

University of Michigan Law School

University of Michigan Law School Scholarship Repository

Reviews

Faculty Scholarship

1986

Review of Disputes and Settlements: Law and Human Relations in the West, by J. Bossy, editor.

William I. Miller

University of Michigan Law School, wimiller@umich.edu

Available at: <https://repository.law.umich.edu/reviews/19>

Follow this and additional works at: <https://repository.law.umich.edu/reviews>



Part of the [Legal History Commons](#)

Recommended Citation

Miller, William I. Review of Disputes and Settlements: Law and Human Relations in the West, by J. Bossy, editor. *Am. J. Legal Hist.* 30, no. 2 (1986): 266-8.

This Review is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Reviews by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

BOOK REVIEWS

John Bossy, ed., *Disputes and Settlements: Law and Human Relations in the West*. Past and Present Publications. Cambridge: Cambridge University Press, 1983. ix, 296 pp. \$49.50.

Evans-Pritchard probably knew he was exaggerating, but not being able to resist the chance to repay a gift in kind, he reversed Maitland's dictum and claimed that history must choose between being social anthropology or being nothing.¹ If we substitute "tedious" for "nothing" we would have a truer statement. Legal history, if not quite heeding Evans-Pritchard, has in the past decade begun to learn some lessons from legal anthropology and the sociology of law. Studies of bureaucratic development, forms of action, formulae and writs, while still flourishing in the hands of several brilliant practitioners,² are tending to give way slowly, but steadily, to the study of a broad spectrum of disputes and dispute processing. Under the influence of legal and social anthropology legal history has moved toward social history and away from administrative history. If anthropology had one thing to teach legal historians it was by example of showing that the category of the interesting did not always involve a king, his judges and courts, and the lawyers who hovered about them. Alternative modes of dispute processing—negotiation, mediation, arbitration, feud—just as much as THE LAW can be a part of the array of options a society might offer disputants. (For students of the early and central middle ages, legal history would be a pretty thin subject indeed without these so-called alternative modes.) Legal historians have also learned from legal anthropologists that a lawsuit needs a social context if it is to make much sense. It took anthropology to remind us what we must have already known: that cases have histories and that litigants have them, too; that the form a claim takes when it is presented to a court may have little to do with the real matter in dispute; that a lawsuit might be no more than a tactic in a wider dispute and the litigants may be surrogates for the real parties in interest; and that neither a dispute, nor a lawsuit, need lead to a judgment of a court.

Of the ten contributors to this volume one is an anthropologist—Simon Roberts; the rest are legal and social historians. All are united by an interest in legal sources, mainly in the form of court records, although one, Diane Owen Hughes, in an interesting piece, treats of sumptuary legislation in Renaissance Italy while another must do without court records because of the century he is interested in: Edward James's fine article, "'Beati pacifici':

1. F.W. Maitland, *Selected Essays*, ed. H.D. Hazeltine, G. Lapsley and P.H. Winfield (Cambridge, 1936), p. 49; E.E. Evans-Pritchard, *Anthropology and History* (Manchester, 1961), p. 21.

2. See, e.g., Robert C. Palmer, *The County Courts of Medieval England, 1150-1350* (Princeton, 1982).

Bishops and the Law in Sixth-Century Gaul”, relies extensively on Gregory of Tours and hagiographical literature. A prominent theme in several articles concerns the factors that lead disputants to go to law, especially in the light of the very low percentage of cases that end in adjudicated outcomes. Among these are Richard L. Kagan’s “A Golden Age of Litigation: Castile, 1500-1700”, J.A. Sharpe’s “‘Such Disagreement betwix Neighbours’: Litigation and Human Relations in Early Modern England”, and James Casey’s excellent “Household Disputes and the Law in Early Modern Andalusia”. This last piece is engaging, carefully argued, and graced with wonderful circumstantial matter from the sources. Casey seeks to account for the willingness of the honor-conscious Andalusians to air conjugal disputes in courts of law. He suggests that the significance of going to law needs to be evaluated in light of the fact that the courts acted more as mediators than adjudicators. “Mediation in the old world was frequently cast in the mould of law, and vice versa, the court simply serving to publicize and authenticate claims and counter-claims in an oral culture lacking alternative forms of record” (p. 212). Going to court was also a kind of ritualized reclamation to oneself of what gossip had previously taken away. It was a way of doing something to vindicate honor by showing the “appl[ication of] reason to the control of anger and sexuality” (p. 216).

