

C H A P T E R - V I I I

S O C I A L . A N T H R O P O L O G I C A L . P S Y C H O L O G I C A L A N D L E G A L I N V E S T I G A T I O N I N T O T H E P R A C T I C E O F T H E O R D E A L

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Ordeal is one of those institutions, which have attraction not only for the legal historian, but also for the histories in general, and for everyone, who is interested in studying the general ideas of civilizations in primitive people.⁵⁸⁰ This method of trying the accused person by subjecting him to a physical test and judging the guilt or innocence of the person as revealed through the divine justice is practically universal in all the civilizations of the world. There is perhaps no country in the world which has not made use of some test of such a kind.

The practice of ordeals is always found at a certain stage of peoples social and religious growth. It is thus a custom playing an important role during the long period of social evolution, but the purpose for which the ordeal was used i.e. to decide the guilt or innocence of the accused person is important from judicial point of view and thus the history of ordeal constitutes an important chapter in the book of justice. The ordeal had a potent influence in the primitive society and has contributed largely to the first fruition of legal ideas.

For a thorough understanding of the role played by the practice of ordeal in human history, or in the evolution of law,

580. Gustave Glotz : 'The ordeal and the oath', PLI p.609.

it is necessary to grasp the spirit with and the environment in which the ordeal was resorted to. The conception which was at the bottom of the ordeal was often misunderstood. The ordeal was considered 'cruel and barbarous, always superstitious and often unfair.'⁵⁸¹ The issue in these methods of trial by ordeal depended upon the 'physical Vigour of the culprit, upon the frauds he was able to practice and upon an anesthesia which was produced in certain persons of nervous temperament similar to hysteria or hypnotism.'⁵⁸² 'Pulgrave says that the ordeal was in fact only a mode of giving to the culprit a last chance of escaping the punishment of law. Stubbs believes that the ordeals in these circumstances being recourse following the verdict of a jury acquainted with the fact, could only be applied to those who were to all intents and purposes proved to be guilty.'⁵⁸³ The main objections thus raised are (i) it is barbarous (ii) it is based on superstition and cannot be supported by reason (iii) the result is declared by luck, (iv) lying and deception played a great role in these tests.

The ordeal was the ancient method of proof in which some deified material object declared the guilt or innocence of the accused person. In all the ordeals thus known to us there is always at the crucial moment a direct appeal to the supernatural powers to manifest the divine judgment by a particular test applied. They all exhibit the firm conviction that god himself

581. W.A.Robson : 'Civilization and the growth of law', p.138.

582. Jean Brissaud : 'History of French Public law', p.119.

583. J.B.Thayer; 'The older modes of trial' collected in the
'Select essays in Anglo-American legal history',
'p.396.

will pronounce the truth by letting the party to perish or by saving the accused person from an otherwise certain destruction. Primary significance of the ordeal must be expected to appear only in the customs of the ancient people - the custom that had a vital influence on the primitive society. It is risky to base our inferences on a comparison of peoples differing not only in their stages of civilizations but also in their social habits.

The great role played by the ordeal in human history or the social evolution, in the development of the legal ideas towards practical justice, or the philosophy involved in it, can be well understood only by making a systematic study of the various aspects of the method, which are undertaken here for discussion under the following heads.

- (I) Basic instincts and influencing forces.
- (II) Ordeal and rationality.
- (III) Various aspects.
 - (a) Ordeal and divination.
 - (b) Ordeal and Eschatology.
 - (c) Ordeal and priesthood.
 - (d) Ordeal and curse.
 - (e) Ordeal and luck or chance.
 - treatment of the innocent.
 - (f) Psychological aspect.
 - (g) Ordeal and torture.
- (IV) Ordeal : General nature.
- (V) Various stages in the development of the ordeal.
- (VI) Legal development of the ordeal.

(I) Basic instincts and influencing forces :

We have seen above that the ordeal is a custom, a method of proof in which the judgment is declared through the intervention of some supernatural power or divine agency. At its lowest stage, the whole process appears magical. It is however principally based on the principle of the curse or imprecation. It is mainly influenced by the religion. The basic concepts underlying the ordeal are supernaturalism, divination, magic and religion and imprecation. A study of these concepts would show that, these are essentially the psychological processes vitally related with the human mind.

"Supernaturalism is a mental attitude that has supernatural as its object. Supernaturalism is a term used by anthropologists to express the fact that primitive magic and primitive religion alike rest in a belief in supernatural power. As such, supernatural may be equated now with magical and now with divine. The savage respects the human magician on account of his continual intercourse with the supernatural world, and on the other hand must be allowed to possess rudimentary notion of certain supernatural beings who may be fittingly called gods, though not in the full sense in which we use the word.

Frazer assumes a general tendency among savage to claim powers which we should call now supernatural on the ground that a savage hardly conceives the distinction commonly drawn by more advanced peoples between the natural and supernatural. According

to F.B.Jevons there was a time when man did not make distinction between the natural and supernatural. J.H.Lemba observes that belief in supernatural power would call attention to the power rather than the supernatural quality attaching to it.

Chief aspects of the mental attitude under the supernatural belief -

(a) Emotional aspects -

"The emotional constituents of the magico-religious sentiment have been subjected to psychological analysis with the results that show even in its simplest forms exceedingly complex. 'AWE' is perhaps the word in our language that expresses its many sided nature most fully. AWE is defined by W Mc-Dougall as a tertiary compound of fear, wonder and negative self-feeling. Round the object provided by the supernatural, fear, admiration, submissiveness in varying degrees are organised in a mood. Thus the sentiment is excited equally by magic and religion-the sorcerer like god, being surrounded by a halo of mystery and an atmosphere of AWE. To appreciate the emotional attitude of primitive man towards universe which beyond the narrow circle of daily routine is almost wholly unknown yet felt to be pregnant with immeasurable possibilities of weal or woe. Confined to his ignorance to the immediate here and now, the savage attributes mystic powers alike to the stranger at a distance and to those of his own race that are dead and gone. Nor does the familiar present remains ^{unvisited} universal potents. The sky above him is disturbed by thunderstorm, eclipse, shooting stars, the aurora, earth and sea, their fantastic

rock; then living nature teems with wonder-trees and herbs, reptiles and fishes, birds and quadrupeds that look strange and behave unaccountably. Moreover man is mysterious to himself, with his visions, his seizures, the power of his eye and gesture, his sheer impressiveness ranging from majesty of kings to the ^{ug}grossness of witches. For the rest, life is all full of accidents and co-incidences. Altogether, the savage world provides plenty of scope for that interplay of primary emotions of which awe is the outcome. Be it noted however, that the essence of supernaturalism does not consist of bare feeling but attains expression through every aspect of mental life at once.

