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The Organizing Principles of Aboriginal Justice

Christophe Darmangeat

Introduction

- 1 From its very birth as a scientific discipline, social anthropology has placed the legal dimension at the heart of its reasoning - as the title of J. J. Bachofen's founding work, *Mother right* (1861), amply demonstrates. However, this early interest was only partially confirmed later on. The middle of the twentieth century, in particular, saw the publication of a series of major works that studied in detail the law and judicial practices of stateless societies, mainly in North America (Richardson 1940; Llewellyn and Hoebel 1941) and in sub-Saharan Africa (Howell 1954; Gluckman 1955; Bohannan 1957). Nevertheless, in the late 1950s, Paul Bohannan could note with humor and regret that the high quality of publications in legal anthropology was matched only by their low number. A few decades later, this observation is partly invalidated. Even if it has never aroused as much interest as, for example, kinship, law continues to be an object of study for anthropologists. This continuity, however, has been accompanied by a shift in focus. The exposition and analysis of the law of traditional societies, in a broad comparative perspective, has given way to work on "the state and governance in colonial, postcolonial and post-socialist societies; human rights; war, violence and post-conflict processes; global legal processes; (...) transnational (often legal) institutions (...) tribal rights to natural resources; (...) and on state policies vis-a-vis NGOs" (Mertz and Goodale 2012, 78).
- 2 This should arguably be seen as the effect of two joint movements. The first is the growing disinterest in - and even outright rejection of - the classificatory and comparative agenda that has affected social anthropology as a whole. The very project that had motivated the founding research, that of forging a general theory of human societies and their evolution, was gradually abandoned, even if it was not explicitly opposed. The second factor, which partly explains the first, is the assertion that any

scientific advance remains conditioned by new fieldwork. As modernity sounded the death knell of traditional pre-state societies, the object of anthropology thus moved, sometimes to the point of turning, in a withdrawal movement, to Western societies themselves.

- 3 While there is no question of denying the legitimacy of the fields explored in recent decades, it is regrettable that the construction of an authentic comparative law - in a perspective that is not limited to a few extremely similar modern societies (Nagel 1962, 147) - has remained in the draft stage. Hoebel's ambitious attempt (1954), whatever its limitations, remained virtually without a follow-up. And with the benefit of hindsight, Bohannan's view (1969, 418) view that such a program was on the cusp of a vigorous development seems singularly optimistic.
- 4 The present work intends to make a contribution to this issue which, although it has been somewhat neglected, has in our opinion lost none of its scientific interest. To begin with, it undertakes to draw up a reasoned inventory of the traditional judicial procedures of the Aborigines of Australia, thus adding an important piece to the dossier - with the exception of the Inuit (Rouland 1979; Patenaude 1989; Nungak 1993), very few hunter-gatherer peoples have been studied in this respect. We also propose to understand their logic through a reading grid that could constitute a key for future comparative analyses.
- 5 The very possibility of a comparative reflection constitutes an extremely delicate subject which, in the 1950s, gave rise in the 1950s to a controversy as intense as famous between Max Gluckman and Paul Bohannan (on this point, in addition to the writings of these two authors, see the particularly enlightening contributions of Nader 1965; 1969). According to the former, the characterization of the law of the societies studied had to be carried out through Western legal categories, both because they were the ones that served as reference for the ethnographer and because they were the fruit of centuries of theoretical reflection. To this, Bohannan replied that the law of each society should above all be carefully apprehended through the categories in which it was thought of by itself and denounced the risk of ethnocentrism entailed by the approach advocated by Gluckman. Without going into this fundamental discussion in greater detail, we will simply suggest that the method adopted here constitutes an alternative solution, perhaps making it possible to get out of the dilemma expressed just now. We have in fact chosen to classify judicial procedures from an external point of view ("etic"), without systematically mobilizing Aboriginal conceptions and vocabulary on this subject. The concepts used for this classification, at least at a first level, do not however belong to the Western legal tradition. They are purely formal and make it possible to order the legal procedures, whether Australian or others, in a way that one can hope to be objective and without conveying connotations that would be foreign to this culture.
- 6 It should be emphasized that our approach differs from most previous work in that it is not concerned with rights and obligations, as is the case with Hohfeld (1917), nor with the institutions that govern the judicial process. We wish to suggest here that what might be called the "coercive modes of conflict resolution", whose diversity includes but is not limited to that of sanctions, is rich in lessons - starting with those relating to the question of collective responsibility, a question that was already nagging Malinowski (1926).

- 7 As soon as they were able to observe Aboriginal societies, from the end of the 18th century onwards, Westerners were struck by the profusion and originality of their legal procedures. Far from the disorganization and spontaneity of a fantasized “state of nature”, these hunter-gatherers with such a crude material culture showed, as in matters of religion or kinship, a remarkable concern for refinement and formalism. Social anthropology thus logically found material for several accounts of prime importance: in particular, and in chronological order, those of Howitt (Fison and Howitt 1880, 209–33), Wheeler (1910), Warner ([1937] 1969, 144–79) or Berndt and Berndt ([1964] 1992, 336–66). All of them undertook a cursory survey of the different ways in which organized violence was exercised and gave information about the circumstances in which it was used.
- 8 On the whole, however, two sets of criticisms can be directed at these studies. First, although they expressed the proximity, in these societies, between the spheres of justice and war, they failed to articulate them satisfactorily. This point is particularly sensitive in Warner’s work, which uses the same term “warfare” to encompass all the phenomena he deals with, even the spontaneous brawls that broke out within a camp. However, such scuffles, which generally caused little damage and whose conduct, if it obeyed certain social norms, remained informal, clearly do not in any way fall within the scope of justice and even less within that of war. The second criticism is that while these writings presented a more or less reasoned inventory of the legal proceedings, none of them attempted to order them into a genuine classification that would reveal their intimate logic. As we shall try to show in the following pages, not only is such a classification possible, but it constitutes an irreplaceable point of entry into the social relations that organize them.
- 9 As indicated, the method followed will consist in dealing initially with the formal aspect of the judicial proceedings, regardless of the reasons for choosing one over the other. It is only in a second stage that we will show that this formal classification corresponds to more fundamental determinations: the rationale to which they obey thus echoes the social logics that determine the resolution of disputes arising from offences and crimes. Such an approach makes it possible to integrate war, which, where it existed, was mainly, if not exclusively, judicial in nature (for a more detailed presentation of the data and analyses discussed in this article, see Darmangeat 2020).
- 10 Let us add in conclusion that the elements treated here correspond to what is called the “ethnographic present”, and relate to societies, if not pre-colonial, at least whose functioning, in this respect, had not yet been affected by the presence of the Australian State. As the State advanced and consolidated, it broke down the mechanisms and ways of traditional justice. Until today, however, an attenuated form survives alongside it, sometimes without its knowledge, sometimes with its active collaboration. This “double standard” situation, although fascinating, stands outside the scope of this paper and will therefore not be discussed here.

