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Lawyers and Savages : Ancient History and Legal Realism in the Making of Legal Anthropology: Juristeista ja villeistä : Antiikin historian ja oikeusrealismin rooli oikeusantropologian synnyssä

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2. Blood: Law as Culture

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Introduction

This book is about the search for the origins of law. Earlier Enlightenment thinkers had by and large subscribed to the idea of dualism between the primitive and the civilized, which in the legal sphere was understood as a division between savage customs and the laws of civilized peoples. This division was undermined by Romanticism, which emphasized the role of culture and tradition. To the early investigators, the quest for the origins of law was a search for culture and for them early predecessors of European civilization and the exotic indigenous peoples were equally followers of early and primitive law. Their explorations for the authentic early culture took place in remote and secluded places in both Europe and beyond.[1]

In this chapter, we approach the early nineteenth century interest in early and primitive law through the issue of violence. The violence of the customs and culture of uncivilized peoples was a central preoccupation in the depictions of what was called "the savage way of life." Violent rituals and violence as a traditional way of settling disputes, for example, through blood revenge, separated the savage from the civilized. While earlier scholarship had emphasized the tendency towards violence as a moral deficiency and a lack of law, a new interpretation claimed that the resolving of disputes through controlled violence was a part of the cultural heritage and in its own way, law. We will commence our inquiry through the examples of two little known explorers, who sought knowledge of the remnants of cultures they considered early and, in some cases, primitive. The first was Karl von Martius, a Bavarian explorer, botanist and a medical doctor, the second Elias Lönnrot, a Finnish folklorist and a medical doctor as well. We then examine the theoretical background of this transformation and the crucial change it brought to the understanding of the key issue of *lex talionis*, the law of talionic revenge, before continuing to the impact of the civilizing narrative and the primitivistic interpretation of the past on early scholarship. Finally, we look at how issues of property were given primitivistic interpretations through the theories of primitive collectivism and ritualism.

Legal theory had, during most of the seventeenth and eighteenth centuries, maintained that law was both something that was derived from a sovereign power and something that was based on pure volition, the validity of its contents only checked by an adherence to a religious or intellectual system such as natural law. Based on the philosophy of German Romanticism, a new antirationalistic school of thought, the Historical School of jurisprudence, presented a radical claim that law exists within a popular culture and evolves with that culture.

One might wonder what this has to do with legal realism and anthropology? This change was crucial to the formation of the new type of scholarship that relied on the concept of culture and the use of observations. Both legal realism and anthropology trace their methodological roots from the folklore studies of the early nineteenth century. The history of interpretations shows how these play a role also in the modern legal anthropology.

When discoveries and nascent colonialism brought Westerners into closer contact with indigenous populations, two factors led to a growing scholarly interest in what was later known as early and primitive law: theories of Romanticism and its manifestations in scholarship, but also the interest in otherness. The intellectual current of Romanticism was preoccupied with nature and culture, the uncorrupted human experience. In the humanities, this played out on two fronts, the study of folklore and customs (*Völkerkunde*) and the Historical School of jurisprudence. While the study of folklore laid the foundations for the academic study of culture as understood later on in fields like anthropology, the Historical School claimed that law and culture are historically bound and develop together. Both fields were interested in the earliest foundations of human culture and their development. The obsession with scientific discoveries and the channeling of curiosity into science gained unprecedented prominence in the nineteenth century.

An era of European expansion, nineteenth century developments fueled to a growing interest in otherness, foreign cultures, and their customs that were studied and compared using scientific methods. Two important though stereotypical literary models influenced the understanding of civilized Western gentlemen regarding indigenous cultures: the Hobbesian negative and the Rousseauan positive view of the state of nature (Fitzpatrick 1992, 77). Hobbes's state of nature was a state of war in which life was a continuous struggle for survival: Life was solitary, poor, nasty, brutish and short (*Leviathan*, ch. 13). Even Hobbes himself noted that these circumstances are not purely hypothetical and belonging to ancient times because the American savages of the time lived in those conditions. In contrast, in Rousseau's state of nature, man was healthy, happy and free, living his life as his own man and hunting and gathering what he needed. Rousseau himself would, as examples, point to American Indians, African Hottentots and also to "wild men" who were raised among animals (Rousseau 1992, 170-179). The struggle and the strife were all the product of the advance of civilization and the inequality of wealth. When European explorers and settlers came into contact with indigenous cultures, they often followed one or the other of these stereotypes. For example, in Australia in the first half of the nineteenth century, both stereotypes were in good use. As noble savages, the Australian aboriginals were observed, captured and sent to Europe as samples of the original state of man, while as thieving natives they were summarily hunted and killed. At the same time, philanthropic societies clamored against the ill-treatment of the indigenous population and Protectors of the Aborigines were appointed (Hiatt 1996, 6, 79-81).

The relevance of the issue of violence in the current discussion should not be understated. Though the stereotypical image of the inherently violent savage has been conclusively refuted in mainstream anthropology, it still holds a prominent place in the popular imagination. The continuing popularity of the works of Napoleon Chagnon, the controversial anthropologist known for his studies on the Yanomami people in Brazil, testifies how imbedded the theory is into Western culture (starting with Chagnon 1968; Tierney 2000). Equally, in the contemporary debates over what might be understood as culturally motivated violence such as honor killings or female mutilation, the vocabulary of barbaric savagery tends to be utilized (Fernandez 2009).

Martius and the legal exploration in Brazil

After the Austrian Archduchess Maria Leopoldina Josepha Carolina was married by proxy on May 13, 1817 to Dom Pedro of Braganza, the future emperor of Brazil, she was sent off to meet her new husband in Rio de Janeiro. Prior to her departure, two ships full of naturalists, artists, taxidermists and assistants had already sailed to Brazil in April 1817 as part of her retinue. The archduchess was an avid naturalist and botanist. Despite its connection with the royal marriage, the Austrian Expedition to Brazil (*Österreichische Brasilien-Expedition*) was a fully-fledged scientific expedition that lasted until 1835.[2] As part of the first group of scientists, sailing on the ship *Austria* was Carl

Friedrich Philipp von Martius (1794-1868), a Bavarian doctor and naturalist. Martius's main interest was in botany and he embarked on what was to become a three-year journey into the interior of Brazil with a fellow member of the expedition, zoologist Johann von Spix (1781-1826). The voyages of both Martius and Spix were under the auspices of the Bavarian Academy of Sciences and financed by the king of Bavaria. Spix was already an established naturalist and the conservator of the zoological collections of Munich, while Martius, at the age of 23, was a young assistant in the botanical gardens.

The voyage would be a defining moment for Martius, who was to become one of the central figures in the history of botany. Spix, on the other hand, succumbed to a tropical illness soon after their return to Bavaria, leaving Martius to publish much of their findings. Despite the international fame, not all of his works gained recognition. While Martius's groundbreaking contribution to botany and zoology is still celebrated,[3] his linguistic and ethnographic works are barely remembered (Schulze 2008, 117-132) and his work on legal anthropology, based on the same expedition, has been nearly forgotten. In the following, we examine these little known works as examples of the way early Western explorers came to grasp the legal culture of the indigenous people through their own preconceived ideas.

While the main part of the Austrian expedition stayed close Rio de Janeiro after the celebrations of the ill-fated royal marriage, the Bavarian team of Spix and Martius took off in December with a an ever expanding team consisting ultimately of 56 men and eight boats. Over the period of three and half years, they covered vast distances, zigzagging through the interior of Brazil (some estimates of the actual distance are over 10,000 kilometers, see Hausser 2009 43; Tiefenbacher 1994), reaching almost to the border of Peru. They documented their progress in a travelogue, published later in three parts under the title *Brazilian Travels*[4]. During their expedition, Martius and Spix collected, in addition to samples of minerals, plants, seeds, animals and insects, geographic data on the land and rivers, ethnographic notes on the language and culture of the indigenous peoples, especially the Tupi. Spix and Martius brought back to Europe an immense collection of samples, including 6500 plants, 2700 insects, 350 amphibians, 116 fish, 85 mammals and two indigenous children from the tribes of Juri and Miranha. The last two were promptly baptized but died shortly thereafter (Spix and Martius 1831, 1268, 1387; Tiefenbacher 1994, 46-48; Wunschmann, 1884, 517-527).

Though Martius's ethnographical interest was wide-ranging, it is something of a surprise that in 1832 he published a study on the legal conditions of the indigenous population of the interior of Brazil, which is one of the first scholarly studies of legal ethnography. Martius's view of the indigenous population that he was describing was decidedly negative, a contrast to many of his contemporaries who idealized the natural state of the indigenous peoples. The Indians of the remote inland regions were to him violent, childlike, backwards and undeveloped, a "dark mystery". They were separated from the rest of mankind by their spirit and character, existing on the lowest levels of humanity. According to Martius, morally they were like small children, but like old men they were unable to learn and develop. They had resisted all attempts by the conquering Europeans to turn them into happy citizens.[5] This lack of progress made even the scientific observation of their origins and history nearly impossible, as it appeared that they had existed for thousands of years without noticeably improving their lot. They were not, by and large, on the same path of development as the earliest humans known from historical sources. Instead of divine origins, there were animal instincts from the past and by studying them one may shine a light in the dark phases of the historical process that mankind has gone through (Martius 1832, 1-2).

The lack of context and history within the Indian culture was clearly disturbing to Martius. He laments that there is no tradition, no monuments of earlier creative power in the thick jungle: "no voice of human upheaval, no heroic songs or elegic laments come to our ears." However, he recognizes that this exasperation had been the lot of scholars interested in Brazil since the beginning, even

necessitating a Papal Bull stating that even the Indians should be counted as humans (Martius 1832, 6-7).

Based on his extensive travels in the country and accounts by earlier explorers, Martius attempted to describe the legal culture of the over two hundred then known tribes, but mostly concentrating on the Tupis. Whether the "wild men" were part of the same people was likely, but the discrepancies between isolated groups were great. Though his inquiry appears to be grounded on observation, the conceptual framework that he builds upon is that of the European tradition, especially classical civilization. For example, in the discussion of landownership he makes explicit comparisons with the European past. The Indian tribes that Martius observed held that the tribe in general owned land communally. However, as an exception to this principle of common ownership, individual persons owned single houses. In this, Martius maintains, the indigenous peoples "are in agreement with the ancient Greeks and the forefathers of the Germans" (p. 35). The references he makes are to what authors like Aristotle, Xenophon and Tacitus would say about the customs of their archaic forefathers, and to the *Lex Salica* and the Sachsenspiegel for the Germans (Martius 1832, 3-6, 33-36).

To Martius, the most obvious sign of the low level of civilization among the indigenous peoples of Brazil was their adherence to the custom of blood revenge. According to Martius, blood revenge was a very significant part of the culture in most tribes, just like in contemporary Sardinia, Bosnia and Valachia. A murder was not met with a legal sanction but rather blood revenge by the kinsmen of the victim. Though intertribal blood revenge could easily escalate into a war between tribes, within a group or a family the revenge was swift and unanimously accepted. Blood revenge was highly ritualized and performed with openness and pride. The avengers, the men who set out to avenge the crime or insult, marked themselves with black spots and at times shaved their heads. Martius describes how the Indians could whip themselves into an immense animal rage that would last for years until the quest for revenge would receive its bloody fulfillment. When caught, the victim was sometimes killed after the gruesome torture of being tied to a tree and slowly bled to death with knives and arrows. The ritual acts of killing, including the inflicting of the same wounds that the murderer had perpretrated on the avenged, reminded Martius of the ancient Hebrew practice of Goël. Within a tribe, the chief could either allow or forbid blood revenge; among the peaceful tribes even a compensatory fine might be accepted. In short, Martius's depiction shows the Brazilian Indians as primitives comparable to some Europeans, who also were plagued by cycles of feuding and blood revenge that last for generations. They were living under the law of blood revenge, but one which was regulated by the *lex talionis*. In some cases, the progress of peace had even led them to adopt the principle of compensation (Martius 1832, 73-76).