(b) Intellectual aspect -

" Since supernaturalism has a negative as well as positive side, embodying cautious doubt of the unknown combined with an effort to read meaning into it, primitive thought needs two-fold set of concepts - negatively supernaturalism is a taboo, positively it is mana. ^{Among} ~~A-mong~~ savage however such notions have not been built up into any systematic theory. It cannot be said that the rudimentary thought is altogether without an idea corresponding to that of natural or normal. We must not however look for definiteness in primitive categories since they are never subjected abstractly and as ideas to reflective examination, but merely embody such more or less arbitrary associations as custom suggests and sanctions.

(c) Practical aspect -

"Seeing then, that the savage may be said to live out his ideas rather than to think them out, it is in the sphere of his actual practice as regulated by social use and wont that we are likely to meet with clearest indications of his mental tendencies. Primitive supernaturalism will declare itself primarily in a group of traditional activities through which appropriate feelings and thoughts find their satisfaction. All that need be assumed here is that certain activities tend to be organised about the interest in the supernatural as embodied in a specific tissue of feelings and beliefs. The majico-religious life is unlimited in its claims on human endeavour and its ulterior effects on human welfare may be well-high and all pervasive. But, the mental attitude that it demands cannot be continuously maintained whenever the tension is relaxed, nature in shape of effortless rule of habit is busy making good the strain."⁵⁸⁴

"Magic constitutes veritable stormcentre in anthropological literature. The word magic in common language is used in vague and conflicting ways. Modern anthropology attributes to it something inferior or bad, belonging to lower level, or to the pathology of mind and society, but the word magic refers to religion, learning and occult practices. 'Principal key to the understanding of occult science is' points out Tylor, 'to consider it as based on association of idea, a faculty which

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lies at the very foundation of human reason, but in no small degree of human unreason also'. The laws of mind are unchanging as the laws of chemical combination so that 'the thing that has been, will be' J.E. Frazer credits the primitive man with two views of world that exist side by side (i) it is worked by personal beings acting on impulses and motives like his own. (ii) it amounts in germ to the conception of nature as a series of events occurring in an invariable order without the intervention of personal agency. In the evolution of thought magic as representing a lower intellectual stratum has probably everywhere preceded religion. He presents magic as 'next of kin to science', since the two have in common general assumption of a succession of events determined by law', Magic is nevertheless only 'bastard sister of science'. All the cases of sympathetic magic resolve themselves on analysis into mistaken application of association of ideas by similarity and contiguity.^{584A}

Age of magic gave place to an age of religion. Human evolution is a tissue of many interlacing strands. It is with the help of psychological and sociological consideration of a general type that a primordial stage of mind and society can be theoretically posited out of which religion may be shown to have emerged, by some sort of subsequent process. The ideas involved in the concept of religion concern man's whole body of thought. They point to subjective convictions of the most vital importance, i.e. (i) recognise a gulf between man and divine (ii) admit the strength support, peace and consolation

afforded by religion. (iii) intensify and santify otherwise non-religious phases of life and thought. Effects of religion are seen to be varyingly emotional and intellectual leading to practical social, aesthetic and speculative efforts.⁵⁸⁵

Divination should be treated as a branch of symphathetic mag magic and regarded as a deduction from a vaguely conceived principle of something like uniformity of nature.⁵⁸⁶

A curse is an excellent example of product of two powers- thought and word. As distinguished from desire on one hand and actualization on the other, it is the spoken word. It is based on an unconscious theory that the word is nearer to the end than the wish. It is a natural process of suggestion working through the strength of emotion, fear of ill-will and enmity and reinforcedly complex associated ideas relating to the essence of words and the energy of souls that gives the curse its independent power. Forms of ordeals and the whole theory of oaths as well as its practice upto the latest stages of civilization depend upon the conditional curse often embodied in symbolic action.⁵⁸⁷

(II) Ordeal and Rationality -

Struggle for existance, fear and hope for better are the basic tendencies of the human mind. These have made man channalise all his efforts to make good use of the universe round about him. All these efforts coupled with the thinking faculty and the

585. Ibid ~~Vol.VIII.p.245.~~ vol X p.663.

586. Ibid Vol.IV.p.776

587. Ibid Vol.IV p.367.

energy of soul have resulted in forming his notions about the supernatural or the belief in god. Magic and religion function on the principle of the association of ideas while a miracle happens or a curse gets materialised mainly due to the will-power of the person. Concepts of truthfullness, honesty, morality, ethics, or those of law, justice or crime, are the developments of the civilization - man's effort for better living, which are obviously influenced by man's notions about the supernatural or belief in god.

What we have to point out is : Belief in god or resorting to the supernatural for the settlement of difficulty in human affair is deeply ingrained in human nature. The aspect is vitally related with the basic tendencies of human mind. Rationality helps man in channalising his emotions but it cannot uproot the basic instincts of the man.

