

“AN AGREEMENT SUPERSEDES THE LAW, AND AMICABLE SETTLEMENT A COURT JUDGEMENT” DISPUTES AND LITIGATION IN MEDIEVAL EUROPE*

SUSUMU YAMAUCHI

Introduction

Defining the bounds of medieval Europe, both in time and space is an almost impossible task, and addressing the issues of disputes and litigation within that framework is a very broad topic defying generalities. Nonetheless, recent work in this field is stimulating, and it has an appeal that transcends medieval European history. This paper summarizes the issue by clarifying its relation to order.

In this paper, ‘medieval’ is not used to refer to the period spanning from 500 to 1500 C. E., but a period that has little direct bearing on modern or contemporary Europe: a relatively primitive time in which a social system ruled based on tribal relations and kinship, a social system that was considerably advanced, beginning around the 6th century and ending around the 12th.

Although there is no sudden delineation marking the end of the Middle Ages, the “12th-Century Renaissance”¹ marked the beginning of a long spiritual and systemic transition to a new social system, as pointed out by George Duby and Aaron Gurevich. The issue of litigation, of course, is relevant to the turning point in Europe, that is, the formation of a more modern Europe. It is from this perspective that I examine disputes and litigation in medieval Europe.

I. Iudicium Dei: Judgement of God

According to van Caenegem, in the 12th century, the methods of (legal) proof that had ruled for years began to face a crisis. That danger was sufficient to overturn and eliminate the method of proving guilt or innocence in use until then. The old system might be called primitive, irrational, or mystical. The highest authority was held by the judgement of God, oaths with oath-helpers, and other such methods for asserting who is right and who is wrong, or who is innocent and who is guilty.²

* This article is based on my article “Doi wa Houritsu ni, Wakai wa Hanketsu ni Masaru” in *Rekishigakukenkai, Hunso to Soshō no Bunkashi*, Tokyo, 2000. This English version has also received financial support of Hitotsubashi University’s 21st Century COE Programme, “The Centre for New European Research — Conflict and Settlement”.

¹ Charles Homer Haskins, *Renaissance of the Twelfth Century*, Harvard University Press, 1927 (reprint 1979).

² R. van Caenegem, *The Law of Evidence in the Twelfth Century, Proceedings of the Second International Congress of Medieval Canon Law*, Vatican, 1965. Cf. Kiyonori Takahashi, “‘Chuusei-toshi versus Shinpan’ Ron to Sono Parameters,” in *Hougaku Ronshuu* 11-1, p.173ff.

The term “*iudicium Dei*” refers to a physical test, accompanied by a ritual, by which God was to decide guilt or innocence. In general, the accused swore an oath, and then had his or her life or body beset with danger. The intervention of God, after waiting for supernatural results, would make clear the right or wrong of the accused. Some of these methods are also known as “trial by ordeal”. There were several types: a trial by hot water, where the accused was made to put his or her hand in boiling water, and the degree of burn would determine his or her fate; trial by fire, where the accused had to hold a red-hot piece of iron and walk a certain distance, after which guilt or innocence was likewise determined by the degree of burn or recovery; trial by cold water, where the accused was bound and thrown into water, in which case innocence was proved by sinking and guilt by floating (based on the logic that exorcised water would accept the innocent and reject the guilty); a two party ordeal by the cross where both parties had to spread their hands up before a cross, and the first one to lower theirs would lose; trial by combat, where after swearing in court, the armed parties dueled, with the victor seen as right.

“Compurgation,” accompanied by “oath-helpers” (compurgators), was a method whereby an accused claiming innocence would wager an oath to God, and the oath itself, if successful, would show that he was right and innocent. Compurgators were people who would swear on the validity of the accused person’s oath itself, regardless of its content, wagering their own life and reputation as collateral. According to H. J. Berman they might swear: “By the Lord, the oath is clean and unperjured [the complaint or the defendant] has sworn.”³ Generally speaking, in the case of freepersons in medieval Europe, a large number of disputes were settled by compurgation, and if either the person’s status or the nature of the case did not permit, matters were solved by ordeals or judicial duels. There is a great variety of evidence of cases with various particulars, and the above description presents nothing more than a general picture.

That methods such as divine judgement and oaths enjoyed such a high position attests to just how deeply rooted the basis of these methods were in the hearts of the people of medieval Europe. According to Gurevich, while the laws of medieval Europe were synonymous with fairness, the intention was not to seek the “truth” in the modern sense of the word.

What was “true” was what was “proved” in court, by means of oaths and sworn statements and the rigorous observance of all the ceremonial steps prescribed by custom. Credence was placed on oaths, rituals, trial by ordeal or single combat rather than in material proof or evidence, on the grounds that truth inheres in the oath, and a solemn act of this nature cannot be carried out against the will of God.⁴

If medieval Europeans did think as Gurevich claims, then as van Caenegem notes, oaths, ordeals, and judicial duels cannot be considered completely irrational. The reason is that for the people of the time, such a system matched their understanding of the world around them, and to that extent it can be considered rational. American historian Peter Brown points out that ordeals were not irrational because, in terms of function, they were in conformity with the social system, or the system of order, at the time.

