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Michael Kohlhaas or the Germans and Their Law

HEIKE JUNG *

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Abstract

Asked to pick a single representative 'German' piece for a discourse on 'Law and Literature' one almost inevitably ends up with Kleist's tale *Michael Kohlhaas*. It seems to be the literary incarnation of the German stance vis-à-vis the law. It is all about horses; it could just as well be about dogs. Kohlhaas fights a devastating battle, using legal means and outright violence, even warfare, for their recovery in good shape. Victorious eventually with his legal actions, he is happy to trade in his own life for this victory, thus giving an extreme example for the nice line between being in the right and pursuing this position with disproportionate rigour.

Of course, the interpretations of *Michael Kohlhaas* (which, in its complete version, dates of 1810) have varied from epoch to epoch as well as from reader to reader. It is not possible to rehearse the bulk of 'Kohlhaas literature'. In comparing legal cultures, it might be of interest to look into the question why such a somber story on the law forms part and will continue to form part of the German cultural heritage.

Key words

Proportionality; to be in the right; rigour; Rechtsstaat; autonomy of the reader; modernity of the Kohlhaas theme

Resumen

Si se tiene que elegir un único representante "alemán" para una ponencia sobre "derecho y literatura", es inevitable optar por la obra de Kleist, *Michael Kohlhaas*. Parece la encarnación literaria de la posición alemana hacia el derecho. El libro trata de caballos; también podría tratar sobre perros. Kohlhaas libra una batalla devastadora usando medios legales y la violencia pura y dura, incluso la guerra, para que se recuperen en buena forma. Finalmente resulta ganador mediante

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* Heike Jung is Professor Emeritus of Criminal Law at the University of Saarland. His publications include *Was ist Strafe?* (Baden-Baden: Nomos, 2002), *Richterbilder–Ein interkultureller Vergleich* (Baden-Baden: Nomos, 2006), *Kriminalsoziologie* (2nd ed. Baden-Baden: Nomos, 2007) and, recently, *Justiz und Komödie*, co-edited with Egon Müller and Heinz Müller-Dietz (Baden-Baden: Nomos, 2014).
Universität des Saarlandes, Rechts- und Wirtschaftswissenschaftliche Fakultät. Postfach 15 11 50. D-66041 Saarbrücken (Germany) heike.jung.saar@t-online.de

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acciones legales, está contento de dedicar su propia vida para conseguir esta victoria, dando así un ejemplo extremo de la línea que existe entre tener la razón y seguir esta posición con un rigor desproporcionado.

Por supuesto, las interpretaciones de *Michael Kohlhaas* (publicado en 1810) han variado de una época a otra, y de un lector a otro. No es posible revisar el grueso de la "literatura sobre Kohlhaas". Al comparar las culturas legales, podría ser interesante estudiar la razón por la que una historia tan sombría sobre el derecho forma parte y va a continuar formando parte del patrimonio cultural alemán.

Palabras clave

Proporcionalidad; tener la razón; rigor; estado de derecho; autonomía del lector; modernidad del tema de Kohlhaas

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1. Prologue

When the first general excitement about the invitation to attend a workshop on "Law and Literature" at Oñati had gone by, my task began to frighten me, since I was supposed to present a piece of literature that was symptomatic for the German approach to law. I realized immediately that I would inevitably end up with *Michael Kohlhaas*, Kleist's famous tale of 1810, a classic on the reading list of schools, an encounter which I had thus far successfully avoided.

Mandatory reading lists are indicators of the cultural heritage. Of course, generally speaking, I am familiar with Kleist's work and I share the general admiration for him. Yet, I have always considered *Michael Kohlhaas* to be heavy stuff, full of complicated characters, in short a bit too somber for me who rather needs optimistic boosters. I ventilated to opt for another one of Kleist works such us "Der zerbrochne Krug" ("The Broken Jug"), sort of a comedy, or "Prinz Friedrich von Homburg" ("Prince Frederick of Homburg"), a "Prussian" drama on obedience, with the advantage of a happy ending. I even considered to swap sides and to present a French farce instead.

At that point I said to myself: Heike, you cannot sneak out by the back door. I began to wonder why I had hesitated in first place. It probably had to do with the fact that I associate with "Law and Literature" fun and not duty. With *Michael Kohlhaas*, my only stimulus was indeed the old Prussian maxim that one should fulfill one's duties cheerfully. Also, *Michael Kohlhaas* would not really pass as a discovery, rather, within the community of German lawyers, it is a slightly overworked topic. This implies that you cannot start from scratch, since it is virtually impossible to totally disregard the bulk of learned literature on the subject. Finally, I accepted the challenge and worked myself through a weird, yet fascinating meandering story situated on the edge between good and evil, between "summum ius" and "summa iniuria".

