

AIMS AND PRINCIPLES OF THE CRIMINAL TRIAL:
FROM FRANZ VON ZEILLER'S *ZWECK UND PRINCIPIEN*
TO FRIEDRICH VON SAVIGNY'S *PRINZIPIENFRAGEN*

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Abstract: A comparative analysis of Zeiller's *Zweck und Principien* and of Savigny's *Prinzipienfragen* provides useful information for shedding new light on the animated debates and attempts to reform in a liberal way the regulations of the deutscher gemeinrechtlicher Strafprozeß followed in most Mitteleuropean countries during the first half of the nineteenth century. The growing awareness that adjective law should both protect human rights and promote personal freedoms led in fact many important German jurists to declare for a radical reform of the inquisitorial system and of the traditional forms of carrying out criminal trials.

Keywords: Criminal Law; Inquisitorial procedures; German criminal law scholars; Austria; Prussia

Forty years separate the publication of Franz von Zeiller's *Zweck und Principien der Criminal-Gesetzgebung* (1806-1807) and the 1846 edition of the *Prinzipienfragen in Beziehung auf eine neue Strafprozeß-Ordnung*, edited by Friedrich von Savigny. These were years filled with animated debates and attempts to reform the regulations of the *deutscher gemeinrechtlicher Strafprozeß* (i.e., the criminal adjective law of the German *ius commune*) followed in most Mitteleuropean countries during the first half of the nineteenth century.

The former was a substantial article, published in the first two volumes of the *Jährliche Beyträge* edited by Zeiller himself. The well-known Styrian jurist had attempted to offer a comprehensive account of the reasons which lay behind the choices made by the drafters of the Austrian code of criminal law and criminal procedure (the *Gesetzbuch über Verbrechen und Schwere Polizei-Übertretungen*) enacted in 1803. Zeiller and Sonnenfels had in fact been its main drafters and *Referenten* in Vienna's legislative Court Commission¹. On the other hand, Savigny's *Prinzipienfragen* constitute a

¹ F. von Zeiller, *Zweck und Principien der Criminal-Gesetzgebung. Grundzüge zur Geschichte des Oesterreichischen Criminal-Rechts. Darstellung der durch das neue Criminal-Gesetzbuch bewirkten Veränderungen, sammt ihren Gründen*, in Idem, *Jährlicher Beytrag zur Gesetzkunde und Rechtswissenschaft in den Oesterreichischen Erbstaaten*, Vienna, K. K. Hof- und Staatsdruckerei, 1806-1807, I (1806), pp. 71-185, and II (1807), pp. 1-98. About the role of Zeiller in the writing of the *Gesetzbuch über Verbrechen und Schwere Polizei-Übertretungen* see H. Hoegel, *Geschichte des Oesterreichischen Strafrechts in Verbindung mit einer Erläuterung seiner grundsätzlichen Bestimmungen*, Wien, Manz, 1904, I, pp. 85-95; M. Horrow, *Grundriss des oesterreichischen Strafrechts mit besonderer Berücksichtigung der historischen Entwicklung*, Graz-Wien, Leykam, 1947, pp. 38-53; T. Rittler, *Lehrbuch des österreichischen Strafrechts*, Wien, Springler, 1954, pp. 17-18; H. Conrad, *Deutsche Rechtsgeschichte*, II, *Neuzeit bis 1806*, Karlsruhe, C.F. Muller, 1966, pp. 450-451; P. Leslaw, *Die Bedeutung Zeillers für die Kodifikation des Strafrechts unter besonderer Berücksichtigung der polnischen Strafrechtsgeschichte*, in *Forschungsband Franz von Zeiller (1751-1828). Beiträge zur Gesetzgebungs- und Wissenschaftsgeschichte*, W. Selb, H. Hofmeister (ed.), Vienna-Graz-Köln, Böhlau, 1980, pp. 180-191; G. Kleinheyer, J. Schröder, *Deutsche Juristen aus fünf Jahrhunderten*, Heidelberg, Müller, 1989, pp. 327-330; F. Hartl, *Grundlinien der österreichischen Strafrechtsgeschichte bis zur Revolution von 1848*, in G. Máthé, O. Werner, *Die Entwicklung des österreichisch-ungarischen Strafrechtskodifikation im XIX-XX Jahrhundert*, Budapest, Unio, 1996, pp. 13-54, especially pp. 35-44; A. Cavanna, *Ragioni del diritto e ragioni del potere nel codice penale austriaco del 1803*, in *Codice Penale Universale Austriaco (1803)*, S. Vinciguerra (ed.), Padova,

partially revised version of a detailed ministerial memorandum which the father of the Historical School of jurisprudence, as *Justizminister für die Gesetzrevision*, had commissioned a few years earlier to a group of his closest collaborators (Heydemann, Heffter, Eichhorn and Bischoff). Under the Minister's supervision, in 1843 they had prepared a work with the provisional title of *Denkschrift über die Principienfragen der neuen Strafprozeß-Ordnung*².

