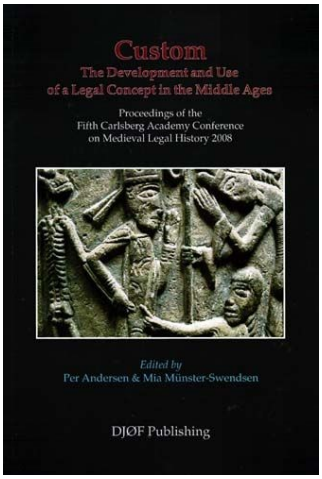

Per Andersen & Mia Münster-Swendsen (eds), *Custom. The Development and Use of a Legal Concept in the Middle Ages. Proceedings of the Fifth Carlsberg Academy Conference on Medieval Legal History 2008,* DJØF: Copenhagen 2009. 133 pp.

Custom. The Development and Use of a Legal Concept in the Middle Ages is a volume that contains papers presented at the Fifth Carlsberg Academy Conference on Medieval Legal History. This time the venue was not the Carlsberg Academy in Copenhagen but the University of Aarhus Law School. In the preface the editors, Per Andersen and Mia Münster-Swendsen, point out that the aim of the conference was to steer away from the research of the latest decades that has been more concerned with dismantling the Germanic idea of custom as something 'old' and unchanging, rather than trying to understand how custom was used and how it developed in different places at different times. As the title of this volume shows, precisely these issues will be addressed here. Local case studies, as well as more general studies on learned law, set out to explore the concept of custom – how it was used, how it worked, how it manifested itself at different places and how it changed over time.

The volume begins with an introduction to the topic by John G. H. Hudson, 'Customs, Laws, and the Interpretation of Medieval Law'. Hudson first examines the term in question, 'custom' or *consuetudo*, and he points out that a clear definition has been hard to come by, both in medieval and modern writings. Examining the possible meanings of *consuetudo* in eleventh- and twelfth-century England, Hudson concludes that there were various interpretations or understandings connected with this word, and moreover, that English law did not draw a sharp distinction between *lex* and *consuetudo*. Hudson then makes some 'Historiographical remarks', with a particular focus on England, for instance how scholars traditionally have associated custom with various liberties, typically in urban charters.

In the following chapter England is still the main area in focus, as Paul Brand explores 'Law and Custom in the English Thirteenth Century Common Law'. In this context, it seems that 'custom' or *consuetudo* means either a normative rule or a procedural rule, which did not apply nationwide but only within a particular area or jurisdiction, for instance a specific manor, county or

city. Brand shows that some contemporary sources describe the English law either as 'law' *or* 'custom', whereas other sources may say it was 'law' *and* 'custom'. When the English common Law was characterised as 'custom', two issues were stressed: first, it was unwritten law, and secondly, it was considered to be the *law of the land* or *the kingdom of England*, and not the *king's* law. Because the English Common Law was considered to be based on national customs, and hence to derive its authority from the consent of those subject to it and by age-old usage, it was used to bar the application of canon law – when the two legal systems were in conflict.

In 'Roman Law vs. Custom in a Changing Society: Italy in the Twelfth and Thirteenth Centuries,' Emanuele Conte approaches the subject of 'custom'; first with an historiographical overview going back to the so-called Germanist school. For these nineteenth century legal historians, 'custom' was of paramount importance in the perception of medieval Germanic law, and terms like *Sitte* and *Volksglaube*, habit and the popular beliefs of the people, came to establish the essence of ancient Germanic 'law'. Next, Conte explores the nature of Roman law in the late twelfth and thirteenth centuries, and he argues that this was the law of free cities of Lombardy. Conte also shows how Roman law was used to defy 'bad customs' claimed by the nobility. Roman law was the defender of local communities, and it also promoted the freedom of serfs, hence opposing 'custom', because when 'custom' no longer felt just and reasonable it had become 'bad custom.'

