

LAW AND PROTESTANTISM

The Legal Teachings of the Lutheran Reformation

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With a foreword by

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Illustrations

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Canon law and civil law on the eve of the Reformation

In his 1520 manifesto, *To the Christian Nobility of the German Nation Concerning the Reform of the Christian Estate*, Martin Luther described the law of Germany as a “wilderness” of confusion. Confronted by the masses of “rambling and farfetched” laws that prevailed in his day, Luther threw up his hands in frustration as he sought to map out appropriate legal reforms. He scratched a couple of quick lines about the superiority of civil law to canon law, and of territorial law to imperial law. He spoke of the need to tailor laws to the “gifts and peculiar characteristics” of local polities. But then, uncharacteristically, Luther gave up. He recommended simply that “wise rulers, side by side with Holy Scripture, would be law enough,” and expressed hope that others would give “more thought and attention to the matter.”¹ Luther himself would soon return to the matter of law reform with a vengeance, but for the moment his mind was on more pressing questions – not least the growing perils to his own body and soul occasioned by the papal bull calling for his excommunication.

Luther had ample reason to be frustrated in his attempts to take the measure of the German law of his day. In 1520, the German-speaking lands of the Holy Roman Empire had no fewer than 364 registered polities, most with their own local legal systems. Nearly half of these were ecclesiastical polities, run by powerful prince-bishops and prelates, who exercised both spiritual and temporal jurisdiction within their domains. The remainder were civil polities of various sorts and sizes – several large and powerful principalities, scores of lesser principalities, duchies, graveships, lordships, and free cities, most with their own forms of local civil law.²

¹ LW 44:203–4.

² The numbers are drawn from the imperial tax schedule (*Reichsmatrikel*) of the Diet of Worms, reprinted in Gerhard Benecke, *Society and Politics in Germany, 1500–1700* (London, 1974), appendix II, 382–93. For alternate numbers, based on other imperial and territorial registers, see Holborn, *A History of Germany: The Reformation*, 39 (120 ecclesiastical princes and prelates, 30 secular princes,

Germany was part of both the Western Christian Church and the Holy Roman Empire. Accordingly, it was subject to the jurisdiction of both the pope and the canon law, and the emperor and the imperial law. At the turn of the sixteenth century, the canon law was considerably more effective and authoritative. Germany was a rather conservative Catholic bastion at the time, and German bishops and prelates were more faithful to Rome than many of their foreign co-clerics. Particularly in ecclesiastical principalities, the general canon law norms of the pope and the Church councils, and the local canon law norms of German bishops and local synods, dominated spiritual and temporal life. A hierarchy of Church courts and other administrative offices saw to the effective implementation of canon law, with a refined system of litigation, judgment, and appeal.

By contrast, the law of the Holy Roman Emperor was increasingly subject to the local control of the German princes, cities, and estates. The emperor did pass several “imperial reformations” and “peace statutes” for Germany in the later fifteenth century, and in 1495 put in place an Imperial Supreme Court to enforce imperial law among the feuding German estates. But rather little came of these efforts prior to the middle of the sixteenth century. Considerably more effective were some of the so-called “legal reformations” of the cities and territories of late medieval Germany. These legal reformations both consolidated the legal power and prestige of local princes and city councils and empowered some of them to impose increasing restrictions on the power and property of local bishops and prelates. But in circa 1500 neither the Holy Roman Emperor nor any of these local princes or city councils could match the power or the prestige of the Church and its canon law.

The task of this brief chapter is to describe (1) the nature of canon law and the sources of ecclesiastical jurisdiction; (2) the forms of civil law and the impetus for the new legal reformations; and (3) the increasing friction between civil law and canon law that helped prepare the way for the Lutheran Reformation.

100 plus counts and dukes, and 66 cities); *New Cambridge Modern History* vol. 1 (Cambridge, 1970), 194 (6 electors, 120 prelates, 30 lay princes, 140 counts and lords, 85 towns); F. R. H. DuBoulay, *Germany in the Later Middle Ages* (London, 1983), 93–4 (7 electoral and 25 secular principalities, 90 archbishoprics, bishoprics, and abbeys, 100-plus countships, and many lesser lordships); Ozment, *The Age of Reform*, 190ff. (75 free cities and roughly 3,000 towns). The German-speaking regions of the Empire included not only modern-day unified Germany, but also sections of the modern-day Netherlands, Switzerland, Austria, Slovakia, and the Czech Republic. For maps, see *The New Cambridge Modern History*, 16:66–7, 122–3; Geoffrey Barraclough, *The Origins of Modern Germany* (New York, 1957), 359–60.

CANON LAW

On the eve of the Lutheran Reformation, the Catholic Church was a formidable legal and political body that ruled throughout much of Germany. In 1517, the German-speaking sections of the Holy Roman Empire were divided among three electoral territories, four archbishoprics, forty-six bishoprics, and eighty-three monasteries and other prelaties. The three electoral territories of Cologne, Mainz, and Trier, and thirty of the bishoprics – collectively comprising about a quarter of the land of Germany – were ecclesiastical principalities, where prince-bishops ruled without strong local civil rivals. The remaining ecclesiastical polities overlapped with civil polities, and clerics and magistrates ruled concurrently.³ The Church operated most of the schools, hospices, almshouses, and charities in Germany through its cathedrals, monasteries, chantries, and ecclesiastical guilds. Thousands of clerics served in the Church, many of them trained in both theology and canon law in one of the dozen German universities that had been chartered by the Church, or abroad in Italy, France, Spain, or the Netherlands.⁴ In 1500, canon law dominated the law faculties of the German universities: the majority of chairs were occupied by canonists, and the majority of law students pursued canon law studies.⁵

With this elaborate structure, the Church claimed a vast *spiritual* jurisdiction in Germany. The Church claimed exclusive personal jurisdiction over clerics and monastics, over Jews, Muslims, and heretics, over transient persons like pilgrims, students, crusaders, sailors, and foreign merchants, and over such *personae miserabiles* as widows, orphans, and the poor. It also claimed subject matter jurisdiction over religious doctrine

³ Benecke, *Society and Politics*, 382–93; Willy Andreas, *Deutschland vor der Reformation*, 5th edn. (Berlin, 1932), 61 ff.; Lawrence G. Duggan, *Bishop and Chapter: The Governance of the Bishopric of Speyer to 1552* (New Brunswick, NJ, 1978), 3ff.

