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LEGAL TRADITION OR LEGAL MARASMUS? THE 'CURULE AEDILES OF LÜBECK' OR ANIMAL DEFECTS ACCORDING TO THE HISTORICAL INFLANTIC LAWS (BEFORE 1938/1940)

Andrzej Dzikowski

ORCID: 0000-0002-3223-7542
Department of Pathophysiology, Forensic Veterinary Medicine and Administration
University of Warmia and Mazury in Olsztyn, Poland

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Abstract

The study concerns on the analysis and interpretation of the legal norms formerly applied in the territories of present-day Latvia and Estonia, in relation to civilian liability for physical defects of animals. The following trends were revealed: the hybridity of law, containing, i.a. Roman and Germanic elements; connectivity of municipal, noblemen's and peasants' law; basing the discussed provisions on the Lübeck and Roman law; persistence in organic continuity with local legal tradition; lack of willingness to change and rationalize the law in relation to changes in the surrounding world, new codifications and discoveries of the veterinary medicine.

Introduction

Trade of animals takes place regardless of the nationality of the parties to the contract of sale or the existence of their own country. This is also true for the small Baltic nations and states, like Latvia and Estonia, which first gained independence only in the 20th century. This does not mean, however, that there were no legal norms or standards regarding animal trade.

In the English literature the term *Livonia* is often used for the whole area of Inflants, the *Terra Mariana*, which is unprecise and incorrect. In the present analysis the term *Inflants* would be used in relation to territories of the current states of Latvia and Estonia, covering the following historical regions: Courland, Semigallia, Livonia (or Livland, or Swedish Livonia, now divided between Latvia and Estonia), Latgale (or Polish

Addres: Andrzej Dzikowski, University of Warmia and Mazury in Olsztyn, Oczapowskiego st. 13, 10-719 Olsztyn, Poland, phone: +48 (89) 523 37 07, e-mail: andrzej.dzikowski@uwm.edu.pl

Livonia) and Estonia (northern part of the present state of Estonia). These areas are divided by a common history – and share a common history, since the Middle Ages.

Fig. 1. Current Latvian and Estonian territories as the Baltic Provinces (*Ostseegouvernements*, *Ostseeprovinzen*) under the Russian occupancy and administration in the 19th century (Meyers Konversations-Lexikon 1885–1892), public domain, 1 : 2,250,000

The areas inhabited by numerous Baltic tribes were the area of territorial expansion and conquest and colonisation of other European nations: since the 12th and 13th century – the Danes (northern Estonia), and, most of all, the Germans. The feudal institutions, reflecting the Western European standards of the Holy Roman Empire, were formed by the Sword Brethren (transformed in the Livonian Order, a branch of the Teutonic Knights), the prince-archbishops of Riga and prince-bishops of Courland, Dorpat (now Tartu), Reval (now Tallinn) and Ösel-Wieck (now Saaremaa), as well as the German-speaking landlords. Also the urban populations were predominately German. It should be remembered that, for ages – lasting up to the first half of the 20th century, there was a firm social, cultural, linguistic and legal domination of Baltic Germans in the discussed areas. The languages of the legal norms were initially Latin and later on – German (MODRZYŃSKI 2017).

The development of the Protestant Reformation led to the secularization of the ecclesiastical states, establishment of the vassal Duchy of Courland and Semigallia, and incorporation of Livonia (Dutchy of Livonia – Inflants Voivodeship – so-called Polish Livonia, Wenden Voivodeship and Dorpat Voivodeship), as parts of the Polish-Lithuanian Commonwealth. In the 17th century the northern parts became dependencies of Sweden. Apart from that, it was the area of an uninterrupted Russian interest: starting from the Ruthenians in 11th century, then the Muscovites, through the full conquest by the Tsar's troops in the 18th century (forming the Baltic Provinces – Governorates of Courland, of Livonia, and of Estonia – Figure 1), and by the Soviets in 1940 and 1944 (Latvian and Estonian SSRs), to informal steps undertaken nowadays.

