Crooked justice. Corruption, inequality and civic rights in the early modern Netherlands[1]

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Abstract. With the help of several case studies from the 16th, 17th and 18th centuries, this article focuses on two key questions. How did ordinary Dutch citizens protect themselves against corruption and misuse of power by law enforcement agents, public prosecutors and the courts? And, whose interests were actually being served by the early modern criminal justice system? Or, put another way: whose order was being maintained and who was excluded from it?

Its is argued that the weakness of a critical traditional in Dutch —and possibly even more widely, in Continental European— historiography concerning these issues fits in with the Continental perspective in which the rights of the state are emphasized rather than the rights of the individual. In England (perhaps even in the wider Anglosaxon context) the opposite seems to be the case: a critical historiographical tradition juxtaposed to a past in which civil rights rather than state privilieges were emphasized, together with resistance to the state and other bastions of power.

Key words: Corruption, civil rights, judicial history & historiography, microhistory.

"Sucia justicia": Corrupción, desigualdad y derechos cíviles en la Holanda de la Edad Moderna.

Resumen: Con la ayuda de varios casos prácticos de los siglos XVI, XVII y XVIII, este articulo se centra en dos cuestiones clave: ¿cómo se protegían los ciudadanos ho-

[1] Archival research for the case studies was done while working for the Pioneer project "Judicial history" at the University of Leiden, financed by the Dutch Research Organization NWO. This project focused on the massive (and still only partially explored) archives of the Supreme Court of the Dutch Republic (*Hoge Raad*) from 1582-1800, and continued from a previous project coordinated by Prof. J.Th. de Smidt concerning the archives of the Hoge Raad's predecessor for the Southern and Northern Netherlands, the *Grand Conseil de Malines* or *Grote Raad van Mechelen*. I have integrated findings from previous research concerning criminal justice in the Dutch Republic which was likewise financed by NWO. I would like to thank the universities of Leiden and Utrecht for giving me the opportunity to try out some ideas during lectures. With special thanks to Peter Mason, Sjoerd Faber, Henk van Nierop and Jos de Jong for comments on earlier versions of this article and to J.J. Woltjer and N. Plomp for sending me further information and references.

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landeses corrientes de la corrupción y abuso de poder de los agentes encargados de hacer cumplir la ley, de los fiscales públicos y de los tribunales? Y ¿a qué intereses servía en realidad el sistema judicial durante la Edad Moderna? O, dicho de otro modo, ¿qué orden estaba siendo mantenido y quién era excluido de él?

En este trabajo se sostiene que la debilidad de una crítica tradicional en Holanda —y posiblemente incluso, de manera más amplia, en el continente europeo— se debe a que la historiografía sobre estos temas se ajusta a una perspectiva continental, en la que se da más importancia a los derechos del Estado que a los derechos del individuo. En Inglaterra (o incluso, en el más amplio contexto anglosajón) lo opuesto parace ser lo habitual: una tradición historiográfica crítica yuxtapuesta a un pasado en el que se daba mayor énfasis a los derechos civiles que a los privilegios del Estado, junto a una resistencia al Estado y a otros bastiones del poder.

Palabras clave: Corrupción, derechos civiles, historia judicial e historiografía, microhistoria.

"Justice?—
You get justice in the next world,
in this world you have the law".
William Gaddis,
A Frolic of his Own (1994).

1. Introduction

Much is known about the formal structures of political power, the administrative and judicial organisation, and political participation in the early modern Netherlands. Yet we are hardly familiar with what legal inequality really meant, how prosecution strategy in the 16th, 17th and 18th centuries could be used as a political instrument, or what happened when a private citizen became the victim of corrupt officials. Could anybody help? To whom could a victim turn for protection? Did criminal justice and procedure offer any guarantees? And if so, how, and were such means available to all members of society? Or did it make more sense to forget about justice and resort to other strategies: lay low, resort to violence, flee the country, bribe some other officials, look for help among the political enemies of the persecutors, start a riot, hire a gang, or find an influential person who could act as intermediary? It is also possible that the officials of these ages were so powerful that they erased all traces of their misdemeanours, and thus whitewashed their historical image for ever.

These matters were important to many early modern Europeans —they could even be critically important— and the Netherlands was no exception in this respect. Just as in any other part of the world, some

private persons found themselves persecuted by corrupt officials and became the victims of their abuse of power[2]. The means used by these victims to defend themselves against abuse inform us not only about relations between public authorities and private citizens in these areas but also about the structures of power. Research into these issues shows us a side of early modern society that is not revealed in the idealised representations of relations between subjects and authorities that are based on analyses of legislation, bureaucratic structures, or administrative and judicial organisation.

In Great Britain much attention has been paid to such themes during the last three or four decades —especially by scholars connected with the "E. P. Thompson-tradition"[3]. The same cannot be said of the Netherlands, in spite of a considerable and respectable Dutch historiographical tradition in the field of criminal justice and criminality. The cause of this absence —which can certainly not be explained by a general lack of interest in English historiography— must be sought in the general orientation of Dutch historiography in this field. It lacks a connection with any kind of explicit social critique[4]. In

[2] Little can be said about numbers or percentages given the nature of this problem and the concomitant scarcity of documentation.

[3] Besides Edward P. Thompson's own writings, two of the most inspiring publications have been for me: Keith WRIGHTSON, "Two concepts of order: justices, constables and jurymen in seventeenth-century England" in John BREWER and John STYLES (eds.), *An ungovernable people. The English and their law in the seventeenth and eighteenth centuries*, London, Hutchinson, 1980, pp. 21-46; and V.A.C. GATRELL, *The Hanging Tree. Execution and the English People 1770-1868*, Oxford, Oxford University Press, 1994. Of course, I would not want to argue in this essay that a critical tradition is absent in other Continental European countries as well. Italy immediately comes to mind with the journal *Quaderni Storici* and scholars such as Carlo Ginzburg, Ottavia Niccoli, Guido Ruggiero, Andrea Zorzi, to name but a few.

[4] Naturally, this is a generalization –which may not be out of place since we are discussing dominant trends here. It is striking that scholars from the Southern Netherlands (such as Blockmans and Van Rompaey for the Burgundian period) did explicitly pay attention to corruption, abuse of power, the role of bailiffs and sheriffs etc. Blockmans' central argument, however, concerns the development of an administrative ethic and the establishment of a public judicial system —that is, topics in which the state is the focus after

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so far as any paradigms have been influential, it has been at the 'Continental' view of Michel Foucault or Norbert Elias, who focus on the state, rather than 'British' perspectives in which class struggle, social inequality, and different concepts of justice are given far more attention[5]. In Dutch historiography the usual perspective is 'top down', concentrating on the state and public authority in its diverse manifestations —even if the state in question was one of the most politically fragmented ones to be found in Europe. Themes like power and discipline are well represented in Dutch historiography, but they are largely discussed in terms of topics such as the increasing or decreasing severity of punishment (especially during the *ancien régime*), the history of imprisonment (17th-20th centuries) and the organisation of the police in the 19th and 20th centuries[6].

This orientation is not coincidental, but reflects —either explicitly or implicitly— two closely connected dominant and conservative perspectives on law and justice in history. The first concentrates on civil law and presents judicial practice in an anachronistic way as an instrument for conflict settlement. However, few cases dealt with by the civil courts in early modern Europe were resolved in court. Many

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all. See especially Wim BLOCKMANS, "Privaat en openbaar domein. Hollandse ambtenaren voor de rechter onder de Bourgondiërs" en Jean-Marie DUVOSQUEL & Erik THOEN (eds.), *Peasants and townsmen in Medieval Europe. Studia in honorem Adriaan Verhulst,* Ghent, Snoeck-Ducaju, 1995, pp. 707-719, and Jan VAN ROMPAEY, *Het grafelijk baljuwsambt in Vlaanderen tijdens de Boergondische periode,* Brussels, Paleis der Academiën, 1967.

[5] The work of Sjoerd Faber, Pieter Spierenburg, Arend Huussen, and Herman Diederiks (who died far too young) immediately comes to mind. The Dutch branch of the Society for the History of Crime and Criminal Justice united for almost 25 years nearly all researchers in the Netherlands interested in these themes until 1998.

[6] See for example the work of Pieter Spierenburg on forms of punishment and houses of correction, Arend Huussen on criminal justice by the provincial courts of Holland and of Friesland, Herman Franke on penal institutions, and Cyrille Fijnaut on the history of the police and trends in prosecution. Some exceptions should be mentioned as well: see Herman Roodenburg's publications on extra-judicial forms of conflict settlement, Rudolf Dekker's work on protest, riot and rebellion, and Lotte van de Pol on prostitution in early modern Amsterdam.

of them, in fact, escalated, while the original problem multiplied and proliferated, causing new cases to be piled on top of the original one —a situation only appreciated by the lawyers involved. The second perspective presents criminal law and justice as a means to *restore* order, without ever asking whose order this was, what kind of order it was, and to what extent we should speak of restoring.

In this perspective, 20th-century consensus models are projected back onto early modern history, creating (or helping to maintain) a largely fictive image of a homogeneous and relatively egalitarian Dutch society with consensus throughout society about issues such as public order and its guardians. This perspective, moreover, ignores the fact that criminal justice before 1800 was 'exemplary' in nature all over the Continent. Judicial authorities generally concentrated on exemplary cases that could be dealt with in a deterrent and symbolic way[7]. Criminal justice was selective; the goal was to punish and deter, but the first objective was perhaps simply to show that there were indeed public authorities and that they had some power.

The great strength of the second perspective (and at the same time its main weakness) lies in the fact that it so closely fits the idealised self-image of the early modern Dutch authorities. In each and every verdict Dutch judges used to call the Dutch Republic "a country of good police and justice", meaning a country where public order was maintained and laws and established power relations were respected. The least we should ask ourselves as historians is what kind of power relations and public order they were talking about, which class differences were important in this society, and to what extent law and justice did function as instruments of power in the hands of certain social groups and individuals. Those questions take us into the domain of conflict rather than consensus, and into a territory where bodies of public authorities acted as rivals, competed for power, and created conflicts instead of resolving them. They take us to situations in which the powers that be used law and justice for their own private purposes, while public authorities intruded into the lives of their subjects in brutal, tyrannical, overbearing, and arbitrary ways.

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[7] See esp. Esther COHEN, *The crossroads of justice. Law and culture in late medieval France*, Leiden/New York, E.J. Brill, 1993.

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This article discusses such by no means rare occurrences, focusing on a number of Dutch cases and going on to sketch the mechanisms of exclusion built into Dutch criminal law and justice. This will show us a dark side of Dutch society that must have been familiar to anyone alive during these ages, but largely forgotten —or rather blotted out— since then by a conceited historiographic self-image in which the tone is set retrospectively by politically correct notions of consensus, egalitarianism and tolerance. It would be simplistic to generalize the Dutch case into a Continental European one, but there are enough parallels between the Dutch situation and that in the neighbouring countries on the Continent to at least set us thinking about larger patterns.

2. The harassment of a locksmith (1506-12)

The early sixteenth-century case of the locksmith Claes Jansz demonstrates not only how far the powers reached of a local sheriff and bailiff, but also where they ended and whose power was greater than theirs[8]. At the time a certain Jan Gerytsz —as he is called in the archival documents —acted as sheriff of the town of Alkmaar in North Holland and as bailiff of the nearby castle De Nyenburg and the surrounding rural district (or jurisdiction). Gerytsz was a regional dignitary whose grandchildren would adopt the surname of Egmond as well as the name of the castle during the later 16th century[9]. As sheriff and bailiff Gerytsz was responsible for public order in the town of Alkmaar; he also acted as 'police commissioner', public prosecutor in criminal cases, and chairman of the court of the district Nyenburg.