Ordeal is mainly developed as a legal institution. In order to operate effectively, and to accomplish its mission, law must be supported by the belief that it is of divine origin and of higher power realised in a wordly existance, and that x it is not a human product to be mastered by will. In purest form, this belief is found in the earliest childhood of a race, for, more that reason enters into the law, the less pronounced this belief becomes, it however cannot disappear entirely except that the law itself should fall into decrepit trifling with dead ideas.⁵⁸⁸

588. Andreas Heusler : 'Ancient formalism', PLI p.638.

'The practice(of ordeal) is based on a belief in the certainty of divine intervention to punish the wicked and protect the innocent. If today, civilised nations can pray to god to intervene in their wars to give victory to the righteous cause, it was a difference only in degree and not in kind if simpler people expected providence to take note also of the humbler affairs of ordinary man. Even today, after a century of Benthamite influence, the nations of West have not thought fit wholly to discard the oath, in the law of evidence. If the practice is to be justified on the pragmatic or psychological grounds the same argument will be equally available to justify the practice of oath and of resort to ordeal in an age when the possibility of divine intervention was more widely and sincerely believed in'.⁵⁸⁹

We can thus summarise following points as far as the ordeal and the rationality are concerned.

(i) Concepts on which the ordeal is based are related with the basic instincts of man. Reason can help man in channalising his emotions but it cannot uproot the basic instincts and as such they are bound to influence the human mind in some form or other. As a method, ordeal may die, but the concepts that make the ordeal are always there with the man.

(ii) The ordeal is in fact a result of the advancement of human and legal ideas. The discussion below will reveal to us that the ordeal has replaced more crude methods like Judicial

589. S.Varadachariar : 'The Hindu Judicial System', p.163.

combats and admits ^{itself} in themselves the elements of reason.

(iii) A close study of the rules of administration of these trials will indicate that there is all through-out a sympathetic consideration for the accused person undergoing the trial. They allowed right to live for the accused person and gradually became more mild and humane.

(iv) Ordeal has always put the weaker on defensive.

(v) We can discern a certain empirical foundation for the ordeal. The ordeal essentially turns out to be a psychological test of truth-telling.

(vi) It has practical utility. It has played a historical role in the evolution of law by giving a practical solution to the most perplexing problem of evidence in the law of procedure.

(III) Various Aspects -

(a) Ordeal and divination -

We have seen above that divination is a process of mind which takes recourse to some supernatural power. It is based on the principle of sympathetic magic based on the association of ideas and uniformity of nature.

According to Mr.H.J.Rose, divination may roughly be divided into two kinds (i) automatic divination in which an omen is looked for and interpreted with its own right, with no thought of appeal to any supernatural power or god or spirit. (ii) divination proper, in the strict etymological sense of the word

which inquires some sort of deity.

Ordeal is based on the belief that if the suspected person or disputants are exposed to serious danger, the divine powers will be compelled to take sides, and the truth will thereby be revealed or matter determined.

Divination by ordeal, according to Mr. Rose, may be classed as follows : Ordeals are of two kinds - either a suspected person (or the accuser and the suspected person both) is subjected to some process which could naturally injure or endanger him or the process is a magical one with power to hurt the guilty but not the innocent. In the first class, there is the root idea of judicial torture. The idea was probably that an innocent man or a truthful witness would feel no pain. In the second class, we find different methods which warn us of thinness of the party wall between magic and religion.^{589A}

Conception of divination of which ordeal is based has not remained the same, but is found evolved along with the development of the ordeal which has tended to be more and more religious. Explaining the role played by divination in the primary conception of ordeal, A.E. Crawley points out that in the later stage, both oaths and ordeals were appeals to the moral nature of the divinity, but in the savage theology, the god or his equivalent is a mere tool in the hands of the person invoking him. Thus Westermarck concludes - the idea of ordeal is not

590. ERE Vol. XX p. 512.

589A. ERE Vol IV p. 776.

primordially based on the belief in an all knowing, all powerful and just god, who protects the innocent and punishes the guilty, but that it largely springs from the same notion as underlies the belief in the efficacy of oath, i.e. mechanical power of cursing.⁵⁹⁰

Kohler makes following analysis of the judgment of god. Judgment of god is not unique. We find following varieties -

(a) judgment connected with the augury like judgment by lot or the seer's power who could discover evil-doer (b) divine judgment connected with the worship of the dead, it being presupposed that a murdered man will point out his murderer (c) divine judgment proper, the accused or the accuser or both placed in relation of some material object so that the deified object might make out his guilt or innocence.⁵⁹¹

(b) Ordeal and Eschatology -

Ordeal is largely influenced by the religious idea of the people. 'The ordeal had naturally showed marks of the popular beliefs as to the future fate of the wrong-doer', observes Mr. Gustave Glotz, 'for the ordeal was to demonstrate whether the man was stronger than death. He was placed between life and death, at the very boundary between the world of men and the world of spirits, so that he would naturally be forced into the latter and yet by magic of a divine birth ~~at~~ or by protection of god he could be retained on the earth. Thus the method and

590. ERE Vol.IX p.512.

591. Joseph Kohler, 'Survey of the law of procedure', PLI p.576.

place of the test varied according to the local conception of a future life. In primitive communities, the ordeals reveal sometime a whole eschatology.⁵⁹²

Gustave Glotz explains this by giving various examples. Greeks were born sailors. We therefore find prominence of the water ordeal amongst them. The water ordeal is popular among many people. In some cases, it is considered favourable to the accused person when he sinks to the bottom but condemnatory when he floats, while in others we find reverse of it i.e. the guilty is retained below by the god of river, while the innocent restored to the surface. Whence this contrariety? Is it due to different races - the Indo-Europeans or Samites? No. points out the author. It is merely a difference between the stages of civilization. 'For a long period they left it to the divine forces to determine whether the subject of ordeal should be released unto life or retained for death. This was the primitive solution simple and realistic. It attributed the disappearance to death and death to dishonour, (as we find in the latter case) --- but when the idea had developed that gods would keep among-themselves the worthiest men to bestow upon them a share in their own deathless happiness, the greeks like to believe that, in the ordeal by immersion, the god of water kept to himself those who were dear to him and repudiated the others. This solution more idealised and more refined in its moral element was also that of Manu. The change is significant. It reveals the soul of a people in its deepest belief - its

592. Gustave Glotz : 'The ordeal and the oath', PLI p.616.

conception of the other world'⁵⁹³

(c) Ordeal and Priesthood -

Religion has played a great role in the growth of the ordeal. Its (ordeal's) extension accompanies the growth of religion as distinct from magic,' points out A.S.Diamond⁵⁹⁴ The idea inspiring the procedure of the ordeal, according to Gustave Glotz is 'at once religious.'⁵⁹⁵ The person undergoing the trial utters a prayer, a direct appeal to divine providence.