The aim of the present research is to examine and demonstrate how the civilian norms can be transferred and was transferred in the Baltic states, and how sticking to the legal tradition can affect animal trade in terms of physical defects.

Materials and Methods

Legal and juridical texts consisting sources of law of the historical regions of Inflants (pre-1938/1940) were tested:

– state or noblemen laws: *Statuta Curlandica,* 1617 (BIRKEL 1804), *Ritter- und Landrecht des Herzogthums Esthland* of January 17th, 1651, June 17th, 1690, and January 27th, 1699, and Livonian laws (BUDDENBROCK 1804);

– municipal law of Lübeck according to the 1586 revision, as adopted in Reval (Tallinn) and other Inflantic towns (BUNGE and MADAI 1842–1844);

the municipal law of Riga – *Statuta und Rechte der Stadt Riga*, 1673; *Polizeiordnungen* – municipal regulations of Bauske (current Bauska) of August 1st, 1635, and of Friedrichstadt (Neustädtchen, current Jaunjelgava) of January 15th, 1647;

– Rural or Peasants' Codes (*Bauerrechte*): *Gesetzbuch für die curländischen Bauern* of August 25th, 1817, *Livländische Bauerverordnung* of March 26th, 1819, and *Livländische Bauer-Verordnung* of November 13th, 1860;

– Roman law reception in the *ius commune* form (MOMMSEN and KRÜGER 1872, KRÜGER 1892, ZIMMERMANN 1996, ZIMMERMANN 2001, SIIMETS-GROSS 2012);

– and the Code of the Private Law of Livonia, Estonia and Courland, 1864.

1938 is marked as one of the temporal limits of the present study – as the year of the entry into force of the new Latvian Civil Code of January 23rd, 1937, called the *Code Ulmanis* (CL 1937. gada 28. Janvārī, LUTS-SOOTAK et al. 2019). Shortly after that, during the World War II, the Baltic Germans were evicted (*Heim ins Reich* action, 1939–1941) and the area was captured by the Soviets (according to the Molotov-Ribbentrop Pact, 1939). The previous civil law was replaced in both countries with the Soviet one in 1940 (KULL 2013). *Le monde ci-devant* ceased to exist.

Historical, historical-legal, comparative and dogmatic methods of legal analysis and interpretation were used.

Results and Discussion

Non-codified Laws

For many centuries, the Lübeck municipal law was the basis for the functioning of over 50 towns in the North-German cultural area, including in particular the Hanseatic towns on the southern coast of the Baltic Sea. Among them, Riga, Reval (now Tallinn) and Hapsal (now Haapsalu) in Inflants, Braniewo (Braunsberg), Frombork (Frauenburg) and Elblag (Elbing) in Poland, Hamburg, Wismar, Rostock and Kiel in Germany can be counted (KAHLE 1879, EBEL 1971, EBEL and SCHILLING 2001, HACH 1839, ROZENKRANZ 1962, ROZENKRANZ 1967, ROZENKRANZ 1991, TANDECKI 2001, MODRZYŃSKI 2017, STEFFENHAGEN 1875). Initially also cities like Gdańsk (Danzig) or Szczecin (Stettin) and most of the Pomeranian towns were ruled according to the Lübeck standards. They were later relocated under the Magdeburg law, incl. its Kulm variant – which, however, did not mean a complete abandonment of the application of the earlier laws (PISKORSKI 1986, ROZENKRANZ 1966, MACIEJEWSKI 2000, MODRZYŃ-

SKI 2017). The Lübeck law was the essential basis of many laws – not only municipal ones – formerly in force in the territory of present-day Latvia and Estonia.

