Freedom and the Construction of Europe

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14

Roman law, German liberties and the constitution of the Holy Roman Empire

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I

The year 1495 marked a milestone in the history of early modern Germany. It was in this year that the Holy Roman Emperor, Maximilian I, meeting with the assembled members of the princely nobility and representatives of the cities in the imperial diet, enacted the *Reichsreform* designed to improve the institutional structure and administration of the empire. These changes included a number of ambitious proposals such as the establishment of a central administrative apparatus (*Reichsregiment*), the territorial division of the empire into imperial circles (*Reichskreise*), the promulgation of a Perpetual Peace to end the private feuds among the warring nobility in the German lands (*Landfriede*), and the establishment of an imperial high court of appeals (*Reichskammergericht*). Taken together, *Reichsreform* signalled the beginning of an attempt to frame a policy of imperial statecraft by providing some semblance of political and juridical unity in what was, in effect, a deeply fragmented medieval patchwork of lesser jurisdictions, bishoprics, feudalities and cities.[1]

But perhaps the single most important aspect of this movement was the formal reception of Roman law in Germany as a valid imperial law. It was also to be one of the most controversial of the reform proposals and activated a resistance movement in the sixteenth century designed to prevent the reception of the 'learned law' into the German lands. Chief among the opponents of Roman law were free city-dwellers, or burghers, men who viewed Roman law as a slavish and foreign Italianate system of domination which threatened to supplant their native ancient customs. The civilian practitioners of Roman law, the *doctores* or *Bartolisti*, were viewed with even greater

1. Friedeberg and Seidler 2007: 104.

suspicion as peddlers of supposedly dangerous modern innovations to displace the free people's 'good customs'. In the popular literature, the jurists were regarded as bad Christians: *Die Juristen sind böse Christen*.[2] The German humanist Ulrich von Hutten simply called these *jurisconsulti* 'robbers'.[3]

Most remarkable about this popular resistance to Roman law and the Habsburg policy of imperial statecraft was the widespread perception that these intrusive institutional and legal reforms constituted mortal threats to the local liberties and privileges which the German burghers had traditionally enjoyed since time immemorial, hailed as *die alte deutsche Freiheit*. The introduction of the learned law into the German lands opened the door, it was thought, to the invasion of an untrustworthy lawyerly class of foreigners, the Italian-educated *doctores*, who, as expressed in the Grievances of the Protestant Estates at Passau (1552), were 'foreigners ignorant of the German nation and the German tongue, and ill informed on matters touching Germany and the Empire'.[4] Their grievances reflected the rapid transformation of German law courts with the progressive replacement of lay judges and jurors in local tribunals by professional jurists trained in the *Corpus iuris civilis* and civil law procedures which included the practice of *Aktenversendung* whereby courts consult formally with learned jurists to assist with adjudicating in specific points of law.

The hostility directed against Roman law was, to be sure, not unique to the burghers and estates of early modern Germany. French humanist legists had similarly cultivated a profound distaste for Roman law, such as the monarchomach François Hotman, who had defended at length, in the *Anti-Tribonian* and the *Francogallia*, the absolute superiority of local customs over the supposed universal scope of Roman law.[5] Even the young Jean Bodin had complained in his *Methodus* of the then-fashionable academic practice of treating Roman law as a law of universal scope; he ridiculed the 'absurdity of [legists] attempting to establish principles of universal jurisprudence from the Roman decrees'.[6]

However, unlike France, where even the most vocal critics of Roman law were themselves academic jurists and acknowledged at least the pedagogical utility of the *Corpus iuris civilis*, the German resistance to Roman law was led not simply by academic lawyers, such as Hermann Conring, but also by laymen, free burghers who expressed an urgency not to be found elsewhere

2. Fay 1911: 235; Vinogradoff 1929: 142; Stein 1999: 92. 3. Strauss 1986: 27.
4. Strauss 1986: 28.
5. Hotman 1765 [1576]; 1972. On Hotman, see also Kelley 1970; 1973; 1981.
6. Bodin 1945: 2.

in early modern juristic thought.[7] Imperial reform was, indeed, thought to be a direct assault on the native and ancient liberties and the 'good old law' of Germany. At stake was the loss of German liberties and, with it, the Germans' sense of place and identity within the larger social and moral order.

What I hope to do in this chapter is to understand why Germans regarded the importation of Roman law into German lands as a threat to liberty. To do so, we need to understand how the free burghers and estates of the empire conceptualised their liberties and elucidate what they took to be the incompatibility between Roman law and German liberty. I shall proceed first by offering a brief excursus on the differences between the Romanist and Germanist concepts of liberty. I argue that the German law of the empire, shielded from the influence of the *Corpus iuris civilis*, developed a concept of liberty that relied not on the Roman *libertas* but, as Maissen has demonstrated in an earlier chapter, on a feudal-law conception of granted privileges, or *Freiheiten*, which specify concessive grants from a lord 'enfranchising' a specific person, or class of persons, to do certain acts or hold certain advantages or immunities, in derogation from the more general obligatory rule of law. I then turn to investigate how the liberty of cities and estates in the Holy Roman Empire was customarily interpreted in terms of such stated privileges granted by charters, one of the chief causes of its internal fragmentation. Finally, I examine the particulars of the clash between Romanist and Germanist concepts of liberty during the period of imperial reform and reception of the Roman law. Because liberties were regarded as concessive grants of privilege, they remained vulnerable, in theory, to revocation by the lords who granted them, a point which only became fully legible with the importation of the rules and concepts of Roman private law into Germany.

