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# DOMESTIC PRIVATE LAW IN THE *USUS MODERNUS* OF KIEL LAW FACULTY

# DIRITTO PRIVATO INTERNO NELL'*USUS MODERNUS* DELLA FACOLTÀ DI GIURISPRUDENZA DI KIEL

Editoriale Scientifica

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# DOMESTIC PRIVATE LAW IN THE *USUS MODERNUS* OF KIEL LAW FACULTY

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*L'articolo tratta della speciale funzione delle facoltà di giurisprudenza nel Sacro Romano Impero come organi tra perizie e tribunali reali. Per illustrare questa funzione, risponderemo alla domanda fondamentale se le facoltà hanno discriminato il diritto privato nazionale rispetto al diritto romano. La Facoltà di Giurisprudenza dell'Università di Kiel e le sue decisioni manoscritte del XVII e XVIII secolo ne sono un esempio.*

Parole chiave: facoltà di giurisprudenza, primi tempi moderni, *usus modernus pandectarum*

*The paper deals with the special function of law faculties in the Holy Roman Empire as bodies between expert panels and real courts. To illustrate this function, we shall answer the fundamental question of whether the faculties discriminated against domestic private law as compared to Roman law. The Faculty of Law at Kiel University and its handwritten decisions from 17th and 18th centuries serve as an example.*

Keywords: law faculty, early modern times, *usus modernus pandectarum*

## 1. *Introduction: Law Faculties and the Value of Domestic Law*

The law faculties of the universities of the Holy Roman Empire are an extremely rich source for the history of the judiciary.[1] It may seem surprising to outsiders that law faculties were part of the judicial system.

[1] The article is based on: F.L. SCHÄFER, *Das einheimische Privatrecht im Usus modernus der Kieler Spruchfakultät*, in Aa.Vv., *Judiciary and judicial system: 7th Conference in Legal History in the Baltic Sea Area, 3rd-5th May 2012 Schleswig-Holstein*, cur. W. Schubert & F. L. Schäfer, Peter Lang, Frankfurt am Main et al. 2013, pp. 175-198.

However, we are not talking about the entire law faculty here, but rather about a faculty panel, which in German bears the name *Spruchfakultät* and which in the following is equated with the law faculty for lack of a precise term in English. This body occupied an intermediate position between a panel of experts and a real court.[2] One can illustrate this with the course of proceedings: a state or city court asked a law faculty for advice on how to decide an entire case or individual legal questions. The procedure is called *transmissio actorum*, in English sending of files to the law faculty, in German *Aktenversendung*. The faculty then drew up a decision and sent the files back to the court. In the end, the court presented the decision of the law faculty as its own judgment. Some of the decisions had even a binding effect on the court, i.e. the court was not allowed to change the decision of the faculty. Such binding decisions are generally more important than non-binding decisions that are similar to private opinions of individual scholars.

The law faculties play a central role in answering the question of the extent to which legal practice during the era of the *usus modernus pandectarum* (17th and 18th centuries)[3] took into account domestic German legal norms alongside the *ius commune*, the common Roman law. Based on the printed collections of decisions of the legal faculties, the classical answer is that legal practice prior to the 19th century had preferred Roman law to domestic private law.[4] More recently, research has tended to come to the opposite conclusion, to a much more balanced relationship between Roman and domestic private law in legal practice.[5] However, the underlying sources for the modern view concern so far only the Imperial Chamber Court as the highest court, the lower courts in the imperial cities of Frankfurt am Main and Lübeck, the Wismar Tribunal as the highest court of the Swedish territories of the Holy Roman Empire, and the procedural legislation. The question

[2] See F. WIEACKER, *A History of Private Law in Europe: With Particular Reference to Germany*, translation of the 2nd original edition in German by Tony Weir, with a foreword by Reinhard Zimmermann, Oxford University Press, Oxford 1996, pp. 136 ss.

[3] WIEACKER, History of Private Law, cit., pp. 159-198.

[4] For instance, A. S. STRUVE, *Dissertatio academica de commodis et incommodis transmissionis actorum*, Bartsch, Kiel 1744, p. 25.

[5] Summary in F. L. SCHÄFER, *Juristische Germanistik: Eine Geschichte des einheimischen Privatrechts*, Vittorio Klostermann, Frankfurt am Main 2008, pp. 261 s.

now is how the law faculties – as another source of judicial history – applied domestic law.

The classical opinion, according to which legal practice gave priority to Roman law over domestic private law, has a true core. The approximately 200 printed collections (German *Konsiliensammlungen*), i.e. the collections of decisions from the law faculties, as well as private expert opinions, do indeed create such an impression for the 17th century as well as for the first half of the 18th century.

