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NICOLAS BOHIER (1469 – 1539) AND THE *IUS COMMUNE*:

**A STUDY IN SIXTEENTH – CENTURY FRENCH LEGAL
PRACTICE**

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ABSTRACT

European legal history, as a field of scientific enquiry, is a relatively young discipline that can trace its roots back to the German jurist Savigny, whose work on the jurists of the medieval *ius commune* is commonly seen as the first of its kind. As one of the foremost German scholars of the nineteenth century and a fierce opponent of German codification, Savigny laid the foundation for generations of subsequent historians, not only in terms of the scope, but also in terms of the method of enquiry. Thus, in the generations after Savigny, European legal history tended to be approached in terms of general narratives charting the development of the European legal order through successive historical epochs. Within these narratives, jurists played a prominent role. Thus, the creation of the legal order of Europe was based upon a *translatio studii* from the Roman jurists via the medieval *ius commune* to civil codes of the nineteenth century. By grouping jurists into “schools” or “movements”, modern commentators, so it was argued, were able to assess the impact of these on the narrative of European legal history.

Although, since the end of the Second World War, this narrative has become more nuanced, the jurists remain central to it. This has had a number of consequences. The main consequence of this focus on jurists (mostly academic figures teaching at universities) has been the marginalisation of legal practice and legal practitioners in the narrative of European legal history. And yet, as recent research on the rise of central courts in Europe has shown, legal practice clearly had an impact on the development of the European legal order. In light of these insights, this thesis seeks to contribute to the narrative of European legal history by focusing not on the works of academic jurists, but on the activities of legal practitioners.

This statement requires delimitation. Rather than focusing on a number of legal practitioners over a long period of time, this thesis will focus on a single legal practitioner who flourished during a specific period in European history using the principles of a microhistory. The individual in question is the French lawyer Nicolas Bohier (1469-1539). The reasons for this specific focus are twofold. First, a focus on a specific individual and his works allows for greater scrutiny in depth, thus providing a counterbalance to (and also a means of testing and verifying) the broad sweep accounts found in most works on European legal history. In second place, Nicolas

Bohier and his oeuvre cry out for a critical analysis and, until now, remain largely unstudied. As a practising lawyer and eventually president of the regional court of Bordeaux, Bohier was at the coalface of French legal practice in the sixteenth century. As a prolific writer and editor, Bohier left a rich corpus of work consisting of records of decisions of the court in Bordeaux, legal opinions as well as customs of the region. Furthermore, sixteenth-century France is a particularly exciting topic of investigation. This period not only saw the rise and solidification of Royal authority, but also saw the beginning of the homologation of customary law in France. On an intellectual level, the sixteenth century saw the rise of “legal humanism”, a particularly controversial intellectual movement in the context of European legal history as shown by recent research.

This then brings us to the central point of this thesis. If, during the sixteenth century, the medieval *ius commune* was being replaced by “national” legal orders across Europe, as the general surveys of European legal history state, the works of a legal practitioner would show it much more clearly than the works of academic jurists. This thesis will therefore examine Bohier’s use of the term *ius commune* across his works to assess not only his understanding of the term, but also to assess how this concept operated in relation to other “sources of law”, for example statute and custom. Although the results of a microhistory study should not be generalised too far, it will permit us to interrogate the general narratives of European legal history of the early modern period.

LAY SUMMARY

This thesis is an investigation into the works of a French judge and legal practitioner of the sixteenth century, Nicolas Bohier (1469 – 1539). The aim of the investigation is to place this figure in context against the backdrop of the political and legal developments in sixteenth-century France. The reasons for this focus on Bohier are twofold. First, as a legal practitioner, Bohier and his considerable oeuvre have received much less attention than the works of University-trained French jurists of the same period. Until now, the established narratives of European legal history have tended to focus primarily on the transmission of legal doctrine from the medieval to the early-modern period. Legal practice tended to be largely overlooked in the context of the creation of such a narrative. In second place, the sixteenth century is a particularly vibrant period in the history of European legal thought. This period witnessed the rise of “legal humanism” and, on a political level, the consolidation of Royal authority and the recording of customary law in writing. If, as modern surveys of European legal history suggest, the emergence of French national law during the sixteenth century led to a decline of the medieval *ius commune*, the oeuvre of a judge and legal practitioner would demonstrate this much more clearly than that of academic jurists. This thesis therefore sets out to examine Bohier’s use of the term *ius commune* with a view to establish his understanding of the term and of its interaction with other sources of law such as statute and customary law.

DECLARATION

This is to certify that that the work contained within this thesis has been composed by me and is entirely my own work. No part of this thesis has been submitted for any other degree or professional qualification. Part of chapter 3 has recently been published in *Reassessing legal humanism and its claims: petere fontes?*, (Edinburgh, 2016), pp. 244-281.

Signature:

Date:

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ABBREVIATIONS

a	anno
ad	on/concerning
art	article
AE/	AE series, <i>Archives Nationales</i> , Paris
b	Year of birth
B	B series, <i>Archives départementales de la Gironde</i>
c	circa
C	Codex of Justinian
ch	chapter
comm	commentary
<i>Cons</i>	<i>Consilia</i>
<i>Consuet</i>	<i>Consuetudo</i>
D	Digest of Justinian
<i>Dec</i>	<i>Decisiones</i>
disp	<i>disputatio</i>
ed	editor
eg	for example
fol/s	folio/folios
<i>Gloss</i>	<i>Glossa Ordinaria</i>
H/	H series, <i>Archives départementales de la Gironde</i>
Inst	Institutes of Justinian
l	<i>lex</i>
lib	book
n	footnote
num	<i>numero</i>
para/s	paragraph/s
pr	<i>principium</i>
<i>quaest</i>	<i>quaestio</i>
r	<i>recto</i>
tit	title
transl	translated

U/	U series, <i>Archives Nationales</i> , Paris
v	<i>verso</i>
V/	V series, <i>Archives Nationales</i> , Paris
vol	volume
X	<i>Liber Extra</i>
X/	X series, <i>Archives Nationales</i> , Paris
Z/	Z series, <i>Archives Nationales</i> , Paris

INTRODUCTION

1. Object of thesis

This thesis examines the life and works of Nicolas Bohier (1469-1539), a lawyer who lived in late fifteenth- and early sixteenth-century France. Bohier studied law at Montpellier, one of the great medieval universities of Europe and well known in the sixteenth century for maintaining the late-medieval traditions of the *Ultramontani*. He did not aspire to a career into academia, but instead entered legal practice. Despite being a practising lawyer, he retained an interest in the law as an academic pursuit, writing books and producing editions of great medieval legal works. This thesis is therefore about a man and his books. It is an attempt to place him within the context of sixteenth century France, a particularly complex place and time in the history of European legal development.

The traditional narrative of European legal history has tended to focus on jurists of various historical epochs who have contributed to the formation of national legal orders.¹ For much of the twentieth century, the aim of this narrative has been to establish an unbroken line of juristic thought from Rome to the modern day, whereby the proverbial “torch of learning” was passed from one school of jurists to the next. Much of this narrative is open to revision, as has recently been demonstrated by the volumes edited by Paul du Plessis and John Cairns on the late medieval period² and, more recently, the sixteenth century.³ In their latest volume, legal humanism, the intellectual movement synonymous with sixteenth century France, has formed the subject of systematic debate.⁴ Its place and scope in the early modern period has recently been shown by Alain Wijffels to be highly problematic, especially as to its impact on legal practice.⁵ He claims that the lawyer continued to rely on those texts of

¹ See for example, F. Wieacker, *A history of private law in Europe* (Oxford, 1995) [translated from the original German].

² P. du Plessis and J. Cairns (eds.), *The creation of the ius commune: from casus to regula*, (Edinburgh, 2010).

³ P. du Plessis and J. Cairns (eds.), *Reassessing legal humanism and its claims: petere fontes?*, (Edinburgh, 2016).

⁴ *Ibid.*

⁵ A. Wijffels, “*Antiqui et recentiores*: Alberico Gentili – Beyond *mos italicus* and legal humanism”, in du Plessis and Cairns, (n. 2), pp. 11-40, at 14. See also A. Wijffels, “Early modern *consilia* and *decisiones* in the low countries: the lost legacy of the *mos italicus*”, in P. Maffei and G. Varanini (eds.),

the *mos italicus* tradition, and that sixteenth century practice orientated literature appears to have been largely unaffected by legal humanism.⁶ This legal philosophical movement is therefore particularly problematic in the case of Nicolas Bohier, who was first and foremost a practising lawyer.

This thesis aims to provide a more nuanced picture of this part of the narrative of European legal history. The primary aim is to reveal the meaning of the term *ius commune* in legal practice through an examination of its relationship with the *ius proprium*, one of the most nebulous and understudied aspects of the development of national legal orders in early modern Europe. This will enable an assessment of the term's authority and function in legal practice.

2. Motivation

As recent studies have shown, the narrative of European legal history cannot be evaluated without an investigation into legal practice. So far, the traditional focus of legal historical studies has largely left the legal practitioner and their works aside.⁷

Any work on European legal history will reveal a plethora of references to the *ius commune*. The term is generally used in these works to refer to the *utrumque ius*, certainly in the late medieval period. Every book on European legal history will tell you that it meant an amalgam of Roman, Canon and Feudal law. It is typically cited in general terms, with broad frames of reference. Such broad sweeping works do not adequately explain what occurred in any particular locale or whether the term had a consistent meaning. Ultimately, this definition works well on a broad scale in an intellectual style history, but it is clearly open to a lot of problems when it comes to detail.

The early modern period was chosen for a number of reasons. The perception of Europe at this time is of a vast and complex succession of reforms, conflicts and evolving legal and political orders. Of course, it should also be remembered that this period is especially turbulent and marked by wars, civil unrest and plague.⁸ The state

Honos alit artes. *Studi per il settantesimo compleanno di Mario Ascheri. La formazione del diritto comune* (Florence, 2014), pp. 127-142.

⁶ Wijffels, "Antiqui et Recentiores", *ibid.* 14; Wijffels, "Early modern *consilia* and *decisiones*", *ibid.*

⁷ Wieacker, (n. 1); F. Von Savigny, *The history of the Roman law during the middle ages*, (Edinburgh, 1979) [translated from the original German].

⁸ On the Early modern period, see J. Ruff, *Violence in early modern Europe: 1500-1800*, (Cambridge, U.K., 2001); Bercé, Y., *Revolt and revolution in early modern Europe: an essay on the history of*

of the law was no less complicated. Locating the precise role of the *ius commune* in this period is a difficult task, but it is arguably also the best time at which to view its influence in legal practice. The period is most conspicuously marked by advancement towards the nation state and the role of the lawyer in this was significant. This is the period where there is thought to have been a shift away from *ius commune* to national legal decisions and this is visible in judicial decision making.

France offers an interesting setting for this thesis. It was not yet fully developed as a nation state by the beginning of the sixteenth century. It still lacked a comprehensive state bureaucracy and in many respects was still a medieval “state”. The role of custom in France during this period means that the potential for investigation into its relationship with *ius commune* is considerable. France's legal system was fragmented: a diversity of the legal regimes existed from region to region and a division between the Northern customary law (*pays de coutumes*) and the Southern version of written law regions (*pays de droit écrit*), which relied more heavily on Roman law, complicated matters further.⁹

Historically, before the fifteenth century, customs were written down in a piecemeal fashion, seemingly without any official purpose. In 1453, the Royal Ordinance of *Montil-les-Tours* started the process by which customs were selected and written down.¹⁰ Different forms of court and Royal justice applied to various legal regimes. However, the decline of Feudal and municipal justice was gradual.¹¹ From the mid to late sixteenth century, France saw a homologation of its customs. This movement, led by the Crown, saw lawyers play a prominent role in compiling and revising custom. This process would reconcile different localities to bring them under a more unified system of law¹² and was an integral part of a state building process in early modern Europe.¹³

political violence, (Manchester, U.K., 1987); D. Shlapentokh, *Societal breakdown and the rise of the early modern state in Europe*, (New York, 2008).

⁹ M. Bellomo, *The Common legal past of Europe, 1000-1800*, (Washington, D.C., 1995) [translated from the original Italian] [1988], p. 102.

¹⁰ D. Margolf, *Religion and royal justice in early modern France: the Paris chambre de l'édit, 1598-1665*, (Kirkville, 2003), p. 15.

¹¹ É.Chénon, *Histoire générale du droit français public et privé des origines à 1815*, (Paris, 1929), volume 1, p. 491.

¹² M. Kim, “Custom, community, and the crown: lawyers and the reordering of French customary law”, in C. Parker and J. Bentley, (eds.), *Between the middle ages and modernity: individual and community in the early modern European world*, (Lanham, 2007), pp. 169-186, at p. 170. On customary law see also J. Dawson, “The codification of the French customs”, (1940) 38 *Michigan Law Review* 765; D. Kelley, “Second nature: the idea of custom in European law, society and culture”, A. Grafton and A. Blair (eds.), *The transmission of culture in early modern Europe* (Philadelphia, 1990), p. 150; F.

Lawyers played an important role in the creation of the nation state of France. The narrative of legal history in the Early Modern period will be tackled from this perspective; by focusing on the legal practitioner who stands in the broader shadow of the legal humanist movement but is somewhat apart from it. Bohier was also a scholar, with a sound university education in law. Because of his professional interest in the practice of law, the works he produced offer an insight into what was relevant or of interest to the lawyer in France in the early sixteenth century.

The middle of the sixteenth century represented a so-called “fault line”¹⁴ where a movement from the *mos italicus* to the *usus modernus* is believed to have taken place. However, it seems that many practitioners would still refer to the old tradition.¹⁵ Recently, Xavier Prévost recognised that even those regarded as legal humanists, such as Jacques Cujas (1520-1590), still adopted the commentator stance on certain topics.¹⁶ Bohier was born around the start of the Early Modern period, and died just before the middle of the sixteenth century. He is therefore positioned at the very cusp of the change from medieval to the early modern and his lifetime spanned a crucial, and lesser-studied, period of legal history. By studying his written works the extent to which he still referred to the sources of the *mos italicus* will be assessed.

In approaching the question of the *ius commune* from a practitioner’s perspective, it was first necessary to ask “which practitioner?” It was decided that a lawyer who was not an academic jurist, but not removed entirely from it, would be the best candidate. In 2012, Gerard Guyon published a collection of articles on the history of law in Bordeaux, *Le droit Bordelais dans tous ses états*.¹⁷ Within this work, a chapter on Nicolas Bohier and the scientific nature of his *Decisiones* may be found.¹⁸ This work demonstrated the value of this figure who aside from this chapter by Guyon, had been without a dedicated study on his oeuvre of works.

Olivier-Martin, *La coutume de Paris: trait d’union entre le droit romain et les législations modernes*, (Paris, 1925).

¹³ Kim, (n. 12), p. 170.

¹⁴ Wijffels, “Early modern *consilia* and *decisiones*”, (n. 5), p. 127.

¹⁵ *Ibid.*

¹⁶ X. Prévost, “Reassessing the influence of medieval jurisprudence on Jacques Cujas’ (1522-1590) methods”, in du Plessis and Cairns (n. 3), pp. 88-107, at pp. 100-102. Reliance on fourteenth century jurists, such as Baldus, Bartolus, Albericus de Rosate, is mirrored in the works of renowned humanist, Jacques Cujas.

¹⁷ G. Guyon, *Le droit Bordelais dans tous ses l’états: les anciennes coutumes, les jurists et la justice, les institutions de l’Eglise locale*, (Limoges, 2012).

¹⁸ G. Guyon, ‘*Un arrétiste bordelais: Nicolas Boerius (1469-1539)*’, in *ibid.*, pp. 128-149.

Bohier offers three main advantages as the focus of this microhistory. First, he wrote two important works documenting law in action: the *Consilia*, and perhaps most importantly the *Decisiones Burdegalenses*. Second, given the important role of custom in the *ius commune-ius proprium* relationship, his work on the customary law of Bourges, the *Consuetudines Biturigium*, is of particular value as an early record of written custom in the region. Third, his professional activities, which included the positions of *avocat*, *conseiller*, and president of the Bordeaux *parlement*, as well as author and editor, meant that he offered an interesting perspective on legal practice in this region in France. The role of the *ius commune* in legal practice will therefore be analysed through the life and works of a multi-faceted individual and will facilitate a fresh approach to the question of the *ius commune*.

3. Terminology

Throughout this thesis, a number of terms are used and a definition of these terms from the outset is necessary. The terminology outlined here are the textbook definitions and the extent to which Bohier's understanding of these terms corresponds to them will be considered in the course of the three textual chapters in this thesis.

The *ius commune* is traditionally understood as representing a body of law which developed, initially mainly through university teaching but later also through legal practice, and consisted of a synthesis of Roman, canon and feudal customary law. This body of law was said to exist concurrently with the *ius proprium*, the local (mainly customary) laws of the various medieval city states and to operate as a repository of concepts, terminology and ideas with which to enhance local law.

Historically, "customs" of the various French regions were unwritten. Reference to "custom" in the context of Bohier's use of the term refers to the emergence of a form of legal literature, the "*coutumiers*", in the twelfth century set the customs of a region in writing, and many of these texts relied on Roman and Canonic sources. By the late fifteenth century, these written customs had become royal law, having been ratified by the *Parlements*, and consequently a process of homologation took place that saw the systematic recording and collation of these customs *en masse* across the French regions. When the term "*stylus*" is used, it refers

to the *stylus curiae* of a court, namely the “styles and manners of conducting legal proceedings.”¹⁹

The term “jurist” is used throughout this work. The meaning is a broad one, but generally the term’s use refers to the professional category of learned authors based in universities, from the twelfth century onwards. The rise of law faculties in universities at this time saw the emergence of a professional class of jurist, and together with the creation of legal method, which was developed by glossators and commentators, through the interpretation of Roman law. A jurist was someone who, by virtue of his training, could give an “opinion” on law and would be respected by other jurists. If one jurist cited authority for an opinion it would likely be the written view of another jurist. As James Gordley has explained: “Law was based, as much of it still is, on the exposition of authoritative texts.”²⁰

A definition of legal humanism, or as it is otherwise known, *mos gallicus*, is problematic. According to Douglas Osler, legal humanism is “an expression generally used to refer to the study of Roman law by 16th Century philologists.”²¹ When the term is used in this thesis, it ought to be understood as referring to the school active in sixteenth century France that applied historical and philosophical methods to understanding Roman law.

4. Methodology

I first assessed the oeuvre of Bohier to establish the available material. He wrote a number of works. Given that the focus of this thesis is role of the practitioner, it was important to identify which of these works would be best suited to a study of this kind. This selection was carried out with two principal aims in mind: first, to identify those works that best represent law in action; secondly, to identify those that offer interesting examples of the way in which the term *ius commune* and *ius proprium* were handled. This is not to say that only those sources that had a large number of references to the term *ius commune* were considered. The *Consilia*, for instance, has comparatively few references to the term in comparison with other works. However, the use of the term offered a number of interesting examples.

¹⁹ L. Waelkens, *Amne adverso: Roman legal heritage in European culture*, (Leuven, 2015), p. 163.

²⁰ J. Gordley, *The jurists: a critical history*, (Oxford, 2013), p. 32.

²¹ D. Osler, “Images of legal humanism”, (2001) 9 *Surfaces* 101.

In each of the chosen works, I searched for where Bohier used the term “*ius commune*”. An assessment of the importance of the term in each fragment selected was made. The product of this can be seen in the tables presented throughout this thesis for each of the works. This was followed by a philological analysis and an examination of Bohier’s source use. Such an analysis was carried out with an awareness of the complexities of sources used at this time and the understanding that some of the sources cited by Bohier may have been secondary in nature or taken from lists of sources that were compiled by others.²² Furthermore, the search for the term *ius commune* relied on text that had been scanned and made available through Optical Character Recognition (OCR) method. There are limits to this kind of search within uncorrected OCR text, particularly with Latin texts, such as the possibility that some words may not be recognised when searched for. On account of this, a control was added by using two editions of the same work for the *Consilia* (Lyon, 1554 and Venice, 1574) *Decisiones* (Frankfurt, 1574 and Lyon, 1611) and *Consuetudines* (Lyon, 1529 and Paris, 1547).

The fact that Bohier may not necessarily have consulted the works he cites is therefore taken into account in this thesis. However, this concern is overcome as far as it is reasonably possible to do so. Bohier’s source use is only one of the indicators of his understanding of the term *ius commune*. Where he refers to certain jurists and their works, this was noted where it was deemed significant in his reasoning or the outcome of the case before him. Even if we assume that Bohier did not cite it first-hand, the way in which he employs the source can still reveal the extent to which his reasoning suggests a shared approach with that contained in the source. In any case, Bohier’s citation practices are not the only indicator of how he approached the *ius commune*, and, though important, is not the sole focus of this thesis. Instead, it is the *ius commune-ius proprium* relationship that is its central concern.

Where the *ius commune* is mentioned, the focus has been on identifying what sources of law were also present, and how Bohier used them.²³ The *ius proprium*

²² M. Van Ittersum, “The working methods of Hugo Grotius: which sources did he use and how did he use them in his early writings on natural law theory?”, in du Plessis and Cairns, (n. 3), pp. 154-193.

²³ It should be noted that Bohier’s use of certain sources in sections of the text that do not refer to the *ius commune* have also been consulted. This comparison has revealed that Bohier’s use of these sources was largely consistent with those sections that did use the term: Baldus and Bartolus still feature prominently, for example. However, these examples are less useful in establishing Bohier’s understanding of the *ius commune* and other key concepts such as custom. An assessment of these examples would also go beyond the remit of this thesis and have therefore not been included.

largely occurs in the same context as custom (*consuetudo*) and statute (*statutum*), although also the likes of *stylus* (*stylus curiae*) in certain instances. Where these sources and the *ius commune* were mentioned alongside each other, the way in which Bohier employed the sources was examined in detail. This interplay is revealing of what he perceived the position of the *ius commune* to be. The extent to which there was rivalry between the sources, or if there was a detectable source hierarchy at this time will be assessed.

This thesis is written using the principles of a microhistory. This approach is characterised by a focus on certain cases and persons, allowing an intensive historical study of the subject.²⁴ The purpose of a microhistory is more far reaching than that of a case study: the former typically look for answers to big questions when studying small objects.²⁵ Its value lies “in its power to recover and reconstruct past events by exploring and connecting a wide range of data sources so as to produce a contextual, three dimensional, analytic narrative in which actual people as well as abstract forces shape events.”²⁶ The temporal aspect of microhistory is the “relationship of a particular or peculiar event to a larger context.”²⁷ Through books documenting law in action, which contain particular cases and local laws, it is anticipated that a microhistory will bring us closer to understanding the larger issue of the *ius commune* in sixteenth century legal practice.

The three books that form the basis of this microhistory differ substantially from one another. These include the *Consilia* (legal opinion), *Decisiones Burdegalenses* (law report) and *Consuetudines Biturigium* (customary law). Each of these is considered in a dedicated chapter, which looks at their format and contents, and then proceeding to a study of selected references to the *ius commune*. Their differences rest not only in their format, but also the motivations behind their production. The *Consilia* and *Decisiones*, for example, are direct products of law in action: the former contains the legal opinions of one lawyer; and the *Decisiones* is made up of a collection of court decisions. The *Consuetudines*, although not as obviously linked to legal practice as the other two works, is still related to law in

²⁴ S. Magnússon and I. Sziujártó (eds.), *What is microhistory?*, (London, 2013), p. 5.

²⁵ *Ibid.*

²⁶ R. Brown, “Microhistory and the post-modern challenge”, in Renders and de Haan (eds), *Theoretical discussions of biography: approaches from history, microhistory, and life writing*, (Leiden, 2014), pp. 119-128, at p. 127.

²⁷ M. Peltonen, “What is micro in microhistory?”, in Renders and de Haan (eds), *ibid*, pp. 105-118, at p. 107.

action. It was compiled with the practitioner in mind, who sought a comprehensive account of the customary laws of the region.

In the early modern period, given the nature of printing practices, texts were moveable not only between editions but also in editions.²⁸ Therefore, a degree of sensitivity to editions used for this work is required. Douglas Osler has recognised the importance of this.²⁹ Those editions closest to Bohier's death have been selected because they are thought to best represent the thoughts of the author more clearly than those published significantly later.³⁰ Given that the *Consilia* and *Decisiones* were published posthumously, those editions closest to 1539 were chosen.³¹

4.1 Limitations

One criticism of microhistory as an approach is its tendency towards “the singularisation of history”.³² It is not possible to know more than a small part of a large story, and the sources relied on preserve only a minute selection of historical facts. Of course, it is true that this thesis only looks to one man and his written works in order to try and address part of a larger issue: the role of the *ius commune* in sixteenth-century legal practice. However, the value of a microhistory lies in the fact that it typically looks for answers to “great historical questions” in the *minutiae*.³³ It is of course true that, as with any method, there are definite limits as to what a microhistory can reveal.

First, the broad spectrum of the role of the *ius commune* in legal practice in France during this period will not be addressed in this thesis. It will not assess the role

²⁸ J. Cairns, “The moveable text of Mackenzie”, in J. Cairns and O. Robinson (eds.), *Critical Studies in Ancient Law, Comparative Law and Legal History*, (Oxford, 2001), pp. 235-248 at p. 245.

²⁹ D. Osler, “Towards a legal-historical bibliography: a census of 16th century legal imprints”, (1988) *Ius Commune* 232; also “*Dies diem nocet*”, (1991) *Ius Commune* 207. Cited in *ibid*, p. 245.

³⁰ Wherever possible, those sources examined are closest to 1539. However, in some cases direct reference was not possible, and so latest editions were used.

³¹ The *Consuetudines* was first published in 1508, but the earliest version available for reference was the 1529 (Lyon) edition. A control element was built in by referring to two editions for each of the works. This meant that searches for the use of the term *ius commune* were conducted in both works. For the *Consilia*, the 1554 (Lyon) and 1574 (Venice) editions were used. For the *Decisiones*, the works of 1574 (Frankfurt) and 1611 (Lyon) were relied on. Finally, in the case of the *Consuetudines*, reference was made to the 1529 (Lyon) and 1547 (Paris) editions. The choice of editions was motivated by their accessibility. This selection does have limitations given that only two of each are represented. The editions chosen for the *Decisiones* have their own particular limitations in that those selected are not only published many years after Bohier's death in 1539, but also the 1611 (Lyon) publication is a pirate edition.

³² Magnússon and Szijártó, (n. 24), p. 115.

³³ *Ibid*.

of the *ius commune* in legal practice in France more generally. France, as a developing nation state, with its large number of regions, together with the various regional *parlements* and other institutions, is too large a topic for a work of this kind. No broad conclusions about whether Bohier's use of the *ius commune* is common or exceptional will be reached. This would only be achieved as part of a much larger work that considered the role of other lawyers and other *parlements*. This is something to be revisited and expanded, perhaps at postdoctoral level, but is not the aim of this work.

Secondly, those cases selected for study within the oeuvre of Bohier will not be subject to investigation beyond philological analysis. Reference to the particular legal issue at the centre of the example will of course be noted and discussed, but this will be brief and only to the extent that it is relevant for understanding the role of the *ius commune* in the case. Each area of law considered in this thesis would merit a dedicated study of its own legal history, origins and role. Also, ascertaining what the law is in any given situation during this period is difficult. The books of the jurists will not tell you beyond what the law formally is and so, in very practical terms, we do not know precisely what law would apply on a given issue during this time.

Finally, much more can be said about Bohier and his works. I have offered a history of him in a specific context, but there is equally a thesis to be written on the man himself. Despite all these limitations, the contribution of this work is that a small part of an answer to the large question of the *ius commune* will be offered, namely whether the medieval meaning of the *ius commune* had endured into the early modern period or whether it had undergone some change.

CHAPTER 1

BOHIER'S FRANCE (1469-1539)

1. Introduction

This chapter seeks to place the lawyer, *conseiller* and magistrate, Nicolas Bohier within the broad and complex history of the sixteenth century so that his works, decisions, and professional roles can be better understood and his motivations behind them exposed. At the centre of this, the question of the state as an emerging entity, together with currents of legal nationalism, loom large. State formation is the key to understanding the *ius commune*, and its meaning and function in sixteenth century France. Historians have traditionally struggled to understand how the law shaped politics and governance in this period.¹ The purpose of this chapter is to provide a more informed reading of the law and the relationship between lawyers and institutions; the growth of a nation; and the concept of statehood.

