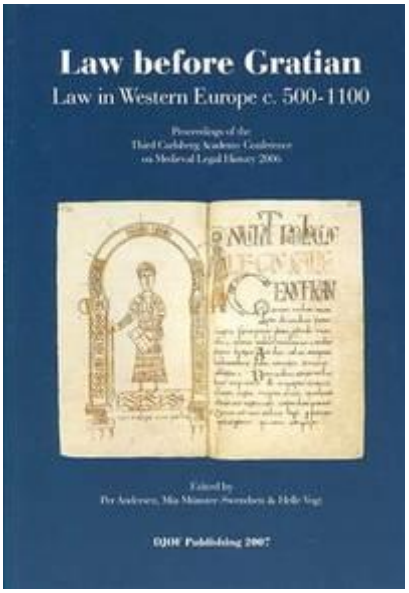

Per Andersen, Mia Münster-Swendsen & Helle Vogt (eds), *Law before Gratian: Law in Western Europe c. 500–1100: Proceedings of the Third Carlsberg Academy Conference on Medieval Legal History 2006* (Carlsberg Academy Conference on Medieval Legal History 3), DJØF: Copenhagen 2007. 139 pp.

This volume *Law before Gratian* contains the proceedings of the third Carlsberg conference on medieval legal history, held in 2006, of the same title. Unusually for conference proceedings in general, but not so for the series of proceedings of the Carlsberg conferences, the volume appeared less than a year after the conference itself. It brings together seven contributions on the various legal traditions of early and high medieval Europe. This in itself is very welcome, not only because early medieval law is often ignored, but also because it often is treated as a mere interlude between the Roman Antiquity and the later Middle Ages, between the Golden Age of the *Digest* and the *âge classique* of Gratian and the *Liber Extra*. We may no longer call it the 'Dark Age' or indeed the 'darkest age' (as Pollock and Maitland did in 1898), but legal scholars sometimes still neglect this period, or describe its legal scholarship as largely inexistent. This perception is evidently linked to the traditional emphasis on the role of the universities (namely Bologna) and university-trained lawyers for the emergence of a common legal system in Western Europe. Concepts like the 'Renaissance of the twelfth century' have helped to disseminate this view well beyond legal history, and have proved to be difficult to overcome.

In the first contribution of the volume, Maurizio Lupoi engages directly with this situation by arguing that well before 'Bologna' there were legal *principia* that provided a basis for a 'common law' both on the continent and in England. Rather than concentrating on the 'rediscovery' of the *Digest* and dismissing most early medieval evidence, as older scholarship has sometimes done, Lupoi draws on very diverse normative texts, and in particular highlights

the importance of ecclesiastical legislation in the early Middle Ages. It was the Church that insisted on written law, preserved Roman law, and both by preserving the Roman heritage and by providing new laws provided universal law in an increasingly decentralized, fragmented world.

As in his 1994 book,[1] to which he refers the reader from the beginning, Lupoi draws on a very large body of primary sources and secondary literature. Perhaps inevitably, this approach means that the *principia* he identifies are supported by evidence from often very different times and places and that these sources cannot be studied in any detail, let alone be put in context. Historians in particular may often feel uneasy by the way texts and institutions from very different societies are labelled and interpreted. For example, the term (p. 19) 'Holy See' is clearly anachronistic for the period Lupoi is concerned with, and it is not entirely clear whether this is only a problem of terminology; as in his book, Lupoi seems sometimes to equate 'the Church' with the papacy and/or the Roman church (or perhaps the 'Holy See'?), although elsewhere it seems that 'the Church' is mainly identified with kings and bishops.

This being said, Lupoi's main argument on the central role of the Church, and the unity of the legal 'system' (even if this term is problematic) is both attractive and important for scholars interested in early medieval legal history. It is therefore a pity that the argument is not always laid out as clearly as it could have been. In any case, the reader is introduced to an important debate on the changing nature of 'law' between Roman times and the high Middle Ages.

