

The Practice of Criminal Law by the Supreme Court in the Austrian *Vormärz*.

A Workshop Report¹

„Die Züchtigung ist zur Beßerung von bester Wirkung und macht gegen alle andern muthwilligen übelgesinnten Verbrecher dieser Art einen weit größeren Eindruck als die Straf Dauer besonders in dortiger Gegend.“

(Judge Carl von Conci von Tres und Mollarburg, on the high value of corporal punishment as compared to long-term punishment, particularly in the southern parts of the Tyrol)

1. Introduction

The history of criminal law in the Habsburg Monarchy in the period between the Vienna Peace Congress in 1815 and the March Revolution of 1848 (hereafter the *Vormärz*) has basically received only brief treatment in the relevant literature; it is mostly portrayed as a time of stagnation in contrast to the post-1848 period, with its fundamental reforms in the field of criminal and especially procedural law². There has been little reflection as to the further impact of enlightened discourse and ideas in this field, and possible lines of continuity in the second half of the nineteenth century are not discussed. Research on the development of criminal law prior to the 1848 Revolution is strikingly lacking, compared to the rich literature of the criminal law reform projects of enlightened absolutism. Up to now scholars have concentrated on the formation of the criminal law codifications of the eighteenth and early

¹ The authors would like to thank the Anniversary Fund of the *Oesterreichische Nationalbank (OeNB)* for promoting the research project “*Rechtstatsachen im Vormärz. Strafrechtsjudikatur der Obersten Justizstelle*” (project-number: 16346), the Austrian State Archives for their permission to digitalise the council minutes and Dr. Laurie R. Cohen for the translation of the grant application, which was the basis for this text.

² F. HARTL, *Grundlinien der österreichischen Strafrechtsgeschichte bis zur Revolution von 1848*, in: *Die Entwicklung der österreichisch-ungarischen Strafrechtskodifikation im XIX-XX. Jahrhundert*, ed. by G. MÁTHÉ/W. OGRIS, Budapest 1996, p. 13–54, here: p. 44–47.

nineteenth centuries³. Therefore, apart from this tracing of the normative development, little research in Austria has appeared that extends this view to the practice of criminal law⁴. Even recent research on the history of criminality (*Historische Kriminalitätsforschung*), which tends to rely strongly on empirical sources such as court files, has still been unable to fill in the gap of genuine juridical criminal law history in the Austrian sphere⁵.

Indeed, works on the *Vormärz* judicature are rare; the few that do exist are limited to private law, such as the research conducted by (now emeritus) Professor Christoph Faistenberger of the University of Innsbruck in the mid 1990s: namely, the examination of civil law decisions by the *Oberste Justizstelle* (Supreme Judicial Authority, SJA). Professor Monika Niedermayr too has carried on this work and has published various books and articles concerning this matter⁶.

Given the current inadequate status of research, an extensive examination of criminal law in the first half of the nineteenth century and especially of its criminal law judicature, is a major desideratum for Austrian legal history. Italian and German historiography, by contrast, is more advanced, having expanded its research fields to include legal facts within the area of criminal law⁷. The works of Francesca Brunet⁸ and Loredana Garlati⁹ are examples which

³ C. NESCHWARA, Franz Zeiller und das Strafrecht: Seine Ambitionen zur Verbesserung des Österreichischen Strafgesetzes von 1803, in: *Revista Chilena de Historia del Derecho* 22/1, 2010, p. 363–388. F. HARTL, Grundlinien (*supra*, n. 1). H. HOEGEL, Geschichte des Österreichischen Strafrechts. 1.+2. H. Wien 1904–1905. G. MÁTHÉ/W. OGRIS, Die Entwicklung der österreichisch-ungarischen Strafrechtskodifikation im XIX-XX. Jahrhundert, Budapest 1996. H. RÜPING, Grundriss der Strafrechtsgeschichte (Schriftenreihe der Juristischen Schulung 73), 6. Auflage, München 2011. M. STEPPAN, Die österreichische Strafrechtsentwicklung im mitteleuropäischen Konnex, Graz 2002. S. VINCIGUERRA/S. AMBROSIO (Ed.), Codice Penale Universale Austriaco (1803) (Casi, fonti e studi per il diritto penale Serie 2, Le fonti 18) Padova 2001.

⁴ E. SCHMIDT, Einführung in die Geschichte der deutschen Strafrechtspflege (Jurisprudenz in Einzeldarstellungen 1), 3. Auflage, Göttingen 1995. F. HARTL, Das Wiener Kriminalgericht. Strafrechtspflege vom Zeitalter der Aufklärung bis zur österreichischen Revolution (Wiener Rechtsgeschichtliche Arbeiten 10) Wien-Köln-Graz 1973. H. HOEGEL, Freiheitsstrafe und Gefängniswesen in Österreich von der Theresiana bis zur Gegenwart, Graz 1916. G. JEROUSCHEK, Strafverfolgung und Staatsraison. Deutsch-ungarische Beiträge zur Strafrechtsgeschichte (Rothenburger Gespräche zur Strafrechtsgeschichte 6) Gießen 2009. R. MOOS, Der Verbrechensbegriff in Österreich im 18. und 19. Jahrhundert. Sinn- und Strukturwandel (Rechtsvergleichende Untersuchungen zur gesamten Strafrechtswissenschaft N.F. 39) Bonn 1968.

