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Karl Härter

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Violent Crimes and Retaliation in the European Criminal Justice System between the Seventeenth and Nineteenth Century

Karl Härter

Abstract

Early modern courts dealing with violent crimes constitute an exemplary field to study historical changes in the function and significance of retaliation as a measured reaction to criminal behaviour. In pre-modern times, on the one hand, appropriate violence could be considered as a socially accepted behaviour to react to violations of honour, body and property, as well as violent assaults could be compensated with a material recompense. On the other hand, penal justice partially followed the purpose of retaliation in the sense of retribution, and criminal courts punished manslaughter or murder with the death penalty. The ambivalence of retaliation with regard to violence was even more emphasised since the seventeenth century, because the emerging public criminal justice system followed more and more utilitarian purposes and punished violent crimes to maintain social control or to ‘discipline’ and ‘civilise’ perpetrators. Whereas the death penalty and retribution slowly decreased since the eighteenth century the purpose of private compensation and conflict settlement persisted to a certain degree, influencing court decision. If compensation between perpetrators and victims was achieved criminal courts could waive public punishment, but instead increasingly imposed punitive damages (*Privatstrafe*) and material public recompense. As a consequence, the function of retaliation and the relations between the different actors shifted from private compensation (perpetrators and victims) and public punishment (state and perpetrators) to ‘public compensation’ and ‘private punishment’ as an amalgamation of private and public retaliation which served for the interests of the state: fiscal recompense, the juridification (*Verrechtlichung*) of vindictory violence as well as private retaliation, and the extension of social control through the criminal justice system.¹ Commencing with the legal practice of the early modern criminal justice systems in Europe private and legal retaliation to violence significantly changed from legitimate vindictory violence, private compensation and retributive public punishment to a system of formal social

¹ In the following the term ‘public’ is used in the sense of state-based (*staatlich*), whereas ‘private’ indicates the sphere of social actors.

control and public retaliation that prevents violence, but impairs the interest of victims and prefers public compensation. Based on recent studies on violence in early modern Europe and exemplary court records this paper analyses the significance and the different functions of retaliation in the legal practice of European criminal justice systems responding to violent crimes.

Violence and Violent Crimes: Long Term Developments and Models

Historical research has stressed the dominant role of interpersonal male violence within in pre-modern society resulting in physical injuries and such violent crimes as assault, battery, homicide, manslaughter, or murder. Physical injuries aiming at or harming the body were often coupled with verbal insults, intimidation and the violation of honour. In the pre-modern period many manifestations of violence can be characterised as affective and irrational (notably domestic and sexual violence), but implied also more or less rational elements: material benefits, defending or raising someone's honour, or vindictive violence. Thus violence can be characterised as a ubiquitous resource of conflicting, used frequently in private conflicts as well as a legal means by the state and non state actors. Even private conflict parties could exercise legitimate or legal violent actions like feud or retorsion to deal with conflicts and to assert claims and interests.²

All in all the social ubiquity and importance of violence resulted in a considerable amount of violent crimes (or the behaviour which was defined and labelled as such), and homicide in particular with an annual average number of 35 homicides per 100.000 inhabitants in Europe in the late middle ages.³ Recent studies discern a significant decline of murder and manslaughter in Europe from the sixteenth century onward and especially between the eighteenth and nineteenth century that concerns the rate of homicide calculated in relation to the population as well as the proportion to other crimes, notably property crimes.⁴ This was interpreted as a digression of violence, as the civilising of violent crime, the disciplining of affective, irrational violent behaviour and the shift from 'violence-to-theft', related to historical changes such as the shift from a feudal to a bourgeois society, the emergence of a state based criminal justice system and the implementation of a monopoly of violence or state based penal power.⁵ However, a direct interdependence between property and violent crimes was largely rejected due to insufficient empirical evidence, and some authors have as well questioned the dominant function of homicide crimes as the pivotal (and only) indicator for the level of interpersonal violence. They argued that the decline of homicide could result for

² Ruff 2001; Ulbrich et al. 2005; Carroll 2007; Wood 2004; Body-Gendrot and Spierenburg 2009; Eibach 2009; Eisner 2001; Schwerhoff 2011.

³ Spierenburg 1996; Thome 2001; Kaspersson 2003; Eisner 2003.

