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Adrian of Utrecht (1459–1523) at the crossroads of law and morality: conscience, equity, and the legal nature of Early Modern practical theology

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Summary
This paper investigates the interconnection between moral theology and legal thought in the work of Adrian of Utrecht (1459–1523). It is shown that early modern Catholic theology as it was practised at the University of Louvain cannot be properly understood without reference to the scholarly disputes in the law faculties. The legal character of practical theology draws on a long tradition that reaches back at least to the late medieval manuals for confessors. The legal nature of Adrian of Utrecht's moral theology, in particular, will be illustrated through an analysis of the sixth among his *Quastiones quodlibeticae* (1515). In the context of a discussion on the question of whether statutory provisions are binding in conscience, Adrian develops compelling ideas about the use of equity as a tool for the interpretation of laws. He then applies this general theory to the interpretation of the precept of fraternal correction.

Keywords
Pope Adrian VI, moral theology, legal thought, *Quaestiones quodlibeticae*

I. – Introduction: misleading appraisals of law by Adrian's humanist friend

'Among the learned men the jurists claim the first rank for themselves. Hardly anyone pleases himself so much as they do. Assiduously rolling Sisyphus' stone, unremittingly producing tens of thousands of laws – however pointless they may be –, and heaping glosses upon glosses and opinions upon opinions, finally they bring to pass that all people believe jurisprudence is the most difficult of all studies'[1]. This quote from Erasmus of Rotterdam (ca. 1466–

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[1] D. Erasmus, *Encomium Moriae sive declamatio in laudem Stultitiae*, Lugduni Batavorum, apud

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1536), his *Praise of Folly*, leaves little room for doubting the Dutch humanist's sense of humor and his keen observation of the professionals of law. Although philologists, philosophers and theologians were the butt of ridicule, too, Erasmus' witty description of the advocates of Themis might have struck a special chord with the dedicatee of his satirical essay, his humanist friend Sir Thomas More (1478–1535), the English jurist who went on to become Cardinal Wolsey's successor as Lord Chancellor in 1521[2].

Thomas More's successful career both as a humanist and a legal professional illustrates that, despite the apparent hostility they frequently displayed towards jurisprudence as a discipline, humanists from Francesco Petrarca through Justus Lipsius (1547–1606) often had a lot of legal scholarship and practice in their background[3]. The legal context of many aspects of Renaissance humanism are relatively well-known[4]. This is true only to a lesser extent with regards to the study of the legal background of late medieval and early modern theology[5]. The fact that the legal heritage of the Church has fallen into oblivion over the last decades needs not be surprising, considering that, over the course of the twentieth century, the Catholic Church has grown increasingly anti-nomian[6]. Accordingly, research into the legal aspects of the history of the Church and theology has received little impulse. Granted, there is little in law that one needs to understand in order to interpret a theologian (and

A. Cloucquium, 1624, p. 82: 'Inter eruditos iureconsulti sibi vel primum vindicant locum, neque quisquam alius aeque sibi placet, dum Sisyphi saxum assidue volvunt, ac sexcentas leges eodem spiritu contexunt, nihil refert quam ad rem pertinentes, dumque glossematis glossemata, opiniones opinionibus cumulantes, efficiunt ut studium illud omnium difficillimum esse videatur' (cited from the online edition available at http://www.let.leidenuniv.nl/Dutch/Latijn/ErasmusLaus1624.html; accessed 2 July 2012).

[2] J. Baker, *The Oxford history of the laws of England*, Vol. 6: *1483–1558*, Oxford 2003, p. 177–179, and B. Cummings, *Conscience and the law in Thomas More*, in: H.E. Braun / E. Vallance (eds.), The Renaissance conscience, [Renaissance Studies, Special Issues, 3], Oxford 2011, p. 29–51.

[3] E. Peters, *The sacred Muses and the Twelve Tables*, *legal education and practice*, *Latin philology and rhetoric*, *and Roman history*, in: K. Pennington / M.H. Eichbauer (eds.), *Law as profession and practice in Medieval Europe*, *Essays in honor of James Brundage*, Aldershot 2011, p. 137–152; J. Papy, *Justus Lipsius*, Stanford Encyclopedia of Philosophy, Fall 2011 edition (available at http://plato.stanford.edu/entries/justus-lipsius/; last visited 2 July 2012) and the introduction by J. Waszink to J. Lipsius, *Politica*, *Six books of politics or political instruction*, ed. J. Waszink, Assen 2004, p. 15–24.

[4] D.R. Kelley, *History*, *law and the human sciences*, *Medieval and Renaissance perspectives*, [Variorum Collected Studies Series, 205], Aldershot 1984; D. Osler, *Budaeus and Roman law*, Ius commune, 13 (1985), p. 195–212; I. Maclean, *Interpretation and meaning in the Renaissance*, *The case of law*, [Ideas in Context, 21], Cambridge 1992.

[5] But see J.F. Keenan, *A history of Catholic moral theology in the twentieth century*, *From confessing sins to liberating consciences*, London–New York 2010, p. 1–34.

[6] Ch. Donahue, Jr., *A crisis of law*?, *Reflections on the Church and the law over the centuries*, The Jurist, 65 (2005), p. 1–30. For a critical assessment of this evolution, see C.J. Errázuriz Mackenna, *Justice in the Church*, *A fundamental theory of canon law*, Montréal 2009.

reformer) such as Erasmus. But the same does not seem to hold true with all theologians.

The interconnection between law and theology is apparent in the writings on ethical problems of a theologian who was a contemporary of Erasmus and More: Adrian of Utrecht (1459–1523), a luminary of the University of Louvain and the only pope from the Low Countries (1522–1523) ever[7]. Adrian exchanged letters with Erasmus which offer a good insight into the political and religious turmoil of the time[8]. In their youth, Adrian and Erasmus were both exposed to the Dutch religious reform movement known as the *devotio moderna* and they were proud about their common country of origin[9]. In 1502, Adrian even lobbied to get Erasmus a job at the Catholic University of Louvain, an offer which Erasmus declined. This does not mean that Erasmus and Adrian were best friends in every regard. More specifically, Adrian turned out to be far less hostile to scholastic and legal thinking than Erasmus.

This paper invites scholars to consider how our understanding of the moral writings of theologians such as Adrian of Utrecht can be enriched if we pay sufficient attention to the legal character of their discourse. Present-day representations of law and theology, respectively, may not be a good source of inspiration for our analysis of moral theology as it was practiced by early sixteenth century theologians at the Louvain theology faculty[10]. This paper

[7] Recent biographies of Adrian of Utrecht include M. Verweij, *Adrianus VI* (*1459–1523*), *de tragische paus uit de Nederlanden*, Antwerpen–Apeldoorn 2011; G. Gielis / M. Gielis, *Adrian of Utrecht* (*1459–1523*) *as professor at the University of Louvain and as a leading figure in the Church of the Netherlands*, Fragmenta, Journal of the Royal Netherlandish Institute in Rome, 4 (2010), p. 1–21 (almost identical to the Dutch contribution M. Gielis, *Adriaan van Utrecht* (*1459–1523*) *als professor aan de Universiteit van Leuven en als kerkelijk leider in de Nederlanden*, in: Jaarboek 2001–2002, Provinciale Commissie voor Geschiedenis en Volkskunde (Antwerpen), Antwerpen 2003, p. 40–56), and N.H. Minnich, *Adrian VI*, in: H.J. Hillebrand (ed.), The Oxford encyclopedia of the Reformation, New York 1996, vol. 1, p. 8.

[8] For a Dutch translation of the letters exchanged between Erasmus and Adrian VI, see M. Verweij, *Pas de deux in stilte*, *De briefwisseling tussen Desiderius Erasmus en paus Adrianus VI* (*1522–1523*), Rotterdam 2002, with a foreword by Mgr. A.H. van Luyn.

[9] Verweij, *Pas de deux in stilte*, p. 58–59 (letter from Erasmus to Adrian VI, Basel, 1 August 1522).