⁵ Cf. the overview by G. SCHWERHOFF, Historische Kriminalitätsforschung (Historische Einführungen 9) Frankfurt a. M. 2011. For Austria, Martin Scheutz's works (which however mostly concern the eighteenth century) are particularly relevant; cf., for instance, M. SCHEUTZ, Alltag und Kriminalität. Disziplinierungsversuche im steirisch-österreichischen Grenzgebiet im 18. Jahrhundert (Mitteilungen des Instituts für Österreichische Geschichtsforschung, Ergänzungsband 38) Wien-München 2001.

⁶ C. FAISTENBERGER/M. NIEDERMAYR, Ratsprotokolle oberste Justizstelle Tyrol.-Vorarlberg. Senat 1814-1844, Band 1-5, Innsbruck 2003–2010. As part of a research project financed by the Austrian National Bank, headed by Monika Niedermayr, a sixth volume has also appeared: R. OBERHUMMER, „Civil Streitacten zwischen Michäl Pfurtsceller und Anna Maria Heilig verwittwete Schmied pto Rechnung. Vom Landgericht Bregenz über das Appellationsgericht Innsbruck bis zur Obersten Justizstelle in Wien: Darstellung und Erläuterung eines alle drei Instanzen durchlaufenden tirolisch-vorarlbergischen Zivilrechtsaktes aus den Jahren 1827 und 1828 (Ratsprotokolle oberste Justizstelle Tyrol.-Vorarlberg. Senat 1814-1844, Band 6) Innsbruck 2012.

⁷ E. DEZZA, Der Feind der Wahrheit. Das Verteidigungsverbot und der Richter als „Faktotum“ in der habsburgischen Strafrechtskodifikation (1768-1873), in: E. DEZZA/L. GARLATI, Beiträge zur Geschichte der habsburgischen Strafgesetzgebung in Italien. Mit einem Anhang: Cesare Beccarias Gutachten zum Allgemeinen

illustrate the analytical potentials of *Vormärz* trial records as primary sources. The analysis of the court records of the appellate courts of Brescia (in today's Lombardy) has resulted in notable insights as regards the judges' considerable latitude in decision-making, in spite of the prohibition against reasoning by analogy and the rigid rules of evidence. What is even more remarkable is that Brunet and Garlati deal with the Criminal Code of 1803 passed under Francis II (*Französisches Strafgesetzbuch*), which was also the normative basis of the SJA's jurisdiction.

2. Research topic

A voluminous and comprehensive archival holding of the Supreme Judicial Authority, which had been created in 1749 in Vienna as the highest court of the civil and criminal jurisdiction of the Habsburg Monarchy and which later merged into the Supreme Court¹⁰, is this research project's main primary source.

Until the SJA was dissolved in 1848, several senates of judges, who had fields of competence in different geographical areas, carried out the administration of justice. However, the documentation they produced, including the Council Minutes (*Ratsprotokolle*), was almost entirely eradicated in a major fire that destroyed the Palace of Justice in Vienna in

Gesetzbuch über Verbrechen und Strafen aus dem Jahre 1791, ed. by T. VORMBAUM (Rechtsgeschichte und Rechtsgeschichten 24) Berlin 2010, p. 31-87. L. GARLATI, Das Gericht als Interpret der Gerechtigkeit. Die Anwendung des Strafgesetzbuchs von 1803 im Königreich Lombardo-Venetien, in: DEZZA/GARLATI, Beiträge (*supra*), p. 89–102. E. DEZZA, Die habsburgische Strafgesetzgebung und die politischen Prozesse im Königreich Lombardo-Venetien, in: DEZZA/GARLATI, Beiträge (*supra*), p. 103–121. T. VORMBAUM, Einführung in die moderne Strafrechtsgeschichte, 3. Auflage, Berlin 2015. T. VORMBAUM, Der strafrechtliche Schutz des Strafurteils. Untersuchungen zum Strafrechtsschutz des strafprozessualen Verfahrenszieles (Münster Beiträge zur Rechtswissenschaft 22) Berlin 1987.

On the level of the Empire, there has been research on the Imperial High Court and the Aulic Council as the highest courts of the Holy Roman Empire. This led in 1985 to the founding of the “*Gesellschaft für Reichskammergerichtsforschung e. V.*” which included an associated research office, and then in 1996 to the founding of the network “*Reichsgerichtsbarkeit*”. See: <http://www.reichskammergericht.de/index.htm> and <http://www.netzwerk-reichsgerichtsbarkeit.de/>.

