

# The Evolution of Criminal Law in Continental Western Europe

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**Abstract:** Through the ages societies have been confronted with criminal behavior. Whenever an act was committed that harmed an individual or threatened the whole community, the legal system had to be restored one way or another. In the course of history all sorts of methods and measures have been introduced to deal with persons who had infringed private interests or endangered the common safety. Studying the evolution of criminal law in Western Europe, from its early stages to its present form, some main features can be distinguished. One of these features is the gradual shift of criminal procedure from the private domain to the public domain. At first, there was not much public interference with criminal behavior whatsoever. For the greater part, it was up to the victim of the offence, or the family he belonged to, to take legal action against the offender. Only gradually the authorities began to consider criminal justice a matter of public interest. In the Middle Ages, judicial officials were appointed who had to bring each and every culprit to justice. They had to ensure that they were punished properly by the courts of law. To do so, the judges had a wide range of penalties at their disposal, including various species of the death penalty and other forms of corporal punishment. Meanwhile, the criminal liability of a person who had to stand trial changed drastically. No longer was an offender criminally liable for the sole reason that he had committed an unlawful act, like before, but also because he was to be blamed for having done so. When the Middle Ages came to their end, some new theories about punishment were introduced, aiming at the exclusion of wrongdoers from society by depriving them from their freedom. This new penal policy was gaining ground rapidly and would eventually lead to the introduction of various prison systems in the eighteenth and nineteenth centuries. In that same period, ancient sources of criminal law, such as customary law, divine law and revived Roman law, lost their legal power and made way for statute law. As a result of this rise of legislation various voluminous criminal codes were issued at the end of the eighteenth century. In the course of the twentieth century most of the penal practices in Western Europe were significantly transformed. This transformation had a lot to do with the notion that one should reform the moral standards of wrongdoers, in order to prevent them from making the same mistakes again.

**Keywords:** Criminal Law, Ancient Penal Policies, Procedural Law, Prison Systems

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## 1. Introduction

Crimes are an expression of human needs, according to the Dutch legal historian Dick Berents. Therefore, crimes can be found in each culture and each epoch [1]. The way society reacted to criminal behavior, however, differed throughout history. It took a very long time before a modern criminal law system evolved from these reactions. Likewise, it took a long time before legal scholars regarded criminal law to be an autonomous and valuable branch of law that was worth while studying, instead of a discipline that was necessary for the sole reason that there were criminals.

One of these scholars was the Flemish lawyer Filips Wielant (1441/42–1520), one of the founding fathers of legal science in The Netherlands. At the beginning of the sixteenth century Wielant published an introduction to criminal law, entitled *Corte instructie in materie criminele* ('A brief instruction regarding criminal law'). In one of the opening chapters of this handwritten treatise he makes the following observation:

'According to the legal doctrines of former times every respectable and trustworthy person was allowed to bring forward an accusation whenever a crime was committed. (...) However, this doctrine has been abandoned and

nowadays it is custom that a public prosecutor accuses the suspect and presents a criminal conclusion. And a private party who has suffered any damages can only demand that these damages will be compensated. And these procedures are now current in all places [2].

In this paragraph Wielant describes in just a few words one of the most significant phenomena within the field of criminal law and its historical development. For centuries criminal law had been for a major part private by nature. Whenever an offence was committed – such as murder, theft or rape – the victim of that wrongful act, or someone of his family or clan, had to bring the offender to justice. The authorities would not undertake any action against the wrongdoer, because no common interests were at stake. They just gave the victim the opportunity to settle his conflict with the offender one way or another. However, from the thirteenth century onwards the attitude of these authorities towards criminal behavior gradually changed. Crimes were more and more considered to be violations of the public order and communal safety. From that moment on criminal justice became a public task and criminal procedures could no longer be initiated by private parties but only by officials acting on behalf of the community. Nevertheless it took some three hundred years before the transmission of criminal justice from the private domain to the public domain was completed.

The evolution of criminal procedures as described by Wielant not only took place in Flanders but – globally speaking – in all countries of continental Western Europe [3]. In this essay, I will first discuss this historical evolution of continental procedural law. After having described the traditional procedures that could be initiated by a private person who had suffered injustice by the hands of another person (paragraph 2), I will outline the public methods of dealing with lawbreakers that were developed in the Middle Ages (paragraph 3). In the subsequent paragraphs, I will discuss the regulation and unification of criminal procedural law in the Early Modern Age (paragraph 4), the development of new penal concepts at the end of the sixteenth century (paragraph 5), the codification of criminal law and the mitigation of its measures in the Modern Age (paragraph 6) and the introduction of various prison systems in the nineteenth century (paragraph 7). I will conclude this essay with some final remarks regarding the individualization of punitive measures in the twentieth century (paragraph 8).