For the greater part of their history, Inflants' laws were not codified, and included historical layers of legal norms: since the crusaders' and Danish times in the 12th century, through the German law, reception of Roman law (*ius commune*), Polish, Swedish, and, finally, Russian laws in the 19th century, including various privileges, statutes, nobility codes, municipal and rural laws, constitutions, resolutions, decrees, judgments and preliminary rulings, as well as doctrinal achievements and unwritten customary law (BUNGE 1833, BUNGE 1847, BUNGE 1849, BUNGE 1851, REY 1875, SIIMETS-GROSS 2012).

In the examined scope a relatively complete legal system is revealed, within which two basic sources of responsibility for physical defects of animals can be distinguished: the Roman law (Justinian's Digest (MOMMSEN and KRÜGER 1872) and *ius commune*), and local statutory norms, based on the Lübeck law.

In the nobility laws the discussed problem was covered by the §§ 100, 101 and 148 of the *Statuta Curlandica* (BIRKEL 1804), Art. 9 (Book 4, Ch. 11) and Art. 5 (Book 4, Ch. 12) of the Estonian *Landrecht*, as well as the No. 293 of the Livonian laws (BUDDENBROCK 1804).

For the municipal laws, the following provisions should be indicated: Art. 6, 14, 15 and 17 (Book 3, Ch. 6) of the Lübeck law (BUNGE and MADAI 1842–1844, BUNGE 1847, BUNGE 1851, REY 1875); Art. 3 (Book 3, Ch. 11) of the laws of Riga (BUNGE 1847, REY 1875). It should be noted that the regulations of the two main Inflanitc cities – Riga and Reval were the reference point and model for the surrounding towns (BUNGE 1847). The issue of animal defects was also regulated by the 17th-century norms of the smaller towns based on the Lübeck law, but constituting elements of the Polish law *sensu largo*: §§ 4 and 6 (Ch. 24) of the *Bauske'sche Polizeiordnung*, and §§ 4 and 6 (Ch. 23) of the *Friedrichstädt'sche Polizeiordnung*.

In the 19th century, the discussed problem was regulated in the following paragraphs of the Peasants' Codes: § 98 (Courlandian), § 394 (Livonian, 1819), and § 978 (Livonian, 1860).

Auxiliary sources of law in northern and southern Inflants were: canon law, German law, Biblical (Mosaic) law, Polish and Swedish law, and – above all – the Roman law, fully adopted, just like in the Holy Roman Empire (BUNGE 1847, SIIMETS-GROSS 2012), constituting an important element of the sources of law also in the Prussian cities of the Polish-Lithuanian Commonwealth, e.g. in Elbląg (KWIATKOWSKI 2017).

Courlandian statutes established, on the basis of the principle of good faith (*bona fides*, *Treu und Glauben*), the obligation to pronounce all defects. Concealment of any imperfections of animals was prohibited. Deceitful concealment of the defect was the basis for redhibition: *rem venditam recipiet, et pretium restituet* (*die varkaufte Sache wieder zurücknehmen, und das Kaufgeld* (*den Kaufschilling*) *zurückzahlen*; return the item sold and refund the price) (BIRKEL 1804, BUNGE 1851, REY 1875). Under their rule, the limitation period for the *actio redhibitoria* was extremely short. It was the term in which not only the defect had to be detected, but also the judge had to decide: *rem vitiosam emens intra sex dies eam Judicis definitione redhibere vel retinere tenebitur* (*...nach vorgegangener richterlicher Erkenntnis...*) (BUNGE 1851, REY 1875).

The Livonian *Landrecht* did not provide for the *actio redhibitoria*, but the seller was obliged to repair damages if he knew about the defect and concealed it. Nevertheless, in the every-day practice and case-law, Aedilician warranty was applied (BUNGE 1847). This can be considered, in the author's opinion, as a manifestation of the subsidiary application of the Roman *ius commune*: redhibitory action available for 6 months, and *actio quanti minoris* – on an annual basis.