Martius maintains that the Indians used legal symbols especially in trade and contracts such as the uttering of words and the taking of objects like weapons at the same time. These are just some of the symbolic actions taken by the Indians as legal rituals. He posits that the taking of weapons at the end of the agreement symbolizes the use of force as the final resort of making the contract binding. The rituals themselves may be seen as symbolic representations of the legal relations behind them or that they themselves are the legal format of the Indians. However, to decipher each of these rituals would necessitate a longer stay, a deep knowledge of the language and keen observation. However, he noted that a study of advanced legal institutions, such as servitudes is not really necessary because the understanding of the Indians is so simple and straightforward that a development of complicated transactions would not be necessary (Martius 1832, 44-45).

What is certain is that whatever legal proceedings the Indians had, they were mixed with magical and religious rituals. Among the Pajé tribe a trial over the ownership of a thing was full of strange incantations and spells meant to strengthen the legal ownership and weaken the illegitimate. Different

forms of witchcraft were employed to limit, transfer or secure ownership, rights or duties. What this entailed was the acceptance of the power of the chief as a mediator with the supernatural, which enabled him to operate as a legislator, judge and secret police (Martius 1832, 30-32).

By training, Martius was a medical doctor and naturalist, who had already enrolled in the University of Erlangen when he was 16 (Wunschmann 1884, 519). His methodology was very strictly that of a natural scientist, who seeks to gather empirical data and to build comparisons and typologies.[6] The systematizing tendency was of course prevalent in the ethnographical scholarship of the time, but it had comparisons in the legal writings. Even Martius follows the civil law systematics in his presentation of Indian law, beginning from public law and legal status and progressing towards contracts and ownership, to family law and finally to criminal and procedural law. It would appear that Martius used some sort of book on Roman law as a model for the systematics, as the text has references to Roman legal institutions such as *depositum* or *mutuum* that are not to be found among the Indians (Martius 1832, 44).

The methodology assumed by Martius in the book was one of observation and synthesis, but the impartiality of the observer in this legal work was markedly improved from the irritated moral indignation expressed widely in the earlier travelogue. His approach is, perhaps unsurprisingly, one of a natural scientist, who records observations and collects samples, be they plants, words or examples of behavior. This issue of collecting samples brings us to the two children that Spix and Martius brought along to Europe. What were they, exactly? There is of course a long tradition, in the case of the exploration of America extending to Columbus, of bringing captives as examples of the people living in the new lands, with or without scientific motives. There was also the nascent tradition of exhibiting to the general public people of different cultures as a spectacle. Just a few years before Spix and Martius set out for Brazil, a Khoisan woman named Sawtche, later baptized as Saartjie Baartman, toured Europe under the stage name Hottentot Venus, serving as a spectacle to scientists as well as to the cabaret audiences (Boëtsch and Blanchard 2008, 62-68). Spix and Martius give little indication of whether the children were dependents as wards or slaves, or under contract. Martius only mentions that the young boy from the Juri tribe joined the crew in Manacapurú and came from the Comá-Tapuüja family, indicating that he would have more a worker than a sample. He mentions in passing that he followed them to Munich, but along with the young Miranha girl, paid with his life for the change of climate and conditions. Of the girl, Martius says that she was one of five children that the Miranha tribe had caught while raiding their neighbors and whom Martius had taken along when they were suffering from fever. Two other Indians were also taken, but they already perished on the Atlantic crossing.[7] Perhaps the children were abandoned or unwanted, like the infant abused by her stepmother described in a footnote in the *Brazilian Travels*. Martius tells the story as an example of the crude savagery of the Indians. A half-year-old child whose mother had died was starved and abused by her stepmother, who, in her anger, abandoned her to death. Martius had rescued her and gave her to the care of one of the crewmembers, but to no avail. She died soon afterwards and was buried under the waterfalls of Cupati (Spix and Martius 1831, 1267).

The exploration of Brazil by Spix and Martius took place in the beginning of the age of exploration and scientific inquiry. The increase of contacts with indigenous peoples and the advance of what was perceived as the scientific method led to the gradual disappearance of the cabinets of curiosities and the evolution of the strangeness of the exotic savage. However, there continued a dualism in which the indigenous others were simultaneously depicted as the uncivilized savages and people comparable to the earliest ancestors of the European nations. This dual nature of the indigenous peoples was, of course, mostly evident in manifestations of exotism and escapism like the mythical noble savage. For the nascent science of anthropology, this led to a number of pitfalls in describing the foreign cultures

encountered. For example, what is the point of comparison that is used to present the culture of a people, their language, laws and customs, to the reader?[8]

Martius opposed the image of the noble savage and instead argued that the existing Indians were the degenerate remnants of earlier civilizations.[9] He strongly attacked the romanticizing tendency to see the Indians as noble savages living happily in the original state of nature, as the innocents of paradise in Rousseau's false images of the original state (Martius 1867, 3-4). In fact, Martius's travelogue contains some of the most damning descriptions of the nature of the indigenous people, the savage Brazilian *Urmensch*, which probably are to a large extent the result of his depressed state of mind and his longing for Europe:

> [T]hey grasp only what exists in being, not that of thought. Only hunger and thirst remind them of their existence. Even thus life is not valued and death is meaningless. This passes everything; at most there continues hatred and revenge as painful ghosts. … The man is comfortably half dressed, the naked wife is a slave; instead of shame there is vanity; the marriage is an ever changing concubinate. …Instead of law there is a feeling of egoism; instead of patriotism there reigns an unconscious trust in the speakers of the same language; an inherited hatred towards other tribes. … The chief's power comes with the powerlessness of others, but instead of the true moral community there is only that of command. --- Thus is and lives the original man of this wilderness! (Spix and Martius 1831, 1268)

The Brazilian Indian is in the "most savage stage of mankind." It is noteworthy that the words Martius uses in describing the Indians have, almost without fail, animal connotations. There are "apelike playing," lust, animal instincts, fear and terror, but no intellectual activity or thought, no discipline or rationality in either action or organization (Spix and Martius 1831, 1268). Likewise, there is the admiration with which Martius describes the efforts of missionaries to educate the savage Indians and to bring "civilization within the reach of the wildmen." The savages "should be brought through civilization into the realm of humanity," because what is found is not the harmless simple life of innocence, but rather fire, blood and horrible sacrificial victims (Spix and Martius 1831, 1310, 1378-1379).

The travelogue that Spix and Martius published was in part a scientific publication on the expedition, a report of the findings that they made, in part meant to inform potential settlers of the region and its possibilities. Beyond the stated intent, the published accounts illustrate the two main currents of the literature of exploration at the time. The first was the romantic image of the noble explorer traveling alone among the savages, stopping to rest and make scientific observations in picturesque settings. This vision was amplified by the dozens of illustrations of the indigenous peoples and their traditional costumes. Spix and Martius, who made many of the drawings themselves, were always presented as impeccable aristocratic gentlemen as a contrast to the nearly naked Indians.[10]

Along with Alexander von Humbolt, Martius was one of the most influential figures of German anthropologists working on the Americas and helped to cement the popularity of several key research interests such as geography and linguistics. Martius's works on the indigenous languages were self-professed amateur studies, but as such, they were extensive, systematic and influential. The anthropological works of Martius bear the mark of both his training as a medical doctor and natural scientist and the general trends of the German Romanticism at the time. However, one should not overemphasize his uniqueness, since empiricism and interest in history and language were to become the defining traits of German ethnology and anthropology of the nineteenth century (Hempel 2009, 195; Mühlmann 1984).

Martius was a character typical of the era in many ways. Regardless of whether one would name him as a precursor of legal anthropology, he represents many of the typical traits of early nineteenth century scholarship. The belief in science and empirical observation and the reluctance of accepting the established wisdom were combined with a paternalizing attitude and a moralistic criticism of the indigenous peoples in ways that were to continue in future scholarship. The many contradictions in Martius's works, such as the fundamental otherness of the primitives and the comparisons with the early history of Europe were also to continue to define the scholarship of legal primitivism.

Lönnrot and the search for the roots of a nation

The second example explores the quest to find the earliest roots of nations in Europe through folklore studies and history. We take the compilation of an epic poem, the Finnish Kalevala, as an example of this search for the sources of the primitive past. As a focus of this inquiry, we will explore the theme of revenge and feuding in the Kalevala and other Northern folk traditions. Vendetta and blood revenge, common topics in folk stories, became a recurring point of interest among scholars of folklore. However, these narratives or the expectations that they created, also had a way of transforming the tradition itself.

Though based on an ancient oral tradition, the Finnish epic poem Kalevala was compiled by Elias Lönnrot, a medical doctor as well as a student of history and folklore. It was first published in 1835-1836, and the second version, currently known as the primary edition of the Kalevala, came out in 1849. As in the case of the Icelandic sagas, a scholar would preserve the existing folk tradition in writing and make it accessible to the world. The poem depicts an ancient society as divided between two warring realms, Kalevala and Pohjola. Even though the main storyline is one of the revenge of the people of Kalevala against those of Pohjola, the meandering poem contains several subplots, which further elaborate on the theme of vendetta or blood feud. In the traditional idea of the civilizing process repeated from Aeschylos to Shakespeare, the blood feud was thought to be the earliest form that revenge took when all-out war was limited. Vendettas or stories of them are a staple of almost universal spread from ancient cultures to the present.

The most interesting of the revenge stories in the Kalevala is the story of a man named Kullervo, son of Kalervo. In the beginning of the poem (book 31), it is revealed that his father, along with all of his family, had been killed by his uncle Untamo as a result of a long standing feud. Though Untamo had killed every member of the family and burned the house to the ground, the feud continues, because Untamo's men had spared a pregnant servant girl. She gives birth to a boy, Kullervo, who is revealed to be the son of Kalervo, when he proclaims at the age of three months:

> Would I were to get bigger
> to grow stronger in body
> I'd avenge my father's knocks
> I'd pay back my mother's tears (Kalevala 31:41-46)[11]

Frightened, Untamo attempts to kill the infant Kullervo, first by drowning, then by burning on a pyre and finally by hanging, only to find the child indestructible. Kullervo had even carved scenes of him killing the family of Untamo on the tree that he had been hung. Kullervo grew up not only indestructible, but also supernaturally strong and with a callous disregard for human life. Raised as a slave, Kullervo proved to be a worthless worker because of his uncontrollable strength. He was later sold to another man, the famous blacksmith Ilmarinen, one of the main heroes of the Kalevala, who used him as a shepherd. One day Ilmarinen's wife gave Kullervo bread baked with a stone inside. The stone broke Kullervo's knife, his only inheritance from his father. He swore revenge and with magical powers, sends the beasts of the forest to kill her (Kalevala 31-33).

After Kullervo had sent the bears and the wolves of the forest to kill the wife of Ilmarinen and she is being torn apart by the beasts, she pleads for help. Kullervo refuses to save her, after which she lays a curse on him before dying. Frightened, Kullervo flees and announces that his only aim is to

> go to Untamo's village
> avenge my kin's doom
> father's knocks and mamma's tears
> burn the cabins to cinders
> reduce them to dust (34:102-106)

Instead of proceeding towards Untamo's village, he becomes distracted along the way by a beautiful girl and seduces her. Only afterwards he realizes that he has seduced his own sister by mistake. She promptly kills herself and Kullervo finds his mother, who was not dead as he had thought (Kalevala 34-35). Upon hearing the stories of murder and incest, his mother offers him the possibility of exile:

> There's lots of room in Finland
> and within murky Savo
> for man to hide from his crimes
> to feel shame for evil deeds
> to hide for five years, for six
> for nine years in all
> till time brings mercy
> and the years ease care (35:345-348)

Kullervo, unable to be dissuaded, tells her that his task is still undone and he will not go into hiding:

> Untamo is still upright
> the mean man is still unfelled
> still unavenged father's knocks
> mamma's tears still unpaid for ---
> not to think of other woes
> my own well-treatment (35:361)

Kullervo proceeds to attack Untamo's house, his father's killers, annihilating the entire family in battle. Returning to his destroyed family home, he commits suicide. His final moments, the questions presented to his sword moments before he plunges upon it, are the great literary highlight of the whole Kalevala (Kalevala 36).

