

The 34th Conference of German Legal Historians in Würzburg (South Germany) 8th – 12th September 2002

El 34 Congreso de Historiadores Alemanes del Derecho en Würzburg (Sur de Alemania) del 8 al 12 de septiembre de 2002

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RESUMEN Los historiadores del Derecho de lengua alemana se reunieron en Würzburg entre los días 8 y 12 de septiembre de 2002. Estas 34 Jornadas de Historia del Derecho trataron no sólo sobre los Derechos Romano y Medieval, sino también sobre la Historia moderna del derecho privado. Así mismo, una parcela importante estuvo dedicada al desarrollo del Derecho de la Europa del Este así como a las investigaciones sobre el Derecho de la ex República Democrática Alemana.

ABSTRACT From the 8th to the 12th of September 2002, the law historians in German language gathered in Würzburg. These 34th History Journeys about Law, studied not only roman and medieval law but also the modern history of private law. Besides, an important place was reserved to the development of law in Eastern Europe, and to the investigations about law in former Democratic Republic of Germany.

RÉSUMÉ Les historiens du droit de langue allemande se réunirent à Würzburg du 8 au 12 septembre 2002. Ces 34^e Journées d'Histoire du droit portèrent non seulement sur les droits romain et médiéval mais également sur l'histoire moderne du droit privé. En outre, une place importante était réservée au développement du droit de l'Europe de l'Est ainsi qu'aux recherches sur le droit de l'Ex-R.D.A.

KURZFASSUNG Alle zwei Jahre findet der Deutsche Rechtshistorikertag statt; der letzte, nämlich der 34. Kongress, trat in Würzburg vom 8. bis 12. September 2002 zusammen und behandelte nicht nur Themen des römischen und des mittelalterlichen Rechts, sondern gleichfalls solche aus der neueren Privatrechtsgeschichte. Einbesonderer Platz war der Rechtentwicklung in Osteuropa sowie der Erforschung des Rechts der früheren DDR gewidmet.

PALABRAS CLAVE

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On the evening of 8th September 2002 participants in the 34th Conference of German Legal Historians gathered in Würzburg, where the Vice President of the University of Würzburg, Wolfgang Freericks, and the dean of the law school, Helmuth Schulze-Fielitz, welcomed them in the Emperor's Hall of the Prince-Bishops' Residence. The opening speeches and festive chamber music will be well remembered, as will the spectacular frescoes of the Emperor's Hall, especially the ceiling fresco which shows the most important event in the -medieval history of the city of Würzburg, namely the marriage of Friedrich Barbarossa and Béatrix of Burgundy in 1156. Ulrich Sinn (Würzburg) presented the keynote address for the conference, "The Law of Asylum in Antiquity".¹

The next day Rolf Knütel (Bonn) and Clausdieter Schott (Zürich) spoke, the latter on difficult questions of interpretation, having chosen as the title of his lecture „Authentic Interpretation: between Hermeneutics and Legislation.” Using many examples from all of legal history, Schott discussed authentic interpretation, which he argued is always in conflict with material revisions: while interpretation can be undertaken retroactively, a law can principally only be in force *ex nunc*. He elaborated four kinds of interpretation which were presented in post-glossator sequence, as follows: first, the interpretation of the *Princeps*, that is, the authentic interpretation in a narrow sense, which is characterised by the formula *Eius est interpretari leges, cuius est condere*; then, interpretation by *Consuetudo*, which rests on the rule *Optima est legum interpres consuetudo*; as well as interpretation through the *Judex* and finally interpretation by the *Doctores* and the *Magistri*. The commentary (*Glosse*) already measured these four types of interpretation by three criteria, namely by their generality, their binding force and the necessity of the written form. In Schott's view only the authentic interpretation of the *Princeps* fulfils all three requirements, because it is *generalis, necessaria et in scriptis redigenda*. In this role model, the subjects of interpretation stand vis-à-vis the corresponding type of legal source, namely the *Princeps* vis-à-vis the law (*Gesetz*), the Judges vis-à-vis customary law and scholars vis-à-vis the glossed Roman law. With a new orientation as to legal sources, that is, the shift from the medieval culture of judicial decision to the modern culture of legislation, the understanding of interpretation and method also changed. Francisco Suárez's *De legibus ac Deo legislatore* was for Schott a prime example of placing the emphasis not on the subject of interpretation but on the method. According to Suárez, Schott argued, authentic interpretation could undertake transforming interventions, because it fulfilled all

¹ Compare the conference report by Inge Kroppenbergh in der Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung = ZRG Rom. Abt. 120 (2003).

conditions of a law and thus had to be just, formally legitimate and promulgated. Schott concluded that, as legislation increased in significance, its „repair shop“, that is, authentic interpretation, also attained a clearly improved status.