Made up of a bewildering mixture of conflicts, radical reforms, evolving political and legal orders, and intellectual revolution, early modern France represents a real challenge to anyone trying to approach it in a critical fashion. Placing the lone figure of a lawyer born in 1469, a year bordering the medieval and early modern, within this period is therefore an unenviable task. It is however from their perspective that this chapter is written. This chapter seeks to present a portrait of the period between the fifteenth and sixteenth century touching on the major events of the time, and asking throughout how this would have affected an individual lawyer, and the extent to which they would have recognised them as significant in their everyday life and practice.² It attempts to humanise what is now perceived as the extraordinary change that occurred in early modern France, and in this sense also, relate this reform in politics and religion, to legal practice generally. The *parlements*, in Paris and

¹ D. Parker, *La Rochelle and the French monarchy: conflict and order in seventeenth-century France*, (London, 1980), p. 19. However, see the recent work of D. Lee, *Popular sovereignty in early modern constitutional thought*, (Oxford, 2016), which offers a fascinating insight into the concept of popular sovereignty and the role of Roman law during this period.

² K. Bezemer, *What Jacques saw: thirteenth century France through the eyes of Jacques de Révigny*, (Frankfurt, 1997) [translated from the original German] [1996] presented a unique approach to the life of a lawyer and the era in which he lived.

throughout France, ought to be seen as living societies central to government and the power-brokering that engaged the monarchy. The relationship between these institutions and the King had a direct and intimate bearing on the nature of law, its authority and practical operation. Only through a better understanding of the impact of the various competing influences of this time, and assessing its likely affect on the individual lawyer or *parlementaire*, will the aim of this work be reached.

The decisive break from Middle Ages to the early modern era is generally identified as taking place in 1453; the year that marked the Ottoman capture of the Byzantium Empire's Capital, Constantinople, and signified the end of the Eastern Roman Empire.³ This year also signalled the end of the Hundred Years War between France and England, where the French restored their domestic authority and re-emerged as a leading Western power.⁴ Johannes Gutenberg had ushered in modernity in 1440, with his invention of the printing press, which would forever change the way individuals would conceive of the society around them.⁵ Universities were established throughout Europe at an unprecedented rate, satisfying a growing demand for an educated elite in office.⁶ However, none of these movements alone explains the ideological and indeed new self-confidence that came with the late fifteenth century. It is possible to attribute this, in part, to the shift in man's individual relationship with God, which changed from one of anxiety and powerlessness to one of awareness, and the belief that their God-given ingenuity was there to question the universe in which they lived.⁷ It was the provision of tools *en masse* (the printing press and book production) by which previous understanding could be realised and then challenged.

³ R. Runciman, *The fall of Constantinople: 1453*, (Cambridge, U.K., 1965), p. xi.

⁴ R. Lesaffer, *European legal history: a cultural and political perspective*, (Cambridge, U.K., 2009), p. 289. See also D. Potter, "Anglo-French relations 1500: the aftermath of the hundred years war", (1999) 41 *Franco British Studies, Journal of the British Institute in Paris*, 28; and C. Giry-Deloison, "France and England at peace, 1475-1513", in G. Richardson (ed.), *The contending kingdoms: France and England, 1420-1700*, (Aldershot, 2008), pp. 43-60.

⁵ For an account of the life of the inventor, Gutenberg, see: A. Kapr, *Johann Gutenberg: the man and his invention*, (Aldershot, 1996) [translated from the German] [1986]. See also generally on the politics of information in early modern Europe: B. Dooley and S. Baron (eds.), *The politics of information in early modern Europe*, (London, 2001); and on the printing press as an agent of change, with an English focus, but universally relevant in terms of the significance of the invention: D. Harvey, *The law empyrnted and englysshed: the printing press as an agent of change in law and legal culture, 1475-1642*, (Oxford, 2015).

⁶ On the history of universities in early modern Europe, see P. Grendler (ed.), *Renaissance education between religion and politics*, (Aldershot, 2006); W. Courtenay, et al. (eds.), *Universities and schooling in medieval Society* (Leiden, 2000).

⁷ N. Davies, *Europe: a history*, (Oxford, 2010), p. 471.

The Protestant Reformation⁸ and legal humanism⁹ were all marks of a newfound independence of thought.

In this chapter, observations are made about the sixteenth century, and so some of these include the years that followed Nicolas Bohier's life. These are highlighted to enable a fuller account of the period and its movements, in order to contextualise the works produced by Bohier, some of which were published posthumously.

1.1 Assessing Legal Humanism

Why is the 16th century identified with legal humanism, and not, say, with the collections of legal opinions of contemporary jurists, the *Consilia*, or the *Decisiones* of the great regional and national supreme courts, both of which were printed in far greater numbers and disseminated throughout Europe?¹⁰

Defining legal humanism and those considered as humanists is problematic. The recent work by du Plessis and Cairns has highlighted the problems with the categorisation of jurists.¹¹ While the overall aim of this thesis is to identify what the term *ius commune* meant when used by Bohier in his works, it also needs to assess the validity of the claim that legal humanism is an appropriate representative for sixteenth century legal thought. A rethinking of nature and purpose in the context of legal teaching and practice is a chief aim of this work.

By the sixteenth century, it is often contended that the schools of humanism and scholasticism had hardened into more distinct groups, with their own identities and that most intellectuals had a clear sense of loyalty to one or the other.¹² The rise of the public persona of the lawyer would have changed the nature of the law and perhaps further separated it from the university jurist, who appeared removed from the contentions and precarious nature of legal practice.

⁸ The inability of the church to console its people during the Middle Ages, at a time marked by plague and war, has been described as creating a "spiritual malaise". See G. Elton, *Reformation Europe: 1517-1559*, (Malden, 1999), p. 29.

⁹ For reference to the general impact of both the Lutheran Reformation and humanism, see H. Gelder, *The two reformations in the sixteenth century: a study of the religious aspects and consequences of renaissance and humanism*, (The Hague, 1964) [translated from the Dutch] [1955]. On new approaches to legal humanism, see P. Du Plessis and J. Cairns (eds.), *Reassessing legal humanism and its claims: petere fontes?*, (Edinburgh, 2016).

¹⁰ D. Osler, "Images of legal humanism", (2001) 9 *Surfaces* 101.

¹¹ Du Plessis and Cairns, (n. 9).

¹² K. Van Liere, "Humanism and scholasticism in sixteenth-century academe: five student orations from the university of Salamanca", (2000) 53 *Renaissance Quarterly* 57.

Those who felt strongly associated with the intellectual movement of humanism, therefore, would have enhanced this demarcation and ultimately created a two-tier legal culture, divided between university teaching and writing and the practice of the law. The rigid periodization of legal history has caused the sixteenth century to become almost exclusively synonymous with legal humanism: “the scholar could be a humanist but the practitioner had to be a Bartolist.”¹³ It is this separation of professional and intellectual identity that has resulted in the jurist overshadowing the practitioner. This division was perhaps not as pronounced at the time as it is commonly said to have been today. This watertight distinction between the humanist and “other” (such as the practising lawyer) has been challenged.¹⁴

It is the later post-sixteenth century treatment of legal humanism that has given it, and the universities, centre stage.¹⁵ This is a possible explanation for the overwhelmingly humanist nature affixed to this period of legal history, and the pale figure of the practitioner within it. The roles of the lawyer, the *avocat*, *procurateur*, and their writings, which were not always directly practice-oriented, were dominant ones and central to the narrative of sixteenth century legal history. Legal humanism is mentioned here to acknowledge the revered place it holds in sixteenth century legal history. However, given its mid- to-late sixteenth century presence, and the aforementioned oversight of legal practice, it is not at the basis of this work.

2. Evolving Legal Orders

2.1 Placing the *Parlement*

The legal system of the *Ancien Régime* was far from autonomous in the modern sense, with judges, parties and institutions subjected to the influences of high-ranking officials with their kinship and clientage networks. Michael Breen has commented that the law and its operation at this time ought to be considered as “working in tandem with clientage networks and other informal channels of influence.”¹⁶ *Ancien Régime* France has been described as a “judicial society where

¹³ P. Stein, *Legal humanism and legal science*, (1986) 54 *Tijdschrift voor Rechtsgeschiedenis* 297.

¹⁴ Du Plessis and Cairns, (n. 9).

¹⁵ Osler, (n. 10).

¹⁶ M. Breen, “Patronage, politics and the rule of law”, (2005) 33 *Proceedings of the Western society for French history* 95.

the experiences of the law courts were central to the way in which political action was conceptualised.”¹⁷ The *parlement* acted as a “judicial field”, by channelling conflicts into an environment where experts with recognised technical competence mobilised appropriate texts, arguments and tactics in an effort to secure a peaceful resolution that favoured their party and cause.¹⁸ This notion of channelling conflict and power is key to understanding the operation and importance of the *parlement*, in particular when considering the eventual regionalisation of these centres of judicial authority. The *parlements* were “curious institutions whose role is difficult for the modern observer to grasp.”¹⁹ They were as independent as a royal institution could be in that they were self-sustaining, self-perpetuating, and self-governing.²⁰

The judicial structure reflected the large topography and landscape of France itself, encompassing a range of tiers and levers by which justice could be delivered, and power exerted, throughout the land. The King and his *Grand Conseil*, with the *parlements*, *Cour des Aides* (which dealt with income from taxation) and *Chambre des Comptes* (which handled revenue from the domain) represented the highest level of the courts.²¹ The *Baillages* (Northern France) or *Sénéchaussées* (Southern France) were the intermediary courts and royal courts of first instance.²² French supreme jurisdiction belonged to the *parlement* of Paris, which co-existed alongside the regional *parlements*. Composed of three chambers, the *parlement* held the *Grand Chambre*, *Chambre des Enquêtes* and the *Chambre des Requêtes*.²³ The *Grand Chambre* was, as the name suggests, the central hub of the *Parlement's* activity, and was the arena for holding trials.

¹⁷ D. Bell, “The public sphere, the state and the world of the law in eighteenth-century France”, (1992) 17 *French Historical Studies*, 933.

¹⁸ P. Bourdieu, “*La force du droit: éléments pour une sociologie du champ juridique*”, (1986) 64 *Actes de la recherche en sciences sociales* 3.

¹⁹ W. Beik, *Absolutism and society in seventeenth century France: state power and provincial aristocracy in Languedoc*, (Cambridge, U.K., 1985), p. 77.

²⁰ L. Kim, “The judicial structure of sixteenth century France”, (2013) 16 *Torch Trinity* 34-59, at 35.

For comparative examples of the history of central courts in Europe, see M. Godfrey, *Civil justice in renaissance Scotland: the origins of a central court*, (Leiden, 2009), and R. Van Rhee, *Litigation and legislation: civil procedure at first instance in the Great Council for the Netherlands in Malines (1522-1559)*, (Brussels, 1997).

²¹ J. Strayer, *On the medieval origins of the modern state*, (Princeton, 2005) [translated from the original Portuguese] [1969]. p. 72.

²² M. Bubenicek and R. Partington, “Justice, law and lawyers”, in C. Fletcher, et al. (eds.), *Government and political life in England and France, c. 1300-1500*, (Cambridge, U.K., 2015), pp. 150-182, at p. 159.

²³ C. Carpenter and O. Matteoni, “Offices and officers”, in *ibid*, at p. 90.

Its structure was ill suited to administrative tasks. Despite its mandate being a broad one, “concerned with everything from the price of firewood or the danger of the plague, to the choice of officers for the militia”²⁴, in the case of local municipal business, its performance was really only reserved for the role of intermediary and overseer.²⁵ Unsurprisingly, the arrival of regional *parlements* saw an increase in municipal activity in this regard, with their ability to dominate city agencies by their greater dynamism and accompanying superiority, and not necessarily because of explicit authorisation.²⁶



Fig. 1: Nicolas Bohier as judge in the Bordeaux *Parlement*.²⁷

The physical space of the *parlement* in Paris is worth considering. The image above depicts a scene at the *parlement* in Bordeaux, with Bohier sitting as judge. These regional *parlements* were based on the Paris *parlement* in terms of structure and organisation. The compound where the *parlement* held its sessions was collectively known as the *Palais de Justice*. A raised *dais* dominated the courtroom, and was positioned at the Northwest corner of the *Grand Chambre*. It was reserved for the occasions where the King would visit the *parlement*.²⁸ Chief magistrates were dressed in ceremonial red robes and other magistrates, dressed in black, sat on

²⁴ B. Diefendorf, *Paris city councillors in the sixteenth century: the politics of patrimony*, (Princeton, 2014) [1982], p. 10.

²⁵ *Ibid.*

²⁶ G. Zeller, *Les institutions de la France au XVI^e siècle*, (Paris, 1948), pp. 79-80. Regional *parlements* are considered in greater detail later in this chapter.

²⁷ Picture taken from: https://commons.wikimedia.org/wiki/File:Nicolas_de_Bohier.jpg (image is in the public domain). Accessed on 9th February 2016.

²⁸ S. Beam, *Laughing matters: farce and the making of absolutism in France*, (Ithaca, 2007), p. 84.

benches that framed the *dais*.²⁹ The social and professional distance between the clerks and the magistrates was clearly illustrated and divisions were physically pronounced. Solicitors and clerks would work outside the *Grand Chambre*, usually based in the *Grand Salle* where “solicitors and barristers established benches and dealt with clients in a busy, crowded, semi-public environment.”³⁰ Many cases brought before the *parlement* would be handled in a written pleading or were appeals of cases of a defendant who was not domiciled in Paris and so the work of the solicitor was crucial to a case’s conclusion. Their role, however, lacked prestige. The barristers, in contrast, although earning only marginally more than their solicitor counterparts, enjoyed a social standing that was considerably higher. Their role as prosecutors gave them a visible standing and being formally trained in law would often present them with wider opportunities for advancement in royal service.³¹

The pinnacle of the elite, however, was reserved for the magistrates. Magistrates enjoyed the possibility of geographic and social mobility. The president of a provincial *parlement* could acquire an office at the *parlement* of Paris, and many magistrates held a number of posts in the capital city. Magistrates belonged to a lower-nobility, perhaps from the retail merchant class: the urban oligarchy.³² It is believed that it was their attendance at university, which was a requirement for their position, which marked them out from other members of this urban elite.³³ Many magistrates would have travelled outside their native region for the purpose of study, often returning home to take up office at their own local *parlement*.³⁴

2.2 Regional rule

2.2.1 National unity: challenge or purpose?

The regional *parlements* were established at a time of royal territorial expansion. As well as being an extension of monarchical power, their formation can

²⁹ S. Hanley, *The ‘lit de justice’ of the kings of France: constitutional ideology in legend, ritual and discourse*, (Princeton, 1983), p. 63. See also E. Maugis, *Histoire du parlement de Paris de l’avenement des rois Valois à la mort d’Henri IV*, (New York, 1967) [1913], pp. 285-286.

³⁰ Beam, (n. 28).

³¹ *Ibid.*

³² *Ibid.*, p. 87.

³³ *Ibid.*

³⁴ Beam, (n. 28). See also J. Dewald, *The formation of a provincial nobility: the magistrates of the parlement of Rouen, 1499-1610*, (Princeton, 1980), pp. 24-28.

also be seen as promoting the importance of preserving local customs and privileges.³⁵ These provincial *parlements* developed out of the courts that had existed in the great fiefs before their absorption into the kingdom. They were modelled on the Paris *parlement* and so exercised a similar jurisdiction within their own areas. In the majority of cases, these provincial institutions were seen as completing, not abolishing, a long established tradition of *seigneurial* justice as it had operated in each fiefdom, and further still, that they “constituted a single body and...were merely the ‘classes’ of a unique and indivisible *parlement* dispersed throughout the kingdom for the convenience of justice.”³⁶

Undoubtedly, the importance of the *parlement* rested in its ability to make sense of the diverse collection of laws that governed its land. The geographic location of the *parlements* is revealing of the monarchic motivations behind their establishment.³⁷ By 1515, there were six provincial *parlements*: Toulouse, Bordeaux, Dijon, Grenoble, Aix and Rouen. Under King Francis I (1494-1547), the personnel of these *parlements* multiplied considerably. In Bordeaux, the number of *conseillers* and presidents rose from 24 to approximately 80.³⁸ This increase was largely a consequence of increased legal business. It is fair to say that: “the operative concepts of government were duplication, ambiguity, and competition.”³⁹ The King would have been hesitant to abolish any existing orders and so built supplementary agencies, with each century bringing an accretion of new ones, familiar in their purposes but bearing new titles. However, the requirement that all regional establishments follow the same basic procedures meant there was an element of uniformity in the operation of the *parlements* throughout the varied and disparate regions. Rebecca Kingston has argued that the *parlements* ought not to be seen purely as an extension of royal power, and that instead their role was as an institution recognising the customary laws as they

³⁵ Of the considerable volume of literature on the *parlement* as an institution, most notably that of Paris, see: E. Fayard, *Aperçu historique sur le parlement de Paris*, (Lyon, 1876); F. Aubert, *Histoire du parlement de Paris, de l'origine à François I: 1250-1515*, (Paris, 1894); E. Glasson, *Le parlement de Paris: Son rôle politique depuis le règne de Charles VII jusqu'à la Révolution*, (Paris, 1901); Maugis, (n. 29); R. Doucet, *Étude sur le gouvernement de François Ier dans ses rapports avec le parlement de Paris*, (Paris, 1926); and J. Shennan, *The parlement of Paris*, (London, 1968).

³⁶ R. Kingston, *Montesquieu and the parlement of Bordeaux*, (Geneva, 1996), p. 63; R. Mousnier, *The institutions of France under the absolute monarchy, 1598-1789*, Volume 2: *The organs of state and society*, (1984) [translated from the original French] [1979], pp. 637-640.

³⁷ See figure 2 below for a sense of distinction between the different regional *parlements*.

³⁸ R. Knecht, *French renaissance monarchy: Francis I & Henry II*, (London, 1996), p. 18.

³⁹ D. Bell, *Lawyers and citizens: the making of a political elite in old regime France*, (New York, 1994), p. 22.

operated in each area.⁴⁰ Each regional *parlement* was born out of its own individual and unique circumstances. The Bordeaux *parlement*, for example, took over the role of the older *Cour superieure* of Guyenne.⁴¹



Fig 2: Map of France in the late fifteenth century.⁴²

The motivations underlying the creation of the regional *parlements* may well have been driven by the need for better application and understanding of regional customs.⁴³ However, even if this position is accepted, they were still the product of

⁴⁰ Kingston, (n. 36).

⁴¹ E. Guillemin, *Histoire de la reformation a Bordeaux et dans le ressort du parlement de Guyenne*, Volume 1, (1523-1563), (Paris, 1894).

⁴² Picture taken from Muir's historical atlas, (London, 1911): <https://commons.wikimedia.org/w/index.php?curid=8167754>. Accessed on 9th February 2016.

⁴³ G. Small, *Late medieval France*, (London, 2009), p. 38.

royal influence and desire to better understand loose localities and their regional peculiarities. The map above illustrates the complex geography of France in this period. The hesitancy of the monarch to impose bold new bodies in place of older institutions did not prevent it from ensuring a uniformity of practice within the walls of each *parlement*. The attempt to recognise and understand customary laws as they applied in each region was in itself the very essence of royal expansion. It was in many ways the only way in which a king could extend his influence.

2.2.2 Statesman or servant?

The operation of the *parlement*, with its complex roll-call of officials, each varied in their role and stature, was marked by a duality of identity: the self identity perceived by those in office, and the conferred identity of an individual by the monarch. The *parlement*, in Paris and those regionally, was an institution that enjoyed the status of having final appeal in their own respective regions. Furthermore, it has been shown above that rulings made in one *parlement* did not affect or change judgments and legislation in other parts of the kingdom. National laws would be registered in Paris first and then passed to the provincial *parlements* to register, but Parisian laws would not undermine another *parlement*'s jurisdiction.⁴⁴ Nancy Roelker refers to the Paris *parlement* as “the corporate institution par excellence... Guardian of the laws, *parlement* alone could apply the check of justice to the crown and maintain constitutional equilibrium.”⁴⁵

It is possible to legitimise the absolute authority of the monarch and reassure a *parlementaire* of their independent importance in the process of judicial administration. Theorists distinguished the monarch's absolute power from the rule of a tyrant by emphasising that the former governed according to the law and not their personal will.⁴⁶

2.2.3 Grand Conseil du Roi

⁴⁴ Kim, (n. 20), 42.

⁴⁵ N. Roelker, *One king, one faith: the parlement of Paris and the religious reformations*, (Berkeley, 1996), p. 80.

⁴⁶ Breen, (n. 16), 95.

The *Grand Conseil*, a superior court of Justice, was established in 1497, with jurisdiction over the entire kingdom.⁴⁷ Situated in Paris, it was presided over by the Chancellor of France.⁴⁸ The relationship between the *Grand Conseil* and the *parlement* in Paris, and indeed regional ones, was characterised by tension. The *Grand Conseil* occupied an ambivalent place, lacking an independent, well defined sphere and territory of jurisdiction; largely judging in cases where the King considered the *parlements*' rulings unacceptable.⁴⁹ Its role also had an ecclesiastical element, taking oaths of fealty of bishops and judging in cases of litigation of religious orders.⁵⁰

Depicting the *Grand Conseil* as paralleling *parlements* would be misleading. In many ways, it was not a competing force, as that would imply a potentially equal share of authority. Instead, it is better thought of as a checker on the *parlements*. Its very existence and operation was as an oppositional force to the sovereign courts and designed to challenge their judicial decision making. It was, however, capable of resolving conflicts. With jurisdiction between *parlements*, it could adjudicate conflicts between judges responsible to different sovereign courts.⁵¹ Over time, important ecclesiastical establishments were transferred from the traditional jurisdiction of the *parlement* to the *Grand Conseil* in order to facilitate appointments that the king believed the *parlement* would not accept.⁵²

2.2.4 The right of remonstrance

The balance of authority between the King and the *parlement* was largely predicated on the right of remonstrance held by the latter. While its primary function was as a law court, the role of the *parlement* encompassed administrative and legislative branches of power also. *Parlements* had a role in the “national legislative

⁴⁷ D. Bjai, “Trois fois par mois? Dix fois par jour?: Montaigne et la réglementation du mariage dans sur des vers de virigile”, (2011) 38 *Studia Romanica Pos Naniensia* 23, at 26. See also J. Laurent, “Le grand conseil”, in J. Laurent, *Guide des recherches dans les fonds judiciaires de l’Ancien Régime*, (Paris, 1958), p 27.

⁴⁸ At the time of Bohier’s appointment to the *Grand Conseil*, the Chancellor was Jean de Ganay (1455-1512).

⁴⁹ A. Kinneging, *Aristocracy, antiquity, and history: an essay on classicism in political thought*, (New Brunswick, 1997) [1994], p. 51.

⁵⁰ *Ibid.*

⁵¹ Mousnier, (n. 36), p. 277.

⁵² Roelker, (n. 45), p. 84.

process”:⁵³ although the King promulgated the laws, each *parlement* needed to register them before they took effect in the jurisdiction of the particular *parlement*. A technical point perhaps, but the attached right of remonstrance (although not constituting a veto, it must be stressed), enabled the *parlement* to remonstrate with the King if there was disagreement with the legislation. Sarah Hanley explains that the use of this right remained a point of conflict throughout the *Ancien Régime*, its meaning in flux for some time: “was *parlement*’s use of remonstrance a privilege or an autonomous right, advisory or binding upon the king?”⁵⁴

The relationship between the *Grand Conseil* and the *parlement* was a topic of particular contention at the time. It is generally recognised that even before the *Grand Conseil* was separated from the King’s council to judge disputes between sovereign courts and administrative bodies in 1497, the Paris *parlement* complained that the recourse to judgment by the King’s council was unconstitutional.⁵⁵ The *parlementary* remonstrance of 1489 is a marked example of power politics and is revealing of the prerogatives of the court and the response of the King, Charles VIII (1470-1498), to it. The background is loosely thus: the *parlement* protested the summons of two *conseillers* by the bailiff of the *Grand Conseil* to the then Chancellor, (Chancellor Guillaume de Rochefort (1433[or 1439]-1492)). *Parlement* had forbidden the two *conseillers* to obey the order, and with the signatures of a great number of *conseillers* expanded this into fully elaborated *remonstrances*.⁵⁶ The remonstrance of 1489:

shows that the *parlement* saw itself as a senatorial court that virtually eclipsed the monarchy... Because Roman law, as interpreted in late medieval Romano-canonical jurisprudence, was viewed as a providential blueprint for the just state, this comparison reinforced the court’s belief in the sacred immutability of its place within the judicial hierarchy and encouraged its rejection of a perceived competitor.⁵⁷

The *parlement* therefore asserted that its powers were equivalent to the Roman senate, in which the Prince was both head and member. This assimilation of Senate

⁵³ Bell, (n. 39), p.25.

⁵⁴ Hanley, (n. 29), at pp. 145-146.

⁵⁵ T. Lange, *The first French reformation: church reform and the origins of the old regime*, (New York, 2014), p. 129. See also J. Krynen, *L’État de Justice, France (XIIIe-XXe siècle)*, (Paris, 2009), for an interesting overview of the relationship between the sovereign’s delivery of justice and the demands of magistrates.

⁵⁶ Lange, (n.55).

⁵⁷ Lange, (n.55) at pp. 129-130.

and *parlement* suggests that the *parlement*'s constitutional vision rested on an interpretation of the Roman constitution.⁵⁸ According to the remonstrance, the *parlement*'s special nature was such that in it resided as “*la souveraine justice du royaume de France, le vray [sic] siege, auctorite, magnificence et majeste du roy.*”⁵⁹

3. National identity

The history of the sixteenth century is most conspicuously marked by a rapid advancement towards the nation state, which had “hitherto unknown strength, and tending to efface, in a larger territorial sovereignty, the independence of cities and smaller units.”⁶⁰ The definition of nationhood at this time denoted a variety of things, including: “students at the University of Paris (organised into various nations), to speakers of languages, to those who shared a common set of customs, to geographical territory.”⁶¹ In 1517, Erasmus praised France’s supreme power and integrity, noting that it was at peace with itself and “pure” in its religion.⁶² Yet, this apparent peace saw writers preoccupied with borders and frontiers. Colette Beaune has shown that the notion of a French “nation” in the medieval period was based on the portrayal of the English as a threat.⁶³ The perception of vulnerability then, it seems, served two functions. One was to cause individuals to seek assurances through the definition of community and the feeling of belonging by constructing an ideological group: a French nation, *per se*. Secondly, and perhaps most importantly, this translated into a tacit willingness for centralisation and unification through a state, at the head of which was the King.⁶⁴

Arguably, any perceived notion of a nation state and an intentional formation of such a system is flawed.⁶⁵ Royal authority increased, and with it centralisation, due

⁵⁸ *Ibid.*

⁵⁹ E. Maugis, (n. 29), p. 374.

⁶⁰ J. Kelley, *A short history of western legal theory*, (Oxford, 1992).

⁶¹ T. Hampton, *Literature and nation in the sixteenth century: inventing renaissance France*, (Ithaca, 2001) [2000], p. 7.

⁶² *Ibid.*

⁶³ C. Beaune, *The birth of an ideology: myths and symbols of nation in late-medieval France*, (Berkeley, 1991) [translated from the original French] [1985]. An in-depth discussion of Bordeaux and England in this regard will follow later.

⁶⁴ Royal absolutism has been the subject of a vast number of works. Generally, see: D. Parker, *The making of French absolutism*, (London, 1983) and K. Cameron (ed.), *From Valois to Bourbon: dynasty, state and society in early modern France*, (Exeter, 1989).

⁶⁵ D. Margolf, *Religion and royal justice in early modern France: the Paris chambre de l'édit, 1598-1665*, (Kirksville, 2003), p. xvi.

to a convergence among governing elites who tended to produce support for the crown and in turn encourage royal dominance of a society that would come to mark early modern France.⁶⁶ The extent to which individuals such as lawyers and office bearers would have been complicit in this growing sense of nation and national identity is unclear. Towards the later half of the sixteenth century, the lawyer and member of the Paris *parlement*, Jean Bodin, published his *République*, which is widely regarded as the framework for the theory of sovereignty upon which the French monarchy was to rest,⁶⁷ born out of France's passing from late stages of feudalism through to a centralised state. The first half of the sixteenth century poses a greater challenge in terms of identifying national mood and awareness of statehood. Would a *conseiller* of the *parlement* have considered himself as a statesman, or indeed as state-builder? Or, is it likely that the general and gradual shift towards statehood happened to them, rather than purposively by them?⁶⁸ The question of whether one holding office was a statesman or a servant, and how external identity was perceived by the royal court is equally relevant to considerations of nationalism and national identity:

Early modern societies inherited a sense of identity that was profoundly local. Citizens might feel a generalised sense of themselves as part of larger national communities, particularly in time of war, but their primary points of identification were more specific: to kin, to their lord, to their parish or guild, to their city.⁶⁹

Much of the period's shift towards a national cohesion was based on a framework of religious affiliation, and a growing shared hostility to Rome and perceived Papal control of religious administration, finance, and law.⁷⁰ It is perhaps equally accurate, or indeed more accurate in some respects, to identify French national identity as being one of Gallicanism⁷¹ in the later sixteenth century, and an

⁶⁶ *Ibid.*

⁶⁷ C. Merriam, *History of the theory of sovereignty since Rousseau*, (Princeton, 1999) [1900], p. 14. See W. Dunning, "Jean Bodin on Sovereignty", (1896) 11 *Political Science Quarterly* 82, and C. Wells, *Law and citizenship in early modern France*, (Baltimore, 1995).

