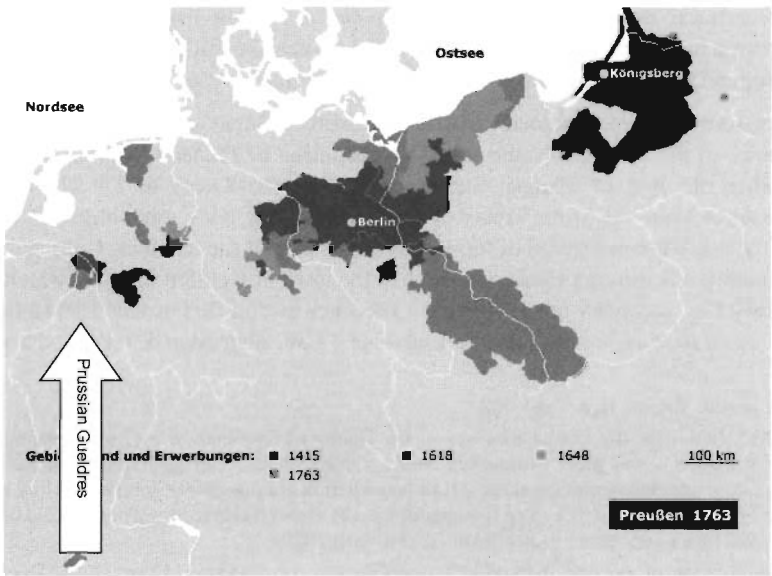
A. M. J. A. BERKVENS

The Reform of Civil Procedure in the Rhine-Prussian Provinces: The Example of Prussian Gueldres 1713 – 1786

I. Introduction

From the beginning of the reign of Frederic William I of Prussia (1713 – 1740), until the end of the eighteenth century, judicial reform in the Prussian provinces was an important item on Frederic's political agenda and that of his successors, Frederic II (1740 – 1786) and Frederic William II (1786 – 1797). The *Allgemeine Ordnung die Verbesserung des Justitz-wesens betreffend* (1713)[1] can be seen as the



Map, with some changes, from <http://www.preussen-chronik.de/>.

[1] General Ordinance on the Improvement of the Organization of the Judiciary: *Mylius*, Part II, p. 517, No. CXXXI, 21 June 1713; according to the Acta Borussica, this Ordinance was not implemented in Prussian Gueldres. See *Acta Borussica* II, p. 327 – 333, rescript of 5 March 1716.

starting point of the eighteenth century Prussian legislation concerning the improvement of civil procedure, which found its conclusion in the *Corpus Iuris Fridericianum* (1781) and the *Allgemeine Gerichtsordnung für den preußischen Staaten* (1793).[2]

The complex organization of the Prussian States made it extremely difficult to introduce uniform legislation on civil procedure for all provinces at the same time. The introduction of uniform legislation was to be achieved through an incremental process of harmonizing procedural law.

In the western province of Prussian Gueldres, uniformity was largely achieved in 1786 with the introduction of two important ordinances: the *Reglement wegens de inrigting van het justitie-weezen bij de ondergerichten ... in het hertogdom Gelder,* Berlin, 21 June 1786[3] (hereafter 'Regulation for the Lower Benches'), and the *Reglement wegens de nieuwe inrichting des gerichtshandels of maniere van procedeeren bij den souvereinen hove van justitie ... in het hertogdom Gelder,* Berlin, 30 July 1786[4] (hereafter 'Regulation for the Sovereign Court of Gueldres').

In the preamble of the *Regulation for the Lower Benches,* Frederic II stated his intention to repair the deficiencies in the judicial administration at the local level by introducing an equilibrium between customary law and fundamental principles of procedural law. In the *Regulation for the Sovereign Court of Gueldres,* he expressed his wish to introduce conformity between the traditional procedural law in Prussian Gueldres and the new *Corpus Iuris Fridericianum.*[5]

Prussian Guelders, originally part of the former Duchy of Spanish Gueldres, a province of the Southern Netherlands, was acquired by Frederic William I of Prussia after the War of Spanish Succession, under the Treaty of Utrecht (1713). Through Article VII of the Treaty of 2 April 1713, the King was obliged to maintain the ancient constitution of the Duchy in his part of the territory. Consequently, he founded a Sovereign Court of Justice in the town of Geldern in 1714, which was to apply the customary laws of Spanish Gueldres as codified in the 1619 *Gelderse Land- and Stadsrechten* (Gueldres Customary Law, abbreviated: GLS).[6] This So-

---

2 *Conrad,* Volume II, p. 466–468.

3 Regulation for the Lower Benches in the Duchy of Gueldres. *A* digitized facsimile of this Ordinance – and other ordinances cited in this article – can be found at the website <http://www.rechten.unimaas.nl/lrg> (last consulted in August 2009); for a direct link to the quoted regulation see: <http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201786/p17860621/directory.djvu> (last consulted in August 2009).

4 Regulation of the new method of proceeding for the Sovereign Court of the Duchy of Gueldres (<http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201786/p17860703/directory.djvu>) (last consulted in August 2009).