Knütel's lecture "Unacknowledged yet very present - Roman Law in the Jurisprudence of Last Instance" demonstrated a continued presence of common law in the jurisprudence of the Bundesgerichtshof (BGH), using the specific examples of the *actio iniuriam* and the *laesio enormis*. With the help of relevant passages in the Digests, the Roman Law expert showed direct connections between the jurisprudence of the Reichsgericht (RG) and the BGH to institutions of the classical Roman law.

That afternoon, the Plenum broke into two sections. The first, led by Maximiliane Kriechbaum (Hamburg), dealt with "Learned Law in Medieval German Legal Records". Gero Dolezalek reported on his project in Leipzig to inventory Latin legal manuscripts from German-speaking areas and areas eastward, as well as the Netherlands. Almost all manuscripts have been roughly inventoried, but only about half have been well catalogued. Between 100 000 und 200 000 manuscripts still need to be catalogued. Canon law is the main emphasis of this project, which will run for ten years and can be viewed and used at Professor Dolezalek's web site.² The large database allows searches for manuscripts by means of indexes (e.g. Author, Work, and opening words). In the coming years our picture of Roman-Canon law in Germany could be corrected, if reception did not occur through the *Corpus Juris Justiniani* and *Corpus Juris Canonici* but was rather very strongly influenced by confession books and the literature of moral theology. It was precisely "half and quarter-scholars," Dolezalek argued, who contributed to the reception in Germany.

In his presentation „Learned Law in Hamburg and Lübeck" Albrecht Cordes (Frankfurt a.M.) dealt with the conditions surrounding the search for scholarly law in the German middle ages, above all in the 13th century. He discussed three levels: scholarly legal science, legal records, and the legal practice. With this as his starting point he specified for learned law in Hamburg and Lübeck a selective reception of norms, arguments and rhetorical topoi of all legal areas on the one hand and, on the other hand, the adoption of basic concepts of scholarly legal thought. An argument for the latter point is the fact that the Hamburg City law (*Hamburger Stadtrecht*) was called an „Ordeelbook" and simultaneously a „*liber iudiciorum*", as well as the fact of its division into twelve books. According to Cordes, the attempt at a systematic codification can be seen from the legal material handled and was reflected in a distantly identifi-

² Editors' footnote: <http://www.uni-leipzig.de/~jurarom/manuscr/index.htm>

able scheme of *personae-res-actioes*. Cordes subdivided the first point of his source analysis, that is, the selective reception of norms, arguments and rhetorical topoi, into citations in the same language, word for word translation, and the explicit adoption of imperial law, all of which appear less often in the sources, as well as into other changes of domestic law under scholarly influence, the adoption of arguments, and mere similarities. The discussion went deeper into the question, whether scholarly law could be qualified as "Verwissenschaftlichung" ("scholarizing") in Wieacker's sense, as „professionalisation" or as „rationalisation". Ulrike Seif (Passau) discussed „Roman-Canon Inheritance Law in Medieval German Legal Records". She elaborated on the precedence of local law (limitations on freedom of testament) over the canon law form of testament (freedom of testament) and emphasized the „variety" and „diversity" of the corresponding legal provisions. It was also made clear that one cannot simply apply to rural areas conclusions that result from research involving urban source materials.

Christoph Meyer (Erlangen) dealt with „Langobardian Law North of the Alps. Unstudied Migrations of Scholarly Law in the 12th - 14th Centuries." True, the glossators were fundamentally opposed to the Langobardian law, yet even the canonist Ostiensis mentioned the *Lombarda* in addition to Roman Law and feudal law (*Lehnsrecht*); the *Lombarda* was of greater significance in the decretal literature than researchers had previously assumed. This raised the question whether influences of the *Lombarda* underlay the *Sachsenspiegel*. In favor of this argument would be the fact that Eike von Repgow spent time at the *Magdeburger Rechtsschule*, which evidences its own scholarly tradition.

