CHAPTER 2

The Outset: The Livonian and Swedish Legal Orders at the Time of the Swedish Conquest

2.1 Livonian Administration, Judiciary, and the Legal Procedure before the Swedish Conquest

2.1.1 *The Livonian "Constitution" and Its German Roots*

According to a chronicler, the old "Livonia […] [wa]s approximately 100 miles long and 20 miles wide, a good kingdom, consist[ing] of six principalities, the Teuzschenmeister with its surroundings and regions, and five bishoprics, with the offices belonging to them, namely, the Archbishopric of Riga as the largest, the Bishopric of Dorpat as the most powerful, the Bishopric of Oesel as the richest, Tallinn the smallest and Courland, the most peaceful."[1]

The Crusades had first brought Livonia[2] into political contact with the Western world. The local peoples – Estonians, Livs and Letts – had traded with Norsemen, Saxons and other Germanic peoples for centuries, but were now gradually brought under German control. The official motive for the subjugation was Christianization, although more worldly motives were certainly involved as well.[3] As the first attempts in the 1160 and 1170s to convert the local

1 Cited in Blaese, *Bedeutung und Geltung des römischen Privatrechts*, 7. There were actually five secular principalities, since the bishop of Tallinn possessed no temporal power. The Grand Master of the Teutonic Order and the bishops, as temporal lords, were vassals of the Emperor, although it was only in 1526 that the Grand Master (Plettenberg) formally acquired a position at the Imperial Diet.

2 The emergence of Livonia in the thirteenth century has been described in terms of a "political order consisting of several small states (those of the Teutonic Order, the archbishopric of Riga, and four bishoprics) characterized by Christianity, towns, literacy, a system of fiefs, and other imported Western values," but on the other hand consisting of "local communities that had undergone serious changes under the influence of the conflicts and coexistence with the crusaders but which had managed to maintain their rural character." Andris Šnē, "The Emergence of Livonia: The Transformations of Social and Political Structures in the Territory of Latvia during the Twelfth and Thirteenth Centuries," in Alan V. Murray (ed.), *The Clash of Cultures on the Medieval Baltic Frontier* (Burlington: Ashgate, 2009), 53–71, 71.

3 See James A. Brundage, *Medieval Canon Law and the Crusader* (Madison: University of Wisconsin Press, 1969), 139–140. The character of the Livonian campaign as a Crusade has been questioned for the lack of a clear papal authorization, see Maureen Purcell, *Papal Crusading Policy: The Chief Instruments of Papal Crusading Policy to the Holy Land from the Final Loss*

populace to Christianity had failed, in 1198, the first year of his pontificate, Pope Innocent III authorized the believers of Lower Saxony and Westphalia to crusade Livonia. The legal terminology developed for the Crusades to the Holy Land of Palestine was now effectively adapted to the need of spreading the influence of the Catholic Church to north-eastern frontiers of Europe.[4]

Innocent's call resulted in a virtual flood of Crusaders, who were to report to Bishop Alfred in Riga. As mentioned earlier, the Crusaders were not only motivated by the zeal to win new souls to the Church. They were also driven by promises of fiefs in Livonia: this was the beginning of the German nobility in the region.[5] The enterprise was taken over by the military order called the Sword-Brothers (*Schwertbrüder*), founded in 1202. The Sword-Brothers were probably not more than 120, and they came from various backgrounds. According to a chronicler, they were "rich merchants, banned from Saxony for their crimes, who expected to live on their own without law or king." The Sword-Brothers formed a heavily armed and well-trained military elite, and they managed to subjugate the Livs and Letts, and finally the Estonians, by the 1220s.

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of Jerusalem to the Fall of Acre (Leiden: Brill, 1975), 16. Recent research has seen the Livonian campaign more liberally as a Crusade, so as Axel Ehlers, "The Crusade of the Teutonic Knights against Lithuania Reconsidered," in Alan V. Murray (ed.), *Crusade and Conversion on the Baltic Frontier 1150–1500* (Aldershot: Ashgate, 2001), 21–44, 43; and Iben Fonnesberg-Schmidt, *The Popes and the Baltic Crusades 1147–1254* (Leiden: Brill, 2007), 255, according to whom the campaign warrants the term "quasi-Crusade" at least. Most research nowadays does not hesitate in defining the Livonian campaigns as Crusades.

4 Wilfried Schlau, *Die Deutsch-Balten* (Munich: Langen Müller, 1995), 52; Tiina Kala, "The Incorporation of Northern Baltic Lands into the Western Christian World," in Alan V. Murray (ed.), *Crusade and Conversion on the Baltic Frontier 1150–1500* (Aldershot: Ashgate, 2001), 21–44. On Innocent´s role in the Crusade, Jane Sayers, *Innocent III: Leader of Europe 1198–1216* (London: Longman, 1994), 3–20.

5 A great deal of literature exists on the Livonian Crusade. See, for instance, William Lawrence Urban, *The Baltic Crusade in the Thirteenth Century* (Austin, Tex., 1967); J.R. Tanner, C.W. Previté-Orton and Z.N. Brooke (eds.) *The Cambridge Medieval History* VI (Cambridge: Cambridge University Press, 1929), 452–456; Wittram, *Baltische Geschichte*, 16–23; Jonathan Riley-Smith, *Crusades: A Short History* (London: The Athlone Press, 1987); Eric Christiansen, *The Northern Crusade* (London: Penguin Books, 1997); Axel Ehlers, "The Crusade of the Teutonic Knights against Lithuania Reconsidered," 21–44; and Iben Fonnesberg-Schmidt, *The Popes and the Baltic Crusades 1147–1254* and "Pope Honorius III and Misson and Crusades in the Baltic Region," in Alan V. Murray (ed.), *The Clash of Cultures on the Medieval Baltic Frontier* (Burlington: Ashgate, 2009), 103–122. On Pope Innocent III's role in the Crusade, see also Sayers, *Innocent III: Leader of Europe 1198–1216*, 179–182. On the military orders, see Michael Burleigh, "The Military Orders in the Baltic," in David Abulafia (ed.), *The New Cambridge Medieval History* (Cambridge: Cambridge University Press, 1999), 743–753.

A network of fortified convents, stone blockhouses, and hill-forts from Dünaburg in the south to Leal in the north was constructed to secure the conquest.[6]

The armed monastic orders laid the basis for the German nobility in Livonia. The conquest of Livonia had been based on an agreement that the Sword-Brothers would be entitled to two thirds of the land as fiefs, whereas the remaining third would pertain to the Bishopric of Riga. It soon turned out, however, that the land did not yield as much as the Sword-Brothers had expected. This led the Order to press their peasants harder, which led to revolt in 1222. After an unsuccessful Crusade to Lithuania, most of the Sword-Brothers were killed in battle, and the survivors were placed under the rule of the Teutonic Order, which now assumed control over the Sword-Brothers' lands in Livonia.[7]

Ecclesiastical administration began to take shape in the late thirteenth century as well. A regular canon named Meinhard had arrived in Üxküll, on the Düna River, around 1180 and started a mission there. In 1186, Pope Clement III (1187–91) consecrated Meinhard as the bishop of Üxküll. After the founding of Riga, Meinhard's successor Albert von Buxhövden chose that city as his residence. Other bishoprics were soon founded in Tallinn, Dorpat, Oesel-Wiek, and Courland. In 1255, the Bishopric of Riga became an archbishopric, with the Bishops of Dorpat, Oesel-Wiek, and Courland as its suffragans. The Bishopric of Tallinn remained under the Archbishop of Lund.[8]

After the subjugation of the local peoples, there were also other Germans who received fiefs in the region in return for knightly war-service. The fiefs were usually bought or they had to be deserved. It was an insecure life. The harsh climate was not their only problem. The Germans lived off the services of locals, who were forced to work on the estates, to build churches and castles, and to serve on the armed forces against their own people or outside foes.[9] Most of the settlers came from a rather limited geographical area between the rivers Ems and Elbe, and some from Mecklenburg, Pomerania, and Holstein. Most of the fiefs of the Danish king were German settlers as well, whereas some, especially in towns, were of bourgeois origin.[10]

At an early stage, the fief typically consisted of a village, part of a village or several villages, sometimes even a whole ecclesiastical parish (*Kirchenspiel*). The vassal regularly appeared before his peasants in order to demand his tithes

6 Christiansen, *The Northern Crusade*, 99–101.

7 Wittram, *Baltische Geschichte*, 28–41; Christiansen, *The Northern Crusade*, 102–103.

8 Kala, "The Incorporation of Northern Baltic Lands," 10.

9 von Pistohlkors, *Deutsche Geschichte im Osten Europas*, 113.

10 von Pistohlkors, *Deutsche Geschichte im Osten Europas*, 114.

and to sit court. As the living conditions became better and more secure from the late 1200s onwards, the noble fief-holders began to construct manor houses and castles close to their fiefs. There were considerable differences between the noble vassals themselves. For instance in 1241, only 13 percent of the fief-holders held 86 percent of the fiefs in the Estonian regions of Harrien and Wierland. Social mobility existed between the different layers of the landed nobility, and hereditary rules in particular could cause mobility.[11]

A division into five rival small principalities thus developed during the thirteenth century: the State of the Teutonic Order, the Archbishopric of Riga, the Bishoprics of Dorpat, Oesel-Wiek and Courland. The five principalities formed the Livonian Confederation, the *Ordenstaat*, until its dissolution in 1561. The lands of the Teutonic Order stretched from the Gulf of Finland to Courland, with the lands of the bishoprics here and there in between. It was a loose unit, held together by a common Diet only, but in practice the Confederation consisted of independent entities. In 1335, however, the Diet ordered the Grand Master to consult the estates in future before waging war and to submit territorial disputes for the arbitration of the Diet. The strife between the bishops and the Order caused the Diet to acquire some additional political strength, as in 1422 the Diet of Walk decided that the four estates (the bishops, the Order, the knights, and the towns) was to meet annually henceforth.[12] Despite this, the Confederation was far from centralized, and the looseness of the Confederation proved, in connection to the Livonian War (1558–1582), to be its main weakness, as the principalities were unable to organise a working defence strategy, thus contributing to the final dismemberment of the Confederation.[13]

The looseness of the Confederation was not only due to Livonia being a patchwork of five principalities. Internally, the principalities consisted of the lands of knightly vassals, many of which had acquired a considerable degree of independence at an early stage, thus benefiting from the continuous struggles between the Order and the bishops. The strong position of the knights of Harrien and Wierland in what is now northern Estonia stretched back into the Danish rule, and although they became vassals of the Grand Master in 1347, they managed to maintain their privileges. Otherwise the Order only rarely

11 von Pistohlkors, *Deutsche Geschichte im Osten Europas*, 114–115.

12 David Kirby, *Northern Europe in the Early Modern Period: The Baltic World 1492–1772* (London: Longman, 1990), 45.

13 On Livonia's medieval structure, see Kirby, *Northern Europe in the Early Modern Period*, 44–47; also Jerry Smith and William Urban, "Introduction," in Jerry Smith and William Urban (eds.), *Johannes Renner's Livonian History 1556–1561* (Lewiston: The Edwin Mellen Press, 1997), ii–vii.

conceded fiefs, but instead ruled its lands through an efficient administrative system, which was virtually the same as that used in the Order's Prussian possessions. The lands of the Order were divided into approximately 30 districts, administered by the functionaries of the Order, from which districts five participated in the workings of the inner council of the Order.[14] The administrative system of the Teutonic Order was thus fairly centralized, in contrast to that of the bishoprics. To ensure the military resources needed for the defence of their possessions, the bishops were forced to grant large fiefs. From their fortified castles, some of the vassals held large tracts of land in various bishoprics.[15] The Tiesenhusen family, for instance, held fiefs in the Bishoprics of Dorpat, Oesel, and Riga.[16]

The *Ordenstaat* ended in 1561, when Livonia became part of the Polish-Lithuanian state, more precisely, part of the Lithuanian Grand-Duchy.[17] The legal documents governing the joint state were the following capitulation and union treaties: *Privilegium Sigismundi* (1561), *Pacta subjectionis* or *Provisio ducalis* (1561), *Cautio Radziviliana* (1562), *Unionsdiplom* (1566), and *Corpus privilegiorum Stepheneum* (1581).[18] The essential feature in all of these documents was that they upheld the previous rights and privileges of the Livonian estates. For instance, the *Privilegium Sigismundi* and the Union Diploma guaranteed the basic principles of the Confession of Augsburg and the German law, at least "until a law book [were] compiled on the basis of customs, privileges and case law" ("*bis zur Zusammenstellung eines Gesetzbuches aus Gewohnheiten, Privilegien und Präjudikaten*"). The position of the German language as the court language was also guaranteed.[19]

In the Polish period, the legal structure of Livonia was later construed with the help of the following pieces of legislation emanating from the Polish kings: *Constitutiones Livoniae* (1582), the first *Ordinatio Livoniae* (1589), and the second *Ordinatio Livoniae* (1598). In addition to these came the Livonian legal products such as the decisions of the Diet, the *Landtag*, and the city statutes, the most important of which were those of Riga (the *Procuratorenordnung*

14 Kirby, *Northern Europe in the Early Modern Period*, 44.

15 Kirby, *Northern Europe in the Early Modern Period*, 44–45.

16 "*Barthol. de Tizenhusen miles et vasallus Rigensis, Tarbatensis et Oziliensis*." February 19, 1392, Friedrich Georg von Bunge (ed.), *Liv-, Est- und Curländisches Urkundenbuch* (Reval, Riga, Leipzig, 1853–1881; henceforth: UB), III c.1, 309.

17 On the Polish-Lithuanian state, see Daniel Stone, *The Polish-Lithuanian State, 1386–1795* (Seattle: University of Washington Press, 2001).

18 Schmidt, *Rechtsgeschichte Liv-, Est- und Curlands*, 139, 212–214.

19 Schmidt, *Rechtsgeschichte Liv-, Est- und Curlands*, 139.

1578, the *Gerichtsordnung* 1581, the *Wett- und Handelsordnung* 1591, and the *Vormünderordnung* 1591).[20]

2.1.2 *The Administrative and Judicial System in the Polish Period*

Administration as a term refers to a modern state, which in most European regions marked the beginning of the early modern period. Modern state organized administrative systems and bureaucratic offices, separate to their holder's persons and other functions.[21] In a feudal state, which the pre-Polish Livonia was, no such modern administration existed. Feudal lords, bishops and their vassals governed their lands according to the rules of feudal law. Urban settlements either belonged to the domains of a feudal overlord, as in the case of the majority of Livonian towns, or had earned some degree of autonomy. Livonia, Riga, and Dorpat belonged to the latter category, although Dorpat to a lesser extent than the others.

In the modern sense and in an attempt to unify the administration, the Polish conquerors established the first administrative system in Livonia. The beginning of the Polish period thus also marks the transition from the Middle Ages to the early modern period in the Baltic region. The Polish governor (*Statthalter*) now represented the royal power in Riga. The area was then divided into four districts (Riga, Wenden, Treiden, and Dünaburg), each of which was led by a senator of Livonian origin. The senators had been accorded a seat in the Lithuanian (later Polish) Diet "after the Lithuanian senators."[22]

The castles and towns, and their lands, that had fallen to Poland during the war were organised into *starosties* (*capitanealia*), according to the Polish model. The head of the town government was a *starost*. In Poland, the trend had been to accord judicial power to the *starosts* (*capitanei cum jurisdictione*, *capitanei majores*), and the same tendency spread to Livonia as well.[23] The *starost* of Dorpat received full jurisdiction, as the king in 1582 after the conquest of Dorpat expressly conferred the powers to the new *starost* Albert Ręczaiski *cum integra et absoluta jurisdictione* over the town people and those residing in the

20 Schmidt, *Rechtsgeschichte Liv-, Est- und Curlands*, 139.

21 See, for instance, Hans Hattenhauer, *Geschichte des Beamtentums* (Köln: Heymann, 1980).

22 Schmidt, *Rechtsgeschichte Liv-, Est- und Curlands*, 223–224; Pr. Aug. Art. 5: P. Subj. § 12; Dogiel Nr. 140. 145, 152; Georg Friedrich von Bunge, *Geschichtliche Uebersicht der Grundlagen und der Entwickelung des Provinzialrechts in den Ostseegouvernements: Besonderer Theil* (St. Petersburg: Druckerei der Zweiten Abteilung S.K.M. eigener Kanzellei, 1845), 29–30; Liljedahl, *Svensk förvaltning i Livland*, 6–15.

23 Schmidt, *Rechtsgeschichte Liv-, Est- und Curlands*, 228. After the issuing of *Constitutiones Livoniae* in 1582, there were 52 starosties in Livonia. Jürgen Heyde, "Zwischen Kooperation und Konfrontation: Die Adelspolitik Polen Litauens und Schwedens in der Provinz Livland 1561–1650," *Zeitschrift für Ostmitteleuropa-forschung* 47 (1998), 544–566.

suburbs, and soldiers stationed in the town of Dorpat.[24] This, however, led to conflict with the city council because the *starost* interpreted his judicial position as an appeals instance in relation to the council.[25] In Riga, the strong city council was able to maintain its judicial power through the Polish period.[26] In addition, King Sigismund III founded separate castle courts (*Schlossgerichte*) for Wenden, Pernau, and Dünaburg in 1599, again following a Polish model. Castle foremen (*Schlosshauptmann*), with a landowning nobleman as his vice president and with a notary, presided over these courts.

From the point of view of organising the judiciary, the Privilege of Sigismund Augustus of 1561 already contained some important articles. According to Article IV, the administration and the judiciary were to remain regulated by the "native" German laws and customs. Article VI founded a Supreme Court for Livonia in Riga. The nobility was to elect the members of the court, and the king of Poland would confirm that election. The Court would convene once a year to decide appeals, and it would only be possible to appeal its decisions to the king in especially difficult cases. The Livonian nobility got also, according to Article XXVI and following the model of Estonia, both civil and criminal jurisdiction over their peasants.[27]

Whether the provision of the Privilege of Sigismund Augustus concerning the founding of a supreme court in Riga ever took effect is difficult to know. In 1582, in any case, King Stephen Báthory (r. 1576–1586) reordered the administration of the Livonian Duchy into three presidential districts (*praesidiatus*): Wenden, Dorpat, and Pernau. Each was headed by a *praeses*, combining administrative and judicial functions, although the judicial function only applied to minor cases. The *starosts* remained under the *praeses*.[28] The jurisdiction of the *starost* in relation to the council (*Rat*) was, however, not clear. Theoretically, the *starost* represented the king locally and held the entire jurisdiction. In Polish towns, councils were administrative bodies not judicial organs and were greatly dependent on the *starost*, whereas the Dorpat privileges had traditionally established the council as the full jurisdiction and the right to the traditional law in Riga. The revised town privileges that the Polish king established in 1582 liberated the towns from the jurisdiction of the presidents and the district courts. The appeals from the council now went to the provincial tribunal. The privileges, however, contained nothing on the council's relation

24 Raimo Pullat (ed.), *Tartu ajalugu* (Tallinn: Eesti raamat, 1980), 74.

25 Schmidt, *Rechtsgeschichte Liv-, Est- und Curlands*, 228.

26 Schmidt, *Rechtsgeschichte Liv-, Est- und Curlands*, 229.

27 Bunge, *Geschichtliche Uebersicht der Grundlagen*, 43–46.

28 Schmidt, *Rechtsgeschichte Liv-, Est- und Curlands*, 225.

vis-à-vis the *starost*, which thus remained somewhat unclear for the rest of the Polish time. In practice the council was not completely independent of the *starost*. For instance, when King Sigismund III in 1588 enfeoffed the role of *starost* of Dorpat to Jan Zamoyski for his lifetime, it was expressly stated that the enfeoffment concerned *arcem et civitatem Derpatensem* with full rights, jurisdiction included.[29]

In the towns, the town council was also the major judicial court and the appellate instance in relation to lower town courts. In Riga, the general lower court for civil and criminal cases was the bailiff's court (*Vogteigericht* or *Niedergericht*). Others included the courts for tutelage matters concerning orphans and their property and upkeep (*Waisengericht*), buildings and lots (*Baugericht*), ecclesiastical law (*Kirchengericht*), and luxury police (*Luxuspolizei*). The commercial court (*Wettgericht*) heard commercial cases; and *Amtsgericht* was in charge of cases related to handwork and guilds.[30]

Dorpat hosted all of these courts as well, except for the church and luxury courts. The lower courts were staffed by council members, two or three for each court, and the council performed its appellate function in its plenary session.[31] Like Riga, Dorpat also enjoyed the services of the legally trained *Syndicus*, although unlike in Riga he did not have a cadre of secretaries, also versed in law, in his service. Each lower court consisted of two council members. When acting as lower court members, they would use titles such as *Wettherr*, *Kammerherr,* and so on. The council chose the *Burgermeister* from amongst its members, and one of them was chosen each year as the presiding *Burgermeister* (*der wortführende Bürgermeister*). Council members divided the various tasks among themselves every two years. Besides *burgermeisters*, *Wettherre*, *Waisenherre*, *Kammerherre*, *Akzizenherre*, inspectors of meat cutters, bakers, bearers, and miners were chosen.[32] The court met often, for instance in October

29 Pullat (ed.), *Tartu ajalugu*, 74.

30 The dividing line between a court of law and an administrative agency is blurred when it comes to early modern courts. It is especially unclear regarding the smaller and more specialized "courts" above. The *Waisengerichte*, for instance, was responsible for organizing tutelage for orphan children and of overseeing their interests. See Katrin Roosileht, *Vaeslastekohtud* (Tartu: Eestiajalooarhiiv, 2003), 44.

