THE NORTHERN WORLD

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A Case of Legal Pluralism in Early Modern Europe

Heikki Pihlajamäki

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Acknowledgements

This book has been long coming. The initial work was a project to examine the archives of the Livonian High Court (Sw. *hovrätt*), one of the oldest high courts established in the Swedish realm in the seventeenth century. It soon became evident, however, that the functions of the High Court could not be understood without setting them in a larger context – that of the entire new judiciary which was emerging after Sweden had conquered Livonia. As is so often the case in scholarship, the end product looks rather different to that which had been envisaged at the outset.

At this point, it is my pleasure to thank people who have helped along the way. I do not think I would ever have embarked on the first archival trips to the Latvian Historical State Archives in Riga had it not been for Pia Letto-Vanamo. We delved into the High Court's archive together, and the results of those first trips were also published in a co-authored article. I benefited a great deal from Pia's expertise in seventeenth-century legal history and sources, which were not my strong point at the time. Because of her patience and assistance in the early stages, the many trips I made to the beautiful city of Riga afterwards were much easier.

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During the past few years, I have been involved in many other projects and scholarly undertakings as well. If this work has one common denominator, it is the comparative method in legal history. Comparative legal history has emerged forcefully in recent years, and many of my good friends and colleagues in different countries deserve thanks for drawing me into these circles. I would be a different scholar had I never come to know people such as Albrecht Cordes, Serge Dauchy, Dave De ruysscher, Seán Donlan, Markus Dubber, Thomas Duve, Dirk Heirbaut, Jaakko Husa, Georges Martyn, Aniceto Masferrer, Dag Michalsen, Kjell Åke Modéer, Anthony Musson, Peter Oestmann, Mathias Schmoeckel, Ditlev Tamm, Alain Wijffels, and James Whitman. Many of them have been instrumental in founding the European Society for Comparative Legal History and its journal *Comparative Legal History*, which have grown to be vital frameworks for me.

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Heikki Pihlajamäki
Helsinki, August 15, 2016

CHAPTER 1

Introduction

1.1 The Research Questions

This is a book about an early modern territorial conquest and its consequences for the law. Livonia became part of Sweden through the Truce of Altmark in 1629. Before the truce, the region had belonged to Poland for almost 70 years. The second half of the sixteenth century and the first third of the seventeenth century were an era of almost continuous wars, under which the province suffered as a result of pest epidemics and hungers. When Livonia passed into Swedish hands, the region had therefore undergone significant economic, social, and demographic changes. According to some calculations, the population of what is now modern Estonia had dropped from the 250,000–300,000 of the mid-sixteenth century to a third of that in the 1620s.[1] The chronicle of Thomas Hiärne describes a pest epidemic in 1580 in a sombre way: "[…] within a short time period, an innumerable number of people had died of it, and there was not one town, castle, or village, where people did not lie sick […]."[2] Because of the demographic changes, the manorial economy looked quite different after the Polish era to how it had looked before it. Many manors were completely or partly destroyed, and the surviving peasants had largely taken to other parts. The audit carried out by the Swedish crown in 1627 showed that in the 50 manors within the Bishopric of Dorpat, only 622 *Haken*[3] were inhabited, and 1605 were deserted.[4]

1 Heldur Palli, "Miks eestlased jäid püsima," *Keel ja kirjandus* 7 (1995), 475–483, 477; see also Alfred Soom, *Der Herrenhof in Estland im 17. Jahrhundert* (Lund: Skånska Centraltryckeriet, 1954), 36.

2 "[…] *innerhalb kurtzer Zeit ein unzählich Volck daran gestorben, und nicht eine Stadt, Schloss oder Dorff gewesen, da nicht die Leute* […] *kranck gelegen; die Strassen und Märckte der Städte, alle Heer-Strassen und Dörffer waren gantz wüst von Volcke* […]." Cited in Johan Kahk, *Bauer und Baron im Baltikum: Versuch einer historisch-phänomenologischen Studie zum Thema "Gutherrschaft in den Ostseeprovinze"* (Tallinn: Tallinna Raamatutrükikoda, 1999), 30. Unless otherwise specified, the English translations throughout the book are mine.

3 *Haken* was a land measurement typical in Livonia. Originally, *haken* referred to a tract of land which could be worked with one horse and plough. In different parts of the Livonia, *haken* could mean different things. As a result of the developing tax system, after 1500 a general tendency towards a uniform *haken* is discerned throughout Eastern Europe. See Ragnar Liljedahl, *Svensk förvaltning i Livland 1617–1634* (Uppsala: Almqvist & Wiksell, 1933), 23–26.

4 Astaf von Transehe-Roseneck, *Gutsherr und Bauer in Livland im 17. und 18. Jahrhundert* (Straßburg: K.J. Trübner, 1890), 6.

As a result of the Great Northern War, Sweden lost Livonia to Russia. The loss went into effect through the Capitulation of Estonia and Livonia in 1710, and was finalised through the Treaty of Nystad in 1721. The major research question that looms behind the other, more specified questions of this work is: what happened to Livonian law during this "short Swedish seventeenth century"?

At the beginning of the seventeenth century, the Swedish legal system, although it had been in contact with the Roman-canon *ius commune* since the thirteenth century, had retained much of its archaic features. Lawyers or learned judges were a rare sight in Swedish courts of law, and virtually no Swedish legal science existed. The University of Uppsala had been founded in 1477, but had been closed down during the turmoil of the Lutheran Reformation. The University had been reopened in the late sixteenth century, but mainly in order to train priests.

Whatever "reception" of Roman law there had been in Sweden, the layer of learned law was thin.[5] Compared to the heartlands of *ius commune*, the layer of learned law in Sweden would also remain thin until the nineteenth century. However, learned law emerged in some form, and the seventeenth century was the main period of the reception. As was the case everywhere in Europe, universities contributed to this. A new institution of higher learning was established in Turku in 1630 and another in the heart of Livonia, Dorpat, in 1632. Like their predecessor in Uppsala, both new universities were founded mainly for pastoral training. All Swedish universities had law faculties as well, but their teaching personnel typically consisted of one professor only.[6]

It is no wonder that the universities, for a long time, did not constitute great centres of legal learning. Legal training was clearly not a priority for the Swedish crown. The law faculties did not, however, remain insignificant. The faculties gained impact not least because there was a connection between them and the high courts. If Swedish universities were founded late, Swedish high courts (*hovrätter*)[7] came late as well. The first wave of European high courts

5 See Åke Malmström, *Juridiska fakulteten i Uppsala: studier till fakultetens historia I, Den medeltida fakulteten och dess historiska bakgrund* (Uppsala: Uppsala universitet, 1976); and Åke Malmström, *Juridiska fakulteten i Uppsala: studier till fakultetens historia II, Den juridiska fakulteten under 1600-talet och i början av 1700-talet* (Uppsala: Uppsala universitet, 1976).

6 Jan Eric Almquist, *Svensk juridisk litteraturhistoria* (Stockholm: Norstedt, 1946), 187, 199, 222; and Lars Björne, *Patrioter och institutionalister: Den nordiska rättsvetenskapens historia, Del 1: Tiden före 1815* (Lund: Institutet för rättshistorisk forskning, 1995), 15–51.

7 It is debatable whether the Swedish term *hovrätt* should be translated as "high court" or "appeals court." These courts were instances of appeals in relation to lower courts, but on the other hand the institution was originally designed to handle the crown's judicial duties. Moreover, a great part of their work, especially in Livonia, was devoted to first-instance cases

had started with the development of the Papal Curia from the eleventh century onwards, and with the founding of the Parlement of Paris and the English central courts at Westminster in the thirteenth century. The Grand Council of Mechelen and the Imperial Chamber Court of the Holy German Empire (*Reichskammergericht*) then followed in the fifteenth century.[8] The first of the Swedish high courts was the Svea High Court in Stockholm, not far from Uppsala, after which both Turku and Dorpat got high courts in 1623 and 1630, respectively.[9] The Göta High Court, located in Jönköping, followed in 1634 and the High Court of Greifswald in Sweden's German territories in 1655. The high courts in Stockholm, Turku, and Jönköping were places in which local university law students could gain practical experience as *auskultanter*, literally "listeners," in order to qualify for lower court jobs.[10] The high courts were also some of the most important channels through which the Swedish legal culture communicated with its European neighbours.

If Sweden's European connection came late and was not particularly deep, Livonia was different from early on. During the late Middle Ages and the Polish period, the reception of Roman law had advanced considerably more there than in Sweden. David Hilchen's Proposal for Livonian law of 1599, although never formally promulgated, is a good example of the extent to which Livonian law was integrated in the world of *ius commune* and especially its German variant *gemeines Recht*.[11] Until the founding of the University of Dorpat in 1630,

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of noblemen. I will therefore call these courts high courts throughout the study. The other option was chosen in articles of Mia Korpiola (ed.), *The Svea High Court in the Early Modern Period: Historical Reinterpretations and New Perspectives* (Stockholm: Institutet för rättshistorisk forskning, 2014).

8 On the development of European high courts, see the articles in Alain Wijffels and C.H. (Remco) van Rhee (eds.), *European Supreme Courts: A Portrait through History* (Antwerpen: Maklu, 2013).

9 On the founding of the court see the recent account of Mia Korpiola, "A Safe Haven in the Shadow of War? The Founding and the *raison d'être* of the New Court, Based on its Early Activity," in Mia Korpiola (ed.), *The Svea High Court in the Early Modern Period: Historical Reinterpretations and New Perspectives* (Stockholm: Institutet för rättshistorisk forskning, 2014), 55–108.

10 See David Gaunt, *Utbildning till statens tjänst: en kollektivbiografi av stormaktstidens hovrättsauskultanter* (Uppsala: Almqvist & Wiksell, 1975).

11 The literature on *ius commune* is vast. See, for example, Francesco Calasso, *Introduzione al Diritto commune* (Milano: Giuffré, 1951); Paul Koschaker, *Europa und das römische Recht* (München: Beck, 1953); Franz Wieacker *Privatrechtsgeschichte der Neuzeit* (Göttingen: Vandenhoeck & Ruprecht, 1952); Helmut Coing, *Die juristischen Auslegungsmethoden und die Lehren der allgemeinen Hermeneutik* (Köln: Westdt. Verl., 1959); Hermann Lange,

however, Livonia had no universities, and it boasted no legal literature of its own.

The linguistic and cultural ties of Livonia's German-speaking elite had nevertheless joined the province to *gemeines Recht.* In addition to the linguistic and cultural ties came the political connection: until the dissolution of the Order State in 1561, Livonia remained part of the Holy Roman Empire of the German Nation. This connection had always been vague, however, as Livonia never belonged to the German Kingdom (*Regnum Teutonicum*) but only to the larger and more loosely defined Holy Roman Empire (*Sacrum Imperium*). The essential difference between the two was that the Kingdom had common institutions, which the estates supported (such as the *Reichstag*), whereas the Empire was universal and more abstract.[12]

The tension between the "unlearned," archaic law of the Swedish conqueror and the learned law of Livonia constitutes the basic framework of this study. What happened to Livonian law when the Swedes conquered the province? Did the Swedes manage to establish their own legal system in the conquered territory, and to what extent did they even attempt to do so? What was the impact of Swedish legislation in Livonia? How much did Livonian procedure come to resemble the Swedish procedure?

I will thus focus on three fundamental areas of legal development: the judiciary, the procedure, and the legal sources. First, the establishment of Swedish judiciary in the conquered areas will be addressed: how did the Swedes restructure the court system? In what way did they rely on the already existing judicial structures, and in what way did they import the existing Swedish solutions or invent completely new ones? How did the court structure change during the Swedish era and for what reasons? Questions concerning "access to justice" arise as well: Who used the courts at the different levels, or in other words, did the social standing of the parties determine in which courts their legal cases were solved? Did courts exercise judicial power effectively – was the judiciary an important venue for solving legal disputes? And what was the role of the High Court of Dorpat, founded according to the general Swedish policy (and thus, according to the model of the Imperial Chamber Court) in 1630?

Römisches Recht im Mittelalter: Band 1, Die Glossatoren (München: C.H. Beck, 1997); and H. Patrick Glenn, *On Common Laws* (Oxford: Oxford University Press, 2005).

12 Jason Lavery, *Germany's Northern Challenge: The Holy Roman Empire and the Scandinavian Struggle for the Baltic (1563–1576)* (Leiden: Brill, 2002), 16; Joachim Whaley, *Germany and the Holy Roman Empire, Vol. 1: Maximilian 1 to the Peace of Westphalia, 1493–1648* (Oxford: Oxford University Press, 2011), 373; see also Ernst Pitz, *Papstreskript und Kaiserreskript im Mittelalter* (Tübingen: Bibliothek des Deutschen Historishcen Instituts in Rom, 1971), 198.

Did the High Court effectively supervise the six district courts (*Landgerichte*) within its jurisdiction, and to what extent did the High Court act a *forum privilegiatum* for the nobility?

Secondly, the problem of procedure is pivotal in understanding the functioning of any legal system, the modes of procedure reflecting the level of legal learning in any early modern jurisdiction. The *ius commune* civil procedure was still in the early seventeenth century an "articled procedure" (*Artikelprozess*), in which points of legal disputes were formulated and enumerated in the form of so-called "articles."[13] The Swedish lower courts did not use this kind of procedure – how about the Livonian ones?

As for criminal procedure, European early modern legal practice has not been the object of much research. We know much more about the early modern theories of criminal law and their development, for obvious reasons: it is much easier to read legal literature than archival material. In a nutshell, the problem left largely unanswered thus far is how inquisitorial did the criminal procedure become in the early modern period. The early modern legal scholars spelled it out fairly clearly. According to the medieval and early modern procedural theory, inquisitorial procedure was always *processus extraordinarius*, secondary to accusatorial procedure. The little legal history literature we have on the legal practice, however, claims that in fact accusatorial procedure was already extinct in many parts of Europe by the fifteenth and sixteenth centuries. I suspect, however, that this is not the whole story and that, at least, it is not the story for the whole of Europe.

It is certainly the case for the Scandinavian region that the inquisitorial procedure had made relatively little progress by the early seventeenth century, never surpassing the accusatorial procedure even thereafter. As will be explained below, the level of low legal learning in Scandinavia probably accounts for this. The consequent use of the inquisitorial procedure required a judiciary that possessed at least some legal learning, as the examples from the European core areas show. Even more so can this be said of the conscious and intricate interplay and switching between the two modes of procedure. It is therefore interesting to examine in what relation the two modes of procedure stood towards one another in Livonia. As I hope the comparison between Sweden and Livonia will show, the choice between inquisitorial and accusatorial modes of criminal procedure was not only a matter of how learned the judges were. It also depended decisively on the political structure of polity. The hypothesis

13 Peter Oestmann, "Artikelprozess," *Handwörterbuch zur Deutschen Rechtsgeschichte*, Band I (Erich Schmidt Verlag, 2008), col. 313–314. For a *gemeines Recht* authority on article procedure, see G.W. Wetzell, *System des ordentlichen Zivilprozesses* (1874), 23, 45, 70–71.

I will advance is that the less politically concentrated the polity, the less likely it would be to operate its criminal procedure inquisitorially even though it may have a learned legal corps available.

My third major research question has to do with the legal sources that Livonian courts used. Inquiring into their use of Swedish laws inevitably leads one to ask how Livonian courts used legal sources in general. In addition to legislation, what role did the *ius commune* or *gemeines Recht* scholarship, biblical arguments, or statutory sources play? The problem of legal sources is connected to a larger debate on medieval and early modern legal pluralism, which was typical of the early modern period. Wolfgang Wiegand's classic study is an important landmark. Wiegand shows how legal theory built on the idea of legal spheres, of which the smallest and closest was always the primary one. If it did not provide the rule needed, there was recourse to the next larger sphere.[14] Providing one of the best accounts of legal pluralism in the early modern period, then, Víctor Tau Anzoátegui has carefully tracked the gradual transition from what he calls "casuism" in Spanish colonial law to systematic thinking.[15] Yet few studies exist to show just what legal theory and its pluralism meant in legal practice: how were the different legal sources related to each other, how they interacted and how they were used in practice. Peter Oestmann's *Rechtsanwendung und Partikularrecht im Alten Reich* provides one of the most important of this kind of accounts. Oestmann shows how the different sources – statutes, customs, scholarship, and others – appeared and were utilized by different actors at the Imperial Chamber Court of the German Empire.[16] As for the comparative aspect, a recently edited work on legal pluralism and the early modern empires is well worth mentioning.[17]

Oestmann's study is a good example of how important it is to pay attention to how legal sources were worked in practice. At the same time, understandably, his results do not necessarily tell much about the relative weight of the same kinds of legal sources in other areas of Europe, or in courts other than the superior ones. Although similar theories of legal sources emerged all over Europe, the practical realizations of those theories varied necessarily

14 Wolfgang Wiegand, *Studien zur Rechtsanwendungslehre der Rezeptionszeit* (Edelsbach: Gremer, 1977).

15 Víctor Tau Anzoátegui, *Casuismo y sistema* (Buenos Aires: Instituto de Historia del Derecho, 1992).

16 Peter Oestmann, *Rechtsvielfalt vor Gericht: Rechtsanwendung und Partikularrecht im Alten Reich* (Frankfurt: Vittorio Klostermann, 2002).

17 Lauren Benton and Richard J. Ross, *Legal Pluralism and Empires, 1500–1800* (New York: New York University Press, 2013).

according to the respective weight of legal sources and legal actors producing them. If towns were strong, town law was likely to be strong. If legal scholarship thrived, literature was probably used in courts as an argument. If high courts had acquired an important position, lawyers would refer to judicial practice in their briefs. In order for the learned law to gain importance in the first place, learned lawyers were needed, and so on. Whatever the weight of a particular legal source, it stood in relation to other sources. This was a zero-sum game: if one source was weak, others would replace it. The exact situation of legal sources varied from one region to another. What was true for Spanish America was not necessarily true for Germany, and what applied for Germany, was not automatically applied for Sweden or Livonia. The only way to find out about legal pluralism in a particular region is to go the archives and find out. This study is one such attempt to do just this.

A few words on the methodology of the study are necessary here. Comparative studies have become the order of the day in today's legal history research. Comparative legal history offers clear advantages, which traditional legal history is lacking. This does not mean that the purely local could no longer serve as a framework of research. It certainly can, for the sheer fact that states (although not always national states) have been important law-producing entities long before they became primary motors of legal change. The point of comparative legal history is rather that one should always be aware of the international context of the legal change. Sometimes, perhaps, the comparative context will show less in the final research report than in some other cases – but the context should always be there. Comparative consciousness is not necessary only because it helps the researcher to test hypotheses, and to prove or falsify them. A legal historian needs to think comparatively in order to find out how legal influences and transplants move from one legal order to another.[18]

A comparative Western framework is indispensable for this study as well. The situation of one legal order spreading to the area of another legal order is nothing exceptional in legal history, and neither is it exceptional in the early modern Western legal history. The spreading of Roman and Canon law from the learned urban centres to rural areas and from the heartlands of Europe to the outskirts of the continent is the paradigmatic case in point, for which it was characteristic that the learned legal systems more or less came to replace

18 On the concept of legal transplants, see Alan Watson, *Legal Transplants: an Approach to Comparative Law* (Athens: The University of Georgia Press, 1977); and on the methodology, see Heikki Pihlajamäki, "Comparative Contexts in Legal History: Are We All Comparatists Now?," in Maurice Adams and Dirk Heirbaut (eds.), *The Method and Culture of Comparative Law* (Oxford: Hart Publishing, 2014), 121–132.

and suppress local customary laws. The learned laws often changed in the process, amalgamating with the traditional legal orders. The emerging dominant legal orders were not always run by university-trained legal professionals: the victory of the English common law over the seigneurial courts and regional laws shows this well, as does the dissemination of German town laws, especially those of Magdeburg and Leipzig to new *Siedlungen* in Eastern Europe. In some cases, less sophisticated legal orders arrived on top of more sophisticated ones, as in the case of Germanic tribal laws over Roman law in the early Middle Ages. A myriad of examples exists; in fact, much of medieval and early modern legal history could be written precisely from the point of view of legal transplants of the kind described briefly above.

The concepts of empire, composite state, and colonization are important for this study. In the early modern period (not only, but typically then), political power was often organised in the form of an empire, which Jane Burbank and Frederick Cooper define as "large political units, expansionist or with a memory of power extended over space, polities that maintain distinction and hierarchy as they incorporate people."[19] The concept is not easy to distinguish from that of a composite state. According to H.G. Koenigsberger, "most states in the early modern period were composite states, including more than one country under the sovereignty of one ruler."[20] Some of the empires or composite states were also colonial polities. Colonization was not only a political, military, and commercial undertaking, but was always also a legal one, from an early period.

It is not crucial to determine here how and whether empires are to be distinguished from composite states, and how a colonization differs from the other two situations. It is significant to recognize that in all of these cases the early modern polity, unlike the nineteenth-century nation-state with its all-encompassing legal codifications, was flexible. As was true of all builders of empires or composite states, and conquerors in the classic cases of colonization, Swedes were and had to be concerned with legal questions from the very beginning. They entered a province in a state of complete chaos caused by continuing wars, a region practically lacking any judicial or legal infrastructure. That infrastructure had to be created lest chaos continue to reign. Like Spain,

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19 Jane Burbank and Frederick Cooper, *Empires in World History: Power and Politics of Difference* (Princeton and Oxford: Princeton Univerity Press, 2010), 8.

20 H.G. Koenigsberger, "Monarchies and Parliaments in Early Modern Europe: *dominium regale* or *dominium politicum et regale*," *Theory and Society* 5 (1978), 191–217; H.G. Koenigsberger, "*Dominium Regale* or *Dominium Politicum et Regale*," in H.G. Koenigsberger, *Politicians and Virtuosi: Essays in Early Modern History* (London: The Hambledon Press, 1986).

England, and Portugal, Swedes had the idea of importing at least some of their own law to the newly acquired lands on the eastern shores of the Baltic Sea. However, as we will see, these plans ran into considerable difficulties, the most important of which was the strength of the local legal culture. Sweden's wishes for legal colonization ought not to be exaggerated, however. As an early modern (colonial) empire or composite state, it was prepared to let the legal order of the new territory take shape according to its particular needs.

As is evident by the research questions I have formulated above, this is a study on Livonian legal practice. The bulk of the research material comes from judicial archives. Studies on early modern case material are not abundant for any part of the Western world, at least when compared to the amount of studies undertaken on the legal scholarship of the time. Studies on legal scholarship provide an indispensable background, as one tries to understand the thinking of the early modern jurist. However, legal scholarship reflects only one part of the complex early modern legal world. The theoretical learning of the scholars is never, not even today, exactly the same as the practical outcome that courts of law produce. It is, and has been since the Middle Ages, the legal scholar's job to present the legal order as a harmonious system – which it rarely is in reality. When it comes to the early modern period, this is even less the case than it is today,[21] even despite the fact that the early modern legal scholars were increasingly approaching the legal practice and incorporating local statutory sources into their writings.[22] Since specifically Livonian legal scholarship was not produced until the nineteenth century, early modern legal scholarship is almost no help for the scholar trying to form a picture of Livonian law in the seventeenth century or in the preceding period.

Legislation is not much more useful, as it depicts early modern legal reality notoriously badly. Written laws were rare, with the exception of police ordinances, which poured out of the legislative machines at an increasing speed in every European state of the early modern period. The normative standing of written laws was, nevertheless, far less important than it is in the modern continental (and even common law) legal cultures. Yet, at least the early modern statutes say something about the legislator's wishes and development plans.

Swedish laws were meant to be subsidiarily in force in Livonia as well, in addition to which the Swedish Crown issued special legislation for the province. This starting point will be discussed more in detail further on. As I have argued

21 Oestmann clearly shows how much the legal practice in the Imperial Chamber Court differed from the law in the books.

22 In the *gemeines Recht* region, this strand of legal literature is called "the modern use of the Pandects" (*usus modernus pandectarum*).

elsewhere,[23] written law had acquired a strong position – compared to other regions and other sources of law – by the early sixteenth century in Sweden. It makes particular sense therefore to ask to what extent Swedish statutory law was applied in Livonia.

The question concerning the practical significance of Swedish legislation or any other source thus cannot be answered without consulting case material. Livonia lacked legal literature written, for example, in the vein of Benedict Carpzov, who not only wrote normative legal scholarship but did it largely by describing the seventeenth century Saxon legal practice. For other parts of Europe, law reports and printed case collections also exist from the medieval and early modern periods – but not for Livonia.[24] Therefore, the only way of gaining an understanding of the law actually practiced in Livonia is by delving into the judicial archives.

1.2 Archival Material

The main bulk of the archival material which I have used comes from the archives of the Livonian lower courts in Tartu (Estonia) and from the archive of the Dorpat High Court in Riga (Latvia).[25] All of these archives contain rather

23 Heikki Pihlajamäki, "Legalism before the Legality Principle? Royal Statutes and Early Modern Swedish Criminal Law," in Georges Martyn, Anthony Musson and Heikki Pihlajamäki (eds.), *From the Judge's Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal Trials* (Berlin: Duncker & Humblot, 2013), 168–188.

24 The French *recueils d'arrêts*, the English law reports and Year Books, the collections of the *decisiones* of the Roman Rota and Italian courts, and similar collections of the practice of the German Imperial Chamber Court (*Reichskammergericht*) and the Great Council of Mechelen – to mention just a few important examples – greatly influenced legal practice in these differents parts of Europe. Some of the collections were printed, others remained in manuscript. See, for instance, the articles in J.H. Baker (ed.), *Judicial Records, Law Reports and the Growth of Case Law* (Berlin: Duncker & Humblot, 1989); Chantal Stebbings (ed.), *Law Reporting in England: Proceedings of the Eleventh British Legal History Conference* (London: Hambledon Press, 1995); Alain Wijffels (ed.), *Case Law in the Making: the Techniques and Methods of Judicial Records and Law Reports* (Berlin: Duncker & Humblot, 1997); and W. Hamilton Bryson and Serge Dauchy (eds.), *Ratio Decidendi, Volume 1: Case Law* (Berlin: Duncker & Humblot, 2006). Dolores Freda provides an excellent comparative synthesis in "'Law Reporting' in Europe in the Early-Modern Period: Two Experiences in Comparison," *The Journal of Legal History* 30:3 (2009), 263–278.

25 For Livonian place names, I use the German names when referring to the Swedish period: thus, Dorpat and Pernau, instead of Tartu and Pärnu (which would be the present-day Estonian equivalents).

large amounts of material, but they also contain significant lacunae. The court language in Swedish Livonia was German, with occasional documents in Swedish.

The district courts (*Landgerichte*) were the general lower courts in the countryside. The choice of material from these courts has been very much determined by what has been available. For instance, the records of the District Court of Pernau are much better preserved than the records of Dorpat. Some case material exists for the District Court of Wenden, but material from other district courts (Kokenhusen and Riga) is virtually non-existent. As for the lower courts, my material includes the cases of the District Court of Pernau (*Pernauische Landgericht*) from the years 1632–1634, 1640–1641, 1655, 1675–1676, 1688–1690, 1695–1698, and 1701–1773, and the cases of the District Court of Dorpat (*Dorpatsche Landgericht*) from the year 1632, 1666, and 1671–1673. For a few years, criminal protocols were been bound as a separate book (District Court of Pernau 1638–1645). The quality of the material varies from well ordered to barely legible. Of course, the amount of information contained in the protocols and decisions also varies.

As for the town courts, the protocols of the Council of Pernau (*Pernauische Rat*) have been read from the years 1667–1670, and the protocols of the Lower Town Court (*Kemnergericht*) of Pernau from the years 1662–1663. The protocols of the Council of Dorpat have been included for the years 1660–1663. The Dorpat Council papers exist also for the last years of the Polish rule (1619–1623, 1625), and those have also been included in the material to allow comparison with the Polish period.

In the cities, as was common in early modern European towns, several other specialised courts functioned in addition to the council, which also exercised important administrative functions in addition to its purely judicial tasks. Separate courts decided cases dealing with market commerce, orphanage, and police matters. Lower consistories (*Konsistorien*) and the Upper Consistory (*Oberkonsistorium*) were responsible for the ecclesiastical jurisdiction, and the University of Dorpat formed a jurisdiction of its own. These specialised courts have not, however, been investigated, with the exception of the *Kemnergericht* of Pernau (1660–1662), which was the court of first instance for civil cases in the town and responsible for investigation of crimes as well.

The High Court of Dorpat, the appeals court for the province and the *forum privilegiatum* for the nobility, forms an important part of the study. The high court archives are now kept at the Historical State Archives of Latvia (*Latvijas valts vēstures arhīvs*) in Riga. The archival material is again limited in many ways. Because of wars affecting Livonia, the High Court functioned only until the first years of the eighteenth century, and the work was interrupted many

times before that as well. Its archives have suffered substantially from wars, and without Bruiningk's reorganizing and catalogizing in the 1910s the archives would be in much poorer shape.

According to Bruiningk, many acts had gone missing as a result of the archive's evacuation to Sweden in connection to the Great Northern War.[26] Bruiningk listed the acts he had at his disposal. He started almost literally from scratch, describing the situation thus: "... the bundles of cases, of the 14,000 of which until the year 1797 the old archive consists, formed a chaos, in which any trace of chronological or other type of an order had ceased to exist." Bruiningk's catalogue covers the year 1630–1710 and includes 4,453 cases.[27]

For some of the cases, Bruiningk has been able to mark the day of the High Court's decision on the dossier (although the decision itself is not necessarily in the dossier any more), and sometimes there is information on other procedural phases as well. Later archivists have added information on whether the acts of a particular case are still to be found in the archives (or were there at least at the time that the archivist was working on the files). The cases are ordered according to the day they arrived at the Court. Only civil cases (*Zivil- und Anklagesachen*) are catalogued. Bruiningk would have wanted to catalogue the criminal cases as well, but he never managed to do that. The fact that criminal cases are missing in Bruiningk's catalogue is a lack, but not as serious as one might think. This is because the category of *Anklagesachen* included the criminal cases against noblemen, all of which were handled in the accusatorial procedure. Criminal decisions (in the contemporary Livonian meaning of inquisitorial cases) of the High Court exist for only two years (1672, 1675), in addition to which approximately 300 lower court criminal cases exist in the archive.[28] The High Court's *Leuteration* cases, or death penalty cases remitted

26 The "Introduction" (*Vorrede*) by Bruiningk, Alfabēts 1630–1710, Historical State Archives of Latvia, Archiv des livländischen Hofgerichts [from here onwards: LHG], Fond 109. Another evacuation occurred during the Second World War, this time to Germany, and again some of the material was lost.

27 Chronologisches Register der Akten des Livländischen Hofgerichts Zivil- und Anklagesachen: Band I 1630–1667 (1910), Band II 1668–1680 (1911), Band III 1681–1710 (1909), LHG 109.2.I–III; "*... Die mehr als 14000 Akten, aus denen sich das bis 1797 reichende alte Archiv zusammensetzt, bildente ein Chaos, in dem jede Spur einer chronologischen oder sonstigen Ordnung aufgehört hatte.*" Bruiningk, "Introduction."

28 See Pia Letto-Vanamo and Heikki Pihlajamäki, "Funktionen des Livländischen Hofgerichts (1630–1710): Bericht über ein Forschungsprojekt," in Jörn Eckert and Kjell Å. Modéer (eds.), *Geschichte und Perspektive des Rechts im Ostseeraum* (München: Peter Lang, 2002), 129–146, 134–135.

from the lower courts to the High Court for approval, are available as a separate collection for the years 1695–1703.

We do not know how much of the case material had already been lost by the time von Bruiningk started his work, because original registers are lacking. However, it is probable that most of the files were still at Bruiningk's disposal. Although many dossiers are missing, we get a reliable picture of the kinds of cases the high court handled, of how many cases came to the Courts, the social status of the parties (at least roughly), as well as of the type of procedure in question. This is possible because each of Bruiningk's entries includes the names and titles of the parties, the type of case and the date of arrival, and sometimes information on the different procedural steps taken.

Although Riga was part of Swedish Livonia, Riga, for the most part, has been left out of the study. This is because the town of Riga did not belong under the jurisdiction of Dorpat High Court as did the other lower courts of the region. Instead, the Riga appeals went directly to the Svea High Court in Stockholm. It was important for the elite of Riga bourgeoisie to secure an independence from the Livonian nobility, which, Riga feared, would gain influence on the city's legal conditions by way of the high court. Since appeals to Stockholm were costly and therefore rare, the solution must have seemed optimal for the bourgeoisie elite. Hiring a lawyer both in Riga and in Stockholm would not have made sense unless the interest was considerable. Most probably, appeals were discouraged also because appellants could not be certain about the Swedish judges' knowledge of Livonian law.

The available material sets its limits. No unbroken series of court protocols exist for any of the courts above. Many case files dossiers are lacking, and in addition to this, many dossiers contain only a small amount of material. Although the minutes for certain years clearly refer to documental material not exposed *in verbis* in the minutes (referring to the written letter of charge or a witness hearing, for instance, with the formula *vide acta*), most of the time the lack of dossiers does not seem to be a problem. Many of the cases are relatively simple and not lawyer-driven, thus not likely to have produced written statements that could have been placed in dossiers. Witness hearings are almost always written directly into the minutes.

1.3 Previous Research

The picture of Livonia's Swedish period has always been sensitive to politics. According to Alexander Loit, the historiography has experienced three major phases. An understanding of *Schweden-Zeit* as a "good old time" grew out of the

popular conception "genuinely and without literary models." In the nineteenth century, a German-Baltic history conception adopted a positive attitude towards the Swedish Protestantism, but was otherwise critical. According to the German-Baltic history conception, the Swedish period had been particularly harmful to the local administration. Loit sees this in connection to the Russification politics of the nineteenth century, arguing that the German-Baltic historians were anxious to show how independent the Baltic provinces had traditionally been. The third history conception, according to Loit, was typical of the 1920s and 1930s. During this first independence period of the Baltic republics, historians looked at the Swedish period in positive terms, although not uncritically. Swedes had otherwise been good to the Baltic provinces, but the position of the peasants had changed for the worse.[29]

The legal historical literature on Livonia roughly follows the trends that Loit has sketched with general history in mind, but the legal historiography would be better divided into two periods. The first period would encompass the nineteenth century, which amounted to a virtual golden era of Baltic legal history. The local legal historians, all of German Baltic descent, followed the development in German universities closely. Most of them had at least at some point studied in these universities and had come under the influence of the German historical school from early on.

Adherents of the German historical school,[30] most Baltic legal scholars were per definition legal historians, as for instance Friedrich Georg von Bunge (1802–1897). His towering figure dominates all discussions on Baltic legal history of the 1800s. After a career in the city administration of Dorpat as its legal official, *Syndicus,* Bunge devoted himself full time to academic life as the professor of legal history at the Jurjew University (later to be renamed the University of Tartu).[31] Baltic laws had not been the object of scholarly studies before Bunge's academic teacher C.C. Dabelow started pioneering the field in

29 Alexander Loit, "'Die alte gute Schwedenzeit' und ihre historische Bedeutung für das Baltikum," in Carsten Goehrke and Jürgen von Ungern-Sternberg (eds.), *Die baltischen Staaten im Schnittpunkt der Entwicklungen: Vergangenheit und Gegenwart* (Basel: Schwabe & Co AG, 2002), 29, 75–90.

30 Marju Luts, *Juhuslik ja isamaaline: F.G. v. Bunge provintsiaalõigusteadus* (Tartu: Tartu Ülikool, 2000), 185–191, 258. Luts shows that many Baltic nineteenth-century legal scholars have been branded "Savignyan" or proponents of the historical school, even though some (like J.L. Müthel and J.P.G. Ewers) shared little or none of Savigny's basic claims. Even Bunge himself did not, according to Luts, follow Savigny all the way. The process of the Bunge's Savigny reception was much more complex.

31 On Bunge's life and career, see Peeter Järvelaid, "Friedrich Georg von Bunge (1802–1897)," *Eesti Jurist* 2 (1992), 148–151; Peeter Järvelaid, "Bunge sajand ja sajand Bungeta I and II,"

the early years of the nineteenth century. Following Dabelow's work, Bunge established himself as the founder of "provincial legal scholarship," defining the legal order in the Baltic Provinces as a separate entity.[32] The provincial laws were, before the work of these legal historians, not much more than a maze of elements stemming from many historical periods.

However, the nineteenth-century German-Baltic legal history can hardly be described as critical towards the Swedish period. More than politically conscious, the nineteenth-century legal history of Bunge and his colleagues was positivist, avoiding stands either for or against past political power-holders. Bunge's stance towards the Swedish legal inheritance was a practical one: he followed the opinion of R.J.M. Helmersen, a scholarly active district court judge. According to Helmersen's practical opinion, Swedish laws should be followed insofar as they had acquired the quality of customary law through legal practice.[33] The attitude, instead of being measurable in terms of being positive or negative, was rather just practical.

The second period of legal history in the Baltic coincides with the first independence period of the Baltic States. The Estonians Adolf Perandi, Jüri Uluots, and Leo Leesment were all noteworthy legal historians who produced lasting results. Perandi's work on the peasant courts has greatly inspired some of the

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Kleio: Ajaloo Ajakiri 4:22 (1997), 49–51; and the articles in Tiit Rosenberg and Marju Luts (eds.), *Tundmatu Friedrich Georg von Bunge* (Tartu: Õpetatud Eesti Selts, 2006).

32 Luts, *Juhuslik ja isamaaline*, 278. There were in fact nine different legal orders in the Baltic provinces: separate legal orders for nobility, towns, and peasants in Livonia, Estonia, and Courland. Bunge produced a huge amount of literature, which can be divided into purely legal historical works and those with clearly contemporary interest. Only a small fraction can be mentioned here. The historical production could further be divided into source publications and actual research. Bunge's *Altlivlands Rechtsbücher* contain the law compilation from the *Ordenzeit*, another work entails the Russian statutes given for the Baltic Sea provinces, yet another one the sources of the Tallinn town law. Bunge's actual legal historical research comprises works on all possible aspects of Baltic legal history, such as the influence of Roman law in the Russian period, the development of Tallinn city laws, and general works on the legal history of the Baltic provinces. Bunge also produced works on general history, such as on the history of the town of Riga and the Baltic estates. See Luts, *Juhuslik ja isamaaline*, for a good bibliography of Bunge's *oeuvre*. Besides source publications, Oswald Schmidt produced a general presentation of the legal history of Livonia, Estonia, and Courland. Oswald Schmidt, *Rechtsgeschichte Liv-, Est- und Curlands* (Jurjew: Karow, 1895).

33 Luts, *Juhuslik ja isamaaline*, 267; R.J.M. Helmersen, "Beantwortung der Frage: auf welchen Grunde beruht und wie weit geht theoretisch die Anwendbarkeit des Schwedischen Rechts für das Livländische Landrecht," in R.J.M. von Helmersen, *Abhandlungen aus dem Gebiete des Livländischen Adelsrechts*, 1. Lief. (Dorpat: Schümann, 1832), 1–20.

passages of this book,[34] and Leesment's archival study of the German Aulic Court and the Imperial Chamber Court is extremely interesting.[35] Uluots, professor of legal history at Tartu University, wrote his major works on Estonian agrarian history;[36] he is, however, perhaps better known to the wider public as the last foreign minister of the first independence era. Much of the legal history of the first independence period thus clearly follows the nationalistic, peasant-oriented trend.

The Soviet period produced little noteworthy legal historiography. Although a new school of legal history has emerged in the second independence period, contemporary Estonian and Latvian legal historians have mostly concentrated on the nineteenth and twentieth centuries.

The twentieth century, however, did produce some noteworthy literature in the field of Livonian legal history outside the borders of the Soviet Union. The Swede Ragnar Liljedahl's *Svensk förvaltning i Livland 1617–1634* (1933)[37] is an older work on the administrative history of Swedish Livonia, but contains much useful information. Anna Christine Meurling's *Svensk domstolsförvaltning i Livland 1634–1700* (1967)[38] concentrates on the judicial administration and is therefore even more relevant for this work. However, neither of the Swedish authors was able to use the archival sources behind the iron curtain and therefore needed to rely on whatever material was available to them. Hermann Blaese's work on the reception of Roman law is, although in many ways outdated, still an important reference for anyone interested in the influence of *ius commune* or *gemeines Recht*, also in the Swedish era.[39]

Of the more recent books, four German works are worth mentioning. Ralph Tuchtenhagen's *Zentralstaat und Provinz im frühneuzeitlichen Nordosteuropa*[40] is important background literature for any more detailed study on Livonian

34 See Adolf Perandi, "Märkmeid talurahva õigusliku ja majandusliku seisundi kohta Liivimaal Rootsi valitsusaja alul," *Ajalooline Ajakiri* 4 (1931), 193–213.

35 See Leo Leesment, *Über die livländischen Gerichtssachen im Reichskammergericht und im Reichshofrat* (Tartu: C. Mattiesen, 1929).

36 See Jüri Uluots, *Grundzüge der Agrargeschichte Estlands* (Tartu: Akadeemiline Kooperatiiv, 1935).

37 Liljedahl, *Svensk förvaltning i Livland*.

38 Anna Christine Meurling, *Svensk domstolsförvaltning i Livland 1634–1700* (Lund: Institutet för rättshistorisk forskning, 1967).

39 Hermann Blaese, *Bedeutung und Geltung des römischen Privatrechts in den baltischen Gebieten* (Leipzig: Verlag von Theodor Weicher, 1936).

40 Ralph Tuchtenhagen, *Zentralstaat und Provinz im frühneuzeitlichen Nordosteuropa* (Wiesbaden: Harrassowitz, 2008).

legal or political history, although the legal history of the Swedish seventeenth century, understandably so, only occupies a minor role in Tuchtenhagen's work. Herbert Küpper's *Einführung in die Rechtsgeschichte Osteuropas* contains only a few pages on the Swedish period of the Baltic provinces.[41] Much the same can be said about Dimitri Steinke's study on the history of Baltic private law.[42]

The only monographic study on a particular theme of Livonian legal history of recent years is, as far as I know, Thomas Hoffmann's book on David Hilchen's law proposal of 1599.[43] Although Hoffmann's research, naturally enough, ends before the Swedish period, he provides important background knowledge for anyone interested in the legal history of the Swedish period in the Livonian history. Hilchen's proposal did, after all, embody much of the law such as it stood at the height of the Polish period, and thus probably also at the beginning of the Swedish period a couple of decades later. Hoffmann's research has therefore been more than helpful. To sum up, no larger legal historical work exists on the Swedish seventeenth century. This book aims to remedy part of that lacuna.

In addition to the legal historical literature, a much larger body of historiography exists from the nineteenth century onwards on many other fields of history. Works on economic, political, and ecclesiastical history have been particularly helpful for the understanding of Livonia's legal past. These include older works such as Leonid Arbusow's *Grundriss der Geschichte Liv-, Esth- und Curlands* (1890) and *Die Einführung der Reformation in Liv-, Est- und Curland* (1921), Sture Arnell's *Die Auflösung des Livländischen Ordenstaates: Das schwedische Eingreifen und die Heirat Herzog Johans von Finnland 1558–1562* (1937), and Reinhard Wittram's *Baltische Geschichte* (1954), and newer ones, for instance *Deutsche Geschichte im Osten Europas: Baltische Länder* (1994, ed. Gert von Pistohlkors), Edgars Dunsdorfs's *The Livonian Estates of Axel Oxenstierna* (1981), Svante Jakobsson's *Överhetens påbud och förbud: Skildringar av förhållandena i svenska provinsen Livland under 1600-talets fyra sista årtionden* (1990), Jürgen Heyde's *Bauer, Gutshof und Königsmacht: die estnischen Bauern in Livland unter polnischer und schwedischer Herrschaft 1561–1650* (2000), and *Schwedische Ostseeprovinzen Estland und Livland im 16.–18. Jahrhundert* (ed. Alexander Loit

41 Herbert Küpper, *Einführung in die Rechtsgeschichte Osteuropas* (Frankfurt am Main: Peter Lang, 2005).

42 Dimitri Steinke, *Die Zivilrechtsordnungen des Baltikums unter dem Einfluss ausländischer, insbesondere deutscher Rechtsquellen* (Göttingen: Universitätsverlag Osnabrück, 2009).

43 Thomas Hoffmann, *Der Landrechtsentwurf David Hilchens von 1599* (Frankfurt am Main: Peter Lang, 2007).

and Helmut Piirimäe; 1993).[44] I have used some chronicles[45] too, including those by Balthasar Russow,[46] Johannes Messenius,[47] and Thomas Hiärne.[48]

1.4 The Structure of the Book

To understand the Livonian legal development after the 1630s onwards, some background in the earlier history of the Livonian and Swedish legal orders before the Swedish conquest of Livonia is indispensable. Chapter 2 provides this. The purpose of the chapter is to identify the essential characteristics of both of these legal orders not only as compared to each other, but also within a broader European context. European *ius commune* and especially its German variant, *gemeines Recht*, will act as a *tertium comparationis* against which the characteristics of Livonian and Swedish law before the conquest will be assessed. My interests here are, broadly speaking, about legal culture and legal communication. I will thus not deal primarily with "black-letter" law, but with

44 Leonid Arbusow, *Grundriss der Geschichte Liv-, Esth- und Curlands* (Mitau: E. Behre's Verlag, 1890); Leonid Arbusow, *Die Einführung der Reformation in Liv-, Est- und Curland* (Leipzig: Vermittlundsverlag von M. Heinsius Nachfolger, 1921); Sture Arnell, *Die Auflösung des Livländischen Ordenstaates: Das schwedische Eingreifen und die Heirat Herzog Johans von Finnland 1558–1562* (Lund: A.-B. Ph. Lindstedts Univ.-Bokhandel, 1937); Reinhard Wittram, *Baltische Geschichte: Die Ostseelande Livland, Estland, Kurland 1180–1918* (München: Oldenbourg, 1954); Gert von Pistohlkors (ed.), *Deutsche Geschichte im Osten Europas: Baltische Länder* (Berlin: Siedler Verlag, 1994); Edgars Dunsdorfs, *The Livonian Estates of Axel Oxenstierna* (Stockholm: Almqvist & Wiksell International, 1981); Svante Jakobsson, *Överhetens påbud och förbud: Skildringar av förhållandena i svenska provinsen Livland under 1600-talets fyra sista årtionden* (Stockholm: Almqvist & Wiksell, 1990); Jürgen Heyde, *Bauer, Gutshof und Königsmacht: Die estnischen Bauern in Livland unter polnischer und schwedischer Herrschaft 1561–1650* (Köln: Böhlau, 2000); and Alexander Loit and Helmut Piirimäe (eds.), *Schwedische Ostseeprovinzen Estland und Livland im 16.–18. Jahrhundert* (Stockholm: Almqvist & Wiksell International, 1993).

45 On the Livonian seventeenth-century chronicles, see Lutz Spelge, "Ruβlandbild der livländischen Chroniken," in Norbert Angermann (ed.), *Deutschland – Livland – Russland: Ihre Beziehungen vom 15. bis zum 17. Jahrhundert* (Lüneburg: Verlag Nordostdeuscher Kulturwerk, 1988), 175–204.

46 Balthasar Russow, *Chronica der Prouintz Lyfflandt: Deel 1–3* (Rostock: August Ferber, 1578).

47 Johannes Messenius, *Suomen, Liivinmaa ja Kuurinmaan vaiheita: sekä tuntemattoman tekijän Suomen kronikka*, Martti Linna, Jorma Lagerstedt and Erkki Palmén (trans.) (Helsinki: Suomalaisen Kirjallisuuden Seura, 1988).

48 Thomas Hiärn, *Ehst-, Lyf- und Lettländischer Geschichte* (Riga: Eduard Frantzen, 1835).

wider phenomena such as law studies, judicial structure, openness to legal transfers, and the effect that the influences from European centres exercised on the two peripheries, Sweden and Livonia. Legal culture in this meaning will inevitably need to be considered within a larger social and political frame.

Chapter 3 is about the reorganisation of the Livonian judiciary under the Swedish rule and the subsequent development of the Livonian courts. One of the first things that the Swedes did after the conquest was to organise the Livonian judiciary along the Swedish lines. The grafting of the Swedish judicial system onto the Baltic Sea province seems to be, at first sight, the most obvious of the Swedish legal transfers. The *Landgerichtsordnungen* of 1630 and 1632 established an essentially Swedish system of lower courts in the countryside, and councils and lower courts (*Kemnergerichte*) in towns. The top of provincial judicial hierarchy was the Dorpat High Court, which received a statute of its own (*Hofgerichtsordnung*) in 1632. Legal transfers, however, tend to change during the process of transfer. Despite the apparent similarities to their Swedish counterparts, the Livonian courts turned out to be quite different in practice. Whereas laymen enjoyed a high status in the Swedish courts, in Livonia they played no role in the *Landgerichten* staffed by legal professionals. As will also be shown, the Livonian lower courts were primarily courts of the nobility. Peasants rarely ended up in the lower courts, except when the other party of a lawsuit was noble or when a peasant was charged with a serious crime. Traditional peasant courts operating in manor houses dealt with all other peasant cases. This is a clear example of how a different social structure can cause a legal institution, in this case a whole judicial structure, to look very different from the original after the transfer process.

Chapter 4 deals with legal procedure. I will start with the civil procedure and inquire into the way the *gemeines Recht* procedure was received into Livonian law. This is the technical side of the law of procedure, and it is interesting in its own right, because the way civil procedure is constructed tells a great deal about lawyers' activities. Professional legal help was first and primarily, although not exclusively, used in civil cases. Criminal procedure is interesting in another way, because its development reflects the involvement of central power through the activity of the judiciary. This activity, in turn, will be approached with the help of a conceptual apparatus of inquisitorial and accusatorial modes of procedure. The functions of official prosecutors merit special attention.

Chapter 5 focuses on legal sources. Again, the approach is comparative *vis-à-vis* Swedish law and *ius commune*. Since neither Swedish law nor European law in general remained stable throughout the 80 years of effective Swedish

rule in Livonia, their development needs to be appropriately addressed as well. As for Livonia, it will be seen that the reception of *gemeines Recht* retained its position and even advanced forcefully during the Swedish rule because of the close cultural links to the German legal world. Swedish written law never managed to build a strong bridgehead in Livonia, with a few exceptions that will be discussed in detail.

Chapter 6 concludes the findings of the previous chapters.

CHAPTER 2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33 Dorpat Council 1619 (NAE 995.1.252).

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

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

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

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

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

2.1.3 *Criminal Law in Dorpat in the Polish Period*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56 On the article procedure, see Chapter 4.2 below.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2 Livonian Law and the Legal Sources: The European Context

2.2.1 *The Feudal Law*

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

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

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

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

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

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

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

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

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

79 Bunge, *Ueber den Sachsenspiegel*.

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

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

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

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

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

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

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

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

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

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

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

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

2.2.2 *The Urban Law in Livonia*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

95 Bunge, *Einleitung*, 144–154.

96 Bunge, *Einleitung*, 185–187.

97 Bunge, *Einleitung*, 154–158.

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

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

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

2.2.3 *The Manorial Law*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

109 Perandi, *Oberlandgericht*, 151–152.

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

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

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

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

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

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

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

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

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

2.2.4 *The Reception of Ius Commune in Livonia*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

130 See Bunge, *Einleitung*, 178–179.

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

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

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

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

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

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

135 *Livländische Güterurkunden*, I, 494.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

144 Hoffmann, *Der Landrechtsentwurf*, 170.

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

2.2.5 *The Royal Law*

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

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

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

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

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

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

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

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

149 Bunge, *Einleitung*, 89.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

159 Printed in Dogiel, nr. 187.

160 Staemmler, *Preußen und Livland*, 80.

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

162 Hoffmann, *Der Landrechtsentwurf*, 169.

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

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

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

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

164 Heyde, "Adelspolitik," 557.

165 Heyde, "Adelspolitik," 551–552.

166 Hoffmann, *Der Landrechtsentwurf*, 169.

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

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

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

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

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

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

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

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

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

2.3 Swedish Law before the Conquest of Livonia

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

177 Norseng, "Law Codes," 146–147.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

189 Aalto, *Kirkko ja kruunu siveellisyyden vartijoina.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

208 Jokipii, II, 53.

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

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

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

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

213 Jokipii, II, 58.

214 Jokipii, II, 52–53.

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

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

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

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

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

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

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

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

219 See Ferm, "Feodalism i Sverige?."

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

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

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

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

2.3.1 *The Influence of Ius Commune in Sweden*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

234 Munktell, *Det svenska rättsarvet*, 172.

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

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

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

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

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

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

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

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

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

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

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

241 Frohnert 532.

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

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

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

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

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

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

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

2.4 Summary

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

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

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

248 Thomson, *I stocken*, 395.

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

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

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

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

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

CHAPTER 3

The Reorganisation of the Livonian Judiciary under the Swedish Rule

3.1 The Alternatives: Colonial Systems and Their Judicial Organisations

Recent research has described early modern states in different ways.[1] Referring to territorial aspects of the state, historians use the term "composite state." The term appears in connection to federative and confederative polities since Pufendorf, but was coined in its modern meaning by H.G. Koenigsberger.[2] Historians see the composite state as a way of combining some of the huge number of independent or quasi-independent medieval polities. Lacking the strength to unify completely all of the territories, early modern princes resorted to the composite state, under the umbrella of which the different territories were allowed to retain differing degrees of independence.[3]

For Koenigsberger, "most states in the early modern period were composite states, including more than one country under the sovereignty of one ruler." Composite states came in two categories: those whose parts were separated by other states or by the sea (such as the Spanish Habsburg monarchy or Brandenburg-Prussia), and contiguous composite states (such as England and Wales, or Poland and Lithuania).[4] J.H. Elliott then developed the idea of "composite monarchies" (as he called them) further, exploring in detail the reasons for their birth and survival, and the different modes in which composite

1 A summary of the different theories of Max Weber, Otto Hintze, Charles Tilly, and some others is Harald Gustafsson, "The Conglomerate State: A Perspective on State Formation in Early Modern Europe," *Scandinavian Studies in History* 23 (1998), 189–210.

2 H.G. Koenigsberger, "Monarchies and Parliaments in Early Modern Europe: *dominium regale* or *dominium politicum et regale*," *Theory and Society* 5 (1978), 191–217; H.G. Koenigsberger, "*Dominium Regale* or *Dominium Politicum et Regale*," in H.G. Koenigsberger, *Politicians and Virtuosi: Essays in Early Modern History* (London: The Hambledon Press, 1986).

3 See Daniel H. Nexon, *The Struggle for Power in Early Modern Europe: Religious Conflict, Dynastic Empires & International Change* (Princeton: Princeton University Press, 2011), 70–71. See also, Hendrik Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* (Princeton: Princeton University Press, 1994); and Charles Tilly, *Coercion, Capital, and European States, AD 990–1992* (Cambridge: Blackwell, 1992); James Muldoon, *Empire and Order: The Concept of Empire, 800–1800* (New York: St. Martin's, 1999).

4 Koenigsberger, "Monarchies and Parliaments."

monarchies appeared in the early modern world. Elliott refers to the *derecho indiano* scholar Juan Solórzano y Pereira (1575–1655),[5] who in his *Política Indiana* (1658) divided newly acquired territories in two classes. In "accessory unions," the acquired territory became legally a part of the acquiring state, the laws of which now governed the new lands as well. In unions *aeque principaliter*, the constituent kingdoms continued as separate entities, with their own laws and privileges.[6] "The greatest advantage," says Elliott, "of union *aeque principaliter* was that by ensuring the survival of their customary laws and institutions it made more palatable to the inhabitants the kind of transfer of territory that was inherent in the international dynastic game."[7]

Composite states were often layered, in that their different parts consisted themselves of several territories, held together by not much else than a common ruler: "Each territory – or rather the social elite of each territory – had its distinctive relation to the ruler, its privileges, its own law code, its administrative system staffed by that same local elite, and often its own estate assembly."[8] All composite states share elements of indirect rule, in which the local authorities enjoy some degree of autonomy over the local affairs.[9] Conceptually, then, composite states differ little from empires, which have been defined as "large political units, expansionist or with a memory of power extended over space, polities that maintain distinction and hierarchy as they incorporate people."[10] Empires do not need to have an emperor.[11] In everyday terminology, the term "empire" may of course evoke the image of a large combination of territories, whereas a composite state can be small. The difference is vague nevertheless, and the two terms can well be used as synonyms.

Early modern empires or composite states were by nature expanding and thus often colonizing states. At first glance, Sweden's conquest of Livonia

5 On Juan Solórzano Pereira, see Enrique García Hernán, *Consejero de ambos mundos: Vida y obra de Juan de Solórzano Pereira (1575–1655)* (Madrid: Fundación Mapfre, 2007).

6 Juan Solórzano Pereira, *Política Indiana* (Madrid, 1658), 4.19.37.

7 J.H. Elliott, "A Europe of Composite Monarchs," *Past & Present* 137 (1992), 48–71, 53.

8 Gustafsson, "The Conglomerate State," 194. Gustafsson uses the term "conglomerate" states, without referring to Koenigsberger or Elliott for some reason. On Sweden as a conglomerate state, see also Tuchtenhagen, *Zentralstaat und Provinz*, 440–441.

9 Muldoon, *Empire and Order*, 119; Nexon, *The Struggle for Power in Early Modern* Europe, 71–72.

10 Burbank and Cooper, *Empires in World History*, 8.

11 The leading theoreticians of the empire, Jane Burbank and Frederick Cooper, do not mention the emperor in the definition of the empire, and they have logically no problem in treating Republican Rome, the United States, and Communist Russia as empires. See Burbank and Cooper, *Empires in World History*, 8–11, 24–28, 251–271, 393–398.

differs from what is traditionally conceived of as colonization. Spain's conquest of Central and South America, England's conquest of its North American colonies, or Portugal's conquest of Brazil or its Asian possessions – the "classic" cases of colonization – can be characterized as professional legal orders assuming domination over traditional, non-professional legal orders.[12] As regards all of these cases, legal domination was very much in conjunction with a military suppression and what is more, with more or less massive founding of colonies – as the name "colonization" implies. The medieval personality principle was followed: the colonizers took their law with them, just as they took their language and culture.[13] The case of Swedish Livonia was demographically different. No large groups of Swedish peasants or town-dwellers immigrated to the conquered territories. The most visible group of Swedes in Livonia were high aristocrats, such as Jacob de la Gardie and Axel Oxenstierna, who were enfeoffed large estates as rewards for their military services, and bureaucrats who came to occupy certain key positions in the administration.

The early modern states – whether called composite states or empires – aimed at growth in two ways: structurally and territorially. The logic of growth led the early modern states to territorial growth, although this was by no means an early modern invention. The early modern state needed resources, which before industrialism meant agrarian land, urban economies, and other humane and material resources. Territorial conquests were an efficient way of achieving these resources.[14] Structural growth meant that the early modern state aimed at reducing, within its traditional boundaries, all competing powers such as independent cities, feudal enclaves, and other centres of power.[15]

Seventeenth-century Sweden was typically such a composite state geared at both structural and territorial expansion, with possessions not only in the region inhabited by speakers of the Swedish language, but also in Finland, the

12 The terminology is introduced in Ugo Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal System," *The American Journal of Comparative Law* 45 (1997), 5–44.

13 Medieval German laws, such as the Mirror of Saxony and the law of Magdeburg are the paradigmatic cases in point. See Ernst Eichler and Heiner Lück (eds.), *Rechts- und Sprachtransfer in Mittel- und Ostmitteleuropa: Sachsenspiegel und Magdeburger Recht* (Berlin: Walter de Gruyter, 2008).

14 See Tuchtenhagen, *Zentralstaat und Provinz*, 440.

15 Wolfgang Reinhard and Anette Völker-Rasor use the German term "deepening" ("*Verdichtung*") of the early modern state to describe this phenomenon. Wolfgang Reinhard, "Das Wachstum der Staatsgewalt: Historische Reflexionen," *Staat* 28 (1992), 59–75; Anette Völker-Rasor, "Nach 1648: Verdichtung und Herrschaft," in Anette Völker-Rasor (ed.), *Frühe Neuzeit* (München: Oldenbourg, 2000), 35–52.

Baltic area, and Germany. The basic composition of the Swedish state thus did not differ essentially from other composite states of the early modern period, such as France, Spain, or England. Each and every time a European state managed to add new territories to the already existing conglomerate, either by war or by inheritance, the conditions of addition were separately negotiated and decided. Complete incorporation was an exception rather than the rule, and the annexed territory was usually allowed to keep its constitutional arrangement, general law, judicial system, and church organization.[16]

When observed as composite states, the difference between colonial powers and other early modern states diminishes if not disappears. As state constructions, England, Spain, and Portugal did not fundamentally differ from Sweden, Denmark, and Russia. They all aimed at both structural and territorial growth, some with greater success than others. In all these countries, structural and territorial growth was intertwined. All of them were composite states in the way defined by Koenigsberger and Elliott. Just as Elliott explained, composite states differed as to the extent and the ways the constituent parts of the monarchy were integrated into the realm. The dividing line was not, as we can conclude reading Solórzano Pereira, whether the state was composed of a European monarchy and its overseas colonies, or of culturally and politically distinct European polities.

All early modern powers aiming at territorial growth had to take a stand on a series of questions. Economy, church, defence, and administration all needed to be arranged. The legal question was among the most urgent, because it had to do with pacifying the conquered lands. A well-functioning military was needed to keep the outer enemies at bay, but a well-functioning legal system was just as necessary to keep peace within the borders of the territory. Arranging law and the legal system led to a host of other questions. What law was to be followed, which legal sources to be used? How were appeals to be organised: within the conquered lands only or all the way to the mother country? Who were going to be the judges: learned or unlearned, local or imported? Was extrajudicial conflict-solving to be tolerated and to what extent?

Spanish America is a perfect example of the difficulties that geography could cause. It took about six weeks for a ship to reach America from Spain, which obviously made it difficult to administer the region efficiently. The Spanish, however, developed a rather efficient means of organizing law and administration in their colonies. One of the central instruments of governance was statutory law. As time passed and more legislation was issued for the Indies specifically, Castilian statutes increasingly became a subsidiary body

16 Gustafsson, "The Conglomerate State," 203.

of law, retreating into the background. Spanish colonial law, *derecho indiano*, was the "compound of legal rules applicable in the Indies, that is, in the American, Asian and Oceanic territories dominated by Spain."[17] Castilian law was used whenever *derecho indiano* did not provide the answer to a legal problem.[18]

The crown with its Council of the Indies steered the development of the *derecho indiano* rather effectively not only by employing the most modern legislative technique effectively, but by other means as well. Richard Ross has pointed out how the crown constantly kept the communication channels between Madrid and the overseas colonies open. Appeals to the Council of the Indies were encouraged and taken advantage of, and the systems of visitation and *residencia* allowed the key officials' activities to be supervised.[19] Both of the institutions had their origin in medieval canon law, but were used particularly effectively in Hispanic America. Visitations were more or less regular inspections effected upon any government official or governmental body, and

17 The *Real Pragmática* was the most ceremonial of all statute types that the Crown issued, but they were seldom issued for America. Most of the significant pieces of legislation fell into the category of *Real Provisión*, which followed the medieval tradition of royal legislation. Numerically most of the new statutes were, however, of the type *Real Cédula* or *Real Carta*, which mostly handled individual cases and were addressed to individual authorities or people. *Ordenanzas* and *Instrucciones* were, then, statutes largely handling entities of problems.

