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Radbruch on the Origins of the Criminal Law: Punitive Interventions before Sovereignty

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ORIGINS OF THE CRIMINAL LAW: PUNITIVE INTERVENTIONS BEFORE SOVEREIGNTY

Mireille Hildebrandt

A. INTRODUCTION

This chapter is dedicated to Radbruch's seminal text on *Der Ursprung des Strafrechts aus dem Stande der Unfreien.* Since it contains a number of counter intuitive insights as to the relationship between public punishment and private revenge I will take the opportunity to position these insights in the broader field on legal history and relate them to insights from anthropological research in non-state societies. Radbruch's aim was not to provide a historiography of punitive interventions in tribal Germanic society, but to remind his readers of the constitutive importance of sovereignty for the emergence of criminal *law*. This relates to Radbruch's concern for legal certainty, and explains his investigation of the continuity and discontinuities between the *pater familias* of the Germanic clan and the institution of the sovereign.[1] My own investigations could similarly be understood under the heading of a 'historical jurisprudence', highlighting the significance of the mutation that occurred when punitive interventions between equals were prohibited and became themselves punishable as criminal offences.

After a brief exposition and first analysis of Radbruch's 'The origin of criminal law in the class of serfs' (section B), I will devote detailed attention to 'The era of private revenge, feud, outlawry and compensation' (section C). Combining analytical distinctions between coordinate and subordinate justice with the findings of historial and anthropologic research in non-state and proto-state societies I hope to clarify the significance of the rise of sovereign states for our concept of punishment and public criminal law. This is followed by a brief inquiry into 'Punitive interventions under suzerainty' (section D), discussing the different roles of punitive interventions during the in-between of tribal society and sovereignty. Finally, in 'Punishment and criminal law under sovereignty' (section E), the implications of the institution of sovereignty are discussed. Sovereignty is often taken for granted, notably by those opposing its abuse. Especially those who

[1] One of the few contemporary authors who has mined Radbruch's seminal text and elaborated some of the crucial insights it contains has been Markus Dubber, especially in his highly original and insightful work on the power of police and the idea of a new science of police. See MD Dubber, *The Police Power. Patriarchy and the Foundations of American Government* (2005) and MD Dubber and M Valverde, *The New Police Science. The Police Science in Domestic and International Governance* (2006). See also my review of the latter M Hildebrandt, 'Governance, Governmentality, Police, and Justice: A New Science of Police', *Buffalo Law Review* 56, no. 2 (2008): 557–598.

critique the nation state as an enemy of individual freedom, however, seem to forget that legal protection depends on the same institution of unilateral enforcement as public punishment itself.

B. THE ORIGINS OF PUNISHMENT IN THE CLASS OF SERFS

'A development that had lasted for centuries thereby has reached its end, the system of punishments against life and limb was complete, serf criminal law became common criminal law, and the distinction in criminal law between the free and unfree was overcome.'
Radbruch 1950[2]

In 1938 Radbruch published a remarkable text on the history of criminal law, tracing the origins of the state's right to punish its subjects to a free man's power to punish the serfs that depend on him. It is important to note upfront that 'freedom' at that point in time meant independence in the sense of not owing any duty of obedience to other persons or institutions. Once freemen become subject to punishment by the state, the duality of a jurisdiction amongst peers on the one hand, and the authority of a lord over his serfs on the other, disappears. The freedom that determined the life of freemen, peers or noblemen,[3] who rejected any authority above themselves, was terminated under sovereign rule: peers and serfs finally became subjected to the same authority of the sovereign. In that sense the loss of freedom resulted in equality; simultaneously the equality of all in relation to the powers of the state resulted in the loss of freedom for those previously independent. We can add that after sovereignty was reconstituted under the Rule of Law it enabled a new type of freedom, based on interdependence and institutionalized countervailing powers,[4] though that is not the focus of this chapter.

Radbruch's text is written in the Germanic tradition of German legal history, and has an interesting predecessor in a1908 Rectorial Lecture of Karl Binding, which to a large

[2] G Radbruch, 'Der Ursprung des Strafrechts aus dem Stande der Unfreien' in *Elegantiae Juris Criminalis: Vierzehn Studien zur Geschichte des Strafrechts* (1950) 11. First published in: *Elegantiae Juris Criminalis: Sieben Studien zur Geschichte des Strafrechts* (1938). A translation of Radbruch's essay is available on the *Foundational Texts* companion website: <http://www.law-lib.utoronto.ca/bclc/crimweb/web1/foundational.html>.

[3] In this chapter I will refer to 'a person who is not a slave or serf' as a freeman (ie the historical meaning of freemen, cf American English Oxford Dictionary at https://oxforddictionaries.com/definition/american_english/freeman). Other terms used are peers, nobles or lords, see eg TN Bisson, 'Medieval Lordship' (1995) 70(4) Speculum 743. All these terms denote a type of freedom that refers to independence. Once freedom comes to depend on citizenship in a society under the Rule of Law a freeman is 'a person who is entitled to full political and civil rights' (see American English Oxford Dictionary ibid).

[4] M Hildebrandt, 'Trial and "Fair Trial": From Peer to Subject to Citizen' in A Duff and others (eds), *The Trial on Trial: Judgment and Calling to Account* (2006) 15–37.

extent makes the same point.[5] In the 19th century, German legal history developed in two competitive strands.[6] On the one hand there was the Romanist or Pandectist School of von Savigny that understood Roman civil law as an expression of the German *Volksgeist*, building on a rationalist and conceptualist tradition in legal science. The emulation of rationalist conceptualism culminated in von Jhering's famous *Begriffsjurisprudenz,* which did for continental jurisprudence what Langdell's legal formalism did for US legal science.[7] On the other hand there was the Germanic or Historical School of eg Heinrich Brunner, who built on Tacitus' *Germania*, which was romanticized in praise of an original democratic society of independent Germanic freemen.[8] Such romantic visions can be detected, for instance, in Friedrich Engels' organic-liberal understanding of an original democratic society of equal and independent freemen.[9] The Historical School developed from suspicions against 18th century rationalist natural law (eg Feuerbach),[10] preferring the idea of an organically grown shared *Rechtsbewusstsein* (common legal consciousness) to refined conceptual calculations. In the 20th century the democratic interpretation of Tacitus' *Germania* changed from a democratic to an aristocratic interpretation, discriminating between two types of jurisdiction: that of the independent lords who depended on consensual jurisdiction between themselves, and that of the family members and the serfs (peasants) who reside on the lord's land (*allod*),[11] dependent on the arbitrary powers of their *pater familias* or landlord. Radbruch's interest in the origins of punishment fit the framework of the Historical School, and the view he expresses in his text on the origin of criminal law fits the idea of an original Germanic society of the aristocratic type. Radbruch, however, practiced 'historical jurisprudence', not legal historiography. His jurisprudential position developed from a neo-Kantian

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[5] K Binding, *Die Entstehung der öffentlichen Strafe im germanisch-deutschen Recht: Rede, bei Antritt des Rektorats am 31. Oktober 1908 gehalten* (1909).

[6] E-W Böckenförde, *Die deutsche verfassungsgeschichtliche Forschung im 19. Jahrhundert* (1961).

[7] Cf Jhering's satirical 'Im juristischen Begriffshimmel: Ein Phantasiebild' in R von Jhering, *Scherz und Ernst in der Jurisprudenz* (2009 [1884]) 245-317, where he distances himself from his earlier infatuation with the logical deduction of legal concepts. (For an English translation, see R von Jhering, 'In the Heaven of Legal Concepts: A Fantasy' (1985) 58 Temp LQ 799.) Christopher Columbus Langdell invented the so-called case-method, which induced legal rules from legal cases, to be applied to other cases, eg CC Langdell, *A Selection of Cases on the Law of Contracts: With References and Citations* (1871).

