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# Knowledge of Production of Normativity at the Imperial Aulic Council. Towards a Procedural Perspective on Early Modern Legal Reasoning

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Abstract

Global and knowledge-historical perspectives represent a productive challenge to the statist positions which still characterise much of legal history – positions whose deficiencies have become increasingly clear in recent times. This also applies to research on the Holy Roman Empire, which dominated the map of Central Europe until 1806. This empire had two central courts, the Imperial Chamber Court (Reichskammergericht) and the Imperial Aulic Council (Reichshofrat), which have been the subject of intensive study in German legal history since the 1960s. In order to utilise the rich yields of this research in terms of global history, German historians will have to stop reconstructing the history of the Imperial Chamber Court and Imperial Aulic Council teleologically as developmental steps towards the rule of law in the modern state. The process categories frequently used in the literature on the Holy Roman Empire, such as juridification, rationalisation and professionalisation, prove to be insufficient to adequately describe knowledge of the production of normativity. What is needed is a sociology of the judicial production of norms that sees the practices of the judges in constant interaction with social normativity regimes. Using the example of the Imperial Aulic Council, the article demonstrates how organisational and social analysis can be linked successfully.

Keywords: collective judging, legal reasoning, early modern period, Holy Roman Empire, Imperial Aulic Council

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# Knowledge of Production of Normativity at the Imperial Aulic Council. Towards a Procedural Perspective on Early Modern Legal Reasoning*

Prologue: Heinrich von Kleist on glocalisation

ADAM Would you like
The case conducted formally, Your Honour,
Or in accordance with our usual practice here?
WALTER I hope the two aren't mutually exclusive.
We'll have your usual formal practice, please.
ADAM Your Honour's wish is my command. Are you
Ready, Clerk Light?
LIGHT Yes, I'm ready, Your Honour.
ADAM Let justice take her course!
Step forward, plaintiff.

The Broken Jug (1806)[1]

## I. Introduction

In large parts of Europe, the 15th and 16th centuries saw the emergence and consolidation of centralised justice, which was exercised by collegially organised institutions such as the Scottish College of Justice, founded in 1532, or the Hogen Raad of the Netherlands, established in 1582. This centralised justice was accompanied by the development of a sequence of courts and was therefore of great importance for the modern state-building process.[2] The Holy Roman Empire participated in this development with the Imperial Chamber Court, founded in 1495 and from 1689 onwards located in the imperial city of Wetzlar, and the Imperial Aulic Council, which was formed in the 16th century from the court councils of the Habsburg emperors Charles V and Ferdinand I and remained tied to the imperial court; for most of its period of existence, it was therefore based in Vienna.[3]

The depiction of these two courts in the historiography has changed fundamentally in recent decades. Until well into the 20th century, numerous German historians, whose works were teleologically focused on the Prussian-dominated foundation of the German empire in 1871, regarded the Holy Roman Empire, which collapsed in 1806, as a pawn of foreign powers and the low point of national development. It was only after the idea of a German state based on military might had been thoroughly discredited by National Socialism that a change in thinking came about.[4] The Holy Roman Empire's low degree of centralised state control now made it appear as a polity structurally incapable of aggression, which could be integrated into the function as a positively connoted countermodel to the contaminated Prussian legacy in the narrative of German traditions underpinning the Federal Republic.

In this paradigm shift, research on the Imperial Chamber Court and the Imperial Aulic Council since the 1960s has played a major role.[5] From the outset, it was based on a consistent combination of basic archival work and university research. Tens of thousands of case files from both courts, held in

* Translated by Michael Kelly, with additional language-editing by Christina Pössel.

1 Kleist (1977) [1806] 26.

2 For an overview on the state of research, see the articles in Godfrey/van Rhee (eds.) (2020).

3 On the current state of research on the imperial courts of justice, see Amend-Traut (2020); Oestmann (2020); Baumann (2021); Amend-Traut et al. (2023). A history of the Imperial Aulic Council that satisfies current scholarly standards remains a desideratum. See: Gschliesser (1942); as an overview: Ortlieb (2019); on the court council of Charles V as a predecessor institution to the Imperial Aulic Council, see Ortlieb (2024).

4 On the reception history of the Holy Roman Empire, see Liebmann (2006); Carl (2010).

5 For overviews, see Coy et al. (eds.) (2010); Wilson (2011); Whaley (2012); Schnettger (2020); Stollberg-Rilinger (2021).

Germany and Austria, have been catalogued according to standardised criteria with the generous support of the DFG (German Research Foundation), the Volkswagen Foundation and the Union of the German Academies of Sciences and Humanities.[6] As part of an interdisciplinary social and constitutional history,[7] this empirical groundwork formed the basis for numerous substantial monographs and source editions. A number of dedicated book series,[8] the *Gesellschaft für Reichskammergerichtsforschung* (Society for Research on the Imperial Chamber Court)[9] and the *Netzwerk Reichsgerichtsbarkeit* (Network Imperial Jurisdiction)[10] provide an infrastructure that has already enabled the productive exchange between several generations of legal scholars and historians. More recently, it has also enabled innovative work on supplications, the use of imperial judicial system by Jews, and on trial records as a source for the history of cartography.[11]

Research into the Imperial Chamber Court and the Imperial Aulic Council can thus be counted as one of the greatest successes of *Europäische Rechtsgeschichte* (European legal history as conceptualised by German scholars in the 1960s). At the same time, however, it also demonstrates the latter's gaps and blind spots, which have recently been pointed out from the perspective of the history of knowledge and global history.[12] In addition, the intensity of research with regard to both courts is currently declining,[13] despite the fact its insights could productively contribute to a number of current debates: while historians identify research into early modern cultures of decision-making as a desideratum,[14] scholars of law are also becoming increasingly aware of their insufficient understanding of collegial decision-making processes. The question of how the legal methodology aimed at forming individual knowledge functions in the sociological context of a court of law has hardly ever been asked, let alone answered.[15] These debates could be brought together under the umbrella of a new approach to renewing research on the imperial central courts in order to contribute to the judicial turn[16] that Dieter Grimm recently advocated with regard to contemporary history.

In order for such a project to succeed, however, research on court practice will have to critically evaluate its premises, many of which still date back to the 1960s and 1970s, and deal with a theoretical deficit in working with trial documents that has now become obvious. For even where no explicit claim for an allegedly specifically German tradition of the rule of law was made with respect to the Imperial Chamber Court and Imperial Aulic Council, the »vehement focus on learned law and the development of a legal system in the strictest sense« of the *Europäische Rechtsgeschichte* was adopted.[17] For example, though it makes little sense in terms of systems theory, the communication space of the Holy Roman Empire has often been equated with a legal system,[18] an approach which inher-

6 On these cataloguing projects, initiated by Bernhard Diestelkamp and Wolfgang Sellert, see Battenberg / Schildt (eds.) (2010); Auer (2017); Schenk (2017).

7 Moraw / Press (1975) is a classic example of this.

8 The series *Quellen und Forschungen zur höchsten Gerichtsbarkeit im Alten Reich* with a current total of 78 volumes and the *bibliothek altes Reich* with 41 volumes (as of 30 January 2024) are particularly noteworthy.

9 http://www.reichskammergericht.de (last accessed on 30 January 2024).

10 https://blognetzwerkreichsgerichtsbarkeit.wordpress.com (last accessed on 30 January 2024).

11 On the significance of the files of the Imperial Aulic Council for supplication research, see Ortlieb (2011); Haug-Moritz / Ullmann (eds.) (2015); Hausmann (2016); Zeilinger (2022); on the use of the Imperial Aulic Council by Jews and Jewish communities, see Kasper-Marienberg (2012); Griemert (2015); Siluk (2021); Kasper-Marienberg / Fram (2022); on Imperial Chamber Court records as sources for the history of cartography, see Baumann (2022).

12 See, with additional references, Duve (2012), (2014).

13 Already around ten years ago, there was talk on various occasions that the historiography of the imperial central courts was increasingly losing touch with current research programmes. See Dorfner (2015) 254; Ehrenpreis (2015) 153; Kalipke (2015) 19.

14 See, with additional references, Krischer (2010), (2012); Stollberg-Rilinger (2016); Krischer (2017); Hoffmann-Rehnitz et al. (2018); Hoffmann-Rehnitz et al. (2021); Krischer (2021).

15 As an early modern historian, I am not in a position to have a complete overview of the jurisprudential debate. However, the following contributions seem to me to have interdisciplinary and cross-epochal potential: Fischer (2013); Cohen (2014); Ernst (2016); Häcker / Ernst (eds.) (2020); Fischer (2021); Lübbe-Wolff (2023); and from a sociological and political science perspective Haberler (2014); Kranenpohl (2009), (2010).

16 Grimm (2022) 324.

17 Duve (2014) 24.

18 For example in Aretin (1999) 110; Willoweit (2006).

ently marginalises extrajudicial and infrajudicial practices,[19] and considerably overestimates the significance of legal communication in the context of social conflict regulation.

Not even the ›cultural turn‹ at the turn of the millennium led scholars to break free from this path-dependency. While other disciplines used ethnological approaches to increase complexity through alienation,[20] the historiography of the Imperial Chamber Court and Imperial Aulic Council continued to reduce complexity by interpreting the two institutions narrowly as part of a »complementary imperial state« *(komplementärer Reichsstaat)*[21] and thus viewing early modern legal production through the lens of contemporary jurists' self-description.[22] Conceptually, this brought researchers closer to the very statist positions of the classic Prussian studies that they had once set out to overcome. In this »history, which made the past look like the present«,[23] the Imperial Chamber Court and Imperial Aulic Council continued to be addressed with macro-sociological process concepts such as professionalisation, modernisation and secularisation, which had long since come under criticism elsewhere.[24] Ambiguities, competition and translation processes between different normative regimes, in which international (legal) historical research is interested,[25] on the other hand, were marginalised or even rendered invisible.[26]

The agenda of *Europäische Rechtsgeschichte* was so »very German«[27] that it did not fall on fertile ground even in Austria. In Vienna, where the Imperial Aulic Council had been based for centuries, scholarly interest in the subject remained limited, despite the progress made in cataloguing its files. The Imperial Aulic Council hardly plays a role in more recent empire research,[28] although numerous Habsburg diplomats and statesmen began their careers there. This is perhaps unsurprising if we consider that the premises of this research do not envisage any kind of *glocalisation* of the object of investigation and instead favoured a decontextualised reading of trial files. Contact with research on the imperial court in Vienna was not sought because there was little interest in examining the integration of the Aulic Council's members within the wider interaction system of the imperial court.[29] The »ubiquitous social networks [which] deeply shaped early modern justice«[30] were almost entirely lost from view, as was the »micro-foundation of macro-processes«.[31]

Instead, idealistic positions were upheld that can hardly be reconciled with the results of more

19 On the concept of infrajustice, see Härter (2012), (2021).

20 Reference should be made to the constitutional-historical synthesis by Stollberg-Rilinger (2015); more recently also Neu (2023).

21 On this concept, see Schmidt (1999), (2001), (2011); Whaley (2012); criticism in Schilling (2001); Gräf et al. (2001); Reinhard (2002); Knorring (2015).

22 Close dependence on the publications of contemporary jurists still characterises the explanations in Schmidt (2021); see the critical review by Fimpel (2023).

23 For instance, with respect to similar tendencies in the legal history of Latin American law, see Herzog (2024) 50. She continues: »By going down this road, proponents of this type of history argued for continuity where none existed, and they ignored all that was no longer relevant to the present or was simply too strange or too counterintuitive to digest.«

24 For example in Eisenhardt (2023) 393; compare the fundamental criticism of the ill-considered use of macro-sociological process terms in Joas (2012).

25 The following are just a few examples: Rosen (2006); Karsten / Thiessen (eds.) (2015); Duve (2017); Thiessen (2021); Duve (2022a); Duve / Egío (2023) 160–167.

26 Recently, for example, with regard to the handling of court privileges, it has been stated that the decisions of the Imperial Chamber Court and the Imperial Aulic Council were characterised by a »clear direction« throughout the early modern period: Eisenhardt (2023) 350–352. However, such a conclusion can only be reached if one disregards the financial interests of the court personnel, which were particularly pronounced in the granting of privileges and stood in irresolvable tension to coherent decision-making processes. On this, see Schenk (2024e). The widespread unwillingness to deal with the economic foundations of pre-modern judicial practice has already been criticised from the perspective of legal scholarship by Falk (2000). With regard to the Imperial Aulic Council, this deficit is also noticeable in the broad field of micropolitics. As will be shown in the following, this has contributed significantly to the misinterpretations regarding the Council's procedural autonomy and judicial independence.

27 Duve (2014) 25.

28 This applies, for example, to Judson (2016). See the articles in Wendehorst (2015).

29 Criticism of this can be found in Schenk (2022b).

30 Rosenmüller (2019) 257 with regard to the Spanish judiciary in Mexico. The fact that early modern rule in Europe cannot be understood without knowledge of the underlying clientele and patronage relationships is emphasised by Rohrschneider (2014) 99–244 (using the example of the imperial diet); as well as in an overview by Emich (2020).

