Early-Modern Consilia and Decisiones in the Low Countries. The Lost Legacy of the mos italicus

Alain Wijffels

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1. *1550-1650: a fault-line in Western legal history*

Between the mid-sixteenth century and the mid-seventeenth century, a fundamental change took place in Western legal history. When one looks at "mainstream legal methods", the intellectual environment of practicing lawyers in the 1650s was clearly different from that of their predecessors one century earlier. In the present contribution in honour of Mario Ascheri, I would like to offer a few elements – no more – which may begin to explain why one may recognize a fault-line in legal reasoning from the mid-sixteenth century onwards. My thesis is that this was a general development in European civil law history at the time, which can be traced – perhaps for each territory with a slightly different chronology, or sometimes with a varying intensity – in most jurisdictions where the *ius commune* tradition had gained a foothold. For the purpose of a brief argument, only a few collections of *consilia* and *Decisiones* from the (Southern) Netherlands will here be mentioned. Focusing on legal practice offers the main advantage that one deals primarily with the prevailing (or "mainstream") legal trends and currents. At the same time, it gives the opportunity to present a more personal homage to Mario Ascheri, from whose work, for many decades, I have been able to benefit in our common area of interest for the life of the early-modern courts. Moreover, addressing the issue of changing patterns of reasoning and argumentation in the courts' practice is a challenging and controversial area of legal-historical research where the history of the law "in books" and the history of the law "in action" meet, or, in more general terms, where the interface between legal scholarship and legal practice can be assessed.

The structural shift in legal thinking[1] referred to is that of the "Italian legal methods" (*mos italicus*) as the prevailing mould of legal argumentation being

[1] For a general but more elaborate argument of the developments briefly sketched in this paragraph, and a little more on the respective features of *mos italicus* and *usus modernus*, I may refer to my textbook: *Introduction historique au droit. France - Allemagne - Angleterre*, Paris 2010, pp. 192-201.

Honos alit artes. Studi per il settantesimo compleanno di Mario Ascheri. I. La formazione del diritto comune,
P. Maffei, G.M.Varanini (a cura di), ISBN (online) 978-88-6655-627-5, CC BY 3.0, 2014 Reti Medievali e Firenze University Press

replaced by the *usus modernus*. The *mos italicus* is a fairly conventional legal-historiographical category, and its characteristics are not too controversial. It is widely accepted that both in legal teaching and in legal practice, the *mos italicus* had a major impact during the last centuries of the Middle Ages and throughout the sixteenth century. As a historiographical category, *usus modernus* is far less a consensual reference. The phrase *usus modernus* is often specifically associated with the scholarly civil law approach which had become wide-spread in the Holy Roman Empire from the (late) seventeenth-century onwards. However, by the time S. Stryk wrote his eponymous work, the legal methods he was refining had been developing for more than a century, according to a pattern which can be identified in most Western European territories. What may be referred to as the new prevailing "early-modern legal methods" (as perhaps a less loaded term than *usus modernus*) differed from the earlier prevailing methods in at least two ways. In the first place, because it followed a pattern of reasoning much more based on a systematization *ratione materiae* of legal topics than before (which entailed that an issue was categorized within a certain area of the law, which then determined which rules of substantive law were more or less exclusively applicable). In the second place, because it merged, in its systematic approach and discussion of legal topics, *ius commune* (and especially its Roman law component) and the *iura propria* of a particular jurisdiction (thus creating a fragmentation of *ius commune* scholarship, for the blend of Roman law and *ius proprium* would inevitably differ from one jurisdiction to another).

2. *European usus modernus: scholarship and legal practice*

The gradual progress of the *usus modernus* features, still relatively modest during the second half of the sixteenth century, but then gaining momentum during the first half of the seventeenth century, can be trailed through various means. One indicator of the change is the development of a more systematic legal literature (no longer strictly bound by the *ordo legalis* of the Digest or Justinian's Code, but more influenced by, for example, the system of the Institutes) or the increasing number of legal monographs dealing with a more or less specific area or topic of the law[2]. Concomitantly, legal reasoning, also among legal practitioners, tended to follow the changing pattern of argumentation and to rely more and more on the new legal literature.

Those are features and general developments which can be traced in many European jurisdictions. A good example which illustrates the emergence of both innovative characteristics of the *usus modernus* is the appearance of the format of early-modern monographs offering a survey of the law of a particular legal sys-

[2] The demise of *mos italicus* literature even in early seventeenth-century Italy and the development of new types of legal literature appear clearly through a recent bibliography of seventeenth-century Italian legal imprints: D.J. Osler, *Jurisprudence of the Baroque. A Census of Seventeenth Century Italian Legal Imprints,* 3 vols., Frankfurt am Main 2009, see my review in «Tijdschrift voor rechtsgeschiedenis» (hereafter «TRG»), 80 (2012), pp. 229-237.

