

Dialogue or Conflict?

The Legal Reform of 1889 and Baltic Private Law Code

The entry “border” is divided into three in the Estonian Encyclopaedia:

- administrative boundary – line dividing the state into administrative units;
- economic frontier – line on which the check points protecting the domestic market are situated;
- state border – line marking the territory of a state.

Thus, border denotes, above all, marking, separating, parting.

It is common indisputable knowledge that Estonia (the Baltic states) is (are) situated on the border; however, neither in Estonia, nor to speak of anywhere else, has it been determined in such a unified manner what a border or a path is, what the position of situating on the border is, on what border(s) Estonia is situated.

The location of Estonia on the border is a fact catching the viewer’s eye on every map of Europe – this need not be even mentioned here; however, this triviality has determined and continues to determine our development to date, including legal development. Map No. 4 in S. Huntigton’s book “The Clash of Civilizations and the Remaking of World Order”, reflecting the border between Western-Christian and Orthodox-Slavonic area, indicates that Estonia is located on the borderland of the Western cultural sphere. In other words or from the viewpoint of legal history – Estonia is located on the border of two large, Russian and German legal cultures.

According to the definition of S. Huntigton, Estonia (the Baltic states) belongs (belong) to the fracture line, region of conflict where the centres of civilisation or fundamental states fight one another. Thus this border is, above all, a site of battle, persisting opposition, a breaking point. The foreword to the Estonian version of the book by S. Huntigton, written by T. H. Ilves, the Estonian Minister of Foreign Affairs, also has a meaningful title “News from the Field of Conflict: Huntigton and Estonia.”¹ The Orthodox Cathedral of Alexander Nevsky with its onion-cupolas, standing opposite the Lutheran Dome Church and citadel of the age of the Teutonic Order, is an expressive embodiment of the historical persistence of such conflict.

Some dominant phrases in the accounts of the history of Estonia in the 19th century, including legal history, and not only in the case of researches proceeding from the Estonian national viewpoints, are “fight, critical years, decade, etc.”² On the one hand it is justified if we think, from the viewpoint of legal development, about the fight for the abolishment of personal dependency of peasants and against this, for the rebirth of the University of Tartu (Dorpat) (*i.e.* the Faculty of Law), for the maintenance of Baltic autonomous provincial regime (*status provincialis, der baltische Landesstaat, ostzeiskii osobyi poryadok*) and codification of the Baltic-German law. Paradoxically, such a “fight-centred” method of treatment was equally suitable for both the Baltic-German and national historical accounts of the Republic of Estonia

¹ S. P. Huntigton. *Tsivilisatsioonide kokkupõrge ja maailma ümberkujunemine (The Clash of Civilizations and the Remaking of World Order)*. Tartu, 1999, p. 16.

² P. Pirsko. *Talud päriseks. Protsessi algus müüjate ja ostjate pilgu läbi (Purchase of Farmhouses. Beginning of the Procedure through the Eyes of Sellers and Purchasers)*. – *Seltsid ja ühiskonna muutumine. Talupojaühiskonnast rahvusriigini. Artiklite kogumik (Associations and Changes in Society. From Peasant Community to Nation State. Collection of Articles)*. Ed. E. Jansen, J. Arukaevu. Tartu–Tallinn, 1995, p. 98.

(1920–1940), as well as for the Soviet Marxist-Leninist historical writing. This approach unavoidably entails categorical generalisations, as the fight presumes that someone prevails and someone surrenders^{*7}, be they “revolutionarily-minded workers and peasants” or “Estonian people, cultivating their land and developing their culture on the shores of the Baltic Sea” for more than five thousand years.

I claim that such treatment already by its nature inevitably restricts the issue under examination.

The position of Estonia on the borderline or frontier between two major legal systems implies that both German and Russian researchers, who focus on a large system, frequently treat one or another event or process in Estonia (in the Baltic states) (*i.e.* on the border) only as a peripheral, insignificant fragment and do not take time or can not penetrate into the process on the border or the actual nature and significance of an event. On the other hand, J. Lotman claims that in the centre, ideas are often rendered static, stagnate, but in the periphery of a cultural oecumene they are renewed, enriched, *i.e.* semiotic processes proceed frequently more actively in the periphery of a cultural oecumene than in the centre.^{*8} The problem is further complicated, when one or even several (*i.e.* Estonian, Latvian, Baltic German) integral cultural systems (*pro*: legal cultures), striving to define themselves, are situated on the border.