⁸ F. BRUNET, Pena di morti e grazia sovrana ne Regno Lombardo-Veneto (1816-1848), PhD thesis Innsbruck 2013. F. BRUNET, Die Begnadigungen der Hochverräter im vormärzlichen Lombardo-Venetien: politische und kommunikationstheoretische Perspektiven, *Römische Historische Mitteilungen*, 53 (2011), p. 303–314. F. BRUNET, L'attivazione del giudizio statario nelle province lombarde durante il Vormärz, in: *Forme e pratiche di polizia del territorio nell'Ottocento preunitario*, ed. by S. MORI/L. TEDOLDI, Soveria Mannelli (Cz) 2011, p. 177–201. F. BRUNET, Donne assassine. Considerazioni di genere nei processi penali lombardo-veneti, *Geschichte und Region/Storia e Regione*, 20/2 (2011), p. 126–142.

⁹ GARLATI, Das Gericht, (*supra*, n. 7).

¹⁰ The most relevant works on the Supreme Judicial Authority are: F. MAASBURG, *Geschichte der obersten Justizstelle in Wien (1749-1848)*, Prag 1879. G. KOCHER, *Höchstgerichtsbarkeit und Privatrechtskodifikation. Die Oberste Justizstelle und das allgemeine Privatrecht in Österreich von 1749-1811 (Forschungen zur Europäischen und Vergleichenden Rechtsgeschichte 2)* Wien-Köln-Graz 1979. G. KOCHER, Wien und die Oberste Justizstelle, in: *Bericht über den vierzehnten österreichischen Historikertag in Wien, veranstaltet vom Verband Österreichischer Geschichtsvereine in der Zeit vom 3. bis 7. April 1978*, ed. by vom Verband Österreichischer Geschichtsvereine, Wien 1979, p. 197–203.

1927. Today, those records that were saved from destruction are mostly preserved as so-called *Brandakten* (arson files) in the section of the General Administrative Archives (AVA) of the Austrian State Archives (OeStA) in Vienna. The files produced by the senates of judges responsible for the Tyrol and the Vorarlberg remained intact, as did the files for the Kingdom of Lombardy-Veneto, and this is the most important legacy of this court of justice. The district of the *Tiroler Senat* (Tyrolean Senate) comprised, apart from the Vorarlberg, the Tyrol (the current region of North Tyrol as well as today's Italian provinces South Tyrol and Trentino). The relevance of this holding is increased by the fact that most of the corresponding first-instance criminal law proceedings for the investigated time period were discarded or destroyed inadvertently; similarly, those of the appellate court were entirely disposed of during the Second World War.

The main focus of this project are the thirteen boxes of files of the *Tiroler Senat*, starting with the year 1814, following the territorial upheavals in the wake of the Napoleonic expansion, as the region was again incorporated into the Habsburg Monarchy. The last documents are dated 1844, what can probably be explained by the fact that the following cases were transferred into the registry of the Supreme Court (*Oberster Gerichtshof*) on the occasion of its foundation in the years 1848–1850.

The holdings comprise trial records that involve among others the capital offences of high treason, of abuse of office and of producing counterfeit money. For these offences there was a general obligation of presentation to the SJA, which would then decide on the basis of merit¹¹. Likewise, the SJA delivered a judgement if a decision by the appellate court (the Criminal High Court in Innsbruck) strongly deviated from the sentence passed by the first-instance court (id est the district court with the competence to decide on criminal matters) or if death penalty or a sentence of life imprisonment was imposed¹². Furthermore, any appeals brought forward by the convicted or by their next of kin against the appellate court sentences were passed on to the SJA; the same was true for all supplications¹³. All death sentences had to be submitted to the emperor by the SJA with a rationale, along with all the documentation, so that the monarch could make use of his pardoning rights¹⁴. (See also p. 10)

The highest court decisions included the original judgements, which may still be found in the relevant Austrian and Italian archives. It is thereby possible to trace for the first time the differing practices of sentencing by the courts and each stage of appeal.

¹¹ § 442 StGB 1803.

¹² § 443 StGB 1803.

¹³ §§ 462–470 StGB 1803.

¹⁴ § 444 StGB 1803.

With this project, files that until now have been entirely unanalysed and yet are significant for the history of Austria's criminal justice shall be comprehensively considered and evaluated by trial analysis. At the same time the practice of criminal law shall be contrasted with the legal norms of that time – the Criminal Code of 1803 passed under Francis II, which as of 1814 was valid in the Vorarlberg and in the Tyrol, and numerous decrees – and shown in its relation to contemporary criminal jurisprudence literature.

3. Research questions and aims

The central questions of the project aim at gaining insight into the judicial practice of sentencing, into the reciprocal influence and differences between court practices and contemporary criminal law theory, and into the importance of supplications and the thus concomitant role of the emperor. In addition, the extent to which socioeconomic conditions of the defendants are reflected in the trials will be examined.

