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Ius Commune Legal Scholarship and Coherence: The Author's Structure*

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ABSTRACT: Over the past decades the characteristics of legal scholarship have been the subject of intense debates. This article aims at confronting strands of arguments on this topic with views concerning *ius commune* legal scholarship, that is the civil law writings of the European continent in the Old Regime (c. 1200-c. 1800). In so doing, it will be argued that neither relativist or dogmatic approaches provide complete explanations of its features. A case will be made for further exploration of “relative coherence” in the texts of legal authors. Analysis of legal scholarly texts that is aimed at exposing clustered ideas, in the author's legal thoughts, was practised for some time, from the angle of intellectual history, but for few legal topics only. This approach can be revived and it would allow for a recalibrated method of analysis of the structural traits of pre-modern legal scholarly writings.

KEY WORDS: legal scholarship, *ius commune*, policy considerations, coherence, clusters, intellectual history, critical legal studies, empirical legal studies, later Middle Ages, early modern period, insolvency, debt enforcement.

1. Introduction

Current debates on the nature of legal scholarship, and on whether coherence in legal texts or law at large is possible or preferable, invite for a new appraisal of pre-modern legal writings. Since the middle of the twentieth century, arguments concerning the methodology of legal history and of legal research have occasionally touched upon the nature of *ius commune* writings, that is the civil law that was practised in the European continent during the Old Regime (c. 1200-c. 1800). However, it was mostly in the United States that methodological ideas relating to legal history were combined with a weighing of the properties of legal writings. One of the critiques that was raised was concerned with so-called “historicist” inflations of the contents of scholarly

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writings to doctrine¹. “Doctrine” has different meanings. First, “doctrine” refers to structure. Legal authors and legal professionals cannot deviate too much from what their predecessors have stated or settled as law, which is what they consider as “doctrinal”². Secondly, “doctrine” is usually referring to a (perceived) intrinsic quality of rules. In both meanings “doctrine” is “learning”, which implies authority and the replication of contents³.

The main question then is to what extent legal writings in the civil law tradition were providing structure, that is doctrinal authority. With regard to common law commentaries, critical views have been expressed on their (thus envisaged) systemic features. Moreover, it was claimed that the earlier exaggerations were connected with assumptions that were part of the method of legal dogmatics⁴, which in turn were related to ideals regarding the legal profession and law, even to ideology and power relations⁵. However, both the criticism of American scholars and the proposals for new methods that came after have but seldom been discussed among European legal historians, or linked to assessments of civil law legal scholarship of the Old Regime. In continental Europe, it was foremost national legal history that became criticized, which gave rise to comparative legal history and an interest for legal pluralism⁶. Analysis of the qualities of *ius commune* legal writings has virtually not been coupled to the mentioned new approaches⁷.

This notwithstanding, the same important questions that were raised in

¹ Foremost with respect to Blackstone’s commentaries: see for example D. Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone’s Commentaries*, Cambridge (MA) 1941.

² Emphasizing the first aspect is J. Getzler, “Legal History as Doctrinal History” in M.D. Dubber and Ch. Tomlins (eds.), *The Handbook of European Legal History*, Oxford 2018, p. 173-174.

³ This idea is linked to conceptions of closed groups of legal professionals; see for example: N. Jansen, *The Making of Legal Authority*, Oxford 2010, p. 89-90.

⁴ For example, R.W. Gordon, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, in R.W. Gordon, *Taming the Past: Essays on Law in History and History in Law*, Cambridge 2017, p. 283.

⁵ See, a.o., D. Kennedy, *The Rise and Fall of Classical Legal Thought*, Washington 2006; D. Kennedy, *The Structure of Blackstone’s Commentaries*, in “Buffalo Law Review”, 28 (1979), p. 205 ff., and many of the papers assembled in R.W. Gordon, *Taming the Past: Essays on Law in History and History in Law*, Cambridge 2017.

⁶ See several contributions in M.D. Dubber - Ch. Tomlins (eds.), *The Oxford Handbook of Legal History*, Oxford 2018, and H. Pihlajamäki - M.D. Dubber - M. Godfrey (eds.), *The Oxford Handbook of Comparative Legal History*, Oxford 2018. Also: D. Heirbaut - S. Donlan, ‘A patchwork of accommodation’: *European legal hybridity and jurisdictional complexity: an introduction*, in D. Heirbaut - S. Donlan (eds.), *The law’s many bodies : studies in legal hybridity and jurisdictional complexity, c1600-1900*, Berlin 2015, p. 9-34; D. Ibbetson, *Comparative Legal History: a Methodology*, in A. Musson and Ch. Stebbings (eds.), *Making Legal History: Approaches and Methodologies*, Cambridge 2012, p. 131-145; D. Ibbetson, *The Challenges of Comparative Legal History*, in “Comparative Legal History”, 1 (2013), p. 1-11.

⁷ Except for the view that in the later Middle Ages the *ius commune* served as glue in a pluralist society, but this idea predates the mentioned changes in scholarly perspectives and also the turn towards legal pluralism in legal studies. See A. Di Robilant, *Genealogies of soft law*, in “The American Journal of Comparative Law”, 54 (2006), p. 515-518.

regard of American law and common law legal writings can be asked with respect to pre-modern legal tracts that were written in the European continent. Were legal scholarly writings a proxy of a profoundly diverse and pluralistic society? Or did they serve as counterweight? Was coherence in legal scholarly texts a construct, an unattainable ideal? Was it only an aim of legal scholars to propose elaborate and encompassing views or was this purpose also achieved?

Any analysis of the state of the art with respect to these questions must delve into the history of legal-historical methodology as well. As has been demonstrated for the American “tradition”, labels and their contents were construed on the basis of certain legal-historical and legal methods, and starting from assumptions with which they were imbued. However, such criticism must not go too far. There is a middle ground between “doctrinal historicism” on the one hand and “contextualism”, “instrumentalism” and “determinism” on the other. Even though earlier categorizations of *ius commune* legal scholarship were combined with “historicist” conjectures and confections, in close relation to the legal dogmatic method, it will be argued that structural features of this scholarship can be assessed in their own right, without inflating features to a “system”.

This article will hereafter analyse arguments on coherence in legal writings in relation to the history of methods in the historical analysis of law and legal scholarship. In the third part, it will be argued that the notion of coherence can be made operational when considering it as pertaining to intellectual units or clusters of substantive legal thought. In a fourth part, first attempts are made to formulate anchoring points for a methodology of tracking and assessing such units. Opinions on the rights of creditors, found in the writings of the Flemish jurist Philip Wielant, will be used as example.

2. Coherence in legal writings: reality, construct or assumption?

2.1. Legal dogmatics, historicism and law-as-system

Some authors claim that coherence in law is a scheme rather than a reality. Edward Rubin for example considers “coherentism” as a pre-modern illusion, with an aftermath in modern times. “Coherentism” he argues is part of the belief in natural law, which is built on the assumption that law has an inherent purpose. Such an approach, according to Rubin, was fit for early modern states that had few ambitions besides maintaining a civil order. However, the emergence of the administrative state in the nineteenth century, which went together with planning and resource allocation, made that utopian project obsolete and unworkable⁸. Others have contended that coherence in law is

⁸ E.L. Rubin, *From Coherence to Effectiveness. A Legal Methodology for the Modern World*, in R. van Gestel -

unfeasible, even detrimental in the legal-pluralist society of today. Since demands and interests are inevitably conflicting, legal responses are found in laws that address specific needs, not in *the* law⁹. These appreciations are firmly rooted in Critical Legal Studies. They not only concern legal theory but also legal history. Starting in the 1970s, American legal historians such as Duncan Kennedy have stated that law may, and often does, provide contradictory solutions. Others went so far as to assert that legal questions lack simple, straightforward answers; sections of legislation can always be interpreted in different ways¹⁰. Most critical legal historians refer to indeterminacy also with respect to the relation between society and law; any given set of solutions should not be deemed the necessary result of a causal effect¹¹.

In stark contrast to the mentioned views are legal theorists that emphasize coherence as achievable purpose, even as a fundamental trait of law. Ideas of this type are raised with regard to legal scholarship as well. Legal scholars are praised for their success in detecting and making apparent substantive reason across diverse sources of law¹². They draw up connections between rules and – according to many scholars – on the level of the “legal system” in its entirety¹³.

Most of the latter arguments have been proffered by legal theorists and in the area of legal dogmatics. For legal dogmatics, opinions of the type mentioned are intimately connected to claims on the validity of their method. The “dogmatic” approach towards law entails that lawyers state “what the law is” starting from an analysis of legal texts, among them writings of legal authors, from which they infer rules. These materials are read for their contents and the divergences that are found in them are reconciled into a comprehensive statement that serves as a solution for a legal problem. This statement is a normative sentence¹⁴. The “dogmatic” style of legal analysis does not take law,

H.-W. Micklitz-Edward L. Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue*, Cambridge 2017, p. 310-350.

