CHAPTER 14

The Reception of the Medieval *Ius Commune* in the Protestant Reformation

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1 Introduction

John Witte has written extensively on the influence of the Protestant Reforms on the laws of church and state—in Lutheran, Reformed, Anglican, and Anabaptist communities alike.\(^1\) Indeed, the new faith communities born of the early “reformations” needed rules to govern at least baptism, the Eucharist, worship, charity, burial, family life, education, clerical marriage, and the like, all of which were theologically reformed very early on. Protestant leaders, therefore, turned to the classic medieval canon and Roman law on which they were raised, even though they criticized it and sought to reform it in accordance with their new ideals. This effort at reformation and repurposing the law applied not to the classic sources of canon law and civil law (known collectively as the *ius commune*) but also local legal traditions (known as the *ius particulare*).

Besides crafting new ecclesiastical ordinances (*Kirchenordnungen*), especially those introduced by Johannes Bugenhagen (1485–1558),\(^2\) the new churches needed laws to administer local church offices, church courts (consistories), and church visitations to local communities. Protestants had to clarify which rules of traditional law, especially ecclesiastical law, remained valid and which had to be abandoned. After Martin Luther’s excommunication and burning of the canon law books in 1520, early Protestants certainly could

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no longer accept medieval Catholic canon law as a whole, which was the foundation of the pope's authority.

In Wittenberg, Lutheran leaders debated how to reevaluate these inherited legal traditions and to build a new foundation of a Protestant legal order, including a new theory of legal sources. Other Protestants at the University of Basel worked out their own Protestant legal formulations. In France, the increasingly Protestant law schools, such as the one at Bourges, continued and intensified the debates that had started in Germany, and giving rise to new emphasis on different legal traditions and sources, and often leading to dramatic legal changes. This transformation slowly led to a new perspective with regard to the influence of history as well.

2 Wittenberg

2.1 Luther's Rejection of Canon Law

When Luther was confronted with his imminent excommunication by the Bull Exsurge Domine on December 12, 1520, he burned the papal bull containing the declaration of excommunication, adding to the fire with several books of the Roman Catholic Church, especially the canon law books, such as the Decretum Gratiani, and some books on penance. Luther's position was well justified, since he had started to study canon law and, throughout his life, understood it quite well. Already in his tract addressing the Christian nobility, Luther denied the authority of ecclesiastical law completely and wrote that it should not be taught anymore. Especially in matters of faith and justification, he rejected the applicability of law in general, because he regarded faith as God's free gift, which could not be bought by human actions: obeying the law and practicing good deeds according to the theory of indulgences of his time would not purchase salvation.

For Luther, furthermore, the papal decretals that comprised the bulk of canon law after Gratian's Decretum only intended to prove the command of the pope, who wanted to dominate even Christian councils. Luther could certainly not accept any law which was founded on the authority of the pope. He argued in a quite compelling way that accepting the contents of one decretal

3 See Witte, Law and Protestantism, 53ff.
invariably included acceptance of the pope’s legislative power. However well-founded the decisions of the decretals might be, the useful contents of the law could not be an argument in their favor for Luther. All laws issued by the church were, according to Luther, a work of the devil.

There was one possible exception, though, for the oldest tradition of canon law, which Gratian himself had “read.” Luther rebuked Gratian not because he rejected his theories, but because he found them rather outdated. He conceded that Gratian had acted in good faith, but that his results were insufficient. Particularly in marital law, Luther found several examples to prove the insufficiency of Gratian’s canon law. Against the arguments of the law professors in Wittenberg, some of them close friends, Luther wanted to stop all teaching of canon law in the university classrooms.

Philipp Melanchthon, Luther’s colleague and eventual successor, at first followed Luther’s harsh rejection of canon law, arguing that popes had no right to enact laws. But in the 1530s he changed his position in this respect as well. In a lecture on the ancient *Canones Apostolorum*, he accepted its contents as the first version of Christian ecclesiastical law. In his “Apologia” of the *Confessio Augustana*, he even argued by drawing on canon law. He criticized the writings of canon lawyers rather than canon law itself. Of course, this might just have been a strategy to persuade the other side.