⁶⁸ Margolf, (n. 65).

⁶⁹ A. Pettegree, *The French book and the European book world*, (Leiden, 2007), p. 19.

⁷⁰ An example of this can be seen in the case of *decisio* 69 in the *Decisiones Burdegalenses*, which is examined at 3.1, in chapter 4 of this thesis. There, Bohier argues that in the case of real actions, ecclesiastical matters are to be dealt with by a secular judge.

⁷¹ On Gallicanism, see J. Parsons, *The church in the republic: Gallicanism and political ideology in renaissance France*, (Washington, D.C., 2004).

eventual movement away from Rome, rather than a principled and concerted effort by individuals in office to construct a unified single nation.

3.1 Language

The role of language was a significant mark of the national and patriotic sentiment in sixteenth century France.⁷² King Francis I's *Ordonnance de Montpellier*, enacted in 1537, established a legal deposit system, providing that the royal library receive a copy of every book to be sold in France.⁷³ This *ordonnance* came following a period of gradual assimilation into one unifying language. By the end of the fifteenth century, French was the only vernacular used for literary purposes in the North.⁷⁴ The language spoken at this time was largely based on that of Paris, Orléans, and Tours, with regional variations in pronunciations and dialects peppered throughout. French was still spoken by a minority in the South, but was steadily strengthening its position as the official language. John Palgrave's *L'éclaircissement de la langue francoyse* (1530) laid out a language hierarchy. The French language spoken in Paris was best; written French of the most worth was based on that spoken tongue. Those holding office were expected to use this kind of French.⁷⁵ Regional features would start to subside over the course of the sixteenth century, with the South becoming increasingly united with the North, and sharing a quasi-united language for official purposes. The *Ordonnance de Villers-Cotteret* would officially remove remnants of written language rivalry in 1539 when it provided for administration and court proceedings to be written only in French to the exclusion of the regional variations and Latin.⁷⁶

Looking to the printed legal works of the sixteenth century, then, notions of an author asserting a sense of national identity through his prose are heavily compromised. The choice of words and language as an indicator of identity or as a trademark of self-demarkation ought to be tempered with the institution to which the

⁷² M. Yardeni, *La conscience nationale en France pendant les guerres de religion, 1559-1598*, (Leuven, 1971), pp. 43-44. See chapter 5 of this thesis, "*Consuetudines Biturigium*", at 3.1 for the role of language in written customs.

⁷³ Margolf, (n. 65).

⁷⁴ P. Rickard, *A history of the French language*, (London, 1974), p. 82.

⁷⁵ J. Palsgrave, *L'éclaircissement de la langue francoyse*, (Paris, 1530).

⁷⁶ See J. Foyer, "L'Ordonnance de Villers-Cotterêt", (1989) 133 *Comptes rendus des séances de l'academie des inscriptions et belles-lettres* 636.

A copy of this Ordinance can be seen in *Les collections du musée des archives nationales*, AE/11/1785.

work is affiliated or about. Instead of an assertion of personal identity, works of an official nature are perhaps more accurately reflections of the status quo. The three works by Bohier that are examined in this thesis demonstrate this change in approach to language. Two of his works are written solely in Latin, the *Consilia* and *Decisiones*, and the third, the *Consuetudines*, is presented in both Latin and French.

3.2 The Lawyer and print

Nicolas Bohier was responsible for a range of publications, and these will be considered in detail later.⁷⁷ For now, however, it is useful to examine the relationship between printing and legal practice in a broad sense so as to greater inform the context of the late fifteenth and early sixteenth century.

In 1440, Johannes Gutenberg's printing press revolutionised the way in which individuals engaged with the written word.⁷⁸ The significance of this in the legal world is particularly evident. While the effects of the printing press will have been gradual, in many respects, with some existing legal texts not being printed for some time, it would affect both legal doctrine and legal practice drastically.⁷⁹ The printing press not only made mass publication possible, but it was accompanied with editing, indexing and marginal notes.⁸⁰ Increased order and method was brought to bodies of law and familiarity with texts helped to reorder the thought of readers and observers of legal literature as well as other publications. Its influence on the classical law was two-fold: it presented the prized works in a more accessible format and therefore allowed for greater appreciation of the content; however, this increase in analysis also allowed for a new kind of scrutiny and would facilitate a more critical form of textual analysis:⁸¹

⁷⁷ See chapter 2, of this thesis, "Nicolas Bohier: A History".

⁷⁸ A. Kapr, (n. 5). See also generally on the politics of information in early modern Europe: Dooley and Baron, (n. 5). See also J. McLeod, *Licensing loyalty: printers, patrons, and the state in early modern France*, (Philadelphia, 2011), in particular at p. 18, where she discusses the history of book printing, and selling, and regional differences in these activities.

⁷⁹ E. Eisenstein, *The printing press as an agent of change*, (Cambridge, U.K., 1979), p. 104.

⁸⁰ *Ibid.*

⁸¹ S. Eussel, *Gutenberg and the impact of printing*, (Aldershot, 2003), p. 79. On the relationship between legal humanism and the book trade, see K. Baston, "Humanist books and lawyers' libraries in early eighteenth-century Scotland: Charles Areskine of Alva's library", in du Plessis and Cairns, (n. 9), pp. 348-376; and also I. Maclean, "The thesauruses of Otto and Meerman as publishing enterprises: legal humanism in its last phase, 1725-1780", also in du Plessis and J. Cairns, (n. 9), pp. 299-347.

Merchants and the *noblesse de robe* – nobles who held purchased offices – stood to gain from the dignity-of-man *ethos* of self-improvement and the humanist emphasis on the achievement of virtue through study and civic service.⁸²

This was especially critical for Bohier's role as editor, which is discussed in detail in the following chapter of this thesis. Bohier published a significant number of medieval works and therefore encouraged new insight into their contents; aided by the mass printing of such texts which had before been available only to a limited market.

Books in this period existed in a completely different cultural context.⁸³ Not all books were bought for reading, with many instead serving as symbols of prestige. By the sixteenth century, books had become sufficiently common so that they were no longer the most prized possessions in a household, but their expense, still being considerable, would have meant their purchase was still a considered act, rather than impulsive consumerism.⁸⁴ Those who read for a living benefited from the marketplace of the *Palais de Justice*, where a veritable cornucopia of stallholders would sell luxury items including books.⁸⁵ In French centres of commerce and trade, information would have been at a premium. The booksellers and their stalls aided the formation of marketplace opinion, and ultimately helped to create a news community. This relationship between the bookseller and the customer, such as *conseillers*, magistrates and other office bearers, was therefore of tantamount importance. Rapport and even friendships between these two groups would be built up over years of retail exchanges, and it would have represented a crucial link between the market and decision making.

The relationship between the book collections of those working in royal or civic administration and their note-taking practices are worthy of special interest.⁸⁶ The way in which advocates constructed their pleadings before the *parlement* and the “types of commonplaces”⁸⁷ used by them to persuade a judge and win a case are predicated on the growing identity of a so-called “professional” readership and their reading habits.⁸⁸ The second half of the sixteenth century saw a movement towards

⁸² L. Warner, *The ideas of man and woman in renaissance France: print, rhetoric and law*, (Surrey, 2011), p. 10.

⁸³ A. Pettegree, *Reformation and the age of persuasion*, (Cambridge, U.K., 2005), p. 159.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, at p. 158.

⁸⁶ Warner, (n. 82), p. 163.

⁸⁷ *Ibid.*, at p. 163.

⁸⁸ *Ibid.*

publishing lawyers' pleadings, and lawyers, enterprising printers and merchant booksellers working together to produce them. Alongside the civil and royal ordinances, there would have been a range of staple items for the library of an officeholder or lawyer. Those booksellers frequenting the *Palais de Justice* stocked a variety of books on history, moral philosophy and poetry in French.⁸⁹ At a time when the capital, in particular, was dominated by the *parlement* and university, who were "united for the most part in their opposition by the growing claims of royal power",⁹⁰ their stock habits would have been responsive to the collective reading habits of those in attendance at these institutions.⁹¹

3.3 Reordering of customary law

The homologation of customary law in the sixteenth century saw a systematic reordering of customs in written form in the French language. This movement, led by the crown, saw lawyers, advocates, judges and legal scholars play a prominent role in compiling, revising and rationalising custom. This would reconcile different localities to bring them under a unified system of law.⁹² Reordering customary law and linking it to statutory laws was an integral part of a state building process in early modern Europe.⁹³ In many respects, a symbiotic relationship between the state and the community "fashioned in this codification process a critical nexus between the crown's assertion of legislative authority and the principle of representative institutions of the local community."⁹⁴

By the middle of the sixteenth century, the majority of customs in the kingdom (including Paris) had been published. There is great agreement on the role of

⁸⁹ *Ibid*, p. 164. Warner has considered the reading habits of the wives and daughters that shared a household with a member of the *Palais de Justice* administration. They may also have frequented these markets and so influenced the extra-legal purchases.

⁹⁰ E. Armstrong, *Robert Estienne, royal printer: an historical study of the Elder Stephanus*, (Cambridge, U.K., 1954), p. xix.

⁹¹ For an insight into French library collections of this period, see C. Jolly, *Histoire des bibliothèques françaises: Les bibliothèques sous l'Ancien Régime, 1530-1789*, (Paris, 1988).

⁹² M. Kim, "Custom, community, and the crown: lawyers and the reordering of French customary law", in C. Parker and J. Bentley (eds.), *Between the middle ages and modernity: individual and community in the early modern European world*, (Landham, 2007), p. 170. On customary law see also J. Dawson, "The codification of the French customs", (1940) 38 *Michigan Law Review* 765; D. Kelley, "Second nature: the idea of custom in European law, society and culture", in A. Grafton & A. Blair (eds.), *The transmission of culture in early modern Europe*, (Philadelphia, 1990), p. 150; F. Olivier-Martin, *La Coutume de Paris: Trait d'union entre le droit romain et les législations modernes*, (Paris, 1925).

⁹³ Kim, (n. 92).

⁹⁴ *Ibid*.

legal humanism in promoting the feudal and customary laws of Europe, France especially, and ultimately in contributing towards the nationalisation of France by creating an “ideological climate sympathetic to the emergence of national law.”⁹⁵ This is not denied, but the importance placed on its role overshadows the background behaviour of the monarchy and its effort to centralise power, using jurists and lawyers to consolidate the customary laws. The renowned jurist and Parisian lawyer, Charles Loyseau (1564-1627)⁹⁶ alludes to the practical motivations behind homologation:

Our customary laws... are so different and so confused that it is very difficult to extract from them a general and certain answer... the law must be married with the practice, usage with reason: in short, Roman law must be linked with our own.⁹⁷

The search for certainty then, or at least a defined source of authorities from which a lawyer could utilise, would have motivated the publication of customary law works. That the bulk of the commentaries written on customs were by legal practitioners is revealing of a practical purpose, or indeed necessity, behind their composition. The later half of the sixteenth century was an intensive period of homologation, but the likes of Nicolas Bohier in 1508, writing a commentary on the customs of Berry, and Barthélemy de Chasseneuz’s (1480-1541) work on the Duchy of Burgundy in 1517 (revised 1528), show the concerted effort by lawyers⁹⁸ to produce works on this source of law earlier.

Perhaps the most marked thing about sixteenth century jurists was “their insistence on the primacy of native traditions” and that there was a “reaction against Romanist influence”.⁹⁹ The changing identity of customary law as being certain and applicable in courts all over France, was not universally accepted, with critics alluding to the inherent ambiguities in customs as individual sources. However, it is perhaps the invocation of “reason” as a justifying factor in the application of a

⁹⁵ J. Cairns, “Institutional writings in Scotland reconsidered”, in A. Kiralfy and H. MacQueen (eds.), *New perspectives on Scottish legal history*, (London, 1984), pp. 76 and 85.

⁹⁶ On Loyseau, see H. Lloyd, “The political thought of Charles Loyseau (1564 – 1627)”, (1981) 11 *European Studies Review* 53.

⁹⁷ C. Loyseau, *Traité du déquerpissement et délaissement par hypothèque in oeuvres* (Paris, 1640). Cited in J. Whitman, “Why did the revolutionary lawyers confuse custom and reason?”, (1991) 58 *University of Chicago Law Review* 1332.

⁹⁸ Barthélemy de Chasseneuz practised law in the *baillage* and later became a member of the Dijon *parlement* and then President of the Aix *parlement*.

⁹⁹ D. Kelley, *Foundations of modern historical scholarship*, (New York, 1970), p. 198. On customary law in France see also: R. Filhol, “The codification of customary law in France, in the fifteenth and sixteenth centuries”, in H.J. Cohn (ed.), *Government in reformation Europe*, (London, 1971), at p. 265.

custom. From the medieval practice where a custom was required to be reasonable, this recourse to reason was a logical extension, identifying custom as a “secondary form of natural law”.¹⁰⁰ Bohier himself offered an account of custom, where he wrote that it “shows by natural law that all men are born free.”¹⁰¹ Crafting a correlation between customary law and political thought about the state served to strengthen the case for a unified *droit coutumier*, which would peak in the late seventeenth century.¹⁰²

4. Pays de droit écrit

4.1 Montpellier

The Montpellier that Nicolas Bohier was born into in 1469 was an emerging centre of royal administration that would eventually become an administrative capital of Languedoc.¹⁰³ Just two years previously, the *Cour des Aides*¹⁰⁴ was established in the city, and was soon followed by several other tribunals of province-wide importance, securing Montpellier’s position as the centre of Languedocian financial administration.¹⁰⁵

Until the late twelfth century, Montpellier was under the commercial dominance of Genoa.¹⁰⁶ At this time there was a recognised shift towards merchants asserting independence from the so-called “commercial hegemony of Genoa and Pisa which had been until then almost exclusive intermediaries in the supply of the markets of Montpellier with spices and other articles of the Mediterranean luxury trade.”¹⁰⁷ Overland routes that linked Montpellier with Northern Italy also facilitated

¹⁰⁰ Whitman, (n. 97), at 1349.

¹⁰¹ Kelley, (n. 90), at 155.

¹⁰² J. Whitman, *The legacy of Roman law in the German romantic era: historical vision and legal change*, (Princeton, 1990), p. 45.

¹⁰³ F. Irvine, “From renaissance city to *ancien régime* capital: Montpellier c1500-c1600”, in P. Benedict, (ed.), *Cities and social change in early modern France*, (London, 1989), p. 105. For a history of this tumultuous period, see: F. Braudel, *The Mediterranean and the Mediterranean world in the age of Philip II*, (London, 1973) [translated from the original French] [1972], p. 360.

¹⁰⁴ The arrêts et procédures (1500-1790) for the *Cour des Aides* can be accessed in the *Archives Nationales*, Paris, Z/1A 863-963. See also F. Hébert, *La cour des Aides de Paris sous l’Ancien Régime*, (Doctoral thesis, University of Paris, 1965).

¹⁰⁵ Irvine, (n. 103), p. 109.

¹⁰⁶ K. Reyerson, *The art of the deal: intermediaries of trade in medieval Montpellier*, (Leiden, 2002) [2001], p. 32.

¹⁰⁷ *Ibid*, p. 33.

an East-West exchange.¹⁰⁸ However, this prosperity did not last beyond the end of the fifteenth century. Frederick Irvine attributes the collapse of the Levant trade partly due to Marseilles joining the kingdom in 1481 and thereby taking Montpellier's monopoly on spice trade.¹⁰⁹ This turned Montpellier into a "centre of regional commerce."¹¹⁰ Although overland trade with Lyon persisted, it was not as profitable as it had previously been, and so many merchant families moved away from commercial activities and instead focused on investing in *seigneurial* estates and robe offices.¹¹¹ This aspiration to "live nobly", as Irvine calls it, saw the creation of a new urban nobility.¹¹² Those escaping bourgeoisie status would often set their sights on investing in royal offices in particular.

The university served to benefit the town of Montpellier considerably. The faculty of medicine in particular enjoyed an international reputation of excellence, and was responsible for much of the international contingent studying at the institution.¹¹³ The law school, in contrast, does not appear to have enjoyed the same reputation, and instead was predominantly made up of local students from Montpellier or those from within the Bas-Languedoc.¹¹⁴ Given the newly acquired status as a centre of royal administration, the university, together with the emerging urban nobility, would have offered a steady recruitment source for Montpellier royal administration. The officers of robe in Montpellier would have been marked by their varied origins, but Irvine has recognised that this group enjoyed a certain social cohesiveness.¹¹⁵ He attributes this to the focus the offices placed on an individual's position in court and their date of admission as opposed to social background.¹¹⁶ Marriage connections, which were of vital importance in this group, also crossed local elites.¹¹⁷

¹⁰⁸ K. Reyerson, *Commerce and society in Montpellier, 1250-1350*, (Montpellier, 1974), pp. 57-152.

¹⁰⁹ Irvine, (n. 103), at p. 106.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ E. Williams, "Medical education in eighteenth century Montpellier", in O. Grell, et al. (eds.), *Centres of Medical Excellence?: Medical Travel and Education in Europe (1500-1789)*, (Surrey, 2009), pp. 247-268.

¹¹⁴ *Ibid.*

¹¹⁵ Irvine, (n. 103), at p. 120.

¹¹⁶ *Ibid.*

¹¹⁷ Jonathan DeWald considers the role of family and connections forged through marriage in the professional life of a *parlementaire*. Much of his discussion is equally illuminating for the present discussion of offices in royal administration. See: J. DeWald, *Formation of a provincial nobility: the magistrates of the parlement of Rouen*, (Princeton, 1980), chapter 6.

4.2 Bordeaux

The *parlement* of Bordeaux was established in 1462. Born out of the two *parlements* of Paris and Toulouse, its jurisdiction extended over a large proportion of Southern France (see map earlier in this chapter for a sense of the different regions and their *parlements*). It was created to rule in the name of the King as an instrument of royal justice, enforcing whatever ordinances had been registered, but with the right of remonstrance.¹¹⁸ However, it was to have its own role in the politics of the region and so, together with its royal relationship, it was a complex force of monarchic defender and critic of royal policy.

Much of the history written about early modern France focuses on centralisation and homologation, and in the case of cities and municipalities, it has traditionally been assumed that there was a general shift by robe officers and so-called legal men to distance themselves from the urban community and align themselves with the crown, undermining the classical idea of the French *bonne ville*.¹¹⁹ However, Michael Breen has highlighted that the power and importance of France's municipalities, while on the wane, remained "vital centres of governance and political activity."¹²⁰ He continues: "Although some urban centres were undoubtedly under close royal control, notables in many others maintained a strong sense of civic identity and attachment to their local privileges and institutions".¹²¹ The case of Bordeaux demonstrates this through its own particular history of unrest and radical change of rule.

Bordeaux was under English rule from 1152 until 1453 when the French victory over the English at the Battle of Castillon stripped them of all French assets (except Calais and the Channel Islands), and ultimately marked the end of the Hundred Years War.¹²² Located in the duchy of Guyenne, the city of Bordeaux then fell under the French crown again (except between 1469 and 1472, when King Louis

¹¹⁸ Kingston, (n. 36), at p. 59.

¹¹⁹ B. Chevalier, *Les bonnes villes de France du XIV^e au XVI^e siècles*, (Paris, 1982), in M. Breen, *Law, city and king: legal culture, municipal politics, and state formation in early modern Dijon*, (Rochester, 2007), p. 6.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*, p. 7.

¹²² M. Vale, "The war in Aquitaine", in A. Curry and M. Hughes (eds.), *Arms, armies and fortifications in the hundred years war*, (Woodbridge, 1994), pp. 69 – 82.

XI (1423-1483) granted the duchy to his brother, Charles de Valois (1446-1472)).¹²³ After the fall of English Gascony, the reinstatement of French authority took many forms. Robin Harris has recognised that while some would have sought to radically reform the duchy's institutions, there was no evidence of a concerted effort to transform the cultural or social identity of Guyenne.¹²⁴ The *parlement* of Bordeaux assumed the jurisdiction and work of the *Cour superieure* of Guyenne. There was a continued authority of traditional privileges, such as communal ones that included municipal control over police and administration in the region.¹²⁵ This extended to local bourgeois of Bordeaux who were granted an exemption from personal and commercial taxes, among other benefits.¹²⁶ However, this period was still marked by unrest. Douglas Johnson sums up the mood of the era of transition well:

So great could be the resistance to the crown on financial matters, and so widespread and persistent were the privileges enjoyed by individuals, classes, corporative bodies and municipalities, that the history of the crown from the fifteenth century onwards is often one of great precariousness.¹²⁷

Indeed, the burghers of Bordeaux presented a long resistance to any attempt to limit their municipal freedoms.¹²⁸ Of course, not each period of unrest can be solely predicated on some strong sense of regional autonomy or civic identity as a motivating factor, with many instances appearing to be simply the product of perceived unfairness in financial administration and collective protest to this effect. There was certainly a relationship between the pattern of royal intervention in the region and the nature of the responses to it by the public, and its direct impact in creating a unique tradition for the *parlement* of Bordeaux.¹²⁹ Taxation was one major recurring contention. One notable case can be found in 1514 when the town of Agen, near Bordeaux, saw a significant uprising as a reaction to the town consul's levying of an impost on wine and other consumer items. Rebels, overburdened with taxation,

¹²³ D. Seward, *A brief history of the hundred years war: the English in France, 1337-1453*, (London, 2003), chapter 1; see also D. Bryson, *Queen Jeanne and the promised land: dynasty, homeland, religion and violence*, (Leiden, 1999), p. 21.

¹²⁴ R. Harris, *Valois Guyenne: a study of politics, government and society in late medieval France*, (Woodbridge, 1994), p. 191.

¹²⁵ R. Kingston, *Montesquieu and the parlement of Bordeaux*, (Geneva, 1996), p. 63.

¹²⁶ *Ibid*, pp. 63-64. Other benefits included the control over wine sold in the city of Bordeaux.

¹²⁷ D. Johnson, "The making of the French nation", in M. Teich and R. Porter (eds.), *The national question in historical context*, (Cambridge, U.K., 1993), pp. 35-62, at p. 41.

¹²⁸ Harris, (n. 124), at pp. 134-135.

¹²⁹ Kingston, (n. 125), at p. 64.

directed their frustration at local magistrates and the so-called *plus apparens* in charge of local offices that administered the city's affairs. The revolt lasted for two weeks, with the *parlement* of Bordeaux acting to suppress it, under the command of the King.¹³⁰

Generally, it seems that there was no uniform program of uprooting administrative and judicial institutions of English Gascony, but instead gradual adaptation. In the *parlement* of Bordeaux, for example, from its time of installation in 1462, there was a trend towards greater use of French language in the notarial registers. Harris states: "throughout the period French, Gascon, and very much in third place, Latin, are to be found side by side."¹³¹ Furthermore, the Romano-Canonical procedure of the different *parlements* did serve to strengthen national unity, however as was the case in the German territories, the variation of local customs within each province made the administration of justice a difficult task. Major cities had their own laws as a projection of their regional autonomy, but made use of the *ius commune* for its "cultural valences, its reasoning mechanisms, and its general principles".¹³² Further, despite apparent incongruences among the principalities, legal procedure and practice would have been generally familiar to lawyers trained in the *ius commune*.¹³³

The maintenance of public order in a particular region had far-reaching implications for all regions. Force would have suppressed the immediate threat that the uprising presented to established order in Agen in 1514, mentioned above. The law, however, would be used as instrument of force, which would have left a far greater mark than any physical injury sustained against those that revolted. It offered an opportunity for the elaboration of preventive policies to avoid the formation of dissent, and for the monarch to flex their institutional muscle in the form of the *parlement*.

¹³⁰ D. Burg, *A world history of tax rebellions: an encyclopedia of tax rebels, revolts*, (London, 2004), p. 144. Nicolas Bohier was involved in the trial of the rioters, publishing a work on the trial, receiving a three-year royal printing privilege for the published treatise, entitled *De seditiosis*. See also E. Armstrong, *Before copyright: the French book-privilege system 1498-1526*, (Cambridge, U.K., 1990), p. 30.

¹³¹ Harris, (n. 124), p. 191. Interestingly in England, the written languages of English law were three: Latin for the formulaic writ book and the final transcription of the plea roll; English for statute; French for the legal report. See B. Cormack, *A power to do justice: jurisdiction, English literature, and the rise of the common law*, (Chicago, 2008) [2007], p. 5. The role of language in creating national identity is considered earlier in this chapter, at 3.1.

¹³² M. Bellomo, *The common legal past of Europe: 1000-1800*, (Washington, D.C., 1995), p. 105.

¹³³ R. Helmholz, *The ius commune in England: four studies*, (Oxford, 2001), p. 14.

The term *sedition* had its roots in the Roman republic, and was rediscovered in the early modern age by jurists looking for an understanding in law of what appeared to be a succession of endemic violent uprisings and movements against the established authorities. It appears that the description of sedition, or at least what can be considered to be so, began from the reference to the *Codex Iustinianus*, where *sedition* was defined as a “general perturbation of the public peace.”¹³⁴ The publication of the treatise *Tracatus de Seditiosis* in 1515 by Nicolas Bohier was the first systematic attempt to bring order to the topic. Following the Roman law definition, and citing the Codex, Bohier states “*sedition est quietis publicae perturbatio*.”¹³⁵ The context of *sedition* was broadly drawn, so as to include “*in exercitu, in classe, in campo, in schola*.”¹³⁶ This ought to be seen as a construction of legal doctrine that served political needs and control public spaces *en masse*. By “defining a crime that was suitable for the brutal repression of any forms of protest against authority”,¹³⁷ this legal treatise constructed a ideological axe with which to grind down those who took part in, or were involved in preparation of, so-called seditious acts. From one region’s behaviour followed a responsive rule that was in operation across France. It was therefore a unifying action and one that promoted a definition that was based on the infraction of political loyalty, which all subjects were bound to, regardless of regional residency. The broad definition of the locus required for sedition may be interpreted as a conscious effort to blur regional identity, merging into a collective one, as a royal safeguard to the differences inherent in each region. The implications of this would therefore be felt beyond the particulars of this offence.

5. Conclusion

This chapter has asked “what of the lawyer?” in late fifteenth and sixteenth century France. The profession was as varied as the institutions they worked in. The period is marked by the advancement towards the nation state, and the role of the

¹³⁴ F. del Vera, “*Quietis publicae perturbatio*: revolts in the political and legal treatises of the sixteenth and seventeenth centuries”, in M. Griesse (ed.), *From mutual observations to propaganda war: premodern revolts in their transnational representations*, (Bielefeld, 2014), pp. 273-308, at p. 280. The title of the Codex referred to here is C.9.30, *De seditiosi et his qui plebem audent publicam quietem colligere*.

¹³⁵ *De seditiosis*, 2, n. 1, 114.

¹³⁶ *De seditiosis*, 2, n. 4, 115. Fabrizio del Vera discusses this in detail at p. 287.

¹³⁷ Del Vera, (n. 134). Kourad Braun, who in 1550 printed his treatise *De seditionibus libri sex*, followed Bohier. Bohier’s work was referred to in this treatise.

lawyer in this was significant. Bohier, like all figures, is a man in context. This potted history of the period in which he lived has been offered to demonstrate that he was a man with a range of identities: professional, regional and increasingly national ones. It is therefore likely that this would have informed his understanding and approach to the law.

The regionalisation of centres of judicial authority, most notably the *parlements*, were symptomatic of the monarchic extension of power into localities, with an aim to better understand custom and regional differences. The arrival of regional *parlements* saw an increase in municipal activity in the towns in which they sat, with their ability to dominate city agencies by their greater dynamism and accompanying superiority.

French nationalism, or more accurately, its origins and movement towards it, are to be found in the sixteenth century, and the extent to which an individual lawyer's own identity was purposively crafted by them to meet nationalist sentiments, to serve as a statesman of a new France, have been considered. French ecclesiastical nationalism, or Gallicanism, accounts for much of the successful forging of a national identity in the later half of the sixteenth century, with an emphasis on the historic distinctiveness of France, and its independence of papacy and empire.¹³⁸ It has been shown that jurisdictional conflict between magistrates and clergy meant that the competition for authoritative rule would have featured, in some cases prominently and in others more latently, in decisions made by the *parlement*, for example, where the clergy was involved.

¹³⁸ On Gallicanism, see Parsons, (n. 71).

