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Albrecht Cordes:

The Lübeck Councillors as Judges

The debate about judicial culture, which this article will prompt, may lead (and this is in fact one of the aims of the initiators themselves) to a typology of judges and images of judges developing and therefore also to hypotheses regarding the relationship between certain characteristics of judges and the result of their work; their verdicts. This expectation is based on the premise, that the education, self image and social standing of judges have had and continue to have an influence on their administration of justice and that these factors are also reflected in the courts' decisions. If these premises are both true, the results of this debate could contribute towards the basic understanding of our historical analysis of case law: those who understand the originators of verdicts, will probably understand the verdicts themselves better. Judicial cultures and styles of administering justice are, according to this hypothesis, closely connected: judicial cultures are a part of legal culture. 1

These abstract fundamental reflections will be elaborated upon with the help of a concrete example, but will at the same time also to some extent be put to the test. Those of you who are familiar with the author of this article will not be surprised to learn that the choice of example is the Lübeck councillors. They are suitable to head up our debate about judicial culture due to their obvious fundamental differences from continental European judges of the present day. The contrasts which are rapidly coming to light provide the ideal comparison. How are judges recruited and trained in other legal systems? How do they understand and perform their work, and what consequences does this have for their administration of justice? 2

The Lübeck councillors, a small circle of patricians who were co-opted by their own fellow officials and who stayed in office for a whole lifetime, governed the fate of a largely independent community for many centuries - all in all with considerable success. "SPQL" has been displayed resplendently (albeit only since 1871) on Lübeck's Holsten gate, a pretentious reference to Republican Rome: "Senatus populusque Lubecensis". In contrast to many other aristocratic and patrician constitutions from late medieval territories and towns, the jurisdiction of the council of Lübeck was comprehensive. There was therefore no separate jury bench as in the towns under the jurisdiction of Magdeburg law, instead the councillors themselves also acted as judges. 3

The councillors also performed this task in person, in contrast to the absolutist princes who only occasionally interfered in the organisationally independent judicial system by means of a dictum. But they were of course not only, and in all likelihood not primarily, judges, instead they performed this task alongside their main role governing the fate of their town; they were administrative leaders and departmental heads, developers, diplomats and, when necessary, military commanders. They were in charge of business in their town and strove (with almost complete success unlike the majority of German towns to the south) to prevent craftsmen of all types from participating in governmental affairs. They were also businessmen, who, even if they did not for the most part participate in day to day business or make trade trips themselves, were still involved; exchanging information, making helpful contacts, networking – in short, making money.

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They received their education in the municipal Latin schools or in the Bishop's cathedral school, but after that mainly in the counting houses of their fathers and uncles as well as those of their business partners. By the 14th century, they could usually read, write and calculate as well as keep accounts. They then typically worked in trade for a considerable length of time, often living in other towns belonging to the Hanseatic league for a number of years. Finally, they would be co-opted onto the council as experienced and successful, though usually no longer all that young, men, not so much because they belonged to one of the great families, but apparently because of their own personal success. Only very few families were able to stay on top in the town for more than three generations, whilst there are plenty of examples of new members who managed to make it onto the council. There, the "Domini", as they are always referred to in Latin sources, remained in the council for life, always active in the council for two years and then acting as a "resting council" in reserve during the following year.

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This functional elite can justifiably be included in a debate about judicial cultures under the title of "The Lübeck Councillors as Judges", as their jurisdiction stretched over an extensive area; the "lübisches Recht" (this is the term used to refer to the law governing the surrounding area too, rather than the purely municipal "Lübecker Recht") that they practiced was applicable in approximately 100 towns in the whole of the Baltic Sea region. One should not imagine however, that this accounted for more than a specific, limited area of the functions performed by the council.

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Research has surprisingly rarely considered the connection between their legal and general function. The field of legal history has overwhelmingly concentrated on their administration of justice and its detailed academic study to form its own specific legal discipline in the 17th and 18th century; the *ius Lubecense*. Legal scholars, above all the

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famous vice-president of the Wismar Tribunal, David Mevius, created a systematic analysis and commentary on it according to the systematic methods of common law and the *usus modernus* and using a translation into Latin. This helped to give “*lübisches Recht*” academic standing and reputation and was probably also helpful in the enforcement of its rules of law in the courts. However, one should note the time lapse! “*Lübisches Recht*” did not achieve its academic zenith until the councillor's administration of justice had long since started to deplete and the flow of verdicts had already been reduced to a thin trickle. It was for good reason that Wilhelm Ebel cancelled his edition of the Council of Lübeck Verdicts in 1550¹. The elaborate and consistent framework of the commentary by the highly educated lawyer David Mevius in 1642 does not allow us to retrospectively infer the attitudes and systematic skills of the experienced, but not academically trained, councillors who created the foundation for this framework with their decisions on individual cases 100 – 200 years earlier. At that point, they could not have envisaged the finished structure. When describing the judicial culture of the Lübeck Councillors at its peak (approx. 1450 – 1550), one must separate it from the role that its case law later plays in jurisprudence and not only focus on the councillors as judges, but instead upon the totality of their cultural environment.