3.1. Judicial application of the law

The comprehensive analysis of the criminal law judicature should allow us to grasp *both* whether and to what degree the catalogue of the Criminal Code passed under Francis II, then in force and heavily aimed at deterrence and retribution, was actually applied in practice *and* which in-house legal argumentative strategies were discursively developed in single cases and used for substantiating a sentence¹⁵. Attention shall be turned particularly to the question of the extent of the judicial personnel's latitude of action and decision-making in the face of a narrow judicial framework within which it had to manoeuvre and reach its verdicts. This concerns namely the technique of subsumption, the consideration of motives for mitigating or aggravating the sentences and questions of a narrow or broad legal interpretation – which is of particular interest if we take into account that as of 1787 any reasoning by analogy was prohibited. In this context it is equally necessary to establish whether the jurisdiction of certain offences had a standardising effect and whether certain legal rights were perceived as particularly worthy of protection. May a continuing legal education of judges be perceived, especially on the level of the SJA, which Garlati believes she detects in the sources from Brescia's appellate court¹⁶?

¹⁵ See here also GARLATI, *Das Gericht*, (*supra*, n. 7), especially p. 92–98.

¹⁶ GARLATI, *Das Gericht*, (*supra*, n. 7), p. 98.

Attention shall be devoted as well to the judge's dealings with the strict rules of formal law. For example, with only circumstantial evidence to go on, the assessment of proof could be extremely difficult.

A statistical analysis will be undertaken regarding the percentage of judgements in first and second instance cases that were confirmed or modified and whether in the latter case the lower courts were reprimanded by the SJA and whether instructions were issued for future practice¹⁷.

3.2. Jurisdiction and the contemporary theory of criminal law

An additional question involves the reciprocal influences and differences between the practice of sentencing and the theory of criminal law at that time, particularly as regards the Austrian literature on criminal law.

Influenced by the writings of legal scholars Paul Johann Anselm von Feuerbach and Joseph von Sonnenfels, criminal law theory at the beginning of the nineteenth century was marked by a combination of thoughts on retribution and general prevention. Up until the middle of that century, according to today's tenor of research, no noteworthy new approaches had emerged, because jurisprudence was entirely conditioned by positivism.¹⁸ It has also been speculated that the "Age of Metternich" (*System Metternich*) had a big influence, resulting in the absence of voiced critical opinions due to political pressure, particularly censorship¹⁹. The research assumptions tersely described here need to be verified in the face of the SJA's practice of criminal law.

In this context, it is important to examine, especially based on contemporary legal literature, whether these attributions are correct and whether any differences may be revealed compared to legal practice.

3.3. Supplications, the practice of pardons and the role of the emperor

The importance of supplications and of the practice of pardons has received intensive attention over the past years by the *Historische Kriminalitätsforschung*, particularly in

¹⁷ GARLATI, Das Gericht, (*supra*, n. 7), p. 102.

¹⁸ VORMBAUM, Einführung, (*supra*, n. 7), p. 67.

¹⁹ HARTL, Grundlinien (*supra*, n. 2), p. 45.

reference to early modern times²⁰. The granting of pardons based on humble petitions was recognised as a frequently applied tool that adapted the normative frame to the circumstance of an individual case; indeed, it contributed substantially to explaining the regularly ascertainable discrepancy between extremely strict threats of punishment on the normative level and milder judicial practice. The archival holdings of the SJA contain numerous supplications, which will be investigated in detail. One must examine inter alia: The persons who submitted the petitions and the patterns of argumentation used; their chance of success; and possible lines of continuity that may be traced back to early modernity. In this way, special attention will be addressed to the long-term prison and death penalty sentences passed by the Supreme Court. According to the Criminal Code passed under Francis II, high treason, insurrection, producing counterfeit money, arson, manslaughter and murder were punished by the death penalty, which had been reinstated in 1795 due to the emperor's explicit suggestion²¹. Nonetheless, close to two-thirds of the death sentences were not carried out, according to the current status of research²². The project will investigate in more detail the opinions of the court for the imposition of sanctions and the emperor's motives to grant pardon or to mitigate the sentences.

Furthermore, apart from the statutory possibilities for an emperor's interference, other potential impacts on the decision-making will be explored. Although interventions by the emperor in the course of justice in civil cases (his *Machtsprüche*) have not yet been

²⁰ Cf. K. HÄRTER, Das Aushandeln von Sanktionen und Normen: Zu Funktion und Bedeutung von Supplikationen in der frühneuzeitlichen Strafjustiz, in: *Bitschriften und Gravamina. Politik, Verwaltung und Justiz in Europa (14.–18. Jahrhundert)* (Schriften des Italienisch-Deutschen Historischen Instituts in Trient 19), ed. by C. NUBOLA/A. WÜRGLER, Berlin 2005, p. 243–274. K. HÄRTER, Strafverfahren im frühneuzeitlichen Territorialstaat: Inquisition, Entscheidungsfindung, Supplikation, in: *Kriminalitätsgeschichte. Beiträge zur Sozial- und Kulturgeschichte der Vormoderne (Konflikte und Kultur – Historische Perspektiven 1)*, ed. by A. BLAUERT/G. SCHWERHOFF, Konstanz 2000, p. 459–480. M. P. SCHENNACH, Supplikationen, in: *Quellenkunde der Habsburgermonarchie (16.–18. Jahrhundert). Ein exemplarisches Handbuch (Mitteilungen des Instituts für Österreichische Geschichtsforschung, Ergänzungsband 44)*, ed. by J. PAUSER/M. SCHEUTZ/T. WINKELBAUER, Wien-München 2004, p. 572–584, here p. 577. A. BAUER, Die Gnadenbitten in der Strafrechtspflege des 15. und 16. Jahrhunderts unter besonderer Berücksichtigung von Quellen der Vorarlberger Gerichtsbezirke Feldkirch und des Hinteren Bregenzerwaldes (Rechtshistorische Reihe 143) Frankfurt a. M. et al. 1996, p. 207. W. HÜLLE, Das Supplikenwesen in Rechtssachen. Anlageplan für eine Dissertation, *Zeitschrift der Savigny-Forschung für Rechtsgeschichte, Germ. Abt.* 90 (1973), p. 194–212, here p. 194 and p. 197–198.