[8] H Brunner, *Deutsche Rechtsgeschichte* (1887).

[9] C Wickham, 'Problems of Comparing Rural Societies in Early Medieval Western Europe' (1992) 2 Transactions of the Royal Historical Society 221. More specifically, for the subsequent conceptualisation of serfs as 'Leibeigenschaft,' see R Blickle, 'Leibeigenschaft: Versuch Uber Zeitgenossenschaft in Wissenschaft Und Wirklichkeit, Durchgefuehrt Am Beispiel Altbayerns' (1995) 18 Historische Zeitschrift: Beihefte, New Series 18 (1995) 57 fn 15, 61, 62 fn 35.

[10] On Feuerbach's position, see G Radbruch, *Feuerbach* in A Kaufmann (ed), *Gesamtausgabe Gustav Radbruch,* vol 6 (1997).

[11] PWA Immink, *La Liberté Et La Peine. Etude Dur La Transformation De La Liberté Et Sur Le Développement Du Droit Pénal Plublic En Occident Avant Le XIIe Siècle* (1973) 29-41. According to Immink the reign over the *allod* is not a matter of property (as Romanist legal scholars would have it) but a matter of jurisdiction over the serfs that reside on the *allod*. On the Romanist interpretation of land and serfs within the scope of private law, see Blickle (n 8 above). As to the situation in the Anglosaxon world see A Macfarlane, 'FW Maitland and the Making of the Modern World' in *Making of the Modern World* (2002) 88, available as an ebook: http://www.alanmacfarlane.com/FILES/ebooks.html.

philosophy – notably the so-called Baden School of critical philosophy.[12] This implies an emphasis on values as constitutive for human society, of which the law is a specific element. This entails that a proper understanding of the law requires an examination of the values or ideas that inform the concept of law. In his *Legal Philosophy* Radbruch highlighted the productive tension between the concept and the idea of law – claiming that a description of the law (conceptualization) will always depend on the aim of the law to achieve justice, legal certainty and purposiveness (the antinomian idea of justice).[13] This implies an acute awareness of the importance of the positivity of the law, notably its ability to provide legal certainty where morality lacks the power to align opposing moral judgements. Though the scope of this chapter does not allow me to elaborate on Radbruch's antinomian legal philosophy, we need to stress that for a proper understanding of his view on the origin of the criminal law we must take into account what concept of law he advocated and how this impacts his interpretation of public criminal law.

Radbruch starts with the crucial observation that in the context of the Germanic *Urzeit* feud or private revenge is a duty, not merely a right. In the case of lighter *Rechtsverletzungen* (infringements of law or right) this duty can be mitigated on the basis of negotiations, resulting in a fine, initially payable in horses or other cattle. At first, the more serious *Rechtsverletzungen* could not be compensated that way. Binding saliently explains this with a story from the Icelandic Thorstein-Saga: 'The son of the blind Thorstein the Wise has been slain. Upon complaint of the father the murderer is banned. When he offers a fine, Thorstein refuses with the proverbial phrase: "I don't want to carry my son in my purse"'. However, Binding continues: 'The banned puts his head in the lap of Thorstein – leaving the decision to kill him to the grace of Thorstein. This melts the ice around the heart of the old man and he says: "I will not have your head cut off. Ears look best where they have grown". And now he takes the fine'.[14] At some point, the *duty* of revenge indeed became a *right* that could be negotiated against monetary compensation. In the end, revenge becomes a *criminal offence*. Radbruch's chapter highlights the great import of the transition from *duty* to *right* to *offence* for our understanding of the criminal law.

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[12] On the Baden neo-Kantian school (notably Wilhelm Windelband, who claimed that 'Kant verstehen, heißt über ihn hinausgehen') see eg AK Jensen, 'Neo-Kantianism' in *Internet Encyclopedia of Philosophy* <http://www.iep.utm.edu/neo-kant/#H3>. The Baden school was focused on the humanities or *Geisteswissenschaften*, resisting the urge of many social scientists to imitate the methodology of mathematics and the natural sciences. On the so-called *Methodenstreit*, which also raged in the science of economics and is closely connected with the notion of political economy and the German *Polizei-Wissenschaft*, see eg K Hauser, 'Historical School and "Methodenstreit"' (1988) 144(3) Journal of Institutional and Theoretical Economics 532-542.

[13] G Radbruch, *Rechtsphilosophie* (E Wolf ed, 1950) ch 9. Parts have been translated in: E Lask and C Wilk, *The Legal Philosophies of Lask, Radbruch and Dabin* (1950). 'Purposiveness' is the translation of *Zweckmässigkeit*, which is also translated with 'expediency', 'utility', or 'effectiveness'. Radbruch uses this value or end to refer to the instrumentality of the law, which, however, concerns the general interest (*res publica*). He holds that no final judgement can be passed on which interpretation of the general interest is the right or the best, taking a pluralist view on the objectives of policy making.

[14] Binding (n 5 above) 948.

The second point Radbruch makes is that the duty of revenge is not an individual issue, but concerns the so-called Sippe, or *gens*, which probably refers to a unilinear segment of a 'segmented society'.[15] In cultural anthropology the rise of segmented societies marks the advent of agriculture, when societies became sedentary and aligned with the land they laboured; these societies often consisted of a set of clans or segments without a central government above them. Radbruch explains that feud, revenge and fines are restricted to *Missetaten* (misdeeds) committed against members of another Sippe; this amounts to what Radbruch terms 'intergentile' regulation. Within the Sippe there is discipline, exercised by the head of the family/clan against his subordinate family members (wife, children and other relations) and the serfs that labor on his land, which Radbruch depicts as 'intragentile' regulation. He deems this a pre-legal social order, determined by the whims of the *pater familias*.[16]

The third point Radbruch makes concerns the emergence of a 'supragentile' jurisdiction that can only develop after the role of the Sippe is mitigated by other forms of community. He suggests the land, military leadership and the culture as focal points for loyalties beyond the Sippe and investigates which of these should be seen as the root of public criminal law. In doing so he rejects private revenge as a forerunner of the criminal law. Private revenge is at stake between different *gens* and must thus be seen as the forerunner of public international law (*Völkerrecht*) and the laws of war, which are like 'intergentile' law, not as that of criminal law, which is structured like 'intragentile' law. Though Radbruch acknowledges that at some point the lust for revenge of an individual becomes part of the satisfaction provided by public punishment (*öffentliche Strafe*),[17] he finds that this does not determine the origins of public punishment. On the contrary, where the state began to overrule the jurisdiction of the warring Sippe it did *not* appropriate private revenge but instead *prohibited* it. This forms the basis of his claim that the origin of public punishment must not be traced to private revenge or feud but to the fine that punished violations of royal decrees, the so-called *Bannbusse*.[18] Radbruch thus rejected 19th century followers of the Historical School, insofar as they argued that punishment derived from the practice of *Friedlosigkeit* (outlawry).

In his inaugural lecture on the development of punishment Binding had advocated the same position: 'In this resides the deep distinction between outlawry and punishment, the

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[15] The notion of 'segmented society' was coined by E Durkheim in his *The Division of Labor in Society* (2012). On the (un)-political structure of these societies, see M Sahlins, 'Poor Man, Rich Man, Big-Man, Chief: Political Types in Melanesia and Polynesia' (1963) 5(3) Comparative Studies in Society and History 285–303.

[16] Cf Immink (note 11 above) eg at 62, who disagrees with Radbruch that serfs had no rights. Immink concludes that though they have no political rights, they are in fact legal subjects under the authority of their lord.

[17] I have translated *öffentliche Strafe* as public punishment, referring to punishment by the state as opposed to punitive interventions between peers. With 'public' I refer to public authority, not to publicness in the sense of being on public display or open to the public. See also Binding (n 5 above) 942, who emphasizes the monopoly of the state as regards punitive interventions that count as punishment.

