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The Plight of Canon Law in the Early Dutch Republic

"[S]piritual or papal laws have acquired ... the force of law in these provinces." Hugo Grotius 1631.[1]

"[P]apal ... law per se has no more authority with us than the popes themselves, [yet] certain portions have come into general practice ... and continue in validity." Ulric Huber 1686.[2]

This Article argues that the Roman Catholic canon law remained a vital part of Dutch legal life in the decades following the Protestant Reformation. Part I analyzes the relationship of canon law and civil law, and of church courts and civil courts, on the eve of the Dutch Reformation. It shows that canon law dominated the Netherlands, both through the vast spiritual and temporal jurisdiction exercised by the church courts and through the extensive penetration of canon law into the writings of the civil jurists and the statutes of the civil authorities. Part II describes the constitutional and theoretical changes in church-state relations born of the Dutch Reformation of c. 1566 - 1581. Part III shows that, despite the polemics of the early reformers, the canon law remained an integral part of the law of both the reformed church and the reformed state. The reformed church law, though much narrower in scope, emulated basic canon law forms. The reformed state law, though filled with bold revisions, readily incorporated canon law provisions.

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[1] H. Grotius, Inleiding tot de Hollandsche Rechtsgeleertheyd, I.2.22 (1631; F. Dorring / H. F. W. D. Fischer / E. Meijers, ed. 1952). A translation and commentary of this work was prepared by R. W. Lee and published as The Jurisprudence of Holland by Hugo Grotius, vol. I: Text (1926; 1953); vol. II: Commentary (1936). I have used the 1952 edition in this article.

[2] U. Huber, Heedensdaegse Rechtsgeleertheyt, soo elders, als in Frieslandt gebruikelyk, I.2.25 (1686; Z. Huber ed. 1742). A translation of the fifth edition of this work was prepared by Percival Gane and published as U. Huber, The Jurisprudence of my Time (1939). I have used the 1742 edition in this article.

I. Canon Law on the Eve of the Dutch Reformation

On the eve of the Protestant Reformation, canon law and canon lawyers played a prominent, even predominant, role in the legal life of the Netherlands – both within the Roman Catholic Church and within the imperial, provincial, municipal, and other civil polities that comprised the state.

1. Canon Law within the Church

Until the sweeping ecclesiastical reorganization of 1559, most of the Netherlands lay within the diocese of Utrecht, a suffragan seat of the archbishopric of Cologne.[3] The diocese was divided into eight archdeaconries and some 1600 parishes and rural deaneries. It was occupied by several hundred cloisters, hospices, almshouses, schools, and other charities operated by the clergy. A large body of spiritual and secular clergy served in the bishopric, many trained in canon law and civil law at the University of Louvain or at one of the French, German, or Italian universities.

This ecclesiastical hierarchy claimed a vast "spiritual" jurisdiction. It claimed personal jurisdiction over secular and spiritual clergy, and members of their households; transient members of society, like pilgrims, students, and foreign merchants; *personae miserabiles,* like widows, orphans, and the poor; and Jews and Muslims, particularly when they brought actions against Christians. The church also claimed subject matter jurisdiction over disputes concerning doctrine, liturgy, and the sacraments; ecclesiastical property, patronage, and tithes; clerical ordination, appointment, and discipline; marriage, annulment, and custody; wills, testaments, and intestacy; oral promises, oaths, and pledges of faith; and such *peccata majora* as blasphemy, sacrilege, iconoclasm, sorcery, witchcraft, defamation, homosexuality, sodomy, prostitution, concubinage, adultery, fornication, bigamy, abortion, and infanticide.[4] The Bishop of Utrecht and his archdeacons repeated their claims to such personal and subject matter jurisdiction in numerous letters and synodical decrees.[5]

Original jurisdiction over most such cases was vested in the consistory court of the archdeaconry, presided over by a provisory judge or, on occasion, the archdeacon himself. Through a variety of ad hoc arrangements, however, minor disputes often came to be adjudicated by rural deans, parish priests, or monastic superiors. Major disputes involving marriage, annulment, heresy, or felonies committed by or against clergy were generally litigated in the consistory court of the bishop, presided over by his principal official. Appellate jurisdiction over such cases usually lay first with the consistory court of the archdeacon, then with the court of audience of the bishop. Cases raising particularly serious or novel questions could be appealed to the court of the archbishop, and from there to the papal curia itself.[6] Each of these courts applied the substantive and procedural canon law – both as adumbrated in papal decretals and conciliar decrees and as elaborated in the decrees of provincial and local synods, in the various concordats between clerical and political authorities, and in the rich body of canonist writings that circulated in the late medieval Netherlands.[7]

The church courts in the diocese of Utrecht also claimed a concurrent temporal jurisdiction over disputes that fell within the competence of civil courts. Through prorogation provisions in contracts or treaties or prorogation agreements executed on the eve of trial, parties could mutually agree to litigate their civil disputes in a church court. Through removal procedures invoked unilaterally by one party, cases could be transferred from a civil court to a church court if the civil relief available was adjudged unfair or unfit. In such cases, too, the canon law was applied. According to some observers, the majority of civil cases in the late medieval Netherlands were litigated in church courts, for parties feared the incompetence and inconsistency of the civil tribunals.[8]

[3] Small portions of the seven northern provinces also fell within the dioceses of Liege, Cologne, and Munster. For the canon laws prescribing this ecclesiastical division, see *J. Joosting / S. Muller,* Bronnen voor de geschiedenis der kerkelijke rechtsspraak in het bisdom Utrecht, 7 vols., vols. 1 - 2 (1906 - 1924). For discussion, see *R. Fruin,* Geschiedenis der staatsinstellingen in Nederland, 28 ff. (1901; 1922).

[4] Among earlier descriptions, see F. Zypaeus, Ius pontificium novum sive analytica postremi iuris ecclesiastici, II. 91 - 124 (1626); P. Gudelinus, Commentarium de jure novissimo optima methodo accurate ac erudite conscriptum additis harum vicinarumque regionum moribus, VI (1620; 1656); P. Peckius, Commentarius ad regulas juris canonici (1660). Several documents are collected in Historie ofte beschryving van 't utrechtsche bisdom, 3 vols. (1719) [hereinafter Historie ofte beschryving]. Among modern accounts, see *S. J. Fockema Andreae,* Kerkelijke rechtsspraak in Nederland in de middeleeuwen (1902), reprinted in id., Bijdragen tot de nederlandsche rechtsgeschiedenis, vol. 5, 79 - 127 (1914); *J. Joosting,* De kerkelijke rechtspraak in het bisdom Utrecht voor het Concilie van Trente, 30 Bijdragen Meded. Hist. Gen. 82 (1909).

[5] See the collection in Joosting / Muller, at vol. 3.

[6] For documents detailing this ecclesiastical procedure, see Joosting / Muller, at vols. 3 - 4 passim as well as the more anecdotal evidence in Historie ofte beschryving, at vol. 1, 120 - 121; vol. 2, 63 - 91, 135 - 145, 325 - 330, 450 - 463, 710 - 712, 734 - 746; vol. 3, 22 - 30, 411 - 415. For discussion of each archdeaconry's practice and procedure, see *Fockema Andreae,* at vol. 5, 79 ff.

[7] Ibid. On late medieval and early modern Dutch legal literature generally, see *Wagner,* Niederlande, in Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, vol. 2, part 2, 1399 - 1430 (H. Coing ed. 1976). See also the Short-Title Catalogue of Books Printed in the Netherlands and Belgium and of Dutch and Flemish Books Printed in Other Countries From 1470 to 1600 (1965), which includes numerous canon law titles.

[8] See, e.g. Historie ofte beschryving, at vol. 1, 120 (describing the "unduly large jurisdiction" of the archdeacons in the Bishopric of Utrecht); *P. de Leyden,* De cura rei publicae et sorte principantis, 237 (R. Fruin / P. Molhuysen eds. 1900) (arguing that, at least in the province of Zeeland, "nearly the entire jurisdiction over civil affairs fell into the hands of the provisors"). For further discussion of Philip of Leyden and his experiences and acquaintance

The civil authorities that governed the Netherlands generally respected and protected the spiritual jurisdiction of the church courts – at least until the early sixteenth century. Several late medieval concordats between dukes and bishops, and between counts and archdeacons, confirmed the list of persons and subjects over which the church courts claimed authority, and guaranteed the clergy immunities from civil taxes, services, and criminal prosecution. These concordats also ensured the church of various forms of civil aid and accommodation. When the church condemned heretics or felons, the civil authorities were to execute them. When church courts encountered contumacious defendants or witnesses, the civil authorities were to punish them. When the clergy or property of the church needed protection, the civil authorities were to supply the troops. When ecclesiastical goods were stolen or misplaced, the civil authorities were to retrieve them.[9]

These concordats did not, however, prevent civil authorities from governing matters at the edges of the church's spiritual jurisdiction that required reform. The famous 1540 Perpetual Edict of Charles V, for example, after decrying the exploitation and deprivation of the youth, ordered that henceforth (1) all testaments, legacies, or donations *inter vivos* or *mortis causa* made by youths that benefitted their tutors, curators, or administrators be declared null and void; and (2) all youths who wanted to marry should receive consent from their parents, on pain of later forfeiting their claim to marital property.[10] Municipal authorities in Delft, Dordrecht, and Amsterdam passed several statutes in the late fifteenth and early sixteenth centuries to regulate the care of orphans, widows, and the poor by ecclesiastical charities and to restrict abuses by the *paterfamilias* of his wife and children.[11] Such scattered instances of civil regulation, however, did not change the reality of a predominantly ecclesiastical authority over spiritual affairs.

Although they generally protected the spiritual jurisdiction of the church courts, the civil authorities generally protested the temporal jurisdiction of

with canon law, see *R. Feenstra,* Philip of Leyden and his Treatise, De Cura Reipublicae et sorte Principantis (1970). For similar sentiments by modern writers, see, e.g., *Fruin,* at 118; *J. Wessels,* History of the Roman-Dutch Law 138 (1908). But cf. *Fockema Andreae,* at vol. 5, 107 - 108, 122 - 127.

[9] See the collection of concordats in Joosting / Muller, at vol. 3, 45, 83; Groot placaetboeck, 11 vols., vol. 2, 1151, 1155 (C. Cau et al. eds. 1658 - 1797) [hereinafter Groot placaetboeck]; J. van de Water, Het groot placaatboek vervattende alle placaten der HH. Staten s'Lands van Utrecht. 3 vols., vol. 2, 967 (1729 - 1733); A. Matthaeus, De jure gladii tractatus et de toparchis qui excercent id in diocesi ultrajectina 82, 467 (1689).