Three formal dimensions

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

- 12 **Symmetry.** In certain circumstances, the judicial process requires that both parties be equal in means (this equality can be accepted with a certain tolerance, or on the contrary, scrupulously observed). In other cases, on the contrary, the party taking the legal action ensures, by consent or surprise, offensive means of which the other party is deprived. We shall therefore speak of symmetry or asymmetry, depending on whether this balance of means is sought or not.
- 13 **Moderation.** Some procedures are organized in such a way as to limit the severity of the physical harm they cause. Others, where violence is not tempered by any rule, are on the contrary explicitly aimed at inflicting death. Depending on the case, this dimension is therefore referred to as the presence or absence of moderation (of violence and lethality). It should be stressed that moderation does not concern the choice of a more or less extensive target, but only what is supposed to happen to it once the choice has been made. Thus, death penalty, which is imposed on a single individual, is a non-moderated procedure, whereas the regulated battle, even if it involves hundreds of opponents, is a moderate one.
- 14 **Designation.** This term refers to the way in which the set of individuals targeted by the procedure is determined. Of the three criteria, this is the most complex, and the only one assuming three possible values. The two most obvious are personal and collective designation. What separates them is not, in itself, a question of numbers: obviously, a collective designation presupposes that the procedure is exercised against a group, and therefore against several individuals. But conversely, a procedure may very well be exercised against several individuals without, however, possessing any collective character: all that is required is that they be involved on a personal basis. There remains, however, a third possibility, rejected by modern law but commonplace in ancient societies: that of a procedure involving a specific number of individuals chosen not on a personal basis, but as representatives, or members, of their group. It is not easy to find a suitable adjective for this situation. For want of a better alternative, and despite the somewhat pedantic nature of this choice, we have resorted to the vocabulary of linguistics and to the term “synecdoche”, a figure of speech that consists of designating the whole by one of its parts. Thus, in the synecdochical designation, the procedure is aimed at a collective through a determined number of individuals chosen (by their own group or by the adversary, depending on the situation) as members of this collective, and not for their personal responsibility.

Ordinary forms

1.1 Duel

- 15 In its canonical form, duel is defined as a regulated and public confrontation between two individuals. This regulation concerns altogether the number of combatants, even possibly their quality, the weapons used, the type of blows and the nature of the injuries that put an end to it. The Aboriginal legal duel was organised according to two main modes. In the first, which can be described as “free”, and which in this respect is the one that is closest to our modern sports fights, the opponents acted freely in accordance with the general rules. The second mode, which can be called “alternate”, has hardly any equivalent in our own society: the opponents took turns to strike.

- 16 The use of a weapon – the same for both protagonists – was imperative (generally speaking, hitting an opponent barehanded in Australia was considered a mark of extreme contempt). The commonest instrument was the club, most often accompanied by the shield. In such cases, the head, and possibly the hands, were the only permitted target (Blackman 1928, 171; Basedow 1925, 166). In the central area, duelists, protected by light shields, faced each other with stone-bladed knives. Only blows to the flesh were legal: it was forbidden to attack a vital part (M. M. Bennett 1927, 407–8; Aiston 1921, 6; Bates 1921, 6). In the North and Northwest, a light reed spear with a hardwood point was used (Basedow 1925, 171).
- 17 The duel was a regulated confrontation in which every effort was made to avoid the death of the participants. The referees, and even the spectators themselves, therefore tried to intervene before the consequences were too serious – which was not always enough (Smyth 1876, 1:xxiv; Helms 1895, 389).
- 18 A notable feature of the duels was that they were the only legal procedure available to women, although they were often less formalized than when they involved men. Blows to the head or fingers were delivered alternately (Basedow 1925, 167–68; Roth 1897, 141; Bates 1938, 11; Clark 2015) or in bursts of two or three (Smyth 1876, 1:159).
- 19 Several descriptions suggest that, in contrast to the Germanic judicial duel, which persisted into our Middle Ages, the role of the duel was not always to legitimize the claims of the victor while imposing a sanction on the defeated. In the Gulf of Carpentaria, the outcome of the battle was assessed by the Elders. If they judged it not to be in accordance with the wrongs and legitimate claims of each party, the winner could be inflicted with various injuries in turn (Roth 1897, 139). These dispositions reveal that such a duel had the sole role of applying *ex ante* the sanction resulting from a judgment that succeeded it. In the case of female duels among Western Desert Mardu, the one who was “clearly at fault” had to bow her head and passively accept the first blow, thereby acknowledging her guilt and giving satisfaction to her opponent, regardless of which of the two won the ensuing duel with clubs (Tonkinson 2013, 267). Here, too, the purpose of the duel was not to establish rights and wrongs. In this example, as more generally in Australia, it aimed primarily at resolving a conflict – in the manner, in our customs, of a handshake or reciprocal apology.
- 20 **Classification.** Striving to avoid a lethal outcome, dueling is obviously a moderate procedure. It is also driven by a keen sense of symmetry, since it always opposes the same number of equally armed combatants. In terms of designation, however, the duel took two forms (and actually three, the regulated battle constituting as we shall see a genuine collective duel). Far from always pitting individuals who had a direct dispute against each other, the duel sometimes involved combatants chosen by their respective camps to represent them in what may be called a “duel of champions” (Fraser 1892, 41; Dawson 1881, 77). Such a form can be found all over the world, sometimes in an unmoderated version, of which the most famous examples are the legendary fights which opposed David to Goliath and the Horatii to the Curiatii.

1.2 Corporal punishment

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

- 22 As in the duel, the weapon used was likely to vary depending on the place and circumstances. One of the most common was the club, which was struck violently on the skull (Roth 1906, 8; Taplin 1879, 35), but the spear was also often found: in Arnhem Land, it was used by the scorned husband to pierce the lover's arm (Foelsche 1882, 2). In Western Australia, a man guilty of abduction was speared in the leg (Fraser 1892, 40). In some places, custom stipulated, depending on the nature of the fault, which part of the body was to be perforated: "thigh, calf, arm, etc." (Calvert 1894, 22).
- 23 The classification of corporal punishment does not raise any difficulty; however, it should be considered in conjunction with the next procedure.

