

OUTLINE — LAW SECTION 7

CUSTOMALS ON MARRIAGE AND THE “TWELFTH CENTURY RENAISSANCE”

Custumals on Marriage

Usatges de Barcelona (c. 108 probably dates from the mid-12th century; c. 145 [below] probably dates from the 13th century)

Usatges 108 [85]. If anyone violently corrupts a virgin, he shall either marry her if she and her parents wish and give her *exovar* [roughly, “dowry” or “bride-price”], or he shall give her a husband of her worth. If anyone violently commits adultery¹ with a woman who is not a virgin and impregnates her, likewise. [Parallels: Petrus, c. 54; Exod. 22:16–17 in X 5.16.1 (Ivo, Decret. 5.292–3); J.I. 4.18.4; Fuero juzgo 3.4.7; *P.* 284.]²

¹ *adulterium* in the text. DK translates “If anyone violently ravishes a woman who [etc.].” In any case, we may doubt whether “adultery” in either the Roman or the modern sense is meant. DuCange, s.v., reports that the word *adulterium* is frequently used in the early middle ages as the equivalent of Latin *stuprum*, a word that normally often means corruption of a virgin, but that does not seem to be what is involved here. Compare Fuero juzgo 3.4.7, where the word *adulterium* is used where we would expect *fornicatio*.

² These suggested parallels are derived from a remarkable doctoral dissertation: Charles Poumarède, *Les usages de Barcelone* (Toulouse: Bonnet, 1920). The last reference, ‘*P.*’, gives the page number in Poumarède where one will find the suggestion and frequently some discussion.

Consider the following texts from fn. 9 on p. X–4, as possible ‘sources’ of UB 108:

Justinian, *Institutes* 4.18.4 (*Materials*, p. II–106): The *lex Iulia*, passed for the repression of adultery, punishes with death not only defilers of the marriage-bed, but also men who indulge in criminal intercourse with those of their own sex, and inflicts penalties on anyone who without using violence seduces a virgin or a widow of a respectable character. If the seducer be of reputable condition, the punishment is confiscation of half his fortune; if a mean person, flogging and relegation.

Exceptiones Petri, c. 54 [A handbook of Roman law for practitioners probably compiled in the early 12th century; there are other passages in the *Usatges* that seem to rely on the *Exceptiones Petri*]: If anyone violates a virgin without using force, or even if she consents, or seduces a widow of respectable character, if he who does this is of reputable condition, the punishment is confiscation of half his fortune; if a mean person, flogging and relegation.

Exodus 22:16–17: When a man seduces a virgin who is not engaged to be married, and lies with her, he shall give the bride-price for her and make her his wife. But if her father refuses to give her to him, he shall pay an amount equal to the bride-price for virgins. [This same passage from the Bible appears in a canonical collection of the late 11th century attributed to Ivo of Chartres (*Decretum* 5.292–3). There is other evidence that the compiler of the *Usatges* knew this work of Ivo’s. The text also appears in X 5.16.1, derived from 1 Comp. 5.13.1.]

The Visigothic Code (*Forum iudicum*, *Fuero juzgo*), 3.4.7 [The provision is probably derived from the Code of Euric (466 X 484)]: If a freeborn girl, or a

widow, should go to the house of another for the purpose of committing adultery, and the man who is implicated should wish to marry her, and her parents, if she has any, should acquiesce; he shall give to the parents of the girl as large a sum as they may demand, or as much as shall be agreed upon between him and the woman herself. But the woman shall not share with her brothers in the inheritance of her parents, unless the latter desire.

But this does not exhaust the possible parallels. One might consider, for example, consider cc. 31, 82–4 of Aethelberht’s Code (*Mats.*, § 4A), or the Burgundian Code, tit. 12 (*Mats.*, § 4B). The question, then, is what is likely to have been in the mind of the compiler of the *Usatges*: Roman law? Canon law? “Germanic” law? All three? None of the above?

cc. 110–112 also deal with adultery and give some hints as to the marital property system in effect. In combination, these provisions would make a great paper. Note that c. 110 seems to contemplate that lords will be adjudicating cases of adultery.