[18] On the royal *Bann* see L von Bar, *A History of Continental Criminal Law* (2010) 73.

one is the absolute opposite of the other'.[19] Binding neatly explains what it means to be outlawed: it implies that anything could be done against the outlawed without disturbing the peace; no proportionality (Talion) was relevant here. That is why, according to Binding, the fine paid to the victim and to the community was not seen as an evil but as a grace and a benefit; it was the price paid for something priceless: the return in the community.[20] The turnaround from such compensation to punishment has been consolidated with the *Constitutio Criminalis Carolina* of Charles V (1532), that prohibits paying compensation and instead imposes corporeal and capital punishment as the only correct – official – response to a variety of crimes. The instigation of corporeal and capital punishment is coupled with a rejection of the type of fine that 'buys' a return in the peace of the community. Its lineage can instead be traced to an altogether different type of fine: that of the Merovingian *Bann*. As mentioned, the *Bannbusse* was the monetary punishment for the violation of a royal order, and its significance had increased ever since the 6th century. The *Bannbusse* implied a relationship of obedience between king and subject in a period of time when sovereignty was not yet invented. The imposition of corporeal and capital punishment, later replaced with the prison sentence,[21] is based on the same logic as the imposition of the Bannbusse: the offender has violated the royal peace by disobeying a royal order. Corporeal punishment or prison sentences should, however, not be seen as a way to buy one's return to the peace of the king but as a unilateral decision of the king to impose punishment on a person that has, however, never left the royal jurisdiction. The fine as compensation is the result of negotiation, the fine as punishment is the result of a unilateral decision.

In the following section I will build on Radbruch's *Ursprung* and Binding's *Entstehung*, taking into account the work of the Dutch legal historian Immink who wrote an extensive history of the relationship between freedom and punishment: *La liberté et la peine* (*Freedom and Punishment*),[22] in which he comes to similar conclusions as both Radbruch and Binding. I will also involve findings and insights from the study of non-state (acephalous) societies to highlight the importance of a clear understanding of the difference and overlap between outlawry, compensation, fines and punishment.

C. THE ERA OF PRIVATE REVENGE, FEUD, OUTLAWRY AND COMPENSATION

> 'Alle, auch die kriegerischsten germanischen Stämme preisen den Frieden, das ist der gesicherte und geordnete Zustand im Volke unter der Herrschaft des Rechts. In der Teilhaftigkeit am Frieden wurzelt die ganze rechtliche Stellung und der

[19] 'Darin liegt der tiefe Unterschied zwischen Friedlosigkeit und Strafe; jene ist das absolute Gegenteil von dieser. Man kann den Wolf scheuchen, hetzen, töten, aber nicht strafen!', Binding (n 5 above) 944.
[20] Ibid 949.
[21] T Sellin, 'A Look at Prison History' (1967) 31 Federal Probation 18. [You might want to also cite to Sellin's book here, *Slavery and the Penal System* (1976).]
[22] Immink (n 11 above) and PWA Immink, 'At the Roots of Medieval Society: I: The Western Empire' in *At the Roots of Medieval Society: 1: The Western Empire; An den Wurzeln der mittelalterlichen Gesellschaft: II: Das Oströmische Reich* (Institutet for Sammelignende Kulturforskning, Series A: Lectures XXIV, 1960) 9–81.

Rechtsschutz des Freien: seine Mannheiligkeit, das ist seine Unverletzlichkeit an Leib und Gut'.

Binding 1909[23]

Coordinate and subordinate justice

Punishment is often seen as synonymous for punitive intervention, bringing private revenge and punitive warfare under the banner of punishment. Similarly, institutions like outlawry are depicted as early forms of punishment.[24] In the state, however, private revenge is a criminal offence and only allowed as self defence or in case of necessity. In contrast, in a non-state society, private revenge is not merely a right, but a duty. You cannot call the police in segmented societies like the Germanic tribal society, only your uncle and others of your own clan – hoping they will protect you by a deterrent punitive intervention that is, however, not based on any monopoly of violence. Which means that you may expect retaliation as a follow-up to the retaliation you just organised, and you may have to live under the pervasive and continuous pressure of feuding and peace-making.

In his *Freedom and Punishment*, legal historian Immink distinguishes between coordinate and subordinate justice.[25] He uses these terms to describe different types of punitive intervention in the course of German legal history, notably punitive interaction between independent freemen and punitive action between men of unequal rank. According to Immink punishment always implies a hierarchy between the punisher and the punished, whereas revenge and war play out between persons or groups who are on equal footing. Punishment regards a vertical relationship, while revenge and its reiteration in the feud regard horizontal relationships. By grouping both punishment and revenge under the heading of punitive interventions instead of depicting both as punishment, we can prevent the common misconception of private revenge as a primitive form of punishment. They are in fact two mutually exclusive types of punitive intervention. Though private revenge is punitive it is not a punishment. It is interesting to note that in his *Feuding and Peacemaking in the Touraine around the year 1100*, White writes that common medieval terms for feud were *werra* or *guerra*, which indicates that the mutual reiteration of private revenge is similar to war rather than punishment.[26] He notes that '[d]uring the later eleventh and earlier twelfth century, the feud, far from constitutiting an aberrant form of political behavior, was an integral part of European noble life'.[27] The emphasis on nobility as the class of people involved in feuding is very relevant here. Whereas in many of the

[23] Binding (n 5 above) 944. All, even the most belligerent German tribes praise the state of peace, i.e. the safe and ordered status of a people under the authority of the law. In their participation in the peace we find the root of the entire lawful status and the legal protection of the freeman: his male sanctuary, i.e. the inviolability of his body and his goods.
[24] Cf Bar (n 18 above) 62.
[25] Immink (n 11 above) 10.
[26] SD White, 'Feuding and Peace-Making in the Touraine Around the Year 1100' (1986) 42 Traditio 196.
[27] Ibid 199.

non-state societies studied by anthropologists punitive intervention may have been restricted to coordinate justice between people of equal rank, in medieval European society many of the freemen who were of equal rank, also ruled over the serfs that labored on their *allod* or *beneficium*.[28] This means that whereas coordinate justice, private revenge, outlawry and war ruled the relationships between the freemen or nobles, subordinate justice and punishment reigned in the relationship between lord and serf. The freeman thus lived on the nexus of two types of jurisdictions: one in which he ruled over his subordinates (being judge, legislator and executive) and one in which he shared political power with his peers (incapable of imposing his own judgement, regulation or decisions, but also free from any duty to obey another).

Opposing coordinate and subordinate justice, as vertical, hierarchical jurisdiction over and against and horizontal jurisdiction between equals, may raise questions as to whether these freemen were in fact equal and their relationship indeed horizontal. Within this context, however,equality merely refers to the fact that both parties do not obey each other, nor a third party; they are equal in the sense of not being subordinated to a higher authority. This does not rule out inequality in terms of physical, military and economic power. It is precisely in horizontal relationships that shifting power relationships require a reiterant negotiation, if not violent confrontation, over issues of revenge and feud.[29]

Coordination and subordination in acephalous and cephalous societies

In legal anthropology, the twin sister of legal history as far as prehistoric times are concerned, scholars speak of cephalous and acephalous societies when differentiating between societies with some form of institutionalized central leadership and those without. The *Oxford Dictionary of the Social Sciences* defines an acephalous society as:

> A society 'without a head' or formal leadership. Pastoral societies, band societies, and other small-scale groups are frequently acephalous. When, in addition, these societies possess few distinctions of rank, they are considered egalitarian societies.[30]

Note that acephalous is not equivalent with egalitarian. Hunting and gathering societies are usually small scale, face to face and they have very little functional differentiation. They seem the prototypical egalitarian society in the sense that nobody has the authority

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[28] Ibid 202. On the role played by the *allod* and the turn-around generated by the transition from *allod* to *beneficium* see Immink (n 11 above) 29-41 on freedom in the allodial era, and 115-145 on freedom in the era of the *beneficium*. An *allod* is held for oneself by oneself; a *beneficium* is held for the king or overlord. The *allod* stands for independence; the *beneficium* is given in loan in exchange for an oath of fidelity that implies a complex hierarchical reciprocity that stands for interdependence. In England the invasion by the Normans set off a system of fiefs that were always a matter of tenure, not of property. See eg Macfarlane (note 11 above) 31 and 88.

