Resistance to the Rise of Roman Law in Early Sixteenth-Century Germany

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The rapid economic, political, and social transformation of German society in the late fifteenth and early sixteenth centuries called for the development of written law, commonly referred to as Gute Policey, that was patterned in the Roman law tradition. This resulted in a shift from community-based legal practices rooted in habitual law to a more rigid written code controlled by cities and territorial princes, whose administration due to its complexity required the employ of a new professional lawyer class. A number of intellectuals and writers of the time pushed back against novel political and legal norms. They typically were not legal scholars and wrote for a general audience in the vernacular. This article explores the nature of this resistance to and backlash against legal innovation in this period and seeks to locate the resistance within a larger nationalist and anti-globalist discourse. Two types of related discourses opposing legal innovation emerged. The first bemoaned the demise of natural law and the rise of positive law, which constituted an unwelcome attempt to centralize institutions of state. It argued that the proliferation of written law hindered the administration of justice and made it impossible for ordinary citizens to prevail in court without legal help. The second rejected Roman law, and lawyers practicing it, as innovations with foreign origin. The larger context of this argument was a nostalgic, nationalistic, and xenophobic rejection of all foreign influences displacing pure ancestral moral norms that had formed the core of traditional German society.

I. Introduction

In the late fifteenth and early sixteenth centuries, Germany experienced a remarkable economic, political, social, and cultural transformation. The development of trade and commerce had started to evolve with the development of a proto-capitalist economy that began in Italy in the thirteenth century. This development only took hold in Germany in the fifteenth century, largely delayed because of the arrival of plague in Germany in 1348. The economic recovery after the plague outbreaks of the fourteenth century led to economic opportunity for an expanding and increasingly powerful class of merchants and artisans in German cities.[1] Boosted by a system of self-governance that many German cities enjoyed, urban economies grew rapidly in the second half of the fifteenth century

[1] Scott, Society, 113-152.

and well into the sixteenth century, particularly in southern German cities, accompanied by population growth, increased wealth, and a flourishing cultural life.

Generally, economic development outpaced economic attitudes and moral norms relating to economic activity.[2] It is this tension between rapid economic development and attitudes toward economic processes that led to concerns about the stability of the social and political structures. Local merchants typically formed the governing patriciate, but in many southern German cities the guild system was politically powerful as well. The growth of trading cooperatives and of large trading corporations in the fifteenth century gave rise to a class of wealthy long-distance merchants that claimed elite status and threatened the existing power structure. This required adjustments to urban governance, but also a reevaluation of social and religious norms and values. A traditional understanding of market economies and their financial sectors no longer was able to provide an appropriate moral framework, creating a need for moral guidance. Simultaneously, exponential growth of spatial knowledge and the establishment of global trade networks around 1500 sparked a phase of globalization that had both supporters and detractors.[3]

Social, political, and economic transformations as well as exponential growth of spatial knowledge explain the rather significant number of texts published in the late fifteenth and early sixteenth centuries that focused on the social order and its disruptions. Anxieties about the moral decay, the demise of the traditional social order, and the perceived victory of self-interest over the common good arose along with fears that traditional norms had become invalidated by this process. While some of these texts attempted to adjust to changed circumstances, many others offered strong resistance. A number of intellectuals and writers of the time pushed back against novel political and legal norms.[4] Of particular concern was the rise of Roman law that started to gradually emerge in Germany in the second half of the fifteenth century. The term Roman law was seldom used in this context, rather it was described as a written code, often referred to as *Gute Policey*, that was promoted by legal scholars at law faculties. Many writers described it as replacing traditional natural law that was at the core of community-based habitual law.

While written Roman law was not universally rejected, there was considerable pushback from writers who could be described as nationalist, who were not legal scholars, and who wrote in the vernacular in a populist vein for a general audience. This essay is not primarily interested in legal innovation and the rise of Roman law in Germany. Rather, it undertakes to explore the nature of the resistance to and backlash against legal innovation in the late fifteenth and early sixteenth centuries and seeks to locate the resistance within a larger nationalist and anti-globalist discourse.

2 McGovern, The Rise, 224.

3 For a definition of early modern globalization see Hess, Resisting Pluralization and Globalization, 233-242.

4 This backlash is the topic of my recent book, Resisting Pluralization and Globalization. Some of the ideas presented here were first developed there, particularly in chapters 2 and 20.

II. Gute Policey

A key tool in response to societal changes was the *Gute Policey*, a term referring to laws, ordinances, and regulations issued by authorities to establish and enforce social norms, to achieve communal order, and to enhance the common good, a dominant theme in the political discourse of the sixteenth century.[5] *Gute Policey* was not interested in mediating individual differences of interests but rather in the order of the political system, of the polity as a whole[6] and was motivated by the need to give direction to communal life by way of legislation.[7] One of the key features of this transformation was the strengthening of institutions of central administration, including the judicial system, from the communal level all the way to imperial administration.[8] *Policey* stood for an acceleration of legislative activity on the level of the territorial state in the early modern period. Such efforts were rare in the late Middle Ages but had become exceedingly common by the eighteenth century.[9] Until the fifteenth century, landed rulers were mainly responsible for protection and high jurisdiction, while the political and social order was maintained by local political units or by the Church.[10] Thus, we see both a shift of legislation from the communal or urban level to the level of the territorial state and a general increase in the number of laws.