In particular two new works² in the field of general history provide us with a wealth of information about the councillors' political and social environment as well as the way in which they were interwoven into family and mercantile networks, their place of residence in the town and so on. Yet, they offer us nothing about their role as judges. Whether this is because “general historians” are not interested in this particular aspect of the councillors professional activity, or whether it is because they do not have the confidence to tackle such legal issues, the role they play in the administration of justice is barely mentioned in works by Lutterbeck and Poeck.

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1 Nils Jörn, Lübecker Oberhof, Reichskammergericht, Reichshofrat und Wismarer Tribunal. Forschungsstand und Perspektiven weiterer Arbeit zur letztinstanzlichen Rechtsprechung im südlichen Ostseeraum, in: *Das Gedächtnis der Hansestadt Lübeck. Festschrift für Antjekathrin Graßmann zum 65. Geburtstag* (2005) 371-380 agrees, that the zenith of the authority of the "Lübecker Oberhof" had already passed by the middle of 16th century, is still optimistic, however, about the possibility of collecting rare examples of council judgements dated after the year 1550, which are as of yet unknown. Incidentally, the "Oberhof" means the council of Lübeck which acted as an instance court for the aforementioned towns under the jurisdiction of "*lübisches Recht*", whilst here all case law, therefore also the case law of the council in the first instance, is taken into account.

2 Michael Lutterbeck, *Der Rat der Stadt Lübeck im 13. Und 14. Jahrhundert. Politische personale und wirtschaftliche Zusammenhänge in einer städtischen Führungsgruppe* (Veröffentlichungen zur Geschichte der Hansestadt Lübeck, series B, vol. 35) 2002; Dietrich Poeck, *Die Herren der Hanse. Delegierte und Netzwerke (1356-1516)*, doctoral thesis Kiel 2009, in: *Kieler Werkstücke. series D: Beiträge zur europäischen Geschichte des späten Mittelalters*. Compare also Michael Hundt, art. Rat, in: *Lübeck-Lexikon* (2006) 283-285.

However, an attempt to look at both of these areas, their administration of justice and their cultural environment, promises interesting results. If you look, for example, at the situations in which the council considered the “kaiserliches Recht” (imperial law), a somewhat surprising discovery is made. One would think, that the council would have taken and defended a clear and consistent position on this central question which could theoretically decide on the entitlement of “lübisches Recht” to autonomy in relation to the *ius commune*. However, this is not the case – in fact quite the contrary! In some cases, the council applied “kaiserliches Recht” (mainly referring to the rules of law of the Roman canon, the *ius commune*, but sometimes also to imperial laws such as the Carolina of 1532) and in some cases it did not, depending on what seemed most opportune. It did not, however, take a consistent position in the sense of a legal principle, instead the council acted consistently according to a non-legal guiding principle: the good of the town of Lübeck³.

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One should not overstep the mark and suggest that their administration of justice did not follow any internal principles, however, it is not easy to name them or define them. The statutes of “lübisches Recht”, which were still written in Latin until the beginning of 13th century and in German from the last third of the century, do not simply convey such principles without further comment. They quote examples from company law, in which legal practice did not remain fixed according to the legal status as set out in the statutes, but instead continued to develop without the statutes themselves being amended⁴. In essence, to establish the rules which the councillors followed in their administration of justice, a detailed analysis of their case law would be necessary in which the standards which were written down at a former point in time in the statutes could only be considered as supplementary material at most. That is a demanding task, for which even the greatest expert of the 20th century, Wilhelm Ebel, did not have the energy despite several announcements of his intentions⁵, this provides us with not very optimistic seeming prospects. However, the person who takes on the task, would be able to bring new life to the old, inconclusive debate that was never finished between Gunter Gudian and Karl Kroeschell concerning the question of whether late Medieval “lay judges” could have

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3 Albrecht Cordes, Kaiserliches Recht in Lübeck. Theoretische Ablehnung und praktische Rezeption. in: Zeitschrift des Vereins für Lübeckische Geschichte und Altertumskunde 89 (2009) 123–145.

4 Albrecht Cordes, Spätmittelalterlicher Gesellschaftshandel im Hanseraum (Quellen und Darstellungen zur hansischen Geschichte NF 45) 1998, 323.