The theory of statutes (German *Statutentheorie*) was the central instrument for giving preference to Roman law in the printed collections.[6] This historical doctrine should not be confused with today's statutory interpretation of legislation since it goes far beyond interpretation; the term *statute* includes both legislation and customary law. The theory of statutes originated in medieval Italy. There, in the sense of international private law, its main task was to regulate the application of conflicting municipal laws. In the present context, however, other aspects of this theory are decisive. It also contained rules on methods and the law of evidence. The prevailing opinion of the *usus modernus* admitted that Roman law as a common law was subsidiary to more specific sources of law (most important imperial acts, domestic town and land laws, and local customary law). However, jurists believed that Roman law had been adopted *in complexu*, so that it was presumed to be valid without proof (*fundata intentio*). Local acts and local customary law, on the other hand, had to be proved in disputed cases. At least the *fundata intentio* for acts based on documented publication eased the proof for this type of legal sources. The abundant collections of acts were an essential aid here, especially for the Kiel Law Faculty. Furthermore, notorious customary law, i.e. customary law known to the courts, did not require proof.

In detail, the theory of statutes contained the following methodological sub-elements: if the wording was unclear, statutes had to be interpreted according to the law of the neighbouring territories or according to Roman law (interpretation requirement) and had to be as close as possible to Roman law (approximation requirement). A jurist was neither allowed to apply statutes in an extending manner (prohibition of analogy or extension to the detriment of domestic law and in

[6] WIEACKER, *History of Private Law*, cit., pp. 101 s., 161 s.

favour of Roman law) nor allowed to transfer a statute from one place to another without proof of reception (prohibition of transfer). In these cases, a lawyer had to close a loophole in a statute by means of Roman law alone.

When it comes to the unpublished sources in the archives, German legal history did so far not examine the substantive private law in the many handwritten decisions, but rather the institutional and procedural side of the law faculties. A major exception is a doctoral thesis about the Law Faculty of the University of Kiel, which focuses on the files from 1780 to 1810.[7] The study anticipates the opinion that, in the legal practice of the *usus modernus*, domestic private law was not substantially disadvantaged in comparison to Roman law. The present examination of the Kiel Law Faculty is to tie in with this study and expand the knowledge base. For this purpose, all Kiel decisions in the State Archives from 1683 up to the end of the Old Empire in 1806 (around 7,000 items) are examined with regard to the application of domestic private law.[8]

## 2. *Framework of Kiel Law Faculty*

Before we move on to examining decisions in detail, we will first look at the legal framework of the faculty for better understanding. The question is in which legal surrounding and with which sources of law the faculty operated and what status the faculty had in the court system.

### 2.1. *Surrounding Legal Landscape*

Kiel is particularly interesting because the faculty is located in an area with a very diverse landscape of political dominions and legal sources. Today Kiel is the capital of the German federal state Schleswig-Holstein. The present federal state is essentially made up of the two historical Duchies of Schleswig and Holstein, the Duchy of Lau-

[7] R. WEISS, Aus der Spruchtätigkeit der alten Juristenfakultät in Kiel: Rechtsgeschichtliche Betrachtung, Grosch, Heidelberg 1965.

[8] Schleswig-Holstein State Archives (= LA-SH), *Abt. 47.5*, no. 13-109, also *Abt. 400.5*, no. 755-760, no. 763 s.

enburg and the Imperial and Hanseatic City of Lübeck. The constitutional situation of the duchies was quite complex: Schleswig belonged as a Danish feud to the later Danish state, Holstein as an imperial feud to the Holy Roman Empire. The Danish king ruled over both Schleswig and Holstein as duke since 1460. The historical Duchy of Schleswig extended northwards into present-day Denmark.

It is not surprising that the legal situation was also challenging. The legal landscape can be divided very simply as follows: the *Jütsche Low* governed Schleswig in the North, the *Sachsenspiegel* the territory of Holstein in the South, the Dithmarsch land law the west coast and the famous Lübeck law the City of Lübeck and many Holstein towns.

These legal sources deserve further explanation. *Jütsche Low* is a Low German term. The High German name is *Jütisches Recht* or *Jütisches Low*, the Danish name *Jyske Lov* and the English is Danish Code of Jutland. It is a medieval Danish legal code from the early 13th century. The Kingdom of Denmark replaced this code in 1683, but it remained in force in the Duchy of Schleswig until the end of the 19th century. The *Sachsenspiegel* (literally "Saxon Mirror" for recording existing law) is the most important medieval law book of the Holy Roman Empire. It also dates back to the early 13th century. The Duchy of Holstein used the *Sachsenspiegel* as a subsidiary legal source until the end of the 19th century. Unlike the *Jütsche Low*, the *Sachsenspiegel* was not a formal legal code, but a private collection of medieval customs and customary laws for the territories later known as Saxony, Westphalia, Hanover, and northern Germany.[9] The Dithmarsch land law originated in the 15th century. It was the territorial law of the Farmer Republic of Dithmarschen on the North Sea coast.[10] Finally, a few words about Lübeck law.[11] The law of Lübeck was both the law of

[9] See M. DOBOZY, The Saxon mirror: a Sachsenspiegel of the fourteenth century, translation, University of Pennsylvania Press, Philadelphia 1999.

[10] For a general account R. HÜBNER, *A History of Germanic Private Law*, translated by Francis S. Philbrick and with an introduction by Paul Vinogradoff & William E. Walz, Little Brown, Boston 1918, p. 3.