It will appear that uttering of the prayer by the accused this way, happens to be a very important part of the trial, since it is the imprecation that binds the person. A good deal of ceremony is also used in connection with the administration of the ordeal. These ceremonies added to the moral effectiveness of the trial and enhanced its practical value as psychological test of truth-telling.

The religious rites in the trial are conducted with the assistance of the priests 'In the communities where priesthood forms a caste, professional men come forward to make solemn invocation, in communities where no priesthood obtained, the party himself uttered appropriate formulae',⁵⁹⁶ observes Mr. Gustave Glotz. It may however be pointed out in general, that the institution of priesthood was practically universal. 'Priesthood broadly speaking owes its origin to the universal need felt

593. Ibid : p.619.

594. Diamond A.S. : Primitive law¹, p.352

595. Gustave Glotz : 'The ordeal and the oath' PLI p.610

596. Ibid : pp.610-611.

by mankind of superhuman assistance, in the struggle of life. Among all peoples, belief exists that under certain circumstances advantages of some kind or other are obtainable from the super-natural world. The desire for guidance in these matters has given rise to various kinds of religious and magical practitioners amongst savage who are to be considered as pioneers of an organised priesthood, but amongst civilised peoples surviving traces of the same need characterised the authority of the priesthood'- points out G.Landtman.⁵⁹⁷

Apart from religious context, we find that the priesthood has in general exercised a considerable influence in the making of the law. 'On the plane of pure legal order, the priesthood attains great eminence, hence it is comprehensible that even that time the law is made mainly by priests' points out Kohler.⁵⁹⁸

Ordeal is the supernatural method expecting divine intervention. As such it is naturally more susceptible to the influence of priesthood. Ordeals of all the civilizations are in general influenced by the respective priests. Ordeal was adopted by the christian communities. It was conducted according to the rites of the christian faith. Church itself accepted and encouraged its use from the 8th century onwards.

The Iranian ordeals are presided over by the priest or the righteous man who acts as the judge of the outcome of ordeal.⁵⁹⁹

597. ERE Vol.X p.278.

598. Joseph Kohler : 'Survey of the law of procedure',PLI p.575.

599. ERE Vol.IX p.525.

Priesthood has obviously influenced the Indian ordeal. The Prādvivāka, the chief magistrate, who conducts the trial is compared with the Adhvaryu priest in a sacrifice. We find that elaborate sacrifices and long rituals precede the Indian ordeal.

(d) Ordeal and Curse -

Analysing the basic concepts, we have seen that super-naturalism, divination, magic and religion have played a great part in constituting the ordeal, but the curse or imprecation was of more importance in making the ordeal efficacious. Curse or imprecation as we have seen above, works on the willpower of the person. It is a great force affecting the actualisation of the desire. The object of the ordeal gives reality to the imprecation for the purpose of establishing the validity or invalidity of the suspicion.

What Westermarck terms 'the conditional cursing' (which he was the first student to remark) is an important development of the principle of cursing and has had a considerable influence in making morality especially in the sphere of good faith, honesty and truthfulness. Put in its own lowest terms, the energy of the conditional curse is the supernatural energy of an ordinary curse or of its embodiment in a latest stage. This is discharged by the act, if or when it takes place against which the curse is directed.

Forms of ordeal and the whole theory of oath as well as its practice upto the latest stage of civilization depend upon the conditional curse, often embodied in symbolic action. An oath may be regarded as 'essentially a conditional imprecation, a curse by which a person calls down upon himself some evil in event of what he says not being true. All the resources of symbolic magic are drawn upon in the multitudinous examples of this principle.⁶⁰⁰

A distinction between the magical and the religious oath is not to be over-emphasised. The two forms merge into one another and either is as magical or religious as the other, while neither is more efficacious. God draws together in his own person, the various threads of supernatural force. Among these are the curse and the blessing. Their inherent mystery of power still depends upon the will of the utterer. His invocation of god to execute for him his desire is rather a long circuiting, than a guarantee of result. The independent force of the wish, in fact tends to remain even when the wish is merged as prayer. Law gradually takes over the function of curse as a term of retribution while the prayer may still retain its use in cases where human intervention fails or even as a spiritual replica of human intervention.

In India, the word Śapatha used for the divine methods in fact stresses the importance of the imprecation in these trials. The later Smṛtikāras have emphasised this aspect of

600. Ibid : Vol.IV p.373.

the trial and elaborated its process by (i) making the Prād-vivāka (who executes the trial) to recite and thereby warn the accused person of the conditional curse implemented in the trial. (ii) by asking the accused to recite by himself the curse that should bind him (iii) making him write it on a leaf and tie it on his forehead. The elaboration is obviously meant for enhancing the effect of the curse psychologically.

(e) Ordeal and Luck or Chance :
Treatment of the innocent -

Tylor emphasises the relation between the ordeal and the idea of chance. There is a little doubt that the concept of luck itself, which is patently primitive, is the root-element in the ordeal. Mechanism of magic seems to be quite secondary- to be in fact the mechanism by which luck works. The concept of abstract justice and fairness seems to have been developed from a primitive notion of chance, one of its embodiments is the ordeal - magic and religion come in as re-inforcing agents.⁶⁰¹

The ordeal is often times denounced as a method merely based on chance and in its treatment of the innocent who is required to undergo the ordeal - the physical danger - for no fault of his own, it must however be pointed out that the person ~~who~~ has to face the trial because he happens to be a party in the dispute. The person is therefore required to clear all the doubts. When he is prepared for the trial, he is naturally

601. Ibid : Vol.IX p.512.

prepared to take that chance which might acquit him of the charges.