tem following the so-called "Institutional system"[3]. Even in international law, R. Zouche considered dealing with the subject-matter following the main arrangement of the Roman Institutes[4]. In the Northern Netherlands, in particular the influential province of Holland, Hugo Grotius's *Inleidinge tot de Hollandsche rechts-geleerdheid* («Introduction to Holland jurisprudence», *ed. pr.* 1631, but written during the author's captivity in 1619-1621), can also be seen as a brief overview of the laws in Holland presented in a Roman law mould, and it was a decisive step towards the formation of Roman-Dutch law. Roman law itself was, during the seventeenth and eighteenth centuries, increasingly discussed along the lines of the Institutes: whereas the Digest and the Code had been the primary sources of the commentaries in the Middle Ages, following the *ordo legum* or, in some cases, the *ordo rubricarum*, works such as Arnold Vinnius's commentary on the Institutes (*ed. pr.* 1642) became the paradigmatic general overviews, all over Europe, of civil law.

Teaching, also, was affected by the new paradigms. When the Louvain law professor Pierre Goudelin (Gudelinus, 1550-1619), who had been teaching the Digest and the Code during the last decades of the sixteenth century, started giving lectures «ad ius novissimum»[5], he gave in 1599 a programmatic speech in his university explaining his new approach. His purpose was to include the *Novellae* in his teaching, since those sources (previously mainly discussed through the *Authenticum* and the *authenticae* incorporated in the medieval versions of Justinian's Code) had been somewhat neglected in the medieval and sixteenth-century curricula. In his *oratio*, Goudelin referred to the spectacular developments of cartography in his days[6] which had been able to give a full survey of the whole world in one synoptic overview (a reference, no doubt, to Mercator's "projection"). Similarly, Goudelin wanted to provide a general overview of the (civil) law[7]. The *summa divisio* he followed was comparatively recent as a teaching device: the distinction between private law and public law. However, within each of those two areas, he then applied the arrangement of the Institutes – indeed,

[3] P.G. Stein, *The Fate of the Institutional System*, in P.G. Stein, *The Character and Influence of the Roman Civil Law. Historical Essays*, London-Ronceverte 1988, pp. 73-82; for a full treatment and survey, see K. Luig, *Institutionenlehrbücher des nationalen Rechts im 17. und 18. Jahrhundert*, in «Ius commune», 3 (1970), pp. 64-97; K. Luig, *The Institutes of National Law in the Seventeenth and Eighteenth Centuries*, in «Juridical Review», 17 (1972), pp. 193-226.

[4] A. Wijffels, *Early-modern scholarship on international law*, in *Research Handbook on the Theory and History of International Law*, edited by A. Orakhelashvili, Cheltenham and Northhampton, MA, 2011, pp. 23-60.

[5] The *editio princeps* dates back to 1620. I have used the Antwerp 1644 edition. Among the later editions, there are two surprisingly late Italian imprints, one at Lucca in 1780 and the other at Florence in 1839.

[6] Some of the most illustrious contemporary cartographers, G. Kremer (Mercator, 1512-1594) and A. Ortels (Ortelius, 1527-1598), were Belgians who had strong links with the printing business in Antwerp, situated (as was also Louvain) in the duchy of Brabant.

[7] Petrus Gudelinus, *Commentariorum de iure novissimo libri sex, Optima methodo, accurate ac erudite conscripti, additis harum vicinarumque regionum Moribus, Opus ut diu avideque expetitum, ita Scholis Foroque utilissimum*, Antverpiae, ex officina typ. Hieronymi Verdussi, 1644, *Oratio Praefationis* (*ultima charta*).

towards the end of his introductory *oratio*, he professes to attempt a presentation which would come close to the «Institutionum Iuris novissimi, si non perfecta forma, saltem quaedam effigies»[8]. Hence, Book I of the *Ius novissimum* deals with the law of persons; Book II with the law on property («de eo iure, quod in rebus habetur»); Book III with obligations and actions; Book IV with procedure. The subject-matter of Book V is public law, and that of Book VI "sacred law" («De iure sacro»). Within books V and VI, the subdivision is again (following in each case a specific hierarchy) based on the sequence of persons, property (and rights), actions – the "Institutional system" serving here as a device for arranging systematically the legal areas outside private law. Moreover, not only does Goudelin adopt a distinctive arrangement governed by the private-public law division and the systematizing categories of the Institutes, he also includes as much as possible for each subject-matter he deals with references to contemporary "Belgian law", i.e. rules of *iura propria* from the Belgian provinces, and from surrounding territories. Thus, students at Louvain who would attend Goudelin's new lectures, or read his text-book, would have, in a scholarly work which primarily purported to discuss the *Novellae*, a systematic overview by subject-matter of both Roman law and some Belgian law – precisely the two distinctive characteristics I have attributed above to the new early-modern legal methods, in this case a Belgian variation on the (early) *usus modernus*.

