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Challenges to legalism in early modern continental civil law

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Abstract
Legalism can denote the range of functions that laws have in any society, but in legal discourse from classical times to the modern day, it has also had, as well as the self-justificatory practice of regimes seeking to establish their legitimacy, negative connotations of a perverse use of the written text of the law in legal argument. In the medieval and early modern periods, in which civil law is considered to be determined by the higher norms of rationality, morality, and the public good, the terms *strictum ius* and *rigor iuris* evoke the danger of over-literal and inflexible understanding of the text of the law, and the need in many cases for its mitigation. This was achieved by the use of techniques for construing the text enshrined in the Corpus Juris Civilis itself and elaborated by the use of scholastic logic. Recourse was made to a range of principles in order to mitigate or correct a given law, including *aequitas*, *bona fides*, *utilitas*, *consuetudo* and *honestas*. With the exception of the last, these are not necessarily to be looked on as extra-legal. This paper investigates the deployment of these norms or principles by a range of early modern jurists (including Arnoldus Holstein, Claudius Cantiuncula, Jean de Coras, and Johan van der Sande). It argues that there is a strong continuity of legal thinking in these areas from the medieval to the early modern period. Where relevant, parallel cases in the sphere of theology (antinomianism, adiaphora) are discussed.

Keywords
legalism, *strictum ius*, *aequitas*, *utilitas*, *honestas*

1. Introduction

In this paper, I set out to investigate challenges to legalism, whether conceived of in neutral or negative terms, in the early modern period.[1] Legalism signifies different things in different disciplines. In anthropology, it has several principal meanings: the nature and function of laws in a given society; an ethical attitude to rules; concept formation (the use and status of general categories organizing a conceptual and cultural field); dispute settlement.[2] Implicit in these usages are a number of difficult questions: if legalism is a defining feature of societies with laws, is it situated in the state or regime?

[1] It gives me great pleasure to acknowledge the help and constructive criticism I have received from a number of colleagues, but most notably Wolfgang Ernst, Paul du Plessis, and Xavier Prévost. I am also grateful for the thoughtful comments of the anonymous reviewer appointed by *Glossae*. The remaining errors are of course entirely my own.

[2] Shklar, J., *Legalism: law, morals and political trials*, 2nd ed., Cambridge, Mass., 1986, p. 1: "Legalism… is the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."; The meanings "concept formation" and "dispute settlement" are discussed in *Legalism: anthropology and history* (P. Dresch, H. Skoda eds.), Oxford, Oxford University Press, 2012. See also West, R., "Reconsidering Legalism", *Minnesota Law Review* 88 (2003), pp. 119-58.

In the legislator? In the draftsman of laws? In the judge? In the advocate? In the notary? In the individual having recourse to law? Or in the whole community by a consensual act or agreement, whether conscious or unconscious? And how does legalism relate to the distinction between written and unwritten law and norms? All of these questions entail another: where does authority lie in respect of the instruments through which law in any society is expressed and administered?

These questions indicate that legalism in anthropology is descriptive and value-neutral. In modern political and legal discourse on the other hand, it is a term with strongly negative connotations, well expressed by Jeremy Waldron:

> "Legalism [is] the lawyerly preoccupation with the letter of the law, the perverse mentality that orients conduct so meticulously to the law that it loses sight of the law's real point or purpose. Legalism is the mentality that insists on precise definitions and operationalized norms, and then uses those for all sorts of counterintuitive purposes. Law in the hands of such a mentality often seems perverse and self-defeating, getting people off on technicalities, betraying real justice, and undermining purposes that really matter."[3]

This may remind us of the Latin term *leguleius* as used by Cicero, who describes this figure in a strongly value-laden negative passage as "a circumspect and sharp pettifogging lawyer, a crier of legal actions, a chanter of legal formulas, a trapper of syllables."[4] A *leguleius* depends on technicalities for getting the better of his opponent, even at the risk of bringing the legal process into disrepute; a risk that is described in the Corpus Juris Civilis as *cavillatio* or *calliditas* (D 50.16.177, D 50.17.65, cf. D 1.3.29).[5] This was a matter not just of the interpretation of law, but also legal practice, as reflected in modern terms in such phrases as "mere legalism", "clinging to legalism", "hiding behind legalism", "having recourse to legalism."[6] Here this negative version of legalism is connected with the clash between pre-existing law on the one hand, and values such as morality, justice, fairness, and political legitimacy on the other. In the Roman Law tradition, it is represented by various words, such as *strictum ius* (a Byzantine term said by the legal humanist Guillaume Budé (1467-1540) to be "peculiar to jurists"; the classical term is *summum ius.)*[7] *Rigor iuris* is a cognate medieval term. Both of these terms were used descriptively as well as negatively.

The most extreme form of opposition to invoking the letter of the law is antinomianism: that is, the doctrine that advocates freedom from the obligations of law of any sort. In the early modern world, outside the confines of the discipline of

[3] Waldron, J., "Dead to the Law: Paul's antinomianism", *Cardozo Law Review* 28 (2006-7), pp. 301-32 (326). For Waldron, Saint Paul's antinomianism resides in Romans 13:1-3, 2:14, and Galatians 3:28. For the purposes of this essay, it is found in I Cor. 6:13 and I Cor.10:23.

[4] Cicero, *De oratore* 1.55.236: *cautus et acutus, praeco actionum, cantor formularum, auceps syllabarum*.

[5] Maclean, I., *Interpretation and meaning in the Renaissance: the case of law*, Cambridge, 1992, pp. 135-8.

[6] See also West, "Reconsidering legalism", 145.

[7] Spiegel, Jacobus (1483-1547), *Lexicon iuris civilis*, Lyon, 1548, s.v. *stricti iuris*: *vocabula peculiare est Iurisconsultorum: reliqui Scriptores, Summum Ius appellant* (citing Budé, Guillaume, *Annotationes in quatuor et viginti Pandectarum libros*, Paris, 1508, f2r,); Calvinus, Johannes (c.1550-1614), *Lexicon iuridicum*, Frankfurt, 1610, col. 1889 lists the *inter alias* following *leges* as relevant to the range of uses of the term: C 3.1.8 (quoted below, p. 00), I 4.6; D 13.6.3.2; D 12.3.5; D 29.2.86pr; D 4.13.5.30; C 3.42.8; D 5.3.50; D 40.7.28pr; the list is not exhaustive. On *summum ius* see also Kisch, G., *Erasmus und die Jurisprudenz seiner Zeit*, Basel, 1960, p. 190.

jurisprudence, there was a potent debate from 1537 to 1540 about antinomianism and its opposite - legalism - between Luther and his protestant colleague Johann Agricola. Because, in Lutheran thinking, it was the believers' faith, not their works, which qualified them for salvation, the Gospel (the New Testament) superseded the Law (the Old Testament). Some protestant thinkers were concerned that preaching the Law to the Christian would cloud the truth of the Gospel and lead the Church back into legalism. Because of this concern, they rejected any use of the Law within the life of the Church, though they did see the need for the Law in the civil realm. Martin Luther labelled these thinkers "antinomians". Between 1537 and 1540 he opposed their doctrines in a series of disputations, and with his colleague Philip Melanchthon made a strong case for knowledge of, and obedience to, the Law. Antinomianism is thus relevant to early modern legalism and the issue of justification by faith alone. It relies on the distinction between Gospel and Law, which is also that between personal conviction and outward obedience to the Law and between spirit and letter. To oppose antinomianism could be construed as seeing justification being achieved by adherence to *strictum ius*.[8] I do not recall seeing this debate evoked in legal writing, but I believe it to be part of the context of such writing, especially in German lands.

Antinomianism is also linked to the absence of legal terminology, and the question whether a crime can be committed if it is not already named in the discourse of the law. What is at issue here is not just a question of historical semantics, but also of substantive law: according to the Renaissance jurist Jacobus Raevardus (1534-68), Remus was not murdered by his brother Romulus, and the Sabine women were not raped (abducted), because crimes cannot occur before the law which defines them is promulgated: as the adage (first formulated in the eighteenth century) has it, nulla poena sine lege [praevia, scripta, certa, stricta.][9] A similar point is made twice in Saint Paul's Epistle to the Romans, at 4:15 and 5:13: "where no law is, there is no transgression"; "For until the law sin was in the world: but sin is not imputed when there is no law". On the other hand, Cicero in his *De legibus* (2.4) argues that rape (abduction) is a crime even before the law imposed penalties on rapists. Indeed, much positive law can be seen as the remedy to a mischief which preceded it.[10]

A final preliminary remark should be made about the place of early modern civil law relative to the often-cited distinction between "legal positivism" and "natural law theory". Early modern jurisprudence is much closer to the latter than the former.[11] One of its authoritative extra-legal sources, Thomas Aquinas, identifies the God-given rational nature of human beings as that which defines moral law: this chimes well with the maxim of the Roman jurist Celsus: "Those things that are prohibited by the nature of things are

[8] See Luther, Martin, *Solus Decalogus Est Aeternus: Martin Luther's Complete Antinomian Theses and Disputations*, Minneapolis, 2008; Peters, C., "Luther und seine protestantischen Gegner", *Luther Handbuch*, Tübingen, (A. Beutel, ed.), 2007, pp. 150-64 (161-4).

[9] Raevardus, Jacobus (1534-68), *De auctoritate prudentium*, Antwerp, 1566, p.7; Maclean, *Interpretation and meaning*, p. 164. See also Thomas Aquinas, *Summa Theologiae*, 1a 2ae 90.4, on the need for the law to be promulgated. *Nulla poena sine lege* is attributed as a phrase to Paul Johann Anselm von Feuerbach, *Lehrbuch des gemeinsam in Deutschland geltenden Rechts*, Giessen, 1801, p. 20. See also Skhlar, *Legalism*, pp. 151-90 (on the Nuremberg trials). For a contrary view, see Coras, Jean de (1515-72) , *Miscellaneorum iuris civilis libri septem* (1549), Cologne, 1598, p. 137, and below, p. 00.

[10] Cross, R., *Statutory interpretation*, London, 1976, pp. 13-15; Maclean, *Interpretation and meaning*, pp. 181-6.

