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Acceptance and Rejection of ‘foreign’ Legal Doctrine by the Council of Lubeck around 1500^{*}

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Abstract: From the late middle ages to early modern times (ca. 1200-1600) the Lübeck City Council was the most important courthouse in the Baltic. About 100 cities and towns on its shores lived according to the law of Lübeck. The paper deals with the old theory that Imperial law, i.e. mainly the learned *ius commune*, was generally rejected by the council on the grounds of its foreign nature. The paper rejects this view with the help of 8 case studies. There exist rather spectacular statements against Imperial Law, but a closer look reveals that they have to be seen in the light of a specific practical context. They must not be confounded with general statements in which the council had no interest. Its attitude towards Learned Law was flexible and purely pragmatic.

^{*} The paper presented at the conference at Miami consisted mainly of part A and the first case study of part B. I was able to discuss the subsequent cases at various later occasions: With the seminar of Prof. Harald Siems, Universität München, at a conference of the Hokudai University at Sapporo organized by Prof. Masaki Taguchi (the conference treated the subject of creole law for which the case of the Imperial Law at Lubeck may very well be an example) and, on invitation of Prof. Antjekathrin Graßmann, in front of the Verein für Lübeckische Geschichte und Altertumskunde in whose journal a german version of this paper is going to appear (ZLGA 2009). I am most grateful to Dr. Mark Godfrey for his invaluable help with proofreading my article – help that went far beyond mere language corrections. The remaining mistakes were left in the manuscript intentionally in order to remind the esteemed reader that the author’s mother tongue is not English.

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A.

Lubeck, today a town with slightly over 200.000 inhabitants 60 km northeast of Hamburg, owes its rise to the top of the hanseatic cities among other favourable factors to its geographic situation at the south-western corner of the Baltic Sea. This made it the most advantageous point for all trade between the countries on the Baltic shores and central, western and southern Europe which did not wish to take the strenuous detour against the prevailing western winds around the northern tip of Denmark. Until the rise of the railroad overseas transport was the quickest and cheapest way of transportation. Each mile covered over water was one land mile spared, and this played in the favour of Lubeck. The city became rich and powerful as the leading member of the Hanseatic League, an association of merchants and cities with the main purpose of obtaining and defending privileges from overseas trade partners, namely England, the Netherlands and Flanders, Scandinavia, Poland and Russia, a strategy which reached its greatest success in the 13th and 14th c. Lubeck was founded in the middle of the 12th c., became an Imperial City in 1226 and then served as prototype for numerous new cities on the Baltic shores, most of them founded in the course of the 13th c. In particular, the law of Lubeck became a model adapted by many of these new cities. This included not only the transfer of the written town law and of Lubeck's Council-based constitution, but also a permanent relation of jurisdiction, in which the Lubeck Council acted as a court of appeal¹ for the cities which had adopted Lubeck's law, although all of these new cities were situated in the provinces of other German princes or even beyond the borders of the Empire. This jurisdiction of the Lubeck Council left relatively rich sources; some thousand decisions mainly from between 1450 and 1550 are passed down to us². In 1495 a centralized imperial court, the

¹ In the 1980ies a sophisticated debate arose whether or not the Lubeck Council acted as a court of appeal in the technical sense of the word – this was the classical point of view by Wilhelm Ebel (see next footnote) – or if it passed its decision on to the lower court as binding but internal advice, giving the lower court the opportunity to pronounce the sentence as its own – as Jürgen Weitzel would have it. See the latter's short book "Über Oberhöfe, Recht und Rechtszug. Eine Skizze" (1981) and his recent article "Appellation" in: Handwörterbuch zur deutschen Rechtsgeschichte, 2nd ed., vol. 1 (2008), p. 268-271.

² Wilhelm Ebel edited the bulk of them in 4 volumes (1955-1967). He was also the most important expert on the law of Lubeck; see his "Lübisches Recht I" (1971 – vol. II never appeared) and his convenient survey in the article by the same name in Handwörterbuch zur deutschen Rechtsgeschichte, 1st ed., vol. 3 (1984), p. 77-84.

Reichskammergericht (Imperial Chamber Court), was founded, and the Council of Lubeck quickly accepted its superior jurisdiction. In return, the Imperial court accepted the priority of local and regional rules and applied Imperial and Roman law only as a subsidiary, if the local law did not offer a solution³. Nevertheless the possible control by a higher court may gradually have influenced style, content and language of the findings of the Council of Lubeck. Most cases discussed here stem from this period of transition.

This article is scheduled to appear in a volume of the series “Comparative Studies in Continental and Anglo-American Legal History”. The dichotomy of this title lets the Channel look broader and deeper than the Atlantic Ocean and at the same time closes the ranks between the numerous Continental legal cultures with their great variety over time and space. This division is owed to the concept of ‘*Rechtskreisen*’ (i.e. ‘circles’, families, of countries sharing a similar legal tradition and/or common roots) which the comparatists use for their work on contemporaneous legal orders⁴. How much sense it makes to project this concept into the past, is an open debate⁵. If the observer is sufficiently distant or his focus is sufficiently blurred, ‘the’ Civil law tradition of continental Europe may indeed look monolithic. If taken literally however, this ‘Continent’ would include among other regions Northern and Eastern Europe, Greece and the South East, with long Ottoman and (in the Iberian Peninsula) Moorish stretches of history. Of course, no one is attempting in earnest to write such a broad

³ This ‘Statutentheorie’, theory of statutes, as it is called in Germany, derives from the high medieval Northern Italian cities who in the regard of law were more like independent republics, and was adopted widely in the north of the Alps. The degree to which it was actually applied by the early modern courts in Germany, is the subject of the important book by Peter Oestmann, *Rechtsvielfalt vor Gericht. Rechtsanwendung und Partikularrecht im Alten Reich* (2002).

⁴ That is the division made popular under others by the classic work of Konrad Zweigert/Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd ed. 1996, engl.: *An Introduction to Comparative Law*, 1998).

⁵ On the debate of the reciprocal influence between Comparative Law and Legal History see the ten articles (three of them in English) in *Zeitschrift für Europäisches Privatrecht (ZEuP)* 1999 which are based on lectures given on the *Deutsche Rechtshistorikertag 1998* in Regensburg. For titles and tables of content see <http://rsw.beck.de/rsw/shop/default.asp?sessionid=F510CAA4FF744398B5CF175810337051&docid=22148&highlight=cordes+ZEuP> (25 Jan. 2009). At that occasion I got the opportunity to utter some doubts regarding the transfer of comparative methods into medieval Legal History. Mainly the “*Praesumptio Similitudinis*”, the presumption of similarity proposed by some scholars of Comparative Law, seems like wishful thinking and does not respect the distance and possible strangeness of other legal cultures sufficiently: Albrecht Cordes, *Was erwartet die (mittelalterliche) Rechtsgeschichte von der Rechtsvergleichung und anderen vergleichend arbeitenden Disziplinen?*; *ibid.*

‘Continental Legal History’⁶. The term describes a somehow coherent topic only under the condition that it is limited in both time and space to a certain sector of Europe’s legal history: the history of the *Ius Commune*, the learned Roman and Canon law since the beginnings of the Law school of Bologna around 1100, and later the strong role of the absolutistic and then the constitutional state with its belief in codifications as universal remedy to legal problems⁷. The focus on these subjects of undoubtedly universal importance implicitly tends to disregard the many other interesting and colourful legal traditions which in their specific way contributed to the many facets of ‘Continental Legal History’.

