INTRODUCTION

Vernacular Writing and the Transformation of Customary Law in Medieval France

'No one before me ever undertook this thing, such that I have a model', wrote Pierre de Fontaines around 1253 in the preface to his *Conseil à un ami*.[1] Pierre had written the *Conseil* in response to the pleas of an unnamed friend who wanted his son to study the laws, customs, and practices of the secular courts in his region of Vermandois, which was just north-east of Paris, lying between Flanders and Champagne.[2] This young man was to succeed his father and govern his lands. Upon inheriting, he would have to become a legal actor: he would have to provide justice to his subjects, keep his lands according to appropriate laws and customs, likely represent himself in court, and provide good advice to his friends.[3]

There was no easy way to learn these subjects, which together constituted the sorts of knowledge necessary to understand the legal culture of secular courts and to navigate them successfully. Procedural manuals had been written in the twelfth century to clarify, establish, and demystify the legal process in the Church courts, complementing an already rich body of rules that formed its substantive law.[4]

[1] 'nus n'enprist onques devant moi ceste chose, dont jaie examplaire' (Pierre de Fontaines, *Le Conseil de Pierre de Fontaines*, 1.3; hereafter Pierre de Fontaines, *Conseil*). An exemplar widely meant an example or model as well as a copy of a book.
[2] 'voudriez qu'il s'estudiast ès lois et ès costumes du païs dont it est, et en usage en cort laie' (*ibid.*, 1.2).
[3] These are the skills the entreating friend hoped his son would acquire from Pierre's book (*ibid.*, 1.2).
[4] Linda Fowler-Magerl, '*Ordines iudiciarii*' *and* '*Libelli De ordine iudiciorum*'.

However, none of this existed for secular courts. Pierre's friend's son would have to attend court sessions, watch, observe, and try to remember as much as he could. He could learn from his father. He could ask for advice from friends and administrators. He might familiarize himself with the family's documents, affirming their rights and attesting to transactions. Ultimately, it would take him much time and effort to get a good handle on how he should run his own court for his vassals and the residents of his land, as was his duty as a lord, and how to navigate others. For this reason, his father implored Pierre 'so many times' to compose a written text that his son could use to learn how to become a legal actor.[5]

Pierre was a native of Vermandois. He owned lands there, arbitrated disputes in the area, and worked in the court of Mahaut d'Artois in a legal and administrative capacity.[6] He made enough of a name for himself to become the royal justice for Vermandois in 1253, an appointment that did not last the year before he went off to work for the royal Parliament in Paris.[7] At some point in this career, he wrote his *Conseil*, and the book makes clear that he was a man of both experience and learning.[8] He was comfortable with the discursive tools of rhetoric, opening his book with the common trope of a humble author with a great task.[9] The book was framed as a scholastic dialogue, and the textual sources he quoted at length

[5] 'vos m'avez tantes fois proié et requis' (Pierre de Fontaines, *Conseil*, 1.1), 'de ce m'avez vos requis, et requerez que je li face un escrit selonc les us et costumes de Vermandois et d'autres corz laies' (*ibid*., 1.2).

[6] Quentin Griffiths, 'Les origines et la carrière de Pierre de Fontaines, Jurisconsulte de Saint Louis', 549.

[7] *Ibid.*

[8] We know very little about Pierre's early career before he entered royal service. The *Conseil* is commonly dated 'around 1253' because Pierre had official judicial functions as a royal justice in Vermandois in 1253. We do not know whether Pierre conceded to his friend's request and wrote the text when his career as royal justice of Vermandois was taking off or once he had become a man of the king and it had reached its summit.

[9] This was the *captatio benevolentiae*, a rhetorical tool developed in classical Roman rhetoric. It was common a trope in medieval prefaces to works on diverse subjects meant to gain the sympathies of an audience by showing the importance of a text without overpraising the author. Rhetoric was part of the education of any schoolboy. It could certainly be an asset in the courtroom; a couple of decades after Pierre, William Durand advised lawyers pleading in ecclesiastical courts to gain the judge's favor with 'immoderately unctuous' praise (James A. Brundage, *The Medieval Origins of the Legal Profession*, p. 427).

were books of late antique Roman law, the form of law one could study at university alongside ecclesiastical law.

