vineyards or crops (Dutton 1995). This law is characterised by the accumulation of offenses, the lack of forms of restitution to be made to the victims, and the reference to the application of a generic retaliation and corporal punishment. This law also introduces the figure of the *inmissores tempestatum*, the invokers of tempests, and, exceptionally for secular laws that were issued as early as these, refers to forms of devilish idolatry. Indeed, Church law stressed the demonic elements of magic in general and witchcraft in particular far more than secular law codes. In it, the sorcerer is condemned to be paraded about the neighborhood after suffering lashing and scalping. And then is either to be kept in prison or else sent to the king for a decision about his fate.

[8] In the *Pactus Legis Salicae* (beginning of the 6th century) the theme of magic is dealt with in title §19 (*De maleficiis <hominum> vel herbis*) which contains four paragraphs of which the last two are not contained in all manuscripts and perhaps were added over time. In the paragraphs that make up the title, the term *maleficium* appears with various meanings: it indicates poison, magic and the set of substances that cause abortion.

[9] Trans.: If anyone has bewitched another or given herbs so that he dies, and it is proved, he shall be sentenced to 8000 *denarii*, which makes 200 shillings. If anyone has bewitched another and he who was thus treated shall escape, the author of the crime, who is proved to have committed it, shall be sentenced to 2500 *denarii*, which make 63 shillings.

De maleficis et consulentibus eos. Malefici vel inmissores tempestatum, qui quibusdam incantationibus grandines in vineis messibusque inmittere peribentur, vel hii, qui per invocationem demonum mentes hominum turbant, seu qui nocturna sacrificia demonibus celebrant eosque per invocationes nefarias nequiter invocant, ubicumque a iudice vel actore sive procuratore loci repperti fuerint vel detecti, ducentenis flagellis publice verbereuntur et decalvati deformiter decem convicinas possessiones circuire cogantur inviti, ut eorum alii corrigantur exemplis. (Zeumer 1902, 259-60)[10]

By indulging in the description of physical penalties that were to be inflicted, the legislators sound as if they were driven by a generic desire to punish magical deeds, without any differentiation between the severity of the offences.

Indeed, the phenomenon of the *inmissores tempestatum* should be read in the light of ecclesiastical literature as it reveals a peculiar aspect of magics in the Early Middle Ages: the relationship between pre-Christian popular beliefs and Christianisation, and between central legislation and local practices (Hen 2015, 198, speaks of the "thin Line between Magic and Religion"; see also Mériaux 2010). The condemnation of the *tempestari* is a motif that recurs in various ecclesiastical sources (Peters 2002, 194-200). However, many sources also suggest the existence of *defensores*, that is to say, individuals with the ability to keep storms away from the fields, to whom the farmers gave a part of their harvest in exchange for this magical service.[11] The Church thus did not restrict itself to critiquing of these pre-Christian practices but instead appropriated popular beliefs regarding meteorological phenomena by adapting them into the system of Christian thought (Lecouteux 1998). In several Lives of Saints, such as Fructuoso de Braga, the ability of the saint to dominate the natural elements to favour crops is narrated (Jiménez drive away storms Sánchez 2017b, 637), and elements were introduced into the liturgy to obtain the Lord's favour and thereby call rain or else drive away storms (Lecouteux 1998, 155-58).

Early medieval compromises with pagan magic were deliberate. Churchmen tolerated and even encouraged certain magic practices to avoid conflict with existing traditions or to appropriate for their own religion the spiritual aspirations associated with non-Christian magic.[12]

3. From an Ideological to a Practical Approach: Another Way of Regulating Crop Damage

Crop damage is approached in a totally different way in the *Lex Baiuvariorum* (XIII, 8).[13]

Si quis messes alterius initiaverit apud maleficias artes et inventus fuerit, cum XII solidis componat, quod aranscarti dicunt, et familiam eius et omnem substantiam eius vel pecora eius habeat in cura usque ad annum. Et si aliquid perdiderit homo ille de res suas in illo anno, illi reddat. Et si negare voluerit, cum XII sacramentales iuret aut cum campione cincto defendat se, hoc es pugna duorum. (von Schwind 1926, 410-11)[14]

[10] Trans. by Scott 1910, 204: "Concerning Malefactors and their Advisers. Enchanters, and invokers of tempests, who, by their incantations, bring hail-storms upon vineyards and fields of grain; or those who disturb the minds of men by the invocation of demons, or celebrate nocturnal sacrifices to devils, summoning them to their presence by infamous rites; all such persons detected, or found guilty of such offences by any judge, agent, or superintendent of the locality where these acts were committed, shall be publicly scourged with two hundred lashes; shall be scalped; and shall be dragged by force through ten villages of the neighborhood, as a warning to others".