One of these traditions, the legislation and jurisdiction of the Lubeck Council, relevant over centuries in great parts of North-Eastern Europe, shall be treated here. It lay in the hands of an experienced, but un-learned elite of Merchants, who little by little made their legal order compatible with the larger context of the early modern *Usus modernus pandectarum* in the Holy Roman Empire they were part of. The process of adaption led to many concessions, especially in regard to the language, possibly because the traditional Low German language was not suited well for this new type of content or simply because High German and especially Latin were more fashionable. The result was a hybrid mix of traditional domestic and of *Ius Commune*-elements and is not easily evaluated as a whole.

The volume this article is written for devotes itself, as the second of two related volumes, to the ‘reasons courts give for their judgements’, as ‘*Rationes decidendi*’ should probably be translated. But in a technical sense the term has a much narrower meaning. Originally, the term is opposed to *rationes dubitandi*,

⁶ What would such a history focus on? Would it be a “European legal history with the exception of the British isles”? Irish, Scottish and Welsh scholars are not likely to agree with that. As far as I see, the term is exclusively used to divide England from “the” Continent. Should there be a vicinity of thinking to the traditional division of Legal history in US Law Schools into three branches, i.e. American (more or less US-American) legal history, Common (i.e. in this context English) legal history as the former’s main ancestor, and thirdly Civil legal history, which consequently has to cover the non-angloamerican rest of the world?

⁷ This is a view of Europe which – by coincidence or not – happens to limit itself more or less to Charlemagne’s empire or – if you prefer a more modern connotation – to the part of Europe in which the EEC was founded in 1957, excluding Great Britain and most certainly any part of Europe beyond the Iron curtain. From a German perspective, this was part of the program to integrate the western German scientific community into Western Europe. It was the same line of thinking in which Helmut Coing founded the “Max Planck Institut für Europäische Rechtsgeschichte” at Frankfurt in 1964. Coing, together with Knut Wolfgang Nörr, also established the series “Comparative studies in Continental and Anglo-American Legal History”.

the reasons for doubt, with which learned jurists began both *consilia* and judgements, before they overcame these reasons for doubt in the *rationes decidendi*, their reasons to decide. This seems to be the main understanding of the term in the Civil Law tradition. Later, and mainly in England, *rationes decidendi* were opposed to *obiter dicta*, musings ‘by the way’, which unlike the former did not necessary have to be supporting parts of the justification of a judgement but supplements of lesser importance (and therefore not binding in a system of precedent).

Neither of these two elaborate technical meanings of *rationes decidendi* can be stipulated for the judgements of the Lubeck Council. Their application would have required elaborate legal training, which, as said before, the Councilmen did not possess. Therefore, the judgements from Lubeck cannot contribute anything to the question of *rationes decidendi* in the technical sense of the term. Instead, we must deem ourselves lucky for the cases in which the generally rather taciturn Councilmen revealed any of their reasoning at all. But this makes their short and sometimes laconic remarks all the more valuable. They do permit some insight if not into their *rationes decidendi* then at least into their reasons to decide.

Thus, if this article does not contribute to a comparison between Anglo-American Common and Continental Civil law nor to *rationes decidendi* in a strict sense, does it at least have something to contribute to the concrete subject of the volume, the role of foreign law within court decisions? Again, not in the narrow sense of ‘foreign’ as ‘something coming from beyond a border’, as the article will focus on questions of Roman Law which according to late medieval and early modern legal theory was German law because it drew its authority from the Roman emperor – who at the same time was German king and in this role highest judge in the realm⁸. Strictly speaking, Imperial law could not be foreign to an imperial city like Lubeck.

⁸ That Roman Law was *ipso iure* also valid law of the Holy Roman Empire was considered self-evident since the days of the Hohenstaufen Emperors of the 12th/13th c. Frederic I. Barbarossa even felt so much the continuity with Iustinian that in 1158 he added his *Constitutio Habita*, a privilege in favour of scholars and universities, to Iustinian’s Codex. This tradition needed support when it became doubtful around 1500, at about the same time when the ‘Holy Roman Empire’ started to be named with the addition ‘of German Nation’ as its universal ambition was fading for good. That support came from the ‘Lotharian Legend’, which apparently originated in the surroundings of Melanchthon. According to this legend Emperor Lothar III. of Süpplinenburg found a copy of the *Corpus Iuris Civilis* when he conquered Amalfi in 1135, and enacted it as a

But in a broader sense, rules and words may be 'foreign' because the traditional domestic law is not familiar with them, because they do not fit into its language and its legal system: here 'foreign' is used in the sense of 'unknown, strange'. To this sense of 'foreign law' the jurisdiction from Lubeck does indeed have something to contribute. They present an interesting case which might be suggestive for other comparative fields besides the Anglo-American v. Continental juxtaposition. The case of Lubeck shows how the representatives of an old but mainly un-learned legal system reacted to the challenge of a fully developed legal order foreign to their indigenous tradition: Which parts did they sacrifice in order to retain others? How did they change their legal language? Did they react differently on a more public – if you like: propagandistic – level on one hand compared to the level of down-to earth daily legal routine on the other? Many peoples all over the world have been confronted with these questions, and all of them have undergone a process of change, from the clashes of the Late Roman Empire with the Germanic tribes to the beginning of European expansion in 1492, the Imperialistic era with its peak in the late 19th c till the choices the countries under former Soviet influence faced when they reshaped their legal cultures after 1990.