Kleist (1777-1811) figures in many of his works as a herald of turmoil, catastrophes and disaster. Though a contemporary of Goethe and Schiller, he can therefore be considered a forerunner if not one of the foremost representatives of the dark side of the Romantic Age in literature, a side which has been hiding behind the common sentimental reading of this epoch and which has only recently been brought to our attention again.[1]

Michael Kohlhaas does not only form part of the German cultural heritage, the name of the protagonist has also entered into the German metaphorical language, since we speak of a Michael Kohlhaas to describe somebody who pursues his right at any price, a righteous person who has lost the sense of proportion. In that Kleist resembles Cervantes or Molière who have also created immortal characters with a proverbial touch, except that they have chosen a lighter confection. The Kohlhaas theme has attracted many other German writers to this day.[2] Its "modernity" is underscored by the fact that one of the entries at the Cannes film festival in 2013 is based on it.

2. My horses, my horses, my life for my horses[3]

The story leaves us in bewilderment. Due to its meandering course it is not easy to follow. It is clad into an old chronicle which makes it even more difficult to read, in particular because Kleist indulges in long sentences. Instead of following the chronological order I am going to present a more structured account which tries to bring across the characteristic features.

[1] E.g. by Alt (2010); also the exhibition staged at Frankfurt's Städel Museum on "Die dunkle Seite der Romantik" (9/26, 2012 to 1/20, 2013).
[2] Cf. Walser (1996) and more recently Krechel (2012).
[3] My overview is based upon the Reclam edition (Kleist 2003). For an English version cf. the German Classics edition by Mondial (Kleist 2007).

Michael Kohlhaas is not totally fictional. The story takes up a historical event. Of course, the form of a chronicle is somewhat a disguise for Kleist to present his own reading and to make it an exemplary lesson about law and justice, about authority and the individual. We find ourselves amidst the 16th century, an era with a weak if non-existent public authority, prerogatives of the nobility, a segmented territorial structure, latent or overt rebellious sentiments and movements in the population at large and a hampering justice system.

Asked to sum up the story in one sentence I am inclined to say: "it is all about horses." Yet, it could just as well be about dogs.[4] The somewhat longer version goes as follows: Kleist introduces Kohlhaas in the opening paragraph as one of the most righteous and the most terrible men of his time whose extreme sense of righteousness turned him into a robber and a murderer thus confronting us with the gist of the story right away.

Kohlhaas, a horse-dealer, was on his way to sell horses when he was, in Saxon territory, forced to stop at the Tronkas' possessions and asked to produce a transit pass. A regular traveler on these routes, this was all new to him. He returned in good faith to avail himself with such a pass only to be told that the castellan had played a trick on him; the whole story about the required transit pass was a fake. The castellan had pressured him to leave his well-fed horses as a security.

This is the starting point for Kohlhaas' legal struggle and his ensuing battle to recover his horses in their original well-fed shape, a battle which sways back and forth, a battle which, though eventually successful, from a legal point of view, ends up with Kohlhaas being beheaded for violation of the peace of the Holy Roman Empire.

We accompany Kohlhaas to the Squire's possessions where he finds his horses in a deplorable shape and his servant whom he had left there to take care of the horses beaten up by the Tronkas. Though he cautions himself not to undertake any precipitated action, he goes to court after having carefully weighed the pros and cons, asking for damages and the reinstatement of the horses in their prior state. He suffers a set-back: his claim is dismissed by a biased Dresden court, Kleist's first hint at the corrupt state of the judiciary at the time. A first plea for support to the Elector of Brandenburg, his home base, fails. A second move into this direction ends in disaster. His wife who had offered to make use of her old personal connections is fatally wounded in the course of this undertaking. At this point, Kohlhaas decides to take the law into his own hands under the cover of a formal resolution taken and issued all by himself. What, in the beginning, has only been aiming at the Tronkas, now turns into an extended vengeful campaign of destruction, arson and murder, if not of war. Even the whole city of Wittenberg is being struck by it. Luther tries to dissuade Kohlhaas from his activities. In vain. Yet, thanks to Luther's good services, the Saxon Elector is prepared to grant a comprehensive amnesty and a re-examination of the case if Kohlhaas disbanded his private army, a move which, for a short period of time, gives hope for some sort of a settlement. The formula of the Elector's pardon signals that we have to do with two lines which are, however, inextricably linked, the law case on the one hand and Kohlhaas' belligerent activities on the other. Whereas in Kohlhaas' eyes one conditions the other, we sense already that these lines may lead to different ending points. Since Kohlhaas' men keep using his case as a cover-up for all sorts of criminal activities and since the Tronkas' relations still have their say at the Saxon Elector's Court, amnesty will not be the last word in the matter.

