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**BOUNDARIES OF LAW: CODE AND CUSTOM IN THE LEGAL PRACTICE
OF EARLY MEDIEVAL CATALONIA**

by Marie A. Kelleher

In the spring of 1011 the court of the count and countess of Barcelona heard a case regarding the rightful possession of certain lands and fortifications located near Muslim-held territory to the south. Adalbert, son of the late viscount of Barcelona, had bequeathed to the monastery of Sant Cugat del Vallés two properties in the southern borderlands of the county of Barcelona: the tower of Moya and the *castrum* of Albinyana.¹ Adalbert died in battle shortly after having made his testament, at which time his brother Geribert laid claim to Moya in the name of Adalbert's surviving siblings. Guitard, the abbot of Sant Cugat, contested Geribert's claim to his late brother's property, bringing a counter-claim before the comital court. The court considered testimony and evidence presented by both sides, and eventually decided in favor of the monastery's claim to both properties.

A case involving a dispute over land during this period is no novelty, especially in Catalonia, where the late tenth and early eleventh centuries were marked by a drive to settle the borderlands that joined the Christian north with the rapidly disintegrating Caliphate of Córdoba to the south. What makes this case noteworthy is neither its existence nor its outcome, but rather the way in which it was settled. Catalan jurists at the time of this case had at their disposal a written law code, the *Liber Iudiciorum*, which had been in use for centuries; but rather than relying on a single code of law, the judicial panel in the case at hand based their final decision on an amalgam of written law and custom. It seems that neither they nor either of the claimants found anything amiss with making use of two separate legal traditions to decide one case.

I wish to address in this paper the question of why the judges in this case should take such a course, and what it means to our understanding

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¹These two properties made up a small part of that monastery's growing holdings in the borderlands, holdings that included not only arable land, but also fortifications. Between 958 and 999, Sant Cugat acquired at least seventeen properties in the frontier district of Olérdola alone. See *Cartulario de Sant Cugat del Vallés*, ed. José Ruis Serra, 3 vols. (Barcelona 1945–1947) (hereafter *SC*); and Archibald Lewis, *The Development of Southern French and Catalan Society, 718–1050* (Austin, TX 1965) 321.

of the way the law worked—at least in Catalonia—before the rediscovery of the Justinianic corpus and the beginning of formal and standardized legal instruction. I believe that an examination of the dispute over the possession of Moya and Albinyana reveals that even those early medieval societies that had fully developed law codes perceived the need for flexible systems of dispute settlement. Specifically, I will argue that written and customary law were not mutually exclusive legal traditions, but rather were complementary systems of conflict resolution.

The interaction between custom and other types of law has historically been presented as a conflict narrative, a struggle for precedence between competing legal systems. Such was certainly the state of the question at the beginning of the twentieth century,² but the dichotomy between customary and other forms of law has persisted into more recent historiography as well. Scholars of medieval Iberia, when they venture into this territory, generally focus on the relative importance of Visigothic law versus local customary practice. Some have emphasized the persistent influence of the great Visigothic law code, the *Liber Iudiciorum*. One historian of medieval Iberia, Roger Collins, has pointed out that Catalan courts continued to cite the *Liber Iudiciorum* in their decisions as late as the mid-tenth century.³ Others, however, have

²Some of the earliest important modern work on the subject was done by F. C. von Savigny and the so-called German Historical School. Savigny opposed codified law on the grounds that written law was inflexible, and thus could not change to reflect the needs of the people at any given time. He and his followers believed that custom was superior to written law in this respect, since the former arose from the *Volksgeist*, and thus accurately reflected the popular will at any given time. They considered custom superior to *Juristenrecht* as well, since jurists could not make law, but could only rule on the application of established patterns of conflict resolution. F. C. von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg 1914). See also C. K. Allen, *Law in the Making* (Oxford 1958) 84–110; and R. C. van Caenegem, *An Historical Introduction to Private Law*, trans. D. E. L. Johnson (Cambridge 1992) 13–24.

