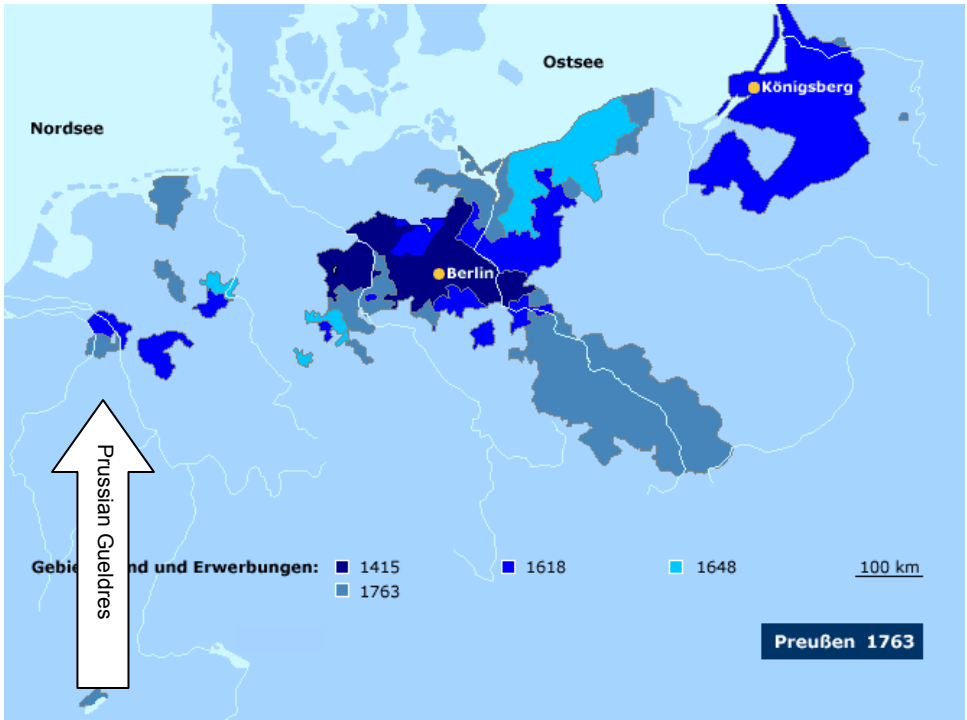
The Reform of Civil Procedure in the Rhine-Prussian Provinces: the Example of Prussian Gueldres 1713-1786

1. Introduction

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



Map adapted from http://www.preussen-chronik.de/

[1] Mylius, Corpus Constitutionum Marchicarum, part II, p. 517, nr. CXXXI, june 21th. 1713: General ordinance on the improvement of the organization of the judiciary; according to the Acta Borussica, this ordinance was not implemented in Prussian Gueldres. See Acta Borussica II, p. 327-333, rescript of March 5, 1716.

[2] H. Conrad, Deutsche Rechtsgeschichte, vol. II, Karlsruhe 1966, p. 466-468

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. This goal was to be achieved through an incremental process of harmonizing procedural law.
In the western province of Prussian Gueldres, this goal 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, June 21, 1786[3], and the "*Reglement wegens de nieuwe inrichting des gerichtshandels of maniere van procedeeren bij den souvereinen hove van justitie ... in het hertogdom Gelder*", Berlin, July 30, 1786.[4]
In the preamble of the "*Regulation for the Subaltern Judiciary*", Friedrich 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]

After the War of Spanish Succession, under the Treaty of Utrecht (1713), part of the former Duchy of Spanish Guelders, a province of the Southern Netherlands, was acquired by Friedrich Wilhelm I of Prussia. Through Art. VII of the Treaty of April 2, 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* (abbreviated: GLS)[6]. This Sovereign 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 mother court, which was originally founded in 1580, in the nearby town of Roermond. In civil litigation, its jurisdiction at first instance comprised civil procedure in privileged cases[7] and, at second instance, the revision of judgements 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 judgements, without the need to submit them to the Oberappelationsgericht in Berlin. In

[3] "*Regulation for the Subaltern Judiciary 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://rechten.unimaas.nl/lrg ; for a direct link to the quoted regulation see: http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201786/p17860621/directory.djvu .
[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)
[5] See below, page 11
[6] *Gueldres Country and Town Statute Law*. This statute book 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 1783 (the widow of Hubertus Bontamps, Venlo). An abbreviated edition was printed in 1831 by R. Maurenbrechter in: Die Rheinpreußische Landrechte, vol. II, p. 467-924 (Bonn 1831). For a modern text edition see: A.M.J.A. Berkvens, G.H.A. Venner, Het Gelderse Land- en Stadsrecht, Arnhem 1996 (Werken Stichting tot uitgaaf van de bronnen van het Oude Vaderlandse Recht 25)
[7] According to the 1752 regulation of instances (cfr. infra), 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.