⁴ Spierenburg 2008.

⁵ Johnson and Monkkonen 1996; Mantecón 2007; Spierenburg 2011.

instance from the progress in medical care reducing the lethality of assaults or from a shift from interpersonal to collective or state violence and rather indicates a change of shape than a civilising of violence.⁶

Moreover, violent crimes below the threshold of homicide are not thoroughly researched and remain within a grey zone. Only recent research has produced some evidence that in eighteenth and nineteenth century interpersonal violence manifesting in crimes such as battery and assault still maintained a high intensity, but were prosecuted and punished differently.⁷ It is remarkable that the developments are quite inverse to the homicide rate: violent crimes such as assault and battery were prosecuted and punished more intense in the nineteenth than in the eighteenth century as a case study for England shows. Peter King observes an increase in the number of indictments and verdicts as well as an aggravation of punishment from fines to imprisonment.⁸ In addition some studies indicate a harsher punishment of homicide since the sixteenth century and a decline of pardoning in the eighteenth century as well.⁹

Though the effectiveness or even the existence of the ‘civilising of violence’ is still questioned, many studies recognise the importance of the criminal justice system and the legal responses to violent crimes to analyse the changes and patterns of violence between the early modern period and the nineteenth century. However, neither the ‘legal history of penal law’ (*Strafrechtsgeschichte*) nor the ‘history of crime’ (*Historische Kriminalitätsforschung*) paid greater attention to the complex interdependences between retaliation and violence within the framework of the criminal justice system, which – in my opinion – are crucial to understand the ambivalent historical developments of violence and the legal responses to violent crimes in early modern Europe.¹⁰ In the following I will argue that the changing and ambivalent legal responses to violence can not only be attributed to the ‘process of civilisation’ or the ‘humanisation of punishment’, but are also related to the legal practice of ‘retaliation’: On the one hand, the early modern authorities and states criminalised vindictory violence and private means of legitimate violence such as feud, duel, or retorsion, but on the other hand integrated patterns of social or private retaliation and compensation into the criminal justice system.

⁶ Lindenberger and Lüdtke 1995; Dinges 1998; Schwerhoff 2002; Schwerhoff 2004.

⁷ King 1996; Lacour 2000.

⁸ King 2000; King 2003.

⁹ Roth 2001; Wittke 2002; Carroll 2006; Mucchieli and Spierenburg 2009; Härter 2011.

¹⁰ Schlee and Turner 2008.

Functions of Retaliation in the Early Modern Criminal Justice System

As a consequence I use a broader historical concept of retaliation, which can be defined as a measured reaction – a repayment in kind – based on religious, social or legal rules and principles such as reciprocity, equality, adequacy, and the principle of talion or the *lex talionis*. ‘Retaliation’ was used by different actors (including the state), to react to different kinds of conflicts – and notably violence – to achieve different purposes such as getting even, restoring or achieving a balance, satisfaction, or restitution, using different means such as compensation or punishment.¹¹ With regard to the patterns of violence and the legal responses to violent crimes we can systematise different functions of retaliation in early modern Europe:

- as a violent practice of conflicting that can be characterised as vengeance and revenge, often lethal, but somewhat measured with regard to the initial conflict and damage;¹²
- as a legitimate (and sometimes ‘legal’) practice such as feud, duel or retorsion, which followed rules and rituals, but included vindictory violent means to assert legitimate claims or titles;¹³
- as social and legal practice of conflicting and conflict resolution that aimed at the compensation of material damage and injury, redress, restitution (financial as well as concerning honour), and the re-establishment of peace by means of money (*wergeld*), compromise agreements and treaties (*Sühne- und Vergleichsverträge*, *transactio*), punitive damages (*Strafschadenersatz*) or by public religious rituals (requiem, penance, pilgrimage);¹⁴
- as a religious concept that provided penance which could substitute retaliatory punishment, but on the other hand emphasised the wrath of God as retaliatory punishment for deviant behaviour;
- as public retributive punishment, notably manifested in capital and corporal penalties mirroring the crime;
- as public retaliation which could include private compensation between perpetrators and victims as well as social sanctions.