In my opinion, these issues emerge distinctly for example in the studies of the Russian judicial reform^{*9} of 1864. The analysis by B. Vilenski, still serving as the principal work on the judicial reform as a whole in the Russian study of legal history, the Baltic states are examined only on 2.5 pages of 400.^{*10} B. Vilenski mainly emphasises the opposition of the Baltic-German nobility against the judicial reform and points out that the Justices of the Peace were appointed by the government, whereas juries were not established in the Baltic states.

J. Baberowski, author of the newest German study on the Russian judicial reform of 1864 dedicates to the Baltic states 11 pages out of 800.^{*11} He states accurately that the knowledge concerning the functions of the judicial institutions in the border areas of the empire are extremely scarce.^{*12} However, this does not prevent him from claiming confidently that there was little difference between the legal organisation of the Russian and Baltic provinces prior to the reform. According to him, only a sufficient supply of jurists accompanied by an opportunity to have recourse to codified law distinguished the justice of these provinces from that of the Russian provinces.^{*13}

In his work, Baberowski self-evidently analyses, above all, the issues concerning the Baltic-German upper class, *i.e.* the nobility; only a couple of passages have been dedicated to the country people, *i.e.* Estonian and Latvian peasants.^{*14} It is yet stranger compared to the fact that in his monograph, J. Baberowski focuses his attention on Russian peasants and emphasises their avoidance with regard to modern law. J. Baberowski demonstrates that Russian people will not accomplish the transfer to the modern law. He accentuates that the gap, or in other words, the border will widen between the peasantry living in the pre-modern world of thinking and educated and Europeanised estates. The relationship between the literate Estonian peasants and modern law is left out from J. Baberowski's analysis.

I dare say that although J. Baberowski himself does not clearly word the problem of the border in his work, he actually deals with this, *i.e.* the cultural frontier and the problem of surmounting it in his work.

When treating the border as having the connotation of a fighting, breaking and dividing line, we inadmissibly restrict the meaning of the border. In mathematics, boundary or frontier is a set of points belonging simultaneously to interior and exterior. (Frontier – a set of frontier points. Frontier point of a set – a point in space surrounded by points belonging to the particular set as well as points outside it.^{*15}) In

⁷ For example, according to the assessment of P. Järvelaid, the outcome of the legal reform of 1889 was an unjustified demolition of the integral legal and legal educational system. P. Järvelaid. 360 aastat Tartu Ülikooli õigusteaduskonda (Three Hundred and Sixty Years of the Faculty of Law of the University of Tartu) (III). (1865–1888 and 1889–1917). – Eesti Jurist, 1992, No. 3–4, p. 246.

⁸ J. Lotman. Semiosfäär (About Semiosphere). Tallinn, 1999, pp. 16–17.

⁹ The Russian media of the 19th century and due to that the Russian legal historical sources have employed the term “court reform” (*Gerichtsreform*). The term *Justizreform*, used also in German writing would be more precise, as the reform also concerned other legal institutions apart from courts. This is evident in S. Kazantsev's study “Istoriya tsarskoi prokuratury”. Sankt-Peterburg, 1993, pp. 125–145.

¹⁰ B. Vilenski. Sudebnaya reforma i kontreforma v Rossii. Saratov, 1969, pp. 214–216.

¹¹ J. Baberowski. Autokratie und Justiz. Zum Verhältnis von Rechtsstaatlichkeit und Rückständigkeit im ausgehenden Zarenreich 1864–1914. Ius Commune. Sonderheft. Studien zur Europäischen Rechtsgeschichte. 78. Frankfurt am Main, 1996, pp. 374–385.

¹² *Ibid.*, p. 8.

¹³ *Ibid.*, p. 375.

¹⁴ *Ibid.*, p. 377.

¹⁵ Ü. Kaasik. Matemaatikaleksikon (Lexicon of Mathematics). Tallinn, 1982, pp. 55 and 147.

semiotics, the border is viewed as the total of bilingual “translation filters”, the passing through of which translates the text into another language (other languages). Thus, the points of the semiotic border may be compared to receptors that translate external stimuli into the language of our nervous system^{*16}, to adapters.

With regard to this meaning, the border denotes a territory that allows for mutual understanding, positive dialogue – consequently, it is first and foremost a uniting, not a separating line. Conflict can naturally be viewed as a form of dialogue but in that case we could probably speak of a negative dialogue. However, we are now interested in a positive dialogue.

