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The Shaping and Reshaping of the Relationship between Church and State from Late Antiquity to the Present: A Historical Perspective through the Lens of Canon Law

Melodie H. Eichbauer 

Department of Social Sciences, Florida Gulf Coast University, Fort Myers, FL 33965, USA; meichbauer@fgcu.edu

Abstract: This essay provides a historical foundation of the Church's relationship with the State from late antiquity to the present. With such a broad scope, the integral role canon law played in the Church's history serves as a window through which to view the shaping and reshaping of the Church's socio-political character vis-à-vis the State. It argues first that between the fourth and fifteenth centuries, canon law intersected at different levels with the secular realm, which, in turn, bolstered the Church's political authority. Canon law had an outward focus. Second, this essay argues that a reorientation of the relationship between the secular and the sacred, a process that came to fruition with the Reformation, resulted in the progressive stripping of the Church's socio-political autonomy but also the adaptation of the *ius commune* to suit new purposes. The divesting of its socio-political autonomy, as it is argued lastly, forced the Church to reassess its legal identity and influence. The First Vatican Council followed by the 1917 *Corpus iuris Canonici* turned reaffirming Catholic ecclesiology. By the Second Vatican Council, however, the Church reemerged on the global stage, having a renewed focus on pastoral care. Its efforts directly targeted social, politic, and economic issues facing society, expanding interfaith dialogue with other religions and missionizing efforts. The 1983 *Corpus iuris canonici* bears the mark of Vatican II's renewed emphasis on shepherding its flock through its advocacy for justice and equity in contemporary society. It demonstrates that the socio-political influence of the Church's legal apparatus has not been extinguished despite contemporary canon law no longer possessing the all-encompassing socio-political control it once held. From a historical viewpoint, canon law's impact on the Western world cannot be ignored: it has shaped legal structures still relevant to this day.



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1. Introduction

This special edition of *Religions* explores the transition of the Catholic Church from a politically independent institution to one circumscribed by secular governments and relegated almost exclusively to social policy. Subsequent essays will explore aspects of this transformation and their future implications using particular case studies. This essay intends to set a stage for what follows by providing a broad historical overview of the Church's relationship with the State from late antiquity to the present. This topic is understandably expansive and could go in any number of directions, but space is limited. To provide a frame of reference, canon law will serve as the window through which to view the shaping and reshaping of the Church's socio-political character vis-à-vis the State.

It argues first that between the fourth and fifteenth centuries, canon law intersected at different levels with the secular realm, which, in turn, bolstered the Church's political authority. Canon law had an outward focus. Roman law laid the foundation for this outward focus by bolstering the Church's legal status. Church councils as legislative bodies debated and decided upon both ecclesiastical and secular matters. The cooperative between secular and sacred extended to their legislative apparatuses which intertwined

to shape social, political, and religious policy. With the twelfth century, the principles and norms from Roman law and canon law melded to form the *ius commune*. Neither purely ecclesiastical nor purely secular, it shaped legal structures still relevant today.

Yet, rulers sought to reframe the relationship between the secular and the sacred—a process that originated in the Middle Ages—and secular governments sought to sever their legal entanglement with the papacy. The German Emperor Henry IV in the eleventh century and King Philip IV the Fair of France at the turn of the fourteenth century set this process in motion by seeking to break free from papal interference. The Reformation brought the process to fruition. Despite the reorientation of power, Romano-canonical law did not fall by the wayside. Rather, its principles continued to be a source of law and were woven into a legal framework that included biblical, civilian, and Protestant thought. The result was the progressive stripping of the Church's socio-political autonomy but also the adaptation of the *ius commune* by Protestants.

The divesting of its socio-political autonomy, as it is argued lastly, forced the Church to reassess its legal identity and influence. The First Vatican Council turned inward and focused on ecclesiological concerns, reaffirming Catholic dogma along with the pope's primacy and his jurisdiction over the entire Church. Canon law likewise turned inward, being concerned more so with its organizational structure and administrative bureaucracy than with the Church's engagement in, and oversight of, society. The 1917 *Corpus iuris canonici* (CIC/1917 2001) followed suit, emphasizing aspects of the ecclesiastical hierarchy. By the Second Vatican Council, however, the Church reemerged on the global stage, having a renewed focus on pastoral care. Its efforts directly targeted social, political, and economic issues facing society, expanding interfaith dialogue with other religions and missionizing efforts. The 1983 *Corpus iuris canonici* (CIC/1983 1998), in turn, bears the mark of Vatican II's renewed emphasis on shepherding its flock through its advocacy for justice and equity in contemporary society.

Despite the Church's greater engagement globally, contemporary canon law has not recaptured the all-encompassing socio-political control it once held. It no longer intersects with purely secular concerns, such as commercial or criminal matters. Its fasting regulations no longer control what people eat and when they eat it. Its tax system no longer demands contributions from every person, and its usury laws no longer curtail financial injustices perpetrated by merchants, bankers, and financiers. Aside from maybe Easter and Christmas, its feasts, festivals, and holidays no longer shape patterns of work and rest. Nor does canon law sway political policy; rather, the Church is relegated to admonitions without recourse. Nevertheless, as the CIC/1983 bears witness, while the socio-political influence of the Church's legal apparatus has been diminished, it has not been extinguished.

2. The Symbiotic Relationship of Church and State

The Church's social and political influence progressively grew from the fourth century and was its strongest between the twelfth and fifteenth centuries. This was in large part because canon law possessed an outward focus, intersecting at different levels with the secular realm. Roman civil law legislated on ecclesiastical matters and, as such, paved the way for the symbiotic relationship between the two entities. In the early Middle Ages, Church councils served as a forum for both prelates and rulers to debate and decide upon issues impacting the sacred and the secular. This cooperative between secular and sacred extended beyond church councils as the two spheres and their legislative apparatuses intertwined to shape social, political, and religious policy. With the twelfth century, the principles and norms from Roman law and canon law melded to form the *ius commune*. Neither purely ecclesiastical nor purely secular, the legal thought embedded in the *ius commune* has shaped Western understanding of a number of legal topics considered today to be purely secular, most notably due process.

The *Theodosian Code* (437/438), which included imperial constitutions from Constantine I until 437, paved the way for the intersection of Church and State by making Christianity a pillar of the Roman official establishment. Book XVI, for example, prohibits rebaptism,

condemns apostates who left the Christian faith, and places the status of Catholics within a wider societal framework (*Cod. Theod.* 437/38 1952, 16.6, 16.7). Clerics were exempted from all compulsory public service (*ibid.*, 16.2.2, 7, 10, 14). Bishops could not be summoned to civil courts; furthermore, cases involving clerics were to be heard by the bishops in ecclesiastical court (*ibid.*, 16.2.12, 23, 41; 16.11). Every person had the right to bequeath any property he wished to the Church at his death (*ibid.*, 16.2.4). The privileges granted, however, only applied to Catholic faith. All heresies, which were addressed individually by name, were condemned: their places of worship were confiscated, and their children were forbidden from inheriting (*ibid.*, 16.5). Paganism was banned and sacrifices condemned (*ibid.*, 16.10). Imperial law made it possible to penalize Christians who rejected beliefs and practices that the Church's leaders regarded as central. As early as 380, the emperor Theodosius described as "demented and insane" those who rejected the tenets of faith defined by the bishops of Rome and Alexandria and warned menacingly that anyone who persisted in erroneous beliefs would be subject to imperial retribution (*ibid.*, 16.1.2.1). In 386, Theodosius spelled out the meaning of this last phrase more bluntly. He decreed that "authors of sedition and disturbers of the peace of the Church" must "pay the penalty of high treason with their life and blood" (*ibid.*, 16.1.4). Deviance from approved Christian doctrine or disobedience to the behavioral standards set by the bishops was now a capital crime (Eichbauer 2022, chp. 1).

With the foundation laid, ecclesiastical law was in a position to infiltrate Roman civil law just as Roman civil law infiltrated ecclesiastical governance. Eventually, this intersection became known as *utrumque ius* (Ferme and Falchi 2006, chp. 5). Compilers of canonical collections of the early Middle Ages, for example, would draw directly upon Roman legal norms such as the *Epitome of Julian*, a work that represents a lecture course given by Julian—the best-known law professor at Constantinople—on the 124 Greek *Novellae* of Justinian.¹ The *Breviarium Alarici*, also known as the *Lex Romana Visigothorum*, was a collection of various Roman legal texts published and compiled at the request of the barbarian Alaric II, king of the Visigoths (484–507), in 506.² It included *interpretationes* (interpretations)—detailed comments on the laws that served as aides for using the law—that sought to expound, summarize, give the meanings of terms or offer updates to reflect the regional, political, social, and cultural differences in a post-Roman world but a world that continued to use Roman law (Matthews 2001). The *Breviarium Alarici* would become instrumental for canonical collections of the early Middle Ages (Eichbauer 2022, chp. 1).