⁴ The thirteenth German university, at Wittenberg, was not chartered by the church on its establishment in 1502. See Heiko A. Oberman, “University and Society on the Threshold of Modern Times: The German Connection,” in James M. Kittelson and Pamela J. Transue, eds., *Rebirth, Reform, and Resilience: Universities in Transition, 1300–1700* (Columbus, OH, 1984), 19, 28. On the training of canon lawyers in Germany and abroad, see Stölzel, 1:45–111; Rainer C. Schwinges, *Deutsche Universitätsbesucher im 14. bis 15. Jahrhundert. Studien zur Sozialgeschichte des alten Reiches* (Stuttgart, 1986); Erich Genzmer, “Kleriker als Berufsjuristen im späten Mittelalter,” in *Etudes d’histoire du droit canonique dédiées à Gabriel le Bras*, 2 vols. (Paris, 1965), 2:1207–36.

⁵ See generally Stintzing, 21ff.; Stobbe, 2:16ff.; Coing, 1:835–46. Karl H. Burmeister, *Das Studium der Rechte im Zeitalter des Humanismus im deutschen Rechtsbereich* (Wiesbaden, 1974), 31–57, 73–7, 181–93, shows that in pre-Reformation Germany, on average, 60% of law faculty chairs were devoted to canon law study, and the vast majority of students pursued either the *doctor juris canonici* or *doctor juris utriusque*.

and liturgy; ecclesiastical property, patronage, benefices, and tithes; clerical ordination, appointment, and discipline; sex, marriage, and family relations; wills, testaments, and intestacy; oaths and pledges of faith; and a host of moral offenses against God, neighbor, and self. The Church repeated its claims of spiritual jurisdiction in numerous concordats and letters from the later thirteenth century onward.⁶

The Church also claimed *temporal* jurisdiction over subjects and persons that fell within the concurrent jurisdiction of one or more civil authorities. Through prorogation or choice-of-law provisions in contracts or treaties, or through prorogation agreements executed on the eve of trial, parties could mutually agree to litigate their civil disputes in accordance with canon law. Through removal procedures, cases could be transferred from a civil court to a Church court if the civil relief or procedures available were adjudged unfair or unfit.⁷

These jurisdictional claims rendered Church officials both legislators and judges in Germany. From the twelfth century onward, Church authorities issued a steady stream of papal decretals and bulls, conciliar decrees and edicts that were to prevail throughout Western Christendom. These general legislative documents circulated singly and in heavily glossed German collections. A formidable body of supplementary legislation promulgated by German bishops and synods also circulated, both in original form and in glossed local collections and pastoral handbooks.⁸ Bulky confessional manuals by Johannes von Freiburg, Johannes von Bruder Berthold, Angelus de Clavasio, and others provided elaborate summaries and illustrations of canon law rules.⁹ Handsomely decorated handbooks such as *The Decretal Pearl*, *The Golden Compendium*, and *The Abridged Decretum and Decretals* provided useful introductions to canonical legislation.¹⁰ More seasoned readers could turn to the learned

⁶ See Udo Wolter, "Amt und Officium in mittelalterlichen Quellen vom 13. bis 15. Jahrhundert: Eine begriffsgeschichtliche Untersuchung," *ZSS KA* 78 (1988): 246; Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA, 1983), 260ff.; Coing, 1:467–504, 835–46.

⁷ Winfried Trusen, *Anfänge des gelehrten Rechts in Deutschland. Ein Beitrag zur Geschichte der Frührezeption* (Wiesbaden, 1962), 63ff.

⁸ On the development of the *Corpus iuris canonici* (so named for the first time in 1671), see Coing, 1:835–46, 2/1:615, 664–7; Roderich von Stintzing, *Geschichte der populären Literatur des römisch-kanonischen Rechts in Deutschland am Ende des fünfzehnten und im Anfang des sechszehnten Jahrhunderts* (Leipzig, 1867) 7–50, 151–96; Stobbe, 2:17ff.

⁹ See lists in Ludwig Hain, *Repertorium bibliographicum in quo libri omnes ab arte typographica inventa usque ad annum MD typis expressi ordine alphabetico vel simpliciter enumerantur vel adcuratius recensentur*, 4 vols. (Milan, 1948) and discussion in Trusen, *Anfänge*, 135ff.; Thomas N. Tentler, *Sin and Confession on the Eve of the Reformation* (Princeton, NJ, 1977), 28ff.

¹⁰ *Margarita decreti seu tabula martiniana*. . . (Erlangen, 1481); *Repertorium aureum mirabili artificio contextum continens titulos quinque librorum decretalium* (Cologne, 1495); Paulus Florentinus, *Breviarium decretorum et decretalium* (Louvain, 1484).

commentaries and opinions of Johannes Andreae, Sebastian Brant, and scores of other German canonists whose writings circulated widely in early sixteenth-century Germany given the advent of printing.¹¹

Church courts adjudicated cases in accordance with the substantive and procedural rules of the canon law. Most cases were heard first in the consistory court, presided over by the archdeacon or a provisory judge. Major disputes, however, involving annulment, heresy, or clerical felonies, were generally heard by the consistory court of the bishop, presided over by the bishop himself or by his principal official. Periodically, the pope or a strong bishop would deploy itinerant ecclesiastical judges, called *inquisitores*, with original jurisdiction over discrete questions that would normally lie within the competence of the consistory courts. The pope also sent out his legates who could exercise a variety of judicial and administrative powers in his name. Cases could be appealed up the hierarchy of Church courts, ultimately to the papal rota. Cases raising particularly serious or novel questions could be referred to distinguished canonists or law faculties called assessors, whose learned opinions (*consilia*) on the questions were often taken by the Church court as edifying if not binding.¹²

The Church's jurisdictional claims to make and enforce canon law rested on three main arguments.