[10] Eeuwich Edict van Keyser Karel in date den 4 October 1540, Arts. 12, 17, reprinted in Groot placaet-boeck, at vol. 1, 311, 318 - 319.

[11] See *Fockema Andreae,* at vol. 5, 104 - 108; *Jones,* Reformed Church and Civil Authorities in the United Provinces in the Late Sixteenth and Early Seventeenth Centuries as Reflected in Dutch State and Municipal Archives, 4 Journal of the Society of Archivists 109, 117-8 (1970).

these courts. Already in the early fifteenth century, provincial and municipal authorities took steps to truncate this jurisdiction. A 1429 statute of Duiveland, for example, required all parties who sought to remove their cases to church courts to petition the local magistrate court *(schepengerechtshof)* and demonstrate that the civil remedy was unavailable or unfair. A 1544 statute of Breskens outlawed all prorogation contracts and invalidated all contracts in which prorogation clauses were included.[12] The imperial authorities became equally churlish of the church's secular jurisdiction and material wealth. In a series of sweeping edicts and orders issued in the 1520s and 1530s, for example, Charles V. required civil judges (1) to nullify all testaments and legacies that left real property to the church; (2) to disregard prorogation clauses and contracts that would transfer civil disputes to church courts; (3) to avoid application or enforcement of any papal rescript that had not been formally accepted and approved by the emperor; and (4) to assume jurisdiction over all actions that had not been specifically reserved to the ecclesiastical courts by concordat.[13] In 1528, Charles formally divested the Bishop of Utrecht – though not the lower clergy – of his temporal jurisdiction. Thereafter, he sternly prohibited all ecclesiastics from censuring the judgments and judges of the civil courts.[14] If the complaints of canonists Petrus Gudelinus and Franciscus Zypeaus are any indication, these imperial orders were rather rigorously enforced, despite the protests of the episcopacy.[15]

2. Canon Law Within the State

The influence of the canon law was not confined to the church courts alone. By the eve of the Reformation, it had also become part of the general *jus commune* of the Netherlands and had penetrated the civil law both of the academy and of the courts. Several factors contributed to this broader secular influence of the canon law – the training in canon law required for both the *doctor juris civilis* and *doctor juris utriusque,* the widespread circulation of writings on canon law, the skillful popularization of canon law principles through catechetical and confessional writings, the ready employment of canonists as civil judges, councillors, notaries, advocates, and judicial clerks, and other factors.[16] The secular appropriation and application of the canon law that

[12] Both statutes are quoted in *Fockema Andreae,* at vol. 5, 125.

[13] See van de Water, at vol. 2, 965; Groot placaet-boeck, at vol. 1, 311, 373, 1588.

[14] Groot placaet-boeck, at vol. 1, 311.

[15] Gudelinis, at VI. 1 - 3; F. Zypaeus, Notitia juris belgici, I. 1 - 6 (1665).

[16] See generally, *L. van Apeldoorn,* Nicolaas Everaerts (1462 - 1532) en het recht van zijn tijd, 1 - 14 (1935); *B. H. D. Hermesdorf,* Römisches Recht in den Niederlanden, 18 - 30 (1968). See further discussion of the role of canon law in Dutch legal education in *Feenstra,* Canon Law at Dutch Universities From 1575 to 1811, an essay included in this anthology [hereinafter *Feenstra,* Canon Law].

resulted contributed greatly to its survival in the post-Reformation Netherlands.

The influence of the canon law can be seen both in the opinions and treatises produced by civilian jurists and in the statutes promulgated by civil legislatures.

First, the opinions *(consilia, advijsen)* of the learned civil jurists incorporated many provisions of canon law. Both private litigants and public authorities solicited such opinions not only to dispose of issues raised in civil litigation but also to shape new civil legislation. The jurists readily availed themselves of the canon law in drafting their opinions.[17] Nicolaus Everardus's famous *Consilia sive responsa juris,* for example, is filled with discussions of and citations to the canon law. In an opinion "concerning the incarceration of fugitives," for example, Everardus analyzed whether a defendant who had been arrested for "scandalous misbehaviour" and who subsequently escaped "by thievery" could be released from prison on suspended payment of bail. Everardus concluded that he could not. Though the general rule is that defendants so charged are released on a promise to pay bail, Everardus reasoned, the defendant had forfeited that right and admitted his guilt to the first offense by escaping. He must, therefore, remain in prison, notwithstanding the possible danger to himself, and the possible negative inferences that a judge might draw from such imprisonment. Everardus predicated his argument not only on Roman and Romanist sources but also on several decretals and the writings of Johannes de Imola, Angelus de Aretinus, and other canonists.[18] Several of his other opinions cite to and quote from the great canonists and penitential writers – Gratian, Hostiensus, Panormitanus, Joannes Andreae, Raymund de Peñafort – as well as a host of lesser canonists. A similar use of the canon law is evident in the opinions of the Dutch jurist Henricus Kinschotius as well as distinguished foreign jurists like Ulrich Zasius, Viglius von Zuichem, and Matthaeus Wesembecke whose opinions commanded considerable authority in the Netherlands.[19] The opinions of these civilians – together with the numerous opinions of the canonists[20] – gave the canon law broad currency in Dutch civil courts and councils.

[17] On Dutch consiliar practice, see *Wagner,* at 1417 - 1430; *Wessels,* at 241 - 246; *R. Dekkers,* Het humanisme en de rechtswetenschap in de Nederland 6 (1938).

[18] N. Everardus, Consilia sive responsa juris, consilium 34 (1554). On Everardus's importance in Dutch legal history, see *Apeldoorn,* at 42 - 58.

[19] See, e.g., H. Kinschotius, Responsa sive consilia iuris item de rescriptis gratiae a supremo senatu brabantiae nomine ducis concedi solitis tractatus VIII (1633). On the consilia of the German jurists and their circulation in the Netherlands, see *Dekkers,* at 71 ff., 211 ff.; *G. Kisch,* Consilia: Eine Bibliographie der juristischen Konsiliensammlungen (1970); *R. von Stintzing,* Geschichte der deutschen Rechtswissenschaft, vol. 1, part 1, 220 ff., 351 ff. (1880).

[20] Among consilia of the canonists, see, e.g., F. Zypaeus, Responsa de iure canonico praesertim novissimo (1645); F. Zypaeus, Consultationes canonicae pleraque ex iure novissimo Concilij Tridentini recentiorumque pontificarum constitutionum depromptae (1640); J. Wamesius, Responsorum sive consiliorum de jure pontificio tomi II (1605 - 1618).

Second, the topical treatises of the learned civil jurists, which summarized and synthesized the law under a number of topics *(topoi, loci),* also make ready use of the canon law. Everardus's equally famous *Loci argumentorum legales,* for example, is replete with citations to and quotations from the canonists. In a topic "concerning contracts and quasi-contracts," for example, Everardus argued that a contract can be binding only where a party has freely consented to its terms and not been subject to duress, fraud, compulsion, or other involuntary means. He predicated his argument on a blend of Romanist sources, decretals, and the treatises of Johannes de Imola, Angelus de Aretinus, and other canonists.[21] Other loci on discrete questions of contract, property, delict, crime, inheritance, and slavery likewise set out the canonists' opinions in considerable detail. Similarly, Cornelius Neostadius's *Observationes rerum judicatarum de pactis antenuptialibus* adduces an array of canonists in support of his arguments, ranging from such eminent early authorities as Panormitanus and Hostensius to a contemporary canon law authority Guido Papa.[22]

Third, some late medieval statutes promulgated by Dutch civil authorities repeated or reflected canon law provisions. Municipal statutes on oaths, for example, repeat canonist commonplaces. An early sixteenth century statute from Erkelens required that to be valid "the oath must have three characteristics, namely, truth, legality, and justice."[23] The very same formula appears in Gratian's Decretum and in subsequent canonist and casuistic writings.[24] A 1454 statute of Breda prohibited all "erroneous" oaths that failed to adhere to prescribed formulae, all "casual" oaths that were sworn in taverns, marketplaces, or gamehouses, and all "horrible" oaths that were sworn "not before our dear Lord," but before some other animate or inanimate object.[25] These (and many other) prohibitions are sprinkled throughout earlier decretals.[26] A similar reflection and repetition of canon law provisions, as B. H. D. Hermesdorf has ably and amply demonstrated, appears in civil statutes on the

[21] N. Everardus, Loci argumentorum legales, locus 37 (1552).

[22] C. Neostadius, Observationes rerum judicatarum de pactis antenuptialibus (1614), published bound together with Utriusque Hollandiae, Zeelandiae, Frisiaeque decisiones (1667). On the loci literature in the Netherlands and elsewhere, see *Dekkers,* at 8 ff.; *Stintzing,* at 114 ff.

[23] Quoted in *Hermesdorf,* De ontmoeting van kanoniek en inheems recht in de noordelijke Nederlanden gedurende de 14de en 15de eeuw, 30 Tijdschrift voor Rechtsgeschiedenis 141, 148 (1962) [hereinafter *Hermesdorf,* De ontmoeting].

[24] See Decretum Gratiani c. 7 C XXII, q. 1; c. 2 C XXII q. 2; Decretals c. 26 X. de iureiur. II 24, collected in E. Friedberg, Corpus Iuris Canonici, 2 vols. (1879). See also T. Aquinas, Summa Theologica, II. II. q. 89, art. 3.

[25] Quoted in *Hermesdorf,* De ontmoeting, at 149.

[26] Ibid.

definition of usury, the enforceability of oral contracts, the treatment of adulterous wives, the protections of church property, the limitations of sanctuary protection, and other discrete questions.

II. The Reformation in the Netherlands

This traditional relationship of canon law and civil law, and of church courts and civil courts, was rent asunder by the violent upheaval of the seven northern provinces from c. 1566 to 1581. The upheaval was as much political as religious in motivation, as much a revolution against royal autocracy as a reformation against papal apostacy.[27] It was a revolt against the bloody inquisition of the Duke of Alva and Philip II, King of Spain and Lord of the Netherlands, which had claimed the lives of some 100,000 Protestants in the previous few decades.[28] It was a revolt against Philip II's repeal of charter privileges and imposition of severe taxes and other exactions on the cities and nobility.[29] It was a revolt against the sweeping reorganization of the Catholic ecclesiastical polity in the Netherlands in 1559, and the widespread immorality, incompetence, and opulence of the Catholic clergy that followed.[30] It was a revolt against Philip II's insistence that the decrees of the Council of Trent be published in his name rather than the pope's. The Dutch revolt thus brought together persons of wholly different political positions and religious persuasions. Eventually, Calvinist reformers took the lead and directed the revolt to their own political and religious ends.

