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German or European?

Jülich and Berg between Imperial and Public International Law

Charles VI. famously promised Prussian King Frederick William I. the succession of the duchies of Jülich and Berg in 1726, but did not keep this treaty pledge. Frederick II. did not think high of public international law, but used this as a political motive for revenge on Austria in November 1740, starting the War of the Austrian Succession. Although the Emperor benefitted from an advantageous position in Imperial law, which was essentially feudal for successions, his decisions in the 1720s were always the counterpart of a bilaterally negotiated concession by the other party, triggered by European, rather than German politics. In the light of the Utrecht and Italian examples, it can be argued that the power relations at the inter-sovereign level and the resulting political compromise created an implicit hierarchy, where vertical Imperial law was bowed and bent to fit the main players' horizontal options.

1. Context, method and sources

Frederick the Great's invasion of the Austrian province of Silesia in November 1740 marked the end of three decades of peace in Europe.¹ The Prussian King ended an unusually quiet era for "bellicose" Early Modern Europe, which the Peace Treaties of Utrecht,² Rastatt and Baden (1713–1714) had inaugurated. Frederick's claims on Silesia were extremely doubtful and vague. He condemned jurists' pretexts for war or peace as irrelevant. Yet, the King saw promises made by Emperor Charles VI. (1685–1740)³ to his father, King Frederick William I. (1688–1740),⁴ as a valid political motive for revenge.

Charles's pledges concerned territories more than 800 kilometres away from Breslau, the Silesian capital. The duchies of Jülich and Berg were situated along the Rhine, and separated by the archbishopric of Cologne. The Hohenzollerns

disputed these territories to the ruling Wittelsbachdynasty. As the extinction of the latter's Palatinate-Neuburg branch was likely, Elector Carl Philip III. (1661–1742) being deprived of male issue, the Hohenzollerns claimed his succession. Thanks to a 1629 bilateral treaty, Frederick II. of Prussia already ruled the duchy of Cleves and the county of Mark, bordering on the duchy of Berg.

The fight over Jülich and Berg seems very German in essence. Yet, princes of the Empire (*Reichsfürsten*) enjoyed autonomy in foreign affairs. The contenders in this battle for Imperial favour –on the one hand, the Palatinate-Sulzbach branch, on the other hand, the Hohenzollerns- sought support outside the Empire. Therefore, the international context of the Post-Louis XIV. era is vital. Emperor Charles VI. had rather unwillingly signed the Peace of Rastatt (6 March 1714). His original ambition had been to become King of Spain, and displace Louis XIV.'s grandson, Philip of Anjou⁵. However, the latter had obtained international recognition at the

¹ DUFFY, Frederick the Great; KUNISCH, Friedrich der Grosse.

² BÉLY, Espions et ambassadeurs.

³ RILL, Karl VI.; LEÓN SANZ, Carlos VI.

⁴ HINRICHS, Friedrich Wilhelm I.

⁵ VARGA, Philippe V.

Peace of Utrecht, albeit under one condition: the crowns of France and Spain had to remain separate for ever, in order to safeguard the European balance. Nevertheless, both Philip and Charles contested the partition of the Spanish monarchy that resulted from Utrecht. Whereas the Austrian Habsburgs had been allies of the Protestant and maritime powers Britain and the Dutch Republic, against Louis XIV., Charles' disgruntlement with the Utrecht settlement drove his former friends into the arms of the French.⁶

Consequently, foreign interference in the Empire concerning the question of Jülich and Berg (and other dynastically linked territories) came from the Anglo-French side. Whenever Charles VI. felt inclined to grant the succession to the Palatinate-Sulzbach, the Hohenzollerns sought support, and *vice versa*. Brandenburg-Prussia could play the card of Protestant solidarity (with Hanover-Great Britain), and of the Peace of Westphalia, which gave France an intervention right to safeguard the States of the Empire (*Reichsstände*)'s liberties.⁷ Moreover, the Wittelsbach branches (Bavaria, Palatinate-Neuburg, Palatinate-Sulzbach and Palatinate-Zweibrücken) had teamed up, constituting an alternative Catholic bloc in the Empire. The union of the Electors of Bavaria, Cologne, Trier and the Palatinate could pose a threat to Charles VI.'s own succession as Emperor. Charles Albert of Bavaria, spouse of Archduchess Maria Amalia, the Emperor's niece, was determined "*à faire un personnage*" in international affairs.⁸ As a result, the Emperor had every interest in keeping both camps satisfied.