⁹ For example, contending that the concept of coherence does not capture decentralized and incremental legal change, is Th. Ruger, *Health Law's Coherence Anxiety*, in “The Georgetown Law Journal”, 96 (2008), p. 625-648.

¹⁰ For an analysis of these arguments, see K. Kress, *Legal Indeterminacy*, in “California Law Review”, 77/2 (1989), p. 283-337 (responding to the arguments on indeterminate law made by Joseph Singer and Duncan Kennedy).

¹¹ R. W. Gordon, *Critical Legal Histories*, in “Stanford Law Review”, 36 (1984), p. 124-125 (also in R.W. Gordon, *Taming the Past*, cit.).

¹² J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Coherence*, in *The Yale Law Journal*, 103 (1993), p. 112.

¹³ E.g. A. Peczenik, *Justice in Legal Doctrine*, in G. Döcker-Mach - Kl. A. Ziegert (eds), *Law and Legal Culture in Comparative Perspective*, Stuttgart 2004, p. 121-122.

¹⁴ On this method, in relation to legal scholarship, see: A.R. Mackor, *Legal Doctrine as a Non-Normative Discipline*, in “Law and Method”, (2012) 2/1, p. 22-45; E.L. Rubin, *Legal scholarship*, in D. Patterson (ed.), *A Companion To Philosophy Of Law And Legal Theory*, Oxford 2010, p. 548-549; F. Schauer, *The Authority of Legal Scholarship*, in “University of Pennsylvania Law Review”, 139 (1991), p. 1009; J. Smits,

or its properties, as an object of study¹⁵.

The scientific quality of this method, and of the legal scholarship that is its product, has received high interest over the past decades. Since the 1980s, critical opinions on the quality and methodological soundness of legal-dogmatic articles in legal reviews became widespread¹⁶. Indeed, many claims on the coherence of legal scholarship that were brought forward by legal dogmatists can – at least partially – be regarded upon as lines of defence in a fierce debate over legal methodology. The same goes for legal theorists, in spite of their outside stance towards law. Their opinions as well can be interpreted as epistemological views that implicitly defend the feasibility of their approaches. In both strands of scholarship, that is the legal-dogmatic and legal-theoretical, coherence is usually presumed, or construed as the theoretical backbone of law as a phenomenon.

Coherence in law is also occasionally referred to in scholarship that applies other sets of method, which are within the broad spectrum of empirical legal studies. The methods and paradigms of empirical legal studies are directed towards systematic-empirical, causal and quantitative research. In contrast to the mentioned legal-theoretical and legal-dogmatic approaches, the focus of empirical legal studies is on the factual underpinnings of or processes underlying normative ideas and conclusions¹⁷. In this regard, empirical legal studies overlap to a large extent with law-and-economics and socio-legal studies.

American legal research of the empirical type that is pursued within the latter disciplines, as well as within empirical legal studies at large, is often concerned with judge-made law. This ties in with Oliver Wendell Holmes Jr.'s urge to conceive of legal studies as “the prediction of the incidence of public force through the instrumentality of the courts”¹⁸. Therefore, legal-empirical methods have only occasionally been applied for analysing coherence in legislation¹⁹ and

What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research, in van Gestel - Micklitz - Rubin (eds), *Rethinking Legal Scholarship*, cit., p. 212-213. Even though some of these authors distinguish between several aspects of legal-dogmatic interpretation and features of legal doctrinal writings (Smits), or do not consider normative sentencing as a predominant characteristic of legal doctrine (Mackor), I stand with the majority of authors that consider the normative purpose of legal scholarship as a core feature (Rubin, Schauer). See, as for the use of the term “normative”, B.W. Wendell, *Explanation in Legal Scholarship: The Inferential Structure of Doctrinal Analysis*, in “Cornell Law Review”, 96 (2011), p. 1039-1040 (distinguishing between “pragmatic” or “frankly” normative and covert normative statements).

¹⁵ There exists ample literature on this difference between law as considered internally and law as a phenomenon. See, for example Hans Kelsen's distinction between normative and descriptive sciences.

¹⁶ Pioneering in this regard was R.A. Posner, *The Present Situation in Legal Scholarship*, in “Yale Law Journal”, 90 (1980-81), p. 1113-1130.

¹⁷ D.R. Hensler - M.A. Gasperetti, *The Role of Empirical Legal Studies in Legal Scholarship, Legal Education and Policy Making*, in van Gestel - Micklitz - Rubin (eds), *Rethinking Legal Scholarship*, cit., p. 451-452.

¹⁸ O. Wendell Holmes Jr., *The Path of the Law*, in “Harvard Law Review”, 10 (1897), p. 457.

¹⁹ In a systematic-empirical way, as for example in D.M. Katz-M.J. Bommarito, *Measuring the Complexity*

legal scholarly writings²⁰. Moreover, the academic genre of legal scholarship, which in continental Europe throughout history has mostly tackled issues of private law, still largely seems to be conceived of as pertaining to the dogmatic method. As a result, empirical legal methods are only exceptionally used with regard to, and also in, legal scholarship that addresses themes of private law²¹. Maybe also, within empirical legal studies the lack of attention for legal writings as object of study followed on from the view, present in Legal Realism and in the empirical legal research that came after, that “doctrine” was not the “real law”²².

The mentioned empirical legal studies differ from the abovementioned legal-theoretical and dogmatic methods not only in terms of techniques and methods, but also with regard to assumptions on consistency in law. This is evident in research with a functional-determinist agenda. Attempts have been made to trace causality between facts of legal cases on the one hand, and the outcome of trials on the other, in order to predict future judicial decisions²³. Methods that were used for that purpose include subject coding, bibliometrics and citation analysis²⁴. Such techniques, and the research questions which they purport to answer, are often aimed at exposing coherence. The goal of empirical functional-determinist analysis is concerned with normative sentencing, as is the dogmatic method. Models of prediction rest on fixed concepts of normativity, thus considering legal interpretation as the mere application and imposing of existing norms²⁵. But in contrast to legal dogmatics, coherence is not considered a property of the law but rather a characteristic of the socio-economic realities, the “facts”, with which lawyers interact. Law is only systematic for as much as these realities force it to be that way. A comparable approach is that of socio-legal scholars and critical legal scholars who endeavour to trace the influence of judges’ profiles, as proxies of their convictions, onto their decisions. In research of this type, there is less attention paid to the distinctive characteristics of facts

of the Law: The United States Code, in “Journal of Artificial Intelligence & Law”, 22 (2014), p. 337-374.

²⁰ A recent example, still very exceptional, is A.S. Chilton - E.A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, in “The Journal of Legal Studies”, 44/2 (2015), p. 277-314.

²¹ J. Vranken, *Exciting Times for Legal Scholarship*, in “Law and Method”, (2012) 2/2, p. 53.

²² M.D. Dubber, “Legal History as Legal Scholarship. Doctrinalism, Interdisciplinarity, and Critical Analysis of Law” in M.D. Dubber - Ch. Tomlins (eds.), *The Oxford Handbook of Legal History*, Oxford 2018, p. 101-107.

²³ For example, S. Brüninghaus-K.D. Ashley, *Predicting Outcomes of Case-Based Legal Arguments*, in “ICAIL 2003 Proceedings of the 9th International Conference on Artificial Intelligence and Law”, (2003), p. 233-242.

²⁴ K. Petroski, *Does It Matter What We Say About Legal Interpretation?*, in “McGeorge Law Review”, (2012), p. 359-402.

²⁵ See for example Brüninghaus and Ashley, *Predicting Outcomes*, cit. On the problem, see H. Gillman, *What’s Law Got to Do With It. Judicial Behaviorists Test the “Legal Model” of Judicial Decision Making*, in “Law & Society Inquiry”, 26 (2001), p. 471-472.

submitted to courts. Moreover, it is assumed that mechanisms detected as underlying the decision-making processes reach beyond, even ignore, the imposing or interpreting of law²⁶.

Since the 1980s, Critical Legal Studies have denounced the historicist assumptions of historical jurisprudence, which were closely related to legal dogmatics. But however, scholars such as Duncan Kennedy and Robert Gordon have referred to paradigms underlying law in its broadest sense in arguing against “social evolutionism”. In trying to save the structural characteristics of legal developments, they rejected “contextualist” approaches that considered law as (swiftly) changing under the impetus of social conditions. As a result of all this, the socio-legal approaches could join the forces of Critical Legal Studies, in that they could expose underlying mechanisms and views that lasted longer than political coalitions or urges for reform.