5 Wilhelm Ebel, Lübisches Recht vol. 1, 1971, explained in the introduction the concept of the work which was originally planned to appear in three volumes; comp., art. Lübisches Recht, in: HRG 3, 1st edition. 1984, 77-84, referred to vol. 2 as „being published“. However, preliminary work for further volumes was not found in his estate and is also not known of (information from Prof. Dr. Götz Landwehr, a pupil of Wilhelm Ebel).

pronounced judgement according to a largely closed and consistent set of rules which they would have had to have known by heart.⁶

However, for the description of judicial culture in Lübeck the question can remain open. 11
This administration of justice can only be described as “lay” in the strictest sense of the word, i.e. that the Lübeck judges did not study law. They were not trained in the law, however they definitely had access to legal specialist knowledge, both through municipal officials and above all through the town clerks who by the 14th century had usually studied law. Books were another source, to which the large collection in the council’s library, which today makes up part of Lübeck’s city library, bears impressive witness. The opportunity to rely on such sources is important when analysing their administration of justice. Against this backdrop, it appears to be the product of an autonomous decision: they could have made use of the help of legal scholars and their books and therefore of taught law and in fact occasionally they did this when it seemed most opportune; a famous example of this is in the case of guardianship law⁷. As a rule, however, the councillors worked in a different way, they were instead trained practically and were skilled in terms of empirical methods, as opposed to the systematic and, in this sense, academic working methods and subsumption techniques of legal scholars. This distinction between legal scholars and legal honorarios which was originally defined by Max Weber⁸ fits perfectly with regard to the situation in Lübeck.

The style and language of the council verdicts, which represents the prominent product of 12
this case law, substantiates this view. The verdicts are structured in a formulaic, confident and laconic manner⁹, their language, Low German, which was referred to as the “Old Saxon language” by contemporaries, suits this direct and clear method of expression, although many specialist legal terms do not exist and can only be laboriously

6 On the one hand Gunter Gudian, *Ingelheimer Recht im 15. Jh.* (1968) 3, on the other Karl Kroeschell, Albrecht Cordes, Karin Nehlsen-von Stryk, *Deutsche Rechtsgeschichte* vol. 2, 1250-1650, 9th edition. 2008, 88. Alexander Krey's doctoral thesis which is being written at the moment attempts to answer the question. The Freiburg scholar, Werner Amelsberg's doctoral thesis which has just been finished and will shortly be published on the topic of the „samende“, a community of property between parents and children, in the Lübeck court judgments offers a analysis of case law in this specific area.

7 Cordes (Anm. 3) 133 f.

8 Max Weber, *Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie*, part 2, chapter VII, § 4: „Die Typen des Rechtsdenkens und die Rechtshonoratioren“, p. 456-468 of the study edition by Johannes Winkelmann (5th ed. 1980). In the current discussion the subject is being discussed under the heading „Rechtsexperte“ (legal experts), a term which has been re-imported from English; comp. Eva Schumann, *Beiträge studierter Juristen und anderer Rechtsexperten zur Rezeption des gelehrten Rechts*. in: *Jahrbuch der Akademie der Wissenschaften zu Göttingen*, 2007, 443–461.

9 In a self description of the council of Lübeck dating from 1402: „unse recht is der worden kortlik, der saken witsichtig.“ („our law is brief in words, yet visionary in content“), quoted after W. Ebel (postscript 5), endpaper.

circumscribed. As Latin gained the upper hand in many academic areas including jurisprudence in the course of 16th century, “lübisches Recht” was eventually also Latinised and therefore made academically presentable. In so doing, however, it partially slipped out of the direct control of its creators and masters of many years, the council of Lübeck. The revision of the Lübeck town law of 1586, which arrived after decades of struggle and constant pressure from its affiliated towns, took another direction in terms of language. Although it also avoided Low German, it did not turn to Latin, instead adopting the New High German language.

The contrasts between the legal culture of the council of Lübeck which gradually began to fade from 1600 onwards and that of a modern higher court of a comparable status should now be apparent. The judges were recruited in a completely different manner with regards to both their training and their social class, their main profession was not that of a judge and they also did not receive a fixed salary. They relied on legal sources in a completely different way to today’s judges, and these sources can therefore hardly be called laws in the modern sense and are better off being referred to as “statutes”. The subsumption techniques of taught Roman canon law played no part; the relationship between individual judgments in court verdicts and abstract formulated standards in municipal statutes was even looser than in our modern understanding of laws.

The case law which thus arose, over whose material principles one can only laboriously gain an overview, was nevertheless attractive enough to be valued by the hundred odd affiliated towns under the jurisdiction of “lübisches Recht” along the Baltic Sea coast; in the Hanseatic counting houses, the “lübisches Recht” was also adopted under pressure from Lübeck. It must be seen as a proof of quality, that "lübisches Recht" continued to be attractive, even when the fortified kingdoms of the Baltic had long since prevented legal proceedings taking place in Lübeck's courts and although the political and economic capital of the Hanseatic league was no longer as powerful as it had once been. By 1800 at the latest, a system of administering justice which was based on academic methods and terminological precision and which was mainly enforced by those trained in law had prevailed throughout the European continent. This case study does not prove, however, that such judgements were superior in quality or justice to those of the legal culture which relied on the life experience and personal authority of the councillors giving verdicts. The differences between the judicial culture of the Lübeck legal honoratiorees and the trained judges of today following academic working methods are great, however, to judge which form is better goes beyond the scope of this article.

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