³ H. J. Berman, *Law and Revolution*, Cambridge (Massachusetts), 1983, p.58.

⁴ Aaron Gurevich, *Categories of Medieval Culture*, G. L. Campbell, (tr.), Routledge & Kegan Paul, 1985, p.175. (Translated into Japanese by Kaori Kawabata, Shigeo Kurihara) *Chuusei Bunka no Category*, Iwanami Shoten, 1992, p.257.

This theory is of great interest, but before exploring it in detail, for explanatory purposes I would like to take up one famous case involving an ordeal.

It is recorded in the memoirs (1115) of the abbot Guibert of Nogent (c.1053-1114) detailing an incident of heresy that occurred in Soissons, outside Nogent. According to Guibert, after the impious Count of Soissons died, the people who had loved the wicked man were accused of heresy. The representative figure was a peasant named Clement who lived with his brother in a village close to Soissons. Clement and his brother were sent to the Bishop Lisiard of Soissons as suspected heretics and questioned. The two were accused of participating in lewd congregations outside the church, and it was rumored by those around them that they were heretics.

Both answered all questions appropriately, but neither denied having participated in the congregations. However, Guibert says, "But since such people typically deny all charges and then seduce the hearts of simple-minded people in secret, they were sentenced to the ordeal of exorcised water."

Guibert himself, who was also present, questioned the two, but he was unable to find proof of heresy in their answers. Finally, he remembered a passage by Augustine, which he applied to the two. The verse mentions what the Priscillianists had formerly agreed to, which was "swear, perjure yourself, but don't give away the secret." Guibert told the bishop, "Since the witnesses who heard them profess this doctrine are not here, lead them to the judgement that has been prepared."

The suspects were then subjected to the ordeal of consecrated water. If they were truly guilty, they would be rejected by the water and should float. Guibert goes on to describe the procedure in some detail.

So the bishop celebrated Mass, and the heretics received the sacrament from his hand as he said: "May the body and blood of the Lord try you this day." Afterward, this most holy bishop headed for the waters, along with Peter the archdeacon, a man of unshakable faith who had rejected the heretics' request not to be submitted to the ordeal. With many tears the bishop recited the litany and then proceeded to the exorcism, after which the accused swore they had never believed or taught anything contrary to our faith. Thrown into a vat of water, Clement stayed afloat like a piece of straw. Seeing this the whole assembly went rapturous with joy. It should be added that this test had drawn such a crowd, of both sexes, that no one present could remember ever having seen anything like it. Clement's companion confessed his error but without expressing any compunction; and with his convicted brother he was thrown into chains.⁵

The narrative continues. The bishop and Guibert left to consult with the Council of Beauvais concerning what should be done with the two. "But in the meantime the faithful people, fearing the weakness of the clergy, ran to the prison, forced it open, and burned the heretics on a large pyre they had lit outside the city." The pious abbot, however, remarks, "Thus the people of God, fearing the spread of this cancer, took the matter of justice into their own zealous hands."⁶

⁵ Ven. Guibertus, *De vita sua*, in: J. P. Migne, *Patrologiae Cursus Completus*, t.CLVI. Parisiis, 1880, p.952. *A Monk's Confession: Memoirs of Guibert of Nogent*, Archambault, Paul J. (tr.), Pennsylvania State University Press, 1996, p.197ff.

⁶ *Ibid.*

There are several significant points to Guibert's story: the fact that heretical faiths are at issue, that before the ordeal the bishop performs an exorcism, that there are many spectators or trial participants, and that they cheer and furthermore conduct acts of vigilantism. We should also note the underlying context in which this trial takes place: a small agricultural village on the outskirts of Soissons.

To return to the topic at hand, Peter Brown considers this amalgamation of factors, i.e. a ceremony, a crowd of spectators, and a small community, to be precisely the key to interpreting the ordeal. That is to say, in Brown's view, the ordeal cannot be discounted as a savage, irrational or barbaric system. Neither is the performance of a ritual due simply to superstition.

Brown poses the following question: exactly who is it that is satisfied by the ceremony? Until the 12th century, it was small, face-to-face groups, i.e. kin groups. The extended kin group is the primary unit of society, and what people fervently tried to protect was the consanguineous social order based on these kin groups. Safety and protection depended on the strong bonds of clans and communities. In such a society harmony among members was necessary, and the condition for this harmony was consensus. The ordeal was nothing more or less than a useful method of gaining consensus.

Medieval society was violent. It was a world in which once a dispute arose, it often led to an endless cycle of revenge and feuds. There was no authority with the power of enforcement that was able to control disputes or pass judgement. This is where "God," whose power transcended the bonds of blood, entered the picture. Entrusting the verdict to God was an effective means of restoring peace, by rising above individual interests, where both parties were able to save face.⁷

Ordeals, for that reason, were a form of spectacle, rituals in which all the members of the community could participate toward restoring or constructing peace. In that sense, the inaccuracy in the judgements was not a flaw, but rather a merit. The standards by which right and wrong were decided in ordeals, i.e. the degree of physical harm done by hot iron or water, seem opaque and irrational. The decisions made, however, were made by the participants in the trial, the spectators, or in other words, decisions were according to the sentiments of the community.