[11] Shklar's *Legalism* is written in the context of the debates between these two legal schools: for a more recent discussion in the context of the Hart-Fuller debate, see the articles in volume 83, issue 4 of the *New York University Law Review* of 2008.

not confirmed by any law."[12] On this common view, since human beings are by nature rational beings, it is appropriate that they should behave in a way that conforms to their rational nature. Such a view will clearly be a factor in the interpretation of law, by creating categories (nature, rationality) superior to the formal expression of legal rules.[13] The *ius naturale* referred to in the Digest (1.1.1-3) is the domain of precepts, which do not bind as do laws, but are principles or norms that provide the basis for moral behaviour: the Christian version of this –"do as you would be done by" (Matth. 7:12) – is enshrined in Canon Law and in Thomas Aquinas's discussion of law in *Summa Theologiae* (1a 2ae 90-74). In the Digest (1.1.10), it is phrased differently: "justice is a constant and unrelenting will rendering to all their due; the precepts of the law are these: to live honourably, to harm no one, and to render to all their due."[14] The French jurist Guillaume Maynier (1455-1500) points to three areas in which these precepts or norms can guide a jurist or judge in respect of the written text of the law, and override its *rigor* in cases where this is seen in need of being done: those things that are permissible according to the principle of *aequitas*; those things that are fitting according to the principle of *honestas*; and those things that are expedient according to the principle of *utilitas*.[15] Of these three terms, *aequitas* has come under considerable scrutiny recently, as the immanent *ratio* of the law (Cicero's *aequitas constituta* [*Topica*, 2.9], and the glossators' *aequitas scripta*), the norm by which law is modified, and, in Canon Law, the manifestation of the Christian virtues of mercy, moderation and charity.[16]

Given the considerable scope of these areas, this paper does not pretend to be anything more than a preliminary survey of medieval and early modern views on these corrective principles as challenges to the civil law. I begin with an account of the passage of civil law from the medieval to the early modern period and the question of its interpretation, before passing to the challenges to *strictum ius* posed by *aequitas, bona fides, utilitas, consuetudo* and *honestas*.

2. Medieval Law and Legal Humanism

[12] *Summa Theologiae*, la 2ae 90,1 resp.: *Regula autem et mensura humanorum actuum est ratio quae est principium primum actuum humanorum* ("the rule and measure of human acts is reason, which is the first principle of human acts.") Cf. D 50.17.188.1 Celsus: *quae rerum natura prohibentur, nulla lege confirmata sunt*. Cf. Cicero, *De officiis*, 3.34: *nihil vero utile quod non idem honestum, nec honestum quod non utile sit*.

[13] Schröder, J., "Aequitas und Rechtsquellenlehre in der frühen Neuzeit", *Quaderni fiorentini per la storia del pensiero giuridico moderno* 26 (1997), pp. 265-307, (294) describes these principles, as well as God himself, as the "roof under which all law shelters". See *ibid*., 289-304 on its relationship to *aequitas*, and whether natural law is complete or subject to change.

[14] D 1.1.10pr- 1.1.10. 1: Ulpianus: *Iustitia est constans et perpetua voluntas ius suum cuique tribuens*; *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*. An exhaustive discussion of this is found in Suarez, Francisco, *Tractatus de legibus ac Deo legislatore*, Antwerp, 1614, book 2, "De lege aeterna et naturali, ac iure gentium", pp. 65-131, esp. 84-88. Cf. also D 1.1.1pr Ulpianus: *ut eleganter Celsus definit: ius est ars aequi et boni* (justice is the art of the equitable and the good).

[15] Maynier, Guilllaume (1455-1500), *Commentaria in titulum Pandectarum, de regulis iuris antiqui*, Lyon, 1545, p.356: *in quolibet negotio tria considerari debet, scilicet quid liceat secundum aequitatem; quid deceat secundum honestatem, and quid expediat secundum utilitatem*.

[16] See Maniscalco, L., *Equity in Early Modern Scholarship*, Leiden and Boston, 2020; Armgardt, M., Busche, H., eds., *Recht und Billigkeit: zur Geschichte der Beurteilung ihres Verhältnisses*, Tübingen, 2021; Beneduzi, R., *Equity in the Civil Law tradition*, Springer, 2021.

The propaedeutic to legal studies in medieval universities was the arts course and especially its scholastic grammar, logic and rhetoric, and this helped form the mind-set not only of the great postglossators (or commentators) such as Bartolus (1314-57) and Baldus (1327-1400), but also of early modern legal humanists (as is testified by the many academic disputations which use the logic and categories of Aristotle to analyze legal texts.)[17] Famously, Aristotle also comments directly on jurisprudence, and points to the problems in applying laws to individual cases posed by the necessary generality of legal formulations and the fallibility of legislators. The law, he avers, needs to be tailored to specific circumstances by equity (*epieikeia*), just as (in his much quoted analogy) the measuring instrument made of lead used by the builders of Lesbos, can adapt itself to irregular shapes (*Rhetoric*, 1.13, *Nicomachean Ethics*, 5.10 [14]). Medieval jurists felt able to associate this sentiment with a law in Justinian's Code (3.1.8): "It is appropriate in all things that reasoning from justice and equity should prevail over that of *strictum ius*". This colours that term with implications of rigidity and over-literal interpretation.[18]

The coming of humanism, not only in the form of the recovery of classical texts such as Quintilian and certain texts of Cicero, but also in the greater concomitant emphasis on the processes of argument to be learned from dialectics and rhetoric, marked a shift in the discipline of law even before the emergence in the early sixteenth century of Guillaume Budé (1468-1540), Ulrich Zasius (1461-1536) and Andrea Alciato (1492-1550), who engaged in textual emendation from the most reliable sources including the Littera Florentina, reinstated the Greek texts of the Corpus Juris Civilis, and used an impressively wide range of classical literary texts as guides to the ancient institutions of law and as sources of meaning and reference, thereby instilling a sense of history into the Tribonian text, which in turn inspired the French historical school of law.[19] These much heralded changes disguise to some extent the strong continuity in jurisprudential writing, evinced on the one hand by the continuing respect shown to the legal writings of Cino da Pistoia, Bartolus and Baldus, and on the other by the already frequent references in the medieval period to relevant passages of Cicero and Quintilian.[20]

That having been said, it is important also to stress the shift in interest towards a more elevated stoic-inspired conception of law itself and its political dimension. Of these, we might mention Plato's *Republic*, and Cicero's *De legibus* and *De officiis*, two of which (the *Republic* and *De legibus*) are dialogues that rehearse fictional descriptions of the ideal state and belong to the realm of political writing. They contain statements about the nature and role of laws in society, such as those of Cicero from *De Legibus*, 1.6.18 : "law is the highest degree of reason set in nature which ordains those things which are to be

[17] For example, Duprat, Pardoux (1520-70), *Lexicon iuris civilis et canonici*, Lyon, 1567, s.v. *aequitas* analyses the term through the four Aristotelian causes (efficient, material, formal and final), even though his is one of the most self-consciously humanist commentaries on the Corpus Juris Civilis. See also Maclean, *Interpretation and meaning*, pp. 67-86. Bartolus expresses the view that Aristotle is of little use to jurists, but only in respect of his political works: see his *Tractatus de regimine civitatis*, in *Politica e diritto nel Trecento*, Florence, Diego Quaglioni, ed., 1983, p. 153.

[18] C 3.1.8. (Constantinus, Licenius): *placuit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem*.

[19] Troje, H. E., *Graeca leguntur. Die Aneignung des byzantinischen Rechts und die Entstehung einer humanistischen Corpus iuris civilis in der Jurisprudenz des 16. Jahrhunderts*, Cologne and Vienna, 1971; Kelley, D. R., *Foundations of modern historical scholarship. Language, law and history in the French Renaissance*, New York and London, 1970; du Plessis, P. J, and Cairns, J. W. (eds.) *Reassessing legal humanism and its claims*, Edinburgh, 2016.

[20] See e.g. Ward, J.O., "Quintilian and the Rhetorical Revolution of the Middle Ages", *Rhetorica* 13 (1995), pp. 231-84.

done and prohibits those which are not to be done", and from *Philippicae*, 11.28 : "law is nothing other than right reason whose source is the will of the gods, ordaining what is honourable ("honesta") and prohibiting its opposite."[21] In Adrien Turnèbe's (1512-65) commentary on the *De legibus* of 1552, he relates this to Stoic thought which associates nature with reason and law.[22]

Cicero notes in the *De officiis* that however elevated in concept, law is vulnerable to misapplication: "injustice often arises also through chicanery, that is, through an over-subtle and even fraudulent construction of the law. It gave rise to the now familiar proverb: "the height of justice is the height of injustice."[23] This is sporadically quoted in the medieval period, and attracts more attention in the Renaissance, including from Erasmus in his *Adages* and from humanist commentators on Cicero, some of whom allude to frequently cited examples of such iniquitous misconstruction: D 1.8.11, for example, states that it is forbidden for foreigners in a city to climb the walls, but if a foreigner does so in order to repel an invading army, then the law must be mitigated to prevent someone being punished for a praiseworthy civic act.[24] The most frequently cited of all such cases is not in fact a law in the Digest, but a medieval municipal statute, first cited by Bartolus in his gloss on C 1.14.5, which ordained that anyone who drew blood on the streets of Bologna would be punished with the utmost severity; this punishment was not however meted out to barber-surgeons who opened the veins of patients for medical reasons.[25] These examples are cited to highlight the fact that the bare words of the law are open to misinterpretation, and may require mitigation. They are given to demonstrate the principle that there is a jurisprudence grounded in natural equity, whose transcendent legal norms or principles (sometimes referred to as "praecepta", but "praeceptum" is also

[21] *De Legibus*, 1.6.18: *Lex est ratio summa, insita in natura, quae iubet ea quae facienda sunt, prohibetque contraria*; *Philippicae*, 11.28: *Est enim lex nihil aliud nisi recta et a numine deorum tracta ratio, imperans honesta, prohibens contraria*. Cf. also *De legibus*, 1.15.42: *Est enim unum ius, quo devincta est hominum societas, et quod lex constituit una; quae lex est recta ratio imperandi ac prohibendi; quam qui ignorat, is est iniustus, sive est illa scripta uspiam sive nusquam* ("for justice is one: it binds all human society, and is based on one Law, which is right reason applied to command and prohibition. Whoever does not know this law, whether it has been recorded in writing anywhere or not, is without justice.")

[22] Turnèbe, Adrien, *M.T. Ciceronis de Leg. Lib, III in eosdem commentarij*, Paris, 1553, pp. 18-20 (18): *lex iube[t] quae agenda, et veta[t] quae non facienda*.

[23] D. 50.16.177 Ulpianus (cf. D 50.17.65 Julianus): *Natura cavillationis, quam Graeci sorites (…) appellaverunt, haec est, ut ab evidenter vera per brevissimas mutationes disputatio ad ea quae evidenter falsa sunt, perducatur* ("It is the nature of cavillation (called *sorites* by the Greeks) to construct an argument by the shortest route from that which is manifestly true to that which is manifestly false"). Cf also D. 1.3.29 Paulus: *Contra legem facit, qui id facit quod lex prohibet, in fraudem vero, qui salvis verbis legis sententiam eius circumvenit* ("whoever does what the law prohibits by fraudulently circumventing the spirit of the law but sticking to its letter contravenes the law"). *De officiis*, 1.10.23: *Exsistunt etiam saepe iniuriae calumnia quadam et nimis callida, sed malitiosa iuris interpretatio. Ex quo illud 'summum ius summa iniuria" factum est iam tritum sermone proverbium*; see also Kisch, *Erasmus und die Jurisprudenz seiner Zeit*, p. 190.