Church councils as legislative bodies served as a forum for both prelates and rulers to debate and decide upon issues impacting the sacred and the secular. Emperor Constantine had convened the Council of Nicaea (325) and taken an active part in the debates surrounding the teachings of the priest Arius who believed that only God the Father could be unbegotten and un-generated.³ In the eighth century, the Carolingian King Pippin III (the Short) issued a capitulary at the Council of Compiègne (757), which would be included in the canonical collection *Decretum Compendiense* that allowed for the healthy partner to separate from the leprous partner with the leprous spouse's consent (Pippin III 757, c. 19). There thus existed a symbiotic relationship between ecclesiastical institutions and civil governments as church councils held between the sixth and the mid-eighth centuries bear witness. Frankish councils, such as those at Orléans (511) and Mâcon (585), cited imperial edicts; secular rulers, such as Clothar II (d. 629), adopted conciliar legislation.⁴ Rulers of the Frankish and Visigoth kingdoms in particular saw councils both as an extension of the symbolic notion of *imitatio imperii* (imitation of imperial rule) and also as a forum where collaboration with the ecclesiastical administrators of their respective realms could take place. For example, of the eighty councils convened in Frankish Gaul between 511 and 768 (the ascension of Charlemagne to the Frankish throne), rulers convoked 60% of them. Yet, they did not make a concerted attempt to monopolize the calling for or agenda of a council.

As Frankish councils bear witness, the Church saw councils as vehicles for directing lay behavior. They could reissue canons from earlier councils as a way to enforce current policy and guard against unwanted actions. They also innovated by adapting existing

policy to address present concerns. Conciliar policy regarding the Jews at the Councils of Clermont (535) and Mâcon (581/583) added the phrase *aut tolonari* (“or toll collectors”) to previous conciliar legislation that had forbidden Jews from being *iudices* (judges) over Christian peoples. The additional wording further clarified, and restricted, Jewish influence. Councils also granted and confirmed privileges to churches and monasteries, rendered judicial decisions, facilitated peace talks, and mediated ecclesiastical and royal interests by informing and influencing royal policy. Such efforts helped to establish parameters for acceptable behavior among the laity. While councils could regulate the rights of the nobility, non-Christians, and even slaves and freedmen, they required the cooperation and buy-in of secular officials to ensure enforcement.⁵

Canon law and canonical collections played an integral role in the governance of the Carolingian empire. In 774, Emperor Charlemagne (d. 814) requested that Pope Adrian I (772–795) furnish him with an up-to-date compendium of the canon law that could serve as the fundamental statement of the church’s current law. Pope Adrian I supplied him with the *Collectio Hadriana*, a newly revised version of the *Collectio Dionysiana*, which Dionysius Exiguus had compiled toward the end of the fifth century. The synod of Aachen (802) directed bishops throughout the Carolingian empire to use this revised collection, in conjunction with the collection of Spanish conciliar canons known as the *Hispana*, as the fundamental lawbooks in their courts. One of Charlemagne’s most important capitularies, the *Admonitio generalis* (789) drew heavily from the *Collectio Hadriana*, citing conciliar canons and papal decretals in an effort to revive education and religious observance and to reform clerical and lay behavior by creating a new generation of educated clergy who would be able to perform the Christian rites and to instruct the people on doctrinal matters (Charlemagne 789).

The administration of the Holy Roman Empire relied on bishops and clerics engaged in a myriad of legal traditions. Many acted as both ecclesiastical and secular administrators in addition to dividing their time between their territory and the royal court. They served as chancellor, archchaplain, and archchancellor in the *hofkapelle* (Guyotjeannin et al. 2006, pp. 106, 224–25). The subscriptions of imperial diplomas reveal that a chancellor would frequently work in conjunction with the archchaplain/archchancellor with the former listed as writing the document and the latter as verifying it (ibid., pp. 88–89). In the courts of Emperor Otto III (d. 1002) and Emperor Conrad II (d. 1039), for example, the canonical and secular legal traditions fused as the pairing of chancellor and archchaplain/archchancellor underpinned much of the law emanating from the imperial court, much of which centered on property transactions. The partnership between Archchaplain Willigis and Chancellor Heribert saw them overseeing a number of imperial diplomas and grants during the reign of Otto III. In many cases, the grants to secular lords consisted, in some combination, of the right to hold a market, the right to mint coins and collect tariffs, and the right of the ban. Such was the case for a certain Count Berthold and a certain Count Eberhard (Otto III 999a, 999c). Count Esiko was granted the city of Kuckenburg, in addition to a fief previously held in Dorfmark which included all those of servile status (Otto III 999b).

In the case of the archchancellor–chancellor partnership of Archbishop Hermann II of Cologne and Cadalus, we see a melding of canonical and nascent feudal elements as this pair oversaw the production of Conrad II’s “Edict concerning the benefices of the Italian kingdom” (Conrad II 1037; Reynolds 1994, p. 200). Known also as the *Constitutio de feudis*, it addressed the discord that had ensued between the Archbishop of Milan, Aribert II (1018–1045), and those holding land from him in benefice (Stock 1983, p. 156; Reynolds 1994, p. 199). In many respects, the *Constitutio de feudis* illustrates nicely how secular and ecclesiastical persons were participating in the same system without distinction. It set down the legal precepts regarding benefices irrespective of whether that benefice was held from royal or ecclesiastical entities. Conrad conceded that while he would continue to collect dues (*fodrum*) from castles in accordance with his predecessors, he would not demand new ones (Conrad II 1037, p. 91, §6).⁶ The *Constitutio de feudis* also kept in check the unabated ability of the lord, in this case the archbishop, to strip his vassals and their

knights unilaterally of their benefice. It begins with the statement that grounds much of the document: no knight—whether of bishops, abbots, abbesses, and marquis (*marchio*) or of counts or anyone else—could lose his benefice without certain and convincing guilt (*ibid.*, p. 90, §1). This concept could also be found in the canonical tradition as a priest could not be stripped of his benefice prior to being found guilty of a crime. The *Constitutio de feudis* likewise reaffirmed the right of judgment by peers, something thought of as more grounded in customary law. The *Constitutio de feudis* highlighted the flexibility of Hermann and Cadalus as bishops to work within different legal spheres applying both the principles used in ecclesiastical court as well as those found in customary law. The distinctions between secular legal theory and ecclesiastical legal theory were, it seems, blurred. While these imperial administrators were navigating imperial policy, they were simultaneously navigating connections and law in their respective regions.

Canon law's outward focus is best reflected in the *ius commune* which melded principles and norms from Roman law and canon law. The *ius commune*, or “general law”, referred to those principles of substantive law (the body of rules setting forth rights and obligations) and procedure that were in common use throughout Christendom from the twelfth century forward. These principles were not simply debated in the classroom amongst law faculty and students but also influenced and shaped society and secular institutions. Municipal and royal courts could invoke these concepts and practices to settle problems for which appropriate local custom or statute was lacking.⁷ The *ius commune* in effect transformed Romano-canonical law into sets, or “blocks”, of legal practices and principles that were conceived as underlying local custom and statute (Eichbauer 2022, chp. 7; Pennington 2007).⁸ Judges could and did exercise discretion to invoke the “blocks” of principles or practices that they deemed useful in order to resolve a dispute and make peace within a community. The *ius commune*—Roman law, canon law, and juridical commentary—operated in theory as well as in practice.

Serving as a case in point, the principles and norms of the *ius commune* shaped the *ordo iuris*, the principle of due process which is central to court procedure. Whether known under cognate names of the *ordo iudiciarius*, as seen in canon law, or the *ordo iudiciorum*, as seen in Roman law, the *ordo* denotes the defendant's presumption of innocence, privilege against self-incrimination, and right to confront an accuser in court (Brundage 2007). The canonist Paucapalea (ca. 1150) traced its origins to Adam and Eve in Paradise. Dissecting Genesis 3:9–12, he pointed to the different aspects of a trial. God had issued a summons for Adam to answer charges against him by asking “Adam ubi es (Adam, where are you)?” Adam answered in his defense by blaming Eve: “My wife, whom You gave to me, gave [the apple] to me, and I ate it.” Essentially, even God Himself could not pass judgment without summoning defendants and hearing their pleas. Men, therefore, were also obliged to summon the litigants before judging. Stephen of Tournai (ca. 1165) built upon Paucapalea—who had drawn on Deuteronomy 19:15 to justify that the testimony of two or three witnesses safeguarded truth—by assigning the appropriate legal term to each part of Adam and Eve's trial. Adam had raised a formal objection (*exceptio*) to God's complaint (*actio*). Adam then imparted the blame on Eve and the serpent. Stephen thus defined the *ordo* as:

“The defendant shall be summoned before his own judge and be legitimately called by three edicts or one peremptory edict. He must be permitted to have legitimate delays. The accusation must be formally presented in writing. Legitimate witnesses must be produced. A decision may be rendered only after someone had been convicted or confessed. The decision must in be writing.” (Stephan of Tournai 1891, ca. 1165, p. 158 C.2 q.1 s.v. an in manifestis; Pennington 2016, p. 139)

The implication was that if God was required to uphold the rights of Adam and Eve then these rights transcended positive law and were protected under natural law. Pope Innocent IV (ca. 1250) argued further that the prince, bound by natural law to render justice, could neither forego the judicial process nor ignore an action. A little later, Johannes

Monachus (d. 1313), Bishop of Meaux and an advisor to King Philip IV the Fair, expounded on the rights of the defendant with the notion of being “innocent until proven guilty.” In his decretal *Rem non novam*, Pope Boniface VIII had upheld the validity of a papal summons regardless of whether or not the defendant knew of it. Johannes’s gloss of the decretal, however, noted that natural law safeguarded the summons. A pope, while above positive law, was not above natural law and thus could not circumvent this right. No judge, not even the pope, could pronounce a just judgment unless the defendant was present in court. He concluded that “a person is presumed innocent until proven guilty” (*Item quilibet presumitur innocens nisi probetur nocens*) (Pennington 1998, 2003, Pennington 2016, pp. 137–39). Divine and natural law guaranteed one’s right to due process and thus the right of people to pursue justice. The *ordo iuris* would represent the procedural rights owed throughout the judicial process in both ecclesiastical and secular courts.

