HOW CAN FEUD-LAW BE LAW PROPERLY SO CALLED?

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If law sometimes needs to go back to anthropology, the latter too can raise nice legal problems, occasionally even complex points in legal theory. One such arises in connection with the blood-feud or vengeance which, as everyone knows, has been, and here and there still remains, a regular way of settling serious disputes between two groups of kindreds. The details of this procedure vary greatly from people to people; but, speaking very generally, only severe offences result in a feud, while smaller, more easily corrigible, wrongs are left to peaceable compromise or reconciliation. Homicide is certainly the prototype of an act calling for revenge, but rape, adultery and maiming often also give rise to family-warfare. In case of a killing, it does not (at least not at first) seem to matter how a death is caused, deliberately, recklessly, carelessly or even accidentally; nor whether the killer is sane or insane or otherwise acting uncontrollably; only gradually does deliberate harm become differentiated from non-deliberate injury.[1] Again, the blood-feud constitutes a solemn or sacred duty, imposed on all (mainly agnatic) members of the family who as kinsmen must accordingly participate, directly or indirectly, in the act of vengeance; so also adopted children and blood-brothers, but not usually the very young or very old, nor of course strangers; the latter being, by definition, persons without immediate kin to take or suffer vengeance on their behalf. The feud classically ends with a counter-killing, but it can also end by an agreement bought at a price, the blood-money, an agreement sometimes arrived at through intermediaries, such as the leopard-skin clad chiefs among the Nuer whose special office is to bring about a settlement.[2]

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1 So in the early Mosaic law, to give one example, the intentional slayer is separated from one who 'killeth any person at unawares', the latter being given the right to take refuge in a protected city to await trial, whereas the former remains exposed to be put to death immediately by his rightful avenger: Numbers, 35:11-20.

2 For a comprehensive if somewhat elementary account of the feud, see A. H. Post, *Grundriss der Ethnologischen Jurisprudenz* (Reprint Aalen, 1970), i, 226 ff.

I

These preliminaries over, we turn to what is our real question, namely, how, or under what condition, the feud can be regarded as 'law', customary or primitive law it may be, but still law 'properly so called'. To answer this we have to begin by distinguishing, as anthropologists now frequently distinguish, between the regulated and the unregulated feud. Where the latter simply suggests a violent or angry reaction to harm, the former rather envisages a predictable or institutionalised response to injury, a response administered by self-redress, not necessarily any the less violent than the unregulated feud, but violence regulated by custom as it is known and accepted by both sides.

The central thing to notice is that the regulated feud can occur only within broadly related groups, related as a clan or tribe; that is, within a coalition of groups that constitute, overall, something of a political or cultural entity; an entity which however loose is still one to this extent, that it represents a wider grouping of which it can be said that, in one way or another, it does possess certain rules in common inasmuch as they are rules recognized and broadly followed by the opposing camps. So a killing by a member of kin group A of a member of kin group B, may 'permit' a counter-killing by B of a member of A; but B can go no further if the feud is to be described as regulated, that is, conducted according to the accepted rules. For if B *may* go further, there is no longer any specified sanction for a specific crime; the so-called 'sanction' rather becomes unspecified revenge, which may well be the occasion of new injury, now by B on A, which again may lead to counter-revenge, thus turn mutual vengeance into a vicious circle from which there is, in principle, no escaping precisely because there is no rule that confines (or at least purports to confine) the sanction to the given injury. Only where a a counter-killing is customarily accepted by A a 'just' or 'definitive' counter-measure, with group A now also staying its hand, do we have a regulated feud or regulated self-redress; quite unlike the unregulated feud which can be an endless series of revenge and counter-revenge, which admittedly may too peter out eventually, by exhaustion or because of other preoccupations, but which is not otherwise vengeance determinable by some known custom or conscious rule.

The crucial question then is whether a regulated feud, with its customary or rule-governed limitations, can properly be called law. We shall say not only that it can be so called, but more importantly

