

CUSTOMARY LAW BEFORE THE CONQUEST

1. INTRODUCTION

In trying to discover how disputes were settled by mediation in Anglo-Saxon England, I found that the practice must have relied on a quite sophisticated law of property. In a dispute between a religious house and the heir of someone who had given it land,¹ the mediators could suggest and the parties regularly accepted the grant of a life interest to the heir, provided no objection was made to the assembly confirming the house's title.² A life interest at any time must incorporate implied terms of considerable refinement, relating to waste if nothing else and probably restrictions on alienation.³ What supplied those terms? It could only be customary law. But where had it come from and how had it developed? I decided to start at the beginning.

A recent article in *Nature* shows that there were humans in England more than 700,000 years ago.⁴ There is evidence that they have been living in communities and talking to one another for at least 300,000 years.⁵ Those were our hominid cousins, like us in many basic ways, social as well as genetic. We know nothing yet of any rules by which they lived. The recent discovery of a jawbone suggests that *homo sapiens*, our own kind, has lived here for more than 37,000 years. That seems to be the earliest realistic starting point for a study of law in England.

We cannot blame the older historians for not starting their stories then. Archaeology and anthropology made their first dependable and necessary contributions only in the last century. Holdsworth, like all historians of his time, believed in the invasion of Angles, Saxons and Jutes and that: 'we must begin the continuous history of England and of English law with the coming of those tribes to England in 449.' But the new *Oxford History of the Laws of England* is intended to start even later, about AD900, except for Canon Law. I hope to show there was law in England before that which makes an essential difference to how we should look at the later law.

¹ The Fonthill Case is the best known example, 'The Fonthill Letter' in Michael Korhammer ed *Words, Texts and Manuscripts: Studies in Anglo-Saxon Culture Presented to Helmut Gneuss on the Occasion of his 65th Birthday* Cambridge, Brewer 1992 53-97

² The Anglo-Saxon word for that life interest was *laen*, which can also mean 'loan' or 'lease'.

³ The first relevant legislation was the Provisions of Westminster 1259 (re-enacted by the Statute of Marlborough 1267) but the implied terms remained largely a Common Law matter.

⁴ Simon Parfitt (and 18 others) 'The Earliest Record of Human Activity in Northern Europe' 438 *Nature* issue 7070 15 December 2005, pp1008-12.

⁵ From studies of the hypoglossal canal, tongue nerves and earbones.

2. THE NATURE OF CUSTOMARY LAW

Definition comes first. There used to be those who thought that a distinction should be drawn between laws proceeding from a central state authority and the rest, which they preferred to call custom, something less than law. But whether customary law is law is not just a matter of nomenclature. It is a matter of scientific taxonomy, with perhaps a dash of ideology. Customary law is just as much law as folk music is music. It is the only law everywhere until states and writing and jurisprudence come along, just as all music is undifferentiated until it becomes the subject of professional attention.

Customary law is not sparse. It does whatever is needed and performs some of the same functions wherever and whenever it applies. It is likely to determine who you can marry, what marriage means, who succeeds to a dead person's property and, most important, how order can be restored after violence. Why should we not call that law? The English always did, as soon as they started writing about it.

Wherever humans are found they are social animals. A permanent group is necessary for the survival of human young. Extended families have relations with wider kin and they congregate with different kin groups at certain times for agreed purposes.⁶ If great care is taken, one may argue that some characteristics of modern communal societies are likely to be the same as those in earlier societies which archaeology shows had similar ways of life, despite Maitland's elegant dismissal:⁷

I have a special dread of those theorists who are trying to fill up the dark ages of medieval history with laws collected from the barbarian tribes that have been observed in modern days.... If I see a set of trucks standing on a railway line from week to week, I do not say, This is the main up line to London. I say, This must be a siding. The traveller who has studied the uncorrupted savage can often tell the historian of medieval Europe what to look for, never what to find.

Those who can write as well as that are usually inspired to do so when they know they are being naughty but I am happy to heed the warning.

Customary law is not simple, any more than so-called primitive languages. Communal life allows less privacy. There is little chance of antisocial conduct passing unnoticed or being attributed to the wrong person. Sanctions are often immediate and applied until they work, that is

⁶ I use 'kin', 'clan' and 'group' with no attempt to discriminate scientifically.

⁷ FW Maitland 'The Body Politic' in HAL Fisher ed. *The Collected Papers of Frederic William Maitland* Cambridge, Cambridge UP 3 vols 1911 repr. Abingdon, Professional Books 1983 III p300.

until the culprits give up their antisocial behaviour, or have their capacity to misbehave removed. Much of customary law's complexity stems from the group's concern to control more of what is now considered private. For example, the smallness of the group requires a wider definition of incest. All the members of any communal group know the rules in detail and expect punishment for their breach. Everywhere in modern communal societies there are legal rules of a complexity, sophistication and abundance that modern lawyers find hard to comprehend.⁸ There is every reason to believe that was so in prehistoric England. As the power of the state grew, law developed by simplification not elaboration.

Modern law has categories: public and private; civil and criminal; property and obligations. Customary law does not, all law being one, consecrated by long use, general acceptance and the group's beliefs. It cannot be openly questioned by anyone on the grounds of utility or fairness. It is an essential attribute of the group. Yet it is always assumed, for that very reason, that to find it you must look for whatever rules produce a result in the best interests of the group. Expediency is all, whatever formula is needed to produce it, as it is today in the nuclear powers' treatment of international law. The ideology of the group insists that customary law is unchanging and unchangeable but it constantly responds to new challenges, particularly technological, without any intention of reform, perhaps before there was even the idea of progress.