## 2. The Early Days of Criminal Law

There are not much detailed data concerning the early legal cultures of Western Europe. Like other archaic legal cultures, the Germanic tribal cultures were for the greater part private by nature, even regarding criminal law [4]. The Roman historian Publius Cornelius Tacitus (ca. 56-117) dedicated two small paragraphs to the traditional way in which criminal offences were dealt with by the Germanic tribes, which would soon after overrun the Roman Empire in the West. In his treatise *De origine et situ Germanorum* ('On

the origin and settlement of the Germans'), published in 98 AD, he wrote that only the most severe crimes – crimes that were of general interest, such as treason and betrayal – were punished by the death penalty. Most offences however gave rise to a financial settlement between the relatives of the victim and those of the offender. The family of the offender had to pay a certain amount of money to the family of the victim. This monetary fine was a compensation for the harm and injustice the injured party had suffered, and it was a substitution for the original retaliation from the early days of Germanic justice. Later on, a monetary fine had to be paid to the tribal king as well, because the offender not only had violated the peace between the two families, but he had also infringed the communal peace of the tribe [5].

From the sixth century onwards, the legal customs of the Germanic tribes were enacted in the so-called *leges barbarorum* ('the laws of the barbarians'), as these laws were called in the nineteenth century. The contents of each of these handwritten codices consisted for the most part in an enumeration of criminal offences one person could commit against another and the monetary fine the perpetrator had to pay to restore the peace and prevent retaliation. A prime example of the financial settlement of 'private offences' can be found in the *Lex Ribuaria* from the beginning of the sixth century. In this 'Codex of the Ribuarians' – one of the Franconian tribes – chapter 36 dealt with manslaughter. According to the provisions of this chapter, the specific amount of money the offender had to pay was dependent on the nationality of the victim. That is, if a Ribuarian killed one of his tribesmen, he was liable for 200 shillings, but if he killed for instance a Saxon or an Aleman or Burgundian, he had to pay the lesser sum of 160 shillings. In this chapter, also special provisions were enacted regarding the members of the clergy. For example, if a deacon was killed, the monetary fine consisted of 300 shillings, but if the victim were a priest, the fine was raised to 600 shillings and in the case of a bishop even to 900 shillings [6].

However, the Franconian kings, who were gradually expanding their powers over the other Germanic kingdoms, made an effort to renew the system of penal law by creating a number of public crimes as well as converting various private offences into public ones. Especially during the reign of Charlemagne (748-814), the most powerful of the Franconian kings, new provisions were made by means of royal regulations known as *capitularia*. In a number of such 'chapters' crimes like lese majesty, high treason, counterfeiting, but also murder, robbery and theft were threatened with the death penalty and other forms of corporal punishment. Having committed such a crime the offender had to stand trial before the royal court, where he was officially charged and prosecuted by a member of the royal household, acting on behalf of the king. The king himself or his representative made up the final sentence, after being counseled by the other members of the court [7].

The efforts of the Franconian kings to make criminal law a public matter would eventually run aground. After Charlemagne had died in 814, his empire crumbled in the

ninth and tenth centuries and on its ruins, new kingdoms arose. Charlemagne's successors however lacked adequate political power to take care of criminal justice. Hence, criminal law once more became an instrument in the hands of private parties seeking satisfaction and retaliation for the harm and grief they had suffered from unlawful acts. Like before the injured party could try to settle its conflict with the offender by means of a financial arrangement. If the victim was not willing to do so, or if the negotiations reached a deadlock, he could initiate a criminal procedure before a court of law. In that case, the victim had to charge the alleged offender and he had to prove that his opponent had indeed committed an offence against him. However, the judge could also decide that the defendant had to prove that he was wrongfully accused and did not commit this crime. In both cases, the evidence that had to be produced consisted of procedural oaths and supporting oaths by relatives or clan members. The judge could also order that one of the parties – or both parties – should be submitted to an ordeal. The outcome of such an ordeal or proof had to make clear if the plaintiff or the offender was speaking the truth [8].

### 3. Criminal Law and Criminal Liability in the Middle Ages

The death of Charlemagne ushered two centuries of decline and disintegration, not only of criminal law but first of all of political power. During the so-called dark ages – the ninth and tenth centuries – the Carolingian empire fell apart and several new kingdoms arose from its ruins. These autonomous kingdoms, like France and Germany, were actually split up in a great number of duchies, counties and other seigniories. In the twelfth and thirteenth centuries, many of these territories developed into semi-sovereign principalities, ruled by feudal lords who had appropriated numerous regalia ('royal rights'), including the right to administer justice [9]. Unhappy with the traditional, accusatorial way in which crimes were prosecuted by private parties, these princes and seigniors considered it their duty to safeguard society and bring wrongdoers to justice independently of any private party.