[10] According to the common opinion, Adrian of Utrecht's thought did not differ very much from that of contemporary theologians at Louvain; cf. L. Vereecke, *De Guillaume d'Ockham à saint Alphonse de Liguori*, *Études d'histoire de la théologie morale moderne 1300–1787*, [Bibliotheca Historica Congregationis Sanctissimi Redemptoris, 12], Rome 1986, p. 302. This traditional assessment of the relationship between Adrian and contemporary theological thought was cast into doubt by M.W.F. Stone (in an article which was later accused with plagiarism), viz. *Adrian of Utrecht as a moral theologian*, in M. Verweij (ed.), De Paus uit de Lage Landen: Adrianus VI (1459–1523), Catalogus bij de tentoonstelling ter gelegenheid van het 550ste geboortejaar van Adriaan van Utrecht, [Supplementa Humanistica Lovaniensia, 27], Leuven 2009, p. 19–44. The novelty of Adrian's moral thought in comparison with the medieval scholastic tradition is stressed by Rudolf Schüßler in *Hadrian VI. und das Recht auf Verweigerung zweifelhaft rechtmäßiger Befehle*, in: N. Brieskorn / M. Riedenauer (eds.), Suche nach Frieden, Politische Ethik in der Frühen Neuzeit, I, [Theologie und Frieden, 19], Stuttgart 2000, p. 41–62.

will try to convey a feeling of how juristic the thinking of a theologian such as Adrian of Utrecht was by analyzing the sixth of his *Quaestiones Quodlibeticae* which were prepared for publication by Maarten van Dorp (Dorpius) (1485–1525) and first printed in 1515 by Dirk Martens from Louvain[11].

In the sixth *quaestio de quolibet*, Adrian deals with the question of whether statutory legal provisions are binding in conscience[12]. In this context, he develops quite interesting ideas about the binding character of legal provisions and the need for interpreting law on the basis of equity. He applies his general ideas about those issues to the interpretation of the precept of fraternal correction (*correctio fraterna*), that is the precept that one should prevent one's brother from sinning[13]. At the beginning and at the end of this contribution, Adrian's bend for juridical thinking will be briefly situated within the much longer legalistic moral theology that was characteristic of the Church before its departure from the scholastic tradition and the turn to the Gospel and the Church Fathers in the course of the twentieth century[14].

[11] Reference will be made to the Paris 1527 edition of Adrian's *Quaestiones quodlibeticae*. This edition was chosen mainly for pragmatic reasons, as it is paginated and easily readable. As far as the passages relevant to this article are concerned, there are no substantial differences between this edition and the first publication of the work, which was edited by Martin Dorpius and published in Louvain in 1515 by Dirk Martens, or the 1522 Paris edition, which is among the last editions Adrian could possibly have seen during his lifetime. A reprint of the Venice 1522 edition was published in 1964 by The Gregg Press. Several editions of Adrian's *Quaestiones quodlibeticae* are available online, e.g. the Lyons 1547 edition at the digital library of the University of Granada under http://adrastea.ugr.es/search*spi/c?SEARCH=BHR%20A%20004%20413 [last visited on 28 March 2013].

[12] The twelve questions dealt with in Adrian's *Quaestiones quodlibeticae*, Parisiis, Apud C. Chevallonium, 1527 (of which we shall only discuss the sixth) are: 1. Utrum propter scandalum vitandum in proximo liceat alicui contravenire voto vel iuramento a se prius rite facto?; 2. Utrum tenemur ad mandatum superioris contra propriam sententiam agere dum scimus propositum apud maiores verti in dubium?; 3. Utrum licet ministrare Eucharistiam aut absolutionis beneficium impendere ei qui se asserit a criminibus abstinere non posse?; 4. Utrum curabilior sit et minus deum offendat, qui peccat ex ignorantia vel infirmitate, an is qui peccat de industria?; 5. Utrum sacerdos consulens de artificio ac iusto labore decimas solvi non oportere, possit sine gravi dolore peccati indulgentiam promereri?; 6. An transgressio humani praecepti iuris vel hominis inducat mortale peccatum?; 7. Utrum mortalis culpa committi possit absque eo quod libero consensu creaturam aliquam incommutabili bono peccator praetulerit in amore?; 8. Utrum orans pro multis aeque prosit singulis ac si pro unoquoque tantundem oraret?; 9. An licet dare alicui pecuniam ut dignitatem ac merita suae personae collatori exponendo beneficium ei procuret?; 10. Utrum levitatis et corrupti animi iuste culpetur iudex, qui etsi non facit, tamen ubi pecunia offerretur iustitiam pro munere servaret aut prostitueret, vel saltem in eum adduceretur affectum, ut cuperet contra iustitiam sententiam licite ferri posse?; 11. Utrum deterior sit alium sceleris notare occulti vel manifesti, an sic tacentem alios audire nec prohibere?; 12. Utrum is propter cuius peccatum populus plaga percutitur vel ad peccandum inducitur, post non reparato prius rerum vel animae damno rite poenitere?

[13] Matthew 18:15.

[14] Keenan, *A history of Catholic moral theology in the twentieth century*, London–New York 2010, p. 1–34.

It was the legal character of practical theology, precisely, which on 31 October 1517, a mere two years after the publication of Adrian's *Quaestiones Quodlibeticae*, met with Martin Luther's (1483–1546) scathing criticism in Wittenberg. In 1521, Luther was excommunicated by Pope Leo X (1513–1521), Adrian's predecessor. Yet, even at Catholic Faculties of Theology, for instance in Louvain, the reform movement led to hostile tensions between the more 'modern', Bible-oriented theologians and the more 'traditional', scholastic theologians[15]. Adrian belonged to the last category, but once he became a pope, he tried to accommodate new views among Catholic theologians and also became a strong advocate of institutional reform in the Church. However, the reform agenda of his short-lived pontificate largely failed, not in the least because of resistance by the Roman establishment[16].

II. – The court of conscience and the legal nature of morality

A couple of preliminary remarks on the concept of 'conscience' in Adrian's time must precede any investigation of his writings on practical ethics. The history of the changes which the concept of 'conscience' underwent in the early modern period is a controversial subject[17]. Thorough discussion of the meaning of conscience in Adrian's work and in the writings of other theologians of his time is beyond the purpose of this paper, but it is important to point out, however briefly, that 'conscience' and moral decision making were

[15] On 'modernist' voices at the Louvain Faculty of Theology in the early sixteenth century, see W. François, *Maarten van Dorp*, *the Oratio Paulina* (*1516–1519*), *and the biblical-humanist voice among the Louvain theologians*, Lias, Journal of Early Modern intellectual culture and its sources, 39 (2012), p. 163–193. However, other scholars have highlighted the 'traditional', that is 'scholastic', nature of the same voices; see D. Verbeke, *Maarten van Dorp* (*1485–1525*) *and the teaching of logic at the University of Louvain*, Humanistica Lovaniensia, Journal of Neo-Latin Studies, 2013, forthcoming. It may be noted that Maarten van Dorp edited Adrian of Utrecht's *Quaestiones quodlibeticae* and fiercely opposed Erasmus' *Praise of Folly*.

[16] R.E. McNally, *Adrian VI* (*1522–1523*) *and Church reform*, Archivum Historiae Pontificiae, 7 (1969), p. 253–285.

[17] For thorough investigations, see K.-H. Ducke, *Handeln zum Heil*, *Eine Untersuchung zur Morallehre Hadrians VI*., [Erfurter Theologische Studien, 34], Leipzig 1976, p. 142–149, and R.B. Hein, '*Gewissen*' *bei Adrian von Utrecht* (*Hadrian VI.*), *Erasmus von Rotterdam und Thomas More*, *Ein Beitrag zur systematischen Analyse des Gewissensbegriffs in der katholischen nordeuropäischen Renaissance*, [Studien der Moraltheologie, 10], Münster 1999, and R.B. Hein, *Conscience*, *Dictator or guide?*, *Meta-ethical and biographical reflections in the light of a humanist concept of conscience*, in: J. Clague / B. Hoose / G. Mannion (eds.), Moral theology for the twenty first century, Essays in celebration of Kevin Kelly, London 2008, p. 34–50. The works by Hein should be completed with the recent monographs by D.R. Klinck, *Conscience*, *equity and the Court of Chancery in Early Modern England*, Farnham 2010, and the essays by H.E. Braun, E. Vallance, R. Schüßler, B. Cummings, A. Redden, C. Tilmouth, J. Daybell and N. Reinhardt contained in H.E. Braun / E. Vallance (eds.), *The Renaissance conscience*, [Renaissance Studies, Special Issues, 3], Oxford 2011.

understood in a different way by Adrian and other (Catholic) theologians than by modern authors[18].

