**Hebrew University of Jerusalem Faculty of Law**

**Jewish Law Seminar, Convenors: Prof. Dr. Amy Birkan/Prof. Dr. Benjamin Porat**

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**Ius Commune and Particular Laws: Jewish Law between Extreme and Representative Case**

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My argument is that, in order to get a proper understanding of the position of Jewish law in the legal order of the Holy Roman Empire, we should a l s o look at it as an integral part of the bewildering pluriverse of the early modern ius commune, as an example of a particular law, an example which was both representative of particular laws in general and and which, at the same time, was an extreme variant of a particular law. If the principle objective of this paper is to shed light on the position of Jewish Law within the ius commune, it approaches this relationship also the other way round, using Jewish law as a barometer to monitor and better understand legal change in general. In terms of chronological scope the paper is restricted to the 17th, 18th and the beginning of the 19th century. The political legal and social framework is provided by the Holy Roman Empire, in terms of modern georgraphy, Central Europe and adjacent areas.

There are a number of questions and ideas that go along with this twin objective. First and foremost, where do we encounter Jewish law in the ius commune? Second, if there is empirical evidence for Jewish law as part of the ius commune, how can this constellation be analyzed and interpreted? And third, if Jewish law as an integral part of Europe’s premodern legal order turns out to be not as astonishing as it might seem at first sight, we can look out for the resons, why it has fallen into oblivion.

The question, to what extent and how Jewish law operated as part of the Ius Commune is addressed from three perspectives, jurisprudence, legislation and jurisdiction. The empirical evidence is provided for by altogether five projects, two of them ongoing research projects, one a completed research project, one an almost completed translation and critical edition of Christian Wilhelm von Dohm’s *On the Civil Improvement of the Jews* and two variants of a new teaching format, historical moot courts.

The two ongoing research projects are „The Jewish Cases of the Imperial Aulic Council“[[1]](#footnote-1)and „The „Jewish desk“ in the early modern administration and judiciary“.[[2]](#footnote-2) The Imperial Aulic Council was one of the two supreme courts of the Holy Roman Empire as well as the main advisory council and executive organ of the Emperors of the Holy Roman Empire in all matters concerning the Empire in contradistinction to their dynastic possessions. This explains, why the archival files of the *Reichsarchive* (Imperial Archives) stored at the Austrian State Archive, Division House, Court and State Archive are a source of incomparable value for the history oft he Empire, but have little in store for the hereditary possessions of the House of Habsburg, from which, with on exception all Emperors were elected/recruited in the early modern period. The Imperial Aulic Council had a caseload of 80.000, perhaps more than 100.000 cases, which, already in mere quantitatve terms, makes it one, if not the most important court of early modern Europe. The precise number, however, is as yet unknown, since only some 2 % of the cases have been properly explored and cataloged. At least some 3000 of them may be classified as „Jewish cases“.[[3]](#footnote-3) By Jewish cases the research project „The Jewish Cases of the Imperial Aulic Council“ understands three distinct groups, a) cases, in which individual Jews or Jewish communities appear directly as litigants, b) cases, where Jews, or rather the right to protect Jews, was at issue between different territories, i.e. the half-sovereign Imperial Estates of the Empire, and c) cases which the Imperial Aulic Council decided at least in part on the basis of Jewish law.

The group of cases caracterized by the participation of Jews and Jewish communities as litigants may be subdivided according to further criteria, e.g. in civil law cases, mostly involving Jewish creditors, and cases pertaining to what modern Continental lawyers would call public law cases, i.e. litigation of Jewish communities with corporate status against half-sovereign Imperial Estates of the Empire, typically the Jewish community of Frankfurt against the Free Imperial City of Frankfurt, or according to whether the Jewish parties were plaintiffs, defendants or both or whether the Jewish party was male or female, affluent or poor.

The cases of the Imperial Aulic Council where Jewish law served at least as one of the legal soures on which the verdict was based, ranged from „ordinary“ divorce, inheritance and contract law cases to slander and fundamental issues in the spectacular Eisemenger case.

„The „Jewish desk“ in the early modern administration and judiciary“ is another ongoing research project, which provides material, on which this paper draws. It explores, what Christian magistrates and judges from bailiffs to supreme court judges knew about Jewish law, how they acquired their knowledge and how this knowledge was transmitted.[[4]](#footnote-4) For this paper the following examples have been selected:

As an, or rather t h e example for a handbook/manual:

Johann Jodocus Beck, ed., [*Tractatus de Juribus Judæorum, Von Recht der Juden*](http://gso.gbv.de/DB=2.1/SET=1/TTL=51/MAT=/NOMAT=T/CLK?IKT=8062&TRM=Tractatus+De+Juribus+Jud%C3%A6orum,+Von+Recht+der+Juden)*. Worinnen von denen Gesetzen, denen sie unterworffen, deren Heyrathen, Contracten, Wucher, Testamenten, Successionen oder Erbfolgen, Verbrechen und deren Bestraffungen, Privilegien und Rechts-Wolthaten, Oneribus und Beschwehrden, insonderheit der Cronen-Steuer und guldenen Opffer-Pfenning, wie auch Gerichten und Gerichtlichen Handlungen, und andern mehr, gründlich und deutlich gehandelt wird. Aus denen Göttlichen und allgemeinen Reichs- und andern Special-Rechten und Gewohnheiten zusammen getragen, und mit Praejudiciis, Decisionibus und Responsis überall bestärcket. Denen Richtern, Amtleuten, und sonsten jedermänniglich zum Besten, mit einem hierzu dienlichen Register versehen heraus gegeben Von Joh. Jodoco Beck, J.V.D. Hochgrävl. Hohenloh-Neuensteinisch und- Hochgrävl. Giechischen Rath, bey Löbl. Universität Altdorf Pandectarum Professore Publico, & Facultatis Juridicae Assessore Ordinario*, Nuremberg: Lochner, 1731.