But unlike Luther, Melanchthon was prepared to listen to his fellow professors in the Wittenberg law faculty. Canonists and other lawyers, such as Henning Göde (1450–1521), Christoph Scheurl (1481–1542), Hieronymus Schürpf (1481–1554), Melchior Kling (1504–1571), and later Matthaeus Wesenbeck (1531–1586) and Eberhard von Weyhe (1553–1633), were prominent spokesmen for the necessity of canon law. In 1528 Justus Jonas the Elder (1493–1555) argued for a re-introduction of canon law lectures in Wittenberg. Schürpf and Kling argued in their publications that use of the canon law was inevitable, particularly in the fields of marital and procedural law, at least as long there was no

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6 For Luther’s thoughts on the sources of law, see Witte, *Law and Protestantism*, 74.


contradiction to their new theology. Protestant lawyers would have to know canon law as long as there was no new authority in the field.

In the end, this opinion prevailed in Wittenberg. Canon law remained useful for many subjects, therefore, including ecclesiastical law. As Johann Oldendorp pointed out, canon law was inevitable for the establishment of law courts and their trials. The University of Wittenberg kept a chair dedicated to canon law, mostly the *primus ordinarius*, and continued canon law courses. In the same way, Melchior Kling had to bring back canon law in order to establish a new Protestant marital law according to Martin Luther’s new concepts. Canon law continued to inspire some lawyers in this academic tradition, such as Justus Henning Boehmer (1674–1749). In theory, at least, the *Decretum Gratiani* can be seen as a subsidiary source of law in German Protestant churches until today.

### 2.2 Melanchthon’s Veneration of Roman Law

While Luther categorically rejected canon law, he slowly gained some respect for Roman law from his colleagues in Wittenberg. He appreciated it as the concretization of natural law and an expression of human reasonability. He argued that Roman law contained a wealth of experience, particularly for secular issues. Although the ancient Romans had been heathens, they had developed great skills, superior to those of all modern lawyers. He could not find any discrepancies between Roman law and his theology. Roman law could claim validity not only until today, in his view, but even until the day of the last judgment. He advised students to learn Roman law.

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12 See also *Law and Protestantism*, 72.


Melanchthon intensified his affections for Roman law and became its fervent admirer, especially after 1525. Together with the court astrologer Johannes Carion in 1543, Melanchthon published a “Chronic,” in which he referred to the emperor Lothar (III of Supplinburg), who had ordered the adoption of Roman law in the courts of the Empire; afterwards Irnerius had rekindled Roman jurisprudence. As no such enactment can be found, this report has since become known as the Lotharian Legend. This new idea soon spread to Italy, where the Lotharian Legend was used to prove the validity of the Roman law in its integrity, as otherwise the use of every rule in the following centuries and in the different territories would have to be demonstrated in order to prove its customary validity.

Apparently, Melanchthon did not want to establish the authority of Roman law based on mere custom as had been the tradition of the Roman Empire, but he preferred a written enactment. For Melanchthon, the *ratio scripta* gave Roman law the legitimacy that he wanted. Indeed, he said, now Roman law could be regarded as the indication of God’s own law, like the Decalogue—written guidelines for society and its morals, which would teach humanity justice. Just like God’s commandments, Roman law had to be proclaimed; thanks to written forms it could become known. Justinian’s codification and the order of Emperor Lothar III guaranteed the validity of the Roman law in its entirety. This is how Melanchthon wanted to assure that nobody could deny the authority of Roman law.

Melanchthon regarded Roman law as the quintessence of human reason, so that no hesitation regarding its validity could be tolerated. Melanchthon venerated Roman law as the oracle of nations, which should teach humanity the exact contents of equity or *aequitas*. In 1538 he characterized ancient Roman law as true philosophy, particularly because of its harsh punishment of crimes.

Johannes Carion, *Chronica* (Wittenberg, 1533), 186. Melanchthon’s role as editor was known only later, and his influence on its contents only in the twentieth century. In his later writings, Melanchthon continued to use this argument in order to legitimize the use of Roman law.


In its humanity and the richness of its rules, it was superior to all other laws. Moreover, it was in accordance with all other information on natural law, so that the Decalogue could even be regarded as its summary: Roman laws are seen as deduced from natural knowledge, as the rays of divine wisdom, also comprised by the Decalogue and, therefore, provided always with good consequences. Melanchthon’s readers had to assume that Roman law was nothing but a longer version of divine natural law. Studying Roman law could accordingly help one to learn about Christian virtues, just like texts from the Bible and the writings of the Church Fathers.

Evidently, Melanchthon taught the lawyers of Wittenberg to venerate Roman law. Roman law was not only reasonable, but the most equitable, sound, and realistic law of all. Everybody should be taught civil law from childhood onwards. Roman law was useful for enhancing the power of the Holy Roman Empire, for ignoring the authority of the pope and the church, and for granting the freedom of testimony and property. So it was as useful politically as it was economically. Humanists agreed on the dignity of the imperial law as the heir of antiquity. Obviously, Roman law could be attractive for a great part of modern society.

