

# Rechtsgeschichte Legal History

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<http://www.rg-rechtsgeschichte.de/rg21>  
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 21 (2013)  
<http://dx.doi.org/10.12946/rg21/016-030>

Rg **21** 2013 16–30

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## Power and Law in Enlightened Absolutism – Carl Gottlieb Svarez’ Theoretical and Practical Approach

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### I. Introduction

The term *Enlightened Absolutism* reflects a certain tension between its two components. This tension is in a way a continuation of the dichotomy between power on one hand and law on the other. The present paper shall provide an analysis of these two concepts from the perspective of Carl Gottlieb Svarez, who, in his position as a high-ranking Prussian civil servant and legal reformist, has had unparalleled influence on the legislative history of the Prussian states towards the end of the 18<sup>th</sup> century. Working side-by-side with Johann Heinrich Casimir von Carmer, who held the posts of Silesian minister of justice from 1768 to 1779 and Prussian minister of justice from 1779 to 1798, Svarez was able to make use of his talent for reforming and legislating. From 1780 to 1794 he was primarily responsible for the elaboration of the codification of the Prussian private law – the »*Allgemeines Landrecht für die Preußischen Staaten*« in 1794 (*Allgemeines Landrecht – ALR*) and the corresponding draft entitled »*Allgemeines Gesetzbuch für die Preußischen Staaten*« (*Allgemeines Gesetzbuch – AGB*) in 1791.

Carl Gottlieb Svarez was an advocate of the new school of natural law and thus convinced of the possibility of every circumstance in life to be governed by rules. At the same time, however, he felt deep loyalty towards the absolute monarch, which was not only due to his position as civil servant. The tension between the law and the ruler’s power entailed by these convictions shall be the topic of the present analysis. Svarez’ approach to the relation between law and power shall be analysed on two different levels. Firstly, on a theoretical level, the reformist’s thoughts and

reflections as laid down in his numerous works, papers and memorandums, shall be discussed (section II). Secondly, on a practical level, the question of the extent to which he implemented his ideas in Prussian legal reality shall be explored (section III).

### II. Svarez’ theoretical concept of power and law

Svarez produced a wide range of theoretical material reaching from lectures to letters and memorandums as well as papers directed at the general public. The following analysis of his views on power and law shall be based mainly on the so-called Crown Prince Lectures. These are lectures given by Svarez between 1792 and 1793 as an introduction to state affairs and jurisprudence for the crown prince, later King Frederick William III.<sup>1</sup>

#### 1. The monarch’s obligations

The starting point for Svarez’ thoughts about power and law is the social contract which he sees as the foundation of the state – a view that was widely shared among his contemporaries. According to him, the regent installed by the social contract has the task of governing his subjects according to the law and for the purpose of the state (*Staatszweck*).<sup>2</sup> The subjects in turn pledge to obey their regent in accordance with the law.<sup>3</sup> Since the actions of the regent are informed by the purpose of the state the idea of the social contract – as seen by Svarez – blends in with the Enlightened Absolutism of the 18<sup>th</sup> century.<sup>4</sup>

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KUHLI, Carl Gottlieb Svarez und das Verhältnis von Herrschaft und Recht im aufgeklärten Absolutismus [Studien zur europäischen Rechtsgeschichte 272], Frankfurt am Main: Vittorio Klostermann 2012.

1 KUHLI (2012) 23 et seq.

2 Svarez, Crown Prince Lectures, in: CONRAD/KLEINHEYER (1960) 582.

3 Ibid. 7. – See BOECK (1966) 61–62.

4 See REIBSTEIN (1962) 523 et seq.

Svarez was convinced that the main purpose of the state derives from the juxtaposition of civil society on one hand and the deficits of the state of nature on the other hand. In his opinion, the state is, on one hand, meant to protect each of its members against any violent attack on their person and property perpetrated by a third party, and, on the other hand, to promote collective happiness.<sup>5</sup> This broad concept of the purpose of the state goes beyond Rousseau's idea of the state's primary purpose being to guarantee safety and peace.<sup>6</sup> Interestingly, Svarez does not refer to any moral commitment to do whatever will promote the happiness of fellow citizens as the underlying principle of the extended purpose he sees for the state. He rather deduces that purpose directly from the social contract.<sup>7</sup>

In his Crown Prince Lectures, Svarez asserts that no form of government has as many visible advantages as monarchy.<sup>8</sup> It has in some cases been concluded from this statement that Svarez was a definite advocate of absolute monarchy and a definite opponent to any form of constitutional arrangement.<sup>9</sup> However, this opinion cannot be subscribed to that easily. Instead, it has to be stressed that Svarez' positive opinion on absolute monarchy basically stems from a comparison of this form of government with other possibilities. It is hence possible that Svarez did indeed hold a certain degree of mistrust against absolute monarchy despite the fact that he witnessed the historic experience of the Enlightened Absolutism of Frederick the Great.<sup>10</sup>

Consistent with the political theory of natural law, however, the fact that in absolute monarchy the state authority resides solely with the monarch does not lead Svarez to the conclusion that the monarch may act completely without bounds.<sup>11</sup> Although it is true that Svarez does not call for any

restriction of the monarch's power in terms of including representatives of the people, the estates of the country or any other authority in the government,<sup>12</sup> he does point out a number of obligations the monarch shall be subject to. As mentioned above, he shall, for instance, pursue the purpose of the state,<sup>13</sup> and hence his action shall always be aimed at increasing general welfare.<sup>14</sup> Apart from that, the monarch's power shall always be subject to the law<sup>15</sup> – this principle was later enshrined in § 22 of the ALR.

According to Svarez' concept, the rule of law has many different implications. For example, it entails the prohibition of retroactivity so that legal rules must not be applied to cases that took place before the respective rule was established.<sup>16</sup> Even Svarez' remarks on so-called *Machtsprüche* (>dictums<) can, to a certain extent, be deduced from the principle of the rule of law.<sup>17</sup> A *Machtspruch* consisted of an authoritative decision by the monarch through which he could intervene in ongoing judicial proceedings in civil law matters either by giving a ruling himself or by instructing the court to come to a certain decision.<sup>18</sup> The term *Machtspruch* was used as of the end of the 17<sup>th</sup> century, however, its first component *Macht* (>power<) did not refer to any violent act but merely to the claim of exerting sovereign power.<sup>19</sup> Svarez holds that *Machtsprüche* must not be binding.<sup>20</sup> As an explanation he refers to the need of protecting the Prussian subjects' civil liberties.<sup>21</sup> A *Machtspruch* issued by the monarch would endanger those liberties since such a decision could well be wrong in substance. Svarez argues that a monarch can neither be expected nor required to know the details of every single legal rule, and that in addition to that, the monarch would be prevented from fully fulfilling his task as governor if he were required to intervene in the civil justice system.<sup>22</sup>

- 5 Svarez, Crown Prince Lectures, in: CONRAD/KLEINHEYER (1960) 464. – See STÖLZEL (1885) 286; WOLF (1963) 450–451.
- 6 ROUSSEAU (2003) 16–17. – See WOLF (1963) 446–447.
- 7 Svarez, Lecture »Über den Zweck des Staats«, in: CONRAD/KLEINHEYER (1960) 642.
- 8 Svarez, Crown Prince Lectures, in: CONRAD/KLEINHEYER (1960) 475.
- 9 HELLMUTH (1998) 75–76.
- 10 See BIRISCH (1985) 95 et seq.
- 11 See LINK (1998) 24–25.
- 12 CONRAD (1958) 34.
- 13 See CONRAD (1961) 20; LINK (1998) 24–25.
- 14 Svarez, Crown Prince Lectures, in: CONRAD/KLEINHEYER (1960) 9.
- 15 Ibid. 246. – See LINK (1986a) 792.
- 16 CONRAD (1958) 36 et seq.
- 17 THIEME (1965/66) 11.
- 18 See Svarez, Crown Prince Lectures, in: CONRAD/KLEINHEYER (1960) 236.
- 19 BORNHAK (1903) 252; FINKENAUER (1996) 101–102.
- 20 Svarez, Crown Prince Lectures, in: CONRAD/KLEINHEYER (1960) 236.
- 21 Ibid. 236 et seq., 616 et seq.; see FINKENAUER (1996) 87 et seq.
- 22 Svarez, Crown Prince Lectures, in: CONRAD/KLEINHEYER (1960) 590.