Yet despite his experience and learning, Pierre's task felt new and unfamiliar to him. How exactly should he compose a work on a subject without a model indicating how to construct a coherent account of customary law, let alone a genre? Without examples to follow, Pierre had to engage in the creative act of choosing which of his myriad observations and experiences to draw upon, which abstract and substantive ideas from his studies to use, and how to write about all of these things.

Adding to the difficulty was the fact that Pierre was expanding access to the study of law to a new audience – laymen, like his addressee – and so he composed the *Conseil* in their vernacular rather than Latin, the general language of legal writing.[10] Unlike clerics and scholars who spent years in Latinate study, 'the mind of a layman cannot spend much time studying such things'.[11] Addressing those 'who wish to learn how to administer justice and hold land', and eschewing 'hard or obscure or long words', Pierre decided that the best approach would be to write with brevity, simplicity, and clarity.[12]

This book tells the story of Pierre and similar authors in northern France who composed the lawbooks, known as *coutumiers* in the French legal tradition, that shaped customary law into a field of knowledge. 'Customary law' typically refers to a type of rule made in practice, and in the courts, by the community, which can include 'the people' in some form, lords and kings, or lawyers and judges.[13]

[10] Laymen and the knightly class played an active role in the development of vernacular literature and writing more generally (Martin Aurell, *Le chevalier lettré*.).

[11] Pierre de Fontaines, *Conseil*, 1.2. [12] Pierre de Fontaines, 1.2.

[13] 'Customary law' can mean significantly different things depending on time, place, and context. For the medieval Latin European West, 'customary law' generally refers to legal rules that are created out of community practice. It can designate the legal rules of both dominant and minority or subjugated populations. Looking beyond the medieval period, its meaning can range from Western European law during the Middle Ages before it was professionalized, to the laws of colonies as opposed to the laws of their metropoles, forms of indigenous law rather than the law of the colonial order, or a form of legal-political rhetoric of the post-colonial order (Jacques Vanderlinden, 'Here, there and everywhere. . . or nowhere?', p. 143). Customary law holds an important place in modern law, but it tends to be underrecognized outside of international law (Gary Brown and Keira Poellet, 'Traditional and Modern Approaches to Customary International Law', 757). Instead, in contemporary society, customary law is most often identified with the law of so-called 'primitive',

Customs concerning specific rules of property, succession, and other subjects certainly emerged out of this oral practice. *Coutumier* authors, however, both known and anonymous, successfully crafted customary law into an expository genre of writing, and these expositions are an excellent starting point for understanding the legal culture of later medieval France.

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If what Pierre accomplished – compiling and systematizing disparate rules of custom into a body of coherent law – seems like a natural way to package customary law, it is because he and other *coutumier* authors gave it the form that is familiar and even obvious to us today. Pierre reminds us that it was no obvious thing to decide how to write customary law. Pierre was not actually the first author of a written customary law as his comment implied. Comparable texts had been and were being written elsewhere in Europe and a couple closer to home in northern France, and indeed the textualization of legal ideas was not restricted to Christian communities.[14] Pierre was thus participating in a wider cultural movement that began around the twelfth century, in which lay court practices and ideas about law were gathered and crafted into bodies of written rules.

The 'classical age' of the *coutumiers* stretches from the twelfth century, when this form of lawbook began, to the fifteenth, when the French king demanded that every region compose one official version of its custom.[15] The historiography of the *coutumiers* is incredibly rich but missing a larger view: there is no large-scale work devoted specifically to the northern French or French *coutumiers* as a whole. They appear variously as part of histories of French law, within larger histories of custom and its lawbooks in Europe, or in a multitude of articles on a specific text or legal subject.[16] This book focuses on what

traditional, subaltern, or preliterate peoples (David J. Bederman, *Custom as a Source of Law*, pp. 3–15). All of these meanings of customary law bear some connection to Roman categories of legal order – where 'custom' and 'law' together described 'civil law,' a law proper to a people, as opposed to natural law and the law of nations.