In a similar fashion, the critiques levelled by intellectual historians against *Begriffsgeschichte* have been combined with scrutiny of the use of concepts and their contextual meaning. Quentin Skinner warned against constructing coherence in ideas on the basis of texts and emphasized that the use of concepts depended more from context than from a preceding tradition to which the concept pertained²⁷. This method has been embraced by historians, writing about subjects of legal and political history. Authors such as Joseph Canning have analysed the ideas of legal writers, in relation to the institutional and societal settings of their time, and also for authors in the *ius commune* tradition²⁸. Yet however, such an approach has mostly tackled topics of public law, and not of private law. It will be argued further that a broad assessment of the legal thought of authors offers a clue to a method of analysing structure in their opinions (see under § 3).

²⁶ Early in this regard: S.S. Nagel, *Applying Correlation Analysis to Case Prediction*, in “Texas Law Review“, 42 (1942), p. 1006 ff.; Sidney S Ulmer, *The Analysis of Behavior Patterns on the United States Supreme Court*, in “The Journal of Politics“, 22 (1960), p. 629-653; S.S. Ulmer, *Quantitative Analysis of Judicial Processes: Some Practical and Theoretical Applications*, in “The Journal of Law & Contemporary Problems“, 28/1 (1963), p. 164-184. For an example, testing variables relating to the background of judges (wealth, race, religion), see F.B. Cross, *Decision Making in the U.S. Court of Appeals*, Stanford 2007. For reflexions on this type of analysis, see Gillman, *What's Law Got to Do With It*, cit.; J. Goldschmidt - A. Vermeule, *Empirical Methodology and Legal Scholarship*, in “The University of Chicago Law Review“, 69/1 (2002), p. 153-167 and R. Korobkin, *Empirical Scholarship in Contract Law: Possibilities and Pitfalls*, in “University of Illinois Law Review“, (2002), p. 153-167. On the lack of attention for legal reasoning in studies of this type, see C. Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, in “Missouri Law Review“, 75 (2010), p. 88.

²⁷ Q. Skinner, *Meaning and Understanding in the History of Ideas*, in “History and Theory“, 8/1 (1969), p. 3-53.

²⁸ J. Canning, *The Political Thought of Baldus de Ubaldis*, Cambridge 1987; C.N. Sidney Woolf, *Bartolus of Sassoferrato. His Position in the History of Medieval Political Thought*, Cambridge 1913.

2.2. Old Regime legal scholarship: from system to method and back

European legal historians have often proffered historical arguments on the unity and harmonisation of law in continental Western Europe, and such arguments refer to (a high degree of) coherence of law. The late medieval and also the early modern *ius commune* has been depicted as a body, as a system of legal scholarship²⁹, even though other authors have emphasized congruence in methods rather than contents³⁰. In combination with the former argument it was stated that legal doctrine provided support and theoretical backing in a society that was marked by diverse and overlapping jurisdictions and haphazard legislation³¹.

This position was criticized by other legal historians pointing to the loose connections between legal orders in the Old Regime³². Yet however, categorizations arguing *pro* and *contra* are mostly based on assumptions or generalizing statements that regard coherence in or the nature of legal scholarship, rather than on close analysis of structured thought in the writings of individual authors or across texts. Admittedly, legal historians have exposed interconnected ideas (the differences of opinion between Azo and Hugolinus are one example³³), and legal authors have been categorized with labels implying consistency in their ideas (e.g. the *aequitas gosiana*, the “philosophical” approaches of Baldus), but usually analysis of specific institutions (*Rechtsbegriffe*) as standing next to each another has prevailed. It will be argued further (under §. 3) that an apt legal-historical method, inspired by intellectual history, can detect structure in legal thought across broad themes and for different institutions.

Old Regime legal scholarship (*ius commune*, *droit savant*) has been defined in ways that explain for why coherence and structure across themes or institutions (*Rechtsbegriffe*) have almost not been studied as such. For long periods of time, in tandem with the prevailing method of legal dogmatics, the legal writings of the *ius commune* were considered as systemic. An older method of legal historians took the academic legal literature of the later Middle Ages and of the early

²⁹ See for this argument in relation to contemporary harmonisation in the European Union, for example R. Zimmermann, *Ius Commune: Europäische Rechtswissenschaft in Vergangenheit und Gegenwart*, in D. Heirbaut-G. Martyn (eds) *Napoleons nalatenschap/Un héritage Napoléonien, Tweehonderd jaar Burgerlijke Wetboek in België/Bicentenaire du Code civil en Belgique*, Mechelen 2005, p. 384 ff. and R. Zimmermann, *Das römisch-kanonische Ius Commune als Grundlage europäischer Rechtseinheit*, in “Juristenzeitung”, 47 (1992), p. 8-20.

³⁰ For example, J. Smits, *The Making of a European Private Law: Towards a Ius Commune Europeaeum as a Mixed Legal System*, Antwerp 2002, p. 42-45.

³¹ For example, P. Grossi, *L'ordine giuridico medievale*, Rome 2000, p. 184. This idea can be traced back to Francesco Calasso. See further.

³² P. Letto-Vanamo, *Fragmentation and Coherence of Law: a Historical Approach*, in P. Letto-Vanamo - J. Smits (eds), *Coherence and Fragmentation in European Private Law*, Munich 2012, p. 159.

³³ M. Bellomo, *The common legal past of Europe, 1000-1800*, Washington DC 1995, p. 168.

modern period, as well as the source texts of Roman and canon law on which legal writers commented, as a body of substantive law that was imposed secondarily when local legislation lacked solutions. The *ius commune* was considered, at least for certain periods of the later Middle Ages or early modern period, a collection of fixed rules. This fixedness was presented as being rooted in the *communis opinio doctorum* (hereafter *COD*), that is the shared opinions of legal scholars who assembled data from legal texts and statements into comprehensive structures. The aggregate opinions of authoritative legal writers were considered as constituting the rules that were to be applied by judges³⁴.

The mentioned legal-historical view of congruent-authoritative-opinion-as-backbone largely was a theoretical conflation of ideas on the nature of legal scholarship and legal science in general. One assumption underlying the mentioned views was a nineteenth-century essentialist one; the “shared conviction of doctors” was held to be a precursor of the Enlightenment codifications, in terms of both the consistency of law and the validity of legal rules that were imposed and applied. The essentialist approach resided in considering the law as being fixed to a large extent and as identifiable (hence, it could be found and imposed). Whereas nineteenth-century positivists considered the nation state or the sovereign as providing the foundation of the law, it was scholarly agreement that marked the cornerstone of the law of the era that predated the age of codifications³⁵.

Furthermore, the essentialist flavour with regard to Old Regime academic writings was combined with the idea that authority of opinion hinged on the quality of legal reasoning. It was thought that some scholarly rules were better than others. The highest quality in legal reasoning was reached by only a few, widely acclaimed legal authors. It was held that in spite of contention among legal writers, some rose to the level of grasping the essence of what the law was, and therefore their ideas were considered as being the inner core of the doctrine of the Old Regime. Essentialism (“scholarly agreement”) was thus mixed with the appraisal of the quality of rules proffered in academic writings.

The mentioned categorization of *COD* as basis for the authority and validity of *ius commune* scholarship rests on exaggerations of historical concepts. The label of *COD* was mentioned among late-medieval and sixteenth- and seventeenth-century legal scholars, but it did not point to a consistent set of exhaustive and effective rules. The formula belonged to a system of dialectic

³⁴ A. Cavanna, *Storia del diritto moderno in Europa. Le fonti e il pensiero giuridico*, I, Milan 1979, p. 152-155; H. Coing, *The Sources and Characteristics of the Ius Commune*, in “Comparative & International Law Journal of South Africa”, 19 (1986), p. 489; P. Koschaker, *Europa und das römische Recht*, Munich 1947, p. 99; R.C. van Caenegem, *European Law in the Past and the Future. Unity and Diversity over Two Millennia*, Cambridge 2002, p. 39, p. 54, p. 56.

³⁵ See, for example, A. Cavanna, *Storia del diritto moderno*, I, p. 152-155 (*communis opinio* was the doctrinal version of legislation).

reasoning rather than to a hierarchy of sources of law³⁶. A “*communis opinio*” was not considered sufficient as underpinning for a judicial decision³⁷. Moreover, the category of *COD* was developed in the fourteenth century only, and disappeared from civil law courts starting at the turn of the seventeenth century. Therefore, it was not used during the whole period during which legal scholarship was pervasive as source of law (c. 1100-c. 1800)³⁸.

