THE ORGANIZING PRINCIPLES OF ABORIGINAL JUSTICE

ABSTRACT:

The various procedures that constitute the repertoire of traditional Australian Aboriginal justice revolve around three dimensions. These three formal criteria correspond to social issues. *Symmetry* expresses a situation where guilt is not recognized. The *mode of designation* reflects both the individual or collective nature of the accused party and the willingness, if necessary, to circumscribe the effects of the legal proceedings. *Moderation*, for its part, highlights a general principle of Australian law, that of modulation: the theoretically strict compensation for damages required by the Law of Talion is either lightened – towards a moderate procedure – or, on the contrary, aggravated, depending on the social relations prevailing between the two parties. This approach also makes it possible to understand how war, which in Australia is mainly, if not exclusively, of a judicial nature, derives from the feud, of which it is an unbridled modality.

KEYWORDS:
Australian aborigines, Law, Justice, Feud, Warfare, Hunter-gatherers.

INTRODUCTION

As soon as they were able to observe Aboriginal societies, from the end of the 18th century onwards, Westerners were struck by the richness and originality of their legal procedures. Far from the disorganization and spontaneity of a fantasized 'state of nature', these hunter-gatherers with such a crude material culture showed, as in matters of religion or kinship, a remarkable concern for refinement and formalism. Social anthropology thus logically found material for several accounts of prime importance: in particular, and in chronological order, those of Howitt (Fison & Howitt 1880), Wheeler (1910), Warner (1969) or Berndt and Berndt (1992). All of them undertook a more or less systematic survey of the different ways in which organized violence was exercised and gave information about the circumstances in which it was used.

On the whole, however, two sets of criticisms can be directed at these studies. First, although they expressed the proximity, in these societies, between the spheres of justice and war, they failed to articulate them satisfactorily, a point particularly sensitive in Warner's work. The second criticism is that while these presentations presented a more or less reasoned inventory of the legal proceedings, none of them attempted to order them into a genuine classification that would reveal their intimate logic. As we shall try to show in the following pages, not only is such a classification possible, but it constitutes an irreplaceable point of entry into the social relations that organize them.

We will deal initially with the formal aspect of the judicial proceedings, regardless of the reasons for choosing one over the other. It is only in a second stage that we will show that this formal classification corresponds to more fundamental determinations: the rationale to which they obey thus echoes the social logics that determine the sanctions for offences and crimes. Such an approach makes it possible to integrate war, which, where it existed, was mainly, if not exclusively, judicial in nature (for a more detailed presentation of the data and analyses discussed in this article, see Darmangeat 2020).

Three dimensions

Formally, Australian judicial proceedings are organized around three fundamental dimensions.

1. **Symmetry**. In certain circumstances, the judicial process requires that both parties be equal in means. In other cases, on the contrary, the party taking the legal action ensures, by consent or surprise, offensive means of which the other party is deprived. We shall therefore speak of

symmetry or asymmetry, depending on whether this balance of means is sought or not.

2. **Moderation**. Some procedures are organized in such a way as to limit the severity of the physical harm they cause. Others, where violence is not tempered by any rule, are on the contrary explicitly aimed at inflicting death. This dimension is therefore referred to as the presence or absence of moderation, depending on the case. It should be stressed that moderation does not concern the choice of a more or less extensive target, but only what is supposed to happen to it once the choice has been made. Thus, death penalty, which is imposed on a single individual, is a non–moderated procedure, whereas the regulated battle, which could involve hundreds of opponents, is a moderate one.
3. **Designation**. This term refers to the way in which the set of individuals targeted by the procedure is determined. Of the three criteria, this is the only one assuming three possible values. The two most obvious are personal and collective designation. What separates them is not, in itself, a question of numbers: obviously, a collective designation presupposes that the procedure is exercised against a group, and therefore against several individuals. But, conversely, a procedure may very well be exercised against several individuals without, however, possessing any collective character: all that is required is that they be involved on a personal basis. There remains, however, a third possibility, commonplace in ancient societies: that of a procedure involving a specific number of individuals chosen not on a personal basis, but as members of their group. It is not easy to find a suitable adjective for this situation. For want of a better alternative, and despite the somewhat pedantic nature of this choice, we have resorted to the vocabulary of linguistics and to the term 'synecdoche', a figure of speech that consists of designating the whole by one of its parts. Thus, in the synecdochical designation, the procedure is aimed at a collective through a determined number of individuals chosen (by their own group or by the adversary, depending on the situation) as members of this collective, and not for their personal responsibility.

1. ORDINARY FORMS

1.1 Duel

Basically, duel is defined as a regulated and public confrontation between two individuals. This regulation concerns altogether the number of combat-

ants, even possibly their quality, the weapons used, the type of blows and the nature of the injuries that put an end to it.

The use of a weapon – the same for both protagonists – was imperative (generally speaking, hitting an opponent barehanded in Australia was considered a mark of extreme contempt). The most common instrument was the club, most often accompanied by the shield. In such cases, the head, and possibly the hands, were the only permitted target (Basedow 1925; Blackman 1928). In the central area, duelists, protected by light shields, faced each other with stone–bladed knives. Only blows to the flesh were legal: it was forbidden to attack a vital part (Aiston 1921; Bates 1921; Bennett 1927). In the North and Northwest, a light reed spear with a hardwood point was used (Basedow 1925).

The duel was a confrontation in which every effort was made to avoid the death of the participants. The referees, and even the spectators themselves, therefore tried to intervene before the consequences were too serious – which was not always enough (Smyth 1876; Helms 1895).

