REFLEXIONS ON RATIONAL AND IRRATIONAL MODES OF PROOF IN MEDIEVAL EUROPE

by

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For centuries scholars have been intrigued by the medieval ordeals and have offered explanations for their early success and eventual disappearance. In the late Middle Ages they were already viewed, in spite of occasional traces of survival or relapse into old practices, as a thing of the past. The explanation offered for their rise and fall was simple and straightforward: they were superstitions which had been tolerated for a long time because of the rudeness of the people and the hardness of their hearts, but had finally been abolished by the Church. Modern historiography has widened our vision and it was a particular merit of the nineteenth century to envisage the ordeals — the unilateral ones and judicial combat — not merely as a stage in European history, but as a quasi-universal phenomenon associated with a particular, early, 'primitive' stage in the development of mankind. This insight was part of a broadening of legal history to include legal ethnology: if ordeals were a thing of the past in Europe, they were a thing of the present among numerous tribes in other continents. There seems to have been a renewed interest in the ordeals during and after the Second World War, which led to the publication of important studies by Erler, Bongert, Leitmaier and particularly Nottarp. In Paris in 1959 the Société Jean Bodin devoted its congress to La Preuve, and the ensuing volumes, while of course not dealing exclusively with ordeals, contained several extensive papers on modes of proof in medieval Europe, where the rise and fall of the ordeal was studied in great detail. Thus vol. XVII contained, as far as the Middle Ages are concerned, papers on proof in Frankish law by F.L. Ganshof, ordeals in canon law by J. Gaudemet, proof in medieval learned, mainly Roman law by J.-P. Lévy, in England after 1066 by F. Joüon des Longrais, in French medieval customary law by M. Boulet-

1. See, for example, what Philips Wielant († 1520) says in his Practijcke Criminele, c. 42: "Previsely people used to purge presumptions and suspicions by taking hot iron in their hand or walking on it barefoot ... , but since those forms of purgation were nothing else but tempting God, the ecclesiastical laws have abolished and eliminated them and their use has been discontinued".

2. We refer to Sir Henry James Sumner Maine and his Ancient Law (1861), Josef Kohler and the Zeitschrift für vergleichende Rechtswissenschaft, founded in 1878, F. Patetta and his Le ordinali of 1890, and A.H. Post's Grundriss der ethnologischen Jurisprudenz, of 1894—95.

3. See, inter alia, Lucien Lévy-Bruhl's epoch making La mentalité primitive, of 1922.

Sautel, in the custom of Toulouse by G. Sicard, in ancient Belgian law by R.C. van Caenegem, in ancient Dutch law by J.W. Bosch, in medieval Frisian law by S. Kalifa, in the late medieval law of Franconia by A. Erler, in medieval Saxony by G. Buchda, on the evolution of the system of proofs among the Slavs until the fifteenth century by V. Procházka, in Polish law by J. Matuszewski, in Hungary by C. d’Eszlary and in Serbia by D. Stojcević. The volume also contained a ‘synthèse générale’ by J.-Ph. Lévy: ‘L’Évolution de la preuve, des origines à nos jours’, which consisted of three parts: 1. La preuve primitive et religieuse, 2. La preuve libre; l’intime conviction, and 3. Les preuves légales et rationnelles. There also was a ‘rapport de synthèse’ by R.C. van Caenegem: ‘La Preuve dans le droit du moyen âge occidental’.

It is our impression that around the time of the publication of *La Preuve*—now exactly twenty five years ago—a sort of consensus was established among legal historians about the main outline of the history of ordeals, and a long period of fruitful research had come to a satisfactory conclusion. The dominant, possibly even general feeling could be described as follows. The ordeals were irrational modes of proof belonging to a particular, primitive stage of development. The Germanic peoples who invaded the *Pars Occidentis* of the Roman Empire lived at that level and brought the ordeals, unknown in mature Roman law, with them. The ordeals survived the conversion to Christianity of the Germanic peoples and were in fact Christianized, and their administration, seen as an appeal to God, largely entrusted to the clergy. For many centuries the ordeals enjoyed the official support of political and ecclesiastical leaders. However, in the twelfth century, they began to encounter resistance and criticism from various quarters. Kings distrusted them as methods of establishing the guilt of criminals and ensuring their punishment. Townspeople disliked and distrusted them and obtained exemption from them. Learned lawyers objected to them because the *Corpus Juris* ignored them, and theologians rejected them because they forced God to perform miracles, *i.e.*, to curb the laws of nature, and this was an unacceptable *temptatio Dei*. This crisis, which led to the prohibition, issued by the Fourth Lateran Council, to clergymen to participate in the administration of ordeals, eventually caused—promptly in some areas and slowly in others—their disappearance. The whole process was seen as the inevitable consequence of a general advance in European civilization—in philosophy, science, politics and social and economic organization, and the rise of a more sophisticated and rational society, where the primitive ordeals had no place any more.

However, this consensus did not last. In recent years, particularly in Great Britain and America, dissenting voices have been raised, not in order to criticize specific aspects or points of detail of the ‘herrschende Lehre’, but to reject some essential theses and underlying assumptions. It seemed to us that they could lead to a renewed and interesting debate about fundamental questions and we would therefore like to present some of these new avenues in a brief, critical survey—