3. *Belgian* usus modernus*: early-modern* consilia *and* Decisiones

Legal practice, too, was eventually influenced by a shift towards the early-modern paradigm. A first indication, although far from conclusive, may consist in the general arrangement (if any) of collections of consultations (*consilia*) or reports on judgments (*decisiones*). The picture for Belgian collections is not very different from that in other countries[9]. Some collections of both *consilia* and *decisiones,* even during the eighteenth century, followed implicitly or explicitly a chronological order, reflecting the career of their author[10]. In some cases, a col-

[8] *Ibidem*. At the beginning of his *oratio*, Goudelin explains that his first idea had been to revert to the teaching of the Institutes, but in a more elaborate way.

[9] One should still rely on the chapter *Niederlande* by U. Wagner in H. Coing, *Handbuch der Quellen und Literatur der neueren europäischen Rechtsgeschichte*, Bd. II, *Neuere Zeit (1500-1800), Das Zeitalter des gemeinen Rechts*, vol. 2, *Gesetzgebung und Rechtsprechung*, München 1976, pp. 1399-1430; see also Ph. Godding, *L'origine et l'autorité des recueils de jurisprudence dans les Pays-Bas Méridionaux (XIII^e - XVIII^e siècles)*, in *Rapports belges au VIII^e Congrès international de droit comparé*, Pescara, 29 août - 5 septembre 1970, Bruxelles 1970, pp. 1-37; A. Wijffels, *Legal Records and Reports in the Great Council of Malines (15th to 18th Centuries)*, in *Judicial Records, Law Reports, and the Growth of Case Law*, edited by J.H. Baker, Berlin 1989, pp. 181-206.

[10] For example: Nicolaus Everardus's *consilia* (early sixteenth century, *ed. pr.* 1554) are not dated, but it has been argued that their sequence in the printed version is chronological; N. du Fief's early seventeenth-century notes on decided cases (mainly by the Great Council and by the Privy Council), not published (but incorporated in the printed reports published under the name of P.C.M. de Saint-Vaast in 1717 and later) reflect the progress of his career as a councilor at those two councils; J.A. de Coloma's reports (printed in 1781) also follow a chronological order. This was the usual way for law reports, cf. Wijffels, *Legal Records and Reports*, *loc. cit.*, for reports of the Great Council's decisions.

lection was (re-)arranged by key-word in alphabetical order[11]. In other cases, the author, compiler or publisher attempted to present the material in some logical order. That was particularly important for the more extensive collections, contained in several volumes, where the system of indices by subject-matter (often compiled for each volume of the collection) was still somewhat cumbersome. Two examples from the first half of the seventeenth century (when, as stated above, subject-related works became an established feature of early-modern legal literature) may illustrate the hybrid approach employed for *consilia* and *decisiones*. The first example is that of the vast collection of *consilia* by Jean Wamèse (Wamesius, 1524-1590). His consultations were published after his death in two series. First, two volumes of *consilia* on canon law related issues («de iure pontificio») published during the first quarter of the seventeenth century[12]. Here, the arrangement could easily benefit from the already more advanced systematization which had been reached in the *Liber Extra*, so that the conventional *ordo titulorum* of the compilations of decretals (which followed itself a rough systematization in five parts by broad subject-matter) could serve for classifying the "ecclesiastical" consultations. Wamèse's production of "secular" consultations (*consilia* «ad jus, forumque civile pertinent[ia]») had been even more prolific, providing material for five in-folio volumes[13]. Here, the first volume or *centuria* is said to have been «ordine iudiciario digesta». The sequence of those first hundred *consilia* complies with that advertisement on the title-page: the arrangement of the consultations' headings starts with *consilia* on the courts' organisation, jurisdiction and powers, and continues with preliminary procedural issues, followed almost step by step by the various stages of proceedings, from the initial summons right until, at the end (consultation 100 of the first *centuria*) the enforcement of the judgement. For the *centuriae* II to IV, each covering a separate volume, the arrangement is supposed to be «ordine titulorum Pandectarum et Codicis digesta». As the combination of Digest and Code indicates, this means that a sequence which follows with a degree of flexibility the order of rubrics in the two main Roman law compilations has been applied. In the fifth volume, the title-page gives away that to some extent, somewhat different criteria have also prevailed: the fifth *centuria* is announced on the title-page as having been «ordine titulorum Pandectarum et Codicis digesta, continens materias Feudales, Donationum, Dotium, Matrimoniales», which indicates a certain focus around family property issues, although antenuptial contracts and questions of inheritance have been brought together in the second volume. Moreover, headings which refer to typical issues governed by *ius proprium* were