## 2. *No legal obligation on the monarch*

The fact that, according to Svarez, the regent is subject to a number of obligations does not necessarily indicate what normative effect such bounds could have. In his works, Svarez repeatedly creates the impression that no earthly authority could implement the monarch's obligations. Such an authority is certainly not meant to be a single judge – Svarez deems a judge competent to judge over the regent only in certain areas such as fiscal matters.<sup>23</sup> Nor are the subjects meant to play the role of an authority charged of supervising the implementation of the monarch's obligations, according to Svarez, and they certainly do not have the right to resist against acts by which the monarch violates his obligations.<sup>24</sup> In the light of such statements it is difficult to understand the reformist's denial of any binding nature to acts through which the monarch violates the obligations that derive from natural law – such as *Machtsprüche*.<sup>25</sup> Affirmations such as the latter seem to justify resistance by the subjects, but Svarez does at no point mention resistance as a valid consequence. The fact that certain acts at the hands of the monarch may not be binding does not entail the subjects' right to resist against that act. Hence, the regent is subject to certain obligations, a violation of which does not necessarily lead to any sanction.<sup>26</sup> Svarez' views on *Machtsprüche* can be referred to once more in order to illustrate the separation between the non-binding nature of certain acts and the (lack of a) right to resist by the subjects. On one hand, the reformist stressed that *Machtsprüche* shall not be legally binding<sup>27</sup> whilst on the other hand he constantly insisted that the judge as well as the party to the proceedings who is affected by the *Machtspruch* are under the obligation to carry it out.<sup>28</sup> Svarez' strict distinction between the non-binding nature of certain

acts and the subjects' duty to obey their regent shows a striking similarity with Christian Wolff's ideas.<sup>29</sup>

For Svarez, the prohibition of resistance is a consequence of the social contract, according to which, in his view, the right to decide whether a certain law is suitable and applicable resides solely with the legislative authority. The subjects in turn have no right to express their subjective view on the validity of a legal rule by refusing to obey the monarch.<sup>30</sup> They do, however, have the right to form and express their own opinion in public as long as in doing so they do not compromise the peace and order of the state.<sup>31</sup> If Svarez' concept does not include an external authority in charge of sanctioning violations of natural law on the part of the regent, the only such authority must be the regent's common sense.<sup>32</sup> The monarch's reasonable actions in accordance with the purpose of the state are what distinguishes Enlightened Absolute Monarchy from despotism.<sup>33</sup> According to Svarez it is thus necessary to call upon the monarch's common sense, and hence it is interesting to consider how he intended to compensate for the fact that the monarch's obligations under natural law were not enforceable. This shall be done in the following section.

## 3. *Compensation for the lack of legal obligation*

Svarez was aware of the fact that the monarch's common sense was a feeble guarantee.<sup>34</sup> His mistrust led him to invoke non-legal means of inciting the monarch to act reasonably. For instance, his work contains numerous hints directed at the regent warning him to apply his common sense for the sake of the political survival of his dynasty in power.<sup>35</sup> For although Svarez rejected the idea of the subjects' *right* to resist against acts of royal power, he was well-aware of the *actual* possibility of

23 See *ibid.* 132 et seq.

24 See THIEME (1937) 378; HELLMUTH (1998) 70.

25 Svarez, Crown Prince Lectures, in: CONRAD/KLEINHEYER (1960) 236.

26 LINK (1998) 24–25.

27 Geheimes Staatsarchiv Preußischer Kulturbesitz (Berlin), Hauptabteilung I, Repositur 84, Abteilung XVI, number 7, vol. 80, folium 2v.

28 Geheimes Staatsarchiv Preußischer Kulturbesitz (Berlin), Hauptabtei-

lung I, Repositur 84, Abteilung XVI, number 7, vol. 9, folium 168r.

29 WOLFF (1968), Pars VIII, Capitulum VI, § 1044–1045 (p. 818–819). – See HELLMUTH (1998) 70; HELLMUTH (1985) 54–55; LINK (1986b) 184; KUHLI (2012) 89–90.

30 Svarez, Crown Prince Lectures, in: CONRAD/KLEINHEYER (1960) 586 et seq.

31 *Ibid.* 219.

32 *Ibid.* 458 et seq.

33 CONRAD (1958) 35.

34 See LINK (1998) 26.

35 Svarez, Crown Prince Lectures, in: CONRAD/KLEINHEYER (1960) 220. – See THIEME (1965/66) 11; BIRTSCH (1985) 96.

single acts of resistance or even a collective revolution.<sup>36</sup> He even made use of this prospect when teaching the later King Frederick William III. in order to convince him of the necessity of observing the bounds set to the ruling authority by natural law. It must be stressed though that Svarez merely describes the possibilities of resistance and revolution – he does not deem them legally acceptable nor does he advocate them in any way.

The hints at possible resistance and revolution must have impressed the later King Frederick William III, but he was possibly even more impressed by his teacher's references to posterity forming its own judgement about former monarchs.<sup>37</sup> Such arguments were especially convincing to the crown prince since there were cases at the time in Prussia where decisions made by a former monarch were revised by his successor on the Prussian throne. In 1786, for instance, Frederick William II. gave order to rehabilitate several high-ranking judges who had been punished by Frederick the Great for an alleged false judgement.<sup>38</sup> It is true that in doing so, Frederick William II. did not explicitly accuse his predecessor personally of an incorrect decision – the nephew of Frederick the Great did not call the admissibility of the decision made by his uncle into question but rather claimed that the decision had been based on incorrect reports and thus brought about surreptitiously.<sup>39</sup> However, Frederick William II.'s action was a clear sign that decisions made by a certain regent did not necessarily persist in the eyes of posterity. It was the function of posterity as a judge of former monarchs that Svarez used as a means of warning during the Crown Prince Lectures.

However, Svarez' educational approach was not limited to his personal influence on the future monarch during the Crown Prince Lectures. His efforts are also visible in that he advocated the idea of third persons acting as advisors to the monarch. Although it is true that Svarez was against any model in which third persons would be granted direct political participation in the monarch's exercise of power on one hand, he did on the other hand wish to give third persons the opportunity of

assisting the monarch by offering him advice on his work. For example, this is true for the Prussian estates of the country and the *Gesetzkommission* (law commission), the working group in charge of elaborating a new code of laws. In Svarez' view, none of these institutions were meant to obtain the right to participate directly in the Prussian legislative process<sup>40</sup> – for instance through the right of approval – but he repeatedly stresses the importance of the estates of the country and the *Gesetzkommission* as an advisory body to the monarch.<sup>41</sup>

Svarez also believed that the subjects as a whole should fulfil an advisory function. It is true that, just like the estates of the country and the *Gesetzkommission*, they do not have a documented right to participate in the exertion of power.<sup>42</sup> However, Svarez accords them a decisive role in the formation of public opinion, which he believes is not necessarily a top-down process, but should also work in the opposite direction. This explains the reformist's relatively moderate views on the freedom of press.<sup>43</sup> In addition to that, he called for legal rules to be formulated in a clear and coherent way so as to give the individual subjects the possibility of being informed about the current legal situation.<sup>44</sup> From the information laid down so far, however, one cannot conclude that Svarez' theorems were indeed fully implemented in legal reality – especially in the codification of Prussian civil law. The question of the extent to which the reformist's views about the relation of power and law entered the AGB and the ALR shall be discussed in the following section.

### III. Practical implementation of Svarez' reflections

The question about the extent to which Svarez' theoretical views were actually implemented cannot be answered without considering the ALR, in whose creation he played a unique and decisive role. Although it is true that Carmer's staff responsible for the codification of the Prussian laws comprised several people, Svarez was the one who took

36 KUHLI (2012) 91. – See Svarez, Crown Prince Lectures, in: CONRAD / KLEINHEYER (1960) 586.

37 Svarez, Crown Prince Lectures, in: CONRAD / KLEINHEYER (1960) 238.

38 See KRAUSE (1998) 160–161.

39 BORNHAK (1903) 268 et seq.

40 Svarez, Crown Prince Lectures, in: CONRAD / KLEINHEYER (1960) 16 et seq.

41 Ibid. 479.

42 See KOSELLECK (1981) 27.

43 For further information on Svarez' views on censorship and the freedom of press see KUHLI (2012) 107 et seq.

44 Svarez, Crown Prince Lectures, in: CONRAD / KLEINHEYER (1960) 602. – See THIEME (1937) 369.

the lead.<sup>45</sup> He was the one who drafted the first version of the code of laws.<sup>46</sup> He was also the one who assessed the results of the participation of the general public in the legislative procedure in his so-called *revisio monitorum*.<sup>47</sup> The draft was then revised on the basis of his assessment, finally resulting in the AGB. Even during the final review Svarez' contribution was by far the largest.<sup>48</sup>

The following section shall offer an introduction to the history of the creation of the ALR (section 1). Thereafter, the actual question about the extent to which Svarez was able to implement his ideas on power and law in the context of the judicial reform shall be explored (section 2). Here, a distinction must be made between the concept underlying the AGB (section 2.A) and that which was later adopted in the ALR after the final review which had been ordered by Frederick William II. (section 2.B).