As in the story of Lemminkäinen, another famous tale of revenge in the Kalevala, insults and injuries are avenged with violence and the vendetta escalates. Here, violence continues until everyone involved is dead, while in the Lemminkäinen story, the vendetta ends with his exile which is to last until time has healed the wounds. From the legal point of view, there are traces of blood revenge, vendetta and the institution of outlawry or peacelessness (*Friedlosigkeit*).

From the viewpoint of legal primitivism, the story of Kullervo was quite perfect. But how ancient was it, actually? It is noteworthy that while Lönnrot collected the poems during his long travels in remote villages listening to the singers of ancient poems, some of whom became quite famous in their own right, only a third of the verses came directly from the singers. Half of them were orthografically modified, 14% were composition verses combining elements from different singers and 3% were written by Lönnrot himself. However, while Lönnrot believed that the songs reflected a historical reality as stories of the past, the main storyline is his. This did not prevent the leading legal historians of the late 19th century from using Kalevala as a historical source of the earliest legal history of Finland.[12]

However, recent studies have also recognized Lönnrot's authorship and the fact that the whole collection of folk poems from the oral tradition, performed by different singers in different places,

involves a significant input from the collector. Lönnrot held that he had merely acted as the collector and organizer of poems, which had spontaneously emerged from the peasant culture and were told and retold in different variations. Only after discussions with his teacher, history professor Reinhold von Becker, did Lönnrot come to the conclusion that the poems might form larger entities such as the ancient Greek and Icelandic epic poems (Lönnrot 1999, 2).

The issue of authorship is important because oral epic by its very nature consisted of the presentation of shorter segments. How these segments were joined together was a problem which preoccupied Lönnrot considerably and the different versions of the Kalevala are a testament to how much an encounter with a single master singer could change the outlook of the epic. For example, on September 18, 1833 Lönnrot met, in the remote Karelian village of Vuonninen, a singer named Vaassila Kieleväinen, who presented to him a lengthy poem that outline the deeds of Väinämäinen and Ilmarinen in relation to each other. To Lönnrot, the meeting was a revelation that started the creative process that resulted in the Kalevala. He also sang to Lönnrot a short poem about Kullervo, the son of Kaleva, who takes revenge against the mistress of the house for baking a stone inside his bread (Hämäläinen 2002, 368; Timonen 2008, 10-11).

In the context of the Kullervo poem, the changes were remarkable. In the version presented by Kieleväinen, the central character is the nameless young wife of Ilmarinen. She was clearly an unwilling wife and repulsed her husband's approaches. The baking of the stone inside the bread, the crucial incident that sends Kullervo over the edge, is here the revenge of the wife against the husband and it is unclear whether the recipient of the bread is Kullervo or Ilmarinen. The context is unmistakably sexual and her killing that follows is tied to the humiliation of Ilmarinen (Timonen 2008, 11).

In the first published version, the 1835 Kalevala, the Kullervo poem is devoid of context and back story. Kullervo is just an unruly slave boy who avenges the insult of the stone in the bread by setting bears and wolves on his mistress. The misogynistic elements are clearly there, but the murder of his father Kalervo and the sequence of vengeance is absent (Lönnrot 1999, 268-285, poem 19). It was only between 1835 and the publication of the definite version of the Kalevala in 1849 that Kullervo develops from the slave boy into the tragic hero of epic proportions, comparable to the Greek mythology.

Lönnrot and other collectors of folk tradition, such as the brothers Grimm, were the strongest advocates of the people as carriers and sources of tradition. In the introduction to the 1835 edition of the Kalevala, Lönnrot held that it is a document of the earliest history of Finland and recounts the life and religion of the people. Consequently, he notes that later influences, such as the references to Christianity that the poems contained, were removed as anachronisms (Lönnrot 1999, 4-5; Kuusi, Bosley and Branch 1977, 30). Even though later scholarship has remarked that Lönnrot was clearly the most significant poet of the epic and was motivated by a nationalistic desire to create an epic for the Finnish people, that perception has never truly caught on and the wider audience has always believed the idea of an epic that is the product of the collective conscience of the nation.[13] Therefore, the poem is very much about what kind of past Lönnrot had imagined for the nation.

The nationalistic and historical interpretation of the Kalevala is evident in the first international translation, by L. A. Léouzon Le Duc, published in 1845. The title of the translation was *La Finlande. Son histoire primitive, sa Poésie épique avec la traduction complete de sa grande épopée* (Finland. Her primitive history, her epic poetry and the complete translation of her great epic) and it also incorporated a large historical segment. The Kalevala would have been a depiction of early Finnish history, as Lönnrot had written, a story of the sons of Kaleva. Léouzon Le Duc wrote how even

historically, the early inhabitants of Finland were a primitive people existing through hunting, fishing and piracy. They valued freedom over everything else and resisted efforts to bring religion or centralized rule to the country, practicing a curious sort of paganism. They, like the modern Finns, valued poetry and music, but also sorcery and magic were a central part of the Finnish life. An important part in the primitive world was played by magicians and savants who acted as intermediators between the supernatural otherworld and the human world (Léouzon Le Duc 1845, xlvi-xlvii, cxii-cxiii).

The fact that Lönnrot had chosen the historical interpretation shows an influence of German Romanticism. The Swedish and French translations brought the Kalevala within the reach of international scholars, the foremost of them Jacob Grimm, German philologist, lawyer, folklorist, fairytale collector and the more famous of the Brothers Grimm, who wrote an essay on it in 1845. Grimm's essay reveals his admiration for the literary quality of the Finnish epic, which he notes as the most difficult style of poetry. He compared the work and its characters, favorably, to Greek, Roman and Scandinavian poems and mythologies (Grimm 1865, 94-95). From a nationalistic point of view, the publication of the Kalevala was a sweeping success. Being lauded by the greatest living expert of folklore and recognized as one its finest works, Grimm's verdict raised the Kalevala and, by association, Finns to the ranks of the old and creative nations with a flourishing traditional culture.

While earlier scholars on the Finnish poetic tradition, like Porthan, saw it in essence mythological (Lönnrot 1999, 8-9; Hyvönen 2008), Lönnrot interpreted it strongly as a historical epic of an earlier heroic age of the nation. Critics of the first edition, using Hegelian thought as their argument, complained that the Kalevala did not sufficiently portray the heroic ancient life of the people in its original state and its development towards nationhood. What was missing was the growth of the national spirit. Partially to answer this criticism, Lönnrot began in 1847 to rework the Kalevala with new material. This time, the political and nationalistic motives were much more explicit. Some even claim that between the first and second edition Lönnrot himself undergoes a transformation from a chronicler to a politically conscious poet who includes features thought to be essential for a national mythology (Branch 1994, 208-209).

Whatever influence Grimm had in the transformation of the Kullervo story is unclear, but he was one of the early voices emphasizing the dramatic potential in the character. Studies on the formulation of the narrative of Kullervo have revealed how, in the new version of the Kalevala, Lönnrot wove together numerous existing passages. The research trips by Europaeus, Lönnrot's pupil, in the 1840s were also crucial to the formation of the Kullervo story. Recent studies have pointed out that the folk poetry itself did not have a central hero character by the name Kullervo. Instead, Lönnrot combined narratives of various poetic characters into a new epic containing the entire life story of Kullervo. Consequently, what is now known as the Kullervo epic is a combination of motifs from Western Finland that tell of superhuman giants called Kaleva, some erotic folk poetry from Eastern Karelia, a narrative of blood revenge, a separate story of a herdsman and so on. Even Kullervo and the "son of Kaleva" were different characters, where Kullervo is the young herdsman and the son of Kaleva is a superhuman character with a cruel streak. It was Lönnrot who defined the mistress of the house as the wife of Ilmarinen, one of the major characters in the Kalevala. However, in the end the additions made by Lönnrot himself were minor, consisting of parallelism and redundancies, as well as unifying the names throughout the poem and replacing words considered vulgarisms.[14] The end result was a powerful narrative of a tragic hero that is both human and superhuman, reduced to slavery but possessing magical powers.

It would though be wrong to see Lönnrot simply as an outshoot of the Germanic tradition. In fact, his knowledge of German was initially weak and his direct contacts with Grimm and the Germanist

school came only later. His primary training and frame or reference was, as was typical at the time, the classical world of Greece and Rome (Fromm 1990, 93-95). Lönnrot's background was in the tradition of Turku Romanticism, where the study of folk poetry had been strong since the works of Henrik Gabriel Porthan, who published, in five volumes, the book *De Poesi Fennica* between 1766 – 1778 and Kristfrid Ganander, whose *Mythologia Fennica* (1789) reproduced ancient poems and spells. The historical basis of the folk poetry was already emphasized by Lönnrot's teacher von Becker, while the collection of ancient poetry from Karelia was pioneered by Zachris Topelius roughly at the same time when Lönnrot was beginning his work (Branch 1994, 200; Kuusi, Bosley and Branch 1977, 36).[15]

It was of crucial significance to the success of the Kalevala that Lönnrot's compilation was perceived as an authentic representation of the ancient tradition. An important feature of this image was the fact that Lönnrot had made, over many decades, such extensive travels in the remote regions between Finland and Russia, visiting ancient villages and listening first-hand to the masters of the oral tradition. The impact of this reputation for authenticity of Lönnrot's work in comparison with, for example, James MacPherson's *Songs of Ossian* should not be underestimated. While MacPherson had freely created his poems using the ancient tradition more as inspiration than as source, Lönnrot's reliance on the sources and faithfulness to the tradition was central. The difference was perceived as one between Virgil's *Aeneid* and Homer. For the continuing impact of Lönnrot, key features were the verifiability of the poetry as sung by the traditional singers and the breadth of the continuing research tradition.[16] It is apparent that Lönnrot himself saw the Kalevala as a historical source and downplayed his own contribution in its formation. However, he was quite frank about his methods and the process of compilation (Honko 1987, 283).

Lönnrot was conscious of the potential impact of his work and he compared it repeatedly with the ancient Homeric tradition and the other epic traditions of Europe. Having studied Homer and even translated Homer into Finnish, Lönnrot was well aware of the scholarship on Homer and the theories on the historical creative process behind it. Despite these influences, scholars agree that epics like Homer, Edda or the Nibelungenlied served as comparisons, not as models (Oksala 1990, 68-69; Fromm 1990, 93-114; Voigt 1990, 249-264).[17]

The world described by the poems of the Kalevala was one of an agrarian community without a central authority, where violence was met with violence and honor was paramount. Injuries were avenged in blood and the only sanctuary was found in the vast forests. This image corresponded exceedingly well, perhaps due to Lönnrot's efforts, with what was known of the ancient Nordic legal traditions and that of the archaic Germanic traditions. For the readers of the Kalevala versed in these traditions, the most immediate point of comparison was the Icelandic saga tradition.

The Icelandic sagas were a collection of traditional narratives that describe events taking place during the tenth and eleventh centuries in Iceland, containing prose, genealogy and history. Possibly originally family narratives, they were written down sometime during the thirteenth and fourteenth centuries. Over forty sagas have been preserved, the best known being the *Brennu-Njáls saga* or the *Saga of the Burned Njál*. They were highly influential in the formulation of the modern legal idea of the blood feud, because they were thought at the time to contain the most authentic and reliable version of the original Germanic legal culture uncontaminated by the influence of Christianity, Roman law and state law. Furthermore, the sagas were prolific in the feuding material, with nearly all sagas containing some elements of vengeance in their storylines. For example, Njál's saga which tells of a famous man with great legal wisdom called Njál, whose family has the habit of entering into violent disputes that ultimately would cost him his life. The saga of Njál and others like it portray a society without any central state authority that could or would enforce order. Medieval Iceland was

nominally ruled by an assembly called the Althing established in 930 that convened to pass laws and settle disputes. Knowledge of the unwritten laws rested on Lawspeakers, who memorized the laws and were consulted when needed. Trials were frequent and forensic oratory and legal expertise were highly appreciated. However, since there was no one to enforce the court's decisions, the rulings were more advisory in their nature, comparable to arbitration. In practice, insults were met with insults and violence with violence, conflicts between roughly equal partners frequently escalating into vendettas and small-scale warfare, which could take years and end with settlements, the expulsion of culprits or the payment of blood money. Legal proceedings, negotiation and violence often proceeded parallel, with parties planning lawsuits and attacks simultaneously. In the case of Njál, the killings of servants were settled with blood money, whereas the killing of principals such as Njál himself were avenged and finally settled with expulsion from the community and compensation. With regards to the development of legal realism, the Njál's saga has been seen as one of the fundamental influences behind Llewellyn's trouble case method (Llewellyn and Hoebel 1941, 26; Dinunzio et al. 2007, 1946).

