
Law and Rationality: A Historiographical Investigation of the Understanding of Motivation and Human Agency in Early Legal Anthropology

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Introduction

- 1 The early history of legal anthropology is largely forgotten. The reason for this is that early legal anthropology operated mainly under the paradigm of legal primitivism where all premodern societies were grouped together using theories of social evolutionism. With the rejection of evolutionary theories in the social sciences, this early scholarship was discredited in the process. The modern scholarship on legal anthropology is very much focused on the present and on the ethnographic methods of participant observation. In contrast, early legal anthropology was almost exclusively a field of lawyers and historians seeking to understand the legal otherness. Nineteenth-century pioneers like Henry Sumner Maine (1822-1888) or Albert Herman Post (1839-1895) were first and foremost jurists who had encountered the realities of legal difference in the colonial world and sought to make sense of the otherness. Their primary method was categorization and the making of distinctions between legal institu-

tions. These tools were founded on the belief that certain legal institutions were universal and could be found in civilizations around the world that shared the same characteristics. Thus, things like blood revenge, communal ownership or forms of marriage were not purely legal facts but also ways of determining the nature of the culture and society. The methodological framework was securely Eurocentric. The developmental patterns of Western or European legal history, beginning counterintuitively from the Bible, moving onwards to the archaic Greeks and Romans and from there to the tribes of the ancient and medieval worlds, formed the universal pattern in which the course of civilization progressed. This civilizing process was equally a legal process, where the development of law mirrored the development of culture and society.

- 2 The way legal science adapted to this varied from the Enlightenment ideas to Romanticism. The main theoretical input was the so-called Historical School led by Friedrich Carl von Savigny (1779-1861), which outlined the historical process of legal development. It resisted ideas of legal reform, maintaining that law developed organically and corresponded to the changes in society¹. From this background, early legal anthropology was created, and despite the fact that much of this had been rejected, the legacy of the Historical School still continues in the ways that otherness in law is understood.
- 3 The purpose of this article is to examine how nineteenth – and early twentieth-century legal science conceptualized and dealt with otherness in law, taking examples of legal phenomena such as ordeal and blood revenge to illustrate how the concept of legal rationality evolved as a way to understand human agency. While the earliest legal anthropology had held that indigenous communities, groups that were described as barbarians or savages, were irrational and prone to violence, magic and superstition, this conviction became the target of criticism in early anthropological scholarship, especially that based on fieldwork. During the course of investigations, scholars noted that the irrational was sometimes less than irrational and that there was logic in the way indigenous legal customs operated.
- 4 Previous scholarship on early legal anthropology is fairly limited. Though there have been important works on legal anthropology and legal evolutionism², the way that the idea of legal rationality evolved

in a mixture of law, history and anthropology during the nineteenth and early twentieth centuries is still not adequately studied. This article seeks to provide new insights on how, in the treatment of specific legal institutions, the ideas of reason and rationality could change in rapid succession where ideas from European medieval history could migrate to aid in the understanding of indigenous cultures. In the early primitivistic scholarship, rationality was a Western or European speciality and rational and logical thought was an essential part of the civilizing process. In contrast, in the scholarship on law in action marked by functionalism, the idea of rationality was relativized and the logic and reason behind seemingly irrational acts and thoughts was sought out.

- 5 The article begins with an analysis of how the theoretical framework on understanding law changed and how the different approaches, internal and external, were used. It follows how the innovations of legal realism, the early 20th-century theory of understanding law in action, led to a new way of seeing legal otherness. Through the analysis of legal institutions and their treatment and the way that rationality was understood, the article takes the examination to the contemporary discussions on rationality and civilization, exposing the primitivistic roots of popular conceptions about indigenous legal cultures.

I. Approaches to legal difference

- 6 As a lawyer, historian and a pioneering social scientist, Max Weber (1864-1920) thought extensively about the different approaches to law. In 1907, Weber distinguished between two approaches to law in a famous parable about a game of cards in a Berlin *Kneipe* or bar. At a corner table of this bar, some people were playing a game of cards to pass the time, bantering and drinking beer. This event, when looked at with a social scientific approach, is studied in its context, carefully recording what is said and how many drinks were consumed and how the players interacted with each other and the other patrons of the establishment. The social scientist would hover close to the table and observe the actions and interview the players and audience. However, when a legal scholar studies the same event, he pays no attention to what happens at the table. Instead, he orders a beer and takes his

place at the bar, reading the rules of the game, learning what should happen and what could happen in the game³.

- 7 From the nineteenth-century legal positivism onwards, most legal scholars knew that law excluded many, many things from its considerations. That was simply how it was made to work, through the separation of legally relevant and irrelevant matters. What the radical legal scholars called legal realists did was that they questioned these separations and the insularity of the system and exposed it to criticism from the outside. This led to the analysis of the workings of law and society – in the sociology of law, legal anthropology and legal history – where the anthropological experience was to have considerable practical use.
- 8 Weber's examples highlight the classic division between the law in action and the law in books and thus the legal and the social scientific approaches to law. In the treatment of indigenous legal cultures, the situation is complicated by the fact that there are quite often no written rules or only rules written down by the colonial powers. In addition to this, there are other long-standing conventions about indigenous legal culture that mark the way that lawyers reflect on indigenous law. To put it bluntly, it appears that the approaches of Western lawyers to indigenous law may be reduced to two alternatives : legal universalism and particularistic legal pluralism. Universalism can be described in this respect as the belief in basic human similarity and equality. Its practical application in colonial settings has often been to extend the rights and privileges granted to the citizens of the colonizing country to the inhabitants of the colonies. As in the French policy in West Africa, this came with the assumption that assimilation would follow. Assimilation would be aided by education and progress in both intellectual and material circumstances. To further those aims, the central government would be directly involved, and ethnic, racial, and cultural differences would be seen as obstacles to development. This was also the policy of the US federal government before the Indian New Deal.
- 9 Legal pluralism as a form of particularism was founded on the idea that culture and tradition would define the form and content of law that should be applied to certain groups. Law as part of the customs and traditions of the indigenous community was essentially unchan-