31 Friedrich Georg von Bunge, *Geschichte des Gerichtswesens und Gerichtsverfahrens in Liv-, Ehst- und Curland* (Reval: Kluge, 1874), 261–262.

32 Pullat (ed.), *Tartu ajalugu*, 76. Another important factor in the urban power structure, besides the representatives of the Polish crown and the council, were the guilds. They also had considerable legal significance through their own ordinances. Guilds are not, however, at the centre point of this presentation. Two of the council members were appointed as members to the other town courts; in other words, a council member normally

1620 sessions were held on seven days, thus almost twice a week. The language at the council remained German, although occasionally Polish-language documents were introduced. Poles often used Latin in the documents handed to the council as well.[33]

In the countryside, the district court (*Landgericht, judicium terrestre*) consisted of three judges and two noble by-sitters, which a notary assisted. Each of the four (before King Stephen Báthory's reform in 1582, thereafter three) circuits (*Kreis*) had its own district court. As the manorial lord could delegate his judicial function to a steward, so also the feudal overlord would routinely nominate the judges for the lower country courts (*Manngerichte*). At a later point, the Diet (*Landesrat*) also took part in the nomination of the judge. The lower court also had "by-sitters" (*Beisitzer*) in charge of supervising the proceedings.[34] They were noblemen, just like the judge, and were obliged to obey the judge's call to the office. The same applied for the law-finders (*Urteilsfinder*): they were to represent the same estate as the parties and were obliged to take office upon call. The job of the law-finders was to decide what was right in a case,[35] according to the facts of the case and the legal customs. As we will see later, the presence of by-sitters and law-finders continued into the Swedish period.

The decisions of the district courts could be appealed to the Senatorial Court (*Senatorengericht*), consisting of four senators, one for each circuit, under the presidency of the governor (*Statthalter*).[36] After King Stephen Báthory's[37] reforms in 1582, the number of district courts diminished to three – and the number of judges at the Senatorial Court was reduced accordingly to three. Instead of four circuits, Livonia was now divided into three presidencies (Wenden, Pernau, Dorpat), and there was one district court in each presidency. The composition of the district courts changed and came now to consist of one judge, six by-sitters and a notary. Each presidency also had a lower judge (*Unterkämmerer*), who decided cases of land strife between

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sat, besides the Council, in at least one or two other courts. See, Dorpat Council 1619 (National Archives of Estonia [from here onwards: NAE] 995.1.252), f. 83–83, 87a–88.

33 Dorpat Council 1619 (NAE 995.1.252).

34 See Oswald Schmidt, *Das Verfahren vor dem Manngerichte in bürgerlichen Streitigkeiten zur zeit der bischöflichen und Ordenherrschaft in Livland* (Dorpat: Karow, 1865).

35 See Bunge, *Geschichte des Gerichtswesens,* 8. In town courts, two town council members acted as bystanders (*Beisitzer*) overseeing the workings of courts.

36 Bunge, *Geschichtliche Uebersicht der Grundlagen*, 30.

37 On Báthory, see F. Nowak, "The Interregna and Stephen Báthory, 1548–72," in W.F. Reddaway et al. (eds.), *Cambridge History of Poland* (Cambridge: Cambridge University Press, 1950), 369–391.

noblemen. The appeals instance was also reformed. The decisions of the district courts and the lower judge could be appealed to a Judicial Assembly (*Gerichtskonvent, conventus iudicialis*). It was to convene twice a year in Wenden, and the Assembly's decisions were final, except for feudal land cases, which could be appealed to the king in Warsaw. The Assembly, however, never started to function.[38] In 1600, it was replaced by a high court in Wenden, consisting of a *Statthalter* as its president and 15 noble by-sitters. The High Court's decisions could not be appealed to the king, unless a case had to do with the largest cities, spiritual property, or property strife concerning royal and noble property. In addition, Riga, Dünaburg, Wenden, Pernau, and Dorpat now came to have castle courts (*Schlossgerichte*), which exercised first-instance jurisdiction in matters both civil and criminal regarding the personnel of those castles.[39]

2.1.3 *Criminal Law in Dorpat in the Polish Period*

Relatively little is known about the Livonian legal practice in the Polish period. Bunge calls this the "dark intermediate period between the old [...] laws and the new creation, which (the Swedish period) called to life."[40] Little remains in the archives on the lower courts of the countryside, with the exception of archival material from the Dorpat Council in the 1620s.

The town privileges, renewed by the Polish king, gave the council the right of jurisdiction according to the inherited local laws. This tells us little of what norms were in use. Criminal procedure during the Polish rule was organised, as far as serious crime was concerned, along the inquisitorial *ius commune* principles. A case of a Russian called Olisky will demonstrate what this meant in practice. The court bailiff (*Gerichtsvogt*) was responsible for the detaining of the criminals and for bringing them to court. In October 1619 two Russians, Olisky and Sawka, were accused of the killing of Mr. Andreas Veyhoff's maid. In the initial inquiries it had not become clear which of the Russians was guilty of the crime. The Council now "decided, that Olisky should be once more seriously asked, if he still held on to his statement of before." The Council also

38 Bunge, *Geschichtliche Uebersicht der Grundlagen*, 31–32. See also, Klaus-Dietrich Staemmler, *Preußen und Livland in ihrem Verhältnis zur Krone Polen 1561–1586* (Marburg, 1953), 80.

39 Bunge, *Geschichtliche Uebersicht der Grundlagen*, 32–33.

40 "[...] *einen dunklen Uebergang bildet von dem alten, im Laufe derselben fast ganz zu Grunde gegangenen Rechte zu der neuen Schöpfung, welche der folgende Streitraum ins Leben rief.*" Bunge, *Geschichte des Gerichtswesens*, 228.

ordered that if necessary the two suspects could be heard simultaneously ("*das Mundt gegen Mundt*") to find out which one was guilty.[41]

After questioning Olisky once more, the Council decided the same day that Olisky, "[b]ecause he did not wish to confess and did not want the truth established" ("*der Olißky weil er in seinen redden Vnbestendikk vnndt mit der Warheit nicht herfier wolte*"), should be tortured ("*solte zur Tortur gebracht warden*"). Olisky seems not to have confessed, although this is not expressly stated in the protocols at this point, because the next day it was also decided that Olisky would be taken to the site of the crime in order to find out more about the circumstances of the crime ("*woe die Dirn sampt den kleidern hin geworffen*"). On the same day, 17 October 1619, Olisky was tortured again ("*peinlich vnndt mit der scharffe sol gefragt warden*"). Clearly, no permission from an upper court was necessary to initiate torture.

The next day the Council pronounced its sentence. The investigations revealed that the maid had first been lured to steal from her master, and Olisky had promised to marry her. After this he had murdered her by cutting her throat with a knife "on the open street." A few points in the sentence are worth highlighting, because they characterize the decision and help to locate it in the contemporary European criminal procedure. The case, first of all, is classified as "penal" ("*peinlich*"). It was thus set apart from the civil cases and accusatorial criminal cases. Even though the case is a penal one, there is no prosecutor involved. Instead, the case was "Mr. Andreas Veyhoff as plaintiff vs. Olisky, accused."

The Council based its decision on Olisky's confession, both voluntary and the one given under torture ("*eigenen so wol gutt: als peinlichen geständtnis nach*"). This was the way the *ius commune* theory of the criminal procedure always had it: confession given under torture did not suffice but had to be reiterated voluntarily before the court.

The Council stated that Olisky had acted "against God's law and human law" ("*wieder Götliche vnndt Menschliche Recht*"). Olisky was sentenced to having his flesh twice torn with hot irons and then decapitated with a sword, after which his body was to be placed on the rack and his head on a pole, all this "as a well-deserved punished and as a warning for others." On the morning of 19 October 1619, the sentence was carried out. On the same day Sawka was set

41 "*E.R.R. geschloßen, das der Olißky noch maln rnstlich befragen werden wolle, ob er bey samen Vorigen Reden gestendigk, auch wo es nötigk wehre, solle der Sawka dem Olipsky vorgestellet worden, das Mundt gegen Mundt keme, Vnndt sie alda einen Tähter vnter sich machten.*" Dorpat Council 1619 (NAE 995.1.252), f. 2 a.

free.[42] From the crime to the execution it took thus only three weeks, with the actual procedure taking only three days. This was also in the spirit of inquisitorial procedure. It was common, in *ius commune*, that confessed cases could not be appealed.[43]

I will take another example of the *ius commune* criminal procedure and criminal law from the practice of the Dorpat Council. Witchcraft was, not surprisingly, considered to be a problem in early-seventeenth century Dorpat as elsewhere in Europe. On 24 May 1623, Matthias Grabbe brought Merten der Kargus before the council. Merten had been subjected to a water trial and had not sunk. This was, according to the common European legal practice, taken to be sufficient circumstantial evidence leading to judicial torture.[44] So it was in this case as well: it was demanded had "he would also be subjected to the proof of torture" ("*das er mit der anden Probe der Tortur auch solle belegt warden*"). The Council had its old protocols read to itself and noted that Merten's wife had already in 1619 "confessed something on him" ("*etwas auff ihn bekennet*"), which also added to the necessary circumstantial evidence. It was decided that Merten should be confronted with all this evidence, and if he still would not confess, he would be tortured. The Council, interestingly, wanted Matthias to promise in writing that the Council would be "held harmless" ("*Deßen soll Matthias sich verschreiben, das er E.E. g. auff alle fälle schadloß halten wolle*"), and Matthias promised this. Merten however died in prison after five days. According to the executioner's (*Scharfrichter*) statement, Merten's neck was broken, and he had a loose tooth in his mouth. Reading between the lines suggests that Merten had died as a result of the torture; he had not confessed, however, which created a legal problem. Should Merten be buried in the sacred ground or not? One of the council members, Friedrich Haneken, thought that since Merten had failed the water trial and "had already confessed before" ("*vorhin bekennet*"), he ought to be buried by the gallows like a criminal. This became the consensus of the Council, which decided to let Matthias take care of the burial. Matthias said he would let the bailiff (*woschna*) take a look at the corpse.

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42 Dorpat Council 1619 (NAE 995.1.252), f. 3 a.

43 See Christian Szidzek, *Das frühneuzeitliche Verbot der Appellation in Strafsachen: Zum Einfluß von Rezeption und Politik auf die Zuständigketi insbesondere des Reichskammergerichts* (Köln: Böhlau, 2002); and Heikki Pihlajamäki, "'At synd och laster icke skall blifwa ostraffade': straffrättsligt appellationsförbud i svensk rättshistoria," in Jukka Kekkonen et al. (eds.), *Norden, rätten, historia: Festskrift till Lars Björne* (Helsinki: Suomalainen Lakimiesyhdistys, 2004), 265–289.

44 See Heikki Pihlajamäki, "'Swimming the Witch, Pricking for as Devil's Mark,' Witchcraft Trials in Early Modern Legal History," *Journal of Legal History* 21:2 (2000), 35–58.

The bailiff and the Castle Court did this and observed, according to Matthias, that the neck had been broken, "as if his neck had been turned around" ("*als wehre ihm der hals vmbgedrehett*").[45]

Witchcraft was also brought up in the case against a peasant named Hans and his wife (whose name was not specified). But witchcraft is not the primary reason why the case is interesting. Instead, it shows how much leeway the court was prepared to leave for the parties' negotiations even in serious criminal cases. Hans and his wife were charged with attacking burgermeister Claus Teschen, the wife using a knife, and of slandering him. The Council ordered Hans's hand to be cut off and the wife to be put in the pillory. Interestingly, however, after pronouncing the sentence the Council stated that Hans and his wife could turn to Teschen for negotiations, in which case the Council would refrain from further measures. The negotiation was successful, and the next day the court confirmed their result. Teschen would refrain from the charges, if Hans would place a guarantee (*caution*); he would refrain from any revenge towards Teschen or the other judges through witchcraft, burning or otherwise; and he would not acquire any land from the town of Dorpat. Hans produced four persons as surety before the Council ("*Matthiam Grabbe, Wiribe Jahn, Daris vnndt seinen bruder*"). They "held out their hands and promised to guarantee all damage that the peasant might cause" ("*dafur hatt er zu burgen gesetzett Matthiam Grabbe, Wiribe Jahn, Daris vnndt seinen bruder, welche behandtstreckett vor allen schaden so der bawr thun wurde, gut zu sein*").[46] The case, of course, portrays the desirability of social peace within municipal community. It was easier for the Council to let the parties contract on their problem than to impose a severe penalty. The case therefore also reflects the weak central power that the Council represents. The appearance of the four guarantors or in fact, compurgators, furthers tells us of an ancient custom involved in the ritual settling of the case in court.

The inquisitorial attitude of the Council shows well in a case in which a dead child was found in the courtyard of St. Mary's Church. Because "the Council wished to inquire properly into the matter," it was announced publicly in every church that "each and every one should inquire into the matter in their

45 Dorpat Council 1623 (NAE 995.1.252), f. 163 a, 165. In 1620 a "Muscovite woman" ("*das Muscowitische Weib*") Manka was also accused of witchcraft. In order to hear her, a couple of extra members, "capable of the Eastern language" ("*der Ostnischen sprache kundigk*") were added to the Council. Dorpat Council 1619, NAE 995.1.252, f. 60 a.

46 "*Können aber beklagten durch biet bey H Teschen etwas erlangen, wil sichs E E g. gefallen laßen.*" Dorpat Council 1619, NAE 995.1.252, f. 90–90 a.

respective household."[47] Purgatory oath was also in the court's repertoire, as was typical in the European criminal *ius commune*. In 1662 Gregor von Santen accused Martinus Lelack for sexually abusing his wife while she had been ill. The wife had herself talked about this, which had been heard by many people. She now denied this and claimed that her illness had caused such talk. The court ordered Martinus to take a purgatory oath "on the third day." This happened, and Martinus swore "on God Almighty and his Holy Evangelium" that he had not committed adultery with von Santen's wife. The Council, however, did not quite believe Martinus and urged him to confess and not to "burden his conscience with perjury" ("*sein gewißen nicht mit falschen eyde beschweren*"). Martin then confessed to sleeping with the woman but denied taking her by force ("*sondern es sey mit ihrem guten willen geschehen*"). He asked for mercy, which was granted because "there was no way of punishing such crimes" ("*keine mittel vorhanden damit solche vbelthaten möchten gestraffet warden*"). The Council thus ended up in a kind of *absolutio ab instantia*,[48] refraining from a hard punishment "for the time being" ("*behelt sich vor zu gelegener Zeit mit scharffer straffe kegen beyde theil zu verfahren*"). Furthermore, the Council decided to keep its decision secret ("*Hisce omnibus Senatoribus Silentium impositum ne ullam hac de re mentionem faciant*").[49]

In the case of Peter Schwede, a blacksmith, his wife complained about Peter treating her "worse than any soldier," smashing in windows and sleeping with Russian whores. Peter explained his behaviour by claiming that his wife did not live with him "like a wife" should, did not kiss him or cook him food, which was why he was obliged to find other company. The Council first sentenced Peter to the stocks (*Pranger*), but stated that Peter could instead pay 50 fl. Should he continue with his crimes he would, however, be sentenced "without mercy" to death and his property would fall to the wife.[50]

The case of Peter Schwede and others above demonstrate how difficult it was for the Council to take stern inquisitorial measures against regular, respected community members should they decide not to cooperate in clearing out their crimes, and how lenient the punishment often turned out to be. The Council clearly preferred settling cases whenever possible, as was done in the case of Lobot (a Polish worker, *Reuter*) and Nicolaus von Wicken, whose settlement in

47 Dorpat Council 1620, NAE 995.1.252, f. 96 a.

48 See Göran Inger, *Institutet "insättande på bekännelse" i svensk processrättshistoria* (Stockholm: Institutet för rättshistorisk forskning, 1976).

49 Dorpat Council 1622, NAE 995.1.252, f. 125 a–126.

50 Dorpat Council 1622, NAE 995.1.252, f. 127–128.

their case involving fighting and defamation ("*schläge vnndt scheltwort*") was recorded in the court protocols.[51]

From all of the above, it is clear that the Council knew the *ius commune* or *gemeines Recht* criminal procedure and its inquisitorial variant well. Being familiar with the inquisitorial procedure did not mean, however, that the Council would have have used it automatically when it came to serious crime. There was room for negotiation especially when the accused was one of the locals. However, when it was felt necessary, the Council did not hesitate to take the sternest measures against crime.

In criminal cases, following the contemporary doctrine, appeals were not allowed.[52] In civil cases, the appeals from Riga went straight to the king and from other parts of the Livonian Duchy to the *Statthalter*.[53] Town courts could not judge noblemen, unless caught in *flagrante delicto*. In such cases the court was strengthened by the local castle commander (*Schlosshauptmann*). If unanimity was not reached, the case was referred to the king to decide.[54]

2.1.4 *Civil Procedure and Notarial Affairs at the Dorpat Town Council in the 1620s*

Civil cases in the Dorpat Town Council in the Polish period started with a citation, which the plaintiff asked the Council to deliver to the defendant.[55] The citations reveal that normal *ius commune* rules of civil procedure were followed, although a fully-fledged *Artikelprozess* was not in use.[56] Ficken vs. Santen from the year 1621 exemplifies this. After stating that the advocate

51 See, for instance, Fabian Mandelstett vs. Heinrich von Santen; Dorpat Council 1622, NAE 995.1.252, f. 129 a. The Council's willingness to settle even homicide cases was evident in the case of Pucke Tith's widow vs. Timp Hans. Hans confessed to having killed Tith with a knife, "after the Devil had taken hold of him" ("*habe der Teuffel zugetrieben*"). The court asked the plaintiff, "what she wanted from the accused" ("*was sie von beklagten begehren*") – a clear indication that a capital punishment was not the only alternative and that the plaintiff could affect the outcome of the trial. Pucke Tith's widow, however, thought that since her husband had died, Hans should also be put to death ("*weil er der Entleibte Todes verblichen als solle der ander auch das leben laßen*"). Hans was thus sentenced to death "according to God's and worldly laws" ("*göttlichen und weltlichen Rechten nach*"), and the sentence was carried out after three days ("*Ad diem Sabbathi 27 Januarij fiet execution*"). Dorpat Council 1622, NAE 995.1.252, f. 150–150 a.

52 See Pihlajamäki, "'At synd och laster icke skall blifwa ostraffade,'" 265–289.

53 Schmidt, *Rechtsgeschichte Liv-, Est- und Curlands*, 231.

54 Schmidt, *Rechtsgeschichte Liv-, Est- und Curlands*, 231.

55 Dorpat Council 1620, NAE 995.1.252, f. 10–10 a.

56 On the article procedure, see Chapter 4.2 below.

Fabian Mandelstadt had personally appeared before the Council, the citation contained a brief description of the plaintiff's claims. The property of David Ficken's children had been left in deposition at the household of the late Hinrich von Santen. According to the claim, part of that property had been sold and some other part otherwise disposed of without the consent of the Ficken children. Greger von Santen, representing the Santen household, was now cited "for the first, second, and third time"[57] and on pain of peremptory decision to appear before the Council on 20 November. Von Santen was to come to the Council either personally or be represented through a power of attorney. If the other party did not appear, the "obedient party" ("*gehorsam theil*") would be accorded "what is right" ("*was Recht ist*"). The absent party would be responsible for the expenses.

As in criminal cases, the procedural forms in civil law were flexible and adjusted to the practical needs. In one of the cases the overseer of orphans (*Weisenherr*; one of the Council members) informed the Council that the mother-in-law of Hans Kroß had complained that Hans and his wife, after getting along fine with the mother-in-law so far, had now started to treat her badly. The mother-in-law wished them to move out and to return the house papers (*Hausbrief*) to her. The court decided to act "*de simplici et plano*"[58] – summarily – "to help the widow in her trouble." The next day Hans appeared in the Council and, although he appeared to be surprised by his mother-in-law's complaint because he had always treated her well, the Council ordered Hans to treat the mother-in-law in a way that meant that all future complaints would be avoided, and to make sure that his wife and her sister would also behave as good children ought to ("*also wie sichs frommen wolgezogenen Kindern eignet vnndt gebühret, das keine ferner klag kommen*"). If the problems could not be settled within six weeks, Hans (apparently with his wife) would have to move out of the house and leave the house papers with the Council.[59] Typically for the Council, thus, an amicable solution was taken to be the goal, this time by way of a summary judgment.