A notable feature of the duels was that they were the only legal procedure available to women, although they were often less formalized than when they involved men. Blows to the head or fingers were delivered alternately (Roth 1897; Basedow 1925; Bates 1938; Clark 2015) or in bursts of two or three (Smyth 1876).

The idea that the role of the duel was to legitimize the claims of the victor or to impose a sanction on the defeated needs to be seriously questioned. In the Gulf of Carpentaria, the outcome of the battle was evaluated by the elders, who judged whether the result was not in accordance with the wrongs and legitimate claims of each party, the winner could be inflicted various injuries in turn (Roth 1897, 139). These dispositions reveal that such a duel had the sole role of applying ex ante the sanction resulting from a judgment that succeeded it. In the case of female duels among Western Desert Mardu, the one who was 'clearly at fault' had to bow her head and passively accept the first blow, thereby acknowledging her guilt and giving satisfaction to her opponent, regardless of which of the two won the ensuing duel with clubs (Tonkinson 2013). Here, too, the purpose of the duel was not to establish rights and wrongs. In this example, as more generally in Australia, it aimed primarily at emptying animosity – in the manner, in our customs, of a handshake or reciprocal apology.

Classification. Striving to avoid a lethal outcome, dueling is obviously a moderate procedure. It is also driven by a keen sense of symmetry, since it always opposes the same number of equally armed combatants. In terms of designation, however, the duel took two forms (and actually three, as we shall see). Far from always pitting individuals who had a direct dispute

against each other, the duel sometimes involved combatants chosen by their respective camps to represent them in what may be called a 'duel of champions' (Fraser 1892, 41; Dawson 1881, 77). Such a form can be found all over the world, sometimes in an unmoderated version, of which the most famous examples are the legendary fights which opposed David to Goliath and the Horaces to the Curiaces.

1.2 Corporal punishment

Corporal punishment is defined as a sanction consisting of codified and non–lethal physical harm, which therefore excludes any form of death penalty.

As in the duel, the weapon used was likely to vary depending on the place and circumstances. The most common one was the club, which was struck violently on the skull (Taplin 1879; Roth 1906), but the spear was also found: in Arnhem Land, it was used by the scorned husband to pierce the lover's arm (Foelsche 1882). In Western Australia, a man guilty of abduction was speared in the leg (Fraser 1892). In some places, custom stipulated, depending on the nature of the fault, which part of the body was to be perforated: 'thigh, calf, arm, etc.' (Calvert 1894).

The classification of corporal punishment does not raise any difficulty; however, it should be considered in conjunction with the next procedure.

1.3 Penalty challenge ('ordeal')

This procedure, which has been documented countless times since the early nineteenth century, is perhaps the most emblematic of Australian justice. Taking place in public, it placed the guilty party, devoid of any offensive weapon, some distance away from one or more opponents lined up in front of him. He would then attempt to dodge projectiles directed at him (usually spears) or, much more rarely, to ward off blows delivered with a club (Fraser 1892).

Such a staging struck the imagination of Westerners who observed it; they were nonetheless at pains to name it. The painter John Clark, who produced a pictorial representation as early as 1814, entitled it 'The Trial,' a choice that had little posterity. Some ethnologists later referred to it as a 'duel' (Hart *et al.* 2001), but most often, by analogy with a medieval custom, it became known as an 'ordeal'.

These denominations, however, are quite unsatisfactory. The duel should be set aside at the outset: this word in no way reflects the unequal position of the participants. Both the terms 'trial' and 'ordeal' have the drawback of suggesting, wrongly, that the process was designed to determine whether the person undergoing it was guilty of the charge brought against

him. However, the Australian challenge was imposed exclusively on a (male) individual whose guilt had been previously established: its outcome determined only the magnitude of the punishment. Another disadvantage of the word 'ordeal' is that it conveys a religious dimension – it was, in medieval times, a 'judgment of God' – which is totally absent from Australian custom. For all these reasons, we propose here the denomination of 'penalty challenge'.

In order to find among us something analogous to this practice, apparently so foreign to our own institutions, we must look less at our judicial law than at our sports regulations. The aboriginal penalty challenge can indeed be characterized as the codified organization of a situation whose outcome depends on the actions of both parties involved, but which places the guilty party at a disadvantage. Contemporary sport does not do otherwise when it provides for free kicks in football, for example.

On a common framework, the penalty challenge allowed for various adjustments, as the free kicks may, for instance be direct or indirect. For example, the number of spears used could vary, depending on the severity of the offence (Smyth 1876; Mann 1883; Fraser 1892; Bennett 1929). In most cases, the offender was provided with a shield to parry the missiles – sometimes with two, in case the first one broke (Lang 1865; Fison & Howitt 1880). To spears, one sometimes preferred boomerangs, or even a heterogeneous assembly that also included the *kunnin*, a throwing stick blunt at both ends (Fison & Howitt 1880). The challenge could involve more than one target: either the fault concerned two culprits (Howitt 1904), or the individual undergoing it had the right to be assisted by a friend (Pelletier *et al.* 2002), a close relative, or a wife (Fraser 1892; Hassell 1936), who helped him to deflect the missiles. A final, important parameter was whether the spears would be projected one by one, or even preceded by a signal, or whether the executors were free to fire their missiles in groups, which naturally made them much more difficult to dodge (Fraser 1892).