II

The German burghers and estates who opposed the reception accused Roman law of being a law of servitude, contrary to liberty. What is perplexing about this view, at first glance, is that it neglects to recognise the fact that Roman law itself contained its own distinctive concept of liberty. In the Justinianic *Corpus iuris civilis*, the notion of liberty, or *libertas*, operated within the conceptual scheme of the law of persons, classically expressed in the First Book of the *Digest*, under the rubric, *De statu hominum*, and, earlier, in the First Book of Gaius' *Institutes*. In the codebooks, the jurisconsult Florentinus

7. Kelley 1981: 268; Wieacker 1995: 103–5; Fasolt 2004: 74–5.

had defined *libertas* as a 'natural capacity of doing whatever anyone wishes to do unless he is prevented in some way, by force or by law'.[8] The Roman jurists had juxtaposed *libertas* against the other basic category of *servitus*, or slavery, a distinction which Gaius had once proclaimed as the great division in the law of persons and would be of monumental importance in early modern republican political thought.[9]

According to the Roman jurists, *libertas* carved out that category of legal persons who were *sui iuris* – that is, those who were juridically independent. Gaius in particular notes that such free persons were to be distinguished from those who were, by contrast, *alieni iuris*, 'in the power' of others, such as minors or slaves.[10] What made a person free was not simply the absence of such an external master or superior but, more significantly, the status of being a master over oneself and over one's estate.

The concept of liberty appearing in the pages of the *Digest* and the *Institutes* made very clear that if one is not free, then one must *ex hypothesi* be in some condition of subjection. Perhaps because of these considerations, Roman law proved to be ill adapted to model the conditions of the post-classical world which lacked precisely those clear-cut divisions of personal jural status that characterised Roman antiquity. In particular, civilian categories of *liberi* and *servi*, and the associated subdivisions of jural personality and status in the Roman private law, such as *adscripti* or *coloni*, could not be made to map on to the complex relations constitutive of European feudalism such as vassalage or villeinage. That did not, however, stop medieval civilians from attempting to assimilate such concepts of Roman law to model feudal customs and legal practices.[11]

In the German lands of the Holy Roman Empire, where the status of slavery was non-existent, lawyers took great pains to integrate the principles from Roman law of persons to systematise the feudal conditions of Germany. One of the most important instances can be found in an early fifteenth-century German text known as the *Klagspiegel*, which functioned in the genre of instructional 'formularies addressed to private citizens and businessmen . . . designed to provide judges and law agents with the knowledge of "imperial [i.e., Roman] law"'.[12] In specifying the similarities between German and Roman law, the *Klagspiegel* attempted 'to fit German

8. Dig. 1.5.4.pr. 9. Dig. 1.5.3. Skinner 1998: 5–6; 2002a: 288–9; 2002c: 312–18.
10. Gaius 1.48.
11. Meynial 1907; Feenstra 1974: 215–59; Burns 1992: 18; Tuck 1979: 15–17; Stein 1999: 62; Garnsey 2007: 201
12. Stintzing 1880: 43–7; Wieacker 1995: 129.

class distinctions into the social classification of Rome', so that it might be possible to analyse German customs with reference to the Roman system.[13] In this task, the author of the *Klagspiegel* made a number of deliberate choices in manoeuvering between the two, but perhaps the most controversial may have been the analysis of the German serf, customarily classified as *Eigen Mensch* or *Leibeigener*. Remarkably, despite the absence of slavery in Germany, the author of the *Klagspiegel* classified the *Eigen Mensch* as a Roman *servus*. In doing so, however, the *Klagspiegel* highlighted the discontinuities that separated German custom from Roman law, especially on the question of liberty and slavery, a theme that reappeared throughout the early modern German juristic literature, such as in the *Lexicon Juridicum* of Johann Kahl.[14]

The problem is again illustrated in a discussion by the celebrated German humanist jurist Ulrich Zasius, who offers a *Responsa singularia* entitled, 'On certain unclassifiable things in German law.'[15] Zasius again considers the case of *proprii homines*, the unfree German peasantry customarily classified as *Eigenleute* or the *Eigen Mann*. Like the *Klagspiegel*, the problem for a German civilian such as Zasius concerned the proper classification of these *proprii homines* according to Roman law. While it would have been possible to try simply classifying *proprii homines* as Roman slaves (*servi*) or as freedmen (*libertini*), both were clearly unsatisfactory to Zasius who, in his own solution, departed from the analysis of the *Klagspiegel* and replied that 'German unfree peasants are like slaves in certain respects but are more like freedmen' in other respects.[16] This approach was to be contrasted with Zasius's thesis, later criticised by the French feudalist Charles Du Moulin, that feudal tenures originated in Roman clientage.[17]