[24] Maniscalco, *Equity*, p. 48n; see also.the multiple commentary on Cicero's *De officiis*, 1.10.33 by Pietro Marso (1442-1512), Francesco Maturanzio (fl. 1518) and Jodocus Badius [Ascensius] (1461?-1535), Venice, 1525, ff. 32-3; D 1.8.11 Pomponius: *si quis violaverit muros, capite punitur…Nam cives Romanos alia quam per portas egredi non licet, cum illud hostile et abominandum sit* ("if anyone trespasses on the walls, he is to suffer capital punishment… for it is not allowed for Roman citizens to leave the city other than through the gate, as that is a hostile and abominable act"). Aquinas, *Summa theologiae*, Ia 96,6 refers to this law.

[25] Maclean, *Interpretation and meaning*, p. 144; the statute is frequently referred to: see e.g. Everardus, Nicolaus (1462-1532), *Topicorum seu de locis legalibus liber*, Louvain, 1516 f. 21 and Alciato, Andrea (1492-1550), *De verborum significatione libri IIII* (1530), Frankfurt, 1582, pp. 16-17.

used in other contexts) govern the parts of the law set out under their umbrella, and are able to act as a corrective to the law.[26]

3. Justinian's Prohibition, and the Space for Construction

Law has to change with changing historical circumstances: Justinian recognized this, and was very concerned to restrict the power to alter or enact legislation to the emperor alone, as C 1.14.1 makes explicit: "it is fitting and permitted that any interpretation interposed between equity and law be investigated by (the emperor) alone."[27] He expressed a particular revulsion for over-subtle linguistic manipulation of the text, and determined the procedure for the resolution of textual problems (*De confirmatione Digestorum*, [Tanta] §21), But at the same time, he allowed analogical reasoning (*ad similia procedere*: see D 1.3.12) and in various parts of the Digest he sanctioned the inclusion of a number of rules for the construal of written law, thus implicitly creating a frontier between "interpretation" as law-making (the role of the law-maker) and "interpretation" as rule-bound construal of texts, which permitted jurists and judges to engage in analytical activity on the text where it was not clear, and to mitigate if necessary its linguistic expression where it failed to convey an unambiguous and clear sense, in harmony with other laws.[28] This role is enshrined in D 1.1.7, in which the authority of *[juris] prudentes* is recognized.[29] There are also exemplary exercises in permitted interpretation in the Digest: one of these (on homicide) is by Julian, and has recently been analysed by Wolfgang Ernst in his monograph on D 9.2.51.[30] There are many other, less extensive, maxims from which interpretative rules can be derived.

These rules belong to the first two categories (grammar and logic) of the four which constitute the elements of interpretational practice as set out by Friedrich Karl von Savigny.[31] At the level of grammar, two exemplary pieces of guidance provided for interpreters at this lower level are found in the Digest title *De verborum significatione*, and concern disjunctive and subdisjunctive clauses (D 50.16.124), and the construal of double negatives (D 50.16.237).[32] There is also the problem of the nature of contraries

[26] For the loose usage of *praeceptum*, see e.g. Cino da Pistoia (c. 1270-1336/7), *In Codicem… commentaria*, Frankfurt, 1578, f. 25r: *ius vero est praeceptum*. Cf. the polysemic use of *regula*, on which see Horn, N., *Aequitas in den Lehren des Baldus*, Cologne and Graz, 1968, p. 38.

[27] C 1.14.1 Constantinus: *inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicere*.

[28] D 1.3.12 Julianus: *Non possunt omnes articuli singillatim aut legibus aut senatus consultis compraehendi : sed cum in aliqua causa sententia eorum manifesta est, is qui iuridictione praeest ad similia procedere atque ita ius dicere debet* ("It is not possible for every point individually to be covered by laws or in *senatus consulta*: but if in any case their meaning is clear, the president of the court shall apply them to similar cases and declare what the law is").

[29] D 1.1.7 Papinianus: *Ius civile est, quod ex legibus, plebiscitis, senatusconsultis, decretis principum, auctoritate prudentum venit* ("civil law is comes from [written] laws, plebiscites, decisions of the senate, decrees of the princes and the authority of the *prudentes*"). On the historical construal of this prohibition, see Falcone, G., "The prohibition of commentaries to the Digest and its antecessorial literature", *Subseciva Groningiana*, 9 (2014), pp. 1-36.

[30] Ernst, W., *Justinian's Digest 9.2.51 in the Western Legal Canon: Roman Legal Thought and Modern Causality Concepts*, Cambridge, Antwerp, Chicago, 2019.

[31] von Savigny, F.K., *System des heutigen Römischen Rechts*, 8 vols, Berlin, 1840-9, 1.213-14. The other two elements are history and system.

[32] D 50.16.124 Proculus: *haec verba "ille aut ille" non solum disiunctiva, sed etiam subdisiunctivae orationis sunt.disiunctivum est, veluti cum dicimus "aut dies aut nox est", quorum posito altero necesse est tolli alterum, item sublato altero poni alterum. ita simili figuratione verbum potest esse subdisiunctivum. subdisiunctivi autem genera sunt duo: unum, cum ex propositis finibus ita non potest*

(whether privative, those with excluded middles, and those with interposed terms) and degrees (the more and the less), and how these are applied to the four functions of law: to forbid, to permit, to prescribe and to punish.[33] These are comprehensively developed in the period of the glossators, as Gerhard Otte has shown.[34] The common maxim *permissum est quod non nominatim est prohibitum*, (what is not expressly forbidden is permitted), derived from D 14.6.7.11 and found in the *Sentences* of Peter Lombard (IV Dist. 32 q.1 art. 5) expresses one of the range of logical possibilities that can be derived from the opposition permitted/forbidden, which include permissions conceded by a given law, permissions implied by a command of the law, and permissions tacitly conceded because the law made no determination concerning the relevant acts. As Brian Tierney has shown, at least one medieval writer (Marsilius of Padua) developed a complex theory of the relationships between permission, law and prohibition. This indicates the sophistication of logical thought at the time, which would have been known to postglossators.[35] In the *Axiomata legum* of 1546, an anthology of texts designed for students of law, there are at least twenty entries that relate to these and other logical issues, which refer in turn to more than eighty maxims, some from the Corpus Juris Civilis, some from glosses and commentaries, some directly expressing logical or linguistic rules, some exemplifying these.[36] As well as all this, there is the issue of general terms (a component of legalism for anthropologists, as we have seen) and the associated thorny issue of definition; D 50.17.202 states that "every definition in civil law is precarious: for it is rare to find one which could not be subverted."[37]

A summary of these problems of construction is given by the English lawyer Thomas Egerton (1540?-1617) in 1609, himself not a civilian, but someone very well acquainted with the Corpus Juris Civilis:

uterque esse, ut possit neuter esse, veluti cum dicimus "aut sedet aut ambulat": nam ut nemo potest utrumque simul facere, ita aliquis potest neutrum, veluti is qui accumbit. Alterius generis est, cum ex propositis finibus ita non potest neuter esse, ut possit utrumque esse, veluti cum dicimus "omne animal aut facit aut patitur": nullum est enim quod nec faciat nec patiatur: at potest simul et facere et pati ("the words "one or another" are not only disjunctive but also belong to subdisjunctive speech. Disjunction is if we say "it is night or day", where one is true, the other is not. So in a similar construction, a word can be subdisjunctive. But there are two kinds of subdisjunctive, one when of two possible conclusions, both cannot be true and neither needs to be true, as when we say "either he is seated or he is walking", for just as no one can be doing both at the same time, so someone can be doing neither, for instance, someone who is lying down. The other kind of subdisjunctive is involved when of the possible conclusion one must be true and both can be true, as when we say "every living thing either is acted upon or acts": for there is none which does neither the one nor the other, and one can do both at the same time"); D 50.16. 237 Gaius : *duobus negativis verbis quasi permittit lex magis quam prohibuit […]* (" By two negative words the law, as it were, permits rather than prohibits […]").

[33] D 1.3.17 Modestinus: *legis virtus haec est: vetare, permittere, imperare, punire*: some of the difficulties in applying contraries to these functions re explored in D 47.12.3.4, D 3.2.37pr, D 28.5.38.2, D 34.9.5.1, D 22.3.5 and D 3.3.43.1. For a very subtle and complete analysis of these problems, see Doneau, Hugues (1527-91), *Commentariorum de iure civili libri sex*, Frankfurt, 1589, I,1-16, pp. 12-50, esp. 1.5, pp. 8-10; e.g., p. 10: the opposites of *recta* are determined as both *turpia* (mediate contrary) and *inutilia* (privative contrary).

[34] Otte, G., *Dialektik und Jurisprudenz. Untersuchungen zur Methode der Glossatoren*, Frankfurt, 1971.

[35] Tierney, B., "Obligation and Permission: on a "deontic hexagon" in Marsilius of Padua", *History of Political Thought* 28 (2007), 419-32.

[36] *Axiomata legum, ex receptis iuris utriusque libris, et interpretum commentariis, ordine certo, et in literas aphlabetical distincta* (1546), Lyon, 1547, passim.

[37] D 50.17.202 Javolenus: *Omnis definitio in iure civile periculosa est: rarum est enim ut non subverti potest.*

"Words are taken and construed sometimes by extension, sometimes by restriction, sometimes by implication ; sometimes by a disjunctive for a copulative ; a copulative for a disjunctive ; the present tense for the future ; the future for the present ; sometimes by equity out of the reach of words ; sometimes words are taken in a contrary sense ; sometimes figuratively, as *continens pro contento* [the container for what it contains] and many other likes: And all of these examples be infinite as well as in the civile law as common law."[38]

The threefold aim of this permitted linguistic and logical construction, as the humanist jurist Claudius Cantiuncula (1496-1560) points out in his *De officio iudicis* of 1543, is to resolve ambiguity, dispel obscurity, and reconcile contradictions in the law.[39] In the medieval period, the reconciliation of such contradictions had stimulated the emergence of legal principles, which stand above the text of the law in the same way as precepts.[40]

What should emerge from these acts of construal is the intention of the law-giver (*mens legislatoris*) which embodies the *ratio legis* in one of several senses : first, the cause of the law (i.e. the mischief which the law is designed to remedy); second, the purpose of the law (the end to which it was enacted); third, the rationality of the law, either that immutable component of universal reason vested in the law in general, or its logical coherence. In the first and second senses, the *ratio* of the law may be said to be historical and even transitory: laws are born to cure a certain social mischief, and can become defunct *cessante causa* ("if the cause ceases to exist"), as the humanist jurist Joachim Hopper (1523-76) points out in a famous passage which describes laws as having a natural life cycle. Justinian's Digest, on the other hand, argues that they should continue to have force even when their cause was no longer known and could not safely be conjectured.[41] This labile *ratio* which is sometimes associated with the *circumstantiae* (specific conditions) of a law's application, contrasts in nature with the *ratio legis* which

[38] *Speech…touching the post-nati* (1609), pp. 49-50, quoted in *A discourse upon the exposicion of statutes,* San Marino, Cal., ed. And introd. Samuel E. Thorne, Huntingdon Library, 1942, p. 140. There is a reference to figurative speech in the Digest (D 44.7.30, 38). Edward Coke's *Reports* (1600-15) and *Institutes* (1628-48) contain many legal maxims relating to interpretation and the *ratio legis*: see Herbert Broom, *A selection of legal maxims, classified and illustrated,* 3rd ed., Philadelphia, 1852, ch. 4, pp. 130-52. A thorough investigation of the linguistic rules of interpretation of contracts is by Wood, Thomas (1661-1722), *A new Institute of the Imperial or Civil law,* London, 1712, 3.1-6, pp.186-269.