Now, as regards to the effect of the chance, it may be said, as Kohler puts it, 'that even the effect of chance was limited, for frequently the elements of reason were also involved. The consciousness of guilt or innocence was an important factor in these tests. They assumed more and more the character of allowing the psychic emotions of suspected person to appear when he is confronted with the deified things of nature. Thus, for instance, the fact that the accused trembled or in some way or other expressed in-ward excitement, might be interpreted as rising from the consciousness of guilt.

Taking a more philosophical view, Kohler observes, 'even if we assume that the element of chance was large, yet it must be taken into consideration that the sacrifice of the individual ~~saves~~ saves the peace of society, for, the belief in the correctness of the divine judgment was so great that even the innocent man believed himself to be guilty. Universal history often requires the individual to be thus sacrificed.... but here we must simply accept the ways of divine providence in the consciousness that thus the progress of the world is accomplished and we must realise that our modern criminal procedure also demands thousands of innocent victims, so liable to error are our own methods of proof and conviction'.⁶⁰²

602. Joseph Kohler : 'Survey of the Law of Procedure', PLI p.577.

In fact, it would appear that the ordeal has always helped ~~that~~ the weaker. Explaining the working of the divine judgment in which a person could overcome the dangers that in natural course of action would subject him to destruction, Gustave Glotz observes :- 'who would be such persons? Naturally, the humble beings who existed in obscurity on the fringe of the community- he it was who needed this help and could save his life and honour. They were aliens, the outsiders, and particularly also women and children. Although ordeal was found in an innumerable variety of cases, it was pre-eminently the weak who were liable to be called upon to furnish this proof of worthy origin, of a right to life and safety. We can even say that the weaker class instead of being sometimes complainants and sometimes defendants, were always put on defensive. The use of ordeal has this general feature running through it. 603

(f) Psychological Aspect -

Apart from the abuses that discredited the ordeal, the method possesses a real psychological merit. The ordeal thus chiefly works on the emotional plane of the human mind. By threatening a person to a great physical risk, what is intended here is to allow the person to express his inner mind. The ordeal is accompanied by various religious rites which increase the moral effectiveness and the psychological influence of the trial.

603. Gustave Glotz : 'The Ordeal and the Oath' PLI p.613.

The psychology of the person undergoing the trial-guilty or innocent-may be analysed as follows :-

Ordeal challenges the accused person who protects his innocence to put that innocence to a dangerous physical test. A recurring feature of the trial is that the innocent is apt to demand while the guilty dare not. The man conscious of guilt must be very strong minded in superstitious or any age to run the risk. Refusal to submit to the ordeal was itself thus regarded as a proof of his guilt in the case of which law punished him with torture or retribution appropriate to his crime.

In the case of an innocent, we find that the person is bound by mere consideration of self-preservation, to embrace the ordeal. In the superstitious age, he has full confidence in its fairness i.e. in its upholding the right. Apart from superstition, he is in the position of a gambler who has a 'certainty' and cannot refuse to put it to the test. And, the records again and again hint that self-confidence or consciousness of innocence has, at least, occasionally served as a mysterious factor of immunity.

In social psychology, ordeal has connection with punishment and torture. The guilty person who submits to the ordeal and is injured is ipso facto in receipt of the punishment. It must however be pointed out that theoretically there is an

essential difference between the ordeal and punishment. The former is a method of proof while the latter is awarded after the guilt is established. The judicial torture which has replaced the ordeal can be distinguished from it on various points. Psychologically, however, the successful endurance of torture is equivalent to the forming of an ordeal by the innocent man and the popular language describes both in similar terms.⁶⁰⁴

(g) Ordeal and Torture -

Torture emerged in the middle ages as a result of the decay of the ordeal. H.C.Lea remarks that the ordeal and torture are virtually substitutes for each other. They have rarely co-existed. In West Africa, when an accused person denies his guilt but refuses to submit to the ordeal, he is tortured. This is quite a logical conclusion from the principle of the ordeal. It amounts to compulsory submission to the ordeal.⁶⁰⁵

A point of affinity between the two was that, both were employed when there was a deficiency of a direct legal evidence. The essential difference between the two can however be pointed out as follows :-

- (i) The ordeal is based on the idea of the divine intervention while the torture works fully in the human sphere.
- (ii) The ordeal is a means of proof investigating the guilt or innocence of the person, while torture aims at achieving

604. ERE Vol.IX p.511.

605. Ibid : Vol.IX p.511.

the confession of the guilt!

(iii) Ordeal has a fair-dealing in the sense that a chance is given to the innocent to try his luck. No chance is offered in the torture. It was without even the negative virtue of offering a percentage of probability of right and truth in its results.

Torture which replaced the ordeal in succession claimed to rise superior to the superstitious belief (of the ordeal) and yet was utterly irrational in its essential character. Seen in the context of religious faith, and primitive belief in which they were set, ordeals did not disfigure that age that practised them because they were the genuine results of the convictions widely held and deeply felt. Torture, on the other hand had no organic relation with the medieval society or the needs of the time.

(IV) Ordeal as a method : General nature :

§ (a) Ordeal as a custom -

Primary significance of the ordeal appears in the customs of the people of old tribes, these ^{were} ~~were~~ all ancestral customs inspiring implicit reverence and forming a part of the public life for the community.

References to the ordeal are found in the old vedic literature. Avesta contains allusions to it. It is known through the old Greek mythologies. Irish mythicoromantic tales speak of the Irish ordeals in general.

Emphasising the customal importance of the ordeal known through the old mythologies, Gustave Glotz observes, 'We have abundant evidence of ordeals in pre-historic times in Greece. This country teemed with legends, and scholars explained these legends as dramatic imagination of reasons of natural phenomena.. but these stories are in truth history-the history of real man. Thus even in those myths which are open for naturistic interpretation, we see revealed the minds of those who invented them, as well as the phenomena which they were meant to explain..... (these myths) are merely the ingenuous memorial of early beliefs and primitive customs. They served to transit the law and religion of a rudimentary social condition. If we call from them the details added by later generations, they become indisputable evidence and rank as historical sources. The collections of the Gk. myths-writers contain virtually a customal of primitive law. Among the institutions therein depicted, the ordeal is prominent.⁶⁰⁶

As a custom, the ordeal was deep-rooted. Before the introduction of Christianity, ordeal was so deep-rooted that Church felt bound to accept it.