Gradually criminal justice became a matter of public interest and officials were installed to carry out investigations whenever a crime was committed. It was the task of these officials – the local bailiffs – to track down the alleged offender, bring him to trial and prosecute him. Acting as a public prosecutor the bailiff had to collect evidence against the suspect, initiate a criminal procedure and bring forward his allegation. During the trial witnesses could be heard and – most importantly – the suspect could be questioned by the judges. If the suspect was reluctant to confess, the crime he was accused of, the court could order a 'painful examination' to get a confession by means of torture. A confession was considered the *regina probationum* ('the queen of all proofs') and for most criminal courts, it was customary to impose the death penalty only after the offender had confessed what he

had done [10].

Death penalty was the most severe punitive measure at the disposal of the judicial authorities in the Middle Ages. Because criminal justice was now considered to be a public task, the objectives of prosecuting and punishing crimes shifted from mere reprisal for wrongdoing to safeguarding society and maintaining its peace.[11] To achieve these goals the punitive system comprised a variety of death penalties, such as beheading, hanging, quartering, and breaking upon the wheel, as well as other forms of corporal punishment, like the mutilation of one's face or the chopping off of one's hand. By means of these penalties, the authorities not only wanted to punish persons who had committed a grave offence but also tried to prevent other individuals from doing so. To discourage potential wrongdoers these capital penalties were carried out in public, with a great display of power by the executioner.

In cases when capital punishment was not an option, banishment was considered a most suitable alternative for the removal of criminals from society. Banishment could be carried out very easily, with no great expenses attached to it, but this punitive measure was hardly effective to deal with criminal behavior adequately. In fact, wrongdoers who were banished, be it for life or a great number of years, were just passed on from one jurisdiction to another. As a warning not to associate with these criminal elements, their forehead was often branded with a mark. In later times, this brand would be placed on the shoulder instead, serving as a 'criminal record' in the event this person had to stand trial again after having committed a criminal offence once again. Since he now was a recidivist, a more severe penalty could be imposed on him.

Because the judicial authorities often used banishment to get rid of wrongdoers, this punitive measure makes perfectly clear that these authorities mainly cared for safeguarding their own jurisdiction. On the other hand, marking these convicts with a 'warning sign' demonstrates that they had some concern for the common safety in other jurisdictions as well [12].

In the Middle Ages, not only criminal procedural law evolved into a more 'modern' system of prosecuting offences, but also the criminal liability of persons having committed such offences changed drastically. Up to the thirteenth century, a person who had committed an offence was criminally liable just because he had done so. It did not matter if this person was a juvenile or an adult, or if he was fully capable of understanding what he was doing when committing an unlawful act. Someone's motives for having committed a criminal offence were hardly taken into account, and only very little attention was paid to mitigating circumstances [13].

From the thirteenth century onwards, the criminal liability of wrongdoers was gradually evolving into a guilt-based liability. The liability of one who had committed a crime was no longer solely based on the unlawfulness of the act but also on the culpability of the actor. The developments that led to this evolution had their origins in

mediaeval canon law. In those days, the Catholic Church had its own courts of law throughout Western-Europa, as well as its own set of legal provisions and its own faculties of law. To transform the liability for having committed a criminal offence into a guilt-based liability, the canon lawyers made use of concepts introduced by some famous moral philosophers, like Albertus Magnus (ca. 1193-1280) and especially Thomas Aquinas (ca. 1225-1274). These theological scholars learned that not every person could be blamed for what he had done. For instance, very young children and persons who were non compos mentis could not distinguish right from wrong, or if they could, they were not capable to act in accordance with this knowledge because they lacked sufficient willpower to do so. The canon lawyers were inspired by these doctrines, and they combined them with concepts adopted from Roman law, like *culpa* (carelessness), *dolus* (intent) and *animus* (objective) [14].

The guild-based liability created by the canon lawyers on the foundation of moral-theological doctrines, found its way to the secular courts of justice in the fifteenth and sixteenth centuries. And so, at the threshold of the Early Modern Age, the Flemish lawyer Filips Wielant – who was introduced in the first paragraph – made it perfectly clear that in principle every person was to be blamed and therefore punishable for what he had done. However, he continued, this principle does not apply to young children, persons with a mental defect, persons who are very drunk, or who commit a crime while being sound asleep, or who do not realize that they are committing a criminal offence. In addition, if a person commits a crime because he has to defend himself or a member of his family, or because he has to protect his properties, he is not liable for his deeds [15].

Filips Wielant however did not get the credits he deserved. He only made a handwritten treatise of his doctrines and just a few copies found their way to the judicial officials. Half a century later, one of these copies was set to print by Joos de Damhouder (1507-1581), also a Flemish lawyer, who complemented Wielant's writings with some minor ideas of his own. Damhouder published a Latin version of this manual under his own name in 1554 and this *Praxis rerum criminalium* ('Legal practice in criminal cases') made him a well-known authority in the field of criminal law.