The mentioned conception of Old Regime legal scholarship as consisting of a core of inter-author “best” opinions went hand in hand with a legal-historical research agenda that comprised conceptual-genealogical research. This method has been prevailing among legal historians since the dawn of the discipline in the nineteenth century and it was closely related to the abovementioned legal-dogmatic method. Central was the analysis of legal institutions (*Rechtsbegriffe*). They can be defined as categories that subsume legal rules that contain or refer to the same terminology (e.g. ownership, contract)³⁹. Legal-historical analysis of legal scholarship then takes the form of tracing back rules through time from within the boundaries of such categories, on the basis of cross-author analysis. The idea underlying this method is that legal writers that are analysed for their opinions stuck to the essential features of the mentioned *Rechtsbegriffe* and that their interpretations did not cross the demarcations that were implicit in the categories⁴⁰. This method was for a long time a corollary of the abovementioned views regarding Old Regime scholarship. Because coherence throughout academic writings on law was more or less presumed in the abovementioned “*COD*” approach, content analysis was restricted to particular institutions and was deemed a piecemeal reconstruction of a systemic and consistent law⁴¹.

³⁶ Th. Duve, *Mit der Autorität gegen die Autoritäten? Überlegungen zur heuristischen Kraft des Autoritätsbegriffs für die neuere Privatrechtsgeschichte*, in W. Österreicher - G. Regn - W. Schulze (eds), *Autorität der Form – Autorisierung – Institutionelle Autorität*, Münster 2003, p. 243; S. Lepsius, *Communis opinio doctorum*, in *Handwörterbuch zur deutschen Rechtsgeschichte*, I, Berlin 2008, c. 875-876. Stressing that only judges (not scholars) were held to conform to the principle and that many exceptions applied, allowing for flexibility, is U. Falk, *Un reproche que tous font à Balde. Zur gemeinrechtlichen Diskussion um die Selbstwidersprüche der Konsiliatoren*, in A. Cordes (ed), *Juristische Argumentation. Argumente der Juristen*, Cologne 2006, p. 43-44.

³⁷ N. Jansen, *The Making of Legal Authority*, p. 89.

³⁸ A. Marongiu, *Legislatori e giudici di fronte all'autorità dei giuristi. Dalla legge delle citazioni all'art. 265 CPV, Reg. Gen. Giud.*, in *Studi di storia e diritto in onore di Enrico Besta per il XL anno del suo insegnamento*, III, Milan 1939, p. 459-463; J. Schröder, “*Communis opinio*” als Argument in der Rechtstheorie des 17. und 18. Jahrhunderts, in *Wege europäischer Rechtsgeschichte. Karl Kroeschell zum 60. Geburtstag*, Frankfurt 1987, p. 409-415; J. Schröder, *Recht als Wissenschaft. Geschichte der juristischen Methodenlehre in der Neuzeit (1500-1933)*, Munich 2012, p. 48, p. 128-132.

³⁹ E. Conte, *Droit médiéval: un débat historiographique italien*, in *Annales. Histoire, sciences sociales*, 57 (2002), p. 1593-1613; E. Conte, “*Storicità del diritto*”. Nuove e vecchio nella storiografia giuridica attuale, in *Storica*, 22 (2002), p. 135-162; M. Stolleis, *Rechtsgeschichte schreiben: Rekonstruktion, Erzählung, Fiktion?*, Basel 2008, p. 22.

⁴⁰ E. Conte, *Diritto comune. Storia e storiografia di un sistema dinamico*, Bologna 2009, p. 16-42.

⁴¹ For a critique of the “*Medioevo sapienziale*”, which takes scholarly efforts of crafting consistency as a

Over the past ninety years, since the 1930s, Old Regime legal doctrine has increasingly been categorized as incorporating a vibrant intellectual model⁴² or a set of methods⁴³ rather than comprehensive collections of rules. Techniques of legal reasoning (the method of the *mos italicus*) and legal terminology were shared across the Western European continent,⁴⁴ but in terms of contents late-medieval and early modern scholarship is nowadays often regarded as a collection of divergent, often regionalized⁴⁵, opinions that were assembled loosely around fundamental rules and principles found in the Justinianic or canon-law sources⁴⁶. However, all this did not preclude a persistent categorization of the *ius commune* as being a “system”, which involved a mind-set apt for the reading of legal texts, from within certain underlying paradigms, but also by means of particular methods for addressing legal problems⁴⁷. This approach resulted in the view that jurists in the late-medieval and early modern societies produced rules and arguments in a highly abstracted fashion, from sets of texts that did not provide for *ex ante* legal certainty. The hard elements in the approaches of jurists were how they inferred rules from certain legal texts, and not the rules themselves⁴⁸.

Yet, this “patchwork quilt” view, with strands of thought that were connected by way of the use of certain legal methods and principles more than

paradigm for the Middle Ages (e.g. P. Grossi), see E. Conte, *Diritto comune*, cit., 33-34.

⁴² F. Calasso, *Introduzione al diritto comune*, Milan 1951; M. Bellomo, *The common legal past of Europe*, cit., p. 154, p. 179, p. 184; K. Pennington, *Learned law, droit savant, gelebrtes Recht: the tyranny of a concept*, in “Syracuse journal of international law and commerce”, 20 (1994), p. 205-215.

⁴³ Analysing the transition in legal-historical analysis of the *ius commune* from substance to method is J.-L. Halpérin, *L’approche historique et le problème du jus commune*, in “Revue internationale de droit comparé”, 52/4 (2000), p. 719.

⁴⁴ M. Bellomo, *The common legal past of Europe*, p. 97, p. 154.

⁴⁵ That is, as evoking legal pluralism on a European scale. Reacting against the *translatio studii*-approach, according to which in the early modern period leading national schools one after the other took up the torch of late-medieval Italian scholars, is D.J. Osler, *The Myth of European Legal History*, in “Rechtshistorisches Journal”, 16 (1997), p. 393-410, and D.J. Osler, *The Fantasy Men*, in “Rechtsgeschichte”, 10 (2007), p. 180-192.

⁴⁶ A. Wijffels, “*Ius commune*”, *Comparative Law and Public Governance*, in M. Adams - D. Heirbaut (eds), *The Method and Culture of Comparative Law. Essays in Honour of Mark Van Hoecke*, Oxford 2014, p. 148 (references to the *ius commune* did not serve the purpose of applying one rule of the *ius commune*, which often was ridden with doctrinal controversies).

⁴⁷ F. Calasso, *Il diritto comune come fatto spirituale*, in “Rivista italiana per le scienze giuridiche”, new series, 6 (2015) (first published in 1948), p. 8: “[legal history must be aimed at reconstructing the *ius commune* as a] ... *sistema vivente di vita propria, animato da un proprio spirito, ricco di un’originalità sua come l’epoca storica di cui fu una delle espressioni più grandi ...*”. For an analysis of this approach, see B. Paradisi, *Il problema del diritto commune nella dottrina di Francesco Calasso*, in D. Segoloni, (ed), *Il diritto commune e la tradizione giuridica europea*, Perugia 1980, p. 167-300. Compare Bellomo’s characterization of *ius commune* as a “system of legal thought”. See M. Bellomo, *The common legal past*, p. 184.

⁴⁸ M. Ascheri, *Les crises du ius commune et la codification*, in D. Deroussin - Fl. Garnier (eds), *Passé et présent du droit n° 5*, Lyon 2008, p. 35 (stating that interpretation of diverging texts was at the core of the *ius commune* methodology, reducing jurists to “*bricoleurs*”); A. Wijffels, “*Ius commune*”, *Comparative Law and Public Governance*, cit., p. 148.

through their contents, was not based on systematic empirical analysis of the contents of legal scholarship across thematic areas. In fact, the analytical deconstruction of the substantive concept of *ius commune* has often been taken on as an implicit argument to continue a conceptual-genealogical analysis of specific legal institutions, which is still widespread⁴⁹.

As a result of all this, assessments on structure and (in)coherence within old legal scholarship were not the outcome of systematic-empirical analysis, or the analysis that is concerned with the coherence of legal thought of authors, across subject matters or within broad thematic fields. Statements on the matter were theorizing rather than empirical. This explains for some discrepancies. Problematic in the mentioned “patchwork quilt” view, for example, is that it takes method as backbone, even though the legal method of the later Middle Ages which has been identified as pervasive and foundational (*mos italicus*) was in itself largely open-ended. Analogous reasoning, creative deductions from the *mens* of rules, even irrespective of their wording, and a lack of guidelines as to when and how to apply methods of reasoning⁵⁰, constituted features of method that not only hampered fixedness in law, but which also renders the label “method” largely artificial. The same goes for the methods of legal humanists, of the later fifteenth and of the sixteenth century, which were not only concerned with strict philology, but also with a “spirited” reconstruction of Roman law. Perceptions of logic could incite creativeness⁵¹.

3. Clusters of coherent legal thought in *ius commune* writings

There is an intermediate way of studying coherence in law, which is different both from the law-as-system (legal dogmatics, legal theory) and law-in-practice

⁴⁹ E. Conte, *Diritto comune*, p. 33-34; M. Stolleis, *Rechtsgeschichte schreiben*, p. 22-24. In many respects, the portrayal of jurists or law professors as groups within which legal studies were practised largely autonomously and independently from societal influences, contributed thereto. See for such characterizations P. Koschaker, *Europa und das römische Recht*, cit.; F. Wieacker, *A history of private law in Europe*, Oxford 1995, p. 95-97. For an analysis of these categorizations, see R. Lesaffer, *The Birth of European Legal History*, in H. Pihlajamäki-M.D. Dubber-M. Godfrey (eds.), *The Oxford Handbook of European Legal History*, Oxford 2018, p. 84-93.