The conditions that were supposed to determine the outcome of the challenge are a rather delicate point. Various testimonies suggest that a wrongdoer could fulfill these obligations by passing the penalty challenge without a scratch (Grey 1841; Salvado 1854; Lang 1865; Ridley 1873; Smyth 1876; Mann 1883; Threlkeld in Threlkeld 1974). In other cases, by contrast, this eventuality was excluded, and the procedure was not completed without blood being shed. In addition to Howitt's account (1904), Pelletier's detailed testimony that a murderer 'lucky enough to avoid being struck' in a penalty challenge would have to let the victim's parents drive a barbed spear into the 'rear and upper part of the thigh', the extraction of which resulted in terrible suffering (Pelletier *et al.* 2002). In formal terms, such a procedure can be in-

terpreted as a combination of a penalty challenge and corporal punishment, and il follows from the same logic as the 'minimum sentence' in our own law.

In the classification, corporal punishment and penalty challenge holds the same place. Both procedures are marked by moderation (care is taken to avoid killing) and asymmetry. The only difference between them is the certainty or only likelihood of the final result.

1.4 Regulated battle

The regulated battle is defined as a confrontation between two groups, the unfolding of which was tightly framed by rules. Two elements are essential. First, the absence of surprise: the meeting was agreed in advance by both parties and any recourse to trickery was forbidden. Second, the limits placed on the lethality of the combat: hostilities ceased as soon as a few significant wounds had been inflicted – these wounds could, however, be very serious, and it was not uncommon for the confrontation to result in one or two deaths. In any case, if blood had to be shed, the aim was not to inflict maximum casualties on the opponent. Moreover, once the battle was over, the friendship between the two groups was restored and ostensibly affirmed.

As with previous procedures, terminology is an issue. This form has sometimes been referred to as 'sham' or 'mock' fights (Hiatt 1996). These terms, which minimize the very real damage they caused, should be rejected. Nowadays, nobody would apply them to a fistfight or a boxing match: there no reason to do so for clashes where injuries were often serious, and sometimes fatal. It seems therefore much more appropriate to speak of 'regulated' combat (Wheeler 1910).

Dozens of more or less detailed accounts of such events are available, which make it possible to grasp both the general pattern and the particular variations (see for instance Flanagan 1888; Lumholtz 1889; Stanner 1979; Hart [illegible] 2001). The number of involved fighters could be quite modest – about ten combatants on either side in Fraser's testimony (1892), about thirty in Le Souef's (Kershaw 1928). But it sometimes reached an a priori surprising order of magnitude concerning mobile hunter–gatherers. Tom Petrie, in Queensland, reports two instances of such battles involving 700–800 individuals in the 1860s (1904). Similar figures are found in New South Wales, in 1837 on the Lachlan River (White 1904), around the same time in Lismore (Kendall 1925) and in the Adelaide area (Stephens 1889). In the same place, in 1849, George Taplin claimed to have witnessed a clash involving 1,300 participants which was interrupted by the authorities (1879). As for Edward Eyre, he mentions gatherings of hundreds of participants in the southwest (Eyre 1845).

Although, in detail, not all the regulated battles followed the same course, they all drew from the same repertoire and obeyed the same general

spirit. Each side faced the other, usually in a single line, at a distance adjusted to the effective range of their throwing weapons. Almost always, the first thing they did was to insult each other, listing their grievances. Hostilities were then triggered once the spirits were sufficiently heated. Fighting almost invariably began with throwing weapons: spears and boomerangs. After a while, either people gradually got closer or they ran out of ammunition, they would come to hand-to-hand combat. The first serious wounds, or even one or two deaths, usually meant the cessation of hostilities. In principle, once the fighting was over, the quarrel was settled. The fighters who fought hard just minutes before would then become the best friends in the world again, helping to heal his opponents' wounds. Sometimes, however, the outcome was not as desired, or there were more casualties than one was prepared to accept: the fight, which was supposed to put an end to resentment, had sown the seeds for future engagements.

Regulated battles were often introduced or concluded with duels. This articulation between both forms is not surprising, given that the regulated battle can be characterized as a collective duel. The concern for symmetry certainly did not go that far: it was possible, and even probable, that the camps did not strictly align the same number of combatants. However, one will look in vain for sources indicating a marked disproportion of the forces in presence. Moderation is also evident. If the absence of lethality is less strict than in a duel, it is for reasons largely due to circumstances: in a combat which is partly at a distance and where numerous projectiles fly in all directions, serious injury, even death, is less unlikely than in a duel which takes place, as it were, under high public surveillance. The limitation of lethality was nevertheless inscribed in the very foundations of the regulated battle where, by mutual agreement and by the vigorous intervention of the elders or a third party, the fighting ceased at the first serious damage.

1.5 Judiciary assassination

Judiciary assassination constitutes premeditated killing in conditions that normally offer no way out for the victim. Deaths resulting from the above–mentioned procedures, whether a duel, a penalty challenge or a regulated battle, are therefore excluded from this category.

In contrast to Kelly (2000), for example, it should be emphasized that judiciary assassination is not reduced to the ‘death penalty’ per se. Death penalty is only imposed for crimes against the community (the two typical Australian motives being incest and religious misconduct). But judiciary assassination may also be carried out by a specific group on a private basis, as a compensation.

The few specific reports on death penalty in Australia indicate that it was inflicted under conditions similar to corporal punishment. On the eastern side of Cape York, a heavy sword club was struck on the skull of the victim (Roth 1906). On the west coast of the continent, a spear was plunged into the back of the thigh, but, unlike in ordinary corporal punishment, it was aimed at the femoral artery instead of avoiding it (Roth 1902).

Compensation killings, on the other hand, were most often committed by specially constituted revenge groups, an institution which in many tribes bore a specific name: the *atninga* of the Aranda, the *pinya* of the Dieri, the *warmala* of the western desert, the *kwampi* of the Tiwi, the *pirrimbir* of southeastern New South Wales, etc.