#### 4. Regulation and Unification of Criminal Justice

In the sixteenth century as well as the seventeenth century, a considerable number of manuals and treatises were published in which criminal law and criminal procedural law were analyzed and explained. Some of them were of great importance for the criminal law practice throughout Western-Europe, like Damhouder's *Praxis rerum criminalium*, the *Practica criminalis* (1568) by the Italian lawyer Giulio Claro (Julius Clarus, 1525-1575), the *Praxis et theórica criminalis* (1616) by his countryman Prospero Farinacci (Farinaccius,

1554-1618) and the *Practica nova imperialis Saxonica rerum criminalium* (1635) by Bendikt Carpzov (1595-1666), one of the founding fathers of legal science in Germany.

The administration of criminal justice was not only regulated by the commentary of famous lawyers and scholars but also by royal and regional acts of legislation. From the sixteenth century onwards criminal statutes and ordinances were issued in various European countries and territories. Most of these acts were rather limited in scope and dealt with specific subjects, for instance certain types of offences or matters of procedural law. However, on occasion the legislators covered the whole field of criminal law and issued rather sizeable ordinances [16]. Prime examples are the *German Constitutio Criminalis Carolina* of Charles V of 1532, the French *Ordonnance Royale* of François I of 1539, and the Dutch *Criminal Ordinances* of Philip II of 1570.

As well as the fore mentioned treatises, these statutes held specific provisions concerning the various procedures that could be initiated to prosecute a criminal offence. In general, the prosecutor had two types of litigation at his disposal to bring a wrongdoer to justice. He could initiate either a *processus ordinarius* or a *processus extraordinarius*. If the offender had to stand trial in an 'ordinary procedure', he had a far better position than in an 'extraordinary procedure'. He could defend himself against the allegations of the prosecutor, produce counterarguments and refutations and he often could make use of the legal aid of an advocate. In most ordinary cases, no painful examination was allowed. In an 'extraordinary procedure' on the other hand, the suspect was mainly a 'subject of investigation'. He was locked up, interrogated by the judge, confronted with witnesses and not seldom, he was tortured to extort a confession [17].

Despite its name, the extraordinary procedure was far more popular amongst prosecutors and judges than the ordinary procedure, which was rather time-consuming. Furthermore, this type of procedure mostly led to a confession of the suspect, confession being the most convincing proof that he had committed the crime he was accused of. Thirdly, having confessed his crime, the death penalty could be imposed on the offender, without him being allowed to lodge an appeal against the verdict. *Confessus non appellat* ('he who has confessed cannot appeal') was a basic principle common to most European law courts when dealing with a criminal case.

By issuing acts of legislation like the just mentioned ordinances, the authorities tried to get a firm grip on the litigation in criminal cases. In various countries and principalities – amongst others France and the Netherlands – the kings and princes also made efforts to standardize the prosecution of criminal offences, by purging and harmonizing the legal customs of the criminal courts. Only the customs that were approved and confirmed by a statute maintained their legal force; the others were abolished. In the Northern Netherlands, however these efforts were not very successful because most courts of law refused to write down their customs and send them in to be examined and approved [18].

Beside statute law and customary law, Roman law was a significant source of law in this period as well. From the twelfth century onwards, the rediscovered law of the Romans had found its way to the European courts of law. In most continental law systems, the provisions of this reanimated *corpus iuris civilis* (i.e. the 'body of law of the citizens') gradually gained the status of supplementary law, to be used whenever the statutes or legal customs did not provide a proper solution [19]. For example, in the Criminal Ordinances of Philip II of 1570 a clause was inserted in which was explicitly ordered that all law courts had to apply Roman law in cases the legislator had not provided for.

When it came to penal provisions, statutory law, customary law and Roman law were not the only sources of law from which such provisions could spring. Judging a criminal offence a law court could also derive provisions from divine law – legal rules incorporated in the Old Testament – and jurisprudence, in particular from the verdicts of central or regional courts of justice. Among these legal sources, the numerous statutes issued by the authorities are often said to be the most important source of law during the Early Modern and the Modern Age. The judicial officials however considered the actual punishment of an offender to be mainly a discretionary matter. They regarded the criminal acts of the legislator – for the greater part – as guidelines rather than as compulsory legal rules. Moreover, there was no obligation whatsoever for a judge to justify his verdict, that is to enumerate the legal provisions on which his decision was grounded. One might conclude that in every day criminal practice it was up to the judge to decide which penalty he should impose on the offender who stood trial.

## 5. The Development of New Penal Concepts

In the Early Modern and the Modern Age, repression and prevention of crimes still were the spearheads of penal policy. Like in former times, these goals were to be achieved by means of harsh penalties and public executions. Therefore, death penalties and other forms of corporal punishment still held a dominant position in the arsenal of punitive measures that could be imposed by the criminal courts. Because of their alleged discretionary powers, however, the criminal courts appeared to have been rather reticent regarding capital punishment, on occasion even when they were dealing with a capital offence for which the legislator had explicitly ordered the death penalty. Globally speaking, courts of law were not always as rigorous as the legislators wanted them to be.