[11] In detail F. L. SCHÄFER, *Codices Iuris Lubecensis: A Comparison of Mediaeval Manuscripts,* in Aa.Vv., *Economics in Urban and Rural Environment: 9th Conference in Legal History in the Baltic Sea Area, 16-20 May 2018 in Tallinn, Sagadi and Tartu, Estonia*, cur. M. Luts-Sootak & F.L. Schäfer, Peter Lang, Frankfurt am Main et al., 2020, pp. 339 ss.

the Imperial and Hanseatic City of Lübeck and the town law of about one hundred cities along the Baltic Sea coast.

### 2.2. *The Role of Kiel Law Faculty*

The Kiel Faculty cooperated with regional higher courts such as the Government Chancellery of Glückstadt as the Higher Court for Schleswig, the Higher Court of Gottorf for Holstein, the Aristocratic Regional Court and, in the application of Lübeck law, with the Lübeck Court of Appeal (*Oberhof*), which was active until the 18th century. There was, however, no general obligation in Schleswig and Holstein to send files to a faculty of law. Rather, a faculty only had to be consulted in problematic cases. The Kiel Law Faculty obtained its files almost exclusively from the northern German area up to Braunschweig-Lüneburg and Brandenburg as southern borders. During the 18th and 19th centuries, the sending of files was subject to ever greater restrictions due to the professionalisation of the courts and the expansion of state power.

The development in Schleswig and Holstein corresponded here with that in other parts of the empire:[12] As a first step, in the course of the 18th century, the sovereigns of Schleswig and Holstein restricted the sending of files from the courts and offices of their territories to the local faculty in Kiel. The majority of the files, therefore, deal with legal cases from Schleswig and Holstein. In a second step, the sending of files was completely prohibited. It all began in 1735 with a temporary ban on sending files from the county of North Dithmarschen. In 1834 a ban followed for the Court of Appeal in Kiel, until the Court Constitution Act ended the sending of any files in 1879.

## 3. *Domestic Law at the Kiel Law Faculty*

### 3.1. *Parallel Developments of Decision-Making and Legal Scholarship*

Now that the framework has been clarified, we will proceed to the analysis of selected decisions. Domestic private law first came to light

[12] In detail E. WOHLHAUPTER, *Die Spruchtätigkeit der Kieler juristischen Fakultät von 1665-1879*, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung*, n. 68 (1938), p. 752 (760 ss.).

in 1707 at Kiel Law Faculty. The decision was about the legal consequences of a community of property *post mortem* under Hamburg law.[13] Unfortunately, almost nothing is known about the rest of the first half of the century, as the archive files from 1714 to 1745 are missing. Only from the year 1746 on we walk on solid ground again. From this point on we can form a definite thesis: the Kiel Law Faculty distanced itself from decisive elements of the statute theory at least since the middle of the 18th century. However, the number of decisions on domestic private law is very limited. Of the approximately 7000 decisions, only about 100 deal with this legal matter. From the point of view of the present narrow definition of private law, family and inheritance law, or intersections such as a community of property in succession dominate the content of the 18th century. Matters relating to the law of obligations such as the law of sale or custody as a trust in the broader sense are less common.

The dawn of domestic law in the decisions began in Kiel parallel to research and teaching on German legal studies. This is the academic discipline comprising German Private Law and German legal history, both subjects established around 1700. Germanists are those who research and teach on topics of German legal studies (*juristische Germanistik*).[14] For outsiders the term German Private Law (with big initials) might be somewhat unusual. The subject German Private Law should not be confused with the present German private law. Therefore, the literature sometimes speaks of "Germanic Private Law" to avoid confusion.[15] The Germanists tried to establish a counterpart to the Roman *ius commune* and called it German Private Law. They constructed their German Private Law from historical sources such as the *Sachsenspiegel* and a legal comparison of contemporary domestic private laws.[16]

In the following three outstanding examples illustrate how the Kiel Law Faculty dealt with domestic law. For outsiders, the reasoning in

[13] LA-SH, cit., *Abt. 47.5*, no. 36, fols. 23r ss., dated year 1707.

[14] More about terminology F. L. SCHÄFER, rec. di G. Dilcher, Die Germanisten und die Historische Rechtsschule: Bürgerliche Wissenschaft zwischen Romantik, Realismus und Rationalisierung, Vittorio Klostermann, Frankfurt am Main, 2017, in *forum historiae iuris*, 18/09/2019, DOI: https://doi.org/10.26032/fhi-2019-007; for a full account on the discipline SCHÄFER, *Juristische Germanistik*, cit., passim.

[15] See the title of HÜBNER, *History of Germanic Private Law*, cit..

[16] In detail HÜBNER, *History of Germanic Private Law*, cit., passim.

many places seems complicated, if not confusing. However, this is by no means the fault of this study. The following analysis merely summarizes the original arguments in the decisions and therefore only rudimentarily reflect the true historical complexity. The legal landscape of the Holy Roman Empire was extremely diverse in comparison to the modern nation states. We count several hundred independent legal systems, an extreme form of legal pluralism.

### 3.2. *First Example: Restriction of Disposition by Beispruchsrecht*

The first example is based on the *Sachsenspiegel* and covers two legal opinions on the so-called *Beispruchsrecht*.[17] A non-binding decision from December 1753 dealt with the validity of a contract of sale in Holstein.[18] The seller's widow and her stepchildren fought over the ownership of a mill. The local Holstein laws and customs formed the first step of the decision since a specific provision takes precedence over the general provision in the application of the law. The subsidiarity of Roman law as common law is an application of this doctrine.