[11] For example in the very truncated version of Nicolas du Fief's reports edited and published in Lille in 1773. It was a system very popular in France among practitioners.
[12] I have used the edition: Ioannes Wamesius, *Responsorum sive consiliorum de iure pontificio Tomus I*[*-II*], Lovanii, typis Iacobi Zegers, 1643 (*ed. pr.* I: 1605; II: 1618, both ex officina Gerardi Rivii).
[13] I have used the edition: Ioannes Wamesius, *Responsorum sive consiliorum ad ius, forumque civile pertinentium, Centuria prima* [*-quinta*], Antverpiae, Apud Henricum Aertssens, 1639 [II: Antverpiae 1641; III: Lovanii, apud viduam Henrici Hastenii, 1631; IV: Lovanii 1632, V: Antverpiae 1641] (the *ed. pr.* for the first volume seems to be Louvain, Hastenius,1625).

sometimes more difficult to bring under the order of the Digest or the Code, and have therefore been gathered differently, such as a whole series of *consilia* on various forms of repurchasing property (*retractus*), mostly governed by customs and statutes, in the third *centuria*. As a result, it is possible for the reader to identify fairly easily consultations dealing (mainly or substantially) with a specific topic, but only by looking up in each volume both the table of contents (which lists the headings given to all the consultations) and the *index materiarum*.

A similar, but more effective system was applied for the six-volume collection of *decisiones* by Paul van Christynen (Christinaeus, 1541-1631), a lawyer active in Mechlin and in various Brabant courts. His *Decisiones* were first published during the second quarter of the seventeenth century, and there is evidence that the author himself had a hand in the arrangement of the collection[14]. The first volume starts off with a series of *decisiones* for which the headings indicate that they discuss core issues with regard to supreme judicature and the authority of supreme courts' decisions[15]. This is followed by several *decisiones* where the headline refers to issues of appellate jurisdiction and appeal and revision proceedings[16]. After that, the sequence of headings becomes more arbitrary: a more detailed analysis of those *decisiones* suggests that Christinaeus was at that stage using former (unpublished) notes and compilations, some written by earlier authors, some of his own[17]. From volume II onwards, the arrangement (announced on the title-pages) follows strictly the order of the titles in the Code. As any reader at the time would have been sufficiently acquainted with that order, it greatly facilitates the use of the collection, although here, too, any methodical research requires also looking up in each volume the table of contents (giving the sequence of the headlines) and, in particular, the index of subject-matters. For a number of specialized topics, the medieval version of the code has been supplemented (in the fifth volume) with the titles of the *Tres Libri*, thus completing the whole sequence of Justinian's Code. Finally, the sixth volume is entirely compiled with *decisiones* on feudal law.

Christinaeus's collection of *decisiones* is therefore, except for the greatest part of entries in the first volume, more systematic than Wamesius's collection of civil law consultations, but the difference is relative, as both a consultation and a *decisio* may deal with a variety of issues. This is particularly true in Christinaeus's work whenever he actually reports on a specific (or several specific) cases, but it should be remembered that for many rubrics of the code, what is presented as a *decisio* in Christinaeus's collection is in fact a more general short doctrinal treatment of the subject, which then may or may not be illustrated or corroborated with a passing reference to a case or even more generally the

[14] I have used the edition: Paulus Christinaeus, *Practicarum quaestionum rerumque in supremis Belgarum curiis actarum et observatarum Decisiones, in sex volumina distributae* ..., 6 vols., Antverpiae, Verdussen, 1661 (*ed. pr.* Antverpiae, Verdussen, 1626-1632).
[15] I. Decc. 1-12, e.g. Dec. I.1: «An sententiae vel decisiones supremi concilii, vel summorum tribunalium, exemplum et praeiudicia statuant».
[16] I. Decc. 13-45.
[17] Wijffels, *Legal records and reports* cit., pp. 193-196.

practice of the courts[18]. Although neither the collection of Wamesius nor that of Christinaeus follow the Institutes, the fact that both follow for the most part a sequence inspired by the Code (and, in Wamesius's case, the Digest) underscores the fact that Roman law is formally and substantially a major reference in both authors' arguments; at the same time, depending on the topics and issues in each single entry, the argument may also include more or less extensively the application of *iura propria* (customary or statutory law). The end result is, at a time which was still a period of transition, a type of legal literature which combines both characteristics ascribed to the early-modern legal methods.

Reflecting the advocates' legal practice in the courts, the *ius commune* authorities referred to in Wamesius's *consilia* (which must date for the most part from the second half of the sixteenth century) and in Christinaeus's *decisiones* (which, but for a few borrowings from earlier collections, can mostly be dated from approximately the last quarter of the sixteenth century and the first quarter of the seventeenth century), still belong to a large extent to the late-medieval and sixteenth-century literature of the "Italian" methods; in Christinaeus's collection, the more recent literature with a greater focus on (Belgian and foreign[19]) *iura propria* or beginning to display more systematizing tendencies appears already with a stronger emphasis. The *mos italicus* authorities gradually receded in the course of the seventeenth and eighteenth centuries, without entirely disappearing, but by the second half of the seventeenth century, *iura propria* authorities and works organised by subject-matter prevailed. Concomitantly, the reasoning in practice-related literature became more strictly disciplined and bound by rules directly related to the issues under discussion. By that time, the paradigm of the *mos italicus* had given way to that of the *usus modernus* [20].

