Michael Germann | Wim Decock (Hrsg.)

Das Gewissen in den Rechtslehren der protestantischen und katholischen Reformationen

Conscience in the Legal Teachings of the Protestant and Catholic Reformations

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Conscience in the Legal Teachings of the Protestant and Catholic Reformations

Leucorea-Studien zur Geschichte der Reformation
und der Lutherischen Orthodoxie (LStRLO)

Herausgegeben von
Irene Dingel, Armin Kohnle und Udo Sträter

Band 31

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Vorwort

Die in diesem Band vereinigten Beiträge untersuchen die Bedeutung der religiösen Reformbewegungen ab dem 16. Jahrhundert für die moderne Rechtsentwicklung am Rechtsstatus der in allen Konfessionen aktuellen Berufung auf das Gewissen. Sie sind zuerst als Beiträge zu einer Tagung an der Leucorea in Wittenberg vom 3. bis zum 6. April 2014 entstanden und anschließend für diesen Band weiter ausgearbeitet und erweitert worden.

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Halle / Löwen, im Advent 2016 Die Herausgeber

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Einleitung

Michael Germann und Wim Decock

Die moderne Rechtsentwicklung ist dicht mit den religiösen Reformbewegungen ab dem 16. Jahrhundert und ihren Wirkungen verflochten. Die Forschung, die dem Zusammenhang zwischen Reformation und Recht über die Traditionsbildung in und nach den Lehren lutherischer, calvinischer und römisch-katholischer Theologen und Juristen nachgeht, untersucht ihn herkömmlich oft nach Konfessionen gesondert. So kommen Wechselwirkungen, Übergänge und Parallelbewegungen nur schwer in den Blick. Ihre Betrachtung als Aspekte einer gemeinsamen Geschichte, deren Vielgestaltigkeit mit der Nennung eines Plurals von »Reformationen« zum Ausdruck gebracht werden kann, verspricht weitere Aufschlüsse über die Wirkungsgeschichte der reformatorischen Impulse des 16. Jahrhunderts unter dem Gesichtspunkt des Zusammenhangs zwischen Konfessionalität und Recht.

Dem widmen sich die Beiträge dieses Bandes am Beispiel eines spezifischen Gegenstands: dem Rechtsstatus des Gewissens. Sie sind Früchte einer Tagung zu diesem Thema, die vom 3. bis zum 6. April 2014 an der Leucorea in Wittenberg stattgefunden hat.[1] Diese folgte in der vergleichenden Methode dem Ansatz, in dem eine erste Tagung unter dem Titel »Law and Religion: The Legal Teachings of the Protestant and Catholic Reformations« vom 7. bis 9. Mai 2012 an der Universität Leuven eine Anregung von Harold J. Berman aufgegriffen hatte: »A book remains to be written on the similarities and differences between the legal writings of the Spanish ›late scholastics‹, as they are sometimes called, and those of the German ›early Biblicists‹, if one may call them that.«[2] Beide Tagungen verdanken sich einer Kooperation zwischen der Stiftung Leucorea – Stiftung des öffentlichen Rechts an der Martin-Luther-Universität Halle-Wittenberg –, der Katholischen Universität Leuven und der Johannes a Lasco Bibliothek in Emden auf der Plattform »Refo500« (siehe <http://www.refo500.nl>). Die erste Tagung hatte sich auf ein breites Spektrum von Gegenständen – unter anderem auf die Lehren vom Strafrecht, Kir-

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1 Tagungsbericht: Franziska Kelle / Raik Müller, ZRG 132 Kan. Abt. 101 (2015), S. 482–489.

2 Harold J. Berman, Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition, 2003, p. 70.

chenrecht, Naturrecht und Eherecht – erstreckt.[3] Demgegenüber bündelte die hier dokumentierte Tagung in Wittenberg den Blick auf das Gewissen als einen ausgewählten, besonders signifikanten Gegenstand konfessioneller Rechtslehren.

Schon im Vorgang der Reformation selbst ist das Gewissen für alle Konfessionen in neuer Weise aktuell geworden: Die aufgebrochene Frage nach der Wahrheit des Glaubens spricht den Menschen in seinem Gewissen an, und umgekehrt nimmt der Mensch sein Gewissen für die Unbedingtheit dieser Wahrheit gegenüber ihrer Bestreitung in Anspruch. Zugleich berührt die Reformation die anthropologischen – theologischen und philosophischen – sowie rechtstheoretischen Prämissen der Vorstellungen vom Gewissen, wie sie allen Konfessionen aus der Antike und der vorreformatorischen christlichen Geistesgeschichte überliefert sind. Die Frage nach den Bedingungen und Grenzen einer Ansprache und Inanspruchnahme des Gewissens ist eine gemeinsame Frage für die Rechtslehre, die Theologie und die Philosophie. Indem sich diese Disziplinen um die Theorie und Praxis der Regulierung menschlichen Handelns bemühen, begegnen sie dem Gewissen als dessen innerer Beurteilungs- und Steuerungsinstanz. Konzepte von Wesen und Funktion des Gewissens handeln davon, ob, wie und warum es von außen zu erreichen ist und wie es sich nach außen, also in die soziale Interaktion hinein vermittelt.[4] Der Rechtslehre geht es darum, ob und wie die soziale Außenwelt – wie sie in der weltlichen oder geistlichen Obrigkeit, in staatlichen oder kirchlichen Institutionen Gestalt annimmt – normativ auf das Gewissen einwirken und auf die Inanspruchnahme des Gewissens reagieren kann. Dabei setzt sich die Rechtslehre notwendig zu den Gewissenskonzepten der Theologie und Philosophie ins Verhältnis und trifft dort wiederum auf eine Auseinandersetzung mit juristischen Theoriefiguren, die insbesondere im kanonischen Recht des Mittelalters entwickelt und von ihm her tradiert und rezipiert wurden.

Wenn man voraussetzen kann, daß die konfessionelle Differenzierung der Theologie im Gefolge der Reformation eine konfessionelle Differenzierung der theologischen Konzepte vom Gewissen mit sich brachte, dann mußten sich die reformatorischen und nachreformatorischen Rechtslehren auch zu den konfessionellen Differenzen dieser Konzepte vom Gewissen verhalten. Dem gehen die in diesem Band versammelten Beiträge nach, indem sie repräsentative Positionen der Rechtslehren des 16., 17. und frühen 18. Jahrhunderts auf Fragen wie diese hin analysieren: Wie – das heißt vermittelt über welche

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[3] Siehe den Tagungsband: Wim Decock/Jordan J. Ballor/Michael Germann/Laurent Waelkens (Hg.), Law and Religion. The Legal Teachings of the Protestant and Catholic Reformations, Law and Religion. The Legal Teachings of the Protestant and Catholic Reformations, 2014 (Refo500 Academic Studies Bd. 20).

[4] Mit dieser Fassung des Gewissensproblems hat Frank Grunert zur Formulierung des Programms für die Tagung in Wittenberg wesentlich beigetragen; siehe jetzt dens. in diesem Band, S. 296.

