

OUTLINE — LECTURE 11

Courts and Custom

Courts in the 12th and 13th Centuries:

1. The most solemn judgment given by the highest authority is that given in a general assembly.
 - a. Innocent IV deposed Frederick II at the council of Lyons in 1245
 - b. the parliaments of Edward I of England hear cases as well as passing legislation
 - c. the *parlement* of Paris and the French ‘estates general’
 - d. the *cortes* of Aragon and the *justicia*, the judicial department
 - e. the Castilian *cortes* and legislation
2. Multiplication of judges associated with the growth of administration
 - a. England: the itinerant justices of Henry I and the central royal courts of Henry II; judges of feudal and manorial courts
 - b. French royal justice associated with the expansion of the royal domain: *baillis* (English ‘bailiffs’) in the north *sénéchaux* (English ‘seneschals’) with associated *juges* in the south; feudal justice at least in some places
 - c. Castile—the judicial function of royal governors, *albedrios*, gave judgments called *fazanyas*, ‘precedent’
 - d. Aragon—characterized by urban justice (also characteristic of the Italian cities, the cities in the Low Countries, and some of the cities in modern Spain)
 - e. By the middle of the thirteenth century every bishop in the West had his own court staffed by a professional judge called an ‘official’.
 - f. Low-level rural justice

Customary law and customals

1. The problem of definition. The anthropologists’ definition of customary law won’t quite do because:
 - a. There were written records
 - b. There was written law
 - c. Academic study of law was happening
2. But some of the elements of the anthropologists’ customary law were there. The earl of Warenne and the *quo warranto* inquiries of Edward I. Efforts were made to preserve the customary system by writing it down in *coutumiers* (‘customals’, books of customary law).

Some general points about *coutumiers* and *fueros*

1. Chronology.
 - a. The English are the earliest. This is not surprising granted the early development of English institutions.

The Treatise on the Laws and Customs of England Commonly Called Glanvill (G. Hall ed. 1965) [1187 X 1189]

Bracton on the Laws and Customs of England (G. Woodbine ed. S. Thorne trans. 4 vols to date 1968–) (not entirely the work of Henry of Bratton (c.1210–1267), but a work of composite authorship the earliest parts of which probably date from the 1220's and 1230's)

- b. The Norman are the next. They differ from *Glanvill* and *Bracton* in that they make more effort to state substantive rules and in that Roman law influence is less obvious.

Coutumiers de Normandie (J. Tardif ed. 3 vols. Rouen 1881–1903) (includes the *Très ancien coutumier* (c. 1200) and *Summa de legibus in curia laicali* (c. 1250))

- c. The four great French ones from the end of the 13th century are all like *Bracton* in the sense that they attempt to integrate Roman and canon law. They are also like *Bracton* and *Glanvill* and unlike the Norman ones in that there is a speaker.

Le conseil de Pierre de Fontaines (M. Marnier ed. 1846) (written in the 1250's by a royal counsellor and bailiff of Vermandois, n.e. of Paris)

Li livres de jostice et plet (L. Rapetti ed. 1850) (a mélange of Roman-canon and customary law, rules of Orléans predominating in the customary parts, perhaps composed by a student associated with the university of Orléans, c. 1260)

Les établissements de Saint Louis (P. Viollet ed. 4 vols. 1881–1886) (a. 1273, cc. 1–9 concern the *prevoté* of Paris and give the work its title; chapters 10–175 of book 1 are based on the *coutume* of Touraine-Anjou, the primitive text of which is given in the third vol.; book 2 is based on the *coutume* of Orléans)

Phillippe de Beaumanoir, *Les coutumes de Beauvaisis* (A. Salmon ed. 2 vols. 1899) (first redaction 1283, by a ?poet, royal official and bailiff of the small customary jurisdiction of the county of Clermont en Beauvaisis near Paris)

- d. As in England the 14th century brings a departure from the learned law, but the glossed *coutume* of Burgundy is an exception.

La très ancienne coutume de Bretagne (M. Planiol ed. 1896) (anonymous coutumier in rule format from early 1300's)

Le grand coutumier de France (E. Laboulaye, R. Dareste eds. Paris 1869) (uncritical edition of the 14th c. coutumier of the Île de France)

Le coutumier bourguignon glosé: (fin du XIVe siècle) (Michel Petitjean et Marie-Louise Marchand eds., Paris 1982).

