An unknown treasure for historians of early medieval Europe: the debate of German legal historians on the nature of medieval law*

In 2009, Martin Pilch published an impressive book combining medieval history, legal history and legal theory,[1] which was the subject of a 2010 workshop in Frankfurt on medieval legal customs as a problem of legal theory and legal history. It would be wrong to think that Pilch's book resulted in a conference because it was completely new. Actually, it marked just one step, though a major one, in a debate amongst German legal historians which already started in 1968 with publications by Karl Kroeschell.[2] Its central question may be easy: ›What is law in the (early) middle ages?‹, but answering it has been a challenge ever since 1968. In fact, one may conclude that a final answer is, in all likelihood, elusive. Nevertheless, many interesting advances have been made and Pilch has used them to attack outdated concepts of law.

Unfortunately, most scholars outside Germany, Austria and Switzerland remain ignorant of this fundamental debate. This is due, first of all, to a linguistic problem. Many scholars do not read German, and the major players in this debate have written in this language only. However, that does not explain everything. An additional hurdle is the nature of the debate. It may concern history, but it is also a debate amongst lawyers, and their language has its own peculiarities. Legal German is even more arcane to outsiders, because it is based on a very systematic thinking. Thus, even for those who have a good knowledge of German and of law, it is very hard to completely grasp all the subtleties of a legal debate in German. After all, in no other country the training as a lawyer takes more years than in Germany, so that one cannot expect a foreigner easily to master German legal. Thus, both language and the high level of German legal scholarship act as a barrier against outsiders.

Nevertheless, a debate on the nature of medieval law concerns a crucial element of early medieval society and should have come to the particular notice of any historian of the Middle Ages, unless he wants to come to some very flawed conclusions. For example, there is a body of historical literature in English which claims that law did not really exist in the era of customs because a strong authority, a monopoly of legitimate violence and trained lawyers were absent.[3] In the German debate arguments for and against this view can be found, but unfortunately they are largely unknown. This text, therefore, wants to bring those readers who are less familiar with German into contact with the ideas of the German legal historians on the nature of early medieval law. Needless to say, this will only be a very short introduction, but it is the hope of this author that it will also be an invitation to take the effort, first, to read the contributions by Pilch and others in this volume and, later, the rest of the literature in German on this debate. The ultimate dream is that one day a young English or American Ph.D. student will have the courage to pick up this subject, to add his voice to the debate, and most of all, to bring it, in all its glory and complexity, to the wider readership it deserves.

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1 M. Pilch, Der Rahmen der Rechtsgewohnheiten. Kritik des Normensystemdenkens entwickelt am Rechtsbegriff der mittelalterlichen Rechtsgeschichte, Vienna 2009.

2 K. Kroeschell, ›Recht und Rechtsbegriff im 12. Jahrhundert‹, in: Probleme des 12. Jahrhunderts, Sigmaringen 1968, 309–335; K. Kroeschell, Haus und Herrschaft im frühen deutschen Recht, Göttingen 1968.

3 See e. g. S. D. White, Custom, kinship, and gifts to saints. The laudatio parentum in Western France, 1050–1150, Chapel Hill 1988, 69–73.

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The following does not offer a summary of the whole debate, neither since 1968, nor of the 2010 Frankfurt workshop only, but rather a first glimpse of a wonderful *terra incognita*. It would be impossible to completely explore this subject here because the works of three great legal historians, Karl Kroeschell, Gerhard Dilcher and Jürgen Weitzel are part of it[4] and also because, before the 2010 Frankfurt workshop, conferences in 1990,[5] 2000[6] and 2004[7] have discussed this topic at large. Therefore, the following account will focus mainly on Pilch's article in this volume and his presentation of the debate so far. Pilch's book will not be the focus here, because it is hard to read (Pilch was also trained as a theoretical physicist and uses that also in his book), and neither will all of his ideas be exposed here. One other author and, like all the other scholars mentioned, participant of the 2010 Frankfurt workshop also needs to be mentioned explicitly, Bernd Kannowski. Being younger, he was not from the start involved in the debate, but he wrote an excellent description of its state in 2002,[8] which is very helpful to any new-comer (for me understanding this debate would have been impossible without it). Therefore, it is significant that even Kannowski has to admit that he has not understood all of Pilch's book.[9] Given that, it would be even greater *hubris* of this author to make such a claim.

