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Repression: From a Preindustrial metropolis to the European Experience

Pieter Spierenburg

Excerpt

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Chapter one

THE EMERGENCE OF CRIMINAL JUSTICE

From the way in which I have defined repression, it is obvious that its evolution should be intimately connected with the development of the state. The practice of criminal justice was one of the means by which authorities, with or without success, attempted to keep the population in line. As the position of these authorities changed, the character of criminal justice changed. However, before we can speak of criminal justice in any society, at least a rudimentary state organization has to be present. A system of repression presupposes a minimal level of state formation. Differentiation of this system, moreover, also presupposes the rise of towns. This chapter is an attempt to trace the origins of preindustrial repression. This cannot be a detailed analysis, but a short discussion is necessary for a fuller comprehension of my central thesis, and will indicate the social context for the subjects treated in the rest of the book. This chapter does not deal with changing sensibilities. It focuses on repression as a system of control, the emergence of which was a function of the rise of territorial principalities and of urbanization.¹

At the height of the feudal age in Western Europe the state hardly existed at all. Violent entrepreneurs were in constant competition; from his castle a baron would dominate the immediate surroundings and *de facto* recognize no higher authority. His domain may be called a unit of attack and defense but not a state. Essentially it comprised a network of ties of affiliation and bondage. But in the violent competition between the numerous chiefs of such networks the mechanism was immanent which would eventually lead to the emergence of states. The first units with the character of a state were the territorial principalities which appeared from the twelfth century onwards.

As it happens, the emergence of criminal justice also dates from the twelfth century. Several legal historians have studied the 'birth of punishment' or 'emergence of public penal law'. The most detailed work is by P. W. A. Immink.² This author also comes closest to a

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sociological–historical view of the subject. He placed the origins of punishment in the context of changing relationships of freedom and dependence in feudal society. Thus he avoided presenting an analysis of legal texts alone, which can be very misleading especially for the period in question. From a sociological–historical perspective the essence of criminal justice is a relationship of subordination. This was noted by Immink: ‘in common parlance the term “punishment” is never used unless the person upon whom the penalty is inflicted is clearly subordinate to the one imposing the penal act’.³ This is the crucial point. This element distinguishes punishment from vengeance and the feud, where the parties are equal. If there is no subordination, there is no punishment.

The earliest subordinates in Europe were slaves. In that agrarian society, from Germanic times up into the feudal period, freemen were not subject to a penal system, but unfree persons were. The lord of a manor exercised an almost absolute authority over his serfs. When the latter were beaten or put to death – or maybe even fined – for some illegal act, this can certainly be called punishment. The manorial penal system of those early ages belonged to the realm of custom and usually did not form part of written law. Therefore we do not know much about it. The Barbarian Codes (*Leges Barbarorum*) were meant for freemen. They only referred to unfree persons in cases where their actions could lead to a conflict between freemen.⁴

Free persons, on the other hand, settled their conflicts personally. There were a few exceptions to this, even in Germanic times. In certain cases, if a member was held to have acted against the vital interests of the tribe, he could be expelled from the tribal community (branded a ‘wolf’) or even killed.⁵ But on the whole, as there was no arbiter strong enough to impose his will, private individuals settled their own conflicts. A settlement could be reached through revenge or reconciliation. Vengeance and the feud were accepted forms of private retaliation, but they did not necessarily follow every injury. In a situation where violence is not monopolized, private violence is potentially omnipresent, but does not always manifest itself in practice. Notably it can be bought off. Reconciliation through payment to the injured party was already known in Tacitus’ time.

To the earliest powerful rulers who represented an embryonic public authority, encouragement of this custom was the obvious road to be taken if they wished to reduce private violence. This is in fact what the Barbarian codes are all about. In every instance they fix the amount which can buy off vengeance. These sums are not fines in the modern sense, but

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indemnities. They were either meant as compensation when a person had been killed, wounded or assaulted (*wergeld*) or as a form of restitution when property had been stolen, destroyed or damaged.⁶ Among freemen this remained the dominant system well into the twelfth century.

