

## ARCHIVE

This issue of *Acta Poloniae Historica* features the first article in our new section, the 'Archive'. This is the place for revisiting once-published studies by outstanding Polish historians – some of them first issued a long time ago – which, deemed 'classical' today, have played an important part in Polish historiography, with citations of them having been used till this day. Not often published outside Poland, they have remained functionally useless to the scholars without a command of Polish.

This collection of texts opens with an article by Benedykt Zientara (1928–83), one of the most eminent post-war medievalists, who died thirty years ago at the height of his creative potential. His output is, admittedly, not too well known to historians outside Poland and Germany.<sup>1</sup> Zientara (graduated 1950) belonged to the 'first generation' of the economic history school formed at the Institute of History, University of Warsaw by Marian Małowist (the first editor of *Acta Poloniae Historica*) and based on the best models of the Marxist methodology. In the 1960s, this formation constituted the substance of the so-called Polish school of economic history, which enjoyed repute among West-European historians (the team was also joined by Bronisław Geremek, Antoni Mączak, Henryk Samsonowicz, the students of Małowist, the other members being Witold Kula, Jerzy Topolski and Andrzej Wyczański).

The article published in this issue was the first in the European historiography (remaining the only one in Polish historiography, to be sure) so penetrating a study of the 'German law' which, beginning with the thirteenth century, thoroughly changed the legal system and the social and economic structures of the rural and urban areas not only in Poland but across the Central and Eastern Europe.<sup>2</sup> Having written a series of studies

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<sup>1</sup> A homage to Benedykt Zientara the man and the scholar was paid by Klaus Zernack in his article 'Polens Westen – Deutschlands Osten. Zum Lebenswerk des polnischen Mediävisten Benedykt Zientara (1928–1983)', *Jahrbuch für die Geschichte Mittel- und Ostdeutschlands*, 33 (1984), 92–111.

<sup>2</sup> The original version was published as: 'Źródła i geneza "prawa niemieckiego" (*ius Theutonicum*) na tle ruchu osadniczego w Europie Zachodniej i środkowej w XI i XII w.', *Przegląd Historyczny*, lxxix, 1 (1978), 47–74. A German translation occurred in the same year: 'Der Ursprung des "deutschen Rechts" (*ius Theutonicum*) auf dem Hintergrund der Siedlungsbewegung in West- und Mitteleuropa während des 11. und 12. Jahrhunderts', *Jahrbuch für die Geschichte des Feudalismus*, 2 (1978), 119–48.

on settlement in Western Pomerania, Brandenburg and Silesia, Zientara embarked on determining the origins of the German law, considering in a detailed manner the great migration movements in Europe of the High Middle Ages. Thus, in his research, he followed the route that was not trodden at the time by most Polish historians, who were embedded in ideological prejudices and punched the consequences of the German Drang nach Osten that were deemed adverse to the 'Polishness' of Pomerania and Silesia,<sup>3</sup> and by their German peers who found it quite burdensome to reject the depiction of German colonists as the Kulturträger. That such research triggers no surprise or controversy these days, goes to Benedykt Zientara's credit – in Poland, his primacy in this respect is undisputable.

The issues of settlement and migration preoccupied him almost since the beginning of his career as a research scholar; this being his starting point, Zientara not only recognised the figure of Duke Henry I the Bearded (Henryk Brodaty), the great moderniser who ruled Silesia in the former half of the thirteenth century,<sup>4</sup> but also arrived at the grand subject to which he eventually devoted the last years of his creative effort: the medieval genesis of national awareness in Western Europe. Świt narodów europejskich, the work which crowned this particular chapter of Zientara's research, was published only after his premature death (1985).<sup>5</sup>

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<sup>3</sup> Zientara found this notion useless and misleading with respect to the Middle Ages, in his well-known article 'Z zagadnień terminologii historycznej. Drang nach Osten', in *Społeczeństwo. Gospodarka. Kultura. Studia ofiarowane Marianowi Małowistowi w czterdziestolecie pracy naukowej* (Warsaw, 1974), 425–33. A German version has been published as well: 'Zum Problem des geschichtlichen Terminus "Drang nach Osten"', in Lothar Dralle (ed.), *Preußen, Deutschland, Polen im Urteil polnischer Historiker. Eine Anthologie*, i: *Millenium Germano-Polonicum* (Berlin, 1983), 171–81.

<sup>4</sup> Zientara's monograph on Henry, *Henryk Brodaty i jego czasy* (Warsaw, 1975), passes in today's Polish historiography as an exemplary biography of a medieval ruler. For the German edition, see *Heinrich der Bärtige und seine Zeit. Politik und Gesellschaft im mittelalterlichen Schlesien*, trans. Peter O. Loew (Munich, 2002).

<sup>5</sup> Published in German, as *Frühzeit der europäischen Nationen. Die Entstehung von Nationalbewusstsein im nachkarolingischen Europa*, trans. Jürgen Heyde, with introduction by Klaus Zernack (Osnabrück, 1997), this study has opened the series 'Klio in Polen' published by the German Historical Institute of Warsaw.

*Benedykt Zientara*

THE SOURCES AND ORIGINS  
OF THE 'GERMAN LAW' (*IUS TEUTONICUM*)  
IN THE CONTEXT OF THE SETTLEMENT MOVEMENT  
IN WESTERN AND CENTRAL EUROPE (ELEVENTH  
TO TWELFTH CENTURY)

I

The term 'German law' has a long history behind it, which certainly deserves being researched into in a dedicated manner. Analysis of the contents attached to the notion by its users and then by researchers, lawyers and historians – the contents that changed as time went on and as ideological currents and scholarly theories evolved – would in itself yield an abundant crop, making one consider the influence of external factors on the results of historical research, even if most scrupulously conducted.

Neither the size of this article nor the competency of its author would suffice to outline the development of the research on the history of the so-called 'German law', and of the changes in understanding this notion. Enough to remind that, regardless of its initial meanings (to be covered in a moment), historiography has made the term in question synonymous to a part of cultural and political-system-related influences of Germany and Germans on the Central and Eastern-European countries. In this capacity, 'German law' served one party as a symbol of 'the great act of the German people': the eastern expansion, and was part of the Germans' national pride; on the other hand, it was perceived as a quintessence of the German *Drang nach Osten* – 'thrust toward the East', regarded as a timeless trend.

The term's long-lasting popularisation in the eastern part of our continent tended to be overstated, or minimised; on the one hand, the presence of 'German law' was identified with German settlement, or colonisation; on the other, attempts have been made to conceal the

very name under some not-quite-fitting substitute expressions, such as ‘emphyteutic law’, ‘rent(al) law’, or, recently, ‘West-European law’. Any discussion often proved impossible, with the colliding sense of superiority, on the one hand, and complex of inferiority on the other. The sense of superiority often rendered German researchers blind to the facts testifying to a high degree of self-reliant development of Central and Eastern-European countries prior to the German law influence period. In turn, the inferiority complex often made the historians from those countries overstate this degree of development whilst minimising the significance of the German influence. Mutual accusations of perverted facts and false interpretations were often legitimate, on both sides.

The rapid transformations in the period after WWII implied a positive change in the scholars’ attitudes.<sup>1</sup> One of the reasons has been a leap in the economic and cultural development of Central-European countries, enabling to overcome the old inferiority complex; another was that the approach to historical research and studies as a tool useful in ongoing politics was quit by a considerable share of German historiography. At last, it needs being mentioned that historians at large have displayed a growing understanding of the necessity to carry out comprehensive research extending to specific groups of issues across the continent. Embarking on such research at numerous symposiums gathering historians from a variety of countries has marked the first step to overcome the hurdles on the way to cognising the past, including in those of its aspects that had a considerable bearing on the shaping of Europe as it stands today.

## II

Numerous popular, and partly also scholarly, publications still offer us reckonings identifying the so-called ‘German law’ with the law of

<sup>1</sup> Due to the size of this article, I do not quote even the most important reference literature. The German and, partly, Polish, Czech and Hungarian literature is most completely listed in Herbert Helbig and Lorenz Weinrich (eds.), *Urkunden und erzählende Quellen zur deutschen Ostsiedlung im Mittelalter*, 2 vols. (Darmstadt, 1968–70), i, 28 ff.; ii, 45 ff. [hereafter: UEQ]. Cf. also Zdzisław Kaczmarczyk, ‘Kolonizacja niemiecka i kolonizacja na prawie niemieckim w średniowiecznej Polsce’, in Jerzy Krasucki, Gerard Labuda, and Antoni W. Walczak (eds.), *Stosunki polsko-niemieckie w historiografii: studia z dziejów historiografii polskiej i niemieckiej*, i (Studium niemcoznawcze Instytutu Zachodniego, 25, Poznań, 1974), 218 ff.

Germany, i.e. of the period's German state, otherwise called the Holy Roman Empire.<sup>2</sup> Clearly, ever since Rudolf Kötzschke made the 'German law'-related terminology subject to minute study,<sup>3</sup> there has been no need to deal with such a view: it is a pity, though, that Kötzschke's study was not included in the collective edition of his works published after WWII.

As is known, the notion of 'German law', as a law binding in the German state, did not exist. There were only certain legal customs, initially cultivated within the individual German tribes (the Franks, the Bavars, the Saxons, *etc.*) and afterwards developing and getting diversified within the individual territories, as they grew autonomised. There were moreover the laws assignable to specific groups of people to whom the general law did not extend (clergy, merchants, Jews, *etc.*). In certain domains, royal or imperial edicts endeavoured to homogenise the legal procedure in the entire country's scale, which proved successful primarily with the aforesaid group laws, which in the Middle Ages essentially had a binding force across the *Regnum Teutonicum* area, at least till the thirteenth century.

The modern understanding of law as a close-ended, if not codified, aggregate of regulations has heavily weighed down on the historians' attitude towards the notion of law in the early medieval period. As Gerhard Dilcher aptly reminded us,

the law, as far as it is cognisable based on the law collections, concerned, in the first place, matters related with the king, the Church, premises for securing peace (e.g. pecuniary penalties determined as a means to help prevent bloody conflicts), and not much more beside this: it clarified certain issues related to inheritance, at the utmost. Court verdicts resolved disputes and were founded on a very imprecise *consuetudo*, on legal concepts and ideas, customs and habits.<sup>4</sup>

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<sup>2</sup> Owing to the name and to the sustained tradition of 'the Roman Empire continued', there appeared views in the Middle Ages whereby the Roman Law was regarded as the Empire's applicable state law.

<sup>3</sup> Rudolf Kötzschke, *Die Anfänge des deutschen Rechtes in der Siedlungsgeschichte des Ostens (ius teutonicum)* (Berichte über die Verhandlungen der Sächsischen Akademie der Wissenschaften zu Leipzig. Philologisch-historische Klasse, xciii, 2, Leipzig, 1941).

<sup>4</sup> Gerhard Dilcher, 'Rechtshistorische Aspekte des Stadtbegriffs', in *Vor- und Frühformen der europäischen Stadt im Mittelalter. Bericht über ein Symposium in Reinhausen bei Göttingen in der Zeit vom 18.–24. April 1972*, 2 vols. (Abhandlungen

Hence, once the scope of cases considered by courts grew enlarged and more complex, it appeared necessary to appoint *Schöffen* (aldermen) among experts on specific areas of social life.

If we agree that the ‘German law’ in Central and Eastern Europe was not the law of Germany, for the notion of ‘German law’ did not exist in the Reich’s territory at all, then we should consider the origin, and subsequently, the content of the notion *ius Teutonicum*.