3. SOURCES

We can be sure that from time immemorial there has been plenty of that kind of customary law in England even though there is little to tell us what it was before written records start two thousand years ago. Most of them are unreliable but there is the better evidence of archaeology, which, though it says nothing directly about law, tells us much about what was going on. Though hard to interpret, the archaeological evidence has one great advantage: it is affected only by the touch of the enquirer, not by its creator, who could rarely have had any thought of its significance for the future, let alone for historians. Literary remains are twice tainted, by what both writer and reader want.

4. PREHISTORIC SOCIETY

So we start in prehistoric times. For the first 35,000 years or so of habitation by *homo sapiens*, until about 750BC, England was lightly

⁸ Peter Lawrence *The Garia: An Ethnography of a Traditional Cosmic System in Papua New Guinea* Melbourne, Melbourne UP 1984.

populated, with many communities little larger than an extended family. Larger groupings were based on kin. There is plenty of evidence that they gathered together for social purposes. If families do not attend such gatherings, they live in backwardness, says Homer in a precocious flash of anthropological insight: ‘they have no assemblies where counsel is taken nor customary laws, *themistes*.’⁹

Stone Age people had fed themselves by gathering food in the wild or by hunting. They gradually added farming, which allowed them to cluster more densely but required the exchange of stock for breeding, if not the trading of surplus.¹⁰ The first hunter-gatherer-farmers were still nomadic but eventually, probably after c3,000BC, they foraged abroad less often and came to settle on a piece of land they called their own. Not in individual ownership, of course, but as part of the clan, inalienable, belonging to all its members, dead and living and still to be born, in the temporary stewardship of those alive who represented the clan.

Is it not inconceivable that the people, who four thousand years ago devised Stonehenge or over three thousand years ago used the exquisite gold cups now in the British Museum, had not worked out a legal system for coping with at least some of their differences in a peaceful way, with rules and replicable routines and the expectations of fairness they arouse? There is evidence of trade in the Old Stone Age, including half-finished flint tools and Baltic amber in the form of beads. There was cross-Channel trade for 3,000 years before the Romans interfered with it. Wrecks off Devon and Kent show it included trade in scrap metal.¹¹ Is it likely that there were no disputes which required customary law and practice for their resolution?

The artefacts buried in a round barrow at Lockington, south of Derby, may have been intended to recognise a settlement, around 2000BC. They include two decorated gold armlets, not a pair, and a long copper dagger made in Brittany and still in its scabbard. Rather than assume these were intended to accompany some dead man to another world, would it not be simpler – though of course still the merest speculation – to suggest that the parties to a dispute gave each other an armlet and with them buried the hatchet, or rather the dagger, significantly sheathed?

⁹ *Odyssey* 9.112; Derek Roebuck *Ancient Greek Arbitration* Oxford, Holo Books 2001 p70.

¹⁰ Francis Pryor *Britain BC: Life in Britain and Ireland Before the Romans* London, Harper Perennial 2004 p111. It used to be accepted that farming was introduced by an ‘invading wave’ from abroad but archaeological scholarship (particularly mitochondrial DNA tests) does not now support that. Indeed, modern archaeology finds little evidence of ‘invading waves’ at any time.

¹¹ TW Potter and Catherine Johns *Roman Britain* London, British Museum, new edn 2002 p13.

The most compelling object, however, was made of polished flint about 3200BC and, though found not in England but at Knowth in County Meath, is of direct relevance.¹² It is a stylised human head, about the size of my fists, of polished brown and white flint, with a great gaping mouth. It has a slot which shows it was meant to be fitted on to the top of a staff. Do we know anything about such 'speaking-staffs' in other times and places? We do indeed! Homer's *Iliad* and *Odyssey* are full of descriptions of assemblies.¹³

Men were crowded together in an assembly. A dispute had been stirred up there, and two men were disputing about the reconciliation-payment for a man who had been killed.... The elders sat on polished stones in a sacred circle and one after another took the speaking-staff of the shouting marshals in their hand and adjudicated.

The elders are given seats on polished stones in the sacred circle, as I know they did in living memory in the Cook Islands. Each elder takes the speaking-staff from one of the marshals and speaks out in turn. No speaking-staff has so far been found by archaeologists in Greece, to my knowledge, but it would not be surprising if the imagery were similar to the Knowth macehead. The wide-open mouth has double significance. It proclaims the authority of the president of the assembly to conduct proceedings. He or his marshal calls for order and he decides who shall speak. Only one person may speak at a time and that is the one holding the staff, a convention which all must honour at the risk of being shunned as a lout. That is the dramatic point of the earlier passage in the *Iliad*, when Achilles, the celebrity superstar athlete, behaves so petulantly, turning on his commander-in-chief Agamemnon, who has taken his slave girl:¹⁴

You drunk with the face of a dog and the heart of a doe, you never have the guts to fight... you just take the booty of anyone who stands up to you.... You listen to me - I swear a great oath by this staff which the Greeks hold in their hands when they turn over their judgments in their minds - they who look after customary law, *themis*, for Zeus - I swear you this great oath - you'll be sorry!

And he does the unthinkable - he throws the staff down.

That was in the Bronze Age in Greece.¹⁵ Some Australian aboriginal communities still use what is translated as the 'talking-stick'. Could the

¹² *Britain BC* p219. I know Knowth is in Ireland but it is irresistible.

¹³ *Iliad* 18.497-508. The references to other passages in the *Iliad* and *Odyssey* and in later literature are in *Ancient Greek Arbitration*, where the speaking-staff is more fully discussed.

¹⁴ *Iliad* 1.224-45.

¹⁵ The *festuca* of the Roman *lictor*, which Gaius (*Institutes* 4.16) said was used like a spear as a sign of rightful authority, *iusti domini*, reappears in the *Lex Salica: Pactus Legis Salicae* 46.1, Paul Fouracre

many so-called ‘maceheads’, of stone or horn, found in England from that time, have served the same purpose?