Not all legal scholars were so sanguine about the role of custom. The subsidiary role assigned to jurists presented a particular problem, and several early twentieth-century legal scholars stressed the role of jurists in the creation of law. Eugen Ehrlich found jurisprudence to be much more influential than custom, since it was by means of the former that the latter gained the force of law. The French legal scholar Edouard Lambert went so far as to assert that *Juristenrecht* may have actually worked to produce custom as a form of “obligatory resignation.” See Allen, *Law in the Making*, 115–120.

³Roger Collins, “*Sicut Lex Gothorum Continet*: Law and Charters in Ninth- and Tenth-Century León and Catalonia,” *English Historical Review* 100 (July 1985) 489–512. Collins has also proposed that Visigothic law had an influence outside of the Catalan counties that is largely ignored, and that regional differences in court procedure and citation practice were no more than minor local variations on a law code that

downplayed the influence of written law in this area. José María Mínguez, for example, does not dispute the fact that both a fully developed law code and a system for the administration of justice existed in early medieval Iberia. However, he argues that local political powers brought their private interests to bear on legal proceedings to such a great extent that both the written law and the notion of uniform justice that it represented were essentially rendered meaningless during the tenth and eleventh centuries.⁴

Scholars on both sides of the issue seem to base their claims about the relative potency of written law on the consistency of its application.⁵ The unspoken assumption seems to be that written law was either a source of universal justice, or that it was largely disregarded in favor of more expedient or relevant methods of dispute settlement. It is my contention, however, that modern historians may have imposed upon the study of dispute settlement a false dichotomy between written law and other sources of justice, and that, moreover, such a distinction would have made little sense to the personnel and disputants in the courts of eleventh-century Catalonia.

The dispute over the possession of Moya and Albinyana is a case in point. The members of the panel that decided the case seem to have made no distinction between written and customary law, nor to have privileged one over the other. This suggests that boundaries between forms of dispute settlement in eleventh-century Catalonia could be less distinct than modern scholars have supposed.

remained in use throughout the peninsula until at least the end of the tenth century. See Roger Collins, "Visigothic Law and Regional Custom in Disputes in Early Medieval Spain," in *The Settlement of Disputes in Early Medieval Europe*, ed. Wendy Davies and Paul Fouracre (Cambridge 1986) 86–100.

⁴José María Mínguez, "Justicia y poder en el marco de la feudalización de la sociedad Leonesa," in *La Giustizia nell'alto medioevo*, Settimane di studio del Centro italiano di studi sull'alto Medioevo 44 (Spoleto 1997) 529–544.

⁵Other authors who have stressed the persistent influence of Visigothic law include Helmut Coing, in his *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* (Munich 1973) and E. N. van Kleffens, in *Hispanic Law until the End of the Middle Ages* (Edinburgh 1968). On the other side of the issue, a number of the papers published in the Spoleto collection (see n. 4 above) argue against the assumption that written law codes, if they existed, were necessarily the primary source of justice for their respective societies. Perhaps most forceful among these is Patrick Wormald's essay, "Giving God and King Their Due: Conflict and its Regulation in the Early English State," in *La Giustizia nell'alto medioevo* (n. 4 above) 549–590. Wormald notes that even in the twelfth- and thirteenth-century heyday of English common law, private dispute settlement was quite common. Like Mínguez, he stresses that the mere existence of a public legal authority did not rule out the possibility of alternative means of dispute settlement.