Conscience in the medieval tradition is an 'objective' concept. It has not primarily to do with emotions or subjective feelings about what one should do in a particular circumstance. Rather, it is a rational decision about what to do under certain circumstances that derives from objective rules[19]. Those rules derive from objective bodies of law, such as natural law (based on reason), divine law (contained in the Gospel) and even statutory law (rules laid down by ecclesiastical or secular authorities). Moreover, knowledge of those rules is not necessarily open to every single individual. The rules conscience obeys are the object of expert knowledge. It is theologians, precisely, who claim to possess that expert knowledge. By spelling out and analyzing the laws which man has to follow to lead a God-pleasing life, they guarantee that man can reach Paradise in the After-life[20]. Pastors and clerics are the masters of an art later expressly denoted by Alfonso Maria de' Liguori (1696–1787), the patron saint of moral theologians, as 'moral jurisprudence' (*moralis quasi iurisprudentia*)[21].

In addition, there is a tribunal where the rules of conscience are enforced, namely the 'court of conscience' (*forum conscientiae*), also called the 'tribunal of the soul' (*forum animae*), or the 'internal court' (*forum internum*). These terms are not just metaphors. Conscience functions like a court: it is the place where norms of a certain kind are enforced, primarily norms pertaining to natural law, but also norms deriving from statutory law. As the Italian historian Ludovico Antonio Muratori (1672–1750) expressly attested, moral theologians were characterized by the fact that they had a jurisdiction over the soul of man (*i teologi morali che hanno giurisdizione sull'anima dell'uomo*)[22]. It is the Protestants, precisely, who, at the time of Adrian, started to challenge this traditional, Catholic, legal understanding of conscience as founded upon law. In the seventeenth century, certainly in Protestant circles, conscience became

[18] A standard work on the history of moral decision making from Antiquity to the modern times is R. Schüßler, *Moral im Zweifel*, [Perspektiven der analytischen Philosophie, Neue Folge], Paderborn, Vol. 1: *Die scholastische Theorie des Entscheidens unter moralischer Unsicherheit*, 2003, and Vol. 2: *Die Herausforderung des Probabilismus*, 2006. A bit narrower in scope but equally useful are I. Kantola, *Probability and moral uncertainty in Late Medieval and Early Modern times*, [Schriften der Luther-Agricola-Gesellschaft, 32], Helsinki 1994, and J.A. Fleming, *Defending probabilism, The moral theology of Juan Caramuel*, Washington DC 2006. A recent work of interest investigating moral decision making in the period of classical canon law and Medieval scholastic philosophy is M.V. Dougherty, *Moral dilemmas in Medieval thought, From Gratian to Aquinas*, Cambridge 2011.

[19] Klinck, *Conscience* (*supra*, n. 17), p. 1–12.

[20] W. Decock, *From law to paradise, Confessional Catholicism and legal scholarship*, Rechtsgeschichte, Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte, 18 (2011), p. 12–34.

[21] Cited *infra*, n. 82.

[22] Cited in P. Prodi, *Una storia della giustizia, dal pluralismo dei fori al moderno dualismo tra coscienza e diritto*, Bologna 2000, p. 430, n. 89.

increasingly a matter of subjective sincerity of intent rather than of objective understanding of laws[23].

The 'objective' understanding of conscience was common at the turn of the sixteenth century, more precisely between 1488 and 1507, when Adrian was teaching classes that would eventually lead to the publication of his *Quaestiones quodlibeticae*. The 'legal' understanding of conscience can be illustrated by reference to England's Chancery jurisdiction, which, typically, was also called the 'Court of conscience' or the 'Court of equity'[24]. In those courts, judgment was rendered by a Chancellor according to the King's conscience – not according to strict law. One of the most renowned Chancellors was Thomas More. He was appointed Chancellor by Henry VIII, and took his task extremely seriously. Chancery allowed the English legal system to adapt itself to new needs or to account for considerations of a moral and equitable nature. At least until the beginning of the sixteenth century, conscience as applied in Chancery was understood in the Medieval sense of the word. It would seem that it largely corresponded to the notion of conscience as it can be found in the theological tradition of manuals for confessors. This is also obvious from the observations by an English contemporary of Adrian of Utrecht, Christopher Saint Germain (ca. 1460–1540)[25]. In his *Dialogue between a doctor and a student* he described Chancery as the court that enforced the principles of conscience. Conscience was objectively understood as governed by laws, notably the law of nature or reason, the law of God, and the law of man.

Both jurists and theologians, then, were required to have the knowledge of a plurality of bodies of law. This explains the eclectic nature of legal as well as moral thought in the late medieval and early modern legal and theological tradition all across Europe[26]. The developments at the University of Louvain in the second half of the fifteenth and at the outset of the sixteenth century illustrate this. Irrespective of connections of friendship or hostility, the content of practical theological thinking was eclectic. One can think of the Carmelite theologian Johannes Beets' *Expositio decem decalogi praeceptorum* (ca. 1486), or of Jean Briard's *Quodlibetica* (ca. 1518)[27]. Both works by theology professors from Louvain make ample use of canon law. Obviously, Adrian of Utrecht is himself a typical example of the fusion of law and theology at the Louvain

[23] Klinck, *Conscience* (*supra*, n. 17), p. 107–140 and p. 183–218.
[24] Baker, *The Oxford history of the laws of England*, Vol. 6: *1483–1558*, p. 171–190; N.W. Jones, *The Elizabethan Court of Chancery*, Oxford 1967.
[25] Klinck, *Conscience* (*supra*, n. 17), p. 44–67.
[26] M. Turrini, *La coscienza e le leggi*, *Morale e diritto nei testi per la confessione della prima età moderna*, [Annali dell'Istituto storico italo-germanico, Monografie, 13], Bologna 1991.
[27] On Beets and Briard, see the scant notes in H. De Jongh, *L'ancienne Faculté de Théologie de Louvain au premier siècle de son existence* (*1432–1540*), *Les débuts*, *son organisation*, *son enseignement*, *sa lutte contre Érasme et Luther*, Louvain 1911, p. 94–99 and p. 149–151.

theology faculty in this period. He drew heavily on the canon law tradition to solve ethical problems[28].

Conversely, the jurists were well aware of what was happening among the theologians, and had a great interest in the jurisdiction of conscience. In fact, a seminal synthesis between civil law, canon law, and moral thought was forged at the beginning of the sixteenth century in the work of the exceptional Louvain jurist Nicolaas Everaerts (1463/4–1516). He lectured for a couple of years at the Faculty of Law of the University of Louvain and went on to become a judge and later the president of the Council of Malines and president of the Court of Holland[29]. Everaerts heralded in a tradition of practice-oriented legal thought which combined a profound expertise in Romano-canon law and a great sensitivity for moral theological thought[30]. He was a friend of Erasmus and is considered to be a protagonist of the legal humanist movement at the University of Louvain[31].

The jurists recognized that the Church exercised judicial power through ecclestical tribunals and 'internal' jurisdiction of the *forum internum*[32]. Moreover, they acknowledged that in conscience the assessment of the case could go straight to the essence of things and leave historical contingencies as well as practical considerations aside. Legal presumptions did not apply in the court of conscience. Hence, the court of conscience was said to be the court of truth (*forum veritatis*). The sophistication and subtleties of law are not allowed in the court of conscience. Baldus de Ubaldis (1327–1400), one of the most influential *doctores utriusque iuris*, defined conscience as follows[33]:

[28] Ducke, *Handeln zum Heil* (*supra*, n. 17), p. 72; Hein, '*Gewissen*' (*supra*, n. 17), p. 199, n. 158.

[29] For a short biography of Everaerts, see D. van den Auweele, in: G. Van Dievoet e.a. (eds.), *Lovanium docet*, *Geschiedenis van de Leuvense Rechtsfaculteit* (*1425–1914*), Cataloog bij de tentoonstelling in de Centrale Bibliotheek (25.5–2.7.1988), Leuven 1988, p. 60–63, and O. Vervaart, *Studies over Nicolaas Everaerts* (*1462–1532*) *en zijn Topica*, Arnhem 1994 [=doct. diss.], p. 3–25.