31 Emich (2005) 196.

recent studies on Austrian history. For example, it is not clear how the picture painted in German research of a functional and widely respected imperial judiciary can be reconciled with the formation of Austria as one of Europe's ›great powers‹. The Habsburg dominions outgrew the institutions of the Holy Roman Empire in the 18th century (at the latest), and Austrian politics frequently disregarded imperial law.[32] Until now, there has been an obvious lack of sensitivity towards the sources, along with a reluctance to recognise that the Imperial Aulic Council hardly fits into the insufficiently complex narrative of the rule of law that was conceived half a century ago on the basis of the Imperial Chamber Court records.

Statist premises should therefore be abandoned in favour of a glocalisation of the Imperial Aulic Council in the early modern *société des princes.*[33] To this end, first, the micropolitical interdependence between the Aulic Council's personnel and Viennese courtly society would have to be examined. Second, the latter should be conceived as an epistemic community whose »knowledge of normativity«[34] was characterised by the primacy of social stratification. Next, the councillors' »knowledge of production of normativity«[35] – with the help of which the councillors applied legal procedural rules and methodological doctrines in everyday court business – would have to be analysed. It may be assumed that there was a pronounced competition of norms[36] between courtly expectations of compromise and legal claims to rationality.

The global-historical points of reference for such a project are obvious. The geographical spread of collegiate court institutions increased considerably in the context of European expansion. As early as the 17th century, it ranged from the Swedish Court of Appeal in Stockholm to the Paris Parlement and the Audiencias of the Spanish crown in Latin America.[37] Today, collegiate courts exist on all continents and are analysed by legal scholars in a global context.[38] Why should early modern research not be able to do the same? And why should it not be possible in both Europe and the Americas to achieve increases in complexity in empirical work with pre-modern trial documents that would enable a dialogue across epochs?

Does critical justice research on the early modern period not face similar challenges to postcolonial historiography? The latter has been dealing with the interweaving of institutional practices and power relations for some time, and for these purposes developed approaches to reading archival materials that do not merely repeat the self-description of the record-forming organisation.[39] Does Heinrich von Kleist, quoted at the beginning of this article, not lead us to the realisation that the archives of the Imperial Chamber Court and the Imperial Aulic Council, in the past often used for writing an affirmative history of progress, represent the material artefact of a »usual formal practice« that reproduced social inequality even (and especially) when trial files and minutes *(Protokolle)* were silent about it?

In order to deal with such questions, we need innovative approaches to the trial files that have been made accessible to researchers in the course of a number of large-scale projects in recent decades.[40] These fascinating sources must not be consigned to the museum along with *Europäische Rechtsgeschichte*, as they are precisely the font of those empirical surprises that theory-sensitive legal history cannot do without.[41] The files and *Protokolle* of the Imperial Aulic Council, which amount to more than a kilometre of shelves in the Haus, Hof- und Staatsarchiv in Vienna, contain millions of surprises just waiting to be discovered. This does also, and especially, apply to the kind of legal history scholarship that seeks to overcome statist positions. In the context of such an endeavour, which is likely to meet with broad approval among

32 On this blind spot, see Kulenkampff (2005) 1–4; also Walther (2021) 190. Moreover, the formation of Austria as a great power went hand in hand with the genesis of a patriotism that did not relate to the Holy Roman Empire. See Fillafer (2020) 23–66.

33 Bély (1999).

34 Duve (2022a) 6: »Knowledge of normativity includes factual knowledge, consequential knowledge, of course also legal knowledge, practical knowledge, implicit or explicit knowledge etc.«

35 Duve (2021) 58–59.

36 On the concept of the competition of norms, see Karsten / Thiessen (eds.) (2015).

37 See Duve / Egío (2023) for an overview.

38 Comparisons between civil and common law courts have proven to be particularly interesting from an analytical point of view. See Cohen (2014); Häcker / Ernst (2020); Lübbe-Wolff (2023).

39 Chakrabarty (2002) 12–16.

40 See also Schenk (2024b).

41 Forst / Günther (2021) 10.

historians, it would be difficult for legal historians to avoid an external description[42] of *their own* normative regime. After all, how could insufficiently complex ideas about the evolution of *Juristenrecht* (law produced by legal experts) be overcome without a sociology of the production of law?[43] The correct and important criticism of the lacunae in the classic »histories of institutional juridical practice«[44] must lead to descriptions of the state, justice and legal knowledge that are more tolerant of ambiguity.[45]

The Imperial Aulic Council offers legal historians ideal starting conditions to prove that with the help of global and knowledge-historical theories, significant increases in complexity are actually possible in supposedly well-ordered fields of legal-historical research. The Council left behind an abundance of artefacts, not only in Vienna but also scattered across large parts of Central Europe, which can be used for an external description as long as one is prepared to be surprised by this early modern community of practice.[46]

This article is an invitation to confront these artefacts with new questions. In the following, I will first present some empirical observations on the creation of law at the Imperial Aulic Council that are diametrically opposed to the prevailing narrative of the rule of law in Germany. Based on these discrepancies, I will then, in a second step, discuss the selective use of sources and the corresponding underdetermined concept of practice in the existing research on the imperial central courts, before going on to present theory-sensitive perspectives on the production of law by a collegiate court in the early modern period. In particular, the focus will be on intersections between projects in the history of knowledge and historical organisational research based on a pragmatic combination of systems theory and practice theory.[47] And because theory and empiricism should inspire each other, in a third step I will link these perspectives with current developments in basic archival work and present the Imperial Aulic Council's various types of *Protokolle*, which we plan to make easily accessible to researchers as part of a Digital Humanities project currently in preparation. The *Protokolle* are particularly important for procedural studies as they record some of the key phases of the decision-making process that do not appear in the trial files. In order to adequately describe record keeping at the imperial court, however, we must first take a look at the community of practice that produced them.

## II. Imperial Aulic Councillor Georg Christian von Knorr, Secretary of State Johann Christoph von Bartenstein and their Knowledge of the Production of Normativity

In the second half of the 1730s, the Republic of Genoa intervened with the Imperial Aulic Council as the supreme feudal court of the Holy Roman Empire[48] against plans by the Imperial Palace to cede Genoese imperial fiefs to the King of Sardinia in order to settle the Polish War of Succession.[49] The Imperial Aulic Councillor Georg Christian von Knorr (1691–1762),[50] who was appointed rapporteur in the proceedings, informed the Genoese envoy in advance of the evidence he required to be able to draw up a statement in support of the Genoese claims and then obtain a collegial opinion from the Council's plenum for submission to

42 See Kieserling (2004); Luhmann (2018) 347–368 on the self- and external description *(Selbst- und Fremdbeschreibung)* of social systems.

43 On this desideratum, see Boulanger (2019), (2020); see also the plea for a sociology of law »with even more law« in Schulz-Schaeffer (2004).

44 Duve (2021) 49.

45 Because if you banish grand narratives to the museum, you have to explain what is to succeed them. See also Hoffmann-Rehnitz et al. (2021) 41; Füssel (2021) 134–163 on perspectives on structures and processes in the history of knowledge. On the »return of the *longue durée*« in global history, see Conrad (2016) 148; see also Blackbourn (2023) XXV.

46 On »epistemic communities« and »communities of practice«, see Duve (2022a) 6.

47 I am building on the following articles: Schenk (2022a), (2022b), (2023b), (2024a); on the potential of systems theory for legal history, see the early work by Teubner (1989); Fögen (2002), (2003a), (2003b); Jansen (2019); on the connection between systems theory and regime theory, see Duve (2022a) 8.

48 See Schenk (2014) on the areas of activity of the Imperial Aulic Council under feudal law.

49 For a detailed account, see Schnettger (2006) 539–545.

50 Brief, partly incorrect biographical information in Gschliesser (1942) 405–406. For more details, see Schenk (2024a).

Emperor Charles VI *(Votum ad Imperatorem)*.[51] At the envoy's request, the imperial palace set up an informal deputation in which Knorr's report was edited under the direction of State Secretary Johann Christoph von Bartenstein (1689–1767)[52] before it was put to the vote in the Imperial Aulic Council, approved without amendment and noted by the secretary in the minutes of the meeting *(Resolutionsprotokolle)*.

These events contradicted the formal requirements for judicial proceedings contained in the Imperial Aulic Council's ordinances and the imperial electoral capitulation in every respect. The oral contacts between Knorr and the Genoese envoy, which directly influenced the presentation of the case in Knorr's statement, violated the Aulic Council's maxim that all communication had to be written as well as the rapporteur's duty to maintain secrecy vis-à-vis the parties.[53] The establishment of a deputation before the case was brought before the full session of the Imperial Aulic Council undermined the plenary principle and reduced the role of the adjudicating body to formalising an informal decision made elsewhere.[54] From the perspective of organisational sociology and procedural theory, the Imperial Aulic Council thus appears as a highly complex system of productive and representational practices of decision-making that constantly alternated between formal showcases and informal back stages.[55]

From an analytical point of view, the actors we encounter at the imperial court are no less interesting. Although the rapporteur Knorr had been a member of the Imperial Aulic Council since 1731, he was not a lawyer by training but a Lutheran theologian. In 1712, this highly talented son of a Swabian braidmaker completed his doctorate at the university of Jena with a dissertation on the origin of evil and eventually entered the service of Duke Ludwig Rudolf von Braunschweig-Wolfenbüttel (1671–1735), Charles VI's father-in-law, as a librarian. The duke sent Knorr to Vienna as a legation councillor in 1731, where the emperor immediately appointed him to the Imperial Aulic Council. He was soon acting as rapporteur in dozens of proceedings, including trials as important to imperial politics as the Mecklenburg estates conflict. Not only the representative of Hanover but also other parties visited Knorr's country estate close to Vienna because of his excellent contacts with the Empress.

Although an industrious autodidact who left behind a specialist library with more than 5200 volumes when he died,[56] Knorr received help in acquiring expert legal knowledge from his later father-in-law Bartenstein,[57] a doctor *utriusque iuris* who rose to become the *éminence grise* of Austrian foreign policy in the 1730s as recording secretary of the Privy Conference and state secretary of the Austrian Court Chancellery.[58] Bartenstein was convinced that the imperial palace needed the support of large imperial estates such as Electoral Hanover and Brandenburg-Prussia to diplomatically secure the Pragmatic Sanction. This house law *(Hausgesetz)* published by Charles VI in 1713 established the indivisibility and inseparability of the Habsburg hereditary kingdoms, provided for a uniform order of succession and formed the basis for the succession of Charles's daughter Maria Theresia to the throne in 1740. Looking back on the 1730s in 1762, Bartenstein wrote that he had done what had to be done to prevent the downfall of the House of Habsburg.[59]

The Imperial Aulic Council was not unaffected by the political arrangements of the teetering imperial house. In return for the support provided at the imperial diet, Berlin and Hanover (or rather, London)[60] expected concessions in various lawsuits against the two elector-kings Frederick William I (1688–1740) and George II (1683–1760)

51 On these collegial reports, see Schenk (2021).

52 On Bartenstein see Arneth (1871); Braubach (1953).

53 See Sellert (1973) 132–137 on the principle of written form; Schenk (2023b) 66–72 on the rapporteurs' duty of secrecy.

54 See Kirchheimer (1965) 22–24 on political justice in the modern age.

55 On the theoretical framework, see Luhmann (1995); Tacke / Drepper (2018); Stollberg-Rilinger / Krischer (eds.) (2010); Emich (2011).

56 See the three-volume auction catalogue: Anonymous (1762). On Knorr's bibliophilia, see also the letter from Friedrich Heinrich von Seckendorff to Johann Christoph Gottsched dated 30 October 1749 in Döring / Rudersdorf (eds.) (2021) 56.

57 After converting to Catholicism, Knorr married Bartenstein's stepdaughter in 1738. See Braubach (1939) 52.

58 On the history of the chancellery, see Göbl / Hochedlinger (2019).

59 Arneth (1871) 123.

60 Since 1714, the Electorate of Brunswick-Lüneburg and the Kingdom of Great Britain had been linked in personal union. See the articles in Asch (ed.) (2014).

pending in Vienna. *De facto*, this amounted to discreetly delaying proceedings and coercing weaker parties into forced settlements.[61] For this, Bartenstein needed ambiguity-tolerant followers like Knorr in the Imperial Aulic Council (of which he himself was not a member), who as rapporteurs were prepared to steer trials in the politically desired direction.