But of course, even Roman law could claim authority only as long it did not contradict Protestant theology or tradition and their understanding of justice and equity. According to Luther’s idea of a prerogative, abstract Lex Christi, even Roman law could only be applied if it had been accepted from the perspective of Protestant theology, but this could generally be assumed. Nor did Melanchthon negate the concurrence between canon law and the particular law of the land in principle. He instead opened a large field for lawyers to seek to fulfill the standards of Protestant theology. For everything that had been banned in canon law, Roman law now offered a substitute. This was necessary to close evident lacunae in the present law system, to find solid foundations for the judiciary, and to provide lawyers with a new approach to jurisprudence. Where the rejection of canon law was carried out in a stricter way than in Wittenberg—for example, in Basel—the remaining chairs of the law faculty were

20 For the exception of usury by, for example, the first banks, the “Monte di Pietà,” see Heribert Holzapfel, Die Anfänge der Montes Pietatis (1462–1515) (Munich: Lentner Verlag, 1903; repr. Brussels, 2002).

21 For love of neighbor especially, see Hartwig Dieterich, Das protestantische Eherecht in Deutschland bis zur Mitte des 17. Jahrhunderts, Jus Ecclesiasticum, no. 10 (Tübingen: Mohr Siebeck, 1970), 45.
dedicated to Roman law only. In many instances Roman law had to close the lacunae left by the abandonment of canon law.

In the end, Melanchthon’s enthusiasm for Roman law helped Protestant lawyers to concentrate on the Corpus iuris civilis, whereas the research on the Corpus iuris canonici remained more in the background. Even in questions of affiliation, the French Calvinist François Hotman (1524–1590) did not want to recur to canon law. He admitted the discrepancy between canon law and Roman law, but preferred to use Roman law. The same approach can be found even in the new Protestant marital law. In order to reintroduce divorce, the ordinances of the Roman emperors could be used. Roman law studies became the dominant field of jurisprudence in Protestant universities. This tradition remained valid until Savigny and his nineteenth century historical school of law. This element is certainly more than a Protestant bias. Nevertheless, the eminent progress of German jurisprudence until the nineteenth century had been influenced by this tradition.

3.3 Rediscovery of Saxon Law

While Luther abhorred canon law and criticized Roman law as a wilderness, he was rather fond of Saxon law. The Saxon reformers were affected by some regionalism, which they particularly used for public teaching. In the view of humanists, all times had their own laws, so that the Sachsenspiegel, or “Mirror of the Saxons” (probably from around 1220)—a collection of Saxon customs—could be regarded as the very image of Saxon tradition. Luther could even equate it with the Old Testament: what Moses had been for the Jews in the collection of ancient Jewish law, Eike von Repgow had been for
Germany in the Sachsenspiegel. This comparison was not meant to lessen the significance of the Pentateuch, but it indicated rather Luther's esteem for the Saxon law tradition. Moses's "writings" had provided a formidable law for his society, but it did not hold the authority of God's own law, the Decalogue. None of these laws was perfect, but had to ensure the prosecution of crimes by the government. In the same way, the "Mirror of the Saxons" helped to deter the population from committing crimes. Luther supposed the Saxon law tradition to be easier to handle in court, but he wanted to leave the decision about the best source of law to the lawyers.

Even Philipp Melanchthon, in spite of his particular veneration for Roman law, developed some ideas that were open to the use of Saxon law. Fundamentally, he rejected lay judges and jurors; he demanded that the deciding members of the court should have received a university education. They should act publicly, to demonstrate the law to the people. This necessarily demanded some training. In his Loci communes, he particularly demanded the necessity of public punishment. He did not want to prescribe to lawyers how to handle legal procedure. But he clearly preferred a trial in public, which could educate the population. Moreover, he preferred easy and short procedures to long and learned debates. This was, of course, the character of the courts in the Saxon tradition. For this reason, he preferred the procedural rules of the "Mirror of the Saxons."