By the end of the Iron Age, there were in England large tribes, some led by chiefs who would be kings, who not only had been using iron tools for centuries but farmed much the same land we do, with many of the same crops, who drove light traps on made roads, drank imported wines and dressed in smart clothes in bright colours. That was how the Romans found them. Tacitus said they were related to the Gauls.¹⁶ Could their customary laws have been similar? Julius Caesar tells a likely story:¹⁷

[The druids] are the ones who lay down the law, *constituunt*, for almost all disputes, public and private, and whether something is considered a crime, and whether there has been a killing, and if there is a dispute about inheritance or boundaries they settle it. They lay down remedies and penalties.

We may accept Caesar’s word that the Gauls relied on druids to state the law, which they kept in their memory. Their British kin had similar druids, and it is likely that they did the same. Druids or no, those well developed British communities had some systems of customary law which continued after the Romans set up their colonial government with its own laws for some people in some parts of England, and there is evidence that those systems continued to be influential long after the Romans had gone.

5. THE ROMANS

The literature allows a few, unconnected glimpses of how Roman law and administration affected the people who lived here then. The Romans never imposed a civil administration over all within their borders. Britannia had many unsettled areas, and only some of them were subject to Roman military occupation. Like the later Germans and Danes, they found England easier to dominate than control. The imperial administration, where it could, co-opted existing tribal leaders and strengthened their control so long as they performed the functions the Romans allotted them. From the Romans’ point of view, the most important was to keep order. The colonial administration governed the settled areas, with a small staff of civil servants. Its legal system applied

‘Disputes in Later Merovingian Francia’ in Wendy Davies and Paul Fouracre eds *The Settlement of Disputes in Early Medieval Europe* Cambridge, Cambridge UP 1986.

¹⁶ Tacitus *Agricola* 11.

¹⁷ Caesar *Gallic War* 6.13-14.

mutatis mutandis in Britannia much as it did in other provinces.¹⁸ The Romans required only those who were citizens to transact their private business according to Roman law. They recognised the customary laws of the various groups, of tribe, clan, trade, or religion. In those parts of Britain where delegated administration was not possible, disputes which did not attract the attention of the military command were no doubt dealt with according to customary law as they had been before the Romans came and were after they left. There is nothing to tell us how that worked or of the content of those customary laws.

In AD212 the *Constitutio Antoniniana* gave full citizenship to all free inhabitants of the empire. But what happened in practice? As Tony Honoré puts it:¹⁹

The provincial governor will reach a decision after ascertaining what has been decided in the town in question in disputes of the kind with which he is now faced, since *preceding custom and the reason that led to the adoption of the custom* must be respected.

The magistrates were appointed from the local landowning class or local chiefs, depending on the district, and knew the customary law as well as anyone. The governor, when he had to be involved, would take care to take advice and apply the local law.

When the legions were withdrawn and the colonial administration lost control, it would be surprising if the Romano-Britons did not continue to consider themselves bound by Roman law as their own customary law. What other legal system could they have had by which they would all abide? Gildas wrote that Magnus Maximus had put an end to the rule of Roman law when he grabbed power from the authorities as early as AD387. For then Britannia was:²⁰ ‘keeping the Roman name but not the custom and law’. That seems to be a straightforward enough assertion. It was common enough to keep a personal Roman name²¹ and *Britannia* and its people the *Britones* were still called that in Latin for centuries. But it cannot be true that Roman law and practice completely disappeared. Many people lived in the towns, of which there were more in Roman

¹⁸ The argument is made more fully by Andrew Lintott *Imperium Romanum: Politics and Administration* London, Routledge 1993; Joan Liversidge *Britain in the Roman Empire* New York, Praeger 1968 particularly Chapter 11; Derek Roebuck and Bruno de Loynes de Fumichon *Roman Arbitration* Oxford, Holo Books 2004 pp8-10.

¹⁹ Tony Honoré ‘Roman Law AD200-400: From Cosmopolis to Reichstaat?’ in Simon Swain and Mark Edwards *Approaching Late Antiquity: the Transformation from Early to Late Empire* pp109-32, 114-6.

²⁰ Gildas *De Excidio Britanniae* 13.1: *nomen Romanum nec tamen morem legemque tenens*.

²¹ Like Aurelius Caninus in Gildas *De Excidio Britanniae* XXX 1 and Silvius Bonus in Ausonius *Epigrams* 107-112.

times than for centuries to come. Indeed, the population may have reached a peak of three or even four million, higher than it was at the time of Domesday Book.²² How many Romano-Britons stayed? It is hard to imagine more than a few thousand emigrating without their influx being recorded where they settled, as it was in Brittany.²³ If the population was, say, two and a half million and only one per cent of them were well-off and 'Romanised', that would mean that there were about 25,000 left to exercise privilege and influence and to carry on such parts of the Roman way of life as they could afford, if they wanted to.

6. ANGLO-SAXONS

But then the Germans came. The traditional story comes from Bede's *Ecclesiastical History*, written three hundred years after the events.²⁴ He tells us that the first forces came in just three long ships and that they were followed by great waves of migrants – 'Angles, Saxons and Jutes' – who invaded different parts of Britain and drove out the British population. The archaeological evidence does not now support that. For example, Nicholas Higham's work has convinced him that:²⁵

By the late sixth century, the Anglo-Saxon world was peopled by a cross-bred community with far more British than Germanic genes.

All the various groups, British and German and mixed, had their own customary laws. Between individuals from different clans, or between clans themselves, there must be some acceptable process. In England that was the feud, an integral part of the world of the clan.²⁶ It is easy to misunderstand the feud if it is thought of first as private war. It may come to that, just as a dispute between modern businesses may end in litigation. The threat is always there but not one in a hundred does, otherwise no society could work. The purpose of the feud is settlement, to find a solution acceptable to both sides. The threat of violence is basic and taken

²² The estimates vary: KO Morgan *The Oxford History of Britain* Oxford, Oxford UP 1988 p4; TW Potter and Catherine Johns *Roman Britain* London, British Museum, new edn 2002 p68.