As an example for a textbook/legal treatise:

Christianus Fridericus Glück, *Praecognita uberiora universae iurisprudentiae ecclesiasticae positivae Germanorum*, Halae: Impensis Orphanotrophei, 1786.

As an example for a piece of legal doctrine/legal treatise:

Johann Samuel Thiel, [*Principia* ***iurisprudentia*** *iudaicae per Germaniam communis*](http://cbsopac.rz.uni-frankfurt.de/DB=2.1/SET=1/TTL=1/CLK?IKT=8502&TRM=Principia+iurisprudentia+iudaicae+per+Germaniam+communis) *: seu conspectus iurium et obligationum Iudaeorum in Germania singularium*, Halae Saxonum: Renger, 1790.

As an example for a collection of responsa:

Johann Burkhard Geiger and Christian Friedrich Glück, *Merkwürdige Rechtsfälle und Abhandlungen aus allen Theilen der Rechtsgelehrsamkeit mit beygfügten Urteilen und Gutachten der Erlangischen Juristenfacultät*, vols 1-3, Erlangen: Palm, 1792-1806.

As an example for the exposition of Jewish law in a lecture on a territorial law:

Anomym. [Joseph Wratislaw Edler von Monse], *Leitfaden zu den Vorlesungen ueber die Landesgesetze des Markgrafthums Maehren. Auf dem kais.koenigl. Lycaeum zu Olmuetz*, Olmuetz: Josepha Hirnlin, 1783.

As an example for a collection of Jewish law:

Carl Ferdinand Hommel, *Bibliotheca iuris rabbinica*, Byruthi, 1762.

The completed research project is called „The Forgotten Side of Jewish Emancipation. Jews and Jewish Communities in Public Eccclesiastical Law“. It has highlighted the significance of Canon Law and Public Ecclesiastical Law for the legal position of Jews i the early modrn period and the trajectory of the emancipation process in states, where there was either no or no complete separation between state and church.

The translation and critical edition of Christian Wilhelm von Dohm‘s, *On the Civil Improvement of the Jews* shows Dohm also as an exponent of the ius commune in its final stage.[[5]](#footnote-5)

Two Historical Moot Courts, the Historical Jewish Law Moot Court, modelled on the jurisdiction of the Prague Rabbinic Tribunal and the Ius Commune Moot Court, modelled on the Imperial Aulic Council, were founded in 2016 as part of the annual summer academy on the History of the Jews in the Holy Roman Empire and its Successor States.[[6]](#footnote-6) The cases the students work with are modelled on concrete historical cases from the 18th century.

So much for the inroduction and the five projects that provide the empirical basis for this paper.

Part 1 will fill in some background information on the state of the art concerning research into the Ius Commune and Jewish law.

Part 2 addresses the position of Jewish law in the Ius Commune from three perspectives: jurispudence, legislation and jurisdiction on the basis of the findings and approaches of the abovementioned projects.

Part 3 offers some prelimary conclusions and makes suggestions for further research.

1. **Ius Commune & Jewish Law: Remarks on the State of the Art**

* 1. **Ius Commune**

Motives for renewed interest in the ius commune post-1945:

* In Germany desire to emphasise the integration of German legal development in a European context, see research agenda of the Max-Planck-Insitute for European Legal History in Frankfurt-on-Main, particularly pronounced in ist initial stage
* The ius commune as Europe’s common legal past (Mario Bellomo) as a blueprint for future European legal unity

Problems:

* Overemphasis on pan-European components of the ius commune
* Lack of interest in the particular laws and the national variants of the combination of ius commune and particular laws: Roman-Dutch law, Roman-German law, Roman-Scots law …
* Frequent restriction of the ius commmune to Roman civil law and corresponding eclipse of Canon/Ecclesiastical la was ist second pillar

* 1. **Particular Laws**
* Studied in isolation from the ius commune
* Identification of particular law and national law
  1. **Intersection of the Ius Commune, Particular Laws and Jewish Law**

Few examples for investigating the legal order of the 17th and 18th century as legal pluralism in general:

* Peter Oestmann, *Rechtsvielfalt vor Gericht* is strong on pluralism and jurisdiction, highlighting the interplay between Roman civil law, Canon/ecclesiastical law and particular laws, but takes no account of Jewish law

Few examples for Jewish law in context:

* Recent examples: Jay Berkowitz and Andreas Gotzman on the interplay between Jewish law and non-Jewish law and jurisdiction
* The first, but entirely forgotten example for placing Jewish law squarely within the context oft he ius commune: Vittore Colorni

Vittore Colorni, *Legge ebraica e leggi locali,* Milan: Giuffrè, 1945.

Vittore Colorni, *Gli Ebrei nel Sistema del Diritto Comune fino alla Prima Emancipazione*, Milan: Giuffrè, 1956.

1. **Jewish Law in the Pluriverse of the Ius Commune: Jurisprudence, Normativity/Legislation & Jurisdiction**

The question, to what extent and how Jewish law operated as part of the Ius Commune is addressed from three perspectives, first jurisprudence, second legislation and third jurisdiction.

Legislation is complemented by normativity, since in premodern times only a fraction of the norms can be understood as having been actively legislated/enacted (prince, estates/parliament, corporate bodies)

* 1. **Jurisprudence**

Several questions to be asked:

First, what did Christian learned lawyers understand by Jewish law?

We’ll try to answer this question on the basis of Hommel and Glück:

Hommel was chair for feudal law in the University of Leipzig, but taught also other legal disciplines and was engaged in comparative law.[[7]](#footnote-7) He owes his fame and his honorary name “Beccaria of the North” to his role as an eminent penal reformer and his annotation of and preface to a new translation of Cesare Beccaria’s principal work “*Dei delitti e delle pene“* into German.[[8]](#footnote-8)

Carl Ferdinand Hommel, *Bibliotheca iuris rabbinica*, Byruthi, 1762.