Although they were living in radically different contexts from the point of view of timeframe and political-institutional backgrounds, both the *Professoren* and *Hofräthe* shared the opinion that the laws concerning the criminal trials needed to be formulated in such a way as to ensure public and private safety, safeguarding the citizens' rights and limiting their individual freedom to the least possible degree³. What the two jurists disagreed on was how to pursue the aim of guaranteeing public order and social peace without dashing the subjects' expectations of always being safeguarded in the full enjoyment of their personal belongings and interests, and consequently on which kind of judiciary and criminal adjective law to rely on. Their divergences of opinion were due to the

Cedam, 2001, pp. CCXIX-CCLXV; E. Dezza, *L'impossibile conciliazione. Processo penale, assolutismo e garantismo nel codice asburgico del 1803*, in *Codice Penale Universale Austriaco (1803)*, cit., pp. CLV-CLXXXIII; P. Pittaro, *Giustizia criminale e ragion di Stato*, in *Codice Penale Universale Austriaco (1803)*, cit., pp. CXLIII-CLIV; S. Tschigg, *La formazione del Codice Penale Austriaco del 1803*, in *Codice Penale Universale Austriaco (1803)*, cit., pp. LI-LXVII, especially pp. LIX-LXVII; S. Vinciguerra, *Idee liberali per irrobustire l'assolutismo politico: il Codice Penale Austriaco del 1803*, in *Codice Penale Universale Austriaco (1803)*, cit., pp. IX-XXXVIII; A. Padoa Schioppa, *Storia del diritto in Europa*, Bologna, il Mulino, 2007, pp. 469-470; C. Neschwara, *Franz von Zeiller und das Srafrecht*, in «Journal on European History of Law», 1 (2010), 1, pp. 4-15.

² See W. von Arnswaldt, *Savigny als Strafrechtspraktiker. Ministerium für die Gesetzrevision (1842-1848)*, Baden-Baden, Nomos, 2003, pp. 44-45, 278-281; P. Rondini, *Introduzione. Dal Denkschrift über die Principienfragen der neuen Strafprocess-Ordnung (1843) ai Prinzipienfragen in Beziehung auf eine neue Strafprozess-Ordnung (1846)*, in F. von Savigny, *Le questioni di principio concernenti un nuovo regolamento del processo penale*, P. Rondini (ed.), Milano, Giuffrè, 2012, p. XIII.

³ See Leslaw, *Die Bedeutung Zeillers* (*supra* note 1), p. 183; F. von Savigny, *Die Prinzipienfragen in Beziehung auf eine neue Strafprozeß-Ordnung. Ausgearbeitet im Justizministerium für die Gesetzrevision*, W. Schubert (ed.), Frankfurt am Main, Lang Peter, 2011, pp. 26, 31.

different backgrounds in which they exercised their functions as legal practitioners serving the State at the highest levels.

Zeiller's apology of the early 19th century Austrian procedural law sprang from an intellectual milieu which still had faith in the so-called *Kabinetjustiz*, on which the enlightened Despotism of the Hapsburgs was based. According to this peculiar system for dispensing justice, all the main decisions were taken by a small number of senior civil servants enlightened only by the sovereign directives and by their own judgement. On the other hand, the manifesto penned by Savigny and his collaborators was influenced by the long debate on the general principles of the criminal procedural law carried out by the Mitteleuropean jurists, in the wake of the diffusion of the *Frühliberalismus* and of the ideas favouring the reformation of the old inquisitorial court procedures used in many German States⁴.

It is possible to discern in Zeiller's words the heritage of a culture which still considered favourably the authoritarian idea of the relationship between State and individuals, justifying the use of traditional judiciaries managed by professional bodies for the sake of preserving public order and social peace. In Savigny's remarks, on the other hand, there is the echo of the decades-long disputes between German jurists about the legal principles (the *Prozeßmaxime*) which legislators were supposed to take into account when shaping a new procedural law (a new *reformierten Strafprozeß*) (such as, e.g., the oral and public nature of trials, the adversary procedure, the free and personal conviction of judges in evaluating evidence, and the fully appealable nature of court decisions).

From the analysis of Zeiller's *Zweck und Principien* it clearly emerges just how much the ideology of the Austrian code of 1803 was influenced by Kant's theory of the categorical imperative, and by the ideas that Feuerbach developed on the subject of psychological compulsion. Punishment imposed by the State was not simply seen as the necessary consequence of

⁴ See E. Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege*, Göttingen, Vandenhoeck & Ruprecht, 1951, pp. 320-336; G. Haber, *Probleme der Strafprozeßgeschichte im Vormärz*, in «Zeitschrift für die gesamte Strafrechtswissenschaft», 91 (1979), pp. 590-636, especially pp. 598-609; A. Ignor, *Geschichte des Strafprozesses in Deutschland 1532-1846. Von der Carolina Karls V. bis zu den Reformen des Vormärz*, Paderborn, Schöningh, 2002, pp. 191-192, 214-217, 231-248, 259-263.

unlawful conduct altering the social balance to be inflicted with no expectation of any form of benefit for the community or individual citizens. Rather, it was a punishment which was expected to have the general effect of preventing any further kind of unlawful conduct⁵.