[30] On Everaerts' familiarity with the theologian Conrad Summenhart (1455–1502), see Vervaart, *Studies over Nicolaas Everaerts*, p. 110–111. Compare L. Waelkens, *Nicolaas Everaerts*, *Un célèbre méconnu du droit commun* (*1463/4–1532*)', Rivista internazionale di diritto comune, 15 (2004), p. 182 : 'Everaerts raisonne toujours *utroque iure*. En outre il ne cite pas seulement les légistes et les canonistes, mais également des moralistes et des pénitenciers comme Angelus de Clavasio, Astesanus de Asti ou Conrad Summenhart'.

[31] V. Brants, *La faculté de droit de l'Université de Louvain à travers cinq siècles*, *Etude historique*, Paris–Bruxelles 1917, p. 8–9; and R. Dekkers, *Het humanisme en de rechtswetenschap in de Nederlanden*, Antwerpen 1938, p. 1–36.

[32] W. Endemann, *Studien in der romanisch-kanonistischen Wirthschafts- und Rechtslehre bis gegen Ende des siebenzehnten Jahrhunderts*, Berlin 1874, vol. 1, p. 59.

[33] Baldus de Ubaldis, *Commentaria in septimum*, *octavum*, *nonum*, *decimum et undecimum Codicis libros*, Lugduni 1585, ad C. 7,59,1, num. 3, fol. 99v: 'Forum enim conscientiae est forum boni et aequi coniunctim, et est tribunal veritatis et non fictionis, nam quando aequum bono opponitur contradictione, divina iustitia potius amplectitur aequum quam id quod ius civile vocat bonum, ut ff. de iustitia et iure, l. 1 in princip. [D. 1,1,1]. Perfecta enim iustitia requirit haec duo simul, ut ibi patet'.

> The court of conscience is the court of the good and the equitable taken together. It is the court of truth and not of fiction, for when the equitable is found in opposition and contradictory to the good, then divine justice embraces the equitable rather than that which is called good by the civil law. This is obvious from the beginning of the first title of the Digest *On justice and right*, where it is stated that perfect justice requires both the good and the equitable simultaneously.

Adrian of Utrecht adopted Baldus' definition of the court of conscience. In turn, Adrian was quoted by other theologians as well as by jurists for endorsing this definition of the court of conscience, for instance by the Jesuit theologian Juan de Valero (1550–1625), by the Italian jurist Francisco Vivio (1532–1616), and by the Louvain jurist Pieter Peck (1529–1589). Vivio showed himself thoroughly familiar with the scholastic theologians, citing all of the famous theologians and canonists by name, ranging from Adrian of Utrecht over Domingo de Soto to Diego de Covarruvias y Leyva. Following them, he defined the court of conscience as the court of the good and the equitable[34]. Pieter Peck argued in true Aristotelian-Thomistic fashion that just laws were binding in the court of conscience, admitting that the subtleties and the rigor of legal provisions could not apply in that court[35]. The rigor of justice and the laws attended in the exterior court had to give way to equity in the court of conscience, with conscience being the dictate of right reason in a good and virtuous man.

III. – Equity and the interpretation of the binding nature of (positive) laws in conscience: general principles

The question of equity lies at the heart of Adrian's sixth *Quaestio de quolibet*, in which he tried to sort out the politically sensitive issue of whether the violation of a secular law is a mortal sin[36]. He eventually concluded that it was. But to this end, he needed to tackle the more fundamental question whether statutory law was binding in conscience in the first place. This remained a thorny issue all over the centuries. It would seem that human legal provisions have no power to bind man in conscience, since an inferior power can hardly be thought of as having jurisdiction in the court of a higher power, namely of God. Yet, as Adrian pointed out, the Apostle Paul himself

[34] Francisco Vivio, *Decisiones regni Neapolitani*, Venetiis, apud D. Zenari, 1592, lib. 1, decis. 160, num. 10–11, p. 229.

[35] Pieter Peck, *Tractatus de amortizatione bonorum a principe impetranda*, cap. 7 (*an clerus tuta conscientia legem amortizationis fraudare possit*), in: Opera omnia, Antverpiae, apud H. Verdussen, 1679, p. 445–446.

[36] See also Decock, *Theologians* (*supra*, n. **), p. 346–352. For a different treatment of the subject, see Ducke, *Handeln zum Heil* (*supra*, n. 17), p. 93–112.

had conceded in an influential passage of his letter to the Romans (13:1–2) that all human power derives from God.

Adrian resolved the question in truly Thomistic fashion. According to Thomas, if a human law wants to be binding in conscience, it must attain to the common good[37]. Adrian says that 'a just law (*lex iusta*), that is a just precept issued by a superior layman or cleric, is binding in the court of conscience, but only 'within the boundaries of reason, that is within the limits of the final cause envisaged by the law (*ad metas rationis seu causae finalis*)'[38].

Adrian argues that each society has a natural 'hierarchy of obedience'. Therefore, the binding nature of a superior's precept is obvious. He maintains that to any position or office (*officium*) in society corresponds a duty for those who are subjected to that office to obey the person holding that office. Those offices range from parenthood over the command of an army to the government of a state. As a child obeys its father, a soldier obeys the general, and a head of the family obeys the political authorities. Apart from the 'natural' character of obedience to superiors, there is also Scriptural evidence for the binding nature of a superior's commands and precepts. For example, the injunction in the first letter of Peter (1 Pet. 2:13) for subjects always to submit themselves to every human creature for the sake of God (*propter Deum*).

This discussion on whether positive law is binding in conscience was not merely a matter of theoretical speculation. While Adrian was making his statements, Luther was raging against the authority of the Church and the State. Rather than emphasizing the duty of obedience to legal provisions issued by superiors, Luther advocated the idea of evangelical or Christian liberty (*libertas evangelica / christiana*), for instance in his little treatise *Von der Freiheit eines Christenmenschen* (1520)[39]. He claimed that Christians should follow the rules of the Gospel, even to the point where that would lead to disobedience toward ecclesiastical and civil authorities[40]. Moreover, Luther

[37] Aquinas, *Summa Theologiae* (Ed. Leonina, tom. 7), IaIIae, quaest. 96, art. 4 (*Utrum lex humana imponat homini necessitatem in foro conscientiae*), concl., p. 183: 'Respondeo dicendum quod leges positae humanitus vel sunt iustae vel iniustae. Si quidem iustae sint, habent vim obligandi in foro conscientiae a lege aeterna, a qua derivantur; secundum illud Prov. 8: *Per me reges regnant, et legum conditores iusta decernunt*. Dicuntur autem leges iustae et ex fine, quando scilicet ordinantur ad bonum commune; et ex auctore, quando scilicet lex lata non excedit potestatem ferentis; et ex forma, quando scilicet secundum aequalitatem proportionis imponuntur subditis onera in ordine ad bonum commune'.

[38] Adrian of Utrecht, *Quaestiones quodlibeticae duodecim, quibus accesserunt Joannis Briardi Athensis quaestiones item quodlibeticae*, Parisiis, Apud C. Chevallonium, 1527, quaest. 6, art. 1, concl. 2, litt. g, fol. 111r: 'Lex iusta, praeceptum iustum superioris laici vel ecclesiastici ligat in foro conscientiae, sed ad metas solum rationis seu causae finalis quae praetenditur'.

[39] A recent contribution on the subject of Luther's conception of Christian liberty is R. Schwarz, *Luthers Freiheitsbewußtsein und die Freiheit eines Christenmenschen*', in: D. Korsch / V. Leppin (eds.), Martin Luther, Biographie und Theologie, [Spätmittelalter, Humanismus, Reformation, 53], Tübingen 2010, p. 31–68.

[40] Even though Luther also claimed that nobody before him had praised temporal government

claimed that a Christian need not observe laws or perform good works to be justified in the eyes of God, since faith alone guarantees salvation[41]. Adrian, as other Catholics in his day, perceived these radical doctrines as a threat to the 'economy of salvation' proposed by the Church. It became one of the central issues of his shortlived pontificate from January 1522 to September 1523[42].