Estonian law established – in case of deceptive concealment – the liability for all defects, including evident and contractually excluded ones. It was a combination of Lübeck and Aedilician law (BUNGE 1847, MOMMSEN and KRÜGER 1872). There was a *lex specialis* related to the main defects of horses: full blindness (Fr. *amaurose*), glanders and a syndrome of behavioral disorders on the background of hydrocephalus (Pol. *wartogłowienie*, Fr. *rétivité*). Other animals were subject to the Aedilician, abstract rules of warranty. The limitation period for claims was 3 weeks.

According to the municipal norms, based on the Lübeck law, there was a rule that evident defects (*sichtbarer Mängel*) constituted a negative redhibitory premise – but not in the case of cattle (widely understood, as many animal species, not just *Bos taurus*). *Dolus* – the insidious concealment of the animal's defect by the seller gave rise to both civilian and criminal liability (BUNGE 1851, REY 1875). The main defects (*Hauptmängel*) were established only for horses, while for other animal species the liability covered all possible defects. The corollary of this was the lack of any responsibility for equine diseases other than: RAO/ COPD (recurrent airway obstruction – chronic obstructive pulmonary disease – *Pferd engbrüstig*, Fr. *pousse*), the syndrome of behavioral disorders as a result of hydrocephalus (*Pferd stetig*), and glanders (*Pferd schnöbich, rotzig*). The strengthening and confirmation of the contract of sale was a down pay-

ment (*arrha*, *Gotts-Pfennig, Gottes-Grosch*), which ensured that the contract could be contested with a claim.

Such regulations were in force in, i.a. Reval and Hapsal. They were also – almost literally – taken over to the regulations of Bauske and Friedrichstadt. They were derived directly from the Lübeck law (*Der Kayserlichen Freyen und des Heiligen Reichs Stadt Lübeck Statuta und Stadt Recht*, 1586), and were approved by the Prince of Courland and the King of Poland (BUNGE 1851).

Riga statutes, 1673, also drew on the law of Lübeck (BUNGE 1847). An open catalog of equine defects was established. Not only glanders, RAO/ COPD, blindness and behavioristic effects of hydrocephalus (*rotzige, hauptsieche, starrblinde, stätige (...) Pferde*) were treated as warranty premises. Also other, analogous defects of horses enabled the buyer for a redhibitory claim within 8 days (BUNGE 1847, REY 1875). As for cattle (in the author's opinion: *sensu largo*), which – besides – was listed in the provisions on the deposit, no major defects were set (*contra*: BUNGE 1847).

Courlandian rural law provided for a warranty period of 7 days since the animal's delivery, and Livonian Peasants' Statutes – a period of twice as long, 14 days from the delivery. The redhibitory claim was used in case of any hidden, unobtrusive (*nicht offenbar und in die Augen fallend sind*) defects in animals.

Code of the Private Law, 1864

In 1860, a draft of a Civil Code for the Baltic Governorates was developed, Art. 3698 and 3719 of which regulated the problem of animal defects (REY 1875). In 1864, a codification – or rather a compilation and systematization of the old laws – came into force (Luts-Sootak 2006, LUTS-SOOTAK et al. 2019, Siimets-Gross 2012, Giaro 2016). The *Liv-, Est- und Curländisches Privatrecht* systematized the old legal norms, but did not provide any substantial change of them.

The analyzed compilation of private law was based on almost the same – highly anachronistic – methodology as the Justinian's compilation of the VI century A.D. (MOMMSEN and KRÜGER 1872, KRÜGER 1872), with sources of individual, chaotically collected and terminologically heterogeneous provisions.