2. Two things stand out among the large number of things that we might say about these efforts:

- a. Most of these products seem to be connected with specialization and teaching if not professionalization. *Glanvill* and *Bracton* are consciously trying to describe the custom and practice of the king's central royal court, a relatively new institution at the time that they write and one that is greatly expanding. The first Norman customal may be associated with an attempt to write down the rules for English administrators; the second is probably to be associated with an attempt to give guidance to the French *bailli*. Pierre des Fontaines and Beaumanoir were both royal *baillis* and were almost

certainly trying to describe a jurisdiction that their successors would have to administer. The *Livres de justice et plet* and the *Établissements* are more complicated but may be connected with law study at Orléans.

- b. Every one these documents is affected by Roman law. *Glanvill*, *Bracton* and the Norman ones are written Latin. All of them make reference to ecclesiastical institutions and thereby indirectly to Roman law. Beyond that the amount of the learned law in them and they way in which it is used varies considerably. *Bracton* and the *Livres* have the most Roman and canon law in them, citing it frequently and consciously making comparisons. *Glanvill*, Pierre and Beaumanoir are further away, though they all know some Roman and canon law and it affects their habits of thought. Intellectual influence is harder to see in the Norman customals and the *Établissements*.

3. Spain was somewhat different.

Fuero de Leon (1017/20)

Usatges de Barcelona (almost certainly not, as it says, the work of Raymond Berenguer I (1035–76), probably the first 80 or so chapters were compiled c. 1162; whether the whole work dates from that time is controverted)

Fuero Viejo (1212), Castilian, but known only in a redaction of 1356

Fuero General (1234/53), Navarre

Fori Aragonum (1247)

Fuero Real (1252/55), a genuine work of Alfonso the Wise or of his court

Libro de las Leyes (later known as *Siete Partidas*) (1256/1325), this work seems to have gone through four redactions, how many of which date from the time of Alfons the Wise is controverted

Fori antiqui Valentiae (1301/41)

- a. The word is not *coutume* or *coutumier* but *fuero*. The word is derived from Latin *forum* and originally means a court, but the Spanish always have a notion that the *fuero* is in some sense promulgated by a king. Once promulgated, however, it becomes the privilege of the area for which it is promulgated. There are *fueros* for particular towns, a great many of them. Any town worthy of the name in medieval Spain had its own *fuero*. Certain types of people would have their own *fuero*. The *fuero viejo* of Castile in its original form was probably a *fuero* for the nobility. There were *fueros* for mozarabs, Christians living under Moslem rule, and for mudejars, Moslems living Christian rule.
- b. The continued vitality of the Visigoth code had considerable effect. Ferdinand III gave the *fuero juzgo* to many of the towns that he refounded in the areas that he took from the Moors.
- c. By the middle of the 13th century the Castilian monarchs came to regard the diversity among the *fueros* as a problem. It is difficult to organize a kingdom that is subject to a multiplicity of laws, and in Castile, precedent, *fazanya*, was also recognized as a source of law. Ferdinand III's giving of the *fuero juzgo* to the newly reconquered cities was probably an effort at unification. The *fuero real* the first effort of his son Alfonso X (el Sabio) was clearly designed to restrict the privileges of the nobility and to get some unity in the law. Alfonso gave this *fuero* as the *fuero* for a number of cities. It

may have applied in the central royal court, a court of appeal in Castile, as in France. It would seem, however, that it was not until the Alfonso XI (1311–1350) that the *fuero real* came to have a more general applicability and even here it was only in the absence of a specific provision in a local *fuero*.