CHAPTER 2

NICOLAS BOHIER: A HISTORY

1. Introduction

Despite his achievements, Nicolas Bohier, an *avocat, professeur* and President of the Bordeaux *parlement*, has not received much attention in contemporary scholarship. The most complete accounts of his personal life and achievements are to be found in Gerard Guyon's "*Le droit bordelaise dans tous ses états: les anciennes coutumes, les jurists et la justice, les institutions de l'Église locale*", where he devotes a detailed chapter to Bohier,¹ and a nineteenth-century work by Georges Calmon, *Avocat Général* of the *Cour d'Appel* of Bordeaux.² Delivered as a lecture to the *Palais de Justice*, Calmon's biography accounts for Bohier's birth, marriage and career but is lacking in its use of authorities and so reliance cannot rest too heavily on it. Information can also be found in the introduction to Bohier's *Decisiones Burdegalenses*, provided by Jean Alesme, a *conseiller* at the Bordeaux *parlement*.³ However, this brief history is a simple celebration of Bohier's life and is more of a eulogy than a biography, being highly stylised and lacking objectivity. Together with the footnotes of related histories and brief entries in biographical works,⁴ these are the only known accounts of Nicolas Bohier's life currently on offer.

The Bohier name has a long and distinguished history in France.⁵ It can be found in many of the prestigious positions of the Early Modern period, including those held

¹ G. Guyon, "*Un arrêteste Bordelais: Nicolas Boerius (1469-1539)*" in G. Guyon, *Le droit Bordelais dans tous ses états: les anciennes coutumes, les juristes et la justice, les institutions de l'église locale: recueil d'articles*, (Limoges, 2012), p. 127-149.

² G. Calmon, *Le Président Bohier (Boerius)*, (Bordeaux, 1880).

³ *Decisiones Burdegalenses* (Lyon, 1547).

⁴ An example being J. Hoefler, *Nouvelle biographie générale*, Volume 6, (Paris, 1852).

⁵ One of the most famous undoubtedly being Thomas Bohier (1460-1523). Like Vincent Bohier, Thomas was also born in Auvergne. Married to Katherine de Briçonnet, a French noblewoman and daughter of Guillaume Briçonnet, a French Cardinal. Thomas served as Chamberlain for King Charles VIII of France but is perhaps best known for the construction of the château de Chenonceau, which would eventually belong to King Francis I, passing to King Henry II (1519-1559), who offered it as a gift to his mistress Diane de Poitiers (1499-1566). See C. Chevalier, *Histoire abrégée de Chenonceau*, (Lyon, 1879).

in the Church and the *parlement*.⁶ Nicolas Bohier upheld this family lineage of professional success, and this biographical history will enable a clearer reading of the lawyer's publications that form the basis of the case study in this work.

2. Early life

Bohier was born in May 1469, in Montpellier, to parents Jeanne Fornerie and Vincent Bohier.⁷ According to Calmon, Bohier's father came from the province of Auvergne and moved to Montpellier to be closer to the University so that he could attend classes there.⁸ Given that he died when Bohier was young, it can therefore be assumed that his involvement in his son's upbringing was brief. Indeed, Calmon's account mentions the encouraging devotion of only Nicolas's mother in his early education.⁹

Bohier studied law at the university in Montpellier, but would later leave the town to visit a number of provinces.¹⁰ He eventually settled in Bourges, the town of his mother Jean Fornerie's birth.¹¹ On 8th July 1499, Bohier married Marie Labourrin.¹² Her Uncle was Guillaume de Cambray, Archbishop of Bourges and once a *conseiller* of the Paris *parlement*.¹³ This alliance seems to have provided for Bohier's attachment to the area, in particular his customary law work on the province of Berry.¹⁴ There is no mention of children in Bohier's will.¹⁵ In his lifetime, Bohier was a jurist, an *avocat*, a *conseiller* in the *Grand Conseil* and President of the regional *parlement* in Bordeaux. He resided in Montpellier, Bourges, Paris and finally Bordeaux, where he died in 1539.

⁶ N. Roelker, *One king, one faith: the parlement of Paris and the religious reformations of the sixteenth century*, (Berkeley, 1996), p.45.

⁷ Calmon, (n. 2).

⁸ *Ibid*, p.7.

⁹ *Ibid*. Calmon states: "sous l'égide d'une mere tendrement dévouée qui fut son guide et son soutien dans les premiers pas de la vie, il se mit résolument au travail et se prépara par de fortes, études à l'avenir brillant que son intelligence précoce permettait d'entrevoir".

¹⁰ Calmon, (n. 2), p. 11.

¹¹ *Ibid*.

¹² *Ibid*.

¹³ G. de la Thaumassière, *Histoire du Berry* (Bourges, 1689), p. 81.

¹⁴ Charles D'Aigrefeuille, *Histoire de la ville de Montpellier depuis son origine jusqu'à a notre temps*, Volume 1, (Montpellier, 1737), p. 368.

¹⁵ Testament of Nicolas Bohier, written 20th May, 1538. A copy of Bohier's will is available at: *Archives départementales de la Gironde, registres d'enregistrement du parlement de Bordeaux* (1538), B/12 fol. 87 to 93.

Bohier is often referred to as *Vicomte de Pommiers*.¹⁶ This title does not seem to have been hereditary; there is no evidence that any of Bohier's family or close associates held this title before him.¹⁷ Georges Calmon has stated that the title came with land bought by Bohier after his growing success as an *avocat* in Bourges, and shortly before his appointment to the *Grand Conseil* in 1508.¹⁸ It is also possible that the title was given to Bohier as a token of royal favour. The King himself sought Bohier out for the position of *conseiller*, and so he was clearly held in high regard by the Royal Court, but there is no clear proof of a title being bestowed on him.¹⁹ He remained in Bordeaux until his death. His will revealed the charitable nature of his character, where he, as a god-fearing Catholic, left substantial provision for the *L'hôpital Saint-André*, and his many books to the *parlement* of Bordeaux.²⁰

3. Bohier's education at Montpellier

Bohier's education would have informed his understanding of the law and its institutions. It has been argued that universities' emphasis on Roman and Canon law in their teaching meant that students were "hardly prepared to begin practicing on graduation."²¹ This, together with the perception that Codes and Digest are "useless to the lawyer because they bear no relation to modern society"²² suggests that the education received would be academic and removed from legal practice. This is perhaps an overstatement. However, it is likely that further education would have been needed to develop a command of customary laws, parliamentary *arrêts* and royal ordinances.²³ The extent to which university education was pragmatic and would have translated into legal practice will be shown in the main part of this thesis through an

¹⁶ He refers to himself as such in his will: *Archives départementales de la Gironde, Registres d'enregistrement du parlement de Bordeaux* (1538), B.12 fol. 87 to 93. See also P. Renouard, *Imprimeurs et Libraires Parisiens du Seizieme siècle ouvrage publié d'après les manuscrits de Philippe Renouard*, Volume 5, (Paris, 1991), p. 270.

¹⁷ In the *Archives Nationales*, Paris, there are references to "*Vicomte de Pommiers*", but the holder of the title was not Bohier.

¹⁸ Calmon, (n. 2), p. 18.

¹⁹ On this topic more generally see: F. Bluche, *L'Ancien Régime: Institutions et Société* (Paris, 1993).

²⁰ Testament of Nicolas Bohier, (n. 15). See also: C. Boscheron des Portes, *Histoire du parlement de Bordeaux, depuis sa création jusqu'à sa suppression (1451-1790), Tome Premier (1462-1640)*, (Bordeaux, 1877).

²¹ M. Breen, *Law, city and king: legal culture, municipal politics and state formation in early modern Dijon*, (Rochester, 2007), p. 39.

²² J. Pocock, *The ancient constitution and the feudal Law: a study of English historical thought in the seventeenth century*, (Cambridge, U.K., 1987), p. 12.

²³ Breen, (n. 21).

examination of Bohier's *Consilia* and *Decisiones*.²⁴ For now, Bohier's role as a student at Montpellier will be considered as well as his position as *Professeur* at Bourges.

3.1 Montpellier

During the sixteenth and seventeenth centuries, when state building in France depended on the government's ability to staff administrative and judicial offices, prime candidates emerged from famous law schools.²⁵ The confidence of the legal profession was intensified by connections with a parallel, and in some ways, overlapping institution: the university, which provided academic apprenticeship and licensing for the vocation of jurisprudence.²⁶ Renaissance Europe would see a succession of universities being created: twenty-eight new ones in the fifteenth century, with a further eighteen between the years in 1500 and 1625.²⁷ The reasons for their creation and expansion stem from an awareness of royal leaders and city governments of the benefit of scholarly expertise and analysis to resolve difficult situations, create solutions and the creation and maintenance of a community from which they could draw educated men to form an elite workforce for the future.²⁸ France, in particular, shared in this spirit of expansion, creating nine new universities between the fifteenth and seventeenth centuries.²⁹

Bohier studied law at Montpellier.³⁰ The late fifteenth century saw Montpellier emerge as a major centre of royal administration and as an administrative capital of Languedoc.³¹ This was considered earlier in greater detail.³² Bohier's particular reasons for studying law are not known, but it is possible to make some assumptions as to his motivations. A legal education was a pre-requisite for some of the most

²⁴ See chapters 3 and 4 of this thesis in particular.

²⁵ S. Hanley, "The jurisprudence of the *arrêts*: marital union, civil society, and state formation in France, 1550-1650", (2003) 21 *Law and History Review* 1.

²⁶ D. Kelley, *The beginning of ideology: consciousness and society in the French reformation*, (Cambridge, U.K., 1981), p. 180.

²⁷ P. Grendler (ed.), *Renaissance education between religion and politics*, (Aldershot, 2006), p. 2.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ R. Frères, *Cartulaire de l'Université de Montpellier publié sous les auspices du conseil général des facultés de Montpellier*, (Montpellier, 1890), p.84. The dates of his attendance at the university are not known, but given the dates of his professional appointments it is likely that he would have been in attendance in the 1480/90s.

³¹ F. Irvine, "From renaissance city to ancient regime capital: Montpellier, c.1500 – c.1600", in P. Benedict (ed.), *Cities and social change in early modern France* (London, 1989), p.105.

³² See chapter 1, "4. Pays de droit écrit".

prestigious positions; indeed, the chief credential in *Ancien Régime* France for admission and promotion to the highest ranks of royal service was a law degree.³³ University courses were lengthy, in particular that of Law, Medicine and Theology, and the cost of living in university towns was high.³⁴ Substantial financial resources were required, and this accounts for the disproportionately large numbers of law students who came from wealthy and well-placed families or those who enjoyed revenues from ecclesiastical benefices.³⁵

Bohier's early legal education would have had a formative impact on him, and his choice of university would have determined the nature of his education. By the time he started his studies there, at the end of the fifteenth century, the university at Montpellier had fallen in its position as one of the greatest centres of study in Europe. This has been attributed to a number of factors, but it is important to note that this apparent decline would not have lowered Montpellier Law School into absolute obscurity, although it seems that by this stage students were drawn mainly locally from Montpellier and other towns of Bas-Languedoc.³⁶ Bohier would have received his professional legal training in an environment rather removed from legal practice, and instead his initiation into the field of law would have been through the intensive study of the texts on the civil and canon law.³⁷ This theoretical legal environment appealed to many students who would remain to pursue the work of a jurist.

3.2 *Professeur* at Bourges

Bohier taught at the University of Bourges, serving as a *Professeur* in the faculty of law.³⁸ The university "represented a sort of training ground not only for

³³ J. Goldstone, *Revolution and rebellion in the early modern world*, (Berkeley, 1991), p. 248.

³⁴ J. Brundage, *The origins of the legal profession: canonists, civilians and courts*, (Chicago, 2008), p. 271.

³⁵ *Ibid.* Compare the similar situation in Scotland. See J. Cairns, "Rhetoric, language, and Roman law: legal education and improvement in eighteenth-century Scotland", (1991) 9 *Law and History Review* 31.

³⁶ Irvine, (n. 31), at p.108. The Medical School continued to enjoy an international reputation. For an interesting first-hand account of the student experience at Montpellier see: F. Platter, *Beloved son Felix: The journal of Felix Platter, a medical student in Montpellier in the sixteenth century*, (London, 1961).

³⁷ R. van Caenegem, *An historical introduction to private law*, (Cambridge, U.K., 1996), p.80.

³⁸ Frères, (n.30). He is referred to as holding a "*Chaire de Professeur*" at Bourges in D'Aigrefeuille, (n. 14). See also Boscheron des Portes, (n. 20), p. 40. J. Ford makes reference to Bohier's position at Bourges in his *Law and opinion in Scotland during the seventeenth Century*, (Oxford, 2007), p. 193. The dates of Bohier's appointment to the position of *Professeur* are uncertain due to a lack of archival records on his role at the university.

humanist jurists but also for the professional ideologists of the next generation.”³⁹ As a renowned centre for legal humanism it has many famous members, including the likes of Andrea Alciato (1492-1550);⁴⁰ Jacques Cujas (1520-1590); Hugo Doneau (1527-1591) and François Hotman (1524-1590).⁴¹ Bohier’s position there would have pre-dated these well-known figures of the Humanist school.⁴² This may account for the relative obscurity surrounding Bohier’s role there. The majority of Bohier’s written works were related to the law in practice, and arguably, humanist discussions would not have been relevant to practical legal debates. Instead, these would have rested on the writings of Baldus de Ubaldis (1327-1400) and Bartolus de Saxoferrato (1313-1357).⁴³

His role as *Professeur* is significant in terms of its influence on his later publications. His *Decisiones* and *Consilia*, in particular show his “aim in writing as a judge... to provide retrospectively the sort of reasoning on the questions raised by cases that he had provided prospectively when writing as a *Professeur*.”⁴⁴

4. Patronage

Nicolas Bohier benefited from informal patronage networks, most notably his link with Antoine Duprat (1463-1535), a French Cardinal from the Auvergne province (like Nicolas’s father, Vincent), President of the *parlement* of Paris and Chancellor of France. Duprat was a cousin of the family,⁴⁵ and has been called “one of the most important men of old France.”⁴⁶ Another powerful association can be found through this Cardinal’s cousin, Antoine Bohier Duprat, (1460-1519) who was Archbishop of Bourges and President of the *parlement de Normandie*.⁴⁷ Chancellor

³⁹ Kelley, (n. 26), at p. 162. Here, it seems “ideologists” can be taken to mean jurists.

⁴⁰ See M. Ducos, “Legal science in France in the 16-17th centuries”, in G. Sandy (ed.), *The classical heritage in France*, (Leiden, 2002), pp. 297-314 at pp. 300-303.

⁴¹ See W. Rugg, “Themes”, in H. De Ridder-Symoens (ed.), *A History of the university in Europe, Volume II: Universities in early modern Europe (1500-1800)*, (Cambridge, U.K., 2003), pp. 3-42, at p. 34.

⁴² P. Stein, *Roman law in European history*, (Cambridge, U.K., 1999), p. 77.

⁴³ This thesis will show that Bohier made considerable use of the likes of Baldus and Bartolus, among others.

⁴⁴ Ford, (n. 38).

⁴⁵ Roelker, (n. 6).

⁴⁶ G. Hanotaux, *Recueil des instructions données aux ambassadeurs et ministres de France: depuis les traites de Westphalie jusqu’à la Revolution Française*, (Paris, 1888), p. 61.

⁴⁷ This association means that Nicolas Bohier is related to Thomas Bohier, *Secrétaire du Roi* to King Charles VIII, and creator of the Château Chenonceaux. Thomas was Antoine Bohier Duprat’s brother. See F. Blanchard, *Histoire généalogique, par ordre alphabétique, des présidens et conseillers du*

Duprat's influence extended beyond those departments of finance and administration that had been placed under his control. Duprat also strengthened royal absolutism by introducing a system of royal nomination to replace the traditional canonical elections in the Church.⁴⁸ The *parlement* of Paris was hostile to Duprat, resentful of his high-handed manner in dealing with matters of the court, further exacerbated by their disappointment in what was perceived as Duprat's disloyalty to his former place of office, having served as President there for a period. Furthermore, he had placed many *protégés* in royal offices and this served to add a further bitterness between *parlement* and Duprat. It is therefore likely that Nicolas Bohier's powerful, although not hugely popular ally could have aided his appointments.⁴⁹

Bohier's career in legal practice began in Bourges.⁵⁰ His hometown of Montpellier would have offered much in the way of opportunities for the young Bohier if he had wanted a career in finance and royal administration. However, if set on a legal path, the city's local tribunals were more limited in their potential career prospects. Most cases came before the *cours ordinaire*, with appeal taken to the *Siège présidial*,⁵¹ and while these courts would have provided a perfectly adequate legal career for Bohier, he left for Bourges. In the majority of the histories dealing with Bohier, he is referred to as an *avocat*, practicing at Bourges.⁵² The legal profession of the early modern period was a diverse body, including scholars, practicing lawyers and notaries.⁵³ Known as the *noblesse de la robe*, the profession would be identified with the middle class or some rank above it, but given the varying types of occupation

parlement de Paris jusqu'en 1712, Volume 5, in F. Blanchard, *Catalogue général des manuscrits des bibliothèques publiques de France. Départements* (Paris, 1855).

⁴⁸ On Duprat's influence on ecclesiastical elections, see J. Jager, *Histoire de l'église catholique en France: d'après les documents les plus authentiques: depuis son origine jusqu'au concordat de Pie VII*, (Paris, 1867), pp.334-336. On Duprat more generally, see A. Buisson, *Le chancelier Antoine Duprat*, (Paris, 1935).

⁴⁹ It is known that Bohier's appointment to the office of *Grand Conseil* was by Jean De Ganay. However, Antoine Duprat succeeded him and so it seems likely that Duprat was involved in Bohier's later post at the Bordeaux *parlement*. E. Armstrong, *Before copyright: the French book-privilege system 1498-1526*, (Cambridge, U.K., 1990), p. 76.

⁵⁰ Frères, (n. 30), p. 84. The date of Bohier's entry to the legal profession cannot be known for certain. Information on his role as an *avocat* has largely dependent on the secondary literature of Calmon, (n. 2).

⁵¹ Irvine, (n. 31), p. 110.

⁵² In particular see A. Cumas (eds.), *Lettres sur la profession d'avocat par Cumas, enrichies de pièces concernant l'exercice de cette profession*, (Brussels, 1833), p. 98. (However, note the erroneous date of death given as 1538, instead of the accepted 1539).

⁵³ W. Bouwsma, "Lawyers and early modern Culture", (1973) 2 *The American Historical Review* 303 at 305.

a man qualified in the law could enter into it is difficult to offer a precise account.⁵⁴ By the end of the sixteenth century, a clear division had formed between the *avocat* and the *procureur*, and it is likely that this distinction had also started to emerge earlier in the century. The *procureur* tended not to have academic credentials, and instead learned their profession through periods of apprenticeship.⁵⁵ Until the end of the fifteenth century, no official qualifications were necessary for the profession of *avocat*.⁵⁶ However, a university education at a faculty of arts, and then law, became a pre-requisite at the close of the century.⁵⁷ They enjoyed a superior social status.⁵⁸ In his biography, Calmon makes reference to Bohier's character as an *avocat*:

*Bohier s'appliqua a réagir contre les tendances des avocats de son temps. L'office de conciliateur était, son sens, l'exercice le plus noble et le plus élevé de cette profession, et, loin de chercher à animer ceux qui venaient le consulter, il s'attachait a calmer leurs esprits et à accommoder leurs differends; lorsque le proces devenait inevitable, il leur indiquait les moyens de le reduire aux moindres frais possible. Il ne se livrait pas, comme les autres avocats, a une declamation creuse; il fuyait la recherche et l'emphase pour ne s'attacher qu'a la precision. Son esprit, vigoureux et methodique, était merveilleusement apte à la discussion; aussi se renfermait-il toujours dans le moyens tires du fond même de la cause qu'il défendait. Était-il attaqué avec violence par son adversaire? Il répondait avec calme et convenance, persuade que jamais la moderation du langage n'a compromis le success d'une bonne cause.*⁵⁹

It is unclear where this nineteenth-century assessment of Bohier's character stems from: whether contained in the accounts of the time by the *avocat*'s contemporaries of his style and approach, or if it is simply Calmon's own

⁵⁴ *Ibid*, at 304.

⁵⁵ In comparison to the role of the *avocat* in early modern France, the *procureur* has received little scholarly attention. However, there has been a recent move towards rectifying this oversight. See C. Dolan, *Les procureurs du midi sous l'ancien régime*, (Rennes, 2012).

⁵⁶ M. Bubenicek and R. Partington, "Justice, law and lawyers", in C. Fletcher, et al. (eds.), *Government and political life in England and France, c. 1300-1500*, (Cambridge, U.K., 2015), pp. 150-182, at p. 159.

⁵⁷ *Ibid*.

⁵⁸ H. Baade, "The education and qualification of civil lawyers", in J. Cairns and O. Robinson (eds.), *Critical studies in ancient Law, comparative law and ancient history: essays in honour of Alan Watson*, (Oxford, U.K., 2001), pp. 213-234, at p. 223.

⁵⁹ Calmon, (n. 2), p. 17. Own translation: "Bohier strove to react against trends of lawyers of his time. The office was, in his view, the most noble and important of his profession, and far from seeking to aggravate those he came to visit, he tried to calm their minds and accommodate their disputes, when the process became inevitable he showed them the means to reduce their costs as much as possible. He did not, like other lawyers, make a hollow declamation; shun research and lacked precision. His mind, vigorous and methodical, was wonderfully suited to argument. What if it was a violent attack by his opponent? He responded calmly, convinced that words should not undermine the success of a good cause."

interpretation taken from reviewing Bohier's written accounts of cases presented at the *parlement*. Whatever the source, it is nonetheless revealing of Bohier's personal legacy and the way in which his image is received, or even constructed, in later accounts.

As a practising *avocat* in Bourges, the clergy would have constituted a considerable part of Bohier's client base. Certainly, the court reports contained in his *Decisiones Burdegalenses* demonstrate the prevalence of ecclesiastical issues before the *parlement* of Bordeaux: they rank first along with familial matters, which were themselves intimately linked to the church.⁶⁰ A significant proportion of ecclesiastical administration was largely based on procedure rather than a scientific body of law.⁶¹ As a result of this a very high proportion of cases were settled by agreement between the parties at some stage in the action. Given that the Canon law, in developing its own procedure in the twelfth century, had borrowed from the *Corpus iuris civilis*, the successful practitioner needed to be well versed in both systems.⁶²

The *stylus curiae* was important in the French courts.⁶³ Familiarity with it was a formal requirement that led in practice to the concept of the "*l'avocat écoutant*" indicating a form of apprenticeship. In his early years as *avocat*, Bohier would therefore have needed to be in constant attendance and observation in court to gain experience and command and style of the court. Without this an *avocat* "could say nothing and act for no one."⁶⁴ The connection between the development of a distinctive legal profession and the evolution of supreme jurisdiction is clear. The *parlement* in Paris encouraged the monopolisation of representation by inaugurated accredited *avocats*, and therefore a need for those who were familiar with the *stylus curiae* and *modus advocandi*.

In an eighteenth-century publication entitled '*Table alphabétique des choses remarquables continues dans les registres du parlement*', Bohier is listed as: "*président en la chambre des Enquisiteur, 12 Septemb[re]. [sic] 1502...*"⁶⁵ This curious entry does not contain any other information making it difficult to state with

⁶⁰ *Decisiones Burdegalenses* (Lyon, 1547). This is especially true of those cases that contain a mention of the term *ius commune*. Examples include: *Decisio* II, 46; IX, 1; LXIX, 22; CXIX, 3; CXXXIII, 8.

⁶¹ P. Stein, "Vacarius and the civil law", in C. Brooke, et al. (eds.), *Church and government in the middle ages*, (Cambridge, U.K., 2008), pp. 119-138, at p. 134.

⁶² *Ibid.*, p. 135.

⁶³ J. Finlay, "Lawyers and the early modern state: regulation, exclusion, and *numerus clausus*", (2009) 44 *The Canadian Journal of History* 383 at 402.

⁶⁴ *Ibid.*

⁶⁵ *Archives Nationales*, Paris. U/492, p. 131 under "Bohier".

any certainty that this is the same Bohier that is under discussion. The date for the appointment, 1502, makes it possible; indeed, at this time in Bohier's history there are no other accounts of his position and place of residence, although it is generally believed that he was working as an *avocat* at Bourges around this time. It is possible that the "*chambre des Enquisiteur*" noted in this work was in fact a reference to the better-known *Chambre des Enquêtes*, and perhaps was the result of an eighteenth-century error. This *Chambre* formed part of the *parlement of Paris*, and was responsible for conducting investigations that were ordered by the *Grand Chambre*. Although initially it was not an independent decision-making body, in the sixteenth century it became semi-autonomous, without the need to issue its decisions via the *Grand Chambre*. It seems likely that it is to this *Chambre* that the publication refers. As a so-called immigrant to the Paris robe, Bohier's role in the *Chambre des Enquêtes* would have marked his first official entry to the robe hierarchy. Nancy Lyman Roelker has recognised the many different avenues of access for career advancement, which included being the beneficiary of royal favour or, in some cases, plain luck.⁶⁶ In the case of Bohier, his appointment as President of the *Chambre des Enquêtes* is evidence of his early *parlementaire mentalité*, and what has been termed as "a keener eye for political patronage" which was distinct from straightforward professional considerations or wealth.⁶⁷

5. **Conseiller**

Bohier would eventually become a member of the *Grand Conseil du Roi* in 1508. A superior court of Justice, based in Paris and established by royal ordinance in 1497, the *Grand Conseil* had jurisdiction over the entire Kingdom.⁶⁸ It was presided over by the Chancellor of France, who at the time of Bohier's appointment was Jean de Ganay (d.1512).⁶⁹ Patrick Arabeyre has recognised that the influence of Chancellors was considerable and would have been responsible for the nomination of

⁶⁶ Roelker, (n. 6), at p. 45.

⁶⁷ C. Stocker, "The politics of the *parlement* of Paris in 1525", (1973) 8 *French Historical Studies* 191.

⁶⁸ This was considered in greater detail in chapter 1. D. Bjai, "*Trois fois par mois? Dix fois par jour?: Montaigne et la réglementation du mariage dans sur des vers de virigile*", (2011) 38 *Studia Romanica Pos Naniensia* 23, at 26. See also J. Laurent, "*Le Grand Conseil*", *Guide des recherches dans les fonds judiciaires de l'ancien régime*, (Paris, 1958), pp. 27-64.

⁶⁹ On Jean de Ganay, see: F. Aubert, *Dictionnaire de la noblesse*, Volume 8, (Paris, 1774).

conseillers.⁷⁰ In the case of Bohier, it seems that he was sought out by the Chancellor himself and was asked to accept the position of *membre du Grand Conseil*, but was initially met by rejection based on Bohier's poor health.⁷¹ On 17th March 1508, Bohier's reluctance was defeated by the intervention of the King and he was appointed to the *Grand Conseil*.⁷² Bohier's position in the *Grand Conseil* is rarely mentioned in any of the existing accounts; the only known reference in secondary literature is in Calmon's work. The *Grand Conseil*'s reports for Bohier's lifetime do mention a "*Monsieur Bohier*" on a number of occasions, and thus do seem to corroborate Calmon's account.⁷³

In 1508, Guillaume Budé (1467-1540) published his *Annotationes*. Therein he set out an ideal method with which to study and practice the law.⁷⁴ This publication would have coincided with Bohier's appointment to the *Grand Conseil*. The extent to which this work represented common opinion is not known, but it is certain that Bohier would have been familiar with its content. The work instructed students and lawyers to abandon abstraction and strict alliances to authorities, such as Franciscus Accursius (1225-1293), Bartolus and Baldus, as well as their own interests. Budé proposed that instead attention ought to be paid to the original sources of Roman law such as the Digest, but also recourse to the likes of Cicero, Aristotle and Homer.⁷⁵ For Budé, if lawyers could understand that Roman law was imperfect in its own age, then they would no longer treat it as "normative, sacrosanct, and uniform on the one hand, and cease to place themselves above it by means of their interpretations on the other."⁷⁶ Once lawyers understood the original meaning of the words of the law, "they would be able to emulate and even achieve the wisdom and virtue of the ancients, and as a result administer law justly."⁷⁷

⁷⁰ P. Arabeyre, "Aux Racine de l'absolutisme: grand conseil et parlement à la fin du moyen âge d'après *le tractatus celeberrimus de auctoritate et preeminentias sacri magni concilii et parlamentorum regni Francie de Jean Montaigne, (1512)*", (2000) 7 *Cahiers de Recherchés Medievales et Humanistes*, p. 7.

⁷¹ Calmon, (n. 2), p. 19. There is no other evidence suggesting Bohier suffered from ill health at this time. It is possible that this is evidence of his reluctance to take office.