²³ Pierre-Roland Giot, Philippe Guigon and Bernard Merdrignac *The British Settlement of Brittany: the First Bretons in Armorica* Stroud, Tempus 2003.

²⁴ Bertram Colgrave and RAB Mynors eds *Bede's Ecclesiastical History of the English People* Oxford, Oxford UP 1969

²⁵ Nicholas Higham *Rome, Britain and the Anglo-Saxons* London, Seaby 1992 pp15, 234, 235; Francis Pryor *Britain AD: A Quest for Arthur, England and the Anglo-Saxons* London, Harper Collins 2004 p196; there are scholars who dispute this, eg MG Welch 'Rural Settlement Patterns in the Early and Middle Anglo-Saxon Periods' (1985) 7 *Landscape History* 13-25, 13-14: 'The minimalist view of Anglo-Saxon settlement... flies in the face of the combined available evidence from linguistic, historical and archaeological sources'.

²⁶ JM Wallace-Hadrill *Early Germanic Kingship in England and on the Continent* Oxford Oxford UP 1971 p14 and 'The Bloodfeud of the Franks' in *The Long-Haired Kings* London Methuen 1962, Toronto, U of Toronto P reprint 1982.

for granted, as is the convention that a transfer of value may buy it off. That value is assessable by customary law. It must be enough for the injured party to accept it honourably as a substitute for retaliation but not more than it would be proper for the offending party to pay. Someone other than the parties may have to say what amount is right according to customary law and in the circumstances. The wronged kin's blood is cooler than the wronged individual's. Wiser heads have more interest in a settlement than bloody vengeance. Exhibit 1 shows how it might have worked, *mutatis mutandis*. The amount depends not just on the severity of the wrong but also on the status of the wronged. You cannot buy off the duty to retaliate for an injury to the mighty as cheaply as you can an injury to a slave. The wrong may be so great that no payment will suffice, though that is rare. What is finally offered may not be accepted, at least at first. There is a period set for settlement through compromise; only if all else fails does violence follow and even then it may be formal.

By the fifth century, the ties of kinship had slackened. Anglo-Saxon kings were from the start leaders of bands of warriors from different clans, bound together not by ties of blood but loyalty to chiefs who needed to be able to control their peoples not only by force when they were physically present themselves or by deputy but by their authority without force. By a system of laws they could provide for exceptional challenges to their 'peace'.

Within a century, most of the British kingdoms had fallen under Anglo-Saxon overlordship. There is nothing to show how that affected the application of customary law. But once the edicts of Anglo-Saxon kings were reduced to writing they show that, though they drew many distinctions and recognised many different categories of person, they were directed not just at those of recent German stock but at everyone within their jurisdiction. They attempted to impose a simplified uniform legal order in matters they considered important.

7. THE FIRST WRITTEN LAWS

I now turn to showing how an understanding of customary law can enlighten the study of those first written laws. The first legislation had been oral adjudications in specific cases, in which the king declared the law on which he or some delegated body would make or had made a decision on the facts. The Anglo-Saxons called them dooms, decisions. These statements of the specific application of general principles of customary law were remembered for future use. Later, they were written down by those who wanted them kept. The successful party would want a

record. Anyone who wanted them to have a wider reach than the original parties would make use of writing, if they could, to establish and publish them. That might be the king, for the use of those he deputed to mediate and arbitrate and adjudicate on his behalf. The clergy, too, had an interest in establishing their new privileges which the dooms proclaimed. This first English legislation was intended for those who applied the law, not those who were expected to abide by it. At first it was a matter of governmental indifference whether those who were ruled knew of its existence as long as those who imposed it did.

8. LAWSPEAKERS

All members of a community are assumed to know the law to which they are subject but, in societies which do not rely on writing, often there are those, either elders generally or someone given the task specifically, who can be called on, when a dispute is heard, to tell the tribunal and the parties what the law is. Gildas criticised the unsatisfactory ‘tyrants’ who ‘rarely look for the rule of correct judgment’. Where could they have found it? *The Gifts of Men*, an Anglo-Saxon poem of unknown date lists the various talents which God distributes, including those of ‘lawspeakers’:²⁷

One in a meeting	prudent of mind
Can further consider	the rules of the people,
Where elders are gathered	crowded together.

That is the man who is called on to declare the customary law, the ‘rules of the people’, *folcrædenne*. Thirty lines later in the poem, separated by the distribution of many different talents to different men, comes another lawspeaker:²⁸

One knows dooms	where the retainers
Work out their counsel.	

That is the man whose memory can be called on to provide the king’s own declarations of law, to an assembly where the king’s men are meeting to work out what advice they should give or what decision to make. Both these experts must have belonged to an early stage of the Anglo-Saxon kingdoms, before the dooms were first written down and became easier to get at for anyone who could read.

²⁷ GP Krapp and E van Kirk Dobbie eds *The Exeter Book* New York, Columbia UP 1936 p138 lines 41-3.

²⁸ *Exeter Book* p139 lines 72-3.

9. AETHELBERHT

This began to change in AD597 when the Pope sent Augustine to the Anglo-Saxon court of Aethelberht of Kent.²⁹ Neither Augustine's team nor the British clergy were literate in Anglo-Saxon. Yet somehow in Kent royal statements of law were first written down in that language. By whom? If Bede is to be believed the answer is clear:³⁰

So on this spot landed Augustine, servant of the Lord, and his companions, they say about forty of them. On the order of the blessed Pope Gregory, they had taken interpreters from the people of the Franks and they sent a message to Aethelberht announcing they had come from Rome.