Among the members of the Imperial Aulic Council, these practices led to heated debates, in which pragmatic »statesmen« sidelined juristic »pedants«, though this is not apparent from the *Resolutionsprotokolle*. However, in 1740, after the death of Charles VI, Imperial Aulic Councillor Johann Christoph Burkhardt von der Klee (1697–1761) dared to inform the Elector of Mainz in an anonymous report[62] that, in many proceedings, the role of the supreme imperial court had been reduced to that of an acclamation body, merely giving *post hoc* validation to decisions already taken by informal deputations. However, during the weak Wittelsbach empire of Charles VII (1742–1745), the judicial reform that this whistleblower hoped for was out of the question.

In the second half of the 1740s, observers as diverse as the Göttingen public lawyer Johann Stephan Pütter (1725–1807) and the Prussian king Frederick II (1712–1786) still counted Knorr among the most important Imperial Aulic Councillors.[63] The meteoric rise of this excellent networker from humble beginnings to influential player on the imperial stage occurred at the same time as the erosion of formalised official channels; contemporaries opined that the court presidents no longer had any influence whatsoever at the imperial court.[64] In 1789, Friedrich Karl von Moser (1723–1798), who himself served on the Imperial Aulic Council from 1767 to 1770 and contributed a number of important works to *Reichspublizistik* (the Holy Roman Empire's public law scholarship), publicly ridiculed the former Council President Ferdinand von Harrach (1708–1778; in office 1751–1778) as a yes-man.[65] In Vienna, according to Moser, the court played with the blindfold of Lady Justice like the wind with a weather vane.[66]

The practices to which Moser was alluding are illustrated by a fiscal trial that took place in the 1770s concerning the estates of the counts of Schönburg in Saxony.[67] As part of a deputation investigating the case chaired by the imperial vice-chancellor, the president of the Imperial Aulic Council, various hand-picked Imperial Aulic Councillors and representatives of the Austrian Court Chancellery already agreed on the decision that was then to be taken by the Imperial Aulic Council in plenum. All members of the deputation scrupulously concealed the political background to the trial in the Imperial Aulic Council's documents. Even adherence to the usual procedural deadlines was discussed and arranged in advance in order to avoid the case appearing as a suspicious rush job. Bartenstein's son Joseph, who had joined the Imperial Aulic Council in 1750, was involved in all of this. In his career, he served as rapporteur in countless trials and rose to become the Council's vice-president in 1792.

## III. A plea for historical organisation studies from the perspectives of global history and the history of knowledge

The deputations that dealt with cases before they reached the Imperial Aulic Council plenum, their membership and their influence on various trials, have hardly received scholarly attention so far; in fact, they barely feature in the literature on

61 See, for example, the case study of the *Ritterschaften* (noble corporations) of the Duchy of Magdeburg and the Principality of Halberstadt in Schenk (2013); for the relations between Austria and Prussia, see also Schenk (2020a).

62 The report, which I plan to edit, can be found in: Österreichisches Staatsarchiv, Abteilung Haus-, Hof- und Staatsarchiv (hereinafter: ÖStA HHStA), MEA, Reichshofrat, K. 10a, No. 1.

63 In retrospect in his autobiography: Pütter (1798) 158. Frederick II wrote in 1746: »Sous Bartenstein travaillaient deux hommes plus obscurs que lui encore, l'un se nommait Knorr et l'autre Weber, ce triumvirat gouverna l'état.« Quoted from: Frédéric II. (1879) [1746] 164.

64 Both the Prussian envoy Maximilian von Fürst and the Imperial Aulic Councillor Heinrich Christian von Senckenberg independently attested to the lack of authority of the Imperial Aulic Council's president. See Fürst's report in Ranke (1875) 15; Senckenberg's expert report of 1766 in: ÖStA HHStA, RK, Verfassungsakten, RHR, K. 19, fol. 678–686.

65 Moser (1789) 369–370.

66 Mohl (1846) 375.

67 Kordel (2021) 61–63.

the Aulic Council. Monographs and more general surveys on the 18th-century Council published within the last two decades argue that it was characterised by »strict impartiality«[68] because the imperial palace endeavoured »to achieve settlements based on justice, rather than on politics«.[69] The *Vota ad Imperatorem* are regarded as an indication of »how thoroughly the Aulic Council discussed its draft decisions«,[70] while the fact that the emperors hardly ever contradicted the legal opinion presented to them is seen as evidence of the high esteem in which the Aulic Council's legal expertise was held at the imperial court.[71]

These views are all the more remarkable given that there is no shortage of references to the existence of the deputations in the sources. Their history goes back at least as far as the 17th century,[72] but their existence was far from uncontroversial. Around 1740, the *Reichspublizist* Johann Jacob Moser (1701–1785) wrote an expert opinion (which has been available in a modern edition since 1973) in which he explicitly stated that in recent years, the Imperial Aulic Council had in »almost all important matters« had to approve the decisions of informal circles in which representatives of the Austrian Court Chancellery set the tone.[73] The imperial estates took up the issue and in 1742 wrote an explicit ban on deputations into Charles VII's electoral capitulation.[74] Contemporary legal literature also repeatedly emphasised that in politically sensitive matters, the Imperial Aulic Council was sometimes only consulted »pro forma«[75] by the imperial palace. Occasionally, this was even done with explicit reference to the proceedings concerned and by naming the ›grey eminences‹ in the background.[76]

Given the availability of printed primary source material (including modern critical editions on these issues), it is difficult to avoid the conclusion that many researchers have avoided a consistent examination of the empirical evidence that would have called into question the traditional image of the Imperial Chamber Court and the Imperial Aulic Council as representing a German tradition of the rule of law. Even the large-scale archival cataloguing projects, which represent a significant legal historical contribution to the study of the Holy Roman Empire, could not act as a corrective in *this* respect, as their conceptualisation uncritically transferred the understanding of judicial decision-making as intellectualised, anonymous and disembodied that is part of the self-description of the modern legal system (at least in the area of civil law)[77] to historical analysis.

The archival cataloguing projects for the files of both the Imperial Chamber Court and the Imperial Aulic Council have so far focused exclusively on the trial records. While these are of great value to historians due to the evidence they contain (charters, inventories, maps, plans, etc.), reading them without taking into account the context of the files does not enable us to conduct procedural analyses of early modern trials. As already Anselm von Feuerbach (1775–1833) pointed out, trial records are »acts of the court, but they show nothing more than – themselves. How they came into being, what lies behind them, what preceded them, what happened or did not happen in the background when they were made: no more of this appears in them than they themselves thought it good to report. The actual action of the court has passed unobserved; what remains is a mere result, from which it is far from certain that the manner in which it acted can be inferred.«[78]

In contrast to Feuerbach, today's researchers are often insufficiently aware of the fact that the

68 Whaley (2012), vol. 2, 63.
69 Whaley (2012), vol. 2, 65. Westphal (2002) 442–443; Westphal (2005) 251; Erwin (2009) 200; Schnettger (2020) 218–219 also speak of a comparatively high degree of decision-making autonomy on the part of the Imperial Aulic Council, with varying degrees of nuance.
70 Sellert (2018) 91.
71 Petry (2011) 40.
72 Evidence in Schenk (2022a) 104.
73 Sellert (1973) 420.
74 Burgdorf (2015) 448.
75 Mohl (1789) 319; see also Buders (1751) 241; Selchow (1778) 289–290; Zang (1790) 126–127; Senckenberg (1799) 25–26.
76 For example, Gaspari (1790) 204 with regard to the drawing up of a *Votum ad Imperatorem* in the dispute over the expulsion of the Salzburg Protestants (1732).
77 For comparisons with self-descriptions of judiciaries in common-law systems, see Lepsius (2016); Häcker / Ernst (eds.) (2020).
78 Feuerbach (1821) 100.

creation of court records not only served to produce decisions, but also to present them.[79] This is because there is a lack not only of a reflective concept of practice but also of basic research on filing practices *(Aktenkunde)* that would provide a methodological basis for dealing with the case files of the Imperial Chamber Court and the Imperial Aulic Council.[80] As a result, historians who rely solely on the trial records not only ignore the informal, backstage interactions underlying the courts' work, but even disregard important phases of its formal proceedings that are recorded only in the *Protokolle*, not in the files. In view of all this, it is not surprising that numerous legal-historical works on »court practice« have hardly progressed beyond the uncritical reproduction of the courts' own narratives of its cases.

Nor would more than a self-description emerge when applying such a traditional approach to the files of those Imperial Aulic Council proceedings whose outcome, as we know from other sources, was more or less decided in advance by an informal deputation. Even for cases that led to bitter disputes not only within the Imperial Aulic Council but also at the imperial diet, which contributed significantly to the erosion of trust in the imperial judiciary,[81] research of this kind is barely able to penetrate the façades of rationality and consensus that the Aulic Council constructed with the help of its files and *Protokolle*. This state of affairs is highly unsatisfactory not only from the perspective of historical research but also for legal scholars. It means that at present, amidst tens of thousands of files, it is almost impossible to determine whether or not a trial was conducted according to the authoritative contemporary standards. The related auxiliary disciplines (esp. the *Aktenkunde*) are insufficiently developed, and the concept of practice too impractical for judicial decision-making to be observed at the micro level with the precision that would be necessary to deconstruct grand narratives.

Calling for more theory in this situation is therefore by no means aimed at abandoning supposedly proven legal-historical approaches in favour of postmodern arbitrariness. Rather, legal historians must first develop methods for empirical work in order to be able to dissect early modern trial documents *lege artis*. Simply put, we currently lack the »tools to understand what was happening, often behind the scenes«.[82] As a historian, one wishes for more, not less, legal expertise in the interdisciplinary analysis of judicial decisions. This wish, however, is linked to the expectation that this expertise will incorporate into its analyses the emergence and exploitation of legal knowledge that the self-description of jurisprudence rendered invisible.[83]

What a concept of practice would have to achieve can be illustrated using the example of the deputations. Their activities blatantly violated the Imperial Aulic Council regulations and the imperial electoral capitulation, but they were not intended to replace legal with political communication. Rather, deputations enabled the imperial palace to reduce contingency in advance of the deliberations in the plenary session of the Council and to discreetly assert political expectations of compromise. The deputations' members carrying out this work of mediating between the palace and the adjudicating body were drawn from various institutions of the imperial court and linked by ties of friendship and family relationships. All had some degree of legal literacy – either expert legal knowledge, or legal literacy acquired autodidactically or on-the-job.[84]

The transfer of the decision-making process from the Imperial Aulic Council's plenum to a deputation thus did not in any way diminished the importance of legal knowledge. However, it did

79 However, on symbolic information processing, see Krischer (2010) 55; Krischer (2017) 73. Falk (2023) deconstructs rationality myths with a view to the written procedure for sending files to law faculties.

80 Vismann (2011) 27 already emphasised that legal scholarship has not developed a systematic methodology for the analysis of court records beyond the rules of evidence. Schenk (2023c) discusses this in detail with regard to early modern collegiate courts.

81 In his expert opinion written in 1740, Imperial Aulic Councillor Burkhardt reports that in the preceding years, imperial estates had attempted to defend themselves against arbitrary decisions of deputations by appealing to the imperial diet (see note 62). The links between the deputations and appeals *(Rekurse)* to the imperial diet were also established by Zang (1790) 126–127. In general, the appeals remain insufficiently researched. See in particular Härter (1993); Sydow (2003).

82 Duve / Herzog (2024) 14.

83 From the perspective of legal philosophy, an insightful account is provided by Somek (2006); regarding lawyers, see also Pistor (2023).

84 On the concept of legal literacy, see Korpiola (ed.) (2019).

place this knowledge in a context saturated with power, in which the lead responsibility no longer lay with the Aulic Council but with lawyers from the Austrian Court Chancellery or the State Chancellery.[85] Against the background of the processes of differentiation between the political and legal sphere that had already begun, courtly power could not suddenly inscribe itself into the *Verfahrensgeschichte* (›process narrative‹)[86] constructed in files and *Protokolle*. It needed a medium for this, and this medium was the ›reporting technique‹ *(Relationstechnik)*[87] of hand-picked rapporteurs, who also linked the adjudicating body and the deputation in terms of personnel. In such proceedings, the plenum of the Imperial Aulic Council, under pressure to agree with the decision previously made, did not serve as a deliberative but rather as a formalising body. This concealed dissent behind the façade of *Protokolle* that only recorded the outcome, and produced collegial decisions that could be presented to the emperor for signature without fear of arousing imperial displeasure, because the palace's interests were already reflected in their contents as a result of the court officials' participation in the deputations.

