

Private Law of the Baltic Provinces as a Patriotic Act

1. The Baltic Private Law Code – a Unique Legislative Step in the Legal History of the Baltic Provinces

The Russian autocrat Alexander II granted an imperial confirmation to the Private Law Codification of the Baltic provinces^{*1} which entered into force on 1 January 1865.^{*2} This was an extraordinary event, compared to the history of the private law of the German population of *Estland*, *Livland* and *Curland*.^{*3} For the first time, the private law regulations of all the three provinces had been assembled in one code.

During the former period, their private law had remained dispersed in various sources which dated also from various periods of political subjugation. In the 13th–16th century, the territories of the German state were a part of the Holy Roman Empire; the dioceses were directly accountable to Vatican. In the middle of the 16th century, *Livland* and *Curland* as relatively independent units were annexed by Poland, whilst *Estland* or present-day northern Estonia became Swedish. During the first half of the 17th century, Sweden also conquered the territory of *Livland*. *Curland* managed to maintain its status of an independent duchy as a Polish province. In the course of the Great Northern War, Russia conquered *Estland* and *Livland* in 1710 and attached them as autonomous provinces to the Russian Empire. At the end of the 18th century, *Curland* became a part of Russia as well.^{*4}

Each time, the transfer of the ownership had been confirmed with particular surrender treaties, or acts of surrender. From the perspective of legal development it is of major importance that these acts always

¹ The original version of the code was prepared in German: *Provincialrecht der Ostseegouvernements. Dritter Theil. Privatrecht: Liv-, Est- und Curlaendisches Privatrecht. Zusammen gestellt auf Befehl des Herrn und Kaisers Alexander II. St. Petersburg, 1864.* Soon, a Russian translation was prepared and published as well: *Svod mestnykh uzakonenij gubernii ostzeyskikh. Tshast' tretya. Zakony grazhdanskije. St. Petersburg, 1864.*

² For the sake of being concise, I use here a name which is utilised to denote this legal act primarily in Estonian publications: the Baltic Private Law Code, BPLC.

³ Namely, the code did not cover the law of Estonians and Latvians as peasant people. Their law, including private law, was regulated by an agrarian legislation in the 19th century. The BPLC was applied to the entire population in Estonia and Latvia which had regained their independence only after the First World War. In Estonia, the BPLC remained valid until the Soviet occupation in 1940, because the draft Civil Code, completed in 1936, had not entered into force yet. For details: B. Dälemeyer. *Das Privatrecht Liv-, Est- und Kurlands von 1864.* In: H. Coing (Hrsg.). *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte.* Bd. 3. Teilbd. 2., München 1982, pp. 2076–2098.

⁴ An overview of the history of the Baltic provinces until the First World War: R. Wittram. *Baltische Geschichte: Die Ostseelände Livland, Estland, Kurland 1180–1918.* München, 1954. The most representative one of the recent collections is G. Pistohlkors (Hrsg.). *Deutsche Geschichte im Osten Europas: Baltische Länder.* Berlin, 1994.

confirmed the continuing validity of the legislation already in force. Thus, even in the middle of the 19th century, medieval law books, privileges, records of chivalric law, etc. had to be treated as sources of applicable private law on these territories. However, various rulers had still attempted to interfere with the moulding of provincial law in a legislative manner. The result was a conglomerate of legal sources of various origin and nature and the provisions contained therein. In 1822, C. C. Dabelow, the then Professor of the Faculty of Law of the University of Tartu described the local provincial law as a stockpot in which everyone could find something suitable as they saw fit.^{*7} Decades later, no significant changes had occurred. In 1841, Professor C. O. von Madai opined that there could hardly be a country where various types of legal sources combined such a plexus as in the Baltic Provinces.^{*8}

Nobody had ever taken time to scientifically study this topsy-turvy system before the 19th century. During the Swedish era, in 1632, a university was opened in Tartu including a Faculty of Law.^{*9} Only Roman law and, to a lesser degree, Swedish law and natural law were taught there. The actual local law was left intact by the contemporary professors. During the Great Northern War, in 1710, the Swedish university was discontinued. Attempts to reopen the university in the 18th century remained fruitless.^{*10} The university of Tartu (Dorpat) was only reopened in 1802. With regard to administrative control and financing, it was an imperial university.^{*11} With regard to the language of study, as well as the internal structure of the university, it was, however, a German *Landesuniversität* for the Baltic provinces.^{*12} At the beginning, as many as three chairs of local law were established in the Faculty of Law – one for the law of each province.^{*13} However, with the Statutes of the University dating from 1820, they were united into an integrated chair of “theoretical and practical provincial law of *Curland, Livland and Estland*”.

The first professor was elected to the faculty of integrated provincial law as late as in 1831.^{*14} That was Friedrich Georg von Bunge (1802–1897), who later compiled the BPLC.^{*15} In his programmatic article on the scientific approach to the local provincial jurisprudence, published in 1822, C. C. Dabelow predicted eternal fame to the pathfinder of this field both at home and abroad.^{*16} His student Bunge is regarded as the founder of the local provincial jurisprudence. This work was crowned by the codification of local private law. As Bunge proceeded from the same principles in his activities both as a scholar and a codifier, his scientific programme and the problems related to its application need to be examined in greater detail.

⁷ C. C. Dabelow. Ueber die wissenschaftliche Behandlung des besonderen Rechts der Russischen Ostsee-Provinzen. In: E. G. Bröcker (Hrsg.). Jahrbuch für Rechtsgelehrte in Russland. Bd. 1., Riga, 1822, p. 190. About Dabelow’s role as a reformer of the Faculty of Law of the University of Tartu and his views on the research of local rights: M. Luts. Integration as Reception: University of Tartu Faculty of Law Case in 19th Century. – *Juridica International. Law Review. University of Tartu*, III, 1998, pp. 134–139.

⁸ C. O. Madai (Rezension): F. G. Bunge. Das Liv- und Estländisches Privatrecht. – *Kritische Jahrbücher für deutsche Rechtswissenschaft*. A. L. Richter, R. Schneider (Hrsg.), Jg. 5, Leipzig, 1841, pp. 830–831.