In his letter to Cardinal Francesco Chieregati, the papal representative at the Reichstag of Nürnberg (where German princes gathered at the end of 1522 to discuss Lutheranism), Adrian urged Chieregati to make it clear to the princes that Lutheranism was hostile to the stability of the State[43]: 'Fifthly, they have to be aware of what the Lutherans are striving for under the guise of evangelical liberty: namely to abolish all power of superiors (*sub colore liberatis Evangelicae omnis potestas superioritatis tollatur*)'. Although, allegedly, the crusade of the reformers was limited to the destruction of the power of the Church, Adrian warned secular princes that the freedom which the Lutherans were preaching went even more against secular power. According to Adrian, it followed from Lutheran principles that no secular law, however just and reasonable, could bind a Christian on pain of mortal sin (*illa* [*sc. potestas saecularis*] *nullis praeceptis quantumvis iustis et rationalibus obligare possit homines ad parendum sub poena peccati mortalis*)[44]. Indeed, in his treatise on governmental authority, Luther explained that if temporal authorities claimed to prescribe laws for the soul, they would encroach upon God's government. While recognizing the need and legitimacy of government in

as highly as he did, he remained consistent in his view that temporal authorities cannot coerce conscience if that would jeopardize salvation; see D.M. Whitford, *Luther's political encounters*, in: D.K. McKim (ed.), The Cambridge companion to Martin Luther, Cambridge 2003, p. 182–183. This does not necessarily mean that the Lutheran tradition, which is notably variegated, agreed on this point of doctrine; cf. H.J. Hillerbrand, *The legacy of Martin Luther*, in: D.K. McKim (ed.), The Cambridge companion to Martin Luther, Cambridge 2003, p. 230.

[41] Martin Luther, *De libertate christiana dissertatio*, Norembergae, Petreius, 1524, passim.

[42] For an overview of the most important aspects of Adrian of Utrecht's (Pope Adrian VI's) pontificate, see Verweij, *Adrianus VI* (*supra*, n. 7), p. 59–122.

[43] See the edition (accompanied by a Dutch translation) by M. Verweij of Pope Adrian VI's instruction to Francesco Chieregati in M. Verweij (ed.), *De Paus uit de Lage Landen*, *Adrianus VI (1459–1523)*, Catalogus bij de tentoonstelling ter gelegenheid van het 550ste geboortejaar van Adriaan van Utrecht, [Supplementa Humanistica Lovaniensia, 27], Leuven 2009, p. 275: 'Quinto attendant finem ad quem Lutherani tendunt ut scilicet sub colore libertatis Evangelicae quam hominibus proponunt, omnis potestas superioritatis tollatur. Nam licet ab initio prae se tulerint ecclesiasticam potestatem tanquam tyrannice et contra Evangelium occupatam annihilare seu reprimere velle, tamen cum eorum fundamentum, scilicet libertas quam praedicant, aeque vel plus militet contra potestatem saecularem quod scilicet illa nullis praeceptis quantumvis iustis et rationalibus obligare possit homines ad parendum sub poena peccati mortalis, manifestum est'.

[44] For further discussion of Adrian's letter to Chieregati, see R. McNally, *Pope Adrian VI and Church Reform*, p. 279–282.

the temporal realm, Luther insisted that God did not permit anyone but Himself to rule over the soul[45].

Obviously, Adrian could not agree with those Lutheran viewpoints. Firstly, because they were hostile to traditional Catholic thought about the power of ecclesiastical and secular authorities. Adrian of Utrecht confirmed the need for Christians not only to observe divine law as it could be found in the Gospel, but also to obey human positive law. Secondly, one should not forget that, on a personal level, Adrian had been in charge of the education of the future Emperor Charles V[46]. Moreover, he occupied key positions in the Habsburg administration from 1516 onward, for instance as a Bishop of Tortosa and as a Grand-inquisitor of Castile and Leon[47].

However, Adrian believed that there were restraints on human power. Consequently, positive laws could not be considered as automatically binding in conscience. According to Adrian, the restraints on human power are implied in the very same obligation to obey the rulers, since the divine origins of power also determine the limits of power. If the divine purpose for which power was conveyed to human beings is no longer served by that power any more, then human power loses its legitimacy. If a law is not enacted for the sake of the common good, then its *raison d'être* or final cause is not achieved. Hence, the authorities' power to bind in conscience is invalidated. In the words of Adrian of Utrecht, if the final cause ceases to exist, then its effect, too, must cease to exist (*cessante causa finali*, *cessare debet effectus*)[48].

Adrian's argument comes straight from classical canon law, namely from the rescripts of Pope Innocent III (1198–1216) as included in X. 2,24,26 and X. 2,28,60 (*cessante causa*, *cesset effectus*)[49]. Moreover, Adrian argues that the final reason is not merely the soul of the law, but the law itself (*ratio non solum anima legis sed lex ipsa*) – an argument which comes straight from Nicolaus de Tudeschis (1386–1455), one of the most influential canonists of the later Middle Ages, who is also known as Abbas Panormitanus[50]. Equity

[45] Martin Luther, *Concerning governmental authority* [*1523*], in: H.J. Hillerbrand (ed.), The Protestant Reformation, New York et al. 2009[2] [=1968], p. 83.

[46] They even maintained correspondence afterwards; cf. L.P. Gachard (ed.), *Correspondance de Charles Quint et d'Adrien VI*, Rome 1970 [= reprint from the 1859 edition].

[47] Verweij, *Adrianus VI* (*supra*, n. 7), p. 39–57; R. Fagel, *Adrian of Utrecht in Spain* (*supra*, n. 47), p. 23–45.

[48] Adrian of Utrecht, *Quaestiones quodlibeticae*, quaest. 6, art. 1, concl. 2, litt. g, fol. 111r.

[49] In D. Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter*, München 2007, p. 45, num. 23, X 2,28,16 is also cited as a possible source of origin of the expression 'cessante causa cessat effectus'. In its explicit form, though, we could only find it in the abovementioned decretals. On the history of this maxim, see E. Cortese, *La norma giuridica*, *Spunti storici nel diritto comune classico*, [Ius nostrum, 6], Milano 1962, vol. 1, p. 238–242.

[50] Panormitanus, *Commentaria super Decretalibus*, tom. 6 (*Super tertio libro Decretalium*), ad X. 3,49,8, fol. 234r, num. 39: 'Si causa est expressa in lege et potest probari causam istam non extitisse in casu occurrenti, non debet servari constitutio, nec in foro animae nec iudiciali, quia ratio legis est lex, et non econtra, unde ubi cessat ratio cessat lex, ut in l. non dubium C. de

(*aequitas*) fulfills the function of assessing the degree to which the letter of the law still corresponds to its original cause and natural end. In this way, equity prevents the system of peaceful order from turning itself into a brutal system of injustice (*summum ius*, *summa iniuria*)[51]. As Panormitanus said, in the court of conscience the equity of natural law is preferred to the rigor of statutory law (*in foro conscientiae aequitas iuris naturalis praefertur rigori iuris positivi*)[52]. In this way, he established a significant conjunction of conscience, equity and natural law, on the one hand, while associating rigor with statutory law and secular jurisdiction, on the other hand.

This idea of Abbas Panormitanus was widespread by the early sixteenth century. It was confirmed, for instance, by Nicolas Everaerts, the influential contemporary of Adrian at the Law Faculty of the University of Louvain[53]. Adrian sought support for his claim in Roman law, particularly in the lex *Non dubium* (C. 1,14,5), which states that the will behind the law (*legis voluntas*) and not the wording of the law (*verba legis*) is what really matters. Consequently, not only is a law that does not serve its purpose no longer binding in conscience, it is aborted altogether. If its final cause is missing, the law will not apply.

In this manner, Adrian adopted a way of interpreting legal provisions that was typical of the Medieval *ius commune*. If the reason why a law was enacted (*ratio seu causa*) held no longer true, what use was it to remain loyal to it? The glossators used an elegant expression to summarize the idea that a law ceases to apply as soon as its underlying cause no longer applies: *cessante causa / ratione*, *cessat lex*[54]. If a certain law does not fulfill its purpose anymore, then you better have it abolished. The civilian tradition was probably drawing on

legi, etc.'. This passage is discussed in H. Krause, *Cessante causa cessat lex*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung, 46 (1960), p. 97–98.

[51] For the classical origins of this maxim, see Cicero, *De officiis*, 1, 10, 33. Apart from C. 3,1,8, no fragment in the *Corpus Justinianeum* itself comes close to formulating it.