⁵⁰ Elaborate on the issues of extensive interpretation and analogous reasoning is M. Sbriccoli, *L'interpretazione dello statuto. Contributo allo studio della funzione dei giuristi nell'età comunale*, Milan 1969.

⁵¹ H. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition*, Cambridge (MA) 2006, p. 104-108 (both for the first and second phases of legal humanism); P. Stein, *Legal Humanism and Legal Science*, in “Tijdschrift voor Rechtsgeschiedenis”, 54 (1986), p. 303 (only for the second phase). *Contra*: J. Gordley, *The Jurists: a Critical History*, Oxford 2013, p. 112-118 (considering the humanists' activity of building up an *ars* of civil law, while making use of principles, as an effort of ordering, not as a creative process). See also the thesis of Alain Wijffels that scholastic reasoning gave way to textual analysis around the middle of the seventeenth century: A. Wijffels, *Einflüsse der Doktrin auf die gerichtliche Argumentationspraxis in der frühen Neuzeit*, in D. Simon (ed), *Akten des 26. Deutschen Rechtshistorikertages*, Frankfurt am Main 1987, p. 383.

(empirical legal studies) approaches. Labelling the law as systematic or unsystematic should not be reserved to theoretical inquiries or to socio-legal studies. “Coherentism” is not the same as coherence seeking. This latter process, which is at the heart of the writing of modern as well as pre-modern legal scholarship, can be analysed empirically.

It can be assumed that collections of mutually dependent rules can be found in legal scholarship because of the nature of the activities of legal writers. They write about law in order to expose its “soundness”. The vantage point of scholars writing on law encompasses many types of law (legislation, case law, legal scholarship, customs) and legal practice (contractual, forensic). They weave the diverse materials that are found in these texts and practices into a whole. Moreover, one could argue that systemic features of law should be studied foremost starting from legal scholarly writings. The purpose of reaching decisions is less restraining for legal authors than for judges and legislators. Legal interpretations by legal scholars do not have to take certain internal-legal constraints, such as binding force of precedent, hierarchy of sources of law, or the non-normativity of contractual practice, as seriously as judges and legislators. They can state what the law ought to be, and not merely what it is. Therefore, for any research into cross-theme legal thought and coherence in law legal scholarship is the best medium to study.

However, one must be cautious not to conceive of coherence in idealist terms. Therefore, in order to operationalize research into coherence, the concept must be defined more precisely. This can be done starting from the writings of legal theorists that have distinguished between different elements packed within this notion. Coherence in law can refer to intelligibility and organisation, for example. It can point to comprehensiveness, meaning that the entirety of a segment of society is covered by the contents of legal rules⁵². Completeness refers to the absence of indeterminacy; in that case, for any given legal problem, there is one answer⁵³. Logical consistency may be deduced from the lack of contradiction and overlap⁵⁴. Or coherence can be defined as cohesion, which is when it is considered for the connections among components that are based on overarching rules or principles, or underlying ideas⁵⁵.

In this regard, in spite of the mentioned a-historical assumptions among legal historians the use of *COD* in Old Regime scholarship should not be ignored. The use of the concept was ample and it referred to more than an individual

⁵² K. Kress, *Coherence*, cit., p. 528.

⁵³ K. Kress, *Coherence*, cit., p. 528.

⁵⁴ N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford 1978, p. 106-107.

⁵⁵ See for example, E.J. Weinrib, *The Idea of Private Law*, Oxford 1995, p. 36-38 (stating that tort law can contain thematically related rules that rest on conflicting justifications, and therefore lack coherence).

appreciation of the quality of past doctrine by the author who mentioned the concept. *COD* may have served as rhetorical device at times (e.g. when an author construed his opinion as *COD* in order to give it more weight), but that seems to have been exceptional. Instead, *COD* usually referred to inter-author appraisals of arguments and rules. This is evident in the descriptions of what was considered *COD*. Some writers collecting “*communes opiniones*” admitted selection among such opinions, on the basis of detected soundness of arguments for example⁵⁶, but again, individuality in this regard was rather rare. There seems to have been a common acceptance that some rules were *COD* and others were not. In collections of “shared opinions” sometimes dissenting views were mentioned⁵⁷.

But irrespective of the debates over whether some rules were “*communis opinio*” or not, from the viewpoint of a legal historian of today, the use of the category demonstrates the sharing of views on contents. But also, the label of the “communal opinion of doctors” was not essentialist; it did not refer to fixed norms. The shared convictions of scholars were not deemed normative in themselves, but rather were regarded upon as directives that served to guide interpretation (of judges mostly, but also of legal scholars). Among legal authors of the Old Regime, legal interpretation was considered as being innovative and corroborating at the same time. The identification of “shared opinions” was the outcome of a process of coherence seeking, even though these opinions did not determine the contents of judge-made or scholarly law.

Some of the mentioned aspects or components of coherence are difficult to translate into a workable method (for example, comprehensiveness). But for others this is possible. A feasible approach would be to regard upon coherence as entailing intellectual unity. Units or clusters that span different thematic areas and topics of law are reflecting the author’s consistent legal thought. As will be detailed below, cross-theme clusters of legal thought can be found by way of assessment on the basis of policy considerations. It will be argued further that – in contrast to the above mentioned legal empirical studies – clustered legal thought can be detected in the writings of the author, and on the basis thereof, without resorting to explanations based on references to society, ideology or power relations.

⁵⁶ See for example, Francesco Turzani, *CLXV communes opiniones sive sententiae iurisconsultorum*, Venice 1557, fol. 3 “... *Quid multa? Obtemperandum fuit, his praesertim viris, quorum autoritas apud me plurimum valeret ...*”.

⁵⁷ Eg *Communium opinionum syntagma sive receptarum sententiarum*, vol. 2 (Lyon 1608), ad C. 6,2.

4. How to test clustered ideas in legal writings of the Old Regime?

4.1. Clusters of legal thought: further remarks on operationalization

The analysis of clusters of ideas in Old Regime legal scholarship is not an easy exercise. First, there is a diversity of statements found within legal writings. Legal writers could insert their coherent views in their texts in different ways. They could transpose them into newly crafted rules or in principles. Principles served to structure legal interpretation over broad areas of law⁵⁸. They could be meta-principles as well, which allow for deciding which of two conflicting principles prevails⁵⁹. Not only the creation, but also the revision of (components of) existing rules, was a strategy. Opinions found in legal writings could be combined, their underlying goals could be exposed and matched. Both the rules and the reasoning that supported them, as read in legal writings, could be adapted or supplemented in the process⁶⁰. From a methodological and also a conceptual perspective, analysis and construction are not easily separated. For example, when a legal writer read and quoted legal authors, arguments and normative decisions in the source text could be mixed up, even unintentionally. Legal opinions could be read in discursive text that was not purported to be a normative statement by the original author⁶¹.

A second problem relates to the method of jurists of the Old Regime. Legal analysis, in particular according to the methods of the *mos italicus*, was not aimed at philological integrity. Scholars used texts in order to derive underlying meanings or truth from them. The result of their analysis was considered sound if it was reached by making use of authoritative methods. In particular analogous reasoning marked a grey zone between reproduction and construction. From the perspective of the pre-modern legal scholar, legal opinions that were the outcome of methods of logic for textual interpretation were considered as being valid and as rephrasing previous law, even if their contents were “new”. Therefore, distinguishing between reproduction and renewal is not easy. Moreover, legal historians analysing *ius commune* texts must be careful not to identify references as source quotes in a modern sense. A comparison with the referenced text is necessary in order to assess to what extent the author who made use of the text “modified” its contents. Moreover, the phenomenon of reproducing references found in other texts was common, in which case the citing author referred to the authority of his source text, rather

⁵⁸ From the sixteenth century onwards: J. Gordley, *The Jurists*, cit., p. 46-48, p. 50-51.

⁵⁹ K. Kress, *Coherence*, cit., p. 541-542.

⁶⁰ J. Gordley, *The Jurists*, cit., p. 33-45; M. Van Hoecke, *Legal doctrine: which method for what kind of discipline?*, in *Methodologies of legal research: which method for what kind of discipline?*, Oxford 2011, p. 3.

⁶¹ James Gordley identifies this as a mechanism for legal change in Old Regime doctrine: J. Gordley, *The Jurists*, cit., p. 48-50.

than to the authority of the literature mentioned in the latter⁶².

