An Historical Conspectus of the Sources of Byelorussian Law

(Continuation)

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The Privileges of the Nobility and the Charters granted to trading cities and such minority groups as the Tartars and Jews within the Grand Duchy of Lithuania, did not constitute a body of laws universally applicable throughout the land. This was to be the scope of the collection of laws known as *Litoūski Statut* or the Lithuanian Statute, enacted in three successive editions in 1529, 1566 and 1588. Although the body of laws was extended in each edition, the general outline did not vary significantly, and the contents continued to be expressed in the Middle Byelorussian language. The final edition, which remained in force in some parts of Byelorussia until 1918, was published in the printed form in Vilna by L. Mamonič. Not only did the Statute of 1588 reaffirm the sovereignty and territorial integrity of the Grand Duchy, which had been questioned, and even placed in jeopardy by the Act of Union signed with the Kingdom of Poland in 1569; it also reasserted the official status of the Byelorussian language in the following terms: "The Magistrates' clerk must write all letters, copies and summonses in Ruthenian, with Ruthenian words and characters, and not in any other language and words."[26]

The first Statute of Lithuania of 1529 was more in the nature of a consolidation than a codification.[27] A petition was presented to the Grand Duke Zyhymunt in 1515 to obtain a unified system of law for the nobles of the Grand Duchy. A Commission was duly set up under the Chancellor Albrecht Hastaūt, and after a considerable passage of time, a draft was produced which received the Grand Ducal assent in 1529.[28] Customary rules and pre-existing provincial decrees were fused into a coherent system under thirteen chapters containing a total of 282 sections or articles. Each heading grouped a number of articles setting out the provisions of the law. The contents of the Statute cover a wide field, but they are not classified in accordance with modern jurisprudential concepts; criminal law, constitutional law, contracts and torts, the law of persons and property, are all set

[26]) *Litoūski Statut,* Ch. IV, article 1.

[27]) For the full text, see Временник Общества Истории и Древностей Российских, Москва 1849-1857, том. XVIII.

[28]) V. Pičeta: Литовский Статут 1529 г. и его источники, *Белоруссия Литва XV-XVI* ee., Moscow 1961, pp. 507-509.

out in a rather disjointed and arbitrary fashion.[29] The following matters are specifically dealt with under the Statute:

1. The State and the powers of the Grand Duke, the privileges of the *šlachta* and *bajary,* the defence of the realm and military obligations (Chapters I-III).

2. The administration of Justice, the organisation of the Courts, procedure and rules of evidence (Chapter VI).

3. Offences against the person generally (Chapter VII).

4. Crime and punishment, with particular reference to robbery, larceny and crimes of violence (Chapters XI-XIII).

5. Family law, domestic relations, betrothal, the rights of married women and widows to matrimonial property, the status of unmarried women and guardianship (Chapters IV-V).

6. Property rights, disputes arising out of land-holding and ancillary rights, common boundaries, easements, ownership of wild game and wild bees (Chapters VIII-IX).

7. The law relating to creditor and debtor, the giving of security, mortgages, and the procedure for recovering debts (Chapter X).

The earliest edition of the Statute reveals a preoccupation with the problem of regulating compensation for acts of violence, and of keeping the peace — a reflection perhaps of the turbulent conditions which prevailed in earlier times.[30] Thus in the chapter dealing with offences against the person (Chapter VI) provision is still made for the repression of *najezdy* or forays which were then a frequent occurence. These originated in the remedy of self help, but they were not infrequently used as a pretext for a plundering expedition, and constituted a serious menace to the peaceful existence of countryfolk.

The compassionate concern for the weak, or for minority groups which had been shown by the legislative authority in ordinances such as the Statute of Jews, again became evident in the protective measures taken by the *Statut* in favour of women. Rape, for example, was a capital offence, although the victim of such an offence might save the criminal if she agreed to have him for her husband. Other crimes of violence were punished by a fine or the payment of compensation to the victim. The feudal scale of priorities applied to interests calling for legal protection was reflected in the degree of

[29]) The edition of 1529 was never printed at that time, although some writers have suggested, without much justification, that a printed version was made (Cf. S. Borisenok, Списки Литовского Статуту 1529 г. *Праі Комісіі для вивчування історії західно-руського та українського права,* вып. VI, Киів, 1929. л. 37.