Let us again take up the example of Soissons. An unprecedented number of men and women gathered, notorious heretics went through an exorcism, and the people of the crowd, seeing one of them "float like a piece of straw," were filled with tremendous joy. The participants had already given their answer. There were, no doubt, more than a few people who had participated in the heretical meetings. This, however, brought the ritual to a close. In the farming villages of northern France, which had even shown signs of schism, it was in this manner that peace and consensus were restored.

In short, for Brown, the principle of *iudicium Dei* was a unique but rational method of dispute resolution to build peace in the old European social systems. It may be that the general examples that Brown relies on involve disputes and their resolutions involving multiple parties that were on a more equal footing than the case I have illustrated above. In any case, however, in Brown's view of pre-12th century Europe, turning to God was the optimal method for resolving disputes in a manner that the concerned parties could agree upon. In a world in

⁷ Peter Brown, *Society and the Holy in Late Antiquity*, London, 1982, p.313.

which the holy and secular were not separate, this was rational.

They eventually would become separate as the secularization of European society proceeded. The building and keeping of peace would begin to be reinterpreted in this context, and *iudicium Dei* would fall out of favor. The disappearance of *iudicium Dei* would mean the replacement of God by something or someone else in the secular world. And for Brown, that something was the secular power of kings and lords, who would become largely responsible for law and order. It was the 12th century that saw this power emerge, and the 12th century that saw the "transition from consensus to authority."⁸

Brown's thesis is bold and convincing, and it makes a significant contribution to the historical study of *iudicium Dei*. But does this interpretation effectively deal with the problem of disputes and litigation in medieval Europe in general? Because of various problems in this theory, the answer has to be "no". Yet I use Brown's argument as a point of departure. This is because of its clarity and insight, and because it provides us with an important perspective for understanding the history of *iudicium Dei*.

I proceed with this examination, with Brown's theory in mind, by going into a more detailed example.

II. A Lawsuit at Fleury

A volume called *Miracles of St. Benedict* was written around the middle of the 9th century by Adrevald, an abbot of Fleury, a Benedictine monastery belonging to the Frankish kingdom. It records "legal conflicts" with other monasteries, making it a valuable resource of information on litigation. One of the more famous disputes occurs in 830 between the Abbey of St. Denis concerning the ownership of serfs.

The dispute was tried in court. Along with Jonas, Bishop of Orleans, and Donat, Count of Moulin, there were numerous "masters of the law" (*legum magistri*) and judges (*iudices*). Representatives of the king suggested that it would be appropriate to move the lawsuit (*placitum*) to Orleans because judges of Salic law may not pass a verdict on a religious matter that is under the rule of Roman law. When they arrived in Orleans, "The masters of the law and judges from both sides debated fervently. This is because legal experts from Orleans and Gatinais were lined up there." The parties refused to compromise, and in a court held by Genes, the Deputy Count, "It was suggested that the parties should provide one witness each, and after swearing an oath, they should settle the dispute by battling with shields and clubs."

This suggestion was not only in line with the customs of the time, but it also appears as if it was part of established law. Among the decrees issued in 816 by Louis the Pious (Emperor 814-840) is the following passage ordering witnesses to settle disputes through trial by combat.

When one person, for any reason, has a dispute with another, and when a witness of one of the parties is suspected of lying, the person may, with regard to the witness...bring forth another witness thought to be better. However, if witnesses from one side refuse to

⁸ *Ibid.*, p.324. In response to Brown's thesis, see Bartlett, Robert, *Trial by Fire and Water*, Clarendon Press, 1986 (Jpn. translation by Kisukey Ryuzaki, titled *Chuusei no Shinpan*, Shougakusha, 1993). Cf. Shirou Ishii, "Soto kara Mita Kukatachi," in *Soto kara Mita Nippon-hou*, University of Tokyo Press, 1997, p.385ff. Syunichi Akasaka, *Kami ni Tou*, Sagano Shoin, 1999, p.215ff.

compromise with the other and are to quarrel, then from among all of the witnesses, two witnesses, i.e. one from each side, shall be chosen, and those two must fight in the arena (*campus*) with shields and clubs. It shall become clear here which one was lying and which one followed the side of truth. The loser in battle, for his crime of perjury committed before the battle, shall have his left hand severed. However, another witness from that person's side shall be able to buy back (by paying a sum of money in Wergild) his left hand.⁹

According to Adrevald's account, this suggestion to settle the court battle between the two monasteries through trial by combat was "thought by all to be just and correct." "However," he continues, "a legal expert from Gatinais, who by all the laws of God was of a name more like a beast than a man, was bribed by gifts into defending the side of St. Denis. Fearing that the witness from their side would be rejected as a result of the battle, he proposed the following judgement: since serfs are assets of the church, deciding which witness is correct by combat is unjust. Rather, the representatives of both parties should divide the serfs between them."

