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On Legal Pluralism and Ghosts in the *Sachsenspiegel* and in *Gaya*

Abstract

This paper reflects on legal pluralism. How did medieval societies incorporate both unwritten customs and written law at the same time? How did they constitute the process of finding justice? What is the essence of legal pluralism, and will it help us understand the situation of Taiwan's indigenous population?

We aim to solve these problems by taking a closer look at medieval Saxony: for around 400 years, both laws given by the authorities and traditional customs in Saxony worked fine in parallel. The latter were put into writing by the legal practitioner Eike von Repgow around 1230 for reasons unknown. We refer to his collection of laws and customs of the Saxons as the *Sachsenspiegel* («Mirror of Saxons»).

While Saxons certainly differed from Taiwan's indigenous population for many reasons, such as the supposedly weaker egalitarianism among the Saxons than among at least some indigenous groups, the two show some remarkable similarities nonetheless. Just like the Taiwanese *Gaya*, the *Sachsenspiegel's* spiritual origin raises the claim to validity. Furthermore, comparing the handling of a person's sale of inherited property, the legal situations in the *Sachsenspiegel* and Taiwan's unwritten customs resemble each other. The heir can transfer only property he acquired personally. Furthermore, the author discusses the different character of courts and procedure under oral law in contrast to written modern law.

Finally, the paper concludes with some remarks about a learned commentary on the *Sachsenspiegel* written around 1325, combined with an outlook on the possible future of Taiwanese customs.



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On Legal Pluralism and Ghosts in the *Sachsenspiegel* and in *Gaya*

Our conference is largely about searching for historic examples for present-day projects that aim to put unwritten customs into writing. However, we wish by no means to exalt history, nor shall we fall for the trap that suggests we can learn from history *sensu stricto*. All we can strive for – if there is anything at all for us to strive for here – are ideal types in the sense of Max Weber.

Further, we want to discuss how medieval societies managed to incorporate unwritten customs on the one hand and written law on the other. When a government's power over a community was very limited, how did it maintain stability? Moreover, we want to examine the process of finding the law in communities that have not produced any written laws.

Finally, since our medieval prototype is supposed to reflect the current situation of Taiwan's indigenous population, more than abstract processes of finding the law are at stake. Specific contents of the law spark our interest as well. Such research certainly requires at least some general idea of Taiwanese customs. The kind and helpful advice our host has provided indicates some tentative steps in that direction as well.¹

First, let us examine our medieval model. Over the past 15 years, I have studied what is commonly referred to as the »*Sachsenspiegel*«. ² The *Sachsenspiegel*, »Mirror of Saxons« being its literal meaning, is a collection of the laws and customs of the Saxons dating back to around 1230.

Settling primarily in North(ern) Germany, the Saxons were one of the four main tribes of the medieval German Empire. Records of their existence date back as early as the 3rd century.³ The

Saxons were a military people, and it was only by force that they eventually converted to Christianity.⁴

Early modern and medieval Germany used to be a multinational-state – with the emphasis on »multinational«, not »state«. The tribes lived by their own rules, only acting in concert in case of external military threats. Up to the present, these federalist tendencies have perhaps been German history's principal characteristic.⁵ As Montesquieu stressed in 18th century, federalism might be the very core of what is German(ic).⁶

In any case, the Saxons were (in)famous for their enduring resistance against the legendary Emperor Charlemagne.⁷ Only by brute force did he manage to prevail in 785, eventually compelling the Saxons' leader, Widukind, to accept baptism.⁸ In 802, a collection of the Saxons' tribal law was recorded in the so-called *Lex Saxonum*.⁹ However, it was Charlemagne who established this law,¹⁰ so it is unclear whether and to what extent this collection genuinely depicts Saxonian customs.

As opposed to the indigenous population on Taiwan,¹¹ the Saxons never showed any signs of egalitarianism. Even the *Lex Saxonum* distinguishes between people according to their »value«. In case of inter-tribal murder, the perpetrator's tribe was supposed to compensate by paying a so-called »*weregild*«, a specified sum of money. Pursuant to *Lex Saxonum*, the *weregild* varied according to the social status of the victim.¹²

For the time between 800 and about 1230, there exists no Saxon legislation whatsoever, but around 1230 the *Sachsenspiegel*, the most important medieval source of legal thought and laws in German,

1 Tzung-Mou Wu was so kind to introduce me to the following article: SIMON (2012).

2 Editions used here: HOMEYER 1861; HOMEYER (1842).

3 EHLERS (1995).

4 SPRINGER (2004) 179 s.; CAPELLE (1998) 135 s.

5 KANNOWSKI (2008) 108.

6 *la république fédérative*, MONTESQUIEU (1987) 141.