First, the Church predicated its jurisdictional claims on its authority over the sacraments. Since the twelfth century, theologians had recognized seven liturgical sacraments: baptism, confirmation, penance, eucharist, marriage, ordination, and extreme unction, a sacramental theology finally and formally confirmed by the Council of Trent (1545–63). These seven liturgical sacraments, unlike other sacred symbols and rituals, were considered to be, in Peter Lombard's words, both "signs" and "causes" of God's grace, which Christ had instituted for the sanctification of His Church.¹³ If properly administered and received, sacraments transformed the souls of their participants and conferred sanctifying grace upon the Christian community. The administration of such solemn ceremonies could not turn simply on the predilections of parish priests or the preferences of individual believers. Christ had vested authority over the sacraments in St. Peter and, through apostolic succession, in the papal and other ruling offices of the Church. The pope and his clergy thus

¹¹ See discussion in Stintzing, *Literatur*, 451–62.

¹² See sources and discussion in James R. Sweeney and Stanley A. Chodorow, eds., *Popes, Teachers, and Canon Law in the Middle Ages* (Ithaca, NY, 1989).

¹³ Petrus Lombardus, *Libri IV sententiarum*, 2nd rev. edn. (Florence, 1916), bk. 4, Dist. 2.1. See further Joseph Martos, *Doors to the Sacred: A Historical Introduction to Sacraments in the Catholic Church* (Garden City, NY, 1981), 65–96.

had authority to promulgate and enforce canon law rules (literally to “speak the law” – *jus dicere*) that would govern sacramental participation and procedure.

The Church had exercised this jurisdiction over the sacraments since apostolic times, and with increasing alacrity since the twelfth century. By 1517, the Church had woven around certain sacraments whole systems of canon law rules and procedures. The sacrament of marriage supported the canon law of sex, marriage, and family life. The sacrament of penance supported the canon law of crimes and torts (delicts) and, indirectly, the canon law of contracts, oaths, charity, and inheritance. The sacrament of ordination became the foundation for a refined canon law of corporate rights and duties of the clergy. The sacrament of baptism and confirmation undergirded a constitutional law of natural rights and duties of Christian believers.¹⁴

Secondly, the Church predicated its jurisdictional claims on Christ’s famous delegation to the Apostle Peter: “I will give you the keys of the kingdom of heaven, and whatever you bind on earth shall be bound in heaven, and whatever you loose on earth shall be loosed in heaven.”¹⁵ According to conventional canonical lore, Christ had conferred on St. Peter two keys: a key of knowledge to discern God’s word and will, and a key of power to implement and enforce that word and will throughout the Church. St. Peter had used these keys to help define the doctrine and discipline of the apostolic Church. Through apostolic succession, the pope and his clergy had inherited these keys to define the doctrine and discipline of the contemporary Church. This inheritance, the canonists believed, conferred on the pope and his clergy a legal power, a power to make and enforce canon laws.¹⁶ “In deciding cases the authority of the Roman pontiffs prevails,” wrote a thirteenth-century canonist, “for . . . not only knowledge is needed, but also power is needed . . . power, that is jurisdiction.”¹⁷

This argument of the keys readily supported the Church’s claims to subject matter jurisdiction over core spiritual matters of doctrine and liturgy – the purpose and timing of the mass, baptism, eucharist,

¹⁴ See generally Paul Wilpert, ed., *Lex et Sacramentum im Mittelalter* (Berlin, 1969); Peter Landau, “Sakramentalität und Jurisdiktion,” in Gerhard Rau et al., eds., *Das Recht der Kirche*, 3 vols. (Gütersloh, 1995), 2:58–95; Berman, *Law and Revolution*, 165–254; R. H. Helmholz, *The Spirit of the Classical Canon Law* (Athens, GA/London, 1996), 200–28.

¹⁵ Matthew 16:19 (RSV).

¹⁶ Brian Tierney, *The Origins of Papal Infallibility, 1150–1350* (Leiden, 1972), 39ff.

¹⁷ Quoted by Brian Tierney, *Religion, Law, and the Growth of Constitutional Thought, 1150–1650* (Cambridge, 1982), 32.

confession, and the like. The key of knowledge, after all, gave the pope and his clergy access to the mysteries of divine revelation, which, by use of the key of power, they communicated to all believers through the canon law. The argument of the keys, however, could be easily extended. Even the most mundane of human affairs ultimately have spiritual and moral dimensions. Resolution of a boundary line dispute between neighbors implicates the commandment to love one's neighbor. Unaccountable failure to pay one's civil taxes or feudal dues is a breach of the spiritual duty to honor those in authority. Printing or reading a censored book is a sin. Strong clergy, therefore, readily used the argument of the keys to extend the subject matter jurisdiction of the Church to matters with more attenuated spiritual and moral dimensions, particularly in jurisdictions where they had no strong civil rivals.¹⁸ A 1435 declaration by the Archbishop of Mainz, for example, claimed

jurisdiction over all and individual cases, criminal and civil, spiritual and temporal, beneficial and profane . . . and [over] all matters [involving] prelates, chapters, assemblies, corporations, universities, as well as individual persons, clerics and laymen, of whatever status and grade, dignity and preeminence, by reason of orders or condition.¹⁹

Thirdly, the Church predicated its jurisdictional claims on the belief that the canon law was the true source of Christian equity. Canon law, in the words of the early sixteenth-century jurist Nicolaus Everardus, was rooted in "the teachings of the Bible, the Church Fathers, and the seven ecumenical councils, and inspired by the Holy Spirit." Civil law, by contrast, was of "pagan origin" and inspired by "secular reason." In the minds of many canonists, therefore, canon law was perforce superior in authority and in sanctity. Civil law was perforce "secondary, subordinate, and subsidiary."²⁰

The canon law was considered not only a Christian law but also an equitable law. Late medieval canonists referred to it variously as "the mother of exceptions," "the epitome of the law of love," and "the mother of justice." As the mother of exceptions, canon law was flexible, reasonable, and fair, capable either of bending the rigor of a rule in an individual case through dispensations and injunctions, or punctiliously insisting on

¹⁸ See examples in Trusen, *Anfänge*, 45ff.