Between the fourth and the fifteenth century, canon law had an outward focus. The regulation of societal norms augmented the Church’s socio-political autonomy in its reflection of the symbiotic relationship between Church and State. The Church would come to hold jurisdiction over not only ecclesiastical matters—such as doctrine, liturgy, and clerical behavior—but also over the laity. Marriage and family; wills and inheritance; care of the sick, widowed, poor, and orphaned; contracts, and crimes, all fell under the purview of ecclesiastical courts. The systemization of the *ordo iuris*, which was grounded in the norms of Roman and canon law, continues to be felt today in our understanding of the judicial rights of due process. Through the mingling of canon and secular law, the Church would come to structure the day-to-day lives of the laity, shape political policy, and regulate financial and commercial actions.

3. Stripping of the Church’s Socio-Political Autonomy but Adaption of Canonical Principles

Rulers, however, sought to reframe the relationship between the secular and the sacred—a process that originated in the Middle Ages—and secular governments sought to sever its legal entanglement with the papacy. The German Emperor Henry IV in the eleventh century and King Philip IV the Fair of France at the turn of the fourteenth century set this process in motion by seeking to break free from papal interference. The Reformation brought the process to fruition. Despite the reorientation of power, Romano-canonical law did not fall by the wayside. Rather, its principles continued to be a source of law and were woven into a legal framework that included biblical, civilian, and Protestant thought. The result was the progressive stripping of the Church’s socio-political autonomy but the adaption of the *ius commune* by Protestants.

The Church’s role in secular administration began to face challenges during the reigns of Emperor Henry IV of the Holy Roman Empire (d. 1106) and of King Philip IV the Fair of France (d. 1314). Henry IV had challenged papal opposition to the practice of lay investiture, that is, laymen giving bishops the symbols of their spiritual offices, a challenge that resulted in the treatise *Dictatus papae* (1075). Found in the register of Pope Gregory VII, *Dictatus papae* outlined the prerogatives of the church in Rome and obedience of bishops to the pope. It also articulated the pope’s jurisdiction in major cases and his ability to release others from their oaths of loyalty through excommunication of those to whom they were bound. Superior to secular lords, the pope was above judgment (Gregory VII 1075; Henderson 1910, pp. 366–67; Ferme and Falchi 2006, pp. 211–13; Grant 2013; Fuhrmann 1989; Mordek 1974). Henry IV’s response vehemently opposed Gregory VII’s attack on his royal authority. In a letter to Hildebrand, Gregory VII’s given name prior to assuming the papacy, Henry IV argued that his royal power was conferred upon him by God. How could he be unworthy to rule when God anointed him to do so? He questioned Gregory’s audacity in threatening to divest him of his throne, as if he had received his kingdom from the pope and not from God, as if the empire were in the pope’s hands and not in God’s. Henry pointed to the apostolic tradition and the tradition of the holy fathers to support his

stance: he was not to be deposed for any crime unless he strayed from the faith, and then he was subject to the judgment of God alone (Henry IV 1076; Henderson 1910, pp. 372–73).

Polemical treatises bolstered support for Henry IV's (or Gregory VII's) position. *Defensio Heinrici IV regis* ("Defense of King Henry IV") sought to construct an autonomous secular legal sphere, defining the legitimate function of the secular laws and their implication for the church. By positioning reason as the acting subject in relation to both religious and secular law, the author grounded his argument in a conception of rationality that ensured "right order" as envisioned by the emperor. More legalistic was the work of Peter Crassus who drew on both canon law and Roman law in order to defend royal power. The treatise *De investitura episcoporum* ("Concerning the Investiture of Bishops", 1109) defined the relationship between the ruler and the ruled and an understanding of the emperor with an imperial title but liberated from papal influence.⁹

Such questions of sovereignty and jurisdiction likewise anchored the dispute between King Philip IV the Fair of France and Pope Boniface VIII at the turn of the fourteenth century. Philip had been entangled in wars with England and Flanders and he needed money to support his campaigns. He felt that the Church should aid in the defense of the realm as those who lived in his realm should contribute to its defense, regardless of whether they were cleric or lay. Boniface VIII, however, maintained the clergy's exemption from temporal tithing as their status subjected them solely to the pope. What followed was a series of back-and-forth letters asserting the power of one and denouncing the intervention of the other. Boniface VIII's bull *Clericos laicos* forbade all contributions by the clergy to any lay government. Philip IV responded by forbidding the export of arms, horses, other war equipment, and money, which prevented the pope from making a payment to the king of Aragon. Boniface's *Ineffabilis amor* denounced Philip's behavior while the anonymous retaliatory letters *Disputatio inter clericum et militem* denied the power of the pope in temporal affairs and *Antequam essent clerici* asserted that the king could take any steps necessary to defend the realm. Needing to bring these issues to a close when the Colonna family openly broke with Boniface VIII by declaring the abdication of Pope Celestine V illegal and thus Boniface's election uncanonical, Boniface issued *Etsi de statu* authorizing the king to demand subsidies from the clergy, without consulting the pope, whenever it seemed necessary for defense. Philip won the battle: the king was the master of his territory, and those who lived in it fell under royal jurisdiction and taxation (Tierney 1988; Stayer 1970, 1980).

With the Reformation, papal authority no longer held sway over secular rule, and the light of the Church's socio-political autonomy dimmed. Attacks on papal and conciliar authority did not bode well for the continued use of canon law. This threat seemed to be on the cusp of manifestation when Luther and fellow reformers in Wittenberg burned several books of canon law in 1520. Yet, by 1530, the threat subsided, and despite the reorientation of power, Romano-canonical law did not fall by the wayside. Rather, Protestant theologians and jurists adapted the principles of the *ius commune* and canon law continued to be an authoritative source, woven, even if selectively, into a legal framework that included biblical, civilian, and Protestant thought.

The threat to the continued use of canon law subsided because the *ius commune* was too ingrained into the intellectual tradition to simply abandon it. Johannes Carnificis de Lutrea (d. 1479), Jodocus Trutfetter (d. 1519), and Bartholmaeus Arnoldi de Usingen (d. 1532), for example, counted among the philosophy faculty at the University of Erfurt who followed the interpretive framework on the doctrine of the human soul set forth by the *Constitutiones Clementinae*—the canonical collection which incorporated many of the decrees of the Council of Vienne in France (1311–1312)—its ordinary gloss compiled by the canonist Johannes Andreae and by the Fifth Lateran Council (1513). This doctrine maintained that the human soul was united to the body as their matter, but, as the soul is immortal, it is capable of existing without the body when they are separated from each other at death (Kärkkäinen 2006). In England, common lawyers who presided over ecclesiastical courts when Henry VIII banned the teaching and granting of degrees in canon law continued to

legislate within the framework of the legal culture set forth by the medieval jurists. They even remained intellectually connected with developments in post-Reformation canon law on the Continent (Brundage 1993). There thus existed a continuation in legal thought from the Middle Ages. Until Samuel Pufendorf's separation of sacred history from legal reasoning at the turn of the seventeenth century and the subsequent rise of the Historical School, Protestant jurists such as John Locke looked to medieval texts such as Gratian's *Decretum* and the juridical commentary on his distinctions on divine and natural law to point to a biblical past, to the Fall of man, to explain and justify different types of legal normativity, such as natural law, and their source for governmental power, statehood, and individual rights (Thier 2016).

The *ius commune's*—and thus canon law's—intellectual hold over the legal tradition was simply too firm, and it had governed too many subjects that impacted all aspects of society for it to be discarded by law school faculty. Philip Melancthon and the law faculty at the University of Wittenberg drew both on Roman law and Gratian's *Decretum* because it framed the juridical system and its legal measures remained applicable (Wolter 1992, pp. 16–18). Gratian's *Decretum* was particularly useful because the nature of its sources—i.e., the Bible and writings of the Church Fathers—was more varied than papal decretals and conciliar canons (Gratian [1879] 1959, ca. 1130). While Lazarus Spengler had published his own selection of canon law texts from the *Decretum* and Gregory IX's *Decretales* for use in the local Lutheran churches in 1530, the work would also be used by the faculties of both law and theology at the University of Wittenberg. He had excerpted from 39 of the 101 *Distinctiones*, from 21 of the 36 cases, and from 5 of the 7 distinctions from the *De consecratione* of the *Decretum*. From the *Decretales*, Spengler extracted a few sentences from 21 titles, most of which addressed proper clerical life and Church governance. Melchior Kling compiled a *Tract on Matrimonial Cases* (1543) which included citations to the Bible; Justinian's *Digest*; Gratian's *Decretum*; Gregory IX's *Decretales*; and tracts of the canonists Panormitanus, Hostiensis, and Johannes Andreae. Not only did he incorporate canon law into his work, but he also taught it, offering lectures on the *Decretales* and on Boniface VIII's *Liber sextus* (Witte 2003, pp. 73–81). At Oxford and Cambridge, canon law was discussed and references to it were given during the course of university lectures on Roman civil law and also in the course of more informal instruction (Helmholz 1992a, pp. 207–8).¹⁰ Protestant law schools did not abandon canon law because the faculty themselves had been trained in the tradition of the *ius commune* and this tradition underpinned the legal norms of the Continent and England. The survival of Romano-canonical law in England lay with the continued functioning of ecclesiastical courts in the post-Reformation period. The processes of these courts, which changed little from the medieval period, necessitated the teaching, even if done informally, of canon law. At a philosophical level, the principles found in canon law were in harmony with the teachings of the Gospel, the dictates of human reason, and patterns of customary usage. It was simply too entrenched in society through long-term use. At a practical level, it provided for a regulation of society, including the church itself, through a system of courts and legal rules consistent with the Gospel (Helmholz 1992b, pp. 11–12; Schmoeckel 2009a, 2014).