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[8] All information about this case comes from *Grote Raad van Mechelen* (further GRM), Dossier Appeals (*Beroepen*) 683, and verdict of 19 November 1512. The original documents of all cases discussed here can be found in the Dutch National Archive/Algemeen Rijksarchief (further ARA) in The Hague for the Hoge Raad, and in the Belgian National Archive at Brussels for the Grote Raad. Microfilms of all cases can also be consulted at the Leiden Institute for Legal History.

[9] For further details about Jan Gerytsz and his family history, see Johan BELONJE, "De afkomst van het geslacht Van Egmond van de Nijenburg" in *Jaarboek van het Centraal Bureau voor Genealogie*, 9, 1955, pp. 39-76. With thanks to Nico Plomp from the *Centraal Bureau voor Genealogie* for drawing my attention to this publication.

In 1505 or 1506 Gerytsz arrested a young locksmith from Alkmaar in a most irregular way. Both the locksmith and his father were citizens of the town of Alkmaar, holding full civic rights. A year before his arrest he had married a girl from a neighbouring village; they found a house in town and were well respected locally. Sheriff Gerytsz did not hesitate to accost the locksmith outside Alkmaar —and thus *out*side urban territory— when the latter was on a short pilgrimage to a nearby monastery together with his pregnant wife and some friends. The she riff's assistants attacked the locksmith, knocked him down, hurting his shoulder, and locked him up in the dungeons of castle De Nyenburg on the charge of theft.

The sheriff's action was unlawful in several respects. One of the most important privileges of a Dutch citizen —an inhabitant of a city with full civic rights— and a major form of legal protection against intrusive actions by the public authorities was that he or she could not be taken into custody without many formalities. The local court had to give formal and written permission for the arrest. In this case the sheriff had not even requested the court's permission. Moreover, his servants maltreated the locksmith, while the sheriff completely ignored the suspect's right to be detained only in his own town unless he (or she) was caught in the act or proof could immediately be produced to show that he or she had indeed committed a crime within the relevant territory. None of this applied here —even if we follow the sheriff's own story. More was to come. The sheriff refused to release the locksmith when bail was offered and —against every rule in the book— denied his friends and relatives access to the young man. The sheriff further ordered his servants to force entry into the locksmith's house and search the premises. Earlier (possibly during the arrest) they had already maltreated Claes Jansz's pregnant wife: she miscarried.

According to later depositions by the locksmith, the sheriff continued to threaten and intimidate him while in detention. Claes Jansz refused to admit anything, first because he was not guilty (according to his version of the story), and second because he did not want to inflict shame on his wife, parents, and friends, "for which reason the bailiff behaved in a very rude and threatening way towards

Portrait of bailiff Jan Gerytz by Jacob Cornelisz van Oostsanen (c. 1470-1533). Courtesy of Rijksmuseum Amsterdam.

Claes"[10]. Gerytsz apparently declared that he would not harm the locksmith if he admitted certain thefts, adding that "his father was rich enough and would have no problem in buying his freedom". The sheriff apparently thought that Claes Jansz' well-to-do father would not make any problems about paying the so-called *compositie* —a kind of 'legal bribe' which guaranteed that a public prosecutor would desist from further prosecution. However, the legal form of composition (like the legal form of arrest) required formal approval by the local court, which had not been requested in this case.

Composition could be attractive to all parties concerned. The money provided a considerable part of a bailiff's or sheriff's income. They did not receive any salary from the public treasury and in most cases had paid a considerable sum for their office. Composition also saved the local courts a lot of work; it was especially useful in those cases where the evidence was considerable but insufficient for a conviction. Finally, it saved the suspect both the public shame and the costs of a court case. In the hands of malevolent prosecutors, however, composition could easily become an instrument of blackmail, as is evident both from the cases discussed here and from a large number of other court cases against civil servants in the archives of the Dutch provincial courts and the successive Supreme Courts of the Netherlands[11].

In spite of the sheriff's threats, the locksmith continued to deny all charges and the sheriff decided to apply more pressure. He had the locksmith put on the floor of his cell in the castle Nyenburg and in person stood on his legs. When this had no result he:

> "had him laid down and bound on a torture bench like a criminal with a knotted rope around his brow, another rope across his private parts and more elsewhere, with which the aforesaid bailiff and two of

[10] The quotations are from GRM Dossier Appeals 683, d.

[11] On composition see Lodewijk HOVY, "Schikking in strafzaken in Holland tijdens de Republiek" in *Scrinium et Scriptura; bundel opstellen aangeboden aan J.L. van der Gouw / Nederlands Archievenblad,* 84, 1980, pp. 413-429; Oscar VAN DEN AREND, *Zeven lokale baljuwschappen in Holland*, Hilversum, Verloren, 1993, pp. 318-319; and for similar practices in 15th-century Holland see BLOCKMANS, *op. cit.*

his servants inflicted great pain and persecution on the aforesaid Claes without recourse to the law"[12].

Claes Jansz only gave in when the sheriff also threatened to administer a mixture of "piss and mustard": he admitted a few thefts. The sheriff informed the locksmith's father that his son had indeed confessed (sending off the message before the actual confession had taken place), whereupon some relatives collected and paid the composition money and the locksmith was released.

We can only guess at how often such things happened. If the victims lodged no formal complaint nor took any other type of formal action, there is simply no documentation in the archives. I have not come across any references to murderous assaults on sheriffs or bailiffs in retaliation for their transgressions —which, of course, does not mean that this never happened— nor have I found evidence in such cases of relatives having recourse to neutral third parties or intermediaries. In the present case there is no evidence indicating that the locksmith's family encouraged direct political action, stirred up local rivalry or rioting, or made use of local factionalism[13]. Most victims in this position probably chose a low profile —accepting their defeat (at least in public), keeping their mouths shut, and avoiding further threats and escalation. Some may even have chosen to leave town. Legal counter measures were expensive, slow and nerve-racking. They could also turn out to be dangerous, as we shall see in the sequel of this case. The locksmith and his father turned to the provincial Court of Holland and demanded the annulment of the enforced composition, restitution of the money, the payment of damages, and public restoration of their honour: they wanted their shame removed. As secondary points they requested penal measures against the sheriff: he should be reprimanded by his superior (the public prosecutor of the

[12] GRM Dossier Appeals 683, d.

[13] In some other cases during the same period the parties concerned did indeed make use of political means, applied pressure via influential relatives, or asked for mediation. See for example, Florike EGMOND & Peter MASON, *The Mammoth and the Mouse. Microhistory and Morphology*, Baltimore/London, Johns Hopkins University Press, 1997, esp. pp. 43-66.

Court of Holland), who might then institute an investigation into the sheriff's actions.

Although the Court of Holland did not accede to all their wishes it was clearly convinced that irregularities had been committed by the sheriff. He was called to The Hague (the seat of the provincial court), asked to explain his actions, clarify the composition arrangement, and present the evidence against the locksmith. The court was not satisfied by the sheriff's presentation and formally decided that it would start a new investigation of its own. Of course, this was not in the sheriff's interests. He lodged an appeal against the decision of the Court of Holland and thus took matters to the Supreme Court of the Northern and Southern Netherlands, the *Grote Raad van Mechelen*.

Taking into consideration both the contents of the remaining dossiers and the decision of the Court of Holland, it looks as if the locksmith and his relatives had a strong case. The sheriff therefore risked losing a considerable sum of money (composition money, damages and probably a fine), as well as his honour, status and authority as a public official. Again he had recourse to violence. In December 1507 the locksmith and some of his friends and relatives were visiting another relative in the small village of Oudorp (his wife's place of birth). Perhaps it was St. Nicholas or Christmas. At any rate, there were some festivities and people were singing and drinking. In the midst of this the sheriff and two of his servants forced their way into the house to arrest the locksmith once more. A general fight ensued, during which the locksmith and a friend managed to crawl out of a window and escape. They suffered only some bruises and one of their cloaks was torn, but Claes Jansz' uncle lost three of his fingers and was on the brink of death for days on account of a stab in the neck. All the furniture was smashed and some of Claes' friends had been beaten up.

Naturally the locksmith immediately informed the Grote Raad at Malines. It ordered the sheriff to immediately cease his aggressive behaviour. The locksmith thereupon increased his demands: besides a public apology and restoration of honour he now also wanted the very large sum of 100 Flemish pounds and 100 gold crowns in compensation, "considering that he Claes Jansz did not want to be ever again in

such horrible danger and fear". To these 'civil' demands he added a 'criminal' one: the locksmith requested that the Grote Raad would have the sheriff decapitated or else that he be condemned to the payment of 4000 florins in fines; he should moreover be barred from any further public office and lose his job. The sheriff, on the contrary, asserted his right to arrest a person who was at that moment within his jurisdiction and was a self-confessed thief, arguing that the locksmith had committed some further thefts after his previous detention. According to the sheriff, the locksmith had even committed sacrilege by stealing a silver-plated hand with relics from the Carmelite monastery at Oudorp. The wounds and damages incurred during the fight were merely the result of the violent resistance put up by Claes and his friends. Since he (the sheriff) was only prosecuting the new crimes committed by Claes, there was no possibility, moreover, of his obstructing the ongoing court case concerning the old accusations.

We cannot know whether Claes had really committed any thefts, but we may assume that an accusation of theft was especially damaging for a locksmith. He, after all, was the 'key' figure where the safety of the town and its inhabitants was concerned. If he could not be trusted, what was one to think of the security of the city gates, the prison, and the town government's coffer. Private houses and property, secrets and precious objects were all accessible to a locksmith. Much more depended on his reliability, therefore, than just his individual reputation. Perhaps the sheriff had fabricated the charge of theft precisely for this reason, trying to hurt the locksmith where he was most vulnerable. But it is not unthinkable either that Claes Jansz had really betrayed the public trust put in him and had abused his professional skills. Claes Jansz may also have discovered (through his profession and trusted position) some of the sheriff's secrets or past illegal practices, which had then forced the sheriff into self-protective action by means of false accusations[14].

[14] With thanks to Jos de Jong, who drew my attention to the special position of locksmiths and to A.P.A. VAN DAALEN, "Slotenmakers in Delft. Hoe het de gildebroeders van Sint Eloi verging" in *Open Slot: sluitwerk en slotenmakers in Nederland uit de 15e tot de 19e eeuw*, Groningen, Wolters Noordhoff/Forsten, 1986, pp. 73-91.

So much is clear: both the Court of Holland and the Grote Raad had no doubt that the sheriff was taking things much too far. It took the Grote Raad five more years to pronounce a final verdict, which was in favour of the locksmith in almost every respect but provided no clarity whatsoever about the thefts. The Grote Raad stated that the sheriff had used excessive violence and imposed a fine of 400 Carolus florins (to be paid to the Grote Raad itself), as well as damages of 200 Flemish pounds to be paid to Claes Jansz. The sheriff also had to pay the by no means inconsiderable legal costs, but he kept his job. In fact, this nasty incident does not even seem to have tarnished his reputation: the sheriff died in Alkmaar in 1523 a well-respected man, who had been sheriff and mayor of his town for decades. His fourth son succeeded him as town sheriff and many of his seventeen children occupied influential positions. In the long run Jan Gerytsz became the ancestor of one of the most influential families in the province of Holland during the 17th and 18th centuries. In the course of the 16th century his children and grandchildren adopted the names of Egmond and Nijenburg as their family names —without any clear right to either. Rightly or wrongly, they regarded themselves as illegitimate descendants of the counts of Egmond and adopted their family weapon, albeit with a bend indicating illegitimacy. Jan Gerytsz' grandson Diederick van Egmond van den Nijenburg (1537-1596) not only formalised the use of this double surname, but in 1582 also surreptitiously removed the bend from the coat of arms, thus successfully proclaiming himself a nobleman. Ironically, Diederick eventually became a councillor of the provincial Court of Holland, which had sentenced his own grandfather some sixty years earlier, and even reached the highest legal position in the new Dutch Republic: he became president of the Supreme Court, the Hoge Raad (1592-1596)[15].