This particular preventive purpose of criminal laws operated on three levels of «mechanical, moral and psychological limitation» of the will to commit criminal acts. The first kind of limitation was to be dealt with by the Police who were meant to thwart any attempt to breach the law. On the other hand, the Government's task was to promote the morality of behaviour and remove any obstacle that might prevent individuals from distinguishing good from evil and from acting in their own and in the community's interest. Last but not least, psychological coercion was aimed at persuading people that violation of the legal rules would always cause greater suffering than the supposed benefits gained from their crimes⁶.

Thus, public and private safety could be more efficiently guaranteed by threatening to inflict on any perpetrator of a behaviour that had been previously qualified as unlawful a punishment set *ex ante* in accordance with the gravity of the breach in question. Once it had been established how to restrict such unlawful behaviour and how the judicial authorities were meant to prosecute those who had decided to commit a crime in spite of such a dissuasive mechanism, the legislator was then obliged to operate by limiting individual freedom and activities in the least invasive way possible by adopting measures strictly aimed at «avoiding the most serious dangers threatening public safety»⁷.

This entailed the need to resort not only to a «fair and reasonable description» of punishable behaviours and the penalties to be imposed, but also a precise formulation of all the general «useful prescriptions» to

⁵ Zeiller, *Zweck und Principien* (*supra* note 1), I (1806), pp. 71-79, and II (1807), pp. 1-3. See also Hartl, *Grundlinien der österreichischen Strafrechtsgeschichte* (*supra* note 1), p. 38; Vinciguerra, *Idee liberali per irrobustire l'assolutismo politico* (*supra* note 1), pp. XXIX-XXXVI; Cavanna, *Ragioni del diritto e ragioni del potere* (*supra* note 1), pp. CCXXIX-CCXXXII.

⁶ Zeiller, *Zweck und Principien* (*supra* note), I (1806), pp. 71-74, and II (1807), p. 7.

⁷ *Ibidem*, I (1806), p. 79, and II (1807), pp. 1-5, 7-8.

provide the judges with every possible clarification regarding the exact fulfilment of their duties, and the procedures to be followed in a trial⁸.

For this purpose, Austrian legislators laid down a criminal procedure not only with the aim of carrying out and concluding trials as quickly as possible but so that it could also be considered both by citizens and legal practitioners a balanced compromise between a system of «terror» induced by «limitless care for collective safety» and a system of «blind indulgence» caused by an excessive love of «civil liberty»⁹. Besides wanting to appease the natural wish of the victims and of the whole community to see wrongdoers punished without delay, the State had in fact assumed the task of preventing any unlawful behaviour by showing the citizens that measures had been taken in order to enable the courts to be equally quick and efficient in prosecuting offenders without indulgence, freeing the innocent of the burden of unfair accusations, and submitting suspects to Police surveillance¹⁰.

The real *deus ex machina* of a court system with such aims could not but be – according to Zeiller – a professional and permanent judge with considerable technical and practical expertise: a fine *connoisseur* of the mechanisms of law and also a skilful investigator, used to reasoning with «mature judgement» and «strict impassibility» in the reconstruction and analysis of events, in unravelling the twists and turns of the human mind, and in evaluating all the implications concerning the behaviour of each individual involved in the inquiries¹¹.

After all, in setting down inquisitorial-type rules, the Austrian code of 1803 (also known as *Franziskana*) referred precisely to the presence of judges of such a level operating in all the courts. Although it did not prescribe torture or extraordinary penalties, this form of inquisitorial procedure was not too dissimilar from the classic postulates of the *ius commune* (such as the primacy of the written form and secrecy; the use of

⁸ *Ibidem*, I (1806), p. 79, and II (1807), pp. 1, 9-11.

⁹ *Ibidem*, II (1807), pp. 3-5.

¹⁰ *Ibidem*, II (1807), pp. 9, 12-13. See Cavanna, *Ragioni del diritto e ragioni del potere* (*supra* note 1), pp. CCLII-CCLIV; Dezza, *L'impossibile conciliazione* (*supra* note 1), pp. CLXXIV-CLXXV.

¹¹ Zeiller, *Zweck und Principien* (*supra* note), II (1807), p. 12.

legal proof; the ex-officio prosecution; an imperfect acknowledgement of the right to hire a defence counsel; the absence of a clear distinction between the different functions of investigating, prosecuting and judging; the appealable nature of judges' decisions with the *Revision* system)¹². In this archetype of a *deutscher gemeinrechtlicher Strafprozeß* the professional judges played a key role in applying the provisions laid down by the law in order to safeguard traditional values such as the established order, public authority, social peace, and trust in the law. In order to avoid the risk of arbitrary decisions, it was established that judges would carry out their tasks on the basis of a «sage discernment» only in the few set circumstances in which it would not be possible to provide them with anything but «general regulations» and «ready-made opinions». Such would be the case, for instance, in the hypothesis of deliberating on the presence of grounds justifying the remand of people under investigation or their arrest, or deciding how to carry out the examination of the accused or of a witness, or evaluating the existence of all the requirements to obtain a legal proof, or weighing up the legal force of clashing evidence¹³.