⁹ The last collection of the history of the University of Tartu dates back to the 350th anniversary of the university: K. Siilivask (Ed.). History of Tartu University 1632–1982. Tallinn, 1985. An overview of the history of the Faculty of Law is presented only in Estonian and in the parallel publication also in Russian: P. Järvelaid. 360 aastat Tartu ülikooli õigusteaduskonda (Three Hundred and Sixty Years of the Faculty of Law of the University of Tartu). – *Eesti Jurist*, 1992, No. 1–6, pp. 43–48, 154–158, 241–250, 346–349 and 419–428.

¹⁰ Details: H. Neuschäffer. Die baltischen Provinzen ohne Universität von 1721 bis 1802. In: G. Pistohlkors u.a. (Hrsg.). Die Universitäten Dorpat/Tartu, Riga und Wilna/Vilnius 1579–1979. Köln, Wien, 1987, pp. 20–32.

¹¹ See V. Tamul. Die Dörptsche Universität – Landes- oder Reichsuniversität? Zum Verhältnis von Deutschbalten, Stadt und Universität im 19. Jahrhundert. In: H. Piirimäe, C. Sommerhage (Hrsg.). Zur Geschichte der Deutschen in Dorpat. Tartu, 1998, pp. 85–110.

¹² Details: M. Luts. Keiserlik *Landesuniversität* Läänemereprovintsidele. Tartu ülikooli õigusteaduskonna struktuur 19. sajandi alguses (Imperial *Landesuniversität* for the Baltic Provinces. Structure of the Faculty of Law of the University of Tartu at the Beginning of the 19th Century). – *Ajalooline Ajakiri*, Tartu, 1998, No. 3 (102), pp. 43–53; Summary p. 124.

¹³ About the original scientific orientation of the university and the Faculty of Law: M. Luts (Note 5), pp. 130–133.

¹⁴ From 1825 to 1831, the extraordinary Professor of provincial law was G. E. Bröcker, who was elected as a professor of constitutional and international law in 1831.

¹⁵ Bunge had begun to teach provincial law as a private associate professor already in 1825. Until 1842, Bunge remained a professor of provincial law in the University of Tartu. Then he had to leave the position and continued as a member of the town council of Tallinn. Bunge spent the years 1856–1864 in the II department of the Emperor’s Privy Council where he had to prepare the draft BPLC. His biography W. Greiffenhagen (Hrsg.). Dr. jur. Friedrich Georg v. Bunge. Reval, 1891 gives an overview of his life. Proceeding from that, but with corrections and supplements: H. Diederichs. Friedrich Georg von Bunge. – *Baltische Monatschrift*. Jg. 39, Reval, 1897, pp. 357–386. Even the latest Estonian overview of Bunge’s life and works has taken Bunge’s autobiography as the basis, supplementing it with important references to sources and other relevant literature: P. Järvelaid. Bunge sajand ja sajand Bungeta (Bunge’s Century and Century Without Bunge). I and II. – *Kleio. Ajaloo Ajakiri*, No. 4 (22), Tartu, 1997, pp. 49–51 and *Ajalooline Ajakiri*, No. 3 (102), Tartu, 1998, pp. 17–30.

¹⁶ C. C. Dabelow (Note 5), p. 213.

2. F. G. von Bunge's Point of Departure upon Scientific and Legal Treatment of Local Private Law

Before proceeding with a more detailed analysis of Bunge's provincial law concept, I have to point out one generally acknowledged opinion in research to date. This is manifested in the belief that Bunge developed his approach to provincial law according to the historical school of F. C. von Savigny and K. F. Eichhorn. E. Landsberg, who compiled the most comprehensive review of German jurisprudence in the 18th–19th century, called Bunge the man who transferred the methods of the historical school to the far edge of German culture. At the same time, Bunge could discuss the law of the Baltic provinces in vivid relation with German law and its historical development.^{*17} Landsberg also called the Baltic Private Law Code, compiled by Bunge, “the most glorious victory of historical-germanic German jurisprudence”. Landsberg compared this to the achievements of J. C. Bluntschli in compiling the civil code of Zurich on the basis of the methods of the historical school.^{*18} Estonian legal historians have also assumed up to this point that when now analysing the rights of local provinces, Bunge proceeded from the methods of the historical school.^{*19} Thus, Bunge has been proven to be famous both locally and internationally for his use of the methods of the historical school in his scientific treatment of the local private law regulations in the Baltic provinces of *Estland*, *Livland* and *Curland*. As he was also the founder of this branch of research, it must signify that the Baltic-German jurisprudence established by Bunge was in the wake of the most modern contemporary legal school from the very beginning.

Such treatment was facilitated, if not established, primarily by Bunge himself. In an autobiography published in 1891, he claimed that he had got hold of Savigny's *About the Call of our Era to Legislation and Jurisprudence* in about 1830–1831.^{*20} The reading of this work had reportedly evoked in him an awareness and a scientific transformation “into an eager disciple of the historical school”.^{*21} Prior to that, he had been excessively influenced by the practical and strictly deductive-logical approach of his teacher Dabelow to law and jurisprudence. However, Bunge was not too accurate when he extended Dabelow's generally practical and formal logical approach to his attitude to the scientific treatment of the law of the local provinces. Dabelow splendidly recognised the special historical condition of the Baltic provinces and demanded that the local jurisprudence observe the methods of Savigny's historical school.^{*22}

However, this situation was already pre-determined in 1710 when the former Swedish overseas provinces *Estland* and *Livland* were attached to the Russian Empire during the Great Northern War. As mentioned above, the merger was formalised with surrender treaties or acts of surrender. The merger of *Curland* with the Russian Empire in 1795 was also completed through the conclusion of an act of surrender. All the acts of surrender confirmed the continuing validity of the local legal order, privileges, judicature and, among other things, also the “historically developed law”.^{*23} In this context, it seems only natural that when a foundation had to be established to the scientific treatment of the local law in the 19th century, historical research into its sources proved unavoidable. At the same time, the historical school led by F. C. von Savigny was highly valued on the theoretical law market. Moreover, Savigny himself demonstrated how to build of centuries-old legal material, relying on one's own theoretical principles, a modern private law system that

¹⁷ E. Landsberg. *Geschichte der deutschen Rechtswissenschaft*. III Abth., 2. Hbd, Text., München und Berlin, 1910, p. 559.