such cases, the bench was supplemented originally with two, and from 1752, with 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 comprised in Book V of the GLS, regulating the method of civil procedure in seventeen titles (340 articles). These statutes were supplemented with a number of seventeenth century Spanish Guelders regulations, of which the 1674, 1679 and 1683 ordinances on the judiciary administration, regulating the role of solicitors in civil litigation, the revision of judgements of the Sovereign Court, the granting of relief, and the deliberations of the Justices, were of the utmost importance. [8]
The reforms of Samuel Cocceji[9], culminating in the introduction of the *Codex Fridericianum* 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 the preamble of the 1752 "*Reglement betreffende de Reguleeringe der instantien in Sijne Maj.s aendeel des Hertogdoms Gelre*", the king abandoned his attempts to introduce the *Codex Fridericiani*, because of its incompatibility with the customary laws of the province, and because of the lack of German speaking advocates in this province. Consequently, the GLS was to be maintained "*pro lege et norma*" in the future as it had been in the past.[10] Learning from this experience, the Prussian administration in 1781 did not even try to introduce von Carmer's[11] new *Corpus Iuris Fridericianum* in Prussian Gueldres, but only tried to reshape Gueldres procedural law, according to the principles of the *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 Friedrich II in 1779 and the changes made by the 1786 ordinances for the Sovereign Court and for the subaltern justices in Prussian Gueldres, in adaptation to the 1781 *Corpus Iuris Fridericianum*.

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[8] 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

[9] Samuel Cocceji (1679-1755), Professor of law, Frankfurt a. O. (1702), Prussian minister of justice (1723), Great Chancellor (1747), reformer of the Prussian judiciary, author of the *Codex Fridericiani* (1747/1748); cfr. A.Erler, E. Kaufmann, Handwörterbuch zur deutschen Rechtsgeschichte (HRG), vol. 1, col. 617-619 (A. Erler).

[10] "*Regulation of instances in the Duchy of Gueldres*",
http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201752/p17521221/directory.djvu

[11] 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); cfr. HRG, vol. 1, col. 590-592 (H. Winterberg).

2. The procedural Law of Gueldres in the seventeenth century

GLS procedural law was a mixture between medieval customary law and Romano-Canonical procedural law. According to the GLS, there were five types of civil action[12], of which the *ordinary procedure* was the most common. This *ordinary procedure* was a normal cause-list procedure, which was initiated with a writ of summons. A writ of summons before the local courts could be obtained without the *command* of the bailiff[13]; in the case of a summons before the Sovereign Court, it was necessary to obtain a provision of justice from the court. Although the cause-list procedure was the only procedure mentioned in the statute book, according to the 1674 regulation for the Sovereign Court, the ordinary procedure could also take the form of a so called communicatory procedure or 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.[14]

Book Five of the Gueldres Statutes mainly describes the civil procedure at first instance before the lower benches. It contains a detailed description of the writ of summons procedure, and the procedure in case of default of appearance (tit. 7); the duties of advocates and procurators, representatives and gardians (tit. 8), the rights and duties of the plaintiff – in which title we find rules on the statement of claim, the effects of *res judicatae*, election of domicile and powers of attorney – (tit. 9), the rights and duties of the defendant – possible exceptions, counter claims – (tit. 10), replication, rejoinder, surrejoinder and rebutter (tit 11), the production of evidence – witnesses (tit, 12), written evidence (tit. 13); oath (tit. 14), closing of the debate, rules on the evaluation of the available means of proof ("reproches" and "salvations") (tit 15) –, judgement, advisory opinions, pronunciation and revision of judgements of the lower benches (tit. 16), and the execution of judgements (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, which unlike its counterparts in the Spanish Netherlands, such as the Great Council at Malines, the Council of Brabant at Brussels or the Council of Flanders at Ghent, did not dispose of a comprehensive procedural regulation of its own. These special regulations were often derived from the styles of other provincial courts in the Netherlands, and related to subjects like revision of the judgements of the Sovereign Court, the granting of relief, or the duties of advocates and procurators, giving the procedural law of Spanish Gueldres a somewhat fragmentary outlook.[15]

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[12] GLS page 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 17th century).