5 See *infra.*

6 This Statute was originally promulgated by the Archdukes Albrecht and Isabella in 1619. Printed editions appeared in 1620 (Johan Hompesch, Roermond), 1665 (Gaspar du Pree, Roermond), 1679 (Johan Friderich Hagen, Arnhem), 1740 (Henricus Korsten, Venlo) and

vereign Court or *Justiz Collegium,* consisted of a Chancellor, four justices and an Attorney General: the so called *Momboir.* Its competence was derived from the 1609 Instruction of its predecessor, which was originally founded in 1580, in the nearby town of Roermond. In civil litigation, its jurisdiction in cases of first instance comprised of privileged cases[7] and, at second instance, the revision of judgments of the aldermen benches in rural villages and market towns, which were the ordinary judges at first instance in civil litigation. Being a sovereign court, the *Justiz Collegium* was entitled to revise its own judgments, without the need to submit them to the *Oberappelationsgericht* in Berlin. In such cases, the bench was supplemented originally by two, and from 1752, by four justices from the High Court of the nearby Duchy of Cleves. The bailiff and aldermen in the market towns of Geldern, Wachtendonck and Kriekenbeck and a number of rural villages, were appointed by the provincial government, but in most of the local villages they were appointed by the local lord.

As a consequence of the provisions of the Treaty of Utrecht, civil litigation in Prussian Gueldres at the beginning of the eighteenth century was governed by the rules of statutory law as contained in Book V of the GLS, regulating civil procedure in seventeen titles (340 articles). These rules were supplemented with a number of seventeenth century Spanish Gueldres regulations, of which the 1674, 1679 and 1683 Ordinances on judicial administration, regulation of the role of advocates and procurators in civil litigation, revision of judgments of the Sovereign Court, granting of relief,[8] and deliberations of the justices, were of the utmost importance.[9]

The reforms of Samuel Cocceji,[10] culminating in the introduction of the *Codex Fridericianus* of 1747/48, did not have any impact in Prussian Gueldres. The Estates of the Duchy successfully argued that the introduction of the new Codex was inconsistent with the Treaty of Utrecht and the ancient constitution. According to

---

1783 (the widow of Hubertus Bontamps, Venlo). An abbreviated text was printed in 1831 by *Maurenbrechter,* Volume II, p. 467–924. For a modern text edition, see: *Berkvens & Venner.*

7 According to the 1752 Regulation on the hierarchy of Courts in the Prussian part of the Duchy of Gueldres (cf. *infra,* note 108), lawsuits concerning the nobility, royal officers, judges of the Sovereign Court, and cases concerning the bailiffs, clerks of the local benches and aldermen were regarded as privileged.

8 *Van Rhee,* p. 306, s.v. 'Relief'.

9 <http://lrg.unimaas.nl/djvu/Spaans%20Overkwartier/djvu%201674/p16740108.djvu>; <http://lrg.unimaas.nl/djvu/Spaans%20Overkwartier/djvu%201679/p16790713.djvu>; <http://lrg.unimaas.nl/djvu/Spaans%20Overkwartier/djvu%201679/p16790803.djvu>; <http://lrg.unimaas.nl/djvu/Spaans%20Overkwartier/djvu%201679/p16791124.djvu>; <http://lrg.unimaas.nl/djvu/Spaans%20Overkwartier/djvu%201683/p16830930.djvu> (last consulted in August 2009).

10 Samuel Cocceji (1679–1755), Professor of law, Frankfurt (Oder) (1702), Prussian Minister of Justice (1723), Great Chancellor (1747), reformer of the Prussian Judiciary, author of the *Codex Fridericianus* (1747/1748); cf. *Erler & Kaufmann,* Volume I, col. 617–619 (A. Erler).

the preamble of the 1752 *Reglement betreffende de Reguleeringe der instantien in Sijne Maj.s aendeel des Hertogdoms Gelre* (Regulation on the hierarchy of appeal courts in the Prussian part of the Duchy of Gueldres),[11] the King abandoned his attempts to introduce the *Codex Fridericianus,* because of its incompatibility with the customary laws of the province, and because of the lack of German speaking advocates there. Consequently, the GLS was to be maintained *pro lege et norma* in the future as it had been in the past.[12] Learning from this experience, the Prussian Judiciary in 1781 did not even try to introduce von Carmer's[13] new *Corpus Iuris Fridericianum* in Prussian Gueldres, but only tried to reshape Gueldres procedural law according to the principles of this *Corpus Iuris Fridericianum.*

This article provides a short description of the procedural law of Gueldres in the seventeenth century, as the basis of the procedural law of Prussian Gueldres in the eighteenth century. Further, it will discuss the defects of this procedural law, according to the 1752 Ordinance, the inspections ordered by Frederic II in 1779 and the changes made by the 1786 Ordinances for the Sovereign Court and for the Lower Benches in Prussian Gueldres, in adaptation to the 1781 *Corpus Iuris Fridericianum.*

II. The Procedural Law of Gueldres in the Seventeenth Century

GLS procedural law was a mixture of medieval customary law and Romano-canonical procedural law. According to the GLS, there were five types of civil procedural regimes,[14] of which the ordinary procedure was the most common. This ordinary procedure was a normal procedure initiated by writ of summons. A writ of summons before the local courts could be obtained without the intervention of the bailiff;[15] in the case of a summons before the Sovereign Court, it was necessary to obtain authorization to serve a summons from the Court itself (i.e. a 'provision of justice'). Although the ordinary procedure at the cause-list sitting was the only procedure mentioned in the Statute Book, according to the 1674 Regulation for the

---

11 See *infra* note 108.

12 Regulation on the hierarchy of Courts in the Prussian Part of the Duchy of Gueldres, <http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201752/p17521221/directory.djvu> (last consulted in August 2009).

