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*The LEX BARBARORUM of the DAGHESTAN.*

By Professor MAXIME KOVALEVSKY.

I AM sure to be approved by those who have made a special study of the so-called customary law, if I say that the chief difficulty of their investigations lies in the total want of chronology as soon as one enters the bright field of folk-lore. It is all very well to repeat after Puchta and so many other German legists that the origin of custom lies in the very soul of the people, that for this reason alone it is older than the oldest of written laws. The moment comes when bondage to theory must ply to evidence; and such an evidence has been recently brought forward by the almost complete edition of the sacred books of the East, by which the English and more particularly the Oxford scholars have acquired a new right to the gratitude of historians, lawyers and folk-lorists all over the world. From the moment when learned Orientalists under the guidance of Professor Max Müller have revealed to the larger public the religious, moral and legal ideas of our remote ancestors no special study of the customs and usages of some definite people or tribe can be tried without a look to this common treasure of old knowledge and old prejudice. On Caucasian folk-lore, of which I have made a particular branch of my investigations, the sacred books of the East have thrown a quite unexpected light. They revealed the fact that many a usage which has already lost its meaning even in the eyes of those who follow it, had its origin in the religious, moral and legal ideas summarised by the compilers of the Avesta.

The people among whom the usage still lives (I mean the Chevsurs, Pschavs and Touchins) have little or nothing in common with the old Iranians; they belong to the Cartvelian race, they speak a dialect of the Georgian, but their remote ancestors have been placed centuries ago under the military command and the cultivating influence of the Sassanides. And this accounts for the fact why survivals of Iranian ideas about purity and impurity still live among these highlanders, who, during ten months in the year, are prevented from any communication with the outer world and stick to their old creeds and practices with quite a religious fanaticism.

Applying the same method of investigation, I mean the comparative one, we come to the rather astonishing conclusion that Greek and Roman, as well as Persian and Georgian cultures, have left their traces in the Caucasian folk-lore. The rules and sentences attributed to old customs are very often but an adulterated reproduction of some ancient law. Religious and

legal codes, such as the Bible and specially the Decalogue or the Digest, of which an Armenian monk, Mechitar Gosch, has introduced a good part in his private compilation, have contributed to a large extent to the evolution of Caucasian custom. Thus contrary to current opinion, custom is not always the source of written law. Sometimes it is the reverse; to account for the origin of custom we have to make a large appeal to ancient legislations.

This conclusion, which for the majority of European nations presents but a theoretical interest, in the vast Empire of the Tzar is not deprived of practical importance.

In our extension to the south-east we come in conflict with Mahomedan civilisations, powerful enough to keep us in check during several decenniums. Saying this I have more particularly in view our dearly acquired successes in Daghestan, where the capture of Schamil was as you know followed by a complete pacification of the country under our rule. The first administrators of this province—men of the sword, not of knowledge—attributing the animosity we inspired to the influence of the Mahomedan religious and civil law, the so-called schariat, thought it wise to prohibit its application in the courts. Accordingly they appealed to local custom. Private arbitration remained the general rule, and elected judges, under the supervision of a Russian official, were entitled to pronounce in civil and criminal causes according to the dictum of old and well-accredited men; the authority of the legal doctor Navavi whose code, the *Minhadg al Talibin*, the same still in use in Java, belongs to the small number of juridical treaties left by the school of Schafai, was to be recognised no more. Now this was, on the part of the government, a voluntary return to old barbarism. The customs of the Daghestan are those of a people who still admit the vengeance of blood, and make the remotest relation of the murderer or some other trespasser responsible for his deed. It contains among other rules this astonishing one; a husband who murders the adulterer on the spot side by side with the wife, is free from punishment or private vengeance: but if one of the two victims survives, the criminal responsibility of the trespasser begins.

This way of proceeding, this systematical hostility to written law and high appreciation of custom had at least one happy result. It induced the search for old collections of local customs and usages. It was supposed that the rulers of the Avars, still inhabiting the high plateau of the Daghestan, had proceeded to a sort of codification of these old customs.

During a long time all researches were fruitless. At last a code was discovered. It belongs to the Tartars of the Kaitag, a

province placed at a small distance from the Caspian Sea, not far away from the once Persian town Derbent. This code is known to the people under the name of the Code of Roustem-Khan. Now who was this Roustem, and when did he live?

Some years ago I had the occasion to study the accounts which the Dutch traveller Olearius left of his journey to Daghestan and Persia. There I found the only mention we have of Roustem judge or "outzmi" of the Kaitag. Olearius applied to him, in the name of the Shah of Persia, as to one of the at least nominal vassals of this empire. The Dutch traveller visited the country in the second quarter of the seventeenth century. To the same period belong the two letters of the Persian rulers, Abbas and Safva, directed to the same Roustem; the first is dated 1609-10, the second 1619. In these letters Persian merchants are placed under the protection of the outzmi. The Shah makes him responsible for the preservation of peace on the land placed under his rule. This land, called the Kaitag, lies on the way from the Persian town Derbent (on the shore of the Caspian) to the dominions of the Schamchal of Tarki, another vassal king, whose power on the native tribes, had been established, according to the French travellers such as Chardin and Tavernier, under the pressure of Persia. The Code of Roustem, a Russian version of which is preserved in the official records of Derbent, is not the personal work of this celebrated ruler and judge, but a later compilation, dedicated to his memory. The precise title runs as follows:—"A code of the customs or adats of the Kaitag, made in memory of the outzmi or judge Roustem-Khan."