[11] See Martino da Braga in *De correctione Rusticorum* (6th century); for this and other sources see Jiménez Sánchez 2017a. See also King 1972, 146.

[12] For missionary accommodation to pre-Christian rituals see Fruscione 2003, 119-22, 184.

[13] The first evidence of the Lex Baiuvariorum is found at the synod of Aschheim in 756. It is probably a transcript from 740 (Siems 2001; Landau 2004).

[14] Trans.: If any one destroys another's harvest with evil arts, activity called *aranscarti*, and is found, he shall

Here the legislator punishes, in the traditional restitutive way, *aranscarti*, that is "damage to the crops" (see OHG *are(a)n* "harvest", scardi "cut", and ON *skera* "to cut") caused by a magic spell (Kremer and Stricker 2018, 57-58).

In order to understand the perception and priority of the lawgiver, it is important to pay attention both to the position of the law that addresses crop damage within the overall legislation and in relation to the sanction that is imposed for the crime. The law on crop damage follows a group of laws which constitute one of the thematic and pictorial cores of the *leges*, one which deals with the countryside, animals and enclosures. The law on *aranscarti* is then followed by a penalty against anyone who takes possession of another's servant by helping him to escape. The lowest common denominator within this sequence of laws is thus the protection of property.

Therefore, the Bavarian law does not focus so much on a generic defense of Christian values against superstition and magic, nor does it express the fury of the legislator against those who practice them. Instead, this group of laws concentrates on the violation of an order, of an arrangement that concerns the heart of the Germanic laws which mainly deal with the protection of settlements, of human beings, and of the movable and immovable property that were part of it. The actuality of this law speaks to the long tradition of the Bavarian compound *aranscarti*, which clearly refers to the damage (*scarti*) of this good, the crop/harvest (*aran*) and offers a malleable definition of the offense (Mederer 1793; Fruscione 2021). Moreover, the penalty for the offence of *aranscarti* is traditionally restitutive. Alternatively, the case can be resolved with an oath or a duel, two institutions that also reflect a magical mentality of conflict resolution.

4. The Accusation of Witchcraft and the Needs of a Family-Based Society

The zealous and abrasive tone of the code of the Visigoths regarding magic and witchcraft is not shared by other law codes in the western parts of the old Roman Empire. Another difference between the law of the Visigoths and the latter is the relevance given to the regulation of witchcraft accusations.

The tension between the offence of witchcraft and the charge that a false accusation of witchcraft has been made is fundamental in the Early Middle Ages.[15] Most codes show that it was mainly a man who accused a woman of being a *stria*.[16] An exception is *Pactus Legis Salicae* 64, 1 (De herburgium):

> Si quis alterum herinburgium clamaverit, hoc est strioportio, aut illum, qui inium portare dicitur, ubi strias coccinant, et non potuerit adprobare, MMD denarios qui faciunt solidos LXII semis culpabilis iudicetur. (Eckhardt 1962, 230-31)[17]

compensate with 12 *solid*s, and his family and all his substance or cattle shall be confiscated for up to a year. And if that man has lost anything of his possessions in that year, he shall give it back to him. And if he chooses to deny it, then he has to exculpate with the help of the 12 oath-helpers or defend himself with a ringed champion, in a duel between two.

[15] A provision of the Burgundian Code (XXXIV, 3: *De divortiis*) represents one background of witchcraft accusations. The legislation enacted by Gundobad in the 6th century echoes earlier Roman Law. In it, we read that *maleficium*, a generic word indicating various magical practices, is one of the crimes (together with adultery and the violation of graves) that allow the husband to leave his wife (von Salis 1892).