²¹ G. AMMERER, Das Ende für Schwert und Galgen? Legislativer Prozess und öffentlicher Diskurs zur Reduzierung der Todesstrafe im Ordentlichen Verfahren unter Joseph II. (1781-1787) (Mitteilungen des österreichischen Staatsarchivs, Sonderband 11) Wien 2010, p. 417.

²² SCHMIDT, Einführung, (*supra*, n. 4), p. 258. In all of the Habsburg lands in this period, excluding Lombardy-Veneto, there were apparently 1,304 death sentences meted out in ordinary court procedures, of which merely 448 were carried out. See: A. VON DOMIN-PETRUSHEVECZ, *Neue österreichische Rechtsgeschichte*, Wien 1869, p. 305.

detected²³, they may emerge in the criminal cases. To be analysed is also whether the change of government in 1835 represented a turning point in this respect.

3.4. Statistical analysis – social and economic conditions

Historical research has meanwhile discovered court documents to be a rich pool of primary sources for questions of social history. In the trial records, among other things, socioeconomic situations, margins of manoeuvre by the defendant or social and kinship networks come to light.

This is also important for the present project, because the trial records shall be assessed not only statistically according to offences charged, to age, to gender, and to the offenders' social and geographical backgrounds – whereby these categories shall be set in relation to the proportion of convictions and acquittals – but beyond that, certain individual cases that are revealed by the sources to be particularly significant shall be subjected to a more detailed analysis and account. Since the court documents always only mirror a socially and politically distorted impression of reality, the perception of “nationalities” in this context – both German-speaking and Italian-speaking persons were accused – may be particularly fruitful: It has been claimed fairly often and also confirmed for the civil jurisdiction that there were relatively more trials in the Italian-speaking regions in the territories of the Tyrol²⁴. It is also necessary to investigate whether certain population groups were discursively attributed unique qualities and whether these might have had impacts on the trials' outcomes.

4. Methods

To arrive at the aims of this project, broad perspectives are of central importance, reaching beyond the purely normative level and into the practice of criminal law. This may be done by taking up empirical legal research as well as historical research on criminality. To this end, the first step is to examine the criminal law records of the *Tiroler Senat* of the SJA, which are stored – as mentioned above – in Vienna's Austrian State Archives (OeStA) in the section of

²³ M. NIEDERMAYR/R. OBERHUMMER, C. Peer, Ratsprotokolle der Obersten Justizstelle, in: H. BARTA/C. LEHNE/M. NIEDERMAYR/M. SCHENNACH (Ed.), *Kontinuität im Wandel. 200 Jahre ABGB (1811–2011)*, Innsbruck 2012, p. 21–42, here: p. 31–32.

²⁴ A. MAGES, *Die Justizverwaltung in Tirol und Vorarlberg in den letzten hundert Jahren*, Festschrift zur Eröffnung des neuen Justizgebäudes in Innsbruck, Innsbruck 1887, p. 106–107. M. LAICH, *Zwei Jahrhunderte Justiz in Tirol und Vorarlberg*, Innsbruck-Wien-Bozen 1990, p. 75. NIEDERMAYR ET AL., *Ratsprotokolle*, (*supra*, n. 23), p. 25.

the General Administrative Archives (AVA). There one finds thirteen boxes, which contain an estimated 1,300 individual cases and which are ordered alphabetically according to the initials of the offender²⁵. Next, the judgements of the courts of first instance shall be added; these may be found in the Austrian and Italian archives of Innsbruck, Bregenz, Bolzano and Trento. The unearthed trial documents shall be summarised in the form of registries (*Regesten*) (a list of records of documents ordered chronologically that include short summaries of the documents) by taking into account the research questions addressed; their key data shall be recorded in a database, which shall enable statistical analysis. Thereafter they shall be compared to the legal norms in force at that time. Meanwhile, the contemporary legal discourse especially in Austria shall be integrated, which shall be achieved not only by considering numerous monographic writings – by way of example we shall only mention here the commentaries to the Criminal Code by Johann Borschitzky²⁶, Anton Hye²⁷, Karl Indermauer²⁸ or Sebastian Jenull²⁹ – but also by documenting the rich criminal law literature in the juridical journals of the time³⁰.