The interpreters must have known a Germanic language near enough to one spoken in Kent. Though there were no doubt scholars in Christian Britain, clergy and lay, who could write in Latin, and presumably some even in pagan Kent to handle diplomatic correspondence, there is no evidence that any of them could write in Anglo-Saxon, even if they could speak it. Augustine's Frankish interpreters may have been the first scholars with the technical skills to write down dooms in a Germanic tongue. The existing oral dooms were in Anglo-Saxon, so that was the language in which it would be natural to write them when the necessary skill could be called on.

Aethelberht's dooms can be explained only if their relationship to prevailing customary laws is understood. The fact that those laws were plural is the key. At least one purpose of the first legislation was to deal with that plurality.

There was a place called Kent before the Romans created a Romano-British *civitas* with its centre in Canterbury. Some time in the fifth century that became the eastern part of an Anglo-Saxon kingdom which included a west Kent sub-kingdom, the former *civitas* whose capital was Rochester.³¹ All the British in the two *civitates* had their own customary law which for some may have drawn on their old Roman law. Outside the *civitates* customary law no doubt varied from one community to another,

²⁹ DR Howlett *The Celtic Latin Tradition of Biblical Style* Dublin, Four Courts P 1995 but also AS Gratwick 'Latinitas Brittanica: Was British Latin Archaic?' in Nicholas Brooks ed *Latin and the Vernacular Languages in Early Modern Britain* Leicester UP 1982 1-79.

³⁰ Bede *Ecclesiastical History* I 25. Tacitus had written 500 years before that there was not much difference between the speech of the Gauls and the British, but then they were Celtic not Germanic languages.

³¹ DP Kirby *The Earliest English Kings* London, Unwin Hyman 1991 p15.

as Kentish customs have done into modern times.³² Even if all the Anglo-Saxons had the same customary law, it could not have been the same as the Romano-British. As there must have been more than one customary law, anyone who had the task of resolving disputes needed guidance, particularly where there was a conflict of laws. That explains *one* purpose (though not of course the content) of Aethelberht's dooms. It is not surprising that he was called on to speak, to lay down simplified principles which would apply to the disputes of all his subjects where uniformity was needed. Perhaps he wanted to encourage an existing trend. As Hodgkin saw more than fifty years ago:³³

Kentish culture was a cross between Frankish and northern cultures, with perhaps some mingling of a British strain in its remoter ancestry.

It has been suggested that Aethelberht wished to show he was overlord of all Kent and proclaimed his laws to bolster his position. But to what audience? He had more direct ways to dissuade anyone who might challenge him. It has also been said that his dooms offered a gentler system than the old feud, exacting money rather than blood, and that this shows a Christian influence. Such pleasant thoughts are quickly dispelled not only by the evidence of the Church's support of the feud but also by the cruelty with which it treated its opponents in this world, with promises of even nastier suffering for its own weaker brethren in the next.

No doubt there were many kinds of dispute which Aethelberht could leave alone but not those which were new and for which no customary law existed, for example those which arose from recent conversion to Christianity and the presence of powerful and demanding clergy.

When Aethelberht or his administrators adjudicated in a dispute, they had first to find the right rule of law, as Gildas insisted, and then apply it to the facts. When the king spoke, his decree laid down the law not only for that matter. He would not be intentionally inconsistent. He could not handle all disputes himself. His delegates would want to be consistent, too, and he would expect them to be. Disputants themselves could reasonably expect replicability. Augustine's interpreters could please the king by writing in something recognisable as his own language, though he could not read it himself, which we now call Anglo-Saxon or Old

³² WS Holdsworth *A History of English Law* London, Methuen 17 vols 1903-1972 III pp260-61; gavelkind (inheritance by all sons equally); 'father to the bough, son to the plough' (no escheat for felony).

³³ RH Hodgkin *A History of the Anglo-Saxons* London, Oxford UP 3rd edn 2 vols 1932 I pp98 and 101.

English. In writing down the king's dooms they gave priority to their own privileges, setting them high.

It has been fashionable to call these collections codes but that is inexcusable. The English word 'code' means a systematic collection arranged in order. They are heterogeneous collections of edicts. The first evidence of order has to wait for Alfred and then Edgar and Cnut.

The language of the dooms is simple. Those who used them still had to remember them. Many decision-makers would not have been able to read and all would be used to memorising whatever rules they needed.

The word they use for payment is *gylde*, usually translated 'compensation'. That too is misleading and this is not a legal or semantic quibble. It is vital for the understanding of customary law to get this meaning right. Compensation means payment of a sum calculated according to the injured party's loss. These are reconciliation payments, made to buy off retaliation. There may be payment without coin. Then customary legal processes require great discrimination and expertise on the part of the assessors. When I practised law in the Highlands of Papua New Guinea in the 1980s I saw stakes in a 20x20 grid, set in the assembly ground to take 400 pigs, each an individual of different value, which the arbitrators had to assess before deciding whether a fight between two clans should continue. Though the total would be worth perhaps £100,000 today, and there was plenty of money about then, customary law demanded at least some of the reconciliation payment in pigs.

Though there had been a lack of coin in Britain since the Romans left, by Aethelberht's time that technology was also to hand, which reduced but did not remove the difficulties of assessment. What his collection of dooms was intended to do was not only to iron out differences between the customary laws but to extend them to new offences, particularly against new categories of victim, the churchmen. He was also astute to protect his own interests. As king he could retaliate at any time in any way he liked for any real or imagined wrong, though it might not be politic to do so too arbitrarily, too often. But, when his deputies had to adjudicate or assist in a settlement, or when an assembly or other arbitral body was faced with an injury to the king's interest, he was letting them know what payment to exact on his behalf. That would be multiplied according to the status of the injured party. The amount might also depend on the severity of the injury: different amounts for damage to different teeth and fingers. They need not have been what actually

changed hands but they acted as starting points for negotiating the final settlement.