that it can be called law even in a fully positivist sense. This answer, needless to say, is diametrically opposed to all our orthodox views of legal positivism. According to current positivist doctrine the regulated feud cannot possibly qualify as law if only because, in John Austin's language, there cannot be law properly so called if it cannot be identified as a command from a sovereign authority. Hence where, as in these situations, a political sovereign is either non-existent or anyhow too weak to rank as truly superior, the regulated feud can be nothing more than positive morality. For Austin, indeed, it is a 'fallacy' or 'conceit' to think as law what is merely customary law, what the Romans called *jus moribus constitutum;* because to be law custom has to derive from either a statute or a judicial precedent, that is, derive in each case, directly or indirectly, from the sovereign himself.[3] It is easily seen that this view completely overlooks the difference between stateless and state societies; for though we may take it as true, at least for the purposes of this argument, that law and its sanction must descend from an identifiable sovereign, this truth only obtains for state societies, not for stateless ones. The Austinian doctrine, depending as it does on a rigid distinction between positive morality and positive law, almost inevitably neglects together with the stateless society the special features that pertain to customary or primitive law, including now the special features pertaining to the regulated feud, namely, that it does operate according to certain limiting rules under which it applies a particular sanction to a particular wrong. This sanction, it is true, is presently administered not by a sovereign or his enforcing agents, but is applied by the aggrieved party's self-help. Even this however does not mean, or at any rate does not have to mean, that such regulated self-redress cannot possibly qualify as law but can, at best, only be Austin's 'positive morality'.

The reason is that it does not really help to call this sort of regulated sanction 'positive morality' if only because this puts too great a strain on the latter concept. As the expression 'positive morality' already accommodates all sorts of social rules, it is surely appropriate to distinguish among them those rules or customs that regulate the application of a serious sanction for a serious wrong (e.g. an eye for an eye, a death for a death) from other rules which, though also morally regulative, do not suggest a similarly certain or predictable consequence for a specific injury. It is the organized

[3] Austin's *Lectures on Jurisprudence,* Lecture XXX.

social consequence of the sanction, its regular predictability as an event following upon a particular wrong, that gives the rule its special and, we may say, its peculiarly legal character, even though the sanction here is privately rather than publicly organized. And once this is seen, we no longer need to insist, though this positivists usually do, on the further requirement of a separate (law-enforcing) staff or agency, precisely because the private sanction is, on our present hypothesis, no less regular or predictable or certain than a public remedy. A seperate enforcing staff is not then the important mark of law, but the existence of a regular and regulated sanction for a particular offence.

All this, moreover, is not at all incompatible with legal positivism, provided 'positivism' is not given an excessively narrow or restricted meaning but is allowed to mean what, in the history of ideas, it naturally or generally has meant, i.e., an approach rejecting metaphysical assumptions by concentrating on specifiable and predictable natural events. Accordingly the distinctive demands of legal positivism are satisfied once there exists a regular sanction, since the existence of this sanction puts the emphasis exactly where it belongs as it puts it on certain regular facts, including the regular enforcement of certain rules. Whether we also have a functioning political society, with a political sovereign charged with applying and enforcing the law, becomes then a somewhat minor matter, at any rate as regards stateless or primitive societies. Somewhat curiously, the latter (sovereign-dominated) view of positivism still seems firmly held by some modern anthropologists. Thus it has been maintained that even the regulated feud is not a proper manifestation of law, on the ground that it only represents an *inter-group* not an *intra-group* phenomenon, since the two sides ignore or even defy whatever there is of political authority now in any case either too weak or uninterested to intervene forcibly; quite unlike law properly so called which presupposes decisions passed by a political authority having both the will and the power to impose its jurisdiction upon all parties in dispute.[4] However this sort of argument, as well as repeating the previous Austinian view, and so again overrating the need for a powerful sovereign while correspondingly underrating the law-like features of rules or customs that envisage regular and predictable sanctions for given wrongs, also

[4] L. Pospisil, *Anthropology of Law: A Comparative Theory* (1971), 819. He disagreed with Malinowski that this feud does constitute a form of law.

obscures a perhaps more interesting point, a point relating to what we might call political anthropology. This is that, contrary to what Austinian or neo-Austinian positivism usually implies, law instead of being the 'result' of a political organization, or of being wholly dependent on a sovereign or a state, is, so to speak, also its forerunner or pioneer, in the sense that it is just this sort of customary law that suggests the need, just as it prepares the ground, for a more active, or more forcible, political organization that will, step by tentative step, transform self-redressing sanctions into sanctions of a more 'public' kind.