Njál and his friend Gunnarr were each married to women with hot tempers, Bergthóra and Hallgerðd. Following a quarrel during a winter feast regarding seating arrangements and places of honor, the women began plotting and sending servants of the house to kill the servants of the other. Njál and Gunnarr owned a forest in common and when they were away, Njál's wife Bergthóra sent a man to cut some trees. Gunnarr's wife Hallgerðr found out about this and decided to put a stop to it by sending a man to kill the worker cutting the trees. Njál and Gunnarr decided that they would not let this ruin their friendship and Njál asked for 12 ounces in silver as a fine, which Gunnarr then paid in good faith. Bergthóra would have none of this peace and hired a new man, one known for his violent temper, and gave him the task of killing the murderer. When the deed was done, Njál and Gunnarr reconvened to assess the damages and Gunnarr received the same 12 ounces in silver as compensation. The wife of Gunnarr was not satisfied and had the killer of the killer killed. The same 12 ounces changed hands once again. Each time, the men would pay the blood money accordingly and peace would remain between them:[18]

> Njál said: 'This is bad, that my wife should have broken our settlement and had your servant killed.'
> 'She shall not be blamed for that', said Gunnarr.
> 'Assess the compensation yourself now,' said Njál.
> 'Very well,' said Gunnarr. 'I put equal price on the two men, Svart and Kol; you are to pay me 12 ounces of silver.'
> Njál took the purse and handed it to Gunnarr, who recognized it as being the money that he himself had given to Njál.[19]

However, the feuding between the two women would soon escalate and free men would be killed. Even when blood money had been paid by the men, the women continued to plot, incite and dare younger men to take vengeance in blood:

> Hallgeðd said to Gunnarr, 'It is impossible to be satisfied with the hundred ounces of silver you accepted for my kinsman Brynjolf. I'm going to avenge him if I can.'[20]

At times, court proceedings were engaged in to settle the accounts and prices were set for the men killed by that time (ch. 66), but the underlying vendetta continued even after, his wife and children had been killed. When the killing of Njál came up in the courts, the parties took their sides armed and ready for battle. Immensely complicated legal argumentation would then end abruptly and a bloody battle ensue around the Law Rock, only to end with outsiders separating the sides and the court proceedings continuing, with the killers of Njál sentenced to exile (chs. 142-146).

The systematic study and publication of the sagas commenced in 1846 by the Royal Society of Nordic Antiquities in Copenhagen and interest in them increased. Konrad Maurer (1823-1902), as the

translator and editor of the sagas was influential in the spread of the idea of Germanic original law (*Urrecht*) that rested on blood revenge. Maurer, a German jurist, was inspired by Jacob Grimm to study the sagas and published many in German translation. He toured Iceland and visited the sites of the famous events depicted, for example, describing his visit to Njál's house. Maurer relished the idea that history was so incredibly alive with everyone aware of the tradition and the spirit of the people (*Volksgeist*) still animated by the traditional stories told during long winter evenings (Maurer 1860, v-vii, 219-221).

Because the Iceland of the sagas contained so little in the way of state intervention, it was often thought that they represented the most original version of the Germanic legal culture (von Amira 1922, 11). Modern studies on the sagas have revealed that in the typical fashion of folklore, while some events depicted might have well taken place, parts of the sagas show evidence of quotations from literature and they were never meant to be strictly historical accounts. As is detectable in the reference to Christianity in Njál's saga, there are also later ideological elements embedded in the material (Sigurdson 2004, 24-26). In a like manner, it has been the subject of much debate how much of the Kalevala may be seen as a reflection of a prehistoric past. For Lönnrot and many of his followers, the epic was a historical document, while an influential, competing interpretation saw it as a mythological tradition. Even many later historians of the early Finnish past subscribed to an interpretation of the prehistoric period as a heroic era of an essentially barbaric community, details of which were gleaned from excavations of Viking era settlements. However, current studies on oral culture emphasize the fact that in traditional cultures, myth and reality are seldom separate categories. Mythical history incorporates the history not only of humans, but also superhuman heroic figures, distant ancestors, deities and other characters (Siikala 1994, 16-17, 34-37).[21]

Both Njál's saga and the story of Kullervo use the rhetoric of payment when talking about revenge. The offence had to be paid back in order to have peace and the silence demands for vengeance. It is slightly contradictory that both stories repeat the premise that for the vendetta to end with violence, all potential avengers must die. After the house and family of Njál had been burned, when the culprits noted that Kári, Njál's son-in-law, had escaped, the conclusion was immediate: They had failed and would meet a miserable end. With a survivor, the cycle of violence would continue and with their rash and disproportionate act, they had wasted their chances of garnering support against the family of Njál. The story of Kullervo contains a similar logic of betting everything on one throw of the dice and losing: Untamo had thought that by killing everybody in the family and burning the houses, he would have won. Instead, the servant girl carried Kalervo's son, who would grow up to be an indomitable avenger.

Both of the narratives tell of a society without central authority, resting on blood revenge as the ultimate recourse. One of the most influential descriptions of the early Germanic community was the depiction of *Sippe* and *Mark* by Jacob Grimm. According to Grimm, the community of *Sippe* offered protection and peace, through blood revenge if necessary (Grimm 1828, 494-495; Grimm 1899, 6-7). Grimm explained the process as a consequence of natural social cohesion:

> The institution of *Sippe* and being neighbors created the natural bond between free men; from it came about inheritance law, blood revenge, reciprocal protection and peace, common law and justice, from it can one also deduce the origins of the oldest community of land ownership (Grimm 1828, 494-495).

The protection offered by *Sippe* meant that the entire community was obliged to avenge the death of a member. From Grimm onwards, the theory of blood money or *Wergeld* (*Werigelt, Wirigildus* etc) as a central feature of this system and a typically Germanic way of avoiding blood revenge through the paying of compensation for manslaughter has reigned (Grimm 1899, 216).

Wergeld or blood money was thought to have been an addition to the talionic system, in which laws regulated the amount of money that should be paid for each person killed. *Wergeld* formed an integral part of the evolutionary theory of the spread of civilization because it signified the spread of compensation as an alternative to revenge in kind. The Germanic legal sources contain the richest tradition of blood money, for example in the Anglo-Saxon codes like the Laws of King Aethelberth (ruled Kent approximately 590-616) give an immensely detailed table of compensation in which the loss of an eye, for example, is offset by 60 shillings (Miller 2006, 113-115).

Njál's saga contains a striking description of the exchange of blood money which was mentioned earlier in the feud between the wives of Njál and Gunnarr. Even though the men paying the *Wergeld* were friends and there was no animosity between them, their servants in danger of being killed, began asking for compensation for their high-risk position, as in the case of the servant who asks only that his death should not be compensated with the *Wergeld* of a slave, to which Njàl agrees. When he is killed, his settlement shall be settled the *Wergeld* of a free man.[22]

Both the Kalevala and the Icelandic sagas emphasized the idea of honor as one of the main components of revenge and the fact that even insults to the honor of a man in the form of jokes and songs might trigger revenge. As a comparison to the singing of insulting songs by the Brazilian indigenous tribes, Martius referred to Cranz's description of the Eskimo (Inuit) song duels (Martius 1832, 77). The song duel even existed in the Kalevala, where the magical powers of the singers could lead to the death of their opponents.

The German missionary and historian David Cranz (1723-1777) was sent to Greenland in 1761 to continue the Herrnhutian missionary work there. As a result of his experiences in Greenland, Cranz wrote a history of Greenland and the missionaries there (1765), peppering his work with ethnographic observations. Cranz's work is also one of the few books Martius refers to continuously as a comparative material. One of the interesting depictions is that of the Eskimo song duel:

> It is remarkable how they resolve their quarrels by dancing and singing: this is called the song duel. When a Greenlander thinks that he has been offended, he seldom seeks revenge but rather channels his anger and indignation into the making of a satirical song which he presents in front of his people and especially women, singing and dancing, repeating the song so many times that everyone will know it by heart. Then he lets the whole region know that he wants to sing about his opponent. The opponent comes to the appointed place and sets himself inside a circle. The man starts to sing accompanied with a drum, repeating his accusations accompanied by his people, the song containing jokes and inconvenient truths that make the audience laugh. When he has finished, the accused steps forward and according to the laws of his people, answers the accusations in the same joking manner. The accuser responds by continuing to pester him and whoever has the last word has won the process and is in the future considered to be an important person (Cranz 1765, 231-232).

The audience decides the winner and the opponents leave the arena as the best of friends. This is despite the fact that the opponents may sing about inconvenient truths and use foul language, even vicious attacks being allowed. Cranz noted that the event is often shadowed by the threat of violence and seconds of sorts ensure that the parties do not attack each other. The song duel was used in everything from making a debtor pay to cases of adultery. Cranz credits the institution with preventing physical reprisals and even murders by giving people a way to vent their anger and vengeful instincts (Cranz 1765, 232). Even in modern scholarhip, the Inuit song duel is an interesting example of honor used in dispute resolution when blood revenge is not appropriate or possible. Using traditional style and composition, the opponents try to ridicule each other utilizing their weaknesses. The songs are

performed in front of an audience and the one who wins the favor of the audience is considered the winner (Hoebel 1964, 93-99).

In all of these cases, there are some elements of the idea of the original state of man. The sagas of the Icelanders and Lönnrot's Kalevala both depict a society where social organization is so nonexistent that conflicts were resolved with violence or, at best, negotiated settlements under the threat of violence. Cranz considered that the Inuits were the closest one got to people living in a state of nature: "They live like the first men after the Deluge" (Cranz 1765, 233), in freedom and without compulsion. Martius's idea of Indian society is a strikingly similar one of people existing on the lowest levels of humanity, even though his conviction was that the Indians had actually degenerated, not evolved.

Juristic romanticism and folk law

The examples of the explorations, collections of indigenous folk traditions and culture by scholars like Grimm, Martius, Lönnrot, Maurer and Cranz follow much the same pattern. A Western scholar travels to a remote region to discover a lost culture, a culture that is original and uncontaminated by modern civilization. The remoteness of the region, away from the perceived corrupting influence of civilization, would be a recurring feature in the anthropological study of law, where vast forests, impassable deserts and remote mountains would serve as guarantees of the authenticity of the findings. The fabled collection of folk stories by the brothers Grimm in the secluded villages and forests of Germany were as much explorations as Martius's journeys to the rainsforests of Amazonia, Lönnrot's treks through the forests to distant villages in Eastern Karelia, Maurer's Icelandic travels and Cranz's voyage to Greenland.

However, in order to join the compilation of folk traditions, such as songs, to legal scholarship, one needed a new conception of law. Instead of looking at law as a legal text or custom, or even following the actions of courts, judges or magistrates, legal scholars found law in the culture of the people. Even violent traditions like blood revenge were simply the manifestations of this legal culture.

The idea that law was a not just a set of rules but a part of culture was a theory that arose as a reaction to the rationalism of Enlightenment thought. It was developed by the founders of the Historical School of jurisprudence (*Historische Rechtsschule*), mainly its influential theorist Friedrich Carl von Savigny (1779–1861), but also Gustav Hugo and Jacob Grimm. They claimed that the validity and the content of the law were derived from the culture of the people and law was historical in its character. Many of the central concepts of the school such as history, culture and people were staples of German Romanticism (Whitman 1990; Wieacker 1995, 284-299).

