

Introduction

During the period of the *vorstaatlichen Gesellschaften* (pre-state societies), meaning the *hunters and gatherers* as well as the *pre-state segmental societies*¹, in principle there was no legal order and thus no criminal law. Of course, there already existed a large number of unwritten behavioural norms being part of the **pre-legal** social order, such as incest taboo, prohibition of stealing hunting weapons of another Horde/clan member,² and last but not least the taboo of killing those members. Furthermore, in cases of serious **infringements of such prohibitions** respectively **breaking taboos**, there obviously were informal mechanisms for conflict-resolution, such as negotiations, e.g. ending by agreements about compensation to the person concerned respectively about the offender leaving the Horde.³ By contrast, because there was no criminal law at that time, all the more death penalty against offenders in principle was unknown; this even held true in case of homicide.⁴

Certainly, there have been cases of blood revenge.⁵ However, such reactions were very dangerous to the domestic peace, because blood revenge could lead to blood feuds being characterized by **mutual bloodshed within the circle of retaliatory revenge**.⁶ Thus, blood revenge in principle was not at all in the interest of the Horde/clan, therefore unwanted and unusual.⁷

Rather, the most serious sanction for intolerable misdeeds may have been the **exclusion of the offender from society**, provided that it was necessary for the community's security and domestic peace.⁸

The mentioned informal mechanisms for conflict resolution within those pre-state societies may have been based on the prevailing principle of equality among the members of such Horde; those societies were to be characterized as authority-free, non-hierarchical.⁹ Thus, in the absence of a ruler, there was no one equipped with the authority to impose death penalty against a member of the Horde. In contrast, where a community has got a ruler, e.g. a tribal chief or even a king, typically the temptation arose to increase his power. And after all, one characteristic part of the power of a community chief increasingly became the domination over life and death.

Hence, the development of death penalty in principle was to be expected not before the time when communities like tribes respectively city states have got leaders and so lost the nature as authority-free societies.

1 As to this period see Wesel, *Geschichte des Rechts*, 4th edition, 2014, side note 5, 6 et seq., 18 et seq.

2 These examples are named by Wesel, side note 11, 15.

3 Wesel (supra note 1), side note 7, 8, 14, 27, 29.

4 See Wesel, side note 7, 8, 14, 15, 27, 29. To this, Wesel nowhere mentions death penalty, but only the aforesaid informal mechanisms for conflict-resolution in serious cases like homicide.

5 Wesel, side note 27.

6 Thereto (regarding Germanic Law) Krey, *Interrogational Torture in Criminal Proceedings – Reflections on Legal History –*, Vol. I, in: *Rechtspolitisches Forum (Legal Policy Forum)*, Institut für Rechtspolitik (IRP), University of Trier, No 68, dated 2014, p. 19–22; Krey, *About Magicians and Witches – Reflections on Legal History – from the Ancient World up to the High Middle Ages*, in: *Festschrift for Walter Lindacher* (C.H.Beck, Munich, publication 2017), p. 235, 237, 238 at the end, 239; both with further references.

7 Wesel, side note 27 at the end. The undesirability and rarity of blood revenge due to its aforesaid hazardous nature also held true for the mentioned period of Germanic Law; see Krey (supra note 6).

8 Regarding the hunters and gatherers see Wesel (supra note 1), side note 7, 8, 14.

9 Thereto Wesel, side note 8, 14, 22, 34.