The second contribution by Alice Rio introduces the reader to early medieval formularies by discussing one of the most important collections of this kind, that of Angers. Like the whole genre, the *formulae Andecavenses* have puzzled scholarship for a number of reasons. Does the eighth-century manuscript faithfully preserve the original, supposedly compiled in the sixth century? Did these *formulae* have any practical use, and if so, for whom and at what time? These questions are all the more important, as the content is also striking, most notably as the collections (copied by ecclesiastical scribes?) famously contain *formulae* for divorce 'proper': a first marriage, without being declared void, was dissolved, with provisions being made for consecutive remarriage. In a very nuanced way, Alice Rio argues that these works indeed reflect legal practice, being used as models by individual scribes and reflecting the continuous negotiations of day-to-day legal questions. She therefore comes to the conclusion that *formulae* (p. 30) 'show a strong consciousness of rights and a wide participation in the legal process of lay people from a varied range of social statuses', and that the very existence of these collections is the result of

[1] *Alle Radici del Mondo Giuridico Europeo*, Istituto poligrafico e Zecca dello Stato, Libreria dello Stato: Roma; *The Origins of the European Legal Order*, Adrian Belton trans., Cambridge University Press: Cambridge 2000.

negotiations at this level of society – just like early medieval kings had to negotiate law with powerful magnates. At least north of the Alps, where most of these formularies emerged, they were therefore results of negotiations between feudal lords and people, whose voice is nonetheless preserved in these collections not of written laws but of 'useable law'. Helpfully, Alice Rio provides English translations for five *formulae* in the appendix of her contribution.

The contribution of Charles M. Radding on the *Justinian Code* is another good introduction to very general questions on medieval legal history. Like Lupoi, he calls into question the paramount importance of Bologna and the 'rediscovery' of the *Digest* that is often found in handbooks of legal history. Like Lupoi, Radding is stressing continuity where scholars subscribing to the 'Renaissance' paradigm have seen dramatic change. His approach is mainly focused on the textual transmission of the *Corpus Iuris Civilis*. In particular, he calls into question the stark difference between the textual history of the *Digest* (long lost but suddenly rediscovered at Bologna) and the *Code* (continuously in use during the Middle Ages) as found in many textbooks of legal history. In the context of his contribution, Radding limits himself to the question of knowledge of the *Code* in the early Middle Ages. The codicological evidence for the claim that the *Code* was known between the seventh and ca. 1000 is small indeed. Radding points out that the *Code* itself was known in this time, even if no extant manuscript dates from these centuries. As for the Epitome of the *Code*, an abbreviated version that is commonly thought to have originated in the early Middle Ages, Radding makes more radical claims. Following the paleographical re-evaluation of the Pistoia manuscript by Antonio Ciarelli, Radding argues that no extant manuscript of the Epitome was written prior to the mid-eleventh century. He goes on to argue that the Epitome itself was a product of the eleventh century and not, as it is commonly held, of the seventh or eighth century (p. 40). More specifically, he links it to legal scholarship in Pavia in the last third of the eleventh century.

Readers not familiar with the debates will learn from this contribution how radically different the picture of early medieval legal history can be, depending on how one dates a relatively small number of manuscripts, and how one reconstructs the textual interrelations between them. Scholars interested in these arguments and their far-reaching consequences should now consult the monograph Radding co-authored with the palaeographer Antonio Ciarelli[2] in which they bring forward powerful arguments, but in my opinion many questions are still open to debate. Radding certainly stimulates discussions, makes a complex issue more accessible, and certainly has made a

[2] *The Corpus Iuris Civilis in the Middle Ages: Manuscripts and Transmission from the Sixth Century to the Juristic Revival*, Brill: Leiden – Boston 2007.

powerful argument to look at the contribution of Lombard lawyers to the recovery of Roman law well before the age of universities.