13 Johann Heinrich Casimir von Carmer (1721–1801), Prussian Minister of Justice (1763), Great Chancellor (1779), reformer, auctor intellectualis of the *Corpus Iuris Fridericianum* (1781) and the *Allgemeine Landrecht* (1791); cf. HRG, Volume 1, col. 590–592 (H. Winterberg).

14 GLS, p. 281, mentions the 'ordentlicke ende gemeine rechtsvorderinge' (ordinary procedure); 'onvertoghen recht' (summary procedure); 'commerrecht oft arrest' (personal arrest); 'pendinghe' (seizure), and the 'voightsgedinghe' (a kind of traditional moot court procedure, already obsolete at the beginning of the seventeenth century).

15 GLS, p. 299, Article 2.

Sovereign Court the ordinary procedure could also take the form of a so called 'communicatory procedure', i.e. a procedure before commissioners of the Sovereign Court. This communicatory procedure was a completely written procedure, accorded as a prerogative to distinguished parties. The procedure before commissioners was reserved for cases unsuitable for a public hearing.[16]

Book Five of the GLS mainly describes the civil procedure of first instance before the lower benches. It contains a detailed description of the procedure started by writ of summons, and the procedure in case of default of appearance (tit. 7), the duties of advocates and procurators, representatives and guardians (tit. 8), the rights and duties of the plaintiff – in which title we find rules on the statement of claim, the effects of *res judicata,* election of domicile and powers of attorney – (tit. 9), the rights and duties of the defendant – exceptions, counter claims – (tit. 10), replication, rejoinder, surrejoinder and rebutter (tit. 11), the production of evidence – witnesses (tit. 12), written evidence (tit. 13); oaths (tit. 14), closing of the hearing, rules on the evaluation of the available means of proof ('reproches' and 'salvations') (tit. 15), judgment, advisory opinions, promulgation and revision of judgments of the lower benches (tit. 16), and the enforcement of judgments (tit. 17).

Most of these procedural rules applied before both the lower benches and the Sovereign Court. Besides these rules, there were some special regulations, which only applied to the Sovereign Court. Unlike its counterparts in the Spanish Netherlands, such as the Great Council of Malines, the Council of Brabant in Brussels or the Council of Flanders in Ghent, it did not have a comprehensive procedural regulation of its own. These special regulations were often derived from the procedural regulations (styles) of other provincial courts in the Low Countries. They related to subjects like the revision of the judgments of the Sovereign Court, the granting of relief,[17] or the duties of advocates and procurators, giving the procedural law of Gueldres a somewhat fragmentary look. This system of seventeenth century civil procedural law survived essentially unchanged until Samuel Cocceji's 1746 justice reforms, resulting in the attempted introduction of the 1747 / 48 *Codex Fridericianus* in Prussian Gueldres.

III. The Codex Fridericianus and the 1752 Ordinance for Gueldres

After being informed in September 1746 of problems at the *Hofgericht* in Cöslin in the Baltic province of Pommerania, which were mainly caused by improper interference in civil litigation through Cabinet Orders, repeatedly causing undue de-

---

[16] *Reglement voor d'Advocaeten ende Procureurs op 't stuck van instrueren ende furneren der processen* (Regulation for Advocates and Procurators concerning the Instruction and Submission of the case files of legal proceedings, 8 January 1674 (<http://lrg.unimaas.nl/djvu/Spaans%20Overkwartier/djvu%201674/p16740108.dj vu>) (last consulted in August 2009).

[17] See *supra* note 107.

lays, Frederic II deemed that a profound reform of civil procedure was necessary.[18] He assigned this task to his trusted Minister of Justice Samuel Cocceji, who prepared the draft of the *Codex Fridericianus Pommeranicus* (6 July 1747), followed in the next year by the *Codex Fridericianus Marchicus* (3 April 1748), which was intended for general use in every Prussian province.[19] According to this draft, all legal proceedings had to be conducted orally and all proceedings, even those in three instances, had to be concluded within one year. For that reason the use of procedural rules and interlocutory appeals as a means of delay were prohibited. According to the *Codex Fridericianus,* all cases could be tried in three instances, with the newly created *Oberappelationsgericht* in Berlin serving as the court of final instance. Superfluous courts, for instance the *Kammergericht* in Berlin, were abolished. Judges were to be examined before their appointment, and incompetent judges were to be dismissed. The necessary strict separation between the Judiciary and the Administration was regulated by the *Reglement, was für Justitz-sachen denen Krieges und Domainen-Cammern verbleiben und welche vor die Justitz-Collegia oder Regierungen gehören* (Resort Ordinance, defining the competence of the Administrative Chambers and the Courts of Justice) of 19 June 1749, which prohibited interference of the *Krieges und Domänenkammern* in civil proceedings.[20]

The introduction of these reforms in Prussian Gueldres met with firm resistance from the Estates of the province, because, in their opinion, appeal to the Berlin *Oberappelationsgericht* was inconsistent with the conditions of the 1713 Treaty of Utrecht, according to which Friederich II had to respect the Gueldres *ius de non evocando* of 1543[21] as part of the fundamental law of the land. In the ensuing deliberations, a compromise was reached: In Prussian Gueldres, the Resort Ordinance of 1749 was revoked, Frederic II abandoned the introduction of the *Codex Fridericianus* in this province, and, on 12 December 1752, a special ordinance for Prussian Gueldres was published, in the form of the *Reglement betreffende de Reguleeringe der instantien in Sijne Maj.s aendeel des Hertogdoms Gelre* (Regulation on the hierarchy of courts in the Prussian part of the Duchy of Gueldres.[22]

The main objective of this Ordinance was to accommodate the desired regulation of appeal jurisdiction in three degrees with the restrictions of the *ius de non evocando.* Therefore, a distinction was made between revision of the judgments of the Sovereign Court, or 'Great Revision', and appeal of the judgments of the lower

---

18 *Stölzel,* Volume 2, p. 175.