The case of the harassed locksmith shows how extremely thin the borderline was between legal composition and illegal extortion by sheriffs and bailiffs. Moreover, even when extortion or blackmail could be proven it might take years before sanctions were imposed. Those sanctions were generally less than drastic. Furthermore, this case shows that the discretionary powers of sheriffs and bailiffs —on whether or not to institute formal legal proceedings— were enormous,

[15] See BELONJE, *op. cit.*, esp. p. 55.

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even where urban citizens with full civic rights and a good reputation were concerned. Bailiffs and sheriff obviously could and did use their assistants as hired thugs —which is perhaps less surprising when we know that they hired and paid these servants themselves. Finally, even those citizens with full civic rights could only protect themselves against abuse of power by such officials if they were strong, wealthy, and smart enough, and if they could rely on the support of friends and relatives. If Claes Jansz had not been a young man who could rely upon his father's and friends' physical, moral and financial assistance, he would not have stood a chance against this sheriff, nor would he have dared to take legal action.

3. A farmer steals back his own cattle (1552-54); an extortionist bailiff (1691-92)

These conclusions are supported by various other cases in the archives of the successive supreme courts of the Netherlands. Two short examples indicate how much (or how little) could be reached by private citizens intimidated by a sheriff. In 1552 sheriff Lubert Aelkens of the small town of Weesp (to the east of Amsterdam) confiscated fourteen cows and two horses in payment for debts incurred by the farmer Jan Gielisz from the neighbouring village of Weesperkarspel[16]. The sheriff organised a public auction in which he himself was the only bidder –because it took place when most villagers were in church. Thus the sheriff became the new owner of the cows and horses, having paid only a minimal sum which just covered the farmer's debts. The sheriff thereupon ordered his assistants to take the animals to the cattle market in a nearby town, but the farmer and his relatives and local friends —who by then realized what happened— blocked their way, beat up the sheriff's assistants and started a riot "in such a way that the whole town is in great commotion". They recaptured the animals and threw stones at the members of the local court. This could not but lead to criminal charges, which were soon dealt with in an appeal case by the provincial court of Holland. Heavy penalties were demanded: the farmer was to be decapitated and his possessions confiscated. None of this actually happened. The farmer

[16] For all information about this case see GRM Verdict 2255, 28 March 1556.

and his relatives and friends managed to inform the provincial court about the local background of the case and this completely turned the tables.

The local information made clear that farmer Gielisz was not quite right in the head. Ten years earlier, in 1542, he had formally been made a ward on account of his limited mental capacities and his fits of madness. He was not allowed to incur debts or commit any financial transactions unless his guardians, relatives or close friends approved. Everyone in the small town of Weesp was well aware of this, including sheriff Aelkens. There was something more, however. It turned out that the farmer had incurred his debts in an inn owned by the sheriff himself: it had been sheriff Aelkens who had sold him drink on credit. Only Aelkens could estimate how much the farmer had actually been drinking and how high his debts were. Finally, the way in which the sheriff had impounded the farmer's animals looked like a well-planned assault and robbery rather than legal action. Therefore the Court of Holland ordered a new and independent investigation into the facts. It eventually decided completely in favour of the farmer in March 1553. He was cleared of all charges, while the sheriff's superior —the bailiff of the region of Gooiland, who had been acting as public prosecutor on behalf of the sheriff in the criminal case against the farmer— had to pay all legal costs.

All in all, it seems no more than a trivial case in which the greed of a local sheriff threatened to harm a local inhabitant with limited mental capacities. To the farmer in question it would not have looked like a trivial case, however. After all, he was at some point in danger of losing both his head and his possessions. For several years, moreover, this minor case caused serious problems for both parties. The final defeat of the sheriff and his superior the bailiff made them both lose prestige, and the financial consequences continued to trouble the bailiff's children for years. Just like the Alkmaar locksmith, the farmer only managed to win his case thanks to the physical and moral support of his friends and relatives. After all, if their violent behaviour had not (unintentionally) turned the case into a criminal one and thereby taken it out of the local domain, it would have remained within the territory and control of the local sheriff. The farmer would not have had much of a chance.

The huge latitude enjoyed by corrupt high officials in the Dutch Republic is even more painfully clear in the case of the Rotterdam bailiff Jacob van Zuijlen van Nyevelt. The Hoge Raad tried him in 1691-92 for large-scale fraud, corruption, abuse of power, and numerous other misdeeds. The impressive indictment covers sixty *crimina* —all of them described in some detail— including lese majesty, extortion and blackmail, illegal detention, illegal and secret composition in several adultery and rape cases, besides forgery and theft. It is more than likely that these sixty *crimina* formed just the tip of the iceberg. Since early modern criminal justice generally operated in an "exemplary" way, we may assume that the charges in this bailiff's case covered only those misdeeds for which the prosecutor (the *procureur-general* of the Hoge Raad) could expect a conviction with some confidence, and which were regarded as the most serious given the defendant's public function. The list is therefore important because it presents us with a virtual pattern-book of the types of misdeed that could be committed by a public prosecutor. The large number alone of the crimes mentioned in this list also shows that the misrule of this bailiff was not a matter of weeks or months, but of years. That again implies that the victims of these sixty crimes had not received any satisfaction, compensation, restoration of their honour, or damages until the moment when these combined charges were brought against the bailiff.

Even then there was no justice for them. The indictment cannot tell us whether the Rotterdam bailiff had really committed all these crimes, but the special character of this lengthy document does reveal something of what happened behind the closed doors of the meetings of the Hoge Raad. Because the document reveals the opinion of each councillor for each of the sixty crimina, we can reconstruct per crime how many councillors regarded the bailiff as guilty. The records of the final deliberations of the councillors reveal that at least two out of the eight councillors regarded bailiff Van Zuylen van Nyevelt as guilty of a very large number of crimes and pleaded for his conviction. One of them even demanded capital punishment. The majority of six, however, thought that proof was insufficient, and the bailiff was discharged —in spite of the fact that each of the councillors regarded him

as guilty of at least several of the *crimina*[17]. There was nothing fortuitous about this favourable verdict for the bailiff, as we can find out not from these judicial records but also from publications about the history of Rotterdam. Van Zuylen van Nyevelt was one of the personal clients of stadholder Prince Willem III of Orange, who continued to support him through thick and thin. The Rotterdam population rioted and plundered the bailiff's house, while libellous poems appeared and the Rotterdam town council even suspended the bailiff from his post. All was to no avail. It was the prince's influence that inspired the Hoge Raad's final sentence and cleared the bailiff. What is more, the Rotterdam town council had to reinstate the bailiff in his former office and pay him an enormous sum in damages, after which Van Zuylen van Nyevelt managed to place some of his friends and relatives in attractive and influential positions. Even then he was not satisfied: the bailiff eventually managed to politically eliminate most of his former enemies within the Rotterdam city government[18].

These two examples show what few practical means were at the disposal of the highest courts in the Netherlands (the provincial court of Holland, the Grote Raad van Mechelen and its successor the Hoge Raad) to curb physical intimidation, extortion and similar practices by local bailiffs and sheriffs[19]. In this respect nothing much appears to have changed during the 16th, 17th and 18th centuries. That in itself may seem surprising, because it implies that the formation of the Dutch State (and the institution of a new supreme court for the

[17] See Hoge Raad (further HR), Collection Grande Book 11, deliberations and verdict of 27 May 1692.

[18] The case is notorious. See Arie VAN DER SCHOOR, *Stad in Aanwas. Geschiedenis van Rotterdam tot 1813*, Zwolle, Waanders, 1999, pp. 279-282. [With thanks to Jos de Jong for the reference.] For an example of a case against a 17th-century autocratic bailiff that did end disastrously for the bailiff, see Martinus Antonius Maria FRANKEN, *Schandalen uit Apeldoorns verleden*, Zaltbommel, Europese Bibliotheek, 1993, pp. 11-30.

[19] Further examples tried by the Hoge Raad can be found in ARA, Hoge Raad Collection Grande. See also the excerpts from criminal cases tried by the Hoge Raad published by J. C. GIJSBERTI HODENPIJL, "Extracten uit de crimineele ordonnantien van Holland" in *De Navorscher*, 1894, pp. 321-333; 1895, pp. 185-197; 1896, pp. 462-475; 1898, pp. 449-457; and 1899, pp. 40-45, 229-232, 349-353, 439-442, 543-548.

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northern Dutch provinces in 1582) did not make any difference at all. The three following examples will show, however, that there were indeed some changes, in particular with respect to specific categories of defendants. These developments were closely connected with changes in the complicated configuration of power involving the almost independent local criminal courts of the Dutch Republic, the higher provincial courts, and the newly created supreme court (the Hoge Raad). The mere fact of the latter's geographical proximity —it was based in The Hague, as compared to the former Grote Raad at Mechelen— enabled it to impose its presence, but the Hoge Raad first had to justify its position and show what is was worth. It had to demonstrate its authority, which was never uncontested during the first century of its existence.

4. A woman demands restoration of her honour (1592)

Surely one of the most miserable situations to find oneself in during the 16th or 17th centuries was to be suspected of sorcery. This happened to a woman by the name of Neeltjen Andries in the small town of Schiedam not far from Rotterdam. She had been living there for at least three decades. She and her husband owned a timber business. Although she had a good reputation in town and was known to be "a woman of honour" who always frequented "people of quality", the rumour that she was a sorceress went around for several years. In 1587, therefore, Neeltjen herself turned to the town court requesting formal proceedings to clear her name. She "staked her reputation", which meant that the court invited any person who knew of any evidence against her to come forth and produce it publicly in front of the court[20].

A court could only initiate such a procedure at the request of a private citizen. It offered such ordinary persons a weapon in a delicate situation in which no formal complaints or charges had been made, but serious damage to a person's reputation was already being done.

[20] All information about this case can be found (unless indicated otherwise) in HR Collection Grande Book 3, 4 March 1592. For further information see Hans de WAARDT, *Toverij en samenleving. Holland 1500-1800*, Rotterdam, s.n., 1991.

To a certain extent it enabled a 'suspect' to pre-empt (criminal) legal proceedings by means of starting (another type of) juridical action. The immediate goal of such a "*purge*" or "cleansing" was rehabilitation, but the final, even more important purpose was not to have to appear in dock as a suspect in a witch trial. If no persons came forth and no evidence was produced, the 'suspect's' reputation was thereby cleared and any person who subsequently spread rumours could be criminally prosecuted[21].

It was a risky procedure, however, which could easily and disastrously turn against the person who had initiated it. Those who requested such a procedure in connection with accusations of witchcraft or sorcery could become the suspects in a judicial investigation that might easily turn into in a criminal trial. Moreover, during the period in which witnesses could come forth, the 'suspect' was usually taken into custody. Even a short stay in prison entailed health risks, but this was a minor problem compared with the chance that someone might indeed come forth with evidence that triggered formal questioning or even interrogation under torture. Everyone knew where such interrogations could lead: death by fire or water. Only someone for whom the clearing of name and reputation (and the regaining of a former respected social position) was literally a matter of life and death would take such risks. So much is obvious from the very small number of such proceedings in the archives. For the province of Holland only 24 such cases concerning sorcery and witchcraft are known for the whole of the period between 1500 and 1800. A large part of those occurred during the years 1580-1600, the heyday of the witch trials in the Northern Netherlands[22].