I attempt to analyse the legal reform performed in 1889 in the three Baltic provinces (*Estland, Livland and Curland*) or the implementation of the Russian court laws of 1864 in these three provinces as a dialogue between two different legal cultures, not as a battle between the advancing Russian legal culture and Baltic-German legal culture engaged in desperate defence. Although each and every dialogue, and in particular a dialogue proceeding as a reform, can be viewed as a process in time. At the moment, I choose to focus on two texts – the text of the third volume of the Baltic Provincial Code or the Baltic Private Law Code as of 1890 and “The Law Applying to the Reorganisation of Court Institutions in the Baltic Provinces” (“*Polozheniye o preobrazovanii sudebnoi tshasti v Pribaltiiskikh guberniyakh*”) enforced by a registered ukase on 9 July 1889.^{*17} The reasons for this approach are twofold. Firstly, the current stage of research and secondly, the limited size of this article that will not enable me to analyse the process the duration of which was at least 25–30 years.^{*18}

To date, the legal and historical analysis of the legal reform in the Baltic provinces in 1889 has mainly paid attention to its “external aspects”, focussing primarily on the structure of the judicial institutions (*Gerichtsverfassung*) and the general description of codes of proceeding, where some minor deviations with regard to the Russian inland provinces have been noted. However, the legal historians have not actually analysed the changes taking place in procedural law, whereas the draft Code of Civil Procedure, submitted by F. G. Bunge but never implemented, has been entirely left out.^{*19} As it is known, the collection of laws issued by Alexander III on 9 July 1889 consists of the following acts^{*20}:

- registered ukase concerning the implementation of the court laws of 20 November 1864 in the provinces of *Livland, Estland and Curland* and reorganisation of local peasant agencies (*Imenoi vysotshais-hii ukaz o primenenii k guberniyam Lifyandskoi, Estlyandskoi i Kurlyjandskoi sudebnykh ustavov 20 noyabrya 1864 goda i o preobrazovanii mestnykh krestyanskikh prisutstvennykh mest*);
- the opinion of the State Council on the reorganisation of judicial institutions and peasant agencies in the Baltic provinces (*Mneniye Gosudarstvennogo Soveta o preobrazovaniyakh sudebnoi tshasti v Pribaltiiskikh guberniyakh i krestyanskikh prisutstvennykh mest sikh gubernii*);
- law on the reorganisation of judicial institutions in the Baltic provinces (*Polozheniye o preobrazovanii sudebnoi tshasti v Pribaltiiskikh guberniyakh*);
- law on the reorganisation of peasant agencies in the Baltic provinces (*Polozheniye o preobrazovanii krestyanskikh prisutstvennykh mest v Pribaltiiskikh guberniyakh*);
- opinion of the State Council on the implementation rules of the reorganisation of judicial institutions and peasant agencies in the Baltic provinces (*Mneniye Gosudarstvennogo Soveta po proyektu pravila o privedenii v deistviye zakonopolozhenii o preobrazovanii sudebnoi tshasti i krestyanskikh prisutstvennykh mest v Pribaltiiskikh guberniyakh*);
- implementation rules of the law on the reorganisation of judicial institutions and peasant agencies in the Baltic provinces (*Pravila o privedenii v deistviye zakonopolozhenii o preobrazovanii sudebnoi tshasti i krestyanskikh prisutstvennykh mest v Pribaltiiskikh guberniyakh*).

The following discussion covers primarily only one part of the law on the reorganisation of the court institutions in the Baltic provinces, namely, Part A “About the Implementation of the Court Laws of the Emperor Alexander II” (“*O primenenii sudebnykh ustavov Imperatora Alexandra II*”).

¹⁶ J. Lotman, p. 13.

¹⁷ Polnoye Sobraniye Zakonov Rossiiskoi Imperii. III T. 9. No. 6188. 1889 g. iyulya 9.

¹⁸ The Russian Emperor Alexander II signed the Baltic Private Law Code on 12 November 1864 and the Russian Court Laws on 20 November 1864.

¹⁹ F. G. Bunge. Entwurf einer Ordnung des gerichtlichen Verfahrens in Civilsachen für Liv-, Est- und Curland. Reval, 1864.

²⁰ Sobraniye uzakonenii i rasporyazhenii Pravitelstva. Izdavayemoye pri Pravitelstvuyjuschem Senate. 1889, No. 78.

The opinion that no significant changes took place in material law, particularly in civil law, prevails to date.^{*21} One may get the impression as if the court system and procedural law operated in some other isolated space, without a dialogue with the former law.