Altogether retaliation constituted a pivotal purpose of the early modern European criminal law as part of the *ius commune*, which implied ambiguous norms, functions and means, ranging from retributive public punishment and public compensation to private sanctions and compensation.¹⁵ In consequence retaliation indicates measured legal, social, and/or economic relations to different actors and elements of the early modern criminal justice system such as the crime, the culprit/perpetrator (and their family, kinship), the victim (and their family or kinship), the legal protected interests (*Rechtsgüter*) comprising rights, goods, bodies, honour, order or security, and the interests of other third party actors such as authorities, rul-

¹¹ Miller 2006; still of use: Günther 1889-95.

¹² Nassiet 2007; Boehm 2011; still of relevance: Frauenstädt 1881/1980.

¹³ Chauchadis 1997; Spierenburg 1998.

¹⁴ Lange 1955; Schaffstein 1987; Montazel 2001; Sonntag 2005.

¹⁵ Beling 1894; Günther 1889-95; Hoffmann 1995; Evans 1996; Maihold 2005; Hilgendorf and Weitzel 2007; Schulze et al. 2008.

ers, powers, mediators, jurists, layers, communities, etc. As a result the early modern criminal justice systems in Europe used different means of measured reciprocal action to implement or achieve retaliation, ranging from harsh capital punishment and a variety of public penalties to pardoning, compensation and private sanctions.

These different functions and means of retaliation shaped most notably the ambiguous responses of the European criminal justice systems to violence and influenced criminal legislation, court practice, and punishment. Concerning the early modern criminal law we can observe the criminalisation of violent behaviour and the differentiation of violent crimes, in the long run resulting in a (by no means coherent) system of violent crimes, notably:

- homicide, comprising premeditated murder, manslaughter, accidental homicide (*homicidium qualificatum* & *homicidium simplex*) as well as atrocities such as familicide, regicide or suicide;
- property related violent crimes, especially robbery, murder with robbery (*Raubmord*) and church robbery (*Kirchenraub*);
- furtive crimes such as arson, poisoning, or witchcraft;
- collective, popular and political violence such as riots and breach of peace (*Landfriedensbruch*) as well as feud and duelling;
- infanticide, abortion, rape and other sexual related violent crimes;
- interpersonal physical violence such as assault, battery and brawls (*Schlägerei, Raufhändel*), also distinguished as physical severe and less serious injuries (bleeding and non bleeding wounds).¹⁶

From the late sixteenth century onward we can observe an increasing criminalisation and penalisation of deviant violent behaviour, particularly concerning manslaughter which was criminalised as a serious crime that should be punished like murder with the death penalty.¹⁷ Likewise, penal laws and *ius commune* defined physical injuries, assault and battery as public crimes, established the obligation of the authorities/states to prosecute and punish such crimes via inquisitorial procedure and threatened serious punishment. Thus retaliation in such cases was no longer a private matter of civil litigation only.¹⁸ Moreover, penal law criminalised different modes of legitimate violent retaliation such as feud or the duel. However, the enforcement of such laws remained deficient (notably duelling), and different forms of more or less legitimate violent retaliation lasted to the eighteenth or even nineteenth century.¹⁹

On the whole, the early modern penal law prioritised capital and corporal punishment as the retributive answer to violent crimes. Admittedly, laws and legal discourses stressed harsh bloody retaliation via mirroring penalties, but as well developed concepts such as simple or

¹⁶ Kröner 1958; Rousseaux 1999; Wittke 2002; Shoemaker 2004; Härter 2005; Spierenburg 2008; Eibach 2008; Ruff 2008; Mucchieli and Spierenburg 2009.

¹⁷ Pohl 1999.

¹⁸ King 1996; King 2000; Lacour 2000; Härter 2000.

¹⁹ Kiernan 1988; Billacois 1990; Frevert 1991; Chauchadis 1997; Spierenburg 1998; Netterstrøm and Poulsen 2007; Israel and Ortalli 2009.

accidental homicide, diminished responsibility, vindication (against an assault), or self-defence which allowed a greater flexibility of sentencing and the meting out of punishment.