Transformationen – gelangten die konfessionellen Gewissenskonzepte in die Rechtslehren? Welche theoretischen und praktischen Effekte ergaben sich daraus? Wirkten sich die konfessionellen Differenzen darin aus, wie die Rechtslehren mit dem Gewissen umgingen? Wurden unterschiedliche Erfahrungen wirksam, die die Konfessionsparteien mit der Berufung auf das Gewissen in den verschiedenen historisch-politischen Situationen gemacht haben? Lassen die Rechtslehren eine explizite oder implizite Auseinandersetzung mit konfessionellen Differenzen im Umgang mit dem Gewissen erkennen? Gibt es Parallelen oder Konvergenzen im rechtlichen Status des Gewissens? Wie sind solche Differenzen, Parallelen oder Konvergenzen in die Vorgeschichte der modernen Verständnisse von Toleranz und Gewissensfreiheit einzuordnen?

Die Beiträge behandeln die Rechtskonzepte des Gewissens sowie ihre Umsetzung in den Lehren vom Öffentlichen Recht und vom Kirchenrecht aus theologie-, rechts- und philosophiegeschichtlichen Perspektiven. Sie zeigen Wechselwirkungen der nachreformatorischen Rechtslehren vor dem Hintergrund ihrer Kontinuitäten und Diskontinuitäten mit den scholastischen und humanistischen Konzepten des Gewissens. Am spezifischen Kriterium des Gewissensproblems treten Beziehungen zwischen der nachtridentinischen Moraltheologie, der Herausbildung einer calvinistischen Tradition und den langwirkenden Paradigmen der Naturrechtslehre zutage. Der theoretische und praktische Umgang mit dem Gewissen konkretisiert sich unter anderem in Erörterungen über seine Aktualisierung im Widerstandsrecht und im ius belli, aber auch im Verhältnis zwischen dem Gesetzesrecht und der vom Richter erwarteten Gerechtigkeit in der Rechtsanwendung.

In die frühneuzeitliche Entwicklungsgeschichte des Gewissensbegriffs in der lutherischen, reformierten und katholischen Tradition, wie sie in mehreren Beiträgen in Bezug genommen wird, brachte die reformatorische Theologie vor allem eine veränderte Vorstellung vom Gesetz ein. Herman Selderhuis arbeitet dies für die reformierte Tradition im Werk von Jean Calvin heraus. Die Befolgung göttlicher und weltlicher Gesetze wird im Gegensatz zur katholischen Lehre ihrer unmittelbaren Heilsrelevanz entkleidet, indem die Rechtfertigung des Sünders und das Seelenheil des Christen allein der Gnade Gottes in Christus vorbehalten bleibt; die Rechtfertigung geht in einem umgekehrten Bedingungsverhältnis dem gesetzestreuen Leben voraus. Diese Befreiung des Gewissens von der Herrschaft des Gesetzes ist ganz auf das geistliche Ziel des Menschen ausgerichtet. Gewissensfreiheit ist hier die Freiheit von der Sorge um das Heil. In diesem Grundansatz stimmt das reformierte Konzept der Gewissensfreiheit mit Luthers Auffassung vom Gewissen überein, wie unter anderem Harald Maihold sie darlegt, um sie mit den katholischen Lehren vom *forum internum* zu kontrastieren. Der reformatorisch ›befreite‹ Gewissensbegriff prägt die protestantischen Vorstellungen von Gewissensfreiheit bis in die Aufklärung hinein. Das zeigt die Untersuchung von Michael Germann zu Justus Henning Böhmers Abhandlung über die Gewissensfreiheit für die protestantische Kirchenrechtslehre des frühen 18. Jahrhunderts. Zusammen

mit der Begrenzung der Staatsgewalt auf das *forum externum* schlägt diese Auffassung bereits durchaus eine Brücke zur späteren, freiheitsrechtlichen Entwicklung der Gewissensfreiheit.

Allerdings bezieht sich die Emanzipation des Gewissens in der Reformation zunächst keineswegs auf irgendeine Befreiung von obrigkeitlichen Gesetzen im *forum externum*. Vielmehr geht die Übertragung der äußeren Kirchenleitung von der geistlichen Gewalt des Papstes auf die Gemeindeältesten und – in der lutherischen Entwicklung – auf den Landesherrn mit einer Verstärkung weltlicher Obrigkeit einher. In dieser politischen Entwicklung identifiziert Jordan Ballor die »cura religionis« als eine für die Frühe Neuzeit kennzeichnende Verweltlichung der geistlichen Gewalt oder umgekehrt eine »Spiritualisierung« der weltlichen Gewalt. Der These, daß die Reformation des 16. Jahrhunderts so einen bis heute wirkenden »politischen Absolutismus« staatlicher Religionskontrolle hervorgebracht habe, setzt er die »weitreichenden Folgen der Berufung auf das Gewissen im Herzen des reformatorischen Widerspruchs« gegen eine geistliche Herrschaft entgegen.

Unumstritten galt die ursprüngliche Betonung der Gewissensfreiheit in der Reformation der Ablehnung kirchlicher, insbesondere päpstlicher Gewissenssteuerung. Weil die Zurückweisung der päpstlichen Autorität nicht nur die geistliche, sondern auch die weltliche Herrschaft betraf, sieht Mathias Schmoeckel – in einer vom Gewissensproblem losgelösten Gesamtschau – eine der wichtigsten juristischen Leistungen der Reformation in der Herausbildung des modernen Völkerrechts. Die reformatorische Geltendmachung der Gewissensfreiheit gegenüber dem Papst und aller geistlichen Obrigkeit konnte sich aber auch in eine kritische Haltung gegenüber den weltlichen Obrigkeiten hinein ausdehnen. Wie das Gewissen zum Ausgangspunkt für eine solche Kritik an der Politik der weltlichen Obrigkeiten werden konnte, führt Angela De Benedictis' Beitrag über Gewissen und Widerstand in der konfessionell markierten Auseinandersetzung zwischen Johannes Althusius und Johannes Beccaria vor. Lucia Bianchin erläutert die Bedeutung des Gewissensbegriffs als Bollwerk für die Verteidigung einer höheren Gerechtigkeit am Beispiel reformierter Autoren wie Althusius und Lambert Daneau, um dann am Beispiel des später zum Katholizismus übergetretenen Lutheraners Christoph Besold Übergänge zu einer konfessionsübergreifenden Anerkennung von Gewissensfreiheit um des öffentlichen Religionsfriedens willen sichtbar zu machen. Robert von Friedeburg veranschaulicht anhand der Traktatliteratur orthodoxer, nicht calixtinischer Lutheraner im Kontext des Dreißigjährigen Krieges den Unterschied zwischen einer Kritik, die den Fürsten im Gewissen anspricht, und seiner polemischen Entmenschlichung zur »gewissenlosen« Bestie. Die kritische Ansprache des Königsgewissens findet sich freilich auch in der katholischen Fürstenliteratur. Ein Beispiel dafür untersucht Matthias Kaufmann in seinem Beitrag über Willensfreiheit und Gewissen bei Luis de Molina, der im Traktat *De justitia et jure* seine kritische Auseinandersetzung

mit der Praxis der Sklaverei vornehmlich an das Gewissen der Fürsten adressierte.