This proposal was something that Deputy Count Genes agreed with. "He [the deputy count] ruled that rather than a trial by combat between the witnesses, it is more appropriate that the serfs be shared. The whole court deferred to his opinion." As a result, although Adrevald does not go into detail, the monastery at Fleury agreed to this and approved of the division of serfs, and a court settlement was reached.

Adrevald, however, was obviously dissatisfied with the result. "St. Benedict," he writes, "did not forget that judge and legislator who, with a beastliness appropriate to his name, wickedly suggested that the serfs be divided. For, after the serfs were divided this man received the judgement of God, and was robbed of his volubility and became unable to say a word."

Adrevald concludes his story with the following: being aware of the truth, the servants of the legal expert took him to an abbey of the Saint which he had so fiercely attacked, and for one month he stayed there and prayed for the grace of God. As a result, he regained his faculty of speech, but was never again able to correctly pronounce the name of St. Benedict.¹⁰

III. *Trial by Combat*

Adrevald believed that trial by combat was just and compliant with the will of God. For Adrevald, it was *iudicium Dei*, and God's verdict was absolute. For that reason, avoiding the trial and letting *people* solve the issue was unforgivable. Adrevald's conviction is clearly evident from the way in which he shows no hesitation in recording that the jurist who proposed the non-violent resolution offended St. Benedict and ended up losing his ability to speak. What is more, it is apparent that settling the matter by duel had gained the approval of all participants. Had the trial by combat occurred, it might fit Brown's thesis relatively well.

However, the results of a trial by combat are decisive, and there is little room for the

⁹ A. Boretivs (ed.), *MGH LL in quarto, legum sectio II*, t. I, Hannoverae, 1883, p.269.

¹⁰ O. Holder-Egger, *Ex Adrevaldi Floriacensis Miraculis S. Benedicti*, *MGH SS*, t. XV, p.1, Hannoverae, 1887, p. 490. Cf. Tomohisa Fujita's "Nanji no tame ni Kami ha Tatakaeri," in *Seiyō Chuusei-zō no Kakushin*, Kouichi Kabayama (Ed.), Tousui Shobo, 1995, p.323ff.

feelings or will of the community or court participants. Brown's thesis seems to be applicable only where the result of the "*iudicium Dei*" may be ambiguous or subjective, e.g. determining the scars of a burn, etc. This deals in part with the fact that trial by combat does not fall precisely into the same category as other forms of *iudicium Dei*, but the important point is that even if the community had a certain interest in the results of the trial, their interest was not essential to its outcome. In a tribal, consanguineous, provincial and feudal sociopolitical order, the indispensable element was the restoration and rebuilding of the temporarily broken peace.

In societies in Medieval Europe the bonds of one's own kin, clan, territory, and sworn allies as well as the maintenance and prosperity of the communities they formed were seen as paramount; and fighting to those ends was seen as right and just. In such a world, it was important to resolve disputes in a manner in which all members of the pertinent organizations would be satisfied. The battle of a trial was, above all, a peace-building battle.

In addition to the aim of constructing a dispute resolution system with built-in remedies for the individual, one of the purposes of the decree of Louis the Pious above was to raise the possibility that resolutions could be solved in court. The order that if witnesses cannot compromise they are to fight leads the disputing parties to court by securing the option of self-remedy.

Formally, however, witnesses had recourse to combat only when his or her testimony was contested as false. The weight of the oath was implicit, and with the oath the witness became identical with the party for whom he was swearing the oath. To become a witness was to wager one's fate, and sometimes one's life. This role was occupied primarily by blood relatives, and next by one's quasi-relatives: sworn allies, retainers and vassals. Communities bound by blood or oath had to provide witnesses that would fight in order to protect their honor and interests. Witnesses naturally had to also be capable of fighting.

Trial by combat is mentioned as early as the Bavarian Law Code, and as long as the spirit and system of self-help continued in one form or another, the custom was to continue. In the famous legal treatise, *Coutumes de Beauvaisis*, written in northern France in the 13th century, there is an article that states that women and clergy, who are said to be unable to fight, are not allowed to become witnesses involving cases where trial by battle might be called for. For example, of clergy is written the following.

In any case witnesses can be removed and challenged under a wager of battle, if clerks are called to testify, they can be excluded, for they cannot be either called or challenged under a wager of battle. And for this reason, they should not be permitted to testify in such a case when they are challenged.¹¹

As in the time of Louis the Pious, incidentally, the punishment in this era for witnesses who lost was extremely harsh. In Chapter 61 of *Coutumes de Beauvaisis*, entitled "Appeal," the author Philippe de Beaumanoir states:

If it happens that a witness who is challenged by a wager for false testimony (or his champion if he has a champion) is defeated, whether the battle is for personal or real property, he must have his hand cut off, the one who fights. If the champion fights and is defeated, the person who was accused as a false witness is found guilty of false testimony,

¹¹ Philippe de Beaumanoir, *Coutumes de Beauvaisis*, t.2., Paris, 1970, p.107. F. R. P. Akehurst (tr.), p.425. Translated into Japanese by Hiroshi Hanawa, *Beauvaisis no Kanshuuhousho*, Shinzansya, 1992, p.457.

and he is at the will of the lord who may impose any fine he wants. And if the case for which he was challenged was a crime, he would lose his life along with the suit.¹²

The “champion” (*campio*) here refers to a person that fights in place of a concerned party. The clause above mentions both a champion and a witness, but for practical purposes they may as well be identical, since the witness in this case is someone who fights for the original party.