In most early modern European countries such violent crimes were dealt with by higher and lower/local criminal courts and judicial authorities. Cases of verbal and less serious physical injuries and interpersonal physical violence were often dealt with by lower courts and local authorities, for which public punishment formed only one option and which decisions mostly aimed at private compensation and the maintenance of the peace.²⁰ On the other hand the state based higher criminal courts staffed with professional jurists seized jurisdiction over the serious violent crimes, and over the course of the early modern period increasingly expanded their judicial powers to all kind of violent crimes. However, lower courts operated by intermediary powers to a certain degree maintained jurisdiction or participation in cases of less serious violent crimes, and moreover, the judicial practice of higher criminal courts adopted certain means und purposes of social or private retaliation and compensation.

Violent Crimes, Punishment and Retaliation in the Judicial Practice

As a result, decision making and punishment of early modern criminal justice concerning violent crimes and retaliation showed an ambivalent outcome.²¹ First of all, premeditated murder and atrocities as well as the death penalty remained an exception. Only in the case of infanticide some studies discern an increase of capital punishment, which, however, was followed by a more or less rapid decrease in the second half of the eighteenth century induced by the debates and reforms of 'enlightened absolutism'.²² Though courts could also impose capital punishment for homicide (manslaughter), the majority of the convict was able to negotiate a mitigation of punishment or obtained pardon. Concerning assaults, battery and brawls the court practices can be characterised as indefinite or reluctant to met out (severe) public punishment, and the high and more so the lower or local courts of many countries preferred conflict settlement, maintenance of peace, and compensation as the model (or means) of retaliation und the purposes of criminal justice.²³

Only with regard to violent property crimes – notably robbery – committed by marginal groups and 'dangerous classes' (vagabonds/vagrants, strangers, Gypsies, Jews, bandits, gangs) most criminal courts meted out exemplary harsh and 'socially two tracked' capital punishment, which mirrored the deed and aimed at general deterrence and bloody retribution as

²⁰ Rummel 1993; Frank 1995; Thauer 2001.

²¹ Based on the case studies of: Muchembled 1989; King 2000; Lacour 2000; Härter 2005; Carroll 2006; Mantecón 2007; Spierenburg 2008; Ruff 2008; Chaulet 2008; Eibach 2008; Mc Mahon 2008; Mucchieli and Spierenburg 2009.

²² Jackson 2002.

²³ Muchembled 1989; Frank 1995; Eibach 1998; Bulst 1999a; Bulst 1999b; Eriksson and Krug-Richter 2003; Eibach 2005; Mantecón 2007; Eibach 2008; Follain et al. 2008.

one pattern of public retaliation.²⁴ For example, between 1650 and 1800 in most cases of violent property crimes the Criminal High Court of the electorate of Mainz convicted marginal groups and meted out harsh punishment; more than 80 per cent of the death penalties concerned violent property crimes and delinquents who belonged to marginal groups (or were labelled as such).²⁵

In contrast, homicide, manslaughter and more so assault were punished more lenient. Planned premeditated murder was very hard to prove and many judicial authorities in Europe tended to punish common homicides or manslaughter committed by regular male subjects, who defended their honour or acted unintentionally, with lenient penalties or permitted the option of supplicating and pardon. Serious or lethal violent crimes were often adjudicated as simple or accidental homicide and therefore punished with extraordinary penalties ranging from banishment or prison to fines. In addition, the courts sometimes included a private settlement or compensation into the decision. Although up to the eighteenth century homicide and other serious violent crimes formed the majority of criminal cases, “the authorities did not see the punishment of interpersonal violence as one of their central tasks”, concludes Smith with regard to the English example.²⁶ Many case studies on the judicial practice of criminal courts in other European countries and central European territories and cities have produced corresponding results and often observe that criminal courts adjudicating violent crimes still in the eighteenth or even nineteenth century referred to traditional patterns of private retaliation, compensation and negotiation.²⁷

In cases of interpersonal violence ranging from manslaughter to assault and battery the Criminal High Court of Mainz, for example, often mitigated or even waived harsh penalties - and therefore public retaliation - and included into its decisions a so called private compensation (*Privatsatisfaktion*) which, too, was considered as a part of public punishment. To adjudicate punishment and appropriate retaliation in such cases the court (the jurists who conceived the legal opinion/council as well as the Elector, who could approve and modify the proposed verdict) evaluated, calculated and measured the violent actions, the circumstances, the damages as well as the motives and the social status of perpetrators and victims. Based on the variety of legal arguments which the *ius commune* provided and regarding as well social arguments and utilitarian purposes the court considered in detail many aspects of retaliation and violence, such as: who started the brawl, did both, aggressor and victim, use violence or cause a violent reaction through verbal injuries that infringed the honour of a person and could the violent action be measured and reckoned up. This included the consideration if a violent action could be legally classified as appropriate, reciprocal, retaliatory, as legitimate retorsion and therefore could be subsumed under the right of retorsion, or as a self-defence

²⁴ Ortalli 1986; Rousseaux 1989; Blok 2001; Härter 2003; Härter 2005. Many other studies on early modern violence somewhat neglect the issue of violent property crimes and marginal groups.

