



Per Andersen, Mia Münster-Swendsen & Helle Vogt (eds), *Law and Power in the Middle Ages: Proceedings of the Fourth Carlsberg Academy Conference on Medieval Legal History 2007*, DJØF Publishing: Copenhagen 2008. 251 pp.

Law and Power in the Middle Ages is a conference anthology from the Fourth Carlsberg Conference on Medieval Legal History, which took place in 2007. The group behind the Carlsberg Conferences in medieval legal history (Helle Vogt, Mia Münster-Swendsen, Per Andersen and Ditlev Tamm among others) has successfully revived the study of medieval legal history in the Nordic countries and, moreover, firmly placed the Nordic medieval laws in a European context. The very first conference in 2003 addressed how Nordic the Nordic medieval laws actually are, thus specifically discussing possible influences from other legal traditions. This is also connected to the question of the political elites' level of influence on the legislation. It is in this light that we shall see also this conference and the theme, *Law and Power*. What role did the king and aristocracy play in legislation? What role did the Church play? How did political elites use legislation? The anthology gathers a number of contributions from various regions and time periods and the papers are quite scattered. Indeed a stricter editing principle could have been used in order to exclude contributions that did not fit the theme of the anthology. I will get back to the overarching theme and some general questions at the end; first I will briefly discuss the content of the various papers.

In her paper 'The King's Power to Legislate in Twelfth- and Thirteenth Century Denmark,' Helle Vogt continues a discussion started in her doctoral thesis (subsequently published in English with Brill) on the limits and extents of royal legislation, in this case in medieval Denmark. She begins her discussion with the preamble to the Law of Jutland (1241) which states that the king had the right to promote new legislation but that the provincial assemblies had the right to accept or reject these laws. This traditional description of legislative procedure thus gives an important role to the provincial courts and, indeed, to the local communities, 'the peasants' as they are often referred to in the Nordic laws. Vogt, however, argues that the king primarily legislated in accordance with 'the best men,' that is the noble and ecclesiastical elite, through ordinances. These

ordinances did not need approval from the provincial assemblies like the law codes.¹ So in reality, while keeping up the appearance that the provincial law assemblies played a pivotal role in legislation, the political elites had found a way to circumvent their influence by the thirteenth century. The paper thus underlines two aspects of Danish medieval legal culture: that the provincial assemblies had no real influence on legislation by the thirteenth century, and, secondly, that the role of the king as legislator was symbolically important, but that legislation was created in collaboration with the other elites in society.

Gerd Althoff discusses the role of law and legal sentencing in conflicts between Frankish and German kings and nobility. Althoff takes us on a journey from the eighth century to the twelfth portraying differences and developments in the strategies with which kings dealt with revolting aristocrats. The paper portrays some very interesting and lively examples of conflicts among the elites but also provides an attempt to establish structural and chronological changes in conflict resolution. Althoff has reminded us before of the well-established methods for amicable conflict resolution that existed in the Middle Ages.² This tendency should complement and contrast the descriptions of medieval royal authority as repressive, and violence as the primary form of conflict resolution. Althoff outlines the changes that took place in Frankish/German kingly dealings with insubordinate aristocrats. We see a shift from repressive measures based on legal sentencing among the Carolingians to an emphasis on forgiveness and repentance (from the rebelling aristocrats) among the Ottonians and finally back to more repressive measures and use of law among the Salian kings. Althoff underlines that the emphasis on forgiveness must be influenced by Christian doctrine. These developments are interesting and show the importance of both repressive methods and amicable conflict resolutions. It should come as no surprise that Althoff underlines the importance of rituals as a way to demonstrate that the two parties had reached an agreement. Althoff notes that kings preferred to settle amicably with the leaders of a rebellion while they punished and even executed lower level leaders. This was probably a general phenomenon and a quite effective way of both enforcing authority while stemming further conflicts.³ One important message to carry with us is that law and politics cannot be separated in this period. Althoff discusses the early and high Middle Ages but this is valid for the entire medieval period. To completely separate law (legislation and legal practice) from other sectors such as religion or politics is simply not possible. Any result of a conflict would be influenced by the social and political context, and not necessarily reflect written law. As Warren Brown has pointed out, the question whether law was followed or not is not a particularly productive one since we will get varying and conflicting answers. A more interesting question is how

¹ The same has been argued for Swedish medieval law, see: Gabriela Bjarne Larsson, *Stadgelagstiftning i senmedeltidens Sverige* (Rättshistoriskt bibliotek, 51), Institutet för rättshistorisk forskning: Stockholm 1994.

