II. Arbitration in Primitive Legal Systems

A primitive legal system, on our account, lacks certain kinds of “state” institutions – courts and police – and if it is to vindicate its authority it must rely on people to settle disputes in certain ways and voluntarily to comply with agreed settlements. Such systems include stateless societies described by anthropologists, but also other societies that rely on self help for law enforcement. Thus, many kinds of commercial law and international legal systems are included as well. What is characteristic of such systems, from our perspective, is that the parties to disputes must be seen as having powers and capacities that need to taken account of and recruited in any dispute settlement practice.

One nearly universal finding from the anthropological literature is that persons who have high status for other reasons are useful third parties. There is a reciprocal relationship between high social status and dispute resolution in many simple societies. Shapiro notes the Papuans would turn to a man with many pigs; in other cases, a chief or elder may play the role. High status individuals have several advantages. First, they are likely to have many relationships in the community, which means they have a stake in mitigating the escalation of violence. They may also be able to call on resources (material, social) to help resolve the dispute or to enforce the settlement. Further their pronouncements may have a kind of focal quality that changes the perceptions of outsiders as to who others are likely to see as being in the right, changing incentives to fight for one or the other side, and aligning expectations of likely behavior. These are all, of course, facts about social power – high status groups are likely to have power and that
makes them attractive dispute settlers. At least it does if “status” is not very contested. But it has nothing to do with neutrality.

There may be other means for motivating neutrality. One interesting example comes from the Shield of Achilles in the Iliad. Achilles shield features several scenes of urban life in peace time and war. One of the scenes of peace concerns dispute resolution:

“And the people massed, streaming into the marketplace where a quarrel had broken out and two men struggled over the blood-price for a kinsman just murdered. One declaimed in public, vowing payment in full -- the other spurned him, he would not take a thing -- so both men pressed for a judge to cut the knot. The crowd cheered on both, they took both sides, but heralds held them back as the city elders sat on polished stone benches, forming the sacred circle, grasping in hand the staffs of clear-voiced heralds, and each leapt to his feet to plead his case in turn. Two bars of solid gold shone on the ground before them, a prize for the judge who'd speak the straightest verdict.”

The scene describes early dispute resolution and the shift toward judging. Here, it seems to us, that the element of contest among the judges suggests that a party-independent norm of some kind is in play. The judges engage in an epistemic competition to state or approximate a ground for a just resolution, as perceived by the gathered crowd. And if the sheer glory of conquest is not enough for these archaic Greeks, the two bars of gold

\[1\] Translation R. Fagles (1996); note that Cantarella’s version differs slightly.
represent an extra gratuity – putting the weight of the community behind the resolution of the dispute.²

Early societies in which the state has not yet established a monopoly of violence typically resolve dispute by blood-feud, still a popular method in the Pashtun tribal region and other areas in which formal states have little reach.³ Such societies are characterized by several features: (1) they strongly encourage retaliation, for only if retaliation is mandatory will there be a deterrent to violence; (2) they utilize strong honor norms to accomplish this—one who fails to retaliate will be seen as weak, and this may lead to “thin-skin”—errng on the side of perceiving injury; and (3) they utilize blood-price to mitigate the tendencies toward violence that flow from (1) and (2) above.

To illustrate: a young man in the Pashtun tribal areas committed adultery with a married woman and the husband wanted to exact revenge. He appealed to a tribal council which acted in this case to give a solution. A banquet was held that included both extended families and during the dinner the father of the young man pulled out a gun and killed him. And then he handed the gun to the father of the married woman, who killed her. The father gave one of his daughters to the cuckolded husband as a kind of blood price and the other family accepted it as compensation for the wrong. It seems likely that that there was not much choice as to what would happen. The two families implemented a “fair” settlement and did so in a way that established blood ties between the two

² Cantarella has a different interpretation of the two gold bars, and sees the reference as referring to a prize going to the winner of the trial. Eva Cantarella, Private Revenge and Public Justice: The Settlement of Disputes in Homer’s Iliad, Punishment and Society 3:473-83, 478 (2001). She believes the bars refer to an institution, found later in Roman law, in which each litigant would put down deposits related to the amount in dispute, perhaps to deter frivolous litigation. See also Eva Cantarella, Dispute Settlement in Homer: Once Again on the Shield of Achilles, 147-64 in Melanges en L’honneur de Panayiotis D. Dimakis, Droits Antiques Et Societies.
³ Peter Stein, Legal Institutions: The Development of Dispute Settlement (1981)
families, reducing the likelihood of further conflicts between them. And it was also quite a dinner.