1.3 Penalty challenge ("ordeal")

- 24 This procedure, which has been documented countless times since the early nineteenth century, is perhaps the most emblematic of Australian justice. Held in public, it placed the guilty party, devoid of any offensive weapon, some distance away from one or more opponents lined up in front of him. He would then attempt to dodge projectiles directed at him (usually spears) or, much more rarely, to ward off blows delivered with a club (Fraser 1892, 23).
- 25 Such a staging struck the imagination of Westerners who observed it; they were nonetheless at pains to name it. The painter John Clark, who produced a pictorial representation as early as 1814, entitled it "The Trial", a choice that had little posterity. Some ethnologists later referred to it as a "duel" (Hart, Pilling, and Goodale [1963] 2001, 86), but most often, by analogy with a medieval custom, it became known as an "ordeal".
- 26 These denominations, however, are quite unsatisfactory. The duel should be set aside at the outset: this word in no way reflects the unequal position of the participants. Both the terms "trial" and "ordeal" have the drawback of suggesting, wrongly, that the process was designed to determine whether the person undergoing it was guilty of the charge brought against him. However, the Australian challenge was imposed exclusively on a (male) individual whose guilt had been previously established: its outcome determined only the magnitude of the punishment. Another disadvantage of the word "ordeal" is that it conveys a religious dimension – it was, in medieval times, a "judgment of God" – which is totally absent from Australian custom. For all these reasons, we propose here the denomination of "penalty challenge".
- 27 In order to find among us something analogous to this practice, apparently so foreign to our own institutions, we must look less at our judicial law than at our sports regulations. The aboriginal penalty challenge can indeed be characterized as the codified organization of a situation whose outcome depends on the actions of both parties involved, but which places the guilty party at a disadvantage. Contemporary sport does not do otherwise when it stipulates, for example, free kicks in soccer.
- 28 On a common framework, the penalty challenge allowed for various adjustments, as the free kicks may for instance be direct or indirect. For example, the number of spears used could vary, depending on the severity of the offence (G. Bennett 1929, 5–6; Smyth 1876, 1:282; Fraser 1892, 39; Mann 1883, 12). In most cases, the offender was provided with a shield to parry the missiles – sometimes with two, in case the first one broke (Fison and Howitt 1880, 216–17; Lang 1865, 13). To spears, one sometimes preferred boomerangs, or even a heterogeneous assembly that also included the *kunnin*, a

throwing stick pointed at both ends (Fison and Howitt 1880, 216). The challenge could involve more than one target: either the fault concerned two culprits (Howitt 1904, 335), or the individual undergoing it had the right to be assisted by a friend (Pelletier, Merland, and Pécot 2002, 92), a close relative, or a wife (Fraser 1892, 39; Hassell 1936, 701), who helped him to deflect the missiles. A final, important parameter was whether the spears would be projected one by one, or even preceded by a signal, or whether the executors were free to fire their missiles in groups, which naturally made them much more difficult to dodge (Fraser 1892, 39).

- 29 The conditions that were supposed to determine the outcome of the challenge are a rather delicate point. Various testimonies suggest that a wrongdoer could fulfill these obligations by passing the penalty challenge without a scratch (Lang 1865, 12-13; Smyth 1876, 1:81; Ridley 1873, 267; Grey 1841, 2:244; Threlkeld in Threlkeld 1974, 2:239; Salvado 1854, 324; Mann 1883, 12). In other cases, by contrast, this eventuality was excluded, and the procedure was not completed without blood being shed. In addition to Howitt's account (1904, 336), Pelletier writes that a murderer "lucky enough to avoid being struck" in a penalty challenge would have to let the victim's parents drive a barbed spear into the "rear and upper part of the thigh", the extraction of which resulted in terrible suffering (Pelletier, Merland, and Pécot 2002, 92). In formal terms, such a procedure can be interpreted as a combination of a penalty challenge and corporal punishment. In substance, it can be compared to the "minimum sentence" of our own law, with the difference that the margin of variation did not depend on a judge's appreciation, but on the result of the penalty challenge.
- 30 In the classification, penalty challenge and corporal punishment hold the same place. Both procedures are marked by moderation (care is taken to avoid killing) and asymmetry. The only difference between them is the certainty or only likelihood of the final result.

1.4 Regulated battle

- 31 The regulated battle is defined as a confrontation between two groups, the unfolding of which was tightly framed by rules. Two elements are essential. First, the absence of surprise: the meeting was agreed in advance by both parties and any recourse to trickery was forbidden. Second, the limits placed on the lethality of the combat: hostilities ceased as soon as a few significant wounds had been inflicted – these wounds could, however, be very serious, and it was not uncommon for the fight to result in one or two deaths. In any case, if blood had to be shed, the aim was not to inflict maximum casualties on the opponent. Moreover, once the battle was over, the friendship between the two groups was restored and ostensibly affirmed.
- 32 As with previous procedures, terminology is an issue. This form has sometimes been referred to as "sham" or "mock" fights. These terms, which minimize the very real damage they caused, should be rejected. Nowadays, nobody would apply them to a fistfight or a boxing match: there no reason to do so for clashes where injuries were often serious, and sometimes fatal. "Ritualized combat", by introducing an ambiguity about a possible religious dimension totally absent from Australian custom, calls for a criticism of the same order as the one addressed above to the ordeal. Rather than the term "stylized" combat, which is also sometimes proposed (Meggitt [1962] 1971), we

prefer to retain here the term “regulated” combat (Wheeler 1910) as the most appropriate.