Savigny devised the theory of the historical development of law to counter the ideas of rationalism and the codification of law that dominated the natural law thinking of the late eighteenth century. He argued against the conception of law as purely the product of the will of the lawmaker or as a natural phenomenon arising directly from reason. In 1814, Savigny defined law as an expression of the common conviction of the people and the task of lawyers as finding and describing it (Savigny 1984, 24-29).

Because the historical development of law presumed that there was also a historical beginning for law, the question of origins was fundamental for the theory. However, Savigny noted that the question of ultimate origins could not be answered historically, since the very origins of humanity were so unknown:

> ... the prevalent opinion has been that all lived at first a sort of animal life, advancing gradually to a more passable state, until at length the height on which they now stand was

> attained. We may leave this theory alone, and confine ourselves to the mere matter of fact of that first authentic condition of the law. We shall endeavour to exhibit certain general traits of this period, in which the law, as well as the language, exists in the consciousness of the people. (Savigny 1984, 25)

There is thus no separate law given by a legislator, be it a ruler, assembly or divine prophesy. Law is just an aspect of the consciousness of the people. In the earliest natural phase, uncomplicated by the trappings of material wealth and civilization, not only social structures but also legal rules were shared knowledge. This was not changed by the fact that laws might be embedded into religion:

> This youth of nations is poor in ideas, but enjoys a clear perception of its relations and circumstances, and feels and brings the whole of them into play; whilst we, in our artificial complicated existence, are overwhelmed by our own riches, instead of enjoying and controlling them. This plain natural state is particularly observable in the law; and as, in the case of an individual, his family relations and patrimonial property may possess an additional value in his eyes from the effect of association, --- so on the same principle, it is possible for the rules of the law itself to be amongst the objects of popular faith (Savigny 1984, 25).

Savigny claims that the early era of law was characterized by the concreteness of its rules and language:

> On the contrary, we then find symbolic acts universally employed where rights and duties were to be created or extinguished: it is their palpableness which externally retains law in a fixed form; and their solemnity and weight correspond with the importance of the legal relations themselves, which have been already mentioned as peculiar to this period (Savigny 1984, 26).

He calls these formal acts "the true grammar of law in this period", which, for example, the Roman jurists preserved in their writings (Savigny 1984, 26). This formality and the importance of rituals was something that Martius also noted in describing the legal acts among the Brazilian Indians. Taking a surprisingly enlightened tone, Savigny warns against calling the use of rituals and symbols the "creations of barbarism and superstition," because they have their advantages in their concreteness and popularity (Savigny 1984, 27).

The organic growth and development of the law, according to Savigny, may be compared with language. Just like every other factor of the people's development does not remain constant, there is no cessation of the development of law: "Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality." (Savigny 1984, 27). Because Roman law had been central in Germany since medieval times, it was the original source of the spirit of the German people and their true law.

Not all agreed. Jacob Grimm, a personal friend of Savigny, led the effort to build a Germanic counterpart to Savigny's Roman law scholarship. Grimm, Eichhorn and the other so-called Germanists believed that there was much to be discovered in the proper Teutonic roots of the German legal tradition. The Romanist and Germanist sides of the Historical School shared the same methodological convictions of law as the common conviction of the people, but differed on the question of material. The Germanists proceeded to study the historical roots of the German legal tradition and to publish texts in scholarly editions, such as the *Monumenta Germanicae Historica* beginning from 1819. In addition to his monumental work on the German language, Grimm produced two works, *Deutsche Rechtsaltertumer* or *German Legal Antiquities* (1828) and *Weisthümer* (1840) on Germanic legal customs. For Grimm, as for many of his colleagues, the collection of folk traditions was a broad quest that encompassed the totality of human culture: language, law, stories, songs and so forth.

Grimm's compilation of *Weisthümer* ultimately contained seven volumes and it is considered to be one of the main achievements of Germanist scholarship. *Weisthümer* were collections of the customary law of the Germanic peasants as explained by the peasants themselves for the benefit of medieval feudal courts in present southern Germany and Switzerland. While at the time the *Weisthümer* were hailed as a source of ancient legal custom, modern scholarship has recognized that much more than the pure recording of oral tradition was taking place within the seigneurial courts. The transcripts, which contain a number of hilarious rules, for example, involving chickens, were also translated into and from Latin with flourishes and archaic additions tacked on.[23]

Even the Romanistic scholarship of the Historical School excelled in finding new sources for the history of Roman law, its main discovery being the 1816 find by Niebuhr in Verona of the manuscript of the Roman jurist Gaius. The discovery of the text of Gaius was an important breakthrough for the Historical School. For the first time, an authentic text was found direct from Roman jurists, undisturbed by later Byzantine compilators. The Verona manuscript offered a route to the uncorrupted past (Vano 2000). It is notable that the most important sources of law was for Romanists the writings of jurists, to the Germanists it was the people themselves (Reimann 1990, 868-869).

The Historical School of jurisprudence operated, like folklore studies in general, under the paradigm of loss, which meant that the inquiry always operated under the assumption of the existence of a folk community now lost. The aim of scholarship was to gather the evidence that remained from this lost community and to attempt reconstruct its culture. Folklore and folklife as well as folk societies have served as modernity's constructed othernesses and in places like Germany, have been seen as antimodernist constructions based on regressive ideology. Where modernity signifies alienation and the disruption of life, folk society offers directness, unmediated experience and face-to-face interaction (Anttonen 2005, 59).

While figures like Savigny and Grimm were central to the application of the ideas of Romanticism to legal thinking, their ideas also led to fundamental changes in the way academic historical investigation took place. Moralizing interpretations of the past gave way to the idea of culture as the fundamental factor in the human development.

The second major characteristic of the Historical School was science. Savigny and his followers like Georg Friedrich Puchta (1798-1846) wanted legal science systematize the law that was found.[24] In the theory of Savigny, the material of the law was historical, but legal science was to discover the inherent system of the law. While the Historical School derived the tools of the systematization of law from the natural law school, its approach to law itself was completely different. The crucial innovation was the separation of legal science to two concepts, history and system. The first meant that the law was a product of organic growth within the larger context of culture, while the second entailed that logical order could be found inherent in the law (Savigny 1984, 64-65). The systematic ideal of research was very pervasive in the scholarship of the era, Martius, for example, embarked to make a systematic inquiry into the flora of Brazil, while Grimm systematized the German language and its study. When Abegg, whose theories were central to the spread of the evolutionary hypotheses, described the development of the Roman system of self-help in criminal law, he called it a "historical-systematic description of the unpunishable killings" (Abegg 1830, 124-125).

That the law was a product of organic growth that should be discovered through empirical historical inquiry did not mean, as it has been proposed, that their aim was to find the oldest law. Law was, in essence, the custom of the people that was developing organically and at some point administered by jurists. It was an expression of the spirit of the people, *Volksgeist*, and the result of the internal development of this spirit. The people were a cultural entity that demonstrated a character, the spirit

of the people, which was the indigenous essence of that people. The culture of the people was its intellectual life, a definition which set the Historical School apart from the folklorists. The term *Volksgeist* was actually coined by Pucta and Savigny uses the term meaning the common conviction of the people (Reimann 1990, 852-854).

The theoretical foundations of the Historical School had similarities with what would later become the principles of academic anthropology and legal realism. All were devoted to the primacy of observation and scientific analysis of those observations. The concept of culture was a shared preoccupation, as was the idea of custom and human agency. They all shunned universal rules and abstractions and instead focused on cases. These similarities were, of course, the result of shared roots in Romanticism, though the paths of development that were taken were quite distinct. If anthropology was the offshoot of Romanticism and folklore studies, legal realism had its origins in the combination of Romanticism and legal studies in the form of the Historical School and its followers.

While there had existed an underlying interest in the indigenous legal customs, some of the investigations were also driven by a more instrumental need to know. During the colonial conquests in Africa, Australia and America, large indigenous populations had come under the rule of European empires and the United States. Lisa Ford argues in her book *Settler Sovereignty* that one of the crucial transformations of the early 19th century was that the settler colonies in America and Australia claimed universal jurisdiction over the territory they occupied. Previously, the policy had been to recognize the jurisdiction and sovereignty of indigenous nations over their inhabitants, but from the beginning of the century, the pluralistic practices came under pressure and during the 1830s the indigenous peoples were subordinate to settler sovereignty (Ford 2010). Even though there was a will to exert ultimate sovereignty over the natives, it was quite universally thought that a measure of autonomy with regards to legal practices was advisable lest not to extend the full extent of settler law and possibly the benefits of citizenship on them.

The limits of pluralistic practices were tested by the moral outrage that resulted from news of barbaric punishments and other acts repugnant to the general public of the settler states. In the US, the principle of the judicial sovereignty of the Indian tribes was tested in a number of cases on issues such as whether a tribe has the right to execute a witch. While there had earlier been little question in the State of New York on the right of the Indian tribes to try their own members, except when crimes had been committed outside tribal areas, the case of Tommy Jemmy was fundamentally different. The chief of a Seneca Indian tribe, Jemmy was arrested in 1821 on charges of murder and put on trial in the Erie County Court. Jemmy's alleged crime was the execution of a man called Chaughquawtaugh, who had been tried by a council of Seneca chiefs and sentenced to death on charges of witchcraft. Jemmy had been merely acting according to his duty as a officer of the law for his tribe. The defense argued that the State of New York did not have jurisdiction to try Jemmy because the Seneca were a sovereign state within the borders of the United States. Jemmy was initially freed, and during the arguments in the New York State Supreme Court, the state legislature passed legislation that pardoned Jemmy. Though the case of New York State attempting to extend its jurisdiction into the internal affairs of the Indian tribes was exceptional, its justifications for the extension were not. The state argued that barbarous practices, such as the execution of witches, needed to be eliminated by state intervention (Rosen 2007, 25-29). The case brought to the fore the idea of the civilizing process and the conviction that the state should promote the spread of civilization and to eradicate barbarous practices even when sanctioned by the law of the indigenous peoples.

In the case *Johnson v. McIntosh* [21 U.S. 543 (1823)] tried by the US Supreme Court under Marshall, the court asserted US sovereignty over the Indian tribes. Marshall wrote that the Indians were "fierce savages, whose occupation was war," and therefore no peaceful coexistence could be possible. The

US should neither respect the sovereignty nor the property rights of the Indians because of their uncivilized culture (Rosen 2007, 13). It was clear that the idealization of the original state of the Indian had given way to the will to control the barbaric customs of savages. It has recently been argued that even during the drafting of the Constitution, one of the main arguments for federal power was curtailing Indian savagery (Ablavsky 2014).

When the British began to impose their rule over the Zulu territories in South Africa, one of the steps taken was introducing the state monopoly of violence and the death penalty by the banning of the payment of blood money. Brookes recounts how the idea of the death penalty for murder was skillfully introduced, holding it "a lesson to all rulers of child-races" thought to be at the stage of *Wergeld*:

> To all Native Chiefs, Petty Chieftains, Heads of Kraals and Common Native people in the District of Natal: Hear ye and listen with both ears. Whereas from your youth up you have been thought to consider a man's life to be the property of the Supreme Chief, and that is unlawful to destroy such life without his consent; and whereas the Supreme Chief in this District is the Lieutenant-Governor, representing the Queen of England; and whereas several lives have been destroyed without trial, and without his knowledge or consent: Know ye, therefore, all Chiefs, Petty Chieftains, Heads of Kraals and Common People, a man's life has no price: no cattle can pay for it. He who intentionally kills another, whether for Witchcraft of otherwise, shall die himself, and whether he be a Chief, Petty Chieftain, or Head of a Kraal, who kills another, he shall follow his murdered brother; his children shall be fatherless and his wives widows and his cattle and all other property shall become forfeited.[25]

This proclamation made by Diplomatic Agent Theophilus Shepstone in Pietermatizburg on the 25th of November 1850 was later reused by other agents in other territories. In practice, it introduced the death penalty to the Zulu. To "impress the Natives," a few years later several public executions took place (Brookes 1927, 53). The ultimate purpose of the enactment is unclear, but it effectively established a monopoly on punishment for the British crown. Whatever civilizing theories were behind it, factually it banned the use of not only blood money or compensation, but also the regime of arbitration in the criminal sanctions system. A parallel development of claiming the monopoly for the legal use of violence by the settler state was taking place is other parts of the British Empire, for example, in Australia and New Zealand the initial policies of allowing the indigenous inhabitants to retain their legal autonomy were curtailed due to public outrage at the "barbarous "practices (Dorsett 2009).