Thomas Simon identifies three possible reasons why the early modern territorial state gradually took over the maintenance and extension of the communal order in the late fifteenth and sixteenth centuries: (1) the declining capacity of local governments and of the Church to establish and maintain order, (2) a profound crisis of order that unsettled and destabilized society, and (3) an ongoing process of condensation, that is urbanization, more complicated webs of transaction, denser and geographically larger networks, and growing social interdependence.[11] In Simon's reading, the third factor outweighed the other two. An increasingly complex society required more intensive legislation at a higher political level, that of the territorial state.[12] However, a tighter web of social interdependences made the social system more susceptible to disruption.[13]

The early modern state created stronger written public policy, *Gute Policey*, to provide a framework that could be implemented more uniformly in the various territories of the state. The establishment of the *Reichskammergericht* (imperial chamber court) in Wetzlar in 1495 helped introduce and spread Roman law in Germany. The trend toward written public policy manifested itself in legislation issued by the imperial diet, such

5 Blickle, Beschwerden und Polizeien, 564.

6 Simon, Gute Policey, 112. For a broader definition of the term Gute Policey, see Iseli, Gute Policey, 14-31.

7 Simon, Gute Policey, 168.

8 Hieber, Policey, 1.

9 Simon, Krise oder Wachstum, 1201.

10 Simon, Krise oder Wachstum, 1203.

11 Simon, Krise oder Wachstum, 1206-1207.

12 Simon, Krise oder Wachstum, 1213.

13 Simon, Krise oder Wachstum, 1211.

as the *Reichsabschied* (recess) of 1512 and different versions of the *Reichspolizeiordnung* (imperial public policy ordinance) from 1530, 1548, and 1577.[14] Corresponding ordinances were issued by landed princes and by city councils as well, like the Bavarian *Landesordnung* (state ordinance) from 1516. The latter, for instance, prescribed the ingredients that could be used to brew beer, the source of the purity law that still defines German beer, indicating how detailed and also potentially invasive these codes could be. *Policey* thus stood for a larger transformation of state: from *Herrschaft*, the rule of a sovereign who ruled a domain based on entitlements, to *Staat*, a state that covered a well-defined territory that was based on laws, and that was administered by bureaucrats.

These legal responses to changes in German society did not go unnoticed and prompted a range of responses. Pragmatists recognized that a more complex society offered more opportunities for transgressive behavior and therefore required more regulations and a growing body of written law. Others expressed growing concerns about matters of state organization and the legal order, and in particular about the growing gap between legal code and communal legal practices.

In a cautiously supportive response, the early reformer Martin Bucer (1491–1551) attempted to link the notion of *Policey* to the divine order. In his short tract *Das ym selbs niemant/ sonder anderen leben soll* (*That No One Should Live for Himself, but Rather for Others*) from 1523, Bucer argued:

> *"Now we have to bear witness: as God immeasurably surpasses the wisdom and prudence of all humans, so also do the divine order and statute have to surpass the order and statute of humans to establish a just, honest, peaceful, and well-crafted policy [politzey] and to govern."*[15]

In this text, Bucer represented a world where everything had a place in creation, as told in Genesis, and by analogy also had a place in the order of the world as it was created by God. For humans, there was an obligation to subject themselves to this divine order. The function of *Policey* therefore was to create a worldly order that followed the precepts of the divine order. Bucer thus acknowledged a need for *Policey*, no matter how imperfect, yet also demanded that it closely follow divine law.

While the notion of a divinely ordained order was not seriously challenged by other writers in the sixteenth century, most grounded the notion of *Policey* in a framework derived from a secularized moral philosophy and designed it as the primary tool to create a political structure that served the common good. Within that context, *Policey* dominated the political process from the late fifteenth century up to the beginning of the Thirty Years War. It included the entire system of authority-led public administration: it dealt with cultural, social, and religious issues and addressed the economic order, public safety, and infrastructure issues. It embodied a more systematic, comprehensive, and

[14] For a detailed discussion see Weber, Die Reichspolizeiordnungen.

[15] Bucer, Das ym selbs niemant, sig. c2r: "Nun müssen wir ye bekennen/ wie gott on masß übertrifft aller menschen weißheit vnd klůgheit/ also můsß auch göttlich ordnung vnd satztung/ aller menschen ordnung satzung/ ein rechte/ eerliche/ fridliche/ vnnd gantz wol angestelte politzey anzůrichten vnd regieren übertreffen." All translations are mine, unless noted otherwise.

proactive vision of a positive law and represented the beginning of the modern legislative process.

The early modern territorial state increasingly relied on advisers and bureaucrats to maintain the stability of political and social structures. This was the target audience for the rising number of legal handbooks at the time, like *Von dem Gemeinen nutze* (*On the Common Good*, 1533) by the legal scholar Johannes Ferrarius (1486–1558). Ferrarius agreed with the assessment that traditional German values and support for the common good had been in steep decline within just a couple of generations while disobedience and selfishness had risen.[16] Providing a firmer legal environment was the logical consequence to Ferrarius, which was the purpose of his book. Handbooks like that by Ferrarius mediated emerging new legal frameworks to an educated urban audience. However, many of the sixteenth-century texts paid more attention to issues arising in territorial states.[17] They walked a fine line between preserving German community-based legal traditions and promoting a necessary new legal framework, the *Gute Policey*. But they were also designed to train advisers and bureaucrats in the employ of cities and principalities who were in need of guidance. Many handbooks thus assisted a class of political operatives, who in turn became objects of scorn. While these handbooks targeted public officials who needed help, they also emboldened citizens to demand action from the authorities, particularly from city councils.