*…*

*Fontem autem totius Rabbinorum iurisprudentiae*

*…*

*Inter Rabbinos … etiam iuris consultos Iudaeos obvenire magni nominis et excellentis doctrinae, p. 3*

*…*

*Constitutiones, hebraice Hattetanoth magistri Gersonis Hazakenii p. 7*

*…*

*Domus Josephi, hebraice Beth Joseph, in qua omnes leges, consuetudines et iudiciorum ordines hodie inter Judaeos usitati continentur, Haec liber … autorem habet celeberrimum illum jurisconsultum JOSEPHUM CARONEM Hispanum, qui Portentum Seculi vocari meruit, et in Galilaee urbe Sapheto principatum scholae tenuit. p. 10*

*…*

*Liber Formularum, hebraice Sepher Schetaroth … [Wien Frankfurt/Uffenbach, Paris/Sorbonne], p. 15*

*…*

*Liber Synagogae magnae, hebraice Sepher Cheneseth Hagedola, quo titulo commentarium suum … Liburni … Furthi, p. 18*

*…*

*Lux sata, hebraice Or Serua … magister Isacus Viennensis, pp. 19-20*

*…*

*Manus fortis, celeberrimum Maimonidis opus, quod interderdum etiam Repetitio Legis appellatur, universa quidem Rabbinorum scientiam atque theologiam imprimis complectitur, attamen etiam legalia ei quam plurima insunt … Huius libri artifex ipse est summus Judaeorum et immortalis doctor, MOSES MAIMONIDES … S. 20*

*…*

*Mensa Instructa, hebraice Sciulchan Aruch, incomparabilis viri, JOSEPHI CARONIS, saepius edita. Hanc mensam egregio commentario illustravit MOSES ISARLES sacerdos Cracoviensis sub titulo Mappam super Mensam [The Tablecloth], p. 22*

*…*

*Omnia in eo, hebraice Col Bo, liber Pandectis in titulo similis …, p. 23*

*…*

*Responsa et Quaesita, hebraice Utescivuoth et Scheeloth. Maxima enim jurisprudentiae Rabbinicae vis in huiusmodi consultationibus, resonsis, rebus judicatis atque decisionibus constitit. p. 28*

*…*

*Responsa et Quaesita Legalia, hebraice Utescivuoth et Scheeloth*

*…*

*die bekanntesten: magister Arahamus filius Maimonidis, magister Benjamin filius magistri Josephi, magister Bezalel Germanus, sive ut hebraice dicitur Aschenaci; magister Chajimus Abu Zahi; magister Elias … magister Mordechaus Rotenbergensis, filius Mosis … magister Samuel Luria; magister Samuel Medinensis, S. 28-29*

*…*

*Semita Justitiae, Nehtivoth Mischpath, Richtsteig, p. 30*

Hommel has a broad understanding of Jewish law. He is aware oft he importance of rabbinical commentaries, collections of responsa, community statutes as sources of Jewish law.

Christianus Fridericus Glück, *Praecognita uberiora universae iurisprudentiae ecclesiasticae positivae Germanorum*, Halae: Impensis Orphanotrophei, 1786.

Following his exposition of the sources of Catholic and Protestant ecclesiastical law Glück inserted an “*Additamentum, in quo de fontibus Iuris Ecclesiastici Iudaeorum in Germania agitur“* (Addition, in which the sources of the ecclesiastical law of the Jews in Germany are dealt with).[[9]](#footnote-9) What are these sources of Jewish ecclesiastical law according to Glück? He distinguishes between several categories: First, *“Sacra Scriptura Veteris Testamenti”* (The Holy Scripture of the Old Testament), second, *“Rabbinorum Scripta”* (the writings of the rabbis), third, the *“Talmud”*, fourth, *“Sanctiones Juris Civilis et Canonici quae judaeorum sacra concernunt”* (The sanctions contained in civil law and canon law that concern the sacred of the Jews) *“et denique … quad Ecclesiam Judaicam Brandenburgicam Privilegium Illud Generale, Judaeis sub Sceptro Borussorum Regis Viventibus, Concessum, Berolini die XVII. April MDCCL promulgatum in Novo Corporore Constitut. Marchicarum Tom. II. pag. 118 sqq.“* (and finally, as far as the Jewish church in Brandenburg is concerned, the general privilege granted to the Jews living under the sceptre of the Prussian king on 17 April 1750 in Berlin and promulgated in the *Novum Corpus Constitutionum Marchicarum*).[[10]](#footnote-10) In addition, he also refers to the “*Ritual-Gesetze der Juden. Entworfen von dem Verfasser der philosophischen Schriften auf Veranlassung und unter Aufsicht R. Hirschel Lewin, Berlin, 1778.“* [[11]](#footnote-11)

What did Glück understand by these five categories, and what can we infer from them about his concept of Jewish ecclesiastical law? To him, the Holy Scriptures of the Old Testament constituted unquestionably a source of Jewish ecclesiastical law, “*quatenus nimirium sanctiones in illa obvenientes non ad cultum in Templo quondam Hierosolymitano instituendum unice adstrictae sunt”* (insofar as the norms contained in there are not exclusively restricted to the cult that was once instituted in the temple of Jerusalem). Under the heading “Rabbinic Writings”, which Glück identifies as the second source of Jewish ecclesiastical law, he understands Jewish legal literature. Instead of listing individual works himself, he refers summarily to a collection published by his Leipzig colleague Carl Ferdinand Hommel (1722-1781): *“Rabbinorum Scripta, quae qualia sint, cognoscere licet ex Car. Ferd. Hommeli Bibliotheca iuris rabbinica”* (Rabbinical Library of Law)*.*[[12]](#footnote-12) By the Talmud, the third source, Glück understands the collection of Jewish traditions consisting of the Mishnah and the Gemara: *“Corpus Illud Traditionum Judaicarum, quod sub nomine Talmud notum est, et ex Mischnah ac Gemara constat”*. He refers to the German translation of the Mishnah made by Johann Jacob Rabe (1710-1798).[[13]](#footnote-13) Although Rabe had translated the entire Talmud into German, only the Mishnah and the Talmud tractates Berachoth and Peah were actually published.[[14]](#footnote-14) Rabe, a Lutheran theologian, had risen to the position of superintendent in Ansbach (or Onolzbach in 18th century German), the capital city of the principality of Brandenburg-Ansbach, ruled by Margrave Karl Alexander ([1736](http://de.wikipedia.org/wiki/1736) - [1806](http://de.wikipedia.org/wiki/1806)), to whom he had dedicated his translation of the Mishnah. Rabe also corresponded with Moses Mendelssohn, whose commentary on Ecclesiastes he had translated into German.[[15]](#footnote-15)