A blood-price is a set amount of compensation to be paid in case of injury. The injurer pays the compensation in exchange for the victim foregoing the right to take revenge. In Homeric society (and in some Pashtun areas), there was no third party that would compel the victim to accept the bloodprice. But the if the victim does accept, it is done in public so that the victim may show that he is giving up his right of revenge because of the compensation, rather than out of fear of fighting with the other party.

The shield scene concerns such an instance but introduces an additional element: a third party, in the form of the city elders, who wield scepters to indicate their public roles. (It is not clear precisely whether the elders are resolving a primary dispute, a dispute over the amount of compensation, or as indicated in an alternative translation in Cantarella a dispute over whether compensation has already been paid or not.) Note that the decision-making is collective. This may be useful on Condorcet jury grounds, ensuring that the ultimate decision is more accurate, though it may or may not affect neutrality per se.

The Pashtun story outlined above concerned a situation in which the two parties resolved the dispute among themselves using bloodfeud norms, without the intervention of third parties. But third parties are available to implement the loosely defined set of norms called the Pashtunwali. They are not mandatory, but require agreement of both parties *ex ante*, and so many disputes are left without resolution. (Before deliberating,

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the parties are called on to decide whether the dispute should be resolved according to Sharia (Islamic law) or the Pashtunwali norms which differ in several important respects. We thus see some element of consent in the selection of the norms. Typically disputes are resolved by jirga, councils of the members of the community, who can be called on to decide which party is in the wrong and stipulate the compensation or bloodprice. (Before deliberating, the parties are called on to decide whether the dispute should be resolved according to Sharia (Islamic law) or the Pashtunwali norms which differ in several important respects. We thus see some element of consent in the selection of the norms.) In jirga, each adult member of the community will speak and deliberation will proceed until there is agreement as to the proper resolution of the case. There is an emphasis on voluntary acceptance by the parties, though in extreme cases, the community can impose collective punishments such as banishment. The Pashtun “legal” system is an intermediate one, in which there is no monopoly of dispute resolution (there are others who can provide the service such as Mullahs or chiefs), and some specified external norms but not many. In this situation, the job of the dispute resolvers is to contain conflict by working out a mediate solution, one that likely takes into account both the material strengths of the parties as well as their compliance with local norms.

For several hundred years, Iceland had a stable legal system with judges but no public enforcement of their decisions. When someone won a court case in Iceland, enforcement would be left to private parties. Typically, legal cases involved killing of an individual for which blood money had to be paid. If one failed to pay damages as

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determined by an adverse judgment, the original claimant could come back to the adjudicator, who would declare the defaulting defendant an outlaw, meaning the person could be killed without incurring legal liability. But consider the puzzle: the immunity granted to the killer of an outlaw is merely the right to be free from judgments issued by a court that had no power to enforce its judgments. Yet, despite the purely expressive power of the court, the Icelandic system provided sufficient incentives for many people to pay judgments.

The risk of this system was that it would seem to allow the stronger parties to avoid paying judgments rendered against them, Iceland had a market in claims, so that a successful but weak claimant could transfer his claim to a stronger party for enforcement of the judgment. This system worked so long as power asymmetries among the players were not too great. Apparently Iceland had some social surplus, but not a large one. There were enough resources to support a few public officials. But there were not enough resources so that a powerful individual could hire enough other powerful people as retainers to form a state. Presumably, whenever one faction would gather a number of powerful individuals so as to try to coerce others, it would lose judgments. As the number of judgments against the prospective ruler rose, so did the incentive for other powerful individuals to challenge the person so as to gain the payment due earlier but weaker plaintiffs. This may have created a mechanism for internal stability and an equilibrium of power.

We can find similar examples in international legal systems. Milgrom, North and Weingast present an account of the old law merchant (which regulated trade among the Hanseatic merchants) in which arbitral courts simply announced judgments in triadic
disputes and left it to the community of merchants to enforce their judgments. Obviously this kind of system could only work where merchants are normally repeat players. While the authors don’t really describe the substance of the trading norms in any detail, it seems likely that these norms would have embodied ordinary notions of fairness that merchants could be presumed to be familiar with. Probably modern commercial disputes are often decided within agreed contracts and if the transactions are among strangers, the contractual terms required to permit trade will be complex.

The point of bringing in these examples of adjudication in primitive legal systems is that they may be relevant to dispute settlement when established legal practices have broken down or become less legitimate. For example, in civil wars or insurrections some shared norms may, nevertheless, be available to permit “neutral” arbitration of disputes. There may well be conflicts among these norms – between fairness, efficiency and democratic rule for example – so that what counts as neutral will be contested. They therefore better approximate the anarchic situation with which our theory is concerned than does the more conventional conflict in an established legal system.

IV

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