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57 This clearly refers to the *ius commune* practice, which originated in medieval law, and had been taken as part of the medieval Swedish laws as well. See Heikki Pihlajamäki, "Summoning to Court: The Influence of *ordines iudiciarii* on the Swedish Medieval Legislation," unpublished presentation at the International Conference on Medieval Canon Law (Toronto, August 2013).

58 On the summary procedures at *ius commune*, see Kenneth Pennington, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993), Chs. 4–7; Michael Macnair, *The Law of Proof in Early Modern Equity* (Berlin: Duncker & Humblot, 1999), 48–50. At *ius commune*, summary procedure was often used in cases of *personae miserabilae*, such as widows.

59 Dorpat Council 1621, NAE 995.1.252, f. 45 a–46.

Unlike in many other regions of Europe,[60] notaries as a separate legal profession do not seem to have existed in Livonia during the Polish reign – and nor did they in the ensuing Swedish era. Notarial affairs, such as the drafting of contracts, were taken care of by advocates. The Council also participated in this: testaments, contracts, and guarantees[61] were routinely recorded in the Council protocols. On November 4, 1619 Fabian Mandelstatt came before the Council asking for a copy of a testament that Chartraudt Hinrich von Santen had had the Council record in protocol on 10 October 1603.[62] Contracts were also registered in the Council protocols, as when "the honourable Herman Wetter as well as the honourable Christoffer Dringenbergk appeared personally before the Honourable Council, and they had produced amongst themselves the following contract, and asked for the Council to insert it into the protocols of the town of Dorpat and that they themselves would allowed a copy of the contract." The contract regarded paying back a debt.[63] Estate inventories were also recorded in the council protocols, such as the one performed by the Council Secretary Joachim Gerlach on 12 October 1621 on the estate of Claus von Wahlen. The inventory was undertaken in the presence of impartial witnesses, and Wahlen's belongings were carefully listed in the protocol.[64]

In order for contracts regarding real estate within the city limits to be valid, the Council had to approve of them. Most of these were routine, of course, but sometimes the real estate sales could be extremely sensitive. The powerful Jesuits had an interest in widening their possessions in the town, and they regularly came in conflict with the Dorpat Town Council, which feared that its tax revenues and jurisdiction would diminish.[65] In 1620 Henning Lademacher wanted to sell certain houses, which he had inherited, to the powerful Society of Jesus, the Jesuits, which needed more space. When the Council raised doubts as to Lademachers capability of acting as the seller on behalf of his supposedly

60 Dorpat Council 1619, NAE 995.1.252, f. 35–35 a.

61 Dorpat Council 1619, NAE 995.1.252, 19 a; ("*Burgen vor Hans Huhn*").

62 Dorpat Council 1619, NAE 995.1.252, f. 8 a–9. See also the recording of Magdalena Keller's will on 4 October 4, 1622.

63 "*Vorr E.E.R. Personlichen erschienen der Ehrengeachte Herman Wetter wie dan auch der Erbar vnndt Vornehme Christoffer Dringenbergk, vnndt folgenden contract so sie vnter sich getroffen produciret, vnndt gebeten das derselbe den Actis Prothocolli Civitatis Dörpatensis inseriret vnndt ihnen vmb die begühr copia ertheilet werde*." Dorpat Council 1619, NAE 995.1.252, f. 18. See also, for instance, Dorpat Council 1619, NAE 995.1.252, f. 22 ("*Contract inter Suchoezki et Lauterbach*"); Dorpat Council 1619, NAE 995.1.252, f. 27 ("*Schadtlowski trägt Hans Heute gärber sein Haus auff*").

64 Dorpat Council 1621, NAE 995.1.252, f. 120 a–122.

65 See Vello Helk, *Die Jesuiten in Dorpat 1583–1625* (Odense: Odense University Press, 1977), 175–177. Helk describes many such cases.

dead brother and some friends of his, Andreas Gescher, the representative of the Society of Jesus, asked the Council to wait until he could fetch the *Pater Rector* to the *Rathaus*. The Council explained its worries to the *Pater*, and why the case had to be postponed until Lademacher's position be clarified.[66] The Council asked the elders of the guilds for their opinion as well. The elders were strongly against the sale: it was "against the city *privilegia*, because no inheritance or land should be brought into the hands of the spirituals, therefore [the sale] could not be approved."[67]

The Council and the elders decided not to accept the sale. The Council referred to the Riga statutes, which the king had given to Dorpat as privileges, stating that the town of Dorpat went by the Riga law. Paragraph 2 of the fourth part of the Riga statutes states that should someone want to sell inherited land (*Erbe*), he should first offer it to his two closest relatives. If they did not wish to purchase it, then he would be free to offer it to someone else, however, the spirituals were excluded. Because Lademacher had not shown the consent "that his friends consented to the sale" or, for that matter, that his brother had died, the sale could not be approved. The Jesuit Pater Rector complained ("*beschweret sich höchlichen*") of the decision. He claimed that certain noblemen had previously been allowed to purchase houses, yet now the Jesuits were clearly considered less honest. And besides, the paragraph of the Riga law that was referred to must have been "a new one" ("*ein Neues*") and the *Pater* did not think that the king would confirm it.[68]

Insolvency-related recordings were common as well. Heinrich Nidderhoff, a "burgher and inhabitant of Riga," turned to the Court in 1619 following a letter issued to all creditors of a burgher called Paul Wapler. Wapler had declared himself bankrupt. Nidderhoff claimed a debt of 131 guilders, which he had thus claimed "*in termino competenti*" and wanted this be protocolled.[69] Privileges were needed to own houses in the town of Dorpat, and these privileges, given by the king of Poland, were also recorded in the protocols,[70] as were simple debts and mortgages.[71]

66 Dorpat Council 1619, NAE 995.1.252, f. 33 a–34.

67 "*...es wieder der Stadt privilegia laute, das nemblich keine Erben oder grunde in geistliche Hände sollen gebracht werden, darumb könne dieses auch nicht verstattet werden.*" Dorpat Council 1619 (NAE 995.1.252), f. 34 a. See also Helk, *Die Jesuiten in Dorpat*, 176.

68 Dorpat Council 1619, NAE 995.1.252. The Jesuits continued their negotiations with the Council, which in turn approached the elders again. A compromise was felt necessary, because "if the Council did not consent to the contract because of the town laws, the Fathers would [take the houses] anyway by force."

69 Dorpat Council 1619, NAE 995.1.252, f. 21.

70 Dorpat Council 1622, NAE 995.1.252, f. 133.

71 Dorpat Council 1622, NAE 995.1.252, f. 146–146 a.

The court records seldom refer to written legal sources, which may be taken as a sign of the prevalence of customary law. However, the "Polish Constitution" is mentioned in a case concerning interests on a loan. According to the defendant, the Polish law declared that no interests were to be paid on loans for the period of war. The court accepted this argument, declaring that the debtors were to pay interest "from 14 December 1594 to 1600 when there was peace" ("*von Ao 94 den 14 Decemb: bis Ao 1600 als welche Zeit es friede gewesen zu verrenten schuldig sein*"). The reason was that after that "a long-lasting war had started" and because the debtor had at that time not been able to use the money for anything, he was absolved from paying interest for that period.[72]

2.1.5 *Summary: Sources of Law in Dorpat during the Polish Era*

After forty years of Polish rule, the law of Dorpat showed little signs of Polishness in the 1620s. If at any time in the history, it would be expected to find Polish influence in these last years before Livonia fell into Swedish hands. This however, is not the case. The privileges for houses were given officially in the name of the Polish king by his local representative, the *starost*, but the giving of the privileges was routine work and brought with it no invasion of Polish law to the town courts, of which the council was the most significant one. Polish statutes were occasionally mentioned in the sources, but they remained exceptional. The Polish officials, the *podstarost*, and the *wozny*, interfered in the court affairs sometimes when the interests of the Polish citizens or the Catholic Church were at stake. Other than that, the town officials were left in peace to administer the town affairs.

The available sources leave open the question of how the Polish officials managed their own courts. Council protocols occasionally mention castle courts. What cases pertained to its jurisdiction and which law it applied remains unclear. Judging by the range of different cases in the council protocols, both civil and criminal cases as well as notarial affairs, there is a strong suggestion that the traditional Livonian town courts in practice enjoyed a full jurisdiction at least as far as the town inhabitants were concerned. The castle court was probably, then, in charge of the affairs of the Polish officials and their families residing in town.[73]

If the town court did not apply Polish law, what law did they apply? The town law included elements of *ius commune* and German common law, *gemeines Recht*, in the spheres of private, criminal, and procedural law. The influence of *gemeines Recht* was particularly clear in civil procedure, where the

72 Dorpat Council 1619, NAE 995.1.252, f. 81a.

73 As I will show below, the castle courts in the beginning of the Swedish era were, instead, appeal instances for all kinds of cases.

regular system of citations was in use. A bankruptcy law existed much in the same vein as in other European towns of the era. As for criminal law, statutory theory of proof was observed, with its insistence on confession. Judicial torture, although rare, was used as well. The contemporary European terminology, with *poena ordinaria* and *poena extraordinaria* as its backbone, was common.

Although elements of "Roman" law or *gemeines Recht* thus exist in Dorpat of the 1620s, they do not overwhelm the reader. This obviously must have something to do with the amount of legal training available at the council. The council members, the *Ratsherre*, were chosen for merits other than legal expertise. Although the membership was not hereditary by law, the Council's right to choose the new members itself in practice led to the membership being limited to certain families which belonged to the Great Guild.[74] Nevertheless, although the council members were not trained in law, they probably acquired some practical legal knowledge during their long service periods in the council.

The secretary of the court, instead, had legal training. Throughout the period treated above, Joachim Gerlach served as the town secretary of Dorpat. He knew Latin, and was able to draw professional-looking contracts and perform notarial duties on behalf of the Council. As we have seen, at least three advocates were active in the Dorpat council during the years inspected, and they, judging by their use of legal terminology, must also have been legal professionals. It is only logical that there was at least some legal expertise in both the advocacy and on the town council. The legal arguments of the lawyers needed to be communicated to the unlearned council members, and this cultural translation work was carried out by the legally educated council secretary. However, given that the *Ratsherre* themselves remained laymen, the finesses of *gemeines Recht* could not be fully utilized in the proceedings. The argumentation, therefore, retains a rough, simple flavour, although it not nearly as provincial and unlearned as Swedish procedure still continued to be in the eighteenth century.

Although politically Dorpat in the Polish era had largely lost its autonomy, in judicial affairs its autonomy mostly continued. The appeals (*protestatio*) went to an appellate tribunal in Wenden, and was registered in the council protocols. At least in civil cases appeals were sometimes filed, although they remain rare. In the war-ridden country the practical affair of appealing was probably not easy or cheap.

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74 Heinz von zur Mühlen, "Das Ostbaltikum unter Herrschaft und Einfluβ der Nachbarmächte (1561–1710/1795)," in Gert von Pistohlkors (ed.), *Deutsche Geschichte im Osten Europas: Baltische Länder* (Berlin: Siedler Verlag, 1994), 174–264, 220.

The flexibility of the urban criminal justice and its tendency towards settlements deserves to be highlighted. In the period of five years under inspection here, judicial torture was used on a few occasions and some capital punishments were enforced. In almost all of these cases, the accused were outsiders to the town community. The actual town-dwellers had a much lesser risk of being subject to the harshest measures and could in most cases hope to be able to settle even the most serious crimes. This reflects the close-knit community values, both good and bad. Outsiders became easier targets for hostile and harsh treatment, whereas the small political community had the tendency to treat its own members leniently.

After this glance into the everyday judicial practice of a Livonian town during the Polish rule, Livonian pre-conquest legal sources will be introduced systematically. This is important because they formed the basis for legal practice in the Swedish era.

2.2 Livonian Law and the Legal Sources: The European Context

2.2.1 *The Feudal Law*

In the Middle Ages, Livonia evolved into an estate society. The estates – nobility, clergy, bourgeoisie, and peasants – continued forming an important structuring element of Livonian society throughout the Swedish period and beyond. It is no coincidence that it was Hermann Bruiningk, an official of the Order of the Livonian Knights, who saved the archives of the Livonian High Court. The Knights had played a crucial role in the development of local written law ever since the *Ritterrecht*, the "knightly" or feudal law, was put into written form in the late Middle Ages. The German origin of this now needs consideration.

German settlers took their law everywhere they went. It was in the form of the Saxon Mirror (*Sachsenspiegel*) in particular that their law spread eastward with the colonizers.[75] Knight Eike von Repgow had compiled the *Sachsenspiegel* sometime between 1215 and 1230. It was a combination of customary territorial (Saxon) law (*Landrecht*) and feudal law (*Lehnrecht*).[76] A Livonian version of the Saxon Mirror (the "Livonian Mirror," *Livländische Spiegel*) was

75 Friedrich Georg von Bunge, *Ueber den Sachsenspiegel, als Quelle des mittleren und umgearbeiteten livländischen Ritterrechts, sowie des öselschen Lehnrechts* (Riga: W.F. Häcker, 1827).

76 On the Saxon Mirror, see Karl Kroeschll, "Der Sachsenspiegel als Land- und Lehnrechtsbuch," in Ruth Schmidt-Wiegand (ed.), *Der Oldenburger Sachsenspiegel: Kommentarband* (Graz: Akademische Druck- u. Verlagsanstalt, 1996), 13–21; and Eichler and Lück (eds.), *Rechts- und Sprachtransfer in Mittel- und Ostmitteleuropa.*

then worked out about a hundred years later. The Livonian Mirror was in many ways accommodated to Livonian circumstances.[77] The Livonian version was shorter than the Saxon Mirror. Whereas the latter was a law of knights and free peasants, the Livonian Mirror was more of a general law of the land.[78]

It was in the form of the Livonian Mirror that German law took root in Livonia. The Mirror was both directly applied amongst the early settlers, and it also served as a model for the first written laws of Livonia.[79] The first of them was the Feudal Law of Wiek and Oesel (*das Wieck-Oeselsche Lehnrecht*), consisting of the Oldest Knightly Law, and the peasant law of Wieck.[80]

The history of medieval Livonian legislation is complex. The laws that had made up the *Wieck-Oeselsche Lehnrecht* were later to form the so-called Knightly Laws (*Ritterrechte*). The first of these was the Oldest Knightly Law (*Ältestes Livländisches Ritterrecht*) or the Riga Knightly Law from the early fourteenth century. Middle Livonian Knightly Law (*Mittleres Livländisches Ritterrecht*), based on the previous laws, was committed to writing in the late fourteenth or early fifteenth century. The dating of the so-called Reformed Knightly Law (*Umgearbeitetes Ritterrecht*, or The Common Episcopal Laws in the Bishopric of Riga, called the Knightly Laws, "*de gemeenen stichtischen Rechte ym Sticht van Riga, geheten dat Ridderrecht*") has remained unclear. According to Bunge, it was probably finished either in the fifteenth or sixteenth century.[81] Von Bruiningk disagreed, mainly because the Law does not reflect the changes that the Roman-Canon law had brought into procedural law, as one might have expected. The treaties made regarding runaway peasants and certain inheritance questions do not seem to have caught the attention of the unknown compiler of the Reformed Knightly Law, which leads von Bruiningk so assume that the Law must have been compiled very soon after the Middle Knightly Law in the early fifteenth century.[82] Blaese would date the law to the latter half of the fifteenth century, because he sees no reason for the law to have been reformed so

77 The parts of the Saxon Mirror that had no practical relevance in Livonia were left out of the Livonian Mirror, such as the articles concerning the *Verfassung* of the Empire, judicial duel, and Jews. Blaese, *Bedeutung und Geltung des römischen Privatrechts*, 16–17.

78 For a detailed analysis of the differences between the two Mirrors, see Leo Leesment, "Abweichungen des Livländischen Rechtsspiegels vom Sachsenspiegel," *Litterarum Societas Esthonica 1838–1938: Liber saecularis* (Tallinn: Õpetatud Eesti Selts, 1938), 348–358.

79 Bunge, *Ueber den Sachsenspiegel*.

80 Blaese, *Bedeutung und Geltung des römischen Privatrechts*, 18.

81 Friedrich Georg von Bunge, *Das liv- und estländische Privatrecht* (Dorpat: Kluge, 1838), 7–8.

82 Hermann von Bruiningk, "Zur Geschichte des U.R.R.," *Dorpater Zeitschrift für Rechtswissenschaft* 7, Heft 3 (1882), 230, especially 249.

soon.[83] The problem cannot be solved here. Bruiningk's dating seems correct, nevertheless. We now know, for instance, that Roman-canon law was received into the practice of German and Livonian courts by the early sixteenth century.

It was the Middle Knightly Law which acquired the greatest practical importance in the long run. The collection consisted of 249 articles. The statute consists of feudal law,[84] law of inheritance, and police and criminal law. The Law was printed in 1537, and it was this version, originally in *Plattdeutsch*, but later translated into High German, that continued as the official law text until the nineteenth century.[85] This written statement of local law was thus in force during the Swedish period. It must, however, be emphasized that the *Ritterrecht* was just one source of Livonian law dealing with the nobility. Others included conventions sealed between the Bishops and the Knightly Orders on one side and the subjugated clans on the other side; the peace treaties between the different *Landesherren* and the estates; and the decisions of the *Landtage*.[86] But the validity of the *Ritterrechte* or other written sources of customary law obviously did not rest on their being in writing, but in the extent that they were *de facto* "found" to be law in day-to-day court proceedings carried out by lay judges, *Schöffen*, in their courts. The written customary laws, obviously, did not contain all of the legal customs.[87]

Medieval law was polycentric by nature, and Livonian law was no different to other European laws in this respect. In addition to customary and feudal legal bodies, represented by the *Ritterrechte,* there were several significant bodies of law gaining in importance during the Middle Ages: Roman law, canon

83 Blaese, *Bedeutung und Geltung des römischen Privatrechts*, 19.

84 The feudal law existed first in the so-called *Artikel vom Lehngut und Lehnrecht* from the early fourteenth century, see Blaese, *Bedeutung und Geltung des römischen Privatrechts*, 17.

85 Königl. Resolution vom 17. August 1648, § 6. Buddenbrock published a new edition and High German translation in the early nineteenth century, as the law was still in force. See Gustav Johann von Buddenbrock (ed.), *Sammlung der Gesetze, welche das heutige livländische Landrecht enthalten, kritisch bearbeitet, Erster Band: Angestammte livländische Landes-Rechte* (Mitau: Johann Friedrich Steffenhagen und Sohn, 1802), 21–23.

86 Friedrich Georg von Bunge, *Einleitung in die liv-, esth- und kurländische Rechtsgeschichte* (Reval, 1849), 84–88.

87 Blaese, *Bedeutung und Geltung des römischen Privatrechts*, 7–8. Can we then speak of a "common Livonian land law" (*gemeines livländishes Landrecht*) already in the first phase of the Livonian colonization and before the consolidation of the *Ritterrecht*, as Bunge did? Hermann Blaese denies this. He explains Bunge's enthusiasm for a common Livonian land law by the fact that Bunge also constructed such "common" norms of Baltic private law when drafting the Baltic Private Law Code of 1864. Blaese, *Bedeutung und Geltung des römischen Privatrechts*, 9–10.

law, town law, and royal law. Like the customary laws, these bodies of law also had a strong connection to Germany.

2.2.2 *The Urban Law in Livonia*

In medieval Europe, urban law travelled with colonizers and formed families.[88] In France, the laws of Loisin, Beaumant-en-Argonne, and Soissons were the most widespread, and the major cities of Flanders also adopted identical laws.[89] As for Germany, Magdeburg law was the source of some 80 central and eastern European cities founded as a result of the *Ostsiedlung*.[90] The Baltic cities followed German models as well. Lübeck law became the law of the town of Tallinn, whereas Riga adopted the law of Hamburg. Many smaller towns in Livonia, such as Hapsal, then received the Riga law.[91]

Bishop Albert of Buxhoevden (ca. 1165–1229), however, modelled the first Riga law according to the model of Visby. It has been a disputed question whether Albert actually transplanted the whole of Visby law.[92] Nevertheless, eight articles have remained, and they consist of privileges accorded to Riga's merchants. These included, for instance, the right to bear arms, the right to mint Gotland coins, and the exemption from judicial ordeals and customs. Killing a man led, according to the statute, to a punishment of 40 marks, and it was also declared that no new guilds could be founded without the consent of the bishop, who was also the highest judge in the city (*principale iudicium*).[93]

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88 See Robert Bartlett, *The Making of Europe: Conquest, Colonization and Cultural Change, 950–1350* (Princeton, N.J.: Princeton University Press, 1994); Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983).

89 David M. Nicholas, *The Growth of the Medieval City: from Late Antiquity to the Early Fourteenth Century* (New York: Routledge, 1977), 154–155.