In terms of classification, this procedure is obviously unmoderated, inasmuch as its purpose is to inflict death. Its asymmetrical character clearly stems from the fact that the victim is always unarmed, and most often attacked by surprise. Here again, the only difficulty lies in the need to distinguish between the different variants with regard to designation. The designation may be personal, when it is aimed at a particular individual, or synecdochical – the target being killed because he or she belongs to the group that is to be punished, as in a famous example reported by Spencer and Gillen (1899). In this case, one can speak of assassination by equivalence: the target is chosen because he or she belongs to a group in which the lives, in terms of the blood debt that the execution is supposed to settle, have the same value. However, It should be remembered that if one kills anyone, one does not kill in any quantity, as it would be the case with collective designation.

2. RARE OR COMPLEX FORMS

2.1 *Makarata*

The *makarata*, described in particular by Warner for Arnhem Land, follows a murder, and imposes a meeting between the clan of the victim and the clan of the culprits. The procedure then takes place in three distinct phases. In the first phase, the alleged perpetrators must run in a zigzag pattern, avoiding the spears of the victim's clan – which are, however, devoid of stone points, in order to limit their dangerousness. Then it is the turn of the assassins themselves to undergo the same procedure. Although the elders of each side try to keep calm and urge the shooters not to kill, this time the spears used are equipped with their heads. Finally, after a dance, the murderers are given corporal punishment in the classic form of a spear thrust into the upper

thigh. Warner points out that this is the ideal form of the *makarata*. In practice, things could get out of hand at any time and turn into a free–for–all.

It is difficult to establish to what extent this procedure was specific to the eastern part of Arnhem Land. Although no ethnographer has clearly reported it elsewhere than in this region, some episodes that occurred elsewhere seem to be related to it (Hodgkinson 1845; Smyth 1876).

Both in terms of its asymmetry and moderation, the *makarata* is clearly a variation of the classic combination of penalty challenge and corporal punishment. Although it involves several individuals, its designation is clearly personal: only men with individual responsibility for the crime are subject to it.

2.2 Collective penalty challenge

This form was probably rare as, to our knowledge, it is only reported once, by Pilling. This episode, which involved fighters from Melville and Bathurst Islands, began with a sequence in which the Bathurst fighters, while receiving projectiles from the opposing side, 'did not throw weapons but merely defended themselves. They accepted a mild form or punishment' (1958). The fact that this initial phase was followed by an ordinary regulated battle irresistibly evokes the collective version of the combination of corporal punishment and duel encountered earlier.

3. VINDICATORY WARS

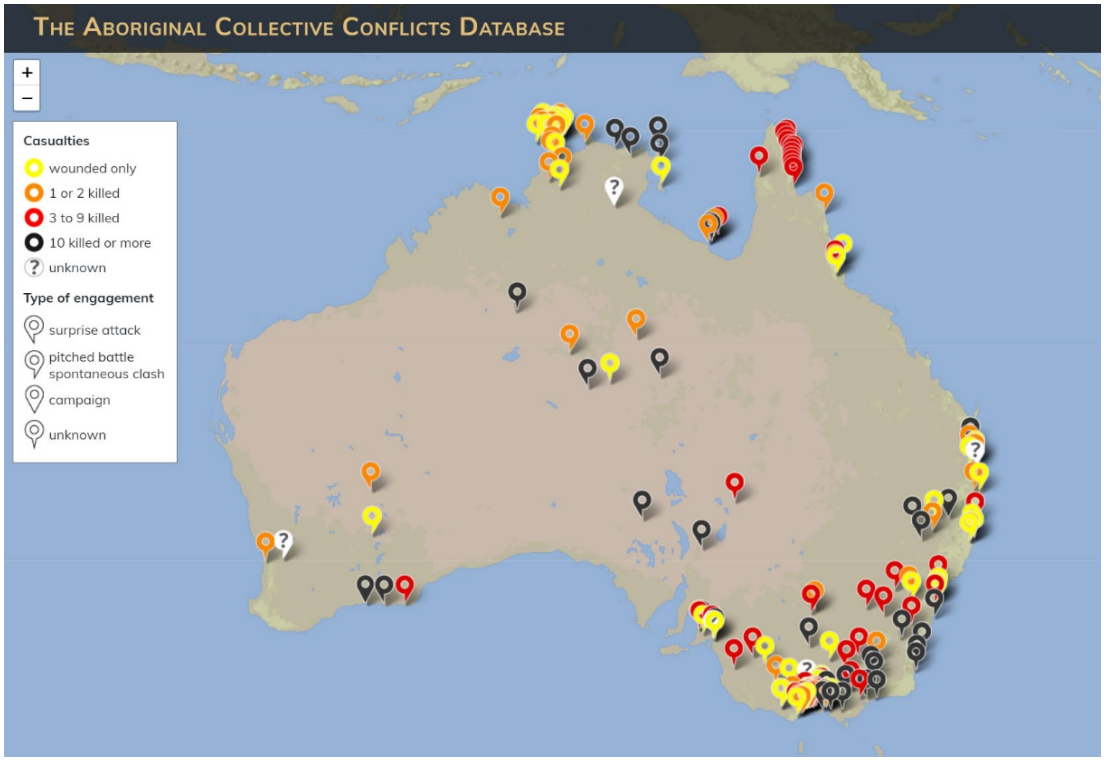
2.1 War as a judicial process

In addition to these first forms, there were, to begin with, cases of particularly deadly collective confrontations, whose existence beyond all reasonable doubt in traditional Aboriginal Australia is demonstrated by a recently published database [1]. Should some of these episodes be referred to as 'wars'? Despite a lively debate, the definition of this term has never led to a consensus. In any case, and beyond the terminological aspects, clashes that could sometimes result in tens of fatalities clearly fall outside the scope of regulated battle or judiciary assassination. Yet another major lesson from this survey is that these conflicts were mostly, if not exclusively, motivated by judicial reasons: they were commonly fought to right a wrong, and almost never to seize resources or conquer territory. Even the abduction of women, so banal at the individual level, does not seem to have been the aim of large-scale

[1] Available online at https://cdarmangeat.ghes.univ-paris-diderot.fr/australia.

operations. This close proximity between warfare and justice in Aboriginal Australia has already been noted several times (Hodgkinson 1845; Wheeler 1910; Berndt & Berndt 1992), and requires that these events be included in the general classification.