ging and tied culturally to the past. The two ugly extremes of particularism were naturally racist essentialism and Apartheid separatism that reduced indigenous groups to being prisoners of their ethnicity. More acceptable forms were, and still are, legal autonomy and self-government, and the legal protections to shield indigenous groups from exploitation. The fine line between protection and oppression is hard to evaluate, for example, with regard to limiting individual freedom in order to protect group traditions. In the US, indigenous communities were under state protection as separate entities in separate areas, but the rights of individuals to ownership and freedom of contract were limited. In the British colonial regime, tribes were often incorporated as administrative units and the role of traditional chiefs was strengthened without much regard for the internal dynamics of the area⁴. Thus the legal understanding and conceptualization of indigenous law had and continues to have important concrete ramifications on how the rights of the indigenous peoples are realized.

- 10 The influence of anthropology and legal anthropology on legal scholarship was much like that of legal history : they both served to provide the legal system with a contextual framework. As legal historians controversially claimed, the observation of reality is actually quite similar to the study of history. For example, Hermann Kantorowicz (1877-1940) argued that the whole realist claim of observing realities is flawed because what the meaning of an observable phenomenon is remains a wholly separate issue not deducible from the reality. Thus, what the realists were doing was in fact legal history : “much of the research work of the Realists is indeed nothing but contemporary American legal history”⁵. Another legal historian and realist, Hessel E. Yntema (1891-1966), maintained that ever since Oliver Wendell Holmes (1841-1935), the rational or realistic study of law has been a study of history. While Holmes would famously claim that the law may be studied like a great anthropological document, the practical implications of this orientation would be clearly historical⁶. Holmes’s famous dictum about the life of the law was a call to understand law as history.
- 11 What was significant was that both politically conservative authors and socialists found the impulse to construct fairly parallel developmental narratives of the history of humankind. Part of the debate was of course the discussions of biology, race and evolution ; these were,

from the modern perspective, strange racial arguments about Aryans and Turanians.

- 12 One of the most evident contradictions between later legal and anthropological studies of law comes from the different perception of law itself. The stereotypical conception has been that while lawyers would approach law as a set of rules and consider the legal system to be essentially self-reflective, social scientists would see it as a social fact manifesting itself in social relations. Within the legal community, the interest in primitive law had a distinct role in the debate between legal formalism and realism. To people like legal realist Karl Llewellyn (1893-1962), primitive law was an example of how the law that was found and examined was dependent to a large degree on what was sought⁷. The scholarship of legal primitivism continued a great development of legal history, the juxtaposition of learned law and folk law. There was a distinct similarity in the nineteenth-century German attempts to reconcile and combine Roman law with folk law, and the African context where a distinction was made between legal reforms based on Western law and the conservation of native law in its supposed precontact form.
- 13 Legal realism opened up the possibilities of analysing law in non-literary societies and detached legal scholarship from its preoccupation with written law. However, the claim I am making here is that the narrative of legal primitivism continued to be so successful because it provided content for the concept of civilization. Even though legal realism and revolutionary anthropology were crucial in liberating legal anthropology, the way that legal scholarship still needed the polar other of the uncivilized had nothing to do with it. The success of the modes of legal primitivism and evolutionism survived even the change from theories of culture to theories of society in the late nineteenth century. As the cultural arguments were presented less and less, social and economic rationalizations were presented to cover human development, modes of production being linked with the perceived advances in the social and political organization of society. In many cases, the whole social context was simply avoided. For instance, Post's books are veritable museums of curiosities in which example after example is piled up to be examined by the readers, usually briefly and without context or continuity.

II. Ordeal and the uses of history

- 14 The way that legal science encountered otherness and how the concept of rationality played a central role in the evolution of thought is evident in how the legal institution of ordeal was discussed in early legal history and anthropology. It was just one of the uses of the supernatural in law. The practice of ordeal as a means of proof relied on supernatural intervention in the legal process. Though examples of ordeals may be found in anthropological material in, for example, Africa, Oceania and the Middle East, it is best known from medieval European historical sources. In the following, we will take a look at the development of the discussion on legal rationality in the nineteenth – and early twentieth-century legal and anthropological scholarship using ordeal as a focus. A crucial point of interest is how the interpretations of the rationality or irrationality of the historical acts were transferred between the scholarship of European history and works on indigenous cultures. In the following, my interest is solely in the modern interpretations of the ordeal, which often bears little or no relation to the actual historical or anthropological facts regarding the institution.
- 15 Within medieval studies from the nineteenth century onwards, opinions on the functions of ordeal were divided between irrationalists and rationalists. In the first group were those who held that the practice of ordeal was a sign of the pre-rational mentality of the Middle Ages and indicative of the great division between medieval and modern cultures. It was noted that pre-modern people did not think of God as a faraway transcendental being, but rather a benevolent patron who aided and abetted his believers and who would come to their aid. The second group considered the ordeal to be a very rarely used instrument that was employed to resolve issues of evidence that under the rules of the day would not have been resolved at all. In this function, it was a perfectly rational and effective tool. Also in dispute was the relationship of ordeals to public authority : whether or not it was an archaic remnant that was abolished with the introduction of rational legal procedure. Though the use of ordeals was prohibited by the Catholic (church) in 1215, it continued to be used in Europe sporadically for a number of issues. Earlier, it was thought that a stronger public authority would have been able to introduce new

rules of evidence making ordeals redundant. However, observations that the ordeal was actually common in societies where public authority was strong has called this theory into question and suggestions have been made that the abolition of ordeals would have to have had an intellectual explanation⁸.