- 33 Some thirty more or less detailed accounts of such events are available, mostly dating back to the 19th century, which make it possible to grasp both the general pattern and the particular variations (see for instance Flanagan 1888, 40–43; Hart, Pilling, and Goodale [1963] 2001, 90–93; Lumholtz 1889, 119–27; Stanner 1979, 67–70). These confrontations involved widely varying numbers of people. The number of fighters could be quite modest – about ten combatants on either side in Fraser’s testimony (1892, 40), about thirty in Le Souef’s (Kershaw 1928). But it sometimes reached an a priori surprising order of magnitude concerning mobile hunter-gatherers. Tom Petrie, in Queensland, reports two instances of such battles involving 700-800 individuals in the 1860s (1904, 161–64). Similar figures are found in New South Wales, in 1837 on the Lachlan River (White 1904), around the same time in Lismore (Kendall 1925, 4) and in the Adelaide area (Stephens 1889, 487). In the same place, in 1849, George Taplin claimed to have witnessed a clash involving 1,300 men which was interrupted by the authorities (1879, 2). As for Edward Eyre, he also mentions gatherings of hundreds of participants in the southwest (Eyre 1845, 2:223).
- 34 Although, in detail, not all the regulated battles followed the same course, they all drew from the same repertoire and obeyed the same general spirit. As mentioned, the regulation prohibited the use of surprise. Each side faced the other, usually in a single line, at a distance adjusted to the effective range of their throwing weapons (about thirty meters). Almost always, the first thing they did was to insult each other, listing their grievances. Hostilities were then triggered either by a formal signal or spontaneously, once tempers were sufficiently heated. Fighting almost invariably began with throwing weapons: spears and boomerangs. After a while, either people gradually got closer or they ran out of ammunition, they would come to hand-to-hand combat. The first serious wounds, or even one or two deaths, usually meant the cessation of hostilities. However, if the fight was fierce, a truce had to be firmly signaled to the protagonists. This intervention was sometimes achieved by a third group whose presence was precisely intended to ensure compliance with the rules. More often, however, it was the elders and the women who intervened, the latter interposing themselves between the combatants or surrounding them. In principle, once the fighting was over, the quarrel was settled. The fighters who fought hard just minutes before would then become the best friends in the world again, helping to heal his opponents’ wounds. Sometimes, however, the outcome was not as desired, or there were more casualties than one was prepared to accept: the fight, which was supposed to put an end to resentment, had sown the seeds for future engagements.
- 35 Regulated battles were often introduced or concluded with duels. This articulation between both forms is not surprising, given that the regulated battle can be characterized as a collective duel. The concern for symmetry certainly did not go that far: it was possible, and even probable, that the camps did not strictly align the same number of combatants. However, one will look in vain for sources indicating a marked disproportion of the forces in presence. Moderation is also evident. If the absence of lethality is less strict than in a duel, it is for reasons largely due to circumstances: in a combat which is partly at a distance and where numerous projectiles fly in all directions, serious injury, even death, is less unlikely than in a duel which takes place, as it were, under high public surveillance. The limitation of lethality was nevertheless

inscribed in the very foundations of the regulated battle where, by mutual agreement, the fighting ceased at the first serious damage.

1.5 Judiciary assassination

- 36 Judiciary assassination constitutes premeditated killing in conditions that normally offer no way out for the victim. Deaths resulting from the above-mentioned procedures, whether a duel, a penalty challenge or a regulated battle, are therefore excluded from this category.
- 37 In contrast to Kelly (2000), for example, it should be emphasized that judiciary assassination is not reduced to the “death penalty” per se. Death penalty is only imposed for crimes against the community (the two typical Australian motives being incest and religious misconduct). But judiciary assassination may also be carried out by a specific group on a private basis, as a compensation. In the same way that financial damages paid to the civil party are not fines, it is therefore imperative, without abusing the legal categories, to distinguish a murder carried out in this context from the death penalty.
- 38 The few specific reports on death penalty in Australia indicate that it was inflicted under conditions similar to corporal punishment. On the eastern side of Cape York, a heavy sword club was struck on the skull of the victim (Roth 1906, 5). On the west coast of the continent, a spear was plunged into the back of the thigh, but, unlike in ordinary corporal punishment, it was aimed at the femoral artery instead of avoiding it (Roth 1902, 55–56).
- 39 Compensation killings, on the other hand, were most often committed by specially constituted revenge groups, an institution which in many tribes bore a specific name: the *atninga* of the Aranda, the *pinya* of the Dieri, the *warmala* of the Western Desert, the *kwampi* of the Tiwi, the *pirrimbir* of southeastern New South Wales, etc. Sometimes what is named is not the group itself but the typical mode of combat that was associated with it, namely a surprise attack, usually carried out in the early hours of the morning: thus the *maringo* identified by Warner in Arnhem Land.
- 40 In terms of classification, this procedure is obviously non-moderated, inasmuch as its purpose is to inflict death. Its asymmetrical character clearly stems from the fact that the victim is always unarmed, and most often attacked by surprise. Here again, the only difficulty lies in the need to distinguish between the different variants with regard to designation. It may be personal, when the killing is aimed at a particular individual, or synecdochical – the target being killed just because he or she belongs to the group that is to be punished, as in a famous example reported by Spencer and Gillen (1899, 490–92). It should be remembered that in this case, if one kills anyone, one does not kill any number of people: an action whose purpose would be to kill as many members of a given group as possible would fall into the category of plenary designation.
- 41 Self-designated killing includes both the death penalty and compensatory killing. In the case of synecdochic designation, one can speak of assassination by equivalence: the target is chosen because it belongs to a group within which the lives, from the point of view of the blood debt that the execution is supposed to settle, have the same value.

Rare or complex forms

2.1 Makarata

- 42 The *makarata*, described in particular by Warner for Arnhem Land, follows a murder, and imposes a meeting between the clan of the victim and that of the culprits. The procedure then takes place in three distinct phases. In the first phase, the alleged instigators must run in a zigzag pattern, avoiding the spears of the victim's clan – which are, however, devoid of stone points, in order to limit their dangerousness. Then it is the turn of the assassins themselves to undergo the same procedure. Although the elders of each side try to keep calm and urge the shooters not to kill, this time the spears used are equipped with their heads. Finally, after a dance, the murderers are given corporal punishment in the classic form of a spear thrust into the upper thigh. Warner points out that this is the ideal form of the *makarata*. In practice, things could get out of hand at any time and turn into a free-for-all.
- 43 It is difficult to establish to what extent this procedure was specific to the eastern part of Arnhem Land. Although no ethnographer has clearly reported it out of this region, some episodes that occurred elsewhere seem to be related to it (Hodgkinson 1845, 240; Smyth 1876, 1:158–59).
- 44 Both in terms of its asymmetry and moderation, the *makarata* is clearly a variation of the classic combination of penalty challenge and corporal punishment. Although it involves several individuals, its designation is personal: only men who bear an individual responsibility for the crime are subject to it.

2.2 Collective penalty challenge

- 45 Judging by the paucity of occurrences in ethnographic sources, this was probably a rare form.
- 46 A synecdochic designation is reported by the Aborigine Gaiarbau, concerning the intertribal organization that included the Jinibara of Queensland. In the event of serious misconduct by one tribe against another, the intertribal council organized a particularly dangerous penalty test, to be undergone by a representative of the offending group designated by the latter (Winterbotham 1957, 61).
- 47 As for a version involving an entire group, one finds mention of it concerning the Tiwi of Melville and Bathurst Islands. The proceedings begin with a sequence in which the Bathurst fighters, while receiving projectiles from the opposing side, “did not throw weapons but merely defended themselves. They accepted a mild form of punishment” (Pilling 1958, 267). The fact that this initial phase was followed by an ordinary regulated battle irresistibly evokes the collective version of the combination of corporal punishment followed by a duel encountered earlier.