7 SPRINGER (2004) 175; CAPELLE (1998) 135 s.

8 SPRINGER (2004) 195 ss.; CAPELLE (1998) 135 s.

9 MGH LL V, 34 ss.

10 The supposed influence of Charlemagne is described in detail by SCHMIDT-RECLA (2011) 356 ss.

11 SIMON (2012) 169, 171.

12 *Qui nobilem occiderit 1440 solidos componat*, *Lex Saxonum* cap. 14, *Litus*

occisus 120 solidis componatur, *Lex Saxonum* cap. 16, *Servus a nobili occisus 36 solidis componatur*, *Lex Saxonum* cap. 17, (MGH LL V), pp. 52 ss.

appeared.¹³ Indeed, it is so well-preserved that it is a one-of-a-kind source of history.

But who recorded those customs in writing? It was Eike von Repgow, whom we sadly know little about other than that he existed. Eike was apparently a legal practitioner of some sort, probably a juryman or alderman in court. What we can be certain about is that Eike was unaware of his work's impact and the importance that would eventually be attributed to it.

Surprisingly, collective memory seems to have forgotten the ruthless war perpetrated by Charlemagne against Eike's people 400 years earlier. Charlemagne is portrayed as a legendary Christian emperor and the architect of the *Sachsenspiegel*.¹⁴ On one hand, the Saxons were part of the Empire and had assimilated. On the other hand, the notion of being »Saxonian« still prevailed among the population. For example, the *Sachsenspiegel's Landrecht* (»common law«, »law of the land«, literally »land law«) covers all those born in Saxony,¹⁵ the point of reference thus being the place of birth irrespective of one's later place of residence.

One matter remains unsolved: what motivated Eike to commit these laws to writing? Obviously, governmental laws and traditional customs worked fine in tandem for 400 years. This crucial question has yet to be answered. What we do know, however, is that circumstances at that time differed greatly from today's situation in Taiwan. Surprisingly, there was no such thing as a governmental order for Eike to record the customs. Consequently, the *Sachsenspiegel* is what is known as a »*Rechtsbuch*«, a compendium of laws, a phenomenon primarily attributed to 13th century Europe. Essentially, these are works of individuals without any mandate by the authorities.¹⁶

Medieval law books are comprehensive records of law that had previously been passed on orally. At that time, such (law) books were in vogue. To name but a few others, in England, the tracts »*De legibus et consuetudinibus Regni Angliae*« appeared;

in France, there were the »*Coutumes*« and in Spain the »*Fueros*«. Apart from legal habits as its basis (1), the main characteristics of a law book were its intention to impart a comprehensive understanding of the legal life in a community by way of recording legal habits and its norm-building effect of this process (2), though this effect must be clearly distinguishable from monarchical or collective legislative measures (3).¹⁷

To illustrate how such a book could ever achieve general legally binding effect with a modern analogue, the example of an authoritative textbook may help. Not legislation but imparting legal knowledge (»teachings«) is the author's main objective: »Whoever wants to understand feudal law must follow the teachings of this book«. ¹⁸ The *Sachsenspiegel's* section on feudal law starts with these words. The present legal culture of the English common law is arguably compatible with this way of thinking. There, venerable textbooks of famous lawyers of the past centuries are accepted as sources of law (»books of authority«) without further ado.¹⁹

As to why these records have been produced, the answers of legal historians appear, as mentioned above, somewhat feeble. One explanation given is that writing a law book simply »had been in the air« all over Europe,²⁰ another that there had been »an urge for codification«. ²¹ We can perhaps approach an answer if we bear in mind that these authors did not record the law in order to make law. Rather, they seem to be of the opinion that the written form grants the law greater authority. This could have been an important reason. The words »*consuetudo in scriptis redacta*« (»habits that have been brought into written form«) from the *Decretum Gratiani* might indicate such a view.²² But literature beyond legal texts also flourished around 1200, as it was also the time of chivalric romances.