[52] Panormitanus, *Commentaria super Decretalibus*, tom. 2 (*Super secunda parte libri primi Decretalium*), ad X 1,41,1, fol. 155v, num. 19.

[53] Nicolaas Everaerts, *Topicorum seu de locis legalibus liber*, Lovanii, Theodoricus Martinus 1516, loc. 34 (*a ratione legis stricta seu limitata ad restrictionem ipsius legis*), fol. 43v: 'Ratio legis est anima legis, unde sicut anima dominatur corpori, ita ratio legis vel canonis dominatur verbis'; loc. 64 (*a lege cessante*), fol. 81v: 'Hoc tamen volo te scire, quod ille non loquitur sine lege qui allegat rationem, quia lex est omne quod ratione consistit'.

[54] Glossa *Causam* ad D. 3,1,1,5, in *Corporis Iustinianaei Digestum vetus* (ed. Gothofredi), tom. 1, col. 330: 'Quid ergo si aliqua bona foemina inveniatur, poteritne postulare? Videtur quod sic, quia causa cessante, cessat effectus (…), sed dico contra, quia illud obtinet in causa finali. Hic autem, sc. improbitas Calphurniae, fuit impulsiva, nam alia fuit finalis, sc. ne contra pudicitiam etc. et ne officiis virilibus etc. (…) et alias est causa impulsiva (…)'. On the distinction between *causa impulsiva* (the immediate occasion which had pushed the legislator into action, e.g. Calpurnia's turpitude) and *causa finalis* (the general aim of that particular law, e.g. prohibiting women from interfering with the business of men), see Krause, *Cessante causa* (*supra*, n. 50), p. 92–93, and E. Cortese, *La norma giuridica* (*supra*, n. 49), vol. 1, p. 217–221. On the *causa seu ratio seu mens legis* more in general, see E. Cortese, *La norma giuridica*, vol. 1, p. 257–296.

the canon law tradition in spreading this maxim, particularly on canon 41 of Gratian's *Decretum* C. 1, q. 1 – one of the major canonical texts to which the maxim '*cessante causa*, *cessat lex*' goes back[55].

The rule that a law ceases to be binding as soon as its underlying cause is not met anymore was an essential part of the *ius commune*. It became a commonplace in both legal and moral theological tradition. Nicolaas Everaerts included it as a *topos* in his work on legal argumentation[56]. In the early seventeenth century, Francisco Suárez (1548–1617) dedicated an entire chapter to a discussion of this typically teleological way of interpreting legal obligation[57]. Suárez knew about the development of the question in Adrian and elaborated on it. There is one example of an authoritative jurist who held the contrary opinion, namely Baldus. In Baldus' view, if a statutory law has been enacted by the legitimate authorities, its underlying cause or reason should not be put into question (*supposita potestate*, *non est quaerendum de ratione*)[58].

IV. – Norms binding in conscience and the interpretation of precepts: the case of fraternal correction

The preceding paragraphs have shown that in following traditional scholastic and legal thought, Adrian argued that a positive law could be binding in conscience only on the condition that it served its final cause. As a practical application of the validity of the rule '*cessante causa cessat lex*', Adrian then adduced the precept to admonish a brother in the Lord who is sinning (*praeceptum corripiendi fratrem*). This is a precept commonly known as 'fraternal correction' (*correctio fraterna*), or, alternatively, as 'evangelical denunciation' (*denunciatio evangelica*)[59]. This procedure is laid down in Matthew 18:15–18, which is a text of fundamental importance to understanding the institutional role of the Church as the mediator between man and God – a mediating role which met with severe criticism in the work of the reformers during Adrian's time:

[55] S. Kuttner, *Urban II and the doctrine of interpretation*, *A turning point*?, Studia Gratiana, 15 (1972), p. 62, n. 21.
[56] Everaerts, *Topicorum seu de locis legalibus liber*, loc. 85 (*a cessatione rationis*), fol. 96v. Following the gloss, Everaerts is careful to stress that the maxim only holds in regard to the *causa finalis*.
[57] Francisco Suárez, *Tractatus de legibus et legislatore Deo*, in: Opera omnia, ed. C. Berton, Parisiis, Apud L. Vives, 1856, tom. 6, lib. 6, cap. 9, p. 39–46.
[58] Krause, *Cessante causa* (*supra*, n. 50), p. 89, n. 28.
[59] P. Bellini, Denunciatio evangelica *e* denunciatio iudicialis privata, *Un capitolo di storia disciplinare della Chiesa*, Milano 1986. Also discussed in Decock, *Theologians* (*supra*, n. **), p. 88–101.

> (15) If your brother does something wrong, go and have it out with him alone, between your two selves. If he listens to you, you have won back your brother. (16) If he does not listen, take one or two others along with you: the evidence of two or three witnesses is required to sustain any charge. (17) But if he refuses to listen to these, report it to the community; and if he refuses to listen to the community, treat him like a pagan or a tax collector. (18) I tell you solemnly, whatever you bind on earth shall be considered bound in heaven; whatever you loose on earth shall be considered loosed in heaven.

The precept of fraternal correction, then, holds that every Christian is under a duty to talk to his brother about his misbehavior. If the brother in question refuses to listen to him, then he should try to persuade him by appealing to one or two witnesses. In the event that even this second warning fails, the wrongs should be reported to the Church. These steps were seen as forming part of a true judicial procedure, which, in serious cases, could ultimately lead to the convocation of a council where the sinner was judged[60]. The medieval and early modern canonists insisted on the necessity of following each step in this procedural order (*ordo*)[61]. The secret, fraternal correction had to occur first (*primo fraterna et secreta correctio*), then the appeal to witnesses (*deinde testium adhibitio*), and, finally, the denunciation in court (*postremo denunciatio*). Helmut Coing claimed that this was exactly the procedure that had to be followed to bring a case before the English Court of Chancery[62]. Through this procedure of fraternal correction or 'evangelical denunciation', all cases involving sin could be brought before an ecclesiastical tribunal. At any rate, a Christian who sees his brother committing a sin must try to dissuade him.

The combat against sin and the promise of salvation are at the heart of Christianity, and of the Church as an institution, in particular. It is no coincidence, then, that the precept of fraternal correction precedes the verse that lays the foundation of the Church's power of the keys (Matthew 18:18). The Church's power of the keys (*potestas clavium*), that is the power to bind and loose sins, was central to the Church's claim to spiritual jurisdiction. In a remarkable book, Ronald Rittgers rightly finds it surprising that relatively little scholarly attention has been paid to the change in the conception of the

[60] The Council of Sens (1141) is a case in point. Subsequent to Bernard of Clairvaux's vain efforts to 'fraternally correct' Abelard in private, a council was summoned to judge Abelard; cf. W. Verbaal, *The Council of Sens reconsidered*, *Masters*, *monks*, *or judges*?', Church History, 74.3 (2005), p. 481–483.

[61] E.g. Martin de Azpilcueta (Dr. Navarrus), *Relectio in cap. Novit de iudiciis*, not. 5, num. 1, in: Opera Omnia, Venetiis, Apud D. Nicolinum, 1601, tom. 3: Commentarii et tractatus relectionesve, fol. 76r.

[62] H. Coing, *English equity and the 'denunciatio evangelica' of the Canon law*, Law Quarterly Review, 71 (1955), p. 223–241.

power of the keys during the Reformation[63]. The 'power of the keys' has been central to the Church's self-understanding throughout the ages[64]. It grants the Church jurisdiction over the soul. The precepts of fraternal correction and the power of the keys, then, lead us to the heart of that unique symbiosis of law and faith in the Catholic tradition. Not surprisingly, Adrian of Utrecht spent long pages on the question of the power of the keys in another of his popular writings, the *Quaestiones in quartum Sententiarum*, published in 1516, but going back to his lectures in Louvain between 1499 and 1509[65].