1. The Institutional Reform

The reformers first cast off the Spanish king and his retinue. The early attempts of some of the Dutch nobles to negotiate a settlement with the emperor were repeatedly rebuffed.[31] In 1579, therefore, the seven northern provinces of Holland, Zeeland, Gelderland, Utrecht, Overijssel, Friesland,

[27] See *H. van Gelder,* Revolutionnaire reformatie. De vestiging van de gereformeerde kerk in de Nederlandse gewesten, gedurende de eerste jaren van de opstand tegen Filips II, 1575 - 1585 (1943).

[28] See *M. Dierickx,* De lijst der veroordeelden door de Raad van Beroerten, 60 Revue Belge de Philologie et d'Histoire 415 (1962); *A. Verheyden,* Le conseil des troubles. Liste des condamnés, 1567 - 1573 (1961).

[29] See *P. Geyl,* The Revolt of the Netherlands (1555 - 1609), 50 - 79 (1932); *Smit,* The Netherlands Revolution, in Preconditions of Revolution in Early Modern Europe, 19 - 54 (R. Forster / J. Greene eds. 1970).

[30] See *M. Dierickx,* De oprichting der nieuwe bisdommen in de Nederlanden onder Filips II, 1559 - 1570 (1950); *R. Post,* Kerkelijke verhoudingen voor de Reformatie van c. 1500 tot 1580 (1954).

[31] See generally Texts Concerning the Revolt of the Netherlands, 53 ff. (E. Kossmann / A. Mellink, trans. and eds. 1974).

and Groningen confederated themselves in the famous Union of Utrecht. The Union united the military and diplomatic efforts of the provinces, but preserved the political and legal autonomy of each province.[32] In 1581, the United Provinces declared that "Philip the Second had forfeited his right of sovereignty over the said provinces."[33] After a bloody war, independence from the empire was ultimately gained.[34]

The reformers then turned their energies to the pope and his clergy. For a brief time, the survival of the traditional Roman Catholic polity and with it the traditional canon law seemed likely, despite the violence of the revolt.[35] The Pacification of Ghent (1576) prohibited "all attacks on the Roman Catholic religion and its exercise," restored to the prelates their "abbeys, dioceses, foundations, and residences," and made restitution to other ecclesiastics whose properties had been confiscated and destroyed.[36] The Religious Peace of Antwerp (1578) further guaranteed the Catholic clerics a "traditional" spiritual jurisdiction over their parishioners and ordered the civil courts to enforce both the canon law impediments of affinity and consanguinity and the canon law regulations for observance of the Sabbath and other holy days.[37] These guarantees were repeated in several municipal statutes – albeit on the condition that "the Roman Catholic clergy and consistory courts ... behave themselves ... in political matters, without interfering in any matters of [civil] jurisdiction or ... magisterial authority."[38]

This toleration of the Catholic religion and the canon law was short-lived. The Union of Utrecht had guaranteed each province independent authority

[32] Unie van Utrecht (January 29, 1579), reprinted in A. De Blecourt / N. Japiske, Klein plakkaatboek van Nederland. Verzameling van ordonnantien en plakkaten betreffende regeeringsvorm, kerk en rechtsspraak, 120 (1919) [hereinafter Klein plakkaatboek]. See further discussion in *P. F. M. Fontaine,* De raad van state. Zijn taak, organisatie en werkzaamheden in de jaren 1588 - 1590 (1954).

[33] Acte van Afzwering van Philips II (July 26, 1581), reprinted in Klein plakkaatboek, at 137.

[34] See further discussion in *Feenstra,* A quelle époque les Provinces-Unies sont-elles devenues indépendantes en droit à l'égard du Saint-Empire, 20 Tijdschrift voor Rechtsgeschiedenis 30 - 63, 182 - 218 (1952).

[35] See generally *De Jong,* Unie en Religie, in De Unie van Utrecht. Wording en werking van een verbond en van een verbondsacte, 155 (1979).

[36] Pacificatie van Gent, Arts. 3 - 5, 20 - 21 (November 8, 1576), reprinted in Klein plakkaatboek, at 113.

[37] Religious Peace of Antwerp, Arts. 2 - 3, 8 - 10, 15 - 18 (July 22, 1578), reprinted in E. van Meteren, Historien de Nederlanden, VIII. folio 141 - 142 (1647). (Folio 141 of the van Meteren volume in the Harvard Law School Treasure Room was too badly faded and torn to read the official title; hence the English title).

[38] This caveat appears in The Ordinance and Edict Upon the Fact of the Execution of Both Religions [of Ghent]; (December 27, 1578) (A. Vinetree trans. & ed. 1579), one of several municipal regulations on religion that supplemented, and qualified, the Pacification of Ghent.

over religion and the church, insisting only that they preserve the freedom of private conscience.[39] As they were drawn to Calvinism, the provincial authorities turned against Catholicism. Placards against public Catholic worship appeared in Zeeland and Holland in 1578, and, within a decade, in Utrecht, Friesland, Gelderland, Overijssel, and Groningen. Sterner measures soon followed. Payment of annates, tithes, and other ecclesiastical taxes to Rome were prohibited. Catholic sanctuaries, parsonages, and administrative buildings were destroyed or confiscated for use by the new reformed congregations. Cloisters, hospices, and almshouses were converted into state-run charities and public schools.[40] Clerics were stripped of their immunities from civil prosecution, services, and taxes. Several clerics were martyred, and most others fled or were banished to France and the Southern Netherlands.[41] By the turn of the seventeenth century, the traditional Catholic episcopacy had been all but banished from the United Provinces. To be sure, strong populations of Catholic laity still remained in the Netherlands after the revolt, particularly in the cities of Middleburg, Haarlem, Utrecht, and Delft, where they commanded a substantial majority. These parishioners were served by a handful of priests and missionaries, who secretly celebrated the mass in houses and barns and baptized, confessed, and married those parishioners whom they could reach.[42] But little of the traditional ecclesiastical government survived the revolt in the United Provinces.

2. The Ideological Reform

The reformers attacked not only the traditional forms and functions of ecclesiastical and political authority, but also the theory that supported them. Building on the work of John Calvin and other earlier reformers, a series of

[39] Unie van Utrecht, Art. 13 (1579), reprinted in Klein plakkaatboek, at 120. This Article authorized the provinces of Holland and Zeeland to deal with religion "according to their discretions" and the remaining provinces to follow the Religious Peace of Antwerp (1578) or to devise their own policy, which would require ratification by the confederation. See discussion in *De Jong*, at 157ff. and *H. Rowen*, The Low Countries in Early Modern Times, 73ff. (1972).

[40] See generally *L. van Apeldoorn*, De kerkelijke goederen in Friesland (Thesis, Utrecht, 1915), 2 vols. [hereinafter *Apeldoorn*, De kerkelijke goederen]; *D. Rengers Hora Siccama*, De samenhang in het recht bei den strijd over de Utrechtsche kapitallen (Inaugural Address, Utrecht, 1906).

[41] See generally, *Jones*, at 114ff.; *J. van Beeck Calkoen*, Onderzoek naar den rechttoestand der geestelijke en kerkelijke goederen in Holland na de reformatie (1910); *P. Ditchfield*, The Church in the Netherlands, 260ff. (1893).

[42] See generally *L. Rogier*, Geschiedenis van het katholicisme in Noord-Nederland in de zestiende en zeventiende eeuw, 3 vols. (1947); *W. Knuttel*, De toestand der nederlandsche katholieken ten tijde der republiek, 2 vols. (1892); *Dauvillier*, Les diverses formes extraordinaires du mariage et l'absence totale de forme dans le droit de l'Église d'Orient et de l'Église d'Occident, in Mélanges a Pierre Herbert 273, 283 - 292 (1981).

brilliant Dutch theologians and moralists – Guilielmus Apollonius, Jacobus Triglandus, Gisbertus Voetius, Antonius Walaeus, and many others – devised a new theory of church and state, of church law and civil law, that dominated Dutch ecclesiology and political theory until well into the eighteenth century.[43]

The reformers rejected the two swords theory that supported the rule of the papacy and the canon law in the Netherlands. For centuries, the Catholic Church had taught that the pope is the vicar of Christ in whom God has vested the authority of both the spiritual and the temporal swords. The pope and his clergy had used the spiritual sword to establish the canon law. They had delegated the temporal sword to civil authorities. Civil authorities were thus subject to clerical authorities. Civil law was limited by canon law. Civil jurisdiction was subordinate to ecclesiastical jurisdiction. This two swords theory was not confined to dusty medieval tracts. It was vigorously reasserted by Franciscus Zypeaus, Robert Bellarmine, Francisco Suarez, and other Catholic apologists whose writings enjoyed broad circulation and authority in the Netherlands.

The reformers started from the premise that church and state "are two separate and independent seats of godly power and authority in the world." They are "not subordinate but coordinate to each other. One does not depend on the other. Both depend upon God."[44]

God has vested in the church the spiritual power of the Word, the reformers argued. He has called ecclesiastical officials to be His "high priests" in the world, to preach the word, to administer the sacraments, to teach the young, and to care for the poor and needy. He has equipped each church with independent authority to devise its own polity *(potestas guberna)*, to define its own doctrine *(potestas circa dogmata)*, and to discipline its own members through the spiritual means of admonition, censure, and excommunication *(potestas judicans seu disciplinaris)*. Such authority could be exercised only over members who voluntarily joined the church and only for the purpose of maintaining the "integrity" and "continuity" of the church. The downfall of the Catholic Church, the reformers believed, was that it had extended its authority well beyond its voluntary members, had employed coercive and exploitative means of enforcing its decrees, and had insisted that adherence to the laws and traditions of the church was requisite for salvation. The Catholic Church had

[43] See G. Apollonius, Ius maiestatis circa sacra, sive tractatus theologicus de jure magistratus circa res ecclesiasticas (1642/3); J. Triglandus, Dissertatio theologica de civili et ecclesiastica potestate et utriusque ad se invicem tum subordinatione tum coordinatione (1642); G. Voetius, Politica ecclesiastica, 4 vols. (1663 - 1676). For secondary accounts see *E. Conring*, Kirche und Staat nach der Lehre der niederländischen Calvinisten in der ersten Hälfte des 17. Jahrhundert (1965); *Bohatec*, Das Territorial- und Kollegialsystem in der holländischen Publizistik des XVII. Jahrhunderts, 66 Zeitschrift der Savigny-Stiftung (Kan. Ab.) 1 (1948); *D. Nobbs*, Theocracy and Toleration. A Study of the Disputes in Dutch Calvinism from 1600 - 1650 (1938).