The whole diplomatic game had legal aspects as well.⁹ The impermeability of the domestic public

legal order had come under pressure as a consequence of the treaties of Utrecht, Baden and Rastatt. Philip V. of Spain had sworn a renunciation of his rights to the throne, contrary to the French *loix fondamentales*. Nevertheless, the Parliament of Paris had registered the peace treaties, successively confirmed by the British (1716), the Dutch (1717) and the Emperor (1718). Political compromises in these international treaties gradually imposed themselves over even the most fundamental norms of imperial feudal law, as the example of the internationally settled succession of the duchy of Parma-Piacenza and the grand-duchy of Tuscany (1718–1731/1737) shows.¹⁰

Political historians tend to discard the legal discussions as the mere rhetorical disguise of each party's interest. Legal historians, conversely, have preferred to work on scholarly writings and "big names". Yet, the European diplomatic community was a creative legal environment in itself. Esteemed practitioners, jurists themselves or counselled by jurists,¹¹ applied and modified positive law, in constant mutual interaction. As such, law was seen as the main legitimating vector for the interests of princes, capable of creating convergence or acceptance, and not as a mere instrumental or apologetic device, as the absence of a centralized monopoly of violence would suggest.¹² Legal discourse reflected power differences between individuals as well as states, and was an essential element of diplomatic "praxeology" or implicit practical logic.¹³ In French and British diplomatic correspondence and legal memoranda for the 1710s, 1720s and 1730s, legal reasoning is at every time historical and precedent-seeking.¹⁴ Diplomats had to be good historians, as well as text analysts: their

⁶ BOURGEOIS, *La Diplomatie secrète*.

⁷ ARETIN, *Kaisertradition*; ULBERT, *Frankreichs Deutschlandpolitik*; WHALEY, *Holy Roman Empire*

⁸ Poyntz to Newcastle, Paris, 23. 3. 1729, NA, SP, 78, 190, fol. 311v.

⁹ DHONDT, *From Contract to Treaty*.

¹⁰ STEIGER, *Völkerrecht versus Lehnsrecht?*

¹¹ De La Sarraz du Franquesnay, *Le ministre*.

¹² REINHARD, *Geschichte der Staatsgewalt*.

¹³ BOURDIEU, *Sur l'État*.

¹⁴ LOUGHLIN, *Foundations* 56–60.

work consisted in combining and criticising texts, to see the consistency or fallacy of the chronological enumerations used to prove the lawfulness or the legitimacy of a political position.¹⁵ Archivists such as Nicolas-Louis Le Dran (1687–1774), who served as *premier commis* in Louis XV.'s administration of foreign affairs, identified original and authoritative documents and wrote considerable treatises at simple request.¹⁶ Diplomats could then work with their writings, or consult the popular compilations of Rousset de Missy,¹⁷ Glafey¹⁸ or Schweder.¹⁹

The Jülich and Berg question, which has triggered a substantial production of historiography, will be approached from the latter perspective: how did French and British diplomats qualify the Prussian and Palatine requests for support in the case of Charles III. Philip's eventual decease? How did France and Britain see the Imperial law and institutions? And, finally, how did this change impact on the theoretically discretionary Imperial freedom of action?

2. Legal argumentation

a. The Empire and International Law

Should it be repeated that the distinction between private and public law was a fairly recent one, even in 18th century Germany? The differences between common feudal law, in essence an instrument to organize the patrimony of private individuals, and its imperial variant, were not clear.²⁰ An imperial fief could have movables as well as immovables, territories or dignities,

lay and ecclesiastical, regalia or income as an object. Doctrine distinguished vassalship, or the Bartolian *dominium utile* ('property in analogy') from lordship (*dominium directum*). However, in public law, the element of power, or the exercise of legitimate violence over the inhabitants of a given territory, leads to a *de facto* internal and external independence, which we call sovereignty. Public law is thus a different kind of *lex terrae*, where concepts depend on historically and politically constructed discourse.