The point that these German lawyers were trying to stress was the fundamental discontinuity between Roman law and the social conditions of feudal Europe. It would simply not be proper to use the categories of Roman law to describe and analyse institutions born of European feudalism. This was likewise the problem with the Roman concept of *libertas* which, like slavery, did not reflect the inner complexity of feudalism. Liberty was not an abstract marker of personal jural status as the Romans thought but, rather, signified the feudal privileges and legal powers that free persons possessed, including the privileges of territorial immunity that accompanied the holding of a fee, as well as the positive legal rights powers of jurisdiction and government within the domain of one's fee. As Alan Harding has suggested, liberty in

13. Vinogradoff 1929: 131. 14. Kahl 1683.
15. Cited in Fay 1911: 237, n. 17, Ulrich Zasius, *Responsa singularia*, Lib. II, Cap. VII (*Opera* v.36).
16. Fay 1911: 238. 17. Friedeberg and Seidler 2007: 122; Du Moulin 1681: 3.

medieval legal thought became a matter of 'doing, not being, the exercise of power rather than the possession of status'.[18]

Because Roman legal concepts of *libertas* and *servitus* did not cohere with the social facts of feudalism, medieval jurists questioned whether they were even meaningful concepts. The English jurist Bracton, following the teaching of his civilian master Azo, had observed this discontinuity in a gloss on the Roman law of persons, by complaining that Florentinus's classical definition of liberty appearing in the *Digest* was severely inadequate for the conditions of feudal Europe since, according to the Romans, even men of servile status would appear to be free.[19] The problem, specifically, was the identification of *libertas* as an unbridled *facultas naturalis*, as Florentinus and the Glossators had envisaged. In feudal Europe, persons with the servile status of bondsmen might in fact be in possession of significant power, as in the example of 'the great German serf-knights like Markward of Anweiler, enfranchised the day he became duke of Ravenna but obviously a powerful man before that'.[20] On the other hand, persons with free status at law might nevertheless be incapacitated by the lack of an effective power, such as the free peasantry who were, unlike serfs, not tied to the land and were technically free to leave the lord's estate at will.

Thus, in order to serve as a meaningful concept, the notion of liberty in medieval juristic thought had to be reconfigured to meet the conditions of, as Thomas Maissen puts it in Chapter 13 of this volume, 'the graduated structure of feudal societies', in which formal legal status often shared little connection with the de facto powers and capacities that a person might hold by right. The concept of liberty had to be re-conceptualised in such a way that did not collapse back to the primitive distinctions of personal jural status found in the Roman codebooks. The key to this analysis was the concept of 'privilege', and specifically 'in the sense of a privilege granted to a landowner' or to 'a landed magnate'.[21]

III

Privilege, literally 'private law', was a *ius*, but it was specifically *ius singulare*, *ius speciale*, or sometimes *beneficium iuris*, a *ius* granted as concession to a private person in derogation of a more general principle of law which otherwise held universal validity and obligatory force.[22] A privilege could take a positive form, by conferring a special power, benefit or advantage on a

18. Harding 1980: 423–43. 19. Bracton 1968: 29; Maitland 1895: 44–6.
20. Harding 1980: 424. 21. Harding 1980: 424. 22. Dig. 1.3.16.

private person or group of persons, such as a right to hold a monopoly over a certain craft. Likewise, privilege could take a negative form by securing for the privilege-holder an exemption – *immunitas* or *vacatio* – from a general requirement of the law such as the performance of certain duties to the state such as payment of taxes or exemption from military service.

As legists observed, privilege was 'derogatory' of the civil law, because it 'derogated' from it and consequently negated its full force. Given this, it is easy to see why privilege must fall outside the scope of public law. Privilege was thought to be like a private-law obligation carved out between a privilege-granting lord and the privilege-holding tenant. From the point of view of a formal jurisprudence, then, privilege occupied a very limited conceptual space within the larger framework of civil law. Indeed, the idea of privilege was kept distinct from liberty in classical thought, for the simple reason that the two terms belonged to different areas of the civil law.

By contrast, if we turn away from the codebooks and look instead at the sources of feudal law, we see a remarkable transformation in the post-classical discourse on liberty. We find, in particular, that the notion of liberty has become inseparably attached to the notion of *privilegium*, almost to the point that liberty and privilege seem to function as synonyms for each other. It was, indeed, not in classical law but, significantly, in medieval jurisprudence that the two were brought together such that jurists could speak of a *libertatis privilegium*, in connection with the ecclesiastical or clerical privileges and liberties of the medieval church, as expressed in a Merovingian *Formulary*.[23] By the end of the fifteenth century, it would have been a commonplace to hear liberty and privilege uttered together in immediate succession, almost invariably in connection with the legal device of charters which a lord might grant as a concession to a particular person or to a particular class of persons, either enfranchising them with certain exclusive legal powers or immunising them from some legal obligation.