There was a noticeable movement at the University of Wittenberg to prefer the local legal tradition to "foreign" laws. The lawyers tried to argue that neither canon nor Roman law had ever been acknowledged in Saxony, so that Saxon law was the only option. For the same reason, other scholars worked on the textual tradition of the "Mirror of the Saxons" and its glosses. In 1542, a professor at the University of Wittenberg, Melchior Kling (1504–1571) offered his prince, the Elector of Saxony, a new, systematically ordered version of the "Mirror of the Saxons." He worked on the edition until his death, and his sons could finish the new edition only in 1572. Kling divided the material into four parts, distantly inspired by the ancient Roman lawyer Gaius. But from the beginning, he underlined the importance of orality in legal procedure. Contrary to Roman

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law procedure, the necessity to resolve matters on the day of the trial helped to settle cases quickly, which would help poorer people in particular. He admitted the existence of some reasons and forms for swift justice, even in the *ius commune*, but this only proved that this general difference was not essential, and that Saxon law remained superior.

In the same way, Matthias Coler (1530–1587) argued for the superiority of the “Mirror of the Saxons” over Roman law in the field of court procedure. This argument can be found again in the writings of Matthew Wesenbeck and others. The orality and concentration of Saxon legal procedure on the days of public trial were more convincing than material law issues.

Konrad Lagus (c.1500–1546)31 wrote an exhaustive manual on Saxon law around 1537, which was published only in 1597 by Joachim Gregorii von Pritzen (1527–1599).32 Lagus presented the Saxon ways of legal procedure according to the principles of the *ius commune*. He thus wanted to integrate the advantages of Roman law, such as the differences between property (*dominium*) and possession (*possessio*), as well as between the protection of possession by “possessor” or “petitory” actions. As he wanted to combine the advantages of the different legal traditions, he referred to them only from time to time.

An addition called *Ein kurzer und nützlicher Process* (A short and useful trial), according to the customs of the city of Magdeburg, was added, probably by the editor, Joachim Gregorii. He wanted to prove that the book was in accordance with the Saxon law court trials of the first and second instance. He even claimed to have learned this as a student of Martin Luther and Melanchthon, as well as of Hieronymus Schürpf and Melchior Kling. The orality of the Saxon legal procedure was to be preferred to other laws. He therefore concentrated on the Saxon law tradition alone, instead of comparing it to other laws. So he presented the Saxon procedure from the first legal action until the sentence of appeal. Following him, Hermann Conring, Justus Henning Boehmer, and Christian Thomasius also praised the simplicity of German legal procedure.33

Other benefits were seen in Saxon law as well. Compared to Roman law, the Saxon law in general could be seen as the lord, whereas civil law had to remain the servant. Even the apparent differences had the advantage of giving the authors more freedom to choose the best solution.

In the end, it was not only the advantages of the ancient “German procedure” that recommended the use of Saxon law, but also the greater freedom the lawyers gained by it. Lawyers had to find a way of combining the different legal traditions and could determine the new criteria according to their convictions. The more the “Mirror of the Saxons” offered alternatives, the more scholars were free to establish the necessities of a modern legal order.

The tradition of Roman imperial law might have been venerated, but claiming the intellectual improvements of Saxon law gave the lawyers of the Saxon Protestant universities the liberty and autonomy to separate from the Holy Roman Empire and its old legal traditions. Saxon law even gave the lawyers of the University of Wittenberg a foundation to find arguments against the emperor. The research into the German law tradition was meant to increase the autonomy of Protestant lawyers against the imperial lawyers. Those motives were admitted by editors like the important Melchior Goldast von Heiminsfeld (1578–1635).

3 University of Basel

Since its beginning in the fifteenth century, the University of Basel had been a place of canon law teaching. Peter of Andlau had been a famous canon law professor. Students could obtain a lic.jur.—degree in canon law; for a doctor iuris utriusque, students had to study ten years. In 1529, the Reformation was introduced in the university and city of Basel, and it was probably the Protestant theologian Johannes Oekolampadius who reorganized the

university. In the law school, only the teaching of Roman law, consisting of the courses on the Institutes, the Pandects, and the Codex, justified three chairs dedicated to these subjects.

The University of Basel had known a discussion on the prevalence of Roman or canon law since the first years of the sixteenth century. Guido Kisch published short tracts on this question from Johann Ulrich Surgant (from 1502) over texts from Thomas Murner (1518 and 1519), Claudius Cantuincula (1522 and 1534) as well as Johannes Sickardus (1528 and 1530).\(^{38}\) In Basel, Bonifacius Amerbach, a friend of Erasmus of Rotterdam, continued to lecture on Roman law and used the authority of Philipp Melanchthon to underscore the authority of Roman law.\(^{39}\)

Another discussion concerned the medieval authors of ius commune. Humanism in theology meant to discredit the old authors since the Church Fathers, but law could be continued without the authorities of medieval jurists Bartolus de Saxoferrato and Baldus de Ubaldis? In Basel, like the humanists from Lorraine, Claudius Cantuincula (Claude Chansonnette, 1490–1560), who taught Roman law from 1518 to 1524, thought the old authorities indispensable. Bonifacius Amerbach started his teaching in 1524 with his famous Defensio interpretum iuris civilis. The old authors should not be regarded according to their Latin, but with regard to their qualities as lawyers.