Although the Code of Roustem is but of a relative antiquity, it is unique in its way, not only in this sense that we have no earlier compilations of Daghestan usages, but also because of the antiquity of legal customs mentioned by it.

Let me call your attention but to this fact; all payments prescribed by the code are to be effected not in money but in kind. The chief merchandise of the country consisting of very ordinary linen, known under the name of chabzaldick, the code prescribes to the misdoer to pay to the grieved party as well as to the judge a fixed number of kari, something like a metre of this linen.

Amercements are not inflicted for all kinds of trespasses. Vengeance and private forcible entry are admitted as a rule in all cases of criminal or civil offences. Consanguinity to the remotest degree makes a person jointly responsible. The Roman "gens" survives in the touchoum of the Daghestan. Whole villages are occupied by families pretending to descend from some supposed and mythical ancestor. Each of the members

of the touchoum is bound to prosecute the trespasser and to revenge the misdeed on him or his relations. A legal saying inscribed in the code and still repeated by the people says: "blood must be washed with blood." This means that in case of murder or wounding, not only the trespasser but each one of the members of his touchoum or gens has to expect vengeance on the part of the touchoum, to which the victim belonged. The same mutual responsibility exists in the case of forcible entry. The last is known under the name of "schikil" and is still used in the Kaitag. Any appropriation of things belonging to a foreign touchoum empowers all the members of the last to a forcible entry on the goods and chattels of each of the parents and relations of the offender.

Stating this the law-giver only confirms the existing practice. But his intentions have a wider and nobler end. He is ambitious for nothing less than the extinction of private vengeance and private forcible entry. He accordingly prescribes the transfer of the trespasser to some remote village and orders it to give him hospitality. He also establishes the way in which an accommodation can be arrived at between the party of the victim and that of the offender. It is the same way which is followed in our own days all over the Daghestan. According to general usage the last offender appears unarmed and with an uncovered head before the tribe of the offended. The next relation, the brother or the son, of the victim receives him with kindness and places his hand on his head in sign of peace and pardon. Mediators establish the amount of the composition or wehrgeld by which the feud is to be brought to an end.

As to forcible entry, without abolishing it entirely, the Code of Roustem tries to limit the sphere of its action; no recourse to it is allowed unless the creditor acts publicly. Who attacks the property of the debtor in some deserted place is condemned to repay ten times the amount of his appropriation.

Certain persons, judges, officials, old men in general, are declared free from any forcible entry. This is also the case of those who have declared their desire to break with their own gens or touchoum. This desire must be expressed in a solemn way still in use among the inhabitants of the Daghestan. Who wishes to be delivered from all joint responsibility has to make his desire known to his neighbours and tribesmen. At some meeting in the mosque he declares openly that every tie is broken with the touchoum, to which he did belong. In commemoration of this a nail is solemnly placed in one of the walls of the temple.

As to the other modifications of the principle: eye for eye, tooth for tooth, they all proceed from the teaching of Mussulman lawyers, and may be cited as an evidence of the early

influence exercised by the shariat on the customary law or the adat of Daghestan. Let me say a few words more as to the legal position occupied by the law-giver himself, the outzmi or judge. It is that of a private arbitrator, who by and by became a judge and military commander of his people.

It has something in common with that of the judges of Israel and the Brehons of old Erin. A feature common to the outzmi and the Brehon is that both keep their legal learning for themselves. You know what Maine has said on this subject. His critic, M. D'Arbois de Jubainville, has not contradicted him on this point; quite the contrary, he has more plainly stated the fact, that sentences pronounced by the Brehon and serving as precedents in case of new disputes, were communicated by the way of teaching only to his direct pupils. The same was the case with the outzmi of the Kaitag.

The code we try to analyse inflicts a high amercement on those who make use of it without the permission of the outzmi. A sentence placed at the head of the different articles is: "who keeps his mouth will not lose his head." No commentary is wanted. The words reported plainly state the obligation to keep secret the different rules which the treaty contains. The outzmi was not the absolute ruler of his subjects; in the times of Roustem he was only a judge bound to the exercise of his duties. One of the legal prescriptions of the code mentions the case if the outzmi should refuse to accommodate the parties. Such a judge according to law ought to be deposed. The outzmi does not pronounce the sentence by himself. He is surrounded by old men, who form a sort of council, and give their opinion as well on administrative matters, such as peace or war, as on legal.

The code admits private vengeance even towards the outzmi. At the same time it entitles him to receive the wehrgeld of those who have no family or gens. Such is more particularly the case of strangers and of Jews. "Who murders a Jew has to pay to the outzmi the weight of the dead body in silver."

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MAY 14TH, 1895.

E. W. BRABROOK, Esq., F.S.A., *President, in the Chair.*

The Minutes of the last Meeting were read and signed.

The presents that had been received were announced and thanks voted to the respective donors.