### 1. *The creation of the ALR*

There are not many pieces of legislation whose creation was as long a process as that of the ALR.<sup>49</sup> Under the influence of natural law, the idea of codifying nearly all areas of the subjects' lives emerged in Prussia as early as the 17<sup>th</sup> century.<sup>50</sup> What was called for was a comprehensible and clearly structured code of laws that would be written in simple language and be void of any type of academic discussion.<sup>51</sup> Apart from that, the new school of natural law, which developed in Germany from the mid 18<sup>th</sup> century on,<sup>52</sup> began increasingly drawing on ancient German sources of law.<sup>53</sup> The pursuit of reforms in Prussia was further sustained by the wish to correct certain deficits of the legal system.<sup>54</sup>

Efforts to create a new civil legislation as well as to improve Prussian legal proceedings had already been made under Frederick I. and Frederick William I.<sup>55</sup> However, for several reasons, these basic

approaches were just as fruitless as the attempts made by their successor Frederick the Great together with the Prussian minister of justice Samuel von Cocceji during the early years of the former's reign.<sup>56</sup> Cocceji's successors to the post of Prussian minister of justice, Philipp Joseph von Jariges and Carl Joseph Maximilian von Fürst und Kupferberg, hardly made any effort to revisit Cocceji's reformist ideas. During the Seven Years War from 1756 to 1763, which constituted an existential danger to the Prussian state, such attempts would most likely have failed in any case.<sup>57</sup>

Reform efforts were only resumed in 1780.<sup>58</sup> Frederick the Great had increasingly been faced with complaints about the slow march of the Prussian judiciary, so that the mistrust he had always held in the legal profession turned into outright dissatisfaction.<sup>59</sup> One court case became a catalyst for the revival of efforts to reform the judiciary: A case that entered German legal history as the so-called *Müller-Arnold-Prozess*.<sup>60</sup> By intervening in this case, Frederick the Great caused a legal scandal. The monarch accused the respective judges of having handed down a false judgement – wrongly as it later turned out – to the detriment of a miller and in favour of a nobleman. Frederick II. saw this case as a confirmation of his mistrust of the Prussian judicial system and in late 1779 ordered the dismissal and incarceration of several high-ranking judges as well as the removal of the minister of justice Fürst und Kupferberg<sup>61</sup> who was according to him responsible for the state of the system.<sup>62</sup> On 25 December 1779 Johann Heinrich Casimir von Carmer was named the new minister of justice.<sup>63</sup> Carmer seemed to the king to be suitable for the post. On one hand he had already voiced several ideas for reforming legal proceedings during the preceding years, and on the other hand he was no longer needed in his previous position as Silesian minister of justice since he had already succeeded in regulating legal

45 See HINTZE (1915) 397.

46 HATTENHAUER (1996) 9; HINSCHIUS (1889) 8.

47 HINSCHIUS (1889) 8 et seq.

48 SCHWENNICKE (1995) 86–87; STÖLZEL (1885) 394–395.

49 CONRAD (1958) 12.

50 SCHREIBER (1976) 83; see KRAUSE (1988) 21.

51 CONRAD (1958) 10–11.

52 CONRAD, in: CONRAD/KLEINHEYER (1960) XI, XII.

53 KARST (2003) 183.

54 See OGRIS (1987) 80; DILTNEY (1960) 133.

55 MERTEN (1992) 32 et seq.; THIEME (1937) 361.

56 See KUHLI (2012) 122 et seq.

57 GEUS (2002) 114.

58 SCHREIBER (1976) 86.

59 HATTENHAUER (1996) 3. – See BARZEN (1999) 17; SCHMIDT (1926) 23.

60 KÖBLER (1996) 140; BENTHAUS (1996) 46.

61 HATTENHAUER (1996) 4.

62 BARZEN (1999) 18.

63 PÄTZOLD (1938) 353; BARZEN (1999) 19.

matters in that province so that his talent for organising and legislating could now be put to use for the whole state of Prussia.<sup>64</sup>

After appointing him, Frederick immediately instructed Carmer to correct the deficits of the legal system. He did not, however, at the time envisage a reform of procedural and substantive law.<sup>65</sup> To him the judicial reform was rather to revolve around changes on the staff level, namely the introduction of new criteria for the appointment of judges and the approval of advocates.<sup>66</sup> For decades, the king had attributed the shortcomings of criminal proceedings to personal failure on the side of the judiciary staff rather than to any deficit of the underlying laws.<sup>67</sup> In the end, it was Carmer who initiated the codification, not the king.<sup>68</sup> Carmer was opposed to the idea of limiting reform to the staff level from the very beginning.<sup>69</sup> Finally, he succeeded in convincing Frederick II. that a general review of procedural and substantive law was necessary.<sup>70</sup> On 14 April 1780 the king issued the cabinet order putting Carmer in charge of implementing a general reform of the legal system.<sup>71</sup>

The first step of the new minister of justice's legislative work was the reform of civil law proceedings.<sup>72</sup> As for the planned reform of substantive law, the cabinet order issued on 14 April 1780 included plans to create codes of provincial law as well as a general code of law for the Prussian states. The latter was to be a subsidiary to the codes of provincial law and hence to be applied only in cases of loopholes in those codes.<sup>73</sup> This measure was meant to harmonise the legislations of the different Prussian states without altogether eliminating state and provincial legislations.<sup>74</sup> Econo-

my of procedure was one of the aims of all those reforms, but in addition to that they were also meant to satisfy the needs of non-jurists in search of legal protection:<sup>75</sup> First of all, the laws were to be written in German and free of any artificial Latin terms, making it easier for the subjects to understand them; secondly, the new simplified language as well as enhanced completeness of the legal rules was meant to diminish the number of disputes and legal proceedings as a whole.<sup>76</sup> The aim was not necessarily to create a new body of laws, but merely to compile and revise existing laws.<sup>77</sup> According to the cabinet order of 14 April 1780, the task consisted in collecting the hitherto existing legal rules, which stemmed mainly from the Roman tradition, measuring them against the standards of natural law and adapting them to the characteristics of society at the time.<sup>78</sup>

Svarez, who had accompanied Carmer to Berlin as a member of his staff, co-authored the first draft of the codification of Prussian civil law,<sup>79</sup> which was published during the period from 1784 to 1788.<sup>80</sup> Meanwhile, the Prussian and German educated public were also involved in the legislative process (external experts were asked for advice and an academic contest was held).<sup>81</sup> During the phase of public involvement, Frederick the Great passed away (17 August 1786).<sup>82</sup> He had promised in the cabinet order of 14 April 1780 to protect Carmer and his staff against any possible rejection of their plans.<sup>83</sup> Following the king's death and Frederick William II.'s accession to power, however, their position was less than certain. Carmer and Svarez had enjoyed the late king's trust since Frederick II. had been fully convinced of the philosophy of Enlightenment and the need to

64 STÖLZEL (1885) 151.

65 See BARZEN (1999) 19.

66 SCHMIDT (1926) 27.

67 KRAUSE (1998) 149.

68 KARST (2003) 185.

69 BORNHAK (1903) 260.

70 SCHMIDT (1926) 27.

71 Frederick II., cabinet order (14 April 1780), in: HATTENHAUER (1996) 37 et seq. – See HUCKO (1994) 1449–1450; BIRTSCH (1969) 269.

72 SCHMIDT (1926) 27–28; CONRAD (1965) 3; CONRAD (1958) 16; THIEME (1965/66) 5–6.

73 Frederick II., cabinet order (14 April 1780), in: HATTENHAUER (1996)

39–40. – See THIEME (1965/66) 7;

BARZEN (1999) 23.

74 Frederick II., cabinet order (14 April 1780), in: HATTENHAUER (1996)

39–40. – See CONRAD (1958) 13–14.

75 See CONRAD (1965) 3.

76 See SCHREIBER (1976) 86; GEUS (2002) 116.

77 See HATTENHAUER (1988) 43.

78 SCHREIBER (1976) 86; HATTENHAUER (1996) 8–9; see HUCKO (1994) 1449–1450; see BENTHAUS (1996) 49.

79 BORNEMANN (1842) 8; HATTENHAUER (1996) 9; MERTEN (1986) 59.

80 SCHWENNICKE (1994) 457. – See BUSSI (1966) 47; BARZEN (1999) 58 et seq.; GOSE (1988) 5.

81 For further information about the reasons for this change of the original plan and for involving the public see KUHLI (2012) 147 et seq.