III. The foreign origin of disorder and nostalgia for an orderly world

A number of writers believed that disorder was not part of ancient German culture and that the need to bolster the legal system only arose because of inappropriate foreign influence. Consensus held that a divine plan shaped modest, yet ethical and noble early societies and forged a stable social order. Chronicles, like Christian Egenolff's (1502–1555) *Chronic von an vnd abgang aller Welt wesenn* (*Chronicle of the Beginning and End of All Beings in the World*) from 1533, referred to these utopian beginnings: "And a divine order, as Paul teaches, is implanted into nature and reason, to protect the pious and to punish the evil."[18] The first threat to this natural order was the ejection from Paradise. Yet humans continued to live peacefully in simple settlements following the norms of natural law for some time: "Thus they built houses, invented all kinds of arts, led a sweet sociable life, and a civil and amicable coexistence, without any walls, defenses, armor, rule, authority, and war."[19] Soon many left the path of virtue, and envy, disloyalty, theft, robbery, and murder became commonplace. To protect innocent people the need for

16 Ferrarius, Von dem Gemeinen nutze, sig. A2r

17 Simon, Gute Policey, 99.

18 Egenolff, Chronic, fol. 86r: "vnnd ist ein götlich ordnung wie Paulus leret/ der natur vnd vernunfft eingepflantzt/ dem frommen zu schutz/ dem bösen zu straff."

19 Egenolff, Chronic, fol. 86r: "Derhalben bawten sie heuser/ erfanden allerley künst/ fürten ein süß geselligs leben/ vnd ein Burgerlich freuntlichs nachburlichs wesen bei einander/ on alle mawr/ wör/ harnasch/ herschafft/ oberkeyt vnd krieg."

leaders arose who built castles and walls around their villages. Armed conflicts and wars emerged and grew among these kingdoms, and the need arose to create a supreme imperial monarchy to control the other rulers.[20]

Egenolff was one of many writers who developed a nostalgia for a simple and morally pure German society as it was alleged to have existed during the Carolingian and Ottonian periods. In the introduction to his *Cosmographia* from 1544, Sebastian Münster (1488–1552) told a similar story of the origins of a modest German culture that did not know money or private property and where people shared freely.[21] There were no thieves or murderers until "wild animals and foreign humans began to engage in robbery." [22] By likening foreigners to wild animals, Münster engaged in a xenophobic topos to justify the development of an organized society that was able to fend off demonic forces, which promoted the rise of vices and illicit desires in Germany.

Many contemporaries argued that the demise of an authentic German culture was due to foreign influences. The contemporaneous urban merchant culture was viewed as a foreign invention. Merchants thus were un-German in their essence and in their activities. The new global trade system arising around 1500 didn't just have economic and political consequences. Rather, it created moral and ethical challenges that were rooted in the very nature of long-distance trade and of merchants as a class.

Ulrich von Hutten (1488–1523), most prominently in his dialogue *Die Anschawenden* (*The Observers*), pitched a similar story of a pure German culture where walls, weapons, war, and political authority were unknown, until German innocence was spoiled by foreigners:

> *"Subsequently, foreigners from day to day came to them more and more. First, they traveled to those who lived along the seashore and started to trade with them. After that, they traveled further, until finally the new things were pleasing to the unfit, lazy, and curious ones and the habit of excess was accepted by the common population. This gave them the incentive to first build villages and then cities, which they later fortified with walls, bulwarks, towers, and moats, and within which they sealed themselves off. To this community all slothful, lazy and cowardly members consented."*[23]

20 Egenolff, Chronic, fol. 86v.

21 Münster, Cosmographia, sig. a3r.

22 Münster, Cosmographia, sig. a3v: "die wilden thier vnd außlendigen menschen begunnen auff den raub zelauffen."

23 Hutten, Die Anschawenden, sig. x2v: "Nachvolgens haben sich die außländer von tag zů tag mer und mer bay jnn zugethon/ vnd erstlich bey denen/ so am gestaden des möres gewonet/ angefaren/ mit jnn zů handelen angefangen. Darnoch seind sye auch weyter kommen/ so lang/ biß dz erstlich den vntüglichen trägen vnd fürwitzigen/ die newen ding gefallen/ vnd ist gewonheit des überflusses von gemeyenen hauffen angenommen. Das hatt jnn anreytzung erstlich dörfie/ darnoch auch stätt zů bauwen gegeben/ die sye nachuolgens mit muren/ polwercken/ türnen/ vnd gräben beuestiget/ vnd sich also darein verschlossen. Jn welche versamlung alle trägen/ faulen/ vnd vnstreitbaren verwilliget."

Germans succumbed to the temptation of fine imported garments and spices and became a soft, effeminate, and timid people.[24]

The chronicler Johannes Aventinus (1477–1534) pointed out that the old Germans built neither churches nor altars, nor did they support priests, as this was not part of their pristine culture.[25] To the Franciscan friar Johann Eberlin von Günzburg (1465–1533), an early Luther supporter, the foreign origin of the Church was the key reason why it was beyond redemption:

> "*The courtiers and the mendicant friars bring all falsehood, stigmas, infidelity, and craftiness from foreign lands, particularly from Italy and Rome. In this way, loyalty and faith are broken, and henceforth one brother cannot trust the others anymore, in contrast to the traditional honesty of the German nation.*"[26]

The Church was greedy, preached a false theology, and taught reprehensible morals. Therefore, it introduced its own corrupt foreign values to a pristine German culture, just as the merchants did.

