

Part I

Backgrounds

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Excerpt
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I

The Emergence of Written Law in Early England

The *Domboc*, Before and After: An Overview

When Alfred the Great (r.871–899) issued toward the end of his reign the compilation of laws his successors would call *seo domboc* or “the book of judgment[s],” the practice of writing legislation in English was already around three centuries old.¹ Yet its being the most ancient of the Old English prose genres did not make the place of written law as an instrument of governance more secure prior to Alfred’s accession than it had been generations before. Its adoption in England began with a lengthy assemblage of decrees authorized by the Kentish king Æthelberht (d.616), an event prompted in some fashion by the arrival of missionaries in Canterbury.² The reigns of Hloðhere and Eadric (c.679–685) and Wihtred (690–725) would likewise see the appearance of laws, also in English.³ That these compilations disturb an otherwise near-total silence of documentary

¹ On the difficulties of dating Alfred’s *domboc*, see Keynes and Lapidge 1983: 304; Frantzen 1986: 11 and n. 1; Richards 2014b: 282. William of Malmesbury held Alfred’s laws to have been composed “amid the braying of trumpets and the roar of battle” (*inter stridores lituorum, inter fremitus armorum*); Mynors, Thomson, and Winterbottom 1998: I, 188–189 (ii.121). The view is rightly dismissed by Turk (1893: 50–51).

² On the background of Æthelberht’s laws, see 12–15 of the present chapter.

³ On the dating of these texts, see Oliver 2002: 120 and 148; Hough 2015 offers a contrasting view on the provenance of Æthelberht’s laws.

evidence for this period gives them the appearance of inaugurating some new epoch in the legal history of Britain. But to the extent that these texts reveal the intentions of the kings under whose names they circulated, there is little to warrant such a conclusion. At no point in this first unfolding of English legislation do we see any attempt to explain why an otherwise obscure tongue was here favored over Latin, the preferred language of lawmaking on the Continent. The concerns of the laws are invariably parochial and their prefatory material modest about the kind of sway legislation might be expected to have over the affairs of subject populations.⁴ The impression given by the last such compilation before Kent was absorbed into the kingdom of Mercia is that the employment of writing, rather than widening the scope of royal authority over law-making, had instead made legislative activity the sphere of bishops, with the king reduced almost to a spectator.⁵

As the Kentish laws do not suggest a kingdom even dimly aware of what these texts would mean to later generations, it was possible only in retrospect to see in them a foreshadowing of what Anglo-Saxon England would achieve in later centuries.⁶ (Alfred, as we will see, was probably the first to suggest as much.) Purely local circumstances were likely determinative in shaping these first works of English legislation. The presence within its borders of Britain's most powerful archiepiscopal see, and not any particular investment in the vernacular as such (or sense of its possibilities), may well have been the foremost stimulus for the production of written law in Kent.⁷

⁴ “We have spoken of Æthelberht’s ‘laws’, but it is desirable to make it clear that these laws are not legislation in a wide sense. They do not enounce general principles or new principles, such as might have followed Æthelberht’s conversion to Christianity, nor do they provide a code for every justiciable cause in the kingdom” (Richardson and Sayles 1966: 5).

⁵ See Chapter 2, 51–52. The Kentish king Eorconberht (r.640–664) also issued laws according to Bede (*Historia ecclesiastica* [henceforth *HE*] iii.8), but their language goes unremarked in his account; they do not survive into the present. Liebermann (1903–1916: I, 9) includes Bede’s paraphrase in his edition.

⁶ See, e.g., Wormald 2005. While later legislators did make use of Kentish materials, it cannot be safely assumed that those who prepared these texts in the seventh century appreciated the full significance of what they were doing (which does not detract from its importance).

⁷ The laws of Wihtried are concerned almost exclusively with ecclesiastical matters. On the possibility that Archbishop Theodore of Tarsus “may have deliberately encouraged the use of written English,” see Brooks 1984: 95–96.