Die Verbindung protestantischer Papstfeindlichkeit mit Widerstand gegen gewissenlose Fürsten führte an der Schwelle des 17. Jahrhunderts zur Auflösung der spanischen Niederlande. Dem Argument der Gewissensfreiheit kam bei den Unabhängigkeitsbestrebungen bekanntlich eine wichtige Rolle zu. Weniger betont allerdings wurde die allmähliche Umwandlung dieses Toleranzdenkens in einen relativ intoleranten, von den Generalstaaten auferlegten, reformierten Religionskultus in der jüngen Republik der Vereinigten Niederlande. Genau diese Erkenntnis untermauert Antonie Hage in seiner kunsthistorischen Auslegung der Allegorie der Gewissensfreiheit auf dem berühmten Glasgemäldefenster in der Johanneskirche Goudas.

Des engen Zusammenhangs zwischen dem Erhalt der staatlichen Ordnung und der Religion waren nicht nur Obrigkeiten, sondern auch protestantische Gelehrte bewußt. In seinem Beitrag über den Gewissensbegriff in den protestantischen Naturrechtslehren am Ende des 17. Jahrhunderts legt Frank Grunert dar, dass noch der Gewissensbegriff eines Samuel Pufendorf von dem Anliegen geprägt war, die Spannung zwischen dem Gewissen des Einzelnen und den Gesetzen des Staates zugunsten der politischen Stabilität aufzulösen. Selbst im Fall eines manifest ungerechten Krieges sollten Untertanen den Kriegsdienst nicht aus Gewissensgründen verweigern können. Im Gegensatz dazu fällt die Flexibilität der katholischen Gewissenskasuistik in der von Merio Scattola – dessen allzu früher Tod in die Zeit der Drucklegung seines Beitrags gefallen ist – erörterten Frage nach der Möglichkeit der Gehorsamsverweigerung bei den Spanischen Scholastikern des 16. Jahrhunderts auf. Ganz entsprechend zeigt auch Harald Maihold in seiner Darstellung über die Abgrenzung von *forum internum* und *forum externum* auf, wie katholische Theologen sich bemüht haben, das Verhältnis zwischen dem inneren Gewissensurteil und den äußeren Normen zu harmonisieren.

Jenseits einer reinen Begriffsgeschichte der reformatorischen und gegenreformatorischen Gewissenskonzepte verdient auch die Bedeutung des Gewissens für die Rechtspraxis Beachtung. Auf der Tagung in Wittenberg referierte hierzu Heinrich de Wall über »Die Bedeutung des Gewissens für den Augsburger Religionsfrieden 1555«. Er skizzierte darin die verfassungshistorische Dimension des Gewissens als eines politischen Faktors mit erheblichen, ambivalenten Wirkungen für die vorläufige Befriedung der konfessionellen Konflikte. Eine rechtsmethodische Dimension hat das Gewissen in seiner Bedeutung für die Gerichtspraxis. In seinem Beitrag über die externe Wirkung des *forum internum* schlägt Laurent Waelkens vor, den oft festgestellten, aber bisher unaufgeklärten Rückgang von Streitfällen vor europäischen Gerichten zwischen 1550 und 1750 vor dem Hintergrund des Aufstiegs einer vom Gewissen geleiteten Rechtswissenschaft neu zu deuten. Richard Helmholz legt dar, wie vor englischen Gerichten zwischen 1500 und 1800 der Verweis auf das Gewissen weniger auf die Bestreitung als auf die Durchsetzung des positiven Geset-

zesrechts zielte. Die Bezeichnung »court of conscience« für Gerichte, die über Forderungen von geringem Streitwert nach gelockerten Verfahrens- und Beweisförmlichkeiten entscheiden konnten, deutet eine Anschauung vom Gewissen als Sitz des Gerechtigkeitssinns an. Selbst wenn der konkrete Einfluß des Gewissens auf die richterliche Entscheidungsfindung schwer greifbar bleibt, bietet uns der Artikel von Wim Decock über den *Tractatus theologico-juridicus* von Johannes Andreas Van der Meulen einen Einblick in die individuelle Auseinandersetzung mit dem Gewissensrecht im Werk eines reformierten, niederländischen Richters aus dem Ende des 17. Jahrhunderts. Für das Kernland der lutherischen Reformation im 16. Jahrhundert sind solche Traktate nicht überliefert, aber an indirekten Hinweisen auf die Aktualität protestantischer Gewissenslehren für die kursächsische Rechtspraxis fehlt es nicht, wie Heiner Lück aus den Quellen belegt.

Einer der Schlüssel für einen Vergleich der konfessionellen Rechtslehren über das Gewissen könnte es sein, das Verhältnis zwischen der Ansprache des Gewissens als Adressat für die Verinnerlichung äußerer Normen einerseits, andererseits der Inanspruchnahme des Gewissens als inneres Residuum »normativer Resistenz des seine Autonomie behauptenden Subjekts«[5] zu beobachten. Einen entsprechenden Übergang untersucht Frank Grunert bei Samuel Pufendorf und seinem Schüler Christian Thomasius. Nicht nur hier, sondern auch in vielen anderen Proben zum Status des Gewissens in den Rechtslehren sperrt sich die benannte Spannung gegen eine schlichte konfessionelle Zuordnung. Auch historisch ist mit der Ungleichzeitigkeit verschiedener scheinbar ›moderner‹ oder ›vormoderner‹ Vorstellungen vom Gewissen zu rechnen. So stellte auf der Tagung in Wittenberg Kerstin Hitzbleck »Das Gewissen als handlungsleitende Instanz im Großen Abendländischen Schisma« vor und zeigte eindrucksvoll am Beispiel des Schismapapstes Benedikt XIII. und seiner Begründung für die Weigerung, die Überwindung des Schismas anzuerkennen, daß auch das mittelalterliche Gewissen sich um der individuellen Verantwortlichkeit vor Gott willen als Widerstandsposition gegen das positive Recht ausprägen konnte.

Das Beispiel eines Papstes, der sich auf sein gottunmittelbares ›Amtsgewissen‹ beruft, nimmt so gesehen nur in einem kleineren Umfang vorweg, was möglich wurde, als die Reformation jeden Getauften in seiner Gottesunmittelbarkeit dem Papst gleichstellte. Dies allerdings leitete dann eine viel weiterreichende, wenn auch langsame, verschlungene und auf vielfältige Weise konfessionell gefaßte Akzentverschiebung von der verbindlichen Ansprache des Gewissens hin zur verbindlichkeitskritischen Inanspruchnahme des Gewissens ein.[6]

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[5] Grunert, in diesem Band, S. 296, im Anschluß an Hans Kittsteiner.

[6] Der vertieften Erschließung dieser und weiterer Querbezüge zwischen den Beiträgen in diesem Band dient das bewußt darauf zugeschnittene Sachregister zusammen mit dem Namenregister am Ende des Bandes.

The *forum internum* and its external features

in the legal history of Early Modern Times

Laurent Waelkens

In the colloquium of Wittenberg on »the conscience in the legal teachings of the Protestant and Catholic reformations«, we tried to understand the role of the *forum internum* in the legal history of Early Modern Times.[1] Our lecture started with two statements. Firstly, in the period 1550–1750, in the heydays of the *forum internum*, the number of court cases decreased considerably. Secondly, in the same period many perennial legal notions received a new significance. Both elements indicate a strong evolution in legal history. In the legal sources from that era, the emphasis was shifted from jurisdiction to jurisprudence, from judge-made law to academic law. In our lecture and in this paper we argue that the trigger of this major shift in the law of continental Europe was the *forum internum*, not as a conscience, but as an internal court of justice.