The sources of Jewish ecclesiastical law, which Glück enumerates in categories one to three, even though interpreted from a Christian perspective, are intended to represent Jewish law as understood by Jews themselves at the time. The sources of Jewish ecclesiastical law, which Glück lists in categories four and five, represent the three most important bodies of non-Jewish law which contained norms concerning Jews. Category four comprises the common law, or rather the common laws, i.e. Roman civil law and canon law, and category five the particular territorial law as a source of Jewish ecclesiastical law. In case of conflict, the particular law took precedence over the general law. The general laws which Glück refers to were neither the ancient Roman civil law nor the canon law of the Roman Catholic Church. What Glück means by civil law is the contemporary Roman civil law as practiced in Germany in the 18th century, comparable to Roman-Dutch Law. The canon law which Glück had in mind was the contemporary ecclesiastical law, in particular that which Protestant lawyers had developed for the purposes of the Protestant territories in the Holy Roman Empire. In addition to these five categories, Glück mentions the *“Ritual-Gesetze der Juden*“,[[16]](#footnote-16) compiled by Moses Mendelssohn. Mendelssohn’s treatise is the best known example of the “pocket-book“ summaries and extracts of Jewish law that circulated in the 18th century.

The passages quoted from Glück already point tot he second question, where to place Jewish law from the perspective of early modern Christian jurisprudence?

While there was a clear awareness that Jewish law originated from Jews themselves, there was at the same time a tendency to connect this body of law to non-Jewish norms concerning Jews. In terms of system/doctrine the Jews as addressees of norms sees to have been more important than whether these norms had a Jewish or non-Jewish origin.

The way Glück designs his *Ius ecclesiasticum Iudaeorum* makes this as clear as Johann Jodocus Beck’s understanding of the „Rights of the Jews“

Johann Jodocus Beck, ed., [*Tractatus de Juribus Judæorum, Von Recht der Juden*](http://gso.gbv.de/DB=2.1/SET=1/TTL=51/MAT=/NOMAT=T/CLK?IKT=8062&TRM=Tractatus+De+Juribus+Jud%C3%A6orum,+Von+Recht+der+Juden)*. Worinnen von denen Gesetzen, denen sie unterworffen, deren Heyrathen, Contracten, Wucher, Testamenten, Successionen oder Erbfolgen, Verbrechen und deren Bestraffungen, Privilegien und Rechts-Wolthaten, Oneribus und Beschwehrden, insonderheit der Cronen-Steuer und guldenen Opffer-Pfenning, wie auch Gerichten und Gerichtlichen Handlungen, und andern mehr, gründlich und deutlich gehandelt wird. Aus denen Göttlichen und allgemeinen Reichs- und andern Special-Rechten und Gewohnheiten zusammen getragen, und mit Praejudiciis, Decisionibus und Responsis überall bestärcket. Denen Richtern, Amtleuten, und sonsten jedermänniglich zum Besten, mit einem hierzu dienlichen Register versehen heraus gegeben Von Joh. Jodoco Beck, J.V.D. Hochgrävl. Hohenloh-Neuensteinisch und- Hochgrävl. Giechischen Rath, bey Löbl. Universität Altdorf Pandectarum Professore Publico, & Facultatis Juridicae Assessore Ordinario*, Nuremberg: Lochner, 1731.

See also:

Johann Samuel Thiel, [*Principia* ***iurisprudentia*** *iudaicae per Germaniam communis*](http://cbsopac.rz.uni-frankfurt.de/DB=2.1/SET=1/TTL=1/CLK?IKT=8502&TRM=Principia+iurisprudentia+iudaicae+per+Germaniam+communis) *: seu conspectus iurium et obligationum Iudaeorum in Germania singularium*, Halae Saxonum: Renger, 1790.

Monse: Jewish Law as a Particular Law/Foreign Law:

Anomym. [ Joseph Wratislaw Edler von Monse], Leitfaden zu den Vorlesungen ueber die Landesgesetze des Markgrafthums Maehren. Auf dem kais.koenigl. Lycaeum zu Olmuetz, Olmuetz: Josepha Hirnlin, 1783.

Erster Abschnitt. Geschichte der Gebraeuche, und Gerichte in Maehren., pp.1-2

II. Von den Gesetzen und Landesgebraeuchen, welche H. Landeshauptmann Ctibor von Cimburg in dem Buch *Kniha Towaczowská* genannt, und H. Ctibor von Drnowiti gesammelt, in eigenem manuskript verfassset, und hinterlassen haben.

III. Von verschiedenen Sammlungenn der alten Puhonen und Nalezen

Zweyter Abschnitt. Historische Nachricht von den Gesetzbuechern des Markgrafthums Maehren, pp. 3-5

IV. Von der alten Landesordnung, welche im J. 1535. in Monte Liliorum gedrucket, und 1662, in Olmütz neuerdings aufgelegt worden.