¹⁸ E. Landsberg (Note 15), p. 561. H. Schlosser uses the same comparison with Savigny's student Bluntschli's activities in Zurich in his overview of the more recent history of private law. H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte*. 6. Aufl., Heidelberg, 1988, p. 139. Also, in the most authoritative reference book on the history of German jurisprudence, *Handbook of History of German Jurisprudence (Handwörterbuch zur deutschen Rechtsgeschichte, HRG)* H. Blaese claims that Bunge laid a foundation to the scientific treatment of the Baltic law, using the method of the historical school: H. Blaese. *Bunge, Friedrich Georg von.* – HRG, Bd. 1., Berlin, 1971, p. 540.

¹⁹ P. Järvelaid (Note 13), II, p. 19; also, M. Luts. *Die Modernisierung der Rechtswissenschaft und Juristenausbildung in den Ostseeprovinzen im 19. Jahrhundert im Rahmen der alteuropäischen Ständeverfassung.* – *Acta Baltica*, XXXV, Königstein, 1997, pp. 248–252.

²⁰ F. C. Savigny. *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*. Heidelberg, 1814. Bunge probably came across the second edition, published in Heidelberg in 1828, because he refers to that in his work. F. G. Bunge. *Wie kann der Rechtszustand Liv-, Esth- und Curlands am zweckmässigsten gestaltet werden?* Riga und Dorpat, 1833, Fn. 26, p. 44.

²¹ W. Greiffenhagen (Hrsg.) (Note 13), pp. 13–14.

²² C. C. Dabelow (Note 5), pp. 207–218. See also M. Luts (Note 5), pp. 137–138.

²³ The law confirmed with the acts of surrender acquired such a general name, above all, in the 19th century literature. See C. C. Dabelow (Note 5), p. 207. The acts of surrender laid down that courts administer justice “according to Livonian privileges, old generally-accepted customs and the old well-known Livonian Chivalric law” (clause 10 of the acts of surrender of the Livonian Knighthood) or the persistence of “income, benefits, privileges, court procedures, customs, freedoms and other similar matters” would be confirmed (clause 2 of the acts of surrender of the city of Riga).

conforms to the needs of the industrialising society. It was a thoroughly considered act that Savigny entitled his dogmatic fundamental work as *Contemporary (sic!) Roman Law System*^{*24}, not Roman Law System.

As expected, it seems that the professor of the provincial law of the University of Tartu and the later codifier of the local provincial law F. G. Bunge adopted Savignian demands to jurisprudence and legislation in his scientific and legislative activities. In what other reasonable manner would he have been able to shape the law originating from medieval sources into a convenient form for the modernising 19th century? Moreover, Bunge himself claimed that he became an eager disciple of Savigny and the historical school around 1830, which gave rise to the inconsistencies in the views presented in his earlier and later works.

In 1833, Bunge published his jurispudent programme *How to Shape Legal Condition* in Livland, Estland and Curland in *Most Efficient Manner*.^{*25} Following a historical overview of the development of provincial rights by that time, Bunge formulated his views concerning their scientific and subsequent legislative treatment. Doing so, he also had to find a solution to at least two complicated problems arising from the peculiarities of the historical development of local rights. The first may be regarded as an issue of territorial and estate particularism; the second as an issue of the crucial role of practice.

2.1. Solution to the Issue of Particularism

Bunge began his historical overview from the Middle Ages. During the Old Livonian period, the area was occupied by several state-like units. However, their private law did not differ according to states but rather according to estates. For example, the principles of inheritance law of the nobility in the countryside could radically differ from the inheritance law norms valid in towns, not to mention the clergy and the private law applicable within that estate. In the 19th century, the estates-based legal order had survived in the Baltic provinces, but its structure had undergone transformation. Catholic clergy as an estate had largely disappeared and the evangelical church did not constitute a comparable estate. In addition to that, as a result of the agrarian reform laws dating from the beginning of the 19th century, a new free estate of peasants had developed. Consequently, Bunge had to distinguish between four contemporary estates, to each of which particular private law principles applied: the nobility, townspeople, peasantry and Protestant clergy as well as other persons who did not belong to any of the three above-mentioned estates.^{*26}

With regard to the latter, Bunge acknowledged the existence of a general provincial law in his programme dating from 1833, which should have been distinguished as such from the private law of the principal estates. According to Bunge, the general private law was to be applied in cases where none of the particular rights of the estates were applicable. Still, in 1833 Bunge did not mention anything about the origins or material contents of the general private law. However, three years earlier he had asserted that its norms relied primarily on Swedish, general German (together with Roman and canon law) and Russian law.^{*27}

Thus, according to the differentiation by estate, Bunge obtained four types of private law proceeding from various principles. When during the Old Livonian period, or, according to Bunge, “during independence”, the differences arising from private law were nearly entirely related to estates, then later history and different political jurisdiction of individual territories had also given rise to territorial differences. So, due to a colourful historical background, the private law regulations applying to each province had acquired its own peculiarities by the beginning of the 19th century. Their validity had also been confirmed in the acts of surrender concluded with the Russian rulers. Thus, Bunge had to admit that there were $3 \times 4 = 12$ different types of private law valid in the Baltic provinces.^{*28}

In order to avoid confusion and unnecessary transfers, Bunge considered it necessary that all these private law regulations be treated separately. So it would be easier to notice inherent overlaps and differences. The separated treatment should also allow for obtaining a better overview of the whole system in Bunge’s opinion. However, the unification of private law regulations to an integrated system would give rise to

²⁴ F. C. Savigny. *System des heutigen Römischen Rechts*. Bd. 1–8, Berlin, 1840–1848.

²⁵ F. G. Bunge (Note 18).

²⁶ *Ibid.*, pp. 1–21.