I. Two notable external changes in the law of Early Modern Times

All over Europe, the number of court cases decreased considerably during the 17th and 18th century. Seen over two centuries, the evolution of the number of sentences is staggering. Since the Roman Empire, Western law was driven by judge-made law, by court sentences. In Early Modern Times the monarchs still modelled sovereign courts on the prefecture of the Roman emperors and the chancellery of Constantinople. In the sixteenth and early seventeenth century their courts passed an impressive number of sentences. From then on until the second half of the eighteenth century, the number of cases decreased. Nearly every decade saw less court decisions than the previous one. In monarchical sovereign courts as well as in city courts in the 1780s, their number was reduced to a fifth of what we counted for the middle of the sixteenth cen-

[1] Colloquium organised in Stiftung Leucorea Wittenberg, 4–6 April 2014; see the introduction to this volume, supra p. 10 f.

tury. This phenomenon was for instance observed in the Low Countries,[2] in England,[3] in the German Reichskammergericht,[4] the Parliament of Paris[5] and the Chancery of Valladolid.[6] Although the decrease in the number of court cases in the 17th and 18th centuries is conspicuous, it does not coincide with a major shift in the legal procedures of conflict resolving. The explanation has to be found outside the courts, in an internal development within the law and jurisprudence.

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2 For the Court of Holland: from 280 cases a year in 1600 to 20 in the 1750s; or measured otherwise: in 1514 one annual case for every 6,000 inhabitants, in 1622 one for every 13,000 and in 1795 one for every 23,000; High Counsel of Holland: 120 a year in the 1670s, 20 in the 1770s; Municipal Court of Rotterdam: 1500 cases a year in 1700, 300 in the 1740s; Great Council of Mechlin: 1500 sentences a year in the 1540s, 10 a year in the 1760s; 1500 judgements a year in the 1720s, 500 in the 1780s; 1800 lawsuits in the 1720s, 600 in the 1780s; Council of Flanders: 240 cases a year in 1650, 30 in the 1760s; Council of Friesland: 160 cases a year in the 1710s, 35 in the 1790s; Court of Gelder: 80 cases in the 1790s, 25 in the 1760s; States Council of Brabant: from 40 in the 1670s to 7 in the 1770s; States Council of Flanders: from 50 in the 1670s to 5 in the 1780s. The counts were done by M. C. Le Bailly, Langetermijntrends in de rechtspraak van de hoven van justitie in de Noordelijke Nederlanden van ca. 1450 tot 1800, Pro Memorie 13 (2011), p. 30–67. For the Great Council of Mechlin: An Verscuren, The Great Council of Malines in the 18th century. An aging court in a changing world?, 2015, p. 179–211; Alain Wijffels, De Grote Raad voor de Nederlanden te Mechelen (ca. 1445–1797), in: De centrale overheidsinstellingen van de Habsburgse Nederlanden, ed. by E. Aerts et al, 1994, p. 448–461; for Flanders: Jan Buntinx, Inventaris van het archief van de Raad van Vlaanderen, 9 vol., 1964–1979.

3 In the Courts of Chancery and Common Pleas: 20,000 cases a year in the 1650s, 3,000 in the 1780s; Shrewsbury Curia Parva: 0.2 actions a year pro household in the 1670s, 0.03 in the 1790s; Guildhall of King's Lynn: 0.25 actions a year pro household in the 1630s, 0.04 in the 1740s; Great Yarmouth Borough Court: 0.15 actions a year in the 1570s, 0.03 in the 1740s; Mayor's and Provost's Court of Exeter: 0.17 in the 1570s, 0.03 in the 1740s; Mayor's and Tolzey Courts of Bristol: 0.3 a year in the 1640s to 0.03 in the 1750s. Numbers kindly communicated by M.-C. Le Bailly; cf. Christopher W. Brooks, Litigants and attorneys in the King's Bench and common Pleas 1560–1640, in: Legal records and the historian, ed. by J. H. Baker, 1978, p. 42–43; id., Civil litigation in England 1640–1830, in: The first modern society, ed. by A. L. Beier et al, 1989, p. 362–363; Craig Muldrew, The economy of obligation, The culture of credit and social relations in Early Modern England, 1998, p. 230–232.

4 700 Cases a year in the 1590s, 100 in the 1690s: Filippo Ranieri, Recht und Gesellschaft im Zeitalter der Rezeption. Eine rechts- und sozialgeschichtliche Aanlyse der Tätigkeit des Reichskammergerichts im 16. Jahrhundert, II, 1985, p. 295.

5 2000 Jugés a year in the 1670s, 300 in the 1770s: kindly communicated by M. C. Le Bailly.

6 1300 Cases a year in the 1580s, reduced to 300 in the 1660s: Richard L. Kegan, Litigants in Castile, 1500–1700, 1981.

A second basic premise is that many notions of ›Roman‹ law changed considerably in the Early Modern Times. The humanists tried to tie up with Antiquity, with the noble Roman culture. The lawyers followed. They tied up with old Roman law, flying over centuries of medieval legal studies, but they did not connect to the real antique institutes. Many civil law notions of the so-called *ius commune* bear a traditional Latin name, but were newly developed during Modern Times. The sudden and radical evolution of a series of Roman legal notions in the 16th and 17th century is something that we analysed in the past. Let us remember some examples.[7] *Dominium*, which had referred to the status of *paterfamilias* in Antiquity, became ›private property‹ in the 16th century. On the Continent ›possession‹ was a way to control farmland outside feudality during the Middle Ages. It became a kind of real tenancy and an aspect of ownership. *Tutela* evolved from ›custody in court‹ to ›guardianship‹. *Religio*, which had meant ›burial‹ in pre-Christian times (e. g. in the Twelve Tables), was always associated with religion in Modern Times. *Causa* and its Greek equivalent *aitia* no longer referred to a conflict, but indicated causality. *Culpa*, an ancient referral to violence and disturbance, was henceforth read as ›guilt‹ and induced an ethical reflection in jurisprudence. *Legitimi* were no longer heirs, but lawful citizens. *Libertas*, the ancient legal status of the soldiers, and *ius civile*, the privileges judges would have had to consider when soldiers brought cases to court, merged to become a corpus of innate rights. *Bona fides* had been a procedural means in Antiquity which obliged the judge to check the whole relation between parties. In Modern Times it indicated the Christian attitude everyone had to adopt when fulfilling obligations.[8] *Divortium*, which had meant a diversion in Antiquity, from *divertere*, became the title of the institution of divorce in Modern Times. In fact, the list of changed notions is as long as the lexicon of Roman law. Consequently, the meaning of emblematic texts in the *Corpus iuris* also changed dramatically. We illustrate this with two examples, which were also explained in previous articles. Firstly, in C. 8,52,2 we find the *consuetudo contra legem aut rationem*. In Antiquity it had meant ›a custom against judicial precedents or the imperial budget‹. The chancellery of Constantine ruled in 319 that the custom not to follow a court decision or not to pay a specific tax, never led to the prescription of fiscal proceedings nor to

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7 An overview was given in Laurent Waelkens, Le droit antique, un produit de l'interprétation des Temps Modernes, in: L'interprétation du droit. Actes des Journées internationales de la société d'histoire du droit 2013, ed. by B. Barnabe, 2016 (in press). A more extensive survey of the development of Roman law from Antiquity to the 19th century is to be found in our textbook id., Amne adverso, Roman legal heritage in European culture, 2015, passim (notions to be found in the general index).