10. HLOTHHERE AND EADRED

When Aethelberht died in 616 (or 618) there were many other kingdoms in Britain, large and small, Anglo-Saxon and British. For most of the seventh century, all our sources come from Kent. Only with Ine's dooms from Wessex at the end of the century can we begin to find out what was happening elsewhere and make comparisons. The same twelfth century manuscript which preserved Aethelberht's dooms contains texts of the laws attributed to Hlothhere and Eadred, as well as those of Wihtred. If we could be sure that it accurately represents the laws when they were first declared, the rubric with which they begin would be revealing:

Hlothhere and Eadric, kings of the Kentish people, added to the laws which their ancestors had made before, by these dooms hereafter stated.

Those words, however, may have been put there by any of the scribes who copied the manuscript over the next four centuries. Yet there is no reason to believe they are untrue. Their natural sense is that the two kings added these, their own decrees, to the existing laws of their ancestors, who included Aethelberht.

These are laws of and for the Kentish people, to be applied in the assemblies where those people or their representatives make decisions. Anyone with any claim can bring it before an assembly. Both claimant and defendant must give surety of some kind and each must perform what the decision-makers award.

It is not possible to say how long such a system of public dispute resolution had operated but it has all the marks of a well-established customary procedure and could well predate the dooms of Aethelberht. This was the way the Anglo-Saxons knew of preventing the feud ending in violence. By the time of Hlothhere and Eadric the central authority, the king of the Kentish peoples, was prepared and powerful enough to declare an interest in assisting the course of justice in the traditional assemblies or, put another way, to bring ordinary claims within his jurisdiction. There was still no distinction between civil claims and criminal prosecutions, still no courts, or judges, or lawyers. The feud still provided the underlying system of enforcement. But there was now some established written law.

11. THE DOOMS OF WIHTRED

Wihtred probably became undisputed king of all the Kentish peoples in 694 after some years of power struggles. His dooms may date from the following year. They show how the relationship between customary and written law was thought of then. The rubric and prologue, no doubt added later, state:³⁴

These are the dooms of Wihtred, king of the Kentish people... at Berghamstead... there was gathered a deliberative assembly of the fortunate.

The 'fortunate' – *eadigan*, what a lovely word for the privileged, clerical and lay – are then listed, first Birhtwald, archbishop of Britain, secondly 'the aforesaid king', then 'Gybmund, bishop of Rochester', and every order of the church unanimously with the 'subject people'. It is the 'fortunate' who:

devised these dooms with the consent of all and added them to the lawful customs of the Kentish people, *Cantwara rihtum þeawum*.

So it was clear to the writer of the prologue that this was a legislative assembly at which the 'fortunate' together devised the dooms but that it was the whole assembly that made them law by adding them to what was already the law: 'the lawful customs of the Kentish people'.

12. INE

Ine was king of Wessex and his dooms are the first to survive from outside Kent. They were probably made just before Wihtred's. It seems likely that in Kent decisions were taken collectively in some way, with the king's representative, if one were present, presiding rather than deciding. The king was not usually involved directly. Ine's laws, however, show that in Wessex the *ealdorman*, the king's deputy, had a more individual and decisive role, with the assembly responsible for fixing the amount of payment or punishment. Ine's prologue is not unlike Wihtred's:

I, Ine, by God's gift king of the Wessex people, with the counsel etc ... so that just law and just government should be established and secured throughout our people, so that no *ealdorman* or associate of ours shall henceforth depart from these dooms of ours... we command that the customary law, *folces aew*, and dooms, *domas*, of all the people be obeyed.

³⁴ Perhaps the date is 6 September 695, Lisi Oliver *The Beginnings of English Law* Toronto, U of Toronto P 2002 p165.

Ine 8 also makes it clear what procedural rules apply:

If anyone asks for justice before any shire official or other decision-maker, *dema*, and he cannot get it, and [the defendant] will not give him security, thirty shillings payment and within seven nights do him the justice he deserves.

That places on decision-makers an obligation to do justice to whoever asks for it. It also fixes the penalty to be paid by a recalcitrant defendant. Ine 9 makes the necessary complementary provision to stop self-help and compel all those who want justice to follow the procedures now established:

If anyone resorts to self-help, before asking for justice, he shall give back what he has taken, and recompense, *forgielde*, and thirty shillings payment, *gebete*.

13. ALFRED

Then the Scandinavians started to set up other systems as they invaded and then settled. Alfred's reign was always troubled by them, yet he intervened in the administration of justice in many more ways than his forebears. He appointed *ealdormen*, whose responsibilities for the administration of a shire included control of its assemblies. He collected dooms and published them in writing and taught the *ealdormen* to read so that they could take instructions and he could supervise their performance. More than any earlier ruler, he used his legislative powers to issue dooms to reform the law. Yet everything he did presupposed a foundation of customary law. His own will makes that clear. He wrote there that he had brought the will of his father Aethelwulf before an assembly of the whole *witan* and asked them to decide freely to recognise its validity:³⁵

I urged them all... to declare what was right, that none of them, from love or fear of me, would hesitate to apply the customary law, *folcrist*.

Not only in testamentary and other property matters, such as the use of life interests in settlements, but wherever no doom applied, as a general principle, customary law provided the legal norms then and for centuries to come.

The legislation now regularly calls it *folcrist*, as Exhibit 3 shows. Misconceptions have arisen because of errors in the standard

³⁵ FE Harmer *Select English Historical Documents of the Ninth and Tenth Centuries* Oxford, Oxford UP 19xx pp15-19.

translations.³⁶ Both Robertson and Attenborough consistently translate *folcrist* as ‘public law’, perhaps because they had their eyes on Liebermann’s translation, *Volksrecht*, rather than the Anglo-Saxon. But public law is a concept and a phrase whose time did not come in English for another thousand years.