Spanish colonial law can then be divided into a. norms specifically created for the Indies (*derecho indiano propiamente tal o municipal*); b. Castilian law (*derecho castellano*), which was used if "proper *derecho indiano*" did contain the normative solution needed; and c. Indian law (*derecho indígena*), or the law of the aboriginals. "*[E]l conjunto de reglas jurídicas aplicables en Indias, o sea, los territorios de América, Asia y Oceanía dominados por España*." Antonio Dougnac Rodríguez, *Manual de historia del derecho indiano* (México D.F.: Universidad Nacional Autónoma de México, 1994), 11.

18 Ricardo Zorraquín Becú, "Hacia una definición del derecho indiano," *Revista de Historia del Derecho* 22 (1994), 405–417, 407. Ricardo Zorraquín Becú, one of the grand old men of Spanish colonial law, defines *derecho indiano* more in detail as "a system of law, doctrines, and customs, created or accepted by the Castilian kings, in order to organize the spiritual or secular government of the Hispanic New World, regulate the condition of its inhabitants, direct the navigation and commerce, and, above all, ensure the incorporation of the Indians to the Catholic faith." For the complicated relation between the notions *ius commune* and *ius proprium*, see Guzmán Brito, "Historia de las nociones de 'Derecho Común' y 'Derecho Propio,'" 224–225.

19 Richard Ross, "Legal Communication and Imperial Governance: British North America and Spanish America Compared," in Michael Grossberg and Christopher Tomlins (eds.), *The Cambridge History of Law in America, Volume 1: Early America (1580–1815)* (New York: Cambridge University Press, 2008), 104–143.

every major official was subject to a *residencia* procedure at the end of his period of office. In connection with the *residencia*, the local subjects had a right to issue complaints against the official. Both visitation and *residencia* could lead to legal measures against the officials.

The production of statute law also remained in the hands of the central administration, although because of the vastness of the Spanish American territories a certain degree of local administration was inevitable. Thus, practically all levels of administration also issued legislation. Viceroys and *audiencias* could issue statutes of general nature as representatives of the crown. Lower level administrative authorities – general-captains, governors, and district and municipal authorities – issued their own statutes, which were subject to the acceptance of the higher administrative organs. Therefore, *derecho indiano* inevitably experienced certain local differentiation over time.[20] In spite of the production of local legislation and the ensuing differentiation of Spanish colonial law, the Spanish crown thus created mechanisms to ensure that legal communication followed smoothly from the colonies to Madrid, as Richard Ross has stressed. Communication was not an end in itself; instead, it made effective administrative control and legal regulation possible.

The situation was different in North America. Besides a kind of police regulation, which started to develop from early on mainly in the colonies themselves,[21] the law developed on the basis of the English common law doctrines from England. This was, however, not the case right at the beginning of the colonization. William Nelson has observed that in Virginia, the "rulers sought to accomplish their main chore, which was to coerce labor out of the local inhabitants, through intimidation and brutality, while New England's leaders strove to create a religious utopia by recourse to the law of God, not the law of England." These norms took the form of statutory law, such as Dale's Code of Virginia (1611), and in addition, English customary law was also used. In the initial period of the colonization, however, English common law was not on the agenda.[22] Common law with all its intricacies was simply too sophisticated a tool for directing the new colonies effectively and, what is more, it could not

20 Horst Pietschmann, *Die staatliche Organisation des kolonialen Iberoamerika* (Stuttgart: Klett-Cotta, 2008), 106–107.

21 I have described this elsewhere, see Heikki Pihlajamäki, "The Westernization of Police Regulatio: Spanish and British Colonial Laws Compared," in Thomas Duve and Heikki Pihlajamäki (eds.), *New Horizons of Spanish Colonial Law: Contributions to Transnational Early Modern Legal History* (Frankfurt am Main: Max Planck Institute for European Legal History, 2015), 97–124.

22 William E. Nelson, *The Common Law in Colonial America: The Chesapeake and New England, 1607–1660* (New York: Oxford University Press, 2008), 16.

function without lawyers. Common law might have been, as Lawrence Friedman puts it, "somehow the norm; colonial differences, then, were examples of some sort of rude primitivity."[23]

The common law arrived as soon as lawyers started arriving. They often had legal education and continued fomenting their need of legal information reading English treatises.[24] The legal orders of the colonies were also at the other end of the string held by the Privy Council in London, although, as Richard Ross has observed, the Council's decisions were way too few to control the legal life in the colonies effectively. The Privy Council took, for one thing, only relatively few cases from the colonies for consideration. In this respect, the difference to the Council of the Indies is clear.[25]

Although in principle the overseas colonizing experiences thus did not differ from the geographical expansions in Europe or elsewhere, differences abound as to the ways colonized lands were governed. In addition to the points raised above, recent research has emphasized the importance of not only the circumstances of the conquered areas but also the legal and political models of the mother country. The case of France has been highlighted as one in which the complex nature of the legal and political authorities in the colonizing state reflected on the colonial state building. According to Helen Dewar, "colonial state building in the early modern period is usually seen in terms of an actively engaged crown of the delegation of power and privileges to private enterprise, either a company or an individual proprietor." The "government" overseas, however, far from forming a neat unity, consisted of "company representatives, agents to the viceroy, and outside traders [who] came armed with knowledge of customary privileges, legal instruments, and the labyrinthine justice system in France." For instance, the Parliament of Brittany did its best to protect the trading privileges of the Breton settlers to New France against the crown's attempt to establish exclusive privileges for other parties. The Parliament had a means of doing this, because according to the French law sovereign courts (which the provincial *parlaments* were) had to register royal letters patents before they could enter into force.[26] The legal pluralism of France was thus doubled in the colonies.

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23 Lawrence M. Friedman, *A History of American Law* (New York: Touchstone, 1985), 34.

24 See Mary Sarah Bilder, "The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture," *The Yale Journal of Law and Humanities* 11 (1999), 47–117.

25 Ross, "Legal Communication."

26 Helen Dewar, "Litigating Empire: The Role of French Courts in Establishing Colonial Sovereignties," in Lauren Benton and Richard J. Ross (eds.), *Legal Pluralism and Empires, 1500–1800* (New York: New York University Press, 2013), 49–79.

The solutions of colonial powers thus differed from each other considerably. Their starting points were different, and so were, at least partly, their goals and means of achieving those goals. They ranged from Spain's relatively close integration of the colonies into the administrative and legal structure of the mother country to England's rather loose leash on the North American colonies.

How does Sweden fit into the picture of these different models? The largest difference between Spain and England on the one hand, and Sweden on the other, was perhaps not only differences *vis-à-vis* the distances to the new territories. Instead, an even greater difference consisted of the fact that the new regions falling into the hands of the Swedish conquerors already had legal systems comparable, and indeed in many ways superior according to early modern standards, to that of Sweden proper. For Spain and England the crucial question was to what extent they should let their legal orders "exported" overseas diverge from the law of the motherlands, and should they perhaps actively foster such development. The question for Sweden was, instead, how to deal with the local laws and lawyers, and to what extent should Sweden try to influence the laws of the new provinces.

Livonia was, however, not the first of Sweden's overseas conquests: some experience was already there. Sweden needed to tackle the same problems as the other expanding powers of the early modern period. The challenges that the Swedes faced differed, to be sure, from the ones major colonial powers such as England, Spain and Portugal encountered when attempting to assume control over their new possessions much farther away from the motherland than Livonia was from Sweden. Similarly, the lack of pluralism, as in the case of Sweden, was doubled. The Swedish crown obviously did not have to wrangle with the kind of complex legal pluralism of the French kind, although compared to Sweden proper Livonian law was clearly more pluralistic. Indeed, the Swedish crown had no easy task in implementing its policies in Livonia. Simply formulating those policies was a complex undertaking, in which the interests of the Swedish estates as well as those of the Livonian estates had to be considered and comprised. After the conquest, it had been far from self-evident which strategy the Swedes would adopt in relation to the conquered Livonia. Governor-General Johan Skytte favoured a thorough incorporation, whereas the King and his chancellor adopted a stance that could be called one of political realism, in other words, letting Livonia stay relatively loosely aligned to the rest of the realm.[27] Instead of irritating the Livonian estates, they probably thought it politically wise to let the Livonians stay aloof from the Swedish *rike*. The attitude showed in the way the structure of the Livonian Lutheran Church was

27 On the differing views of Skytte and Oxenstierna, see Rósen, *Historia och samhälle*.

allowed to develop along the lines of German models: instead of the Swedish-type episcopal chapters (*domkapitel*) with priests in charge, mixed superintendencies were established in Livonia.[28]

Once this policy was formulated and after some initial problems with the comital jurisdictions described above were solved, the crown's judicial and political authority was not continuously challenged in Livonia. The Swedish judicial landscape provided no similar host of alternative judicial instances or privileges, as in the French case, which would tend to be reproduced in the conquered lands.

Many models of incorporating annexed territories existed, even within Sweden itself, and they were flexibly used to meet different political needs. Finland, the eastern half of the realm, had belonged to Sweden as a fully integrated part since the Middle Ages. Finland thus shared the same legal and judicial system, and church organization, as Sweden proper. In 1645, Denmark ceded Oesel (Saaremaa), Gotland, Jämtland, Härjedalen, and Halland to Sweden (although at this stage Halland passed to Sweden as a surety only for a period of thirty years). A Swedish governor was appointed to rule over Oesel, which was otherwise allowed to maintain the relatively free position it had enjoyed under Denmark. The other regions were fully incorporated as parts of Sweden. The full incorporation brought Swedish law, administration, taxes, and church organization to the newly annexed provinces. In exchange, the estates of the incorporated provinces were given seats in the Swedish Diet. The fate of Scania, Blekinge, Bohuslän, and Halland (previously ceded to Sweden as a surety) was slightly different. After another victorious war against Denmark, Sweden annexed these territories in 1658. They were not, however, fully incorporated in that they got to keep their laws and privileges at first, although the local estates got their representation at the Diet immediately. Full integration only followed in 1683 as a consequence of another (from the Danish point of view) unsuccessful war, in which Denmark had attempted to gain back the lost provinces.[29] By the time the Danish territories came to be joined with Sweden, the new mother country had already had the chance to experiment with its Baltic and German possessions. Compared to the conquests from Denmark, the Baltic regions and the territories within the Holy Roman Empire were allowed considerably more leeway.

28 See Aleksi Lehtonen, *Die livländische Kirchenordnung des Johannes Gezelius* (Helsinki: Die Kirchengeschichtliche Gesellschaft Finnlands, 1931), 9–78.

29 Gustafsson, "Conglomerate States," 203.

3.2 Sweden's Other Overseas Possessions: Organizing the Judiciary in Estonia and the *Reich*

3.2.1 *The Duchy of Estonia*

The Livonian war (1558–1582) brought the Livonian Order State to an end. The southern parts fell to the Lithuanian-Polonian Confederation, and Sweden acquired the possession of the northern parts in 1561. After negotiations with the representatives of the Swedish crown, the powerful bourgeoisie of Tallinn, and the vassals of Harjumaa and Järvamaa transferred their loyalty from the German Knight Order to the Swedish King Erik XIV in June 1561. The King promised to uphold the old privileges and laws of the nobility. The possessory rights to their manors, together with criminal jurisdiction (*peinliche Gerichtsbarkeit*), were confirmed as well.[30] A governor (from 1674 onwards a governor-general) represented the Swedish crown in the province. The Estonian estates were not represented at the Swedish Diet, but the Estonian nobility convened instead at their own *Landtag*.

Until the beginning of the seventeenth century the law of the Duchy of Estonia remained based on its medieval sources. In other words, the law continued – as far as we know – based on the same premises as it had during the *Ordenstaat*. The oldest medieval collection of feudal law, which has relevance mainly in what later became the Duchy of Estonia, was the Feudal Law of Waldemar and Eric (*Das Waldemar-Erich'se Lehnrecht*). According to chronicles it was given by the Danish king Waldemar II and first put into writing by King Eric VI of Denmark in 1315. The contents of the law were heavily influenced by contemporary feudal law in Germany, which is understandable taking into consideration that the royal vassals came from Germany. The Feudal Law of Wiek-Oesel (*Das Wiek-Oeselsche Lehnrecht*) dates roughly to the mid-fourteenth century. Of its five books, three entail an adoption of the Saxon Mirror and the fifth an edition of the oldest Livonian feudal law. The fourth book contains the peasant law (*Livisches Bauernrecht*) probably originating from the time of Bishop Albert I of Riga (1198–1229).[31] As in Livonia, the influence of Roman-canon *ius commune* or *gemeines Recht* started at least around mid-sixteenth century in secular law, and much earlier in ecclesiastical court practice.[32] Roman law was customarily used as a subsidiary source whenever

30 Bunge, *Geschichtliche Uebersicht der Grundlage*, 33.

31 Friedrich Georg von Bunge, *Einleitung in die Geschichte der liv-, esth-, und curländische Rechtsgeschichte und Geschichte der Rechtsquellen* (Reval: Koppelson, 1849).

32 Juhan Liebe et al. (eds.), *Eesti rahva ajalugu: 4, Poola ja rootsi aeg, Põhjasõda* (Tartu: Loodus, 1932), 1031–1032.

the domestic failed to provide the necessary rule.[33] The privileges of the Estonian estates and towns were confirmed in the capitulation treaty of 1561 and after that by each new Swedish monarch.[34]

Similar to how the Polish conquerors in Livonia initiated David Hilchen's codification work, in Estonia the task was given to the Secretary of the Estonia Order of Knights, Moritz Brandis (ca. 1550–ca. 1604).[35] "The Knightly Laws of the Principate of Estonia" (*Die Ritterrechte des Fürstentums Estland*) of 1600 was a collection of the court practice of the various courts, both upper and lower, of the duchy. The collection had practical goals, and it probably became at least to some extent used in the courts.

However, after fifty years the need for a new collection had emerged. This time the Philipp Crusius,[36] judge at the Tallinn City Court, took over the job and produced the "Knightly and Feudal Law of the Duchy of Estonia" (*Des Herzogtums Esten Ritter- und Landrechte*) in 1650. The collection was based on practically all possible sources: the medieval feudal law, privileges from the Danish periods onwards, court practice of the Estonian Upper Court, and the Brandis Collection. Crusius built his collection also, much more so than Brandis had done, on the contemporary literature of *gemeines Recht.* The criminal law of the *Reich*, *Constitutio Criminalis Carolina*, figures in the sources as well. Crusius's work was meant to be confirmed by Queen Christina. She refused to do this, however, before she had the chance to compare the collection to the sources used. King Charles XII finally confirmed the collection as law in force, but only insofar as it was compatible with the privileges and the feudal law.[37]

As for the town law, Tallinn had adopted the law of Lübeck in 1248. The town had ever since developed *pari passu* with the law of the mother city, although with increasing influence from Hamburg. Even after the coming of the Swedes and at least until the end of the sixteenth century, Tallinn followed the legal developments of Lübeck closely, and the reforms of the mother town usually found their way to Tallinn law as well.[38] In addition to keeping up with Lübeck law, Tallinn was active in developing its own statutes as well, passing the

33 For examples of such cases from the years 1585 and 1587, see Bunge, *Geschichte des Gerichtswesens*.

34 Bunge, *Geschichte der Rechtsquellen*, 196–198.

35 On Moritz Brandis, see Johann Friedrich von Recke and Karl Eduard Napiersky, *Allgemeines Schriftsteller- und Gelehrten-Lexicon der Provinzen Livland, Esthland und Kurland*, Band 1, A–F (Mitau: Steffenhagen, 1827), 234–235.

36 On Philipp Crusius, see *Nordisk familjebok* (1911) at http://runeberg.org/nfbo/0065.html.

37 Bunge, *Geschichte der Rechtsquellen,* 221–225; Libe et al., *Eesti rahva ajalugu 4*, 1034–1036.

38 Bunge, *Geschichte der Rechtsquellen,* 225–229.

statutes on the upper courts (*Obergerichtsordnung*), procurators (*Procuratorenordnung*), and consistories (*Consistorialordnung*).[39]

The judiciary continued almost unchanged until the early seventeenth century as well. The district courts (*Landgerichte*) were in charge of the nobility's civil and criminal cases. The *Manngerichte* judged, among other things, border disputes, and handled the inspection of criminal cases of the lower estates (the actual adjucation pertaining to the *Landgericht*). The *Hakenrichter* was in charge of police cases.[40]

In the practice of district courts (*Landgericht*), the Swedish overlord thus made some efforts to unify the complex law of its new duchy. These efforts never, however, amounted to any "Swedification" of the law. Instead, the projects of both Brandis and especially Crusius probably contributed to the advancement of European *ius commune* in the region.

3.2.2 *The Territories in the German Reich*

As a result of the Thirty Years War and the Peace of Westphalia, Sweden acquired territories within the Holy Roman Empire of the German Nation. The Swedish kings became vassals of the emperor in the Duchies of Bremen-Verden and Vorpommern, the Principality of Rügen, the town and the Barony of Wismar, and the Cathedral Chapter of Hamburg. Queen Christina, only 21 years of age at the time, needed to organize the judiciary in these territories. Not only did Sweden's own interests as the new lord of the conquered territories compel her to that, but the provisions of the peace treaty obliged her as well. During the peace negotiations at Osnabrück, the Emperor had granted the Swedish crown a so-called appeals privilege (*privilegium de appellando*, *Appellationsprivilegium*). Within the Empire, several kinds of appeals privileges existed traditionally, limiting the appeals to the imperial courts (the Imperial Chamber Court and the Aulic Court).[41] The Swedish crown managed a full appeals privilege (*privilegium de non appellando illimitatum*) for itself, meaning that practically all appeals to the imperial courts were forbidden. The full privilege, however, entailed the responsibility of organizing a territorial high court to remedy the possibility of appeals which was lacking in

39 Friedrich Georg von Bunge, *Die Quellen des Revaler Stadtrechts* I (Reval: Franz Kluge, 1844), 250, 268, 287.

40 Bunge, *Geschichte des Gerichtswesens*, 168–169. Bunge's account is based on *Ritterrechte des Fürstenthums Ehsten*, which the Secretary of the Knigthly Estate Moritz Brandis compiled around 1600; Bunge, *Geschichte des Gerichtswesens*, 166.

41 On the different kinds of appeals privileges, see Weitzel, *Der Kampf um die Appellation*.

the system.[42] However, not even the full appeals privilege excluded all appeals: the so-called nullity claims (*Nichtigkeitsklage*) and petitions, in which it was claimed that the petitioner did not get his or her case heard at all (*Rechtsverweigerungsklage*), remained still possible.[43] In the case of the Swedish territories in Germany, these claims still went to the highest tribunals of the *Reich*, just as from all other parts of the empire.[44] The Swedish delegation managed, however, to negotiate still a further privilege of determining in each case whether the Imperial Chamber Court or the Aulic Court would hear them (*privilegio fori electi*).[45]

A high appellate court (*Oberappellationsgericht*) was thus founded in Wismar, the location of which was central from the point of view of all Swedish possessions in Germany. After a long stage of preparations, the Court could finally start operating in 1653. The Court was still not free of troubles, as neither the local estates nor the crown itself were willing to finance the new court. Johan Oxenstierna, the first President of the Court, managed, however, to secure sufficient finances for the Court. The legal planning of the tribunal's works was entrusted to its first vice-president, David Nevius, already then a prominent lawyer and legal scholar.[46]

The upper echelons of the judiciary in the conquered regions was rather thoroughly reformed, and the reform work was directed from Stockholm. Not only was the High Appellate Court founded in Wismar, but the Swedish crown also established new high courts in the provinces. The courts of the "middle instance" – the appellate courts and the consistory for the ecclesiastical affairs – became courts of the Swedish state. This says something of the Swedish interest in making sure that at least the outcome of the most important cases could be followed all the way up to Wismar and even to Stockholm. The influence of estates persisted only at the lowest lever, at which the Swedish reform plans could not be carried out as the conquerors had planned. However, the estates could secure much judicial power at the lower courts, because the

42 Heinz Mohnhaupt, "Organisation und Tätigkeit des 'Hohen Königlichen Tribunals zu Wismar,'" in Nils Jörn, Bernhard Diestelkamp and Kjell Åke Modéer (eds.), *Integration durch Recht: Das Wismarer Tribunal (1653–1806)* (Köln: Böhlau, 2003), 215–237, 217–225.

43 Weitzel, *Der Kampf um die Appellation*.

44 Nils Jörn, "Integration durch Recht? Versuch eines Fazits und Perspektiven der Forschung," in Nils Jörn, Bernhard Diestelkamp and Kjell Åke Modéer (eds.), *Integration durch Recht: Das Wismarer Tribunal (1653–1806)* (Köln: Böhlau, 2003), 387–408, 390.

45 Kjell Åke Modéer, *Gerichtsbarkeiten der schwedischen Krone im deutschen Reichsterritorium: Voraussetzungen und Aufbau 1630–1657* (Lund: Institutet för rättshistorisk forskning, 1975), 285.

46 Modéer, *Gerichtsbarkeiten*, 258, 419–420.

enfeoffments that the crown ceded to the nobility – especially during the reign of Queen Christina – often included a right to keep patrimonial courts as well (*jus primae instantiae*). The jurisdictions of these new courts, however, rarely coincided with the old jurisdictions. The town courts, then, usually became state-run (Alten-Stettin, Bremen, Süderstadt Verden) or were made part of the territorial judicial hierarchy.[47]

Little research exists on the substantive legal norms that the courts followed in Pomerania, Bremen-Verden, and Wismar, but we can draw certain conclusions based on the study of Kjell Åke Modéer's study on the development of Swedish judiciary in the conquered German territories.[48] A thorough Swedification would have been unthinkable and unrealistic. The Swedes did not have enough legally qualified personnel to staff themselves all the new courts that they created on German soil. They barely had enough jurists for their own purposes at home. It is therefore likely that the few Swedish judges that took posts in the Wismar court and elsewhere accommodated themselves to the legal environments of German *gemeines Recht*, without bringing their own influences to Germany. The ideology of an early modern conglomerate state did not, as discussed above, depart from the idea of automatically completely changing the laws of the conquered territories. It was already something to assume control of the judiciary and to design it hierarchically in such a manner that the highest courts – which the crown controlled – could sufficiently control the lower ones.

This was not, however, enough for the Swedes. Disagreements between the Swedish crown and the Germans as to how closely the German territories should, as far as law was concerned, be integrated to the Swedish realm remained until the end of the Swedish rule. The questions concerning the highest judicial power were never brought to a consensus. The *privilegium de appellando illimitatum* still left open the question of whether the Swedish crown or its courts in Stockholm (for instance, the Svea High Court) might exercise judicial control over the Wismar tribunal. The Swedes initially thought so, but the German interpretation was such that no regular appeals to the Swedish courts were possible. As mentioned above, the extraordinary claims – such as the nullity claims – continued to go the highest courts of the empire. Another bone of contention were the disputes between the individual provincial governments (*Landesregierungen*) and the estates of those provinces. These would have ordinarily have belonged to the jurisdiction of the *Reichskammergericht* and the *Reichshofrat.* As their substitute, the Wismar tribunal now claimed

47 Modéer, *Gerichtsbarkeiten*, 421–422.

48 See Modéer, *Gerichtsbarkeiten*.

the exclusive jurisdiction on these cases. The Swedish crown was against this and organised a visitation of the *Oberappellationsgericht* in 1688. The visitation commission ruled according to the crown's opinion, and the situation was only reversed in 1721, when the estates, taking advantage of Sweden's loss of the Great Northern War, managed to reverse the commission's ruling. The third major problem where differences as to the desired level of integration arose had to do with another extraordinary legal instrument, the so-called revision (*beneficium revisionis*). At the start of its rule in the German territories, the Swedish crown wanted the revisions to go to the Svea High Court, but the estates of German provinces declined this. Instead, the estates thought that the visitation commission – with representatives from the estates themselves, the provincial governments, and the University of Greifswald – would be an appropriate organ to handle revision petitions. The committee did in fact decide a few petitions in 1688, but since after that no other visitation was organised, the revision as a legal institution became meaningless in Sweden's German territories.[49]

The Swedes drafted plans to reform some of the laws, but realised no wholesale reforms. The laws effectuating the court reforms were self-evident. In addition, a Government Ordinance (*Regierungsordnung*) for Bremen-Verden was passed in 1652, and drafts of Consistorial and Church Ordinances were also sent to Stockholm but never approved. In Wismar a new Church Ordinance was given in 1665, and the same ordinance came to be used in Bremen-Verden as well. In Pomerania a new Church Ordinance was given in 1672.[50] Mainly church laws were thus reformed not the least because of their significance for overall governance of the territories.

The judicial and source-of-law solutions, which the Swedes adopted in Germany and Estonia, thus followed because of several interrelated factors. Many of them had already influenced, of course, the capitulation treaties that laid the legal base for the conquests. First, foreign policy affected all solutions taken in the conquered territories. The position of the local power elite was decisive in determining how law was shaped: old privileges had to be respected, and those had everything to do with the old law. Second, the legal cultural standing of the local legal elites and their contacts to the European legal world were crucial in determining which possibilities were realistic and tempting for the designers of the legal framework – as the collections of Brandis and Crusius show. Third, the social and political situation in the conquered lands unavoidably influenced the legal development after the conquests. As we shall see, all

49 Jörn, "Integration durch Recht?," 395–396.

50 Modéer, *Gerichtsbarkeiten*, 422.

of these factors played a role in the treaties and decisions taken in the case of Livonia as well, and these factors influenced the direction the legal history took in the seventeenth century regardless of the initial intentions and wishes of the conquerors.

Integrating the law of German territories to the Swedish realm thus proved extremely difficult. The ties to the German imperial courts were severed after the Peace of Westphalia, but never broken completely. The Swedish attempts to establish corresponding routes of judicial controls from Wismar to Stockholm failed. The strong German legal culture was capable of creating a system which could effectively substitute the imperial courts and resist most efforts to control on the part of the Swedish overlord. This was a significant difference between the German and Baltic territories, although the difference was one only of degree. Also in Livonia, the Swedish crown encountered considerable difficulties when attempting to establish judicial control.

3.3 Reforming the Livonian Judicial Structure

3.3.1 *The Social and Political Situation in the Beginning of the Swedish Epoch*

After the long, chaotic wars of the Polish era, the Livonian population began to increase in the peaceful conditions of the Swedish period. The manorial system was largely reorganised, and many manor houses were given to Swedish noblemen as fiefs. The manorial production grew steadily in the 1630s and 1640s. This has led the traditional German-Baltic historiography, and not without reason, to emphasise how beneficial the Swedish era was – not only for the province in general, but for the peasants in particular:

> The beginning of the Swedish government marks the time when Livonia lay in complete ruin, economically [...] Only very slowly was the wellbeing of the land raised, thanks to the victorious sceptre of the first Swedish regents. Indeed, Livonia has much to be thankful for to Sweden, and especially to Gustav Adolf.[51]

Yet another contemporary Swedish traveller-chronicler, apparently shocked by the contrast between the peasants' living conditions in Sweden proper and Livonia, describes the life of the peasants in 1645–46 in much more sombre terms:

51 Transehe-Roseneck, *Gutsherr und Bauer in Livland*, 7.

> The peasants along the road [from Riga to Estonia] find themselves in a very sad situation. They live in misery, have no clothes nor pelts to rest on in the night, as is customary elsewhere. They lie in their kilns, in smoke and soot, and it is, indeed, surprising that one can manage to live in such a room. There is a big oven in their hut that they light in the morning. The smoke has no exit other than through the door and a small hole through the wall.[52]

Thus, to talk about an improvement in peasant conditions in these early years is unavoidably relative. In spite of the more or less chaotic situation that had lasted for decades, the Livonian legal culture, along with Estonia and much of central Europe, had been on its way to a lawyer-driven reception of *ius commune*. Reception of Roman law had been advancing, and Livonian lawyers undoubtedly felt themselves to be part of the European learned legal community. Swedes, in turn, had been filtering the *ius commune* mass of legal material and adapting it in a simplified form for local use.

The Livonian Diet (*Landtag*) remained the major organ of noble autonomy during the Swedish period. King Sigismund of Poland had already confirmed the nobility's right to the Diet in the Privileges of 1561. For the Livonian nobility, not being represented in the Swedish Diet and having instead a diet of its own was important, indicating that the province was not wholly incorporated into Sweden. The city of Riga was, as the only town, also represented at the Diet. The Livonian Diet enjoyed the right to propose internal taxes and provincial legislation directly to the king or to the governor. The Diet had been headed since 1634 by a land marshal (*Landmarschall*), elected for a three-year period by the governor. The land marshal served as the knighthood's liaison with the crown, and observed the proper running of judicial affairs.[53] In 1643, the Swedes also created a *Landratskollegium*, a provincial college consisting of six (12 from 1648 onwards) *Landräte* or noble councillors, to act as a link *vis-à-vis* the local state administration and the governor-general (*generalguvernör*). The original idea had been for the *Landsratskollegium* to act as counselling organ of the governor. However, the *Landratskollegium*'s tasks were increasingly limited to the knighthood's internal affairs, as the governor acquired counsellors of his own (*Assistenzräte*). The authority of the *Landratskollegium* increased

52 Magnus Mörner and Arne Mörner, "An Unknown Travel Account from Livonia of 1645–1646," in Mati Laur and Enn Küng (eds.), *Die baltischen Länder und der Norden: Festschrift für Helmut Piirimäe zum 75. Geburtstag* (Tartu: Akadeemiline Ajalooselts, 2005), 152–171, 155–156, 165. Translation of the citation by Magnus and Arne Mörner.

53 Tuchtenhagen, *Zentralstaat und Provinz*, 92.

towards the end of the century, however, until the organ was abolished in 1694 as part of Carolingian absolutist reforms.[54]

The Swedish crown also issued legislation specifically for Livonia, especially in the area of police law. The Governor-General Clas Tott had them codified in 1668, and the King ratified the *Policeyordnung* in 1671.[55]

The larger Livonian towns also got their privileges confirmed. This included the towns, which were seen as beneficial from the point of view of Swedish mercantilist economic policy, in other words those practicing foreign commerce with the rights of a Swedish *stapelstäder* (*ius emporii*).[56] The case of the Estonian nobility and the towns was the same, and the position of both the knighthoods and the urban corporations differed decisively from the position of the noblemen and towns in Ingria and the Kexholm County, the nobility and towns of which were represented at the Diet in Stockholm. As Tuchtenhagen explains, the relatively insignificant corporations of Ingria and the Kexholm County were easier to incorporate into the Swedish state and the Swedish legal order than the Livonian estates.[57]

This was roughly the situation when the Swedes assumed control over the Livonian legal system in the 1630s and began to build a judicial system. The clearest difference between the situation in Livonia on one hand, and in Estonia in the 1560s and the 1630s on the other is that whereas in the latter case, the Swedes could continue on the basis of the old judicial structure, in the former, fewer of the old structures existed that could be built upon. The town courts, as the example of the Dorpat court shows, had operated without major interference from the Polish powerholders and continued to do so under the Swedish rule. We have no reliable information from the district courts, but the fact that the social infrastructure had been largely demolished in the countryside must certainly have had a bearing on the workings of both the district courts of the nobility as well as on the manorial courts in charge of peasant affairs. The Polish rulers had created the high court system from scratch in 1582 and

54 Roger Bartlett, "The Russian nobility and the Baltic German Nobility in the Eighteenth Century," *Cahiers du monde russe et soviétique* 34:1–2 (1993), 233–244, 235.

55 Buddenbrock II, 560–595.

56 In Livonia Dorpat, Pernau, and Riga received this right, although Dorpat only for a short period of 1646–1647. In Livonia, however, the system of *ius emporii* was never as dogmatically enforced as it was in Sweden proper. Arnold Soom, "Die merkanlitische Wirtschaftspolitik Schwedens und die baltischen Städte im 17. Jahrhundert," *Jahrbücher für Geschichte Osteuropas* 11 (1963), 183–222, 193–194.

57 Ralph von Tuchtenhagen, "Das Dorpater Hofgericht," in Mati Laur and Enn Küng (eds.), *Die baltischen Länder und der Norden: Festschrift für Helmut Piirimäe zum 75. Geburtstag* (Tartu: Akadeemiline Ajalooselts, 2005), 114–151, 119–120.

reformed it again in 1600. Indeed, the Swedish conquerors had a lot to do, and the construction of the judicial system would take time. The situation called for an interim solution, which would take care of day-to-day court cases and, not least, sort out the pressing land disputes.

3.3.2 *Commissorial Courts*

Early modern law had such a flexible solution: the commissorial court. In early modern terminology, the term "commission" could refer either to a committee-like organ put in charge of preparing legislation, or to a special court operating outside the regular court system. The latter type of commissions interest us here. For the sake of distinction I will call them commissorial courts.[58] They could function on a relatively permanent basis or could be set up with a particular case or group of cases in mind. The use of commissorial courts is perhaps best known in the context of witchcraft trials,[59] but in addition to criminal cases they were often used also in civil cases,[60] and in the domain of what today would be classified as public law.[61] Commissions could serve for many different ends: they sometimes took care of only investigating a case while leaving the decision to a regular court, and sometimes they also decided

58 For the distinction between committee- and court-like commissions, see Gunnar Hesslén, *Det svenska kommittéväsendet in till år 1905: dess uppkomst, ställning och betydelse* (Uppsala: Uppsala universitet, 1927); Marie Lennersand, *Rättvisans och allmogens beskyddare: den absoluta staten, kommissionerna och tjänstemannen, ca 1680–1730* (Uppsala: Studia Historica Upsaliensia, 1999), 33–34.

59 See Bengt Ankarloo, *Trolldomsprocesserna i Sverige* (Stockholm: Nordiska Bokhandeln, 1971); and Birgitta Lagerlöf-Génetay, *De svenska häxprocessarnas utbrottsskede 1668–1671: bakgrund i Övre Dalarna, social och ecklesiastisk kontext* (Stockholm: Almquist & Wiksell, 1990).

60 J.E. Almquist has investigated the use of commissorial courts in cases involving forestry, see Jan Eric Almquist, *Studier i svensk jordrätt: 2. Skogskommissionerna under det karolinska enväldet* (Stockholm: Nordstedt & Söner, 1928); and Åke Holmbäck in cases involving the use of waterways, see *Kvarnkommissionerna enligt Kungl. breven den 13 April 1967: En studie i svensk vattenrätt* (Stockholm: Nordstedt & Söner, 1914).

61 See Rune Blomdahl's study on the so-called Great Commission (a political court, which in 1680 was put in charge of investigating the workings of Carl IX's regency), *Förmyndarräfstens huvudskede: En studie i stora kommissionens historia* (Stockholm: Stockholm Studies in History, 1963); Fredrik Lagerroth's work on the estates commissions of the eighteenth century, *Frihetstidens makttagande stander, 1719–1772, Sveriges riksdag*, vol. 5 (Stockholm: Viktor Pettersson, 1934), 328–350; and Kenneth Awebro's study on the commissiorial investigation concerning the judges at the Göta High Court in the 1770s, *Gustaf III:s räfst med ämbetsmännen 1772–1779: aktionerna mot landhövdingarna och Göta hovrätt* (Stockholm: Almquist & Wiksell, 1977).

the case. Commissorial courts were often used in distant places, to which a high court would displace itself.[62]

A commissorial court derived its power from the crown, as did all other courts of law.[63] Commissioners or members of a commissiorial court were usually appointed by the monarch directly. All this was perfectly logical in the early modern legal and political thinking which knew no separation of powers. Commissorial courts were a general European phenomenon, and they were particularly plentiful in seventeenth-century France, and there were efficient tools in the hands of absolutist rulers.[64] Commissions were common in Sweden as well: in 1680–1730 alone, more than 200 commissions were appointed.[65]

Commissiorial courts were frequently used in Livonia as well, although a systematic study of their practice falls outside the scope of this work. Commissorial courts proved especially useful during the 1620s, during the decade when the new regular court system was not yet in place but cases nevertheless needed to be decided. After the capitulation of Riga in September 1621, a commission was immediately established to sort out the landed property and to decide all property disputes in Livonia. Anyone claiming to own land in the lands conquered by the Swedes had to present the necessary documents to the commission in order to prove their ownership. The commission consisted of Governor Jesper Kruus (1577–1622), Vice-Governor Johan Derfelt (1561–1633), and representatives of the nobility and the towns.[66]

The commissorial court at Riga soon acquired the position of a general court of law in Livonia. The old system of courts had most probably ceased to function, and King Gustav Adolf announced to the Livonian estates in 1622 that a new judicial system would be established as soon the province had been pacified. The same year, the commissorial court received an official instruction, which clarified its position as a general court of law. The court was to receive all cases that his majesty remitted to it as well as all cases which private parties brought to it directly. The commissorial court was, however, not allowed to decide cases pertaining to the Riga courts lest the town privileges be violated. The court hearings were to take place openly in the presence of the parties. Documents would be inspected, witnesses heard, and oaths taken. Without specific

62 Lennersand, *Rättvisans och allmogens beskyddare*, 34.

63 Lennersand, *Rättvisans och allmogens beskyddare*, 33, 35.

64 For the commissorial courts in France, see Jean-Pierre Royer, *Histoire de la justice en France: De la monarchie absolue à la République* (Paris: Presses universitaires de France, 1995), 94–96. Surprisingly little is written on commissorial courts in Europe.

65 Lennersand, *Rättvisans och allmogens beskyddare*, 33.

66 Liljedahl, *Svensk förvaltning i Livland*, 36–37.

royal permission, the court could not arrest or sentence anyone to prison. The decisions of the commissorial court could be appealed to the Svea High Court in Stockholm.[67]

3.3.3 *The Lower Courts: The Landgerichte*

After the truce of Altmark in 1629 had led to the annexation of Livonia to Sweden and the first Governor-General Johan Skytte (1629–1634) had been appointed, the reorganisation of judicial administration could truly begin with Skytte as its main architect. The combination of three statutes came to determine the jurisdiction of the Livonian lower courts and the high courts: the District Court Ordinance (*Landgerichtsordinanz*, LGO) of 1630 (§8), the Improved District Court Ordinance (*Verbesserte Landgerichtsordinanz*, VLGO) of 1632 (Art. 5–7), and the High Court Order (*Hofgerichtsordnung*, HGO) of 1632 (§20).

The first statute to regulate the judicial system, LGO, was thus issued in 1630, and later some further instructions for the individual courts were issued.[68] The first level to be organised was that of the district courts (*Landgerichte*), the number of which was fixed at five in 1631. The division was kept in the VLGO, according to which the province was divided into five royal court districts, responsible for both criminal and civil cases in the first instance: Riga, Dorpat, Pernau, Wenden, and Kokenhausen. However, the court of Wenden never began to function, or functioned only for a few years, because it was too small to function as an independent unit after the private court of Chancellor Oxenstierna had assumed most of the legal business in the Bishopric of Wenden.[69] The four other courts functioned throughout the Swedish period.

According to Art. 5 of the VLGO, "each and every person, which in these lands were directly subject to the Royal Majesty, that is noble or not noble, ecclesiastical or secular, and also soldiers placed in castle camps" belonged to the jurisdiction of the noble court.[70] This seemed to include everyone. Art. 6 continued that all cases (*criminalia und civilia*) were included in the jurisdiction

67 Liljedahl, *Svensk förvaltning i Livland*, 38–40.

68 Liljedahl, *Svensk förvaltning i Livland*, 284.

69 The royal Wenden District Court was founded in 1634, but surviving records show that at least by 1638 the court had ceased to function. See Meurling, *Svensk domstolsförvaltning i Livland*, 81–82.

70 LGO 1632 Art. V: "*An diese Land-Gerichte gehörne alle und jede Personen so in diesen Landen der Königl. Majestät immediate unterworffen, sie seyn Adel oder Unable, Geistlich- oder weltlichen Standes, auch im Burglager liegende Reuter und Soldaten.*" Buddenbrock II, 27. See also LGO 1630 § 20.

of district courts, except for those belonging to the High Court's jurisdiction according to the *Hofgerichtsordnung* or "the Swedish laws."[71]

The division of jurisdictions between the district courts and the High Court was thus quite clear – and almost identical to that in Sweden proper. However, as we will see when observing the court practice, the law in action did not exactly correspond to the law in the books. In practice, lower courts dealt primarily with the cases of noblemen.

Every district court was to have a judge and two assessors. All judicial offices – with the exception of Georg Stiernhielm (1598–1672), an experienced Swedish lawyer – went to the former commissorial courts members.[72] The *Landgerichtsordinanz* also provided for a notary, but since the notaries were not paid, they did not figure in the early years. In 1639, two district court judges suggested that offices of notaries be set up in the courts; however, the answer was that should an assessor not wish to keep protocol himself, he could always hire a notary with his own funds. As a result, assessors usually also acted as notaries.[73]

The main administrative language and the official court language remained German, which was only logical, since all the legal tradition of the preceding Polish and *Ordenstaat* period was in German, and the Livonian privileges entailed the right to be ruled by them. The nobility and the learned stratum of Livonian society continued in the hands of the German-speaking nobility, although some Swedish officials were recruited as well. The fact that the laws intended for use in Livonia only were given in German speaks for itself, and that the language relations changed little during the seventeenth century is evident from the fact that the Swedish Law of the Realm was translated into German in 1695. We shall later return to consider what this tells us regarding the theory of legal sources.

The Swedish reorganisers of the Livonian judiciary thus did not, as far as judicial culture was concerned, start off with a clean slate, although Livonia had stumbled more or less into chaos in the last years before the final ousting of the Poles. Whatever the Swedes did, they had to respect the privileges affirmed in the capitulation treaties.

The Swedish *häradsrätter*, by the time of the Livonian conquest, had been incorporated as part of a court hierarchy in the Roman-canon meaning of the

71 LGO 1632 Art. VI: "*Imgleichen gehören zu diesem Gerichte, alle und jede Sachen, criminalia und civilia, die allein ausgenommen, so in der Hofgerichtsordnung excipiret und nach Schwedischen Rechten immediate ans Hoff-Gerichte gehören* […]." Buddenbrock II, 27.

72 Liljedahl, *Svensk förvaltning i Livland*, 287.

73 Meurling, *Svensk domstolsförvaltning i Livland*, 81.

word.[74] Because of the lack of court records, it is difficult to say whether such a hierarchy existed in Livonia before the founding of the appeals court at Dorpat, during the *Ordenstaat* or in the Polish period. The fact that cases were appealed to the *Reichskammergericht* and *Reichshofrat* in the *Ordenzeit* does not alone prove that the whole court system would have turned modern in the Roman-canon sense. Nor can it be automatically concluded from the fact that the Polish established upper courts of their own. The presence of professional lawyers in some Livonian courts already in the first years of Swedish rule nevertheless points a conclusion that a Romanization of the judicial system had begun at least during the Polish period. Hilchen's Draft Law points to the same conclusion. Both of these phenomena suggest a context of Roman law.

3.3.4 *The Patrimonial Courts: Pernau and Wenden*

In addition to the four royal courts, there were also two private courts, one in Pernau and another one in Wenden. These are not to be confused with the royal courts of Pernau and Wenden. The two patrimonial courts represented

74 The Swedish court hierarchy was not fully developed in the 1630s and 1640s. The lack of clarity, however, had mainly to do with position of the royal jurisdiction *vis-à-vis* the high courts. See, for instance, Sture Petrén, "Hovrättens uppbyggnad 1614–1654," in Sture Petrén, Stig Jägerskiöld and Tord O:son Nordberg, *Svea hovrätt: studier till 350–årsminnet* (Stockholm: Norstedt, 1964), 3–117; and Korpiola, "A Safe Haven in the Shadow of War." To appreciate the distinction between the "modern" appeal and the medieval high courts, we need to see how the emergence of the appeal has been explained in European legal history. Bernhard Diestelkamp distinguishes between *Rechtszug* and the actual appeal. The medieval *Rechtszug* is closely associated to the idea of *Dinggenossenschaft*, emerging from the writings of Max Weber and later developed by Jürgen Weitzel. In the medieval court, the judge did not participate in the decision-making. He only represented the *Herrschaftsgewalt*, making sure that the proceedings did not deviate from the ordinary course. A decision was taken by the populace gathered at the court or their representatives, the law-finders (*Urteilsfinder*, *Schöffen*). Similar principles of legal decision-making ruled in courts at all judicial levels, from the humblest manorial courts to the royal council. If the court was unable to arrive at a consensual decision, an *Oberhof* or other authoritative organ could be asked for a "second opinion" in the *Rechtszug* procedure. The final decision was given nevertheless in the name of the first court. The *appellatio*, in turn, was directed against the decision of a lower court, the appellate decision replacing the first-instance decision. In the German legal sphere, the appeal in this sense emerged during the second half of the fifteenth century. See Bernhard Diestelkamp, *Die Durchsetzung des Rechtsmittels der Appellation im weltlichen Prozessrecht Deutschland* (Stuttgart: Franz Steiner, 1998), 7–9.

jurisdictional complexity, which was typical of early modern Europe, Sweden proper included.[75]

The maintenance and income from the private courts belonged to the privileges of the landlords, Pernau to those of the counts of Thurn, and Wenden to Count Axel Oxenstierna.[76] In Wenden, Oxenstierna had held court *de facto* in 1625, receiving the formal privilege only in 1632. The county of Pernau was enfeoffed to Count Frans Bernhard von Thurn (1595–1628), who in 1627 received jurisdiction over all the subjects of the crown.[77] When he died in 1628, the Count's widow Magdalena von Thurn (ca. 1600–1651) began administering his goods – the court included – in the name of their underage son.[78]

Whether the allodial goods of free noblemen were included under the comital jurisdiction remained a bone of contention practically until the dissolution of the patrimonial courts in 1681. The negative attitude of the Livonian Order towards such inclusion persisted particularly clearly.[79] According to Meurling, Oxenstierna was not interested at first in including noblemen in his jurisdiction. His attitude changed, however, and according to Liljedahl the royal letter of privilege seems to have extended his jurisdiction to everyone living within his enfeoffment.[80] The interpretation is supported by the fact that by 1638 the royal District Court of Wenden – previously in charge of those areas in the Wenden *Kreis* not belonging to Oxenstierna's court – is no longer mentioned in the accounts of the Baltic provinces,[81] suggesting that the royal court had fallen out of business. Whether the cases of noblemen now belonged to Oxenstierna's court or to the surrounding royal courts is not quite clear, and no court records survive. *De facto*, the latter was probably the case at least until

75 See the articles in Donlan and Heirbaut (eds.), *The Laws' Many Bodies*; and my own article in the same volume, comparing the situation in Livonia and Sweden, "On Forgotten Jurisdictional Complexities: The Case of Early Modern Sweden," 127–144.

76 See Meurling, *Svensk domstolsförvaltning i Livland*, 81.

77 Margareta von Thurn, the mother of the Count of Pernau, was ferociously against to a royal district court in the area. In 1631, Governor-General Johan Skytte gave her a resolution not to hinder the establishment of a royal district court in the Pernau District. Liljedahl, *Svensk förvaltning i Livland*, 45, 284–285.

78 Countess von Thurn was a litigious character and treated her peasants harshly. See Emil Schieche, "Die schwedischen Grafen von Thurn," *Bohemia: Zeitschrift für Geschichte und Kultur der böhmischen Länder* 14:1 (1973), 81–94.

79 Meurling, *Svensk domstolsförvaltning i Livland*, 90–91.

80 Liljedahl, *Svensk förvaltning i Livland*, 285; cf. Meurling, *Svensk domstolsförvaltning i Livland*, 88. See the privilege in Dunsdorfs, *The Livonian Estates of Axel Oxenstierna*, 128. The privilege does not seem to exclude nobility from the court's jurisdiction.

81 Meurling, *Svensk domstolsförvaltning i Livland*, 88.

1640, when a royal resolution ordered that the cases arising from the lands of the free noblemen should not be taken to the private court of the count. Besides, it was ordered that in order to be executed, the decisions of the private court would have to be sent to the High Court of Dorpat for approval. In 1649 the royal resolution of King Gustav Adolf was reversed, and it was now ordered by Queen Christina that all the cases from the noble lands situated within the country would also belong to the count's jurisdiction. This was in line with the royal policy to seek support from the high nobility for a strong central power. In Oxenstierna's lands the situation had been the same *de facto*, even without a specific statute regulating the matter. Such a statute was finally given in 1655, regarding the private court in Wenden as well.[82]

The founding of the court in the region surrounding the town of Pernau was not simple, for the Countess Magdalena Thurn bitterly opposed the founding of a royal court on her lands. Governor-General Johan Skytte even issued a resolution prohibiting the Countess from complicating the founding of the new royal district court. A resolution of 1633 and the one of 1640 (mentioned above) had it that the free allodial goods of noblemen were excluded from the comital court's jurisdiction, and thus pertained to that of the royal court.[83] The comital court proved unreliable when its responsibility of sending its minutes to the Dorpat High Court for inspection was concerned. If the minutes nevertheless arrived at the High Court, it was more "*ad illusionem, als ad leuterationem*," as the Court's President formulated it.[84] In 1644 the High Court even summoned the Countess and her judges to respond to the charges according to which the comital court had executed sentences without sending them to the High Court for approval. The Countess, however, appealed to the king and managed to have the summons annulled.[85]

The minutes of the Comital District Court from 1632 speak for the rebellious attitude of the Countess. In the protocols, the court is not invariably called a district court, but instead *Gräffliches Pernouwsches Obergericht, Gräffliches Thurnisches Obergericht, Gräffliches Landgericht*, or *Gräffliches Schlosgericht.*[86] Different names are sometimes used even in the same legal case.

82 Meurling, *Svensk domstolsförvaltning i Livland*, 91–94.

83 Meurling, *Svensk domstolsförvaltning i Livland*, 91.

84 Meurling, *Svensk domstolsförvaltning i Livland*, 91–92.

85 Meurling, *Svensk domstolsförvaltning i Livland*, 91.

86 Eesti Ajalooarhiiv, Fond 915/1/1; Pärnu maakohtu protokoll (kriminaal) 1632–1643 [PLG] f. 6, 8 a, 22.

The protocols of the criminal cases handled by the Comital Court of Pernau have been preserved in their entirety for 1632–41.[87] The case load was light, because the Court only decided cases of serious criminality. The numbers of cases per year were as follows: 1632/2, 1633/1, 1634/0, 1635/1, 1636/4, 1637/1, 1638/0, 1639/1, 1640/0, and 1641/1. Of these 11 cases four were homicide cases, four witchcraft cases, two thefts, and one fornication.[88]

After the Thurn family became extinct in 1661, the county was enfeoffed to the Chancellor of the Realm (*rikskansler*) Magnus de la Gardie. The Pernau enfeoffment was now included in the jurisdiction of the comital court covering all of de la Gardie's Baltic possessions. In 1681, as part of the Great Reduction, the enfeoffments of both de la Gardie and Oxenstierna returned to the state. This meant that the two private district courts ceased to exist, and their jurisdictions were taken over by the royal courts.[89]

3.3.5 *Dealing with Peasants and Manorial Courts*

An additional factor needed consideration on the part of Swedish reformers: the tradition of law-finders and the manorial courts. Since the Middle Ages in most parts of Europe, manor houses were not only units of agricultural production, but they took also part in the legal and general administration. In the early modern age, the general European trend was towards the state taking increasing responsibility for these tasks. The centralization was, however, often far from thorough, and in some regions manorial units were left with considerable judicial and administrative functions. Livonia was one of those regions.[90]

The Swedes themselves, as was seen above, were used to the idea of unlearned peasants taking part in the legal decision-making. In Sweden itself, the traditional peasant participation had, by the time Swedes took over Livonia, been transformed rather smoothly into a part of the royal judiciary. Peasant jurors, as part of the local district courts, together with the crown-appointed judge (or his substitute), decided all legal cases. The so-called blood cases were, according to the law, investigated in district courts; however, an appeals court was always the final decision in these cases.

In the *Ordenszeit* the Livonia manorial lords, as vassals of the landlord (the Bishop or the Master of the Teutonic Order), were enffeofed the right to hold court for their subjects. Manorial courts normally heard both civil and criminal

87 Whether the Comital Court decided civil cases as well, is not known, but it is probable.

88 Pärnu maakohtu protokoll kriminaal 1632–1643 a.; NAE 915/1/1.

89 Meurling, *Svensk domstolsförvaltning i Livland*, 87.

90 Alfred Soom, *Der Herrenhof in Estland*, 1.

cases. As the latter were concerned, the manorial courts thus exercised the lord's *Halsgerichtsbarkeit*, literally, the right to sentence to blood punishments.

The lord himself or his steward acted as the judge and three or four of the most respected of the peasants as law-finders.[91] Manorial courts normally had three noble assessors who observed that the court acted legally in criminal cases. According to David Hilchen's proposal for land law (1599), their presence was necessary always when "there arose between a nobleman and his peasant a case, in which it had to be decided over blood […] as had been customary since olden times […]."[92] If the assessors found the law-finders' sentence to be too harsh or too mild, they could alter the sentence.[93] The Privilege of Sigismund Augustus confirmed the manorial lords' full judicial authority in both civil and criminal cases *vis-à-vis* the peasants living on their lands.

In Livonia, the judicial position of the peasantry was limited to the manorial courts where they took part in deciding the legal cases arising from the manorial life. The practical difference between the lowest judicial stratum in Sweden proper and Livonia was huge: Livonian peasant courts were clearly manorial courts, and they had no say in criminal affairs, strictly speaking, or those of the nobility. The Swedes basically had a choice between two ways of dealing with these ancient judicial organs. They could either assimilate them into the new judicial system, or they could let them continue in their functions and let them remain as islets of independent judicial decision-making controlled by the manorial lords only. It seems, however, that no clear-cut decision was immediately taken.

Peasant history, manorial courts included, has traditionally been a touchy subject in the Baltic countries. Transehe-Roseneck's overwhelmingly positive conception of the Swedish period started to be reassessed long ago. In the 1930s, Johan Vasar criticised the one-sided Protestant orientation, which had led the German-Baltic historiography to glorify the Swedish period and, consequently, to downplay the Polish era. The research had concentrated excessively on the nobility and forgotten the history of the peasantry.[94] If the Swedish period could be called at all "the good old Swedish time," it was not because the

91 Arbusow, *Die altlivländischen Bauerrechte*, 134; Adolf Perandi, "Märkmeid talurahva õigusliku ja majandusliku seisundi kohta Liivimaal Rootsi valitsusaja alul," *Ajalooline Ajakiri* 4 (1931), 193–213, 198; Soom, *Der Herrenhof in Estland*, 9.

92 "[…] *zwischen Junker und seinen Erbbaurern so eine Sache vorfällt, darin über Blut muss gerichtet werden,* […] *wie denn von Alters gebräuchlich gewesen* […]." Transehe-Roseneck, *Gutsherr und Bauer in Livland*, 41.

93 Arbusow, *Die altlivländischen Bauerrechte*, 133–134; Soom, *Der Herrenhof in Estland*, 8–9; Perandi,"Märkmeid," 198.

94 Juhan Vasar, "'Halb' poola ja 'hea' rootsi aeg," *Olion* 8 (1930), 2–6.

Swedes would have done much to better the lives of their Baltic subjects, but because the ensuing Russian period proved to be even worse.[95]

In the newer historiography, Vasar's points, undoubtedly enhanced by the first Estonian independence period on the one hand and the general contemporary tendency towards histories of the suppressed on the other, have been taken seriously, and the emphasis has shifted from the nobility to power politics, culture, and social history. Juhan Kahk, Jürgen Heyde, and Christoph Schmidt have shown that the peasant obligations (*Fron- und Abgabepflichten*) increased until the middle of the seventeenth century, and the peasants became more dependent on the manorial lords than they had been before the Swedes. In fact, no serious attempt at the betterment of peasants' lives was undertaken during King Gustav Adolf's time/regency, the most praised of the Swedish regents.[96]

The *Landgerichtsordinanz* of 1630, however, changed the competence of the manorial lords. The *Halsgerichtsbarkeit* was taken away from them; from now on, the manorial lords were only allowed a right to apply disciplinary justice (*Hauszucht*). According to the *Verbesserte Landgerichtsordinanz* of 1632, the manorial discipline had to be used with "Christian modesty" (*christliche Bescheidenheit*). The judicial power of the nobility was severely curtailed.[97] Ever since the 1560s, the Swedish rulers had regularly attempted to limit the strict discipline on the Baltic manor houses. However, as more and more Swedish noblemen themselves came into possession of manor houses in the region, the attempts gradually wore off.[98] At the end of the Swedish period, after the Great Reductions, the house discipline became an issue again. The Economy Regulation of 1696 now came to include rules which, at least on paper, regulated the

95 Libe et al., *Eesti rahva ajalugu 4*, 972.

96 See Gert von Pistohlkors, "Die Ostseeprovinzen unter russischer Herrschaft (1710/95–1914)," in Gert von Pistohlkors (ed.), *Deutsche Geschichte im Osten Europas: Baltische Länder* (Berlin: Siedler Verlag, 1994), 288; Georg von Rauch, "Die deutschbaltsiche Geschichtsschreibung nach 1945," in Georg von Rauch (ed.), *Geschichte der deutschbaltischen* Geschichtsschreibung (Köln: Böhlau, 1986), 413; Jürgen Heyde, *Bauer, Gutshof und Königsmacht*, 109; Christoph Schmidt, *Leibeigenschaft in Ostseeraum: Versuch einer Typologie* (Köln: Böhlau, 1997), 58.

97 "*Es sollen aber obgedachte Land-Richter solche Sachen annehmen, und vor ihren Land-Gerichte ventilieren lassen: in civilibus: Schuld und Wieder-Schuld, Forderung, braun- und blauschlagen, Acker-Entscheidung, Gränzbereitungen, Fischerey-Besichtigungen und dergleichen Sachen; in criminalibus: Todtschläge, Mord, öffentliche Strassengewalt, Räuberey, Zauberey, Ehebruch, leviores injuriae und der gleichen*," *Landgerichtsordinanz* 1632; Buddenbrock, II/1, 16. See also Soom, *Der Herrenhof in Estland*, 14–29.

98 Soom, *Der Herrenhof in Estland*, 28–29.

use of discipline on crown estates. An almost identical plan emerged to regulate discipline on private estates, but the proposal did not lead to legislation.[99]

Whereas manorial justice adjudicated by the manorial courts dealt with the legal relations between the peasants, the disciplinary justice is associated with the peasants' responsibilities towards the manor house. An ethical and religious aspect was also involved: it was the lord's right and duty to make sure that his peasants behaved in an orderly way, and sometimes disciplinary measures were needed to ensure this.[100] According to Oxenstierna's Court Instruction, disciplinary measures were taken because of "lazy work, disobedience [and] not returning to lawful [behaviour]."[101]

Nineteenth-century Baltic legal history, oriented in the spirit of the Historical School and legal positivism, was not yet concerned about social and cultural history, or the history of the powerless. The nineteenth century Baltic legal history, dominated by Friedrich Georg von Bunge, was not much interested in evaluating the preceding periods normatively. Transehe-Roseneck, however, thought that the Swedish period definitely changed this for the better. Legal historiography followed suit with the general trend of historical science. In Estonia during the first independence this meant that a nationalist orientation combined with a trend away from the Rankean historiography led some legal historians to delve into the legal history of the peasants (Perandi, Uluots). The newest research again generally states that the legal position of the peasants, by and large, changed for the better in the Swedish period. The peasantry regularly raised cases against the noble landlords in the Dorpat High Court, as the nobility raised peasant deliveries. The mere existence of such a right, confirmed in the *Landgerichtsordinanz* of 1632 (Art. IX), shows that a major change in the power structure of the Livonian society had occurred with the coming of the Swedes.[102]

The new orientation of the interwar period did not leave the history of the peasant untouched. Adolf Perandi, in an important article on the manorial courts, claimed that the Swedish *Landgerichtsordinanzen* of 1630 and 1632 had in fact amounted to a virtual destruction of the judicial participation of the peasants.[103] Perandi departed from the supposition that the manorial lords had never held full judicial power in their lands. The peasantry had decided its

99 Soom, *Der Herrenhof in Estland*, 33–35.

100 Soom, *Der Herrenhof in Estland*, 14–15.

101 Edgars Dunsdorfs, *Uksenšernas Vidzemes muižu saimniecības grāmatas 1624–1654* (Riga, 1935), 168.

102 See Schmidt, *Leibeigenschaft in Ostseeraum: Versuch einer Typologie*, 58.

103 Adolf Perandi, "Märkmeid, talurahva õigusliku ja majandusliku seisundi kohta Liivimaal Rootsi valitsusajal," *Ajalooline Ajakiri* 1 (1931), 300–311; see also Soom, *Der Herrenhof in Estland*, 9–11.

internal legal problems in the manorial courts and in practice without much interference from the part of the manorial lord. Perandi interprets the sources so that it was the responsibility of the peasantry to hold court on the manor. In the peasant court, the lord of manor had no say in any of the cases; in criminal cases, however, three noble by-sitters took part in the proceedings.[104] Thus, whatever judicial power seems to have been taken away from the lords was mainly taken away from the peasants who now had no say in the new country courts. According to Soom, the judicial power in manorial courts was now transferred to the lord or his steward.[105]

The claim that the manorial lords had no say in the workings of manorial courts seems, nevertheless, exaggerated. The Privilege of Sigismund had expressly allowed the nobility a jurisdiction on their manors, and the privilege was not meant to alter the existing state of affairs. Thus, if the lords in practice did not usually get much involved with the courts on their lands, which is very possible in most cases, that is altogether another matter. It does not mean that they could not, should they have felt the need to influence the court directly or indirectly by way of their stewards or reeves in individual cases. It is beyond doubt that the manorial lords were deprived of their right to issue death sentences, of their *Halsgerichtsbarkeit*. This right was transferred to the lower courts and the Dorpat High Court, which administered blood sentences jointly and in the same way that was done in Sweden.