When analysing these subtle mechanisms of translation, formalisation and invisibilisation,[88] it is not productive to see them as pathologies: we are not dealing with individual dispositions but with epoch-specific practices that were reproduced over a period of around 200 years. Only a concept of practice that views formal and informal structures as complementary components of one and the same social system can usefully produce insights here. Such a concept is offered by organisational sociology, which is aware that the formalisation of behavioural expectations necessarily goes hand in hand with »usable illegality«[89] and the »organization of hypocrisy«.[90] Otherwise, organisations would hardly be able to meet the contradictory demands with which they are confronted. After all, doing everything ›by the book‹ is known not as a recipe for success in the trials of everyday life but rather as a method of obstruction.[91]

Since the law aims to be formal,[92] the analysis of informal structures in studies of court practice has a particularly productive potential for disrupting common assumptions regarding the rule of law.[93] Sociologically informed organisational research is currently being tried in many areas[94] and has already found its way into research on the Holy Roman Empire's central courts.[95] And it is precisely the Imperial Aulic Council which represents an ideal object of study for this form of research, because it strikingly demonstrates the absurdity of classical modernity's insufficiently complex narratives of progress. Since 1495, the Holy Roman Empire had had a central court of justice – the Imperial Chamber Court – which was geographically separate from the imperial court and had highly formalised procedural law and professionalised assessors.[96] However, the Imperial Aulic Council, which was tied to the imperial court, attracted more and more cases from the end of the 16th century onwards, until its caseload finally exceeded that of the Imperial Chamber Court after

85 The State Chancellery emerged from the foreign policy department of the Austrian Court Chancellery in 1742. See Hochedlinger (2019).

86 *Verfahrensgeschichte* is a term coined by Niklas Luhman to describe the narrative developed in the course of a court case, which also legitimises its outcome. See Luhmann (2019) 43–46.

87 The early modern literature providing advice for judges on how to handle files also offers material for innovative studies in the history of knowledge. Until the 19th century, the object was referred to as *Referierkunst* (›the art of reporting‹). For example in Klüber (1808). On the widespread genre of early modern how-to books on all manner of *artes*, see Daston (2023) 55, 51: »True science attained demonstrative certainty; an art achieved at least regularity in most cases; a mere craft was haphazard.«; »To formalize craft knowledge into rules was to give it voice and dignity but not remove it from the workshop.«

88 Of course, these mechanisms occasionally failed. In the 1690s, for example, the awarding of the ninth electoral dignity to Brunswick-Lüneburg led to serious friction between the Imperial Aulic Council and Emperor Leopold I. See now Kampmann (2023). However, such events are particularly noteworthy because they did *not* represent the usual situation, which was clearly characterised by (formal) consensus.

89 Luhmann (1995) 304–314.

90 Brunsson (2011).

91 Daston (2023) 33.

92 Fish (2011).

93 Collin (2022) 332.

94 See Emich (2010); Neumann (2020), (2021); Jakobs (2021); Neumann et al. (2025).

95 Schwarting (2020a); see the detailed discussion by Collin (2022); see also Schwarting (2020b).

96 Edition of the *Reichskammergerichtsordnung* (Imperial Chamber Court Ordinance) of 1555 in Laufs (1976); cf. Dick (1981). Jahns (2003/2011) provides a fundamental overview of the assessors.

1648.[97] In contrast to the Imperial Chamber Court, the Aulic Council made do with »procedural snippets«[98] instead of a fully developed procedural law. Its body of judges, divided between a bench of noblemen and a bench of scholars in a manner typical of the time, became increasingly aristocratic due to the appointment of nobles from Austria and Bohemia.[99] Thus, although qualified jurists and ›legal literates‹ sat on both benches of the Aulic Council at all times during its existence, the average Imperial Aulic Councillor in 1730 had a lower degree of professionalisation than the average assessor of the Imperial Chamber Court in 1530.

This highly ambiguous development points to Luhmann's insight that the differentiation of the modern legal system was by no means straightforward but rather characterised by the regression of structures whose imposition on influential elites had turned out to be too risky for the as yet little developed state.[100] The shift in emphasis from the Imperial Chamber Court to the Imperial Aulic Council, already noted by contemporaries, was one such regression that made the manifold encroachments on the elite's privileges by the increasing functional differentiation and organised jurisdiction bearable for a society still characterised by the primacy of stratification.

The consensus community[101] of the Holy Roman Empire, primarily formed of the emperor and princes, reproduced itself as a »culture of presence«.[102] The creation of normativity thus required not only legal expertise but also communication amongst the nobility (e. g. at imperial diets) to be carried into all corners of the Empire.[103] As the seat of the ruler and the hub of a network of envoys (which intensified after 1648), Vienna proved very attractive to numerous noble families and thus offered a much more favourable infrastructure for such communication processes than the Imperial Chamber Court in Speyer or Wetzlar.[104] At the imperial court, where nearly all the major imperial estates were represented in one form or another, expectations of compromise – typical of legal communication in interaction systems[105] – could be discreetly realised. The Holy Roman Empire lacked the means of power to push through independent judicial decisions reached entirely within the constraints of formal court procedure against the major estates' opposition.[106]

Until now, research has hardly dealt with the fact that in the 18th century, the pioneering role in the differentiation of law passed from the imperial level to the ›fiscal military states‹[107] of Prussia and Austria. These states initiated reforms of their judicial systems based on their ability to enforce their elites' compliance. At the same time, they used sustained criticism of corruption to put pressure on the micropolitical entanglements between elite society and judges that had characterised judicial decision-making for centuries.[108] This path remained closed to the Holy Roman Empire which, in Hegel's much-quoted phrase, was a »state in thought« *(Gedankenstaat)* and not a state in reality.[109] Thus the Josephinian reform of imperial justice, which had been modelled on the Prussian system in many respects, came to a standstill in the

97 Quantifying information on the volume of business can be found in Schenk (2022a) 84–91.

98 Sellert (1995) 830. Sellert (1973) is seminal reading regarding the procedural law of the Imperial Aulic Council. The ordinances of the Imperial Aulic Council were edited by Sellert (1980/1990); an edition of the *Gemeine Bescheide* (General notices) is provided by Oestmann (2017).

99 On this, see Schenk (2023b) 50–66, with additional sources and references.

100 Luhmann (2015a) 27.

101 On the research concept of consensual rule in the pre-modern era, see Schneidmüller (2000).

102 Stollberg-Rilinger (2015) 4.

103 The integrative achievements of the Diet of Regensburg for the Holy Roman Empire also consisted less in the production of binding political decisions than in the provision of information and communication services. See Friedrich (2007).

104 Reference should be made to the excellent theoretical and empirical studies by Pečar (2003) and Hengerer (2004).

105 Luhmann (2015b) 71.

106 Luhmann (2008) 172.

107 On the concept of the fiscal military state Storrs (ed.) (2009); Godsey / Mata (eds.) (2022).

108 Schenk (2020b) 200–220; Schenk (2023a). In the *longue durée*, connections between these reforms and the bourgeoisification of court personnel and a fundamental change in patronage cultures become visible. See Straubel (2010); Bernsee (2017); Engels (2014) for an introduction to historical corruption research; and Rosenmüller (2019) with regard to the early modern judiciary. Some reflections on the comparison of Latin America and the Holy Roman Empire are found in Schenk (2020c).

109 Hegel (2004) [1801] 37.

1760s and 1770s.[110] At the operational level of the judicial production of law, the increasing differentiation of law as a system reproducing itself through communication[111] thus corresponded less and less with formal structural links between the judiciary and politics that could have taken this differentiation into account.

The omnipresent reference to the juridification *(Verrechtlichung)* of political-social conflicts in the Holy Roman Empire,[112] together with an understanding of negotiation processes that ignores the sociological scholarship on their societal costs,[113] has obscured historians' view of the conflicts of norms arising from the renunciation of authoritative conflict resolution. This is all the more striking as these were absolutely evident to contemporaries, particularly in the context of the enlightened 18th-century zeitgeist's striving for disambiguation.[114] In order to accommodate political expectations that contradicted the – already highly developed – representational constraints of judicial procedure, the imperial central courts, dependent as they were on the consent of the major imperial estates, responded by informalising court practice.[115] This phenomenon has so far escaped legal historians' attention because the latter have limited themselves to anachronistic terms such as *Machtspruch* (sovereign intervention) or *Kabinettsjustiz* (›cabinet justice‹) to frame political interventions in the legal system.[116] Not finding evidence of either in the trial records, they conclude that the Imperial Aulic Council had a high degree of autonomy.[117] This approach is based on an intellectualised understanding of practice in which the Imperial Aulic Councillors themselves do not appear at all. Researchers who followed this understanding thus also deemed it unnecessary to deal with the councillors' private correspondence, in which, however, one can find talk of the Council producing »ius incertum«[118] and following the unspoken expectation of the imperial palace to conduct proceedings »in dubio semper pro domino« as late as the 1790s.

The practices with which this *ius incertum* was created were legal practices and therefore require legal-historical analysis. Whether in Vienna, Wetzlar or Mexico City: »political, economic, and social circumstances cannot simply be seen as ›external‹ influences. They need to be integrated into a legal historical analysis and analysed as part of the knowledge of normativity people had at their disposal when they were producing law.«[119] Where the failure of positivist concepts of the past, burdened with the task of legitimising a narrative of progress, is so apparent, research on judicial decision-making for the 21st century should be conducted with the help of approaches from the history of knowledge, not least to show that the jurists' willingness to deconstruct grand narratives does not spare their own normative regime.

As emphasised above, research on the Imperial Aulic Councillors' knowledge of the production of normativity would have to describe juridical practice as a courtly practice. At the same time Viennese court society should be conceptualised as an epistemic community through which expectations for compromise found their way into the Council's proceedings. This was even – or rather, especially – the case when these expectations ran counter to the judicial system's claims to rationality. From this perspective, the councillors no longer appear as standard-bearers of modernisation but as holders of expert knowledge that linked the legal system and its courtly context and was anchored in the »jurisdictional culture of a profoundly corporative society«.[120]

110 See Aretin (1997); Denzler (2016).
111 See most recently Jansen (2019).
112 See also the criticism of the concept of juridification in Duve (2021) 54.
113 Traditionally, large parts of German-language research tend to favour arbitration over judgement as a positive instrument of conflict regulation because the former aims for consensus. There is rarely a serious discussion of the social costs associated with the renunciation of authoritative state decisions. Insightful reflections on this can be found in Kamp (2016) 151.
114 Thiessen (2021) 321–364.
115 This applies not only to the Imperial Aulic Council but also to the Imperial Chamber Court, as illustrated by the growing importance of so-called extrajudicial proceedings *(Extrajudizialverfahren)*, which as yet remain largely unexplored. See Stodolkowitz (2023).
116 See already Willoweit (2016) 177–178 for insicisve criticism.
117 There is even talk of »independence« with regard to the period around 1800 in Erwin (2009) 201.
118 This and the following quote come from the private correspondence of the Imperial Aulic Councillor Count Friedrich Ludwig Christian zu Solms-Laubach. Quoted from Prössler (1957) 25, 29–30.
119 Duve (2024) 70.
120 Duve (2012) 13.

For research approaches that actually seek to link theory and empiricism, the Imperial Aulic Council boasts a wealth of sources by no means limited to the official procedural history kept in the Haus-, Hof- und Staatsarchiv in Vienna. Due to the high proportion of imperial estates among those bringing cases before the Aulic Council as well as its location at the hub of a European network of envoys, material artefacts relating to trials before the Aulic Council can be found in countless archives across Europe.[121] In addition, several state and aristocratic archives in Germany and Austria hold papers of former Imperial Aulic Councillors still awaiting scholarly attention, although already 19th-century historians pointed out the »very remarkable«[122] correspondence they contain. The latter deals precisely with the translation processes that are of interest to the international legal-historical theory discussion today. While elsewhere the analysis of »normative practices of (behind) juridical practice«[123] is confronted with sometimes considerable source problems,[124] with regard to the Imperial Aulic Council scholars could draw on the full range of material to reach the microlevel of decision-making that must be explored in order to deconstruct the grand narrative.[125]

Of course, this can only succeed on the condition that the material artefacts of informal communication are not played off against the legal communication in the files and *Protokolle*. In order to make intertextualities and translation processes between different normative regimes describable, a sociology of legal knowledge production must understand informality and formality as complementary phenomena. Under the umbrella of interdisciplinary judicial research, it therefore makes sense to combine impulses from the history of knowledge with the methodological rigour of organisational research based on systems theory, which never loses sight of the operational structures of the court organisation that reproduces itself through decisions.

But what does this mean in concrete terms? In the previous section, we have already familiarised ourselves with deputations as »relatively stable historical arrangements in which the translation of knowledge of normativity«[126] took place. These circles formed an »epistemic setting«[127] that could be activated *ad hoc* by the imperial palace, as they were based on the linking of formal and informal structures that were already in place. The Imperial Aulic Council cannot be fully understood as an organised social system if the deputations' role in its translation of normative knowledge is not taken into account. This applies in particular to the *ex ante* logic that emerged from the construction of facts by rapporteurs prior to the deliberation in the adjudicating body and which characterises collegial decision-making in civil law systems to this day.[128] Countless examples could be used to demonstrate that in early modern collegiate courts, the most conflict-laden translation processes between different normative regimes had been completed long before the deliberation in the adjudicating body. It was the rapporteurs' reporting technique *(Relationstechnik)* that produced these translations; their artefacts should therefore be at the centre of any knowledge-historical examination of the normative regime of modern judicial practice.