The chapters dealt with these matters in the following order: The prerogatives of the sovereign (Ch. I.); the defence of the realm (Ch. II.); the privileges of the *šlachta* (gentry) (Ch. Ill); Property rights of women (Ch. IV); Guardianship (Ch. V); the organisation of the Courts and of civil procedure (Ch. VI); Property rights of the gentry (Ch. VII); Property and boundary rights (Ch. VIII; rights relating to forests, lakes, beaver-hunting and hops (Ch. IX); Mortgages and debts (Ch. X); poll-due for bondsmen and peasants (Ch. XI); Robbery and crime of violence (Ch. XII); and Theft (Ch. XIII). (See V. Pičeta: Литовский Статут ..., p. 510).

[30]) Pičeta stresses the essentially feudal character of the First Statute.

severity of the sentence whether by way of fine or damages. In extreme cases mutilation or capital punishment might be imposed. For the homicide of a bee-keeper the fine was eight *rubl-hrošy,* and for that of a serf, twelve *rubl-hrošy.* The killing of a red falcon involved a fine of twelve rubl-hroš y, that of a white falcon, eight, and that of a grey falcon six rubl-hroš y. It is an interesting thought that the value of the penalty for killing or stealing a dog was fixed at twelve *kop hrošy,* whereas the fine for killing a servant was merely *five kop hrošy.* A stealing of property belonging to the Grand Duke carried the death penalty if the stolen goods exceeded half a *kopa* in value, otherwise the wrongdoer stood to have his ears docked.

It is, however, plain from the headings of the chapters, as also from the contents of the Statute itself, that this was a system of legislation designed to govern a property-owing class.[31] It enshrined concepts and institutions which were largely archaic, and even gave some attention to the system of personal slavery, which still persisted in some parts of the Grand Duchy. It soon became clear that the first Statute was not an entirely satisfactory piece of codification, and it was found necessary to elaborate a second draft. A further petition was therefore presented to Zyhymunt Aūhust in 1544 to that effect.

A second Commission was then appointed under the presidency of Jonas Damanieuski, Catholic Bishop of Samogitia, a man well-versed in the interpretation of the Privileges and local custom. The commission included two Civilians, Auhustin Rotundus, who was Mayor of Vilna, and Pedro de Ruiz, a Spaniard who had studied Civil law in the University of Bologna. An equal number of Catholic and Orthodox noblemen sat on the Commission. Its purpose was to bring the Statute more into line with prevailing social conditions.

On account of pressing political considerations, and in particular of the need for national unity in the face of the threat from Russia in the East, the magnates of the Grand Duchy agreed to renounce some of their privileges, and to introduce into the Grand Duchy a system of government by a council of nobles known in Poland as the *Sojm.* Similarly the effects of the Reformation are reflected in the work of the Second Commission in that nobles of any religion were to be treated as equals before the law.

The Second Statute was promulgated in 1566, and was generally a larger and more businesslike piece of legislation. It included fourteen chapters and 368 articles, an increase in volume of almost one third over the older version.[32] Nevertheless it was still found to be unsatisfactory. A Third and final version was finally promulgated and published in 1588, and proved to be an unbridled success among the gentry, whereas the peasants themselves aspired to enjoy the privileges which it conferred on the more exalted landowners. It was also to become a durable monument, since it was to remain in force until 1840. An attempt made by the Poles in the XVIIIth century to abolish the Statute and to replace it by a unified code for both the Grand Duchy and Poland was brought to nothing by reason of the attach-

[31]) Pičeta, Литовский Статут … p. 509.
[32]) For full text see Временник О.И.Д.Р., том XIX.

ment of the Byelorussian and Lithuanian nobles to their own separate legal system and institutions.[38]

The scope of the Third Statute is set out in the headings of the Statute itself, which is worth a little detailed consideration.[34] The headings for each chapter follow in general outline those of the 1529 and 1566 editions, and give a picture of the matters covered by the codification:

I. Concerning the person of the Sovereign (35s.). II. Concerning the defence of the realm (27s.). III. Concerning the liberties of the gentry, and the expansion of the Grand Duchy of Lithuania (51s.). IV. Concerning Judges and Courts (105s.). V. Concerning Dowries (22s.). VI. Concerning guardianship (15s.). VII. Concerning the transfer and sale of property (31s.). VIII. Concerning last Wills and Testaments (9s.). IX. Concerning Land Tribunals, rights to land, boundaries and manors (32s.). X. Concerning forests, hunting, trees with bee-hives, lakes and meadows (18s.). XI. Concerning injuries, affrays and penalties for homicide (68s.). XII Concerning punishments and penalties for commoners, and concerning commoners and bondsmen who desert their master, and servants (24s.). XIII. Concerning robberies and injuries (14s.). XIV. Concerning crimes committed by persons of various estates (37s.).[35]

The general disposition of the headings is more orderly than in the 1529 edition, and forms a pattern roughly similar to that followed in Justinian's Institutes: Constitutional law (Ch. I-III), Civil procedure (Ch. IV), the law of persons (Ch. V-VI), the law of property (Ch. VII-X), and Criminal law (Ch. XI-XIV).

By its contents the Statute of 1588 indicates that it was devised for a more settled social order than that which prevailed in 1529. Such seemingly anachronistic touches as the inclusion of a chapter dealing with hunting and trees with beehives, were obvious required in a country vasts tracts of which were covered by primaeval forest land. The longevity and lasting popularity of the Statute in its final version even among the peasant class, who primarily were not entitled to benefit under it, bore witness to its efficacity as a piece of legislation, and pointed to its popular and customary origins.

* * *

The application of law, whether statutory or customary, gave rise to a very substantial body of case law which in itself constituted a major source of law. Such was the case with the vast corpus of the *Litoūskaja Metryka,* the most extensive collection of recorded cases ever to be formulated within the Grand Duchy. More than any other collection, the Metryka reveals the manner in which the law received its practical application.

The credit for the publication of the records of the old Grand-Ducal

[33]) Cf. ante p. 113.

[34]) For a more detailed study see I. Lappo: К вопросу о первом издании Литовского Статута 1588 г., *Tauta ir žodis*. Kaunas No. V, 1928; I. Lappo, Литовский Статут 1588, Kaunas, 1934-1936.

[35]) For the full text see: Временник О.И.Д.Р ... том XXIII.

courts of ordinary jurisdiction must go to the various archaeological Commissions in Vilna, St. Petersburg and Kiev who, in the XIXth century collected and printed the Court records, not so much as lawyers as historians.[36] Indeed many of the selections from the Court records include much material which is either religious, political or even purely economic or social. Again there are difficulties of nomenclature and terminology. The records were published at a time when the word "Byelorussian" was not recognised, and even prohibited for political reasons. Documents were classified either as "West Russian", "South Russian", "Lithuanian Russian" "Russo-Livonian", or some other similarly confusing circumlocution, or again in accordance with their place of origin, for example "Register of the Pinsk prefecture" or the "Record of the Bieraście Municipal Court." Although a large quantity of judicial documentation was published in St. Petersburg, Kiev and other cities, the most valuable work was done in Vilna where some thirty nine volumes of Judicial reports and administrative regulations were collected and published by a group of archaeologists and historians directed by I. Sprogis, Ju. Kračkoūski, D. Daūhiała and N. Gorbačevskij.

By their very names the records tell a great deal about the nature of the legal system, and point the way to sources of the utmost interest to the student of Byelorussian law and procedure. In between the years 1865 and 1891 the following collections of law reports and regulations were printed: I. Acts (i. e. Instruments and Judgements) of the Horadna Land Tribunal. II. Acts of the Bierascie Land Tribunal. III. & IV. Acts of the Bieraście Municipal Courts. V. Acts of the Horadna and Bieraście Municipal Courts. VI Acts of the Bieraście Municipal and Land Tribunals, and the Bierascie, Kobryn and Kamieniec Commercial (Magdeburg) Courts. VII. Acts of the Horadna Municipal Courts VIII. Acts of the Vilna Municipal Courts. IX. Acts of the Vilna Land Tribunal, Magistrates and Commercial (Magdeburg) Courts. X. Acts of the Vilna Magistrates and Commercial Courts. XI-XIII. Acts of the High Court of Lithuania. XV. Decrees of the High Court of Lithuania. XVII. Acts of the Horadna Land Tribunal. XXII. Acts of the Słonim Land Tribunal. XXIV. Acts relating to Bajars. XXVIII-XXIX. Acts relating to Jewish affairs. XXXI. Acts relating to the Lithuanian Tatars. XXXII. Acts of the Vilkamier Municipal Courts. XXXIX. Acts of the Mahiloū Magistrates Court.[37]