4. *The demise of the* mos italicus*: political factors*

That changing pattern of legal reasoning can be related to other, similar changes in different areas of scholarship in early-modern times, breaking away from medieval scholastic methods[21]. Apparently, the changes in legal scholarship and its repercussions in legal practice reflected broader intellectual and cultural

[18] For examples, see A. Wijffels, *Business Relations Between Merchants in Sixteenth-Century Belgian Practice-Orientated Civil Law Literature*, in *From lex mercatoria to commercial law*, edited by V. Piergiovanni, Berlin 2005, pp. 255-290, and my article mentioned in the following footnote.
[19] A. Wijffels, *Orbis exiguus. Foreign authorities in Paulus Christinaeus's Law Reports*, in *Ratio decidendi. Guiding Principles of Judicial Decisions*. Vol. 2, *Foreign Law*, edited by W.H. Bryson, S. Dauchy, M. Mirow, Berlin 2010, pp. 37-62.
[20] A. Wijffels, *Van Paul van Christijnen (†1631) tot Jean-Alphonse de Coloma (†1739): rechters en advocaten bij de Grote Raad van Mechelen tegen de achtergrond van de zeventiende-eeuwse Europese rechtsontwikkeling*, in «De zeventiende eeuw», 9 (1993), 1, pp. 3-14.
[21] A major theme in H.J. Berman, *Law and Revolution* II. *The Impact of the Protestant Reformations on the Western Legal Tradition,* Cambridge Mass.-London 2003, esp. chapter 3; the prevailing *ius commune* methods before the systematizing tendencies started have been accurately set out by H. Coing, *Europäisches Privatrecht,* Bd. I, *Älteres Gemeines Recht (1500 bis 1800)*, München 1985, pp. 15-24.

developments in Western Europe. Other factors, however, may also have played a part in the demise of the *mos italicus*. One of these factors appears to be linked to the obsolescence of the political context in which the *mos italicus* had evolved and thrived. In very general terms, the evidence is that in the course of the sixteenth century, legal practice shows a growing tension between the qualifications assumed or worked out by medieval *mos italicus* learning with respect to the exercise of supreme political authority and the growing effectiveness of supreme political power during the sixteenth century. Or, phrased differently (at the risk of oversimplifying the issue), that the balance between the medieval legal concepts of "absolute" supreme political power (also referred to as «potestas extraordinaria») and the "ordinary" exercise of supreme political power (referred to as «potestas ordinaria») was tilted in favour of the former. Whereas in the political context of the medieval Italian peninsula, the political weight of the city-states was such that in legal theory, the supreme authority of the emperor (or even, in several autonomous territories, of the pope) could be acknowledged in theory, without fearing that it would affect the public governance of the city very much in day-to-day practice, during the sixteenth century, the emerging political theory of sovereign power became in several polities, not least outside Italy, to some degree a reality. That was the well-known development of the early-modern concept of "absolutist" sovereignty, which was not bound by any concurrent political authority within the territory, nor by any political authority above the realm. In legal terms, it meant that the sovereign ruler was now the only authority who would ultimately decide what the law was, and whether or not his actions would have to abide by the law. In medieval (*mos italicus*) legal theory, the phrase *potestas extraordinaria* was precisely what it said: a power which could be, but only would be, exercised in extraordinary, exceptional circumstances; the ordinary, usual practice of public governance was through the exercise of the *potestas ordinaria*. One of the defining distinctions between the two was that the latter was exercised according to the rule of law, whereas the extraordinary exercise of power allowed the ruler to depart from legal constraints[22]. Early-modern political theories emphasizing the supremacy of the sovereign were paving the way towards absolutist rule because they allowed more readily the exercise of the extraordinary power, which became for some rulers all the more attractive since, within their polity, the balance of power had shifted in such a way that they faced far less than in earlier times any political counter-weight. During the sixteenth century, the theoretical supreme political power of the later Middle Ages was becoming within particular polities an effective political power. Late-medieval *mos italicus* was steeped in a political environment and culture which emphasized the rule of law. The emergence of early-modern absolutist power was increasingly incompatible with that legal tradition[23].

[22] K. Pennington, *The Prince and the Law 1200-1600. Sovereignty and Rights in the Western Legal Tradition*, Berkeley-Los Angeles-Oxford 1993, pp. 54-77 and *passim*.
[23] On the significance of (late-)medieval law for the concept of *Rechtsstaatlichkeit* (here for convenience sake translated as rule of law): R.C. van Caenegem, *The Modernity of Medieval Law*, in «TRG», 68 (2000), pp. 313-329.