The original rationale behind the trial by combat was of course to have the duel conducted between the disputing parties themselves. The suggestion in the case between Fleury and St. Dennis that witnesses from each side engage in combat was in part due to monasteries being *organizations* (not individuals) and also because it was forbidden to shed the blood of clergy, who were party to the case. This case aside, why would trial by combat not be limited to the actual disputing parties and allowed to be conducted by champions?

Needless to say, trial by combat entailed a fight that could end in death. The elderly, women, and the physically handicapped would be at a clear disadvantage. Along with women, clergy were likewise thought to lack the legal competence to fight. Hence, were such people the parties to a dispute, it is far from unnatural that a replacement in combat would be sought and allowed. It was a duty to protect the women of a family, as well as the elderly or handicapped. The principles at work here are the bonds of blood and the solidarity of the kinship or clan. To protect one member of the family was to protect the whole family, and further to protect oneself. Gregory of Tours writes of an incident where the Kings Grand Chamberlain was accused of killing a dear, and he has his nephew fight with the forest guard that gave unfair testimony against him.¹³ This incident happened in 590.

The solidarity of families who sought trials by combat remained strong for a long span of time. In the *Sachsenspiegel*, the 13th century northern German code of common law written by Eike of Repgow, the right is laid out for persons to conduct a trial by combat on behalf of the dead. According to *Sachsenspiegel* Landrecht (Common Law) 1.63.5, the plaintiff or accuser is to enter the campus first. If the other party does not appear after three summonses, the plaintiff may strike two blows and make one thrust into the air, and with that is judged to have won the duel. In cases of self-defense where the alleged attacker has been killed, the remaining party may likewise sue the dead, and if the dead party does not respond to the summons the first may also strike two blows and make one thrust into the air, thereby publicly proving his innocence and avoiding revenge by the family of the dead. In fact, when a witness was used, the whole legal fiction of the application for trial by combat was unnecessary. The *Sachsenspiegel* states:

If one person kills another engaged in an act of burglary or robbery or other such crimes, concerning that dead as well, that person must prove there was a crime. If seven witnesses can prove the crime, it is not necessary to apply for trial by combat.

This formula, however, was not absolute. Eike of Repgow, out of consideration for the honor and solidarity of the family, leaves the possibility of blocking this measure. Proof of crime by the dead from the killer can easily be overturned by the surviving family’s right to pursue a trial by combat:

¹² *Ibid.*, p.395. (Akehurst, *op. cit.*, p. 642f., Hanawa, *op. cit.*, p.692.)

¹³ “Tours no Gregorius,” in *Rekishi* (10 vols.), Vol 2, Tokai University Press, 1997, p.437.

However, whosoever it may be, if the surviving family of the dead request that they may act in place of the dead in a trial by combat, the family thereby removes the proof by witnesses. For, provided that the dead has not been banished, the crime of the dead cannot be recognized without a trial by combat.¹⁴

What had to be protected were the honor and interests of the family and the blood-bound extended clan. That being the case, the proxy for the combatant did not necessarily have to be limited to cases of weak persons. If it was for the honor and profit of the family, based on the principle of blood-ties there was nothing to keep a stronger member of the family from standing in for a weaker one. On the contrary, according to a collection of statutes from 15th-century Wales, one method for a complete stranger to earn status as a family member was to fight of his own free will for someone who could not fight or lacked the will to do so. Trial by combat was so closely tied with blood that it could turn a stranger into a relative.

The principle of blood and the community also extended to unrelated persons, because people bound as quasi-relatives by pledges became oath-helpers, witnesses and champions. By feudal contract, knights paying homage to their lords fought. Moreover, knights "would go to battle to free the innocent, whoever they may be."¹⁵

However, trial by combat was a danger for the people who actually fought. Many defeated in battle lost not only their honor and possessions, but also their lives. Even if it was for the clan, it was an excessive burden. For that reason, the appearance of professional champions was, in a sense, perfectly natural. That duty was generally taken up by "unsavory characters," and so the low social status of professional champions is not surprising. Even at that time, for example in England, until the Statutes of Westminster were promulgated in 1275, champions hired in cases concerning titles of estate had to make pledges concerning ownership of the land and gain the position of witness. Witnesses had to be physically able and legally competent to fight, and so this system was used.

Glanvill, the 12th-century "textbook" of common law in England, states that the champion of the accuser must be a proper witness or someone capable of being a witness, but at the same time mentions that it frequently occurs that a hired champion is produced in court, who on account of a reward, has undertaken the price.¹⁶

In this situation, a legal fiction was necessary whereby even a professional champion could become a witness through the strong bond formed with the original party by pledges.