In the field of criminal law, it is evident that the Code of Laws on Punishments to be Inflicted by Justices of the Peace (*Ustav o nakazaniyakh, nalagayemykh mirovymi sudyami*) could not be implemented in the Baltic provinces before 1889, as there were no appropriate court institutions available. In the Code of Laws on Punishments to be Inflicted by Justices of the Peace, punishments have been determined through the institution imposing them – magistrates' court. It is a code that is aimed at a particular court institution.^{*22}

At a first glance, the private law supports the above-mentioned standpoint. Section 63 in Part I of the law concerning the reorganisation of judicial institutions in the Baltic provinces sets out that upon hearing civil cases, the courts shall proceed from the provisions of Volume III of the Baltic Provincial Code (*i.e.* the Baltic Private Law Code) and the local agrarian laws. However, attention has not been paid to the second half of the very same section 63, which adds:

“...mit Ausnahme derjenigen Theile der erwähnten Gesetze, welche durch das Erlassen dieser Verordnung aufgehoben oder abgeändert werden.”^{*23}

By the way, the history of this provision vividly illustrates the temporal dimension of the dialogue (reform) – this principle has been laid down already in the law on the introduction of Justices of Peace in the Baltic provinces issued on 28 May 1880.^{*24}

The former Professor of the University of Tartu, one of the best experts in the Baltic private law, C. Erdmann affirms the existence of rather significant changes in the particular field of material law, saying:

“Allein gerade in einem sachenrechtlichen Gebiete, dem des Pfandrechts, haben sie [d.h. Justizgesetze] recht wesentliche Veränderungen vorgenommen.”^{*25}

When speaking of the changes in law, we have to take into account the fact that the following restrictions were imposed on the territorial applicability of several laws in the tsarist Russia: “... in those parts of the Russian State, where the court laws of 20 November 1864 have been implemented in full.” Thus, these laws extended without a special act also to the Baltic provinces in 1889. In this case, the law concerning the international private law of 5 April 1869 may be pointed out.^{*26}

The avoiding nature of the dialogue was in accordance with another view, pervading tacitly but without a fixed ground, that the Baltic Private Law Code as it was enacted in 1864 was preserved without significant changes until 1940. Thus, “*Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes*” issued by F. Schlegelberger in 1929 claims that the main source of private law for the inhabitants of Estonian rural regions are estate-based agrarian laws.^{*27} Here the authors have taken into account neither the Constitution of the Republic of Estonia of 1920, nor the law on the abolishment of estates adopted on 9 June 1920^{*28}, nor the practice of the Supreme Court.^{*29} Such an erroneous claim is not accidental because the same assertion is offered about Latvia.^{*30}

21 B. Vilenski. Sudebnaya reforma i kontreforma v Rossii. Saratov, 1969, pp. 214–216; E. C. Thaden. Russia's Western Borderlands, 1710–1870. Princeton, 1984, p. 196; V. Kalninsk. Otscherki istorii gosudarstva i prava Latvii v XI–XIX vekakh. Riga, 1980, p. 165–169; Y. Meguro. Istorija gosudarstva i prava Estonskoj SSR: Dooktyabrskii period (XIII v. – okt. 1917). Tallinn, 1981, pp. 125–130.

22 Sudebnaya reforma. Otv. red. B. Vilenski. Rossiiskoye zakonodatelstvo X–XX vekov. V 9-ti tomakh. T. 8. Moskva, 1991, p. 420.

23 Die Verordnung über die Reorganisation des Gerichtswesens in den baltischen Gouvernements § 63. In: Die Verordnungen über die Reorganisation des Gerichtswesens und der Bauerbehörden in den baltischen Gouvernements und die Regeln betreffend die Ausführung der erwähnten Verordnungen mit Darlegung der Motive, auf die sie gegründet sind. Zusammengest. von A. Gasman, A. Nolcken. Ausgabe des Justizministeriums. Band. I, p. 40.

24 Pravila o primenenii utsherezhdeniya mirovykh sudebnykh ustanovlenii v Pribaltiiskikh guberniyakh. § 19. Sudebnye Ustavy, 1883; Ustav Grazhdanskogo Sudoproizvodstva, 1883, § 1880.

25 C. Erdmann. System des Privatrechts der Ostseeprovinzen Liv-, Est- und Curland. Zweiter Band. Sachenrecht. Riga. 1891. Vorrede zum zweiten Bande.

26 Polnoye Sobraniye Zakonov Rossiiskoi Imperii. II T. 44. Nr. 46935. 1869 g. aprelya 5.

27 H. von Nottbeck, V. Johanson. Estland. – Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes. Erster Band. Länderberichte. Herausgeb von F. Schlegelberger. Berlin, 1929, p. 53.

28 Riigi Teataja (the State Gazette) 1920, 129/130, 254.

29 Judgement of the Supreme Court en banc No. 6 of 9 May 1927.

30 A. Lawrentjev. Lettland. – Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes. Erster Band. Länderberichte. Herausgeb von F. Schlegelberger. Berlin, 1929, p. 112.