- 16 Older scholarship held a staunchly irrationalist view and considered ordeals to have been seldom used archaic remnants based on folk beliefs. Lawyer and folklorist Jacob Grimm (1785-1863) held that “when an act was unclear, a right questionable, proof was needed” and it could be found in the ordeal. It provided the infallible declaration of the godhead in question, who as the highest judge determined the right and the just. Ordeals were of ancient origin and according to Grimm had deep roots in the beliefs of the people. Later incursions by Christianity and lawmakers had transformed the institution, which took many forms such as ordeal by water or by fire, to mention the most common. Grimm stated that it was likely that ordeals were seldom used, since frequent use would have eroded the trust of the people in them. In fact, Grimm claims that if one believes that the Germans would have used ordeal regularly one would also presume that they would have been quite dumb⁹.
- 17 The publication of legal sources such as medieval Scandinavian laws and sagas from Norway and Iceland during the nineteenth century and the discovery of ordeals in the laws of Manu, the laws of Hammurabi and elsewhere led to a resurrection of interest in ordeal as a primitive form of evidence during the first years of the twentieth century. For example, Edward White’s (1869-1935) book from 1916 titled *Legal Antiquities* explores ordeal as a universal primitive form of judgment that is attested in the Old Testament, ancient Egypt and India, during the Middle Ages in England and France, and even in the contemporary world in Nigeria. White’s description of the ordeal is very clearly one of the progress of rationality over superstition. In Western Europe, ordeals were halted as regular court procedures by order of the pope, but the unjust and irrational vehicle of prejudice and superstition resurfaced especially during the witch hunts. He recounts how women suspected of witchcraft had little chance of survival because, if they failed the test of ordeal, they were guilty, but also if they passed, it was considered to be a sign of Satan’s assistance and consequently the poor woman was sentenced as being in a pact

with Satan. According to White, the examples show how the ordeal was the ultimate injustice, because the individual was completely helpless and without protection against the attack of the combined forces of the Church and State. For White, the institution of ordeal was a remnant from pagan antiquity, from time immemorial and passed on to the Church as an old custom.¹⁰ In my opinion, White's book is the epitome of the primitivistic interpretation which saw otherness as irrational.

18 However, according to German legal historian Karl von Amira (1848-1930), a student of the German jurist Konrad Maurer (1823-1902), the ordeal was not an original element in old Germanic law. It was introduced with Christianity and spread only from Germany to Scandinavia. Instead, trial by duel was known extensively and considered to be the original form of settling disputes of certain kinds. Ordeals, on the other hand, were only secondary modes of proof and were replaced by different material forms of evidence. The combined opposition by the Church and the Crown from the ninth century onwards led to the abandonment of ordeals in ordinary trials by the thirteenth century¹¹. I would suggest that the main difference between a diligent scholar such as von Amira and White was that the first was seeking to describe and interpret a historical situation while the second was interested in building a general theory of civilization and thus their attention to detail was markedly different.

19 Even in general theories of ordeal, things were beginning to change within the evolutionary interpretations through the advent of psychological theories. A completely different interpretation from White's is presented in a book published a few years later, Hugh Goitein's (1896-1976) 1923 *Primitive Ordeal and Modern Law*. Though Goitein recounts the same basic story of the history of ordeal through the Middle Ages and the witch hunts and the examples from ancient India and Greece, the focus of the argument is the primitive legal mentality that the ordeal illustrates :

[T]he ordeal implies a social background and a psychological basis that are almost unintelligible to the modern mind. Modern travellers studying backward peoples are apt unconsciously to distort, to give a rational twist, to the ceremonies they have witnessed¹².

- 20 We can see how Goitein stands between the older tradition of primitive law and the newer anthropological scholarship in that he describes, for example, the water ordeal as an ancient Indo-European tradition of which the earliest records are from India and similar examples are to be found among Germanic peoples. Despite this, he was also interested in the social mechanisms of ordeal in primitive societies as described by anthropological accounts. Anthropology and psychology were the tools with which one may decipher the course of evolution that led from the spear-throwing ordeal of Australian aborigines to the rational modern criminal trial. However, the ordeal was also a general tool for the whole judicial process from determining the offender to the question of innocence. According to Goitein, the primitive mind sees magic and the supernatural in almost everything that it cannot readily explain. The rationality of the ordeal, which made it a universal institution that found innumerable uses, was the way it utilized basic human psychology in a way that provided results¹³.
- 21 The popularity of the theme of indigenous ordeal rose with the publication of Roy F. Barton's studies on the Ifugao ordeal in 1919. According to Barton (1883-1947), an American dentist-cum-anthropologist who studied the recently conquered Philippines, ordeals were used among the Ifugao in the Philippines in both civil and criminal cases and either of the parties could challenge the other to an ordeal. His view of the ordeal is fundamentally one of social rationalizing. Refusing the challenge would automatically mean losing the case. However, if the accused were to pass the ordeal the accuser was liable to pay a fine for false accusation. The ordeals and wrestling duels used for the same end were supervised by an independent arbiter called the *monkalun* and used as ways to demonstrate one's innocence and also to prod the suspected person to confess. Barton described how different forms of ordeal were used to settle disputes. In the hot water ordeal, the person attempts to pick up a pebble from a cauldron of boiling water and without too much haste to replace it on the bottom. Being too quick or hesitant would amount to an admission of guilt. A version of carrying the iron was the knife ordeal, in which a knife was first heated to make the blade glow red and then pressed on the hand of a person. In a dispute, the knife was pressed in turn on the hands of both parties and the one with lesser burns