[14] Talya Fishman, *Becoming the People of the Talmud*.

[15] Van Dievoet, *Les coutumiers, les styles, les formulaires*, p. 22.

[16] As a genre of writing, the Northern French *coutumiers* are part of Guido van Dievoet's typology of *coutumiers* written across Europe from the twelfth to fifteenth centuries (Van Dievoet, *Les coutumiers, les styles, les formulaires*). The collected works of Paul Ourliac, Jean Yver, André Gouron, and Robert Jacob are foundational

I call 'the first *coutumiers*'. These are the earliest *coutumiers* of northern France, which were composed from the mid-thirteenth century to the first years of the fourteenth.[17] This group of texts includes the *Très ancien coutumier de Normandie* (early thirteenth century with later additions); the *Coutumes d'Anjou et du Maine* (1246); Pierre de Fontaines' *Conseil à un ami* (1253); *Summa de legibus Normannie* (between 1254 and 1258); the *Livre de jostice et de plet* (ca. 1260); the *Établissements de Saint Louis* (1272 or 1273); the *Livre des constitutions demenées el Chastelet de Paris* (between 1279 and 1282); Philippe de Beaumanoir's *Coutumes de Beauvaisis* (1283); the *Ancien coutumier de Champagne* (ca. 1295); *Ancien coutumier de Bourgogne* (end of thirteenth century); and the *Coutumier d'Artois* (between 1283 and 1302).[18] Generally, the

reading for understanding these texts. F. R. P. Akehurst's important English translations and studies illuminate not only the meaning but also the courtly context of customary law. The *coutumiers* appear in Yvonne Bongert's analysis of the practice of the lay courts between the tenth and thirteenth centuries, and in Esther Cohen's sociocultural analysis of law and legal practice in the later Middle Ages (Bongert, *Recherches sur les cours laïques de Xe au XIIIe siècle*; Cohen, *The Crossroads of Justice: Law and Culture in Late Medieval France*). John Gilissen provides an analysis of the concept of custom in the European Middle Ages that includes a discussion the *coutumiers* (Gilissen, *La coutume*). The *coutumiers* are an important part of various introductions to French legal history or the history of French private law. Other essential works on the history of custom in Europe include the Jean Bodin Society's series of volumes entitled *La Coutume = Custom*, notably the one devoted to the medieval period edited by John Gilissen, and the wonderful volume on custom edited by Per Andersen and Mia Münster-Swendsen (Gilissen, *La Coutume = Custom*, vol. 2, *Europe occidentale médiévale et moderne*; Andersen and Münster-Swendsen, *Custom: The Development and Use of a Legal Concept in the Middle Ages*). There are many scholars who have studied custom in the general area of Northern France, too many to list here. The reader can refer to the bibliography, looking out notably (but certainly not exclusively) for articles and books by Fredric Cheyette, Jean Gaudemet, Gerard Giordanengo, Dirk Heirbaut, Jean Hilaire, Emily Kadens, Jacques Krynen, Laurent Mayali, and Laurent Waelkens.

[17] The traditional manner in which medieval French law is described is through the distinction between the North of France as the land of customary law (*pays de droit coutumier*), where oral customary law reigned, and the South of France as the land of written law (*pays de droit écrit*), where law was written and Roman. Although specialists have long emphasized that the former made use of Roman law while the latter also relied on custom, this distinction is still commonly repeated. Those terms are used in medieval sources with a rhetorical purpose that needs additional study.