¹⁹ Quoted by Georg May, *Die geistliche Gerichtsbarkeit des Erzbischofs von Mainz im Thüringen des späten Mittelalters* (Tübingen, 1950), 111.

²⁰ Nicolaus Everardus, *Loci argumentorum legales* (Amsterdam, 1603), locus 130. See further L. J. van Apeldoorn, *Nicolaas Everaerts (1462–1532) en het recht van zijn tijd* (Amsterdam, 1935), 9–14.

the letter of an agreement through orders of specific performance or reformation of documents. Canon law thereby “smoothed the hard and coarse edges of strict Roman [i.e., civil] law,” in Everardus’ words.²¹ As the epitome of love, canon law afforded special care to the disadvantaged – widows, orphans, the poor, the handicapped, abused wives, neglected children, maltreated servants, and the like. It provided them with standing to press claims in Church courts, competence to testify against their superiors without their permission, methods to gain succor and shelter from abuse and want, opportunities to pursue pious and protected careers in the cloister.²² As the mother of justice, canon law provided a method whereby the individual believer could reconcile himself or herself at once to God and to neighbor. “Herein lies the essence of canonical equity,” Eugen Wohlhaupter maintains, and perhaps the principal reason why litigants would tend to be drawn to Church courts over civil courts. Church courts treated both the legality and the morality of the conflicts before them. Their remedies enabled litigants to become “righteous” and “just” not only in their relationships with opposing parties and the rest of the community, but also in their relationship to God.²³

This system of canon law and ecclesiastical jurisdiction was not without ample detractors, both within the Church hierarchy and without. As early as 1324, for example, Marsilius of Padua issued a withering attack on the Church’s claims to temporal jurisdiction and the papacy’s claims to superiority within the clerical hierarchy. These views were echoed by a number of later critics in the German Empire, notably John Hus of Prague and Nicholas of Cusa, who spent a good deal of his career in Germany.²⁴ Nicholas of Cusa also laid the foundation for Lorenzo Valla’s famous exposure of the forged fourth-century “Donation” of power by Emperor Constantine to Pope Sylvester. This Donation of Constantine had been a key early canonical text that supported a whole welter of later medieval arguments for the superiority of the pope to the emperor, and of the spiritual power to the temporal power. This philological deconstruction was of a piece with several other humanist

²¹ Ibid., 12. See further sources quoted in Pier Giovanni Caron, “Aequitas et interpretatio dans la doctrine canonique aux XIII^e et XIV^e siècles,” *Monumenta Iuris Canonici Series C* 4 (1971): 131.

²² Berman, *Faith and Order*, 55–82.

²³ Eugen Wohlhaupter, *Aequitas canonica. Eine Studie aus dem kanonischen Recht* (Paderborn, 1931), 16–17. See also Stobbe, 2:110ff.; Trusen, *Anfänge*, 22ff.

²⁴ See Marsilius of Padua, *The Defensor Pacis Translated with an Introduction*, trans. and ed. Alan Gewirth (New York, 1956), Discourse II. For its circulation in fifteenth-century Germany, see Hermann Heimpel, “Characteristics of the Late Middle Ages in Germany,” in Gerald Strauss, ed., *Pre-Reformation Germany* (New York, 1972), 43–72, at 59ff.; Paul E. Sigmund, “The Influence of Marsilius of Padua on xvth-Century Conciliarism,” *Journal of the History of Ideas* 23 (1962): 392.

challenges to the authenticity of other important canon law texts, and with the agitation for the development of critical editions of the original canonical sources, freed from the (sometimes self-serving) medieval glosses and commentaries.²⁵

These humanist attacks on some of the canon law texts also provided fuel for the growing movement of conciliarism within the Church. Since 1378 the papacy had been bitterly divided, with rival popes in Avignon and Rome, and for a brief time a third rival pope in Pavia. Given the widespread confusion within the Church hierarchy, and in the operation of the canon law, Emperor Sigismund in 1415 convoked at Constance the first of a series of great Church councils that declared the Church council to be the final authority over Church polity and canon law, despite papal disapproval. This was partly a fresh canonical and theological invention to restrict papal tyranny and to restore the canon law to its preeminent authority in Christendom. But it was also a return to long-observed earlier canonical texts that the humanists had helped to bring to new light and life.²⁶

The weakness of the papacy during and around this period of the Great Schism also empowered strong kings in Europe to take a measure of control over the Church's law and property. In England, for example, the Statutes of Provisors (1351) and Praemunire (1353) truncated the original and appellate jurisdiction of the Church courts.²⁷ In the Pragmatic Sanction of Bourges (1438) and again in the Concordat of Bologna (1516), French kings banned various papal taxes, limited appeals to Rome, required French bishops to be elected by French Church councils called by the king, subjected the clergy in France to royal discipline, and increased royal control over Church property.²⁸ Comparable movements to restrict the power of the clergy and the canon law were afoot in Germany, but in the absence of a strong central monarch, they came to more sporadic local application.

²⁵ For a modern edition of the Donation see Walter Schwahn, ed., *De falsa credita et ementita Constantini Donacione declamatio* (Stuttgart, 1994), with discussion in Donald R. Kelley, *Foundations of Modern Historical Scholarship: Language, Law, and History in the French Renaissance* (New York, 1970), 19ff.; Myron P. Gilmore, *Humanists and Jurists: Six Studies in the Renaissance* (Cambridge, MA, 1963), 3ff.; Ernst Cassirer, *The Individual and the Cosmos in Renaissance Philosophy*, trans. Mario Domandi (Philadelphia, 1963), 78ff.

