Sin, Misdemeanor, Capital Crime?

Adultery and Bigamy in the Holy Roman Empire

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In the first part of this paper, I will offer an overview of criminal law in the Holy Roman Empire and its use in various jurisdictions. I will concentrate specifically on adultery and bigamy and examine the occasions when both practices, considered a grievous sin by the Christian worldview were incorporated into territorial criminal laws. Considered a sin on the one hand, a misdemeanor or capital crime on the other, several authorities felt entitled to prosecute and punish the offenders in different ways. In the second part, turning from legal theory to practice, I confine the scope of investigation to the Archduchy of Austria below the Enns. I then explore the ways in which various authorities were either cooperating with or alternatively ignoring the juridical competence of the other institutions. In a close reading of two bigamy cases from the beginning of the seventeenth century I will show that the same offences committed by different genders were treated differently. In the last part I will discuss the pleas for clemency and their place within the criminal legal system. Finally, I end with a brief look at bigamy and its criminal prosecution in the eighteenth century and then present my concluding remarks.

Before going into detail, it is important to make preliminary remarks on the political structure of the Holy Roman Empire. The Empire consisted of hundreds of different territories, ruled by different kinds of nobility (kings, princes, dukes, bishops, etc.) or alternatively, patrician families mostly based in Free Imperial Cities. The *Constitutio Criminalis Carolina* was the first and only attempt of a supra-regional criminal law (*Strafgesetzbuch*) for the whole Empire.[1] Agreed upon in 1530 at the Diet of Augsburg, the *Carolina* was ratified two years later at the Diet in Regensburg. The precondition for its ratification was a severability clause, which allowed the rulers to hold on to and to issue their own legal and legislative powers. The only other supra-regional criminal law, the *Constitutio Criminalis Theresiana*, issued at 1768, covered only the Austrian and Bohemian lands of the Habsburg Monarchy.[2] Due to the severability clause, the *Carolina* did not become effective in all territories of the Empire. The prominent place the *Carolina* still has in the field of criminal history is due to the fact that an edited version of the *Carolina* became available in 1975.[3] Before digitalization of archival materials, copies of regional criminal codes were only available in the archives or in old law book collections, which most law specialists and criminal historians did not even bother to consult. Undoubtedly, the *Carolina* had reformatory effects on criminal law – the adoption of the legal institution of the inquisition being an example, and the fact that it served regional jurists and rulers as a reference point. Having said that, for an accurate understanding of the way the criminal law functioned and its relationship to the legal sources used at criminal trials it is just as important to know about regional legal enactments.

The Middle Ages witnessed an increase in the Christian church's influence in the Holy Roman Empire. Historians agree that around 1200 the Christian view of the world and its moral universe became hegemonic in all territories. The church was vested with the power to define the legal meaning of marriage and was granted the legal jurisdiction over its implementation. In contrast to Roman law, Canon law forbade divorce. The refusal to grant divorce was based on the Christian idea that the consummation of marriage (*copula carnalis*) established a sacramental bond of matrimony, dissoluble only by the annulment of the marriage, or by the death of a spouse. The spouses had not only to support each other, they also had to live together, share bed and board. Sexual intercourse was limited to married couples and was the right and the duty of both spouses. The Christian dogma of the unity of marriage, sexuality and reproduction meant that sexual practices outside the marriage were treated as a sin against God, and if not aimed at reproduction, as a sin against nature.

In lieu of divorce, Canon law only allowed a separation from bed and board. Precondition for an unlimited separation was that the complaining spouse could proof that the other committed physical adultery (*fornication carnalis*), converted to another religion (*fornication spiritualis*), that he or she feared for his/her life (*saevitia*) or was willing to enter a monastery and/or take monastic vows. Physical maltreatment, insuperable aversion, contagious disease, war-related

absence and the conviction for a crime only could qualify for a temporary separation from bed and board.[4] The separation from bed and board had to be approved by the ecclesiastical court of the diocese of the spouses. Because a separation from bed and board left the sacramental bond of marriage intact, remarriage was proscribed. Whether the couple lived separately of their own free will or through the Church's authorization, the Christian worldview deemed spouses living separately as having the religious obligation to live in celibacy. Should they transgress this mandate, they invited sin into their lives. If they had sex with a different person than their spouse, they committed the sin of adultery; if they entered a new marriage they committed the sin of bigamy, both punishable with penance and in severe cases, excommunication.[5] Which of the two sins was the more serious was still debated well into the beginning of the 18th century.[6]

I. Adultery and Bigamy in the Criminal Codes

Criminal codes until the *Carolina*

The incorporation of Christian moral norms in criminal law led to the creation of capital crimes such as sodomy, bestiality, adultery and bigamy. In the following paragraph I will analyze the way *Carolina* and its legal predecessors defined adultery and bigamy and the punishment the offenders were threatened with. The first codification of criminal law in the Holy Roman Empire, the *Constitutio Criminalis Maximiliana*, issued in 1499 by the later Holy Roman Emperor Maximilian I was effective in Tyrol.[7] It mentioned bigamy but not adultery. Whereas canon law penalized bigamy with repentance (*Buße*) and in severe cases, excommunication,[8] the *Maximiliana* threatened bigamists with the death penalty by drowning: "If a man takes two women or a woman two men, this man or woman should be drowned." It is not quite clear whether having two men or two women simultaneously or successively or both was meant by this prohibition.

The *Constitutio Criminalis Bambergensis*, adopted in 1507 included adultery and bigamy.[9] Harking back to Roman law, the *Bambergensis* threatened to behead husbands who had committed adultery with a married woman: "following imperial law, to be punished by the sword to the death." In the case of the married adulteress, her punishment was confined to losing her morning gift and her dowry to her husband and being "locked and held to everlasting repentance and punishment". In contrast to its predecessor, the *Bambergensis* excluded bigamy from the death sentence by arguing that imperial law "did not place the death sentence" on bigamy. Hence the *Bambergensis* threatened bigamists with the dungeon and corporal punishments such as lashing, standing in the pillory, or banishment.

Like the *Bambergensis*, the aforementioned supra-regional-criminal law treated both adultery and bigamy (double marriage) as capital offences. The *Carolina* defined the state of "double marriage" as "when a husband takes another wife or a wife another husband in the form of a holy union during the lifetime of the first spouse" (Art. 121). And like the *Bambergensis* it excluded this kind of marriage from the death sentence: "just as the imperial law does not place a punishment on life for that wrongdoing, so we want to punish those who commit these vices through deceit, by choice and free will, not less than an adulterer" (Art. 121). Article 104 explains furthermore, that in cases where Roman law does not allow "someone to be sentenced to death", the *Carolina* also renounces the death sentence and only admits torture on "body or limbs" so that "afterwards the one punished remains alive". What is new in comparison to the *Bambergensis* is that the *Carolina* directly relates double marriage to adultery and assesses bigamy as the more severe vice: "which wrongdoing is also adultery and greater even than that very vice" (Art. 121). Concerning the punishment the *Carolina* contains no more concrete provisions, but stipulated that women as men "are not to be physically punished less than the adulterers" (Art. 121).