Nor is this latter hypothesis, speculative or 'unproven' though it be, improbably far-fetched. Surely we can say, as a broad social generalization that apart from the contingencies of war and the need for organization imposed by war, what does drive a society towards a political organization is precisely the need or desire to overcome the inconvenience of the private feud in favour of more impartial as well as more peaceful, or less private and more public sorts of sanctions: on the one hand, by substituting special enforcement staffs for the private recourse to, or constant participation in, revenge; and, on the other hand, by replacing physical revenge with pecuniary remedies such as wergeld, composition and so on. In any case, the difference between a stateless and state society is not that the former has no law, while the latter has, but that the latter introduces a public machinery of law enforcement where the former relied on self-help. It is, as we indicated before, the ways and means of enforcement that differ, not the social existence or acceptance or sanctionability of legal rules. Or, to put this a little differently, it is only because we already have a knowledge and a social acceptance both of rules of conduct and of rules for sanctioning deviant or delictual behaviour that political developments become possible at all: without customary law somehow preparing the ground, the *polis* or state seems indeed an utterly unthinkable phenomenon.

But we must not jump ahead too fast. The fact remains that this transition from stateless to state-enforced law is a very gradual process which for a long time will not easily dispense with various (however diminishing) forms of self-help. To exclude private force entirely the state obviously requires fully operative enforcement agencies which however the primitive city or state does not yet possess, or at any rate not yet possess to any full or significant extent. The early *legis actiones* of Roman law, for example, still rely on the

plaintiff's own capability of getting the defendant into court or executing judgment on his own behalf; even so, it has never been suggested that, notwithstanding this (in Austinian eyes) blatant lack or failure of sovereign power, these legal actions were anything less than genuine law, were not law properly so called. It is true that the *legis actiones,* together with what we generally describe as Roman law, start off with a 'written' enactment, the XII Tables; yet this seems to have been, at least in its 'procedural' aspects, no more than a 'codification' (and, in its triumph over the priestly oligarchy, a retrieval) of earlier unwritten customary law. But in other respects early Roman society, seen from a strictly Austinian or positivistic point of view, was perhaps not significantly more advanced, politically or legally, than other primitive societies in which we discern the existence of customary law as soon as we can discern rules regulating the feud. Indeed the regulated feud, though certainly not betokening an advanced society, yet reveals, precisely because it is regulated, what is already a 'complex social development—a large social entity with an overall political organization that is segmented into sub-groups', for unless we have reached this stage we cannot distinguish the regulated feud from unregulated hostilities which, as Pospisil has pointed out, constitute 'external' rather than an 'internal' social phenomena.[5] In other words, the regulated feud, however much it may depend on familial or agnatic units initiating and conducting group hostilities, nevertheless takes place between two 'related' groups, related in the sense that they both belong to a larger entity, what Malinowski called a 'larger cultural unit' within which the same relevant customs operate.

The upshot is that once we admit this much, we do not need to insist further on there being a full political society before the regulated feud can be regarded as law. For the admission implies that the regulated feud can only obtain between 'related' groups, i.e. groups sufficiently related in a 'cultural' or 'political' sense, to have come to recognize between them the existence of regular rules that determine certain consequences for certain acts. It follows that a difference between the regulated and unregulated feud is not simply one of degree, but conceptually or categorically a difference in kind, for it is a difference that presupposes, for the regulated feud, the recognized social operation of limiting or regulative customs within

[5] Pospisil, id. at 6-7.

a cultural or semi-political framework, while the unregulated feud just happens as it happens without any control by rules.

All this, needless to say, is by no means to suggest that such law as pertains to the regulated feud is theoretically indistinguishable from modern municipal law, the law of the fully organized state. However the well-known legal anthropologist Hoebel maintained that if one group 'customarily accepts the action of the avengers as just, and stays its hands from further counter-killing, then we have legal law'.[6] While this view is certainly preferable to the rigid positivism we criticized earlier, the expression 'legal law' may, if taken uncritically, give the impression that there is little to choose between stateless and state law provided the sanction that is customarily applied does not cease to be 'just'. For this view overlooks, or at least seriously underplays, the very important difference between sanction-enforcement in customary and modern law, including the fact that in the former the parties in dispute are opposing families, not yet individuals and that the whole legal process there still depends on the familial or agnatic units conducting their feuds as group hostilities, whereas in modern law or so-called 'legal law' the principal characteristic of the legal process is that self-help is, subject to a few limited exceptions, rigorously excluded, execution being almost entirely taken out of the aggrieved hands. In modern (or 'legal') law the existence of a separate enforcement agency will thus more firmly ensure that the relevant sanction will be applied even more regularly or predictably than might otherwise be the case.