²⁶ See Brian Tierney, *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism*, new enlarged edn. (Leiden/New York, 1998).

²⁷ Reprinted in Carl Stephenson and Frederick G. Marcham, eds., *Sources of English Constitutional History*, rev. edn. (New York/San Francisco, 1972), 226–8.

²⁸ Reprinted and analyzed in Sidney Z. Ehler and John B. Morrall, *Church and State Through the Centuries* (Westminster, MD, 1954), 96–144.

CIVIL LAW

The hierarchy of canon law structures that prevailed in pre-Reformation Germany stood in marked contrast with the honeycomb of civil law structures. In 1500, German civil authority was divided among the four electoral principalities of Bohemia, Brandenburg, Saxony, and the Palatinate, thirty-one additional secular principalities, some 138 smaller duchies and lordships, some eighty-five “free” imperial and territorial cities, and nearly 3,000 tiny towns and villages.²⁹ Many of these local civil polities had their own internal laws and courts, some of them predicated on centuries-old charters of rights and privileges, which local leaders fiercely defended against civil and ecclesiastical detractors.

In theory, these sundry civil authorities of Germany were all confederated within the Holy Roman Empire of the German Nation. Formal constitutional law of the day declared the Holy Roman Emperor to be the preeminent civil authority of Germany. The emperor discharged executive authority through his Chancery and Treasury, as well as through the Imperial Council of Regency (*Reichsregiment*) that sat in his absence. He exercised legislative authority through the imperial diets – literally imperial meeting “days” (from *dies* in Latin). These were itinerant parliamentary meetings with representative princes, nobles, and city officials called by the emperor and empowered to vote on general ordinances and imperial peace statutes prepared by the Chancery and Regency. The emperor discharged judicial authority through the high imperial courts: the *Reichshofgericht* of the thirteenth century that eventually fell into desuetude, and the Supreme Imperial Court (*Reichskammergericht*) established in Germany in 1495.³⁰ The emperor was an important source and symbol of national identity in late medieval Germany, and a great deal of political pageantry and nationalist liturgy was attached to his court and office. Individual emperors sometimes exercised a considerable influence over the military, material, and moral tone and temperature of the German people.³¹

In reality, however, the Holy Roman Emperor and Empire were largely under the control of the German princes and estates by the end of the fifteenth century. Already in the imperial Golden Bull of 1356, a severely weakened and overextended Emperor Charles IV had given the right to elect his successors to the seven “electoral” princes of Germany – the

²⁹ Benecke, *Society and Politics*, 382–93.

³⁰ Denys Hay, *Europe in the Fourteenth and Fifteenth Centuries* (New York, 1966), 193ff.

³¹ Guy E. Swanson, *Religion and Regime: A Sociological Account of the Reformation* (New York, 1967), 85ff.

three prince-bishops of Mainz, Trier, and Cologne, and the four secular princes of Bohemia, Saxony, Brandenburg, and the Palatinate – who were jealous of their own local interests. This Bull also tacitly rendered the seven electoral princes the preeminent civil authorities of Germany, touching off more than a century of intermittent rivalries among them and the lesser principalities, duchies, cities, and estates of nobles and imperial knights.

In 1495, Emperor Maximilian I sought to quell these perennial German feuds and to regularize his procurement of imperial taxes and soldiers. He declared a territorial peace (*Landfriede*) in the Empire and established the Supreme Imperial Court (*Reichskammergericht*) with jurisdiction over sundry disputes between and within local German civil polities. What might have been a strong assertion of imperial authority in Germany, however, ultimately proved to be a further abdication of the same. The 1495 Ordinance that created the Court put power to appoint the Court's judges and notaries in the hands of the German princes and estates. Invariably, they appointed judges who tended to be more favorable to local German rather than imperial interests. The same Ordinance also stipulated, however, that at least half the judges of the court must be legal professionals trained in Roman law, and that the court must follow written procedures and issue formal written judgments.³² In the sixteenth century, this insistence on legal formality and professionalism would render the *Reichskammergericht* an influential and distinguished tribunal in German legal life, especially when the Peace of Augsburg (1555) granted it further power and autonomy. But in the fifteenth century, the imperial court and the emperor became and remained rather weak.

While German emperors waned in authority in the course of the fifteenth century, many German principalities and cities waxed. Indeed, the century before the theological reformation of Luther was an era of intense "legal reformation" in Germany. In the early fifteenth century, German jurists began to call for a thoroughgoing "reformation" (*reformatio*) of the doctrines, structures, and methods of private and criminal law. Beginning with Cologne in 1437, several German cities passed what they called "legal reformations" (*Rechtsreformationen*). These were major new pieces of legislation, some in excess of 100 dense folio pages.

³² Barraclough, *The Origins of Modern Germany*, 249ff.; Fritz Hartung, "Imperial Reform, 1485–1495: Its Course and its Character," in Gerald Strauss, ed., *Pre-Reformation Germany* (New York, 1972), 73–135; Hans Gross, "The Holy Roman Empire in Modern Times: Constitutional Reality and Legal Theory," in James Vann and Steven Rowan, eds., *The Old Reich: Essays on German Political Institutions, 1495–1806* (Brussels, 1974), 1–30, at 5ff.

