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### Romer (Hermann), *Herrschaft, Reislauf und Verbotspolitik. Beobachtungen zum rechtlichen Alltag der Zürcher Solddienstbekämpfung im 16. Jahrhundert*

Zurich, Schulthess Polygraphischer Verlag, 1995, 414 pp

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# Comptes rendus Review

Romer (Hermann), *Herrschaft, Reislauf und Verbotspolitik. Beobachtungen zum rechtlichen Alltag der Zürcher Solddienstbekämpfung im 16. Jahrhundert*, Zürich, Schulthess Polygraphischer Verlag, 1995, 414 pp.

In the late Middle Ages, numerous battle-hardened Swiss soldiers served as mercenaries in foreign armies. These mercenaries, who were called *Reisläufer*, could represent a profitable source of income for the Swiss authorities, yet they could also confront them with serious problems of civil order. One reaction to these problems was to issue decrees which either proscribed the unauthorized and disorderly *reisen* («going to war») or which entirely prohibited serving as a mercenary for foreign princes. In particular, the council of Zurich imposed a large number of comprehensive prohibitive decrees (the so-called *Reislaufverbote*), from the end of the 15th century up to the year 1600. In so doing, it created a completely new criminal offence, which limited the traditional *ius armorum* of the population. Hence, these prohibitive decrees could not at all be expected to meet with a broad public acceptance. This is the starting point of Romer's study, *Rule, «Reislauf», and the Politics of Proscription. Observations in Regard to the Legal Practice of the Zurich Fight Against Mercenary Services in the 16th Century*, which is an inquiry into the «Connection between the implementation of legal order and the refusal of norms» (p.3).

The primary emphasis of the work (chapter 3) is on a detailed analysis of 117 magisterial mandates from the period between 1481, when the practice of issuing prohibitive decrees started, and 1600, when the Zurich magistrate stopped criminalizing mercenary services for foreign princes. First and foremost, these mandates regulate questions concerning disorderly and unauthorized campaigns of Swiss mercenaries, but at the same time they also deal with related affairs such as the prohibited recruitment of mercenaries (called *Aufwiegeln*, «to stir up»), receiving secret pensions from foreign princes, and so on. Transgressors are threatened primarily with fines, increasingly with imprisonment and the forfeiture of civil rights (*infamia*) as well, but less with corporal or capital punishment. A serial analysis reveals distinctive boom periods of magisterial «decreeing» between about 1510 and 1530 as well as during the 1580s. Romer interprets these periods as an expression of a general uncertainty about the political line on mercenary service, which was intended to be removed by a deluge of decrees. In contrast to traditional legal history, Romer does not naïvely attempt to infer the realisation of magisterial norms or even societal reality from his analysis of the decrees. Rather, he argues, these mandates have to be understood as symbolic politics: their rhetoric had, above all, the function of making a breach for new contents of consciousness. Thus, the

linguistic stigmatisation of the *Reisläufer* as «idlers» and «rabble-rousers» led to a gradual undermining of the Swiss warrior ethos.

A second centre of the study is represented by the thorough analysis of nearly 7,000 cases dealt with in court between 1460/80 and 1600. It is noteworthy, however, that any recorded note of a Zurich institution of legal proceedings due to a violation of the *Reislaufverbot* is counted as a «case». In this regard, too, temporal concentrations become apparent (especially during the 1490s and 1540s), while, from a geographical point of view, the results offer little reason for surprise: the share of the delinquents from each Zurich region corresponds quite clearly with the particular region's share of the able-bodied population. Sanctions were provably imposed in 2,333 cases (= 33.8%). Against the old thesis of Rusche and Kirchheimer, concerning the penalisation of criminal law in the late Medieval period, the author once again stresses the fact, that, for the most part, these sanctions consisted of fines, prison sentences or the forfeiture of civil rights, which was in fact, more often than not, narrowly limited. The number of actual sentences pronounced - 6 percent of the whole sample and 18.4 percent of all sanctioned cases - is distinguished from the number of sanctions carried out. Exclusively for the 1550s, an uninterrupted sequence of the sanctions which were actually executed is recorded, a fact which Romer also interprets as an attempt on the part of the magistrate to emphasize the validity of a legal norm which was increasingly called into question.