If bigamy would not be punished less severely than adultery, the question arises as to what punishments *Carolina* threatened adulterers with. This question cannot be answered in a single sentence, since adultery was not defined in a uniform way: gender, religious affiliation, social status, possible kinship, as well as the marital status of the sexual partners entered into the construction of the offence. Moreover according the *Carolina,* the prosecution before a Criminal court required that "a husband sue another man on account of the adultery that he committed with his wife" (Art. 120). Whether the adulterer himself must also be married depends on how the formulation "another" is interpreted. For the interpretation "another husband" speaks the provision in the *Bambergensis* that two unions must be "injured" in order for adultery to exist. If only one marriage was impaired, the intercourse was considered as "fornication" and therefore not as capital crime. Against this interpretation is the formulation that the wife could press charges against her husband and "the person with whom the adultery" was committed. However, important is the fact that the *Carolina* limited the right to sue to the deceived spouses and did not consider it as an offence that must be prosecuted ex officio (*Offizialdelikt*). Instead of formulating threats of punishment, the *Carolina* referred to both common and Roman law: "the adulterer along with the adulteress are to be punished according to [the laws of] our ancestors and our imperial laws" (Art. 120). According to the *Bambergensis*, the death penalty for adultery requires first that the offender is male and second that two unions have been damaged, i.e., double adultery. Under the presumption that the *Carolina* shared this interpretation of Roman law,

a contradiction between the provision that bigamy was excepted from the death sentence and that bigamists were not to be punished more lightly than adulterers emerges only in relation to a married man marrying a married woman. Focussing on the Habsburg lands the following section will examine how these stipulations of the *Carolina* were adopted in regional and territorial criminal codes.

Criminal Codes after the *Carolina*

The Criminal law (*Landgerichtsordnung*) of the archduchy of Austria below the Enns became effective in 1540, that is eight years after the *Carolina* and remained so until 1656.[10] On the crime list can be found sexual practices as "against nature, with an animal or another man" (sodomy) and with "wives or virgins against their will" (rape), but not premarital sexual relations (fornication), adultery or entering into a new marriage while the spouse is still alive (bigamy). The Criminal Code for Carinthia in 1577, Bohemia in 1627 and Moravia in 1628 contained no provisions for adultery or bigamy either.[11] The Styrian Criminal code from 1574, however, largely followed the provisions of the *Carolina* and assessed bigamy as a qualified adultery, which was not to be punished more lightly than adultery. The Criminal Codes for the archduchy of Austria above the Enns from 1559 and 1627 did list adultery among the capital crimes, but not bigamy. Like its predecessor, the *Maximiliana* from 1499, the Tyrolean Criminal code from 1573, however, threatened bigamists with death by drowning.[12] In the other territories of the Empire the situation was as diverse as in the Habsburg lands.

The Saxon code for capital crimes from 1572 called for the decapitation of bigamists and based its decision on the argument that the *Carolina* had ordered the "punishment of the sword" for double marriages and that the local judges (*Schöppenstühle*) had ruled according to this code in the past ("auff solche Constitution gesprochen").[13] The police and Criminal Code for Sachsen-Weimar, issued in 1589, did not include bigamy.[14] The Criminal Code adopted in 1582 for the Electorate Palatinate (Kurpfalz) likewise threatened to punish the vice of a "twofold marriage" with death; it emphasized, however, its difference from Roman law: "although the old imperial law does not punish those men who take two wives at the same time with death, we regard this vice, however, to be the same as adultery." This Criminal Code differentiated punishments according to gender: men who committed either adultery or bigamy were to be executed by sword, women by drowning.[15]

Under the general heading "various incontinences", the Upper and Lower Bavarian code from 1611 took Articles 116 to 123 from the *Carolina* and decreed that the judges should use the *Carolina* in these cases and rule according to it. In the case of bigamy, the Bavarian code made clear that "he, who weds two women should be punished as an adulterer". According to Roman law he should be "executed by the sword from life to death" (Art. 8, pg. 825).[16] The Baden-Durlach capital code of 1622, in contrast, threatened bigamists only with expulsion or a tripling of the punishment for adultery.[17] The penalty for adultery was four weeks imprisonment living on bread and water, and depending on the wealth of the adulterer, a fine of fourteen Gulden and eighteen Kreuzer. In the Electorate Mainz a "poena extraordinaria" was established for bigamy in the police code (*Policeyordnung*) of 1647. The arbitrary penalty was argued with reference to the ambiguous provision in the *Carolina*.[18]

As this cursory overview has shown, Roman law and the provisions of the *Carolina* – provided these were adopted – were interpreted very differently in the various criminal codes of the sixteenth and early seventeenth centuries. How did contemporary jurists interpret the Bigamy article from the *Carolina*? This question will be approached very briefly through the example of the Flemish jurist Joos de Damhouder (1507–1581)[19] and the Saxon jurist Benedict Carpzov (1595–1666)[20]. Each published a manual on the practice of criminal law, which influenced European criminal law into the eighteenth century. Joos de Damhouder completed the *Praxis rerum criminalium* in 1551. The first editions was published it Latin in 1554. Already in the same year a French and Dutch edition followed, in 1565 a German translation appeared.[21] The first edition of the *Practicae Novae Imperialis Saxonicae Rerum Criminalium* by Benedict Carpzov appeared in 1635.[22] Even though it was reprinted frequently after that, it was never translated into any other language.

Joos de Damhouder dedicated the eighty-ninth article of his handbook to adultery; he did not address bigamy or double marriage at all. A possible reason could be that the topic was too charged for him since the dispute concerning the ruling on the second marriage of Landgrave Phillipp of Hesse was still virulent. While Emperor Charles V insisted that the Landgrave was to be a subject to the *Carolina*, Luther and Melanchthon assessed his second marriage to Margarethe von der Saale in 1539 to be theologically sound and considered polygamy a lesser evil than adultery.[23] Benedict Carpzov considered bigamy in the second volume of his manual. He emphasized that contrary to the Saxon code for capital crimes, the *Carolina* definitively excluded the death sentence for cases of bigamy and refuted a reading of the *Carolina* that bigamists should be executed.

Ecclesiastical versus secular Marriage courts

The view that a Christian marriage is indissoluble was beginning to be undermined in the 1520s when Martin Luther and other reformers denied the sacramental status of the marriage. Martin Luther expressed his conception of marriage as "an outward, bodily act, like any other worldly undertaking", which brought into question not only the sacrament of marriage but also the church's authority over marriage law.[24] Whereas Luther only allowed divorce in cases of physical adultery or of "malicious abandonment", other Protestant Reformers accepted a wider range of circumstances as legitimate grounds for divorce. The possibilities for divorce varied greatly according to the particular Protestant confession and the specific arrangement of the territorial marriage law (*landesherrliches Eherecht*). One common denominator was the rule, that during lifetime of the divorced spouse, a new marriage was restricted to the innocent party.[25] Protestant authorities used these ideas to discipline the moral behavior of their subjects and established secular marriage courts of their own, which functioned also as courts of morality. The first marriage courts were installed in the German speaking cities of the Swiss Confederation, in Zürich (1525), in St. Gallen (1526), in Bern (1528) and in Basel und Schaffhausen (1529).[26] One of the first reformed marriage courts in the south-west of the Empire was erected in Stuttgart, enforced by Duke Ulrich of Württemberg in 1541.

As a response to this loss on power over marriage, on November 11th, 1563, the Council of Trent issued the decree *Tametsi*. It opens with the proclamation of marriage as a sacrament. Aside from the conditions for the validity of the marriage, the decree listed the doctrinal stances, which if adopted, would result in anathema, i.e., excommunication. Among such prohibited opinions was the Protestant position that the marriage could be dissolved because of heresy, difficulties in conjugal life, malicious abandonment or adultery of a spouse. The decree also condemned secret marriage and banned the informal practice that living together transformed the marriage vow into a valid marriage. The decree ordered that a valid marriage had to be performed by a priest and witnessed by two persons.[27] In territories where the rulers continued to adhere to Catholicism, the Catholic Church kept the marriage jurisdiction until the 18th century, in the Habsburg lands until 1783.

II. Adultery and Bigamy in legal practice

As demonstrated, secular and church authorities competed over the interpretation and the judgment of adultery and bigamy. To investigate how they dealt with adultery and bigamy in every day life, I will confine the scope of investigation in the next pages to the Archduchy of Austria below the Enns. As I already mentioned the archduchy's Criminal Code, issued in 1540 and valid until 1656, had neither adultery nor bigamy on its crime list. Nevertheless the transgression of Christian morality did not go unpunished by the secular authorities. "Adultery and frivolous extramarital relations" were defined as misdemeanors in the archduchy's Police Code[28] publicized in 1566. The Code stipulated that people arrested for these minor offences, be they of higher or lower status, were to receive the punishment of the "tower" or imprisonment with bread and water for their first offence; for their second, however, regardless of the person's rank, he or she would be tried according to the "common written laws". From the specification that adultery was no longer to be punished by a monetary fine we can deduce an aggravation of the penalty.