They included the legal reformations of Nürnberg (1479), Hamburg (1497), Tübingen (1497), Worms (1499), Frankfurt am Main (1509), and Freiburg im Breisgau (1520) as well as reform measures in several smaller towns. They also included the new reformation laws of the principalities and duchies of Baden (1511), Franken (1512), Bavaria (1518), Erbach (1520), and several others.³³ Also important was a whole series of statutes that sought to reform criminal law, criminal procedure, and criminal courts in Würzburg (1447), Nuremberg (1481), Tyrol (1499), Bamberg (1507), and Laibach (1514), among others.³⁴

These local legal reformations aimed, in part, to routinize and reform the civil laws and procedures of these local polities. At minimum, they reduced a good deal of local customary law to writing, often thereby supplanting the ancient urban and territorial laws of the twelfth and thirteenth centuries.³⁵ More fully, these legal reformations aimed to update and integrate these local laws to some extent – sometimes plucking various substantive and procedural provisions from the many learned medieval texts and commentaries on Roman law and canon law as well as from the new reformation laws already on the books in neighboring German polities.³⁶ Later and more sophisticated legal reformations, such as the Reformation of Worms (1498) and the Statute of Freiburg im Breisgau (1520), were veritable codes of the local private laws of contracts, property, inheritance, and more.³⁷ The same is true of some of the territorial laws of the 1500s and 1510s on criminal law and procedure (*Halsgerichtsordnungen*) that put in place comprehensive new rules of evidence, proof, and punishment in criminal cases, incorporating a number of rules drawn from the medieval canon and medieval Roman law.³⁸

Many of these local reformations also began to reform local courts and local methods of adjudication. Prior to the legal reformation movements, most late medieval cities and territories of Germany had courts of lay judges called “assessors” (*Schöffen*) to implement and enforce local civil

³³ The most important of these are collected in Kunkel, vol. 1. See analysis in Stobbe, 2:279–480; Wieacker, 189ff.

³⁴ Stobbe, 2:237ff.

³⁵ On these medieval city laws, see Berman, *Law and Revolution*, 371ff.

³⁶ For a detailed analysis of these Roman and canon law texts available, see Stintzing, *Literatur*.

³⁷ Reprinted in Kunkel, 1:95–220; 241–320, with detailed analysis in Carl Koehn, *Die Wormser Reformation vom Jahre 1499* (Berlin, 1897); id., *Der Ursprung der Stadtverfassung in Worms, Speier und Mainz* (Berlin, 1890); Hansjürgen Knoche, *Ulrich Zasius und das Freiburger Stadtrecht von 1520* (Karlsruhe, 1957); Hans Thieme, “Die ‘Nuewen Stattechten und Statuten der löblichen Staat Fryburg’ von 1520,” in W. Müller, ed., *Freiburg im Mittelalter* (Baden, 1970), 96–108.

³⁸ See sources and discussion in John H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Cambridge, MA, 1974); id., *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago, 1977).

and criminal law. Most of these *Schöffen* were drawn from distinguished families, guilds, or estates and known more for their institutional wisdom than for their professional legal acumen. They tended to adjudicate by giving specific written answers to specific written questions about (the often unwritten) local law. The *Schöffen* would sit together as a court (the *Schöffengericht*) to discuss the local law in light of the questions put to them, and to render a written decision. There was rarely occasion for formal pleadings, written briefs, or adversarial procedure, let alone for formal appeal to a higher court. Hearings in a case, if allowed at all, were usually oral, informal, and without the presence of legal counsel. The written judgment of the *Schöffen* was often a highly distilled statement of fact and of judgment, with little by way of citation to authority, *ratio decidendi*, or concern for precedent.³⁹ This did not mean that these judgments were intrinsically unjust. Particularly the judgments of more distinguished *Schöffen* courts in the big cities (often called *Oberhöfe*) were highly coveted and prized. But this was a highly localized and plastic form of adjudication, with little obvious predictability as one moved from one polity to the next. This was a notable factor for merchants, bankers, shippers, and others with legal interests in more than one venue. This was one further reason why German litigants often found Church courts to be more convenient tribunals: they all, at least in theory, applied the same substantive law, and allowed for litigation and adjudication following formal written procedures.

Following the example of the Church courts, the legal reformations of the fifteenth and early sixteenth centuries introduced formal rules of procedure into local civil courts. This, in turn, triggered the development of new rules of pleading, evidence, argument, appeal, and more. Even more important, it placed a growing premium on and demand for professional judges, lawyers, and notaries in local courts, most of them trained in the new law faculties of the local German universities. Increasingly at the turn of the sixteenth century, professional lawyers came to represent clients in adversarial proceedings in local courts in accordance with written rules and procedures. Increasingly, professional judges now issued formal opinions, at least in major cases, with an eye to interpreting local legal reformation laws, to adducing Roman law and canon law authorities in support of their positions, and to being consistent with precedents of the local courts. Increasingly, the learned opinions of professorial jurists, and sometimes of whole law faculties of

³⁹ See detailed discussion in Stölzel, *passim*; John P. Dawson, *The Oracles of the Law* (Ann Arbor, MI, 1968), 158ff.

German universities, were solicited in important cases, both by litigants and by courts, and these juridical opinions became important sources of law in their own right. This gradual rationalization, systematization, professionalization, and “scientization” (*Verwissenschaftlichung*) of German law, born of the legal reformation movement, are now regarded as the most salient features of what traditionally had been called “the reception of Roman law” in Germany.⁴⁰

CANON LAW AND CIVIL LAW

The German civil authorities generally respected and protected the *spiritual* jurisdiction of the Church, and the spiritual privileges and prerogatives of the pope and the clergy. Dozens of late medieval imperial statutes, as well as concordats between German princes and bishops, dukes and archdeacons, confirmed the persons and subjects over which the Church claimed spiritual jurisdiction. These same instruments guaranteed the clergy their immunities from civil taxes, services, and prosecution – though strong secular princes and dukes sometimes exacted a high price for their acquiescence. These instruments also obligated ecclesiastical and civil officials to aid and accommodate each other. When Church courts or inquisitors condemned heretics, civil authorities were to torture and execute them. When Church courts encountered contumacious defendants or witnesses, civil authorities were to punish them. When the clergy or property of the Church needed protection, civil authorities were to supply the troops. When the Church’s goods were stolen or misplaced, the civil authorities were to retrieve them. Church officials, in turn, were to support and protect the civil authorities. When civil authorities sought to execute a felon, a ranking ecclesiastic was required to give his acquiescence. When a prince sought to discipline or depose a lower official, the bishop was expected to lend his suasion and sanction. When a city or territory faced a natural calamity or military emergency, local churches were to open their doors and coffers freely.⁴¹

These statutes and concordats did not, however, prevent civil authorities from seeking to govern matters at the edges of the Church’s spiritual

⁴⁰ The terms are from Wieacker, 131ff. See also comparable judgments by Dawson, *Oracles of the Law*, 238ff.; Stobbe, 2:83ff.; Berman, *Faith and Order*, 92ff.; Wolfgang Kunkel, “The Reception of Roman Law in Germany,” in Strauss, ed., *Pre-Reformation Germany*, 263–80; Georg Dahm, “On the Reception of Roman and Italian Law in Germany,” in *ibid.*, 281–315.