Under the Salic law, trial by ordeal, was not a thing legally ordained, but was privately agreed upon and legally permitted. Chineses law never accorded theoretical recognition to the ordeal but merely granted it more or less a grudging tolerance as a concession to immemorable custom.

606. Gustave Glotz : 'The Ordeal and the Oath', PLI p.612.

The law-givers of ancient India accepted ordeal as an antique method practised by the gods and sages. They recognised its importance as a custom. They call it 'Samayakriyā (i.e. the practice of the people) and advocate its utility.

(b) Procedural Aspect -

It may be observed in general that the mechanism of the tests tended to be more refined in course of time. It will thus appear that the older dreadful ordeals are gradually made milder and humane.

(c) General features -

Here we shall try to know the general features of these tests :-

(1)(a) Surprising is it to find that the forms of ordeal apparently vary little from people to people. This is naturally due to the imitation because of the contact of the people with another. As Gabriel Tarde points out, the formulas of invocation used for the ordeals of fire and water were the same throughout Christendom. The circumstance reveals the important role played by imitation in this point. Gabriel Tarde gives other examples of ordeals in which the principle of imitation is found working. (b) In Chinese and Japanese, there is no trace of ordeal and that acquaintance with them in Cambodia and Tibetan countries subject in all epochs to the influence of enlightenment from India and its imitative influence. The ordeal used there was that of boiling water and probably of Hindu origin. (c) In Madagascar, among Hovas, and here and there

throughout Africa, the usual ordeal is that of a poisoned drink.⁶⁰⁷

(ii) Examining the conditions in which the ordeal in general or the forms of it in particular country appear, A.S.Diamond points out that, (a) It is only among a few highly advanced tribes whose law is in fact derived from old civilizations that there appears development of the ordeal. (b) The ordeal by oath is far less common than other forms of ordeals and is confined to the more advanced tribes. (c) The rarest form of ordeal is that involving a present danger of physical injury such as ordeal by poison or throwing into water....Dangerous ordeals are confined to these cases where the sanction is capital.⁶⁰⁸

(iii) General features of the method are analysed by Paul Vinogradoff as follows :-

Subject of ordeal has been treated too much as a unity, whereas it is really a combination of several modes of procedure. The main idea is undoubtedly^{eddy} that supernatural powers are called upon to decide in a case leaving the decision of human wisdom. We find however that notwithstanding this unity of fundamental conception, three different modes are employed in order to reach that result (a) the practices grouped round the idea of struggle, the outcome of which is influenced by divine power, (b) group of appeal to chance (c) group of appeal to miracle. This group again falls into sub-divisions.- (i) appeal to a direct manifestation of god's judgment. (ii) appeal to a miraculous support against a human presumption.⁶⁰⁹

607. Gabriel Tarde : 'Evolution of procedure', PLI p.694.

608. A.S.Diamond : 'Primitive Law', pp.352 ff.

609. ERE, Vol.IX p.519

(iv) A.E.Crawley points out that it does not seem possible to detect any sequence of development in different modes of ordeal either in general or in particular countries. Special conditions often dictate the mode adopted.⁶¹⁰

It may be pointed out here that it is true that every form of the ordeal happens to be independent in its own way, and therefore it may not be possible to find any exact sequence of development amongst them. It however, appears that the ordeals investigating through natural powers e.g. ordeals of fire and water are the primitive ones. Other forms are obviously developed later on.

A study of the Indian ordeals reveals to us that the Dh.writers have systematised the procedure of the ordeals and have standardised the most popular methods into definite forms so as to make them helpful means. All these ordeals are essentially based on the principle of Dharma and are typically stamped with Dharmaśāstra principles. If we go through the order in which these forms appear in the Dh.literature it is possible to see a line of development in these forms.

(V) Various stages in the development of the ordeal -

The divine judgment has taken many forms. It appears in its universal form in the shape of the ordeal.

At its lowest stage ordeal was scarcely more than a magical process of divination, applied to the determination of a legal question. The communities in which ordeal appeared, points
610. Ibid : Vol.IX p.507.

out Gustave Glotz, had not become city states. They were the Genoi or family groups, clans, or patriarchal families. In these small groups, the later distinctions growing out of complex social life were not yet known. Law was undistinguished from religion, even religion had not imbued that ethical spirit which was later to dominate. The gods were also not dispensers of justice. Amidst such beliefs, when quarrels arise, it is not a question of deciding moral truth and justice, what is wanted and what it suffices is that the party shall be able to invoke some magical power and thus overcome the dangers which in natural course of things would subject him to destruction.⁶¹¹ Ordeal in primitive times thus served to decide not only the question of guilt but also personal status.

Religion has played great role in the growth of ordeal. We have already observed above how the priesthood has influenced the ordeal. The whole procedure is rendered religious. The ordeal is influenced by the religious ideas of the people e.g. the popular beliefs as regards to the future fate of the wrong-doer, or the conception of the people regarding the other world. Religion helped ordeal in its fast expansion.

When ordeal was accepted as a legal means of proof they became more formalistic and rigid.

Decline of ordeal - We may certainly suppose that during the greater period of its long life, the ordeal was regarded by all concerned as an infalliable method determining the truth. Most of the institutions however outlive the idea on

611. Gustave Glotz : 'The Ordeal and the Oath' PLI p.613.

which they are based and ordeal was no exception to it. When people knew that the result in fact was determined by physical vigour or pure chance, they probably realised that they were deceiving themselves by hypocritically pretending to submit disputed questions to tests alleged to elicit divine judgment.

When thus faith wavered and conviction gave way to scepticism or disbelief, a period of decadence was set in, in which ordeals were carried out by priests, who had ceased to believe in the efficacy or who perhaps manipulated the implements employed and when the results were accepted, by the public which no longer put trust in divinity inspired.