Foreign influences were at the core of the moral decline that Hutten saw in contemporaneous Germany. His xenophobic argument held that the triad of merchants, lawyers, and clergy were contaminating his countrymen with undue foreign influences and hence were disrupting the German social and moral order. In his dialogue *Praedones* (*The Robbers*) from 1521, Hutten identified four types of robbers: street robbers, long-distance merchants, legal scholars, and members of the Catholic clergy. Ordinary street robbers did the least harm because their transgressions were in plain view and because the damage they inflicted was localized and merely was of a material nature.[27]

Hutten was particularly concerned with the latter three categories as they were the result of undue foreign influences, were harmful for the common good, compromised the morals of Germans, and therefore triggered Hutten's xenophobic reflexes.[28] The Roman Curia instrumentalized their clergy in Germany to unduly deprive Germany of crucial financial resources, a theme that was further developed by Luther's reform movement. Merchants were responsible for importing opulent products from countries far away as well as for market manipulation and profit-making schemes. Lawyers introduced alien legal concepts in the form of Roman law. Members of these three groups were among the most mobile and best-educated segments of society, had occupations that transcended national boundaries, and had most in common with Renaissance Humanists. Merchants and jurists, in particular, were members of a new transnational elite that threatened the

24 Hutten, Die Anschawenden, sig. x2r.

25 Aventinus, Chronica, sig. H3r.

26 Eberlin von Günzburg, EJn klägliche klag, sig. ++1r: "Die Curtisan vnd bättel münch bringen auß fremden landen/ besunder vß Jtalia vnd Rom allen falsch/ vssatz/ vntrew/ hinderlist/ do durch trew vnd gloub gebrochen wirt/ vnd schier ein brůder den anderen nit truwen darff/ wider alte redlichkeit teütscher nation."

27 Hutten, Praedones, fol. 21v.

28 Hutten, Praedones, fol. 21v.

traditional social order by establishing foreign practices in Germany. Hostility to these three groups thus formed the core of a nationalist program.

This nationalist program sought to limit and even eradicate foreign influences. A Humanist nationalism was developed in scholarly literature in the fifteenth century, grouped around the ideas of national languages, national stereotypes, and civic patriotism.[29] The novel term *natio Germanica* designated a community that shared the same language and culture. The terms Germany and German nation in the understanding of the time referred to a community where German was commonly spoken. A xenophobic element, the rejection of foreign influences by educated elites, usually was part of it. This notion of a German nation was supported by the simultaneous ascent of the German vernacular as a cultural and political language.[30] Ulrich von Hutten addressed his anti-papal tract of 1520 to the "fatherland of the German nation" that he defined through its common German language.[31]

The German nation was vaguely associated with the empire and more clearly with the person of the emperor. It did not correlate with established political practice nor align with imperialist, dynastic, and religious principles.[32] The term empire, by contrast, referred to the polity that was governed by the emperor and the imperial diet and was commonly referred to as Holy Roman Empire. The distinction between the empire and the German nation was increasingly blurred by the idea that the empire was German in character, leading to the official designation *Heiliges Römisches Reich Deutscher Nation* (*Holy Roman Empire of the German Nation*) at the Diet of Cologne in 1512.[33] This is evident in Ulrich von Hutten's definition of the imperial diet as "an assembly of the council of princes, and of the common German nation."[34]

Conrad Celtis (1459–1508) was one of the most important disseminators of German nationalistic ideas. While Celtis wrote exclusively in Latin and always valued the learning of the ancient Greeks and Romans, he urged Germans to assert themselves against hegemonial aspirations of the contemporaneous Italian and French cultures. At the same time Celtis called on Germans to return to the moral purity of the ancient Germans and to resist the temptation of corrupt foreign cultures:

> *"To such an extent are we corrupted by Italian sensuality and by fierce cruelty in exacting filthy lucre, that it would have been far more holy and reverend for us to practice that rude and rustic life of old, living within the*

29 Hirschi, The Origins of Nationalism, 10-13; Hess, Resisting Pluralization and Globalization, 289-307.

30 Knape, Humanismus, Reformation, 113-116.

31 Hutten, Clag und vormanung, title page: "dem vatterland Teütscher Nation zů nutz vnd gůt;" also sig. b2r: "Now I shout at the fatherland of the German nation in its own language." ("Yetzt schrey ich an das vatterland Teütsch nation in irer sprach.")

32 Hirschi, The Origins of Nationalism, 3.

33 Knape, Humanismus, Reformation, 116.

34 Hutten, Die Anschawenden, sig. t4r: "Es ist ein versamlung zům rat der Fürsten/ vnd gemeyner Teütschen nation."

> *bounds of self-control, than to have imported the paraphernalia of sensuality and greed which are never sated, and to have adopted foreign customs."*[35]

Celtis thus set the tone for the next generation of German writers who were less subtle in their nationalistic messaging. German nationalism provided the framework for the rejection of all things foreign, and in particular Roman law.

IV. Anxieties about the demise of natural law

The effort to create more uniform legal codes was seen by its promoters as a corrective for underlying uncertainty and instability of the traditional legal system. This notion was rejected by traditionalists who believed that communal governments were best able to regulate communal affairs, which is why the intervention by princely governments to implement broader legal frameworks was widely resented. Furthermore, legal scholars were seen as recent foreign arrivals who sought to disseminate the principles of Roman law in a country that had not known a written legal tradition. The Brunswick public official Hermann (Hermen) Bote (c.1450–c.1520), for instance, anxiously rejected the new legal doctrine out of concern for the old corporative order that he saw threatened by it. Similarly, Martin Luther (1483–1546) considered a rigid legislative regime to be a sign of bad governance.[36] He stated this at the very beginning of his *Ein Sermon vom Neuen Testament* (*A Sermon About the New Testament*) from 1520:

> *"Firstly. Experience, all chronicles, and on top of that Holy Scripture teach us: the fewer laws, the better the justice, and the fewer commands, the more good deeds. And there never has been a community that was governed well for a long time that had a lot of laws."*[37]

The idea that a community could not be primarily governed through legislation seems to have been still commonplace at the time.

Luther believed in settling legal disputes according to local customs and held a rigid legislative regime to be a sign of bad governance.[38] This informed his antipathy against positive law, Roman law, and more generally against lawyers:

> *"Secular law—God help us—has become a wilderness. [...] It seems just to me that territorial laws and customs should take precedence over general imperial laws, and that the imperial laws be used only in case of necessity. Would God that every land were ruled by its own brief laws suitable to its gifts and peculiar character. This is how these lands were ruled before these*

35 Celtis, Oratio in Gymnasio, 53.

36 Simon, Gute Policey, 173-174. As Tacitus had famously stated, "The more corrupt the state, the more numerous the laws."