Although the *Sachsenspiegel* is not a literary text but rather one of the first longer prose texts in German,²³ Eike, perhaps, has much more in com-

13 KANNOWSKI/DUSIL (2003); KROESCHELL (1998) 83.

14 Ssp. Textus prologi; Ldr. I 18 § 1.

15 Ssp. Ldr. III 79 § 2 mentions the general law of the land in contrast to the special law of a village (Nen utwendich man n'is ok plichtich in deme dorpe to antwerdene na irme sunderliken dorprechte, mer na gemeneme lantrechte).

16 The only exception I know of is the Hungarian »*Tripartitum*«, which, however, was created only in the beginning of the 16th century.

17 KÜMPER (2009) 44 s.

18 *Svie lenrecht kunnen wille, die volge disses bukes lere.*

19 KÜMPER (2009) 44 ss., 47.

20 ECKHARDT (1966) 35.

21 GAGNÉ (1960) 288.

22 Gratian, however, makes customary habits, which become *constitutio*, that is *ius*, by virtue of their recording, the very center of legal life: *consuetudo partim est redacta in scriptis, partim moribus tantum utentium est reseruat. Quae in scriptis redacta est, constitutio sive ius vocatur* (d. p. Dist. 1, c. 5).

23 EBEL (1990) col. 1228 s.

mon with writers of chivalric romances than is traditionally assumed.²⁴ The poet Hartmann von Aue, for example, mentions in his famous novel about poor Heinrich that the main reason for this work was to create a divinely inspired piece. For Hartmann, writing was akin to celebrating a Holy Mass to promote his own soul's salvation.²⁵ This was, of course, an important consideration for the people of the Middle Ages.

This is perhaps also true for Eike.²⁶ In any case, he moves the law so close to the religious sphere that the two spheres – the legal and the religious – merged.²⁷ »God Himself is law. That is why He loves the law«, writes Eike in the preface to his work.²⁸ And this is just the beginning. When Eike had a feeling of uncertainty and feared bearing false witness,²⁹ he defended himself with magical techniques. He used a curse to infect his adversaries with leprosy.³⁰

This leads me to indigenous law in Taiwan, more precisely to the law of the Sejiq. What in their language is called »Gaya« can apparently not be translated into English. If it can be considered as »law« in a Western sense at all, it would arguably mean »sacred law«.³¹ Further, the meaning of the word »Gaya« is also linked with ritual groups responsible for the moral behaviour of their members and with political institutions.

It is difficult to say where the normativity of these connotations ends and the facticity begins. Whatever the case, what particularly reminds me of Eike von Repgow is that spirits, the *Utux*, control the compliance with *Gaya*. And wrongdoers are punished by the *Utux* with nothing but a curse, the curse of *lumuba*. This curse does not cause severe illness, as was the case with Eike, but rather mysterious accidents. In either case, however, the wrongdoers' death is the outcome.

What rules need to be broken in order to fall under the curse of *lumuba*? It might follow, for

example, the sale of property inherited from one's ancestors. Such behaviour would be a severe violation of the *Gaya*. The interesting aspect is that there is an exact parallel of this in the *Sachsenspiegel*.

Roman law is dominated by the principle of »universal succession«. ³² According to this principle, everything possessed by the decedent is transferred to the heirs as a uniform asset. In the *Sachsenspiegel*, there was a different approach, according to which particular items were given to particular surviving dependants. Furthermore, a certain amount of food, which was specified in more detail, was separately transferred to the widow in order to ensure her livelihood.³³ All of this is the expression of a medieval way of life and asset structure. This is alien to us, as we live in a world where everybody can theoretically satisfy their desires with their own labour and where there are no shortages, at least as far as prosperous countries are concerned.

83 years ago³⁴ one legal feature of this strange world appeared before the highest German court for the last time.³⁵ In 1932 a succession dispute raised the question of whether the heir has legal standing to contest the decedent's disposition concerning the inheritance. In the German Civil Code, which applied then as it does now, such a legal position does not exist, but it does in the *Sachsenspiegel*.³⁶ The *Sachsenspiegel's* law of succession is based on the medieval property order that distinguished between inherited assets on the one hand and acquired assets on the other. Only what one had personally acquired could be legally given to strangers. Thus, there was a crucial difference between inheritance and possession. The inherited assets, especially land as the basis of an agricultural economy, had to stay within the family for its livelihood. The point is to prevent one individual from squandering the livelihood of the whole family or clan. An individual can never dispose of

24 KANNOVSKI (2005) 352.

25 For Hartmann, written texts must serve God's glory (*gotes êren*) (Der arme Heinrich, V. 13).

26 An illustrated manuscript, for instance, shows Eike v. Repgow as an evangelist, WENZEL (1998).

27 IGNOR (1984) 183.

28 Ssp. Prologus: *Got is selve recht. Dar umme is eme recht lief.*

29 *Groz angst get mich an/ ich vorchte sere, daz manich man/ diz buch wille meren/*

unde beginne recht verkeren, V. 221–224.