The Council of Lubeck mainly applied its own rules, the Lubeck town law (*Stadtrecht*), which had become the legal framework for over a hundred cities on all shores of the Baltic Sea, either by privilege of the founding princes or by free choice of the first settlers. For about 400 years, from the 13th-17th c., these cities turned to the 'founding fathers' of their law at Lubeck as a higher jurisdiction in settling legal disputes. Thus the Lubeck Council acted in the double role of both legislator and high court. In the 17th c. the emerging modern states cut off this jurisdiction of Lubeck over their cities, because such ties across the state borders were now considered as an insult and a threat to the new claims of sovereignty of the kings and princes. But although the 'daughter-

formal law in the whole Empire. This must have been the level of awareness of the matter the Lubeck Councilmen had around 1500, the time considered here. One century later, in 1643, Herman Conring refuted this legend and established the modern conviction that Roman law came into vigour in Germany by the slow osmotic process of 'reception'. This insight granted the courts a great amount of freedom because it entrusted them with the task of investigating for each single Roman rule whether or not it had been adopted in Germany. The purpose of this paper is to show that the Council of Lubeck, even without this elaborate reasoning at hand, anticipated much of that freedom in dealing with the Roman law one century earlier.

cities' were thus left on their own, the substantial law remained that of Lubeck, at some places, e.g. Reval (today Tallinn, capital of Estonia), well into the 20th c. The Lubeck town law is not identical with the hanseatic law⁹. Among other cities, Cologne, Magdeburg and Hamburg developed successful legal systems, and on a superior level the Hanseatic League itself pursued certain legislative activities. But the law of Lubeck was by far the most important within the hanseatic area, and in all of Central and Eastern Europe it was second only to Magdeburg. Whereas the law of Magdeburg spread widely eastwards over land, reaching as far the Ukrainian capital of Kiev, and to a large part reflected the primarily agricultural way of life in these regions, the Lubeck law is rather shaped by the needs of the sea and overseas trade.

The Lubeck Council was manned by members of the patriciate, mainly rich and experienced merchants, who handled all political, administrative and legal business of the city. They co-opted their members and future successors for life, thus giving a typical example of a small oligarchic medieval group. They were powerful, self confident and experienced, but they were no lawyers¹⁰. Max Weber referred to them as '*Rechtshonoratioren*', 'legal dignitaries', and this denomination seems quite close to the 'legal experts' of the modern discussion¹¹. The many roles this small group of powerful councilmen had to play – merchants and diplomats, politicians and administrators, legislators and judges – are the reason why this paper is based not only on judgements in the strict sense, which the Council issued when acting as court, but also on other results of their government activities. Strictly speaking, this syncretism of sources oversteps the focus of the present volume. But this seems acceptable because we assume that the councilmen stayed true to their legal convictions when changing from one function in the government of the city to another.

⁹ On the difference between the hanseatic level of law issued by the union of the cities on their yearly gatherings, the *Hansetage*, and the level of the cities which belonged to the Hanseatic League but had many other loyalties and sources of law besides the decisions of the *Hansetage* see Albrecht Cordes (ed.), *Hansisches und hansestädtisches Recht* (2008).

¹⁰ This does not imply that they had no access to learned advice – quite in the contrary! As far back as the middle of the 13th c. cities like Hamburg and Lubeck started to employ jurists who had studied at the contemporaneous universities in Northern Italy and Southern France, namely Bologna, Padova and Montpellier.

¹¹ Susan Reynolds, The Emergence of Professional Law in the Long Twelfth Century, in: *Law and History Review* 21, Bd. 2, 2003, http://www.historycooperative.org/journals/lhr/21.2/forum_reynolds.html (25 Jan. 2009) and the reply from Charles M. Radding, *Legal Theory and Practice in 11th c. Italy*, *ibid.*, http://www.historycooperative.org/journals/lhr/21.2/comment_radding.html (25 Jan. 2009).

These non-learned dignitaries had to cope with the challenge of ‘foreign’ legal doctrine within their jurisdiction mainly in one regard: They had to decide to what extent they were willing to accept and apply *Kaiserrecht*, Imperial Law, within their jurisdiction. That this question should arise at all may come as a surprise to e.g. English legal historians who would have no doubt that royal law issued in London would be observed in Boston, Bristol or Exeter. So how can Imperial law at all be ‘foreign’ to a city like Lubeck, proud of its status as Imperial city since the days of Emperor Frederic II.? The answer lies in the fact that around the middle of the 15th c. ‘Imperial Law’ became more and more synonymous with ‘Roman law’.¹² In many regards Lubeck was more like an independent republic than a city subject to any prince. The pride of this independence is well reflected in the four letters ‘SPQL’ on Lubeck’s Holstentor¹³, arguably Germany’s most famous city gate: “*Senatus Populusque Lubecensis*”!

As the German king and Roman Emperor was, at least north of the Alps, more of a judge than a legislator, Imperial cities were more or less free in their legislation¹⁴ and especially in the question whether or not to accept and integrate Imperial – i.e. Roman – Law into its indigenous legal order. This new (and very old) legal doctrine was the challenge to which the Lubeck legislators and judges had to find an answer. They did not succeed in developing a consistent attitude in this regard.

B.

In the following chapter this paper will examine the variety of answers to be found in the various legal sources from Lubeck. Very distinct reservations against any influence of Imperial law – where the Council claims that it was too hard to understand, that it was inappropriate and even vexing to the traditional

¹² Hermann Krause, *Kaiserrecht und Rezeption* (1952), p. 118-126.

¹³ If you happen to have a Two-Euro-coin in your pocket, you may be carrying this symbol of medieval burgher’s pride and power with you. The famous motto on the Holstentor (which also figured on the pre-Euro 50-Marks-bills) “*Concordia domi foris pax*” lets one ponder if German history would not have profited from more mercantile and less belligerent activities. The name of the German airline is another example of the role the Hanseatic League plays for the image which today’s Germany likes to paint of itself and its past.

¹⁴ Eberhard Isenmann, *Gesetzgebung und Gesetzgebungsrecht spätmittelalterlicher deutscher Städte*, in: *Zeitschrift für Historische Forschung* 28 (2001), p. 1-94, 161-261, especially p. 52-57.

civil liberties – stand right next to cases where ‘Imperial’ statutes are accepted without any apparent hesitation – or in one case even with the remark that “we are applying Imperial Law as we duly may”¹⁵. This comment is noteworthy as it seems to suggest an underlying controversy about which nothing else is known. Between these two poles, other reactions were possible. At least in one case, the introduction of the Roman *societas omnium bonorum*, learned legal doctrine was accepted theoretically and even incorporated into the code of law but nevertheless did not become effective in court because its prerequisites were so hard to prove.¹⁶ In this way the Council was able to present itself as a state-of-the-art legislator without forcing new legal provisions upon the merchants who preferred to stick to their traditional ways of doing business.

(1) The judges of Lubeck gave only short and scarce ‘*rationes decidendi*’ in their written rulings. In the judgements they present the main arguments of both sides very shortly and then award the victory to one side. As the only reason for their decision they repeat one of winning side’s arguments. The structural logic of these judgements is explained best with the help of a case study, which also represents an early case of confrontation with learned law – in this case with the doctrine of “*iustum pretium*”.