The second afternoon section, dealing with "Contemporary History of Law" was led by Rainer Schröder, who commented that it is not always easy to draw a line between the work areas of contemporary legal history and political science. In the end though he relies on the competence of historically trained lawyers in the field of the most recent legal history as well. Five substantial projects in contemporary history were presented.

Tuesday, 10th September, began with a contribution on Roman law. Andreas Wacke (Köln) spoke on "Roman Jurists' Image of Man". Then Jan Schröder (Tübingen) addressed the topic "'Law' and 'Natural Law' in Modern German Legal Theory". Beginning with the uniform conception of law up to the mid-17th century, Schröder tracked two phases of the disintegration of this concept of law. As of the middle of the 17th century, the positive law was still only the value-free directive of the lawgiver, whereby the characteristic of reasonableness or justice was inapplicable. As of the mid-18th century, the legal-moral and physical natural law was ascertained by reason

and experience and, in addition, the exigency of a (divine) lawmaker was eliminated, so that subsequently the law was only „conditional rules“ (*notwendige Regel*).

The section on „Political Criminal Procedure in European History“, chaired by Günter Jerouschek of the University of Jena, was held in the Imperial City Hall of Rothenburg ob der Tauber, with the option afterwards to visit the medieval Kriminalmuseum or the archives of the Imperial City.

Udo Ebert (Jena) dealt with the case of Catilina, whom the Roman Senate declared *hostes* / conspirator in 63 B.C. Ebert began his four-part talk “Criminal Law, Public Emergency Law and Martial Law” by considering the persons defeated under martial law outside Rome and later criminally condemned, and then the process against the conspirators arrested in Rome. The third part inquired into the legal justification for execution by public emergency law, martial law, and general criminal law, and the fourth section went deeper into the political motives and backgrounds of the executions. He came to the result that the executions were not justified in the case of the Catilineans, since the criminal process was not legitimated but was a purely political process.

Hans Schlosser (Augsburg) made the connection to the High middle ages with his topic “*Corradino sfortunato*: Victims of Power Politics? On the Conviction and Execution of the Last Hohenstaufen”. He was interested in examining which crimes deserving of death were attributed to Konradin, whether he received an orderly process or if he was likewise victim of a political process. His *crimen laesae*, Schlosser claimed, was high treason, which could be subsumed under Part I 9 of Frederick II’s constitution for the Kingdom of Sicily (MGH *Constitutiones et Acta Publica Imperatorum et Regum*, vol. II, Supplementum 1996): *De guerra non movenda. Comes, baro, miles seu quilibet alius, qui publice guerram in regno moverit, infiscatis bonis suis omnibus capite puniatur...* For Schlosser it depended on being able to show that Konradin not only broke a simple prohibition against feuding - according to the prevailing opinion to date - but that he committed an act hostile to the public peace (*Landfriede*), which Schlosser could establish particularly on the basis of the characteristic of *publice*. This rule was applicable to the *usurpator* Konradin and thus made possible the elements of the offense of crimes against the sovereign, for which according to the valid law at that time, no process needed to take place (*manifestus regis hostes*). It was then immediately adjudged and enforced according to the notoriousness and manifestness of the act, a principle that first appears in the doctrine of *crimen manifestum vel notorium* in thirteenth century canon law. Thus, Schlosser showed convincingly that Konradin’s death was covered by the criminal and procedural law in force at the time.

Ulrich Falk (Mannheim), in his presentation, "Political Witch trials? A case study from the 17th century", singled out the shire of Vaduz (in the Principality of Liechtenstein) in order to present the rich archive material still existing on criminal proceedings against witches before the *Hofgericht* there. The material showed a high frequency of persecution, with approximately 300 executions for a population of 1 650 inhabitants. From a total of 48 prosecutions, only 28 were directed against men. Falk put forward the thesis that the count of Vaduz, deeply in debt because of intensive warfare, mal-administration and harvest failure, richly profited from the confiscated money and goods of the tortured. According to Falk, the Vaduz process shows that there was a "murderous institutionalisation of the judicial process", evidencing "serious governmental criminality", that was likewise capable of being used by various interest groups.