The LGO of 1630 can indeed be read as having ended the system of manorial courts. The wording of the statute suggests that all peasant cases were to be taken to the general district courts instead of being tried at their home manors. The statute does not mention manorial courts, nor does the VLGO of 1632. It allowed the manorial lords only house discipline ("*eine disziplinäre Hauszucht*"), which was to be exercised with "Christian modesty" ("*mit christlicher Bescheidenheit*").[106] Yet, at the beginning of the Swedish period, legal administration was uncertain as to what attitude should be adopted to the institutions of manorial courts and the *Rechtsfinder*. Law-finders had been a dying breed in the European legal world since the appearance of the professional lawyer in the high Middle Ages. They had been gradually replaced by

104 Perandi, "Märkmeid."

105 Soom, *Der Herrenhof in Estland*, 10.

106 "*Es sollen aber obgedachte Land-Richter solche Sachen annehmen, und vor ihren Land-Gerichte ventilieren lassen: in civilibus: Schuld und Wieder-Schuld, Forderung, braun- und blauschlagen, Acker-Entscheidung, GränzbereituIngen, Fischerey-Besichtigungen und dergleichen Sachen; in criminalibus: Todtschläge, Mord, öffentliche Strassengewalt, Räuberey, Zauberey, Ehebruch, leviores injuriae und der gleichen*." Buddenbrock, II/1, 16.

university-trained legal professionals first in southern parts of Europe in the Middle Ages and then in Germany from the late fifteenth-century onwards.[107] Instead of laymen, best capable of applying customary law and transmitting it to new generations, legal professionals were now needed to master the European *ius commune* and the increasing masses of statutory law.[108] As I have suggested elsewhere,[109] however, the institution survived the Swedish restructuring of the judiciary in Livonia. Swedes, although they pushed the law-finders out of the state courts, did not completely demolish the institution. Instead, the law-finders continued not only as members of the manorial courts but sometimes as experts in customary law and local usages in the lower courts as well. The law-finders, just like jurors or *nämndemän*, were often able to inform the judges (most often not conversant in vernacular languages either in Livonia or Sweden) of the local rumours and the reputation of the people. They certainly had the fame of knowing the law a little better than the regular peasants.

I will take a few examples of the different solutions taken to deal with the problem of manorial courts, peasants' legal cases, and law-finders. As Soom point outs, the few available sources do not give a uniform picture of the manorial courts after the Swedish reforms.[110] It is understandable that, since the whole practice was now against the written law, or at least left unregulated, different solutions were invented for different manor houses.

A few instructions for the manorial courts exist. Jacob de la Gardie's archives offer interesting insights into the operation of the court on his manors of Fellin, Hemlin, and Tarvast. In 1640, the steward of Fellin, Helmet, and Tarvest, von Husen, received a memorandum from the count, giving instructions on various things. The memorandum is partly in accordance with the LGO. It says that the border disputes should be referred directly to the district court ("*Landrichter*"), and so also cases of severe crime ("murder, adultery, witchcraft, and other such *criminalia*"). However, the king had given the count all of the rights ("*Regalia und Hoheheit*") that he himself would enjoy over such regions. This gave the count the right to judge all cases of petty crimes and civil cases. A "jury of two

107 On law-finders in Germany, see Reinhard Schartl, "Gerichtsverfassung und Zivilprozess in Frankfurt am Main im Spätmittelalter," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung* 123 (2006), 135–165.

108 See John P. Dawson, *A History of the Lay Judges*.

109 Heikki Pihlajamäki, "'…. dass kein Theil mit Billigkeit zu klagen Ursache habe': Die schwedische Hof- und Untergerichtsreform der Jahre 1630/32 in Livland und das Schicksal der bäuerlichen Gerichtsbarkeit," in Nils Jörn, Bernhard Diestelkamp and Kjell Åke Modéer (eds.), *Integration durch Recht* (Köln: Böhlau, 2003), 197–213.

110 Soom, *Der Herrenhof in Estland*, 10.

or three able men" ("*en Jury af 2 eller 3 redlige män*") was chosen to investigate and decide these cases ("*som togo saken i ögonsigte och fällde dom*"). Without doubt, the "jury" here refers to the law-finders. If the parties were not satisfied with the result, the case could be taken to the Count himself to decide, as a kind of an appeals instance. However, should one of de la Gardies "fief-holders, burghers, or peasants" ("*någon af* [*de la Gardies*] *Länneleuten, Bürgern oder Pauren*") appeal a case to the district court, they would lose they land ("*län och land*").[111] Appeals from the manorial court to the district courts were thus effectively forbidden, which explains why practically no peasants or burghers appear as parties in the district courts. Although the memorandum was directed only to de la Gardie's steward, it is probable that judicial matters were arranged similarly elsewhere as well.

Axel Oxenstierna's Judicial Order (*Gerichtsordnung*) of 1649 accords land disputes and small fights between peasants to the steward's judicial competence. The steward could only apply moderate physical punishments ("*mittelmässiger Correction*") on the peasants, and he was to send all of the more serious cases to the district court.[112] Count Claes Tott issued an instruction in 1649, according to which his stewards should adjudicate disputes concerning fields and hay meadows, the responsibility of setting up fences and damage to growing grain caused by animals. All other civil and criminal cases belonged to the senior steward's (*Oberverwalter*) competence.[113]

In addition to manorial instructions, provincial regulations on manorial courts were given as well. Law-finders and manorial courts were already mentioned in Tott's *Landespolizeiverordnung* of 1671, Article IX of which is about peasant weddings. Law-finders are expressly mentioned in the context of the maximum number of guests allowed.[114]

In the Economy Regulation (*Ökonomie Reglement*; Ch. 5, §2) of 1696 it stated that when a peasant's crime could lead to a punishment or damages to be paid, the lord of the crown manor could not convict him, but instead had to delegate the case to "law-finders and objective peasants to be investigated and determined." If the punishment did not exceed 10 pairs of whips or the damages 20 *Reichstaler*, then it could be administered immediately, as long as the plaintiff agreed. If the maximum amount of whips or damages was exceeded, or the

111 Per Wieselgren (ed.), *De la Gardiska Arckivet eller Handlingar ur Grefl. DelaGardiska Bibliotheket på Löberöd, 6: Biographiska handlingar upplysande Svenska Historien i sjuttonde seklet* (Lund: Lundbergska Boktryckeriet, 1835), 138.

112 Dunsdorfs, *Uksenšernas Vidzemes muižu*, 168.

113 Soom, *Der Herrenhof in Estland*, 11.

114 *Lieffländische Landesordnungen* (Riga: G.M. Nöller, 1707), 29.

plaintiff did not agree with a lower punishment or damages, then the case had to be taken to a district court.[115]

Court records offer additional support for the thesis of manorial courts surviving through the Swedish time, although not much, because in manorial court sessions records were usually not kept. On the island of Oesel, the local governor – not the stewards – is known to have held court for peasants on the estates.[116] In the 1950s, Arhold Soom found fragments from a session held by a senior steward (*Oberverwalter*) for Jacob de la Gardie's manor houses on the island of Hiiumaa (Dagö), probably in the 1640s. The protocol consists of four cases. One of them seems a typical case of a land dispute, which had led to a physical fight. The defendant was condemned to a fine. In the second case, the plaintiff was the renter (*Besitzerin*) of one of de la Gardie's manors, Lauka. She accused two peasants of stealing an anchor from her boat. The senior steward managed, however, to settle the case. The third case involved a senior peasant (*Kubias*) accusing another peasant of libel. After hearing witnesses, the court ordered the defendant to apologize to the *Kubias* and to suffer a punishment of 10 pairs of lashes, instead of which he could choose to pay fines. In the fourth case, two peasant brothers accused a third man of conducting an affair with their mother. Because the accusation was so serious, adultery in fact, the defendant was taken into custody and the case was remitted to the ecclesiastic authorities.[117] Although the fragment consists of only four cases, they are informative. The cases reveal the way the (upper) manorial court functioned in much the same way as a regular district court: witnesses were heard, and both corporal and monetary punishments were given. The court actively strove for settlements. A case pertained to the jurisdiction of a manorial court if at least one of parties was a peasant. De la Gardie's archives also contain fragments of notes kept by a scribe at a manorial court. The notes, apparently from the year 1649, pertain to a complaint that De la Gardie's peasants had filed against his

115 "[…] *die Sache* [*muβte*] *auf andere, absonderlich der verordneten Rechtsfinder und unpartheyscher Bauren Untersuchung und Determinierung ankommen*." Buddenbrock II, 1221. In modern Estonian literature, it has been claimed that the Economy Regulation of 1696 returned the institution of law-finders to Livonian law. August Traat, "Õigus ja kohus," in Juhan Kahk (ed.), *Eesti talurahva ajalugu* (Tallin: Olion, 1992), 463–473, 469. However, the Latvian historian Arveds Schwabe quite rightly wrote in the 1920s that the Regulation only confirmed the existence of manorial courts, which had previously existed by way of customary law. Arveds Schwabe, *Grundriss der Agrargeschichte Lettlands* (Riga: Lamey, 1928), 244; see also Elina Öpik, "Mõisate reduktsioon 17. sajandi lõpul," in Juhan Kahk (ed.), *Eesti talurahva ajalugu* (Tallin: Olion, 1992), 549–560, 559.

116 Soom, *Der Herrenhof in Estland*, 12.

117 Soom, *Der Herrenhof in Estland*, 12–14.

steward von Husen. The document lists 10 points of complaint and the steward's response to each of them, but no final decision by the Count.[118]

The proceedings of the Dorpat District Court in the summer of 1632 combined old and new elements in yet another interesting way. The fact that law-finders were not mentioned in the district court ordinances quite apparently did not, to contemporary lawyers, mean that law-finders were abolished. After all, law-finders had not been mentioned in written legislation before either. It must therefore have seemed a perfectly possible alternative to deal with the peasant representation the way the Dorpat District Court did. In the first sessions it held after the reorganisation of the Livonian judiciary, the Dorpat District Court thought it best to incorporate the law-finders in the workings of the court. This solution may largely be explained by the composition of the court, which was interesting. Georg Stiernhielm, "the father of Swedish poetry," presided over the court, with two German Baltic jurists, Hermann Liebstorff and Andreas Schilling, as assessors.[119]

Was Stiernhielm – or were Liebstorff and Schilling – a jurist? The concept of a jurist is ambiguous in a time when formal degrees were not necessary to hold any posts that in today's world require a complete university degree. This holds especially true for Sweden, where people with completed degrees were few and far between: advocates, judges, and law professors could well be without law degrees.[120] Yet some of them were distinguished as "learned lawyers" based on the fact that they had taken at least some university studies in law. We know that Stiernhielm had studied Aristotelian philosophy and political science in Wittemberg and Greifswald, but whether he also followed lectures in law remains obscure.[121] However, his work at both the District Court and the

118 Wieselgreen (ed.), *De la Gardiska Arckivet*, 142–147.

119 On Stiernhielm, see Kjell Å. Modéer, "Stierhielm som jurist," KVHAA *Konferenser* 50 (2000), 99–111.

120 See, in particular for the judges at Svea High Court, Marianne Vasara-Aaltonen, "From Well-Travelled'Jack-of-all-trades to Domestic Lawyers: The Educational and Career Backgrounds of Svea Court of Appeals Judges 1614–1809," in Mia Korpiola (ed.), *The Svea Court of Appeal in the Early Modern Period: Historical Reinterpretations and New Perspectives* (Stockholm: Institutet för rättshistorisk forskning, 2014), 301–354.

121 See Rune Pär Olofsson, *Georg Stiernhielm – diktare, domare, duellant: En levnadsteckning* (Hedemora: Gidlund, 1998); Modéer, "Stiernhielm som jurist." Stiernhielm was appointed judge (*asessor*) to the High Court of Dorpat in 1630, in addition to which he sat at court, at least occasionally, in the District Court of Dorpat. Stiernhielm was appointed Vice President of the High Court in 1648 and stayed until the Russian invasion in 1656. Of these years, however, he spent several in Stockholm, first as member of the Law Commission and then as Archivist of the Realm.

High Court shows, as we will see, that Stiernhielm most probably had taken up some serious law studies while in Germany.

For Stiernhielm, it must have seemed perfectly natural to do more or less what was done in Sweden with peasants in courts. Swedish law recognized the peasant panels (the *nämnd*), and they had a prominent role in the procedures alongside the judge. The Livonian District Court Ordinance of 1632 did not allow the law-finders a comparable role. However, since the law did not expressly abolish the institution, Stiernhielm did his best to accommodate the peasant law experts into the system. Thus, a panel (sometimes even called *Nembd*, after the Swedish equivalent) was composed of the law-finders. The analogy, however, could not be complete because of the Livonian legislation, which, unlike the Swedish laws, provided for three judges, and not just one which was the case in Sweden.

Not only were law-finders incorporated; in one case, the protocol also reveals that by-sitters (*Beisitzer*) continued to be involved. It states: "Nicolaus Langenborg, who has been sworn in as by-sitter, is now asked for help. Herman Schrowe is also ordered to act as by-sitter and sworn in."[122] The by-sitters, an indigenous Livonian legal institution not known in Germany, were already known in the Law of Waldemar and Eric. Their function was act as witnesses to the whole court procedure. Interestingly, their number in that record was two, which speaks for continuity.[123]

From 4 July until 12 August 1632 the court held sessions in fourteen of the most important manor houses in its district. If law-finders were wanted in the sessions, it was absolutely necessary for the court to go to where they were, not vice versa. After all, the law-finders as serfs were *glebae adscriptae*, tied to the turf, and not allowed to leave the premises of their lords freely. Another practical reason for the travelling district court had to do with parties: were the court to replace the old manorial courts and handle the cases which had previously belonged in their jurisdiction, it had to hold its sessions at the manors in which the parties to the law suits were.

The manors visited included Timov, Karrifer, Ellistfer, Layß, Engefer, Rafwelecht, Dumpianshoff, Sagnitz, Ultzen, Marienburg, Nihusen, Rappin, Aye, and Rallishoff. For nine of the manor houses, the protocol mentions that law-finders, usually six of them, were chosen using more or less the same formula,

122 "*Nicholaus Langenborg, welcher hiebevoor zum Beysitzer beeydigt, ist für dißmahll für beystandt und gehulff angezogen worden. Herman Schrowe is auch zum Beisitzer geordnet und beeydigt worden.*" Dorpater Landgericht [District Court of Dorpat, from here onwards: DCD] 1632, NAE 914.1.1, f. 35 a.

123 Schmidt, *Das Verfahren vor dem Manngerichte*, 22–24.

for instance "as law-finders chosen and sworn in" ("*zu Rechtfinder erwehlet und beeydiget*") or "as law-finders are ordered and sworn in" ("*zu Rechtfinder seindt verordnet und beeydiget*"). Why law-finders were not elected at every manor is difficult to say. It may be that where new law-finders were not chosen, it was because the law-finders that had been chosen for previous sessions were still available to serve in court. It is possible that the law-finder positions were considered hereditary to an extent. At least in one case the son of an old and sick law-finder was chosen to serve instead of the father.[124]

The law-finders were all peasants,[125] and most probably some of the most respected members of the community to ensure the enforceability of court decisions, which at least before the Swedish procedural reforms had been consensual at the manorial courts. In most of the groups of law-finders there were at least one or two *Kubias*, peasants who served as foremen for their peers at the manor.

The local knowledge of *Rechtsfinder* was frequently used, as might be expected, and the court asked for their opinion at several occasions. In a witchcraft case against a peasant called Pudell, it was recorded that "the *Kubias* [stated] that Pudell [...] had been tortured, which the accused confesses, and the same is confirmed by J. Nicholaus Langenborg [a by-sitter], and the law-finders all witness that the accused had a bad reputation."[126] The law-finders (and the by-sitter, who was also elected at this session) were thus asked what they thought of the accused's reputation. This was relevant, because Pudell had been tortured. Some evidence was necessary, according to the contemporary legal doctrine, for judicial torture to be lawful. Normally, of course, the necessary evidence would have needed to be there before the torture. These, however, were not normal circumstances. As we shall see, the courts would later subject the torture cases, with the necessary evidence, for the appeals court to decide.

In another case, Kurbitz Jack vs. Fraw Zigemayersche "in a case involving unfulfilled promise concerning a piece of land" (*in puncto non-servatae promissionis wegen eines Stück Landes*), the plaintiff lost the case and was therefore

124 DCD 1632, NAE 914.1.1, f. 4 a, 29 a.

125 This is clear by the vernacular names of the law-finders alone. For instance, on August 6, 1632, the following men were elected at the Rappin manor: Christoffer Paell, Naggle Jan, Thomas Oraff, Michaell Hanssa, Mini Merte and Lockat Pape. DCD 1632, NAE 914.1.1, f. 29 a.

126 "*...daß Pudell* [...] *uff die tortur gewesen, welches Beklagter gestehet, solches bezeigt auch J. Nicholaus Langenborg. Die Rechtsfinder bezeugen allesampt, daß ein bosz gerucht allewegen von Beklagten gewesen.*" DCD, NAE 914.1.1, 1632, f. 39.

himself sentenced to a fine of two roubles, or, in the case of insolvency, to be whipped. But how many whips equalled to a fine of two roubles in the region: "The law-finders were asked what the custom out here in the country was, how many strikes equalled to one rouble? A[nswer]. One pair of whips, and with each pair – three strikes. Who strikes with the whips? A[nswer]. The house- or court soldier. Whereby two law-finders make sure that the punishment is rightly administered."[127] The interesting information that the law-finders' answers yields is that they also acted as overseers of the punishment. There is another interesting detail here. The case description begins by stating that "the oldest peasants of the region had issued a sentence, according to which he [Kurbitz Jack] should not act against it, at the risk of being fined two roubles."[128] I would interpret this as part of the transitional phase: Kurbitz Jack probably thought that he could now "appeal" the old, unfavourable from his point of view, manorial court decision to the new district court.

The Dorpat summer court of 1632 was in many ways a true peasant court. Not only did peasants act as law-finders; they were also active as plaintiffs and were drawn into the court to be accused of crimes and as witnesses. Peasants were accused of crimes (*Halsgerichtssachen*) such as theft, sodomy, fornication, witchcraft, and infanticide. They acted as both plaintiffs and accused in accusatorial cases, such as *iniuria*, and they appeared as both plaintiffs and defendants in all kinds of civil cases (such as disputes over hay fields and horses, damages, and debt claims) and complaining about the misbehaviour of manorial stewards. Most of the cases were typical of everyday manorial life. On 7 July 1632, a dispute between Hans Meckeneër and Juß Hans was decided at the Lais manor. The dispute had to do with a mutilated horse (*in puncto equi mutilate*) and is worth citing at length:

> It is decided. Because the accused himself confesses that he has hit the plaintiff's horse twice on the back with a stock […] And all the same he has rendered the plaintiff's horse incapable of work, so shall the accused, according to Chapter 33 in Book 6 of the Swedish law, take the horse to heal it and give the plaintiff a useful horse for work, so that when the horse is again healed, the plaintiff shall take his horse back and return the

127 "*Die Rechtsfinder würden gefragt, wie es hier in Lande gebreuchlich, wie viele Ruthen sie uff 1. Rubell schätzen? R. 1. par wützen, und uff jeder par Ruthen – 3. striche. Wer mit dem Ruthen streichet? R. der Hausz: oder Hofesknecht. Worbei 2. Rechtsfinder aufsicht haben, das die strafe recht zugehet.*" DCD 1632, NAE 914.1.1, f. 39.

128 "*Es sey auch von den Eltisten Pauren des gepiethes ein Vrtheill gefellet, das Er bei straffe 2. Rubell nich darwider handlen sollte.*" DCD, NAE 914.1.1, f. 15.

> other one to the accused, but if [the plaintiff's horse] remains defective, the accused, who has violated it, shall remain with the injured horse and pay damages…[129]

Some of the cases were between noblemen only, but they were a minority, dealing with border disputes, libel cases, or the ownership of peasants.[130] The picture that the summer protocols remit is that the Dorpat District Court had taken the role of the former manorial courts, albeit mixing those functions with those of a Swedish-type lower court. The Dorpat District Court, in the summer of 1632, was indeed a court for the peasants and by the peasants, with the exception that professional judges representing the Swedish crown led the proceedings. The presence of noble judges made it also possible for the court to handle the few cases involving nobility that were presented to it. The procedures are "manorial" also in the sense that there are no legal professionals involved, except for the judges. Instead, the peasants plead their cases themselves, and the proceedings are completely informal and oral (although protocolled) – much like in Swedish district courts. To reach its customers and witnesses, the court rushed from one manor to another at a breakneck speed of 15 manors in two months. There is little Roman law in the protocols, one of the few exceptions having to do with the torture case referred to above – and even that may not have been recognised as learned law by the contemporaries. Swedish law, instead, is mentioned on several occasions, and customary law is referred to as well.

The protocols of the Dorpat District Court from 1632 are, however, an exception in the archives. Unfortunately, the next surviving protocols from the same court date to 1664. Thus we do not know how long the practice developed in 1632 continued. By 1664, in any case, the procedure of the Dorpat District Court had completely changed. No *Rechtsfinder*, no *Beisitzer*; instead, the procedure had fallen solidly into the hands of the legal professional: legally trained judges

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129 "*Ist verabschiedet: Weil Beklagter selbst gestehet und bekennet, das er Klägers pferdt mt den Zaustocke 2. mahll auffm rücken geschalen, vormutlich, damit er die thatt vermüntelln mochte, das er seinen Mittcon harten, der Ihme von Cibius überliefert worden mit sich ins gericht zu bringen, und lauffen laßen, Und gleichwohl Klägers pferdt zur arbeit unnütze gemachet, alß soll beklagter, vermöge des 33. Capittels im. 6. buch de Leg. Suec. daßelbige pferdt zu heilen annehmen, und Klägerm ein nützliches pferdt zur arbeit geben, dergestaldt, kan das pferdt ohne gebrech geheilet worden, soll Kläger sein pferdt zu sich nehmen und Beklagten widerumb das andere zu stellen, aber wo es mangelschafft bleibt, soll Beklagter, der es verletzt, das gebrechte pferdt behalten und Klägerm den schaden* […]," NAE 914.1.1, f. 5.

130 See, for instance, J. Melchior Blome vs. Christoph Langenborg, a land dispute (*in puncto streitiger gudter*), NAE 914.1.1, f. 20.

and advocates now dominated the Court. The procedure had become a written procedure, with advocates writing long pleadings to the court. The case docket looked completely different, and the peasants now figured only exceptionally in other procedural roles, rather than as the accused in penal cases. An overwhelming majority of the cases dealt with in the court were now internal disputes of the nobility; one looks in vain for horse thefts or calumny cases between peasants. Consequently, the court had almost ceased to travel: instead of the fifteen session sites of 1632, there were only three in 1664. Because the Court was no longer a court for the peasants, it was no longer necessary to go to where the peasants were. Noblemen and other litigants could instead easily come to where the court was.

The protocols of the Dorpat District Court from the summer of 1632 are important, because they provide a rare glimpse of the institution of law-finders, whose workings had not been protocolled before the Swedish era. The view that we get with the help of these protocols is naturally not an authentic picture of a manorial court, but only of a mixed court, which was most probably a creation of Georg Stiernhielm's productive mind. Stiernhielm developed the procedure practically from scratch, in a situation in which no working judiciary existed in the war-ridden Livonian countryside. The solution was thus unique in its kind, but interesting because of the way Stiernhielm combined traditional judicial elements with the new elements imposed by the conqueror. Stiernhielm kept the law-finders and the by-sitters, incorporating them into the new courts and thus abolishing the manorial courts. Stiernhielm's solution did not dominate even at the beginning of the Swedish rule, and also in Dorpat the solution to integrate peasants in the workings of the lower court did not prove to be a long-lasting solution.

A different solution was chosen at the beginning in the Pernau Comital Court, the patrimonial court of the Thurn family. The first session of the Comital Court was held on 15 February 1632, thus only two weeks after the District Court Ordinance of 1632 had been issued. On that day "her high and noble […] Mrs. Countess of Thurn […] allowed a court day to be held for penal affairs."[131] Six assessors had been chosen to assist the President Friedrich Regius. Two of them were *Herren der Stadt*, representatives of the town of Pernau. Apparently the principle of parity (*Ebenbürtigkeit*) demanded that the burghers be represented in the court, since the town figured in one of cases as plaintiff. In the years 1632–1641 the number of the assessors varied from three to ten, with the nucleus of the personnel remaining unaltered and the number of additional

131 "*… hat Ihr Hoch undt Wolgebore:* […] *frau Gräffin von Thurn* […] *zum Criminal Gerichtstag haltten laßen*." NAE 915.1.1.

assessors changing. Except for the two town burghers mentioned, all of the assessors were noblemen. It is most likely that they represented the different manors from which the cases originated. But there were no peasants sitting in the Court as law-finders.

Thus, neither of the District Courts of Pernau or Dorpat followed the rules of the District Court Ordinance, according to which the district courts were to consist of three learned judges. Both district courts diverted from the Swedish statute, albeit in different ways and in different directions. The Ordinance said nothing about *Rechtsfinder*, the parity principle, or additional assessors. As years passed, the differences ebbed out, however, and both courts arranged their composition so that it corresponded to the requisitions of the statutory law.

A third example brings us closer to the wording of the District Court Ordinance. A complete protocol of the District Court of Wenden from 1639 remains in Stockholm's *Riksarkivet*. Although the Court only had 11 cases to decide, they nevertheless tell us something. The Court was presided over by District Court Judge (*Landrichter*) Franciscus Reiniken, who was assisted by two other noble judges. No *Rechtsfinder* took part in the proceedings. The parties were almost all peasants, and their cases ranged from assault (Maij, "woman" vs. Jürgen Suber, peasant) and witchcraft (Jürgen Pabbars, peasant vs. Kaus Mayssingh, peasant) to cases concerning marriage (Ehrinn, vagrant vs. Hinrich, foot soldier) and pledge (Kauss Stahlen, peasant's wife vs. Jürgen, peasant). No lawyers were involved, and no official prosecution appeared in any of the cases. The Wenden District Court was thus similar to the Pernau one as far as its composition was concerned. Its clientele, then, resembled that of Dorpat more closely. It thus seems that in the initial phase of the Swedish rule, the statutory law was followed in a flexible way, and that many procedural variations existed side by side.

It is clear that the peasant population must have engaged in all sorts of minor illegal activities, such as ranging theft, fighting, and violations of police ordinances. They also must have had at civil cases also in Pernau as they had in Dorpat and Wenden. Therefore, as I suggested above on the basis of statutory material and on the fragmentary manorial court protocols, the manorial courts continued to function throughout the Swedish period. The virtual absence of peasants in the dockets of most of the Livonian district courts offers indirect evidence of the existence of manorial courts, where these cases must have been taken.

Indeed, the docket of a Livonian lower court looked quite different from what could be gathered simply by reading the *Landgerichtsordnung*. In 1663, the Pernau District Court decided 92 cases in its summer session, from 24 June

to 27 July. Only 10 of these cases were criminal cases and the remainder were different kinds of civil cases. Except for some cases in which clergy were involved, almost all of the civil cases were between noblemen.[132] The nobility thus used the lower court voluntarily even though according to the statutory law their cases would have belonged to the high court. From the point of view of the Livonian nobility, it probably did not make much difference whether their cases were heard in the higher or lower courts as long as their peers heard their cases – as they were also in the lower courts. The access to justice might have been even easier at the local lower court for pure practical reasons, and even tactical considerations may have been involved, although on the basis of archival material, venue shopping cannot be shown.

The District Court of Pernau was, thus, practically a court of the nobility. However, some criminal cases, of course with peasants as the accused, were also decided in the summer of 1663. All 10 cases involved serious charges: four cases of poisoning, two infanticide cases, one murder, two assaults, and one theft. But these few cases do not account for the problem of the "lost" peasant cases. It is quite certain that cases involving peasants only cannot have completely disappeared. Instead, manorial courts operating on the manors must have continued deciding them.

At the end of the century, the Swedes were planning to establish new courts with a jurisdiction over the affairs of crown peasants. Legal professionals would have presided over these courts, and they would have included peasant juries – the Swedish model, in other words. The outbreak of the Great Northern War, however, prevented the reform from taking place.

3.3.6 *The Town Courts*

Medieval cities had developed complex jurisdictional systems, typically with several specialized courts and overlapping jurisdictions. Much of the medieval complexity remained in the early modern period.[133] Livonian law in the period preceding the Swedish and Swedish law itself were no exceptions when it comes to the jurisdictional complexity in the urban centres.

Riga, the model for the other Livonian towns, continued hosting several courts. The Town Council (*Rat*) was the most important, in charge of both

132 Liivimaa rootsiaegne Kindralkuberner, Protocolle, Akten und Schriften, 278/1/XV-5, NAE; *Designatio der parten und sachen bey jüngsten Sommer juridical beym Königl. Landgerichte pernauschen Creyses vom 24 junii biβ zum 27 julij entschieden und abgerichet wurden 1663.*

133 For Finland (as part of Sweden in the early modern period), see Oscar Nikula, "Kaupunkilaitos 1721–1875," in Päiviö Tommila (ed.), *Suomen kaupunkilaitoksen historia 1: keskiajalta 1870-luvulle* (Vantaa: Suomen Kaupunkiliitto, 1981), 224–225.

civil and criminal affairs. It consisted of all the council members and a legally trained *Syndicus*, and enjoyed the services of legally trained secretaries. For criminal affairs, there was the public prosecutor (*Official*), who was also responsible for ensuring the legality of the proceedings. The council met from Wednesday until Friday, excluding feast days. Until the second half of the seventeenth century, all court sessions were open to the public.[134]

The Council had first-instance jurisdiction in matters concerning wills, inheritance, and immissions. The Council was also the appellate instance for several first-instance courts: the Court of Orphans (*Waisengericht*), the *Amtsgericht,* the *Kämmereigerichte,* the Court of Construction (*Baugericht*), the Church Court (*Kirchengericht*), and Court of Luxury (or the Court of Statutes; *Luxuspolizei-* or *Gesetzesgericht*). The general lower instance in town was the Bailiff's Court (*Voigteigericht* or *Niedergericht*), which handled all criminal and civil cases in the first instance.[135]

Following the Riga model, the most important courts in Livonian towns were the bailiff's courts (*Niedergericht* or, as it is sometimes called, *Vogteigericht or Kämnergericht*) and the magistrate acting as court (often *Obergericht, Rat*).[136] All urban power concentrated on the magistrate, and it was also the most important urban court, in charge of criminal and civil cases. The *Kämnergericht* then, was the first instance, from which the civil cases came to the magistrate by way of appeal. The lower town court decided petty criminal cases and inspected the more serious ones, which the town court finally decided. Both courts were lay-dominated. Professional lawyers were rarely involved in the cases, and the deciding magistrates had of course been chosen for reasons other than legal expertise.[137]

The courts in small towns could be subjugated to the overlord of the town. This was the case at Wolmar, which belonged to Oxenstierna's fief. The town privilege given by Erik Oxenstierna in 1652 ordered that the town court's decisions could be appealed to Oxenstierna's district court.[138]

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134 Bunge, *Gerichtswesen*, 261.

135 Bunge, *Gerichtswesen*, 261–262.

136 The other town courts will not be discussed for reasons of brevity, and they have not left archives behind. In addition to the district courts and the town courts, other courts existed. Each bishopric hosted a consistory for ecclesiastical cases. Orphan courts (*Weisengerichte*) and police courts (*Ordnungsgerichte*) should also be mentioned. All these special courts fall outside the scope of this study.

137 Riga was an exception, as some of its council members had legal training as well. See Liljedahl, *Svensk förvaltning i Livland*, 247.

138 *Privilegia Civitatis Wolmariensis*, printed in Dunsdorfs, *Uksenšernas Vidzemes muižu*, 129.

3.3.7 *The Castle Courts*

When Johan Skytte designed the Livonian judiciary, he took advantage of an old Polish institution, the castle courts. Two statutes were issued to regulate the castle courts, one in 1630 (Provisional Ordinance on Castle Courts) and the other in 1631 (Ordinance on Castle Courts).[139] Three courts were established, one each in Dorpat, Kokenhusen, and Riga. The governor or commandant presided over the courts, which included 2–4 judges. The castle court now became an appeals instance between lower courts and the High Court, in addition to which the castle courts served as first instance in cases involving interests of the crown.[140]

Crown interests seem to have been interpreted widely, as one of the few remaining protocols of the Dorpat Castle Court shows. In 1630, a Swede called Andreas Larsson stood accused of murdering another Swede, Per Israelsson. Larsson's lawyer was the learned Georg Stiernhielm, who did not hesitate to let his learning show in his writings and his statements to the court. The effort paid off, as Stiernhielm's client was not condemned to full ordinary punishment, which would have been death, but to extraordinary punishment only (church penance and fines). The court, over which Jost Taube[141] presided, handled the case as first instance.[142]

Bruiningk's register contains three appeals to the High Court from the Dorpat Castle Court (1630, 1634 and 1653), three from the Riga Castle Court (1634, and two from 1635) and two from the Narva Castle Court (1631 and 1639). The Kokenhusen Castle Court does not appear in the register.[143] Of the eight appeal cases in the register, three concern land disputes, and five are debt cases.[144]

The Swedish judicial reorganization mixed Livonian and Polish tradition with Swedish models, without being identical to any of them. Castle courts are a good example of this. Meurling has pointed out the analogy between the Swedish judicial hierarchy of lower courts – lawman's court – high court, and the Livonian system. She claims, however, that the similarity is superficial

139 Both are published in Friedrich Bieneman, "Zur Geschichte der Schlossgerichte in Livland," in *Sitzungsberichte der Gesellschaft für Geschichte und Alterthumskunde der Ostseeprovinzen Russlands für d. Jahr 1900* (Riga: W.F. Häcker, 1901), 17–36, 25–31.

140 Liljedahl, *Svensk förvaltning i Livland*, 292; Meurling, *Svensk domstolsförvaltning*, 72–73. The castle courts of Swedish Livonia should not be confused with the few castle courts (*borgrätter*) in Sweden proper.

141 Taube's years of birth and death are unknown. In protocols, he bears the title of governor (*Statthalter*).

142 Dorpat Castle Court, NAE 4036.1.1.

143 Chronologisches Register der Akten I.

144 Chronologisches Register der Akten I.

only. The Livonian castle courts (unlike lawman's courts in Sweden proper) had a clear police function, as they were presided over by the governor.[145] The leaning towards the interests of the Swedish crown rather than a wish to accommodate the tribunal with provincial interest is reflected in the way legal sources were listed in paragraphs 5 and 11 of the Ordinance of 1631. Unlike the Ordinance on Landcourts (1632), which builds a hierarchy of sources (Livonian law, Swedish law, *ius commune*), the Ordinance on Castle Courts concentrates on Swedish legal sources, only briefly mentions Livonian customs, and fails to mention *ius commune* altogether.[146] On the other, it should be noted that the appeal cases that came from the castle courts to the Dorpat High Court were typical civil cases and similar to those, which lawman's courts decided in Sweden proper.

Because they were identified with the Swedish central government, the castle courts met with strong resistance from the very beginning. In 1634, the Livonian Order turned to the king asking him to abolish the castle courts. According to the Order, the procedure in Livonia was too slow, and there was not enough competent personnel to staff all the courts. Meurling has observed that the slowness in the first years of Swedish rule was partly also due to the fact that the judiciary had functioned so poorly in the years preceding the Swedish rule.[147]

The final impetus to abolish the castle courts came from the motherland. In 1635, a new Swedish statute on governors (*landshövdingar*) was issued.[148] It was applied in Livonia as well and prohibited governors from sitting as judges in courts. This complicated the workings of the Livonian castle courts, as a result of which the Kokenhusen court was shut down in 1636. The Riga castle court disappears from the sources in 1638, and the Dorpat court in 1639.[149]

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145 Meurling, *Svensk domstolsförvaltning*, 73.

146 The wording of the Ordinance on Castle Courts (1631) § 11 is as follows: "[…] *schwedischen Rechten, constitutionen, abschieden, reichs- und liefflandischen vernünfligen gewohnheiten übereinstimmet* […]" In §5 of the same Ordinance the judicial oath contains a list of legal sources, which differs slightly from that in §11. The judges pledge to follow "[…] *schwedischen rechten, reichs statute, abhandlungen, abschieden, guten, löblichen schwedisch- und liefflandischen gebreuchen und sitten* […]" Printed in Bieneman, *Geschichte der Schlossgerichte*, 29.

147 Bieneman, *Geschicte der Schlossgerichte*, 32–33; Meurling, *Svensk domstolsförvaltning*, 73–74.

148 C.G. Styffe (ed.), *Samling av instruktioner för högre och lägre tjenstemän vid landt-regeringen i Sverige och Finland* (Stockholm, 1852), 195.

149 Bieneman, *Geschicte der Schlossgerichte*, 35; Meurling, *Svensk domstolsförvaltning*, 76. See also Leonid Arbusow, *Grundriss der Geschichte Liv-, Est-, und Kurlands*, 230.

As mentioned above, the last appeal case from the Narva Castle Court to the Dorpat High Court came in 1639.

Meurling explains the abolition of Livonian castle courts not only by the statute of 1635 but also by their closeness to the central administration. In this respect, the castle courts were different to the district courts and the High Court, which were more commonly run by the local Livonian nobility. Neither the Livonian nobility nor the Swedish nobility, which had settled in the province, was fond of a strong central government in any form. As for the governors-general, although Johan Skytte favoured a strong central government, his successor Bengt Bengtsson Oxenstierna (1591–1643) was against it.[150] At the end of the 1630s, the tide had turned against the castle courts, as the local nobility was gaining a leading role in the province.[151]

Castle courts, thus, proved to be not much more than a short episode in the judicial history of Swedish Livonia. They hardly figure in the High Court sources, which is not surprising. As will be shown later, the High Court was primarily a first-instance court of the noble estate and received relatively few cases at all in appeal. The need to appeal district court decisions was not pressing, as mentioned above, since peasants were effectively barred from appealing to any court. For the few litigants who needed to appeal district court sentences, the High Court sufficed. To have another appeals instance below it was costly and time-consuming – in other words, superfluous.[152] In hindsight, the abolition of the castle courts did not cause problems for practical legal life. Livonia, small as it was and with a limited number of legal professionals, had a sufficient number of courts already without requiring a judicial middle level.

150 Meurling, *Svensk domstolsförvaltning*, 77–79.

151 On the changing policy of the Swedish crown *vis-à-vis* the Livonian nobility, see Heyde, Adelspolitik, 544–566. Gustav Adolf had treated Livonia as a conquered land, showing little understanding of the wishes of the nobility. Heyde argues that this policy changed under the tutelage government of Queen Christina and Chancellor Axel Oxenstierna. The Constitution of 1634 confirmed Livonia's position as a separate province. The Livonian nobility was thus prevented from exerting influence on Swedish imperial politics, but on the other hand the provincial *Ritterschaft* gained more say on internal affairs.

152 As Meurling has shown, appellants sometimes attempted to bypass the castle courts, appealing district court decisions directly to the High Court. Meurling, *Svensk domstolsförvaltning*, 78.

3.3.8 *The High Court of Dorpat*

The High Court was established in Dorpat in 1630, as the third in a series of high courts founded in seventeenth-century Sweden. The establishment of the high courts formed part of the centralization efforts, which King Gustav II Adolf directed at the administration.[153] The first of high courts had been the High Court of Svea (1614) and the second, the one in Turku (1623). One further high court was founded in the seventeenth century, the High Court of Göta (1634) in Jönköping. The High Court of Svea was first established as an institution to which royal judicial power would be entrusted.[154] However, the Procedural Ordinance of 1615 ordered that if a party was not satisfied with a high court decision, he could apply for a *beneficium revisionis* from the king. The high courts thus became appeals instances, although not exclusively so. They were also first instance courts for the nobility.[155]

The geographical jurisdiction of the Dorpat High Court covered Livonia with the exception of Riga, which the local bourgeoisie after serious negotiations managed to secure under the jurisdiction of the distant Svea High Court in Stockholm. Skytte was anxious at first to draw the powerful town of Riga into the new jurisdiction. However, these plans not only encountered the opposition of the Riga bourgeois elite, eager to keep its legal affairs out of the Livonian nobility's reach, but the plans also received little or no support from the king or his politically cautious Chancellor Axel Oxenstierna.[156]

The Estonian nobility was strictly against Skytte's original plan to include both of the Baltic Sea provinces within the jurisdiction of the new high court.

153 As Mia Korpiola shows, the traditional interpretation which situates the founding of high courts within a great masterplan to rationalize Swedish administration, is probably farfetched; see Korpiola, "A Safe Haven in the Shadow of War." It is altogether another matter that in hindsight the Svea High Court, together with the other high courts, came to form an important part of the Swedish administrative reform of the early seventeenth century.

154 Several attempts to organise the king's judicial power were made during the reigns of Erik XIV and Charles IX, and the founding of Svea High Court should be seen against this background. For these earlier attempts, see Jerker Rosén, *Studier kring Erik XIV:s höga nämnd* (Lund: Gleerup, 1955); and Göran Setterkrans, "Karl IXs högsta domstol," *Scandia* 28 (1962), 374–390.

155 Sture Petrén, Stig Jägerskiöld and Tord O:son Nordberg, *Svea hovrätt: Studier till 350-årsminnet* (Stockholm: Norstedt, 1964); Sture Petrén, "The Reform of the Swedish Judiciary under Gustavus Adolphus," in Morris D. Forkosch (ed.), *Essays in Legal History in Honor of Felix Frankfurter* (Indianapolis: The Bobbs-Merrill Company, 1966), 263–274.

156 Liljedahl, *Svensk förvaltning i Livland*, 319, 533.

Cautious not to endanger their loyalty, the King finally decided not to include Estonia.[157]

Ingria belonged to the jurisdiction as well, but was retracted from it and moved to the jurisdiction of the Turku High Court in 1684. The redrawing of jurisdictional boundaries occurred as a result of the Swedification policies of the crown. The Dorpat High Court had, apart from those policies, had problems in acting as an appeals court for the region, whose court system was organised entirely according to the Swedish model and where Swedish law was in use. In 1684 the Governor of Ingria, Jöran Sperling reported to the King that local judges were not doing their work well and that it took too long, sometimes years, for the Dorpat High Court to decide appeals. The King first reacted by appointing new judges to the region and by ordering the High Court to continue its sessions until all cases originating from Ingria were decided. The High Court was also ordered to make sure that no unqualified substitute judges were used in the region's judicial offices. Apparently this was not enough, because the King ordered the transfer of Ingria from the jurisdiction of the Dorpat Court to that of the Turku High Court after three months. To bring the region under the Turku Court, whose judges used Swedish laws on a daily basis, was a logical move.[158]

The island of Oesel had fallen to Sweden in the Peace of Brömsebro in 1645, and Queen Christina in 1646 guaranteed their privileges to the estates of the island. Oesel had a judicial system of its own, which separated it from the mainland. The court structure included the district court (*Manngericht*), town courts (castle court and *Wackengericht* in Arensburg), a court of orphanage (*Waisengericht*), and an *Oberlandgericht* as an appeals court.[159] The privilege letter of the Queen had established the Svea High Court as the appeals court regarding the decisions of the *Oberlandgericht*. The opinions of the local nobility varied, however, as to whether Svea or Dorpat High Court would better correspond to their interests. Meurling suspects that both high courts were used until in 1661, when the Queen established by her resolution that the appeals would henceforth go to Dorpat.[160]

The composition of the Dorpat court followed that of the other Swedish high courts. Besides a president – who was appointed by the king and usually came from the Swedish high nobility – and vice-president, the court consisted

157 Liljedahl, *Svensk förvaltning i Livland*, 310, 318.

158 Meurling, *Svensk domstolsförvaltning i Livland*, 211–213.

159 Peter Wilhelm von Buxhöwden, *Beiträge zur Geschichte der Provinz Oesell* (Riga: Edmund Götschell, 1838), 60.

160 Meurling, *Svensk domstolsförvaltning i Livland*, 53–57.

of 12 members (assessors, *Assessoren*). Half of the judges were noblemen, half of them learned jurists. The noblemen received a wage about 16% higher than the other assessors. The court also counted among other personnel: a secretary (*Obernotar*), notaries (*Notarien*), and chancery workers (*Kanzlisten*). In addition, the king appointed an advocate-fiscal (*Advokatenfiscal*, *advocatus fisci*) to oversee the workings of the court. The presidents rarely took part in the proceedings personally, which were instead led by the vice-president. Most of the vice-presidents were Livonian, with the exceptions of Georg Stiernhielm and Johan Stiernstråle.[161]

As in the lower courts, the court language was German. Since the German-Baltic judges had practically all studied at German universities, they were well versed in *gemeines Recht*, but obviously less knowledgeable in Swedish legal sources. Most of the judges had other jobs on the side during the first half of 1600s: two of the judges (Hein, Stiernstråle) were professors at the Dorpat Law Faculty, some were burgermeisters at the same time as being judges (Stampehl, Schmieden), and some were also district court judges (Stiernhielm, Birkholz, Ceumern). The Swedish crown forbade high courts judges to hold other positions on the side in 1667, so that they would not interfere with the main responsibilities of the office-holders.[162]

The High Court received its first statute, *Hofgerichtsordnung*, in 1630.[163] The Instruction was based on the Swedish Procedural Ordinance of 1615 (*Rättegångsprocess*), of which it was largely a translation.[164] As Meurling remarks, Paragraph 31, being a direct translation of the corresponding paragraph of the Swedish *Rättegångsprocess,* thus states that the judge in charge of preparing a case should see whether the decisions of the lower courts were "based on Swedish laws, and [whether they] complied with it or not" ("*in schwedischen Rechten gegründet, und damit übereinkombt oder nicht*").[165] However, as discussed above, the *Hofgerichtsordnung* should best be understood in the context of the *Verbesserte Landgerichtsordinanz* of 1632, carefully placing the Swedish and Livonian law in relation with one another, and with the *ius commune*. Obviously,

161 Meurling, *Svensk domstolsförvaltning i Livland*; Arvo Tering, *Über die Juristenausbildung der Mitglieder des Hofgerichts in Dorpat (Tartu) 1630–1710* (Tartu: Tartu Ülikooli Toimetised, 1989), 29–30.

162 Tering, *Juristenausbildung*, 31.

163 Buddenbrock II.

164 Liljedahl, *Svensk förvaltning i Livland*, 302; Buddenbrock II, 1, 62–75; Meurling, *Svensk domstolsförvaltning i Livland*, 44–45.

165 Meurling, *Svensk domstolsförvaltning i Livland*, 45.

all parts of the judicial system needed to communicate with each other and apply the same legal sources.

Paragraph 20 of the *Hofgerichtsordnung*, which was by and large an abbreviation of the Swedish Procedural Ordinance of 1615, provided the instructions regarding the High Court's jurisdiction. As mentioned above, the Court was the appeals instance for all civil cases decided by the lower courts in both the countryside and the towns in the provinces of Livonia, Ingria, and Carelia. Cases with an interest of less than 50 dalers, however, were not appealable. Cases emanating from the courts in Ingria and Carelia were to be decided according to Swedish law.

According to the same paragraph, several other categories of cases were decided in first instance:

1. The Court decided as first instance all crimes against the royal majesty (*crimina laesae Majestatis*), and against the state or state finances (*causae fisci*). These cases were, however, to be investigated at the lower courts (although not decided there).
2. The Dorpat High Court decided as first instance cases of *denegatio iustitiae*, or cases where justice had been denied or delayed, or in which the lower court was suspected of not being objective or being suspect.
3. Testamentary cases of the nobility were first instance cases of the High Court.
4. All cases regarding consistories, the church, gymnasiums, schools, hospitals, and the like, as well as cases concerning governors, *Statthalter*, or royal economic interest, which could not be decided otherwise, belonged directly to the High Court, as well as
5. all those cases that the crown itself ordered the High Court to hear and decide.

The HGO needs to be read against the context of the LGO of 1630, which also contained important complementary information on the High Court's first instance jurisdiction. According to the LGO §8, the following types of case belonged to the High Court jurisdiction as well: all cases concerning land privileges, inheritance, succession, possession of noble goods, and serious crimes (*nec non atrocissimarum injuriarum*) by noblemen.[166]

166 According to §8 VLGO, if a nobleman was caught red-handed committing a crime, he was to be taken into custody and questioned at the local lower court, after which the documents and the suspect were to be delivered to the Government in Riga. See also Buddenbrock II, 24, who says that in his time (the early nineteenth century) the norm was

Another interesting addition to the High Court jurisdiction came from the LGO of 1632 Art. 10, which stated that if peasants had claims against their lords or stewards, or the like (*Herrschaft, und deren Haupt- und Amptleute oder Arendatoren*), because of excessive workloads or overly harsh treatment (*wegen übermässiger Bedrückung und unträglicher Schärffe*), these claims were to go to the High Court directly. Even if a peasant did not make an official claim, a district court judge finding about an oppressive situation was obliged to advise the suspect to employ "moderate behaviour" (*Moderation*). Should he not comply, the judge was to inform the High Court.[167] The normative content of the paragraph obviously relates to the contemporary German situation. In the German territories, as a result of the sixteenth- and seventeenth-century peasant uprisings, peasant-lord relations had become a distinctly legal matter. Literature, both pro-peasant and pro-landowner, had emerged.[168]

Although the Swedish judicial regulation was thus used as a starting point when drafting the regulation on the Livonian judiciary, the Swedish laws were not slavishly copied but were instead adjusted to the local conditions. The division of jurisdictions between the district courts and the High Court was clear and practically identical to that in Sweden proper. However, as court practice is observed, it becomes clear that the law in books was not necessarily the same as the law in action. Above I have already shown this insofar as the manorial courts continued to function during the Swedish period. As I will demonstrate further on, the Livonian legal reality proved to be considerably different to that of Sweden proper also when it came to the procedural practice.

The Russo-Swedish war (1658–1660) interrupted the workings of the High Court of Dorpat. When Governor-General Clas Tott received instructions in 1666 from King Charles XI's regency, it was especially noted that the Governor-General should act in cooperation with the local nobility to ensure that the destructed high court building be repaired. Because caseloads had increased "for this and that reason," it was also ordered that the High Court hold two yearly sessions instead of one from that time on.[169]

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still in full force, except that the case file was then no longer sent to the Governor first but straight to the High Court. Interestingly, the Swedish Judicial Ordinance §14 (of which §8 LGO was by and large a compendium) stated that crimes committed by all noblemen, not just those caught *in flagrante delicto*, were to be considered at lower courts and then decided at appeals courts.

167 VLGO 1632, Art. X, Buddenbrock II, 93.

168 The German scholarship speaks of *Verrechtlichung*; see Schulze, 133.

169 "Kongl. Maj:ts instruktion för generalguvernören Clas Tott," in Svante Jakobsson (ed.), *Överhetens påbud och förbud: Skildringar av förhållanden i svenska provinsen Livland under 1600-talets fyra sista årtionden* (Uppsala: Almquist & Wiksell, 1990), 20.

What happened to the High Court of Dorpat when the Great Northern War (1700–1721) broke out has remained something of a mystery. When the war began, preparations for evacuation started in Dorpat as well, although it took some time before the town itself became a target of military operations. In 1704 the Russians conquered the town, which never returned to Swedish hands. Anna-Lisa Meurling, ending her research in the year 1699, fails to mention anything of the Court's later fate during the early years of the eighteenth century. Heinz von zur Mühlen briefly mentions that the Court was transferred to Riga in 1700,[170] whereas Margus Laidre claims that the Court was instead (in 1700) relocated to Tallinn "under the King's orders and protected by guards."[171]

Laidre's source here is Friedrich Konrad Gadebusch's *Livländische Jahrbücher*. Gadebusch, often regarded as the father of modern Livonian history-writing, relied on the records of Dorpat Town Council. According to the council records, the Court asked for permission to move its office and archives to Tallinn in February, 1700, because the town was no longer sufficiently safe. The commandant of the local garrison, however, refused to provide the necessary horses, which caused the Court to turn to the Council for help. Nothing came of the relocation this time.[172] In September 1701 the Court informed the Council again of its wish to relocate and, again, asked for horses to transport its archive. Governor-General Eric Dahlberg gave the Council orders to provide for two horses. The move was nevertheless delayed to the next year, and the Court held its first session in Riga – thus not in Dorpat – in 1703,[173] where its activities as a Swedish high court continued until the capitulation to Russia in 1710.[174]

3.4 The Personnel in Charge: Judges, Lawyers, and Administrators

3.4.1 *The Judges*

Although the High Court of Dorpat belongs to the same series of seventeenth-century Swedish high courts as those in Stockholm and Turku, it was in

170 von zur Mühlen, "Das Ostbaltikum unter Herrschaft," 220 (the book chapter does not carry footnotes).

171 Margus Laidre, *Dorpat 1558–1708: Linn väe ja vaenu vahel* (Tallinn: Argo, 2008), 524.

172 Friedrich Konrad Gadebusch, *Livländische Jahrbücher* (Riga: Hartknoch, 1780–1783), 85–86, 116, 217; Laidre, *Dorpat 1558–1708*, 521.

173 Gadebusch, *Livländische Jahrbücher*, 139.

174 The correspondence from the High Court to the king in Stockholm also clearly shows this. As of January 1703 all letters from the High Court are dated in Riga and continue to be so until the end of the Swedish rule. Logically, the Court no longer calls itself the High Court of Dorpat, but instead the Livonian High Court (*Livländisches Hofgericht*). Hofrättsdiarier 1697–1709 II 107 C, Livonica II, RA.

important ways different to the other high courts in the Swedish realm. For one thing, the judges at the Dorpat court differed from their colleagues in Sweden proper. The HGO of 1632 stated that the judges were to be Swedish, German, or Livonian. The number of Swedish judges remained low always, however, and most of the judges were Baltic Germans. During the first four decades of the court's existence there were typically three or four Swedish judges in the court. Towards the end of the period there were even fewer Swedish judges, the 1680s representing an all-time low. In 1685, for instance, not one single Swedish judge sat in the court.[175] According to the studies of Tering, half of the assessors (37 out of 73) in 1630–1710 were of Estonian or Livonian origins, a rough fourth Swedes and a fifth Germans. For the Swedes, the Dorpat court was a stepping stone to other posts in the Swedish judiciary, which is why they usually stayed in Dorpat for a relatively short time. Although half of the posts were allotted to noblemen, they were often – especially towards the end of the period – men with legal training. This was especially case in the 1690s and 1700s when all assessors, the noblemen included, were trained in law.[176] Curiously enough, the end of the Swedish era was precisely the time when the Swedish laws poured into Livonia much more vigorously than at the beginning of the period.

The judges of the High Court of Dorpat had studied in at least 20 different universities, and two thirds of the learned judges in more than one university. The Court was thus one of the most learned establishments in Swedish Livonia. Among the most influential universities in terms of high court judges that had studied in them were Uppsala (20), Leiden (15), Königsberg (10), Jena (10), Rostock (9), Helmstedt (10), Dorpat (7), Frankfurt an der Oder (6), Leipzig (5), and Greifswald (5). However, the influence of Uppsala concentrated on the early decades of the 1630s and 1640s.[177]

The local university, that of Dorpat, was not as influential for the development of the local legal profession as one may think. The reasons are easy to understand. After its founding in 1632, the University ceased its functions in 1656 when the Russians invaded Livonia and occupied the province for several years. Already in the 1660s, plans to reopen the old "Academia Gustaviana" in Pernau emerged. Competing ideas, not least from the Town of Dorpat and the Livonian nobility, developed as well. Decisive steps were not taken until 1687, when the Livonian Knighthood proposed to the King and the Governor-General that the University be reopened in Dorpat. Things finally started to move, and Governor-General Johan Jakob von Hastfer (1647–1695) could hold

175 Tering, *Juristenausbildung*, 30–35.

176 Tering, *Juristenausbildung*, 30.

177 Tering, *Juristenausbildung*, 34–35.

his opening speech at the new "Academia Carolo-Gustaviana" in 1690. The idea of the University's reopening in Pernau had never died, not least because the construction of a new university building had been started in Pernau already before 1690. The move to Pernau became urgent again, connected to the uprising of the Livonian nobility against the Swedes in the early 1690s. In 1699 the University was in fact transferred to Pernau, where it was closer to the Swedish mainland and thus more controllable. The university continued to function until the Russians invaded the region again in 1710 as a result of the Great Northern War.[178] Altogether the University thus operated for little more than four decades during the Swedish reign.

Tering has been able to trace the career paths of more than a half (36/61) of the high court judges (*Assessoren*). The High Court was, for most, the pinnacle of their career, except for the judges of Swedish origin who often moved to other high courts in Sweden proper. Of the 36 cases, twelve had been judges in other Livonian courts, such as district courts, castle courts, the Upper Consistory, or military courts. Thirteen had served as notaries or secretaries. Some university professors were also recruited. Not all judges were legal scholars: for instance, one of the earliest representatives of Newtonian teachings in Sweden, Sven Dimberg, was given a post in 1706. As mentioned earlier, many judges held other jobs on the side as professors, burgermeisters, or district court judges. For instance, Georg Stiernhielm was district court judge at Dorpat (at the High Court 1630–42, 1689–49), and Caspar Ceumern in Pernau (at the High Court 1662–86). Most of the learned judges were also ennobled at some point, although not necessarily at the same time they were appointed.[179]

Because the High Court was mostly the high point of a judicial career, it is understandable that the careers of the lower court judges were rarely as convincing as those of the high court judges. The lower court judges were, however, always learned men, because nobility alone did not qualify for these posts.

3.4.2 *The Advocates in the Livonian Courts*

Professional advocates already appeared in the Livonian district courts in the early years of the Swedish rule, although not nearly in all cases. Parties handled

178 Roderich von Engelhardt, *Die deutsche Universität Dorpat in ihrer geistesgeschichtlichen Bedeutung* (Reval: Franz Kluge, 1933), 19–33; Georg von Rauch, *Die Universitä Dorpat und das Eindringen der frühen Aufklärung in Livland 1690–1710* (Essen: Essener Verlagsanstalt, 1943), 17–25, 118–124. On the reduction of Livonian fiefs, the question of the privileges of Livonian noblemen, and the ensuing power struggle in 1684–1693, see Alvin Isberg, *Karl XI och den livländska adeln 1684–1695* (Lund: Lindstedts Universitetsbokhandel, 1953).

179 Tering, *Juristenausbildung*, 30–31.

most of the cases themselves. Many legal problems involved manorial interests, and in those cases the steward usually represented the manor.[180] Both civil and criminal law suits in the lower courts of the early Swedish period often took place without lawyers. In 1640, Christoffer Schiltt sued his father-in-law Wolmer Kloett at District Court of Pernau for taking unlawful possession of a piece of land that Schiltt held in pledge (*Pfand*) from Kloett. Both parties wrote briefs in this case, and clearly without legal counsel.[181]

Priests often stepped in for their parishes, as on 1 June 1640, when Christoffer Stade accused the soldiers Zibbi Muhr and Willy Pavel of the theft of the church case (*Kirchenkaste*).[182] Pastors could also assist and represent peasants of the church (*Kirchbauer*): such a situation happened when Pastor Anders Friedrich Döpner represented the widow of one the church's "fisher peasants," Köppö Marts.[183]

In the lower court protocols of the years 1640 and 1641, my material includes only three cases in which legal professionals took over the representation of a client. Even in these cases, they did advocacy only as a side job, not as full-time engagement. In the early years of the Swedish rule, it was common for judges and prosecutors to handle this type of advocacy business to gain extra income. When the Pernau Lower Court held assizes in February of 1641 at the Luhde Manor, Judge (*Landrichter*) Gerhard von Lewenwolde represented Colonel Casper Ermiss, charging Elias Dirickher with violently preventing Ermiss from constructing a tavern (*Krug*).[184] The President of the Pernau Lower Court, Ernest von Mengden, represented his nephew Aloff Anrep in a civil case in 1641[185] and in another civil case against Wilhelm Rehbinder.[186] In the third case Philipp Tinctorius, the public prosecutor at the High Court (*Oberfiskal*), assisted a client charged with contumacy.[187]

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180 For instance NAE 915.1.3, f. 44. In this case, Philip Nothuelffer, the steward at the Ruien Manor, charged Hanss Mytzleff for not returning a peasant that had run away from Ruien and from his wife; and see e.g. steward Detmer von Damm on behalf of Johan and Lorens Keunsen vs. Dirich Wolfelt, District Court of Pernau [from here onwards: DCP] June 1, 1640, NAE 915.1.3, f. 1.

181 NAE 915.1.3, f. 9a–10, 12 a–17 a.

182 DCP 1640, NAE 915.1.3, f. 4 a, 37 a, Pastor Henricus Trancks vs. Jurgen Platzbeck. According to the "Protestation schrift," Platzbeck had taken over some of the church's lands and peasants, and was not willing to cede them "against the Consistory's command."

183 DCP 1688, NAE 915.1.8, f. 243.

184 DCP 1641, NAE 915.1.4, f. 1.

185 DCP 1641, NAE 915.1.4, f. 28.

186 DCP 1641, NAE 915.1.4, f. 29.

187 DCP 1641, NAE 915.1.4, f. 28.

No professional lawyers appeared in the 1640 sessions of the District Court of Pernau when the sessions were held in Fellin, Ruigen, or other manorial houses. Some of the sessions were, however, held in the town of Pernau itself: there, the first lawyer whom I have not been able to identify as doing advocacy as a side-job only appears in the Court. Michael Schultotus appeared "in the name and on behalf" ("*in nahmen vnd von wegen*") of Arendt Eckhoff in a slander case against Isaac Bohn. Philipp Tinctorius, the above-mentioned prosecutor at the High Court, again acted as counsel for the defendant.[188]

Wives could also represent their husbands, as in the case of Pastor Joachimus Keibelius against the tenant of a manor house (*Arrendator*) Elias Diricksen. Keibelius charged Diricksen with hiring a Pole named Andres Lobbanowsky to set fire to Keibelius's house. Diricksen was himself present on 5 February 1641, when the case was first discussed in the District Court of Pernau. As the trial was continued the next day, Diricksen's wife (no name given) represented him, because of the husband's inability to attend because of "weakness of the body" ("*wegen schwacheit des Leibes*").[189] In the case of Gotthard Platzbeck vs. Michel Engelhart, his wife represented the absent Engelhart. The case, however, was postponed at the request of Mrs. Engelhart until her husband returned home.[190]

During the latter half of the Swedish period, at least from the 1660s onwards, the lawyerization had advanced much further: advocates were commonly used in civil cases at lower courts and practically always at the High Court. The presence of lawyers clearly affected the court proceedings. In fact, the learned advocates seem to have been the prime difference between the Livonian and Finnish parts of the Swedish realm, and the most important reason as to why Livonian law in action looks almost completely different from the Finnish lower court procedures. Whereas Livonian law in the courts was, by the end of the sixteenth century, thoroughly learned, Finnish lower court procedures from the same period bears few to no signs of learnedness. The differences have to do with the way law was and could be communicated in the different parts of the realm. The Livonian lower court judges had normally studied in universities, often abroad, and there were three of them sitting at a lower court. In the Swedish and Finnish courts only the presiding judge sometimes had some legal training. It would have been much more difficult for the Finnish courts to lawyerize to the extent that the Livonian courts had. In the Livonian courts, lawyers talked with and wrote to legal professionals sitting in court. In the

188 DCP 1640, NAE 915.1.3, f. 26 a–28 a.

189 DCP 1641, NAE 915.1.4 f. 9.

190 DCP 1641, NAE 915.1.4. f. 19.

Finnish (and Swedish) courts, parties talked to courts consisting of lay panels, and legally trained judges only chaired the courts from the 1680s onwards. The strong presence of laymen in the Finnish-Swedish courts forced the court president, whether he had legal training or not, to refrain from translating the legal disputes into a professional, international language of the law. In the Finnish courts of the countryside, learned advocates were virtually unheard of in the seventeenth century, whereas in Livonian courts they ran the whole show.[191]

Because of the lack of protocols, it is difficult to say when exactly professional advocates took over the lower courts. At least in the town of Pernau, advocates were commonly used in the 1660s. In my example year, 1667, advocates were an everyday occurrence in the Town Court. One of them, Görner, appeared almost daily in court.[192] The other two mentioned were the Town Secretary Fredericus Hippius and an advocate named Johannes Finicus, but they did not appear regularly in court.[193]

Two decades later, lawyers had taken over the country courts as well. Most of the advocates showed their learning in the briefs they wrote and the talks they delivered in court. A good example of this is advocate Schönfeld and one of his several speeches on behalf of Jurgen Poribe, who was accused of slander in District Court of Pernau in 1690. I will cite the excerpt untranslated in order to preserve the linguistic interplay between Latin and German, so typical for Livonian lawyers:

> Dn. Schönfeld. P.P. Mandatorius Hn. Citati hätte wohl vermuhtet der Eylfertige Kläger würde Ihm zu folge so wohl J.K.M. des Königl. Gen: Gouvern: alß aller Process=Ordnungen in der gantzen Welt, per breve tempus ad agendum agenda gegönnet und nicht umb Ihn in seiner rechtmeßigen Sache zu præcipitiren und zu überschnellen alle momenta gezehlet, eine jede stunde zu dupliciren poussiret, viell weniger und welches das großeste seinen gevollmächtigten ad videndum et audiendum jurare

191 See Pia Letto-Vanamo, *Suomalaisen asianajajakunnan synty ja varhaiskehitys: oikeushistoriallinen tutkimus* (Helsinki: Suomalainen Lakimiesyhdistys, 1989).