The German, Polish and Czech historians have established, beyond any doubt, that the notion ‘German law’ emerged in the non-German language area, referring to the special rights of a group of people to which the local laws did not apply and who were privileged, primarily, by being released from the obligations of ducal law<sup>5</sup>. Initially, such a group was constituted by immigrants from Germany, settling in Slavic towns: these were merchants who, at a rather early stage – probably as early as in the eleventh century, in Bohemia – formed guilds and other like organisations to defend their interests against the duke and the local people. Granting privileges to alien merchants, similarly to other ‘guests’, was an obvious thing in the countries of the eastern part of Central Europe – like elsewhere, in fact; it did not solely refer to Germans. The latter prevailed among the ‘guests’ in Poland and in Bohemia; in Hungary, their influence was balanced by immigrants from Romance countries: the Wallonians, the French, the Italians, the Dalmatians.

Since an essential element of the foreigners’ privileges was their being allowed to exercise low justice according to their own customs (high justice, especially in assassination suits, was usually reserved for the ruler), there was a trend to create separate groups of merchants and craftsmen based on their origin. Jiří Kejř supposes that there existed separate Romance (possibly, Wallonian) groups in Prague and Brno;<sup>6</sup> a privileged Flanders group existed in Vienna; the Walloons of Wrocław also probably formed an organised

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der Akademie der Wissenschaften in Göttingen. Philologisch-historische Klasse. Dritte Folge, 83, 84, Göttingen, 1973–4), i, 30.

<sup>5</sup> Heinrich F. Schmid, ‘Das deutsche Recht in Polen’, in Albert Brackmann (ed.), *Deutschland und Polen. Beiträge zu ihren geschichtlichen Beziehungen* (Munich and Berlin, 1933), 71; Kötzschke, *Die Anfänge*, 64 f., and other relevant studies.

<sup>6</sup> Jiří Kejř, ‘Zwei Studien über die Anfänge der Städteverfassung in den böhmischen Ländern, II. Privileg des Herzogs Sobieslaw II. für die Prager Deutschen’, *Historica*, 16 (1969), 130 f., fn. 51.

group.<sup>7</sup> In most cases, however, the existence of those groups was ephemeral, as the general privileges pushed them closer to the more numerous German merchants whereas the legal customs, imported from their native countries, tended to be pushed backwards and complemented (as with the German community of Prague) by the regulations elaborated in the new country of their residence.

The earliest known charter granted by a Slavic ruler to privilege the Germans as a singled-out group was issued by Bohemian Prince Soběslav II around 1176–8; the authenticity of this document, undermined in the earlier historiography, has been convincingly reaffirmed.<sup>8</sup> The charter makes a reference to a hundred years' older decisions of King Vratislav II (1061–92), of whose details we are not aware. The privileges granted by Soběslav II to the Prague Germans are called in the charter the *lex et iustitia Theutonicorum*, thus precisely denoting the group concerned. German merchants formed similar communities in the eleventh and twelfth centuries in other countries too, in the centres and hubs where they appeared in considerable numbers and settled for a long time – above all, London and the island of Gotland.<sup>9</sup> The Prague charter envisioned the option for the less numerous 'guests' from other countries to join the German group and to consequently take advantage of its rights and freedoms. This is how the 'Germans' of Prague, as a legally defined group, extended not just to Germans in a linguistic/ethnic terms, but to other persons too. In Hungary, where the German group did not prevail, the privileges of alien merchants were described as the *ius hospitum*.<sup>10</sup>

In spite of their mostly German origin, the Jews, with their rather numerous representation in Central-European urban hubs since the tenth century, retained their distinct character. They were organised into separate religious communities to which the ruler extended his care and, ensuring their autonomy, drew special benefits on this basis. The religious antagonism, intensifying, especially, from the First Crusade onwards, obstructed a merger of the German Jews with

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<sup>7</sup> Benedykt Zientara, 'Walonowie na Śląsku w XII i XIII w.', *Przegląd Historyczny*, lxxvi, 3 (1975), 349–68.

<sup>8</sup> UEQ, ii, 93; cf. Kejř, 'Zwei Studien', 116 ff.

<sup>9</sup> Kejř, 'Zwei Studien', 134 f.

<sup>10</sup> Erik Fügedi, 'Das mittelalterliche Königreich Ungarn als Gastland', in Walter Schlesinger (ed.), *Die deutsche Ostsiedlung des Mittelalters als Problem der europäischen Geschichte* (Vorträge und Forschungen, 18, Sigmaringen, 1975), 484 f.

a group of German merchants, or a complete integration of the Jewish people in what was later to become a self-governing urban borough.<sup>11</sup>

It is hard, though, to regard the privileges granted to the German merchants as the incipience of '(the) German law', in the term's later meaning. Similarly to what the merchant guilds were granted in the West,<sup>12</sup> those privileges only extended to the merchants (and, possibly, handicraftsmen) personally, but not to the immovable properties they owned (land, urban parcels) which continued instead to be subject to the local customs, not being singled out of the land-lord's jurisdiction. It was only the launch of unrestricted hereditary landholding and separation of the territory inhabited by the privileged populace into a territorial commune that provided the conditions corresponding with the thirteenth-century freedoms of German law.

Not every foreigner was approached in the Slavic countries as a privileged guest, and not every German could enjoy the rights based upon the *iustitia Theutonicorum*. They did not extend to dispersed individuals who were subject to the local legislation covering alien guests, which offered them efficient protection, in line with the monarchy's support for immigration of specialists. Similarly, war captives were excluded; in the eleventh and twelfth centuries, these captives were an important element of the rulers' settlement policy whereby not-yet-utilised terrains were populated by such settlers. The latter were enslaved, as a rule,<sup>13</sup> and were arranged into a decimal organisation, rather well known from the Polish and Hungarian sources.

Beginning with the early thirteenth century, the situation in Central Europe began changing. Populating the country with war

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<sup>11</sup> Let us leave aside the problem of so-called 'Ismaelites', i.e. the Muslim community in Hungary: apart from the special rights and obligations they were burdened with, the religious factor caused, again, that this group was separated from the other foreigners.

<sup>12</sup> Cf. the objections expressed by Edith Ennen, *Frühgeschichte der europäischen Stadt* (Bonn, 1953), 169, 175; Franz Steinbach, 'Stadtgemeinde und Landgemeinde. Studien zur Geschichte des Bürgertums', *Rheinische Vierteljahresblätter*, xiii (1948), 29 f.

<sup>13</sup> Exceptions did occur, in case of voluntary submission to an alien duke – as testified to by the dwellers of Giecz, who, having rendered themselves subject to Bretislav I of Bohemia, moved to Bohemia where they set up a settlement of Hedčany, preserving their own customs. Cf. *Die Chronik der Böhmen des Cosmas von Prag*, ed. Bertold Bretholz, MGH, *Scriptores rerum Germanicarum*, N.S., vol. 2 (2nd edn, Berlin, 1955), 83 f.



captives had been impossible for a long time then, for political reasons, and was no more profitable economically. It was in the twelfth century that attempts were made to develop unpopulated, especially forested, areas, with use of the local forces: it became clear that coercion did not favour economic development, and that man was the most valuable element in economy. The rulers of Bohemia, Hungary and Poland always supported migration of aliens. Now their initiative encountered a supply of people willing to undertake the development of outlying lands, obviously on beneficial terms. These people encompassed colonists from various German countries who have already tested their forces and methods in the lands on the Elbe and the Saale; the conditions proposed and guaranteed to them by the Slavic and Hungarian rulers are usually referred to as 'German law'.

### III

Time has come now to consider the notion of *ius Teutonicum*, since its apparent simplicity makes it difficult to grasp the essence of the issue, but basically there are various elements to it. Lawyers tend to highlight separate legal customs the colonists had brought along from their native countries and were allowed to make use of in their new country. G. Dilcher shares this view in a slightly different context, considering the notion of 'urban law': he limits it to civil law, criminal law, and court proceeding. The privileges assigned to towns and determining their relation to the monarch, so-called urban freedoms, protection of peace and organisation of the authorities are thus placed outside the scope.<sup>14</sup> Also the scholars researching into the later-date written collections of 'German law' tend to highlight the civil and criminal law which were used by towns incorporated under the German law until the nineteenth century. What they tend to forget is that the texts they study are relatively late date-wise; and, that they evolved resulting from a complicated development as a complex of various elements, among which the Saxon land law prevails (compiled as the *Sachsenspiegel*). This was partly due to the origin of a significant part of the colonists from Saxony; on the other hand, the commercial and political importance of Magdeburg and of other Saxon urban centres, where the binding regulations were written down, had a say

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<sup>14</sup> Dilcher, 'Rechtshistorische Aspekte', 18.

too. Yet, the 'German law' notion existed before the so-called *Weichbild* was compiled in Magdeburg; the legal customs used by the individual groups of colonists were of secondary importance then. If they had been decisive with regard to the name assumed, the idea of German law would never have occurred: the older notions would have remained, related to the colonists' origin (Flemish/Dutch/Franconian law) or to the name of the hub where the pattern was originated (Magdeburg/Burg/Schartau/Brandenburg/Berlin/Neumarkt law).

It was not the legal customs brought along by the colonists but the general privileges reappearing everywhere (personal freedom, hereditary and transferable right to land under the determined conditions and a judicial system of their own) formed, in the perception of thirteenth-century people, the major element of 'German law'. They were common to all the variants of the earlier laws of rural settlement, and thus could be denoted under a general description. What were the governing customs for a local countryside or urban court-of-law, in a specified locality, was a secondary thing, which a privilege would normally have regulated; the decision to choose the specified regulations could, after all, be changed on the ruler's consent.

This double meaning of the term 'German law' and the significance of settlement freedoms being primary to it was emphasised already by R. Kötzschke.<sup>15</sup> Johanna van Winter, examining the 'Flemish law' and the 'Dutch law' in the territories on the Elbe, endeavoured to detect in those ancestors of 'German law' traces of terminological discrimination between legal customs imported by the settlers (*iustitia*) and the general settlement privileges (*ius*). The terminology used in the documents is too imprecise, however, to make it possible to discern between both constituents. Both elements are traceable in the further developments of 'German law', van Winter claims.<sup>16</sup> Analysis of documents has fully confirmed this view.

To sum up this argument, one finds that it is not the diverse legal customs coming from the various areas of the Empire but the complex of primary settlement privileges, together with it accompanying structural pattern of rural areas and agricultural technology (and the analogous organisational and town-planning regulations for urban

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<sup>15</sup> Kötzschke, *Die Anfänge*, 47.

<sup>16</sup> Johanna van Winter, 'Vlaams en hollands recht by de kolonizatie van Duitsland in de 12e en 13e eeuw', *Tijdschrift voor Rechtsgeschiedenis*, 21 (1953), 210 ff., 217 ff.

areas) comprised that 'German law' which triumphantly encompassed the entire Central Europe, to expand finally in sixteenth and seventeenth century to Lithuania, Belarus and Ukraine. Those countries were in need of organisational forms for their internal colonisation and economic reorganisation, and these were provided by the 'German law' – meaning as indicated above. I will be referring to this term below in the meaning so determined. It is by no means pointless to remind here that customs contained in the *Sachsenspiegel* and in the *Weichbild* of Magdeburg, have only partly been adopted to the Polish rural conditions,<sup>17</sup> albeit most Polish villages underwent transitions related to their establishment (*locatio*) according to 'German law'. Occurrence of German legal customs in the Grand Duchy of Lithuania is all the less relevant.