82 WOLF (1963) 447.

83 Frederick II., cabinet order (14 April 1780), in: HATTENHAUER (1996) 41.

transfer those ideas into legal reality. Frederick William II. can instead be characterised as a monarch who was far less enthusiastic about Enlightenment.<sup>84</sup>

At first, however, the process of codification continued. Starting in the summer of 1787, Carmer's staff began evaluating the results of the public's participation.<sup>85</sup> Svarez delivered his opinion on the reports handed in in his so-called *revisio monitorum*.<sup>86</sup> On the basis of that work, the draft was revised until the spring of 1791.<sup>87</sup> The revised work was called »Allgemeines Gesetzbuch für die Preussischen Staaten« and was published after having been patented on 20 March 1791.<sup>88</sup> It was planned to enter into force on 1 June 1792,<sup>89</sup> but history took a different turn. Through a cabinet order issued on 18 April 1792 Frederick William II. imposed the suspension of the code.<sup>90</sup> He justified his decision by referring to objections voiced by the Silesian minister of justice Albrecht Leopold, Carmer's successor in Breslau.<sup>91</sup> On 9 April 1792, Danckelmann had submitted a *promemoria* advising the king to suspend the code for an indeterminate period of time, arguing mainly that the Prussian general public had not had sufficient time to become acquainted with its content.<sup>92</sup>

At the time, the suspension by the king was possibly interpreted as the definite failure of the whole project that had brought about the AGB,<sup>93</sup> however, the king – as well as Danckelmann – did most probably not intend to definitely abrogate the code of laws. The fact that the suspension ordered by Frederick William II. was not limited to a certain period of time only suggests that he was unable to estimate the amount of time it would take to communicate the new laws as well as to apply certain corrective changes to the code which

had even been proposed by the Silesian minister of justice. Moreover, it is important to consider the fact that in the spring of 1792 the king was faced with more urgent problems than putting the code into force:<sup>94</sup> Ever since 1791, Prussia was on the verge of being involved in a war with France – a war which actually broke out only a few days after the cabinet order of 18 April 1792 was issued.<sup>95</sup> Hence, a number of facts indicate that for Frederick William II. the reform of the Prussian judicial system was not a priority in the spring of 1792, which is why he did not object to the idea of postponing the entering into force of the AGB. There is certainly no evidence that the king's aim was to undermine the project of codification as a whole. Nor are there any grounds for the assumption that Frederick William II. might have been acting under the influence of other political forces (such as his companions Johann Rudolf von Bischoffwerder or Johann Christoph Wöllner for example).<sup>96</sup>

The reformists reacted immediately to the order of suspension,<sup>97</sup> but at first Frederick William II. insisted on his decision.<sup>98</sup> The fact that the project was reverted to relatively soon is, among other things, due to the second Polish partition, which was agreed between Prussia, Austria and Russia in January 1793.<sup>99</sup> The partition of Poland entailed an expansion of the Prussian dominion,<sup>100</sup> which in turn led to the Hohenzollern monarchy being in doubt as to which laws the Prussian judges and civil servants were to apply in the newly annexed province of Southern Prussia.<sup>101</sup> When the AGB became a possible alternative in this scenario, Carmer and his staff saw a fresh opportunity to advocate for the application of their work in the whole of Prussia. After a long period of discus-

84 HATTENHAUER (1996) 10.

85 SCHWENNICKE (1994) 457.

86 See BORNEMANN (1842) 9; KRAUSE (1998) 163–164; HINSCHIUS (1889) 8; WILLOWEIT (1998) 92.

87 FINKENAUER (1996) 60.

88 HATTENHAUER (1996) 10.

89 *Publikationspatent* (20 March 1791), preamble, in: Allgemeines Gesetzbuch für die Preussischen Staaten, Erster Theil, Berlin 1791 (reprint: Frankfurt am Main 1985), p. VI.

90 HATTENHAUER (1996) 14.

91 Geheimes Staatsarchiv Preussischer Kulturbesitz (Berlin), Hauptabtei-

lung I, Repositur 84, Abteilung XVI, number 7, vol. 88, folium 10r. – See STÖLZEL (1885) 354.

92 Geheimes Staatsarchiv Preussischer Kulturbesitz (Berlin), Hauptabteilung I, Repositur 84, Abteilung XVI, number 7, vol. 88, folium 11r.

93 See HATTENHAUER (1996) 14; STÖLZEL (1885) 355–356.

94 See BRINGMANN (2001) 246; MEIER (2007) 129.

95 For further information on the foreign policy constellation at the time see MÖLLER (1994) 542 et seq.

96 See KUHLI (2012) 160 et seq.

97 VOIGT (1972) 145.

98 Frederick William II., cabinet order (5 May 1792) (Geheimes Staatsarchiv Preussischer Kulturbesitz [Berlin], Hauptabteilung I, Repositur 84, Abteilung XVI, number 7, vol. 88, folium 15r). – See BARZEN (1999) 247.

99 BOECK (1966) 65; THIEME (1965/66) 12; SCHWENNICKE (1994) 457; BENTHAUS (1996) 92; HINSCHIUS (1889) 9; KLEINHEYER (2008) 431.

100 See HOENSCH (1998) 167; DAVIES (2001) 279; BOOCKMANN (1992) 330–331.

101 HATTENHAUER (1996) 14–15.



sion,<sup>102</sup> Frederick William II. finally issued a royal cabinet order on 17 November 1793, assigning Carmer with the task of applying certain modifications to the code of law and finding a new title for it.<sup>103</sup> According to the King, once those measures had been taken, the code could enter into force in the whole of Prussia.<sup>104</sup> After the final review, which was mainly carried out by Svarez,<sup>105</sup> was completed on 4 January 1794, the code was patented and promulgated on 5 February 1794 with the title »*Allgemeines Landrecht für die Preussischen Staaten*«. <sup>106</sup> On the basis of this patent, the essential elements of the ALR entered into force on 1 June 1794.<sup>107</sup>

With its 19,000 articles this piece of legislation is one of the most extensive codes of law of modern history.<sup>108</sup> Its authors had had the intention of providing legal rules for every possible circumstance that might become a matter of criminal proceedings in any Prussian court or of a legal dispute between subjects.<sup>109</sup> The ALR did not cover procedural law, since that field was regulated in a separate set of laws. Instead, it covered the fields of mercantile law, company and labour law, inheritance and family law, municipal, industrial and building law, civil service law, feudal law, canon law, and criminal law.

## 2. *The concepts of power and law in the Prussian code of laws*

### A. The concept of the AGB

The term »*Gesetzbuch*« (code of law) contained in the title of the AGB already suggests that what was to be applied was not *the law* in its definition as the sum of all existing legal norms, but rather the

*single laws*, i.e. the legal rules representing the formalised will of the state.<sup>110</sup> Therefore, each field of law – after a period of three years even provincial law<sup>111</sup> – was to be codified in single legal rules. Accordingly, the AGB stipulated the ultimate abrogation of customary law.<sup>112</sup> In a very prominent position, namely in the very beginning of the code, in § 1 of the introduction to the AGB with regard to the rights and duties of the citizens of the state, reference is made only to the rules stated in the AGB or in special codes of law. Moreover, the room for interpretation offered to judges and academics was to be reduced.<sup>113</sup> In cases in which the scope of a certain legal rule was not clear, the only body authorised to determine its applicability was to be the Prussian *Gesetzkommission* (§§ 50, 51 of the introduction to the AGB).<sup>114</sup>

Thus, the concept underlying the AGB included the rejection of traditional law as it had been in force in the Prussian states up to that date as well as an opposition to the authority of the judiciary to interpret the rules in different ways. This conclusion raises the question of whether the AGB did indeed impose certain limits to the monarch himself, for in order to regulate the lives of the subjects there might well have been a need to codify certain rules that regarded the monarch as well. That was the case with § 6 of the introduction to the AGB for example,<sup>115</sup> which has been widely discussed by scholars. It stipulated rules about the effects of *Machtsprüche* spoken by the monarch, and was deleted during the final review. More precisely, it stipulated that *no rights and no duties* arose from *Machtsprüche* that were spoken during an on-going legal proceeding. The rule explicitly referred only to civil law proceedings and hence did not apply to criminal or disciplinary proceedings.<sup>116</sup>

102 See KUHLI (2012) 164 et seq.

103 STÖLZEL (1885) 380 et seq.

104 Geheimes Staatsarchiv Preussischer Kulturbesitz (Berlin), Hauptabteilung I, Repositor 84, Abteilung XVI, number 7, vol. 88, folium 45r–46r.