Around 10 000 to 12 000 of these reports *(Relationen)* have been preserved in the Haus-, Hof- und Staatsarchiv in Vienna.[129] In addition, there are several thousand *Vota ad Imperatorem*, the collegial decisions taken by the Council on the

121 Schenk (2024a) provides detailed information on this.

122 For instance, with regard to the archive of Johann Wilhelm von Wurmbrand-Stuppach in Steyersberg (Lower Austria), see Zwiedineck-Südenhorst (1895) 287. Zwiedineck-Südenhorst (1896) documents the richness of the records there. Numerous other examples could be cited. The pioneering study by Rast (2014), dedicated to a vice-president of the Imperial Aulic Council, illustrates the potential yield of such research.

123 Duve (2017) 94.

124 Most recently Martus / Spoerhase (2023) 28 from a general praxeological perspective; and Decock (2021) 17 with regard to judicial research. With regard to the councillors of the *relação* of Bahia in the 17th and 18th centuries, see Schwartz (1973) XIX: »Five years of searching failed to uncover any personal papers or private correspondence of the magistrates.«

125 Duve (2017) 93 on the importance of the microlevel.

126 Duve (2022b) 6.

127 In the sense of the »structure of conditions within which a specific person or office could ›know something‹«. See Brendecke (2016) 7.

128 For a comparison with the *ex post* deliberations of common law, see Cohen (2014); see also the contributions by legal practitioners in Häcker / Ernst (eds.) (2020).

129 Ortlieb (2023) 351–353.

basis of the rapporteurs' *Relationen*.[130] Remarkably, legal scholars have hardly dealt with these sources to date. There is no monograph on the *Relationen*,[131] while the first and only legal-historical study on the *Vota ad Imperatorem* is almost 50 years old.[132] Regarding procedures, (legal) historians have therefore hardly progressed beyond the level of the literature of the time.[133] But anyone who, following Eugen Ehrlich, wishes to describe courts as both state *and* social institutions[134] can no longer avoid the reporting techniques that formed what we might call the ›operating system‹ of these institutions.

Adopting approaches from the history of knowledge for the study of the Imperial Aulic Council might lead some legal historians to worry that the specialist *proprium* of jurisprudence is lost sight of. Such projects working on the *Relationen* and *Vota*, however, would provide the opportunity to disprove these fears and, through a sociology of early modern legal reporting techniques, would enable us to make visible those translations of normative knowledge that were inscribed in collegial judicial decision-making. The digitisation of the minutes of the Imperial Aulic Council, which is currently being planned, would create the necessary archival infrastructure for such a reinterpretation.

## IV. Records in Context: The *Protokolle* of the Imperial Aulic Council as a starting point for procedural analyses of knowledge of the production of normativity

The Viennese Haus-, Hof- und Staatsarchiv's »Reichshofrat« holdings not only include tens of thousands of procedural files but also a wealth of minutes. The full texts of the latter are to be made available to researchers online as part of a German-Austrian Digital Humanities project. This would comprise 197 volumes of *Exhibitenprotokolle* (books recording the submissions received by the Imperial Aulic Council; total period covered: 1579–1806), 13 volumes of *Referentenprotokolle* (documenting the internal distribution of cases, ca. 1690–1806) and 688 volumes of *Resolutionsprotokolle* (minutes recording the results of the Council's plenary sessions, 1544–1805). Making these sources easily accessible will provide ›big data‹ for innovative research questions also beyond the fields of history and law. For example, linguistics researchers could use it to analyse the influences of the Imperial Aulic Council's written records, disseminated via the printed works of *Reichspublizistik*, on the development of Standard High German over a period of around 250 years.[135]

The *Protokolle* are also indispensable for an external description of knowledge of the production of normativity, because they functioned as formalising instances of the trial narrative, the *Verfahrensgeschichte*. Epistemic settings such as the deputations did not negate these instances, but rather made use of their »strict order«[136] in order to conceal the micropolitical ›contamination‹ of the production of the Council's judgements. Formality therefore also unfolded its power in the social spaces of negotiations in advance of the plenary adjudication. The deputations were the sites of highly ambiguous translation processes between different normative regimes, which then found their way into the *Resolutionsprotokolle* via the rapporteurs. As a social practice, early modern legal reasoning took the form of »semi-official business« that required minutes in order to make decisions recognisable as such and to differentiate judicial proceedings from its courtly environment – the imperial palace, characterised by oral, face-to-face communication, of which the Imperial Aulic Councillors were also part.[137] The formalisation processes that could be observed everywhere in the early modern judiciary and administration did not

130 See Schenk (2021) 252–254.

131 Ranieri (2009) provides at least a formal overview; for an analysis of *Relationen* from the perspective of interdisciplinary judicial history, see Schenk (2023b).

132 Leyers (1976).

133 See the contemporary collections of *Vota ad Imperatorem* in Moser (1752–1769); Bergsträsser (1792–1795).

134 Ehrlich (2022) [1913] 149.

135 See Burgdorf (2023); also Braun (ed.) (2011); Schenk (2024c).

136 This and the following quote: Kafka (2019) [1926] 85.

137 Schlögl (2014) 263–278 is fundamental in this regard. With good reason, systems theory does not assign personnel to the organisation itself but to its environment: Luhmann (1995) 25.

cause communication between patrons and clients to dry up, but rather led to its migration into informal contact systems.[138]

In order to open up historical organisational research to impulses from the history of knowledge, it is therefore necessary to consistently relate the *Protokolle* to the relevant trial files. This would enable us to develop a procedural understanding of the formal organisation of the Council's trials, which can then be applied to the interpretation of the material artefacts of process-related informal communication. The judicial knowledge of the production of normativity cannot be analysed by observing only some practices; it requires a sustained examination of those decisions through which the court reproduced itself as a social system. From this theoretical premise follows the necessity of the empirical work to adopt the approach of »records in context«.[139] The particularly favourable archival starting conditions enable this context to be made visible for the decisions of the Imperial Aulic Council. In the following, I will briefly outline the associated perspectives.[140]

The narrative of a *Verfahrensgeschichte* began with the entry of a written pleading in the so-called *Exhibitenprotokoll*, as there were no oral hearings in the proceedings of the Imperial Aulic Council. *Quod non est in actis non est in mundo:* anything not contained in the *Exhibitenprotokoll* did not find its way into the file and was therefore not recognised. The volumes of *Exhibitenprotokolle* therefore form the basis for the kind of trial statistics currently being increasingly called for in international research.[141] Taken individually, the volumes provide information on the status, gender, denomination and regional origin of the users of the justice system. In the context of procedural approaches to the collegial judicial production of law, however, the volumes unfold their true potential only in combination with the *Referentenprotokolle* and the *Resolutionsprotokolle*.

With the help of an AI-supported analysis of the data contained in the three types of *Protokolle*, it would be possible to reveal the »time regime« of the Imperial Aulic Council, which was of decisive importance for *de facto* access or non-access to the law. A direct comparison of the *Exhibitenprotokoll* and the minutes of the plenary sessions *(Resolutionsprotokolle)* would not only reveal striking connections between the procedural time regime and the persons involved on both the parties' and the judges' side. The link between the socio-economic status of the parties and the chances of a case being dealt with quickly (or at all) would also no longer remain hidden. These point to a commodification of the law that has so far been rather nonchalantly disregarded by large parts of legal-historical research.[142] To quote Kafka: »Before the law stands a door-keeper. A man from the country comes to this door-keeper and asks for entry into the law. But the door-keeper says he cannot grant him entry now.«[143] The *Exhibitenprotokolle* tell us about these women and men from the countryside who knocked on the door but never gained entry to the law and thus not into the *Resolutionsprotokolle*.

At 13 volumes, the *Referentenprotokolle*, which were the procedural step immediately following on from the *Exhibitenprotokolle,* are by far the smallest series. Nevertheless, they are of central importance for studies on the knowledge of the production of normativity. As in most other early modern central courts, the Imperial Aulic Council combined the *ex ante* logic of collegial decision-making in civil law with an *ad hoc* allocation of business by the president that was hardly restricted by normative provisions. This monocratic prerogative was all the more important as there was no provision for circulating cases among all the members of the Aulic Council. In addition, in most cases only one rapporteur was appointed,[144] with the result that generally only he had knowledge of the file.

On the basis of the *Referentenprotokolle* – which have hitherto received curiously little attention from legal historians – it is possible to reconstruct the case allocation practice for nearly the entire 18th century at an institution which almost lacked

138 See Strunz (2022) 215–217 on the example of the Prussian administration; also the remarks in Meier (2004), which aim to link systems theory and archival studies.

139 On this new standard of archival description, see Wildi (2023).

140 Schenk (2024a) provides detailed information on the following.

141 Vermeesch (2021) 32; Baumann (2021) 214.

142 For incisive criticism of this, using the example of law faculties, see Falk (2006).

143 Kafka (2015) [1925] 170.

144 A random sample showed that in 77 % of all proceedings received in 1730, no co-rapporteur *(Korreferent)* was appointed. See Schenk (2024a).

any formal procedure for this.[145] For almost all cases, the *Referentenprotokolle* show which councillor was appointed as rapporteur and what subsequent changes in personnel may have occurred in the course of the proceedings. These documents are precisely the material artefacts of the production of law that projects in the history of knowledge require in order to overcome the anonymisation and disembodiment of collegial decision-making in favour of the actor-centred approaches that are essential for an external description. The functioning of the deputations described above makes it clear that the practice of allocating cases can only be understood if framed as a courtly practice. If the imperial palace showed an interest in a trial, the president appointed a rapporteur from among the deputised councillors and reached agreement with the lawyers of the Austrian Court Chancellery or the State Chancellery on the content of the rapporteur's report *(Relation)* before the case was presented to the Aulic Council's plenum for decision. Since Germanophone research working with early modern trial documents has so far hardly gone beyond positivist approaches and, moreover, has traditionally neglected the problems associated with the judicial construction of facts *(Sachverhaltskonstruktion)* raised by the sociology of knowledge in favour of legal source theory,[146] such judicial practices have so far eluded observation.

This shortcoming is all the more serious because the allocation of cases based on interests was not limited to a few particularly controversial cases but presumably represented the rule of early modern justice. Until well into the 18th century, there are countless examples of the Aulic Council's president appointing rapporteurs who were known to have close ties to the defendants or other interested imperial estates, in clear violation of the relevant regulations regarding bias. The parties who benefited from being discreetly favoured in this way included not only members of the imperial clientele such as the Elector of Mainz[147] and other religious princes, but also, depending on the political climate, the elector-kings of Brandenburg-Prussia or Hanover-England. The Aulic Council thus opened up informal channels through which expectations of compromise could be communicated that could not have been openly expressed in formal proceedings.

Scholars of judicial history who do not seek to construct a narrative of a German tradition of the rule of law can accommodate the informal aspects in their understanding of the working of the court by interpreting them as an expression of a micropolitical interdependence between court personnel and the higher echelons of society. In the absence of sufficient imperial means to impose judgments against the more powerful estates' opposition, the Imperial Aulic Council had to rely on cooperation. The already advanced differentiation between politics and law could be ›defused‹ through interaction ›backstage‹. At the imperial diet in Regensburg, the imperial palace secretly signalled its willingness to make concessions to a number of imperial estates involved in Imperial Aulic Council proceedings in return for their ›good behaviour‹ in imperial politics.[148] Berlin's agents, on the other hand, met with rapporteurs working on relevant cases over dinner to sound out the prospects of a Prussian-Austrian alliance.[149]

The Imperial Aulic Councillors thus carried out not only judicial duties but also tasks which we would nowadays associate with diplomacy. Rapporteurs were faced with informal expectations that they conduct their cases with »ambiguity tolerance«,[150] juggling the divergent demands of the legal and courtly normative systems. During the 18th century, a number of councillors who fell short of such expectations fared badly as a result. In 1740, Imperial Aulic Councillor Burkhardt reported that the »statesmen«, who were willing and able to »combine« jurisprudence and politics, were now setting the tone in the Council.[151] Anyone who considered this way of exercising the judicial office as arbitrary (»willkürlich«) was ridiculed as a »pedant« and marginalised. Imperial Aulic Councillor Nikolaus Christoph von Lyncker (1643–1726) had already expressed a similar opin-

145 The only years for which records are not existant are 1739–1744.

146 On this imbalance see Maxin (2021) 5; also a pointed remark by Rosen (2006) 68: »Legal systems create facts in order to treat them as facts.«

147 Numerous examples can be found in Schröcker (1978) 96–103.

148 For more on this example from 1746, see Rohrschneider (2014) 190.

149 In 1717; further details in Schenk (2013) 143.

150 The concept of »ambiguity tolerance« used by Bauer (2011) to analyse Islamic societies was introduced into early modern research by Thiessen (2021) to describe a pragmatic way of dealing with conflicting expectations of behaviour associated with different normative systems.