Next, Martin Brett addresses the fundamental question of what, from an ecclesiastical perspective, was actually was 'the law' before Gratian. To a sometimes surprisingly large degree, church law was written law, but while writing may have its advantages, this also meant that the corpus of texts continued to grow and, on the whole, was enormous. As Brett puts it (p. 51), 'applicable precepts might be found anywhere throughout the inherited Mosaic and Christian tradition', including not only ecclesiastical and secular law but also many traditions that, in modern terminology, were not legal (but theological) or not even texts (but customs). This immediately leads to the second issue Brett addresses: an ecclesiastical judge not only had to find an appropriate authority, he often would also have to make sense of different authorities that were not easy to reconcile. As Brett points out, there was a long tradition of accepting this doctrinal plurality: as compilers of canon law collections like Regino of Prüm (d. 915) asserted in their prefaces, it was up to the judge to select the appropriate passages. Other compilers, in contrast, saw the internal contradictions as a genuine problem, and tried to achieve consistency by selecting and indeed reworking the material they included in their collections. Burchard of Worms (ca. 950/65–1025) is perhaps the most important example here.

Brett makes very clear that this was nothing new around 1100, but also that in the century or so before Gratian the situation changed in many respects. While some of this can be attributed to the church reform and, more generally, the ecclesiastical crises of the eleventh century, Brett also stresses the importance of the Eucharist debates. These debates, which begun earlier than the Church reform in the traditional sense, and which were (p. 58) 'a burning issue across the Latin West, even where the Roman reformers were barely headed', are often underestimated in their importance. And yet, as Brett puts it, a (p. 58) 'collection of *Libelli de corpore et sanguine Christi* in the same period would be as substantial as the MGH *Libelli de lite*, and would contain many works with a far wider circulation'.

It is no coincidence that the three authors Brett concentrates on – Bernold of Constance (ca. 1054–1100), Ivo of Chartres (ca. 1040–1115) and Alger of Liège (ca. 1055–1131) – all took part in this debate. The Eucharist debate, as well as the conflicts of their own days, shaped their views on conflicting authorities. How was the need for uniform dogma to be reconciled with the inherited plurality of normative traditions, sometimes in the form of normative texts that were directly at odds with each other? In addition to the absence of a canon law corpus, it is this context that makes a crucial difference between Bernold, Ivo and Alger on the one hand and later canonists working with a much more predigested selection of tradition. Brett suggests that one could perhaps even

call the older approach (p. 72) 'applied theology' in contrast to the 'canon law' in a much more narrow sense that established itself as an academic discipline in the thirteenth century.

In his contribution, Bruce Brasington highlights the plurality of sources of authoritative texts by introducing the reader to episcopal letter collections as legal *florilegia*. Looking closely at the content of the letters, but also the manuscripts that contained them, Brasington argues convincingly that letter collections like that of Bishop Fulbert of Chartres (d. 1028) or his successor Ivo were often produced for an audience interested in the legal cases discussed here and the authorities quoted in this context. The evidence comes from the content of the letters, the selection criteria (in particular for smaller collections), the joint transmission with other (legal) texts, and marginal annotations. In the case of the epistolary of Ivo, Brasington's manuscript studies make clear that this process of selecting, copying and reading the letters for their legal content must have started independently in different milieux, as the manuscripts come from very different times and places, and do not seem to stem from a common ancestor. Some letters, however, caught the attention of more than one compiler, and Brasington devotes special attention to these letters (both in the text and in a number of useful tables in the appendices of his contribution). Some letters are indeed small legal treatises – though not necessarily on 'legal' issues in the modern sense, but on liturgy and sacramental theology. However, for the eleventh and twelfth centuries, such distinctions make little sense, as Brasington's discussion, e.g., of Ivo's letter 63 shows. The manuscripts reflect many uses later cover by completely different genres (like commonplace books and decretal collections), but they should be studied as legal sources in their own right – not just for the eleventh century, but also for the twelfth century, when they continued to be produced and read. One can only agree with Brasington's closing remark (p. 86): 'Students of canon law found bishops Fulbert and Ivo useful. So should we.'