105 SCHWENNICKE (1995) 86–87; STÖLZEL (1885) 394–395; HATTENHAUER (1996) 15.

106 Geheimes Staatsarchiv Preussischer Kulturbesitz (Berlin), Hauptabteilung I, Repositor 84, Abteilung XVI, number 7, vol. 88, folium 193r.

107 In the newly annexed province of Southern Prussia, the *Allgemeines Landrecht* even entered into force at an earlier date since there was a lack of existing legal rules in that area at the time (see KÖBLER [1996] 140).

108 SCHWENNICKE (1994) 456.

109 LANCIZOLLE (1846) 46 et seq.

110 HATTENHAUER (1988) 46–47.

111 *Publikationspatent* (20 March 1791), in: *Allgemeines Gesetzbuch für die Preussischen Staaten, Erster Theil*, Berlin 1791 (reprint: Frankfurt am Main 1985), p. VIII.

112 HATTENHAUER (1988) 48, 65.

113 See *ibid.* 65.

114 See »*Vorläufige Instruction für die zu etablirende Gesetz Commission*« (Geheimes Staatsarchiv Preussischer Kulturbesitz [Berlin], Hauptabteilung I, Repositor 84, Abteilung XVI, number 1, vol. 1, folium 13r–16v); Frederick II., cabinet order (14 April 1780), in: HATTENHAUER (1996) 40.

115 See WILLOWEIT (1998) 101–102.

116 FINKENAUER (1996) 83, 101 et seq.; SCHWENNICKE (1994) 460; CONRAD (1961) 25; CONRAD (1965) 16 et seq.

Declaring *Machtsprüche* to be of non-binding nature as § 6 did was a programmatic act against such interventions in on-going legal disputes by the monarch. However, the provision does not equal a *prohibition* of *Machtsprüche*.<sup>117</sup> In this respect, Svarez' views on the duty of the judiciary and the parties involved in a legal proceeding to obey any *Machtspruch*, as laid down in the Crown Prince Lectures, must be referred to. Here, the reformist states clearly that the respective judge or party to the proceedings shall have no right to defy the *Machtspruch*.<sup>118</sup> This idea was to hold true in reality even according to § 6 of the introduction to the AGB, which can be deduced from the fact that the introduction to the AGB does not comprise any provision to be applied in the case of a *Machtspruch* being spoken by the king in violation of § 6.

There is thus evidence that § 6 of the introduction to the AGB was not meant to represent a departure from Svarez' theoretical concept according to which the court was under the obligation of obeying the king's *Machtspruch*. The court did, however, have the possibility of submitting a motion of reconsideration and hence suggesting to the monarch to annul his *Machtspruch*. If the monarch did not decide to do so, the *Machtspruch* remained binding.<sup>119</sup> In that case, the respective party was de facto forced to wait for the Prussian throne to be passed on to the monarch's successor and to resubmit their motion of reconsideration to the new king.<sup>120</sup> Hence, neither the king nor the courts were the actual addressees of § 6 of the introduction to the AGB.<sup>121</sup> It seems as if the provision was meant to advise the litigant against submitting a petition to the monarch in the first place. *Machtsprüche* were undesirable but not ultimately forbidden.<sup>122</sup> What would have been in the spirit of § 6 instead was probably to some extent a

voluntary renunciation of *Machtsprüche* on the king's behalf. From this perspective, the provision is certainly in line with Frederick II.'s views expressed in his political testaments written in 1752 and 1768.<sup>123</sup>

The same holds true for § 12 and § 79 of the introduction to the AGB respectively, both of which were deleted from the code during the final review, just as § 6.<sup>124</sup> § 12 stipulated that the *Gesetzkommission* was to participate in the legislative process, and § 79 laid down that all laws had to contribute to the purpose of the state. Just as from § 6, no legal obligation for the king arose from § 12 and § 79. Ultimately, all AGB provisions that might have limited the king's authority merely suggest possible limitations on political or moral grounds. § 6, § 12 and § 79 could only be enforced by the monarch himself, since the AGB did not provide for any external and independent institution with the authority to supervise the king to such an extent. As long as the monarch did not pronounce an opinion on the validity of a certain provision, each act of royal authority would suggest that he deemed the respective provision valid. The king's will still represented the ultimate grounds for the validity of the law. The authority to enact laws remained with the king despite the new code.<sup>125</sup> At the same time, due to its non-binding nature, the AGB cannot be called a constitution in the post-revolutionary sense.<sup>126</sup> Thus, Conrad's view, according to which § 6, § 12 and § 79 of the introduction to the AGB can be called a *catalogue of fundamental rights* (»Grundrechtskatalog«),<sup>127</sup> cannot be subscribed to either. A code that could have been annulled by the monarch easily at any time, did not offer any room for fundamental rights directed against the monarch.<sup>128</sup> During the age of Absolutism – even Enlightened Absolutism –, no rules could be de-

117 SCHWENNICKE (1993) 137 et seq.

118 Svarez, Crown Prince Lectures, in: CONRAD/KLEINHEYER (1960) 238.

119 SCHWENNICKE (1993) 158; STÖLZEL (1885) 309 et seq.

120 Svarez, *extractus monitorum* (Geheimes Staatsarchiv Preußischer Kulturbesitz [Berlin], Hauptabteilung I, Repositur 84, Abteilung XVI, number 7, vol. 72, folium 20r); STÖLZEL (1885) 309 et seq.

121 See KRAUSE (1998) 189.

122 FINKENAUER (1996) 103, 108.

123 See KUHLLI (2012) 202 et seq.

124 Ibid. 219 et seq.

125 HATTENHAUER (1996) 17.

126 LINK (1998) 45; FINKENAUER (1996)

128. – Different view: TOCQUEVILLE (1998) 317; PHILIPPSON (1882) 56; THIEME (1937) 385 et seq.; THIEME (1967) 161; CONRAD (1965) 6 et seq.; MERTEN (1986) 62–63.

127 CONRAD (1961) 26.

128 For this reason, FEHRENBACH's view is to be rejected. According to her, the AGB and ALR represented a first guarantee of the fundamental rights of civil liberties and equality (FEHRENBACH [2001] 55).

veloped which would subject the monarch to any legal duty. Such rules only became accepted in constitutional monarchy.

At the same time, however, the effect of the public promulgation of political duties must not be underestimated.<sup>129</sup> With provisions such as § 6, § 12 and § 79 of the introduction to the AGB, the code constituted a publicly available document of the self-discipline of monarchical power<sup>130</sup> and hence it increased the political pressure to fulfil those duties.<sup>131</sup> After all, the AGB does in its provisions lay out certain guidelines for the king's actions. The provisions reflect the basic principles about right and wrong, which according to Svarez constitute a veritable fortress for the citizens' civil liberties.<sup>132</sup> Even if those principles about right and wrong had no direct legal implications for the current monarch's actions, from the perspective of the Prussian subjects hope remained that one of his successors would put them into effect.

The provisions that publicly documented the monarch's self-discipline, however, were not the only aspect of the AGB that functioned as guidelines for the king's actions. The code also provided for certain institutions to act as advisors to the king in matters of legislation. In his Crown Prince Lectures, for example, Svarez refers to the *Gesetzkommission* as the unpartisan voice of truth.<sup>133</sup> Accordingly, the high-ranking Prussian civil servants were to support the king with their knowledge and skills not only in drawing up the judicial reform itself, i. e. in compiling the new Prussian code of laws. In addition to that, they were also meant to be given the opportunity to advise the king on any future amendment of the AGB (or of the ALR respectively).<sup>134</sup> The estates of the country in turn were not conceded an advisory function comparable to that of the *Gesetzkommission*. Although it is true that in the Crown Prince Lectures Svarez had stressed the advisory function of the estates of the countries towards the king,<sup>135</sup> in political practice they did not have any general consultative right on the legislature concerning the

whole of Prussia even at that time (1792/1793). The AGB merely codified the rights of the estates of the country in that it stipulated their role as local authorities.<sup>136</sup> They were not an official advisory body to the king.

As for the role of the subjects, however, the AGB explicitly stressed their consultative function. It is true that they were not meant to participate actively in the exertion of state power.<sup>137</sup> Furthermore, the 1791 code of laws includes the prohibition of fomenting public unrest by mocking the laws – and a threat of punishment for those who act in violation of this provision (§ 151 of the 20th title of the second part of the AGB).<sup>138</sup> At the same time, however, the AGB provided for the possibility of single subjects either voicing objections to existing legal rules or other royal orders to the king or the leader of a department, or of submitting suggestions for improvement in general (§ 156 of the 20th title of the second part of the AGB). Hence, public participation in assessing and amending the laws was permitted – though certainly to a limited extent – in the name of general welfare. This measure did not, of course, aim at creating a general public discourse. The power of acting as an advisory body was to remain with the public authorities. It must, however, be stressed that the subjects' opinions were indeed taken into account. This can be seen as a continuation of the tendency that had started with the participation of the public in the legislative process that led to the creation of the AGB in the first place.