147 [C4].³ If a widow lives honestly and chastely in her honor after the death of her husband, she shall have her husband’s substance so long as she remains without a husband. If she commits adultery and violates the bed of her husband, she shall lose her honor and all the property of her husband, and the honor shall come to the power of her children [perhaps “sons”] if they are of age or of their relatives, in such a way, however, that she shall not forfeit her property (*suum*), if she appears to have a present interest in it (*si in presenti apparuerit avere*), nor shall she lose her spousal gift (*sponsalicium*) so long as she lives; afterwards it shall return to the children or the relatives. [Parallels: *Fuero juzgo* 3.2.8, 4.2.14, 3.2.1; *P.* 289–90.]

³ Chapters that begin with a letter are those that JB regards as later additions.

Touraine-Anjou (The text that we have of this *coutume* probably dates from the middle of the 13th century.)

c. 56 deals with the remarriage of widows who hold feudal land.

57. Of the surety given for suspicion of marriage to one’s liege lord and of doing honor and the proof on behalf of the unmarried lady made by her relatives. When a lady remains a widow and she has a daughter, and she (the lady) is getting old, and her lord comes to her, to whom she was liege lady, and requires her: “Lady, I wish that you give surety that you not marry your daughter without my counsel, nor without the counsel of the lineage of her father; for she is the daughter of my liege man, and because of that, I do not wish that she be outcounselled.”; it is fitting that the lady give him surety for it by right. And when the maid is of age to marry, if the lady finds someone who asks her of her, she ought to go to her lord and to the lineage on the side of the girl’s father and speak to them in this manner: “Sir, someone is asking me to give my daughter, and I do not wish to give her without your counsel, nor ought I. Now give me good and lawful counsel, for such a man asks her of me (and she ought to name him).” And if the lord says, “I do not wish that he have her, because such a man asks her of me, who is more rich and more gentle than he of whom you speak, and he will take her willingly (and he ought to name him)”, and if the lineage on the father’s side says, “We know someone still more rich and gentle than any of those whom you have named to us (and it ought to name him)”, then they ought to look to the best of the three and the most profitable for the

young lady. And he who is said to be the best of the three ought to exceed the others so that no one could rightfully misunderstand it. And if the lady marries her without the counsel of the lord and without the counsel of the lineage on the side of the father, as she ought to have, she will lose her movable. And the lord can distrain her by faith or by pledges, if necessary, before she leaves her fee or her faith; and she should swear to tell truly about her movable even before she loses them by judgment; and when they have all been taken away from her, there ought to remain to her a dress for every day and a dress for adornment, and suitable jewels for adornment, if she has them, and her bed and her carriage, and her war horse which suffices for her affairs, since she has no husband, and her palfrey, if she has one.

c. 108 has more on marriage gifts

cc. 129 and 132 contain more than hints of community property.

Beumanoir (This is a large work by Philippe de Rémi, sire de Beumanoir, courtier and royal bailiff of the customary jurisdiction of Clermont en Beauvaisis. The work is dated in 1283, and there's no reason to doubt that.)

cc. 598–600, canonical rules more or less accurately stated:

[598] Sometimes it happens that two gentle persons who are married separate by their will and with the permission of holy church for no evil reason; as when they wish to vow chastity or enter religion. But this separation cannot be made without the agreement of the two parties, for the man cannot do it without the agreement of the woman nor the woman without the agreement of her husband; and if they have children, they do not cease for this reason to be legal, nor for this reason [fail] to come to succeed their father and mother.

[599] Those who it is certain are bastards and adulterine can in no way be legal so far as coming to the descent of inheritances of the father and mother. But those who are only bastards can be made legal heirs by being placed under the veil (*paile*) at the espousals, as we have said below. Adulterines are those who are engendered in married women by another other than their lords, the married man. Therefore if it happens that a man has a child in adultery⁴ of a woman who has a husband and the husband dies and the man who is living takes her to wife, the children which are born after the marriage or who were engendered or born when she was a widow can be made legal, but those who were engendered or born in adultery when she had another husband cannot be made legal for succession to the father nor to the mother. But we have seen those who by the apostolic grace became clerks or held goods of holy church,⁵ but in these things the lay courts are not to mingle, for the administration of holy church pertains to the apostolic see and to prelates.