8 Not explained in the studies mentioned in the previous note, but in a more recent article: Laurent Waelkens, De la *bona fides* à la *mala fides* chez les légistes et canonistes médiévaux, in: Les mensonges dans le droit romain, Aspects juridiques de Rome à nos jours, Actes du Colloque du 27 février 2014, ed. by P. Vassart (in press).

the acquisitive prescription of an exemption. In Early Modern Times this fragment was read in a completely different way: it dealt with the (popular) custom introduced against the (monarchical) law and against reason. It became the clue for discussions about sovereignty and the hierarchy of customary law, statute law and reason. The second example deals with C. 1,1,1, the Edict of Thessaloniki. In 380 the chancellery of Theodosius I decided to no longer endorse the court decisions of monophysite bishops and he forbade imperial judges to procure them exequaturs. The aim of this measure was to facilitate the reunification of the Eastern and Western Empires. In the 12th century the text was recycled. Following the medieval legists, in 380 the emperor simply accepted the Catholic creed in his law and hence the jurisdiction of the bishops. In the 16th century the same text C. 1,1,1 was, however, reinterpreted again. It became an important argument to subject the bishops to the monarchs: their jurisdiction was part of the royal jurisdiction, not of the pope's.[9] When one compares ancient Roman law with medieval *ius commune* and *ius commune* of Modern Times, one is struck by the way Roman legal notions are recycled without any historical criticism.

Both changes in the legal history of Modern Times, the falling number of court cases and the systematic reinterpretation of legal institutions, have hardly been studied. Twenty years ago studies of the jurisdiction of the sovereign courts were fashionable, but limited to the Early Modern Times. Most legal historians only recently started to focus on the 17th and 18th centuries. The same remark is to be made about the evolving significance of Roman legal vocabulary. It has never been analysed thoroughly. For a long time, legal historians read Latin texts through the spectacles of humanism and Modern Times. They did not assess the different interpretations in Antiquity, Middle Ages and Modern Times. The *Corpus iuris* was understood as it was interpreted by the jurists of the Early Modern Period and not as it was understood when it was composed in the 530s. In fact, the Latin language most scholars learned was developed during Modern Times. We read Cicero and St Augustine as they were interpreted by the humanists of the 16th century.[10] It is still difficult today

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[9] For C. 8,52,2 see Laurent Waelkens, Consuetudo contra rationem: la signification de C. 8,52,2, in: Studi in ommaggio di Ennio Cortese, ed. by I. Birocchi / M. Caravale / E. Conte / U. Petronio, 2001, p. 466–473; for C. 1,1,1 see Laurent Waelkens, L'hérésie des premiers titres du Code de Justinien, Une hypothèse sur la rédaction tardive de C. 1, 1–13, The Legal History Review 79 (2011), p. 253–296.

[10] E. g. St Augustine wrote about the mastership (dominium) of God the Father and we read about his ownership of the world: see Marie-France Renoux-Zagamé, Origines théologiques du concept moderne de propriété, 1987, passim. When Cicero, De fato 15, 34 wrote about the Aristotelian aitia, he clearly understood causa as a determining conflict. Fifteen centuries of Christianity later the Aristotelian causa expresses the freedom of choice. Examples in legal history: supra, n. 8. For those who like deconstruction, we recommend the works of the philosopher Klaus Oehler, who e. g. explains in his Antike Philosophie und Byzantinisches Mittelalter, Aufsätze zur

to explain to Romanists that Latin was in constant evolution. Many scholars were first confronted with Latin during childhood, by listening to Latin texts in church and following along in bilingual missals. They had to study Latin at school without any introduction to historical criticism. Today some Romanists still resent pre-humanistic readings as an intrusion into the certitudes of their early youth. But why do they feel comfortable with the ›Roman‹ notions of Modern Times mentioned supra?

II. The forum internum as an incentive for major changes

The medium binding both striking elements, the reduction of court cases and the redefinition of legal terminology, is the emergence of the *forum internum*. In fact, the reduction of the number of court cases and the renewal of legal thinking were a sound reaction to the catastrophes of the Early Modern Times.

Which catastrophes? Were the Early Modern Times not the stage of the Big Leap Forward in the West? As we explained in Louvain, in our first lecture in this Refo500 frame,[11] the massive immigration of Greek *Romaioi* from Constantinople did not only influence arts and techniques, but rotated our economic, political and theological thinking. In a first time it gave a boost to the Western wealth. The Greek immigrants brought us better shipping, new financial techniques and intercontinental trade, new traffic lines and the commerce of commodities. They introduced new crops in the West: cotton in Andalusia, chestnut in Corsica, sugar cane in Madeira. They developed copper mining in Tirol and replaced the Anatolian iron by that of Rio Tinto and Bohemia. They promoted high value manufacturing, such as silk cloth in Lyon, damask and tapestry in Flanders, metal tools in the Rhine region.[12] In our first lecture we

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Geschichte des Griechischen Denkens, 1969, how the lecture of the Greek philosophers was also adapted to the Christian thought of the Church Fathers. Otherwise they would never have withstood the transliteration of the 9th century.

[11] Laurent Waelkens, Legal Transplant of Greek Caesaropapism in Early Modern Times, in: Law and religion. The legal teachings of the Protestant and Catholic reformations, ed. by W. Decock / J. J. Ballor / M. Germann / L. Waelkens, 2014, p. 213–230.

[12] There is no design weaving in Flanders and Lyon before the 15th century. Cf. D. Jenkins (ed.), The Cambridge history of Western textiles, I, 2002; Ph. Hamon / J. Cornette (ed.), Les Renaissances, 1453–1559, 2009. The development of cotton industry in the two new ›Renaissance‹ cities of Baeza and Ubeda in the province of Jaen is common knowledge. For the systematic development of Rio Tinto from the 16th century on see Leonard Unthank Salkield, A technical history of the Rio Tinto mines. Some notes on exploitation from pre-Phoenician times to the 1950s, 1987. From 1453 till 1552 Corsica was exploited by Genovese merchants who resettled from the Levant. The KU Leuven Department of Legal History is conducting a study on their government of the isle. We were struck by the introduction of new trees

also emphasised the importance of political and religious changes. The Greek immigrants promoted the political system of Constantinople, led by a strong absolutist monarch, whose chancellery was also a court of last appeal against all decisions in the country – including decisions of the patriarchs. The immigration accelerated the rise of absolutism, which medieval jurists introduced by studying the law of the *Romaioi* at university. Many immigrants worshiped the same God in the West, but without the Eastern Church. They prompted the Reformation. At a certain moment, the changes in economics, politics and religion became too overwhelming and destabilised the West. Our beautiful new ship capsized. The horror of endemic wars began in Italy in the fifteenth century. It reached France, the Netherlands and Germany in the 1530s and was omnipresent in the second half of the sixteenth century. In large parts of the Continent, daily life became comparable to present day life in Syria. War, levies, persecution, exaction, pillage, burning of villages, ravaging of fields, looting of harvest, the pressure of a larger population and migrations... This period has been repressed from collective memory and is often embellished when historians describe it. Indeed, it brought the Reformation and the foundation of strong nations and it is difficult to associate this intellectual and political renewal with the misery of daily life. When thinking about Early Modern Times we prefer to admire the new building our ancestors had to build, rather than to remember their daily vicissitudes on a Continent turned adrift.

