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Abstracts

Beyond Legal Dogmatics in the History of Medieval Criminal Law

Generalising doctrines of a »criminal legal historical« character on act and delinquent only very inadequately capture medieval objectives and forms in the way wrongs were handled, since punishment in the legal life of society was only one of several possible reactions towards wrongdoing. Occasionally, individual acts of revenge were accepted. Threats of punishment did not necessarily lead to actual punishment in individual cases since the principle of legality, mandatory for the prosecution of offences, was unknown and punishments could be redeemed by financial settlement or even by labour. Moreover, in addition to punishment, restitution by the offender through an agreement to compensate, as well as public penance, especially in serious cases of homicide, played a leading role. This flexibility of legal practice suggests that an examination of the history of the penitentiary and other forms of conflict resolution in medieval times by means of a differentiating consideration of sanctions would be rewarding. To this end, recent scholarship has gathered a rich fund of material, both by a comparative analysis of normative texts and especially by studies of legal reality in particular places. On this basis, certain developments are noticeable: Roman and Christian influence in early medieval times, a policy since the 12th century to keep the public peace, Roman paradigms and the formation of dogmatism in criminal law in the late Middle Ages. If nothing else, the diversity of sanctions – in contrast to common prejudice – shows quite clearly that elements of guilt were taken into account in the run-up to proceedings, proving not least the actual, although not dogmatic, differentiation between homicide and murder.

Dietmar Willoweit

The Judge and his Sources

The guiding thread of the treatise *de maleficiis* by the Lombard judge Alberto Gandino, who served Italian courts of the *podestà* for more than two decades (1281–1310), is represented by the attempt to legitimate both juridically and politically a new penal system based on the inquisitorial search for truth and on the necessity of a system of penalties. Gandino directs the extraordinary number of sources used to constitute his treatise to this purpose. The present article analyzes the relation between the sources he used and the chapters he dedicated to inquisition and an individual's reputation. The Decretals can immediately be seen to play a key role: not only can the procedure be traced back in its totality to the Decretal *Qualiter et quando*, but the *Liber Extra* also serves to justify the role of reputation as a form of proof, being used as a sufficient »half proof« in order to apply torture. Using canon law allows Gandino to overcome the limits of Roman law still present in previous treatises (an anonymous *De tormentis* and the *De fama* by Tommaso da Piperata), which he embraced with only some modifications regarding the rules on torture. The »person's reputation« (in other words his behaviour within the community) becomes a form of evidence beyond objective guilt, as it highlights a deeper, inherent characteristic of his personality: his addiction to good or evil. Yet Gandino took another important concept from the canon law: »the guilt« a man of bad reputation necessarily carries for having deliberately led a degenerate life, excluding himself from the community, a crime that always requires a judicial sanction.

Massimo Vallerani

The »juridification« of covert investigations in the transition from the ius commune inquisition process to the reformed criminal justice process of the 19th century

The »juridification« of covert investigations in the transition from the ius commune inquisition process to the reformed criminal justice process of the 19th century, understood as a material (i. e. law creating) normative distinction between true or wrongful circumstances, is a complex phenomenon. This paper traces the introduction of covert investigations into the law of criminal procedure. It takes its starting point in the uncodified, but nevertheless legally sophisticated search and seizure of letters or the use of informers in the ius commune process. Influences of the French Revolution on the development of law, the 19th century's early individual legislation, but mainly the tumultuous times before the Revolution of 1848 and the great surge of single procedural codes in the

mid 19th century are the subject-matter of this analysis. This research has unearthed some surprising facts: Juridification affects various measures in quite different ways. At the same time, it is shaped by subjects which are hardly comparable with one another (monarchs, parliaments etc.), and it is associated with the production of the criminal process as a subject that manifests itself particularly in the redefining of the pre-trial phase.