[44] Apollonius, at vol. 2, 282ff.; see also *Triglandus*, at 258.

thereby "usurped the state's authority and law," "Judaized the Christian faith," and "tyrannized the Christian conscience."[45]

God has vested in the state the temporal power of the sword. He has called civil officials to be His "vice-regents" in the world, to represent and reflect His authority, to appropriate and apply His law.[46] Each magistrate was, in Voetius's words, the "guardian and vindicator of both tables of the [Decalogue]."[47] This rendered him responsible for governing both the relationships between man and God, based on the First Table of the Decalogue, and the multiple relationships among men, based on the Second Table. Thus the magistrate was to punish all idolatry, blasphemy, false swearing, witchcraft, alchemy, Sabbath-breaking, and other sins against God, based on the Four Commandments in the First Table. He was also to promulgate criminal, property, contract, family, corporate, commercial, and other laws based on the Six Commandments of the Second Table.[48]

This two powers theory of the reformers, though dominant, did not always receive unqualified acceptance in the Netherlands. One group of "erastian" reformers, while accepting this basic theory, argued for a greater state authority in ecclesiastical affairs. The First Table of the Decalogue, they argued, empowered the state not only to prohibit blasphemy, idolatry, and other offenses, but also to establish one religion and to participate actively in the government and operation of the established church. A second group of "theocratic" reformers, while accepting this basic theory, argued for a greater church authority in political affairs. The church, they argued, is uniquely qualified to interpret the requirements of the godly law which the state is required to implement. It should thus participate actively in both civil legislation and civil adjudication.[49]

Neither the erastian nor the theocratic position ultimately came to prevail in the Netherlands. The provincial authorities did not establish the reformed religion. The ecclesiastical authorities did not dominate provincial politics. Yet there are ample theocratic and erastian tendencies in evidence in the early

[45] See Voetius, at vol. 1, 114ff., 241ff., vol. 3, 783ff.; Triglandus, at 305; Apollonius, at vol. 1, 120, vol. 2, 314ff., vol. 3, 372.

[46] See Triglandus, at 14ff.; Voetius, at vol. 1, 123ff.; Apollonius, at vol. 2, 262ff.

[47] Quoted in *Conring*, at 65. See also discussion in *Nobbs*, 10ff., 108ff.

[48] Ibid. For a discussion of similar sentiments by the Lutheran reformer Philip Melanchthon, who was influential in the Netherlands, see *Berman / Witte*, The Transformation of Western Legal Philosophy in Lutheran Germany, 62 Southern California Law Review 1573, 1626 - 1632 (1989).

[49] See generally J. Uytenbogaert, Tractaet van't ampt ende authoriteyt eener hooger christelijker overheydt in kerckelycke saecken (1647); H. Grotius, De imperio summarum potestatum circa sacra (1647); N. Vedelius, De episcopatu Constantini Magni. ... (1661); G. Vossius, Dissertatio epistolica de jure magistratus in rebus ecclesiasticis (1669). See discussion in *Nobbs*, at 25ff.; *Bohatec*, at 12ff.

decades of the Dutch republic. The reformed church, though not established, was favored throughout the Netherlands and subject to considerable civil control, particularly in Zeeland, Holland, and Gelderland.[50] The provincial and municipal authorities, though not dominated by the reformed ecclesiastical officials, often cooperated with them in the promulgation and enforcement of civil law, particularly in Friesland and Groningen.

III. Canon Law After the Reformation

The Reformation transformed the law of both the church and the state in the Netherlands. The reformed ecclesiastical authorities promulgated a welter of new ordinances to govern the internal affairs of the church. The reformed civil authorities promulgated a welter of new ordinances to govern those subjects and persons previously within the jurisdiction of the pope and the Spanish monarch.

This legal transformation, however, was not nearly so radical as some of the earlier reformers had envisioned. The new reformed church law, though far narrower in scope than the canon law, still emulated basic Catholic forms. The new civil laws, though filled with bold revisions, readily incorporated canon law provisions.

1. Canon Law Within the Reformed Church

a) Ecclesiastical Polity

Like the Catholics, the reformers developed a hierarchical church polity. Just as the Catholics had divided the Netherlands into parishes, deaneries, and archdeaconries, so the reformers divided it into congregations, classes, and synodical provinces. Just as the Catholics had assigned courts and officials to each ecclesiastical division, so did the reformers. Just as the Catholics had provided for a system of appeal to and review by higher ecclesiastical courts

[50] See generally *De Jong*, at 179ff.; *Duke / Jones*, Towards a Reformed Polity in Holland, 1572 - 1578, 89 Tijdschrift voor Geschiedenis 373 (1976); *H. van Gelder*, Getemperde vrijheid (1972); *Geyl*, De protestantisering van Noord-Nederland, 2 Leiding 113 (1930), who argue that, for the first few generations, the Dutch republic was too religiously and politically heterogeneous to make possible the establishment of one reformed religion. The Netherlands moved toward religious establishment in 1651, when the General Assembly resolved that "the states of the respective provinces ... declare that they shall maintain and preserve, each in their own lands, the true, christian reformed religion ... as it was established by the national synod held in the year 1619." *Bakhuizen van den Brink*, Documenta reformata, 2 vols., vol. 1, 487 (1960). Yet, even then, the strength of dissenting Protestant and Catholic groups and the fierce independence of provincial synods and assemblies stymied the efforts of those who sought to establish a single national reformed faith.

and officials, so did the reformers.[51] These basic parallels in polity were not accidental. Already in 1563, delegates to the so-called Synod of Teur had recommended that the reformed polity replicate as closely as possible the traditional Catholic polity – a recommendation taken to heart by subsequent synods.[52]

Each congregation was governed by a separate consistory court *(kerkraad; consistorie)*. The reformed consistory courts were modelled not on their Catholic predecessors, but on those developed earlier by John à Lasco in East Friesland, John Calvin in Geneva, and Martin Micronius (with Lasco) in London.[53] The multiple responsibilities of the consistory were divided among the four offices of preacher, doctor, elder, and deacon that Calvin had defined.[54] (1) An ordained minister *(dienaar, predikant)* was responsible to preach the word, administer the sacraments, counsel the wayward, console the sick, and preside at all plenary consistory sessions. Most ministers were trained in theology. Very few ministers were trained in law, and those that were could not readily engage in legal, political, or commercial activities.[55] Despite the

[51] On the organization of the Dutch reformed churches in the early decades of the republic, see generally *Apeldoorn*, De kerkelijke goederen, passim; *Rengers Hora Siccama*, passim; *Duke*, The Ambivalent Face of Calvinism in the Netherlands, 1561 - 1618, in International Calvinism, 109, 121ff. (M. Priest ed. 1985); *T. Haitjema*, Nederlands hervormd kerkrecht (1951); *Ellemeet*, De organisatie der utrechtse gereformeerde kerken voor de invoering der dordtse kerkenorde, 36 Nederlandsch Archief voor Kerkgeschiedenis (n.s.) 247 (1948); *S. De Jong*, The Hierarchical Order in Holland at the Time of the Reformation (Ph. D. Diss. Gregorian, 1938); *H. Hoffmann*, Das Kirchenverfassung der niederländischen Reformierten bis zum Beginne der dordrechter Nationalsynode von 1618/1619 (1902; 1907).

[52] *M. Hansen*, The Reformed Church in the Netherlands Traced From 1340 to 1840, 94 (1884).

[53] The ecclesiastical ordinances developed by Lasco and others for East Friesland are collected in E. Sehling, Die evangelischen Kirchenordnung des XVI. Jahrhunderts, 16 vols., vol. 7, part 1, 307ff. (1902 - 1978) and discussed in *Hoffmann*, at 1 - 13. The ecclesiastical ordinances developed for the exiled reformed church in London are collected in W. Dankbaar, De christelijke ordinancien der nederlantscher ghemeinten te London (1554) (1956) and discussed in *A. van Schelven*, Kerkeraadsprotocollen der nederduitsche vluchtelingen-kerk te London, 1560 - 1563 (1921) and *A. Kuyper*, Kerkeraads-protocollen der Hollandsche gemeente te London, 1569 - 1571 (1870). The Ecclesiastical Ordinances of Geneva (1541) are collected in J. Bergier, Registres de la compagnie des pasteurs de Geneve au temps de Calvin, 1 - 13 (1964).

[54] J. Calvin, Institutio christianae religionis, IV. 3 (1559), reprinted in Corpus Reformatorum, vol. 30, 1 (1864). The delineation and definition of these four offices was set forth in numerous acts promulgated by the early Dutch synods. See particularly Acta synodi ecclesiarum belgicarum ... habitae Embdae, items 13 - 17 (1571), in F. Rutgers, Acta van de nederlandsche synoden der zestiende eeuw, 55 (1889); Acta ofte handelingen des nationalen synodi der Nederlandschen ... gehouden tot Dordrecht, items 1 - 46 (1578), in C. Hooijer, Oude kerkordeningen der nederlandsche hervormde gemeenten (1563 - 1638), 145 (1865); and Kerkenordeninge der nederlandsche gereformeerde kerken ... gesteld in den nationalen synode ... in s'Gravenhage, items 2 - 25 (1586), in Hooijer, at 270. See also *Hoffmann*, at 95 - 124.

[55] See, e.g., Acta ofte handelingen des provinciale synodi der kerken van Holland en Zeeland, gehouden binnen Dordrecht, q. 4 (1574), in Hooijer, at 109 - 110; Acta synodi particularis van Suydthollandt, gehouden in den Briel, item 28 (1593), in J. Reitsma / S. Van Veen, Acta der provinciale en particuliere synoden, 8 vols., vol. 3, 11 (1953). See generally *G. Groenhuis*, De predikanten. De sociale positie van de gereformeerde predikanten in de republiek der vereinigde Nederlanden voor c. 1700 (1977).

church's protests, civil rulers, particularly in Zeeland and Holland, took an active hand in selecting and supervising the ministers.[56] (2) One or more doctors of theology served to catechize the young, to organize parochial schools within the community, and to help adjudicate disputes concerning doctrine and liturgy that arose within the congregation. Their appointments, too, were sometimes subject to civil scrutiny and control. (3) Several elders *(ouderlingen)* were appointed to maintain orthodoxy and order within the congregation. They regularly visited the homes of parishioners *(huisbezoek)* to ensure that they were faithful in their devotional life. They examined new members who sought to participate in the congregation or to partake of the communion. They adjudicated, usually with the minister presiding, all cases involving spiritual or moral disputes or offenses that arose within the church.[57] (4) Several deacons *(diakonen)* served as financial officers of the church, who collected the tithes, coordinated the maintenance of church properties, and made distribution to the poor and needy within and without the church.