37 Luther, Ein Sermon, 353,5-9: "ZUm ersten. Das leret vns die erfarung, alle cronicken, dartzu die heyligen schrifft, das, yhe weniger gesetz, yhe besser recht, yhe weniger gepott, yhe mehr gutter werck, und ist noch nie keyn gemeyne odder yhe nit lang wol regirt, wo vil gsetz geweßen seyn." See also Luther, To the Christian Nobility, 451-452.

38 Simon, Gute Policey, 173-174.

> *imperial laws were designed, and as many lands are still ruled without them! Rambling and farfetched laws are only a burden to the people, and they hinder cases more than they help them.*"[39]

In Luther's view, only localized governance was able to regulate local affairs while centralization could not serve the needs of the people. Furthermore, written imperial law was based on Roman law that was too closely intertwined with the Catholic Church and therefore ill-suited to regulating German affairs.

One of the most prominent critics of the rise of positive law was the writer Sebastian Brant (1458–1521), at least in his popular text *Das Narrenschiff* (*Ship of Fools*) from 1494. Ironically, Brant was a lawyer himself who endorsed the publication of texts promoting Roman law in Germany, as will be discussed below. In chapter 71, entitled "Zancken vnd zu gericht gon" (Quarrelling and going to court), Brant described a legal system that allowed legal maneuvers to delay and obscure justice to the point where the fees for foreign lawyers exceeded the value of the matter at hand. Lawyers also deceived judges with their hollow talk: "One has to hire expensive jurists and bring them here from countries far away, so that they can whitewash the issues and deceive the judges with their babble."[40] Under natural law, common sense had prevailed, while the new system of written law required the assistance of a lawyer in order to entangle the judge in a web of verbal deception. While legal disputes could formerly be resolved locally, the service of learned foreign lawyers, who were skilled at understanding and manipulating the new legal standards, was now required.[41]

Similarly, the Dominican priest Simon Grunau (c.1470–c.1530) told a story to illustrate the advantages of a localized justice system in his *Preussische Chronik* (*Prussian Chronicle*), written in the 1520s. Here, a son shows his law books to his father and explains the difference between what is printed in big black letters and in small red letters. The former is "the text of law and the truth according to justice" and the latter "the words of law in which one can find deceit."[42] In his critique of the new written law, Grunau made a distinction between the law that was rooted in justice and legal verbiage that was designed to obfuscate and manipulate the law. In a comical twist, the father takes his scissors and cuts out all the small, red texts from the book, thus symbolically restoring justice based on local customs while cutting away the alien language associated with imperial law.

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39 Luther, To the Christian Nobility, 451-452.

40 Brant, Narrenschiff, ch. 71, v. 21-24: "Man můß yetz köstlich redner dyngen | Vnd sie von verren landen bringen | Das sie die sachen wol verklügen | Vnd mit geschwätz/ eyn richter betrügen." Geiler von Kaysersberg argues in a similar way in his sermons on Brants Narrenschiff (Des hochwirdigen doctor Keiserspergs narenschiff, fol. 141v).

41 In chapter 79, Brant similarly reinforced the idea that lawyers were only motivated by their own gain while justice was not served and the legal system as a whole suffered.

42 Grunau, Preussische Chronik, 2,318-319: "der text des rechtens unnd die warheit nach der gerechtigkeit;" "die wortter des rechtenns, auff wolche man kan ein bescheisserey finden." The Prussian Chronicle was printed for the first time in 1875-1889. It is considered the first chronicle of Prussia, but a number of segments, like the one discussed here, are works of fiction.

The discussion in the early sixteenth century was informed by the assumption that Germans had lived according to natural law throughout their history and that it provided the foundation for the traditional system of justice. While natural law was thought to be close to divine law, Martin Luther even viewed them as identical. He held that natural law was instilled by God in all humans, enabling them to make a distinction between right and wrong.[43] The rise of written law, and of Roman law in particular, thus created a range of issues for the administration of justice: "uniform law versus diversity of customs, central versus distributed power, authority versus freedoms."[44] Any kind of new positive law meant a curtailment of natural law as well as of local practices and therefore was met with reservation and even hostility.

Many writers used nostalgic references to natural law to oppose the rising prominence of the written Roman law in Germany. The anonymous author of the rhymed pamphlet *Die welsch gattung* (*The Italian Kind*) from 1513 alleged that the Italians lacked natural law and argued that written Roman law was used to pervert natural law in Germany.[45] Some, like Hutten, blamed undue foreign influence for the demise of the native legal foundation and political structures, while others argued that self-interest, which in itself was on the rise due to inappropriate foreign influence, erased this idyllic state of things.[46]

Yet, establishing legal texts seemed unavoidable, if only to shore up existing law with the goal of preserving or restoring the old order. Johannes Ferrarius attempted to preserve communal legal norms by integrating them into an indispensable written "permanent law"[47] that codified customary law that had been passed down through generations: "This is why the written law is highly necessary, not just to govern by it, but also to give shape to customs as long as they promote the common good."[48]

Sebastian Brant discussed the transition from natural law to an arbitrary and subjective legal code in his 1509 preface to the *Laÿen Spiegel* (*Layman's Mirror*) by Ulrich Tengler (1441–1511), which was perhaps the most important summary of Roman law in Germany at the time. Brant edited several legal texts and pragmatically conceded in the introductions that canon law and secular law were necessary to regulate an increasingly complex society. As the title of Tengler's text implies, its purpose was to explain the legal code in the German vernacular to those without legal training and without knowledge of Latin, which included many officials in the service of cities or princes.[49] Brant even compared Tengler to the Emperor Justinian (c.482–565) whose *Institutiones*, the sixth-

43 Strauss, Law, Resistance and the State, 211.

44 Strauss, Law, Resistance and the State, 240.

45 Anon., Die Welsch-Gattung, 228, v. 2161-2167; see also Egenolff, Chronic, fol. 86r.

46 Examples: Egenolff, Chronic, fol. 86r-86v; Münster, Cosmographia, sig. a3v-a4r.

47 Ferrarius, Von dem Gemeinen nutze, fol. 7v: "bestendig recht."

48 Ferrarius, Von dem Gemeinen nutze, fol. 7v: "Darumb das beschrieben recht hoch von nöten ist/ nit allein da durch zu regirn/ sonder auch den gewonheyten/ so fern die vor den gemeinen nutz sein mögen/ ein maß zu geben."

