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COHERENCE IN LEGAL SCHOLARSHIP: IN SEARCH FOR CONNECTIVITY AND UNITY IN CIVIL LAW DOCTRINE (16TH-18TH CENTURIES)

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Old Regime legal scholarship has insufficiently been tested for patterns and clusters within the legal contents that they contain. The legal interpretation of scholars of that period who wrote academic texts has not been scrutinized systematic-empirically for the coherence they were seeking. This paper demonstrates that this lacuna in present-day legal-historical research has a match in legal studies in general, but also that it follows on from assumptions and methodological choices that have long been prevalent among legal historians. A likewise modest attention for coherence, in general, and as established within contemporary legal scholarship in particular, is highly determined by the ambiguity of the act of legal interpretation. This compound act commonly hasn’t been done justice. Data and testable features have been selected on the basis of researchers’ approaches and assumptions in which normative purposes are not absent. In that regard, old legal doctrine is a good test ground for establishing a methodology that aims at capturing coherence seeking. Its analysis cannot serve normative goals. Moreover, because of the advantage of hindsight, legal academic writings of bygone times can serve as basis for assessing coherence in law as enveloping over time and in response to context. Furthermore, the high and virtually exclusive authority of Old Regime legal scholarship makes it fit for analysis on coherence in law in general. This paper formulates modes of interconnectedness that disentangle the act of legal interpretation as reflected in legal scholarship. It illustrates these modes and their evaluation on the basis of scholarly writings of the Early Modern period (c. 1500-c. 1800) regarding cessio bonorum, which was the transfer of property by an imprisoned debtor in return for his liberation.

1. Coherence as object of research in legal studies: a state of the art

Coherence in law has hardly ever been studied in any systematic-empirical way. Arguments and solutions that are brought forward in legal texts are usually examined from a dogmatic perspective. This also goes for legal writings of scholars, which – as will be explained below – are nonetheless the medium par excellence through which coherence is sought and crafted. Contemporary legal scholarship is examined empirically, but foremost by way of legal interpretation, in a dogmatic fashion, and not systematically. The most common viewpoint of lawyers pursuing legal analysis of legal writings does not take law as an object of study in itself.¹ Lawyers decide ‘what the law is’ starting from a scrutiny of diverse legal materials, among them doctrinal writings, from which they infer decisions. These materials are read for their contents and their divergences are reconciled into a comprehensive statement that is a solution for a concrete problem. This act of legal interpretation serves the purpose of

¹ There is a whole body of literature on this tension between law-making and law as a phenomenon. See, for example Hans Kelsen’s distinction between normative and descriptive sciences.
normative sentencing.²

When the empirical analysis for patterns in legal materials is conducted, this same normative aim is often pursued as well. Empirical legal studies, which have become widely practised among American legal scholars, focus on judgments and judicial opinions. Research of this type is imbued with Oliver Wendell Holmes Jr.’s urge to conceive of legal study as “the prediction of the incidence of public force through the instrumentality of the courts”.³ As a result, empirical approaches have been directed towards a search for mechanisms that structure judge-made law. Attempts have been made to trace causality between facts of the case, legal constraints, and the outcome of trials, in order to predict judicial decisions (hereafter: “determinist approach”). Legal empiricists also endeavour to trace the influence of judges’ profiles – and in this regard, with less attention for the distinctive characteristics of facts submitted to courts – onto their decisions, in order to expose mechanisms in the decision-making process that reach beyond, even put aside, legal interpretation (hereafter “legal-realist approach”). The same goal of certifying potential results of cases is often present in this approach as well.⁵

Techniques used among scholars of both strands of method include subject coding, and bibliometric or citation analysis.⁶ Such techniques, and the research questions which they purport to answer, are often aimed at clarifying coherence within law (this especially in the “determinist” approach). For legal-realists this coherence resides in mechanisms outside the framework of the law as system. However, for the “determinist” strand of research, many of these techniques are incomplete in that they are concerned with some elements of coherence only (e.g. the authority of opinions, as sought through cross-author analysis and citations). Case coding is mostly restricted to the outcome of the case and to basic facts (claim, type of court). The focus is on judges’ opinions and if legal reasoning is assessed, it is usually restricted to cited texts or concepts.⁷

Furthermore, the empirical methods used, both in the “determinist” and “legal-realist” approach, hinge on choices and practices in research design and inference that are


⁴ For example, S. Brüninghaus and K.D. Ashley, ‘Predicting Outcomes of Case-Based Legal Arguments’, ICAIL 2003 Proceedings of the 9th International Conference on Artificial Intelligence and Law, 233-242.


problematic because of a blending of descriptive with normative aims. First, this has an effect on source selection and on the choice of coding categories, which are often (unwillingly) narrowed down from the start. The impact of context on legal decision-making is analysed by legal-realist scholars that identify attitudinal variables along such lines (e.g. in assessing the impact of political ideology of judges). Also other legal-empiricist scholars explore the influence of variables that come from outside the legal system, and they do not concern the profile of judges, but their design of potential variables (coding) is equally restricted. As a result, priors affecting selection criteria and coding categories end up in corroborations of researchers’ assumptions. Such selective attitudes have an impact on the nature of conclusions reached. Even when reliability is affirmed, external validity is seldom justified. All this, as will be explained further, largely relates to a conflation of descriptive and normative approaches (in both mentioned strands of research) and an exaggeration of applicative features of the act of legal interpretation (in the “determinist” approach).

Furthermore, while aspects of legal complexity and coherence, as reflecting underlying mechanisms and properties of agents, have been studied on the basis of factual data – in case law (judgments and judicial opinions), and also, for example, concerning references that exist between articles of legislation – they are scarcely scrutinized with regard to legal scholarship. The broad viewpoint of legal authors is then missed. Their approaches, which crystallize into legal academic writings, are more encompassing than those of judges and legislators. Even though different forms of law (“sources”) have few distinctive characteristics when law is considered from an external perspective, as a phenomenon in itself, there remains a huge difference between legal doctrine and other types of “legal writings” in regard to coherence seeking. The vantage point of scholars writing on law encompasses many types of law (legislation, case law, legal scholarship, customs) and legal practice (contracting, forensic) as well. They weave the diverse materials found in these texts and practices into a whole. The activities of legal scholars – as reflected in the legal scholarship that they produce – have been identified as crucial when it comes to achieving legal coherence. Legal scholars seek to expose substantive reason across diverse forms and sources of law. They draw up connections between rules and on the level of the legal system as a whole. Moreover, the purpose of reaching decisions is less restraining for legal

11 GILLMANN, ‘What’s Law Got To Do With It’, 468; HALL and WRIGHT, ‘Systematic Content Analysis’, 82 (concerning coding categories).
16 A. PECZENIK, ‘Justice in legal doctrine’ in G. DODKER-MACH and K.I.A. ZIEGERT (eds), Law and legal culture in
writers than for judges and legislators. The products of the legal interpretations of legal scholars do not have to take certain internal-legal constraints, such as binding force of precedent, hierarchy of sources of law, or the non-normativity of contractual practice, as seriously as judges and legislators do. They can state what the law ought to be, and not merely what it is. For any research into coherence in law, and of the act of legal interpretation to which it relates, legal scholarship is thus the best medium to study.