[16] On terminological questions: Russell 1972, 15-16.

[17] He who calls another man a sorcerer, that is, a *strioportio* or one who is said to carry a cauldron in which witches brew, if he is not able to prove it, he shall be liable to pay twenty-five hundred *denarii*, i.e., sixty-two and one-half *solidi*.

The compensation for calling a man a *strioportio* is in all manuscripts smaller (one third) than the compensation for calling a woman a *stria*. The sorcerer is called here a *strioportio*, that is one who carries a cauldron in which the *stria* brew. The vernacular form *hereburgius* is related to ON *hverr*, OE *hwer* "cauldron" + SALFR *burjo, buro* "the person who carries" (Niederhellmann 1983, 115-16; Schmidt-Wiegand 1992, 584). According to Seebold, the term indicates "the son of the witch": the first part to be reported to MLG *herje, herge* "prostitute", MLG *hirgenson, herenson* "son of the devil" and the second GOT *baur*, ON *burr*, OE *byre* "son" (2012, 337). The accusation would be that of being the "son of the devil" as the "son of a witch".

Ethno-anthropological investigations support the evidence of the *leges*: indeed, in affinal relationship of the kind so meticulously regulated in the *leges*, accusations were more likely to be directed at women rather than men, and women were also more likely to live with their accusers. Affinal relationships characterized by a legal relationship, such as marriage, could provide an expanded social network and additional avenues for social support, but they could be problematic as it is difficult to merge families together. In many societies, witchcraft accusations seemed to occur most often between individuals who interacted frequently, such as close kin and neighbours, leading Peter Geschiere to famously describe "Witchcraft as the dark side of kinship" (2003, 43) in an article with that title. Using witchcraft accusations in order to take possession of the partner's goods or to dismiss a partner who is infertile or otherwise thought to be unsuitable might generally be a rapid and clear-cut means of doing so, and effective in protecting the reputation of the accuser from allegations of wrong-doing or unfair dismissal (Peacey 2020, 131).

The prevalence of laws regulating witchcraft accusations in the legislation of the Salian Franks,[18] the Alamanns[19] and the Lombards, not sufficiently evidenced by the research (Kaufmann 1998, 1617-18; Skinner 2001, 34-67), shows that the legislator of the time considered such accusations socially more harmful than witchcraft itself. Moreover, within the *Lex Salica* the compensation owed for calling a woman a witch is, in all manuscripts, greater (three times) than the compensation for calling a man a sorcerer.

5. The Protection of Women in the Edict of Rothari

How serious and disruptive a (false) witchcraft accusation made against a woman was considered to be, is shown in a detailed and exhaustive way in the Lombard legislation of king Rothari (643). Indeed, the *crimen nefandum* (nefarious crime) regulated in these chapters is not witchcraft, but falsely accusing a woman of being a *striga*. The intent of the early medieval legislator to limit the private accusations of witchcraft, evidently very widespread, is not me-

[18] *Pactus Legis Salicae* 64, 2: "Si quis mulierem ingenuam striam clamaverit (aut meretricem) et non potuerit adprobare in triplo MMD denarios qui faciunt solidos CLXXXVII et semis culpabilis iudicetur" (Eckhardt 1962, 230-31). Trans.: He who calls a free woman a witch (*stria* or *meretricem*) and is not able to prove it (called *faras* in the Malberg gloss) shall be liable to pay three times twenty-five hundred *denarii* (i.e., one hundred eighty-seven and one-half *solidi*).

[19] *Pactus Alamannorum* 32: "Si femina aliam stria aut erbaria clamaverit, sive rixam sive absente hoc dixit, solvat sol. XII" (Lehmann and Eckhardt 1926, 24). Trans.: She who calls an other woman a witch or a poisoner, whether it is said during a quarrel or in her absence, let her pay twelve *solidi.* The term *Pactus Alamannorum* denotes a fragment of an older Alemannic law book that only survives in Paris Lat. 10753. It is *communis opinio* that the short penitential catalogue dates back to the time of the Merovingian king Chlothar II (584-628/9). On the equation of *stria* with *erbaria* see Niederhellmann 1983, 114-15. The knowledge of herbs, an instrument of healing but also of death, gave the witch a power that was considered a threat. See Schmidt-Wiegand 2003.

rely confirmed by the Lombard laws (Müller 2017, 172-75). The loquacity of the Lombard legislator in paragraphs 197 and 198 reveals both the reasons and scopes of the accuser and the structural protection of the law.