IV. *Peaceful Resolution*

Trial by combat was connected to the right of self-help, which was considered self-evident in medieval Europe. Rather than this being an uncivilized and barbaric system carried out by unenlightened medieval Europeans caught in the grips of superstition, it was more of a system

¹⁴ Eike von Repgow (hrsg. von Clausdieter Schott), *Der Sachsenspiegel*, Zurich, 1984, p.88. Japanese translation by Masahata Kubo, Takeshi Ishikawa, and Jun Naoi, Sobunsha, 1977, p.121. Cf. Wakasone, Kenji, *Chuusei Doitsu no Keiji Saiban*, Taga Shuppan, 1998, p.72ff.

¹⁵ Henry C. Lea, *Superstition and Force*, New York, 1971 (1870), p.141.

¹⁶ Glanvill (ed. G. D. G. Hall), *De Legibus et Consuetudinibus Regni Angliae*, London, 1965, pp.24-5. Jpn. trans. by Katsujiro Matsumura, *Glanvill: Chuusei England no Oukoku no Hou to Kanshuu*, Akashi Shoten Co. LTD., 1993, p.56. John Beams, *Translation of Glanville*, London, 1812, p.44.

that put the exercise of self-help, all the way to feuds, into a more or less public court order, and thereby limited the range of combatants. This point was already clearly noted by the 18th-century Enlightenment thinker Montesquieu:

When there was such a war [of revenge] and one of the relatives gave or accepted battle gages, the right to make war ceased; the parties were considered to want to follow the ordinary course of justice, and the party that continued the war was condemned to make good the damages.

Thus the advantage of the practice of judicial combat was that it could change a general quarrel into an individual quarrel, return strength to the tribunals, and restore to the civil state those who had been governed until then only by the right of nations.

As an infinity of wise things are pursued in a very foolish way, there are also foolish things conducted in a very wise way.¹⁷

To be certain, the *Coutumes de Beauvaisis* also lists trial by combat as one way to end private wars.

The third way in which war ends is when the parties plead in court by wager of battle concerning the action because of which they were, or could have been, at war. For you must not seek vengeance on your enemy by war and by going to court at the same time. Therefore when there is a suit in court on the dispute because of which the war occurred, the lord should take the war into his hands and prevent the parties from doing harm to each other and then give judgment on what is pleaded in his court.¹⁸

In that sense, one aspect of judicial combat was to turn private wars into legal wars. This was, in a sense, the penetration into the legal system by the principle of self-help in a world based on ties of blood and community, and at the same time it also meant the incorporation of that system of public order. That element could be said to be even stronger when it came to ordeals such as the trial by hot water. For that reason, if one puts emphasis on restoration of the peace, then it was St. Benedict who was unjust in robbing the tongue of the jurist that suggested a peaceful resolution, i.e. an agreement.

The jurist with the “beastly” name who lost his ability to speak is said to be Lupus of Ferrieres (Servatus Lupus, c.805-862). Despite his name (“lupus” being Latin for “wolf”) Lupus was far from a beast. Rather he was the abbot of Ferrieres and a renowned classicist. Lupus merely suggested a peaceful resolution as a scholar of the classics and as a man of God. And when one compares his proposal with the decrees of Louis the Pious, Lupus was not by any means incorrect.

The provisions of the decrees mentioned above concerning combat between witnesses are actually limited to secular matters. “Concerning disputes between churches, truth is to be sought by a trial by the cross,” it says, yet these trials are forbidden in later decrees (818-9), and it is expected that the parties settle matters amicably among themselves.

In supplementary decrees of 818-819 it is ordered that when witnesses disagree and both or one of the parties is lay, then the matter shall be settled by combat; but if they are both

¹⁷ Montesquieu, *De L'Esprit Des Loix*. Spirit of Laws, Anne M. Cohler, et al. (trs., eds.), Cambridge University Press, 1989, p.566. Jpn. trans. *Hou no Seishin* by Yoshiyuki Noda, et al., vol.2, Iwanami Shoten, Publishers, 1993, p.134.

¹⁸ Philippe de Beaumanoir, *op. cit.*, p. 361. (Akehurst, *op. cit.*, p. 615, Hanawa, *op. cit.*, p.664.)

churches, and the leaders wish to settle amicably, they are free to do so, but if a settlement cannot be reached, then legal representatives of both parties are to go to the court of the count, where final judgement must be passed.¹⁹

But as Tomohisa Fujita points out in a remarkably convincing interpretation of trials by combat, it is not clear whether this final verdict left the possibility of combat. "Adrevald's tale above leaves ambiguity, and seems to hint at the possibility that resolution by judicial combat may have been possible even in disputes between churches."²⁰

At least between churches, however, it is certain that amicable solutions were preferred to duels. Regardless of how enraged Adrevald was, it seems that the other participants in the trial agreed with the proposal of Lupus. There was certainly an avenue to rapprochement, and it is evident that this case was no exception.