[29] EA Hoebel, 'Feud: Concept, Reality and Method in the Study of Primitive Law' in AR Desai (ed) *Essays on Modernization of Underdeveloped Societies* (1971) 500–512.

[30] C Calhoun (ed), 'Acephalous Society' in *Dictionary of the Social Sciences* (2002).

to command another.[31] However, in the *Oxford Dictionary of Sociology* we read that 'acephalous' is:

> [A] term used to describe the political system of societies without centralized state authority—such as, for example, traditional African lineage political systems (see J. Middleton and D. Tait, Tribes without Rulers, 1958). Authority is wielded at the level of the clan, lineage, or lineage segment. For this reason these 'headless' societies are often referred to by the alternative term 'segmented.[32]

Here acephalous mainly refers to sedentary societies, as they emerged during the Neolithic revolution that started some 10.000 years ago, which initiated the cultivation of the land and the herding of cattle, thus introducing the era of agriculture. These types of societies are much larger than those of hunting and gathering types. They were capable of producing a surplus of foods that required storing, protecting and distributing in ways unknown to nomadic communities that could – to some extent – afford to live by the day. The invention of the script has been explained by the need to plan and administrate the sowing, harvesting, storing of food, and the distribution of food and land.[33] The fundamental structure of these early sedentary societies is segmentation along the lines of kinship, usually organised on a matrilinear or patrilinear basis (meaning that the segments or clans contained only relatives from a maternal or paternal ancestor, not from both). As indicated in the first section, most probably the German Sippe was a patrilinear segment within the larger tribal society.[34] These societies are not 'headless' in the sense that there are no leaders. There is, however, no centralized leadership with power to command. At the supra-segment level decisions had to be made in assemblies where all the freemen gathered and no one could command another. At the level of the freemen there is a continuous struggle amongst the heads of the households or clans as each strives to gain in honor (status), which is based on military or economic power. In Germanic society, military power was based on the capability to bring together and command a military band or *Gefolgschaft* to engage in acts of war. Economic power was achieved by distributing a part of the surplus gained from the land over which a noble had control (the *allod*, later the *beneficium*). The more serfs a lord had, working on his land, the higher the surplus – the more he could share, to impress his peers. In line with this, Wickham remarks on the role of giving in Icelandic segmented societies of the early medieval period:

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[31] They are usually based on cognate groups that trace descendence from both paternal and maternal lineage. See on these types of acephalous societies as compared to those with institutionalized leadership structures based on unilinear descendent: Sahlins (n 15 above).

[32] J Scott and G Marshall (eds), 'Acephalous' in *A Dictionary of Sociology* (2009). The reference is to JF Marchment Middleton and D Tait (eds), *Tribes Without Rulers. Studies in African Segmentary Systems* (1958).

[33] J Goody, *The Logic of Writing and the Organization of Society* (1986).

[34] This may be derived from Tacitus' *Germania* ch 20: 'Sisters children enjoy with the uncle of their mother the same respect as with their father'. Precisely in patrilinear ancestry the relationship with the patrilinear ancestors of the mother is strong. For a nuanced view see eg CB Bouchard, *Those of My Blood: Constructing Noble Families in Medieval Francia* (2001).

> The richer a man was, the more he was expected to be generous, and the more people expected to spend the winter eating his stores, although, conversely, the more people he could count on to support his activities.[35]

Notably, Wickham links the exchange of gifts with the feud:

> Feud and gift-exchange each have the same structure, as has often been pointed out, that of the obligation to return a gift: (…).[36]

> [T]he less hierarchy, and the less stable and inherited authority, there is in a society, the more people one has to win with generosity, food or charisma in order to gain political support, and the longer one has to go on doing it.[37]

> No fully 'feudal' aristocrat ever had to spend much of his resources in gifts to his dependent peasants, for example; for him, the gift-exchange relationship, in land or movables and the patterns of negotiation I have outlined for Iceland, were restricted to his military entourage and to his aristocratic equals.[38]

This suggests that coordinate jurisdiction between peers is structured upon the sharing of one's riches and on thus obliging another, whereas subordinate jurisdiction is not structured by *giving*, but by *taking*. This brings us to Marcel Mauss' famous 1925 essay *The Gift*, saliently elaborated by Marshall Sahlins', who made it the founding principle of his *Stone age economics*.[39]In this work he describes reciprocity as the structural economic principle that keeps non-state societies in check. Sahlins compares Mauss' essay on the gift as the basis of social organisation with Hobbes' Leviathan:

> Like famous philosphical predecessors, Mauss debates from an original condition of disorder, in some sense given and pristine, but then overcome dialectically. As against war, exchange. The transfer of things that are in some degree persons and of persons in some degree treated as things, such is the consent at the base of organized society. The gift is alliance, solidarity, communion – in brief, peace, the great virtue that earlier philosophers, Hobbes notably, had discovered in the State. But the originality and the verity of Mauss was exactly that he refused the discourse in political terms. The first consent is not to authority, or even to unity. It would be too literal an interpretation of the older contract theory to discover its verification in nascent institutions of chieftainship. The primitive analogue of social contract is not the State, but the gift.[40]

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[35] Wickham (n 9 above) 239.

[36] Ibid. Wickham refers to these powerful men, called Godar, as the Icelandic equivalent of the 'big men' of New Guinea: 'leaders who must personally construct their power over others, and whose ability to accumulate wealth is constrained by the necessity to provide what their followers expect from them, to prevent them from transferring their allegiance to someone else', ibid 240. See also O Falk, 'A Dark Age Peter Principle: Beowulf's Incompetence Threshold' (2010) 18(1) Early Medieval Europe 2–25.

[37] Wickham (n 9 above) 240-1.

[38] Ibid 241.

[39] M Sahlins, *Stone Age Economics* (1974).

[40] Ibid 169, referring to M Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies* (2000). Cf P Clastres, *Society Against the State: Essays in Political Anthropology* (1989).

In segmented societies the notion of the gift refers to the exchange of goods and people (women), whichallows for the establishment of temporary leadership. Those who have more to give will raise more followers. Whereas institutionalized leadership that included the authority to command is based on *taking*, (a levy or tax that is imposed on subjects), the kind of leadership that is both personal and temporal is based on *giving* (thus obliging the person or group who becomes indebted). Institutionalized leadership based on taking a surplus and imposing obedience assumes and produces a vertical, subordinate relationship between leader and subjects; temporary leadership based on giving and obliging assumes and sustains a horizontal, coordinate relationship amongst peers. The vertical relationship indicates that authority does not depend on the military or economic power of the person who occupies the higher position, but on the institutionhe represents. Kantorowicz' *The King's Two Bodies* refers to precisely this point,[41] highlighting the paradigmatic change that was at stake in the transition from suzerainty (kingship based on personal power) to sovereignty (kingship based on institutionalised authority). Anthropology may romanticize non-state societies by emphasizing the consensual aspect. Even Shalins seems to succumb to such romatics in the quotation above. If fact, however, revenge, feuding and tribal wars are often default. Only recurrent negotiations, meditations and reconciliation can keep reiterant efforts to gain military prominence at bay. Even Tacitus, in his *Germania*, insists on recounting the violent nature of Germanic freemen, who prefer wartime to the cultivation of their lands andto the pleasures of leisure.[42]Gaining a surplus from their serfs allows the freemen to generate what is required to engage in warfare, which highlights that the independence and the honor of the freemen in this type of society are contingent upon the jurisdiction they hold over their *allod* or *beneficium*.This subordinate jurisdiction enables them to take the surplus they need to achieve economic or military force. Nevertheless, at the level of the community of freemen, peers or lords, their status will depend on their personal ability to generate and share economic wealth and to show excellence on the battleground. Their status as leaders amongst their peers thus depends on a certain heroism.

