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Françoise Briegel, *Négocier la défense. Plaider pour les criminels au siècle des Lumières à Genève*. Geneva: Droz, 2013. 392 pp. Figures, notes, appendices, bibliography and index. €36.48 (pb.). ISBN 978-2-600-01618-6.

Review by Jeremy Hayhoe, Université de Moncton.

This book analyzes the political history of the right to counsel in criminal cases in Geneva during the eighteenth century. This story is relatively well-known in the case of England, thanks to the work of John Langbein and others.[1] It now seems clear, however, that over the course of the eighteenth century, Spain, Italy and Savoy all gradually allowed criminal defendants to be represented by an attorney. The Republic of Geneva followed a similar trajectory, despite the fact that legal procedure in large part followed that used in France, where no right to counsel existed until the Revolution.

The first chapter documents the history of lawyers in eighteenth-century Geneva and demonstrates that, while the Bar was not yet a potent political force, over half of the members of the Petit Conseil were lawyers. The Petit Conseil was both a judicial court and the main political body for the Republic, so the opinions of lawyers were well-represented within circles of power. The demand for legal representation in criminal cases arose within the context of debates over the fundamental laws of the Republic. The first main change allowing representation occurred in 1734 when the Conseils gave in to armed threats from the bourgeois *milice*, but that was the result of a case from 1709 where the Conseil had sentenced a bourgeois reformer to death for his role in fomenting sedition.

In accordance with standard inquisitorial procedure, that trial was not public, and in this instance he was executed quietly in prison in order to avoid scandal. This convinced many of the bourgeois that criminal justice needed to become more open, that the accused needed access to the documents of the trial, and that representation was a necessity. The law of 1734 allowed the use of a lawyer for all major criminal cases, although the first accused criminal to invoke the right had to fight very hard to have his lawyer. A new law in 1738 clarified the situation considerably, and other changes were implemented in the second half of the century. One loophole allowed magistrates to choose whether to judge a case summarily (Petit Criminel). That was important given that lawyers were only allowed when regular, Grand Criminel procedure was applied. A case against a certain Charles Pictet, the author of a seditious pamphlet, led to a procedural reform in 1768 allowing the accused to insist on being tried by using the procedure of Grand Criminel rather than leaving this decision to a judge's discretion. This was confirmed by an edict in 1782 that also allowed those who had been accused and found innocent to claim damages from the government.

The extension of the right to counsel in Geneva sprang out of concrete cases perceived as evidence of abuse and led to change when reformers were backed by armed mobilization in the streets. Briegel argues, however, that by the 1780s, there was a broad consensus around the issue. In 1782, with the overt support of France and at a time when the opposition was weak, the government considerably reduced the political rights of Genevans. With respect to the rights of criminals, however, not only did the reforms not reduce the right to counsel, they actually increased the publicity of criminal trials.

The third chapter is a long discussion of the rights of accused criminals, explaining the seven major changes that occurred over the course of the eighteenth century. Much of this chapter deals with material covered in other parts of the book, such as the choice of Petit or Grand Criminel procedures, the publicity of trials and even the right to counsel. There are a few new elements here, such as a discussion of the abolition of judicial torture (*la Question*) successively in 1734 and 1782 and the right of pardon exercised by the Grand Conseil. This chapter might work well on its own, but as it stands much of it seems redundant. It ably demonstrates, however, that the reforms were in large part based on a desire by Geneva's citizens and bourgeois to limit the arbitrary power of the Petit Conseil and to create a state governed by the rule of law.

How did the right to counsel work in practice? In the most interesting part of the book, Briegel uses the registers of the Petit Conseil from 1734 to 1792 to find all criminal cases where the accused availed themselves of the services of a lawyer. It turns out that very few people invoked their right to counsel: only 107 of 948 people accused of major crimes, or about 11 percent. Those accused of property crimes were most likely to do so (38 percent), followed by crimes against persons (25 percent), while only 6 percent of those brought up on morals charges used a lawyer. The rarity of recourse to counsel is partly explained by financial considerations. Even though the poor were to be defended for free, the cost of having copies made of the documents could be very high. Accused criminals sometimes deferred their decision until they had consulted a lawyer or seen the evidence, at which point they might conclude that they were better off throwing themselves on the mercy of the court.

The most interesting reason people did not choose to have a lawyer (and the phenomenon that gives the book its title) is that litigants and the court frequently engaged in a kind of plea bargain where the accused received a reduced sentence in return for what amounted to a guilty plea, namely agreeing not to ask for legal representation. There is no "smoking gun" evidence for this practice, presumably because this type of negotiation was illegal, but Briegel presents some suggestive examples. One criminal did describe such negotiations, but he was almost certainly exaggerating the clarity of the quid pro quo (complete freedom in return for his cooperation). It does seem clear, however, that judges and criminals alike interpreted the decision to forego legal representation as an expression of confidence in the court, and criminals expected that judges would take this into account.

While *Négocier la défense* is not an easy read, especially for historians who are, like this reviewer, relatively unfamiliar with the political and institutional history of Geneva in the eighteenth century, it is an important book. In a system characterized by much overlap between legislative and judicial power, much of the energy of the reforming and liberal factions was devoted to extending the rights of accused criminals in order to ensure that the Petit Conseil could not abuse its judicial power to silence the opposition. Reformers championed the cause of people arrested in times of trouble for their political activism. The concessions made in these trials subsequently became the norm, enshrined in law, including the right to counsel and the presence of family members at the trial. Briegel demonstrates the complex and reciprocal relationship between norms and practice and admirably sets ideas within their political context.

NOTE

[1] Among Langbein's many works on the subject, the most directly relevant is John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003). See also John M. Beattie, "Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries," Law and History Review 9:2(1991), 221-267.

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