How far did the feudal bond of loyalty reach in a vast geographical entity, stretching from Bohemia to the Rhine, and from the Alps to the Baltic? In theory, any territory in Germany was considered an Imperial fief, unless explicitly provided otherwise.²¹ In practice, the loyalty of the German princes amounted to treaty loyalty, and this in a Hobbesian era.²² Consequently, the Emperor, as lord, could have as much, more, or less authority over his vassal than in 'common' feudal law, by which German authors generally designate the feudal law of Lombardy.²³ However, the ensuing political conflicts between the Emperor and members of the Empire led to the imposition of constitutional arrangements, such as the Peace of Augsburg (1555) or the Peace of Westphalia (1648). The latter brought innovations at two levels. First, all members of the Empire acquired a *ius territoriale* ("landeshoheit"), or the right to legislate, to punish or to levy taxes, including the right to send out diplomats²⁴ or to contract defensive and offensive alliances with partners outside the borders of the Empire.²⁵ This was limited by collective solidarity: never could a prince give occasion to a breach of the Imperial Peace (*Reichsfriedensbruch*), in which

¹⁵ THULLIER, La première École d'Administration.

¹⁶ FOURNIER, Nicolas-Louis Le Dran.

¹⁷ ROUSSET DE MISSY, Les intérêts présents; DERS., Recueil historique d'actes.

¹⁸ SCHMIDT, Praktisches Naturrecht.

¹⁹ SCHWEDER, Theatrum Historicum.

²⁰ E.g. MOSER's 101 word-definition (Reichs-Hof-Rathsprocess III, 5).

²¹ VON SCHÖNBERG, Recht der Reichslehen 82.

²² VON SCHÖNBERG, Recht der Reichslehen 81.

²³ LE DRAN, Sur les fiefs, fol. 141^v–142^v.

²⁴ FURSTENERIUS, De jure suprematus.

²⁵ LE DRAN, Memoire sur les droits, fol. 124^r–135^v and NA, SP, 78, 190, fol. 212^v.

case the Imperial Diet (*Reichstag*) could declare an Imperial war (*Reichskrieg*). Second, as indicated previously, France and Sweden, who intervened in the Thirty Years' War, obtained a right of intervention on behalf of the Protestant Powers "pour empêcher que l'Empereur ne parvint peu à peu à traiter les Princes de l'Empire selon son bon plaisir".²⁶

Emperors Leopold I. (1640–1705),²⁷ Joseph I. (1674–1711)²⁸ and Charles VI. strongly affirmed their central powers to the detriment of the states. Joseph I. accused the Electors of Bavaria and Cologne of felony. They had concluded alliances with Louis XIV. against the pretensions of the House of Habsburg to Spain. Consequently, Joseph put them into the ban of the Empire at the Diet of 1708, annexed Bavaria to his Austrian dominions and gave its electoral see to the house of Palatinate-Neuburg. Charles VI., his brother, had to come back on this after international pressure. Moreover, Charles VI. used his *dominium directum* over fellow monarchs, who happened to be his vassals in the Empire, as a bargaining chip to exact concessions of European partners. E.g. George I. (1660–1727), the King of Great Britain, was at the same time Elector of Hanover. In 1716, he bought the duchies of Bremen and Verden in North Germany. It took sixteen years for Charles VI. to grant him the formal investiture²⁹. The Emperor toyed with the idea to shift the duchies to the King of Denmark, to compensate the Duke of Holstein, related to the Czar, with Sleswig. This situation, of course, was schizophrenic and led to sarcastic comments by outsiders,³⁰ such as the French foreign affairs legal experts: "Si la souveraineté reside dans

la Personne seule de l'Empereur, les Etats n'en peuvent pas participer. Et si les Etats en participent, il est impossible quelle reside dans la seule Personne de l'Empereur [...] Grotius a déjà prouvé, que les Puissances Feudataires peuvent être Souveraines, et qu'il ne faut pas se laisser imposer par l'ambiguïté des mots, ni s'éblouir par l'apparence des choses extérieures". Charles VI. was compared to his ancestor Ferdinand II., who engaged the Thirty Years War in 1618, "avec cette différence que Ferdinand II. agissoit à force-ouverte et par les armes, et que c'est presentement par le Conseil Aulique et sous le nom et l'autorité d'un Juge Suprême dans l'Empire qu'on se propose le même but".³¹

b. Feudal Law of the Empire

The Jülich-Berg question was similar. In Imperial feudal law, the personal bond between a lord, count, margrave or duke and the Emperor was formed through a ceremony at the start of his tenure.³² When his predecessor died, the new vassal had to come to Vienna to receive official Imperial confirmation. In case the family died out, the Emperor became the new master of the fief and could award it to a new vassal of his choice. To prevent this, Charles III. Philip married his daughter Elisabeth Auguste Sophie (1693–1728) to Joseph Charles of Palatinate-Sulzbach (1694–1729) in 1717. The Hohenzollerns, on the other hand, claimed that the 1666 partition treaty for Jülich, Berg and Ravensberg (Palatinate-Neuburg) and Mark and Cleves (Hohenzollern) provided a valid title to recover all of the dominions. However, in the early 17th century, Hohenzollern and Palatinate-Neubourg had seized the territories by use of force, leaving out the Emperor, who could not intervene militarily. A third party, Saxony, claiming the suc-

²⁶ Extrait de la lettre de Mr. Chambrier au Roy de Prusse du 10 Janvier 1729 N.S., NA, SP, 78, 190, fol. 155^r.