#### IV

How did the 'German law' emerge? One could think that this is a continued evolution of the already-known complex of laws applicable with groups of German merchants in Slavic towns. It is logical that once the laws of Germans in individual centres assumed a more uniform shape and more durable forms (e.g. of a ducal document, like Soběslav II's charter for the German community of Prague), the trend evolved transferring them to new groups of people, not necessarily of German nationality. The corpus of laws vested in the Germans, referred to as the *ius Teutonicorum*, began living its own life and transformed into a *ius Teutonicum*: detached from a specific group of people, it now found it easier to serve the transformations of legal-social structures in individual countries.<sup>18</sup>

The existing privileges of groups of German merchants (possibly, merchants and craftsmen) in Slavic towns could obviously have

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<sup>17</sup> Roman Grodecki, 'Wole i Lgoty. Przyczynek do dziejów osadnictwa w średniowiecznej Polsce', in *Studia z historii społecznej i gospodarczej poświęcone prof. dr. Franciszkowi Bujakowi* (Lvov, 1931), 63 ff.; Ludwik Łysiak, 'U podstaw formowania się polskiego stanu sołtysiego', *Czasopismo Prawno-Historyczne*, xvi, 1 (1964), 233 f.

<sup>18</sup> A *ius Teutonicum/teutonice* (and not *Teutonicorum*) was first mentioned in Lower Silesia in 1221 (UEQ, ii, 10); in Upper Silesia, in 1222 (UEQ, ii, 21); in Bohemia, in 1221 (UEQ, ii, 94). The alleged earlier examples quoted by Kötzschke were based on counterfeits.

influenced the shaping of 'German law', which indeed was the case. They contain elements characteristic of this law, such as personal freedom or judicial autonomy. An important factor without which the 'German law' would have lost its importance: the hereditary right to land, was absent there, though. This obviously comes of no surprise as far as a privilege for a group of alien merchants periodically settled in a town is concerned: such was the case with other privileges too, granted to foreign merchants in various European countries. But this is why one needs to look for even more sources of 'German law', in the primary meaning of the concept. It is correct that they have long been sought after in privileges concerning rural settlement, of a variety of types, starting from the aforesaid 'Flemish' and 'Dutch law', the direct predecessor of 'German law'. In the course of the twelfth century, Flemish and Dutch settlers in Germany, colonising, draining and reclaiming a wealth of areas on the lower Weser and Elbe and on the middle Elbe – primarily in Meissen, in the Magdeburg Bishopric area and in Brandenburg – brought about a gradual standardisation of the land improvement technology, demarcation of farmsteads and fields, as well as general legal principles of settlement, which were termed 'Flemish' or 'Dutch law', often swapping the terms over. No surprise, then, that historians long ago began seeking the origins of the broad legal principles of rural settlement in the native countries of former Dutch and Flemish colonisers.<sup>19</sup> Others, however, paid attention to the other settlement current, going from the south-western direction – namely, the Franconian colonisation which used a 'Franconian law'. The laws of rural settlement, produced

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<sup>19</sup> To quote the most important reference literature: Hendrik van den Linden, *De Cope. Bijdrage tot de rechtsgeschiedenis van de openlegging der Hollands-Utrechtsche laagvlakte* (Assen, 1955); reviewed by Adriaan Verhulst, *Revue Belge de Philologie et d'Histoire*, xxxv, 1 (1957), 161–6; Adriaan Verhulst, 'Die Binnenkolonisation und die Anfänge der Landgemeinde in Seeflandern', in Theodor Mayer (ed.), *Die Anfänge der Landgemeinde und ihr Wesen*, 2 vols. (Vorträge und Forschungen, 7/8, Stuttgart, 1964), i, 447–68; Johanna van Winter, 'Die Entstehung der Landgemeinde in der Holländisch-Utrechtschen Tiefebene', *ibidem*, i, 439–46; Franz Petri, 'Zum Problem der herrschaftlichen und genossenschaftlichen Züge in der mittelalterlichen Marschsiedlung an der flämischen und niederländischen Nordseeküste', in Helmut Beumann (ed.), *Historische Forschungen für Walter Schlesinger* (Cologne and Vienna, 1974), 226–41; Franz Petri, 'Entstehung und Verbreitung der niederländischen Marschkolonisation in Europa (mit Ausnahme der Ostsiedlung)', in Schlesinger (ed.), *Die deutsche Ostsiedlung*, 695–754.

by colonists of both currents, were so close that in Silesia, both terms were eventually replaced by 'German law'.<sup>20</sup>

It appeared necessary, in turn, to resort to still earlier sources out of which 'German law' evolved. The obvious guide in this search was mentions of colonisers enjoying personal freedom and hereditary right to land. The search led in two different directions: on the one hand, to the urban communes getting formed from the eleventh century onwards in the area between the Loire and the Rhine, where unrestricted hereditary landholding by possessors of the land appears (usually, preserving fixed rent for the land-lord); on the other, to still-earlier royal land grants to peasants under the hereditary law, with the duty of rent and military duties.

It is an obvious thing that in the course of historical processes that formed the cradle of deep economic and social transformations of Western Europe in the eleventh century, the influences of rural and urban forms of landed property were mutually intertwined and it was not before very long that an urban law grew distinct, dissimilar to the customs appearing in rural areas. Even in the thirteenth century, when a diversification existed between the urban and rural forms of social life, it was still far in numerous areas, especially those with new settlements, from complete separation of those forms – as has been proved, based on abundant material, by Karl A. Kroeschell.<sup>21</sup> I should however think that a search for the origins of those specific forms of the law of rural and urban settlement, which gained success in the great process of transformations of the face of Central Europe in twelfth to fourteenth century, is not a pointless effort. Even if we can realise that the processes under research form part of the changes taking part in the whole of Europe and we are aware that analogous forms of the right to land would be encountered everywhere, from England to Spain, then the chronological differences in their appearance and, at times, tiny or essential characteristic features open the

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<sup>20</sup> Walter Schlesinger, 'Bäuerliche Gemeindebildung in den mittelelbischen Landen im Zeitalter der mittelalterlichen deutschen Ostbewegung', in Mayer (ed.), *Die Anfänge der Landgemeinde*, ii, 46 ff., esp. 71 ff.

<sup>21</sup> Karl A. Kroeschell, 'Rodungssiedlung und Stadtgründung. Ländliches und städtisches Hagenrecht', *Blätter für deutsche Landesgeschichte*, 91 (1954), 53–73; *idem*, *Weichbild. Untersuchungen zur Struktur und Entstehung der mittelalterlichen Stadtgemeinde in Westfalen* (Forschungen zur deutschen Rechtsgeschichte, 3, Cologne and Graz, 1960), 1 ff.

opportunity, anyway, for tracing the routes along which the forms in question were propagated and, indirectly, for penetrating the people who have transferred those forms.

Due to the noted similarities between the merchant law and the later freedoms of German law, and to the terminological closeness of the Prague 'law of the Germans' and the law of settlements that was initially similarly described, let us first set about making an insight in the possibility of deriving free possession of land from the early-medieval merchant law (*ius mercatorum*).

## V

The already said autonomous groups of alien merchants in Bohemia and Hungary as well as in Scandinavian countries have genetically evolved from merchants' guilds<sup>22</sup> encountered in tenth-century German and French towns, whose origins date to still earlier time. Those guilds grouped merchants not really on an ethnical, but rather professional, basis: the latter was, in any case, related to the issue of personal freedom and its defence. Merchants in the early Middle Ages formed an alien factor in a feudalising society. They formed a mobile group and it was intrinsically impossible to have them bound to the land and dependent for good. After all, they were initially recruited – similarly to the twelfth-century merchants in Slavic countries – from foreign comers: Syrians, Greeks and Jews, and this facilitated their exclusion from the previous organisation of jurisdiction and system

<sup>22</sup> Cf. Henri Pirenne, 'L'origine des constitutions urbaines au Moyen Âge', in *idem, Les villes et les institutions urbaines*, 2 vols. (Paris and Brussels, 1939), i, 1 ff.; Karl Fröhlich, 'Kaufmannsgilden und Stadtverfassung im Mittelalter', in *Festschrift A. Schultze zum 70. Geburtstag dargebracht* (Weimar, 1934), 85 ff.; quoted here after the reprint, in Carl Haase (ed.), *Die Stadt des Mittelalters*, ii: *Recht und Verfassung* (Wege der Forschung, 244, Darmstadt, 1972), 11 ff.; Hans Planitz, 'Kaufmannsgilde und städtische Eidgenossenschaft in niederfränkischen Städten im 11. und 12. Jahrhundert', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung* [hereafter: ZSS GA], 60 (1940), 1 ff.; *idem, Die deutsche Stadt im Mittelalter, von der Römerzeit bis zu den Zunftkämpfen* (Graz and Cologne, 1954), 79 ff.; Emile Coornaert, 'Les ghildes médiévales (Ve–XIVe siècles)', *Revue Historique*, 199 (1948), 22–55; 208–43; François-Louis Ganshof, 'Einwohnergenossenschaft und Graf in den flandrischen Städten während des 12. Jahrhunderts', ZSS GA, 74 (1957); quoted here after the reprint, in Haase (ed.), *Die Stadt*, ii, 203 ff., esp. 206 ff. Again, I am only mentioning the main bibliographical items, currently of relevance.

of obligations to the state. However, the state proved able to draw benefits from their existence; the prerequisite was that their personal freedom and property needed to be recognised, and protected, by the king. In a feudalising society, any free individual who has settled in an alien land (and such was the land within urban areas too) was threatened with lost freedom by acquisitive prescription (according to the *Luft macht eigen* principle).<sup>23</sup> Hence the necessity of special laws, or rights, for the merchants.

As time went on, alien merchants grew permanently related with the specific markets and determined their domiciles. Their ranks were enlarged as merchants of local origin joined. The Carolingian period sources often refer to this category of people, with no more references to a foreign origin. Although some of those people could have come, and indeed came, from the enslaved, joining the merchant community's ranks led to legal recognition of personal freedom regardless of whether it was brought about in a legal manner (*manumissio*) or *via facti*. It was already in Louis the Pious' time that a separate merchants' group law existed, regulating the social status, obligations and rights of this particular group. The tenth century saw the guaranteeing, through a number of imperial charters, of personal freedom and of the privileges of those *negociatores* and *mercatores* among whom, apart from merchants as such, craftsmen appeared, selling their products and purchasing raw materials.<sup>24</sup> The importance of craftsmen in the communities of interest, getting formed then as merchant guilds, ought not to be overestimated: although craftsmanship did play an enormous role in the development of premises for emergence of towns, it was merchants that proved of primary importance in the shaping of bourgeoisie as a separate estate of the medieval society. Most of the craftsmen were subjects or serfs who operated within the framework of the demesnes of the king or of other feudal lords.

The *ius mercatorum* of the ninth and tenth century, ensuring personal freedom and inviolability of property of the individuals it

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<sup>23</sup> Fritz Rörig, 'Luft macht eigen. Eine verfassungsgeschichtliche Studie', in *Festgabe Gerhard Seeliger zum 60. Geburtstag dargebracht* (Leipzig, 1920), quoted here after the reprint, in Günther Franz (ed.), *Deutsches Bauerntum im Mittelalter* (Wege der Forschung, 416, Darmstadt, 1976), 232–57.

<sup>24</sup> Hans Planitz, 'Die deutsche Stadtgemeinde', *ZSS GA*, 64 (1944), 1 ff.; quoted here after the reprint, in Haase (ed.), *Die Stadt des Mittelalters*, ii, 55 ff.; on craftsmen, 63 ff.

extended to,<sup>25</sup> immediately preceded the privileges granted to alien merchants in the eleventh–twelfth century in Bohemia, Poland and Hungary. This law initially concerned people loosely related to their abode and possessing no land: protection of property initially extended to movable properties only. If, however, merchants settled for good in the major commercial centres, in the land owned by the municipality, they consequently had to acquire the land in a manner not bothering their personal freedom whilst enabling them to make use of the acquired piece of land at their sole discretion.