The Police Codes were published foremost through the copies of local adaptations. To give just one example, the first local adaptation of the reformed police code of 1566 can be found in the market town of Perchtoldsdorf in 1567. It was prefaced with the councilors' intention to follow and uphold its articles.[29] In order to compel not only the authorities but also the citizens and inhabitants to follow the dictates of the Police Code, it was read aloud annually from the pulpit on the second Sunday of Lent (*Reminisce*), as attested by the annotations on the surviving exemplar of 1567. In contrast to the archduchy's Police Code, the term adultery is not found in the shorter Perchtoldsdorf version. It instead included generalized formulations such as "indecent, frivolous relations" that would not tolerated and that would be met with severe punishments following strict procedures.

The punishing and sanctioning of minor offences was within the jurisdiction of the manorial courts (*Ortsgerichte)*. In market towns, towns and cities this right was exercised either by the members of the council (*Markt- oder Stadtrat*), in larger towns by specially established city courts (*Stadtgericht*). The council was divided in the "internal" and "external" council (*Innerer und Äußerer Rat*). The twelve honorable men of the external council were elected by house owners (*Hausbesitzer*) within the market-town or the city, the members of the internal council and the city court were appointed by selected members of both councils. Capital crimes had to be examined by criminal courts (*Landgerichte*), i.e. courts given the so-called blood jurisdiction by the archduke. Therefore the transformation of misdemeanors into capital crimes reduced the power of those manorial courts not having been granted the blood jurisdiction. The Archduchy's criminal law clearly stipulated that the criminal courts alone were responsible for the punishment of capital crimes.[30] If there was only a suspicion that a person committed a capital crime, the Criminal court could not arrest the suspected person right away. The local authorities

first had to deliver faithful evidence that the suspicion was well founded. If the submitted evidence did not appear sufficient to the Criminal court, the criminal law transferred responsibility for the decision to the of the Archduchy archduchy's government (*Niederösterreichische Regierung*).[31] This distinction between the these courts is quite important because only Criminal courts were authorized to threaten to use and to use torture during interrogations, to inflict corporal punishment on delinquents and to pronounce death verdicts.

Manorial Court | City Council | Criminal Court | Government | Ecclesiastical Court

In 1601, the City Council (*Stadtrat*) of Tulln, a town 50 kilometers northwest of Vienna, filed a case against Andreas Pucher. The City Council informed the ecclesiastical court of the lower vicariate of the bishopric of Passau that the defendant had committed "adultery five times" and requested to sentence Andreas Pucher to a spiritual penance as well.[32] The ecclesiastical court decided that

> Puecher should attend the service in the parish church Tulln on three Sundays or holidays in succession barefoot and dressed in a penitent shirt (*Büßerhemd*). If there was a procession before the service, he has to attend it with a candle in his right, a birch rod in his left hand. From the beginning of the solemn Mass up to the *praefatio* he has to kneel before the altar, then up to communion lie on the face with outstretched arms. On the third Sunday or holiday before being absolved by the priest he has to confess. [...] Afterwards he should publicly receive the sacrament of the altar.[33]

How the city council punished Andreas Pucher is not reported. That the city council, the ecclesiastical courts and the criminal court cooperated can be seen in an example from Wiener Neustadt, situated around 50 kilometers south of Vienna.[34] Under the assumption that his wife, who had been taken by the "Janissaries" (soldiers of the Ottoman empire), was no longer alive, Simon Wolfperger married again in 1606. Because of his "untimely" union, the ecclesiastical consistory of the bishopric of Wiener Neustadt sentenced him in January 1607 to "spiritual penance" while the City Council desisted from banishing the couple. On May 6th, 1607, the presumed dead wife returned to Wiener Neustadt. Questioned by the criminal judge (*Stadtrichter)*, she consented to forgive her husband. In an agreement between the City Council, the Criminal court and the ecclesiastical court, it was decided two days later that Simon Wolfperger should "take" his first wife again and must "give away" the second one. Accompanying the ruling was the expulsion of the couple from the territory (*Stadt- und Burgfrieden*) of Wiener Neustadt.[35] The secular courts thus implemented the canonical marriage law, which prescribed a common residence for couples. Hardly back from her Ottoman capture, together again with her husband, Martha Wolfpergerin was banned from her hometown. Both the protocols of the City Council as well as the protocols of the criminal court (*Malefizbüchl*) remain silent about the second wife and the child she had born during her marriage to Simon Wolfperger. The protocols of the ecclesiastical court have not survived.

In a similar case five years later the ecclesiastical court of the lower vicariate of the Bishopric of Passau ordered the husband to pay financial compensation for the children and the second wife. In 1612 Kain Teufel and his first wife Barbara went to the ecclesiastical court to indicate that Barbara "was abducted by the enemies in the rebellion seven years ago". With the knowledge of the secular authority he was remarried after the abduction, to his second wife Lucia, with whom he had two children, a daughter aged three years and a one year old son. The ecclesiastical court declared the first marriage valid and ordered Kain Teufel to the aforementioned compensations for Lucia and their common children.[36] From the ecclesiastical court protocols of the bishopric of Vienna we see that the consistory of the University of Vienna acted in concert with the ecclesiastical court. In 1611 Margaretha Fornicin sued her husband, a typographer, at the consistory of the University of Vienna. She complained that Christoph Michael had married her while his first wife was still alive. The consistory of the university sent the files of the inquiry to the ecclesiastical court, asking for judgment. After a close reading of the documents and taking into consideration the confession of the accused, the ecclesiastical court decided in its meeting on 18th March 1611 to declare in the name of the Father, the Son and the Holy Spirit the marriage for "invalid" and "null".[37]

No hint of any cooperation between the secular and ecclesiastical authorities however can be found in the case of Christoph Treibsam in 1603. In mid-June, Magdalena Treibsamerin told the administrator (*Pfleger*) of the manorial estate Rodaun, situated southwest of Vienna that her husband Christoph had recently married again. In addition to her complaint, she presented a letter of confirmation from her former employer.[38] In this letter, dated June 17th, 1603, Christoph Welzer confirmed that Magdalena and Christoph, who had both been in his service, had been married according to Christian ordinance by the Priest Thomas, and that the wedding celebration took place in his house with him acting as a witness. Christoph Welzer also confirmed that after their wedding in 1599, both remained for a while in his service. Magdalena subsequently moved to Lebarn for work, Christoph to Hausleithen, where Magdalena later joined him. As far as he knew, both lived together in Hausleithen until around Christmas when Christoph left her. Since that

time, he had not heard anything from Christoph Treibsam, even though the latter owed him four Gulden, which he had been advanced as a loan. The administrator held the view that the "very wicked deed" of Christoph Treibsam was to be considered a capital crime.[39] He ended his letter to the Criminal court by requesting information about the day and hour of the offender's transfer. The Criminal court also had no doubts about its own jurisdiction. Just two days later, on June 25th, 1603, Christoph Treibsam was transferred into detention at the criminal court, which then initiated a capital trial (*Malefizprozess*).

Twenty-five years later, a different administrator of the same manorial estate was presented with a similar case. This time he delegated the decision to the Criminal court. On October 27th, 1626, he sent two messengers to the administrator of the Criminal court. He asked to be informed of what to do with an arrested woman who "had taken" two husbands.[40] The elder husband had ceded his right to the younger, no longer desiring to live with her, while the younger husband "wanted to keep" her. The two messengers were to determine whether Katharina Aicherin should be transferred to the Criminal court or, should "the Criminal court not wish to make anything of it", and have her released. Not only was the administrator of the manorial estate unsure about the procedure, but also the members of the Criminal court themselves were unsure what to do in this case. They decided to dispatch the court administrator and the clerk to the Imperial city of Vienna, three hours away, in order to ask the archduchy's government what to do. In order to prevent premature judgments, the criminal court ordered *the administrator* to transfer Katharina Aicherin to the Criminal court.