19 *Stölzel,* Volume 2, p. 197.

20 <http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201749/p17490619/directory.djvu> (last consulted in August 2009); *Van Rensch,* p. 225–226.

21 In 1543 the Emperor Charles V granted his Gueldrish subjects the privilege, that they could not be summoned before judges outside the Duchy of Gueldres. This privilege was deemed the cornerstone of the Gueldrish 'Liberty'.

22 <http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201752/p17521221/directory.djvu> (last consulted in August 2009).

benches, or 'Petty Revision'. In the case of revision of judgments of the Sovereign Court, the bench consisted of three justices of the Sovereign Court, who had not previously been involved in the lawsuit at issue, supplemented by four justices from the Court of Justice in Cleve. Thus, the principle that litigants from Gueldres could not be brought before a court outside the duchy was considered to be preserved. These revision commissionaries passed judgment *ex iisdem actis.* To prevent needless cost, the use of this expedient was very restricted. In case of imprudent revision, the advocate could be fined, or even imprisoned. Mutatis mutandis, the same rules applied to the revision by the Sovereign Court of the judgments of the lower benches.

A second objective of the 1752 Ordinance was to reform certain abuses of civil procedure, as originally observed at the Cöslin *Hofgericht,* mainly after the closure of debate, in the preparation of the judgment. Thus, the Ordinance contains regulations on the investigation of the case file. The reporting judges were to present in their report the *facti species, genus actionis, historia processus, rationes dubitandi, rationes decidendi,* their *votum* and a draft judgment. Afterwards, it was the task of the Chancellor to make sure that the judges could freely deliberate about the case. Judgments were to contain reasons, and dissenting opinions could be added.

A third objective of this Ordinance was cost reduction. This aim was to be achieved principally by not allowing the reporting judge to read the complete case file aloud to his fellow judges and by restricting the costs of reading the judgment in court to a maximum of sixteen Thaler.[23]

The procedural law of the GLS as such remained unchanged until, in 1776, a new Ordinance on the Abbreviation of Procedure was published.[24]

IV. Inspection of the Subaltern Judiciary and the 1779 Ordinance for the Lower Benches in Prussian Gueldres

As was stated in the preamble of the 1776 Ordinance on the Abbreviation of Procedure, the introduction of the *Codex Fridericianus* had initially resulted in a thoroughgoing expedition of justice. However, the salutary effect had later disappeared. Therefore, Frederic II deemed it necessary to introduce a number of new general principles of procedure and new means of accelerating the course of justice, which were to be applicable in all provincial courts of justice, including the

---

23 <http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201752/p17521221/directory.djvu> (last consulted in August 2009); see also *Acta Borussica* IX, No. 302, p. 539, and *Reckmann* (Veröffentlichungen des Historische Vereins für Geldern und Umgegend, Volume 73), p. 66.

24 Neue Verordnung um die Processe zu verkürzen, Berlin, 15 January 1776 (<http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201776/p17760115.djvu>) (last consulted in August 2009).

Sovereign Court of Gueldres, despite the fact that the Codex Fridericianus had never been introduced in this province.

This Ordinance decreed the introduction of the *Eventualmaxime* in civil procedure: henceforth, plaintiffs had to submit all relevant documents when introducing their statement of claim; the introduction of additional documents in a later phase of the procedure was not allowed. If these documents were not at their disposal when introducing the claim, they could require their opponents to submit relevant documents, at least if these were in their opponents' possession. The same rules applied to the defendant. Preferably, cases were to be pleaded orally. In such cases, the advocates were obliged to mark their most important arguments in the margins of their memoranda of oral pleading. Only in very complicated cases were written proceedings to be allowed. In all cases, advocates were admonished to put forward the truth, and not to make themselves culpable of quibbling and petty foggery. Their remuneration was to be fixed by the judges, according to the advocate's zeal and promptness.

The provisions of this Ordinance were adapted by the Sovereign Court of Gueldres for the lower benches by an Ordinance of 30 September 1776.[25] This regulation was followed on 4 August 1777 by another Ordinance, admonishing the lower judges to bring civil proceedings to a speedy conclusion. Negligent judges faced the possibility of penal servitude at the fortifications.[26] Finally, new regulations concerning legal fees were also announced.[27]

On 4 December 1779, after examination of the lower benches of Prussian Gueldres,[28] the Sovereign Court published an extensive new regulation for these benches, comprising 63 articles, as a remedy for established abuses.[29] This Ordinance was a compromise between seventeenth century statute law and the principles of the 1776 Ordinance.

According to its preamble, abbreviation of legal proceedings and cost reduction were the main goals of the 1779 Ordinance. The Sovereign Court sought to achieve these goals by the strict application of the statutory rules of the GLS in combina-

---

25 <http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201776/p17760930.djvu> (last consulted in August 2009).

26 <http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201777/p17770804.djvu> (last consulted in August 2009).