Moreover, according to Zeiller it was not enough to impose restrictions on the discretion of the courts in the fulfilment of their task, in order for citizens to trust in the impartiality of the judges and in a fair and equal justice for everyone. The adjective law should in fact ensure that trials were conducted publicly in all their phases, and not only at the time of notifying and carrying out the sentence. Maintaining secrecy during the

¹² *Ibidem*, II (1807), pp. 25-30, 32-72, 77-79, 87-89. See Hartl, *Grundlinien der österreichischen Strafrechtsgeschichte*, cit., (nt. 1), pp. 41-43; R. Pöttl, *Die Lehre vom Indizienbeweis im 19. Jahrhundert*, Frankfurt am Main, Lang, 1999, pp. 357, 360; Cavanna, *Ragioni del diritto e ragioni del potere* (*supra* note 1), pp. CCXXXV-CCXLI; Dezza, *L'impossibile conciliazione* (*supra* note 1), pp. CLXIV-CLXVII; Idem, *Il nemico della verità. Divieto di difesa tecnica e giudice factotum nella codificazione penale asburgica (1768-1873)*, in *Riti, tecniche, interessi. Il processo penale tra Otto e Novecento*, Atti del Convegno (Foggia, 5-6 maggio 2005), M. N. Miletti (ed.), Milano, Giuffrè, 2006, pp. 13-77, especially pp. 25, 69-70; Pittaro, *Giustizia criminale e ragion di Stato* (*supra* note 1), pp. CXLVII-CXLIX; C. Povolo, *Nella selva incantata degli indizi*, in Idem, *La selva incantata. Delitti, prove, indizi nel Veneto dell'Ottocento. Saggio di etnografia giudiziaria*, Sommacampagna, Cierre, 2006, pp. 11-145, especially p. 30; P. Rondini, *Ex sententia animi tui. La prova legale negativa nell'età della codificazione*, Milano, Giuffrè, 2012, pp. 228-230.

¹³ Zeiller, *Zweck und Principien* (*supra* note), II (1807), pp. 11-12.

various stages of a trial would obviously give rise to the fear that «the law could be misinterpreted» through «obscure and unclear practices». This would inevitably jeopardize the citizens' trust in such a kind of judicature and prevent from «justifying it in everyone's eyes»¹⁴.

Nevertheless, in spite of such a manifest stand for a public procedure, the Austrian code framed by *Referent* Zeiller re-proposed the traditional trial forms of the *ius commune* era; this included the complete secrecy over every step of the inquiry and of the acquisition of evidence. The reason why on this occasion the members of the Viennese *Kompilationskommission* had chosen to persevere in following the past procedural forms was explained precisely by the person who, more than anyone else, had helped produce the 1803 *Gesetzbuch*. Zeiller stated that «the precise nature and form of the criminal trial» was inexorably destined to change in time and in the various States, according to the political, social, cultural and scientific conditions of the people. For this reason it was often difficult for the legislative authorities to decide whether it would be generally preferable and feasible to adopt, among the many desirable reforms, innovations as radical as the «accusatorial system, the juries, the public nature of the judicial proceedings, etc.»¹⁵.

According to Zeiller and the other Viennese court counsellors, at the beginning of the century the Austrian State lacked the prerequisites and the «preparatory institutions» necessary for the quantum leap, represented by the use of bold changes such as the 'mixed' procedural system adopted in France with the promulgation of the 1795 *Code Merlin* (the *Code des délits et des peines, 3 brumaire an IV*)¹⁶.

Therefore, until the end of the *Vormärz* the Austrian subjects were always judged according to a strictly secret procedure which opened with a «preliminary inquisition» set up *ex officio* by professional judges once the «likely reasons» for an unlawful behaviour were known. During such preliminary inquiry it was necessary to ascertain that a crime had been indeed committed and the existence of «evidential material»

¹⁴ *Ibidem*, II (1807), p. 13.

¹⁵ *Ibidem*, II (1807), p. 14.

¹⁶ *Ibidem*.

sufficiently serious to declare the «formal indictment» against the alleged offender¹⁷.

After the summons, the «ordinary inquisition» could start. During this second kind of inquiry, carried out in secrecy and recording the statements in writing, the judges were required to collect any proof, both against and in favour of the accused. The defendant did not have the benefit of choosing a trusted counsel, as it was assumed that thanks to their expertise and fairness the judges had the means to discover and acquire all the exculpatory evidence. The judgement was to be pronounced by a trial court on the basis of a report provided by the investigating judge who also took an active part in voting on the final deliberation. This decision had to be grounded on a careful evaluation of the legal value of both the incriminating and exculpatory evidence, and by giving the reasons why the trial judges had decided on a conviction, acquittal, or suspension of the trial with the *absolutio ab instantia*¹⁸.