[18] I exclude the *Livre Roisin*, which describes the customs of the city of Lille, from my analysis of the first *coutumiers* because it is an early theorization of municipal law, and its urban context and thus political and legal culture are significantly different. I draw upon but do not focus on the *Livre de Jostice et de Plet* (ca. 1260). This text is

coutumiers of the classical age have been defined as works penned by a *patricien* (someone elite or privileged, a judge, a municipal official, a lawyer), who principally treats local or regional law, written in a 'popular' style, often in regional vernaculars.[19]

My approach to these *coutumiers* departs from assumptions in existing scholarship in two critical respects. Scholars tend to emphasize the regional and purely private, 'unofficial' character of the *coutumiers*, as well as the importance of distinguishing them from the learned law studied and composed by canonist and Romanist jurists.[20] These two points, while correct, tend to suggest that all redactors of custom did the same thing; namely, simply to transcribe custom. But when taken as a whole, we can see that the first *coutumiers* each tell a unique story about what it meant to take various elements – live legal practice, observation, opinion, texts recording specific transactions or specific cases, and some learning – and turn these into a largely coherent interpretation of customary law. Instead of copyists who transcribed legal practice, those who composed *coutumiers* were authors who made

usually included as part of the Northern French *coutumiers* but it is largely a translation of Roman law with medieval cases inserted as examples. It stretches the meaningfulness of the category of '*coutumier*,' though in doing so it does form an important contrast to other contemporary *coutumiers* and tells an important story about how one person (we have one manuscript), likely someone associated with the university of Orléans, imagined thirteenth-century legal life within a Roman law framework. I do include the *Livre des constitutions demenées el Chastelet de Paris*, which is often overlooked, but is an early theorization of the *coutume de France* (i.e. the royal domain). The *Ancien coutumier de Bourgogne* is the least studied of this group. The title was given to the text in the nineteenth century, but from the incipit it should be the *Usages of Bourgogne*. The date is drawn from the earliest manuscripts, which are from the late thirteenth century (M. Petitjean, 'La coutume de Bourgogne. Des coutumiers officieux à la coutume officielle', p. 14). It may very well be an earlier text. Some provisions seem to go back to the late twelfth or early thirteenth century (André Castaldo and Yves Mausen, *Introduction historique au droit*, s. 445). Where there are ambiguities, the dates of the *coutumiers* listed here are discussed in the brief descriptions of the *coutumiers* near the end of Chapter 1 in 'Brief Descriptions of the "First" *Coutumiers*'.

[19] Van Dievoet, *Les coutumiers, les styles, les formulaires*, p.14.

[20] The line between private and unofficial and public and official for van Dievoet is the legislative intent expressed in the text, not consistent enforcement or other forms of more direct link between text and practice. So in official redactions, he includes the *leges barbarorum*, the *fureos*, the *statuta* of Northern Italian cities, some Scandinavian lawbooks (*ibid.*). Emphasis on the *coutumiers* as 'private redactions' and 'private customals' is a common thread in modern scholarship (Cohen, *Crossroads of Justice*, pp. 30–1). It is not a distinction found in the *coutumiers*.

individual and idiosyncratic choices in how they wrote about custom, some without available models or prototypes. While the *coutumiers* authors hold an important place in French legal history, there is sometimes a tacit resistance to thinking of them as jurists, with the exception of Philippe de Beaumanoir and sometimes Pierre de Fontaines. It is certainly the case for the anonymous authors and thus the majority. Tellingly, a recent volume on the *Great Christian Jurists in French History* includes no *coutumier* author in these ranks.[21]

Coutumier authors deserve to be recognized as jurists.[22] The texts and *techne* of *coutumier* authors differed, of course, from those of Roman and canon law scholars in substance as well as style, the latter with their voluminous Latinate texts and apparatus, formal modes of citation, and scholarly erudition. *Coutumier* authors generally wrote shorter texts in the vernacular for a lay audience that operated in lay courts – they aspired not to complexity but brevity and clarity. Even so, they were persons with an expert legal knowledge, who analysed and offered their commentary on law. I argue in these chapters that their dynamic engagement with a variety of legal ideas from different milieus and the inventive approach they had to have to shape individual customs into holistic bodies of customary law are evidence of expansive juristic minds.