² Gerd Althoff, 'Satisfaction: Peculiarities of the amicable settlement of conflicts in the Middle Ages', in Bernhard Jussen ed., *Ordering medieval society: Perspectives on Intellectual and Practical Modes of Shaping Social Relations*, University of Pennsylvania Press: Philadelphia, PA 2001, pp. 270–284.

³ Also see Matthew Strickland's article in the same anthology, p. 180, and John Gillingham's paper, p. 207.

law was used, referred to, but also ignored for other forms of solutions.⁴

A highly interesting article by Hans-Jacob Orning follows Althoff's paper. Orning's paper 'The Interplay Between Law, Sin and Honour in Conflicts Between Magnates and Kings in Thirteenth Century Norway' considers the political culture in Norway. The author starts out by outlining the fruitfulness of legal anthropology as a means to study medieval society. In accordance with Althoff, Orning underlines that law cannot be separated from political or social culture. But Orning does not underline chronological patterns in kingly responses to rebellions; instead, he emphasizes unpredictability as a core aspect of the king's power. Orning refocuses the issue of kingly forgiveness and claims that, rather than an indication of Christian doctrine, this was dictated by practical reasons. In order to maintain support leniency was sometimes necessary, but only towards people who were necessary for the king. People in other areas, such as the peripheries of the kingdom, could be treated harshly and repressively. This would also explain why the Frankish and German kings would chose to execute lower level rebels while showering mercy on the actual leaders: it was an excellent way to display the potential for violence without breaking the bonds to the very aristocrats that were needed for governing and support.

In turn this also points back to Vogt's results, which emphasized the cooperation between the Danish king, and secular and ecclesiastical elites, in legislative processes. Orning's article is fascinating and builds on a large body of scholarship; as such it functions well as an introduction to legal anthropology. He demonstrates that unpredictability is a fruitful concept in order to understand the exercise of power in the Middle Ages. Gerd Althoff ends his article by explaining that the outcome of the conflict between Duke Henry the Lion (1129–1195) and Emperor Frederick Barbarossa (r. 1155–1190) was described as surprising by a contemporary chronicler. According to Orning, that might have been the entire point. In fact, the vacillation described by Althoff between mercy versus repression, clemency versus punishment and legal versus extrajudicial solutions fits Orning's interpretation of power strategies very well.

The next article, 'Social Ordering and the Doctrine of Free Choice' by Charlotte Christensen-Nugues, discusses the concept of *sub pena nubendi* which was a way for church authorities to transform extra-marital sexual liaisons into marriage. If a man and woman were found fornicating, an abjuration *sub pena nubendi* would transform them into man and wife if they continued to have sexual relations. As Christensen-Nugues points out this could be and, indeed, was seen as in conflict with the Church's emphasis on free choice in marriage. The author bases her study on a 201 cases of lay fornication in the small jurisdiction of Cerisy in Normandy. Out of these only 84 have a penalty recorded, and in turn out of these only five couples were sentenced to abjuration *sub pena nubendi*. One obvious result is that the use of *sub pena nubendi* was not common in this jurisdiction. But can the reasoning behind its use be divulged? Christensen-Nugues opts for the interpretation that the penalty was only used when the defendants themselves agreed to it. This would then be in agreement with the doctrine of free choice. It is perhaps unnecessary to point out that this

⁴ Warren Brown, 'The use of norms in disputes in early medieval Bavaria', *Viator* 30 (1999), pp. 15–39.

preliminary study is based on very limited evidence, something the author is well aware of.

Dominique Bauer's article 'Twelfth Century Views of Power in Peter the Venerable's *Contra Petrobrusianos* and in Canon Law' deals with differing views of the sacraments. Bauer examines Peter the Venerable's (ca. 1092–1156) treatment of the heretical apostolic Petrobrusian movement and also the differences between Ivo of Chartres (ca. 1040–1116) and Gratian's interpretation of marriage. She furthermore explores differing views of the church: those underlining its institutional character (Gregorian ideas) versus a transcendental (Cluniac). She concludes that the Gregorian view of justice and power is set in an institutional context, while the Cluniacs' view is of justice as 'transcendent realities.' How justice is related to power, and in which regard the article is on power, remains unclear.

