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Criminality: Terminology and Interpretation (An Introduction)

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Abstract

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This issue examines some theoretical questions and concerns related to the study of criminality in the past. The categories and boundaries of what is considered criminal depend on circumstances determined by both power and religion. An act was not considered a crime until generally recognized as such, or made illegal by those with the power or authority to do so. Each era and society maintained its own scale and hierarchy of crimes. Some forms of behaviour were criminalised, others decriminalised. To understand and correctly interpret criminality of the past on the basis of surviving sources, it is impossible to avoid terminological issues and language usage. How the sources name criminalised behaviour, or whether it is named at all, the terms and descriptions used are indicative not only of the level of legal awareness and standards in judicial practice, but also of the personal attitudes of judges towards the offenders themselves. Just as no strict boundary between private law and criminal law existed for a long time, there was also no clear deviation between crime and sin. In medieval and Early modern periods, judges frequently referenced the Bible and spoke of a breach of the divine or natural laws. The journey from sin to crime was a longer process, beginning as late as the era of the Enlightenment. Based on a qualitative content analysis of historical sources, their language and terminology, the authors here present crime not only as a form of social pathology, but also as an important indicator of changes in society.

The aim of this issue is to explore several theoretical problems often encountered with studying criminality in history, especially terminological and interpretative questions. The basis for a thorough analysis and accurate interpretation of any phenomenon, including crime and criminality is through a critique of relevant sources combined with a deep knowledge of contemporary political, social, and cultural context, and related terminology. The use of appropriate methodology chosen according to the character of preserved sources is fundamental as well. However, each field of history has its own set of theoretical as well as practical difficulties that researchers have to tackle. In crime history, it is the dark figure of unrecorded crime in quantitative analyses, for example, or the discrepancy between legal norms and local practices.¹ In recent decades, the history of crime

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- 1 ROUSSEAUX, Xavier. From Medieval Cities to National States, 1350–1850: The Historiography of Crime and Criminal Justice in Europe. In EMSLEY, Clive – KNAFLA, Louis A. (eds.) *Crime History and Histories of Crime: Studies in the Historiography*

has become an interdisciplinary research subject and an important part of social history, demanding unique anthropological and sociological approaches, leading to new theories, trends and challenges.² Apart from history, legal history or criminology, among the contributing disciplines to the research on history of crime we can count sociology, philosophy, psychology, linguistics, cultural and gender studies. Topics explored include the differences in urban and rural crime incidence and judicial practice, the phenomenon of disciplinisation, the relationship and links between crime and violence, honour, masculinity and gender as well as poverty, ethnicities and marginalisation.³

The concept of criminality and the term itself encompasses the many ways of violating a legal or customary moral norm, with varying degrees of severity. However, if we take a closer look at the provisions encompassed in this seemingly simple definition, we find that defining legal and moral standards becomes a problematic task, all the more so the further back in history we go. Even the most basic of questions—“what is law?”—has occupied minds of thinkers at least since the times of classical Greece, without a simple or easy answer.⁴ Additionally, the meaning of the Latin term “crimen” itself, i.e. a crime or a criminal offence, from which the etymological origin of the word “criminality” is derived, is a tough terminological nut to crack.

Through sociological deconstruction, crime has become a social construct conditioned by the cultural beliefs of a given society, and the antithesis of its protected values and interests.⁵ The categories and boundaries of what is considered criminal depend on circumstances determined by both power

of Crime and Criminal Justice in Modern History. Westport, Connecticut; London : Greenwood Press, 1996; pp. 3–6; PÁNEK, Jaroslav. Současné evropské bádání o dějinách kriminality a trestní justice. In FRANCEK, Jindřich (ed.) *Hrdelní soudnictví českých zemí 16.nahradit pomlčkou (en dash)18. století: Sborník příspěvků z konference konané v Pardubicích 21.–22. 9. 1995*. Pardubice : Východočeské muzeum v Pardubicích, 1996, p. 15–28; MATLAS, Pavel. *Shovívavá vrchnost a neukáznění poddaní? Hranice trestní disciplinace poddaného obyvatelstva na panství Hluboká nad Vltavou v 17.–18. století*. Praha : Argo, 2011, pp. 11–36. A more recent overview: ROUSSEAU, Xavier. A History of Crime and Criminal Justice in Europe. In BODY-GENDROT, Sophie – HOUGH, Mike – KEREZSI, Klara – LÉVY, René – SNACKEN, Sonja (eds.) *The Routledge Handbook of European Criminology*. London; New York : Routledge, 2013, pp. 38–54; LAWRENCE, Paul. The Historiography of Crime and Criminal Justice. In KNEPPER, Paul – JOHANSEN, Anja (eds.) *The Oxford Handbook of the History of Crime and Criminal Justice*. Oxford : Oxford University Press, 2019, pp. 17–31.