The rulings made both by the courts of first instance and the court of appeal could be revised on request of the convicted or with the *Revision* system by arguing an incorrect factual finding or an erroneous application of law. This involved automatically sending to the higher courts petitions concerning decisions made in the absence of a full confession, or those dealing with serious crimes or involving severe punishments (such as high treason, or death by hanging), or decisions presenting major differences with other rulings already given on the same case¹⁹.

Zeiller thought deeply about one particular aspect of this complex regulation of criminal trials: the systematic use of legal proofs managed by professional judges instead of the personal conviction of the jurors. He attempted to demonstrate how in a specific political, institutional, social and cultural context it was difficult – if not impossible – to implement radical changes. As regards the procedure to be followed in order to

¹⁷ *Ibidem*, II (1807), pp. 25-30. Dezza, *L'impossibile conciliazione* (*supra* note 1), pp. CLXVII-CLXVIII.

¹⁸ Zeiller, *Zweck und Principien* (*supra* note), II (1807), pp. 39-72. Dezza, *L'impossibile conciliazione* (*supra* note 1), pp. CLXVIII-CLXXII

¹⁹ Zeiller, *Zweck und Principien* (*supra* note), II (1807), pp. 77-79, 87-89. Dezza, *L'impossibile conciliazione* (*supra* note 1), pp. CLXXII-CLXXIII.

ascertain the existence of a crime and identify its author, the *Franziskana* was in fact fully embedded in the late-eighteenth-century German tradition of the *gesetzliche Beweislehre* (i.e., the system of the legal proof) according to which judges could not evaluate through their own discernment the reliability of the evidence conforming to the legal requisites²⁰.

Precisely for this reason, within the Austrian legislative Commission unanimous approval was given to the argument according to which in a legal system focused on the sole presence of professional judges, and in the absence of an overall reform which was valid throughout the whole of the Hapsburg dominions, it would not have been possible to rely only on the discretion of judges in evaluating evidence without putting «public and private safety» at risk²¹. At the same time, it was not thought possible to bring about a far-reaching change, such as the one suggested by those – Filangieri above all – who proposed combining the «moral certainty» of the judges with the «rules prescribed by the State». Indeed, the prevailing conviction was that resorting to such a new version of the system of legal proof (a so-called ‘negative’ system) the State, each individual and the whole community would be exposed to the risk of being damaged by judicial decisions taken because of a personal persuasion that went against the legal evidence established by the codes²².

Therefore, there was nothing to do but confide in the old *gesetzliche Beweistheorie* which enjoined logical and reasonable limitations on the judges who were required to play the threefold role of inquirers, counsels for the defence and decision makers, but without this forcing them into «keeping strictly to the only types of legal evidence laid down by the law» and hushing up the conflicting voice of their conscience²³. It was the task of the judges to look for any possible material in support of both the accused and the defence. They then had to verify that it «complied with the legally prescribed requisites» in order to be admitted as evidence. Furthermore, they had also not to evaluate the various contrasting proofs

²⁰ See Dezza, *L'impossibile conciliazione* (*supra* note 1), pp. CLXXVIII-CLXXXII; Rondini, *Ex sententia animi tui* (*supra* note 12), pp. 229-231.

²¹ Zeiller, *Zweck und Principien* (*supra* note), II (1807), pp. 42-43.

²² *Ibidem*, II (1807), pp. 40-42. Rondini, *Ex sententia animi tui* (*supra* note 12), pp. 232-234.

²³ Zeiller, *Zweck und Principien* (*supra* note 1), II (1807), p. 67.

separately but «in connection with the full evidential picture», so to ascertain whether the «full legal force» of such evidence was in the case at hand so negligible – indeed, practically non-existent – that the trial judges could not be forced to give a ruling that went against their conviction²⁴.

In spite of these attempts to reject the criticism towards the Austrian code of regarding judges as mechanical performers of the *voluntas legis* and slaves to the rules of legal evidence, one of the main remark made to the drafters of the *Franziskana* – and therefore primarily to Zeiller – was that of wanting to pursue the mirage of public and private safety allowing the «least space possible to judicial evaluation» about the relevance of evidential data²⁵.

Rather than acknowledging the impossibility of giving a comprehensive set of general and rational rules such as might appear convincing to those called upon to absolve the difficult task of discovering the truth, preference was given to attempting to lay down the rules defining the quality and even the quantity of the evidence necessary for a ruling to be given. The fear was that formulating only a few concise and general precepts might run the risk of being interpreted discretionarily by the judges²⁶. But by

²⁴ *Ibidem*, II (1807), pp. 48-50, 66-67. See Cavanna, *Ragioni del diritto e ragioni del potere* (*supra* note 1), pp. CCXXXV-CCXLI; Rondini, *Ex sententia animi tui* (*supra* note 12), pp. 234-240.