Sixteenth-century legal practice at the "supreme court" of the Low Countries (i.e. the Great Council of Mechlin) reflects the tensions between the old tradition[24] and the new political tendencies. A few case-studies, which can here only be discussed in succinct terms[25], show that the use of *mos italicus* references to the requirements for exercising the *potestas extraordinaria* were coming under the strain of a political situation where it became increasingly difficult to reconcile political expediency and due process of law. The exercise of supreme political power had been buttressed by the reliance on the concept of *utilitas publica*, a concept acknowledged in *mos italicus* doctrines, and legal practitioners had actively adopted the concept whenever it was in their client's interest to put forward a statute, grant or decision of the prince in order to override the private or particular interest of their opponent[26].

A first example[27] is offered by a case from the 1540s opposing the creditor of a licensed loan-monger who had been convicted of counterfeiting coins and executed, and the Proctor General, representing the Crown's interests, after the counterfeiter's estate had been confiscated. At one stage of the litigation, the creditor's counsel was arguing in favour of the prince's supreme power to legislate: with regard to the prohibition of usury, the advocate quoted Bartolus and Innocentius for arguing that in order to secure public interest (*utilitas publica*), the ruler could even restrict and change divine law[28]. This put the Proctor General in the rather uncomfortable position where he had to argue that on such issues (the argument was extended by analogy to homicide and adultery), secular law had to defer to the law of the Church. However, in the same case, the creditor's counsel also had to argue (so that his client could benefit from the terms of the license of a loan-house which the emperor had granted to the client's debtor)

[24] Throughout the sixteenth century, *mos italicus* prevailed in the advocates' practice at the Great Council: A. Wijffels, Qui millies allegatur. *Les allégations du droit savant dans les dossiers du Grand Conseil de Malines (causes septentrionales, ca. 1460-1580)*, 2 vols., Amsterdam and Leiden 1985.

[25] For a more detailed analysis and further references to primary and secondary sources, see the published case-studies mentioned for every example. Other examples could be drawn to the same effect and in order to argue the same point for other jurisdictions, e.g. in the international controversy between the German Hanse and England in the 1550s (when Mudaeus and Leoninus acted as consultants to the Hanse), see A. Wijffels, *International Trade Disputes and* ius commune*: Legal Arguments on the 'Gdańsk Issue' during the Hanseatic Embassy to London in 1553*, in *Eine Grenze in Bewegung: Öffentliche und private Justiz im Handels- und Seerecht. Une frontière mouvante: Justice privée et justice publique en matières commerciales et maritimes*, hrsg. von A. Cordes, S. Dauchy, München 2013, pp. 65-89; and in J. Mearns, *A consultation by Andrea Alciato on the laws of war*, in «TRG», 2013 (forthcoming), on litigation before the *Reichskammergericht* opposing Henry II (the Younger), Duke of Braunschweig-Wolfenbüttel, on the one hand, and the town of Goslar, together with the leaders of the Schmalkaldic League, on the other.

[26] That use of the concept of *utilitas publica* can be found in several other cases of litigation before the Great Council during the late fifteenth century and during the sixteenth century, e.g. A. Wijffels, *Gelehrtes Recht und Wirtschaftsordnung: Niederländische 'Bierkriege' im 15. und 16. Jahrhundert*, in «Zeitschrift für Neuere Rechtsgeschichte», 25 (2003), pp. 177-203.

[27] For a full discussion, see A. Wijffels, Een prince ende heere van justitie. *Un avis de G. Mudaeus sur l'organisation d'une table de prêt*, in «TRG», 64 (1996), pp. 113-139.

[28] Transcripts of the full argument, including the *allegationes iuris* cit., pp. 122-123.

that a ruler, because he must be assumed to act as a «prince and lord of justice» (in Dutch: «een prince ende heere van justitie», and because «in principe presumitur iustitia»), he was bound by his own («contractual») obligations. The argument touched all the more upon a fundamental political issue, because it referred to an important statute of the emperor from 1540 which had authorized interest-loans between merchants. The case shows that, the protests of the Proctor General notwithstanding, the somewhat opportunistic argument of the creditor's counsel had a point, for the emperor's recent legislative act on usury had been justified by the general interest of the commonwealth.