The starting point is, once again, Karl Kroeschell. In 1973 the second volume of his legal history of Germany was published.[10] Kroeschell had been thinking hard on the legal concepts to be used and for customary law he departed from the established terminology. The concept ›legal customs‹ (*Rechtsgewohnheiten*) replaced ›customary law‹ (*Gewohnheitsrecht*).[11] The terminology as such was not new, but his usage of it was. Kroeschell most of all wanted to have a ›new‹ word to better express the difference with customary law and the distance between our concepts and the Middle Ages. Medieval law is different because:
– it operated within another mental framework in which one did not work with the formulation and application of norms;
– it did not really differentiate law, religion, usage and morals;
– because the state was lacking and because writing was not, or at least not primarily, used in law.

At least in Germany Kroeschell was moderately successful in promoting his new terminology. For example, at the 28th German legal history conference in 1990 there was a session about ›legal customs and customary law‹.

Part of the success of Kroeschell's new terminology was the lack of a precise definition. Others could take it up because it was an empty box, waiting to be filled. Kroeschell himself put the emphasis on procedure. Law was essentially the law of procedure, whereas substantial law could only exist in individual cases. Critics may say here that the empty box has, in effect, remained (almost) empty. Jürgen Weitzel went beyond Kroeschell's approach in his book on the popular assembly and the law.[12] Law to him is what the court finds. Thus, the judgements are the concrete manifestations of unwritten legal customs, because they express the consensus. This means that material law exists, but only through the action of the court. Only Gerhard Dilcher does not chain substantial law to forms and courts. Instead he links the legal customs to orality.[13] Medieval law is different because it is non written and written law cannot be the standard for measuring it. Nevertheless it has binding rules, the legal customs.

4 For references, see the bibliography in Pilch's book and also their articles in this volume.
5 Gewohnheitsrecht und Rechtsgewohnheiten im Mittelalter, ed. by G. Dilcher, Berlin 1992.
6 For the book, see note 8.
7 , Leges – gentes – regna. Zur Rolle von germanischen Rechtsgewohnheiten und lateinischer Schrifttradition bei der Ausbildung der frühmittelalterlichen Rechtskultur, ed. by G. Dilcher and E.-M. Distler, Berlin 2006.
8 B. Kannowski, Rechtsbegriffe im Mittelalter. Stand der Diskussion, in: Rechtsbegriffe im Mittelalter, ed. by A. Cordes and B. Kannowski, Frankfurt 2002, 1–27.
9 See his review of Pilch's book on http://www.koeblergerhard.de/ZRG128Internetrezensionen2011/PilchMartin-DerRahmender-Rechtsgewohnheiten.htm
10 Deutsche Rechtsgeschichte, II, Opladen, 1973, 86 (the latest edition [Stuttgart 2008] has Albrecht Cordes and Karin Nehlsen-von Stryk as co-authors).
11 ›Rechtsgewohnheiten, aber kein Gewohnheitsrecht‹ (*Ibid.*).
12 J. Weitzel, Dinggenossenschaft und Recht, Cologne, Vienna 1985.
13 G. Dilcher, Oralität, Verschriftlichung und Wandlungen der Normstruktur in den Stadtrechten

It should be clear that, so far, the efforts to come to a generally accepted definition of the concept ›legal custom‹ has failed, so that Pilch's work also tries to construct one. For this he builds upon a *trias* found in Ebel's history of legislation in Germany.[14] Rather confusingly, he uses the word ›law‹ both in a broad and in a strict sense. Law in the broad sense has three basic forms: law in the strict sense, law by order of an authority and law by choice of those involved. Law in the strict sense can be equated with the legal customs. However, all law can be seen as legal customs, because each of the three basic forms needs memory to operate and to be preserved. However, in the two other basic forms the memory concerns an original order or choice and the law results from the latter. For legal customs, however, there is no other foundation than memory itself, i. e. the common conviction of the existence of law. This also means that it is possible for rules to move from one of the two other forms to that of the legal customs, because the original foundation in order or choice has been forgotten. Three main groups of legal customs can be distinguished:
– procedure, in particular before the court, but also outside it (legal rituals and symbolic forms)
– abstractions: legal principles, legal terms etc.
– the individual rights, competences and legal relationships, which only exist in the form of memory.