Adalbert bequeathed Moya and Albinyana to the monastery of Sant Cugat in October of 1008/9.⁶ He died about two years later while on a military expedition led by Count Ramon Borrell of Barcelona. News of Adalbert's death probably reached his family late in the summer of 1010, possibly as early as August. Although we do not know if Adalbert's brother Geribert acted upon this news before or after his brother's testament was made public, we do know that by April of the following year he had taken possession of Moya, and possibly Albinyana as well.⁷ Faced with what he believed to be a usurpation of his monastery's rights, Abbot Guitard gathered the documents that attested to Sant Cugat's ownership of Moya and Albinyana, and brought a complaint before the court of the count and countess of Barcelona.⁸

Abbot Guitard contended that Geribert had usurped the monastery's right to the possession of Moya.⁹ In response to Guitard's claim, Geribert asserted that he and his siblings had been fully within their rights to take possession of the contested properties after Adalbert's death, on the grounds that their late brother's bequest to the monastery of Sant Cugat had been invalid. As Geribert stated, "My brother was not able to discharge or will this tower with its adjacencies to [the monastery of Sant Cugat] because my patrimony and that of my brothers and sisters is there."¹⁰

Geribert seems to have based his argument on the belief that, at the time of Adalbert's death, Moya had been a part of a general family inheritance, to be divided among siblings, rather than Adalbert's prop-

⁶SC 2, no. 441. Determining the correct date of Adalbert's testament is problematic. The copy in the printed cartulary indicates that Adalbert signed this document, meaning that it was most probably drawn up before he set out on the expedition on which he died. Rius Serra's edition of the cartulary gives the date of document 441 as October 18, 1011, a date which is clearly incorrect, as it would require the testament to have been written and signed by Adalbert almost sixteen months after his death (Rius Serra does note this discrepancy, but does not resolve it). I have based my dating of the document on a reconstruction of the events surrounding its creation, as well as on the assumption that there was, at some point, an error in the transcription of the regnal year in the dating clause. One document involved in the case (SC 2, no. 431) states that Adalbert died in the attack on Córdoba of June 1010. The same document also records that, after dictating his testament, Adalbert went on to Montmagastre, and after returning, lived "*aliquantos dies*" before setting off on the aforementioned expedition. Under these circumstances, and assuming that the month and date were correctly attributed, the most likely date for this document would be October 18 of 1008 or 1009, rather than 1011.

⁷SC 2, no. 439.

⁸SC 2, no. 439.

⁹SC 2, no. 439.

¹⁰"non potuit frater meus hanc turrim cum suis adiacenciis predicto cenobio dimittere vel testari, quoniam ibi mea hereditas sive fratris mei sororisque mee est." SC 2, no. 437.

erty to alienate. As an equal division of property to both male and female descendants was the rule under Visigothic law,¹¹ Geribert would seem to be in the right. However, Abbot Guitard's reply makes clear that the two brothers' relationship, at least where it touched on matters of inheritance, had been anything but smooth in the past, and that in fact Geribert had never given Adalbert the property that should have gone to the latter upon their father's death:

You have always disdained to give to your brother this [property], which ought to have fallen to his lot as his inheritance from the paternal goods. For that reason, when you saw fit not to give him as a part of his patrimony those things that rightfully belonged to him, he, made very angry at this, redeemed this tower and its adjacencies from the power of creditors who were retaining it in their right for a debt for which it was a deposit.¹²

It is at the point of the verdict that we see the interplay of custom and written law in dispute settlement during this period. The *Liber Iudiciorum*, the great compilation of Visigothic law, was the written law of the land, and it remained in force in Catalonia long after it had been supplanted in other parts of Christian Iberia. However, the progress of the *reconquista* had given rise to situations that the centuries-old law code could not address. Catalan courts resolved such cases in the only way they could—by depending on written law whenever possible, and incorporating customary law into their rulings in situations that the written law did not cover, making little or no distinction between what modern legal scholars have usually considered two separate traditions.

The way that the judicial panel reached its verdict in the case at hand illustrates this point. After hearing the arguments presented by both sides and examining copies of Adalbert's testament and its corresponding sacramental publication,¹³ the panel found in favor of the monastery's claim. The panelists began by addressing Geribert's claim that the first property in question, Moya, had never been Adalbert's to alienate. The panel sided with the monastery, declaring:

¹¹See n. 15 below.