192 See the protocols of the Town Court of Pernau [from here onwards: TCP] 1667, NAE 1000.1.725, f. 39, with Görner appearing as lawyer, for instance, for Brekel (plaintiff) in a debt case; for Andreas Barclay (plaintiff) in a debt case, f. 40; for the widow of Burgermeister Breetfeldt (plaintiff) in a debt case, f. 42; and for Clement Wigandt (accused) in a libel case, f. 45, 670, for instance f. 9, 19, 24. The protocols mostly refer to the counsel only as "*mandatorius*" without mentioning his name. The only exception is the town secretary Fridericus Hippius, who a represented a client in one case.

193 TCP1667 1; Secretarius Friderius Hippius appearing for plaintiff Von Dammen in a case of *condictio indebiti*; f. 42; and Jonas Ficinus appearing for plaintiff Georg Plönnies, f. 44.

> testes einzuruffen, auch seine nohtwendigkeit dabey zu observiren zu gelaßen haben; dennoch aber Mandatorius ex præcipitantia deduciren und in dieser sache hauptsächlich zu schließen genötiget würde, wolte Er solches hiemit und Krafft dieses sub seria protestatione de qvisibusvis impertinentibus itidem contra damnum, injurias coeteraque emergentia, salvis uti in exceptione geschehen qvisibus Juris adminiculis folgender maßen und eventualiter dupliciret haben, daß allen Rechten nach in omnibus actionibus præprimis injuriam animus offendendi auf lædendi itidemque dolus betrachtet werden müste, und aber Kläger weder per testes noch sonst erwiesen und ihn überweisen könte, daß BeKlr Ihn Klägern injuriandi nimo, oder seinem Nahmen ein schandfleck […][194]

The courts were still small, and there was very little legal business. At the end of the century, the same court at Pernau usually still only had two or three active advocates who handled cases regularly.[195] This is in any case more than a couple of decades before the time that Görner was clearly the only one lawyering full-time at Pernau. In addition, the official prosecutor of the High Court at Dorpat still often also assisted clients.[196] Lawyers were also clearly behind many of the briefs signed only by the clients themselves.

The High Court in Dorpat was, from the outset, a playground for lawyers. Practically all of the civil cases featured lawyers on both sides. Let only one example suffice. In 1630, Martin Hendesius represented a client ("*mein principal*"), while Johann Gerlach, the secretary of the Dorpat Town Council, represented the defendant.[197]

Courts demanded advocates to prove that they had the right to represent their clients. When Advocate Schröder appeared *per mandatum* for Mrs. Dorothea Barnowitz against Prosecutor Philipp Schirm for allegedly unpaid rent for a house in Pernau, Schirm made a procedural claim according to which he had not rented the house from Barnowitz but from her sons. Schröder should

194 DCP 1690, NAE 915.1.7, f. 690–692.

195 Melchior Martens was one of them, see e.g. Pärnu LG 1695 f. 91 a; and Jacob Schröder the other one, see e.g. DCP 1695, NAE 915.1.8, f. 11. In 1690, advocates Beneck and Schönfeld appear in the files regularly.

196 DCP 1695, NAE 915.1.8, f. 114, among others, features Prosecutor Philipp Schirm in his private law business.

197 Johan Spenckhausen vs. Claus Terchen; LVA, 109/2/6. Hendesius handed in a 20-point *libellus articulatus.* Both lawyers used the typical legal language dotted with Latin phrases ("*nemini si quiden injuriam facere, qui jure suo utatur*") and citations from the Digest ("*l. si nox consu ff. de Injur: Et Iure executionem nullam habere injuriam, l. injuriarum. §. is qui jure, ff. cod.*").

have had a valid *mandatum* from the sons, but he could not produce such a document. The Court therefore dismissed the case and condemned Schröder to fines.[198] If an accused was summoned to appear in court personally, it was not tolerated that he was represented by an advocate.[199]

The basic rule was that the loser in a civil case or an accusatorial criminal case paid the expenses of the winner. Sometimes the defendant could be ordered to pay the plaintiff's expenses even when he did not lose the case. In a libel case in 1696 of Pastor Andreas Hornung against Johan Friedrich Gant von Schieffelbein, the latter was acquitted. Schieffelbein had written a letter to the pastor, in which he had "treated his former *Beuchtvater und Seelensorger* somewhat harshly." Although the contents of the letter did not amount to libel, according to the District Court of Pernau, Schieffelbein had "given cause to the court case" ("*zu* […] *Process Uhrsach und Anlaβ gegeben*"). He was therefore ordered to pay the plaintiff six thalers in expenses. After the sentence, the pastor asked for the immediate execution of the sentence, and the court ordered Schieffelbein to pay costs "before leaving Holsterhoff" (the manor where the Court held its session) on pain of double the cost ("*sub poena dupli*").[200]

The costs awarded to the advocates were often much less than what they tried to charge. Magnus von Linten's bill ("*Expens-Zettell*") that his advocate presented to the Pernau Lower Court in 1690 to charge the cost from the other party, Lieutenant Anthon Friedrich von Fischbach, the loser of the case, totalled up to 47 thalers (*Reichsthaler*). Of this, the advocate's fee was 10 thalers. Although the Court reduced the sum considerably, to only 13 thalers, the bill gives some kind of an idea of the costs charged.[201] Similarly, in Zimmermann vs. Mrs. Schlippenbach et al., the court mitigated the expenses of 71 thalers to only 17 thalers; of the original bill, the advocates "trouble, journeys, and other costs" formed 21 thalers.[202]

Civil cases were where the money was, and Livonian professional advocacy began and flourished with these cases. Advocates seldom appeared in criminal cases, as defendants usually came from the poorer social layers and would have been unable to pay fees. The situation was the same on the plaintiff's side, at

198 DCP 1688, NAE 915.1.7, f. 176–181.

199 DCP 1688, NAE 915.1.7, f. 367. In this case, *actor officiosus* vs. Matthis Donau, the prosecutor even demanded punishment for the advocate Weisensee for representing his client Donau in court "*ultra competentiam*," even though Donau had been summoned to appear in person. In its interlocutory decision, the court ordered Donau to be kept in custody until the next court session.

200 DCP 1696, NAE 915.1.8, f. 216–217.

201 DCP 1690, NAE 915.1.7, f. 397–398.

202 DCP 1690, NAE 915.1.7, f. 490–491.

least at the beginning of the Swedish period when official prosecutors were still not very active in homicide cases. The victim's relatives had then no other chance that to bring forth the case themselves. This is what happened in when the Curwitz brothers, Fitin, Janus, and Hanss, charged Hanss and Tönnis Tennacken with killing their brother Mats in a fight. The case was taken to court in February 1640, while the alleged crime had taken place in April 1638 – thus almost two years after. The delay was probably due to attempts at reconciliation, although the protocols reveal nothing of this.[203] Sometimes, as in the Curwitz vs. Tennacken case, the plaintiff acted orally, but sometimes even lay plaintiffs presented their claims in written form.[204]

In the latter part of the century, the accused in criminal cases seem more often to have acquired legal help, provided of course that they had the means for that. Thus merchant Gustav Nothhelffer hired advocate Beckman for his counsel when he had been accused by the official prosecutor of *verübter haussgewalt* in Pernau Lower Court in 1690. Apart from writing a response brief to the actor's *libellus*, Beckman also produced two written testimonies on behalf of his client.[205]

Cornet Remling had hired Advocate Beneck as his counsel, when he charged Christoph Beckman, the steward at Moysekyla manor, with illegal self-help (*Eigenthatigheit*). Beneck's colourful *libellus* describes how Beckman had realised a thorough, but unlawful search on Remling's premises, looking for peas that Beckman thought belonged to him. Beckman, assisted by two peasants, had "in clear day light" gone through "rooms and cellars, boxes, and cupboards" ("*kammern und keller, kisten und kasten*") searching for the goods. Threatening Remling's sister-in-law – who was present – Beckman had said that he must have the peas "even if they are under ten keys." As the peas were not found, the alleged perpetrators took some boxes away with them. Such self-help was unacceptable and the accused had behaved "as if there were no more higher power, law and judges in the country, but as if there were only enemies" ("*ob ware gar keine hohe obrigkeit, Richter noch Recht im Lander mehr zu finden, sondern alles feindl. gewesen*"). Also, the accused was assisted by a lawyer, Weisensee, who naturally did his best to save his client from punishment. The prosecutor, Philipp Schirm, was not completely idle either. Before the Court retired for its deliberations, Schirm "intervened" (*interveniendo*), stating that he also demanded punishment.[206] In another case, Philipp Schirm himself assisted

203 DCP 1640, NAE 915.1.3, f. 4 a–9.

204 Christoffer Schiltt vs. Wolmer Kloett; DCP 1640, NAE 915.1.3, f. 9–10.

205 DCP 1688, NAE 915.1.7, f 424.

206 DCP 1688, NAE 915.1.7, f. 57–70.

Lieutenant Colonel Brackell in a theft case against Andres Hoch. Typically, Schirm did this as private attorney, not as public prosecutor.[207]

The right to use advocates was self-evident, up to the point that sometimes the need to get a lawyer was used as a reason or maybe even an excuse to postpone the procedures. When Town Secretary Fridericus Hippius left the inheritance case of the Damm heirs for the District Court of Pernau to be decided in 1688, Johann Schmidt asked the court to postpone the case so that he could get himself a lawyer, "because he did not understand anything" of Hippius's argumentation. Hippius protested, because the case was ready to decided, and the "advocates could give or take nothing" ("*die Advocaten können Ihme nichtß geben oder nehmen*").[208]

Schmidt's frustration is understandable, because Hippius's argumentation was not of the easiest kind for a layman to understand. The lawyer argued in a sophisticated manner, using Latin phrases in a way which would have hardly been accessible to a non-lawyer:

> Actor danckte im Nahmen seiner MittErben pro Citatione, repetirete sein vorig einbringen, vndt gebethene Execution, bahtt zue protocolliren, daß Er die handtschrifft vor die Seine Gerichtlich gestanden, worbey sie rechte klaht schließen, daß wenn eienr Gerichtlich seine handt erkennet, alß dann die Execution unaufhältlich ihren fortgangk gewinnet; die Exceptiones metus, vis & minorennitatis altioris indaginis sein, vndt ad ordinarium processum gehören, so mit dieser summarischen action nicht zu confundiren: Opponiret Ihm ratione minorennitatis Preæscriptionem qvadrienny, denn so die Gemeinen Rechte einen 14 Jahrigen ad conjugia, vndt die Rigischen Rechte einen von 18 Jahren Mundig erkennen, Er beklr. auch längst majorennis geworden, vndt in 4 jahren nicht wiedersprochen Akß set Er nunmehr damit nicht zuläßlich, daß aver die Sehl. Fr. Damsche seine Sehl. Mutter in Lubeck nicht besprochen, sey nicht nötig gewesen, weiln Sie nicht persona obligata oder debitrix, vndt tenor obligationis sey, daß, wann Er zuem ehrlichen Kerrl gedeihen wurde, wolte Er zahlen, repetirte sonsten priora, vndt submittirete zum Urtheill.

Hippius thus claimed that the *exceptiones* presented by the defendant in earlier sessions belonged to an ordinary procedure and could not be treated in the kind of summary procedure that execution procedure was.[209]

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207 DCP 1688, NAE 915.1.7, f. 230–232.

208 DCP 1688, NAE 915.1.7, f. 50.

209 TPC 1668, NAE 1000.1.723, f. 50.

Lawyers played a growing role in all Livonian courts thus almost from the beginning of the Swedish period, more in civil than criminal cases, and more in high courts than lower courts. By the end of the seventeenth century, however, Livonian legal life was mostly lawyerized. The only major exceptions were the serious criminal cases against peasants, who usually had no means of acquiring legal advice.

3.4.3 *The Tower of Babel: The Languages in the Livonian Courts*

At least six languages were heard and used in the Livonian courts in the Swedish period: German, Swedish, Latin, Russian, Estonian, and Latvian. Occasionally, French occurs in the court documents as well, and just before the Swedish period, Polish documents appeared frequently in the court procedures. The position each of these languages had in the daily workings of the courts will now be explained.

The local languages – Estonian and Latvian – appear seldom in protocols, although they must have been heard every once in a while in court sessions. Not much though, since the peasants, who used the vernacular in everyday communication, only appeared as defendants in serious criminal cases or as witnesses in the lower courts and the High Court.[210]

The main court language was German, the language of the educated elite, nobility, and townspeople. German had been the language of the elite since thirteenth century, when the German Order took over the Baltic area. Together with Latin, it was also the language that tied the Livonian legal system to the *gemeines Recht*. In the Baltic region, Middle Low German persisted as a literary language and a means of oral communication until the first half of the sixteenth century. By the 1620s, the transition of written language from Middle Low German (*Mittelniederdeutsch*) to New High German (*Neuhochdeutsch*) had been completed,[211] although orthographical differences to the modern

210 For the use of vernacular (Estonian), see Pernau Lower Court 1690, f. 618 ("*Mis sinna tehet Herris*"). See also TPC 1688, NAE 915.1.1, f. 4, "*dortigen Sprache nicht kundig*"; and the TPC 1668, NAE 1000.1.723, f. 94, "*Ehstnischen sprache mächtig*." For instances of the Latvian language in the Livonian court protocols of the Swedish period, see P. Arumaa, "Läti keelt Liivimaa kohtuaktides 17. sajandist," *Litterarum Societas Esthonica 1838–1938: Liber saecularis* (Tallinn: Õpetatud Eesti Selts, 1938), 69–78.

211 Frédéric Hartweg and Klaus-Peter Wegera, *Frühneuhochdeutsch: Eine Einführung in die deutsche Sprache des Spätmittelalters und der frühen Neuzeit* (Tübingen: Niemeyer, 1989), 28–35; Dzintra Lele-Rozentāle, "Über das Mittelniederdeutsche im Baltikum und seine verbindende Rolle für die Ostseeländer," in Gisela Brandt and Ineta Balode (eds.), *Beiträge zur Geschichte der deutschen Sprache im Baltikum* IV (Stuttgart: Akademischer Verlag, 2005), 5–23, 9.

language of course abound. The court style, like legal language often is,[212] was complicated and the sentences often long. One typical example of this will suffice:

> Actor officiosus zum fernern Werfolg und gantzlichen außübung der wieder beklagten, wegen despectirung der Gerichtl. brieffe intendirten action produciret officialischer Anwalt zu mehren behauptung, einer deren über bringern mit unterdienstl. bitte denselben desfalß summariten abzuhören, hätte auch den andern Mitüber bringen, E. preißl. Königl. Landgrt gleichfalß worstellig gemachet, falß derselbe in diesem Creyß anzutreffen gewesen, all die weiln aber derselbe sich im Dorptschen burglager befindet, alß hatt Er so baldt dazu nicht gelangen können, doch werhoffer Er, daß des producirten Zeugen außsage, und dann bey gehendes Attestatum worinnen den beKln, beyderseits überbringere der ersten Notification, welche auch der gestalt despectiret worden, vor schurcken und hunds p. gescholten, genug seyn werde, Ihn des geklagten facti zu convinciren, aller maßen producirtes attestatum durch 2. attestantes so fort verificiret werden kan, submittirets hiemit zum abscheide.

As far as law is concerned, languages are seldom neutral. The incidences of Latin in legal texts usually imply exposure to learned law, which in the case of Livonian judiciary was the *gemeines Recht* that they had studied in the German universities or the local German-language University of Dorpat. Thus, when in the Pernau District Court in 1688 Mrs. Dorothea Barnowitz, "an old widow," was excused of contumacy charges because of *ignorantia iuris*, the concept of legal ignorance had to be known to the lawyers of the Court.[213] Latin concepts such as this one were shorthand expressions for legal doctrines and could not easily be replaced by vernacular terms.

The use of French was purely ceremonial. The language appeared in salutations, addresses, and titles. Philipp Schirm, probably for the sake of change, sometimes addressed the President of the Pernau Lower Court in French: "Monsieur Christian de Ceumer, Assesseur de Justice Royal du Pernau officieusement à Fellin."[214]

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212 On legal languages creating professional cohesion and lawyers' "team spirit," see Heikki E.S. Mattila, *Comparative Legal Linguistics* (Aldershot: Ashgate, 2006), 52–53.

213 DCP 1688, NAE 915.1.7, f. 198–199.

214 DCP 1690, NAE 915.1.7, f. 475.

3.4.4 *Voting in Court*

Voting in courts was no everyday phenomenon but occurred often enough not to make it look like a complete rarity. Votes were basically taken over by legal questions, evidence, and the quantity of punishment. As an example of the last mentioned, in the case of Philipp Schirm, the prosecutor vs. Gustav Nohtthelffer, in the case of breaking domestic peace at the District Court of Pernau in 1690, two of the judges thought that the accused had wounded the victim with a sword, whereas one of the judges thought that it was only a verbal assault. Nohtthelffer was condemned, by majority vote, to a fine of 20 thalers, whereas one of the judges would have sentenced him to only a 10-thaler-fine.[215]

The District Court of Pernau voted also in a duel case of Schlippenbach vs. Wachtell (see above), in which the plaintiff was absent but had left a clearly insufficiently formulated *libellus* to the court. Assessor Harnisch would have absolved Wachtell *ab instantia.* The majority absolved Wachtell, stating however that "should the plaintiff not wish to drop the case completely, it is his responsibility for bringing it to the next court session *de novo.*"[216]

Assessor Harnisch also dissented in 1690 in a case involving the assessment of proof. Prosecutor Schirm accused Inspector Schmidt, the *Arrendator* or tenant of Tennesilm manor, of not attending church services as he should have according to the Royal Prayer Placate. It did not seem certain whether the accused had been physically in such a bad condition, as he claimed, that he had not been able to attend church. According to assessor Harnisch's somewhat unclear opinion, the accused was "not to be completely absolved of the Her Majesty's Criminal Placate" ("*alß ist Er dahero von der Ihr. Königl. Maytt: straff Placat nicht gäntzlich zu befreyen*"). The majority (the President and assessor von Ceumern), however, wanted to give the inspector a chance to present witnesses, because "he was not to be deprived of such a defence" ("*alß ist ihm solches alß ein defension Mittell nicht abzuschneiden*"). In the final sentence, Harnisch stuck to his opinion, whereas the other judges freed the accused on the basis of purgatory oath.[217]

Some of the voting had to do with procedural practicalities, as in the case of Captain David von Hollern vs. Colonel Wolf Henrich von Anrep's widow, Mrs. Anna Dorothea von Ungern Sternberg, in which the cited party did not appear before the Pernau Lower Court. Since this was already the second time, Harnisch would have sentenced directly according to the plaintiff's demands, but the other two judges decided to give Mrs. von Ungern Sternberg one more

215 DCP 1690, NAE 915.1.7, f. 459–460.

216 DCP 1690, NAE 915.1.7, f. 480–481.

217 DCP 1690, NAE 915.1.7, f. 500–509.

chance ("*ob wohl nun mehr nach dem letztens zu LeuenKyll den 15. Junij. Ao. 1687. gefallenen abscheid das Königl. Landgrt in der sache definitivè Sprechen und verfahren könte…*").[218]

3.4.5 *The Courts and the Government*

An independent judiciary is a modern invention, which did not exist in the early modern period. However, this does not mean that crown officials would have continuously interfered in individual cases. The possibility of doing that on general level was nevertheless self-evident in the early modern period, when judicial, legislative, and administrative powers were not separated. The crown steered the working of the high courts with a help of a continuous flow of letters, and the high courts themselves also asked for the crown's advice. As mentioned above, in both Sweden proper and Livonia, as elsewhere in early modern Europe, commissorial courts were a common way of handling politically or otherwise delicate issues outside the ordinary judicial system.[219]

In Livonia, the governor-general as the crown representative was the most important official to meddle directly with the courts cases. By law, the governor-general acted as the executing official of the court decisions. Other than that, most of the cases were too unimportant for the governor-general to bother with, and in most cases his office had no automatic way of knowing what kind of cases were on the docket. Neither do we know of any cases in which the governor-general would have attempted to assume any of the legal responsibilities of the judiciary for himself.[220]

But in some cases the Governor-General did interfere. In 1690 Joachim Olrau claimed that his female family members had been slandered by the Quartermaster (*Quartiemeister*) Wilhelm Stuart, who with a group of other soldiers had also unlawfully entered the plaintiff's house and attacked him and his household. Olrau thus turned to the Governor-General asking for his protection ("*in deßen mit und meinem Hause für fernern Gewalt schützen und befreyen mögen*"). Olrau also asked that the Governor-General see that the defendants be sent to answer at the Town Court of Walk. This was not done, but instead the Governor-General sent the defendants to the Pernau District Court.[221]

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218 DCP 1690, NAE 915.1.7, f. 523–524.

219 For the crown's activities in this respect see Meurling, *Svensk domstolsförvaltning i Livland*. On the Swedish commissorial courts, see Lennersand, *Rättvisans och allmogens beskyddare.*

220 Meurling, *Svensk domstolsförvaltning i Livland*, 110–141; Tuchtenhagen, "Das Dorpater Hofgericht," 144.

221 "*Durch welche atrocissimam injuriam und Ertz-Verläumbdung so wohl ich alß die Meinigen an Ehr und guten Nahmen, solcher gestalt angegriffen und beleidiget, auch gewaltsam und mörderl. weise überfallen worden, daß ich genohtsachet werde, rechtmäßige satisfaction*

In the case of Pastor von Audern vs. von Linten, at the District Court of Pernau in 1690, the Court had also received a rescript from the Governor-General.[222] Carefully formulated, the Court stated that "[w]hile according to the Royal Land Ordinance the Royal District Court is to proceed summarily in less important matters, and because the rescript of the Royal General Government aims at the same," it might be possible in principle to take the case. However, as the Court felt it problematic to proceed on the basis of what it thought was an overly sketchy libel letter (*libellus*). Therefore, the Court decided not to inquire into the case.[223]

In sum, little evidence exists to show that the crown either directly or through the governor-general would have routinely interfered into the workings of the Livonian judiciary. However, the possibility of establishing commissorial courts for almost any purpose greatly diminished the need of interfering. The institution of *référé judiciaire*, in which high courts submitted dfficult legal questions for the crown to decide, was also in use. Royal decisions in referred cases were communicated to all high courts of the realm.

3.5 Summary

Seventeenth-century Sweden was a typical early modern composite state or small empire, with possessions in the Baltic area and in Germany. Whenever new territories were added to a composite state, the conditions of annexation were separately negotiated and decided. A series of questions had to be taken into account. The organization of the judiciary belonged to the most urgent of

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und reparation meiner und der Meinigen gar zu schändl beleidigten Ehren und geschehenen Haußgewalt zu suchen, weilen solches aber auf Ihr Königl. Mytt. allergnödigsten verordnung so wohl arm alß reichen nicht anders alß durch hochobrigkeitl. Hülffe geschehen kan; So ergehet demnach an Ewr. Hochwgbr: Excell: M. unterthäniges füßfälliges bitten, Sie wollen gnödig, geruhen, in abwesenheit den. Hn. ObristLieut: Wrangel. den. H. RittMr. Wrangell von der Compagnie durch Hochobrigkeitl. Rescript ernstl. anzubefehlen, daß Er nicht allein die Reutere so es alles angesehen und gehöret haben, vor unsern Walckischen Gerichte umb die sache außführlich zu inqviriren stellen […]." DCP 1690, NAE 915.1.7, f. 569–573, 599.

222 The rescript is not copied in the protocols but is simply referred to.

223 "*Weiln vermöge Königl. Lands Ordnung bey dem Königl. Landgrt de simplici er plano sonderlich in der gleichen wenig importirenden sache zu verfahren, daß Königl. General Gouvern: in dieser sache eingekommenes rescript auch dahin zielet.*" DCP 1690, f. 383. For governor's rescripts to initiate legal proceedings, see also *actor officiosus* vs. Lieutenant Haaken (DCP 1690, NAE 915.1.7, f. 416); von Hollern vs. von Ungern Sternberg, DCP 1690, NAE 915.1.7, f. 511.

matters, because a well-functioning legal system was helpful in keeping peace within the borders of the territory.

As is usually the case, the Swedish conqueror had to depart from the existing circumstances. In spite of the chaotic situation that had lasted for decades, Livonians, along with the rest of central Europe, had been on their way to a reception of *ius commune.* In Sweden, the reception had not been taken as far and consisted largely of filtering the *ius commune* norms and adapting them in a simplified form for local use.

The town courts were arranged according to the Riga model, which was by and large also the Swedish model. The most important courts were the bailiff's courts (*Niedergericht* or, as it was sometimes called, *Vogteigericht* or *Kämnergericht*), and the magistrate acting as court (often *Obergericht*, *Rat*). All urban power concentrated on the town council (*Rat*), and it was also the most important town court, in charge of criminal and civil cases. The *Kämnergericht* then, was the first instance, from which the civil cases came to the magistrate by way of appeal. The lower town court decided petty criminal cases and inspected the more serious ones, which the town court finally decided. Both courts were lay-dominated. Professional lawyers were rarely involved in the cases, and although sometimes deciding magistrates could have legal training they had been mainly been chosen for their familial standing and not their legal expertise.

The High Court was established in Dorpat in 1630, as the third of a series of high courts founded in seventeenth-century Sweden. The judges were to be Swedish, German, or Livonian. The number of Swedish judges remained low always, and most of the judges were Baltic Germans. Although half of the posts were allotted to noblemen, they were often – especially towards the end of the period – men with legal training.

In the early years of the Swedish rule, learned lawyers rarely appeared as advocates. If they did, it was as a side job only. Parties themselves handled most cases, or had representatives other than legal professionals. Towards the end of the seventeenth century, the situation changed, and lawyers regularly assisted clients in civil cases and sometimes in criminal cases as well, especially noble clients when accused for crimes. The procedure in the High Court was completely in the hands of learned lawyers from the outset.

The Swedish crown seldom interfered the working of the Livonian judiciary. The "judicial revolution" had advanced to a certain extent by the seventeenth century. In other words, although the judiciary could not in theory gain independence from the crown, in practice the division of labour had developed to the point by which the crown and its officials rarely bothered to venture into the judicial area. If pressing needs occurred, commissorial courts were always at the crown's disposition.

CHAPTER 4

The Procedure in the Livonian Courts of the Swedish Era

4.1 The Classification of Cases into Civil and Criminal

In modern law, criminal law involves crimes and punishments, whereas civil law does not. Procedurally, a public prosecutor initiates criminal cases, whereas private parties pursue civil cases. Medieval and early modern law carried slightly different distinctions.

In legal literature, delicts were divided into civil and criminal types. Benedict Carpzov, the leading German scholar, enumerated several features separating civil law delicts from actual crimes. Civil delicts carried "civil" punishments (*bürgerliche Strafe*), such as fines, whereas crimes carried "painful" punishments (*peinliche Strafe*), such as maiming or death. As for civil delicts, the defendant could not normally be taken into pre-trial custody (*incarceratus*), except when not able to place a warranty ("*incarceratus sub cautione fidejussoria est*"). Torture could only be used in criminal cases. Contrary to civil delicts, criminal cases could never be decided on circumstantial evidence or violent presumption alone.[1] Civil delicts were dealt with through the help of adversarial (also called accusatorial) procedure, whereas criminal delicts called for inquisitorial procedure.

Livonian statutory law did not quite follow the teachings of *gemeines Recht*, which Carpzov typically represents. Criminal cases in the Middle Ages were still not clearly distinguished from civil cases. The *Mittlerer Livländischer Ritterrecht*, Chapter 77 stated: "*Es darf der Richter nicht über das, was nicht vor Gericht ausgeklaget wird, Recht sprechen*," and "*wo kein Kläger ist, da ist kein Richter*." Thus, without a plaintiff, there was no case. During the Swedish period, criminal procedure had evolved to become status-based. According to the VLGO of 1632 (art. XXV), the accusatorial procedure was the main rule in all criminal cases against noblemen. The only exception were the "*hochpönliche Laster*," crimes punishable by capital or corporal punishments, and which were to be processed inquisitorially. The term was obviously a translation of the Swedish *högmål*, which constituted the most serious category of crimes

1 Benedict Carpzov, *Practica nova III*, q. 102, n. 19–32.

in Sweden in the Middle Ages. According to the VLGO, whenever there was no private prosecutor but a crime had nevertheless taken place, a district prosecutor (*Kreisfiskal*) stepped in to perform the duty of the official prosecutor (*actor officiosus*). Although according to the noble privileges noblemen were only to be tried in the lower court but were not sentenced there, a prosecutor was thus necessary. The high court prosecutor (*Oberfiskal*), on the contrary, was not normally involved in prosecuting noblemen. A major exception to this were the majesty crimes (*crimina laesae majestatis*), which were directly tried in the high court as the first instance.[2]

The living law was, however, not the same as the law in the books. I will first discuss the lower court procedure in four parts: civil procedure, accusatorial procedure, accusatorial procedure with a prosecutor, and inquisitorial procedure. After that the high court procedure and the so-called revision procedure from the high court decisions to the king will be discussed. To avoid repetition, some features, which are common for all procedural types, will be treated under civil procedure.

To give an idea of the relative frequency of the different modes of procedure, some statistics are necessary. In the winter and summer seasons of 1640 the Pernau District Court handled 32 cases, of which 12 were civil cases and the rest (20) were accusatorial criminal cases. The civil cases were about the ownership of serfs and land, in addition to which one isolated debt case appeared.

Thus, all criminal cases were accusatorial. These included three homicides, one of which led to a death punishment. There was also one infanticide case, in which the Court asked the High Court of Dorpat for permission to torture the suspect, and the permission was granted.

Almost 50 years later, in 1688, the Pernau District Court heard 94 cases. Fifteen of them were civil cases and 26 accusatorial cases; thus, the numbers were practically the same as in 1640. However, two other groups had appeared, which had not existed at all in 1640. There were 28 prosecutor-driven accusatorial cases and 25 inquisitorial cases. The grip of the state on criminal procedures had considerably tightened.

In addition to the four classes of cases explained above, the town court records include a considerable number of entries which are, more than anything, administrative by nature (*Stadtsachen*, as they are marked in the protocols). For instance, in 1619 the alderman of the Greater Guild, Daniel Reder, brought

2 HGO 1630, Art. 20; LGO 1632, Art. 6; J. C Schwarz, "Zur Geschichte des livländischen Criminalprocesses während der Periode der schwedischen Herrschaft," *Zeitschrift für Rechtswissenschaft herausgegeben von der juristischen Facultät der Universität Dorpat, zweiter Jahrgang* (1870), 29–80, 99–133, 64–65.

a list of petitions to the Council that the Guild wished the Council to consider. The Guild thought that it would be wise to start burning chalice at the *Landgüter* that the town owned, so that the chalice could be used to repair town houses. The Guild was also worried about the custom of those dwelling outside the town limits (*Vorstedter*) who were "bringing beer from the countryside and selling it in the suburb." This caused damage to the city. The Council promised to consider both problems.[3] I will not, however, discuss these "administrative" cases further in this study.

4.2 The Civil Procedure in the Lower Courts

4.2.1 *What was a Civil Case?*

Not only were the categories of criminal cases construed differently to the way they are classed in modern law, but the early modern society also produced civil cases, which seem exotic to the modern mind. The legal problems concerning peasants are the case in point. Runaway peasants caused a considerable amount of litigation in Livonia. In February 1641, when the District Court of Pernau sat at Fellin Manor, Wilibald von Bergen – the manorial lord – brought the peasant Mönnicke Michel to court to tell his story, because the lord of Karkus, Krausen, was demanding him as his runaway serf. Michel attested that he was originally from Oesel. He had previously been at Karkus, but had been freed in order to become a foot soldier (*Knecht*). Nine years earlier, already a free man, he had moved to the estates of Fellin, something which was also testified to by a witness.[4]

An overwhelming majority of Livonian peasants were thus serfs, and were treated as property. At the same assizes at Fellin, Gotthard Platzbeck demanded that Michel Engelhart return three of his peasants. Engelhart, represented by his wife, claimed that the peasants had been exchanged for other peasants. She was willing to return the peasants if she could get her own peasants back. After the hearing, the Court concluded that the steward had exchanged the peasants without the consent of his lord, and two of them were ordered to be returned within four weeks. The third one, Surwa Matz Wilm, according to the Court, had only lived at Karkus as a son-in-law (*hauss Schwager*) and served as a

3 Dorpat Council 1619, NAE 995.1.252, f. 31–31 a.

4 DCP 1641, NAE 915.1.4, f. 18. See also DCP 1641, NAE 915.1.4, f. 20 (Gotthard Platzbeck vs. Michel Engelhardt, a case of three peasants); DCP 1641, NAE 915.1.4, f. 32 a (Michel Engelhart vs. Magnus Stricken, a case of a peasant named Hanss Jesit).

Knecht there. While he was actually a peasant ("*Erbbauer*") at Fellin (the manor of Engelhart), he was not ordered to be returned.[5]

The feudal social structure sometimes produced interesting possibilities for plaintiffs to pursue their rights. At the Pernau Lower Court in 1641, Andres Scharffenbach came forth with a civil case against Aloff Anrep, whose peasant Lauke Peter had allegedly stolen Scharffenbach's horse. Scharffenbach now wanted Anrep to pay compensation. After the theft had been proven, the Court ordered Anrep to compensate within six weeks. The peasant was to be taken into custody ("*zur gefenglichen haft einschicken*"), and "he was not to be let out of prison, before the plaintiff Andres Scharffenbach be fully satisfied including expenses."[6] The case was thus treated fully as a civil case, and the peasant was in fact treated as a guarantee for payment.

How often were civil cases taken to court and decided in favour of one of the parties? How often were cases taken to court, but either not decided definitively (because of an extrajudicial agreement) or ended in an agreement confirmed by court decision? And how often were civil cases decided completely out of court? Because of the incompleteness of the archives, it is not possible to give exact figures. It is, however, clear from the archival material that all variants occurred. In one of his letters, Judge Georg Stiernhielm, for instance, mentions that a court case of his against the Town of Dorpat had been brought to an end thanks to "good men's intervention" ("*godhe Mäns interposition*"), meaning arbitrators.[7] In this study we must leave these extrajudicial legal phenomena aside, however, and concentrate on the actual judicial processes.[8]

4.2.2 *Starting the Process: The District Court Ordinance*

The VLGO of 1632, as mentioned above, was the major piece of legislation regulating the procedure at the lower courts. It is by no means a complete description of the procedure, leaving many details for the court practice.

In the Livonian civil procedure, the case began with the plaintiff asking the Court for a citation. According to the *Landgerichtsordnung* (Art. 8), the citation had to be obtained from the district court judge (*Landrichter*). The plaintiff

5 DCP 1641, NAE 915.1.4, f. 19 a. See also Adolph Stephan Rahs vs. Jochim Kaulbars, a case to two runaways from Wehoff to Lehowa manor.

6 "*...vnd sol er nicht ehe aus dem gefengniß gelassen werden, bieß Kläger Andreß Scharffenbaech volkommen contenritet worden compensatis expensis.*" DCP 1641, NAE 915.1.4, f. 32.

7 See Per Wieselgren (ed.), *Samlade skrifter av Georg Stiernhielm, Tredje delen: Brev och inlagor, Första Bandet* (Stockholm: Bonniers, 1937–48), 64.

8 Astrid Thomsch, *David Mevius und der* (*Prozess-*)*Vergleich im Usus modernus pandectarum: Eine Analyse von Gerichtsordnung, Decisionen und Akten* (Hamburg: Kovac, 2014).

had to explain the reason he wanted the counterparty cited to court, and the citation needed to be delivered at least 14 days before the court session, by one or two people. They had to hand the citation to the *citatus* either in person or to someone in his household. The 14 days was a novelty, different to the *Ritterrecht*'s six weeks, which was also the law in Estonia (Ch. 114).[9] If the summoned party did not appear in court, he was summoned again. If he then could not lawfully explain his absence, he had to pay the costs. If he did not appear at all, he lost the case (Art. 14, *Verbesserte Landgerichtsordnung*).

The VLGO aimed at establishing oral procedure. According to Article 15 of the Ordinance, "no written procedure shall be allowed, but everything shall be handled orally and summarily."[10] The Swedish oral tradition had clearly influenced the article, but the rule never really took root in the Livonian practice. Already in the earliest protocols from the 1640s, written statements were, however, sometimes used.[11] In the latter half of the century, civil procedure predominantly consisted of exchanging legal briefs.[12] If one of the parties wanted the court to proceed summarily, this had to be asked for expressly. Pastor Johannes Vestring accused Advocate Gönner of slander in 1668, wanting a "*processum summarium*," "*absque strepitu judicij*" so that the accused would be obliged to answer to the charges right away. The lawyer, however, claimed that he was "not responsible for answering to the charges immediately" and the plaintiff "could not deprive him of the *beneficia iuris*"; instead, he ought to proceed "ordinarily" ("*ordentlich*").[13]

At *gemeines Recht*, parties in a civil case could demand that the opposing party place a guarantee (*cautio*, *Bürgschaft*) with the court.[14] The Livonian law, unlike Swedish law, knew this institution as well. However, no guarantee was demanded on landowning parties, and if people other than a land-owning party could not place a guarantee, they were allowed to take an oath instead (Art. XVI).

Calumny oaths (*juramentum calumniae* or *malitiae*) were another *ius commune* institution. A party in a civil case swore that he would not engage himself

9 See Buddenbrock I, 149; Perandi, *Oberlandgericht*, 83.

10 "*Kein schrifftlicher Process soll bey diesem Gericht zugelassen seyn, sondern alles mündlich und summarie gehandelt* […]."

11 See, for instance, Didricksen vs. Lobbanowsky, Pernau Landcourt 1.6.1641, 9 a: "*Hierauff Elias Diricksen haußfrauw empfig gebetet, man möchte ihm zu keinen eydt gestatten, v. dabey Ihr exceptionschrifft wieder dem Lobbanowsky ubergeben* […]"; or Schiltt vs. Kloett, DCP 1641, NAE 915.1.3, f. 9a–10, 12a–17a.

12 DCP 1696, NAE 915.1.8, f. 323–341.

13 DCP 1668, NAE.1000.1.723, f. 112–115.

14 The *Sachsenspiegel* already knew the institution of guarantee (Book II, Art. 9).

in court proceedings simply for the sake of chicanery. Already in pre-Justinian law, *juramentum calumniae* was known in relation to specified procedural actions, and Justinian extended the institution to the complete legal process.[15] Canonists and *gemeines Recht* authors then developed the institution, so that *juramentum calumniae* now came to refer to the larger version of the institution whereas *juramentum malitiae* referred to the more specified oath. *Juramentum calumniae* found its way also to the *Jüngste Reichsabschied* (1654), one of the most important pieces of early modern German procedural legislation.[16] Unlike the legal practice in the Estonian *Oberlandsgerichte*,[17] the Livonian Ordinance of 1632 squarely forbade *juramentum calumniae* (Art. XVII). This was probably due to the fact that the calumny oath was unknown in Swedish law. Neither version of the oath is found in the Livonian legal practice either.

Otherwise, the Ordinance left the civil procedure for the court practice to regulate. The plaintiff presented his arguments either orally, or in the written form of a *Klaglibell* or *libellus*, thus setting the stage for the lawsuit. In the early protocols, oral arguments appear side by side with written briefs, often drafted by lawyers.[18]

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15 Codex II, 59; Nov. 124, 1.

16 *Jüngste Reichsabschied,* § 43.

17 Perandi, *Oberlandgericht*, 95. In the Estonian high court, the *juramentum* emerged in the late 1640s.

18 Lieutenant Berend Wilhelm Rehbinder's *Klaglibell* against his brother, Ensign Hinrich George Rehbinder at the District Court of Pernau in 1690, in a case involving an unpaid debt (*in puncto extradendae obligationis*), looked like this: "*Hoch Edell gebohrne, Gestrenge, GroßMann-Veste und Hochgelahrte Hr. LandRichter und Hn. Assessores. Geneigte und Hochgeehrte Hhn.*

E. preißl. Königl. Landgrte vorc wieder meinen bruder H. Fähnrich George Hinrich Rehbinder, sahe ich dienstschuldigen danck, sehe und wünsche nichtß lieber mit meinem Bruder in Fried und vertraulicher Freundschafft zu leben, beKlage von hertzen, daß ich mit demselben vor Gerichte mich schleppen muß. Er scheine in termino, und will hier mit kürtzlichen der sachen beschaffenheit zu tage legen; wie daß Meine fraw Schwiegerin Anna Sophia von der Felden. Seel. H. Lieutnant Zedellmans Wittibe nach Ihnen seel. Ehemanß Tode ein pferdt meinem obgedachten bruder zu verkauffen gebehten, daßelbige pferdt habe ich von meinem bruder Rthlr. an mich erhandelt, laut meine an ihn gegebene obligation, obgedachte summa habe Ihm folgender gestalt richtig contentiret. Auf der Reise von Hamburg nach Reval 10. Rthlr. wie außbeygelegten sub Lit: A. et B. zu ersehen, auf Frau Zedellmanschen selbsten 30 Rthlr sub Lit C. bezahlet; Zu Rigaan meinen Bruder 16. rthlr. auf der Weise zu H. Rittmeister Dör Felden 2. rthlr. gegeben, wie auß sub Lit: D. klägerlichen zu ersehen ist. am meines bruders Wirtin in Riga frau Cupperschen vor deßen Qvartir 1. Rthlr. bezahlet kommen. auß diesem allem ersiehet. E. oreißl. Königl. Landgrt, daß Ich meinen bruder richtig contentiret habe, so ist Er auch schuldig meine obligation außzugeben. So ergehet an E. preißl. Königl. Landgericht mein dienstgehorsamstes bitten, meinen bruder ernstl. anzuhalten,

4.2.3 *Procedural Claims*

Procedural claims were common in Livonian courts. They were an essential part of the advocates' strategy to delay the procedures in order to gain time for negotiations or to tire the other party out. One of the most common claims involved the problem of the correct forum. A good example is from the year 1688, when Lieutenant Carl Friedrich Lilienfeld, the tenant (*Arrendator*) of the island of Kyhn (*Kihnu*), was charged by his peasants with their mistreatment. The Pernau District Court dismissed the case because the forum was not appropriate. The defendant being a nobleman, the case should have been taken to the High Court.[19] The Court's interpretation is questionable, however, because the District Court Ordinance actually stated that the cases of the nobility should be inspected in a lower court, which was then to send the documents to the high court for the decision.

This was the stand taken by the same court in another case two years later. The question on the *forum superioris* was discussed in the case of aggravated assault at the Pernau Lower Court (1690, Johan Christoff Beneck vs. Lieutenant Caspar Haacken). Advocate Weisensee, on behalf of Haacken, asked the Court that "Mr. Beneck would let [Weisensee's client] free from this court […] and […] to turn to the High Court with his charge, insofar as he does not wish to give it up."[20] The Court voted on the matter. Assessor Harnisch, following the letter of the law, stated as his opinion (*sentiment*) that it was the lower court's task to make the inquiry (*Inquisition*) in the case, and then send the file to the high court for a decision.[21] President von Anrep and Assessor von Ceumern, however, thought that the case had been brought to court at such an early phase that it was up to the plaintiff first to specify his demands before the trial could continue at all.[22]

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daß Er mir selbige Obligation außgeben möchte, und mir meine angewandte Kosten und Reisen, so ich wegen seiner thun müßen zu erstatten gehalten seyn; worüber und waß sonsten möchte und könte gebehten werden, dem hoadel. Richter ampt anheim stelle." DCP 1690, NAE 915.1.7, f. 416–417.

19 "[…] *weil vermöge Königl. Ordinanzt solche actiones in puncto atrocissimarum injuriarum contra Nobiles immediate ihre primam instantian vor das Königl. Hoff-gericht haben, und dahin remittiret werden sollen.*" DCP 1988, NAE 915.1.7, f. 95–109.

20 "[…] *daß Mons. Beneck Ihn alß einen von adell vor dieses preißl. Königl. Landgrt in dieser sache schleppen will, dawieder protestiret Er semel pro semper, und bittet Ihn mit seiner Klage, wo Er nicht acqviesiren will, an das Königl Hoffgericht verweisen* […]."

21 "[…] *alß kan solchem nach des H. Lieutn: Haack petitum, daß diese sache anietzo schon nachm Königl. hoffgrt solte remittiret werden, keine statt finden, besondern aller, erst nach geschehener Inqvisition, alß dann die acta ad forum superius zur decision hingehen* […]."

22 "…*so wohl alß im Klag=Libell selbst Kläger wieder beKlagten keine ordenrl. Klage geführet, noch selbe directè auf Ihn gerichtet, sondern bloß ein Zeugen Verhör, und zwar da noch keine*

In another case at Pernau Lower Court in 1688, *actor officiosus* Philipp Schirm brought charges against Johann Grake, Mortiz Bretholz, and their wives. Schirm actually charged only the wives for fighting with each other in church, and the husbands were summoned because they were their legal guardians. In his *exceptio*, Bretholz identified three problems related to the problem of correct *forum*. For the first, according to the Consistorial Order § 8, all cases of alleged violence in church belonged to the consistorial courts.[23] For the second, the name of his wife had not been mentioned in any of the official court documents ("*weder in supplica noch Citatione ihren Nahmen benennet…*"). Bretholz argued that although he should represent his wife as her legal guardian ("*ehelicher Vormund und Paterfamilias*"), he ought not to be charged for the crime. And for the third, were he nevertheless charged with slander, as Grake's writings to the court seemed to imply, his correct forum should then be the high court as *forum privilegiatum* for the nobility. The Court accepted Bretholz's "*exceptio fori declinatoria*" and advised Schirm to redirect his charges to the consistorial court.[24]

The argument about *forum domicilium* also appeared. The advocate of Johann Lorentz Hammerin answered the civil charge against his client by claiming that Lorentz "did not belong under the Royal District Court of Pernau." Therefore the plaintiff had to take the case to the Dorpat Court, which was where Lorentz resided, "because the plaintiff has to follow the forum of the defendant."[25] In the case of Fiscal Philipp Schirm against Johann Grake *et alia*, the defendants claimed that the citation did not mention their names, thus

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ordentle. Klage angestellet, oder lis contestiret, sie gerichtl. aufnehmen zu laßen intendiret, und solches gantz contra formalitem Processus…" DCP 1690, NAE 915.1.7, f. 565–566.

23 According to the Livonian Consistorial Order of 1636 § 7, "order in ecclesiastical ceremonies" ("*Ordnungh der Kirchen Ceremonien*") indeed belonged to the jurisdiction of lower consistories. However, the paragraph hardly meant by "order" violent crimes but rather matters of faith. In any case, ecclesiastical jurisdiction in criminal matters never excluded secular jurisdiction, but came in addition to it. This was typically the case in sexual crimes, to which the same §7 also refers. See Ernst Hj. J. Lundström, *Bidrag till Livlands kyrkohistoria under den svenska tidens första skede från Rigas intagande 1621 till freden i Olïva 1660* (Stockholm: Almquist & Wiksell, 1914), 257.

24 "[…] *daß des Mittbeklagten H. Moritz Bretholtz exceptio fori declinatoria billig statt hat, und dahero, weil diese Sache ihrer natur und eigenschafft, auch Königl. ordinantz nach, vor das geistl. gerichte gehörig kläger mit seiner Action, falß Er beklagten derselben nicht zu erlaßen gedencket, billig dahin mediante citatione auß zu führen, zu werweisen sey, wie Er den hiemit falcher gestalt dahin werwiesen wird.*" DCP 1690, NAE 915.1.7, f. 97–98, 109.

25 "*Insondertheit aber muß ich meine schutz wehre in vim declinatioria wieder die citation bey bringen, daß ich unter das Königl. Landgrt Pernauschen Creyses nicht gehöre, sondern jure domicili dem Königl. Landgrt.Dorptschen Creyses, dahin auch vermeinte Kläger, dafern sie*

causing "a lack of an important requisite." In the same case, the defendant also claimed, in his *exceptio*, that all *iniuria* cases against noble people belonged to the High Court[26] – and the defendant was correct of course.

The Pernau Lower Court voted again on procedural issues when the widow of Marts Köppö, a fisher peasant for the Auder Pastor, complained about Lieutenant Jakob Linten, who had allegedly taken away her boat, her "only means of livelihood." The procedural problem was as follows. Judge J.A. von Anrep, the President of the Pernau Court, had given a summons at the request of the widow Marrette. According to the summons, Linten should either replace the boat and repair the damages to the widow, or appear at court where the case could be solved. Linten complained that he had not enjoyed the 14 day period of summons, which he should have had according to the *Landes-Constitution*, but had only 10 days. However, the Court argued that it was "all things considered" ("*gestalten sachen nach*") not "reasonable" ("*billig*") that Linten should be able claim that he was not lawfully summoned. Linten was thus ordered to plead to the charges, which he did. He was given two hours to prepare himself,[27] and he came back with a written brief, clearly written by a legal professional. Before replying to the charges, Linten still made the Court decide whether the Pastor should be ordered to place a pledge (*cautio*) to cover for Linten's eventual "damages and costs." According to the Court, however, it was too early to ask for such a pledge.[28]

The case was postponed, and when it was taken up again in January 1690 (after more than six months), the Pastor was armed with a letter from none less than the Governor-General Erich Soop,[29] in addition to which the public prosecutor now appeared on the side of the widow. It is evident that the governor-general and the prosecutor did not get involved only to defend the poor widow's rights. The Governor-General was careful not to take a stand

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mir und meinen bruder des anspruchs nicht erlaßen wollen, mit der Klage billig folgen sollen, cum indubitate Iuris sitm qvod actor seqvatur forum Rei…" DCP 1690, NAE 915.1.7, f. 202.

26 DCP 1688, NAE 915.1.7, f. 98–99.

27 The *Abscheid* does not state this, but before it is given Judge von Ceumern is recorded to have said that "because the case is of no importance but is only about a fisher boat and does not require a long time to think over whether to appeal or not, the accused shall within two hours utter, whether he will take on the appeal or not."

28 DCP 1690, NAE 915.1.7, f. 243–251.

29 The Governor-General, stating that "this kind of things were best decided by courts," nevertheless orders the Court to decide the case "without further delay" ("*ohne Weitläufftigkeit rechtlich zu entscheiden*").

on the actual case, and the Prosecutor was (most probably) ordered to take the case.[30]

Summary procedure was, according to the contemporary criminal law literature, not used in serious criminal cases. The matter arose in a case at the Pernau Town Court in 1667, when Pastor Vestring accused Advocate Görner of libel. Since, as Vestring argued, Görner's crime was obvious and affected the priest's professional life so much, the court should proceed summarily (*sine strepitu iudiciarii*). The lawyer, however, replied that he should be given time to prepare his defence, because it was not lawful to proceed summarily in "serious cases" (*causae magnae praejudicii*). Görner was correct in theory, although the kind of crime of which Vestring accused him can hardly be called serious. The court took no clear position on this, and Vestring gave the case up by walking out of the courtroom.[31]

4.2.4 *Evidence*

Whether and to what extent written proofs were superior for witnesses in the Middle Ages is a contested affair.[32] It is nevertheless clear that written proofs had superseded witness proofs in the *ius commune* civil procedure by the beginning of the early modern period. The idea was encapsulated for instance, in the French *Ordonnance de Moulins* (1566): "*lettres passent témoins*."[33] The principal authors of the *gemeines Recht* procedure adapted the same idea, and,

30 The Pastor, in a new piece of writing, said that the case had been offered to the Prosecutor, who had indeed taken the case. Because he lived close to defendant, it was, however, probable – so the Pastor says – that he would take care of the case "somewhat," *taliter qualiter*. ("*Den Königl. Fiscalen habe die sache und zwar vor gebühr außzu führenaufgetragen, der sie zwae angenommen; allein weiln Er bey dem Contraparten wohnet, ist zu befürchten, daß er sie taliter qvaliter führen möchte, hernach aber heist es dictum dictum.*") DCP 1690, NAE 915.1.7, f. 313–327.

31 TPC 1668, NAE 1000.1.723, f. 112–115.

32 For Jean-Philippe Lévy, glossators and commentators were still suspicious of documents, because their veracity could not be controlled in the same way as could that of witnesses; Jean-Philippe Lévy, *La hiérarchie des preuves dans le droit savant du Moyen-âge depuis la renaissance du droit romain jusqu'à la fin du XIVe siècle* (Paris: Sirey, 1939), 103. Yves Mausen, in turn, describes, both kinds of evidence as more or less equal; see Yves Mausen, *Veritatis adiutor: la procédure du témoignage dans le droit savant et la pratique francaise (XIIe–XIVe siècles)* (Milan: Giuffrè, 2006), 771. Mathias Schmoeckel goes one step further, stressing the growing importance of written proofs already in the Middle Ages; Mathias Schmoeckel, "Convaincre par l'écrit: La force des documents," in Bernard Durand (ed.), *Ars Persuasionis: Entre doute et certitude* (Berlin: Duncker & Humblot, 2012), 165–178.

33 See Didier Lett, "La langue du témoin sous la plume du notaire: témoignages oraux et rédaction de procès de canonisation au début du XIVe siècle," in *L'autorité de l'écrit au*

as Schmoeckel has demonstrated, protestant legal scholars took it even further. In earlier scholarship, "public" documents (those attested by a notary) were in general regarded to be more trustworthy than private ones. Protestant legal scholars, such as Justus Henning Boehmer, no longer made a difference, valuing all written documents equally highly.[34]

In Livonian civil procedure, written documents were highly valued but by no means exclusive evidence. In 1640, a dispute on the lands of the Karkus manor house was taken to the District Court of Pernau. At least according to the protocols, the plaintiffs relied exclusively on witness evidence to show their title.[35] This may of course be due to the unclear state of land owning, owing to long-lasting wars, which lasted long into the Swedish period: even if documents existed, entire villages had been moved and swept away. This created obvious difficulties for landowners, who wished to determine the exact limits of their holdings. In many civil cases, documents were hardly available at all, such as in cases involving ownership of serfs.[36] Sometimes documents were produced, such as in the case of Schiltt vs. Klodt. In this case, the defendant produced a contract, which nevertheless did not help him win the case.[37] Debts were mostly documented as well.[38]

Witnesses were an important source of evidence. It is therefore understandable that witness ability was sometimes questioned, especially if they threatened to become key witnesses for the opposing party. This was the case when Pastor Joachimus Keibelius charged tenant Elias Diricksen in 1641 with paying Andres Lobbanowsky, a Pole, to set fire to the pastoral residence of Keibelius. Diricksen sent a written statement (*exceptionsschrifft*) to the Lower Court, stating five reasons why Lobbanowsky was not a reliable witness. Lobbanowsky had already given his statement the day before, confirming Keibelius's charge. Diricksen, asking for dilatation, had stated that Lobbanowsky had not spoken the truth but had acted out of "hatred and enmity" ("*hass vnd feindtschafft*") towards the defendant. In his brief, Diricksen now demanded that Lobbanowsky's statement be discarded, because 1. he had committed perjury;

Moyen Âge (*Orient – Occident*): *XXXIXe congrès de la SHMESP* (*Le Caire, 30 avril – 5 mai 2008*) (Paris: Publications de la Sorbonne, 2009), 89–106, 102–103.

34 Schmoeckel, "Convaincre par l'écrit," 175.

35 Johan and Lorens Keunsen vs. Dirich Wolfelt; DCP 1640, NAE 915.1.3, f. 1–4.

36 See the case of Zwicko Jahn, DCP 1640, NAE 915.1.3, f. 32; which was decided on the basis of witness proof.

37 DCP 1640, NAE 915.1.3, f. 12–17a. See also DCP 1640, NAE 915.1.3, f. 47, Walentin Schilling vs. Adolph Graßen; in which both parties produced documents to prove their case.

38 The wife of Eberhardt Örten vs. Michel Engelhart, DCP 1640, NAE 915.1.3, f. 37–38.

2. according to rumour, he was a thief; 3. his statement was self-contradictory; 4. he was a heretic; and because 5. Lobbanowsky was Diricksen's enemy.[39]

4.2.5 *The Process Continues: The Exchange of Briefs*

The German *gemeines Recht* procedure – which the Livonian procedure followed in many ways – consisted essentially of the exchange of briefs. Although the written nature of the procedure has traditionally been emphasized in literature (*quod non est in actis non est in mundo*),[40] the picture has changed somewhat recently. As regards the *Reichskammergericht* in the sixteenth century, Bernhard Diestelkamp has shown that although the civil procedure in that court was primarily based on documents and lawyers' briefs, oral communication was more important than has been assumed in traditional research based on normative rather than archival sources. For one thing, lawyers read their briefs out loud, which prolonged the sessions up to a point where the court was sometimes forced to take measures to limit the time spent on reading. But it was not only about reading the briefs aloud. Lawyers were often indulged in lively discussions as well, in which they repeated what they had written in the briefs. These discussions sometimes concerned legal questions, sometimes facts.[41] Briefs were read aloud in Livonian courts as well, and sometimes discussions between the advocates were taken on record.[42] On the basis of available sources, it is not possible to say how many unrecorded discussions took place.

The *gemeines Recht* procedural terminology consisting of *libellus*, *exception, replica, duplica*, and *litis constestatio* already appears in the early years of the Swedish rule. The defendant contested the *libellus* with an *exceptio*, in which he presented his counterarguments and possibly admitted some of the claims. Then followed a *replica*, in which the plaintiff replied to the defendant's points of defence. The defendant could still meet the plaintiff's *replica* with a *duplica*. As was the case in the *Reichskammergericht*, so also the protocols of the

39 The wife of Eberhardt Örten vs. Michel Engelhart, DCP 1640, NAE 915.1.3, f. 37–38. Diricksen was ordered to take a purgatory oath (*iuramentum corporalis*).

40 See Günther Wesener, "Prozeßmaximen," in *Handwörterbuch zur Deutschen Rechtsgeschichte*, Bd. IV (1985), col. 55–57.

41 Bernhard Diestelkamp, "Beobachtungen zur Schriftlichkeit im Kameralprozeß," in Peter Oestmann (ed.), *Zwischen Formstrenge und Billigkeit: Forschungen zum vormodernen Zivilprozeß* (Köln: Böhlau, 2009), 105–115, 105–106.

42 See, for instance, Advocates Schirm and Benecken in a debt case Hinrich Anrep vs. Johann von Schlippenbach, DCP 1688, NAE 915.1.7, f. 310–316; DCP 1707, NAE 915.1.9, f. 14a–16. Advocate Melchior Martens and Sigismund Grass, the *Königliche Landfiscal* or lower court prosecutor, discussing a case concering a church fight.

Livonian courts show that advocates could and often did indulge in *viva voce* discussions, in addition to exchanging briefs.

In the early years written briefs were exchanged in the *Landgerichte*, which points the conclusion that they were already in use there during the Polish period in the country courts. As shown above, the town courts did not yet use them during the Polish period, at least not in Dorpat Town Court, from which archival material survives. By the 1660s at least, the *gemeines Recht* procedure had reached the city courts as well. Thus in the Lower Town Court of Pernau in 1662, the *gemeines Recht* procedural terminology was in use.[43] Since advocates pressed the procedure in these forms in the lower city courts, it hardly surprises that the upper town court protocols are full of similar terminology. So, in a debt case in the Pernau Town Court in 1667, when Mrs. Breetfeldt had sued Mr. Bruning in a debt case, Bruning "as his *exceptio*" (*loco exceptionis*) claimed that the plaintiff also owed him some money.[44] The *libelli*, *replicae,* and *duplicae*, as well as *litis contestatio*[45] also appear in abundance, so that one can say that the whole civil procedure was clearly organized the *gemeines Recht* way. The more the century advanced and the more lawyer-dominated the procedure became, the more clearly legal proceedings were organized this way. The procedural formula is, to the say the least, dominant in the Pernau *Landgericht* protocols of 1690s and 1710s.

4.2.6 *The Article Procedure of the* Gemeines Recht *and the Livonian Procedure*

Another feature of the early modern *gemeines Recht* civil procedure was that the procedure was "articled." The literature calls this type of procedure "article procedure" (*Artikelprozess*) or "positional procedure" (*Positionalverfahren*). After *litis contestatio*, the plaintiff had to present the material side of his claim in "articles" (*Artikeln*), or as they were sometimes called, "positions" (*Positionen*). They usually began with the words "true, that" (*wahr, dass …*). The answers

43 Pernau Lower City Court 1662, NAE 1001.1.4058, f. 2, "*Actor Replicando gestanden, daß er die so seinen Meister dieses nachreden vor Schelme gescholten, und noch halte, biß sie ihm solches beweisen*." F. 15, "*Reus duplicando priora repetiret*."

44 "*H bekl. gab seine Kegenrechnung loco Exceptionis ein, womit Er solutionem biß an die Obligation wolle beweisen, leget 4 Documenta ein, vndt will mit N. 2. beweisen, welcheß ein revers, der mit Hinrich Von Dammen unterschrieben, aber allerdingß Rohttländerß handt, daß die 51 rth in Obligatione zu viel gesetzet, vndt sollen davon decurtiret werden…*" DCP 1668, NAE.1000.1.723, f. 48.

45 On *litis contestatio*, see Steffen Schlinker, "Die *Litis Contestatio* im Kameralprozess," in Peter Oestmann (ed.), *Zwischen Formstrenge und Billigkeit: Forschungen zum vormodernen Zivilprozeß* (Köln: Böhlau, 2009), 139–164.