[13] GLS page 299, Art. 2

[14] "Reglement voor advocaten en procureurs op't stuck van instrueren ende furneren der processen", January 8, 1674 (http://lrg.unimaas.nl/djvu/Spaans%20Overkwartier/djvu%201674/p16740108.djvu)

[15] See before note 8.

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 1748 *Codex Fridericiani* in Prussian Gueldres.

3. The *Codex Fridericiani* and the 1752 ordinance for Gueldres

After being informed in September 1746 of problems at the *Hofgericht* in Cöslin in the Baltic province of Pomerania, which were mainly caused by the improper use of the possibility of interference by the administration through Cabinet Orders in civil litigation, which repeatedly resulted in undue delays, Friedrich II deemed a profound reform of civil procedure necessary.[16] He assigned this task to his trusted minister of justice Samuel Cocceji, who prepared the draft of the *Codex Fridericiani Pomeranici* (July 6, 1747), followed in the next year by the *Codex Fridericiani Marchici* (April 3, 1748), which was intended for general use in every Prussian province.[17] 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 appeal as a means of delay were prohibited. According to the *Codex Fridericiani*, all cases could be tried in three instances, with the newly created *Oberappelationsgericht* in Berlin, as court of last 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" ("Resortreglement*") of June 19, 1749, which prohibited interference of the "Krieges und Domänenkammern" in civil proceedings.[18]
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[19], as part of the fundamental law of the land. In the ensuing deliberations, a comprise was reached: The "*resortreglement*" of 1749 was revoked in Prussian Gueldres, Friederich II abandoned the introduction of the *Codex Fridericiani* in this province, and, on December 12, 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*" ("*Instantiereglement*").[20]

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[16] A. Stölzel, Brandenburg-Preußens Rechtsverwaltung und Rechtsverfassung, Berlin 1888 (reprint Topos 1989), vol. 2, p. 175
[17] A. Stölzel, Brandenburg-Preußens Rechtsverwaltung und Rechtsverfassung, vol 2, p. 197
[18] http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201749/p17490619/directory.djvu ; Th.J. van Rensch, Het Hof van Justitie van Pruisisch Gelre, in: Publications de la Société Historique et Archéologique dans le Limbourg 113 (1977) p. 193-268, p. 225-226
[19] 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".

The main objective of this ordinance was to accommodate the desired regulation of appeal jurisdiction in three degrees within the restrictions of the *ius de non evocando*. Therefore, a distinction was made between revision of the judgements of the Sovereign Court, or "Great Revision", and appeal of the judgements of the lower benches or "Petty Revision". In case of revision of judgements of the Sovereign Court the bench had to be formed by three justices of the Sovereign Court, who had not been involved before in the lawsuit at issue, supplemented by four justices form 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 judgement "*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 be imprisoned. *Mutatis mutandis*, the same rules applied for the revision by the Sovereign Court of the judgements 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 the debate, in the preparation of the judgement. 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 judgement. Afterwards, it was the task of the Chancellor to make sure that the judges could freely deliberate about the case. Judgements should contain grounds, and dissenting opinions could be added.
A third objective of this ordinance was cost reduction. This aim was mainly to be achieved by not allowing the reporting judge to read the complete case file aloud to his fellow judges and by fixing the costs of the reading of the judgement in court to a maximum of sixteen thaler[21]
The procedural law of the Gueldres Statute law as such, remained unchanged until, in 1776, a new ordinance on the abbreviation of procedure was published.[22]

4. 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 Fridericiani* had initially resulted in a speedy and thorough expedition of justice. However, these salutary effects later diminished. Therefore, Friedrich II deemed it necessary to introduce a number of new general principles of procedure and new means to accelerate the course of justice, which were to be applicable to all provincial courts of justice, including the Sovereign Court of Gueldres, despite the fact that the *Codex Fridericiani* had never been introduced in this province.