Figure 1 : The map visualisation of the database



Such episodes are obviously collective and unmoderated procedures. However, they could clearly be of various nature in terms of symmetry. In most cases, at least one of the protagonists made every effort to establish the most unfavorable balance of power possible for the adversary before the battle. The essential factor was surprise: raids and ambushes were the favored forms of asymmetrical combat and represent the bulk of the clashes causing the most casualties. But there are also a few particularly deadly encounters which were the result of a prior agreement to fight, and are therefore part of a somewhat different process. Among them, the *gaingar* of eastern Arnhem Land is the best known, thanks to the description left by Warner.

2.2 *Gaingar*

From the point of view of symmetry, the *gaingar* raises a particular difficulty. The combat that characterizes it occurs as a result of a formal procedure, in-

volving the exchange of specific objects marking mutual acceptance. Both troops then meet at a time and place agreed upon in advance, midway between their respective territories. However, in this confrontation, 'trickery is used if possible' (Warner 1969), and in one of the occurrences mentioned by this author, while respecting the agreed battlefield, one side had ambushed the other, inflicting heavy losses.

In terms of symmetry, the *gaingar* is thus characterized very differently depending on whether one considers its military phase alone or the whole procedure. The military phase seeks to be asymmetrical: if one side can ensure itself a decisive advantage, including through deception, it will do so. However, this asymmetry is part of an overall procedure that was demonstrably symmetrical. It paved the way for a situation in which all blows were allowed, but only on the basis of a declared will of both parties. In this sense, the *gaingar* was a declaration of war of an infinitely more binding type than those of modern times, which are generally unilateral and do not require the consent of the enemy.

Insofar as diplomatic procedure conditioned military operations, this is the relevant level for the classification of the *gaingar*, which must therefore be regarded as a particular form of collective, unmoderated and symmetrical procedure.

2.3 Lethal pitched battle

More generally, the possibility of symmetrical collective and unmoderated fighting arises, therefore, in which no element of surprise had been implemented. Such a situation, in theory, can result from two variants.

A first possibility is that, as in the *gaingar*, a scheduled pitched battle has been planned with the common prospect of fighting without restraint, while refraining from cunning. Such an eventuality necessarily presupposes an explicit prior agreement between the parties, in contrast to our own world, where two armed troops facing each other do not need to tell each other in advance that they intend to inflict maximum losses on each other.

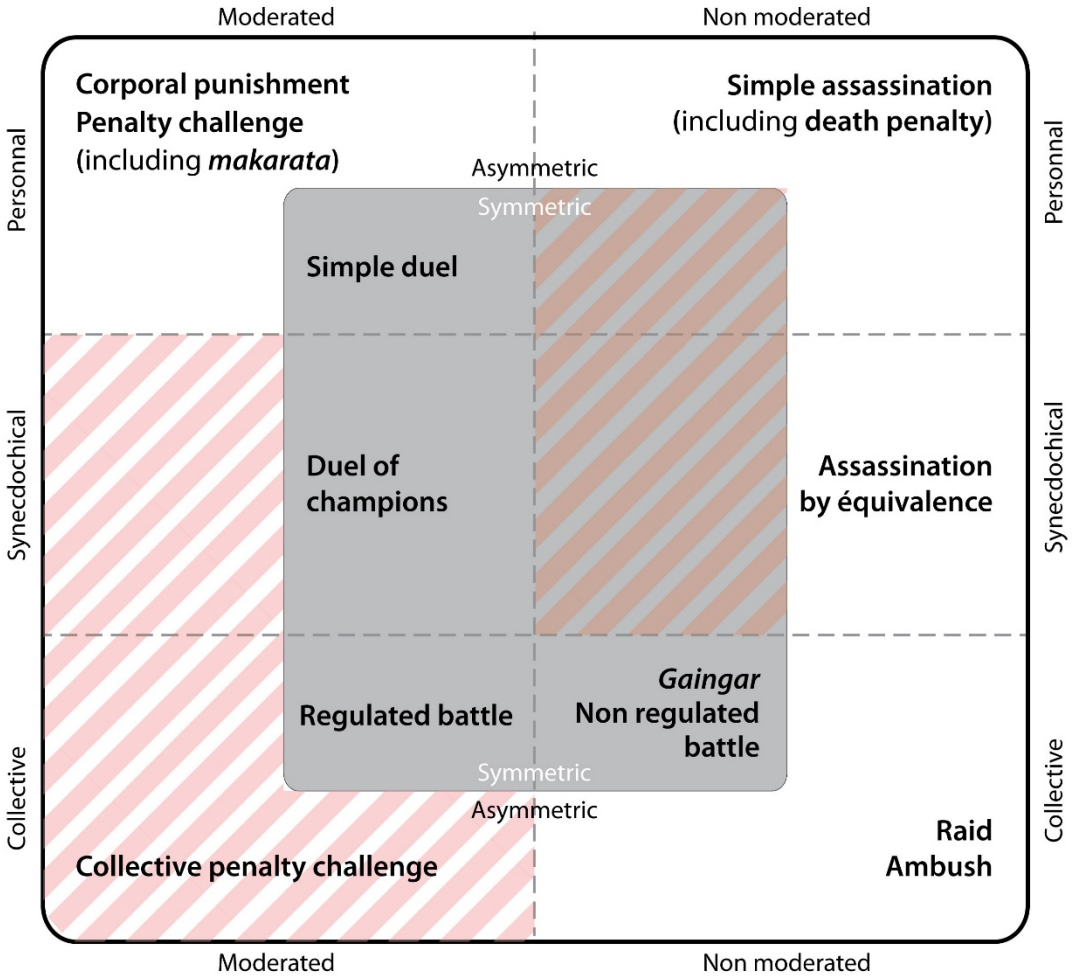
The other theoretical possibility is that of unpremeditated deregulation. It would correspond to any procedure started in regulated forms where, because of an accident, a wrongful act or for any other reason, the tempers would flare up and the situation would get out of hand. An additional difficulty is that between the regulated and unregulated battle lies a zone of indeterminacy that blurs the line of demarcation. The former is supposed to stop at the first serious injury, while the latter has, in theory, no other limit than the ability or the willingness of the victors to push their advantage to its ultimate consequences. In reality, however, some battles have a heavier than normal toll without appearing to have gotten out of hand.