⁴ Akehurst translates “in concubinage.” The phrase (*en soignantage*) can mean either.

⁵ The reference may be Innocent III's famous decretal *Per venerabilem*. X 4.17.13.

[600] One ought not doubt that when a man has company with a woman outside of the bond of marriage, and he marries her when the children are born or when she is pregnant, if the children are placed under the cloth (*drap*)—which cloth it is the custom to place over those who marry solemnly in holy church—they are not legal until they are put with the father and mother making the marriage; and after that, the children are not bastards

but are heirs and can inherit as if they were legal children born in marriage. And by this grace which holy church and custom accords to all sorts of children, it frequently happens that fathers marry mothers for pity of the children, so that less evil is done them.

cc. 621–628 the varieties of *compagnie* (translated here as ‘partnership’)

[621] Many gains and many losses arise often by partnership which ought to be called partnership according to our custom, and for this reason one ought to take care with whom he places himself in partnership and whom he receives as partner. And these partnerships of which we wish to speak are those which by the partnership the property is partitioned when the partnership fails, and such partnerships are formed in several ways.

...

[622] Everyone knows that partnership is made by marriage, because as soon as marriages are made the goods of the one and the other are common by virtue of the marriage. But the truth is that so long as they live together the man is the administrator (*mainburnisseres*) of it, and the woman must allow and obey insofar as concerns their movable and the profits of their inheritances; so much so that the woman may see the entire loss of it, so much must she suffer the will of her lord. But the truth is that the underpinning [*tresfons*] of the inheritance on the side of the woman the husband cannot sell without the permission and will of the woman, nor his own either unless she renounces her dower that she will not take her dower if she survives him. And of the partition that ought to be made of the partnership of marriage when marriages fail, we spoke of them in the chapter that speaks of dower, and we pass over it here.

[623] The second way in which partnerships are made is by merchandise

[624] The third way in which partnerships are made is by agreement

[625] The fourth way by which partnership is made is the most dangerous and in which I have seen more people deceived; for partnership is made according to our custom simply by staying together at one bread and at one pot a year and day when the movable of each are mingled together. ...

[628] The fifth way of partnership is made between commoners [*gens de pooste*] when a man or a woman marries two or three or more times, and there are children of each marriage, and the children of the first marriage stay with their step-father or step-mother without leaving and without a fixed agreement to hold of them; in such a case they can lose or gain by reason of partnership with their father and their step-mother or their mother and their step-father. ...

cc. 1626–1639, separations

[1626] We see that often ill-will arises between husband and wife who are together by marriage, so that they cannot endure to remain together, and there is not reason for separating the marriage so that they can remarry. Nevertheless, they hate each other so much that they do not wish to remain together, and sometimes it is by the blows of one, and sometimes by the blows of both. And when such a state of affairs comes about, cognizance belongs to holy church, if a plea is brought there. But nevertheless, sometimes women have come to us to require that they be given their common goods for their life and sustenance, and sometimes the husband does not agree, because he says that he is lord of the things and that it is not by his blows that the woman is not with him. And

because such complaints come every day into the lay court, we will treat in this chapter of what one ought to do according to our custom with such request.

[The chapter is too long to translate in full, but it makes it clear that the court had a quite well developed fault-based jurisprudence for determining whether a separation of goods should be made.]

[1639] When marriages are separated between husband and wife for reasonable cause witnessed by holy church,⁶ one ought to know that if there were acquets while they were together each one ought to take one half; and if they have movable, each one ought to take a half; and of the inheritances, each one ought to take his own. If they have children who have passed seven years, the fathers ought to have ward of half of the children; if there is only one, he has it if he wishes and the mother ought to provide half its nourishment [*au nourir*]; and if the children are under seven years, the ward ought to be bailed to the mother, and the father ought to pay half their reasonable sustenance. And all such cases when they arise ought to be supervised by the estimation of lawful judges.