4 France

4.1 Triumph of Roman Law

Domenico Maffei was speaking of the “return of Roman law in France” already in the sixteenth century.\(^ {40}\) Of course, Roman law had been present in the French universities since the thirteenth century. In southern France, the Roman law tradition (pays du droit écrit) was regarded as the decisive legal tradition. But even in northern France, in the provinces of the coutumes, the authority of Roman law, at least as a theory, had been recognized.\(^ {41}\) The progress of jurisprudence in the sixteenth century led to the triumph of Roman law

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\(^{39}\) Guido Kisch, Melanchthons Rechts- und Soziallehre (Berlin: De Gruyter, 2019), 214–20, with Melanchthon’s tracts on De Inerio et Barolo iurisconsultis oratio [1537].

\(^{40}\) Domenico Maffei, Gli inizi dell’umanesimo giuridico (Milan: Giuffrè, 1956), 182ff.

\(^{41}\) Piano Mortari, Diritto romano e diritto nazionale (Milan: Giuffrè, 1962), 8. The references for the following can be found in Mathias Schmoeckel, Das Recht der Reformation in Frankreich (Tübingen: Mohr Siebeck, 2023).
in French law faculties on different levels. In the work of the greatest French lawyers of this age, such as, among others, Jacques Cujas (1522–1590), Francois de Connan (1508–1551), André Tiraqueau (1488–1558), François-Éguinaire Baron (1495–1550), and Denis Godefroy (1549–1622), the Roman law tradition continued to achieve famous new works, commentaries, and manuals of Roman law destined to advance the jurisprudence of the time. Certainly, Roman law dominated in the faculties as the chief subject of education. But the achievements of the professors can be found on different levels, namely, in establishing new sources, new historical insights into the history of Roman law, and a dogmatic perspective.

But the French discussion of this time is marked moreover by the difference of standpoints. In his Antitribonien ou discours d’un grand et renomme iurisconsulte de notre temps sur l’estude des loix, written in 1567 and published in 1603, François Hotman (1524–1590), the most famous Calvinist lawyer of France, challenged the traditional authority of Roman law for France. He argued that it had never been enacted in France. Although there had been kings of France for at least eight hundred years, Roman law had been taught in the kingdom for only the past three hundred years. In contrast to Melanchthon, he did not invent a law establishing the authority of Roman law. Instead, he compared the ancient Roman law, referring to the paterfamilias or the Roman slaves, in order to show the difference in contemporary law. He did not want to deny the scientific value of Tribonian’s achievement. The Corpus iuris civilis should be studied for its academic achievements, but Europe’s law had been re-invented by Irnerius and Gratian. France, however, needed a new legislation.

4.2 A Critical Use of Canon Law
Traditionally, France was regarded as a country void of canon law since the Protestant Reformation; only much later authors, such as Louis de Thomassin (d’Eynac, 1619–1695), returned canon law to the kingdom. In reality, however, canon law held an important place in practice and within the faculties at the beginning of the sixteenth century. The rather classical canon lawyer Pierre Rebuffe (1487–1557) already questioned the authority of the church in France,

42 Giovanni Rossi, Incunaboli della modernità. Scienza giuridica e cultura umanistica in André Tiraqueau (1488–1558) (Turin: Giappichelli, 2007), 238–51, on discretionary power of judges.
44 Kelley, Francois Hotman, 125.
much in favor of the competence of the royal courts. Charles Dumoulin (1500–1566) taught that canon law was applicable only in the territories where the pope had the right of legislation.

In France, however, canon law and papal constitutions could not deviate from French law. This was based on the Pragmatic Sanction, enacted in Bourges in 1438, which established the independence of the Gallic church, confirmed in the Concordat of Bologna in 1516. François Le Douaren (1509–1559) was a little more permissive in admitting the applicability of the Decretum, whereas he thought the decretals to be worse, and the Liber Sextus, according to him, had never been accepted in France. Right from the beginning, therefore, the French discussion of canon law concentrated on its applicability in France rather than on its evaluation from a theological perspective. François Hotman, however, rejected canon law: it would lead to the ruin of all law, he thought. Only the Decretum Gratiani could be regarded as acceptable.