A group of congregations within a large municipality or rural region formed a classis. The classis had its own court comprised of representatives from each consistory court. This court generally met every few months to hear appeals from the consistory courts, to appoint visitors to review the spiritual and material health of the classis, and to review the performance of local congregations. The classis courts also adjudicated *de novo* any case involving spiritual or moral corruption of a minister or doctor and any case in which the consistory court had recommended excommunication of a parishioner.[58]

Each of the seven provinces also had a synod or provincial church court *(provinciale kerkeraad)*, comprised of representatives from each of the classes.

[56] See, e.g., Kerkelijke wetten ... van Holland en Zeeland, items 1 - 18 (1576), in Hooijer, at 121; Kerkelijke wetten ... van Holland, items 1 - 4, 7 (1583), in Hooijer, at 233; Kerkenordening van Zeeland, items 2 - 17 (1591), in Klein plakkaatboek, at 193. Zeeland later established a so-called *collegium qualificatum*, comprised of both civil and ecclesiastical officials, to appoint ministers. See *Jones*, at 116 and, more generally, *W. de Beaufort*, De verhouding van den staat tot de verschillende kerkgenootschappen in de republiek der vereenigde Nederlanden, 1581 - 1795 (1868).

[57] See generally, *A. van Ginkel*, De ouderling. Oorsprong en ontwikkeling van het ambt van ouderling en de functie daarvan in de gereformeerde kerk der nederlanden in de 16e en 17e eeuw (1975); *T. Hoekstra*, Het Huisbezoek, 52ff. (3d ed. 1923).

[58] Among the numerous early synodical acts to describe the form and function of the classis, see particularly Acta ofte handelingen des provinciale synodi der Kerken van Holland en Zeeland, gehouden binnen Dordrecht, items 9 - 11, 73 (1574), in Hooijer, at 98; Kerkenordre van landtschap Drenthe, items 45 - 55 (1638), in Klein plakkaatboek, at 257. For a careful study of the work of one classis, see *C. Tukker*, De Classis Dordrecht van 1573 tot 1609 (1965) and *J. van Dooren*, Classicale Acta 1573 - 1620 (1980).

The synods were both legislative and judicial bodies. They issued church ordinances to govern the policy, doctrine, and discipline of the church. They adjudicated cases that raised particularly novel or intricate claims or that had divided the classis courts. They set standards for ordination of ministers and appointment of doctors, and examined new candidates for each of these offices. They issued advisory opinions and orders to classis and consistory courts.[59] In theory, each of the seven provincial synods was to convene at least annually, and a national synod was to convene biannually. In reality, after the first generation, the provincial synods rarely met more than twice a decade, and a national synod was convened only four times in the period of the republic.

The new reformed church courts were far less formal than their Catholic predecessors. They had few professional judges, notaries, advocates, or other officials trained in law. They had few formal procedures for pleading cases, hearing evidence, or registering appeals. They had few requirements for written proceedings and formal records. The ordinances promulgated by the provincial and national synods were relatively simple legal documents that listed rules and requirements categorically but left most of the details to the discretion of the officials. The opinions issued by the classical and synodical courts usually included only cryptic descriptions of the issue at hand together with the holding; little was offered by way of *ratio decidendi* or citation to authority. In later years, the reformed church law was rendered more systematic and formal by the learned tracts and advisory opinions *(kerkelijke advijzen)* of university theologians. But, in the first several decades, a good deal of this new church law was left informal and unwritten.

b) Ecclesiastical Jurisdiction[60]

The reformed church courts also exercised a far more limited jurisdiction than their Catholic predecessors. They restricted themselves, in one synod's

[59] The ordinances promulgated by the provincial and national synods are collected in Hooijer; Rutgers; Reitsma en van Veen; W. Knuttel, Acta de particuliere synoden van Zuid-Holland, 1621 - 1700, 6 vols. (1621 - 1700); N. Wiltens / P. Scheltus, Kerkelijke Plakkaatboek, 5 vols. (1722 - 1807). Most of the synodical opinions are simply appended to these ordinances under the title *"particularia"* or *"quaestiones"* or, on occasion, simply annotated to the relevant provision in the church ordinance.

[60] I am using the term "ecclesiastical jurisdiction" here in the modern sense of the authority or power of church officials to declare, interpret, and enforce rules and regulations to govern doctrine and discipline within the church. Many of the reformers, building on Calvin, spoke of ecclesiastical power (potestas ecclesiasticae), which they divided into: (1) "doctrinal power" (potestas doctrinae), that is, "the authority to lay down dogmas and interpret them" (autoritatem dogmatum tradendorum et eorum explicationem); (2) "legislative power" (potestate in legibus ferrendis), that is, the power to make laws that protect "deceny" and "dignity" in the church and "humanity" and "moderation" in the community at large; and (3) "jurisdiction [which] pertains to the discipline of morals [and promotes] an order framed for the preservation of the spiritual polity" (jurisdictio ... pertinet ad morum disciplinam ... ordo comparatus ad spiritualis politiae conservationem). See Calvin, at III. 8, 10, 11; Voetius, at vol. 1, 114ff., 340ff., vol. 3, 783ff. The political nomenclature of the Calvinist reformers differed markedly from that of their Catholic predecessors and contemporaries. On the latter point, see the excellent article by *Wolter,* Amt und Officium in mittelalterlichen Quellen vom 13. bis 15. Jahrhundert: Eine begriffsgeschichtliche Untersuchung, 105 Zeitschrift der Savigny-Stiftung (Kan. Ab.) 246 (1988).

words, to "matters that are wholly ecclesiastical," and left "all matters that are partly ecclesiastical and partly political [the *res mixti fori*] ... to the judgments and authority of the magistracy."[61] Moreover, the reformed church courts narrowed considerably the definition of "wholly ecclesiastical" matters. They did not accept the sacraments of marriage, penance, and extreme unction, and thus claimed no special subject matter jurisdiction over marriage, divorce, and annulment, over crimes, delicts, and oaths, or over testaments, trusts, and intestacy, respectively. They did not distinguish between clergy and laity, and thus claimed no special personal jurisdiction over clerics and no special clerical immunities from civil taxation, prosecution, and services. They limited their jurisdiction to matters (1) doctrinal and liturgical; (2) moral and disciplinary; and (3) charitable and educational.[62] These matters had also lain at the heart of the spiritual jurisdiction of the Catholic church courts.

First, the reformed church courts, like their Catholic predecessors, prescribed orthodox doctrine and liturgy for their parishioners. Ministers were instructed to preach from the Geneva Bible, the "ancient ecumenical creeds," and the Confession of 1561 (later called the Belgic Confession). Doctors were enjoined to teach from the Genevan and Heidelberg catechisms. Parishioners were instructed to read the Word and to offer prayers daily and to teach their children Christian piety and charity. The church ordinances required attendance at Sunday services and observance of the holy days of Christmas, Good Friday, Easter, and Ascension Day. They prescribed prayers, rituals, and songs for the celebration of the sacraments, the confirmation of new communicant members, and the consecration of marriages.[63]

[61] Acta ofte handelingen des provinciale synodi der Kerken van Holland en Zeeland, gehouden binnen Dordrecht, item 5 (1574), in Hooijer, at 97 - 98; see also id., at item 88. In the province of Holland ministers were required to swear oaths that they would defer to and respect the civil law, on pain of defrockment. See Kerkelijke wetten ... van Holland, items 4 - 5 (1583), in Hooijer, at 235.

[62] This limitation on the church's jurisdiction was consistent with the influential Confession of Faith of 1561, which declared that the church be governed by "a spiritual polity," that "it is useful and beneficial that those who are rulers of the church institute and establish certain ordinances among themselves," and that "by these means" (1) "the true religion may be preserved and true doctrine everywhere propagated"; (2) "transgressors [may be] punished and restrained by spiritual means"; and (3) "the poor and distressed may be relieved and comforted." Confessio Belgica, Arts. 30, 32 (1561), reprinted in P. Schaff, The Creeds of Christendom, 3 vols., vol. 3, 383 (1877).

[63] These doctrinal and liturgical prescriptions are particularly prevalent in early synodical decrees collected in Rutgers; Hooijer; Reitsma / van Veen. See, e.g., Acta ofte handelingen

The church courts also proscribed "spiritual or doctrinal sin" among their parishioners. Such sin included not only idolatry, blasphemy, Sabbath-breaking, sorcery, and sacrilege, and other obvious spiritual lapses. It also included entertaining or teaching heretical doctrines, printing or selling scandalous literature, associating too closely with Anabaptists, Lutherans, or Catholics, refusing participation in the sacraments, or resisting the spiritual admonitions and instructions of the church courts.[64]

Much of the litigation over spiritual affairs in the reformed church courts concerned minor details of liturgical form. The early synodical and classis records are replete with inquiries concerning the minimum age for infant baptism, the appropriate form of baptism of new converts, the frequency of celebration of the Holy Supper, the standards for admission to communion, the appropriate language and length of worship services, the purpose and procedure of marital consecration, and numerous similar questions. Such issues were disposed of summarily, rarely producing an order or opinion of more than a few sentences. Later, these judgments were often woven into revised versions of the church ordinances.

On occasion, the litigation over spiritual affairs concerned more interesting issues of doctrinal formulation. The theological teachings of Caspar Coolhaas, for example, a reformed minister and theology professor in Leiden, sparked considerable controversy and litigation.[65] In 1579, Coolhaas sought to accord the Leiden magistrates greater authority in the selection and supervision of the elders and deacons that served in his consistory. When challenged by fellow ministers in Leiden, he wrote a lengthy apologia for his position and criticized sharply the reformed doctrines of church and state.[66] A national synod, meeting at Middleburg in 1581, condemned his teachings and ordered him to repent.[67] When he refused, a Provincial Synod at Haarlem the following year defrocked and excommunicated him.[68] Later synodical and classis courts further condemned distribution of his writings and teaching of his doctrines. Similar litigation erupted over the theological teachings of Leiden theology

des provinciale synodi der Kerken van Holland en Zeeland, gehouden binnen Dordrecht, items 37 - 81 (1574), in Hooijer, at 102; Kerkenordeninge der nederlandsche gereformeerde kerken ... gesteld in den nationalen synode ... in s'Gravenhage, items 47 - 63 (1586), in Hooijer, at 276; Canones synodi dordrechtanae (1618/1619), in Schaff, at vol. 3, 550.

