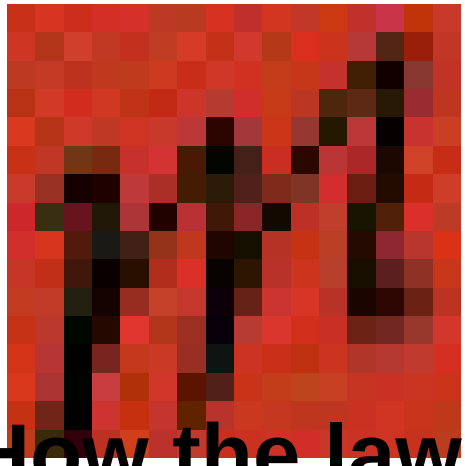
http://montesquieu.ens-lyon.fr/spip.php?article3074



XXVIII.9 How the law codes of the barbarians and the capitularies were lost

- The Spirit of Law - Book XXVIII. On the origin and transformations of the civil laws among the French -

Date de mise en ligne : vendredi 7 septembre 2018

The Salic, Ripuarian, Burgundian, and Visigoth laws gradually ceased to be in use among the French : here is how.

Fiefs having become hereditary, and sub-fiefs having been extended, many practices were introduced to which these laws were no longer applicable. Their spirit was indeed retained, which was to settle most matters with fines. But the values having doubtless changed, the fines also changed, and we see many charters where lords set the fines that were to be paid in their petty courts. [1] Thus the spirit of the law was being followed, but not the law itself.

Moreover, France being divided into an infinite number of petty seigniories which recognized feudal dependency rather than political dependency, it was most unlikely that anyone could have authorized a single law ; indeed there would have been no way to enforce it. Nor was it any longer the practice to send extraordinary officers [2] into the provinces to oversee the administration of justice and political matters ; it even appears from the charters that when new fiefs were established, kings renounced the right to send them. Thus, when almost everything had become a fief, these officers could no longer be employed ; there was no more common law, because no one could enforce the common law.

The Salic, Burgundian, and Visigoth laws were therefore extremely neglected at the end of the second dynasty, and at the beginning of the third they were scarcely ever heard of.

Under the first two dynasties, the nation was often assembled, which is to say the lords and the bishops ; there was as yet no suggestion of commons. In these assemblies they sought to regulate the clergy, which was a body in the process of formation, so to speak, under the conquerors, and establishing its prerogatives ; the laws made in these assemblies are what we call the capitularies. Four things occurred : laws of fiefs were instituted, and a large part of the Church holdings were governed by the laws of fiefs ; the ecclesiastics separated themselves more and neglected reform laws where they had not been the sole reformers [3] ; the canons of the councils and papal decretals were collected [4] ; and the clergy received these laws as coming from a purer source. Since the erection of the great fiefs, the kings, as I have said, no longer had envoys in the provinces to enforce the laws they had promulgated ; thus, under the third dynasty there was no more talk of capitularies.

---

[1] M. de la Thaumassière has collected several. See, e.g., chapters lxi, lxvi, and others.

[2] *Missi domenici*.

[3] Let the bishops, says Charles the Bald in the capitulary of year 844 (art. 8), under pretext that they have to authority to make canons, not oppose or neglect this constitution. It seems he already could foresee its demise.

[4] An infinite number of papal decretals were inserted into the compendiumof canons ; there were very few of them in the former collection. Denis the Small put many in his, but that of Isidore Mercator was filled with true and false decretals. The old compendiumwas in use in France until Charlemagne. That prince received from the hands of Pope Adrian I the compendiumof Denis the Small, and had it accepted. The compendium of Isidore Mercator appeared in France about the time of the reign of Charlemagne ; they persisted with it ; finally came what is called the course of Canon law.