It can thus be concluded that the AGB does not reflect any intention of legally binding the monarch to fulfil his duties. All of the legal rules that seem at first sight to legally subject the king to any duty – including §§ 6, 12 and 79 of the introduction to the AGB, which were deleted in the course of the final review – are void of any real legal prohibition against him. The function of those provisions is rather the promulgation of the regent's political duties. Nevertheless, uncertainty remained from the perspective of the monarch as

129 See LINK (1998) 37.

130 See BIRTSCH (1985) 92–93.

131 See FINKENAUER (1996) 135.

132 Svarez, Lecture »Über den Einfluss der Gesetzgebung in die Aufklärung«, in: CONRAD/KLEINHEYER (1960) 636.

133 Svarez, Crown Prince Lectures, in: CONRAD/KLEINHEYER (1960) 480.

134 LINK (1998) 36–37; see SCHWENNICKE (1993) 287.

135 Svarez, Crown Prince Lectures, in: CONRAD/KLEINHEYER (1960) 479 et seq.

136 SCHWENNICKE (1998) 122; BORNHAK (1903) 275 et seq.

137 CONRAD (1965) 26.

138 See Svarez, Lecture »Vorschläge zu Censur Gesetzen« (Staatsbibliothek zu Berlin Preußischer Kulturbesitz, Handschriftenabteilung, Manuskripta borussica, vol. 443, folium 272r–277v).

to whether the provisions might possibly be misinterpreted by third persons. In this context, the final review, which the three articles mentioned above fell prey to, is of interest, and it shall thus be discussed in the following section.

#### B. The relevance of the final review

As a result of the final review, which had been ordered by Frederick William II., certain significant changes were applied to the Prussian code of laws distinguishing it from the AGB.<sup>139</sup> The most obvious one was the modification of the code's title («*Allgemeines Landrecht für die Preussischen Staaten*»). The deletion of § 6, § 12 and § 79 of the introduction to the AGB was another important result of the final review. Changes were also applied to certain provisions that were not as fundamental, such as those concerning morganatic marriage or inheritance law for poorhouses in cases in which the deceased was unmarried.<sup>140</sup> The latter modifications were of course of much less political importance than the deletion of § 6, § 12 and § 79 of the introduction to the AGB. However, even the elimination of those three provisions of the introduction did not mean that the general legal concept underlying the Prussian code of laws suffered any fundamental change. This is especially true for the ultimate deletion of § 6, the provision according to which the king would renounce to speaking *Machtsprüche*. It has been explained above that this provision did in no way run counter to Svarez' theoretical concept, according to which the court was obliged to obey any *Machtspruch* spoken by the monarch. According to the AGB, royal *Machtsprüche* would have been undesirable but not forbidden. Hence, Frederick William II. would not have faced any legal impediment to issuing such a dictum.

The same holds true for § 12 and § 79 of the introduction to the AGB,<sup>141</sup> which is why it can be affirmed that the deletion of § 6, § 12 and § 79 would not have been necessary from a legal per-

spective. All of these provisions, however, carried the inherent risk of being interpreted in a much too extensive way or of being altogether misinterpreted by third persons applying them at a later point in time. Since the provisions stipulated the prospect of royal acts *losing their binding nature* as a possible consequence of their violation, they might under certain circumstances have been misinterpreted to the effect that subjects or members of the judiciary were not obliged to obey when the King issued a *Machtspruch* (§ 6), when a law was drawn up without participation of the *Gesetzkommission* (§ 12) or when a provision excessively limited the subjects' rights (§ 79 of the introduction to the AGB). Apart from that, the three provisions bore a certain potential of becoming central to large-scale reform efforts.<sup>142</sup> Therefore, the reasons for the modifications applied in the course of the final review were probably not the *actual content* of the affected provisions but rather their possible *interpretation* by third persons.<sup>143</sup>

In this respect, the events that took place at the time in other European countries must also be taken into consideration. The outbreak of the French revolution for instance gave a clear picture of what Enlightenment could ultimately lead to.<sup>144</sup> Against this background, the Prussian view on many issues must have changed significantly. In 1792, the king did indeed receive a number of official letters from certain estates of the country and regional governments reporting unrest among the peasant population. Peasants had allegedly declared that they were under no obligation to provide any services to their landlords that were not required by the AGB.<sup>145</sup> Given the events and background of the French revolution, the authors of the Prussian code of laws might well have been suspected of importing revolutionary ideas into Prussian society.<sup>146</sup>

When Frederick William's confidants began discussing the final review, there was already a strong indication that the provisions of the AGB which were later deleted could easily have been

139 GEUS (2002) 153–154.

140 MERTEN (1986) 62–63.

141 See KUHLI (2012) 236 et seq.

142 REIBSTEIN (1962) 516–517.

143 KRAUSE (1998) 132; FINKENAUER (1996) 110–111.

144 HUCKO (1994) 1450. – See THIEME (1965/66) 10; KOSELLECK (1981) 30;

ALBRECHT (2005) 64; MERTEN (1986) 61.

145 See for example Geheimes Staatsarchiv Preußischer Kulturbesitz (Berlin), Hauptabteilung I, Repositur 84, Abteilung XVI, number 3, vol. 5, folium 87r–88v. – See DILTNEY (1960) 149–150; KRAUSE (1998) 176–177.

146 SCHWENNICKE (1994) 457;

SCHWENNICKE (1993) 51 et seq.;

FINKENAUER (1996) 134.

interpreted in a much broader sense than within what was originally intended to be their scope of application. The Bavarian civil servant Johann Georg Schlosser – one of Goethe’s brothers-in-law – for instance brought up the painful subject in his paper published in 1789, in which he raised the question of whether the *Machtspruch* provision of the AGB meant that the party affected had the right to resist in cases in which the king acted in violation of that provision.<sup>147</sup> Although it is true that from an objective point of view, according to what has been established above, the answer would have been in the negative, a judge might – just as Schlosser – not have been certain as to how to interpret the respective provision. It was probably due to such examples that the king grew increasingly concerned about the AGB creating incentives for further reforms on a larger scale. Since such a risk was highest with regard to provisions that were given a prominent position within the AGB – namely in the introduction – certain provisions which had a similar content but were not as exposed within the text were kept. For that reason, the *Machtspruch* provision of § 6 of the introduction to the AGB was deleted while § 10 of the 13th title of the second part of the AGB/ALR was kept. The latter provision stipulates that if a criminal offender is pardoned by the king, that does not mean that the victim of the crime loses their right to compensation under civil law. Apparently, the risk of the members of the judiciary disobeying the king was not deemed as high with regard to this provision as with regard to § 6 of the introduction to the AGB.

It is hence apparent that § 6, § 12 and § 79 were deleted because they contained a certain risk of misinterpretation rather than because of their actual legislative content. This does not, however, justify drawing the conclusion that the final revision did not entail any substantial changes to the legal concept underlying the Prussian code of laws. The fact that the deletion of the provisions mentioned above meant that certain substantial political duties of the monarch were no longer laid down publicly plays a decisive role here. As a result of the final review, the need for the king to justify

possible violations of those duties to the public was reduced significantly.

On the other hand, many of the reformists’ ideas did indeed persist even after the final review. For instance, the revised version of the Prussian code of laws still stipulated the limited room for interpretation of the laws by the judges. Another concept that was left untouched was the role attributed to civil servants and the subjects. Even under the application of the ALR, the *Gesetzkommission* maintained its role as the institution whose task it was to advise the monarch on issues regarding the legislative process. As far as the Prussian subjects are concerned, Svarez had never aimed at their full participation in the legislative process. He had always insisted in distinguishing between civil and political liberties – he was only interested in achieving the former.<sup>148</sup> The AGB did, however, contain some substantial provisions regarding the freedom of thought that did not fall prey to the final review.<sup>149</sup> One example is the right for each subject to publicly voice possible doubts about or objections to any legal rule (§ 156 of the 20th title of the second part of the ALR). Criticism by the subjects was hence allowed, a fact that certainly had a normative effect, since it could in certain cases mean that the regent was under increased pressure to justify his actions. The right to voice public criticism was certainly not individualised, but it was meant to serve an enlightened exercise of power by the monarch. Furthermore, the fact that Svarez provided for the subjects’ right to voice their objections reflects his fundamental concern with regard to the relation between free people and the state.<sup>150</sup> The codification of this principle may well be one of the big achievements of this extraordinary legal reformist.