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[21] A similar type of procedure is described in Jose PARDO TOMÁS, "Physicians' and inquisitors' stories? Circumcision and crypto-Judaism in Spain, 16th-18th centuries" in Florike EGMOND & Robert ZWIJNENBERG (eds.), *Bodily Extremities. Preoccupations with the human body in Early Modern European Culture* (forthcoming, Aldershot, 2002).

[22] For the whole of the province of Holland we know of 103 trials for witchcraft or sorcery, of which 37 ended in capital sentences. Of these 103 cases 33 (with 15 capital sentences) occurred between 1580 en 1600. See DE WAARDT, *op. cit.*, p. 283.

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Apparently no one approached the court of Schiedam in 1587. Therefore it declared Neeltjen to be "pure, clean and innocent of the alleged sorcery" and it announced that anyone who would hereafter continue to spread rumours could count on a fine as well as further punishment. Normally, this would have been enough, but in Neeltjen's case it did not help. The rumours continued and even increased in the course of the next few years. Neeltjen decided that she had to repeat her previous measures, but at a higher level. At the end of 1591 she went straight to the provincial court of Holland[23]. At that moment Neeltjen must have been confronted by an impossible choice: either to take the initiative herself to start a procedure to clear her reputation once more, or to wait, thereby losing the initiative and running the risk that the local sheriff might start a criminal investigation after all. She must have imagined that the latter tactic was more dangerous — probably rightly so, because during the last two decades of the 16th century the small town of Schiedam was the epicentre from which waves of witchcraft and sorcery accusations and trials spread through Holland. Just a few years earlier, in 1585, four women had been tried for witchcraft and sentenced to death in Schiedam. And the immediate cause of Neeltjen's second procedure to clear her name was the confession of yet another woman who had been arrested for sorcery in January 1591 in Schiedam (she hanged herself in her cell)[24].

From the start everything seemed to go wrong in this second procedure. When Neeltjen presented herself to the Court of Holland, it refused her request to be released as soon as possible and declared that she was to remain in custody during the whole of the procedure. Moreover, her case almost immediately changed into an active criminal investigation following the so-called "*ordinary procedure*" (about which more later). Instead of waiting for witnesses to come forward, the prosecutor-general of the provincial Court (acting as public prosecutor) and the local sheriff of Schiedam did their best to gather evidence *against* Neeltjen Andries. Besides the accusations by two local women who had already been sentenced themselves for witchcraft and named Neeltjen as an accomplice, they gathered a further nine in-

[23] Strictly speaking the provincial court of Holland was the only court in Holland with full powers to carry out such a rehabilitation.

[24] See DE WAARDT, *op. cit.*, pp. 99-101.

criminating depositions. Neeltjen Andries and her 'accomplice' Maritjen were accused of all kinds of sorcery. It was said, for instance, that Neeltjen had made several maidservants in her quarter ill by means of sorcery (one of them vomited fish, nails, and knives). She had committed "other horrible spooky acts", caused numerous small domestic items to disappear in neighbouring houses, and had even caused a shipwreck because the captain refused to give her a lift to the port in his cart. Moreover, Neeltjen had been observed dancing at night on a local meadow together with invisible devilish companions. [The dossiers do not make it clear how the witnesses observed these invisible companions.]

To counter these accusations Neeltjen and her lawyer brought together 42 favourable depositions which attested to her excellent reputation, good name, good behaviour, and innocence as regards sorcery. Several of these depositions were signed by prominent local inhabitants, such as the mayor and other notables. Nonetheless the Court of Holland judged that the depositions against Neeltjen and her friend Maritjen were serious enough to warrant interrogation under torture and in February 1592 the Court gave formal permission for that interrogation to be carried out. Neeltjen and her lawyer decided to appeal against this sentence and took their case to the Hoge Raad. This was the crucial moment: there was not much of a chance that she would be able to withstand torture without confessing, while a confession in such a case could mean only one thing: capital punishment. The months that Neeltjen spent in detention waiting for the decision of the Hoge Raad must have been horrible. The decision finally came in June 1592, but was by no means straightforward. The Hoge Raad neither confirmed nor nullified the provincial court's torture sentence, but ordered a new and independent investigation at the local level: "not only concerning the things related in the dossiers, but also concerning all circumstances they might come across at their discretion, which may serve as evidence against or in favour of the defendant and thus will serve to uncover the truth in this case". Neeltjen remained in prison, waiting for an even longer period. During the summer holidays

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of 1592 two delegates from the Hoge Raad went to Schiedam and interrogated a large number of local inhabitants[25].

Until the summer of 1593, when Neeltjen had spent more than 18 months in detention, it was unclear whether she would be tortured after all. During this period her husband died. The local sheriff did his utmost to obstruct the usual division of the couple's joint property and even tried to have it impounded —as if Neeltjen had already been found guilty. Finally, on 13 July 1593 the Hoge Raad pronounced its final verdict. It annulled the torture sentence of the provincial court, stated that Neeltjen was completely innocent of all crimes with which she had been charged by the sheriff of Schiedam and the prosecutor general, and released her from detention. The two prosecutors had to pay all legal costs. The court's verdict could hardly have been more unequivocal: Neeltjen was completely innocent and her name was cleared for ever.

Two 'para-juridical' aspects of this case deserve special attention: Neeltjen's social position and the political implications of the verdict. Like the locksmith from Alkmaar and the farmer from Weesp, Neeltjen would have had very little chance of standing up to the prosecutors had she not been supported by friends and relatives. Had she been a poor widow without 42 witnesses willing to testify to her good reputation, and had many of these witnesses not been prominent local inhabitants, the Court of Holland would no doubt have resorted to torture much sooner; and that would have almost certainly precluded the chances of a new investigation and eventually of a favourable verdict and release from detention[26].

The 'political dimensions' of this case call for some further exploration —especially given the considerable effects of the Hoge Raad's verdict, which went far beyond this particular case[27]. If we take into

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[25] The term summer holiday (*zomervakantie*) literally occurs in the archival documents.

[26] See also the conclusions of DE WAARDT, *op. cit.*, pp. 104-105.

[27] Because they contain these brief summaries of the councillors' deliberations, the archives of the Hoge Raad are an extremely rare exception among the legal archives of early modern Continental Europe. Normally no deliberations or motivations of verdicts can be found at all. In Neeltjen's case such

account how much time the new investigation and further deliberations of the Hoge Raad took (almost a year) and note that during this same period several local courts in the province of Holland refrained from pronouncing verdicts in cases of sorcery or witchcraft until they had learnt the Hoge Raad's verdict, we cannot but infer that Hoge Raad was well aware of the importance of its verdict and realised that it might set a precedent. Without so much as a hint of an opinion as to whether sorcery or witchcraft really existed, the Hoge Raad's verdict implied that *any* future decision by *any* court in the province of Holland to apply torture in such cases would be liable to appeal. That would mean lengthy new investigations, which entailed delays as well as considerable extra costs that pleased nobody. Whether intentionally or not, the verdict in Neeltjen's case effectively blocked further capital sentences in trials for sorcery or witchcraft all over the province of Holland. After all, a capital sentence could only be imposed upon confession. Unless a defendant confessed to sorcery or witchcraft without being tortured, the criminal courts of Holland had no choice but to impose less severe punishment, invent a new charge, or cease prosecution. This is exactly what happened. Neeltjen's case was not the last trial for sorcery or witchcraft in Holland, but except for one trial in 1614 none of these cases ended in capital punishment[28].

The intervention by the Hoge Raad thus considerably increased the legal rights of defendants in such trials and raised a major obstruction to the criminal prosecution of sorcery and witchcraft. It seems unlikely that this was just a chance side-effect. After all, the Hoge Raad could easily have decided otherwise: it might just as well have confirmed or annulled the previous decision by the provincial Court of Holland. The former would have led to torture and a probable capital sentence by the provincial court, the latter to Neeltjen's release from detention but without any new investigation. It looks very much as if the Hoge Raad did not *wish* to limit itself to just a procedural verdict and ordered a new investigation regarding the facts of the case precisely because this gave it an instrument to stop or at least obstruct the

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information is minimal, however, and limited to the question of whether a new investigation should be ordered.

[28] See DE WAARDT, *op. cit.*, pp. 100-101.

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tendency of some local courts to start new witch trials[29]. There is a good chance that political considerations played a part in this (presumed) policy, and it cannot be a coincidence that the Hoge Raad pronounced such a far-reaching verdict precisely in the first phase of its existence —only ten years after it was created (in 1582) as one of the symbols of the new Dutch Republic— when the scope of its verdicts and the power relations with the technically less powerful but much older and prestigious provincial Court of Holland had not yet been clearly defined. Perhaps the Hoge Raad made an astute use of this opportunity to set a precedent, enhance its own prestige, challenge the power of the provincial court of Holland, and cut the costs of witch trials in Holland. Who knows, even humanitarian motives with respect to defendants suspected of witchcraft or sorcery may have played a part.

5. A bailiff gets into trouble (1609-1610); a bandit lodges an appeal (1717-18)

Such speculations are not that far-fetched when we look at two more cases in which the Hoge Raad pronounced verdicts that clearly contained a political message for the other Dutch courts and entailed changes both with respect to prosecution policies and the rights of defendants. In 1609 bailiff Jacob de Witte of the town of Goes near Middelburg in Zealand was shocked to find himself a suspect in a criminal case before the Court of Holland that was taking the shape of an *extraordinary* trial (a common type of procedure to which we will come back later). The bailiff's 'crimes' as well as his trial were closely intertwined with local factional strife involving both religious and political issues. According to the court's prosecutor De Witte had made no attempt whatsoever to prevent or impede the distribution of seditious pamphlets in his home town, and he was even suspected of having spread slanderous rumours himself implicating the members of one of the local factions. Complaints about his behaviour had reached the provincial Court (which at the time dealt with both Holland and

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[29] Such a local tendency to conduct trials for witchchraft and sorcery does not, in my opinion, conflict with a tendency at the provincial or national level to curb such trials. At these different judicial levels different considerations played a part in determining prosecution policies.

Zealand) which ordered an investigation. In an unguarded moment the bailiff apparently admitted that he had indeed made some negative remarks about certain members of the local government and had neglected to confiscate some seditious pamphlets. According to the prosecutor general this was tantamount to a formal confession. The provincial Court shared his opinion and condemned the bailiff in December 1609 to a heavy penalty: he was suspended forever from his office, banished from the town of Goes for the duration of six years, and ordered to pay a heavy fine of 1000 pounds as well as legal costs.