2 SCHWERHOFF, Gerd. *Historische Kriminalitätsforschung*. Frankfurt; New York : Campus Verlag, 2011; HÄRTER, Karl. *Strafrechts- und Kriminalitätsgeschichte der Frühen Neuzeit*. Methodica – Einführungen in die rechtshistorische Forschung – Band 5. Berlin : De Gruyter Oldenbourg, 2018, pp. 3–10, 157–165.

3 On the poverty and marginalisation see for example: GEREMEK, Bronisław. *Poverty: a History*. Cambridge, Mass. : Blackwell, 1994, 273 p; GEREMEK, Bronisław. Social Margins of the Pre-Industrial Age – Categories and Comparative Problems. In ZAREMSKA, Hanna (ed.) *Bronisław Geremek on the Middle Ages*. Translation by George Szenderowicz. Warszawa : Instytut Historii PAN, 2017, pp. 151–169; GEREMEK, Bronisław. L'emarginato. In LE GOFF, Jacques (ed.) *L'Uomo medievale*. Roma : Laterza, 1987, pp. 393–421; ZAREMSKA, Hanna. Marginaux. In LE GOFF, Jacques – SCHMITT, Jean-Claude (eds.) *Dictionnaire raisonné de l'Occident médiéval*. Paris : Fayard, 1999, pp. 639–654; GOODICH, Michale (ed.) *Witnesses at the Margins of Medieval Society*. Philadelphia : University of Pennsylvania Press, 1998; HIML, Pavel. *Zrození vagabunda. Neusedlí lidé v Čechách 17. a 18. století*. Praha : Argo, 2007.

4 MORRISON, Wayne. *Jurisprudence: From the Greeks to post-modernism*. London : Cavendish Pub, 2000, pp. 1–2.

5 More on the topic: TINKOVÁ, Daniela. *Hřích, zločin, šílenství v čase odkouzlování světa*. Praha : Argo, 2004, pp. 13–15.

and religion. An act was not considered a crime until generally recognized as such, or made illegal by those with the power or authority to do so. Each era and society maintained its own scale and hierarchy of crimes. Some forms of behaviour were criminalised, others decriminalised, or certain circumstances were specified; the so-called features of criminal liability, which must be met in order for a given act to be considered criminal.

For these reasons, the legal classification of offences has changed many times in the past, and even contemporary historians of crime and punishment do not completely agree on a single definition. A selection of criteria is assembled, which usually takes the form of the harm committed (against life, health, property, morality, authorities, etc.) and the marginally similar but still different classifications are applied to the realities of the studied period and its contemporary judicial practice.

To understand and correctly interpret contemporary criminality on the basis of surviving sources, it is impossible to avoid terminological issues and language usage. How the sources name criminalised behaviour, or whether it is named at all, the terms and descriptions used are indicative not only of the level of legal awareness and standards in judicial practice, but also of the personal attitudes of judges towards the offences themselves. Of no lesser importance is an understanding of the past ways of conflict resolution, strategies of dealing with offenders and the purpose and intended functions of various punishments and the social and legal consequences.

Medieval law in its origins, but also in the later period, was far from today's understanding, function and implementation, let alone the legal systematics, categorisation, universality or enforceability. It is evident that the perception of crime and methods of dealing with violators of established social rules has since changed considerably. Miroslav Lysý sheds some light on the formation of legal terminology in archaic law by examining surviving texts from Moimir's Moravia and Árpáds' Hungary. The oldest legal sources not only often lack exact definitions and basic terms (such as *culpa*, a perpetrator, or a punishment), but also do not differentiate between criminal and civil law. When a violation occurred, the main goal was not so much to punish the wrongdoer, but to remedy the situation, with emphasis put on conflict resolution, reconciliation, compositions or even private revenge.

In the course of researching the past understanding and changing definitions of crime, it is crucial not to impart modern perceptions of law and crime on the standards and principals of the past. Judicial practice in the medieval and early modern period in Hungary, as in other regions of Europe, was a mixture of royal privileges and exceptions to common territorial judicial systems. Just as there had been no strict boundary between private and criminal law for a long time, there was also no clear deviation between crime and sin. In medieval and Early modern periods, judges frequently

referred to the Bible and the divine commandments, and spoke of breaching God's laws or crimes against God and nature.⁶