⁷² M. Pelletier *Le grand conseil de Charles VIII à François I, (1483-1547)*, (Doctoral thesis, l'École nationale des chartes, Paris, 1960), pp. 213-214. See also: Boscheron des Portes, (n. 20), p.40.

⁷³ *Archives Nationales*, Paris. V/5/1043 marks the only set of records that contains Bohier's name as an active member of the *Grand Conseil*. This particular record spans his lifetime so this is expected.

⁷⁴ S. Longfield-Karr, *Nature, self, and history in the works of Guillaume Budé, Andrea Alciati, and Ulrich Zasius: a study of the role of legal humanism in western natural law*, (Doctoral thesis, University of Chicago, 2008), p. 65.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

The intellectual mood at the time was changing, and it demonstrates the intellectual climate within which Bohier would have been appointed and then working. Bohier was certainly aware of Budé's publication. In his commentary on Jean Montaigne's *Tractatus celebris de auctoritate*, he mentions Budé's thinking in relation to the disparity, created by the *civilistes* of the medieval period, between the "sénats et les centumvirs", and agrees with his reasoning.⁷⁸

Jean Montaigne (d.1540), a *professeur* of civil and canon law at the universities of Toulouse (1506) and Bourges (1507-8), served as legal counsel to Cardinal Louis d'Amboise, and authored several legal treatises. In the preface to his *Tractatus universi iuris*, Montaigne cites Bohier as one of his closest friends.⁷⁹ It is known that Bohier contributed to his work, *Tractatus celebris de auctoritate et preeminencia sacri magni concilii et parlamentorum regnie Francie* (Paris, 1512), providing annotations. This publication offers a real insight into how Bohier viewed the *Grand Conseil*, its relationship with the *parlements*, in particular that of Paris, and the King.⁸⁰ Patrick Arabeyre has stated that Montaigne represented the prevailing opinion on the matter of judges, royal officials and state absolutism.⁸¹ All editions of the work were accompanied by Bohier's annotated commentary, leading some in the eighteenth-century to entertain the possibility that Bohier was in fact writing under the guise of the Montaigne name:

*c'est Boïer [Bohier] lui-même, qui avait été conseiller au Grand Conseil, qui est le véritable auteur du texte de ce traité, où il s'est déguisé sous le nom de Jean de Montaigne.*⁸²

This seems highly unlikely. In Barthélemy Chasseneuz's (1480-1541) work, *Catalogus Gloriarum mundi* (Lyon, 1529), Montaigne and Bohier are mentioned as two separate authors.⁸³ Further, Jean Montaigne was related to the humanist Jean de

⁷⁸ Arabeyre, (n. 70), p. 8.

⁷⁹ Like Bohier, Montaigne left his possessions to the church. Montaigne's estate was given to the Saint Cecile Monastery (which he represented as a lawyer in a legal dispute against municipal authorities between 1510 and 1516). See A. Vidal, *L'Ancien Diocèse d'Albi d'après les registres de notaires* (Paris, 1913), p. 291.

⁸⁰ Patrick Arabeyre has written a detailed analysis of this work. See Arabeyre, (n. 70), 189-200.

⁸¹ Arabeyre, (n. 70), 190: "Jean Montaigne, qui representent l'opinion dominante des magistrats et des fonctionnaires royaux et affirment l'absolutisme monarchique."

⁸² P. Lelong, *Bibliothèque historique de la France*, (Paris, 1745), pp. 54-79.

⁸³ See C. Dugas de La Boissonny, *Barthélemy de Chasseneuz (1480-1541)*, (University of Bourgogne, 1984), pp. 215-216.

Toulouse Boyssone (1505-1559), and is mentioned by him in one of his letters.⁸⁴ Therefore, while this view is easily disproved, it does still stand as a reminder of the contradictory accounts that have come to mark Bohier's professional life and publications in legal historical study.

In one of the annotations Bohier made to the *Tractatus*, he examined the *Grand Conseil*, and ultimately defended its superior position to the *parlements*. He stated:

*Oui, le Grand Conseil procède du prince; de même que la lune est d'avantage éclairée par le soleil que les autres planètes, le Grand Conseil reçoit la lumière du prince sans aucun intermédiaire, contrairement aux parlements, qui ne font qu'entendre la voix de celui au nom de qui ils parlent. Non, la stabilité des parlements ne leur fait pas un plus grand mérite, car les conseillers au Grand Conseil mènent une vie plus laborieuse: quand les uns vivent avec leurs femmes et meurent dans leur lit, les autres, qui suivent la Cour, meurent le plus souvent 'sur la paille' ...*⁸⁵

The relationship between the *parlement* and the *Grand Conseil* was often characterised by tension. *parlement*'s right of remonstrance demonstrated that it was a body that had political interests and ambitions of its own.⁸⁶ As was considered earlier, it is generally accepted that, by this stage many magistrates sought equilibrium within the government. This would allow for the King's authority to be tempered by the knowledge and counsel of the *parlement* so that it would not be exercised arbitrarily. This defence of the *Grand Conseil*'s superior position is therefore certainly a tactical manoeuvre by Bohier, who, showing such political awareness, would have remained in royal favour.

6. Catholicism

A combination of allegiance to the King and defence of the *Grand Conseil*, goes some way towards explaining Bohier's obscurity in legal-historical scholarship: Bohier was not a revolutionary as his professional appointments and his works show a

⁸⁴ H. Jacoubet, *Les trois centuries de maistre Jehan de Boyssoné, régent à Tholoze*, (Paris, 1923), pp. 69-71, 106 and 112. There is also a mention of a letter sent from near Avignon, August 4, 1527, addressed to Boniface Amerbach in which Montaigne speaks of the excesses committed by the Lutherans after taking the town in May of that year. Moreover, Montaigne seems to have also met with André Alciat during his first professorship in 1518-1522 in Avignon.

⁸⁵ Citation from *Tractatus celebris*, fol. 28, 39-40. Own translation: "Yes, the *Grand Conseil* is closest to the Prince, just as the moon is illuminated by the sun more than the other planets, the *Grand Council of the Prince* receives light without any intermediary, unlike *parlements*, who only hear the voice of those on whose behalf they speak... No, the stability of *parlements* does not make them more worthy because advisors to the *Grand Conseil* lead a life more laborious: when some live with their wives and die in their beds, others, following the Court often die penniless."

⁸⁶ Stocker, (n. 67).

figure that was loyal to the existing regime. Bohier was a practising Catholic,⁸⁷ and so his Catholicism precludes him from any speculative persecution at this time. Instead, he is a figure who enjoyed royal favour, was well connected and loyal to the status quo. History can often neglect such individuals, despite their value as representatives of the norm and therefore accurate reflections of the period and its regimes, legal practice and ideas. There are, of course, notable exceptions to this.⁸⁸

Following a period of monarchic hostility and persecution by lower authorities in the secular and ecclesiastical hierarchies, French Protestantism experienced a period of rapid advancement from the 1540s.⁸⁹ Leading up to this, in the period spanning Bohier's lifetime, the expansion of religious reform movements attracted Catholic authorities, which in turn made efforts to suppress them.⁹⁰ These authorities, such as the Sorbonne and the Paris *parlement*, recognised that ideas of reform began to transcend the elites and as a result they made a systematic effort to persecute alleged seditious activity.⁹¹ Protestantism's links with legal humanism are well known.⁹² The notion of the "narrow Catholic" and the "productive Protestant" are present to a considerable extent in many legal historical narratives. The preoccupation with Humanist-Protestantism in contemporary works have ignored the contribution of pre-Reformation figures who were "perhaps too old and settled in the establishment to come over to the Reformation in the 1520s and 30s and who published their legal works before 1517."⁹³ Bohier is such a figure, and the time of his appointments and his professional affiliations at this time meant that he was very much ensconced within the old French Catholic establishment. It is worth noting that a number of his publications were published from the 1540s, following his death, with

⁸⁷ Out of the extensive literature on the history Catholicism in France, see: R. Gibson, *A social history of French catholicism, 1789-1914*, (London, 1989); D. Bell, *Cult of the nation in France: inventing nationalism, 1680-1800*, (London, 2001); J. Byrnes, *Catholic and French forever: religious and national identity in modern France* (Philadelphia, 2005); J. Hitchcock, *History of the catholic church: from the apostolic age to the third millennium*, (San Francisco, 2012).

⁸⁸ A notable example is Robert Joseph Pothier (1699-1772), a French jurist and judge in Orléans. He excelled as a jurist, producing significant treatises throughout his life, as well as experiencing success in professional practice. See J. de Montmorency, "Robert Joseph Pothier and French law", 13 (1913) *Journal of the Society of Comparative Legislation* 265.

⁸⁹ G. Sunshine, *Reforming French protestantism: the development of Huguenot ecclesiastical institutions, 1557-1572*, (Kirksville, 2003), p. 16.

⁹⁰ *Ibid*, pp. 13-14.

⁹¹ *Ibid*, p. 14.

⁹² See for example H. Berman, *Law and revolution, II: the impact of the protestant reformations on the western legal tradition*, (London, 2003), pp. 110-111.

⁹³ D. McNeil, *Guillaume Budé & humanism in the reign of Francis I*, (Geneva, 1971), p. 17.

continued demand for them in the seventeenth century.⁹⁴ The motivations for this will be considered in detail later,⁹⁵ but for now it seems legitimate to suggest that it is perhaps the combination of being a practising lawyer, *parlementaire* and Catholic living in pre-Reformation France, that has meant that Bohier and his works have historically been overlooked.

7. President of the Bordeaux *Parlement*

Bohier's career culminated in his appointment as President of the Bordeaux *parlement* in 1518.⁹⁶ The records of the Bordeaux *parlement* list Bohier as *Président à mortier* as well as *tiers President*.⁹⁷ The *Président à mortier* was arguably one of the highest-ranking judicial posts in France at this time, with the office holder serving as a principal magistrate in the most important chamber in the *parlement*. Bohier would have worn the official black gown with gold braided ribbons to symbolise his superior standing.⁹⁸ The *parlement* of Bordeaux was established in 1462.⁹⁹ Born out of the two *parlements* of Paris and Toulouse, its jurisdiction extended over a large proportion of Southern France and was created to rule in the name of the King as an instrument of royal justice, enforcing whatever ordinances had been registered, but with the right of remonstrance.¹⁰⁰ However, it was to have its own role in the politics of the region and so, together with its royal relationship, it was a complex force of monarchic defender and critic of royal policy.

Judicial posts were sold in Renaissance France, and were regularly the fruit of nepotism, but early sixteenth-century *parlements* did require entrance examinations and so promotions were often based on merit.¹⁰¹ The practice of appointments based

⁹⁴ The last known edition of Bohier's *Decisiones*, for example, to be published is 1665.

⁹⁵ See below in this chapter at 9, "Publications".

⁹⁶ "Nicolaus Bohier", *Archives historique du departement de la Gironde, liste generale at alphabetique des membres du parlement de Bordeaux depuis la fondation de cette cour souveraine en 1462 jusqu'à sa suppression en 1790*, available at http://archives.gironde.fr/actu/fiche.asp?id_actu=60 (last accessed 10th February 2016).

⁹⁷ J. Dast le Vacher de Boisville, *Archives Historiques du département de la Gironde, Liste Generale et Alphabetique Des Membres du parlement de Bordeaux* (Bordeaux, 1896), p. 6.

⁹⁸ J. Davidson, (ed.), *Persian letters*, (1899) [translated from the French original version] [1882], p. 3. Interestingly, Montesquieu was also *président à mortier* at the Bordeaux *parlement*.

⁹⁹ A fuller history of Bordeaux and the *parlement* was offered in chapter 1 of this thesis. Also in that chapter, see figure 2 for an impression of the disparate regions of France and the geography of the regional *parlements*.

¹⁰⁰ R. Kingston, *Montesquieu and the parlement of Bordeaux*, (Geneva, 1996), p. 59.

¹⁰¹ E. Monter, *Judging the French reformation: heresy trials by sixteenth-century parlements*, (Cambridge, Massachusetts, 1999), p. 8.

on heredity is believed to be a largely post-1543 trend and so it is possible that Bohier's appointment was based on merit and not solely through associated patronage networks.¹⁰² By 1540, every new judgeship appears to have involved a payment to the King, described as a "loan" to help the Monarch with his urgent necessities; a practice the *parlement* of Paris was particularly known for in the 1520s.¹⁰³ The fiction of repayment was at first maintained in order to demonstrate the purchase of office was not a market transaction but a friendly loan.¹⁰⁴ The judicial nomination was also backed by important legal figures whose recommendations were essential but who would often anticipate later services from this newly appointed judge. Professional reputation, however, largely determined judicial careers. The career of André Tiraqueau (1488-1558) furnishes an example of this; having acquired fame through his juristic publications he was able to refuse a seat in the *parlement* of Bordeaux, choosing to wait for a call to Paris that came six years later.¹⁰⁵ Bohier's professional reputation as an *avocat* was highly favourable¹⁰⁶ and by the time Bohier was appointed President of the *parlement*, he had also already edited a work by Dynus de Mugello (1254-1300) (Lyon, 1500)¹⁰⁷ and published his *Consuetudines Biturigium* (Paris, 1508), and so will have been a man of some repute.

8. Bohier as judge

In the juristic works of the twelfth and thirteenth centuries, there is the perception of a judge removed from the social rule of a court, where judges are characterised by power and competence, not politics.¹⁰⁸ However, the post-glossators increasingly emphasised judicial privileges, titles and rank.¹⁰⁹ It became increasingly common to write about "courts" instead of "judges": the latter becoming synonymous

¹⁰² Boscheron des Portes, (n. 20), p. 98. See also Stocker, (n. 67), at 202. However, Bohier's connection to influential figures such as Antoine Du Prat should not be discounted.

¹⁰³ N. Davis, *The gift in sixteenth-century France*, (Oxford, 2000), p. 163.

¹⁰⁴ *Ibid.*

¹⁰⁵ On André Tiraqueau see J. Brejon, *André Tiraqueau (1488-1558): un jurisconsulte de la Renaissance*, (Paris, 1937).

¹⁰⁶ Calmon, (n. 2), p. 18.

¹⁰⁷ This is the earliest edition found, held by the *Bibliothèque Municipale de Lyon*. Note that Calmon in his biography of Bohier cites the date of 1501.

¹⁰⁸ J. Given, *Inquisition and medieval society: power, discipline, and resistance in Languedoc*, (London, 1997), p. 21.

¹⁰⁹ A. Gouron, *Juristes et droits savants: Bologne et la France médiévale*, (Aldershot, 2000), p. 30.

with public service.¹¹⁰ There was a definite detachment from the idea of the individual lawmaker, and it became part of the greater change between the French towns and the role and nature of the judge. Only after 1400, and then only in royal courts, was there a tendency to appoint permanent offices of justice.¹¹¹ The rise of the social standing of judges became more apparent at the start of the fifteenth-century in particular. Fees rose and so litigation and access to justice changed with it. Perhaps more important to this rise in social stature was the role of legal theory: the juristic rule of *quod facit iudex, populus videbitur facere*.¹¹²

An efficient and fair-minded royal justice provided a fundamental prop supporting any sixteenth-century government. The level of skill required of a judge in one of the *parlements* was high. In his work on customary law, *Consuetudines Biturigium*, Bohier set out what he deemed to be essential judicial qualities. Calmon summarised it thus:

*Les fonctions du juge, dit-il, exigent des connaissances et des aptitudes particulieres, et il convient, en consequence, de laisser a des hommes experts et spécialement instruits la decision des matières de droit; de même que pour les choses de l'agriculture, on s'en rapporte aux cultivateurs; pour l'art de la guerre, aux militaires; pour l'art de guérir, aux médecins.*¹¹³

As a President of a regional *parlement*, Bohier's decisions served not only to settle disputes or provide remedial action, but also to offer a definitive guide as to the tone of the region on contentious matters.¹¹⁴ His power was therefore just as much one of governance as it was one of justice. Ulrike Müßig has stressed the intimate link between the sixteenth-century concepts of justice with that of sovereignty.¹¹⁵ An excerpt from the registers of the Paris *parlement* suggest this to be the case:

¹¹⁰ R. Descimon, "La haute noblesse parlementaire parisienne: la production d'une aristocratie d'Etat aux XVI e XVIIe siècles", in P. Contamine, (ed.), *L'état et les aristocraties (France, Angleterre, Ecosse), XIIIe-XVIIe siècles*, (Paris, 1988), pp. 357-384.

¹¹¹ Gouron, (n. 109), p. 41.

¹¹² *Ibid*, p. 43. On the birth of a "judicial ideology" see M. Sbriccoli, "Politique et interprétation juridique dans les villes italiennes du Moyen Age", (1972) 17 *Archives de Philosophie du Droit* 99.

¹¹³ (1531), folio 25. Own translation: "The functions of the judge, he said, require knowledge and outstanding merits, and should be left to experts who are specially trained men and decide with the right materials, the same as for matters of agriculture, where we refer to the farmers; to the art of war, the military; the art of curing, the doctors."

¹¹⁴ I will address this point in chapter 3, where I consider the *Consilia*. There, *consilium* 8 will be examined and the role of the judge considered.

¹¹⁵ Ulrike Müßig, "Superior courts in early modern France, England and the Holy Roman Empire", in J. Getzler and P. Brand (eds.), *Judges and judging in the history of the common law and civil law: from antiquity to modern times*, (Cambridge, 2012), p. 209.

...la souveraineté est si étroitement conjointe avec la justice que séparée elle perdrait son nom et serait un corps sans âme.¹¹⁶

The ability of the *parlement* to control town matters depended largely upon two factors: the distance between it and the place in question, and the proximity of the town to alternative forms of political alliance.¹¹⁷ In the latter case, the *parlement* would strive to emphasise the theoretical prerogatives of the sovereign. Bohier's time in office was not marked by the same difficulties as those that had affected his predecessors. Instead, he inherited a position that had grown from those tensions and risen as a powerful and determined judicial and political machine. Élise Frêlon states that at this time, the role of the magistrate was effectively to police, control public finances and administer justice.¹¹⁸ In 1523, Bohier was commissioned by the King to reform the monastic brothers in the *L'Ordre de Saint François*.¹¹⁹ Bohier performed this task to such a standard that the King himself was moved to write a letter of praise for his work in quashing the so-called “*grandes rebellions, désobéyssances, injures et menasses* [sic]”.¹²⁰ Such actions demonstrate two things: firstly, Bohier's close proximity to the King; and secondly, it offers a glimpse into the relationship between *parlement* and religious orders.¹²¹

8.1 Judging citizenship

It was not until the late sixteenth and early seventeenth centuries, that the state “developed an extensive, complex administration monopolizing the exercise of power, and that it gained immediate control of its citizens: before, central domination had typically been mediated by independent powers.”¹²² On the related topic of the

¹¹⁶ *Archives Nationales*, X/IA, 1583, 5 Decembre, 1556. This is quoted by Müßig, *ibid*, p. 209.

Müßig's translation: “Sovereignty is so closely joined up with justice that, if separated, it would be like a body without a soul”.

¹¹⁷ R. Little, *The parlement of Poitiers: war, government and politics in France (1418-1436)*, (London, 1984), p. 154.

¹¹⁸ É. Frêlon, *Le parlement de Bordeaux et la loi (1451-1547)*, (Paris, 2011), p. 559.

¹¹⁹ *Catalogue*, t. I, n. 1801, 20 Avril 1523.

¹²⁰ Cited by Frêlon, (n. 118).

¹²¹ Cases of a religious nature seem to form the basis of many of the cases that came before the *parlement*. In the case of the Paris *parlement*, many were instances of appeals. See: *Arrêts notables du parlement de Paris, notes de jurisprudence, consultations, principalement en matiere ecclesiastique*. *Archives Nationales, Paris*, U/419.

¹²² N. Jansen, *The making of legal authority: non-legislative codifications in historical and comparative perspective*, (Oxford, 2010), p. 13.

ius commune, Nils Jansen argues that it was distant from the political process, but that the law's validity was based on the sovereign's will; a sentiment found in the *Corpus iuris*.¹²³ While this is true to an extent, when applied to the case of the sixteenth century, this account is too simplistic: it fails to appreciate the role of the French judiciary, as well as the complexity that marked the relationship between it and the King.

François Hotman's *Francogallia* offers an interesting perspective into such matters. Here, Hotman mentions Bohier in favourable terms when discussing the relationship between law and sovereignty. He states:

*...we must acknowledge that kings were not granted a free and unlimited power over all things in antiquity, which is also what Aufrier, Bohier, Montaigne, Chasseneuz and other practising lawyers of the highest authority in France attest with a single voice and without any variation.*¹²⁴

Admittedly, Hotman's work was in the late sixteenth-century and had underlying political motivations; both of which should be kept in mind when relying upon his writings. However, it is mentioned here to demonstrate that practising lawyers during Bohier's time were working in an environment where the King did not necessarily possess unfettered power over the law courts.¹²⁵ In terms of sovereignty and the practice of law then, this movement away from absolutism in terms of royal authority had already begun, albeit on a very small scale, in Bohier's time.¹²⁶ Bohier had considerable power as an individual member of the judiciary and was involved in the very early stages of the autonomy of the *parlement*.

Bohier's involvement in an early sixteenth-century case dealing with a matter of inheritance gave him an opportunity to declare his, and the position of the *parlement*, on the contentious matter of French citizenship. The case concerned a French native who had lived in Spain for forty years and who had expressly

¹²³ Jansen further contends that private law is conceptually and normatively independent from the political and social discourse. While he admits that it is influenced by politics and social developments, he believes that "the law's historical development is to a large extent determined by an inter-systemic order of its own." Jansen argues that professional lawyers and judges determined sources of law, with the legal elites deciding which texts are to be applied.

¹²⁴ F. Hotman, *Francogallia*, in Salmon, J. and Giesey, R., (eds.), (Cambridge, U.K., 1972) [translated from the original French version] [1573].

¹²⁵ Hotman is referring to Bohier's *Decisiones* here, in particular *Decisio* 126.

¹²⁶ However, see Jean Bodin (1530-1596) who believed that Kings do not discover the law but make the law and deliver it to their subjects. See A. Edward, "Jean Bodin on Sovereignty", (2011) 2 *Republics of letters: a journal for the study of knowledge, politics, and the arts* 84.

renounced his allegiance to the French state, being formally naturalised in Spain. The son of his marriage to a Frenchwoman had moved to France and petitioned to be allowed to make the *retrait lignager*¹²⁷ for property that had been alienated by his paternal grandfather. The *retrait* was normally not permitted for foreigners. The *parlement* therefore had to answer the question of whether this man was a French citizen. By the standard of *jus soli* the man was not and therefore had no right to inherit. However, Bohier put forward an argument rooted in the *jus sanguinis* and admitted the man to the *retrait lignager*. Bohier contended that he ought to be considered a citizen by birth as “no one can reject his domicile of origin simply by an act of will...because no one can change his nature, as the laws say...”¹²⁸

The Bordeaux position can be contrasted with that of the *parlement* of Paris which had tended to think in terms of the *jus soli*, as seen in a later case of 1554, although it did not display an outright endorsement.¹²⁹ This demonstrates the independence of the Bordeaux *parlement* from other institutions such as that of Paris, the judicial reasoning employed, as well as the fragmented nature of the law.¹³⁰

9. Publications

Bohier published extensively. Those works he compiled are included here for consideration and to offer a comprehensive, although not exhaustive, account of the lawyer’s printing practices. The works that form the basis of the case study at the centre of this thesis, namely the *Consilia*, *Decisiones* and *Consuetudines*, are accounted for, but this is also an effort to provide for other works by Bohier that point towards his character and interests. Such works include not only those he wrote himself, but also works that he edited or annotated.

This thesis considers the extent to which there was a sense of routine, or equally whether it is possible to detect an assertion of national sovereignty through the

¹²⁷ See chapter 5 of this thesis, where I consider the *retrait lignager*.

¹²⁸ Cited in C. Wells, *Law and citizenship in early modern France*, (Baltimore, 1995), p. 37.

¹²⁹ Known as the Cenamy case. This also concerned the citizenship of the son of an expatriate father.

¹³⁰ There is a link between the emergence of international private law as a subject and this idea of citizenship. It is possible to relate it to the broader issues of municipal citizenship, such as the intention of parties being of such significance that it goes beyond territorial considerations. On this point, see: Voet, P., “*De statutis eorumque concursu singularis*”, in A. Edwards, et al., (eds.), *The selective Paulus Voet: being a translation of those sections regarded as relevant to modern conflict of laws, of the De statutis eorumque concursu singularis* (1661) by Paulus Voet (1619-1667) as a single book on statutes and their concurrence: an abridgement, (Pretoria, 2007). This work identifies a link between the likes of Dumoulin, Bartolism and French international private law, p. 40.

decisions of the *parlements*. The possibility that sixteenth-century judicial decision-making was influenced by a growing sense of nationalism was considered earlier in this work. It has been argued that cases were increasingly decided away from the *ius commune*,¹³¹ where it “might be received or it might not, depending on the suitability of the rule in question to the needs of the state; and this decision was the courts.”¹³²

At this stage the nature of judicial decision-making became less predictable, with a professional judiciary in a so-called “national” court reacting without a set rationale to cases.¹³³ The *stylus* of the court was itself a tool of procedure; written and subject to interpretation.¹³⁴ As a reaction to this perceived change in judicial reasoning, there grew an increased desire for written collections of court decisions, with the dual purpose of providing practitioners with “a guide to the practice of their particular court”¹³⁵ and for judges as they “needed to show that their judgments were based not on whims but on accepted principles.”¹³⁶

It is certain that Bohier’s reputation amongst those in high office, such as Chancellor Jean de Ganay, would have been bolstered by his juristic work, as well as by his successful career as an *avocat*. Making oneself known through publications was often best achieved through the request of printing privilege. Dedications came to be used as expediting factors in the privilege process; an acceptance meant that the request for privilege would be looked more favourably upon and supported by the recipient dedicatee. Jean de Ganay was a popular recipient of such dedicated offers by lawyers and royal officials, with the likes of Guillaume Budé also dedicating work in his name.¹³⁷ In the case of Budé, he chose to dedicate his text in this way because he thought that his commentaries “were going to be insufficiently believable coming from me as the author”, and so he attach to them “some great and august name when

¹³¹ P. Stein, “Judge and jurist in the civil law: a historical interpretation”, (1985) 46 *Louisiana Law Review* 241 at 248.

¹³² *Ibid.*

¹³³ André Gouron has considered the issue of whether there was a birth of a juridical “ideology”. See Gouron, (n. 109), p. 44. Further on this topic see: M. Sbriccoli, (n. 112), 99.

¹³⁴ Indeed, in his *Consilia*, Bohier does approach the *Stylus Curie* in a critical fashion, reminiscent of juristic analysis, rather than a routine adherence to procedure. This is examined in considerable detail later in this work. See: Phillippe Paschel, “*Les Sources du Stylus Curie Parlamenti de Guillaume du Breuil*”, (1999) 49 *Revue Historique de Droit Français et Étranger* 311.

¹³⁵ Stein, (n. 131), p. 249.

¹³⁶ *Ibid.*

¹³⁷ Longfield-Karr, (n. 74), p. 72. Budé’s *Annotationes* were first published in 1508. See G. Budé, *Praefatio, Annotationes Gulielmi Budaei parisiensis secretarii regii in quatuor et viginti pandectarum libros ad Ioannem Deganaum cancellarium Franciae* (Lyon, 1562) for the dedication to Jean de Ganay.

they went out to the public.”¹³⁸ Bohier’s *Consuetudines* of Bourges was dedicated to the Chancellor, and was duly issued privilege at Lyon in June 1509.

In 1515, Bohier was granted a three-year privilege, “*Par le roy, a la relation du conseil*”, which was a grant to which agreement had already been given or was assumed.¹³⁹ Not long before this particular grant, in the same year, Bohier obtained royal privilege for his treatise, *De seditiosis*. The work was prompted by a trial at Agen in 1513, in which he had taken part, and was discussed earlier in this work.¹⁴⁰ The trial dealt with a riot staged in the said town, where it was seized for several days, and the full judgment including the whole account of the proceedings was added to his treatise.¹⁴¹ From this we know that Bohier was a trusted servant of the crown in 1513, as was called upon by Louis XII as a commissioner for this case.¹⁴² The dedication in *De seditiosis* is also revealing: it is offered in the name of Antoine Duprat.¹⁴³ Following Chancellor Jean de Ganay’s death in 1512, Louis XII (1462-1515) did not appoint a replacement. However, the succession of Francis I (1494-1547), in January 1515 saw the role filled by Duprat.¹⁴⁴ Bohier was already in royal favour as he had been appointed to the *Grand Conseil* in 1508, and appears to have been well acquainted with this new Chancellor. His haste in securing privilege therefore followed the trend of the elite authors of the time, and he was clearly highly motivated to secure it and ensure that he stayed in touch with royal favour.