[21] http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201752/p17521221/directory.djvu ; see also Acta Borussica IX, nr. 302, p. 539, and Hans Reckmann, Das neuzeitliche Gerichtswesen in der Stadt Geldern, Kevelaer 1972 (Veröffentlichungen des Historische Vereins für Geldern und Umgegend, vol. 73), p. 66
[22] Neue Verordnung um die Processe zu verkürzen, Berlin, January 15th, 1776 (http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201776/p17760115.djvu)

This ordinance decreed the introduction of the *Eventual Maxime* in civil procedure: henceforth, plaintiffs had to submit all relevant documents, when introducing their statement of claim; the introduction of other documents in a later phase of the procedure was not allowed. If those documents were not at their disposal at this stage, they could also require their opponents to submit the relevant documents in their possession. The same rules applied to the defendant. Preferably, cases were to be pleaded orally. In such cases, the advocates were obliged to mark in the margins of their memoranda of oral pleading, their most important arguments. 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 quibbles and pettifoggery. 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 September 30, 1776.[23] This regulation was followed on August 4, 1777, by another ordinance, admonishing the lower judges to bring civil proceedings to a speedy conclusion. Negligent judges stood the chance of penal servitude at the fortifications.[24] Finally, new regulations concerning legal fees were also announced.[25]

On December 4, 1779, after examination of the lower benches of Prussian Gueldres[26], the Sovereign Court published a new extensive regulation for the lower benches, comprising 63 articles, as a remedy to the established abuses.[27] This ordinance was a compromise between 17th 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 combination with the prescriptions of the 1776 ordinance. For instance, in Arts. 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 immediately all their documents (Art. 4-7).
In the next 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 procedure, advocates had successfully turned it into a source of delay, by requesting written copies of the dictated claims (Arts. 8-11). In the next articles, the Court tried to prevent delays in the instruction of the communicatory procedure by fixing peremptory time limits. Parties exceeding these time limits were to be declared in default *ex officio* by the judges, without the request of the advocate of the party adverse (Arts. 12-13). In the articles 15-

[23] http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201776/p17760930.djvu
[24] http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201777/p17770804.djvu
[25] A provisional regulation of legal fees was published by the Sovereign Court, December 4, 1779 (http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201779/p17791204.1/directory.djvu)
[26] In May 1779, Great Chancellor von Fürst initiated a "Haupt-Justitzvisitation jenseits der Weser". By cabinet order of June 8 1779, a member of the Secret Tribunal, Koenen, president of High Court of the Duchy of Cleve since 1749, was again assigned to examine the situation in Prusian Gueldres (Acta Borussica XVI,2, p. 520); he submitted his report August 26 1779 (Acta Borussica XVI,2, p. 526).
[27] http://lrg.unimaas.nl/djvu/Pruisisch%20Overkwartier/djvu%201779/p17791204/directory.djvu

24, the Sovereign Court regulated the procedure of evidence, supplementing the rules of Statutory Law of Gueldres with the *ex officio* declaration of default in cases of exceeding peremptory time limits, 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 the closure of the debate, 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 phrases, such as "condemning party adverse according to the just complaint of the plaintiff", which could easily cause parties to lodge an appeal (Arts. 25 and 26). In Art. 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 litigate.

5. The 1781 *Corpus Iuris Fridericianum* and the 1786 ordinances for the subaltern judiciary and for the Sovereign Court of the Duchy of Gueldres

In the famous Cabinet Order of April 14 1780[28], addressed to the Great Chancellor von Carmer, Friedrich II formulated a threefold approach towards judiciary reform:

- improvement of the quality of the judiciary by examination of new judges before their admission, and regular inspections 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

According to the nineteenth century Prussian historian Adolf Stölzel[29], 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 Silezia 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"[30]. In May of the same year, the last stage started with the establishment of a commission, chaired by Carl Gottlieb Svarez[31], which was to prepare the next books of the *Corpus Iuris*, containing the *Allgemeine Landrecht*, that, although completed in 1791, did not actually become law until June 1, 1794.[32]

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[28] Corpus Juris Fridericianum. Erstes Buch. Von der Prozeß-Ordnung, Berlin 1781, p. III-XIV

[29] Adolf Stölzel (1831-1919); cfr. HRG, vol. 3, col. 2006-2008 (R. Lieberich)

[30] The "Prozeß-Ordnung" was published by patent of April 26, 1781 (Mylius, Novum Corpus Constitutionum Prussio-Brandenburgensium praecipue Marchicarum, Vol. 7, P. 249).

[31] Carl Gottlieb Svarez (1746-1798), assistant of von Carmer, author of the Allgemeine Landrecht; cfr. HRG, vol. 4, col. 97-100 (H. Thieme).

[32] A. Stölzel, Brandenburg-Preußens Rechtsverwaltung und Rechtsverfassung, vol. 2, p. 293; about the Allgemeine Landrecht, also see HRG, vol. 1, col. 99-108 (H. Thieme).