Protestant theologians and jurists had placed the Ten Commandments in a central position of importance by applying them to the governance of secular government and society (Witte 2018, pp. 589–90). Despite this, the use of Romano-canonical law continued to be used and adapted in service of the State. One such area was civil law and procedure as it reflected the Protestant framework, first put forth by Luther, of the “two-kingdoms” theory. One kingdom was the heavenly kingdom, the purely invisible Church governed by the Gospels. The other kingdom was the visible Church, made up of saints and sinners and governed by the law. Romano-canonical law was important to the kingdom of the visible church because the moral law of the Ten Commandments did not supply a complete guide for proper Christianity living. Canon law had translated the general biblical principles into specific human precepts which could help frame the positive law of secular ruler and guide the faithful. Secular law under Protestant rule had three uses: (1) it provided moral

principles to make sinners conscious of their sinfulness to help to bring them to repentance; (2) it threatened sanctions to deter sinners from actions contrary to a Christian society; and (3) its principles and procedures educated and guided people on the path of justice for the common good (Witte 2003, pp. 70–72; Berman 2003, pp. 6–7).

Protestant jurists drew upon and adapted Romano-canonical sources in a wide array of writings. In setting forth rules appropriate for a political and ecclesiastical community, Richard Hooker's *Laws of Ecclesiastical Polity* drew upon and adapted both canonical and Roman sources. He referenced canons from the earliest councils of the church, such as those of Nicaea (325), Laodicea (ca. 363/364), Antioch (341), and the First Council of Constantinople (381). Among the canonical collections, he drew from Gratian's *Decretum*, Gregory IX's *Decretales*, and Boniface VIII's *Liber Sextus*. Among the Roman legal collections, he drew from the *Codex Theodosianus* and from Justinian's *Institutes*, *Digest*, *Codex*, and *Novels*. His marginal notes included references to medieval jurists Azo (d. 1230), Guido de Baysio (d. 1313), Hostiensis (d. 1271), Innocent IV (d. 1254), Johannes Andreae (d. 1348), Raphael Fulgosius (d. 1427), and Panormitanus (d. 1453) (Helmholz 2001; Doe 2017, p. 122; McGrade 2008, p. 53; Helmholz 1992a, pp. 216–18). English proctors' books included forms for use in litigation and addressed procedural questions. Francis Clerke's *Praxis in curiis ecclesiasticis* adopted the rules Romano-canonical procedure drew on citations from the *ius commune*. John Lane's proctor book included elementary procedural material which included a list of exceptions that could be taken against the person of proctors, that is, reasons any proctor might use to disqualify his opponent in litigation. The possibilities were followed by citations from Gratian's *Decretum*, Gregory IX's *Decretales*, or from Justinian's *Digest*. English advocates' treatises treated specific areas of substantive law. Among these treatises are Sir Thomas Wilson's treatise on usury, Henry Swinburne's treatise on the law of wills and testaments, and Sir Thomas Eden's commentary on the title *De regulis iuris* from the *Digest*. Advocates also drew on Romano-canonical law, such as the treatises of Panormitanus and the works of Hostiensis and Innocent IV, in their formal responses to questions of law that had been put to them, known as *concilia*. Dutch jurists, such as Nicolaus Everardus, also wrote *consilia* that drew upon Roman and canonical sources as evidence for the position supported. Dutch treatises, such as Everardus's *Loci argumentorum legales* drew from the writings of Romanists and canonists, as well as decretals to discuss contracts and quasi-contracts. Hugo Grotius' opinions, such as those on usury, and treatises on questions of public and private law likewise reflect a use of Romano-canonical law. Reports of English ecclesiastical causes likewise betray the use and adaption of Romano-canonical law. For example, *Haiward c. Graple* (1598) records a defamation cause brought against Graple for allegedly having said that Haiward had "occupied" the wife of another man. The question was whether a discrepancy in the depositions of the witnesses about exactly when and where the defamatory words had been uttered meant that there had been a dispositive failure of proof. Authorities cited included: *Institutes*; *Decretales*; and treatises by Baldus de Ubaldis (d. 1400), Panormitanus (d. 1445), Lanfrancus de Oriano (d. 1488), Franciscus Curtius (d. 1495), Felinus Sandeus (d. 1503), and Joannes Antonius de Sancto Gregorio called Praepositus (d. 1509) (Helmholz 1990, pp. 124–44; Witte 1992, pp. 141–42, 158–60).

In German Lutheran territories, legally trained theologians developed *Ordnungen* "ordinances" which regulated areas that previously fell under the jurisdiction of the Catholic Church. Such areas included marriage and family; moral offenses; education of children; and caring for the poor, sick, widows and orphans, the homeless, and the unemployed (Berman 2003, p. 7). Melancthon maintained that the precedents found in Roman law in particular, but also in canon law as it provided the best example of a Christian and equitable interpretation of the natural law, could serve as precedents for developing ordinances. His ideas would come to influence the ordinances of Nuremberg (1526), Wittenberg (1533), Herzberg (1538), Cologne (1543), and Mecklenburg (1552), and lay at the heart of the territorial laws of Hesse (1526) and Saxony (1533). He may have also influenced legal reforms in Tübingen, Frankfurt an der Oder, Leipzig, Rostock, Heidelberg, Marburg, and

Jena (Witte 2003, pp. 77, 189; Schmoeckel 2009b). John Oldendorp (d. 1597) drew from an obscure commentary by Claudius Tryphoninus on Justinian's *Digest* (16.3.31 on Roman contract law of deposit) in shaping the relationship between equity, positive law, and rights. His wide swath of writings made use of civil law writings by the Romanists Accursius and Bartolus of Sassoferrato. He also made use of canonical writings by Gratian, Hostiensis, Panormitanus, and Johannes Andreae. Oldendorp, like Melanchthon, would help to shape *Ordnungen*, specifically the ordinances of Lübeck, Marburg, and Hesse (Pennington 2015, pp. 19–20; Witte 2003, pp. 80–81, 189; Berman 2003, pp. 88–90). Romano-canonical influences on civil law and procedures would also be seen in the new rules of pleading, evidence, adversarial argument, and appeal that came to replace the local civil law of the lay Schöffen courts. Professional lawyers trained in the *ius commune* represented clients in local courts, and professional judges issued formal opinions which drew on Roman law and canon law authorities in support of their positions (Witte 2003, pp. 178–79). Even among university law faculty, the importance of the procedural norms contained in the *ordo iudiciarius* (due process) was praised. Konrad Lagus (d. 1546) deemed the *ordo* essential for the functioning of the law courts: “At the same time I warn you not to reject the *Ius canonicum* and its judicial norms. They preserve the customs of common usage. Since these rights are now observed everywhere in the courts, they expedite cases when conducting trials” (quoted in Pennington 2015, p. 11).

The ordinances of Calvin Dutch territories, like Lutheran German territories, adapted Romano-canonical principles to regulate the community. Originally penned by John Calvin, the Geneva Ordinance would be amended by the Council of Geneva to create the official text of 1541.¹¹ The ordinance dealt in great detail with two different categories of misconduct: in the first category were crimes that should never be tolerated and in the second category were minor offenses. The crimes that should never be tolerated comprise a list that, with the exception of dancing, were also crimes under canon law: heresy and schism; rebellion against ecclesiastical authority; blasphemy significant enough to merit civil punishment; simony and any corruption of benefices; deserting a church without legitimate reason or sufficient excuse; insincerity and perjury; lewdness, larceny, forbidden or scandalous amusements, and drunkenness; usury; crimes against civil law; and any wrong that would merit excommunication, which had its roots in Catholic correction. The secondary category of minor faults included, for example: fruitless reoccupation with vain questions; negligence in the study and the reading of the holy scriptures; susceptibility to flattery; negligence in any of the obligations pertaining to his office; vulgarity; careless or injurious speech; avarice; quarrelsomeness; and dress unbecoming of a minister (Calvin 1541, pp. 9–12).