was right. It was said that the gods of war and justice will not permit the hand of the innocent to be burned even though the *monkalun* would press the knife with all his strength. If the accused survived the ordeal with minor damages the accusers were made to pay compensation. The belief was that supernatural powers would aid the one who is right and produce the correct decision. However, accusations of adultery would never be settled with an ordeal because it was thought that the gods of fertility would aid the accused, who was, after all, doing their work. Another special case is the settling of boundary disputes, for which trials by wrestling were used. The parties or their champions would wrestle in the terraced rice fields in deep water, after sacrifices and prayers to the correct deities had been made. In all of the cases the figure of the judge or *monkalun* was central because he was the one who decided who had won each contest. Of course, blatant unfairness on the part of the *monkalun* would result in the ruling being contested and the *monkalun* himself being the target of accusations.

- 22 Barton noted that while the ordeals favour those with thick or dry skin, the issue is fundamentally of a state of mind. As ordeals are a feature in cultures around the world, could they be somehow connected to the trials of walking on hot stones or burning coals?¹⁴ Thus the one with a calm disposition, strengthened by the truthfulness of his cause, would be surer to pass the test than the one who knows his uncertain merits. What becomes clear from reading Barton's account is that instead of attempting to place the ordeal in an arbitrary outside template with criteria of rationality and civilization, he sought to understand the institution in its context.
- 23 The contradictions between irrationality and primitive psychology were furthermore a question of whether the application of objective criteria is useful. The nineteenth-century irrationalists maintained that the utilization of tools like ordeals or magical elements in contracts is irrational and the sign of an undeveloped mind. The rationalists, as observers of primitive psychology, maintained that it was immaterial whether or not something really worked as a way of finding out the truth or enforcing a contract. The crucial question for them was whether or not it functioned in the social setting. Thus, if the use of rituals, ceremonies or other manipulations of beliefs in the super-

natural forces helped establish something that was believed to be the truth in the social setting, then it had served its purpose.

- 24 In conclusion, in the history of jurisprudence, theories of evidence have been a crucial point of determining the advance of legal rationality. Formal theories of proof, let alone ordeal, were thought to lie in the irrational past and the free evaluation of evidence would be the future. In the analysis of the ordeal, cases where the context could be considered led scholars of the early twentieth century to a new understanding about the previously hidden internal logic of the ordeal. What the shift in the early interpretations of ordeal in the first works of legal anthropology meant was in my opinion the gradual abandonment of the theory embedded in the legal scholarship about ordeals as irrational and their replacement with a theory of culturally understanding actions from the actors' perspective.

III. Revenge and the barbarian theory

- 25 Like ordeal, revenge was traditionally seen by scholars and moral theoreticians alike as an inversion of justice, a primal urge that would be abolished with the advance of civilization. Different forms of revenge such as blood revenge or talion were seen earlier as instances where the slow progress of civilization would first limit and finally eradicate violence as a form of settling conflicts. The initial point of inquiry in these theories was nearly always the figure of the savage or barbarian as incapable of controlling his violent urges and society incapable of controlling him¹⁵. From the nineteenth century to the twentieth, the issue of revenge in early societies continued to interest legal scholars and anthropologists. Much like the interpretations of the institution of ordeal at the same time, the modern interpretations of blood revenge develop from explanations of primitive savagery to the understanding of the actor perspective, leading to a new conception of rationality in revenge. In the following, I seek to demonstrate how this historiographical development took place, but equally how its legacy still influences the current understanding of revenge as a legal custom.

- 26 The theory of the primitive as the other had its classical precedents in the form of the figure of the barbarian, defined by uncultured lawlessness, immorality and general savagery. The complexity of the concept of primitive is the result of the many layers of thinking involved. Its foundations are in the classical theories of social philosophy on the formation of law and social order, beginning with the 5th-century BCE Greek authors through the nineteenth-century German theorists. The classical theories on the primitive can be divided into two main lines, the foundationalist and the otherness theories, which represent the classical dichotomy between the primitive as the archaic origins of our civilization and the idea of the uncivilized barbarian as the other forever outside our culture. Formative in the theory of the primitive were the natural state theories of Hobbes, Locke, Rousseau and Marx, as well as the theories of the nation, *das Volk*, of German Romanticism. The term “noble savage” was coined in 1609 by the French legal scholar Marc Lescarbot (1570-1641) as a concept of comparative law. The term was only reused by British ethnologist John Crawford in 1859 for the purposes of scientific racism and led to its use in anthropological scholarship by Lubbock, Tylor and Boas. However, in legal history the term was considered to be so problematic that it never gained popularity¹⁶. Because these foundations were constantly used as points of reference, studying the primitivist discourse without a background in social philosophy would be futile.
- 27 Revenge was a constant source of fascination for the nineteenth-century pioneers of legal anthropology, who wanted to step away from the moral condemnation of revenge prevalent in the earlier scholarship (often stemming from the use of moral philosophy based on Kant and Hegel) and to take a more analytical approach, seeking to classify and categorize it. According to A. H. Post, revenge is not a legal phenomenon but part of the social system. It may take the form of 1) a duel, 2) an attack, 3) authorized revenge, or 4) a fine¹⁷. The offering of composition with money and other valuables was a sign of the decay of the primitive system of upholding the peace that was characterized by blood revenge and social outlawry (*Friedlosigkeit*)¹⁸. The institution of social outlawry was a universal institution as well, but as von Amira already noted, was it a punishment in itself or a precondition for the punishment?¹⁹ An equally universal institution was talion, and finally fines took the place of blood revenge and social