Use of the vernacular probably began as a concession to the already recondite legal vocabulary of Old English. A similar compromise between ecclesiastical learning and the practical realities of litigation is suggested by the “Malberg glosses” of the *Lex Salica* – words in the Frankish vernacular essential to the conduct of law and thus supplied where needed (and occasionally gathering themselves into fragments of near-prose) throughout an otherwise Latin text.⁸ We see something comparable in the laws of Æthelberht, where the meaning of clauses frequently depends on compound nouns (e.g., *cearwund* “grievously wounded, bedridden,” *þurhðirel* “pierced through”) enclosed within a simple “if *x* happens, then pay *y*” syntactic frame.⁹ It is probably no coincidence that a separate category of poetic compounds underlay the structure of Old English verse before it adapted itself to writing in later centuries and shed these vestiges of oral composition in favor of a more discursive style.¹⁰ In the earliest phases of both English law and verse, to learn the tradition involved committing its characteristic terms to memory.

During the reign of Ine, Wessex appears to have become the first neighboring polity to follow the Kentish example. But aside from Alfred’s assertion that his *domboc* relied in part upon materials issued by Offa of Mercia (r.757–796), we have no evidence that any other early king before Alfred issued laws in his own name.¹¹ If we take Alfred at his word that Offa’s laws were in some sense available to him, the period between the *domboc* and the last royal code to precede it may well encompass a nearly century-long void. A more skeptical response – warranted given the faint evidence for Offa’s legislative activity – suggests an even wider chasm separating Alfred’s laws from Ine’s. Most of what we know about lawmaking in Offa’s kingdom comes not from any legislation attributed to him but from a report by papal legates on the condition of Mercia. The

⁸ On the “Malberg glosses,” see Schmidt-Wiegand 1989 (who notes that these are not limited to single words or phrases but sometimes preserve vernacular legal formulae as well); also Oliver 2011: 18.

⁹ One clause characteristic of this tendency is Æthelberht §68: *Gif wælt[-]wund weorðeþ, III scillingum forgelde(n)*, (“If a ‘welt-wound’ occurs, let him pay three shillings”). Oliver 2002: 76–77.

¹⁰ See Fulk 1992: 254.

¹¹ That Alfred’s remarks are the only evidence for Offa’s legislation is made clear in Wormald 1999a: 106.

circumstances of its later transmission may, in Patrick Wormald's view, have lent it the appearance of royal law; indeed, Wormald was so taken with this conjecture that he considered the legates' report to be what Alfred had in mind when he claimed knowledge of Offa's laws.¹² Given the general scarcity of evidence for this period, the "Legatine Capitulary" is indeed a valuable witness to the state of Mercia in the eighth century, and the present edition takes note of it where necessary. But few of its statements seem to have any clear bearing on clauses of the *domboc*. The odds are therefore good that, while Alfred may have heard of laws attributed to Offa, he had in mind as concrete precedents to his own legislative undertaking primarily the laws of Ine and those earlier issued in Kent.

That the decades between Offa's reign and Alfred's involved such a lengthy silence, not only in law but in other forms of writing as well, of course had much to do with the arrival of the Vikings. The raid on Lindisfarne in 793, just as the reign of Offa neared its end, presaged decades of humiliation and loss for kingdoms whose learning had once been the envy of Western Europe. Alongside the achievements of Bede, Alcuin, and Boniface and the heyday of the Kentish church (a favorite subject of the former's *Historia*), royal legislation in English issued during the seventh century probably took on new associations during Alfred's lifetime. In a text likely composed before the *domboc*, Alfred refers to books written in England prior to the onset of Danish raiding as "tracks" to be followed.¹³ It may not be ruled out that the laws of Kent figured in his

¹² Wormald 1999a: 107: "Since the proceedings in southern England are said to have been 'read out both in Latin and in the vernacular (*theotisce*),' it is not impossible that the English version was preserved with a more or less continuous gloss, so accentuating its resemblance to the codes of seventh-century kings." For a full exposition of the possible (but unlikely) relationship between this text and the *domboc*, see our headnote to the edition of Alfred's laws in the present volume.

¹³ Alfred's Preface to the *Pastoral Care* (see also, in this chapter, 32–33) begins by imagining the clergy of his and prior generations looking back on the age of Bede and Alcuin and exclaiming, upon seeing Latin books they were unable to read, "In this we can still see their tracks, but we cannot follow them, and therefore we have lost both the wealth and the wisdom, because we would not incline our hearts after their example" (*Her mon mæg giet gesion biora swæð, ac we him ne cunnon æfter-spyrgan, forðæm we habbað nu ægðer forlæten ge þone welan ge þone wisdom, forðamþe we noldon to ðæm spore mid ure mode onlutan*); Sweet 1871: 1, 4–5; cf. also Schreiber 2002: 193. Throughout the present study, *Regula pastoralis* designates Gregory's work and *Pastoral Care* the translation by Alfred and his circle.

imagination among such texts. To any king of this era with the time and wherewithal to reflect on more than survival, the early kingdom of Kent would have served as much as Northumbria as a paradigmatic example of what might be achieved through wise governance. Only the most fortunate could dream of establishing such conditions among their own people.