- d. Alfonso X did not stop at the *fuero real*. He also had compiled large book about law in general. The work was reedited into seven parts and has been known ever since as the *Siete Partidas*. It is written in the vernacular and is quite comprehensive. It is of enormous importance for Spanish legal history. I have chosen, however, not to extract it in the materials for two reasons: (i) What it says about witnesses, marriage and wild animals it simply repeats the rules of the academic law, as it does in many other areas. (ii) There is no evidence that it was ever used as a working law-book in Alfonso's time. Indeed, there is considerable evidence that it was not even regarded as authoritative in the courts until 1348, and then it was only a secondary authority. The work is, however, a political statement that the only way for Spain to achieve legal unity—and legal unity is intimately connected with political unity—is by the use of the academic law. This is a theme that will become more and more important as time goes on; it seems to have appeared first in Spain.
- e. The realities, however, in the Iberian Peninsula in the 13th century were considerably messier. There was no political unity, even within the individual kingdoms and there were four of them. The *Usatges de Barcelona* (*Mats.*, § 10) shows us a *coutume* that probably was being used in the 13th century, though we must puzzle over exactly how it was being used. The word *usatges* is interesting. It is much closer to *coutumier* than *fuero*. What we are looking at is probably a redaction of the mid-twelfth century containing material that is considerably older, some of which probably goes back to the eponymous Raymond Berenguer I in the mid-11th century. Most of the scholarly effort with this document has been with recovering the earliest material. My efforts with it in connection with producing a translation for this class have suggested to me that some of it, perhaps a quite a bit of it, is probably later than the mid-12th century. I'm encouraged in this by the fact that the most recent editor of the text agrees with me, but not everyone agrees with him.

The *Usatges de Barcelona* [images]

1. We have some wonderful stories at the beginning:
 1. Before the usages were issued, so that all misdeeds might always be emended if they could not be ignored, the judges used to judge by oath and by battle or by cold or hot water, saying thus: "I (name) swear to you (name) by Jesus God and these four holy gospels that the evil that I have done to you I have done by my right and your wrong (a mon dret et ton tort); and I would stand to battle about this or to one of the above-said judgments, of cold or hot water."
 2. Homicide and adultery which cannot be neglected were adjudged according to the laws and customs and emended or vindicated.
 - 3 [2]. When the lord Raymond Berenguer the old, count and marquis of Barcelona and subjugator of Spain, had the honor, he saw and recognized that the Gothic laws could not be observed in all causes or businesses of this country . He also saw many quarrels and pleas which these laws did not specifically treat or adjudge. With the advice and counsel of his

upright men, along with his most prudent and most wise wife, Almodis, he constituted and published usages by which all quarrels and evils inserted in them were controlled,¹ pleaded, judged, and also emended and vindicated. The count did this by authority of the Fuero Juzgo which says: “Clearly, the prince shall have license to add to the laws if just cause of novelty requires it.” “And let it be treated by the discretion of royal power how the new case shall be inserted into the laws.”² “Only the royal power shall alone be free in all things whatsoever penalty he commands be put in the pleas.”³

1. “submitted to judgment.” DK.

2. Fuero juzgo 2.1.13.

3. Fuero juzgo 2.5.8.

And the usages that he issued begin thus:

4 [3]. These are the practices (usualia) of court usage that the lord Raymond the old, count of Barcelona, and his wife Almodis constituted to be held forever in their country, with the assent and acclaim of the magnates of the land, to wit: [Nineteen names follow, three viscounts and sixteen men described as “judges.”]

[4]. Whoever kills a viscount or wounds or dishonors him in any way shall make amends to him as for two comdors⁴ and a comdor like two vavassors.

4. A member of a line of middle-ranking Catalan nobility. DK.

5. Concerning a vavassor who had five knights, he shall emend for his death with ounces of seared gold⁵ and for a wound with 30 ounces. If he has more knights, the composition shall grow according to the number of knights. Whoever kills a knight shall give 12 ounces of seared gold in composition. Whoever wounds shall emend to him with 6.

5. A Muslim coin of the late 10th century which was minted in Cordova but circulated in all the Christian realms of the Peninsula. DK.

Clearly, there’s a problem with the transmission, though not so great that one can’t guess about origins. A probably accurate description of an ancient form of proceeding, coupled with the statement that the usages abolished them, which they clearly did not, see, e.g., c.112:

Husbands can accuse their wives of adultery by suspicion, and they ought to purge themselves by an *avagant* [champion]⁶ by oath and by battle, if there are manifest indicia and competent signs in it: the wives of knights by oath and also by a knight, the wives of citizens and burgesses and noble bailiffs by a foot-soldier, the wives of peasants [*rusticorum*] by their own hands by the cauldron. If the wife wins, her husband shall retain her honorably and shall pay her all the expenses that her friends and relatives made in the plea and in the battle and the damage to the champion. If she loses, she shall come into her husband’s hand with all the goods that she has.