The christian church and Roman law, observes Mr. Robson, had combined to accomplish a great civilizing step in emancipating mankind from the superstitions practices into which society had submerged.⁶¹²

It was through the action of the church in adopting the various ordeals and consecrating them with all religious ritual that the practice survived in full vigour in Western Europe after the barbarous invasion, and it was when the christian church set her face against the system that it died in a remarkably short space of time. From 1159 to 1227 the popes were vigorously opposed to the ordeal and denounced it in unmeasurable terms. Innocent III who undermined the wagers of law or compurgation^g made a still more deadly attack upon the ordeal by forbidding it to be attended by the rites of the church. This was a fatal

612. Robson : 'Civilization and the growth of law', pp.135.

blow and the judgment of god died out in the 13th century in every form save one i.e. ordeal by battle.⁶¹³

Under circumstances, there was an attempt to find out newer methods. So long as appeal can be made to the judgment of god, confession is unnecessary. It is highly significant that when the judicial use of torture was being systematised as a means of obtaining evidence or confession, the ordeal was falling out of use.

(VI) Legal development of the ordeal -

Legal activity of every civilised people show a movement through three stages of development-divinatory, formalistic, and intellectual.

In early ages of mankind, law and religion were one. Law in primitive society had hardly reached the footing of settled practice or custom. Recurrent action in the moral, no less than the physical world, was most satisfactorily explained by the undeveloped intelligence by presupposing some divine agent as an active cause. All over the world, men have shown themselves eager to believe that rules for guidance of their conduct have been specially laid down or revealed to them by some superhuman power. Thus law in early society was believed to have come directly from god. This is the case in almost all the systems of law that are known to us.

613. Ibid p.127.

Law and religion in these olden days were so closely intervoven that it is scarcely possible to say where one begins and other leaves off. The ancient Hindu codes contained more about the observance of caste, domestic ceremonies, funeral rites, rules for diet, oblations to gods and similar matters, than about the question of secular law. Law was thus religion applied to domestic, social and political life. To infringe law was to commit an offence against gods. Among Greek^s and Romans, as among the Hindus and Mohamadans law was at first merged with religion and was indeed a part of it.

Primary significance of the ordeal lies in the old customs in which divine intervention was sought to solve a legal problem. It took its origin when law and religion were one and when state was still restricted to the narrow circle of family. 'Perhaps the most impressive manifestation of the connection between human laws on one hand and man's conceptions of the universe on the other is to be found in the complete reliance which has everywhere been placed in various forms of divine intervention as a sure and certain method of solving the most difficult problems of legal right and of indicating the true requirements of practical justice and political expediency.⁶¹⁴

It is necessary to examine the role played by ordeal in its primitive form. In the primitive ordeal, the consequences were decisive and the dispute was terminated after the trial. The ordeal thus served both as proof and judgment. 'If we turn

614. Ibid p.108.

from the legends of ancient Greece to the practical tests of supernatural character, we find that in their most primitive form there is no separation between proof, verdict, and penalty. The divine judgment is indeed revealed by the act which enforces the sentence. The guilty man is condemned by the very fact of ~~his~~ his death, the innocent is acquitted by his survival... Another end of the scale is the revelation which serves only as proof of guilt....large number of ordeals come midway between these extremes'.⁶¹⁵

Thus, the ordeal of the primitive people formed by itself a whole system of penal law and procedure. These oldest forms of trials were in fact no trials in modern sense of the word at all. They were the methods of proof. The legal history in general will show that the question of proof has always dominated the scene and was the crucial element in the judicial process. The vocabulary of law, possessed indeed no word for trial even late as Bactron's day. Men spoke of proof, and by proof they meant oath and ordeal each of which involved an appeal to the ~~x~~ supernatural.⁶¹⁶

If we study the evolution of the law of procedure in general, it will appear that the ordeal comes to the scene as a result of the advancement of human and developed legal idea. Observing the developments of the ancient legal systems of various countries, Gabriel Tarde points out that there appears

615. Ibid. p.116

616. Ibid. p.125.

to have been a certain logical order in the historical succession of the ordeals at least whenever the judicial combats were employed. Thus, the judicial combats, the most senseless and bloody of the ordeals, gave rise to the ordeals of fire and water, practices more humane one might imagine.⁶¹⁷ Gustave Glotz also points out that 'this conception of justice made visible upon earth by a divinity, is in fact the conception of a relatively advanced epoch. It presumes that the primitive human hordes have already formed social groups of governed communal life, before they can have admitted a belief in superior deities, who watch over the common interest and disperse justice. The conception which is advanced one has been applied to the earlier crude procedure, it did not create the procedure.'⁶¹⁸

Ordeal as we have seen above was practised as a custom. Evidence throughout the tribes was given by ~~unknown~~ unsworn statements and as in other mundane matters of life, when normal secular methods failed, primitive man resorted to the use of supernatural, so also when there was no evidence, he used ordeals. Thus the ordeal came into legal procedure from outside and continued to be used for legal as well as non-legal purposes. 'when trials first appear', says Diamond, 'it ~~app~~ seems doubtful if ordeals are employed, but in the second and third agricultural grades they spread rapidly and found amongst the most tribes of the later stage.'⁶¹⁹

617. Gabriel Tarde : 'Evolution of procedure' PLI p.691.

618. Gustave Glotz : 'The ordeal and the Oath' PLI p.611.

619. A.S.Diamond : 'Primitive Law' p.352.

The primitive law thus called in the aid of ordeal for the purpose of the ascertaining the guilt or innocence of the defendant. The onus of proof is, as in most of the modern systems, upon the defendant and the ordeals are naturally called into aid, for the defendant to clear himself....a system rapidly increasing in the second and third agricultural grade.