The official version of the ordinance suggests a distinction between civil and spiritual correction that followed along similar procedural lines as that found in Romano-canonical law. Of keen concern in both Protestant law and canon law was that corrective measures be moderate as the degree of rigor should not be so severe that the medicinal aspect of correction is lost. Furthermore, ministers possess the spiritual sword while civil jurisdiction belongs to the Council. In cases involving the first category of intolerable crimes, secular and ecclesiastical jurisdictions melded into one with clerics who committed offenses essentially being treated in a manner akin to a Catholic cleric who had been degraded. Following an accusation, the ministers and elders should assemble to conduct an inquiry in order to proceed according to reason and the requirements of the case. In civil offenses, that is to say, those that should be punished by the law, the authorities should punish the offense even if the accused was a minister. In cases involving offenses belonging to ecclesiastical assembly, the commissioners or elders, together with the ministers, should attend to the matter. Their procedural process was similar to the canonical procedure for excommunication. Secret vices should be set aside and dealt with in private. Because the fault was neither public nor scandalous, it could not be brought before the Church for accusation. Obvious public evil, which the Church could not handle privately if it merited more than admonition, required the offender to be summoned to appear before the consistory. If he recanted his fault, he should be dismissed without prejudice. If he

did not recant and he persisted, passing from bad to worse, he should be admonished three times. If, in the end, such action proved unprofitable, he should be denounced as contemptuous of God, ordered to abstain from Communion until it was evident that he has changed his way of life. Upon excommunication, the Geneva Council mandated that the matter be reported to authorities (Calvin 1541, pp. 31–35). A keen difference between the Geneva Ordinance and canonical law, however, was the involvement of the secular authorities whether the fault was intolerable or minor. In both cases, the council played some sort of role in the final judgment and recommendation. The consistory should report judgments and recommendations to the council for it is their duty to deliberate and pass judgment according to the merits of the case.

The Geneva Ordinance had adapted established canonical procedure. Canon law characteristically gave judges broad discretion to fit the punishment both to the crime and to the circumstances of the crime. In part, certainly, this reflected what is sometimes called the medicinal approach to sentencing, that is, a belief that the primary goal of punishment ought to be rehabilitation of the wrongdoer. The detection and punishment of secret offenses were often left to the penitential forum, the private, individual ministry of their confessors whose first goal was to try to save the sinner, rather than to pursue delinquents and subject them to formal disciplinary action. A judge could call a defendant to court based on *publica fama* or *mala fama*. One way of achieving such status was on account of one's reputation within the community for chronic misconduct. An accused was to be summoned by three citations, which in effect gave him approximately thirty days to prepare his answer to the complaint. Should the guilty be found guilty or, after confessing, fall back into their erroneous ways, a sentence of excommunication would be imposed. The recalcitrant or those guilty of the most horrendous canonical crimes, especially heresy, might merit "relaxation to the secular arm", which involved turning the convicted defendant over to civil authorities for punishment (Eichbauer 2022, chp. 7).

The *ius commune*—and thus the canonical tradition—continued to retain legitimacy as an authoritative source of precedent and Protestant jurists and theologians found it helpful in framing civil regulation and policy with effective regulations. The visible Church of the earthly kingdom necessitated both biblical rules contained within the Ten Commandments and the canonical procedures carried on from the Middle Ages to properly order society: law had the civil use of restraining sin, the theological use of driving sinners to repentance, and the "educational use" to educate saints and sinners in proper faith and conduct (Witte 2003, pp. 10–11). German and Dutch ordinances made a select use of and adapted canon law in their regulation of marriage, schools, moral discipline, and poor law, areas which previously had fallen under the purview of the Catholic Church. These adaptations, as Witte stresses, were made to suit developments in Protestant theology and the relationship of the Church to the State (Witte 2003, pp. 23–27). With the moral discipline and procedural process discussed above, I briefly highlight continuities and adaptations to the canonical tradition with respect to marital law and poor law.

Protestant theology deviated from Catholic marital law in a few key areas. First and foremost, marriage was no longer considered a sacrament, and thus it did not fall under the purview of church courts but rather fell under state courts. It also denounced clerical celibacy and the inability of priests to marry. Parental consent and a public ceremony involving the participation of parents, peers, priests, and political officials were required in order to enter into a valid marriage. The impediments to marriage found in canon law were also whittled away. These included the intricate counting of relation according to consanguinity and spiritual affinity as well as those formed by legal ties of adoption. Finally, divorce with acceptable proof of cause and the right to remarry were permitted (Witte 2003, pp. 241–52; 2018, pp. 600–1; Berman 2003, pp. 184–85).

Despite these deviations, Protestant law adapted a fair amount from the canonical tradition. Take clandestine marriages, that is, secret or private marriages, as an example. Protestantism had banned such unions, which were also prohibited in Catholicism. However, as petitions to the Apostolic Penitentiary reveal, the Church would validate them on

occasion (Korpiola 2006, p. 159). Kenneth Pennington (2015, p. 18) pointed to the legal thought of Konrad Mauser (d. 1548) who distinguished between two types of clandestine marriages. The first was completely secret and without witnesses, and the second was secret, with witnesses, but without the consent of the parents. He tasked the consistory courts with judging such cases according to the principles found in the *ius commune* as neither Roman law nor canon law were contrary to the faith. Protestant marriages also followed canon law with regards to the initial formation of marriage by a betrothal promising to marry using words in the future tense. Later, the marriage ceremony took place with vows spoken in the present tense followed by consummation. Required was the mutual consent of the man and the woman who had the age, fitness, and capacity to marry each other. The marriage could take place after the publication of customary banns (Witte 2018, pp. 601–2; Korpiola 2006, pp. 143, 148, 154–60; Calvin 1541, pp. 25–26). The marriage was to be a permanent union whereby the spouses were to care for one another and their children. Betrothals and marriages could be annulled on the discovery of an impediment that was validated through an appropriate legal process. Illness was rejected as a reason for divorce. Divorce, however, was permitted for impotence, desertion, and adultery. Pennington (2015, pp. 17–18) noted Joachim von Beust's (d. 1597) *Tractatus de iure connubiorum et dotium*, a tract that aimed to bring the marital law of the *ius commune* in line with reformers' theology. In his section on adultery, Beust cited the medieval jurists Panormitanus, Johannes Andreae, Cinus of Pistoia (d. 1336), and Henricus Bohicus (d. ca. 1350) to support the argument that a husband could bring a civil suit against an adulterous wife, but a wife could not bring a criminal suit against her husband, the reason being that the adultery of the wife was a greater danger to the husband and she could bear children from her adulterous union. Interestingly, Beust would also note a statute of Emperor Charles V that permitted a wife to accuse her husband criminally. In the event that a marriage was dissolved, the guilty party encumbered the responsibility of caring for the innocent spouse and children (Witte 2018, pp. 601–2; Korpiola 2006, pp. 143, 148, 154–60).

Protestants had adapted canonical poor law to suit a new age with similar features remaining recognizable. In both cases, the Church and secular society worked hand-in-hand to help those in need. Canon law had earmarked a quarter of the tithes to be dedicated to social welfare. The secular faithful—particularly rulers and confraternities—were encouraged to support hospitals, though the administration of those hospitals was often in the care of the Church. For Lutherans, the entire community was tasked with the responsibility of caring for the poor and sick, though the administration of that care fell on the shoulders of local political authorities (Arffman 2006, pp. 206–7; Berman 2003, pp. 189–92). Yet, as Kaarlo Arffman (2006) noted in highlighting the differences in how secular authorities approached this task, church funds continued to play an integral role. The Ordinance of Wittenberg of 1522 called for all finances of a parish (minus the castle church owned by the Elector of Saxony and the Chapter of All Saints which operated in the castle church) to be gathered into a single fund and distributed from there. This included relief for the poor. The Ordinance of Nuremberg (1522) established separate chests. Churches administered one chest which comprised of donations. The other chest was the Great Alms fund, which collected revenue from donations to churches and from those left in wills and testaments. It was administered by trusted people subordinate to the council (Arffman 2006, pp. 213–17). With the Protestant reformation, social welfare that had once fallen under the auspices of the Catholic Church now fell under the state. The Geneva Ordinance (1541) tasked two orders of deacons with tending to social welfare. One was charged with receiving, distributing, and guarding the goods of the poor, their possessions, income and pensions, and the quarterly offerings. The other cared for the sick and administered the pittance to help the poor. The public hospital should be well administered and open not only for the sick but also to aged persons who are unable to work, widows, orphans, and other needy persons (Calvin 1541, pp. 20–21).

Yet, aside from who was responsible for oversight, there were similar overlaps between Catholic and Protestant law with respect to who was to receive care and how that care

should be administered. People through their tithe and pious donations were tasked with providing social welfare for all of those in need. Medieval hospitals under the auspices of the Church cared for a wide swath of people. Saint John Baptist in Aylesbury, Saint Mary Magdalene in King's Lynn, Saint Leonard in Northampton, Saint Giles in Hexham, Saint Giles in Wilton, and Saint Nicholas in York all cared for both lepers and the sick. Saint Bartholomew in Dover was founded for lepers, the sick, and pilgrims. Saint Mary and Saint Clement in Norwich were founded for lepers, the sick, and the poor. Saint Giles in Hereford was founded for lepers and the poor. Saint Peter in Bury Saint Edmunds was founded for lepers, the sick, and invalid priests. Finally, Saint Mary Magdalene in Ripton was founded for lepers, blind priests, and pilgrims. At the Council of Vienne (1311–1312), Pope Clement V chastised delinquent custodians of *leprosaria*, hospitals, almshouses, and hospices (*xenodochia*) who disregarded the fact that these institutions were founded and endowed by the faithful so the poor and leprous could have a home and find support. Bishops were to see that the property having been seized, lost, or alienated was restored. They should ensure that those managing the institutions receive those needing care and provide for them as the resources would allow. These houses should be governed by experienced and knowledgeable men of good repute and good will who were to take an oath, take inventories of the property, and provide a yearly account of their administration. Local ordinaries should offer assistance in the event that some fail to comply or act as accomplices to the neglect (Eichbauer 2020, pp. 177, 182). Responsibility of care had shifted to the State, but the administration of that care echoed a medieval canonical framework.