Pierre Hauck

The Dual System of Sanctions
Criminal policy and legislation in a transnational discourse: Franz von Liszt, the Swiss penal reform and the dualism of punishments and security measures

This contribution examines Franz von Liszt's involvement in the Swiss penal reform movement. It points out the transnational character of a reform movement which called for a criminal law based on individual prevention in many European countries. Being the author of the widely acknowledged »Marburger Programm«, Liszt exerted much influence on penal reforms in Switzerland, though this was directed more towards programmatic and organizational matters than legislation. In turn, he repeatedly introduced elements in his own argumentation that had previously been put forward in Switzerland. Thus, he finally adopted a dual system of sanctions, which differentiated between punishments and security measures. For Liszt, as for his Swiss colleagues, this system allowed the introduction of indeterminate sentences, though restricted to a minority of offenders, and of sanctions specifically adapted to different classes of offenders. At the same time he welcomed the dualism of punishment and security measures as a herald of »social defence«, which should definitely transgress the borders of criminal law. Actually this concept was to influence criminal policy both in Germany and Switzerland after the First World War. Thus, trends towards the establishment of differentiated regimes of sanctions and tendencies towards the gradual extension of the state's prophylactic possibilities alike reflect a shared but highly problematic feature of continental criminal policy in the early 20th century.

Urs Germann

»Born victims«
Fragments towards a history of victimology – Hans von Hentig as an example

Before 1945, German criminology was strongly influenced by structures formed previously by penal law and its requisites for the fight against crime. It focused, therefore, on the criminal, and constructed, at most, a passive picture of the victim of crime. Beyond penal law, however, these structures were gradually widened and finally disassembled. Within this process, three important trends can be identified: First of all, eugenic and biologistic concepts were transplanted into criminology. Conceiving of social life in terms of a struggle for existence, criminologists tended to differentiate between criminals and victims, illustrated by the example of the reception of anti-Semitism in the works of Hans von Hentig and Cesare Lombroso. Secondly, contemporary criminal psychology occasionally broadened its scope of research from the »born criminal« to the »born victim«. Sexual violence, for example, was first and foremost perceived from a reactionary and anti-emancipatory position. From this point of view it seemed logical to shift the blame for sex crime to the victims of these offences. Moreover, the administrative strategy in the fight against crime changed during the 1920s and 1930s: the approach of optimizing public security by means of a universal programme of prevention directed attention to the victim's share in the crime. Thus, perception of the victim was also influenced by these changes in criminal policy. Initially, all these factors were isolated; it was not until the end of World War II that they were combined into a single concept of victimology. Nevertheless some of the ambivalences of its early history can still be found in today's victimological theory.

David von Mayenburg

Lessons from Nuremberg
The relevance for modern international criminal law of the Nuremberg Trial against the major Nazi war criminals

The significance of the trial against the major Nazi war criminals before the International Military Tribunal (IMT) at Nuremberg can be shown in four different ways: (1) impunity for heads of state and other members of the military or political elite of a state does not apply to a set of core international crimes. (2) There exist a number of crimes which are universally accepted as international crimes, which are aggression, war crimes and crimes against humanity. The crime of genocide was added to the list of these Nuremberg-crimes by the so-called genocide convention of 1948. (3) The attribution of guilt follows a set of general principles of criminal law as e. g. the mens rea-principle. In general »superior order« cannot operate as an excuse; similarly a military or political commander can be held responsible for the conduct of his subordinate. A rather difficult and contested issue is the attribution of guilt by means of »conspiracy« as was foreseen in the Charter of the IMT. Modern international criminal law follows a similar concept, which is called »joint criminal enterprise«, as is found in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia. The crucial issue in attributing guilt thereby lies in the »common plan«, whereas the actual conduct is of minor relevance. (4) Finally, the Nuremberg proceedings have shown that in principle a criminal trial must be fair and must adhere to the presumption of innocence.

However, it is difficult to prove whether a criminal trial can add to reconciliation and to preventing future crimes. Although it is fair to say that Nuremberg was the beginning of a prosperous time for Europe, criminal prosecution is not always an adequate way to help societies in transition.

Christoph Safferling