²⁷ BÉRENGER, Léopold I^{er}.

²⁸ INGRAO, In Quest and Crisis.

²⁹ MECENSEFFY, Die Bündnispolitik Karl VI. 14.

³⁰ BRAUN, La connaissance.

³¹ NA, SP, 78, 190, fol. 210^v, 213^r (reference to De Iure Blli ac Pacis (1625) Bd. I, cap. 3, § 10 and § 23) and 215^r.

³² STOLLBERG-RILINGER, Le rituel de l'investiture.

cession in the three duchies on the basis of a 15th century Imperial privilege, was thus shut out.

According to internal feudal law, succession rules fell into two categories: legal succession and feminine succession. The former stated that only males (ascendants, descendants and then collaterals) could inherit.³³ In most cases, either imperial law, imperial privilege or treaties had established primogeniture, whereby the oldest son inherits everything. Almost all the parties in the present case invoked the consent of the Jülich and Berg estates.³⁴ There is no trace of any normative hierarchy. When imperial privilege is in their favour, the pretenders give it the preponderant weight. Nevertheless, when it becomes hard to sustain what the Imperial position was (which clearly favoured the Palatinate-Neuburg family, when Emperor Leopold I. took Eleonore of Palatinate-Neubourg (1655–1720) as his third and ultimate spouse in 1676), other documents are given more weight, as the maxim *lex posterior derogat priori* could erase numerous late medieval concessions to the House of Saxony. Furthermore, it was argued that all possible pretenders needed to consent explicitly in their exclusion from the order of succession, a point which Saxony did not omit to contest. Feminine succession was the exception to the general rule. The succession of women as rulers, or passing on successions to their heirs, was only allowed in case of the extinction of the male line,³⁵ if explicitly stated in the grant of the fief by the Emperor (at renewal, or at the initial investiture), if granted by Imperial privilege (during a vassal's life), or if feudal court jurisprudence accepted it.

³³ VON SCHÖNBERG, *Recht der Reichslehen* 166–168.

³⁴ 'Raisons du Roi de Prusse', ROUSSET, *Les Intérêts I*, 201–210; 'Prétensions de la Maison de Saxe sur la succession de Berg et de Juliers', DERS., *Les Intérêts I*, 210–241; 'Prétensions de la Maison Palatine de Neubourg', DERS., *Les Intérêts I*, 241–273.

³⁵ LE DRAN, *Sur le droit feudal*, fol. 136: "*filia non succedit in feudo, nisi investitura fuerit facta in patre, ut filii et filiae succedant in feudum*".

c. Prussia between Hanover and Vienna

On 30 April 1725, Emperor Charles VI. signed a peace treaty with Philip V. of Spain, leading to the break-up of the Cambrai peace conference, charged with the elaboration of the Treaty of the Quadruple Alliance. As a result, two blocs formed in Europe: a league between Vienna, Madrid and Moscow, and one between Versailles, London and Berlin. Frederick William I. of Prussia adhered to the so-called League of Hanover (3 September 1725)³⁶ with the secret clause that he would acquire the succession of Jülich and Berg. Yet, the conclusion of an alliance between Charles VI. and Czarina Catherine of Russia made Prussia change sides. Charles VI. promised Frederick William his best offices in the succession affair at the secret treaty of Wusterhausen (12 October 1726).³⁷

The tension between the two blocs did not subsist long. On 31 May 1727, the Parisian preliminaries inaugurated a new series of treaties and talks.³⁸ Yet, Frederick William had lost credit with the Allies of Hanover. France was now treating with the four Wittelsbach Electors. In exchange for support in the troubles of Mecklenburg (a duchy bordering on Hanover),³⁹ foreign affairs secretary Chauvelin asked the British an engagement "*à n'entrer en aucune négociation sur la Succession de Berghes et de Juliers avec [v] le Roy de Prusse, soit en renouvelant l'annexe Secret du Traitté de Hanover, dont sa Majié Brité ainsy que Sa Majié Très Chret^{ne} sont entierement*

³⁶ Treaty of Alliance between George I., Louis XV. and Frederick William I., Hannover, 3. 9. 1725, in: CUD, VIII/2, Nr. XLI, 127–129; CHANCE, *Alliance of Hanover*.

