Background

Introduction

Any understanding of the relationship of church and state must take into account very basic problems of terminology. Both terms (ecclesia and res publica being the most direct contemporary terms) bear a variety of contradictory meanings when used by people of the period. What is more, while it remains possible to use the term “church” as long as we keep in mind that the concepts of the spiritual, universal, and particular church were related, but not synonymous, the term “state” (res publica) harbors very significant problems. It was indeed known and employed—in terms of the legal person of the universitas, in its capacity of being endowed with jurisdiction and finance a res publica. But most terms pertaining to it remained part of the strategic resources employed mainly in legal and political discourse, used by the lawyers of competing groups of persons of the higher and middle nobility (from the emperor and princes to the imperial counts) but also by magistrates of imperial cities, abbeys, and monasteries, and others in order to claim independence from one another and competing jurisdictional and other rights. The political philosophy of commentators on Aristotle, e.g., Melanchthon, who made the term res publica common coinage, had little or no direct relation to the argument of lawyers who identified certain status groups or individuals with specific rights. Only by the very end of the 16th century were these rights beginning to be perceived as an outgrowth of what was increasingly addressed as a single right of territorial superiority, addressing power over something that was not, at this time, perceived to be a single closed legal entity. Around 1630 someone could still be geographically sitting within a territory without being part of it.¹ The term ius territorii, and the accompanying superioritas

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*territoriale*, was an invention about 1590 in the course of the reception of Jean Bodin and in conflicts about rights over the church. By the 1590s legal specialists at imperial courts claimed that it was generally accepted that whoever had *ius territorii* must also have the right to reform the institutions of the church covered by this right. Geographical location did not determine this issue alone, for still in the 1620s major scholars like Christoph Besold distinguished between “*in*” and “*de territorio*”. Control over a parsonage that was part of, e.g., an abbey immediately responsible to the empire, geographically lying within the lands of another principality, was thus by no means a clear-cut issue.

With regard to the empire up to the later 17th century, we should not speak of ‘state’ or ‘states’, unless metaphorically, but of competing social-legal groups in various relations of allegiance to the emperor: of princes, counts, and other groups immediately responsible to the empire, for whom the acquisition of *ius territorii* by adequate interpretation of their own position became a strategic goal to improve their rights, and for whom the claim over the church became part and parcel of that strategic debate. While the term *ius territorii* began to become general legal coinage from 1600 on, most principalities, to say nothing of minor imperial estates, were not yet closed legal entities with any clear-cut monopolistic structure of supreme power that we often associate with the term ‘state’. Even major principalities in the empire were, into the 16th century and indeed the 17th, constituted by personal legal relationships between prince and vassals and by a multitude of rights and legal claims. These included *Patronate* over the church, and control over assorted *Ämter* that together made up a principality.2 “Church and state,” as in “church and territory” or “*ius reformandi* and *ius territorii*” is thus only part of an objective past insofar as we can discover that it was part of a polemical and controversial debate among interested parties, in which late medieval legal and constitutional settings were slowly, but not entirely, transformed. To assess this debate one must take into account what was transformed. What we can describe with more clarity is what contemporaries thought of the relationship of

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