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 procedures, by personally interrogating the litigants, who were obliged to appear in court personally and to inform the judges truthfully about the matters at hand. As a consequence of this official 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. It was their only task to give the litigant parties objective advice and to see that they were equally treated by the judges.[33] Civil litigation thus became judge driven and part of public law ("Staatsprozeß").

The introduction of the *Corpus Iuris Fridericianum* in Prussian Gueldres, at first met with the firm resistance of the Sovereign Court of Gueldres and the Provincial Estates. There were two basic objections and a number of practical objections 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 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 statute law of Gueldres 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 his 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, von Carmer communicated in October 1783 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 judgements were often reversed upon appeal. To improve the quality of the rural courts, von Carmer proposed reducing the number of rural benches and professionalizing of the judges. After another period of inactivity of the Sovereign Court, von Carmer decided, on August 25, 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 subaltern judiciary were to be modified, according to

[33] Corpus Iuris Fridericianum, Vorbericht, p. XV-XXXV.

the principles of the *Corpus Iuris Fridericianum*. This task was enthrusted to Peter Heinrich von Coninx, Justice and later Chancellor of the Sovereign Court.[34]
His activities resulted in two new regulations, the first on June 21, 1786, regulating the subaltern judiciary and the second on July 30, 1786 regulating the Sovereign Court.

The 1786 regulation for the subaltern judiciary
In the preamble of the regulation of the subaltern judiciary, five reform principles were stated: according to the first principle, the local lords were given the possibility to merge their local benches voluntarily. According to the second and third principles, the number of aldermen that could participate in litigation was reduced to one. This alderman functioned as assessor to the bailiff, who in the future would act as *unus judex*. This was a quite revolutionary measure, because it brought about a reversal of the traditional system, in which the aldermen acted as judges, and the bailiff acted 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 number: they simply participated by rotation in the administration of justice. The fourth principle stated that the competence and legal knowledge of bailiff and clerk should be examined by the Sovereign Court. According to the last principle, the lower courts should strictly adhere to the new regulations, as a means to a speedy, less costly and less formal way of legal proceedings.
The actual regulation consists 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, the legal care for the property of orphans, and civil and criminal procedure.
In the last chapter of the regulation we can still see the same mixture of seventeenth century statute law and the principles of the 1776 ordinance, as mentioned before 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, and measures to prevent delay in the instruction of 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 judgement, and the obligatory attempt of an amicable settlement still applied. However, in addition to these elements of the 1779 ordinance, new elements of the *Corpus Iuris Fridericianum*, such as the *Inquisitionsmaxime*, the duty of parties to personally appear in court[35], and the replacement of the advocates by public legal assistants, were also introduced. In summary procedures, legal assistance was not allowed, and it was the duty of the bench to *ex officio* establish the veracity of the facts, with recourse to experts, when necessary.[36] Only

[34] 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; cfr. H. Reckmann, Das neuzeitliche Gerichtswesen in der Stadt Geldern, Kevelaer 1972, p. 73 and Th.J. van Rensch, Het Hof van Justitie van Pruisisch Gelre, p. 249-260
[35] Only the sick and elderly, and those full-filling official duties were to be dispensed from the duty of making a personal appearance in court (Regulation for the lower benches, ch. VII, § 42).
[36] Regulation for the lower benches, ch. VII, § 10 “discovery of the truth”; § 11 “expert witnesses”

in ordinary procedures, were legal assistants admissible: it was their duty to foster the truth finding process and to encourage amicable settlements between parties.[37]

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 style of civil litigation was to prevent every form of arbitrariness in the instruction of civil procedures. Henceforth, it was the duty of the justices personally to discover the truth – *Inquisitionsmaxime* – and to protect parties from arbitrary judgements by strict application of the rules of procedure.[38] Consequently, it was the duty of the litigant parties personally to appear in court so as to immediately inform the justices about the full facts of the case (*Unmittelbarkeitsmaxime*), without help of procurators, who were abolished.