The power of the keys is so crucial, that it was strongly reaffirmed during the Counter-Reformation. A century after Adrian, Suárez warned that orthodox Christianity maintained that Christ had established a kind of tribunal in the Church, crowding it with judges to whom cases of conscience and sinners are to be brought[66]. In other words, the juridical approach to practical theology was a matter of Catholic orthodoxy. According to Suárez, seeing things differently was heretical. According to a view which circulated in his time, but which has remained subject to dispute within the canon law tradition, the power of the keys fell directly to all priests by virtue of the sacrament of holy orders[67]. The power of the keys granted priests the power to absolve

[63] R.K. Rittgers, *The reformation of the keys, Confession, conscience, and authority in sixteenth-century Germany*, Cambridge Mass. 2004, p. 3. But see E. Roth, *Die Privatbeichte und Schlüsselgewalt in der Theologie der Reformatoren*, Gütersloh 1952.

[64] For a historical account of the development of this concept, see L. Hödl, *Die Geschichte der scholastischen Literatur und der Theologie der Schlüsselgewalt*, Teil. 1: *Die scholastische Literatur und die Theologie der Schlüsselgewalt von ihren Anfängen an bis zur Summa Aurea des Wilhelm von Auxerre*, [Beiträge zur Geschichte der Philosophie und Theologie des Mittelalters, Texte und Untersuchungen, 38, 4], Münster 1960.

[65] For an in-depth analysis of Adrian's understanding of the 'power of the keys', see Ducke, *Handeln zum Heil* (*supra*, n. 17), p. 284–292.

[66] Francisco Suárez, *Commentaria in tertiam partem Divi Thomae, a quaestione 84 usque ad finem*, Disp. 16 (*De potestate clavium*), sect. 1, coroll. (*potestatem hanc esse per modum judicii*), num. 10, in: Opera omnia, ed. C. Berton, Parisiis, 1861, tom. 22, p. 340: 'Ex quibus facile etiam colligitur, potestatem hanc esse judiciariam, seu per modum judicii exercendam; quod etiam est de fide, ut constat ex Conc. Trid., sess. 14, cap. 1, ubi propterea can. 9 definit absolutionem esse actum judicii et sententiae prolationem. Quod etiam maxime confirmatur ex traditione Ecclesiae, quae in illis verbis semper intellexit, constituisse Christum Dominum in Ecclesia sua quoddam tribunal, et reliquisse judices, apud quos peccatorum et conscientiarum causae tractarentur; quod verba illa Christi, *remittendi et retinendi peccata*, *ligandique et solvendi*, satis indicant, ut disp. seq. sect. 2 latius expendam'.

[67] F. Merzbacher, *Azpilcueta und Covarruvias*, *Zur Gewaltendoktrin der spanischen Kanonistik im Goldenen Zeitalter*, in G. Köbler / H. Drüppel / D. Willoweit (eds.), Friedrich Merzbacher, Recht – Staat – Kirche, Ausgewählte Aufsätze, [Forschungen zur kirchlichen Rechtsgeschichte und zum Kirchenrecht, 18], Wien–Köln–Graz 1989, p. 275–302 (294–295). See also L. Villemin, *Pouvoir d'ordre et pouvoir de juridiction*, *Histoire théologique de leur distinction*, Paris 2003. The contemporary debate about power in the Roman Catholic Church centers around the interpretation of canons 129–144 in book 1, title 8 (*De potestate regiminis*) of the 1983 Code of Canon Law; see the notes by Myriam Wijlens in J.-P. Beal *et al.* (eds.), *A new commentary on the Code of Canon Law* (commissioned by the Canon Law Society of America), *Study edition*, Washington DC 2000, p. 183–194.

penitants from sin in the court of conscience (*potestas absolvendi a peccatis in foro animae*). However, the actual exercise of the power of the keys presupposed that a priest had first been granted the power of jurisdiction (*potestas iurisdictionis*) from the Pope or from a bishop, as when the care over a particular group of souls is committed to him. Hence, from the moment a priest was punished with excommunication, for instance if he converted to Lutheranism, he lost his jurisdictional power both in the ecclesiastical court and in the court of conscience[68].

Fraternal correction was thought to be a binding precept for every Christian. It was considered to pertain to justice as well as charity. Huguccio of Pisa, the 12th century commentator of the *Decretum Gratiani*, and, later, Cardinal Hostiensis, the most important canonist of the 13th century, forcefully asserted that every Christian was bound as a matter of charity to correct the sins of his brother[69]. As Thomas Aquinas explained in his elaborate question *De correctione fraterna*, fraternal correction is an act of charity in that it liberates the sinner from an evil, and an act of justice since it sets a good example for Christians other than the sinner in question[70]. If the sinner would not listen to the corrections of his brother, he could be taken to court by virtue of evangelical denunciation. Moreover, his brother was under a duty to take the sinner to court. However, it being a precept or law, the question was raised, whether the general theory of the equitable interpretation of norms also applied in the case of this specific precept of fraternal correction.

Adrian took the view that the underlying cause of the precept to admonish a sinner was the promotion of the spiritual health of that other person's soul (*causa est utilitas spiritualis fratris*)[71]. It should be noted that fraternal correction was not merely conceived of as a counsel or a good deed. Rather, it was a commandment, which required fulfillment under pain of mortal sin. So, in principle, there was no escaping its execution when necessary, unless the observation of the commandment did no longer serve its purpose. Adrian asserted that the obligation of fraternal correction could not obtain in the

[68] Francisco Suárez, *Disputationes de censuris in communi et in particulari de excommunicatione, suspensione et interdicto, ac praeterea de irregularitate*, disp. 14 (*De sexto effectu excommunicationis majoris, qui est privatio jurisdictionis ecclesiasticae*), in: Opera omnia, ed. C. Berton, Parisiis 1861, tom. 23, p. 366: 'Hic est ultimus effectus excommunicationis pertinens ad privationem spiritualem bonorum, in quo nihil addere oportebat de jurisdictione spirituali pertinente ad forum poenitentiae; nam in superioribus dum ostendimus excommunicatum privatum esse potestate administrandi sacramenta, satis est consequenter ostensum, esse privatum jurisdictione judicandi in illo foro. Solum ergo hic agimus de jurisdictione in foro exteriori'.

[69] Bellini, *Denunciatio evangelica* (*supra*, n. 59), p. 52–53.

[70] Thomas Aquinas, *Summa Theologiae*, IIaIIae, quaest. 33, art. 1 (*Utrum fraterna correctio sit actus caritatis*), in: Opera omnia iussu impensaque Leonis XIII edita, tom. 8: Secunda secundae a quaestione I ad quaestionem LVI cum commentariis Cardinalis Cajetani, Romae 1895, p. 262–263.

[71] Adrian of Utrecht, *Quaestiones quodlibeticae*, quaest. 6, art. 1, concl. 2, litt. h, fol. 111v.

event that admonishing a brother in faith made no sense. To buttress his view, Adrian quoted a statement from one of Augustine's sermons on penance saying that 'if I knew that it were of no use to you, I would not terrify you with my admonishments'[72]. For example, if the brother was dangerously stubborn, or a recidivist. In that case, the cause behind the precept ceased to exist, since its end was never served. Pursuant to the rule '*cessante causa cessat lex*', the precept itself also ceased to exist.

For Adrian, the case of fraternal correction was a perfect illustration of how important it was to be concerned with what is really equitable (*verum aequum*), and to have an eye for circumstances that escape the general scope of the law. If the priest were to stick to the letter of the law (*ad corticem literae*), he would become the murderer of the soul (*necator animae*)[73]. In the course of his sixth *quaestio quodlibetica*, Adrian applied his theory about the equitable interpretation of the binding force of positive laws to many other cases, often deriving from Roman law. Most problems were distinctly juridical, at least in the eyes of the modern theologian. For example, his discussion of a prostitute's right to claim compensation for her work directly inspired the Dutch humanist jurist Hugo Grotius' views on the subject[74].

V. – Concluding remarks: Adrian and the Catholic tradition of 'moral jurisprudence'

Through a close-reading of Adrian of Utrecht's sixth *quaestio de quolibet*, we tried in this paper to reveal the juridical character of moral thinking in the Catholic tradition in the early modern period. True to traditional Catholic practical theology, which was highly indebted to Roman and canon law, Adrian engaged in technical legal argument to solve problems of practical morality. For the sake of solving cases of conscience, he used more or less the same arguments as the jurists of his day. Adrian was not hostile to juridical thinking, as one could have wrongly surmised from his indebtedness to the *devotio moderna*[75]. If anything, Adrian was hostile to Luther and his new way

[72] Augustinus, serm. 393 Maur. (= PL 39, c. 1715): 'Nam si scirem non tibi prodesse, non te admonerem, non te terrerem'.