27 A provisional regulation of legal fees was published by the Sovereign Court, 4 December 1779 (<http://lrg. unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201779/p17791204.1/directory.djvu>) (last consulted in August 2009).

28 In May 1779, Great Chancellor von Fürst initiated a 'Haupt-Justitzvisitation jenseits der Weser'. By Cabinet Order of 8 June 1779, a member of the Secret Council, Koenen, president of the High Court of the Duchy of Cleve since 1749, was again assigned to examine the situation in Prussian Gueldres (*Acta Borussica* XVI, 2, p. 520); he submitted his report on 26 August 1779 (*Acta Borussica* XVI, 2, p. 526).

29 <http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201779/p17791204/directory.djvu> (last consulted in August 2009).

tion with the prescriptions of the 1776 Ordinance. For instance, in Articles 1 and 2, they maintained the principle of oral pleadings in bagatelle cases (GLS 310 § 3, and GLS 311 § 9), but added the obligation for plaintiff and defendant to introduce all their documents immediately (Articles 4 – 7).

In the next series of articles, the Sovereign Court tried to prevent the abuse of the oral procedure at the cause-list sitting (*Instructie der Rechts-saecken ten verbaele*). Although this procedure was originally introduced as a means of abbreviation of proceedings, advocates had turned it into a source of delay by requesting written copies of the statements of case (Articles 8 – 11). In the following articles, the Court tried to prevent delays in the communicatory procedure by fixing peremptory time limits. Parties exceeding these time limits were declared to be defaulters *ex officio* by the judges, without the need of a request to this end by the advocate of the other party (Articles 12 – 13). In the Articles 15 – 24, the Sovereign Court regulated the production of evidence, supplementing the rules of the GLS with the *ex officio* declaration of default in cases where peremptory time limits were exceeded, and giving the local aldermen strict guidelines on how to formulate the burden of proof. In the next part of the Ordinance, the Sovereign Court addressed the investigation of the case file after closure of the hearing as a possible cause of delay, by admonishing the aldermen to continue their deliberations until they reached a verdict. They also required that the verdict should be specific, and not formulated in vague or general terms, such as 'condemning the adverse party according to the just complaint of the plaintiff', which could easily cause parties to lodge an appeal (Articles 25 and 26). In Article 34, the Sovereign Court recommended amicable settlements as the best means to prevent prolonged lawsuits, making it mandatory for the aldermen to undertake a *tentamen concordiae,* before admitting parties to litigation.

V. The 1781 *Corpus Iuris Fridericianum* and the 1786 Ordinances for the Lower Benches and for the Sovereign Court of the Duchy of Gueldres

In the famous Cabinet Order of 14 April 1780,[30] addressed to Great Chancellor von Carmer, Frederic II formulated a threefold approach to reform of the Judiciary:

- improvement of the quality of the Judiciary by examination of new judges before their admission, and regular inspection of the courts;
- reform of procedural law to abbreviate the course of justice and to reduce costs;
- introduction of a general subsidiary civil code, to reduce litigation caused by unclear laws.

---

30 *Corpus Juris Fridericianum.* Erstes Buch. Von der Prozeß-Ordnung, Berlin 1781, p. III-XIV.

According to the nineteenth century Prussian historian Adolf Stölzel,[31] this approach was not new. Its roots lay in the ideas of Cocceji and his unfinished 1746 reforms. What was different, however, was the speed in which the three parts of the plan were realized by the energetic von Carmer. First, a thorough inspection of the courts took place in Silesia and Prussia in 1781 and in Westphalia and the Mark in 1782. By April 1781, the reform of procedural law was accomplished with the publication of the first book of the *Corpus Iuris Fridericianum,* containing the *Prozeß-Ordnung.*[32] In May of the same year, the last stage started with the establishment of a commission, chaired by Carl Gottlieb Svarez,[33] which was to prepare the next books of the *Corpus Iuris,* containing the *Allgemeine Landrecht,* which, although completed in 1791, did not actually become law until 1 June 1794.[34]

In the first part of the *Corpus Iuris Fridericianum* of 1781, von Carmer tried to realize the abbreviation of the course of justice by introducing the *Inquisitionsmaxime* in civil procedure, which he considered as the philosopher's stone of procedural law, and by abolishing the traditional role of lawyers during litigation. In the introductory part of the *Corpus Iuris Fridericianum,* he elaborated on the *Inquisitionsmaxime* and other – in his opinion – general and unvarying principles of procedural law. According to these principles, it was the duty of judges to establish *ex officio* the veracity of facts in civil procedure by personally interrogating the litigants, who were obliged to appear in court in person and to inform the judges truthfully about the matters at issue. As a consequence of this fact finding by the judges, the traditional role of advocates was deemed superfluous. Their role, therefore, was abolished, and they were replaced by legal assistants or *Assistant-Räthe.* These legal assistants were publicly funded. Unlike the traditional advocates, they had no financial interest in the outcome of the procedure. Their only task was to give the litigant parties objective advice and to see that they were equally treated by the judges.[35] Civil litigation thus became judge driven under the supervision of the State (*Staatsprozeß*).

The introduction of the *Corpus Iuris Fridericianum* in Prussian Gueldres at first met with firm resistance from the Sovereign Court of Gueldres and the Provincial Estates. Two basic objections and a number of practical objections were raised against the new procedural law. First, the *Prozess-Ordnung* was in German and not in Lower-Dutch: the language of the local lawyers and the courts; secondly, some of the rules of the *Corpus Iuris* were deemed incompatible with the statutory law

---

31 *Stölzel;* cf. HRG, Volume 3, col. 2006 – 2008 (R. Lieberich).