Examining the ancient codes of North-East and Leges Barbarorum and Anglo-Saxon law, Mr. Diamond points out that 'in the 8th century and later in the Frankish Empire, the ordeal and oath attained a scope never reached in the ancient Near East, nor in ancient Greece or Rome. The oaths and ordeals showed the steps of expansion. The ordeal by oath always threatened unless checked, to engulf the whole law. About 750 A.D. the ordeal had been extended not merely to cases where there was no evidence but ~~at~~ to other cases where there was no~~t~~ sure proof, that is to say, where the court expected difficulties.' 620

Main reasons pointed out for the development of ordeals in legal courts, according to Diamond, are the weakness of the central executive authority and of courts and the rise of the power of the church. In an average people of the third agricultural grade, observes Mr. Diamond, even though executive power may be weak, the influence of the public opinion in small legal groups and the general desire for justice and respect for law, are usually manifest. It was thus in part the weakness of the secular courts in the 8th century that caused them take refuge

behind the ordeal from the odium of deciding disputed issue against a powerful litigant. Secondly the decrease of the royal authority greatly assisted the rise of the power of church. In the ecclesiastical courts, as in those of Hebrews long before, and in those of Norman England at a later date, the priests had extended the ordeal by oath to a general method of trial and they also presided over application of oath in the secular courts. It was undoubtedly in part of their influence that the oath at this time experienced wide spread.

Taking a review of the role played by the ordeal in the legal courts, we find that the ordeal identified itself with the whole of the legal procedure at its primary stage, but as justice religion and government became more and more separate, ordeal was adopted to the uses more and more distinct. Thus ordeal had ceased to be both proof and penalty in one and had become either proof or a penalty. Later on it served as a capital punishment for in Greece or Rome the party condemned to death was cast into sea. As a proof, ordeal had degenerated for the most part into a mere form or even symbolic utterance, the oath had replaced ordeal and preserved its memory in terrible imprecation which it contained. It was merely an ordeal in words.⁶²¹

It is unjust to believe that lying and deception played a large part in these judgments. There is certainly no intentional deception, observes Kohler, until all these institutions reached a stage of decay and priesthood began a rapid decline.⁶²²

621. Gustave Glotz : 'The Ordeal and the Oath', PLI p.620.

622. Joseph Kohler : 'Survey of the law of procedure' PLI p.577.

Disposing the charges of lying and deception or unwillingness to undertake the task of finding out the truth against this odd method of proof, S.Vardachariar points out that 'the cases in which no evidence is or can be available give rise to greater difficulties. A modern court may dispose of such cases by holding that the party on whom the onus of proof lies, has not discharged that burden. If the ancients resorted to the oath or ordeal in such cases, I do not see how they can be justly accused of unwillingness to undertake the task of finding out the truth. Their methods may be right or wrong, but they were certainly the result of an anxiety to discover the truth.⁶²³

The ordeal is full of merits (i) the divine means of proof is used only in the absence of the human proofs, - when it is impossible for man to establish truth by his limited knowledge and ability. The ordeal was necessiated because of ^{human limitations and} human helplessness was rather more important in resorting to it. (ii) ordeal was full of psychological merit. It raised the inner consciousness of the person. (iii) Practical utility of the method was another factor that made ordeal popular. For the truthseeking man resort to ordeal becomes indispensable if there is no other proof. The ordeal thus solved a great difficulty towards arriving at the justice and its highest contribution in the legal history was towards practical justice. Mr.Thayer believes that the modern civilization occasionally feels now-a-days the want of some substitute for these old tests, in cases where there is strong ground for suspicion but full legal proof is wanting.⁶²⁴ (iv) one feature of the judgment of the god

623. S.Varadachariar : 'The Hindu Judicial System', p.162.

624. J.B.Thayer; 'The older modes of trial' collected in the 'select essays in Anglo-American Legal history' p.396.

which may be noted is the development of the idea of divine justice. 'In the early legends, the purpose of ordeal is to reveal the will of gods, the divine pleasure or displeasure rather than to serve as a measuring rod of justice in any abstract sense. But with the progress of human thought the conception of justice became of increased importance and the religious doctrine evolved the idea that divine will is identical with perfect justice. God thus becomes the Supreme judge. 'Thou art just. Oh lord, and righteous are thy judgments' runs the Psalm. 'Thou art just and a judge, make a manifest burn to appear on his feet' echos the ordeal of ploughshare, which was the cause and which effect, it is impossible to say. It is probably an inter-action between religious creed and legal institution, but for whatever reason, the will of god gave way to the justice of god and a new chapter in human history was begun. Once it was postulated that justice was ^{an} attribute of the heavenly powers, the business of establishing on earth became the task to which men could address themselves without constraint or misgiving.⁶²⁵

We have seen above that the use of ordeal spread during the medieval period due to the rising influence of the religion. When it was adopted in the legal courts, it became more formalistic and rigid and degenerated in a mere form or a symbolic utterance. With the development of science and advancement of human knowledge, man naturally tended towards

625. Robson : 'Civilization and the growth of law' p.138-139.

taking a scientific view of life which resulted in the change of human values and legal principles. Man no longer believed in divine or supernatural agencies and naturally his belief in these trials was shaken. When once the belief had ceased, the procedure was to be changed entirely on different lines, but again as Kohler points out, 'the essential thing is not that it should lead to objective^h right results, but that society should recognise the dominion of the law in the administration of justice. Hence as long as people believe in a divine procedure, it can be retained, but when once this belief is shaken, the procedure must be built on another foundation. This however cannot be done until education has advanced so far that it is possible to obtain fairly sound results with the procedure of reason and this is only possible if judges possess a certain degree of insight, of impartiality, of those who find the judgement beyond doubt and also if the conditions of life are such that it is possible in the main to reach a reasonable establishment of the necessary facts. Until man has reached this point the religious method of proof will continue to live in certain off-shoots. It does not die easily and can still be traced even today in certain institutions. One of its outgrowth for instance, is oath. The institution can maintain itself for a long time even if men no longer believe that the course of god can be brought down upon us by the will and power of a man yet the belief that it is possible for a man by appealing to the divinity to place himself under the divine power of vengeance is not so remote even from man of today.⁶²⁶

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626. Joseph Kohler : 'Survey of the law of procedure' PLI p.578.