#### IV. Conclusion

Did Svarez’ ideas prevail then? The answer seems at first sight to be a definite yes. The considerations about the final review not having led to any fundamental changes of his basic concept in particular seem to confirm the assumption that the

147 SCHLOSSER (1789) 175.

148 MÖLLER (1991) 116.

149 KRAUSE (1998) 133.

150 See Svarez, Crown Prince Lectures, in: CONRAD/KLEINHEYER (1960) 219.

Prussian reformist achieved his ends. However, there are some objections to be made to this view: If one were to believe that the concerns Frederick William II. and his confidants had about §§ 6, 12 and 79 of the introduction to the AGB – which were deleted in the course of the final review – becoming central to further large-scale reform efforts were indeed justified, one cannot rule out the possibility that Prussian history would have taken a different turn if it had not been for the final review.

However, considerations about the hypothetical effects of events in counterfactual history are usually vague and partly even futile. With regard to Svarez, the speculations described above might even be completely erroneous, since they do in no way reflect the reformist's aims. Svarez was known to be a most dutiful civil servant, loyal not only to his minister of justice, with whom he shared remarkably close bonds all throughout his professional career, but also and especially to the Prussian monarchs. It is hence improbable that he would have designed the Prussian code of laws with the idea in mind of promoting attempts to constitutionalise the Prussian monarchy.

At the same time, however, Svarez' undeniable dutifulness should not be misinterpreted as meaning that the reformist was altogether opposed to any change in the Prussian political system. His

loyalty towards the state and its regent must not be mistaken for an uncritical attitude. As he mentioned in one of the Crown Prince Lectures, Svarez did not shy away from voicing *audacious truths* (»dreiste Wahrheiten«<sup>151</sup>) as long as he was convinced that they were valid. However, one of these *audacious truths* was certainly the publicly stipulated advice towards the king to renounce to issuing *Machtsprüche*. Without the final review, the Prussian code of laws would have become a publicly available document of the self-discipline of monarchical power and as such it would have made possible violations by the monarch of the duties he was subject to according to natural law visible to all citizens of the Prussian states. As a consequence of the final review, however, Svarez was denied the opportunity of influencing the monarch's exertion of power. Nevertheless, a number of his efforts to point out the path of natural law to the king were indeed successful. All in all, it may be true that Svarez' work did not exactly make him the one to bring about a new era in Prussian legal history – his great achievement, however, lies in his systematic attempt of bringing about enlightened limitations to what was at that time illimitable. ■

## Bibliography

- ALBRECHT, MATTHIAS (2005), Die Methode der preußischen Richter in der Anwendung des Preußischen Allgemeinen Landrechts von 1794. Eine Studie zum Gesetzesbegriff und zur Rechtsanwendung im späten Naturrecht, Frankfurt am Main
- BARZEN, CAROLA (1999), Die Entstehung des »Entwurf(s) eines allgemeinen Gesetzbuchs für die Preußischen Staaten« von 1780 bis 1788, Konstanz
- BENTHAUS, RAIMUND (1996), Eine »Sudeley«? – Das Allgemeine Landrecht für die Preußischen Staaten von 1794 im Urteil seiner Zeit, Kiel
- BIRTSCH, GÜNTER (1969), Gesetzgebung und Repräsentation im späten Absolutismus. Die Mitwirkung der preußischen Provinzialstände bei der Entstehung des Allgemeinen Landrechts, in: Historische Zeitschrift 208, 265–294
- BIRTSCH, GÜNTER (1985), Carl Gottlieb Svarez. Mitbegründer des preußischen Gesetzesstaates, in: ALTER, PETER et al. (eds.), Geschichte und politisches Handeln. Studien zu europäischen Denkern der Neuzeit. Theodor Schieder zum Gedächtnis, Stuttgart, 85–101
- BIRTSCH, GÜNTER, DIETMAR WILLOWEIT (eds.) (1998), Reformabsolutismus und ständische Gesellschaft. Zweihundert Jahre Preußisches Allgemeines Landrecht, Berlin
- BOECK, DIETER (1966), Die Schlußrevision des Allgemeinen Landrechts für die preußischen Staaten von 1794. Vorgeschichte und Entstehung des Landrechts, privatrechtliche Neuerungen anhand der Schlußrevision, geschichtliche Wirkungen und Würdigungen, Hamburg
- BOECKMANN, HARTMUT (1992), Ostpreußen und Westpreußen, Berlin

151 Ibid. 450.

- BORNEMANN, W[ILHELM] (1842), Systematische Darstellung des Preußischen Civilrechts mit Benutzung der Materialien des Allgemeinen Landrechts, vol. 1, 2nd ed., Berlin (reprint: Frankfurt am Main 1987)
- BORNHAK, CONRAD (1903), Preußische Staats- und Rechtsgeschichte, Berlin
- BRINGMANN, WILHELM (2001), Preußen unter Friedrich Wilhelm II. (1786–1797), Frankfurt am Main
- BUSSI, EMILIO (1966), Stato e amministrazione nel pensiero di Carl Gottlieb Svarez precettore di Federico Guglielmo III di Prussia, Milano
- CONRAD, HERMANN (1958), Die geistigen Grundlagen des Allgemeinen Landrechts für die preußischen Staaten von 1794, Cologne
- CONRAD, HERMANN (1961), Rechtsstaatliche Bestrebungen im Absolutismus Preußens und Österreichs am Ende des 18. Jahrhunderts, Cologne
- CONRAD, HERMANN (1965), Das Allgemeine Landrecht von 1794 als Grundgesetz des friderizianischen Staates. Vortrag gehalten vor der Berliner Juristischen Gesellschaft am 25. Juni 1965, Berlin
- CONRAD, HERMANN, GERD KLEINHEYER (eds.) (1960), Vorträge über Recht und Staat von Carl Gottlieb Svarez (1746–1798), Cologne
- DAVIES, NORMAN (2001), Im Herzen Europas. Geschichte Polens, 2nd ed., Munich
- DILTHEY, WILHELM (1960), Gesammelte Schriften, vol. 12: Zur preußischen Geschichte. Schleiermachers politische Gesinnung und Wirksamkeit. Die Reorganisatoren des preußischen Staates. Das Allgemeine Landrecht, 3rd ed., Stuttgart
- FEHRENBACH, ELISABETH (2001), Vom Ancien Regime zum Wiener Kongress, 4th ed., Munich
- FINKENAUER, THOMAS (1996), Vom Allgemeinen Gesetzbuch zum Allgemeinen Landrecht – preußische Gesetzgebung in der Krise, in: ZRG (GA) 113, 40–216
- GEUS, ELMAR (2002), Mörder, Diebe, Räuber. Historische Betrachtung des deutschen Strafrechts von der Carolina bis zum Reichsstrafgesetzbuch, Berlin
- GOSE, WALTHER (1988), Entwurf, Gesetzbuch, Landrecht [1], in: GOSE, WALTHER, PETER KRAUSE (eds.), Aufklärung und Gesetzgebung. 200 Jahre Entwurf eines Allgemeinen Gesetzbuchs für die Preußischen Staaten. Eine Dokumentation, Trier, 5
- HATTENHAUER, HANS (1988), Preußens Richter und das Gesetz (1786–1814), in: HATTENHAUER, HANS, GÖTZ LANDWEHR (eds.), Das nachfriderizianische Preußen 1786–1806. Rechtshistorisches Kolloquium. 11.–13. Juni 1987. Christian-Albrechts-Universität zu Kiel, Heidelberg, 37–65
- HATTENHAUER, HANS (ed.) (1996), Allgemeines Landrecht für die Preußischen Staaten von 1794, 3rd ed., Neuwied
- HELLMUTH, ECKHART (1985), Naturrechtsphilosophie und bürokratischer Werthorizont. Studien zur preußischen Geistes- und Sozialgeschichte des 18. Jahrhunderts, Göttingen
- HELLMUTH, ECKHART (1998), Noch einmal: Freiheit und Eigentum. Zum politisch-gesellschaftlichen Bewußtsein der Landrechtsautoren Carl Gottlieb Svarez und Ernst Ferdinand Klein, in: BIRTSCH/WILLOWEIT (1998) 63–89
- HINSCHIUS, PAUL (1889), Svarez, der Schöpfer des preussischen Landrechts und der Entwurf eines bürgerlichen Gesetzbuches für das deutsche Reich. Rede bei Uebernahme des Rectorats der Königlichen Friedrich-Wilhelms-Universität zu Berlin, gehalten am 15. October 1889, Berlin
- HINTZE, OTTO (1915), Die Hohenzollern und ihr Werk 1415–1915, Berlin (reprint: Hamburg 1987)
- HOENSCH, JÖRG K. (1998), Geschichte Polens, 3rd ed., Stuttgart
- HUCKO, ELMAR (1994), Zum 200. Geburtstag des Allgemeinen Landrechts für die Preußischen Staaten, in: NJW, 1449–1453
- KARST, THOMAS (2003), Der Einfluß von Carl Gottlieb Svarez auf die preußische Gesetzgebung, in: ZRG (GA) 120, 180–199
- KLEINHEYER, GERD (2008), Carl Gottlieb Svarez (1746–1798), in: KLEINHEYER, GERD, JAN SCHRÖDER (eds.), Deutsche und Europäische Juristen aus neun Jahrhunderten. Eine biographische Einführung in die Geschichte der Rechtswissenschaft, 5th ed., Heidelberg, 428–433
- KÖBLER, GERHARD (1996), Deutsche Rechtsgeschichte. Ein systematischer Grundriß der geschichtlichen Grundlagen des deutschen Rechts von den Indogermanen bis zur Gegenwart, 5th ed., Munich
- KOSELLECK, REINHART (1981), Preußen zwischen Reform und Revolution. Allgemeines Landrecht, Verwaltung und soziale Bewegung von 1791 bis 1848, 3rd ed., Stuttgart
- KRAUSE, PETER (1988), Naturrecht und Kodifikation, in: KRAUSE, PETER (ed.), Vernunftrecht und Rechtsreform, Hamburg, 7–28
- KRAUSE, PETER (1998), Die Überforderung des aufgeklärten Absolutismus Preußens durch die Gesetzgebung. Zu den Hemmnissen auf dem Weg zum Allgemeinen Landrecht, in: BIRTSCH/WILLOWEIT (1998) 131–211
- KUHLI, MILAN (2012), Carl Gottlieb Svarez und das Verhältnis von Herrschaft und Recht im aufgeklärten Absolutismus, Frankfurt am Main
- LANCIZOLLE, CARL WILHELM VON (1846), Ueber Königthum und Landstände in Preußen, Berlin
- LINK, CHRISTOPH (1986a), Anfänge des Rechtsstaatsgedankens in der deutschen Staatsrechtslehre des 16. bis 18. Jahrhunderts, in: SCHNUR, ROMAN (ed.), Die Rolle der Juristen bei der Entstehung des modernen Staates, Berlin, 775–795
- LINK, CHRISTOPH (1986b), Die Staatstheorie Christian Wolffs, in: SCHNEIDERS, WERNER (ed.), Christian Wolff 1679–1754. Interpretationen zu seiner Philosophie und deren Wirkung. Mit einer Biographie der Wolff-Literatur, 2nd ed., Hamburg, 171–192
- LINK, CHRISTOPH (1998), Aufgeklärtes Naturrecht und Gesetzgebung – vom Systemgedanken zur Kodifikation, in: BIRTSCH/WILLOWEIT (1998) 21–46
- MEIER, BRIGITTE (2007), Friedrich Wilhelm II. König von Preußen (1744–1797). Ein Leben zwischen Rokoko und Revolution, Regensburg
- MERTEN, DETLEF (1986), Allgemeines Landrecht, in: TREUE, WILHELM (ed.), Preußens großer König. Leben und Werk Friedrichs des Großen, Freiburg i.Br., 56–69
- MERTEN, DETLEF (1992), Die Justiz in den Politischen Testamenten brandenburg-preußischer Souveräne, in: BRACHER, KARL DIETRICH et al. (eds.), Staat und Parteien. Festschrift für Rudolf Morsey zum 65. Geburtstag, Berlin, 13–46