How has free and hereditary proprietorship of land evolved? Henri Pirenne satisfied himself at this point with a deduction: since the holder of an urban immovable property, a house, had to ensure himself the possession of the parcel within which the house was (to be) constructed, “the dominial land was turning, everywhere, into proprietorship limited by a rent, a rental allodium”. This author did not explain the evolution behind it, limiting himself to the remark that the process was first completed “in the land dependent on the public authority” (possibly, the king).<sup>26</sup> A more penetrating approach to ownership of land in Flanders towns was taken by Guillaume des Marez, a student of Pirenne’s, who aptly found that in order to learn how a town emerged, one needs to study the origin of the local proprietorship.<sup>27</sup> Instead, however, of looking for legal forms in which merchants’ possession of land in urban areas appeared, he assumed, on no evidence, that a merchant could not take possession of a parcel on the conditions of entering into a feudal dependence (albeit a number of such cases actually occurred in reality!). Hence, the rent *de mansionibus* paid in 941 by the merchants of the Ghent fair settlement (*portus*) was regarded by him not as a land rent but as a recognition levy, symbolising the recognition of the count’s judicial

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<sup>25</sup> Hans Planitz, ‘Frühgeschichte der deutschen Stadt’, ZSS GA, 63 (1943), 81 ff.; *idem*, ‘Handelsverkehr und Kaufmannsrecht im fränkischen Reich’, in *Festschrift Ernst Heymann zum 70. Geburtstag am 6. April 1940 überreicht von Freunden, Schülern und Fachgenossen*, 2 vols. (Weimar, 1940), i, 175–90 (this article was inaccessible to me); Pirenne, *Les villes et les institutions*, i, 65.

<sup>26</sup> Pirenne, *Les villes et les institutions*, i, 67; *idem*, *Les villes du Moyen Âge. Essai d’histoire économique et sociale* (Brussels, 1927), quoted here after the reprint in *idem*, *Les villes et les institutions*, i, 410.

<sup>27</sup> Guillaume Des Marez, *Étude sur la propriété foncière dans les villes du Moyen Âge* (Ghent and Paris, 1898), X.



authority.<sup>28</sup> Yet, Count Arnulf's document from the said year returns the rent to St Peter's Abbey, together with the tithe, which is an indication that this rent must have belonged to the convent before then, apparently as the land-lord of the appropriate part of the Ghent fair settlement.<sup>29</sup> We cannot learn anything of the character of this rent and the forms of tenure of land by the Ghent merchants from the Arnulf document; hence, we find it difficult to infer why Hendrijk van den Linden and Johanna M. van Winter interpreted it as the beginning of collective bestowals of land under the terms of full and free inheritability.

Hans Planitz advocated the view that inheritable and free landholding was derivable from the merchant law; he associated this type of land-holding with ownership of the building therein located.<sup>30</sup> The main basis for this view was the 1033 charter issued by Kadaloh, Bishop of Naumburg, to the merchants of Jena moving for good to Naumburg. The document indeed bestowed the merchants with a hereditary right to the parcels they would settle on, with an option to freely dispose of this land, without paying a rent. The Bishop only stipulated a *ius omnium mercatorum*, which denotes permanent tributes payable by the merchants to the town's lord, probably flat-rated already.<sup>31</sup> Contrary to what Planitz stated, however, this document implies no direct relation between the rights to the land granted to the comers and the merchant law,<sup>32</sup> moreover, we have earlier testimonies of free and inheritable landholding, which certainly did not ensue from membership of the recipients among the merchant group.

One could ask whether a source, or at least one of the sources, of the agreements for free inheritable landholding, subject to rent, ought to be sought in the remnants of the Roman Law tradition in the towns, remaining in a reduced form in the territory of the former

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<sup>28</sup> *Ibidem*, 13 ff.

<sup>29</sup> Ennen, *Frühgeschichte*, 184; Adriaan Verhulst, 'Die Frühgeschichte der Stadt Gent', in Werner Besch *et al.* (eds.), *Die Stadt in der europäischen Geschichte. Festschrift Edith Ennen* (Bonn, 1972), 108–37, argues that the *portus* area had previously belonged to St Bavo's Abbey, rather than St Peter's, and hence the land rent from the *portus* would have been vested in the former (cf. 125 ff., esp. 128).

<sup>30</sup> Planitz, 'Frühgeschichte', 83 ff.

<sup>31</sup> *Conradi II. Diplomata*, ed. Harry Bresslau, MGH, *Diplomata regum et imperatorum Germaniae*, iv (Hanover and Leipzig, 1909), no. 194, p. 258.

<sup>32</sup> Cf. the critique of Planitz's position in Kroeschell, *Weichbild*, 12 f.

Gaul; as is known, such forms have survived in Italy. Edith Ennen, who looked for models of the medieval urban commune in Mediterranean countries – especially in Italy, with its numerous institutions of the Roman Law, preserved in a reduced form<sup>33</sup> – has unfortunately not tackled the forms of landholding in towns.

The Frankish formularies of the eighth and ninth century, such as the formularies of Marculf (*Formulae Marculfi*) or Tours (*Formulae Turonenses*), comprise deeds of transfer of urban land (*area infra civitate*) limited by the adjacent parcels or minutely measured, in feet terms.<sup>34</sup> These doubtlessly are deeds of transfer of complete properties, maintained within the Roman Law rules. It is worth, however, to take a closer look at the transfer deed issuers, as per the formularies: these are bishops or other clergymen (each referred to as *frater*),<sup>35</sup> and so the rudiments of free bourgeois land proprietorship are hardly traceable there. It befits to remind that the frequently quoted example of Genoa's old legal customs, as approved in 958 by King Berengar II, was rather associated with the Longobardian law<sup>36</sup> and resembles the bestowals of royal land known from the Frankish sources.

Among the late-Roman forms of landholding developed in the early Middle Ages by ecclesial institutions, the *precaria* has become an object of interest to scholars.<sup>37</sup> It assumed various forms, and it is fairly easy to find such which are close to the later full and free inheritance. There was no personal dependence that a *precaria* implied. Of the forms of land holding being our focus here, the closest concept is

<sup>33</sup> Ennen, *Frühgeschichte*, 223 ff., 267 ff.

<sup>34</sup> Hans Strahm, 'Die Area in den Städten', *Schweizer Beiträge zur allgemeinen Geschichte*, iii (1945), 23 f.

<sup>35</sup> MGH, *Formulae Merowingici et Karolini Aevi*, ed. Karl Zeumer (Hanover, 1896), 90, 158. In Strahm's opinion, the Tours formulary's deed of transfer refers not to a complete property but only to hereditary usufruct, which would ensue from the statement *salvo iure ipsius terrae*; yet, this argument is not fully convincing.

<sup>36</sup> *Codice diplomatico della repubblica di Genova*, vol. 1, ed. Cesare Imperiale di Sant'Angelo (Rome, 1939), no. 1; Robert von Keller, *Freiheitsgarantien für Person und Eigentum im Mittelalter. Eine Studie zur Vorgeschichte moderner Verfassungsgrundrechte* (Heidelberg, 1933), III; Edith Ennen, *Die europäische Stadt des Mittelalters* (Göttingen, 1972), 82, 128, also speaks against a Roman-Byzantine origin of these forms.

<sup>37</sup> The relation of *precaria* with the Roman *precarium* has been impugned, in any case; cf. Artur Steinwenter, 'Das Fortleben der römischen Institutionen im Mittelalter', in *X Congresso Internazionale di Scienze Storiche, Roma 4–11 Settembre 1955: Relazioni*, i: *Metodologia. Problemi generali. Scienze ausiliari* (Florence, 1955), 538.

the *precaria data* – a possession bestowed on temporal or life usufruct, usually in exchange of certain defined benefits (rent or performance of a service). The *precaria* of this sort rarely appears in the sources, though, as it was soon ousted by the akin form of benefice. The longer-lasting *precaria oblata* and *precaria remuneratoria* admitted inheritance in exceptional cases only, being instead, in principle, forms of life estate.<sup>38</sup>

Karl Lamprecht was the first to have focused on benefice as a form of landholding which did not imply lost personal freedom and, as a general rule, admitted inheritance under the condition of fulfilment of certain specified functions or duties related to such benefice.<sup>39</sup> He obviously realised that this particular form had been subject to multidirectional development and filled with a varying social content: it was benefice that became the germ of clerical and knightly fief as well as of ministerials' feuds. The term 'benefice' was also used to denote hereditary farm-holdings of servile peasants (*beneficium quod lazgūt dicitur, feodum servile*). Lamprecht got particularly interested in the benefices granted for rent, which initially were scarce in number (at least, according to the surviving sources) and limited to rather small estates, and were moreover exposed to be classed in the lower category of *feoda servilia*. All the same

it was an institution whose application, in the form of hereditary holding, had to increase as the old system of great landed property, based on compulsory attachment to the land, receded.<sup>40</sup>

This form became particularly widespread in viticulture, which called for the peasant's personal involvement in tending a vineyard.

Similar results were elaborated by Ernst von Schwind, who had subject to analysis numerous land bestowal deeds from the Rhineland area in the tenth to thirteenth century. He also sought for the origins of free hereditary holding of land for rent in the various forms of feudal law, highlighting its heterogeneity and lack of strict borders between

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<sup>38</sup> Karl Lamprecht, *Deutsches Wirtschaftsleben im Mittelalter*, 3 vols. (Leipzig, 1885–6), i, pt. 2, pp. 891 ff.; Ernst von Schwind, *Zur Entstehungsgeschichte der freien Erbleihen in den Rheingegenden und den Gebieten der nördlichen deutschen Kolonisation des Mittelalters. Eine rechtsgeschichtliche Studie* (Breslau, 1891), 85.

<sup>39</sup> Lamprecht, *Deutsches Wirtschaftsleben*, i, pt. 2, p. 900 ff.

<sup>40</sup> *Ibidem*, 902.

the peasant and knightly holding, and between the free and unfree tenures.<sup>41</sup> Feudal homages paid in some cases by peasants,<sup>42</sup> as well as peasant farms bestowed to Church institutions on the same terms as applied prior thereto to their peasant owners,<sup>43</sup> testify to the fact that free hereditary holding of land by peasants could have been originated in the feudal forms. E. v. Schwind associates the emergence of settlement freedoms with this particular branch of the feudal law development.<sup>44</sup>

Also referring to the early-feudal forms of land holding as a source for the subsequent free forms of possession in the rural and urban areas, Siegfried Rietschel emphasised the importance of benefice. However, he also indicated the transformation, occurring in the eleventh century, of other forms of precaria into hereditary possession.<sup>45</sup> This author has introduced a differentiation between ordinary endowment of land under the hereditary law (*freie Erbleihe*), applied with respect to individual farms, urban parcels, as well as mills, inns, houses, and the like, and collective bestowal of land to settlers (*Gründerleihe*). In the former case, the contractual terms strictly correspond with the value of the property in question; in the latter, the conditions ensue from generally accepted, pre-existing principles, normally accompanied by public-law provisions with respect to the new commune.<sup>46</sup> This distinction concerns, however, the posterior stages of development, at which a free settlement law got shaped. Rietschel does not deny at all that the *Gründerleihe* could have been a purposeful adaptation of the earlier forms of the *freie Erbleihe* to the needs of colonisation actions organised on a large scale.<sup>47</sup>

## VI

The older research, part of which was the studies by Lamprecht, v. Schwind, and Rietschel, was mainly based on ecclesiastical sources and avoided to extend the analysis of sources of free hereditary

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<sup>41</sup> Schwind, *Zur Entstehungsgeschichte*, 90 ff.

<sup>42</sup> *Ibidem*, 95 f.

<sup>43</sup> *Ibidem*, 102 f.

<sup>44</sup> *Ibidem*, 105 f.