“Intellectual unit” or cluster must be properly defined. A distinction must be made between two types of unit. One is related to connectivity (interconnectedness, by means of source references and quotes), the other to substantive legal thought (compatibility). Legal scholars interconnect the materials that they reflect on. They add structure, in a specific way. When arguing in favour for this or that rule they indicate the legal materials from which this position is inferred. With cross-references or source citations they point out which are the adhesion points in texts to which their own legal statements connect. The result of this process of referencing, which is an intricate part of the act of legal interpretation, can be labelled as connectivity or interconnectedness. This connectivity is evident in links among the components of legal texts, which are established in glosses and footnotes. When looking at legal scholarship from this angle, this yields a picture of a web of references.

However, such interconnected texts do not necessarily rely on clustered substantive legal thought. Content analysis is crucial when aiming at exposing the latter. Substantive intellectual unity between the writings of a legal author and his legal thought can be categorized as “compatibility”. Different normative statements of a same author have to “match” in terms of content, in order to establish a coherent cluster of rules. They are compatible because they pertain to consistent substantive legal thoughts.

Congruence in contents of legal writings, as reflecting consistent legal thought, can be tested in a negative fashion: when contradiction and overlap among rules and principles are absent, this may be an indication of compatibility. Yet, such a test does not suffice. Rules of corporate law and rules of criminal law, for example, cannot be considered mutually coherent when/because they do not overlap. When reflecting and writing legal scholars do more than referencing and defining scopes. Several authors have grappled with this “extra”, substantive, element within the notion of coherence. Some consider coherence as a characteristic of legal rules if their contents or components can be tied together from within an underlying value or principle⁶³. Coherence may then be concerned with base values, even truth.⁶⁴ But also when

⁶² A.J. De Groot, *Datenverarbeitung bei der Rezeptionsgeschichte*, in *Miscellanea Consilii Magni ter gelegenheid van twintig jaar werkgroep Grote Raad van Mechelen*, Amsterdam 1980, p. 160-166; A. Wijffels, *Qui millies allegatv. Les allégations du droit savant dans les dossiers du Grand Conseil de Malines (causes septentrionales, ca. 1460-1580)*, Amsterdam 1985, I, p. 202-203.

⁶³ This position is held by Neil MacCormick and Ernest J. Weinrib, among others.

⁶⁴ Many legal theorists emphasize the autonomy of law and legal systems, as being separate from “truth” or a system of beliefs. See, for example, the distinction between epistemic (as based on the beliefs of individuals) and constitutive coherence (i.e. as accounting for coherence independently from what agents think): J. Raz, *The Relevance of Coherence*, in J. Raz, *Ethics in the Public Domain*, Oxford 1994, p. 282-287, p. 290-297. Compare with Weinrib’s “justificatory coherence”, which is the foundation that lies in the coherence of justificatory considerations of rules. These justifications are legal, not political or referring to base values. See E.J. Weinrib, *The Idea of Private Law*, cit., p. 32-36, p. 42-46.

coherence is not considered as a property of truth, or a system-of-beliefs (for example, when values are reduced to the values upheld by the individual legal scholar who seeks coherence), the notion is too broad to be operational for cluster detection. At the same time, considering clusters as relating to interconnectedness only, through references of one type or another, is too narrow.

A possible solution, which disentangles the problem considerably, is to consider substantive intellectual unity from the perspective of effectiveness. Clusters of ideas can then be defined as being based on congruity in legal thought between rules as means and their ends, in the way as purported by the author. As a result thereof, the concept becomes more manageable. The mentioned “ends” should not be regarded as animating principles unifying a field of law (as, for example, the principle of adversity in the law of procedure)⁶⁵, but rather as societal goals of restricted scope. Such societal considerations may underlie normative statements regarding both rules and principles. It has been attested that policy considerations were mentioned in *ius commune* doctrinal writings⁶⁶. They differed from “values” in that they were more concrete; they expressed a purpose, an intended improvement⁶⁷. By contrast, values can be defined as generic concepts that evoke a foundation from which selection of legal materials is derived. In *ius commune* legal doctrine, common phrases, for example, were “*iniquum est*” (it is not equitable) or “*ex ratio aequitatis*” (for reason of equity). Such values were supposedly directive, but cannot be used as evidence of substantive intellectual unity, mainly because of their broad scope.

4.2. Tracing clusters and compatibility in the writings of Philip Wielant

An example of a policy consideration, from which conclusions regarding cross-theme clustered, substantive legal thought can be drawn, is the opinion of the Ghent jurist Philip Wielant (1441/42-1520) on *cessio bonorum*. Wielant was a high judge in the Parliament of Mechelen, which was the Supreme Court of the Low Countries. He wrote several tracts on Flemish law, of which the most important one was the *Practijke civile* (“Civil practice”). Wielant wrote this treatise in the first years of the sixteenth century but it was published in print only in

⁶⁵ Arguing against such principle-monism, is for example Ruger (footnote 3).

⁶⁶ See, for example, A. Wijffels, *Argumentationsmuster in belgisch-niederländischen Konsiliensammlungen des 16. Jahrhunderts. ‘Policy considerations’ in der Ius Commune-Tradition*, in A. Cordes (ed), *Juristische Argumentation – Argumente der Juristen*, Cologne 2006.

⁶⁷ I use “policy” in the sense given by Ronald Dworkin, which is that of “standards that set out goals to be reached, generally an improvement in some economic, political, or social feature of the community”. See R. Dworkin, *Law’s empire*, Cambridge (MA) 2006, p. 438.

1558⁶⁸.

Cessio bonorum was a proceeding that could be initiated by incarcerated debtors; it entailed the transfer of their estate to the creditors, in exchange for being released from prison. *Cessio bonorum*, originally a proceeding of Roman law, was elaborated on in *ius commune* legal scholarship⁶⁹ and was applied in the Low Countries under the label “*cessie van goede*”⁷⁰. In his *Practijcke Civile*, Wielant states that *cessio bonorum* was not practised in the County of Flanders, “because otherwise fraudulent application of the arrangement would harm commerce too much”⁷¹. This was not only an appraisal of municipal practices⁷², but also a normative standpoint: according to Wielant, *cessio bonorum* was to be applied with restraint.

When considering Wielant’s remarks from a contextual perspective, a great deal can be learned from them for retrieving Wielant’s substantive thoughts on insolvency. *Cessio bonorum* was the only voluntary insolvency proceeding that existed in the later fifteenth and early sixteenth-century Low Countries. It could only be initiated by debtors. According to the majority views of Italian legal scholars of the later fourteenth and fifteenth centuries, creditors could not block the debtor’s application. The debtor was neither allowed to renounce from his right to obtain *cessio bonorum*⁷³. Yet, however, an earlier view, expressed amongst glossators, had held the idea that the creditors could offer a five-year moratorium instead of *cessio bonorum*. This was sometimes interpreted such that creditors could deny the debtor’s request for *cessio*⁷⁴. Some towns in the Southern Low Countries, in the early sixteenth century, still acknowledged the latter approach⁷⁵. But that seems to have been exceptional. In the fourteenth

⁶⁸ E.E. Strubbe, *Philippe Wielant*, in *Biographie nationale de Belgique*, XVIII, Brussels 1938, c. 279-298.

⁶⁹ W. Forster, *Konkurs als Verfahren. Francisco Salgado de Somoza in der Geschichte des Insolvenzrechts*, Cologne 2009; J.A. Obarrio Moreno, *La cessio bonorum en la tradición jurídica medieval*, in *Glossae. European journal of legal history*, 13 (2016); W. Pakter, *The Origins of Bankruptcy in Medieval Canon and Roman Law*, in P. Linehan (ed), *Proceedings of the Seventh International Congress of Medieval Canon Law*, Vatican City 1988, p. 485-506; P. Zambrana Moral, *Derecho Concursal Histórico I. Trabajos de Investigación*, Barcelona 2001, p. 51-171.

⁷⁰ W. Druwé, *Dignity and Cessio Bonorum in Early-Modern Dutch Learned Legal Literature*, Research paper Max-Planck Institut für europäische Rechtsgeschichte 2016; P. Godding, *Le droit privé dans les Pays-Bas méridionaux: du 12e au 18e siècle*, Brussels 1987, p. 518-520.

⁷¹ Ph. Wielant, *Practijcke civile*, Antwerp 1573, p. 83 (ch. 18, no 6).

⁷² Wielant’s assessment corresponds with the municipal practice in early sixteenth-century Bruges: L. Gilliodts-Van Severen, *Coutumes de la ville de Bruges*, Brussels 1875, I, p. 306-315 (statement of 1527).

⁷³ J.A. Obarrio Moreno, *La cessio bonorum*, cit., p. 446; W. Pakter, *The Origins of Bankruptcy*, cit., p. 491; Zambrana Moral, *Derecho concursal*, cit., p. 81-84, p. 146-147, p. 181.