Through these efforts, *coutumier* authors created a form of 'learned law' for the lay jurisdiction. Learned law normally refers to Roman and canon law as these branches of knowledge grew and developed in the university context, with the specific modes of 'teaching, writing, disputing, and questioning' used there.[23] My book considers *coutumiers* alongside books of Roman and canon law as a form of learned law but one whose learning was quintessentially different

[21] The recent book of this title has chapters on Ivo of Chartres, Stephen of Tournai, Guillaume Durand, Jacques de Revigny, and Pierre de Belleperche to represent the jurists of the Middle Ages (Olivier Descamps and Rafael Domingo, *Great Christian Jurists in French History*). While such a volume has to be selective, it really should have a chapter on Philippe de Beaumanoir and, arguably, on 'anonymous' as an author.

[22] The transition from diffuse and undifferentiated to professional customary law has almost exclusively been studied in relation to the rise and development of Roman law studies and their diffusion (Susan Reynolds, 'The Emergence of Professional Law in the Long Twelfth Century', 351).

[23] Kenneth Pennington, 'Learned Law, *Droit Savant*, *Gelehrtes Recht* ', 206.

because it consisted of a lay, vernacular law for the secular courts. The vernacular law composed by *coutumier* authors made customary law into a body of knowledge in its own right, with its own modes of writing, thinking, performing, and arguing. The composition of customary law should be seen neither in opposition to learned law nor as its lesser derivative but as a wholly different endeavour in the formation of legal knowledge.

The 'unofficial' *coutumiers* – those composed before the mid-fifteenth century, when the French king called for each region to write a conclusive and official version of its customs – tend to be treated together and as essentially alike. However, it meant something very different for Pierre de Fontaines to conceive of how to compose his *Conseil* in the mid-thirteenth century without a model than for Jean Boutillier to write his *Somme rural* near the end of the fourteenth century on the heels of many earlier prototypes. Also, the century and a half or so between the two texts saw many fundamental changes in the administrative, legal, and political culture of France. Treating the first *coutumiers* as a discrete set permits us to appreciate what made these texts so innovative and important. They illuminate the writing of custom at its genesis, when *coutumier* authors had to imagine how to create original texts that provided a comprehensive narrative for the customs of the secular courts, before seeing a model or before there was a written tradition showing how to complete the task. In this way, we can glean the evolutionary steps of customary law, distinguishing between the first writing of custom and the written tradition of customary law that developed out of these first texts by the fourteenth century.[24]

[24] The vast changes in legal culture and court practice that occurred in the four centuries of the 'classical age' of the *coutumier* are well known. While this fact is commonly mentioned, it is often not reflected in actual analysis of the *coutumiers* and the customs they describe. It is not uncommon to find scholars talking about customary law by lumping thirteenth-century *coutumiers* together with ones from the late fourteenth century (ex. describing an aspect of custom using the *Établissements* together with Jacques d'Ableiges' *Grand coutumier* though there is a century between them) or explaining something in thirteenth-century *coutumiers* by using texts or cases from the fourteenth or fifteenth centuries. This collapses the differences between them and makes it difficult to track change over time. This is the case for Van Dievoet's typology. Though it is a useful and important study, it is divided thematically with analysis skipping back and forth between centuries. While he consistently provides dates, he moves around so much in time that it is difficult to have a clear

As regards the second scholarly assumption, it is certainly true that the *coutumiers* were unofficial and private compositions, in the sense that they were not legislation promulgated by a sovereign. The designation of these texts as private or unofficial belies the nature of the courts in thirteenth-century northern France, which themselves referred preponderantly to custom rather than legislation.[25] Indeed, while the practice of legislating kept increasing throughout the thirteenth century, legislation alone offers a significantly incomplete view of the legal culture of northern France.[26] The binding nature of law in the customary legal culture of the period was not the monopoly of the state or of formal enactments, as shown by the importance of custom and the popularity of Roman law. In other words, unofficial and influential were certainly not mutually exclusive.