This lack of systematic-empirical attention for patterns and consistency in legal scholarship stands in contrast to theoretical views concerning the inevitability of ordering through legal interpretation, and the relevance of the activities of legal scholars in this regard. Coherence in law has often conceptually been linked to concrete legal work. A theoretical wealth on this issue explains partly for why pattern analysis has seldom been done on a systematic-empirical basis. Legal-theoretical scholarship aims at looking at law from a perspective that is not directed towards resolving concrete legal issues, but it has a foundational bias. Coherence then serves as analytical argument for the validity and functionality of law as a phenomenon, and this obfuscates to a large extent the question of whether it is actually there.

The linchpin in devising a methodology to assess coherence in law – in its widest form, thus in legal scholarship – resides in addressing the compound nature of legal interpretation. This is necessary in order to define the object of study properly, but it is equally essential because an objective approach of coherence must be done on the basis of other methods than legal interpretation. Legal research that combines a normative positioning with descriptive analysis inevitably mixes up an external and internal perspective on law. The mentioned legal-empiricist studies have been marked by this problem. Many researchers of legal empirical studies have commonly blended an implicit purpose of their research with artificial limitations projected onto their research object. An aim for legal positioning (making a normative statement), purportedly reached on the basis of systematic analysis, was combined with reductionist assumptions regarding variables and legal interpretation. A reductionist approach towards legal interpretation could go either way. In the mentioned “legal-realist” approach legal arguments are conceived of as “logical forms given to conclusions”, the latter of which are reached on the basis of attitude-steered selection. Scholars standing in the mentioned “determinist” strand of thought have founded their prediction models on fixed concepts of normativity, thus relegating legal interpretation to

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the application of existing norms.  

However, legal interpretation by academics encompasses both application and construction. Construction can entail transposition (of e.g. policy considerations, practices) into rules and principles, as well as the revision of norms that are in use, their combined and systematic exposition, and the argumentative reasoning underpinning these operations. Moreover, reasoning can mean that rules and principles are extended in scope. Analysis and construction are not easily separated. For example, when legal authors are read and cited, arguments, even rhetorical reasoning, and decisions can become blurred. In Old Regime legal doctrine, the reasoning of one scholar could be considered as normative by another. This happened, for example, when normative power was read in discursive text that was not purported in that way by the original author. Therefore, the act of legal interpretation is more than a affirmation of existing law.

However, it is neither a one-on-one product of structural influences that are not legal. Any legal agent has to take the fixedness of law, its aim of providing legal certainty, into account, and cannot deviate too much from the materials which are interpreted. Yet, even so, legal interpretation, and the coherence that it spawns, can be assumed to develop in response to contextual factors (i.e. those factors residing outside the sphere of doctrinal legal writing), which can relate to law in a strict sense (e.g. change of legislation) and to variables existing outside the law (e.g. the economic constellation). The latter can be more or less fixed, or more subject to change.

Another important distinction, besides application-construction, with regard to coherence as sought in legal interpretation concerns connectivity (interconnectedness) and unity (compatibility). Legal scholars interconnect the materials that they reflect on. In arguing in favour for this or that rule they indicate the legal materials from which this position is inferred. They point out which are the adhesion points at which their own legal statements connect with existing legal materials. This can be labelled connectivity or interconnectedness. When considering legal scholarship from this angle, the picture yielded is a web of references, which can be of different kinds, but which demonstrates the foundations as mentioned by authors for reaching their normative conclusions. From an empirical standpoint, connectivity can be traced by way of analysis of the concrete links between legal reasoning of authors and the “sources” from which they claim their ideas were derived. Another aspect of coherence is unity or compatibility. Different normative statements of authors have to match, in order to establish a coherent cluster of rules. This matching amounts to law that is not contradictory, either in its contents, or with regard to their purported function. Empirically, unity is more difficult to assess than connectivity. Compatibility in contents can be tested empirically (negatively: contradiction is absent), but the congruity between purposes of rules, as seen in the relation between contents and

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purpose, and in interaction with other rules and their purposes, is a complex object (see further below). Moreover, compatibility does not require traces to be left in writing. Legal writers can implicitly condone the normative positions in legal sources other than legal scholarship, or in writings of other legal authors. In contrast to connectivity, compatibility does not refer to arguments but only to the legal positions proffered by legal writers. In the third paragraph, a case will be made to use compatibility as evaluative concept to assess different modes of interconnectedness.

By way of provisional conclusion, it can be stated that coherence is best tested on the basis of legal scholarship, and that an apt methodology must take into account practices of referencing and linking of elements with assessments of congruence in contents and purpose. Legal interpretation is both corroborating and innovative. This contextual influence adds another difficulty to the design of a proper methodology. Contextual elements can but difficultly be translated into manageable and measurable data categories. Moreover, the dropping of a normative perspective is a necessary – yet not sufficient – condition to avoid preliminary selection of sources and coding categories for a large part. In order to preserve a perspective as broad as that of the jurists studied, any methodology aiming at capturing their coherence must be of an ample scope (see further under 3).

2. Old civil law as test ground: from communis opinio doctorum to legal method

2.1. Communis opinio doctorum and conjectures on coherence in Old Regime legal writings

Old Regime legal scholarship (ius commune, droit savant) has been depicted in ways that explain why its coherence has not been studied as such. An older approach by legal historians took the academic legal literature of the later Middle Ages and the Early Modern period, as well as the source texts of Roman and canon law on which it was based, as a body of substantive law that was imposed secondarily when local legislation lacked solutions. It was considered a collection of fixed rules. This fixedness was conceived of having its foundation not so much in the source texts of the Corpus Iuris Civilis and Corpus Iuris Canonici but rather in the communis opinio doctorum (hereafter COD), the shared opinion of legal scholars who assembled these texts and the comments on them into a comprehensive whole. The aggregate opinions of authoritative legal writers were considered as constituting the rules that were to be applied by judges.

The mentioned legal-historical approach of congruent-authoritative-opinion-as-backbone was a conflation of ideas on the nature of legal scholarship and legal science in general. One assumption underlying the mentioned views was a nineteenth-century essentialist one; the “shared conviction of doctors” was held to be a precursor of the Enlightenment codifications, at least with regard to the validity of legal rules that were imposed and

applied. The essentialist approach lay in considering the law as being fixed to a large extent and as apt of being identified (hence, found and imposed). Whereas nineteenth-century positivists considered the state or the sovereign as providing the ground of the law, it was – in the opinions of the legal historians cited – scholarly agreement that marked the cornerstone of the law predating the nineteenth-century state.\textsuperscript{27}

Furthermore, the essentialist flavour with regard to Old Regime academic writings was combined with the idea that authority of opinion hinged on the quality of legal reasoning. It was thought that some rules were better than others. The highest quality in legal reasoning was reached by only few but widely acclaimed legal authorities. It was held that in spite of contention among legal authors, some rose to the level of grasping the essence of what the law was, and therefore their standpoints were considered as the hard content of the doctrine of the Old Regime. Essentialism (‘scholarly agreement’) was thus blended with normative appraisal.

