OUTLINE — LECTURE 4

The Burgundian Code

Introduction.

1. The Burgundians crossed the Rhine sometime around 410 — kingdom centred in Worms, Speier and Strassbourg, overthrown by the Huns (in Roman employ) c.436 — the remnants regathered north of Lake Geneva and under Gundobad (r.474–516) established a kingdom up and down the Rhone. By 534 it was gone, divided among the Franks but it retained a territorial identity Burgundy, throughout the M.A. and beyond.

2. Territorial law and personal law. The Lex romana burgundionum (L.R.B.) for the Romans, the Lex Burgundionum (L.B.) for the Burgundians. Tit. 2–41 of the L.B. composed between 483, date of Euric’s Visigothic code, and 501 first dated constitution. Law remained in force after the fall of the kingdom, the loi Gombette. The date of the L.R.B. is uncertain but it was almost certainly composed before 506, the date of the massive compilation of Roman material that goes under the name of the Visigothic king Alaric.

Titles in the L.R.B. compared to L.B.

(See the notes following the Burgundian Code in Materials, § 3B.)

Most of the provisions of the L.R.B. contain references to known sources of Roman law. The most commonly cited are the Theodosian Code, the Sentences of Paul, a post-classical work that contains summaries of what seems to be material written by the classical jurist Paul, and the Institutes of Gaius, probably known to the author through an epitome. There are no citations in the L.B. but the correspondence, at least at the beginning, to the titles of the L.R.B. is pretty obvious:

L.R.B. 1. Concerning the gift of father or mother or the munificence of lords
L.B. 1. Of the privilege of bestowing gifts permitted to fathers, and concerning royal gifts and gratuities

L.R.B. 2. Concerning homicides
L.B. 2. Of murders (translation difference, it’s De homicidiis in the Latin of both)

L.R.B. 3. Concerning grants of freedom (libertatibus) [to slaves]
L.B. 3. Of the emancipation (De libertatibus) [of our slaves, only in some mss.]

Someone is clearly engaged in a comparative effort. It is unlikely to be Syagrius, but the fact that Saygrius is known to have mastered Burgundian shows what is possible.

Some Specific Comparisons of the two laws

(See the notes following in the Burgundian Code in Materials, § 3B.)
1. Homicide:
   a. L.R.B. tit. 2.1: “A man who commits homicide, be he freeborn or slave, if they are [sic] found outside of a church, shall be condemned to death.”
   
   L.R.B. tit. 2.2: “If, moreover, it is said that homicide happens to have been committed by accident of for the the sake of avoiding death, [the matter] is to be referred to the notice of the prince by report of the judge, according to the law in the body of Novels of Theodosius and Valentinians given to the patrician Maximus.”
   b. L.B. tit. 2.1: “If anyone presumes with boldness or rashness bent on injury to kill a native freeman of our people of any nation or a servant of the king, in any case a man of a barbarian tribe, let him make restitution (conponat) for the committed crime not otherwise than by the shedding of his own blood.”
   
   L.B. tit. 2.2. “We decree that this rule be added to the law by a reasonable provision, that if violence shall have been done by anyone to any person, so that he is injured by blows of lashes or by wounds, and if he pursues his persecutor and overcome by grief and indignation kills him, proof of the deed shall be afforded by the act itself or by suitable witnesses who can be believed. Then the guilty party shall be compelled to pay to the relatives of the person killed half his wergeld according to the status of the person: that is, if he shall have killed a noble of the highest class (optimas nobilis), we decree that the payment be set at one hundred fifty solidi, i.e., half his wergeld; if a person of middle class (mediocris), one hundred solidi; if a person of the lowest class (minor persona), seventy-five solidi.”

2. Proof:

I’m going to skip the materials on proof (see Mats., III–41, III–43). I think it’s fairly clear that the author of the L.R.B. is still thinking in terms of the Roman law of proof, with witnesses and documents. The Burgundians seem to be thinking about decisory oaths and ordeals. This is a wonderful group of texts on which to do a short paper.

3. Furtum prohibitum
   a. L.R.B. tit. 12.1: “If any freeman prohibits someone who is seeking his animals or his things from entering his house to investigate, let him be held for theft, so that the thing which is being sought be paid for fourfold, by the same reason that when he has suspicion of finding theft he enters with three free witnesses.”
   
   “12.2. But if a colonus or a slave prohibits someone who is so inquiring, his presumption shall be vindicated by the judges by torture of blows and by these [presumably the coloni] the things lost shall be paid for simply, after the fashion of Gaius who lays this down concerning prohibitions.”
[The reference is probably to G.I. 3.186, 188, 192. The references to the classical law are not exact. *Furtum prohibitum* is a pretorian four-fold penalty for Gaius, so 12.1 is reasonably accurate, but Gaius says nothing about 3 witnesses. The author may have confused *furtum prohibitum* with *futum conceptum*, where someone, with witnesses, finds stolen goods in another’s house. This is a three-fold penalty. Gaius says nothing about *coloni* or slaves.]

b. L.B. tit. 16.1: “If anyone has followed the tracks of an animal, and following those tracks comes to another’s house, and if he to whose house he comes prohibits his entering the house to seek back his property, let him who drives him away from his house when he is making inquiry about that which he seeks back be held for punishment as a thief, with the further provision that it is not permitted a woman to deny questioning [i.e., to refuse to reply to an inquiry].

“2. But if perhaps a slave or a maidservant prohibits this when his or her master is absent, let him who prohibits it be held by law liable to punishment as a thief.”

“3. If there is a way-pointer (tracker, *veius*) present and he has received his payment (*vegiatura*) and he to whom he points the way is not able to find them (the animals), let the way-pointer (tracker, *veius*) pay for the theft in fee simple because he lies that he has pointed the way to them.”