VII. Von der verneuerten Landesordnung Kais. Ferdinad. II. vom Jahr 1628.

IX. Von den verschiedenen Sammlungen des Johann Jakob von Wingarten

Dritter Abschnitt. Von den verschidenen Rechten und Gesetzen in Maehren, pp. 5-6

1. Die alte und neue Gerchtsordnung.
2. Konkurs= Tax== Wechsel=Vormunfdschaft=Bergwerk=Gesind=und Executionsordnungen, Verordnungin Ehresachen, und anden buergerlichen Geschaeften
3. Verordnungen in Geistlichen=Religion=Toleranz=und Disciplinarsachen
4. Von den Lehrechten und Gewohnheiten
5. Von der peinlichen Halsgerichtsordnung, und andern dahin einschalgenden Verordnungen, und Erleuterungen.
6. Von den Landtagsschuesn in alten und neuen Zeiten
7. Von den Militaergesetzen
8. **Gerichts=und Polizeyordnung fuer die Juden**

Vierte Abschnitt. Von dem Herkommen., oder ungeschriebene Rechte, p. 7

Fünfter Abschitt. Von dem Gebrauch fremder Gesetze, pp. 7-8

II. Von dem Gebrauch de boehmischen Gesetze in Maeheren

III. Von dem Gebtrauch des roemischen Rechts *Corpus Juris civilis Romani*

Iv Von dem Gebrauch der kanonischen Rechte und paepstlichen Dektretalen, in buergelichen Rechtssachen. Corpors Juris Canonici

V Von dem Gebrauch fremder Rechte vor Einführung der Appellation unter Kaisr Ferdinand dem Ersten

**VI. Von dem unter den maehrischen Juden ueblichen Gebrauch der Mosaischen Rechte, dann deren Gebrauch, und Misbrauch unter den Christen.**

Sechster Abschnitt. Von den Kirchengesetzen in Maeheren, S. 9

[Besonderes Kirchen Recht]

IV Maehrische Conzilien, und Kirchensatzung des Olmuetzer Immediat-Bisthums bis zu dessen Erhoehung in ein Ezrbishzum, und Errichtung des neuen Bisthums zu Bruenn

Siebenter abschnitt. Von dem Gebrau des natur=oder Vernunft=und allgemeinen Staatsrechts zur Erklaerung der maehrischen Gestze. S. 10

1. Von der noethigen Anwendung des Vernunftrechts uebrrhaupt.
2. Von der Nothwendigkeit des Vernunftrechts um geschrieben Gesetze zu verstehen.
3. Von der Nothwendigkeit des Vernunftrechts in Ermangelung aller anderen Gesetze

Achter Abschnitt. Von der Bschaffenheit der Gesetze und derselben Anwendung, S. 10-11

Neunter Abschnitt. Von den Mährischen Gerichtshoefen, ihrer Vefassung, Insztruction, und Verfahrungsart, pp. 11—12

No Jewish courts mentioned here, royal court of appeal in Bruenn, „obriste Justistelle in Wien“

Zehnter Abschnitt. Subsidien und Hilfsquellen in der maehridschen Jurisprudenz, p. 13

See also: Hommel

Third, Jewis law as an ecclesiastical law

See Glück and Dohm

“*Ius Ecclesiasticum Judaeorum in Germania, quod … alterum constituit Jurisprudentiae Germanorum ecclestiastica partem, praeteriri possit a nemini, nisi qui Semi Canonista haberi velit“* may be translated as: “The ecclesiastical law of the Jews in Germany, which constitutes the other half of the ecclesiastical law of the Germans, cannot be evaded by anyone who does not want to be considered a *Semi Canonista*, a semi canon lawyer, only.”[[17]](#footnote-17) Those were the words used in 1786 by Christian Friedrich Glück (1755-1831), one of the more renowned law professors in late 18th and early 19th century Germany. Glück was educated at the Prussian University of Halle, where he taught as a *Privatdozent*, a private non-salaried lecturer, until in 1784 he accepted a call to a chair at the University of Erlangen in the principality of Brandenburg-Bayreuth. He is considerered the perfecter of the *usus modernus pandectarum*. Glück owes his lasting fame to his magisterial commentary on the *Pandektenrecht,* the contemporary modified Roman civil law as practiced in Germany until the end of the 19th century.

Fourth: „*Ex auctoritate ius*“: The learned layer as a source of law

* 1. **Normativity & Legislation**

Several questions to be addressed:

* The Jewish lay leadership as legislator: Jewish community statutes (Livorno as an extreme cases)
* The Christian prince/state as Jewish legislator: Jewish police ordinances (Rachel Manenkin)

**2.3. Jurisdiction**

Three points to be addressed: First, the early modern state and competing agencies of jurisdiction, second, the academic as paracticioner, third, Jewish law as a source of law in the ius commune.

The early modern state of the 17th and in particular 18th century was an increasingly interventionist state and pushing aside competing agencies of jurisdiction, in articular the church (Paolo Prodi). Yet it was also still a weak state compared to its modern 19th and 20th century successors. The encounter between state and Jewish jurisdiction had ambivalent, even antagonistic consequences. On the one hand there is a clear tendency to increasing control of the administration of justice by Jewish courts on the part of the stae, on the other, the state, as a weak state, instrumentalizes and boosts rabbinical jurisdiction – as a court of first instance.