The mentioned categorization of COD as foundation for the authority and validity of ius commune scholarship is a transposition of an exaggerated historical concept. The label of COD was mentioned among late medieval and sixteenth- and seventeenth-century legal scholars, but it was far from a systematic guideline for judges in order to decide which rule applied.\textsuperscript{28} Moreover, COD was developed in the fourteenth century only, and disappeared from civil law courts starting from the turn of the seventeenth century, thus it did not encompass the whole period during which legal scholarship was pervasive as source of law (c. 1100-c. 1800).\textsuperscript{29}

However, in spite of the mentioned a-historic assumptions among legal historians the use of COD in Old Regime scholarship should not be downplayed. Its application was ample and it was more than a label expressing appreciation of past doctrine by the author referring to it. COD could serve as rhetorical device (COD was then construed in order to give arguments more weight), but that seems to have been exceptional. COD referred to inter-author appraisals of arguments and rules. This is evident in the descriptions of what was considered COD. Some authors collecting “communes opiniones” admitted deductive inference at selection, on the basis of detected soundness of arguments for example,\textsuperscript{30} but there seems to have been a common acceptance that some rules were COD and others were not. Hence, from the viewpoint of a legal historian of today, these depictions have an empirical touch.

\begin{footnotes}
\item[27] See, for example, CAVANNA, Storia del diritto moderno, 152-155: “communis opinio was the doctrinal version of legislation”.
\item[28] Stressing that only judges (not scholars) were held to conform to the principle and that many exceptions applied, allowing for flexibility, is U. FALK, “‘Un reproche que tous font à Balde. Zur gemeinrechtlichen Diskussion um die Selbstwidersprüche der Konsiliatoren’, in A. CORDES (ed.), Juristische Argumentation. Argumente der Juristen, Cologne, Böhlau, 2006, 43-44.
\item[30] See for example, F. TURZANI, CLXV communes opiniones sive sententiae iurisconsultorum, Venice, Iordanus Zilettus, 1557, 3 ’... Quid multa? Obtemperandum fuit, his praesertim viris, quorum authoritas apud me plurimum valeret...’
\end{footnotes}
However, COD was not essentialist, it did not refer to fixed norms. Bundles of “shared opinions” were devised as collections of so-called adages, principles; the shared convictions of scholars were thus not considered norms in themselves, but rather overarching rules of thumb that served to guide interpretation (of judges, scholars). Legal interpretation, even with tools such as COD, was considered as innovative and confirming at the same time. This was the case for Old Regime scholarship as it applies to present-day legal writings. COD was not the basis of a consistent set of scholarly norms, but instead a collection of gridlines for legal interpretation. As such “shared opinions” contributed to coherence seeking, and expressed coherence themselves, even though they did not determine the contents of judge-made or scholarly law.

2.2. The demise of the substantive ius commune and a remaining disinterest for cross-theme patterns

The mentioned conception of Old Regime legal doctrine as consisting exclusively of inter-author ‘best’ opinions went hand in hand with a legal-historical research agenda that comprised conceptual-genealogical analysis of legal institutions. This approach has been prevailing among legal historians since the dawn of the discipline in the nineteenth century. Legal institutions can be defined as categories subsuming legal rules that contain the same terminology (Begriffe, Rechtsideen, e.g. ownership, contract). 31 Legal-historical research takes the form of tracing back rules through time from within the boundaries of such categories, on the basis of cross-author analysis. The idea underlying this method is that legal scholars that are analysed for their opinions stuck to the essential features of the mentioned Begriffe and that their interpretations did not cross the demarcations that were implicit in the categories. 32 This method was for a long time a corollary of the abovementioned views regarding Old Regime scholarship. Because coherence throughout academic writings on law was more or less presumed in the abovementioned “COD” approach, content analysis was restricted to particular institutions and was deemed a piecemeal reconstruction of a systemically consistent law. 33

Over the past sixty years Old Regime legal scholarship has increasingly been categorized as reflecting an intellectual model rather than comprehensive sets of rules under overarching concepts. Techniques of legal reasoning (the scholastic method, also called mos italicus) and legal terminology were shared, but in terms of contents late-medieval and Early Modern scholarship is nowadays often considered a dispersed field of opinions that were but loosely clustered around rules and principles found in the Justinianic or canon-law sources. 34 Depending on author and period the solutions proposed could be divergent and even contradicting. This approach amounted in the view that jurists within late-medieval and

32 Conte, Diritto comune, 16-42.
33 For a critique of the “Medioevo sapienzale”, which takes scholarly consistency without links to society as a paradigm for the Middle Ages (e.g. P. Grossi), see E. Conte, Diritto comune. Storia e storiografia di un sistema dinamico, Bologna, Il Mulino, 2009, 33-34.
Early Modern society produced rules and arguments in a highly abstracted fashion, from within a set of texts that did not provide for ex ante legal certainty. The hard elements in the approaches of jurists were how they inferred rules from these texts, and not the rules themselves.

However, this “patchwork quilt” view, with strands of thought only connected by way of method, was not based on systematic analysis of the contents of legal scholarship across themes. In fact, an analytical deconstruction of the substantive ius commune has often been assumed as an implicit argument to continue a conceptual-genealogical analysis of specific legal institutions, which is still widespread.\textsuperscript{35} Again, assessments on (in)coherence within old scholarship were not a result obtained by applying systematic-empirical research. Legal historians have exposed genealogies of thought. Sometimes schools of thought were identified (the divide between Azo and Accursius is one famous example), and legal authors have been categorized with labels implying consistency in their ideas (e.g. aequitas gosiana, the “philosophical” approaches of Baldus), but most of these claims rest on the analysis of specific institutions as standing next to one another. Problematic in the mentioned “patchwork quilt” view is that it takes method as backbone, even though the legal method which has been identified as pervasive and foundational (mos italicus) was itself largely open-ended. Analogous reasoning, creative deductions from the mens of rules, even irrespective of their wording, and a lack of guidelines as to when and how to apply them,\textsuperscript{36} constituted tools within the method that not only precluded fixedness in law, but which also render the label “method” problematic.

The mentioned method-approach was one way to solve the conundrum of state formation. For the early modern period (ca. 1500 - ca. 1800), there is a discrepancy between the rise of the state, and its common attributes, which include legislation and central courts, on the one hand, and the persisting importance of scholarly writings in law, often read across borders and with remaining relevance for legal practice, on the other. Added to that is regional divergence, which became paramount from the sixteenth century onward. It was reflected in the contents of legislation that was issued by different states deviating – each in their own different way – from ideas that had been proffered by scholars before, even though legal writings remained paramount for solving issues concerning the many themes that were not the object of legislation. Legal doctrine became regional itself. This regionalization has commonly been associated with mounting incoherence in law in general. Therefore, legal historians have argued that starting from around 1450 the method and contents of the ius commune were dismantled.\textsuperscript{37} From that point forward, regional divergence in legislation and legal scholarship was presumed. This was then implicitly considered an argument in support of legal-historical analysis of the development over time of demarcated institutions only, now within borders and with cross-state comparison. Not only is this dismantling-idea much linked to the view of ius commune as comprehensive law in a substantive sense, it also hinges on the assumption that legal method is immune to regionalization. Furthermore, regionalization and a multiplication of sources of law do not incite incoherence per se. New ways of establishing links within law could have been

\textsuperscript{35} Conte, Diritto comune, 33-34; Stolleis, Rechtsgeschichte schreiben, 22-24.


undertaken by legal scholars in their writings.