⁴¹ See, e.g., May, *Die geistliche Gerichtsbarkeit des Erzbischofs von Mainz*, 143ff.; Paul Kirn, “Der mittelalterliche Staat und das geistliche Gericht,” *ZSS KÄ* 46 (1926): 162, 185ff.; Lawrence Duggan, “The Church as an Institution of the Reich,” in Vann and Rowan, eds., *The Old Reich*, 149–64.

jurisdiction – particularly where local clerics were delinquent or inclined to overreach. The 1438 Reformation of Emperor Sigismund, for example, after decrying the swollen ranks and dockets of the Church courts, ordered cryptically that “[m]atters of jurisdiction and punishment are to be observed according to the old imperial law.”⁴² A 1440 statute of the City of Ulm, in an effort to curb exploitative betrothals and secret marriages allowed under the canon law, authorized the local civil court to order a man who had seduced a virgin either to marry her or to pay her dower; to fine a secretly betrothed couple and order them to seek parental and clerical approval of their marriage; and to enforce in civil court the canon law of marital impediments.⁴³ A 1495 territorial ordinance of Baden concerned with both the dwindling number of priests and monks and the manipulation of children into the cloisters, set out detailed instructions and formulas for enrollment in these Church offices.⁴⁴ The 1498 City Reformation of Worms, after citing the corruption of the Church courts and the complexity of canon law procedures, set forth a series of simple procedures for gaining relief from defamation, for preparing and proving last wills and testaments, and for disposing of an intestate estate.⁴⁵ A comprehensive 1520 statute of Freiburg prohibited a number of “immoral acts” that the Church had not adequately punished – sacrilege, slander, breach of faith, oath-breaking, blasphemy, and unconscionable contracts. The same statute, though it deferred to the canon law of marital formation and dissolution, carefully delineated the secular matters of marriage and family life that were subject to civil law – dowries, prenuptial contracts, wife and child abuse, child support after separation, and the like. The same statute simply supplanted altogether the traditional canon law of guardianship, adoption, and inheritance with new civil rules.⁴⁶ By the later fifteenth century, as we shall see in

⁴² Heinrich Koller, ed., *Reformation Kaiser Siegmunds* (Stuttgart, 1964), 296–97. See further Heinrich Werner, ed., *Die Reformation des Kaiser Sigismund: Die erste Reformschrift eines Laien vor Luther* (Berlin, 1908).

⁴³ Quoted in Walter Köhler, “Die Anfänge des protestantischen Ehegesetzes,” *ZSS KA* 74 (1941): 277.

⁴⁴ Landesordnung (1495), art. 3, in Rudolf Carlebach, ed., *Badische Rechtsgeschichte* (Heidelberg, 1906), 1:95ff.

⁴⁵ Worms Reformation (1498), bk. 3, part 1, and bk. 4, parts 2–3, in Kunkel, 1:109ff., 150ff. See further Koehne, *Der Ursprung*, 139ff.

⁴⁶ Der Staat Freiburg im Brisgow Statuten und Statrechten (1520), tract 5, xciii (“On Slander, Outrage, and Evil Deeds”), in Kunkel, 1:276ff. On unconscionable contracts, see tract 2, part 9, reprinted in *ibid.*, 1:261ff. See also tract 3, part 2 (“On Marriage and Preparations for Marriage”), tract 3, parts 3–7 (“On Inheritances and Other Solicitudes Between Married People and Their Children,” “On the Settlement of Inheritances Between Children,” “On Testaments and Wills,” “On Adopted Children and Their Inheritance”), in Kunkel, 1:278–308.

later chapters, a number of city councils came to exercise considerable control over the operation of schools, charities, guilds, poor relief, and family life.

While they generally respected the Church's spiritual jurisdiction except at the edges, the German civil authorities did not often take kindly to the Church's expansive *temporal* jurisdiction. Already a century before the Reformation, the emperor and several strong princes and city councils took steps to restrict the Church's temporal powers, privileges, and properties. The 1438 Reformation of Sigismund, for example, ordered that "temporal and spiritual justice must be kept distinct. If a cleric has a claim against a layman, let the case be tried before a [civil] magistrate. Similarly, if a layman litigates against a cleric, they should go before a spiritual judge." At the same time, bishops should restrict the use of the ban and the interdict to instances of true injustice in spiritual matters, and civil judges must resist attempts at removal of simple civil cases to the Church courts. The same 1438 Reformation also sought to curb abuses among clerics and monks that the canon law in action had come to tolerate. Priests who persisted in the sin of concubinage and "despoiling women" were ordered simply to marry their concubines, to desist from sexual activity on Sabbath and holy days, and to provide shelter and support for their illegitimate children. Mendicant monks were ordered to stay in their cloisters and cease their begging; almsgivers were forbidden to support them. Rich monasteries were ordered to curb their sumptuousness, to cease their commerce, to limit the income of their abbots and the size of their endowments, and to return to their original tasks of prayer, contemplation, education, and poor relief.⁴⁷

Similar provisions were introduced in some of the legal reformations of the German cities and territories.⁴⁸ The City Reformations of Nuremberg (1479) and Frankfurt am Main (1509), for example, both included stern restrictions on the use of prorogation clauses in private contracts and treaties and strict prohibitions against judicial removal of cases from civil to Church courts. Civil courts were required to remove to Church courts "purely spiritual cases," but only so long as Church courts, in turn, would remove to civil courts "purely temporal cases."⁴⁹ These same City Reformations, together with the City Reformation of Frankfurt am Main (1578), also took increasing control of the traditional

⁴⁷ Koller, ed., *Reformation Kaiser Siegmunds*, 152–57, 187–211, 230–34, 298–303. See further Erich Molitor, *Die Reichreformbestrebungen des 15. Jahrhunderts bis zum Tode Kaiser Friedrichs III* (Breslau, 1921).