The authoritative legal opinions issued by *Spruchkollegien* were an integral part of the jurisdiction of the Holy Roman Empire (as they were elsewhere) and, overlaps notwithstanding, need to be distinguished from legal opinions issued by learned lawyers in a private capacity.[[18]](#footnote-18) The practice of arriving at a legal decision by consulting a *Spruchkollegium* was called *Aktenversendung*, which may literally be translated “as transfer of the court files”. In some territories, lower courts were obliged to turn to a *Spruchkollegium* in certain instances and to pass their findings as their own verdicts without any alteration. In territories lacking a legal forum with the required expertise, such as a high court staffed by professional judges, law courts turned to law faculties in neighbouring territories. There were also cases in which a prince turned to a law or theology faculty, or to both, to obtain a definitive settlement of a controversial issue that would stand on firm legal and theological grounds. Several Protestant princes entrusted the question as to whether the toleration of Jews was compatible with a Christian conscience to the counsel of their universities. August the Strong, Elector of Saxony and King of Poland, asked the Leipzig theology faculty for a ruling against the ritual murder charges rampant in Poland-Lithuania.[[19]](#footnote-19) Yet it was not only in exceptional cases concerning questions of high legal politics, but also as a matter of almost everyday routine that *Spruchkollegien* issued rulings in cases involving Jews.

Legal opinions were published in large number in collections that served as teaching tools and reservoirs of case law and played a significant role in unifying the legal pluralism of the Holy Roman Empire. Together with his Erlangen colleague Johann Burkhard Geiger, Glück edited one such collection comprising altogether fifty cases.[[20]](#footnote-20) It was entitled *Merkwürdige Rechtsfälle und Abhandlungen aus allen Theilen der Rechtsgelehrsamkeit mit beygfügten Urteilen und Gutachten der Erlangischen Juristenfacultät* (Noteworthy Legal Cases and Reasonings from all Parts of Jurisprudence with the Verdicts and Legal Opinions of the Erlangen Law Faculty). Two of the fifty cases contained in Geiger’s and Glück’s *Merkwürdige Rechtsfälle* concerned Jewish matters: the *Rechtliches Gutachten über die Frage, ob ein von seinen Eltern verlassenes Judenkind, der Landesherrschaft zur Verpflegung und Erziehung in der christlichen Religion heimgefallen sey, und solches den Eltern, wenn sie es künftig zurückfordern sollten, wieder verabfolget werden müsse?* (Legal opinion concerning the question, whether a Jewish child deserted by his parents was to be transfered to the territorial government for board and education in the Christian religion and if it was to be returned to the parents, if they claimed it back again in the future)[[21]](#footnote-21) and *Ob ein Rabbiner das Recht habe, Vormünder zu bestellen, Inventuren und Theilungen vorzunehmen, und über Erbschaftsstreitigkeiten zu erkennen?* (If a rabbi was entitled to appoint guardians, to make inventories of and to partition estates and to decide in inheritance disputes?).[[22]](#footnote-22)

Examples from the jurisdiction of the Imperial Aulic Council

1. **Conclusions, Open Questions & Suggestions**

At the end, in conclusion, I should like to add a few reflections.

1st, why we know so little about Jewish Law in the bewildering pluriverse of the ius commmune?

2nd, what ist the heuristic value of placing Jewish law within the ius commune from the perspective of the study oft he latter?

3nd, what methodolical tools may be used interpret and understand this constellation?

1st, why we know so little, why have we forgotten/ignored Colorni?, why does it come as a surprise?

1. general reasons:

19th and 20th century priorities of legal history

* Natural law
* State as sole legislator
* German law/Historical School
* Ius Commune: Roman Civil Law

1. More specific reasons:

* *Reichsstaatsrecht* (Imperial Public Law): emphasis on statute law, not custom, not imperial privileges (the privileges granted unilaterally by the Emperor,[[23]](#footnote-23) imperial customary law, intersection with territorial law)
* Ecclesiastical law: eclipse of Jewish heritage: Broadly speaking, from the beginning of the 19th century, there was a trend for Christian ecclesiastical lawyers to detach both the Jewish community and Jewish law from their understanding of ecclesiastical law. The German translation of Glück’s textbook published posthumously in 1839, and in part rewritten, highlights this trend and shows that more was involved than a change in terminology. In the original version, Jewish law serves as a vehicle for the understanding of Christian ecclesiastical law. The editor of the German translation, by contrast, states unmistakably on page one that he has little use for Jewish law: *“Kirchenrecht seinem Namen nach begreift blos die christliche Kirche in sich. Vor Christus gab es keines; weder das jüdische Zeremonienwesen, noch das ius sacrum der Römer gehört dahin“ (“*Church law by its very name encompasses the Christian Church only. There was no church law before Christ. Neither Jewish ceremonies nor the ius sacrum of the Romans belongs there.”[[24]](#footnote-24) The double trend in Christian theology a) to stress the natural, rational and moral aspects of religion, rather than revelation, and b) to lay exclusive claim to naturalness, rationality and morality for the Christian church, reduced the function Judaism performed for Christianity.[[25]](#footnote-25)
* Study of Jewish law: law in the books, not law in action

2nd, ius commune

* Persistence of religion, question mark behind the secularization of law

* Focus on the importance of custom, academic interpretation of the law
* Focus on the persistence of pluralism

3rd, how can we interpret and understand this?