The last contribution is that of Dominique Bauer: 'From Ivo of Chartres to the *Decretum Gratiani*: the legal nature of a political theology revolution.' She studies Ivo's *Decretum*, his *Prologue* and the *Panormia* attributed to him, the works of Peter Abelard (1079–1142) and the *Decretum Gratiani* for the history of ideas such as individuality, legal voluntarism and intentionalism. She points out that the Ivonian collections contain several texts which highlight the importance of intention, namely in the case of lying (intention making the difference between a lie and an error). In other cases, she finds conflicting evidence as to whether or not intention alone is relevant for the moral worth of certain actions. Her example here is the use of violence. She quotes several canons found in Ivo's *Decretum* that stress the importance of the right intentions of a knight participating in a just war. At the same time, the *Decretum* contains texts that rather highlight the importance of legitimate authority to wage a just

war. Bauer is absolutely right that the *Decretum* contains very different texts. If anything, the 'contradiction' is more radical than Bauer tells the reader. For example, *Decretum* x, c. 152 (ultimately going back to Rabanus Maurus, ca. 780–856) quoted by Bauer as evidence for Ivo's view that 'the just nature of the use of violence depends on the righteousness of the warrior' (pp. 126–127) is also concerned with legitimate authority. Rabanus Maurus assumed that warriors acted out of selfish motives (and held that they should all do penance), but also argued that it did matter who was waging the war and why: 'There is a great difference between a legitimate prince and a mutinous tyrant.'

The different traditions Bauer studies are thus not only found in one and the same collection but indeed in one and the same passage. Likewise, the differences between the Ivonian collections are perhaps greater than Bauer admits, implicitly rejecting the arguments of Erdmann, Gilchrist, Russel, Hehl and other scholars who have studied the concept of just war in the Ivonian collections. The larger problem here is that Bauer seems to read these canons as expressing Ivo's thought – a dangerous assumption in the analysis in any pre-Gratian canon law collection. For such an enterprise, Ivo's *Prologue* or indeed his letters would have provided a much more solid base. Therefore, Bauer is back on safe ground when she studies Ivo's famous *Prologue*, in particular the distinction between mutable and immutable precepts, and the possibility of dispensation. The latter, very few in number, are sanctioned by divine law and cannot be dispensed from, while the vast majority of precepts, however, is mutable and may – if need be – dispensed of according to Ivo. Bauer rightly stresses that the area of mutable law is very large according to Ivo. She also highlights the role of *necessitas temporis* in the *Prologue*. As she goes on to show, many of these ideas can be found in Abelard's works, sometimes directly taken from the Ivonian works, and indeed also in the various works commonly attributed to the 'school of Laon.' Bauer concludes that Ivo helped to develop the idea of positive law that is 'clearly distinguished from the theologically formulated dimension of transcendent justice' (p. 132). In the Ivonian works and Abelard's philosophy according to Bauer 'secular reality [...] is given a positive, constructive dimension in its own right' (p. 124). Gratian's works, in contrast, mark the (p. 125) 'disappearance of an independently and positively valued secular reality', as Gratian does not take up the distinctions found in Ivo's *Prologue*. Finally, Bauer states that this development in legal scholarship also has a parallel in theology in the Eucharist debates of the eleventh and twelfth centuries.

The proceedings of the third Carlsberg conference on legal history make an unusually useful edited volume. Different as the contributions are, they introduce the reader to many important aspects of early medieval law. The authors present both ongoing discussions and results of current research in different fields of scholarship well beyond what can be found in standard

textbooks. Individually, but even more when read together, the contributions make abundantly clear that 'the law' before Gratian was multifold, and clearly has to be studied in a different way than legal history in the time of the universities. Reading this book prepares one to find law and legal thinking in sources such as formularies and letter collections and in an academic context as in the Eucharist debate that are often ignored when looking for 'the law.' A splendid volume!

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