In his insightful paper on the Old English heroic epic poem*Beowulf,* Oren Falk brings his knowledge of both anthropology and medieval history to bear on the significance of the saga for our understanding of leadership and kingdom before the rise of the modern, abstract state.[43]He compares the literature on so-called 'Big Men' in Melanesia with the undercurrent of the Beowulf saga, thereby 'reading the surviving elitist sources against their ideological grain'.[44] With this he indicates that whereas most of the interpretations understand the poem as lamenting the downfall of a great king, he would rather read Beowulf as speaking 'to an aristocracy disinclined to submit to royalty' and finds that the poem 'shines a light on Anglo-Saxons' aversion to despotic rule: to protect ist own decentralized political structure, society against the state foredooms King Beowulf to

[41] EH Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (1957).
[42] Tacitus, *Germania* (JB Rives ed, 1999) ch 14.
[43] Falk (n 36 above). Seamus Heaney (trans), *Beowulf: A New Verse Translation* (1st ed, 2001).
[44] Falk (n 36 above) 24. On Big Man: Sahlins (n 15 above)

death'.[45]Falk highlights the difference between an institutionalised head of state (kingship) and heroism (the role of independent 'big men') and finds that 'kingship, the individual office at the head of the social hierarchy, is fundamentally incompatible with heroism.'[46] He then asks the question: '[b]ut what if heroism, rather than a mortal malady afflicting the body social, were an adaptive social strategy? What if it were a product not just of individualist vainglory but also of rational collective culture?', and he maintains 'that the poem actually shows a social system which has little use for kings'.[47] This introduces the opposition between segmental and pyramidal societies, whereby the last refers to societies in which the segments are actually 'subdivisions of a more inclusive political body', whereas in the first the segments co-exist without being subordinated to each other or to a higher authority.[48]Sahlins, also the author of the canonical 'Poor Man, Rich Man, Big-Man, Chief: Political Types in Melanesia and Polynesia' finds that the pyramidal societies of Polynesia compare well to feudal societies in other parts of the world, whereas the segmental societies of Melanesia are of a different kind:

> Within his faction a Melanesian leader has true command ability, outside of it only fame and indirect influence.[49]

This is interesting, because it resembles the situation of the tribal Germanic society, as described by Tacitus and the German Historical School.It might even align with early medieval kingdoms such as the Merovingian rule, or Beowulf's kingship; though the king is no longer*primus inter pares,* his kingdom is a matter of personal power that plays out between the king and his former peers.He is a suzerain, not a sovereign.[50]When the king dies the kingdom loses coherence, the lords he aligned under his command realign or try to grasp power. The former kingdom enters a period of 'warring lords', until one of them manages to subject the others. However, there is a difference. Though the Merovingian rule and the Carolingian Empire during the early Middle Ages cannot be compared to the sovereign rule of the 17th and 18th centuries they depart from the contingent temporal leadership of the segmented Germanic society. Their kingship entails a measure of political authority, an institutional power to command, to lay down the law (eg the *Capitularia*), to impose various types of rules (the royal *Bann)* and to impose fines on those who violate these rules (the *Bannbusse*).[51] This is more like Sahlins' Polynesian societies, entailing a pyramydal structure with a chain of command and subordination, creating a string of offices that are occupied by office-holders. Instead of the office-holders depending on their following, these officesderive their authority from the highest office. Bureaucracy, subscription and taxation uphold this highest office instead of personal achievement, based on military strength or the ability to oblige others by sharing

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[45] Falk (n 36 above) 2.
[46] Ibid 11.
[47] Ibid 12.
[48] Sahlins (n 15 above) 287.
[49] Ibid 290.
[50] See section D below.
[51] FL Ganshof, *Wat Waren de Capitularia? Verhandeling van de KNAW, Letteren En Schone Kunsten van België, Klasse Der Letteren, Verh. 22* (1955). FL Ganshof, *Feudalism* (1996).

a surplus: 'Power resided in the office; it was not made by the demonstration of personal superiority'.[52]These societies are cephalous.

Outlawry in acephalous society

In his influential *Homo Sacer*, Agamben suggests that the Roman law figure of the outlaw stands for the victim of absolute sovereignty.[53] He connects the *homo sacer* with Foucault's bio-power, suggesting that the outlaw is treated as a biological entity (bare life) without any legal standing, subject to the arbitrary rule of the sovereign. Though the idea that an outlaw finds himself outside the legal order fits well with the history of outlawry, it is entirely at odds with sovereignty. Understanding outlawry as the ultimate arbitrary punishment goes against the grain of the findings of both Radbruch and Binding: punishment does not build on outlawry but rules out any such thing. At the same time, it makes a lot of sense to expect a return of outlawry in an era where the nation state is losing ground and unilateral decisions on extraterritorial criminal-jurisdiction-to-enforce become entwined with the law of war.[54] This, however, does not connect with the increasing influence of an alleged transnational sovereignty (or empire),[55] but with the direct opposite: the diminishing role of sovereignty in transnational relations and the transformation of national, international and supranational jurisdictions that are all based on the idea of sovereign nation state. Radbruch's seminal text should inspire us to pierce the veil of transnational empire, because it is dangerous to mistake outlawry for punishment.[56]This justifies specific attention to the notion of outlawry in the context of acephalous societies, in particular tribal Germanic society and early medieval kingdoms such as the Merovingian and the Carolingian.

A jurisdiction based on consensus, coordination and negotiation is a fragile artefact, requiring hard work to sustain the level of trust and legitimate expectations needed to survive in peace. Radbruch and Binding contend that freemen could prevent punitive intervention by offering to pay compensation, part of which was due to the community, or – later on – to the king. This part of the 'fine' was called *fredus*, referring to the fact that it allowed a person to buy one's return to the peace (*Frieden*) of his community.[57] Within the acephalous society of Germanic tribes the concept of *Frieden* had a specific meaning that got lost once the abstract state established its monopoly of violence. I have called this a 'militant' peace as compared to the 'pacified' peace that is contingent on the

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[52] Sahlins (n 15 above) 295.
[53] G Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998).
[54] M Hildebrandt, 'Extraterritorial Jurisdiction to Enforce in Cyberspace' (2013) 63 University of Toronto Law Journal 196.
[55] M Hardt and A Negri, *Empire* (2000).
[56] Agamben actually follows the 19th century German Historical School (referring to Wilda) in its position that outlawry is the root of punishment, aligning this position with Hobbes' notion of sovereignty. Agamben (n 53 above) 103-109. As indicated above, Radbruch aligns with 20th century insights of the German Historical School.
[57] Immink (n 11 above) 56-62.

institution of the monopoly of violence.[58] A society that is not ruled by an institution with an effective monopoly of violence is – obviously - not a society without violence. On the contrary, one may expect that an outbreak of violence over all types of disputes will threaten to disrupt the peace, requiring a cogent normativity to prevent disastrous reiteration of feud and revenge.[59] Whoever threatens the *Frieden,* therefore, threatens the constitutive normative order that holds together society, and many authors suggest that this peace is in fact law itself.[60] This raises the interesting question of whether non-state societies 'had' law and, if so, what this could mean. For instance, how can one discriminate between law and order if there is no legislator or court capable of enforcing its dictates? And, to what extent can one discriminate between a legal, a moral and a political order in a society without institutions that can authoritatively decide cases on the basis of previously enacted legal norms?[61] Obviously our current notion of law as positive law is a historical artefact that developed in response to various strands of natural law and is tied up in various ways with internal and external sovereignty. Before the rise of centralist governments with unilateral powers to enforce the law, however, normative orders had to be negotiated on a daily basis and vigilance as well as ritual were required to protect and sustain the fragile equilibrium of mutual expectations.