However, since local law did not provide a specific provision in favour of the stepchildren, the question of subsidiary application of the *Sachsenspiegel* as domestic common law arose. The *Sachsenspiegel*, land law, book 1, article 52 linked the sale of the real estate by the future testator to the consent of the (potential) heirs (German *Erbenlaub*). The heirs could demand the surrender of the real estate from the purchaser if they had not given their consent. Medieval German law calls this claim for recovery *Beispruchsrecht*, a term that cannot really be translated.[19] The *Beispruchsrecht* thus secured the inheritance within the family against transactions of land to third parties, which would have deprived the inheritance of its economic substance.

From today's point of view, the *Beispruchsrecht* is to be classified as a statutory restriction on property transfer. The German Civil Code (*Bürgerliches Gesetzbuch*, abbreviation BGB) does not know such a mechanism, but only a restriction in favour of so-called subsequent heirs. The testator may provide in his will that the estate first passes to

[17] In Detail HÜBNER, *History of Germanic Private Law*, cit., pp. 306 s.

[18] LA-SH, cit., *Abt. 47.5*, no. 39, pp. 174 ss.

[19] On such difficulties see the translator's note in HÜBNER, *History of Germanic Private Law*, cit., p. 1 ss.

a prior heir (*Vorerbe*) and upon a certain condition, to the subsequent heir (*Nacherbe*). Section 2113(1) BGB secures the right of the subsequent heir as follows: "The disposition by the prior heir of a plot of land or right in a plot of land that is part of the inheritance or of a registered ship or ship under construction that is part of the inheritance is, in the case where subsequent succession occurs, ineffective to the extent that it would defeat or adversely affect the right of the subsequent heir".[20] In contrast to the *Beispruchsrecht*, this modern legal institution does not restrict the free disposition of the first testator, but only of the second.

The law faculty examined in detail whether the Saxon law (meaning the *Sachsenspiegel*) was a binding legal source in Holstein and thus the *Beispruchsrecht* should be applied there. The legal opinion of the faculty reveals that the stepchildren challenged the application of the medieval law book. In the *rationes dubitandi*, the reasons not supporting the decision, the faculty listed the arguments in favour of applying the *Sachsenspiegel*. The arguments read as follows: In Holstein, the law book had the *fundata intentio* for itself. As evidence, the ruling faculty cited the following legal sources: the Bordesholm Settlement of 1522 between Christian II, King of Denmark, Norway and Sweden (1481-1559), and Duke Friedrich I von Gottorf (1471-1533), the Holstein Regional Court Rules of 1573 and the Holstein Regional Court Rules of 1636, which were the law in force at the time.

In contrast to the older 16th-century Regional Court Rules, the order of 1636 limited the application of the *Sachsenspiegel* to an official extract from the law book. As the faculty noted, however, such an extract had not been prepared "up to that hour". In the *rationes dubitandi*, the faculty set aside the omitted preparation of an extract: the *Sachsenspiegel* continued to apply until such an extract had actually been prepared. The faculty cited a whole host of reasons for this thesis. First, the law book was not only used by nobility, but also by all other persons "in the countryside and in the offices". Second, important authorities in Kiel confirmed the applicability of the *Sachsenspiegel* in Holstein. Third, the faculty referred to article 2 of the High Princely Chancellery Regulations of 1708, which were authoritative for Reinbeck. They ordered the subsidiary application of "old Saxon

[20] Translation based on *German Civil Code: BGB*, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

Law" without restriction, unlike the Regional Court Rules. Fourth, it was argued that this had "always been *juris Germanici universalis*",[21] meaning a rule of German Private Law. The faculty underlined this point with a comparative conclusion derived from the town and land laws in Schleswig and Holstein and from Lübeck law. Such a comparison of the laws of neighbouring territories was typical for both statute theory and German Private Law in the mid-18th century.

However, the faculty rejected the application of the *Sachenspiegel* in their supporting reasons for the decision, the *rationes decidendi*. Thus, the faculty decided against the *Beispruchsrecht* and validated the purchase contract at the same time. The faculty argued that it rejected the *fundata intentio* in favour of the *Sachsenspiegel*, since the law book had not been adopted in Holstein in *toto suo complexu* due to the lack of an extract as demanded by the act of 1636. For this reason, the practical applicability of provisions from the *Sachsenspiegel* had to be proven in each individual case – which the stepchildren did not achieve in the end. The faculty quoted some Germanist pioneers on the question of the burden of proof.[22] Ironically, the faculty thereby turned the intention of these lawyers into its opposite.