²⁵ AT-OeStA/AVA Justiz OJSt JS TS 170-182.

²⁶ J. BORSCHITZKY, *Handbuch des österreichischen Gesetzes über Verbrechen vom 3. September 1803. Mit allen auf dieses Fach Bezug nehmenden Verordnungen, Erläuterungen und sonstigen Hilfsquellen versehen*, Prag 1815.

²⁷ A. HYE, *Das österreichisches Strafgesetz über Verbrechen, Vergehen und Übertretungen, und die Preßordnung vom 27. Mai 1852, Bd. 1*, Wien 1855.

²⁸ K. INDERMAUER, *Handbuch des österreichischen Straf-Rechtes, Enthaltend: den Text des Strafgesetzes vom 3. September 1803 I. und II. Theil, mit Ausschluß des Verfahrens, eingetheilt nach der Competenz der Gerichte gemäß der neuen Strafprozeß-Ordnung vom 17. Jänner 1850, und versehen mit den wichtigsten einschlägigen Verordnungen und Patenten bis auf die neueste Zeit, nach ihrem wesentlichen Inhalte*, Innsbruck 1850.

²⁹ S. JENULL, *Das Oesterreichische Criminal-Recht nach seinen Gründen und seinem Geiste, Teil I-IV*, Wien 1808–1809 (Neudruck: Wien 1837).

³⁰ *Jährlicher Beytrag zur Gesetzeskunde und Rechtswissenschaft in den österreichischen Erbstaaten I-IV*, ed. by F. VON ZEILLER, 1806–1809. *Materialien für Gesetzeskunde und Rechtspflege, in den Oesterreichischen Erbstaate I-VIII*, ed. by C. J. PRATOBEVERA, 1814–1824. *Archiv für wichtige Anordnungen in den k.k. österreichischen Staaten über Criminal- und Civiljustiz für merkwürdige Rechtsfälle mit denen Entscheidungen der Gerichtshöfe nebst Abhandlungen und literarischen Nachrichten 1-7*, ed. by J. C. VON WAGERSBACH, 1814–1820. *Zeitschrift für österreichische Rechtsgelehrsamkeit und politische Gesetzkunde* (from 1846 onwards: *Österreichische Zeitschrift für Rechts- und Staatswissenschaft*), jährl 3 Bde., ed. by V. A. WAGNER, later on by: T. DOLLNER, J. KUDLER, M. J. FRÄNZL, M. VON STUBENRAUCH, ET AL., 1825–1849. *Themis* (für Rechts- und Staatswissenschaften) I-III, NF I-VIII, *Neueste F I-II*, ed. by J. WESSELY, 1835–1849. *Archiv für Civil-Justizpflege, politische und cameralistische Amtsverwaltung in den deutschen, böhmischen, galizischen und ungarischen Provinzen des österreichischen Kaiserstaates I-III, NF I*, ed. by F. J. SCHOPF, 1837–1846. *Rechtsfälle aus dem österreichischen Civil- und Kriminalrechte, ab 1837* (hg. von Joseph Tausch). *Beiträge zur Kriminalrechtswissenschaft mit besonderer Rücksicht auf das österreichische Kriminalrecht 1-4*, ed. by A. VISINI, 1839–1843. *Der Jurist, eine Zeitschrift vorzüglich für die Praxis des gesammten österr. Rechtes 1-19*, ed. by I. WILDNER, 1839–1849. *Central-Organ für die Civil- und Criminal-Gerichtspflege politische und cameralistische Amtsverwaltung im constitutionellen Geiste in den deutschen, böhmischen und galizischen Provinzen I*, ed. by F. J. SCHOPF, 1849. Cf. W. BRAUNEDER, *Juristische Fachzeitschriften in Österreich/Cisleithanien als Zeichen rechtlicher Zäsuren in der zweiten Hälfte des 19. Jahrhunderts*, in: *Juristische Zeitschriften in Europa* (Studien zur europäischen Rechtsgeschichte 214), ed. by M. STOLLEIS, T. Simon, Frankfurt a. M. 2006, p. 287–309.

5. First results

During the initial phase of the project the court records were digitalised in the Austrian State Archives in Vienna. At the same time the database was established to insert the key data and case registries. During the first months it was possible to look through two boxes of the stored files of the *Tiroler Senat* of the SJA which allowed for the carrying out of the first statistical analyses.

Until the end of December 2015 more than 2,000 pages of the digitalised sources (about 15% of the files to be examined) were processed. This regarded 183 individual court files: sentences, decisions on appeals or supplications and inter-administrative correspondence. The important information (parties, facts of a case, legal questions) and detailed registries were entered into the database.

Among these files there were 122 which either confirmed or modified sentences from the lower courts. A criminal case would be submitted to the SJA: 1) due to the general statutory obligation of having to present certain capital offences (high treason, abuse of office and producing counterfeit money); 2) when the lower court passed a death penalty or a life imprisonment sentence; and 3) by way of appeal when a decision of the appellate court strongly deviated from the first-instance court, whereby approximately 50% of these appeals were dismissed by the SJA.