Within the context of tribal Germanic societies, whoever violated the *Frieden* placed himself outside the societal order, committing a *Friedbruch* that made him *friedlos* (outlawed). This means that the norms that constrained the interactions between those under the protection of the peace no longer held in relation to the outlawed, who could be killed without any consequence, his home destroyed (*Wüstung*),[62] his children left to starve. Violating the peace meant entering an a-legal space, outside the protection of eg the proportionality that ruled punitive interactions between peers, such as private revenge (*Talion*).[63] The decision to declare *Friedlosigkeit* rested upon consensus amongst peers, reached in their assembly, the *Thing* or – in German – the *Ding*. This type of peace was therefore called the *Dingfrieden*.[64] Both Radbruch and Binding make clear that outlawry

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[58] M Hildebrandt, *Vrijheid En Straf: Ontstaan En Ontwikkeling van Straf En Strafrecht in Het Denken van PWA Immink (1908-1965)* (2005).

[59] Hoebel (n 29 above).

[60] Notably Binding (n 5 above) 944. Immink (n 11 above) 47-51 and 56-62.

[61] On this see eg U Wesel, *Frühformen des Rechts in vorstaatlichen Gesellschaften: Umrisse einer Frühgeschichte des Rechts bei Sammlern und Jägern und akephalen Ackerbauern und Hirten* (1985) 52-68, and S Roberts, 'After Government? On Representing Law Without the State' (2005) 68(1) MLR 1–24. HP Glenn, *Legal Traditions of the World* (2007). H Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983).

[62] Immink (n 11 above) 51-56.

[63] On the proportionality inherent in the Talion, see MJ Fish, 'An Eye for an Eye: Proportionality as a Moral Principle of Punishment' (2008) 28(1) Oxford Journal of Legal Studies 57-71. On the relationship between Talion and retribution, see U Ebert, 'Talion und Vergeltung im Strafrecht - ethische, psychologische und historische Aspekte' in H Jung, H Müller-Dietz, and U Neumann (eds), *Recht und Moral* (1991) 249-268.

[64] On different types of peace, restricted to specific persons, places, assemblies or eg to the church, see Bar (n 18 above) 66-67 for early Germanic 'law', and 98-101 for medieval germanic law, focused on the *Landfrieden* that developed with the shift from communities based on kinship to those based on adherence to a regional lord. Ibid 107 on the changing meaning of the concept of *Frieden* which – according to Bar –

should not be confused with punishment and does not qualify as the origin of public punishment.

During the reign of the Merovingian and Frankisch kings in the early Middle Ages the concept of *mundium* appears, referring to the protection of the king.[65] It concerned the nobles who had pledged an oath of fidelity to their king, which brought them within the protection of the royal *mundium*. Violating this *mundium* was an act of treason that placed the infidel outside the peace of the king – at the mercy of whoever wished to harm him.

The *Dingfrieden* of Germanic freemen depends on coordinate justice, whereas the *mundium* of a Frankish king constitutes and depends on a complex mix of coordinate and subordinate justice. Nevertheless, both the *Dingfrieden* and the *mundium* reign between peers, even if the Frankish kings stand in a reciprocal but partly hierarchical relationship to their loyal vassals (*fideles*). Outlawry placed them outside the community of freemen and outside the grasp of its peace. In that sense it was hardly punitive; the relationship between those within the peace and those banned is broken. The suffering that is caused no longer 'counts' as such, it no longer compares to the suffering of those within the protection of the *Frieden* or *mundium*. Similarly, Agamben's *homo sacer* was the one who had broken the peace and whose life, limbs and estate were up for grabs. The term *homo sacer* derives from Roman law, but not from the Roman law of the Republic or the Empire. The term goes back to the period before something like a strong central government appeared, when kings were hardly more than *primus inter pares*, forever struggling to sustain their – essentially - temporary military and/or economic power. The *homo sacer* was the outlaw, excluded – banned - from the protection offered by the peace of his king. He may have lived on the threshold of a cephalous society but in being outlawed he demonstrates the acephalous dimensions of the early Roman kingship.[66]

In the final section I will investigate the transition from the segmental Germanic society to suzerainty, feudalism and finally sovereignty. This should demonstrate the intricate and mutual transformations of early and modern statehood on the one hand and punitive interventions on the other.

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became ever more equivalent with the legal order of the community the violation of which required stringent measures.

[65] Immink (n 11 above) 105-115.

[66] The relevant period is that before the Twelve Tables, 754-449 BCE. Cf T Mommsen, *The History of Rome* (1996), notably ch V, 'The original Constitution of Rome'. However, Mommsen has problems with understanding acephalous societies and interprets the kingdom as if it is already fully cephalous. See eg AA Schiller, *Roman Law: Mechanisms of Development* (1978) ch V on 'Early Roman History'. Schiller dates the concept of *imperium* to the domination of the Etruscan kings at the beginning of the 6th century BCE. *Imperium* typically presumes a cephalous society. On the *homo sacer* as an outlaw, see ibid 193 and ff.

D. PUNITIVE INTERVENTIONS UNDER SUZERAINTY

> Yet, although lords wielded political power, they did not, as a rule, constitute sovereign mini-states. Classically, they held their land in tenure as a fief that carried, next to specific rights or exploitation over the producing peasantry, military and administrative duties to the land-granting overlord. 'Land, in fact, was not "owned" by anyone; it was "held" by superiors in a ladder of "tenures" leading to the king or other supreme lord.' (…) The arms-bearing lord stood in a double-edged position between a subjected peasantry tilling 'his' estate and competing rival lords.
>
> Teschke 1998[67]

Radbruch is not concerned with the subsequent shifts from Germanic segmented society to the early medieval Kingdoms, to later medieval feudality but only to the final transition to the reign of sovereignty. He simply draws a straight line from the arbitrary authority of the head of the clan to the absolute powers of the sovereign state (within the French context of 17th century absolutism this was often depicted as rule according to 'le bon plaisir du prince').[68] Nevertheless, a study of the in-between of tribal leadership before the Middle Ages and the sovereign state that emerged after the Middle Ages, may be instructive for a proper understanding of sovereignty as well as the Rule of Law. I will therefore proceed with an inquiry into the interstitial era by discussing suzerainty and feudalism before finally turning to sovereignty.

Historically, a suzerain was 'a feudal overlord'.[69] Ganshof has defined feudalism as

> a body of institutions creating and regulating the obligations of obedience and service--mainly military service--on the part of a free man (the vassal) towards another free man (the lord), and the obligations of protection and maintenance on the part of the lord with regard to his vassal. The obligation of maintenance had usually as one its effects the grant by the lord to his vassal of a unit of real property [actually the grant of tenure] known as a fief.[70]

We have seen that freedom for Germanic freemen refers to independence, or the freedom from obedience to a higher authority. The Germanic freemen did not accept the competence to command, except in specific circumstances such as feuding and war (where members of a *Gefolgschaft* agreed to serve under the command of another). The

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[67] B Teschke, 'Geopolitical Relations in the European Middle Ages: History and Theory' (1998) 52(2) International Organization 325-358, 339-340. The quotation is from Berman (n 61 above) 312.

[68] J Chevallier, *L'Etat de Droit* (1994).

