

Cultural Diversity, Deviance and Public/Criminal Law in Early Modern (Central) Europe

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Cultural diversity – “diverse cultures within the borders of particular political communities” (Foblets et al. 2010, XIII) – challenges the law. The concept of cultural diversity is based on the precondition of a more or less uniform state with a cohesive state law that is confronted with cultural differences between a dominating monoculture and groups which diverge with regard to crucial cultural/social dimensions such as religion, ethnicity, language, gender and sexual preferences, age, socioeconomic or legal status, migration or ‘foreignness’. If we conceptualize ‘culture’ as collective ‘way of life’ resulting from and manifesting in shared social practices, customs, habits, attitudes and values, the early modern European society was characterized, on the one hand, by the ideal conception of a culturally uniform Christian society of orders (*Ständegesellschaft*), but on the other hand showed an increasing variety of different ‘cultures’. In particular the Holy Roman Empire of German Nation can be characterized as a multi-cultural polycentric composite imperial system with in terms of power, law, society and culture extremely diverse and unequal members.

Since the 16th century – augmented by the first wave of European colonization and the Protestant Reformation – we can observe the spread of various religions/‘confessions’ (denomination), increasing migration, and the growth of social and ‘ethnic’ minorities in Europe. In this setting religion, ‘foreignness’, ‘migration’, ‘honor’ and to some extent gender formed the main categories of cultural differences, whereas ‘age’, ‘sexual preferences’ or ‘ethnicity’ had none or little relevance for the early modern perception of cultural differences. However, this was accompanied by the formation of the early modern (territorial) state, aiming to establish a homogenous, uniform, disciplined society of subjects (*Untertanenverband*) as well as a cohesive public/state-based legal system through processes described as confessionalization, social disciplining, state building, and monopolization of legislative and judicial powers. Hence, studies dealing with the law and cultural diversity in the early modern period are faced with basic challenges/preconditions:

- the early modern society was based on political and social inequality, prescribed and protected by the legal order; on the other hand, the early modern state aimed at the formation of a uniform society of subjects;
- on the base of an unequal pre-modern society the respective legal order prescribed and protected cultural diversity, and as a consequence, the state and the legal system aimed to control, criminalize, persecute or exclude cultural behavior and the respective (social, ‘ethnic’, religious) groups that deviated from this order/culture;
- however, the legal system/order itself was characterized by multinormativity, hybridity and judicial pluralism; in particular the Empire was a multi-layered patchwork of imperial, territorial, seigniorial, ecclesiastical, aristocratic, corporative, communal and local jurisdictions, sometimes overlapping and comprising limited legal autonomy for different groups/communities (the Jews, the guilds); the emerging pre-modern state, on the other hand, strived to redress legal diversity and to establish a uniform legal system that partly aimed at legal equality.

Research has described the different cultural habits/practices of each order or strata with such concepts as nobility/court culture (*höfische Kultur/Adelskultur*), elite culture, everyday culture (*Alltagskultur*), popular culture (*Volkskultur*), and lower class culture (*Unterschichtkultur*). Some studies claim that through the processes of civilizing, (social) disciplining or acculturation cultural differences were leveled; this comprised the ‘disciplining’ or exclusion of diverging cultural practices and habits to form a more or less uniform society. Despite wide spread criticisms of such linear

modernization concepts and their actual impact, from the 16th century onwards the authorities/state increasingly established and ascribed cultural differences through public (administrative and criminal) law by determining cultural boundaries, protecting the existing cultures and labeling cultural differences as well as the respective groups as divergent and deviant. Administrative laws intensified the regulation of groups which were perceived (or constructed) as socially and culturally different regarding their religion/confession, their social status, 'ethnicity' or 'way of life' such as foreigners, vagrants, beggars, Gypsies, Jews, and various religious groups. Thereby the authorities/early modern states reacted to developments such as the growth of population and marginal groups, the increase of poverty, migration and vagrancy, the diversification and gradual disintegration of the society of orders, or the Protestant Reformation, which were accompanied by or produced further cultural diversity and were perceived as threatening the order.

As a result, the law/legal system obtained different/ambiguous functions:

- it should maintain and protect cultural habits/privileges of each group/member of the *Ständegesellschaft*/the Empire and the respective cultural differences (based on social, political and legal inequality), partly by granting protection and privileges (including separate/autonomous jurisdictions) and by prohibiting the transgression of cultural boundaries and the respective laws;
- it should regulate conflicts resulting from cultural and legal diversity, for instance conflicts between religious communities (*Religionsprozesse*), conflicts within a cultural/religious community, conflicts of jurisdiction etc.;
- it labeled manifestations of cultural diversity as deviant or even as criminal behavior and aimed at the control, disciplining, persecution or exclusion of the respective groups;
- it served to consolidate the cultural identity of the dominating group/culture and to produce cultural homogeneity;
- it was part of a cultural (normative) discourse and a contest of cultural interpretation (*kulturelle Deutungshoheit*).