*De Ersame Radt tho Lubeck hebben tuschen Hinrick Jonsen eins und Andreas Vickinckhusen anders deles, van wegen einer bode in der olden Kisouw bolegen, so Hinrick Jonsen ome lude einer certen, de gelesen, vor 37 marck vormende vorkofft tho hebben, dar van ock Andreas 13 marck botalinge gedaen, stellende tho rechte, Andreas schuldich were, ome sodane bode tho vorlaten etc. dar kegen durch Nicolaum Wolters gesecht, dath idt ein umborlich und unredlick kop sundergen soven marck jarlickes borige vor 37 marck und were ultra dimidium iusti pretii ock van rechts wegen by keiner werde etc., de certe were ock noch an beiden stucken by Hinrick und nicht, wo geborlick, overgelevert, na widerem vorgevende und vorhoringe etlicker tuge, de nicht eindrechtigen tugeden, clage ... affseggen laten: **Dath de***

¹⁵ See below, case (2).

¹⁶ See below, case (7).

gedane kop is by keinen werden, dann Andreas moth Hinrick sodane 37 marck weddergeven. Actum ut supra [Mercurij quinta Aprilis].¹⁷

In 1525 Hinrick Jonsen sued Andreas Vickinckhusen, in order to make Andreas transfer to him a market booth (Bude), which Andreas had sold him for 37 Marks of Lubeck silver¹⁸. The validity of the sales contract was in question because this price was very low. One Nicolaus Wolters, possibly a neutral third party or some sort of expert witness, but more likely a counsellor, intervened in the defendant's favour. He stated that the booth produced yearly revenue of 7 Mark, nearly 19% of the agreed vending price: indeed an attractive investment! Nicolaus is cited as having offered four arguments. He (1) called the contract unjust and unfair, continued in Latin that (2) the price was *ultra dimidium iusti pretii*¹⁹, stated, switching to Low German again, that (3) the contract therefore was not rightly valuable, adding that (4) the contract had not become effective as the seller never received his copy of the contract charter.

The text relates these points without comment. The court continues by reporting that it had heard contradictory witnesses, and then gives its judgement. It repeats a shortened version of Nicolaus' point (3), saying that the contract was not valuable, and sentences the defendant Andreas to pay the purchase price back. This is a somewhat surprising outcome for two reasons: Firstly, the plaintiff is not reported to have asked for this alternative verdict, and secondly, we learn only now that apparently the whole price had been paid in the meantime, although only a partial payment of 13 Marks is mentioned at the beginning. Perhaps this was a first instalment at the moment when the charter was drafted.

¹⁷ From the Niederstadtbuch, Lubeck famous city book of debts and contracts, entry dated 1525 *Iudicia*, cited according to Wilhelm Ebel (ed.), *Lübecker Ratsurteile* vol. 2, 1501-1525, Göttingen 1956, Nr. 1055, p. 583 f. The judgement is set in bold letters. The following interpretation is not beyond doubt in regard to the functions of the parties. The 3rd and 4th lines seem to suggest that, contrary to my view, Hinrick was the seller and not the buyer. But then the main part of the judgement does not make any sense at all. Why on earth would a buyer have an interest in reversing such a favourable deal?

¹⁸ Very roughly 37.000 US \$ of today's value – a number which can only be given under the caveat which economic history rightfully raises against such equations because of the huge difference between the baskets of goods of 1525 and 2009.

¹⁹ This means that according to the fair price of the booth would have been at least $37 \times 2 = 74$ m, producing an income of 9.5% per year at the most.

Be that as it may, the tricky question in our context is whether the verdict was based on the learned *lustum pretium*-doctrine²⁰ or not. One may argue that the court came to the same conclusions as Andreas' partisan Nicolaus and therefore must have agreed with him. But it does not say so. It might have arrived at the same conclusion on another way, e.g. because of the missing handover of the charter. The act of handing over the contract charter may very well have been the decisive act by which the contract was constituted; this is a concept wide spread in medieval legal realms beyond the learned law. But as the reasoning about the price of the booth and its annual profit uses a larger part of the short text – the hanseatic rulers were no friends of many words and lengthy reasoning – it is a fair assumption that the *laesio enormis*-argument was at least part of their *rationes decidendi*.

In the 14th and 15th c. Latin words were very rare in the legal language of Lubeck. One century earlier, since 1218, the first Lubeck law codes were written in Latin, but the language of the laws shifted to Low German in the course of the 13th c., and the administration followed a few decades later. The era of Low German as predominant legal language lasted about 250 years. In the late 16th c. 'the old Saxon Language', as its coevals called it, was waning again. The revised Code of 1586 was penned in High German, and the jurists returned to Latin. First Latin *termini technici* were integrated into the Low German and later into the High German codes and legal manuscripts, and when David Mevius published his authoritative commentary on 'Ius Lubecense' in 1641, the Law of Lubeck was once again being treated in Latin. All this is not simply a superfluous detour into the history of philology; the legal language in use is obviously an important indicator for the influence of foreign law.

Around 1500 the mere use of a Latin word may suggest that not only the words but also the ideas they expressed were foreign to Northern Germany. But there is no certainty here, either. In some cases from this period, a new expression was introduced simply because the domestic legal tradition did not already provide an adequate term. In one case from around 1560 the word '*administration*' is newly introduced to describe the management of a trading

²⁰ C. 4, 46, 2; see Max Kaser, *Das römische Privatrecht* II, 2nd ed. 1975, p 388-390.

company.²¹ This was a function which of course was not foreign to a merchants' town like Lubeck, but the Low German language had not yet coined a word for it. The example shows that sometimes the legal experts imported just words, and sometimes entire legal concepts with the matching terminology as a bonus. In any case, the number of passages of Latin within the Low German sources is increasing in the course of the 16th c. The edition of the Council's Judgements starts around 1450 (vol. 1), continues from 1500-1525 (vol. 2), and ends 1550 (vol. 3). Wilhelm Ebel's index lists no Latin words in vol. 1, five in vol. 2 and over 30 in vol. 3!

(2) And now for a review of some other cases which have been discussed among Hanse-historians. There is more evidence for references to Imperial law²², but in many cases our information does not go beyond the mere fact of its mentioning. So it seems preferable to discuss a few examples thoroughly than look at many of them superficially. The total number of eight examples seems enough to prove my point, namely the seemingly inconsistent and erratic handling of learned law at Lubeck.

Among the oldest evidence for learned law is the manuscript of the Lubeck town law of 1294. It belongs to the early stage of hanseatic legal history, a time of very active legislation. The makers of the code imported the various rules from a large variety of sources²³; the biggest chunks deriving from the resources of befriended neighbouring cities²⁴ and from the Saxon land law which had been collected a few decades earlier by Eike von Repgow in his *Sachsenspiegel* (1220-35). It is rather impressive how especially Hamburg forged this heterogeneous bulk of rules into a coherent new legal codex. The language of

²¹ Albrecht Cordes, Kapital, Arbeit, Risiko, Gewinn. Aufgabenteilung in einer Lübecker Handelsgesellschaft des 16. Jahrhunderts, in: Das Gedächtnis der Hansestadt Lübeck. Festschrift für Antjekatrin Graßmann (2005), p. 517-534

²² One finds them quite easily through the convenient registers of the edition of the Lubeck charters (Lübecker Urkundenbuch) and the aforementioned edition of the Council's judgements by Wilhelm Ebel.