[64] See, e.g., Acta ofte handelingen des provincialen synodi van Zeelandt ... gehouden binnen Middelburgh, items 62 - 63 (1591), in Hooijer, at 317 and discussion in *Hoffmann*, at 78ff.

[65] See discussion of this case in J. Triglandus, Kerckelycke Geschiedenissen, 163ff. (1650); *Hansen*, at 122ff.; Hooijer, at 188ff.

[66] Apologie. Een christelycke ende billycke verantwoordinge Caspari Coolhaessen (1580).

[67] Hooijer, at 188ff.

[68] The examination and excommunication of Coolhaas is recounted in Memorien van den acten ... den synode der provincie van Hollandt te Haarlem (1582), in Reitsma / van Veen, at vol. 1, 89 - 113.

professor Jacob Arminius and other so-called Remonstrants (including the famous Dutch jurist Hugo Grotius). The Remonstrants taught conditional election on the ground of foreseen faith, universal atonement, partial depravity, resistible grace, and the possibility of lapsing from grace.[69] Several synodical and classis courts at the turn of the seventeenth century criticized these doctrines. In 1618 - 1619, the national synod meeting at Dordrecht issued a stinging *Five Articles Against the Remonstrants* in which they required adherence to the doctrines of unconditional election, limited atonement, total depravity, irresistible grace, and the eternal perseverance of all the saints.[70] Arminius, Grotius, and all those who entertained contrary doctrines were branded as heretics and were banned, with their families, from the church.

Second, the reformed church courts, like their Catholic predecessors, exercised a stern moral authority over their parishioners. The Catholic Church had based its authority over morality chiefly on the sacrament of penance. Baptized believers, the Church had taught, were required to confess their sins and to reconcile themselves to God, on pain of eternal punishment. The church had claimed the authority to define the vices that required confession, to hear the sinner's confession, to absolve him from eternal punishment, and to prescribe virtuous works of purgation.[71] The reformed church based its jurisdiction over morality on the sacrament of the Eucharist or Lord's Supper *(Avondmaal)*. Baptized believers, the church taught, who sought to partake of communion, were required "to examine their hearts and confess their sins," lest they "profane and pollute" the sacrament and "eat and drink judgment upon themselves" and upon the whole congregation.[72] Like the Catholics, the reformed church courts assumed the authority to define the vices that required confession and to punish by spiritual means those who resisted such confession. Unlike the Catholics, however, they did not assume the authority to absolve the sinner from eternal punishment or to prescribe penitential works of purgation. Critics, like Coolhaas and Arminius, saw little substance in these distinctions and charged that the reformers had "retained a large remnant of the popish yoke" and had "restored the tyranny of Christian consciences."[73]

[69] See generally, *C. Bangs*, Arminius: A Study in the Dutch Reformation (2d ed. 1985); *Hoenderdaal*, Arminius en Episcopius, 60 Nederlands Archief voor Kerkgeschiedenis (n.s.) 203 (1980).

[70] See the Canones synodi dordrechtanae (1618/1619) together with the Sententia synodi de remonstrantibus (1618/1619), in Schaff, at vol. 3, 550 and 578 respectively.

[71] See generally, *P. Anciaux*, The Sacrament of Penance (1962); *K. Rahner*, Theological Investigations, 2 vols., vol. 2, 135ff. (K. Kruger trans. 1963).

[72] The formulation is from Calvin, at IV. 17. 40 and is repeated in numerous church ordinances and synodical acts. See, e.g., the Kerkelijke wetten ... van Zeeland, items 68 - 73 (1591), in Klein plakkaatboek, at 200 - 201. See discussion in *Duke*, at 130ff.; *Hoffmann*, at 73ff.

[73] Quoted in *Duke*, at 131.

Building on Calvin's taxonomy, the reformed church courts distinguished between private or light sins and public or grave sins.[74] Private sins *(heymlicke delicta)* were those immoral thoughts or acts that caused no tangible harm to others – greed, sumptuousness, lust, masturbation, bestiality, hatred, jealousy, envy, and similar vices. Public sins were those crimes or shameful acts *(scelera, flagitia)* that caused either tangible harm to others or open scandal within the church – "murder, adultery, bigamy, prostitution, robbery, theft, perjury, drunkenness, and other ... open violations of the Second Table [of the Decalogue]."[75]

Private sinners were punished by the private admonitions of the minister or an elder. Public sinners were required to confess their sins first before the consistory court, then before the whole congregation. Such public confession had a retributive, deterrent, and rehabilitative effect. It brought shame and scorn on the sinner. It warned the sinner and others of the perils and punishments of wayward living. It enabled the sinner to fortify himself with the counsel, comfort, and prayers of fellow believers. Those who refused either private admonition or public confession, or who persisted in their moral delinquency, were banned from the Eucharist and had their names posted. Recalcitrant or incorrigible parishioners were excommunicated from the church, after a period of warning.[76]

Much of the litigation over morality within the reformed church courts dealt with marital, sexual, and sumptuary concerns – whether church members could marry other Protestants, Catholics, or Jews, whether adulterers who became widowers could marry their mistresses, whether earlier secret marriages could be formalized and consecrated, whether nonmarried couples could cohabit for reasons of necessity or convenience, whether wives could leave drunken or abusive husbands, whether children could disobey or leave negligent parents, whether illegitimate children could be baptized, and the like. The church courts – at least after the first generation – addressed only the morality of the parties' actions and instructed them to take up their legal questions with the local magistrate.[77]

[74] See Calvin, at IV. 12. 3, 4, 6.

[75] Kerkelijke wetten ... van Zeeland, items 62 - 67 (1591), in Klein plakkaatboek, at 200.

[76] Ibid. See generally the detailed treatment in *Haitjema.*

[77] See, e.g., Acta ofte handelingen des provinciale synodi der Kerken van Holland en Zeeland, gehouden binnen Dordrecht, items 88 - 89, qq. 8, 11, 12, 14, 17, 18, 26 (1574), in Hooijer, at 109 - 114; Acta ofte handelingen des nationalen synodi der Nederlandschen ... gehouden tot Dordrecht, items 90 - 97, qq. 5, 39 - 40 (1578), in Hooijer, at 145; Kerkenordeninge in den nationalen of generalen synodi ... tot Middelburg, qq. 36, 60, 87 (1581), in Hooijer, at 201. See generally, *Nörr,* Die kirchliche Gesetzgebung – Niederlande, in Coing, at vol. 2, part 2, 1100 - 1101. In more erastian polities like Holland and Zeeland, the civil authorities included marriage and family provisions in the church ordinances they promulgated and delegated to the church courts, as their agents, some authority to enforce them. See, e.g., Kerkelijke wetten ... van Holland, items 23 - 39 (1583), in Hooijer, at 225.

Several of these issues were combined in a case that came before the National Synod of s'Gravenhage (1586). From the court record and external accounts the following facts are clear. The defendant, while serving abroad in the army, committed adultery. Thereafter, he was notified that his wife had died. He secretly married his lover and cohabited with her. He then discovered that his first wife, though ill, was still alive. He decided to live in bigamy with his second wife, until his first wife died. After she died, the defendant and his second wife sought to be formally married and admitted to communion in a reformed church in Groningen. The Provincial Synod of Groningen apparently refused to formalize the marriage and to admit the couple to communion. The National Synod of s'Gravenhage reversed the Provincial Synod, holding that if the couple would publicly confess their sins of adultery, bigamy, and secret marriage to the congregation, and if they could have their marriage formalized at civil law, they would be admitted to communion in the church.[78]

The church's jurisdiction over sin coincided closely with the state's jurisdiction over crime. In theory, the two authorities maintained strictly independent procedures and would hear nothing of a double jeopardy defense. "Criminal punishment will not absolve a sinner from ecclesiastical punishment," reads one church ordinance, "nor will ecclesiastical punishment insulate a criminal from criminal punishment."[79] In reality, church courts and magistrate courts sometimes collaborated informally in the prosecution and punishment of guilty parties. The two courts often apprised each other of pending cases. They shared evidence gathered in the investigation of the offense and the interrogation of the defendant and witnesses. They drew on each other's personnel and expertise when dealing with particularly difficult cases. They consulted with each other in devising the appropriate punishments. Church courts would send felons who appeared before them to the magistrate courts with a strong recommendation that they be executed or forced to perform hard labor. Magistrate courts would send those guilty of "light offenses" to the church courts for reproof and prescribed community service.[80] Some of this cooperation, particularly in Holland and Zeeland, was forced on the church by officious magistrates. Some of the cooperation was inevitable, given that officials served simultaneously on both the church courts and civil courts.

[78] See Kerkenordeninge ... gesteld in den nationalen synode ... in s'Gravenhage, q. 11 (1586), in Hooijer, at 282 along with discussion in *L. Ippel,* Kerkgeschiedenis in s'Gravenhage, 144 - 147 (1877).

[79] Acta ofte handelingen des nationalen synodi der Nederlandschen ... gehouden tot Dordrecht, item 92 (1578), in Hooijer, at 157 - 158; see also Kerkenordening van Zeeland, item 72 (1591), in Klein plakkaatboek, at 201.

[80] See generally, *Fockema Andreae,* De kerk op wereldlijke terrein onder de republiek, 39 Nederlands Archief voor Kerkgeschiedenis (n.s.) 146, 151 - 156 (1952/3) [hereinafter *Fockema Andreae,* De kerk].

Third, the reformed church courts, like their Catholic predecessors, exercised broad authority over education, poor relief, and other forms of public charity. The Catholic Church had vested its charitable authority in cloisters, chantries, rural deans, and parish priests, the latter three of which were subject to the general supervision and visitation of the archdeacon. Funding for their charitable work had come from both diocesan contributions and private gifts and inheritances. The reformed church vested charitable authority in the congregational consistory courts, each of which was subject to the general supervision and visitation of the classis. Funding for their charitable work came from a portion of the weekly congregational tithes that was deposited in a designated "benevolent fund."