For example, Art. 3243 was based on the Justinian's Digest 18.1.45, 19.1.6.4, 19.1.13.pr.-1, 21.1.1.2 (MOMMSEN and KRÜGER 1872), Art. 9 (Book 4, Ch. 11) of the Estonian *Landrecht*, §§ 100 and 101 of the *Statuta Curlandica*, and Art. 15 (Book 3, Ch. 6) of the Lübeck law (BUNGE and MADAI 1842–1844); Art. 3244 was based, according to its *διδασκαλία*, only

on the Digest 21.1.17-8, 21.1.4.6, 21.1.6.2, 21.1.7-8, 21.1.10-14 (MOMMSEN and KRÜGER 1872); Art. 3253, 3256 and 3257 were modelled after §§ 100 and 101 of the *Statuta Curlandica* and the Digest 2.14.31, 18.1.45, 19.1.1.1, 19.1.6.4, 19.1.6.9, 19.1.13.pr., 19.1.39, 21.1.14.9-10, 21.1.19.2, 21.2.16.2, 21.1.28, 21.1.38.pr., 21.1.48.1-2, 21.2.31, 21.2.65.5 (MOMMSEN and KRÜGER 1872).

Warranty for physical defects was regulated in Art. 3243-3272 of the new Code, separately from the regulations of sales, incl. the obligations of the seller and the termination of the contract (*Auflösung des Vertrages*), as well as from warranty for legal defects (*evictio*), and for defects in real estate. Warranty regime was fully dispositive. Contractual exclusion of warranty was permissible, but ineffective in the event of an insidious concealment of the defect.

It covered all physical defects, regardless of the seller's knowledge, but depending on the significance and evidence (*in die Augen springen*) of the given defect. Defects must have been prior to the conclusion of the contract of sale (but not: pre-existing and eliminated by then), according to the Art. 3247 and 3248 of the Code, based on the Digest 21.1.1.10, 21.1.16, 21.1.54 (MOMMSEN and KRÜGER 1872) and Justinian's Code 4.58.3 (KRÜGER 1892).

According to Art. 3251, 3254 and 3255, full warranty liability was established for the seller who untruthfully ascertained and assured that there were no specific defects in the animal sold or that it has possessed some specific characteristics – but not for a mere merchant praise. This regime was based on the Roman concept of *dicta* and *promissa*, after the Justinian's Digest 4.3.37, 18.1.43.pr., 18.1.66.pr., 18.6.15, 19.1.13.3, 21.1.4.3, 21.1.1.1, 21.1.17.20, 21.1.18, 21.1.19.pr.-4 (MOMMSEN and KRÜGER 1872).

The remedies for the buyer were: *Wandelungsklage* – claim for redhibition, recission and cancellation of sale, according to Art. 3259–3262, 3271, and *Minderungsklage* – claim for estimation, i.e. price reduction, regulated in Art. 3263-3265 of the Code.

What was analyzed and discussed above was applied to all animal speciei – except horses. Equine *leges speciales* of Art. 3252 and 3258 of the Code inherited the regulations of: Art. 17 (Book 3, Ch. 6) of the Lübeck law, Art. 5 (Book 4, Ch. 12) of the Estonian *Landrecht*, Art. 3 (Book 3, Ch. 11) of the Riga statute, Art. 3 (Ch. 24) and Art. 3 (Ch. 23) of the discussed *Polizeiordnungen*, respectively, *Bauske'sche* and *Friedrichstädt'sche*.

In case of horse sale – unless the parties agreed otherwise – the warranty was limited to liability for the main defects. The number of these defects was territorially differentiated, according to the old laws, discussed above. While glanders (*Rotz*, *Schnöbe*), syndroms of hydrocephalus

(*Koller*, *Stätigkeit*) and full blindness (*Staarblindheit*) were available everywhere, the liability for RAO/COPD (*Engbrüstigkeit*) was limited only to the Estonian and Courlandian cities and towns. While in case of other animal speciei, governed by general rules, both Aedilician claims were possible to conduct, for horse defects the *Wandelungsklage* was a sole possibility for the buyer.

In addition to significant terminological heterogeneity, the biggest disadvantage of the *Privatrecht* was the huge territorial diversity of the limitation periods for warranty claims, unjustified by nothing other than local tradition and constituting a significant impediment to animal trade.