²³ Recently Frank Eichler analysed and edited the Hamburg City code of 1270, masterpiece of the Magister iuris and experienced ambassador Jordan von Boizenburg: Das Hamburger Ordeelbook von 1270 samt Schifffrecht (2005).

²⁴ In 1841 Jacob Grimm compared this process of diffusing new legal rules from one town to the next with borrowing fire and light from a neighbour – a metaphor which became quite famous: "Man entlieh das recht, wie feuer und licht bei dem nachbar"; Kroeschell/Cordes/Nehlsen-von Stryk, Deutsche Rechtsgeschichte Band 2: 1250-1650 (9th ed. 2008), p. 117.

the law is the local Low German – with the one exception from Lubeck which is of interest here.

The law of tutelage was a subject of eminent practical importance in a time where merchants were not at all unlikely to die young on perilous journeys and leave possibly large fortunes to their minor children. The passage dealing with the deposition of inept guardians is a direct quotation from Inst. 23, 3+4! One copy of the code inserts the Latin words into the Low German context; a parallel copy translates them into Low German, thus camouflaging their foreign origin²⁵ – and presenting Latin-Low German translation equations like *furiosus=dauendich*; *prodigus=ein thobringer* and so on.

One part of the phrasing strikes the eye: the legislator felt obliged to insert a justification for the reception of Imperial law. A few words (*alse wi van rechte scholen* - as we rightfully may) seem oddly out of place, as legislators normally do not give reasons for their provisions within their codes of law. But they are of special value as the Council's only scarce comment why Imperial law could come into application at Lubeck at all. *Van rechte* may refer to the status of Lubeck as Imperial city, but this is just an educated guess. *Scholen*, although related to the English word *shall*, does not indicate a duty but a permission and therefore has to be translated with *may*. The fact itself, the insertion of the justification, seems to hint at an underlying controversy whether or not the Lubeck legislator was free to serve himself on the rich buffet of classical Roman law. It would have been interesting to witness the pros and cons exchanged in the Council on that matter.

²⁵ Johann Friedrich Hach, *Das Alte Lübishe Recht*, Lübeck 1839, Cod. II. The provisions on guardianship are art. 97-102, p. 293-297: *Art. 97 De vormunden settet*; *Art. 98 Van vormuntschap der gheste*; *Art. 99 De sinen kinderen set vormunden*; *Art. 100 De nene vormunder set*; *Art. 101 Van unnutzen vormunden*. This last article begins with the account about bad experience with incompetent guardians, and continues: „Therefore we receive, as we rightfully may, in these points the Emperor's law...“ – „*dar umme so unt fa wi alse wi van rechte scholen indessen stukken des keiseres recht also dar unse borghere hebbet unnutte vormunden dat schal man vor den rat bringhen*, and the Council may depose incompetent guardians and appoint others in their place; *Art. 102 Van vordorvenen iunghelinghen de mundich sint*: „Furthermore we have the Emperor's law like this...“ – “*Vord mer hebe wi des keiser recht also...*” that also an adult can receive a warden if he is “*furiosus {dauendich} ofte prodigus {ein thobringer}*, he schal also lange wesen under den bisorgheren bet deme rade anders umme ene bedunke vord mer omnes mente capti surdi et qui in perpetuo morbo laborant sine intervallo {alle unsinnighen lude, und dove lude, unde de sunder underlath in suken arbeyden} den schal men bisorghere gheven ane de se nicht don moghen dat stede moghe bliven wo olt se oc warden.”. The additions in {brackets} refer to a parallel codex in which the Latin words are translated into Low German. The source is Inst 23 (De curatoribus), 3 and 4.

As to the motives of this reception of Roman law, the code itself reports the difficulties which concern the deposition of incompetent guardians. Apparently the domestic law did not offer satisfying solutions, and on this occasion the Council, in this case acting as legislator, also adopted other rules, e.g. regarding tutelage over handicapped or sick adults. With the help of the Roman law, the Council was able to make a distinction between *Vormündern* (guardians over minors) and *Besorgern* (wardens over handicapped or sick adults).

(3) In 1384, a rebellious group of craft guilds with the butchers at the top (hence the name of “*Knochenhaueraufstand*”, “bone-smasher rebellion”) tried to overthrow the patrician Council of Lubeck – one of many disturbances and revolutionary upheavals in German cities in the late 14th c. In this case the rebels were betrayed before they could start to act, and apparently were given the opportunity to flee unhindered. Those however, who preferred to stay and bring their cause before the court, were badly mistaken.

As the procedure in criminal cases before non-learned courts was oral, we know next to nothing about the practice of criminal law from direct sources. In this case it is a chronicle which tells us about the revolutionary events and their juridical aftermath – victor’s justice for sure. Although the chronicler had no genuine interest in legal history and in exact juridical description of the process, we are entitled to use this source here as it claims explicitly that the rebels were treated *na kaiserrechte*, according to Imperial law. They were sentenced to death penalties cruel even by medieval standards for having committed a *crimines laesae maiestatis*.²⁶

In claiming *maiestas* for itself, the Council did not exactly act in the republican tradition it emphasized on frequent other occasions. This must have been part of the policy to restore its authority, but it is also typical of the growing self esteem and the claim for absolute supremacy the city councils developed in the late medieval and early modern times. But the immediate financial consequence

²⁶ Bernd Kannowski, *Bürgerrechte und Friedebriefe. Rechtliche Streitbeilegung in spätmittelalterlichen Städten* (2001), p. 84-87, and id., „*is sint nicht vil wort die eynen man schuldig machen*“. Der Wille als Verpflichtungsgrund nach land- und stadtrechtlichen Quellen im späten Mittelalter, in: *Stadt – Gemeinde – Genossenschaft. Festschrift für Gerhard Dilcher zum 70. Geburtstag* (2003), p. 45 ff. (p. 52 f.). His account is based on the report of the Detmar-Chronik (*Chroniken der deutschen Städte* vol. 19, 1884), p. 581-2.

of the verdict was that unlike other crimes punished by death, high treason led to the confiscation of the criminals' goods²⁷. In this way not only the 'traitor' was punished, but his family as well. The traditional hanseatic law knew of no such sanction, but the Roman law did – in the cases of *crimines laesae maiestatis*! In this case, it seems quite obvious that the Council, in the double role of injured party and judge, adopted the Imperial law to claim its constitutional superiority and for fiscal reasons.