From the nature of these reports one notes the existence of several distinct jurisdictions *ratione loci* and *ratione materiae.* The High Court of Lithuania appears to take precedence in jurisdiction above a complex of municipal and Magistrates Courts, Courts specialising in Land law, and in the Law merchant of the cities under the Magdeburg privilege. There is also a jurisdiction *ratione personae,* or judicial organisation dealing with certain privileged or autonomous classes such as the *Bajary,* the Jews and the Tatars.[38]

[36]) Pičeta, Разработка истории Литовско-Белорусского права XV-XVI вв. в историографии, *Белоруссия и Литва,* бб. 418-426.
[37]) Pičeta, Разработка истории ... p. 420.
[38]) Pičeta, Разработка истории ... p. 441.

No complete or accurate picture of the legal system of the Grand Duchy of Lithuania can possibly be drawn without reference to the collection of Law Reports known as the *Litoūskaja Metryka* or Lithuanian Register, of which parts were edited by the archives of the Ministry of Justice of the Russian Empire under the editorship of the distinguished Byelorussian historian M. Doūnar-Zapolski. This was the register of the Chancery of the Grand Duchy, and was considered by Daūhiała, another well-known Byelorussian scholar and historian, as the richest source of information on the social, economic and judicial structure of the former Byelorussian State. Indeed, it contains more than 500 tomes.[39]

The first significant feature of the *Metryka* is that, at least until the XVIIth century, it was written in the Middle Byelorussian language, which was the official idiom of the Grand Duchy until it was displaced by Polish. This fact already indicated that there must have been a strong influence of Byelorussian judicial usage and custom on the development of the legal system in the Grand Duchy, though of course one cannot claim that that system was entirely closed to other influences. The conservativism and local patriotism of Byelorussian judges inevitably left a powerful imprint on the case-law of that time.

Daūhiała in his analysis of the *Metryka* discerns four distinct categories of records:

I. Books of records, which include the various grants of statutes and privileges to cities, towns and villages, grants of charters to cities under the Magdeburg Statute, Administrative regulations and petition, and complaints addressed to the Chancery office by the Princes, nobles, gentry and commoners of the Grand Duchy.

II. Collections of Law reports recorded in the Courts, whether of judgments in the Grand Ducal Court, or in that of the Marshall. Other reports include those of the Council of Nobles *(Rada)* or of the Assessors Court (from 1623 onwards), and of the Courts sitting as Courts of Appeal from the decision of the lower Magdeburg or Commercial Courts. The records of the Assessors Court are of particular value, being very complete. The collections also cover the Minutes of the Courts of Sessions, the Chancery Register, and the register of the Clerk of the Court.

III. Documents and records relating to the meetings of the *Rada,* the security of the realm, and the acts of Governors.

IV. Records covering the registers of castles, prefectures, and other administrative districts.[40]

Clearly the Courts, in dealing with litigation work could not make law or overrule statutory texts. Nevertheless, insofar as they apply the law to different situations, and are called upon to propound the law, the Courts of any country have a strong tendency to make law, at least to a limited degree. It is precisely in the application of the law to a set of given facts that the specifically Byelorussian elements in the practice of law become apparent.

[39]) Zm. Daūhiała, Літоўская Мэтрыка і яе каштоунасьць для вывучэньня мінуўшчыны Беларусі Riga, 1933, б. 12.

[40]) Dauhiala, op cit. 12-13.

Notwithstanding the considerable corpus of statute law, and the extensive body of case-law enshrined in the *Litoūskaja Metryka,* and other collections of law-reports, the great majority of Byelorussians, and in particular the peasant classes, remained subject to the rules of customary law, and to the jurisdiction of the rural or village courts.[41]

In modern societies, custom as such does not partake of the character of law, and merely consists of tacit usages. Customary rules which regulated legal relationships in Western countries, were relatively swiftly rationalised and fixed in a permanent form, either in statutes, or custumals, or as in England, in case-law. History provides sufficient evidence of the existence of societies in which there was no explicit formulation of rules, and which had no clearly articulated machinery for the making and dispensing of law. Where men were governed by customary rules, these rules frequently overlapped those of religion and morality, which in an early stage of development, are hard to differentiate from law. Not all jurists would readily accept such rules as being law, yet insofar as they are binding and accepted rules of human conduct, they are legal rules. Custom may become law, whether or not it is officially recognised as such by the sovereign.