<sup>45</sup> Siegfried Rietschel, 'Die Entstehung der freien Erbleihe', ZSS GA, 22 (1901), 201 ff.

<sup>46</sup> *Ibidem*, 187 ff. For a critique of this differentiation, cf. Strahm, 'Die Area', 37 f.

<sup>47</sup> Rietschel, 'Die Entstehung', 190.

holding of land to royal benefices, connected with military obligations. It was only the restarted discussion on the structure of the Frankish society in the early Middle Ages, and on the origins of the free peasantry appearing in Carolingian sources, that drew the scholars' attention to the action of colonising the uninhabited borderland areas, deemed to be the royal land, or in other areas of strategic importance, with free peasants, which was pursued by the Frankish kings, and by Longobardian ones too.<sup>48</sup> I leave aside here the polemics on the origins of free peasantry in the Carolingian period. Regardless of whether one derives the mass of those free people from the former free Germanic populace, which I am personally inclined to accept,<sup>49</sup> or – following the opponents of this view – one would regard them as a rather new formation of social practice, the occurrence of royal colonisation in the state's peripheries is absolutely doubtless. The people who were settled down in that area are described by the German historians as 'the free royal' (*Königsfreie*), as their freedom and proprietorship were limited by the obligations to the king, among which military service played a very important part. The Frankish sources mention these people simply as 'free Franks' (*franci homines, friero Frankono*) and they are hard to discern from the free people from the old settlement areas. In many a case, however, traceable are

<sup>48</sup> Theodor Mayer, 'Königtum und Gemeinfreiheit im frühen Mittelalter', *Deutsches Archiv für Erforschung des Mittelalters*, vi (1943), 329–66; *idem*, 'Bemerkungen und Nachträge zum Problem der freien Bauern', *Zeitschrift für württembergische Landesgeschichte*, xiii (1954), 46–70; both articles are quoted here after the reprint, in *idem*, *Mittelalterliche Studien. Gesammelte Aufsätze* (Lindau and Konstanz, 1959), 139–63, 164–79; Heinrich Dannenbauer, 'Die Freien im karolingischen Heer', in *Aus Verfassung- und Landesgeschichte. Festschrift für Theodor Mayer*, 2 vols. (Lindau and Konstanz, 1954), i, 49–64; quoted after *idem*, *Grundlagen der mittelalterlichen Welt. Skizzen und Studien* (Stuttgart, 1958), 240–56; *idem*, 'Königsfreie und Ministerialen', *ibidem*, 329–53; Karl Bosl, 'Freiheit und Unfreiheit. Zur Entwicklung der Unterschichten in Deutschland und Frankreich während des Mittelalters', *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte* [hereafter: VjSWG], xlv (1957), 193–219; quoted after *idem*, *Frühformen der Gesellschaft im mittelalterlichen Europa* (Munich and Vienna, 1964), 180–203; Walter Schlesinger, *Die Entstehung der Landesherrschaft. Untersuchungen vorwiegend nach mitteldeutschen Quellen* (Dresden, 1941), 79 ff.

<sup>49</sup> The reader is kindly referred to a well-documented defence of this statement in Eckhard Müller-Mertens, *Karl der Grosse, Ludwig der Fromme und die Freien. Wer waren die 'liberi homines' der karolingischen Kapitularien, 742/743–832? Ein Beitrag zur Sozialgeschichte und Sozialpolitik des Frankenreiches* (Berlin, 1963).

the subsequent vicissitudes of those free royal peasants whose heirs were – a rather legitimate guess – the so-called *Bargilden* from the Würzburg vicinity, the *Barschalken* of Bavaria, free Swiss peasants, or the *Biergeld*en of the eastern Saxony.<sup>50</sup>

Most of the free royal people lost their privileged position resulting from the transferral of their duties by the king to his vassals or to the Church, and were equalised to the serf peasants; those have primarily survived whose military duties lasted the longest. In the Saxon dynasty period, Germany saw the emergence of new groups of military colonisers – chiefly, the *milites agrarii*, settled by Henry I on the frontier area between Thüringen and Slavic lands, along with the *marcomanni* who had an analogous function in Holstein.<sup>51</sup> A direct continuance can seemingly be found between the military settlement trend in question and certain groups of late-medieval free peasants, the Swiss in the forefront. Heinrich Dannenbauer sees the freedoms enjoyed by this peasantry group as the origination of the posterior freedoms of the settlers grubbing out and colonising the primeval-forest areas. Theodor Mayer and Karl Bosl took a much more cautious approach here, the latter seeing no direct continuation whatsoever.<sup>52</sup>

The obligations of Carolingian settlers mostly consisted of military duties (warfare service, watch and guard, provision of post horses, mending of bridges), against which the role of rent was not significant. The purpose of the colonisation action in the eighth and ninth century was, primarily, to secure the border zone and strategically important roads (especially, the Alpine passes); expansion of acreage and clearing primeval forest was of secondary importance. This colonisation action is hard to assess in numerical terms, as the main

<sup>50</sup> An analogous case is that of the fugitives from the Visigoth Spain subdued by the Arabs, settled by the Carolingians in Aquitaine (*aprisionarii*) and the Longobardian military colonists settling in spots of strategic importance, mainly in the eastern borderland (*arimanni*). Patterns for this military settlement have recently been sought in Byzantine settlement, which itself had inherited the Roman models. Cf. Mayer, 'Königtum', 148 ff.; *idem*, 'Bemerkungen', 167 f.; Heinrich Dannenbauer, 'Freigrafschaften und Freigerichte', in *Das Problem der Freiheit in der deutschen und schweizerischen Geschichte* (Vorträge und Forschungen, 2, Lindau, 1955), quoted here after the reprint in *idem*, *Grundlagen* 309–28; Müller-Mertens, *Karl der Grosse*, 61 ff., 74 ff.

<sup>51</sup> Dannenbauer, 'Königsfreie', 342 f.

<sup>52</sup> Dannenbauer, 'Freigrafschaften', 324 f.; Mayer, 'Bemerkungen', 172 f.; Bosl, 'Freiheit', 195.

students of the problem expand the notion of *Königsfreie* to all the free peasants appearing in the Carolingian sources.

It seems that Th. Mayer has aptly separated the points of departure and the functions of the Carolingian settlement and of the later clearings of land.<sup>53</sup> In the eleventh to twelfth centuries, it was no more the military duties, redundant in face of a different organisation of the military system, founded on the mounted feudal knighthood, but rather, enlargement of acreage, farming output, population, income based on landed estates became the purpose of settling peasants under the rights of free colonists. This time, kings were not the only ones to have organised the settlement action;<sup>54</sup> monasteries, bishops and dukes took it up as they sought to increase their gains and prestige. Let us add, though, that the survival of certain older groups of free peasantry (the *Bargilden*, *Biergelden*, *Barschalken*) provided the models for a legal shaping of the new settlement. On the other hand, towns have provided an important element, being the hubs where groups of free people, gaining in importance, existed and unrestricted forms of land holding were disseminated.

## VII

The origins of settlement freedoms in the economically leading areas between the Rhine and the Seine are observable in the tenth century. Apart from the possible survival of the older settlement of free royal peasants, whose side purpose was, as we saw it, to colonise the unpopulated areas, group privileges appeared, bestowed by the kings (and, by the Church, later on also by the aristocrats) to those settlers who assumed the task of developing the wastelands. The freedoms of free royal peasants and the hereditary form of land holding under permanent conditions, as shaped within the precaria/benefice system, formed the main content of those privileges, which only gradually became assuming more crystallised forms. Initially, the scope of

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<sup>53</sup> Mayer, 'Bemerkungen', 166. Similarly, in Bosl, 'Freiheit', 193 ff.

<sup>54</sup> E. Molitor associates the enigmatic category of the Saxon *Pfleghaften*, free royal peasants, with the colonisation-and-clearing action taken by Henry IV in the forest areas which were meant to be the basis of a new Saxon royal domain. This conjecture must remain hypothetical, though. Cf. Erich Molitor, *Die Pfleghaften des Sachsenspiegels und das Siedelrecht im sächsischen Stammesgebiet* (Forschungen zum deutschen Recht, iv, 2, Weimar, 1941), 108 ff.

freedoms and the amount of rent differed much depending on the local conditions: particularly hard terrain and small supply of people willing to undertake a colonising effort forced feudal lords to be more munificent. In the lands with greater populations and lesser grubbing or land improvement possibilities, the settlers had to decide to accept the worse conditions, or to wander instead to more remote countries, offering them better opportunities.

Research into the origins of the law of rural settlement proves quite complex as it evolved by way of oral bestowals and arrangements, not set in precise terms in writing. It usually was only the colonists arriving from more distant countries that endeavoured to secure the oral agreement with its documented form, which of course was not a rule. Apart from a relatively abundant source base documenting Flemish/Dutch colonisation in north-western and eastern Germany, we encounter no similar documentation for the beginnings of colonisation of wastelands in Flanders and Holland, not to mention an almost complete lack of written privileges for the other powerful colonisation movement, referred to as the Franconian one.

The scarce oldest documents come from Church archives: although we can guess that the king settled more colonisers in his spacious forest estates, he used no writing in the relations with his peasants. Probably, a public announcement of the king's decision sufficed the purpose. It seems that the earliest document concerning the granting of land to a group of peasants in order to develop it, with hereditary usufruct right and fixed-rate rent, is the charter of Rotbert, archbishop of Trier, of 29 February 952. He bestowed a land in Bidgau on the Lieser, a tributary of the Mosel, to his steward Wido and his companions (*cum suis paribus*), in order for them to set up vineyards there. The rent was a mere 4 buckets (*situlas*) of wine per annum, the possessors not only having the right to inherit the farms but also to sell or otherwise alienate them.<sup>55</sup>

In the areas between the Rhine, Mosel and Meuse, a considerable number of rural settlements enjoying the settlement-related freedoms – incl. hereditary holding of land for fixed rent, personal freedom, and even self-government – existed probably in as early as the eleventh century. More detailed information on the order of those villages

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<sup>55</sup> *Quellen zur Geschichte des deutschen Bauernstandes im Mittelalter*, ed. Günther Franz (Darmstadt, 1967), no. 45.



date to a later time, but their origins, in the opinion of a considerable number of scholars, date to the eleventh century. This type was described as *libertates*, the equivalents being: *franchises*, *Freiheiten*, *Vrijheiden*; it mainly appeared in the area of Luxembourg (in its historical limits) and in the neighbouring Rhineland territory, north of Eifel and Westerwald and in Flanders. The counterpart term south of the said mountain range was *vallis* – *val* – *Tal*. The description *villes neuves*, appearing from twelfth century onwards in, basically, the Romance language area, is of somewhat later date.<sup>56</sup> Franz Steinbach argues that the settlement freedom principles referred to as *libertas*, *etc.*, were more-or-less established in as early as the eleventh century, as the earliest surviving urban privilege of the Leodium bishop for the town of Huy defines the freedoms granted as *libertas ville*.<sup>57</sup> Karl A. Kroeschell identifies the Westphalian and Lower-Saxon *Weichbilds* (*vicbolde*), quite often referred to as *Freiheit* (*vryheide*), as an equivalent of those *libertates*. It has to be added here that the Saxon *Weichbilds* are, in this sense, a late imitation of the western *libertates*, with the urban law having had a considerable impact on their shaping.<sup>58</sup>

Guests, the *hospites*, occupied an important place in this colonisation movement in the West: the term obviously refers not to dwellers of towns, denoted in a similar way, but to a category of rural people.<sup>59</sup> This category had appeared in the Carolingian period too, but played no important part at that time. The name referred to free landless people who undertook temporary leasehold in various types of estate. Their longer stay in the same place usually made them exposed to a loss of personal freedom. It was only in the eleventh century, the moment individual rulers took the action of development

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<sup>56</sup> Otto A. Kilmayer, *Die Dorfbefreiung im deutschen Sprachgebiet* (Bonn, 1931), *passim*; Walther Maas, 'Loi de Beaumont und "ius Teutonicum"', *VjSWG*, xxxii (1939), 209–27; Paul Bonenfant, 'La fondation de "villes neuves" en Brabant au Moyen Âge', *ibidem*, xlix (1962), 145–70.

