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**Specialised theme**

**The theory and practice of justice : law, norms, deviance**

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**Judicial history, *histoire des mentalités*, historical anthropology**

**A commentary to the session „The theory and practice of justice: laws, norms, deviance”**

**Gábor Klaniczay**

Judicial history has been in the forefront of methodological innovation in historical writing for many reasons. Its sources combine legal reasoning on most aspects of human existence with concrete cases of individual actors and institutions, the conflict and the outcome, the various arguments and counter-arguments expressing what the parties considered a fair, legal, and just solution. The judicial institutions produce a mass of well-categorised cases allowing long-term quantitative analyses. The changing patterns of norm and deviance point to the role of ecclesiastic and secular institutions defining at macro-level the rules of social coexistence, while with the individual testimonies one can dive into the micro-historical contexts of „thick description”. Historical anthropology has unfolded with judicial sources on Montaillou, Menocchio, Martin Guerre, or on the “sociology of accusation” of early modern witches. Many stimulating approaches sprang up here in the past decades: from a qualitative analysis of medieval ordeals to the prosopography of early modern gallows convicts, from the “theatre

of horror” of public executions to the meticulous mapping of spaces controlled by legal mechanisms, from the history of pain to the rhetoric of story-telling, from the legal debates on miracle and sainthood to an anthropological approach of *charivari* and lynching.

In 1995, in Montreal, a rich comparative discussion was made of the themes in this “history from below” under the banner “Punishment, penalties, prison”. The past five years seem to have slightly shifted the perspective towards a new synthesis, reconsidering the evolution of the theory and practice of justice in the past 6-700 years, from the point of view of the exercise of power within modern nation states. Based on some fundamental insights by Elias (a growing monopoly of the state on violence and the achievement of internal peace by channelling violence towards the margins or the borderlines) or by Foucault (on institutional or state powers of discipline, police and punishment combined with or opposed by a variety of micro-powers on all levels), the rich research results of the previous decades, both on modern statehood and on the history of criminal justice, permit now a reconsideration of this complex long-term historical process. This is represented by many of our papers, and summed up by the three “rapporteurs” who rely upon the history of criminal justice as an indicator of the varieties of this centralising and modernising process of state control, pointing to its structural components, its social and regional limits, the forms and successes of resistance to it by various local, regional and traditional legal mechanisms. A ”global” extension of these analyses (in our session still rather incomplete) is also on the agenda: setting the characteristics of the process in the Western world into the perspective of the colonial experience, the instrumentalisation of the modern techniques of criminal justice in this field, and their conflict with the local systems of justice. My brief comments would try to propose that the basic questions of the “*histoire des mentalités*” and those of “historical anthropology”, two methodological labels from yesterday, could be reinvigorated by these recent insights in judicial history, they might put on the order of the day further questions.

For understanding the forms and meanings of this violence to be “pacified” by the growing judicial control, the most important resource still seems to rely in the late medieval and early modern documentation: the analyses of late medieval criminality, massacres, pogroms, banishment (treated here by Gauvard – cf. also Chiffolleau, Graus, Nirenberg, Rossiaud, Rubin, Toch, Trexler, Zaremska), and of the even richer judicial sources of early modern popular revolts, wars of religion, witchcraft prosecutions, and the violent emergence of absolute monarchy and modern institutions of disciplinary confinement (treated here by Porret and Sharpe – cf. also Behringer, Briggs, Burke, Davis, Geremek, Muchembled, Roper, Schindler, Scribner, Soman). To be able to build on these results, a continued combination of generalist, comparative and “localist”, interpretative approaches remains indispensable for the modern times as well. This would add to a power-framed and legally, judicially articulated enquiry a set of softer investigations on the group tensions, the personalities of the involved, the debates on religious and moral principles, local axioms of crime and justice, a historical anthropology of value systems.

The papers of the session do indeed make these openings. The perspective of gender stirs up methodological questions on honour and shame, on the psychology of bourgeois respectability, on violence as a male code of behaviour, or on the discordance between the female scopes of action and the moral politics of the early modern state (Schwerhoff). The growing weight of legal medicine (Porret) brings in a foucauldian association of power/knowledge, taking its hold on the tortured or inspected body of the accused. The long-term history of the imposition of modern legal code (Farmer, Feeley, Petit) and the forms of local resistance to it (custom, agreement, vengeance), the opposition of *litigiosité* and *arbitrage* as two distinct mentalities (Chauvaud) constitute a neat opposition of the centralising structures of state power meeting a diffuse but systematic opposition and counter-powers on all levels of social existence: an image which takes us back again to Foucault. A

new agenda emerges: to map all the diversities of these tensions in social, ethnic, and geographic space – as the *rapporteurs* have done. On the other hand, the attraction still remains to provide a microscopic diagnosis of the workings of these powers and counter-powers, the changing parameters of convincing proof and evidence – as Levi has done with Giovan Battista Chiesa, a 17<sup>th</sup>-century exorcist.

The examples of the new qualitative insights opened by modern judicial history could be continued: the entry of criminal justice to the privileged sphere of family power relations (intramarital quarrels, domestic violence, childhood delinquency – Schwerhoff, Dupont-Bouchat), the exportation of European police techniques to colonial situations (Salvatore, Singha). The agenda remains: if judicial history wants to handle the theory and practice of justice, the problem of norm and deviance throughout the constitution of modern state power, it has to make frequent digressions from its narrower field – not the least to *histoire des mentalités* and to historical anthropology.

Two distant but still relevant examples. Febvre pleaded in 1948 for the *histoire des mentalités* precisely when confronted with the change of judicial attitudes to witchcraft: “*Sorcellerie, sottise ou révolution mentale*”, an enquiry subsequently well elaborated upon by Mandrou. One should also recall the memorable answer Duby gave in 1958 to the classic question, put by the legal historian Ganshof in 1914: “*Qu’est que la féodalité?*” – “*Une mentalité médiévale*”.