In addition, the faculty introduced many other arguments. First, the fundamental exclusion of the *Sachsenspiegel* was also common in the neighbouring Duchy of Sachsen-Lauenburg. Second, even a member of Kiel Law Faculty had to admit that the *Sachsenspiegel* in Holstein had only a *usum dogmaticum* (academic value), and no *usum legalem* (practical value).[23] Third, the historical legal situation in the 16th century could not be used as an argument, because the relevant Court Rules of 1636 technically made a double step: it suspended the *Sachsenspiegel* in the first step and in the second step required the adoption of provisions in an extract in order to apply the *Sachsenspiegel* in the future. The effectiveness of the first step, i.e. the annulment, was independent of whether the sovereign had prepared the said extract in the second step. Fourth, as a member of Kiel Law Faculty himself explained, the authorities had already shifted the burden of proof for

[21] LA-SH, cit., *Abt. 47.5*, no. 39, p. 185.

[22] On these jurists SCHÄFER, *Juristische Germanistik*, cit., pp. 62 ss., 137.

[23] LA-SH, cit., *Abt. 47.5*, no. 39, p. 190 citing J. C. H. DREYER, *De usu genuino iuris Anglo-Saxonici in explicando iure Cimbrico et Saxonico liber singularis*, Bartsch, Kiel 1747, pp. 89 s.

the *Sachsenspiegel* before 1636. The regulations of 1708 did not provide a counter argument since they referred to the Holstein Regional Court Rules of 1636 for the application of the *Sachsenspiegel*.

A three years younger, also non-binding decision of the Kiel Law Faculty of 2 October 1756 for Holstein, reached the opposite conclusion and took the side of the *Sachsenspiegel*.[24] In the facts of the second decision, a wife, who had died without children, had bequeathed her personal property. The wife's relatives took action against this last will, using the *Beispruchsrecht*. The professors simply exchanged the *rationes decidendi* with the r*ationes dubitandi*. Therefore, the arguments against the *Sachsenspiegel* appeared in the *rationes dubitandi*: the Regional Court Rules of 1636 had annulled the *Sachsenspiegel* and made its renewed validity dependent on the composition of an extract. So far, however, the officials had not prepared such an extract. In the *rationes decidendi*, the faculty then decided in favour of the opposite interpretation of the Regional Court Rules and referred to the continuing legal practice and, on a comparative basis, to German Private Law. As a result, the second decision favoured the intestate heirs.

Such a contradiction between two decisions of the same faculty is remarkable. Since both decisions use exactly the same arguments and only exchange the assignment to the *rationes decidendi et dubitandi*, one of the two decisions appears to be flawed. The first decision is supported by the fact that Germanists have generally been critical of the use of medieval legal sources for the construction of a German Private Law since the middle of the 18th century. The more important history of provincial private law in the Duchy of Holstein, on the other hand, speaks in favour of the second decision.

Even after 1636, the legislation repealed provisions of the *Sachsenspiegel* for Holstein in individual stages and replaced them with modern solutions. From this, one can conclude *e contrario* that the legislation still assumed the continuing applicability of the medieval law book. Likewise, the literature of the 19th and 20th centuries unanimously confirms the application of the *Sachsenspiegel* in the Duchy of Holstein for the early modern period.[25] In view of these facts, the second

[24] LA-SH, cit., *Abt. 47.5*, no. 41, without pagination.

[25] From the 20th century O. KÄHLER, *Das Schleswig-Holsteinische Landesrecht. Eine Darstellung des in Schleswig, Holstein und Lauenburg noch geltenden Sonderrechts*, 2nd edition, Augustin, Glückstadt, 1923, p. 19; from the 19th century N.N. FALCK,

decision seems to be right. However, the contradiction was not permanent. The legislator settled the dispute about the *Beispruchsrecht* at the end of the 18th century. In the course of the abolition of serfdom in both duchies, the government abolished the *Beispruchsrecht* in 1796 and 1798 respectively.[26]

### 3.3. *Second Example: Inheritance from Half-Siblings*

The next example is also taken from the law of succession. It starts with a binding decision of the Kiel Law Faculty in 1753. The Mayor and Council of Burg on the Isle of Fehmarn had asked the faculty for a judgement on the legal succession of half-brothers and -sisters, i.e. siblings who, unlike full-brothered siblings, have only one common parent.[27] This constellation concerns a childless testator if at the same time the parents are pre-deceased and the testator's siblings are to inherit. The question then arises as to whether the testator's half-brothers and -sisters should be treated like his or her full brothers and sisters. This is not only a present problem in the age of so-called patchwork families, but has been of great practical importance in the past in view of the high mortality rate and frequent remarriages. According to present German inheritance law, which is based on the parentelic system (German *Parentelsystem*),[28] half-siblings are heirs in the second order alongside full siblings according to section 1925 BGB. In many cases, this leads to a halving of the inheritance for half-siblings. The case at the faculty, however, did not relate to the second order, but to the third order with the half-siblings of the testator's parents. Pursuant to section 1926 BGB, the present German private law also reduces the half-sibling's share of inheritance here.

The case before the Kiel Faculty was far more difficult to solve. The historical case played in the town of Burg, which, like the whole Isle of Fehmarn, belonged to the ducal part of Schleswig from 1581 to 1713, and then to the Royal Danish Duchy of Schleswig in the Danish

*Handbuch des Schleswig-Holsteinischen Privatrechts*, part 1, Hammerich, Altona 1825, pp. 404 ss.

[26] KÄHLER, *Landesrecht*, cit., p. 201.