When the administrator tried to comply with the order on the morning of October 29th, the Criminal court refused to receive Katharina Aicherin. One argument was that the Vienna consistory, i.e., the ecclesiastical court, was responsible for dissolving marriages. The other, that preventing the Criminal court from acting on its "privileges", it first had to be clarified if Katharina Aicherin was guilty of a capital crime in the first place. To establish this, the Criminal Court thus sent a council member, again accompanied by the clerk, to the manorial court. The sources do not tell us why, but apparently the council members came to the conclusion that enough evidence for a capital crime existed. On November 2nd, 1626 Katharina Aicherin was brought before the Criminal court, which then initiated a capital trial (*Malefizprozess*).

What we can learn from these examples is that the offense bigamy was as diversely interpreted as adultery. The five examples can be ordered along two types. In the case of Simon Wolfperger and Kain Teufel the spouse had been abducted. Because they did not hear from them they remarried. Christoph Michael, Christoph Treibsam and Katharina Aicherin left their spouses and then entered into a new marriage. Neither of them maintained two simultaneous marriages. All they did was remarry, but by doing so they violated the Catholic marriage law. The first three cases were negotiated between the secular and the ecclesiastical authorities. In the case of Katharina Aicherin, the councilors of the government brought the ecclesiastical court as the responsible authority into play. In the case of Christoph Treibsam, the ecclesiastical court was not even considered. One explanation would be that the Protestant lord of the manorial estate was not willing to accept the Catholic ecclesiastical court as an authority. How the Perchtoldsdorf Criminal court dealt with Christoph Treibsam and Katharina Aicherin and how the defendants justified their second marriage will be explored in the next section.

The Proceedings against Christoph Treibsam

On June 30th, 1603, the judge of Perchtoldsdorf interrogated Christoph Treibsam, and the examination was summarily recorded, i.e., without the questions the judge asked.[41] Christoph Treibsam stated that he was approximately fifty years old and was born in Styria. After the death of his first wife, he married the widowed Magdalena in 1599 in Tulbing. Knowing that Magdalena had denounced him to the administrator of the manorial estate, Christoph Treibsam did not deny that he had entered into a further marriage but tried to explain why he had left her. According to his statement, only a few months after their wedding, Magdalena secretly moved away from their home, although she did return to Hausleithen, where he had moved after the harvest. Extensively recorded is a fight they had had over food, which ended with Magdalena serving his share of the meat to "a black dog" in the garden, which was then found dead under a tree in the garden the next morning. In addition to this attempted poisoning, Christoph Treibsam blamed his wife for infidelity with soldiers, with whom she spent nights and, "in his sight, had practiced all kinds of frivolous acts with them". Despite his punishment, she continued in her "frivolousness". When questioned, Magdalena allegedly answered him, "why is he asking, she has to suffer, during the night all cows are black". The words he attributed to his wife indicated that he did not merely suspect Magdalena of having sexual relations with the soldiers, but that Magdalena also admitted these to him. No longer able to bear his wife's behavior, he allegedly informed her that "he could not stay with her any longer" and left her "with her knowledge".

According to his story, Christoph Treibsam did not surreptitiously run off, but explained to his wife why he could no longer live with her. Work had taken him in 1601 to Mauer, where he met Margaretha, his third wife, with whom in 1603 he lived in Rodaun, about 25 kilometers away from Tulbing,

where he married the second wife. Their mutual employer, who, as Christoph Treibsam added, did not know that he had already been married, hosted their wedding. Clearly having been asked if he had not thought of his wife Magdalena, he explained that he "had not thought (of her), thinking she was long dead". He moved with Margaretha to Rodaun, where the couple lived for a year and a half in a house that they rented from the administrator. His wife Magdalena learned of his place of residence and his new marriage presumably from his stepson, whom he accidently met in Rodaun, though he did not speak with him. Where his stepson and other wife were living was unknown to him; he only knew that Magdalena had him arrested. He had likewise wanted to have her arrested but was not allowed to bring forward his complaints at the manorial court. The interrogation protocol ends with the suggestion that Christoph Treibsam had confessed to having committed some "injustice", but it only occurred out of "ignorance and particularly because of his previous wife's malice".

Five days after his examination, on July 5th, 1603, the Criminal court sent a letter to the judge of Mauer, a town about an hour's walk away, where Magdalena Treibsamin had been arrested in the meantime.[42] The accusations of her husband were repeated almost verbatim from the interrogation. How Magdalena responded to the allegations and how she portrayed her husband has not survived. On August 11th, 1603, the Criminal court sentenced Christoph Treibsam – because of his "capital crime" – to thirty lashes and expelled him together with his third wife Margaretha from the district of the Criminal court.[43] Christoph Treibsam and his third wife thus had to leave Rodaun, where they had made their living for the previous year and a half. As to his "crime", the sentence stated that he "he had taken two conjugal women who were both still alive", and that he was arrested because of "the denunciation of his one wife named Magdalena". The ruling is notable both with regards to form and content. It is interesting formally because there is no sign that the files had been sent to a legal expert, who would have checked the procedure and issued a recommendation on the sentence. Although it was not stipulated before the announcement of the Crime Code in 1656, the inclusion of a legal expert was already an established practice, as attested by other criminal procedures conducted by the Criminal court in the first half of the seventeenth century. The same applies to the filing of the ruling to the councilors of the archduchy's government, for which there is also no evidence. In contrast, as a note on the sentence shows, the penalty was administered two days later on August 13th. Concerning its content, the sentence is notable because it is not the second but the third wife who is expelled with Christoph Treibsam; through this, the ruling de facto breaks his union with Magdalena, which was valid under canon law, and legitimizes the "bigamous" marriage to Margaretha.

The Proceedings against Katharina Winterin, Married Superin, Married Aicherin

Unusually, the Criminal courts investigation procedure against Katharina is available today in its original elaborate form. In addition to the excerpt from the council protocols quoted above, twenty-six additional documents (fair copies and drafts) have survived.[44] Katharina's statements in Rodaun on October 16th, 1626 are summarily recorded. The recordings of the first two interrogations of Katharina at the criminal court on December 3rd, 1626 and July 10th, 1627 present both the questions addressed to Katharina as well as her replies to them. Her answers in the subsequent interrogations from July 16th and 19th, 1627 and those from August 26th, 1627 are once again only retained in summary. An undated catalogue of questions has also survived along with the corresponding statements; a draft of the sentence from August 11th, 1627 and the sentence of the *Criminal court* from September 13th, 1627 are also available. The version from Katharina's second husband Aegidi Aicher can be reconstructed through questions and answers of the recorded interrogation. In addition, the correspondence of the criminal court with the archduchy's government and with the city council of Weiden am See have been maintained. The transmission is rounded off by a small note on the death of Aegidi Aicher on July 13th, 1627 and a confirmation dated November 23rd, 1627 for Peter Super, Katharina's first husband.

The unusually long break in the investigation spanning from December 1626 to July 1627 is striking, but there is a simple explanation for this. Katharina Aicherin claimed at her arrest in Rodaun that for about a month she had been "carrying a living fruit", that is feeling the movements of a child, and gave as her expected due date – "when her time is up" – Candlemas, or, February 2nd, 1627.[45] Apparently doubtful of her pregnancy, the criminal court had Katharina examined by midwives. As can be gathered from the interrogation of December 3rd, 1626, the midwives did not at first discern a pregnancy, but eventually calculated the due date for the period between "Pentecost" and "Midsummer's Day", the 24th of July 1627.[46] Katharina did indeed deliver a son in jail, presumably near the end of May 1627. The date of birth is not conveyed in the sources, nor can it be reconstructed from the baptismal registry, which was only introduced after 1648 in the parish of Perchtoldsdorf.[47] In addition to the midwives' calculations, the resumption of the interrogations on July 10th refer to a birth date near the end of May, since a puerperium of six weeks was typical at this time.[48] Katharina Aicherin could therefore only have suspected her pregnancy in October 1626. Her stated period of a month is accurate, if it is placed not in relation to the movements of a child, but to the absence of menstruation.