With all this Pilch has not given the final answer to the question of what legal customs are, but, at least, he makes some new openings.

Pilch also stresses that the legal theories of positivism are not a good tool for grasping the reality of early medieval law. Previous authors have also said this, but they did not always go as far as Pilch. Giving up the concept of law as a system, they kept on working with the building blocks for a legal system, the abstract legal norms. (One may remark here that not all lawyers have been so enamoured of legal systems as their German colleagues, but the idea of law as a system, or at least a body of legal norms, has indeed been pervasive.) However, they cannot be used as instruments for describing early medieval law, because they belong to a model, which was developed for a state-oriented written law. Early medieval law did not have systematic legislation and did not consist of legal rules. The latter does not mean that early medieval law did not work with rules at all, but only that these rules are not its constitutive elements and that early medieval law cannot be reduced to a closed structure of rules.

The next step is to try to define early medieval law in its context of orality. Critics of legal positivism may offer some ideas here and, therefore Pilch turns to Dworkin's concept of law as interpretative praxis.[15] Law is not a fixed body of norms, but an interpretative praxis, in which a community constantly justifies its own legal decisions. This model of law may not have been made with early medieval law in mind, but it is better able to accommodate it than the positivistic theories. To do so, one has to see legal customs no longer as a special type of norms, but as another and autonomous mode of the legal. Whereas the ideal type ›written law‹ is law in the mode of norm and validity, the ideal type ›legal customs‹ is law in the mode of order and memory. As such law is only one aspect ordering medieval life, so that Pilch pleads for the use of a concept developed by Bernd Schneidmüller and Stefan Weinfurter, ›order configurations‹.[16] Kannowski doubts whether this concept itself may be useful. Yet, the idea of coexisting and competing order configurations can be helpful in making clear that conflicts were not just about

des 12. und 13. Jahrhunderts, in: Pragmatische Schriftlichkeit im Mittelalter, ed. by K. Grubmüller, H. Keller and N. Staubach, Munich 1992, 9–19.

14 W. Ebel, Geschichte der Gesetzgebung in Deutschland, Göttingen 1958.

15 See the references in note 86 of Pilch's text in this volume.

16 To explain this concept completely would need another article, see Ordnungskonfigurationen im hohen Mittelalter, ed. by B. Schneidmüller and S. Weinfurter, Ostfildern 2006.

individual rights, but also about the general frameworks in which they were embedded.

The great challenge is to come to a concept of law which can underlay both the modes of written law and of legal customs. For that, Pilch takes violence into account. Law is the exercise of (legitimate) violence with the goal of reducing (illegitimate) violence, so that law is linked to peace. Leaving aside the many interesting forays into legal theory this concept of law can lead to, it is possible to see several medieval phenomena, like the feud, as legal, without using categories from written law. That the latter are considered to be indispensable indicates how great their triumph is. To us they have become the ›natural‹ structure of law. Whether historians of the Middle Ages will really care about such a general concept of law may be doubted, but many of them will appreciate Pilch's efforts to develop a concept which also takes the Middle Ages into account.

The debate on the nature of early medieval law did not stop with the publication of Pilch's book. As the papers of the Frankfurt workshop published in this volume show, he did not give all the answers and his answers can themselves be questioned. Nevertheless, his main argument is hard to dispute. Legal theory and legal history can learn something from one another. The problem is that up to now it has been legal theory and legal history in German. This text surely will have done more than one injustice to the participants in the German debate by reducing and misrepresenting their views, but if it will lead to more interventions by outsiders, it will have met its objective.

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