[39] *De officio iudicis,* Basel, 1543, p. 67: (*aequitas non scripta*): *Quicquid enim lege omissum est, hac ratione suppletur, (modo non contra legis mentem: id enim esset corrigere legem, quod principi, senatui, ac praetori […] reservatum esse). Quicquid ambiguum, constituitur; obscurum, explanatur; pugnans, dissolvitur et conciliatur. In hoc etenim non scriptae aequitatis campo, apparebit animus et ingenium Iudicis, quam probae mentis sit, quam peritus iuris, ac in fori disputationibus exercitatus* ("for omissions from the law will be supplied by this process (however not against the original intention of the law: for that would be to correct the law, which is reserved to the princeps, senate and praetor). Ambiguity is settled, obscurity is explained, contradictions are resolved and reconciled. For it is in this field of unwritten *aequitas* that the mind and expertise of the judge will become apparent"). The judge has, however, complete power over the issue of fact as opposed to law: D 50.1.15pr Papinianus: […] *cum facti quidem quaestio sit in potestate iudicantium, iuris autem auctoritas non sit* ("for as the question of fact is in the power of those who sit in judgment, let it not become a matter for the authority of the law").

[40] du Plessis, P., "The creation of legal principle", *Roman Law Tradition* 4 (2008), pp. 46-69.

[41] Hopper, Joachim, *Tractatus de iuris arte,* in *Tractatus iuris universi,* Venice, 1584, 1. 81-103. D 1.3.20 Julianus: *Non omnium, quae a maioribus constituta sunt, ratio reddi potest* ("it is not possible to determine the reason for all that was laid down by our forebears"); D 1.3.21 Neratius: *Et ideo rationes eorum quae constituuntur inquiri non oportet; alioquin multa ex his quae certa sunt subvertuntur* ("accordingly it is not right to investigate closely the rationale for enactments; otherwise many settled certainties will be thrown into doubt"). On *cessante causa*, see D 3.1.1.5; D 37.14.6.2; *Axiomata legum*, p. 42, and Cortese, E., *La norma giuridica*, Milan, Giuffrè, 1962-4, 2.239 ss.

embodies some part of eternal reason and which is one and universal. That version of *ratio* is also associated with the law inscribed by God in our hearts (Rom. 2: 15, 2 Cor. 3:3) and with the *naturalis ratio* referred to in D 1.1.9. In these senses, it is close to Aquinas's determination of the rational nature of law and the role of "conscience" or a "natural sense of justice" which in Canon Law, as by Aquinas himself, is referred to as the *forum conscientiae* or *forum animae*.[42]

The *ratio* of the text of the law is consistently subjugated to the intention (*mens*) of the legislator, and this gives rise to circular arguments in the process of construal: since the only access to the intention is the very words of the law, and the sense of these is determined by their *ratio*, the *mens* is a product of the *ratio*, or rather, the jurist's or judge's determination of the *ratio*.[43] So "legalism" or *strictum ius* in the early modern period is grounded in a potentially unstable determination of sense, and is threatened by the assumption that *rigor iuris* itself needs in many cases to be modified, and made more "benign" or "mild". This is attested by a number of legal maxims: D 1.3.18: "laws are to be interpreted in a more benign way, by which their intention will be preserved": D 50.17.56 "in doubtful cases the more benign line is to be taken"; D 50.17.192.1: "it is more just and safer to follow a less strict interpretation."[44] This last maxim reveals the difficulty of having a legal system which is said to incorporate justice and yet may have to be tempered by something "more just" which is defined in the higher realm of norms or precepts. It also reveals the uneasy frontier (a structural feature of all legal systems) that lies between the activity of the judge (his exercise of *iudicium* in its various senses), and the legislative activities reserved to the law-maker (here, the emperor) alone, namely law-making (later called "general interpretation"), clemency, and dispensation in a given case from the application of laws that cannot be mitigated through textual construal or the application of the principle of *aequitas*.

4. *Strictum Ius* and *Aequitas*

In the time of Gaius, there were two actions – the formula for one of which contained a reference to *bona fides* – which carried no necessary implications of over-literal interpretation; these came to be distinguished in Justinian's compilation as the *actio stricti iuris* and the *actio bonae fidei* (I 4.6.28), but the formulas were not themselves recorded there.[45] They were not known to legal scholars until the discovery of the

[42] Aquinas, *Summa theologiae*, Ia 2ae 96,4; See Oldendorp, Joannes (1488-1567), *De iure et aequitate forensis disputatio*, Cologne, 1541, p. 145: *nam conscientia est tacitum animi iudicium, per quod aut accusatur falsitas, turpitudo: aut defenditur veritas honestasque secundum infallibilem iusticiae a DEO nobis inscriptae formulam* ("for conscience is the silent act of judgment of the mind, through which either falsity and turpitude are denounced, or truth and honour defended according to the infallible formula of justice inscribed by GOD in us"). The issue of conscience in Canon Law is discussed principally in the context of penance and confession: see Goering, J., "The internal forum and the literature of penance and confession", in Harman W., Pennington, K. (eds.), *The history of medieval Canon Law in the classical period*, Washington D.C., 2008, pp. 379-428.

[43] Maclean, *Interpretation and meaning*, pp. 142-58.

[44] D 50.17.56 Gaius: *semper in dubiis benigniora praeferenda sunt*; D 50.17.192.1 Marcellus: *in re dubia benigniorem interpretationem sequi non minus iustius est quam tutius*. See also the use of *minimum*. in D 50.17.9, D 50.17.200. Cf. Co. Litt. 112b [Coke, Edward (1552-1634), *The first part of the Institutes of the Lawes of England*, London, 1628, f. 112 v]: *in contractibus benigna; in testamentis benignior; in restitutionibus benignissima interpretatio facienda est* (benign interpretation is to be made in contracts, more benign in wills, most benign of all in restitutions).

[45] I 4.6.28: *Actionum autem quaedam bonae fidei sunt, quaedam stricti iuris, bonae fidei sunt hae: ex empto, vendito, locato, conducto, negotiorum gestorum, mandati, depositi, pro socio, tutelae,*

Institutes of Gaius in the early nineteenth century. In Codex 3.1.8 (quoted above, p. 00) the *ratio stricti iuris* is given as a term opposed to the *ratio aequitatis* which implies the need for correction by the higher principle of equity.[46] Early modern discussions of the distinction are based on this law, and not the Gaian formulas that preceded it.

An elegant and expressly humanist essay on this issue is the *Tractatus de aequitate iuris* by the Dutch jurist Arnoldus Holstein (1540-99) that appeared in Cologne in 1566.[47] Like Cantiuncula, he situates his discussion in the context of Aristotle's sentiments on equity quoted above, and Quintilian's *quaestio scripti et voluntatis* (described by Cantiuncula as "a dangerous rhetorical locus.")[48] Holstein produces a dialectical argument *in utramque partem*, beginning with the proposition that the letter of the law should never be departed from, any more than one should leave a well-beaten track through a forest; and that exceptions should not be made where the law does not allow the distinction on which the exception is based.[49] This will entail upholding the strict meaning of the law, even if this is hard (*durum*): he cites a number of leges, including D 40.9.12.1 (cited as the *lex prospexit*), in which the Roman jurist (Ulpian) recognized the harshness of a law relating to manumission if it were to be applied to all cases, but did not restrict its rigorous application.[50] The postglossator Bartolus had said of this law that it was inequitable and inconsistent with the purpose of the law, but yet had to be upheld.[51] It was referred to widely, and was used, for example, in a letter written by a supporter of

commodati, pigneraticia, familiae erciscundae, communi dividundo, praescriptis verbis quae de aestimato proponitur, et ea quae ex permutatione competit, et hereditatis petitio. quamvis enim usque adhuc incertum erat, sive inter bonae fidei iudicia connumeranda sit sive non, nostra tamen constitutio aperte eam esse bonae fidei disposuit; ("again, some actions are *bonae fidei*, some are *stricti iuris*. Those *bonae fidei* are the following: actions on sale, hire, unauthorised agency, agency proper, deposit, partnership, guardianship, loan for use, mortgage, division of a "family", partition of joint property, those on the innominate contracts of sale by commission and exchange, and the suit for recovery of an inheritance. Until quite recently, it was a moot point whether the last-named was properly an equitable action. But our constitution has definitely decided the question in the affirmative").

[46] I am grateful to Xavier Prévost for drawing my attention to this point. See Nicholas, B., *An introduction to Roman Law*, Oxford, 1962, pp. 163-5; Padoa-Schioppa, A., *Storia del diritto in Europa dal medioevo all'età contemporanea*, Bologna, 2007, 2nd ed. 2016; *id*., *A history of Law in Europe from the early Middle Ages to the Twentieth Century* (C. Fitzgerald, trans.), Cambridge, 2017, pp. 193-211.

[47] Holstein, Arnoldus, *Tractatus de aequitate iuris*, Cologne, 1566; Maniscalco, *Equity*, pp. 84-5.

[48] D 1.3.12; Quintilian, *Institutio oratorica*, 7.6. Cantiuncula, Claudius, *Oratio apologetica in patrocinium iuris civilis, De ratione studii paranaesis*, Basel, 1522, f. 3r: *hinc enim oriuntur periculosi illi loci, a scripto contra sententiam et a sententia contra scriptum*.

[49] Holstein, *Tractatus*, p. 66: *Ubi lex non distinguit, nec nos distinguere debemus*: he does not refer to the rule *exceptio firmat regulam in casibus non exceptis*, of which two early modern sophisticated discussions are that of Oldendorp, Joannes, *Lexicon juris*, Frankfurt, 1553, s.v. regula, quoted in Maclean, I., "Evidence, logic, the rule and the exception in Renaissance law and medicine", *Early Science and Medicine* 5 (2000), pp. 227-57 and that of Philippus Decius (1454?-1535), in Decius, P. et al., *Commentarii de regulis iuris antiqui*, [Lyon], 1593, pp. 10 ss. The relevant leges are D 44.1.2 and D 44.1.22.