90 Eichler and Lück (eds.), *Rechts- und Sprachtransfer in Mittel- und Ostmitteleuropa*.

91 The lord of a new town would grant it the law of a mother city, the *Schöffen*, from which he would prepare a new edition of the law and then hand it over to the representatives of the daughter city. The taking of a new urban charter resembled, according to Harold Berman, a sacrament: "it both symbolized and effectuated the formation of the community and the establishment of the community's law." Urban law was, thus, essentially communitarian by character. Cities were often founded solemnly by a collective oath, which obliged the citizens to respect the charter that was read aloud to them. Berman, *Law and Revolution*, 393.

92 Blaese, *Bedeutung und Geltung des römischen Privatrechts*, 21.

93 *Monumenta Livoniae Antiquae* IV, 139. It remained unclear, however, whether Bishop Albert had meant the whole Law of Visby to be in force in Riga, or only the eight paragraphs. In 1225, Wilhelm of Modena, as the papal legate, resolved the question in favour

The first version of the actual Riga law was put into writing in the early thirteenth century.[94] The Hamburg law (of 1270), then, was adopted sometime between 1279 and 1285. Riga had close relations with Hamburg, whose statutes were also one of the most advanced in the Hanseatic region. The Riga city law was soon reformed, however, probably in the late thirteenth or early fourteenth century (the so-called Reformed Statutes, *Umgearbeitete Statuten*). The Reformed Statutes included paragraphs on many different areas. City administration, marriage, inheritance, as well as serious crimes such as battery, robbery, theft, and forgery, were covered. Maritime law was devoted a part of its own.[95]

During the Polish rule, towns developed their statutes just as independently as before. The Council of Riga published, to name but some of the most significant pieces of statute law, a new Court Order (*Gerichtsordnung*) in 1581 and an Ordinance of Guardianship (*Vormünderordnung*) in 1591. In the early 1600s, plans for a wholesale revision of town law emerged, but nothing came of it.[96]

However, civil law questions were largely left untouched, which probably left room for *ius commune*. The Reformed Statutes stayed in force until 1673, well into the Swedish period. The Riga law was adopted by other Livonian towns as well. Reval (Tallinn) adopted it in 1225 (although it abandoned the Hamburg/Riga law for Lübeck law in 1248), Hapsal in 1279, and Pernau in 1318. Hafenpoth, Goldingen, Windau, Pilten, Fellin, Dorpat, Wenden, Wolmar, and probably some other townships adopted the Riga law for use during the Middle Ages and the early modern era. The towns also followed the later development of Riga's urban law and tended to adopt the same changes to the law that Riga did.[97] It may thus be said that Riga law acquired the position of common urban law in medieval and early modern Livonia.[98]

In addition to the city statutes, *Burspraken* formed an important part of town law. They were statutes issued by the town council, which were read publicly once a year and also included in the collection of *Burspraken.*[99]

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of the strict interpretation. Even after this decision, however, the problem cropped up a few times in the remaining centuries of the Middle Ages. See Bunge, *Einleitung*, 133–139.

94 Blaese, *Bedeutung und Geltung des römischen Privatrechts*, 21–22.

95 Bunge, *Einleitung*, 144–154.

96 Bunge, *Einleitung*, 185–187.

97 Bunge, *Einleitung*, 154–158.

98 This is true for the part of Old Livonia that came to the form the Swedish Livonia in the seventeenth century. The Tallinn – Lübeck law also adopted some town in Estonia, namely Wesenbeck and Narva.

99 Heinz von zur Mühlen, "Livland von der Christianisierung bis zum Ende seiner Selbständigkeit (etwa 1180–1561)," in Gert von Pistohlkors (ed.), *Deutsche Geschichte im Osten Europas: Baltische Länder* (Berlin: Siedler Verlag, 1994), 25–172, 110.

Wars and political changes also changed the situation of the towns. In 1562, the Polish king gained lordship over Riga, and it took until 1581 before the old privileges were partly confirmed (*Privilegium Stephaneum*). The limitations on the freedom of religion that the Poles had introduced were lifted in the Swedish era, although King Gustav Adolf (r. 1611–1632) left the institution of *Burggraf* – a representative of the king in the city council – in place.[100] A royal privilege confirmed Dorpat its old Riga law in 1582, with the exception of some important limitations. The *starost* as a representative shared some of the council's judicial power and, although the town dwellers were basically guaranteed freedom of religion, it now had to be exercised under the shadow of the Catholic Reform. The confirmation of the old town privileges had to wait until the Swedish period: Gustav Adolf renewed them in 1626 and Queen Christina (r. 1632–1654) again in 1645. During the Swedish period, the smaller towns were enfeoffed to the Swedish magnates: Wenden and Wolmar to Axel Oxenstierna (1583–1654), Fellin and Hapsal to Jacob de la Gardie (1583–1652), Weissenstein to Leonhart Torstenson (1603–1651), Wesenberg first to the Brederode family and then to the Tiesenhausens, and Pernau to the Thurns.[101]

2.2.3 *The Manorial Law*

Manorial law was one of the medieval bodies of law that acquired a written form in many European regions after the Renaissance of legal science in the twelfth century. Legal historians have, however, remained surprisingly silent on the matter, with Harold Berman forming the major exception.[102] Peasants – like clergy, townspeople, and the nobility – were in many parts of Europe governed by their own legal rules, regulating the life of peasant communities, the villages. This is the part of law whose concrete contents are often the most difficult to find out because it has rarely left written traces. Manorial law can be defined as governing lord-peasant relations, in contrast to the closely related feudal law, which regulated the relations between lords and vassals. Manorial

100 von zur Mühlen, "Das Ostbaltikum unter Herrschaft," 216.

101 von zur Mühlen, "Das Ostbaltikum unter Herrschaft," 216, 220.

102 Berman's principal argument on the topic in his path-breaking *Law and Revolution* (1983) was that manorial custom transformed into a system of manorial law between 1050 and 1150. The argument about the systematization of manorial law, based on little evidence, is not among the best-founded in the book. See Heikki Pihlajamäki, "Berman's Best Pupils? The Reception of *Law and Revolution* in Finland," *Rechtsgeschichte – Legal History* 21 (2013), 212–214.

law regulated and set limits for the services rendered by the serfs to the lords, thus balancing the interests, and reciprocal rights of the lord and the serfs.[103]

Manorial law was a prerogative of the lord, an integral part of the fief, although most lords exercised "low justice" (minor affairs) only, whereas the "high justice" (cases involving death punishments) was reserved for royal courts. Manorial law was typically administered by "an assembly of members of the manor, including the serfs, who participated in adjudication of disputes under the presidency of the lord's official, the steward." The administration of law was thus usually delegated to the lord's steward, whereas the lord himself rarely took part in the proceedings.[104]

Livonian manorial law (*Bauerrecht*) turned into *ius scriptum* early. Leonid Arbusow, in the 1920s, remarked that the main events in fixing the Livonian feudal law into writing ran parallel to the emergence of the written expressions of the Livonian manorial law. For Arbusow, manorial law could only be understood within the framework of "the totality of peasant conditions" ("*der gesamten bäuerlichen Verhältnisse*").[105] As collections of both Livonian feudal and manorial law are considered, the fourteenth century was the decisive period of growth, and in the fifteenth century, the development of written law in these fields continued in the form of privileges.[106]

Written sources of feudal and manorial law are, needless to say, just one way of describing and approaching the matter. Lacking court records, we have no way of knowing how and whether the written sources were applied, and to what extent local legal customs differed from one another. Fortunately other sources exist. They help us to understand the procedure, although less the substantive law. Balthasar Russow, a famous sixteenth-century chronicler, informs us about Livonian manorial courts.[107] Russow talks about the "oldest peasants" as being in charge of acting as law-finders, and also states that their number was three or four. We are told that in civil cases (*bürgerliche Sachen*) the *Rechtsfinder* not only evaluated the evidence after hearing the plaintiff and the answer to that, but also pronounced the decision. The source thus lets us understand that civil cases amongst peasants were decided by their own

103 Berman, *Law and Revolution*, 316–321.

104 Berman, *Law and Revolution*, 321–328.

105 Leonid Arbusow, *Die altlivländischen Bauerrechte* (Riga: Häcker, 1924), 4–5.

106 Hermann v. Bruiningk, [article with no name], *Dorpater Zeitschrift für Rechtswissenschaft* 7 (1882), 252; Friedrich Stillmark, *Rechtsverhältnisse der Bauern in Alt-Livland* (Reval, 1901).

107 Russow, *Chronica der Prouintz Lyfflandt* [7], 203.

law-finders, without the lord's interference.[108] If the case was criminal, the law finding of the peasants was subject to the scrutiny of three sworn noblemen as by-sitters (*Beisitzer*). They could accept the sentence or change it in either direction according to the circumstances, but they probably could not touch the guilty verdict.[109] David Hilchen's *Landrechtsentwurf* of 1599 does not mention law-finders, but states that "whenever between a landed nobleman and his peasants a case emerges, where the court must decide over blood, he shall not take the decision in consultation and presence of other noblemen, as it has been done in olden days […]."[110] One piece information is still worth pointing out. In 1601, the conflict between King Sigismund of Poland and Duke Karl had escalated to a state of war. At this point, Karl met with the representatives of the Livonian Order, who had plans to have Livonia incorporated into Sweden. The Livonian knights informed the Duke, among other things, about the way Livonian judiciary was built. The Privileges of King Sigismund II had guaranteed the manorial lords a full jurisdiction in both civil and criminal courts over the people residing on the manor – mostly peasants, of course. The lord did not, however, exercise the jurisdiction himself; instead, his steward mostly presided over the court whereas the most respected peasants, "*die eltesten*," were involved as members of the court.[111]

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108 Perandi says that there were six law-finders. The difference may be explained by the fact that Perandi speaks on the basis of the Dorpat District Courts protocols from 1632, whereas Russow wrote his chronicle about half a century earlier. See Adolf Perandi, *Das ordentliche Verfahren in bürgerlichen Streitsachen vor dem estländischen Oberlandgericht zur schwedischen Zeit* (Tartu: Verlag des estnischen Zentralarchivs, 1938), 51–52.

109 Perandi, *Oberlandgericht*, 151–152.

110 "[…] *zwischen Junker und seinen Erbbaurern so eine Sache vorfällt, darin über Blut muss gerichtet werden, so soll er das Urtheil nichts anders, als in Zuziehung und Beisein etzlicher von Adel, wie denn von Alters gebräuchlich gewesen, sprechen*." Cited in Transehe-Roseneck, *Gutsherr und Bauer in Livland*, 41. David Hilchen became the *Stadtsyndicus* of Riga in 1589. It is not certain to what extent his project, which the Polish King never promulgated as law, mirrored the contemporary legal conditions. Hilchen used Roman, Polish, Lithuanian and Livonian law as his sources. See Bunge, *Einleitung*, 194–196.

111 "*Wann ein Pauer Etwas verbricht gegen seine Herrschaft oder sonst einen Andern: wird er realiter für gefordert und ihme eine Zeit zu seiner Verantwortung und der Zeugen an die Hand Bringung eingesetzet, auf welche Zeit der eltesten Pauren, die Rechtfinder genandt, 3 oder 4 berufen werden. Ist die Sache bürgerlich, bringen dieselben auf vorhergehende Klage und Antwort, auch der Zeugen Verhörung, das Urtheil ein. Wird es recht befunden, muss der Beklagter, nach Gelegenheit der Sachen, demselben Folge leisten, oder mit seinem Gegentheile nach Laut des Urtheils sich abfinden. Wäre es aber eine peinliche Sache, werden zu obbenanten Rechtfindern bei der hohen Obrigkeit geschworenen Eingesessene von Adel mit darzu verschrieben und auf ihr Gewissen niedergesetzet, welche die Sache mit anhören.*

As will be shown later, both the institution of law-finders as well as that of noble by-sitters was still found in Livonia in the early years of the Swedish rule. Adolf Perandi, an eminent Estonian legal historian, claimed in an article from 1931 that the manorial lords had never actually possessed full judicial power, which had they had supposedly been granted by Sigismund's Gnade in 1561. Instead, the power of the lords had always fallen short of the judicial power that was invested in the manorial courts (*Bauergerichte*), because of the competence of the law-finders in both civil and criminal cases.[112]

The Swedish judicial reform of 1630 and 1632, traditionally celebrated as a major advance and a "golden period" in Livonian history, had actually, according to Perandi, brought about a virtual destruction of the peasants' right to decide their own legal problems in their own courts. Perandi's view, however, is exaggerated. For one thing, although it is true that the manorial lords never possessed full judicial power, it was hardly in their interest to assume such powers. A comparative look at manorial law shows that European manorial lords gave away only those parts of their jurisdiction which were not important to them from the point of view of maintaining control over the peasants residing on their lands. Thus, the peasants got to decide petty crimes, their internal debts, slander cases, and other minor legal affairs, which were of lesser interest to the lord – as long as peace was maintained.

The peasants were not only allowed to decide these cases; in fact, it was their duty to take part in the running of the manorial courts deciding these cases. The ordinance of Grand Master Johan Freytag von Loringhoven clearly shows this: the duty of the senior peasants to take part in the court proceedings was listed among all the other responsibilities of the peasants. The language of rights, even though the written form of *Gerechtigkeiten* was probably experienced by the peasants as being more secure than their relying on custom alone, hardly fitted the picture of the Livonian serf-peasant. The running of the courts was a service owed to the lord, much in the same vein as producing corn or honey for the manor's storage rooms. Besides, although the manorial courts, according to the sources available, were staffed by peasant law-finders, the courts were headed by stewards, who were the lord's officials. Had the lord had an interest in any particular law case, he certainly had the means of making

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Bringen alsdann die Rechtfinder das Urtheil recht ein, bleibet es bei demselbigen; im Fall aber, dass solches nicht geschiehet, moderiren oder schärfen die anwesende Geschworenen dasselbe Urtheil nach Beschaffenheit der Sachen, dass kein Theil mit Billigkeit zu klagen Ursache habe." Cited in Transehe-Roseneck, *Gutsherr und Bauer in Livland*, 40–41.

112 Friedrich Georg von Bunge and C.J.A. Paucker (eds.), *Archiv für die Geschichte Liv-, Esth- und Curlands,* Bd. VI (Reval, 1851), 216; Perandi, *Oberlandgericht*, 51–52.

his wishes heard. In addition to this, the lord had the judicial power in the so-called *Halsgerichtssachen*, in cases of serious criminality.

Even more importantly, peasant courts did not cease to exist during the Swedish rule. Throughout the Swedish period, peasant courts continued to function. They decided both petty crimes and small civil claims.[113] The functioning of the peasant courts will be dealt with more in detail below.[114]

2.2.4 *The Reception of Ius Commune in Livonia*

The legal pluralism typical of Europe was thus at work in Livonia, with town law, and feudal and manorial law. We still need to consider one typical ingredient of medieval and early modern legal pluralism and ask whether, and to what extent, *ius commune*, the major driver of legal change in the contemporary German Empire, had advanced in Livonia. We have in fact already seen that *ius commune* had gained some authority in the practice of the Dorpat Council in the 1620s.

Patrick Glenn contributed in an interesting way to the reception theories in his *On Common Laws*. According to Glenn, common laws have a "relational character." They yield to, and define themselves in relation to, particular laws or *iura propria*. They thus have "no obligatory or mandatory content."[115] The learned Roman-canon law of medieval origin was not the only *ius commune*, but many others formed similar systems – and still do. The Spanish had their *derecho común* (that ruled as subsidiary law not only in Castile, but also in "the Indies," or Spain's American colonies[116]), and the French *droit commun* lurked

113 The peasant courts were not allowed to order whip punishments of more than 10 pairs or damages greater than 20 thalers. Gustav Johann von Buddenbrock (ed.), *Sammlung der Gesetze, welche das heutige livländische Landrecht enthalten, Zweiter Band: Aeltere hinzugekommene Landesrechte, Erste Abteilung: Landesordnungen vom Jahr 1621–1680* (Riga: Häcker, 1821), *Ökonomie Reglement* (Ch. 5, § 2), 1221.

114 From the point of view of the *Rechtsfinder*, fragments of an Estonian translation of *Livische Bauerrecht* (LBR), the manuscript dating to the sixteenth century and found in 1893 in the Tallinn City Archive, is of great value. Not because it would directly deal with how the system *Rechtsfinder* functioned, but merely because of its existence. Although it is unlikely that the any of the peasant *Rechtsfinder* themselves would have been literate, the translation could well have been read aloud to them, as Arbusow assumes. Leonid Arbusow, *Die altlivländischen Bauerrechte: Mitteilungen aus der livländischen Geschichte* (Riga: Gesellschaft für Geschichte und Altertumskunde zu Riga, 1924–1926), 68–70, 125–126.

115 Patrick Glenn, *On Common Laws* (Oxford: Oxford University Press, 2005), 62.

116 See Alejandro Guzmán Brito, "Historia de las nociones de 'Derecho Común' y 'Derecho Propio,'" in *Homenaje al Profesor Alfonso García-Gallo* (Madrid: Editorial Complutense, 1996), 207–240.

behind the hundreds of local customary laws. Similarly, it was the *gemeines Recht* that served as the common law patching up for the deficiencies in German territorial legal orders, not to mention the English common law, which at an early stage came to replace the local customary laws. The relational character of the common laws means, for instance, that the continental common laws (the French, Castilian, and German) were united by the common Roman-canon law (the traditional *ius commune*), which served as their common background. Common laws can in other words be layered, one on top of the other.[117]

In this study, Glenn's idea of relational common laws plays a role in explaining why the legal universe of the Swedish Livonia was arranged the way it was. Before getting to that question we must, however, inspect how and to what extent the reception of Roman-canon law, or *gemeines Recht*, had proceeded prior to the Swedish conquest in the 1620s. Just as elsewhere in Europe, the reception has been a classic problem of legal history in the Baltic area. Bunge claimed in the 1840s that canon law had never gained any general validity in the old Livonia. Instead, only isolated laws ("*einzelne Extravaganten*") had been followed directly, in addition to which the synods of Costniss and Basel had expressly been taken into use by the Archbishopric of Riga. However, Bunge affirms that the provincial synods in fact received the contents of the Decretales of Pope Gregor IX (1234, Liber Extra), often word for word.[118] Secular courts followed canon law as well, and some of the Livonian legal cases reached the papal curia.[119] Canon law also remained in force, as in other Protestant regions, as long as the provisions of canon law were not in conflict with the "basic principles of the Protestant church."[120]

The other half of the Siamese twins, Roman law, apparently became known at an early stage. The mastery of canon law already required at least some knowledge of Justinian's legal corpus. Thus, Bishop Alfred of Riga notes already

117 Glenn, *On Common Laws*. It should be pointed out that this description surely gives an excessively limited picture of Glenn's thoughts. The early modern *iura communalia* are, for him, only examples of common laws, which are, and have, a global phenomenon, very much alive today in different shapes and forms.

118 Bunge, *Einleitung*, 170–174. Modern research has come to precisely the same conclusion. See Richard Helmholz (ed.), *Canon law in Protestant lands* (Berlin: Duncker & Humblot, 1992); and Virpi Mäkinen (ed.), *Lutheran Reformation and the Law* (Leiden: Brill, 2006).

119 UB XI, 775–776, in which the term "common laws" ("*gemeyne Rechte*") is used to refer to Roman and Canon law and which refers to the Decretals, Pandects, Codex and the *libri feudorum*.

120 Bunge, *Einleitung*, 170–174. Modern research has come to precisely the same conclusion regarding other Protestant regions. See Helmholz, *Canon law in Protestant lands*; and Mäkinen, *Lutheran Reformation and the Law.*

in 1211: "*iuxta illud dictum legis: Quod quis iuris in alterum statuit, eodem et ipse utatur*" (Dig. II, 2; 1 C. Inter alios, VII, 60) and Bishop Nicolaus (also of Riga) in 1232 "*cum, secundum legem Imperatoriam, res inter alios acta aliis minime debet praeiudicare.*"[121] The document concerning the sale of Estonia by the King of Denmark to the Teutonic Order in 1341 is full of Roman law terminology, such as *iustus titulus, nulla fraus, exceptio non numeratae pecuniae*, vindication, and *bona fides*.[122] Otto, Bishop of Courland, mentions *restitutio in integrum*, a typical instrument of Roman, but especially of canon law,[123] in the Middle Ages, in a document of 1392.[124] The provincial statute of the Archbishop of Riga (1428) contains norms about sales contracts (*emptio venditio*), testaments, marriage, and usury, in the vein of Liber Extra of 1234.[125]

Yet another attempt to Romanise Livonian law dates to the mid-fourteenth century. Emperor Charles IV (r. 1316–1378) decreed on 18 April 1366, that all Livonian statutes and decrees not in accordance with Roman law were not in force.[126] At first glance, this appears to be a strange decree. After all, by the fourteenth century it had become a general rule that Roman-canon law served as a subsidiary body of law only, thus applied only if the parochial legislation was silent on the question. It now seems that the Emperor wished to leave the Livonian laws in place only where *ius commune* was silent, thus reverting the normal order of the bodies of law. A closer reading reveals however that the statute may not be so categorical. Only those "statutes and ordinations" that have been expressly rejected by "civil and canonical sanctions" are annulled. In other words, perhaps it was not the Emperor's intention to revert the established relation between Roman-canon *ius commune* and municipal law;

121 Bunge, *Einleitung*, 174–175; Blaese, *Bedeutung und Geltung des römischen Privatrechts*, 14. See UB I, 20, 125.

122 Blaese, *Bedeutung und Geltung des römischen Privatrechts*, 15; UB I, 805, 798, 851, 852, 855.

123 See, Helmholz, *Canon law in Protestant lands*.

124 Blaese, *Bedeutung und Geltung des römischen Privatrechts*, 15; UB III, 1399.

125 Blaese, *Bedeutung und Geltung des römischen Privatrechts*, 15; Friedrich Georg von Bunge, *Beiträge zur Kunde der Liv-, Esth- und Curländischen Rechtsquellen* (Dorpat, 1831).