Criminal justice, however, slowly developed alongside this system. Its evolution during the feudal period was construed by Immink as one argument against the thesis put forward by Viktor Achter.⁷ The latter had argued that punishment suddenly emerged in Languedoc in the middle of the twelfth century, from where it spread to the rest of Europe. Although Immink placed the definite breakthrough around the same time, he believed the evolution of punishment was inextricably linked with feudalism. The feudalization of Western Europe had brought about a fundamental change in the notion of freedom. This change eventually led to the emergence of criminal justice.

Before the feudal age the notion of freedom was closely connected to the allod. An allod should not be considered as a piece of property in the modern sense, but rather as an estate which is free from outside interference. Its occupant is completely his own master. His freedom implies a total independence from any worldly power and is similar to what later came to be called sovereignty. Hence the relationship of a freeman with the unfree persons subject to him, and over whom he exercises a right of punishment, is not one of owner–owned but one of ruler–ruled. The development of the institution of vassalage slowly put an end to the notion of freedom based on the allod. The Frankish kings and their successors attached freemen to themselves in a relationship of lord and *fideles*. Hence the latter were no longer entirely independent. By the time the whole network of feudal ties had finally been established, the notion of freedom had been transformed. Freedom meant being bound directly to the king, or to be more precise, there were degrees of freedom depending on how direct the allegiance was.⁸

The feudal transformation of the notion of freedom formed the basis of the emergence of a penal system applied to freemen. The king remained the only free person in the ancient allodial sense, the only sovereign. His reaction to a breach of faith by his vassal (*infidelitas*, felony),⁹ usually the imposition of death, can truly be called punishment. The king himself never had a *wergeld*, because no one was his equal.¹⁰ His application of punishment for *infidelitas* resembled the exercise of justice by a master over his serfs. When more and more illegal acts were defined as felonies, the emergence of a penal system with corporal and capital punishments applied to freemen became steadily more apparent.

The implication of Immink's analysis for the study of state formation

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processes is evident. Absence of a central authority is reflected in the prevalence of private vengeance, the feud or voluntary reconciliation. The development of criminal justice runs parallel to the emergence of slightly stronger rulers. Originally it is only practiced within the confines of a manor; later it is applied by the rulers of kingdoms and territories. But we do not have to accept every part of Immink's story. For one thing, in his description the evolution of criminal justice and the parallel decline of the feud appeared too much as a unilinear process. This follows partly from his criticism of Achter. The latter, for instance, saw the legal reforms of the Carolingian period as a precocious spurt in the direction of a breakthrough of a modern notion of punishment. This would be in line with the fact that this period also witnessed a precocious sort of monopoly of authority. Achter considered the spurt as an isolated episode followed by centuries of silence.¹¹ This may be too crude. Immink, however, with his conception of an ultimate continuity, seems to go too far in the other direction, playing down the unsettled character of the ninth and tenth centuries.¹² These were certainly times when the vendetta was prevalent, despite whatever intentions legislators might have harbored.¹³ On the other hand, we should not overestimate the degree of monopolization of authority around AD 800. The Carolingian Empire and its successor kingdoms were no more than temporary sets of allegiances over a wide geographic area, held together by the personal prestige of an individual king or by a military threat from outside. From Roman times until the twelfth century Europe witnessed nothing approaching a state, but there were certainly spurts in that direction.

In the middle of the twelfth century the first territorial principalities made their appearance and a penal system applied to freemen was established. The symbiosis is evident. Criminal justice emerged because the territorial princes were the first rulers powerful enough to combat private vengeance to a certain degree. The church had already attempted to do so, but largely in vain. I leave aside the question of whether its representatives were motivated by ideological reasons or by the desire to protect ecclesiastical goods. In any case they needed the strong arm of secular powers in order to succeed. The *treuga Dei* only acquired some measure of effectiveness when it became the 'country's peace'.¹⁴ Two of the earliest regions to witness this development were Angevin England – which can also be seen as a territorial principality¹⁵ – and the duchy of Aquitaine.