[27] See HÜBNER, *History of Germanic Private Law*, cit., p. 730.

[28] In detail HÜBNER, *History of Germanic Private Law*, cit., pp. 716 ss., 725 s., 735 s.

State. In contrast to the surrounding countryside, Burg was not governed by the Fehmarn land law of 1558, but – by virtue of undisputed dedication (German *Widmung*) – by Lübeck law from the 14th century onwards. The Lübeck law of inheritance modified the three-line system,[29] which differentiated between descending relatives, ancestors in a straight line, and side relatives: first the descendants were to inherit, then the parents and siblings, only then the grandparents and finally more distant side relatives according to the degree of proximity. In detail, Lübeck law generally stated that half-brothers and -sisters in the second order receded behind full-brothers and sisters in the rank of heirs, i.e. they did not inherit alongside full-brothers and sisters. It was highly disputed, however, under Lübeck law whether the priority of full siblings extended to the present constellation in the third order. A parallel, edited legal dispute with a ruling of the Imperial Chamber Court, impressively documents the complexity of the legal discussion in the 18th century.[30] The local laws in Schleswig and Holstein offered various solutions to the problem, from complete equality of half-siblings to several degrees of a minor inheritance share up to the complete exclusion of the right of succession.[31]

The Kiel Law Faculty first discussed *liber* 2 *titulum* 2 *articulum* 1 of the Lübeck law of the printed code of 1586. According to the legal proverb "The half limb steps back" (German *das halbe Glied geht zurück*), the provision placed the half-siblings in the rank behind the full siblings. Similarly, article 22 stipulated: "Full brothers' and sisters' children, claim their right before half-brothers and -sisters". The open formulations in the 1586 edition of the town law would not have been an obstacle to an extension of the priority of full-brothers and -sisters to the third order.

Contemporary authors doubted, however, whether the 1586 edition provided the decisive norms. Jurists discussed the question of whether medieval, handwritten *codices* of Lübeck law should apply instead.[32] A printed expert opinion of a member of Kiel Law Faculty is

[29] In detail HÜBNER, *History of Germanic Private Law*, cit., pp. 726 s.

[30] P. OESTMANN (cur.), *Ein Zivilprozeß am Reichskammergericht: Edition einer Gerichtsakte aus dem 18. Jahrhundert*, Böhlau, Cologne et al., 2009.

[31] KÄHLER, *Landesrecht*, cit., pp. 530 ss.

[32] On these codes see SCHÄFER, *Codices Iuris Lubecensis*, cit., pp. 339 ss.

exemplary.[33] The opinion referred to a provision in the Regional Court Rules of 1636. According to this provision, the Holstein towns were to keep "credible", i.e. authentic copies of the Lübeck law. According to the opinion, this could not mean the printed edition of 1586; rather, the order referred to handwritten editions from the time before that. This view was in line with rescripts from 1765 for the Ducal-Gottorf cities in Holstein, which preferred the old Lübeck codes before 1586.[34] The Kiel Law Faculty took the same view in its decision in 1753, although the Isle of Fehmarn belonged to the Duchy of Schleswig at this time. It rejected the printed edition of 1586 as a binding authority. On this basis, the faculty explained that although the manuscripts before 1586 contained references to half-brothers and -sisters in some places, the sources did not indicate any different rank in the succession. The decisive provisions on legal succession only used the term siblings.

The faculty, therefore, had to concretise the term "brothers and sisters" by interpretation. First, the faculty used the principles of natural law (*secundum principia juris naturalis*), then the Soest law (*ius sufatensium*) as the so-called mother law for Lübeck. It even consulted Tacitus's "Germania" about ancient Germanic customs. In his description of the Germanic tribes, Tacitus had not distinguished between "full and half birth", although he was aware of the opposite legal situation in Roman law. Referring to the Germanist Johann Gottlieb Heineccius (1681-1741), the faculty stated that this practice had continued as customary law to this day.[35] As a result, half-brothers and -sisters had the same rank as their full-born brothers and sisters in legal succession. This argumentation could even have been transferred to the half-brothers and -sisters in the second order.

The faculty expressly rejected to use Roman law for the interpretation or amendment of Lübeck law. This was a consistent position because the High Princely Chancellery Regulations of 1708 and the Higher Court Resolution of 1746 explicitly prohibited the application of *ius commune* and thus of Roman law. This clearly distinguished the

[33] J.C.H. DREYER, *Rechtliche Bedencken*, in LA-SH, cit., *Abt. 400.5*, no. 755, without pagination.

[34] KÄHLER, *Landesrecht*, cit., p. 20.

[35] On Heineccius F. L. SCHÄFER, *Heineccius and the Foundation of German Legal History*, in *Proceedings of the Conference The Natural Law Theory of Johann Gottlieb Heineccius (1681–1741) and its Context*, manuscript submitted.

legal situation from that of the Duchy of Holstein and the City of Lübeck, which both ordered the subsidiary application of Roman law.[36] Specifically, the faculty spoke out against the interpretation of Lübeck law according to the *novella* 118 from the year 543, which placed full siblings before half-siblings in the succession. Contrary to the current understanding of the *novella*, a significant legal opinion at that time did not want to limit its scope of regulation and consequently (according to current terminology) the priority of full siblings to heirs of the second order, but rather to extend it to the third order.[37] The interpretation according to Roman law could therefore have led to an extension of the priority of full siblings beyond the second order.