[73] Adrian of Utrecht, *Quaestiones quodlibeticae*, quaest. 6, art. 1, concl. 2, litt. h, fol. 112r.

[74] Decock, *Theologians* (*supra*, n. **), p. 495.

[75] The founder of the *devotio moderna*, Geert Grote (1340–1384), was notably hostile to Roman and canon law; see P. Brachin, *Adrien VI et la* devotio moderna, Études germaniques, 14 (1959), p. 97–105 (103). However, the same cannot necessarily be said of his followers. Besides Adrian of Utrecht one could cite the example of Arnold Gheyloven of Rotterdam (c. 1375–1442), a regular canon at the Windesheim monastery at Groenendaal, whose work on practical theology is replete with references to the canon law tradition; cf. A.G. Weiler, *Het morele veld van de Moderne Devotie, weerspiegeld in de* Gnotosolitos parvus *van Arnold Gheyloven van Rotterdam, 1423, Een Summa van moraaltheologie, kerkelijk recht en spiritualiteit voor studenten in Leuven en Deventer*, [Middeleeuwse studies en bronnen, 96], Hilversum 2006, p. 41–72.

of looking at morality. As is obvious from Adrian's letter to Chieregati, Adrian opposed the idea of evangelical liberty because, allegedly, it posed a threat both to the ecclesiastical and the secular establishment. The institutional power of the Church to bind and loose sins, the 'power of the keys', was undermined by the new ideas on conscience and Christian morality.

Adrian may well have approved of the maxim that 'pure jurists are pure donkeys' (*purus legista purus asinus*), or, for that matter, of the saying, popular among the Lutheran reformers, that successful jurists make poor Christians (*Juristen böse Christen*)[76]. But he understood very well that if he fulfilled his job as a pure Bible-based theologian he would turn himself into a pure Lutheran-like heretic. The Lutherans' Bible-based theology would eventually make the Church's 'economy of salvation', including the expert advice in the *forum internum* and the sophisticated legal analysis on which it was based, useless. The legal character of moral theology in the Catholic tradition was intricately intertwined with a view of the pastor as the exclusive guide to salvation. From his correspondence with Erasmus, it is obvious that Adrian took the pastoral task of the Church very seriously[77]. He argued that Christ's blood had set man free and then He entrusted the salvation of their souls to the Church[78]. He warned Erasmus that evangelical liberty came down to diabolic slavery.

Increasingly, though, the reformers found support for their theses in the Louvain Faculty of Theology. Certainly in the second half of the sixteenth century, this would lead to hostility between Louvain theologians such as Michael Baius (1513–1589) and members of the Jesuit order such as Leonardus Lessius (1554–1623)[79]. Inspired by the theologians of Salamanca and by leading canonists such as Martín de Azpilcueta (1492–1586) and Diego de Covarruvias y Leyva (1512–1577), Lessius reinforced the old tradition of combining law and theology against the reformed currents prospering in Louvain. Lessius insisted that the knowledge (*scientia*) a good confessor must possess pertains not only to theology but also to canon law[80]. Moral theologians

[76] M. Stolleis, *Juristenbeschimpfung, oder*: '*Juristen – böse Christen*', in: Th. Stammen et al. (eds.), Politik – Bildung – Religion, Hans Maier zum 65. Geburtstag, Paderborn et al. 1996, p. 163–170.

[77] For further analysis, see K.-H. Ducke, *Das Verhältnis von Amt und Theologie im Briefwechsel zwischen Hadrian VI. und Erasmus von Rotterdam*, [Erfurter Theologische Studien, 10], Leipzig 1973.

[78] Verweij, *Pas de deux in stilte*, p. 75 (letter from Pope Adrian VI to Erasmus, Rome 23 January 1523).

[79] This controversy has been studied mostly from the perspective of dogmatic theology, cf. E.J. Van Eijl, *La controverse louvaniste autour de la grâce et du libre arbitre à la fin du 16ième siècle*, in: M. Lamberigts (ed.), L'augustinisme à l'ancienne faculté de théologie de Louvain, [Bibliotheca Ephemeridum Theologicarum Lovaniensium, 111], Leuven 1994, p. 207–282.

[80] L. Lessius, *In III Partem D. Thomae de Sacramentis et Censuris*, quaest. 8, art. 5, dubium 8 (*quanta requiratur scientia in confessario*), num. 50, in: De beatitudine, de actibus humanis, de incarnatione Verbi, de sacramentis et censuris praelectiones theologicae posthumae. Acceserunt

needed a sound knowledge of all sources of law to be able to determine the rights and obligations of the penitents with due precision. In the words of Francisco Suárez[81]:

> The road to salvation passes through free actions and moral rectitude. Since moral rectitude strongly depends on law's being, as it were, the rule of human actions, the study of law is a major part of theology. In treating of laws, the sacred doctrine of theology investigates nothing less than God himself in his function as a legislator. (…) It is the task of a theologian to care for the consciences of the pilgrims on earth. Yet the rectitude of consciences is dependent on observing the law just like moral depravity is dependent on breaking the law, since a law is every rule which leads to the acquisition of eternal salvation if observed – as it must be – and which leads to the loss of eternal salvation when it is broken. The study of law, then, pertains to theologians, to the extent that law binds conscience.

Jurisdiction over the souls required a profound knowledge of a plurality of legal sources and the ability to reason as a jurist. Saint Alfonso Maria de' Liguori, who was a lawyer by training, agreed to define moral theology properly as 'a kind of moral jurisprudence and civil science' (*quasi moralis iurisprudentia ac scientia civilis*) capable of determining what was right if the existing norms remained silent[82]. Clearly, in the eighteenth century, the Catholic fusion of law and theology was still very much alive. Moreover, an influential Churchman such as Cardinal Van Roey (1874–1961), who taught moral theology in Louvain about four hundred years after Adrian of Utrecht, was still trying to come to grips with some of the most sophisticated techniques in contract

variorum casuum conscientiae resolutiones, ed. I. Wijns, Lovanii, apud C. Coenestenium, 1645, p. 240.

[81] F. Suárez, *Tractatus de legibus et legislatore Deo*, in: Opera omnia, ed. C. Berton, Parisiis, Apud L. Vives, 1856, tom. 5, Prooemium, p. ix–x : 'Quoniam igitur hujus salutis via in actionibus liberis morumque rectitudine posita est, quae morum rectitudo a lege tanquam ab humanarum actionum regula plurimum pendet ; idcirco legum consideratio in magnam theologiae partem cedit ; et dum sacra doctrina de legibus tractat, nihil profecto aliud quam Deum ipsum ut legislatorem intuetur. (…) Deinde theologicum est negotium conscientiis prospicere viatorum ; conscientiarum vero rectitudo stat legibus servandis, sicut et pravitas violandis, cum lex quaelibet sit regula, si ut oportet servatur, aeternae salutis assequendae ; si violetur, amittendae ; ergo et legis inspectio, quatenus est conscientiae vinculum, ad theologum pertinebit.'

This passage is also commented upon in D. Tamm, *Rechtswissenschaft im Dienste der Theologie, Zur Stellung der Rechtswissenschaft an den nordischen Universitäten im 17. Jahrhundert*, in: D. Tamm (ed.), Med lov skal land bygges og andre retshistoriske afhandlinger, Copenhagen 1989, p. 185–195.

[82] A.M. Liguori, *Theologia moralis*, Venetiis, apud Remondini, 1773, tom. 1, prol. (*Dissertatio prolegomena de casuisticae theologiae originibus, locis atque praestantia*), part. 3 (*pars apologetica*), cap. 1, p. lxv: 'Est enim theologia illa moralis quasi jurisprudentia, ac scientia civilis, quae si bene definiatur, non in eo sita est, quod quispiam memoria leges omnes scriptas teneat, quamvis et id non sit extra ipsam, sed quod ubi leges nihil dicunt, norit id, quod rectum est invenire.'

law[83]. Each in their own way, Adrian and Van Roey embodied a distinctively Catholic mode of practical thinking which lays at the crossroads of law and morality.

[83] E. Van Roey, *Le contractus germanicus ou les controverses sur le 5% au XVIe siècle*, Revue d'Histoire Ecclésiastique, 3 (1902), p. 901–946.