151 See note 62.

ion in a confidential document in 1712. According to von Lyncker, many of his colleagues were of the opinion that the ability to judge justly was »masculum«[152] and not bound to an »exaggerated erudition«. After all, »quid juris«.

These two artefacts of participant observation bear witness to fierce disputes within the body of Imperial Aulic Councillors of which researchers have to date hardly taken any notice. However, these were not simply the result of competing patronage networks tussling with each other. Rather, the ›pedants'‹ critique of corruption[153] was part of their demands for disambiguation, that is, the separation of the political from the judicial sphere. The micropolitical contamination of the *Relationstechnik* was thus a logical target. However, since not consensus but power was required for the dismantling of the pervasive systems of close contacts between councillors and parties that ›pedants‹ like Lyncker and Burkhardt demanded, the ›statesmen‹ in the Imperial Aulic Council won out. The *Referentenprotokolle* reveal what effects their victory had on the practice of the Imperial Aulic Council.

These *Protokolle* contain a number of trials for which – again in clear violation of the Imperial Aulic Council regulations – a new rapporteur was appointed if the first proved to be a ›pedant‹ with insufficient ambiguity tolerance regarding courtly norms and expectations. Particularly when this occurred in *Untertanenprozesse* (cases in which subjects brought cases against their ruler) we can observe the proceedings taking a marked turn in favour of the defendant sovereign after the change of personnel.[154] Incidentally, the context of the knowledge of production of normativity also includes the fact that the ›statesmen‹ among the Imperial Aulic Councillors not only served as rapporteurs for hundreds of cases but also went on to enjoy stellar careers and rose to become vice-presidents of the Aulic Council, imperial vice-chancellors and commissioners (Konkommissare) of the imperial diet. Actor-centred procedural approaches to legal reasoning that encompass such contexts do not favour any romanticisation of premodern negotiations of norms that are still sometimes seen as precursors of the rule of law.[155] Translation processes between politics and law based on the symbolically generalised media of success – power and money –[156] are generally speaking not aesthetically pleasing, and this also applied to the Imperial Aulic Council.

As already mentioned, it is not least the wealth of extant material that makes the Imperial Aulic Council such an excellent model system for the procedural analysis of knowledge of the production of normativity.[157] First, the *Referentenprotokolle* make it possible to adopt the actor-centred perspective necessary for an external description of the formal *Verfahrensgeschichte* narrated in the documents of the formal procedure – the trial files, *Resolutionsprotokolle* (minutes of Council's plenary meetings), *Relationen* (the rapporteurs' reports) and *Vota* (the Council's submissions to the emperor). Second, the documents relating to the trials produced by the parties in dispute – distributed across dozens of archives – in combination with numerous other sources (such as contemporary journalism), enable the observation of process-related *informal* communication. In these records in context, contact systems around the rapporteurs based on the »law of meeting again«[158] become visible in which the translation between conflicting regimes of normativity took place. The analysis of the cases of the Imperial Aulic Council could thus be used to overcome the »mystification of decision as an internal mental occurrence«[159] that is inherent in the concept of *richterliche Kognition* (judicial cognition) in Ger-

152 This and the following quote: ÖStA HHStA, RK, Verfassungsakten, RHR, K. 3, Konv. 2, no. 2, not foliated.

153 Here I follow the argumentation of Thiessen (2021) 324–332, according to which criticism of corruption has played a major role in the differentiation of fields of action since the 18th century. The fact that the field of jurisdiction played a pioneering role here can be observed not only in Europe but also in Latin America. See Rosenmüller (2019).

154 Trossbach (1985) 484 on the basis of Hessian examples.

155 For example, Dohmen et al. (2019) 15.

156 On the term Luhmann (2021) 316–396.

157 For an application of this model to Prussian justice in the 17th and 18th centuries, see Schenk (2023d).

158 Luhmann's concept of the *Gesetz des Wiedersehens* describes social contacts that will be repeated in the foreseeable future. See Luhmann (2019) 75–81.

159 Luhmann (2018) 196.

man jurisprudence, to be replaced with a description of empirically observable practices.

With regard to communication between the Imperial Aulic Council and the parties, it is important to emphasise that the »maxim of written form« *(Schriftlichkeitsmaxime)* represented an organisation of hypocrisy at its very best.[160] For while the imperial palace shielded the Aulic Council's body of judges from the risks associated with face-to-face communication by expressly dispensing with oral procedural elements, in the same breath it instructed them (orally, of course) to grant audiences to parties and their representatives in their private residences. This informal expectation of behaviour[161] was directed above all at the respective rapporteurs, whose key position in the *ex ante* logic of collegial decision-making was known to every litigant. In 1739, a senator of the City of Frankfurt summarised this knowledge in the following way, referring to the Apostle Paul (1 Corinthians 13): »If we speak in the tongues of men or of angels, but do not have the love (*scilicet* of the rapporteur), we are only a resounding gong or a clanging cymbal.«[162]

The conviction that the rapporteur dominated the adjudicating plenum due to his exclusive knowledge of the case file was so deeply ingrained in the contemporary use of justice that society would never have accepted a ›truly‹ written procedure. Thus, as countless sources attest, behind the façade of written communication at a distance, the reporting technique of the *usus modernus* was reproduced as a »domestic practice«.[163] This included the rapporteur's interaction with the parties or their lawyers and solicitors *(Sollicitanten)* which was not only not part of the Aulic Council's procedural law, it was even expressly prohibited in order to prevent corruption. Nevertheless, throughout the early modern period, those who could not afford to employ a *Sollicitant* to act in their stead travelled to the imperial court to pursue their cases at the Aulic Council, often staying in Vienna in precarious social conditions for months and years at a time. At the end of the 18th century, the jurist Karl Friedrich Häberlin estimated that the associated income of the Viennese hospitality industry amounted to 300 000 Reichstaler per year.[164]

Early modern use of the justice system was thus accompanied by migration processes on a scale that was visible in the cityscape and thus undeniable. The self-description of contemporary jurisprudence explained the presence of so many litigants, which stood in contradiction to the Aulic Council's procedural law, with reference to insufficient staffing. The courts, so the explanation went, were forced to devote their resources only to those proceedings in which the parties expressed their interest continuously and in person.[165] Researchers have often uncritically repeated this exculpatory reference to insufficient resources, without taking into account the fact that the Imperial Aulic Council did not have a periodic reporting system until after the middle of the 18th century and thus lacked information on the cases still pending.[166] As in other places, it was left to the parties to put pressure on the court personnel to settle the case by using their physical presence as well as what Luhmann called symbolically generalised media of success (power, money), exerting pressure that the legal organisation itself did not generate, unless the case happened to be of interest to the imperial palace or the upper echelons of the Aulic Council.

But that was not all. In the private home of the rapporteur, the parties sought above all the legal hearing (in the literal sense) that the court as a collegiate body denied them. The documents of the parties throughout the centuries contain countless examples of an informal oral presentation of facts having taken place, often accompanied by the

160 Schenk (2022a) 50–63; Schenk (2023b) 72–80.

161 This expectation was shared both by the ruler and the parties, and could also be found in a similar form at numerous other royal and princely courts in early modern Europe and Latin America. This applies to courts as diverse as Madrid, Wolfenbüttel and Quito. See Brendecke (2014) 139; Bei der Wieden et al. (eds.) (2020) 16; Herzog (2004) 190–191.

162 »Wenn wir mit Menschen- und mit Engel-Zungen reden könnten und hätten die Liebe (scilicet des Hrn. Referenten) nicht, so sind wir ein tönendes Erz und eine klingende Schelle.« Quoted from Kriegk (1874) 44. Knowledge of the decisive role of *Referenten* found its way into literature in the 1770s through Wieland (2012) [1774–1780] 248. In his satirical novel, a town court always follows the rapporteur's recommendation. The example highlights the intersections between approaches to judicial decision-making in the history of knowledge and the law and literature movement. On the latter, see Posner (2009).

163 Ludwig (2015) provides an instructive case study from the field of territorial justice.

164 Häberlin (1793) 706.

165 Schenk (2023b) 80–85.

166 Schenk (2023a).

handing over of a specially printed statement *(species facti)* that was, however, not intended for the trial's files.[167] While large parts of legal history still cling to rationality myths of judicial decisions based on files, the facts of the case at the Imperial Aulic Council were *de facto* constructed on the basis of an opaque constellation of media consisting of both the written and the oral. Behind closed doors, contemporary legal experts were fully aware of this problem of informal factual statements being included in the collegial decision even if they contradicted the file – which, moreover, most of the assessors would not even have read.[168] In addition, some councillors secretly slipped into the role of advocates, helping selected parties to draft the pleadings that they then discussed and voted on in plenary sessions.[169] The interaction between Imperial Aulic Councillor von Knorr and the Genoese envoy described above was therefore by no means unusual.

The self-description of the functioning of the Aulic Council contained in the official files and the legal discourse was all the less able to deal with these problems of truth because the homes of the rapporteurs were not only the dwelling place of legal expertise but also the arenas of an exchange of gifts that actually ventured into what was considered corruption also at the time.[170] Numerous rapporteurs not only accepted considerable sums of money from the parties in ongoing proceedings, sometimes they actually demanded them – combined with the threat that the file would otherwise simply be left lying around. Concealment practices – such as handovers in the private area of one's own home, transactions via middlemen or wives, or disguising sums as harmless fees – all testify to the awareness of the actors that they were moving in an area that was no longer covered by contemporary ambiguity tolerance.

In the existing historiography, such instances of entanglement of court personnel and society are often not recognised as structural but instead marginalised as regrettable exceptions from the rule.[171] A project employing the approach of historical organisational studies would not go to the opposite extreme by constructing Aulic Council justice as habitually subverted by informal processes. Rather, it would highlight the systemic nature of informal financing mechanisms, which not only relieved the burden on the notoriously cash-strapped rulers, but, like the deputations, also enabled the elites to influence the judicial production of law, because a *Gedankenstaat* such as the Holy Roman Empire could not function without their support. Several imperial princes even – discreetly – paid fixed annual salaries to individual councillors, who were then appointed as rapporteurs by the Aulic Council's president for those trials in which the donors were involved.[172] The president thus played an active role as a patronage manager in these structures and, if necessary, ensured that ambiguity-intolerant councillors (who castigated such practices as corrupt as early as the early 18th century) were silenced.[173] In such a system *type ancien*, judicial knowledge of the production of normativity thus reproduced social inequality by promoting the commodification of law that, within the limits set by imperial interests, functioned according to private entrepreneurial calculations.[174]

If one were to follow these traces consistently, even the *Resolutionsprotokolle* of the Imperial Aulic

167 These printed works, which survive in large numbers, remain mostly unexplored. On this research lacuna with regard to the Imperial Chamber Court, see Oestmann (2021) 378–379; and generally Limbach (2021) 85. See Kasper-Marienberg (2023) on the great significance of printed matter in the context of Jewish use of justice.

168 Imperial Aulic Councillor Burkhardt made a clear statement on this in 1740 in his expert opinion cited in note 62. See also the polemical but knowledgeable report written by the Prussian envoy Maximilian von Fürst around 1750, in Ranke (1875) 15.

169 For an example, see Rast (2014) 316.

170 Schenk (2024d) with numerous sources.

171 Fuchs (2002) 282, for example, speaks of the »human weaknesses of individuals« with regard to the Imperial Chamber Court. The majority of the Imperial Aulic Councillors were also repeatedly ascribed a professional ethos that was above material temptations; see, for example, Sellert (2013) 294.

172 In the 18th century, for example, the Duke of Mecklenburg, the Bishop of Würzburg and the Count of Lippe-Detmold: Hughes (1988) 51–52; Zwiessler (2023) 137; Landesarchiv Nordrhein-Westfalen, Abteilung Ostwestfalen-Lippe, L 7, No. 795.

173 See Schenk (2024d) for relevant examples.

174 Brakensiek (2010) 290 on the epoch-specific nature of this phenomenon.

Council, which record around 30 000 meeting days and 500 000 decisions over a period of 250 years,[175] could be rendered amenable to an external description, because the commercialisation of the *Relationstechnik* pursued by numerous councillors was followed by the commodification of the agenda. There are complaints from the middle of the 18th century that, contrary to the regulations, the Imperial Aulic Council no longer prioritised the trials of the poor and other *miserabiles personae*; instead, its members used their speaking time to promote the cases that brought them the most money.[176] Judicial knowledge of the production of normativity not only served to mobilise the law, but also to demobilise it. Before the law stood a doorkeeper. It was the rapporteur.[177]

## V. Conclusion

Although most higher courts around the globe are collegiate, the scholarly debates on collective judging in a comparative perspective[178] show that we know little about how they actually reach their decisions. This desideratum has a deep historical dimension, as collegiate central courts were already developing at the threshold of the modern era and then spread across large parts of the world in the course of European expansion. Researchers speaking of pre-modern collective judging are thus referring to a geographical area that already stretched from Stockholm to Vienna to Mexico City. As a result, they face the challenge of leaving the Procrustean bed of national history and opening up the material artefacts of the early modern judicial production of law to global-historical perspectives.