Subsequently, Regina Ogorek (Frankfurt a.M.) presented her investigation into "Strategies of Argumentation in Political Trials. A Legal Historical Reflection". She also dedicated her presentation to looking at the "political trial" and its juridical methods of argumentation. Using the example of the Nazi *Blutschutzprozesse* (processes to protect the purity of German blood) before the Supreme Court of the German Reich (*Reichsgericht*), she explained that the court was less interested in the legal justification than in unlimited punishment, which required not a legal but a national-socialist justification. As was to be expected, this showed itself also in the application of the topoi from Nazi ideology. Nevertheless, Ogorek claimed, the *Reichsgericht* still gave judgement more "professionally than the special courts".

The next day, Wednesday 11th September, began with two plenary lectures under the Chairmanship of Wilhelm Brauner, from the University of Vienna.

In his study "Learned Law and the Economic Order. The Dutch 'Beer-War' in the 15th and 16th centuries", Alain Wijffels (Leiden/ Louvain-la-Neuve) described impressively the extent to which Dutch law was influenced by Roman canon law: as a result of the development of new methods of beer production and the diversification of beer production, princely justice was strengthened, which in turn provided a legal framework to the quarrels over beer production. Wijffels developed five strategies of argumentation with respect to this point. The strongest argument was that of the protection of property, as the process of determining ownership was well-established in the judicial process of Roman canon law and thus accepted by all parties. Often bound up with this was the challenging of administrative acts. Moreover, the parties called for a restrictive interpretation of the law or, when the opposing claim was based upon the protection of property, stressed traditional interests, such as the *utilitas publica*, that

is, public interest. Finally, the congruence of individual interests with the prince's was sometimes claimed, for the execution of which the *procureur général* was responsible. Wijffels presented four types of conflicts: firstly, the local-internal town quarrels; secondly, those which the town had with the countryside, because they did not want competition, in particular breweries, to establish themselves in their area; thirdly, those conflicts between towns in the shire of Holland; and fourthly, the inter-province judicial trials. The result of the study was that in fact no highly developed doctrine, in which legal scholarship stood to the fore, had developed, but important legal concepts and juridical *Leitmotive*, such as, most importantly, that of *utilitas publica*, were used to justify the greater values represented by economic and tax interests. According to Wijffels, the beer trade illustrated impressively how hard, even outside their boundaries, cities tried to enforce their interests against the competition.

Klaus Luig's (Köln) presentation "The History of Private Law -an Assessment" had, as the speaker affirmed, rather the character of a "selective sampling of the history of the Doctrine of Private Law", focussing on the General Part and the law of obligations for the greater part of his assessment. To this end, Luig talked about the large range of published studies on certain private law institutions, biographical/bibliographical thematic works primarily tied to individuals, as well as studies on basic concepts of private law (such as freedom and social issues). The discussion unearthed several suggestions for future research, such as work on contract practice and on economic and trade law, for example merchant status and its ostensible existence. The history of private law should not only be seen in terms of that preceding the German civil code (*BGB*), but rather needs to be brought into the wider historical context.

For the sake of completeness, the following speakers and topics from the section concerning legal practice in Antiquity (led by Ulrich Manthe from Passau) should be named; these are presented in the Roman law section of the *Savigny Zeitschrift*.³ Ralph Backhaus (Marburg) spoke about the "Modification of risk-taking in common companies through agreements in classical Roman Law". Peter Gröschler (Mainz) chose the theme "The Oath in *TPSulp.* 28-29",⁴ Éva Jakab (Szeged) on "Peril and Practice - Agreement Models for Risk-Sharing in the Purchase of Wine".

The section entitled "The Modernisation of the Legal Order in Central and Eastern Europe since the Enlightenment" brought important new findings for European legal history. Central to the work of Gabor Hamza (Budapest) was "The Concept of the *ius consuetudinarium* in the *Tripartitum* of Werböczy". As the main source of Hungarian

³ Editors' footnote: Conference report by Inge Kroppenber in der *ZRG Rom. Abt.* 120 (2003).

⁴ Editors' footnote: *TPSulp.* = *Tabulae Pompeianae Sulpiciorum*.

private law, first printed in Vienna in 1517, the *Tripartitum* was in force in Hungary from 1514 until 1848. However, it never achieved the status of law as the Hungarian House of Lords at no point made it such, the higher nobility fearing that it would result in a power shift towards the lower ranks of nobility. Hamza pointed out the difficulty of qualifying the *Tripartitum* as legal; neither *lex* nor regulation or statute describe it, and one can at best speak of it as *ius consuetudinarium* or as a *recueil officiel de coutumes*.