To be free, therefore, translated into something quite distinct from both the classical understanding of *libertas* and even the modern understanding of natural liberty, as a modern political theorist such as Hobbes or Bentham might have understood it. Here, liberty was, specifically, conceptualised as a legal bundle of 'stated privileges granted to a group or an individual, specifying something that could be done or could not be done'.[24] Indeed, since liberties originated as concessive grants from the empire, we may restate Maissen's observation that the liberty of the cities 'did not mean liberation

23. Harding 1980: 425. 24. Strauss 1986: 116.

from the Empire, but liberty through and within the Empire'. Perhaps of greatest significance, however, was the fact that liberty could be regarded as a communal possession, and not simply an individual one.[25] Towns and cities claiming a communal possession of liberty benefited by foundation charters which conferred certain stated privileges and assured a degree of juridical autonomy and independence from external control. These included the powerful German cities of the Holy Roman Empire such as Nuremberg, Ulm, Lübeck and Cologne which were regarded by their burghers as *Frei Reichsstädte*, Free Imperial Cities, and which prompted Machiavelli's famous observation in the tenth chapter of *The Prince* that, 'the [Imperial] cities of Germany are completely independent (*liberissime*), and obey the Emperor only when they want to'.[26]

For a variety of reasons, then, Free Cities were widely regarded as the ancient depositories of German liberties. Chief among them, however, must be the fact that these cities remained practically isolated from imperial control as well as from the intellectual influence of Roman law until the later Middle Ages, thereby allowing the urban culture of political independence to flourish. Only with the formal reception of Roman law did German burghers and estates, such as the Estates of Württemberg in 1569, finally begin to express their self-conscious awareness of the liberties that they had enjoyed as corporate or communal privilege, as a '*possessio libertatis* . . . from the days of yore, and longer than human memory can recollect'.[27]

Particularist possession of such liberties, however, came at a great cost, as the early modern *Reichspublizisten* observed, and that cost was imperial unity. What needs to be explored next then is how the liberty of cities and estates activated the movement toward *Reichsreform* and set the stage for a confrontation on the issue of the privileges and liberties held by Free Cities. The confrontation, as we shall see, was conducted through the juridical grammar of Roman law, which became a major intellectual force in sixteenth-century Germany.

IV

Roman law came relatively late to Germany. In the absence of a written system or uniform code of learned law, Germans governed themselves for centuries throughout the Middle Ages by the use of a heterogeneous patchwork of unwritten local customs in *Schöffen* courts presided over by laymen

25. Schmidt, Van Gelderen and Snigula 2006. 26. Machiavelli 1988: 38.
27. Strauss 1986: 104, note 27.

and the princely nobility.[28] While it is true that the medieval German universities began formal instruction on the *Corpus iuris civilis* as early as 1387, with the establishment of a Chair in Civil Law at the University of Heidelberg and the recognition of *doctores utriusque iuris*, in practice Roman law would have very little impact in the *Reichsstände* until the beginning of the imperial reforms at the end of the fifteenth century.[29] Given this relative isolation of the German principalities and cities from Roman law, the empire followed a developmental trajectory in its internal constitution that resulted in a highly fragmented polity.

This internal fragmentation of the empire, which carved out the great principalities of the Prince-Electors, or *Kurfürsten*, of the empire, the lesser feudalities of the princely nobility, and the Free Cities grouped together into the great federations and leagues, such as the Hanseatic League and the Swabian alliance, presented a genuine intellectual puzzle to early modern jurists who went to great lengths to classify the empire within one of the classical, Aristotelian regime types. For example, in both the *Methodus* and later in the *Six livres de la république* of 1576, Jean Bodin acknowledged that the empire was a sovereign *respublica* but challenged the traditional view of the Holy Roman Emperor as a sovereign prince with full undivided *imperium*.[30] Instead, he put forward the controversial thesis that the empire with its complex internal constitutional arrangements was 'a pure aristocracy, composed of the princes of the Empire, of the seven Electors, and the Imperial Cities'.[31] Bodin's analysis of the empire would be evaluated by his most vocal German critic, Johannes Althusius, the Syndic of the Calvinist *Reichsstadt* Emden, who argued in his *Politica methodice digesta* of 1603 that the rights of full sovereignty in the empire, the *jura regni*, belong not to the emperor but rather to the *Reichstag* as a whole as a properly constituted and assembled body of the people.[32] German *Reichspublizisten* of the early seventeenth century such as Dominicus Arumäeus, founder of the Jena school of jurisprudence, and the Tübingen jurist Christoph Besold would take a further step in these debates on the *forma imperii* by rejecting entirely the attempt to treat the German constitution as originating in a uniform source of sovereignty, *Kaiser* or *Reich*. Instead they treated sovereignty as consisting of two essential components, as expressed in the Germanic doctrine of

28. Vinogradoff 1929: 122–4; Dawson 1960: 94–115.
29. Stintzing 1880: 57–60; Koschacker 1947: 124–41; Vinogradoff 1929: 119, 126–8, 139–44; Wieacker 1995: 114; Stein 1999: 88–92; Lobingier 1916: 562.
30. Gilmore 1941; Pennington 1993; Fasolt 2004: 178–204. 31. Bodin 1962: 81.
32. Althusius 1932: 91 (ch. 9, §18).

duplex majestas, with the *majestas personalis* belonging to the emperor or his representative and the *majestas realis* belonging to the princes and *inferiores respublicae* of the Estates.[33]

But despite these early modern attempts to visualise the empire as a sovereign state, the *Reichspublizisten* could not avoid the de facto fragmentation that shaped the imperial constitution. Commentaries on the constitution of the empire, such as those by Hermann Conring, merely diagnosed a decentralised pattern of government that had been sealed by the 1555 Treaty of Augsburg which, by its formalisation of the doctrine *cuius regio eius religio*, secured the political and religious autonomy of the princely estates.