Incidentally, the South of France is also the region where, according to Achter, the concept of punishment originated. It is interesting that he reached this conclusion even though he used quite different sources and

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from a different perspective. Achter considered the element of moral disapproval as the essence of punishment. This notion was largely absent from Germanic law, which did not differentiate between accidents and intentional acts. If a felled tree accidentally killed a man the full *wergeld* still had to be paid.¹⁶ Immink criticized this view and it may be another point where his rejection is too radical. He indicated, in fact, how Achter's view can be integrated into an approach focusing on state-formation processes. For the private avenger redressing a personal wrong, the wickedness of the other party is so self-evident that it need not be stated. As long as the law merely attempts to encourage reconciliation, it is likewise indifferent to a moral appreciation of the acts which started the conflict. When territorial lords begin to administer punishments to persons who have not wronged them personally, their attitudes to the law change as well. Theorizing about the law increases. The beginnings of a distinction between civil and criminal cases become apparent. The latter are *iniquitates*, acts that are to be disapproved of morally and which put their author at the *miser cordia* of his lord.¹⁷

Thus it is understandable that a new emphasis on the moral reprehensibility of illegal acts also dates from the middle of the twelfth century. Indeed this period witnessed an early wave of moralization—individualization, connected to what medievalists have long been accustomed to call the Renaissance of the twelfth century. And yet we should not overestimate this spurt towards individualization, certainly not with regard to penal practice. Before the twelfth century there may have been even less concern for the motives and intentions of the perpetrators of illegal acts, but – as I will argue in other chapters – the practice of criminal justice continued to focus on crimes and their impact on the community rather than on the criminal's personality and the intricacies of his guilt. Up into the nineteenth century repression was not primarily individualized.

There is another aspect of the transformation under discussion which merits attention. When a malefactor finds himself at the mercy (*miser cordia*) of a prince, the implication is that a religious notion has entered criminal justice. Mercy was an attribute of God, the ultimate judge. The relationship of all people with God had always been viewed as one of subordination. Hence God was indeed able to punish. Any wrong suffered, such as the loss of a combat, could be seen as a divine punishment, of which another man was merely the agent. Heavenly justice was never an automatic response. The Lord could be severe or show mercy. By analogy this line of thought was also applied to human justice practiced by a territorial lord.

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Several authors discussed the ‘sacred quality’ of preindustrial punishment and even considered it an explanatory factor for its character.¹⁸ According to this view, executions, especially capital ones, were a sort of sacrifice, an act of expiation. They reconciled the deity offended by the crime and restored the order of society sanctioned by heaven. This notion may have been part of the experience of executions, although there is little direct evidence for it. But it would certainly be incorrect to attribute an explanatory value to it as being in some way the essence of public punishment. For one thing, during and after the Middle Ages *every* social event also had a religious element. In the absence of a division between the sacred and the profane, religion pervaded life entirely. To note the sacred quality of executions in this context is actually redundant. If a religious view of the world has to ‘explain’ public punishment in any way, it should do so in a more specific sense. But the evolution which gave rise to criminal justice hardly lends support to this view. Criminal justice arose out of changing relationships of freedom and dependence in the secular world. It was extended by powerful princes at the expense of vengeance and the feud. Ecclesiastics had indeed already advocated harsh corporal penalties in the tenth century. But they too favored these merely as alternatives to the vendetta.¹⁹ Their wishes were realized by the territorial princes of the twelfth century. Only then, when powerful lords applied a new form of justice, did notions of mercy, guilt and moral reprehensibility enter the picture; rather as a consequence than as a cause of the transformation. That clergymen should figure in the drama on the scaffold during the next centuries is only natural. As will be argued in this study, the role of the church remained largely instrumental in a spectacle which primarily served the purposes of the secular authorities.

The transformation during the twelfth century was only a small beginning. First, private vengeance had been pushed back to a certain degree, but continued to be practiced throughout the later Middle Ages. Second, generally the various courts were not in a very powerful position. Often they acted merely as mediators facilitating the reconciliation of the parties involved. A resolute practice of criminal justice depended as before on a certain measure of state power and levels of state power continued to fluctuate. But state formation is not the only process to which the further development of criminal justice was linked. A new factor entered the stage: urbanization. During the later Middle Ages the peculiar conditions prevailing in towns increasingly made their mark on the practice of justice. This situation was not equally marked everywhere. In a country such as France alterations in criminal procedure largely ran

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parallel with the growth of royal power. In the Netherlands, on the other hand, the towns were the major agents of change.