While Protestant codifications of secular law became the arbiters of society, the Romano-canonical principles of the *ius commune* were not discarded. Quite the opposite, in fact: they were adapted and woven into a legal framework that included biblical, civilian, and Protestant teachings. Despite the continued use of canon law via the *ius commune* during the Reformation, the sovereigns of nation states in time would set out their own legal order in national codes, which in themselves would mark another shift. These codes would draw more on customary law and Roman law, and canon law played less and less of a role. In the Holy Roman Empire, Frederick William I's *Allgemeines Gesetzbuch gegründet auf das römische Recht* (1738) was rooted in Roman law. In France, Napoleon's *Code Civil* (1804) drew on customary law and Roman law. The age of the pope's universal authority had waned, and canon law no longer had a place in the promulgation of secular law; yet, the imprint that canon law had made over the centuries could not be erased.

4. The Church's Reassessment of Its Legal Identity and Influence

The divesting of the Church's socio-political autonomy and subsequent rise of nation states led to reassessments of both its position vis-à-vis the world and how its legal apparatus engaged with it. The First Vatican Council formalized the first reassessment. The Church turned inward, reaffirming Catholic dogma along with the pope's primacy and his jurisdiction over the entire Church. The CIC/1917 followed suit by emphasizing its organizational structure and administrative bureaucracy. The Second Vatican Council formalized the second reassessment with the Church reemerging on the global stage, having a renewed focus on pastoral care. The CIC/1983, in turn, bore the mark of Vatican II's renewed emphasis on shepherding its flock through its advocacy for justice and equity in contemporary society. Despite the Church's greater engagement globally, contemporary canon law has not regained the influence it once held over society and politics. As we saw with the Reformation, the secular sphere now controls that which previously fell under the purview of the ecclesiastical. With that said, the CIC/1983 bears witness that while the socio-political influence of the Church's legal apparatus has been diminished, it has not been extinguished.

The First Vatican Council (1869–1870), summoned by Pope Pius IX with his bull *Aeterni Patris* (29 June 1868), was tasked with reaffirming right belief and the primacy and infallibility of the bishop of Rome. To that end, the conciliar canons did not engage with the outside world but rather sought to reinforce the Church's internal framework vis-à-vis

modernity (see [Baumeister et al. 2020](#)). Session 2 reaffirmed the Nicene Creed, the validity of the seven sacraments, the existence of purgatory, the benefit of the intercession of the saints, the power of indulgences, and the authority of councils. Session 3 turned to dogma by reaffirming both God as the creator of all things and divine revelation; embracement of the faith; and that, while faith is above reason, they are in agreement with one another because God both reveals the mysteries and infuses faith while also endowing the human mind with the light of reason ([Tanner 1990](#), vol. 2, Vatican I, Session 2, pp. 802–3; Session 3, pp. 804–11; [Aubert 1963](#); [Rusconi 2011](#)).

Taking a well-traveled road, Session 4 reaffirmed papal primacy. After His resurrection, Christ conferred onto Peter Apostolic primacy, that is, jurisdiction over the Church of God. Whoever succeeded Peter to the see of Rome succeeded to his primacy over the Church. Adherence to the leadership of Rome was central to its effective leadership. Such viewpoints were espoused, for example, by the Council of Florence (1431–1449) which decreed that the apostolic see and the Roman pontiff held a worldwide primacy and that the Roman pontiff was the successor of Peter, the true vicar of Christ, the head of the whole church, and father and teacher of all Christian people. The First Vatican Council repeated that position, affirming the Roman Church’s possession of ordinary power over every other church, to which all clergy and faithful, of whatever rite and dignity, were bound to obey in matters concerning faith and morals and in discipline and government of the church. Setting the Church as independent from the State, the consent of civil authority—given or not—had no force or effect on papal power. The pope was the supreme judge of the faithful, and all may have recourse to his judgment in any case that fell under ecclesiastical jurisdiction (*ibid.*, Session 4, cc. 1–3, pp. 811–15).

Along with reaffirming papal primacy, the council reaffirmed the pontiff’s infallibility. The apostolic primacy, which the Roman pontiff possessed as a successor of Peter, included the supreme power of teaching. Citing medieval authorities, this principle has been demonstrated by the Fourth Council of Constantinople (869–70); by Michael Palaeologus’ profession of faith at the Second Council of Lyon (1274) where he noted that “The holy Roman church possesses the supreme and full primacy and principality over the whole catholic church”; and at the Council of Florence (1431–1449). Thus, in the exercise of his office as shepherd and teacher of all Christians and in his supreme apostolic authority, the pope infallibly defines a doctrine concerning faith or morals to be held by the whole church (*ibid.*, Session 4, c. 4, pp. 815–16).

Following on the path laid by the First Vatican Council, the CIC/1917 likewise looked inward. Reflecting on Stephan Kuttner’s observations, John Beal noted that “[d]rafted in the spirit of the great legal codifications of the nineteenth century, this code marked a triumph of ‘conceptual juridical abstraction’ in which a legal system was constructed that consisted of ‘a rational aggregate of all juridical norms, each reduced to the most abstract formulation and conceived as set apart from the concrete social situations which in life are the mainsprings of law itself’” ([Beal 2021](#), p. 26 citing; [Kuttner 1968](#), p. 139). The CIC/1917, as Beal remarked, bore the mark of “an apologetic basis to defend the independence of the Church against the encroachments of the liberal State” ([Beal 1995](#), p. 3). This mark echoed the *Schema constitutionis dogmaticae de ecclesia Christi patrum examini propositum* which had been prepared for the First Vatican Council. Though the council did not act on the decree, it asserted that, as a perfect society, the Church of Christ possessed all the means necessary to pursue its end (*ibid.*, pp. 2–3; see also [Feliciano 1977](#); [Fantappiè 2008](#), pp. 543–638; [LeGrand 2013](#)). The CIC/1917 thus focused almost exclusively on the Church’s organizational structure and administrative bureaucracy, particularly on each element of the ecclesiastical hierarchy and the associated obligations. Book 2, “On Persons” serves as a case in point. It begins by addressing clerics in the first part, then religious in the second part, and only lastly addresses the laity in the third part. Of particular note is the level of detail found in Title 7 of CIC/1917 which delves into the minutia of the grades of ecclesiastical office and the inner workings of the Roman Curia. The CIC/1983 is not as focused on such details as the canons on the various Congregations, tribunals, and the

offices that take part in each (chp. 4, cc. 243–64); the Vicars and Prefects Apostolic (chp. 8, cc. 295–98, 300–1, 303–8, 311); Apostolic administrators (chp. 9, cc. 313–18); and inferior prelates (chp. 10, cc. 320–28) were not absorbed into the collection. Also not absorbed into the CIC/1983 are canons referring to the age-old heresy of simony (CIC/1917 2001, bk. 3, cc. 727–30).

The attention paid to the laity in the CIC/1917 concerned their attachment to the institutional church. Title 17 of Book 2 focuses on societies of lay men and women who live in common imitating a monastic rule but without having taken formal monastic vows while title 19, the canons of which were not absorbed into the CIC/1983, focuses on secular third orders under the moderation of a particular religious order and on archconfraternities and confraternities (CIC/1917 2001, cc. 700–25). The titles of Book 4 “On Procedures” pursue delicts involving non-resident clerics, concubinous clerics, pastors who were negligent in fulfilling parochial duties, and suspensions from an informed conscience (tit. 30–33 cc. 2168–94). The titles related to the beatification and canonization (tit. 22–26 cc. 2000–141) likewise demonstrate the depths of the inward focus. As with the titles mentioned above, the canons in these titles also were not absorbed into the CIC/1983. The canons—almost 100 in total—in titles 18, 25, and 26 of Book 3 “On Things” devote particular attention to the management of sacred furnishings, ecclesiastical benefices, and non-collegiate institutions which serve as a final example of canons not absorbed into the CIC/1983.

