

The discovery of the Common Law at the University of Göttingen in the middle of the 18th century.

– On Christian Hartmann Samuel Gatzert’s “*Commentatio iuris exotici historica de iure communi Angliae. Of the Common Law of England*”

I. **Introduction**

Gatzert’s work is a remarkable opus as it is one of the first scripts by a continental lawyer especially dedicated to the Common Law at that time. It can serve as example in order to substantiate and proof the thesis that the representatives of the “*Ius Germanicum*” in the second half of the 18th century “explored” the English law and tried to use it as source for proofing the autonomy of German private law.

II. **Biography and opus of Christian Hartmann Samuel Gatzert. A representative of the *Jus Germanicum* from Göttingen**

1. **Studies and academic career**

Christian H.S. Gatzert (1740-1807) came from a simple petit bourgeois background. Nevertheless, he received a higher education. He was especially supported by Georg Heinrich Ayrer, a then famous professor of law who enabled his academic studies at the faculty of law at Göttingen University. It was also him who awarded Gatzert a doctorate in 1764. In the same year, he was assigned as *extraordinarius*. Prior to his assignment he had accompanied the young aristocrat Johann v. Uslar, whose tutor he had been, on a journey to England. He stayed in Göttingen until 1767 when he was appointed as ordinary professor of *Reichsstaatsrecht* at Gießen University. At his time, he was one the most active reform politicians and publicists of the German territories.

2. **The subsequent political career**

Even though his nomination to the Imperial Chamber Court in Wetzlar failed due to a dispute between two earls, he was assigned as a judge to the *Appellationsgericht in Darmstadt (Hesse)* in 1782. In the following years, he gained a lot of political influence especially concerning finance and administration reforms. Moreover, since 1792 he has been responsible for Hessen-Darmstadt’s foreign policy. As a supporter of the Imperial Court in Vienna and the imperial patriots he resigned in 1799 when the Court of Darmstadt decided to settle with the French.

III. **The script from 1765: “*Commentatio iuris exotici historica de iure communi Angliae. Of the Common Law of England*”**

1. **The University of Göttingen and the German reception of English law**

In the 17th and 18th century there had been manifold contacts between continental and English scholars. Even the English constitution was a central issue in policy debates in Germany and France. Especially the University of Göttingen founded by the King George II of Great Britain and the Elector of Hanover was a favored place for the reception of English culture.

The “*Göttingische Gelehrte Anzeigen*”, a scholarly journal of book reviews, published legal information and announced new legal literature from England. English books were acquired systematically by Göttingen University Library. Moreover, there were at least two scholars who shared the interest in English law with Gatzert. Alongside the aforementioned Georg Heinrich Ayrer it was Justus Clapproth who had influenced him. Clapproth – professor of law in Göttingen since 1759 – had then been working on the German translation (1767) of William Blackstone’s “*An analysis of the Laws of England*” (

1st ed. 1756). Furthermore, the author – as a typical representative of the German late Age of Enlightenment – stood in contact with anglophone correspondants (e.g. Benjamin Franklin). For his script he drew upon various English legal literature but he especially relied on the following then well known opera: “The common law common-plac’d” by Jacob Giles, “History of the Common Law of England” by Matthew Hale and “De usu et autoritate juris civilis” by Arthur Duck. Nevertheless, this script remained Gatzert’s only work on the Common Law.

2. The script’s content and outline

Gatzert’s script is a typical university script of its time. It contains 200 pages including a seven page “introduction” which describes the author’s incentive and aims. Apparently, Gatzert had offered a private course of lectures “anglicano sermone” to an English and a Scottish auditor in Göttingen in 1764. His script seems to be an elaboration based on the course materials.

The first section contains a presentation of the Common Law in general and its legal sources. The second section is dedicated to the history of English law. Gatzert had precisely understood the essential characteristics of English law as different statements show, for example his detailed description of the doctrine of the precedent and of the legal customs as well as the difference between Common Law and Statute Law in general. Furthermore, Gatzert treats the issue of the limited authority which Roman law possessed in England. Thus, he also refers to the bitter conflicts between Civilians and Common Lawyers. However, his perspective remains to be one of a continental lawyer; consequently, he favors John Cowell and the Civilians and considers the roman sources being indispensable also in English law. Moreover, Gatzert deals with the role of canonic law in the jurisdiction of ecclesiastical courts and Courts of Equity.

The last three sections are dedicated to a bibliographic documentation of English legal literature and the then current status of English law. Thus, the script offers a short but well documented history of English law. Even the apprenticeship of the Common Lawyers is treated in detail. Same applies for the establishment of the “Vinerian Chair” in Oxford and William Blackstone’s inaugural lecture hold there in October 1758. But even then Gatzert’s perspective remained one of a continental observer without real comprehension of the English legal particularities. He regrets that the difficulties in studying English law are insurmountable, the language is incomprehensible and its case law due to the large amount of Reports very complex and confusing. Accordingly, he sympathises with those English authors who demand the Common Law to be reformed and systematically compiled and codified.

3. Instrumentalisation of the Common Law as source of the “lus germanicum”

Gatzert justified his choice of studying the Common Law just along with the typical line of reasoning of the then early *lus germanicum* which means it should serve to improve the comprehension of the *lus germanicum* and its legal sources. Up to date, historical studies have ignored that the early *lus germanicum* referred not only to the older so called German legal sources but also to the Common Law, which was “discovered” on the continent at that time. Nevertheless, Gatzert’s script has gone widely unnoticed in legal literature. It is only in the second tome of Falck’s translation of Blackstone’s “Commentaries” that it is mentioned in the preface. However, the script is more than remarkable as it shows how a continental observer in the middle of the 18th century received, understood but also misunderstood the Common law of his time. It marks the beginning of a long era of confrontation and encounter between Civil and Common law which leads to the current discussions on a European Private Law.