A second example[29] is that of a case (1548-1559) which involved major economic and commercial interests linked to the Low Countries' international maritime trade. The Brabant city of Antwerp tried to counter the Zeeland city of Middelburg's attempts to acquire the position of a staple in the Scheldt estuary by interpreting and applying extensively its right of gauge, which Middelburg had obtained through a series of (quasi-statutory) privileges. After protracted proceedings in first instance and revision before the Great Council, Antwerp, having lost its case, started to lobby the Estates of Brabant so that the emperor's statute which allowed Middelburg's control of maritime trade would be abolished or at least restricted. Both during the proceedings and (in the case of Antwerp) after the case had been finally decided, Louvain professors were pressed into service and commissioned (by both sides) to write *consilia*. Middelburg could rely on favourable statutory provisions (issued by the emperor in 1524 and 1546) on gauge-duty and staple-privilege. Those provisions were expressions of the ruler's economic policies, no doubt part of his legislative prerogative when addressing the (economic) interests of his commonwealth. E. de Leeuw (Leoninus, 1519-1598) advised in two consultations on behalf of Middelburg that the statutes were consistent with the general interest and equity. His client could therefore rely on provisions which met the standards «utilitati reipublicae et Principi, et ad magis conservandam justitiam in commerciis»[30]. After losing the case in revision, Antwerp's lobbying in Brussels relied partly on an extensive legal consultation co-signed by de Leeuw's colleagues in Louvain G. van der Muyden, P. Peck and J. Wamèse. One of the difficulties the three consultants for Antwerp faced was the dilemma in applying for a revocation or restriction of a statutory act of the supreme ruler, for they had to enlist the support of the Estates of Brabant: they therefore had to argue that the ruler did have the power to exercise his supreme power in order to abolish the statute (even at the expense of Middelburg's vested interests), but at the same time that the ruler was bound by his constitutional obligations (laid down in a medieval

[29] A. Wijffels, Ius commune *and international wine trade. A revision (Middelburg c. Antwerp, 1548-1559)*, in «TRG», 71 (2003), pp. 289-317; A. Wijffels, *A consultancy on wine imports*, in «TRG», 73 (2005), pp. 321-355; A. Wijffels, *Wamèse, la pratique du droit commercial dans l'œuvre d'un professeur louvaniste*, in *Liber Amicorum Guy Horsmans*, Bruxelles 2004, pp. 1151-1175, at pp. 1167-1174.
[30] Wijffels, Ius commune *and international wine trade* cit., pp. 305 and 308.

covenant[31]) towards his Brabant subjects. The consultants thus also relied on the *utilitas publica*, claiming that the statute's extensive implementation by Middelburg caused a «Belgicae gravissimum praeiudicium». At the same time, they also tried to argue that the ruler was bound by the covenant that legitimized his authority over the Brabant subjects:

> For such laws have the authority and scope of conventions or contracts. When they acquire a conventional character, constitutions, ordinances, privileges and statutes become irrevocable, and have therefore the same obligatory force for the prince as for any other person. They cannot be repealed, not even by the pope or the emperor, not even by virtue of the *plenitudo potestatis*, as some would have it. By his oath and the mutual solemn promise of fidelity, the prince is deemed to have waived any possibility to depart from his obligations. The powers of the prince are indeed conferred to him in order to be exercised according to true equity, and not on behalf of particular favours, as it has been observed [by Nicolaus de Tudeschis, following Saint Thomas]. Therefore, because the emperor Charles could not have issued such a statute or granted such a privilege at the expense of the Brabant people, without having given them an opportunity to submit their arguments, and because it cannot be assumed that he would have had any such intention by expressing himself in such broad terms, without specifying their object, and considering that the terms of the statute can be construed differently, so as to avoid any breach of the fundamental privilege and rights of the Brabant people, the rule "potius valeat quam pereat" should apply, and the author of the statute is deemed to have acted in conformity with, rather than in violation of, the laws, ordinances and statutes.

Once more, one may be tempted to recognize in the consultants' balancing act a degree of opportunistic advocacy. What the ambivalence illustrates, however, is how traditional legal authorities were adduced (in this example, once again by the same litigant) both in order to prop up the exercise of "absolute" power by the ruler (in order to set aside a statute) and in order to uphold the ruler's submission to a political covenant. The apparent contradiction is somewhat attenuated by the reference to the concept of *utilitas publica*, which allows to support the client's claim by introducing policy considerations aiming at establishing that the client's interest is more compatible with the general welfare than the opponent's interests at stake.

A third example (in which litigation covered the period 1559-1574)[32] was a case of compensation and liability for the loss of a cargo following an accident in the course of transport by river. In this case, also, the alleged corporate liability of the Ghent free shippers raised the issue of interpreting an ordinance of Charles V. The ordinance of 14 February 1541 on the carriage of goods on the rivers Scheldt and Leie was, again, a statute which expressed the ruler's economic and commercial policies. At the same time, it had an unmistakable political resonance, for it had been issued in the almost immediate aftermath of the Ghent rebellion of 1537-1540, one of the last – and doomed – attempts of a once

[31] A reference to the Brabant *Joyeuse Entrée* (*Blijde Inkomst*) of 1356, to which each new duke of Brabant plegded his oath at his accession until the end of the Ancien Régime.
[32] A. Wijffels, *Vicarious liability for the carrier by river?,* in «TRG», 75 (2007), pp. 333-353, based on original unpublished records and on *consilia* by Leoninus and Wamesius; the case is also twice referred to in Christinaeus's *Decisiones*.