There is another point. It being part of the nature or concept of a sanction that it is not only a regular or predictable but also a measured or 'equivalent' response, the regulated feud, just as customary law in general, may be more in tune with the moral convictions of a community as to what such an equivalent response should be. For the rules or customs surrounding the regulated feud are not just legal or social rules, they are rules with important moral content which the related groups respect; indeed, they are rules respected primarily for their moral content since *ex hypothesi* the rules have no other superior force. Without moral content, it will be clear, the feud would not be a regulated one; thus if the B (victim) group were in their counter-killing to stay their hand merely because they thought it useful or advantageous to themselves, the feud now ensuing would not be conducted according to rules but according to the

[6] Cited Pospisil, id. at 9.

calculation or contingency as to whether or not B found it prudent to stop. Certainly the B group could now stay its hand out of a prudential conviction that things might otherwise get out of hand or that prolonged hostilities might create more trouble than the original injury was worth; but in so doing they would not follow a rule. It follows that the opposing groups have to share a moral belief that a certain offence may justify a particular punishment but no more, what we may broadly call a rule of equivalent (an eye for an eye, a man for a man) if there are to be rules both to permit and to limit or regulate B's response. Such a moral conviction does not of course exclude a prudential one: our social or personal reactions are often a mixture of the two; still without respect for the moral content of a rule there would in fact be no rule and no custom, since there would be no shared values, no sense of a 'measure for measure', that made for a regulated as compared with an unregulated feud. Austin was not wrong to regard such a custom as 'positive morality', but he was wrong to assume that positive morality was invariably and utterly distinct from positive law, at any rate positive customary law.

II

What we have tried to explain to be the nature of the regulated feud can be reinforced by some contemporary evidence: as when we look at the consequences of a homicide among the Bedouin, the latter being one of the few customary, yet highly organised, societies in which the feud still occurs and in which the various forms of active hostility as between different groups are particularly clearly marked out.[7] Our business now is with intra-tribal rather than inter-tribal relationships, for reasons that should soon be obvious. Within a tribe we can distinguish between three groups: first among them a tertiary segment, normally a unit of about 200 to 700 people; then a secondary group formed by several tertiary units, comprising (broadly) several thousand people; finally the primary group made up of several secondary segments, so constituting what is virtually a sub-tribe.

The tertiary is our basic group. It consists of a camp, or a cluster of smaller camps around a watering point, together with some ploughland pasture, thus occupying a territorially discrete area which is also economically separate from other tertiary homelands as it is

[7] I owe here a great deal to E. L. Peters, "Some Structural Aspects of the Feud Among the Camel-herding Bedouin in Cyrenaica," 37 *Africa* (July 1967), 261-282.

self-sufficient in its major necessities. This tertiary segment is the 'corporate' group *par excellence*: its male members are all closely (agnatically) related, regarding themselves as of 'one bone' or 'one body'; all carry a common name, thus leaving no doubt as to the affiliation of any tribesman; hence an offence against one is an offence against all, while an offence by one of them creates a 'solidary' or 'joint' liability of the whole group. It is important to observe that a killing *within* this unit cannot have the usual consequence: vengeance is now excluded, nor can blood-money be exacted, unless the group is prepared to split; for since the group is 'one body' it would either be fighting or paying itself. The only possible redress now available is the offender's expulsion or exile; although, what apparently happens more often, such a killing is covered up; for so strong is the 'solidary' bond that it excludes a penal action even for the greatest offence. Of course the group will not refrain from verbal condemnation, the offender being regarded as the perpetrator of an internal calamity, the more sinful and tragic as it leaves the group helplessly at a loss as to what to do.[8]

Where, to return to our typical case, the killing occurs between two tertiary groups, we have of course an exemplary occasion for retaliatory vengeance, but vengeance of a very regulated kind. It will be a regulated feud if only because unregulated hostility would seriously disrupt everyday life. The two tertiary groups may be neighbours, with close human and economic relations between themselves. Family ties may interweave; the group's strips of territory may overlap, pastures may be shared. Consequently they will try to settle their dispute as quickly as possible by resorting to the customary sanction, that is, either taking a life in exchange or alternatively accepting blood-money instead.[9] A high degree of regulation is thus characteristic of related tertiary groups; indeed, the less related the opposing groups, the less the desire for regulation, so that in a case of homicide between secondary groups inhabiting different areas, each with its socially very separ-

8 Id. at 264, 274. This is mainly true where the group is small since it tends to close ranks if the killing is of a close relative. If the group is large, and the killing is of a more distant relative, the group may split: the single tertiary group now divides into two.