In legal history the Early Modern Period was featured by the sovereign courts. Their decisions were the only source of law. The system was based on the law of Rome and Constantinople. The Roman emperors never issued edicts or ordinances with general rules. They organised the judicial appeal against decisions of officials and judges and waited until conflicts were submitted to their chancellery in last appeal. When the supreme court decided a case, the lower courts had to consider its solution as a precedent and had to adopt the same solution. Otherwise the losing party would be able to ask the sovereign court to review the case in appeal. The procedure of appeal was the backbone of the judicial procedure. It was introduced in England in the 11th century, in Italy and Flanders in the 12th, in France in the 13th century. In the 15th century

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and crops in the 15th century, e. g. the Indian chestnut. The water management in the plain of Aléria which was subsequently ruined by malaria indicates trials to introduce cotton. The development of the weaponry of Toledo in Early Modern Times is known. In the north it was not coincidental that Maritz and August of Saxony commended the book of Georgius Agricola (1494–1555), De re metallica libri XII, Basel 1556. They wanted to develop the mining industry. About new metal industry see e. g. Wilfried Reininghaus, Gewerbe in der Frühen Neuzeit, 1990, p. 20–23. The link between the German metal industry and immigrants has not yet been proven, but the market was freed from the import of metal goods from Constantinople.

it was boosted and promoted all over Europe by the immigrants.[13] A court of appeal controlled all lower instances. Numerous new law faculties were founded by feudal rulers who wanted to challenge the decisions of their vassals. By this means absolutism was installed in the West. One became king over the territory submitted to his sovereign law court. The kings had proctors in every judicial instance, who assigned appeal against all kinds of local decisions. Their bailiffs and representatives could eventually instigate decisions of the sovereign court on every aspect of daily life.[14]

In our first lecture for Refo500 we also described how the sovereign courts vested control over the ecclesiastical courts. They were influenced in doing so by the Greek immigrants, as an aspect of the reception of Eastern caesaropapism.[15] In Scandinavia the bishops were integrated in the royal administration as civil servants. Similarly to all other institutions, church institutions entered the royal domain and all decisions were suitable before the sovereign courts. The prevailing system in reformed countries was seizure of church goods by the rulers and integration of ecclesiastical institutions into cities and municipalities, under the jurisdiction of the aldermen benches. In catholic countries rulers introduced competing jurisdiction. They accepted cases on all ecclesiastical matters. In the Netherlands this system was introduced when Nicolas Everaerts (†1531) was president of the Great Council of Mechlin. In England Henry VIII was the most orthodox follower of the *Romaioi*. In 1534 he adopted the solution foreseen in Justinian's Nov. 123, 21. The consistory courts were left unchanged, but the last appeal against York and Canterbury no longer went to Rome but to the Privy Council.

By the middle of the 16th century, most Western countries had no law outside the secular courts anymore, and no rule outside the sovereign courts. The monarchs used their new legal power to overrule city courts, feudal and consistory courts. They were also masters of war and peace. Medieval feudality had been a valuable system to limit warfare. When solicited for the war, feudal lords would try to convince their king to change his mind, talk with the enemy and try to settle the *casus belli*. The monarchs of the Early Modern Times, on

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[13] See e. g. Jonathan Harris, Cardinal Bessarion and the ideal state, in: Der Beitrag der Byzantinischen Gelehrten zur Abendländischen Rennaissance des 14. und 15. Jahrhunderts, ed. by E. Konstantinou, 2006, p. 91–97; Chryssa Maltezou, Still more on the political views of Bessarion, ibid., p. 99–105, both with bibliography. In the Netherlands the judicial appeal to the sovereign court was developed by Philip the Good: Laurent Waelkens, Le rôle de l'appel judiciaire romain dans la formation des Pays-Bas au seizième siècle, in: Separation of powers and parliamentarism, The past and the present, Law, doctrine, practice, ed. by W. Ururszczak / K. Baran / A. Karabowicz, 2007, p. 75–85.

[14] An excellent introduction into the legal history of the Early Modern Era is given by Antonio Padoa Schioppa, Storia del diritto in Europa, Dal medioevo all'età contemporanea, 2007, p. 223–387.

[15] Supra, n. 11.

the other hand, could decide on war and peace on their own. They could borrow the money for it from the new merchant bankers, usually pledging feudal rights or future taxes. Hence the omnipresence of war and the economic decline of the West. During wars there was no respect for the civil rights of the other side. Rights were fleshed out by the sovereign courts and only the winners received them. In the second half of the 16th century continental Western Europe slipped away into its deepest crisis ever. But what could be done against absolute monarchs? How to protect the civil society and how to secure daily life once every jurisdiction is controlled by the sovereign courts? In our first lecture we stressed the repression of the Greek culture by the humanists. Many scholars reduced the influence of Greek ideas by challenging their actual value. For them the great Greek culture was not of the 16th century. It was an old pre-Christian culture and a democratic one.[16] Hieronymus Wolf (1516–1580) was the first to use the scornful name of Byzantines, when he translated Nicephor Gregoras' (1295–1360) *Romaike Historia* as *Romana hoc est Byzantina historia*, reducing it to the history of our former colony of Byzantium in the East.[17] But here we focus on the reaction of the law faculties. How could they push back absolutism in a lawful way?

Lawyers change the societal order and the constitution of their country by interpreting it. Even today, if your human rights have been guaranteed by a constitutional text, what is protected changes every day because of the interpretations made by constitutional courts and Strasbourg. But lawyers can only be successful when their interpretations are accepted by society. In the 16th century the jurists found two elements helpful for breaching the monopoly of the sovereign courts: the introduction of canon law into the sovereign courts and the theory of the *forum internum*.

The overruling of canon law by the sovereign courts has already been mentioned. Due to the takeover of the ecclesiastical jurisdiction, continental sovereign courts had to work with principles of canon law. When dealing with former canon law matters, royal justices applied the old precedents of the canonists. This new activity modified the jurisdiction. It introduced a new mentality in the sovereign courts. Canon law principles were secularised, but not stripped of their ancient values. In the 16th century sovereign courts start-

[16] Think about the controversy of Erasmus and Reuchlin on how to pronounce Greek: for Reuchlin it had to be pronounced like the immigrants, for Erasmus the ancient pronunciation should be reconstructed: Desiderius Erasmus, De recta latini graecique sermonis pronuntatione dialogus, Gryphius, Lyon 1528. The democratic calibre of the Greek *demokratia* and Roman *republic* first came to the foreground in the work of Jean Bodin, Les six livres de la République, Paris 1576. In Philips van Leyden's Cura reipublicae (1355) ›republic‹ still meant ›commonwealth‹.