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Authors of *coutumiers* wrote about custom, but what did that mean? It was custom – and not legislation or regulation, although these things existed – that animated legal life in medieval France. Customary law defined the legal practices of the medieval period but, even within this period, the term referred to significantly different forms of legal culture. Roughly the first half of the medieval period – around the end of the fifth century to the beginning of the eleventh – is understood

picture of the stages of development of the *coutumiers* between the twelfth and fifteenth centuries and the relationship between these and more general changes in legal culture. This slippage is common in the treatment of the *coutumiers*, and dates are not always included, so the reader may not be aware of it. This practice is at least partially due to the richness of documentation from the fourteenth century onward. Professionalization and specialization led to a vast expansion in record keeping, not only in the number of judicial proceedings recorded but also in the detail of information about legal arguments and witnesses' testimony. Using these to understand an earlier period whose records are less forthcoming if done must be explained. Another reason is the periodization of the *coutumiers* themselves. The unofficial private works of the thirteenth through the mid-fifteenth centuries are grouped together and distinguished from the official legislated redactions from 1454 onward, giving the former an illusion of sameness. Lastly, an underlying assumption about the unchanging stability of custom and the fixity of written custom is likely shaping how this history is written.

[25] While true, this classifies the *coutumiers* using categories that were not meaningful until later. These categories are awkward for much of the Middle Ages and better fit the centralizing state of the fifteenth century onward, the period where the distinction between official and unofficial starts to matter, where 'unofficial' starts to seem insufficient, and where the crown asks for official texts to be composed.

[26] Gérard Giordanengo, 'Le pouvoir législatif du roi de France (XI–XIIIe siècles)'.

as an age of customary law.[27] People spoke of 'law', but the things encompassed by that term were often all but indistinguishable from other forms of obligation; courts were comparatively unprofessionalized; and the resolution of disputes was often more of a negotiation aimed at peace rather than the selection of a winner and loser according to an established set of rules.

The term custom (*consuetudo*) proliferated in the tenth and eleventh centuries, as local and regional lords in the area that became France claimed political and legal powers held by the Carolingian king.[28] Criminal and policing functions became part of seigneurial jurisdiction. Local and regional lords and their courts became the site of justice and 'custom' typically designated the rights of lords and the exactions they could impose.

At this time communities resolved disputes through negotiation and mediation, political wrangling, or according to a collective sense of what seemed right. The main 'legal' documents produced were charters and brief texts that testified to contracts and transactions or that granted rights, often in land. Developed notions of law based on nuanced categories underlay these terse accounts of what was agreed upon or what happened, but rarely do these documents express legal principles and frameworks.[29] Norms thus existed and left traces in grants; individual agreements; and the occasional, more or less laconic piece of legislation but were not articulated descriptively in comprehensive form.[30]

[27] This at one time was described as an 'age without jurists' (Manlio Bellomo, *The Common Legal Past of Europe*, p. 34), and, 'if there were "jurists" in Western Europe, they were capable of little more than knowing how to read, comprehending what they read as best they could. They did not bother to weed out what they did not understand; nor did they take the trouble to reflect on the materials they handled or to wonder whether anthology could become law' (*ibid.*, p. 36). Implicit here was a definition of jurist and what counted as legal thinking, and thus what deserved to be counted as legal history. The period looks different and less lacking when historians inquire into modes of governance and nature of dispute resolution (see Janet Nelson, *The Frankish World*; Geoffrey Koziol, *Begging Pardon and Favor*; Warren C. Brown, *Violence in Medieval Europe*).

[28] J.-F. Lemarignier, 'La dislocation du "pagus" et le problème *des* "consuetudines" (Xe–XIe siècles)', pp. 401–10.

[29] See Stephen D. White, 'Inheritances and Legal Arguments in Western France, 1050–1150'; John G. H. Hudson, 'Court Cases and Legal Arguments in England'; Matthew W. McHaffie, 'Law and Violence in Eleventh-Century France'.

[30] Reynolds, *Kingdoms and Communities*, pp. 14–17.