powerful city to assert the legal and political autonomy it had acquired in medieval times against an early-modern sovereign. The pre-enactment stages of the statute show that the emperor had taken advantage of a collective action by several cities from the Belgian provinces against Ghent in the wake of the latter's political and judicial punishment in order to intervene in the regulation of inter-regional river transport in Flanders. The corporation's legal advisers had the task of arguing that, the broad terms of the ordinance of 1541 notwithstanding[33], the ordinance had to be construed narrowly, so as to exclude the corporation's *prima facie* liability. That was of course a highly conventional interpretatory technique of *ius commune*, consisting in imposing a strict interpretation to *ius proprium* (at least, when it departed from *ius commune* rules). In this case, however, it is clear that the legal consultants would not hedge all their bets by merely referring to *ius commune* rules of construction aiming at restricting a statute's scope, but they went out of their way to establish that the political considerations behind the ordinance were consistent with the defense of their clients. In other words, the ability to restrict an enactment of the sovereign could no longer rely exclusively on *ius commune* authorities, but had to be underpinned by an argumentation which looked at the sovereign's statute in its own right.

Finally, as a last example from the same period, in a case dealt with quasi-judicially by the Privy Council during the years 1562-1564[34], the issue was whether the ruler could forbid the implementation of an exemption of taxes granted by way of "contractual privilege" by the city of Bruges to the merchants of the Spanish nation in that city. Wamesius wrote a consultation on behalf of the Spanish merchants, who insisted on their exemption, or on being compensated by Bruges for any taxes they were forced to pay. The division of the arguments in this case seems to have opposed the Proctor General, who followed a public-law reasoning, and the Spanish Nation, whose arguments were mainly drawn from private-law principles. The Proctor General relied on the administrative subordination of the city to the sovereign, and argued that the taxes had been levied in order to meet a state of necessity (*viz.* the costs of war) and were therefore justified by the *utilitas publica*, which allowed to cancel all private privileges. Counsel for the Spanish merchants had to counter those claims by asserting that any prohibitions formulated by the prince against exemption privileges did not affect vested contractual rights, and that in any case, such rights could not be set aside without due process of law. The case ended with a decision of the Privy Council which may have reflected a political compromise, but again, the discussion during the proceedings highlights the fact that the legal arguments for or against the ruler's pre-

[33] For the background and pre-enactment proceedings of the ordinance, Wijffels, *Vicarious liability* cit., pp. 336-338; for an English translation of the relevant section of the ordinance, *ibidem*, p. 343.
[34] A. Wijffels, *Une consultation de Wamèse sur une question de droit fiscal*, in *Liber amicorum Jacques Malherbe*, Bruxelles 2006, pp. 1169-1193 (including a French translation of Wamesius's *consilium*). The case in which Wamesius intervened as a consultant had been triggered by an exemption of beer excises; a few years earlier, a similar case between the same parties with regard to an exemption of wine excises had been decided by the Great Council of Mechlin.

rogative to frustrate the exercise of existing legal rights were being increasingly overshadowed by the ruler's growing ability to avail himself of his political preponderance – the *utilitas publica* argument could henceforth be called upon in circumstances which were hardly exceptional any more in early-modern public governance.

5. *A provisional conclusion*

Sixteenth-century legal practice in the supreme courts of the Low Countries reflects the growing strain on the medieval concept of extraordinary or absolute power. In the political context of the Italian city-states where the *mos italicus* had been developed in the law faculties and in the courts, *potestas extraordinaria* was essentially a security valve of public governance, aimed at securing (in exceptional circumstances) the city's paramount interests. In the normal course of political life, the exercise of the *potestas ordinaria* ensured that the rule of law and due process of law prevailed. The emergence of the early-modern concept of sovereignty was not merely a political theory, in many polities it also reflected a new political reality, a new balance of power in favour of the new-style sovereign. In that new political context, the old medieval theory of *potestas* underwent a transformation. What had been a *potestas extraordinaria* could easily become the ordinary way of conducting political affairs by an absolute ruler, especially if he could legitimize his action and policies by invoking the *utilitas publica*, of which he was now the sole representative. Of course, such a radical course was not achieved in all the European polities, but it was at least a general tendency. In this paper, it has been argued that those political developments, the impact of which can be followed in contemporary legal practice of the higher courts, contributed to undermine, and eventually to discard, direct reliance on the *mos italicus* learning. Other factors, such as the early-modern intellectual propensity to seek other forms of systematization, also played a role. However, the legacy of the *mos italicus* was not entirely lost. Just as many legal doctrines on specific topics were saved through a *translatio studiorum* and incorporated by the *usus modernus*, a certain tradition of due process of law was upheld, not least through the practice of the superior courts, even in those jurisdictions where political absolutism made the most progress. That contribution to the rule of law – which for the sake of simplicity can here be assimilated with the notions of *état de droit* or *Rechtsstaatlichkeit* in a broad sense – was one of the most fundamental and long-term achievements of the early-modern higher courts – Mario Ascheri's beloved *grandi tribunali* –, not only in Italy, but throughout Europe.