(*Responsionen*) of the sued party then began with the expressions "believes to be true" (*glaubt wahr*) or "believes not to be true" (*glaubt nicht wahr*).[46]

According to Gönner, in fact "the whole theory of the *gemeines* procedure in Germany was based on the articles."[47] The *Reichskammergerichtsordnung* of 1555 (art. 3, 40, 2) stated that the parties should

> articul principaliter uff die geschicht oder that und nicht uff das gemeyn recht, es were dann, daß eyner das gemeyn reth, so auß vorarticuliter that fleußt, anzeygen wolt, welches dann ime unbenommen sein soll, doch daß er die recht nicth überflüssig und unnottürftig allegir, damit dem widertheylzu disputirn und zu cavillirn nit urascah gegeben werde.[48]

Statements of law were thus forbidden, insofar as they were known to the court.[49] The plaintiff had to present his claims, "legal or factual positions" (*positiones iuris* or *facti*) in the form of articles, which the court then communicated to the defendant.[50]

The plaintiff carried the burden of proof regarding the articles that the defendant denied in his *responsiones* to the *positiones*. The plaintiff had to prepare a list of *Beweisartikel*, "articles of proof" or evindentiary articles, according to which the witnesses were questioned. The list of *Beweisartikel* was then communicated to the defendant, who could add his own list (*Fragstücke, Interrogatoria*) to be presented to the witnesses. In the German *gemeines Recht* the word *articuli* referred to the contents of the *positiones* and *responsiones*. If evidentiary questions were involved, the term *Beweisartikel* was used. Sometimes the *positiones* were already called articles, which were then divided into positional and evidentiary articles (*Positionalartikeln*, *Probatorialartikeln*). The article procedure was not introduced at the territorial level everywhere in Germany, because it was considered to be inflexible, in addition to which separating the factual side of cases from the legal issues proved to be a continuous bone of contention in the scholarly discussions. The article procedure was not used in the *gemeines Recht* criminal procedure, except for the fact that

46 Peter Oestmann, "Artikelprozess," *Handwörterbuch zur Deutschen Rechtsgeschichte*, Band I (Erich Schmidt Verlag, 2008), col. 313–314. For a *gemeines Recht* authority on article procedure, see G.W. Wetzell, *System des ordentlichen Zivilprozesses* (1874), 23, 45, 70–71.

47 Nicolaus Taddeus Gönner, *Handbuch des deutschen gemeinen Prozesses* (Erlangen: Johann Jacob Palm, 1804), 67.

48 At Laufs, 257.

49 Oestmann, *Rechtsvielfalt vor Gericht*, 54.

50 Gönner, *Handbuch des deutschen gemeinen Prozesses*.

the questions posed to the accused in the inquisitorial procedure were set out much in the same way as in the article procedure.[51]

The *Kameralprozess* served as a model for the *gemeinrechtlich* civil procedure throughout Germany, even though the procedure was plagued from the start by great deficiencies mainly related to its slowness.[52] In 1555 the plaintiff got the right to choose between an articulated or a summary *libellus* (RKGO 1555 III 12 §8), and in 1570 it was established that the plaintiff had to present his articles in his *libellus* in order to save time. The article procedure, although it gave the procedure a clear backbone, however, tended to be cumbersome and often led to lengthy processes. Therefore the *Jüngste Reichsabschied* of 1654 finally got rid of the article procedure in both lower and appeals instances, except for the evidentiary articles, which remained until the nineteenth century.[53] Instead of articles, the defendant now had to formulate his or her claims summarily and if necessary, as points (*Punkten*). Both claims and answers had to be put clearly and be kept brief.[54]

In Livonian civil procedure articles were not used even in the first decades of the Swedish rule, although one could expect them to have been in use at that time. A reason for this may be that civil law suits in the lower courts of the early Swedish period often still took place without lawyers. Article procedure was also unknown to the pre-seventeenth-century Swedish civil procedure, which operated much less learnedness and predominantly orally. To give an example from the Livonian procedure, in 1640 Christoffer Schiltt sued his father-in-law Wolmer Kloett at Pernau District Court for taking unlawful possession of a piece of land that Schiltt held in pledge (*Pfand*) from Kloett. Both parties wrote briefs in this case, by nature not of the easiest legal kind, and clearly without legal counsel – and without articles.[55]

In later decades of the Swedish rule, the article procedure was nevertheless often used, but only insofar as evidentiary articles are concerned. In other words, the questions to the witnesses, starting in the latter half of the Swedish rule, are regularly formulated as articles. They were "communicated" to the defendant in order that he could produce his own questions (*interrogatoria*). Both *articuli* and *interrogatoria* were delivered to the court in written form,

51 "Artikelprozeß," in *Handwörterbuch zur Deutschen Rechtsgeschichte* (Berlin: Erich Schmidt Verlag, 1971), col. 233–234.

52 See Wolfgang Sellert, "Prozeß des Reichskammergerichts," in *Handwörterbuch zur Deutschen Rechtsgeschichte* (Berlin: Erich Schmidt Verlag, 2005), col. 29–36.

53 "Artikelprozeß," col. 233–234.

54 "Artikelprozeß," col. 233–234.

55 DCP 1640, NAE 915.1.3, f. 9a–10, 12a–17a.

and the court took care of the questioning.[56] Sometimes one or both of the question groups were divided into "general" and "special" questions, as was the case between the lieutenants von Linten and von Fischenbach from the year 1690. Fischenbach's general *interrogatoria* included questions such as "if the witness was not afraid that his lord might to resort to punishments should the witness testify against him" and "whether he did not like to see the plaintiff win the case, especially since his own guilt was at dispute here."[57] The special questions, of course, went straight to the heart of the matter and, insofar as *interrogatoria* were concerned, discussed directly certain specified *articuli*.[58]

To give another example, in a case of a stolen boat at the Pernau District Court in 1688, the plaintiff's advocate, prosecutor Philipp Schirm, handed to the Court a list of evidentiary articles (*articuli probatorii*), which he asked the Court to communicate to the other party. Schirm listed first eight witnesses and then fourteen questions (*articuli*) to be asked of each one of them.[59] When Linten's advocate Schröder received "communication" that the *articuli* had been drafted by Schirm, Schröder criticized Schirm that the plaintiff's advocate "did not yet know what the right focal point of the legal suit" was ("*noch zur zeit das rechte punctum actionis nicht wißе*").[60] Schröder thought that Schirm's articles did not establish clearly what the case was about; the questions were, according to Schröder, "impertinent." Many of the articles were in fact directed not against Schröder's client but against his son or the peasant the plaintiff claimed had actually taken the boat. Schröder wanted, nevertheless,

56 See von Linten vs. Lintenbach, DCP 1690, NAE 915.1.7, f. 387–389.

57 "*2. Ob nicht Zeuge besorge daß sein Erbherr, wen Er waß wieder Ihn zeugen würde ihn solgendes zur Straffe ziehen möchte, und 3. Ob Er nicht gerne sehe, daß Producens die sache gewinne, absonderlich da eben wegen seiner eigenen schuldt hier der disput ist.*" DCP 1690, NAE 915.1.7, f. 391.

58 DCP 1690, NAE 915.1.7, f. 391–392.

59 The articles were, for instance, as follows:

"Art: 1. Wahr und Zeuge bekennen muß, daß der Redig selbige Zeit ehe das boht genommen bey ihm gewesen und gesagt, Er wolle den Michell eines Pastorat Bauren Sohn, dafern Er sich wiedersetzen würde, und sein Herr nemblich productus davor guht sein wolte, erschießen.

Art: 2. Wahr daß hier auff Zeugens Weib dem selben Redig geantwoertet, Redig will dein Herr vor dich stehen? schießestu ihn todt, so wirdt sich dein Herr vor dich nicht richten laßen.

Art. 3. Wahr daß bemelter Redig nach vorbeygang verwichenen Sommer Iuridicqve bey Zeugen gewesen und Ihr gebeten, daß Er möchte auff ihrer seite seyn, seyn Hr solte Ihn davor bezahlen. DCP 1688, NAE 915.1.7, f. 391, 323–324. See also DCP 1688, NAE 915.1.7, f. 335."

60 DCP 1690, NAE 915.1.7, f. 380–381. See also Olrau vs. Schmidt, DCP 1690 f. 578–588, where the plaintiff delivers a list of 35 questions, *"articuli probatioralis puncte vorüber angeführte Zeugen jurato & formaliter zu examineren,"* to the Court.

to put forth counter questions (*interrogatoria*), and he handed in a document consisting of four questions to be put to the witnesses.

According to Schirm, his questions were only intended to clear the case ("*wären die formirte articuli zu beßerer erhäupt – und erleuchterung der angeklagten gewaltthat hinweg nehmung des bohts gestellet worden, und könten dahero dieselbe vor inpertinentes nicht genennet warden*"). Schirm claimed that Linten's son was, at the time of the deed, under the father's "potestas," *potestät*, and it was therefore not necessary to cite the son personally. The peasant, in turn, was no longer under Linten's *dominium*. Schirm asked the court to decide the case summarily, "*absque ulteriori Iuris strepitu*" ("*wegen des hierunter mit versirenden Interesse publici rescribirter maßen absq ulteriori Iuris strepitu, & qvidem levato velo zu verfahren submittirets zum Abscheide*"). Objecting bitterly to this, Schröder stated that the plaintiff's claims were worth nothing if they were not proven ("…*so gelten dicat absq probatione nichts*…."), and the plaintiff had not shown that the son was no longer in royal service (which would have implied that he was under his father's protection) or that the peasant was under Linten's judicial power (*botmässigkeit*). Schröder went on to wonder, "how far a father [had] a legal responsibility over his son, in case the son sinned, especially when the son does not confess himself responsible to answer in court."[61] The Court decided that "although the Royal Land Ordinance allowed the courts to proceed summarily in cases of little importance," since in this particular case the *articuli* were rather lengthy and not completely consistent with the *libellus*, the plaintiff's witnesses should nevertheless be heard.[62]

The case was taken up again on 18 June of the same year (1690). The plaintiff had not produced any witnesses, and von Linten was therefore now ready to ask compensation for the expenses that the "unnecessary process" had caused him. The plaintiff, in turn, asked Linten to prove his claim, and Jakob Schröder produced seven witnesses. The case was again postponed *ad proximam,* because the Court did not think that the case was definitely closed from the side of the original plaintiff, the Pastor of Audern. The compensation claim of Linten was thus premature.[63]

The *gemeines Recht* procedure, written as it was, depended on lawyers, and without them there was no article procedure. Instead, the procedure was straightforward and uncomplicated. Thus when Christopher Veng sued the Stockmann heirs, because he thought their house was causing damage to his,

61 "…*wie weit ein Vater noch anleitung der Rechte für seinen Sohn, falß Er waß pecciret, alß welches doch durch auß nicht gestanden wirdt zu antworten schuldig*."

62 DCP 1690, NAE 915.1.7, f. 382–384.

63 DCP 1690, NAE 915.1.7, f. 602–607.

Veng simply explained the matter to the court, and the defendants answered.[64] Courts of nobility as the district courts were in practice, the customers of the district courts could often afford lawyers, who then presented the witness hearing in accusatorial criminal cases in an articled framework.

Evidentiary articles were often used in accusatorial criminal cases as well. The accusing party delivered the court a list of witness, and questions to be asked, *nomina testium cum articulis*.[65] For instance, in an accusatorial case of the Small Guild vs. Clement Wigandt at the Pernau Council in 1660, the plaintiffs handed in "positional articles," in which a witness was named.[66] The situation at the end of the seventeenth century had not altered significantly. Witness hearings were still presented in the form of *articuli probatoriales* and the questions of the accused in *interrogatoria.*[67] Even this form of article procedure seems to have disappeared in Livonia by the 1690s. Thus, advocate Johann Christoff Beneck's long *libellus* for the District Court of Pernau in 1690 was followed not by the traditional *articulii* but instead by *puncta*, a list of 34 detailed questions intended to be asked of one particular witness to the case.[68]

4.2.7 *The Final Decision* (*Urteil*)

The final court decision was called *Urteil* (several spellings occur in the sources: *Urtheil, Urtheill, Urthell*), and sometimes in the lawyers' Latinised briefs, *sententia definitiva.* The decision begins with the names of the parties and continues by identifying the type of case (for instance, *in puncto debiti ex obligatione*). Then the court lists the evidence, according to which the case has been decided.[69] A *ratio decidendi* then follows, in which the main arguments for the

64 Christopher Veng vs. Stockmann Erben; Dorpat Council, 1619, NAE 995.1.252, f. 3.

65 "*…producirt entlichen zu behaubtung seiner Klage zeugen ubergaeb die Nomina. Testium cum articulis, bittend Dieselbige juxta articulos formaliter zu verhören…*" DCP 1640, NAE 915.1.4, f. 1.

66 Die Kleine Gilde Cont. Clement Wigandt, NAE.1000.1.713, f. 68: "*Actores übergeben Articulos Positionales, worinnen sie Hanß Rost, zimmergesellen, zum Zeügen produciren, bittende, denselben darauff zu examiniren.*" The positional articles are not given in the protocol, so we do not know their contents.

67 See, for instance, a case concerning a horse theft were again both *articuli probatoriales* and *interrogatoria* appeared. DCP 1696, NAE. 915.1.8.

68 DCP 1690, f. 539–567.

69 For instance; "[…] *erkennet das Königl. Landgrt auf das waß seither in unter schiedlichen Instantie, so mündt= alß schrifftlich von beyden theilen vor und eingebracht, producirte obligation, transport, attest, qvitantz. E.E. Rahtß zu Pernau Protocoll, Mahenungß schreiben der sachen befindung und umbständen nach, von Recht* […]"; DCP 1688, NAE 915.1.7, f. 258–259.

plaintiff and for the counter party are weighed against each other, albeit usually briefly and often stating only the arguments *pro* the decision.[70]

A sentence typically ends in a conclusion, in which the court takes a stand on the plaintiff's claims. In the example case here, the court has accepted the claim as such, with the addition of six percent in interest, but allowing the payment in two parts. As is usual, the loser is ordered to pay the litigation expenses.[71] Sometimes, as in the example case, there is an instruction to the successful plaintiff to turn to the governor-general for the execution of the sentence.[72] An abbreviation "V.R.W." for "*Vor Rechts wegen*" ("by law," *de jure*) is added customarily at the very end.[73]

After the actual decision, a remark on the appeal was often added. In the example, the defendant's lawyer reserved the right to deliberate on the possible appeal.[74] The protocols contained no signatures, but the copies given to the parties were signed and sealed.[75]

4.2.8 *Slowness and Inefficiency of the Civil Procedure: Livonian Procedure in European Comparison*

Early modern civil procedure was often slow. The *Reichskammergericht* is the prime example. Its slowness culminated in the famous quote from the one-time junior judge at the Court, Johann Wolfgang von Goethe (1749–1832): "[A] monstrous chaos of papers had accumulated and was increasing from year to year, since the seventeen assessors were insufficient even for the dispatch of current business. Twenty thousand lawsuits had accumulated; sixty

70 "*Demnach alß der producirten obligation de dato den 18. Octobr. Anno: 1660. zu ersehen, daß Fr: beKln. Ehe Mann dero bruder Capitain Barnowitz mit 70. rthlr. die Er nachgefunds am Hans Rubusch und dieser hin wieder an jetzigen Kläger transportiret, verhafft worden, daß aber selbe beklegter seite vorgeben noch, entrichtet nicht bewiesen, sondern vielmehr von Klägern durch producirten attest von Ao. 69. und die drauf an beKln. seite bewürckte unterschiedliche Mahenungs=schreiben das contrarium dargethan* […]"; f. 258–259, DCP 1688.

71 "*Alß soll Fr: beKln dahero solche schuld der 70. Rthlr. sampt denen à tempore moræ aufgelauffenen Renten à 6. de centum jedoch daßselbe sich nicht ultra alterum tantum erstrecken, und verursachten Unkosten, salva tamen Iudicii moderatione in zweyen terminen, alß die helffe künfftigen Weynachten die andere helffte aber auff Weinachten übers Jahr an Klägern zu entrichten und abzutragen schuldig sey*"; DCP 1688, NAE 915.1.7, f. 259–260.

72 "*In entstehung deßen Kläger zur Execution an das Königl General=Gouvern: nach Riga verwiesen wird.*" DCP 1688, NAE 915.1.7, f. 259–260.

73 DCP 1688, NAE 915.1.7, f. 260.

74 "*Post publicationem sententiæ reserviret Mandatorius* […] *ad deliberandum die fatalia*"; DCP 1688, NAE 915.1.7, f. 260.

75 See also Perandi, *Oberlandgericht*, 127.

could be settled every year, and double that number were brought forward."[76] Modern research shows that Goethe was not exaggerating. As for the sixteenth century, it was not rare that it took up to 30 years for the Court to give its final verdict. However, as Manfred Hörner stresses, all the delays were hardly due to the working methods of the Court but resulted at least partly from the different functions that the parties set for litigation.[77] Anja Amend-Traut observes that introducing a lawsuit at the Imperial Chamber Court could sometimes serve the strategic interests of the plaintiff by redefining the negotiating positions or endangering the reputation of the defendant.[78] Obtaining a verdict was only one of the goals. For instance, the *Kameralprozess* offered the defendant several possibilities of stalling the procedure for years. In many cases no verdict was given because the cases were either formally settled or they were settled extra-judicially, so that the case just seemed to fade away in the records.

Slow justice was by no means a prerogative of German law. Henry Kagan has shown that lawsuits in early modern Castilian courts frequently lasted for years. Procedural rules in Castile were extremely complex, allowing the litigants to stall the proceedings with the help of widespread appeals, lawsuits against the judges (*recusación*), or by obtaining suspension orders (*cédula de recusación*) from the Crown. Judges had little means of punishing parties wilfully delaying procedures. Furthermore, Kagan notes that frequent illnesses and deaths of the judges and parties to the lawsuits, as well as poor weather conditions, played a role in the delays of justice.[79] Similarly, in the sixteenth-century English Court of Chancery most cases lasted from two to five years,

76 Johann Wolfgang von Goethe, *Poetry and Truth from my own Life*, (trans.) Minna Steele Smith (London: George Bell & Sons, 1908; orig. 1808–1831), 76.

77 Manfred Hörner, "Anmerkungen zur statischen Erschließung von Reichskammergerichtsprozessen," in Anette Baumann, Siegrid Westphal and Stefan Ehrenpreis (eds.), *Prozeßakten als Quelle: Neue Ansätze zur Forschung der höchsten Gerichtsbarkeit* (Köln: Böhlau, 2001), 69–81, 81. For Spain, see Henry Kagan, *Lawsuits and Litigants in Castile 1500–1700* (Chapel Hill: The University of North Carolina Press, 1981).

78 Anja Amend-Traut, "Brüder unter sich: Die Handelsgesellschaft Brentano vor Gericht. Elemente privater Konfliktlösung im Reichskammergerichtsprozess," in Albrecht Cordes and Serge Dauchy (eds.), *Eine Grenze in Bewegung: Öffentliche und private Justiz im Handels – und Seerecht; Une frontière mouvante: Justice privée et justice publique en matières commerciales et maritimes* (München: Oldenbourg, 2013), 91–116, 96–97; and Anja Amend-Traut, "Konfliktlösung bei streitigen Wechseln im Alten Reich: Der Kaufmannstand der Suche nach Alternativen zur gerichtlichen Geltendmachung von Forderungen und stratetischer Justiznutzung," in Rolf Lieberwirth and Heiner Lück (eds.), *Akten des 36. Deutschen Rechtshistorikertages Halle an der Saale, 10.–14. September 2006* (Stuttgart: Nomos, 2008), 153–175.

79 Kagan, *Lawsuits*, 43–51.

and a large number of them were never brought to conclusion but ended with an interlocutory decision.[80]

The *ius commune* civil procedure was thus not only accused of being slow, but was accused of being inefficient. It also seemed inefficient, because often, civil cases remained undecided. For instance, in the Imperial Chamber Court (*Reichskammergericht*) fewer than one fourth of the cases were decided by a court decision (*Urteil*).[81] The obvious reason for this is that the parties used courts of law not only to obtain formal decisions, but also as strategic weapons. A pending court case could be used as a tool to extract a payment from the other party or to make them submit to other demands. This is probably part of the reason why parties sometimes tolerated the long duration of the procedure as well. The function of the court case was clearly different to what it is today.

The Livonian courts could not, at least usually, be accused of slowness. The protocols of 1688–1690 of the Pernau District Court offer some perspective on the duration of the cases. In those years, 14 civil cases were tried at the Court.[82] Six cases were definitively decided, and the others were postponed, usually because of defendant's absence.[83]

Of the six cases decided definitely, two were decided during the same session in which they were initiated.[84] The others were tried three,[85] four,[86] or five[87] times. The trials followed each other, however, in a rather short sequence. The

80 W.J. Jones, *The Elizabethan Court of Chancery* (Oxford: Clarendon Press, 1967), 306.

81 See Hörner, "Anmerkungen zur statischen Erschließung von Reichskammergerichtsprozessen," 69–81, 79.

82 The number does not include libel cases (*injuria*).

83 It is not entirely certain that some of the cases left without a definitive sentence in 1690 might have been decided in the following years. In most the cases it highly unlikely, especially if the case was in court in the beginning of 1690.

84 The case of Lieutenant Carl Friedrich Lilienfeld vs. Herman Jencken and the peasants of the island of Kühn (in – Estonian: Kihnu), DCP 1688, NAE 915.1.7, f. 1–40; and Quartermaster Georg Forbes and his wife Anna Kühn vs. Steward Herman Fix, DCP 1688, NAE 915.1.7, f. 141–158. In the first case, the Court was probably pressured to arrive at a definitive decision, because the trial was held at the remote island of Kühn, to ensure that the peasants themselves could be heard in their case against their lord.

85 Merchant Peter Frantzen vs. Soldier Andres Hoch, DCP 1689, NAE 915.1.7, 369–371, 488, 608–610.

86 Ebert Frohn vs. Frau Dorothea Barnowitz et al.; DCP 1688, NAE 915.1.7, f. 162–164, 171, 189–206, 258–260; and Lieutenant Magnus von Linten vs. Lieutenant Anthon Friedrich von Fischbach; DCP 1688–90, NAE 915.1.7, f. 276–286, 327–339, 350, 384–398.

87 *Rahtverwanter* Hinrich Zimmerman vs. *OberstLieut:* Wolmar Anthon von Schlippenbach; DCP 1688, NAE 915.1.7, f. 269–274, 286–292, 305–313, 357–361, 489–490.

case which took the longest was that of Ebert Frohn vs. Dorothea Barnowitz et al. (*in puncto debiti ex cessione*), in which the Court took one year (June 1688 – June 1689) from the initiation to the decision. In one of the cases which were not decided definitively,[88] the Court nevertheless handled the case nine times before it disappeared from the files in February 1690. This shows that the Court itself was prepared to proceed with the cases relatively swiftly.

However, it often happened that civil cases never came to the court after they were first introduced there. This seems to have been the case when Peter Petersen sued Johann von Harten and his wife Brigitta Elisabeth von Sahlfeld for an unpaid debt. The trial started on 6 March 1688, without the defendants.[89] The case did not return to the docket, at least not in the same year, probably because it was settled out of court. One cannot help concluding that in many situations, the lower court was only used as an instrument to pressurize the defendant into action. In many other cases, other means were probably used towards the same end, and they never came to court at all. From the plaintiff's point of view, even though the Court was rather quick, it must have appeared to be toothless, incapable as it was of effectively avoiding the contumacy of defendants. The Court was thus not slow, but inefficient, because it was lacking the means of enforcing whatever authority it had on its subjects.

4.3 The Criminal Procedure in the Lower Courts

4.3.1 *European Criminal Procedure in the Middle Ages and the Early Modern Period*

Before going into the Livonian criminal procedure such as it figures in the statutes and court practice, in order to build a context, it would be worthwhile to take a look at the common European criminal procedure at the beginning of the seventeenth century, the time of the Swedish conquest.

From the time of Pope Alexander III (r. 1159–1181), inquisitorial procedure was gradually introduced as a regular part of canon law of crimes, starting with visitations and disciplinary procedures against cleric. The scientific consensus on the formation of the inquisitorial procedure is as follows. The problem with the traditional procedures had been that they had entirely dependent on the appearance of private accusers. For obvious reasons, private accusers were not always available. Should the defendant not be found guilty, the accuser ran the

88 Pastor Friedrich Döpner vs. Lieutenant Captain Jacob von Linten; DCP 1688, NAE 915.1.7. f. 243–258, 313–327, 379–384, 398–399.

89 DCP 1688, NAE 915.1.7, f. 45.

risk of facing the same punishment to which the defendant would have been condemned if he had been convicted. In practice the punishments in these cases tended to be more lenient, but were nevertheless substantial, so that the accuser had to be certain of his case. Around the time of Pope Alexander III, in the 1150s and 1160s, the early modern *fama* procedure evolved into a procedure in which the church officials began to investigate actively into the alleged misbehaviour of clergymen. Clerical concubinage was one of the most burning practical problem calling for a disciplinary solution. A series of decretals moulded the inquisitorial procedure into its classical shape, confirmed in the Fourth Lateran Council in 1215.[90]

Since its birth in the twelfth century, the European criminal procedure had been divided into the inquisitorial and the accusatorial, the "extraordinary" and the "ordinary" procedure.[91] Starting in the thirteenth century, the accusatorial and inquisitorial modes of criminal procedure were adopted in the secular legal orders as well. As political power was centralised in the early modern age, judicial apparatus began to intervene more often and more effectively in petty crime. As a result, the scope of criminal law widened.[92]

In the leading early modern Italian and German scholarly presentations, the accusatorial procedure was still presented as the basic model of criminal procedure, and in principle it remained so until the breakdown of the ancient

90 See Eberhardt Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege* (Göttingen: Vandenhoeck & Ruprecht, 1965); Ditmar Willoweit (ed.), *Die Entstehung des öffentlichen Strafrechts: Bestandaufnahme eines europäischen Forschungsproblems* (Köln: Böhlau, 1999); Heikki Pihlajamäki and Mia Korpiola, "Medieval Canon Law: The Origins of Modern Criminal Law," in Markus D. Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014), 201–224.

91 See Winfried Trusen, "Der Inquisitionsprozess: Seine Historische Grundlagen und frühen Formen," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 74 (1988), 168–230; Günter Jerouschek, "Die Herausbildung des peinlichen Inquisitionsprozesses im Spätmittelalter und in der frühen Neuzeit," *Zeitschrift für die Gesamte Strafrechtswissenschaft* 104 (1992), 328–360; Arnd Koch, *Denunciatio: Zur Geschichte eines strafprozessualen Rechtsinsitituts* (Frankfurt am Main: Klostermann, 2006); Lotte Kéry, "Inquisitio – denunciatio – exceptio Möglichkeiten der Verfahrenseinleitung im Dekretalenrecht," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 87 (2001), 226–268. Besides the accusatorial procedural, three other modes of procedure emerged in the twelfth and thirteenth centuries, the inquisitorial procedure being only one of them. Denunciatory procedure and "exceptionary" procedure (*Exeptionsprozess*) remained particular to canon law and had no direct continuation in secular legal orders.

92 See B. Lenman and G. Parker, "The State, the Community and the Criminal Law in Early Modern Europe," in V.A.C. Gatrell, B. Lenman and G. Parker (eds.), *Crime and the Law* (London: Europa Publications, 1980), 11–48.

regime of criminal law in the nineteenth century. The accusatorial procedure remained at the statutory level as well. The criminal law of the Holy German Empire, *Constitutio Criminalis Carolina* (CCC) of 1534, is worth focusing upon here, because it was followed in Livonia as well. The CCC presented the accusatorial procedure (*der Anklageprozess*) as the first, ordinary mode of procedure. This was despite the fact that the CCC did everything it could to make the accusatorial procedure as unattractive as possible in the eyes of the potential "users" – exactly as its predecessors, the *Wormser Reformation* (1498) and *Constitutio Bambergensis* (1507), had already done. Article 12 of CCC ordered the plaintiff to place a surety (*Bürgen*) should the claim not succeed. If the plaintiff was unable to provide for the guarantee, he or she was taken into custody. According to Eberhardt Schmidt, all criminal proceedings began accusatorially. Should the plaintiff's evidence prove to be unsatisfactory, the procedure did not end but was instead continued inquisitorially. The court could then attempt to collect the necessary evidence with the help of judicial torture *ex officio*.[93] Wolfgang Sellert and Hinrich Rüping have, however, emphasised that the plaintiff by no means lost control of the case after the initiation phase. It still remained the plaintiff's task to provide the evidence. If the accused would not confess, the plaintiff could ask the court to inflict torture on the suspect.[94]

As Massimo Meccarelli has shown, the judicial *arbitrium* in the *ius commune* procedure was extremely flexible, and judges were allowed to exercise a wide discretion as to the mode of procedure which they wished to pursue. The mode of procedure (*iter*) was frequently changed from inquisitorial to accusatorial, or vice versa, during the investigation of a single case. Even though a case could start as accusatorial or denunciatory, it could later be taken over by the court and thus change into an inquisitorial one. The court could assume active charge of the proceedings and even apply judicial torture if deemed necessary.[95]

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93 E. Schmidt, *Einführung*, 125–126. See also, Hermann Conrad, *Deutsche Rechtsgeschichte: Band II, Neuzeit bis 1806* (Karlsruhe: Müller, 1966), 430.

94 Sellert and Rüping, *Studien – und Quellenbuch*, 206–207. See also Gerd Kleinheyer, *Zur Rechtsgestalt von Akkusationsprozeß und peinlicher Frage im frühen 17. Jahrhundert: Ein Regensburger Anklageprozeß vor dem Reichshofrat* (Opladen: Westdeutscher Verlag, 1971), 16–17.

95 Massimo Meccarelli, "Le categorie dottrinali della procedura e l'effettività della giustizia penale nel tardo medioevo," in Jacques Chiffoleau, Claude Gauvard and Andrea Zorzi (eds.), *Pratiques sociales et politiques judiciaires dans les villes de l'Occident à la fin du Moyen Âge* (Roma: Ecole française de Rome, 2007), 573–659.

Despite the theoretical subsidiarity of the inquisitorial procedure in relation to the accusatorial procedure,[96] the numerous exceptions to the main rule in practice rendered it more and more obsolete. Historians of criminal law have thus shown the text-book picture to be misrepresentative of the reality: at least at the beginning of the sixteenth century, it is said, the inquisitorial procedure had taken over from the accusatorial one in most parts of Europe. In his classic work on the history of French criminal procedure (*Histoire de la procédure criminelle*), Adhémar Esmein claimed that after the fourteenth century the accusatorial procedure was "a remnant of the past," rarely used. It was gradually replaced by the denunciatory procedure, and the *Ordonnance* of 1670 was then wholly dominated by the inquisitorial procedure.[97] The continued prevalence of the accusatorial procedure fundamentally distinguished Livonia from most areas in the heart of Europe, where most early modern states vigorously sought to extend their powers in criminal procedure. The inquisitorial procedure was an important instrument that the developing states used to gain effective control over their territories. A logical consequence of the extension of inquisitorial procedure was that the use of accusatorial procedure was limited.[98] According to Eberhardt Schmidt, in Germany, early modern criminal law was characterized by the inquisitorial procedure pushing accusatorial procedure out of its way, although the accusatorial procedure never completely lost its importance.[99]

Although empirical studies on judicial practice are still largely lacking, the picture has become more nuanced than before. Focusing on late medieval France, Esther Cohen emphasises that "whatever or whenever the shift [from the accusatorial to the inquisitorial procedure] began, it was neither unidirectional nor overall." It was a slow process with many reversals, and "… one which took place in different areas at different times."[100] Nevertheless, not even Cohen contends that the inquisitorial procedure would not finally – at least by the seventeenth century – have completely taken over from the accusatorial procedure. Karl Härter has shown that the accusatorial procedure vanished in

96 "*…nemine enim accusante regulariter iudex ex officio inquirire non potest: quia inquisitionis remedium non ordinarium, sed extraordinarium est…*" (l.1, t.1, q.1, 7). Prosper Farinacius, *Praxis et theorica criminalis libri II* (Frankfurt, 1606), 3 (Liber 1, titulus 1, quæstio 1,7).

97 Adhémar Esmein, *Histoire de la procédure criminelle en France et spécialment de la procédure inquisitoire depuis le XIIIe siècle jusqu'à nos jours* (Paris: Larose et Forcel, 1882), 108–109. See also John Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Cambridge, Mass.: Harvard University Press, 1974), 210–222.

98 Conrad, *Deutsche Rechtsgeschichte*, 430.

99 Schmidt, *Einführung*, 194–195.

100 Esther Cohen, "Inquiring Once More After the Inquisitorial Process," in Dietmar Willoweit (ed.), *Die Entstehung des öffentlichen Strafrechts* (Köln: Böhlau, 1999), 42–65.

some parts of Kurmainz probably soon after the introduction of Carolina and at the latest by the late sixteenth century.[101] In canon law, inquisitorial procedure had become the rule by the sixteenth century, and local customs could also favour the inquisitorial procedure at the cost of the accusatorial one. However, European regions vary a lot in this respect.

Relying on statutory sources, Schmidt also remarked that the accusatorial procedure never completely lost its importance in Germany.[102] In several German territories the accusatorial procedure retained its primary position long into the eighteenth century.[103] In many territories, the inquisitorial procedure evolved into a "mixed procedure" (*prozessuelle Mischform*), in which the position of the official prosecutor (*Fiskal*) became important. In East Prussian *processum mixtum*, for instance, the *Fiskal* acted as the prosecutor in an accusatorial procedure, but could rely on a previous inquisitorial inquisition. The procedure was thus started with an inquisition, after which the procedure turned accusatorial with the *Fiskal* taking over. Judicial torture could also be used, in which case the inquisitorial features again took over.[104] The East Prussian example goes to show how public interest could be taken care of by the *Fiskalat* even in a system with strong accusatorial traits.[105] For instance, even though the inquisitorial features dominated the *peinlich* procedure of Kursachsen from the late fifteenth century onwards, elements of ancient oath procedure did not vanish for a long time.[106]

In conclusion, the takeover of the inquisitorial procedure is clearly not the whole picture of the European development. It is the picture of the European heartland, which fulfilled two important criteria. First, the regions where inquisitorial procedure overtook the accusatorial one in the early modern period were those where the modern state, in the centralised and bureaucratised meaning of the word, also developed. Second, the inquisitorial mode of criminal proceedings could not develop fully without an effective corps of trained

101 Karl Härter, "Regionale Strukturen und Entwicklungslinien frühneuzeitlicher Strafjustiz in einem geistlichen Territorium: Die Kurmainzer Cent Starkenburg," *Archiv für Hessische Geschichte und Altertumskunde* 54 (1996), 111–162.

102 E. Schmidt, *Einführung*, 194–195.

103 Kleinheyer, *Zur Rechtsgestalt von Akkusationsprozeß*, 21–25.

104 Kleinheyer, *Zur Rechtsgestalt von Akkusationsprozeß*, 38.

105 E. Schmidt, *Einführung*, 202–203.

106 Heiner Lück, "Sühne und Strafgerichtsbarkeit im Kursachsen des 15. und 16. Jahrhunderts," in Hans Schlosser and Dietmar Willoweit (eds.), *Neue Wege strafrechtsgeschichtlicher Forschung* (Köln: Böhlau, 1999), 83–99.

legal professionals staffing the courts. The core areas of Germany, France, Italy, and Spain fulfilled both these criteria more or less successfully.[107]

The observations on previous research on the demise of accusatorial procedure have been made primarily on the basis of material from the heartlands of Europe, and it is questionable to what extent they allow for European-wide generalisations. The studies of Cohen and Härter have already questioned the thesis of the complete disappearance of accusatorial procedure. More regional studies on legal practice are needed, however, to see how well the thesis of the vanishing accusatorial principle holds for more peripheral areas. One of aims of this study is to provide one such study. As will be shown, the accusatorial procedure remained pivotally important in seventeenth-century Livonia (as it did in contemporary Sweden as well), and its relation to the inquisitorial procedure was far more complicated than one of the procedural modes simply giving way to the other. As Schmidt's example on the East Prussian procedure shows, it was not only a question of whether the system was ruled by the inquisitorial or accusatorial principle. When estimating how active the state was in crime control, we need more than two alternatives.

4.3.2 *The Accusatorial Procedure in Livonia*

According to VLGO of 1632 Art. XXVI, all criminal cases other than those punishable by death and in which a nobleman was accused were to be dealt with accusatorially. Criminal procedure depended on the social standing of the accused, and on the practical possibility that the crown would have to implement tough measures on criminality.

The Livonian legislation, which remained largely the same throughout the Swedish period, does not get one very far in trying to understand the practice of Livonian criminal procedure. Livonian legal practice continued to make frequent use of the accusatorial procedure throughout the Swedish period, but the scope of the accusatorial procedure changed in time. Accusatorial procedure was first used against all social classes, but towards the end of the century it was increasingly restricted to noblemen as it was supposed to be according to the VLGO. At the same time, inquisitorial procedure replaced the accusatorial in serious criminal cases involving peasants.

In 1640, for instance, all criminal cases were accusatorial in the sense that a private person initiated them. Relatives of the deceased took the homicide cases to court, and in the infanticide case it was the steward of the manor in which the accused woman served that took the initiative. The same private

107 For France, see Samuel Clark, *State and Status: The Rise of the State and Aristocratic Power in Western Europe* (Montreal: McGill-Queen's University Press, 1995), 33–38.

initiators also provided witnesses. Thus in the case of Curwitz vs. Tönniß and Hanß Kennecken, the Curwitz brothers asked the Pernau District Court to hear two witnesses in a homicide case. The Court itself was also active in this case: the case was postponed for a few days in order to hear two other witnesses, because the accused brothers had "in this severe criminal case so often referred" to them.[108] In the third case the Court did not seem active, finally convicting the accused Hans Wardi to a fine, instead of a death punishment, because there was not enough evidence was for the *animo occidendi*, and because Wardi had settled with the relatives of Lellepe Peet, the victim. The High Court thought otherwise when the case was subjected to its revision, ordering the Lower Court to hear more witnesses.[109]

The procedure in accusatorial cases against noblemen was, to a large extent, written, and thus in this respect no different to ordinary civil cases. Thus when Heinrich von Dam accused Joachim Schumacher of sticking him with a knife (*injuria realium*) in the Lower Town of Pernau in 1662, von Dam's advocate Johann Ficken handed the charges to the Court in writing (*libellus*). Schumacher, present at court, replied at once that the case had not taken place at all in the way that it was stated in the written charge, but instead he "had had to act in self-defence." The Court, however, ordered Schumacher to reply in writing the next day. On the next day the accused turned up in court again and stated that he had not been able to produce the written reply because he was getting ready to travel. Instead, he asked whether the accusing party should also appear in person. Von Dam's advocate did not consent to this, because his client was sick.[110]

Once a case had reached the court, the criminal procedure was thus flexible enough to be changed to a more inquisitorial mode, if the court felt it was necessary to take the initiative in its own hands. Choosing the "correct" mode of procedure was not a matter of principle, and no fixed dividing line existed between the accusatorial and procedural modes.[111]

Inquisitorial procedure would have opened the possibility of bringing noblemen to court by force. This, however, was almost unthinkable in Livonia.

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108 DCP 1688, NAE 915.1.7, f. 7–9.

109 DCP 1688, NAE 915.1.7, f. 20, 33.

110 "*Bekl. soll morgenden tages schrifftlich antwortten, auch beyderseite Parten ihre Zeugen mitbringen.*" DCP 1668, NAE.1000.1.723, f. 7.

111 This is exactly how Meccarelli describes the *iter* of early modern criminal procedure. See also Schwarz, "Zur Geschichte des livländischen Criminalprocesses," 29–80, 99–133, 113–114, according to whom in Livonian practice it is difficult to distinguish neatly between accusatorial and inquisitorial procedure.

Manorial lords, as we have seen, could well be put in charge of ensuring that their peasants be held responsible for serious crimes in the district courts. However, this could happen only accusatorially, because the courts were lacking the authority to force noblemen into court against their will. The prevalence of accusatorial procedure was a practical necessity, and it retained its position – with some important exceptions – until the end of the Swedish period. These exceptions will be discussed later (see 4.6).

Because all criminal cases were accusatorial in 1640, severe criminal cases also included as defendants members of all estates and social classes. Milder violence between individuals rarely interested the prosecutors even at the end of the period, and the victims had to take such cases to court themselves. Philipp Schmidt, a burgher from Fellin, charged Michell, a smith's son, with attacking him on Christmas Day. Michell with his friends had started calling Schmidt names, and the situation had then escalated to the point where Michell battered Schmidt severely by hitting him on the head and breaking one of his ribs.[112] Cornet David Remling, assisted by advocate Johann Christoph Beneck, accused the steward of Moysekyla manor of violent behaviour at the Pernau Lower Court in 1688.[113] For the prosecutors, these cases were not the centre of attention. Other classic areas of criminal law, such as theft, also depended completely on the victim's activity. For instance, in 1688 Lieutenant Colonel Brackell accused Andres Hoch, a soldier, of stealing a horse at the funeral of Brackell's daughter.[114] So also Steward Christian Winkelmann of Aydenhof Manor brought charges against the peasant Leuco Thomas for disloyalty and theft ("*in puncto beschuldigter Untreu und Dieberey*") in the same assizes.

Many of the accusatorial cases involved slander: out the 26 cases in 1688, 10 were such accusations. Slander cases, if proven, resulted in criminal punishment, usually fines, but sometimes prison was also used. Anna Kühn, for instance, was condemned in 1688 to 14 days of bread and water for grave slander (*injuria atrocissimarum*).[115]

Slander cases throughout the period remained completely out of the public prosecutor's sphere of action.[116] Instead, the procedure depended entirely on the injured party's activity. In 1640, Christoffer Schiltt accused Berent Eggert

112 DCP 1688, NAE 915.1.7, f. 465–469.

113 DCP 1688, NAE 915.1.7, f. 57.

114 DCP 1688, NAE 915.1.7, f. 211–217.

115 DCP 1688, NAE 915.1.7, f. 158–162.

116 For instance, the case of Clas Fürstenberg, blacksmith, against Johann Lüders Scheider, tailor, both from the Karkus manor. DCP 1688, NAE 915.1.7, f. 223.

of slandering him and his family at his home, and of attacking his wife and his children.[117]

In the 1688, the criminal procedure had clearly become status-based. Serious crimes with peasants as defendants were handled almost exclusively in inquisitorial procedure. In contrast, most of the accusatorial cases had burghers (from small towns belonging to a district court's jurisdiction such as Fellin), free subjects of the manors (such as blacksmiths), or sometime noblemen as defendants.

The strong position of the accusatorial procedure also shows in the fact that purgatory oath continued in frequent use from the Polish period to the end of the Swedish period. The oath suited the system well, where the outcome of the case was firmly in the hands of the parties and the public authorities – both the court and the prosecutor – assumed a more limited role. To give an example, the *iuramentum corporalis* was used in the above-mentioned case when Pastor Joachimus Keibelius in 1641 charged the tenant Elias Diricksen with paying Andres Lobbanowsky to commit arson. Lobbanowsky testified in favour of the plaintiff, but the defendant questioned the witness's reliability, because he was a heretic and – so Diricksen claimed – his enemy. The District Court of Pernau ordered Diricksen to take a purgatory oath, which was to take place a week later. Should Diricksen not appear, he would have to pay 100 thalers.[118]

The procedure in the accusatorial cases was often informal, and sometimes the court's control was rather vague. A good example is a witchcraft case, in which Lorens Erichson accused a man called Hanss. The accused Hanss at first refused to confess, until he was – according to the protocol – "persuaded by the witnesses that he should confess." As a result, Hanss was convicted.[119]

As has been stressed above, it was not always clear-cut whether a case was handled accusatorially or inquisitorially. The way the District Court of Pernau handled the case of four peasants accused of the murder of a Finnish soldier fits well with the picture of the *ius commune* criminal procedure as a flexible procedure. The case against Zeamick Ewert, Pick Peter, Sava Otti, and Lutzin Bertel was brought to the Court by the "denouncement" (*delatio*) of Wilibalt von Bergen, a nobleman, and the "charge" (*Anklage*) of wife of the murdered soldier. Technically, the case was thus a mixture of an accusatorial case and a denunciatory one. Although torture was not applied in this case, the court

117 Pernau Lower Court 1640 915.1.3, f. 11a–12a. Eggert did not deny having used calumnious words, but claimed that he had not meant to slander. The Court concluded that he had not spoken *animo injuriandi*.

118 DCP 1641, NAE 915.1.4, f. 10.

119 DCP 1640 915.1.3, f. 10 a. "*…von denn Zeugen uberwunden, das erss gestehen muessen*."

otherwise did everything it could to solve the case, where von Bergen and the victim's wife did not figure actively in the proceedings after they had brought the case to court. The Court's primary concern was, of course, to have the accused confess. This was not easy, and one of the accused, Zeamick Ewert, seemed particularly hardheaded, claiming that Pick Peter and Lutzin Bertel had been the killers. The other three confessed more easily, to most of the charges. The Court took advantage of this by using the interrogatory technique of "confrontation" (*confrontatio*), which meant interrogating the suspects simultaneously. This proved successful, and after hearing Pick Peter and Lutzin Bertel testify against him, Zeamick Ewert's resistance broke down and he confessed as well.

4.3.3 *Accusatorial Procedure with Prosecutor* (Staatsanklageprozess)

Three different modes of criminal procedure can be discerned in the Livonian legal practice. Besides an accusatorial and inquisitorial procedure, a third one gained increasing ground as the century advanced: an accusatorial procedure with a public prosecutor as the plaintiff. Although this form of procedure was in theory no different to other kinds of accusatorial procedure, it was different in practice. The active prosecutor represented an active state, keen on taking control of certain kinds of crimes.

Prosecutors are the least researched party in the continental criminal procedure. The reason is quite obvious: in the pure inquisitorial procedure the role of the prosecutor was limited. In Germany, the main reference point for Sweden and Livland, prosecutors (*Fiskal*) in charge of supervising the territorial princes' fiscal interests were known from the fourteenth century onwards.[120] Fiscal cases were a typical branch of police law,[121] and the development of public prosecution was typically linked to the growth of police law. The modern official prosecutor (*Staatsanwalt*) did not appear before the unification, in 1877.

The Swedish experience was not dramatically different. Public prosecution developed in Sweden in the seventeenth century, which was not only the period of the hierarchisation and professionalisation of the Swedish judiciary, but that of police law as well. At the beginning of the century, the Swedish *länsmän* and other civil servants, who later took over the prosecution, were mainly responsible for activities other than prosecution. The *länsman*'s primary task

120 Franz Schneider, *Geschichte der formellen Staatswirtschaft der Brandenburg-Preußen* (Berlin: Duncker & Humblot, 1952), 80–81.

121 For France, see Serge Dauchy, "De la défense des droits de la roi et du bien commun à l'assistance aux plaideurs: diversité des missions du ministère public," in Jean-Marie Carbasse (ed.), *Histoire du parquet* (Paris: Presses universitaires francais, 2000), 53–75.

was the transportation of crown officials, such as judges. The so-called land fiscals (*landfiskaler*) were given over the responsibility of watching over the fiscal interests of the crown in the mid-1500s.[122]

The Livonian prosecutors were a German-influenced institution. In the Livonian judiciary of the Swedish period, there were public prosecutors in both the lower courts (*Unter* – or *Kreisfiskal*; lower or district prosecutors) and the High Court (*Oberfiskal*), in which it was their duty to supervise the crown interests. The high court prosecutor also supervised the church administration. The law on the high court prosecutor (*Oberfiscals-Instruktion*) was given in 1630, and in the same law (§15) the office of the district prosecutor (*Kreisfiscal*) was also mentioned. However, the law on district prosecutors (*Kreisfiscalsinstruction*) was only given two years later, in 1632. Previous scholarship has assumed that no hierarchical relationship existed between the two prosecutorial offices, and this study affirms this. Each had their tasks, which rarely overlapped.[123]

During the nineteenth century, procedural reforms were among the most discussed legal problems in Baltic Provinces of the Russian Empire.[124] As with most of the contemporary legal problems during the zenith of the Historical School, procedural questions were also approached historically. With his book *On the History of Criminal Procedure in Livonia* (*Zur Geschichte des Criminalprozesses in Livland*) in 1849, Woldemar von Bock joined in a discussion on the nature and importance of different procedural modes. A staunch critic of the inquisitorial procedure in his own time, von Bock sought to show with the help of historical material that the use of inquisitorial procedure could not be based on old Swedish laws.[125]

Von Bock criticized the picture of Livonian criminal law history that Gustav Johann von Buddenbrock had given in the editorial notes to his collection of old Livonian legislation, a few decades before von Bock's time.[126] Von Bock blamed

122 See Heikki Ylikangas, *Wallesmanni* (Kauhava: Suomen Nimismiesyhdistys, 1996). Johan Stiernhöök also mentions prosecutors in his *De iure sveonum et gothorum vetusto* (Holmiae: Wankijf, 1672), 68: "*Inquisitores hi hodie Fiscales nominari coeperunt*." All in all, however, the history of the Swedish prosecution is a poorly researched area. We have no full-length studies or even high quality articles discussing such activities and the position of prosecution in the early modern period.

123 See Schwarz, "Zur Geschichte des livländischen Criminalprocesses," 60–61.

124 See Marju Luts, "Die juristischen Zeitschriften der baltischen Ostseeprovinzen Russlands im 19. Jahrhundert: Medien der Verwissenschaftlichung der lokalen Partikularrechte," in Michael Stolleis and Thomas Simon (eds.), *Juristische Zeitschriften in Europa* (Frankfurt am Main: Vittorio Klostermann, 2006), 67–116, 105–108.

125 Schwarz, "Zur Geschichte des livländischen Criminalprocesses," 30.

126 Buddenbrock II.

von Buddenbrock and von Himmelstierna for overemphasizing the importance of the inquisitorial procedure during the *Ordenszeit* and downplaying it in the period of the "Polish barbarians." Von Bock was convinced that accusatorial procedure had dominated before the Polish rule and that inquisitorial procedure – that "spiritual illness" – had gained the upper hand towards the late sixteenth century, especially after the promulgation of the *Ordinatio Livoniae* by King Sigismund III of Poland in 1589. The *Ordinatio* established the Prussian criminal procedure ("*ordo judiciorum, qui in Prussia retinetur*") in Livonia as well, and the Prussian procedure was inquisitorial. Whereas the Poles represented the evil and the inquisitorial procedure, the Swedes brought with them progress and the accusatorial procedure. Von Bock believed that the inquisitorial procedure played no role in Swedish early seventeenth-century criminal procedure. The *Executionsverordnung* of 1669, von Bock believed, finally made accusatorial procedure driven by the prosecutor (*Staatsanklageprozess*) the exclusive form of criminal procedure in Livonia.[127]

Through quite extensive case material, Bock shows that the Pernau District Court in 1678–1704 used, indeed, only accusatorial procedure with a prosecutor. During the last years of Swedish rule and according to Bock, contrary to the law, accusatorial procedure emerged again besides *Staatsanklageprozess* and in some years was even dominant. Accusatorial procedure was not, claims Bock, a noble prerogative, but was used on the accused of bourgeois and even peasant origin.[128]

Bock's findings, however, met with sharp criticism. The leading figure of nineteenth-century Livonian legal history, Friedrich Georg von Bunge, wrote in a review on Bock's book that his results were not representative because they were based on a relatively small amount of case material. According to Bunge (and Schwarz), inquisitorial procedure had been taken to be used as part of the canonical procedure against *Ordensbrüder*. This is probably true, because inquisitorial procedure had by the fourteenth century taken over the ecclesiastical criminal procedure. Bunge also claims that the canon law exerted influence on secular criminal law, which by the end of the sixteenth century had turned overwhelmingly inquisitorial, the Polish period creating even more favourable circumstances for this kind of a development. This is a good guess, but it is not supported by archival sources.[129] If it had been in use, which is possible, inquisitorial procedure seems to have disappeared before the Swedes came.

127 Bock, *Kriminalprocesses in Livland*, 24, 45–47, 61–62, 72.

128 Bock, *Kriminalprocesses in Livland*, 97–98.

129 Schwarz, "Zur Geschichte des livländischen Criminalprocesses," 33.

J.C. Schwartz joined in with Bunge's criticism. Like Bunge and contrary to von Bock, Schwartz argued that inquisitorial procedure had at least some influence on the Swedish legal procedure at the time of the Livonian conquest. Schwartz emphasizes, however, that the procedural legislation (LGO, VLGO, HGO), which the Swedes issued for Livonia, did not decisively rule which of the procedural modes was to prevail. The only exception was that criminal cases against noblemen were always accusatorial, with the exception of some exceptional crimes (*hochpeinliche Sachen*). As for the cases against representatives of other estates, the statutes did not say anything definite.[130] The Execution Order of 1669, then, only spoke of the prosecutorial activity in police cases (*Policey*) not in criminal cases in general, as von Bock believed.[131]

Schwartz had gone through 400 cases referred from the lower courts to the Dorpat High Court in 1630–1710. His main conclusion was that the accusatorial procedure by the prosecutor in fact "never played a significant role in the Livonian criminal procedure."[132] Instead, the inquisitorial procedure would have continued to strengthen throughout the Swedish period. If the prosecutors were at all important, their significance showed in the strengthening of the inquisitorial procedure and in ensuring its right course.[133]

There is, however, a methodological problem in Schwartz's argument. He looked only at cases that had reached the Dorpat High Court, in other words cases that had been subject to automatic referral or *leuteration.* These were, as was explained above, the most serious criminal cases. The bulk of the prosecutorial activity did not, however, deal with these cases but instead with minor crimes, which nevertheless were important from the point of view of creating and upholding the state's authority. Furthermore, von Bock was correct in asserting that prosecutorial activity increased during the seventeenth century. The prosecutorial activity increased precisely in the areas in which it could grow against the least amount of obstacles: minor crimes against the crown and the inquisitorial cases against peasants. Instead, prosecutors had much more difficulty taking a firm grip of noble perpetrators, although a clear attempt was made in the 1680s.

It was up to the prosecutors to watch over the lawfulness of judicial administration and the behaviour of the parties in courts. The high court prosecutor

130 Schwarz, "Zur Geschichte des livländischen Criminalprocesses," 40–42.

131 Schwarz, "Zur Geschichte des livländischen Criminalprocesses," 43.

132 Schwarz, "Zur Geschichte des livländischen Criminalprocesses," 29–80, 99–133. Bunge got his share of Schwarz's criticism. According to Schwarz, Bunge had depended too much on Bock's sources; Schwarz, "Zur Geschichte des livländischen Criminalprocesses," 31.

133 Schwarz, "Zur Geschichte des livländischen Criminalprocesses," 80.

ensured that fines were actually paid and other punishments carried out. Furthermore, the high court prosecutor was to make sure that the lower court sent their decisions to the High Court each year in due time. The high court prosecutor was also entrusted with the supervision of ecclesiastical administration.[134] The close links of the Livonian prosecutorial offices with police law show in the way the prosecutorial tasks were defined as not only supervising the abiding of the law in general. Instead, the prosecutor was to ensure especially the "fulfilment of royal ordinances, decrees, and mandates" ("*der Erfüllung der königlichen Verordnungen, Decrete, Mandate*");[135] that is, typically the kinds of statutes likely to include police law.[136]

Livonian lower prosecutors became much more interested in rooting out two types of crimes, sexual ones and those reflecting disrespect toward state authority. The court itself, by way of the inquisitorial procedure, took charge of violent crimes – although some of the prosecutorial cases involved violence as well. The prosecutor-driven cases were always accusatorial.

Defendants often failed to appear in the early modern courts.[137] This was also the situation during the Swedish rule in Livonia. For instance, when the Pernau Lower Court held assizes at the Fellin Castle in 1641, four civil cases involved contumacy.[138] Towards the end of the Swedish era, contumacy cases became one of the most important activities of the *advocatus fisci*.[139] In clear civil cases, where written evidence was available, contumacy was a lesser problem. If the plaintiff could produce an IOU, the absent defendant normally lost the case.[140]

An example of sexual crimes is the case which Prosecutor Phillipp Schirm brought against Jochim Schneck, the weaver, and a woman ("*Weibstück*") called Mari, charged with adultery and fornication. Schirm motivated the criminal

134 Oberfiscalsinstruktion §§ 3, 5–7, 12–14, Kreisfiscalsinstruktion §§ III–V, VIII–IX (Buddenbrook). See also Schwarz, "Zur Geschichte des livländischen Criminalprocesses," 61–62.

135 Oberfiscalsinstruktion 8–10, 15; Kreisfiscalsinstruktion § VI.

136 See Schwarz, "Zur Geschichte des livländischen Criminalprocesses," 62.

137 See, for instance, Jones, *The Elizabethan Court of Chancery*, 226, for the English Court of Chancery in the sixteenth century.

138 DCP 1641, NAE 915.1.4, f. 31–31 a.

139 See, instance, DCP 1696, NAE 915.1.8, f. 41–41a, Gustaf Helffreich vs. Arend von Burghausen; see also Plate vs. Christoph Kleinschmid (f. 43–43a). DCP 1655, NAE 915.1.5. See Königl. Landgericht vs. Petersen, Pernau Lower Court 1690, 57, stating that in inquisitorial cases it was not possible to claim that the summons had come too late ("*Exceptio termini nimis anguisti ex non rite factae insinuationis in dieser inquisition Sache keinen Statt finden kann…*").

140 See Grotenhielm vs. Wolffeld, DCP 1696, NAE 915.1.8, f. 225.

charge with the threat of divine punishment.[141] Prosecutor Schirm[142] also charged Captain Ebert Engelhardt and his maid Hillpig Roop with fornication (*scortatio*) at the Pernau Lower Court in 1690. Both confessed and were sentenced to a fine of 40 thalers.[143] Out of the 28 cases of accusatorial activity in 1688 at Pernau Lower Court, 14 were sexual crimes.

Maintaining public order had thus, by the late seventeenth century, become of great concern for the prosecutors.[144] The wish to maintain public order was typical for the prosecutorial cases, as when Prosecutor Schirm raised charges against soldier Jacob Bremer for robbery (*rapina ex violentiarum*). The alleged crime had taken place on a highway and was particularly gross. Schirm noted that "especially this kind of open street violence" should be curbed and "the highway in the future be secured."[145] Bremer, represented by *Rittmeister* Vittinghoff, answered in writing. Thus in the case of Philipp Schirm, the prosecutor, vs. Gustav Nohthelffer (burgher from Fellin), Schirm accused Nohthelffer of entering the burgher Ebert Doben's house and of attacking the company saddler Zyriatus Iben. According to the charges, Nohthelffer had used a sable to wound Iben's hand. Interestingly, Schirm motivates the charge with criminal policy: "…should violent crimes such as this go unpunished, no-one would be able to live in peace in their houses and under their roofs, and despite of the fact that domestic peace should be the most protected, Mr. Gustav Nohthelffer gave little thought to this …"[146] The victims (Doben and Iben) did not figure as parties to the law suit, but the prosecutor prosecuted nevertheless. In its interlocutory sentence, the court obliged the prosecutor in summoning the alleged victims to the court as witnesses.[147]

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141 "*Wenn hurerey und Ehebruch nicht solte gestraffet werden, würden die schädliche Laster so gemein werden, daß Eß bey keinem für Sünde dürffte geachtet werden, und ungeachtet die hurerey und Ehebruch so wohl in Gött= alß Weltlichen Rechten ernstl. und bey hoher straffe werbohten* […]." On the rhetorics concering God's wrath, see also, Schirm vs. Capitain Ebert Engelhardt and his former maid Hilpig Roop. Lower Pernau Court 1690 f. 433; and Schirm vs. Second Lieutenant Arnd Turlau; DCP 1690, NAE 915.1.7, f. 433.

142 Schirm was prosecutor at the DCP in 1681–1697. His successors were Sigismund Grass (1697–1699), Peter Timmermann (1700–1702), Werner (1702), Martin Hintze (1703–1705), and Michael Andreas Schmidt (1705–1710); Bock, *Kriminalprocesses in Livland*, 80–81.

143 DCP 1690, NAE 915.1.7, f. 434–435. See also the case against Soldier Christoff Malm in the DCP 1690, NAE 915.1.7, f. 460.

144 In DCP 1688, NAE 915.1.7, 9 out of 28 prosecutorial cases involved public order.

145 DCP 1688, NAE 915.1.7, f. 50–57.

146 "*…daß wenn Gewaltthaten nicht solten gestraffet werden, würde keiner in seiner Hütten, und unter seinem Dache gesichert leben können, und ohngeachtet der hauß friede am meisten gesichert seyn soll, hatt dennoch beKlr. Mons: Gustav Nohthelffer dieses wenig betrachtet…*" DCP 1690, f. 169–171.

147 DCP 1690, NAE 915.1.7, f. 432.

In the case of *Rittmeister* Schlippenbach vs. Lieutenant Wachtell, Schirm asked for continuation because even though Schlippenbach had "passed a case involving *atrocissimi iniuria*" to him, the prosecutor had not had time to gather "enough information" on the case.[148] It seems thus anyway to have been clear to the contemporaries that it was one of the prosecutor's tasks to bring charges as far as least some classes of serious crimes were concerned. In this case the discussion makes it clear that the term *atrocissimi iniuria* referred to a duel. The Court of Pernau decided to absolve Wachtell, stating however that "should the plaintiff not wish to drop the case completely, it is his responsibility to bring it to the next court session *de novo.*" Perhaps too much attention should not be paid to the Court's formulation that it was the plaintiff's responsibility to carry on with charges and not that of the prosecutor. However, the two ways of carrying charges in what was certainly seen as a serious breach of the law were clearly both seen as possible. The duel cases were thus not purely inquisitorial, but they could well be processed accusatorially as well.

Some of the official prosecution cases were intended to maintain public order, even when the crime itself may not have been serious. Cases involving disrespect towards authorities were typically lacking private accusers. Thus Prosecutor Schirm brought two servants, Jürgen and Jakob, to the Pernau Lower Court, for having a fight.[149] To enforce respect for the court and the royal authority behind it, it was especially important to keep order in court. Officers Arent Turlau, Dettloff vs. Plate, and David Remling were, therefore, charged in 1688 by Schirm with "improper behaviour against each other before the Court" ("*in puncto immodesten verfahrung gegen einander vor Gericht*"). It was, however, often difficult to get noblemen to appear in court as the accused, even though the courts threatened them with punishment.[150] Thus in 1690 Schirm cited Lieutenant Johan Grack in the District Court of Pernau for disrespect of a court order ("*vilipendirung gerichtlichen befehls*").[151] Schirm was again active in the same year against Inspector Schmid, who was accused of breaking the Royal Prayer Placate.[152]

In another case at the Pernau Lower Court in 1690, Prosecutor Schirm had in 1689 summoned Lieutenant Daniel Brüning's wife to Pernau Lower Court

148 DCP 1690, NAE 915.1.7, f. 480–481.

149 DCP 1690, NAE 915.1.7, f. 476–477.

150 DCP 1688, NAE 915.1.7, f. 140, 165. "*Alß wird Er dahero alß aperte' contumaß et supine negligens in poenam contumacia* […] *condemniret* […]." Plate was again charged for improper behaviour in court in 1690, f. 301.