[50] See Maniscalco *Equity*, pp. 84-5; Other laws cited by Holstein are D 1.14 1.20, D 40.9.12pr, D 32.25.1, D 24. 3.64.9 (on silences in the law) cf. Brunnemann, Johann (1608-72), *Commentarius in duodecim libros Codicis*, Leipzig, 1663, on C 3.1.18, who upholds the application of *aequitas* only in cases where the *strictum ius* is not a *ius expressum*.

[51] Bartolus, *Repetitiones et lectiones*, Frankfurt an der Oder, 1518, sig. b1v: "Repetitio l. omnes populi ff. de iust. et iu.", (on *lex prospexit*): *ibi enim servus perdit lucrum libertatis et tamen propter hoc non recedimus a verbis generalibus nec restringimus* ("from this the slave loses the benefit of liberty, and yet in spite of this we do not retreat from the sense of the words or restrict the application").

the papacy to Martin Luther in the 1520s to persuade him to accept the authority of the Pope (a *dura lex*) in all matters.[52]

Holstein next argues that the crucial issue is not the words of the law but its "soul" (*anima*), namely the *ratio legis*, consisting in the intentions and meanings that the words express (and what can legitimately be deduced from them, even if they are understood figuratively) and the things that they designate.[53] He then offers an Aristotelian reconciliation of the two positions, referring to the lead rule of Lesbos, the unavoidable generality of the law, the need for it to be accommodated to individual circumstances, and to the common good. He acknowledges the postglossator Bartolus's wisdom on these issues, and sets out the different determinations of the law with respect to different categories of persons (scholars, madmen, women and peasants) which necessitate a departure from the literal text. This raises for him the issue of exceptions, including the *exceptio doli* (see below, p. 00), which is a legal action which restricts the application of a law, even if it is completely unambiguous. These two features show that for Holstein, the logic of opposition in the law aims to exclude the middle, and to produce perfect disjunctives and contraries which it is the role of interpretative techniques to elucidate.

Holstein does not address directly the nature of the higher principle *ratio aequitatis* which *inter alia* can justify a departure from the literal text. This issue is the subject of Lorenzo Maniscalco's recent monograph on early modern equity which concentrates on the major maxims concerning *aequitas* in the Corpus Juris Civilis, notably C 3.1.8 and C 1.14.1, quoted above. Maniscalco claims (as had Jan Schröder in his essay "Aequitas und Rechtsquellenlehre in der frühen Neuzeit") that the legal humanist Guillaume Budé published in 1508 a watershed work which characterised *aequitas* not as an inherent quality of justice in the law (the only medieval accepted sense, according to Maniscalco), but as a mental disposition which ensures fairness: this is Aristotle's *epieikeia*, previously only referred to in Canon Law and Aquinas. "It would be a mistake", Maniscalco states, "for scholars to treat the two periods, medieval and early modern, as enjoying some kind of scholarly continuity when it comes to *aequitas* or *epieikeia*."[54] Maniscalco claims that from the change in dominant meaning of *aequitas* comes the distinction between *aequitas generalis* (the general principle of being just) and *aequitas particularis* (the application by the judge of the principle of equity to individual cases in which *strictum ius* is modified). He concentrates on the application of this principle to texts which are clear and unambiguous; but he also mentions the modification of the law by the medieval practices known as *interpretatio restrictiva* and *interpretatio extensiva*, seeing these as separate jurisprudential exercises.

A different view emerges if we look at the issue of interpretation or construal of texts over the medieval and early modern periods, which link the *ratio aequitatis* of C 3.1.8 to *interpretatio restrictiva* and *interpretatio extensive*.[55] By the time of the

[52] Luther, Martin, *Luther's correspondence and other contemporary letters*, 1521-20, vol. 2, Philadelphia, P. Smith, C.M. Jacobs eds., 1918, p. 540 (Peter Albinianus Tretius (Trezzio) to Luther, c. 1524-5).

[53] D 24 3 47; D 31 77 12; D 37 14 6pr; D 4 2 13.

[54] Maniscalco, *Equity*, pp. 40-2, 219; this mistake is associated with Horn, *Aequitas* and Caron P. G., *"Aequitas" Romana, "Misericordia" Patristica, ed "Epicheia" Aristotelica nella Doctrina dell'Aequitas Canonica*, Milan, Giuffrè, 1971. See also Beneduzi, *Equity in the Civil Law tradition*, p. 98; Schröder, "Aequitas und Rechtsquellenlehre in der frühen Neuzeit".

[55] See Maclean, *Interpretation and meaning*, pp. 87-179; for the association in Bartolus, see his *Prima Super codice*, Lyon, 1535, 32r-34v, and his *Repetitiones et lectiones*, sig, b 1r-b2v. Spiegel, *Lexicon*,

postglossators, textual analysis had become linguistically and logically adept, and distinctions such as *aequitas generalis* and *aequitas particularis* were being made:[56] this was done by the jurist Lucas de Penna (c.1310- c.1390) as Walter Ullmann points out, and later by Baldus, according to James Gordley.[57] Maniscalco quotes without analysis Baldus's distinctions of *aequitas* into *abusiva*, *motiva* and *precisa*; and, more importantly here, *disposita* and *disponenda*.[58] When the late postglossator Philippus Decius (1454-?1535) looked at Baldus's text, he characterized *aequitas* as a "way of interpreting laws and pacts" (*modus interpretandi leges et pacta*.)[59] Decius understands *disponenda* as a process applied to a text, and *disposita* as the consequent objective character of the text.[60] This links *aequitas* to a set of polysemic legal terms widely discussed in the medieval period whose various senses combine an objective category, and the function that is linked to it: another such term is *pignus*, which is "a pledge [that] is sometimes taken for the thing given in pledge, sometimes for the obligation, and the right that comes from it, and sometimes for contract."[61] Both the *iurisperiti* of Roman Civil Law, and medieval civil and canon jurists record examples of this sort of polysemy in legal terms, even if they do not always theorize it.[62] What is also important here is that *aequitas* is clearly already linked to a process of more benign interpretation by the postglossators; rather than seeing Budé as a watershed, it seems to me more appropriate to stress the continuity in the conceptual universe.[63]

5. *Strictum Ius* and *Bona Fides*

Bona fides is closely associated as a term with *aequitas*, and by Justinian's time had come to be seen as a component of fair and just dealing in contracts. It is also related to the *exceptio doli* in actions where the *bona fides* of the plaintiff could be challenged by

s.v. *stricti iuris* however does not appear to doubt that Bartolus in his discussion of extensive, restrictive and declarative interpretation understood *aequitas* as *epieikeia*: Bartolus, *Prima Super codice*, ff. 32r-34v, and id., *Repetitiones et lectiones*, sig, b 1r-b2v. See also Horn, *Aequitas*, pp. 28-9, and Maniscalco, *Equity*, pp. 63-7 (although there are exceptions to this: see above, p. 00, on the *lex prospexit*, D 40.9.12.1).

[56] For an example of such subtlety in definition, see Maclean, *Interpretation and meaning*, pp.118-19 (Caepolla's definition of *extensio interpretativa*).

[57] Baker, J., *The Oxford History of the Laws of England*, vol 6, 1493-1558, Oxford, 2003, pp 39-48 (40); Ullmann, W., *The medieval idea of law as represented by Lucas de Penna*, (1946), London, New York, 1969, pp. 41-2; Gordley, J., "Good faith in contract law in the medieval ius commune", in *Good faith in European Contract Law*, Cambridge, R. Zimmermann, S.Wittaker eds., 2000, pp. 93-117 (108-9).

[58] Maniscalco, *Equity*, p. 41n.

[59] Baldus had put *fundamentum interpretandi leges et pacta*: see Horn, *Aequitas*, p. 27.

[60] On the use of *dispositus*, *dispositivus* (cf. the *ius dispositivum* as a legal term for a flexible legal provision), see Maclean, *Interpretation and Meaning*, pp.118-19.

[61] See Wood, *A new Institute*, p. 212. Cf also above, Egerton's example of *continens pro contento*. Also the term *iudicium* as the faculty of judgement and the product of that faculty, discussed by Aquinas, *Summa theologiae*, 2a 2ae 60,1 ad 1, and by Cantiuncula, *De officio iudicis*; and the various meanings of *bona fides*, discussed below, p. 00. See also Maclean, I., *Logic, signs and nature in the Renaissance: the Case of Learned Medicine*, Cambridge, Cambridge University Press, 2001, p. 247 (on nature as producer and product).

[62] Lange, H., "Ius aequum und ius strictum bei der Glossatoren", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanische Abteilung*, 71 (1954), pp. 319-47 (346-7) suggests that the glossators were not fully aware of the distinction, and did not make use of it: "die Glossatoren haben die beiden Funktionen der *aequitas* nicht sehr bewusst und ohne zugängliche theoretische Grundlegung gehandhabt."

[63] Maclean, *Interpretation and meaning*, pp.203-5.

the defendant by appealing to *aequitas naturalis*.[64] As I have said, Maniscalco argues for a change in the dominant meaning of *aequitas* in legal humanism from an intrinsic property of justice to a psychological disposition: Andras Földi claims that the same change occurs in the term *bona fides*, from an undifferentiated "monist" understanding of the term as both an objective feature of contracts and a subjective psychological state of the contractants to a clear statement of its duality, whose first example he records as being in the work of Franciscus Aretinus (1418-86.)[65] This claim has been challenged by Peter Bónis, who sees the distinction emerging in the twelfth century, together with a new legal concept: *bona fides exuberans*, denoting an overflowing of the moral disposition of the contractants into any contract made in good faith, making it a necessary (and hence objective) component to which the parties of a contract subscribe.[66]

A celebrated discussion of this issue was produced by the legal humanist Jean de Coras (1515-72) in his *Miscellanea* of 1549, in the context of the already-mentioned distinction made in Institutes (4.6.28, cited in note 45) between *actiones bonae fidei* and *actiones stricti iuris*. Coras begins by pointing out that Justinian was wrong to make the *actiones bonae fidei* a contrary category to *actiones stricti iuris*. In Coras's view, as all contracts must have *bona fides* to be valid, the distinction is one of degree (*plus aut minus*.)[67] So his view of *bona fides exuberans* is that of a transfer, overspilling (*exuberans*) as it were from the moral character of those engaging in contracts (*illum purum, et rectum animum ab omni fraude seiunctum*) into the contract, where it becomes an embodiment of equity and justice (*aequitatem et iustitiam ipsam*). He accepts Budé's definition of the legal technical term *strictum ius* as "a very hard, inflexible and rigorous version of law which is on the verge of being iniquitous" (*ius perdurum, exactum, rigoris plenum, et propemodum iniquum*), and links this state of "being on the verge of iniquitous" to the saying *summum ius, summa iniuria*.[68] In his discussion, he includes the two common examples – climbing the city walls (D 1.8.11) , and letting blood in Bologna - that we have seen used elsewhere; and offers also the example of horse-buying, where it is to be presumed that if the horse in question was seen by the potential purchaser equipped with saddle and reins, then they are implicitly part of the sale by *bona fides*.[69] He also makes the point that this is an issue in which the judge has freedom to determine the law.[70]

A later, and very thorough, examination of the differences in positive law between *bona fides* and *strictum ius* actions by Ferdinand-Christophorus Harpprecht does not cite Coras among the many jurists to which he alludes, but he confirms the association of *bona*

[64] The *exceptio doli* (D 44.4.1.1) is a defence that can be raised by a defendant "so that a person should not by reason of the subtlety of the civil law, and contrary to the dictates of natural justice, derive any advantage" (*ne cui dolus suus per occasionem iuris civilis contra naturalem aequitatem prosit*).