outlawry. In his examples, Post moves fluently between Malayan natives, Old Norwegians and Somalis as samples of a universal phenomenon²⁰.

28 According to Ludwig Günther (1859-1943), revenge was a primitive characteristic. Though there were differences in how the institutions have been realized between places and climes, the odd resurgence of the Montesquiean idea of climates and cultures, revenge is a universal phenomenon in the childhood of man. Likewise, there is not a people (*Volk*), whose phases of development did not include talion as the crucial element in the measurement of punishment²¹. For Günther, as for Post, talion was an institution linked to a developmental stage in the advance of civilization. As such, it may be seen as application of the unilinear theory popularized by the American anthropologist Lewis Henry Morgan (1818-1881) and others, but it also drew upon the earlier theories of, for example, Montesquieu which followed a universal line of development from barbarism to civilization.

29 In the early ethnographic work, the fascination with revenge and violence continued, but the scholarship would focus almost exclusively on single groups or cultural areas. The pioneering work of Baldwin Spencer (1860-1929) and Francis James Gillen (1856-1912) on the Australian aborigines concentrated on the elements of difference that separated the aborigines from Western culture, such as peculiar marriage customs or the use of blood revenge. The use of revenge was widespread because it was often believed that, instead of a disease, a man's actual cause of death would be magic. The dying person might even reveal to a medicine man the name of the person whose magic is killing him or her, or the medicine man would find out by other means such as the location of an animal burrow. When the identity of the killer is revealed, work begins on the organization of an avenging party to be sent out. The avenger is selected and he wears a special set of elaborately made shoes after a rite of initiation. Rubbed black with coal, the colour of magic, they approach their victim and, aided by magical ceremonies and rituals, spear the man to death. Spencer and Gillen note that while the tradition is alive in the sense that it was talked about and referred to, knowledge of actual cases where the ritual and the blood revenge had been carried out was lacking²². Their work would later become fundamental in the way anthropology

could capture the public imagination and penetrate into social theories.

- 30 While Spencer and Gillen noted that, in Australia, the tradition of blood revenge was mostly a historical feature rather than an existing custom, other anthropologists of the time reported it as a contemporary practice. For instance, Finnish anthropologist and scholar of religion Rafael Karsten (1879-1956) noted that, among the Jivaro in South America, both private vengeance within the tribe and larger wars between tribes were conducted with equal passion, but only in the latter case were trophies made of the heads of the enemies killed. Because most deaths are attributed to sorcery, the perceived murder “naturally awakes the desire for blood revenge”. A feast lasting several days is held for the slayer and elaborate rituals performed to wash away the spirit of the killed man²³.
- 31 According to Barton, the Ifugao approach the feud as a legal matter, each killing seen as punishment for a crime. They also see the feud as a matter of debt in which the revenge is understood as a payment. Capital punishment as part of a blood feud is the rule, and no self-respecting family would accept blood money for the killing of their kin. For other crimes, blood revenge may be resorted to only when the payment of proper fines has been refused. Because the culprit is never officially notified that he has been sentenced to death and the execution is carried out by ambush, the line between punishment and murder is thin. Thus, the carrying out of a death sentence has often lead to a blood feud between families. Because of this, in cases where another punishment that would be consistent with the dignity and respectability of the family would be possible, it is usually taken²⁴.
- 32 The distinction between feuding and war was sometimes hard to make. For example, in 1920 Robert Lowie (1883-1957) traces feuding to group solidarity in which conflicts between members of different groups are turned into conflicts between groups with one side protecting the assailant and the other the victim’s right to revenge²⁵. Thus, instead of being a sign of underdevelopment and lack of civilization, feuding was a trait reflecting social organization.
- 33 These contextual approaches were of course not the only way ethnographic data was explained, and belief in the universalist theories of the advancement of civilization continued. For example, the British

folklorist Sidney Hartland (1848-1927) portrays the Australian Aborigines in 1924 as the first step of unmitigated and uncontrolled clan violence. Only the advance of civilization and the decay of clans removes first women and children and later uninvolved men from harm's way²⁶. If Spencer and Gillen, Karsten and Lowie sought to understand the social dynamics of revenge, Hartland still seeks to insert it into an evolutionary model without much concern for its social context.