Yet another focus of the study is an analysis of the social structure of the delinquents (chapter 5). Romer questions the common perception of the mercenaries as a «marginal group» (this perception, he states, was due to magisterial efforts to stigmatize and criminalize the mercenaries) and stresses the fact that they were fully integrated members of the community. Their social status is checked against the lines of their professional background, estate, social stratum, and military rank. However, the sources contain satisfactory information only on the last criterion. Nonetheless, Romer succeeds in shedding more light on some aspects which provide a deeper insight into the matter: for instance, the fact that, during the first period of prosecution (up to c. 1530), the council of Zurich successfully concentrated on court actions against noble war entrepreneurs (and thus against direct competitors for the monopoly of the use of physical force). In addition, poverty is clearly established as the primary driving force of the *Reislauf* in the second half of the 16th century: it is notable that the authorities carried out the criminal prosecution in a rather mild and lenient way - especially, when lower-class delinquents were concerned. Chapter 6 deals with the «forms of perception and definition of situations» of the magistrate, on the one hand, and the delinquents, on the other. Above all, the open insubordination reflected in the statements of the *Reisläufer* deserves mentioning. Many of them stated that they had undertaken their campaigns because of *Widermut* («opposition») to the magisterial mandates. They understood the decrees of the authorities as an inadmissible intrusion on their traditional right to bear arms. The invectives and derision of foreign soldiers aimed at the Zurichans demonstrates that the mercenaries had sufficient reasons to interpret the authorities' prohibition as a threat to their honour as soldiers.

Even such a short sketch suffices to show that Romer's case study contains a multitude of aspects which are of interest for the history of criminal justice. Both the careful and differentiated analysis of the level of norms and the efforts at socio-historical pungency deserve recognition. Unfortunately, however, the descriptive and

stylistic shortcomings of the work «hide» rather than highlight many interesting observations. A stilted and artificially technical style - (e.g. «*Der Index skalierter Sanktionen ist damit ein Gradmesser des realisierten Gewaltmonopols*», p. 182) - impedes the reader's access to the sense of his text; unintentional comic effects only seldom make up for this defect (on page 322, for instance, a *Reisläufer* shows himself «*reumütig und diskurswillig*», while «*das gesatzte Recht über den Delinquenten gebrochen wird*»). The sometimes confusing structure of the text produces the same effect (as regards the contents, the focus of the second chapter is difficult to determine. And the difference between chapter 3.4 «*Tatbestände und Rechtsfolgen*» and chapter 3.5 «*Angedrohte Rechtsfolgen in den Reislauflaufmandaten*» is unclear). Equally confusing are the many redundancies of the text and the fatal inclination of the author to introduce his (sub-) chapters in a very general way («*Ganz allgemein richten Menschen ihr Verhalten nach Normen, sobald sie sich vergesellschaften...*», p. 75). Unfortunately, the total of 49 charts, which are sometimes crucial for the understanding of the text, are not placed in the relevant passages of the text, but in a separate appendix. Nor does their design really facilitate access to the contents (the key of the regional distribution of chart 19, for instance, is hidden in the text on p. 155/56). With the exception of some passages on exemplary single cases, which closely refer to the sources, the reader has difficulty gaining a reliable picture of the general meaningfulness and the range of the sources on which the study is based. Finally, the work completely lacks a coherent introduction on the historical background of the topic. Romer does not care in the least about making his episodic statements about the economic and political motivations of the *Reisläuferverbote* plausible and intelligible for those readers who are not at home in the history of Zurich.