This constitutional polity resulted not in a modern unitary state but rather in a constitutional model conventionally labelled the *Ständestaat*, a pluralistic polity of estates, each governed by virtually autonomous princely nobles, similar in structure to the French *États Généraux* or the English Parliament balanced against the central powers of the royal government. Samuel Pufendorf, less generously, would later famously describe the constitution of the empire not as a sovereign state at all in the standard Bodinian scheme, but as a 'diseased state', an 'irregular body', and even 'like some mis-shapen monster' (*monstro simile*).[34]

The great beneficiaries of this settlement were, of course, the enfeoffed members of the princely nobility who secured a guarantee of juridical immunity and de facto independence from the imperial court or, indeed, any other foreign court.[35] What is perhaps more remarkable is the official recognition of status conferred on the liberties and privileges of the Free Imperial Cities under the immediate jurisdiction of the emperor, as well as the various privileged cities under the territorial jurisdiction of the princes. Like the princely nobility, these cities held and asserted liberties at the expense of imperial unity and sovereignty.

These *burgherliche Freiheiten* ran the gamut from the freedoms of Tyroleans to 'sell our cattle, cheese, and lard inside and outside our own country . . . [and] to graze cattle on high-lying meadows in the spring', to the freedoms of the Stadt Meran to ban 'open inns and taverns . . . to mint coins, try criminal cases, or make free use of peasant labor', as recorded in a 1563 entry in the *Tiroler Landtagsakten*.[36] But these liberties were more than simple freedoms of action. As Bodin had rightly observed in his commentary

33. Arumäeus 1620: fos.17–20; Besold 1625: 5–6, 10–11; see also Salmon 1959: 52–3; 1996: 509–13; Riley 1976; Franklin 1991: 316–23; Friedeburg and Seidler 2007: 155; Van Gelderen 2002.
34. Pufendorf 2007: 176; Wilson 2006: 565–76. 35. Henderson 1903: 240.
36. Strauss 1986: 116.

on the Holy Roman Empire, German liberty as enjoyed 'in the cities of Ulm, Brunswick, Lübeck, and others' was properly to be conceived as 'an old vacation (*vacatio*) from certain services, and an immunity (*immunitas*) from customs and tributes granted by the Emperors'.[37]

These liberties that German burghers and estates claimed for themselves originated as primitive grants of privilege, which were popularly taken to have been 'awarded to [their] forefathers in remote antiquity (*vor uralten zeiten*)'.[38] But they were not simply voluntary grants or concessions by princely rulers of a mythical or noble past. In practice, many of the accumulated bundles of liberties and privileges reflected the desperation of princely rulers who, faced with constant pressure for raising revenues for the fisc, turned to venal practices by the sale, mortgage, and even full alienation of lands and privileges originally attached by right as possessions of the imperial crown and part of the domain of the empire.[39] As Lord Bryce once observed, the survival of the empire and 'the Imperial treasury depended mainly on this inglorious traffic in honors and exemptions'.[40] In celebrating the noble origins of their liberties and privileges, the burghers and estates never failed to acknowledge the contractual and even explicitly economic and venal nature of their ancient purchased liberties, 'die alte verkauften Freiheiten'.[41]

Liberties were also deeply tied to the political economy of taxation and fiscal policy in the empire, by which the representatives of Free Cities formally consented to requests for tax revenues in return, as a *quid pro quo*, 'the confirmation, reconfirmation, and . . . extension of their liberties'.[42] For example, the Tübingen Contract of 1514, a charter of fundamental rights and liberties of the free burghers of Tübingen, was the result of drawn-out negotiations between the estates of Württemberg and their princely lord Duke Ulrich, who granted and confirmed those liberties in exchange for 22,000 gulden in each of the succeeding five years.[43]

Because these liberties took the form of privileges, it was essential for the beneficiaries to confirm their validity and make use of them continually so as to avoid loss of liberty by desuetude or prescription. The Bavarian jurist Caspar Schmidt explains why this was the case: 'Being a private and particular kind of law . . . [they are] valid only as long as [they are] used and observed . . . Standing as they do against legal reason, privileges are lost when not used.'[44] Thus, burghers and estates had to engage in the practice

37. Bodin 1962: 131. 38. Strauss 1986: 116.
39. Bornitz 1612: 87–94 [ch. 10]; Riesenberg 1956. 40. Bryce 1889: 224.
41. Strauss 1986: 275. 42. Strauss 1986: 250. 43. Strauss 1986: 251.
44. Strauss 1986: 110.

of confirming their liberties and privileges since a freedom 'had no standing unless it was *verbrieft*' – that is, recorded, confirmed and documented in some concrete written form.[45] The appeal to the *originalia* of charters and contracts was essential for the security of communal liberties, as in the case of the Tyrolean estates, whose request for the confirmation of liberties was made contingent upon production of the '*originalia* of their old privileges', to the satisfaction of their princely lord.[46]

But with the reception of Roman law in the late fifteenth century, Germans began to complain vocally, through formal grievances, remonstrances and petitions, that the same liberties were under attack and directly threatened by the learned law. We next need to consider just how Roman law threatened German liberty.