²⁷ F. G. Bunge, Recension: R. J. L. Samson v. Himmelstiern. *Das livländische Erbschafts- und Nöherrecht*, Riga 1828. – R. J. L. Samson v. Himmelstiern. Ueber die Recension, welche der Dr. (jetzige Professor) Bunge in der *Allgemeinen Litteratur-Zeitung*, May 1830, Nr. 84 und 85 hat abdrucken lassen. St. Petersburg, 1834, pp. 97–98. Himmelstiern’s fierce criticism of Bunge’s thesis of the existing “general provincial law” above all, was obviously the reason why Bunge abandoned this view in his later works.

²⁸ F. G. Bunge (Note 18), p. 21.

inevitable errors and mistakes. It would create a danger that the crucial deviations of various institutes in different particular laws would remain unnoticed or seem illusory. According to Bunge, this was also a reason behind the temptation to remove crucial differences by force.^{*29}

For Bunge an integrated private law system, of which an overview should be gained by means of separated treatment, was a private law of a particular individual estate of one province. Naturally, similarities and overlaps could be detected concerning the institutes or principles, but the researcher should not have been troubled thereby. The main objective was to avoid unreasonable generalisations. Another grave danger concerning integrated treatment of private laws arose from the fact that they seemed to complement one another. This would lead the person applying the law to an idea that, for example, the provisions of the chivalric law of *Estland* could be subsidiarily applied to the private law of *Curland*. However, only the validity of Roman law and general German law had been imperially approved as subsidiary law in all these provinces. And the extent to which they were applied varied again in individual provinces and their estates. Thus, according to Bunge, the uniform applicability of the subsidiary rights in the Baltic provinces was merely abstract. But specifically, it differed according to the developed yardstick of local practice in each province and also according to the estates. And this difference had to be taken into account in the provincial law.^{*30}

In this context it is natural to wonder why Bunge dedicated so much attention to issues that seem to relate to the form rather than the content at a first glance. The programme dating from 1833 does not answer the question. Namely, Bunge does not point out any particular authors, with whom he should discuss the issue. This is clarified when we take into account the legal and political background of Bunge's tract. The tract had to be a counter-programme to the codification plans of Reinhold Johann Ludwig Samson von Himmelstiern.^{*31} Thus, Bunge had to provide a detailed account of shortcomings from which his opponent's approach to the provincial law suffered in his opinion. Already at the end of his life, Bunge criticised the unified and thus confusing treatment of the differing private law regulations of the Baltic provinces in Himmelstiern's projects.^{*32}

The practical consequence of the differentiation was that a dozen men were needed for the (scientific) treatment and scientifically reasoned codification of the private law regulations in force in the Baltic provinces. Bunge agreed that they should be educated in legal matters but the knowledge of the theory and practice of the local law (their estate^{*33}) would be even more important.^{*34} A condition added by Bunge that these men should not be trammelled by prejudices arising from general law and an excessive love of the Roman law was aimed at Himmelstiern as criticism. Also, Bunge considered it essential that they work locally (not in St. Peterburg). This was necessitated, above all, by the location of the sources. In addition to that, it was in the interests of exploring the bulk of the material that these men be free from all other obligations for that time.^{*35}

So Bunge demanded, in the general scientific treatment and codification of the provincial law, the active participation of local practitioners. In addition to them, his plan involved one more man. He had to undertake the task of exercising supervision over all works done. He had to take care of the harmonisation of the form of all private law regulations and final revision. In order to accomplish this, he had to be familiar with more or less all private law regulations in force in the Baltic provinces.^{*36} It is hardly necessary to add who the man was in the then Baltic provinces who had to know already, due to his profession, the private law regulation of all three provinces to some extent. Naturally, this could only be the Professor of the provincial law of the University of Tartu, Friedrich Georg Bunge.

²⁹ *Ibid.*, p. 22.

³⁰ F. G. Bunge (Note 18), pp. 22–23.

³¹ R. J. L. Samson von Himmelstiern (1778–1858) was the president of the provincial codification committee from 1824 and from 1829–1840 a member of the codification committee of the imperial Privy Council with the task of compiling codes of the laws of the Baltic provinces. Himmelstiern himself about his concept of the codification of the local laws: R. J. L. Samson von Himmelstiern. *Codex der Livländischen Rechte nach der Römischen Pandektenordnung*. In: E. G. Bröcker (Hrsg.). *Jahrbuch für Rechtsgelehrte in Russland*. Bd. 2, Riga, 1824, pp. 196–222. It is already evident from the title of this programme that Himmelstiern aimed at taking the legal order of Roman law as the basis.

³² W. Greiffenhagen (Hrsg.) (Note 13), p. 13.

³³ In case of peasantry, it is clear that it was hardly possible to find any one within the estate in the first half of the 19th century who would have been educated in law. Obviously, Bunge did not regard that as a problem – legislation concerning the peasantry was prepared by the representatives of the knighthood. So they had to know better on what principles the respective private law was based.

³⁴ F. G. Bunge (Note 18), p. 25.

³⁵ *Ibid.*, pp. 39–40.

³⁶ *Ibid.*, p. 25.

In 1838, Bunge published his first major work on the private law of the Baltic provinces: *Private Law of Livland and Estland, A Scientific Approach*.^{*37} The title of Bunge's work manifests an important deviation from his original strict programmatic demand that the law of each province be handled and treated as a separate integral unit. In fact, it could be deduced from his earlier writings that he considered a unified treatment of at least these two provinces feasible. Namely, already in 1832 in the plan to publish legal sources Bunge provided for an integrated collection of the legal sources of *Livland* and *Estland* and a separate collection of the legal sources of *Curland*. At the time, his reasoning behind the feasibility and necessity of an integrated collection of legal sources of the two northern provinces was that these sources were either closely related or even common and thus frequently also complementary.^{*38} In addition to that, in 1838, Bunge found that the unified treatment of the private law of both provinces was not only feasible, but even reasonable due to reciprocal influences and complements.^{*39} Nevertheless, he emphasised that he considered it justified only with regard to scientific treatment. After all, his book was to be used as a textbook. The treatment meant for practitioners was another matter altogether. In that, Bunge was determined to remain faithful to the separation thesis expressed in his programme of 1833.^{*40}

What else was meant for a more practical use than the Baltic Private Law Code compiled by Bunge himself? In the case of the BPLC, Bunge has still adopted an integrated treatment and thus abandoned his original requirement of strict separation. This solution was probably caused by an entirely practical attempt to avoid otherwise inevitable repetitions.^{*41} The fact that Bunge himself was able to observe the practical consequences thereof presumably also forced him to abandon the separation thesis. The imperial codification committee had already earlier drawn up a draft on the private law of the Baltic provinces, in the preparation of which both the nobility and the delegations of the towns had participated. Bunge notes that one of the major shortcomings of this draft was the endless repetitions.^{*42} He was determined to avoid them in his code and opted for the integrated treatment of the private law of all three provinces.