This view is also amplified to a particular extent by the fact that the last comprehensive text of the Baltic Private Law Code was published in Russian in 1915^{*31}, remaining, as a rule, outside the field of vision of scholars. The last official comprehensive issue was published in 1893.^{*32} The last amendments to the text of the Baltic Private Law Code were made as late as in 1938.^{*33}

These two above-mentioned views have amplified each other.

C. Erdmann proposed law of pledge as the field where the most significant changes took place. The right of security found in the Baltic Private Law Code was largely based on Roman and Old Germanic law. Section 1336 of the BPLC (1864):

“Erhält der Gläubiger zugleich den Besitz des verpfändeten Gegenstandes, so ist ein Pfandrecht im engern Sinne – bei beweglichen Sachen Faustpfand oder Kastenpfand genannt – vorhanden. Wird dagegen das Pfandrecht ohne Besitzübertragung bestellt, so heisst es Hypothek.”

Section 1357:

“Gegenstand des Pfandrechts können alle und jede Sachen sein, deren Veräusserung nicht ausdrücklich. Verboten ist (a), und zwar nicht nur gegenwärtige, sondern auch zukünftige (b), sowohl körperliche, -bewegliche, wie unbewegliche, – als auch unkörperliche Sachen, namentlich Sculdforderungen (c).”

Consequently, both immovable and movable property could serve as the object of mortgage, whereas this included single movables as well as sets of movables or the entire property both in the present and in the future. According to section 1387 of the BPLC (1864) this could involve general or universal mortgage:

“Das Pfandrecht an einem gesammten Vermögen wird ohne Besitzübertragung bestellt und General- oder Universalhypothek genannt.”

These old provisions regulating right of security conformed to the contemporary needs neither in the Baltic states nor elsewhere in Europe^{*34}, expanding the notion of mortgage too much. The main principles characterising the modern mortgage system related to property – the principle of publicity and speciality of mortgages – were extremely inconsistent in the former provisions of the BPLC. In addition to that, the previous provisions failed to ensure the protection of the creditors' claims even in *Livland*^{*35} and *Curland*, where the BPLC demanded that the mortgages be entered in public records (engrossed). A. Gasman and A. Nolcken considered, with regard to the principles of publicity and speciality of mortgages, as the major shortcoming of the former provisions of the BPLC the possibility that mortgages under law of property might be created also without entry into the public records.^{*36} The BPLC provided for the total of 12 tacit mortgages related to various types of immovables, having privileged status when compared to the mortgages entered in the public records.^{*37}

Consequently, the opportunity held by the local great landowners to obtain actual credit from the capital markets to be formed was limited. This was not felt solely by the Russian central government but also by the local great landowners. Thus, the Council of the Diet magistrates – the directing body of the Livonian corporation of the nobility – submitted by the demand of Diet (*Landtag*) to the Russian Ministry of Internal Affairs their proposals concerning the prompt improvement of the current system of mortgages as early as in 1882.

The central government did not regard the making of a limited number of amendments reasonable and decided to reorganise the system of mortgages in the framework of the general legal reform, which also included the reorganisation and harmonisation of the registry system and bankruptcy proceedings within the entire territory where the BPLC applied.

³¹ A. Nolken. Svod Grazhdanskikh Uzakonenii Gubernii Pribaltiiskikh (tsh. III Svoda mestnykh uzakonenii gubernii Ostzeiskikh) so vklutsheniemy izmenenii i dopolnenii po prodolzheniyam i pozdneishim uzakonieniyam i s razyasneniyami Pravitelstvuyushchago Senata. Izdaniye nieofitsialnoye. Izd. 2-oe. Ispravl., peresmotr. Sost. A. Nolken. Petrograd, 1915.

³² Svod grazhdanskikh uzakonenii gubernii pribaltiiskikh. Izdaniye 1864 so vklutsheniemy statei po prodolzheniyu 1890. St.-Peterburg. 1893. 16' Izdaniye Kodifikatsionnogo Otdeleniya pri Gossudarstvennom Sovete.

³³ Riigi Teataja (the State Gazette) 1938, 60, 588.

³⁴ H. Coing. Europäisches Privatrecht. Band II. 19. Jahrhundert. Überblick über die Entwicklung des Privatrechts in den ehemals gemeinrechtlichen Ländern. München, 1989, pp. 207–220.

³⁵ Except for the city of Riga.

³⁶ Gasman, Nolcken, p. 392.