A study of the nature and development of the early law of Greece and Rome in their historical context, and the study of undeveloped societies in the contemporary world, cast sufficient light on the nature of custom, and its affinity to law. In advanced societies, law means primarily statute law, and its development consists mainly in the interpretation of statutes by the Courts. Customary law plays a subordinate part though it might lie at the origin of many legal institutions. Thus the custom of merchants, and indeed that which prevails in other branches of community life, is frequently referred to as applicable, even in the texts of Statutes.

In Mediaeval and Renaissance Byelorussia, custom not only contributed to the general formation and development of legal norms,[42] but also survived until recent times as an articulated legal machinery with its own rules of substantive law and procedure.

The Privileges and the Statute were characters for distinct classes — the *šlachta,* the *bajary* and the merchants. The peasantry which comprised the overwhelming majority of the population of the Grand Duchy, continued to be subject to and judged in accordance with

[41]) The status and *modus vivendi* of the peasants is studied by Z. Ivinskis, in Geschichte des Bauernstandes in Litauen von den altesten Zeiten bis zum Anfang des XVI-ten Jahrhunderts, *Historische Studien,* Berlin, 1933, and by V. Pičeta in Юрыдычнае становішча вясковага несельніцтва на прыватнаўласьнічкіх землях к часу выданьня Лігоўскага Статута 1529 году, Запіскі Аддзелу Гуманітарных Навук Інстытуту Беларускае Культуры, Том III, Менск, 1929.

[42]) Todar Jeūłaseuski in his *Memoirs* mentions his conducting of an inquiry "according to local custom" during his sojourn in the village of Darahova. (Cf. Дневник Новгородскаго подсудка Феодора Евлашевскаго, *Киевская Старина,* Том. XIV, Киев 1886, л. 130).

their local custom — a form of common law which survived as a living force until the present century. It is perhaps in this system of customary law that the true and most distinctive features of Byelorussian legal concepts made themselves felt. Feudal privileges, the Magdeburg Statute, and even the Lithuanian Statute, were more or less influenced by Roman, German, Czech and Polish law. Customary law, on the other hand, arose directly out of the needs of the Byelorussian rural community.

There was no general custom of the land as was the case for example with the common law of England. Neither were there any written custumals or codes of customary law containing concise legal formulae as was the usage in the pays de *droit coutumier* in pre-Revolutionary France. When in the course of the late XIXth and early XXth centuries ethnographers began to record local customs of a legal character in Byelorussia, it was in the course of their general research in such fields as marriage ceremonies and farming usage that they came to deal with customary law. Much information of considerable interest to a legal historian lies dispersed in works dealing primarily with beliefs, legends, home life and ritual. Certain writers, however, such as Doūnar-Zapolski, Pachman and Teslenko, have dealt specifically with custom as a source of law, and their works constitute valuable handbooks of local law and procedure before the rural courts. Manuals of customary law exist for the provinces of Minsk, Smalensk, Palessie, Viciebsk and Mahiloū.[43] Similarly, detailed studies exist on judicial procedure before the rural jurisdictions.[44] Through these treatises and the works of the ethnographers, a complete picture of Byelorussian customary law, and its variations from province to province, may be built up.

Customary law was essentially an unwritten system of law, the rules of which were handed down orally from generation to generation. The records of the local courts *(sielskija sudy, vałastnyja sudy),* although frequently badly kept, and sometimes not kept at all for considerable periods, provide a most valuable source of material for research.[45] Doūnar-Zapolski, whose collection of customary law covers the provinces of Minsk, Navahradak and Mozyr recorded more than 270 judgments of the rural courts of Telechany, Pinsk, Harbaceviču, Babrujsk, Dziarnoviču and Rečyca.[46] Personal experiences of customary usage in a given locality, together with the questioning of rural