(4) In the most blatant example of the opportunistic approach to the question 'imperial law or not?' the Council of Lubeck was acting in yet another role: as plaintiff. In 1418 the city sued Duke Erich von Sachsen-Lauenburg because he had led a violent feud without formal announcement against the town of Mölln near Lubeck.²⁸ This supposedly affected belongings of the city; the question whether the goods of the city had suffered damage was in dispute. The verdict depended on the burden of proof – in this case rather a privilege as proof was produced by "making one's assumptions true" by a simple oath. According to traditional Saxon law, the right to swear would have been the defendant's. He would have been allowed to take it upon his oath that he had not caused the damage in dispute. But "*gestliken unde keyserrechte*", Canon and Imperial Law, granted this oath to the plaintiff.

Quite obviously the plaintiff's enthusiasm for Learned Law was in this case not deriving from theoretical convictions.

(5) Not in a court ruling but in a letter of advice that the Council of another hanseatic city, Braunschweig, had asked for, the Council recommended that two women, who were found guilty of heresy, should be treated according to Imperial law. The letter continues by stating that at Lubeck they would have

²⁷ Ibid. p. 88 n. 473 refers to Cod. 9.8, Dig. 48.4.

²⁸ Hermann Krause, *Kaiserrecht und Rezeption* (1952), p. 89 n. 443, cites the Lübecker Urkundenbuch (LUB) vol. 6 Nr. 38 p. 39-49 [46]: „*dat denne na gestliken unde keyserrechte de beschedigeden ere schade betugen edder mit eren eden war maken unde beholden mogen, unde dat de hertogs de nicht mynren en moge umme der pyne wegen, dar he umme der vorsate unde gewald willen in vorvallen is na keyser Karols gesette vorscreven.*“ Emperor Charles' law“ refers to the Bulla aurea (1356); its c. CXVII (De diffidationibus) is cited six pages further up.

been sentenced to the stake for such crimes²⁹. This juxtaposition suggests that Imperial law imposed the death penalty for heresy. This may indeed have been the case, but some doubt remains: The request letter from Braunschweig was accompanied by the case files but they have not come down to us. The correspondence dates from 1450. In 1532 the Imperial penal code “Constitutio Criminalis Carolina (CCC)” was decreed, and it did indeed punish heresy with burning³⁰. This was the single most important legislative achievement of the Empire which for the most parts of its history was not a very active legislator. After 1532 an allusion to Imperial law in criminal matters would without doubt have referred to this code. But before this date? As the CCC was not a codification of new norms but a systematic collection of the common rules already in use (in the case of sorcery for example in the *Sachsenspiegel*), it is likely that the Council referred to that same rule although it was only laid down and promulgated in the CCC 80 years later.

In this case it is not obvious that Imperial law can be equated with Roman law as has been done in most parts of this paper. As to the motives of the ready embrace of Imperial law, at this occasion the Council did not act out of obvious selfishness. The 15th c. in general was a time where the cities, and especially the northern German cities, increased their activities in the fight against crime. As the central powers of the Empire were rather weak the cities started to play a more active role and took the matter into their own hands. A suggestion of harsh punishment in accordance with Imperial law would fit well into this picture.

(6) Probably the most famous statement against Imperial law, enthusiastically cited by generations of scholars who wanted Lubeck to be a palladium of national resistance against foreign intrusion, was a remark of Mayor Hinrich van Warendorp in 1456. But the evidence is thin. The remark consists of nothing but an incomplete subordinate phrase torn out of context, and our confidence is not restored by the fact that the only written proof is more than 300 years

²⁹ Hermann Krause, *Kaiserrecht und Rezeption* (1952), p. 89. Krause cites LUB 8 Nr. 681; Nr. 677 is the inquiry of the Council of Braunschweig to which Lubeck is replying: “[So we let you know] *dat gy na Keyserrechte klarliken vinden, wo men sodanne mysdaet schole unde moge richten, unde weret dat se en sodanne hir mit uns began hadden, so hadde wy se in ere hogeste gerichtet unde bernen laten.*”

³⁰ CCC Art. 109.

younger³¹. It is incorporated into a collection of ancient Lubeck laws where it is out of place because the remark is most likely a political statement but certainly no rule of law.

Its wording is: „*Wente nemant möt der Stades Rechte krenken mit kaiserliche Rechte, dat sulvest na des Kaisers worde ewig stede unde vast bliven schal, wen de Latienische Rechte unse Stades Wesen unnütte und gantz unteemlick sin [...]*“ – „Because nobody may vex the city’s laws with Imperial law, that even according to the words of the Emperor shall stay firm and solid eternally, because the Latin laws are useless and completely unseemly for our city’s nature [...]” The “that-even”-sentence must refer to the city’s laws (and not to the Imperial law although the position in the sentence would suggest that connection) in order to bear any meaning. The Mayor defends the law of his city in a slightly offended tone against someone who wants to impose a rule of Imperial law on Lubeck, and he introduces two arguments. First, he refers to the series of Imperial privileges since 1226 which typically contain the promise to respect the local law of the city. Second, he refers to the “Wesen”, the inner core or true nature, of the city. It is interesting enough that this vague concept is powerful enough to serve as an argument against reception, but apart from that, so torn out of context, the weight of the Mayor’s statement is hard to evaluate. No precise context is visible.

Was this protest a service for the cities along the Baltic shores which lived according to the law of Lubeck? Most of them were country towns (and not Imperial cities like Lubeck) subject to regional princes like e.g. the Dukes of Mecklenburg. Since the middle of the 15th c., these princes attempted to take away little by little the traditional rights and freedoms of their cities, as they tried

³¹ First communicated by Johann Carl Heinrich Dreyer, *Einleitung zur Kenntniß der von der Reichsstadt Lübeck ergangenen allgemeinen Verordnungen* (1769), p. 310 f. who commented on it with the gloss „Lübeckischer Eifer wider die Einführung der fremden Rechte“ – „Lubeckish zeal against the introduction of foreign laws“ but immediately afterwards devalues the statement by presenting early examples of Learned law in northern Germany. The mistrust against Dreyer, at his time town syndic of Lubeck, rises when one learns about a number of historical documents which he forged in order to fit them better into his line of thinking; Ahasver v. Brandt, *Das angebliche Privileg Heinrichs III. von England für Lübeck. Ein ergänzender Hinweis auf die Fälschungsmethoden des Lübecker Syndikus Dreyer*, in: *HGBll.* 71 (1952), p. 84-88. Antjekathrin Graßmann, *Eine weitere Dreyersche Fäschung an den Tag gekommen*, in: *ZVLGA* 51 (1971), p. 90-93 On Dreyer in general see Antjekathrin Graßmann, *Johann Carl Heinrich Dreyer und das Lübecker Archiv*, in: *Mecklenburgische Jahrbücher. Festschrift für Christa Cordshagen*. (Beiheft zum 114. Jahrgang 1999), p. 264-299.

to intensify the governance and establish modern sovereignty in their countries³².