On all these points, the ethnographic data provide only partial insight. Nevertheless, everything indicates that the degeneration of regulated battles remained exceptional. Only one episode in our database seems to illustrate this case: again, it is a situation where one of the two camps had premeditated to pursue its adversary during his retreat: it is in fact a case of the use of surprise, and therefore of asymmetry (Fison & Howitt 1880). There are still a few cases of clashes that resulted in a fairly high number of victims, without it being possible to decide in favour of a real desire to inflict maximum losses. The scant indications suggest that, as in a [illegible], this violence had been planned in advance by both sides (Struilby 1863; Harvie 1927; Anonymous 1929). In the same vein are the twelve conflicts reported by Pelletier (Pelletier [illegible] 2002). Although these battles each time killed only 'a few' of the participants, they are notable for the fact that the wounded were systematically killed. This custom, in addition to significantly increasing the toll compared to the norm, contrasts with the general practice of taking care of the wounded, both friend and foe, as soon as the fighting is interrupted. There is therefore an intermediate form of lethality, which, however, seems to be enshrined in custom and therefore previously and tacitly accepted by the protagonists. This does not in any way prevent these conflicts from following the general rule according to which they settle disputes and restore – provisionally – good relations: once the battle is over, the bodies in the enemy are returned to their families (on this point, see also Basedow 1925, 188).

A graphic visualization

The various forms of organized violence in Aboriginal societies can be positioned in a Venn diagram (see below). They occupy ten of the twelve fundamental positions delimited by the three criteria on which the classification is based.

Figure 2. Diagram of the aboriginal judicial procedures.
Hatchings indicate rare or absent procedures



3. FROM PROCEDURES FORMS TO LAW

The preceding analysis focused exclusively on the forms of legal proceedings; it is now necessary to substantiate these forms, that is, to shed light on under what circumstances, and for what reasons, one procedure rather than another was resorted to. This implies an effort to decipher the social significance of the three criteria that organize them.

3.1 Designation

In a somewhat trivial way, the personal or collective nature of the procedure is a direct echo of that of the object of the grievance: in other words, personal designation indicates personal responsibility, and collective designation collective responsibility. The intermediate situation of synecdochical designa-

tion corresponds to a collective responsibility marked by a willingness to limit the consequences of the procedure – not in its effects, but in its scope.

This criterion thus marks a double alternative: between personal and collective responsibility and, in this case, between synecdochical and collective designation. The former underlines the difficulty, in Australia, of establishing a strict demarcation between the two terms. Admittedly, the procedures were able to express the fact that collective structures, be they clans or local groups, could be formally involved in disputes or not. But Australian custom did not establish a formal boundary between the areas of private and collective responsibility. Fundamentally, the transition from one to the other was almost imperceptible, by a simple transformation from quantity to quality. Collective guilt, in particular, could be established on the basis of an accumulation of individual guilt, or individual guilt that benefited from a level of complicity that was considered too high. If a man stole a woman from another group, the procedure, a priori, was aimed at him personally. But whether he received a little too much support from his group, or whether these thefts had multiplied, and the victims were all the more inclined to attribute responsibility not to individuals but to their group as a whole. In another context, once hostility had taken hold, any individual act became a potential manifestation of that hostility and, as such, liable to be sanctioned by collective action. Individual responsibilities could therefore easily coagulate into collective responsibility, just as, conversely, collective responsibility could just as easily disintegrate into a series of individual responsibilities: this explains, in particular, the fluidity observed between personal duels, duels of champions and regulated battles.

An essential element must be stressed: among the mechanisms that could bring about a shift from individual to collective responsibility, the attitude of the accused group was as important a factor as that of the accusing one. In situations that were not marked by a pre-existing deep-seated enmity, it can be assumed that judicial actions were a priori aimed at individuals. It was only when, for one reason or another, the group of accused persons stood in solidarity with them and asserted its readiness to defend their cause with weapons in hand that the object of the legal action changed in level. In this sense, it can be said that the personal or collective nature of the judicial action stemmed from the absence or presence of solidarity (real or presumed) by the group of defendants with those who were accused.