In order to draw up a methodology of capturing coherence in *ius commune* writings, which will assess whether the mentioned claims on a crumbling down of legal scholarship are justified, a thematic area must be chosen. For some subjects of law, coherence can be presumed to have been more vital than for others. The factual relevance, and normativity, of legal scholarship is particularly evident with regard to the theme of collateral rights. Coherence that was crafted by legal scholars was significant because of the economic relevance of this subject. Rights of collateral can be defined functionally as encompassing security interests in movables and intangible assets (cash, financial instruments, future gains). This definition is much broader than the legal categories that legal-historical literature has traditionally linked to collateral rights (*e.g.* pignus (possessory pledge), fiducia (ownership as collateral)), and they are not only concerned with property (ownership). Rights of collateral are considered conditional claims vis-à-vis a debtor’s property, assets or capital, for their proceeds or substituted value; they serve as security for creditors in case of default. This function means that they support credit markets. Lending can be effective only on the basis of law, because it determines when and how security interests can be materialized. In the Early Modern period (c. 1500 - c. 1800), the rise of states and legislation notwithstanding, the law on collateral rights was still predominantly crafted by legal scholars in their writings. Throughout the later Middle Ages (ca. 1250 - ca. 1500) and the early modern period, legislation on the substantive requirements of security interests and on matters of insolvency remained scarce and succinct. Bylaws and statutes usually referred implicitly to scholarly arrangements (*e.g.* actio Pauliana, fraus creditorum, cessio bonorum, and so on). As a result of all this, the thematic area of collateral rights serves best to test whether coherence was present in the scholarly legal writings addressing questions related to it.

3. Studying coherence in law

3.1. Can legal coherence be studied systematic-empirically?

Coherence of law has not been operationalized so as to test it and to produce falsifiable statements concerning coherence. For all approaches mentioned, coherence has not been studied as an empirical object in itself. It has been suggested above that this follows on from methodological choices and perspectives. However, in order to ascertain that such reasons are not merely correlative to this absence of attention, but are also causal in sufficient terms, questions on epistemology must be raised. Before advancing a methodology for exposing coherence in law, as found in legal scholarship, one must wonder whether coherence can be anything else than a concept used in legal-theoretical discourse, an argument underpinning legal-dogmatic approaches, or a systemic quality attributed to data that are not in themselves coherent.

If the concept of coherence in law pertains to the reasoning of the researcher and not to the actual legal activities of the scholar (and its traces) under scrutiny, then a study of coherence as such would be analytical and not empirical. Then coherence would pertain to a domain of concepts that are imposed on collected facts by way of inference. If so, coherence can relate

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to language and methods of the social sciences when it is analysed by researchers that take an external perspective on law. When being considered from an internal-legal viewpoint, coherence risks to be blended with the normative labour of what lawyers do. “Coherence” then is at a danger of being instrumental, stressing the validity of legal arguments and their purposiveness. In this regard, it is crucial to distinguish between the search for and assessment of coherence by the lawyer producing normative statements on the one hand and by the researcher who examines these statements and those of other lawyers on the other. The question is then whether lawyers of old times searched and established coherence, the second one whether it can be found without inference beyond the actions and views of historical subjects.

In order to operationalize these questions a bit more, there are a number of ways in which not to approach coherence. First, it should not be considered as monism among or total connectedness between each individual element of the law. The clustering of materials (arguments, rules) can reveal coherence seeking, even if some clusters are incompatible with other clusters. Legal scholars are humans. Their attempts to establish coherence must not be put aside on the basis of systemic-ness as an absolute category. As a result, also the diachronic properties of coherence must be taken into account. Legal interpretation yields new decisions (normative positions) and it aims at integration of these new decisions within the decisions that were made in the past. It can be assumed that legal arguments are consolidated over time. This consolidation is then an expanding of (the search for and establishment of) coherence. When it takes places over time, it is the work of more than one individual. It is the aggregate effort of scholars, in their interactions, that then increases coherence. As a result of all this, assessing coherence and its development should not be a test of the congruence of elements within the system of law in idealist terms. It can be identified by way of pattern and cluster analysis.

Secondly, coherence can but must not be inferred from a foundational basis (a hierarchy of “sources of law”, a moral high ground in e.g. natural law). If such a basis were present, and applied throughout the interpretative actions of lawyers, coherence is its mimicking feature. From the vantage point of the legal scholar of old times, such foundations could have been important. However, for the contemporary and externally looking researcher, they are not useful as analytical concepts. This is because foundational arguments changed over time. Whereas early legal scholars, of the later Middle Ages, attached the validity of their statements to the authority of highly esteemed peers that came before them (see above, the “communis opinio doctorum”), in the sixteenth century a more “spirited” approach became prevalent. In that period, legal scholars sought to expose the law not by way of matching authoritative texts, but instead by expanding their underlying “reason” or “equity” so as to re-align and reformulate rules in consistent ways. Deductive approaches, deriving rules from natural law or concepts, pertain to the seventeenth-eighteenth and nineteenth

39 In this regard, some have explained different levels of coherence for law as a whole by means of the notions of comprehensiveness and completeness. ‘Comprehensiveness’ refers to the existence of normative stances for every question (including the position ‘indeterminate’). ‘Completeness’ is more than comprehensiveness in that there are no ‘indeterminate’ answers: every possible legal problem is solved with a determined ‘yes’ or ‘no’. See K. Kress, ‘Coherence’ in PATTERSON, D. (ed), A companion to philosophy of law and legal theory, Oxford, Blackwell, 1996, 540-541.

40 H. Berman, Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition, Boston (Ma.), Harvard University Press, 2006, 100-130, particularly at 108-111.
The foundational arguments of scholars changed, in periods during which legal scholarship remained an authoritative source of law (that is, at least until the end of the eighteenth century). Even though these conceptions by old lawyers may have had an impact on the coherence they were seeking and establishing, it is crucial not to use any of these foundational statements as analytical benchmark for coherence. For example, if a legal scholar’s interpretation resulted in a new rule that was contradicting the contents of legislation that was in force, there is no justification on the basis of that assessment alone that this resulted in “incoherence”. This judgment would take a hierarchy of sources, and the lower position of scholarly opinions vis-à-vis legislation as a yardstick.

Moreover, it can be argued that the shifts in externalizations of proffered legal statements make any analytical foundational benchmark in testing coherence obsolete. This is relevant because coherence does not only entail connectivity, which is the linking of diverse materials (through referencing, citation, paraphrasing, ...), but also compatibility. Testing this compatibility necessarily encompasses some inference by the researcher. Indeed, congruency in contents of law does not always follow from an actual linking of elements, but can exist in the lawyer’s head and remain implicit. I will argue hereafter that inference of compatibility in such cases must remain empirical, in the sense of it being tied to traces of legal interpretation to allow for small analytical jumps. Compatibility can then cautiously be deduced from those traces and not from anything else.