Birgitte Meijns presents a fascinating picture of both the fervour of the Gregorian reformers and the local resistance with which they could be met. In the paper 'Without Were Fightings, Within Were Fears,' she takes us to the diocese of Thérouanne in Flanders around the year 1100. Meijns describes how this diocese went from being conservative to radically enforcing the Gregorian rules by rejecting simony and nicolaitism. She identifies a group of radicals in the young canons. These young radicals staunchly upheld an apostolic ideal to the point of refusing to mingle with clerics who (they thought) were guilty of simony or nicolaitism. They were met with fierce resistance and even violence, although as the author points out, we should be aware of the usual monastic exaggerations of sufferings that were overcome. The priory, however, received papal support and they were given the right to preach and absolve sins. Gregory VII (r. 1073–1085) also placed the abbey under papal protection and declared it 'a safe-haven.' The author asks if this priory – and others – would function as retreats for other reform-minded clerics who were too radical for their time. In conclusion, when the reform-minded bishop John of Warneton (d. 1130) took over the diocese, the foundation for change had already been laid by the group of young canons who held onto the Augustinian rules. They abandoned their wealth and lived an apostolic life despite forceful resistance. Meijns' paper provides an interesting case study of the effects and reactions to the church reforms around the year 1100. This paper definitely deserves to be read, but it seems ill-fitting in an anthology on law and power.

In 'Outlawry and Ecclesiastical Power in Medieval Norway,' Anne Irene Riisøy discusses the relationship between outlawry and ecclesiastical law. Riisøy outlines that the outlawed, who in general had committed the most serious crimes, were sometimes seen as non-Christian and were to be expelled to heathen countries. Indeed, some of the outlaws were not provided a Christian burial. However, Riisøy argues that the traditional penalty of outlawry, which entailed expulsion and loss of all rights including property rights, became increasingly connected to ideas on confession and penance. In the Norwegian Church laws, we find that expulsion could be avoided by confessing one's crimes and making penance. While the secular laws do not require penance, diplomas from the fourteenth century demonstrate that penance had become a standard part of

receiving the king's pardon. The inspiration for these changes is thought to stem from Anglo-Saxon Church law. Riisøy underlines that a combination of secular and ecclesiastical sanctions was the most efficient way to enforce law.

In her article 'The Conflict in the Stavanger Church Around the 1300 and the Intervention of Håkon Magnusson,' Eldbjørg Haug discusses a conflict in the 1290s that concerned the bishop's tithe. Haug argues that the conflict regarded the secularization of the cathedral chapter but that the conflict concerned core issues in ecclesiastical legal procedure. Unfortunately, any results are completely hidden in the very detailed narrative. I am certain that this paper is valuable for scholars interested in the Stavanger cathedral, but in my view the author fails to provide a wider context or make her results interesting for a larger audience. In fact, after reading it I am not even sure what the more general conclusions are, except that the Stavanger chapter had gone from being regular to secular.

The next article, 'The *Hauldr*: Peasant or Nobleman?,' is basically the opposite of Haug's in format and detail; it is short, to the point and very colloquial. In his essay, Jo Rune Ugulen discusses a social category used in Norwegian law. He argues that the term *hauldr* should be interpreted not as an ordinary peasant but rather as part of the elite, possibly the aristocracy. His evidence is legislation from the Danelaw that ranks the wergild for various social categories. In this hierarchy the *hauldr* is clearly ranked well above the ordinary land owning peasant, the *ceorl*. Why is this important? Having worked with the Swedish medieval laws I am fully aware of the stakes at play in this debate. It goes back to whether or not the Nordic laws can be interpreted as representative of a pure 'peasant culture' or not; whether the laws are purely customary and traditional or whether they represent new legislation. Ugulen's article brings a new perspective to the debate on whether the legal subject of the Nordic laws really can be seen as a 'peasant' (the traditional interpretation), and also what status this peasant had. I myself have argued that the legal subject in the Swedish provincial laws is indeed portrayed as a respectable landowning 'peasant,' but that this is an ideological construct and not grounded in reality. Ugulen's paper presents interesting findings, but it is very poorly edited. It contains some very convoluted and awkward phrasings and it would appear that the author has simply published his notes from the oral presentation.⁵

John Hudson's article 'Power, Law and the Administration of Justice in England 900-1200' also has a colloquial tone, but with none of the awkwardness. 'Knowledge is power' is a common saying and Hudson explores this by investigating how royal servants derived power from their role in justice and their knowledge in law. This type of power could be of different kinds, either in the form of 'petty tyrannies' and abuse of positions for profit or in the form of verbal authority. This verbal power would then increase with a specialization of the judicial system and the use of specialist legal language and knowledge. Hudson suggests that in England, the increased specialization of legal knowledge in the

⁵ Some examples of this, p. 152: 'I do however feel that I have argued reasonably for the case that there has to have been a rather extensive development in the meaning of the concept'; p. 150: 'hardly ought to be characterized as mere local bigshots'; p. 149: 'What I have concluded with, is that there is not much that can be said to be absolute conclusive.'

twelfth century can be connected to the royal justices. These royal justices represented the legal expertise before the emergence of a legal profession (late thirteenth century). Hudson summarizes that the legal rules became more separated from societal norms in the later twelfth century. Law became autonomous and specialized and non-intelligible for ordinary people, in this regard it could provide the legal experts with power.