The final collapse of these rival powers afforded Alfred just such an opportunity to restore what they had lost, and there is every reason to think that the *domboc* was as much affected by his ambitions for the education of his people as other texts of this period. With respect to its most basic aims alone, legislation could remain in these new circumstances what it had been in Kent: as did earlier compilations, the *domboc* collects in one place, presumably for future reference, solutions to disputes earlier resolved by the king and his judges.¹⁴ (It may not be ruled out that some of the judgments enumerated therein were issued during the reigns of prior West-Saxon kings.) But Alfredian additions to this core structure effectively establish law alongside historical writing and translation from Latin as the fields in which Alfred's house of Cerdic would win fame in (relative) peace as it earlier had in war.¹⁵ The result was something much more complex than the mere "propaganda" or narrow assertion of royal "power" that some earlier commentators have seen in the *domboc*.¹⁶ As will be shown throughout the present volume, Alfred and his circle sought to alter both the relationship between writing and legal practice and the meaning of "law" itself for contemporaries and successors. They did so in part by answering the doubts and hesitations with which earlier kings had presented their laws to populations unaccustomed to writing and suspicious of norms lacking a clear basis in oral tradition. In its unapologetic treatment of laws *as texts* and its deliberate arrangement of them into a historical framework, the *domboc* is a major (and largely

¹⁴ According to Lambert (2017: 265), "Alfred's law code [...] is filled with what look very like royal judgements issued to resolve legal quandaries, which could well have come to the king's attention as appeals."

¹⁵ On the origins of the West-Saxon kingdom with Cerdic and Cynric, see the *Anglo-Saxon Chronicle* s.a. 495 and 519 (Plummer and Earle 1892: 14 and 16; Bately 1986: 19–20).

¹⁶ See, in the present chapter, 31–32; also Chapter 3, 79–80.

unrecognized) step along the path from law as we find it in the early Kentish materials to the fully “bureaucratic” institution realized in England during the reign of Henry II (1154–1189), the foundations of which, as has long been acknowledged, lay deep in the pre-Conquest past.¹⁷ It is the first English legislative statement to present law as primarily something to be learned from books and to suggest that it may not be adequately grasped without some depth of historical knowledge. And there is every reason to think that the kings who succeeded Alfred not only made further use of the *domboc* but accepted its premises. Though records of litigation from the Anglo-Saxon period offer no citations of royal law – a circumstance that has long suggested the inefficacy of the latter – the reception of the *domboc* indicates that Alfred succeeded to a modest extent in making his ordinances binding on his successors. Quotations of its contents and assertions of its authority persist from the earlier tenth century until the end of the Anglo-Saxon period.¹⁸ No legislating king seems to have felt free to disregard it in formulating his own laws. Thus much commentary of the past two centuries, emphasizing as it has the basis of the *domboc* in orally transmitted custom, has proceeded from a sense of its significance somewhat at odds with what is known of how it was used in the generation immediately following Alfred’s death. And this, in turn, has implications (to be explored in subsequent chapters) for the much-disputed question of whether legislation of this period was in any sense efficacious or even useful.¹⁹

Alfred’s aspirations for the text necessitated many departures from convention. While some prior legislation in English had begun by naming the bishops and magnates consulted and the circumstances to which the provisions respond, the *domboc* commences with the extraordinary “Mosaic Prologue” (henceforth *MP*), a loose

¹⁷ A point often made, the classic demonstration being Maitland 1897. An essential later exposition of such ideas is Campbell 2000 (particularly its first chapter, “The Late Anglo-Saxon State: A Maximum View”). See also Wormald 1998.

¹⁸ Its influence on subsequent legislation is considered in Chapter 5.