During the early nineteenth century there emerged several developments that were fundamental to the creation of legal primitivism and, later, legal anthropology. One was the conviction of the Historical School that instead of legislation, law was culture and could be found through observation. The second was the heroic figure of the researcher who travels across the borders of the civilized world and into the authentic indigenous experience. In contrast to this transliminal character is the third development, that of the colonial erection of boundaries and limitations between savage law and civilization.

Lex talionis *and the narrative of progress*

Reading closely the account of Martius and the poems compiled by Lönnrot, it is easy to see behind their narratives the logic of development, which was later expanded into the theory of the civilizing process. In the case of Martius, the most uncivilized tribes practiced unrestricted blood revenge, while some of the more advanced allowed a system of restitution to be administered by the tribal chiefs. The original state of Kalevala recognized only the taking of revenge and, for the culpable, the

possibility of going into exile and hiding to await the crimes being forgiven or forgotten. This developmental narrative of progress or the civilizing narrative, runs through much of the scholarly literature on revenge.

The concept of *lex talionis* or law of retaliation refers to inflicting the same injury on the perpetrator that he has caused. It has an interesting intellectual history. From the ancient Greeks and Romans onwards, it was widely believed that this kind of private vengeance was permitted under early law. However, both the scope and content of *lex talionis* underwent dramatic changes during the late eighteenth and early nineteenth centuries. What was initially a concept from the ancient and biblical worlds was first sought parallels from the Germanic world and later from the indigenous cultures. There was an essential change in the discussion from the classical and premodern conception of *lex talionis*, which understood it as a moral, ethical and religious issue that was tackled using ancient and biblical material, to the primitivistic conception which began with the cultural explanations of the late eighteenth century but was popularized in the nineteenth century through the discovery of the so-called "primitive" cultures.

The change in the interpretations of the *lex talionis* from the moralistic model to the cultural model may be traced to a German theological scholar, Johann David Michaelis (1717-1791), who in his *Mosaic Law* of 1776 reinterpreted the biblical sources based on the knowledge gained from pastoral societies in the Near East. The fundamental transformation of the interpretation was from the theological and moral viewpoint to a cultural understanding, which saw the *lex talionis* as a typical feature of a primitive society. Though Michaelis himself did not participate in expeditions into the Arabian peninsula, he actively promoted them and gathered results from various explorers. Michaelis was also one of the few sources cited by Martius in his depiction of the custom of blood revenge.

Michaelis saw the biblical concept of an eye for an eye as blood revenge typical of pastoral societies and not part of God's law. As a theologian and an orientalist, Michaelis began to study the Bible in a Near Eastern context. Reill suggests that Michaelis leaped at the idea of primitive man as a universal phenomenon that could be used to explain the early development of societies. Conversely, its application meant that primitive laws such as the *lex talionis* should be understood in the context of primitive society and had no bearing in modern society. Michaelis wrote that blood revenge comes from a state of nature and is similar in all peoples in the childhood of man. All peoples going through their early development have comparable games and habits, of which the blood avenger is an odd leftover that has survived the transition to civil society. Michaelis referred specifically to the Arabs, whose concept of Taïr resembles closely the Hebrew concept of Goël, or the blood avenger. In both, the idea was that the blood of the deceased stains the one who is bound to avenge him until he has carried out the deed. The duty hangs heavily on the avenger, who has no value until he has with his own hand brought death, inflicted the same injury on the culpable. If he fails to do so, he will be infamous for his cowardice and weakness (Michaelis 1776, vol. 2, 401-405; Whitman 1995, 55; Reill 1975, 194-196).

The moral and theological interpretation of the civilizing narrative that Michaelis set out to transform was deeply embedded into the legal, theological, philosophical, moral and historical scholarship of the time. One of the most influential early legal instances of the civilizing narrative comes from famous seventeenth century Dutch scholar Hugo Grotius's (1583-1645) 1625 *On the Law of War and Peace*. Grotius mentions that private revenge is not unlawful according to the bare law of nature. Citing evidence from ancient authors, he notes that even in antiquity, governments tried to limit the right to revenge and only in certain places, like the high seas, does the ancient liberty of revenge prevail. Among the ancient Hebrews, Greeks and Romans, and the Germans before Christianity, the rule of revenge in kind was applied. Even in contemporary cultures, the primitive right of vengeance

as punishment survives as traces and remnants in exceptional cases. The major reversal in the tradition of revenge came only after Jesus had unequivocally forbidden *lex talionis* in the law of Gospel.[26]

The deep past of the Western legal culture, the ancient sources provided by Roman and Hebrew legal texts, lent easily to the idea that there is a development from an early era of private violence and a later, more peaceful period in which violent reprisal had been replaced by punishment. The institution of *talio* gets its name from the surviving fragments of the XII Tables, the archaic Roman compilation of law from the mid-fifth century BC. The Latin text reads as follows:

> *si membrum rupit, ni cum eo pacit, talio esto.*
>
> If he has maimed a part (of a body), unless he settles with him, there is to be talion.[27]

The text here is a reconstruction of passages in various later authors. Because the passage that was commonly associated with it listed prices for minor injuries, it was thought that the victim's right to vengeance was redeemed by monetary compensation:

> *si os fregit libero, CCC, <si> servo, CL poena<e> su<n>to.*
>
> If he has broken a bone of a free man, 300, if of a slave, 150 (asses) are to be the penalty.[28]

Roman legal discussion of the talionic regulation is exclusively from a later date and revolved around the concept *iniuria* and the evolution of damages. There were, however, no debates on the actual application of the principle of talion.

Even the biblical material could be seen to support the theory of development, since the Hebrew Bible contained many passages outlining innumerable offences that should be repaid in kind, avenging violence with violence. This could then be contrasted with the words of Jesus in the New Testament, calling for forgiveness to replace revenge.

In the New Testament, Jesus speaks of the law of talion in the Sermon on the Mount by urging men to turn the other cheek and not to demand an eye for an eye:

> You have heard that it was said, 'Eye for eye, and tooth for tooth.'
>
> But I tell you, Do not resist an evil person. If someone strikes you on the right cheek, turn to him the other also. (Matthew 5:38-41)[29]

The sermon referred to the talionic passages in the Hebrew Bible such as *Exodus 21:12-27*. However, the passage listing the various offences is actually very complex and detailed, taking into account degrees of intentionality and the seriousness of the offence.

> Anyone who strikes a man and kills him shall surely be put to death.
>
> However, if he does not do it intentionally, but God lets it happen, he is to flee to a place I will designate. (Exodus 21:12-13)

The following table is mostly about evaluating damages. Homicide, kidnapping and disrespect for parental authority are to be punished with death; unintentional killings are punished with exile, while the killing of slaves is punished with fines. From Section 24 onwards there is introduced the tit-for-tat list, which appears rather strange compared with the rest.[30]

> eye for eye, tooth for tooth, hand for hand, foot for foot,
>
> burn for burn, wound for wound, bruise for bruise. (Exodus 21:24-25)

The curiously straightforward this-for-that logic of these rules stands very much in contrast to what follows from the maiming of one's servants, who are liberated as compensation.

A similar, though not as exhaustive table is given in *Leviticus 24:17-22*. Religious scholars interpreted early on that these passages were remnants of more ancient times. In fact, even Talmudic scholars suggested that the passages were figurative and monetary compensation was used. The death penalty was probably used in cases of murder, retaliation being retaliation. However, Daube suggests that the

"life for life" could be interpreted in many cases as offering a new animal or a slave in restitution (Daube 1947, 102-109, 141, 146).

Early interpretations of *lex talionis* followed the idea that it was a cruel custom reflecting an ethic of vengeance. In addition to Roman and Hebrew sources, the opinion of Aristotle condemning revenge but approving reciprocal punishment was fundamental in the formation of the early modern opinion (Aristotle, *Nicomachean Ethics*, 5.5). Kant approved of the *lex talionis* as a principle of equality, but condemned applying any motivation for vengeance. In order to give everyone their due, a dispassionate judge will need to evaluate rationally the form and amount of retribution (Kant 1995, 399-400). From the 17th century onwards, there was a constant stream of philosophical literature on *lex talionis*. A selection of doctoral dissertations from Swedish universities tackled *lex talionis* with references to ancient Greek, Roman and biblical sources and some contemporary authorities such as Pufendorf and Grotius. The conclusion that, for example, Johannes Eenberg reached in 1707 was that though there is ample precedent for the *lex talionis*, talion is unsuitable as a punishment because it is either too severe or too lax. The final line in Eenberg's argument was Jesus' teachings on Christian morality (Eenberg 1707, 20-29).[31]

The moral philosophical stance of the inquiry into *lex talionis* was settled by Hegel, who considered it to be a first step towards the principle of retribution based on value. Hegel saw that the problem with talion was evaluation, the comparisons between the objects such as eyes and teeth. The criminal law side of revenge and *lex talionis* Hegel assigned to the dustheap of history, as a concept that was replaced by a more sophisticated system of retribution, a theory of thing to thing equivalence is being replaced by value-equivalence (Hegel 1952, 39, § 102). Whitman claims that after Hegel, scholars especially in Germany began to follow the paradigm of talion followed by compensation. Hegel established the paradigm that the primitive legal mind operated within concrete acts and things, whereas civilized criminal law developed from these roots towards the modern concept of retribution and compensation based on value (Whitman 1995, 58-60).

One of Hegel's followers, Abegg, took this developmental idea and applied it to legal history. He maintained that the earliest Roman criminal law was characterized by private revenge and self-help, which may be called natural criminal law where revenge takes the place of punishment. Private revenge operated on the principle of subjectivity, where the most original, genuine and immediate sense of justice was achieved by avenging wrongs. The defects were that there was no objective view of justice, because the subject was understood as the individual, the family or the tribe. However, in a more advanced stage, the taking of revenge comes to be limited through a treaty, which establishes the amount of vengeance taken or the compensation paid (Abegg 1830, 123, 126-127).

While the scholarly tradition on *lex talionis* had until the early nineteenth century been mainly based on ancient and biblical sources and approached as a question of religious morality, Germanic scholars inspired by Romanticism saw it as a cultural phenomenon much like Michaelis. In his 1828 *German Legal Antiquities* Jacob Grimm described revenge as a natural reaction to injustice. In the case of murder, blood revenge would be the principal Germanic reaction, but talion was never strictly enforced. In fact, talionic punishments were very rare and fines and blood money mostly took its place (Grimm 1899, 210-212, 216-219, 343). The reinterpretation of the law of talion in the nascent legal history scholarship of the nineteenth century was prompted by the reading of medieval Germanic laws. The Germanists emphasized the element of revenge as the natural result of wrongs, the anger that being wronged had provoked unleashing the violence that would restore both one's honor and provide action that would vent the anger.

The Germanic legal cultures[32] had a rich tradition of talionic regulation, mostly relating to unlawful killings, which was to some degree adaptable to the civilizing narrative. We can take the example of medieval Swedish laws and their talionic rules. First, the rules on willful killings of the Swedish law of King Magnus Eriksson from the 1350s state that if a man kills another without being forced to do it and is caught in the act, he shall be killed without an opportunity to settling the offence with a fine:

> If someone kills another and is caught having just committed the deed by the dead body, or fleeing within the same day and night, he who did the deed, he shall give a life for a life …[33]

Like other medieval Scandinavian laws,[34] it also had elaborate tables of compensation relating to different body parts, such as fingers. The most notable application of *lex talionis* in the law concerned vagrants, who were liable to have a knife struck through their hands for inflicting a cut.[35]

However, only a century later, the Swedish King Kristoffer's Law of the Country states that retaliatory killings are allowed only during the first day and night when a killer is caught red-handed by the family of the dead man. They can kill the murderer "in anger" without a trial, and only pay compensation. After the first day and night, the case would go to a court procedure where the normal rule of monetary compensation applied, unless the killing was premeditated.[36] It appears that the state regulation became stronger and the civilizing process started to curtail the exercise of revenge.