49 Knape, Der humanistische Geleittext, 117-118.

century codification of Roman law, served as model for Tengler.[50] Just as Justinian had compiled the vast body of ancient law, Tengler was credited with publishing the first summary of German law.

While God had instilled natural law into humans as part of the act of creation, natural law was crushed after the seduction by the snake in Paradise, an act that created daily strife, envy, and disunity:

> *"Against that the faded natural law was no longer sufficient and compelling enough to teach and discipline humans with commands of statutes, out of divine providence, how they should live honorably, offend no one, and give to each his own. Such commands should be handled and administered by two swords conferred by the Almighty, one to the clerical and one to the secular estate."*[51]

While the demise of natural law was regrettable, the lawyer Brant did not hold it to be sufficient to deal with the complexities of contemporaneous life. Canon law and secular law, both also installed by divine authority, thus constituted a suitable alternative. In spite of a common theoretical aversion to change and innovation, writers like Brant conceded that rapid changes in urban German society required appropriate adjustments to the legal structure. However, we cannot ignore the contradiction that is inherent in Brant's legal thinking. In his professional editorial work as a lawyer, he defended the rise of a written code based on Roman law. As a writer of popular texts, however, like the *Narrenschiff* (*Ship of Fools*), he bemoaned its morally corrosive potential. The *Ship of Fools* was a vessel that allowed Brant to send a more populist message and to more broadly register his misgivings about a world gone awry.

Others grudgingly took a similarly pragmatic stance, like Johannes Ferrarius, who also viewed the new statutes as a pragmatic necessity since society was evolving at an ever more rapid pace:

> *"Because everyday something new transpires, and also because the circumstances of states and people and their affairs occur in such a way that they cannot be settled and governed through written or habitual law, therefore it is necessary to reflect on a new order or new statutes on occasion."*[52]

Political and literary writers expressed an aversion to legislation in principle and bemoaned the demise of natural law. Yet, the simultaneous perception of rapid change

50 Knape, Der humanistische Geleittext, 123-124.

51 Tengler, Laÿen Spiegel, sig. ¢1v: "Dargegen das verblichen natürlich gesatz/ nicht mer gnůg vnd not gewesen ist auß götlicher fürsichtigkait die menschen mit geboten des rechtens zů vnderweisen vnd bezwingen/ wie sy ersamlich leben/ nyemands belaydigen/ vnd ainem yeden das sein geben solten. Solche gepot sollen durch zway swert/ der ains gaistlichen vnd das ander weltlichen stand von dem allmechtigen verlihen sein/ gehandthabt vnd verwalten."

52 Ferrarius, Von dem Gemeinen nutze, fol. 28v: "Dweil aber allen tag was news sich zutregt/ vnd auch gelegenheit der lande vnd leuthe/ vnd dero hendel/ ettwan der massen furfalln/ das sie durch beschriebene Rechte/ odder herbrachte gewonheiten nit so statlich mögen entscheiden/ vnd regirt werden/ ist von nöten auff newe ordnung vnd statuten der gelegenheit nach zu dencken."

in society prompted an increased appreciation for *Gute Policey*, whose purpose was to regulate these new developments and to outlaw new practices that were seen as detrimental to the common good. Change brought about increased opportunity for transgressive behavior that, in Ferrarius's view, urgently needed to be curbed:

> *"This is why there has to be a law so that the rogue can be disciplined, the good one can be protected, and to each can be given what he deserves according to the law. For the law is a gift of God, a lesson from the wise, a punishment of transgressions, a link to the common good, according to which each deserves to live who is in the community."*[53]

In an attempt to insert traditional notions of law and justice, Ferrarius noted that the law was not proactive and was not meant to design new visions of society, rather it was conservative and defensive of the status quo. The law also was not based on politics nor on the needs and desires of the sovereign but rather represented an attempt to preserve and restore order rooted in divine law and wisdom and was devoted to the punishment of transgressions and the promotion of the common good.

V. Pushing back against the rise of foreign law and its advocates

A number of writers, mostly with a nationalistic outlook, were not prepared to accept new legal norms and practices. In 1521, Johann Eberlin von Günzburg wrote a series of political pamphlets known as *Fünfzehn Bundesgenossen* (*Fifteen Confederates*). In two of them, Eberlin designed the utopian state of Wolfaria. Just like in Thomas More's *Utopia* from 1516, there were no lawyers in Wolfaria.[54] Rather, Eberlin demanded the abolition of both imperial and canon law: "We reject all imperial and priestly law."[55] Instead, Eberlin insisted that citizens should know common customs and traditional law: "Everybody should know common law, and everybody should know what is fair and what is unjust."[56] Eberlin's utopia created a state free from foreign influence but connected to traditional German values, which allowed him to pitch the rising Roman law as a frivolous and useless innovation.