151 "*Vorauff an das Königl. General-Gouvernam: geschrieben, und der Michel nach Riga zur thurmhafft gesandt worden.*"

152 DCP 1690, NAE 915.1.7, f. 472.

for contempt of court orders. When it turned out that the Lieutenant was not at home, the court servant (*Gerichtsdiener*) had delivered the summons to his wife instead. According to the prosecutor, she had thrown the envelope away with "highest disrespect and slander" ("*zum höschsten despect und beschimpffung*").[153] Although the accused was acquitted for lack of evidence, it shows a typical case, the type which interested Livonian prosecutors.

Schirm's case against *Hauptmann* Schwenewandel from Fellin, for tearing and burning down a fence in connection to an argument about correct borders, also belongs to the class of cases concerning public order. The burning had caused "more than a little danger" ("*kein geringer Schade*") because of the animals moving in the area. Self-help from the side of the accused seemed to anger the Prosecutor the most: he had "no right to set another person's property to unrest, and even less in a violent way."[154]

4.3.4 *Inquisitorial Procedure*

In the early years of the Swedish rule, inquisitorial cases in the strict sense thus did not appear, and not even accusatorial cases initiated by public prosecutors were seen. It was not government officials but private parties who initiated the criminal cases. However, cases initiated as accusatorial often acquired traits which made them inquisitorial. A leading role taken by the judge in the proceedings and the use of judicial torture are the most typical of those traits. Similarly, despite the active role of the official prosecutor in initiating cases, the records show that towards the end of the seventeenth century it was the court that overtook the search for material truth in the criminal cases. The case of the official prosecutor Philipp Schirm against Jochim Schenck illustrates this. Schenck was a weaver at the Auder manor house, and he was accused of adultery, having engaged in an illegal sexual relation with his former servant Mari. Schirm had brought the case to court and stated, to begin, that if "adultery would not be punished, harmful sins would become so common that noone would take them for sins."[155]

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153 DCP 1690, NAE 915.1.7, f. 293–299.

154 DCP 1690, NAE 915.1.7, f. 127–135.

155 "*Als hurerey und Ehebruch nicht solte gestraffet werden, würden die schädliche Laster so gemein werden, daß Eß bey keinem für Sünde dürffte geachtet werden, und ungeachtet die hurerey und Ehebruch so wohl in Gött= alß Weltlichen Rechten ernstl. und bey hoher straffe werbohten, so hat sich dennach beklagter Jochim Schenck deßen eheilhafftig gemachet, in dehm Er wie zu tage mit seiner eigenene dienst Magd in hurerey und Unzucht ein Kindt gezeuget, alß bittet actor officiosus denselben, nebst der hure com refusione eßpensarum gerechtsamst zu bestraffen.*"

In Livonia, "crime" (*crimen*) was terminologically associated with and limited to inquisitional procedure. The book of the Pernau District Court minutes for the years 1688–1690 contains a list of *Criminalia*.[156] They are not many, only ten, and there is no mention of the proceedings or the sentence. What most of these cases have in common is the inquisitorial procedure in the proper meaning of the term: eight of the cases are court-driven ("*Das Königl. Landgrt ex officio*"). Two can be classified as denunciatory, with a pastor prosecuting in one case and a peasant in another. All of the crimes are severe ones, such as homicide, infanticide, desertion, blasphemy, and incest.

According to the learned *ius commune*, the inquisitorial procedure should have begun with a "general inquisition," in which it was established whether the crime had been committed and who the suspect was. A "special inquisition" aimed at establishing whether the accused was guilty or not. The Livonian inquisitorial procedure knew no such division into the different phases of the inquisitorial procedure. Instead, the accused was taken directly into the court, usually by his manorial lord, the steward, or the pastor – and sometimes by the victim, or his or her relatives.[157]

After the prosecutor's opening statement, the questioning of the accused began and was completely in the hands of the court. This "denunciation" was in fact the prosecutor's most important task. This is also why the difference between accusatorial procedure driven by the prosecutor and inquisitorial procedure is often at best unclear, and is not significant.[158] In Mari's case also, the court asked detailed questions, first of the accused herself. The court wanted to know who the father of the child was, where and when the two accused had had sex together, and whether the sexual intercourse had taken place only once, or more than that. She was also asked whether she knew that Jochim had a wife, how Mari and Jochim had communicated (because Jochim only spoke German and she the vernacular), and why she had not told anyone that Jochim would not "leave her in peace" but followed her everywhere.[159] Jochim admitted that he had slept with Mari, but only once, whereas Mari had "done it with everybody." Jochim also claimed that he had not completed ("*vollbracht*")

156 The same book of minutes contains an index of all cases protocolled (and thus handled) by the court in those years. This *rotulus actorum* contains 72 cases. Besides the 10 *criminalia*, 55 can be classified as other crimes, 15 as civil cases and two as cases of manorial law. DCP 1688, NAE 915.1.7, f. 732–733.

157 Schwarz, "Zur Geschichte des livländischen Criminalprocesses," 101.

158 Schwarz, "Zur Geschichte des livländischen Criminalprocesses," 121, 125.

159 *Das Königl. Landgrt sie Marie befraget wer Water zum Kinde?*
Illa, Jochim Schenck ihr gewesener Wihrt und sonst kein ander.
Q. Wo und zu welcher zeit sie mit einander zu thun gehabt?

the intercourse. Jochim offered to confirm all this on purgatory oath, which was accepted. The purgatory oath, as was customary, did not take place on the same day, and the case was dismissed. Before the dismissal, however, Jochim was asked whether he could produce witnesses to testify on Mari's sexual promiscuity. He answered that he certainly could but that that would take some time.[160]

The keeping of public order entailed controlling legal self-help. It was important for the courts to sanction the independent use of violence. In court records, the formula "*sein eigen richter*," to be "one's own judge," figures in the early years of the Swedish period. Magnus Anrep, for instance, was punished for dragging Arendt von Hursen's serf onto Anrep's own manor and having the serf slashed. Anrep accused the serf of stealing honey and took also a saddle from the serf as a pledge until the honey be replaced. The Court found Anrep's activities unacceptable and punished him for being "his own judge" ("*weilen er sein eigen richter gewest*").[161]

Illa, Eß wäre geschehen zum ersten mahl nun vor 2. Jahren in der heu Zeitt auffm boden, da sein Weib nach Reval gewesen, und gehe das Kindt nu ins ander Jahr, in dem es werschienen diengstag alß worgestern 1. Jahr alt gewesen.

Q. Ob es bey dem mahl geblieben, oder ob Er mehr mahl mit ihr zu thun gehabt?

Illa, Noch 2. mahl aufm boden so lang sein Weib noch in Reval gewesen, nach dem und da sein Weib von Reval zu hause gekommen, habe Er wieder mit Ihr, alß seiner Stieff-tahter hoch zeit in Pernau, und dees Webers Weib auch alda gewesen, in

der stuben auf der banck beym offen 2. mahl mit Ihr hin wieder zu thun gehabt, da keiner in der stuben, sondern die gesellen in der kammer gewesen; Das str. mahl alß sie umb Martini zeit mit roggen nach der Mühlen gesand, sey Er ihr nach der Mühlen gefolget, und unter wegens vom pferde gezogen worden, und abermahl mit ihr zu sammen gewesen, da Er über das wesen noch 1. paar handtschug werlohren.

Q. Warumb sie da sie gewuste, daß er ein Ehe weib habe ihm nach Willen gewesen?

Illa, Sie habe keinen Frieden vor ihm haben können, sondern Er habe sie in und alle wege in der badt-stuben und an allen ohrten werfolget, daß sie sich seiner nicht erwehren können.

Q. Wie Er solches von ihr begehren können, weil Er nicht die undeutsche, sie hergegen nicht die teutsche Sprache werstehe?

Illa, Er habe kein großes Reden gebraucht, sondern mit Minen und geberden alles zu werstehen gegeben, und also ad actum geschritten.

Q. Warumb sie es keinen gesaget, daß sie keinen Friede vor ihm haben könne?

Illa, seinem Weibe zu klagen, habe sie nicht gedürfft, sie hätte sonst noch schläge dazu bekommen, frembden solches zu klagen habe sie nich auß dem hause kommen können, sie sey umb des willen von Ihm weggelauffen, daß Sie es nicht außhaltenkönnen. DCP 1688, NAE 915.1.7, f. 167–169.

160 DCP 1688, NAE 915.1.7, f. 169–171.

161 NAE 915.1.3. f. 23 a.

In an almost separate category were cases in which the lower courts proceeded on the basis of a "delinquent list" (*Delinquentenzettel*, *lista delinquentium*) provided by a local pastor, who thus denounced wrongdoers from their parishes.[162] This is close to a denunciatory procedure.[163] However, it is doubtful whether any one of the legal professionals in the Livonian courts conceived of it theoretically as such. The pastor thus initiated the case, after which the investigation was taken over by the court. On 29 June 1640, Pastor Christoph Sevarius brought three cases to the District Court of Pernau holding assizes at the Rugen Manor. In this case one of them involved infanticide and the two others were cases of fornication.[164] The case of a woman named Orste will illustrate. After the denunciation, the court took over the inquisition completely. Orste was probably questioned about her sexual crimes, because the Court wanted her to list all of her children (four altogether) and their fathers. She was sentenced to be whipped and branded for "many crimes and serious excesses," but the sentence was sent to the magistrate's court for approval or *leuteration*. The answer came within a week: the magistrate's courts, having mercy on Orste, expelled her out of town, with the stipulation that she would be whipped and branded should she reappear.[165] The infanticide case of Maye at the Pernau Lower Court in 1641 is another typical example. The local priest Christoph Sevarius, again, denounced Maye in the court. After the denouncement, Sevarius no longer appeared in court proceedings, but instead the Court itself took over the proceedings. It questioned the suspect and decided to proceed to judicial torture, which the High Court of Dorpat permitted.[166]

162 Schwarz, "Zur Geschichte des livländischen Criminalprocesses," 104.

163 See Koch, *Denunciatio*.

164 DCP 1641, NAE 915.1.3, f. 41 a–46 a.

165 Lower Town Court of Pernau 1663, NAE 1001.1.4060, f. 2–3. See also the cases of the same court against two soldiers, Ernst Svedman, and Melcher Johan Böhm, and maid Magd Marie, on the basis of a list prepared by the Pastor of Fellin. The three trials, all fornication cases, were held consecutively on the same day. All suspects confessed immediately and were fined. From the point of the view of the condemned, the cases were not closed, however, because they still had to face the Consistory Court and face the ensuing church punishment. DCP 1690, NAE 915.1.7, f. 494–499. The formula reserving the consistory court its jurisdiction was "*dem Königl. Unter Consistorio die Kirchen die Kirchen Sühne vorbehaltlich.*" On the relation between the secular and ecclesiastical punishment, see Heikki Pihlajamäki, "*Executor divinarum et suarum legum.*"

166 DCP 1641, NAE 915.1.4, f. 45–45a.

4.3.5 *The Proof in Criminal Cases*

By and large, the Livonian courts followed the statutory theory of proof, developed in the medieval and early modern *ius commune*. A typical example of a decision embodying the essential elements of the theory, the confession and the witness statements, is the decision of Pernau District Court in 1690 against Jurgen Poribe in a slander case. The conviction was based both on confession (although a partial one) and witness statements ("*theilß durch eigen geständniß, absonderlich aber der geführter Zeugen Eydliche außsage überwiesen, und convinciret*").[167]

The theory was reflected first and foremost, however, in the significance of the confession as the basis for conviction, which was sometimes extracted using judicial torture. It was an important part of the inquisitorial quest for judicial truth, although torture was already on the decline in seventeenth-century Europe.[168] In Livonia, judicial torture was used regularly from the early years of the Swedish period until 1680s. LGO 1632 Art. XXX and XXXIV regulated torture following the typical *ius commune* precepts.[169] Judicial torture was lawful, if based on "sufficient circumstantial evidence" ("*genugsame indicia*") and "presumptions" ("*praesumptiones*"). The lower court was not to proceed to torture before it had received permission to do so from the High Court. Depending on the results, more witnesses could be heard and additional inquisitorial

167 "*Urthell. In sachen Hinrich Niehusen klägers an einem gegen und wieder den QvartierMeister Jurgen Poribe beKln. am andern theill in puncto Injuriarum verbalium und Verübter Insolentien in Klägers Kruge, erkennet das Königl. Landgrt. auf angehörte Klage,drauf gethane antwort, von beyden theilen geführte eydliche Gezeugnißе sampt waß ex officio der Königl. Land-Fiscal Philipp Schirm vorbracht der Sachen befindung und umbständen nach vor Recht. Demnach beKlr. theilß durch eigen geständniß, absonderlich aber der geführter Zeugen Eydliche außsage überwiesen, und convinciret, daß Er jüngst hin bey außgang April: in der Nacht, und wie alle Leuthe schon geschlaffen, von Olustfer nach Klägers Kruge, so keine halbe Meile von einander, gantz truncken in der Stuben eingeritten, so wohl wieder Klägern selbst besage Acten grobe Injurien auxgegoßen, alß auch den Krüger gescholten, und mit der Pistohlen zu erschießen gedrauet, und sein pferd in der Stuben herumb getummelt; Alß wird Er dahero wegen solcher insolentien und verübten Haußgewalt auch wieder Klägern außgegoßenen groben Injurien in 40. dHr. S.M. der da Er selbe nicht zu erlegen vermöchte.*" DCP 1690, NAE 915.1.7, f. 717–718.

168 See Bernhard Schnapper, "Les peines arbitraries du XIIIe au XVIIIe siècle (doctrines savants et usages français)," *Tijdschrift voor rechtsgeschiedenis* (1973), 237–277 and (1974), 81–112.

169 On these, see Piero Fiorelli, *La tortura giudiziaria* I–II (Milano: Giuffré, 1952–1953); and John Langbein, *Torture and the Law of Proof* (Chicago: The University of Chicago Press, 1977).

measures be taken. The final decision should then again be sent to the High Court's approval.

A witchcraft case may serve as an example. In 1632, Georg Stiernhielm, judge at the District Court of Dorpat, referred a witchcraft case to the High Court's review. In his cover letter to Per Sparre (President of the High Court in 1631–34), Stiernhielm hoped that the High Court would "have some consideration for torture in this case" ("*hafva något betänckiande om Torturen i denne Saken*"). According to Stiernhielm, the crime of witchcraft had become common, probably because this was an "occult crime, which could rarely carry half a proof, or even circumstantial evidence, but never full proof." Because of the lack of any evidence, the criminals could rarely be brought to torture. Peasants were therefore scared of even trying to get witches to courts, thinking that "they could get themselves no justice" ("*sigh ingen rätt kunna få*").[170]

In European criminal procedure, judicial torture is normally associated with inquisitorial procedure. In Livonia this was the case as well although, as explained above, a case which had started as accusatorial or by denunciation, could turn into inquisitorial. After it had been decided to employ judicial torture, the procedure more or less followed the *ius commune* rules, which the case of Maye shows well.

In 1641 a woman named Maye was accused of infanticide at the Pernau Lower Court, and another woman referred to as "the old Saika wife" (*die alte Saikatsche*) was charged with acting as accessory to the crime. Both women refused to confess. If the lower court thought that the confession should be applied in criminal cases, the High Court's decision on that had to be solicited. This was done in the case of Maye and the Saika wife.[171] Maye was asked "seriously to reveal the truth," but she refused to confess. The Saika wife did not confess either. When tortured again, Maye confessed. Following the normal *ius commune* procedure, she was asked again, on the next day, before the court. She maintained that she had only given birth to one child, but now confessed that she had killed the child with "her own hands" ("*mit Ihren händen gethötet*") and given it to the Saika woman, so that she, with the help of her son, would hide the body. According the judicial doctrine, in order to be valid, the

170 Stiernhielm's letter to Per Sparre, March 17, 1632; Wieselgren, *Samlade skrifter av Georg Stiernhielm*, 6–7. On Stiernhielm's stern stance towards witchcraft, see Jan Eric Almquist, "Handlingar rörande 1642 års lagkommission, dess förutsättningar och verksamhet: med inledning och kommentar," *Lunds universitets årsskrift* 1937 (Lund: Gleerup, 1937).

171 "*Zu folge deß Königl. Hoffgerichtß Declaration, ist wie der die in puncto Infanticidy Beklagte Weiber Maye vnd die alte Saikatsche; mit der Tortur verfahren worden.*" DCP 1641, NAE 915.1.4, f. 14 a.

confession had to be repeated after the torture. Maye repeated her confession word for word ("*wörttlichen*") and was condemned to death.[172] What happened if judicial torture did not produce confession? There are not many examples of this. In the infanticide case of Maye, in which the Saika wife was charged with acting as accessory, the latter did not confess even when tortured ("*keineß wegeß bekennen wollen*"). She did not, however, escape punishment, but was sentenced to two pairs of lashes.[173] The court thus, as was customary in the European common criminal law of the time, took recourse to *poena extraordinaria*: when there was not enough evidence for capital punishment, the accused could nevertheless be sentenced to a punishment less than death.

Judicial torture lessened towards the last decades of the Swedish period, following the general European trend.[174] In 1668, however, the Pernau Town Court decided to torture Karro Hans to find out whether Parrihild Herman had really acted as an accessory to him in a horse theft.[175] The torture took place "around 3 o'clock" on the morning of 8 April 1668. The questions were protocolled, as well as the answers. After the torture, Hans was asked whether he still held to what he had said under torture. Hans replied affirmatively, "after which the *actus inquisitionis* was terminated for this time, and the suspect was taken back to his cell."[176]

In another case from the Pernau Lower Court in 1679 a peasant woman named Oyo stood for charges of infanticide and refused to confess.[177] Because considerable circumstantial evidence was in place, she was "sentenced" to torture "*per gradu*," although the decision was referred to the High Court's final

172 "*Peinlich Beklagtin Maye, deß vmbgebrachten Kindeß Mutter ist ante torturam ernstlich ermahnet worden, die Wahrheit auß zu sagen, woh sie das Kindt gelassen nach dem eß an die Welt ankommen, vnd ob eß lebendig gewest. Beklagtin hatt nicht bekennen wollen, besonder ist dabey verbleiben, daß die Saickatsche daß Kindt in der Kammer hie der der thuer, von ihr genommen, woh sie ex gelassen möchte sie wiessen. Die Saikatsche mit der Tortur angegrieffen worden, aber keineß wegeß bekennen wollen, daß sie daß kindt, von dem Weibe Maye ampfangen…": "Diese ihr in Tortura gethaen außsaeg, ist Ihr à Tortura wörttlichen vorgehalten, da sie dan alleß repetiret, vnd bestendig bey ihr auß saeg verblieben.*" DCP 1641, NAE 915.1.4, f. 14 a–15.

173 "*Die Saikatsche aber welche Beklagtin Ihr Wirthin gewest, vnd dieß factum occultiren helffen, sol deß wegen mit .2. par ruetten am prangel gestiechen werden.*" DCP 1641, NAE 915.1.4, f. 15 a.

174 See Schnapper, "Les peines arbitraries du XIIIe au XVIIIe siècle"; and Langbein, *Torture and the Law of Proof*.

175 Pernau Town Court 1688, NAE 1001.1.723, f. 61.

176 "*Womit der Actus inqvisitionis vor dieß mahl geendiget, vndt der gefangener wieder zur vorigen hafft geführet*"; Pernau Town Court 1688, NAE 1001.1.723, f. 64–66.

177 "[…] *gleichwol große indicia* […] *Des wird p. geklagte dahero zur tortur* […] *per gradus* […] *hiermit condemniret. Dem königl hofgerichte der leuterung* […] *werksgültig.*" NAE 915.1.43.

decision. The High Court issued the permission, and the accused was subjected to torture with the executioner (*Scharffrichter*) and the local priest present. Oyo was first shown torture instruments, but since that did not have the desired effect on her, the actual torture started. She refused to confess, and the torture proceeded to the severest phase (*summo gradu*). The torture still not resulting in confession, Oyo was returned to her cell. The District Court then declared that since the accused had not confessed, she now was "purged" of the charges. She was acquitted.[178] The case is rare, because it seems that Oyo was indeed set free and not sentenced to an extraordinary punishment of any kind.[179]

In early modern European criminal law, one of primary fields of application for judicial torture was witchcraft cases. As I have shown elsewhere, the medieval institution of judicial ordeals resurfaced in connection with the witchcraft cases in the early modern period. Ordeals of cold water and needle tests were used in close connection to the prevailing statutory theory of proof. Witchcraft cases were often difficult to prove, and it was often difficult even to acquire enough evidence to initiate judicial torture. Ordeals were helpful in this respect: water ordeal or a needle test could provide the necessary *semiplena probatio*, a half proof, which authorized a court to proceed to judicial torture.[180]

The connection between the ordeal and judicial torture is clear in the Livonian witchcraft trials as well. On 22 July 1641, Kiese Wilhelm, a peasant from the manor of Sarishoff, brought charges against a man named Morjahn. The latter had allegedly used witchcraft against Wilhelm's wife, causing her death. Morjahn denied the charges. Urgamus Henn, another peasant, appeared in court as well, claiming that Morjahn had cast a spell on his wife as well to the effect that she had "become immediately sick and raging, had torn her clothes off and run around like crazy" ("*sie alß baldt kranck vnd rasend geworden, die kleider vom Leibe abgeriessen, vnd wie vnsinnig herumb gelauffen*"). Morjahn had also offered to teach witchcraft to Wilhem, Henn, and some others. Morjahn then admitted that he had learned magical formulae ("*Koffaretta, Zeittap Sax, Wietta, Weitta Liehatarck*") from "an old Kerrig," and other tricks from a "Courlandish peasant"; these, however, were all good sorcery and had nothing to

178 NAE 915.1.43, f. 4, 9, 10.

179 "*Sentiment. Als das was leuterirtermaßen* [....] *Weil in der tortur und peinlicher frage der angeklagte Oyo xxx keinesweges zu erhalten geworden, die tortur von ihr auch völlig aufgestanden,* [...] *gleichsam purgiret. Alß wird sie dahero gestalts absolviret u freygesprochen.*" The lower court decision was likewise still submitted to the High Court for approval, and we have no information on that final decision. NAE 915.1.43, f. 11.

180 Heikki Pihlajamäki, "'Swimming the Witch, Pricking for the Devil's Mark'," 35–58.

do with evil ("*dienen dieselbige nicht zum bösen*"). Morjahn refused to confess, but because he was "*ex communi fama*" a sorcerer, he was ordered to undergo the water ordeal and to be tortured. As usual, the decision to apply torture was submitted to the High Court's approval, which was obtained.[181]

A Royal Letter of December 1686 prohibited judicial torture, although the prohibition was not a novelty. The Letter was a response to a *référé legislatif* that the High Court of Dorpat had made. The King ordered the High Court to "follow the general usage of the Kingdom and the content of the War Articles."[182] In 1683, King Charles XI had issued a Royal Ordinance to regulate the legal procedure in courts martial (the War Articles). Article 23 of the Ordinance said that "Legal proof consists of the accused's own confession, when the accused confesses voluntarily and unforced in court [...] but no one may be tortured or persecuted to confession, because torture is forbidden in the Kingdom of the Royal Majesty and in itself is dangerous and uncertain." The article was, however, also based on an earlier practice: in a high court case of 1652, the Svea High Court had already stated expressly that "torture is not, and for many reasons, in use here in our country."[183] The Swedish law on judicial torture in the mid-seventeenth century was, however, still uncertain, which partly explains the need of the Dorpat High Court to inquire about its legality in the 1680s. The other part of the explanation certainly has to do with the fact that judicial torture had indeed been in regular use in Livonia. In Sweden proper this had not been the case. The prohibition of the Svea High Court in 1652 has to be understood as a measure against certain isolated attempts to regularize torture, which had also been in use in the Stockholm city court.[184]

The Letter of 1686 seems to have been effective. At least the case material in this study shows no instances of judicial torture after 1686.[185] The following year, 1687, a peasant from the island of Kihnu stood accused of incest at the Pernau District Court. Since full proof was lacking, the District Court remitted

181 DCP 1641, NAE 915.1.4, f. 21–22, 33–34.

182 Johan Schmedeman (ed.), *Kongl. stadgar, ordningar brev, och resolutioner, ifrdn dhr 1528. in til 1701. angående Justitiae och Executions-Ährender* (Stockholm: Uppsala Acad. Boktryckiare, 1706), 837, 963 [hereafter Schmedeman, *Justitiewercket*]. In 1686 the King ordered the High Court of Dorpat, the highest court in Sweden's Livonian possession, to "follow the general usage of the Kingdom and the content of the War Articles." Schmedeman, *Justitiewercket*, 1088. The *référé* was quite frequently used to guide the high courts.

183 Schmedeman, *Justitiewercket*, 837, 963.

184 See Heikki Pihlajamäki, "The Painful Question: The Fate of Judicial Torture in Early Modern Sweden," *Law and History Review* 25 (2007), 557–592.

185 Even at the end of the 1670s, several cases of judicial torture occurred at the Pernau Lower Court. See the case of Oyo above; also NAE 915.1.61 (murder) and NAE 915.1.41 (sodomy).

the question of torture to the High Court. It decided that "because there is no full proof against [the accused] at hand, in this dubious case, he be, according to the law on the abolition of torture, acquitted [...]."[186] However, the concept of torture still needed to be defined. In 1692, the District Court of Dorpat asked the High Court whether "in order to save the soul of the accused and to arrive at a rightful verdict," it might be possible "in these circumstances and because of the hard-headedness of the accused, without violating his royal majesty's prohibition against torture" to proceed to *territio verbalis* or even *territio realis* – threatening with torture or preparing for it. The High Court, taking a firm stand, answered negatively stating that *territio* was also considered "a sort of torture."[187] The pressure to use judicial torture in witchcraft cases was apparently there, although it is does not seem probable that the prohibition of torture contributed to the dying out of witchcraft cases. Their zenith had been earlier, in the first half of the century: in the years 1610–1650, 55 witches were executed in Estonia.[188]

The prohibition of judicial torture was among those Swedish legal rules, which were effectively enforced in the last decades of the seventeenth century. Still, it is likely that the prohibition of torture did not contribute much to the demise of torture in Livonia. The practice of torturing was on its way out. As we saw above, few cases of judicial torture are found in the court protocols of the second half of the century that I have analysed. This also explains the District Court's need to pose the question to the High Court. The Lower Court probably felt unsure when the need for judicial torture arose in connection with a witchcraft case. It is not strange that the problem arose there, because torture

186 "[...] *weilen Er sein voriges geständnüs der violentj halber wieder geleugnet, und daher kein volliger beweisz wieder Ihn vorhanden, in dieser zweiffelhafftigen Sache, vermöge J. Königl. Maytt: der tortur halber gemachter verordnung von der Straffe absolviret* [...]" Cited in Leo Leesment, "Piinamise ehk tortuuri kaotamine Eesti – ja Liivimaal," *Ajalooline Ajakiri* 1 (1931), 186–193, 190–191.

187 According to Carpzov, *territio verbalis* and *territio realis* referred to different preparatory stages of torture. In *territio verbalis*, an executioner prepared verbally for the torture, by threatening the accused. In *territio realis*, the executioner proceeded from the verbal threats to more concrete preparations, such as removing the accused's clothes or setting the torture devices ready ("*conjuncta cum praeparatoriis atque praeludiis tormentorum leviusculis*"), cited in "Criminalistische Miscellaneen," in *Das Inland: Eine Wochenschrift für Liv-, Esth – und Curlands Geschichte, Geographie, Statistik und Literatur*, 45 (1850), 706–710.

188 Maia Madar, "Estonia 1: Werewolves and Poisoners," in Bengt Ankarloo and Gustav Henningsen (eds.), *Early Modern European Witchcraft: Centres and Peripheries* (Oxford: Oxford University Press, 2002), 257–272.

was frequently used in witchcraft cases in other parts of Europe, even when the suspects were no longer tortured in other kinds of cases.

With or without torture, confession was central to the seventeenth-century law of proof, which is shown, among other things, by the fact that fictitious confessions were sometimes constructed. Arend Turlau was charged with fornication in 1690 at the Pernau Lower Court, but did not appear in court. Turlau had been cited several times to answer to the charges, but had made himself guilty of contumacy over and over again. He had, however, been seen in Fellin around the time of the trial without even bothering to send a notification of an excuse to the court. The court therefore drew the conclusion that he had "acknowledged the case lost" ("*der sache verlustig erkannt*").[189] From the point of view of the theory of proof, it is interesting that the Court felt the need to construct Turlau's behaviour as a kind of a confession, albeit only a fictitious one.[190]

As part of the statutory theory of proof, the courts followed the two-witness rule. Full proof could thus be constituted not only of a confession but also of the statements of two eyewitnesses.[191] Thus in the Pernau District Court (1688) in the case Carl Friedrich Lilienfeld vs. Herman Jencken (*in puncto injuriarum verbalium*, slander) the fiscal Schirm, as the advocate of Jancken, claimed that the plaintiff had only produced one witness ("*testis unicus*") which was not sufficient.[192]

Claims against the witnesses' hability were also made, again line with the *ius commune* theory. The learned advocate Schönfeld, when defending his client in a slander case in the District Court of Pernau in 1690, suggested that the Court should proclaim the plaintiff's witnesses as "not habile."[193]

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189 "*… demnach beKlr. auf die an ihn ergangene unterschiedliche Citationes, sonderlich die letzte welcher die Clausul annectiret, daß im Fall seines beharlichen Ungehorsamß und nicht erscheinens in termino wieder Ihn alß merè et verè contumacem et tanqvam convictum et confessum werfahren und gesprochen werden solte*." DCP 1690, NAE 915.1.7, f. 437.

190 On legal fictions, see Maksymilian Del Mar and William Twining (eds.), *Legal Fictions in Theory and Practice* (Dordrecht: Springer, 2015). See also *actor officiosus* Schirm vs. Anthon Schilling (fornication). Schilling did not appear and was sentenced ("*sub poena convicti et confessi und bey Verlust der sachen* […] *persönlich zu erscheinen*…"). DCP 1690, NAE 915.1.7, f. 702a–703.

191 See Schmoeckel, "Convaincre par l'écrit."

192 DCP 1688, NAE 915.1.7, f. 702a.

193 "*Man fundirete sich auf der von dieser seite producirten Zeugen, gethane außsage, daß Sie ut testes habiles omni exceptione majores nicht gehöret, ob solte Kläger beKlgten solcher gestalt ehrenrühriger weise angetastet haben, bey so gestalten sachen nun, und da ohne Zweiffell wie im letztern abscheide nur contra testes et corum effata zu excipiren frey gelaßen, die*

People of all estates were heard as witnesses, although sometimes distrust of peasant folk could come through. Thus the advocate Schönfeldt, on behalf of quartermaster Jürgen Poribe (Pernau District Court 1690), reminded the Court to ask the plaintiffs' witnesses, "in order to avoid perjury, to which these [...] people were prone enough, in general whether they prayed, went to the holy communion, if they knew that God rewarded perjury with a punishment in hell, whether they profited from these cases [...]"[194] The Court took Schönfeldt's point into consideration, although it would probably have asked the same questions anyway.[195]

Purgatory oath (*iuramentum purgatorium*) was an important part of the *gemeines Recht* theory of evidence. When half a proof existed, but the alleged crime was not serious, the accused could be allowed to purge himself of the charges.[196] In the case of Schilling, the accused took the oath and was acquitted. However, sometimes the threat of purgatory oath produced a confession. When Herman Jancken was shown by one witness (*testis unicus*) to have libelled Carl Friedrich Lilienfeld in 1688, he was ordered to take a purgatory oath. After the interlocutory sentence demanding the oath had been given, Jancken confessed, and the case was finally settled with a handshake.[197] In 1690 the official prosecutor charged Magnus Geijer with sleeping with a prostitute.

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producirt gewesene Zeugen von dem Hochpreißl. Königl. Landgrt alß inhabiles et rejicibiles judiciret werden würden." DCP 1690, NAE 915.1.7, f. 694–695.

194 "*...das preißl. Königl Landgrt. dienstdemütigklich gebehten haben, die gezeugen wohl zu befragen, und ad evitandum perjurium, wozu solche unteutsche leuthe facil genug wären generaliter interrogiren, ob Sie beten, zum heyln. Nachtmahl gingen, wüsten daß Gott den Meineyd mit ewiger Höllenstraffe belohnete, und wenn sie denn Gewinn dieser sachen gönneten...*" DCP 1690, f. 658–659.

195 DCP 1690, NAE 915.1.7, f. 661–662. "[...] *die Zeugen in Eyd genommen, und des Meineydes ernstl. verwarnet sagen auß wie folget. Testis 1. Krügers Weib Tio, gehet zum Nachtmahl, kan beten, wiße waß ein Meineyd bedeute, und gönne dem den Gewinst der sachen der Recht hätte, und der Richter Recht geben wprde, sey von keinem außgelehret, waß sie sagen soll, referiret darauf in allem wie libelliret und attestiret. Testis 2. Der Krüger Bartell der vorigen gleich. Testis 3. Leppekko Jahn, ut præcedens. Testis 4. Pujo Jahn, ut prior.*"

196 The following is an example of the *formula iuramenti*: "*Formula Iuramenti. Ich QvartierMr. Johann Andres Schiling bezeuge hiemit vor Gott und diesem Königl. Landgrt, daß ich des beschuldigter Criminis der hurerey mit der Magd Margret unschuldig und nimmer mich mit derselber fleischlich wermischet, so wahr mir Gott helffe und seyn heyl. Evangelium.*" DCP 1688, NAE 915.1.7, f. 210.

197 DCP 1688, NAE 915.1.7, f. 40–44; see also *actor officiosus* vs. Schmidt, DCP 1690 f. 500–509 (Interlocutory sentence: "*...also mir semiplene seine intention probiret, alß soll Er in supplementum, daß es so mit ihm wie testis eingezeuget bewant, Juramento zu erhalten schuldig seyn... von H. beKln. darauff geantwortet eydle*"; Definitive sentence: "*... Gezeugnißе,*

Because the only evidence was the whore's own statement, Geijer was made to swear a purgatory oath.[198] Soon Geijer stood trial again, this time for having illicit sex with the maid of his mother. Again the evidence was strong (*grosse praesumptiones*), but not tantamount to full proof, and Geijer was ordered to take the oath. This time, however, he lacked the courage and confessed, thus getting himself a fine.[199] Similarly, Stephen Dettmer, when charged with fornication in the Pernau Lower Court in September, 1690, first denied and was given a chance to purge himself by oath. After the Court's warning that "he should think about what he had done and not soil his soul," he confessed.[200]

A standard part of the *ius commune* theory of proof,[201] the concept of notoriety, was also known. In a battery case, the Pernau Lower Court stated that "since the accused does not yet confess to charges [...], the plaintiff is himself responsible for proving his case." The plaintiff replied that he did not need any witnesses, because everything he claimed was "notorious" ("...*sey*

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præstiretes Juramentum suppletorium, und darauff von Klägern beschehener renunciation... absolviret und entbunden.").

198 "*Philipp Schirms klägers an einem gegen und wieder magnus Ewert Geijer beKln. am andern theill, wird auf das waß beyderseits Parten dies mahl an und vorbracht, von diesem Königl. Landgrt verabscheidet. Daß weill Actor officiosus mit keinen Zeugen, alß nur bloß mit der strupratæ eigenen außsage seine Klage zu beweisen vermeinet, beKlr. aber das factum gar nicht gestehen will, gleich wohl aber große præsumptiones wieder Ihn militiren, alß soll Er niemahlen mit der Persohn in unehren zu thun gehabt zu haben, juratò sich zu purgiren schuldig seyn, wenn solches geschehen, ergehet weiter in der sache, auch ratione contumacie waß recht ist. Nach publicirten Abscheide erkläret sich Reus juramento zu erhalten, daß Er nicht mehr alß ein mahl mit der Hure zu thun gehabt.*"

199 "*Demnach BeKlr. auf dem gestern publicirten Abscheidt sich juramento, daß Er mit seiner Mutter gewesenen Dienst Magd Maria nicht in Hurerey und Unzucht gelebet, wue Er andangß vorgeben, nicht purgiren können, sondern endlich selbst gestanden, daß Er ein mahl mit Ihr zu thun gehabt*"; DCP 1688, NAE 915.1.7, f. 567–568. For a purgatory oath leading to absolution, see also DCP 1688, NAE 915.1.7, f. 211.

200 "*Er solte bedencken waß Er thäte und seine Seele nicht muhtwillig beschmitzen*." DCP 1688, NAE 915.1.7, f. 682. Similarly Fürstenberg vs. Depenbrock, DCP 1690, NAE 915.1.7, f. 728: "*Das Königl. Landgrt die Parten abtreten zu laßen*. [...] *Über eine kleine weine beKln. wieder einfordern laßen, Ihm das gewißen geschärffet und ermahnet lieber die Warheit zu bekennen alß seine Seele weiter zu beschmitzen seitemahlen Er sich doch mit einem Eyde würde purgiren müßen. Worauf beKl. gestanden und bekant, daß Er die Christin beschwängert, sey im trunckenen Muht, da Er sehr bezecht gewesen geschehen; fiehl dem Königl. Landgrt zu füße und baht umb liederung der straffe, wolle sich ins künfftige für so groben sünden hüten*."

201 On the concept of notoriety, see Lévy, *La hiérarchie des preuves*, 32–53; and Adalbert Erler, "Notorietät," *Handbuch zur Deutschen Rechtsgeschichte* (HRG) III (Berlin 1984).

alles notorisch waβ er geklaget"), to which the accused stated that "it is not enough to accuse but one must also present evidence."[202]

4.3.6 *The Policing and Execution of Punishments: A Function of the Manorial Lords*

Modern policing is the product of the eighteenth and nineteenth centuries,[203] and thus Livonian society had no police forces. In towns, defendants could sometimes be taken into custody and for crimes which were not even very serious. They could be taken into custody into the city hall (*Rathaus*) if there was a risk of contumacy,[204] or if the defendant might not be able to place a surety (*cautio*).[205] In the countryside, there were no corresponding institutions for keeping suspects in custody in existence. Manorial lords were entitled to keep order on their estates – and indeed were responsible for doing so – as part of their powers of house discipline (*ius apprehendi et incarcerandi*).[206] This involved taking suspected criminals into custody into the manor's premises, both before the trial, during the trial, and after the trial while awaiting the execution of the punishment.[207] In 1694, the *Landrichter* Johan Adolph Anrep ordered the Steward Didrich Wistinghusen at Fellin Manor to arrest Karja Koera Jahn and Jahno Elst, suspected of "severe crime" ("*Schwere Missethaten*"). Jahn and Elst were to be put in "secure custody" ("*sichere Verhafft*") until their day in court. Wistinghusen was threatened with a fine of 200 silver thalers, should he not succeed in arresting the suspects. He was further ordered to arrange to transport Karja Koera Jahn to a prison in Pernau "after the inquisition," ordering "good and trustworthy people" to take care of the transportation so "that

202 DCP 1688, NAE 915.1.7, f. 158. (Forbes vs. Ficks).

203 See Clive Emsley, *The Great British Bobby: a History of British Policing from 18th Century to the Present* (London: Quercus, 2009).

204 As in a libel case of *Kleine Gilde* vs. Clement Wigant 4.2.1667 at Pernau Town Court; NAE 1000.1.723, f. 41–42. The defendant was not personally at court but was represented by his advocate, who resisted the defendant's wish to have his client arrested. The advocate said that they would try to settle the case amicably ("*…amicabilis Compositio von Ihm solle gesuchet werden…*"). The court nevertheless decided to take the defendant immediately into custody.

205 Pernau Town Court 1666, NAE 1000.1.723.

206 See Soom, *Der Herrenhof in Estland*, 14–28. For an example, see DCP 1688, f. 119. The accused, Leuco Thomas, claimed that the steward of the Aydenhoff manor (*Aydenhoffsche Schilter*) had kept him in chains for 14 days "although he was not guilty" (*unschuldigerweise*).

207 LGO 1632, Art. XXVI: "*Dero vom Adel Unterthanen und Haußgenossen, so hochpeinlich delinquieren, sollen auf Anhalten des Beleidigten oder ex officio von ihrer Herrschaft auf frischer That, damit sie nicht entnommen, zur Hafft gebracht, wohl verwahret* […]."

he does not escape." Wistinghusen was also reminded of a previous court order, according to which he was responsible for arresting another criminal suspect.[208] Wistinghusen apparently tried to avoid the burdensome responsibility and was summoned to court by Prosecutor Schirm for not acting in the prescribed manner "for such a long time and not in within the set time." After the parties had exchanged various briefs, the court decided to give Wistinghusen more time to catch the runaway suspect, stating that should Wistinghusen fail to do this, no more writings would be allowed, but the case would then be decided on the basis of the material already gathered.[209] In an infanticide case a steward had taken a peasant in custody. Lacking sufficient evidence, the accused was ordered to be tortured. In the meantime and in between the torture sessions, the steward was ordered to keep the suspect in custody on pain of 100 thalers "according to the Royal Instruction."[210]

Sometimes the limits of what manorial authorities were allowed to do lawfully were trespassed. The case of Remling vs. Beckman of 1688 shows how this worked in practice. Remling charged Beckman, the steward at Felix Manor, with taking a sack of peas from him during a violent house search initiated by himself. The District Court of Pernau had even given a summary order (*Mandat*) to Beckman's superior, Cornet Plathe, to return the peas, but this order had not been respected. The Court decided to acquit Beckman, who had acted on the command of his superior ("*auf befehl seines Herren*"), and Remling was directed to summon Plathe to court, should Remling want to pursue his charges.[211] Although the case ended in acquittal, the responsibility of the plaintiff himself to inspect the crime and take the necessary steps to have the guilty person condemned is clear.

The limits of the master's powers were at times surpassed, as in the case of "exceeded house discipline" ("*in puncto excedirter Hauß discipline*") of the peasant Jurri. According to Jurri, Steward Bartel had falsely accused him of stealing from another peasant. Bartel had arrested Jurri ("*gefangen genommen*") and tied his hands behind his back. On the way to the manor house the steward had hit Jurri and had kept him prisoner for twelve days. When Jurri had not confessed to the theft charges, Bartel had put handcuffs of iron (*eyserne Handt-Feßeln*) on him and kept them on his wrists for three hours. When Jurri still had not confessed, Bartel had finally let him go. In addition to this, Bartel had

208 DCP 1696, NAE 915.1.8, f. 123.

209 DCP 1696, NAE 915.1.8, f. 323–341. "*…auff die jetzt geschlossene Acta alß dann gesprochen warden soll.*"

210 DCP Criminal Protocol 1638–45, NAE 915.1.1, f. 13–13a (*in puncto infanticidij*).

211 DCP 1688, NAE 915.1.8, f. 70.

also arrested Jurri's wife and held her for three days. Jurri, without an advocate or the involvement of the *actor officiosus*, now asked the court to punish the steward. The steward also appeared by himself, without a lawyer, asking the court "because he was a stranger [to law], to teach him whether he had to stand before the Court with the plaintiff who was a thief" ("*BeKlagter Verwalter trat vors Protocoll und baht weill Er ein frembder Ihn zu belehren, ob Er mit Kläger, alß mit einem diebe* […]"). The steward had brought a witness, who stated that the plaintiff had broken into the witness' room "before Bartholomew" (*vor Bartholomei*). The witness had followed Jurri's footsteps and had found a box with the stolen goods in it near the witness' home. The steward confessed that he had arrested and held Jurri, but only for half an hour. The Cubias of the manor also witnessed that he himself had tied Jurri to a post about a hand wide ("[…] *habe Klr. Mit den Füßen auf einem pfahl einer handt breit gestanden* […]").

The Court voted on the outcome of the case. Assessor Harnisch was not convinced by the witness statement and the plaintiff's culpability to the theft, and since the steward had nevertheless confessed (and the Cubias had also witnessed it to the same direction), he was ready to sentence the steward to a fine of 20 thalers. Harnisch would have absolved Jurri of the theft charge. Judge von Anrep and assessor von Ceumern were not quite so convinced of the peasant's innocence and applied the institution of *absolutio ab instantia* until more proofs emerged.[212] The decision thus amounted to nothing else as far Jurri was concerned. As for Bartel, the majority found him guilty of exceeding the limits of lawful house discipline, but decided that it was the official prosecutor's responsibility to prosecute Bartel for the crime. In fact, Bartel walked free, although he had been pronounced guilty.[213] Again, regardless of whether

212 "*Weill der Jurri des beschuldigten diebstalß im geringsten nach zur zeit nicht convinciret werden können; Alß sey die sache, waß das punctu furti anbelanget, blß deßen der Jurri zu recht erforderter maßen überzeuget, in suspenso zu laßen.*"

213 The Court formulated its decision in the following way: "*Auff angestelte Klage des Königshoffschen bauren Ein wohner Jurri gegen und wieder den Verwalter Barthel Schmid in puncto exedirter Hauß disciplin, gibt das Königl. Landgrt auf das waß an – und vorbracht, und darauf geantwortet, sampt waß die producirten Zeugen wegen der denn Klr. insimulirten dieberey außgesaget, diesen bescheidt. Daß weiln der Jurri des beschuldigten diebstals noch zur Zeit im geringsten nicht convinciret, Alß muß die sache waß das punctum furti anbelanget, biß deßen der Jurri zu recht erforderter maßen überzeuget in suspenso bleiben. daß aber der Königshoffsche Verwalter an dem Jurri die zu gelaßene Hauß disciplin excediret, und besage eigenem geständniß und Acten unzuläxig mit dem Jurri verfahren, solches muß durch den Königl. Land=Fiscal, welcher besagten Verwalter deßwegen gerichtl. belangen wird, gebührendt geahndet werden.*" DCP 1690 NAE 915.1.7, f. 704–709.

Bartel was condemned or not, the question was about his exceeding the limits of house discipline, which in itself included certain police powers.

The manorial lords could be specifically entrusted with the responsibility of ensuring that a defendant showed up in court. An example of this is the case heard by the Pernau Lower Court in 1688 at its session at the Karkus Manor, in which blacksmith Clas Furstenberg accused the tailor Johan Lüders, both from the Karkus Manor, of slander. According to the Court, Lüders had been seen the night before the court session around the manor, but since he was nevertheless present at court either in person or through a representative, he was condemned for contumacy. At the same time, the manorial lord was to ensure that Lüders appear in court for the next stage of the proceedings.[214] In the case of a summons demanding the personal presence of the accused, it did not suffice to send a lawyer. When Matthis Donau had been summoned to appear in person before of Pernau Lower Court in 1690, he sent his advocate Weisensee to ask for continuance instead of coming personally. In its interlocutory decision, the court ordered Donau to be kept in custody until the next court session.[215]

The homicide case that Wilibald Bergen brought against four peasants at the Pernau Lower Court in 1641 illustrates the post-sentencing custody: after the accused had been sentenced, two of them were ordered into the custody of Bergen, one in Michel Engelhardt's custody and one in that of Wolmer Kloett, according to which manor house each of them belonged to.[216]

Based on VLGO of 1632 (Art. XXXII), the execution of punishments also remained a duty of manorial personnel throughout the Swedish era. The administration of lashes was routinely entrusted to the manor houses under which the sentenced belonged.[217] Thus when Cubias Puiste Matz was condemned in 1688 by the Pernau Lower Court to lashes for selling his lord's rye for his own benefit (*wegen Untreu*), the Court commanded the lashes to be administered by "a man from the manor" ("*durch einen hoffskerl gestrichen werden*").[218] It was usually the steward of the manor (*amtsmann*, *hauptmann*) who would bring the accused to the court, keep him available for the proceedings and then

214 DCP 1688, NAE 915.1.7, f. 226–227.

215 "[…] *wo entzwischen deßen Lohn und Habseeligkeit beym Hn. Cornett Platen biß zu außtrag der sache hiemit gericht. verarrestiert wird, weßwegen Ihm dieser abscheidt zur notitz zu zu schicken.*" DCP 1688, NAE 915.1.7, f. 367.

216 NAE 915.1.4, 27 a.

217 DCP 1688, NAE 915.1.7, f. 115. The official prosecutor Peter Timmermann asked the Pernau Lower Court to order the *arrrendator* of Holstfershoff in 1701 to take Kippi Jahn into custody for suspected homicide; NAE 915.1.9, f. 12 a.

218 DCP 1688, NAE 915.1.7, f. 115.

execute the punishment. Stewards were responsible for administering the punishment of lashes, but not only that: sometimes even death punishments were carried out at the manors and by the manorial personnel. In the homicide case against Erich Kiefer in 1641 the Pernau Lower Court, in a sentence at the end of the case entry and after pronouncing the death sentence, it is stated that "the execution will be entrusted to the local steward Arendt von Hursen, and he is to undertake the execution in order to avoid legal punishment."[219] In the infanticide case of Maye, the steward of Maye's manorial lord (*Grundherr*) was commanded to arrange for her execution.[220]

4.3.7 *Between Civil and Criminal Law: The In-court Settlements in Swedish Livonia*

The following will show that the inquisitorial and accusatorial principles, and the various ways of combining them, were not the only ones in Livonian seventeenth-century procedure. One cannot fully understand the Livonian legal system of the seventeenth century in terms of the procedural principles only. From the fact that crimes were still largely understood as belonging to the accused's private sphere it followed that the individual taking cases to court was sometimes allowed to dispose of the case once it reached court. The courts were anything but passive in this: they favoured and sometimes even pressed parties to settle.

Both extra-judicial arbitration (*arbiter*) and active settlement by judicial courts themselves had a long pedigree in European legal history by the seventeenth century. The procedural handbooks (*ordines judiciarii*) of the twelfth and thirteenth centuries, building on Justinian law, developed the topic of arbitration and amicable settlement to the minutest detail. As in procedural questions in general, canonists – such as Tancredus – were especially active here. Following canonist literature, *Liber extra* (1234) contained a title "*De arbitris*" (X I, 43), and the enormously influential late thirteenth-century *Speculum iudicialis* of Guillielmus Durantis then gathered the threads of scholarship

219 "*Vnd weilen dieß ein offenbahr vnleugbar thaet ist, alß wirdt dem haubtman alhie Arendt von Hursen, die Execution vom gericht committiret, vnd wirdt er dieselbige bey vermeydung deß gerichtß straeff zu excqvisiren wissen.*" DCP 1641, NAE 915.1.4, f. 23 a. See also the case of Maye, DCP 1641, NAE 915.1.4, f. 15, in which the formula "to avoid punishment" is lacking, but surely only for reasons of scribal inconsistency; and Wilhelm Kiese vs. Morjahn, DCP 1641, NAE 915.1.4, f. 34.

220 "*Vnd weilen dieß ein offenbahr vnleugbar thaet ist, alß wirdt dem haubtman alhie Arendt von Hursen, die Execution vom gericht committiret, vnd wirdt er dieselbige bey vermeydung deß gerichtß straeff zu excqvisiren wissen.*" DCP 1641, NAE 915.1.4, f. 23 a.

together.[221] Different forms of dispute settlements were common in medieval legal practice as well,[222] although the terminology varied. Settling agents themselves could be called *arbitri*, *arbitratores, diffinitores*, *amicabili compositores, dispensatores, boni viri*, or *communes amici.*[223]

The institution of arbitration, and amicable settlements by and with the assistance of judicial courts, survived into the early modern period. As I will show later, settlements occurred and were encouraged even in the Council of the Realm, which decided cases as the last instance by way of *beneficium revisionis.*

The medieval Livonian *Ritterrecht* thus also entailed provisions on the theme. Thus Chapter 77 forbids settlements in cases brought to court without the court's permission, and Chapter 84 provides rules on how the killer is to pay compensation to the victim's relatives.[224] I will now establish some central characteristics of legal settlements such as they emerge inlight of Livonian court practice during the Swedish period.

My first example is from the Polish period. In an interesting homicide case at Pernau District Court in 1624, a minor was charged accusatorially with homicide. The Court refers to the old institution of *Wergeld*, which "in this kind of case, *gemeines Rechts* orders that the criminal accuser does not demand the boy's blood." The *Wergeld* was on its way to extinction, however, because the Court sentenced the defendant's father to pay fines and to arrange for the deceased's funeral.[225]

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221 Karl S. Bader, "Arbiter arbitrator seu amicabilis compositor: Zur Verbreitung einer kanonistischen Formel in Gebieten nördlich der Alpen," *Zeitschrift der Savigny-Stiftung der Rechtsgeschichte, Kanonistische Abteilung* 11 (1960), 239–276; Karl-Heinz Ziegler, "Arbiter, arbitrator und amicabilis compositor," *Zeitschrift der Savigny-Stiftung der Rechtsgeschichte, Romanistische Abteilung* 84 (1967), 376–381.

222 For Switzerland, see Bader, "Arbiter"; and for England, Edmund Powell, "Settlements of Disputes by Arbitration in Fifteenth-Century England," *Law and History Review* 21:2 (1984) 21–43.

223 Ziegler, "Arbiter," 380–381.

224 "*Ueber Sachen, welche vor Gerichte ausgeklagt werden, darf man ohen des Richters Zustimmung nicht vergleichen.*" Buddenbrock II, 110, 117.

225 "*Wan aber die gemeine recht in huius modi casibus solutionem Werigeldi verordnet, zumahlen peinlich Anklägere sich der action begeben des Knaben bluet nicht begehren … und sol beklagtens Vatter anstaet des Wehrgeldts der Kirchen zur strafe 300 Rthlr erlegen und dem beleydigten und peinlichen Klägern an seines Sohn staett einer abbiett und dessen entleibten Sohn ein ehrlich begrabniß zy thuen schuldig sein.*" Cited in vs. Blauckenhagen, 270–271.

On 26 February 1640, Lellepe Peet's widow Anne appeared in the District Court of Pernau. Anne demanded punishment for Hans Wardi, whom she accused of murdering her husband. Hans admitted that he had slain the victim, but claimed that this had happened without premeditation (*ohn nachgier und vorgesetztem eyffer*) – to use the modern English concept in homicide vs. murder. Hans, however, asked the Court to spare himself from the "harshness of the law" ("*der scharffe des rechtenß*").[226]

At this point Anne, together with her son and the brother of the deceased, intervened, "totally resigning their case" (*totuliter begeben*). They asked the court to spare the deceased from the ordinary punishment, because the killing had not been intentional (*ex proposito*). Anne also notified the court that Hans had apologized to the deceased's relatives for the deed. In addition, he had promised to live peacefully with them and to take care of the victim's children "as if they had been his own" (*alß sein eigen zu versorgen, angelobet*). The foreman of the manor house, to which the accused (and most probably the victim as well) belonged, also intervened on behalf of the manorial lord ("*General feldt Herr*"), reporting that the accused's father and the accused himself had both served the manor "faithfully and had behaved well." The crime had been accidental. Hans had been kept "with his hand and feet bound up for a whole year," and the case had been "settled between friends" ("*diese sache mit dem freunden gesuehent vnd vertragen*"). Therefore, the foreman suggested, the Court ought to refrain from resorting to ordinary punishment.

The Court accepted the petition of the plaintiff and the foreman. The killing had not occurred wilfully, *ex proposito occidendi animo*, in addition to which Hans had spent almost a year in the manorial "hard prison" (*in schweren gefengniß*). The Court was further motivated in its decision by the fact that the relatives had given up the charges, and had foregone the ordinary death punishment but had sentenced Hans Wardi to a fine of 200 *Reichstaler* and a church punishment. However, Hans had to wait in custody until the High Court of Dorpat had accepted the lower court verdict.

It may seem odd that Anne took the case to court if she was willing to settle it anyway. In actual fact, Anne's behaviour makes perfect sense. Most probably, she wanted to get the court's approval for the conditions under which she was willing to drop the charge. Accordingly, Hans' promise to take care of Anne's children was recorded in the minutes. This must have been essential for Anne.

The practice of sentencing to a milder punishment in exchange for compensation of the victim's damages fits the comparative international

226 DCP 1640, NAE, 915.1.3, f. 20–20 a.

picture well.[227] Homicide cases were often settled elsewhere in the German cultural sphere in the sixteenth century, but in the seventeenth century the practice only remained in the most remote areas of the Empire.[228] In line with the development in the *Reich,* the case of Lellepe Peet and Hans Wardi is the only settled homicide case I have found in the archives of the Livonian courts during the Swedish era. It may therefore be safe to contend that the case of Hans Wardi was something of a relic from the past – at least insofar as settling homicide cases in court was concerned. Interestingly, in Sweden proper (that is, the area comprising roughly present-day Sweden and Finland), the settlements seem to have continued in use well into the second half of the seventeenth century.[229]

However, as late as 1696, the District Court of Pernau, in session at Fellin, received a manslaughter case in which settlement became an issue. The charges involved several allegations of violent crime, of which Parce Andres accused

227 See Karl Härter, *Policey und Strafjustiz in Kurmainz: Gesetzbgebung, Normdurchsetzung und Sozialkontrolle im frühneuzeitlichen Territorialstaat* (Frankfurt am Main: Vittorio Klostermann, 2005), 493, according to whom in early modern Kurmainz "*Waren Schadenersatz, Opferentschädigung und Kostenersatz gewährleistet, so fielen die Strafen – vor allem bei Gewalt – und Eigentumsdelikten einheimischer Delinquenten – meist milder aus.*"

228 See Andreas Deutsch, "Späte Sühne – Zur praktischen und rechtlichen Einordnung der Totschlagsühneverträge in Spätmittelalter und früher Neuzeit," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung* 122 (2005), 113–149, especially 148–149. Settlements in homicide cases, again, need to be distinguished from the well-known practice of commuting death sentences into more lenient punishments, common in the practice of the Livonian High Court as well as elsewhere in the seventeenth-century Swedish Realm. The Swedish legal language referred to this European-wide practice of extraordinary punishment (*poena extraordinaria*) as *leuteration*. Contrary to what has sometimes been claimed, *poena extraordinaria* (and *leuteration*) did not conceptually mean commuting a death sentence to a milder one, but instead the term simply referred to deviating from the ordinary punishment. This could also be commuting a milder sentence to a harsher direction. For instance, the Council of Arensburg (on the island of Oesel) condemned Terriskiwi Michelstochter to death for infanticide in 1674. On 22 January 1675 the High Court of Dorpat changed the woman's punishment to a harsher one, in that her body was to be burned (Protocollae votarum 1672–1675, 109.1.11, LVA). *Leuteration*, thus, simply meant the referral of the sentence for a higher court´s inspection. In practice this most often led to commuting death sentence to a fine, forced labour, or something else. It is another matter whether *leuteration* could be effectively enhanced by the fact that compensation had been paid to the victim.

229 For the settlements in homicide cases in Sweden, and even at the high court level, Petri Karonen, "Rahakkaista sovitteluista valtiovallan väliintuloon," in Anu Koskivirta (ed.) *Tie tulkintaan: Heikki Ylikankaan juhlakirja* (Juva: WSOY, 1997), 248–269, especially 252–253.

Kollope Andres and his relatives. As a result of the alleged violence, Andres claimed that his three-year-old boy had also accidentally died. From the point of view of legal settlements it is interesting to note that at one point in the proceedings, Andres mentioned that Puste Jasche had told him not to settle the case, but to bring it to court.[230]

Jasche denied ever having given Parce Andres such advice. Two interesting details are nevertheless worth considering here. First, it seems that Andres had been willing to settle the killing of his son without court interference. According to Andres, Jasche seems to have thought that the case was too serious to be settled, whereas Jasche denies this in court, thus suggesting that the case might well have been settled. The sparse markings in the court protocol do not allow for decisive interpretations here. It is nevertheless significant that settling a manslaughter case was considered to be an option in the first place, even if no settlement was reached in this particular case.[231] Second, it is important to note here that Jasche was not just any neighbour. He was a law-finder (*Rechtsfinder*). It is therefore understandable that Jasche would have offered his advice, or that Kollope would even have asked him for it.

Even though settlements in homicide cases are true rarities in the Livonian material, civil cases continued to be settled frequently, and so were petty criminal cases occasionally. Settlements were especially common in slander cases. David Grage vs. Michel Gende of 1641 at the District Court of Pernau is a typical example. David, a tailor, accused Michel, a foreman (Cubias) at a manor house, of slander. Michel had allegedly called David "a villain" (*Schelm*), and David asked Michel to prove his words before of the Court.[232] Should he not be able to do so, David demanded that Michel be appropriately punished. When Michel then denied having called David names, the plaintiff marched a witness into the courtroom. The witness, "a cook," told that he had indeed heard Michel say that when David had been "loitering around villages," he had not done the work he had promised to do at the manor (where the cook probably served). Instead, David had been after alcohol (*Gesöff*). When asked if he had any way of proving this, Michel told the Court that he did not, and "that he did

230 "*Parce berichtet weiter, daß der Jasche zu ihm, wie Er sich mit beklagten vertragen wollen, gesagt, Er solte sich nicht vertragen, Sie hätten das Kind besichtiget, Er solte es dem Gerichte klagen.*" NAE 915.1.8, f. 101–113.

231 Because there was not enough evidence against Kollope Andres, the case was "*suspendiret*" in case new evidence might turn up.

232 NAE 915.1.3, f. 11.

not have anything else to say about David." After this, David and Michel shook hands "amicably" and settled the case.[233]

There is no doubt that these "amicable settlements" continued to be made throughout the Swedish period. Sometimes courts themselves actively promoted peace between parties. On 20 January 1666, two brothers named Per and Tönnis were charged at the Town Court of Pernau with fighting (*schlägerey*) and causing each other "gross injuries" ("*grobe injurien*"), in addition to which the wives of both brothers had also taken part in the fight. Should they wish to avoid lashing, the brothers were "seriously advised to withhold from [such behaviour] in the future" ("*ernstlich vermahnet sich dergleichen hin kunfftig zu enthalten, bey vermeidung der ruthen*"). According to the protocol, the brothers then settled the case and shook hands ("*allerseit vertragen und ein ander die hände gegeben*").[234]

As far as slander cases were concerned, the courts were thus particularly active in encouraging the parties to settle their arguments. The frequent use of different versions of the formula "settled the case and shook hands" shows well the courts' view of themselves as guarantors of social peace. When on 5 September 1662 the saddler's apprentice Johann von Brehmen accused the tailor Caspar Schindler and the glassmaker Johann Spelbing before the Lower Town Court of Pernau of slandering him, both of the accused directed a similar charge at Johann. As none of the charges could be proven properly, the court stated that "since it has now turned out that neither party has slandered the other one, so let the apprentice immediately return to his work, and those having taken counter-charges [*retorquenten*] shall not take recourse to such charges, but should instead look for an ordinary judge." And so both the parties settled and shook hands with each other.[235] On 13 December 1662, Johann Cassel had summoned Johann Schmidt before the Lower Town Court of Dorpat to answer a slander case as well. According to Cassel, Schmidt had broken the peace at his home by calling him a rogue "*Schelm*" and a scoundrel "*Hundsvott*" in the presence of several other people. After hearing the witnesses, the Court

233 "*Dan er kunne ihm nicht anderß nachreden alß waß der ehren vnd redligkeit gemeß ist; hierauff sich die parten die hand geboten vnd guettlichen vertragen*." See also Small Guild vs. Clement Wigandt; Dorpat Council 1668, f. 75 NAE 1001.1.723.