The ardent supporter of science as handled by Savigny and Eichhorn should find these common and "inevitable" principles on what the definitions of the law sources of various provinces relied. In other words: to identify the principle concealed behind the legal provisions, which would connect the seemingly conflicting provisions. Naturally, the "uniqueness" of each and every private law would have been lost in such a procedure, which, for Bunge, was worthy of preserving and storing them all as autonomous values.

In BPLC, Bunge has adopted a method that reminds of the legal method (*usus modernus*) used in the 18th century. Firstly, he has provided a list of provisions common in all three provinces. Then, the characteristics of regulations applicable in one or another province and their deviations from the previously determined common share have been presented as separate subsections. In the same way, he used to treat Estonian and Livonian rights in his earlier scientific works. Apart from that, deviations applicable in one or another city or rural region have been presented as notes accompanying respective paragraphs.

Thus, as a result of conscientious and detailed work, Bunge managed to register almost the entire territorial and estate particularism, which characterised the condition of the Baltic provinces before that time. In fact, the notes describing regional variations served as independent provisions. If they had been set out as separate paragraphs in BPLC, their already large number (4,600) would have increased further. This number of paragraphs implicates a working standard used by Bunge. Consequently, the work did not contain general principles, but rather, was as casuistic and detailed collection of applicable law as possible.

³⁷ F. G. Bunge. Das liv- und estländische Privatrecht, wissenschaftlich dargestellt. Dorpat, 1838. In this, Bunge already abandoned the analysis of the general provincial private law. He emphasised, however, that theoretically its existence and applicability should be acknowledged (p. 4). Thus, Bunge did not want to disregard the (theoretical) idea that such general private law existed in each province. He surrendered to the sharp criticism of practitioners and excluded its analysis from his work. The fact that theory had to give way to practice in the Baltic provinces arose from the crucial role assigned to practice by Bunge. Besides that, the arithmetic operation familiar to us already could be rewritten as follows: $3 \times 3 = 9$ different types of private law in total in all the Baltic provinces. As Bunge failed to summon a dozen local jurists under his auspices, this restriction enabled his work to be better covered and accomplished.

³⁸ F. G. Bunge. Plan zu einer Handausgabe der liv-, esth-, und curländischen Rechtsquellen. In: *Ibid.*, Beiträge zur Kunde der liv-, esth-, und curländischen Rechtsquellen. Riga und Dorpat, 1832, pp. 146–147.

³⁹ F. G. Bunge (Note 35), p. 2.

⁴⁰ *Ibid.*, p. 3, Anm. a.

⁴¹ No other reason can be detected at least in Bunge's own handwritten explanation on the history of BPLC. Cf. F. G. Bunge. Geschichte der Entstehung des Privatrechts. The Estonian History Museum (Tallinn), fond 53, liat 1, item 49, p. 3p: "... die verbundene Darstellung der neun verschiedenen Privatrechte mußte in der Art geschehen, daß jedes derselben in seiner Eigenthümlichkeit erkenntlich blieb und doch dabei Wiederholungen vermieden wurden."

⁴² *Ibid.*, p. 3–3p.

In addition to that, every local jurist could enjoy the fact that all peculiarities applicable in their territory until that time were entered into the new code. In this respect, we have no reason to join E. Landsberg in congratulating German diaspora provinces where legal unity had reportedly been achieved already when the motherland could only dream about it.^{*43} Rather, one has to admit that Bunge managed to provide the entire legal particularism, having its origin in the Middle Ages, with modern legal force. Problems arising thereafter in Estonian jurisdiction indicated that such solution was confusing and unexpected for the modern society.^{*44} As already mentioned, Bunge's contemporary practitioners could meet the familiar, particularly local law in the code compiled by him.

2.2. Acknowledgement of the Crucial Role of Practice

Another important peculiarity of the private law applicable in the Baltic provinces, apart from their estate and territorial diversity, was the fact that they had developed and transformed not as a result of persistent legislative activities but rather as common law and court practice. First of all, it applied to the original law or the law applicable before 1561. It was primarily feudal law that determined the nature of private law at that time. Notwithstanding the persistence of estates in the Baltic provinces, the underlying feudal order lost its validity over the course of time. However, several sources of that time were still applicable in practice. At the same time, the courts had frequently extended provisions concerning only nobility also to other estates. Moreover, no legislator has ever *expressis verbis* repealed the older legal sources. On the contrary, each new conqueror had confirmed the continuing validity of the existing law. Thus, it had been for the practitioners to decide which old laws and to what extent they acknowledged them as valid law.

As the major role in deciding on the applicability of earlier laws was played by the practitioners, so it was also in the case of foreign laws. These were imposed either by former rulers or received on the initiative of practitioners. The first category embraced Polish, Swedish and Russian laws. Canon law, Roman and general German law, above all, constituted the other category. In Bunge's opinion, the section of Swedish law applied by Livonian and Estonian courts only after these territories had been annexed to Russia was also to be included here.^{*45} Despite the fact that the acts of surrender never mentioned a more extensive use of Swedish law, the local courts were, in fact, rather eager to do this in the 18th–19th centuries.