Vindictory wars

2.1 War as a judicial process

- 48 In addition to these first forms, there were, to begin with, cases of particularly deadly collective confrontations, whose existence beyond all reasonable doubt in traditional Aboriginal Australia is demonstrated by a recently published database ¹. Should some of these episodes be referred to as “wars”? Despite a lively debate, the definition of this term has never led to a consensus. In any case, and beyond the terminological aspects, clashes that could sometimes result in tens of fatalities clearly fall outside the scope of regulated battle or judiciary assassination. Another major lesson from this survey is that these conflicts were mostly, if not exclusively, motivated by judicial reasons: they were commonly fought to right a wrong, especially a real or alleged murders, and almost never to seize resources or conquer territory. Even the abduction of women, so banal at the individual level, does not seem to have been the aim of large-scale operations. This close proximity between warfare and justice in Aboriginal Australia has already been noted several times (Hodgkinson 1845, 236; Wheeler 1910, 130; Berndt and Berndt [1964] 1992, 356), and requires that these events be included in the general classification.

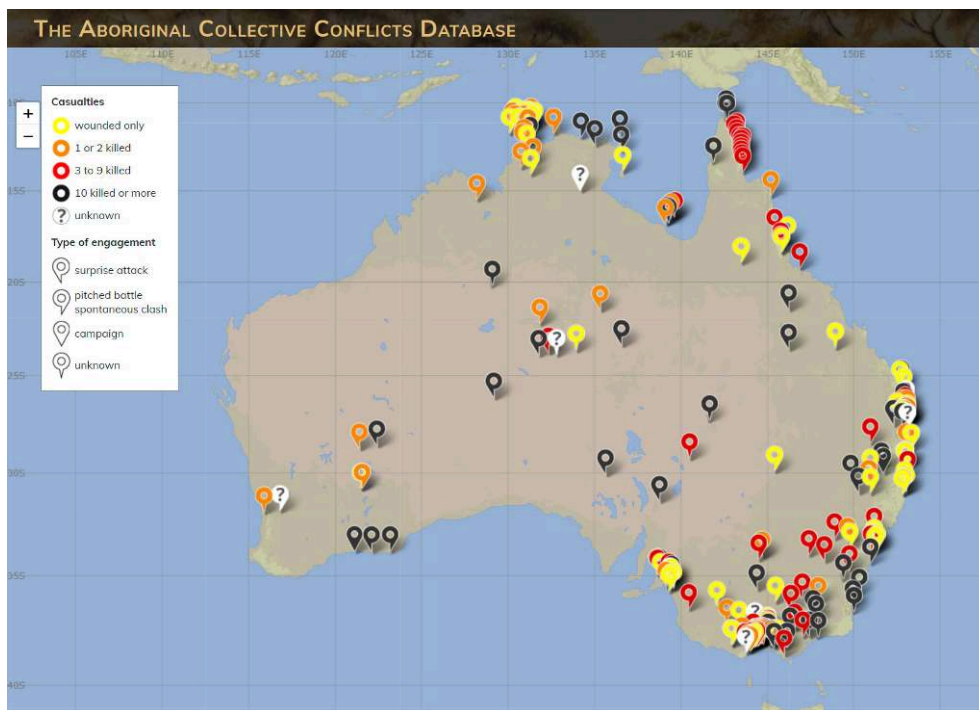


FIGURE 1: The map visualization of the database. Black markers represent clashes that resulted in ten or more deaths

- 49 Such episodes are obviously collective and non-moderated procedures. However, they could clearly be of various nature in terms of symmetry. In most cases, at least one of the protagonists made every effort to establish the most unfavorable balance of power possible for the adversary before the battle. The essential factor was surprise: raids and ambushes were the preferred forms of asymmetrical combat and represent the bulk of the clashes causing the most casualties. But there are also a few particularly deadly encounters which followed a prior agreement to fight, and represent therefore a

somewhat different process. Among them, the specific case of the *gaingar* of eastern Arnhem Land is the best known, thanks to the detailed description left by Warner.

2.2 Gaingar

- 50 From the point of view of symmetry, the *gaingar* raises a particular difficulty. The combat that characterizes it occurs as a result of a formal procedure, involving the exchange of specific objects marking mutual acceptance. Both troops then meet at a time and place agreed upon in advance, midway between their respective territories. However, in this confrontation, “trickery is used if possible” (Warner [1937] 1969, 163), and in one of the occurrences mentioned by this author, while respecting the agreed battlefield, one side had ambushed the other, inflicting heavy losses.
- 51 In terms of symmetry, the *gaingar* is thus characterized very differently depending on whether one considers its military phase alone or the whole procedure. The military phase is clearly asymmetrical – at least, it seeks to be: if one side can secure a decisive advantage, including through deception, it will not miss the opportunity. Yet this asymmetry is embedded in an overall procedure that is perfectly – one might be tempted to say “demonstratively” – symmetrical. Warner unfortunately does not specify what happened when a clan declined the challenge and did not return the two ceremonial spears. Everything suggests that in such cases, the *gaingar* did not take place. This procedure therefore opened the door to a situation in which all blows were permitted, but only on the basis of a will stated by both parties. In this sense, the *gaingar* was a declaration of war, but of a type much more constraining than those of the modern era, which are generally unilateral and do not care about the consent of the enemy.
- 52 Insofar as diplomatic procedure conditioned military operations, this is the relevant level for the classification of the *gaingar*, which must therefore be regarded as a particular form of collective, non-moderated and symmetrical procedure.

2.3 Lethal pitched battle

- 53 More generally, the possibility of symmetrical collective and unmoderated fighting arises, therefore, in which no element of surprise had been implemented. Such a situation, in theory, can result from two variants.
- 54 A first eventuality is that, as in the *gaingar*, a scheduled pitched battle has been planned with the common prospect of fighting without restraint, while refraining from cunning. Such an eventuality necessarily presupposes an explicit prior agreement between the parties, in contrast to our own world, where two armed troops facing do not need to tell each other in advance that they intend to inflict maximum losses on each other. The reason is that between two state armies, except in very specific situations, the concept of a regulated battle does not exist. Maximum violence is in a sense the default option in the confrontation between two military forces. In aboriginal society, it was the opposite: if one fought without using surprise, it was always, implicitly, within the framework of a regulated violence – it is precisely to remove this brake that the *gaingar* had to be subject to a double prior acceptance.
- 55 The other theoretical possibility is that of unpremeditated deregulation. It would correspond to any procedure started in regulated forms – one thinks obviously of an

ordinary pitched battle, but it can also be a duel or a penalty challenge – where, because of an accident, a wrongful act or for any other reason, the tempers would flare up and the situation would get out of hand. An additional difficulty is that between the regulated and unregulated battle lies a zone of indeterminacy that blurs the line of demarcation. The former is supposed to stop at the first serious injury, while the latter has, in theory, no other limit than the ability or the willingness of the victors to push their advantage to the complete extermination of the enemy. In reality, however, some battles have a heavier than normal toll without appearing to have gotten out of hand.