The limitation period for redhibitory claims was calculated since the date of conclusion of the contract, referred to as *Veräusserung*, or from the date on which warranty – or, in the current terminology: guarantee – ascertainments (*Gewährleistungsversprechens*) were given by the seller. The periods were: for horses – 3 weeks in Estonia (land law) and 8 days in Livonia (municipal law); for other animal species – 6 days in Courland, and 6 months in Livonia and Estonia (*sic*!). The basis for the norm of Art. 3271 were: § 148 *Statuta Curlandica,* 1617 (Birkel 1804), Art. 5 (Book 4, Ch. 12) of the Estonian *Landrecht*, Art. 3 (Book 3, Ch. 11) of the Riga law, as well as Roman legal sources: the Digest 21.1.19.6, 21.1.38.pr. (Mommsen and Krüger 1872), and the Justinian's Code 4.58.2 (Krüger 1892).

The limitation period for *quanti minoris* claims was, according to the – urely Roman – Art. 3272, one year since the conclusion of the contract (*Abschliessung des Vertrages*) or since the assurances (*Zusicherung*).

Conclusions

The above-mentioned special regulations of equine main defects were typical of Germanic customary laws, e.g. German and French customs, both written and unwritten. Also the types of defects mentioned, and limitation of the claims, like gradation depending on the significance of the defect, exclusion of the *actio quanti minoris*, are perfectly typical to the so-called German legal model of warranty (*deutschrechtliches Prinzip*). It was adopted – in the author's opinion: in an unjustified and blameworthy manner – in most of the European legal systems (Huzard 1837, Galisset and Mignon 1864, Beugnot 1836–1859, Meisner 1927, Lerche 1955, Wengersky 1988, Sommer 2000, Visser 2000–2001, Bardeleben 2013, Adamczuk 2008, Viguier 2006, Mayer 2009).

In other cases, including warranty for defects of all other animal species except horses, the Inflants' law exhibits the features of hybridity, cha-

racteristic for a mixed legal system. The laws of different genesis and history were acting in a complimentary way. Moreover, auxiliary and subsidiary ancillary Roman norms could provide a basic legal features in some factual situations, while in the others, a little different ones, the German norms should be applied. Similarly, local municipal and noblemen's laws, and *ius commune* were complementary to themselves. Premises of both Roman (Aedilician) and Lübeck laws, preserved in slightly different statutory acts, were combined and processed to build up an uniform system of civilian responsibility. This is, in the author's opinion, the justification for the – somewhat jocular – title of the current study.

Despite the flawed editorial of the *Liv-, Est- und Curländisches Privatrecht*, in the author's opinion, it could, create an effective warranty system for physical defects of animals – provided terminological and temporal harmonization, mainly due to the Roman law. The impact of the German legal tradition, the immanent part of which is the Roman law reception, is still present in both Latvian and Estonian civil laws (LUTS-SOOTAK et al. 2019, KULL 2013, KÄERDI 2003).

In the author's opinion, the historical laws of Inflants were, on the one hand, examples of the organic development and continuity of legal norms, deeply rooted in the local tradition, while on the other – outstanding examples of the legislative stagnation and lack of logical criticism, which resulted in deep anachronism of the legal norms. They could be considered as a negative embodiment of the observation made by Robert Evans-Jones on the margins of reflections on classic mixed legal systems – Scots and South African laws: *...if history seriously obstructs reason, lawyers must choose reason because the consumer has no interest in legal history for his own sake* (EVANS-JONES 2003). At the time, however, local lawyers and lawmakers did not choose *reason*. It was not only the – quite typical, even in the most developed legal systems and states – lack of willingness to change and rationalize the law in relation to new discoveries of the veterinary medicine, but even to adapt to changes in the surrounding world, including new legal trends and ideas of the age of the great European codifications.

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