²⁵ Härter 2005: 1080-1122.

²⁶ Smith 2008: 209.

²⁷ King 2000; Lacour 2000; Wiener 2004; Wood 2004; Härter 2005; Carroll 2006; Mantecón 2007; Spierenburg 2008; Ruff 2008; Chaulet 2008; Eibach 2008; Caron et al. 2008.

concerning life and limb as well as the honour of a person or family. Of crucial importance was the evaluation of the intention of a perpetrator to harm and kill, and if he had committed a violent crime intentionally. Moreover, social factors and ‘special prevention’ played a role, notably whether a perpetrator could be classified as a regular subject (*nützlicher Untertan*) who could be disciplined via arbitrary non-capital penalties such as prison-workhouses, forced labour, jail or fines. Though the Criminal High Court of Mainz adjudicated to the infringement of penal law and the public order, the actual decision also took into account the damage of perpetrators or victims (concerning body and/or honour), the nature and amount of satisfaction and compensation, the medical costs, the consequential costs of an inability to work, and the costs of the procedure as well as the potential disciplining of a perpetrator.²⁸

To achieve a public as well as private retaliation in violent crimes (with the exception of robbery and infanticide) many criminal courts in Europe used different legal opportunities and means of compensation and control, and included them into public punishment. For example, the sentence could impose a delinquent to swear an oath that intentional damage had not been the intrinsic purpose of violent action (*juramentum den non offendo; Eid, daß nichts Schädliches beabsichtigt war*); this oath should also prevent future and retaliatory violence (vengeance). In cases of less serious injuries perpetrators had to formally apologise to the victim in public (*öffentliche Abbitte*), sometimes coupled with the ritual of handshaking and public amends to make a statement of honour (*Ehrenerklärung*). Criminal courts also determined the amount of money of a private compensation, and as a result the verdict prejudged the civil decision. From this perspective (inquisitorial) criminal procedure could be more favourable for conflict parties than litigation in civil courts to which perpetrators and victims sometimes resorted, too. If the court adjudicated violent actions and damages as reciprocal and equivalent or based on the right of retorsion the crimes could annul or compensate each other and the court waived the legally stated punishment, imposed a lenient *poena extraordinaria* (often a fine) or considered a material compensation as the punishment. Fines and material compensation formed the base for a hybrid concept of retaliation and punishment: the so called ‘private punishment’ (*peine privée* or *Privatstrafe*) or punitive damages (*Strafschadenersatz*).²⁹ On the one hand it builds upon traditional concepts of ‘private satisfaction’ (*Kompensation/Komposition*) such as the wergeld and incorporated private redress and compensation for victims, but on the other hand also took public fiscal interests into account. To enforce such decisions some courts threatened an aggravation of punishment if the convict did not comply or kept peace; early modern English courts frequently used so called recognisances as a mean to keep the peace and to secure a future disciplined behaviour of perpetrators.³⁰ Moreover, during the procedure and after the verdict convicts as well as victims had the opportunity to supplicate and to negotiate punishment, retaliation, pardon or letters of remission. The courts also used this to urge opponents to conclude a private settlement and offered the mitigation or even the waiving of punishment, especially

²⁸ Härter 2003; Härter 2005 (based on a survey of more than 3000 cases/verdicts).

²⁹ Lange 1955; Großfeld 1961; Schaffstein 1987; Holzhauser 1984; Montazel 2001; Sonntag 2005.