- 34 Though almost contemporary with Hartland, accounts by most anthropologists and sociologists presented a picture that was completely opposite to the evolutionary model, one that sought to present the indigenous understanding, much like Spencer and Gillen, Karsten and Lowie. For example, Lucien Lévy-Bruhl (1857-1939), the famous French sociologist, wrote that, in the primitive mentality, there are no accidents but rather there are causes for everything, leading to very impractical demands for revenge. Every death must be avenged in principle, but in practice with high child mortality it becomes impossible. Even with notables, it is possible that the warriors leave clamouring to avenge the dead but do not touch the enemy. However, he claims that the spirit of the dead and the next of kin are satisfied with the demonstration of intent and will. Without this revenge, the family of the dead would have suffered his wrath in the form of the loss of catch or wild animals destroying the camp or other damage. In the case of the natives of New Guinea, the dead actually aid the living in taking vengeance²⁷. The theories of primitive mentalities advanced by Lévy-Bruhl and others were in many ways attempts to point out the root causes of the differences between customs, but ended up essentializing the indigenous peoples and depriving them of agency.
- 35 The impact of the early scholarship on the current understanding of blood revenge is an interesting case of cultural continuities and connections. If one looks at the most recent scholarship on blood revenge and indigenous violence, the first impression is a move away from the ethnographic present and towards history, much like the early twentieth-century ethnographic work. This is rather ironic since the main tenet of functionalism had been a move away from history and towards the ethnographic present. In part, the explanation may be that blood feuding has been prevented in most parts of

the world by state authorities and thus the resurgence of feuding is possible only when public order breaks down. Thus, the need to use historical sources that are available. For example, F. Georg Heyne's work on ritual blood revenge among the Reindeer Evenki describes events taking place some fifty years earlier. In general, the theoretical foundations of the studies on blood revenge have undergone a fundamental transformation. In the mainstream anthropological scholarship, the theory of the civilizing process that would have led from unrestricted revenge to talion and finally to compensation was dead by the early 1970s. It was noted that observations suggest that revenge killing is more common in loose societies without central authority than elsewhere, but the idea that there would have been a development leading from one to the other is untrue, except perhaps in ancient Rome or Athens²⁸. Thus, for example, in 1973 MacCormack was already flogging a dead horse when he wrote that there is no evidence of a development from revenge to compensation, because there are no societies in which wrongs were met with only revenge, but rather that revenge killings are a special instance which depends on the relationship of the parties involved. In fact, revenge killing is actually compensation because the offender is reduced to the same state as the victim. What made his article "Revenge and Compensation in Early Law" unique was the comparison between the talionic passages of the XII Tables and contemporary African material²⁹.

36 At the same time, social and moral philosophers have attempted to revitalize the concept of *lex talionis* as a philosophical idea. Jeremy Waldron has maintained that much of the dislike of the *lex talionis* stems from a moralistic misunderstanding of the principle as a backward-looking and mechanistic approach to punishment. Instead, he shows that it does not really fit into the current theories of punishment, but that it has great value in the debate on punishment and proportionality as soon as simplistic conceptions are abandoned³⁰. In the debate over revenge, Jon Elster has claimed that revenge is indeed rational, while Alan P. Hamlin says that honour is the psychological motivator of action in revenge. Richard Posner has argued that both emotion and rationality play a role in revenge³¹.

37 There are three main contemporary models that have recently been used to describe blood feuds : the functionalist, culturalist and rationalist models. The functionalist models claim that blood feuds pro-

mote group coherence. Cultural models suggest that, in societies where revenge and feuds are common, groups are the natural bearers of responsibility. Rationalist models claim that blood feud serves a distinct purpose to protect an individual and his group from further aggression through deterrence of violence and thus blood revenge is a strategic response³².

- 38 Functionalist models like Edward Evan Evans-Prichard's (1902-1973) early studies on the Nuer sought to uncover the underlying reasons for revenge and feuding. For example, Jacob Black-Michaud's famous book, *Feuding Societies*, explained feuding as a process with a logic of its own where terms like debt and honour are parts of the mechanism of feud, not its reasons. Beyond this cultural phenomenon, feuding was ultimately economic, caused by a "total scarcity" in resources³³.
- 39 Cultural models instead maintained that cultural factors channel conflicts and aggression into revenge and feuding. For example, Schlegel's study on the Tiruray of Mindanao in the Philippines explains that an insult causes bad *fedew*, which the revenge removes. This intense moral outrage that is caused by the bad *fedew* is both the cause and the justification of violence that could be exacted on the entire extended family³⁴. Cultural change may also affect customs like feuding. R. Lincoln Keiser's 1986 article on the Thull community describes the adoption of revenge. While, historically, feuding had been a part of the culture in Thull as long as historical records exist, composition had earlier been an established part of the system. Only the introduction of Pakhtun influence due to the change in the balance of power by the British Empire led to the escalating violence of feuds. The *Pakhtunwali* or the code of the Pakhtun emphasized *badal* or revenge as the suitable resolution of conflict instead of the traditional values of village peace and prestige. But only modernization and the incorporation of Thull into the modern state with the building of schools, roads and hospitals led to the widespread adoption of blood vengeance or *dushmani*. As religious leaders travelled to centres of Islamic learning in Pakistan, they adopted a stricter religious interpretation and with it many elements of an honour culture. Some of the new ideals and values of purified religion stipulated violent retribution for many real and imagined injuries, especially those regarding women and sexuality. When to this volatile mixture was

added the ready availability of firearms, the fact that death enmity spread is hardly surprising³⁵.