Regarding the choice of the synecdochical rather than collective designation, it proceeded, as has been said, from the desire to circumscribe the effects of the proceedings. This is particularly noticeable in the case of compensatory killing: whatever happens, the group of the culprit is held responsible, and therefore jointly liable for the crime. By opting for the synecdochi-

cal designation, however, one limits in advance the number of lives that will be taken to extinguish the blood debt. By choosing the collective designation, on the contrary, one frees oneself from this limit, considering that the group as a whole must atone without counting for the fault committed.

3.2 Symmetry

The symmetry criterion differentiates between situations where the procedure pronounces a judgment and those where it applies a sanction. In other words, symmetry exists when one proposes to settle a dispute or, more simply, to dispel animosity between the two parties involved. Asymmetry, on the other hand, occurs when guilt is previously established.

Determining whether symmetrical proceedings, insofar as they are accompanied by physical damage, entail or not the sanction of the judgment they pronounce is not an easy question, and it is doubtful whether a unilateral answer can be given. In duels, for example, some tribes clearly admitted that the victor makes non-lethal, but not symbolic, injuries on the vanquished. Elsewhere, as we have seen, the duel was subject to a very strong constraint of balancing the damage, and the winner could not have finished without the defeated, or his close relatives, causing him the same damage as that which he himself had inflicted. It does not appear that such a concern ever prevailed in pitched battles, whether regulated or lethal. The most reasonable hypothesis therefore seems to be that in symmetrical procedures, punishment was not the central element. Sometimes explicitly banned, in other cases it was only a by-product of the litigation process, and quarrels were expected to be settled as a result of the fighting itself. From this stemmed the possibility that a symmetrical fight which, from the point of view of those who had lost it, had had consequences too severe for what was permissible, might feed new resentments.

Another aspect is that, at least in non-lethal cases, asymmetrical procedures presupposed the acquiescence of the person subjected to them. Accepting to undergo the penalty challenge was thus tantamount to a public admission of guilt. Conversely, those who refused to acknowledge their guilt tried to escape the procedure, or did so only with great reluctance. Howitt relates how, around 1850, at a meeting on the banks of the Tambo River in Victoria, a man named Bunbra, accused of causing the death of another Aboriginal man by sorcery, was sentenced to a penalty challenge. Placed in front of the executioners, he again protested his innocence: ‘I want to tell you that I did not hurt that poor fellow’, but was nevertheless urged to accept his fate. He dodged most of the boomerangs, but a tapered stick pierced his thigh. He pulled it out and returned it to its senders, a gesture which, while expressing

his refusal to admit his guilt, was a serious breach of the rule. The women then rushed between the two parties and calmed things down (1904).

3.3 Moderation

Of the three criteria, that of moderation of lethality is certainly the one whose interpretation is the least trivial, while at the same time addressing the most crucial issues. In the first instance, as befits a justice based on compensation, the severity of the sanctions is directly related to the seriousness of the act that motivates them: 'an eye for an eye, a tooth for a tooth' is the principle from which aboriginal justice proceeds, as has been said enough for two centuries. A minor damage will therefore be compensated by a minor damage, and murder by murder. Many facts, however, refuse to comply with this alleged rule. Either – frequently – the injured party consents, in one way or another, to be satisfied with compensation which is much lower than the fault. Typically, instead of requiring a homicide to be avenged by the death of the perpetrator, one will accept that he submits to a penalty challenge or a corporal punishment in which blood will probably flow, but which will not take his life. Or – more rarely – that the judicial act more or less goes beyond the initial fault, real or supposed, and that the compensation proves, in fact, to be an overbid.

These frequent deviations from the principle of equivalent compensation can be interpreted as the application of a second principle which has been much less noticed than the first and which we propose to call the *principle of modulation*. It consists in the fact that compensation was attenuated, or on the contrary, aggravated, depending on the social relations prevailing between the two parties. Whether they were bound by strong social proximity and whether they maintained friendly relations, then a damage was likely to be compensated by a lesser damage: the bloodiest version of a procedure was renounced in order to apply its moderate equivalent, opting for a penalty challenge rather than an assassination and for a regulated battle rather than a free one. Conversely, whether the dispute was between distant or hostile groups (in Australia, the two terms tended to be synonymous), compensation applied in full or even exceed the original damage; and for actual or alleged murder, a family or even an entire group was attacked.

Although it has not been expressed in the general form just stated, this correlation between social distance and modulation of procedures has frequently been noted. Curr wrote that serious injury or murder resulted in regulated battles only between tribes that were 'associated (…), or at least (…) pretty well acquainted' (1886). Eyre, speaking of the need to avenge the deaths, real or supposed, in encounters with other tribes, said it was 'regulated by the desire of the injured tribe to preserve amicable relations with the

other or the reverse' (2014). Mathews noted that the *pirrimbir* revenge expedition was launched when death was due to the action 'of a hostile tribe' (1904); Hart and Pilling expressed themselves in the same terms, writing that its Tiwi equivalent, the *kwampi*, 'allowed punishment of a nonlocal hostile party to occur' (2001). Foelsche, referring to Arnhem Land, explained that murder committed by a member of the same tribe was punishable by corporal punishment, and that care was taken to ensure that it was not lethal. By contrast, when the crime was committed by someone from another tribe, a revenge expedition was organized. If the culprit was not caught and none of his close relatives were executed in his place, the principle of modulation would take effect over time, and the matter would eventually be settled by a battle fought with light spears, 'without any serious consequences, after which the tribes are on friendly terms again' (Foelsche 1895). But it was probably Fison and Howitt who, on several occasions, provided the most detailed evidence on this point. Referring to the Kŭrnai in Gippsland, they stressed the difference between the treatment of strangers (indifferently grouped under the infamous name of Brajerak), whose lives could and should be taken, and the treatment of other Kŭrnai. Within the tribe (or confederation of tribes, the exact structure of this set being debated), the only confrontations that could occur were 'the set fights which have been so often described as wars' – that is, what we called here regulated battles (Fison 1890). In other passages, the attenuation of compensation via the principle of modulation is even more explicit:

> In the case of a member of the same tribe, a blood feud is not necessarily to the death, but may be expiated by his undergoing a certain ordeal. (…) In the case of members of an alien tribe the blood feud is fatal, and cannot be satisfied but by the death of the offender ; and, further, that the feud attaches not only to the individual, but also to the whole group of which he is a member (Fison & Howitt 1880).

Remark on war and feud

The respective definitions of war and feud have been the subject of decades of extensive discussion, which never led to a consensual solution. Actually, and without getting into too rich a debate here, neither the military objectives, nor the ('political') nature of the social units involved, nor their size, provide a satisfactory criterion. Boulestin (2019) has just recently proposed a new and promising outcome to this old problem, which identifies the fundamental difference between feud and war in the number of casualties targeted by operations. In the feud, this number is specified and corresponds to the will to balance the losses previously suffered – in other words, to pay off a debt. In war, there is no such count: operations are a priori unlimited.

While having none of the drawbacks of other approaches, such a definition is perfectly operational: it makes it possible to clearly discern the two phenomena, considering them as mutually exclusive. Moreover, it is remarkably linked to the classification of legal proceedings that has just been proposed on the basis of Australian data.

Battles that fall within the realm of war clearly correspond to the zone characterized by the absence of moderation – one fights to kill – and a collective designation – one targets a group as such: in other words, no a priori restraint is placed on the number of victims one seeks to inflict on the adversary. The most normal form of such a confrontation is asymmetry, in these raids and ambushes where the effect of surprise is sought. But in some particular contexts, social rules mean that such fighting can occur on the basis of a prior declaration and take the form of *gaingar*, or a similar form.

Feud involves procedure localized in the unmoderated and asymmetrical areas, with either a personal or a synecdochical designation. It should be noted, however, that while any feud necessarily entails such procedures, the reverse is not true: these, in themselves, do not necessarily presuppose the character of equilibrium which, in Boulestin's definition, constitutes a central element of the feud. It can nevertheless be argued that in spirit, if not in letter, a procedure which targets a specified number of victims, but which goes beyond the rebalancing of losses, constitutes a serious step in the direction of outright war.

All of this also provides a closer insight into the nature of the intimate relationship between feud and vindictive warfare, so often highlighted for Aboriginal Australia (Hodgkinson 1845; Wheeler 1910; Berndt & Berndt 1992). A feud is a war of limited intensity, not in terms of damage to the aimed individual, but in terms of damage to the aimed group; that is, it is a war in which only a small number of adversaries are killed voluntarily – the number necessary to pay off debts. Conversely, the vindicatory war is a feud without limits, whose operations no longer seek to restore any balance, but on the contrary, to break it definitively, by crushing, if not annihilating, the enemy.

THREE CONCLUDING POINTS

To begin with, we must try to explain the absence, or the great rarity, of procedures corresponding to four of the twelve possible locations of the classification. These four locations can be read two by two, as, on the one hand, unregulated and non-collective duels and, on the other hand, non-personal penalty challenges (or corporal punishments).

This set represents a combination of opposite values of the three variables that can be seen, so to speak, as the two ends of the same club: one is characterized by symmetrical, non-collective and unmoderated procedures, the other by asymmetry, non-personal designation and moderation of violence. For the same fundamental reasons, those values are difficult to reconcile. A symmetrical procedure marks a situation where guilt is not established. Its primary goal is far more to settle a dispute than to impose a sanction. If, moreover, it involves a small number of individuals, its progress can be easily monitored by the rest of the community. It would therefore make no sense, in such a context, for the outcome to be fatal. Conversely, an asymmetrical procedure directed against a group means that the group's collective guilt is considered to be firmly established. In such cases, the principle of modulation hardly plays its mitigating role: the mere fact that guilt has reached the collective level tends to indicate, in itself, a degree of animosity that is hardly compatible with the desire for appeasement that motivates the choice of moderate procedures. It is therefore logical that the corresponding positions in the classification are only very rarely occupied: they express contradictory combinations, not in the form of the procedures themselves, but in terms of what these combinations would express in social terms.

It would obviously be of the greatest interest to check the robustness of these results outside the Aboriginal world. A first question is to what extent this classification devised for the Australian continent remains valid for other societies without wealth, as defined by Testart (2005). To test this conjecture, the investigation should undoubtedly be pursued with the Inuit world, the most documented after Australia and, therefore, the most likely to provide enlightening information in the perspective of a broad reflection of comparative law. This comparative approach can also be extended far beyond, particularly to modern law. When it is subjected to the same analytical grid, several striking differences become immediately apparent. To begin with, symmetrical procedures have been completely banned from our law. The reason for this is trivial, and is due to the existence of the State. This institution which, according to a famous formula, claims a monopoly on the legitimate use of violence, seeks everywhere to prevent any form of legal procedure that directly confronts the involved parties. The other major difference lies both in the disappearance of any form of collective designation (whether plenary or synecdochical) and in the invention of the legal person, which allows justice to target a collective as such, independently of its members. To what extent is this development general to State societies, or does it concern only some of them? This question, among many others, will have to be the subject of further research.

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