126 Bunge, *Einleitung*, 176. "[…] *Sane ad Imp. Mai. audientiam* […] *est deductum, Quod saeculares quidam in potestatibus et officiis publicis constitute* […] *Statuta singularia et iniquas ordinationes… conciderant, eiusdemque publices et de facto insistere praesumserunt, contra legitimas civiles et canonicas Sanctiones etc. – quae omnia, et quaelibet ab inde secuta, cum per sacras civiles et Canonicas sanctiones expresse reprobata sint* […] *ex Authoritate Imperiali cassamus, irritamus et annullamus* […]"; at Dogiel, *Codex diplomaticus regni Poloniae et Magni Ducatus Lithuaniae, Tomus v. in quo universae Livoniae ita speciatim Curlandiae et Semigalliae ducatuum res continentur* (Vilnae, 1759), Nr. 100; Friedrich Georg von Bunge (ed.), *Liv-, Est- und Curländisches Urkundenbuch* (Reval, Riga, Leipzig, 1853–1881), 1029.

instead, he was referring to specific instances in which the civil or ecclesiastic authorities had condemned certain laws. To establish a general preference for *ius commune* would have been unrealistic, given the scarcity of legal learning in medieval Livonia.

From early on, the Teutonic Order employed men versed in learned laws. In 1352 the Master of the Order, Winrich von Kniprode (r. 1351–1382), ordered that each convent of the Order house two learned persons, one theologian, and one lawyer. These learned brothers were responsible for teaching the others.[127] According to a chronicler, Winrich also invited "excellent jurists," legalists, to the Order's headquarters in Marienburg where a sort of a law school was thus established. This college of lawyers would then also have acted as a high tribunal for Livonia and may even have issued *consilia* in lawsuits outside Livonia.[128] Pope Martin V (r. 1417–1431) undoubtedly refers to this same *studium generale* in a bull of June 13, 1422, which conferred to the Brothers of the Order the right to acquire titles in civil law and to enjoy the corresponding privileges.[129]

As Bunge remarks, doctors of both laws (although mostly canonists) were not uncommon in the court of the Grand Master either. It seems, however, that whatever *ius commune* learning there was, it was retained for the use of ecclesiastical courts.[130] The secular courts seem to have remained virtually untouched by *ius commune* in the Middle Ages. The fact that the private law collections and for instance the *Ritterrecht* do not contain Roman-canon influences, or contained very little, demonstrated this. Bunge notes that even the *Formulare procuratorum* of Dionysius Fabri of 1538 still contained almost no Roman-canon learning, thus forming a striking contrast to its German equivalents of the same time.[131] This is only logical considering the fact that learned law had begun to advance in the North German territories at the beginning of the sixteenth century.

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127 Lucas David, *Preussische Chronik* VII (Königsberg: Hartung, 1812–17), 27.

128 Johannes Voigt, *Geschichte Preussens* V (Königsberg, 1827), 99.

129 Bunge, *Einleitung*, 177. "[…] *Cum itaque sicut accepimus vo, ut aequum et iniquo et licitum ab illicito discernere valcatis iuris civilis studio in loco ubi illud vigeat generale insistere affectatis tempore procedente, nos vobis* […] *ut leges audire et in eis studere* […] *etiam legere, omnes actus scholasticos exercere ac doctoratus insignia et gradus alios debitos in illis more solito recipere libere et licite valeatis, nec non graduandis et doctorandis, cum gradum et doctoratum huiusmodi susceperint, in legibus ipsis omnibus et singulis honoribus, privilegiis etc. – quibus ceteri in earundem legume facultate doctores et graduate generaliorum studiorum ubilibet potiuntur, uti possitis et gaudere* […] *indulgemus.*"

130 See Bunge, *Einleitung*, 178–179.

131 Bunge, *Einleitung,* 178–179. See also Steinke, *Die Zivilrechtsordnungen*, 40–41; *Formulare procuratorum*, in Bunge, *Altlivlands Rechtsbücher*, 185–264.

It was not only imperial legislation which had effect in Livonia. As part of the Empire, Livonia came under the jurisdiction of the newly reorganized highest judicial authorities of the Empire, both of which derived their jurisdiction from the Emperor, the highest judicial lord in the Empire. These courts became lasting institutions and one of the few which gave substance to the abstract and vague idea of the *Reich*. The Supreme Court of the Holy Roman Empire of the German Nation (*Reichskammergericht*) had been established at the Worms Diet in 1495 as part of the imperial reform and is considered to be one of the primary vehicles of the reception of Roman law in the Old Empire.[132] The founding of the Supreme Court of the *Reich* was closely associated to the Perpetual Public Peace (*Ewiges Landfrieden*), also proclaimed at the Worms Diet. The establishment of the Court was seen as necessary to help bring about Eternal Peace. The Court was the appeals instance of the Empire, except for the territories, which held appeals privileges (*privilegium de non appellando*). Such privileges did not, however, shield the territorial princes against cases of refusal or delay of justice (*Rechtsverweigerung, Rechtsverzögerung*).[133] *Privilegia de non evocando*, based on Emperor Charles IV's Golden Bull of 1356, meant that the holder of the privilege could not be summoned to a court of a *Reichstand* other than his or its own. *Privilegium de non evocando* was granted to the Livonian Order in 1420 and private appeal outside Livonia was forbidden in the early sixteenth century (*privilegium de non appellando*).[134]

There are some documentary examples of Livonians already approaching the medieval predecessor of these high courts in the fifteenth century. For instance in 1473, the Imperial Chamber Court (*Kaiserliche Kammergericht*), at Baden then, heard a case concerning the dowry of Johan Morrien's widow,[135] and in 1483 the Duke of Pomerani – commissioned by the Emperor – heard a case of Henvard von der Linden against "Tallinn people."[136]

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132 On the appeals privileges, see Jürgen Weitzel, *Der Kampf um die Appellation: Zur politischen Geschichte der Rechtsmittel in Deutschland* (Wien: Böhlau, 1976).

133 On refusal of justice, see Peter Oestmann, "Rechtsverweigerung im Alten Reich," *Zeitschrift der Savigny-Stiftung: Germanistische Abteilung* 127 (2010), 51–141.

134 Bunge, *Einleitung*, 178. The privilege for the Order from Sigismund, 20.3.1424 (UB, VII, 102); Plettenberg's prohibition of appeals 22.9.1510 (UB, III, 877), the prohibition of appeals in civil cases for all Livonia; privilege of Archbishop Jasper Linde (1523), August Wilhelm Hupel, *Neue Nordische Miscellaneen*, vols. 7–8 (Riga: Hartknoch, 1794), 268.

135 *Livländische Güterurkunden*, I, 494.

136 "[…] *acta in causa Henvard von der Linden contra Revalienses in aula Caesaria et coram duce Pomeraniae, quem commissarium voluerat Imperator, agitate 1483*." Buddenbrock I, 166.

Despite the *privilegia*, Livonians did in fact take advantage of both of the imperial high courts, although apparently not to a very large extent. Leo Leesment recorded 29 Livonian cases in the Imperial Chamber Court of the Holy Roman Empire in the years 1530–1564. Almost all of them were appeals cases, which had been first decided by the Archbishop of Riga, the Council of Riga, or a lower court in Livonia. Leesment also went through some of the documents at the *Haus-, Hof- und Staatarchiv* in Wien, which houses the archive of the Aulic Court, and found some precedent cases from Livonia from around middle of the sixteenth century.

Leesment's main achievement was bringing the Livonian cases to light, but he did less by way of analysing the material. According to Leesment, the primary reason for the concentration of Livonian cases around the middle of the sixteenth century was the fact that that was the time when Livonian relations *vis-à-vis* the *Reich* were at their most intense.[137] This may be true in part, along with the simple fact that it understandably took a few decades before the Livonians learned to take advantage of the imperial high courts, which was also true for other regions of the Empire.[138] In addition, *privilegia de non evocando* and *appellando* had been granted, and in principle it made most of the appeals illegal. It is difficult to decide to what extent the contact with the Imperial Chamber Court and the Aulic Court might have advanced the march of *ius commune* into Livonia. The effect should certainly not be exaggerated.

Since it is evident that *ius commune* learning had reached judicial practice before the Swedes came, something must have happened in the Polish period. The reception process probably advanced around the same time as it did in the northern parts of Germany, because of the cultural relations between the German Baltic population and Germany. With court records lacking for the most part, we must again rely on other sources.

In 1598, King Sigismund set up a high-profile commission entrusted with the task of drawing a new *Landrecht* for Livonia,[139] ordering a wholesale reception

137 By the time of reporting on his findings, Leesment had not been able to complete his archival studies in the Viennese archive. See Leo Leesment, *Über die livländischen Gerichtssachen im Reichskammergericht und im Reichshofrat* (Tartu: C. Mattiesen, 1929).

138 See Filippo Ranieri, *Recht und Gesellschaft im Zeitalter der Rezeption: Eine rechts- und sozialgeschichtliche Analyse der Tätigkeit des Reichskammergerichts im 16. Jahrhundert* (Köln: Böhlau, 1985).

139 The members of the commission were Archbishop J.D. Solikowski, Castellan I. Zborowski, the Lithuanian Chancellor Leo Sapieba, the Lower Court Judge Sbigneus Osolinski, the Novgorod *Hauptmann* M. Lenieck, P. Ostrowski von Ostrow, the Dorpat *Oeconom* B. Schenking, the Dorpat Lower Court Judges B. Holzschuer, and the royal secretaries N. Niemieschinki, Hj. Wilczek, and David Hilchen. Bunge, *Einleitung*, 192.

of Magdeburg or Saxonian law, together with the Prussian judicial order.[140] The commissaries decided to delegate the actual task to one of commissaries, a Riga-born lawyer and notary of the Wenden District Court, David Hilchen. He had been trained in law in the universities of Tübingen, Heidelberg and Ingolstadt, and he had served in various significant legal posts during his career.[141] Undoubtedly, and unlike many other members of the Commission, Hilchen was well prepared to draft the law. After only five months of efficient work, Hilchen presented a draft law for scrutiny to the Commission, the representatives of the nobility, and the Council of Riga. It has been assumed that they considerably influenced the final draft, which was presented to the Diet, gathered in Warsaw, in 1600. Sigismund III's attempt proved unsuccessful, like all of its predecessors, this time again because of the resistance it met from the side of the Livonian nobility. The matter was postponed to the next Diet, and the draft was never promulgated as law.[142]

Hilchen's *Landrecht* has, for a long time, remained a blank spot in Livonian legal history. Thomas Hoffmann's recent study on Hilchen's work has now remedied the situation. Apart from some sections, the *Landrecht* never appeared in print.[143] This is understandable against the precarious political background in which the Polish authorities found themselves in the Livonia of the late 1590s. As mentioned above, the loyalty of the Livonian nobility was shifting towards the Swedes and Duke Karl. In this situation, the Poles could not expect too much from the Livonian compilation of land law: it was enough that the Polish administrative structure was kept intact. The compilation could then protect Livonian law well, as long as it did not encroach on Polish law.[144]

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140 "*Cum provincia Livonia hactenus nullon iure usa sit, constituimus, ut hoc tempore iure Magdeburgensi aut Saxonico utatur, eumque ordinem iudiciorum, qui in Prussia retinetur, servet.*" Cited at Schmidt, *Rechtsgeschichte Liv-, Est- und Curlands*, 147.

141 David Hilchen was born in 1561 in Riga. After studying at Tübingen, Heidelberg, and Ingostadt, he served in the Polish Great Chancellor Zamoiski's Chancery. In 1585 he became the Secretary (*Oberratssekretär*) of the Riga Council and in 1589 the *Stadtsyndicus.* He also represented the town of Riga at the Imperial Diet and was ennobled in 1591. In 1597 he became royal secretary and *Landgerichtsnotar* at Wenden. He died in 1610 at Orisow. See Johann Friedrich von Recke and Karl Eduard Napiersky, *Allgemeines Schriftsteller- und Gelehrten-Lexicon der Provinzen Livland, Esthland und Kurland*, Band 2, G-K (Mitau: Steffenhagen, 1829), 296–303.

142 Himmelstiern, "Über die Anwendung des Schwedischen Rechts," 1.

143 For some pieces of the *Landrecht*, see Friedrich Georg von Bunge (ed.), *Archiv für die Geschichte Liv-, Esth- und Curlands,* Bd. V (Reval: Franz Kluge, 1846), 285; von Helmersen, *Abhandlungen aus dem livländischen Adelsrecht*, 221–224.

144 Hoffmann, *Der Landrechtsentwurf*, 170.

Although never officially approved, Hilchen's *Landrecht* seems to have been in use at least for some years in the Livonian lower courts.[145] The Proposal consisted of three books. The book on public law, based on the *Ordinatio Livoniae* of 1598, is divided into 22 titles; the book on private, police, and criminal law into 67 titles; and the book on courts and procedure into 31 titles. Each title has one or more paragraphs. Hilchen drew on a variety of sources, such as Livonian customary law, Polish, Lithuanian, and, of course, Roman law. The private law parts of the second book follow the tripartite division of the Institutes, and some Roman institutes were directly received into the book. The old Livonian *Ritterrecht*, however, seem to have been used much less. Hoffmann reminds us, however, of the fact that many of the provisions of foreign origins probably resembled the Livonian customary law of the time. The medieval *Ritterrechte*, although formally in force, had most probably been very much altered by customary law. It is therefore also likely that the Livonian nobles were not necessarily against the replacement of those old rules by new ones, albeit of foreign origin.[146] This explains at least partly why and how the learned law advanced in late sixteenth- and early seventeenth-century Livonia.

2.2.5 *The Royal Law*

Livonia was formally incorporated to the *Reich* as soon as the province was conquered by the Sword Brothers and remained so until the dissolution of the *Ordenstaat* and Livonia's subsequent incorporation into the Polish-Lithuanian Union in 1561. In the imperial structure, the Bishop of Riga (in temporal matters) and the Grand Master figured as vassals of the Emperor. They also had a seat and voting rights in the Imperial Diet, which they used either personally or via ambassadors. Imperial legislation thus covered Livonia.[147] Because of the scarcity of such legislation in the Middle Ages, however, imperial law never came to have much significance in medieval Livonia, although expressions such as *ius scriptum*, *ius commune*, and *gemeyne rechte* can be found in fourteenth-century documents.[148] The weight of imperial legislation changed in the sixteenth century, and the Livonian Diet expressly demanded the

145 The judges of the three *Wojwodschaften,* established by the Polonian authorities as the new lower courts in the region, were ordered to base their civil verdicts on Hilchen's law. Bunge, *Einleitung*, 193–214.

146 Hoffmann, *Der Landrechtsentwurf*, 171–172.

147 Friedrich Georg von Bunge, *Theoretisch-praktische Erörterungen aus dem in Liv-, Esth- und Curland geltenden Rechten* (Dorpat, 1840), 289–312. See, however, Lavery, *Germany's Northern Challenge*, 16, on the differences between Livonia as part of the *Sacrum Imperium* only and not of the *Regnum Teutonicum* or the German Kingdom.

148 UB XI, 285; UB X, 645; XI, 774; UB XI, 626.

authorities to observe the Imperial Police Ordinance (*Reichspolizeiordnung*) of 1536. The Constitutio Criminalis Carolina (*Halsgerichtsordnung*, 1532), the criminal law of Emperor Charles V (r. 1519–1556), was taken into active use as well. This happened apparently quite soon after its promulgation,[149] as the diet at Wolmar stated that crimes had to be punished by "imperial and domestic laws" ("*kaiserlichem und dieser Lande Rechte*").[150]

The Polish rule from the 1560s to the 1630s brought no drastic or abrupt changes to Livonian law. Given the feebleness of the state structures in most parts of Europe, continuity rather than change was still more the rule than the exception in this type of situation in the sixteenth century. The Livonian estates expressed their wish to retain their own laws, customs and privileges in the power-of-attorney that was given to the Grand Master Gotthard Kettler (r. 1561–1587) for the capitulation negotiations with the Polish.[151] The Polish overlord, King Sigismund II Augustus, did not question the Livonians' right to their own laws,[152] upholding the rights and privileges of the Livonian estate in his *Privilegium Sigismundi* (1561).

According to Bunge, Sigismund's Privilege referred to the totality of Livonian law at the time of the capitulation. This is apparently the message that the King wanted to convey to the Livonian estates. The interpretation of Bock, according to which *iura Germanorum propria ac consueta* would refer to the *Ritterrecht* only,[153] is based on a modern, nineteenth-century notion of what "law" means: that law is first and foremost statutory law. Basically the same idea of not touching the old law (and not only the law in its statutory form) was

149 Bunge, *Einleitung*, 89.

150 *Neue Nordische Miscellaneen* VII–VII 310 ff., 317, art. 13.

151 *Vollmacht* September 12, 1561 (In Bunge, *Einleitung*, 181). "*Zum andern, dass wir allesammt und sonderlichen bei Ehren, Würden, Herrlichkeiten, Freiheiten, Privilegien, Siegeln und Briefen, deutschen Rechten, Gewohnheiten und Gerechtigkeiten, landläufigen Gebräuchen und Gewohnheiten, bei deutscher Herrschaft und Verwaltung derselben gelassen, bestätigt und confirmirt werden mögen.*"

152 As was the contemporary custom, the disinterest was put down in writing in the form of the capitulation treaty: "*Quartum est, cum nihil respublicas magis quassaer aut concutere soleat, quam legume, consuetudinis atque morum mutation: Sacra Regia maiestas vestra bene constitutas respublicas* […] *servandas* […] *censuit, quod per* […] *principem* […] *N. Radzivil* […] *princibu, nobilibus, civitatibus atque statibus Livoniae, sub ipsiu S.R.M.V. plenae potestatis, mandatique proposition scripto promiserit, nobis no solum germanicum magistratum, sed et iura Germanorum propria et consueta permissuram, concessuram atque confirmaturma se esse.*" *Privilegium Sigismundi* (1561), Art. 4.

153 Woldemar von Bock, *Zur Geschichte des Kriminalprocesses in Livland* (Dorpat: Verlag von E.J. Karow, 1845), 71–72.

expressed in several other capitulation documents, such as: the capitulation treaty between Nicolaus Radziwil (1549–1616), Sigismund's representative, and the Knighthood of the Archbishopric (*Cautio Radziviliana*) of 4 March 1562; the treaty signed by the representatives of the Livonian estates and confirmed by Sigismund on the annexation of Livonia to Lithuania (*Unionsdiplom*, December 1566); and the Capitulation of Riga (*Corpus Privilegiorum Stepheneum*, Jan. 14, 1581).[154]

Sigismund's Privilege, however, was not only about maintaining the privileges, but was also about clarifying the law. To accomplish this, the estates themselves asked the King to issue a general law of the land, to which all Livonians would be bound. The law would be based on the Livonian customs, privileges, and judicial cases.[155] The Livonian estates thus wished the new overlord to undertake the task of drafting the new Livonian law on the basis of the existing one. The reason, one might assume, was their willingness to establish order into Livonian law, a confusing maze of legal sources as it stood. However, this is hardly the best explanation. The Livonian estates could well have undertaken the compilation during the *Ordenstaat*, had they felt the need to rid local law of excessive complexities. That this was not done is understandable, for sixteenth-century Livonian law only reflected the medieval social order of the *Ordenstaat.* The situation of each estate having their law – town law for the towns, peasant law for the peasant, feudal law (*Ritterrecht*) for the noblemen, and church law for the Church – suited the *Ordenstaat* perfectly well. It is much more logical to see the sudden urge for compilation as a protective measure against the invading Poles. The capitulation treaties only went halfway, as they let the Livonians keep their old law.