40 Rationalistic models on revenge explained the violence as a way to re-establish dominance or social standing. This act may be explained by the actor as a defence of his or his group's honour³⁶. Analysing feuds in Montenegro, Christopher Boehm claimed that blood feuds actually serve as a way to channel honour-based conflicts and limit the damage they pose to the whole community. The fighting was limited to reciprocal acts of violence that targeted specific persons and when honour had been served there were established systems to enable the conclusion of the feud³⁷. Cultural and rationalistic models thus have a tendency to exist side by side. For example, William Ian Miller's book, *Eye for an Eye*, claimed that talionic cultures used talion as a way to measure the worth of a man. The elaborate tables of compensations, the measuring of worth in blood money, was a way to take the full measure of a person. That measure, because talionic cultures tend to be honour cultures, includes the social and moral order that is called honour. Miller's main point is that talion is a system of getting even³⁸.

41 Within the debates over feuding and revenge, the concept of honour has loomed large even recently. In the current discussion regarding violent honour cultures, there are two main stereotypes : the honour culture among the uncivilized natives and the murderous subjects of modern societies. Regarding the first, the Bedouin have ever since the orientalist Johann Ludwig Burckhardt's (1784-1817) time served as examples of an unfettered honour culture in which honour is the only measure of a man and where to die and kill for honour are not only expected but required. Pierre Bourdieu's (1930-2002) famous description of the honour code of the Kabyle, a Berber group living in Algeria, has strengthened this view. According to Bourdieu, the Kabyle honour system is a reciprocal exchange of challenge and response. Each challenge brings a man honour since a true man has enemies. Thus, a man has to be constantly vigilant and ready to respond to whatever a slightest challenges may come to his honour. However, challenging someone who is incapable of responding only brings shame to the challenger, as does the extreme public humiliation of the victim. Uncontrolled anger and unreasonable behaviour will only lead to irreparable dishonour. Consequently, one should only answer

challenges from one's equals, for quarrelling with inferiors only lessens one's value and honour³⁹. Bourdieu's romantic picture has been much criticized ; for example, Lila Abu-Lughod maintains that vengefulness and aggression are for men the acceptable ways of dealing with sorrow and other negative feelings. The ideals of revenge are also expressed in the songs of mourning, which tell of the bones of the dead demanding vengeance so that the repayment of the offence would set them free⁴⁰. Like the Bedouin, many modern honour cultures – such as Mafiosi or the communities of kinsmen in Albania, Montenegro, Corsica and elsewhere – use the metaphor of blood as a symbol of their community, a ritual brotherhood of men that shuns state control and values blood revenge⁴¹. The interpretations of honour cultures have also been strongly influenced by Western traditions of an aristocratic honour culture and the practice of duelling⁴².

42 Participant perspective and the symbolic order that accompanies the descriptions of honour codes do not always help explain the way blood vengeance works as a purposeful sanction against aggression. Roger V. Gould suggests that the culture of honour that is so prevalent in the explanations of blood feuds is not a factor that could be used to explain blood feuds. Noting that institutionalized revenge operates mostly in settings where population density is small and bureaucratic structures for dispute resolution are weak or in stateless domains within industrial societies, revenge is often the only viable option. Therefore, the reason why someone thinks he is acting (such as defending honour) is sometimes misleading because all theoretical models are based on the fact that the expectation of vengeance is a deterrent⁴³.

43 In the modern public discourse, things like blood revenge and feuding are regularly treated as remnants of former eras, barbarian practices that should have been eradicated long ago. The rise of reports about blood revenge taking place in failed societies such as Afghanistan, Albania, Iraq or Somalia have been met with ponderings about the retreat of civilization and a return to savagery. However, at the same time, contemporary critics such as Raymond Verdier have pointed out how the monopolization of violence and revenge by the state has removed the victim on the sidelines and fails to deal with their psychological need for a hearing, for getting even⁴⁴.

- 44 Favali and Pateman describe at length the various contemporary Eritrean traditions of blood feuds and the approaches to the many ways of ending blood feuds such as arbitration, blood money, other compensation and marriage. Even though the Christian and Islamic authorities and the Egyptian, Ottoman, Italian, Ethiopian and Eritrean state authorities have attempted to limit blood feuds, the mechanisms appear to be fully functional to the present day. What actions lead to a blood feud and whose responsibility it is to pay blood money and to whom and how much were meticulously described in the numerous tribal laws. Some murders could be ransomed, while others could not and some were legitimate targets for revenge killings and others were not. However, even here the references to actual blood feuds are mostly to historic events and it is repeatedly mentioned in different contexts that it is well known that the government does not approve of it⁴⁵. While the Eritrean material conforms or is made to conform to the civilizing process of blood feuds and vengeance being replaced gradually by compensation, there continues to exist a culture of revenge in which familiar abstractions such as honour and blood are said to demand vengeance in blood and, to close the rationale, that revenge killing brought honour (and sometimes even a special chain to mark the killer as a blood avenger). The common mode of explanation appears to be that it is always that in the old days people were obsessed with revenge and long, drawn-out vendettas were common⁴⁶.
- 45 In a fashion similar to the way the colonial powers often decried punishments that were deemed barbaric, modern states and the public opinion in them have responded to the punishments ordered by traditional courts with outrage. A recent example is the execution of a young couple by the order of an Indian traditional court in 2009. The couple had married in violation of the Khap law that prohibited marriage among the members of the same clan. They were subsequently kidnapped and killed by members of the girl's family, ostensibly to set an example of the inviolability of the traditional laws. When the killers were sentenced, the state courts criticized the traditional Khap court harshly, describing it as brutal, barbaric, feudal and shameful. The Supreme court even suggested that they should be stamped out completely. As Makhija has pointed out, the clash of traditional and modern legal traditions played out the narrative of modernization and

civilization where the traditional system was portrayed as backwards and barbaric⁴⁷.

