Comparative Studies
in Continental and Anglo-American Legal History

Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte

Band 11

Canon Law in Protestant Lands

edited by

Richard H. Helmholz

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Introduction

A Working Group was formed in 1987 to undertake research into the fate of the medieval canon law in the parts of Europe (and subsequently the New World) where the Protestant Reformation enjoyed success. The results of its investigations appear in this volume. From the outset, three assumptions, amounting almost to convictions, animated the Group's efforts. First, even though this was not a wholly new subject of historical inquiry, all participants felt that insufficient study had been given to it. Too often dramatic events such as Martin Luther's casting the papal law books into the flames have been as far as historians have looked. We believed that more detailed research projects into particular aspects of the law were needed, and that they might enrich the commonly accepted understanding of the relationship between the Reformation and the law. Second, the members of the Working Group thought that we would profit by pooling our research. Historians of one part of Europe have known less than enough about parallel research being undertaken for the other parts. Certainly ignorance of the dimensions of the field initially prevailed among us. Third, all participants believed that this would be a good subject for exploring possible influences running between different parts of the Continent, including English speaking lands. Protestantism was an international movement and it might therefore fit the theme of comparative studies that has provided the impetus for the wider venture "Anglo-American and Continental Legal History".

At the end of the day, most aspects of these three initial assumptions have proved correct. Although there is clearly much more to do, both in research and in exposition, particularly as to our third assumption, and although it has not been possible to apply a comparative method to our results as rigorously as it might be, results so far largely vindicate the assumptions with which this Working Group began its investigations. The results many of its participants have achieved by opening up new manuscript sources have been particularly encouraging. This has been a fruitful subject for collaborative exploration.

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The principal conclusion to have emerged from the Working Group's investigations is that the medieval canon law continued to be of at least some continuing importance in each of the regions investigated. Lutheran, Calvinist, and Anglican traditions continued to include much of the law inherited from the Middle Ages, although not everywhere in the same measure and certainly

with variations across time. Only for colonial America did Lloyd Bonfield's research turn up little or no sign of reference to the canon law. His essay shows that what application did exist in the New World apparently came only second-hand, through English civilian works such as those of Henry Swinburne on testaments or Henry Conset on court procedure. Indeed there does not appear to have been a great deal of even that sort of indirect influence during the period before 1776, although it may well be that more intensive research will reverse this conclusion or show greater influence for a later period. However, in Europe itself the investigation found no areas where the canon law was cast aside entirely. Rejection of papal authority apparently did not necessarily entail discarding the canon law itself, though of course the Protestant Reformation did in every instance require the rejection of those aspects of the medieval canon law which defined and exalted the powers of the papacy within the Church.

This finding does not mean that the story turns out to have been everywhere the same. Nor does it mean that the canon law was anywhere retained in exactly its medieval form. Strict preservation did not occur even in Catholic lands. These essays all demonstrate a selective use of the canon law, and also some important differences between one place and another. To take only the most basic point, the guiding principle in Lutheran territories was that the canon law must always be tested against God's Word contained in the Scriptures. Only if it passed muster under that standard could it legitimately continue. In England and Ireland, on the other hand, the test was whether or not the medieval canon law was consistent with national traditions and the royal prerogative. In Calvinist lands, our investigators found no single principle at work, and in fact a rather more thorough-going reevaluation of many of the underlying rules of the canon law. John Witte's work on the canon law in the Dutch Republic is especially valuable in this regard. He elucidates the challenges and differences of opinion that were possible within a system that nonetheless retained many of the features of the canon law system. The Dutch Calvinists were more critical and selective in their use of the canon law than the English or German Protestant jurists.

One merit of these essays is that they explore the various ways in which announced principles were worked out in the experience of each region. Some quite interesting results have been obtained. For instance, Robert Feenstra shows how the title *Doctor utriusque iuris* reappeared in Dutch Universities towards the end of the sixteenth century, after it had fallen out of use during the initial years of the Reformation. This usage is evidence of a revival in the prestige of the canon law, and it is doubly suggestive in matching the conservative trend shown by Udo Wolter's careful investigation of the German jurists' reactions in the face of Martin Luther's strictures against the canon law. Witte's essay, just mentioned, also rightly stresses the importance of the

attitudes and the work of the academic jurists. Understandable attachment of academic jurists to the *ius commune* must account for part of this conservative trend.

As if by contrast to these Dutch findings, but ultimately compatible with them, W. N. Osborough's study of the canon law's perseverence in Ireland during the years of Protestant ascendancy shows how the canon law could subsist even without the existence of a university in which Roman or canon law was taught successfully, if at all. In Ireland, the continued presence and usage of books from the *ius commune* and also practices passed down from one generation of court officials to another apparently sufficed to keep at least some canonical learning alive at this outer edge of Europe. The learned of the *ius commune* could continue even in such apparently unwelcoming circumstances.

Equally surprising, though in quite a different way, is the great tenacity in Reformed circles of canonical procedure. Raymond Mentzer, for example, finds that the Calvinist churches in France commonly established a consistory to enforce standards of conduct upon their members. Although these consistories were governed by officials unknown in the medieval Church's courts, and although they "had no legal force" in overwhelmingly Catholic France, nonetheless they continued to follow established rules of procedure in most aspects of their deliberations. They also made frequent use of the sentence of excommunication, despite criticism of that sanction's overuse during the medieval period, and they may even have extended it to serve new ends. The underlying strength of inherited procedural standards, also described in Wolter's treatment of the organization of Protestant courts in Germany, emerges as one of the most salient features of the evidence. It is found within all three of the principal traditions investigated.

The law of marriage and divorce has presented a subject of especial interest for many of the contributors to this volume, and it illustrates themes common to the subject in several parts of Europe. The essay of Thomas Max Safley summarizes them particularly well, although the pattern was not identical in all Protestant lands. Building on changes and attacks on ecclesiastical jurisdiction that had begun before the Reformation, each of the Swiss cities he investigated established a marital court and promulgated an *Ehegerichtsordnung*. Changes in substantive law followed. The number of prohibited degrees was restricted, the ceremonies requisite for a legitimate marriage were defined, and freedom for (at least) the innocent party to remarry after divorce *a mensa et thoro* was established. However, it is Safley's conclusion that the degree of change was not enormous. "Evolution, not revolution" was the watchword in most aspects of marriage law. The procedure used, the underlying conception of marriage, and even most of the subsidiary legal rules surrounding the subject remained dominated by the established canon law. It seems that the