¹²“Vos semper contempsistis fratri vestro huic dare de rebus paternis suam hereditatem quam illi debebat contingere. Id circo, cum vos vidit non duros tibi suam hereditatem quam illi iuste contingebat, multiociens exinde lacessitus, redemit de potestate creditorum hanc turrim cum suis adiacenciis qui in iure suo eam retinebant pro debito quo hec pignus deposita fuerat.” *SC 2*, no. 437.

¹³The sacramental publication was a type of document that often accompanied testamentary dispositions, recording the testators' oaths as to the legitimacy of the testament. Testators swore a solemn oath while touching the testament in question with one hand and a relic, the gospels, or (as in this case) an altar with the other.

. . . according to the principles of justice, the aforementioned Adalbert ought to have had the adult inheritance of the paternal goods, that is, Moya with its adjacencies, because he was from a legitimate marriage and the law provided for such an inheritance for him as much as for any one of his siblings in the matter of patrimony . . .¹⁴

According to the *Liber Iudiciorum*, at the time of a parent's death all children, male and female, were entitled to an equal share of the patrimony.¹⁵ The panel seems to have felt that Geribert had denied Adalbert his fair share of the patrimony as mandated by Visigothic inheritance law. The court also pointed out that Adalbert had paid a debt owed on the land, which appears to have been mortgaged. According to the *Liber Iudiciorum*, if a piece of land was placed as a *pignus*, or collateral, for a loan, and if that loan was not paid back within the specified period of time, the holder of the deposit had a right to sell his interest in the land.¹⁶ The court determined that, by paying the debt owed on Moya, Adalbert had established beyond any doubt his right to his inheritance, even if his brother had chosen to withhold it from him. The matter of Moya, then, seems to have been decided largely on the basis of written law.

The panel then moved on to consider the second property mentioned in Adalbert's testament, the *castrum* of Albinyana. This part of the case presented panel members with an entirely different problem, for Albinyana seems never to have been a part of the family patrimony, but rather was a property that Adalbert had acquired on his own initiative. According to the panel's ruling:

. . . Adalbert found [Albinyana] barren and uninhabited and founded it just as is the custom by right of *aprisio*, and by this right held it for as long as he lived, and by right of paternal succession that he ought to have had on the unsettled frontier, just as his siblings might have in other similar places, it is sufficiently clear that this *castrum* was, by right, Adalbert's, and he could do with it as he wished, just as the law says. Every free person, be they man or woman, noble or lesser, if he leaves behind neither children nor grandchildren nor great-grandchildren, let him have

¹⁴“Patet nobis per iusticie ordinem quod Adalbertus iam dictus maiorem hereditatem debuit habere ex rebus paternis quam est Mogia cum suis adiacentiis, quoniam et ipse ex legitimo fuit coniugio et talem hereditatem dedit illi lex qualem uni ex fratribus suis in rebus paternis. . . .” SC 2, no. 437.

¹⁵Fernando Arvizu y Galarraga, *La Disposición “mortis causa” en el derecho español de la alta edad media* (Pamplona 1977) 24.

¹⁶*Lex Visigothorum*, ed. Karl Zeumer, in *Monumenta Germaniae Historia, Leges*, Sectio I, vol. 1 (hereafter MGH) 1.2.4.

the power to do as he wishes with his own goods.¹⁷

The counts of Catalonia were eager to have the borderlands settled, and favorable land grants were one incentive they used to entice people to set up homes and even fortifications in remote and often dangerous areas. One of the more common variants of this policy was the land grant *per aprisionem*. The term *aprisio* usually referred to a customary type of land tenure by which a peasant would settle a piece of deserted land. After a person or family had lived on and cultivated the land in question for a specified period of time, the land granted *per aprisionem* became an allod.¹⁸

In this case, however, the panel seems to be referring to a variant of the *aprisio* that applied to fighters rather than farmers. Under the *ius aprisio*, a *miles* could be granted ownership of a castle, tower or other fortification and control over the lands pertaining to it, provided that he could occupy, garrison and defend the fortification and the surrounding lands.¹⁹ The panel pointed out that Adalbert had found the *castrum* of Albinyana in ruins,²⁰ and had not only claimed it, but had personally occupied it.²¹ By occupying and defending Albinyana, Adalbert had fulfilled his obligations under the *ius aprisionem*, and the land was his.