This also applies to the Holy Roman Empire's two central courts, the Imperial Chamber Court and the Imperial Aulic Council, whose activities have left behind an extensive written legacy in numerous European archives. Over the past decades, legal scholars and historians have made valuable contributions to researching these sources. However, the traditional narrative of these two courts as precursors of the rule of law in Germany is no longer convincing. If early modern trial documents are to be used to make well-founded contributions to a »multidisciplinary social theory«[179] incorporating approaches from global history, one can no longer limit oneself to emphasising the emancipatory content and the pacifying function of judicial practice. Rather, one should work towards a legal history »that deliberately makes visible, within the very structure of its narrative forms, its own repressive strategies and practices«.[180] This can only succeed if we focus not just on this or that judgment in a positivist manner: rather, what is needed are precisely those procedural approaches that have so far been largely lacking.

In this article, I have used the example of the Imperial Aulic Council to argue for combining organisational sociology and the history of knowledge in order to develop a reflective concept of judicial practice. Organisational sociology offers a concept of practice that understands formality and informality as complementary phenomena and can therefore also be applied to the early modern period, which in many respects appears as an era of formalisation.[181] This makes it possible to go beyond the system's self-description to analyse those of its rationalities that a legal history burdened with legitimising tasks neither wanted nor was able to observe.

As shown above, this field of tension between formality and informality can only be explored if we take into account the *ex ante* logic embodied by

175 See Rasche (2015) 232.

176 Schenk (2024a). On the privileging of *miserabiles personae* before the courts of the early modern period, see Duve (2008) 102–137; Cunill (2017); Duve (2024) 61–64.

177 As early as the 18th century, a discursivisation of the written maxim as a cover for the supposed arbitrariness of the rapporteurs began, which in the 19th century fed into the legal-political debate on the orality maxim. Consequently, analysis of this development would also be able to provide empirically founded contributions to a history of the evolution of the knowledge of the production of normativity. Schenk (2022a) 40–49; Schenk (2023b) 92–101.

178 Häcker / Ernst (eds.) (2020).

179 Auer (2018) 51.

180 Chakrabarty (2008) 45. With regard to the lower courts in the Holy Roman Empire, it has already been emphasised that compared to nobles and urban notables, the rural population benefited the least from judicial conflict regulation and perceived it as part of an authoritarian apparatus of oppression. For examples from Hesse, see Brakensiek (2001) 364. However, studies on the Imperial Chamber Court and the Imperial Aulic Council have so far hardly dealt with the idea that we could – at least in part – be dealing with »archives of oppression« (Ginzburg [2023] 17).

181 Stollberg-Rilinger (2013).

rapporteurs, which continues to characterise collegial decision-making in civil law to this day. During the early modern period, it was strengthened by the *ad hoc* distribution of cases to rapporteurs that was barely normatively constrained. Behind the façade of written proceedings, central courts such as the Imperial Aulic Council to a considerable extent communicated with both the ruler and the parties via informal contact systems, in face-to-face meetings in the homes of the individual councillors that left no traces in the trial's files and *Protokolle*. It was thus not only in the Aulic Council's plenary session but above all in the preceding informal communication that the councillors dealt with the challenge of negotiating the coexistence of partially conflicting normativities that characterised the early modern period. And it was in the rapporteur's home that the reports were written that pre-structured the collegial decisions through which the court reproduced itself as a social system.

By penetrating beyond the anonymisation and intellectualisation of decision-making inherent in the collegial principle, an organisational sociological approach makes it possible to increase the complexity of empirical work in the way required by projects in the history of knowledge to deconstruct statist interpretations of court practice at the microlevel. To this end, it makes sense to regard *Relationen* and *Vota* not simply as the result of formal judicial *Relationstechniken*. A more open concept like »knowledge of production of normativity« is much better suited to locating the actions of the actors in a framework that extends beyond contemporary self-descriptions.

Historical court proceedings should no longer be considered as stories »with an objective ending« but as forums »of cultural interaction«,[182] and archives »not as sites of knowledge retrieval but of knowledge production«.[183] What Kathryn Burns noted in her study on writing and power in colonial Peru also applies to the Imperial Aulic Council: »record making was not a straightforward, by-the-book matter. […] The archives [are] marked by the intervention of ›powerful hands‹ – and this much was clearly not just colonial.«[184] Despite this, however, one should not lose sight of the reproduction of law or denounce the early modern court's techniques of justification as mere farce. Instead, the goal is to reveal the conditions of the production of law »that shaped what could be written, […] what competencies were rewarded in archival writing, what stories could be told, and what could not be said«.[185]

This would open up a broad field for legal history, ranging from micropolitics to gift exchange and corruption, enabling researchers to observe the translations and intertextualities necessary for making epoch-specific contributions to a sociology of legal dogmatics. At the same time, such a combination of organisational sociology and the history of knowledge could represent a viable way of placing early modern central courts' production of law in a global historical context. For, despite all local differences, the judicial panels of civil law are first and foremost epistemic communities whose formal organisation shares many characteristics. For example, in the Spanish Council of the Indies, the president »enjoyed vast powers. The Ordenanzas of 1571 authorised him to distribute and assign cases to the councillors as he saw fit. They, in turn, analysed the petitions and documents and elaborated an ›opinion‹.«[186]

Here, too, we find the combination of a construction of facts by rapporteurs in advance of the collegial decision and an *ad hoc* distribution of business, which ensured a pronounced *ex ante* logic in the Imperial Aulic Council's decision-making process and facilitated the discreet translation of courtly norms into legal norms. Also for Hispanic Latin America one can easily find evidence of face-to-face communication between parties and councillors in their private homes.[187] It thus seems likely that central courts are examples of communities of practice that are amenable to glocalisation by current research. They allow us to »take the normative self-description of a community at its word and at the same time grasp the societal practice that addresses it«.[188] The rich archival records of the Imperial Aulic Council offer the best possible empirical starting conditions for this and could be used to develop the programme of *Europäische Rechtsgeschichte* into a legal history of Europe from a global historical perspective.[189] For

182 Herrup (1999) 6.
183 Stoler (2002) 90
184 Burns (2010) 142–143.
185 Stoler (2002) 91.
186 López Valencia (2020) 480.
187 See, for example, Herzog (2007) 190–191; Brendecke (2014) 139.
188 Möllers (2015) 436.
189 See Duve (2012).

whether we are researching normativity in Latin America or in the Holy Roman Empire, the same applies: »the more we go into the archive and learn about our sources and their subjects, the less any simplistic generalization is possible, and the richer our story lines become.«[190]

■

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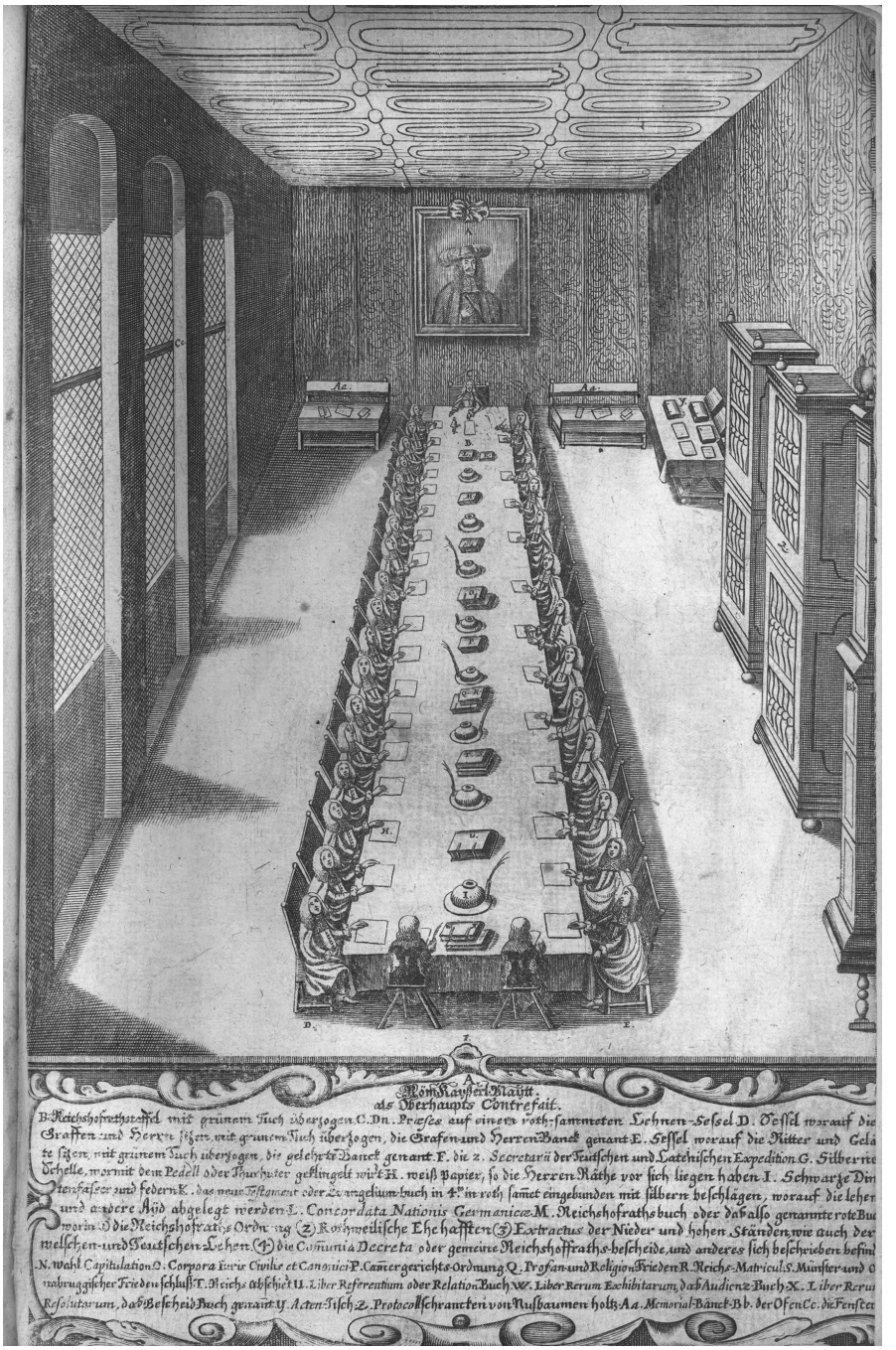


Fig. 1: Imperial Aulic Council meeting under Emperor Leopold I. Illustration from: Johann Christoph von Uffenbach, Tractatus singularis et methodicus de excelsissimo consilio caesareo-imperiali aulico, Frankfurt am Main 1700 (photo: Manfred Huber).

In a manner typical of the time, the Imperial Aulic Council's members were divided into a *Herrenbank* (noblemen's bench; left) and *Gelehrtenbank* (scholars' bench; right). The engraving demonstrates that already 300 years ago, joint deliberation was at the centre of the self-description of collegiate courts as epistemic communities. However, procedural analyses of collective judicial decision-making should not reproduce this view but instead emphasise the pronounced *ex ante* logic resulting from the allocation of cases to individual councillors as rapporteurs. It was they who carried out the most conflict-prone translations between different normative regimes in advance of the case reaching the Council's plenum. Their *Relationstechnik* (reporting technique) was the medium that inscribed these translations into the procedure and at the same time rendered them invisible.