³⁷ *Ibid.*, p. 393; BPLC (1864) sections 1394, 1395, 1397–1402, 1406–1409.

The law on the reorganisation of judicial institution in the Baltic provinces of 9 July 1889 was followed by actual rearrangements. The law consisted of several parts:

- implementation of the court laws of Emperor Alexander II (*Primeneniye sudebnykh ustavov Imperatora Alexandra II*);
- some amendments to the laws concerning mortgages (*O nekotorykh izmeneniyakh v zakonopolozheniyakh ob ipotekakh*);
- about the establishment of guardianship and welfare institutions (*Ob utshrezhdenii opekunskikh ustanovlenii*).

The Part B of the law on the reorganisation of the court institutions in the Baltic provinces involves significant changes with regard to mortgages. According to section 1 of Part B, a mortgage shall be established only in immovable property and the mortgage shall assign a real right to a creditor in the pledged immovables only upon entry into the land register. The general mortgages in movables as well as (so-called legal or tacit) mortgages established on the law itself³⁸ were generally abolished; only special tacit rights of security remained valid.³⁹ In the text of the BPLC, these changes were repeatedly reflected as follows:

Section 1336 of the BPLC (1890):

“Erhält der Gläubiger zugleich den Besitz des verpfändeten Gegenstandes, so ist ein Pfandrecht im engern Sinne – bei beweglichen Sachen Faustpfand oder Kastenpfand genannt – vorhanden. Wird dagegen das Pfandrecht an einem Immobil (T. A. [author’s emphasis]) ohne Besitzübertragung bestellt, so heisst es Hypothek.”

Section 1357 of BPLC (1890) Anmerkung:

“Gegenstand der Hypothek kann nur ein Immobil sein.”

Section 4 set out that mortgages were entered into the land register only within the limits of a particular amount and in relation to a pre-determined immovable property, the pledgor of which had been entered in the land register as its owner or user.

Section 1580 of the BPLC (1890):

“Hypotheken dürfen nur in dem Betrage einer bestimmten Summe Geldes und auf ein bestimmtes Immobil, als dessen Eigenthümer oder Nutzungseigenthümer der Verpfänder in den öffentlichen (Krepost-) Büchern verzeichnet steht, in diese Bücher eingetragen werden.”

The sequence of satisfying the claims entered in the land register was inseparably connected to the principles of publicity and speciality. Critical changes were also introduced here.

As determined by the BPLC (1864), various privileged claims of pledge were preferred before 1889, the claims registered (engrossed) in the public records were only satisfied in the second order. The latter had, in their turn, advantage over the claims that had not been engrossed.

Section 5 of Part B also established the procedure for determining the priority of mortgages – the time of entry of one or another mortgage in the land register proved decisive. Simultaneously registered claims had to be met proportionally. Secondary claims related to the basic claim were to be satisfied in the same order; however, interest was to be paid only for the three previous years in this stage. The interest for the remaining years were to be paid equally with all other personal claims.

Section 1351 of the BPLC:

“Das Pfandrecht dient zur Sicherheit nicht bloss der Hauptforderung, sondern auch der mit ihr zusammenhängenden Nebenforderungen an Zinsen, Schäden und Kosten, Conventionalstrafe u. dgl. m, wenn nicht das Gegentheil ausdrücklich verabredet worden (a). Die Priorität der Hypotheken richtet sich nach dem Zeitpunkt ihrer Eintragung in die öffentlichen (Krepost-) Bücher. Nach derselben Priorität gelangen auch die mit der Hauptforderung zusammenhängenden Nebenforderungen zur Befriedigung, doch werden die Zinsen nur für die drei der öffentlichen Versteigerung des Immobils vorhergehenden Jahre bezahlt. Zinsforderungen für frühere Jahre werden im demselben Maasse wie Schulforderungen persönlicher Gläubiger befriedigt (b).”

Another purpose in addition to the updating of law of pledge was the harmonisation of the existing law. It is perhaps self-evident that the provisions observed above extended to all the regions of the territory where the BPLC was valid (*Rechtsgebiet*). Apart from the establishment of new provisions, the reform of 1889

³⁸ BPLC (1864), sections 1394–1402.

³⁹ BPLC (1890), sections 1403–1405.

expanded the territorial applicability of several provisions already existing in the BPLC, which had previously applied only in one or two of the legal regions, to the entire sphere of influence of the BPLC. According to section 7 of Part B of the law on the reorganisation of court institutions in the Baltic provinces, sections 1572, 1574, 1595 and 1606 extended to all legal regions. For example, section 1595, which had been valid only in *Livland* and *Curland* until that time, extended now to *Estland* in both the fields of city and rural law. It set out that the transfer of property to third persons would not alter the creditors' claims related to mortgages.