<sup>57</sup> Franz Steinbach, 'Stadtgemeinde', 26. Cf. André Joris, *La ville de Huy au Moyen Âge. Des origines à la fin du XIVe siècle* (Bibliothèque de la Faculté de philosophie et lettres de l'Université de Liège, 152, Paris, 1959), 479 ff.

<sup>58</sup> Kroeschell, 'Rodungssiedlung', 70; *idem*, *Weichbild*, *passim* (the earliest example dates to 1178). The opposite view is in Heinz Stoob, 'Minderstädte. Formen der Stadtentstehung im Spätmittelalter', *VjSWG*, xlvii (1959), 25 ff.

<sup>59</sup> Henri Sée, *Les „hôtes" et les progrès des classes rurales en France au Moyen Âge* (Paris, 1898); Stefan Ingot, 'Hospites we Francji i Belgii na tle współczesnej epoki', *Kwartalnik Historyczny*, xlii, 1 (1928), 1–28.

of non-utilised areas which were to expand the range of their demesnes and multiply their income, that in exchange of their ensured permanent freedom, *hospites* provided the first human resources for those undertakings. Their ranks expanded thanks to a permanent inflow of fugitives from various feudal estates and a legal outflow of the younger sons from peasant holdings.

The eleventh century saw the launch of drainage of the seaside areas of Flanders and, subsequently, Holland. The scant source references available seem to imply that the action was organised by the counts, treating the wasteland as part of their own demesne; the counts of Flanders engaged some monasteries in the project. The drainage operation was taken up by the *hospites*, brought along by the counts. Their privileges are known to us, unfortunately, only from thirteenth-century accounts, and it is hard to state what rights they actually had at the outset of the idle-land development action.<sup>60</sup> In any case, it was already then that they formed teams collaborating in the construction of canals, dykes and embankments: Franz Petri perceives those teams as a continued tradition of the Carolingian guilds (*conjuraciones*).<sup>61</sup> Petri's supposition that those 'guests' were of a Frisian origin, seems rather plausible, at least for Holland.<sup>62</sup> This would be confirmed by an enormous mobility of the Frisians in the last three centuries of the first millennium AD (including in the area of trading), and their expertise in canal and dyke construction technology. However, in Friesland proper there were no conditions for reclaiming waterlogged areas for agriculture; on the contrary, the coastal areas were increasingly destroyed in eleventh–twelfth century by inundations of the Northern Sea.<sup>63</sup> It was probably then that a part of Frisian peasants migrated to Flanders and Holland; in twelfth century, the Frisians took part also in the colonisation of Wagria; Helmold of Bosau mentions their presence there.

It was in the areas of Flanders and Holland that the principles of the law of rural settlement evolved, which gained the highest popularity

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<sup>60</sup> Verhulst, 'Die Binnenkolonisation', 449 ff.; Michel Mollat, 'Les hôtes de l'abbaye de Bourbourg', in *Mélanges d'histoire du moyen âge dédiés à la mémoire de Louis Halphen* (Paris, 1951), 513–21.

<sup>61</sup> Petri, 'Entstehung', 705 f.; *idem*, 'Zum Problem', 233.

<sup>62</sup> *Idem*, 'Entstehung', 707.

<sup>63</sup> *Idem*, 'Zum Problem', 239 ff. (after: Wilfried Ehbrecht, *Landesherrschaft und Klosterwesen im ostfriesischen Fivelgo* [Münster, 1974]).

later on in Central Europe. Moreover, the land improvement techniques developed there, along with the rules of rational organisation of the spatial layout and social life of the newly established settlements. Beginning with the time of Baldwin V (1036–67), the land improvement and settlement movement in the coastal Flanders assumed a great size. Archbishop Gervaise of Rheims commended the count on having turned the wasteland into a soil more fecund than the intrinsically fertile grounds.<sup>64</sup> Baldwin V supported the colonisation action pursued by monasteries (Bergues-St Winnoc and St Bertin), granting their guests privileges analogous to those offered to the counts' guests.<sup>65</sup> The drainage action progressed on a great scale in the twelfth century, the time of Charles the Good and of Dietrich and Philip, the first Alsatian dynasty counts.<sup>66</sup>

The Dutch scholars Hendrik van den Linden and, following him, Johanna van Winter,<sup>67</sup> are inclined to track the origins of wasteland development projects in Holland back to the tenth century, with the rules of free hereditary holding of land, imported from Flanders, proving helpful to this end. The numerous objections with respect to such an early dating cannot challenge the fact that it was already in 1063, as convincingly proved by van den Linden, that settlement evolved north of the Old Rhine (Oude Rijn). Its principles formed the immediate source for the so-called 'Dutch law', which in the later period evolved in the lands on the Weser and Elbe. It was there that settlement forms evolved which were later on reapplied in Lower Germany. Van den Linden's studies have shown that the area on the Old Rhine, the villages of Leimuider, Rijnsaterwoude and Esselijkerwoude was the hub of the Dutch colonisers who in 1106 (or, as adjusted by A. Koch, in 1113) entered into an agreement with Friedrich, the archbishop of Hamburg-Bremen, for dehydration of the areas on the lower Weser.<sup>68</sup>

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<sup>64</sup> *Ex miraculis S. Donatiani Brugensibus*, ed. Oswald Holder-Egger, MGH, *Scriptores*, xv, pt. 2 (Hanover, 1888), 854–8.

<sup>65</sup> *Actes des comtes de Flandre 1071–1128*, ed. Fernand Vercauteren (Brussels, 1938), nos. 87, 105. Cf. Petri, 'Entstehung', 700 ff.

<sup>66</sup> Adriaan Verhulst, 'Initiative comtale et développement économique en Flandre au XIIe siècle: le rôle de Thierry et de Philippe d'Alsace', in *Miscellanea mediaevalia in memoriam Jan Frederik Niermeyer* (Groningen, 1967), 227–40.

<sup>67</sup> Cf. fn. 19.

<sup>68</sup> UEQ, i, 1. Cf. A.C.F. Koch (ed.), *Oorkondenboek van Holland en Zeeland tot 1299*, i: *Eind 7e eeuw tot 1222* ('s-Gravenhage, 1970), no. 334.

This time, the contract was made in a written form. From this moment onwards, the development is traceable, at least partly, of legal rules of settlement on the hereditary law, which was organised in self-governing settlements and was crowned in the thirteenth century by the emergence of so-called German law.

This is not the fit place for detailing the abundant output of more than 150 years of studies on Dutch and Flemish settlement in northern Germany, on the Elbe and on the Saxon-Slavic borderland – the stages of this research being marked by the names of August von Wersébe, H. de Borchgrave and Richard Schröder, with the contributions by J. van Winter and, particularly, Walter Schlesinger. The (relatively) abundant documentation in the form of contracts and settlement charters enables to determine that the term ‘Dutch law’ appeared since 1149 (“*iustitia qualem Hollandensis populus circa Stadium habere consuevit*”).<sup>69</sup> It referred at that time both to the specific legal customs, brought along by the immigrants from their native country, and, in the first place, a complex of privileges vested in them: personal freedom, hereditary possession of land with a fixed rent (often defined in the relevant document), self-governed autonomy with an own court-of-law. Since this set of privileges was vested in Dutch as well as Flemish settlers, twelfth-century documents more and more often confused the colonists from the two countries. A 1152 charter of the bishop of Naumburg Wichmann von Seeburg (who later was appointed archbishop of Magdeburg)<sup>70</sup> enumerates the “*populum de terra que Hollanth nominator*” as settlers, but the name of the village, Flemmingen, irrefutably implies that they were Flemish. For the local German milieu, with the issuers of the documents in the forefront, the origin of the immigrants was irrelevant: of importance was only their distinguished privileged position, to which, exactly, the name of ‘the Dutch’ or ‘the Flemish’ referred. This is how the description “*Hollandini qui et Flamingi nuncupantur*” possibly evolved.<sup>71</sup>

The term *ius Hollandicum* – ‘Dutch law’ – appears already in 1171 in a document of Duke Henry the Lion, thus testifying to the law getting detached from its foreign carriers.<sup>72</sup> Indeed, as noticed by

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<sup>69</sup> UEQ, i, 2.

<sup>70</sup> UEQ, i, 5.

<sup>71</sup> van Winter, ‘Vlaams’, 208 f.

<sup>72</sup> UEQ, i, 3.

J. van Winter, the 'Dutch law' in that document does not relate to Dutch colonists: Friedrich of Mackenstedt, the settlement *locator*, had the right to provide the farms *quibuslibet emptoribus*.<sup>73</sup> The 'Dutch law' privileges extended ever since also to German peasants who received land on analogous terms. Clearly, they would not take over the Dutch judicial customs, applying the Saxon custom, instead.

While the Dutch and the Flemish applied settlement forms imported from their home country to the marshy areas they drained – regular rectangular strips separated by ditches, perpendicular to the main duct and the lane set along it (so-called *Marschhufendörfer*) – in other types of environment, they introduced an arable-based field system, related to three-field rotation, and a settlement layout in the form of a linear village. The latter was not exclusively related to their colonisation, of course.

## VIII

The colonisation current flowing eastwards from the Netherlands, and its accompanying Flemish-Dutch law, are quite profusely documented by twelfth-century sources. Still, our knowledge is much poorer with respect to the origins and development of the southern current, which from Swabia and Hessen, through Upper Franconia, the Saxon-Thüringen borderland and Meissen reached Silesia and the southern mountainside of the Ore Mountains and Sudetes. Connected with this current is the notion of 'Franconian law', appearing in Meissen and Silesia; it could have, naturally, evolved when already there, after the colonisers left the area it had first developed in. Unfortunately, the 'Franconian' current did not leave much trace in the twelfth-century documentary material: it would even be quite a well-informed guess that no documents were issued to accompany the settlement foundations of this sort.

Karl Weller once endeavoured to find in Swabia the traces of scheduled colonisation undertaken by Friedrich Barbarossa and his

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<sup>73</sup> van Winter, 'Vlaams', 209 f.; Schwind, *Zur Entstehungsgeschichte*, 136 f., also identified the charter of Hamburg Archbishop Adalberon, 1142 (UEQ, i, 24), as an instance of colonisation following the Dutch model, featuring the local peasants; servile peasants also appear, and there is an even stronger emphasis on the feudal lord's right to the peasant land. Also, cf. Molitor, *Die Pflughaften*, 164 ff.

successors: this would have been a continued Carolingian action of settling free peasants in the royal land – the difference being that those peasants were no more bound to do military service.<sup>74</sup> Weller did not, however, manage to support his supposition with a larger portion of evidence; H. Dannenbauer called into question a considerable part of the examples he had quoted, as an earlier Carolingian settlement.<sup>75</sup> Weller's concept of a planned colonisation action pursued by the Hohenstaufen was nonetheless taken up by Walter Schlesinger, who indicated that they created large demesnes in eastern Franconia, Vogtland, and Pleissnerland.<sup>76</sup> The plausibility of such an action is reinforced by the fact that in a close vicinity, between the Pleisse and the Mulda, a colonisation action was carried out at the very outset of the twelfth century by Count Wiprecht of Groitzsch, who, we are told by the *Annales Pegavienses*, brought the settlers down from Franconia.<sup>77</sup> Nothing in specific is known to us about those settlers' law, but their personal liberty is supported by the fact that the settlements they founded were specified using the names of their leaders.