Increasingly, the history of church law became a major argument in the religious debate. The search for the original church, therefore, was used to question the legitimacy of the authority of the Roman Church in secular matters. Protestant lawyers like the French Calvinist Pierre Pithou (1536–1596) turned their interest to early canon law with the intention of proving what the law of the first Christians and the first church had been. If this original form of Christian law did not know the pope and his privileges, then his claim for superiority could be rejected. From this perspective, the first church constituted an ideal to which the modern church should revert, and it was up to historians to determine its true and original character. Together with his three brothers, Pithou belonged to the most eminent humanists of France. Pierre and François Pithou reedited the Corpus iuris canonici in 1587, as well as the late-antique Legum Romanarum et mosaicarum collation. This was also a means to defend Gallican liberties.

Other authors worked on the traditional liberties of the Gallican church. Pithou’s publication, Les libertez de l’eglise gallicane, is considered to be the

48 On this perspective, see Rodolphe Dareste, Essai sur François Hotman (Paris: Nabu Press, 1850), 28ff., 36.
classic summary of this position.\textsuperscript{50} In his \textit{Ecclesiae Gallicaneae in schismate status}, published in 1594, he collected the arguments for French independence, drawing on historical developments. François Le Douaren's\textsuperscript{51} 1557 publication \textit{De sacris Ecclesiae ministeriis & beneficiis libri octo}\textsuperscript{52} became famous. How should the priest in the country be paid? Le Douaren used history to establish a system which even Lutherans could accept.

In 1550 a scandal ensued concerning the beneficiaries of clerics in France: did they have to pay their levies to the king or to the pope? The king favored the thought of quitting the Roman Church altogether, following the English example. He asked Dumoulin to write an opinion proving that the payment belonged to the kingdom. Dumoulin's book on the administration of beneficaries and the apostolic datary was written for this purpose. In the end, pope and king maintained their alliance, and Pierre Lizet, president of the Parlement of Paris, started a persecution for heresy against Dumoulin, who for the rest of his life could no longer safely stay in France. Obviously, canon law was not ignored in France, but the literature flourished in order to strengthen the French position against the pope.

4.3 \textit{The Coutumes as the Essential French Law}

In the sixteenth century, France developed a new esteem for its own legal tradition. In 1517, Barthélemy de Chasseneuz (Chassaneus, Chassené, 1480–1541), published his \textit{Commentaria in consuetudines ductus Burgundiae}, a commentary on the coutume of Burgundy. The \textit{Commentaria} also used the \textit{ius commune} tradition for new humanistic inspirations.\textsuperscript{53}

However, Charles Dumoulin's work on the \textit{Coutume de Paris}, which he published with his commentaries in 1552, became much more famous. In 1540 Dumoulin had converted to Protestantism. This inspired France to a new


\textsuperscript{52} Kelley, “Fides historiae,” 361, on Franciscus Duarenus, “De sacris ecclesiae ministeriis ac beneficiis libri octo,” \textit{Opera omnia} (Lucca, 1768), 185ff.

interest in its own local laws and influenced legal ideas in France as well as its colonies.\footnote{François-Olivier Martin, Histoire de la coutume de la prévôté de Paris, Vol. 1: Introduction, l’état des personnes, la condition des biens; Vol. 2: La propriété et les droits réels (Paris: Forgotten Books, 1922, reprint 1995).} Dumoulin himself was called the Papinien François. He did not ignore the *ius commune* but emphasized the French development in contrast to the Italian tradition. His treatment of legal history was meant to prove the greatness of France and the independence of French law and its sources.

The French discussion was marked by a progressing national sentiment.\footnote{Jean-Louis Thiereau, “L’alliance des lois romaines avec le droit Français,” in Droit Romain, jus civil et droit français, Études d’Histoire du Droit et des Idées Politiques, vol. 3, ed. Jacques Krynen (Toulouse: Presses de l’Université des Sciences Sociales de Toulouse, 1999), 347–74, at 355.} The Parlement of Paris, the highest court of the central part of the French kingdom, debated whether Roman law had to be considered the supreme law of the Christian tradition, or whether France’s own law tradition, especially the *coutumes*, had to be preferred.

In Bourges the debate started as to whether the Breton François Le Douaren, when called to the Parlement of Paris in 1547, should be succeeded by a specialist of Roman law or French legal history. By choosing François Baudouin (1520–1573), the faculty chose a specialist on both as a compromise.