Having a dialogue, particularly a positive dialogue, presumes the principle of reciprocity and this is also evident in the case of the ukase issued on 9 July 1889. Section 9 of Part B of the law on the reorganisation of judicial institutions in the Baltic provinces provided for the retention of all rights and privileges prescribed by law, valid at the time of their establishment, by all mortgages in movables and general mortgages insofar as concerning movables until their termination according to the procedure provided for by the BPLC (sections 1414–1436).

Section 10 set out that all mortgages irrespective of the manner of creation^{*40}, established in immovables until 1889 but not entered in the land register and all general mortgages insofar as concerning immovables, even if engrossed, were to be reregistered during the coming two years in an appropriate land registry institution in order to preserve their nature under law of property.^{*41} Section 11 demanded that the principle of speciality be observed upon the (re)registration of general mortgages.

Before 1889, common law played a rather significant role besides the BPLC. For example, the BPLC lacked concrete provisions laying down the procedure for deletion of mortgages registered in the public records. The court practice in the Baltic provinces prior to the reform proved determinant here, and later served as the basis for the procedure set out in section 344 of Part A of the law on the reorganisation of court institutions in the Baltic provinces.

The changes introduced on 9 July 1889 did not naturally concern the issues related to the updating and harmonisation of law of pledge, neither were the amendments to the BPLC restricted to the repeal or amendment or supplementation of the wording of one or another section of the BPLC. The ambient legal environment might occasionally cause the alterations in the meaning and validity of a provision even if the wording remained intact.

From the perspective of the future development of the BPLC, it was important that due to the legal reform of 1889, the BPLC came to be in the sphere of activity of the reorganised cassation department of civil cases of the Russian Senate. Both the BPLC (1864) and section XXVI of the Introduction (1890) set out that court judgements made in particular individual cases, even the judgement made by the medium to higher level courts, do not have the legal force of law and thus are not mandatory upon the adjudication of other analogous cases. At the same time, the law did not prohibit a plaintiff or defendant from referring to earlier judgements already in force upon reasoning their rights.

Section XXVI of the BPLC (1864) and (1890):

“Die in einzelnen Fällen ergangenen Urtheile selbst der höchsten Justizbehörden haben nicht die Kraft eines Gesetzes und können daher für andere Fälle nicht maassgebend sein. Insofern jedoch die Richter verpflichtet sind, in ihren Urtheilen, unter ganz übereinstimmenden Verhältnissen, folgerecht zu bleiben, ist es den rechtsuchenden Parteien nicht verwhrt, zur Begründung ihrer Ansprüche, sich auf früher ergangene, rechtskräftig gewordene, übereinstimmende Erkenntnisse des Gerichts zu beziehen.”

At the same time, section 815 of the Russian Code of Civil Procedure set out that, “all judgements and rulings of the cassation departments of the Senate, clarifying the precise meaning of law, shall be published for general knowledge and as instruction for the uniform interpretation and use of laws.”^{*42} This provision applied also in the Baltic provinces.^{*43} The cassation department of the civil cases of the Senate commented

⁴⁰ The BPLC recognised three manners: legislative, judicial and voluntary.

⁴¹ Note 2 in section 1389 of the BPLC (1890).

⁴² Ustav Grazhdanskogo Sudoproizvodstva (Izd. 1883), section 815.

⁴³ Svod deistvuyuschikh v Pribaltiiskikh guberniyakh zakonopolozhenii po grazhdanskomu protsessu, o notarialnoi tshasti i o poryadke proizvodstva del o nesostoyatelnosti. Section 815. Polozheniya o preobrazovanii sudebnoi tshasti i krestyanskikh prisutstvennykh mest v Pribaltiiskikh guberniyakh. i pravila o privedenii oznatshonnykh polozhenii v deistviye. S izlosheniyem soobrashenii, na koikh oni osnovany. 2-oe peresmotrennoye i dopolnennoye izdaniye Ministerstva Yustitsii. Osoboye prilozheniye. Sost. A. Gasman, A. Nolcken. St. Peterburg, 1890, section 815.

on and explained the BPLC for the first time in its judgement No. 66^{*44} of 16 October 1891 and it concerned the registration of “tacit” (*bezmolvnyaya*) mortgage. According to the assessment of some authors, the contents of the judgement of the Senate exceeded its restricted (court judgement) limits, acquiring nearly the meaning of a law.^{*45} As such example, V. Tsheshikhin points out judgement No. 78 of the cassation department of civil cases of the Senate dating from 1892, which concerned section 3621 of the BPLC and handled the limitation periods in *Curland*. The explanation provided came to serve as the basis of the State Council resolution approved by the Emperor.^{*46}