The estates proposed that a group of legal experts should write this law on the basis of legal customs, privileges, and royal judicial decisions. The estates would then approve the proposal, and the King would issue and publish it. King Sigismund II consented to this,[156] but changed his mind later. In the

154 Printed in Dogiel, n:o 138, 139, 141, 154, 155, 180.

155 Dogiel, n:o 145. Schwarz, "Geschichte der livländischen Ritter- und Landrechte," in August Wilhelm Hupel (ed.), *Neue Nordische Miscellaneen*, vols. 5–6 (Riga, 1794), 167–196. "*Ut autem certum atque commune aliquod provinciale ius, quo omnes provincials teneantur, ex consuetudinibus, privilegibus, latiisque sententiis, autoritate S. Regiae Maiestatis Vestrae constituatur, etiam atque etiam oramus, ut ad eam rem certi homines in iurisprudentia versati* [*in some mss: in iurisprudentia Romani versati*] *ex autoritate Regiae Maiestatis Vestrae designentur, qui talem formam iuris provincialis concipiant, component, et communibus reipublicae Livoniae ordinibus consentientibus et recognoscendum, confirmandum et promulgandum Vestrae Sacrae Regiae Maiestati offerant*."

156 Dogiel, *Codex dipomaticus regni Poloniae et magni ducatus Lituaniae* V (1759), Nr. 139, 244.

Union Treaty of 1566, the Livonian courts were instructed simply to decide "according to the Livonian laws and rational customs."[157] When the estates reiterated their wish to have the compilation based on the existing precepts of indigenous Livonian sources during the rule of King Stephan Báthory, the King again did not insist on forcing a reception of foreign law on the Livonian judiciary. This is clear by Art. 14 of the *Constitutiones Livoniae* (1582), according to which the new district court, established by the same Constitutions, were to apply "Livonian provincial law." The King wished to have a statement of the provincial law presented to him within four months, after which he would have it published.[158] However, Báthory never received the codified Livonian laws on his desk.

The *Constitutiones* of 1582, drafted according to the corresponding Prussian model,[159] was part of Báthory's repressive policy towards the Livonian nobility. The law relegated the Lutheran faith to a level of a tolerated belief only, and some of the fundamental status differences between the nobility and the bourgeoisie were removed. The bourgeoisie could own manorial land, and the nobility could acquire urban property.[160]

The tightening grip on the nobility continued in the measures taken by Báthory's successor, King Sigismund III as well. In 1589, King Sigismund III issued a further major piece of legislation, the *Ordinatio Livoniae*.[161] The law was given at the zenith of Polish power in Livonia, which shows in its contents, severely limiting the rights of the Livonian nobility.[162]

Sigismund III claimed in *Ordinatio Livoniae* that there had been "no law in force" ("*kein Recht gegolten*") in the province. The Polish King thus agreed with the need to clear up the disorganised Livonian law. However, unlike his predecessors, he did not depart from the local legal sources, but returned to

157 "*...ut* [...] *Iudices terrestres* [...] *ius dicat et iustitiam administrent secundum leges patrias et consuetudines rationabiles*." Dogiel, *Codex dipomaticus regni Poloniae et magni ducatus Lituaniae* V (1759), Nr. 154, 271.

158 "*Tam in iudiciis terrestribus, quam conventionalibus iustitia administrabitur ex praescripto iuris provincialis in Livonia recepti. Cuius quidem iuris municipalis exemplum provincialis ad nos mittere debent intra quadrimestre, ut a nobis recognoscatur, et autoritate nostra publicetur*." Bunge, *Einleitung*, 189–190. Samson v. Himmelstiern, "Über die Anwendung des Schwedischen Rechts und der russischen Ukasen in Livland," in Erdmann Gustav von Bröcker, *Jahrbuch für Rechtsgelehrte in Russland*, Band II (Riga: Häcker, 1824), 1–96, 1; Schmidt, *Rechtsgeschichte Liv-, Est- und Curlands*, 146.

159 Printed in Dogiel, nr. 187.

160 Staemmler, *Preußen und Livland*, 80.

161 Printed in August Wilhelm Hupel, *Nordische Miscellaneen*, 27–28 (Riga: Hartknoch, 1791).

162 Hoffmann, *Der Landrechtsentwurf*, 169.

his original idea of transplanting foreign law in the area. Instead, he entrusted his Field Marshall Jan Chodkiewicz (1560–1621), the task of "acting so that clear and certain law be received in that land, be it Culmian law, or that which is used in Prussian lands or any other which [the Livonian] might wish."[163] The attempt of Sigismund III proved unsuccessful, like all of its predecessors, this time also because of the resistance it met from the side of the Livonian nobility. According to the *Ordinatio*, 26 of the strategically important starosties could only be held by Polish or Lithuanian noblemen.[164] The *Ordinatio* caused outrage amongst the Livonian nobility, who brought several complaints to the King and the Polish Diet.

Thus, a second *Ordinatio Livoniae* was issued in 1598, and Livonia was accorded an equal place with other parts of the Swedish realm, of which Poland was then part, and thus Livonia as well. The provisions of the the *Constitutiones* of 1582 and the *Ordinatio* of 1589 discriminating Livonian nobility were removed, and Livonian noblemen were now to be treated equally when filling governmental posts.[165] The second *Ordinatio* has to be seen against its political background. In 1594, Sigismund III had come to the Swedish throne in addition to the Polish one which he already held. Because of the problems with his uncle Karl, Duke of Södermanland (future King Charles IX of Sweden, r. 1604–1611) Sigismund had been advised to support the Livonian nobility. Religious conflicts and the first *Ordinatio* had caused the loyalty of the Livonian noblemen *vis-à-vis* the Polish crown to wane drastically, and many of them positioned themselves at the side of Duke Karl in the war that broke out in 1600.[166]

Still in the same year, 1598, King Sigismund entrusted the task of drawing a new *Landrecht* for Livonia to a commission, which, as was explained above, delegated the task to David Hilchen. Hilchen's Draft Code and the tensions surrounding the codification effort, together with the other pieces of Livonian legal history of the *Ordenszeit* and the Polish period, form part of the same complex legal situation, which the Swedes faced upon their conquest. The continuous changing of the mind as to which law was to rule in Livonia shows that the purpose of the King may not have been to impose a foreign law as such on the Livonians, but rather to clarify the unclear system of sources. From the crown's point of view, as well as from the estates', a messy situation of legal

163 Dogiel, nr. 145. "*Aget etiam, ut certa irua in terra illa recipiantur, sive ius Culmense, sive quo utitur terra Prussiae, aut denique quodcunque aliud sit, prout voluerint*."

164 Heyde, "Adelspolitik," 557.

165 Heyde, "Adelspolitik," 551–552.

166 Hoffmann, *Der Landrechtsentwurf*, 169.

sources was the worst alternative, as it was difficult to control. Instead, a system based on clear sources, approved by the king and the estates, was better. It would be even better if it were written down. The Livonian case was, again, perfectly in line with the development towards a growing significance in royal law elsewhere in Europe from the sixteenth century onwards. It had been exactly the same case earlier in France, with its *Ordonnance de Villers-Cottêrets* (1539), Castile with its *Leyes de Toro* (1505), and in the all the Protestant world where power had increasingly concentrated into the hands of the ruler.

2.2.6 *Conclusion: Livonian Law in the Early Seventeenth Century*

What kind of law did the Swedes meet when they set about organizing the legal order of the province in the 1620s? Livonian law can best be described as medieval in the sense that it was politically and legally polycentric. The Holy Roman Empire of the German Nation continued much in the same vein at the beginning of the early modern period, albeit with a clear tendency toward territorialisation even before the Peace of Westphalia in 1648. This tendency had no counterpart in pre-Polish Livonia. Livonia before the Poles was, as it had been since the coming of the Germans and the Teutonic Order in the thirteenth century, a loose confederation of regions, far from being a state in any modern sense of the term, and mostly activated only at times of outside threat or in order to convene the Diet. Inside the confederation, power within the bishoprics was divided between the bishop and his fiefs. The only part of the confederation remotely resembling a modern state in the German territories and in Sweden at that time, for instance,[167] were the lands of the Teutonic Order, administratively organized quite effectively and with practically no lands granted to vassals. However, the general marks of the rising modern state – a standing army, taxation, and professional bureaucracy – were lacking in the lands of the Order as well. Some of the towns had developed a considerable degree of independence, with Riga and its strong bourgeoisie clearly carrying the flag, Tallinn and Dorpat more or less following suit. The other towns were much more dependent on their surrounding regions. The noble vassals of the bishops (and of the Teutonic Order in the Estonian regions of Harrien and Wiek) acted like little kings on their manors, with relatively little political constraint placed upon them from the other estates of the confederation.

The political diversity unavoidably influenced the legal landscape. The medieval *Ritterrechte*, although they changed and developed, continued to be the basis of the Livonian customary law governing the life of the nobility well into

167 On Sweden's rise to a modern centralized state, see Seppo Tiihonen, *Herruus: Ruotsi ja Venäjä* (Helsinki: Painatuskeskus, 1994).

the Swedish period. The peasant law consisted of strongly localised bodies of law, *Bauerrechte*, that ruled the legal relations between the peasants on the manor houses and the relations of the peasants *vis-à-vis* their lords. The town charters of German origin, continued their development throughout the *Ordenszeit* and the Polish period. The estates thus all had their law, and it had relatively little influence from the other bodies of law present in the Livonian confederation.

European common law, *ius commune*, in its German version of *gemeines Recht* nevertheless was gaining influence in Livonia as it did in many other regions of the *Reich* from the late Middle Ages onwards. Like elsewhere, so also in Livonia the presence of the learned law was first known in the church administration and ecclesiastical courts, as some of the medieval documents cited above show. The Teutonic Order also had a clear interest in securing its share of legal learning in its ranks, as important as this form of knowledge had become in late medieval Europe. Legal learning was of use, if not so much for the use of courts in the home lands, then at least when dealing diplomatically with the neighbours and the rest of the Empire. Much the same can be said about the largest towns, which also, at least in the sixteenth century, would regularly contract learned lawyers for some of the key positions of urban administration – David Hilchen of Riga is a good example of this.

The role of legal learning, as Arvo Tering and others have shown, rose steadily from the late Middle Ages onwards, and Livonian young men customarily embarked on *peregrinationes academicae* to the renowned universities of the Empire and even other parts of Europe. When the students came back, they brought their learning with them, although it was first and foremost used to benefit church institutions. As Leo Leesment has shown, Livonian connections to the Imperial Chamber Court and the Aulic Court, the primary vehicles of the reception of Roman law in the *Reich*, intensified in the mid-sixteenth century. Without legal knowledge, appeals to the highest courts of the Empire would have been unthinkable. The Polish period, despite continuous attempts from the side of the crown, did not leave many traces in Livonian law. The resistance of the nobility worked well: without their cooperation, the "Polification" of Livonian law was difficult if not impossible to realize.

David Hilchen's unofficial compilation of Livonian law was probably, from the point of view of the Swedish period, the most lasting achievement that the Polish conquerors initiated. That compilation shows clear traces of *ius commune* learning and was also used in Livonian court practice. To sum up, these bits and pieces of information make it clear that *ius commune* was present in the protocols of the Livonian *Landgerichte* straight from the 1630s onwards, when Sweden took over the province.

2.3 Swedish Law before the Conquest of Livonia

Medieval Sweden was a European periphery. As far as legal history is concerned, Christianisation played a pivotal role there as it did everywhere in Europe, although in Sweden the conversion occurred later than in neighbouring Denmark and Norway.[168] Swedish Christianisation is usually taken to have begun in 829–830, when Ansgar (801–865), the Archbishop of Hamburg and Bremen, first visited Birka, a trading post in what later became central Sweden. Christianisation, however, took much longer to establish its roots. Pope Innocent III (r. 1198–1216) let the Archbishopric of Lund be founded in 1104 in the province of Scania in present-day southern Sweden. The provincial council of Skänninge in 1248 then organized the Swedish church along the lines of canon law, which has been taken to have been a decisive milestone on Sweden's path to become a part of Catholic Europe.[169] Although these formal milestones of Christianisation have little to do with the Christianisation of the populace, they are significant from the point of view of legal history. In principle, the Church claimed the same wide jurisdiction as it did elsewhere in the Christendom.[170]

Wherever it spread on the outskirts of what later came to be viewed as Europe, the Catholic Church brought with it not only a written culture but also the idea of fixing customary laws into a written form. All over Europe, the thirteenth century was the era when laws were increasingly put in writing. However, not all written enactments of law can be put into the same category. At one end of the scale we have the written customary laws, such as *Coutumes de Beauvaisis*, *Sachsenspiegel,* or the Livonian *Ritterrechte*; at the other, more systemic compilations with the intention of changing law, and typical of more centralised governments such as the *Siete Partidas* of Alfonso X the Wise

168 Thomas Lindkvist, "Crusades and Crusading Ideology in the Political History of Sweden, 1140–1500," in Alan V. Murray (ed.), *Crusade and Conversion on the Baltic Frontier 1150–1500* (Aldershot: Ashgate, 2001), 119–130, 119.

169 See Anne-Sofie Gräslund, "Religionsskiftet i Norden," in Göran Dahlbäck (ed.), *Kyrka – samhälle – stat: från kristnande till etablerad kyrka* (Helsingfors: Finska historiska samfundet, 1997), 11–36.

170 Göran Inger, *Das kirchliche Visitationsinstitut im mittelalterlichen Schweden* (Lund: Gleerup, 1961), 41–44; Richard Helmholz, *Roman Law in Reformation England* (Cambridge: Cambridge University Press, 1994), 1–11; Richard Helmholz, *The Spirit of Classical Canon Law* (Athens, GA: University of Georgia Press, 1996); Brundage, *Medieval Canon Law*; Mia Korpiola, "On Ecclesiastical Jurisdiction and the Reception of Canon Law in the Swedish Provincial Laws," in Ditlev Tamm and Helle Vogt (eds.), *How Nordic are the Nordic Medieval Laws?* (Copenhagen: University of Copenhagen Press, 2005), 202–231.

(r. 1252–1284) of Castile,[171] or the Constitutions of Melfi, which Fredrik II gave as the King of Sicily (r. 1198–1250).[172] *Magna Carta* of England (1215), a list of feudal rights but not a thorough legal compilation, cannot be counted in either of these groups, but it still reflects the general tendency towards written legislation typical of the period. Hardly by coincidence, written laws emerged at the same time in the northernmost parts of Europe as well: Iceland's *Jónsbók* (1281), Norway's *Gulating* (ca. 1250),[173] Denmark's *Jydske Lov* (1241),[174] and the Law of Scania (from the early years of the thirteenth century) all represent written legislation, although at the provincial level only. The Nordic laws were, much like *Sachsenspiegel* and *Ritterrecht*, typical enactments of customary law. The role of the Church in their emergence was decisive: without the learned churchmen, any major piece of legislation would have been unthinkable. The participation of the Church had its price, and thus the country came to represent not only the rising power of the nobility but also the strengthening position of the Catholic Church in northern Europe.

The way for the Church to implement its law in Scandinavia was through provincial legislation, which emerged as a compromise between the provincial strongmen, the crown, and the Church. Most of the ecclesiastical crimes were explicitly mentioned in the provincial legislation in Sweden. This is clearly the case with perjury, which was mentioned in all of the laws, except for the Older Law of Western Gothia. Sorcery was mentioned in some of the laws, which assigned the handling of these matters to church courts. This was also the case with most sexual crimes, except for adultery, which was developing into a mixed cause (*causa mixta*). The boundaries between secular and church jurisdictions were just as unclear as they were elsewhere. Incest, for instance, was considered to be a secular crime in the Newer Law of Western Gothia and the Law of Dalarna, but only a case of *forum internum* requiring penance in the Law of Småland.[175]

The first Swedish statutes were thus provincial laws, only some of which the king confirmed. In the older literature these laws have been called "statute books" (*lagböcker*), instead of law books (*rättsböcker*), which were not

171 See Richard I. Burns (ed.), *Las Siete Partidas* (Philadelphia: The University of Pennsylvania Press, 2001).

172 See David Abulafia, *Frederick II: A Medieval Emperor* (Oxford: Oxford University Press, 1992).

173 Laurence M. Larson, *The Earliest Norwegian Laws* (New York: Columbia University Press, 1939).

174 Ole Fenger and Chr. R. Jansen (eds.), *Jydske Lov 750 år* (Viborg: Udgiverselskabet ved Landsarkivet for Nørrejylland, 1991).

175 See Korpiola, "On Ecclesiastical Jurisdiction," 215–222.

assumed to have been officially promulgated but were instead products of private initiative. The Laws of Uppland and Södermanland are thought to have been drafted by judicial commission, and the Law of Uppland was promulgated by King Birger Magnusson (r. 1290–1318); the Law of Södermanland by King Magnus Eriksson (r. 1319–1364).[176] The distinction into statute books and law books no longer holds, as it anachronistically gives weight to royal promulgations of some of provincial laws. However, they do not essentially differ from the ones that were supposedly not officially approved. In addition, we cannot be perfectly sure that some law books would not have had royal approval.

The oldest written existing manuscripts of the provincial laws date to the period between 1280s and 1350s.[177] The Swedish provincial laws compromised several interests: those of the king, the Church, and the secular magnates. Law drafting never starts at the *tabula rasa*, and especially in the Middle Ages no major deviations from the existing customary law were possible.[178] However, medieval laws did not simply reflect customary law. Instead, scholars tend to view the medieval law compilations as contracts. Medieval political power was based on consensus. Both secular authorities (emperors and kings) as well as the ecclesiastical princes (pope and the bishops) ruled *consilio et consensus* – by advice and consensus – of the elective collegium,[179] and the conditions under which power was used were confirmed contractually.[180] The contractual model was particularly clear in the land peace legislation all over Europe. In the first phase, the tenth century in southern France, the peace laws protected God's peace, the church and its institutions, and by the eleventh century the idea had been transformed to safeguard the king and his party wherever they were. In the next phase of the *Landfrieden*, the peace laws covered the whole area in which the king and his party resided. In the final phase all crimes taking place in the region were thought to violate the interests of not only the plaintiff but also those of the king. The sanction for breaching the peace was that

176 See Per Norseng, "Law Codes as a Source for Nordic History in the Early Middle Ages," *Scandinavian Journal of History* 16:3 (1991), 137–166.

177 Norseng, "Law Codes," 146–147.

178 See, for instance, Elsa Sjöholm, *Sveriges medeltidslagar: europeisk rättstradition i politisk omvandling* (Stockholm: Institutet för rättshistorisk forskning, 1988), 21–24, 244–249.

179 See Fritz Kern, *Recht und Verfassung im Mittlealter* (Tübingen, 1952); Hans-Jürgen Becker, "Pacta conventa," in Paolo Prodi, *Glaube und Eid* (München: Oldenbourg, 1993), 1–9.

180 See Gerhard Oestreich, "Vom Herrschaftsvertrag zur Verfassungsurkunde: 'Die Regierungsformen' des 17. Jahrhunderts als konstitutionelle Instrumente," in Heinz Rausch (ed.), *Die geschichtlichen Grundlagen der modernen Volksvertretung: Die Entwicklung von den mittelalterlichen Korporationen zu den modernen Parlamenten*, Part 1 (Darmstadt: Wissenschaftliche Buchgesellschaft, 1980), 246–277.

the criminal was pronounced peaceless. Anyone could kill such a person. The novelty when compared to the traditional kinship law was that the peacelessness only followed after a certain period (typically a year), during which the criminal could try to settle the case with the victim or his or her relatives.[181]

The royal peace laws were also the first ones that were in force, at least in principle, all across the Swedish realm. The first nation-wide peace law was that of Birger Jarl (r. 1248–1266) from the mid-thirteenth century, and its contents were reiterated in the Rule of Alsnö in 1280. These peace laws sought to limit bloodfeud by prohibiting it after, for instance, the blood money had been paid.[182]

The normative contents of the first Swedish piece laws were then included in the provincial laws, in which the local magnates promised by oath to assure peace under certain conditions. These chapters (*balkar*) of the provincial laws were called *edsörebalkar* (literally: the chapters concerning the taking of the oath). In these laws, the king promised to punish breaches of home, women, court, and church peace as well as illegal feuds, with harsh punishments. A good example of this is the provincial law of Eastern Gothia, which was put into writing in the 1290s.[183] The ecclesiastical chapter of the law included provisions against sexual crimes, modelled after canon law (art. XV, XXVII), and crimes against the clergy. The *edsörebalken* takes after the European models, although the punishments are milder. Only some of the crimes could result in capital punishments, and in most cases the punishment was fines, outlawry, or confiscation.[184]

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181 See Elmar Wadle, *Landfrieden, Strafe, Recht: Zwölf Studien zum Mittelalter* (Berlin: Duncker & Humblot, 1981); and Elmar Wadle, "Zur Delegitimierung der Fehde durch die mittelalterliche Friedensbewegung," in Hans Schlosser, Rolf Sprandel and Dietmar Willoweit (eds.), *Herrschaftliches Strafen seit dem Mittelalter: Formen und Entwicklungsstufen* (Köln: Böhlau, 2002), 9–30, 16–17.

182 See Gabriela Bjarne Larsson, *Stadgelagstiftning i senmedeltidens Sverige* (Lund: Institutet för rättshistorisk forskning, 1994).

183 Åke Holmbäck and Elias Wessén (eds.), *Magnus Erikssons landslag* (Lund: Institutet för rättshistorisk forskning, 1962), 217.