Thus, contrary to the collections comprising the medieval *Corpus iuris canonici* which betrayed a church very much engaged in the world in which it occupied, the CIC/1917 scantily engaged with society at large. Marriage, which traditionally occupied considerable space in the medieval collections—Causae 28–36 in Gratian’s *Decretum* and Book 4 in the *Decretales*—was reduced to a mere title (Bk 3 tit. 7) in CIC/1917. Book 3 title 29 of CIC/1917 deals with a variety of contracts, specifically addressing prescription and the alienation of church property. In the *Decretales*, however, these topics are found separate titles: Book 2 title 26 “De praescriptionibus” Book 3 title 13 “De rebus ecclesiae De rebus ecclesiae alienandis vel non”. The *Decretales* addressed business transactions in Book 1 title 36 “De transactionibus”, surety in Book 3 title 22 “De fideiussoribus”, and usury in Book 5 title 19 “De usuris”. Usury in the CIC/1917 is found in Book 5 title 13 c.2354, a canon that also deals with homicide, the rape of young of opposite sex, the sale of humans into servitude, theft, arson, destruction, and mutilation. The *Decretales*, on the other hand, addressed murder in a series of titles, Book 5 titles 10–12 on killing sons, infanticide, and homicide. The CIC/1917 also does not address the issue of war, save c.2351 on those who engaged in a duel (Bk. 5 tit. 14). Gratian’s *Decretum* discussed war in Causa 23 and the *Decretales* discussed related elements in Book 1 titles 34 and 35 on “De treuga et pace” and “De pactis”. As a final example, CIC/1917 treats apostates, heretics, and publishers of works that promote such ideas in the six canons that comprise Book 5 title 11 (cc. 2313–19); it does not address either Jews or Muslims at all. The *Decretales*, by contrast, devotes Book 5 titles 6–9 to Jews, Muslims, and their servants; heretics; schismatics; and apostates, respectively. The titles reflect a concern both with internal deviation and with external threats and those who believe otherwise. Overall, the CIC/1917’s engagement in the world is much more limited than it was in its predecessors. Medieval collections reflected a Church comfortable inserting itself into societal issues, while the Church of the CIC/1917 felt it necessary to focus inward to shore up its borders in defense against the encroachments against the State (see Lo Castro 2017 for an assessment of CIC/1917).

With the Second Vatican Council (1962–1965) and a renewed focus on pastoral care, the Church had reemerged on the global stage with an outward focus. Session 3 on liturgy set this tone with its emphasis on the renewal of the people through their active participation in the mass and by encouraging every priest to strive for greater holiness so as to serve all the people of God. These two threads laid the foundation for spreading the gospel throughout the world and thus for dialogue with the modern world (Tanner 1990, vol. 2, Vatican II, Session 9 Decree on the ministry and life of priests, chp. 3, pp. 1057–58). Under the pastoral guidance of the Holy Spirit, priests are to shepherd the flock through concerns

brought about by modern developments, humanity's place and purpose, and the purpose of individual and corporate endeavors (*ibid.*, Session 9 Pastoral Constitution on the Church in the World Today, p. 1070; see also [Alberigo and Komonchak 1995–2006](#); [O'Malley 2008](#); [Chenaux 2012](#)).

Pastoral care centered on the condition of humanity in today's world. At the core lay married and family life, and the laity's role in evangelizing the world. Collectively, their engagement is critical to improving structures and conditions of the daily life of all (*ibid.*, Session 5, chp. 4, p. 879). Priests also need to be mindful of global changes, as well as of the individual and collective judgments of people as their actions and material wishes impact others. They, in conjunction with the laity, should tend to the disparity between the abundance of wealth, resources, and economic power and those racked by hunger and need. Of particular interest is the impact of science and technology on societal relations. Socialization does not necessarily promote personalization. Compounding matters is that the youth are becoming more engaged in the world at a younger age. Care must be taken to tend to the imbalances of modernity: between races and classes; between rich and weaker/more needy nations; between ideologies of nations; between demographic, economic, and social pressures within the family; between generations; between changing relationships of men and women in society (*ibid.*, Session 9 Pastoral Constitution on the Church in the World of Today, pp. 1070–75).

The expansion of interfaith dialogue with other religions likewise reflects the council's outward focus. In 1960, Pope John XXIII established the Vatican Secretariat for Promoting Christian Unity in an effort to rebuild the bridge between Catholics and Protestants ([Vischer 1970](#)). Vatican II continued that trajectory of outreach. It acknowledged the value of precepts and teachings that reflect a ray of truth that enlightens everyone. Hinduism and Buddhism serve as two such examples. The council also expressed respect for Islam as a faith that worships the one God living and subsistent, venerates Jesus as a prophet, and honors virgin mother Mary. Judaism was the foundation for Christianity, and although Jewish authorities with their followers called for the death of Christ, those events cannot be ascribed indiscriminately to all Jews living then and not to the Jews of today. They should not be seen as rejected by God or accursed. The council called for mutual understanding of faiths to maintain and promote social justice and moral values, as well as to maintain and promote peace and freedom for all people (*ibid.*, Session 7 Declaration on the church's relation to non-Christian religions, pp. 968–71; see also [Roukanen 1992](#); [Fisher and Klenicki 1987](#); [Cunningham et al. 2007](#)).

Missionizing efforts offer yet another example of the Church's renewed outward efforts. Undertaken for the salvation of souls, missionary activity is undertaken through preaching and celebration of sacraments, particularly the Eucharist (*ibid.*, Session 9 Decree on the ministry activity of the church, chp. 1, p. 1019). The Church does this through the founding of churches and the care needed for newer churches, especially in poor areas. These efforts should be done in coordination and cooperation with national and international organizations as necessary (*ibid.*, pp. 1027–31; chp. 6, p. 1038). Bishops should pay special attention to missionary activity as their principal task is to preach the gospel in every part of the world. Institutions of nuns, regional efforts, and organizations of lay people, especially international organizations, should work alongside them at their behest (*ibid.*, chp. 5, pp. 1035–36). The Church should enjoy all of the freedom of action it needs to care for the salvation of humanity. However, no one must be forced to embrace the faith against her or his will (*ibid.*, Session 9 Religious freedom in light of revelation, p. 1009). No one should be forced to act against his conscience in religious matters, within due limits. It is the duty of every civil authority to safeguard and promote inviolable human rights and equity of citizens before the law (*ibid.*, pp. 1002, 1005).

The initiatives outlined above—focus on liturgy, family, and missionizing—coalesced into what the Church outlined as the major problems in which it sees itself at the front line of tackling: the threat to the family unit. Marriage and family—supporting married couples and parents—are integral to the healthy state of the community and Christian society. For

the Church, polygamy, the plague of divorce, free love and pleasure seeking, selfishness, and wrongful practices against having children all threaten marriage as an institution. In support of the family unit, parents need their priest's assistance to serve as examples of humanity and holiness to their children. Mothers in particular need guidance to raise children in the way of Christ in an age with increasing technology. Parents themselves need that support so their mutual love as partners can continue to develop and grow (*ibid.*, Session 9 Pastoral Constitution on the Church in the World of Today, pt 2, chp. 1, pp. 1100–6; chp. 2, p. 1111).

Socio-economic and political life was a second social concern. The Council recognized that the economy has become more global as people have greater control over nature, live closer together, and have more contact with one another. Economically developed areas tend to ignore the poor, and the gulf between those who need the absolute necessities of life and those living in opulence or extravagance is becoming greater. The Church's principles of justice and equity should work to remove socio-economic imbalances so that individuals and their families are not uncertain or unsettled (*ibid.*, pt 2, chp. 3, pp. 1113–19). It should also encourage a greater inner sense of justice and of good will and service for the common good—especially with respect to civic and political education for the young—to strengthen basic convictions on the true nature of the political community, as well as the purpose, and the right use and the limitations of public authority (*ibid.*, pt 2, chp. 4, p. 1121).

The third social issue for the Church was the promotion of peace and encouragement of the community of nations. According to the Church, peace is the work of justice, and it cannot be obtained unless the wellbeing of persons is safeguarded. People must willingly share their intellectual resources and abilities with each other. Contrary to Vatican I and CIC/1917 and in the wake of World War II, Vatican II confronted the plague of war, noting that it has become more scientific and barbarous in its weaponry. Total war has increased the horror and perversion. Countries should adhere to conventions concerning the treatment of wounded and prisoners, should strive to make the consequences of war less inhumane, and should put an end to the arms race. The Church should work to help construct an international community to remove the causes of discord among people on which war feeds: economic inequalities, spirit of domination, and contempt for persons. It must help provide provisions for the various needs of people: food, health, education, work, and encouraging general growth in developing countries. In these endeavors, the volunteerism of young people, along with organizations collecting and distributing aid, is of critical importance (*ibid.*, pt 2, chp. 5, pp. 1125–34).

The advancement of the human person and the growth of society are dependent on each other. To that end, the Church needs to avail itself to the social nature of humans to increase the common good by advancing mutual relationships and dependence through its connections and technology. The council stressed respect for human beings by emphasizing the importance of looking upon everyone as a neighbor. Respect and love should extend also to those who think or act differently from us in social, political, and even religious matters. It is love that drives Christ's disciplines to proclaim the saving truth to everyone. The Church should work to lessen excessive economic and social inequalities among members of the human family and promote cultural education so people are less individualistically minded and more responsible toward their fellow man (*ibid.*, pt 1, chp. 2, pp. 1084–87). Key to these outward initiatives was the utility of mass media as a fresh way of communicating the news, ideas, and directives. Modern technology has contributed greatly to the growth in contacts among people. Thus, mass media can communicate events publicly and timely so that individuals can contribute effectively to the common good. Essentially, mass media is an extension of preaching, imbuing its readers with a Christian spirit and sense of morality (*ibid.*, Session 3 Appendix chps. 1 and 2, pp. 843–49). The CIC/1983 was equally as forward-facing in its approach to communication with the faithful by encouraging priests of the Church to make use of the instruments of communication to properly instruct those in the faith. The various forms of communication, then, become tools to lively instruct others in correct faith and good morals (CIC/1983 1998, c. 822).