V

It was against this social and intellectual background of the empire as a fragmented pluralist polity governed by rules of custom and feudal *Landrecht* that Roman law began to make an appearance in the sixteenth century. Roman law was designed chiefly to reassert the imperial jurisdiction over the various German lands of the empire and lay the groundwork for envisaging the empire as a proper unitary state.

Roman law was regarded as essential for 'rationalizing the affairs of state' and was valued especially for its 'virtues of clarity and uniformity', precisely what the customary liberties of the German lands and cities seemed to lack.[47] The practical aim of reform was, thus, to 'Romanise' German law, to make it more legible and uniform across the empire. Even at the sub-imperial level, the princely nobility recruited the *doctores* to refashion, reform and modernise local law in the rational manner of Roman law or, as Melchior Kling put it, to put the law 'in its right order'.[48] These included Romanist reforms in criminal procedure influenced by the use of the inquisitorial method, as reflected in the *Constitutio criminalis Bambergensis* of 1507 and the *Constitutio criminalis Carolina* introduced over the imperial seal of the emperor Charles V in 1532 which did much to standardise criminal procedure throughout the German lands.[49] At the local level and in principalities, the legal *reformatio* often resulted in the wholesale revision of custom by professional jurists, such as in the Romanist *Neu Landrecht* of Württemberg devised by the Tübingen jurist Johann Sichard and the codification of the

45. Strauss 1986: 106. 46. Strauss 1986: 106, n. 44. 47. Wieacker 1995: 132; Strauss 1986: 85.
48. Strauss 1986: 96. 49. Strauss 1986: 123; Weisser 1979.

laws of Freiburg-im-Breisgau by Ulrich Zasius. In Saxony, which for centuries had been governed according to principles recorded in the medieval German lawbook, the *Sachsenspiegel*, the Prince-Elector August I ordered the doctors of Leipzig and Wittenberg to revise – indeed, to Romanise – the local laws so as to systematise them into a rational order, resulting in the *Constitutio* of 1572.[50]

The Romanising of German law in this manner was thought to be essential to reforming the state of the empire, and it is indeed in this way that Roman law and German statecraft went together, hand in hand, laying the groundwork for the *Usus modernus pandectarum* of later centuries.[51] As Gerald Strauss has observed, 'Roman law and lawyers played a major role in advocating this cause [of statecraft], and it is not claiming too much to say that the early modern state was the product of their labors.'[52] And in the process, German civilians treated the Roman codebooks, as Peter Stein once put it, as a 'legal supermarket in which lawyers of different periods have found what they needed at the time'.[53]

But because Roman law provided the tools for statebuilding, it presented critical dangers to the enjoyments of German liberty. There are two broad reasons why this was the case. One thesis is that Roman law induced a displacement effect whereby the process of Romanisation 'displaced' the exceptional nature of local liberties with the introduction of a scientific, and indeed foreign, jurisprudence. Moreover, the broader culture of civil law displaced lay tribunals and officials by bringing in the expertise of *jurisconsulti* trained in the Roman codebooks and establishing professional courts staffed by jurists such as the territorial *Hofgerichte*. Franz Wieacker has, in particular, defended this displacement-effect view, with his influential thesis of *Verwissenschaftlichung* which stresses the expanding scope of administrative powers held by the professional class of learned jurists in Germany.[54] But in doing so, he, and many other legal historians, have effectively discounted the fundamental importance of the substantive rules and concepts of Roman private law on the customary liberties and privileges of the German burghers and estates. It is this second set of arguments which merits further investigation.

German liberties were regarded not only as possessions (*possessiones libertatis*) but even as vendible objects (*verkauften Freiheiten*). In theory, they were equivalently also regarded as *concessiones principis*, concessions or grants voluntarily made by a sovereign *princeps* in derogation from the law to benefit

50. Wieacker 1995: 143–55. 51. Fasolt 2004: 75. 52. Strauss 1986: 97–8.
53. Stein 1999: 2. 54. Wieacker 1995: 96–7, 106, 176.

or shield some particular person or class of persons. In practice, the granted liberty was to be regarded almost like property over which the recipient could assert a possessory interest. The jurists even declared that one could prescribe or usucape rights of ownership by long possession and usage.[55]

But it is important to keep in mind that, in the civil law, a *concessio* was to be distinguished from *translatio* which, alone, represented a full and complete alienation of a *res* by one of the civil law methods of transfer.[56] *Translatio* alone was thought to represent the full and irrevocable alienation of property within one's domain. *Concessio*, by contrast, fails to meet the bar required for full transfer. Indeed, *concessio* is properly to be regarded not as a transfer at all, but as a mere delegation.[57] Thus, when one makes a *concessio*, the jurists thought, the transaction involves only a temporary loan of limited rights to a second party, such as the limited and inferior right of usufruct, while the first party retains intact the fundamental rights of *dominium*. The beneficiary of a *concessio*, for example, might receive usufructuary rights (*jura in re aliena*) to hold and use a piece of land for some period of time, but the *dominus* who granted the *concessio* must remain the *dominus* and, therefore, hold the undiminished rights of ownership and title to that land, including the right to recover that land. Thus, one German writer asserts a general principle at the heart of public law and political economy, that 'in all concessive grants, the superior power is always reserved (*reservetur*) to the granting party'.[58]