The bailiff wanted to lodge an appeal with the Hoge Raad against the provincial court's verdict. The problem was that Dutch criminal law did not allow an appeal against a verdict in a criminal case of the "extraordinary" type ***if*** the defendant had indeed confessed. And that was precisely the issue here. Had he confessed or not?[30]. The bailiff argued that he had been tricked. Whatever the case may have been, a majority of the members of the Hoge Raad took his side and granted him the right to lodge an appeal. Naturally, the provincial court protested and regarded this as an infringement of its rights. It made it clear that it regarded the case of the bailiff as a test case for the relations between the provincial court and the Hoge Raad. If the latter did indeed allow an appeal, this would create a precedent: an appeal might become possible in all similar future cases of the extraordinary type (the bulk of all criminal cases in the Dutch Republic) in which a confession had been made. This alone was bad enough. The provincial court was even more upset by the fact that the Hoge Raad's positive decision about the appeal directly seemed to threaten the provincial

[30] Unless indicated otherwise, all information about the case against bailiff De Witte comes from HR Collection Grande Book 5, 11 December 1609-30 July 1611. For an example of a fraudulent official who committed perjury as well, was barred from office, and lodged an appeal, see Arend H. HUUSSEN jr. and Barendina Sijtje HEMPENIUS-VAN DIJK, "Rechtsbescherming van individu en ambtenaar tijdens de Opstand: de evocatie van de procedure tegen grietman mr. Pilgrum ten Indijck voor het Hof van Friesland naar de Grote Raad van Mechelen, 1572-1575" in Hugo SOLY and René VERMEIR (eds.), *Beleid en bestuur in de oude Nederlanden. Liber amicorum prof. dr. M. Baelde*, Gent, RUG.Vakgroep Nieuwe geschiedenis, 1993, pp. 205-216 (which mainly focuses, however, on the technical aspects of this case). In this case too protection and politics played an important part.

court's own authority, autonomy and honour, while indirectly jeopardising the near autonomy of the local criminal courts in the provinces of Holland and Zealand. From this moment on —it was thought— each and every verdict in a criminal case of the *extraordinary* type could be open to appeal and therefore to interference by the Hoge Raad. For that reason the Court sent a lengthy written protest not only to the Hoge Raad but also to the relevant political authorities, the Provincial Estates of Zealand[31]. A decision would have to be taken at the political level to break the deadlock.

A protracted round of negotiations, discussions, protests and meetings followed, during which poor bailiff Witte was all but forgotten. Tempers ran high. In order to pacify the parties involved the provincial politicians emphasised "that the honour and authority of ***both*** courts were of close concern to them"[32]. In February 1610 the Hoge Raad decided to send one of its councillors as a delegate to the official meeting of the Estates of Zealand in order to present them with a detailed explanation of the reasons why the Hoge Raad had decided in favour of the bailiff's appeal. The councillor emphasised that the Hoge Raad certainly did not try to create a precedent, but considered that appeal should be allowed only in some exceptional cases: i.e. if there were reasons to assume that a confession had not been a real confession, or if the wrong type of procedure had been followed.

However politely formulated, the message was that the Hoge Raad considered the provincial Court's investigation into the bailiff's case faulty and incomplete. It emphasised that no additional evidence had been produced by the provincial prosecutor apart from this so-called confession. Since this was a clearly political trial, instigated by members of one of the local factions, the Hoge Raad may have had good reason to doubt the quality of the investigation, the strength of the

[31] The way in which the Hoge Raad reacted clearly indicates that we are dealing here with a power conflict. The Hoge Raad immediately sent a letter of its own to the provincial estates of Zealand, indicating politely but very clearly that the Hoge Raad did not wish to be obstructed. It trusted that the estates of Zealand would do nothing to impede "good justice" or to jeopardize "our jurisdiction or our reputation" (letter of 23 January 1610).

[32] My emphasis.

evidence and —by implication— the impartiality of the provincial court. We cannot even exclude the possibility that certain councillors of the provincial court were themselves implicated in the factional strife that lay behind the original conflict and charge[33]. In a malicious aside the Hoge Raad also pointed out that the provincial court itself made no bones about interfering (against the rules) in the criminal cases of the local criminal courts ***if*** that served the provincial court's own interests. It even allowed appeal in *extraordinary* cases as long at it was an appeal to itself and against the local courts[34].

The bailiff was lucky: the Estates of Zealand approved his appeal to the Hoge Raad, and in July 1610 it decided that the previous procedure had indeed been faulty. It partially annulled the provincial court's sentence: the bailiff did not have to pay the fine, nor was he banished for six years, but he still lost his job. Perhaps that was not a bad decision: it is hard to imagine a situation in which working relations had been more structurally disrupted. The case of bailiff Witte sprang from factional strife in Zealand and ended in The Hague amidst political and judicial rivalry. Nothing but a political decision could have broken the stalemate between provincial court and Hoge Raad.

The extent and weight of the political considerations in this case are nicely demonstrated by the Hoge Raad's justification to the Estates of Zealand. Referring to the great importance of civic rights "for protecting subjects against oppression" and "protecting the liberty and welfare of the nation", the Hoge Raad argued that both the provincial court of Holland and Zealand and the Hoge Raad itself realised the great danger of a situation in which private citizens had no choice but to submit to the verdicts of local criminal courts without possibility of redress and without the possibility of calling the latter to account.

[33] Further research might clarify whether the political alliances of the court's councillors may have influenced this verdict.

[34] It was indeed true, the Hoge Raad continued, that a further treaty between the provincial estates of Holland and those of Zealand had laid down that the Hoge Raad should not allow an appeal in "extraordinary cases in which the defendant had confessed", but this (it maintained) applied only to sentences pronounced by the town courts of Zealand and not to those pronounced by the provincial court itself.

Moreover, the Hoge Raad continued, each and every lawyer was aware of the fact

> "that every case can easily be changed into a criminal one [...] even though it may be intrinsically a civil matter [...] only to execute the sentences promptly and prevent further legal action and the spreading of information [...]; that many faults and miscarriages of justice are caused by the animosity or high-handedness of those in charge of criminal prosecution, or on the contrary by their lack of initiative or laziness, while they should in fact act judiciously, with discretion, lenience, and without haste".

This statement by the Hoge Raad contains a devastating criticism of current criminal justice and procedure. Apparently each and every case —even the most obviously "civil" ones— could easily be turned into a criminal one, thus (in nearly all cases) blocking appeal and the restraints of a possible check by a higher court; furthermore, the bias, corruption, haste and incompetence of the local criminal courts caused grave mistakes in criminal procedures.

It would be unwarranted to doubt the Hoge Raad's sincere concern for the welfare and rights of private citizens, but we should not ignore the fact that this plea for further checks on the prosecutions by all inferior criminal courts also furthered the Hoge Raad's own interests. While the provincial court's jurisdiction was limited to Holland and Zealand, the Hoge Raad was closely connected with the national government of the Dutch Republic, but encountered grave problems in having its authority recognised by the Dutch provinces outside Holland and Zealand, and therefore saw its effective powers limited to the same two provinces where the provincial court ruled. Effectively this turned the two courts into rivals —a situation that proved to be in the defendant's interest in this case.

The Court of Holland need not have feared: the bailiff's case did not set a precedent. Throughout the 17th and 18th centuries it remained nearly impossible to appeal from a verdict based upon confession in a criminal case of the extraordinary type. Almost a century after the bailiff's case, in 1718, the few procedural gaps that still allowed some exceptions to this rule were closed by the so-called *Edictum Jacotianum* —again for predominantly political reasons. In

that year the most famous bandit of the Netherlands, Jacob Frederik Muller alias Jaco, almost escaped the "punishment due to him" because of a legal loophole[35]. Jaco's gang had committed a long series of assaults, armed robberies, and some murders and rapes. There was no lack of evidence, and a considerable number of his accomplices had been sentenced by the time Jaco himself was arrested. Although the depositions of his accomplices left no doubt about Jaco's own involvement in a series of major crimes, Jaco denied everything and continued to do so even under torture. This left the Amsterdam town court no choice— that is, following a strict interpretation of the procedural rules —but to impose a relatively mild punishment. Corporal punishment on the scaffold was out of the question, because it could only be imposed if the defendant had confessed. However, very few Dutch courts adhered to this strict interpretation of the rule.

Usually more "creative" solutions were thought up: it was possible to either reformulate the charge, which created a new opportunity to still impose the intended punishment, or change the type of criminal procedure from an *extraordinary* to an *ordinary* one, which triggered a new trial. The latter in a way rewarded the defendant for his perseverance and physical hardiness, since he (I have not come across a she) 'earned' an *ordinary* criminal trial which entailed the right to both legal defence and a possible appeal. This is what happened in Jaco's case. In 1717 the Amsterdam town court finally sentenced Jaco in an *ordinary* trial to the most severe form of capital punishment known at the time: breaking on the wheel. However, to the great consternation of the court, Jaco's lawyer decided to appeal: first to the provincial court of Holland and finally to the Hoge Raad. Jaco was not as lucky as the bailiff mentioned above. Both courts rejected his appeal and confirmed both the change of procedure and the Amsterdam verdict. In 1718 Jaco died on the scaffold. The mere fact, however, that he had been in the position to lodge an appeal was felt

[35] For further information about Jaco and his gang see Florike EGMOND, *Underworlds. Organized Crime in the Netherlands, 1650-1800*, Cambridge, Polity Press, 1993, with further references. Jaco is still relatively well known in the Netherlands. During the 1990s several articles and a children's book have been devoted to him. Frans Thuijs is currently writing a historical dissertation about Jaco and his companions.

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to be so shocking that the authorities proposed new measures. They never wanted to come across another case in which a 'hardened criminal' could earn legal rights by standing up to torture. Still in the same year (1718) the Estates General approved a draft law that had been inspired directly by the Jaco case. It denied any kind of appeal to all defendants belonging to the category of vagrants, thieves or beggars who had been convicted previously —whatever the type of criminal procedure[36]. This law remained in force until the penal reforms of the French revolutionary period. During the remaining eight decades of the 18th century it further restricted the already minimal legal protection of those who belonged to the despised and feared groups at the social margins. As will be shown in the following section the *Edictum Jacotianum* of 1718 was much more than a procedural adjustment: it formed part of a structural politico-juridical policy of exclusion.

6. Justice for whom?

The first few cases discussed in this article throw some light on the structurally weak position of those defendants in the 16th- and 17th-century Northern Netherlands who saw themselves confronted by arrogant, overbearing, or corrupt prosecutors. They also clarified which circumstances enabled defendants to put up resistance to these officials. In the second group of examples the focus was not on abuse of power but on the ways in which defendants could use legal loopholes, lack of clarity in the procedural rules, or political and judicial rivalry to their own advantage. We have also seen how the authorities tried to fill such gaps and close legal loopholes. That in itself should make us think twice about the general tenor of Dutch (or even Continental European) criminal justice at the time. Whose interests did it serve? Did criminal justice function as an instrument serving the purposes and interests of particular groups in society —even if everything went by the book and there was no abuse of power? And if so, what does that tell us about the relations between subjects and authorities in a society that has long been characterised as relatively tolerant and egalitarian?

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[36] For an 18th-century summary of the case against Jaco, see Jan WAGENAAR, *Amsterdam in zijn Opkomst.* Vol I, Amsterdam, I. Tirion, 1760, pp. 732-33.

A short sketch of the way criminal justice was organised and of the main outlines of criminal procedure is sufficient to trace this tenor[37]. In the Northern Netherlands each town, each city and sometimes even each village or group of villages, each polder, and each larger section of a province constituted a separate jurisdictional territory: the so-called 'high jurisdiction'. The judicial geography of the Dutch Republic thus looked like a fine-meshed web. We may also describe this situation as one of extreme fragmentation of judicial powers. The size (both in terms of kilometres and number of inhabitants) of such high jurisdictions or territories varied from a village, a small town or castle to a large part of a province or a major city. Size, however, did not influence autonomy: the verdict pronounced by the court of a small jurisdiction was just as valid as one pronounced by the town court of, for instance, Amsterdam. In the province of Holland alone there were more than 200 such 'high jurisdictions'. Each of them had its own sheriff and almost autonomous criminal court with full powers within its own territory to prosecute criminal cases and impose punishments including the death penalty[38].