²⁵ See C. Mittermaier, *Theorie des Beweises im peinlichen Prozesse nach den gemeinen positiven Gesetzen und den Bestimmungen der französischen Criminal-Gesetzgebung*, Mannheim, Kaufmann, 1809, p. 227; Idem, *Die Lehre vom Beweise in deutschen Strafprozesse nach der Fortbildung durch Gerichtsgebrauch und deutsche Gesetzbücher*, Darmstadt, Heyer, 1834, pp. 83-85, 98, 361-362; Idem, *Das Deutsche Strafverfahren in der Fortbildung durch Gerichts-Gebrauch und Lan-des-Gesetzbücher und in genauer Vergleichung mit dem englischen und französischen Straf-Verfahren*, Goldbach, Keip, 1996 (Nachdr. der Ausg. Heidelberg, Mohr, 1845-1846), I, p. 534, also II, pp. 314-315; C. Pratobevera, *Einige Bemerkungen über den Beweis aus dem Zusammentreffen der Umstände (Anzeigungen, Indicien) nach den Vorschriften des Oesterreichischen Gesetzbuches über Verbrechen*, in «Materialien für Gesetzkunde und Rechtspflege in den Österreichischen Erbstaaten», 1 (1815), pp. 143-168, especially 162-164.

²⁶ See Zeiller, *Zweck und Principien* (*supra* note 1), II (1807), pp. 27-29, 62-64; Pratobevera, *Einige Bemerkungen* (*supra* note 25), pp. 162-164; F. V. Barbacovi, *Degli argomenti ed indizi nei giudizi criminali*, Milan, Società Tipografica dei classici italiani, 1820, pp. 33, 43, 47-48.

operating in this way the limitations were «too restrictive on the judge's decision», and the arbitrary power of ruling without any restrictions was confused with the possibility of carrying out a pondered and motivated «reflection in the light of clear principles established by the law»²⁷. For this reason, only a few years after the 1803 code came into force, the question was raised as to whether it might be opportune to urge the legislative power to modify the prescriptive wording.

Nevertheless, a radical reform of the inquisitorial system codified in the Austrian *Strafgesetzbuch* was carried out only as a consequence of the revolutionary European Spring of 1848. That event traumatically showed the élites in power that it was time not only for a political and institutional change but also for a major reform of the legal system, reflecting the social, cultural and scientific upheavals of the previous few decades of the *Vormärz*.

In the 1840s the Prussian jurists and politicians were much more far-sighted. They managed to convince the Hohenzollern dynasty and the more conservative factions of the Berlin government that it was time to overhaul the administration of criminal justice which dated back to the Prussian *Criminalordnung* of 1805 (the Part I of the *Allgemeines Criminalrecht für die preußischen Staaten*). They also succeeded in turning into laws some of the suggestions and precepts devised by German criminal law scholars about the advantages of adopting a new liberal adjective law (a *liberaler Strafprozeß*).

With the sole exception of the abolition of torture, the trial system set out at the start of the nineteenth century by the drafters of the *Criminalordnung* showed very little difference from the inquisitorial system of the late *ius commune* period. At the end of a preliminary phase aimed at acquiring legal evidence and carried out by the investigating judge in secrecy and in writing, the sentence was pronounced by a panel of professional and permanent judges on the basis of a mere reading of the proceedings of the preliminary inquiry. This meant they were not directly involved in the various stages of the investigation and acquisition of the evidence. During the inquiry, the investigating judge could inflict punishments on liars (*Lügenstrafen*) or uncooperative and disrespectful

²⁷ Pratobevera, *Einige Bemerkungen* (supra note 25), p. 164.

people (*Ungehorsamstrafen*), whilst forms of psychological coercion could be carried out both on the accused and on witnesses by making the interrogations last for hours, or by demanding surprise interrogations, even at night. The accused had no right to appoint a defence counsel until the court's decision passing a sentence, or a *absolutio ab instantia*, or an extraordinary penalty on the grounds of 'semi-full' proofs (*Verdachtstrafe*) was appealed²⁸.

Over the space of forty years various attempts were made to update the code issued at the beginning of the century, as the 1828 *Entwurf der Straf-Prozeß-Ordnung* (i.e., the draft of a new criminal adjective code) and particularly the 1839 *Verordnung, betreffend die Criminal-Gerichtsverfassung und das Untersuchungs-Verfahren* (i.e., the law concerning the judiciary and the inquiry) testify. The latter provided, in the territories of Pomerania and Rügen, for trying out a procedure which allowed the judges to use circumstantial evidence and to impose penalties of an exclusively ordinary nature²⁹.

It was only with the drafting and the following circulation of the memorial illustrating the *Principienfragen der neuen Strafprozeß-Ordnung* – an initiative undertaken by Savigny in 1843 – that within Berlin government circles and at the highest levels of Prussian judiciary was it understood how advantageous it would be to adopt a system where trials were open to the public and conducted orally, as well as including certain essential principles (such as the intervention of the public prosecutor, an

²⁸ See Schmidt, *Einführung* (*supra* note 4), pp. 260-262, 268-270; C. Richstein, *Legale Beweistheorie und Beweiswürdigung im 19. Jahrhundert*, in "Auss liebe der gerechtigkeit vnd umb gemeines nutz willenn". *Historische Beiträge zur Strafverfolgung*, G. Jerouschek - H. Rüping (ed.), Tübingen, Diskord, 2000, pp. 191-215, especially pp. 192-195.