Foundational reasoning must be brushed out from coherence analysis. In order to substantiate this approach, one can refer to theories of law that combine legal change with diminutive derivative structures and thus do not take coherence, or correlated concepts, as analytical basis. At the same time, such theories must fit with what we (by now) know of legal scholarship and the act of legal interpretation, which seeks coherence. Positivist, monist theories (Kelsen, Raz) and legal interpretivism (Dworkin) are thus not considered: they are foundational in themselves and they propose structures (e.g. hierarchy of sources, rules/principles) that are linked to certain historic constellations (the nineteenth-century state, legislation as prime source of law) or that exclude newness in legal interpretation (Dworkin: even new, hard cases are solved by way of principles). More attention can be paid to hermeneutical and poststructuralist approaches and to systems theory.

The poststructuralist approach (Latour) would exclude coherence as existing on an analytical level of law, from the vantage points of both the legal practitioner that interprets law and of the researcher studying it externally. Latour analyses law as developing from concrete interactions between agents and regards legal decisions as enchained results of several small steps (value objects). From the researcher’s point of view the links that are established by lawyers in their actions can be labelled a fabrique (in the sense of producing and woven unit). There are elements of fixedness and coherence in this concept. Indeed, Latour acknowledges that providing for legal certainty and “imputing” the concrete solution to existing law are constraints that lawyers face. They use a language that allows them link any

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element to the totality of the law. However, any statement on coherence of law, of an existence of the law, is excluded by Latour. Legal certainty has the purpose of settling conflicts, and is not primarily directed towards crafting a consistent conglomerates of rules with which new decisions are compatible, even though the totality of the law, as well as anything, can be brought in in any “imputation”. Studying coherence would be a study of how agents respond to constraints of providing certainty and of linking their decisions to existing law. This would at best provide insight in the language attributed to these constraints by individual agents. ‘The’ law does not exist; there is only law. Tracing the mentioned responsive behaviour would not contribute to an empirical assessment of what law consists of. However, in Latour’s view, the actions of linking elements to what is perceived of as legal, in language, can be attested by a researcher.

A hermeneutical approach denies fixedness in meaning. A foundational approach is incompatible with legal hermeneutics: lawyers do not derive rules from legal materials, they interpret materials that are in themselves without legal meaning. However, legal hermeneutics contends that arguments raised in interpretation can be considered in terms of inherent quality, as measured by comparison with other arguments and on the basis of the interpretation techniques that are used. Legal hermeneutics excludes constraints of integrating interpretations with other interpretations. It denies ontology of law, but at the same time does not account for much structural features in the act of interpreting that are beyond interpretation. As a result, it is descriptive more than it is analytical. However, even though legal hermeneutics captures much of the act of legal interpretation, such an approach does not entirely fit with characteristics of interpretation as found in legal scholarship. Legal interpretation is both purposive and consolidating, and at the same time. It is aimed at providing a solution and also at linking this solution to the elements of law that are considered by the one who interprets.

For an assessment of coherence in legal scholarship, in many respects the systems theory of Niklas Luhmann is interesting. Luhmann describes law as a self-referential system, which is functional in deciding what is legal/illegal and which produces communications in the form of programmes. These programmes link propositions to an answer ‘legal/illegal’ by way of a reasoning that is expressed within a programme. Some programmes are of restricted scope (e.g. ‘if there is consent on price and object of sale, then the claim for the purchasing price of the seller is legal’, in French law), others have broader implications, but all of them are linked to other programmes. Luhmann’s theory is very apt to be projected on the features of legal scholarship of the Old Regime. It combines structures with adaptability and responsiveness, but avoids determination and foundational validity schemes. According to Luhmann, lawyers select facts from within the system of law and from within its environment. The environment consists of what happens in other systems (e.g. politics, …).

However, selection is not inevitable; what is selected depends on how the lawyer perceives of the fact in the environment (this is inevitably in terms of law). Also within the system of law there is selection: some elements taken out of the environment are maintained, others are not.\(^47\) As a result of all this, rules can change (new communications are selected and confirmed). This adaptability and responsiveness is nonetheless steered from within the system of law only ("self-observation"). Some programmes can be more important than others (e.g. justice), but even these programmes can change (for example, the hierarchy of "sources" of law). The validity of legal decisions depends on the use of programmes which link existing elements to new outcomes.

This theory allows for explaining the changing contents of legal writings, the interactions between them, the responsiveness to yet detachment from contextual factors and the combination of purposiveness (orientation towards solutions), connectivity, compatibility and legal change. In combination with the ample use of writing in legal interpretation, both Luhmann’s and Latour’s theories can be taken as anchoring points for arguing that empirical assessment of links within the system of law is possible even without a researcher’s analytical interpretation. The programmes relate to the law itself, they must be used, and since lawyers interpret on the basis of writing, and produce writings, their operations of seeking and establishing connectivity and compatibility leave written traces.\(^48\) Hereafter, however, it will be expanded on how an assessment of structure on coherence seeking by legal authors must digress from the theories of Luhmann and Latour.

3.2. Legal coherent reasoning and process tracing

Luhmann’s theory leaves room for constraints. Lawyers are part of a system that forces them to phrase solutions by way of programmes. Latour equally acknowledges that lawyers cannot do what they want. Both Latour and Luhmann consider constraints as inherent to either the language or the system of the law. In terms of the interactions between law and society, Luhmann acknowledges “loose causality”, conjunctures and “structural coupling” between the system of law and other systems. Latour, as well, sees interactions but does not consider causality from societal factors, since he denies the bifurcation law-society. In his view, the language of the law is not thematically bound, it can phrase and address any problem. Both Latour and Luhmann deny the impact of non-legal variables on legal development. In the end communications within the system or language of law are self-referential and not produced by way of mechanisms or provided with structural features that determine the contents of programmes, decisions or arguments, except for those structures that lawyers phrase themselves. Yet, again, Luhmann acknowledges responses by lawyers to what they perceive in the environment. Therefore, Luhmann’s approach, when applied onto old legal scholarship, must not be deflected towards a corroboration of older theories of *ius commune* as a "Professorrecht" that only developed internally, among scholars, and with no reference to society.\(^49\)

\(^{47}\) See chapter 6 in Luhmann, Law as a Social System, 230-273.

\(^{48}\) Luhman identified writing as one of the preconditions for the development of law as a self-referential system. See Luhmann, Law as a Social System, 234-243.

\(^{49}\) KOSCHACKER (1947), the idea was already proffered by Wilhelm von Leibnitz and Gustav Hugo (1799). See Conte, *Diritto comune*, 30-31.
It is unclear how contextual factors influence legal interpretation. In that regard, both mentioned approaches by Luhmann and Latour must be put aside in favour of opening a window towards assessment of whether they have an impact. This is as relevant for contemporary as for Old Regime legal scholarship. The abovementioned contextual explanations as to the demise of the substantive *ius commune* (the rise of the state, regionalization, ...), or the rise of, for example, conceptualism in the nineteenth century are vague and not the result of empirical assessments. Moreover, legal change is not a topic that is commonly analysed by European-continental legal scholars or legal historians studying the European continent.