The congregations and consistory courts discharged a variety of charitable functions within the community. Church meetinghouses and chapels were used not only to conduct religious services, but also to host town assemblies and political rallies, to house the community library, and to hold certificates of birth, marriage, and death. Parsonages were used not only to house the minister and his family, but also to harbor orphans and widows, the sick and the aged, and victims of abuse and disaster. Ministers served not only as preachers in their churches, but also as chaplains in local prisons, hospitals, and asylums. Doctors of theology served not only to catechize parishioners in the congregation but also to organize schools in the community for theological and humanistic education. Deacons served not only to control the finances of the church, but also to distribute alms to the poor and to coordinate the work of local almshouses, hospitals, orphanages, and other charitable organizations.[81]

The reformed church courts regarded such charity not only as a form of ministry, but also as a form of mission. On the one hand, they insisted that their charitable services cross denominational lines. "No distinction may be made," one church ordinance put it, "between persons of different faiths in giving or distributing poor relief, food, or other alms."[82] On the other hand, they insisted that such charity serve the end of spreading the reformed gospel. Thus ministerial chaplains not only dispensed comfort and counsel but also distributed Geneva Bibles and reformed pamphlets. Day schools hired only those teachers who "accepted the confession of faith of the Dutch churches" and who "taught not only language and the arts, but also and primarily the

[81] Among provisions on the charitable and educational responsibilities of the churches, see, e.g., Kerkelijke wetten van ... Holland en Zeeland, items 32 - 33, 35, 40 (1576), in Hooijer, at 125 - 126; Acte ofte handelingen des nationalen synodi der Nederlandschen ... gehouden tot Dordrecht, items 47 - 52 (1578), in Hooijer, at 152; Kerkelijke wetten ... te s'Gravenhage, items 25, 26, 39 (1591), in Hooijer, at 345 - 348. See generally *Fockema Andreae,* De kerk, at 146ff.; *Tukker,* at 67ff.; Groenhuis, at 145ff.; *Duke,* at 128ff.; *A. Kunst,* Van Sint Elisabeths-Gasthuis tot Gereformeerd Burgerweeshuis (1954).

[82] Quoted in *Kunst,* at 119.

Christian catechism."[83] Charitable organizations generally accepted the services only of those who professed the reformed faith.

In some communities at least, the reformed ecclesiastical and civil authorities collaborated in the dispensing of public charity. The civil authorities would supply a portion of the monastic or other property that they had confiscated from the Catholic Church during the Dutch revolt. The ecclesiastical authorities would supply the staff and volunteers to operate the charity.[84] In 1582, the authorities in Leiden forged an even closer alliance. They established a common charitable fund comprised of both church tithes and state taxes. They also established a common governmental body, comprised of both ecclesiastical and civil officials, that coordinated the work of charity throughout the city.[85]

2. Canon Law Within the State

The Dutch Reformation transformed not only the law of the church but also the law of the state. The abolition of papal and Spanish royal authority required the provinces and municipalities to assume jurisdiction over numerous subjects and persons previously beyond their competence. The doctrines of the reformers required them to develop laws and policies that were consonant with Scripture and natural law. Thus, in the early decades of the Dutch republic, civil legislatures and councils promulgated a welter of new statutes and codes. Civil courts assumed jurisdiction over such subjects as marriage and family, testaments and charities, moral and religious crimes and over such persons as church officials, heretics, and *personae miserabiles.* Civil jurists produced systematic syntheses of the new civil laws and offered learned opinions in explication and elaboration of the new codes and cases.

The reformers did not begin, however, on a *tabula rasa.* They drew upon the entire legal tradition of the Netherlands, preserving what they could of the past. The canon law was an essential part of this legal tradition, whose use, as Apeldoorn put it, "was never expressly prohibited by the reformed authorities."[86] It thus remained an important source of the civil law of the early Dutch republic, as it had been prior to the Reformation.

The canon law manifested its influence after the Reformation in four types of Dutch legal writings inherited from pre-Reformation times: the learned

[83] Acte ofte handelingen des nationalen synodi der Nederlandschen ... gehouden tot Dordrecht, items 47, 50 (1578), in Hooijer, at 152.

[84] See generally *Fockema Andreae,* De kerk, at 146ff.; *D. Campbell,* The Puritan in Holland, England, and America, 225ff. (4th ed. 1892).

[85] See *Jones,* at 121.

[86] *L. van Apeldoorn,* Geschiedenis van het nederlandsche huwelijksrecht voor de invoering van de fransche wetsgeving, 76 (1925) [hereafter *Apeldoorn,* Geschiedenis].

opinions and treatises of civil jurists together with the judicial opinions and statutes of civil magistrates.

First, the numerous new opinions of the Dutch civil jurists drew upon the canon law. Johan Schrassert's famous five volume collection of opinions of Dutch jurists reflects this dependence already in its subtitle: "[a collection] wherein different cases, questions, and points of law out of the fatherland ... are clarified on the basis of both the written Roman *(keyserlycke)* and canon *(pauslycke)* laws."[87] Though many of the opinions in Schrassert's collection make no reference to the canon law – or, for that matter, to any law – those of the more learned jurists are replete with such references. Likewise, the opinions of Hugo Grotius draw on the canon law. A 1616 opinion of Grotius, for example, posed the question whether a defendant who had extracted a usurious rate of interest from a loan, disguised as a purchase and sale, could be sued in delict. Citing Panormitanus and several decretals, Grotius concluded that he could be so charged since "the word usury ... applied to all contracts whereby one made unjustifiable profit through extortion from needy persons." Citing another decretal, he recommended a "heavier punishment" for the defendant, since his repeated extortions of "usurious profit" betrayed a "delinquent spirit."[88] A 1632 opinion of Grotius analyzed whether a woman had furnished sufficient proof of her husband's adultery to divorce him. The husband had confessed that he was "dissatisfied with her" and that "he had had a connection with" another woman. Several witnesses had testified that he was a man of "ill repute" who was known to frequent houses of "ill fame." Citing the work of the canonist Johannes de Imola on the law of evidence, Grotius concluded that the woman had proved the adultery and could be granted at least a separation from bed and board, if not an outright divorce.[89] A similar dependence on canon law sources is evident in dozens of opinions by Grotius and other seventeenth century Dutch jurists.

Second, the canon law also found a place in the numerous new treatises on Dutch law produced by judges and jurists after the late sixteenth century.[90] Such treatises included both (1) systematic summaries of provincial law, modelled on the two early classics, Hugo Grotius's *Inleiding tot de Hollandsche Rechtsgeleertheyd* and Ulric Huber's *Heedensdaegse Rechtsgeleertheyt;* and (2) more specialized treatises on discrete questions of public law and private law. The use of canon law varied greatly in concentration and sophistication from treatise to treatise. Grotius' Inleiding, for example, though it covers numerous subjects previously governed by the Catholic church, refers only sporadically and casually to the rules of the "spiritual law," with no citation to and little explication of the rules adduced.[91] Similarly, Cornelius van Bynkershoek's *Quaestiones Juris Privati* admits almost grudgingly that "[w]e cannot deny that the canon law has had some influence on our practice with regard to marital affairs," and in the next line warns that "we must strive to ensure that this influence does not become any greater than it need be."[92] By contrast, Henrici Brouwer's *De Jure Connubiorum,* whose subtitle reads, "[a work] in which the natural, divine, civil, and canon law of marriage are referenced, expounded, and explicated," analyzes the canon law of marriage, annulment, and divorce in copious detail and traces its vestiges in the new civil law of the Netherlands.[93] Similarly, works like Johannes Voetius's *Compendium juris ... civilis et canonici*[94], and J. F. Böckelman's *De differentiis juris civilis, canonici et hodierni*[95] provide a detailed comparison of endemic and ecclesiastical laws governing discrete questions of contract, property, delict, marriage, inheritance, and other private laws. These and other treatises reveal that the canon law remained an essential part of the learned law of the Dutch republic.[96]

Third, the judicial opinions of some of the high provincial courts in the Netherlands drew regularly on the canon law. Even a casual perusal of some of the opinions collected in Johannes a Sande's *Theatrum practicantium*[97] and in an early collection *Utriusque, Hollandiae, Zelandiae, Frisiaeque, curiae decisiones*[98] reveals an array of quotations and discussions of contemporary

[87] J. Schrassert, Consultatien, Advysen, ende Advertissementen; waer in verscheyde gevallen, quaestionen ende poincten van regten uyt de vaderlandsche, mitsgaeders meest overeenkoomende ende nabuyrige statuten ende gewoonten werden verhandelt, gededuceert ende opgeloscht, ende uyt beyde de beschreevene keyserlycke ende pauslycke Regten gesterckt ende opgeheldert ..., 5 vols. (1740 - 1754; 1783). The subtitle appears in each of the five volumes.

[88] See *F. de Bruyn,* The Opinions of Grotius as Contained in the Hollandsche Consultatien en Advijsen, 527 (1897), translated from Hollandsche Consultatiën (1648).

[89] *de Bruyn,* at 610.

[90] For an excellent introduction to these jurists and their writings, see *R. Feenstra / C. D. J. Waal,* Seventeenth Century Leiden Law Professors and Their Influence on the Development of Civil Law (1975); *Dekkers,* passim.

[91] See Grotius, at I. 2., I. 5, II. 7, II. 16, II. 17, II. 20, II. 45.

[92] Quoted in *Wessels,* at 140. See a similar deprecation and warning of canon law influence in P. Voetius, De usu juris civilis et canonici in Belgio unito (1657), further discussion in *Feenstra,* Canon Law.

[93] H. Brouwer, De jure connubiorum libri duo in quibus jura naturae, divinae, civile, canonicum, prout de nuptiis agunt, referuntur, expenduntur, explicantur (1665; 1714).

[94] J. Voetius, Compendium juris juxta seriem pandectarum, adjectis differentiis juris civilis et canonici (1682; 1720).

[95] J. Böckelman, De differentiis juris civilis, canonici et hodierni, cum notis E. Ottonis (1694; 1737).

[96] Among later treatises, see particularly A. Matthaeus, Manductio ad jus canonicum (1696); C. Regnerus ab Oosterga, Dissertatio de iure canonico, quomodo et quando locum habeat in foris Protestantium (1644). These and other treatises are treated at greater length in *Feenstra,* Canon Law, passim.

[97] J. a Sande, Theatrum practicantium hoc est decisiones aureae sive rerum in suprema frisiorum curia judicatarum (1635; 1698).