²⁹ See E. Gans, *Beiträge zur Revision der preußischen Gesetzgebung*, Berlin, Dunccker&Humblot, 1832, pp. 68-71, 76-77, 91-93, 96; C. Mittermaier, *Teoria della prova nel processo penale del Dr. C. G. A. Mittermaier, Consigliere intimo e Professore in Heidelberg, traduzione italiana eseguita sull'originale tedesco dal Dr. Filippo Ambrosoli con molte aggiunte inedite dell'autore e con note del tra-duttore sulla legislazione austriaca*, Milano, Sanvito, 1858, pp. 20-21; H. Zachariä, *Handbuch des deutschen Strafprozesses. Systematische Darstellung des auf Quellen des gemeinen Rechts und der neuern deutschen Gesetzgebung beruhenden Criminal-Verfahrens*, I, Göttingen, Verlag der Dieterichschen Buchhandlung, 1861-1868, pp. 13-14.

exhaustive cross-examination of the parties carried out in open hearings, the full acknowledgement of the accused's right to defence and to challenge the judges, the repeal of the system of legal evidence, the possibility to appeal judicial decisions on the grounds of incorrect factual finding or legal errors)³⁰.

In the 1846 edition of the *Principienfragen*, Savigny himself specified that it was up to the State to proceed first of all with a general reform of the judicature, in order to create the office of the public prosecutor, as well as to distinguish between the different roles assigned to the State prosecutor, the investigating judge and the trial court made up exclusively of professional and permanent judges. Only after having completed this essential preliminary reorganization of the judiciary would it be possible to modify the forms of carrying out criminal trials in the manner described above³¹.

As far as the criminal adjective law was concerned, the first step was to extend to the whole Prussian Kingdom the 'mixed' and 'two-phase' model which had remained in force in the Rhenish provinces after the end of the Napoleonic age.

At the end of the preliminary inquiry, carried out according to the criteria of complete secrecy and accurate recording of all judicial proceedings, the oral and public hearing began between the public prosecutor and the defence counsel before a panel of judges, so that the latter could personally observe the dispute between the two parties, interact with the accused and the witnesses, and supervise the acquisition of evidence³². Having an active role in admitting evidence rather than simply reading the trial records to gather the necessary information to pass judgment, the professional judges could be more precise in their evaluations not only about the connections between the facts, but also about the influence of the different moods (malignity, impetuosity in the affections, premeditation, free will etc.) of all the people involved in the inquiry. Furthermore, rather than simply trusting the skill, experience and

³⁰ Rondini, *Introduzione* (*supra* note 2), pp. XIII-XV, XXI-XXIV.

³¹ Savigny, *Die Prinzipienfragen in Beziehung auf eine neue Strafprozeß-Ordnung* (*supra* note 3), pp. III-IV.

³² *Ibidem*, pp. 1-5.

impartiality of the investigating judge, the *erkennende Richter* (i.e., the presiding trial judges) were able to interrogate and confront the accused, the witnesses and the experts. In this way they could point to any contradiction between the various statements, or the possibility of their having been made as a result of threats, violence, confused states of mind, or interests of various kinds³³.

Public hearings also ensured the advantage of allowing the community to exert a certain degree of control over the conduct of the prosecution, the defending counsels and the judges, thus removing the suspicion of decisions being taken arbitrarily or under the influence of bias and inexperience. In this way the accused and also other citizens could rely on the equity and justice of the rulings given by the courts, and public opinion could have greater faith in the State, in the law passed in order to guarantee safety for all persons, and in justice being dispensed quickly and efficiently³⁴.

Clearly the adoption of such an archetype implied the essential presence in a trial of two key figures: the public prosecutor and the counsel for the defence. The law therefore had to guarantee the full enjoyment of the right to defence from a technical point of view and, at the same time, to give up the inquisitorial *Offizialmaxime* taking up the accusatorial *Anklageprinzip* instead. The latter postulated assigning the roles of accuser and inquirer to two distinct public officers: the prosecutor and the investigating judge³⁵. The State's interest in prosecuting criminals was to be represented by the former who had to gather, at the request of one of the parties or *ex officio*, the evidence of the presumed perpetration of a crime. He had also to carry out their careful examination, identify the people against whom prepare the case for judgement, and intervene in the inquiry on behalf of the State. On the other hand, the investigating judge was to act in the sole interest of the truth, and carry out the inquiries «within the specified directions and limitations» as reported by the public

³³ *Ibidem*, pp. 6-13, 17-19. Rondini, *Introduzione* (*supra* note 2), pp. XXVIII-XXXI.