Regarding capital punishment in general, criminal records show that in most cases the offender was put to death by means of the sword or the gallows. Harsh methods of execution, like breaking a person on the wheel or burning him alive, were quite exceptional. Criminal records also show that when it came to other species of corporal punishment, whipping and marking were the penalties that were inflicted most frequently. These punitive measures were

mostly inflicted on an offender preceding his banishment for life from the jurisdiction. Only in very few cases, did mutilation of a part of the body take place. For example, when someone had committed an offence that had caused a lot of consternation, such as a series of arsons or a murder with much bloodshed, it was not uncommon to cut off the hand of the offender before executing him.

For example, in 1721, 18-year-old Joseph Jansen had robbed one woman and raped another woman and killed her with his knife. After being arrested and questioned, he was sentenced to death by the criminal court of 's-Hertogenbosch. He was executed by the wheel, but first his hand – the one that had held the knife – was cut off [20]. Likewise, the wheel executed Adriaen van Campen, aged 41, in 1787. The criminal court of Breda had found him guilty of a series of arsons and violent acts to extort money from his victims. Before he was put to death, his hand was cut off and nailed to a post together with his tinderbox and firestones. After being executed, his head was chopped off and the remains of his body were burned [21].

However, such intensified death penalties were quite exceptional. In former times, harsh methods of executing a death sentence were more common, not only in the Netherlands but also in other European countries, for instance in France and Germany. Furthermore, although corporal penalties still hold a dominant position among the punitive measures, some new ideas about punishment and its methods and means were introduced as well. From the second half of the sixteenth century onwards the notion of penalties that excluded wrongdoers from society by depriving them of their freedom, was gaining ground rapidly. These new concepts of dealing with criminal behavior sprung not only from the desire to mitigate the penal system and humanize its measures. The exclusion of wrongdoers from society should simultaneously benefit society. People who had committed criminal offences had to make up for the harm and damage they had done to society. By performing hard labor, they had to make their selves useful, thus serving the common interests of the whole community [22].

In various countries, the combination of depriving a person of his freedom and forcing him to perform heavy manual labor led to different types of penalties. For instance, in France, Spain and Italy petty thieves, beggars and other small criminals were sent to the galleys, thus providing the national navies with extra manpower. In England, such culprits were sentenced to serve time in so-called 'bridewells' or houses of correction. There they had to perform hard labor, often for a vast number of years. By doing so, they repaid the costs of their maintenance and thereby ensured the existence of these institutions [23].

Houses of correction were also established in the Netherlands. The introduction of this new provision in the Dutch penal system was largely based on the ideas presented by Dirck Volkertszn Coornhert (1522-1590) in his book *Boeventucht, ofte middelen tot mindering der schadelijke ledighgangers* (i.e. 'the correction of criminals, or means to

diminish the number of harmful lazybones'), published in 1587 [24]. Being one of the first criminologists, Coornhert observed that the existing penal measures – harsh as they might be – did not prevent or decrease criminal behavior whatsoever. According to him, the main reason why many people committed criminal offences, not only in the Netherlands but all over Europe, was their reluctance to work. Instead of earning money in a decent manner, these people would rather lay their hands on someone else's belongings. Therefore, penal servitude was the appropriate measure to be imposed on these idle hands.

Coornhert made it clear that penal servitude was a penalty far more effective than corporal punishment, because this measure could be ordered for a considerable number of years whereas corporal punishment consisted in just 'a brief moment of pain'. Moreover, society could benefit from the labor performed by the convicts, who could be sentenced to build dikes, to fill in swamps, to row ferries or to work indoors and make useful products. Finally, the convicts were profiting from their hard labor as well, because they were getting used to the concept of working. This enabled them – if they were willing to mend their ways – to reenter society and make an honest living.

This mutual benefit to the community and the convicts themselves was a key motive to establish two houses of correction in Amsterdam at the end of the sixteenth century. In one of these houses – the so-called 'rasp house' – young male delinquents were put to work; in the other one – the 'spinning house' – young female delinquents were serving time, all of them having committed small offences like begging, vagabonding and petty theft. Both houses were fully self-supporting because money was earned by making and selling materials needed by the paint industry respectively the textile industry. Attention was paid to the convicts as well, for there was a schoolmaster present to give these young offenders some basic education, and a chaplain to reform them morally.

The houses of correction in Amsterdam served as an eminent example for other countries to follow [25]. During the seventeenth and early eighteenth centuries, similar institutions were established in other parts of Northern and Southern Netherlands and also in France, Germany, and Italy. In the second half of the eighteenth century, however most houses of correction deteriorated and their progressive objectives rapidly crumbled off. Often these penitentiary facilities were leased to entrepreneurs, who simply wanted to make as much money as possible, paying no attention whatsoever to the resocialization of the convicts. Furthermore, regarding the population of these facilities, not only persons having committed minor offences were sentenced to serve time in a house of correction, but also delinquents who were guilty of having committed very serious, capital crimes [26].