The idea of revenge being the original impulse behind law was developed further in 1842 by Wilda in his influential *Criminal Law of the Germans*. The feeling of injustice and being wronged stemmed not from the fact that one has suffered pain or loss of property but from the disrespect to one's person. Revenge was the brute reaction against injustice and the only one in the state of nature. According to Wilda, revenge found different manifestations in different nations; in the oldest German convictions it meant direct attack with weapons to kill or to wound. Talion was only a later, non-German addition of possibly Christian origins that sought to balance the injury and vengeance. The original German revenge was the revenge of the angered man who held cold-blooded deliberation as alien as the mutilation of a helpless man. The payment of compensation, however, because it included the admission of guilt, could appease the vengeful will (Wilda 1842, 157-159, 170, 213-314).

The conventional wisdom among scholars in the nineteenth century onwards had been that the talionic passage in the Roman XII Tables is a remnant of a brutal earlier age in which the state only had begun to limit the right to self-help in revenge. In fact, already Vico called it uncivilized, coarse, inhumane, cruel and savage (Vico 1725, 120). Dirksen held that the talionic passages of the XII Tables bore the unmistakable traits of private vengeance (Dirksen 1820, 104).

Rudolph von Jhering summarized the developments in 1854, presenting revenge and *lex talionis* both as parts of a civilizing process and a situational impulse motivated by honor. According to Jhering, the core and foundation of law is revenge. Both the Roman system of *lex talionis* and the Norse sagas described a system of vengeance, of getting satisfaction for wrongs done. Talion was a system of controlling revenge. Historically, pure revenge was the first form of self-help to become obsolete, because the reaction was completely subjective. Injury wounded the honor of the injured and lead to subjective demands for vengeance. Because the violent impulses could lead to unintended consequences, the archaic Roman system of *talio* prevented this escalation by offering compensation for bodily injuries, if necessary through the intervention of a judge to enforce a settlement. Private vengeance was slowly converted by state intervention to paying damages for the injuries caused. (Jhering 1993, 129-140; Whitman 1995, 45, 65). Jhering recognized that the legal feelings and the law itself may be at odds, referring to the blood revenge among the people of Corsica or the lynch law of the United States. The individual is torn between obeying the law and following his natural feelings. The first would result in him being despised by his own people for refraining from blood

revenge, while the second would lead to him being punished according to the law (Jhering 1915, 95-96).

However, Jhering maintains that the defense of a man's rights is mandatory, a duty like physical and moral self-preservation: "without law he sinks to the level of the beast (Jhering 1915, 31). If one has not grown accustomed to lawlessness, an insult to one's honor is prone to produce a psychological reaction, of which Jhering takes the example of the profession with the most sensitive sense of honor, the military: "An officer who has patiently borne an insult which involves his honor is no longer an officer." (Jhering 1915, 42-43). Jhering compares the officer to a peasant, who would never value his honor so much as to defend it with violence. However, a lazy peasant who does not care for his land is as much despised by his peers as the officer who does not defend his honor (Jhering 1915, 42-44).

In the issue of *lex talionis,* the narrative of progress in the Western legal tradition is clearly a version of the civilizing narrative. The original state is one of unlimited vengeance, which is then gradually limited and finally abolished by the state. However, alongside this narrative there emerges a primitivistic line of argument that traces the birth of law to the impulse of revenge. The inherent conflict between these two developments, that of the law and of the feeling of justice, was seen as the reason behind the violence in honor cultures.

Primitive properties

One of the central features of Martius's depiction of the legal system among Brazilian Indians was their communal land ownership. It is noteworthy that Martius makes direct comparisons here to ancient European cultures who also practiced communal tenure early in their history. In the classical tradition, communal land tenure had been seen as a sign of an uncivilized society. As a concomitant, the concept of ownership and especially ownership of land was seen a fundamental factor in the formation of the Western political and legal thought. Owning and tilling the land was often the precondition for participation in the political process. Like military service, it has also been an idealized part of the cultural heritage. Already in the classical Roman tradition, Cicero defined ownership and securing ownership of land as the foundation of law (*On Duties* 1.7.21).

The hallmark of the civilizing narrative is the development from simple early forms to the complexity of civilization. The theory of development from communal to private ownership as fundamental to the idea of how legal rights to things have progressed was formed in the early modern scholarship. In their typical fashion, early modern scholars relied mostly on biblical and classical sources and precedents as their sources for this development. As an example, we may turn again to Hugo Grotius, who offers an eloquent description of the original state of man and the development towards private ownership. The original state of things, as found after the creation of the world or after the biblical flood, was that all things were owned communally, in a "community of property arising from extreme simplicity, may be seen among certain tribes in America."[37]

Grotius refers to the ancient accounts of the original state of man which describe the primeval innocence and simplicity, before passions and crimes. The first humans practiced agriculture and grazing and traded their products, leading to ambition and rivalry. At first, the grazing grounds were still common though the flocks were divided, but later lands and animals were partitioned among families according to possession. The reason why primitive common ownership was abandoned was civilization; the pursuit of comforts and food other than what the nature spontaneously produced.[38]

German legal philosopher Samuel Pufendorf (1632-1694) followed Grotius in the idea that the primitive community of men had originally common ownership that was later divided into individual

shares (Pufendorf 1934, 569). Pufendorf discusses several examples of communal ownership after the original division had been made in ancient Rome and Germany. While in Rome, according to Livy (5.55), individual allotments were taken without any order and among great confusion, the ancient Germans of Caesar (*Gallic War* 4.1.4-7, 6.22.2) and Tacitus (*Germania* 26) redistributed individual parcels each year (Pufendorf 1934, 569-570).

Early modern writers strengthened several strands of thought, starting from the original state of simplicity and the discord that followed from riches. The transition from communal ownership to private ownership was both a transition away from a more ideal condition and an evolution towards a more developed society. The exact opposite idea, that of the savage stage as lawless, was also deeply rooted. Authors from Locke to Austin maintained that property was the basis of law and therefore, in the savage state of nature, men have simply no rights. Only the simultaneous arrival of agriculture and property would create the necessary foundations for both civilization and law. In a like manner, the idea of human progress from savagery and its correlations in society and law were already outlined in theory by Montesquieu, Smith and others. As a result, when the nineteenth century authors began to present the development as a historical fact, they were writing to a receptive audience (Fitzpatrick 1992, 72-91).

Jacob Grimm's depiction of the ancient German system of land tenure was to a degree similar to that presented by Martius. According to Grimm, the ancient Germanic community of *Sippe* mentioned earlier in conjunction with blood revenge was, in addition to offering protection and peace, also a land community of common ownership. Grimm, relying on the same passages from Caesar and Tacitus as the earlier writers, recognized in early Germany two opposing developments, that of communal land ownership and that of the allotment of land to individuals (Grimm 1828, 494-495; Grimm 1899, 6-7). For Grimm, the natural social cohesion of the *Sippe* was strengthened by communal ownership of land (Grimm 1828, 494-495). Because the farmer was naturally entitled to the fruits of his labor, certain areas were given for exclusive use, even though the land was common (Grimm 1828, 495).

The use of rituals was another characteristic mentioned by many of the authors describing early legal practices. The use of concrete acts, the wielding of spears and ritual incantations were discussed by Martius as well as scholars of archaic law. Because of the centrality of land tenure in the community, its transfer took sacral forms.

The development of the debate over primitive property and its potential transfer by contract is clearly evident in the interpretations over the Roman law institution of *mancipatio*, because it is a recent addition to the Roman legal tradition (Tuori 2008). The main evidence for it was discovered only in 1816 in the Gaius manuscript found in Verona. *Mancipatio* was an institution of Roman *ius civile* that was used exclusively for the sale of certain types of land and slaves, among other things, through a complex ritual involving scales, a man to hold the scales, witnesses, a piece of bronze and a complicated incantation to be uttered. *Mancipatio* was an archaism in Roman law, an institution that was used extensively in historical times but contained remnants of archaic law that perplexed both the Romans of the historical era and later observers. Consequently, *mancipatio* has been the object of continuous discussions on the impact of the ritual and the transcendental in law.

Gaius' account of *mancipatio* in his legal textbook, the Institutes, dates from the mid-second century AD, and describes a curious ritual:

> Gaius 1.119: Mancipation, then, as we have said earlier, is a sort of imaginary sale; it is also part of the law peculiar to Roman citizens. It is carried out as follows. There are brought together not less than five witnesses, adult Roman citizens, together with another of the same

> status, who holds bronze scales and is called the "scale-holder" (*Libripens*). The person who is taking by mancipation (the purchaser), while holding the object says the following words: "I declare that this man (the slave) is mine by quiritary right and let him be bought to me with this bronze and bronze scales." Then he strikes the scales with the bronze, and gives it to him from whom he is taking by mancipation (the seller) by way of price. (Translation adapted from Gordon and Robinson).

In the text, Gaius himself claims that the ritual and the use of scales hark back to a time when money was not yet in use (Gaius 1,122). Perhaps reflecting a wider understanding of early Roman history among the Roman jurists, a later Roman jurist called Paul mentions barter as a remnant of an earlier time when no money was used and things were traded for things (Paul Dig. 18.1.1pr; Tomulescu 1971).

In early nineteenth century scholarship, the discovery of *mancipatio* was celebrated as an example of the earliest kind of archaic contract of sale in which ritual, religion and law were mixed. In his early remarks, Jacob Grimm wrote that archaic methods of transfer such as *mancipatio* and *stipulatio* utilized a symbolic imagination and artistic impression. Like some institutions of the old Germanic law, the archaic Roman legal acts were representations of legal symbols, such as the land or the taking of possession. These symbols were placeholders, such as the keys that were used to symbolize the house, but they were not mere acts in themselves, but rather had a "shadowy, holy and historical meaning," which was necessary to create a belief and understanding of the legal act itself for the audience.[39] This method of appealing to the senses and imagination was later supplanted by a process of rationalization in legal thought. Grimm's near contemporary Puchta maintained that at the same time the ritual publicized the transfer of ownership and, through solemn incantations, bound the parties to observe the deal. Rituals like *mancipatio* celebrated the links among military discipline, conquest and citizenship that were the preconditions of ownership (Puchta 1875, 78).

However, the mainstream understanding of *mancipatio* in the Roman law scholarship came to have a quite mundane explanation. Rudolph von Jhering argued that *mancipatio* was originally a system of barter that later developed into a symbolic ritual which repeated the actions but not the content of the original act (Jhering 1993 533, 537-538). This view has since become dominant in the scholarship (Bechmann 1876, 47-48, 74; Stintzing 1904, 3-5; Tomulescu 1969, 350; Wieacker 1988, 326, 335).

This explanation also fit the grand narrative of the gradual rationalization of Roman law from the archaic to the classical. Of course, scholars have long viewed the early history of Roman law as the realm of rituals and ceremonies in which rights and duties were transferred with solemn incantations and the wielding of sticks or spears (Buckland 1939, 16-28). Many of the early Roman legal institutions such as *mancipatio*, *stipulatio* and *vindicatio*, contained elements that have been seen as religious or supernatural, such as ritual acts or words (Kaser 1971, 27; Bretone 1991, 90; Watson 1992, 33).[40] In contrast, classical Roman law was understood as being the realm of rational legal thinking.

In the early nineteenth century scholarship on early and primitive law, the issue of communal property was central in the understanding of the legal culture. Information from both the deep past of the European legal tradition and the accounts of explorers supported the view that among early and primitive cultures land was held in communal ownership and it could be transferred only through cumbersome rituals. In contrast, private ownership and rational forms of contract were considered to be signs of civilization. These convictions were to have far reaching consequences.