De crimen nefandum. Si quis mundium de puella libera aut muliere habens eamque strigam, quod est mascam, clamaverit, excepto pater aut frater, ammittat mundium ipsius, ut supra, et illa potestatem habeat vult ad parentes, vult ad curtem regis cum rebus suis propriis se commendare, qui mundium eius in potestatem debeat habere. Et si vir ille negaverit, hoc crimen non dixissit, liceat eum se pureficare et mundium, sicut habuit, habere, si se pureficaverit. (Bluhme 1868, 48)[20]

Chapter 197 makes it clear to the man who owns the protection of the woman that he cannot take possession of the woman's properties received with the acquisition of her *mundium* "legal guardianship" by accusing her of witchcraft. The legislator protects the woman by inflicting a high sentence on the accuser if he cannot prove the woman's guilt. The paragraph refers mainly, but not only to the husband who accuses his wife of witchcraft. In order to avoid the dispersion of the family properties, in the Lombard marriage-law, the *mundium* of the wife was not a right that was acquired irrevocably by the husband. As a consequence of a witchcraft accusation, if unfounded, the woman either returns under the protection of her male family members, and bringing back her goods, or, if there are no males, the king becomes the owner of her *mundium* instead (Joye 2010, 33). One of the purposes of this law, therefore, is the protection of family property, which is one of the fundamental principles of Lombard law. By protecting the woman, the legislator also protects the consanguineal family.[21]

The strong and structured protection of women is supported by a system which is found within the laws.[22] In the earliest Lombard laws the wife givers seem to be superior to the wife takers. Indeed, in the Early Middle Ages consanguinity was still stronger than conjugality. Women who circulated between families bringing with them goods and honour, had a strong legal protection because at this stage of Lombard society the position of consanguineal kinship was still stronger than the position of the affinal kinship.

The case of a woman accused of witchcraft by someone who does not possess her *mundium* is addressed in chapter 198:

De crimen in puella iniectum, qui in alterius mundium est. Si quis puellam aut mulierem liberam, qui in alterius mundium est fornecariam aut histrigam clamaverit et pulsatus penitens manefestaverit, per furorem dixissit, tunc praeveat sacramentum cum duodecim sacramentalis suos, quod per furorem ipso nefando crimen dixissit, nam non de certa causa cognovissit. Tunc pro ipso vanum inproperii sermonem, quod non convenerat loqui, conponat solidos vigenti, et amplius non calumnietur. Nam

[20] Trans. by Fischer Drew 1973, 90: "On the nefarious crime. If he who possesses the guardianship of a free girl or a woman – with the exception of her father or brother – unjustly accused her of being a witch, quod est mascam, he shall lose her *mundium* as above and she shall have the right to choose whether she wishes to return to her relatives or to commend herself with her own property to the court of the king, who will then have her *mundium* in his control. And if the man denies that he accused her of this crime, he may clear himself by oath, and if he clears himself, he shall have her guardianship as before".

[21] Similarly, speaking about Liutprand's law which extended the inheritance of those fathers who died without legitimate sons to their daughters, Ross Balzaretti argues that they were made to protect family rather than women's interests (2005, 363).

[22] As Janet Nelson and Alice Rio wrote, women represented a highly prized asset and a crucial form of symbolic capital on one hand, but also a heavy financial burden, a liability, and a weakness in men's safeguarding of their honour. These conflicting characteristics – as both asset and burden – are evident in the two main topic categories where written law concerned itself with women: marriage and property (2013, 107).

si perseveraverit et dixerit, se posse probare, tunc per camphionem causa ipsa, id est per pugnam, ad dei iudicium decernatur. Et si provatum fuerit, illa sit culpabilis, sicut in hoc edictum legitur. Et si ille, qui crimen misit, provare non potuerit wergild ipsius mulieris secundum nationem suam conponere conpellatur. (Bluhme 1868, 48)[23]

In this chapter calling a woman *histriga* is not so much a specific legal charge as a form of general insult, much like calling her a *fornecariam* "whore".[24] If the offender/accuser is willing to withdraw the slander and admit that he did so in a moment of anger, he can clear himself with the help of 12 sacramentals and compensate the offense with the considerable sum of 20 *solidi*.