- 56 On all these points, the ethnographic data provide only partial insight. Nevertheless, everything indicates that the degeneration of regulated battles remained exceptional. Only one episode in our database seems to illustrate this case: again, it is a situation where one of the two camps had premeditated to pursue its adversary during his retreat: it is in fact a case of the use of surprise, and therefore of asymmetry (Fison and Howitt 1880, 218–20). There are still a few cases of clashes that resulted in a fairly high number of victims, without it being possible to decide in favour of a real desire to inflict maximum losses. The scant indications suggest that, as in a *gaingar*, this violence had been planned in advance by both sides (Harvie 1927; Anonymous 1929; Struilly 1863, 133–39). In the same vein are the twelve conflicts reported by Pelletier (Pelletier, Merland, and Pécot 2002, 87–91). Although these battles each time killed only “a few” of the participants, they are notable for the fact that the wounded were systematically killed. This custom, in addition to significantly increasing the toll compared to the norm, contrasts with the general practice of taking care of the wounded, both friend and foe, as soon as the fighting is interrupted. There is therefore an intermediate form of lethality, which, however, seems to be enshrined in custom and therefore previously and tacitly accepted by the protagonists. This does not in any way prevent these conflicts from following the general rule according to which they settle disputes and restore – provisionally – good relations: once the battle is over, the bodies in the enemy are returned to their families (on this point, see also Basedow 1925, 188).

A graphic visualization

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

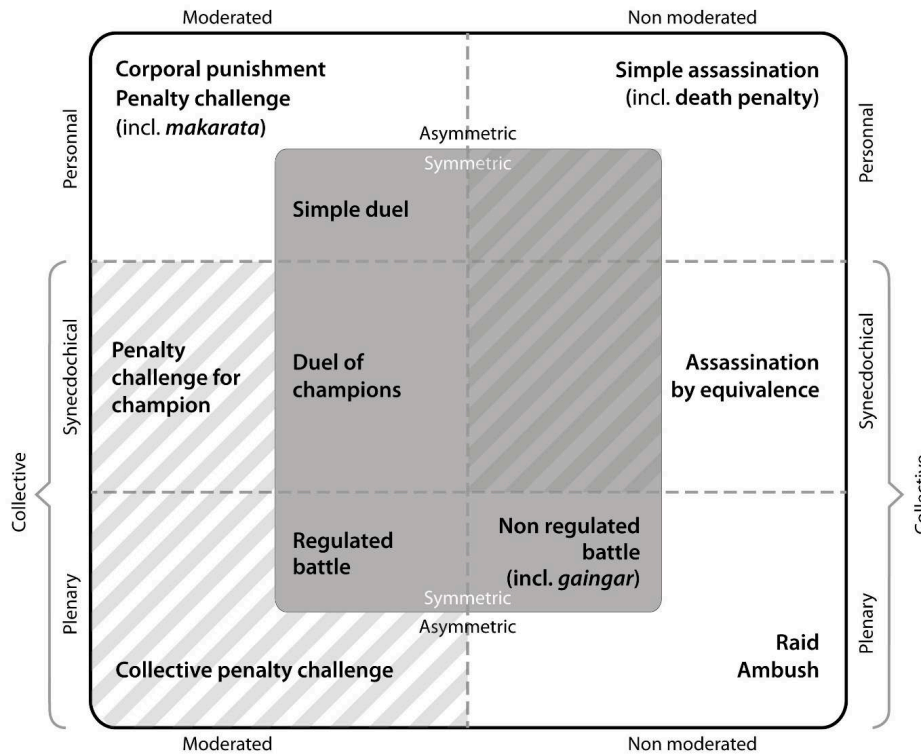


FIGURE 2: Diagram of the aboriginal judicial procedures. Hatchings indicate rare or absent procedures.

From procedures forms to law

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

3.1 Designation

59 In a somewhat trivial way, the personal or collective nature of the procedure is a direct echo of that of the object of the grievance: in other words, personal designation indicates personal responsibility, and collective designation collective responsibility. The intermediate situation of synecdochical designation corresponds to a collective responsibility marked by a willingness to limit the consequences of the procedure – not in its effects, but in its scope. In the case of symmetry, and thus of the duel of champions, this will is shared by both parties. In the case of the compensation killing, it emanates from the sole accusing party.

- 60 This criterion thus marks a double alternative: between personal and collective responsibility and, in this case, between synecdochical and plenary designation. The former underlines the difficulty, in Australia, of establishing a strict demarcation between the two terms. Admittedly, the procedures were able to express the fact that collective structures, be they clans or local groups, could be formally involved in disputes or not. But contrary to our own law, Australian custom did not establish a strict boundary between the areas of private and collective responsibility. Fundamentally, the transition from one to the other was almost imperceptible, by a simple transformation from quantity to quality. Collective guilt, in particular, could be established on the basis of an accumulation of individual guilt, or individual guilt that benefited from a level of complicity that was considered too high. If a man stole a woman from another group, the procedure, a priori, was aimed at him personally. But whether he received a little too much support from his group, or whether these thefts had multiplied, and the victims were all the more inclined to attribute responsibility not to individuals but to their group as a whole. In another context, once hostility had taken hold, any individual act became a potential manifestation of that hostility and, as such, liable to be sanctioned by collective action. Individual responsibilities could therefore easily coagulate into collective responsibility, just as, conversely, collective responsibility could just as easily disintegrate into a series of individual responsibilities: this explains, in particular, the fluidity observed between personal duels, duels of champions and regulated battles.
- 61 An essential element must be stressed: among the mechanisms that could bring about a shift from individual to collective responsibility, the attitude of the accused group was as important a factor as that of the accusing one. In situations that were not marked by a pre-existing deep-seated enmity, it can be assumed that judicial actions were a priori aimed at individuals. It was only when, for one reason or another, the group of accused persons stood in solidarity with them and asserted its readiness to defend their cause with weapons in hand that the object of the legal action changed in level. In this sense, it can be said that the personal or collective nature of the judicial action stemmed from the absence or presence of solidarity (real or presumed) by the group of defendants with those who were accused.
- 62 Regarding the choice of the synecdochical rather than plenary designation, it proceeded, as has been said, from the desire to circumscribe the effects of the proceedings. This is particularly noticeable in the case of compensatory killing: whatever happens, the group of the culprit is held responsible, and therefore jointly liable for the crime. By opting for the synecdochical designation, however, one limits in advance the number of lives that will be taken to extinguish the blood debt. By choosing the plenary designation, on the contrary, one frees oneself from this limit, considering that the group as a whole must atone without counting for the fault committed.