[69] Oxford Dictionary: <http://oxforddictionaries.com/definition/english/suzerain>. See also Merriam-Webster on its etymology: 'French, from Middle French souserain, from sus up (from Latin sursum, from sub- up + versum -ward, from neuter of versus, past participle of vertere to turn) + -erain (as in soverain sovereign) — (…). First Known Use: 1807': <http://www.merriam-webster.com/dictionary/suzerain>. The fact that the term originates from a much later period than the period it aims to describes is, of course, not uncommon in historiography.

[70] FL Ganshof, *Wat Waren de Capitularia? Verhandeling van de KNAW, Letteren En Schone Kunsten van België, Klasse Der Letteren, Verh. 22* (1955).

emergence of Merovingian and Carolingian kingdoms implied that such a competence to command was finally conquered, enforced and recognized between formerly independent freemen. Instead of wondering how tribal societies were sustainable without centralized authority, we should marvel at the fact that its freemen came to accept the command of one of their peers.

The early medieval Kingdoms rested on the personal military and economic powers of the person of the King, and on his ability to bind other freemen to his service, probably based on an oath of fidelity.[71] The King was no longer a *primus inter pares*, but a superior above his peers, and the contradiction this entails is crucial for a proper understanding of suzerainty. On the one hand, nobles who held their *allod* for themselves were often robbed of their land, which they, however, regained as a *beneficium* held for their lord (who might be holding it for his overlord), in exchange for military or other services (*consilium et auxilium*).[72] On the other hand the King could decide to give out part of his own land to serfs, who thereby gained in status and became equals of the freemen. One can best understand the *beneficium* as a concession of jurisdiction, which entails the right to hold court and to raise taxes.[73]Those closest to the King are part of the body politic constituted by the King, meaning that they co-decide (coordinate justice) while they are also under its rule (subordinate). The only person who accepts no authority above himself is the King, but – other than the later sovereign – the suzerain is dependent on his vassals in numerous ways, because they co-constitute the body politic and remain lord over those in their 'own' lands. The King has no jurisdiction over the serfs that reside in the lands of his vassals; they are not his subjects. This indicates a major difference with the type of jurisdiction that is constitutive for sovereignty. Meanwhile, as already indicated above, these Kingdoms did entail forms of hierarchical order based on the institution of a chain of offices, the highest of which was that of the King.

Punitive intervention within the context of suzerainty hovers between punishment and private revenge.[74] The so-called *leges barbarorum* 'recorded' the existing 'laws' of the Germanic societies. Their 'codification' was commissioned by the Frankish Kings, who wished to have an idea of the consolidated expectations of the freemen under their rule. These laws basically provide long listings of compensation that was due for a freeman who wished to prevent revenge and feud or even outlawry. The 'fines' listed could not be imposed, but they could be used to turn the duty to revenge into a right; unless the compensation was paid the victim had a right to retaliate. Next to documenting the *leges barbororum*, the Frankish Kings also issued *Capitularia*.[75] These were an early type of legislation, based on the King's competence to command his subjects. Due to the fragile nature of this power to command (called his *Bannum*), which was entangled with the reciprocal nature of the hierarchical relationship between King and vassals, it was limited to administrative rules that were usually negotiated before being enacted. A violation of

[71]Immink (n 22 above).
[72] Immink (n 11 above) 142.
[73] Ibid 117, 126. High jurisdiction, then, involved the criminal trial.
[74] Ibid 208-226.
[75] Ganshof (n 70 above).

such rules was a violation of the fidelity owed to the King, and at the same time an infringement of royal authority. This required punishment; a top-down punitive intervention that clarified and re-established the hierarchical dimension of the *Capitularia.* The fine payable for such violation is the *Bannbusse*, already referred to above. We can now understand why Radbruch and Binding consider this fine to be at the root of public punishment. It emerges from the fragile and still somewhat negotiated power to impose rules on freemen, though from the perspective of modern law these rules would qualify as administrative law rather than criminal law. This is precisely the point that Radbruch, Binding and Immink make: the criminal law as we know it derives from administrative law, not from private revenge. It is a matter of upholding an imposed order, though in the interstices of the Frankish Kingdoms this imposed order is intricately entwined with a negotiated order that includes the most powerful nobles. In the loan of the *beneficium* we may still recognize Sahlins' gift as a structuring feature of acephalous, though not egalitarian, societies. But where the *beneficium*– other than the *allod* - is held for the King and where administrative rules can be imposed on former peers, we must acknowledge the beginnings of a unilateral power to lay down the law for those subjected to a unifying authority.

Feudalism succeeds the decline of the Frankish empire; it demonstrates the weakness as well as the strength of a cephalous society that is built on personal leadership, even when this is institutionalised at the summit of a hierarchical order. The idea that a *beneficium* is held for the King becomes a misrepresentation of the actual power structures, once the King dies. Lords and overlords grasp their chances to increase their personal 'clout'. Much has been written about the later Middle Ages, which simultaneously prepare (in hindsight) for the rise of absolute sovereignty and present a prolonged era of warring lords. Thus, punitive interventions expressed the difference between nobles and other folk, as in earlier times. Nobles enjoyed the privilege to be judged by their peers and could refuse adjudication if they preferred a duel.[76] Punishment was reserved for those under the authority of a lord, who was entitled to the criminal jurisdiction over the residents of his lands. Whereas the two-sided ordeal of freemen consisted of a duel, thus affirming the equality and independence between peers, the one-sided ordeal of ordinary folks consisted, for instance, of the trial of water or fire, which boils down to a form of corporeal punishment under the banner of religious justification.[77]

[76] On the privilege of a trial by combat as an alternative to feudal blood feud, see RH Bloch, *Medieval French Literature and Law* (1977) eg at 63-64.

[77] Trial by ordeal should, therefore, not be confused with the law of evidence, but, like torture and punishment, be seen as a way of dealing with subordinates suspected of challenging the highest authority, which was seen as committing treason. This does not mean that priests did not manipulate the mechanism to distinguish the innocent from the guilty: see eg PT Leeson, 'Ordeals,' (2012) 55(3) Journal of Law and Economics 691-714.

E. PUNISHMENT AND CRIMINAL LAW UNDER SOVEREIGN RULE

'Sovereign is who decides on the exception', if we believe Schmitt's decisionist version of what counts as a sovereign.[78] If we follow Bodin (though in my own words), sovereignty can only be constructed if a monopoly of violence is institutionalized and brought under the rule of a highest office instead of a specific person.[79] We may prefer Bodin and Kantorowiz to Schmitt here, highlighting the institution rather than the person who occupies its place,[80] emphasizing the constructive and relational nature of sovereignty as an artefact that presumes and produces the abstract state.

In his 'After Government: On Representing Law Without the State', legal anthropologist Simon Roberts outlines the pitfalls of confusing order with domination, power with authority, negotiations over binding rules with unilateral imposition of legal code, and dispute resolution with adjudication. He warns against the tendency to see law 'everywhere', in the slipstream of transnational global orders and local normativities that seem to be interacting at high speed, generating reciprocal 'glocal' effects.[81] Roberts argues that law is not merely a matter of creating order but implies domination, generating unified, centralized authority, enabling the imposition of binding legal rules if necessary against the will of a person, thus aligning law with cephalous society and the institution of a central government. My interest is not whether Roberts is right in excluding non-state normative orders from those qualifying as law, though he has a point where he remarks that:

> the provenance of the 'the binary code of legal/illegal' seems directly traceable to those venerable representations under which the 'pure form of power resides in the function of the legislator' [referring to Foucault's *The History of Sexuality*]. We listen here to the formal and imperative tones of kings, and ultimately the criminal laws of nation states.[82]

My interest resides in keeping a clear view of the difference between two types of punitive intervention: one that is constitutive of a negotiated order and one that is constitutive of an imposed order. I wouldnot argue that private revenge in an acephalous society is not law, but I do claim that it is not punishment, let alone public punishment in the sense ofa punishment imposed by a state. Sovereignty as a centralized institution of a highest office is a unique historical artefact that realigns all other forms of political

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[78] C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (2005). On Schmitt, Bodin and Radbruch, see my 'Extraterritorial Jurisdiction to Enforce in Cyberspace' (2013) 63 University of Toronto Law Journal 196.