The local practice had exclusively decided and still did in 1833 about the mutual relationships of all these various bodies of law and what was to be done if various provisions collided. In defining practice, Bunge proceeded from the opinions and definition published by Dabelow in 1824.^{*46} Guided by Dabelow, Bunge regarded as binding practice the common and persistent decision-making practice of mid to upper-level courts.^{*47} When Dabelow spoke about the crucial role of practice in shaping and transforming law in the Baltic provinces^{*48}, it was but a confirmation of the condition prevalent in the Baltic provinces till that day. In moulding private law, the future provincial jurisprudence had to take over, if not the leading role, then at least position itself as an equal creative factor beside the local practice according to his programme. At the same time, an understanding of the guiding principles reflected in historical sources of provincial law had to be gained through legal and historical study, on which the system of applicable law, or rather, a system of law that was to be applicable, would be erected.^{*49} It is clear that this task was to be assumed by

⁴³ E. Landsberg (Note 15), p. 561.

⁴⁴ Upon the application of BPLC to the whole population of Estonia after the First World War the differences concerning estate contained in them were cancelled, but the territorial ones remained in force. Taking all of them into account proved, periodically, to be even beyond the powers of judges and the higher instance had to draw their attention thereto. See the decisions of the Civil Department of the Supreme Court of 18 May 1922 and 3 November 1933: T. Anepaio (ed.). *Riigikohus. Otsuste valikkogumik 1920–1940* (The Supreme Court. Selected Decisions 1920–1940). Tartu, 1999, pp. 107–108 and 124–127. After Estonia regained its independence (1991) the principle of restitution, return of property to their former owners or their successors were taken as the basis in ownership reform. In determining succession, the present Estonian officials and judges have to proceed from the provisions of BPLC once again. The practice testifies that there is a tendency in such cases to forget the territorial particularism included in BPLC, and it is implemented as a modern code with common principles. For more details: T. Anepaio. *Hobusemüügist omandireformini* (From Horse Selling to Ownership Reform). – *Juridica*, 1997, No. 6, p. 291.

⁴⁵ F. G. Bunge (Note 18), pp. 27–31.

⁴⁶ One of Dabelow's programmatic works dating from 1820s was dedicated to the problem of legitimacy of court practice: C. C. Dabelow. *Die Praxis sowohl überhaupt, als in den Russischen Ostsee-Provinzen besonders, kritisch beleuchtet*. In: G. E. Bröcker (Hrsg.). *Jahrbuch für Rechtsgelehrte in Russland*. Bd. 2, Riga, 1824, pp. 223–248.

⁴⁷ F. G. Bunge (Note 18), pp. 31–32.

⁴⁸ C. C. Dabelow (Note 5), p. 201. See also M. Luts (Note 5), p. 137.

⁴⁹ C. C. Dabelow (Note 5), pp. 213–215.

jurisprudence. In this sense, Dabelow demanded, in fact, fully Savignian and metaphysically based (provincial) jurisprudence also for the Baltic provinces.^{*50}

Bunge has abandoned the very same metaphysical element and pursuit of general principles in his programme. According to his scientific treatment of provincial law it was unnecessary to investigate the origin of each legal institution “down to the roots”^{*51}, neither was it necessary to strive for the perception of principles through a thorough study of law provided by history. In Bunge’s opinion, the scientific treatment of local law was to proceed from nothing but the currently existing practice and common law.^{*52}

If jurisprudence has to proceed from practice and common law, its methodological impact will be different from the one produced by the study of historical legal sources. The source criticism will nearly be minimised in this case. The only concern will be the text from which practice proceeds. The question whether the text corresponds to the original and what version of the text should be regarded as valid no longer exists. The demand of the scientific treatment of local law established by Bunge necessitated a study of other sources. Court records were to lie in the centre of provincial jurisprudential research. As Bunge’s understanding of practice (as a more limited concept) involved the common judgement practice of mid to upper-level courts, a scientific research could remain restricted to the above-mentioned judgements of local and mid to upper-level courts of the central government. Such a proposition also clarifies why the persons preparing summaries of local laws had to work on the spot and not, for example, in the Department of Codification of the Imperial Chancellery in St. Petersburg. Making copies of older laws could also have been a feasible option. Delivery of all archives of upper-level courts to the imperial chancellery or making copies thereof would, however, have been unthinkable.

Bunge also demanded that the research of court practice extend as far back in history as possible.^{*53} It is clear what gave rise to such demand. Bunge recognised a continuing common judgement of courts as the legitimisation criterion of practice (following Dabelow’s example). It was for the sake of identifying continuity and uniformity that a study of as long a period of practice as possible was required.

Thus, according to Bunge’s concept, research of judicial practice was to be launched in order to reveal what was valid as justified practice and consequently as provincial law in force or current provincial law. In case of judgements based on clear written sources, the matter was simple – the solution derived from law. In the case of other judgements the first step was to identify whether these were common and continuous judgements. The last step was to be the adjustment of already studied judgement practice and its use in (scientific and legislative) treatment of provincial private law regulations.

Having reached such a methodologically and jurisprudentially suspicious opinion that the existing practice had to be rendered compulsory, Bunge had to make certain reservations. Above all, he admitted that practice was not always consistent. If the actual practice was not consistent, it could not be regarded as valid practice according to the Dabelow-Bunge definition and here jurisprudential adjustments were probably expected. Bunge considered inadequate knowledge of law, first and foremost, insufficient knowledge of local law, as another reason for mistakes and confusion in local law. On the one hand, it was caused by the existing court system where legal training of judges was, in fact, not required.^{*54} Insufficient knowledge of local law among judges and other legal professions originated from training in foreign universities as well as the former weakness of the University of Tartu in teaching provincial law. If lawyers had been educated in some German university, they also tended to implement the knowledge acquired there in subsequent practice. Roman law studied as general law and the theories derived therefrom could frequently not be combined with the principles valid in the local law of the Baltic provinces according to Bunge. Unnecessary dependency on Roman law principles was the third mistake expostulated by Bunge with local practice. However, he had to admit that Roman law was undoubtedly better researched and juridically better founded. In his eyes, this was no reason to justify the abandonment of implementation of the existing legal source of local origin.