François Hotman (1524–1590) once again defended a more radical position, not so much in his *Antitribonien* but in his *Francocallia* of 1573, a reaction to the St. Bartholomew’s Day Massacre. Hotman defined France by drawing on its history, equating the Gauls of Vercingetorix with the Franks of Clovis. He found an essential identity in these epochs, so that he spoke only of “Franco-Gallia,” which at the same time underlined the difference from the Romans. For Hotman, the Gauls and the Franks had never surrendered their original liberty to the Romans. The *Lex Salica* was considered as a means to save the royal independence and the essential form of the kingdom (*regni Francogalliae constituendi forma*). Comparing Gaulish and Frankish legal history, Hotman established general traits of the French kingdom, mostly in order to limit royal power. He considered the Merovingian *placita*, just as the *curia regis*, as independent institutions that initiated the French courts of law and the administration of the realm. In the end, since the beginning of the realm, *curators*, alongside the king, had administered the kingdom. For this reason, the king could not be identical with the kingdom, just as a captain could not be confounded with his ship. Since the late Middle Ages, royal powers were limited by principles and the competence of magistrates, such as the lawyers of the Parlement of Paris.
In the following decades, French nationalism became more important. French replaced Latin as the language of law in legal literature, legislation, and jurisprudence. Eminent historians and editors, such as the brothers Pithou and their *Leges Visigothorum*, helped to question the established authorities of *Corpus iuris canonici* and *Corpus iuris civilis* in France. The discussion later asked whether all coutumes were equal in importance or just in their rank, or if some were more important.

This generation used law, in particular Roman law, to unify the kingdom and to develop ideas to protect the kingdom’s legal institutions as well as the citizens. It has been regarded for a long time as the Golden Age of French law.

5 Amalgamation

5.1 Canon Law and Its Inherent Qualities

In Saxony, Eberhard von Weyhe (1553–1633) started a new approach for defining the applicability of Roman and canon law, which many followed. Although historical research would show that popes never had any right of legislation, he wanted to accept the inherent quality of canon law, especially in cases not regulated by Roman law. So he tried to determine general criteria for the applicability of the different laws. Matters in which canon law was still necessary could be found particularly in the laws of succession, obligations, and votes, as well as in family law. It was wrong to assume that modern jurisprudence could be based on Roman law alone. The old papal law, therefore, still had to be studied, amended, and taught.

A professor in Altdorf, Konrad Rittershausen (1560–1613), developed simple rules to determine the application of canon law:


58 Eberhard à Weyhe, *De controversia an jus Pontificium siue Canonicum, meriti & liciti, in scholis, & foro fidelium, locum obtinere, doceri, observari, ac Publice priuataeque utilitatis, denique humanae necessitatis gratia, ipsius commercium fidelibus concedi possit?* (Wittenberg, 1588), Dv.

Canon law should be applied whenever civil law—he was referring to the Roman law tradition here—was unclear; otherwise, Roman law should prevail.

Canon law could be used to supplement Roman law—for example, in marital matters, contracts, obligations (in pactis, stipulationibus, and Emphyteusi), usury, beneficiaries, testaments, tithes (decimis), oaths, and all questions of legal procedure.

When ius civile conflicted with ius canonicum, Roman law should be followed in secular matters, but canon law in ecclesiastical courts, particularly in Roman Catholic countries.

But with regard to religious questions, canon law was regarded as more useful in many countries.

In case of doubt, nobody should assume a discrepancy between civil and canon law.

In the end, all major matters of canon law could be cited in Protestant courts, at least in a supplementary way.

Christian Thomasius (1655–1728), law professor in Halle, worked on a synthesis of these different strategies to legitimize the use of canon law. He published a commentary on Giovanni Paolo Lancilotti’s handbook of canon law written by the famous law professor from Wittenberg, Caspar Ziegler (1621–1690). This manual, first published in 1713, was dedicated to canon law instruction in Protestant universities. Thomasius pleaded in many instances for the applicability of canon law not only in universities but also in court. Students needed to know canon law more than even the local ordinances of their territories or Roman law. Of course, canon law had some disadvantages, but judges, professors, and students needed to be informed about the shortcomings of law. Students should be warned of the prejudice that canon law had been abandoned, and rather should recognize its persistent benefit.