184 The *edsörebalken* of the Law of Eastern Gothia XVII, uxoricide; XXI, infanticide. See Åke Holmbäck and Elias Wessén (eds.), *Svenska landskapslagar* (Stockholm: Hugo Geber, 1933). For the German peace laws, see the God's Peace of Saxony (1084), which sanctions the breaking of domestic peace with a capital punishment. Wolfgang Sellert and Hinrich Rüping, *Studien- und Quellenbuch zur Geschichte der deutschen Strafrechtspflege: Band I, Von den Anfängen bis zur Aufklärung* (Aalen: Scientia, 1989), 114; and Elmar Wadle, "Zur Delegitimierung der Fehde," 9–30, 16–17.

The central tenet of the peace laws, the strengthening of the Church and royal power, continued in the fourteenth century, when the first general statutes encompassing the entire realm were issued. These were the Law of the Realm of Magnus Eriksson (1347) and his Town Law (1350). The strife between Church and the crown was far from settled at the time of drafting of these laws. The representatives of the church thought that the commission in charge of drafting the Law of the Realm had tried to limit the ecclesiastical privileges too much. Because of the Church's protests, no church chapter was included in the final statute, although the provincial laws had customarily included one; instead, the church chapter of the Uppsala Provincial law continued to be applied well into the seventeenth century and until the drafting of the new Church Statute in 1686. The town law had mainly been drafted with the Stockholm bourgeoisie in mind, but it came to be applied in other towns as well. A new version of the country law, the Law of the Realm of King Christopher, was issued in 1442. One of the reasons for the perceived need of a new law were the different manuscript traditions of the old country law. Four fifths of the normative material in the new law was taken from the old one. The novelties of the new laws tended to stress the position of the king, and the criminal sanction grew tougher accordingly. The old provincial laws and the Law of the Realm of Magnus Eriksson, all continued in force to a certain extent. This situation was probably brought to an end only in 1608, when Charles IX (1599–1611) reaffirmed that the Law of the Realm of King Christopher was to be in force.[185]

In 1397, Norway, Denmark, and Sweden formed a confederation, the so-called Union of Kalmar, under the crown of Denmark, which lasted until 1523. Politically, the Union was weak, and it had little impact on the Swedish legal history. The dissolution of the union led Gustav Vasa (r. 1526–1560) to the throne. As far as legal history is concerned, one of the most significant developments during the time of Gustav Vasa was the Protestant reformation. It changed Swedish law remarkably, although the changes did not occur overnight. The rural dean's assizes functioned alongside the secular court until the late 1500s, when their functions were taken over by secular courts. Unlike many of the German *Kirchenordnungen*, the Swedish church ordinances were not invaded by harsh criminal sanctions. Sweden thus seems to belong to the same group as Mecklenburg, Courland, and some other territories of northern Germany, who chose not to include penal sanctions into their church ordinances. When discussing German church ordinances, however, too much should not be made of the differences in legislative technique. The Decalogue, a primary vehicle of harsh religious punishments in Germany, was turned into law in Sweden as

185 On the Swedish medieval laws, see Per Norseng, "Law Codes," 137–166.

well although through separate legislation in 1608 and not by way of church ordinances.[186]

The church's disciplinary machinery, together with ecclesiastical police legislation, acted as a powerful vehicle of social control or *Sozialdisziplinierung*. Crown and church were partners in social control: the newly established modern state was still too feeble in the sixteenth and seventeenth centuries to undertake social control all by itself. The growing Swedish military might have needed justification and support from the late sixteenth century onwards, and the ideological services that the church was able to render by way of sermons were valuable in this respect. For these reasons, it is understandable that the crown took advantage of the church, which had its administrative network established across the entire kingdom. The alliance was not only beneficial for the crown, but for the church as well. The discipline that the church got to practice by way of delegation from the secular power served to restore the prestige that had been lost in the Reformation.[187] All this is not to say that church discipline did not simultaneously serve as an instrument for curing souls. For medieval Catholics, the whole ecclesiastical law ultimately served only one purpose, to guide souls to heaven.[188] Luther's two-kingdom theory served much the same purpose. From the theological point of view, the final goal of the alliance between the crown and the church, and their common efforts at efficient social control, was salvation. The Protestant church thus remained an important factor in social life throughout the seventeenth and eighteenth centuries. According to the precepts of the Lutheran social theory, the church functioned as the *bracchum seculare* of the state when it came to worldly matters entrusted to the church. Priests watched the popular morals in matters of sexual discipline, but they were also in charge of educating of people.[189]

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186 Heikki Pihlajamäki, "*Executor divinarum et suarum legum*: Criminal Law and the Lutheran Reformation," in Virpi Mäkinen (ed.), *Lutheran Reformation and the Law* (Leiden: Brill, 2006), 171–204; Heikki Pihlajamäki, "Epilogen," in Jørn Øyrehagen Sunde (ed.), *Dekalogen: 13 essay om menneske og samfunn i skjeringspunktet mellom rett og religion* (Bergen: Fagbogforlaget, 2008), 235–249.

187 Seppo Aalto, *Kirkko ja kruunu siveellisyyden vartijoina: Seksuaalirikollisuus, esivalta ja yhteisö Porvoon kihlakunnassa 1621–1700* (Helsinki: Suomen Historiallinen seura, 1996), 140–141.

188 See Knut Wolfgang Nörr, "Prozeßzweck und Prozeßtypus: der kirchliche Prozeß des Mittelalters im Spannungsfeld zwischen objektiver Ordnung und subjektiven Interessen," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 78:1 (1992), 183–209, 188; and Helmholz, *The Spirit of Classical Canon Law*, 395.

189 Aalto, *Kirkko ja kruunu siveellisyyden vartijoina.*

By the seventeenth century, Sweden had developed into a fully-fledged estate society, although different from its European counterparts. The privileges of the estates were few, and in the long run the estates were unable to resist the strengthening royal power. Because of the weak nobility, feudalism never grew to the same proportions as in the Empire, France, or Spain. The proportion of the free peasants was overwhelming, and the decree to which the tenant peasants were tied to manor houses was weak compared to Livonia where serfdom was the order of the day. Apart from some exceptions (to which I will come soon), the nobility had no jurisdiction over their manors and their power over the peasants was always limited. The position of the Swedish nobility in the seventeenth century came to be based increasingly on privileges they enjoyed over royal offices.[190] Other estates had their privileges as well, with the clergy dominating the ecclesiastical positions, and the bourgeoisie the urban administration.

Small towns produced weak urban legislation. It had already come to be different to the law in the countryside through Magnus Eriksson's town law, but the decisive difference between that law and the urban charters, and other pieces of urban legislation in Livonia and other parts of the Empire, was that Swedish urban legislation was not a product of autonomous towns, but part of the royal legislation. Bjärköä and Visby town laws had been independent town laws, but their golden period dates to the time before the 1350s after which Magnus Eriksson's town law became prominent in most towns – with the exception of Visby.[191] The basic idea of *dominium* and *usus* found its expressions in Sweden as well,[192] but with little of the complexities that the theory developed in other countries, and feudal law did not develop otherwise either.

Manorial law, as a separate body of law administered by peasants themselves with the manorial lord or his steward acting as an overseer, was relatively insignificant in Sweden.[193] Thus, King Magnus Eriksson (r. 1319–1364) granted the oldest Swedish manorial law (*gårdsrätt*) sometime after 1332. Another manorial law that we know of appears under the regent names of Queen Margaret I

190 Bo Eriksson, *Svenska adelns historia* (Stockholm: Norstedts, 2011).

191 See Åke Holmbäck and Elias Wessen (eds.), *Magnus Erikssons stadslag* (Stockholm: Institutet för rättshistorisk forskning, 1966).

192 See Päivi Paasto, *Omistuskäsitteistön rakenteesta: tutkimus jaetun omistusopin mahdollisuudesta ja merkityksestä omistuskäsitteistössä 1700-luvun lopulle tultaessa* (Turku: Turun yliopisto, 1994).

193 The following account is based on my article "On Forgotten Jurisdictional Complexities: The Case of Early-Modern Sweden," in Seán Donlan and Dirk Heirbaut (eds.), *The Laws' Many Bodies: Studies in Legal Hybridity and Jurisdictional Complexity c1600–1900* (Berlin: Duncker & Humblot, 2015), 127–144.

(r. 1387–1412) of Denmark, Erik of Pomerania (r. 1396–1439), and Karl Knutsson (r. 1448–1457, 1464–1465, 1467–1470). Gustav Vasa, Erik XIV (r. 1560–1568), John III (r. 1568–1592), and Charles IX issued manorial laws of their own during the sixteenth century. They usually provided harsher punishments than would be found in general lawmaking, so that royal manors, often with heavy military troops, were well-disciplined. For instance, the *gårdsrätt* of Magnus Eriksson forbade slapping another person's face with the hand (*örfil*), or hitting him with a stick on pain of corporal punishment, whereas the same king's Law of the Realm provided only fines for the similar misdemeanours.[194]

Gårdsrätt (literally: manorial law) thus referred to a body of law, but also to manorial courts. The courts could also be called castle courts (*borgrätt*).[195] The *gårdsrätt* of Magnus Eriksson not only established the separate court for royal manors, but also extended the right to hold court as a privilege to members of the royal councils on their manors (*sätesgårdar*) as well. The reasons were undoubtedly similar: noble magnates also needed to keep their troops under check.[196] This privilege remained in force until 1691, when the last remaining *borgrätter* (on the manors of Bergkvara, Torpa, and Ängsö) of the high nobility were abolished.[197] By the seventeenth century, however, the castle courts already decided their cases according to the general Swedish law and no longer according to their specific manorial statutes, which had been the case in the middle cases.[198]

The history of Swedish manorial or patrimonial courts is important, because their legal position provides a context for the two patrimonial courts active in seventeenth-century Livonia. The medieval *gårdsrätter* have been seen as the root of the larger wave of patrimonial courts emerging from the late sixteenth-century onwards.[199] The subject has been poorly researched, but it seems that the importance of seventeenth-century patrimonial courts has been underestimated. The crux of the matter was that with the growth of Sweden to a European great power, the crown was forced to give in to demands of the high nobility. One of these demands was the privilege to hold court on their lands,

194 See Konrad Maurer, *Das ælteste Hofgericht des Nordens* (München: C. Kaiser, 1877), 31–87.

195 Olle Ferm, "Feodalism i Sverige? Högfrälsets gårdsrätter under medeltiden och 1500-talet," *Historisk tidskrift* 103 (1983), 130–139, 130.

196 Lars Bergquist, "Om de svenska borgrätternas uppkomst," in *Rättshistoriska studier* II (Lund: Institutet för rättshistorisk forskning, 1957), 104–115, 109.

197 See Bergquist, "Om de svenska borgrätternas uppkomst"; see also Lars-Olof Larsson, "Borgrätt och adelsjurisdiktion i medeltidens och 1600-talets Sverige," in Jerker Rósen, *Historia och samhälle: Studier tillägnade Jerker Rosén* (Malmö: Studentlitteratur, 1975), 49–67.

198 See Ferm, "Feodalism i Sverige?," 131.

199 See Bergquist, "Om de svenska borgrätternas uppkomst," 104–115.

which was the case in the European regions with deeper feudal pasts, nearby Denmark included.[200]

It is probable that high nobility would have carried on holding court *de facto*, even without express legitimation, due to a privilege by King Gustav Vasa from 1526, which guaranteed noblemen the right to their "law, privileges, freedoms, and good old customs." In the Privilege Letter of 1590, King John III, however, expressly forbade nobles, on a general level, from holding courts on their manors, stating that legal cases concerning the nobility's personnel or peasants were to be decided in "lawful courts" and according to Swedish law.[201] However, King Erik XIV had given the few barons and counts of the realm the right to hold patrimonial courts in 1569,[202] and King John III also consented to such patrimonial courts on these larger enfeoffments. He donated a countship and six baronies, mostly to his relatives, and on these enfeoffments the newly-grafted high nobility received the right to hold court.[203] Thus, there was no general right for noblemen to hold patrimonial courts on their estates, but counts and barons had the right to courts of their own on their larger fiefs.

During the early part of the seventeenth century the number of such fiefs granted to high nobility rose steeply. By 1650, roughly 50 countships and baronies had been enfeoffed in Sweden (Finland included).[204] All of these had the privilege to hold court. We do not know for certain whether they all actually did, but it is probable, given the monetary incentive involved. The essential benefit was that the patrimonial court gave their lords the right to keep the part of the fine monies, which otherwise would have gone to the crown. Enough patrimonial court archives have been preserved, furthermore, to draw the conclusion that we are not dealing with an isolated phenomenon.[205]

It is then altogether another matter what the existence of patrimonial courts meant in Sweden. The right to collect tax money was the most obvious benefit for the lord. In the Swedish system, the fines were divided into three lots: one

200 Ferm, "Feodalism i Sverige?," 132.

201 See Sven A. Nilsson, *Krona och frälse i Sverige 1523–1594* (Lund: Gleerup, 1947), 92; Ferm, "Feodalism i Sverige?," 135.

202 Robert Swedlund, *Grev- och friherrskapen i Sverige och Finland: Donationerna och reduktioneran före 1680* (Uppsala: Almqvist & Wiksell, 1936), 196.

203 Swedlund, *Grev- och friherrskapen*, 35–46; Mauno Jokipii, *Suomen kreivi- ja vapaaherrakunnat* I (Helsinki: Helsingin yliopisto, 1956), 26; and Mauno Jokipii, *Suomen kreivi- ja vapaaherrakunnat* II (Helsinki: Helsingin yliopisto, 1960), 32. See, however, Ferm, "Feodalism i Sverige?," 135, according to whom John III expressly forbade noblemen from keeping courts on their lands.

204 Swedlund, *Grev- och friherrskapen*, 337–338.

205 For the Finnish part of the realm, see Jokipii, II, 44–50.

for the victim (or his or her family), one for the judicial community (in charge of the practical arrangements involved in running the court), and one for the crown. Few lords chaired their courts in person.[206] A lord was nevertheless entitled to choose his judge independently, whereas in crown courts the appointment came from the king. In practice, substitute judges ("law-readers") with little or no legal learning were appointed to chair both kind of courts,[207] and often the same law-readers sat alternately both in crown courts and in patrimonial courts.[208]

Lay juries (*nämnd*) were an essential element in both kinds of courts. Both patrimonial courts and regular crown courts based their decisions on the same legal sources. Importantly, not only crown courts but also patrimonial courts were part of the same judicial hierarchy after the high courts were founded. It was thus possible to appeal from the decisions of the patrimonial court to the high court.[209] Patrimonial courts, like crown courts, only investigated serious criminal cases, the final decisions being made in the upper instances.[210] Importantly, the lord was also in charge of executing the decisions of his courts.[211]

By analogy to the lawman's courts (*lagmansrätt*), the patrimonial lord also acted as an appeals instance for his own court in civil cases. His decision could then be appealed to a high court. As was the case for royal judges (*lagman*), the patrimonial lord in this capacity was entitled to levy a judicial tax. Patrimonial lords regularly delegated the judgeship also in appeals cases to paid substitutes (*underlagman*),[212] who were to hold court in the barony or countship every three years.[213] Again, little is known about how this faculty was enforced, although the *underlagman* was usually appointed.[214] At least in Jakob de la Gardie's Barony of Kimito, in southern Finland, the institution of patrimonial appeal had fallen almost to desuetude by the 1660s. There had been no cases, and

206 Swedlund, *Grev- och friherrskapen*, 197.

207 On the practice in Jakob de la Gardie's Barony of Kimito, see John Gardberg, *Kimito friherrskap: En studie over feudal-, gods- och länsförvaltning* (Helsingfors: Mercator, 1935), 265–268; also Jokipii, II, 32.

208 Jokipii, II, 53.

209 I thank Prof. Mia Korpiola for stressing this point in our discussions.

210 At least one exception is known: Per Brahe, who in 1654 got the right to decide serious cases as well on his courts at Visingsö; Jokipii, II, 32.

211 Swedlund, *Grev- och friherrskapen*, 197–198; Jokipii, II, 59–60.

212 Swedlund, *Grev- och friherrskapen*, 196; Jokipii, II, 32.

213 Jokipii, II, 58.

214 Jokipii, II, 52–53.

when one appeared, the count's judge and other personnel of the countship had to contact Turku High Court in order to have a lower lawman appointed for the case. On the other hand, the proceedings were not extremely formal, and sometimes difficult cases could be referred to the lord himself, the local governor, or the high court, even without the parties specifically asking for it or expressly consenting to the referral.[215]

All patrimonial courts judged according to the same general law of the Swedish realm as crown courts. The use of *gårdsrätt* in the sense of stricter disciplinary law was not permitted on private goods, although they continued in use in royal castles and new ones were issued until 1655. However, it seems that at least in practice manorial statutes continued in use in private goods as well.[216] The use of manorial discipline (*hustukt*) was then legalized during the tutorial government dominated by nobility in 1671, but again abolished in 1675.[217]

The fact that keeping a patrimonial court amounted to little judicial independence for its lord is crucial compared to the German (and French) patrimonial courts. They often enjoyed appeals privileges and because of the multiplicity of local customary laws, in practice often had at least some legal sources of their own. In comparison to patrimonial courts elsewhere, their Swedish counterparts were ordered strictly within the same judicial hierarchy as crown courts. Two exceptions are known: Carl Carlsson Gyllenhjelm (1574–1650) had the privilege of not having to refer even the types of cases carrying death punishments (*livssaker*) to a high court, and Per Brahe had a similar absolute jurisdiction over his estates in Visingsö confirmed by a privilege in 1654.[218] And most importantly, the Swedish patrimonial judiciary was, at its largest, a short-lived phenomenon, lasting only some decades. The patrimonial courts of counts and barons were abolished in 1681, and the three remaining patrimonial courts with allegedly medieval origins – at Bergqvara, Torpa, and Ängsö – in 1691.[219]

The Swedish manorial courts remained, after all, a relatively marginal phenomenon. The peasants were, to be sure, mainly in charge of running the

215 Gardberg, *Kimito friherrskap*, 260–261.

216 See Eino Jutikkala, *Väestö ja yhteiskunta: Hämeen historia* II (Hämeenlinna: Gummerus, 1957), 316–317.

217 Eino Jutikkala, *Suomen talonpojan historia: sekä katsaus talonpoikien historiaan Euroopan muissa maissa* (Porvoo: Söderstrom, 1942), 356–357.

218 Swedlund, *Grev- och friherrskapen*, 201.

219 See Ferm, "Feodalism i Sverige?."

local district courts (*häradsrätter*). These courts dealt almost exclusively with peasant matters, as those of the nobility were (since 1614) by privilege mostly excluded and handled by the high courts, and clerical cases belonged to the consistories. Taxes were collected from the peasants to meet the costs of the courts of the countryside, and the peasants chose their representatives to serve in the *nämnd*, a rough equivalent of the jury,[220] and to various other positions such as inspectional boards. Until the time of Gustav Vasa, the peasantry also chose the judge for the district courts, but from the 1560s onwards the crown took over the right to nominate the judge.[221] From then on, and as the judges (or before the late 1600s, their substitutes, "the law-readers") became increasingly trained and more knowledgeable in legal matters and often even trained in law, their position *vis-à-vis* the *nämnd* grew more powerful.

Even though district courts were peasant courts in many ways, they differed from the Livonian (or other European) manorial courts in some decisive aspects. Entities of local administration (*socken*) determined the scope of their jurisdiction, and the manorial lords automatically had no say in the courts, although it was to noblemen that the judgeships were enfeoffed. Second, even though a vast majority of the cases in country courts involved only peasants as parties, the law did not completely exclude noblemen from these courts. Thus, instead of manorial courts, the district courts were the equivalent of the Livonian *Landgerichte* or general lower courts of the countryside. Before the founding of the high courts, the district courts at least in principle dealt with noble matters as well. Even after high courts were established in the seventeenth century, country courts were in principle (although hardly in practice) responsible for inquiring into the crimes of which a nobleman would be suspected. It was only after the initial inquiry that the documents were sent to the high court, in which the nobleman's peers took the final decision. In other words, even though the peasants largely ran the local country courts, from quite early on they became predominantly organs of the state, not judicial organs of the peasant estate. This is a big difference reflecting the strength of the Swedish state and the weakness of the estate society.

220 The *nämnds* decided, together with the judge, questions of both fact and law. Whether this is a decisive difference to the English jury and how the Swedish institution is to be compared to the German *Schöffen* is a matter well meriting a study of its own.

221 See Yrjö Blomstedt, *Kihlakunnantuomarin viranhoito Suomessa 1600–1652* (Helsinki: Helsingin yliopisto, 1955).

2.3.1 *The Influence of Ius Commune in Sweden*

The medieval and early modern Swedish legal history differs from the history of German law in important respects, which is crucial for understanding the differences between Sweden proper and Livonia. Sweden's social structure was also markedly different from that of Livonia. Compared to the political patchwork of Livonia, Sweden was a politically homogeneous kingdom, central power being concentrated in the hands of a relatively small nobility supporting the crown.