³⁰ Smith 2008: 205.

if it was presumably that future vindictory violence could be prevented and the public order could be restored.³¹

Contemporary jurists of the *ius commune* discussed these ambiguous legal practices of private and public retaliation within the criminal justice system under the title of public composition (*herrschaftliche oder fiskalische Composition oder Vergleichung*) and private punishment/punitive damages (*Privatstrafe/Strafschadenersatz*), which admittedly were not fully conform to the *ius commune*, but nevertheless were frequently used in court practice.³² In this regard the state based criminal justice system offered an opportunity for private retaliation within the framework of inquisitorial procedure and public punishment. The early modern state, on the other hand, transferred the concept of private compensation to the public sphere, claiming that violent crimes had also infringed the public order or the public weal (*Wohlfahrt*) which could be compensated instead of regular public punishment through a regress in (charitable) payment or community service. This flexible system of private and public retaliation fitted the utilitarian purposes and fiscal interests of the state, who at last could extend the functions of the criminal justice system with regard to the social control of violence.³³

In the eighteenth century the opportunity of retaliation and compensation via criminal justice was used more frequently in cases of assault, battery, brawls and less serious injuries, because the criminal justice system provided private compensation and a more advantageous conflict regulation. In consequence, this allowed the state to extent the penalisation of violent crimes below the threshold of homicide. Moreover, with the enlightenment and the emerging civil society (*bürgerliche Gesellschaft*) the perception of violence started to change slowly, especially with regard to the elites. The elites used less interpersonal violence to solve conflicts and developed a sort of disgust against affective, irrational and uncontrolled violence, especially of the lower classes. The changing attitudes influenced the legal discourses, the legislation – we can observe an increase of ordinances dealing with assault, brawling, weapons, and prevention – and the penal practice as well.³⁴

Many studies observe an intensification of the prosecution and public punishment of violent crimes such as assault and battery and a decrease of pardoning and mitigation concerning homicide since the last decades of the eighteenth century. Notably the courts meted out a harsher public punishment if the opponents did not resort to means of compensation or if the perpetrators were perceived as savage, disorderly, or habitual offenders, who used violence not to defend themselves, but for base motives and with an antisocial effect or infringed the ‘good order’ and the public weal. In addition the shape of public retaliation and punishment changed: In cases of assault and even manslaughter ‘modern’ penalties such as imprisonment

³¹ Muchembled 1989; King 1996; Nubola and Würgler 2002; Carroll 2006; Ruff 2008; Härter and Nubola 2011.

³² Beling 1894; Schaffstein 1987; Montazel 2001; Sonntag 2005.

³³ Schwerhoff 2004; Smith 2008.

³⁴ King 1996; King 2000; Lacour 2000; King 2003; Shoemaker 2004; Wood 2004; Härter 2005; Eibach 2008; Piant 2008.

and forced labour were used more frequently and the courts no longer accepted vindictory violence, passion, anger, rage, or inebriety as mitigating circumstances. In this regard the criminal justice system enhanced the purposes of punishment, aiming at the disciplining and the policing of interpersonal violence especially of the lower classes, intending also the deterrence of the middle sorts and the elite. On the one hand, that resulted in a more or less stable low homicide rate, often interpreted as the ‘civilisation of violence’, but on the other hand led to an increase of the crime rate that concerned less serious violent crimes such as assault and battery.³⁵

Conclusion: Changes and Continuities in Violence and Retaliation

All in all, since the end of the eighteenth century we can observe ambiguous changes in the adjudication of violent crimes and the intertwined concepts of retaliation and punishment. Many states reduced public retaliation through exemplary retributive capital punishment to violent property crimes (robbery with murder), especially if committed by vagrants and bandits, and violent political crimes such as assassination. In this regard the criminal justice system reduced retributive violence – notably torture, corporal punishment and the death penalty. However, in the nineteenth (and even twentieth) century the death penalty remained an option of the criminal justice system to retaliate violent crimes using the concept of exemplary mirroring punishment, and prosecution, criminal procedure or imprisonment still used extensively different forms of violence to control and discipline perpetrators and delinquents.³⁶ Nevertheless, since the second half of the eighteenth and more so in the nineteenth century homicide and more serious interpersonal violence were increasingly punished with imprisonment, prison workhouse (*Zuchthaus*), forced labour and other non-bloody penalties which aimed at disciplining and ‘betterment’ especially of violent men who belonged to the lower classes. This, in fact can be seen as a more lenient punishment in comparison to the harsh penalties the early modern penal codes had stated, and it concurs with the decline of the homicide rate and the decrease of vindictory violence and vengeance.³⁷

However, these changes were based on the intensification of the prosecution and punishment of violent crimes below the threshold of homicide and they indicate the expansion of the disciplining and policing of violence via the criminal justice system. These developments still may fit well into the model of the civilising of violence, the humanisation of retributive punishment and the establishment of a state based monopoly of violence (or power), but they were none the less accompanied by the persistence of early modern patterns of retali-

³⁵ Johnson and Monkkonen 1996; Eisner 2001; Spierenburg 2008; Spierenburg 2011.