3.2 Symmetry

- 63 The symmetry criterion differentiates between situations where the procedure pronounces a judgment and those where it applies a sanction. In other words, symmetry exists when one proposes to settle a dispute or, more simply, to dispel

animosity between the two parties involved. Asymmetry, on the other hand, occurs when guilt is previously established.

- 64 Determining whether symmetrical proceedings, insofar as they are accompanied by physical damage, entail or not the sanction of the judgment they pronounce is not an easy question, and it is doubtful whether a unilateral answer can be given. In duels, for example, some tribes clearly admitted that the victor makes non-lethal, but not symbolic, injuries on the vanquished. Elsewhere, as we have seen, the duel was subject to a very strong constraint of balancing the damage, and the winner could not have finished without the defeated, or his close relatives, causing him the same damage as that which he himself had inflicted. It does not appear that such a concern ever prevailed in pitched battles, whether regulated or lethal. The most reasonable hypothesis therefore seems to be that in symmetrical procedures, punishment was not the central element. Sometimes explicitly banned, in other cases it was only a by-product of the litigation process, and quarrels were expected to be settled as a result of the fighting itself. From this stemmed the possibility that a symmetrical fight which, from the point of view of those who had lost it, had had consequences too severe for what was permissible, might feed new resentments.
- 65 Another aspect is that, at least in non-lethal cases, asymmetrical procedures presupposed the acquiescence of the person subjected to them. Accepting to undergo the penalty challenge was thus tantamount to a public admission of guilt. This is even the case when it was inflicted by a *pirrimbir* group, and its outcome was therefore certain death; Mathews states that when the avengers claim their future victim, “none of his fellow tribesmen interfere, because they are probably all acquainted with the facts of his having shed the blood of some man in another neighbouring camp, and retributive justice must take its course” (Mathews 1904a, 250). Conversely, those who refused to acknowledge their guilt tried to escape the procedure, or did so only with great reluctance. Howitt relates how, around 1850, at a meeting on the banks of the Tambo River in Victoria, a man named Bunbra, accused of causing the death of another Aboriginal man by sorcery, was sentenced to a penalty challenge. Placed in front of the executioners, he again protested his innocence: “I want to tell you that I did not hurt that poor fellow”, but was nevertheless urged to accept his fate. He dodged most of the boomerangs, but a tapered stick pierced his thigh. He pulled it out and sent it back to its senders, a gesture which, while expressing his refusal to admit his guilt, was a serious breach of the rule. The women then rushed between the two parties and calmed things down (1904, 347–48).

3.3 Moderation

- 66 Of the three criteria, that of moderation of lethality is certainly the one whose interpretation is the least trivial, while at the same time addressing the most crucial issues. In the first instance, as befits a justice based on compensation, the severity of the sanctions is directly related to the seriousness of the act that motivates them: “an eye for an eye, a tooth for a tooth” is the principle from which aboriginal justice proceeds, as has been said enough for two centuries. A minor damage will therefore be compensated by a minor damage, and murder by murder. Many facts, however, refuse to comply with this alleged rule. Either – frequently – the injured party consents, in one way or another, to be satisfied with compensation which is much lower than the fault.

Typically, instead of requiring a homicide to be avenged by the death of the perpetrator, one will accept that he submits to a penalty challenge or a corporal punishment in which blood will probably flow, but which will not take his life. Or – more rarely – that the judicial act more or less goes beyond the initial fault, real or supposed, and that the compensation proves, in fact, to be an overbid.

- 67 These frequent deviations from the principle of equivalent compensation are to be interpreted as the application of a second principle which has been much less noticed than the first and which we propose to call the principle of modulation. It consists in the fact that compensation was attenuated, or on the contrary, aggravated, depending on the social relations prevailing between the two parties. Whether they were bound by strong social proximity and whether they maintained friendly relations, then a damage was likely to be compensated by a lesser damage: the bloodiest version of a procedure was renounced in order to apply its moderate equivalent, opting for a penalty challenge rather than an assassination and for a regulated battle rather than a free one. Conversely, whether the dispute was between distant or hostile groups (in Australia, the two terms tended to be synonymous), compensation applied in full or even exceeded the original damage; and for actual or alleged murder, a family or even an entire group was attacked.
- 68 Although it has not been expressed in the general form just stated, this correlation between social distance and modulation of procedures has frequently been noted. Curr wrote that serious injury or murder resulted in regulated battles only between tribes that were “associated (...), or at least (...) pretty well acquainted” (1886, 1:84). Eyre, speaking of the need to avenge the deaths, real or supposed, in encounters with other tribes, said it was “regulated by the desire of the injured tribe to preserve amicable relations with the other or the reverse” ([1845] 2014). Mathews noted that the *pirrimbir* revenge expedition was launched when death was due to the action “of a hostile tribe” (1904b, 239); Hart and Pilling expressed themselves in the same terms, writing that its Tiwi equivalent, the *kwampi*, “allowed punishment of a nonlocal hostile party to occur” ([1963] 2001, 95). Foelsche, referring to Arnhem Land, explained that murder committed by a member of the same tribe was punishable by corporal punishment, and that care was taken to ensure that it was not lethal. By contrast, when the crime was committed by someone from another tribe, a revenge expedition was organized. If the culprit was not caught and none of his close relatives were executed in his place, the principle of modulation would take effect over time, and the matter would eventually be settled by a battle fought with light spears, “without any serious consequences, after which the tribes are on friendly terms again” (Foelsche 1895, 95). But it was probably Fison and Howitt who, on several occasions, provided the most detailed evidence on this point. Referring to the Kurnai in Gippsland, they stressed the difference between the treatment of strangers (indifferently grouped under the infamous name of Brajerak), whose lives could and should be taken, and the treatment of other Kurnai. Within the tribe (or confederation of tribes, the exact structure of this network being debated), the only confrontations that could occur were “the set fights which have been so often described as wars” – that is, what we called here regulated battles (Fison 1890, 51). In other passages, the attenuation of compensation via the principle of modulation is even more explicit:

In the case of a member of the same tribe, a blood feud is not necessarily to the death, but may be expiated by his undergoing a certain ordeal. (...) In the case of members of an alien tribe the blood feud is fatal, and cannot be satisfied but by the

death of the offender; and, further, that the feud attaches not only to the individual, but also to the whole group of which he is a member (Fison and Howitt 1880, 220–21).