[65] Földi, A., "Traces of the dualist interpretation of good faith in the ius commune until the end of the sixteenth century", *Fundamina (Pretoria)* 20 (2014), pp. 312-21,

[66] Bónis, P., "Bona fides exuberans. A New Legal Concept of Twelfth Century Legal Scholarship", *Journal on European History of Law* 7 (2016), pp. 97-101.

[67] See, on differences of degree, D 50.17.110 pr Paulus: *in eo, quod plus sit, semper inest et minus*. The opposite of *bona fides* is *mala fides*: if it is alleged by a party, proof of bad faith needs to be provided: see Fachineus, Andreas (d. 1607), *Controversiarum iuris volumen secundum*, Lyon, 1623, col. 891. But there are also legal actions in which neither good nor bad faith are to be presumed: see *ibid*.

[68] Spiegel, Jacobus (1483?-1547), *Lexicon iuris civilis*, Lyon, apud Sebastianum Gryphium, 1548, s.v. *stricti iuris*; Guilllaume Budé, *Annotationes in Pandectarum libris*, (1508), Lyon, 1551, pp. 13-19.

[69] Coras, *Miscellanea*, p. 96; D 21.1.25; see also Salazar, Pedro de (d.1575), *De usu et consuetudine tractatus*, Frankfurt, Palthen, 1600 p. 220 (on *equus nudus*), and D 13.6.5.9.

[70] Coras also cites D 28.2.13, 47.10.7.3, D 4.1.7, D 28.51.85, and D 42.1.2.

fides and *aequus et bonus* in *bonae fidei* actions which can benefit both parties in the suit, and points out that the freedom of the judge is limited in actions based on *strictum ius*, which will benefit only one party.[71]

6. *Utilitas*; *Consuetudo*

With these two terms, we leave the broadly moral sphere and enter the realm of law and politics, which generates from the Middle Ages onwards voluminous commentaries around the reason of state, a full consideration of which is beyond the scope of this paper.[72] There are a few points that can be made, however. The term *utilis*, as in *actio utilis* (as opposed to *actio directa*,)[73] refers in the Corpus Juris Civilis to things that are deemed to be intended by the lawgiver, are expedient, but are not covered by the written law, or apparently excluded from it. In that sense, such an action goes beyond *strictum ius*, and is based on analogical reasoning from similar laws.[74] The jurist's or judge's rôle is to apply the principle to individual cases, but they have to give their reasons for departing from the literal meaning of the written text.[75] One of these could be the failure of correct textual transmission: as the great jurist Jacques Cujas (1522-90) says "there is nothing that can more easily be corrupted than a text."[76]

The principle that is variously designated as *bonum commune*, *commodum reipublicae* and *utilitas* (the final cause of the law, according to Aquinas, 1a 2ae 90,4) is presumed always to be in the mind of the lawgiver, to whom any judgement about general *utilitas* falls. In the description of the law as the "art of the equitable and the good" (D 1.1.1pr), the good (*bonum*; *bonitas*) may be identified with the interest of the commonwealth and republic. Usucapion (a mode of acquiring title to property by uninterrupted possession of it for a definite period) is an example of a legal concept that was introduced for the public good (D 41.3.1). Having recourse to an argument from *utilitas* is precarious: it is founded in the *communis et rationabilis intellectus*, but as the public good is determined by the princeps (C 1.14.1), his authority subjugates the *ratio legis* to that of the state.[77] That is why jurists often stress the need for *utilitas* to conform

[71] Harpprecht, Ferdinand-Christophorus (1650-1714), *Actionum bonae fidei et stricti juris differentiae principes*, praeses Johan-Andreas Frommann, Tübingen, 1669, §1-3, §16. See also S. Wittaker, R. Zimmermann, (eds.), *Good faith in European contract law*, Cambridge, 2000.

[72] There is a plentiful bibliography on the interface of politic and law in the Renaissance; one of the rare technical legal treatises on the subject is by Müller, Peter (1640-96), *Dissertatio de subtili disputandi ratione in causa publicae utilitatis*, Jena, 1681 (esp. thesis 7, on *strictum ius* and *actiones publicae utilitatis*).

[73] See D 9.2.25.1; D 9.2.27.32; D 44.7.51; D 44.7.51;D 50.4.6..

[74] D 3.5.47; Harke, J. D., *Actio utilis: Anspruchsanalogie im Römischen Recht*, Berlin, 2016.

[75] Zasius, Uldericus (1461-1535), *In titulus Digesti veteris commentaria*, in *Opera omnia*, Frankfurt, 1590, 1.101: *Legislator considerare debet, quid in universum utile sit, non quid mihi vel Titio vel Sempronio, utile est* ("the law-maker must consider what is *utile* at a general level, not what is *utile* for me, or Titius, or Sempronius"). D 3.5.46 ; D 48.23.3; C 2.18.17; Alciato, *De verborum significatione*, Lyon, 1530, p. 223 ; Fournier, Guillaume (d. 1584), *In titulum de verborum significatione*, Orléans, 1584, p. 22 ; Rebuffi , Pierre (1487-1557), *In titulum Digestorum de verborum et rerum significatione*, Lyon, 1586, p. 56 ; Kelley, D.R., "Civil science in the Renaissance", *The languages of political thought in Early Modern Europe*, Cambridge, A. Pagden ed., 1987, pp. 74-5 ; Cortese, *La norma giuridica*, 1.266, 309 ss.

[76] Cujas, Jacques, *Observationes* (1577) 1.1, *Opera*, Lyon, 1606, 4.1345: *nulla res est quae facilius depravari potest*.

[77] Caepolla, Bartolommeo (c. 1420-c. 1475), *In titulum de verborum et rerum significatione doctissima commentaria*, p. 26 ; Rebuffi, *In titulum Digestorum de verborum et rerum significatione*, p. 3, quoting Baldus, gl. in rub. D 38.1.

to the higher, divine, law.[78] In question here also is the role of higher norms and precepts derived from theology, and the problem of the prince, king or emperor being at the same time subordinate to these higher norms, and yet not bound by them, as Ennio Cortese's classical study *La Norma guiridica* shows. Not all jurists, however, see the equitable and the good as indissolubly linked; Coras does not link *bonum* and *aequum*, and criticizes his fellow jurist Mario Salomoni (fl. 1525) for doing so. Coras cites the Roman abduction of the Sabine women as an example of *bonum* (the need for the state of Rome to acquire women for demographic purposes), which is not an equitable action.[79] This appears to be a minority view however: the strong recommendation found elsewhere of the need for the argument from *utilitas* to have solid rational and moral grounding reminds us of the subjugation of civil law to the higher principles of nature and reason. In this regard, Cantiuncula cites approvingly Cicero's claim that *utile* and *honestum* are interdependent.[80]

A further principle to consider which can challenge written law is custom (*consuetudo*). This is authoritative without embodying legal *ratio* or logic. According to Modestinus, "every law has been made either by agreement or brought about by necessity or has been established by custom." Another jurist, Paulus, D 1.3.37 describes custom as "the best interpreter of law."[81] As part of the *ius non scriptum* (or *aequitas non scripta*), custom can be said to reflect an innate natural principle or norm "written in the hearts of men" (D 1.1.1-3). It is linked to the social or political value of *utilitas*. As the study of the customary laws of European states developed alongside the Corpus Juris Civilis, they afforded a point of comparison with the Corpus, encouraged localism and nationalism, and generated a space in which comparative law, with its implicitly radical promotion of the search for norms and first legal principles, could flourish. In that way, they played a part in supplying a superior legal *ratio* to the *strictum ius* of Roman Law.[82]

7. Beyond and above *Strictum Ius*: *Honestas*

Aequitas and *bona fides* as principles can temper *strictum ius*, and guide jurists and judges in their determination and application of the text of the law: *honestas* (honourable behaviour; moral probity) is rather different as a principle, in that it can supply rules of conduct which are neither binding nor enforceable, are not explicitly set down in law, and belong to the higher realm of norms and precepts. *Honestas* shares with *aequitas* and *bona fides* the status of a moral quality or virtue, but unlike *aequitas* and *bona fides*, it does not seem to have been accorded a formal definition in glosses and commentaries on the Corpus Juris Civilis, possibly because the term relates differently to different sexes, zones of moral behaviour, and classes of person.[83] There is a mention of

[78] See Maniscalco, *Equity*, pp. 74-7, and Oldendorp, *De iure et aequitate forensis disputatio*, p. 145.

[79] Coras, *Miscellanea*, p. 137.

[80] Cf. Cicero, *De officiis*, 3.34: *nihil vero utile quod non idem honestum, nec honestum quod non utile sit*; Cantiuncula, *De officio iudicis*, p. 13.

[81] D 1.3.40 Modestinus: *Omne ius aut consensus fecit aut necessitas constituit aut firmavit consuetudo*; D 1. 3.37 Paulus: *optima… est legum interpres consuetudo*.

[82] See Raevardus, *De auctoritate*, pp. 140-4.

[83] *Honestus* can be used as an adjective expressing the contrary of *plebeius*: Calvinus, *Lexicon iuridicum*, s.v. *Honestus*, citing inter alia D 47.18.1.1, 48.19.38.3 and 48.19.28.2. According to Maynier, *Commentarius*, p 356, without a formal definition, *honestas* cannot have the force of a command: it can only *suadere*: cf. Schott, Christoph Friedrich (1720-75), *Quaestio iuris naturalis: an justum esse possit*

honeste vivere at the very beginning of the Digest (D 1. 1.10), but this is described as a precept, not a law, and is derived from *ius naturale*, whose precepts are not regulated by lawmakers. *Honestas* is governed by conscience, a moral domain lying beyond the *strictum ius*; it lies in the higher court *of recta ratio*, as Cicero points out (see above, p. 00). This is where the command to do moral things, and law's duty to prohibit immoral things, is situated.