Thus a large part of the decision regarding the second property in question rested on the judicial panel's interpretation of a provision of customary law that appeared nowhere in the *Liber Iudiciorum*. We should note, however, that the panel's decision regarding the status of Albinyana was twofold: first, it ruled on the legitimacy of Adalbert's

¹⁷c. . . Adalbertus heremus et sine habitatore illud invenisset, et sicut consuetudo est per vocem aprisionis eum condirexisset et per hanc vocem quandiu vixit eum tenuisset, et per vocem paterne successionis quam habere debebat in marchii heremis, sicut fratres sui in aliis locis habent istius similimis, sates patet hoc castrum fuisse iuris istius Adalberti, et potuit exinde facere quod voluit, quoniam lex dixit. Omnis ingenuus, vir sive femina, seu nobilis seu inferior fuerit, si filios aut nepotes seu etiam pronepotes non reliquerit, faciendi de rebus suis quod voluerit habeat potestatem." SC 2, no. 437.

¹⁸Paul Freedman, *The Origins of Peasant Servitude in Medieval Catalonia* (Cambridge 1991) 59–60; Archibald Lewis, "Land and Social Mobility in Catalonia, 778–1213," in *Geschichte in der Gesellschaft: Festschrift für Karl Bosl zum 65. Geburtstag*, ed. Friedrich Prinz, et al. (Stuttgart 1974) 314–315.

¹⁹Lewis, "Land and Social Mobility," 317.

²⁰The *castrum* of Albinyana had been in ruins as far back as the reign of Louis the Pious, and even as late as 1088, a document from the monastery of Sant Cugat describes the area as "destructum, eremum et sine habitatione." See Pierre Bonnassie, *La Catalogne du milieu du X^e à la fin du XI^e siècle: Croissance et mutations d'une société*, vol. 1 (Toulouse 1975) 356.

²¹SC 2, no. 437. The panel does not comment on whether Adalbert had garrisoned Albinyana, although this was normally a requirement of holding a fortification *per aprisionem*.

ownership of the land, and second, on whether he had the right to give it to the monastery. Here, when the panel members rule that Adalbert could dispose of Albinyana as he wished, “just as the law says,” they once again cross the boundary between written and customary law, referring to a provision of Visigothic law that stipulates that a person who dies without issue may alienate the entirety of his or her goods as he or she wishes.²² Thus, Adalbert’s ownership of Albinyana was based on a provision of customary law, while his right to alienate it rested on a centuries-old provision of the written law code.

The panel referred to both “principles of justice” and “the law” in its verdict, yet the decision itself was based on two different forms of law, written and customary. How were the judges in this case able to reconcile the two? This brings us back to our original problem of the relationship between written and customary law in early medieval jurisprudence. I believe that the case outlined here suggests that, at least in Catalonia, jurists made little distinction between the two.

Catalan jurists would not have been the first to traverse what we think of as the boundary between written and customary law. Justinian’s *Corpus Iuris Civilis*, to cite one important example, made distinctions between types of law, but rarely privileged one over the other. The *Corpus Iuris Civilis* officially recognized custom (*usus*) as a source of law,²³ thereby providing a model for jurists of the High and Later Middle Ages who would need to find a place for custom alongside written law. A title of the Digest, *de conditione ex lege*, specifically provides for actions under “new law,” or law not included in the Code or the Digest, and thirteenth-century jurists continued to rely on this principle, including both canon law and custom under the rubric of “new law.”²⁴

Iberian law codes reflect a similar stance on the interaction between written and customary law. The *Liber Iudiciorum* itself was designed to be adapted to new situations. According to book 1, *de lege*, the law ought to be administered “according to the custom of the citizenry, adapted to place and time.”²⁵ Catalan jurists writing over four centuries later gave voice to a similar legal philosophy, stating that “each nation

²²MGH, *Lex Visigothorum*, 4.2.20.