The extent of the territorial autonomy of these local criminal courts was astonishing. Only a few categories of suspects and types of offences were dealt with directly by other courts, such as soldiers and

[37] Much has been published about the organisation of Dutch early modern criminal justice, but the emphasis in most of the publications which originated in a juridical or legal historical context is on formal aspects, whereas publications by historians generally concentrate on only one city or court. Comparatively little attention has been paid to rural criminal justice. The following sketch is largely based on research in the records of all local criminal courts (both rural and urban) in the Dutch provinces of Holland, Zealand and Brabant and goes back to EGMOND, *Underworlds...;* and Florike EGMOND, "Fragmentatie, rechtsverscheidenheid en rechtsongelijkheid in de Noordelijke Nederlanden tijdens de 17e en 18e eeuw" in Sjoerd FABER (ed.), *Nieuw licht op oude Justitie. Misdaad en straf ten tijde van de Republiek*, Muiderberg, D. Coutinho, 1989, pp. 9-23. For an important contemporary work about criminal law and procedure see Joos(t) DE DAMHOUDER, *Practijcke ende hant-boeck in criminele saacken* (ill. ed. 1555; Lat. ed. *Praxis rerum criminalium,* Antwerp, 1570).

[38] This situation did not originate in the early modern period but already existed in the 13th and 14th centuries, possible even earlier.

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the court officials themselves, coin clipping and forgery, high treason and some other political crimes. Attempts at interference with each other's suspects or procedure as well as infringement on each other's territory were a continuous source of rivalry between the local criminal courts[39]. Quite a few of them were more interested in competition than in co-operation —a situation that was exploited to the full by all professional and mobile criminals.

Besides these local criminal courts, most Dutch provinces had a provincial court, while a supreme court, the Hoge Raad, was created in 1582 as symbol of the newly created Dutch Republic. The role of these higher courts was much more important in civil cases than in criminal ones, precisely because appeal was not allowed (as we have seen above) in most criminal cases. The higher courts thus dealt with only a small number of all criminal procedures and for most of the 16th, 17th and 18th centuries some 90% of all criminal trials ended where they had started: at the local level[40]. The higher courts wanted a larger share of the "criminal trials" and attempted to change this situation, often by encroaching on the lower courts' privileges. As we have seen, the politics of 'appeal' (which helped to take a case out of one court's powers and into another one's) provided a particularly suitable instrument for such machinations. Understandably, this policy sometimes brought the higher courts into open conflict with the local

[39] A nice example concerns a 16th-century conflict between the town of Delft and the abbot of Egmond, which was taken all the way to the Supreme Court. The abbot claimed high (i.e. criminal) jurisdiction in a certain territory close to the town of Delft and therefore had the local gallows (re)surrected. The town council of Delft immediately instructed its carpenter to take down this symbol of high jurisdiction. The ensuing case lasted for years. See GRM Dossier Appeals 698-I (circa 1557).

[40] The situation in the northern Dutch province of Friesland was somewhat different on account of earlier and stronger centralisation. The provincial Court of Friesland controlled nearly all criminal cases in this province. See esp. Arend H. HUUSSEN Jr., "Jurisprudentie en bureaucratie; het Hof van Friesland en zijn criminele rechtspraak in de achttiende eeuw", *Bijdragen en Mededelingen betreffende de Geschiedenis der Nederlanden*, 93, 1978, pp. 241-298; and Idem, *Veroordeeld in Friesland. Criminaliteitsbestrijding in de eeuw der Verlichting*, Leeuwarden, Hedeby Publishing, 1994.

ones. As we have seen in some of the cases discussed above, outright conflict could also flare up between the provincial courts and the Grote Raad van Mechelen or its successor the Hoge Raad[41].

It is commonly known that there was no formal distinction between government and the judiciary in most of Continental Europe before the French Revolution. Members of the local criminal courts (or *schepenen* as they were called in the Netherlands) acted as judges in criminal trials one moment and during a next meeting joined the local burgomasters to form the town council. Their prerogatives as judges underpinned their formal and informal administrative powers and vice versa. The local criminal courts usually had some four to nine members. They were recruited from the circles of respectable (i.e. of good repute and well-to-do), male and (during the period of the Dutch Republic) mainly Protestant inhabitants of the relevant jurisdiction. Neither women, Jews nor Roman Catholics could hold the position of court member, and this was also true of a considerable part of the male population which did not fulfil the criteria of respectability and (relative) wealth. In principle, court members held this function for only one year at a time, but they could be re-appointed (or re-elected by co-optation) after an interval of a year. In the countryside this usually meant that the function of court member circulated among the fairly limited circles of wealthy farmers, artisans, merchants and local notables. A law degree was not required and in the countryside there were very few trained lawyers among the court members. In the larger towns and cities, however, trained lawyers were more prominently represented among the court members, and membership of both court and city council was often monopolised by members of a small number of elite and upper middle-class fami-

[41] Such attempts were by no means always succesful. A lawyer from Malines, Jan Scheers de Jonge, argued that the local sheriff and court had no right to interrogate him under torture on suspicion of heresy. Scheers argued that only the church courts were competent in such matters, and he was supported in this case (for understandable reasons) by the bishop of the relevant diocese. Scheers lost his case. See GRM sentence nr. 1692, 11 January 1552 (1551). With respect to the Burgundian period Wim Blockmans has drawn attention to the importance of such power conflicts between local and higher courts for state formation —a theme that is also of central importance to the work of Hugo de Schepper, albeit for a slightly later period.

lies, who continually co-opted their own cousins, brothers, uncles, nephews and fathers. Nonetheless, a very large majority of all Northern Dutch court members had no legal background or training whatsoever.

In many respects the Dutch situation resembled the organisation of criminal justice in other continental European countries north of the Alps. Local courts consisting of lay judges likewise dealt with a large part of criminal justice in the Southern Netherlands, most of Germany, and France. However, political and judicial centralisation had progressed much farther in France, delimiting the power of the local criminal courts, whereas in many parts of Germany the influence of trained lawyers and of local (princely and other) rulers was much stronger than in the Northern Netherlands. Thus the organisation of criminal justice at the local level shows many family resemblances with that in other parts of Europe, but the combination of territorial fragmentation, considerable autonomy of 'first instance' criminal justice in the Northern Netherlands, the lack of administrative centralisation, the dominant role of lay judges and the relatively minor one of trained lawyers, and the near absence of a right to appeal to higher courts in criminal cases, all went together to produce a special judicial system which gave extended powers to local lay judges from the Protestant middle and upper classes[42].

Yet their powers were not unlimited, and even outside the city courts and the provincial and supreme courts there was some room for

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[42] Thus the territorial basis of the high jurisdictions, the principal characteristics of the local criminal courts, and the distinction between *extraordinary* and *ordinary* procedure can be found in both the Netherlands, Germany and France. The degree of independence of the local courts as well as procedural rules governing appeal and the influence of trained lawyers differed from one country (or even region) to another on the Continent. For old but still useful comparative discussions of criminal justice see John H. LANGBEIN, *Prosecuting Crime in the Renaissance. England, Germany, France*, Cambridge Mass., Harvard University Press, 1974; and *Torture and the Law of Proof. Europe and England in the Ancien Regime,* Chicago, University of Chicago Press, 1977. Cf. Raoul Charles VAN CAENEGEM, *Judges, legislators and professors. Chapters in European legal history*, Cambridge, Cambridge University Press, 1987, pp. 33-39.

both direct and indirect influence of trained jurists. There were two crucial moments in a criminal trial in which professional legal advice ***had*** to be asked by court and prosecutor: when the court considered either a verdict of interrogation by torture or a decision to impose corporal punishment. In each case the court had to request the written advice of two or three so-called "impartial lawyers". On the basis of the remaining archival records it is impossible, however, to determine whether courts generally obeyed this rule. Indirectly, the example of the provincial courts and Hoge Raad also provided a counterweight against extreme forms of autonomous policy and procedure by local criminal courts. Finally, as the case studies showed, the higher courts occasionally also provided a certain safe-guard against the worst cases of corruption, abuse of power and similar acts by the local courts and sheriffs —but as a last resort they were only available to those defendants who knew how to find their way to such courts, were not poor, and had the support of their family and friends.

Each high jurisdiction —whether it comprised a city or rural territory— had its own sheriff or bailiff, who united many functions in one person: he acted as head of police (being responsible both for maintaining public order and for criminal investigation, arresting, and interrogating suspects); he acted as public prosecutor, formulating the indictment and the "criminal conclusion" which summed up the charge, confession and other evidence, and proposed a particular form of punishment; and finally he acted as chairman of the local court sessions until the moment when the lay judges (*schepenen*) started to discuss the final verdict. Who appointed the sheriff or bailiff depended on various local rules and traditions: in the cities he was usually chosen by the town council, in rural districts by the provincial estates or the descendants of a former feudal lord. Given their many functions the sheriffs and bailiffs formed the lynchpin of Dutch criminal justice. As in the case of the lay judges, legal training was not required to hold the office of sheriff or bailiff —but the public prosecutors of the cities and larger towns often did have some legal training, while all of the public prosecutors of the provincial courts and the supreme court were lawyers. Most sheriffs and bailiffs belonged to the higher middle and upper classes, albeit it only rarely to the top layers of the elite. At least part of their income came from the fines and composition payments they imposed. They usually remained

in function for years, sometimes even for decades or for life. That was one reason why local courts with their changing membership often had great problems in getting rid of autocratic, corrupt, incompetent, or even senile bailiffs[43]. Their influence, contacts, and considerable discretionary powers offered them a unique and powerful position in the local community which was ideally suited for extortion and other types of abuse of power and office. We have already seen how little even the provincial courts and the supreme court could do to counteract such corrupt sheriffs.

Looking at the composition of the nearly autonomous local criminal courts with their lay judges who dealt with the vast majority of all criminal cases it is not difficult to see whose interests were served most by criminal justice in the Dutch Republic: not the lowest social classes, not women, Jews or (during the period of the Dutch Republic) Catholics (irrespective of their wealth or respectability[44]), but Protestant men from the higher and middle classes, in particular local notables and the urban patriciate[45]. The crucial boundaries between those with civic rights who could count on a large degree of legal protection and those with very few rights followed the dividing lines of wealth and class, gender and religion. This conclusion does not imply,

[43] A good example of such a local potentate is Nicolaes van Berendrecht, who acted as sheriff of Leiden from 1539 to 1565-66, when he had to retire on account of bad health. He died in 1567, left enormous debts, and was succeeded in 1567-68 by his son Jan. A mass of documents is kept in the Municipal Archive of Leiden concerning his misconduct, which could easily form the basis for a monograph. See also Florike EGMOND, "Limits of tolerance. Justice and anti-semitism in a sixteenth-century Dutch town" in *Jewish History,* 8, 1994, pp. 73-94; and Jeremy Dupertois BANGS, "Book and art collection of the Low Countries in the later sixteenth century: evidence from Leiden" in *Sixteenth Century Journal,* 13, 1982, pp. 25-39.

[44] The rule that barred Catholics from public office was not always observed, especially in the Southern Dutch provinces during the 18th century.

[45] The role of the nobility has to be ignored here, both because they played no part as defendants in criminal cases, and because very little is known about their influence on the appointment of sheriffs and bailiffs, or their own occupation of such offices. A synthetic monograph is much needed about the role of Dutch bailiffs as key figures in the maintenance of public order and in criminal prosecution. For the Southern Netherlands see VAN ROMPAEY, *op. cit.*

however, that all lay judges in the Netherlands cynically manipulated criminal justice to further their own interests. Many of them undoubtedly believed in justice and fulfilled their duties as best they could— conscientiously, with integrity and sincerity. The point here is that early modern criminal justice in the Netherlands had an inherent *bias* with respect to certain parts of the population. Men belonging to a limited section of Dutch society were in control of both political and judicial matters. The rest had no alternative but to accept this situation.