Perhaps it is more than a coincidence that just a few years earlier the Swedish King Christopher decreed a new Land Law, which contained as part of the king's oath of office the pledge, that the king would not bring foreign laws into the realm as a burden to the people.³³ The resemblance is quite striking. Apparently, in the middle of the 15th c. Nordic kings and Mayors alike fulfilled an expectation of their subjects and citizens by turning openly against Roman law.

(7) Shortly before 1500, for the first time in 1486³⁴, a new type of commercial society appears in the court records of Lubeck. It was called "vulle selschop", "full society", and is adapted from the "Societas omnium bonorum" of the classic Roman law³⁵. Unlike the traditional types of hanseatic trade societies which were undisclosed partnerships, the "full society" was visible to the public. The Roman legal roots of this "full society" are already suggested by the structural similarity and by the period of its first appearance: Around 1500 many patterns of learned Law show up in the practised German law for the first time. The learned origin becomes completely evident when a few decades later the Low German terminology is replaced by High German. In that process the name "vulle selschop" is changed into "Gesellschaft aller Güter", "society of all goods", which is a more obvious translation of "societas omnium bonorum". It was, not surprisingly, the new pattern of shared liability which caused disputes and

³² The idea is supported by a cry for help from Rostock, harbour town in the realm of the Dukes of Mecklenburg but living according to Lubeck law, a few decades later. In 1529 the town wrote to Lubeck and expressed its fear that the Duke would apply Imperial law on disputes which hitherto were governed by Lubeck law, using exactly the same word "*unziemlich*" – "unteeming" as the Mayor Hinrich van Warendorp in 1456. See Peter Oestmann, *Rechtsvielfalt vor Gericht. Rechtsanwendung und Partikularrecht im Alten Reich* (2002), p. 653 and Ulf Peter Krause, *Die Geschichte der Lübecker Gerichtsverfassung. Stadtrechtsverfassung und Justizwesen der Hansestadt Lübeck von den Anfängen im Mittelalter bis zur Reichsjustizgebung 1879* (1968), p. 159.

³³ „*serlica ath engen wtlendzsker rætter draghis jn i riket almoganom til twnga*“ http://www.nordlund.lu.se/Fornsvenska/Fsv%20Folder/01_Bitar/B.L1.A-KrL.html (25 Jan. 2009). For details see Heikki Pihlajamäki's contribution in this volume, who was friendly enough to help me with the citation.

³⁴ Wilhelm Ebel, *Ratsurteile* (n. 2), vol. 1 (1955), Nr. 369. The case is thoroughly discussed in my contribution „Kupfer aus Schweden. Haftung für Gesellschaftsschulden im 15. Jh.“, to the new collection of case studies Ulrich Falk et al. (eds.), *Fälle aus der Rechtsgeschichte*, 2007, p. 164-177. In order not to repeat myself too extensively I shall be very brief here and present merely my findings.

³⁵ Kaser (n. 20), p. 409-413.

litigation. In the court records the new society is always mentioned in this context. It is question of cases where somebody sued the presumed partner of his debtor, a remedy which could not have been sought until then. “What one partner buys, the other has to pay,” was the wording in which this principle arrived in the revised town law of Lubeck in 1586³⁶ – exactly 100 years after it was first mentioned.

But the new remedy was feeble. Apparently, the Council was reluctant to allow the consequences which should have derived from the new type of society. To actually have someone pay a debt out of a contract he did not stipulate himself would have meant to abandon the traditional and cherished standpoint that everybody “had to look for the trust where he left it” and had to deal with the person alone with whom he had concluded the contract. Be this speculation right or wrong (as usual, the Council reveals little about its motives): the result is clear. The Council accepted the new type of society theoretically but dismissed the claims because it also granted the defendant the single-handed oath whether or not the company in question really existed. It was the widespread procedural rule in medieval domestic law to grant the defendant the single-handed purgatory oath which was applied here. The one case where the claim was admitted is no exception: in that case the defendant had conceded that the company had indeed existed.

Why did the Council accept a new type of company but not endow it with a sufficient degree of legal protection? Why open the door when apparently the new institution was not supposed to come in? In which way the *societas omnium bonorum* arrived in the north is not clear; other innovative trading techniques of the 15th c. arrived at Lubeck from the west, mainly from Bruges, where the hanseatic merchants were in intense contact with Flemish, Italian and other traders. Parallel incidents of acceptance and rejection of foreign commercial law and other trading techniques (accounting, banking, insurance, stock exchange etc.) suggest that acts of reception were not likely to occur by

³⁶ Art. 3, 9, 5: „Wollen etliche mit einander eine gemeine Gesellschaft aller Güter anrichten, die mögen wol zusehen, mit wem sie dieselbige anstellen, dann was der eine kauft, muß der ander bezahlen“ – „If several people want to start a common society of all goods with one another, they should look well, with whom they conclude it, for what one partner buys, the other has to pay.“ The text sounds more like a recommendation than a hard legal rule. This triggers the speculation that the sentence was adopted from a manual or a piece of legal literature, but its roots remain obscure; see Albrecht Cordes, *Spätmittelalterlicher Gesellschaftshandel im Hanseraum* (1997), p. 94 f.

accident but rather were the results of deliberate choice. Was this an exception, a foreign concept that slipped in and now had to be contained as much as possible? Lubeck's great efforts to keep up its fame and reputation suggest another possibility: just like every single merchant the city must have had an interest to appear modern and open to innovations, and that may have included a state-of-the-art choice of types of commercial societies. While in its legislation the Council embraced the prestige of the modern institution, in the daily court routine the traditional principles prevailed.

(8) The last and latest example is a letter from the Council to the Reichskammergericht (Imperial Chamber Court) from 1555³⁷. Peter Oestmann³⁸ recently discussed the letter thoroughly, so here we may be brief. The letter accompanied an unprinted draft of Lubeck's revised code which was still in the making, and it demanded from the Imperial Chamber to respect the local law and not to burden the city with Imperial laws "*die wir nicht ertragen mögen*" – "which we do not wish to bear".

The claim that a code should be respected although it was not yet promulgated is consistent with the state of the legislative theory of the time. As the town laws themselves only claimed to be revisions and therefore often went by the name of "Reformations", the theory was that they only assembled and organized rules which were already in force. But another thing about the letter is puzzling. Why did the Council react so sharply at all? The Imperial Chamber had already proven in the 60 years since its foundation, that it stood firm to its oath to decide primarily according to local law and applying learned Imperial law (*Ius Commune*, i.e. Common Law in the Continental sense of the word) only if the local law provided no solution – an adaption of the theory of statutes developed in the Northern Italian cities in the late middle ages. On the other hand, the Council had, after receiving a limited *privilegium de non appellando* in 1504, obediently accepted the authority of the higher jurisdiction. Given the fact that

³⁷ Dreyer (n. 31), p. 310 Nr. XXXI: The Council asked the Imperial Chamber Court, „*in Fällen und Sachen, darin wir nach unser Erkendniß und Stadt Lubsch Recht und alte löbliche Gewohnheit geurteilt und erkandt haben, by solcher unser Erkendniß und Stadt Lubsch Recht und Gewonheit lassen, dieselbe Urteile confirmieren und approbieren, und uns darüber mit Kayserliche Rechte, die wir nicht ertragen mögen, nicht beschweren lassen*“.