³⁷ *Traité apocryphe de Wusterhausen entre l'Empereur & le Roi de Prusse*, Wusterhausen, 12. 10. 1726, in: CUD, VIII/2, Nr. LI, 139–140.

³⁸ *Articles Préliminaires conclus entre l'Empereur & les Alliez d'Hanover*, Paris, 31. 5. 1727, NA, SP, 78, 187, fol. 314^r–316^r.

³⁹ HUGHES, *Law and politics*.

degagées [...] après tout ce qui s'est passé de la part du Roy de Prusse."⁴⁰ The allies even contemplated a partition of Charles Philip's possessions. In 1729, his younger brother Francis Louis, Archbishop of Trier and Elector (1664–1732), had designs to marry and asked for the cession of Jülich and Berg.⁴¹ Charles Philip refused and stuck to the Wittelsbach family pact. Yet, the promises of Charles VI. to Frederick William made an accommodation possible, in case a war broke out between the alliances of Vienna and Hanover. The equivalent offered for Berg and Jülich could consist of the seigneurie of Ravenstein, "*dont le Revenu est tres considerable*" and "*une partie des Conquêtes qu'Elle [Sa Majesté Impériale] pourroit faire pendant la Guerre.*"⁴²

3. Conclusion

The Emperor's manoeuvring between Electors did not lead to an effective war with France and Britain. In the words of Stephen Poyntz, British envoy extraordinary and plenipotentiary at the Congress of Soissons: "*The Imperial Court is sensible, the subsidys and concessions necessary towards securing these Princes would [r] more than counterbalance any advantage the Emperour can possibly*

hope from a War, or even from the friendship and treasures of Spain and that it would be cheaper as well as safer for him to compound with the utmost demands of his adversarys, than to purchase friends at so dear a rate."⁴³ Nevertheless, the negotiations on Jülich and Berg shed a different light on the nature of succession quarrels in the eighteenth century. Although the Emperor benefitted from an advantageous position in Imperial law, which was essentially feudal for successions, decisions were always the counterpart of a bilaterally negotiated concession by the other party. The legal and historical arguments used by all parties mainly regarded imperial recognition of family treaties, or the granting of a specific favour or investiture in times long past. In practice, the Emperor had the freedom to pick and choose the relevant facts of legal acts to motivate his decision, or to let the Aulic Council perform the job. Yet, his freedom of action was constrained by the international political context. In that respect, I plead for a multilevel legal interpretation. In the light of the Utrecht and Italian examples, it can be argued that the power relations at the inter-sovereign level and the resulting political compromise created an implicit hierarchy, where vertical Imperial law was bowed and bent to fit the main players' horizontal options.

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⁴⁰ Chauvelin, Versailles, 13. 1. 1729, NA, SP, 78, 190, fol. 49^v–50^r. The British reaction was not over-enthusiast, and consisted in "not acting contrary to the Guaranty of France", albeit "not [...] in writing" (Poyntz to Newcastle, Paris, 23. 3. 1729, NA, SP, 78, 190, fol 132^v).

⁴¹ NA, SP, 78, 190, fol. 272^v. Francis Louis' contemplating to lay down his ecclesiastical orders and marry was coupled with a back-up plan, so the Wittelsbachs could hold on to Trier or Mainz: Johann Theodor, Bishop of Regensburg (1703–1763), from the Bavarian branch, was eager to move to one of the archbishoprics.

⁴² "*Projet qui prouve la façon dont Sa Majesté Imp^{le} pourroit fortifier ses Alliances, en cas qu'Elle fût obligée a faire la Guerre et comment Elle pourroit aussy sans guerre mettre les Alliés d'Hannovre a la raison*", NA, SP, 78, 190, fol. 310^r.

⁴³ Poyntz to Newcastle, very private, Paris, 11. 2. 1729, NA, SP, 78, 190 fol. 145^v–146^r.

Abkürzungen:

AMAE	Archives du Ministère des Affaires Étrangères et Européennes – France (La Courneuve)Abkürzungen
CUD	Jean Du Mont de Carels-kroon, Corps universel diplomatique du droit des gens (Amsterdam 1731)
M&D	Mémoires et Documents
NA	National Archives – United Kingdom (Kew Gardens)
SP	State Papers

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