The Kiel Law Faculty reported that important scholars from the 16th and 17th centuries wanted to use Roman law because the medieval Lübeck law did not clearly decide the case (*cum statuta stricte sint interpretanda, nec de casu ad casum extendenda*). The faculty argued against this opinion: "Since all this, however, amounts to the legal argument, *quod statuta ex Jure Civili Romano sint interpretanda, limitanda et restringenda,* which has long since been rejected. In accordance with the intention and common sense of the legislator, the application of the law must not be limited to the cases laid down in the statutes".[38] The faculty adhered to the theory of statutes only in those parts which do not restrict domestic law.

This verdict against the theory of statutes was not an isolated case, as a further binding decision of 6 September 1783 on Lübeck law proves.[39] The Kiel Law Faculty advised Mayor and Council of the Imperial and Hanseatic City of Lübeck on a delict on personal injury. The faculty delivered its decision with reference to Joachim Lucas Stein (1711-85),[40] a renowned expert on Lübeck law: "the *vulgatum: iura statutaria stricte sunt interpretanda ex ita, ne nimis a iure communi discrepent* [...] is rejected as erroneous and wrong, and therefore the usual rules of legal interpretation are to be applied here as in other

[36] KÄHLER, *Landesrecht*, cit., pp. 18 ss.

[37] In detail M. DOMS, *Rechtsanwendung im Usus modernus. A case study on the law of succession of half birth*, readbox unipress, Münster 2019, pp. 71 ss.; for present Roman scholarship see H. HONSELL, T. MAYER-MALY & W. SELB, *Römisches Recht*, 4th edition, Springer, Berlin 1987, p. 447.

[38] LA-SH, cit., *Abt. 47.5*, no. 39, pp. 208 s.

[39] LA-SH, cit., *Abt. 47.5*, no. 51 II, pp. 807 ss.

[40] In detail SCHÄFER, *Germanistik*, cit., pp. 178 s.

cases and no restrictions are to be assumed in view of the preconditions made".[41]

A second binding decision of the Kiel Law Faculty of March 1755 on half-siblings confirmed the first verdict. The enquiring judges in Burg on Fehmarn had to decide a case regarding half-brothers and sisters in the third order, but this time for the surrounding area of Burg. The legal basis was a decree from 1563 which superseded the Fehmarn Land Law. The decree did not list the half-brothers and -sisters separately so that the half-brothers and -sisters had the same rank as full brothers and sisters. It would again have been possible to correct this result with the help of *novella* 118. However, in the further line of argument, the faculty went beyond Roman law and confirmed the equal rank of half-brothers and -sisters. It preferred the domestic laws of the neighbouring territories and referred to David Mevius (1609-70), a famous authority on Lübeck law: *cum tamen in interpretatione statutorum magna vir fit legum adiorum populorum ejusdem provinciae*. At this point, the faculty did not leave the framework of statute theory completely, since it used a method of interpretation affirmed by the statute theory. Moreover, as the faculty itself pointed out, Roman law was subsidiary to the neighbouring town and land laws. Hence, the Lübeck law of the City of Burg was the decisive neighbouring law. Furthermore, the Faculty listed Hamburg law and *Jütsche Low* to strengthen its argument.

As a result, the Kiel Law Faculty was in line with the Imperial Chamber Court, which was also opposed to the priority of full siblings in the third order.[42] The Kiel Law Faculty however argued clearly more extensively. Their arguments would have spoken at least for the Lübeck law and for Fehmarn even in the second order against a priority of the full-brothers and -sisters. In contrast to the application of the *Sachsenspiegel* for Holstein, the faculty resorted without hesitation to medieval legal sources up to Germanic customs.

### 3.4. *Third Example: Community of Property*

The last and third example is the succession in a community of

[41] LA-SH, *Abt. 47.5*, no. 51 II, pp. 823 s.
[42] See OESTMANN, *Zivilprozeß am Reichskammergerich*, cit., pp. 521 ss.

property (German *Gütergemeinschaft*)[43] between spouses at the interface of family and inheritance law. A community of property is based on a so-called *Gesamthand* in which the owners may not transfer the property without the consent of the other owners. On 2 March 1789, the Kiel Law Faculty ruled on a case of the Municipal Court Neubrandenburg in the Electorate of Brandenburg.[44] After a childless marriage, the widowed husband argued with the relatives of the deceased wife about the amount of the respective inheritance share from the deceased wife's part of the joint property. Such a legal dispute was quite common. The quotient between the surviving spouse and the relatives of the deceased spouse constituted a classic problem of the *usus modernus* and German Private Law. Numerous treatises dealt with the problem.[45] The Kiel Law Faculty therefore stated that there was hardly a subject with a greater diversity of opinions than a community of property.