The files also contained 82 supplications and some inter-administrative correspondence: for example, recommendations by the judges regarding the dismissal of officials after criminal proceedings; or notes, such as announcements of judgments by the military courts.

The contents of the processed court records cover a broad range of cases and promise to be of great significance for the research on the practice of criminal law in the *Vormärz*. It has already become clear that it will be possible to answer the project-related questions. Moreover, we also expect to gain further knowledge.

The following table shows the criminal offences that have appeared so far in the processed decisions of the SJA (total: 163). The total number of offences is larger than the number of cases for two reasons: sometimes, defendants were tried for more than one offence; and some proceedings took place against multiple defendants. This statistical analysis does not include cases in which the SJA did not decide on the subject matter (for example, when the Criminal High Court in Innsbruck was the competent court) or when a supplication was submitted against a sentence from before 1814.

The high percentage of the offence of “abuse of office” (*Mißbrauch der Amtsgewalt*) (35%), which also includes cases of “incitement to abuse an office” (*Verführung zum Mißbrauch der Amtsgewalt*), can be explained by its qualification as a capital offence which always had to be presented to the SJA. Moreover this offence was committed very often, as even an offer of a very small amount of money to an official fulfilled the *actus reus*. It is noteworthy that a lot of these crimes were associated with contrabands, especially in the area of the Vorarlberg, where the caught smugglers offered border guards money for their release.

crimes	quantity
abuse of office (<i>Missbrauch der Amtsgewalt</i>)	58
robbery (<i>Raub</i>)	22
theft (<i>Diebstahl</i>)	19
public violence (<i>öffentliche Gewalttätigkeit</i>)	17
fraud (<i>Betrug</i>)	13
misappropriation (<i>Veruntreuung</i>)	7
murder (<i>Mord</i>)	7
manslaughter (<i>Totschlag</i>)	6
bodily injury (<i>Verwundung</i>)	4
arson (<i>Brandlegung</i>)	4
overstepping the sanitary cordon (<i>Sanitätskordonsübertretung</i>)	3
rape (<i>Notzucht</i>)	1
abetting (<i>geleisteter Vorschub</i>)	1
libel (<i>Verleumdung</i>)	1

It needs to be pointed out that the vast majority of the defendants were male (210 men and 25 women = 12%). The 25 female defendants are listed in the following table: This number includes not only cases in which investigations against women took place, but also cases in which the women petitioned for a pardon. The chart also includes a case against a woman under military jurisdiction. Altogether six of the offences by women (almost 25%) regarded infanticide. These will certainly be dealt with in more detail later. Murder was even more prevalent (eight times), followed by seven cases of fraud, seven thefts and six incitements of the abuse of office. Two of the women were accused of arson and one was suspected of having committed high treason.

An accurate analysis is planned for 2016 to provide a more precise comparison between female and male delinquents. In the files examined up to now there was no case of a woman being suspected of robbery, manslaughter or public violence. A possible reason could

be that these crimes are connected with physical attacks, which men were more prone to commit; but this is one of the issues which need intensive and thorough research as the project continues.

name	crime(s)
Elisabeth Kalchschmid	infanticide (<i>Kindsmord</i>)
Maria Köfler	infanticide (<i>Kindsmord</i>)
Crescenzia Krug	infanticide (<i>Kindsmord</i>)
Barbara Knapp	infanticide (<i>Kindsmord</i>)
Magdalena Hofer	infanticide (<i>Kindsmord</i>) (supplication)
Barbara Gostner	infanticide (<i>Kindsmord</i>) (supplication)
Agatha Gamper	murder (<i>Mord</i>) (supplication)
Maria Haidacher	murder (<i>Mord</i>) (supplication)
Maria Köfler	high treason (<i>Hochverrat</i>)
Katharina Sutterlitte	incitements of the abuse of office (<i>Verleitung zum Missbrauch der Amtsgewalt</i>)
Katharina Schobel	incitements of the abuse of office (<i>Verleitung zum Missbrauch der Amtsgewalt</i>)
Anna Köllemann	incitements of the abuse of office (<i>Verleitung zum Missbrauch der Amtsgewalt</i>)
Barbara Höllwart	incitements of the abuse of office (<i>Verleitung zum Missbrauch der Amtsgewalt</i>) and fraud (<i>Betrug</i>)
Anna Hofer	incitements of the abuse of office (<i>Verleitung zum Missbrauch der Amtsgewalt</i>) and theft (<i>Diebstahl</i>)
Elisabeth Huber	incitements of the abuse of office (<i>Verleitung zum Missbrauch der Amtsgewalt</i>) and theft (<i>Diebstahl</i>)
Franziska Gemeiner	fraud (<i>Betrug</i>)
Catterina Giacometti	fraud (<i>Betrug</i>)
Ursula Griesser	fraud (<i>Betrug</i>) and theft (<i>Diebstahl</i>) (supplication)
Katharina Hämmerle	fraud (<i>Betrug</i>) and theft (<i>Diebstahl</i>) (supplication)
Maria Josepha Hohlenstein	fraud (<i>Betrug</i>) and arson (<i>Brandlegung</i>)
Josepha Joriati	fraud (<i>Betrug</i>) and perjury (<i>Meineid</i>) (supplication)
Anna Haller	theft (<i>Diebstahl</i>) (supplication)
Magdalena Haller	theft (<i>Diebstahl</i>) (supplication)
Christina Inngruber	arson (<i>Brandlegung</i>) and theft (<i>Diebstahl</i>)
Elisabeth Kofler	unknown (supplication)