⁴⁸ See further analysis of these early legal reformations, below pp. 177ff.

⁴⁹ Reprinted in Kunkel, 1:1, 1:221.

canon laws of inheritance and marital property, introducing a number of changes drawn from various medieval Roman law tracts and commentaries.⁵⁰ A number of territories and cities passed new laws that limited gifts and legacies of property to the Church, regulated the amortization of Church property, subjected the Church's secular properties to taxation, and controlled the disposition of income from Church endowments.⁵¹ The preambles to many of these statutes, and the growing numbers of pamphlets and formal grievances (*gravamina*) defending the same, castigated the Church for its greed and opulence – its excessive court fees, high tithes and taxes, indulgence trafficking, self-interested laws of testate and intestate succession, vast holdings of tax-exempt realty and personalty, and luxurious clerical and monastic livings.⁵² In a few territories, such as Bavaria, Württemberg, and the Palatinate, territorial rulers simply took over much of the Church's traditional jurisdiction over tithes, benefices, and Church properties.⁵³

CONCLUSIONS

These growing instances of popular complaint and civil control of the Church's property and temporal jurisdiction at the turn of the sixteenth century were important storm signals of the Lutheran Reformation to come. They were of a piece with several other reform movements of the day: conciliar restrictions on the excesses of papal monarchy, humanist

⁵⁰ See Helmut Coing, *Die Frankfurter Reformation von 1578 und das Gemeine Recht ihrer Zeit* (Weimar, 1935), 63ff.; id., *Die Rezeption des römischen Rechts in Frankfurt am Main* (Frankfurt am Main, 1962), 75ff., 134ff.; id., "Zur romanistischen Auslegung von Rezeptionsgesetzen," *Zeitschrift für Rechtsgeschichte* 69 (1936): 264; E. Ziehen, *Frankfurt, Reichsreform und Reichsgedanke 1486–1504*, repr. (Vaduz, 1965); Andreas Gedeon, *Zur Rezeption des römischen Privatrechts in Nürnberg* (Nürnberg, 1957), 44ff.

⁵¹ See Eugen Mack, *Die kirchliche Steuerfreiheit in Deutschland seit der Dekretalengesetzgebung*, repr. (Aalen, 1965), 211ff.; John A. F. Thomson, *Popes and Princes, 1417–1517* (London, 1980), 145ff.; Albert Werminghoff, "Die deutschen Reichskriegssteuergesetze von 1422 bis 1427 und die deutsche Kirche," *Zeitschrift für Rechtsgeschichte* 5 (1915): 1–111.

⁵² For contemporary examples, see Ulrich von Hutten's lengthy diatribe *Vadiscus* (1520), in Eduard Boecking, ed., *Ulrich von Hutten's Schriften*, repr. (Aalen, 1963–6), 4:145–268; Gerald Strauss, ed., *Manifestations of Discontent in Germany on the Eve of the Reformation* (Bloomington, IN, 1971), 52–62; Anton Störmann, *Die städtischen Gravamina gegen den Klerus am Ausgange des Mittelalters und in der Reformationszeit* (Münster, 1916); Detlof Ploese and Günter Vogler, eds., *Buch der Reformation. Ein Auswahl zeitgenössischer Zeugnisse (1476–1555)* (Berlin, 1989). See summary in Ozment, *Protestants: The Birth of a Revolution*, 11–18.

⁵³ See sources and discussion in Henry J. Cohn, "Church Property in the German Protestant Principalities," in E. I. Kouri and Tom Scott, eds., *Politics and Society in Reformation Europe: Essays in Honor of Sir Geoffrey Elton on his Sixty-Fifth Birthday* (New York, 1987), 158–187, at 161; id., *The Government of the Rhine Palatinate in the Fifteenth Century* (Oxford, 1965), 140ff.; Paul Mikat, "Bemerkungen zum Verhältnis von Kirchengut und Staatsgewalt am Vorabend der Reformation," *Zeitschrift für Rechtsgeschichte* 93 (1981): 300.

attacks on the authenticity of some of the Church's canons, nationalist agitation against the universalist ambitions of Rome, pietist exposures of the moral and material excesses of the clergy, and more. Taken together, these attacks rendered late medieval Germans highly suspicious of abuses of power and privilege by the pope and other high clergy, and of the high costs and intense casuistry of some of the Church courts and their canon law. When Luther later attacked the "Babylonian" qualities of the Roman papacy, and the "tyrannical abuses" of the canon law, he was sounding very familiar themes.

It was a long way, however, from these *gravamina* of discontent to the outright rejection of canon law and ecclesiastical jurisdiction. No fifteenth-century critic or magistrate in Germany seriously questioned the reality of maintaining one Christian faith and one Catholic Church. No one seriously questioned that the Church was a divinely appointed legal and political corporation in Christendom, with authority to rule spiritual affairs by inner norms and outer laws. No one seriously questioned the natural superiority of the clergy to the laity, of the spiritual sword to the temporal sword, of the canon law to the civil law. When Luther began his theological reformation in 1517, he was very much of the same mind. He, too, at first, sought to reform the Church from within, to call it back to some of its neglected biblical and canonical sources that had become obscured and obfuscated through centuries of power papal politics and plain clerical greed. Luther soon went much further.