And what about the horses? Doubts come up whether their *restitutio in integrum* is still a realistic perspective, since they are said to be on the verge of dying.

[4] Cf. "Kohlhaas, dem es nicht um die Pferde zu tun war – er hätte gleichen Schmerz empfunden, wenn es ein Paar Hunde gegolten hätte..." (Kleist 2003, p. 20).

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Yet, the course of events is about to take a new unexpected diplomatic turn: at last Brandenburg's Elector decides to engage himself on Kohlhaas' behalf. The Saxons also try a piece of tricky diplomacy inasmuch as they report Kohlhaas illicit activities to the Emperor at Vienna hoping for imperial intervention since the Emperor is not bound by the Saxon amnesty.

To cut a long story short: The last two pages confront us with a happy ending of a special kind. We could also speak of a final show-down. In a ceremonial setting, Kohlhaas finally receives justice on all points only to be beheaded for violation of the Emperor's peace. At peace with himself and the world, Kohlhaas advances to the block. - In their extraordinary density these two pages incarnate the "message" of the tale. Our thoughts go back to the superb laconic presentation of our "hero" in the beginning which underlines once again the importance of the introduction and of the conclusion in the dramaturgy of any piece of writing.

3. Kleist's *Michael Kohlhaas* as a "living instrument"[5]

Any piece of literature is liable to be interpreted differently in the course of history. Of course, the text itself will fix a frame. Also its "trademark" in the literary discourse will remain unchanged. Still, the relevance of the piece as well as its reading may shift over time, due to the interaction with the changing social architecture of the world and the changing perspectives of its readers who will, accordingly, be caught in a different cultural web. Though this effect will be more obvious in the field of drama where the *mise-en-scène* will tend to oscillate between historical authenticity and modern adaptations, it applies to any type of literature. As a matter of fact, the longevity of a piece depends on a certain "adaptability" which inhibits that it will fall into desuetude.

Of course, the readings may not only vary from epoch to epoch, but also from person to person. Again, the story will profit from a certain openness which allows for a personal interaction with the reader. At the same time, there should be enough common ground to allow for a general debate. To put it differently: it matters that the piece generates a shared set of associations, at best strong feelings.

This said, lawyers have always had strong feelings about Kohlhaas. The first and perhaps most prominent voice in the Kohlhaas debate has been that of Rudolph von Ihering who, in his "Kampf ums Recht" has cherished Kohlhaas as a martyr for the law: "Aber auch derjenige, den seine edle, sittliche Natur gegen diesen Abweg schützt, wie Michael Kohlhaas, wird Verbrecher, und indem er die Strafe desselben erleidet, Märtyrer seines Rechtsgefühls." (Ihering 2012, p. 64) Some hundred years later the philosopher Eugen Bloch strikes a similar pseudo-heroic tune in relating Kohlhaas to Immanuel Kant and to Don Quijote at the same time: "Kohlhaas ist der Immanuel Kant der Rechtslehre – als Don Quijote." (Bloch 1961, p. 96).

On the whole, the interpreters have, in particular in our times, been more cautious in their comments underlining the ambivalences and contradictions of the text (Müller-Dietz 2010, p. 121 et seq.). At least Scholdt - from the literature side - , Müller-Dietz and Voßkuhle/Gerberding converge in their assessment that these ambivalences and contradictions favour the reader's autonomy to make up his own mind of the story (Scholdt 1991, p.131; Müller-Dietz 2010, p. 129; Voßkuhle, Gerberding 2012, p. 919),a popular position in the contemporary literary discourse anyway.

4. My personal account

"Law and Literature"[6] has become a special discipline with its own methodological repertoire, its controversies and categories. I do not intend to rehearse these

[5] Term borrowed from the methodological repertoire of the European Court of Human Rights.

disciplinary niceties in our context. I subscribe to the idea that the rendezvous of law and literature is an opportunity to come forward with one's own freely floating associations. I leave it to others to reconstruct the philosophical debate which may have stimulated Kleist at his time. Likewise, I do not consider it overly illuminating to revisit the 16th century's still amorphous state of the legal system. Finally, I do not want to embark onto the slightly anachronistic test of how a contemporary Kohlhaas would cope with today's world of the law.[7] My associations are of a different nature, partly owed to the particular character of our international gathering, partly owed to my own preferences for friendly settlements.