Looking to printing practices in Paris at this time, between 1505-1526, 7,719 books were published, and of these, just over 5 per cent were covered by printing privileges.¹⁴⁵ This process was therefore very much atypical from the routine behaviour of authors and publishers of the time generally. Applications for privileges were sometimes accompanied by supporting arguments from the author or printer. Bohier edited three legal works for which he attained printing privilege in favour of

¹³⁸ *Praefatio. Guilielmi Budei parisiensis regii secretarii in annotationes ad libros pandectarum praefatio. ad illustrissimum virum Ioannem De Ganeium cancellarium Franciae*, in *Annotationes*, fo. a.ii-a.iii; “*Quae res mihi imprimis exoptanda fuit: vir illustrissime Ioannes Deganai: ea mihi hoc tempore forte (ut spero) fortuna evenit. Nam cum abhinc septem plusminus menses: Paulo postquam tum ad principem istum magistratum assumptus es: annotationes quasdam in pandectas scribere coepissem...*” (Lyon, 1562). Cited in Longfield-Karr, (n. 74), p. 71.

¹³⁹ E. Armstrong, *Before copyright: the French book-privilege system 1498-1526*, (Cambridge, U.K., 1990), p. 30.

¹⁴⁰ See in this thesis, chapter 1, 4.2 “Sedition: a political offence”.

¹⁴¹ *Preclarus et elegans tractatus de seditiosis noviter editus*, (Lyon, 1515).

¹⁴² Armstrong, (n. 139).

¹⁴³ *Tractatus de seditiosis* (n. 141).

¹⁴⁴ Buisson, (n. 48).

¹⁴⁵ Armstrong, (n. 139), p. 82.

his printer Simon Vincent (d.1532), in 1515, where he stated: “*pour le bien, prouffit et utilité de la chose publique*”.¹⁴⁶ He also stressed the time and difficulty taken by himself and others working for him in the compilation of these works and the expense Vincent would incur to print them.¹⁴⁷

Simon Vincent acted as Bohier’s printer for the great majority of his works.¹⁴⁸ Born sometime between 1470 and 1480, Vincent lived in Lyon from 1499 through to his death in 1532.¹⁴⁹

9.1 Bohier as author

9.1.1 *Consuetudines Biturigium* (1509)

Bohier’s *Coutumes Biturigium* was first published in 1509.¹⁵⁰ It was noted above that this work was produced with a dedication to Chancellor Jean de Ganay. Given the nature of the work this dedication takes on greater importance. The Chancellor was responsible for administering justice and reforming the laws throughout the kingdom. Because of the continual process in France at this time of transforming the unwritten and customary law into an official written form, it was important for Bohier to ensure his own commentary was issued amidst this time of reform. This work was a statement setting out the customs of Bourges for the purposes of homologation. They were purposively compiled so as to form a new “written law” of sorts.

By the middle of the sixteenth century, the majority of customs in the kingdom (including Paris) had been published.¹⁵¹ In recording custom, Bohier helped

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ A summary of some of Bohier’s best known works and their publisher can be found in A. Pettegree, and M. Valsby (eds.), *French books III & IV: books published in France before 1601 in Latin and in languages other than French* (Leiden, 2011), p. 285. Note the incidence of Vincent as Bohier’s publisher: almost every book in their respective lifetimes. Notable exceptions include those such as Jacques Mareschal, who acted on behalf of Simon Vincent in the 1512 edition of *Quaestio de custodia clavium portarum civitatum*. Following Bohier and Simon Vincent’s deaths, the publishing mantel seems to have passed to Antoine Vincent, who was involved in posthumous publications of Bohier’s works on a number of occasions.

¹⁴⁹ “Simon Vincent”, in *World Biographical Information System (WBIS)*.

¹⁵⁰ Printing privilege for this work was issued in 1509. See Armstrong, (n. 139), p. 75. However, Calmon states the year of first publication as 1508, (n. 2), p. 14. The date of 1508 is given elsewhere, including in the Universal Short Title Catalogue.

¹⁵¹ M. Kim, “Custom, community, and the crown: lawyers and the reordering of French customary law”, in C. Parker, J. Bentley, (eds.), *Between the middle ages and modernity: individual and community in the early modern European world*, (Lanham, 2007). p. 170. This is discussed in greater

to create a symbiotic relationship between the state and community: providing the means for the king to reform provincial customs while avoiding the appearance of an open interference with the private law. The jurist and Parisian lawyer, Charles Loyseau (1564-1627) alludes to the practical motivations behind homologation:

Our customary laws... are so different and so confused that it is very difficult to extract from them a general and certain answer... the law must be married with the practice, usage with reason: in short, Roman law must be linked with our own.¹⁵²

Reordering customary law and linking it to statutory laws was an integral part of a state-building process in early modern France. The direct role of jurists and lawyers in politics and government has been overlooked, and instead the image of the humanist has been promoted to one of the great contributors to the eventual emergence of the nation state. Most studies of early modern Europe, the sixteenth century especially, have tended to downplay the law's role in understanding a nation's operations, with a focus on patronage networks and personal ties as enabling power and authority among the many regional and local authorities that made up a state.¹⁵³

9.1.2 *Decisiones Burdegalenses* (1544)

Bohier's *Decisiones Burdegalenses* is a typical French law report from the first half of the sixteenth-century.¹⁵⁴ It contains a collection of decisions from the *parlement* of Bordeaux, where Bohier himself was President. It has been argued that the sixteenth-century saw those legal authors already steeped in the Italian method further develop other genres of legal literature.¹⁵⁵ The *Decisiones* was one of the more popular genres to emerge. Although initiated during the last centuries of the middle ages, the *Decisiones*, rose to prominence in the sixteenth-century and survived the decline of the Italian method.¹⁵⁶ The publication's importance was two-fold. Firstly, the *Decisiones* fulfilled a need for consistency in the court by providing a

detail in chapter 1 of this thesis at 3.3 "Reordering of Customary Law", and most fully at chapter 5, "*Consuetudines Biturigium*".

¹⁵² Charles Loyseau, *Traité du déquerpissement et délaissement par hypothèque in oeuvres* (Paris, 1640).

¹⁵³ See J. Salmon, *Renaissance and revolt: essays in the intellectual & social history of early modern France*, (Cambridge, U.K., 1987), pp. 54-72.

¹⁵⁴ First published 1544. Edition used here is 1547.

¹⁵⁵ A. Wijffels, "Early modern scholarship on international law", in A. Orakelashvili, (ed.), *Research handbook on the theory and history of international law*, (Cheltenham, 2011), pp. 23-60, at p. 32.

¹⁵⁶ *Ibid.*

record of authoritative decisions: a “locus”: informing the reader of relevant authorities and opinions.¹⁵⁷ It is worth noting here, however, that this take on early modern court reporting is not uniformly accepted: it has been argued that the *Decisiones* ought to be thought of more as general case law, than as a binding source.¹⁵⁸

While demand for court reports did increase from the sixteenth century, this was not necessarily rooted in any judicial desire to reassure. Bohier’s *Decisiones* were published posthumously, with many successive editions being produced into the seventeenth century, and so its value evidently remained.¹⁵⁹ If its purpose was to serve purely as a definitive statement as to the rationale behind judicial decision-making, it would suggest that there was not a great deal of change between the centuries, which seems unlikely. Instead, it is likely that this enabled practitioners to refer back to different statements on matters of interpretation, in particular the relationships between different sources of law.¹⁶⁰

9.1.3 *Consilia* (1554)

The earliest known edition of Bohier’s *Consilia* is a posthumous publication in 1554. As sources, the *consilia* have been overlooked in legal-historical scholarship. In his work on Baldus’s *consilia*, Jacques Pluss referred to the *consilia* as “untapped sources of inquiry for two disciplines, legal history and social history.”¹⁶¹ This is partly owing to the tendency of many legal historians to look more to doctrine than to the law as practised in the courts.¹⁶² The gradual systematisation of the court structure between the fourteenth and seventeenth centuries was just one example of the tendency towards centralisation and the idea of the state. The law, however, could not be so controlled, and so the *consilia* offered a tangible link between the regulated

¹⁵⁷ *Ibid*, p. 30.

¹⁵⁸ D. Freda, “‘Law reporting’ in Europe in the early-modern period: two experiences in comparison”, (2009) 30 *Journal of Legal History* 263.

¹⁵⁹ The last known edition of the *Decisiones Burdegalenses* was published in 1665.

¹⁶⁰ Stein, (n. 131), p. 249. Stein warns not to confuse this reliance on authoritative judicial statements by practitioners with the contemporary notion of “precedent”. However, there is not yet a consensus on this. For an interesting take on the nature of precedent, see: V. Fon and F. Parisi, “Judicial precedents in civil law systems: a dynamic analysis”, (2006) 26 *International Review of Law and Economics* 519.

¹⁶¹ J. Pluss, “Reading case law historically: a *consilium* of Baldus de Ubaldis on widows and dowries”, (1986) 30 *The American Journal of Legal History*, 241 at 243.

¹⁶² J. Baron, “Interdisciplinary legal scholarship as guilty pleasure: the case of law and literature”, in Freeman, D. and Lewis, A. (eds.), *Law and literature*, (Oxford, 1999), p. 21 at p. 33.

delivery of justice and the free opinion of a jurist; whose opinion although full of diverse sources of law, was thus contained within one document and so offered a single account of the law on a particular issue in that locality. This offer of coherence was an attractive quality of the *consilia*, and as a physical representation of the law as it stood in the early modern period, its value as a legal-historical source is considerable.

Since it, like the *Decisiones*, was published outwith Bohier's own lifetime, one might assume that he did not intend it to be published. However, despite their relative obscurity in contemporary scholarship, the *Consilia* were prized publications in their day. Working a century before, but with his work still in demand in Bohier's time, Alexander de Imola (1424-1477) achieved considerable success with his *Consilia*, producing a work that was allegedly "better than those of other lawyers and superior to his Commentaries; and it was probably on these he founded his reputation."¹⁶³ Keen to release his other works for public consumption, it seems strange that Bohier did not attempt this. However, it is likely that the opinions contained within his *Consilia* were written during his role as President of the *parlement* at Bordeaux, and so perhaps they were withheld so as to protect the sanctity of his position. Those other *Consilia* that have been published were often those of professional jurists, firmly ensconced within their universities, and not the practising lawyer or judge. Yet, given the absence of any declaration prohibiting the publication of the *Consilia*, together with Bohier's prolific printing practices, it seems likely that this was something he may have intended to publish during his lifetime.¹⁶⁴

9.2 Bohier as annotator and editor

To better understand Bohier's legal thought through his writings, his role as editor is as revealing as the content of his original scholarship. Bohier's best-known publications, the *Consuetudines*, *Decisiones* and *Consilia*, are compilations, and, it seems, written with a practice-oriented purpose in mind. Their contents do reveal a great deal, especially by way of informing us of citation practices, and ultimately

¹⁶³ P. de Colquhoun, *A summary of the Roman civil law: illustrated by commentaries on and parallels from the Mosaic, Canon, Mohammedan, English, and foreign law*, (London, 1849), p. 206.

¹⁶⁴ No firm conclusions can be drawn on this, however. Examination of the archival holdings of the *Archives Nationales*, Paris and *Archives Départementales de Gironde*, did not reveal any evidence of the text having circulated among the legal community in manuscript form.

form the basis of this thesis. However, it is worth mentioning Bohier's involvement with the publications of others that he selected as noteworthy, to see what this selection can tell us about his legal thought as well as any intellectual and philosophical allegiances he may have had.

It is not possible to examine each of those publications that Bohier was involved with here. Instead, his most popular work will be considered in order to identify any intellectual allegiances or professional allegiances Bohier may have had in his role as editor. Achieving success with a great number of editions, were Bohier's edited publications of Dynus de Mugello's (1254-1300) works: *Commentaria in regulae iuris pontificii*¹⁶⁵ and *Commentarius mirabilis super titulo de regulis iuris*.¹⁶⁶

Many of Bohier's other publishing practices also deal with the canon law, such as his edition of Johannes Andreae's work. Celse-Hugues Descousu (1480-1540) was also associated with Bohier in a range of publications.¹⁶⁷ The former edited Bohier's work on Dynus de Mugello, and a gloss by Etienne Aufreri (1458-1511) accompanied it.¹⁶⁸ Etienne Aufreri was a *conseiller* at the Toulouse *parlement* and *Professeur* at the University of the same town.¹⁶⁹ Descousu was a *docteur in utroque jure*, and *Professeur* at the University of Montpellier.¹⁷⁰ He assumed the role of editor on a number of occasions, working together with Bohier on an edition of Dynus de Mugello's work,¹⁷¹ but he also wrote extensively and published a number of other books. His most notable works include the *Consilia* (posthumously published in

¹⁶⁵ Earliest edition of this work I have found is 1551. However, Bohier is listed as an editor on this work and subsequent editions.

¹⁶⁶ Appended to a number of editions of the *De regulis iuris* compilation, reportedly first published in 1500, are two of Bohier's *Consilia*, (Lyon, 1530). Bohier's involvement with these works suggests that he was interested in principles of interpretation.

¹⁶⁷ In terms of co-edited works and also those editions dedicated to Bohier, such as an edition of the *Stylus Curie Parlamenti*, (Paris, 1513), which is discussed in greater detail later in this chapter.

¹⁶⁸ This edition is now very rare and can be found at the *Bibliothèque municipale de Lyon* (no. 126613)

¹⁶⁹ P. Arabeyre, et al. (eds.), *Dictionnaire historique des juristes français (XIIIe-XXe siècle)* (Oxford, 2007).

¹⁷⁰ F. Aubert, *Collection de Textes pour servir à l'étude et à l'enseignement de l'histoire, Guillaume du Breuil: Stylus Curiae Parlamenti, Nouvelle Edition Critique Publiée avec une introduction et des notes par Felix Aubert* (Paris, 1909), p. 56. A work discussing the writings of Johann Amberbach mentions Celse-Hugues Descousu in unfavourable terms. In the early sixteenth-century it seems that an individual bearing that name was responsible for the theft of some valuable books belonging to the Amberbach family, who had welcomed Descousu into their household for food and discussion. Correspondence charging Descousu with theft and deception offer accounts of this incident. It is not known if this is the same Descousu that is under discussion here, but the dates make it possible and it is therefore an interesting note if it is the same individual. See B. Halporn (ed.), *The correspondence of Johann Amberbach: early printing in its social context*, (Michigan, 2000), pp.106-110.

¹⁷¹ Dynus, *De regulis Iuris* (Lyon, 1530), (Lyon, 1533), (Lyon, 1535), (Lyon, 1537), (Lyon, 1551), (Lyon, 1578), (Lyon, 1583), (Lyon, 1585), (Lyon, 1590).

Lyon, 1570),¹⁷² and the *Coutumes de Bourgogne* (Lyon, 1513, 1516).¹⁷³ Guillaume du Breuil's *Stylus Curie Parlamenti* was first published in 1330. In 1513, Simon Vincent published the most popular edition of this work in Lyon that was edited by Celse-Hugues Descousu. Descousu dedicated the work to Bohier.

Another of Bohier's edited works, Dynus's *Commentaria*, saw the involvement of Charles Dumoulin (1500-1566). Dumoulin studied at Orléans, before becoming an *avocat* before the Paris *parlement*. He then moved to Germany to teach following the French persecution of Protestants, and later was imprisoned in Paris for writing against the Council of Trent.¹⁷⁴ Dumoulin has been described as: "the most important exponent of the customs".¹⁷⁵ His main work was the *Commentaria in consuetudines Parisienses* published in 1538, but his *Annotationes ad jus canonicum* (Lyon, 1550) are perhaps most noteworthy here. Dumoulin's position on the canon law was a complex one. His own religious affiliations changed throughout his life, and it was: "one of his points of departure as well as one of his primary targets. He attacked to plunder it as well as to demolish it. His basic objection was that the canonist standard of judgment was provided not by scripture but by the papal chancery."¹⁷⁶ His involvement in the *Commentaria* was of course to provide an annotated critique of the contents.

The precise nature of Dumoulin's affiliation with Bohier is not known, and it is only those editions that appear post-1539 (after Bohier's death) that bear his name. It is then highly probable then that Dumoulin himself used Bohier's publication to provide his own commentary. There are also those editions containing notes that were attributed to Dumoulin in publications printed in Lyon have not been appropriately cited in other copies.¹⁷⁷ A 1533 edition of this work contains the words "*doctorem*

¹⁷² Bohier's *Consilia*, (Lyon, 1554) was also published posthumously. This is notable and the notion whether this is something of a trend in *consilia* publications will be considered later in the chapter dealing with Bohier's *Consilia*.

¹⁷³ Interestingly, one of the most complete accounts of Descousu's life can be found in a publication by a "President Bouhier": *Histoire des commentateurs de la coutume de Bourgogne*, (Dijon, 1742). Of course, the date reveals that this was not the work of Nicolas Bohier, but it is still worth noting this so as to avoid initial confusion. The author was in fact Jean Bouhier (1673-1746), a *President à mortier* of the *parlement de Bourgogne*.

¹⁷⁴ On the Council of Trent and Dumoulin, see J. Kainulainen, "*Libertas ecclesiae* in post-tridentine debates on church and state", in Q. Skinner and M. Van Gelderen, (eds.), *Freedom and the construction of Europe: religious freedom and civil liberty*, (Cambridge, U.K., 2013), pp. 38-56, at pp. 41-44.

¹⁷⁵ Stein, (n. 42), p. 84.

¹⁷⁶ D. Kelley, *Foundations of modern historical scholarship: language, law and history in the French renaissance*, (New York, 1970), p. 174.

¹⁷⁷ For instance, the Library of Congress collections contain a number of editions of this nature.

anonymum” in its title. This could be a reference to Dumoulin. When his name first appears in 1549 those notes that belonged to the anonymous writer were now expressly attributed to Dumoulin, with a noted absence of the anonymous contributor left out from the title page.¹⁷⁸

Bohier had an editorial role in other publications such as Joannes Andreae’s *Mercuriales domini* (1510). Joannes Andreae (1275-1348) took his doctorate in canon law between 1296 and 1300 at Bologna, and also taught at the University by 1303.¹⁷⁹ Andreae had finished his Apparatus to the *Liber Sextus* by 1305 and it was almost automatically accepted as the authoritative gloss on the text. Andreae was received well by contemporary canonists. Subsequent commentators on the *Liber Sextus* would use this gloss as a model, and it served as a reference book for lawyers.¹⁸⁰ Bohier’s editorship of the 1510 edition¹⁸¹ of Andreae’s *Mercuriales domini* also saw the involvement of Joannes Gradibus and Charles Dumoulin. Joannes Gradibus received his *legibus baccalaureus* from Orléans (1477) and was responsible for a large range of publications including the works of Jason de Mayno, Baldus and Angelus Aretinus.¹⁸² Robert Feenstra has recognised Gradibus’s influence as an author of marginal notes and various annotations to the works he was associated with. His name from 1496 onwards often bears the title of *utriusque iuris professeur* or even *consiliarius regis*.¹⁸³

Bohier served as editor for other canon law works: Juan Torquemada’s (1388-1468) *Commentaria reverendi in Christo Petris* (1519)¹⁸⁴ and *Commentaria super toto decreto* (1519),¹⁸⁵ and Benedetto Barzi’s (1350-1410) *Lectura* (1517).¹⁸⁶ His only editorial work that is not of a canon law nature is his publication of the *Leges*

¹⁷⁸ With thanks to Nathan Dorn, Curator of Rare Books at the Library of Congress Law Library for help with this, in particular the linking of the “*doctorem anonymum*” to Dumoulin.

¹⁷⁹ E. Makowski, *Canon law and cloistered women: periculosus and its commentators (1298-1545)*, (Washington, D.C., 1997), p. 57.

¹⁸⁰ *Ibid*, p. 49. Also, R. Helmholz, “The bible in the service of the canon law” (1994) 70 *Chicago-Kent Law Review* 557.

¹⁸¹ (Lyon), published by Simon Vincent.

¹⁸² Gradibus’s involvement can also be seen in many works of jurists at this time, including many of whom Bohier cited: Jason de Mayno, Baldus, Angelus de Aretinus, Alexander Tartagnus, Filippo Decio, to name a few. For a comprehensive list of juristic works where Gradibus was involved, see R. Feenstra, “*Editions lyonnaises des lectures de droit civil de Balde par Jean de Grandibus, avec un aperçu des autres éditions du XVIe siècle*”, (2000) 27 *Ius Commune* 345. See works noted here at pp. 348-350.

¹⁸³ *Ibid*, p. 347.

¹⁸⁴ (Lyon), published by Simon Vincent.

¹⁸⁵ *Ibid*.

¹⁸⁶ (Lyon), co-editor Jean Thierry, published by Simon Vincent.

Longobardorum (1512).¹⁸⁷ The fact that nearly all of his editorial works deal with the canon law goes beyond any anecdotal curiosity he may have in relation to Dynus de Mugello. Instead, this is a clear indication that Bohier was acutely interested in the canon law as something worthy of editing and of contemporary commentary, and it may also go some way towards explaining the selection of cases included in his *Consilia* and *Decisiones*. The publication of these works falls within a twenty-year period: the first being in 1500 and the last in 1519. For much of this time, Bohier was a member of the *Grand Conseil*. His original works come later when he is President of the *Bordeaux parlement*, with the exception of the *Consuetudines Biturigium* (Paris, 1508). It is possible that his position as *conseiller* meant he felt it more appropriate to edit rather than create works that reflected on the practice and operation of the *parlement*. His later works, the *Decisiones* and *Consilia* were most likely compiled while President of the *parlement*, and are practical works that relate to the decisions of that institution. A notable exception is his collaborative work with Jean Montaigne, *Tractatus Celebris de Auctoritate* (Lyon, 1512). However, it was shown earlier that this work saw Bohier promote and defend the unique position of power that the *Grand Conseil* and its *conseillers* had, and so this is likely to have been tactical.¹⁸⁸

In terms of his preference for those works of canon law, it is possible that this preference was rooted in a desire to reflect the reality of legal practice. The Paris *parlement*, for example, saw a high number of appeals to its chambers. A sample of appeals heard at the *parlement* demonstrates that a significant number of these were of an ecclesiastical nature.¹⁸⁹ It is possible that Bohier was simply wishing to recognise this and provide contemporary editions for reference. The prominence of the canon law in his original works will be examined later when the content of his publications are considered in detail in order to understand his legal reasoning and approach to different sources of law. It is important, however, to recognise this trend now so that this be kept in mind when carrying out these later analyses.

10. Conclusion

¹⁸⁷ (Lyon), published by Simon Vincent.

¹⁸⁸ *Tractatus celebris*, (n. 85), fol. 28, 39-40.

¹⁸⁹ U/419, *Arrêts notables du parlement de Paris, notes de jurisprudence, consultations, principalement en matière ecclésiastique*, Archives Nationales, Paris.

In the previous chapter, I set out the larger context of early modern France, to foreground Bohier, and offer a better understanding of the environment in which he lived. He was an individual with an illustrious career in the law, an *avocat*, *professeur*, *conseiller*, president at the Bordeaux *parlement* and author, as well as an editor. His role as author and editor goes some way towards suggesting that the traditional firm division between the practising lawyer and the jurist should be reconsidered. Living between the fifteenth and sixteenth centuries, Bohier offered an insight into the legal profession at a time that has not traditionally benefited from the same scrutiny as the mid-to-late sixteenth century, for example.

His range of professional associations with notable figures of the time demonstrates that he achieved success in his various roles. It has been made clear that although predominantly a practising lawyer, Bohier enjoyed notoriety owing to his many publications, which included editorial works on the likes of Dynus de Mugello. His time as a *professeur* at Bourges reveals that he was also a jurist, and so the sources he relied on in legal practice will have been informed by this earlier role. Bohier's own works documenting the law in action are especially valuable in this regard.

Given that the greater aim of this thesis is to assess the meaning of the term *ius commune* in sixteenth-century practice, understanding the mind-set of the author behind the works is of pivotal importance. Further, appreciating the nature of the written works themselves and the contextual histories behind the publications is equally vital. It is hoped that a portrait of Nicolas Bohier has been created here and enables a fuller understanding of the relationship between the individual and printed works on legal practice.

CHAPTER 3

CONSILIA

1. By what authority?

To understand the use of the term *ius commune* in Bohier's works, some context is required. The first two chapters of this thesis have examined the man himself and the context in which his written works existed. This provides a backdrop against which his works can be assessed. The remainder of this thesis will focus on the occurrence of the term *ius commune* in these works. However, it is first necessary to look at the authority of the term in sixteenth-century France. This involves asking what authoritative underpinning it would have had and why Bohier would have cared about it to the extent that he did. Admittedly, an answer to this question is of itself an aim of this thesis, but for the purposes of this case study it is helpful to ask what authority any source of law had at this time.

The way in which the *ius commune* operated in individual cases will be examined to better grasp the meaning of the term itself. The term is so loosely used in legal historical literature and has been taken to mean an array of things, as shown in detail earlier in this work.¹ Understanding its role as a concept at the time of Bohier's writing relies on a degree of generalisation. With that said, this work does not seek to reveal whether the *ius commune* was truly a common law, applied equally throughout France. This is outwith the scope of a microhistory and the parameters of this work. Instead, it looks at the term as a tool of one practitioner and assesses where and how the term was used. Looking to the authorities Bohier cited, if any, alongside the term itself, will provide a better indication of what he had in mind when writing the term: a set group of authorities that to him, and those who relied on his works, would deem a recurrent set of citations. It is not possible to know precisely which editions of works Bohier referred to.² Further, it cannot be known whether or not he directly referred to a specific work, or borrowed the citation, especially given that the availability of

¹ See "Introduction" of this thesis.

² On this point, see M. van Ittersum, "The working methods of Hugo Grotius: which sources did he use and how did he use them in his early writings on natural law theory?" in P. du Plessis and J. Cairns (eds.), *Reassessing legal humanism and its claims: petere fontes?*, (Edinburgh, 2016), pp. 154-193.

books of citations in the early modern period. Every instance therefore has to be assessed on its own merits. However, whatever sources he does cite will still offer a general insight into what the *ius commune* may have represented to Bohier, and together with his textual treatment of the term itself, will offer a new insight into what it actually and practically meant to him and his peers.

While the nature of this case study will seek to identify the kinds of cases the *ius commune* appeared in, how it was used, and the authoritative sources of the *ius commune*, by way of the citation practices of Bohier, it will not fully answer the question of “why” he referred to the term, the extent to which he felt compelled to or could freely do so, nor the history behind the primacy of Roman legal principles and methods. This question links in with the bigger narrative of the “reception”³ of Roman law and falls outside of the historical remit of this thesis. Yet, better understanding of the term’s meaning and relationship with other sources of law will go some way towards a fuller explanation of its practical use and its benefit as a source used in legal reasoning.

2. The sources: where the *ius commune* is mentioned

Three of Bohier’s books have been selected for this study. Each of them has been examined and the incidence of the term *ius commune* noted and studied. These are presented below in order of appearance within the work, with brief details on it provided so as to offer an initial overview of the kinds of cases the term *ius commune* appears in. The relevant table will be reproduced at the beginning of each chapter, but are all presented here together to offer a general overview.

Fig. 1: Cases where the *ius commune* is used in *Consilia*

SOURCE	CASUS
<i>Cons.</i> 8	Ecclesiastical appeal.
<i>Cons.</i> 24*	Land/lake use.
<i>Cons.</i> 27	Procedural matter (expenses).
<i>Cons.</i> 26	Canon law dispensations.

³ F. Wieacker, *A history of private law with particular reference to Germany*, (Oxford, 1995) [translated from the original German].

Cons. 40	Marriage contract.
Cons. 46	<i>Usufruct</i> /hereditary rights in marriage.

*Indicates a case where *ius commune* is less significant in the *ratio decidendi* of the case.

Fig. 2: Cases where the *ius commune* is used in *Decisiones*

SOURCE	CASUS
Dec. 2	Elections (ecclesiastical).
Dec. 9	Jurisdiction (rights of Barons to punish offenders).
Dec. 42	Possession.
Dec. 46	Jurisdiction (divided jurisdiction).
Dec. 68	Procedural (sentencing).
Dec. 69	Evictions (ecclesiastical).
Dec. 82	Papal benefits (ecclesiastical).
Dec. 113	Marriage and dowry.
Dec. 133	Procedural (ecclesiastical).
Dec. 141*	Procedural (proclamations).
Dec. 186	Heritable rights.
Dec. 188	Heritable rights.
Dec. 199	Usufruct.
Dec. 203	Marriage and property rights of children.
Dec. 221*	Father giving surety on behalf of a son.
Dec. 225	Procedural (ecclesiastical).
Dec. 228	Testamentary provision.
Dec. 230	Moveables and heritable property.
Dec. 236	Prescription.
Dec. 238	Ownership and possession.
Dec. 239	Possession.
Dec. 240	Testamentary provision.
Dec. 244	Marriage and testamentary provision.
Dec. 262	Punishment and clerical privilege.