In judicial practice, multiple and sometimes inconsistent legal references were employed as there was a lack of a singular, generally valid and binding code, as is common in the nature of laws today. Rather, the sources of law served as handbooks or a collection of recommendations of how to proceed in certain cases. In Hungary, judicial sentences commonly referred to not only a range of domestic sources of law, but also to codes and legal collections and treatises of foreign provenances, such as the German law code of Emperor Charles V *Constitutio Criminalis Carolina* of 1532, the Lower Austrian code of Ferdinand III *Neue peinliche Landgerichtsordnung* of 1656 (and its Latin translation *Praxis Criminalis* from 1687), a work by renowned Saxon author Benedikt Carpzow, *Practicae novae imperialis Saxonicae rerum criminalium* (1677), or the law code of Maria Theresia *Constitutio Criminalis Theresiana* of 1768 (even though it was officially valid only in the Czech and Austrian countries).⁷

The journey from sin to crime, in other words from a moral to social crime or from a sinful to deviant perpetrator, was a longer process, beginning as late as the era of the Enlightenment and was triggered mainly by an influential treatise *On Crime and Punishments* by Cesare Beccaria.⁸ At the same time, the period witnessed a shift from criminality of blood, or violent crimes, to the criminality of fraud (property crimes), from attacks on bodies to the more or less direct seizure of goods, and from mass criminality to a marginal criminality.⁹ Michel Foucault claims that crime became less violent long before the punishment reforms took place, arguing that the shift was a complex mechanism comprising several developments and related phenomena. The result was a withdrawal from the theatre of horror, i.e. spectacular public and ritualised forms of punishments, including public exhibitions and executions, with their final abolition by the beginning of the 19th century.¹⁰

An important concept that has slowly faded in the modern world but one that every historian will inevitably encounter in dealing with the history of crime is an all-pervading sense of honour, even if not specializing in defamatory cases. Honour as an important part of social capital was perceived as an essential quality, especially in the urban milieu. Two papers here focus on

6 Cf also GRIESEBNER, Andrea. Justiz und Gerechtigkeit. Anmerkungen zu religiösen und säkularen Gerechtigkeitsmaximen. In GRIESEBNER, Andrea – SCHEUTZ, Martin – WEIGL, Herwig (eds.) *Justiz und Gerechtigkeit*. Innsbruck; Wien; München; Bozen : StudienVerlag, 2002, p. 24.

7 SZEGLHYOVÁ, Blanka. *Súdnictvo a súdna prax v mestách Pentapolitany v 16. storočí*. Bratislava : Veda, 2016, pp. 49–50.

8 TINKOVÁ 2004, p. 16. Also, in more detail on the discourse and legislative process in the Habsburg monarchy under Joseph II see: AMMERER, Gerhard. *Das Ende für Schwert und Galgen?: legislativer Prozess und öffentlicher Diskurs zur Reduzierung der Todesstrafe im Ordentlichen erfahren unter Joseph II. (1781–1787)*. Mitteilungen des Österreichischen Staatsarchivs. Sonderband. Innsbruck : Studienverlag, 2010, pp. 45–427.

9 FOUCAULT, Michel. *Discipline and Punish. The Birth of the Prison*. London : Penguin Books, 1991, p. 76.

10 FOUCAULT 1991, pp. 8–9, 77; DÜLMEN Richard van. *Theater des Schreckens: Gerichtspraxis und Strafrituale in der frühen Neuzeit*. München : Beck, 1995, pp. 7–8.

the topic of honour, both examining situations from the town of Bardejov (Bártfa, Bartfeldt) in the north-eastern part of today's Slovakia, then Hungary; one through medieval sources, the other Early modern. Mária Fedorčáková explores the phenomenon of the dishonour imparted by insults, gestures, threats and rituals of violence, citing preserved written material containing cases of disputes and conflicts between burghers and other town inhabitants, guild members and clerics in the town parish. The strategies of town authorities used in dealing with conflicts and violence in everyday life are presented, providing valuable insight into the medieval mind.

Peter Benka chose the period of 1550 to 1750 to investigate the role of honour and the issue of "unbridled tongues" in Reformation and humanist intellectual discourse of the period. He treats honour as a historically variable, complex system conditioned by cultural values and specific social roles, as well as the status of an individual, including one's personal, group and confessional (religious) layers of identity. Combining and comparing theoretical opinions with an analysis of the preserved examples of defamation, three basic types of slander that diminish one's honour are identified on individual, collective or institutional and transcendental levels.

An example of how special conditions in the frontier zones and military presence generated new unique forms of criminality that developed in the Ottoman-Hungarian borderland is the subject of Štefan Szalma's paper. It deals with the trade of captives during the time of the general captainships of István I. Koháry in the 17th century. Captive trade flourished despite the peace between the two empires in the years 1606–1663, including the existence of unwritten, albeit illegal, rules concerning the ransom and conditions of keeping and redeeming captives, which were largely accepted by both Ottoman and Hungarian rulers. The involvement of Hungarian soldiers in frequent looting expeditions and captive trading is explored, predominantly in cases when civilians were taken captive.