6. JB emends to *averamentum*, in which case translate “by their affirmation, by oath and by battle.”

2. I think that the prelude is 12th century and it reflects the concern of the period with making the procedure more “rational.” The document which purports to be adoption document looks genuine.

3. A core of material that looks like it is an attempt to integrate feudalism into the wergild system of the *fuero juzgo*. This may well be from the mid–11th century.

4. The provisions about witnesses suggest a gradual acceptance of the Romano-canonical scheme. The beginning is clearly in c.57 where witnesses are being used instead of battle, apparently, for the situation in which the tenant is not in possession.

57 [54]. Fees which knights hold, if their lords deny that have given them to them, they shall aver them by oath and by battle and shall have them. Those which they do not hold and claim,⁷ they shall either prove by witnesses or by writing that they acquired them from their lords, or they shall abandon them.”

7. Neither DK nor I can make much sense of this. Perhaps it means “those they do not hold but claim.”

Even here we must be careful. Witness procedure is mentioned in the Visigothic Code, and the man who wrote the dissertation on the topic found some documents as early as the 11th (?) century that mention them. It is tempting to see the distinction here as being like that of writ of right and novel disseisin. In any case this is the base case. It’s the only one that the most recent editor includes in his edition of the base (mid-12th century) text.

85 [B2]. We command in order that perjuries be guarded against [that] witnesses not be admitted to take an oath before they are examined. If they cannot otherwise be examined, they shall be separated from each other and examined singly. The accuser may not chose witnesses in the absence of the accused. In no way shall anyone shall be admitted to the oath and to testimony unless he is entirely fasting.⁸ If a witness is recused, let him who is recusing say or prove why he ought not be received. Witnesses shall be chosen from this territory and not from another, unless the case must be investigated far from the county. If anyone is convicted of perjury, let him lose his hand or redeem it with 100 shillings. [Parallels: C.3.20.14; C.22 q.5 c.6; X 2.20.2; MGH, *Capitularia regum francorum* 1.124 (805); *P.* 310–12.]

8. DK’s translation of this is just wrong.

86 [B3]. Before witnesses are interrogated about the case, they shall be constrained by an oath that they will say nothing other than the truth. We also order this, that faith shall be admitted to more honest rather than more vile witnesses.⁹ The testimony of one, however, however splendid and suitable a person he might seem, shall never be heard. [Parallels: Petrus 4.36; Brev. Alaric 11.14.2 (interp.); Benedict the Levite 1.283; Ivo, Decret. 16.204; Panorm. 55.21; *P.* 312–13.]

9. An awkward sentence. Perhaps *fides adhibeatur* (“faith shall be placed on”) rather than *fides admittatur* is meant. A meaning of *fides* as “oath” is also possible (“the more honest should be admitted to the oath in preference to the more vile”).

87 [B4]. If someone is proven to have made an unjust appeal, he ought to be forced to recompense the expenses that he compelled his adversary to bear, not in simple but in four-fold. Two or three suitable witnesses suffice to prove all matters. The testimony of one is disapproved by the laws and the canons. [Parallels: Petrus 4.30 (s. 2–3);* Brev. Alaric 5.39 (s. 1);* Epit. Aegidii (epitome of the Breviary of Alaric);* C.3.20.9; C.2 q.6 c.27; Ivo, Decret. 5.285; Ivo, Pan. 4.131; *P.* 313–15.]

88 [B5]. No one shall ever presume to be at once accuser, judge and witness, since in every judgment it is necessary that four persons be present, i.e., chosen judges, suitable accusers, appropriate defenders and legitimate witnesses. Judges moreover ought to use equity, accusers claim to amplify the cause, defenders extenuation to diminish the cause; witnesses ought to prove the truth. [Parallels: Petrus 4.7, 12; Benedict the Levite 3.339;* C.4 q.4 c.1;

Ps. Isid. Epistle of Fabian;* Ivo, Pan. 4.81; Ivo, Decret. 7.321; *P.* 315–17.]