Conclusions

Dunga is a man torn between two worlds. As a member of the Ethiopian Kara tribe, he is bound by obligations towards his family and tribe and the traditional way of life. But even as a child, he ran away from home to attend school, and as a diligent student, learned a great deal about the outside world. Hunting game and herding cattle were not among his priorities. However, the traditional way of life placed other obligations on him. First Dunga's father had been killed in a skirmish with the neighboring Nyangatom tribe. His older brother, who had been living in the traditional way and was considered to be one of the leaders of the tribe, was encouraged to avenge their father. Then even Dunga's brother was killed, shot in a cowardly way by a Nyangatom warrior to avenge another man. The social pressure on Dunga to avenge both his father and his brother was mounting, but he had thus far refused to go to war and to prolong the cycle of vengeance that was tearing the region apart.

The story of Dunga, told in the National Geographic Magazine (Shea 2010), is so powerful because it is very universal. Literature has been full of such stories ever since ancient times, stories of the conflict between the old traditions and the new ways, stories of Antigone and Hamlet, of revenge, honor and violence set against a new order of civilization and peace. Juxtapositions of traditional honor culture and modern civilization, a common enough occurrence, for example, in the cities of Europe with large immigrant populations, are presented in the media as conflicts between primitive, violent cultures and the civilized modern state. Honor killings, blood revenge and feuding represent, both in the popular media and the legal community, a troubling resurgence of traditions that were thought to be obsolete. Furthermore, violent and repressive traditions are problematic to Western countries committed to pluralism and respecting the cultural heritage of immigrants. In the legal imagination, revenge killings done in Afghanistan under the Pashtu code of honor, and the honor killings in Arab cultures or feuding among the Roma in Europe, all widely separate phenomena, fall under the same wide tent of premodern, violent, reprehensible and ancient legal customs.

One of the most persistent narratives of Western history is the civilizing narrative, the story of how the growing influence of the state gradually brought an end to lawless violence and misery created by the cycle of vengeance. The problem of tradition, violence and revenge is central to the civilizing narrative. *Lex talionis* occupied a critical point between unrestrained revenge and the state monopoly of punishment and violence and became a key preoccupation for the observers of primitive law in the nineteenth century. Issues like the purpose and morality of revenge were initially discussed using the biblical, Roman and Greek traditions and the examples they furnished. The history of interpretations on *lex talionis* shows a clear trajectory from a moralizing to a cultural interpretation of law and revenge. The early modern authors examined mainly ancient sources and made their interpretation based on Christian morality. Later on, the Germanic tradition produced very different sources and the Germanists idealized the quest for revenge against offenders. Following *lex talionis*, concepts like vendetta, blood money and honor culture were explored to elaborate on the theories of culture, revenge, violence and justice. The end result was the idea of revenge becoming the foundation of primitive law. However, in the colonial context, the logical conclusion from the theory of civilizing process was to place the monopoly of violence in the hands of the state and to prevent alternative dispute resolution mechanisms.

The two examples in this chapter illuminated the interest in blood revenge and lex talionis from two viewpoints, that of Martius's legal exploration of the Amazonia region and that of Lönnrot's compilation of ancient Finnish epic poetry. As a botanist turned to linguistics and ethnography, Martius was typical of the early students of anthropology. Making observations on their way of life and even taking human samples, he made his inquiry as a natural scientist. An anti-Rousseauan, he presented a dark vision of the Indians as half-animals without a past or culture. However, they represented the lowest level of human existence and their laws of violence and blood revenge, not to mention rituals and symbols, were indicative of the origins of law.

In contrast, Lönnrot worked in a Western tradition, a different point of origin where the source is an oral tradition where history and mythology are intertwined. The epic poem of the Kalevala was not just poetry, but it also served as a founding myth for the nation. Its compilation and the role of the collector in shaping the tradition was also one of construction of the past. Especially in the feuding tale of Kullervo, the narrative of the tragic hero avenging his honor was shaped by expectations of the folklore genre. Comparisons were made to the Icelandic sagas and other hallmarks of the earliest Germanic legal traditions. Despite the creative role of the collectors, regarding both Martius and Lönnrot, the authenticity of their material was the key to their credibility and reputation. Empirically gathered information that was also verifiable was their main claim to being scientific.

Contemporary legal theory led to the revival of the reputation of primitive law. In the nineteenth century, the Historical School of jurisprudence, based on the theories of nations and cultures, claimed that law was inherent in the culture of the people and that law would develop organically as a historical part of that culture. This radical view of law contained two elements that challenged the earlier theories of savage peoples and law. First, that there were no people without law, just law in its various stages of development. Second, that the civilizing mission of imposing enlightened laws was plainly wrong.

The juxtaposition of tradition against civilization continued as the European peoples had more and closer contact with indigenous peoples as the blank areas on maps were filled in during the nineteenth century. Explorers produced more and more accounts of the lives and traditions of different peoples. Though the period from the age of discovery onwards had brought Europeans into virtually every corner of the world, only during the late eighteenth and early nineteenth century did the systematic and scientific exploration of indigenous cultures begin. When scholars began to make interpretations on the laws of indigenous peoples, these theories were based on and reflected their previous scholarly information, the models of the deep and more recent past from the biblical, Greek, Roman, Germanic, European and American examples.

The result was the first of the four scientific revolutions of this book. Its main feature was the idea of empirism, the gathering of empirical information on the world. This data, whether it was sought through the exploration of the jungles of Amazonia or the distant villages of Karelia, replaced philosophical theories on the natural state, such as Rousseau's. Culture, for them, was a totality, not some individual details or customs. The information provided by individual informants or observations revealed to them the workings of culture as a unique trait of a people. The origins of culture and the development of tradition replaced the idea of a natural or original state. The relationship between the hallowed past and the present was understood through the paradigm of loss, where the original form of a tradition was always shown through remnants and traces existing in the present culture. The most original forms were always found farthest away from the corrupting influence of the modern world, in the jungles, the forests or mountains.

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[1] Obregón 2012. This introduction summarizes in part the main sections of the chapter and thus for references the reader is advised to turn to check the main text.

[2] Mauthe 1994, 13-27. On the subject, there is also the dissertation of Robert F. Steinle, *Historische Hintergründe der österreichischen Brasilienexpedition (1817–1835) mit einer Dokumentation der*

Bororo-Bestände aus der Sammlung Natterer des Museums für Völkerkunde in Wien. Dissertation Wien 2000. There were a number of other expeditions around the same time, see Becher (1975, 300-306).

[3] *Historia naturalis palmarum*, (with Hugo von Mohl und F. J. A. N. Unger), three volumes 1823-50, *Flora brasiliensis*, an edited work that continued after his death, reaching 15 volumes (1840-1906) and other works.

[4] J. B. Spix and C. F. P. Martius, *Reise in Brasilien 1-3,* München 1823-1831. The third volume, published after Spix's death, is cited as Spix and Martius 1831, even though the text is by Martius unless otherwise noted. See also Guth 2012.

[5] Martius 1832, 1. The book was republished as chapter 2. in Martius 1867, 43-144.

[6] On his links between ethnographic and historical works, see Guimarães (2000, 389-410).

[7] Spix and Martius 1831, 1265, 1277; Tiefenbacher 1994, 48. The pictures of the children are reproduced in Helbig 1994, 183.

[8] See, for example Mülhmann 1964.

[9] Recent archaeological excavations have pointed out that there are remains of extensive earthworks built by an unknown precolumbian civilization. See Pärssinen et al. 2009; Lombardo et al. 2013.

[10] On the image of the explorer, see Hempel (2009).

[11] All the translations from Bosley 1989.

[12] Hämäläinen 2002, 365; Kotkas 2004, 103; Kuusi, Bosley and Branch 1977, 30. The most exhaustive estimate of Lönnrot's own contribution is Kaukonen's 1977 study.

[13] Wilson 2008, 232; Kuusi, Bosley and Branch 1977, 32 note that using Lönnrot's Kalevala as a primary source for ancient Finnish folk poetry is as reliable as considering Liszt a first hand source for Hungarian folk music.

[14] Hämäläinen 2002, 366-382. Hämäläinen compares the texts of the proto-Kalevala of 1935 (poem 10) and the earlier poems, published in the collection Suomen Kansan Vanhat Runot (Old Finnish

Folk Poetry) SKVR XII_1:120. Branch 1994, 209 considers the transformation of the Kullervo narrative one of the examples in which social and ethical themes were woven into the story.

[15] Already in 1817, scholars had hoped for a systematic inquiry into the Finnish folklore that would produce something comparable to Homer, Ossian or the Nibelungenlied. Fromm 1990, 97.

[16] Hämäläinen 2002, 364-365. On Macpherson and Ossian, see Thomson (1990, 115-130) and Stafford (1990). For problematizing the Homer or Virgil debate by Honko and Fromm, see Oksala (1990, 67-68).

[17] These comparisons were fairly common in the international reception of the Kalevala. Léouzon Le Duc (1845, cxxxiii) pointedly and earnestly calls Lönnrot the Homer of Finland.

[18] Njál's saga (tr. Magnusson and Pálsson 1968), chs. 35-38. I have unified the orthography of names in the quotations with the main text.

[19] Njál's saga (tr. Magnusson and Pálsson 1968), ch. 37, p. 70.

[20] Njál's saga (tr. Magnusson and Pálsson 1968), ch. 41, p. 74.

[21] Even now the true age of folk poetry is debated, because oral poetry may change every time it is recited. Siikala 1994, 18-22.

[22] Njál's saga (tr. Magnusson and Pálsson 1968), 26-29.

[23] Grimm 1840. On the reinterpretation of the tradition, Teuscher (2011), reviewed by Paul Freedman in The Medieval Review 13.01.10. See also Pilch 2009.

[24] Puchta developing then the jurisprudence of concepts (*Begriffsjurisprudenz*), which approached law as a logical system.

[25] T. Shepstone, 25th November 1850, quoted by Brookes (1927, 52-53).

[26] Grotius 1925, 472-480 (book 2, ch. 20.8-10).

[27] Explored most recently by Waelkens 2005, 404-410. On *membrum ruptum*, see, Birks (1969, 163-208), Hageman (1998, 1-47), De Francesco (2005, 415-440).

[28] Bruns, *Fontes iuris Romani antiqui*, vol. I (1909) table VIII, 2-3; Crawford, *Roman Statutes*, vol. 2. (1996) table I, 13-14. English translation by Crawford. Interpretations Kelly (1966, 154-155), Zimmermann (1996, 3), Whitman (1995, 45).

[29] All biblical references are from the New International Version.

[30] The text continues with the detailed account of the responsibility of and for bulls (28-36).

[31] See Günther (1889, 11, 16-17) on the lengthy lists of dissertations on *lex talionis*.

[32] On recent developments, the reader is adviced to turn to the extensive modern secondary literature by the likes of G. Dilcher and J. Weitzel. On these influential theries, see Pilch 2009

[33] Konung Magnus Erikssons stadslag, in C. J. Schlyter (ed.), *Corpus iuris sueo-gotorum antiqui/Samling af Sweriges gamla lagar, Vol. 11*, Stockholm 1865, DB Vl 1, the law of homicide I, 2.

[34] For the medieval Scandinavian laws and *Wergeld*, see Vogt 2010, 118-153. Other laws such as the Law of Uppland or the Law of Hälsinge had a more extensive list of talionic punishments, with mutilations for castration and the whole list of biblical equivalences. Professor Helle Vogt has kindly allowed me to consult her unpublished work on the matter.

[35] King Magnus Eriksson's Law of the Realm, the law of homicide, 39-40.

[36] *Konung Kristoffers Landslag,* Carl Schlyter (ed), 1869, Lund, the law of intentional killings I-III.

[37] Grotius 1925, 186-187 (book 2, ch. 2.2.1).

[38] Grotius 1925, 188-190 (book 2, ch. 2.2.2-5).

[39] Grimm 1816, 74-80, republished in Grimm 1957.

[40] As Wieacker 1991, 316, points out, these elements are commonly seen as remnants of earlier times and that the fundamental nature of the legal system was secular and rational.