Regarding cultural diversity and dissent, social and legal history has focused on such issues as the regulation, policing and disciplining of feasts, the clothing, or the 'sub-culture'/'counter-culture' of the poor, migrants and other marginal groups. For instance, the early modern authorities issued numerous administrative laws that prescribed in detail dress-codes for each estate/group or imposed the obligation to dress in appropriate fashion or even wear additional symbols so that minority group such as the Jews or the poor could be immediately distinguished 'culturally'. A plethora of laws regulated and criminalized the infringement or transgression of cultural boundaries with regard to drinking, dancing, the carrying of arms, hunting and other distinguished cultural practices.

Cultural differences were also related to the respective honour of each group of the *Ständegesellschaft*. Transgressing cultural boundaries could effect or damage not only the honour of a single person but of the whole order or group, in particular regarding minority groups. The imperial penal code of 1532 and the *ius commune* comprised provisions that diminished the legal status and protection of socially and culturally different groups such as 'infamous people', Gypsies or Jews with regard to the criminal procedure, apprehension and detention, the application of torture, testimony, or the oath.

Moreover, the authorities issued administrative and criminal laws that should maintain and protect the society of orders against 'external' influences, in particular against foreign migrating marginal groups such as beggars, vagrants, Jews and Gypsies. They were also perceived as culturally divergent regarding their foreignness, complexion, language, habits, customs, religion or honour and labelled as infamous, masterless and dangerous, intruding the society of orders and threatening the well ordered state as well as public security. Although cultural differences constituted only one fac-

tor to label them as deviant, public and administrative laws criminalized them as socially and culturally divergent, dangerous groups that formed a or specific ‘criminal culture’ or ‘underworld’. As a result the criminal justice system was increasingly assigned with the function to discipline, criminalize, prosecute and ostracize such socially and culturally deviant groups.

With regard to religious diversity, research has primarily focused on the Jews and the formation of different confessional cultures (*Konfessionskulturen*) since the Protestant Reformation that also produced a remarkable religious variety and new religious groups. These developments are strongly related to concepts such as ‘confessionalization’, ‘intolerance and the emergence of religious tolerance’, ‘religious pluralization’, and ‘heterodoxy, heresy and heretic groups’. Concerning the function of law and judicial systems, a wealth of studies is dealing with the (Protestant) ecclesiastical law, church ordinances, the ‘juridification’ of religious (confessional) conflicts and the legal foundation of religious tolerance, parity and emancipation. But the processes of Protestant and Catholic confessionalization aimed at homogeneous confessional cultures and therefore produced cultural/religious deviance. Undoubtedly, traditional church and criminal law labeled and criminalized dissident religious behavior/belief as superstition, blasphemy, heresy etc. Although religious deviance/crimes were related to diverging cultural practices, they were most often regarded as ‘internal dissenting behavior of individuals that still somehow belonged to the dominating culture. The confessionalization changed the patterns of religious deviance and crime which were increasingly conceptualized as external behavior of larger, separated groups (the other confession, minorities, ‘sects’) which differed in terms of religious as well as cultural beliefs, attitudes, practices and even established ‘sovereign’ communities. From the viewpoint of the authorities such dissenting groups – mostly labeled as ‘sects’ – could still exist as ‘secret societies’ within a society (for example crypto-protestants), practice divergent customs, seduce the subjects and endanger the order. Hence, cultural diversity could flourish in obscurity and could lead to sedition or revolt. Thus, religious deviance was partly criminalized as a social/political crime and as a response the state enhanced the means of social control (through various laws, censorship etc.). Although recently historical research has discovered ‘religious deviance’ anew, the focus is still on deviant religious behaviour of single dissenters/perpetrators and not on collective cultural diversity and deviance (or crime).

On the whole, the interdependences between cultural diversity, deviance and criminal law/justice are explored to a lesser extent within the context of the early modern society of orders and early modern legal diversity. The legal system of the Holy Roman Empire of German Nation provided different norms and instruments to respond to cultural diversity and deviance. They ranged from privileging, judicial autonomy, legal protection and tolerance to social control and disciplining, labeling, exclusion and criminalization and concerned in particular religious diversity, migration and foreignness as main ‘fields’ of cultural differences and deviance. This could be studied in detail for exemplary topics that are still of relevance, such as:

- religious deviance related to culturally different groups, in particular the Jews and the sects;
- marginal/migrating groups perceived/labeled as culturally different (because of their foreignness/ethnicity) such as ‘vagrants’ the Gypsies, slaves, or Ottoman war prisoners.

Regarding the ambiguous function of the legal system, research should study the whole range/variety of norms and instruments – including extrajudicial/infrajudicial modes as well – from discrimination and criminalization over privileging, special rights and judicial autonomy to the protection of rights. A focus should also go to the actors or protagonists of cultural diversity and their ‘legal agency’ (including practices, knowledge, cultural arguments) to use the legal system and the opportunities of legal/judicial diversity to regulate conflicts (*Justiznutzung*).

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