³⁸ Peter Oestmann, *Rechtsvielfalt vor Gericht. Rechtsanwendung und Partikularrecht im Alten Reich* (2002), p. 654/5.

these principles of handling conflicting statutes were already well established, it sounds as if the harsh letter was mainly theatrical thunder accompanying the draft. This propaganda may again have been meant as support to the Lubeck-law-cities. They, first of all Rostock, were constantly urging the Council in these days to come forward with a renewed version of the codification which would help them against the growing pressure from their dukes who wanted to abolish the privileged zones of Lubeck law in their realms. But it took the Council another 30 years until they finally implemented the *Erneuerte Stadtrecht* in 1586³⁹.

C.

These eight cases stem from different types of sources, spread over a great span of time and cover largely divergent subjects. In order to decide if they nevertheless permit coherent conclusions, they are presented here in a chart in chronological order, with the proposed motives for the attitude towards learned law in the last column.

(Nr.), Year	Type of source	Subject in question	Attitude towards Imperial law	Motive
(2) 1294	Statute	Tutelage over disabled and ill persons	Positive: Using Imperial law „as we duly may“	Weakness of local law
(3) 1384	Court ruling	Crimen laesae maiestatis: Confiscation of convicted traitors' goods	Utterly Positive	Financial
(4) 1418	Argument within a law suit, the city acting as plaintiff	Right of proof by the plaintiff about the sum of damage suffered	Positive	Financial

³⁹ See case (7).

(Nr.), Year	Type of source	Subject in question	Attitude towards Imperial law	Motive
(5) 1450	Letter of advice to the befriended city of Braunschweig	Prosecution of heretic women	Positive	Unclear, possibly religious
(6) 1456	Musing of the Mayor	Unclear (Introduction of Roman Law in Lubeck?)	Negative	Patriotism ?
(7) 1486/ 1586	Court ruling Statute	Liability for a partner in a commercial society: <i>societas omnium bonorum</i>	Theoretical acceptance, but practical rejection on grounds of law of proof: the sued can simply deny the existence of the partnership	Window dressing
(1) 1525	Court ruling	Purchase price too low, no <i>iustum pretium</i>	Probably positive as the side with this argument (among others) wins	Normal court ruling (?)
(8) 1555	Letter to the Imperial court (RKG)	Lubeck and Imperial law in general	Negative	Protection of the traditional ways?

The explanations which legal historians have offered for this wide variety of reactions and motives are scarce and unsatisfactory. Before 1945, the German tradition wanted the rejection to be an act of resistance against foreign influences, a proud defence of domestic values – and therefore tended to overlook the partly conflicting evidence. This nationalistic position is not taken up openly any more, but it still seems to play a certain role in the heads of the public. Wilhelm Ebel (1908-1980), the most important researcher of the Lubeck

law in the 20th c., was not always immune against nationalistic temptations but was at least after 1945 wise enough to tread these difficult grounds carefully. He never took a clear stand in the question in which degree foreign law had infiltrated the hanseatic legal world, but his sympathies clearly were on the side of the indigenous law.

The erudite study of Hermann Krause, *Kaiserrecht und Rezeption* (1952), tackled the problem from the other side. He did not ask himself how 'pure' the northern German law was preserved, but instead offered an somewhat syncretistic overview (he made no distinction between the regions he picked his examples from) over the changing meaning and content of Imperial law across the centuries. He summarized his results in a development curve: an early phase of silent, unconsidered acceptance of Imperial Law since the 12th c., the times of Emperor Frederic I. Barbarossa, a middle phase of open rejection which starts in the middle of the 15th c. and lasts about a hundred years, and a late phase in which the opposition dies down little by little in the decades after 1550. Most of the cases examined in this paper would belong to the middle phase, the period of rejection. Krause's view has stayed more or less uncontested, and it does indeed match nicely with the changes of legal language described above. But a short glance at the chart is enough to raise doubts about the pattern of supposed hostility towards learned law. It shows at the very least that the phases did not proceed as smoothly as stipulated. But the curve is certainly too general to explain the sudden, seemingly erratic changes sufficiently. Krause's theory thus remains too vague to serve as a convincing explanation of the reasons for when Imperial law was accepted and when not.

Perhaps the discussion was not fully convincing until now because it was only led by jurists. It was based on the unspoken assumption that there had to be some fundamental legal doctrine or at least a prevailing conviction within the Council whether or not Imperial law was valid law at Lubeck. But on closer inspection this assumption becomes questionable. The legal experts in the Council had lawyers working for them and thus had access to legal knowledge. They themselves however were no learned lawyers. Why would they have been genuinely interested in the consistent application of a sophisticated rule when and when not to accept Imperial Law? In other cases, not the least of these

being the fundamental question what the legal nature of the Hanseatic League was and who its members were, they stubbornly and successfully avoided any commitment⁴⁰. As experienced merchants, as members of the patriciate, of the families who had governed the city since its foundation in the middle of the 12th c., they acted within another grid of coordinates than one would find in a community simply under the rule of law and jurists. In the question whether to apply Imperial law in its court the Council of Lubeck acted purely pragmatically. Imperial legal doctrine was applied whenever it was in favour of the city.

As long as the Council's authority was not questioned, it was a question of mere pragmatism and possibly of the quality of the rules whether or not they were applied. In their daily legal practice the Council was not generally opposed to Imperial law, but political statements to third parties were a different matter. Seen in this light, the two most spectacular statements against Imperial law suggest that the councilmen were not opposed to learned law but were against interventions from third parties or institutions. The councilmen did not fight for their indigenous law but for their liberty and independence.

⁴⁰ The Hanseatic League never produced an exhaustive list of its members! Its London competitors, the Merchant adventurers therefore dubbed them "crocodile creature merchant": Like a crocodile lurking in muddy waters the Hanseatic League would never show its entire body. – In the period of our cases (1450-1550), England and the Hanseatic League were in a constant debate whether the Hanseatic League was a corporate body liable for the actions of its members and entitled to act for them in case of damage suffered. When claims against it were made, the representatives of the Hanseatic League denied that it was a corporate body; as plaintiff they insisted that they were indeed bearers of rights and claims; Albrecht Cordes, *Die Rechtsnatur der Hanse, Politische, juristische und historische Diskurse*. In: *Hansische Geschichtsblätter* 119 (2001), p 49-62. See also Alain Wijffels, (Roscoff conference paper, forthcoming).