Heikki Pihlajamäki (Helsinki) addressed "The *Hofgericht* Dorpat/ Riga -a new chapter in the history of the highest courts in the Baltic region". He was interested in the role of this court in Dorpat, a town that was founded by the Swedes. The speaker made the point that in the *Hofgericht* of Dorpat, first Livonian law then Swedish law followed by the *ius commune* were applied. There was no *Aktenversendung* (case referral for advisory opinions) and in the beginning also no university in Dorpat. Appeals did not play such an important role at this court as in other Swedish *Hofgerichte*, since only seven records of appeal survive. Moreover, the investigation showed that the judges in Dorpat had studied at thirty different universities.

To this, the section leader Peeter Järvelaid (Tallinn) fittingly informed us about his knowledge of the "Legal education in the Baltic region – a case-study of the University of Dorpat". Following the surrender of the Swedish King, Karl XII, at Poltava in 1709, Russia granted Livonia the right to its own university, which was in fact not established until 1802 and whose language of education was German until 1893, from whence it was Russian.

Jürgen von Ungern-Sternberg (Basel) raised in his presentation the following question of "How does one Surrender Formally? The Surrender of the Baltic Countries to Peter the Great from a European Perspective." The speaker brought out the fact that at the start of the 18th century a certain convention existed that was used generally in Europe for the purpose of capitulation and surrender of power to the new ruler. Thus, the Russians left untouched former offices, such as those court instances with German as the chancellery- and court-language, the privileges of the nobility in the countryside and those of the burghers in the towns. Contemporary parallels such as the surrender of Strasburg during the time of Louis XIV support this theory. Moreover, the Roman form of capitulation (*deditio*) could be seen as a contractual agreement, as the "formal handing over" was an "agreement" between the surrendered community and the new ruler. In order that there should be no interruption in the transfer of power, the Livonian order of knights and the town of Riga concluded an agreement with Peter the Great concerning the handover of power, which was confirmed by the previous ruler, Sweden.

All in all, this section of the conference confirmed that the Baltic region, like Hungary, was very much bound up with the culture and legal order of Central and Eastern Europe.

Following a very instructive and at the same time enjoyable organ recital in the university assembly room and a minute's silence in memory of the victims of the September 11th terrorist attack on New York, attention turned to a large-scale editorial project of interest to all legal historians. Heiner Lück (Halle) and Albrecht Cordes (Frankfurt a.M.), together with the leader of the Philological Department of the Erich Schmidt-Verlag, Carina Lehnen, elaborated on the ideas and concepts of the second edition of the *Handwörterbuch zur Deutschen Rechtsgeschichte (HRC)* (Concise dictionary of German Legal History). In the coming years, a comprehensive and up-dated new six-volume edition by Wolfgang Stammer, Adalbert Erler and Ekkehard Kaufmann, with a strong improvement of the structure of headings, is planned. The main emphasis will be on the German legal history of the Middle Ages and of the early modern period (the old Reich and the subsequent state-building), including a European dimension. The new editors asked legal historians for their co-operation and support.

It was furthermore announced that the 35th German Legal Historians Conference would take place from 12th to 17th September 2004 at the University of Bonn and that there would be a special section to mark the bicentenary of the passing of the French *Code civil*.

The three evening receptions with Würzburg University in the Residency, the Mayor of Würzburg in the old Town Council building (*Grafeneck*), as well as with the Mayor of Rothenburg ob der Tauber in the *Reichsstadthalle* of that town were splendid. The merry wine-tasting of *Bocksbeutel* by candlelight in the historical cellar of the Residency among the wine barrels on the evening of 9th September will without doubt remain a wonderful memory for all the participants. The last day, 12th September, was reserved for a tour in glorious sunshine of the sights of the Tauber valley; also visited were the Cistercian monastery at Bronnbach, with its Roman cloister, the castle of Bad Mergentheim with its museum of the history of the Teutonic Order, the chapel of Stuppach with the Madonna by Matthias Grünewald, the Renaissance castle of Weikersheim with its impressive knight's hall and original Baroque gardens, the Church of Our Lord at Creglingen with the altar by Riemenschneider, as well as the picturesque wine-growing village, Frickenhausen, where finally dinner was enjoyed.