It is not only the composition of the local criminal courts or the considerable degree of autonomy that point towards this bias, but also the ways in which criminal law and procedure could be used as instruments of power and exclusion. It is a commonplace to state that not only social but also legal equality was the rule until 1800. Far less is commonly known of the practical effects of legal inequality. It meant that not everyone enjoyed the same degree of legal protection. Whether a defendant in a criminal case had many or few rights completely depended in the Netherlands —as in Germany or France— on the question of whether he or she had a permanent residence and a good reputation or, on the contrary, was known to lead a vagrant or itinerant life. Someone who belonged to the latter category eluded (and therefore subverted) social control by 'established' citizens. Precisely for that reason fewer formalities were required to arrest or torture suspects who belonged to this 'mobile' category. The evidence in their cases was not evaluated in a different way from that of other defendants, but since poor and itinerant suspects usually owned no property and were regarded as dangerous precisely because of their mobility, they were often locked up or physically punished instead of given fines. Social status and respectability —or the lack of them— thus determined to a large extent the procedural rules to be followed and the type of punishment to be imposed.

The crucial boundary between those with many rights and those with very few is expressed in the difference between *ordinary* and *extraordinary* criminal procedure. Both types have been mentioned above in the case studies. The bulk of all criminal cases in the Netherlands followed the *extraordinary* procedure with minimal rights for

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the defendant[46]. And the bulk of the defendants in these cases belonged to the category of 'outsiders' without a fixed domicile, including beggars, vagrants, itinerant salesmen, artisans and rural labourers, sailors between jobs, ex-soldiers, fairground performers, etc. Jaco is a good example. But even some well-to-do and 'respectable' defendants were tried by this procedure. In bailiff De Witte's case it was the type of offence (political crimes) that determined the procedure, not his social position. He was understandably worried because of the ensuing lack of civil rights. In an *extraordinary* procedure the defendant had no right whatsoever to legal defence. The defendants in such cases were arrested, detained, interrogated, sometimes tortured, confronted with witnesses, and eventually sentenced (sometimes to death) without legal aid and without even having the right to see the documents in their case. Some of them may have been unaware right up to the verdict what they were precisely charged with. Their situation was all the more perilous because if they confessed during interrogation —which at least some three quarters of them did, even without torture— they lost any right to appeal[47]. Unlike bailiff De Witte they were almost never able to challenge the court's verdict.

It is significant that the bulk of all criminal cases followed the *extraordinary* procedure —involving minimal legal protection— and concerned defendants who can be categorised as unwanted 'outsiders'. For it was precisely that social category which formed the main threat to the security of the middle and upper classes and their undisturbed possession of property. It is all the more interesting to investigate how big (or small) the difference was between the treatment of these defendants and that of the small percentage of defendants who were accorded an *ordinary* procedure and who mainly came from the circles of more or less respected local (established) inhabitants. It should be noted that the Dutch criminal records for the period 1500-1800

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[46] The first instance court that dealt with a case —generally one of the local criminal courts— was the one that decided which type of procedure was to be followed.

[47] This was not always as dramatic as it sounds. Many of these cases concerned petty theft or other minor offences, and the defendants were well aware that they would get away with banishment, whipping, or a short term in the house of correction at most.

provide us with only very few defendants in criminal cases who belonged to the real upper classes —a tell-tale fact in itself. The defendants who were tried by *ordinary* procedure did not belong to the aristocracy, urban patriciate, or even the higher ranks of the bourgeoisie, but mainly to the urban and rural middle classes, the circles of small entrepreneurs and tradesmen, artisans, and in rare cases to the local notables. The locksmith from Alkmaar and the farmer from Weesp are fairly typical examples.

This category was —usually but not always— tried by *ordinary* procedure **not** because of the different type of crimes they had committed but purely on the basis of their social position. Even if they were tried for murder these defendants did not always have to be detained. They had a right to legal defence and their lawyer had to be given copies of all documents in the case. Torture was used less frequently than in *extraordinary* cases and punishment more often included fines, confiscation of property, and barring from a particular function or office. Neither corporal punishment nor interrogation by torture were excluded, however, and ordinary procedures could and did end in capital sentences. One of the main differences —and perhaps *the* most important one to the defendants themselves, besides the right to legal defence— was the right to lodge an appeal against a verdict in an *ordinary* procedure and thus turn to a higher (provincial or supreme) court. As we have seen, the Grote Raad van Mechelen and its successor after 1582, the Hoge Raad, did not have to limit themselves to a procedural scrutiny; they could and did sometimes start a whole new investigation. Although even this category of defendants had great difficulties in resisting corrupt bailiffs, abuse of power by officials and other irregularities, they stood much more of a chance than their mobile counterparts.

As a last structural characteristic of early modern criminal justice – one that can be found all over Continental Europe —we should mention its procedural "fluidity": the fact that the boundaries between criminal and civil procedure or between the main types of criminal procedure were as yet less completely fixed than in later ages. The criminal trials of the early modern period (like those of modern times) are primarily distinguished from the civil ones by the fact that "the state" was actively involved and instigated the procedure —either in

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the person of the sheriff or bailiff at the local level, or of the prosecutor general at the level of the provincial court or Hoge Raad. In civil cases two (or more) private and basically equal parties confronted each other in court, asking the judges to help them reach a compromise or pronounce a verdict in favour of one party which had to be adhered to by the other party as well. The boundaries between civil and criminal procedures were less solid than now, however: elements of each could be combined, or transitional types of procedure could be followed which might change from civil to criminal and back again. Cases that looked intrinsically similar could be dealt with by civil procedure one time and by criminal one the next. A civil case could change into a criminal one, a criminal case could suddenly lose its criminal character, or criminal and civil charges could be combined in a case that had at first looked like a civil one[48]. This procedural fluidity *might* offer extra opportunities to the defendants —and in this respect the loopholes caused by procedural fluidity look very much like the ones caused by interjurisdictional rivalry. However, flexible 'rules' might be detrimental to the defendant's prospects and could also offer the courts and prosecutors more latitude to "come to grips" with a defendant. Jaco's case demonstrated both aspects.

The above sketch shows us the contours of a judicial system that not only manifested the fundamental inequality considered normal in early modern society, but actively propagated this inequality and served as an instrument in perpetuating it —a policy that was in the interests of the established and well-to-do citizens. In practice— contrasting this term with ideology and both contemporary and later ideals of justice —criminal justice and prosecution served primarily to come to grips with persons and groups who belonged to the lowest rungs of society and through their mobile way of life eluded (or looked as if they might elude) social control by the established part of

[48] For more information about the differences between these types of criminal procedure, see especially Jos MONBALLYU, "Het onderscheid tussen de civiele en de criminele en de ordinaire en de extraordinaire strafrechtspleging in het Vlaamse recht van de 16e eeuw" in Herman A. DIEDERIKS and Herman W. ROODENBURG (eds.), *Misdaad, zoen en straf. Aspekten van de middeleeuwse strafrechtsgeschiedenis in de Nederlanden*, Hilversum, Verloren, 1991, pp. 120-132, even though he primarily discusses the Southern Netherlands.

society. On account of their poverty defendants from these groups were unable to pay fines or damages, which meant they had to pay with the only things they possessed: body and liberty. In contrast, criminal justice and prosecution both protected and proffered legal rights to those who were expected as "people of quality" to keep themselves and each other from violating the norms and laws.

7. Conclusion

What precisely can these case studies tell us? Was criminal justice in the early modern Netherlands really that bad? At first sight it was. Considering both the structural inequality built into the system and the examples of extortion, corruption, and abuse of power discussed above —in which rivalry, political interests, and power games influenced (or even guided) both policy and verdicts of the higher courts— it is hard to avoid the conclusion that criminal justice in the Northern Netherlands between 1500 and 1800 was a corrupt and cruel instrument in the hands of the higher middle classes and elite. But that would be a partial misrepresentation. Above all it rests on a simplistic combination of *structural* characteristics (such as inequality before the law and concomitant class justice) and examples that are by definition *incidental*. Furthermore, it proceeds from the implicit assumption that these examples are representative, typical, normal. The assumption is false, and the typical is of no interest or value to us here in any case. These examples cannot —and in fact historical cases never can— be taken to be typical or representative in a statistical or quantitative sense: as if they represent *the* normal shape of things. That does not prevent them from being important, significant or illuminating, however. The case studies discussed above are special, unusual, and sometimes even transgressive/borderline examples which help us discover patterns, structures, boundaries and power relations that are at least half-hidden by ideologically informed views of history as all view of history, of course, are[49].

We can be brief about the 'normal' course of criminal justice and prosecution in the Northern Netherlands. As I have tried to show

[49] For an extensive discussion of these methodological issues see EGMOND and MASON, *The Mammoth...*

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elsewhere, more unity and uniformity existed in criminal justice in the Dutch Republic than one might expect given its enormous organisational and territorial fragmentation. An everyday criminal case did not, on the whole, proceed like the cases discussed above. Corruption and cruelty seem to have been —in so far as we can still trace them in the records— neither exceptional nor routine[50]. As long as we accept that legal inequality was considered normal and that current opinion accepted torture and corporal punishment in public, most criminal cases proceeded more or less according to the rules, and large numbers of sheriffs and bailiffs were not corrupt. The crux of the matter, of course, lies in the rules themselves: the fundamental legal inequality and the exemplary character of early modern criminal justice and prosecution. Since these core aspects of early modern justice were shared by all Continental European systems of justice (but not, or only partly, by Anglo-Saxon justice) whatever their organisational and procedural differences, in this respect the Dutch case may help us to discover issues that are of a much wider, Continental European relevance.

The individual abuse of power and transgressions of the rules by cruel and corrupt officials discussed in the case studies above reveal the weak areas of Dutch (perhaps even Continental European) criminal justice —its potential for corruption, the weak spots where things easily went wrong, those recurring situations in which it was easy and tempting to bend the rules or exceed the limits. They also reveal which officials could do so most easily and which persons or groups were their "natural" victims. Thereby they point to the rules and norms of a society which helped create or maintain such flaws, or at

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[50] It is impossible to specifiy corruption by courts and sheriffs in a quantitative sense —first because of the nature of the offence itself, second because of the exemplary character of early modern criminal justice and the fragmentation of judicial organisation, and third because the realy modern records are (as they always must be) incomplete. That is not so much of a problem as it may seem, because for the present article we do not need more than a general outline. At the same time I would like to call for more research concerning the meaning and nature of corruption, and the wide-ranging role of sheriffs and bailiffs in the early modern period.

least did not combat, mend, or improve them[51]. Some of the examples discussed above have a further dimension and are revealing in yet another sense because they became test cases and (looked as if they might) set precedents. Good examples are the cases of the bandit Jaco, the suspected sorceress Neeltjen and, to a lesser extent, bailiff De Witte. Test cases —whether they were intended as such or not— by definition explore the margins of legal (and other) categories. They are always exceptional. After all, no one needs a test case as long as ordinary and everyday matters are being dealt with. It is precisely because they explore the limits that such test cases are so revealing and significant. The people involved were very well aware of this. As we have seen, at least two of the cases discussed here had substantial consequences for the history of criminal prosecution and procedure in the Northern Netherlands.