According to recent studies from the UK and the US, peaceful settlements in court were not just between churches, but were a phenomenon seen widely in the secular world as well. According to these scholars, the view that ordeals and trial by combat were representative of medieval lawsuits and medieval methods of proof, stressing their violent and irrational nature, is a distorted view of history steeped in the traditions of German legal history. Beginning with *Deutsche Rechtsaltertümer* (1828) of Jacob Grimm and finding its exemplary work in Heinrich Brunner's *Deutsche Rechtsgeschichte* (1887-1892), the study of German legal history was colored with 19th century Romanticism. Their history was mainly limited to Germanic law and "pure" Germanic tribes (particularly the Franks), and their sources were prescriptive rather than descriptive: they put emphasis on legal treatises rather than on records of trials. Modern research, however, has rightly attempted to place more importance on the actual records of legal proceedings.²¹

Rudolf Hübner's *Grundzuege des Deutschen Privatrechts* provides us with a wealth of records, but of the 257 cases listed from the 9th century, there is little mention of oath-helpers, and none of ordeals.²² Many legal records can be found today in churches, a large portion of which consists of charters (proof of transfers of titles of rights) and *placitum*, or official documents of dispute resolutions. Investigations of these reveal that the majority of disputes concern land titles, and it is clear that medieval Europeans were not averse to legal proceedings or resolution. Rather, it seems to have been the normal course of action to willingly go to court, produce witnesses, and find a friendly resolution (*amica pactuacio*).

In France as well, until the middle of the 13th century, peaceful settlements were not rare. Trials were held where local people of influence, friends and kinsmen acted as arbiters. Although judgements were handed down, what they attempted was not to seek the judgement of God, but to divide the disputed property and have the parties reach an agreement. What was important was not to determine a loser or winner, but to achieve a result that would satisfy both parties, taking into account pride, honor and shame. In divisions of land by peaceful resolution, "no one left empty-handed"²³ When demands clashed over property, it was important to satisfy the relevant parties, and the solution adopted by Ferrieres and St. Dennis was precisely this method.

¹⁹ A. Boretivs (ed.), *op. cit.*, p.18.

²⁰ Fujita, *op. cit.*, p.340.

²¹ W. Davies & P. Fouracre, *The Settlement of Disputes in Early Medieval Europe*, Cambridge, 1986, p.3.

²² *Ibid.*, p.59.

²³ Frederic L. Cheyette, Suum Cuique Tribuere, *French Historical Studies*, VI (1970), p.293.

According to Steven White, who surveyed records of 11th-century disputes from the monastery of St. Martin in western France, of 180 cases of property disputes between laymen, two-thirds were settled officially by agreement with witnesses present and without interference by the courts. According to one source, after it was decided that a dispute should be settled by trial by combat at the court at Vendome, the plaintiff retracted based on the advice of a relative (*amici*). There is also a case where a settlement was reached immediately before a knight and the champion of a monastery were scheduled to fight. By White's account, resolution was not simply giving something to each party. It was the formation of a new bond. The parties exchanged gifts, and those gifts became symbols of friendship.²⁴

In order to restore or create a new peace, in the true sense of the word, a one-sided and decisive victory was not a favorable solution. Resolution not only meant the reconciliation of disputing parties, it also contributed to the creation and maintenance of many social bonds. The phrase that best characterizes the spirit of this method is contained in a legal treatise under the name of Henry the First of England: An agreement supersedes the law and amicable settlement a court judgement.²⁵

Conclusion

There are many elements in the theme of dispute and resolution in medieval Europe. First, in contrast to modern European methods based on rational thinking and civil rights, the unique methods of dispute resolution of the time might be called medieval or even "pre-European," and prime examples are ordeals and judicial combat. This aspect is intimately connected with the consanguineous, clannish and communal social order of the day. For that reason, through the study of a legal problem, this area gives us a superior opportunity for a deeper understanding of the medieval European social system. It also opens the possibility of, to a certain extent, comparison with the systems of order of other cultural spheres, both past and present. Relying on the verdict of a higher power is an almost global phenomenon, and there are regions in which examples can still be seen even in this century. How they are analyzed and understood involves the evaluation of the achievements of cultural anthropology.

What must not be forgotten in this area of research is its relation to peace. Medieval Europe was a warlike society that placed high value on vendettas of blood. This aspect expressed itself in a legal manner in the existence of the private war, or feud. It was not illegal for any person, clan or community that valued honor to respond with force to a wrong done. Far from illegal, it was a source of honor. But despite this, the legality of private wars was only possible because their purpose was to repair damage done, return order, and restore peace.

The legal court was another method of restoration of the peace. In medieval Europe, however, eminently civil courts were not feasible. Both ordeals and judicial combat were rational methods within the limits of time and space that was medieval Europe. Since there were trials, there were already inherent civil elements.

The problem of resolution and arbitration should also be considered within this context.

²⁴ Stephen D. White, "Pactum...Legem Vincit et Amor Judicium: The Settlement of Disputes by Compromise in Eleventh-Century," *American Journal of Legal History*, XXII (1978), pp.281ff.