⁶ This paragraph is clearly speaking of a divorce *a vinculo*, i.e., an annulment.

Why did Bologna happen?

The question that I want to pose now is not what happened at Bologna or even how did it happen but why did it happen. How would you evaluate the following propositions as “explanations” of the extraordinary revival of legal studies in the twelfth century (you may take the “facts,” some of which are controversial, as true)?

1. *The conflict between regnum and sacerdotium*. Just because the investiture controversy was settled at the beginning of the 12th century that doesn't mean that the tensions that underlay it disappeared nor does it mean that reformist zeal ceased. The 12th century, after all, was the century of the conflict between Becket and Henry II of England, and between Alexander III and Frederick Barbarossa.

2. *Economics*. The twelfth century saw an extraordinary revival of economic activity. Numbers are hard to come by, but some economic historians estimate that the percentage growth of gross domestic product in western Europe in the twelfth century was greater than in the sixteenth century, perhaps even than in the nineteenth century (the other two leading candidates for the centuries of greatest economic growth before the twentieth).

3. *The revival of culture*. In France, there is an extraordinary flowering of sculpture and architecture in the great Romanesque churches of central France and the very beginnings of Gothic in the north. There is a notable revival of secular literature. In the south of France the Troubadour poets develop a love lyric the likes of which had not been seen in the West certainly since the Romans and perhaps never before. It is the century of Abelard and Heloise, of Henry II of England and Eleanor of Aquitaine, of a transnational Latin culture. It is perhaps the last century in which a man named John could be born in Salisbury in England, write the first original treatise of political thought since the Romans in a Latin as good as Cicero's, and end his life as bishop of Chartres.

4. *Contact with the East.* The first Crusade was conducted between 1096 and 1099. Whatever its true motivations, it resulted in a Latin Kingdom in Palestine that lasted, at least in part, for almost two hundred years and brought renewed contact between the Christian West and the Christian, Muslim, and Jewish East. Importation of ideas of Roman law, particularly from Byzantium, could have stimulated interest in such law in the West.

5. *The revival of other kinds of disciplines.* The twelfth is a century of the study of the Bible and of what today we would call theology and philosophy in the monastic and cathedral schools, particularly in France. Abelard (d. 1148) is a major figure in this tradition, but his work probably comes too late to have influenced the beginnings of Bolognese study of Roman and canon law. The glossators of the Bible, however, certainly are early enough. It was also the century that saw by its end the development of a new discipline for which they still did not have a name but which we call ‘moral theology’.

6. *Increase in judicial activity, particularly in Italy.* We know that in the eleventh century and probably before there was a law school at Pavia where Lombard law (a Romanic-Germanic mix) was studied. A recent book (by Charles Radding) has pointed out that the Pavese jurists served as judges, and Radding tries to argue that they were beginning what we might call legal method. There probably isn’t enough material that certainly antedates the revival at Bologna to make that statement with any confidence, though practical concerns at a lower level than the high politics of the reform movement are almost certainly important in the development of the method and of Bologna. All of the first Bolognese civilians are known to have acted as judges. An even more recent book (by Anders Winroth) argues that Irnerius was largely mythical and that the real study of Roman law doesn’t get going at Bologna until the 1230’s, by which time Gratian had already composed the first draft of his *Concordance of Discordant Canons*.

7. *The growth of canonic institutions.* That the growth happened is clear enough from what we have said in lecture. The problem is is this the chicken or the egg?

8. *Violence.* Despite all of these developments, which frequently go under the name of the “twelfth-century Renaissance” the twelfth century, particularly its first half was a very violent time. Castellans all over Europe beat up the peasants and spent a great deal of time fighting each other. The second half of the twelfth century, it has recently been argued (Thomas Bisson) sees the emergence of more centralized authority, itself pretty violent, but powerful enough to tame the castellans, at least in many areas. The more centralized authority (it wasn’t always kings) used accounting and then law (indeed the two were inextricably intertwined) to exercise their power when they were not doing it with force of arms.