In his essay '*In Coronam Regiam Commiserunt Iniuriam: The Barons' War and the Legal Status of Rebellion, 1264-66*,' Matthew Strickland discusses the concept of treason through examining three highly interesting letters exchanged between royalists and rebels during the Barons' War in England (1264–1266). He demonstrates that at this time concepts of sovereignty and kingship co-existed with ideas of independent lordship and feud. Furthermore, he shows that the king and his opponents carefully chose which terms they would utilize in correspondence in such a time of crisis. Strickland argues that they had access to terms based on the concept of treason of a sovereign prince, as well as terms that departed from ideas of lordship and, subsequently, the renunciation of homage. We might take for granted that a medieval king wanted to be perceived as the superior and sole ruler – the *princeps* of his realm – but Strickland shows that this could also carry with it a responsibility to show lenience and forgiveness. He demonstrates that King Henry III (r 1216–1272) chose not to use terms of treason in his dealings with the insurgent barons, instead he defied them (and not the other way around...) as enemies and rejected their assurance of loyalty. He placed them outside of his lordship. Declaring enmity instead of pursuing a discourse of treason and disloyalty allowed him to fully indulge in 'total' warfare that needed to spare no one. Indeed, Earl Simon de Montfort (ca. 1208–1265) was not only killed but severely mutilated by the royalists after his death. This paper very nicely complements the papers of Orning and Althoff and shows another 'unpredictable' way that the king could demonstrate his power and deal with rebels.

In his essay '*Enforcing Old Law in New Ways: Professional Lawyers and Treason in Early Fourteenth Century England and France*,' John Gillingham continues the discussion on treason but takes us to the early fourteenth century England (the 'and France' in the title is more of a suggestion than actually pursued in the paper). Gillingham states that the relatives of the executed Earl Thomas of Lancaster (ca. 1278–1322) complained to the king that their noble relative had not been judged by his peers as he should have. Indeed, Gillingham proves them quite right. He argues that the use of judges who came from a humble background presented the kings with a useful and malleable tool in trials against rebels. These judges were less willing than the barons to let noble rebels get away with lenient punishments. Indeed, this might explain the increased use of the death penalty for treason, Gillingham suggests. It is thus not a change in law (Gillingham and Strickland tone down the influence of Roman law on the concept of treason in medieval England), but the practice of law that had changed and turned the political game into a slightly bloodier field.

Both Strickland and Gillingham give examples of kings that at times were less willing to show mercy and more interested in demonstrating their power.

While Henry III used a feud resembling terminology declaring his opponents mortal enemies, Edward II (r. 1307–1327) used the services of highly trained judges willing to serve their king in any way they could. (Indeed the most intriguing of these judges is the absolutely fascinating Geoffrey le Scrope (1285–1340), who somehow successfully managed to shift his allegiance from Edward II to his deposed Isabella of France (1295–1358) and Roger Mortimer (1287–1330) and then again over to Edward III after he had taken over control. This shows some sort of talent, although I am not sure of which kind or how admirable...). But several papers highlight how kings vacillated between mercy and ruthlessness, between forgiveness and punishment. It would be interesting to see whether there are patterns to this or if, indeed, Orning is right that temporary practical circumstances and a certain unpredictability was at the core of medieval governance.

In his essay 'Frustra Legis Auxilium Invocat: Reception of a Medieval Legal Maxim in Early Modern England and America,' Bruce Brasington explores the long life of a Roman legal maxim. The original meaning of the maxim is that a person who has violated the law cannot count on getting protection from the law. Brasington traces this maxim from its original context through time and place, and thus explores the various contexts in which it has been used. One of the most common usages was in discussions of the right to sanctuary. It would be used to deny sanctuary to those who had committed a crime on ecclesiastical property for example. Sanctuary could also be reinterpreted as diplomatic privilege in the early modern era. Despite the many different contexts and time periods, the maxim has in general been used in an affirmative way that did not question its validity. But Brasington brings up one interesting example of the opposite. During the American Civil War one lawyer protested against the meaning of the maxim and claimed that to deny a criminal legal protection was hypocrisy and undermined the legal foundation of society. Brasington takes us on a fascinating journey through time and reminds us that legal maxims are volatile and powerful aspects of law. He is right that a study of the reception of these maxims can successfully be used to demonstrate shifting political circumstances.