Stylistic defects as serious as these point to problems in managing the subject matter. Numerous aspects raise questions or objections: thus, chart 16 cannot carry the burden of proof for the thesis about the suppression of *mediärer Gewaltenträger* (middle-level officials, p. 123); the overall assessment of the *Geschrei* («*rumour*») as «*informal criticism of the authorities*» remains rather doubtful; and diagram 5, which contains the statement that, «*up to 1479, there had not been any provable sanctions in the case files*», contradicts the information concerning penances and imprisonments for the participants in the campaign against the Abbot of Kempten in 1460. A considerable lack of consistency among the various levels of examination and among different explanatory approaches runs through the study like a red thread. Primarily from a normative point of view, Romer interprets the prosecution of the *Reisläufer* as a *Herrschaftspenetrierung* («*penetration of rule*») and, thus, as a developmental stage on the way to an early modern state. Yet, the relationship of the prosecution to short- and middle-range economic and political motives of the magistrate remains unsolved. First and foremost however, his explanatory model conflicts with his observations on the level of actual criminal prosecution, with which the author is obviously somewhat at a loss for how to deal. For instance, when he stresses the pragmatic, even «*opportunistic*» political line of the magistrate in prosecuting the *Reisläufer* and when he writes of the «*Eklektizismus der politischen Praxis von Verbot und Toleranz, Strafe, Billigung und Nutzung des traditionellen Kriegssystems*» («*eclecticism of the political practice of proscription and tolerance, punishment, approval and exploitation of the traditional war system*»), he is – for the moment – in accord with the results of current historical research (although he usually eschews comparative considerations). Due to his modernization-theoretical

perspective, he is only able to recognize a «*mangelhaft durchgeführtes Legalitätsprinzip*» («a principle of legality defectively implemented»), which he diagnoses at once as representing «a vital risk for the functioning of rule» as such (p. 166-67). It remains the author's secret how the presumed «failure» of the prosecution practice is to be linked with the presumed aim of the «penetration of rule».

In his last chapter, entitled «*Reislauf, Recht und Kriminalität*», Romer puts the empirical results of his work into perspective using two historical macro-concepts. The first concept, *Verrechtlichung* («the process of legalisation»), points primarily at the creation of new legal norms, the extension of the judicial system, and the intensification of control mechanisms, which aimed at the consolidation of magisterial rule and, therefore, point in the direction of the implementation of the early modern state. «Criminalization», his second concept, means - in a complementary fashion - social strategies of exclusion with respect to lansquenets and war entrepreneurs who did not abide by the legal norms. Unfortunately, the chapter does not offer a summary of the empirical results, which the reader urgently needs, but once again displays the problems of interpretation mentioned above. It abounds with doubtful truisms, both referring to society as such ('In the society of the 16th century, the open breach of norms also meant a denial of the common order» [p. 296] - Is any breach of dress regulations really to be interpreted as a fundamental vote against common values?) or and to his own research results («therefore, the stronger the negotiating position of the magistrate became the more use it made of repressive instruments of authority» - a proposition whose general validity is not substantiated in the previous text). If the Zurich findings exist at all - in some passages, the idling programmatic degenerates into an end in itself - then they have to content themselves with the role of sprinkled set pieces that may not offer any resistance to the theoretical concepts. A modernization-theoretical view that presumes an increase in the quality of repression and a «penetration of rule» remains the major guideline. There may be good reasons for this, but the author himself, time and again, points out the difference between the traditional *ius armorum* and the new code of the authority - and he does so correctly, even though he tends rashly to overstate the case by inflating the disagreement between the population and the authorities into a principal conflict. But: what conclusions are drawn from this difference between the official code of the authorities and the second code of the population to which he devotes so much attention? Romer notes that the actions of the authorities «fell flat almost without any effect at all» because of the frailty of magisterial organisation and the persistence of the mercenary «sub-culture» (p. 314). Only by a change in mentality during the 17th century could the *Reislauf* have lost its attractiveness. You cannot help gaining the impression that Romer has recognized the discrepancy himself and prepares his escape when he finally claims that the actual criminalization of the *Reisläufer* had not really been on his agenda but rather he had intended «to make the perspective of criminalization, supplementary to the well-established constitutional and legal history, more plausible as an explanatory concept for the process of state building» (p. 323). With these words, he leaves behind a reader who takes away with him the vague impression he could indeed have learned more from the work than the author allowed him to.

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