Ulrich von Hutten tied his opposition to lawyers in general and to the practice of Roman law in particular to nationalistic and xenophobic reflexes common in his writings. In his dialogue *Praedones*, briefly mentioned above, he developed the theme that lawyers, and particularly experts in Roman law, infiltrated princely chancelleries, installed themselves

53 Ferrarius, Von dem Gemeinen nutze, fol. 3v: "Darumb müssen gesatz sein/ damit der schalck gezempt/ der gutte vor gewalt geschutzt/ vnd einem jeden was jme rechts halber gepurt/ mitgetheilt werde/ Dan das gesatz ist ein gab gottes/ ein lehr der weisen/ ein straff der vberfarung/ ein verbindung des gemeinen nutzes/ dar nach einen ieden zu leben gepurt/ der in der gemein ist."

54 Strauss, Law, Resistance and the State, 21-23.

55 Eberlin von Günzburg, Ein newe ordnung, fol. 4r: "Alle kayserliche vnd pfaffen recht thůnd wir ab."

56 Eberlin von Günzburg, Ein newe ordnung, fol. 4r: "Jetlicher soll gemeine recht wissen/ vnd dz jetlicher wiß sin billichs vnd vnbillichs."

as advisors to princes and city councils, and abused the recently deceased Emperor Maximilian I in what, so Hutten, constituted a dark chapter in German history. Yet, these advisers already were at work at the court of the young Emperor Charles V. According to Hutten, Charles was coerced into the edict against Luther at the Diet of Worms by malevolent court officials who had been bribed by papal gold.[57]

Hutten contended that these lawyers held immense power at diets and councils.[58] Legal scholars thus presented a menace to Germany as they blinded the princes with their proud display of hair-splitting sophistry that only served "to turn all things upside down and to overthrow the common order of things."[59] The princes, in turn, were at fault for surrendering their power. These "robbing lawyers" plundered their princes who were enamored with their jurists and who no longer were able to live and govern without their counsel. According to Hutten, they trusted the paperwork of their lawyers more than their own judgment, "their own wisdom, goodness, fairness, and leniency,"[60] which in former times would have guided them in rewarding the good ones and punishing the bad ones. Hutten concluded that "this foolishness of the princes naturally led to the oppression of the people."[61] Germans therefore would not feel unhappier under the rule of a foreign tyrant than they did at present "under the villainous administrators of justice."[62]

Hutten identified the recent flood of printed books as a major culprit. Books gave jurists ideas and material for their outlandish legal theories and courtroom antics. While books helped recover and propagate the long-lost wisdom of the ancients, they also were seen as having a deceptive potential. Many early humanists, like Brant and Hutten, did not trust this new medium because they were concerned that printed books could not be controlled and were capable of disseminating unorthodox information and validating dissenting viewpoints. The influx of a written and printed legal code that was based on Roman law was a prime example: "Nowadays, we learn from books in which way honesty can best be sidestepped."[63]

Printed sources taught flimsy lawyers to destroy legitimate claims with empty words and fancy rhetorical tricks:

> *"Conscience does not have any rights with these people anymore. Words decide if someone is convicted or acquitted. They are no longer concerned with justice but rather spend all day with their quarrelsome gossip. They know how to assemble the most horrible trial from mostly invented and insignificant items. Indeed, peace would reign in all places, and all minds would*

57 Hutten, Praedones, fol. 26v.

58 Hutten, Praedones, fol. 28v.

59 Hutten, Praedones, fol. 27r-27v.

60 Hutten, Praedones, fol. 28v.

61 Hutten, Praedones, fol. 28v.

62 Hutten, Praedones, fol. 28r.

63 Hutten, Praedones, fol. 28r.

> *agree in love, it they did not debase the most splendid arrangements in the most malicious way, and if they were prevented from giving everything a different shape with their malicious learnedness."*[64]

Twisting words and facts and turning the law upside-down had become a common practice since the arrival of these lawyers:

> *"Should we call that wisdom when sincere people are cunningly deceived, when the laws are twisted with the help of mischievous legal interpretations into judgments that are far removed from the intent of the lawmaker, and when all sense of propriety is mutilated?"*[65]

Deceit was their method by habitually confounding law and injustice. They were bending laws, like artists were molding wax, to arbitrarily make them conform to their purposes.[66] Furthermore, they frivolously prolonged trials by derailing orderly proceedings so that legitimate claimants would be scared away by the extensive time commitment and high legal fees.

Hutten stressed that the invasion of legal scholars was a recent development and likened it to a contagious pestilential infection:

> *"As I hear from old people who still are alive, these little doctors [of law] were creatures that were unknown to their fathers, as they remembered. Only little by little they crept in with us with their red hats in order to flood Germany as they pleased, like a heavy downpour. Sadly, nobody could be found right away to fend off this plague-like innovation."*[67]

The exception to this were the Saxons who as simple people were able to maintain their old laws while keeping the lawyers at bay. Even though they were prone to drinking, they settled their affairs peacefully and quietly without legal scholars and managed to maintain social order based on traditional law. Equally praiseworthy were the citizens of Nuremberg who did not allow lawyers in their council.

In a bout of nostalgia, Hutten evoked a better past where German princely regimes governed fairly yet with an iron fist:

> *"I truly hold the view that Germany enjoyed a happier government back then, when the sword decided over matters of law, than now when these legal scholars rule formally and publicly. By desiring to be high priests of the law, they are the main culprits for the injustice. Back then the sword still protected the innocent against adversity and violation because humans acted and evolved more simply and because fraud was not prevalent yet."*[68]

64 Hutten, Praedones, fol. 28r.

65 Hutten, Praedones, fol. 27v.

66 Hutten, Praedones, fol. 28r.

67 Hutten, Praedones, fol. 27v.

68 Hutten, Praedones, fol. 28r.

The abandonment of ancestral values and ways of living had given Germans a bad reputation among foreign peoples to the point where Brant, Hutten, and others feared that the German dominance of the empire, which had been earned by observing pure ancestral values, might be threatened. Hutten argued that the mob of lawyers needed to be reined in "for through them a terrible sickness of morals, a complete ossification of life, and every vice to a highest degree were domesticated in this country."[69] Restoring moral purity and resisting the emerging new legal order therefore served to fend off a threat to German pre-eminence in the empire and over the Christian Occident.