Katharina's Statements

What story did Katharina tell the court? Or, better formulated, which statements of hers did the judge and the clerk consider worthy of recording?[49] From the different interrogations, the following biography can be reconstructed: Katharina was born as the daughter of Thomas and Katharina Winter in 1587 near Graz, in the duchy of Styria. Her parents were Catholic and had ten children altogether. As a thirteen-year-old, Katharina first came as a maid to Bruck an der Mur, about fifty kilometers away, and afterwards to Mödling in the archduchy of Austria below the Enns. When she was about fifteen, i.e., around 1602, she decided to go with an unspecified "horsemen" to the "Dutch war". It can be assumed that the mercenaries were on their way to Ostende, which had been besieged by Spanish Habsburg troops since 1601. Katharina lived with one of these mercenaries, Sebastian Kegler, for about three years, though she did not have children with him and was also not married to him – points she insisted on in every interrogation. After Sebastian was stabbed to death during a scuffle, she returned to the archduchy of Austria below the Enns, where she earned her living in the winter of 1605 as a cook, spinner and day laborer, first in Vienna and then in the surrounding villages. In early 1606, Katharina worked as a day laborer in Baden, where she met her first husband Peter Super. In Baden a Catholic priest wed them. After six years, the couple moved to Weiden on Lake Neusiedl, about fifty kilometers away, which belonged to the Kingdom of Hungary at that point. How the couple made their living is not clear in the sources. All that is certain is that they lived as lodgers.

At Pentecost in 1616, after ten years of marriage, Katharina left her husband. She went with her three-year-old son – her first child died after eighteen weeks – to relatives in the duchy of Styria. She did not mention when she moved to Bad Ischl, located in the archduchy of Austria above the Enns; were her second son died. All we learn for the years between 1616 and 1619 is that she lived "alone" during this time, i.e., without a man. In 1619, Katharina worked for a female widowed locksmith in Enns, also in the archduchy of Austria above the Enns; this is where she met Aegidi Aicher, her second husband. Aegidi Aicher was the son of a harness maker from the free imperial city of Regensburg, who was hired out as a mercenary. Katharina's journey with him took her, among other places, to his parents in Regensburg where according to Katharina's statement their first child was born in 1621. They gave the girl, christened Gertrud, to foster parents. According to Katharina's testimony, their second child, a son named Hans, was born in 1625 and resided with Katharina's sister in Sulz, about fourteen kilometers from Rodaun. During carnival 1626, after living together for seven years, Katharina and Aegidi Aicher married in Mödling, about two and a half hours by foot from Baden, where Katharina had lived for six years with her first husband. In 1627, the couple lived in Rodaun, where Peter Super sought them out and told Katharina that since she had already been living so many years with Aegidi Aicher, he no longer wanted her as a wife and yielded his rights to Aegidi Aicher. Whoever informed the administrator of Rodaun that Katharina Aicherin had "taken two husbands" cannot be determined from the sources.

The Interest of the *Criminal court*

As a close reading of the interrogation proceedings shows, the criminal court was interested foremost in two points of Katharina's biography: first, why she had left her husband, and second, why she had decided to live in "frivolousness" with Aegidi Aicher. The criminal court did not seek an answer to what I find to be the intrinsically related question, why she finally married Aegidi Aicher in 1626. Or at least the clerk did not find it worthy of being recorded in the interrogations. Katharina insisted above all that she left her first husband because she could not "house well" with him. In Weiden she had learned that Peter Super already had two premarital children, whom he repudiated; he also beat her. This is why she left him at Pentecost 1616. For the second point, Katharinas statements are likewise consistent in each interrogation. She met Aegidi Aicher in Enns, where he used to bring his laundry to the widowed locksmith for whom she did the washing. She initially rejected his proposal to go with him, telling him that she already had a husband. He explained, according to Katharina's statements, that he did not desire her as a wife, but she should "house" with him. Aegidi Aicher first moved away from Enns without her. As the news spread to Enns that "there was mayhem in Austria (the archduchy Austria below the Enns is meant)", she presumed that her husband had also surely "perished". She thus decided to follow after Aegidi Aicher, who had sent three letters to her in Enns.

Aegidi Aicher was also interrogated on both points.[50] After the transfer of Katharina to the criminal court, he first took flight, but then went of his own free will to the Perchtoldsdorf town hall, where the jail was located on the ground floor. Asked why he came to the town hall without first reporting to the mayor (*Marktrichter*), he stated that he had a letter, composed for him by master Philipp Dischler, which he wanted to give to the court usher (*Gerichtsdiener*). He was assured that the mayor would also let him speak with his wife. The time when Aegidi Aicher came to the town hall remains unclear. It is only certain that he was immediately arrested. The writing he mentioned is not referred to in any of the other texts. Since the name Philipp Dischler is not cited again, the content of the piece can only be speculated upon. It is conceivable that Aegidi Aicher, raised a Protestant,

had tried to organize a notarized certification of divorce, a practice that Alexandra Lutz has documented for Protestant Holstein.[51] In her investigation of marriage jurisdiction, she describes how Hans Moerson, accused in 1659 of bigamy, tried to invalidate the accusation with the argument that he and his wife, from whom he had been separated for years, had sought a notary, who was to have issued them a "Missumentum Notarii", i.e. a letter of divorce. Under the assumption that "he was sufficiently separated", he married a second woman.[52] Aegidi Aicher described the beginning of their life together somewhat differently than Katharina. He stated that Katharina came to him "carrying a child" and that he moved away from Enns with her. His reckoning of the children they had together is also different. Their first child died in Enns, the second, the daughter Gertrud, was born at his parents' place in Regensburg. While Katharina did not tell of a common child who died in Enns, he did not mention the son born in 1625, who according to Katharina's statements was with her sister.

Unexpected Developments and Reaching of the Verdict

On July 10th, 1627, Katharina, who had meanwhile delivered a son, was interrogated again for the first time since the proceedings were interrupted.[53] Four questions and four answers were recorded, all of which concerned only the time before 1616. The draft of the interrogation, also listed only these four questions and answers. Thus it seems plausible that the interrogation with Katharina was interrupted, and because of Aegidi Aicher's death on July 13th, 1627, it was not resumed. As mentioned on the small note, the roughly thirty-year-old man died in jail.[54] The surgeon, who "inspected" the corpse, attested that the cause of death was a gastric ulcer from which Aegidi Aicher choked to death, and he supported his findings with the argument that Aegidi Aicher had complained of a stabbing pain in his chest on July 8th, 1627, while he was being bled. While I cannot answer if Katharina and Aegidi Aicher saw each other during their joint stay in the jail, it seems very likely given the spatial conditions, as they were described in various criminal proceedings of the eighteenth century.

After Aegidi Aicher's death, the Criminal court apparently decided to end the investigations quickly. Katharina was interrogated once more on July 16th, i.e., three days after the death of her second husband, and her statements were recorded in a text that represents a mix of report and interrogation protocol.[55] What is new is that Katharina stated for the first time that she had been convinced of the death of her first husband not only because of general rumors about military conflicts in the archduchy of Austria under the Enns but also on the accounts of two witnesses. Three weeks before Christmas in 1625, i.e., a little more than a year before her marriage to Aegidi Aicher, she coincidentally ran into Hans Pollweiß, her former landlord from Weiden am See, on the Kärntnerstraße in Vienna and had asked him about her first husband. Hans Pollweiß told her that Peter Super was surely already dead, since he hadn't heard from him in several years. The husband's brother, whom she also saw on the Kärntnerstraße the same day, once again coincidentally, also confirmed the death of her first husband.