234 NAE 1000.1.722, f. 4 a.

235 NAE 1001.1.4058, f. 1a–2 a. "*Nunmehro aber erhellet, daß keiner den andern geschelten, So soll alßbald der Geselle in seine arbeit treten, die retorquenten ins künfftige solche retorsiones unterlassen, dafür aber den ordentlichen Richter suchen. Wurden also die Parten vertragen und gaben einander die hande*." "To look for an ordinary judge" probably means that, instead of having such easy recourse to counter-charges, defendants should raise cases on their own – if they had a case.

declared that since the accusing party had not been able to prove the gross injury, but had instead himself started to look like a suspect for the same crime, both parties were absolved. Therefore they "both as town residents had the duty to settle the case soon."[236]

When the Pernau Lower District Court sat at the Hostfershoff Manor House on 20 March 1688, the administrator of the Aydenhoff Manor House, Christian Winckelman, also came forward with a slander case. A peasant named Leuco Thomas had, according to Christian, accused him of taking unlawful advantage of his position by selling the manor's corn on his own account and for his own benefit. Christian denied this and charged Thomas to step forward with evidence. Thomas could not produce any and was sentenced to 10 pairs of lashes. At this point Thomas and his wife turned to the court and asked it to spare Thomas from the punishment, because it might injure him. Winckelman, most probably personally, had already kept Thomas in irons for 14 days. "The Administrator for a long while would not let this have any effect on him, but at last and after a pleading from [Thomas and his wife] and an intervention by other peasants, he agreed that the [accused] would get off with only five pairs." The peasants, however, still did not give up. "Because they still did not give up asking for a complete absolution of the punishment, and as the Court had him understand that it depended on him whether Thomas would remain unpunished or not, [the Administrator] agreed to Thomas's impunity this time, wherefore Thomas then lay down at his feet and thanked him for the pardon."[237]

The case of Leuco Thomas represents well the kind of social involvement that Karl Härter has described in his studies concerning the court practice in early modern Kurmainz. Contrary to the picture sometimes conveyed in the older literature, the judge (or the accusing party) and the accused were not the only ones involved in criminal cases. Relatives, expert witnesses, administrative authorities, denunciators, advocates, and many other groups of people might have a stake in the proceedings.[238] The more important the case and the

236 NAE 1001.1.4058, f. 16–17. "*Womit Sie sich auch beyderseits alß bürger alß bald zu vergleichen und zu vertragen schuldig seyn.*" See also the slander case Friederich Laurstein vs. Johann Martin Hardes, Lower Town Court of Dorpat, 2.2.1660, NAE 1001.1.4060, f. 4–6 (the original not paginated); and Johan Jerriz Tischler vs. Christoff Birt, 29.4.1660, Lower Town Court of Dorpat, 2.2.1660, NAE 1001.1.4060, f. 20 (the original not paginated).

237 NAE 915.1.7, f. 119–121.

238 Härter uses the term *Justiznutzung* to denote to this phenomenon: "*mit* [*diesem Terminus*] *lassen sich zwar zutreffend Einflußmöglichkeiten der Untertanen beschreiben, die Policey und Strafjustiz durchaus nutzten, um Konflikte zu regulieren.*" Härter, *Policey und Strafjustiz in Kurmainz*, 9–10, 416–417.

more drastic the potential consequences of the trial, the more extra involvement was to be expected.

Another variant of settlement is worth presenting here because of the Christian element involved. In 1688, when the Pernau Lower Court held session on the island of Kyhn, Lieutenant Carl Friedrich Lilienfeld raised a case against a peasant called Jancken for slander. After it had been demonstrated by one witness (*testis unicus*) that Jancken had libelled Lilienfeld, he was ordered to take a purgatory oath. Jancken, however, confessed. He came back to the court room after the sentence ordering the purgatory oath had been pronounced, and told the court that "he could free his consciensce of the possibility that he had inflicted some injuries" on the plaintiff. Jancken had been so drunk that he could not remember what had happened. The Court now decided actively to pursue a settlement, telling the parties that "the case was of the kind that the parties might want to see whether they could agree on a settlement." Jancken then offered to ask for "Christian forgiveness" before the Court, which Lilienfeld accepted. The ritual was completed with a handshake and the aforementioned asking for Christian forgiveness.[239]

Settlements were not always approved, however. In 1690 Prosecutor Philipp Schirm accused the steward of Kirbel Manor, Matthis Donau, of assault on Christoph Beckman, the steward of Moysekyla manor. According to the *libellum*, the parties had settled the case after Beckman had asked the Court for a citation on Donau ("*in zwischen beyde theils hierüber vereinbahret* […]"). The settlement could not, however, override public interest ("[…] *so kan dennach dieser Vergleich dem Interesse public nichts derogieren, sondern verdienet billige bestrafung*."). It may be that Schirm decided to prosecute for the assault, too, because he had already tried earlier to get Donau to answer to a fornication charge, for which Schirm was prosecuting again.[240]

Early modern settlements of criminal cases survived for as long as they did in a procedural environment which was becoming increasingly hostile to arrangements that left too much say to the parties of the criminal cases themselves. This was the grand lineage of the medieval and early modern procedural development. Even though the inquisitorial procedure was thus vigorously

239 DCP 1688, NAE 915.1.7, f. 40–44; see also *actor officiosus* vs. Schmidt, DCP 1690 f. 500–509 (Interlocutory sentence: "*…also mir semiplene seine intention probiret, alß soll Er in supplementum, daß es so mit ihm wie testis eingezeuget bewant, Juramento zu erhalten schuldig seyn… von H. beKln. darauff geantwortet eydle; Defeintive sentence: Gezeugnißе, præstiretes Juramentum suppletorium, und darauff von Klägern beschehener renunciation… absolviret und entbunden.*").

240 DCP 1690, NAE 915.1.7, f. 363–369.

making its way in early modern Europe from the late Middle Ages onwards, there are great geographical and temporal variations to the theme. For instance, the German regions most resistant to the *Rezeption* (mainly the ones in which *Sachsenspiegel* was relevant) were also resistant to the inquisitorial procedure. Even if the *Bambergensis* and the Carolina already provided for the inquisitorial procedure, local legislation still allowed for settlement agreements (*Sühneverträge*) in the early seventeenth century. The up-and-coming inquisitorial procedure thus lived side by side with the archaic settlements of serious crime for a long time.[241]

Is it possible to speak of a kind of *Justiznutzung*, or "the use of law," in the way this term has been utilized in literature?[242] It has been emphasized that the law was not only imposed on the parties from above, but that the people instead took advantage of the legal services of the community, thus converting courts into instruments with the help of which they could press the other party to yield concessions, settlement money, and other kinds of benefits. From the plaintiffs' point of view, the aim was not necessarily to have the other party formally convicted, but it was to further other ends. The case of Leuco Thomas at least shows that the local populace could sometimes be actively involved in the court proceedings.

The idea of *Justiznutzung* does not, however, describe well the settlements in the Livonian slander cases in general. For one thing, monetary settlements were rarely agreed upon or awarded. It seems that the plaintiff never got material benefits from taking the case to court and settling it there. The case of Leuco Thomas is the only exception in the material, and even that case is from the very start of the Swedish era. Instead, the minutes convey a picture according to which it was the courts that actively promoted social peace by compelling the parties to settle their disagreement. The different variations of the formula according which the court had the parties shake each other's hands is telling in this respect. It is, of course, possible that settlement money could have been exchanged outside the courthouse without it being registered in the minutes. The protocols, however, contain no sign of this.

Cases were settled regardless of whether there was evidence for slander or not. In some cases the minutes tell us that the case was clear, in others it was not. This also goes to show that it was important for the courts to secure social

241 Deutsch, "Späte Sühne," 131–137.

242 See Martin Dinges, "Justiznutzungen als soziale Kontrolle in der frühen Neuzeit," in Andreas Blauert and Gerd Schwerhoff (eds.), *Kriminalitätsgeschichte: Beiträge zur Sozial – und Kulturgeschichte der Vormoderne* (Konstanz: Universitätsverlag Konstanz, 2000), 503–544.

peace by getting rid of slander cases that threatened to disturb it. Although witnesses were occasionally heard in these cases, finding out what had actually happened in these cases was clearly of secondary importance compared to re-establishing peace.

Slander cases were almost routinely settled in the Livonian town courts, but less often in the country courts. Few slander cases appeared in the district courts in the first place. After the 1640s, cases between peasants do not appear in the courts observed here; instead, pure peasant cases (be they slander cases or otherwise) were decided directly on the manors, probably by some kind of peasant court. Peasants normally appeared in the district courts only when the other party was of higher social rank (as was the case for Christian Winckelmann vs. Leuco Thomas). Slander cases between noble persons, then, seem to have been taken directly to the High Court of Dorpat, the *forum privilegiatum* of the nobility.[243] This leaves us only with burghers and their municipal courts.

Civil delicts, such as slander, were procedurally not distinguished from other civil cases in the Livonian practice, and there was no legal problem in settling them. In fact, the courts actively promoted the settling of these cases, suppressing charges and counter-charges whenever possible. Both inquisitorial procedure in the more serious cases and the settlements in the relatively harmless slander cases could thus be used to further social peace. Inquisitorial procedure and the settlements can then perhaps be interpreted as two sides of the same coin: the phenomenon that has been called the early modern judicial revolution.[244] Bread and water was used, for instance, in slander cases, as when the soldier Hanss was convicted to four days prison with bread and water for calling Lorens Erichson a witch, without being able to show that his claim was true.[245]

4.3.8 *Summary: From Passive to Active Criminal Adjudication – and towards* Gelehrtes Recht *in Civil Law*

When the start of the Swedish period is compared to its end, two fundamental changes in criminal adjudication emerge. First, official prosecution at the lower courts became significantly more active towards the end of the century. The prosecutors were interested, above all, in cases that involved prohibited sexuality or which endangered public order in a narrow sense of the word, thus excluding regular violence and property crime. After the duel ordinances of the 1680s, prosecutors became active in pursuing duel cases against noblemen

243 For limitations of space, those cases need to be omitted in this discussion.

244 Lenman and Parker, "The State, the Community and the Criminal Law," 11–48.

245 DCP 1640. NAE 915.1.3, f. 10 a.

in the High Court. Second, the use of inquisitorial procedure increased. Cases in which the lower court figured as the other party – as it did in the inquisitorial procedure of the *ius commune* – do not appear in the early years but become more frequent in the late seventeenth century. Inquisitorial procedure was almost exclusively used against peasants.

Besides changes, there was also continuity. Pure accusatorial procedure, without a prosecutor, dominated the Livonian criminal proceedings throughout the century. Accusatorial procedure was mainly used between social classes other than peasants. Cases of theft, violence, and slander were typically processed this way. Although the number of criminal cases processed purely accusatorially diminished dramatically in the years 1640–1641 compared to the years 1688–1690 at the Pernau Lower Court, accusatorial cases all but disappeared. This is especially the case if the prosecutor-driven accusatorial cases are added to the list. The Livonian lower court procedure was thus fundamentally accusatorial throughout the Swedish period.

On the other hand, it should be emphasized that the *ius commune* procedure was flexible by nature. What started as accusatorial procedure could end in the inquisitorial mode. As Schwarz remarked, it could sometimes depend on the prosecutor's whim whether he initiated a case as an accusatorial procedure or only denounced it, in which case the procedures could continue inquisitorially. Sometimes the terminology wavered: a case could be introduced as *actor officiosus vs.* NN (thus, as an accusatorial case), and when the witnesses were heard the term "inquisitorial article" (*articuli inquisitionales*) is used.[246]

According to the common scholarly opinion, the inquisitorial procedure took over from the accusatorial procedure in most of the central parts of Europe from early on. However, to what extent this is the general European story is doubtful. Research is still lacking, and much of the existing research is entirely based on legal literature. Without archival research it is, however, difficult to say anything definitive about the use of the different modes of procedure in other parts of Europe. This study has hopefully contributed something new to the discussion, showing that at least in seventeenth-century Livonia, accusatorial procedure had all but lost its importance.

In the beginning of the Swedish rule, legal professionals as advocates remained a rare sight in Livonian lower courts. Towards the middle of the seventeenth century, the lawyerly domination brought with it the learned procedure of the *gemeines Recht* and the *ius commune*. The procedure turned thus predominantly written. It started with the plaintiff's *libellus*, and continued with the defendant's *replica*, *duplica*, and so on. The briefs were customarily read

246 Schwarz, "Zur Geschichte des livländischen Criminalprocesses," 117–118.

out loud in court. The other party would then ask for a copy of the brief, and ask for a postponement in order to be able to prepare his next move. The procedures advanced slowly and the charges were often dropped at some point.

The lawyer-dominated nature of the civil proceedings not only brought with it the *gemeines Recht* proceedings but also the *gemeines Recht* legal sources, as lawyers often referred to *Corpus iuris civilis*, especially the Digest, and sometimes also to *ius commune* scholarship. The lawyerization of the urban courts took longer, but had evolved into a fact by at least the 1660s as well.

4.4 The Cases and the Procedure at the High Court of Dorpat

4.4.1 *The Cases and Their Handling at the Court: An Appeals Instance or a First-Instance Court?*

The Swedish high courts had two functions. Besides being courts of appeal, they served in some types of cases as courts of first instance for the nobility, a *forum privilegiatum*, in which noblemen judged their peers. The Dorpat High Court also fulfilled both these functions. The legislative basis of the Court's position as the court of the nobility was the *Hofgerichtsordnung* of 1632. In Sweden proper (today's Sweden and Finland), the appeals function of the high courts was the main feature, compared to the first-instance function. As Mia Korpiola has recently shown, however, this was not the case in the Svea High Court during its early years, but the situation was soon reversed.[247]

The Dorpat High Court, in turn, was predominantly a first-instance court throughout the Swedish period. It is understandable that the Court received only two appeals cases out of 36 in its first year (1630) of functioning. The number of appeals, however, remained low even after that: in 1631, there were two appeals out of 58 cases; in 1632, three out of 25; and in 1633, one out of 19. During the first ten years (1630–1639), the Court had 382 cases, of which only 26 were appeals. The number of appeals then started to rise slightly: in 1640 the corresponding figures were 10 out of 32 and in 1650, 10 out of 42. For the rest of the Swedish reign, the number of appeals stayed more or less at this level. In 1670 there were still only 33 appeal cases out of 98; in 1680, 32 out of 94 cases were appeal cases; and in 1690, eighteen out of 63. In 1697, the number of appeals was slightly higher (28 out of 58), but remained as under half of all new cases at the High Court.[248]

247 Korpiola, "A Safe Haven in the Shadow of War."

248 Chronologisches Register der Akten des Livländischen Hofgerichts Zivil – und Anklagesachen: Band I 1630–1667 (1910), Band II 1668–1680 (1911), Band III 1681–1710 (1909),

Why was the Dorpat High Court so different? First, the proportion of noblemen in Livonia was significantly higher than elsewhere in the Swedish realm, which can be presumed to have contributed to the significance of the Dorpat High Court as a court of first instance. Second, not only were there more noblemen in Livonia than elsewhere in the realm, but in Livonia peasants – the largest bulk of the population – were practically barred from appealing their cases to the High Court. As was explained above, peasants with their civil cases did not figure even in the lower courts, because they had their cases handled in the manorial courts – from which no appeal was possible. The Dorpat High Court thus received both in absolute and relative terms fewer appeals than the other high courts in the Swedish realm.

The caseload of the High Court of Dorpat concentrated on certain kinds of cases. Land quarrels of different kinds figured among the most numerous in the four years which we have under scrutiny (1630, 1640, 1650, and 1682). This was especially so in the early period, which is understandable given the somewhat chaotic situation after the wars preceding the Swedish conquest. Thus, in 1630, 18 out of 36 cases were land disputes. Of the 32 cases in 1640, 14 had to do with land. In 1650 the corresponding figures were 19/42, compared to 13/86 in 1682. *Injuria*, both verbal and corporal, were also frequent: 5/36, 7/32, 3/42, and 14/86. The third group which stood out was payment demands: 7/36, 5/32, 3/42, 15/86. Inheritance cases were little more than an isolated phenomenon: 2/36, 3/32, 4/42, and 6/86. Register, put together by Bruiningk in the first years of twentieth century, suggests that the number of cases coming to the High Court arose with the years. In 1630, 36 cases were on the Court's docket; in 1640, 32; and in 1650, 42. In 1670 we already have 98 cases and 94 in 1680.[249]

By far the most numerous criminal cases were the *injuria* ones, handled accusatorially, of course. Other criminal cases concerning noblemen were rarities, given the fact that it was extremely difficult for the authorities to bring noblemen to court against their will. In 1640, only one case of embezzlement figures in the docket.

The procedure at the Court can best be described as oral and written at the same time – the procedures were thus similar to those at the district courts. A typical day at the Court consisted of the following types of business. Lawyers would show up to present their cases, which, given the frequent postponements, had advanced to different phases. Some were first-instance cases,

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LHG 109.2.I–III. The protocol books exist for years 1666–75 and 1684–96 and the decision books for the years 1666–69, 1672, and 1693–94.

249 Chronologisches Register der Akten des Livländischen Hofgerichts I–III.

others appeals. The parties were practically always represented by lawyers, of which there were usually four or five active at any one given time at the Court.[250] The handling of the case began with the plaintiff's lawyers presenting the case by reading his *justificatio appellationis* or *libellus* out loud and then handing it in *ad acta*, for the record. The defendant's lawyer would then ask for the copy and usually deliver his own *exceptio* the next time the case came up on the docket. The subsequent procedural phases, *replica* and *duplica*, followed the same pattern.

Sometimes the High Court Prosecutor (*Oberfiscal*) would present his cases – accusatorial, first-instance and against noblemen, and it would proceed in a similar way to the civil cases. In civil cases and the accusatorial cases, most of the legal discussion took place in the written statements of the lawyers. Procedural claims were an exception, at times discussed *viva voce* and recorded in the protocol.[251]

A presenting judge prepared the draft decisions, which were sometimes copied in the protocols. After the presenting judge had read his proposal aloud, the other judges expressed their opinion, with a vote sometimes taking place.

The actual criminal cases (serious crimes, *criminalia*, those carrying a corporal punishment) would be usually handled in larger groups, typically around ten cases at a time, one after another. Criminal cases left very little by way of text in the protocols, largely because no lawyers were involved. Another reason was that the procedure of *leuteration*[252] was light. *Leuteration* often entailed no more than a summary revision of the lower court document, with judges only signing *approbat* ("approve") and their name on the front cover of the lower court's decision.

4.4.2 *The High Court as a Court of First Instance*

As mentioned above, land disputes, inheritance cases, and payment demands formed the bulk of the High Court's daily work. They were mostly first-instance cases between noblemen, because civil cases between peasants were decided in manorial courts and could not be appealed anywhere. The few appeals cases

250 In 1695, for instance, four lawyers dominated the business of the Court: Spalchaber, Landenberg, Heinen, and Dieterici. Two others, Schultz and Eggerdes, represented clients as well, but the four other ones appeared in court on a daily basis. Protocollum votarum 1695–96, LVA 109.1.28.

251 See for instance, Protocollum votarum 1695–96, 109/1/28, f. 44: "*3.* [*Actor officiosus*] *cont: Frau Anna Christina Nolcken, Capit: Rems: Landenberg: Vorliest und gibt ad acta Except: in comp: Act: cum Doc: sub N13.Eichler: Bittet Copij. Ille übergibt zugleich Mandatum.*"

252 On the Saxon origins of *leuteration*, see Benedict Carpzov, *Processus iuris in foro Saxonico* (Jena: Birckner, 1675), Tit. XVII, n. 12.

that reached the High Court were civil cases (including accusatorial ones) in which a town burgher, soldier, or a member of some other group, neither noble or peasant, was a party. Another important group of first-instance cases were those in which the public prosecutor (*Oberfiskal* at the High Court) prosecuted noblemen. The trend is clear, and again similar to that in the lower courts: the number of prosecutor-driven cases increased with time. These cases were accusatorial, not inquisitorial: the prosecutor thus had fewer procedural weapons at his disposal than when a case proceeded inquisitorially. If the defendant refused to show up, which was often the case, he or she could be declared *contumax* and eventually sentenced to pay fines. Should he or she refuse to pay, there was little that they could do.

An example of a typical prosecutor-driven, accusatorial case at the High Court was the Royal Prosecutor (*Königl. Oberfiscal*) Christoff Wagner vs. Gustav Adolph Boldt. Wagner accused Boldt of the killing of Matthias Lampsius in 1682. The Governor-General Christer Horn had decided on 15 February 1682 that the accused would not be kept in custody, granting him a *salvum conductum.* On 28 November 1682 the Court issued the citation, according to which Boldt was to appear in court on 29 January 1683. He did not appear, but instead sent a letter, in which he claimed to be innocent and asked for permission to prove his innocence through witnesses and documents, as his health did not allow him to come to court himself. The prosecutor was not convinced: Wagner begged the Court not to let Boldt proceed in writing. After all, this was a homicide case, and it was thus not "in the interest of the crown" (*observierung des interesse regii*) to let the accused get away in such a way. Instead, he should be convicted for contumacy. The procedure continued entirely in writing until the High Court's decision on 14 February 1685, after six briefs from the accused and three from the prosecutor. The prosecutor's evidence consisted of an investigation conducted by the army in 1681 and written versions of statements by witnesses heard in lower courts. The final outcome of the case is unfortunately not known.[253]

Nevertheless, the sheer changes in the number of prosecutor-driven cases and their breakdown into different categories reveal rather a lot about the interests of the early modern state. The first prosecutor-driven case at the High Court was High Court Prosecutor (*Oberfiskal*) Christoph Mebild vs. Heinrich Abel Ziegenmeyer on 16 October, 1630, and it was about excessive violence against peasants. According to Bruiningk's register, there were 28 prosecutorial cases in 1630–1639. In 1640, the higher court prosecutor had no cases

253 LVA 109.2.1481, nr. 78.

at the High Court, but ten years later (1650), there were four (manslaughter, violent behaviour, violent behaviour in the house of the court bailiff, and violent behaviour in connection to the financial exaction of the state etc.). The basic interests of the prosecutor already show in these early cases: his activities were about cases which included a dimension of public interest. Killing fulfilled this criterion, but so did cases in which a royal interest or servants were directly violated, as in the case of the bailiff.

After mid-century, these trends become even clearer. In 1670 there were 12 prosecutor cases, 12 in 1680, and in 1690, 14 cases. Some of the crimes that figure among these include disobedience against superiors (*Halsstarrigkeit gegen Obrigkeit*), unlawful arrest (*widerrechtliche Arrestierung*), misuse of public power (*Missbrauch der Amtsgewalt*), unlawful fishing (*unberechtigte Fischerei*), unauthorized use of the title of lieutenant colonel (*Anwendung des Oberstltns. Titel*), and destruction of judicial documents (*Misshandeln eines Gerichtsaktes*), in addition to common crimes.[254]

Duels formed an important subgroup of the first-instance cases in the early years of the 1680s. Bruiningk's register shows a concentration of duel cases during the first half of the 1680s. In 1681–85 there were 20 cases, in contrast to the five cases in 1671–75, none in 1676–80, three in 1686–90 and again none in 1691–95.[255] Some duel cases had already appeared earlier in the seventeenth century.[256] But why was there such a large concentration of cases in the early 1680s? A new Duel Placate was issued in 1682,[257] serving as a legislative background to the campaign against duelling. Legislation alone hardly explains the craze, however. Following European models,[258] duels had already been

254 In Bruiningk's categorization: *Tötung, Gewalttätigkeit, Gewalttätigkeit im Hause des Gerichtsvogtes, Gewalttätigkeit bei der Beitreibung rückständiger staatlicher Forderungen und gegenüber zur Aufgreifung von Deserteuren abkommandierter Soldaten.* Letto-Vanamo and Pihlajamäki, "Funktionen des Livländischen Hofgerichts (1630–1710)," 144–145.

255 I have gone through the registers from 1671 to 1695 and counted as duels the entries with the titles "*Provokazion zum Duell*," "*Tötung im Zweikampf*," "*Duell*," and "*Vergehen gegen das Duellplakat*." Chronologisches Register der Akten II–III.

256 In 1666, the High Court decided four duel cases; see *Urtheile 1666–69*, LVA.

257 "*Kongl. May:tz stränge och allvarlige Förbud angående Dueller och Slagzmål* [etc.]" August 22, 1682; Schmedeman, *Justitiewercket*, 764–770.

258 On early modern duels, see Ute Frevert, *Men of Honour: A Social and Cultural History of the Duel* (Cambridge: Polity Press, 1995); and Pieter Spierenburg (ed.), *Men and Violence: Gender, Honor, and Rituals in Modern Europe and America* (Columbus: Ohio University Press, 1998).

outlawed in 1662,[259] and the campaign had already begun in 1681, when 10 duel cases were prosecuted.

It is not a coincidence that the reduction in the land possessions of the nobility in Livonia started to be planned in the same year and went into effect the following year.[260] The reduction was part of King Charles IX's so-called Great Reduction, which was meant to improve the financial situation of the crown. Most of the noble enfeoffments and donations were restored to the crown. The reduction was put into effect everywhere in the realm, putting the law of the realm *vis-à-vis* provincial law, which meant that in Livonia the restitution was done without consulting the *Landtag*. This greatly severed the relations between the crown and the Livonian nobility, despite the fact that the restitution concerned the enfeoffments of Swedish noblemen in Livonia as well. These made up about 50 per cent of all the noble possessions in the province.[261] The curtailment of duelling habits fits this picture well: it can be interpreted as an additional strike against the special status of noblemen.

The office of the *Oberfiskal* was clearly one of the most important ones protecting the interests of the crown in the province. It therefore does not come as a surprise that the crown took great interest in filling the post with a Swede after the death of *Oberfiskal* Christopher Wagner had left the position vacant. Contrary to the crown's interest, the High Court found it more important that the new prosecutor knew German and was familiar with Livonian law.[262] Again, this tells something of how little the reception of Swedish law had in fact advanced, even at the end of the century.

4.4.3 *High Court of Dorpat as Second Instance*

In the early modern criminal procedure of the *gemeines Recht,* no appeal was possible if the accused had confessed, and the case had thus been rendered

259 "*Kongl. May:tz Placat och Förbud angående allahanda Dueller, och otwungne Slagsmåhl,*" December 23, 1662; Schmedeman, *Justitiewercket*, 325–328.

260 See Isberg, *Karl XI och den livländska adeln 1684–1695*, 14. On the reduction in Livonia, see Juhan Vasar, *Die grosse livländische Güterreduktion: Die Entstehung des Konflikts zwischen Karl XI. und der livländischen Ritter – und Landschaft 1678–1684* (Tartu: Acta et Commentationes Universitatis Tartuensis, 1931).

261 Juhan Vasar, *Die große livländische Güterreduktion: Die Entstehung des Konflikts zwischen Karl XI. und der livländischen Ritter – und Landschaft 1678–1684* (Tartu: Tartu Ülikool, 1930–1931); Tuchtenhagen, *Zentralstaat*, 345–346; Antti Kujala, *The Crown, the Nobility and the Peasants 1630–1713: Tax, Rent and Relations of Power* (Helsinki: SKS, 2003), 134.

262 Meurling, *Svensk domstolsförvaltning i Livland*, 216.

notorious.[263] Thus, in the infanticide case of Maye in the Pernau Comital Court (1641), the court proceeded immediately to the capital punishment.[264] The Comital Court of Pernau was, as stated above, an exception even in Livonia.

In Swedish (and Livonian) procedural law, lower court sentences in capital cases were never final, but were instead always referred to a high court for final approval (the so-called *leuteration*).[265] *Leuteration* could lead to deviation from the letter of the law, either to a harsher or to a more lenient result. In practice, *leuteration* almost always meant that, instead of capital punishment, a more lenient punishment (such as forced labour, extradition, or fines) was used.

According to the Swedish Procedural Ordinance of 1614, the High Court (Svea being the only one at the time) had the right to decide capital cases only if the king was travelling out of the country or if the High Court wished to confirm a capital punishment given by a lower court. In all other situations, the crown reserved the right to confirm capital punishment.[266] In principle, the High Court could thus not deviate from a statutory capital punishment because of mitigating circumstances. In practice, the high court took more liberties, arbitrating death sentences extensively. In 1641, the high courts then received a formal right to arbitrate sentences whenever the circumstances were similar as in the cases in which the crown itself had previously deviated from statutory punishment.[267]

The statute of 1641 thus legalised *leuteration* at the high courts in Sweden. The legal status of leuteration remained, however, a problem well into the eighteenth century. In 1653 the high court practice was extended to the lower

263 See Pihlajamäki, "'At synd och laster icke skall blifwa ostraffade'," 265–289; Christian Szidzek, *Das frühneuzeitliche Verbot der Appellation in Strafsachen: Zum Einfluß von Rezeption und Politik auf die Zuständigketi insbesondere des Reichskammergerichts* (Köln: Böhlau, 2002).

264 "*Vnd weilen dieß factum offenbahr vnd vnleugbar alß ist die execution dem haubtman alhie anbefohlen.*" DCP 1641, f. 15. See also the case of Maetz and Caye vs. Erich Keiffer, DCP 1641, NAE 915.1.4, f. 22 a–23 a.

265 See Rudolf Thunander, *Hovrätt i funktion: Göta Hovrätt och brottmålen 1635–1699* (Lund: Institutet för rättshistorisk forskning, 1993); Schmedeman, *Justitiewercket*, 139. According to the law, the High Court was to "oversee all cases carrying a death punishment" (*öfwersee all Lijfzsaker*) in the absence of the king. Whatever the punishment (capital, corporal, imprisonment, or fines; "*Lijf, Lem, Hächte eller Penninge-böte*"), it was as if the king himself had pronounced it. At least by 1643, leuteration had come to be understood as a privilege of the high courts. See Thunander, *Göta Hovrätt*, 198.

266 Schmedeman, *Justitiewercket*, 139.

267 *Resolution for Giötha Hoffrätt om Lijfz – och Högmåhlz-Saker*, 29 April 1641; Schmedeman, *Justitiewercket*, 238.

courts, which also acquired the right to deviate from the strict letter of the law.[268] This changed again in 1672 and 1674 when King Charles XI ordered that both high and lower courts would have to follow the written law *stricte*.[269] Despite Charles's law, the high courts kept leuterating the sentences. No wonder, thus, that Charles returned to the question in 1684, stating that the high courts' way of "judging according to conscience" was a problem, and that they would "in civil and criminal matters stricte go according to the law and [the king's] statutes."[270] Even after this, the practice of mitigating sentences continued in the high courts.

King Charles XII, who had taken a firm stand on judicial affairs, again forbade deviating from statutory punishment, or *leuteration*, in 1699. The King had observed "with miscontent [...] that [the high courts] had mitigated sentences more than to what law and circumstances would have given reason." The application of mitigating circumstances was, once again, to be left to the king alone.[271]

According to Thunander's study, the Göta High Court at least did not effectively observe the prohibition.[272] The Dorpat High Court, however, seems to have sent their capital cases systematically to Stockholm after King Charles's statute was issued in March 1699.[273] Apparently, the prohibition did not work in practice, since in 1714 the high courts were again given the right to mitigate capital sentences. This time, the permission remained in force until the great changes of the nineteenth century.[274]

Whereas the statute of 1641 allowed for *leuteration* by high court in Sweden proper, in Livonia the institution of *leuteration* was already made legal in LGO 1632 Art. XXIV. It stated that all lower courts decisions which concerned cases

268 *Drottning Christinae Straff-Ordning*, 15 May 1653; Schmedeman, *Justitiewercket*, 294.

269 *Kongl. May:tz Bref till Swea Horätt om Criminal Sakers skyndsamma afgiörande,* 31 October 1672; Schmedeman, *Justitiewercket* 633; *Til Swea hofrätt att intet gå ifrån sielfwa bokstafwen i Sweriges lag beskrefwen uti Strafs pläggiande,* 4 April 1674; Schmedeman, *Justitiewercket*, 656–666; Thunander, *Göta Hovrätt*, 200–201.

270 *Til Svea håfrätt angående* [...] *Barnemordzplacater, och at them intet arbitrerande, hwarken uti Civil eller Criminal ährender tillåtes*, 14 November 1684; Schmedeman, *Justitiewercket*, 876–877.

271 "*Wij hafwe med missnöije befunnit* [...] *at I fört til at lindra med the brotzlige widare, än lagen och omständigheterne ha kunnat Eder ther til gifwit anledning*"; *Til N.N. Hofrätt, at ther någre lindradne skiäl finnas, som äro af någon wicht, the tå allena lemnas til Kongl. May:tz nådige ompröfwan och förklaring*, 29 March 1699; Schmedeman, *Justitiewercket*, 1543–1544.

272 Thunander, *Hofrätt i funktion*, 201–202.

273 See various cases in Livländska hovrätten 1698–99 II 105, Livonica II, RA.

274 Thunander, *Hofrätt i funktion*, 202.

carrying the death penalty ("*hochpoenliche*"), such as incest, sodomy, rape, infanticide, and intentional homicide, should be sent to the High Court for approval.

In the *leuteration* procedure, the high court could either confirm the sentence, or mitigate or harshen it. The procedure took place on the basis of documents only, and the accused had no chance to react or speak for himself. It was essentially a matter of revising lower court sentences, although in practice it became an automatic way of mitigating death sentences to lesser punishment in certain types of crimes.

Neither the prosecutor nor the parties had the opportunity to have their say regarding the lower court's decision. The *leuteration* procedure was not an appeals system in disguise. The review was a summary procedure, the function of which in Sweden proper has become quite clear in previous scholarship. It may well be assumed that the purpose was to maintain the preventive value of death punishment at the lower court level, whereas the High Court could then show its benevolence through *leuteration.*

As discussed above, the patroness of the Court, Countess Magdalena von Thurn, did not acknowledge the authority of the royal high court over the decisions of her court. The Countess finally gave in (see above), but in the other Livonian lower courts the *leuteration* procedure was introduced from as early as records begin. In July 1641, the case in which three accused men were sentenced to death and one to deportation was submitted to the High Court of Dorpat. The High Court approved of the sentence, which was carried out in September.[275] The other lower courts adjusted to the *leuteration* procedure without complaint.

Because of the lack of archives from the lower courts in this period, we cannot confirm whether the Livonian courts took advantage of the possibility of more creative punishment in the 1650s and 1660s. In 1670–72, the High Court of Dorpat received 14 criminal cases from the lower courts. The cases represented a wide range of serious crimes (infanticide, manslaughter, uxoricide, theft, fornication, and disobedience of soldiers). The number of serious criminal cases sent for review to the High Court from the lower courts varied somewhat: for instance, in 1675 (from January to September), 25 cases were reviewed.[276] A little over twenty years later, the number of cases was larger, a total of 77 cases, including 22 infanticide cases, six sodomy cases, five adultery cases, seven homicide cases, seven cases of incest, and seven of theft.[277] In the archive of

275 DCP 1641, NAE 915.1.4, f. 23 a–27 a.

276 *Protocollae votarum, Criminalia*, LVA 109.1.11, (no pagination).

277 For instance, on 3 July, 1672 the High Court commuted the decision of the Wenden District Court of 5 May, 1672 on a homicide case of Peter (no surname given) to a lifelong

the Dorpat High Court we have a list of the reviewed criminal cases from the years 1695–1703. The High Court reviewed 263 cases in those years, and with only one exception all these cases had ended in a capital punishment in the lower court. A vast majority were approved in the High Court: for instance, in 1695 the Court "approved totally" 13 out of 19 cases. In the cases in which the Court changed the lower court sentence, a clear policy can be observed. In almost all of the cases, a death punishment was altered to whipping and extradition.

For instance, in a case concerning "violent behaviour" (*Gewalttätigkeit*), the capital punishment was changed to "twenty pairs of whips administered by the headsman and an lifelong extradition after that" ("*zwanzig Paar Ruthen vom Scharfrichter gestrichen und darauf des Landes ewig verwiesen sollte*"; 18 May 1695). In another case of fratricide (*fratricidium*), the accused was condemned to essentially the same punishment, although the terminology employed differed from the previous example ("*extraordinaria poena, nemlich fustigatione enim relegatione*"). In the latter example, we see how the contemporary Livonian lawyers equated *leuteratio* with *poena extraordinaria.*[278] When on 25 April 1674 the Dorpat Lower Court had condemned a peasant called Jürgen to have his right ear cut off and to deportation for assault and battery, the High Court commuted the sentence to 30 pairs of whips ("*scharpfe Hausdisciplin* […] *mit 30. Paar Ruthen*").[279]

As stated above, the *leuteration* procedure consisted of a summary inspection on the basis of documents.[280] The work was sometimes done swiftly, and the parties had no opportunity to comment on the lower court decision. For instance, the Council of Arensburg (on the island of Oesel) had condemned Terriskiwi Michelstochter to death for infanticide and Daniel Sommer for the same crime to a fine of 100 thalers. The council decision was made on 7 December 1674. By 22 January 1675 the High Court had already reached its own decision. Interestingly, the woman's punishment was changed to a harsher one, in that her body was to be burned; the man's fine, in turn, was lowered to 80 thalers.[281] When the reviewed case came from a lower court geographically close to the High Court, the High Court could be extremely quick. Thus when the District Court of Dorpat on 23 April 1765 condemned both Siwert Hauss and Porman Knut Hinrich to death – for separate crimes, Siwert for homicide and

deportation and 40 pairs of lashes LVA 109.1.8, in 1673–75, the High Court handled 11 cases by way of leuteration and in 1692–1693 a total of 72 cases.

278 F. 24, 21.10.1695.

279 Protocollae votarum 1672–75, LVA 109.1.11.

280 The *Leuteration* of the High Court followed three days after the lower court decision.

281 Protocollae votarum 1672–1675, 109.1.11.

Porman for fratricide – their sentences were "completely approved" (*in totum approbiret*) already on 1 May.[282]

The review is not to be confused with appeal, which – in accordance with the contemporary *ius commune* doctrine[283] – were forbidden in criminal cases. When seen in the context of European *ius commune*, the Saxon-Swedish *leuteration* can be understood as a variant of extraordinary punishment. It was thus a way of departing from the punishment (*poena ordinaria*), when attenuating (or in principle also aggravating) circumstances were at hand. Like extraordinary punishment, the statutory punishment could be either mitigated or harshened. In other kinds of crimes, which did not go through *leuteration*, the punishment was often administered immediately. Thus when, at Pernau Lower Court in 1696, Puju Jack confessed to assaulting and wounding Jasche Matz, and was therefore sentenced to 12 pairs of lashes, the punishment was administered immediately.[284]

The prohibition of appeals concerned only proper criminal cases, in other words those in which the mode of procedure was inquisitorial. Appeals were, however, allowed in accusatorial criminal cases just as in regular civil cases. In 1640, two of the ten appeals cases were accusatorial criminal cases, both dealing with slander. The rest of the appealed cases in that year were civil cases, dealing with issues such as disputed land, fishing rights, and tort payments.[285]

When the tenant (*Arrendator* on Luhde Manor) Elias Diricksen was convicted to a fine of 20 thalers for unlawfully obstructing the construction of the tavern (*Krug*) on Colonel Caspar Ermiss's lands, both parties appealed. Diricksen was also ordered to return to Ermiss the same number of refuse bins that had removed from the construction site.[286] When a civil case was appealed, the appellant was to inform the court of his intention to appeal. This often occurred immediately after the trial and was recorded (*protestatio*). If the other party made a similar request (*reprotestatio*), it was also recorded. The appellant placed a surety (*Appellationspfenning*) and was ordered to lodge his appeal "at the next

282 LVA, Dorpat High Court, Protocollae votarum 1672–1675, 101.1.11.

283 For the general *ius commune* prohibition of appeals in criminal cases, see Szidzek, *Das frühneuzeitliche Verbot der Appellation in Strafsachen*; and for the prohibition in Sweden, Pihlajamäki, "'At synd och laster icke skall blifwa ostraffade'," 265–289.

284 "*Die Rihten Straff ist sofort exequiret*"; Pernau Lower Court 1696, f. 100. Similarly, Parce Andres vs. Kollope Andres at DCP 1696, NAE 915.1.8, f. 113.

285 *Handlumpdiener* Jochim Grieb vs. *Rechtsverw.* Claus Rusze (*Verbal – und Realinjurien*); and Isaac Boher vs. *Berggraf zu Pernau* Arend Eckhof (*Diffamation*).

286 NAE 915.1.4, f. 6.

session of the Royal High Court in Dorpat, lest the appellant be held responsible for the consequences."[287]

The distribution of appeals cases between the different lower courts does not produce surprises but was more or less even. For instance, from the appeals cases in 1650 three came from the District Court of Kokenhusen, one from the Distirct Court of Wenden, one from the Town Court of Wenden, one from the Town of Riga, one from the District Court of Riga, and three from the District Court of Dorpat. Decisions of commissorial courts could also sometimes be appealed to the High Court.[288]

The High Court of Dorpat supervised the lower courts in several ways other ways as well. The high court prosecutor (*Obergerichtsfiskal*) routinely supervised the workings of the lower courts and, when needed, would resort to correctional measures. The responsibility of sending court books yearly to the High Court for inspection was in use in Livonia as well as in Sweden proper. The Court actively watched the lower courts and sent circulars and rescripts to them. Some of these documents were directed to the lawyers, who were also under the judicial supervision of the courts.[289]

Many of the "constitutions, publications, and circularies" concerned advocates and their behaviour. The Court issued an Ordinance on Advocates and Parties (*Advocaten – und Parten-Ordinanz*) in 1646, giving precise orders of how wide the margins were to be left in documents handed to the courts and how many lines of writing were allowed per page. Financial reasons were the most important here, because each page handed over to the court was taxed. The Advocates Ordinance also contained behavioural norms, warning the advocates against presenting excessively personal remarks, or from engaging in "philosophical or political discourses." A disobedient advocate would risk a discretionary punishment or a rejection of his brief.[290]

287 NAE 915.1.4, f. 6a.

288 See, for example, the Council of Wenden vs. David Troltzsch (insubordination, defamation and false denunciation) and the Council of Wenden vs. David Hoen (land dispute in the town of Wenden); Chronologisches Register der Akten I, 174 (cases 688 and 689).

289 Happily, the "constitutions, publications, and circularies" of the Court were conveniently edited and published by Professor Oswald Schmidt in 1875. His main source was the so-called *Brown Book* at the High Court's archive, but Schmidt also added some manuscripts to the collection: Oswald Schmidt (ed.), *Constitutionen, Publicationen und Circulärbefehle des livländischen Hofgerichts* (Dorpat: Mattiesen, 1875).

290 "*Alle personalia, impertinentia, philosophische und politische Discurse, Injurien, Schimpf – und Stachelworte sollen bei Vermeydung willkürlicher Strafe und Rejicirung der Satzschrifften ausgelassen werden.*" Schmidt, *Constitutionen*, 2–3.

4.5 The Revision Procedure

In 1865, the Swedish historian C.T. Odhner wrote that Queen Christina's regency in the 1630s "was often disappointed at the Livonian High Court in Dorpat: it was difficult from such a distance to exercise sufficient control and despite the fact that some Swedes always sat there as judges, this high court showed great disposition towards the German legal order." It was therefore considered whether the High Court should be replaced with two lawman's courts, which in the Swedish judicial hierarchy were situated between lower courts and high courts but for civil cases only.[291]

Despite these worries and the suggestions of the early years, nothing came of the plans. The Swedish crown never acquired systematic control over its high courts in Livonia or elsewhere in the realm, nor were ordinary remedies available for those dissatisfied with high court decisions. The only remedies available were extraordinary. Two kinds existed. First, it was possible to apply for a pardon against high court decisions in criminal cases. Although early modern legal scholarship and statutory law separated the pardon from the crown's other judicial function, in practice the difference was not always clear, because high courts automatically remitted their death sentences for the approval of the crown, who then acted "out of mercy."[292] In civil cases, those involving "land, goods, and money" ("*jord, gods och penningar*"), a legal remedy called *beneficium revisionis* was at the disposal of a party unsatisfied with a high court decision. Although the theoretical difference between criminal and civil cases was still not always clear in the seventeenth century,[293] as a practical rule the courts held on to the distinction.[294] The *beneficium* was the logical

291 C.T. Odhner, *Sveriges inre historia under drottning Christinas förmyndare* (Stockholm: Nordstedt, 1865), 139. "*Med den lifländska* [hovrätten] *i Dorpat var regeringen ofte missbelåten: det var svårt att på ett sådant afstånd utöfva tillräcklig kontroll, och oaktadt några svenskar alltid voro bisittare, visade denna hofrätt allt större böjelse för tysk rättsordning; det föreslogs derföre att ersätta hofrätten med två lagmansrätter, hvilka skulle bana väg för den svenska lagen*." Odhner refers to the protocol of the Council of Realm of December 10, 1635 and May 25, 1641.

292 In this study, the pardon petitions to the crown regarding Livonian cases have not been studied. On sixteenth-century Swedish pardoning legislation and practice, see Lindberg, *Praemia et poenae*, 359–369; Toomas Kotkas, *"Suosiosta ja armosta": tutkimus armahdusoikeuden historiasta autonomian ajan Suomessa* (Helsinki: Suomalainen Lakimiesyhdistys, 2003), 107–118; and Thunander, *Göta hovrätt*, 188–189.

293 Jan Sundin, *För Gud, staten och folket: Brott och rättskipning i Sverige 1600–1840* (Lund: Institutet för rättshistorisk forskning, 1992), 412–413.

294 Thunander, *Göta hovrätt*, 280–281.

result of a political system, in which the king theoretically kept all judicial power, although he had delegated substantial parts of it to the high courts.

The revision was regulated in the *Hofgerichtsordnung* (§ 35) and the Royal Resolution of 1634 (*Königliche Resolution vom 6. August 1634*; § 4).[295] The revision cases were decided in the Council of the Realm (*riksrådet*), either in its plenary session or in a special section called the Judicial Revision (*justitierevisionnen*) or Higher Revision (*övre revisionen*). The Lower Revision, in turn, consisted of the administrative entity preparing the cases for revision.[296] The model for the institution of revision came from Germany, where in the sixteenth century in "unappealable" cases a "supplication" or "revision" could still be requested from the territorial prince. If revision was granted, it was based on a review of the acts (*Revision der Akten*), without a new oral hearing.[297]

Another variant of the revision procedure emerged as an intermediary phase before the Resolution of 1634. The decisions of the high courts operating in the duchies and the provinces (thus, the Courts in Dorpat, Turku, and Wismar) could be revised at the Svea High Court. The court against which the revision was directed would send a delegation to Stockholm in order to defend the high court's decision at the Svea Court. Sometimes one of the Councillors of the Realms could act as an arbitrator between the Svea High Court and the other high courts. This procedure seems, however, to have been an intermediary phase only. After the Svea High Court consolidated its place within the Swedish court hierarchy and the revision as a sort of highest instance was fixed in the Resolution of 1634, the position of Svea as a *primus inter pares* of the high courts began to mean less and less.[298]

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295 For the details of the revision procedure, see Bunge, *Geschichte des Gerichtswesens,* 245–249.

296 Wilhelm Uppström, *Öfversigt af den svenska processens historia* (Stockholm: Nordstedt & Söner, 1884), 104.

297 Christian Friedrich Koch, *Der Preussische Civil-Prozess* (Berlin: Guttentag, 1855), 66.

298 Sture Petrén, "Kring Svea hofrätts tillblivelse," *Svensk Juristtidning* (1945), 171–184; Petrén, "Hovrättens uppbyggnad 1614–1654," 3–117, 3–45; Tuchtenhagen, "Das Dorpater Hofgericht," 132. Tuchtenhagen claims that this in fact led to a three-tier system of appeals instances (Council of the Realm, Svea High Court, and the other high courts) during the middle of the seventeenth century, and this system would have then persisted until the early nineteenth century. This interpretation may go too far, though, and is not supported in what still remains the major archival study on the subject: Petréns "Hovrättens uppbyggnad 1614–1654." According to the Petrén, the Councillors (who were often high court judges at the same time) did take part in deciding revision cases, especially during the king's absences abroad. At times, Svea judges decided, on revision, cases they had previously decided at the High Court. This, however, came to an end during Axel Oxenstierna's

Parties had no absolute right to have their case reviewed. According to the Procedural Ordinance of 1615 (*Rättegångsprocessen*), the king granted *beneficium* not "through an appeal but through a petition for mercy" ("*genom något vädjande utan genom ödmjuk böneskrift*").[299] In practice, though, revision gradually came to be understood as more or less of a right as the petitions became a mass phenomenon. The increase in their number also gave rise to discussions on how to institutionalize their handling.[300]

The need to institutionalize the legal institution that had grown in practice led to the Placate on the Revision of Legal Cases of 1662. Even though the procedures were now formalized in the letter of the law, the revision was according to the statute still not intended to be a regular appeal or "some new instance." Instead, it was only an "*examen actorum prioris instantiae.*" No new documental evidence was allowed, although the Placate did allow for a new hearing ("*afdömda akters öfverseende och nogare förhör*"). Unlike in appeal, no new arguments were allowed either. If neither of the parties asked for revision, the high court decision was left intact. The crown's control was thus passive, a kind of "institutionalized feedback."[301]

As the letter of the High Court of Dorpat mentioned above suggests, the pressures to treat revision as appeal had been present from early on. In practice, and in spite of the 1662 Placate, revision came to resemble a regular *ius commune* appeal more and more as time passed.[302] Even new arguments were tolerated if the party claimed that they had not been able to present them at an earlier stage – which Almquist calls "a Swedish modification of the strict rules of the [...] Roman-canon procedure."[303]

Although a thorough, archive-based study of the seventeenth-century appeals and revision procedures in Sweden is still lacking, Almquist's characterization sounds intuitively correct. A working Roman-canon or *ius commune*

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time in the 1640s. The practice, initially linked to the unclear judicial hierarchy, ended as the revision procedures were better organized from the mid-century onwards, culminating in the founding of the Supreme Court in 1789. Thus the fact that the Svea judges took part in the revision procedures in some cases did not elevate the court above the others in the hierarchy either *de facto* or in a formal manner.

299 *Rättegångprocessen*, art. 35. Schmedeman, *Justitiewercket*.

300 Rudolf Thunander, "Den svenska hovrätten i 1600-talets rättsliga system," *Scandia* (2008), 21–28, 23.

301 *Kongl. Majestäts Placat angående Revision öfver Justitiae* Sakerna (June 28, 1662); Schmedeman, *Justitiewercket*, 321–324. See also, Thunander, "Den svenska hovrätten," 23.

302 Uppström, *Öfversigt af den svenska processens historia*, 104.

303 "*Detta kan sägas vara en svensk modifiering av den recipierade tysk-romerska processens stränga regler.*" Jan Eric Almquist, *Svensk rättshistoria: I Processrättens historia* (Stockholm: Juridiska Föreningens Förlag, 1961), 55.

appeals system with strictly enforced preclusion rules does not work without a sufficient amount of legal learning at all levels of the judicial system: learned lawyers as judges to enforce the rules and learned advocates as watchdogs. These were still largely lacking in seventeenth-century Sweden, which probably led to a rather lax attitude towards strict preclusion rules.[304]

It is also difficult to see whose interest strict rules of preclusion would have served. The drafters of the Procedural Ordinance of 1615 still thought that the royal high court would take of most (if not all) of king's judicial business.[305] This soon proved to be far from realistic as revision petitions started to pour into the Royal Chancery. In the second half of the century, it was certainly in the crown's interest not to be too selective as to the cases allowed for revision, if the aim was a realm-wide uniformity of legal practice. A logical step in the development was the requirement of the Form of Government of 1772 that the members of the Higher Revision had judicial experience. In 1789 the Higher Revision was then reorganized and renamed the Supreme Court.[306]

The revision procedure can be observed through the protocols of the Council of the Realm. The procedure followed, *mutatis mutandis,* the Swedish lower court procedure. After the supplicant had first received the king's permission (*beneficium*), the Council sent citations to both the defendant and the high court. Both of them appeared before the Council, either personally or represented by a lawyer, and the proceedings were largely oral. The council members – the king or the queen included – asked questions, and the parties answered. After a few sessions, the Council announced its decision.[307]

The high courts were thus summoned to the Council of the Realm to answer to the complaints of the appellant. The High Court of Dorpat complained bitterly about the burden. In a letter drafted by Judge Georg Stiernhielm to

304 Johan August Posse, *Bidrag till Svenska lagstiftningens historia från slutet af sextonde århundradet till stadfästelsen af 1734 års lag* (Stockholm: Nordstedt & Söner, 1850). It was only from 1772 onwards that the members of the Higher Revision members were required to have "judicial experience," and even this did not mean that they needed to have legal education. More than anything, the members were chosen for political reasons. To be sure, by the late eighteenth century the Lower Revision already had legal expertise in its ranks.

305 See Korpiola, "A Safe Haven in the Shadow of War."

306 Uppström, *Öfversigt af den svenska processens historia*, 104–105. For the practice of the Revision during the two last decades of the seventeenth century, see Wedberg, *Karl den XII*.

307 See, for instance, Wellam Petri vs. Baber, Revision cases 1646, *Svenska riksrådets protokoll* [Minutes of the Swedish Council of the Realm; henceforth: SRP] II 1630–1632 (Stockholm: Norstedt, 1882), 383–386; and Clas Russ vs. Libstorff, Revision cases 1653, SRP XV 1651–53, 491–494.

the King in July 1636, the Court asked to be spared the trip to Stockholm. The Court argued that the High Court Ordinance said nothing of such a duty, which was "nowhere in use"[308] (*nirgends bräuchlich*). The judges refer here clearly to the practice of corresponding high courts in other countries. The Court goes on to claim that the judges did enough for their office, when they heard the case, wrote the judgment and pronounced it; they should not be bothered with anything else. Whatever else which might result could be taken care of in writing. The Court also maintained that the judges lived far apart from each other, many of them having care of more than one office, and besides, the Court was far away ("*zu Waszer vnd lande weit entlegen*") which made trips to Stockholm expensive. All this tended to diminish the authority of the Court. The Court reminded the crown that revision procedures should be based on the high court case files alone anyway, so that "no new allegations, documents, and evidence" be added. If these were nevertheless allowed, revision would turn into appeal. According to the Court, the reason to "cut further appeals from the high courts to the crown" had been precisely this: "to amputate the legal cases, liberating the Realm of that dangerous, gloomy pest of commonwealths."[309]

In August of 1636, President Johan Ulrich and Judge Georg Stiernhielm nevertheless appeared before the Council of the Realm in Stockholm to represent the Dorpat High Court in several cases which had been allowed revision. The judges had taken the trip "regardless of all incommodities," ("*oansedt alle incommoditeter*") and despite it causing them "great trouble" ("*itt stortt besvär*"). On behalf of the Council, Chancellor Axel Oxenstierna thanked the delegation for making the arduous trip, from which the government "would readily have saved them." However, the pertinent cases were of such importance that the help of the Dorpat judges was absolutely necessary, so that "justice could be done" ("*göra een richtigheet*").[310] The visit to the Council must have been frustrating to the delegates, who only appeared during that one session, and also handed their statement in writing. No larger discussions are recorded in the council protocols, which tend to be quite detailed.

The practice of sending high court delegates to present revision cases to Stockholm caused a clash between two legal cultures: the European learned *ius commune* and the Swedish unlearned law. The practice was undoubtedly cumbersome and expensive, but the Dorpat judges seem also to have been

308 Daniell Falck vs. Nils Assersson, Revision cases 1631, SRP II 1630–1632, 129.

309 "*Damit die lites amputiret, Vund das Reich von denselben alsz einer gefehrlichen grausamen Peste Rerumpublicarum liberiret werde.*" The letter of the High Court of Dorpat to the King, July 7, 1636; Wieselgren, *Samlade skrifter av Georg Stiernhielm*, 3:2, 372–376.

310 Revision cases 1636, SRP VI 1636 (Stockholm: Norstedt, 1891), 514–516.

genuinely unconvinced about the benefits of the system, a kind of system which was "nowhere in use." This was true as far as the procedure at the Imperial Chamber Court of the Holy Roman Empire of the German Nation was concerned. The Imperial Chamber Court was a natural reference point for the Livonian high court judges, but in other parts of Europe high court procedures were common. A good example is Denmark, where the whole judicial system was, if possible, even more antiquarian than in Sweden.[311] In practice, the Council gave up on demanding the presence of Dorpat court delegates. The incident described above was both the first and the last one.

The Council of the Realm actively encouraged dispute settlement.[312] Revision being the last possibility of putting judicial pressure on the opponent and all remedies having been exhausted, both parties at least sometimes probably felt the need to avoid a complete loss in the case.[313] I will take two examples of this. A contract dispute in 1642 (Lewold vs. Patkel) ended in settlement in court. The Council, however, would not approve just any settlement. After a few sessions, Patkel's advocate Hans Kemm ("and others who had arbitrated between Lewold and Patkel")[314] informed the Council that the parties had arrived at a settlement of 2800 thalers. The Council wanted to know what the basis of this settlement was, "because it should be based on justice." Kemm's answer, according to which the parties "felt that the settlement was based justice," was apparently not sufficient. The Council interviewed Lewold's lawyer Detterman as well. Although Lewold, "out of good will" ("*af godh vilje*"), was willing to settle on the said sum, the Council, in a proposal of its own, raised the sum to be paid to 3500 thalers. Other detailed provisions were included in the settlement contract as well, and the parties finally approved it "by handshake and thanks" ("*handslaget och tacksejelse*").[315] In a commercial dispute

311 For the Danish system, see Per Andersen, *Legal Procedure and Practice in Medieval Denmark* (Leiden: Brill, 2011). All three levels of the Danish judiciary operated largely orally.

312 This was the case in Scotland as well, as Mark Godfrey has shown in an article on the King's Council, the highest tribunal in sixteenth-century Scotland. Mark Godfrey, "Arbitration and Dispute Resolution in Sixteenth-Century Scotland," *Tijdschrift voor Rechtsgeschiedenis* 70 (2002), 109–135.

313 "*Fabian Wrangell von Uchteen och Öfverwerstlieutenanten Reinholt Johan von Fersen nu enteligen hafwa sigh förenat uti den långsliga strijdigheet, som de sinsemellan hafwa fördt, så att de derom medh hwarandra för in för Wår Revision hafva ingådt en wänlig förlijkning, som Wij och medh War Nådige Confirmation hafwa bekräft.*" F. 300: 31.8.1684, LVA, 109.1.13. See also f. 441 (21 April, 1686).

314 The wording suggests that as well as Patkul's advocate, extrajudicial arbitrators had been at work.

315 Revision cases 1642, SRP IX 1642 (Stockholm: Norstedt, 1902), 401–406.

between Gustav Horn and Georg von Schwengeln in 1652, the High Court of Dorpat[316] had already attempted to settle, but von Schwengeln had refused. The High Court's proposal for settlement was read aloud, but neither of the parties was willing to accept it. The Court suggested that von Schwengeln draft another proposal. The case probably ended in settlement, since it disappears from the sources.[317]

What kind of cases were decided in the revision procedure? Given the elevated cost of litigation, the stakes were understandably high in these cases. Land disputes and cases involving commercial contracts were typically taken to the Council, and high nobility – names such as Wrangell, Sparre, and Thurn – appear as parties. Besides the council protocols, the archives of the Justice Revision yield additional information. Many of the acts lack documents, and it is often difficult or impossible to find out what a particular case handled, even. The few remaining documents nevertheless include inheritance cases and those involving "excess regarding the execution of a sentence" ("*excessus in modo executionis*"). Even criminal cases were sometimes subject to revision. To mention an example from the Dorpat High Court's reviewed cases, a manslaughter case from Ingerman originally decided in 1648 at a lower court arrived in Stockholm via *beneficium revisionis*. The accused, Erich Hassi, had denied his guilt, but had not been able to acquire oath-helpers. He had been condemned to death at the High Court. Criminal cases could in principle not be appealed, but the prohibition did not, it seems, concern revision.[318]

How often did the Livonian parties receive *beneficium revisionis*? As the procedure was costly, it is unsurprising that only one to three cases appear in the protocols of the Council of the Realm each year. In some cases, it is not entirely clear from which high court a revision case originates, but these ambiguities hardly change the general picture. Further information is again available in the archives, although only little remains there too. From the years 1632–1647, 12 (mostly very incomplete) case files remain in the archive. Nine of them have to do with the High Court at Dorpat and, interestingly, three with

316 Gustav Horn (1592–1657) was a field marshal and became governor of Livonia in 1652. Georg von Schwengeln (ca. 1590–1664) was of Livonian descent and was a general in the Swedish army.

317 Revision cases 1651, SRP XV 1651–53 (Stockholm: Norstedt, 1920), 86–90, 107–110.

318 *Rättegångshandlingar* 1648–1652 (Handlingar tillhörande justitiaerevisionens arkiv), Livonica: II:724, RA. The doctrine was, however, uncertain and changing. In another case from 1646, Per Brahe (*riksdrotsen,* comparable to a minister of justice) stated that revision was not allowed in criminal cases but that a high court's decision could be appealed by way of sending a supplication letter (*per libellum supplicam*) to the king. Revision cases 1646, 485, 488, 489.

Oxenstierna's private court in Wenden.[319] For 1648–1652, six cases remain,[320] and for 1653–1659 another six.[321] Supplicants from other Livonian and Baltic jurisdictions were much more active: for instance, we have five cases from Oesel and seven from Riga – neither of which belonged under the jurisdiction of Dorpat High Court. These numbers are naturally not statistically reliable, but they indicate the amount more or less, especially when compared to other material. The information, in any case, supports that of the protocols of the Council of the Realm.

A register of the Justice Revision for the years 1670–1672 exists also in the archive, and the register is probably more reliable as to the quantities of revision cases coming from different high courts. Most of the cases came from the Svea High Court. For the three years there are 50 cases from Svea, 20 from Dorpat and two from Turku. For the sake of comparison, 11 cases came from Göta High Court and 12 from Riga. In addition to these pieces of information, the collection of royal letters in the archive of the Dorpat High Court includes the petitions (*compulsoriales*) by way of which the Revision asked the Court to provide the Revision with the documents of individual cases in which *beneficium revisionis* had been granted. The number of these is roughly in the same category as other information that we have. Thus, in 1680 the Court was asked to send the documents in three cases, in 1681 in one case, in 1683–84 in five cases, and in 1685 in five cases.[322] To sum up, it seems that no more than a few revision cases went from the Dorpat High Court each year.