³⁴ Savigny, *Die Prinzipienfragen in Beziehung auf eine neue Strafprozeß-Ordnung* (*supra* note 3), pp. 28-31.

³⁵ *Ibidem*, pp. 9, 41-42.

prosecutor. He had also to try to gather with the same degree of impartiality the proof both against and in favour of the accused³⁶.

A further major implication of resorting to the trial system proposed by Savigny was that it would be possible at last to renounce to the system of the legal proof, and ban both the extraordinary penalties inflicted on the basis of imperfect evidence and the *Lossprechung von der Instanz* (i.e., the *absolutio ab instantia*)³⁷.

The attempts made during the centuries to establish general and binding provisions relating to evidence had turned out to be inexorably ineffectual, given the difficulty in foreseeing *ex ante* the various combinations that might actually occur in real situations. The certainty of a fact originated from the evaluation of such a vast number of elements and circumstances to be taken into consideration at the same time in relation to each case that no law could provide a comprehensive compendium. Judges of course could not rule without adducing evidence which conformed to legal canons (confessions, witnesses' statements, documents, circumstantial evidence) and to the requisites necessary to be admitted as evidence. It was nevertheless no longer possible to confide in the fact that the law could pre-determine the specific weight of such material, nor could it prescribe to the judiciary how to evaluate all of the contrasting proof and thus decide either in favour of or against the accused³⁸.

The solution suggested in the *Prizipienfragen* was therefore that of giving professional and permanent judges the possibility to pass judgment on the basis of their free «personal conviction» after having scrupulously analysed the sole evidence admitted by law with the aid of the rules of logic, experience and science. Such a judgment would have not been based on a personal sense of what was true and right – a *Total-Eindruck* as was the case of the verdicts pronounced by the juries – but rather it would have been the outcome of a series of interconnected rational arguments developed by experienced professional judges, who knew all about human nature and societal dynamics. Through the daily performance of their

³⁶ *Ibidem*, pp. 42-45.

³⁷ *Ibidem*, pp. 10-11, 62, 76, 133.

³⁸ *Ibidem*, pp. 67, 70-74. Rondini, *Introduzione* (*supra* note 2), pp. XXXII-XXXIV.

duties they became learned in «observing [...] evaluating together all of the phases of the trial [...] more rapidly [...] without being influenced by the arguments of the prosecution or of the defence»³⁹. Furthermore, in the statement of the grounds for the ruling the judges were required to give detailed explanations to the parties, and also to public opinion, about the complex procedures followed in the inquiry and the hearing, as well as in formulating a decision «according to logic and reason»⁴⁰.

This obligation of specifying the grounds for the conviction or the discharge of the accused constituted the key prerequisite in order to add to the framework devised in the Berlin *Ministerium für die Gesetzrevision* the last important detail concerning the full possibility of filing an appeal or contesting those decisions on grounds of nullity.

The possibility to challenge in a higher court the decision of a lower court on substantive or legal grounds was a prerogative that the convicted person could fully enjoy only in a *Anklageprozeß*, that is to say, in a public accusatorial judicial system where the public prosecutor and the defending counsel were on exactly the same footing⁴¹. This implied that the State was entitled to request the revision of an acquittal or of a mild sentence. As a consequence, the public prosecutor could appeal to a higher court asking to give a harsher ruling than the impugned decision⁴². Finally, it was also considered whether establishing in the whole Prussian Kingdom the Court of Cassation on the Rhenish and French model. Before this court it would have been possible to raise an issue of nullity resulting from an erroneous interpretation of substantive law (as would be the case if a crime had been misjudged as non-indictable, or if the wrong provision had been applied) and from a breach of the rules concerning the jurisdiction of the courts, their composition, and the way the trials were supposed to be carried out⁴³.

³⁹ Savigny, *Die Prinzipienfragen in Beziehung auf eine neue Strafprozeß-Ordnung* (*supra* note 3), pp. 53, 55, 57, 65-66, 74.

⁴⁰ *Ibidem*, pp. 59, 62, 65-66.

⁴¹ Rondini, *Introduzione* (*supra* note 2), p. XXXV.

⁴² Savigny, *Die Prinzipienfragen in Beziehung auf eine neue Strafprozeß-Ordnung* (*supra* note 3), pp. 80, 84-85, 89.

⁴³ *Ibidem*, pp. 95-100. Rondini, *Introduzione* (*supra* note 2), p. XXXVI.

The reform plan suggested in these *Prinzipienfragen* met soon with general approval, and in the summer of 1846 the Prussian government enacted a law regarding new ways of conducting trials in the courts of the city of Berlin. As a consequence of the positive results of this reform, the following year it was enforced in the whole Kingdom, thus formalizing the definitive triumph of the 'mixed' and 'two-phase' trial system over the old inquisitorial procedure⁴⁴.

⁴⁴ See Arnswaldt, *Savigny als Strafrechtspraktiker* (supra note 2), pp. 44-45, 249-315; Rondini, *Introduzione* (supra note 2), pp. XXXVII-XL.