Bad customs, particularly in eleventh century France, is the topic of the next chapter, where Stephen D. White sets out to explore the meaning of 'bad customs' (*malae consuetudines*) historiographically. In earlier scholarship, 'bad customs' were connected to the gradual break-up of the Carolingian state and the privatization of public powers; for instance, in regard to rendering judgement, exacting punishment and collecting fines or taxes. From the 1840s and for the next hundred years or so, scholars argued for a gradual fragmentation of public power, but from the early 1950s a more abrupt change around the year 1000 has been argued for. In various parts of western France, disputes over 'bad customs' are well attested in charters from the late tenth- and eleventh centuries, and looking more closely into how the various disputes were described, White associates these developments with the economic changes of the times. As the economy expanded, got more productive and complex, the competition to seize profits from these changes increased. Customs relating to mills, for instance building of new mills or diversion of millstreams, are an important example. This was a situation where lords, whether lay, ecclesiastical or monastic, competed between each other and between peasants, and the parties involved classified their opponents' 'customs' as *malae* – 'bad.'

Whereas 'custom' abounds on the continent and in England, Helle Vogt states at the outset that a more suitable title of her paper, now 'The Concept of Law and Custom in Thirteenth Century Denmark', would be 'The non-use of custom in thirteenth century Denmark.' The Danish provincial laws, probably written down between the 1170s and 1240s, are in the vernacular, and the concept of custom is not evidenced there. However, the concept of custom is found in

legal charters written in Latin. Vogt explores the use of custom as a legal concept in the charters written before 1300, and these sources reveal three ways in which custom occur. One is connected to the transfer of land, where a certain ritual conferred legal validity to the transaction. A letter from 1198 from Innocent III (papacy 1198–1216) to Archbishop Absalon of Lund (archiepiscopate 1178–1201) describes how the donor wrapped earth taken from the land in a piece of cloth and placed it on an altar. This symbolised the idea that the gift was given to a patron saint. Because donations on the altar are known from many places, Vogt finds it more likely that this was a ritual originally developed for pious gifts, and not the other way round, that it was a secular ritual later adopted by the Church. The second way in which custom occurs is confirmation of privileges and duties, and this is also by far the biggest group. Thirdly, 'good old' custom was also used to legitimate law. This stylistic feature is not found in the provincial laws written in the vernacular, and it probably entered Denmark through learned law. Based on the meagre sources, Vogt suggests that the concept of custom was introduced in Denmark via Latin, and that originally it was used and properly understood only by a learned elite. In the later Middle Ages, custom entered the Danish language as the term *sædvane*, and it gained a wider usage and became understood as unwritten legal practice.

'*Antiquis Fas Erat*. Reflections on Custom in Glosses to Ivo of Chartres' *Panormia*' is the next chapter. Here Bruce C. Brasington takes a manuscript of the *Panormia*, an early twelfth-century collection that may be attributed to Bishop Ivo of Chartres (ca. 1040–1115), as his point of departure. Brasington examines glosses on law and legal custom, and he finds that as long as custom did not contradict authority or truth, it was considered valid. Also custom could always be altered. The glosses were intended for practical use, argues Brasington, and they make use of local practices that could enlighten the judge. After all, in daily life, canon law was practical.

The last chapter is 'Custom in Canon Law and the Expansion of Legal Reality' by Dominique Bauer. Bauer points out that a crucial difference between law and custom is that custom at some point existed outside law before it became integrated into the legal system. According to Canon law, custom had to be rational in order to be considered a custom in a legal sense. In discussions on 'custom,' this is one of the few criteria canonists agree. This criterion is also linked to the requirement that it must be possible to recognise custom as if it were prescribed, as if it were a law. By definition, law cannot be irrational, and Thomas Aquinas (ca. 1225–1274), who said that custom is human rational will expressed in actions, succinctly expresses this idea.

There is much to admire in this book that would appeal to specialists in medieval law. We are presented with studies that venture into new terrain in the study of 'custom'. The various essays contribute to our understanding of the breadth and complexity of this concept.

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