Torn between the two poles of the plot, the corrupt legal system on the one hand and Kohlhaas' total loss of proportion on the other, I am, frankly speaking, more attracted by the latter theme. This is not because I am a timid, peace-loving character who cannot understand, not to speak of condone, such an outburst of violence. It is because I believe that Kleist's novella has contributed to the rise of the principle of proportionality as one of the over-arching principles not only of the German Constitution, but of social life as such. Of course, we may, on first sight, take the story as an underpinning of the American colloquialism "If you don't move your baggage, your baggage won't move". Yet, a more dispassionate reading brings the proportionality theme into the foreground. It can well be that my outright rejection of Kohlhaas' vengeance crusade is the consequence of a more refined sense of proportionality which may well have been pushed by the Kohlhaas story itself. In other words: Kohlhaas has helped to shape the normative aspirations of our society and, in the long run, promoted the European success story of the principle of proportionality. We might at some stage have to take a deeper look into this question, i. e. the impact of literature and film on the development of social standards.

The second aspect that I want to address has to do with the "national character" of the plot. Michael Kohlhaas is, as I have stated in the beginning, a more or less inevitable choice when it comes to (re)present Germany in a "Law and Literature" contest. Why have the French produced marvelous comedies ridiculing the justice system whereas German pieces related to law and justice are normally bound to end up in deep waters? This holds even true for "The Broken Jug", Kleist's comedy on a justice theme which rather falls into the category of "black comedies."[8]

Of course, the French take law and justice seriously, too. French writers and philosophers have, throughout history - take Voltaire, Zola, Camus and Sartre -, battled against injustice (Sapiro 2011). Still, it still looks as if law played a more important and somewhat different role in the German social and political context.[9] As we all know, Germans want to be in the right which need not always be a virtue. In that sense, we may take *Michael Kohlhaas* as an illustration of the destructive potential of this attitude.

If we extrapolate this German priority onto the level of state construction, we find ourselves in a discourse on the role of the judiciary. Vesting hope in the Courts is a tradition of long-standing in Germany embodied in the famous political slogan in 18th century Prussia "Il y a des juges à Berlin",[10] a slogan which stands in marked contrast to the historical French formula "Dieu nous préserve de l'équité des Parlements". According to a dictum of the Swiss criminal lawyer Peter Noll, in Germany it is democracy, in Switzerland it is the Rechtsstaat which is somewhat

[6] Cf. inter alia Müller-Dietz (1990), Jung (1991), Mölk (1996).
[7] See the attempt by Voßkuhle and Gerberding (2012, p. 922).
[8] Cf. recently Müller-Dietz (2014, p. 49).
[9] Well captured by the title of Voßkuhle's Herrenhausen Lecture "Freiheit und Demokratie durch Recht" (Voßkuhle 2013).
[10] Related to the struggle for independence of the courts in connection with the famous "Müller Arnold" case; e.g. Dießelhorst (1984).

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deficient.[11] Though this statement may be exaggerated, there is something to it: This may also be illustrated by the dominant role of the Bundesverfassungsgericht in Germany. Take for example the controversial issue of gay marriages: in France, the legislator has, after an agitated public and parliamentary debate, decided to allow gay marriages; the Conseil constitutionnel subsequently dismissed the "recours". In Germany, the legislation still falls short of allowing gay marriages. I predict that the Bundesverfassungsgericht will in the near future "force" the legislator to move ahead. Such has been the course of events with many politically contested cases in the past. Not to speak of the fact that our Federal Constitutional Court has, due to the German inclination to transform political issues into legal questions, become a major player on the European scene.

Of course, Kohlhaas takes the law into his own hands. In that sense, it is not a story about "Verrechtlichung". Still, it is a story about the law and, contrary to some French comedies, it is a sad story about the law. Yet, perhaps these French comedies like "Les plaideurs" (Witz, Hlawon 2014) and "La Farce de Maître Pathelin" (Jung 2014, p. 17) are the exception to the rule. By and large, "Law and Literature" is rather dominated by serious plots. In that sense, Kohlhaas and his many literary followers throughout Europe[12] stand for an over-sensitivity to legal questions which may end in personal tragedy.

This European "Kohlhaas reception" may indicate that I am perhaps overstating my point, i. e. the "Germanness" of the Kohlhaas story. Going to court with each and every conflict is, as we all know, a general current throughout the so-called Western world. Also, despite a certain continuity in the German approach vis-à-vis the law, there is also discontinuity. Speaking of the Rechtsstaat, we should not disregard the fact that the Rechtsstaat has been trampled to death during the Nazi period. Yet, this disastrous experience has given birth to a new and more vigorous Human Rights oriented concept of the Rechtsstaat and has sharpened our senses for its implementation in everyday life. These normative aspirations tell us a different emancipatory story about law and justice, calling for responsible citoyens and not for a Michael Kohlhaas.[13]

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[11] "In Deutschland ist die Demokratie unterentwickelt, in der Schweiz der Rechtsstaat." (Noll 1985, p. 237).
[12] Listed by Müller-Dietz (2010, p. 130).
[13] Cf. also Voßkuhle and Gerberding (2012, p. 925).

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