An important aspect of crime is the associated phenomenon of violence, which can serve as a significant indicator of the development of cultural attitudes and moods. The boundaries of acceptable forms of behaviour, of what is and what is not considered violent, how violence is named and employed can change radically, even in relatively short periods of time. One such area is domestic violence, including child abuse and maltreatment, or more precisely, what we consider it to be today and label as such. As we shall see, violence could be regarded not only as an abuse, but also as an appropriate and justified means of hierarchical discipline for parents, husbands and heads of the households towards the upbringing of children and maintaining order in the family in the patriarchal society. Andrea Fehér studied cases of family violence in the archival documents of both secular and ecclesiastical courts of 18th century Cluj (Kolozsvár, Klausenburg) and Transylvanian Protestant Consistories and provides an in-depth analyses, reporting not only the subject matter of cases, but also paying careful attention to the language used in

the sources. From the phrasing used in the records, formulations of depositions as well as justifications of punishments, conclusions are drawn about the attitudes of the parties involved and defence strategies of the accused.

A detailed and intriguing study offered by Pavel Himl explores the novel concept of morality that emerged in the Enlightenment era and further evolved among police administrative officials. The previous concept of identifying a crime as a sin was replaced by a “corruption of morals,” and distinctions began to be made in recognizing the socioeconomic and moral causes of crime. Proper moral conduct was believed to be the result of appropriate education and cultivation, whereas a lack of ethics was attributed to low education and religious instruction. It was this age that saw the beginning of criminal statistics and quantification of crimes with the first protosociological attempts to identify specific causes and determine the reasons for changes in crime rates.

The ideas of the Enlightenment also influenced emerging criminal law dogmatics in Hungary, which produced works and manuals dedicated to the amendment of substantive and procedural criminal law. Adriana Švecová summarizes criminal legislative developments and codification attempts in Hungarian and Habsburg legislation. In the second part of her study, Švecová focuses on the work of Štefan (István) Huszty, a professor of law and expert on 18th century Hungarian law. In his work, Huszty provides definitions for every offence, essential characteristics and practical examples from procedural practice and introduces a discussion of elementary, criminal law terminology. However, many crimes were still perceived as sins, especially when it came to crimes against God, e.g. blasphemy and some sexual or moral offences.

Generations that remember changing policies against smoking and the gradual implementation of smoking bans throughout the second half of the 20th and the beginning of the 21st century might be surprised to learn that smoking restrictions are nothing new, only the reasons behind them have changed following society’s changing needs and priorities. In the 16th century when smoking began to grow in popularity around Europe, it was not adverse health effects but the public safety risks it posed which led to restrictions. Smoking bans were part of fire prevention legislation, which was of great importance due to the devastating effects fires could have on towns and villages and the limited firefighting abilities of the time. In the case of arson, even unintentional instances were considered crimes so severe that the minimal legal age for prosecution of 12 years could be reconsidered or even lowered. In contrast, alcohol consumption was never restricted legally, but on the contrary, it was considered as a mitigating circumstance in some criminal cases. Zsuzsanna Peres presents an array of legal norms related to the consumption of alcohol and smoking in Hungary and reveals the interesting phenomenon of how fines for a petty offence so widespread that it was impossible to contain were conveniently transformed into smoking taxes.

Through a thorough, critical study of sources and a deep understanding of the

social and cultural context of the researched period, including the micro-historical and individual circumstances of studied cases we can come closer to comprehending what crime was and how it was perceived by contemporaries. Only then, can insight be gained into why seemingly identical actions could be assessed one time as criminal, while other times defensive or even heroic. For certain activities, why is a woman considered a saint and other times a witch?¹¹ Why does a supposed perpetrator become a victim, or why is the use of violence a sign of good parentage, but also of abuse?

Seemingly purely theoretical questions discussed in the current issue, they make a crucial contribution to documenting and understanding developmental changes in the perception, assessment, sanctioning and explanation of crime. Based on a qualitative content analysis of contemporary sources of judicial criminal practice, the language and terminology of internal and external official and private correspondence, legislation, legal literature, and religious and political writings, the authors here present crime not only as a form of social pathology, but also as an important indicator of changes in society.

11 A reference to the title of the book by DINZELBACHER, Peter. *Heilige oder Hexen? Schicksale auffälliger Frauen in Mittelalter und Frühneuzeit*. Zürich : Artemis & Winkler, 1995.