32 The 'Prozeß-Ordnung' was published by patent of 26 April 1781 (*Mylius,* Volume 7, p. 249).

33 Carl Gottlieb Svarez (1746 – 1798), assistant of von Carmer, author of the Allgemeine Landrecht; cf. HRG, Volume 4, col. 97 – 100 (H. Thieme).

34 *Stölzel,* Volume 2, p. 293; about the Allgemeine Landrecht, also see HRG, Volume 1, col. 99 – 108 (H. Thieme).

35 *Corpus Iuris Fridericianum,* Vorbericht, p. XV-XXXV.

of the province. Practical objections were that the Judiciary was not in favour of the abolition of advocates and the introduction of legal assistants. Further, it was feared that the inhabitants would seek legal advice from advocates from other parts of Gueldres, where the GLS was still in force. Nevertheless, the Sovereign Court again deemed it necessary to reform the rural courts and offered to prepare a draft Ordinance to that end. Although this offer was accepted by von Carmer, over the next few years virtually no progress was made.

In an effort to convince the Sovereign Court and the provincial Estates of the urgency of the matter, in October 1783 von Carmer communicated the findings of another committee of inquiry on the poor quality of the lower courts in Prussian Gueldres. According to their report, the local aldermen were often illiterate farmers, without any legal knowledge. Often drunk, they were easily influenced by local bailiffs, clerks of the benches and advocates, and their judgments were often reversed upon appeal. To improve the quality of the rural courts, von Carmer proposed reducing the number of rural benches and professionalizing judges. After another period of inactivity of the Sovereign Court, von Carmer decided, on 25 August 1784, according to his 1783 proposals, to introduce the *Corpus Iuris Fridericianum* in an adapted form. Therefore, the procedural ordinances of the Sovereign Court and of the lower benches were to be modified according to the principles of the *Corpus Iuris Fridericianum.* This task was enthrusted to Peter Heinrich von Coninx, justice and later Chancellor of the Sovereign Court.[36]

His activities resulted in two new regulations, the first of 21 June 1786, regulating the lower benches, and the second of 30 July 1786, regulating the Sovereign Court.

1. The 1786 Regulation for the Lower Benches

In the preamble of the Regulation of the Lower Benches, five reform principles were stated: according to the first principle, the local lords were given the power to merge their local benches voluntarily. According to the second and third principles, the number of aldermen who could participate in litigation was reduced to one. This alderman functioned as assessor to the bailiff, who in the future would act as *unus iudex.* This was quite a revolutionary measure, because it brought about a reversal of the traditional system, in which the aldermen acted as judges, and the bailiff as a non-voting president of the local bench. According to the third principle, the local benches henceforth were to be composed of the bailiff, one alderman and the clerk of the bench. However, the aldermen were not reduced in total number: they simply participated by rotation in the administration of justice. The fourth principle stated that the competence and legal knowledge of each bailiff and clerk

36 Peter Heinrich von Coninx (1746–1814), eldest son of Johan Baptist Coninx, Chancellor of the Sovereign Court 1765–1768; appointed justice in the same court 1769, Chancellor 1788–1794; cf. *Reckmann,* p. 73 and *Van Rensch,* p. 249–260.

should be examined by the Sovereign Court. According to the last principle, the lower courts should strictly adhere to the new regulations, as a path to a speedier, less costly and less formal way of legal proceedings.

The actual Regulation consisted of seven chapters, totaling 172 articles and various appendices, the most important of which was the regulation of the costs of litigation.

The seven chapters dealt with the local benches in general, the duties of the bailiff, aldermen and clerks, matters of voluntary jurisdiction, legal care for the property of orphans, and civil and criminal procedure.

In the last chapter of the Regulation one sees the same mixture of seventeenth century statute law and the principles of the 1776 Ordinance that was mentioned in the description of the 1779 Ordinance for the local benches, such as the principle of oral pleadings in civil procedures, the application of the *Eventualmaxime,* measures against the abuse of the oral procedure at the cause-list hearing, rules designed to prevent delay in the communicatory procedure by fixing peremptory time limits, and the *ex officio* application of defaults. Further the same prescriptions about the investigation of the case file, the deliberations and the specification of the judgment, and the obligatory attempt at amicable settlement still applied. However, in addition to these elements from the 1779 Ordinance, new elements of the *Corpus Iuris Fridericianum,* such as the *Inquisitionsmaxime,* the duty of parties to appear personally in court,[37] and the replacement of the advocates by public legal assistants, were also introduced. In summary procedure, legal assistance was not allowed, and it was the duty of the bench *ex officio* to establish the veracity of the facts, having recourse to experts when necessary.[38] Only in the ordinary procedure were legal assistants to be admissible: it was their duty to foster the truth-finding process and to encourage amicable settlements between parties.[39]

2. The 1786 Regulation for the Sovereign Court

The 1786 Regulation for the Sovereign Court consisted of a summary preamble, seven chapters, and two annexes. These chapters concentrated mainly on aspects of civil procedure. According to the first chapter of this Ordinance, the main goal of the new rules was to prevent every form of arbitrariness. Henceforth, it was the duty of the justices personally to discover the truth – *Inquisitionsmaxime* – and to protect parties from arbitrary judgments by the strict application of the rules of

---

37 Only the sick and elderly and those fulfilling official duties were to be dispensed from the duty of making a personal appearance in court (Regulation for the Lower Benches, Chapter VII, § 42).