Together these examples highlight a number of interesting and by no means incidental characteristics of Dutch criminal justice during the long period starting in the late Middle Ages and ending with the French Revolution. First, it is no coincidence that the rights of defendants were most seriously jeopardised in two types of situations: whenever adhering to those civic rights was going to subvert public order (or what was felt to be public order), as in the case of Jaco who claimed rights that were not meant for "his kind of people"; and whenever the limited degree of power held by the higher political and judicial institutions over the local courts and authorities —a phenomenon directly related to the enormous judicial and political fragmentation of the Netherlands —created opportunities for local bailiffs and sheriffs to become local autocrats who first and foremost served their own interests. The early modern higher courts and Estates General were by no means naive and they did acknowledge the problem, just as contemporary lawyers and politicians were aware of the strength of local particularism and its centrifugal effects. To what extent they acknowledged the problem emerges in salient fashion from the declaration by the Hoge Raad quoted above. This statement, after all, justi-

[51] For an extensive discussion of the question of historical 'clues' and Carlo Ginzburg's perspective on them, see EGMOND and MASON, *The Mammoth...*; and Florike EGMOND & Peter MASON, "A horse called Belisarius" in *History Workshop Journal*, 47, 1999, pp. 240-252.

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fied the role of the Hoge Raad itself as court of appeal in criminal cases by arguing that it could guarantee legal protection for private citizens *against* representatives of the same judicial system of which the Hoge Raad was a part.

Fears of a pending subversion of public order were even stronger. The 'tolerant' Dutch republic rested on foundations of social, economic, and judicial exclusion. Civil rights and privileges were a badge of distinction: some had them, others therefore did not. To possess or not to possess such rights was a constitutive characteristic of both identity and social status —in the case not only of individuals but also of groups, organisations and institutions. Right down to the years of the French Revolution early modern Dutch justice displayed a considerable number of traits more usually associated with the late middle ages —when rights were always limited according to time, place, and social group. As Robert Bartlett put it:

> "jural discontinuity or diversity was the presumption, not, as in the modern world, jural uniformity. People, places and times had their own distinctive legal status, recognized in law and custom. (...) In the Middle Ages equality before the law was as distant as the metric system or the Gregorian calendar"[52].

When it looked as if individuals were going to break out of the categories designed for them, thereby subverting public order in the most literal sense of the term, immediate attempts were made to reinstate and strengthen those boundaries, whether by legal or by economic, political, or violent means[53]. Order was restored.

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[52] Robert BARTLETT, *"Mortal enmities": the legal aspect of hostility in the middle ages*, Aberystwyth, Jones Pierce Lecture, 1998, pp. 2-3.

[53] This applied as much to an individual (Jaco) as to a group, institution, or town that tried to expand its privileges. The 18th-century local by-laws that reinforced the restrictions on the sale of specific types of textiles by Jews are interesting in this respect. These by-laws were proclaimed when it transpired that Jewish tradesmen had discovered some loopholes in legislation barring them from a whole range of economic activities (including owning land).

A second striking aspect of the cases discussed here is that persons who had been the victims of corruption and flagrant abuse of power by officials still had recourse to courts to right their wrongs. The farmer who had his own cattle stolen back from the sheriff and whose friends started a local riot nonetheless turned to the Court of Holland for restoration of his honour and damages. The locksmith from Alkmaar who wanted revenge, restoration, and payment of damages took his case all the way to the Grote Raad of Mechelen; Jaco's appeal went to the provincial Court of Holland and thereafter to the Hoge Raad. And these are just a few examples out of the dozens of such cases that can be found in the archives of the Grote Raad, Hoge Raad, and the provincial Court of Holland. We should not forget, however, that only well-to-do and established citizens —i.e. those who could count on an *ordinary* procedure including defence and appeal— turned to the higher courts and had any reason at all to trust in them[54]. The bandit Jaco was one of the very few non-respected private persons who managed to lodge an appeal with a higher court —and we have seen how it ended.

It would take a new investigation to discover to what extent these private citizens who lodged an appeal did indeed trust in the impartiality of the judiciary and believed in "justice". While not discarding that possibility, it might be useful to keep an open mind on this issue. On the one hand, interpreting their behaviour as a sign of trust fits in perfectly with a view of law and the judiciary as a means of resolving conflicts —a rather simplistic view, as we have seen. On the other hand it leads us to think that turning to the law means renouncing all other means— another simplification. Without influential witnesses who attested to Neeltjen's honour and good reputation, she would have been tortured and sentenced to death. Without the help of friends and relatives the locksmith from Alkmaar might just as well have dropped his case against bailiff Jan Gerytsz, and the farmer from

[54] We should not be naive, however, about alternative 'means' either: not everyone could start a feud or riot, manipulate factionalism, pull political strings, or enter into forms of *private violence*. I would not be at all surprised if those who did indeed have access to such forms of self-help belonged to roughly the same groups and social categories as those who were able to turn to the higher courts.

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Weesp would have never seen his cows again. All of this required both physical and social strength. No one who could not help himself (or herself), who was socially isolated, or lacked a network of friends, relatives and patrons could count on support by higher courts against powerful local bailiffs and other officials. In this respect civil rights mainly helped those who were able (to a certain extent) to help and protect themselves[55].

We can go one step further: to defendants legal means were just one more instrument, which could be combined with political, social and economic measures, and if necessary with violence as well. Such means were not at all mutually exclusive. An overspecialised (technical-juridical) approach to (historical) court cases has often made researchers blind to this mundane phenomenon, as well as to the fact that these cases are about the real lives of real persons and not only about their representations in juridical terms and contexts. The conclusion that the use of violence by defendants and the use of legal means by those same persons were by no means mutually exclusive, is in outright contradiction to the view that state formation (entailing conflict-solving by juridical rather than violent means) goes with an increasing state monopoly of the means of violence[56]. Recourse to the courts did not exclude the use of private violence. The case studies demonstrated, on the contrary, that physical action, violence, honour, and social force were of crucial importance within the juridical procedures themselves. Physical strength (the locksmith and the farmer) and physical endurance (Jaco) turned out to be extremely useful 'instruments' to coerce the courts to offer some form of justice rather than mere law[57].

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[55] *Cf.* the conclusions in BLOCKMANS, *Privaat en openbaar domein...*, p. 719, who does, however, only mention wealth as a requirement to be able to take legal action.

[56] There is a broad range of perspectives on state-formation: some argue that only organised forms of group violence were eventually monopolised by the state, others also include various forms of 'private' violence among those categories of violence that were eventually monopolised by the state.

[57] These conclusions support a point eloquently phrased and developed further by Robert BARTLETT: "The immediate and natural reaction of a twentieth-century mind is to relate the existence of enmity to the weakness of the state" ... , "To call the world in which enmity flourished stateless pre-

The considerable importance of physical and social strength and the fact that honour and reputation could be worth more than a defendant's life to him or her invite further reflection. The role and significance of the honourable witnesses testifying to Neeltjen's good reputation, who staked their own name and honour for hers— should remind us of the sworn assistants in medieval court cases, when 'reputation' could be much more important than what we now call evidence[58]. Furthermore, the defendants in the case studies discussed above remarkably often demanded first and foremost restoration of their honour and only then the payment of damages or other types of compensation. This was not just a matter of rhetoric. The crux of Neeltjen's whole campaign to clear her name was the fact that her reputation had been seriously damaged by rumour. She literally risked her life in order to regain her reputation. Justice, the restoration of honour, and finally compensation —those appear to have been the chief purposes of the defendants.

The fact that honour, reputation and social and physical strength played such key roles in these cases fits in very well with the exemplary character of contemporary justice in Continental Europe, and in a sense goes with the lack of juridical uniformity mentioned earlier. At the time no judicial authorities would try to act and prosecute in *every* instance of crime, in *every* case of corruption. It was normal to highlight only the most tell-tale and striking crimes in any defendant's confession, and to formally include only those in the indictment. The rest was not forgotten, but subsumed under the more striking ones, and thus remained 'below the surface'. In a similar way, no public authorities in early modern Continental Europe ever attempted to prosecute each and every person suspected of a crime. This had little to do with a lack of manpower or money, and even less so with negligence, but mainly with a different view of justice and the role of the

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supposes the traditional sociological characterization of the state as the monopolist of legitimate violence"... "There may be merit in at least considering a different picture, one which would stress that the violence of the state in the modern period can be seen not as public violence reborn but as private violence writ large". *Mortal enmities*..., pp. 13-14.

[58] In this respect comparison with legal systems outside Europe (especially Islamic and Chinese law) might be illuminating.

judiciary in which criminal procedure, trial, verdict, and punishment should be symbolically effective in an exemplary way rather than effective in a quantitative sense[59]. In this kind of context physical force, social strength and the efforts of friends and relatives —which all presuppose reputation and honour— were not a luxury but a necessity.

These considerations are no more than an attempt to historicise —or de-anachronise— notions of justice and the law. We need to take one further step while focusing on the concept of legal protection. This will also take us back to the differences between the British and the Continental European historical and historiographical contexts, and to the question of why connections between power and criminal justice could apparently be discussed more easily in the British context than in the Continental one. It is no coincidence that concepts such as civil rights and legal protection —in the sense of rights that set limits to the powers of the authorities— are extremely hard to translate from Dutch, German, French and perhaps other Continental European languages as well into English[60]. On the Continent judicial activities were and are generally dealt with in writing. That was not only the case with legislation but also with the privileges and duties of the public authorities as well as those of the 'citizens' or 'subjects'. The legal protection of individuals, groups and institutions was based —in general terms— on rights that had been written down. Privileges that had not been set down on paper did not exist, and unless a group, individual, or institution could point to such documents, the rights were all on the side of the state. The English context —again in general terms— was almost the opposite. The rights of individuals, groups, or organizations did not have to be put on paper in the shape of privileges or civil rights, because the basic situation was one of civil liberties. The public authorities could not act against their subjects unless *they* had the explicit right to do so. A written

[59] See COHEN, *op. cit.*

[60] Both systems have the same medieval roots, by the way. For an interesting discussion of some of the main differences between Anglo-Saxon and Continental legal traditions, see VAN CAENEGEM, *op. cit.*, esp. pp. 33-39. *Cf.* Donald KELLEY, *The human measure. Social thought in the Western legal tradition*, Cambridge Mass., Harvard University Press, 1990.

constitution was not (or less) needed in this context and precedent (i.e. jurisprudence, the example of judicial practice rather than legislation) formed an important guarantee for the rights of individuals.

It should set us thinking: an English historical tradition in which the rights of individuals came first and those of the state second, combined with an influential British historiographical tradition in the field of crime and justice dominated by a critical perspective from below that proceeds from practice to ideology. On the other side of the North Sea, in the Netherlands —and possibly in a much larger part of Continental Europe— we find a much less critical, top-down perspective in the relevant section of historiography, with an emphasis on the interests of the state, public order, and on ideology, rules and procedures rather than on practice. This historiographical top-down tradition is seamlessly connected with a historical tradition in which the rights of the state always had priority over those of the individual. This rather disturbing double parallel between historical systems of justice and power, on the one hand, and historiographical traditions, on the other hand, calls for more than reflection. At best, it should be subverted and deconstructed. At least, it provides one of the principal reasons why it is important to occasionally distance ourselves from our own traditions and try to look at the history of our own societies with the eyes of an 'outsider'[61].

[61] *Cf.* Carlo GINZBURG, *Occhiacci di legno. Nove riflessioni sulla distanza,* Milano, Feltrinelli, 1998; and Idem, *No island is an island. Four glances at English literature in a world perspective*, New York, Columbia University Press, 2000.