OUTLINE — LECTURE 3

NON-ROMAN LAW IN THE ROMAN EMPIRE

1. Citizen and non-citizen, mixtures of Roman and non-Roman law.
2. The example of Greco-Roman Egypt
3. The mercantile law of the Eastern Mediterranean, e.g., the giving of arrha or earnest money.
4. Celtic elements in the West? The Ligurian inheritance law?
5. Bottom line: the most important non-Roman and non-canonic elements in Western European law that are not the product of medieval and modern developments are probably, at least in some sense, Germanic in origin.

ÆTHELBERT’S ‘CODE’

Æthelbert was king of Kent, today a small county in the very southeast of England. The boundaries of his kingdom were probably roughly those of the modern county.

1. The circumstances

From Bede, Ecclesiastical History of the English Nation (completed around 732) [From Dorothy Whitelock trans. in English Historical Documents, 2d ed., vol. 1, pp. 663–64]:

‘In the year of our Lord's incarnation 616, which is the 21st year after Augustine with his companions was sent [by Pope Gregory the Great] to preach to the nation of the English, Ethelbert, king of the people of Kent, after his temporal kingdom which he held most gloriously for 56 years, entered into the eternal joys of the heavenly kingdom. He was indeed the third of the kings in the nation of the English to hold dominion over all their southern provinces, which are divided from the northern by the river Humber and boundaries adjoining it; but the first of them all to ascend to the heavenly kingdom.

‘King Ethelbert died on 24 February . . . and was buried in the chapel of St Martin within the church of the blessed Apostles Peter and Paul, where also Queen Berhta lies buried. Among the other benefits which in his care for his people he conferred on them, he also established for them with the advice of his counsellors [cum consilio sapientium] judicial decrees [decreta iudicialia] after the example of the Romans [iuxta exempla Romanorum], which, written in the English language, are preserved to this day and observed by them; in which he first laid down how he who would steal any of the property of the Church, of the bishop, or of other orders, ought to make amends for it, desiring to give protection to those whom, along with their teaching, he had received.’

Is Bede’s account to be believed?
1. Did Æthelbert become a Christian?
2. Does the text that Bede had correspond to ours? (We may be missing a prologue. The other two Kentish laws that survive from later in the 7th century both have prologues: Hlothere and Eadric (673 X 686): “Hlothere and Eadric, kings of Kent, extended the laws which their predecessors had made by the decrees which are stated below.” Wihtred (probably 695): “During the sovereignty of Wihtred, the most gracious king of Kent, in the fifth year of his reign, the ninth Indiction, the sixth day of Rugern, in a place called Barham, there was assembled a deliberative council of the notables. There were present there Behtwald, the chief bishop of Britain, and the above-mentioned king; the bishop of Rohester was called Gefmund; and every order of the Church of the province expressed itself in unanimity with the loyal laity.”
3. Did St. Augustine of Canterbury bring literacy to Kent?
4. The possible role of Liudhard, Bertha’s bishop.

2. The Manuscript

3. Notes on the Words in Bede
1. *decreta iudicialia*. The phrase does not have a technical legal meaning, but *decretum* (the singular of *decreta*) does: a decision of the emperor in a specific legal case. *Iudicialia* is derived from *iudex*, which means ‘judge’. The Anglo-Saxon for *decreta iudicialia* is *domas*, which means ‘judgments’. Cf. the Spanish for the Visigothic Code: *fuero juzgo*, literally ‘the forum of the judge’.

2. The A-S word *ae* or *aew* also means law in a more general sense and is cognate with modGer *Ehe*, ‘marriage’. ‘Fundamental agreement’ might be a good translation. The earliest version of the Salic law of the Franks is called in Latin *pactum legis Salicae*, the agreement of the Salic law.

3. *iuxta exempla Romanorum*. Literally, “according to the examples of the Romans.” There is no Roman law in Æthelbert’s code, not even a hint. Does this simply mean a written law? or a secular law? or like what the Germanic kings were doing in areas that were thought of as still being parts of the Roman empire?