As can be inferred from the further proceedings, as well as by analogy from other capital cases conducted by the same Criminal court in the first half of the seventeenth century, the Criminal court sent the above-mentioned "report" to a legal expert. He apparently instructed the Criminal court to check Katharina's statements about Hans Pollweiß. According to canon law, this was the decisive point, since the state of a double marriage or bigamy would become inapplicable if Katharina Aicherin could cite witnesses to her certainty in the matter of her husband's death. The evidence through *testes de auditu* required, however, that the person con-cerned was reliable. Should the witnesses instanced by Katharina prove unreliable, the legal expert suggested in his preliminary version of a sentence dated August 11th, 1627 to execute Katharina by the sword, to be accomplished by the hangman.[56]

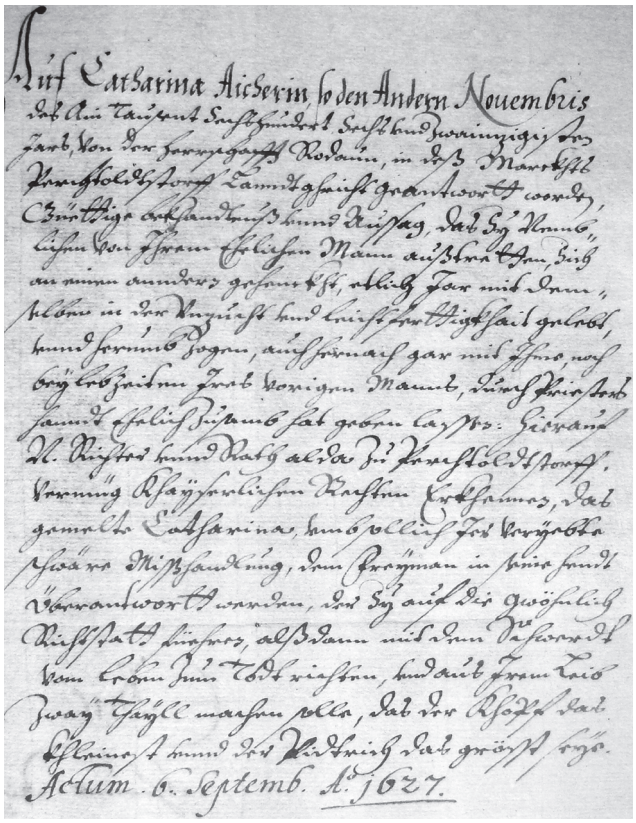
On August 19th, 1627, Katharina was extensively interrogated about her alleged witnesses.[57] Again she described when exactly she met Hans Pollweiß and what words they had exchanged. On the same day, the criminal court sent a messenger to Weiden at Lake Neusiedl. The council of Weiden was informed of the case and was requested to question Hans Pollweiß about "if, when and about what" he had spoken to Katharina concerning her first husband Peter Super.[58] Already one day later, the messenger returned from Weiden. The criminal court was informed that Katharina Aicherin could not have spoken with Hans Pollweiß two years earlier – he had already been dead for seven years.[59] Furthermore, the Weiden town council reported that Katharina did not leave alone during Pentecost of 1616 but had "secretly traveled away" with another man.[60] Confronted with these replies from Weiden, which were read to Katharina, the same day, she vehemently denied the assertion that she "ran away" with another man. To Hans Pollweiß having been dead for seven years, she replied that she had clearly erred about the person. This mistake was probably because the man with whom she had spoken in Vienna had a brown beard, while her landlord during the time she lived with him did not yet wear one. She had been sure, however, that it had been Hans Pollweiß before her. Attempts by the court to find Peter Super's brother cannot be verified. In the following two days, the criminal court produced the aforementioned two undated statements from the different interrogations of Katharina. One of these documents listed fifteen questions;

the other cited the corresponding answers, which transformed the different statements of Katharina into a coherent narrative.[61] For the sentence, the *Criminal court* adopted the draft of August 11th, 1627, which as mentioned, was almost certainly composed by the legal expert and stipulated the death sentence for Katharina. The date was crossed out on the draft of the sentence, and the new date of September 6th, 1627 was inserted. Additionally a clean copy was created for the officials of the archduchy's government.[62]

Reasoning of the Death Sentence

In contrast to the sentence of Christoph Treibsam, the sentence of Katharina contained some vague juridical references as a basis for the verdict: The sentences contained the argument that according to "imperial law", the criminal court decided to deliver Katharina Aicherin to the hangman, who has to execute her by the sword. "Imperial law" could mean either the *Carolina* or Roman law.[63] As stated, both excluded the death sentence for bigamy. The territorial Criminal Code provided no legal basis for the death sentence either. The exceptionality of this sentence can be seen when compared with the sentence of Christoph Treibsam. To bear in mind: He was sentenced by the same Criminal court in 1603 to thirty lashes. Additionally the verdict banned him and his second wife form the territory of the Criminal court. His proper wife, whose complaint was cited in the sentence, had sued Christoph Treibsam. Katharina's case had no eligible prosecuting party. Peter Super, the first husband, did not take Katharina to court but rather the contrary: he surrendered his "right" to his wife to Aegidi Aicher, her second husband. As Katharina also agreed to this, the three people found a consensual "solution" to their situation. The death sentence for Katharina is even more striking if we remember that at the beginning it was unclear if she was to be charged at all.

How can this sentence be explained? How is it justified in the ruling? According to the sentence, Katharina had confessed that she had left her husband and had "hooked up" with another man, to whom she was bound in matrimony by the hand of a priest while her first husband was still alive. In comparison with the sentence of Christoph Treibsam the gender bias became apparent. Even though he had left his wife, he was only accused of having married another woman; there was no talk of him having "hooked up" with another woman and having lived with her in "frivolousness" before marriage.



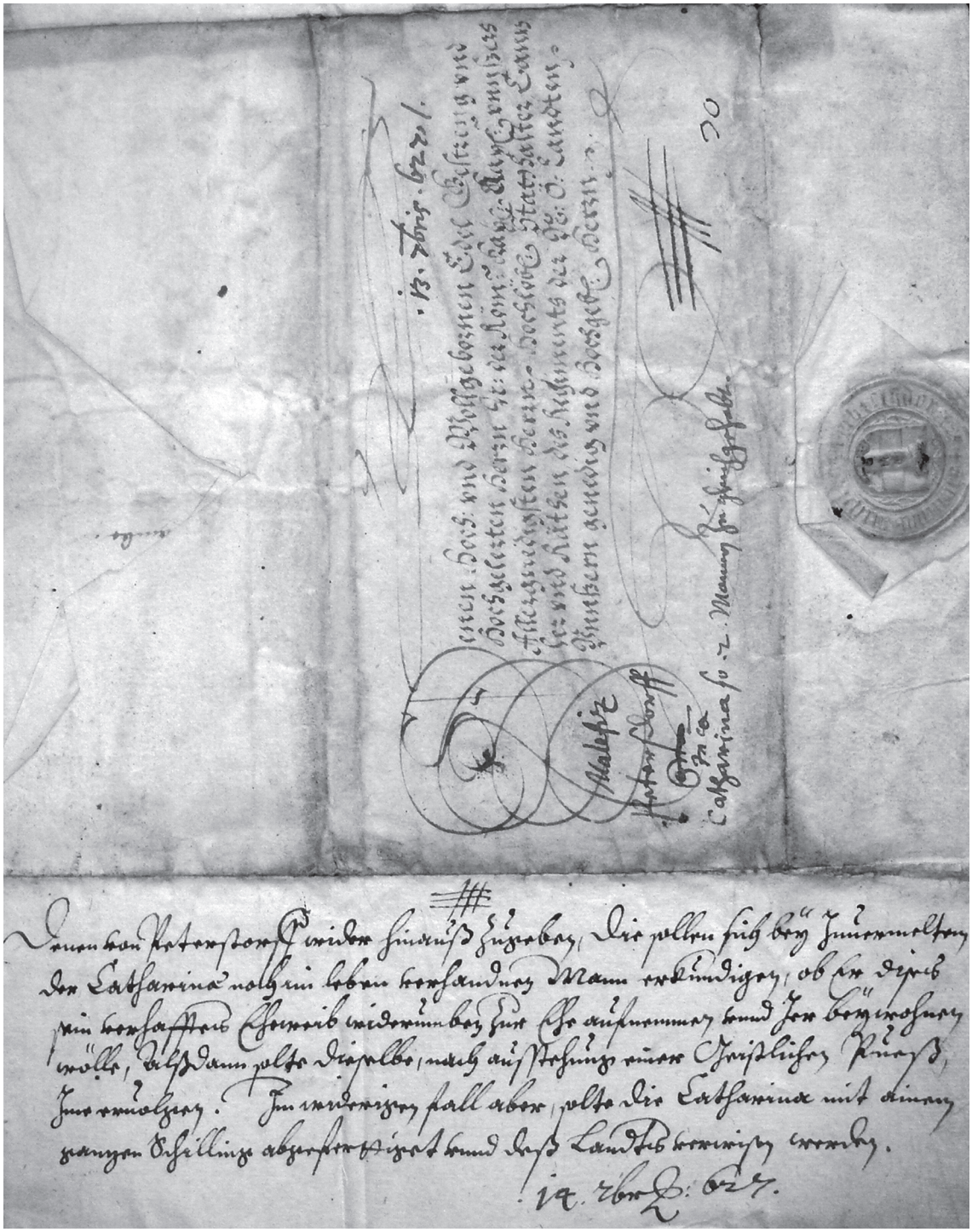
1 Death verdict for Katharina Aicherin, MAP: Box 16 / Fascicle Katharina Aicherin.