[17] Nicephori Gregorae Romanae, hoc est Byzantinae historiae libri XI [...], D. Antonii Fuggeri, &c., & Hieronymi Wolfii labore, Graecè Latinéque editi [...], Basileae, per Joannem Oporinum, 1562. About H. Wolf: Hans-Georg Beck, Der Vater der deutschen Byzantinistik: Das Leben des Hieronymus Wolf von ihm selbst erzählt, 1984.

ed to ask for equity in all cases, good faith in all obligations, they accepted *pacta sunt seruanda*, marriage and legitimacy as admission ticket to the courts and civil rights... In the 17th century the jurists would also receive the principles of ecclesiastical administrative law, which would become important to the development of public law. In reformed countries some jurists had problems with the introduction of this kind of ›popish‹ law in the jurisdiction of the sovereign courts.[18] It was nevertheless accepted as ›customary law‹ in most countries.[19] The theory of customary law in Early Modern and Modern Times is related to the acceptance and the recycling of canon law, which was old and good law.[20] It was a way for justices to bring a new spirit into the monarchical law. »Canonists«, as Hostiensis already wrote, »are not only settling cases, they are also aware of the final destiny of both parties«. By processing canon law, the civil jurists began to admit that, like priests who managed both judicial and spiritual reasons, civil servants in turn had to be moved by ethical thinking, they were considered to develop an ›Amtsgewissen‹. They became sensitive to the *forum internum*, an expression medieval canonists like Hostiensis never used.

Most monarchs – and royal justices – of the 16th century were God-fearing. Some jurists saw this as a drawback to breaching absolutism. The example of Castile is emblematic. In 1521 Emperor Charles V ordered the killing of Villalar. Three thousand ›communeros‹, who stepped to Valladolid in order to claim respect for their civil rights, were exterminated. The theologian Vitoria reacted in Valladolid and later in Salamanca with his courses about *iustitia et iure*, in which he mixed theology and law. In his slipstream indignant theologians continued to oppose justice to royal law. Through creation and baptism, people entered the divine order, which transcended the royal order.[21] The breach was not to be stopped anymore. In the Controversy of Valladolid of

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[18] The Louvain Reformed jurist Mudaeus made total abstraction of canon law in his works. Others, like Molinaeus (Paris) or Wesenbecius (Louvain – Wittenberg), were more practical: »If the courts accept it, it is no longer canon law«.

[19] Thesis of Udo Wolter, Ius canonicum in iure civili, 1975.

[20] Our actual ideas on customary law are determined by the 19th-century theory. It is only then that, in a romantic search for law of popular origin, scholars considered the medieval jurisprudence of the feudal *iudices delegati* in cities and seigneuries as ›customary law‹. Also the jurisprudence of lower courts of the Early Modern Times was considered as ›customary law‹. In Germany it furthermore became ›German‹ customary law. For the legal theory about this, see at the beginning of the era e. g. Georg Friedrich Puchta, Das Gewohnheitsrecht, Erlangen 1828, and at the end of the era Siegfried Brie, Die Lehre vom Gewohnheitsrecht, I, Geschichtliche Grundlegung, Eine historisch-dogmatische Untersuchung, Breslau 1899. About the myth of German customary law: Frank Ludwig Schäfer, Eine Geschichte der Wissenschaft vom einheimischen Privatrecht, 2008.

[21] About theologians and *ius commune* see Wim Decock, Theologians and contract law. The moral transformation of the ius commune (ca. 1500–1650), 2013, p. 21–104.

1550–51 about the civil status of ›los Indios‹, Charles V had to bow in front of a mixed panel of jurists and theologians and recognized that all men had civil rights.[22] The influence of the *Salmanticenses*, those Castilian scholars, on the law faculties has been disclosed in the last half century.[23] They focused on ›natural law‹ and are often called the Spanish ›jusnaturalists‹. In many law faculties a parallel development can be found directly in the interpretation of *ius naturale*. In Antiquity this words meant ›innate‹ or ›instinctive procedure‹. In the Middle Ages it became a way for the canonists to introduce precepts of moral theology into canon law.[24] In the middle of the 16th century the theory of natural law is to be found in many courses of ›introduction into law‹. In Louvain Joachim Hopperus suggested in 1553 that God poured some rights into newborn children at birth (*natura*).[25] Four years later Joannes Ramus published his *Oikonomia*, a booklet on the hundred axioms of law.[26] The monarchs and justices who did not respect natural law were sovereign on earth, but had to fear for their Last Judgement. Due to warfare in the last half of the 16th century, the pitiful state of many law faculties and the small number of students, new ideas took a long time to strike root.[27] We find the advancement of theological arguments in legal theory in different studies.[28] Wim Decock analysed how theologians developed the notion of *forum internum* and how they associated it with a so-called *forum conscientiae*. At the beginning of the 17th century we find a massive extrajudicial influence on law. It is expressed in the works of Lessius, who introduced and adapted the doctrine of the Spanish jusnaturalists in Louvain and in Catholic legal theory, and Grotius, who spread it in the Reformed countries. Grotius, who was a theologian, a lawyer and a strong opponent of the government of his country, is considered the ›father of natural law‹.

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22 Jean Dumont, La vraie controverse de Valladolid, Premier débat des droits de l'homme, 1995.

23 Bibliography in Decock, Theologians and contract law (supra n. 21).

24 Rudolf Weigand, Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus, 1967, is an iconic study about this matter.

25 See e. g. his De iuris arte, Martinus Rotarius, Louvain 1553, I, 13.

26 Joannes Ramus, Oikonomia seu dispositio regularum utriusque iuris in locos communes, Bartholomaeus Gravius, Louvain 1557.

27 The ›productive‹ academic peregrination of scholars like Jacques Cujas, Johannes Reuchlin, Alberico Gentili, Johannes Ramus, Justus Lipsius... were largely inspired by insecurity in the intellectual centres and lack of means of the universities where they stayed.

28 E. g. Renoux-Zagamé (supra n. 10); Decock, Theologians and contract law (supra n. 21).

III. The forum internum of the lawyers

Lessius often wrote about the *forum conscientiae*, but the jurists avoided the term. Their main problem was the absolutism of the monarchical courts, in Latin the *forum externum*. They needed the *forum internum* to challenge the absolutism of the sovereign courts. The acceptance of an inner forum steered them towards the legal doctrine. The jurists would build theory like theologians. The existence of innate rights was the basis of the thought of the ›school of natural law‹. At the law faculties they led to a theoretical approach of the law and to the development of legal theory, which appealed to the new ›Amtsgewissen‹ of lawyers and judges. The jurists developed legal theory and young lawyers were ›indoctrinated‹ with legal principles which were not based on judicial precedents. This was acceptable for the officials, including the judges – who were still officials at that time. This acceptance of the new dogmatic source of law was first and foremost due to the momentum. In 1600, Europe was exhausted because of the wars. Even the monarchs were at rock-bottom. Everything that could improve this situation was accepted. Twenty years afterwards the justices of the sovereign courts had been inoculated with the new legal theories. They applied the values they had been educated with at law faculty.