4. **Æthelbert’s Code cc. 1–7, 10 with a Literal Translation**


   10. *Gif frigman cyninge stele*, IX gyld. If a freeman steals from the king, let him pay forth 9 by payment.

5. **Method**

   1. Elaboration, most notably in cc. 32–71

   2. Analogy, implied in many of the provisions to the extent that we doubt that they are all real cases. It seems to be reasonably explicit in cc. 6–7.

6. **Outline of Æthelbert's Code**

   1. The Church cc. 1–7
2. The king cc. 8–17
3. Eorls cc. 18–19
4. Ceorls cc. 20–71
5. c. 20–31 mundbyrd, wergeld, property offenses
6. c. 32–71 personal injury, arranged from head to toe
7. Women cc. 72–77
8. Servants, slaves cc. 78–83

7. Basic Concepts

1. wergeld. *Wer* is cognate with Latin *vir*, a male person; *geld* is our word ‘gold’ but it’s broader: literally ‘man-payment’ or ‘man-price’.
2. mundbyrd. The *mund* part means ‘protection’; it is cognate with Latin *manus*, ‘hand’. The *byrd* part is harder, but it is probably related to our word ‘border’, hence *mundbyrd* is ‘area of protection’.
3. friþ pronounced frith, cognate with Modern German *Friede*, ‘peace’.
4. *bot* (‘compensation’) occurs very frequently particularly in the verbal form *gebete* (‘let him make compensation’);
5. *wite* (‘fine’, ‘penalty’) occurs only once in c.15, but there are a number of offenses to the king’s *mundbyrd*.
6. This is clearly not criminal law, but it’s not quite civil either.
7. One may doubt if these are absolute liability offenses.

8. The sorts and conditions of men: A comparison of Æthelbert’s code and Ine’s (West Saxon, roughly 695)

A TABLE OF WERGELDS

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<td>mundbyrd</td>
<td>wergeld</td>
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*a In Hlothere & Eadric 1.*
Price lists from London in the first half of the 10th century value an ox at 30 pennies, a cow at 20, a pig at 10, a sheep at 5. Probably no ordinary ceorl in Athelbert’s Kent could command 400 sheep, and precious few kingroups of ceorlas could.

9. An Insular Comparison

*From an Irish Penitential of c.800 (McNeil and Gamer p. 165):*

Ch.5 Of anger. 2. Anyone who kills his son or daughter does penance twenty-one years. Anyone who kills his mother or father does penance fourteen years. Anyone who kills his brother or sister or the sister of his mother or father, or the brother of his father or mother, does penance ten years: and this rule is to be followed to seven degrees both of the mother's and father's kin to the grandson and great-grandson and great-great-grandson, and the sons of the great-great-grandson, as far as the finger-nails. ... Seven years of penance are assigned for all other homicides; excepting persons in orders, such as a bishop or a priest, for the power to fix penance rests with the king who is over the laity, and with the bishop, whether it be exile for life, or penance for life. If the offender can pay fines, his penance is less in proportion.

Ch. 4 Of envy. 5. ... There are four cases in which it is right to find fault with the evil that is in a man who will not accept cure by means of entreaty and kindness: either to prevent someone else from abetting him to this evil; or to correct the evil itself; or to confirm the good; or out of compassion for him who does the evil. But anyone who does not do it for one of these four reasons, is a fault-finder, and does penance four days, or recites the hundred and fifty psalms naked.

10. The bottom line

a. An expression of the Volk, the people?—the simplest counterargument to this is the virtually no one in Aethelbert’s Kent could read, much less write.

b. Mystification?—this is a harder argument to counter, but the archaisms in the language do suggest that at least for the bodily offenses there’s an oral substratum

c. The missionaries trying to persuade the Kentings to accept compensation payments in lieu of an obligation to take revenge?—the counter-argument to this is that virtually every society that practices blood-feud also has compensation payments, and Tacitus confirms this for the Germanic peoples

d. An expression of value but not a solvent of controversies?

e. The beginnings of breaking out law and turning it into a specialized activity in a way in which we can see it?