The Decision by the Councils of the Lower Austrian Government

Fortunately for Katharina the Criminal court did not administer the death sentence immediately but instead submitted it to archduchy's government for confirmation. In 1627 the confirmation of sentences was not prescribed by the criminal law. This procedure was made mandatory in 1656, when the new criminal law was issued for the archduchy, the *Ferdinandea*.[64] Along with the ruling, the criminal court sent the summary of the interrogations and the correspondence with different authorities to the Government.[65] What judgment did the councils of the Government come to?

They did not endorse the sentence but instructed the criminal court

> to ask the living husband of Catharina if he is willing to take his arrested wife again as a wife and share bed and board with her. If so, after a Christian repentance, she must be delivered to him. If not, she should be flogged thirty times and be banished from the lands.[66]



2 *Letter to the Government, MAP: Box 16 / Fascicle Katharina Aicherin.*

The judgment of the councils of the Government, dated September 14th, was written down on the inner side of the *Criminal court's* letter to the Government, which had been folded into an envelope. If you skim the papers in the archive quickly, you can easily miss this unimposing text. Instead of the death sentence, Katharina was to be "punished" by returning to her first husband, if he were to take her again as a wife and share board and bed with her. In the case that

Peter Super was unwilling to do this, Katharina was to be birched with thirty lashes and expelled from the archduchy. Also the second option would punish Katharina more severely than Christoph Treibsam who was "only" banned from the district of the criminal court, meaning form the market town Perchtoldsdorf and the village Rodaun.

If her first husband were to "accept" her, she would have to return to the same place and person she had run away from eleven years earlier. Notable about the ruling in Katharina's case is also that it was up to Peter Super to decide if he wanted to live with Katharina again. Allowing married couples to live separately from each other lay not with the secular but with the ecclesiastical courts. I can neither rule out nor confirm if the councilors of the ecclesiastical court advised the councilors of the Government in their decision. For the 1620s years the consistory protocols of the Viennese archdiocese have not been preserved. What decision did Peter Super make? He first left Katharina and the Criminal court in the dark, coming only after several summons[67] to the criminal court on November 23rd, 1627. Before the assembled council, Katharina had to beg him "for forgiveness, for God's sake, because of her vice and shameful conduct, fornication and wicked life". With "mouth and hand" she had to vow and promise that in the future she would "house (with him), as is due to an honorable woman, whereof he, good-natured, accepted her". It is with this description of her humiliation, a transcription of which was handed over to Peter Super, that the documents on Katharina and her two husbands end in the archive of Perchtoldsdorf.

III. Pleas for clemency

In most territories of the Holy Roman Empire there was no possibility of appeal against the verdicts of the criminal courts.[68] Nevertheless harsh sentences were not always followed. How can this be? The answer to this question is also the last part of my paper. The only option for sentenced men and women to have their verdict reduced was an appeal to the grace of the sovereign. Although the supplications have come to be of interest to scholars in the last few years, the knowledge of if and how these supplications altered the court practices are still very limited when it comes to the Holy Roman Empire. The outstanding study of Natalie Zemon Davis: *Fiction in the Archives: Pardon Tales and their Tellers in Sixteenth-Century France* does not provide an answer to this question for France. Her goal was a very different one. Natalie Zemon Davis analysed *the lettres de remission*, which she gathered from different French regions, with regard to the question, what cultural resources were at the writer's disposal.[69]

The plea for clemency (*Gnadengesuch*) was to be directed to the sovereign him or herself (*LandesfürstIn*). For most of the Early Modern Period the sovereign of the archduchy Austria below the Enns also held the position of the emperor or the empress of the Holy Roman Empire. It was unlikely that the emperor or empress was informed about all the pleas from the different lands. From comments on remaining original pleas for clemency we can learn that the processing was done by the officials of the Austrian Chancellery (*Österreichische Hofkanzlei*) and the Supreme Court (*Oberste Justizstelle*). Unfortunately the supplications to these two institutions did not survive. Like most of the Viennese Criminal court records they were destroyed when the Palace of Justice was set on fire in July 1927. That historians are informed about these pleas is due to the fact that the officials of the Supreme Court asked the responsible criminal court for a comment. Sometime together with the original plea these comments survived in local archives.

The importance of these pleas for clemency becomes apparent if we look at them in conjunction with the final verdict. Let me give you an example: In the eighteenth century the Perchtoldsdorf Criminal Court respectively the councilors of the Government sentenced 59 persons. For 15 of them a supplication was handed in.[70] In relation to 59 verdicts this is a small number. However, if we relate the supplications to the harsh verdicts the picture changes. Out of the 59 persons only 22 were sentenced to imprisonment or public forced labor exceeding six months. Two-thirds of these 22 harsher verdicts were followed by a supplication for grace. The emperor or empress showed his or her mercy to 12 out of these 15 offenders, although not always to the extent wished for. He or she pardoned five out of eight persons the criminal court had sentenced to death by reducing their sentences to four to ten years of imprisonment or forced labor, combined with perpetual banishment from the German lands of the Habsburg Empire. Among them was Franz Mayerhofer, son of a deceased councilor. Young Mayerhofer had severely stabbed the mayor in 1772. He was the only person for whom the criminal court could not find any argument why the empress should commute his death sentence. For the three people who were executed there is no hint that a supplication was handed in on their behalf. The correlation between supplications for clemency and verdicts makes clear that the acts of grace can be viewed as a fundamental element of law enforcement. In the territory of Württemberg, Helga Schnabel-Schüle detected that the establishment of the prison in Ludwigsburg in 1736 prompted the sovereign to use his power to transform the various verdicts by the courts to the common one of imprisonment.[71] In contrast to the archduchy of Lower Austria, the Duchy of Württemberg acted on his competence regardless if there was a supplication or not.