9 This compensation can even be paid by instalments, a mode of payment often preferred as this is supposed to keep the lines of communication open between the groups; the thought seems to be that a single payment would not create new relationships: 'Where there is no debt, there are no relationships. Debt must be allowed to run between groups, for it is this which creates obligations and perpetuates social relationships'; id. at 267.

ate concerns, there is no corresponding urgent desire for peace, with the further result that the feud, now becoming unregulated, can go on indefinitely, just as long as the parties wish it to go on. Even less regulated is the feud between primary sections, the members of which regard themselves as strangers and who may therefore carry on prolonged hostilities.

The picture so far presented yet needs to be redrawn in several respects. While true that the difference between the regulated and unregulated feud cannot be explained without a structure of sharply varying group-relationships, an explanation of the feud in purely family or lineage terms would (as Peters pointed out) confine the regulated feud to the tertiary segment while secondary and primary groups would be left more or less at war, more or less indefinitely so, with the sociologically somewhat absurd consequence that each tribe would remain segmented in small groups, all mutually hostile actually or potentially.[10] Not only would this completely undermine intra-tribal solidarity, but it would be almost impossible to understand how a tribe could at all evolve, or how it could constitute, as it does constitute, a structurally significant grouping of its own. As inter-tribal conflicts usually lead to full-blown wars, while intra-tribal disputes are distinctly less hostile in duration or intensity, we have to explain the special relationships obtaining between secondary and primary groups precisely because they do not also explode in war-like hostilities.

One explanation might be that a feud between (say) secondary groups does not in practical fact involve the whole segment but only certain parts of it; but to say this would be to suggest that some of these parts which, on lineage theory, simply must fight, or at least go through the motions of fighting, simply omit to fight, without however explaining how we can account for these omissions. Just this difficulty leads Peters to challenge the lineage theory as a whole, although a little reflection shows that this seems a dubious move since it runs the risk of doing away with the basic structural elements on which familial or agnatic ties depend and without which we would not even have the most elementary groups able or willing to rally round one of their members in case of a fatal or serious injury. This said, it is nevertheless no less clear that the lineage theory cannot be left as it is but needs to be expanded by some qualifications as Peters indeed suggests. In the first place, we have to take into consideration certain political realities. The various groups though, as we have seen, struc-

[10] Id. at 270.

tuarlly independent of each other, may yet be quite unequal numerically (among the Bedouin, for example, one tertiary group may have three or more times the population of another), thus creating an obvious disparity in their political power, especially if the larger group also controls more resources, whether land or water. And in such circumstances the 'dominant' group, or its leaders, may override the agnatic cries for revenge and impose or at least encourage more peaceful dispute-adjustments.

A second and perhaps more interesting, because more pervasive, qualification relates to the facts of outside marriage and its effect in creating new personal relationships. Though the Bedouin may say they always marry their parallel cousins (i.e. their father's brother's daughter), in fact many men find wives outside their agnatic circle and find them not just in neighbouring tertiary groups but also much farther afield (sometimes for primarily economic reasons, as for the sake of enlarging the group's resources). Such external marriages do not admittedly spread quite so extensively as where explicit rules of exogamy cause a more deliberate dispersal of family ties; yet there still occurs enough exogamy to qualify the assumption under which marriage is confined to the (local) agnatic group. As a result even remote groups may develop cognatic or affinal associations which may come to occupy an important place in social life. Thus the killing of a maternal relative (and, in particular, one's mother's brother) is as sinful as the killing of a close agnate, since the uncle often plays a crucial role: there often exists a particularly easy and friendly relationship between him and his nephew, also one can 'call' on his help in difficult situations, especially where one has to seek help outside the agnatic group, as where an agnatic unit may need further contributions to blood-money or need additional water-resources in times of scarcity. Only this can explain why the Bedouin say that they do not feud with cognatic relatives or why some cognatically related segments may, now very legitimately, opt out from fighting that may otherwise rage between their respective groups.

We then begin to see a growingly complex pattern of social relationships, with new consequences as regards homicide as well. The greater the affinal relationships between non-tertiary groups, the greater the possibility that close human or sentimental relationships will develop between them, relationships which may or may not be also economic but in any case transcend purely agnatic ties. This again, will increase the chances that any feud between (say) second-

ary or even primary groups, hitherto unregulated, will tend to become regulated, if only because wider (extra-agnatic) human relations will now overshadow agnatic ones. And the moment this occurs we seem on the threshold of wider groupings, not only with increasingly shared values and common concerns but also with shared and deepening rules or customs about conflict-management. We may call this, perhaps a little boldly, the beginnings of political or, rather less boldly, of a semi-political society; but however this may be it is certainly the kind of society in which customary or primitive law may grow and spread.