³⁶ Evans 1996; Martschukat 2006; Härter 2011.

³⁷ Kurgan-van Hentenryk 1999; King 2000; Wood 2004; Wiener 2004; Shoemaker 2004; Ambroise-Rendu 2006.

ation.³⁸ Though former legitimate practises of violent retaliation such as feud and duel had been criminalised, in the nineteenth century elites and other social groups still resorted to vindictory violence – notably the duel.³⁹ Moreover, the criminal justice system still provided options to deal with vindictory violence and violent conflicting of elites and citizens which were not only based on public punishment, but utilised lenient non-public penalties such as fines as well as private compensation, private punishment and punitive damages, particularly in cases of less serious violent crimes.⁴⁰

In this regard traditional pre-modern modes of retaliation concerning violent crimes did not entirely cease in the nineteenth century but were partially transformed and integrated into the ‘modern’ criminal justice system. The Prussian code of 1851, for instance, allowed compensation for simple assault and the option to waive public punishment.⁴¹ Beyond the normative level criminal courts still considered compensation of material damage and injury, redress and restitution between perpetrator and victim in deciding cases of violent crimes and meting out (and often waiving) public punishment and therefore offered even better options for private retaliation, compensation and conflict settlement. However, the motives of the early modern and emerging modern state to integrate patterns of social or private retaliation were not only to safeguard the interests of victims or to settle conflicts without retributive punishment. Rather the integration and juridification (*Verrechtlichung*) of retaliation permitted functional gains of the criminal justice system: the monopolisation of punitive powers as well as an intensification of prosecution and social control with regard to such violent crimes as assaults and battery and violent behaviour of the lower classes.

These purposes influenced the function of private compensation between perpetrators and victims which developed into the legal institution of the *Privatstrafe*: punitive damages which on the one hand should ensure the compensation of victims but, on the other hand, should also deter and prevent perpetrators of violence.⁴² From the nineteenth century onward the relationship between perpetrator and victim as a pivotal element of retaliation became more and more of secondary importance to the purposes of the state. Private compensation should not only serve as punitive damages, but the state claimed recompense for legal expenses and the infringement of the (legal) order and offered the mitigation of public punishment, which in the long run emerged into the modern concept of ‘*Wiedergutmachung des Schadens durch eine bestimmte Leistung*’: a redress by paying a charitable contribution (sometimes directly to the state).⁴³

As a consequence, the function of retaliation and the relations between the different actors shifted from private compensation (perpetrators and victims) and public punishment (state

³⁸ Härter 2008.

³⁹ Frevert 1991; Spierenburg 1998.

⁴⁰ Kurgan-van Hentenryk 1999; Burton 2001; Wiener 2004; Ambroise-Rendu 2006; Bernaudeau 2008; Caron 2008; Smith 2008; Spierenburg 2008; David 2009.

⁴¹ Strafgesetzbuch 1851: §§ 188, 189.

⁴² Montazel 2001; Sonntag 2005.

⁴³ Albrecht 2008.

and perpetrators) to public compensation and private punishment as an amalgamation of private and public retaliation which served for the interests of the state: fiscal recompense, the juridification (*Verrechtlichung*) of vindictory violence as well as private retaliation, and the extension of social control through the criminal justice system. Commencing with the legal practice of the early modern criminal justice systems in Europe private and legal retaliation to violence had significantly changed from legitimate vindictory violence, private compensation and retributive public punishment to a system of formal social control and public retaliation that prevents violence, but impairs the interest of victims and prefers public compensation. However, it is doubtful if violence – especially vindictory – and private retaliation are nowadays really prevented or even controlled by the state and formal social control, and it is still in question if the modern criminal justice system really does justice to the complex task of retaliation.

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