Conclusion and Prospects

In order to assert their conceptions of the only correct cohabitation of the genders into a generally binding norm, all churches and confessions used and use the law. In the sixteenth and seventeenth centuries, the police and the criminal codes trans-formed sins into misdemeanors and capital crimes, to be punished by the manorial courts or by the criminal courts. The Christian ideology of a unity of marriage, sexuality and reproduction and its application in criminal laws created offences such as "fornication", "sodomy", adultery and bigamy. Contrary to the assumptions of much recent scholarship,[72] it was not the *Carolina* but territorial criminal codes that had called for the death sentence for bigamy. Apart from Tyrol, where the very first criminal law, the *Maximiliana*, threatened bigamists of both sexes with drowning, most of the older territorial criminal laws did not included bigamy, or if included, did not call for the death penalty. The legal situation changed in the second half of the seventeenth century. Issued in 1656, the aforementioned *Ferdinandea*, defined both adultery and bigamy as capital crimes and threatened bigamists with death by sword (Art. 77). The prescriptions of the *Ferdinandea* were adopted from the *Leopoldina*, the criminal law for the archduchy Austria below the Enns from 1672 and from the *Theresiana,* covering the Austrian and the Bohemian lands of the Habsburg Monarchy after 1769. Research on how bigamous marriages in the Holy Roman Empire were treated in every day life and how the norms were applied in legal practice is still missing.[73] Apart from some particular cases within the very high Nobility,[74] the existing historical studies on bigamy focus on either European colonies or on England, Italy or the Nordic countries.[75] To date, for the territories of the Holy Roman Empire no book on the subject exists, even though some studies in the field of gender studies include some paragraphs on bigamy.[76]

Christoph Michael, Christoph Treibsam and Katharina Winterin, married Superin and Aicherin, had left their spouses. This part of their decision was not that unusual, as the proceedings of the ecclesiastical court of the lower vicariate of the Bishopric of Passau and of the Bishopric of Vienna demonstrate. The protocols of both ecclesiastical courts, the focus of my new research project "Marriage before the court",[77] document "cohabitation complaints" on a regular basis, mostly from husbands who, with the help of the consistory, wanted to force their wives to return to the common household. To file a petition for divorce because of "malicious abandonment" was no option for Catholic couples. But even for the Protestant duchy of Holstein, Alexandra Lutz has come to the conclusion that separation on one's own authority was still a current social practice in the seventeenth century, since separation or divorce proceedings held the danger of sentencing one to cohabitation.[78]

With regard to the findings of Kim Siebenhüner for seventeenth century Italy, the decision of the three offenders to enter a bigamous marriage was not that uncommon either. What seems to be extraordinary is the long trial and harsh sentence inflicted on Katharina Aicherin in 1627. This harshness cannot be explained by the fact that she was not prosecuted by the ecclesiastical but by the criminal court which had to apply the harsher rules of the secular law. The harsh sentence is even more striking if we compare it to the findings of Sara McDougall for fifteenth century France, where she found a general reluctance to treat female bigamists as equally culpable as men: "Men were not only given larger fines, but were imprisoned and subject to public humiliation far more often than women."[79] The explanation she offers is that in the view of the contemporaries, a man, "in committing bigamy, violated his responsibilities towards his first wife and abused the (ostensible) trust of the second bride he deceived", while a women "chose a more respectable path than an abandoned wife who remained alone".[80] Katharina Aicherin did not fit into these patterns. She was not an abandoned wife, left in precarious social and financial straits. She was not left but had left her husband. Perhaps the crucial difference is that she was not a victim but a woman taking her life in her own hands. To get a better picture of how the same action undertaken by different genders was valuated differently more research has to be done, one that takes into account ecclesiastical courts in conjunction with city councils and criminal courts. As indicated, all these tribunals could be in charge for passing moral and legal judgment on the behavior of ordinary folk.

In eighteenth-century Vienna, there was no clemency for bigamists of both sexes any longer. As Susanne Hehenberger's analysis of the Vienna newspaper *Diarium* has shown, at least four men and one woman were sentenced to death and executed.[81] To what extent the newspaper only reported exceptional cases cannot be evaluated, since the Viennese criminal records of the seventeenth and eighteenth centuries were destroyed in 1927. Even if the criminal codes in the eighteenth century do not differ that much as the codes from the sixteenth and seventeenth centuries, we still have to consider regional differences in the application of the law at the criminal courts. While in the eighteenth century at least five persons were executed in Vienna, in the mainly Catholic Electorate Mainz in two of nineteen bigamy cases a death sentence was passed, but as Karl Härter has shown, not executed.[82]

There are many reasons why the final sentence prescribed in the different law codes are not to taken at face value or cannot be treated as a maximum penalty. In modern law, the rulings of the judges are limited by the definitions of minimal and maximum sentences, whereas their power in early modern times was nearly unlimited. One of the reasons for this kind of latitude was the widely shared belief that the threat of

harsh punishment should deter and therefore discourage persons from committing capital crimes. If the authorities thought that certain offences were becoming rampant, some unlucky delinquents were utilized to state an example.[83] Another reason why the criminal law provided the judges with such latitude, which was denounced as arbitrary, is that early modern law codes were formulated within an estate-based society. The entitlement of equality before the law we know from modern democratic societies would not only have been a contradiction, but was indeed unthinkable. The criminal law, therefore, was not a norm, but a relational framework for the judgment of actions and individual cases. A look at proceedings shows that the latitude of the judges was the prerequisite of sentencing delinquents to either a few weeks or months of forced public labor instead of hanging or beheading them. And harsh sentences could be commuted. The institution of pardon or clemency was a fundamental element of early modern judicial system. For a better understanding of early modern criminal systems and therefore early modern societies, it is necessary to overcome the modern binary and dualistic thinking. The criminal trials demonstrate the interplay of different socially and culturally constructed assessments and power systems such as gender, estate, ethnicity, religion, age, marital status, reputation and "native and settled" against "alien and vagrant".

Annotations

1 Die Peinliche Gerichtsordnung Kaiser Karls V. (hereafter *Carolina*), edited and elucidated by Gustav Radbruch, Stuttgart: Reclam 1975.

2 *Constitutio Criminalis Theresiana*. Peinliche Gerichtsordnung (hereafter *Theresiana*), reprint Graz: Akademische Druck- und Verlagsanstalt 1993.

3 *Carolina*.

4 See Ilona Riedel Spangenberger: Die Trennung von Tisch, Bett und Wohnung (cc. 1128–1132 CIC) und das Herrenwort Mk 10,9 – Eine Untersuchung zur Theologie und Geschichte des Kirchlichen, Bern [u.a.]: Peter Lang 1978.

5 For an overview on late medieval canon law on bigamy, see Kim Siebenhüner: Bigamie und Inquisition in Italien 1600–1750, Paderborn et al.: Schöningh 2006, p. 30–35.

6 Cf. Siebenhüner, p. 38–40.

7 Maximilianische Halsgerichtsordnung, quoted after: http://www.koeblergerhard.de/Fontes/TirolerMalefizordnung1499.pdf

8 *Decretum Gratiani*, c. 19 C.24, qu. 3, quoted after Susanne Hehenberger: Sexualstrafrecht und Geschlechterordnung, in Gaby Temme and Christine Künzel (eds.): Hat Strafrecht ein Geschlecht? Zur Deutung und Bedeutung der Kategorie Geschlecht in strafrechtlichen Diskursen vom 18. Jahrhundert bis heute, Bielefeld: transcript 2010, p. 101–118.

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38 MAP, Box 16/Fascicle single files 1600–1658: Kundtschaft of Christoph Welzer, June 17, 1603.

39 MAP, Box 16 / Fascicle Christoph Treibsam, letter of the Pfleger of Rodaun to the Criminal court, June 23, 1603.

40 MAP, Box 16 / Fascicle Katharina Aicherin excerpt from the council protocols, October 9, 1626.

41 MAP, Box 16/Fascicle Christoph Treibsam, summary protocol (Summarisches Verhör) with Christoph Treibsam, June 30, 1603.

42 MAP, Box 16 / Fascicle Christoph Treibsam, letter of the criminal court to the judge of Mauer, July 5, 1603.

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□