I have surveyed commentaries from before the Reformation, and from Catholic, Lutheran, and Calvinist universities, on two pertinent leges of the title *De regulis iuris antiqui*: D 50.17.144 Paulus; "not everything that is allowed is moral"; and D 50.17.197 Modestinus: "in unions (or contracts) one must consider not only what is lawful but also what is honourable."[84] These commentaries are very different in character (some reflecting the traditions of the *ius commune*, some exclusively humanist in their references, some including material from theology and Canon Law), but it cannot be said that the confessional origin of the commentary inflects them.[85]

A very coherent discussion of the gap between moral prescription and legal prohibition or sanction, the medieval logical mapping of which I have already mentioned (above, p. 00) is found in the work of the Dutch jurist Johan van der Sande (1577-1617), whose commentary was first published in 1645. He opens his discussion thus:

"What is permitted is what we do not expressly prohibit to be done in either our laws or according to the *mores* of our society (*civitas*) [D 22.2.39, D 4.6.28.2]. The honourable [*honestum*] is what is good, right and fitting, even if nothing is laid down about it explicitly in civil law. For although everything prescribed by our laws is honourable, not everything however that is honourable is prescribed, with the result that not everything that is dishonourable is forbidden: thus it transpires that sometimes something that is not honourable or fitting is permitted, namely when it is not expressly forbidden."[86]

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quod non est honestum? Dissertatio academica, Tübingen, 1756; van der Sande, Johan, *Ad titulum Digestor. De Diversis Regulis Juris Antiqui Commentarius* (Bernardus Schotanus, ed.), Leiden, 1652, p. 591: *nonnumquam lex honestum suadet non iubet*; see also Aquinas, *Summa theologiae*, 2a 2ae 145,1,3.

[84] D 50.17.144 Paulus: *non omne quod licet honestum est*; D 50.17.197 Modestinus (cf. D 23.2.42pr): *semper in contractibus [*or *coniunctionibus] non solum quod liceat considerandum est, sed et quid honestum sit*. Both readings are found in the Middle Ages; *coniunctionibus* is the Littera Florentina reading. In the writings of postglossators, precedence is given to D 50.17.197 over D.50.17.144; after 1530, the precedence is reversed.

[85] These are the commentaries that have been consulted: Maynier, *Commentaria* (postglossator); Decius, Philippus, *In tit. Dig. de Regulis iuris antiqui cum additionibus Hieronymi Cuchalon et annotationibus Caroli Molinaei*, Lyon, 1549 (postglossator): Johannes Calvinus, *Ad Tit. De diversis Regulis Juris notae ex ICtis Cuiacio, Fabro, Gothofredo, Pacio et aliis collectae*, Frankfurt, 1612 (Calvinist); Matthaeus, Philippus (1554-1603), *In …tit. De diversis regulis Juris antiqui commentarius*, Marburg, 1607 (Calvinist); Faur de Saint-Jorry, Pierre (Faber, Petrus) (1540/1-1600), *Ad tit. Dig. De diversis iuris antiqui*, Lyon, 1566 (Catholic); Neldelius, Iohannes (1554-1612), *Commentarius in titulum Digestorum de regulis iuris antiqui*, Frankfurt, 1614 (Lutheran); Godefroy, Jacques (1587-1652), *In titulum Pandectarum de diversis Reguis iuris antiqui commentarius*, Geneva, 1652. D 50.17.144 (Calvinist); van der Sande, *Commentarius* (Calvinist); first edition 1645.

[86] *Ibid*., van der Sande, *Commentarius*, p. 515: *licitum est quod neque legibus neque moribus civitatis facere nominatim prohibemur* [D 22 2 39.1 D 4 6 28.2]. *Honestum est, quod bonum, rectum et decorum est, licet de eo nihil nominatim jure civili sit constitutum. Quamvis enim omne quod legibus nostris praecipitur honestum sit, tamen non omne, quod honestum sit, praecipitur, ut nec omne quod inhonestum est, vetatur: unde fit ut aliquando liceat, quod non sit honestum, nec deceat, quando scilicet id ipsum nominatim prohibitum non est*. This sort of logico-semantic analysis is popular with jurists: see e.g Doneau, *Commentariorum libri*, 1.13, p. 30: *neque omne quod scriptum ius est, neque omne quod scriptum non est, ius non est*. See ibid, 1.5, p. 10, on *permitt[ere] tacite*, referring to D 3.3.4pr, and D 22.5.1.

Van der Sande refers here to the range of possible distinctions arising from the non-coincidence of law and morality: namely legal and moral; legal but not moral (i.e. indifferent): moral but not legal. He does not consider two other categories: legal and immoral, of which Coras (above, p. 00) cites the rape of the Sabine women as an example; and neither moral nor legal (i.e. morally and legally indifferent) to which I shall return below. We can see here the application of two different categories of contrariety (privative: with or without a middle term). The French jurist Pierre Du Faur de Saint-Jorry (Faber) (1550-1612) offers a similar set of distinctions, using the verb *oportere* (here meaning "to be fitting or decent") rather than *licere* ("to allow").[87] The moral side of these distinctions can be further subjected to degree (what is more moral or less moral), time (what is moral now, but was not then), and persons (what is moral for some and not for others.)[88]

In most discussions, three groups of examples concerning *honestas* are given: first, permissible but dishonourable marriage (as, for example, marrying the daughter by another man of a wife one has divorced, or the sister of a deceased wife, or marrying foreigners under certain circumstances, or remarrying more than once.)[89] The second group concerns commercial transactions where one or both parties know the true value (*iustum pretium*) of an article for sale, and avoid proper practice in one of a number of ways (*circumvenire* (circumventing), *se invicem decipere* (both parties being wrong about the price), *decipi* (being in error), but not *decipere*, which entails that one party is behaving fraudulently by selling an item for up to 50% more than the *iustum pretium*), raising the issue of the scale between the correct price and the highest permissible limit, and the issue of *bona fides* which like *honestas*, is a principle extraneous to the law.[90] The third group of examples has to do with social behaviour (dancing with one's slaves on solemn religious festivals, keeping concubines or mistresses, failing to compel prostitutes to wear clothes to mark their profession). Mention is often made here of having to accommodate human weakness in legal dispensations, as, for example, male lust being

[87] Du Faur, *Commentarius, ad titulum de diversis iuris antiqui*, p.315: *est enim aliquid quod non oportet, etiam si licet: quidquid vero non licet, certe non oportet. Quicquid enim non licet honestum non est, ideoque non oportet; at non quicquid licet, id etiam honestum est, imo vero plerunque non oportet* ("some things are not fitting, even if they are allowed; some things are indeed not allowed, and are certainly not fitting. Some things that are not allowed are not honourable, and thus are not in most cases fitting; but some things are not allowed, and are also fitting"), See also Godefroy, *Commentarius*, pp, 604-5 (on the relationship of *illicita* to *non debuit*). On the various senses of *licere* (to permit; or lawfully to permit), see Tierney, "Obligation and permission", p. 423.

[88] van der Sande, *Commentaria*, p 518; Neldelius, *Commentarius*, p. 228; Godefroy, *Commentarius*, p. 603 (all referring to *minus honestus*); *Corpus Juris Civilis* (1583) (Godefroy, Denis ed. (1549-1621)), Naples apud Januarium Mirelli, 1830, p. 842 (on D 50.17.144): *licita non continuo honesta vel permissa* (cf. D 1.3.22 Ulpianus: *cum lex in praeteritum quid indulget, in futurum vetat*); Benedictus Aegidius (fl. 1620), *Tractatus de iure et privilegiis honestatis*, Cologne 1620, *4v: *quod maior in faeminis quam in masculis requiratur honestas et castitas*; most of his eighteen articles relate to the behaviour or women. Golius, Johannes Carolus (1612-65), *Disputatio juridica inauguralis jura honestatis exhibens*, Strasbourg, 1665, p. 12 relates this view of sexually differentiated *honestas* to gl. ad D 23.2.43.12: *in foeminis maior requirit honestas quam in masculis*.

[89] Neldelius, *Commentarius*, 228, quotes St Gregory Nazianzen, *Oratio*, 37, 8, in *Patrologia Graeca*, 36.392, who describes a woman who remarries for the fourth time as porcine. There can be cases of *honestas* having the force of marital law e.g. in a father marrying an adopted daughter: van der Sande, *Commentaria*, p. 516 (referring to I 1.10.1).

[90] Langholm, O. *The merchant in the confessional: trade and price in the pre-reformation penitential handbooks*, Leiden, 2003: for *circumvenire*, see D 50.17.49; D 50.17.155; D 41.2.34; D 12.6.6. This is an issue in moral theology also: see Candido, Vicenzo (1572-1654), *Illustrium disquisitionum moralium tomus secundus*, Lyon, 1638, p. 322. See also Brown, J. A., "The Just Price: the Ghost of Tawney and the Enchantment of Exchange", https://www.academia.edu/30338016

accommodated by having concubines: St John Chrysostom, who finds his way into Canon Law, is quoted here: "we cannot prohibit altogether the evil wills of men."[91]

In the first two groups, the *forum conscientiae* (any person's responsibility towards their own moral sense and their behaviour) is invoked as an extra-legal principle which will supplement the text of the law. In the third, the issue of *decorum personae* arises, which defines behaviour by status and character, and can have surprising results, as in the comment that D 12.5.4.3 elicits from the compiler of *Axiomata legum* of 1547: "a woman who is not a prostitute behaves indecently when she engages in any indecent act: but a prostitute doing the same thing is not acting indecently because she is only doing what is expected of a prostitute."[92]

I come back here to the two categories not considered in legal texts: legal and immoral, and neither legal nor moral. One of the strongest statements of the necessary association of law and *honestas* may have led to the denunciation of parts of civil law as immoral. It is found in two short didactic works published in 1522 by Cantiuncula for his law pupils in Basel. In these, Cantiuncula links civil law to the ideals of Christian ethical humanism. He rejects the analogy of *aequitas* and the flexible leaden rule of Lesbos in Aristotle, evokes instead the *divinae Scripturae norma* and Erasmus's *Philosophia Christi*, and argues for a *pia et Christiana aequitas* which would bring civil law into conformity with the Christian model of justice and morality. This leads him explicitly to reject the view of some of his friends, who affirm that the law is immoral.[93] One of these friends was the humanist Henricus Cornelius Agrippa von Nettesheim (1456?-1535), who in his anti-intellectualist *De incertitudine et vanitate omnium scientiarum et artium* (1531) takes delight in citing a list of *regulae* which undermine the principle "give to everyone their due" (*suum cuique tribuere*):

"You may resist force with force. Break faith with him that breaks faith; to deceive the deceiver is not fraud. A deceiver is not liable to a deceiver; a fault may be recompensed by a fault; those that deserve ill should enjoy neither justice nor good faith; no legal injury can be done to the willing; it is acceptable for those engaging in contracts to deceive each other. A thing is worth as much as it may be sold for. It is permissible to provide for one's own safety to the damage of another. No man is obliged to fulfil impossible conditions. If either you or I are to be ruined, it is better that you be ruined than I."[94]

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[91] *Malas hominis voluntates ad plenum prohibere non possumus*: see Gratian, *Decretum*, C.31 q.1 c.9; van der Sande, *Commentarius*, p. 518.