²³Inst. 1.2.9: “Ex non scripto ius venit, quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur.”

²⁴Kees Bezemer, “Legal Remedies for Non-Roman Law in Medieval Doctrine,” *The Legal History Review* 60 (1992) 68–69.

²⁵“Lex erit manifesta nec quemquam in captionem civium devocabit. Erit secundum naturam, secundum consuetudinem civitatis, loco temporisque conveniens . . .” MGH, *Lex Visigothorum*, 1.2.4.

chooses its own law from custom. Indeed, a long-established custom arises in place of law. . . . The establishment of equity is twofold: at times in the laws, and at others in the usages.”²⁶ Thus, jurists in both the seventh-century Visigothic kingdom and the twelfth-century Catalan counties were willing to accept customary practice as a basis for the official administration of justice. The resolution of the dispute over Moya and Albinyana suggests that this tradition was continuous, and that such syncretism, far from being a mere ideal, was actually put into practice by the courts.

Why did medieval jurists feel it necessary to place custom on an even footing with written law? The answer seems to lie in what one legal scholar has called the “dysfunctional” nature of written law.²⁷ Scholars have at times adopted a functionalist interpretation of the law, assuming that a law would not exist unless societal conditions rendered that law necessary and useful.²⁸ However, it may be more accurate in some cases to view written law as *dys*functional, since it necessarily outlives the cause that it was created to remedy, and also may take on new meanings as it spreads geographically. Thus, in the words of one scholar, “a great deal, if not most, of law operates in a territory for which it was not originally designed, or in a society which is radically different from that which created the law.”²⁹

Early eleventh-century Catalan society was very different from the society that had produced the *Liber Iudiciorum*, and in many cases the centuries-old code did not adequately address the needs of that new society. The once-functional code of written law had outlived the circumstances that had generated it. Catalan jurists eventually responded to this state of affairs by drafting a new code, the *Usatges* of Barcelona, which, in the twelfth century, supplemented elements of the *Liber Iudiciorum* with new laws that addressed then-current problems. There does not, however, seem to have been a period in which the old code had fallen into disuse before the new one was adopted. Rather, Catalan courts had been ruling on problems not covered by the *Liber Iudiciorum* long before drafting the new written law. By blending written

²⁶*Usatges of Barcelona*, ed. and trans. Donald J. Kagay (Philadelphia 1994) 102.

²⁷Alan Watson, “Legal Change: Sources of Law and Legal Culture,” chap. in *Legal Origins and Legal Change* (London 1991) 82–84. See also *Society and Legal Change* (Edinburgh 1977) by the same author.

²⁸See, for example, Lawrence M. Friedman, *A History of American Law* (New York 1973) 595: “As long as the country endures, so will its system of law, coextensive with society, reflecting its wishes and needs, in all their irrationality, ambiguity and inconsistency. It will follow every twist and turn of development. The law is a mirror held up to life.”

²⁹Watson, “Legal Change,” 82–84.

and customary law in their decisions on individual cases, they were able to devise appropriate solutions to these new problems.

It is to this model of jurisprudence that present-day historians ought to look if we are to understand the relationship between custom and written law in the Middle Ages. For medieval jurists, custom, written law and other forms of conflict resolution were complementary means to the end of regulating society. The case regarding the possession of Moya and Albinyana illustrates that, in Catalonia at least, boundaries

between forms of dispute settlement could be less rigid than modern scholars have supposed.

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