Other preliminary research results are as follows:

The files are interesting not only with regard to the implementation of substantive law, but also with regard to certain problems and peculiarities of criminal procedure: Confession was still essential for conviction, although circumstantial evidence became more and more

important. It is noteworthy that in most cases it was the defendant's confession which led to the decision. Therefore it would be desirable to investigate the methods of interrogation applied at that time. For the circumstantial evidence, appropriate natural science methods were missing; for instance, it was not possible to distinguish between human and animal blood spots. And yet autopsies were common at that time, leading to detailed medical opinions becoming the basis for the court's decisions; furthermore, chemical analyses were frequently carried out. The witnesses were of vital importance to a sentence; the procedure of witness interrogation, as in civil procedure, was considered similar to applying a mathematical formula. The trustworthiness and the oath of the witness were thus highly important. When there was a contradiction between the testimony of the defendant and that of the victim, the judges tended to acquit the defendant.

The SJA imposed the sanctions of *Kerker* (prison) or *schwerer Kerker* (heavy prison), the latter including methods of punishment such as beating, fasting or being locked into a pillory. It can already be observed that the SJA tended to impose more lenient sentences than the appellate court (i.e., the second instance). The judges of the SJA seemed to be more generous when it came to weighing any mitigating factors, but more research needs to be done on this point, too. A death sentence was imposed only once in the records processed so far. A defendant who was a current threat to public safety could also be sent – by the political authorities – to a workhouse for life. In these cases, the SJA passed on an expert opinion to the court of chancery.

The need for cooperation between justice and administration also became evident when crimes of international dimension occurred. For instance, when a suspect had fled abroad it was necessary to ask another sovereign for help in the investigation or for extradition. Files regarding such matters offer insights into bilateral relationships, especially with the Kingdom of Bavaria, which had ruled parts of the investigated area in the Napoleon era.

We hope that these small glimpses of the results obtained so far prove what a great potential this research project has. We are confident that the results will lead to an informative monograph on the Austrian practice of criminal law.

6. Conclusions

This project is examining for the first time not only archival sources which have up to now not been taken into account by researchers, but which are highly important for analysing the development of the practice of criminal law during the Austrian *Vormärz* – a period which has so far only been treated marginally. The ongoing project focuses on so to speak “classical” research questions of legal history without neglecting social historical insights offered by the archival sources. Moreover, the reappraisal of this research material shall serve as a basis for future comparative legal studies, which is promising especially in connection with Italian research and specifically with the research results of the judicature in Lombardy-Veneto.

Abstract

In September 2015, a research project on the practice of criminal law during the period of the so-called *Vormärz* in the Habsburg monarchy was started at the University of Innsbruck. Of central importance to the research is the practice of criminal law in the first half of the nineteenth century by the *Oberste Justizstelle* (Supreme Judicial Authority) in the Vorarlberg and in the Tyrol (nowadays the Austrian provinces Vorarlberg and Tyrol and the northern Italian region Trentino-Alto Adige). The main primary source material is a comprehensive archival holding of court records, unknown to scholarship until now, from the Tyrolean-Vorarlberg Senate from 1814 to 1844, preserved from the archival legacy of the *Oberste Justizstelle*, the Habsburg monarchy’s court of supreme jurisdiction at that time. This project reappraises an important part of the history of criminal law and especially the Austrian practice of criminal law. Moreover insights shall also result regarding socioeconomic and mentality-related historical aspects of everyday life.

Zusammenfassung

Im September 2015 wurde mit einem Forschungsprojekt über die Strafrechtspraxis in der Zeit des Vormärz der Habsburgermonarchie an der Universität Innsbruck begonnen. Im Mittelpunkt des Forschungsvorhabens steht die höchstgerichtliche Strafrechtspraxis in der ersten Hälfte des 19. Jahrhunderts im Westen des heutigen Österreichs und in Teilen des heutigen Italiens. Als Quellengrundlage dient ein geschlossener, der Forschung bislang unbekannter Bestand von Gerichtsakten der Jahre 1814 bis 1844 des tirolisch-vorarlbergischen Senats aus der archivalischen Hinterlassenschaft der Obersten Justizstelle, der damaligen obersten gerichtlichen Instanz der Habsburgermonarchie. Mit diesem Projekt soll ein wichtiger Teil der Strafrechtsgeschichte und besonders der österreichischen Strafrechtspraxis aufgearbeitet und ebenso Aufschlüsse über sozioökonomische und mentalitätsgeschichtliche Aspekte der damaligen Lebenswelten erbracht werden.