In order to pursue this assessment of causes and contextuality, a case can be made in favour of deep case studies in combination with a close watch on temporality and differentiation in causes. First, a deep case study (“real-world puzzle”) takes into account multiple materials with regard to a certain theme, in order to assess how relations and communication between agents develop concerning that theme. The researcher delves deep into the subject, which can yield insights that would not surface otherwise. Furthermore, the research design must take functionally defined issues as basis, instead of concepts. This is a constructivist-functional approach, which starts from the informed assumption that the range of topics covered by the function are related. For example, for a study of *cessio bonorum* for example, also rules regarding collateral rights (*pignus, fiduca, ...*) and insolvency (*actio Pauliana, fraus creditorum, moratorium*) need to be taken into account. The function would be that any rule regarding the asset-directed rights of creditors to act upon default of their debtors are relevant for any other rule having this function. The functional method is pervasive in comparative legal studies. Even though it is generally esteemed difficult to design the problem on the basis of function, legal comparatists esteem that can be done when the different data, of different subject matters encompassed within the function, are sufficiently known and that they are comparable. There is a tension in familiarizing enough with subject matters in order to decide whether they fit within the function and whether they are comparable. Yet, back-and-forth operations of this type are inevitable in any social sciences research design. Moreover, a broad functional problem design is a cautious measure so as not to exclude relevant data from the start, and it can be

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50 Causal statements in histories of law tend to be formulated in broad undetailed terms of, for example, “crisis” (e.g. BELLOMO, The Common Legal Past of Europe, 204), or “growth” (H. BERMAN, Law and Revolution, the Formation of the Western Legal Tradition, Boston (Ma.), Harvard University Press, 1983, 333-335).
limited when along the way it becomes evident that it is too broad.\textsuperscript{55} Collateral rights serve that purpose just fine. If it will be assessed, for example, during the gathering of data that arrangements of \textit{fiducia} were not considered by Old Regime legal scholars when talking about \textit{cessio bonorum} or interconnected arrangements, then the former legal opinions can be left out of the research.

Secondly, causality and degrees of impact must be differentiated.\textsuperscript{56} Slow-moving developments (e.g. Braudel’s \textit{longue durée}) have another impact than swift and brutal changes. There can be pressure being built up by societal developments that are at odds with existing rules. From Luhmann’s and Latour’s perspective, selection and weaving such influences into the system/language of the law utterly depends from lawyers themselves, but when research is open to assessing potential contextual causes, causality needs to be conceived of in subtle ways. It has been assessed that change through interpretation, which happens in legal scholarship, is incremental rather than abrupt.\textsuperscript{57} In contrast to legal history and legal studies, in political studies, terminology and research methodology regarding causes is more fine-tuned. Causes can be distal or proximate, conjunctive (concomitant), chained or single, and surface or basic.\textsuperscript{58} Such approximations are relevant for assessing moments of legal change. Political scientists analyse path dependency, which can be caused by lock-in. The latter is an entrenchment of existing rules, following after “critical junctures”, which is when agency is high enough to steer development in a new direction but it does not amount to that.\textsuperscript{59} Political scientists distinguish between types of legal change, some of which are not often assessed among legal scholars. Not only “displacement” (abolition and replacement) or “layering” (new rules are added to existing ones), but also “drift” (rules are preserved deliberately even though their impact changes because of contextual change) and “conversion” (rules are kept, but are used for other goals than intended at their issuance) are commonly analysed.\textsuperscript{60} In order to assess causal variables, a focus must be kept on temporality. The chronological order of events, and synchronicity, may provide important clues to “tipping point” (proximate) causes and eventual concomitant causes. Deep analysis may provide clues on surface and basic, even distal, causality.


When devising a methodology for process tracing with regard to coherence in legal scholarly writings, one must take into account that causality can remain underexpressed in the writing of legal scholars, and that it does not per se appear in the legal reasoning leading up to legal decisions. Connectedness is evident in the traces left by legal reasoning, which is written down; it is the linking or paraphrasing of and between arguments and rules. Compatibility is not per se based on expressed connections; therefore any assessment of coherence must also consider compatibility and evaluate coherence even when connections are absent.

4. Towards a methodology: interconnectedness and compatibility

4.1. Modes of interconnectedness (connectivity and construction)

Considering all this, connectivity can be traced by means of modes of interconnectedness. Such modes capture the crafting of interrelations and the creation of rules by legal scholars, as they were written down. They are imposed onto factual characteristics of legal arguments in scholarly writing. These contain citations to or paraphrased parts of those texts which the author identifies as “source” for his statement. But they are broader as well, and relate to the act of constructing as well. For example, rules found in legal materials can be chopped up, in order to use parts of these rules, or principles can be devised for overarching different rules.

The modes of interconnectedness serve as coding categories, imposed onto data, and to which values are attributed, quantitatively or qualitatively. Value attribution starts from the similarities in features among data (rules, principles, arguments), and the number of traceable connections between data. Modes of interconnectedness tie in with basic properties of contents of these writings. Some modes distinguish between legal arguments, proposed rules and principles, others take one or two of them into consideration. Modes of interconnectedness are research instruments that are situated at the level of the legal reasoning, of the act of interpretation, of the legal scholar studied, and of legal scholars interacting in their writings. They stick closely to the traces of this reasoning as found in the texts written by legal scholars. The results yielded by applying these modes of interconnectedness differ for each mode. This is because each mode expresses a different, yet relevant, feature of connectivity.

For analysing the written legal interpretation of Old Regime legal scholars the following modes can be used:

• When applied to legal rules and principles, interconnectedness can be expressed as the number of elements that they share. This category can be labelled “rephrasing interconnectedness”. Connectivity in this mode resides in congruency that is established by using identical concepts and phrasing in order to link rules and principles.

• Another mode of interconnectedness is concerned with principles. They can be crafted or formulated in such a way that they serve as anchoring points for legal interpretation over larger areas of law. Moreover, defining meta-principles that decide conflicts between principles is a technique of maintaining a degree of unity

between newly devised and existing law.\textsuperscript{62} ‘Principle interconnectedness’ can then be defined as the number of principles to which a rule is linked. This can be linear-pyramidal or otherwise. Foundational theories tend to take coherence in legal systems as linear and pyramidal. Every rule is then justified in its match with an overarching rule or principle, which in turn corresponds to a higher principle. By contrast, theories of coherence as justified belief seek to analyse coherence as the support that rules have in other rules or principles, the latter of which must not be general or overarching. According to these theories, coherence must not encompass top-down foundations for all rules, but it can consist of interconnectedness in the form of chains.\textsuperscript{63}

- References in legal scholarship allow for establishing distance between rules and arguments. Quotes and adduced sources (legal scholarship, but also legislation, case law and others) that support legal positions and reasoning can be direct or indirect (e.g. if a direct quotation or reference actually is an interpretation of the argument, rule or principle in the source mentioned or referred to); the number of steps between the position or argument and its original source can be counted (e.g. if author A cites or refers to author B, who based his argument on author C), and serve to express interconnectedness (hereafter ‘distance interconnectedness’).
- The number of sources that are used to support one legal argument or position can be quantified. When checked in reference to the style of the legal author in his use of sources, this is an indication of the novelty of the argument or rule (hereafter ‘source interconnectedness’).
- The small number of rules and exceptions concerning a theme of law can be considered a marker for coherence (hereafter ‘reductive interconnectedness’).
- A qualitative approach through content analysis will allow for the evaluation of the authoritativeness of rules and principles as well as supportive reasoning from the perspective of their impact on the writings of several authors (hence ‘authoritative interconnectedness’).