The first collection of the resolutions and explanations of the Senate concerning the BPLC was the very same collection compiled by V. Tsheshikhin, supplementary Justice of Peace of the province of *Livland*, which was published in Riga already in 1900 and contained the resolutions of the Senate concerning the BPLC until 1898. The issue of the BPLC published by V. Bukovski, member of the tsarist circuit court and subsequent Professor of the University of Latvia and member of the Supreme Court of the Republic of Latvia, which was provided with comprehensive comments also demonstrates the importance ascribed to resolutions of the Senate and explanations contained therein. These relied to a high degree on the resolutions of the Senate.^{*47}

The last collection of the resolutions of the Russian Senate concerning the BPLC, compiled by I. Kantor, was published as late as in 1932.^{*48}

The Supreme Court of the former Republic of Estonia paid also considerable attention to the practice of the Senate.

When analysing the reforms carried out in the Baltic states during the second half of the 19th century, particularly the legal reform of 1889, one may conclude that since the 1870s, the European modern law entered Estonia on the level of legislation and implementation of legal practice increasingly from Russia. However, on the level of jurisprudence and judicial conceptions, such shift took place only after the reform of 1889, when the German-speaking University of Dorpat became a Russian University of Yurev.

The statements above do not imply autochthonous Russian law. On the contrary, I dare say that it was western (western European) law which was received in Russia according to the Russian cultural needs. It has been claimed that it was the last attempt of the Russian historical élite to import in the optimum manner the most modern fruit of the western school, particularly jurisprudence and statehood.^{*49} On the one hand, it means that the western law arrived in the Baltic provinces with Russian influences, adjustments and simplifications, whereas the abundant resources of legal writing, court practice and legal traditions of western Europe (German and French, above all) were not adopted.

On the other hand, the mechanism described above meant that the western law received in Russia arrived in the Baltic states as the laws of the Russian Empire, the political goal of which was to integrate the region increasingly with the rest of the Russian state.

Therefore, the conflict between different legal systems has been highlighted in the previous study of reforms. It is my opinion that future research would be more fruitful, if we viewed the legal reform as a dialogue between two different legal systems.

⁴⁴ Postateyniy ukazatel k polnomu svodu reshenii Grazhdanskogo Kassatsionnogo departamenta Pravitelstvuyushchago Senata. Za 1866–1910 g.g. Izdaniye 2-e neoffitsialnoye. Yekaterinoslav. 1912, pp. 334–335; Polnyi svod reshenii. Grazhdanskogo Kassatsionnogo departamenta Pravitelstvuyushchago Senata (natshinaya s 1866 goda) s podrobnym predmetnym alfavitnym i postateynym ukazatelyami. Za 1891 g. Izdaniye 2-e neoffitsialnoye. Sost. L. Rotenborg. Yekaterinoslav, 1911, No. 66, pp. 162–165.

⁴⁵ Svod grazhdanskikh zakononii gubernii Pribaltiiskikh v razyasneniyakh Pravitelstvuyushchago Senata. Izdaniye nieoffitsialnoye. Sost. V. Tsheshikhin. Riga, 1900, p. 3.

⁴⁶ Sobraniye zakononii i rasporyazhenii Pravitelstva. 1892, No. 20.

⁴⁷ Svod grazhdanskikh zakononii gubernii Pribaltiiskikh s prodolzheniyem 1912–1914 i s razyasneniyami v 2 tomakh. Izdaniye nieoffitsialnoye. Sost. V. Bukovski. Riga, 1914.

⁴⁸ Sbornik reshenii Grazhdanskogo Kassatsionnogo i Obschego Sobraniya 1-go i Kassatsionnykh Departamentov byvshego Pravitelstvuyushchago Senata razyasnyayushchikh zakonopolozheniya deistvuyushchiya v zapadnoi Latvii i Estonii. Sost. L. Kantorom. Riga. 1932.

⁴⁹ J. Baberowski. Europa in Rußland: Justizreformen im ausgehenden Zarenreich am Beispiel der Geschworenengerichte 1864–1914. – Reformen im Rußland des 19. und 20. Jahrhunderts. Hrsg. D. Beyrau, I. Èiëurov, M. Stolleis. Ius Commune. Sonderheft. Studien zur Europäischen Rechtsgeschichte. 86. Frankfurt am Main, 1996, p. 151.