For example, in 1744 a young woman named Cornelia Biertempel stood trial before the Supreme Court of Brabant because she lived in sin with her father, who had made her pregnant. Because incest was a capital offence,

the father was put to death by strangulation. Cornelia however was sentenced to be locked up in a house of correction for the period of 50 years, after which she was to be banished from Brabant for the rest of her life [27]. And in 1777, one Mart Martens was also sent to a house of correction by the Supreme Court of Brabant because he had stabbed another person with a knife during a fight and this person had succumbed to his injuries a few days later. The Supreme Court spared Martens the death penalty because he was provoked and insulted by his victim, who had used a lot of violence as well. Instead, the court ordered him to be locked up in a house of correction for the period of 25 years. After having served his time, he was to be banished for the rest of his life from Brabant as well [28].

The given examples show that convicts often had to perform hard labor for a very long period, and afterwards they were banished for life. For all the reasons mentioned above, penal servitude eventually was not very effective concerning the rehabilitation of criminal offenders. In addition, this penal measure did not prevent or diminish criminal behavior in general, as Coornhert once hoped for. It was just a suitable solution whenever the court did not want to sentence an offender to death for one reason or another.

## 6. Codification and Mitigation of Criminal Law

The introduction of penal servitude and the establishment of houses of correction did not result in a significant reduction of criminal behavior, nor in a radical modification of the penal system. Harsh penalties like the death penalty and other forms of corporal punishment were still in use, albeit, globally speaking, courts of law were rather reticent when it came to imposing these penalties. This situation dragged on until the second half of the eighteenth century, when the political-philosophical movement of the Enlightenment came to a peak.

A basic principle on which French philosophers like Montesquieu (1689-1755) grounded their doctrines, was the notion that the human ratio should be the touchstone of all political and legal systems. Within a state based on rationalistic thinking there should be a separation of governmental powers as well as a limitation of each of these powers. Furthermore, there should be as much freedom for the individuals as possible and they should be treated equally when it came to executing the law. All these goals had to be accomplished by means of a constitution, a bill of fundamental rights and a legal system that was solely based on statutory law. A principle of legality had to assure that the authorities would respect this legal system and would not exceed their powers [29].

Montesquieu also had a serious look at the system of penal law and passed criticism on the discretionary powers of the judiciary, the inequality of justice and the harshness of the penalties that were in practice. He argued that punishment

should be proportional to the offence that was committed, and he held the opinion that the severity of a punitive measure was far less effective than the certainty that a penalty would be imposed. The death penalty therefore should be restricted to a limited number of clearly defined cases [30].

Inspired by these ideas the Italian scholar Cesare Beccaria (1738-1794) wrote his treatise *Dei delitti e delle pene* ('About crime and punishment'), which was published in 1764 [31]. Like Montesquieu Beccaria criticized the penal practice of his days and he proposed major improvements that would lead to a system of criminal law based on the human ratio [32]. He too was in favor of statute law because this would make the penal system transparent and equal to all. Furthermore, this penal system should not contain unnecessary cruelties, because cruelties were inhuman and therefore irrational. This meant, amongst other things, that torture was considered to be an inadmissible method to extort a confession. This coercive measure was not only inhuman but also quite ineffective, because a confession based on fear and pain was not very trustworthy.

Beccaria held a similar opinion towards punitive measures in general. Prevention of crimes – which ought to be the main object of punishment – was not to be achieved by penalties that were very harsh. Penalties should be moderate as well as sure and swift. Taking aside a few exceptional cases, where he considered capital punishment unavoidable, Beccaria rejected the death penalty. According to him, imprisonment was a far more suitable penalty to prevent criminal behavior. First, because imprisonment aimed at a person's individual freedom, which was one of his most precious human rights, so this would scare off potential wrongdoers. Second, when imprisoned, an offender – who was a rational human being like all other people – would gain the insight that criminal behavior did not pay because its price was too high.

Beccaria's ideas about reforming criminal law echoed all over Europe. Translations of his treatise were published in France, England, Spain, Austria, Sweden, Poland and the Netherlands. The French philosopher Voltaire was inspired by its contents, as was tsarina Catharina II of Russia and Frederick II of Prussia. The English legal philosopher Jeremy Bentham (1748-1832) was inspired by Beccaria's plea for prison sentences and published an extensive work on this subject under the title *Panopticon* (1791). Bentham also made a draft of a criminal code and published a treatise on punishment in general. Like Beccaria, he denounced punitive measures that were unnecessarily cruel. However, despite this moderate attitude Bentham regarded capital punishment as a necessity for very serious crimes. He also held the opinion that minor corporal penalties, like whipping, could be appropriate in exceptional cases [33].