⁵⁰ Here I proceed from J. Rückert’s thesis that Savigny’s teaching of law is metaphysical by nature. Above all: J. Rückert. *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny*. Ebelsbach, 1984, particularly pp. 232–415, in summary also J. Rückert. *Savignys Konzeption von Jurisprudenz und Recht*. – *Tijdschrift voor rechtsgeschiedenis*, D. LXI, 1993, pp. 84–95. I am not, however, willing to agree to Rückert’s concept that Savigny’s teaching of law involves “objective” idealism. It should be rather called “individual”, “concrete” or even “positive” idealism.

⁵¹ F. C. Savigny (Note 18), pp. 117–118.

⁵² F. G. Bunge (Note 18), pp. 30–31.

⁵³ *Ibid.*, p. 32.

⁵⁴ For more details: M. Luts. *Freedom via Acquired Profession? On the Possibility of Being a Jurist in an Estate Society*. – *Juridica International. Law Review*. University of Tartu, IV, 1999, pp. 201–203.

However, in his reluctance to appreciate the impact of Roman law, Bunge actually contradicted his own programmatic demand for the crucial role of practice. According to the presented concept of practice he should have acknowledged that at least such practice of judgement based on Roman law, which was consistent and recurrent as to its contents should have been regarded as valid provincial law. This should have been the case even if it was in conflict with the written laws or other legal sources of the Baltic provinces themselves. The failure to correct this contradiction in Bunge's writing once again demonstrates that his point of departure had been Dabelow's article on practice. The article immediately provides an answer to the question why the continuity and uniformity in the practice of judgement of the courts suddenly proved insufficient. The practice, preferring Roman law to local laws, was absolutely unjustified according to Dabelow, as it had unlawfully assumed the functions of legislative power.^{*55}

Now it was the provincial jurisprudence that had to interfere with these deficiencies from which the local practice suffered in Bunge's opinion. On the one hand, the study had to provide a solution to conflicts found in practice. On the other hand, the part of practice which, according to Bunge, unjustly tended to ignore provincial law sources and prefer Roman law solutions had to be redirected. All this had to be done by approximately a dozen men whom Bunge intended to trust with the preparation of the summaries of local private rights.

According to Bunge, the common and recurrent practice of the mid to upper-level courts was to be, above all, declared as valid private law in the Baltic provinces, to provide a foundation for jurisprudence and receive legislative approval. If court practice was inconsistent in case of some institutions, jurisprudence had to identify the local written source concerned and find a legitimate solution from its provisions. Particular attention was to be focussed on these cases where the court practice proceeded from Roman law. In such instances it was necessary to check if there were any written local laws available for the case concerned. If the result proved positive, the provisions of the local law had to be regarded as legitimate. This was obviously also the case when a provision based on Roman law had been consistently applied in court practice.

It is noteworthy that Bunge's plan lacks, for example, individual jurisprudential-dogmatic treatments for systemising the future practice and guiding it to the right path according to his understanding. However, a place has been provided for academic training in law. Namely, Bunge was of the opinion that one of the most important preconditions of the future "provincialisation" of court practice had to be the knowledge of local law acquired in the university. In addition to that, persons who had not passed a thorough examination in local law were not to be admitted to the positions of the judge or registrar.^{*56}

Bunge recognised the major importance of the actual common law, beside court practice, in local private rights and the function of this role as a (trans)forming factor. Nevertheless, apart from the "practice in a more limited connotation", it was another crucial foundation, on which provincial jurisprudence and provincial law were to be based according to Bunge. Bunge aimed at solving the problem of completeness of the (private) law system by means of researching common law. It was from customs and common law that solution should be sought in case of a gap, when appropriate provisions existed in written legal sources of neither local nor subsidiary law, and a solution could not be found from court practice, either.

With regard to the customs of people, the researcher could no longer rely on written sources. In this case, Bunge had to include one more body in his plan, or in other words: the next dozen persons competent in law. They had to be knowledgeable about law for the purposes of medieval court procedure (Ger. *Schöffen*). When Bunge regarded education in law still necessary for compilers of the summary of private law of each individual estate, it was not as essential for persons competent in common law. Nevertheless, they had to know well the local circumstances and customs. In addition to that, it was important that they were trusted by their estate. Bunge provisionally called this body of persons competent in law "a practical committee".

Using the modern diction, Bunge's plan included also a group of experts in common law. Bunge was ready to assign an even more significant role to this group than dissemination of information concerning the local customs. In fact, they and thus the common law were to have the final word in the question of what had to be valid in the Baltic provinces as private law. Namely, in Bunge's opinion, the body of persons competent in common law were to finally check the summaries of applicable private law as prepared by jurists. They

⁵⁵ C. C. Dabelow (Note 44), p. 241. Such an etatist viewpoint refers to the inconsistency of Dabelow himself. On the one hand, he demanded that the method of the historical school be applied to the research of local provincial law. On the other hand, with regard to his own particular scientific viewpoints he proceeded from the concept of law and method prevailing before Savigny.

⁵⁶ F. G. Bunge (Note 18), p. 33.

had to decide whether these provisions were set out precisely as “the local private law had developed them in real life under centuries”.^{*57}

At this point, the question how Bunge intended to find people who actually knew centuries-old customs and could confirm that one or another custom had been in use already for centuries may be left aside. Instead, it is important that by assigning such a role of final decision to experts in common law, Bunge further emasculated the power of decision to shape local law and adjust practice resting with jurisprudence. If sometimes the expression *ancilla legis* is used in jurisprudence, then in Bunge’s concept the study was to have a role that could be called *ancilla usus*. However, one has to admit that Bunge had not yet become an eager disciple of Savigny’s historical school at least by 1833, as he himself asserted in his biography. Still, by that time, he had actually read Savigny’s *Call*. Bunge even referred to it when he had to justify his opposition (*sic!*) to the treatment of provincial law modelled according to Roman law. Bunge also used the Savignian term “unavoidable” and perhaps this is truly caused by reading Savigny’s *Call*. This is indicated by the use of the expression “internal life of people” (*innerstes Volksleben*). Namely, Bunge claimed that the treatment of provincial law developed according to his draft plan would ensure such legal condition in the Baltic provinces, which is inherent to them as their ancestors’ legacy and as such, has become unavoidable.^{*58} Even if this claim by Bunge was meant as a reference to Savigny’s teaching of law and “inherent forces” operating in each nation, Bunge has turned Savigny’s teaching upside down. Bunge called unavoidable the very matters that for Savigny served as an incidental part of law, its external embodiment in a random historical situation.