[98] Utriusque Hollandiae, Zelandiae, Frisiaeque curiae decisiones (1617; 1667).

and historical canonists. The cases both followed and departed from the canon law. In a 1619 case, for example, a magistrate court in Holland was asked to determine the appropriate punishment for a woman convicted for "deliberately asphyxiating her slow [i.e., retarded] infant child." The Court adduced several canonists and confessional writers – Gratian, Johannes Andreae, Angelus de Clavasio, Jacobus Almainus, and Petrus Peckius – to support its ruling that "infanticide is a mortal sin and capital crime." It then ordered the woman to be executed, after "a period of reflection."[99] A 1606 case before the Supreme Court of Friesland posed the following facts. A testator devised certain real property to her husband, in violation of a local statute that prohibited testators from depriving legal heirs of their patrimonial estates without just cause. The legal heirs took possession of the property. The devisee husband sued the legal heirs for the value of the property. The Court held for the legal heirs. Friesland generally follows the canon law rule that allows a devisee to collect the value of the devised property if he cannot get possession, the Court reasoned, citing Joannes de Imola, Jacobus de Arena, Petrus Peckius, and other canonists. Yet this devise was in "open and knowing violation of an express statute" and so the general rule did not apply.[100]

Fourth, the canon law helped to shape the new statutes on morals, inheritance, and marriage that were promulgated in the early decades of the republic. The provincial estates set to work immediately after the Reformation, promulgating, *inter alia,* the Politieke Ordonnantie van Holland (1580), the Politieke Ordonnantie van Zeeland (1583), the Ordonnantie van Utrecht (1584), the Echtordnungh van Gelderland (1597), the Placcaet op 't stuck van de successien ab intestato (1599), the Landrecht van Drenthe (1600; 1614), the Statuten, ordonnantien, en costumen van Friesland (1602), the Ordonnantie van Overijssel (1603), and numerous amendments and emendations to the same.[101] The estates-general of the United Provinces added the famous Egtreglement in 1664.[102]

The new statutes prohibited many moral offenses that had traditionally been governed largely by the canon law and the church courts. New Sabbath-day laws prohibited all forms of unnecessary labor and uncouth leisure on Sundays and holy days and required faithful attendance at services. New spiritual laws prohibited blasphemy, sacrilege, witchcraft, sorcery, magic, alchemy, false oaths, and similar offenses. New sumptuary laws proscribed immodest

[99] Id., at 112.

[100] Sande, at IV. 4. 4.

[101] These statutes are reproduced in Klein plakkaatboek; *J. Ankum / J. De Smidt,* Mini-Plakaatboek. Zeven van de belangrijkste wetten uit het oud-vaderlandse Recht (1968) [hereafter Mini-Plakaatboek]. See also *J. Ennik,* Het landrecht van Drenthe van 1614 (1979).

[102] Egtreglement, over de steeden en ten platten lande, in de heerlijkheden en dorpen staande onder de Generaliteit (1664).

apparel, wasteful living, and extravagant feasts and funerals. New sexuality laws forbad "unnatural" sexual relationships such as incest, bigamy, polygamy, homosexuality, and prostitution and "undignified" sexual acts, such as masturbation, bestiality, sodomy, pornography, exhibitionism, and the like. New entertainment laws placed strict restrictions on public drunkenness, boisterous celebration, wild dancing, and gambling and other games that involved fate, luck, and magic.[103] Neither the state's emphasis upon these moral offenses nor its definition of them strayed far from the formulations of the canon law.

The new statutes that treated testate and intestate succession incorporated several canon law provisions. To be sure, much of this new statutory law was drawn directly from Roman and Romanist sources. Yet certain provisions unique to the canon law and contrary to the Roman law also found their place. For example, parents could disinherit children who had adopted heretical or heathen beliefs, or who had "spurned" or "violated" them. Illegitimate children, though generally prohibited from taking any inheritance directly or indirectly, could receive a portion of the estate for their "necessary maintenance." Legitimate children, who were made both heirs and fideicommissaries under one instrument, could first draw their legitimate portion from the estate and then draw their Trebellian fourth from the residue. Last wills and testaments that made "substantial contributions to pious or charitable causes," though defective in form, could still be found valid.[104] These and other canon law provisions were conceived as "equitable and Christian corrections" to the Roman law and thus incorporated in the civil legislation of the republic.[105]

The new civil statutes on marriage and the family blended traditional canon law rules with new provisions that reflected the reformed theology of marriage. Building on the writings of the Geneva Calvinists, John Calvin and Theodore Beza, and the German Lutherans, Philip Melanchthon and Martin Bucer, the Dutch reformers rejected the Catholic sacramental concept of marriage and the traditional subordination of the marital estate to the celibate state. Marriage, the reformers taught, though created by God was a "worldly, secular institution," in which all were encouraged to participate.[106]

[103] See, e.g., Politieke ordonnantie van Zeeland, items 2 - 5, 24 - 39 (1583), in Klein plakkaatboek, at 176, which was emulated in many provinces.

[104] See, e.g., Politieke ordonnantie van Holland, items 19 - 33 (1580), in Klein plakkaatboek, at 126; Placcaet op 't stuck van de successien ab intesto (1599), in Mini-Plakaatboek, at 39; Landrecht van Drenthe, II. 12 - 38, in *Ennik,* at 43. See also discussion in Grotius, at II. 16 - 20.

[105] *Apeldoorn,* at 9 - 14.

[106] See, e.g., Acte ofte handelingen des provinciale synodi ... gehouden binnen Dordrecht, item 88 (1574), in Hooijer, at 108 - 109; Voetius, at I. 3. See the rich collection of quotations and discussion in *Apeldoorn,* Geschiedenis, at 70 - 122. For Calvinist conceptions, see particularly T. Beza, Tractatio de repudiis et divortiis (1569; 1651). For Lutheran

The civil law accepted the canon law definition of the formal betrothal or engagement *(verloving, trouwbelofte)* as the first step to marriage.[107] It also accepted the canon law impediments to betrothal that allowed either party to break the engagement without issue: if one party became a heretic or lunatic, became engaged to or abducted a third party, became physically or emotionally abusive of the other, or became impotent or deformed. It rejected, however, the canon law rule that prior or subsequent religious vows to celibacy automatically voided the betrothal. It also insisted on far more stringent formal requirements for the betrothal, each enforced by stiff fines. Couples, under the age of majority, were required to receive consent from both sets of parents (or guardians, tutors, or curators). They were required to announce their betrothals before at least two good and honorable witnesses. They were required to register their betrothal with the consistory court of the local reformed church, to receive spiritual instruction on marriage from the minister or an elder, and to request the minister to announce their betrothal from the pulpit for at least three successive Sundays. They were required to petition the local magistrate in their domicile for a certificate showing that they were single, in good standing, and free from communicable disease and criminal delinquency. These changes in the law of betrothals reflected the reformers' axiom that marriage was an inherently public institution, in which parents, peers, and pastors all played a vital role.

The civil law also accepted the basic canon law definition of the marriage itself *(huwelijkssluiting)* as a free consensual heterosexual union between two fit parties. It accepted the canon law impediments that protected the free consent of both parties and annulled marriages based on fear, duress, fraud, and errors of person and quality. It accepted the physical impediments recognized at canon law that annulled marriages where one party was rendered impotent or physically impaired. It accepted the canon law impediments of consanguinity and affinity, but only to the third degree, or in some jurisdictions to the second degree. It rejected the canon law impediments that annulled marriages where one party had departed from the faith or committed a mortal sin. It also rejected canon law impediments that prohibited remarriage to anyone who had previously married a cleric, monk, or nun. These changes in the law of

conceptions, see sources discussed in *Witte,* The Transformation of Marriage Law in the Lutheran Reformation, in The Weightier Matters of the Law: Essays on Law and Religion, 57 (J. Witte, Jr. and F. Alexander eds. 1988).

[107] The following discussion of the new civil law of marriage and divorce draws upon Plakkaat, betreffende huwelijk, echtbreuk enz. (1574), in 39 Nederlands archief voor kerkgeschiedenis (n.s.) 121 (1952/3); Politieke ordonnantie van Holland, items 1 - 28 (1580), in Klein plakkatboek, at 126; Politieke ordonnantie van Zeeland, items 6 - 23 (1583), in Klein plakkaatboek, at 129; Kerkelijke wetten der staten van Holland, items 23 - 40 (1583), in Hooijer, at 229; Landrecht van Drenthe, III. 1 - 11, in *Ennik,* at 39 - 43; Egtreglement (1664). See also *Apeldoorn,* Geschiedenis, at 84 - 122, 126 - 170, 180 - 188, 195 - 198.

marriage and annulment reflected the reformers' belief that marriage is a civil estate, not a divine sacrament.

The civil law departed from the pre-Tridentine canon law in requiring that parties solemnly repeat their vows before, and procure a marriage certificate from, either a reformed minister or a magistrate. Parties who failed to solemnize or certify their marriages were subject to heavy fines.

The civil law also departed from the traditional canon law in granting parties the right to divorce and remarriage. The canon law had treated divorce simply as a separation from bed and board, not as a dissolution of the sacramental bond. Such separation was permitted only where one party had committed adultery, brutalized the other, or contracted a contagious disease. The civil law permitted separation on grounds of wife and child abuse, confessional differences between the parties, defamation of a spouse's moral character, acts of incest and bigamy, and habitual drunkenness and gaming. It allowed outright divorce in the modern sense on grounds of adultery and malicious desertion, and allowed the innocent party to remarry. Couples who sought to separate or divorce, however, were required to publicize their intentions in the church and in the community and to petition a civil judge to order the separation and divorce. Despite the seeming liberality of some of the provincial laws of separation and divorce, parties had a heavy burden of proof to show that their separation or divorce was mandated by statute and that all efforts at reconciliation had failed.

Conclusion

Roman Catholic canon law was an integral part of the Dutch legal tradition, both before and after the Protestant Reformation. Before the Reformation, the canon law dominated Dutch legal life. It was applied broadly by the Catholic episcopacy to deal with the numerous subjects and persons that fell within its jurisdiction. It was also appropriated liberally by Dutch civil jurists and civil authorities. After the Reformation, the canon law continued to influence Dutch legal life, albeit less directly. Reformed church courts adopted much of the administrative law of the canonists and governed questions of doctrine and liturgy, morality and discipline, charity and education, in a manner akin to their Catholic predecessors. Civil jurists drew on the canon law in drafting their opinions and treatises. Civil legislators drew on the canon law in drafting their statutes, particularly those governing moral, marital, and testamentary matters. Civil courts drew on the canon law in interpreting these statutes and adjudicating disputes.

The importance of the canon law was not lost on post-Reformation jurists in the Netherlands. As late as the nineteenth century the great legal educator Joannes van der Linden could urge his students that "the university should not

be left until [one has engaged in] [t]he study of canon law. It is surely absurd to style oneself a *doctor juris utriusque*, and at the same time to know nothing of the canon law."[108]

[108] *J. van der Linden*, Institutes of Holland, or Manual of Law, Practice, and Mercantile Law, xl - xli (H. Juta trans. 1884).