* Legal pluralism
* collaborative pluralism
* contested pluralism

1. The systematic exploration, cataloguing and microfilming of the Jewish cases of the Imperial Aulic Council was started more than 15 years ago as a joint project of the Max-Planck-Institute for European Legal History in Francfurt-on-Main and the Simon-Dubnow-Institute for Jewish History and Culture at Leipzig University under the direction of Stefan Ehrenpreis, Michael Stolleis and Stephan Wendehorst. Microfilm copies are available to interested researchers both at the MPIeR and the Dubnow Institute. As from 2010 work continued with changing regional partners, starting with the City of Fulda and the Friedrich-Alexander-University Erlangen-Nuremberg under the directon of the Institute for Legal and Constitutional History of the University of Vienna. [↑](#footnote-ref-1)
2. Herzog August Bibliothek Wolfenbüttel/Institute for Legal and Constitutional History at Vienna University. [↑](#footnote-ref-2)
3. Leopold Auer and Eva Ortlieb, in: Andreas Gotzmann and Stephan Wendehorst, ed., Juden im Recht. [↑](#footnote-ref-3)
4. What government officials and judges knew about Jewish law and culture in the Holy Roman Empire and how they acquired their knowledge has not yet received the attention it deserves. For some very preliminary thoughts see the section on the „Jewish desk“ in: Stefan Ehrenpreis, Andreas Gotzmann and Stephan Wendehorst, *Jüdisches Heiliges Römisches Reich: Erträge und Perspektiven eines Projekt-Clusters zur Geschichte der Juden in der Frühen Neuzeit*, Erfurt: Lehrstuhl für Judaistik - Religionswissenschaften, Frankfurt am Main: Max-Planck-Institut für europäische Rechtsgeschichte, Leipzig: Simon-Dubnow-Institut für jüdische Geschichte und Kultur an der Universität Leipzig, 2006/2007. [↑](#footnote-ref-4)
5. Christian Wilhelm von Dohm, On the Civil Improvement of the Jews, Berlin and Stettin: Friedrich Nicolai, 1781 and 1783, translated from the German and the French into English and critically edited by Stepahn Wendehorst and the students of the class „History of Jewish Rights before, within and Beyond the Nation State“ taught at the Law Faculty of the University of Vienna from 2014 to 2017. To be completed this year. [↑](#footnote-ref-5)
6. From 2017 the Historical Jewish Law Moot Court – The Rabbinic Tribunal of Prague is a joint enterprise of the Law Faculties of Vienna and Tel Aviv. 2018 Harvard Law School joins in as well, so I’ve just heard. [↑](#footnote-ref-6)
7. Alexander von Joch [Carl Ferdinand Hommel], [*Über* ***Belohnung*** *und Strafe nach Türkischen Gesetzen*](http://swb.bsz-bw.de/DB=2.1/SET=1/TTL=4/CMD?MATC=&ACT=SRCHA&REMEMBERFORMVALUES=N&IKT=4070&NOABS=Y&TRM=U%CC%88ber+Belohnung+und+Strafe+nach+Tu%CC%88rkischen+Gesezen%23%23%23%23%23%23), Bayreuth and Leipzig: Johan Andreen Lübeck, 1770; 2nd ed., 1772; Reprint of the edition of 1772, ed. by Heinz Holzhauer (Quellen und Forschungen zur Strafrechtsgeschichte, 2), Berlin: Schmidt, 1970; Stephan Wendehorst, „Karl Ferdinand Hommel zum Zaunrecht im sächsische Recht, jüdischen Recht und in den Gemeinen Rechten: Mehr als eine rechtsvergleichende Marginalie?“, unpublished paper presented at the 11th Young Researchers Workshop of the *Netzwerk Reichsgerichtsbarkeit*, held at the Austrian State Archive, Division House, Court and State Archive Vienna on 5 October 2012. [↑](#footnote-ref-7)
8. *Des Herrn Marquis von Beccaria unsterbliches Werk von Verbrechen und Strafen auf das Neue selbst aus dem Ital. übers. mit durchgängigen Anmerkungen des Ordinarius zu Leipzig Herren Hofrath Hommels*, Breslau: Korn, 1778; reprint, ed. by John Lekschas and Walter Griebe.Berlin: Akademie-Verl. 1966. [↑](#footnote-ref-8)
9. Christianus Fridericus Glück, *Praecognita uberiora universae iurisprudentiae ecclesiasticae positivae Germanorum*, Halae: Impensis Orphanotrophei, 1786, pp. 123-124. [↑](#footnote-ref-9)
10. [***Novum***](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Novum)[***corpus***](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=corpus)[***constitutionum***](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=constitutionum)[*Prussico-Brandenburgensium*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Prussico-Brandenburgensium)[***praecipue***](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=praecipue)[***Marchicarum,***](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Marchicarum,)[*oder*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=oder)[*Neue*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Neue)[*Sammlung*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Sammlung)[*Königl.-Preußi.*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Ko%CC%88nigl.-Preu%C3%9Fi.) *und* [*Churfürstl.-Brandenburgischer,*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Churfu%CC%88rstl.-Brandenburgischer,)[*sonderlich*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=sonderlich) *in der* [*Chur-*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Chur-) *und* [*Marck-Brandenburg,*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Marck-Brandenburg,)[*wie*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=wie)[*auch*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=auch)[*andern*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=andern)[*Provinzien,*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Provinzien,)[*publicirten*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=publicirten) *und* [*ergangenen*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=ergangenen)[*Ordnungen,*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Ordnungen,)[*Edicten,*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Edicten,)[*Mandaten,*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Mandaten,)[*Rescripten*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Rescripten) *&*[*c.*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=c.) *&*[*c.*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=c.) *&*[*c*](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=c), Berlin: [Akademie](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Akademie) der [Wissenschaften](http://stabikat.de/DB=1/SET=2/TTL=10/MAT=/NOMAT=T/CLK?IKT=1016&TRM=Wissenschaften), 1756-1822, <http://web-archiv.staatsbibliothek-berlin.de/altedrucke.staatsbibliothek-berlin.de/Rechtsquellen/quellen.html>, last access 12 December 2014. [↑](#footnote-ref-10)