⁷⁴ J.A. Obarrio Moreno, *La cessio bonorum*, cit., p. 449, p. 452; W. Pakter, *The Origins of Bankruptcy*, cit., p. 490; Zambrana Moral, *Derecho concursal*, cit., p. 178, p. 186.

⁷⁵ In Mechelen, at first *cessie van goede* could be refused by creditors. This was mentioned in a draft compilation of municipal rules, dating from 1527. In 1535, a revised edition conformed with the majority view among legal scholars and it stated that the *cessie van goede* was any incarcerated debtor’s right. See L.-Th. Maes (ed.), *Costumen van de heerlijckheid Mechelen, II. Costumen van de stad Mechelen. Vol. 2:*

and fifteenth century, it was already common among legal scholars of the *ius commune* to depict the five-year moratorium as a choice of the debtor, who could opt for *cessio* as well⁷⁶.

Wielant's statement was also in line with other majority views in legal writings of his age. For example, he considered that *cessio bonorum*, according to doctrine, did not provide a clean slate for the debtor. The proceedings did not bring about a discharge. The debtor ceded his properties to his creditors but remainders of debts had to be repaid in full⁷⁷. But however, in spite of all this, Wielant's ideas were fundamentally different as compared to a common motive that was found in scholarly comments, which was to grant the imprisoned debtor who had yielded his properties his liberty out of "humanity", in order to prevent life-long imprisonments⁷⁸.

Wielant's general rebuttal of *cessio* as a dangerous practice was at odds with widespread arguments on the goal of avoiding perpetual incarcerations for debts. Moreover, it seems that his explanations of *cessio van goede* were not incompatible with this assessment. Wielant in his *Practijcke civile* tackles *cessio bonorum* as a legal arrangement that is allowed under the *ius commune*, and – so it seems – under the *ius commune* only. One gains the impression that Wielant's explanation of the rules relating to *cessio bonorum* did not entirely mask the fact that he was not concurring with their contents. For example, Wielant stressed that "according to the written law" no one could be held prisoner for life,⁷⁹ whereas it was common in contemporary doctrine to base this assertion on the *boni mores* or on an argument of *aequitas*⁸⁰.

Wielant's assertion on the feasibility of *cessio bonorum* can qualify as policy consideration. In contrast to "values", policy goals are testable against contextual elements. The relative precision of policy considerations allows for making modest analytical inferences. When an expressed policy consideration for one rule is compared with rules that touch upon aspects of a problem that concerns the same consideration, the researcher can cautiously compare these rules, and also contrast them to contextual elements related to the policy consideration, if they are found in other materials.

Ontwerpcostrumen van 1527, Brussels 1960, p. 187-188 (s. 1084); *Coutumes de la seigneurie de Malines, I. Coutumes de la ville de Malines*, Brussels 1879, p. 158-160 (ch. 21).

⁷⁶ J.A. Obarrio Moreno, *La cessio bonorum*, cit., p. 459; W. Pakter, *The Origins of Bankruptcy*, cit., p. 490; Zambrana Moral, *Derecho concursal*, cit., p. 186.

⁷⁷ On this rule in the Southern Low Countries, see W. Druwé, *Dignity and Cessio Bonorum*, cit., p. 5; Ph. Godding, *Le droit privé*, cit., p. 518. On the rule in doctrine: J.A. Obarrio Moreno, *La cessio bonorum*, cit., p. 450, p. 453; Zambrana Moral, *Derecho concursal*, cit., p. 178.

⁷⁸ On this motive, see: W. Pakter, *The Origins of Bankruptcy*, cit., p. 491; Zambrana Moral, *Derecho concursal*, cit., p. 182.

⁷⁹ Ph. Wielant, *Practijcke civile*, cit., p. 83 (ch. 18, s. 1); Ph. Wielant, *Verzameld werk. II: Briève instruction en causes civiles*, L.H.J. Sicking -C.H. van Rhee (eds), Brussels 2009, p. 77 (ch. 60, s. 1).

⁸⁰ E.g. W. Pakter, *The Origins of Bankruptcy*, cit., p. 490, note 37.

However, the mentioned comparison of contemporary legal scholarship with Wielant's views demonstrates that substantive congruity between purposes intended by the author and rules proposed by the author can be far from evident. For example, compatibility in contents does not require traces to be left in writing. Legal writers can implicitly condone the rules in legal sources other than legal scholarship, such as legislation, or the normative positions in writings of other legal authors. Since this leaves no traces in the texts, the danger of incorrect conjectures is high. Moreover, establishing the relation between intentions and stated rules or principles with sufficient certainty requires that the motivations of the author are expressed in detail. The abovementioned opinions of Philip Wielant are a case in point. Judging from the scant wording of his view, possible policy considerations on the non-feasibility of *cessio bonorum* are diverse. Wielant may have aimed at keeping insolvent debtors in prison, or may have opposed to the unilateral features of *cessio bonorum*. Maybe also, he was in favour of extrajudicial agreements and rejected state intervention in debt enforcement.

Thorough contextualization provides further clues. First, it is unlikely that Wielant generally advocated for private debt enforcement instead of public remedies. This is true with regard to private detention. There are examples of private imprisonment for debts (hostage) in Flanders in the fifteenth century⁸¹. Such practices had some backing in scholarly writings as well. Thirteenth-century *ius commune* legal authors commonly stressed that *cessio bonorum* was possible, but that it applied to debtors held in a public prison. This may have yielded the interpretation that following the rendering of the estate to the creditors in a *cessio* proceeding, or otherwise after a certain period of public imprisonment (for example, 40 days), the debtor could be locked at the home of one of the creditors⁸². Even in the early sixteenth century, in some cities of the Low Countries private detention was occasionally practised after *cessio bonorum* and the release from a public prison⁸³. Wielant refers briefly to private imprisonment. In both his preparatory texts and in the final edition of the *Practijcke civile* he mentions the creditor's right to keep an insolvent debtor in private custody, until payment, the providing of pledge or *cessio bonorum*. However, Wielant allowed private detention only temporarily and under very strict conditions⁸⁴. One gains the impression from his writings that Wielant considered private custody an *ultimum remedium*, mostly in order to prevent flight

⁸¹ Ph. Godding, *Le droit privé*, p. 511-512, p. 519.

⁸² H. Dondorp, *Partes secanto. Aulus Gellius and the Glossators*, in "Revue internationale des droits de l'antiquité", 57 (2010), p. 141.

⁸³ D. De ruysscher, *Reconciling old and new: imprisonment for debts and cessio bonorum, in Antwerp and Mechelen (c. 1500–c. 1530)*, in J. W. Oosterhuis-E. van Dongen (eds), *European Traditions: Integration or Disintegration?*, Oisterwijk 2012, p. 43-44 (Antwerp, 1520).

⁸⁴ Ph. Wielant, *Practijcke civile*, cit., p. 78 (ch. 12, s. 14); Ph. Wielant, *Verzameld werk*, cit., p. 73 (ch. 54, s. 20).

of the debtor who did not have immovable property or other collateral in the locality where the debt was due⁸⁵. Therefore, even though Wielant mentioned and allowed private detention, he clearly favoured public imprisonment.

Other parts of his texts indeed show that Wielant was not opposed to, and even preferred government intervention in matters of debt enforcement. In his drafts of the *Practijcke civile*, Wielant referred to the homologation proceedings of princely letters of grace, including letters of *remissio* which granted a period of protection against creditors' actions. In such proceedings all creditors were summoned and they were heard for their opinions on the measure⁸⁶. Moreover, if a debtor fled or when an insolvent person passed away, according to Wielant the creditors had to initiate a court proceeding to appoint trustees to administer the estate⁸⁷. Also, Wielant rejected the so-called "private" enforcement of debts. No clauses in a contract or debt instrument could, according to Wielant, be considered sufficient as substitute for a judgment. In principle, only with a judicial sentence seizure could be laid on the debtor's effects⁸⁸. Considering all this, it is unlikely that Wielant's reservations towards *cessio bonorum* had anything to do with a preference for private solutions.

Wielant's views related rather to the shift of purpose of *cessio bonorum* that had taken place over the course of the fifteenth and early sixteenth centuries. In the Low Countries of the 1400s, "abandonment" had been a creditor-steered proceeding that was purported as a short-cut for procedural requirements. A debtor could be thrown in the public prison and could apply for release in combination with the forfeiture of his properties. Creditors could deny him that possibility, and even if they accepted, keep the debtor in private custody afterwards⁸⁹. Maybe also, the widespread view in academic legal writings that debtors were eligible for *cessio* if they had no belongings⁹⁰ did not apply. In this period, attachments and public auctions of seized properties were generally difficult to obtain: even with waivers in contracts, express authorization had to be obtained from municipal administrators which meant that creditors had to await a judgment before sequestrated assets could be sold publicly. Imprisonment offered a way out. The debtor could be locked up in debtor's prison, in the hope that this would incite the debtor to seek new funds or quickly hand over his assets⁹¹.