4.2. Compatibility: evaluating interconnectedness through value and policy

The pictures yielded by applying these modes will be different for each mode. Because each mode expresses a different aspect of coherence, in the sense of connectivity or construction, it is not possible to infer coherence from them, and neither is it possible to assess from them which mode is the more important for the legal scholar who establishes coherence.

The act of making legal materials match is not identical to their linking or to the act of constructing legal statements. Connecting legal elements and devising rules and principles is one aspect of coherence-seeking, but it is not the whole story. The act of linking and constructing is inherent to seeking coherence, because texts referred to and the act of modifying them builds on these texts, and implicitly refers to their contents. However, it is not the sole component. Legal scholars not only construct, they also design. Their legal reasoning not only encompasses inference from legal materials, but also plotting where the law – as they see it – is going. From assessed connections and constructions coherence cannot be as such be inferred. There are several (possible) reasons for this. Referencing can

\textsuperscript{62} Kress, ‘Coherence’, 541-542.
\textsuperscript{63} \textit{Ib.}, 535.
be loose. Sole links can conceal that the legal scholar thought the two connected clusters of rules as intimately connected. Paraphrasing or citing can be absent, even though in the mind of the legal scholar clusters that are not connected can be proximate. Also, references can conceal *a contrario* or analogous reasoning, in the medieval fashion: in that case clusters may be connected even though they do not match.

A way of detecting clusters within linked and constructed elements is to evaluate them on the basis of broader analysis. After assigning values to the modes of interconnectedness, on the basis of the materials studied, another step is needed. For that step, compatibility is important. Compatibility is more exclusively directed towards the contents of legal materials, which can be connected and not connected. But defining compatibility, so as to make it a research category, is difficult. Compatibility is negative: it is falsified by contradiction. But it is also positive in that it encompasses unity among rules. Indeed, compatibility must also be defined in a positive sense, because of the mentioned potential absent, superficial or unreliable traces of connectivity in scholarly writings. If compatibility were only considered from the negative side, non-contradiction would always yield the result of compatibility. This would not take into account thematic disparity between certain rules. For example, the rule that wills must contain the name of an heir is not contradicting the rule that a red light expresses the command for drivers to stop their cars. The lack of contradiction between these rules is not making them compatible. Drawing up the boundaries of “positive” compatibility is not analytically possible.

Yet, compatibility can analytically be narrowed down, so as to make it manageable as research category, and also in a positive sense. Compatibility must serve to detect the legal reasoning underlying written legal statements. The object of study of coherence must be the coherence seeking of the scholars under scrutiny, whether explicit in their writings or implicit in their conceptions. Therefore, instruments of assessment must aim to determine the contents and limits of this legal reasoning.

Instruments allowing for modest inference are policy considerations. They can be defined as community goals underlying legal interpretation. It has been attested that such policy considerations were amply present in *ius commune* doctrinal writings. They differ from “values” in that they are more concrete; they express a purpose, an intended improvement. By contrast, values can be defined as generic concepts that evoke a foundation from which selection of legal materials is derived. In *ius commune* legal doctrine, a common phrase, for example, was “*in iquum est*” (it is not equitable) or “*ex ratio aequitatis*” (for reason of equity). With regard to *cessio bonorum*, such expressions were sometimes used to argue why creditors did not have the right to deny their imprisoned debtor the right to be liberated upon offering his assets. Yet, such values can serve no

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65 I use “policy” in the sense given by Ronald Dworkin, which is “standards that set out goals to be reached, generally an improvement in some economic, political, or social feature of the community”. See DWORKIN, *Law’s Empire*, 438.

evaluative goal. It is impossible for a researcher to attest coherence on the basis of a decision as to the equity of rules, when this is not expressed in writing. One can assume that for legal scholars of the Old Regime the emblematic nature of equity was too crude as well for being directive for their legal reasoning. As was mentioned above, foundational arguments could have had meaning, but they cannot be regard as reflecting patterns in legal reasoning, or at least not as being sufficient for a researcher to trace patterns on their basis.

Policy considerations, by contrast, are more tangible. With regard to *cessio bonorum*, for example, the early sixteenth-century Ghent scholar Philip Wielant stated in his *Practijcke Civile* that it was not practised in Flanders, “because otherwise fraudulent application of the arrangement would harm commerce too much.” 67 This statement expresses the idea that insolvency had to be creditor-steered, and that imposed forfeiture of assets infringed too much on creditors’ rights. Moreover, a common motive to grant the incarcerated debtor having delivered his properties to his creditors an exemption for cloths and necessities was “humanity”. 68 In contrast to “values”, policy goals are testable against contextual elements. The mentioned statements of Wielant can, for example, be compared with sources of municipal law of cities in Flanders. 69

Moreover, policy considerations often reflect contextual factors (e.g. municipal law, but also contractual practice, judicial approaches). But even if these considerations are too broad to be searched for and tested from within materials that stem from outside the range of writings which legal scholars processed, their relative precision allows for making modest analytical inferences. When an expressed policy consideration for one rule is compared with rules that touch upon aspects of a problem that concerns the same consideration, even if that is not expressed by the legal scholar studied, the researcher can cautiously compare these rules, and also contrast them to contextual elements related to the policy consideration, if they are found in other materials.

An example regards rules, and their supportive policy considerations, on either the asset-orientated or the criminalizing nature of *cessio bonorum*. In the later Middle Ages *cessio* was conceived of as an instrument that was a short-cut for procedural requirements. It was generally difficult to execute debts swiftly: even with waivers in contracts, express authorization had to be obtained which made that creditors had to await a judgment before locked assets could be sold publicly. One way to quickly gain access to the properties of a debtor was to have him or her incarcerated, in the hope that payment or forfeiture would follow. 70 This was mingled with a motive of penalizing the debtor. Thirteenth-century legal authors commonly stressed that *cessio bonorum* was possible, but from a public prison and that following the rendering of the estate to the creditors the debtor could be locked at the

68 For example, I.C. ANTONELLO, *De tempori legali tractatus novissimus*, Venice, heirs Bertani, 1670, 188 (ch. 62, no. 8) “… tum quia hoc beneficium introductum est miserationis causa, tum etiam quia ex parte creditoris inhumanum censetur adimere debitori libertatem evitandi carceris … tunc enim locum habet ratio miserationis, & aequitatis, ne debitor in carcere marcescat …”
home of one of the creditors. Only after around 1300 this rule was among scholars labelled as incorrect and “harsh”. This purpose of circumventing cumbersome debt enforcement proceedings lost importance when impediments on sequestration of assets were lifted. In North-West Europe this happened in the course of the fifteenth and sixteenth centuries. However, *cessio bonorum* was even in this period upheld for the mentioned criminalizing purpose. The debtor without assets could then be imprisoned as sanction for his/her insolvency. At the same time, it served still as a measure taken against insolvent debtors, in order to put pressure on his/her peers and relatives to procure payment of the debts. But even these two functions and the practice of *cessio* itself eventually faded away in the later sixteenth and seventeenth centuries because of the ubiquitousness of insolvency. The collectivization of insolvency made that *cessio bonorum* disappeared as a separate proceeding. Since the early seventeenth century, commercial cities had usually two proceedings, one aimed at liquidation, another one at drawing up debt schemes. Both were collective, and not targeted at harming the debtor or his reputation.