In order to understand the seriousness of this accusation, it is useful to compare the amount of the compensation of 20 *solidi* with the amount due to repay another major offence, which is covered in the same law-code: the compensation due to a man for calling him *arga* "coward" (Santoro 2002; Francovich Onesti 2013, 61-62). This offense is sanctioned in *Edictus Rothari* (title §381) with a lower amount of money, 12 *solidi*, despite *arga* being a particularly infamous accusation in a culture with military connotations such as the Lombard one, in which the survival of the group also depended on the courage of men. (Müller 2017, 288-89).

If the accuser is unwilling to withdraw the accusation, the possibility that the woman could be found guilty through a duel between the accuser and a representative of the woman's family arises. In the event of the accuser's defeat, however, he must repay the woman for the offence with an amount of money equal to her wergild (Rothari 189 and 376). Again, the offence is regulated with the traditional procedural tools of Lombard law: the wergild, the duel and the oath.

As most *leges*, Rothari's legislation also shows no emphasis on magic deeds. Moreover, the feminization of the "witch" does not concern the relationship between the woman and the authorities (Stratton 2014, 17): they were rather private and local accusations, aimed at matters of personal interest and punished as such.

6. Rothari 376*: The Authority of the Lombard Legislator between Superstition and Incredulity*

Chapter 376 legislates on the murder of someone else's *aldia* "half-free woman" or woman slave considered a *striga* (*quod est masca*). This law intervenes to protect the property of the free man. It is no coincidence that it is preceded by chapter 375 which deals with the right of property. The legislator establishes that the penalty to be imposed to the offender is a sum to be distributed in equal parts between the owner of the woman who was killed (compensation) and the king (fine/penalty).

[23] Trans. by Fischer Drew 1973, 90: "Concerning him who accuses the girl in the *mundium* of someone else of having committed an offence. If anyone accuses the girl or free woman in someone else's *mundium* of being a harlot or witch, and if it is clear that he spoke against her in uncontrolled wrath, he may then offer oath with twelve oath helpers to prove that he accused her of the offence of witchcraft in wrath and not with any certain knowledge. For making such an unfounded accusation, he shall pay twenty *solidi* as composition and he shall not be held further liable. But if he perseveres in his charge and says that he can prove it, the case shall be determined by the *camfio*, that is, by duel, according to the judgment of God. If he proves his charge by combat, then she shall be guilty and punished as provided in this code. But if he who accused her of the offence is not able to prove it, he shall be compelled to pay as composition an amount equal to the wergild of that woman as determined by the status to which she was born".

[24] The assimilation of the witch to the prostitute, in continuity with the Roman representation (Stratton 2007, 83), is also present in *Pactus Legis Salicae* 64, 2. Also the malbergic gloss *faras*, an Old German hapax, indicates the "streetwalker".

In the sum that is to be paid to the king, one can glimpse the beginnings of punishment, which often goes hand in hand with the affirmation of royal authority. The last part of the paragraph is revealing in this regard, in which the possibility is foreseen that a judge ordered to kill the woman. He is subjected to the same sanction: there is no room for individual actions and summary judgments in a time when the king and his legislator aspire to rise above local and personal judgements.