During the early stages of urban development the social context actually formed a counter-influence to the establishment of criminal justice. Originally, relationships of subordination did not prevail in cities. The charters of most towns recognized the inhabitants as free citizens. It has long been commonplace in historiography to note that the urban presence was encapsulated into feudal society. The body of citizens became the vassal, as it were, of the lord of the territory. The town was often a relatively independent corporation, a *coniuratio*. *Vis-à-vis* each other the citizens were equal. The councils ruling these cities were not very powerful. There were hardly any authorities in a real sense, who could impose their will and control events.

This situation left plenty of room for private violence. As the degree of pacification around the towns was still relatively low, so was the degree of internal pacification. To be sure, the vendetta might be officially forbidden. In the Northern Netherlands the prohibition was legitimized by the notion of a quasi-lineage: the citizens were held to be mutual relatives and a feud cannot arise among relatives.²⁰ But the fiction of lineage could never prevent actual feuds from bursting out, as the prohibitions, reiterated well into the fifteenth century, suggest.²¹ Similarly, proclamations ordering a truce between parties were frequent until the middle of the sixteenth century.²² An early seventeenth-century commentator gives a good impression of the situation. Speaking of the 1390s, he denounces the lawlessness of the age:

The people were still rough and wild in this time because of their newly won freedom and practically everyone acted as he pleased. And for that reason the court had neither the esteem nor the power which it ought to have in a well-founded commonwealth. This appears from the homicides, fights and wanton acts which occurred daily and also from the old sentences, in which one sees with what kind of timidity the Gentlemen judged in such cases: for they bargained first and took an oath from the criminals that they would not do *schout*, *schepenen* and burgomasters harm because of whatever sentence they would pass against them. And the most severe, almost, which they imposed on someone, was a banishment, or that the criminals would make a pilgrimage here or there before they came in [to town] again, or that they would give the city money for three or four thousand stones. They also often licenced one or the other, if he was under attack from his party, that he might defend himself with impunity, even if he killed the other in doing so. These are things which have no place in cities where the law is in its proper position of power.²³

Apart from the fact that this situation was considered abnormal in the seventeenth century, we note an acceptance of forms of private violence

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and the predominance of a reconciliatory stand instead of serious punishment.

Towards the end of the fifteenth century, however, this began to change. The ruling elites finally became real authorities. Patriciates emerged everywhere, constituting a socially superior group. The towns became increasingly stratified. The patrician courts could act as superiors notably towards the lower and lower-middle class citizens. In the towns of the Netherlands this development is clearly reflected in their ways of dealing with criminal cases. For a long time the main business of the courts had been to mediate and register private reconciliations. Around 1500 'corrections' gradually outnumbered reconciliations. The former were measures expressing a justice from above and often consisted of corporal punishment.²⁴

Another development in criminal law which took place during the same period, was even more crucial. A new procedure in criminal trials, the inquisitorial, gradually superseded the older, accusatory procedure. This change occurred throughout Continental Europe, but not in England. The accusatory trial, when nothing else existed, was geared to a system of marginal justice. Where the inquisitorial trial prevailed, a justice from above had been established more firmly.

The contrast between the two procedures is a familiar item in legal history. Here it suffices to review briefly the relevant characteristics.²⁵ The inquisitorial procedure had been developed in ecclesiastical law, and was perfected by the institution which took its name from it. From the middle of the thirteenth century onwards it entered into secular law. Generally speaking, the rules of the accusatory trial favored the accused, while the rules of the inquisitorial one favored those bent on condemning him. The former procedure was much concerned with the preservation of equality between the parties. Thus if the accused was imprisoned during the trial – which was not usually the case – the accuser was often imprisoned as well. Moreover, if the latter could not prove his case, he might be subjected to the *talion*: the same penalty which the former would have received if he had been convicted. While the proceedings in the older trial were carried out in the open, the newer one was conducted in secrecy. Publicity was only sought after the verdict had been reached.

The most important element of the inquisitorial procedure, however, was the possibility of prosecution *ex officio*. The adage of the older procedure, 'no plaintiff, no judge', lost its validity. If it wished to, the court could take the initiative and start an investigation (*inquisitio*). Its officials would collect denunciations and then arrest a suspect, if they could lay hands on him. The court's prosecutor acted as plaintiff. Thus an

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active prosecution policy was possible for the first time. In the trial the authorities and the accused faced each other and the power distribution between the two was unequal, favoring the former. Under the accusatory procedure the authorities had hardly been more than bystanders. Consequently the rise of the newer form of trial meant a further spread of a system of justice from above.