[43]) For the custom of Minsk, see M. Doūnar-Zapolski, Очерки семейственного права крестьян Минской Губернии, *Этнографическое обозрение,* I, 1897. стр. 82-142; II. 1-16; the custom of Mahiloū, A. Brandt, Юридические обычаи у крестьян Могилевской губернии, *Сборник народных юридическых обычаев* II, ред. С. Пахман, СПб. 1900, стр. 97-118; the custom of Smalensk, S. Pachman, Очерк народных юридических обычаев Смоленской губернии, *Сборник народных юридических обычаев* II, СПб. 1900, стр. 57-96; the custom of Viciebsk, N. Nikiforovskij, Очерк Витебской Белоруссии, *Этнографическое Обозрение,* I, 1892, 70-105; И-Ш. 170-202; И. 1893, 92-151; IV. 1896, 65-88; II, 1893, стр. 1-36; II, 1898, 1-36; I-II, 1899, стр. 19-53.

[44]) N. Teslenko, О судоустройстве по обычному праву белоруссов, Этнографическое Обозрение, III, 1893, 37-52.

[45]) N. Vakar, Belorussia, The Making of a Nation, Cambridge Mass, 1956, 24-25.

[46]) M. Doūnar-Zapolski, Очерк семейственнаго обычнаго права крестьян Минской губернии, *Исследования и статьи,* Том I. Киев 1909 р. 1.

judges or village elders, helped the ethnographers to form a clear and relatively detailed picture of the nature and variations of customary law.

The substantive rules of customary law dealt principally with legal problems most likely to arise in rural life. There was a highly developed system of personal and property law, whereas the rules relating to contracts, torts and criminal offences were of a less sophisticated nature.

Vakar has given a summary of the principal institutions of family law,[47] though his observations are based principally on Doūnar-Zapolski's work and do not really draw a sharp distinction between those institutions as creating valid relationships, and unrelated matters of mere usage.

The more detailed treatises on the subject deal at some length with the customary laws relating to the structure of the family, patria potestas, the status of the married woman, matrimonial property rights, adoption, fostering and guardianship, absentees, and the devolution of land and moveable property. Many of these institutions are of considerable antiquity, dating back to the XVIth century, and in the case of some districts to an earlier period, depending upon the date at which settlement or colonisation took place. Family relations tended to be complicated on account of the size of many of the farming families, and of the fact that they frequently included adopted persons, wards and even strangers in blood and proteges *(zdolniki).*[48] Notions of parental authority were not necessarily related to the natural father, since a collateral or even a stranger in blood *(zdolnik)* could succeed him in the exercise of those rights.[49]

The legal ownership of land was vested in the father but his power of alienation was limited by the custom relating to the division of property. He was held to be more a trustee of the family estate than the owner in fee simple. If there were legal heirs in being, entitled to succeed him, he could not alienate land as the heir might assert his claim at any time; neither did custom commonly admit any statute of limitation nor rustic equity allow a man to plead the benefit of laches. But in his lifetime a father could exclude a son from sharing the communal property if the latter stayed away from home and did not contribute to the welfare of the community.[50]

Women's dowry and trousseau brought into marriage remained her own property throughout life. After death, her personal property went to her legal heir, except where there was failure in the issue, then the property reverted to the donor or his heirs.[51]

The legal position of the daughter varied from region to region but generally male heirs were preferred to female and she was excluded from the share in the family estate. But it was the duty of the head of the family to marry her off and to give her a decent dowry, consisting of money, an assortment of personal chattels and livestock,

[47]) Vakar, op. cit. pp. 17-25.
[48]) Doūnar-Zapolski, Очерк ... p. 6.
[49]) Dcūnar-Zapolski, Очерк ... p. 9 ff.
[50]) Vakar, op. cit. p. 20.
[51]) Vakar, op. cit. p. 21.

according to the father's standing in the community. In the absence of a son, daughters shared equally in the family estate and the husband of the eldest married daughter *(prymak)* assumed wardship for the younger ones.[52]

The imperial law recognised only church marriage as valid matrimonial union but among the country folk in remote areas 'common-law' marriages, celebrated without the church, and consummated by cohabitation, were not uncommon. Children of such union claimed equal rights of inheritance as the offspring from the church wedding though this was contrary to the imperial law.