38 Regulation for the Lower Benches, Chapter VII, § 10 'discovery of the truth'; § 11 'expert witnesses'.

39 Regulation for the Lower Benches, Chapter VII, § 41, 49.

procedure.[40] Consequently, it was the duty of the litigants personally to appear in court so as to immediately inform the justices of the full facts of the case (*Unmittelbarkeitsmaxime*), without help of advocates who were to be abolished.

Only on special occasions, which were mentioned in Chapter Two, could parties be relieved of this duty. Parties dispensed from the obligation of personal appearance in court could only be represented by proxy if this representative was fully informed about the case. They could also be represented by so called 'justice commissioners'.[41] These were aspiring justices, who acted instead of the legal assistants of the *Corpus Iuris Fridericianum,* whose introduction in Prussian Gueldres was deemed superfluous.[42]

Chapter Four, concentrating on the ordinary procedure, formed with 93 articles the point of gravity of the Regulation. This part of the Regulation was extensively modelled on the *Corpus Iuris Fridericianum,* which was more frequently quoted than the GLS.[43]

According to this chapter the litigants were in charge of the beginning, continuation and termination of the proceedings (*Dispositionsmaxime*). After the introduction of the complaint, it was the task of the Chancellor to delegate one of the justices to determine whether the complaint fell under the jurisdiction of the court, and to decide whether the ordinary procedure was the most appropriate way of proceeding. If such was deemed to be so, the plaintiff was offered the choice of attending the hearing of the case in person or with the aid of a justice commissioner. After interrogation of the plaintiff, the formal complaint protocol was drafted by the delegated justice, thereby omitting all superfluous detail and unnecessary bookishness. The completed complaint protocol afterwards was assessed by a reporting justice before a warrant of citation could be issued. This warrant should be drafted in such a way that it was comprehensible for a layman (Article 25). When the defendant made an appearance in court, he was also interrogated and a protocol of his defence was drafted by the delegated justice, answering every point of the complaint (Article 38). Both protocols were submitted to the bench *in pleno,* so as to determine whether there was a possibility of reaching an amicable settlement (Article 40), before the formal hearing of the case began. During the hearing, it was the duty of the instructing justice to do everything necessary to complete the case file (Article 45) and to formulate the *facti species* and the *status causae et controversiae* (Articles 48–50). In the ideal case, the *facti species* were approved by both parties. If not, it was the task of the *Collegium* of the bench to

---

40 Regulation for the Sovereign Court, Chapter I.

41 Regulation for the Sovereign Court, Chapter II.

42 Regulation for the Sovereign Court, Chapter III, § 1; this regulation seems to be in contradiction with the regulation for the lower courts, which makes explicitly mention of the function of legal assistant (see *supra*).

43 *Grahl,* p. 122–130, gives a comprehensive summary of the procedural law of the *Corpus Iuris Fridericianum.*

conclude the unsolved *controversiae* before formulating the burden of proof (Articles 56 and 59). In case the *controversiae* resulted from ambiguous legislation, the *Collegium* had to consult the Commission of Legislation in Berlin, as a preliminary matter (Article 57). The evidentiary procedure, which was formed from a mixture of the rules of evidence of the *Corpus Iuris Fridericianum* and the GLS, was regulated in detail in Articles 60–63.

In Article 64 rules for the evaluation of evidence were given.

At the closure of the hearing, an inventory of the case file was made by the judge and signed by the justice commissioners (Article 67). Afterwards, parties could still submit a *deductio iuris* (Articles 68–70). After the closure the Chancellor appointed a reporter, and if necessary, a second reporter, to investigate the case file and to prepare the judgment according to the detailed instructions of Article 72. The actual judgment was reached by majority vote and was based on the finding of the facts, the opinion of the litigants and the application of the law. Thereby a strict order had to be followed. First the GLS as the law of the land should be applied, secondly, if the law of the land did not provide a solution, the *Algemeine Landrecht,* that was still to be published, was to be applied, recourse to the *ius commune* being explicitly forbidden (Article 74). The judgment was to contain clear grounds and to be precise, so as to give parties no reason for appeal or complaint (Article 77).

The next part of the Ordinance addressed the revision of the judgments of the Sovereign Court, according to the principles of the 1752 Ordinance. The revision procedure varied according to the circumstances. Depending on the personal attendance of the parties, their legitimate absence, their representation by proxy or by justice commissioners, the fatal term for the instalment of revision ended sooner or later, and more or less room was accorded *ad purgandum mora* (Article 78–82). In conformity with the 1752 Regulation the revision occurred *ex iisdem actis;* introduction of new facts was only possible after relief[44] was granted by the Sovereign Court. Article 86 addressed the question of when a judgment had the force of *res judicata,* and the question of nullity and *restitutio in integrum,* referring the litigants to the *Corpus Iuris Fridericianum.*

VI. Concluding Remarks

During the eighteenth century the Kings of Prussia constantly tried to reform civil procedure. In the beginning, they mainly concentrated on the role of advocates, who in their opinion had a very negative influence on civil litigation. After 1746 they concentrated their attention on the quality of the judges and the reform of procedures.

---

[44] See *supra* note 107.