[79] J Bodin, *Bodin: On Sovereignty* (JH Franklin ed, 1992). An excellent analysis has been made by S Goyard-Fabre, *Jean Bodin et le droit de la République* (1989).

[80] Kantorowicz (n 41 above).

[81] We can think of the work of B De Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2002). G Teubner, 'Transnational Fundamental Rights: Horizontal Effect?' (2011) 40(3) Netherlands Journal of Legal Philosophy 191-215. S Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Updated ed, 2008).

[82] Roberts (n 61 above) 20, and see also his own emphasis on legislation as paradigmatic for the law, ibid 14.

authority within its jurisdiction and reconstitutes their competences as derived from its own attribution or delegation. It is a fundamentally monopolistic - if not envious – undertaking, that hopes to rule out any form of negotiation on the public order – the *res publica* - it institutes. By abstracting from the person that occupies the highest office, it radically departs from the leadership of the head of the Germanic Sippe or the Melanesian Big Man.

The continuity of its office, the unilateral competence to lay down the law for its subjects and the singular independence of its placeholders form the constitutive characterics of the notion of sovereignty. Its institution goes hand in hand with the subjection of the peers, the lords, the nobles or any other name given to those whose freedom depended on their *allod* (tribal Germanic society), on their*beneficium* (era of suzereignty and the feudal era),and/or on their hierarchical but reciprocal relationship with the King (era of suzerainty). As mentioned above, the enactment of Codifications such as the *Constitutio Criminalis Carolina* of Charles V in 1532 marks the advent of a new era in which private revenge, suit of peers and the judicial combat (the duel) are prohibited, because all violations of the sovereign royal order must be punished. They are not negotiable. The King must demonstrate the force of his highest office, and its monopoly on violence. Corporal and capital punishment, later replaced by the prison sentence, become the hallmark of an era that puts all subjects at equal distance from the Sovereign, which is the ultimate source of the law, whether its place is occupied by a person (18th century absolutism) or a people (19th century popular sovereignty). The fact that the prison sentence is not merely a matter of humanistic reform has been argued extensively in Foucault's canonical *Discipline and Punish*. By now, many scholars seem to agree on Foucault's analysis of the emergence of the prison sentence as the token of a logic that is basically incompatible with Enlightenment rationalism. According to Foucault, the prison was aligned in a variety of ways with the upcoming disciplinary practices of statistics and the social sciences. Indeed, building on Radbruch's view of punishment, it makes sense to emphasize the shift from corporeal punishment to imprisonment as entirely in line with the establishment of a relationship of domination that also marks corporeal punishment. Actually, Sellin has argued that penal servitude has a long history, dating back to antiquity where convicts where employed in public works, while such punishments 'were properly regarded as sentences to a slow and painful death'.[83] He objects to the idea, advocated by many historians,[84] that 'imprisonment as a punishment in itself' would be something new. In fact, he sets out to confirm Radbruch's position on the continuity between slave punishment and corporeal punishment, by adding imprisonment along the same line.[85] Though Foucault's later analysis is more refined and part of a more extensive investigation into the opposing logics of Enlightenment philosophy and disciplinary

[83] Sellin (n 21 above) 18, (referring to Bar (n 18 above) 36-37).
[84] Sellin (n 21 above) 19, referring to George Ives, *History of Penal Methods* (1914).
[85] Sellin notes that eg 'in Imperial Rome the *condamnatio ad opus publicum* was reserved for the *personae humiles*, the humble class of people; it was not applicable to the upper class or *honestiores*', Sellin (n 21 above) 18.

practices,[86] Sellin helpfully assesses some of the evidence for Radbruch's position on the straight line from *Knechtsstrafrecht* to criminal law in the sovereign state.

For a proper understanding of the 'marks' of sovereignty many authors refer to the idea of legislation as crucial. Bodin remarks that 'law is the command of the sovereign affecting all the subjects in general, or dealing with general interests, (…), whereas privilege is directed to a few individuals'.[87] Berman stresses the novelty of the idea of enacting general legal rules that all subjects must obey.[88] Many legal historians indicate that under suzerainty political power is initiated by means of a royal complaints jurisdiction that often competes with local jurisdictions,[89] whereas only rudimentary forms of legislation are attempted. As observed above, such rudimentary legislation, like the Frankish *Bann,* has often been negotiated with the peers who must comply. The institution of sovereignty, however, changes all that by claiming and enforcing a centralist, unilateral institutionalised power to lay down the law. Legislation takes over from adjudication as the most expedient means to exercise general command over a population, whereas simultaneously the peers are brought under the control of the royal courts where the same general law is applied to all subjects. The peers can no longer claim the privilege of their suit of peers nor can they reject a verdict if it does not suit their purpose. *Res iudicata est* derives from the same unilateral subjection as the power to enact general binding rules, it is unknown in segmental societies that have no centralized government and it combines the subjects need for a *litis finiri oportet* and a *ne bis in idem* with the sovereign's competence to decide.[90]

This concept of sovereignty as a unilateral, absolute and independent power thus displays a clear continuity with Radbruch's depiction of the *Knechtsstrafrecht* of tribal Germanic society. The difference between what he termed the proto-legal practice of punishment by freemen who discipline the serfs of their land, and what he termed criminal law, must be understood in line with his emphasis on the positivity of law that depends on the authority of the state. In line with his antinomian idea of law, it seems that both the justice and the purposiveness of the law depend on the law's ability to engage the powers of the state to achieve them; while the powers of the state, in turn, depend on the law's ability to constrain and direct them in accordance with the requirements of justice and expediency. The paradoxical complexity of this historical artefact, usually termed

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[86] Sellin, who published his article in 1969, ends with an optimistic note where he states that 'for penological progress in the last hundred years (…) we are indebted chiefly to the behavioral scientists' (ibid 23), whereas Foucault, who published his *Surveiller et punir* in 1975, demonstrated the opposite: the reinvention of the prison as an ally in penal policy is partly enabled by the emergence of the behavioural sciences.

[87] Bodin (n 79 above) bk I ch 10 [485] 51.

[88] Berman (n 61 above).

[89] Eg JV Capua, 'Feudal and Royal Justice in Thirteenth-Century England: The Forms and the Impact of Royal Review' (1983) 27 American Journal of Legal History 54.

[90] R von Moschzisker, 'Res Judicata' (1928-29) 38 Yale Law Journal 299. Z Jun, S Changzong, and M Youshui, 'China's Theoryand Practice on Ne Bis in Idem' (2002) 73(3) Revue Internationale de Droit Pénal 865-872.

Rechtsstaat or Rule of Law, was absent from early Germanic society and requires some form of sovereignty as its condition of possibility.

F. CONCLUDING REMARKS

In this chapter I have developed Radbruch's trespass on the history of the criminal law, or rather, on the *pre*history of the criminal law, as it concerns an era before that of the written script, building on texts written by outsiders, such as the Roman historian Tacitus. I have situated Radbruch's position in relation to the German Historical School and to Binding's inaugural lecture on the same topic, while testing his insights by comparing them with the findings of legal anthropology and legal history beyond the German context. Though I am in agreement with Radbruch that punishment is only thinkable in a vertical relationship that enables unilateral imposition of suffering, I disagree with the idea that the untamed sovereignty of the lord over his serfs is entirely continuous with the current sovereign powers of states over their citizens. I also believe that Radbruch would agree that sovereignty is a condition of possiblity for the *Rechtsstaat*, though this requires a peculiar balancing act between the various powers of the state. This means that the chapter calls for a further research agenda, linking Radbruch's work on the prehistory of the criminal law with his antinomian conception of law. To be continued.