Money lending was not uncommon, generally in the nature of bridge-loans to bind over a debtor during the lean period from March to November, at a usurious rate of interest, commonly paid off in kind — with bushels or sacks of corn.

The local judges were to some extent, the guardians of the interest of the community, and in certain circumstances it rested upon them to determine whether the rights of the individuals must prevail or whether they should give way to the higher concept of the requirements of communal justice. It is for the purpose of their guidance in discharge of this duty, that these juristic principles, founded on customary law, were necessarily fluid and susceptible to influences which lay outside the law, such as current ideas of morality and economic and political changes in the structure of human society, so that their application by the judges of the local courts called for the exercise of caution and prudence to prevent them being utilised in such a manner as to undermine the cohesion of the community.[53]

To prevent deviations from the existing custom, unless they be consonant to the interest of the community, the Arbitrum of the local judges was controlled by customary law and by the whole community which could point out any excesses to general disapprobation. Owing to such restraints the judges rarely dispensed law arbitrarily. They had to adhere to the standards of right conduct, which found its expression in the approval of the community, demands were concordant with religion, ethics and the social sense of justice imminent in the common mind. When the local judges did subvert Statute law, they were commonly doing that which the opinion of the community required, and the judges simply thought to protect the general interest of the community.

The village court procedure for obtaining impartial evidence was rustic and unsophisticated. Documentary evidence was seldom required to be examined by the court, and plaintiffs, who frequently were illiterate, and the witnesses were not examined on oath. In the event of any serious doubt in the minds of the judges or the court, arising out of conflicting evidence, an open and public proclamation of innocence by the defendant, in front of the cross, sealed by a kiss of the cross, would acquit the defendant.[54]

[52]) Vakar, op. cit. pp. 23-24.
[53]) Doūnar-Zapolski, Очерк … p. 83; Vakar, op. cit. p. 25.
[54]) A. Brandt, Юридические Обычаи у Крестьян Могилевской губернии, *Сборник народных юридических обычаев,* SPb, 1900, p. 117.

One must not look for a 'Court' as the necessary mark of legal process, though Byelorussian customary local courts followed proceedings of an established order; what the court did was to enforce legal control by following the customary process of law whilst avoiding any recourse to revenge or blood feuds.

Criminal offences were not clearly distinguished from civil offences, and claims for all kinds of personal physical harm to property were understood in terms of material damage which were settled often by compensation to the injured party or his relatives. Rural justice shunned punishment by the incarceration of offenders, and preferred fines and useful public work to prison sentences.

The Compensatory rather than punitive objective of the law is acknowledged alike in both primitive and developed legal systems. The *noxal surrender* of ancient Rome and the distress damage feasant of modern English law illustrate this view. In lieu of liability in the form of losing *res* to the victim, the law substituted an independent fine.

For offences regarded as more serious in an agricultural community, such as horse stealing, arson of farm buildings or crops, the whole community would inflict punishment *(samusud)*.[55] The writer can quote an account of an eye witness to a case in which the village court tried a fire-raiser without even the customary process of law. Death punishment was inflicted and the execution was carried out by the village representatives of both sexes.

Some forms of judgment and punishment contained germs of rustic equity, a disapproval of the moral shortcomings of the offender rather than condemnation of his wickedness. Brandt cites a court record which described how once a peasant drowned his disobedient son in the lake. He was tried by the rural court which sentenced him to three month imprisonment not for the crime of murder but for his failure to infuse in his children esteem for parents.

The law draws on the natural springs of the society itself and not on the artificial reservoir of the sovereign ruler, whether such ruler be a human being or a group. In an ethnically homogenous society, in which the sovereign is not alien to his subjects, legislation and customary law generally go hand in hand. In the Byelorussian community, woven delicately from variegated ethnical and religious groups by incidents of history, legislation became divorced from customary law.

For better or worse the stream of Byelorussian law bifurcated into two branches not without some disturbance to the soil and the tranquility of the waters. The Nobility, the landed gentry, and some of the urban population, irretrievably moved away from the rest of the people who lived on and from the soil. Legal norms and juristic concepts sum up the way the people live their lives, and identify their place in community. It is hardly surprising that Byelorussian villagers found little common identity in legal precepts imposed upon them by what they believed to be foreign elements.

[55]) Vakar, op. cit. p. 25.