By introducing the Resort Ordinance of 1749, they tried to guarantee the quality of justice by periodic visitations of the court, the introduction of comparative examinations of judges, and the administration of justice in three instances. From 1780 they tried to achieve their goal by a threefold approach: improvement of the quality of the judges through a stricter application of the 1749 Programme, reform of procedural law as a way to abbreviate the course of justice and to reduce costs, and introduction of a general subsidiary civil code as a means to curtail civil litigation caused by unclear laws.

The complex constitution of the Prussian provinces offered opportunities to the provincial governments to resist the reform movement. This compelled the Great Chancellors Cocceji and von Carmer to find expedients to realize their reforms.

In the case of Prussian Gueldres they tried to achieve their goals within the limits of the fundamental laws of Prussian Gueldres, not by abolishing the statute law of the province, but by incremental adaptation of the statute law to the principles of the new legislation, such as the *Codex Fridericianus* of 1747/48 and the *Corpus Iuris Fridericianum* of 1781.

The successful opposition of the Estates and the Sovereign Court to the introduction of the *Codex Fridericianus* resulted in the 1752 Resort Ordinance for Prussian Gueldres, which combined the seventeenth century statute law on procedure with measures to improve the quality of the judges and to introduce administration of justice in three instances, within the limits of the *ius de non evocando.*

In 1776, under the influence of the Cöslin visitation, a new period of reform began. After inspection of the lower benches in Prussian Gueldres, the Sovereign Court was given an opportunity to improve the quality of the rural benches, resulting in the 1779 Ordinance for the lower benches, which was aimed mainly at preventing misuse of the oral procedure, curtailing delay, and improving the quality of deliberations. Strict guidelines were given in this document, largely to the aldermen in reaching their judgments, while still leaving the statute law on procedure unchanged.

The introduction of the 1781 *Corpus Iuris Fridericianum* again made adaptation of the law of civil procedure in Prussian Gueldres necessary. The new 1786 Regulation for the Lower Benches saw to the abolition of the medieval courts of aldermen and the introduction of professional judges at the local level. Also the leading principles of the *Corpus Iuris Fridericianum,* such as the *Unmittelbarkeitsmaxime,* the *Eventualmaxime,* the *Inquisitionsmaxime* and the employment of the assistant justices instead of advocates were introduced.

The 1786 Regulation for the Sovereign Court brought many changes, by implementing the fundamental principles of the *Corpus Iuris Fridericianum,* and by reformulating the internal procedure of the court according to these principles.

Formally neither the *Codex Fridericianus,* nor the *Corpus Iuris Fridericianum* were introduced in Prussian Gueldres, but whereas the 1752 Regulation for Prus-

sian Gueldres only paid lip service to the *Codex,* the 1786 Regulation for the Sovereign Court followed the *Corpus Iuris Fridericianum* in spirit, setting aside the seventeenth century rules of procedure without formally abolishing them, thus preparing the way for the *Allgemeine Gerichtsordnung für den preußischen Staaten* of 1793.

Bibliography

Berkvens, A. M. J. A. / *Venner,* G. H. A.: Het Gelderse Land- en Stadsrecht van het Overkwartier van Roermond 1620 (Werken Stichting tot uitgaaf van de bronnen van het Oude Vaderlandse Recht 25), Arnhem: Stichting tot Uitgaaf der bronnen van het Oud-Vaderlandse Recht, 1996.

Conrad, H.: Deutsche Rechtsgeschichte: ein Lehrbuch, Karlsruhe: Müller, 1966.

Corpus Juris Fridericianum. Erstes Buch. Von der Prozeß-Ordnung, Berlin: Königliche Akademie der Wissenschaften, 1781.

Erler, A., *Kaufmann,* E. / *Stammler,* W.: Handwörterbuch zur deutschen Rechtsgeschichte, Volume 1, Berlin: Schmidt, 1971.

Grahl, C.: Die Abschaffung der Advokatur unter Friedrich dem Großen: Prozeßbetrieb und Parteibeistand im preußischen Zivilgerichtsverfahren bis zum Ende des 18. Jahrhunderts unter besonderer Berücksichtigung der Materialien zum Corpus Juris Fridericianum von 1781 (Quellen und Forschungen zum Recht und seiner Geschichte II), Göttingen: Wallstein, 1994.

Maurenbrechter, R.: Die Rheinpreußische Landrechte, Volume II, Bonn: Weber, 1831.

Mylius, Chr. O.: Corpus constitutionum Marchicarum; oder, Königl. Preussis. und Churfürstl. Branddenburgische in der Chur- und Marck Brandenburg, auch incorporirten Landen, publicirten und ergangenen Ordungen, Edicta, Mandata, Rescripta, Novum corpus constitutionum Prussico-Brandenburgensium, Berlin: Im Buchladen des Waysenhauses, [1737]-1755.

Reckmann, H.: Das neuzeitliche Gerichtswesen in der Stadt Geldern, Kevelaer: Butzon und Bercker, 1972.

Van Rensch, Th. J.: Het Hof van Justitie van Pruisisch Gelre, in: Publications de la Société Historique et Archéologique dans le Limbourg, Maastricht: Limburgs Geschied- en Oudheidkundig Genootschap, 1977.

Van Rhee, C. H.: Litigation and Legislation, Brussels: Algemeen Rijksarchief, 1997.

Stölzel, A.: Brandenburg-Preußens Rechtsverwaltung und Rechtsverfassung: dargestellt im Wirken seiner Landesfürsten und obersten Justizbeamten, Volume 2, Berlin: Franz Vahlen, 1888, reprint Vaduz, Liechtenstein: Topos, 1989.