The *forum internum* was not arbitrary.[29] The jurists developed policy lines which made it predictable as well. They stressed the European dimension, and did so not only via Christianity, but also through the strict adherence to the Greek logic which had become established everywhere in the sixteenth century. Catholic legal thought with its centralised theological influence and the Reformed legal thought with its growing rationalism were never far apart. Both systems strove for law and justice outside the court.

Within the doctrine three new matters were developed in the seventeenth century: private law, public law and international law.

During the sixteenth-century wars, the victors were free to deal with the losers as they pleased: the winner took it all. In natural law, however, civil rights transcended the competence of the monarchs. Grotius defended the new vision in his *De iure belli ac pacis* (1625). A war did not change civil rights at all, because these rights belonged to the subjects. They were *res privata* for the sovereign courts. For Grotius all civil rights were ›subjective‹ law. The monarch and the justices who did not respect these rights would be called to ac-

[29] The printed legal literature of the Early Modern Times is too large to read everything. The next pages are based on the publications of the 16th- and 17th-century jurists of Louvain we studied when composing the *History of the Leuven law faculty*, 2014, especially p. 94–111. Due to the sharp crisis in the Low Countries under Charles V and Philips II, Louvain was early in its elaboration of legal doctrine, but it did not stand alone. Comparison with German, French and Italian law faculties leads to the same conclusions. Outside the old empire, e. g. in England and Krakow, one cannot find the same legal theory.

count during the Last Judgement. For Descartes (1596–1650), whose rediscovered degree shows that he was a jurist,[30] every subject remained a point of departure for rights even without the intervention of his Creator. In the legal world, this Cartesian revolution was expressed in private law. During the course of the seventeenth century civil rights were increasingly considered to be private rights of the individual which transcended national jurisdictions. They were studied as detached from the courts. The civil rights became the most important heritage within Roman law, the old legal system of West and East. In order to know their contents, the *Corpus iuris* was combed through. In practice, this revival of the *Corpus iuris* and Roman law was ahistorical. People were not looking for old legal doctrine, but for new legal thought. With the *Corpus iuris*, they wanted to safeguard the private rights of the citizens. In this process, Justinianic law played the same part as humanism in the sixteenth century. It offered a platform to transcend particularism. In the *Corpus iuris*, the jurists no longer saw imperial case law which the sovereign courts could amend. In Leuven, Zoesius represented the *Corpus iuris* as a *lex generalis*, a law that was stronger than the monarchical case law. Most of the jurists considered it an unchanging text which one read like a Protestant Bible: immediately, without taking tradition into account, with current needs as the point of departure, with the convictions, Latin and logic of the moment.

This approach is the *usus modernus pandectarum*. The result was an ›Umwertung aller Werte‹. Apparently it looked like a study of Roman law and seemed to be in line with medieval Roman law. It definitely was not. It was not a study about imperial jurisdiction. The *Corpus iuris* was considered as *ratio scripta*, the carrier of the natural law, of the innate rights, which stood above the courts. Its interpretation was not dictated by the *forum externum* of the sovereign courts, but by an internal theoretical approach, by the *forum internum* of the jurists. They discussed the values of the *ius commune* without national borders. Hence the new meanings given to most Roman legal notions in the *ius commune* of Early Modern Times, as mentioned above. *Dominium* and *possessio*, *causa*, *tutela*, *legitimatio*, *matrimonium*, *obligatio naturalis*, *poena capitalis*, et cetera were given meanings which matched feelings of justice in the *forum internum* and undermined the power of the monarchs. Let us remember one example. In Antiquity and the Middle Ages *dominium* was the sovereign's right to all land, which he could lend out as *dominium utile* in feudality. In the doctrine of Early Modern Times the private *dominium utile* was considered to be the real *dominium* and the monarchical rights in rem were forgotten.[31] This new view of civil rights was called ›private law‹ because it was

[30] Jean-Robert Armogathe, Vincent Carraud / Robert Feenstra, La licence en droit de Descartes, un placard inédit de 1616, in: La nouvelle république des lettres 2 (1988), p. 125–145.

[31] Robert Feenstra, L'emphythéose et le problème des droits réels, in: La formazione storica del diritto moderno in Europa, Atti del terzo Congresso internazionale della

developed outside the courts and without any contribution of the monarchs. As a product of the law faculties it was distributed through the young lawyers. Its introduction in practice was founded on the fact that justices could rely on their convictions. As it was formally founded on the *Corpus iuris*, it was good old law, *ratio scripta*, and they could apply it in the same way as the old canon law. As the *ius commune* of Early Modern Times was common for all Continental nations, it promoted the resumption of trade and cooperation across the borders and contributed to the recovery of affluence.

A second matter of legal theory can be found in the ascent of public law. The relations between the monarch and the people were reconsidered. During the 16th century the monarchs had replaced the feudal lords in their administration with jurists in their employment. In the 17th century, these jurists would reduce the power of their own monarch.[32] Here too, theology was appealed to and the *forum internum* played a part. The jurists began to ponder ethical questions about the relation between the monarch and his subjects. In this period the doctrine was developed that the monarch had received his power from God and would have to justify the way in which he had used it at the Last Judgement. In that context, the theologians were also given the floor for a short while, but their part was gradually reduced and legal doctrine was developed. The fact that jurists had adopted principles of canon law played an important part in public law. Traditionally, in Europe principalities were passed to the eldest son via private inheritance law. If there was no son, the realm was inherited via the eldest daughter, but her husband became the monarch because it was a military function. The 17th-century jurists, by con-

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Società italiana di storia del diritto, 1977, p. 1295–1320; reprints of articles about this subject can be consulted in ID., Legal scholarship and doctrines of private law, 1996, III and XIII, and in ID., Histoire du droit savant (13th–18th century), Doctrines et vulgarisation par incunables, 2005, I–V. An important study about the feudal aspects of *dominium* is Guillaume Leyte, Domaine et domanialité publique dans la France médiévale (XIIe–XVe siècle), 1996. A more recent work is Thomas Rüfner, The Roman concept of ownership and the medieval doctrine of dominium utile, in: The creation of the ius commune. From casus to regula, ed. by J. W. Cairns and P. J. Du Plessis, 2010, p. 127–142. On the influence of theology on the development of the notion of ownership, see Renoux-Zagamé (supra n. 10). On the role of Spanish scholastics in the development towards a single notion of ownership, see among others Decock, Theologians and contract law (supra n. 21), p. 352–374. On the problem of divided ownership, also see Laurent Waelkens, Enkele grondslagen van de leasing in het ius commune, in: Leasing, ed. by B. Tilleman / A. Verbeke, 2007, p. 1–16. Finally, on the notion of ownership in the context of the drafting of the Civil code, see Hannes Siegrist / David Sugarman (ed.), Eigentum in internationalem Vergleich (18.–20. Jahrhundert), 1999.

[32] The manner in which the jurists employed by monarchs managed to bring absolutism under control can be read in the accessible works of Jacques Krynen from Toulouse. A powerful and easy-to-read work is Jacques Krynen, L'état de justice, I, L'idéologie de la magistrature ancienne, 2009.