89 [B6]. Accusers and witnesses cannot be those who a day or two before were enemies, lest in their wrath they seek to harm and lest the injured seek to avenge themselves. An unoffended affect [*inoffensus effectus*] is to be sought in accusers and witnesses, not a suspect one. Suitable witnesses are not those who can be ordered to be witnesses. [Parallels: D.22.5.3, .5; *P.* 317.]

The substance of cc. 85–9 can all be found in 11th century canonical collections and they are largely drawn from Pseudo-Isidore. C.89 probably requires a more profound knowledge of Roman law, though it could be by way of proceduralists, like Tancred. It is possible that these provisions date from the mid-12th century, but it seems unlikely, both because they are not in all the early mss. and because the effort that would have been necessary to put them together from existing sources in the mid-12th century is probably beyond the folks that were putting this material together.

143.¹⁰ Because we have frequently received complaint by our subjects that truth is obscured and repressed by the corruption of witnesses, following in this part the imperial laws, we order that if any witness be produced by anyone he shall be bound by oath that no money or anything else was given or promised to him nor, to his knowledge, to anyone subject to him. Further, to put an end to the slipperiness of witnesses (*testium facilitate*) by which the contrary to the truth is put forward, we order that anyone litigating before us or anyone delegated by us who knowingly produces a false witness or corrupts a witness shall lose his cause and shall incur the publication [*sic*, probably means a type of forced sale] of all his movable goods, of which one-half shall be assigned to his lord and the other half shall be kept in our treasury. The same penalty of publication of goods shall be incurred by anyone convicted of having borne false testimony, and above that he shall lose his hand and his tongue, and the possessions [does this mean immovables?] of both shall devolve on those who are called to their goods by right of succession. [Parallels: D.22.5.5, .16, .3; *P.* 320–1.]

10. JB omits this and c. 144 because they are not in his early mss

144. Because we have frequently received complaint by our subjects that frequently in the courts cases are brought and defended calumniously; then appeals are taken from interlocutory [sentences], and as a result the matter at stake is long protracted and long suspended, so that scarcely or never can it finally be concluded; wishing therefore to counter this fraud and malice with a royal antidote and desiring to impose an end to quarrels, and so that the parties not be unjustly exhausted with labors and expenses, with the counsel and approval of the nobles and magnates and also of our citizens who at that time were present in our court we think that it ought to be laid down as follows: that from henceforth in all cases the oath of calumny shall be taken by both the plaintiff and defendant and that there be no appeal from interlocutory sentences, except from manifest harm, or unless it plainly contains error, or unless it is pronounced against right [*jus*]. In which cases, it shall be determined within three days about the aforesaid sentence and corrected as it ought, and so not only litigation but also calumniators shall be diminished.

Item. By foresighted deliberation we lay down that every judge ordinary shall compel the named witness to take an oath to bear testimony to the truth, and that any party for supporting his claim [can compel] the other party to exhibit instruments that he asks for and have them solemnly copied, even though in the case or court in which they are asked it is

not customary to use instruments, since frequently the truth is hidden for failure of witnesses.

Item. We order that it be observed in an unbreakable fashion that when it happens that a traveler or stranger has a case with any of our subjects that that case be brought to a fitting end quickly and without delay. For it would be wicked if such persons who expose themselves frequently to the fortune of roads and rivers should be seen to make too long a stay in any place against their wishes. [Parallels: D.49.5.12; D.22.5.21; *P.* 321.]

Cc. 143–4 are interesting because they are so clearly legislative (parallels of Innocent III?). In order to follow this form this carefully we need to have either the Code or papal decretal letters or both. (Even that needs to be checked out against the Visigothic examples.) The reference to “slipperiness of witnesses” (*testium facilitate*) is to me, at least, is some indication of 13th century origins (though the phrase does occur in the Digest), as is the efforts of both Innocent III and Innocent IV to limit frivolous appeals to the papacy. When this is combined with the fact that these texts are in none of the early manuscripts, we pretty clearly have reached another stage of development.

Bottom line: With care but with some guess-work, it is possible to construct stages of the reception of at least the formal law of Romano-canonical procedure in Barcelona. To what extent this was reflected in the courts is question that might be answered (the Aragonese archives are very rich), but no one seems to have done the work yet.