This action was not the only such. At that same time, the archbishops of Mainz pursued a colonisation action in the vicinity of Erfurt. It cannot be stated for certain where the settlers came from, but the name Frankenrode appears (as of 1104), i.a., among the villages set up in the cleared area.<sup>78</sup> The colonists were regarded as free people and they owned their farms under the hereditary law. It is them who are meant by the reference from Archbishop Ruthard's document of 1108, mentioning a "quedam novalia in Thuringia iuxta

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<sup>74</sup> Karl Weller, 'Die freien Bauern in Schwaben', ZSS GA, 54 (1934), 178–226, esp. 186 f.

<sup>75</sup> Dannenbauer, 'Freigrafschaften', 326 f.

<sup>76</sup> Walter Schlesinger, 'Egerland, Vogtland, Pleissnerland. Zur Geschichte des Reichsgutes im mitteldeutschen Osten', in Rudolf Kötzschke (ed.), *Forschungen zur Geschichte Sachsens und Böhmens* (Dresden, 1937), quoted here after the reprint in Walter Schlesinger, *Mitteldeutsche Beiträge zur deutschen Verfassungsgeschichte des Mittelalters* (Göttingen, 1961), 204 ff.

<sup>77</sup> *Annales Pegavienses et Bosovienses*, ed. Georg H. Pertz, MGH, *Scriptores*, xvi (Hanover, 1859), 247; cf. a reprint in UEQ, i, no. 37, p. 168.

<sup>78</sup> Alfred Overmann (ed.), *Urkundenbuch der Erfurter Stifter und Klöster* [hereafter: UB Erf. Stifter], pt. 1: (706–1330) (Geschichtsquellen der Provinz Sachsen und des Freistaates Anhalt, Neue Reihe, 5, Magdeburg, 1926), no. 6.

Erfesphurt", the annual rent whereupon equalled 6.5 pounds.<sup>79</sup> One comes across those settlers in Erfurt itself, as "people of varied origin and standing", being all the same regarded as "free men" (*liberi viri*); they were granted a special *libertas et iustitia*, whilst their farms were referred to as the *freigut*.<sup>80</sup> The colonisation in the Thüringen area was also carried out by the Ludowinger counts; the Reinhardsbrunn Abbey's tradition has preserved the appraisal of Louis the Bearded, the dynasty's founder (ca. mid-eleventh century), as an enterprising organiser of the deforestation and colonisation action.<sup>81</sup>

Karl A. Kroeschell, the author of several outstanding analytical studies on the laws of rural and urban settlement, has suggested that the 'Franconian law', which paved the way for itself to the East through Wiprecht of Groitzsch's colonisation activity, evolved from the so-called 'forest law' appearing in the territory of Hessen (the *Waldrecht – ius silvaticum, nemorale*, described at times also as *ius indaginis*).<sup>82</sup> The term stands for a settlement law which was granted to peasants clearing forest areas. Some details on the law's content are known to us based on thirteenth-century documents; no written charters had probably been issued before then. A mention has survived, though, of the bestowal in 1128 by Abbot Henry of Fulda of settlement-related freedoms to the peasants of Bramforst near Hunfeld. They received a twelve-year exemption from charges following which they were obligated to pay a fixed rent in cash (20 *talenta* per year). They were granted a judicial autonomy under the rule of an electable *villicus*, and were meant to inherit the farms conditional upon having paid an inheritance tribute (*Besthaupt*).<sup>83</sup>

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<sup>79</sup> Heinrich Beyer (ed.), *Urkundenbuch zur Geschichte der jetzt die Preussischen Regierungsbezirke Coblenz und Trier bildenden mittelrheinischen Territorien*, 3 vols. (Quellen zur mittelrheinischen Geschichte und Landeskunde Koblenz, 1860–74), i, no. 413.

<sup>80</sup> Carl Beyer (ed.), *Urkundenbuch der Stadt Erfurt*, 2 vols. (Geschichtsquellen der Provinz Sachsen und angrenzender Gebiete, 23, Halle, 1889–97), pt. 1, no. 9 (1108); UB Erf. Stifter, pt. 1, no. 11 (1116).

<sup>81</sup> *Historia brevis principum Thuringiae*, ed. Georg Waitz, MGH, *Scriptores*, xxiv (Hanover, 1879), 820; *Cronica Reinhardsbrunnensis*, ed. Oswald Holder-Egger, MGH, *Scriptores*, xxx, 1 (Hanover, 1896), 518.

<sup>82</sup> Kroeschell, 'Rodungssiedlung', 72, fn. 98.

<sup>83</sup> Ernst F. J. Dronke (ed.), *Traditiones et antiquitates Fuldenses* (Fulda, 1844), chap. 67, p. 145 f.

Strictly related with the Franconian forest law is the Lower-Saxon *Hägerrecht* (*Hagenrecht*); Latin documents often described both as *ius indaginis*. The area of *Hägerrecht*'s occurrence directly bordered on the *Waldrecht* areas.<sup>84</sup> It seems probable that what one deals with here is expansion of the Franconian colonisation to the Lower-Saxon territory – and, in the first place, transferral into this territory of the Franconian settlement forms and privileges vested in the settlers.

We are fortunate to have with us an extant charter issued ca. 1133–7 by Bernard, bishop of Hildesheim, reapproving the rights granted to the Eschershausen colonists by Bishop Udo, one of Bernard's predecessors (1079–1114).<sup>85</sup> The document does not define the settlers' origin but mentions them as immigrants (*advene, advena populus, exules*), as opposed to the local *homines ecclesie*. E. v. Schwind and, following him, R. Kötzschke identified those people as Dutch or Flemish,<sup>86</sup> but the legal regulations specified in that charter do not correspond with the Dutch privileges known from other contemporary documents. The colonists' freedoms appear much more restricted here, and rather closer to the aforesaid Bramforst charter, whilst it primarily differs from the latter by a lack of electable *villicus* (the colonists being subject to the bishop's village mayor).

K. A. Kroeschell expressed his doubt as to the relation of Eschershausen peasants' rights with the posterior *Hägerrecht*, pointing out to certain serious differences<sup>87</sup>. However, more complete information on the latter date to the late Middle Ages, whereas in the course of the centuries between then and Bishop Udo's time, one has to take into account the changes in the law's content, informed by external circumstances and internal developmental logic. It has to be empha-

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<sup>84</sup> Wolfgang Metz, 'Waldrecht, Hägerrecht und Medem', *Zeitschrift für Agrargeschichte und Agrarsoziologie*, 1 (1953), 106; Karl A. Kroeschell, 'Waldrecht und Landsiedelrecht im Kasseler Raum', *Hessisches Jahrbuch für Landesgeschichte*, iv (1954), 131 f., 134 f. For the contrary findings, see: Erich Molitor, 'Verbreitung und Bedeutung des Hägerrechts', in Theodor Mayer (ed.), *Adel und Bauern im deutschen Staat des Mittelalters* (Leipzig, 1943), 331–45, where the *Hägerrecht* is considered to have been a law of settlement emerged in Lower Saxony under a Netherlandic influence.

<sup>85</sup> UEQ, i, 23.

<sup>86</sup> Schwind, *Zur Entstehungsgeschichte*, 129 ff.; Rudolf Kötzschke (ed.), *Quellen zur Geschichte der ostdeutschen Kolonisation im 12. bis 14. Jahrhundert* (Leipzig, 1912), no. 2.

<sup>87</sup> Kroeschell, 'Waldrecht', 119, fn. 18.



sised that the term *ius indaginis* was used neither in Eschershausen nor in Bramforst, which is also true for *ius hegerorum*, a still later name. Similarly to the *ius Franconicum* of the Ore Mountains/Sudetes foothill settlers, the *Hägerrecht* proves to be one of the further stages of development of the primary Franconian law of rural settlement.

A role of importance was played by this law's association with settlement forms that took shape in the course of colonisation of eastern-Franconian lands, namely, forest-field villages. The *Waldhufendörfer*, appearing in the Franconian colonisation area, east of the Saale, and the Lower-Saxon and Baltic *Hagenhufendörfer* both belong to this type. With this pattern at work, the peasants, starting from farmsteads loosely situated along the road or stream, moved into the depth of the forest, forming elongated strips whose breadth was set by the limits of the farmsteads within the village area, the length being dependent on the progress of the stubbing action. There was no division into fields: a farmer's land was, in its entirety, concentrated as a single piece, the farming or husbandry method mainly depending on his own initiative: there were no coerced methods of field cultivation, by and large.

Such apportionments of land were defined among Franconian settlers as the *Lehen*, which tells us that, according to the customs of the time and place, the holding of land by peasantry under the hereditary law was regarded as a feudal form, not limited to knightly tenure. The peasant and knightly forms of land holding merged into a shared term – *Lehen* [Polish, *lenno*], meaning feoff – is possibly a trace of a genetic relation between the twelfth-century Franconian law of rural settlement and the earlier group laws of free royal peasants. The latter were bound to do military service, which made their status similar to that of knightly vassals.

*Lehen*, the term describing peasant field measurement, was in the twelfth century applied exclusively with the Franconian colonisation current; as is many a time confirmed in the documents, this designation was of the *lingua Franconica*.<sup>88</sup> All the same, this particular term has settled in the Polish and Czech languages as, respectively, *lan* and *lán*, synonymous to peasant apportionment of land and, with time, a unit of land, for which the Polish term *włóka* was used in the Mazovia region. This testifies to how powerful the Franconian current

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<sup>88</sup> Cf. UEQ, i, 45 (1162), 47 (1185).

was, in spite of its poorer evidence base in the written sources:<sup>89</sup> *lan* was later on extended to the Flemish area measure, albeit their respective sizes were considerably different.

## IX

This is how analysis of the traces of the wander of settlement forms, and the related legal terms and forms, has led us to the Frankish benefice, or, in certain cases, to its precaria-related origin forms. On the one hand, the benefice became the departure point for the Franconian law – in the south-eastern areas of the former Frankish state, possibly through the fiefs of free royal peasants; on the other hand, between the Meuse and the Rhine, it contributed to the emergence of freedoms and forms of landholding which at a later date developed into the Dutch and Flemish law.

This is not to say that those were the actual sources for all the types of law/customs of settlement applied in the great colonisation movement in the eleventh to thirteenth-century Europe. This article focuses on the origins of (the) ‘German law’, being the type of law of settlement which was disseminated in Central and Eastern Europe. Probably, the medieval centre of a particularly strong economic-and-social development, situated in the lands between the Meuse and the Rhine, radiated in various directions, westward and southward included. Maurice Prou’s study of the French customs of settlement, particularly the law of Lorris, whose role was quite essential as a model for setting up new settlements, was unfortunately not followed up by more penetrating research.<sup>90</sup> The *Freiheiten* of Rhineland and the *villes neuves* located in the Meuse area have their numerous analogies in the *villes neuves* and *neuvilles* of Central France, as well as in the *castelnaux* and *sauvetés* in the south of France.

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<sup>89</sup> This in spite of an opinion diminishing the importance of the Franconian movement, as in Hermann Aubin, ‘Die deutschen Stadtrechtslandschaften des Ostens’, in *Vom deutschen Osten. Max Friedrichsen zum 60. Geburtstag* (Breslau, 1934) (quoted here after the reprint in Haase [ed.], *Die Stadt des Mittelalters*, ii, 244 f.)

<sup>90</sup> Maurice Prou, ‘Les coutumes de Lorris et leur propagation aux XIIe et XIIIe siècles’, *Nouvelle Revue Historique du Droit français et étranger*, viii (1884), 139–267; 441–523; only the subsequent *loi de Beaumont* has enjoyed more interest; cf. Maas, ‘Loi de Beaumont’; earlier reference literature is also listed therein.