²⁵ L. J. Downer, *Leges Heinrici Primi*, Oxford, 1972, p.164.

Scholars of medieval legal disputes rarely focus resolution and arbitration both in and outside of the courts. Granted, we do find pricelists of Wergilds in Germanic law books, and this fact has often been pointed out. From one point of view these are lists of settlements. However, rather than being settlements based on the mutual agreement of the parties, they are merely the presentation of specific monetary figures for a court to rule. In this sense, it is not necessarily of the same character as an amicable resolution, where both parties had something left over and could save face as well. That these efforts towards peace — even in such a blood-centered and warlike society — were widely made is a remarkably important observation.

This point also presents us with a new problem: how feuds and ordeals stood together with the peaceful resolution system, and as a whole headed towards peace. It is necessary to comprehensively — including feuds and vendettas, traditional trials and methods of proof (i. e. ordeals and judicial combat), the verdicts passed and how they were carried out, and furthermore in and out of court resolution systems — reexamine medieval Europe from the perspective of peace-building. Brown's interpretation of *judicium Dei* and Wendy Davis's research on dispute resolution seem *prima facie* to conflict, yet it is possible to understand both of these styles as attempts in medieval Europe at building peace centered on the parties themselves.

It is reminiscent of the "peace of God" and "public peace" movements that started at the end of the 10th century. These movements had many elements of being party-centered whilst at the same time being based on the civil construction of peace. For that reason they are closely related to the modernization of Europe that was to begin in the 12th and 13th centuries, and so are both medieval and modern. The same can be said of *Coutumes de Beauvaisis*, *Sachsenspiegel*, and *Glanvill*. As illustrated above, each of these record medieval, pre-European legal customs as acting laws. At the same time, however, they also adopt preambles that suggest movements toward a new European civil building of peace. To give just one example of this, *Coutumes de Beauvaisis* defined as another method of putting an end to private wars the intervention of a civil court:

The fourth manner in which war ends is when punishment is meted out by the judge for the offense which caused the war, for example, when a man is killed and those who killed him and were guilty of his death are arrested by the judge and drawn and hanged. In such a case, the family of the dead man must not maintain a war against the relatives of those who committed the offense; for when the crime is punished [*vengiés*] the family of the dead person should count themselves as properly satisfied [*bien païé*]...²⁶

As Brown notes, it was important for states before the 12th century to strive for consensus. However, in the 13th century, the rulers were no longer peace-builders of the old style. They became rulers that would impose a new law and order with a new kind of peace-building, one that was scholarly and based on Roman and Church law.²⁷ One symbolic example of which is Frederick II, the Holy Roman Emperor. In his *Constitutiones Regni Siciliae* (or *Liber Augustalis*), the emperor states that he wants from his judges not arbitration, but infallible verdicts. In civil cases, once the point of dispute was decided upon, resolution after that was not permitted without the permission of the court. In criminal cases, it was possible for the

²⁶ Philippe de Beaumanoir, *op. cit.*, p. 361. (Akehurst, *op. cit.*, p. 615.)

²⁷ Peter Brown, *op. cit.*, p. 323.

parties to resolve disputes before going to the courts provided that no money exchanged hands, but as a rule resolutions were not permitted. Furthermore, if, after appearing in court, the parties resolved their dispute without the court's permission or order, the accuser was to pay a fine of 10 augustales, and if the resolution was conducted after the court had settled on the point of dispute a fine of 24 augustales to the state treasury. And if after paying money the court did not recognize the resolution, the suit was to continue (2.16).²⁸

The example of Frederick, though, is rather an exception, and that transition was neither as clear nor as dramatic as Brown insists. *Coutumes de Beauvaisis* clearly allows private wars, and the rights to sue or seek trial by combat by the bereaved are explicitly laid out in *Sachsenspiegel*. Furthermore, civil courts and resolutions continued to compliment each other. The appearance of a ruler that would impose law and order, in the true and newer since, would have to wait four more centuries.

Of course, in human society, consensus and agreement are almost always necessary to make peace. They exist in modern western society as well. But in old Europe, these elements were at the core of the system of order. Even in modern societies around the world today, there are many regions in which these are important elements for the management of the state. But post-medieval Europe was different. Europe worked to overcome these elements in the drive to modernize, and eventually succeeded in constructing a modern system. This process of the "Europeanization" of Europe took place during the tension of the middle ages. The modernization of disputes (and its significance), which progressed in this continuous and discontinuous progress, must be examined elsewhere.

HITOTSUBASHI UNIVERSITY

²⁸ Hermann Conrad, *Die Konstitutionen Friedrichs II. von Hohenstaufen für Sein Königreich Sizilien*, Köln, 1973, SS.196-9. Youichi Nishikawa, "Sicilia Oukoku Chokuhou Shuusei no Soshou-hou 2," *Hougaku Kyoukai Zasshi*, pp.115-8, 1998. Cf. Michael Clanchy, "Law and Love in the Middle Ages" in John Bossy (ed.), *Disputes and Settlements: Law and Human Relations in the West*, Cambridge University Press, p.54.