With Vatican II, the Church had reemerged on the world stage with a force. It sought to bolster marriage and parenting, engage in interfaith dialogue, and defend those who could not defend themselves by calling for the cessation of war and economic inequalities. This focus on pastoral care helped to reshape canon law's socio-political influence as the CIC/1983 flipped the script found in the CIC/1917. Pope Paul VI had begun this process by implementing revisions to the CIC/1917 at the request of the Second Vatican Council (Morrisey 1972). Nowhere is this flip more evident than in Book 2 "On the People of God" which addresses the obligations, rights, and associations of the laity—the Christian faithful—in the first position as opposed to in the third position as found in CIC/1917. As seen in Vatican II, the CIC/1983 also recognized the laity as playing a critical role in the renewal of the Christian faith and in combatting inequalities (see, in particular, Bk 2, pt 1, tit. 1 and tit. 2; see Komanchak 1986). There should be greater dialogue between Christian faithful and their pastors with them making known their spiritual needs. At the basic marital and family unit, the laity, with the guidance of their priest, should work to build up the people of God through education of their children in the doctrine of the Church (though without setting forth their own opinion of that doctrine). The necessity of educating children in the ways of the Church is all the more important in cases of marriages in which one spouse is not Catholic. Bishops and priests should pay special heed to Catholic spouses and children of mixed marriages to ensure they have the spiritual resources necessary (CIC/1983 1998, cc. 1125 §2, 1128). The laity have the duty and right to work so that the divine message of salvation can reach all people of every age in every land (CIC/1983 1998, cc. 211–12). They are to promote social justice and assist the poor from their own resources as individuals and as part of an association (CIC/1983 1998, cc. 222 §2–23).

The second title of Book 3 re-enforces Vatican II's emphasis on missionary activity. The pope and the college of bishops are to spearhead and coordinate such efforts. In their respective dioceses, bishops should promote missionary vocations, designate a priest to promote missionary endeavors, and arrange each year for a day to celebrate missions. The Holy See should contribute yearly a suitable offering for missions. Places where Catholicism has not yet taken root are of particular interest so that nascent churches can be established fully. They should be provided with the proper resources and sufficient means to be able to evangelize. Carrying out this work at the direction of the Holy See and college of bishops are missionaries, institutes, and catechists—lay members of the Christian faithful who are organized into schools, properly instructed and outstanding in Christian life, and devoted to setting forth the teaching of the gospel (CIC/1983 1998, cc. 781–92).

The CIC/1983 thus reflects Vatican II's focus on marriage, education in the faith, and missionizing. The council's focus on justice is paralleled most keenly in Pope Francis's bull *Pascite gregem Dei* which introduced the revisions to Book 6 on penal sanctions. Working in an age in which clerical scandals have led to disillusionment among the faithful, Pope Francis noted that the Church's failure to appreciate the relationship between charity and recourse in cases warranting disciplinary sanctions could lead to tolerating immoral conduct. Over time this conduct could become entrenched, making correction more difficult and thus causing scandal and confusion among the faithful. Thus, the pope called attention to the fact that as communities change, the norms governing them and safeguarding the unity of God's people must likewise change. For norms to remain relevant, they must recognize and reflect the time which is more important than ever as society is changing rapidly. The Church's penal system should restore justice and heal injuries, correct the guilty party, repair scandals, and seek to avoid more serious evils. To that end, pastors must have a flexible means of correction that can be applied swiftly and with charity (Francis I 2021). An offender must be punished if there is no other way to restore justice and repair the scandal caused. But because there are as many penalties as there are offenses, the judge must serve justice but be prepared to moderate the penalties if their sum was excessive. The Ordinary should not grant remission until the offender has repaired the harm caused.¹² Correction must be both reparative and salvific.

Pope Francis's emphasis on justice and mercy parallels those of the medieval canonists such as Ivo of Chartres (d. 1115) and Alger of Liège (d. 1131). In his *Prologue* to the canonical collection *Decretum*, Ivo set forth how the law applied to the Church and, to that end, the systemization and defining of legal norms in order to balance rigor and mercy. He emphasized the importance of *caritas* (charity) and *misericordia* (mercy) and that the judge must keep both at the forefront of his mind as he used dispensations to bring about order, harmony, and enact legal change ("Prologue of Ivo of Chartres" in Somerville and Brasington 2020, pp. 113–32; see also Brasington 2004). Alger of Liège made a similar observation in the preface to his *De Misericordia et Justitia*. Canonical precepts and the imposition of sentences should be adapted to different persons, events, and times by varying procedure and application—"so that a heretic ought to be handled in one way, a sinner in another, a prelate in another, a subordinate in another, each appropriately, each singled out by separate intention, or action, or circumstance." Since some canonical precepts are for mercy and others are for justice, it is the task of the skillful judge to apply those precepts so that justice and mercy balance one another ("Preface to Alger of Liège's *Book Concerning Mercy and Justice*" in *ibid.*, pp. 138–40). Calls for justice and mercy can truly be seen as canon law's enduring legacy.

5. Conclusions

Contemporary canon law has not recaptured the all-encompassing socio-political control once held, despite the Church's greater engagement with the outside world. A stark example came in June 2021, when, in a tip of the cap to the Middle Ages, the U.S. Catholic Council of Bishops at its General Assembly attempted to manipulate the politics of a modern state by threatening to withhold communion from the U.S. President, Joseph Biden, a Catholic, for his stance on abortion. Their attempt to use canon law as a form of socio-political control failed, and they had to walk back their threat (Boorstein 2021). Reflecting what later would be noted in *Pascite gregem Dei*, Pope Francis commented that Catholic bishops must minister to politicians who back abortion with "compassion and tenderness," not condemnation, and noted that politics should not enter into questions about receiving communion. Priests and bishops must respond pastorally, not politically, to any problem that comes before them, noting, "[a]nd what should pastors do? Be pastors, and not go condemning, condemning" (Associated Press 2021).

Canon law, nevertheless, has left an indelible mark on Western society. It shaped our understanding of judicial procedure and due process. Our understanding of betrothal and marriage, and the importance of consent, is also rooted in it. Canon law paved the way for modern notions of private ownership and the right to dispose of that property through last wills and testaments. Canonists created mechanisms by which to address legal problems inherent in corporate organization and structure. They considered the proper relationship between the corporate head and its members, the extent of the head's power over the members, and whether members could impose constraints on the head. Canonists were thus integral to the concept of "What touches all should be approved by all" (*quod omnes tangit*): the concept that all parties with a legal interest in any matter must consent before a legitimate transaction concerning it can be completed, a concept that subjected a state's leader to the same rules as its citizens (Eichbauer 2022, chp. 9). The values and norms that have underpinned canon law throughout its history should not be dismissed despite modern political and economic systems that threaten religious belief and acceptance. While we no longer regard these values and norms as "canonical principles", they originated in the Romano-canonical tradition. The Church's long (though varied) relationship with the State and history of engagement in socio-political affairs provided a mechanism for them to seep into our collective thinking.

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Notes

- ¹ Corcoran, S. “UCL Volterra Project”, <https://www.ucl.ac.uk/volterra/texts/epitome-iuliani>, accessed on 10 April 2022. Its use in teaching at Constantinople may not have extended far past Justinian’s death as Justin II closed the law school.
- ² The collection included selections from: the *Gregorian Code* (290s); the *Hermogenian Code* (290s); the *Theodosian Code*; *Novellae* (new laws) of Emperors Theodosius II (402–50) and Valentinian III (425–55) issued after the circulation of the *Theodosian Code*; and extracts from the Roman jurists, Papinian, Paul’s *Sentences*, and Gaius’ *Institutes*.
- ³ For the following, see (Eichbauer 2022, chp. 2).
- ⁴ See (Halfond 2010, pp. 9–10, nn. 33–34). Examples of councils adopting secular legislation were: Orléans (511), c.1 and c.23; Orléans (541), c.13; Orléans (549), c.7; Tours (567), c.21 and c.22; Mâcon (581/583), c.16; Mâcon (585), c.9. See also (Chothar II 614) for secular legislation adopting conciliar decrees.
- ⁵ Halfond (2010, 2019) are excellent sources for understanding early Frankish councils within their time and place.
- ⁶ The *fodrum* was paid by free men (*arimanni*) on their own property, see (Reynolds 1994, p. 190).
- ⁷ Despite the similarity in terms, the *ius commune* must not be confused with English common law, which was the body of customary rules worked out in English practice from the mid-twelfth century onward. See (Watson 1981).
- ⁸ The standard development of the *ius commune* can be found in Bellomo (1995). On Romano-canonical law in Italy, France, and Scotland, see also (Watson 1984, pp. 51–75).
- ⁹ On the polemical treatises collectively known as the *Libelli de lite*, see (Cushing 2018; Melve 2007; Cushing 2005, pp. 111–38).
- ¹⁰ Helmholz also points to the importance of Doctors’ Commons in London and diocesan courts as places where knowledge of canon law would be acquired.
- ¹¹ See (Calvin 1541) for facing versions. John Calvin’s original is found in the left column with the official text of the Council of Geneva found in the right column. Underlined text in the official version earmarks what the Council of Geneva amended. Added text is clearly recognizable as it is not found in the left column noting Calvin’s original.
- ¹² CIC/1983, cc. 1345–46, 1361 §4 were added to the revised Bk 6.

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