14. EDGAR AND AETHELRED

Edgar succeeded in 959, ruling all England until 975. The collection of his laws known as IV Edgar proclaims his rights and those of his various peoples, English, Danish or British.³⁷ After Edgar, Aethelred the Unready ruled for 35 years, well into the next century. By then there is legislation in the modern sense, no longer collections of dooms but laws deliberated on by the *witenagemot* and enacted by the king with their collaboration, by an established procedure as part of a political programme.

There are three essential lessons to be learned from these tenth-century sources. The first is that, though all judicial business was still done in and by the assemblies, their nature was changing, with royal representatives playing a different role, less presidential and more judicial. Secondly, though the kin remained essential in the system of the feud, local groups determined geographically according to residence were given greater jurisdiction. When there were no longer kin groups which automatically accepted responsibility for all their members, the government needed other groupings to take their place. Thirdly, customary law continued to be the foundation. The early dooms reveal this by implication but by the end of the century the dooms of Edmund and Edgar, and in the next of Aethelred and Cnut reiterate it expressly.

For Edmund the customary law of the feud was still fundamental:³⁸

If henceforth anyone kills another, he shall himself be subject to the feud, unless he with his friends’ help within twelve months pay the full *wergeld* according to his birth. If his kin give him up and are unwilling to make a payment on his behalf, then I will that all the kin except for the wrongdoer be free from the feud, provided thereafter they give him neither food nor shelter.

³⁶ FL Attenborough *The Laws of the Earliest English Kings* New York, Russell 1963; AJ Robertson *The Laws of the Kings of England from Edmund to Henry I* Cambridge, Cambridge UP 1925 repr 2 vols Felinfach, Lanerch 2000. JM Kemble *Codex Diplomaticus Aevi Saxonici* London, English Historical Society 6 vols 1839-48 II ix also translates *folcrist* as ‘public law’, but only to show that *folc* there had the same meaning as it does in *folcland*, *folcsceara* and *folctoga* – ‘*folc* is equivalent to *peod*’.

³⁷ IV *Edgar* 2.

³⁸ II *Edmund* 1.1.

Any kinsman who later protected the wrongdoer forfeited all his property to the king and became subject to the feud again. Anyone from the victim's kin who took vengeance on anyone other than the wrongdoer forfeited all his property to the king.

Edmund enjoined his *witan* to settle feuds and laid down a procedure by which the wrongdoer appointed a mediator, declaring this was the customary law, *folcrist*:³⁹

The *witan* shall settle feuds. First, according to customary law, *folcrist*, the killer shall give a solemn promise to his mediator, *forspecan*, and the mediator to the kin, that the killer will make *bot* to the kin. Then after that the victim's kin shall give a solemn promise to that mediator that the killer may approach under truce and pledge for the *wergeld*. When he has made that pledge, then he finds a surety for the *wergeld*. When that has been done it sets up the protection of the king. Within 21 days *healsfang* is to be paid; 21 days after that *manbot*; 21 days after that the *frumgyld* of the *wergeld*.

Healsfang was the first reconciliation payment, just enough to stop the injured kin retaliating immediately, on the understanding that there was more to come in instalments. It might also be the most the killer's kin could raise on the spot. Both sides would be sensitive to the realities. *Manbot* was the *bot* paid to the dead man's lord. *Frumgyld* was the first instalment of the balance of the *wergeld*.

This doom restates with royal authority the procedure required by customary law on a killing, making it simple, homogeneous and universal. Could that procedure be what customary law required generally, not just on a killing? Was it common, if not obligatory, for the defendant in any feud first to appoint a mediator, who would then go to the other side and make an offer of *bot*?

15. FOLCRIST AND DOOMS

And so, until the eleventh century, the various assemblies provided the infrastructure of all public decision-making. They all applied customary law. In earlier periods the fundamental place of customary law has had to be argued but the royal dooms of the tenth century expressly insist on its application as the basic law. It applied always and everywhere, unless overruled by specific dooms, though there were differences particularly between English and Danes. As Edward the Elder decreed:⁴⁰

³⁹ II *Edmund* 7.

⁴⁰ I *Edward* preamble. Janet Nelson 'Dispute Settlement in Carolingian West Francia' in Wendy Davies and Paul Fouracre eds *The Settlement of Disputes in Early Medieval Europe* Cambridge,

King Edward commands all the reeves that you deem right dooms as most right as you can and base them on the doombooks. But do not neglect in any matter to take the customary law, *folcrist*, into consideration.

And his collection of dooms ends with the general exhortation:⁴¹

... every reeve shall make sure that everyone shall have the benefit of the customary law, *folcrist*.

Aethelstan also stressed the importance of the customary law's general application. He would not allow anyone to escape its grasp, making kin responsible for assigning a place of residence to those who had no lord: 'so that they are domiciled within the customary law, *folcrist*.'⁴²

Expressly in Aethelstan's time, a thief found guilty 'according to customary law, *folcrist*,' should be put to death,⁴³ an accused about to undergo the ordeal had to swear that he was 'not guilty of the charge according to customary law',⁴⁴ and an attachment of cattle had to be according to customary law.⁴⁵

In the law setting out the procedure to be followed at the assembly of the hundred, Edgar requires one who abets an escape to: 'exculpate himself as required in that place, *swa hit on lande stande....*' That doom is specifically required to show how the potential conflict of customary laws is to be resolved and presumes that the laws differed according to geography rather than kinship. It ends with the general decree:⁴⁶

In the hundred, as in other assemblies, we require that customary law be applied in every matter.

That last phrase is a jingle in Anglo-Saxon, '*mon folcrist getaece aet aelcere spaece*', something like:

Give folclaw a place
In every case.

Cambridge UP 1986 45-64 provides an analogy, quoting Hincmar of Reims: 'when they hope for profit of some kind they invoke [customary] law, but when they reckon there's no advantage to be had there, they seek refuge in capitularies: thus it comes about that neither capitularies nor law are properly observed.' Capitularies are the Frankish kings' equivalent of the Anglo-Saxon dooms, legislation publicly read out, with written copies disseminated. Would Maitland let me mention that similar tactics are causing problems in Ghana today?