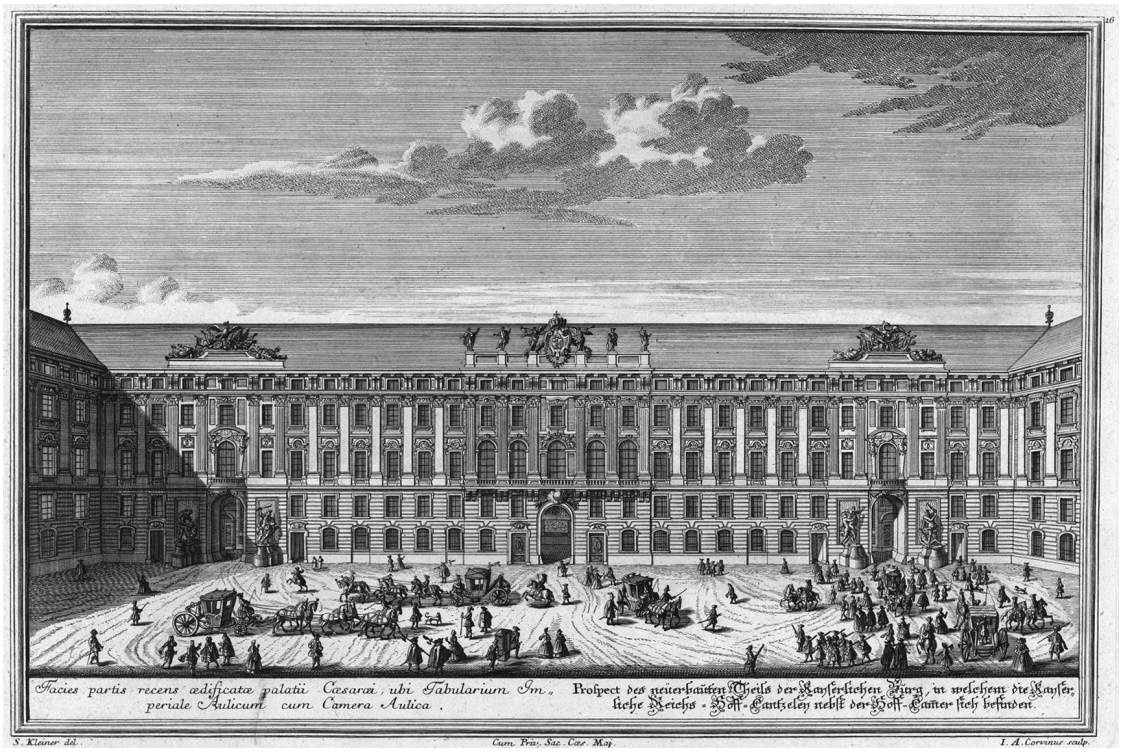


Fig. 2: The Imperial Chancellery Wing of the Vienna Imperial Palace, completed in 1730, which also housed the Imperial Aulic Council until 1806.
Copperplate engraving by Salomon Kleiner, 1733 (Wien Museum, Inv. No. 105443).

The Imperial Aulic Council was not a modern institution, but – like many other central courts of the early modern period – linked to the ruler's court, to which the Imperial Aulic Councillors belonged. It was thus the epistemic community of courtly society that formed the immediate context for the creation and utilisation of the legal knowledge embodied in the Council's records.


Fig. 3: Not a legal expert as such: Imperial Aulic Councillor Hermann von Questenberg with lute.
Copperplate engraving by Andreas Schmutzer, 1728 (Wien Museum, Inv. No. W 5339).

Questenberg, who also distinguished himself as a composer, was one of the many noblemen appointed to the Imperial Aulic Council's *Herrenbank* in the 17th and 18th centuries despite having limited legal knowledge. In 1712, von Questenberg's colleague Nikolaus Christoph von Lyncker accused him of passing the time at plenary sessions reading French novels. Under the spell of the professionalisation narrative, legal history has so far struggled to recognise that the judicial production of law remained dependent on the connections of noblemen like Questenberg.

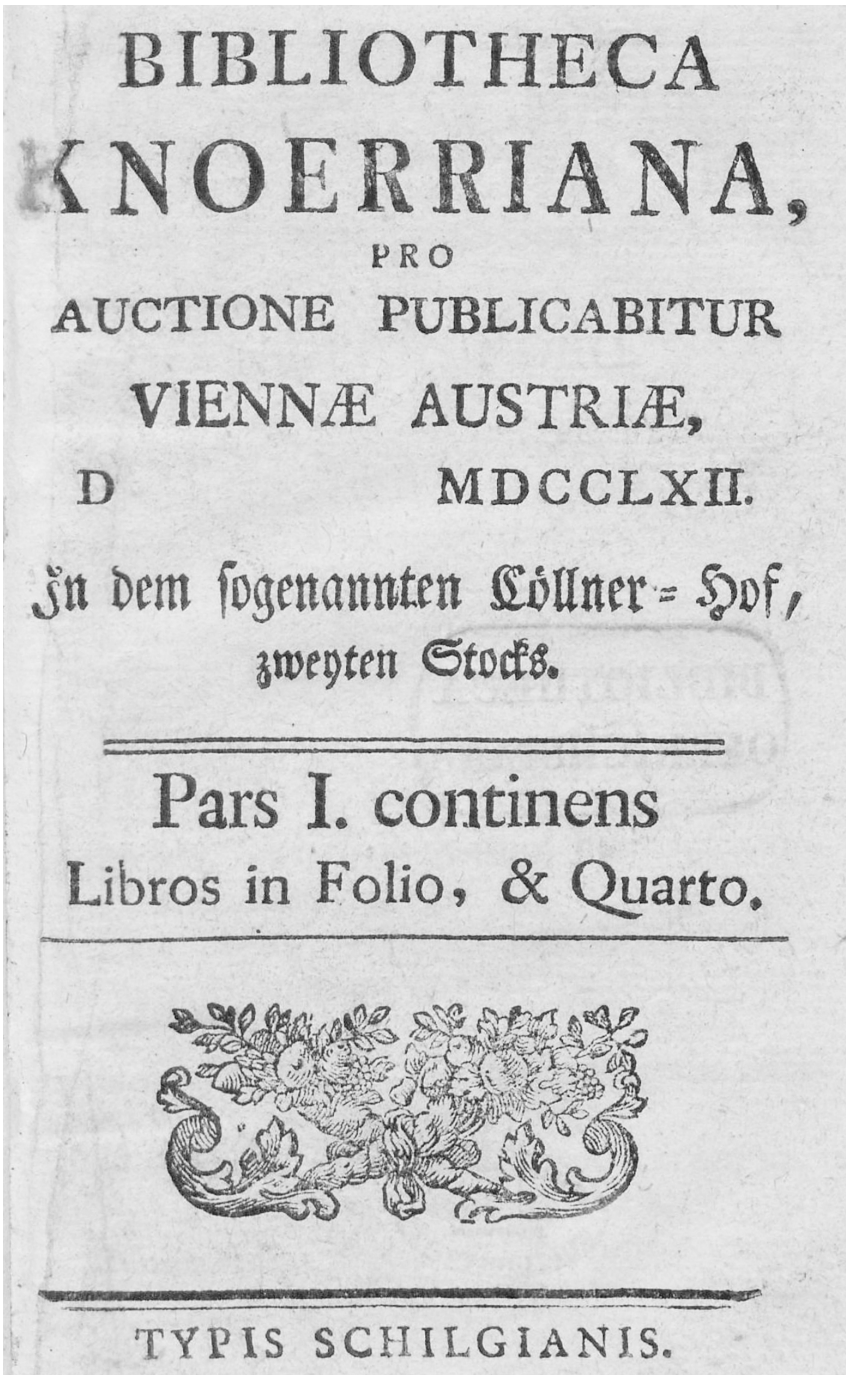
BIBLIOTHECA
KNOERRIANA,
PRO
AUCTIONE PUBLICABITUR
VIENNÆ AUSTRIÆ,
D MDCCLXII.
In dem sogenannten Cöllner-Hof,
zweyten Stocks.
Pars I. continens
Libros in Folio, & Quarto.
TYPIS SCHILGIANIS.

Fig. 4: Bibliotheca Knoerriana pro auctione publicabitur, Vienna 1762 (Berlin State Library – Prussian Cultural Heritage)

While Hermann von Questenberg plucked strings, Georg Christian von Knorr sat over his books, swotting up on law and history. Over the course of his life, the theologian, who was appointed to the Imperial Aulic Council in 1731, amassed a private library of more than 5200 volumes. This three-volume auction catalogue is the material artefact of his self-taught legal literacy, which paved the way to the centre of power for this son of a Swabian braidmaker. Knorr's father-in-law, Dr. utr. jur. Johann Christoph von Bartenstein, the *éminence grise* of Austrian foreign policy under Emperor Charles VI, provided support. At least some of the *Vota ad Imperatorem* of the Imperial Aulic Council, which scholars see as an indication of judicial autonomy and deliberative discussion culture, were de facto drafted in the Austrian Foreign Ministry.


Rechts=gegründete
EXCEPTIONES
Welche
Hr. Hoch = Fürſtl. Durchl.
Herrn
Herzogen
Chriſtian Ludewig
zu
Mecklenburg
bewogen
gegen des
Kayſerl. Reichs = Hoff = Raths
von Knörren
Perſon in Cauſis Mecklenburgicis
Sich zum
Juramento Perhorreſcentiæ
zu
offeriren.
Anno MDCCXXXIX.

Fig. 5: Frontispiece of a printed work by the Duke of Mecklenburg, 1739 (Rostock University Library).

The fact that the imperial palace took advantage of the *ex ante* logic of the Aulic Council's decision-making process by allocating business on the basis of interests did not go unnoticed by the disadvantaged parties. In a pamphlet in 1739, Duke Christian Ludwig of Mecklenburg accused the rapporteur in the case of the so-called »Mecklenburg estates conflict«, the Imperial Aulic Councillor von Knorr, of partiality. The publication belongs into the context of a general critique of corruption aimed at disambiguating the rapporteurs' micropolitical entanglements that began in the 18th century and culminated in the 19th century in the legal-political debate about the maxim of orality.

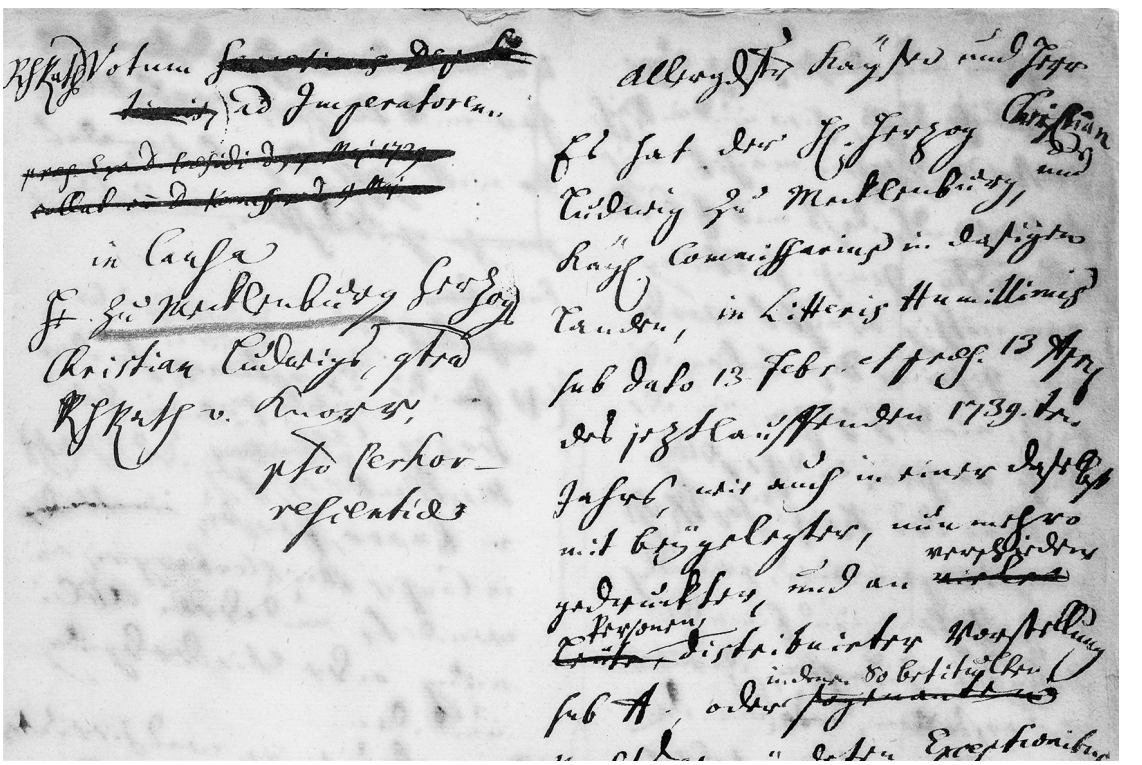

Fig. 6: Intertextuality in the mirror of the Concept of the *Votum ad Imperatorem* of 1 June 1739, in which the Imperial Aulic Council vigorously rejected the accusations of the Duke of Mecklenburg against Imperial Aulic Councillor von Knorr (ÖStA HHStA, RHR, Vota ad Imperatorem, K. 38, No. 17). At the top left the following words are visible: »Votum secretioris deputationis ad Imperatorem«. This became: »R[eichs]h[of]raths Votum ad Imperatorem«. This draft therefore shows that the *Votum* had already been finalised by an informal deputation on 9 May, i.e. around three weeks before the Council's plenary session, and moreover approved by the Emperor (»placet in toto«). The involvement of the Imperial Aulic Council was thus merely *pro forma*. Such translation practices were legal practices and therefore require legal analysis. History as a discipline cannot do this alone.


Fig. 7: *Resolutionsprotokolle* (minutes recording the plenary session's decisions) of the Imperial Aulic Council in the Haus-, Hof- und Staatsarchiv in Vienna (photo: Tobias Schenk).

»›What did you say? A minute? Drafted in my absence, after the event, by someone who was not even at the discussion. That's not bad. And why a minute, anyway? Was it official business?‹ ›No‹, said the schoolmaster, ›semi-official, the minute too is only semi-official, it was made only because with us there has to be strict order in everything. Anyway, there it is and it does you no honour.‹«
Franz Kafka, The Castle.