4.6 Summary: Legal Procedure in Seventeenth-Century Livonia

The Swedish intention, judged by the ordinances of the early 1630s, was to bring the Livonian legal procedures as close to the Swedish model as possible. This was clearly the goal even if the Livonian legal tradition was much closer to the learned European models than to the Swedish tradition. The judicial structure was to resemble the Swedish, at least roughly, the *Landgerichte* being the equivalents of the Swedish *häradsrätter* and the Dorpat High Court joining the series of other high courts within the Realm. However, even the

319 *Livländska hovrätten till K. Maj:t* 1630–45, Livonica II: 101, RA.

320 *Rättegångshandlingar* 1648–1652 (Handlingar tillhörande justitiaerevisionens arkiv), Livonica: II: 724, RA.

321 *Rättegångshandlingar* 1653–1659 (Handlingar tillhörande justitiaerevisionens arkiv), Livonica: II: 725, RA.

322 109.1.13, LVA.

composition of the lower courts was necessarily different to the lower courts in Sweden proper. Whereas free peasants formed the backbone of the lower courts of the countryside in Sweden, in Livonia too little of such an estate existed, and serfs could not be made to sit at court. Therefore, the Livonian lower courts of the countryside consisted of noble judges, deciding cases in which their peers predominantly figured. The cases of serfs continued to be handled in manorial courts – which in the same sense did not exist in Sweden.

The procedure of the lower courts itself soon drifted further and further from the Swedish lay-dominated model, as legal professionals took an effective grip of the procedures – especially the civil one – in Livonia. The *Artikelprozess* and then a procedure more or less modelled after the procedure of the Imperial Chamber Court became the order of the day in accusatorial cases both with and without a prosecutor. The accusatorial procedure as well as civil procedure became heavily dependent on writing and the exchange of briefs, with lawyers frequently appearing in court or at least drafting legal instruments on behalf of their clients.

In proper criminal procedure, or inquisitorial procedure, the differences never became as great, undoubtedly because of the sparse involvement of professional lawyers. In some respects, the development went in the contrary direction: judicial torture, which – unlike in Sweden proper – was still commonplace in Livonia at the beginning of the period, was rooted out by the 1680s in Livonia also.

The high court procedure was also based on written briefs, much in the same way as the lower court procedure. The procedure was, however, not completely written, as lawyers personally appeared in court to read their briefs and to collect copies of the opposing side's writings. The high court procedure was quite similar to that of the Svea High Court and the other high courts in Sweden. The similarity is understandable, because all high courts started more or less from scratch in that their procedure was not inherited from earlier appeals courts in Sweden proper or in Livonia. Instead, the procedure of all of the courts was much influenced by the procedure of the German Imperial Chamber Court. Furthermore, the learnedness of the high court procedure that came naturally for the Livonian high court also became an important feature of the Swedish high courts.

The revision procedure was used only rarely. Given the high costs involved, it is understandable that most of the revision cases came from the Svea High Court district and not from far away courts like Dorpat. It is also probable that the monetary value of the cases in the Svea district were on average higher than in Livonia. This, however, must remain a mere guess since no comparative research has been possible here on that particular question.

The judiciary and the legal procedure were thus heavily under the control of the nobility. When the Swedish crown made decisive blows on the position of the Livonian nobility in the 1680s and the 1690s, attempts to divert the course of legal procedures were made as well. Students at the local university, the Academia Carolo-Gustaviana, were taught Swedish procedural law, especially after the Swedish-born advocate Samuel Auséen was appointed Professor of Law in 1701. So many of the advocates and judges had, however, taken their degrees in Germany that whatever teaching was given in Dorpat or Pernau, it could only have a limited effect on practical legal life. The procedure in the courts thus remained strongly German, and the Swedes never managed to divert the course of legal procedures. In hindsight, this would have been impossible, given the structure of the Livonian courts' personnel and its traditions, not to speak of the social make-up of Livonian society.[323]

323 The University Senate complained to the Chancellor in 1696 that the advocates active in the Consistory, in charge of the cases involving teachers and students, attempted to "impose a straggly, German-type of procedure" on the university court. This could lead even to petty cases lasting the whole year. The Senate strongly recommended that the Swedish procedure be favoured instead.

CHAPTER 5

Transplanting Swedish Law? The Legal Sources at the Livonian Courts

5.1 The Theory of Legal Spheres

Against the backdrop of not incorporating Livonia closely to the Swedish realm, the solutions taken in relation to the law to be applied in Livonian courts become understandable. It was logical for the Swedes to take the common European model of legal spheres, the statute theory (*Statutentheorie*), as the point of departure. The central idea was thus to give priority to the smallest legal sphere and if an appropriate rule was not found, to move to a larger sphere.[1] There was nothing original about this. On the contrary, the solution was known in practically every major European country. The French had their *Droit commun*, the Spaniards their *derecho común*, the Dutch the Roman-Dutch law, and the Germans their *gemeines Recht*. These local "common laws" in principle had to yield to town laws and local *consuetudines*, and these national common laws were primary in relation to the European *ius commune*.[2]

Article XXIX of the Swedish so-called *Verbesserte Landgerichtsordnung* of 1632 encapsulates the idea of legal spheres well. According to the paragraph, Livonian law came first, then Swedish, and then Roman law.[3] According to the article, the Livonian and Swedish laws were to be used so that they remained

1 See Wiegand, *Studien*.

2 See Patrick Glenn, *On Common Laws*.

3 The courts were to judge "*erstlich nach liefflandischen Rechten löblichen Gewohnheiten, soweit dieselbe dem Worte Gottes oder dem Königl. juri superioritatis nicht entgegen, wo dar aber nicht eine Gewißheit nicht vorhanden, nach Schwedischen Rechten, Constitutionen, Reichs-Abschieden, und Gebräuchen, so mit dem jure saniorum populorum communi einstimmig, sprechen und verabschieden*." Buddenbrock II, 104–105. The wording of the Ordinance on Castle Courts (1631) § 11 was slightly different, as it emphasized Swedish law and failed to mention *ius commune*: "[…] *schwedischen Rechten, constitutionen, abschieden, reichs- und liefflandischen vernünfligen gewohnheiten übereinstimmet* […]." In § 5 of the same Ordinance the judicial oath contains a list of legal sources, again not quite identical with that in § 11. The judges pledge to follow "[…] *schwedischen rechten, reichs statute, abhandlungen, abschieden, guten, löblichen schwedisch- und liefflandischen gebreuchen und sitten* […]." Printed at Bieneman, *Geschichte der Schlossgerichte*, 29. As noted above, this may reflect the castle courts' identity as a tribunal especially oriented according to the interests of the Swedish authorities.

"in harmony" (*einstimmig*) with *ius commune*. The common Roman law was thus in Sweden, as elsewhere, understood as a device with the help of which the local legal orders, both Livonian and Swedish, were to be interpreted. Statutory law and customary law were "*stricte interpretanda*" and "*ut quam minus laedent ius commune*." Unless a local statute or legal custom was shown to contradict the *ius commune*, it was supposed that the latter could be applied: the *ius commune* possessed a *fundata intentio*.[4] This was the case at least at the level of written law. Whether it was also the case in legal practice, we will see later.

It was thus far from self-evident which strategy the Swedes would adopt in relation to the conquered Livonia. Some (like the Governor-General Johan Skytte) were keen to have a thorough incorporation; King Gustav II Adolf and Chancellor Axel Oxenstierna favoured adopting a more realistic stance. Ensuring that the King gained the upper hand, the common European model of legal spheres, the *Statutentheorie*, was taken as the point of departure. In this theory, priority was given to the smallest legal sphere and then, if an appropriate norm could not be found, recourse was taken to larger legal spheres. The Swedish solution in Livonia was thus not radically different from the German, French, Spanish, or the Dutch solutions.

5.2 The *Ius Commune* in the Livonian Court Records

Above (Chapter 2) it was argued that the reception of Roman law in all its three aspects (substantive, procedural, and cultural) had already gained ground in Livonia before the coming of the Swedes. The process of Romanization had started in the late Middle Ages and progressed during the sixteenth century. The unruly conditions of almost continuous warfare had shattered much of the Livonian infrastructure in the decades prior to the Swedish period. It is difficult to say how much all this affected the composition of the legal profession, which must have consisted of only a few professionals in the first place. One could nevertheless argue that at least some learned legal culture survived throughout the Polish era. Otherwise the drafting of a learned piece of legislation such as the Hilchen's Code would hardly have made sense. Above, we encountered some learned lawyers in the town courts of Dorpat in the 1620s. In addition, legal professionals quickly surface again in the court proceedings of the 1630s, as both judges and lawyers – although full-time, learned advocates still did not exist, and legal learnedness certainly did not dominate the proceedings. Nevertheless, the presence of learned lawyers shows that some

4 See Oestmann, *Rechtsvielfalt vor Gericht*, 7, 9.

unbroken tradition of legal learning had persisted. More than anything, the work of legal professionals can be concluded from the way *ius commune* appears occasionally in the court papers. I will first pay attention to the early years of the Swedish period, and then compare my observations to what happened later.

It has already become clear in the preceding pages that the procedural influences of *ius commune* were considerable. I will now concentrate on substantial rules of Roman law rules in Livonian court records.

On 21 January 1635 a *Junker* called Matthias Stahl stood accused of murder at Pernau District Court. The procedure was written, lawyerly, and tainted with *ius commune* or *gemeines Recht*. While the advocate of the accused claimed that his client had killed the victim by mistake, the prosecutor (*actor officialis*) answered with a citation from Bartolus: "*Nam si quis errori ducto alium occidat, quim occidere noluit, poena ordinaria homicidij punitendum esse, exto, quod dabat operam rei illicita; Bart: in l. respicitadum §. delinquunt in postr. resb. ff. de poenis.*"[5]

In another homicide case from 1640 against a nobleman called Jacob Hintze, an experienced lawyer and actually the *Oberfiskal* or prosecutor at Dorpat High Court, Philipp Tinctorius acted as the defence attorney for Hintze. In this case Tinctorius used an unusually wide range of legal sources. According to Tinctorius, his client had acted in self-defence, defending his house from an intruder:

> ferrum cum ferro omni de jure licitum est repellere, ex non solum ictum sed etiam impetum in quo timor consistit salutis. p.l. si ex plagijs §. tabernor, ff. de vi et vi armata. […] Cum Domus cuiq sua, tutissimum sit refugium ac receptaculum ut etiam is qui ingreditur in ucto Domo vim inferre videatur. l. pleriq. ff. d. In jus vocando Keysers Caroli des 5. Peinliche Halsgerichts Ordnunge, CCXXXVIII. et seqq. auch besteht. – Und ist im 24. Capt. lib: 2 juris Suetici.

Tinctorius thus refers to most of the legal sources mentioned in the District Court Ordinances: Roman law, *gemeines Recht*, and Swedish law. In his conclusive statement, Tinctorius even makes use of the contemporary legal literature, namely Andreas Gaill.[6]

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5 NAE 915.1.1, f. 9.

6 Based on Gaill, Tinctorius states that "*non ex vulnere, sed ex accidenti portiq vulneratq mortuus praesumitur.*" In the marginal, there is a referral to Gaill's *Observationes* (Liber 2, Obs. 111, nr. 23). In this passage, Gaill does not speak of accidents, however, but discusses the situation

Allusions to legal literature were not frequent, however. Besides the one to Gaill mentioned above, few others appear. Georg Stiernhielm acted as advocate for a Swede named Andreas Larsson, when he was charged for manslaughter at the Dorpat Castle Court in 1630–31. In one of his written statements to the Court, Stiernhielm referred to Baldus.[7] In a case of counterfeiting money and robbery from 1635, Stiernhielm now acted as the *Referent*, the member in charge of preparing the decision. In his *pro voto* statement,[8] following all the basic precepts of Roman-canon evidence law, Stiernhielm shows that he was well aware of the contemporary literature on criminal procedure. The main legal problem in the case had to do with evidence, which will serve as an example of Stiernhielm's argumentation. For instance, Stiernhielm stresses that "proofs in criminal cases need to be brighter than daylight," and therefore also the witnesses must be particularly credible ("*in Criminalibus causis*, […] *probationes luce meridiana debent esse clariores*, *Testes omni exceptione majores requiruntur*"). Since the witness in question had been condemned to death for another crime and because, in addition, his statement was not internally consistent, Stiernhielm did not give the statement any weight. The same conclusion applied to another witness, who was underage, was therefore deposed under oath, and he repeated exactly the same words as the other witness mentioned above – with whom the underage witness had come to the hearing ("*deponiret gleich als aus einem munde mit dem Carpofsin mit deme er gekommen* […]"). Stiernhielm mentions Josephus Mascardus ("*de prob*. *Concl*. 1371")[9] and Julius Clarus ("*Criminalibus*, § fin. q. 53") as his authorities on evidence.[10] As for the robbery, Stiernhielm arrives at the conclusion that the accused should not be condemned to the ordinary punishment (*poena ordinaria*) for lack of proof. Stiernhielm ponders also whether the accused would deserve at least an extraordinary punishment if he cannot be sentenced to an ordinary one. If and when an extraordinary punishment is appropriate, the accused would have

in which a wounded person contracts fever or another illness and dies. Then, according to Gaill, it should be presumed that the death occurred because of the illness, not violence. Later, Tinctorius refers to another passage of *Observationes* (2.110.11I; see also Pastor Andreas Hornung vs. Lieutenant Johann Friedrich Gant vs. Shieffelbein, DCP 1696 915.1.8, f. 213.

7 "*Melius sit mori, quam vili pendi*." NAE 4036.1.1.

8 These statements contained an elaborated version of *ratio decidendi*, whereas much less was disclosed to the parties in the final decision of the High Court. The *pro voto* statement was thus essentially meant as an internal document of the Court. This statement has been kept in Stiernhielm's private archive.

9 Josephus Mascardus, *Conclusiones probationum* (1587).

10 Both scholars were Italian and immense authorities in the early modern period: Mascardus (d. 1588) of evidence law, and Clarus (1525–1575) of criminal law.

already served it anyway, having been kept in pre-trial custody ("[…] *biszhero mit länglicher gefängnüsz auszgestanden*.").[11] Stiernhielm's argument is entirely based on *ius commune*.

Stiernhielm's adherence to *ius commune* is also evident in a *suplicatio* of 20 August 1655, to the High Court of Dorpat. Stiernhielm was himself party to the case. He did not accept that the lower court judge (*Unterlagman*) of Ingria, Jasper Jansson, had refused to let Stiernhielm appeal in a case between himself and Antonius Rosenbröijer, in addition to which Jansson had proceeded to the execution of his decision without waiting for the appeals court decision. The poet-lawyer based his claims on Roman and canon law (*de iure civili quam canonico*), allegedly resulting in that the decision of a lower court was null and void (*ipso iure nulla*). He further claimed that "all laws state" that it was unlawful to execute a lower court decision without waiting for the appeal court's decision on the matter. Even "all laymen" ("*idiotae*") knew this, and equity (*Billigkeit*) demanded as much. In this same supplication, he refers to the procedural works of Roberto Lancelloti (Lancellotus, d. 1586; an Italian canonist, professor in Perugia and later advocate in Rome) and Jean Masuer (Mansuerius, d. 1450; a French canonist).[12]

Let us take one more example of how Stiernhielm argued with Roman law or *ius commune* in his own legal cases – of which there were many. In 1652, he had a legal problem with Johan Adam Schraffer concerning a peasant tavern, which both parties thought was situated on their premises.[13] Stiernhielm characterized Schraffer's claims as aiming at "*actionem nullitatis, & restitutionis in integrum*," and complains that he (Stiernhielm) had not been cited to answer these claims. Nullity claims[14] and *restitutio ad integrum*[15] were both important institutions of *ius commune*. According to Stiernhielm's analysis, the claim was *ad petitoriam* (about ownership), thus in distinction from *ad possessoriam* (about mere possession).[16] He calls his opponent's claim "*frigidum & frivolum*,"

11 Wieselgren, *Samlade skrifter av Georg Stiernhielm*, 3:1, 15–29.

12 See Wieselgren, *Samlade skrifter av Georg Stiernhielm*, 3:1, 181–182; and 3:2, 189. Lancelloti's book was *De attentatis et innovates et appellatione pendent* (the cited *locus* being II.XII.89–92; Rome, 1576), and Masuer's *Masverii Ivris consutli Galli practica forensic* (Paris, 1510).

13 Wieselgren, *Samlade skrifter av Georg Stiernhielm*, 3:1, 143–146; Wieselgren's explanations at 3:2, 149–153.

14 In German *gemeines Recht*, the *sedes materiae* of the nullity claim (*Nichtigkeitsklage*) was the §§ 121–122 of the *Jüngster Reichabschied* (1654).

15 On the *restitutio ab integrum*, see Rudolf Sohm, *Institutionen des römischen Rechts* (Leipzig: Duncker & Humblot, 1911), 284, 318, 356.

16 The difference was well entrenched in *ius commune*.

"senseless and manifestly insufficient," a saying which also belonged to common European legal phraseology.[17]

Livonian lawyers sometimes referred to passages of *Corpus iuris civilis*. When Advocate Schönfeldt defended Jurgen Poribe in a case which Hinrich Niehusen had raised in Pernau Lower Court in 1690, the advocate claimed that the plaintiff's charge, according to Lex Aquilia, amounted to *injuria*.[18] Even larger legal spheres are referred to, such as "the procedural orders of all the world," which supposedly spoke in favour of the standpoint of the accused's advocate.[19]

In criminal cases the intentionality of the deed was observed, following *ius commune*. Advocate Schönfeldt argued with the concept of intention in a slander case against his client in 1690, stating that "according to all laws […] *animus offendendi* or *laedendi*, or *dolus* should be observed, and the plaintiff has not been able to show by way of witnesses or otherwise that the accused would have had *inuriandi animo* against the plaintiff […]."[20] In another case at the Pernau Lower Court in 1690, Prosecutor Schirm had summoned Lieutenant Daniel Brüning's wife to Pernau Lower Court in 1689 for disrespect towards court orders. When it turned out that the Lieutenant was not at home, the court servant (*Gerichtsdiener*) had delivered the summons to his wife instead.

17 Wieselgren, *Samlade skrifter av Georg Stiernhielm*, 3:2, 151.

18 "*Mann kan dahero dieses sein Verfahren vor nichtß anders alß ein pur lantere zu drängligkeit, umb beKln. wenn es ihm anginge in schaden zu stürtzen, æstimiren, allermaßen beKlr. dawieder, wieder allen verursachten schaden und Gericht. kosten, wozu Ihm Kläger gantz frivolè genöhtiget zum feyerlichsten protestirete. Derohalben prætendirte h. beKlr. von Hn. Klägern gnugsame probation seiner Klage, & qvidem à Testibus uti in actionibus injuriarum juxta L. Aqviliam opus est, omni exceptione majoribus, sich dabey veranlaßende, seine exception per Testes irrejicibiles, nebml. mit Hn. Corporal Creitling, und H. Corporal Beyer, und daß Er Klägern mit der gleichen formalien alß im Protocoll exprimiret worden, nimmer injuriret auch keinen einiges Leydt zu gefüget, oder ex proœresi, siqvidem animus et dolus delictum distingvunt zu fügen wollen, zu erweisen. Da dann sich im außgang wieses weisen würde, Actore non probante reum etiam si nihil præstitisset ad sui exculpationem, absolvendum esse* […]." DCP 1690, NAE 915.1.7, f. 646.

19 DCP 1690, NAE 915.1.7, f. 646.690. "*Dn. Schönfeld. P.P. Mandatorius Hn. Citati hätte wohl vermuhtet der Eylfertige Kläger würde Ihm zu folge so wohl J.K.M. des Königl. Gen: Gouvern: alß aller Process=Ordnungen in der gantzen Welt* […]."

20 DCP 1690, NAE 915.1.7, f. 691, 695. "*allen Rechten nach in omnibus actionibus præprimis injuriam animus offendendi auf lædendi itidemgz dolus betrachtet werden müste, und aber Kläger weder per testes noch sonst erwiesen und ihn überweisen könte, daß BeKlr Ihn Klägern injuriandi animo* […] *dolus et animus seu propositum injuriandi; qvæ propriè delictum distinqvint* […]." See also Pernau Town Court 1668, NAE.1000.1.723, f. 111, "*ex mero a*[*nim*]*o injuriendi et calumnandi.*"

According to the prosecutor, she had thrown the envelope away with "the highest disrespect and slander" ("*zum höchsten despect und beschimpffung*"). When heard as witness, however, the court servant stated that the lady of the house had not come to know about the content of the letter, and the witness does not seem to have mentioned anything of her disrespectful behaviour. She had only said that she would not take it and had given the letter back to the court servant. The Court decided that, as the lady "had not been aware that [the letter] was a court summons, she cannot have shown disrespect towards the Court by handing the summons back" to the court servant.[21]

Gemeines Recht, the German variant of *ius commune*, is rarely mentioned as a term. Town Secretary Hippius acting as advocate in the Town Court of Pernau, however, did so in a case concerning a debt. When the defendant Johann Schmidt replied to the charge that he had been underage at the time when he had entered into the obligation, Hippius argued that since the case was a summary one (because it was based on documentary evidence), defences based on "fear, violence, or youth" could not be observed – they had significance in ordinary procedure only.[22] However, Hippius stated that according to the *gemeines Recht*, 14 years was the age of marriage, and according to the Riga law (which was also the mother law of Pernau) the legal age was 18.[23]

5.3 The Influence of Swedish Law in Livonia

Swedish law fundamentally influenced Livonian judicial structures, although Swedish structures were by no means copied as such. In this chapter, however, these observations will not be repeated. Instead, attention will be paid to Swedish sources in the way courts and lawyers used them in their argumentation.

During the first decades of the Swedish rule, the law of the realm is seldom mentioned, and the attempts of the Swedish crown to introduce at least some Swedish law in Livonia were frustrated early on. Eager for quick results, the Council of the Realm noted in 1635 that it was difficult to control the Dorpat High Court from such a distance. Although some of the judges were always Swedish, the Court was inclining more and more towards German law. As a

21 DCP 1690, NAE 915.1.7, f. 293–299.

22 "[…]*die Exceptiones metus, vis & minorennitatis altioris indaginis sein, vndt ad ordinarium processum gehören, so mit dieser summarischen action nicht zu confundiren*."

23 "*Opponiret Ihm ratione minorennitatis Præscriptionem qvadrienny, denn so die Gemeinen Rechte einen 14 Jahrigen ad conjugia, vndt die Rigischen Rechte einen von 18 Jahren Mundig erkennen*." Pernau Town Court 1668, NAE 1000.1.723, f. 80.

remedy, the Council suggested that two lawman's courts (*lagmansrätt*) be founded to replace the High Court. The lawman's court could, so the Council felt, be more readily used to introduce Swedish law in the province.[24] This plan never amounted to more than ink on paper.

Above all, Swedish law was followed in procedural questions and especially insofar as the high court procedure is concerned. It thus makes certain sense that Georg Stiernhielm, in a legal case of his own at the Dorpat High Court in 1652, writes that "the High Court [as far as the law of appeals is concerned] primarily uses Swedish law."[25] However, as mentioned before, the procedure in the Swedish high courts cannot be regarded as a national, Swedish, phenomenon, but entailed a conscious reception of *ius commune* and *gemeines Recht* models. From the very beginning, *ius commune* citations occurred frequently in the protocols of the Svea High Court.

In the substantial law of Livonia, Swedish influences or similarities with the Swedish system are more difficult to detect. Towards the end of the seventeenth century, the courts began to mention Swedish legislation increasingly often in their decisions, and the parties also refer to Swedish statutes. In 1688, the Fiscal Philipp Schirm accused Soldier Jacob Bremer *in puncto Rapina ex violentiarum*, violent robbery, in the District Court of Pernau. Schirm based his demand for punishment on Swedish law:

> …alß bittet actor officiosus bekl. wegen solcher frewellthaten, damitdie heer und Landt-straßen in künfftige gesichert und I.K.M. Werordnung in mehrem nachdruck erhalten werden mögen, andern zum merckl. exempell und schrecken, mit einer in Rechten enthaltenen Criminal=straff, id gz cum refusione expensarum, gerechtsambst zu bestraffen…[26]

Sometimes the courts referred to the "nature of things," which is not surprising in the age of natural law. Thus the Pernau District Court in 1688 motivated its interlocutory sentence, approving an *exceptio fori declinatoria* in the following way:

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24 The Protocol of the Council of the Realm 10 December, 1635 and 25 May, 1641; cited at Odhner, *Sveriges inre historia under drottning Christinas förmyndare*, 139.

25 The legal case concerned a lucrative peasant tavern, which both parties claimed was located on their land. Wieselgren, *Samlade skrifter av Georg Stiernhielm*, 3:1, 146; 3:2, 150: "*Wasz in simili casu Contumaci fur ein beneficium juris reserviret wirdt, haben Sie zu ersehen ausz dem 13.cap. Tingmalb*."

26 DCP 1688, NAE 915.1.7, f. 51–52.

> daß des Mittbeklagten H. Moritz Bretholtz exceptio fori declinatoria billig statt hat, und dahero, weil diese Sache ihrer natur und eigenschafft, auch Königl. ordinantz nach, vor das geistl. gerichte gehörig kläger mit seiner Action, falß Er beklagten derselben nicht zu erlaßen gedencket, billig dahin mediante citatione auß zu führen, zu werweisen sey, wie Er den hiemit falcher gestalt dahin werwiesen wird.[27]

In this case the nature-of-things argument was thus not the only, perhaps even not the decisive argument, but was instead combined with an argument from a royal ordinance, that is, Swedish statutory law.

Swedish influences on substantial law thus remained insignificant. The Livonian legal culture was a learned one, and like learned legal cultures everywhere in Europe and America, the Livonian legal culture was dependent on the written text. Books of law were a major tool of legal communication, without which any degree of a common legal culture was unthinkable. Because of the rudimentary form of Swedish legal literature, such forms of legal communication could not exist between Sweden and Livonia. The only way of communicating the Swedish law to the Baltic province was by way of statutory law and by court decisions. Statutory law, however, had not yet developed into the effective tool of governance it is today. *Beneficium revisionis*, the functional equivalent of a supreme court of the Swedish realm, was too costly and cumbersome an instrument to steer the Livonian legal development effectively.

5.4 The Livonian Legal Sources

Livonian law remained a vague concept throughout the Swedish period. Livonian law is best identified with the medieval feudal laws, the *Ritterrechte*, and in the peasant laws (*Bauerrechte*). Both kinds of law were codified in several layers in the Middle Ages.[28] As was the case with all legal sources, local Livonian law was rarely mentioned in the court documents. Some exceptions where a court based its decision at least partly on Livonian law can be found in the

27 DCP 1688, NAE 915.1. 8, f. 109.

28 As explained above, Livonian feudal law was not codified again during the Polish era, despite several attempts and petitions from the Estonian and Livonian knighthood. The *Mittlere Ritterrecht* was not provisorily confirmed as law before 1648, when Queen Christina did so. This action taken by the Queen, however, did not lead to a final approbation. The Livonian *Landesordnungen* of 1671 and 1707 never received a royal confirmation either. For the manorial laws, see Arbusow, *Die altlivländischen Bauerrechte*.

archives, however. In a witchcraft case, the Dorpat Lower Court argued with God's laws (three specifically mentioned passages of the Old Testament), "all secular and common laws," Swedish law and Livonian law (the *Ritterrechte*).[29]

However, the cases referring to feudal or manorial law are understandably scarce. Both bodies of law had been compiled in the Middle Ages, and most of their development had taken place since then in customary law. As far as peasant law is concerned, it was primarily applied in manorial courts, which mostly operated without written records.[30] The district courts and the Dorpat High Court normally had little use for feudal and manorial law.

Cases in which no sources at all were mentioned were much more common. This does not of course mean that these case decisions would be void of any normative content. If the legal source is not specifically mentioned, then sometimes it may the case that the decision is based on customary law. The settlement cases were treated in detail above, and there is no need to repeat that discussion here. The habit of settling all kinds of criminal cases belongs to the oldest layer of law, which predated the reception of learned law. Customary law is, however, extremely difficult to identify. In 1638, we are quite clearly dealing with customary law. In that year, the District Court of Pernau sentenced Daniel Piski to death for homicide. The Court "condemned [Piski] according to the common laws of the land to [be beheaded by] the sword."[31] In another murder case, not only the beheading was founded on the common laws of the land but also cutting off the defendant's right hand, with which he had struck his father the fatal blow.[32] In a case concerning violence, from the year 1655, the court referred to "Livonian laws" ("*livländische Rechte*"), probably meaning the medieval *Ritterrechte*. The Court recognized the local law, according to which the crime would have merited a corporal punishment. However, because of the young age of the accused, he was instead ordered to pay a fine before leaving the court. If he were not able to pay, the accused would have to spend two months imprisoned on bread and water.[33]

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29 "*Göttlichen Gesetzen Exod; 22.X.18 Levit: 20.X.6 et Deuter: 18.V.11* […] *Und auch alle weltliche und gemeine Rechte, in sonderheit die Königl. Schwedische in unterschiedenen Recessen, auch in Legibus Provincialibq Tit.9. Cap: 6 et 15* […] *Landes Ritter-Rechte*."

30 Arbusow, *Die altlivländischen Bauerrechte*, 16.

31 1 Jan, 1638, f. 1–3a, Pärnu maakohus protokoll kriminaal 1638–45.

32 "[…] *nach gemeinen und landtüblichen rechten zuforderst der rechte handt damit er den Watter geschlagen abzuhauen* […] *zum Schwerdt entdammet* […] *auffs radt gelegt* […]." 2 Feb. 1639, 11–11a *in puncto parricidij*. Pärnu maakohus protokoll kriminaal 1638–45.

33 "*Urtheill, In angestellten Klage Raphael Swentsohn in Assistentz deß Königl. Anwalds an einem, gegen und wieder Heinrich Bönig am anderen theill, in po* […] *verbotenen gewalt* […] *Obwohl vermöge Liefflandischen rechten solche dergleichen hochstraffbaren thaten*

Livonian civil law remained largely customary until 1865, when Friedrich Georg von Bunge collected the different kinds of Livonian law and compiled it into the Baltic Civil Law.[34] The uncodified state of Livonian law helped the Swedes, when trying to ascertain a place for the Swedish law in the Livonian legal heterogeneity, in their initial negotiations with the estates.[35] The decision not to codify the Livonian law even later in the Swedish era may have been intended to strengthen the Swedish reception of Swedish law. Yet, paradoxically, the ambiguity of Livonian law also enabled the local judges to juggle a wide variety of sources according to their discretion. For Swedish judges active in Livonia, establishing what Livonian law was in a particular case must have presented considerable difficulties.

5.5 Divine Law and Natural Law

Livonian lawyers in the Swedish period, as early modern legal professionals in general and as a reflection on law's medieval heritage, thought in the categories of both secular and "higher" law. This higher law was in the Lutheran regions of Europe, no longer church law (except for cases specifically retained in its domain) but "divine" law (*göttliches Recht*) as expressed in the Decalogue.[36] Already in the Polish time, the courts use formulae which included a reference to God's laws. Thus when the Dorpat Council sentenced Timp Hans to death in 1622, he was sentenced "according to divine and worldly laws" ("*göttlichen und weltlichen Rechten nach*").[37]

Divine law is not mentioned in the briefs of lawyers or the court decisions of the Livonian courts any more often than the other sources. When it is, one gets the impression of it being utilized in passing and mainly for rhetorical purposes. This view is, however, probably not correct. Divine law is in many ways comparable to natural law, which Richard Helmholz has studied. Helmholz observes that although natural law may not have been frequently invoked

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poena corporis abzustraffen, dennnoch will das Königl. Landgericht bekgln-n in ansehung einer jugendlichen [unclear] *undt unverstandes* [unclear] *50 Rth straffe die er vor abtretung vom Gericht zuerlegen, oder in nichtbezalung deßen auff 2 Monathlicher fast im thurm bey waßer und brodt hirmit condemniret und vertheilet haben*." f. 52–52a. Raphael Swentson vs. Heinrichs Bönig; District Court of Pernau, Criminal and civil protocols (Pärnu maakohtu protokollid kriminaal ja tsiviil) 1655, NAE 915.1.5.

34 See Luts, *Juhuslik ja isamaaline*.

35 Tuchtenhagen, "Das Dorpater Hofgericht," 114–151, 119–120.

36 See, Pihlajamäki, "*Executor divinarum et suarum legum*," 171–204, 181–182.

37 Dorpat Council 1622, NAE 995.1.252, f. 150–150 a.

in early modern European and American courts, it nevertheless demonstrates often enough that it had an important place in the thinking of the legal professional. Natural law was understood to be a source of positive law, not its rival. Natural law's authority was often used to strengthen the argumentation that flowed from sources of positive law.[38]

Much the same can be said of divine law. It was never mentioned as a source by itself, but both courts and lawyers invoked divine law's authority to fortify their arguments. Every legal professional fresh from their studies, as Helmholz argues, felt that natural law was above positive law.[39] Similarly, they also knew that divine law was, just as clearly, superior to positive law, if not even more so. By the fifteenth century, it was a well-established doctrine that all legal customs, in order to be valid, needed to be at least tacitly approved by the king, and they could not go against God's laws.[40]

The use of God's law in their rhetoric reveals something of the early modern legal professional's set of mind. Rhetoric does not work unless it has as credible basis. Thus when the advocate of Herman Fickß and Johan Bagge, in a slander case (*in puncto injuriarum verbalium*) in 1690, called the alleged "verbal injuries" "in godly and secular laws the highest punishable" ("*in göttl*[*ichen*] *und Weltl*[*ichen*] *Rechten höchststraffbahr*"), he really meant what he wrote.[41] This basic concept of two separate bodies of law is even more obvious when a pastor issued a document, certifying that a certain lieutenant had no illegitimate children (*Huren-Kinder*) registered in the church books, stating that "in God's Holy Scripture, as well as in worldly laws, it is forbidden to give false oath against one's neighbour."[42]

5.6 The Theory and the Practice of Legal Sources: Europe and Livonia

The difference between the uses of legal sources in the Livonian court records when compared to the early modern theory of legal sources is striking. The theory of legal spheres which Livonian lawyers, like all early modern lawyers,

38 R.H. Helmholz, *Natural Law in Court: A History Legal Theory in Practice* (Cambridge: Harvard University Press, 2015), 174–178.

39 Helmholz, *Natural Law*, 174.

40 Roy Garré, *Consuetudo: Das Gewohnheitsrecht in der Rechtsquellen- und Methodenlehre des späten ius commune in Italien (16.–18. Jahrhundert)* (Frankfurt am Main: Vittorio Klostermann, 2005).

41 DCP 1690, f. 633–634.

42 DCP 1690, f. 671. "*Eß ist so wohl in Göttl. Heyl. Schrifft, alß auch in Weltlichen Rechten verboten, wieder seinen Nechsten kein falsch Gezeugniß zu geben.*"

had learned at the university also found its way into the Livonian statutory law. The early modern theory of legal sources was in turn based on the medieval statute theory. As Wolfgang Wiegand has shown, local law was always to prevail against a law of a larger sphere. On the other hand, the court had to know *ex officio* only *ius commune* – Roman and canon law – and the local law that was fixed in writing and taken into the statute book (*ius commune in loco*).[43] According to the *Reichskammergerichtsordnung* (Art. 3), the judges swore to judge according to the local laws presented to them, and then according to the "common laws of the Empire."[44] Parties needed to show the normative contents of all other bodies of law, and in case of uncertainty, the *ius commune* prevailed (*fundata intentio*).[45]

Some details of this picture have been challenged. The point is not that Wiegand was wrong, but that the theory he reconstructed only represents the medieval starting point. From the late fifteenth century onwards, this theory was in constant flux, and many versions of the medieval theory were developed to meet the needs of the different political situations in the German territories and elsewhere. In addition, the legal practice did not necessarily follow any of the theories. For instance, Klaus Luig has shown that in the period of *usus modernus*, judges did not always expect the parties to prove the content of norms, but instead researched them *ex officio*.[46] *Fundata intentio* was also taken by some authors to refer to *gemeines Recht*, "common German law," not *ius commune*, which was to be proven.[47] Territorial rulers had been, since 1692, under obligation to inform the Imperial Chamber Court of their new laws (*Rechtsbeibringungspflicht*).[48]

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43 Wiegand, *Studien*, 149–153; Helmut Coing, *Die juristischen Auslegungsmethoden und die Lehren der allgemeinen Hermeneutik* (Köln: Westdt. Verl., 1959), 266.

44 "*…nach des Reichs gemainen Rechten, auch nach redlichen erbern und leidlichen Ordnungen, Statuten und Gewonheiten der Fürstenthumb, Herrschaften und Gericht, die für si pracht werden.*" Zeumer, *Quellensammlung zur Geschichte der deutschen Reichsfassung in Mittelalter und Neuzeit* (Tübingen: Mohr, 1913), 285.

45 Wolfgang Wiegand, "Zur Herkunft und Ausbreitung der Formel 'habere fundatam intentionem' – Eine Vorstudie zur Rechtsquellen- und Rechtsanwendungslehre der Rezeptionszeit und des usus modernus," in Sten Gagnér, Hans Schlosser and Wolfgang Wiegand (eds.), *Festschrift für Hans Krause* (Köln: Böhlau, 1975), 126–170.

46 Klaus Luig, *Universales Recht und partikulares Recht in den "Meditationes ad pandectas" von Augustin Leyser* (Milano: Giuffrè, 1980), 42–47.

47 Jan Schröder, *Recht als Wissenschaft: Geschichte der juristischen Methodenlehre in der Neuzeit (1500–1933)* (München: C.H. Beck, 2012), 215–216.

48 Oestmann, *Rechtsvielfalt vor Gericht*, 58.

Aritsune Katsuta has helpfully divided the statute theory into two parts, absolute and conditional. The absolute statute theory (*die absolute Statutenvorrangtheorie*) developed in the medieval Italian city-states after the Glossators. This is a theory in which the law of the closest and smallest sphere was given preference over the larger spheres. The judge was expected to know both the local law and the *ius commune*. The theory changed as it was adopted to meet the needs of canon law. The Pope and the judges representing the Papal See could only be expected to know the common law of the organisation, not all of the local ones. The statute theory at the Imperial Chamber Court was structured in the same way. *Ex officio* the judges were supposed to know *ius commune* only, whereas the contents of other bodies of law needed to be proven to the court (the conditional statute theory; *die bedingte Statutenvorrangtheorie*). In addition to this, the judges would evaluate the rationality of the local customs presented to them. According to Katsuta, both absolute and conditional versions of the theory were adopted in different imperial territories.[49]

The Spanish theories offer an interesting example of the versatility of the statutory theories and may also be an aid in understanding the Livonian version of the statutory theory. Castile-León, together with France, was a classic example of *exemptio imperii*, or a region not pertaining to the *Reich*. *Exemptio imperii* led to the idea that the princes of regions not belonging to the Empire enjoyed full legislative powers in their lands. Roman law as *ius commune* thus had no political justification in Castile or France. Roman law nevertheless gained a position as an expression of rationality (*pro ratione*), as part of customary law, or by force of royal acceptance. Royal laws in the non-imperial regions such as Castile were no longer considered to be *ius proprium*, but now *ius commune*. Roman law still continued to be considered *ius commune* as well, but in the writings of Spanish scholars it often carried epithets such as law "of the Romans," "of the emperors," or "of the jurisconsultants and emperors."[50]

The French humanists went even further: François Duaren (1509–1559) and Hugo Donellus (1527–1591) equalled *ius gentium* with *ius commune*. For them, Roman law was now just an example of *ius proprium*. However, since Roman law embodied the essential elements of natural law and law of nations, the intellectual operation of the humanists led to the same result arrived at by others

49 Aritsune Katsuta, "'*Iura novit curia*' und '*fundata intentionem habere*' als ein Niederschlag der Rezeption in Deutschland," *Hitotsubashi Journal of Law and Politics* February (1985), 1–20.

50 Guzmán Brito, "Historia de las nociones de 'Derecho Común' y 'Derecho Propio'," 224–225.

using other justifications: Roman law as an embodiment of the law of nations obliged all nations, including those outside of the Empire.[51]

This versified international doctrinal context of the sixteenth century European jurisprudence helps to understand the Livonian formula. The Livonian version had it that recourse should be taken to Swedish laws "whenever one could not be sure" of the local sources ("*wo dar aber nicht eine Gewißheit nicht vorhanden*"). It does not use any variant of the usual phrase of the conditional theories: the Livonian law does not talk about "bringing the law" to the court. Thus, it seems to imply that the parties were not responsible for proving the existence of the local sources and their normative content. The court was supposed to know it *ex officio*, which makes sense in the relatively small territory with no huge amount of local laws. The Swedish law was presumed to prevail in unclear situations – a case of *fundata intentio*, in other words.

Second, a material check was to be performed on the Livonian sources. They were to be applied only if they were not against "the word of God or the royal *ius superioritatis*" ("*soweit dieselbe dem Worte Gottes oder dem Königl. juri superioritatis nicht entgegen*"). This is an original solution not seen elsewhere, and one which lessens the significance of the local sources, or at least underlines divine law's authority as the source of law.

The other part of Livonian formula is also interesting. It does not say, in the usual German way, that *ius commune* or *Kaiserrecht* would be subsidiary to Swedish law. Instead, it is said that the Swedish laws need to be in accordance ("*einstimmig*") with the *ius saniorum populorum*, in other words, the law of nations. As we saw above, the sixteenth-century French humanist jurisprudence (as well as the Spanish scholars) had justified the use of Roman law by equating it with the law of nations and natural law. This again makes perfect sense in Livonia, which had ceased to part of the Empire and was now part of Sweden, which had never pertained to the Empire. Instead of calling *ius commune* Roman law, it was politically more suitable to speak of *ius saniorum populorum*.

The wording of the Livonian statutory clause is interesting in yet another way. The local Livonian laws shall be applied, if they do not contradict the Swedish laws or the word of God. The Swedish laws shall be applied if no local law is available, if the Swedish law does not contradict the *ius commune*. In other words, the *ius commune* dominates the construction. Livonian law cannot violate Swedish law, which cannot violate *ius commune* (expressed as "the common laws of the civilized peoples"). This seems to have been intended to diminish the importance of Swedish law in relation to *ius commune*. The Livonian courts were to judge according to the local customs in the first

51 Guzmán Brito, "Historia de las nociones de 'Derecho Común' y 'Derecho Propio'," 228–229.

place – insofar as they were not against God's law or royal law, and the contents were known – then according to the Swedish law, and in the last instance according to *ius commune*. The principle of *fundata intentio* was in force in the sense that Swedish laws were to be interpreted in accordance with the "common laws of the civilized peoples."[52]

The particular version of the Livonian statute theory can well be understood as further development of the capitulation treaties, which had guaranteed the Livonian estates the right to continue using their own laws. Already in 1601, when Swedes conquered parts of Livonia for the first time, Duke Carl of Södermanland guaranteed the representatives of the nobility (*Ritterschaften*) of Wenden, Dorpat, and Pernau that they would get to keep "all their privileges, ancient contracts, statutes, and customs of the land" ("*alle Privilegien, uralten Verträge, Beliebungen, Recesse, Statuten und Gewohnheiten des Landes*"). In 1614, when Gustav II Adolf had just reconquered Livonia from the Poles, the noblemen of Dorpat and Riga hastened to beg the King that he remove the Polish laws violating their privileges. After the final conquest in 1629 the privileges were confirmed again, although in a provisory way and in general terms only: it was the idea of the Swedish crown to go through them later in more detail, although this never happened. Instead, the privileges of the Livonian estates were confirmed many times during the Swedish era as well. This was habitual in the early modern period whenever a new regent stepped to the throne, but it still tells us something about the strong position that the local laws had even from the point of view of the Swedes. The town privileges were also confirmed one by one at the start of the conquest.[53]

To sum up, the wording of the Livonian statutory theory was probably a political compromise: the local customs, in order to be applied, could not contradict Swedish law, and Swedish law could not contradict *ius commune*. Many different versions of the statutory theories were developed in sixteenth – and

52 The courts were to judge "*erstlich nach liefflandischen Rechten löblichen Gewohnheiten, soweit dieselbe dem Worte Gottes oder dem Königl. juri superioritatis nicht entgegen, wo dar aber nicht eine Gewißheit nicht vorhanden, nach Schwedischen Rechten, Constitutionen, Reichs-Abschieden, und Gebräuchen, so mit dem jure saniorum populorum communi einstimmig, sprechen und verabschieden.*" Buddenbrock II, 104–105.

53 See Bunge, *Geschichte der livländischen Rechtsquellen*, 198–200. Queen Christina confirmed the privileges in 1648, confirming also the *mittleres livländisches Ritterrecht.* Gustav X confirmed the privileges provisorily in 1658, and so did Queen Hedvig Eleonora in 1660, however making a reservation again, as *ius superioritatis* of the Swedish crown was concerned. Charles XI did the same in 1678, stating that the privileges, laws, and customs that had been in force before the Polish time were still in force.

seventeenth-century Europe and America to meet varying political realities. The solution grafted for Livonia was just one amongst the many.

But statutory theories, varied and customized as they may have been, were only a starting point. Legal practice lived its own life. The sources encountered in the German sources of the early modern period show a legal practice different to the legal theory. The system of legal sources in the German courts has been explained in two important works, one by Peter Oestmann and another one by Steffen Wunderlich.[54] The picture that we get from the early modern German legal practice is quite different from the picture (or pictures) that older research has produced of the early modern scholarship. The parties would present to the courts all kinds of sources they deemed necessary regardless of whether they were or should have been known to the courts according to the principle of *iura novit curia*.[55] The advocates, on behalf of their clients, used a wide variety of all possible legal sources, from canon and Roman law to natural law, privileges, extracts of legal scholarship to prejudicates, customary law, and statutory sources (both domestic and foreign, and town laws), thus producing a true "multiplicity of law" (*Rechtsvielfalt*).[56] The courts themselves used a wide variety of sources as well, referring frequently to legal scholarship and case law too.[57] One thing that was clearly according to the contemporary theory and the prevailing modern description thereof was that courts treated Roman law according to the principle of *fundata intentio*: in unclear cases Roman law was given prevalence.[58]

How do the findings of Oestmann and Wunderlich compare with the Livonian circumstances? How much was taken into the statutory text, and what

54 Peter Oestmann, *Rechtsvielfalt vor Gericht*; Steffen Wunderlich, *Das Protokollbuch von Mathias Alber: Zur Praxis des Reichskammergerichts im frühen 16. Jahrhundert* (Köln: Böhlau, 2011). Both works draw on material from the Imperial Chamber Court, Wunderlich's from the sixteenth century and Oestmann's from the whole period of the Court's existence, 1495–1806. The Imperial Chamber Court was the most learned of German Courts, as far as both its judges and its advocates are concerned, but obviously cannot be directly compared to the Livonian lower courts or even to the High Court. Oestmann's work, however, not only aims to expound the legal sources of the *Reichskammergericht*, but also those of the lower courts from which the cases were appealed to the highest instance. Wunderlich's book is an edition of a private notebook of a *Reichkammergericht* judge.

55 Oestmann, *Rechtsvielfalt vor Gericht*, 65–66.

56 Oestmann, *Rechtsvielfalt vor Gericht*, 100, 108.

57 Oestmann, *Rechtsvielfalt vor Gericht*, 517–525, 604; Wunderlich, *Das Protokollbuch*, 217–224.

58 Oestmann, *Rechtsvielfalt vor Gericht*, 603–605.

was supposed to be known self-evidently by the learned lawyers, was a practical matter. The general theory behind both statutes, as far the teachings on the admissibility of customary law and the hierarchy of legal sources was concerned, was the same. However, although the theory was the same, the circumstances in which the propositions were applied were different. The whole question of whether the Livonian courts knew the content of local laws was, at best, theoretical, and does not appear in the sources at all. One only rarely runs into references to legal sources in Livonian court records. In this respect, they are no gold mines. It is exceptional to encounter Swedish or domestic Livonian sources, *gemeines R echt*, Roman law, or divine law either in the lawyers' briefs or the *ratio decidendi* of the courts themselves. The observer does not run into a complex mass of legal sources, presented to court by the advocates. The small size of the province largely explains the fact that legal sources are rarely mentioned in the court protocols. Even when legal sources are mentioned, their contents and validity appear self-evident and uncontested. The very fact that the sources so rarely deserve a mention – either by the court or by the parties – speaks for the fact that it was, most of the time, fairly clear to everyone involved what the law was.

CHAPTER 6

Conclusions

6.1 The Starting Point: Livonian and Swedish Law before the Conquest

The introduction of Swedish rule in Livonia caused the need to organize the judicial system, which was more or less in ruins after many wars. The situation is not unique in legal history. Legal reforms, however, tend to be conservative and path-dependent, even when reformers might in principle wish or have to rebuild a system more thoroughly. Resources rarely allow for more than partial reforms – one takes what one has and takes that as a starting point. Time is one of the limited resources: a functioning legal and judicial order helps create and maintain peace and order, which are fundamental priorities when securing a successful change of power. It is in the interest of the conqueror to establish a functioning legal order as soon as possible. Human resources also tend to be limited. Implementing a new legal order successfully requires professionals, who are experts in the legal systems of the conquering power, in the legal system of the conquered area, or in both. Limited resources in most cases lead the new power-holder more or less to rely on the existing structures. Examples from different epochs and different parts of the world abound. Napoleon's Civil Code, often thought to have produced a true revolution in law, was largely based in the already existing civil law literature such as Robert-Joseph Pothier's (1699–1772) *Traité des obligations*.[1] Although no-one can deny the huge changes the Russian revolution of 1917 brought to all walks of life, law included, the revolution did not change all law overnight.[2] The Maoist revolution in China caused deep-going transformations in law, but was hardly a point zero: for instance, the Confucian philosophy, so fundamental for the Chinese legal thinking, has ever since continued to influence Chinese law in various ways.[3]

All these examples are from the modern period, and so from the epoch of the powerful state much more capable of effecting the desired legal changes

1 See André-Jean Arnauld, *Les origines doctrinales du code civil français* (Paris: LDGJ, 1969).

2 See, for instance, Tatiana Borisova and Jukka Siro, "Law between Revolution and Tradition: Russian and Finnish Revolutionary Legal Acts, 1917–18," *Comparative Legal History* 2:1 (2014), 84–113.

3 For the changes in how the traditional Confucianism has affected legal changes in China and how this philosophy has been used as a legimitation for changes of course, see Carl Minzer, "China's Turn Against the Law," *American Journal of Comparative Law* 59:4 (2011), 935–984.

than the early modern political powerholders were. Napoleon's Code is famous for its wish to render all other legal sources unnecessary. No doubt also both Communist revolutions were marketed as completely new beginnings, shedding the bourgeois legal past. This is typical of modern legal positivism, in which a whim of the legislator or a court – although neither is omnipotent – can create new legal realities much more effectively than before. However, if even modern legislators have proved themselves incapable of complete legal transformation, this was so much less the case in the early modern period, when written statutory law had yet not gained a supreme position. The other sources – court practice, legal literature, customary law – would always remain. Therefore, the idea of completely replacing old law with a new legal order should be taken with a grain of salt, as a modern invention. Just as it did not automatically occur to an early modern conqueror to substitute a new political system for the old one, normally the idea was not to introduce a wholesale legal reform, but rather to build on the existing one. This was the *modus operandi* of the early empire or the conglomerate. Seventeenth-century Sweden was a typical early modern empire, with possessions added through war in the former Danish territories, Germany, and the Baltic region. Whenever new territories were added to a composite state, the conditions were always separately negotiated. Nothing else was plausible.

Therefore, it is important to know on which base the Swedish conquerors began to build the Livonian legal system in the 1630s. Because reforms of this kind always presuppose interaction between the old legal system and that of the conqueror, it has been important first to draw a comparison of the Livonian and Swedish law before the conquest.

Clear differences emerge between Livonian and Swedish law in the early seventeenth century. Livonia's political and legal system remained heterogeneous from the Middle Ages until the Swedish era. Until the Polish era (from the 1560s onwards), Livonia was a loose confederation consisting of four bishoprics and the land of the Teutonic Order. Of these, the Order was more centralized than the bishoprics, but all of them had yielded much of the power to their vassals. All of the estates were governed by their own bodies of law: the towns had their urban laws, the nobles their feudal knightly laws (*Ritterrecht*), the Church its canon law, and the peasants their customary manorial law (*Bauerrecht*). To a certain extent, learned Roman law had been adopted as a consequence of Livonia belonging to the Holy Roman Empire, through its universities and high courts. Medieval Livonia was thus essentially not different from other parts of the medieval *Reich*.

The Polish overlords changed the Livonian administrative system, but touched on the legal order only very little. As the existing court archives reveal,

the law of Dorpat shows hardly any signs of Polish law in the 1620s. The Polish kings made several attempts to codify Livonian customary law, and to introduce Roman and German law to the region. *Constitutiones Livoniae* (1582), the first *Ordinatio Livoniae* (1589), and the second *Ordinatio Livoniae* (1598) each created controversies of their own, especially as the position of the nobility is concerned. David Hilchen drafted his proposal for Livonian *Landrecht* (1600), building the public law part on the second *Ordinatio*, and the private law part on Roman law and on Livonian legal practice. It is probable that Hilchen's *Landrecht* influenced Livonian legal practice during the last decades of the Polish rule, but this cannot be verified without empirical studies.

The law of Sweden proper was different from Livonian law. The Swedish estates were weak, whereas royal power had been on the increase since Gustav Vasa (1523–60). The Reformation made former church courts part of the state machinery, and much of the canon law was incorporated into secular law. Sweden became centralized not only politically but legally as well, with royal statutory law gaining paramount importance and clearly outweighing the other sources.

The difference between Livonia and the monolithic Sweden was indeed vast. In spite of the chaotic situation that had lasted for decades, Livonians, along with the rest of central Europe, had been on their way to a reception of *ius commune.* In Sweden, the reception had not been taken as far and consisted largely of filtering the *ius commune* norms and adapting them in a simplified form for local use.

Compared to Swedish legal culture, its Livonian counterpart was more learned and more professional. Its links to the German cultural sphere were and remained stronger than its links to Sweden, the legal culture of which had not developed a transferable export product in theway that *ius commune* or *gemeines Recht* had. Swedish law was rooted in the Swedish peasant society: it had developed only little from the medieval, peasant-run legal order to a learned, professional one. In the early seventeenth century, the Swedish law was a legal order for the peasants and by the peasants. This showed not only in the material legal norms, but also in the way legal procedure and the judiciary were organized.

6.2 The Organization of the Judiciary in Swedish Livonia

The organization of the judiciary belonged to the most urgent questions that the Swedes needed to decide in Livonian lands. Even though early modern empires generally felt no pressing need to unify their legal systems, in the case of Livonia the Swedes found little left of the old structures and were obliged to

construct a new judiciary. The Swedish intention, judged by the ordinances of the early 1630s, was to bring the Livonian legal procedures as close to the Swedish model as possible. This was clearly the goal even if the Livonian legal tradition was much closer to the learned European models than to the Swedish tradition. The judicial structure was to resemble the Swedish. The Livonian *Landgerichte* were the counterparts of the Swedish *häradsrätter* and the Dorpat High Court joined the series of other high courts within the Realm. The lower courts became, however, different from the lower courts in Sweden proper, where free peasants formed an essential part of the countryside courts, the *häradsrätter.* In Livonia, free peasants were too few for the judicial system to be built on their contribution, and serfs could not be made to sit in general law courts. Thus, the Livonian lower courts of the countryside (*Landgerichte*) thus came to consist of noble judges, who mostly decided cases in which estates other than peasants figured as parties. Peasants usually appeared as the accused in criminal cases. Manorial courts handled the rest of the peasant cases: disciplinary cases, petty criminal cases, and civil cases.

The urban courts followed the Riga model. The most important were the bailiff's courts (*Niedergericht*, *Vogteigericht*, or *Kämnergericht*) and the magistrate acting as court (often *Obergericht, Rat*). The *Kämnergericht* decided petty criminal cases and inspected the more serious ones, which the town court finally decided. Both courts were lay-dominated. Professional lawyers were rarely seen in any of the courts.

The High Court of Dorpat was established in 1630, as the third of a series of high courts founded in seventeenth-century Sweden. The judges were to be Swedish, German, or Livonian. The proportion of Swedish judges remained always low, and most of the judges were Baltic Germans. Although half of the posts were allocated to noblemen, they were often – especially towards the end of the period – men with legal training.

Even though the Swedish conquerors thus needed to build the Livonian judiciary almost from scratch, local social circumstances limited the options *de facto* available for the conquerors. Swedes could not simply transplant their own laws to Livonia, where the estates were much more developed and powerful than in Sweden proper. This was reflected in the shape that country courts, town courts, and the high court took.

6.3 The Judicial Procedure

The structure of the judicial system remained unchanged throughout the Swedish era, something which cannot be said about the legal procedures. Let us take

criminal procedure first. Two fundamental changes in criminal adjudication emerge, when the beginning of the Swedish period is compared to its end. First, official prosecutors became more active towards the end of the century. The prosecutors got involved, above all, in sex crimes and those which threatened public order. Duel cases, after the duel ordinances of the 1680, are a good example. Second, the use of inquisitorial procedure increased. It did not appear in the early years at all, but became frequent during the latter half of the seventeenth century. Inquisitorial procedure was practically only used against peasants.

Besides changes, there was also continuity. Pure accusatorial procedure, without a prosecutor, dominated the Livonian criminal proceedings all throughout the century. Accusatorial procedure was mainly used between social classes other than peasants. Cases of theft, violence, and slander were typically processed this way. Comparing the years 1640–1641 to the years 1688–1690 for the Pernau Lower Court shows that the number of purely accusatorial criminal cases diminished to a half. In general, it could be said that accusatorial cases all but disappeared. This is especially the case if the prosecutor-driven accusatorial cases are added to the list. The Livonian lower court procedure was thus fundamentally accusatorial throughout the Swedish period. On the other hand, it should be emphasized that the *ius commune* procedure was flexible by nature. What started as accusatorial procedure could end in the inquisitorial mode.

According to the common scholarly opinion, the inquisitorial procedure took over from the accusatorial procedure in most of the central parts of Europe from early on. However, it is doubtful to what extent this is the general European story. Research is still lacking, and much of the existing research is entirely based on legal literature. Without archival research it is, however, difficult to say anything definitive about the use of the different modes of procedure in other parts of Europe. This study has hopefully contributed something new to the discussion, showing that at least in seventeenth-century Livonia accusatorial procedure had all but lost its importance.

The lawyer-dominated nature of the civil proceeding not only brought with it the *gemeines Recht* proceedings but also the *gemeines Recht* legal sources, as lawyers often referred to *Corpus iuris civilis*, especially the Digest, and sometimes also to *ius commune* scholarship. The lawyerization of the urban courts took longer, but had also evolved into a fact at least by the 1660s.

Professional advocates appeared in both kinds of Livonian district courts already in the early years of the Swedish rule, although nearly not in all cases.

Parties themselves handled most cases, or had representatives other than legal professionals. Towards the end of the seventeenth century, the situation changed, and lawyers regularly assisted clients in civil cases and sometimes in criminal cases as well, especially noble clients when accused for crimes. The procedure in the High Court was from the outset completely in the hands of learned lawyers.

The Swedish crown seldom interfered the working of the Livonian judiciary. The "judicial revolution" had by the seventeenth century advanced to a certain extent. In other words, although in theory the judiciary could not gain independence from the crown, in practice the division of labour had developed to the point in which the crown and its officials rarely bothered to venture into the judicial area. If pressing needs occurred, commissarial courts were always at the crown's disposition. They could be established flexibly to handle all kinds of cases which needed special attention and for which the regular judiciary was not deemed sufficient.

The procedure of the lower courts itself soon drifted further and further from the Swedish lay-dominated model, as legal professionals took an effective grip on the procedures – especially the civil one – in Livonia. Procedures more or less modelled after the procedure of the Imperial Chamber Court became the order of the day in accusatorial cases both with and without a prosecutor. The accusatorial procedure as well as civil procedure became heavily dependent on writing and the exchange of briefs, with lawyers frequently appearing in court or at least drafting legal instruments on behalf of their clients.

In proper criminal procedure, or inquisitorial procedure, the differences between Livonia and Sweden proper never became as great, undoubtedly because of the sparse involvement of professional lawyers. In some respects, the development went to the opposite direction: judicial torture, which was still commonplace in Livonia at the beginning of the period – unlike in Sweden proper – but was rooted out in Livonia also by the 1680s.

The high court procedure was also based on the exchange of written briefs, in much the same way as the lower court procedure. Lawyers appeared personally in court to read their briefs and to collect copies of the opposing party's writings. The high court procedure was quite similar to that of the Svea High Court and the other high courts in Sweden. The similarity is understandable, because all high courts started more or less from scratch, in that their procedure was not inherited from earlier appeals courts in Sweden proper or Livonia. Instead, the procedure of all of the courts was much influenced by the procedure of the German Imperial Chamber Court. The learnedness of the

high court procedure that came naturally for the Livonian high court also became an important feature of other Swedish high courts.

High court decisions could not be appealed in the *ius commune* sense of the term. Parties could instead petition for an extraordinary remedy, *beneficium revisionis*. Revision petitions against decisions of the Dorpat High Court remained rare, however. Revision procedures were expensive, and it is understandable that most of the revision cases came from the Svea High Court district and not from more distant courts such as Dorpat. It is also probable that the monetary value of the cases in the Svea district were on average higher than in Livonia. This, however, must remain a mere guess, since no comparative research has been possible here on that particular question.

From the very beginning of the Swedish rule, the Livonian nobility firmly controlled the local judiciary and legal procedure. Swedish attempts to change this came late, and Livonian legal procedures remained closely oriented towards *gemeines Recht* until the end of the Swedish period – and in fact beyond.

6.4 Legal Sources in the Courts of Swedish Livonia

References to legal sources of any kind are rare Livonian court records. Only exceptionally does one encounter Swedish or domestic Livonian sources, *gemeines Recht*, Roman law, natural law, or divine law either in the lawyers' writing or the courts' *ratio decidendi*. When legal sources are mentioned, their contents and validity appear self-evident and uncontested. This can probably best be explained by the small size of the province. Most of the time it was clear to the courts and the lawyers what the law was. This is different to what we know about courts in European heartlands, in which lawyers and courts invoked learned legal sources much more frequently.

The Livonian practice of using legal sources was, however, different from not only the European heartlands but from Sweden proper as well. Swedish high courts, established in the seventeenth century, were staffed largely with learned lawyers, which shows in the way they used legal sources. Swedish lower courts were different: lay-dominated as they were, practically the only sources encountered in their protocols are royal statutory law and, sometimes, customary law. The Livonian practice of referring to a wider variety of legal sources at least sometimes reveals that their way of understanding sources was relatively open and less dependent on statutory law.

Legal practice reveals that Swedish statutory law gained only limited influence in Livonia. The most obvious exception were the duel ordinances, which were effectively applied. Towards the end of the seventeenth century, the prohibition of judicial torture was also enforced onto Livonian courts. Despite these exceptions, it is fair to say that Swedish law could only acquire limited bridgehead in Livonia during the eight decades of the Swedish rule.

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