<i>Dec. 263</i>	Feudal law.
<i>Dec. 284</i>	Arbitration.
<i>Dec. 295*</i>	Oath and confession.
<i>Dec. 297</i>	Procedural (cleric before a secular judge – ecclesiastical).
<i>Dec. 300</i>	Taxation.
<i>Dec. 322*</i>	Rights of neighbour/access rights.
<i>Dec. 328*</i>	Prescription.
<i>Dec. 346</i>	Procedural (ecclesiastical).

*Indicates a case where *ius commune* is less significant in the *ratio decidendi* of the case.

Fig. 3: Cases where the *ius commune* is used in *Consuetudines*

SOURCE	CASUS
<i>Consuet. 4</i>	Power of married women to purchase property.
<i>Consuet. 9</i>	Property between noblemen.
<i>Consuet. 11</i>	<i>Retrait lignager.</i>
<i>Consuet. 21</i>	Judges and jurisdiction.
<i>Consuet. 33</i>	Prescription.
<i>Consuet. 56</i>	<i>Retrait lignager.</i>
<i>Consuet. 61</i>	Marriage.
<i>Consuet. 65*</i>	Dowry on death.
<i>Consuet. 68</i>	<i>Seigneurial system.</i>
<i>Consuet. 69</i>	Clergy/secular judge/procedural.

*Indicates a case where *ius commune* is less significant in the *ratio decidendi* of the case.

2.1 Selection of significant examples

There are two types of references to the *ius commune* in Bohier's works. The first type are relatively insignificant, in the sense that the term's role is cursory or fleeting, and has no real impact on the eventual decision. Where the *ius commune*

plays a minor role like this, it has been identified in the tables above, but will not be studied further. The second type of reference is more substantial. This is where it is clear from the overall decision that the term had an impact on the *ratio decidendi* of the case. These references are the most significant and form the basis of the remaining chapters of this thesis, where a selection of the most interesting examples are analysed in detail. The exposition of juristic thought and legal reasoning varies from case to case and so the extent to which the *ius commune* features is therefore dependent on the individual case. The first of the three works that will be examined is Bohier's earliest, his *Consilia*.

3. *Consilia*

3.1 The source

The *Consilia* has a "scientific quality" to its format, as is evident from the fact that *Consilia* were also prevalent in the study of medicine in this period.⁴ This form lends itself favourably to Bohier's methodology, where he forensically examines a range of topics. The approach to the cases before him is carried out in a set fashion; presenting the *summae* of the matter; proceeding to outline the divergent opinions and corresponding authorities on the matter; and the decision reached. To understand the purpose of this type of work, a brief outline of its history is required.

The period between the fourteenth and seventeenth centuries saw the *consilia* take on a more detailed form, moving from a formal and routine opinion to a complex model with an elaborate layout and a multitude of citations, with arguments from Roman law, canon law, local statutes, customary law, and the works of other jurists. Such a variety of sources at the lawyer's disposal suggest coexistence, rather than a rivalry or fixed order of authority. The presence of other juristic opinions had the effect of creating a miniature history of legal thought on a particular issue, all contained within the one document. Yet, beneath its verbosity, the *consilia* followed a certain predictable formula, and this common form linked all three kinds of written responses. In this later period of the life of the *consilia*, the courts were typically characterised by an increased professionalism and specialisation, with a movement

⁴ W. Turner and S. Butler (eds.), *Medicine and the law in the middle ages* (Leiden, 2014), p. 141.

from oral to written procedure.⁵ Moreover, perhaps the greatest value of the *consilia* at this time was its ability to clarify local law, and provide a means to deal with “the difficult mixture of local statutes and customs...tackled through the techniques of interpretation and argumentation of the Roman lawyers.”⁶ Bohier’s aim when writing was to “provide retrospectively the sort of reasoning on the questions raised by cases that he had provided prospectively when writing as a professor.”⁷ His *Consilia* offers us many examples of the type of legal reasoning he employed, in particular his handling of competing sources of law. It is also possible to identify those authorities that Bohier attributed individual points to, or indeed against, and to compare the approach in the *Consilia* with the *Decisiones*, and further with that of the *Consuetudines*.

Bohier’s *Consilia* contains six cases that deal specifically with the *ius commune* and four of these cases have been selected for the purposes of this chapter. Two relate to canon law matters, including an ecclesiastical appeal,⁸ and the age of subdeacons;⁹ and the remaining pair deal with marriage¹⁰ and *usufruct*.¹¹ *Consilium 8* has recently been the subject of a short study by Paul du Plessis, who recognised the importance of the case and referred to it as “a rather important record of the *ius commune* in action.”¹² He stressed the need for further study into the relationship between the *ius commune* and *ius proprium*.¹³ The cases are considered in order of their appearance in the *Consilia*. Given the findings from the first case, in *consilium 8*, this is helpful as a starting point for discussion in any case. As set out in chapter 2, the earliest known edition of the *Consilia* is 1554, some five years after Bohier’s death, and this edition is being used here.¹⁴

3.2 Cons. 8: Ecclesiastical appeal

⁵ P. Pazzaglini and C. Hawks, *Consilia: a bibliography of holdings in the Library of Congress and certain other collections in the United States* (Washington, D.C., 1990), p. xvi.

⁶ T. Wallinga, “The common history of European legal scholarship”, (2011) 4 *Erasmus Law Review* 5, 10.

⁷ J. Ford, *Law and opinion in Scotland during the seventeenth century*, (Oxford, 2007), p. 193.

⁸ *Cons.* 8.

⁹ *Cons.* 26.

¹⁰ *Cons.* 40.

¹¹ *Cons.* 46.

¹² P. du Plessis, “A dialogue between legal theory and legal practice: thoughts from the *ius commune*”, (2013) 2 *Rabels Zeitschrift* 279, 386.

¹³ *Ibid*, 387.

¹⁴ Lyon, 1554.

The facts of the case relate to an issue emanating from the canon law; where a judge has condemned an individual in expenses contrary to the *stylus* of the court, and the question of an ecclesiastical appeal is raised. The case ended up before the *parlement* in Bordeaux. This particular case considers the authority of and relationship between *stylus*, custom and *ius commune*. Twenty-one sections make up this *consilium*. The most noteworthy, in terms of understanding the use of the term *ius commune*, include: a definition of both *stylus* and custom; the essential differences between *stylus* and custom; and the relationship between *stylus*, custom and the *ius commune*.¹⁵

Bohier begins his *consilium* by referring to the opinion of some learned jurists that *stylus*, *consuetudo*, *mos* and *communis observantia* are thought to be of the same meaning.¹⁶ However, he challenges this and cites a range of authorities. The selection could be termed a conventional one, including late-medieval jurists: Pierre de Belleperche (1230-1308), Cino de Pistoia (1270-1336), Joannes Faure (1478-1541), Angelus de Perusio (1328-1407), Angelus de Aretinus (d.1451) and Bartolus de Saxoferrato.

3.2.1 Defining *stylus* and custom

Bohier's introduction to *stylus* and *consuetudo* rest on provisions in the Codex and Digest: C.8.52.1-2 (a. 319) and D.1.3.32 respectively. It will be helpful for the discussion to briefly consider the content of these provisions first. C.8.52.1 (a. 224) states that:

*nam et consuetudo praecedens et ratio quae consuetudinem suasit custodienda est, et ne quid contra longam consuetudinem fiat, ad sollicitudinem suam revocabit praeses provinciae.*¹⁷

This is followed at C.8.52.2 (a. 319) by a statement establishing limits to legal arguments from custom; essentially that the authority of custom and long-standing

¹⁵ In *consilium* 27, Bohier considers *stylus*, together with its relationship with statute. There, it is also a case centred on a procedural issue, including the amount of expenses to be awarded by the court. See *consilium* 27, para 28 and 29 in particular.

¹⁶ *Cons.* 8, *pr* 1.

¹⁷ Translation by C. Humfress, "Law and custom under Rome", in A. Rio (ed.), *Law, custom and justice in late antiquity and the early middle ages*, (London, 2011), pp. 23-47 at p. 31: "since both the existing custom and the *ratio* which backed it must be conserved, and the provincial governor must make it his business to see that nothing is done contrary to such ancient custom"

usage cannot prevail over reason or statute (*lex*).¹⁸ D.1.3.32pr. states that in those cases where written statute (*lex*) is lacking, custom (*consuetudines*) and usage (*mos*) ought to prevail; but that if what is established by these customs is deficient, then one ought to reason out analogously from these customs. If this reasoning fails then the *ius* that is used in the City of Rome should be applied.¹⁹ The text of D.1.3.32 tries to justify the recourse to custom where statute is lacking on the grounds that the two can be considered analogous:

For since statutes themselves are only binding because they have been accepted by the judgment of the people, those things which the people have approved without any writing at all will be rightly considered as binding on everyone; what difference does it make whether the people declares its will by vote, or by acts or conducts themselves?²⁰

It is widely known that the glossators and commentators looked to D.1.3.32 in particular as representing an authoritative and potentially definitive account of the concept of custom.²¹ It has been suggested that the second-century context of the provision ought to be approached as a “dynamic, problem-solving text – oriented ultimately towards resolving specific difficulties of legal interpretation that arose during Roman law’s expansion from city-state to empire.”²²

3.2.2 *Stylus quid*

From the outset of the case, Bohier offers this description of *stylus*.²³

<i>est ius non scriptum, ab uno iudice</i>	it is unwritten law, more often introduced
<i>saepius circa sententias & acta iudiciaria</i>	or styled by one judge in relation to [his]

¹⁸ (Constantine to Proculus (*proconsul Africae*)): *Consuetudinis ususque longaevi non vilis auctoritas est, verum non usque adeo sui valitura momento, ut aut rationem vincat aut legem* (a. 319).

¹⁹ (Julian, Digest Book 84): *De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est: et si qua in re hoc deficeret, tunc quod proximum et consequens ei est: si nec id quidem appaereat, tunc ius, quo urbs Roma utitur, servari oportet*. See Caroline Humfress, (n. 17), p. 27.

²⁰ Translation from Humfress, (n. 17), p. 28.

²¹ M. Ryan, “Bartolus of Sassoferrato and free cities”, (2000) 10 *Transactions of the royal historical society* 65.

²² Humfress, (n. 17), p. 29. Humfress continues by considering that the very inclusion of ten juristic extracts relating to custom by the Justinianic Digest commissioners perhaps suggests that they too understood how certain juristic arguments “from custom” related specifically to the interpretation (and supplementation) of Roman statute.

²³ *Cons.* 8, para 2.

introducendum sive stylatum...

decisions and judicial acts...

Since the case at hand originated from the canon law, and had been sent to the Bordeaux *parlement* as a matter of appeal, the *stylus* referred to would be that of the ecclesiastical court. It is possible that the particular *stylus Biturice* that Bohier mentions is one recorded in the *Stilus Ecclesiasticae jurisdictionis archiepiscopalis, Primatalis atque patriarchalis Bituricensis*, by Franciscus de Turnone,²⁴ Archbishop of Bordeaux from 1525 until 1537.²⁵ It cannot be stated with any accuracy, however, as more details would be required. Further, although Bohier was president of the Bordeaux *parlement* at this time, the first known edition of his *Consilia* was the posthumous date of 1554, meaning the date of the legal opinions contain within it are approximated.

Bohier offers an interesting insight into the role of the *stylus* and the relationship between canon and civil judges and the authority of their judgments.

3.2.3 *Consuetudo quid*

Bohier continues at *cons.* 8, para 3 by stating that the defining quality of *consuetudo* lies in the nature of its introduction.²⁶

Sicut est consuetudo quae tacita voluntate et usu plurium inducitur, [quia] populi vel maioris partis eiusdem.

Thus custom is that which has been introduced through tacit consent and the frequent use of the populace or the larger part of the populace.

Later in the same part of his *consilium*, he continues:²⁷

²⁴ (Bourges, 1529). Better known examples (but later) include Jean Chenu, *Stylus jurisdictionis ecclesiasticae archiepiscopalis primatalis et concilio provinciali in metropolitana Biturigum civitate habito*, (Paris, 1603). See reference to both Turnone and Chenu: *Catalogue des livres composant la Bibliothèque de la ville de Bordeaux*, (Paris, 1834), p. 316, at “Chenu” and “Turnone” respectively.

Chenu’s other notable works include: *Recueil de réglemens notables*, (Lyon, 1614).

²⁵ Jean Chenu documented the successive Archbishops of Bordeaux in his *Archiepiscoporum et episcoporum Galliae Chronologica historia* (Paris, 1621); Turnone is listed at p. 324. It was considered earlier that the *Stylus curiae* was important in French courts and that familiarity with it was a formal requirement that led to the “*l’avocat l’écoutant*” which was a form of apprenticeship (see the discussion in chapter 2, at 9.2, “Bohier as annotator and editor”). An edition of other *stylus*, Guillaume de Breuil’s *Stylus curie parlamenti* was published in 1513, [1330], edited by Celse Hugues Descousu, and was dedicated to Bohier. While neither of these relate to this particular *Stilus ecclesiasticae*, it is mentioned to demonstrate the prominence of *stylus* as a source in France at this time.

²⁶ Translation from Du Plessis, (n. 12), at 383.

²⁷ *Cons.* 8, para 3. *Ibid*, at 384.

consuetudo tam ex actibus iudicariis, quam extra iudicariis interveniente populi consensu, et sic est usus communis...

custom is introduced both through judicial acts and through extra-judicial acts is the consent of the people, and thus it is common usage...

This distinction between introduction through popular consent for custom and usage and that of the one-man equivalent of *stylus* rests at the heart of Bohier's attack on a shared definition for these sources of law.

In providing a definition of custom and *stylus*, Bohier refers to Joannes Faber, Angelus de Perusio and Angelus de Aretinus on Inst.1.2.9, *De iure naturali, gentium et civili*. Bohier also makes reference to Bartolus' commentary on D.1.3.32. He begins with a reference to Pierre de Belleperche and Cinus de Pistoia. Bohier cited Cinus often in his *Consilia*: four times alongside Belleperche, and separately in two other instances.²⁸ Bohier cites Cinus' (together with Pierre de Belleperche) commentary on C.8.52.2 (a. 319).²⁹ When compared to the argument, the citation appears to be accurate with the passage cited in the commentary discussing the origins of custom belonging to popular tacit consent. Most importantly, perhaps, is the express mention and discussion on the topic of *stylus* and how it differs from custom.³⁰ Clearly, Bohier relied on this part of Cinus' commentary. In the first half of this discussion, Cinus refers to the relationship between a secular court and an ecclesiastical *stylus*,³¹ very similar to the case in Bohier's *consilium*.

Angelus de Perusio is also cited alongside Faure and Aretinus, with reference to Inst.1.2.9. However, no commentary on the Institutes appears to have been written by Angelus, or at least not one that has survived.³² It must be referring to the commentary of another jurist who has cited Angelus as authority for the issue at hand, that of the nature of *stylus* and custom. Aretinus' commentary on the Institutes does reveal a discussion of "*Stylus quid sit, & in quo differat a consuetudine*."³³ Aretinus himself cites Cinus and Belleperche's commentary on C.8.52.2 (a. 319) as to the nature of *stylus* and custom and their differences rooted in the issue of consent.³⁴

²⁸ Cited solo in *Cons.* 8, paras 12 and 21.

²⁹ Cinus de Pistoia, *Lectura super codice*, (1493, Venice).

³⁰ *Ibid*, para 4.

³¹ *Ibid*, para 3: "*in curia seculari...in ecclesiastica consuetudine usum stili...nec sunt iura scriptu qualiter ista differat inter se.*"

³² J. Canning, *The political thought of Baldus de Ubaldis*, (Cambridge, U.K., 1987), p. 272. The absence of any record of such a work on the Universal Short Title Catalogue suggests this is the case.

³³ Angelus de Aretinus, *In quatuor institutionum Justiniani libros commentarii*, (Lyon, 1532).

³⁴ Aretinus: "*Pet. & Cy. in l.2 C.q. sit lon. Consue.*"

When discussing an earlier question, “*consuetudo quid sit*”, Aretinus can be seen referring to Bartolus’ commentary on *de quibus* (D.1.3.32), and Angelus de Perusio is also mentioned.

One of Bohier’s non-Italian authorities,³⁵ Jean Faure, is a prominent figure in this *Consilia*. Bohier cites Faure on some five occasions in his *consilium*.³⁶ Since Faure taught at Montpellier, where Bohier himself studied, he was no doubt more familiar with his works.³⁷ At one point in his *consilium*, it is made especially clear that Bohier holds this jurist in high regard, referring to him as the representative voice on a point of law “in Francia”.³⁸ As a jurist of the *Ultramontani*, Faure tried to “impart to the customary institutions and political organisations of the time a new vigour and vitality by engrafting therein principles of Roman law”.³⁹ Because of an earlier citation to Faure’s work, it is known that Bohier is referring to his *super Instituta*⁴⁰ in this part of the *consilium*.⁴¹ Faure deals with custom in considerable detail here, offering a structured commentary on the matter, divided into six parts:

Primo, circa nomen Secundo, circa diffinitionem. Tertio, circa introducendi modum. Quarto, circa modum agendi. Quinto, circa modum probandi. Sexto, circo vires.

First, about the name. Second, about the definition. Third, about the nature of the introduction. Fourth, about the nature of the operation. Fifth, about the way of proving. Sixth, about strength.

If Bohier directly consulted Faure, it is likely that he would have paid the most attention to Faure’s first two points. While the second part of Faure’s discussion is specifically on defining custom, it is in the first part of the commentary on “*ex non scripto*” that we find a statement on *stylus* and on statute. It is worth noting Faure’s provision of two different descriptions for *stylus* and statute, something mirrored in his commentary on the Codex 8.52.1 (a. 319) in his *super Codice*.⁴² In the annotations

³⁵ The other being Petrus de Bellapertica; born in Paris and later Professor at Orléans.

³⁶ Bohier, *Cons.* 8, paras. 1, 2, 12, 13 and 18.

³⁷ Du Plessis, (n. 12), at 383.

³⁸ *Cons* 8, para 18.

³⁹ C. Phillipson, “The great jurists of the world: XVI. Jacques Cujas”, (1912) 13 *Journal of the Society of Comparative Legislation* 87 at 88.

⁴⁰ (Venice, 1497).

⁴¹ At *Cons.* 8, para 1: “*Ioa. Fab. in ex non scripto. & Ang. Are. ibi Instit. de iure natu. gen. & civi.*”

⁴² Bohier uses Faure’s definition of *stylus* as evidence of its origins and form: a product of judicial proceedings. In his commentary on C.8.52.1, Faure provides this definition of *stylus*: “*stylus proprie et usus circa modum scribendi in iudicio acta, sententias & caetera que possunt modum ordinandi*”. (“Properly speaking, *stylus* is the manner of writing used in court decisions, sentences and other things that can be ordered”.) He goes on to mention *statuta*, and makes a point of differentiating between it

to Faure's work, there is reference to Aretinus, Angelus de Perusio, Cinus and Belleperche. The summary contained in the annotations to Faure's work is in fact very similar to that offered by Bohier on the difference between *stylus* and custom. This is also seen in Aretinus' commentary, but in the body of the text.

Bohier refers to Bartolus as authority for the nature of *stylus* and its introduction through judicial acts. It is possible to interpret this citation as a bid by Bohier to demarcate *stylus* and custom, by using the issue of consent. Bartolus saw that in law making, consent was paramount and could override the will of a superior force. He argued that customary law and statute shared a consensual under-pinning that was rooted in the consent of the people, the former tacit and the latter express, and so did not require superior consent for their authority.⁴³ Perhaps Bohier is referring to Bartolus to demonstrate the difference between a law introduced by a single judge and a statute, the latter being expressly approved by the people. In using this opinion, Bohier would have been drawing a distinction between *stylus* and statute, echoing Faure's view, as outlined above. Bohier is stating that *stylus* is neither statute nor custom; referring to Bartolus' legal reasoning to try and demonstrate that the nature of *stylus* is not rooted in the same sense of consent, although Bartolus himself does not make an authoritative statement as to the nature of custom generally.⁴⁴ Given that he found a definition akin to his own in Belleperche and Cinus,⁴⁵ Bartolus' direct and lengthy consideration of custom and popular consent would have served well as a powerful definition of custom as a source of law. Aretinus also relied on Bartolus' commentary on D.1.3.32 as recognised above.⁴⁶ Perhaps Bohier was citing Bartolus in a routine sense, one rooted in an awareness of the citation practices of other jurists he deemed authoritative. It is not clear whether Bohier directly consulted Bartolus. It is likely that there will have been a significant awareness of the jurist's works, and his influence would have meant that Bartolus would have informed Bohier's understanding in any case. The value of Bartolus as a source is considered below.

and *stylus*, and their differences with custom. For *statuta*, it is introduced by express consent and custom is introduced tacitly. He is keen to demarcate *stylus* and *statuta* here. As authority for this statement, Faure only makes reference to other parts of the Codex and Digest, but generally, the commentary on *quae sit longa consuetudo* cites Azo and the Italian canonist, Hostiensis.

⁴³ Canning, (n. 32), p. 96.

⁴⁴ Bohier cites Bartolus' commentary on D.1.3.32: "*secundum Bar. in d.l.de quibus...*"

⁴⁵ Cinus, (n. 29): Commentary on C.8.52.2.

⁴⁶ Aretinus, (n. 33): Ad D.1.3.32.

In terms of law, the sixteenth century has long been characterised in contemporary accounts by its detachment from the preceding centuries' methods and intellectual approaches to legal sources, namely through the influence of legal humanism.⁴⁷ It has been considered that so-called devotees of pure Roman law displaced the 'Bartolists' in the sixteenth century:

“purity” involved the rejection of such concessions to contemporary practice, whether contrary or complementary, as had been operated by the more practical Bartolists. ‘Pure’ Roman law, however, knows nothing directly of the Conflict of Laws; and since this conflict is a fact of life which will not go away by dint of not being thought about, the structure of the rules founded on Bartolo continued to fill the gap.⁴⁸

The so-called gap-filling quality of Bartolus is not convincing when applied to the case of Bohier's *consilium*. If Bohier is referring to Bartolus in order to deal with the competition of laws and to remedy their conflicts, then the reference suggests reliance and it is in this interaction that we see the true definitions of *stylus*, custom and ultimately the *ius commune*. While legal humanism as a movement is so closely tied to the sixteenth century and may have altered the way in which jurists approached Roman law sources, this is not being debated here. Rather, it is the idea that the value of those sources that had characterised the law prior to the sixteenth century, such as Bartolus, were still being recognised and referred to in relation to the law in action, as embodied in Bohier's *Consilia*.⁴⁹ Indeed, many legal humanists of the age still referred to the likes of Bartolus, and would still adopt, however unconsciously, the commentator stance on certain topics.⁵⁰ This should not be seen as an attempt to categorise Bohier in this way, but rather that Bartolus' influence transcended ideological and philosophical barriers that tend to (sometimes superficially) define jurists and their works. The role of the *ius commune* in Bartolus' commentary on *lex*

⁴⁷ For a new approach to legal humanism that challenges the traditional narrative, see Du Plessis and Cairns, (n. 2).

⁴⁸ J. Clarence Smith, “Bartolo on the conflict of laws”, (1970) 14 *The American Journal of Legal History* 157 at 159.

⁴⁹ See X. Prévost, “Reassessing the influence of medieval jurisprudence on Jacques Cujas' (1522-1590) method”, in Du Plessis and Cairns, (n. 2), pp. 88-107.

⁵⁰ C. Wells, *Law and citizenship in early modern France*, (Baltimore, 1995), p. 37. This is true in particular of the practice of citizenship and the issue of legal precedent in France in the fifteenth and sixteenth century, which Wells sets out generally here at pp. 31-57. Reliance on fourteenth-century jurists, such as Baldus, Bartolus, Albericus de Rosate, is mirrored in the works of renowned humanist, Jacques Cujas. *Ibid*, at pp. 100-102.

*de quibus*⁵¹ is of fundamental importance to the role of this jurist in Bohier's *consilium*. Bartolus' own conception of the *ius commune* can offer an insight into the value of his work for Bohier's own case problem.

3.2.4 The Bartolan world system

Bohier's conception of the *ius commune* was certainly linked to that of Bartolus'. To better understand this, something needs to be said about what Nikitas Hatzimihail has termed the "Bartolan world system."⁵² The Bartolan world focused on a world empire – the Roman Empire – constituted by the *populus Romanus* under a secular Emperor and Pope. Bartolus' chief aim appears to have been the defence of the nominal authority of the Emperor and the unity of Western Christianity under him and the Pope. Woolf has argued that it is the *ius commune* Bartolus is thinking of in his effort to keep Western Christianity together as *populus Romanus* or when he speaks of the Emperor.⁵³ Bartolus used the *ius commune* in two main ways: in both an instrumental and conceptual sense. Bohier mirrors this approach to the *ius commune*. First, his use of it in an instrumental sense: the term acts as an interface needed to enable his theory of statute and custom to work. Here, he uses the *ius commune* not as a positive system of rules to restrict local law, but as an apparatus to mediate between them.⁵⁴ Secondly, the conceptual use of it is especially evocative of Bartolus' approach, in particular that of Bartolus' use of "canon additions from the previous century...the distinction of prohibitive statutes into *statuta favorabilia* and *statuta odiosa*."⁵⁵ There, he sought to reduce the scope of statutes derogating from the *ius commune*; an aim shared with the original gloss on *cunctos populos* in its bid to protect the Bolognese from the statutes of Modena.⁵⁶

In Bohier's case, he made attempts to provide robust definitions of statute and custom and in turn, categorise their role and application to the facts of this *consilium*.

⁵¹ Bartolus de Saxoferrato, *Commentaria in primam digesti veteris partem*, (Lyon, 1525).

⁵² N. Hatzimihail, "Bartolus and the conflict of laws", (2007) 60 *Revue hellénique de droit international* 63.

⁵³ C. Woolf, *Bartolo of Sassoferrato: 1313-1357*, (Cambridge, U.K., 1913), p. 198.

⁵⁴ Not only similar to Bartolus' approach, but also that of Baldus'; where he sees the *ius commune* as a supplementary source for the provisions of local customs and statutes. Joseph Canning has referred to it as providing a suitable standard of law for their interpretation. See Canning, (n. 32), p. 149. Further, see Canning, *Ideas of Power in the Late Middle Ages: 1296-1417*, (2011), p. 147.

⁵⁵ Hatzimihail, (n. 52), at 70.

⁵⁶ *Ibid.*

His aim to restrict their application meant that the value of the *ius commune* was laid bare. The meaning of the term *ius commune* ultimately rests in its relationship with other sources, and in this sense then, this part of *consilium* 8 ought to be held in high regard.

Bohier's handling of the competing sources of law in his *consilium*, and others, bears certain similarities to that of the Italian predecessors. Their similarity rests in both jurists' writing structure. Before putting forward his own position on the matter at hand, Bohier summarises the views of others on the topic in pursuit of comprehensiveness.⁵⁷ He makes reference to sources not only immediately containing specific support to the point he is trying to prove, but also that he is using it to distinguish issues and offer the parameters of the topic he is discussing. This "art of typology" is recognised in Bartolus' writing.⁵⁸ Although the very nature of the *Consilia* meant that lines of argument and style were more restricted in terms of length, and so we are not offered anywhere near as much as in the case of Bartolus' own writings, Bohier still succeeds in offering the enquirer a comprehensive background to the topic, being sure to account for divergent legal opinions.

3.2.5 Introduction through court decisions

In *cons.* 8, para 4, Bohier continues the case by asking whether *stylus* and custom could be introduced through court decisions.⁵⁹ He starts this next part of the argument recognising that there is divergent opinion on this matter.⁶⁰

*secus videtur in arbitr[i]o, per cuius
sententias et acta iudiciaria non
introducatur consuetudo aut stylus...*

*Et in hoc different, quoniam stylus ex
actibus iudicariis solum introducitur...
Et consuetudo tam ex actibus iudicariis,
quam extra iudicariis interveniente
populi consensus, et sic est usus
communis, et stylus est usus unius*

but it appears different in the judgment according to which court decisions and judicial acts do not introduce *consuetudo* or *stylus*...

And they differ in this respect, since *stylus* can only be introduced through judicial acts... whereas *consuetudo* can be introduced both through judicial acts and through extra judicial acts as a result of the consent of the people, and thus it is

⁵⁷ This approach is present throughout the *consilia*. More specifically, in this particular *consilium*, it is notable also at *Cons.* 8, paras 4-5.