11. Glück, *Praecognita*, p. 124. [↑](#footnote-ref-11)
12. Carl Ferdinand Hommel, *Bibliotheca iuris rabbinica*, Byruthi, 1762. [↑](#footnote-ref-12)
13. Johann Jacob Rabe, [*Mischnah oder der Text des Talmuds, Das ist, Sammlung der Aufsäze der Aeltesten, und mündlichen Ueberlieferungen oder Traditionen, als der Grund des heutigen Pharisäischen Judenthums*](http://opac.lbs-braunschweig.gbv.de/DB=2/SET=2/TTL=7/SHW?FRST=1) *… Part 1: Seraim. Von den Rechten und Sazungen dessen, was gesäet und gepflanzt wird*, Onolzbach: Posch, 1760; *idem*, *Mischnah oder der Text des Talmuds … Part 2: Moed. Von den Rechten und Sazungen des Sabaths, der Feier- und Fest-Täge*, Onolzbach: Posch, 1761; *idem*, *Mischnah oder der Text des Talmuds … Part 3: Naschim. Von den Rechten und Sazungen welche die Weiber angehen, ingleichen von Gelübden und Nasiräern*, Onolzbach: Posch, 1761; *idem*, *Mischnah oder der Text des Talmuds … Part 4: Nesikin. Von den Gerichten und Rechtshändeln, dem bürgerlichen und peinlichen Recht der Juden*, Onolzbach: Posch, 1762; *idem*, *Mischnah oder der Text des Talmuds … Part 5: Kodaschim. Von Heiligkeiten oder geheiligten Dingen, Opfern, und was dahin gehört*, Onolzbach: Posch, 1762; *idem*, *Mischnah oder der Text des Talmuds … Part 6: Tohoroth. Von den Reinigungen nach den verschiedenen Arten der Unreinigkeit*, Onolzbach: Posch, 1763. On Rabe’s translation of the Mishnah, see: Barbara Eberhardt, “Johann Jacob Rabe und seine deutsche Mischnahüberstzung“, in: Gudrun Litz, Munzert and Roland Liebenberg (eds), *Frömmigkeit – Theologie – Frömmigkeitstheologie. Contributions to European Church History. Festschrift für Berndt Hamm zum 60. Geburtstag* (Studies in the History of Christian Traditions, 124), Leiden: Brill, 2005, pp. 665-687. [↑](#footnote-ref-13)
14. Johann Jacob Rabe, *Der Talmudische Traktat Berachoth von den Lobsprüchen, als das Erste Buch im Ersten Theil nach der Hierosolymitischen und Babylonischen Gemara*; aus dem Ebräischen Uebersetzt und mit Anmerkungen Erläutert, Halle: Gebauer, 1777; *idem*, *Der Talmudische Traktat Peah von dem Ackerwinkel*, Uebersetzt und Erläutert, Nebst einer Abhandlung von Versorgung der Armen, Onolzbach: Haueisen, 1781. [↑](#footnote-ref-14)
15. Johann Jacob Rabe, *Der Prediger Salomo, mit einer Kurzen und Zureichenden Erklärung nach dem Wortverstande zum Nutzen der Studirenden von dem Verfasser des 'Phädon'*; aus dem Hebräischen Uebersetzt von dem Uebersetzer der Mischnah, Onolzbach, 1771. [↑](#footnote-ref-15)
16. Glück, *Praecognita*, p. 124. [↑](#footnote-ref-16)
17. Christianus Fridericus Glück, *Praecognita uberiora universae iurisprudentiae ecclesiasticae positivae Germanorum*, Halae: Impensis Orphanotrophei, 1786, pp. 123-124. [↑](#footnote-ref-17)
18. See Heiner Lück, *Die Spruchtätigkeit der Wittenberger Juristenfakultät*, Cologne: Böhlau, 1998; Peter Oestmann, ‚Aktenversendung’, in: *Handwörterbuch zur deutschen Rechtsgeschichte*, 2nd ed., vol. 1, Berlin: Erich Schmidt, 2008, c. 128-132. [↑](#footnote-ref-18)
19. Jakub [Goldberg, ’[Leipziger Theologen gegen die Ritualmordprozesse](http://gso.gbv.de/DB=2.1/SET=3/TTL=1/MAT=/NOMAT=T/CLK?IKT=8062&TRM=Leipziger+Theologen+gegen+die+Ritualmordprozesse). Das Gutachten vom Jahre 1714’, *Herbergen der Christenheit*, 23 (1999), pp. 65-72.](http://gso.gbv.de/DB=2.1/SET=3/TTL=1/MAT=/NOMAT=T/CLK?IKT=1004&TRM=Goldberg,Jakub)  [↑](#footnote-ref-19)
20. Johann Burkhard Geiger and Christian Friedrich Glück, *Merkwürdige Rechtsfälle und Abhandlungen aus allen Theilen der Rechtsgelehrsamkeit mit beygfügten Urteilen und Gutachten der Erlangischen Juristenfacultät*, vols 1-3, Erlangen: Palm, 1792-1806. [↑](#footnote-ref-20)
21. Johann Burkhard Geiger and Christian Friedrich Glück, Rechtsfälle, vol. 2, Erlangen: Palm, 1794, I, pp. 1-17. [↑](#footnote-ref-21)
22. *Ibid.*, XXIX, pp. 182-203. [↑](#footnote-ref-22)
23. Questions concerning the weight and function imperial privileges, i.e. privileges granted unilaterallly by the Emperor, in imperial law have as yet not received the attention they deserve. As late as 1795 a professor of law teaching a the Prussian university of Halle numbers imperial privileges among the sources of German public law, in addition to the fundamental laws of the Empire and imperial custom: Christoph Christian Dabelow, *Lehrbuch des Staats- und Völkerrechts der Deutschen, 1. Theil, welcher das Staatsrecht der Deutschen enthält*, Halle: Renger, 1795, pp. 5-6. [↑](#footnote-ref-23)
24. *Darstellung des Kirchenrechts der Katholiken und Protestanten besonders in seinen praktischen Hauptmomenten. Ein Handbuch für Juristen und Theologen, und besonders für Geschäftsmänner in geistlichen und weltlichen Diensten. Nach den Vorlesungen von Dr. C. F. Glück*, Augsburg: Verlag der v. Jenisch und Stage’schen Buchhandlung, 1839, p. 1. [↑](#footnote-ref-24)
25. *Ibid*., p. 21. [↑](#footnote-ref-25)