Roman law with its dotal law was excluded from the outset since the community of property was generally regarded as an originally domestic legal institution. As in the other examples, the faculty relied on the relevant local law. The decisive factor was not the opinion of legal doctrine, which often missed the point in legal practice, but the specific acts, ordinances, and customs. In Neubrandenburg, the *Constitutio Joachimica* (Constitution of Elector Joachim I), a partial legislation of the Elector of Brandenburg from 1527 on the law of succession, applied. On this basis, the faculty classified the property regime or the legal situation *in rem* between the spouses not as mere co-ownership or as Roman *societas*, but as a community of property. However, the *Joachimica* did not contain any express provision for the described constellation of a childless marriage. It would therefore have been logical for the faculty to fill the gap by German Private Law or natural law or by neighbouring town and land laws. Indeed, in the *rationes dubitandi* the faculty considered natural law, that a community of property is a moral person in which the surviving spouse is entitled to the entire inheritance. In the *rationes decidendi*, however, the faculty pursued a more conservative approach. It judged that local law, in this case local customary law, was decisive due to the lack of a

[43] In detail HÜBNER, *History of Germanic Private Law*, cit., pp. 629 ss.
[44] LA-SH, cit., *Abt. 47.5*, no. 55.
[45] See HÜBNER, *History of Germanic Private Law*, cit., p. 736.

common legal regulation. However, since the parties could not provide convincing proof or counter-evidence, the faculty did not issue a final judgment, but merely instructed the plaintiffs to present sufficient evidence on the provisions that were favourable to them.

The Kiel Law Faculty demonstrated here once again its inconsistent line. In the case of the law on Fehmarn it had no reservations about using town and land laws of the surrounding area for comparative interpretation. Contrary to this, in the case of Brandenburg the faculty withdrew to the position that the local customary law was decisive, not the neighbouring laws. However, the turn did not aim against domestic private law. Rather, the faculty weighted the sentence "by-law breaks town law, town law breaks land law and land law breaks customary law" more strongly than the desire for a decision by means of comparative law.

## 4. *Conclusions: Legal Practice at German Law Faculties*

The so-called Law Faculty (*Spruchfakultät*) occupied an intermediate position between a panel of experts and a real court in the Holy Roman Empire. The law faculty as part of the jurisdiction was not a court of appeal, which overruled the decision of a lower court. Rather, the law faculty prepared binding decisions for courts. This meaning of law faculty should not be confused with the faculty of law as the totality of all professors.

The case-law of the law faculties is examined using the example of the Kiel Law Faculty and using a central question of German legal history. The handwritten decisions of the Kiel Law Faculty in the judicial sense illustrate the application of domestic private law in legal practice by the way of examples. The analysis confirms the recent view that legal practice did not discriminate against domestic private law in comparison to Roman law. This finding goes a step further than the research on the printed decisions of law faculties. Nevertheless, the results for Kiel are far less meaningful than for courts already investigated. In particular, the Kiel files do not offer any clues as to the exact application of domestic law in the 17$^{th}$ century and only little evidence for the first half of the 18$^{th}$ century.

A total of six theses are presented:

1) The Kiel Law Faculty applied the domestic acts and ordinances

of the early modern period at their original place of application without further examination, i.e. *ex officio*. The *ex officio* application of norms included interpretation and analogy. This was the logical consequence of the sentence "by-law breaks town law, town law breaks land law and land law breaks common law", also known as *lex specialis derogat legi generali*.

2) The Kiel Law Faculty abandoned the statute theory in its most important parts, i.e. the preferential interpretation of a norm according to Roman law, at the latest from the middle of the 18th century onwards. Two elements of the statute theory remained: firstly, scepticism about the filling of gaps in local domestic law by domestic law from neighbouring territories; secondly, the interpretation of local domestic law by comparison with neighbouring domestic laws. However, these artefacts of the statute theory did not favour Roman law.

3) The only ambivalent aspect was the relationship to domestic legal sources from the Middle Ages. From the middle of the 18th century onwards, Germanists criticized the recourse to the Middle Ages. The Kiel Faculty took a fluctuating position here. In part, it resorted to medieval town laws and even to Tacitus's Germania, in part, it rejected the use of the *Sachsenspiegel* as the most important medieval law book.

4) Possibly the faculty favoured domestic private law already in large parts of the first half of the 18th century due to the faculty's exposed position in the new academic discipline of German legal studies. However, for this important period, most of the records are no longer available, so that the thesis remains unverified.

5) At least for the time before 1700, i.e. in the heyday of the *usus modernus*, the domestic private law quantitatively remains a marginal phenomenon in the faculty. One could argue that courts and private individuals did not even ask the law faculty for legal advice on domestic law in the first place, because there were no experts for these legal sources at any university. German legal studies as an academic discipline of domestic law only emerged around 1700. However, the consistently high influx of files sent to the faculty during the 17th and 18th centuries contradicts this thesis. Another explanation is more plausible is: the faculty in Kiel, like many other faculties of the Holy Roman Empire, turned to German legal studies and thus changed its rulings on the level of legal sources and methodology in favour of domestic private law.

6) Even in the 18th century, decisions with elements of domestic private law were a small minority in the law faculty. However, one cannot necessarily deduce from this that the faculty discriminated against domestic law. It could also be that the faculty cited domestic private law for reasons of efficiency only where its solutions differed from Roman law, i.e. where domestic law was relevant to the decision.