Charles Higounet's research on the settlement in southern France<sup>91</sup> and José Maria Lacarra's research into the colonisation of the north of Spain<sup>92</sup> have enabled us to gain a rather clear image of settlement/colonisation processes of those areas, where, regardless of the north-French and German processes, settlement freedoms evolved, whose role in populating the unpopulated lands in those areas and, subsequently, in colonisation of the areas of Spain taken away from the Muslims, proved enormous.

Insofar as the dating and the social structure of the *castelnaux* allow for a variety of interpretations, Higounet rightly perceives the *sauveté* (*salvitates, salvationes*) as settlements set up in a scheduled manner, by way of granting the settlers with special reliefs and freedoms. The crosses limiting that area where the freedoms were binding; the term itself, which stood for release from burdens; and, the later-date concrete pieces of information on the rules in operation with the *sauvetés*, enable us to conclude that the inhabitants enjoyed personal freedom and held the farms on a hereditary basis, with the obligation to return a specified amount of the crops and a recognition-based head tax.<sup>93</sup> The earliest mention of a *sauveté* was, in Higounet's view, the charter of Count Pons of Albi for the bishop's estate of Vieux, from 987. In the eleventh century, *sauvetés* were primarily established within Church estates; a particularly animated activity was reportedly pursued in this field by St Austindus, the archbishop of Auch.<sup>94</sup> This is not to say, though, that settlements of this sort were specially characteristic to ecclesiastical estates.

Still-earlier are mentions of new settlements being set up with the help of free settlers from the northern-Spanish territory. Beginning with the ninth century, the kings of Asturia organised, by themselves

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<sup>91</sup> Charles Higounet, 'Bastides et frontières', *Le Moyen Âge: bulletin mensuel d'histoire et de philologie*, liv (1948), 113–21; *idem*, 'Mouvements de population dans le Midi de la France du XIe au XVe siècle', *Annales ESC*, viii, 1 (1953), 1–24; *idem*, *Zur Siedlungsgeschichte Südwestfrankreichs vom 11. bis zum 14. Jahrhundert*, in Schlesinger (ed.), *Die deutsche Ostsiedlung*, 657–94.

<sup>92</sup> José M. Lacarra, 'La repoblación de las ciudades del Camino de Santiago', in *La reconquista española y la repoblación del país. Conferencias del curso celebrado en Jaca en Agosto de 1947* (Saragossa, 1951), 223–32; *idem*, 'À propos de la colonisation "franca" en Navarre et en Aragon', *Annales du Midi*, lxxv (1953), 331–42.

<sup>93</sup> Higounet, 'Zur Siedlungsgeschichte', 673 f.

<sup>94</sup> *Ibidem*, 670 f.

or assisted to this end by the Church, settlement in the areas liberated from the Muslim rule, which previously were completely uninhabited or were left soon before then by their previous inhabitants.<sup>95</sup> Some of the settlers were servile peasants (*servi*) from the royal and ecclesiastical estates, but also free people undertook the development of new lands, and they were granted in this context a guarantee of preserving this freedom, i.e. through special documents issued for the purpose (*fueros*). The oldest preserved *fuego* was granted in 824 to the dwellers of Brania Ossoria (today, Brañosera, Province of Palencia), who previously were free shepherds.<sup>96</sup> Some of the free settlers were Christian fugitives from the Muslim Spain. A particularly strong trend was the case with settlement of free peasants in Castile in the tenth and eleventh centuries; their military obligations contributed to a situation where the difference between free peasants and the knighthood was getting blurred, with a considerable social mobility being the case.<sup>97</sup>

The said Spanish settlement in the local 'regained lands' was chronologically prior to the settlement processes of the eleventh and twelfth century, better recognised thanks to J. M. Lacarra's research into the settlement along the Santiago de Compostela pilgrimage route. A great role was played in those processes by settlement freedoms, as codified in the *fuego de los Francos* and initially applied with respect to the settlers from the south of France, subsequently extended to all the colonists who were willing to set about colonising the newly-conquered territory in exchange of being granted such freedoms.<sup>98</sup> As opposed to the earlier action mentioned above, the said colonisation project extended to urban areas, to a considerable degree. A charter for the town of Jaca, dated as early as 1063, became the pattern followed by the other urban laws; in order to attract alien settlers, the Aragon king Sancho Ramirez granted them – certainly, those from southern France – any 'good laws' (*totos illos bonos fueros*) they demanded, quitting all the 'bad laws' (*omnes malos fueros*) previously binding in Jaca. Those 'good laws' should be understood as privileges described later on as the 'French law'. It may be doubted,

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<sup>95</sup> Dietrich Claude, 'Die Anfänge der Wiederbesiedlung Innerspaniens', in Schlesinger (ed.), *Die deutsche Ostsiedlung*, 607–56.

<sup>96</sup> *Ibidem*, 619, 645.

<sup>97</sup> *Ibidem*, 648 f.

<sup>98</sup> Lacarra, 'À propos', 331 ff.; also, cf. Marcelin Defourneaux, *Les Français en Espagne aux XIe et XIIe siècles* (Paris, 1949), 239 ff.

though, whether those old 'bad laws' of Jaca, which was a royal seat earlier on too, had been based on serfdom. León, the capital city of the Kingdom of León, received its own *fuero* in as early as 1020, and it was probably an extension of the law that had been binding there since the tenth century, before Almanzor's destruction. One of the central elements of that law was personal freedom ensured to all the city's dwellers.<sup>99</sup>

As it seems, there is virtually no point discussing the origins of the Spanish law of free settlement on the northern or southern side of the Pyrenees. The southern-French influence was unquestionable in the latter half of the eleventh century, as expressed in determination of the law of free settlers, often coming from France, as a *fuero de los Francos*. Their reception, however, was caused by a demand for a convenient model for a law of settlement, which would reflect the necessity of attracting people into the areas offering hard living conditions whilst also referring to the earlier local models.

What were those earlier models like? They consisted in settling free people on the royal land in exchange for rent or, primarily, military service. Those patterns exactly reflected the military-strategic Frankish colonisation, as described at some length above. Let us remind that it was the southern-French area that Charlemagne populated with free fugitives from Spain who were referred to as the *Hispani* or *Gothi* – or, at times, as *aprisionarii* or *hostolenses* – allowing them to use their own legal customs.<sup>100</sup> The Frankish patterns of freedoms granted to free military settlers could have disseminated in the Christian states in the north of Spain, but it is also possible

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<sup>99</sup> Lacarra, 'À propos', 331 f.; Hektor Ammann, 'Vom Städtewesen Spaniens und Westfrankreichs im Mittelalter', in Theodor Mayer (ed.), *Studien zu den Anfängen des europäischen Städtewesens* (Vorträge und Forschungen, 4, Lindau and Konstanz, 1958), 108 f., 116.

<sup>100</sup> Cf. fn. 50. The similarity of northern-Spanish settlement and the colonisation with the *hostolenses* performed by Charlemagne was noticed by Josef J. Menzel in a discussion on a paper by Dietrich Claude, in Reichenau, March 1972 (cf. *Protokoll über die Arbeitstagung. Konstanzer Arbeitskreis für mittelalterliche Geschichte*, no. 173). The name *aprisionarii* originates from the land apportioned to them for stubbing ("portio quam adprisionem vocant"), whilst *hostolenses* comes from war expeditions (*expeditiones in hostem*) they were obligated to take part in. This group was quite diverse socially: along with owners of small farm-holdings, there were the *aprisionarii* who populated the land bestowed to them with their own peasants. Cf. Müller-Mertens, *Karl der Grosse*, 85 f.

that the Asturian kings based their concept on some Gothic traditions of military colonisation, analogous to the similar Longobardian settlement in northern Italy.

Our search for the sources of 'German law' has led us through the Flemish (Dutch) and Franconian law to the area between the Rhine and the Meuse, where the locality is very likely traceable of the shaping of the patterns of settlement freedoms known to us from Central Europe. It is also probable that at the legal sources of those patterns lies the Carolingian beneficial system, derived, in turn, from the late-Roman *precaria*. In particular, the Frankish kings, populating the borderland or strategically important areas with free peasants, obligated to do military service, contributed to the emergence of a uniform settlement model which was disseminated in the eastern as well as south-western peripheries of their monarchy. This model could have caught on in the colonisation actions pursued by the Spanish rulers, southern-French dukes, as well as German kings and Bavarian dukes. Yet, the origins of the model for the laws of settlement are of secondary importance. The laws in question could have evolved independently of the Carolingian benefice, under an influence of elements of the Roman Law, preserved in Italy and, to an extent, in southern France and Spain.

The thing of primary importance was the conditions-dependent necessity to organise a settlement action in desert or underpopulated areas, be it for military or economic reasons. The colonists settled under such circumstances needed to have ensured the rights that would made the grubbing and development effort worthwhile, whilst compensating the dangers of living in a wilderness – and such rights had, in every case, to include secured personal freedom and possession. The self-government which was usually connected with it, evolved as a result of the necessity of the settlers' mutual cooperation in the defence of a variety of shared interests.<sup>101</sup>

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<sup>101</sup> In her search for the origins of free urban commune, Edith Ennen assumed that the free settlement models were disseminated (with the asylum right granted to settlements) out of Spain, via southern France, into the countries on the Meuse (cf. *eadem*, *Frühgeschichte*, 243 ff.). The chronology of the Spanish examples seemingly supports this statement, but it seems that there is no need to assume such a one-way development. In particular, the peripheral character of Spain in the period's European economy and culture makes the possibility of so extensive an impact of the Spanish models not-quite-plausible.

In case that such necessity appeared, the local rulers would resort to their own legal forms, trying to secure the settlers' freedoms within their scope, or take over ready-developed models from the neighbouring countries. The latter was the case where the colonisation was not brought about with participation of a local populace but with the use of people brought from the outside. Foreign colonists would often carry along with themselves certain established bodies of customs of settlement, only to be accepted and reapproved in the new locality. Such was the role the laws named 'French', 'Flemish', 'Dutch', 'Franconian', and 'German' played in various terrains, putting aside the more local patterns. Still, evolution of settlement-related freedoms was possible without using the already-available models.

Attempts at adapting the local laws to the colonisation-related needs occurred even in the Slavic countries which took over the law of settlement as formed in Germany, in its complete shape. Before the 'German law' started being introduced in Poland, so-called 'law of free guests' (*ius liberorum hospitum*) had existed in the twelfth century, certainly before 1130, guaranteeing to foreign immigrants personal freedom and a special legal care. Before the Bohemian dukes started granting privileges to the German colonists, Duke Bretislav I had in 1038 ensured to the former Polish dwellers of Giecz, who had moved to Bohemia, self-government and the right to make use of their own legal customs.<sup>102</sup> Mentions of 'guests' getting settled in Poland and in Bohemia preceded the reception of the German law of settlement. The basic difference between the 'law of guests' and the later 'German law' rested in the latter's convenient regulation of the right to land and settling the colonists' obligations with respect to the land's lord in a way beneficial to them.

Embracing by this analysis of the Spanish and southern-French settlement process was only meant to help identify analogous processes for the Central-European area, which did not necessarily assume identical forms. Italy, having at its disposal a wealth of various legal forms based on the Roman Law, has almost been ignored here. Our discussion of laws/customs of settlement did not cover Scandinavia or Britain, where a variety of continental influences and local traditions intersected. Lastly, the various forms of free settlement in Rus' have not been taken into consideration. Research into these issues,

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<sup>102</sup> Cf. fn. 13.

forming, on equal terms with the processes under consideration herein, part of the complex problem of development of settlement freedoms in Europe, must also become part of the scope of interest of historians dealing with settlement issues.

*trans. Tristan Korecki*

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