4. Damage by animals

a. L.R.B. tit. 13.1: “If anyone’s animal does damage, the owner shall either pay the estimate of the damage or turn over the animal; this we also wish to be observed concerning a dog or a biped, according to the form of Paul’s *Sentences* book one, under the title, “If a four-footed animal does *pauperies*”

[Not a quotation but close, except for the reference to the biped. The L.R.B. continues with material that has no direct parallel in the L.B., that suggests, at least to me, that the author of the L.R.B. was capable of thinking conceptually about fault in situations where there is damage to property. Another passage that would make a wonderful paper.]

b. L.B. tit. 18.1: “If any animal by chance or if any dog by bite, cause death to a man, we order that among Burgundians the ancient rule of blame be removed henceforth: because what happens by chance ought not to conduce to the loss or discomfiture of man. So that if among animals, a horse kills a horse unexpectedly, or an ox gores an ox, or a dog gnaws a dog, so that it is crippled, let the owner hand over the animal or dog through which the loss is seen to have been committed to him who suffers the loss.”

[Then follows a remarkable passage about the lance, with echoes of the XII, and no parallel in the L.R.B.: “In truth, if a lance or any kind of weapon shall have been thrown upon the ground or set there without}
intent to do harm (*simpliciter*), and if by accident a man or animal impales himself thereupon, we order that he to whom the weapon belongs shall pay nothing unless by chance he held the weapon in his own hands in such a manner that it could cause harm to a man.”

5. Divorce
   a. L.R.B. tit. 21.1-3: “1. By the consent of the father of each repudiation can be given and marriage dissolved.

   [Cf. Nov. Th. 12.1; (repealed in 439); C.J.5.17.8pr, 9pr (none of these mentions parental consent).]

   “2. But if the man’s part wishes to give repudiation, his wife contradicting, not otherwise shall it be allowed to him unless he convicts her of adultery, or poisoning, or bawdry; one of these crimes being proven, he shall be permitted to repudiate his wife and the marriage gift shall be recalled to his right.

   “3. But if the woman wants to repudiate the man, the husband unwilling, not otherwise shall it be allowed her, unless she prove the man a homicide or a violator of graves or a poisoner. And if she proves one of these crimes, she shall dismiss the man, and shall rightfully keep the gift granted for herself, and the shall vindicate the dowry that her husband made for her, according to the Theodosian law promulgated under the title, “Concerning repudiations.”

   [C.Th.3.16.1 (which also mentions the possibility of relegation as punishment for the woman)].”

   b. L.B. tit. 34: “1. If any woman leaves (puts aside) her husband to whom she is legally married, let her be smothered in mire.

   “2. If anyone wishes to put away his wife without cause, let him give her another payment such as he gave for her marriage price and let the amount of the fine be twelve *solidi*.

   “3. If by chance a man wishes to put away his wife, and is able to prove one of these three crimes against her, that is, adultery, witchcraft, or violation of graves, let him have full right to put her away: and let the judge pronounce the sentence of the law against her, just as should be done against criminals.

   “4. But if she admits none of these three crimes, let no man be permitted to put away his wife for any other crime. But if he chooses, he may go away from the home, leaving all household property behind, and his wife with their children may possess the property of her husband.”

The Law of the Burgundians and Æthelbert’s Code

The broader we go the more dangerous the comparisons are, but with so little to go on we have to range widely. In comparing Æthelberht’s to the Burgundian code we're stretching
across a quite long space over some gap in time from an area in which Roman law influence is weak to one in which it is quite strong, from one in which the overwhelming majority of the population is probably Germanic to one in which the Germanic people are a conquering minority, from one Germanic language family to a quite distant cousin. Much of what we see will be by way of contrast.

1. Compare the provisions in the two codes concerning women. In abduction cases, the Burgundians have a clear distinction based on the will of the woman. Does Æthelberht have such a distinction? (What do you make of Abt 77?) The Burgundians are clearly much tougher on divorce than is Æthelberht. (Does this help to interpret the Abt 76?)

2. If we make a broader comparison what do we find? How would you evaluate the following generalizations?
   a. The “if ... then” construction dominates in both codes but the LB is much more rhetorical.
   b. Æthelberht’s code is a code about compensation. This characteristic is less obvious in LB, but see the wergeld payments in 2.2 and the detailing of injuries to the teeth in tit. 16 on teeth.
   c. The LB has much more on succession, courts and procedure than does Abt.
   d. There is much more evidence of problems with status in LB than there is in Abt.
   e. The LB does not have the concept of "mund" nor of peace
   f. There is no evidence of influence of Roman law in Abt. Direct influence of Roman law in the LB is hard to spot but it exists. That it is there is beyond doubt because the LRB has basically the same structure of titles, and it seems relatively clear that someone, at least at the start, was doing a comparative law number. The question is the influence of Roman ideas in LB is much more difficult to evaluate. How would you generalize about it?

3. Possible Celtic influence on Aethelbert’s Code

   “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 [over the clergy], 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.”

4. Four ideas about what it all adds up to:
   a. An expression of the Volk
   b. Mystification
   c. An expression of value but not a solvent of controversies
   d. A beginning of a realization that law is different.

1. Cf. DuCange, op. cit., VI, 753–54. The word vegius seems to refer to some type of soothsayer, prophet, or diviner (harioli, vates, divini) whom the Saxons call vigilent and the Germans viclers, whence viglias means soothsayers, for these consult the auspices to determine whether slaves and animals have been taken away by theft so that they might point out where they are. The payment for providing this information is called vegiaturum. Others deduce a meaning from the Saxon word veg or vaeg, which means a road, thus they are road-pointers (vegii) who point out the tracks of animals. Cf. XCV.