⁸⁵ Ph. Wielant, *Practijcke civile*, cit., p. 77-79 (ch. 12); Ph. Wielant, *Verzameld werk*, cit., p. 71-73.

⁸⁶ See Ph. Wielant, *Verzameld werk*, cit., p. 153 (ch. 114, s. 12).

⁸⁷ Ph. Wielant, *Practijcke civile*, cit., p. 335 (tit. 10, ch. 4, s. 4); Ph. Wielant, *Verzameld werk*, cit., p. 304 (ch. 243, s. 3).

⁸⁸ Ph. Wielant, *Verzameld werk*, cit., p. 78 (ch. 62, s. 1).

⁸⁹ De ruysscher, *Reconciling old and new*, cit., p. 36-38.

⁹⁰ Zambrana Moral, *Derecho concursal*, cit., p. 181-182.

⁹¹ D. De ruysscher, *Bankruptcy, Insolvency and Debt Collection among merchants in Antwerp (c. 1490-c. 1540)*, in Th. M. Safley (ed.), *The History of Bankruptcy. Economic, social and cultural implications in early modern Europe*, Abingdon 2013, p. 185-199.

All this changed tremendously in the later fifteenth and early sixteenth centuries. The purpose of circumventing cumbersome debt enforcement proceedings lost importance because in those years impediments on sequestration and executory sales of assets were lifted⁹². *Cessio bonorum*, now a mixture of the earlier, indigenous “abandonment” and the *cessio bonorum* that was described in scholarly writings, was kept for criminalizing purposes. The debtor without assets could be imprisoned as penalty for his/her insolvency⁹³ and when *cessio* was granted, defamatory rituals were imposed as requirement⁹⁴. In the following years, also under the influence of legal scholarship, in cities such as Antwerp *cessio* became a debtor-orientated proceeding. Creditors could not deny the debtor’s right to leave public prison; private detention was prohibited. Imprisoned debtors were eligible for *cessio* even if they had nothing to declare to their creditors. A hint for detecting Wielant’s underlying convictions lies in his choice of words. He spoke consistently of “*cessie miserable*” (miserable cession)⁹⁵. This reflects his idea that *cessio* was intended for debtors with no properties, and without friends or relatives that could lend money or stand surety for them. As a result, under those circumstances, according to Wielant it was preferable to give creditors the option of keeping their debtor imprisoned.

Wielant reacted foremost against the unilateral features of *cessio bonorum*, which he regarded upon as a free ticket for poor debtors. He advocated participation by creditors in decisions on one or the other outcome in insolvency affairs. One can even push these insights somewhat further. In his writings Wielant did not refer to pledges as linked to privately written contracts or debt instruments such as *obligaties* (i.e. bills obligatory). In his preparatory text as well as the final edition of the *Practijcke civile*, Wielant mentions possessory pledges of movable items in his enumeration of security interests, but not the non-possessory variety⁹⁶. It seems that Wielant strictly distinguished between instruments that entitled to executory sales of assets, which had to be authenticated by the city’s aldermen, on the one hand side, and personal obligations, based on oral or non-authenticated contracts or instruments, on the other hand side. For the latter, private methods of seizure were excluded. Wielant’s opinions in this regard simmer through in his 1520 draft municipal law of the city of Haarlem. In this text he inserted the rule that debts of over twenty *sous* could only be brought into the city’s court if the debt was registered in a

⁹² D. De ruysscher, *Bankruptcy, Insolvency*, cit., p. 188-189.

⁹³ For early sixteenth-century Antwerp, D. De ruysscher, *Reconciling old and new*, cit., p. 46.

⁹⁴ *Dignity and Cessio Bonorum*, cit.; J.Q. Whitman, *The moral menace of Roman Law and the making of commerce: some Dutch evidence*, in “Yale Law Review”, 105 (1996), p. 1841-1889.

⁹⁵ Ph. Wielant, *Practijcke civile*, cit., p. 78 (ch. 12, s. 14).

⁹⁶ Ph. Wielant, *Practijcke civile*, cit., p. 81 (tit. 2, ch. 16, s. 1-3); Ph. Wielant, *Verzameld werk*, cit., p. 75 (ch. 58, s. 1).

certificate, issued by the city's aldermen⁹⁷. Wielant did not accept certificates containing clauses of non-possessory pledge, allowing the creditor to privately pursue items belonging to the debtor as collateral for his debt. Only in the event of bankruptcy, an estate was gathered, including assets that could be found with third parties. But this was done with government intervention⁹⁸. A combined demonstration of Wielant's views on insolvency, public intervention and out-of-court settlements is also found in his appraisal of five-year moratoriums, which according to him could not alter the rights of creditors that had earlier obtained judgments on their debts⁹⁹.

To a large extent, Wielant's approaches went against the tide. In many cities of the sixteenth-century Low Countries, pledges of movables could be established privately, without authentication of the aldermen, and even if the assets pledged remained with the debtor (non-possessory pledge). A limited number of such pledges were even combined with a right of pursuit, allowing beneficiaries to trace assets that were no longer in the hands of their debtor¹⁰⁰. Admittedly, in many cities collective insolvency proceedings were installed in the early sixteenth century, and private, extrajudicial enforcement of debts was less practised¹⁰¹. When considering all of the above, this evokes a picture that is in many ways comparable to Wielant's views on imprisonment for debt. He preferred in-court solutions, not private enforcement. Within that framework, creditors were to have a say. They had to resort to courts for enforcing their debts, except for when urgent circumstances forced them to do otherwise, but in court they were to be given the autonomy in opting for one or the other solution.

In this regard, Wielant's views on such diverse topics of debt enforcement and pledge can be reconstructed as being clustered, as expressing consistent legal thought. They were coherent because they reflect an underlying policy consideration of preferring pressure on a debtor, even if the latter was without any means, but under governmental control.

The example of Wielant's reasoning demonstrates that, even though policy considerations must be handled with caution, clusters of substantive compatible rules can be detected. Of course, such considerations are not sufficient to test coherence in doctrine that is written by different authors. And policy considerations are not always expressed in sufficient detail. Therefore, it is not a

⁹⁷ J.A. Fruin, *Instructie, voor de stad Haarlem ontworpen door Philips Wielant*, Amsterdam, 1874, p. 85 (ch. 10, s. 94).

⁹⁸ Ph. Wielant, *Practijcke civile*, cit., p. 335 (tit. 10, ch. 4, s. 4); Ph. Wielant, *Verzameld werk*, cit., p. 304 (ch. 243, s. 3).

⁹⁹ Ph. Wielant, *Practijcke civile*, cit., p. 341 (tit. 10, ch. 9, s. 10); Ph. Wielant, *Verzameld werk*, cit., p. 309 (ch. 248, s. 3).

¹⁰⁰ D. De ruysscher - I. Kotlyar, *Local Traditions v. Academic Law: Collateral Rights over Movables in Holland (c. 1300-c. 1700)*, in "Tijdschrift voor rechtsgeschiedenis", 86 (2018), p. 378.

¹⁰¹ D. De ruysscher-I. Kotlyar, *Local Traditions v. Academic Law*, cit., p. 383-387.

perfect method. But, however, it allows to look at Old Regime legal doctrine, especially in matters of private law, in different ways than has been done before. A strict focus on *cessio bonorum*, debt enforcement or pledge, as described by Wielant and other authors, would have missed the substantive unity in Wielant's appraisals of creditors' rights.

5. Conclusion

Cross-theme clusters of substantive legal thought can be found in legal scholarship, but this requires an apt methodology. This methodology can take into account practices of referencing and interconnecting of views and sources, but it must foremost allow for assessments of unity in contents and purpose. Judgments on the quality and relevance of pre-modern legal scholarship must come after analysis on the basis of such methodology. Consistent legal thought underlying legal solutions that belong to different *Rechtsbegriffe* can be found on the basis of policy considerations, provided that they are expressed in sufficient detail. Such clusters reveal compatible rules and the author's intention to structure them according to his underlying considerations. This type of analysis offers a middle ground between conjectural approaches towards *ius commune* as a body or system of law, and the genealogical-conceptual analysis of *Rechtsbegriffe*. At the same time, it is an intermediate option between "historicist", dogmatic views on the one hand and "contextualism", "instrumentalism" or "determinism", which presume the high influence of societal factors, ideology and power relations, on the other. Therefore, the abovementioned methodology can be categorized as tackling "relative coherence", that is coherence that relates more to the ideas of the author than to a system of law. Research of this type would lay bare entangled legal thought, which may have constituted cores of legal doctrine that have remained undetected until this day. If that were the case, the results would be of high importance and the activities of legal writers of centuries past could be seen in a new light.