Bunge’s later works are characterised both by consistency with his programme dating from 1833 as well as deviations therefrom. It has to be mentioned of the latter, first and foremost, that he failed to involve a couple of dozen practitioners who would have participated in his effort. Also, Bunge soon abandoned the idea of the primacy of the actual common law.^{*59} Thus, there was no longer any need for a practical committee consisting of common law experts. However, emphasis on the crucial role of common law and practice did not disappear from Bunge’s works. If possible, and knowledge permitting, he always attempted to take that into account. Once again, Bunge tried to “scientifically present”^{*60} “nothing more than the current, practical law”.^{*61} Bunge aimed at offering as local provincial jurisprudence as detailed an overview and summary of the actual functioning of court practice as possible. Its traces can be found in his codification activities. BPLC is, in a large part, a rather casuistic summary of the practice of judgement exercised in local courts in the first half of the 19th century. E. Landsberg has also had to admit that Bunge had remained faithful to his principle “to rely on the prevalent practice with maximally pious conservatism”.^{*62} E. Landsberg did not thematise how to relate such empiricist orientation to contemporary practice to the methodological principles of the historical school.

3. BPLC as Bunge’s Patriotic Gift to the Politics of the Home Provinces

The title of this article makes one wonder how Bunge’s empiricist and casuistic codification was to serve the patriotic interests of the Baltic provinces. Had the Baltic provinces of the 19th century deserved the harmonisation of law accompanying modernisation, a principle-sensitive and flexible provincial jurisprudence, a scientific approach to court practice, etc.? Instead, Bunge offered to them estate and territorial particularism, similar to the medieval legal practice. The codification, having casuistic and detailed regulation, did not facilitate free development of jurisprudence as demanded, for example, by Savigny. Bunge did not take the contemporary practice before the court of science and demand that it follow the scientifically based work method. Instead, he simply put a part of the contemporary practice down as law.

⁵⁷ F. G. Bunge (Note 18), pp. 34–35.

⁵⁸ *Ibid.*, p. 39.

⁵⁹ F. G. Bunge (Note 35), pp. 22–24.

⁶⁰ “Scientifically presented” (*wissenschaftlich dargestellt*) is namely an addition that Bunge included in the titles of his textbooks on private law.

⁶¹ F. G. Bunge. *Das curländische Privatrecht, wissenschaftlich dargestellt*. Dorpat, 1851, p. X.

⁶² E. Landsberg (Note 15), p. 561.

Nevertheless, we have to regard Bunge as the founder of the local provincial jurisprudence. Moreover, he may be considered to be its discoverer. This was also pointed out by Bunge's peer from the faculty, colleague and friend C. O. von Madai. In his review of Bunge's textbook on Livonian and Estonian private law, published in 1838–1839, Madai noted that it was probably through this book that lawyers and jurists could first discover the existence of a particular provincial law. Until that time, there had also been sceptics among the local jurists, to whom the particular law of the Baltic provinces appeared as a couple of insignificant modifications of general German or Roman law. Thus, Madai had a good reason to claim that Bunge's book was an important patriotic gift and deserved the utmost approval.^{*63} However, it is an entirely different question as to for what purpose the fatherland needed such a conservative gift in the 19th century.

An answer to the question is inherent to the relationship between the Baltic provinces and the central government of Russia. On the one hand, Russia had included many frontier territories in the empire with the clause of recognising their (judicial) autonomy. On the other hand, the Russian central imperial government was unwilling to accept such a situation. For example, already at the end of the 18th century, the general Russian administrative reform was extended to the Baltic provinces. After the death of Catherine II, the previous condition was restored in the Baltic provinces. However, the central government did not discard the idea about a harmonised constitutional, administrative and legal organisation. Although major readjustments were made only at the end of the 19th century during Russification, the attempts to harmonise the empire and abolish the differences between provinces could be felt by his contemporaries to a lesser or greater degree throughout the century. The Baltic nobility based their oppositional policy to such attempts on the idea of conservation and protection of their historically developed peculiarities.^{*64} Such policy was supported, above all, by the acts of surrender.

In addition to that, the private law developed by Bunge and BPLC may be regarded as one act in this policy of preserving what was deemed to be *local, fair and appropriate*. As a result of a year's assiduous work, Bunge collected all the particularities of the local law. Moreover, he managed to organise this mosaic of differences in a more or less satisfactory manner. By means of the table of contents and index, it was still possible to find a legal verdict from the casuistic BPLC. To the contemporary patriots of the Baltic provinces, the possibly precise outlining of local particularities should appear so as that everyone's and their home province's particular needs have been taken into account. Bunge's "conservative piety" with regard to local practice only intensified this perception. Each practising jurist could see that BPLC set out their daily operations. At the same time, it was not important whether the local jurists had adopted the same decisions in similar cases in the period preceding 1710. In the same way, it was not necessary to ask in the case of Bunge's codification whether its provisions conformed to "the internal system of law" or the insight into "organic principles" constituting the legal system obtained through historical research, if one uses Savigny's apparatus of concepts. It was important that the local jurist possessed a summary of the provisions of private law, presented in a systematic form, to a certain extent, which allowed them to feel the familiar pleasure of recognition. One could demonstrate to the Russian central government that there was our own law the continuing validity of which was confirmed already by Peter I.

⁶³ C. O. Madai (Note 6), p. 850.

⁶⁴ In fact, the nobility did not lack an innovation-oriented wing among themselves, but ultimately the conservative attitude prevailed. For details, e.g. G. Pistohlkors. *Ostseeprovinzen unter russischer Herrschaft (1710/95–1914)*. In: G. Pistohlkors (Hrsg.) (Note 4), pp. 367–382. See also M. Hatzel. *Der Abbau der deutschen ständischen Selbstverwaltung in den Ostseeprovinzen Rußlands 1855–1905*. Marburg, 1977.