- 46 The issues of primitive mentality that were explored through the issue of ordeal, revenge, or rationality are highly problematic and contain value judgments that perpetuate stereotypes of a racial character. The otherness of the spiritualism and ritualism among indigenous peoples continues to attract the attention of scholars, especially with the resurgence of psychoanalysis⁴⁸. Often these issues have attracted scholars for reasons that have little to do with understanding indigenous culture and more about using it to criticize Western civilization. At the same time, others have contested the very premise of a movement towards rationalization and away from the ritual, magical and occult. For example, Jean Comaroff and John L. Comaroff⁴⁹ have maintained that the resurgence of instances of ritual murder, moral panic, magical evil and witchcraft in post-Apartheid South Africa are not about a retreat into tradition or a reversal of civic education, but rather the emergence of a new “occult economy” operating under the surface of the modern state as expressions of the discontent over the inexplicable capitalist system where the unattainable wealth generated is mixed with the occult. In short, new magic is created for new situations.
- 47 The theory of the advance of rationalization as part of the civilizing process and the linkage between religion and ritual produced some fairly convoluted results where indigenous ritual practices were rationalized while ancient Roman legal rituals were primitivized. The early theories of both the historical and anthropological kind were based on a conviction that there existed an earlier primitive mode of thought that was dominated by magic and supernatural powers that led it to adopt formalistic modes of action in their religious and legal systems. Functionalist critics of this theory maintained that the theories that linked formalism with religion were unfounded⁵⁰.
- 48 In conclusion, both in the early and contemporary scholarship revenge and rationality have been approached with moralistic and primitivistic undertones, a feature that traces its permanence to Biblical precedents. The fact that it has often taken racializing tones demonstrates how easily such hierarchical theories take on political guises. My main claim is that only through openly addressing its past

and seeing the roots of certain interpretations will legal and anthropological scholarship be able to free itself from the moralizing undertones of the research on violence.

Conclusions

- 49 Primitivism and the cultural approach in law has often been criticized for perpetuating social Darwinism and racism. Already, Franz Boas attacked the theories of racial superiority that were founded on primitivism and evolutionary theories. Instead, he held that from each race one may simultaneously observe “the most varied cultural forms”, from fairly advanced civilizations to “primitive tribes”. The claims that the primitive man is mentally undeveloped and incapable of mental exertions he similarly rejects as false observations by bad scientists who just wearied their informants with questions irrelevant to them. Boas attacked the unproven conviction of European superiority, claiming that it influenced the judgment of observers, who interpreted difference as a sign of inferiority. In reality, it is impossible to judge whether the cause of the supposed inferiority is not the result of physical and economic conditions or social and political inequality that take away the possibility to fulfil their potential⁵¹.
- 50 The history of legal primitivism and the transformation of the study of indigenous legal culture during the late nineteenth and early twentieth century was ultimately a question about the understanding of legal rationality. This concerned rationality either as a Western concept seen through a Eurocentric lens of teleology or the internal logic of the indigenous culture. The main significance of this issue today is how much it still informs our understanding of legal otherness and the rejection as “barbaric” or “uncivilized” of the way indigenous cultures operate. In the case of ordeal and blood revenge, the logic of legal primitivism was to assume a near universal developmental logic. According to this interpretation, Western legal cultures had in their antiquity had some similar elements, but they had developed and rejected these barbarian practices of resorting to violence. This teleology would then justify, among other things, the eradication of these customs among the indigenous peoples living under the “tutelage” of European colonial powers.

51 In contrast, legal anthropology ascribed rationality and reason to the most bizarre of legal customs, seeking to understand why and how such an arrangement was born. They sought the internal logic of the actor, the function of this custom in the legal culture. Within the scholarship of law, early legal anthropology had a role similar to legal history and the aim of rejecting claims of irrationality was equally shared. While contemporary legal anthropology has for a long time sought to escape history and to operate in the ethnographic present, the roles of history and anthropology have grown in similarity. Rather than illustrating the savage past or the rejected forms of action, they seek to demonstrate the internal logic of the legal culture. What this entails is that their conceptions of law and rationality, and equally the methods used to analyse them, could be a useful source of interdisciplinary cooperation.

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ABSTRACTS

English

The purpose of this article is to examine how nineteenth-century legal science conceptualized and dealt with otherness in law, with examples of legal phenomena such as ordeal and blood revenge to illustrate how the concept of legal rationality evolved in the early legal anthropology and how it still influences our understanding of legal otherness. It provides new insights on how, in the treatment of specific legal institutions, the ideas of reason and rationality could change as scholars used European medieval history to aid in the understanding of indigenous cultures.

Français

Cet article se propose d'examiner la manière dont la science juridique du XIX^e siècle a conceptualisé et traité l'altérité en droit, en donnant l'exemple de phénomènes juridiques tels que l'ordalie et la vengeance pour illustrer la manière dont le concept de rationalité juridique a évolué au moment du développement de l'anthropologie juridique et voir comment il influence encore notre compréhension de l'altérité juridique. Il fournit de nouvelles informations sur la manière dont les notions de raison et de rationalité pourraient évoluer dans le cadre de l'étude d'institutions juridiques spécifiques, les érudits utilisant l'histoire médiévale européenne pour faciliter la compréhension des cultures autochtones.

INDEX

Mots-clés

anthropologie juridique, primitivisme, réalisme juridique, droit indigène, eurocentrisme, vengeance, vendetta, ordalie

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