Nullus presumat haldiam alienam aut ancillam quasi strigam, quem dicunt mascam, occidere, quod christianis mentibus nullatenus credendum est nec possibilem, ut mulier hominem vivum intrinsecus possit comedere. Si quis de cetero talem inlecitam et nefandam rem penetrare presumpserit: si haldiam occiderit, conponat pro statum eius solidos 60, et insuper addat pro culpa solidos centum, medietatem regi et medietatem cuius aldia fuerit. Si autem ancilla fuerit, conponat pro statum eius, ut supra constitutum est, si ministiriales aut rusticana fuerit; et insuper pro culpa solidos 60, medietatem regi et medietatem cuius ancilla fuerit. Si vero iudex huic opus malum penetrare iusserit, ipse de suo proprio pena suprascripta conpona. (Bluhme 1868, 87)[25]

In chapter 376 the lawgiver, in addition to legislating, expresses opinions that can also help the historian to orient himself. The legislator affirms that he does not believe that a woman can eat a human being "from the inside"; he distances himself from such accusations and shows all his incredulity at a phenomenon that the Christian reason does not accept. The indication of the witch as a men devourer seems to refer to the idea of *striga-strix* of the Latin tradition, who fed on human flesh, even if the *intrinsecus* of the text leads us to think of forms of possession as devouring from within (Stratton 2007). The Lombard legislator in the 7th century considers this belief to be a form of superstition.[26]

Rothari's title §376 also opens the question of the social groups which were involved in witchcraft cases. In chapter 376 explicit reference is made to *aldiae* and to slaves. At the time, the subordinate social group under Lombard rule must have been predominantly of Italic or Roman origin. Therefore, we must take into consideration the possibility that Lombard beliefs met and merged with analogous phenomena of autochthonous origin (Gasparri 1983, 98-99). Moreover, it is remarkable that Rothari also contemplates the possibility that the slayer could be a *iudex*: the involvement of the Lombard ruling class beliefs in such matters would seem normal, despite the explicitly Christian and incredulous position assumed by the legislator.

[25] Trans. by Fischer Drew 1973, 126: "No one may presume to kill another man's *aldia* or woman slave as if she were a *striga*, which the people call *masca*, because it is in no way to be believed by Christian minds that it is possible that a woman can eat a living man from within. If anyone presumes to perpetrate such an illegal and impious act, that is, if he kills an *aldia* (for such a reason), he shall pay sixty *solidi* as composition according to her status and, in addition, he shall add 100 *solidi* for the guilt, half to the king and half to him whose *aldia* she was. If, moreover, she is a woman slave, he shall pay composition for her status as is provided above according to whether she is a household slave or a field slave (Rothari 130-136). In addition, he shall pay sixty *solidi* as composition for the guilt, half to the king and half to him whose slave she was. If indeed a judge has ordered him to perpetrate this evil act, then the judge shall pay composition according to the above written penalty from his own property".

[26] This opinion is at odds with paragraph 64, 3 of the *Pactus Legis Salicae*: "Si stria hominem commederit et ei fuerit adprobatum, mallobergo granderba, suntd enarii VIIIM qui faciunt solidos CC culpabilis iudicetur". Trans.: If a witch eats a man and it is proved, called *granderba* in the Malberg gloss, she shall be liable to pay eight thousand *denarii*, i.e., two hundred *solid.* This paragraph regulates the punishment to be imposed on the witch who devours a human being. Neither death penalty nor a physical punishment are inflicted, only a pecuniary punishment that is slightly higher than that imposed for the false accusation of witchcraft in the same paragraph.

The skeptical position of the Lombard legislator is extremely relevant within the history of diabolic magic. It is attested both in the *Capitulatio de Partibus Saxoniae*: "Si quis a diabulo deceptus crediderit secundum morem paganorum, virum aliquem aut feminam strigam esse et homines commedere […]" (Boretius 1883, 68) and, in later times, in canon law: according to the author of the *Canon Episcopi* (which possibly originated in an early 10th century penitential), witchcraft did not actually exist as a real physical manifestation, but only as deception, dream or phantasm. The belief in the reality of such deceptions is considered a heresy whereas the devil who inspires such beliefs is real (Bailey 2015, 375, 383).

7. On the Border Between Magic and Law

The belief in magic is attested also in other clauses of the Lombard legislation: the evidence of Rothari 368 suggests the use of magical herbs by mentioning the possibility that, during a duel, fighting men could have herbs on them that can alter the divine judgment: "*herbas, quod ad maleficias pertenit*" (Bluhme 1868, 85, emphasis mine).