This is also implicit in the final element to be noted. The inquisitorial procedure brought the introduction of torture. An accused who persisted in denial, yet was heavily suspect, could be subjected to a 'sharper examination'. It is evident that the principle of equality between parties under the accusatory procedure would have been incompatible with the practice of torture. Torture was not unknown in Europe before the thirteenth century. It had long been a common feature of the administration of justice by a lord over his serfs. Under the inquisitorial procedure torture could for the first time also be applied to free persons.²⁶ The parallel with the transformation discussed above is obvious.

The retreat of the accusatory before the inquisitorial procedure did not occur at the same pace everywhere. That the older one was originally more common is reflected in the names of 'ordinary' and 'extraordinary' procedure which the two forms acquired and often retained throughout the *ancien régime*. The gradual establishment of the primacy of the latter took place between the middle of the thirteenth and the beginning of the sixteenth century. Its use in France by Philip the Fair against the Templars paved the way for its further spread.²⁷ Prosecution *ex officio* increased in importance from the fourteenth to the sixteenth centuries. The growth of royal power was the main force behind it.²⁸ In the Netherlands, North and South, the cities formed the most important theater.²⁹ The formation of patrician elites facilitated the shift. But here too the central authorities confirmed it. In 1570, when the Dutch Revolt was already in the process of breaking out, Philip II issued his criminal ordinances, which clearly favored the inquisitorial trial.³⁰

In the Dutch towns non-residents were the first to be tried according to the inquisitorial procedure. As outsiders they were more easily subjected to justice from above. Citizens occasionally put up resistance to it, in Malines, for example.³¹ In France it was the nobles of Burgundy, Champagne and Artois who protested. Louis X granted them privileges in 1315 which implied a suspension of inquisitorial proceedings.³² In the end they were unsuccessful. The forces of centralization and urbanization favored the development of a more rigorous penal system.

England forms a partial exception. Criminal procedure in that country remained largely accusatory throughout the preindustrial period. Never-

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theless, essentially the developments discussed in this chapter can be observed there too, and in the end processes of pacification and centralization brought about a firmer establishment of criminal justice. Originally there had been plenty of room for private violence, just as on the Continent. An outlaw or 'wolf', for instance, could be captured by any man and be slain if he resisted. This right was abrogated in 1329, but as late as 1397 a group of men who had arrested and beheaded an outlawed felon, were pardoned because they had thought it was lawful.³³ Around 1400 it was not uncommon for justices to be threatened with violence by the parties in a lawsuit. The power of the courts went up and down with the fluctuations in the power of a central authority.³⁴ It was the Tudors, finally, who gradually established a monopoly of violence over most of England. Consequently, except in border areas, the feud definitely gave way to litigation.³⁵ The available literature on crime and justice in early modern England suggests that a system of prosecution of serious crimes, physical punishment and exemplary repression prevailed there, which was basically similar to that on the Continent.

Thus, the emergence and stabilization of criminal justice, a process going on from the late twelfth until the early sixteenth centuries, meant the disappearance of private vengeance. Ultimately vengeance was transferred from the victims and their relatives to the state. Whereas formerly a man would kill his brother's murderer or beat up the thief he caught in his house, these people were now killed or flogged by the authorities. Legal texts from late medieval Germany sometimes explicitly refer to the punishments imposed by the authorities as 'vengeance'.³⁶ Serious illegal acts, which up until then had been dealt with in the sphere of revenge and reconciliation, were redefined as being directed not only against the victims but also against the state. In this process the inquisitorial procedure was the main tool. Its increase in frequency in fourteenth-century Venice, for instance, went hand in hand with the conquest of the vendetta.³⁷ Private violence by members of the community coming to the assistance of a victim was similarly pushed back. In the Netherlands a thief caught redhanded could be arrested by any one. His captors were obliged to hand him over to the court, but they might seriously harass him and were often excused if they killed him. This 'right' retreated too before the increase of prosecution *ex officio*.³⁸

It would be incorrect to assume that the state's arm was all-embracing during the early modern period. An active prosecution policy remained largely confined to the more serious crimes. Private vengeance had been conquered, but reconciliation survived in cases of petty theft and minor