Other authors, however, were less inclined to admit the use of canon law. Hermann Conring (1606–1681) wrote a short tract against the heresy of “Hildebrand” (Pope Gregory VII), evident in Gregory’s Dictatus Papae. As this could be seen as the basic program for the legislation of the following popes, Conring asserted that the Roman Catholic Church, as well as its law, had become heretical themselves. In his famous publication on the history of

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60 Cunrad Rittershusius, Differentiarum juris civilis et canonici seu pontificii libri Septem, Utriusque iuris Studiosis apprímé utiles & necessarîj (Strasbourg, 1618), i8f.: The first principle is that, when things are obscure or dubious in civil law, they have to be defined by canon law, and the canons have to be observed.
German law, *De origine iuris Germanici*, he used the complaints of medieval popes about deficiencies of German law practice to prove that canon law had hardly ever been introduced to Germany. Once again, historical arguments were used to prove what should be regarded as the present law of the land.

Many authors followed him, such as Samuel Stryk (1640–1710). Even more radically, the Prussian Johannes Brunnemann (1608–1672) regarded canon law only as the law of the Roman Catholic Church, which could only exceptionally be used outside, if its admission to the law of the land could be proved. In the end, canon law could still be applied when useful. Luther’s resentment, though, continued to dominate the official opinion.

5.2  **The Natural Law School**

In the quest for a new law, many Protestant authors used the natural law approach advised by Melanchthon. Of course, the uses and conceptions of natural law changed tremendously. Still, legal uses were inevitable. Lutheran and Calvinist authors knew canon law quite well and used this tradition for those subjects in which canon law traditionally had prevailed, the laws establishing hierarchy, procedure, ecclesiastical order, family and criminal law, but also ethical corrections of civil law, such as the validity of contracts and good faith.

Grotius’s description of the law of nature, his *De iure belli ac pacis libri tres* of 1615, contained, therefore, many subjects taken from the canon law tradition. The Protestant background of the natural law authors of the seventeenth and eighteenth centuries was known in their time. The German Jesuit Ignaz Schwarz (1690–1763) wrote an extensive book on the confessional prejudices of these natural law authors. As Grotius slowly came to dominate the new international public law, this was one way in which the natural law tradition gradually modernized the European legal order.

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63 See Harald Dickerhof, *Land, Reich, Kirche im historischen Lehrbetrieb an der Universität Ingolstadt (Ignaz Schwarz 1690–1763)* (Berlin: Duncker & Humblot, 1971), 35; on this work, 132ff.

64 Björn Florian Faulenbach, “Rolle und Bedeutung der Lehre in der Rechtsprechung der Internationalen Gerichtshöfe im zwanzigsten Jahrhundert,” in *Rechtshistorische Reihe* (Frankfurt am Main: Peter Lang, 2010), 407.
6 Conclusion

For most matters, Roman law as well as canon law were too important in the *ius commune* tradition, which had been developed from the thirteenth century onward, to be neglected or forgotten. The offices of magistrates, the hierarchy of functionaries, legal procedure, public finance, family, and criminal and international law could not be conceived without the pioneering influence of canon law. Protestant reform, however, gave cause to reconsider the importance of these traditional sources of law: it provided lawyers with good reason to re-evaluate canon law, which had assumed an increasingly dominant position in the Middle Ages. European Protestants developed a new admiration for Roman law, as well as new reasons to honor the local legal tradition, which until the sixteenth century had hardly any dignity.

Due to the humanistic assumption that all ages needed their own laws, both canon law and Roman law—notwithstanding their internal and dogmatic values—could be seen as examples of good law, but no longer as contemporary law. The more dominant the national laws became, the less ancient and medieval legal traditions could be regarded as fundamental for the state. Instead, these subjects became part of history, while the local tradition was regarded as a way to understand national legislation.

In France, François Baudouin (1520–1573), ⁶⁵ from Artois, argued in his *De Institutionae historiae universae*, from 1561, ⁶⁶ that truth had to be established with respect to the history of any subject. Laws could not be understood by ignoring their historical background. Law experts had to know history in order to understand the rules.⁶⁷ For this reason, the legal historian Roderich von Stintzing (1825–1883) regarded Baudouin as “the first legal historian,” who had helped to use legal history for the recognition of law.⁶⁸ Two years later, Jean Bodin (1529/30–1596) published his *Methodus ad facilem historiarum cognitionem*.⁶⁹ Instead of fallible human evaluation, a sound recognition of law

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needed precise knowledge of the local, temporal, and cultural environment. This would help to establish true historiography. This approach presupposed a true nature of each people, based on its history, geography, and even climate. In the eighteenth century, history became, in the perspective of Romanticism, a way to eliminate the individual factor. So when Savigny developed his ideas on the historic school of law, his intention was to scrutinize legal history, Roman and canon law, and the national particularities, in order to distinguish finally obsolete law, confined to history, from the current law of the land.