The doctrines of Beccaria, Bentham and other enlightened representatives of the so-called Classical Movement had a great impact on the actual reformation of criminal law in Europe, which took place in the last decades of the eighteenth century and throughout the nineteenth century.

Spear points of the penal policy of the classical thinkers were the codification of criminal law and the mitigation of its measures [34].

Regarding the codification of criminal law, three criminal codes which were largely based on Beccaria's concepts and ideas, were issued at the end of the eighteenth century. First in line was the *Leopoldina* of Tuscany issued by grand duke Leopold in 1786, closely followed by Josephina *Constitutio Criminalis Josephina* of Joseph II of Austria in 1787. Both codes carried a rather mild character, and their provisions did not include the death penalty. Most famous became the criminal code that was a division of the immense *Allgemeines Landrecht für die Preussischen Staaten* of 1794. This code contained the most complete enactment of criminal law of its time; its provisions were moderate and both crimes and penalties were based on a principle of legality.

A fourth criminal code that may be considered as a prime example of enlightened legislation, was the Dutch code which was issued at the beginning of the nineteenth century, the *Crimineel Wetboek voor het Koninkrijk Holland* of 1809. In this code relatively few offences were punishable by the death penalty, most of them were threatened with imprisonment, the maximum term being twenty years.

Other criminal codes that were also issued in the first half of the nineteenth century were relatively harsh compared to the ones just mentioned. As a reaction to the gentle ideas of the representatives of the Classical Movement and their desire to mitigate penal law, these codes embodied a sort of counter-reformation and a return to more severe punitive measures. One of these codes, the *Code Pénal* of France of 1810, is worth mentioning because it had a great influence on various national systems of criminal law. In this French code a principle of legality was also realized with respect to crimes as well as penalties. However, it introduced a penal system that incorporated severe penalties. A great number of offences were punishable by death, sometimes even in an aggravated form, the offender being tortured before putting to death. Imprisonment was enacted in this code as well but met fierce competition from other forms of exclusion that could be imposed for life, namely penal servitude, placement in a house of correction and deportation. Furthermore, regarding punishment in general, no difference was made between the effort to commit an offence and the accomplished deed. Also, there was no distinction being made between a principal and an accomplice; both were to be punished on equal terms.

As a result of the Napoleonic wars the radius of action of the *Code Pénal* covered not only France itself but also all countries that came under its influence, like Spain, Italy, and the Netherlands. In those satellite states and newly made provinces the French code replaced the original criminal statutes, which mostly bore a far more moderate signature. Even after Napoleon had found his Waterloo in 1815, the *Code Pénal* kept its legal force in some of the former territories of the French empire. For example, the French code remained operative in the United Kingdom of the Netherlands and Belgium (1815-1830), and for some decades

even in the Kingdom of Holland (since 1831), because there was much disagreement and argument among the lawmakers in the process of designing a new national code, especially regarding the punitive measures they had to incorporate in the penal system. Therefore – necessarily – the French code remained in force until a new Dutch code came into effect in 1886. In the meantime, however, the French provisions were adapted and moderated, and eventually the death penalty was abolished in 1870. In military law this capital penalty remained in force – officially – until 1983.

Meanwhile, in France itself the harsh penal regime of the Code Pénal was somewhat weakened by some amendments in 1832. Be it that the death penalty as such was maintained, the offences carrying this penalty were diminished. In the criminal codes that were issued in – amongst others – Austria (1852), Germany and Spain (1870) capital punishment also was not abolished. However, a convict could always ask the government to be pardoned, in which case his sentence was converted into lifelong imprisonment. In their turn, the provisions of the codes of Switzerland (1853), Romania (1864), the Netherlands (1881/1886), Portugal (1886) and Italy (1889) did not include capital punishment at all.

For the most part, the final abolition of the death penalty was actually a mere legal confirmation of an established practice. Along with capital punishment other forms of corporal punishment were gotten rid of in the course of the nineteenth century. These developments were not only rooted in ideas of humanism. They also sprung from a utilitarian approach to criminality. Seeing that the traditional punitive measures did not reduce the crime rates, other types of penalties were needed to safeguard society. Among such penalties, imprisonment was more and more regarded as an outstanding alternative to capital and corporal punishment.

The humanization of criminal law also led up to a rejection of torture as a legitimate means to extract a confession. In the second half of the eighteenth century, torture was already abolished in countries like Sweden (1772), Austria (1776), Tuscany (1786) and the Batavian Republic (1798). Soon after, other countries also rejected this coercive measure. When questioning a suspect, judicial officials were no longer allowed to use any kind of physical force.