30 *alle de unrechte varen/ unde werben an dissem buche/ den sende ich disse vluche/ unde de valsche bir zu scriben/ de mesel-sucht müze in bekliben*, V. 230–234.

31 SIMON (2012) 173.

32 Inst. 2.9.6 (*videamus itaque nunc, quibus modis per universitatem res vobis adquiruntur. si cui ergo heredes facti sitis ..., eius res omnes ad vos transeunt*).

33 So-called »Musteil«, Ssp. Ldr. I 22 § 3, I 24 § 2.

34 Counted from 2015 (the year of the conference when this presentation was delivered).

35 RGZ 137, 324. – The decision mentioned is discussed and presented by HERTZ (2010) 85 ss.

36 Ssp. Ldr. I 52.

items that belong to the economic collective of a family that lasts over many generations. The ancestral spirits are present, similar to the *Gaya* of the Sejiq. A legal position of individual ownership in the modern Western sense did not exist.

A disposition was only legally effective pending the agreement of all heirs. Based on the *Sachsenspiegel's* wording,³⁷ the legal institution of this consent was called »*Erbenlaub*«. ³⁸ The courts recognized these and other variations of Roman law that resulted from medieval customs for centuries. Such variations only gradually disappeared with the harmonization of civil legislation in the German Empire from 1871. Thus, it becomes apparent that the *Sachsenspiegel* continued to affect Germany for over 700 years. In some regions the *Sachsenspiegel* remained valid until the German Civil Code (BGB) became legally valid on 1 January 1900. As mentioned above, courts continued to apply the *Sachsenspiegel* even longer.

However, the functioning of a court prescribed by the *Sachsenspiegel* was very different from current conceptions of courts in Germany.³⁹ It was precisely not about the application of law, which would imply subsumption. Fixed texts that had to be applied simply did not exist. The idea that a written text could solve a legal problem with binding force would have been alien to the *Sachsenspiegel's* creator, Eike von Repgow.⁴⁰ A trial is about finding the law, and that is not even the task of the judge, whose sole role is to lead the trial. The process most closely resembles what is known as the »adversarial system« in the Common Law countries,⁴¹ at least much more so than the continental European legal procedure, which follows the principles of a Roman process. The *Sachsenspiegel* states that the judge has to pose a legal question to one of a group of aldermen. This alderman has to answer the question, and the response is considered the verdict as long as no other person contradicts it. In that case, the two answers are brought before another court assembly.

This assembly must then decide which of the answers deserves consent.⁴²

Unfortunately, I cannot answer the interesting question as to whether or to what extent the transcription of Saxon customs and habits changed Saxon customary law (»*Rechtsgewohnheit*«). There are simply no sources about the nature of the law prior to transcription, to say nothing of empirical field studies before 1230. However, there was apparently a layer of Saxon law applicable to all Saxons and at least one that only applied in certain localities. Eike says that a non-resident does not always have to answer to an action under particular village law. Only the general law of the land is universally binding.

It would be anachronistic to refer to Eike's way of thinking as »legal pluralism«. It is true, however, that magistrate legislation was certainly not the only recognized source of law for him. Rather, law consisted of a web of legal customs at different levels, where the boundaries of normative claim and actually practiced court life were fluid. This medieval concept lost currency in the period of the *Sachsenspiegel's* modern application. In consequence, the *Sachsenspiegel* could only be applied where its relation to the law of »state«, set by king and pope, had been clarified. In this process of clarification Johann von Buch plays a vital role. Johann, who had studied Roman law in Italy⁴³ wrote a commentary on the *Sachsenspiegel* 100 years after its appearance. Johann considers the *Sachsenspiegel* a special law of Saxony, in his terminology a privilege that has been received with the royal consent of Charlemagne.⁴⁴ At one point in the *Sachsenspiegel* Eike says that the Saxons kept certain rights against the will of Charlemagne,⁴⁵ which Johann simply dismisses as untrue. Law is unthinkable for him without the consent of a ruler.⁴⁶ If something like »legal pluralism« ever existed in Eike's world, it was fading as the upcoming Roman ideal of the sovereign royal power rose. There was also no room left for ghosts and curses in