This analysis on the Roman law of property would have devastating consequences for the German burghers' defence of liberty because it potentially shows that the people's communal liberties, their *Volksfreiheiten*, remained under the *dominium* of the lord who granted those liberties in the first place. The people's holding in their liberties became nothing more than what civilians had called a *precarium*, or what Grotius was to denigrate as a mere *ius revocabile*.[59] Arguments from possessory interdicts would have been ineffective against the lord's superior assertions of ownership. If he elected to do so, the liberty-granting *dominus* could rightfully disseise his tenants of their communal *possessiones libertatis*, precisely because he must be assumed to have reserved those prior rights in full when he made the original *concessio*.

Thus, the application of Roman law here illustrates just how vulnerable to their lord's right of *dominium* the German burghers were in holding their liberties as privileges. To be sure, feudal law and German customary *Landrecht*

55. Dig. 41.3.3; cf. Fasolt 2004: 112–15 on arguments of prescriptive acquisition in the empire.
56. Salmon 1959: 43–4. 57. Dig. 1.21.1. 58. Chemnitz 1640: 33.
59. Grotius 1625: [1.3.11.3].

would have surely favoured their possessory claims and rights by long usage, and perhaps even a possessory interdict might have succeeded. But the juristic reasoning of Roman law was less generous to claims by possession, even for possessions of liberty.[60]

By way of response, enfranchised burghers could certainly argue that they held their liberties by right on a number of other grounds. Some argued that the charters which originally granted the liberties were intended to last 'in perpetuity'. Others pointed out that long usage was sufficient to secure full ownership over their legal rights and privileges with the passage of time by prescription or usucaption, as civil law allowed. Indeed, one seventeenth-century legal writer had suggested that the liberties of free cities were no longer 'feudal' in nature, revocable by the emperor, but now 'allodial', held irrevocably by right of property independent of the *princeps*.[61] Moreover, the continuous confirmation of liberties by princely lords and at the election of each new emperor further solidified the legal validity of the German liberties.

The civilians may certainly have agreed with the analysis that, in ordinary property transactions, a *bona fide* possessor or usufructuary might acquire an estate by prescription through the passage of time. On the other hand, they also argued that there were certain things which were fully imprescriptible, and, therefore, could never be acquired as property regardless of the length of time that passed. These included the various things classified in civil law as *res sacrae* and *res nullius* which no man could ever have property in, such as the ocean.[62] Nor could things acquired by fraudulent means such as theft enter into one's *dominium* by usucaption.[63]

Furthermore *res sacrae* and *res nullius* were not the only things to be regarded as imprescriptible. *Res publica* – which, in one of its technical juridical meanings, indicated the imperial public fisc – was likewise imprescriptible, beyond the scope of ordinary prescription.[64] As Modestinus declared, 'usucaption does not run against the imperial fisc', in the same way it does run against private legal persons.[65] On this principle, then, even the passage of a great length of time could never prejudice public imperial rights. It was a principle that became particularly important in the sixteenth-century juristic debates on the boundaries of royal sovereignty and the doctrine that the demesne is not only inalienable but also imprescriptible.[66] On this matter, the French royalist legists such as René Choppin and Charles Du Moulin

60. Friedeburg and Seidler 2007: 123. 61. Cocceji 1695: 290. 62. Dig. 43.3.9; 1.8.1–11. 63. Dig. 41.3.4.6. 64. Dig. 41.3.18; 50.16.15. 65. Dig. 41.3.18. Cf. Cod. 10.1 (*De iure fisci*). 66. Giesey 1961.

took the lead in stressing the point that rights of the Crown demesne, wrongfully (in their view) being prescribed and usurped by seigneurial nobles, were absolutely inalienable (*non sunt alienabilia*) and imprescriptible (*nec praescribi possunt*).[67] And this, in turn, was because the jural personality of the Crown, unlike private persons, was perpetual and beyond temporal constraints imposed artificially by the law on persons who were, as Ernst Kantorowicz once observed, 'temporal beings . . . within time'.[68]

If this analysis was valid for a temporal ruler such as the king of France, then *a fortiori* must it be valid, it was thought, for the emperor. Jurists such as Lupoldus concluded that imperial rights were similarly *impraescriptibile* and incompatible with burgherly claims of a prescribed liberty. It would be impossible for the burghers' argument by long use and antiquity of liberty to hold any validity against fiscal rights of the empire, since the burghers' argument rested wholly upon the claim that the burghers 'prescribed' or 'usucapted' into the fiscal or public imperial rights granted to them in an immemorial antiquity. Public powers of jurisdiction and legislation held as the local liberties of cities and estates were in fact usurpations of prerogatives attached to the *fiscus*, and it was within the right of the *princeps* to reclaim and recover those as part of the public fisc.