Only on special occasions, which were mentioned in chapter two, could parties be relieved of this duty. Parties dispensed of the obligation of an 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".[39] These were aspirant justices, who acted instead of the legal assistants of the *Corpus Iuris Fridericianum*, whose introduction in Prussian Gueldres was deemed superfluous.[40]

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 modeled on the *Corpus Iuris Fridericianum*, which was more frequently quoted than the Statute Law of Gueldres.[41]

According to this chapter the litigant parties determined 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 whether the ordinary procedure was the most appropriate way of proceeding. If such was deemed to be the case, the plaintiff was offered the choice to attend 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 *ex officio* 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 granted. This warrant should be drafted in for a layman comprehensible language (Art. 25). When the defendant made an appearance in court, he was also interrogated and a protocol of rejoinder was drafted by the delegated justice, answering every point of the

[37] Regulation for the lower benches, ch. VII, § 41, 49
[38] Regulation for the Sovereign Court, ch. I
[39] Regulation for the Sovereign Court, ch. II
[40] Regulation for the Sovereign Court, ch. III, § 1; this regulation seems to be in contradiction of the regulation for the lower courts, which makes explicitly mention of the function of legal assistants (see before page 10).
[41] Christian Grahl, Die Abschaffung der Advokatur unter Friedrich dem Großen, Göttingen s.a.(1994) (Quellen und Forschungen zum Recht und seiner Geschichte II), P. 122-130 , gives a comprehensive summary of the procedural law of the Corpus Iuris Fridericianum

complaint. (Art. 38). Both protocols were submitted to the bench *in pleno*, as to determine whether there was a possibility of reaching an amicable compromise (Art. 40), before the formal instruction of the case began. During the instruction, it was the duty of the instructing justice *ex officio* to do everything necessary to complete the case file (Art.45) and to formulate the *facti species* and the *status causae et controversiae* (Art. 48-50). In the ideal case the *facti species* was approved by both parties. If not, it was the task of the *Collegium* of the bench to conclude about the unsolved *controversiae*, before formulating the burden of proof (Art. 56; 59). In case the *controversiae* resulted from ambiguous legislation, the *Collegium* had to consult the Commission of legislation in Berlin, in a kind of preliminary procedure (Art. 57). The evidence procedure, which formed a mixture of the rules of evidence of the *Corpus Iuris Fridericiani* and the Statutory Law of Gueldres, was regulated in detail in Art. 60-63.
In Art. 64 some decision rules for the evaluation of evidence were given.
At the closure of the case, a inventory of the case file was made by the delegated judge, and signed by the justice commissioners (Art. 67). Afterwards, parties could still submit an *deductio juris* (Art. 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 judgement, according to the detailed instructions of Art. 72. The actual judgement was reached by majority vote and was based on the veracity of the facts, the opinion of the litigant parties, and the application of the law. Thereby a strict order had to be followed. At first the statute law of Gueldres 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, being recourse to the *Ius Commune* explicitly forbidden (Art. 74). The judgement should contain clear grounds and be precise, as to give parties no reason for appeal or complaint (Art. 77).
The next part of the ordinance addressed the revision of the judgements 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 installment of revision ended sooner or later, and more ore less room was accorded *ad purgandum mora* (Art. 78-82). In conformity with the 1752 regulation the revision occurred *exiisdem actis*; introduction of new facts was only possible, after *relief* was granted by the Sovereign Court. Art 86 addressed the question when a judgement had force of *res judicata*, and the question of nullity and *restitution in integrum*, referring the litigants to the *Corpus Iuris Fridericianum.*

6. Concluding Remarks

During the eighteenth century the kings of Prussia constantly tried to reform civil procedure. At 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 mainly on the quality of the judges and reform of procedure. 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 administration of justice in three instances. Since 1780 they tried to achieve their goal by a three fold approach: improvement of the quality of the judges by a stricter

application of the 1749 program, reform of procedural law as a means to abbreviate the course of justice and cost reduction, and introduction of a general subsidiary civil code, as a means to reduce 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 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 a policy of incremental adaptation of the statute law of the province to the principles of the new legislation, such as the *Codex Fridericiani* of 1746/'47 and the *Corpus Iuris Fridericianum* of 1781.
The successful opposition of the Estates and the Sovereign Court against the introduction of the *Codex Iuris* 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 the introduction of the administration of justice in three instances, within the restrictions 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 subaltern judiciary in Prussian Gueldres, the Sovereign Court was given the opportunity to improve the quality of the rural benches, resulting in the 1779 ordinance for the lower benches, which mainly aimed at preventing misuse of the oral procedure, and the prevention of delay, and improving the quality of the deliberations, by giving strict guidelines to the aldermen in reaching their judgements, while still leaving the statute law on procedure mainly 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 subaltern judiciary saw to the abolition of the medieval aldermen courts 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 also brought on 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 Fridericiani*, nor the *Corpus Iuris Fridericianum* were introduced in Prussian Gueldres, but where the 1752 regulation for Prussian 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.

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