Remark on war and feud

- 69 The respective definitions of war and feud have been the subject of decades of extensive discussion, which never led to a consensual solution. Actually, and without getting into too rich a debate here, neither the military objectives, nor the “political” nature of the social units involved, nor their size, provide a satisfactory criterion. Boulestin (2019) has just recently proposed a new and promising outcome to this old problem, which identifies the fundamental difference between feud and war in the number of casualties targeted by operations. In the feud, this number is specified and corresponds to the will to balance the losses previously suffered – in other words, to pay off a debt. In war, there is no such count: operations are a priori unlimited.
- 70 While having none of the drawbacks of other approaches, such a definition is perfectly operational: it makes it possible to clearly discern the two phenomena, considering them as mutually exclusive. Moreover, it is remarkably linked to the classification of legal proceedings that has just been proposed on the basis of Australian data.
- 71 Battles that fall within the realm of war clearly correspond to the zone characterized by the absence of moderation – one fights to kill – and a collective designation – one targets a group as such: in other words, no a priori restraint is placed on the number of victims one seeks to inflict on the adversary. The most normal form of such a confrontation is asymmetry, in these raids and ambushes where the effect of surprise is sought. But in some specific contexts, social rules mean that such fighting can occur on the basis of a prior declaration and take the form of *gaingar*, or a similar form.
- 72 Feud involves procedure localized in the non-moderated and asymmetrical areas, with either a personal or a synecdochical designation. It should be noted, however, that while any feud necessarily entails such procedures, the reverse is not true: these, in themselves, do not necessarily presuppose the character of equilibrium which, in Boulestin’s definition, constitutes a central element of the feud. It can nevertheless be argued that in spirit, if not in letter, a procedure which targets a specified number of victims, but which goes beyond the rebalancing of losses, constitutes a serious step in the direction of outright war.
- 73 All of this also provides a closer insight into the nature of the intimate relationship between feud and vindictive warfare, so often highlighted for Aboriginal Australia (Wheeler 1910, 130; Hodgkinson 1845, 236; Berndt and Berndt [1964] 1992, 356). In other words, a feud is a war of limited intensity, not in terms of damage to the aimed individual, but in terms of damage to the aimed group; that is, it is a war in which voluntarily only a small number of adversaries are killed– the number necessary to pay off debts. Conversely, the vindictory war is a feud without limits, whose operations no longer seek to restore any balance, but on the contrary, to break it definitively, by crushing, if not annihilating, the enemy.

Two concluding points

- 74 To begin with, we must try to explain the absence, or the great rarity, of procedures corresponding to four of the twelve possible locations of the classification. These four locations can be read two by two, as, on the one hand, non-moderated and non-collective duels and, on the other hand, non-personal penalty challenges (or corporal punishments).
- 75 This set represents a combination of opposite values of the three variables that can be seen, so to speak, as the two ends of the same club. For the same fundamental reasons, those values are difficult to reconcile. A symmetrical procedure marks a situation where guilt is not established. Its primary goal is far more to settle a dispute than to impose a sanction. If, moreover, it involves a small number of individuals, its progress can be easily monitored by the rest of the community. It would therefore make no sense, in such a context, for the outcome to be fatal. Conversely, an asymmetrical procedure directed against a group means that the group's collective guilt is considered to be firmly established. In such cases, the principle of modulation hardly plays its mitigating role: the mere fact that guilt has reached the collective level tends to indicate, in itself, a degree of animosity that is hardly compatible with the desire for appeasement that motivates the choice of moderate procedures. It is therefore logical that the corresponding positions in the classification are only very rarely occupied: they express contradictory combinations, not in the form of the procedures themselves, but in the significance of these combinations in social terms.
- 76 The second remark concerns the regional differences that may have prevailed, particularly regarding war. War seems to have been absent from certain areas, such as Bathurst and Melville Islands. Generally speaking, the relationship between social distance and the hostility that could prevail between two groups was not always correlated as directly as in the case of the Kurnai or the Victoria tribes, which are very well described in this aspect by Curr (Curr 1883, 246–47; 1886, 1:61–64). Among the Murgin of Arnhem Land, for example, the most violent conflicts did not occur between different tribes (Warner does not even allude to this possibility), but between clans of the same tribe and, more precisely, of the same moiety, insofar as, because of the structure of the matrimonial system, these were the ones who competed for women. These differences relate to the various configurations of local and social structures, in particular to the various kinship systems, and to the way in which they could favour or, on the contrary, hinder the collective cristallization of conflicts. This study is unfortunately very difficult, because of the shortcomings of our ethnological information.
- 77 At last, it would obviously be of the greatest interest to check the robustness of these results outside the Aboriginal world. A first question is to what extent this classification devised for the Australian continent remains valid for other societies without wealth, as defined by Testart (2005). To test this conjecture, the investigation should undoubtedly be pursued with the Inuit world, the most documented after Australia and, therefore, the most likely to provide enlightening information in the perspective of a broad reflection of comparative law. This comparative approach can also be extended far beyond, particularly to modern law. When it is subjected to the same analytical grid, several striking differences become immediately apparent. To begin with, symmetrical procedures have been completely banned from our law. The

reason for this is trivial and is due to the existence of the State. This institution which, according to a famous formula, claims a monopoly on the legitimate use of violence, seeks everywhere to prevent any form of legal procedure that directly confronts the involved parties. The other major difference lies both in the disappearance of any form of collective designation (whether plenary or synecdochical) and in the invention of the legal person, which allows justice to target a collective as such, independently of its members. To what extent is this development general to State societies, or does it concern only some of them? This question, among many others, will have to be the subject of further research.

NOTES

1. <https://cdarmangeat.ghes.univ-paris-diderot.fr/australia/index.php>.
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ABSTRACTS

The various procedures that constitute the repertoire of traditional Australian Aboriginal justice can be organized, on the formal level, around three characters, that is: symmetry, mode of designation and moderation. All three criteria correspond to social dimensions. Asymmetry expresses guilt, while symmetry expresses a situation where it has not been acknowledged. The mode of designation reflects both the individual or collective nature of the accused party and the willingness, if necessary, to circumscribe the effects of the legal proceedings. Moderation, finally, highlights a general principle of Australian law, that of modulation: according to it, the theoretically strict compensation for damages (“an eye for an eye, a tooth for a tooth”) is either lightened – in particular, towards a moderate procedure – or, on the contrary, aggravated, depending on the social relations prevailing between both parties. This approach also makes it possible to understand how war, which in Australia is mainly, if not exclusively, of a judicial nature, derives from the feud, of which it is an unbridled modality.

INDEX

Keywords: Australia, Law, Justice, feud, Warfare

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