Sally Vaughn attempts to examine Archbishop Anselm of Canterbury's (ca. 1033–1109) view of law. She starts out by declaring that Anselm distinguished between four different types of laws: customs, papal/apostolic laws, canons and the Law of God. Through the scholarship of others she establishes that Anselm was not only competent but an expert in canon law. She then declares that the paper 'will seek to extend the argument further, beyond Anselm's competence at law, to see that competence affecting Anselm's view of God, God's law, history, and the functioning of reality itself.' Crystal clear. The formation of God's law, for Anselm, seems to be the repetitive re-enacting of Biblical events. Anselm had a cyclical view of history where history not only repeats itself but can be improved; Vaughn compares Anselm's first exile with his second, where the second one, unlike the first one, presented a 'happy ending' where the king and archbishop were reconciled. Anselm's view of customs was in a sense history: the acts that his predecessors had performed were now precedents. These precedents should be followed until the interpretation of these acts changed; possibly by a new

understanding of God's law through for example a papal decision. Vaughn concludes that Anselm saw God's law as four interactive parts: custom, canon law, apostolic law and historical deeds. It is unclear how this is related to the initial four types of law. Vaughn also comments on the power relationship between archbishop and king and argues that Anselm saw these two positions as equal. She furthermore comes to the somewhat more surprising conclusion that Anselm viewed king and queen as equal partners in rule and claims that equality, in fact, characterized Anselm's view of marriage. She quotes Anselm's sermon on marriage where he states that the wife, with loving obedience, shall submit to her husband. Vaughn's interpretation of this as a demonstration of equal partnership is simply baffling.

The final article by Michael Gelting is a short reminder of the clientelic nature of medieval society. Gelting describes the clientelic society as an asymmetrical structure, with patrons and clients, and characterized by exchanges of gifts and services. In this system, power is exercised on a personal level and not institutionalized. However, between the patron and his clients stood the officials, or brokers as Gelting calls them. These officials often got their positions as a favour, thus they were a part of the clientelic relations. Favouritism and corruption was to a certain extent part of the system and the boundaries between extortion, abuse of power and legitimate patronage were blurred, writes Gelting. However, these midlevel officials could also function as scapegoats and helped preserve the relationship between the client and his patron. This strategy could be used in several different contexts. In his paper, Strickland noted that the rebels did not openly defy the king but targeted his 'malicious counselors.' This paper is certainly aligned with a current research trend to explore networks and friendship; it reminds us that certain features of medieval societal structure are not faults; they are simply part of the system. The paper nonetheless has very little to do with law.

The anthology thus includes papers that discuss various time periods and regions in Europe and, indeed, briefly early modern America. The papers are scattered not only by region, but also by content. This is perhaps to be expected from a conference anthology. While I appreciated the breadth at the conference, I however would have liked somewhat stricter editing principles in the choice of which articles to include. Some contributions seem to deal with law but not necessarily with power, some seem to deal with power structures but not with law. Indeed it would also have been interesting to hear the editors' reasoning regarding the two concepts of law and power and the relationship between the two. It might seem obvious that law has a lot to do with power and the exercise of power. It is through law that power can be sanctioned and legitimized, and social hierarchies established; power is exerted directly over people in legal practice. John Hudson suggests that 'power is embedded in law' since all legal rules involve active interpretations and will be exposed to power interests at court. As such it would be relevant to include any title on law or legal practice in a collection dealing with 'law and power.' But unfortunately this interpretation is not very satisfactory from a practical perspective. As I stated in the beginning, I believe for the readability of the anthology some papers should have been excluded from this

collection. (It should be noted that these papers are not necessarily the least interesting ones; on the contrary.) I would also have liked to see a reordering of the papers, as there are several who deal with similar topics (Vogt, Orning, Althoff, Strickland, Gillingham) and these could have been placed together.

It should also be noted that many of the papers are simply not very readable, and definitely not enjoyable, for readers who are not legal historians. I would like to invite legal historians (lawyer legal historians as well as historian legal historians) to reflect over whether legal history cannot be made accessible to a slightly wider audience. Is it not possible to say what needs to be said clearly without a tiring profusion of Latin quotes and jargon? In conclusion, this conference anthology presents papers within a broad range of topics, regions and time periods. The quality of the articles varies but many of the articles are nonetheless highly interesting.

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