The "robbing lawyers" thus formed a "wicked nation of chancellors and lawyers" that needed to be eradicated for the good of the German nation so that a traditional German order could be restored:

> *"And should we continue to tolerate such people in our midst? Let us instead emulate our forefathers, those brave warriors, having won their great victory over the Romans and restored liberty to their country, struck at all enemies without distinction but saved their most violent vengeance for Roman advocates. Whenever one of these ranters fell into their hands, they cut out his tongue, sewed up his lips, and said to him: 'Now, viper, will you cease hissing?'"*[70]

Hutten's reminiscence of the heroism of his freedom-loving forefathers is typical for the nostalgia expressed by writers who scorned the rise of standardized legal codes seen as unwanted foreign imports, particularly in the form of *Reichsabschied* (recess) and *Reichspolizeiordnung* (imperial public policy ordinance) as well as of new state ordinances introduced by princely governments.

Hutten frequently reminded his readers to fight for their freedoms that were lost to the Romanists and to other foreign influences. The term *freedom* in this context did not refer to individual conceptions of freedom in the Erasmian sense. Rather, it embraced the autarky and self-sufficiency of the German nation in culture and society[71] and stood for the idea of outward freedom in the form of German liberty (*libertas Germanorum*), that is the German independence from, and indeed supremacy over, other European nations, but also the liberation from foreign influences, like Roman law and the Roman Church.[72] The intrusion of foreign legal concepts, and specifically of Roman law, thus represented an existential threat to the moral fabric of German society and to the liberty and sovereignty of the German nation. In order to restore German freedoms, harmful foreign influences had to be curtailed, chief among them foreign, imported concepts of law.

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69 Hutten, Praedones, fol. 29r.

70 Hutten, Praedones, fol. 29v. Translation Strauss, Manifestations of Discontent, 207.

71 Hirschi, Wettkampf der Nationen, 320.

72 Hirschi, The Origins of Nationalism, 170.

VI. Conclusion

The period around 1500 in Germany was marked by rapid urban growth and by a number of economic transformations, which all had an effect on the political, social, legal, and ethical standards of the time. The consequence was secularization and pluralization, but also a nascent globalization on a scale unknown up to that time. These changes were carried by a new elite of long-distance merchants and supported by a number of humanist thinkers. At the same time, traditional elites rejected change and favored the status quo, supported by a different subset of humanist thinkers with a nationalist outlook. This is the context within which we have to place legal innovations at the time, as well as resistance to them.

The gradual introduction of Roman law in Germany starting in the late fifteenth century provoked a range of reactions. Growing princely chancelleries and urban administrations required a tighter organization of the judicial apparatus with more uniform and predictable rules, which were typically introduced as *Gute Policey* and were largely informed by the Roman law tradition. Many writers accepted these innovations provided by *Gute Policey*, although often with reservations, but others offered sometimes polemical resistance.

Broadly speaking, there were two types of discourses opposing legal innovation. The first bemoaned the demise of natural law and the rise of positive law. Traditionally, the practice of law was community-based and handled according to tradition. This enabled communities to settle their own disputes fairly and without legal apparatus. However, these traditional legal practices that guaranteed peaceful communal coexistence were set aside by a trend toward legal standardization. Critics, including Martin Luther, pointed out that a more comprehensive written legal code was unable to incorporate local legal practices. Luther held that fewer laws meant better and more just governance. The codification of customary law and its centralized administration therefore constituted a power grab by the territorial or imperial authorities. Furthermore, new legal codes had become so complex that ordinary citizens no longer could understand them and prevail in court without legal help, aside from breaking with established practices of jurisdiction. This enabled lawyers to manipulate and extend trials to line their pockets while blocking legitimate outcomes. For this reason, Johann Eberlin von Günzburg created Wolfaria, his fictitious utopian state, as a society where lawyers were banned.

A separate but related second discourse was the rejection of Roman law, and of lawyers practicing it, because of its foreign origin. It has to be placed within a larger nationalistic and xenophobic context of rejecting all foreign influences at the time. A first target were global trade networks bringing foreign goods into Germany at great expense. In fact, the merchant class itself was viewed as a foreign invention disrupting economic and social life in Germany. The second target was the Roman Church as a foreign institution holding political influence over Germany, while depriving it of vast financial resources. These misgivings about the Roman Church were widely shared beyond the circle of Lutheran reformers.

The third target was Roman law that brought foreign legal practices to Germany, displaced the traditional, localized legal system rooted in natural law, and invited a flood of lawyers who profited from innocent people while obstructing justice. They all had in common that they weakened the moral disposition of Germans and gave voice to grievances against foreign influences that were alleged to make Germans morally weak and susceptible to manipulations. Part of this backlash was a vague nostalgia for a better, purer, and simpler ancestral culture that was able to settle conflicts within its communities. Critics, including Luther, pointed out that a more comprehensive written legal code was unable to consider and incorporate local legal practices.

Efforts to contain the spread of *Gute Policey* as well as the intrusion of Roman law in Germany remained futile. This is true for the general opposition to foreign influences as well, with the exception of the influence of the Catholic Church in territories governed by supporters of the Lutheran reform movement. The creation of a more uniform and written legal code was a prerequisite for the growth of an economy that increasingly relied on long-distance trade and financial services. The opposing polemic was no match for the powerful forces promoting these changes and fell silent in the 1530s, leaving the rise of Roman law in early modern Germany unchallenged.

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