These were not developments that took place within the minds of legal scholars only; contextual factors played a role in the mentioned shifts. Some were more distal than others. To name but few, these were the development of deposits and clearing at fairs, state formation resulting in a ban on private captivity (from around 1300), the intensifying of credit relations, the mounted importance of movables in economies that had taken immovable property as main source of wealth, and so on ...

The mentioned changes in considering *cessio bonorum* an asset-orientated and criminalizing practice (until fifteenth century), a criminalizing and pressuring practice (fifteenth-sixteenth centuries), and its demise (seventeenth century) are not always clear in the policy considerations expressed by those authors commenting on *cessio bonorum*. However, sometimes, for some rules they were put to writing, and many other concrete rules were changing in the mentioned transitions. Such considerations can then be taken as basis for assessing the compatibility of one rule with others, for which no such considerations were put to paper.

For example, in the later Middle Ages the ritual of *cessio bonorum* was regarded a matter between the debtor and the imprisoning creditor only. When *cessio bonorum* was practised, the assets were transferred to the creditor who had taken the initiative of incarceration. This followed on from the orientation of the practice towards asset retrieval and from its criminalizing nature. It was only slowly, in the course of the sixteenth century, that legal

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authors started to fuse *cessio bonorum* with the newly emerging collective negotiation proceedings. As a result, they stated that all creditors should be invited and were allowed to receive a share of the profits from the public sale. This happened through incremental interpretation. First, the general line of thought was (1) “that it was not necessary to have all creditors summoned to court but that (2) the inventory of assets had to be attested by all creditors”. This evolved into (3) “those with interests in the *cessio bonorum* should be invited”. In the early seventeenth-century the position became (4) “every creditor must be summoned to court for a *cessio bonorum* of his debtor”.

This gradual change of normative statements over time involved a combination of distance, source and authoritative interconnectedness. The combined positions 1 and 2 were read in the “common opinion of doctors” (COD) (“secundum doctores communiter”). A relatively well known early fourteenth-century legal author, Pierre Jacobi, had formulated position 3, in his *Aurea Practica*, which had appeared in print for the first time in 1492. Jacobi cited the Justinian Digest for supporting his claim, but the text referred to does not state what Jacobi purported it to say. Such indirect referencing was very common in Old Regime legal writings. This could followed on from the act of legal interpretation, which was always creative to a certain extent, but also from a practice of citing the text source that was at the basis of doctrinal opinions to which the author actually referred, or from a copying of references from other authors without consulting the writings in these citations. It was Covaruvias y Leyva, nicknamed the Spanish Bartolus, who confirmed position 3 in his 1552 *Variarum resolutionum*, with reference to Pierre Jacobi, but who was in the early eighteenth century nonetheless considered as promoting position 4.

However, the first author expressing position 4 seems to have been Salgado de Somoza in his 1629 *Labyrinthus creditorum*, in which he buried the point under a pile of references to nineteen authors. Now, at the same instance, Salgado de Somoza stressed that *cessio bonorum* entailed the pooling of all assets, for all creditors. This policy consideration can then be taken on to search for other rules that mattered in this regard, and to check to what extent actions of individual creditors were barred.

Moreover, the emergence of new rules and the policy consideration linked to these new rules can be an indication that a shift in context (forensic practice most probably) was taking

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77 Forster, *Konkurs als Verfahren*, 197, footnote 1040 “secundum DD. Communiter” and 196, footnote 1036 (the opinion of Baldus (ob. 1400), which was the combination of position 1 and 2).
81 F. Salgado de Somoza, *Labyrinthus creditorum concurrentium ad litem per debitorem communem inter illos causatam*, Lyon, De Tournes, 1757, vol. 2, 51 (part 1, ch. 8, no 1).
82 ib.
place, which was indeed the case. This can then be contrasted with the rules proffered by legal scholars predating Salgado de Somoza’s writings, and the context in which they were operating. All this indicates that policy considerations may not only serve to identify clusters of compatible rules, but also – in their links to context and their use for underpinning new developments – may allow to highlight which modes of interconnectedness were supportive for the changes in doctrine.

The mentioned new stance by Salgado de Somoza on the invitation of creditors at a cessio bonorum trial is revealing in this regard. It demonstrates a new tactic of coherence seeking. The supporting of the new rule with citations of nineteen authors yields high source interconnectedness. It is not unlikely – but this must be considered against the style of referencing by Salgado de Somoza – that the newness in the legal statement, following on from (probable) contextual influence, had a direct impact on the way Salgado de Somoza crafted coherence in his opinions. The citing of Pierre Jacobi shows that forgotten strands of thought – his opinions were at odds with the “communis opinio doctorum” – could at a later point in time be taken on as authoritative. This aspect of “authoritative interconnectedness” was a way of renewing law, and it was thus indirectly following on from contextual influence.

5. Conclusion

The mentioned examples of evaluating modes of interconnectedness, against policy considerations that were expressed by legal writers themselves, are test measures to assess coherence. The evaluation can yield causality between external factors and developments within the written texts of scholars, not only as to contents, but also in regard to ways of establishing coherence. As a result, assessments of this type can be repeated for many themes of law, functionally defined, and a result thereof could be that similarities in approaches of establishing coherence emerge. Another possible result, in the future, when such studies would be done regularly, is to develop ways to capture other modes of interconnectedness. Distribution analysis might then yield several results expressing how central some rules or arguments of scholars were in a certain thematic field, thus amounting to an assessment of the authority of those cited scholars. In terms of coherence, what the combination of modes of interconnectedness and evaluation through policy considerations (expressed or modestly inferred) allow for is an analysis of how legal scholars conceive of coherence building and whether they achieve their aims. Of course, the mentioned methodology needs further fine-tuning. However, it has the potential to launch a new field of legal studies, focusing on coherence and pattern building in legal scholarship. This is very relevant nowadays, because more and more legislative initiatives are being directed towards committees of scholars. Their legal interpretations would fundamentally profit from the self-images that the mentioned approaches would yield, and as a result, the coherence in the legislation that they craft would increase.

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83 In this latter regard, it seems that Salgado de Somoza was corroborating contemporary forensic and judicial practice. See on Spanish insolvency practice in the sixteenth and seventeenth centuries, J.A. ALEJANDRE GARCÍA, La Quiebra en el Derecho Histórico Español anterior a la Codificación, Seville, Universidad de Sevilla, 1970.