Learned law probably never came to play as significant a role in Sweden as it did in Germany and other more southerly regions of Europe. With the exception of some expertise in canon law in the medieval Catholic Church, no academic legal science existed in Sweden prior to the seventeenth century. The situation was thus different from Livonia, where the reception of Roman law had advanced earlier and more thoroughly.[222]

The influence of *ius commune* in Sweden is a theme in need of a modern legal-historical treatment. The traditional, nationalistic view has it that Swedish law was not very much affected by the learned laws, Roman or canon. This view has been dominant since the writings of David Nehrman-Ehrenstråhle, who preferred not to list Roman law amongst the sources of Swedish law.[223] The statement was, for Nehrman, a political one and has to be read in the contemporary ideological and political context. In the sixteenth and seventeenth century, representatives of *usus modernus pandectarum* had developed European legal science into an increasingly nationalistically oriented direction, combining Roman law sources with national sources. Some of them, often called "institutionalists," pressed national legal institutions into the institutionalist scheme of *personae – res – actiones*. Seventeenth-century Swedish legal scholars did this too, although (unlike in Germany, the Netherlands, or Italy), their influence on legal practice remained scarce.[224]

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222 On this development in Germany, see John P. Dawson, *A History of the Lay Judges* (Cambridge, Mass.: Harvard University Press, 1960).

223 David Nehrman, *Inledning til Then Swenska Jurisprudentiam Civilem* (Lund: Decreaux, 1729), 35.

224 On Swedish instituationalists (Johannes Loccenius, Mikael Wexionius, Claudius Kloot and Claes Rålamb) see Lars Björne, *Patrioter och institutionalister: Den nordiska rättsvetenskapens historia, Del 1: Tiden före 1815* (Lund: Institutet för rättshistorisk forskning, 1995), 23–38; Heikki Pihlajamäki, "'Stick to the Swedish Law': The Use of Foreign Law in Early Modern Sweden and Nineteenth-Century Finland," in Serge Dauchy, W. Hamilton Bryson, and Matthew C. Mirow (eds.), *Ratio decidendi: Guiding Principles of Judicial Decisions, Volume 2: 'Foreign' Law* (Berlin: Duncker & Humblot, 2010), 169–185; see also, Heikki Pihlajamäki, "Legalism before the Legality Principle," 169–188.

That Roman law was not "received" has then developed into one of the specificities of Swedish legal historiography. The Swedish "non-reception" has to be understood against European legal history, which after the Second World War developed the theory of the reception of Roman law.[225] The *Rezeption* could be a wholesale one, *Vollrezeption*, which was the case in Germany itself. In other parts of Europe, such as France, one could talk about a partial reception or *Teilrezeption.*[226] Some other parts were supposedly not affected at all. The prime examples for the last case were England and Scandinavia. In recent research, however, a more nuanced picture of the influence of learned laws has emerged. The influence is no longer seen in rigid categories of "full" or "partial" reception, but more as a combination of substantial and procedural components in differing degrees or as a process of "scientification" (*Verwissenschaftlichungsprozess*).[227]

The traditional view has, however, much truth to it. Scandinavian law surely differs from the German, French, or Spanish law as far as the degree of legal learnedness in the early modern period is concerned. As shown above, the influence of canon law in the Middle Ages was already slighter in Sweden when compared to the European heartlands. Right up to the nineteenth century, Sweden had few legal professionals, which were an absolute prerequisite for any thorough reception of Roman law learning. It would nevertheless be wrong to belittle the influence of *ius commune* in Sweden. Several recent studies have shown that Swedish law was in continuous communication and exchange with the continental legal ideas.[228] The leading figures of Swedish law, having studied in continental (mainly German) universities, were keenly aware of the newest developments in European law. These ideas could and did not, however, transfer as such to the Swedish legal system. Far from it, they

225 The classics include Francesco Calasso's *Introduzione al Diritto commune* (Milano: Giuffré, 1951), Franz Wieacker's *Privatrechtsgeschichte der Neuzeit* (Göttingen: Vandenhoeck & Ruprecht, 1952), and Paul Koschaker's *Europa und das römische Recht* (München: Beck, 1953).

226 See Franz L. Schäfer, "Visionen und Wissenschaftsmanagement: die Gründung eines Max-Planck-Instituts für europäische Rechtsgeschichte," *Zeitschrift für europäisches Privatrecht* 17 (2009), 517–535.

227 This last view is well presented in Marcel Senn, *Rechtsgeschichte – ein kulturhistorischer Grundriss* (Zurich: Schultess, 2003), 189–196.

228 See, for instance, the recent works of Mia Korpiola, *Between Betrothal and Bedding: Marriage Formation in Sweden 1200–1600* (Leiden: Brill, 2009); and Elsa Trolle Önnerfors, *Justitia et prudentia: Rättsbildning genom rättstillämpning, Svea hovrätt och testamentmålen* (Stockholm: Institutet för rättshistorisk forskning, 2014).

were filtered and reprocessed, so that they tended to look sometimes quite different when finally transplanted as parts of Swedish law.[229]

Ripples of learned law thus flowed into Sweden from Germany, along the same route as the Lutheran Reformation. In Swedish temporal courts, the lay judges also began losing their positions to the crown-appointed judiciary in the sixteenth century. King John III reserved the right to appoint lower court judges to the king in 1569 and granted the privilege of the tax revenues pertaining to these judicial offices to noblemen. This, however, did not mean that legal expertise would have taken over in the courts. Legal training among the judiciary did not become normal in the Swedish courts until the founding of the academic legal faculties and appeals courts in the first half of the seventeenth century.[230] Even then, laymen kept their strong position in the courts, as they have done to this day.

The lack of legal expertise placed limits on the reception of Roman law in the secular courts. Complicated legal theories had no fertile soil in Swedish legal life. Criminal law as legal science did not exist in sixteenth-century Sweden, any more than legal science in general. The situation was different from Germany, where the Lutheran Reformation could make use of academically trained legal professionals. In spite of this, the Catholic Church had already managed to influence Swedish legislation in the Middle Ages. This influence, however, is not to be confused with the professionalization of both secular and ecclesiastical venues in the more southerly parts of the European continent. As to criminal law, the learned theories of proof, torture, and individual guilt had little chance of reaching the vast majority of the unlearned secular courts of medieval Sweden.

Examples abound in every field of law. A few may suffice. The first example is the legal theory of Olaus Petri. Olaus is mostly known for two things, as the chief reformer in Sweden and the author of the Instructions for the Judge. The Instructions were not his only legal work, but were clearly the best known. Olaus, born either in 1493 or 1497 in the town of Örebro, studied theology in the University of Uppsala (founded 1477) and thereafter possibly in Rostock.

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229 See Heikki Pihlajamäki, "Gründer, Bewahrer oder Vermittler? Die nationalen und internationalen Elemente im Rechtsdenken des Olaus Petri," in Jörn Eckert and Kjell Å. Modéer (eds.), *Juristische Fakultäten und Juristenausbildung im Ostseeraum: zweiter Rechtshistorikertag im Ostseeraum: Lund 12.–17.3.2002* (Stockholm: Institutet för rättshistorisk forskning, 2004), 29–*38*.

230 Yrjö Blomstedt, *Laamannin- ja kihlakunnantuomarinvirkojen läänittäminen ja hoito Suomessa 1500- ja 1600-luvuilla: oikeushistoriallinen tutkimus* (Helsinki: Suomen historiallinen seura, 1958), 299.

He certainly continued his studies in Leipzig in 1516 and still in the same year in Wittenberg, possibly hearing the lectures of both Martin Luther and Philipp Melanchthon. Promoted to magister in 1518, Olaus returned to Sweden and made a remarkable career in the church and as Gustav Vasa's Chancellor, with whom he vigorously promoted the cause of the protestant reformation in Sweden.[231]

Olaus was not, however, only a religious reformer but was also an important legal writer, thus continuing the medieval tradition in which theologians often took stands on legal problems as law and morals were in close connection to each other.[232] Olaus, "the first Swedish legal thinker," probably wrote the Instructions in the 1530s. Older legal history has shown that Olaus used domestic Swedish law, the Bible, as well as Roman-canon law as material for the Instructions.[233] Despite the wide array of sources which have been identified behind Olaus's work, they have typically been seen as "the simple and sound rules of the common man."[234] This is the notion of the Instructions that has been carried over until today: the rules continue to be printed in Finnish and Swedish statute collections, and Olaus's instructions are widely respected as an expression of wise legal thinking, contrary to overly theorisations of today's lawyers' law. However, as I have shown elsewhere, this conception of Olaus's

231 On Olaus Petri's life and career, see Gerhard Schmidt, *Die Richterregeln des Olavus Petri: Ihre Bedeutung im allgemeinen und für die Entwicklung des schwedischen Strafprozeßrechts vom 14. bis 16. Jahrhundert* (Göttingen: Vandenhoeck & Ruprecht, 1966), 17–19.

232 Winfried Trusen, "*Forum internum* und gelehrtes Recht im Spätmittelalter: *Summae confessorum* und Traktate als Wegbereiter der Rezeption," *Zeitschriftder Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 57 (1971), 83–126, 118–119.

233 See Jan Eric Almquist, "Domarereglernas slutord," *Svensk Juristtidning* 21 (1936), 186–194; Åke Holmbäck, "Våra domar-regler," in *Festskrift tillägnad Axel Hägerström* (Uppsala: Almqvist & Wiksell, 1928), 265–279. Almquist and Ylikangas date the Rules to the 1530s, while Munktell and Holmbäck think that the Instructions emerged "at different times" before the 1650s. Henrik Munktell, *Det svenska rättsarvet* (Stockholm: Bonniers, 1944), 165; Holmbäck, "Våra domar-regler," 268; Heikki Ylikangas, *Valta ja väkivalta keski- ja uuden ajan taitteen Suomessa* (Juva: WSOY, 1988). Recently, see various articles by Mia Korpiola: "On the Reception of the Jus Commune and Foreign Law in Sweden, ca. 1550–1615," *Clio & Thémis: Révue électoronique d'histoire du droit* 2, http://www.cliothemis.com/on-the-reception-of-the-jus; "Desperately Needing Lawyers: Contacts in the Baltic Sea Region and the Rise of Diplomacy in Reformation Sweden," in Otfried Czaika and Heinrich Holze (eds.), *Migration und Kulturtransfer im Ostseeraum während der Frühen Neuzeit* (Stockholm: Kungliga biblioteket, 2012), 101–120; and "Affection or Ancestry? Royal Misalliances, German Legal Influences, and the Law in Reformation Sweden," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* 129 (2013), 145–179.

234 Munktell, *Det svenska rättsarvet*, 172.

Instructions for the Judges as representing the common man's justice, or at least a kind of Swedish "Germanic law," is a product of early twentieth century. In fact, Olaus was one of chief importers of European *ius commune*, as far as criminal legal procedure is concerned. His torture rules, although their precise meaning is notoriously difficult to decipher, are a good example of *ius commune* exposed in a simplified way for the common man to understand. The detailed theories of evidence and other procedural niceties were filtered through to the instructions (and Swedish law) in a simplified form which the unlearned lower courts could understand. However, in principle Olaus represents a Roman-canon theory of the law of proof which imported a simplified, watered-down version to Sweden. The reformer took the practical ability of the Swedish legal world into consideration, and rejected what he must have considered to be excessive complexities of the Roman-canon legal theory and phenomena such as judicial torture in its full form, which he obviously thought would not properly fit the Swedish system of lay-dominated judiciary.[235]

As stated above the influence of learned law has, however, to do with other things rather than simply substantial rules. This brings me to my second example, police statutes, new legislative technique that conquered Europe from the late Middle Ages onwards. Police regulation appeared as part of both church and secular legislation.[236] The concept of police (*politia*) was introduced in Sweden through German influence in the time of Gustav I around the mid-sixteenth century.[237] Kings had issued statutes (*stadga*) from the thirteenth century onwards, but until the sixteenth century the statutes can more aptly be characterized as pacts between the crown and the magnates than as actual

235 See Heikki Pihlajamäki, "Gründer, Bewahrer oder Vermittler?," 29–38.

236 The literature on police has grown immensely in the recent decades. See, for instance, Marc Raeff, *The Well-Ordered Police State: Social and Institutional Change through Law in the Germanies and Russia 1600–1800* (New Haven: Yale University Press, 1983); Michael Stolleis, Karl Härter and Lothar Schilling (eds.), *Policey im Europa der Frühen Neuzeit* (Frankfurt am Main: Vittorio Klostermann, 1996); Karl Härter and Michael Stolleis, "Introduction," in Karl Härter (ed.), *Repertorium der Policeyordnungen der frühen Neuzeit, Band 1. Deutsches Reich und geistliche Kurfürstentümer* (*Kurmainz, Kurköln, Kurtrier*) (Frankfurt am Main: Vittorio Klostermann, 1996); and Paolo Napoli, *Naissance de la police modern: Pouvoir, norms, société* (Paris: Editions La Découverte, 2003).

237 See, Pär Frohnert, "Polizeybegriff und Polizeygesetzgebung im frühmodernern Schweden," in Michael Stolleis, Karl Härter and Lothar Schilling (eds.), *Policey im Europa der Frühen Neuzeit* (Frankfurt am Main: Klostermann, 1996), 531–573; and Toomas Kotkas, *Royal Police Ordinances in Early Modern Sweden: The Emergence of Voluntaristic Understanding of Law* (Leiden: Brill, 2014).

laws given from above.[238] The concept of police law was not customarily used to separate one class of statute from the others. In legal language the concept was, nevertheless, associated with "the maintenance of law and order," or order in general.[239]

Although a few scholarly works drawing on European legislative theory were published in Sweden in the sixteenth and seventeenth centuries,[240] the concept of police law was never clearly defined or separated from the concept of general law. Nevertheless, police ordinances were as important a part of the state-building process in Sweden as in elsewhere in Europe.[241] The power to issue police ordinances, *ius politiae*, considerably widened the power of the prince,[242] and that power was at the same time an important building block in the powers of the prince. About two thirds of the Swedish police ordinances dealt with the economic system and professions, but other areas covered by police regulation in other parts of Europe were regulated in Sweden as well.[243] It seems that many of the objectives of the police ordinances could not be met in practice, however.[244] The fate of the Swedish police ordinances was in this respect similar to that of the German ordinances.[245]

The Catholic Church had sanctioned less serious crimes and other misbehaviour before the Reformation, and the Lutheran Church continued the practice. The Church Law of 1686 sums up the post-Reformation development. The Law of 1686 of course gives only a partial picture of the church's disciplinary law.[246] As mentioned above, ecclesiastical police legislation was not

238 Gösta Åqvist, *Kungen och rätten: studier till uppkomsten och den tidigare utvecklingen av kungen lagstiftningsmakt och domsrätt under medeltiden* (Lund: Institutet för rättshistorisk forskning, 1989), 14–15, 53–54; Gabriela Bjarne Larsson, *Stadgelagstiftning i senmedeltidens Sverige* (Lund: Institutet för rättshistorisk forskning, 1994), 1–31.

239 Frohnert, "Polizeybegriff und Polizeygesetzgebung im frühmodernern Schweden," 540.

240 See Kotkas, *Royal Police Ordinances*, 26–33. He mentions a medieval manuscript called *Konungastyrelsen*, Peder Månsson's *Barnabok* (1510s and 1520s), and Johan Skytte's *Een kort Vnderwijsning* (1604).

241 Frohnert 532.

242 Inger Dübeck, *Fra gammel dansk til ny svensk ret: den retlige forsvenskning i de tabte territorier 1645–1683* (Copenhagen: GAD, 1987), 28–35.

243 Toomas Kotkas, *Royal Police Ordinances*, 40, 100.

244 Frohnert, "Polizeybegriff und Polizeygesetzgebung im frühmodernen Schweden," 532–534.

245 See Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, Erster Band 1600–1800* (München: Beck, 1988), 371.

246 Later statutes also changed the situation from what it was according to the Law of 1686. Halmesmaa's study on the development of Finnish ecclesiastical disciplinary law in the nineteenth century indicates how much ecclesiastical police law had grown by the

incorporated into the Church Law, the issuing of such legislation being considered to be the king's personal prerogative.[247] The logic is thus the same as when secular police legislation was left out of the Swedish Law of 1734. A significant amount of ecclesiastical police legislation was in fact issued, much of which concerned the consistory court and the parish level. For example, the Royal Statute of 1687 on oaths and breaches of the Sabbath contained a number of prescriptions for punishment in the stocks, those unable to pay a fine having "to sit in shame in the stocks on Sunday outside the door of the church before the whole parish." Those who cursed in church were sentenced to heavy fines, which could be commuted to public penance and sitting in the stocks for four Sundays.[248]

The European influences were filtered to Sweden and changed, becoming parts of Swedish law as a result of conscious picking and choosing. In this process not only the local needs but also practical possibilities needed to be considered. As a result, Swedish law at the beginning of the seventeenth century remained relatively little influenced by European learned law. At the end of the century, Swedish law had acquired many more characteristics of European learned law, but was still accommodating them into the local, lay-dominated context.

2.4 Summary

When the Swedish legal and political situation in the Middle Ages is compared to that of Livonia, clear differences emerge. Livonia's political system remained heterogeneous and dispersed throughout the Middle Ages, right until the Swedish era. The Emperor's more or less symbolic position apart, no strong central power ever arose in Old Livonia. The bishoprics had yielded much of their internal power to the vassals, and although the Teutonic Order was the closest thing Livonia had by way of approaching modern statehood, not even the Order could secure power over the whole of the loose confederation of practically independent states that was Livonia. Consequently, the legal picture remained colourful. All of the estates were governed by their own bodies of law: the towns had their urban laws, the nobles their feudal knightly laws

nineteenth century. See Pekka Halmesmaa, *Kirkkokuri murroksen kynnyksellä: koskevan säännöstön kehittyminen Suomessa vuosina 1818–1847 sekä sen soveltaminen Turun tuomiorovastikunnassa* (Helsinki: Suomen kirkkohistoriallinen seura, 1976).

247 Arthur Thomson, *I stocken: studier i stockstraffets historia* (Lund: Gleerup, 1972), 240.

248 Thomson, *I stocken*, 395.

(*Ritterrecht*), the Church its canon law, and the peasants their customary manorial laws. In addition to this typically medieval conglomerate of legal bodies, some Roman law was received as a consequence of learned legal communication with the Empire, its universities and high courts. In these respects, medieval Livonia was no different to other parts of the medieval *Reich*. It did, however, differ from Castile, England, and France, in which royal power had begun to centralise from the thirteenth century onwards and where this centralisation was seen in the attempt at legal compilations, or at least in the forming of a state wide "common law," in the case of England. The Livonian situation also distinguished itself from the rest of the *Reich* in the sixteenth century in that, unlike in many other parts of the Empire, very little centralisation occurred at the territorial level.[249]

The Livonian experience thus differed also from the Swedish situation in important respects. The Swedish society, unlike the Livonian one, had weak estates as counterparts to the rising royal power. None of the medieval towns were comparable to Riga or Tallinn in prosperity, although Visby had been important until the thirteenth century and Stockholm had been rising since the fourteenth. Stockholm with its ca. 10,000 inhabitants around 1600 was, however, far smaller than Riga with its 30,000 inhabitants but somewhat bigger than Tallinn.[250] The Church was increasingly making its voice heard from the early thirteenth century onwards, but it was forced to do so with the help of the local magnates. Canon law as such, a separate body of law administered by the Church's own learned bureaucrats and judiciary, was not a viable an instrument in Sweden, where the ecclesiastic tradition was thin, and learned churchmen and lawyers rare. It was a much better strategy for the Church to influence the secular legislation and have its interests secured directly by way of making sure that appropriate paragraphs found their way into the chapters concerning marriage, inheritance, and other central issues which were important for the Catholic Church. The Reformation made whatever canon law that had been adapted in Sweden into a part of Swedish law, and the former church courts were now subjected to the crown. Sweden was on its way to becoming one of the most centralized countries of Europe, not only politically but also legally. Positive royal law assumed an important position as far as legal sources

249 The "territorialisation" should not, however, be exaggerated. As Joachim Whaley emphasizes, the princely power was internally limited by the Estates and the rights of the subjects (according to the principle *quod omnes tangit, ab omnibus debet approbari*) and externally by princes' subordination to the emperor. Whaley, *Holy Roman Empire*, 48.

250 In the 1620s, Tallinn had a population of about 7 000. Seppo Zetterberg, *Viron historia* (Helsinki: Suomalaisen Kirjallisuuden Seura, 2007), 214.

were concerned, and although we cannot speak of legal positivism in the modern sense, of course, in relation to other sources the enacted royal legislation clearly outweighed the other sources. Importantly, the influence of the learned *ius commune* remained insignificant. The differences between Livonia, resembling a legal mosaic, and the more monolithic Sweden were, then, considerable. How would Sweden, having secured Livonia within its possessions in the 1630s, face this legally asymmetric situation?