In the empire, the jurists carved out a unique argument from Roman law to recover imperial rights, the doctrine of 'fiscal privilege'. Invoking provisions in the *Digest* and the *Code*, jurists pushed the demands of the *fiscus* into jurisdictions of cities which regarded themselves as immune from such interference and declared, unsuccessfully, that 'neither *Fiscus* nor fiscal law have any standing in traditional rights'.[69] The law of fiscal privilege, thus, justified the extension of imperial administration by noting that the burghers' possession or holding of liberty was *in fraudem*.

One of the greatest threats to liberty presented by reception of Roman law was not in the law of property or public law theories of fiscal privilege, but in the law of persons itself, and it is here that we must return to the classical *dicta* on the *status hominum*. The reintroduction of the civilian classifications in the law of persons presented one of the greatest dangers of all to defenders of burgherly liberty because, as we noted earlier, the Roman law of persons envisaged the separation of persons into one of two basic categories, either *liberi* or *servi*, a distinction totally foreign to the Germanic legal tradition such as in the *Landrecht* recorded in the Saxon book of customs, the *Sachsenspiegel*,

67. Choppin 1605: 201; Du Moulin 1681: 79 (Gloss v, §54). 68. Kantorowicz 1985: 171.
69. Dig. 49.14.46; Cod. 10.10.4; Strauss 1986: 158.

which stressed the famous *regula iuris* in the *Digest* that enjoined lawyers always to find *in favorem libertatis*.[70]

The problem was that the Roman *servitus* did not extend into the German lands and was entirely absent from the conceptual structure of the feudal law, an observation echoed by French feudalists such as Du Moulin and Hotman commenting on some parallel differences between civil law and the French *droit coutumier*. It was true, of course, that the German law recognised unfree disenfranchised persons – such as the category of *Eigenleute* that Kahl and Zasius tried so hard to fit into the details of the civilian scheme. But lack of freedom, for the German burgher, did not necessarily entail, as it did for the Roman jurist, slavery or some manner of dependence, to be *in potestate* and *alieni iuris*. Such a conclusion would simply have been a *non sequitur*.

This was just the problem. A Romanist application of the law of persons would have to apply the label of *servus* to rights-holding tenants and subtenants, an utterly unacceptable result to free Germans. It illustrates the many conflicts of law that emerged with the reception, but it above all highlights the essentially monistic concept of liberty in Roman law that is structurally incapable of acknowledging the pluralism and particularism of early modern Germany where liberty rested in varying degrees at all levels and grades of the feudal hierarchy of the empire, the foundation of which was the Free City and its burghers.

VI

These Romanist civilian-inflected arguments illustrate the degree to which the customary defences of popular liberty surrendered to the overwhelming force of the civil law. In revisiting this episode of early modern legal history, what we discover is an emerging clash between statecraft and the preservation of local liberty and privilege, a conflict which ultimately concludes with the rise of princely absolutism and the triumph of the *Obrigkeitsstaat* in early modern Germany. At the same time, it is imperative to understand the nature of the old liberties that were thought to have been lost before the rise of a modern state-centred politics. Let us, therefore, conclude with two brief general observations on the preceding argument.

The first observation is what appears to be the ineliminable dimension of lordship from the Germanic notion of liberty as privilege. If the burgherly liberties of cities and estates are really stated legal privileges, then it must

70. Dig. 50.17.106.

also be true that those liberties originated as a concessive grant from a lord with the power to confer that liberty in the first place. It is only by the grace or favour of the lord that the subject enjoys liberty. Indeed, it is precisely such dependence upon the lord's permissive grace that makes that *possessio libertatis* a precarious tenure (*precarium*). The contrast with modern political theory is worth stressing here. Unlike modern theories of natural liberty, where liberty is regarded as the natural starting point for political and moral reasoning (the natural condition of mankind), medieval jurisprudence takes liberty to be the outcome of a prior relationship of lordship and subjection, which was thought to be the natural order of things.

A second observation is the limited scope of liberty that this conception entails. If liberty is a privilege, in the sense of an exemption or derogation from a general rule of law, then liberty by this definition can never be raised to the level of a universally valid legal property. Liberty, by this definition, is just an exception from a general legal rule, and so, while only some may certainly benefit from the advantages or immunities that liberty provides, others must correspondingly carry the burdens imposed by obligation to obey the general force of law. One potentially unsettling conclusion of this analysis, then, is that not everybody can be free. Some must necessarily be burdened by the law, if others are to have the liberty to be immune or exempt from it.

If this is how we are to conceptualise liberty, then we might ask whether there are any fair principles of justice by which such burdens might be distributed. Or, whether there is any way that liberty itself might be reconceptualised so that it can be raised to the level of universal validity. Ultimately, it was to be the transition from the feudal-law language of privilege to the natural-law language of rights that enabled this change to take place. And while scholarship in the history of ideas has traced this transformation with exceptional precision, we also need to take stock of its medieval intellectual antecedents and understand not only what was gained by the arrival of a modern political understanding of liberty in the modern constitutional state but also, as the German burghers and representatives of the estates lamented, what was lost.