By mentioning the forbidden (but not sanctioned!) use of magical herbs, the Lombard lawgiver ignores the fact that the duel itself is also based on a magical belief. Indeed, the legislator regulates matters of magic making unconscious use of institutions that come from a traditional, magical custom and are free of ecclesiastical character. And this, despite the fact that most of the written texts were composed by clerics, whose Christian view on daily life and social practices is beyond doubt. Thus, in Rothari 198, the truth of the accusation made against the woman was assessed in a duel between fighting men. Likewise, in the previously mentioned law of the Bavarian law-code, magic does not emerge only as a crime to be sanctioned but also as a means underlying the procedural tools of the oath and the duel.

The conditional curse of one's own power, made by touching the hair, chest or the sword on which the oath was taken, belongs in this magical-sacred area. Under the rule of Christianity, the pagan formulas of the oath were replaced by the oath to God and the saints, which was now to be sworn on the cross, on the gospels or on a reliquary (Munzel-Everling 2008, 1250). Magic was an element of law that was intended to influence the resolution of conflicts by means of particular rituals or words. The oath, the duel, the ordeal are experienced concretely as an affirmation of the law: the right word and the right gesture immediately determine and regenerate the law. In the archaic forms of law, the oath is nothing more than the displacement of the struggle for the law to the magical level, which directly addresses the other side, the opponent to be defeated (Luhmann 1987, 112).

8. Liutprand 84 and 85: Magic and Authority

The laws of Liutprand (727), in which Christianisation partially shaped the regulation of behaviours, add a new perspective to the idea of magic among the Lombards. In law 84, Liutprand condemns the consultation of *haruspices* – an offence to be compensated to the king with the payment of a sum equal to half of the *wergeld* of the offender and to be expiated according to the provisions of the Canons. In the same chapter Liutprand condemns and punishes in the same way traditional forms of rural practices, like the adoration of trees and springs.

Si quis timoris Dei immemor ad ariolus aut ad ariolas pro aruspiciis aut quilibuscumque responsis ab ipsis accipiendis ambolaverit, componat in sagro palatio medietatem pretii sui, sicut adpretiatus fuerit, tamquam si eum aliquis occisissit, et insuper agat penitentiam secundum canonum instituta. Simili

modo et qui ad arbore quam rustici sanctivum vocant, atque ad fontanas adoraverit, aut sacrilegium vel incantationis fecerit, similiter medietatem pretii sui conponat in sagro palatio. (Bluhme 1868, 141-42)[27]

In the following law (85), the lawgiver shows his skill in the implementation of the previous chapter by involving his officials in the search and condemnation of the soothsayers and by establishing fines equal to half of their wergild to those who evade these duties:

Si quis iudex aut sculdais atque saltarius vel deganus de loco, ubi arioli aut ariolas fuerit, neglexerit amodo in tres mensis eos exquirere et invenire, et per alios homines inventi fuerent, tunc conponat unusquisque de locum suum mediaetatem pretii sui, sicut supra legitur. (142)[28]

Liutprand's attention to anti-Christian behaviours opens a window on those magical practices, which although apparently not offensive to things or people, were offensive to Christian authority. Despite the similarity in the subject matters, Liutprand's tone in regulating the question of *haruspices* and pagan beliefs is more sober than that of the Visigothic legislator. The legislation of Liutprand places the legitimacy of his regulation in a religious dimension, in which the king himself participates. Indeed, the penalty incorporated both Lombard and ecclesiastical traditions (Everett, 2005, 353-55).

Regarding this law, Gasparri's point of view about Liutprand taking distance from the ancient pagan tradition of his people is too generic: it does not take into consideration that the weight of traditional customs was strong, despite the Christianisation and the fusion with the Romans; warrior values remained a priority within the world of the free, the *arimanni-exercitales* members of the royal army (1983, 120-25). Gasparri himself is quite far away from those old positions. As pointed out speaking about Rothari, the magical-pagan persistence, mainly in the rural areas (*rustici*), cannot be ascribed with certainty to any specific cultural tradition, be it "Roman" or "Lombard" (2005, 28).