[92] Cicero, *De officiis*, 3.29.106; Eramsus, *Praise of Folly*, preface; D 12.5.4.3: *illam enim turpiter facere, quod sit meretrix, non turpiter accipere, cum sit meretrix*, paraphrased as *mulier dum meretrix non est inhonestum facit, si quid inhonesti faciat, sed quando meretrix est, honestum facit quia ea quae meretricis sunt facit*; *Axiomata legum*, p. 179.

[93] Cantiuncula, *Oratio apologetica in patrocinium iuris civilis*, *De ratione studii paranaesis*, esp sigs. b2r, c1r, d4r, g4r; Kisch, G., "Claudius Cantiunculas Lehre von Recht und Billigkeit", *Publications du Centre Européen d'Etudes Bourgignonnes*, 6 (1964), pp. 84-99; *id.*, *Erasmus und die Jurisprudenz seiner Zeit*, p. 141 (referring to Erasmus, *Institutio principis Christiani*, ch. 6, where the phrase *leges ipsas ad archetypum aequi et honesti*, which is quoted by Canticuncula in the introduction to his *Topica legalis* of 1520.)

[94] Agrippa, *De incertitudine et vanitate omnium scientiarum et artium* (1531), Cologne, 1586, ch. 91, sig. Y12v: *Vim vi repellere licet. Frangenti fidem fides frangatur eidem: Fallere fallentem non est fraus. Dolosus doloso nullo tenetur. Culpa cum culpa compensari potest. Male meriti nulla debent iustitia, nec fide gaudere. Volenti non fit iniuria. Licitum est contrahentibus se decipere. Tantum valet res quanti vendi potest. Item, ut liceat sibi consulere cum damno alterius. Ad impossibile neminem obligari. Item, si te vel me confundi oporteat, potius eligam te confundi quam me*.

Agrippa's text (which is inspired by the same evangelical Christianity as Cantiuncula's) shows the conjunction in these discussions of jurisprudence, humanist texts such as Cicero and theology.[95] This is particularly pertinent here, as there are verses in St. Paul that raise the very issue of the relationship between what is permitted and what is seemly or expedient, and are cited in juristic writing: 1 Cor. 6: 13 reads "All things are lawful unto me, but not all things are expedient" (cf. 1 Cor. 10: 23).[96] This is usually glossed as meaning that humans are permitted to do everything that is not prohibited by a law. So, according to the Church Father Theodoret, it is in the power of human beings to fornicate, to steal and get drunk, but it is not expedient to do so, for the sake of their immortal soul's salvation.[97] Agrippa goes further than this, and accumulates maxims from civil law that do not just tolerate immortality but positively recommend it.

The category "neither moral not legal" is not discussed in legal texts; it emerges however in theological debates as the issue of adiaphora. After Luther's death, this was a major point of contention in the second half of the sixteenth century between strict Lutherans and followers of Philip Melanchthon, who had accepted at one Church Council that there were "indifferent matters" that were neither orthodox nor unorthodox, such as confirmation, the Mass, the use of candles, vestments, holy days, the elevation of the host, and exorcism. These can be set aside in negotiations about points of doctrine, and should not be taken to be stumbling blocks to Christian unity. I cite them here, to show that the discussion of what is permitted and acceptable and what is legal (or orthodox) extends beyond the discipline of law itself.[98]

8. Concluding Remarks

We have noted that **t**he term *strictum ius* is Byzantine, and can be value-neutral, but that the over-riding sense in the medieval period, as with the phrase *rigor iuris*, is that it needs mitigating both in laws whose texts are clear and those that are ambiguous, obscure or in contradiction with other laws. This can be done by analogical reasoning (*ad similia procedere*) and by the *ratio aequitatis* which is associated with the mitigation of the law, also denoted by the modes of construal called *interpretatio restrictiva* and *interpretatio extensiva* which deploy the linguistic and logical rules in the Corpus Juris Civils and those derived from the scholastic arts course. From this association, *strictum ius* and associated terms came to carry negative implications of excessive literalism.[99] The norms or precepts in the name of which mitigation takes place include *aequitas, bona fides, utilitas*, *consuetudo* and *honestas*. These are influenced the realm of theology and Canon Law by *aequitas canonica*, in that Christian virtues (such as *misericordia*, *gratia*, *benignitas*, *mediocritas*, *moderatio*)[100] can be applied to the law by the jurist or judge,

[95] On this association, see the dissertation of the elegant Dutch lawyer Mauricius, Johan Jakob (1692-1768), *Dissertatio juridica inauguralis ad legem 144 D. de regulis juris, non omne quod licet, honestum est*, Leiden, 1711.

[96] E.g. Godefroy, *Commentarius*, pp. 601-2.

[97] See a Lapide, Cornelius (1567-1637), *Commentaria in omnes D. Pauli Epistolas*, Antwerp, 1614, p. 184; he records also St Ambrose's different interpretation ("all things permitted to me" to be taken to refer only to adiaphora). Cf. the view of St John Chrysostom, quoted above, p. 00.

[98] See Dingel, I., *Der adiaphorische Streit (1548-1560)*, Göttingen, 2012. For Thomas Aquinas's reference to adiaphora, see *Summa Theologiae*, 92,2. On "indifferent" as a deontic category, see Tierney, "Obligation and permission", pp. 421-4.

[99] Cf. Duprat, *Lexicon*, s. v. *Rigor Iuris*: *non est iuris, sed excessus iuris*

[100] Horn, *Aequitas*, pp. 94-126.

although the dispensation from the application of a given law by clemency is an act restricted to the ruler or an equivalent authorised body, and is not necessarily associated with *aequitas*.[101]

In the early modern period, there seems to be a more rigorous approach to polysemic terms denoting a faculty or category and an act of that faculty or category, but if one considers the whole conceptual field of linguistic construction, one detects in most respects the same philosophical toolbox for unlocking the sense of written law in 1350 as in 1650. This does not mean that legal humanism had no impact: it clearly did, in the way that civil law was presented, the enriched classical framework in which it was placed, the programmatic use of Greek, the visual reduction of an all-enveloping gloss to marginal lemmata, the deployment of more sophisticated philology, and so on. But I remain of the opinion that the processes of interpretation and the understanding of *aequitas* are more continuous than they are progressive.[102] The legal *forma mentis* can be seen as a persistent Aristotelian mind set, marked by linguistic skills that did not change radically with the humanists' embracing of dialectics, topics, and history. What is more, the same anthology of leges and examples underpins the discussions of *strictum ius* in both the medieval and the early modern periods. This can be gauged from the commentaries of Bartolus on the relevant *leges*; a process of accumulation of citations continues, but very little is added to the store of maxims and examples about *strictum ius* after Bartolus. The postglossators continue to be widely cited, and their works updated with additional material by humanist jurists such as Nicolaus Cisnerus (1529-83) and Pieter Cornelis Brederode (1559-1637).[103]

It could be argued that the medieval jurisprudence of the postglossators evinces a will to assert the authority of *iurisperiti* and not to allow other disciplines (notably philosophy in its medieval sense and theology) to invade its disciplinary space.[104] Did this continue into the early modern period? It is plausible that the influence of neighbouring fields of enquiry – politics and theology – did change, with the coming of the Reformation and the rapid development of political thinking; but the recourse to Canon Law, and the appeal to *recta ratio* and nature as principles which govern the whole field of civil law is very much the same across both periods, even if the expression of them is more often couched in Ciceronian, Quintilian and Stoic terms by humanist lawyers, and direct reference to Canon Law is frequently eschewed by protestant jurists. Cujas's famous rejoinder when asked about the religious situation in France and his own beliefs – *nihil hoc ad edictum praetoris* (there is nothing on this subject in the praetor's edict) – is indicative of this robust detachment, which of course does not apply to lawyers

[101] Connan, François de (1508-51) *Commentariorum iuris civilis libri decem* (1553), Hanau, 1610, p. 60; Maniscalco, *Equity*, p. 89.

[102] Maclean, *Interpretation and meaning*, pp. 206-7.

[103] Cino da Pistoia, *In Codicem… commentaria*; Pieter Cornelis Brederode, *Loci communes novi et uberrimi in Bartoli a Saxoferrato Opera Omnia*, Basel,1589, reprinted as *Thesaurus dictionum et sententiarum ex Bartoli operibus omnibus*, Frankfurt, 1610, reissued in 1660 in Frankfurt. On this topic, see also the important contribution of Prévost, X., "Reassessing the Influence of Medieval Jurisprudence on Jacques Cujas (1522-90): Method", *Reassessing legal humanism and its claims: petere fontes*, (P. du Plessis, J. W. Cairns eds.) Edinburgh, 2016, pp. 88-107, who demonstrates that Cujas was still in a productive dialogue with Bartolus; on the general issue of continuity and change from medieval to early modern, see the contributions of Le Gall, J-M., Epron, Q., et Cazals, G. *Lectures de* Interpretation et signification à la Renaissance: le cas du droit (X. Prévost ed.), *Revue d'histoire des Facultés de Droit et de la culture jurdique*, numéro hors série, 2022.

[104] See above, note 17 (Bartolus).

concerning themselves directly with such phenomena as witchcraft and heresy.[105] Even jurists deeply committed to evangelical Christianity, as is Cantiuncula is, still argue forcefully for the predominant role of Roman civil law in legal discourse.[106] This continues to be true throughout the seventeenth century, and ensures that the Corpus Juris Civilis continues to be treated as a living contemporary text set inside a context of moral precepts and norms, whose construal is determined by its internal set of linguistic and logical rules.

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[105] See Prévost, X., *Jacques Cujas (1522-90), jurisconsulte humaniste*, Geneva, 2015, pp. 75-84 (76). Cujas's rejoinder recalls that of Aquilus Gallus, as recorded in Cicero, *Topica* 51: *nihil hoc ad ius, ad Ciceronem*, on which see.Tellegen-Couperus, O.E, Tellegen J.W, "Nihil hoc ad ius, ad Ciceronem", *Revue International des Droits de L'Antiquité* 2006/53 (2007), pp. 381-408.

[106] Kisch, "Cantiuncula".

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