37 Ssp. Ldr. I 52 § 1: *Ane erven gelof unde an echt ding ne mut nieman sin egen noch sine lude geven.*

38 OGRIS/NESCHWARA (2008).

39 This aspect is diligently treated in WEITZEL'S (1985) seminal work.

40 KANNOWSKI (2006) 521.

41 SCHACK (2011) Rn. 149.

42 Ssp. Ldr. II 12.

43 KANNOWSKI (2007) 74 s.

44 KANNOWSKI (2007) 85 ss.

45 Ssp. Ldr. I 18.

46 KANNOWSKI (2007) 550, 593 ss.

Johann's thinking. The *Sachsenspiegel* henceforth appeared in a more rational and sober light. Eike's curse is not even mentioned in Johann's comment.

But even though Johann did not care too much about curses and ghosts, it is hard to imagine the *Sachsenspiegel* going viral the way it did without his glossing. Between 1471 and 1614, the *Sachsenspiegel* was reprinted thirty-one times, all of them accompanied by the glossing.⁴⁷ I mentioned earlier that Johann von Buch viewed the law as an entity exclusively defined by governmental order, but did he countenance legal pluralism after all?

The most prevalent particular law within the old empire's borders was Saxonian law,⁴⁸ as imparted in universities. Unlike any other German group, only the Saxons were privileged with their own made-to-measure law, the *Sachsenspiegel*.⁴⁹ Though Johann intended to preserve the *Sachsenspiegel*'s impact and significance, essentially degrading Roman law to a mere addendum, he makes some seemingly damning statements about it. In a prominent passage, Johann argues that courts tended to dismiss parties as idiots if they based their reasoning on a rule from the *Sachsenspiegel*. However, blazoning a regional legal principle with genuine Roman-law reasoning will most certainly catch the attention of a judge – and perhaps even the Pope.⁵⁰

What is Johann insinuating? His remark recalls a lawyer briefing his client in »legalese« for purely

rhetorical effect without changing the substantive argument. Taiwanese legal customs may meet a similar fate, and this would perhaps not be the worst of all solutions.

The dominance of the *Sachsenspiegel* behind the façade of the learned law becomes increasingly evident when the latter is subjected to the structure of the *Sachsenspiegel*. It was, perhaps counterintuitively, the *Sachsenspiegel*, not the Roman law, that served as the guide to solve legal problems, which had an inestimable impact on medieval legal thinking.

Furthermore, it would be wrong to assume that Johann commented on the *Sachsenspiegel* on the basis of *Corpus Iuris Civilis* and in the Roman language – on the contrary! But there was another dimension to Johann's writing in colloquial German. As judges were laymen without legal knowledge gained through academic studies, it was only through Germanic commentary that they could understand the rules they applied.⁵¹ So from a legal perspective, Johann's use of the German language essentially bridged the medieval and modern ages. For if Johann had not glossed the *Sachsenspiegel*, the latter would not have been applied for such a long time, becoming much earlier what it is today: legal history.



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47 A list of imprints is provided by HOMEYER (1861) 68 ss. The earliest print of the *Sachsenspiegel* without gloss was edited by Ludovici (1720/22). In spite of his devastating polemic against Johann von Buch (»Der Autor der Gloß war ... nach der elenden Arth derer damaliger Zeiten ein guter Stümper, das ist, er verstund weder die alte Historie, noch auch die alten Teutschen Rechte« – »The author of the gloss was, in line with the miserable ways of his time, a good

idiot, which means he understood neither old history nor the old German laws«, 23, XXIX), Ludovici's edition also contains part of the gloss.

48 LÜCK (2008).

49 The strong position of the Saxons as a people with its own laws since the beginnings of the German Empire is emphasised by SCHMIDT-RECLA (2011) 356.

50 Glossenprolog, V. 197–199: *Saltu in der papen recht/ lichte mit eme kiven/ Se bedden di vor dorecht,/ of du woldest*

bekliven/ Mit Sassenrecht din wort,/ wense dit recht versmeen (Foro ecclesiastico/ si debes litigare/ Haberis pro fantastico/ si velis allegare/ Iura huius speculi/ quae ab his contemnuntur), KAUFMANN (2002) 103.

51 KANNOWSKI (2007) 592.

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