The peculiarity of Liutprand 84 is that the acceptance of the Christian message, both in terms of the reception of specific canonical norms and in terms of an ethic-cultural approach, emerges in parallel with the role of the central authority and of the royal fisc. The employment of a network of secular local officials (*de loco*) in order to implement laws against magic shows the willingness of the king to control local societies of the Lombard kingdom through royal rules and royal officials (Delogu 1995, 290-94). Indeed, in order to keep control of his agents, the king established that the fines were due to the royal palace not only by *arioli aut ariolas*, but also by those officials who neglected to seek them (Nelson 1995, 411-12).

Conclusions

The regulation of magic in the *leges* is like a litmus paper which helps to reveal legal mentalities, and shows that in the early Middle Ages practices and beliefs crossed the boundaries between magic and religion. Even if the legislative framework had been Christian since the

[27] Trans. by Fischer Drew 1973, 180: "He who, unmindful of the wrath of God, goes to sorcerers or witches for the purpose of receiving divinations or answers of any kin from them, shall pay to the royal fisc as composition half of the price at which he would have been valued if someone had killed him, and in addition, shall do penance according to the established canon. In the same way, he who, like a rustic, prays to a tree as sacred, or adores springs, or who makes any sacrilegious incantation, shall also pay as composition a half of his price to the royal fisc".

[28] Trans. by Fischer Drew 1973, 181: "If any judge or *schultheis* or forester or *deganus* of the place where there are sorcerers or witches neglects to seek them out and find them within three months and they are found by other men, then each of the named officials from that place shall pay half of his worth as composition, just as is read above […]".

earliest *leges*, the presence of pagan traditions, of which it is impossible to tell if they were Germanic or Roman, emerges from the laws of the legislations. The idea that magic and religion are to be considered as opposite poles is contradicted by the sources. They show a functional syncretism within a social environment that on the one hand is in continuous transformation and on the other remains attached to past practices that survived the conversion. Moreover, the legal sources show an inconstant boundary between a skepticism related to the supposed power and practices of magician and witches and the condemnation of the demonic elements of magic as something that was both real and effective.

By reading the laws of the *leges* on magic we can leave for a moment the skeptical point of view of the historian who despairs reading an early medieval legal source that is not a copy of Roman legislation. In matters of magic, the influence of Roman-Christian penal law is not overwhelming and for this reason the accusation of witchcraft is not less prosecuted than witchcraft itself. Indeed, these laws show actuality and effectivity: the lawgiver legislates by making use of the procedural and penal tools that come from traditional customs. He uses also in the case of witchcraft, the restitutive method of dealing with offences. Moreover, the etic perspective shows that, while regulating matters of magic, the legislator makes use of some institutions based on a magical mentality: oath and duel are concretely experienced as an affirmation of the law. The taking of an oath, for instance, occurs according to a ritual set out in words and forms that belong in the magical-sacred area.

In the *leges* the regulation of magic emphasizes also the border between a family-based society and kingship. Free from the distorting mirror of Christian ideology, the legislator is in fact concerned with curbing hysteria and slander and with unmasking the interests behind anyone making false accusations of witchcraft. The lawgiver's priority is not simply the material damage caused by magical practices, but also the damage caused by false accusations of witchcraft, which can ruin the reputation of a woman and of her family group.

In most Roman-Germanic kingdoms, therefore, the religious offence was only one of the concerns of the legislator and magic was not repressed as a form of heresy or of pagan superstition, but instead is sanctioned in those forms that cause material offense. The only exception is represented by the Roman-Christian laws of the Visigoths and the Lombard Liutprand. But while in the former the lawgiver legislates out of an ideology and is animated by a rush of witch hunts and he focuses on corporal punishment and death penalty, in the latter he is driven by the need to sanction such local conduct that was harmful to his temporal power and to his position as a Christian authority.

Liutprand's laws corncerning magic allow us to glimpse traces of a royal authority that deliberately operates crimes and punishments to its extent: beyond the material damage caused by magic to its subjects, this authority feels offended by magic as it was a form of power at odds with the king's will to control local societies within his kingdom. Consequently, by punishing magicians and fortune-tellers, Liutprand claims for himself *medietate pretii sui*.

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