¹⁹ On the apparent indifference of Anglo-Saxon litigation to royal law, see Wormald 1999a: 148 and 264. Yet Wormald occasionally urges a more qualified view, as in Wormald 1997b: 348 (“[T]here are ample indicators that cases were run roughly as laid down by royal authority”). See also Chapter 3, 78–81.

and at times remarkably unfaithful translation of the laws of Moses (as given in Exod. 20–23) and the Apostolic “Council of Jerusalem” (Acts 15: 22–29).²⁰ Another short chronology of royal legislation in England – effectively, a second prologue – precedes Alfred’s own laws (MP §49.7–8). Here he traces English legislation to a series of unnamed synods before offering assurances that his own ordinances will diverge little from the prior compilations of Ine, Æthelberht, and Offa. The compilation concludes with the laws of Ine, which are nowhere attested independent of the *domboc*. In effect, at least half of the *domboc* – more, if we include in our calculation the laws of Ine – constitutes a sustained meditation on the nature and history of written law in England.²¹ While deference to earlier legislation was customary in royal lawbooks of the early Middle Ages, no prior or subsequent king went to such lengths to represent his laws as the mere ripening of tradition.

Whether Alfred employed or even had access to the books of laws claimed in the “second” prologue as the basis of his own is uncertain. While there may be traces of Æthelberht’s code toward the conclusion of Alfred’s, the only prior English legislation that indisputably survives in the *domboc* is Ine’s.²² What Alfred’s laws themselves owe to written and unwritten traditions is a complex question, to be explored from different angles throughout this book. No such inquiries will be possible, however, without first establishing the broader historical background that underlay the West-Saxon achievement in lawmaking. Accordingly, the present chapter narrates the steps by which Wessex emerged from inauspicious beginnings to become, by the late ninth century, the center of English political life

²⁰ Cf. the short prefaces attached to the laws of Hloðhere and Eadric, Wihtried, and Ine. Of the three, the first is the most self-conscious rhetorical performance. The convention seems to have undergone developments of which Alfred was probably mindful (see Chapter 2, 57–59). On biblical introductions in other works of Germanic legislation that may shed light on Alfred’s, see Chapter 2, 64–66.

²¹ King Alfred’s will (Harmer 1914: 15–19) bears comparison with the *domboc* given the substantial historical prologue (again, nearly as long as the will itself) preceding its provisions, an unusual feature of such documents at this time.

²² For evidence that Alfred or members of his circle had at least read the laws of Æthelberht, see Oliver 2015. Knowledge of at least the preface to the laws of Hloðhere and Eadric is suggested by evidence discussed in Chapter 2, 57–59.

and custodian of earlier kingdoms' achievements. Particular attention will be given to the development of written law and its movement from an uncertain to a major feature of governance. Intertwined with its emergence in England is the somewhat anomalous use of the vernacular for such purposes, a feature of these texts on which the following pages will shed some new light as well.

None of these subjects may be considered apart from the rapidly changing situation of the West-Saxon church and its institutions, which enjoyed sudden prosperity during the reign of Ine and renewal through Alfred's efforts. Conventionally, the church is referred to in historiography as introducing literacy to the English kingdoms who welcomed it. But such generalizations risk concealing the particulars of what it offered to early English polities as they struggled with neighboring kingdoms, their own sometimes-restive nobility, and (ultimately) the Vikings.

Here it helps to have a clear sense of what "the church" was to those who encountered it. The notion of Christianity as a "religion of the book" may not be invoked to explain its role in encouraging literacy (as is sometimes done) without distorting some crucial realities of the earlier Middle Ages. In all likelihood, Christianity would have struck laity and clergy alike as a religion of *books*. This was the case in part because manuscripts containing the entirety of the Bible were exceedingly rare. While an oath sworn on the Gospels was a potent way of visualizing the litigant's putting his or her salvation at risk, we may not doubt that the custom arose in part because these were the portions of the Bible likeliest to be on hand in a church.²³

It is the content of these books, however, that points us to what may have stimulated the kinds of reflections culminating in the *dom-boc*. Anyone attentive to the readings during Mass would have been struck by their fundamentally legal concerns, a quality by no means diminished in the pages of the New Testament.²⁴ (We have seen that

²³ See, e.g., Marsden 2004: 72.

²⁴ See L'Huillier 1997: "All attempts to identify a precise moment to indicate a turning point in the transformation of the primitive Church from a purely charismatic movement to a structured institution fall short under rigorous examination" (119). According to Hough (2018), it cannot be ruled out that the laws of the Old Testament played some role in shaping even the earliest Kentish laws.