## 7. The Introduction of Experimental Prison Systems

When capital and corporal punishment were losing their *raison d'être* in the course of the nineteenth century, imprisonment was regarded to be the most adequate alternative for these harsh penalties. This new penal policy called for a prison system that would work out satisfactorily in practice. All over Europe penal specialists began to discuss what kind of prison facility was the most effective to exclude perpetrators from society. This discussion was fed by new insights and doctrines which were developed in the United States and Great Britain.

In the state of Pennsylvania, an initiative to improve the penitentiary system was taken in 1787 in the city of Philadelphia. The founders of the Philadelphia Prison Society were of the opinion that all of the actual methods of punishment tended to make bad men even worse, and therefore rather increased the crime rate instead of diminishing it. As an alternative penal measure, they introduced a prison system in which each convict was to be locked up permanently in a separate cell. By way of solitary confinement prisoners could think things over and repent, but also 'criminal infection' among them would be prevented. These doctrines were put into practice in the Eastern State Penitentiary in 1829 [35].

Because of its rigid regime, this cellular system was rejected by the members of the Boston Prison Discipline Society. According to their views, prisoners should only be locked up in separate cells during the night. During the daytime they had to perform communal work. To prevent criminal infection while working, the inmates were prohibited to speak. 'Communication' with prison guards or other inmates – whenever this was absolutely necessary – had to take place through gestures. After working hours, being secluded in cells of their own, they had the opportunity to reflect upon the things they had done. In Auburn (1823) and Ossining (1825) in the state of New York prisons were built that served these purposes [36].

Penitentiary experts from all over Europe came to visit and study both the Pennsylvania-system and the Auburn-system, as these systems became to be known. Eventually, the cellular system of Pennsylvania gained most of their support. In the course of the nineteenth century, it was introduced in several European countries, among which France, Germany, Belgium and the Netherlands.

To realize a rather mild version of the Pennsylvania-system, in the Netherlands prison facilities were built after the panopticon-design of the English legal philosopher Jeremy Bentham (see above). Bentham's design consisted of a rotunda – a dome-like building – with prison cells all around and a guardroom in the middle. From this central security unit, the prison guards were able to watch all the inmates in their separate cells.

The search for an efficient method of excluding delinquents from society took its own turn in Great Britain, where so-called progressive prison systems came into use. The general concept of these British systems was the assumption that the transition from captivity to freedom should be a gradual one, and that it should take place in accordance with the behavior of each convict.

The prototype of this concept was introduced in England, halfway through the nineteenth century, when deportation was abolished and replaced by penal servitude. The actual servitude was preceded by a short period of solitary confinement and concluded by a release on parole. The servitude itself consisted of communal labor linked with a bonus system of privileges which could be earned by working hard and behaving well [37].

In Ireland a similar system of penal servitude was made



operational, including the preceding solitary confinement and the release on parole. In this Irish model the convicts served out the last part of their sentence in an intermediate prison, under the surveillance of unarmed guards.

At the end of the nineteenth century most of the West-European countries had inserted new forms of imprisonment in their national legislation. Penal practices nevertheless strongly differed from one country to another. Generally speaking, most prisoners served out the majority of their sentence in communal captivity, in archaic prison facilities, performing manual labor that was not very useful. It would take the greater part of the twentieth century before the European penal practices were improved and more attention was paid to the inhabitants of the prisons [38].

## 8. Conclusion – The Individualization of Punitive Measures

In the course of the twentieth century, most of the penal practices in Western Europe would be significantly transformed, after modern theories were developed within the field of criminology [39]. The common principle of these theories was the notion that one should reform the moral standards of wrongdoers, in order to prevent them from making the same mistakes again. Successful resocialization of former offenders would eventually diminish the social problem of criminality and bow down the crime rates.

These insights resulted in a new penal policy, consisting in the individualization of criminal sentences. Having to pass sentence on a delinquent, the judge had to take into consideration the character of the person who stood trial, the nature of the crime that he had committed, his tendency and eagerness to adjust his moral standards and his chances to resocialize.

Regarding this new penal policy, the Netherlands were an eminent example for the other European countries to follow [40]. In the first half of the twentieth century, special provisions regarding juvenile delinquents and offenders who were not legally accountable were inserted in the Dutch Criminal Code of 1881/1886. In the second half, a prison system based on differentiation and individualization was introduced, which included a variety of rehabilitation programs. Regarding juvenile offenders, a new type of penalty was added to the punitive measures enacted in the code, the so-called task penalty. This penalty could consist of a working order or a training order or a combination of these orders [41].

Most of these Dutch penal provisions would become the common features of the European criminal law of our time. In adapted and revisited criminal statutes one will find special provisions for specific categories of offenders, a wide range of specialized penitentiary institutions, a diversity of resocialization programs, as well as task penalties, suspended sentences, conditional releases, electronic house arrests, et cetera. These ‘novelties’, however, have only very little to do with the history of criminal law, but all the more with current criminal law.

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