⁴¹ II *Edward* 8.

⁴² II *Aethelstan* 2.

⁴³ VI *Aethelstan* 1, of the ordinances which applied to London – the city's customary law!

⁴⁴ II *Aethelstan* 23.

⁴⁵ II *Aethelstan* 9.

⁴⁶ I *Edgar* 7.

I believe that is the sort of thing that everyone who understood Anglo-Saxon learned as they grew up.

Edgar stated the basic principles even more plainly and generally in his third collection of dooms:⁴⁷

Everyone shall have the benefit of the customary law, *folcrist*, whether poor or rich, and be deemed right dooms.

The idea of customary law as the basis for the control of everyone's relations,⁴⁸ supplemented where the king thought necessary on the advice of his *witan*, was no longer merely tacitly understood. It was the fundamental constitutional principle on which the kingdom of England was being expressly settled, for the peace of the whole new *folc*.

16. CNUT

Cnut was king of Denmark and Norway and parts of Sweden. As soon as he became king of England, he sought to establish law and order on a foundation of the old legal systems, for English and Danish alike but not identical. His first decree is a set of laws declared in 1018 at a meeting in Oxford of Danes and English, shortly after the fighting had stopped.⁴⁹ They re-enact Edgar's laws not Aethelred's. Everything of his was discredited. Anyway he had copied from Edgar, whose name had a resonance and an acceptability to both sides. Prominence was given to establishing the basic laws of each community:

3.1 Henceforth let every one, poor and rich, be entitled to customary rights.

Customary rights, *folcristes*, are what you get when your customary law is applied. Cnut made everyone responsible for making the legal system work, not only those who make decisions but even the parties.⁵⁰ Two

⁴⁷ III *Edgar* 1.

⁴⁸ IV *Edgar* 14 and 15. Though he gave the Danes the right to choose the best laws they could, he insisted that the rules for preventing cattle theft be the same for all: 'Earl Oslac and all the armed forces, *here*, living in his earldom shall ensure the observance of these laws, for the love of God, and for the good of all our souls, and the peace of the whole *folc*.' *Here*, which literally means 'enemy army', is used conventionally for the Danish people.

⁴⁹ This decree differs from I and II *Cnut*. It is in a manuscript in Corpus Christi College, Cambridge 201 pp126-30; Dorothy Whitelock 'Wulfstan and the Laws of Cnut' (1948) 63 *English Historical Review* 433-52. AG Kennedy 'Cnut's Law Code of 1018' (1982) 11 *Anglo-Saxon England* 57-81 not only provides a new edition of the text, with translation and commentary, but many insights into the law.

⁵⁰ Sections 25 and 26.

years later, Cnut proclaimed the laws known since as I and II *Cnut*, confirming the Oxford decree and restoring the old laws of Edgar.⁵¹

17. CONCLUSION

No new laws made between 1023 and 1066 have survived and it is unlikely that there were any but, just before the Conquest, the *Anglo-Saxon Chronicle* for 1065 says that on 27 October Edward the Confessor ‘renewed there the laws of Cnut’.⁵²

So, at the Conquest, there were still no codes, no judges, no lawyers. Traditional assemblies rather than courts provided a working legal system based on customary law supplemented by legislation, about whose procedures we hear no complaints, whatever may be said about the honesty of decision-makers or the fairness of the outcome.

Pollock, though he has been criticised as a historian, was the most experienced lawyer of those who wrote legal history in his time. He saw some things clearly:⁵³

Written laws and legal documents, being written for present use and not for the purpose of enlightening future historians, assume knowledge on the reader’s part of an indefinite mass of received custom and practice. They are intelligible only when they are taken as part of a whole which they commonly give us little help to conceive.

That is as true of legal practice today.

We cannot comfortably relegate the first 37,000 years of our legal history into some impenetrable Dark Age. The light was on all the time for those who lived then. It is up to us to see as much as we can, even though the sources allow only intermittent glimpses. This may persuade us to think again about what Glanvill meant by *consuetudines* in 1190, or even Bracton in 1250, and more carefully about what we mean when we speak of the development of the common law a century after the Conquest. As Harold Hazeltine said:⁵⁴

Anglo-Saxon laws and institutions survived the Conquest and formed a material part of the system of common and local law in later ages.

⁵¹ *Cnut Proclamation of 1020* 13; II *Cnut* 1.1, *folcrites*.

⁵² Patrick Wormald *The Making of English Law* Oxford, Blackwell 1999 pp129-30.

⁵³ Sir Frederick Pollock ‘Anglo-Saxon Law’ (1893) 8 *English Historical Review* 239-71, 239.

⁵⁴ HD Hazeltine ‘The Laws of the Anglo-Saxons’ (1913) 29 *Law Quarterly Review* 387-98, 391.

[Let us hope that we never share the experience which recently proved how customary law can comprehensively take over when a modern legal system collapses. In 1991, in the civil war in the Papua New Guinean province of Bougainville, the state lost control. The Constitution and the statute law to which it gave dominance evaporated. The legal system ceased to function. There were no courts and no police. Quite naturally the people turned back to their customary laws to help them bring about reconciliation as soon as they could once the bloodshed stopped, through mediation of every kind of claim, but adopting also the latest learning and modern practices of restorative justice.⁵⁵ We might find it harder and harsher to retrieve ours.]

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⁵⁵ Pat Howley *Breaking Spears and Mending Hearts: Peacemakers and Restorative Justice in Bougainville* Zed Books: The Federation P 2002.

⁵⁶ A lecture delivered to a joint meeting of the Institute of Advanced Legal Studies and the Institute of Historical Research, University of London, 27 February 2006.