- MÖLLER, HORST (1991), Preußische Aufklärungsgesellschaften und Revolutionserfahrung, in: BÜSCH, OTTO, MONIKA NEUGEBAUER-WÖLK (eds.), Preußen und die revolutionäre Herausforderung seit 1789, Berlin, 103–117
- MÖLLER, HORST (1994), Fürstenstaat oder Bürgernation. Deutschland 1763–1815, Berlin
- OGRIS, WERNER (1987), Friedrich der Große und das Recht, in: HAUSER, OSWALD (ed.), Friedrich der Große in seiner Zeit, Cologne, 47–92
- PÄTZOLD, ERWIN (1938), Johann Heinrich Casimir von Carmer, in: GÜRTNER, FRANZ (ed.), 200 Jahre Dienst am Recht. Gedenkschrift aus Anlaß des 200jährigen Gründungstages des Preußischen Justizministeriums, 1938, 331–366
- PHILIPPSON, MARTIN (1882), Geschichte des Preußischen Staatswesens vom Tode Friedrichs des Großen bis zu den Freiheitskriegen, vol. 2, Leipzig
- REIBSTEIN, ERNST (1962), Allgemeines Staatsrecht und Völkerrecht bei Carl Gottlieb Svarez. Zur Edition der »Kronprinzen-Vorträge«, in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 22, 509–539
- ROUSSEAU, JEAN-JACQUES (2003), Vom Gesellschaftsvertrag Oder Grundsätze des Staatsrechts (HANS BROCKARD [ed.]), Stuttgart
- SCHLOSSER, JOHANN GEORG (1789), Briefe über die Gesetzgebung überhaupt, und den Entwurf des preußischen Gesetzbuchs insbesondere, Frankfurt am Main
- SCHMIDT, EBERHARD (1926), Johann Heinrich Casimir von Carmer, in: ANDREAE, FRIEDRICH et al. (eds.), Schlesien des 18. u. 19. Jahrhunderts, Breslau, 22–29
- SCHREIBER, HANS-LUDWIG (1976), Gesetz und Richter. Zur geschichtlichen Entwicklung des Satzes nullum crimen, nulla poena sine lege, Frankfurt am Main
- SCHWENNICKE, ANDREAS (1993), Die Entstehung der Einleitung des Preußischen Allgemeinen Landrechts von 1794, Frankfurt am Main
- SCHWENNICKE, ANDREAS (1994), Zwischen Tradition und Fortschritt – Zum zweihundertsten Geburtstag des Preußischen Allgemeinen Landrechts von 1794, in: Juristische Schulung, 456–460
- SCHWENNICKE, ANDREAS (1995), Die allgemeinen Strafrechtslehren im Allgemeinen Landrecht für die Preußischen Staaten von 1794 und ihre Entwicklung in der Rechtsprechung bis zum preußischen Strafgesetzbuch von 1851, in: DÖLEMEYER, BARBARA, HEINZ MOHNHAUPT (eds.), 200 Jahre Allgemeines Landrecht für die preußischen Staaten. Wirkungsgeschichte und internationaler Kontext, Frankfurt am Main, 79–104
- SCHWENNICKE, ANDREAS (1998), Der Einfluß der Landstände auf die Regelungen des Preußischen Allgemeinen Landrechts von 1794, in: BIRTSCH/WILLOWEIT (1998) 113–129
- STÖLZEL, ADOLF (1885), Carl Gottlieb Svarez. Ein Zeitbild aus der zweiten Hälfte des achtzehnten Jahrhunderts, Berlin
- THIEME, HANS (1937), Die preußische Kodifikation. Privatrechtsgeschichtliche Studien II, in: ZRG (GA) 57, 355–428
- THIEME, HANS (1965/66), Carl Gottlieb Svarez in Schlesien, Berlin und anderswo. Ein Kapitel aus der schlesischen und preußischen Rechtsgeschichte, in: Juristen-Jahrbuch 6, 1–24
- THIEME, HANS (1967), Carl Gottlieb Svarez aus Schweidnitz (1746–1798). Der »größte preußische Gesetzgeber«, in: SCHULZ, EBERHARD G. (ed.), Leistung und Schicksal. Abhandlungen und Berichte über die Deutschen im Osten, Cologne, 157–163
- TOCQUEVILLE, ALEXIS (1998), L'ancien régime et la révolution, Préface, notes, bibliographie, chronologie par Françoise Mélonio, Paris
- VOIGT, ALFRED (1972), Gesetzgebung und Aufklärung in Preußen. Bemerkungen zum Allgemeinen Landrecht für die Preußischen Staaten, in: SCHOEPS, HANS-JOACHIM (ed.), Zeitgeist der Aufklärung, Paderborn, 139–151
- WILLOWEIT, DIETMAR (1998), Die Revisio Monitorum des Carl Gottlieb Svarez, in: BIRTSCH/WILLOWEIT (1998) 91–112
- WOLF, ERIK (1963), Große Rechtsdenker der deutschen Geistesgeschichte, 4th ed., Tübingen
- WOLFF, CHRISTIAN (1968), Jus Naturae (1740–1748), in: Gesammelte Werke, II. Abteilung: Lateinische Schriften, vol. 24, Hildesheim