Non-adjudicative modes of dispute processing and their relation to courts and legal process are central themes of some other essays. Jenny Wormald’s well-known piece on the blood feud in early modern Scotland is reprinted with some minor abridgements in the annotation from *Past and Present*.³ Her argument challenges the widely-held belief that royal justice and consolidation of power necessarily meant hostility to private justice in the form of arbitration and feud. Wormald apparently means by feud “the principle of compensation to those wronged” (p. 112; see also pp. 101-2, 105 n. 13). If the blood feud can be defined as the principle of blood money then her argument succeeds. But if the notion of feud imports some sense of violent self-help then her sources do not show such great royal willingness to tolerate private justice. In any event, the paper is an important one whose argument is well wrought and much too detailed to encapsulate adequately here. In contrast to Wormald’s view, Nicole Castan’s “The Arbitration of Disputes under the Ancien Régime” argues that arbitration and mediation were superseded by a centrally-administered public order that was hostile to and incompatible with the old non-adjudicatory system. The success of the older modes depended, she argues, on an “intensely hierarchical society” (p. 258) since the role of the intercessor was generally a function of relative rank. The rise of the egalitarian spirit, because hostile to hierarchy, tended to devalue the mediator (p. 259). Castan is alone among the contributors in seeing arbitration and mediation to be necessarily incompatible with state-provided adjudication. The evidence from other societies (I offer medieval Iceland as an example I am familiar with) suggests that arbitration might thrive in the presence of adjudication precisely because it represents a more palatable alternative to the “all-or-nothingism” of adjudication.

3. Vol. 87 (1980), pp. 54-97.

To the lone anthropologist belongs the task of providing an introduction to the collection. Simon Roberts' "The Study of Disputes: Anthropological Perspectives" provides a brief and lucid recapitulation of some points made in his useful survey of legal anthropology.⁴ Roberts pitches his essay to a hypothetical audience of historians whom he supposes to have little familiarity with the literature and issues of his field. As such the piece will be very useful to those who need some orientation in the basic concepts of disputes studies.

As in all essay collections of multiple contributors, there is some unevenness in the quality of the essays but not so much that the book doesn't engage the reader from beginning to end. The topics are uniformly interesting and, for the most part, presented competently. The authors, too, have taken care to present their special areas in ways that make each piece accessible to the general reader. How this feature might affect the specialist I am in no position to tell. Finally and unfortunately, as seems to have become the standard practice with Cambridge University Press, the book is affordable only by those who happen to receive a review copy.

WILLIAM IAN MILLER
University of Michigan Law School

-
4. Simon Roberts, *Order and Dispute* (Harmondsworth, 1979).

E.F. Haas, ed., *Louisiana's Legal Heritage*. Forward by R.R. Macdonald. Studies in Louisiana Culture Series. Pensacola, Fla.: Perdido Press for the Louisiana State Museum, 1983. 212 pp. \$12.50.

This brief collection of essays provides an important series of discussions of key points in the legal history of Louisiana. Far too little attention has been paid by "mainstream" American legal historians to the history of the former civil law territories that became part of the United States. Further study of the development of these jurisdictions' legal systems and the interaction between civil law and common law as these territories joined the Union can fill not only an important page in our national legal history but also provide a basis for fascinating comparative law studies. The Louisiana State Museum has done a great service to legal historians by drawing together in one volume the current work of some of the best historians of American civil law.

Interestingly, the essays in this volume deal not only with particular problems that have concerned civilians, such as whether the sources of the *Digest of Orleans of 1808* were Spanish or French or some hybrid thereof, but also with themes and topics of particular interest to historians of the common law in the United States and England. Of the former, more specifically civilian essays, are to be counted Richard Kilbourne's exacting and scrupulous study of the cases decided in the Territorial Court between 1804 and 1808 and A.N. Yiannopolous' contribution on the early sources of Louisiana law. The latter provides an excellent overview of the arguments presented on both