⁵⁸ Hatzimihail, (n. 52), at 63.

⁵⁹ *Cons.* 8, para 3. Translation by Du Plessis, (n. 12), at 384.

⁶⁰ Citing Baldus' *De Feudalis* and his commentary on the Digest, on D.1.3.32.

hominis...

common usage while *stylus* is the usage of a single man...

Here, Bohier cites X.5.40.25, as well as Baldus,⁶¹ Antonius de Butrio⁶² and Jason de Mayno.⁶³ Bohier referred back to an earlier statement that claimed *stylus* and *consuetudo* could be introduced through judicial acts (the latter also through extra-judicial acts).⁶⁴ On this particular point he had cited Bartolus and his commentary on *lex de quibus*.⁶⁵ Here, he acted with purpose. A similar pattern of behaviour has been recognised in Baldus' *Consilia*.⁶⁶ It is an example of the medieval "*sic et non*" approach, taken from Peter Abelard's (1079-1142) work on dialectical method of reflection: "in the heyday of medieval universities, a favourite teaching method was the disputation... Abelard's *Sic et Non* is the ancestor of these medieval disputations."⁶⁷ The placing of opposing and contrasting statements side by side is something Bohier does regularly and is evidence of the continued adoption of this medieval method.

It was in a jurist's best interests to criticise an opposing view to the one they endorsed: it gave them an opportunity to pre-emptively attack it and eliminated the risk of another undermining them with this argument and his authority being called into question.⁶⁸ It also suggests Bohier's intention to present an accurate survey of the legal landscape within his *consilium*, keen to demonstrate not only his view, but also a range of views.

For Bohier, it seems that the main reason for reducing court decisions to writing is to provide instruction for a judge and that it is possible for such judgments to lay to rest *stylus* and *consuetudo*.⁶⁹ This also reveals Bohier's concern with consent, and how it informs his understanding of *consuetudo*. The value of this is threefold. First, Bohier has made a powerful statement as to the power of the court decisions in sixteenth-century France; namely that they can determine *stylus* and custom, as well

⁶¹ Citing Baldus' *De Feudalis* and his commentary on the Digest, on D.1.3.32.

⁶² This citation might also be referring to Baldus' mention of Antonio de Butrio (Antonius de Butrio), *Super prima parte primi decretalium commentarii*, (Venice, 1578) through Baldus' commentary on D.1.3.32.

⁶³ Jason de Mayno, *In primam Digesti novum partem commentaria*, (Venice, 1568).

⁶⁴ *Cons.* 8, para 3.

⁶⁵ *Ibid*, para 3.

⁶⁶ J. Pluss, "Reading case law historically: a *consilium* of Baldus de Ubaldis on widows and dowries", (1986) 30 *The American Journal of Legal History* 241.

⁶⁷ A. Kenny, *A new history of Western philosophy*, (Oxford, 2010), p. 47.

⁶⁸ *Ibid*, at 256.

⁶⁹ *Cons.* 8, para 4-5. See Du Plessis, (n. 12), at 384.

as offer instruction to a judge. Secondly, his reasoning offers an insight into how he dealt with competing juristic opinion, including Canonic and civilian; suggesting that he approached the sources, for the purposes of his *consilia*, in an effort to provide the complete picture, and not only that which supported his own view. Finally, it is a statement on the general instruction between legal doctrine and case law that goes beyond the specifics of this lawsuit. His concluding statement on this matter shows that he cited Angelus de Aretinus and Jason de Mayno again, although relied on different works.⁷⁰

3.2.6 Conflict and competing sources: *stylus*, *custom* and *ius commune*

Towards the end of the *consilium*, at paras. 18-20, we see the very essence of Bohier's argument. The rest of the *consilium* has been to set out the position regarding *stylus* and *consuetudo* and the role of the two in legal practice and procedure. Here, Bohier shows the product of this study, and the relationship between the competing sources of law is revealed:

[1] *Exemplum, lege cautum est, quod in causis iudicialibus non producat libellus in scriptis, nisi in causis summaris et brevioribus. Et non reperitur expresse determinatum, quae sint causae breviores, nisi secundum quod iudex arbitrare fuerit, modo in curia iudicis est stylus quod in causis 20 solidarum non detur libellus in scriptis, certe hic stylus curiae est in posterum servandus, quia non est contra legem, sed tendit ad declarandum. Secus ubi esset contra legem, quia magistratus et iudices deputati ad ius reddendum, non habent potestatem derogandi legi, seu condendi statutum contra ius commune...*

[1] For example, it is stated by law that in legal proceedings a written petition is not to be produced unless in summary or shorter cases. What counts as shorter cases is not found to be expressly determined, unless in accordance with what a judge has decided, namely that in the court of the judge the *stylus* is that in cases to the value of 20 *solidi* a written petition will not be given, then certainly this *stylus* of the court should be observed in future, since it is not contrary to the law, since a magistrate and judges are deputed to provide the law and they do not have the power to derogate from the law or to claim that a statute is contrary to the *ius commune*...

⁷⁰ Angelus de Aretinus, *In quattuor Institutionem Iustiniani libros commentaria*, (1532, Lyon); Jason de Mayno, *De actionibus titulus Institutionum Iustiniani tertiam iuris ciuilibis*, (Venice, 1574).

[2] *Et non possunt inducere per stylum aliquid contra ius commune...*

[2] And they cannot introduce by way of *stylus* something which is contrary to the *ius commune*...

[3] *Et sic in hoc videtur differentia inter consuetudinem et stylum, quia consuetudo potest esse contraria iuri communi...*

[3] And thus it appears that in this respect there is a distinction between *consuetudo* and *stylus* since custom can be contrary to the *ius commune*...

Bohier makes a direct reference to the Codex here: C.1.26.2 (a. 235). Essentially, C.1.26.2 attests to the qualified authority of the *praetorian praefect*, whose rules and regulations could not be contrary to the law. The value of this citation is twofold. First, it offers an insight into the way in which Bohier interacted with his sources. It is not clear yet whether this reference was taken from a juristic commentary, but, without such a citation, we can assume that he was seeing this reference to the Codex as directly relevant to his argument; namely that a magistrate or a judge cannot derogate from the law or to claim that statute is contrary to the *ius commune*. The point he was making was an important one, and it is notable that his reference was to the Roman provision. Secondly, it is interesting as it offers an insight into how Bohier views the magistrate and the judge in the sixteenth-century *parlement*.

In a sense, this citation's authority rests on the ability of Bohier, and the reader, to equate the Roman *praetorian praefect* with the French magistrate or judge, even in the most abstract sense. The *praetorian praefect* of the East was the second most powerful man in the East, second only to the Emperor.⁷¹ This observation can be linked to the greater context of sovereignty and authority in early modern France, and perhaps revealing of Bohier's views on this. The *praefect* was considered as the prototype of the judge in early modern France. It could also be attributed to a need by Bohier to associate these individuals to provide a necessary ordering to the discussion.

This practice of equating individuals and procedures of the Imperial Court with those of the then contemporary institutions were not unusual between those marked as belonging to both the humanist school and in terms of Scholastic practices.

⁷¹ T. Mommsen, *History of Rome under the Emperors*, B. Dernandt & A. Dernandt, (eds.), (London, 1992), [translated from the original German version, Munich, 1992], p. 339. In 1980, Dernandt discovered a transcript of lectures on the Roman Empire given by Mommsen in the late 1800s. The transcript was then edited and reconstructed. Therefore, while a nineteenth-century work, its earliest publication is 1992, as is listed here.

However, the sources referred to in extracting this information varied according to the interpreter. Michael L. Monheit spoke of this in respect of Guillaume Budé, Andrea Alciato and Pierre de l'Estoile (1546-1611), in his comparative work on their relationship and interpretation of passages cited from the *Corpus iuris civilis*.⁷² He recognised the differences between humanist and Scholastic treatment and interpretation, as well as internal conflicts between the former in their approach. Budé, for example, displayed a disdain for the *Corpus iuris civilis* in his treatment of a passage from the Imperial jurist Ulpian (contained in D.1.16.9.1) and on the duties of Proconsul and Legate. Here he expended little effort on the passages of the *Corpus iuris civilis* (although he did cite them), and instead made reference mainly to sources that were representative of the institutional context within which Ulpian worked, using extra-legal sources.⁷³ Most importantly for the purposes of understanding Bohier's citation practices, it is Budé's equation of procedures at the Imperial Court with those of the French royal courts.⁷⁴ This method of interpretation was twofold. First, it was deemed to be more effective to refer to Ulpian in terms of the non-juristic classical sources than to work through the various uses of a particular term in the *Corpus iuris civilis*. Secondly, it furthered his own ambitions in terms of Royal approval and appointment to a position at Court.⁷⁵

This is compared to his well-known humanist peer, Alciato, who, in his interpretation of this same passage of Ulpian's, displayed a degree of faith in the medieval jurists and the *Corpus iuris civilis*; a more harmonious reading than Budé's.⁷⁶ This may well be attributable to the difference in educational background of the two jurists. Alciato, for example, was a jurist who had studied at Pavia, and so, as Monheit recognises, could not have displayed disdain for legal thought in the way in which Budé, who has not completed his formal legal education, did.⁷⁷

⁷²G. Budé, *Annotationes priores et posteriores*, (Lyon, 1565), fol. LXIIIr, LXIIIv-LXIIIr. See M. Monheit, "Guillaume Budé, Andre Alciato, Pierre de l'Estoile: renaissance interpreters of Roman law", *The Journal of the History of Ideas* (1997) 26.

⁷³ *Ibid*, pp. 24-25.

⁷⁴ *Ibid*, p. 26. Budé, *Annotationes* fol. LXIIIr, LXIIIv-LXIIIr.

⁷⁵ *Ibid*, 25-26. Budé dedicated his *Annotationes* to Jean de Ganay, (Chancellor of France) and was appointed as Master of Requests to François I in 1522. See D. McNeil, *Guillaume Budé and Humanism in the Reign of Francis I*, (1975), pp. 12-14 and 30-31.

⁷⁶ Monheit, (n. 72), p. 21. Note here that we see frequent reference to Bartolus and Accursius, despite his attacks on them. A common humanist approach, it seems. See D. Osler, "Humanist philology and the text of Justinian's Digest", in Du Plessis and Cairns, (n. 2), pp. 41-58.

⁷⁷ Monheit, (n. 72), p. 27.

This has been mentioned here to demonstrate the existence of other equations made by jurists of the time between their own reality and that of the Romans. Whether Bohier was citing this passage from the Digest directly, or through the work of another, it is still notable and deserves to be mentioned in terms of understanding his citation practices and with regard to the greater aim of this chapter.

3.2.6.1 Alexander de Imola

Alexander de Imola also played a key role in this part of Bohier's *consilium*. His *Consilia*, at *consilium* 36, is cited in support of his statement on the inability of a judge to introduce by way of *stylus* something contrary to the *ius commune*. However, reference to this volume does not offer a *consilium* with relevant content. Instead, it is believed that here Bohier was referring to the second volume of Imola's work. Here, we find a *consilium* that expressly deals with a statute, *stylus* and *ius commune*, outlined at the beginning as: "*statutum recipit interpretationem a iure communi*";⁷⁸ "*stylus unius curie quid inducere possit*";⁷⁹ and "*magistratus deputati ad ius reddendi non habent potestatem derogandi legi vel condendi statutum contra ius commune*".⁸⁰

It is likely that Bohier had this third part of Imola's *consilium* in mind when citing this source. This discussion reads:

*Sed ubi esset contra legem quia magistratus deputati ad ius reddendum non habent potestatem derogandi legi seu condendi statuta contra ius commune. [l.formam. C. de offi. Prefec. Preto., l. omnes populi, c. de offi. arcibi.] non possunt ipsi magistratus per stilum inducere aliquid contra ius commune ita in specie declarant [Belleperche and Cinus in l. ii. In iii col. in versi iii] circa hoc queritur cum nos habemus [C. quae sit longa consuetudo, Antonius de Butrio in c. si de conseu.] pro hoc datur differentia inter consuetudine [et] stilum.*⁸¹

The similarity between this excerpt and Bohier's own statement in his *consilium* is striking. This is true in terms of both the sources cited and the wording of

⁷⁸ Alexander de Imola, *Consilia* (1537, Lyon), *Cons.* 36, *pr.* 8: statute receives interpretation through the *iure commune*.

⁷⁹ *Cons.* 36, *pr.* 11: what *stylus* the court can introduce.

⁸⁰ *Cons.* 36, *pr.* 12: magistrate assigned not to derogate from the law or to enforce statute against the *ius commune*.

⁸¹ Own translation: "But where magistrate assigned not to derogate from the law or to enforce statute against the *ius commune*...the magistrates themselves are not able to do anything contrary to the *ius commune*..." The citations by Imola here demonstrate his reliance on the Codex, Pierre de Belleperche, Cinus de Pistoia and Antonius de Butrio.

the passage itself; they are in fact identical and so it is fair to assume that Bohier has reproduced this part of Imola's own *consilium* on the matter. Bohier's statement reads: "*Secus ubi esset contra legem, quia magistratus et iudices deputati ad ius reddendum, non habent potestatem derogandi legi, seu condendi statutum contra ius commune*".

Looking back to Bohier's preceding statement on the matter of non-derogation from the *ius commune* and the inability to declare a statute contrary to it, it is clear that Bohier copied, almost verbatim, the wording from Imola also. This includes his discussion of the "*causis summariis et brevioribus*" and "*in curia iudicis est stylus quod in causis 20 solidarum non detur libellus in scriptis*". So it seems this "crux of Bohier's entire exposition"⁸², namely that from *consilium* 8, para 18 to 20, was based on Imola's *consilium*.⁸³ Of course, it is possible that Imola himself has copied this from another source, and so it cannot be stated with absolute certainty that it is Imola that Bohier has himself copied.

Now let us turn to the citations. Immediately after this passage reproduced by Bohier, Imola refers to C.1.26.2 (a. 235). Reference is also made to D.1.1.9 (*omnes populi*), and D.2.2 (*Quod quisque iuris in alterum statuerit, ut ipse eodem iure utatur*) and from the Decretals, ad X.5.7.6 (*de haereticis*)⁸⁴ and X.1.23 (*de officio archidiaconi*). Bohier appears only to have cited, and most likely borrowed, C.1.26.2 here in his own *consilium*. There is another familiar citation, however, that follows on from this. Imola cites Belleperche and Cinus, and their commentary on C.8.52 (*quae sit longa consuetudo*).⁸⁵ We know that Bohier has relied considerably upon this commentary in his *consilia*, and he cites it again at this part of it. Bohier's citation is abbreviated and so appears different from Imola's. It is likely, however, that Bohier was borrowing this citation from the latter; a proposition made all the more likely from his practice with other parts of Imola's *consilium*.⁸⁶

It is worth mentioning some of the other sources Imola cited in this *consilium*, of which Bohier seems to have deemed so authoritative. The jurist relied considerably

⁸² Du Plessis, (n. 12), at 386.

⁸³ This part of Bohier's *consilium* dealt with the method of proving *stylus*: "*consuetudo probari debet per turbam, in Francia*". Conventionally, a *turba* was made up of ten men. See the *Glossa Ordinaria*, at D.47.10.7.5: "*Turba. quae sit ex decem*". Cited in E. Kadens, "The myth of the customary law merchant", (2012) 90 *Texas Law Review* 1153 at 1186, n. 115.

⁸⁴ J. Hogan discusses this in his *Judicial advocates and procurators: an historical synopsis & commentary*, (Washington, D.C., 1941), pp. 38.

⁸⁵ "*Pe. & Cy. in l.ii. in iii. col. iii*".

⁸⁶ *Consilia* (1537, Lyon).

on Antonius de Butrio (1338-1408). The particular parts reproduced by Bohier did not miss out any of the citations to individuals (although some parts of the Digest and Decretal references were not reproduced) and so no conclusions can be drawn here as to whether Bohier did not agree with Imola's choice of juristic sources, but although he does himself cite Antonius de Butrio, he is not a dominant authority.⁸⁷ However, his reproduction of Imola's text and his sources demonstrates that he deemed the jurist authoritative enough for this key part of his *consilium*, and did not feel it important to pay homage to the greater sense of Imola's argument or his citation practices, and reproduced it without editing. It seems that Imola was enough. Of course, the very nature of the *consilia* as a source does limit the opportunity for such things, and cannot be read in the same way as a commentary can, for example.

Is it possible that legal practice altered the way in which an individual used a juristic source; and was one rooted more in necessity, brevity and pragmatism than to any emotive standpoint? In this particular part of his *consilium*, it is fair to assume that he only directly consulted the *consilia* of Imola and Decio, and not necessarily to the sources cited therein. Of course, this is not true for the rest of his *consilium*. Yet, it is worthy of mention here, given that he is outlining his general position at this point and even knowingly selecting sources that he feels are most capable of demonstrating his position in an authoritative sense. Moreover, it is possible that those who would refer to Bohier's *consilia*, in an effort to identify the crux of his argument, would look to this end stage of discussion.

3.2.6.2 Filippo Decio

Bohier cites Filippo Decio's (1454-1535) *Consilia*⁸⁸ in conjunction with Belleperche and Cinus. His citation does not include reference to a specific part of this *consilium*, but a survey of its contents demonstrates that this source held much for him.⁸⁹ Let us first consider the issue at hand, namely that a judge may not introduce

⁸⁷ Antonius de Butrio was cited in those parts of Imola's *consilium* that I suspect were most relevant to Bohier. They were cited at para 8 and para 11 by Imola, so whilst not from para 12, which was reproduced by Bohier, they were mentioned in parts that Bohier was likely to have looked at given their content. Of course, the usual caveat about movable text applies: we cannot know that Bohier referred to this edition.

⁸⁸ Philippus Decius, *Consilia elegantissima d. Philippi Decii sive de Decio iuris utriusque interpretis clarissimi nuperrime impressioni tradita cum apostillis*, (Venice, 1523).

⁸⁹ Decio, *Cons.* 11, para 17.

by way of *stylus* something contrary to the *ius commune*. There does not seem to be specific mention of the role of a judge or magistrate⁹⁰ and so no direct treatment like we saw in the case of Imola (although this was, as it was shown, copied from there). Instead, there are a number of different parts to this *consilium* that could have been used by Bohier in a general sense. Some of these provisions shall be considered, and although not all of them can be classed as strictly related to the specific part of Bohier's *consilium* under discussion, they are nonetheless important to the overall understanding of the role of the *ius commune*, and to the mind-set of the jurist that Bohier has deemed authoritative.

At the beginning of his *consilium*, Decio addresses the issue of “*statutum quod non possit probari per testes, valet*”.⁹¹ The discussion focuses around the *Statuta Mediolani*, and although it is unlikely that Bohier relied specifically on this part of the work, it is worth mentioning here for a statement made on the *ius commune*. On the question of interpreting statutes, Decio makes this point:

*...quia verba statuti debent intelligi, & interpretari secundum quod alia statuta loquuntur... ideo potius statutum ab alio statuto recipit interpretationem, quam a iure communi.*⁹²

The final part of this excerpt is the most important. Decio seems to state that statutory interpretation, on this occasion, is done by reference to another statute rather than from the *ius commune*. Of course, this does not strictly mean that such an interpretation can be contrary to the *ius commune*, and indeed this would be contrary to a later statement by Decio in this *consilium* that shall be examined shortly.⁹³ Rather, it offers an insight into the interpretation practices of the time and the way in which the *ius commune* interacted with these other sources of law; moreover, how individuals would use these sources, and how this sometimes led to creative interpretative practices. Finally, it shows how one of the roles of the *ius commune*, as a so-called interpretative guide, would not always benefit from primacy, even to statute. Alexander de Imola is cited here, by Decio, with reference to his *consilium* 36; a citation shared by Bohier.

⁹⁰ The role of the judge is only briefly discussed at *cons.* 11, para 2.

⁹¹ Decio, *Cons.* 11, para 2.

⁹² *Ibid.* Translation: because the words of the statute ought to be understood according to what the other statutes say, therefore a statute is to be interpreted more after another statute than the *ius commune*.

⁹³ *Cons.* 11, para 17.

Decio's treatment of "*statuta quod contra iura scripta, non possit allegari consuetudo, qualiter intelligendum*" offers a valuable insight into the way in which Decio viewed statute and *consuetudo*. He states: "*Confirmatur hoc, quia statutum loquitur de consuetudine, unde cum sit contra ius commune, debet intelligi de consuetudine propria, quae debet esse praescripta [c.fi.de consue.] in ista in consuetudine interpretativa, in qua interpretatio non requirit*".⁹⁴ Essentially, this passage seems to state that since the statute in question speaks of the custom, and that its content is contrary to the *ius commune*, it ought to be understood according to custom itself. This creative method of interpretation demonstrates the value of custom and the ways in which such approaches to sources of law at this time could overcome the authority of the *ius commune*. It should be stressed that this seems to have been only in those cases where a statute's provisions could be traced to a customary rule, but it is nonetheless an undermining of the authority of the *ius commune*.

Decio deals with the issue of: "*Statutum derogans iuri commune, debet quantum potest reduci ad ius commune*"⁹⁵ discussing when a statute derogates from the *ius commune* and how it ought to be reduced inasmuch as possible so as to be in line with the *ius commune*. Under this heading, Decio states:

"*Cum statutum deroget iuri communi, debet quantum potest reduci ad terminos iuris communis.*"

When statute derogates from the *ius commune*, it should be reduced as much as possible to [be in line with] the *ius commune*."

This particular point is most relevant to the first part of Bohier's statement on the inability of a judge to declare a statute contrary to the *ius commune*, as considered earlier. Although this is not the point which Bohier is addressing, it is nonetheless worthy of note. It provided a clear statement for this first part of his argument, and so he either deemed it unnecessary to cite specifically in relation to the first point (where he only cited C.1.26.2 and relied wholly on Imola) or this reference to Decio's *consilium XI* here is to be taken as authority for all matters under consideration, in this part of Bohier's *consilium*.

⁹⁴ Translation: This is confirmed by the fact that the statute refers to custom so when it is contrary to the *ius commune* it must be understood as referring to this specific custom, which ought to be provided for...[&] which does not require interpretation.

⁹⁵ *Cons.* 11, *pr.* 17. The earliest edition held by the Library of Congress is a 1523 edition (Venice) and this has been used here.

3.2.6.3 Decio on *stylus* and *consuetudo*

Decio deals with the matter of *stylus* under the headings “*Stylus & consuetudo quomodo differant*”,⁹⁶ and “*Stylus pro forma habetur*”.⁹⁷ The second of these largely focuses on the problems arising from additions to a *stylus* that appear inconsistent with the rest of its content; it is more a consideration of the *stylus* and its associated problems of form and content. The first, however, discusses the *ius commune*, and it is used as a distinguishing feature between *stylus* and custom; the relationship of each to the *ius commune* differs. Decio’s choice of citations should be considered. Here, he cites Antonius de Butrio, Baldus, Bartolus, Angelus de Aretinus, Albericus de Rosate (1290-1360) and Alexander de Imola and his *consilia*.⁹⁸ These are individuals who are seen throughout Bohier’s *consilium*.

It seems that Bohier’s reference to Decio here was made for his general position on statutes, *stylus* and custom, and their relationship with the *ius commune*. It is not known whether Bohier referred directly to Decio’s *consilia*, but it is clear that the source offered much to his *consilium* beyond that to which it was specifically referred. Given the very nature of the *consilia* and its inherent restrictions in providing room for facts and indeed citations beyond that which was strictly needed for the case at hand, it may well have been that Bohier’s reference to Decio at this stage of his *consilium* was in fuller recognition of his relevance overall, especially as this point of the discussion was a general statement on the relationship between competing sources of law that had formed the basis of Bohier’s argument.

This case arose as a matter of appeal because of an individual being condemned in expenses contrary to the *stylus* of the court. Therefore, the central debate and decision was predicated on the treatment of *stylus*. However, it is the relationship between different sources of law, in their conflict or cooperation, that we see the nature, role and limits of a source, and a true definition as a product. In the case of each *stylus*, custom, statute and *ius commune*, this was made clear in this *consilium*. It shows that a judge could not introduce something by way of *stylus* (which was equated with statute), something that was contrary to the *ius commune*. Even if much of the debate in the *consilium* was dedicated to *stylus*, this statement is

⁹⁶ Decio, *Cons.*11, *pr.*11.

⁹⁷ *Ibid*, *pr.*16.

⁹⁸ Decio, *Cons.* 26 is cited.

important to the overall decision reached. The findings on the *ius commune* were not the central part of the *ratio decidendi* for this case, but Bohier's statements on the matter are revealing in that they demonstrate how the *ius commune* has a certain role and place in the relationship with statute (*stylus* here) and custom.

4. **Cons. 26: Canon law and dispensations**

The Church and its customs and practices⁹⁹ feature prominently in Bohier's *Consilia*. *Consilium* 8, directly above, is a particular example of this, and *consilium* 26 continues this trend, where it considers the issue of the minimum age of subdeacons.

The main legal issue is the question of allowing dispensations in the case of subdeacons, with specific reference to the age of their appointment. Specifically, here Bohier considers the case where the Pope had first given *beneficium curatum* to a boy aged twelve years old, and now aged eighteen, the same boy wishes to be promoted to the subdiaconate despite being under twenty-five. According to the *casus* set out by Bohier, the *ius commune* provides that only those aged twenty-five can apply for such a position. The main query here is therefore whether a papal dispensation ought to be considered as generally applying to all such cases, or whether it is a specific condition to the case before the court in this instance. Bohier is effectively asking whether this creates a precedent.

Earlier in the *consilium*, Bohier considers the notion of "*dispensationes sunt stricti iuris*", and therein looks at the nature of dispensations more generally.¹⁰⁰ Other points of interest range from the occasions where a monk may be absent from a monastery,¹⁰¹ through to more general statements on the nature of the law and its relation with the Church's right of dispensation.¹⁰²

Most importantly, *consilium* 26 considers the matter of competing sources of authority, and specifically the relationship between canonical procedures and the *ius commune*. Since this case is, for the most part, concerned with a very specific set of

⁹⁹ On the complex history of the Church and its relation to law of this period, see R. Helmholz, *The spirit of classical canon law*, (Athens, G.A., 2000), and further K. Pennington, *The prince and the law, 1200-1600: sovereignty and rights in the western legal tradition*, (Oxford, 1993).

¹⁰⁰ *Cons.* 26, para 7.

¹⁰¹ *Ibid*, para 19.

¹⁰² *Ibid*, para 21.

canon law of the Church itself, the place of the *ius commune* in this context is noteworthy. There is one reference to the *ius commune* in *consilium* 26:

simpliciter in dicta aetate xviii annorii ad subdiaconatum se facere promoveri intra annum: sed solum in dispensatis favore studii, & sic non facit ius commune in aliis...

simply, at the stated age of eighteen years he can be promoted to the subdiaconate within that year: but the dispensation is only for the purpose of study, and does not make the *ius commune* in other cases

Bohier's account of the law on this matter is focused and suggests a strict application of the *ius commune* in the case of dispensations by the Church for the purpose of promotion to the subdiaconate at the age of eighteen years.¹⁰³

His statement: "*sic non facit ius commune in aliis*" is important. Here, it appears that the *ius commune* can be created in some way, by the Pope. Although Bohier provides that this does not happen in this case, it is nonetheless revealing of its nature and potential in other cases. It suggests a living law of sorts in the case of canon law; perhaps an equivalence of the two forms. Since the Canon law is the "common law" of the church, it is possible that the term *ius commune* is being used here so as to represent the canon law generally, which can be made and amended by the Pope. The idea of a precedent is being ruled out here by Bohier; preventing this particular example being relied on for future changes.

Perhaps this is a case where "*sic non facit ius commune in aliis*" is simply another way of saying that "this dispensation" does not apply to other cases. No specific rule of the *ius commune* is cited here, and so it is not possible to identify which authority Bohier rests his statement on, and ultimately what he has in mind when using the term. In the absence of this, it is helpful to consider the role of the Church dispensation and its relationship with the *ius commune* in a more general sense.

4.1 Defining dispensations

The power of an ecclesiastical dispensation has been referred to as "a fairly limited legal device in that its focus was very specific."¹⁰⁴ This is probably from the

¹⁰³ Discussion of the term "*intra annum*" in the Digest.

perspective of the beneficiary, and depended on the context of the dispensation, rather than an accurate statement of its juridical nature and authority. The complex orders of the Catholic Church meant that only certain individuals were vested with the power to grant dispensations, and the power lay, at the lowest level, with the Bishop.¹⁰⁵ A Bishop was bound to obey a strict set of rules when exercising his legislative prerogative. He could not legislate *contra ius commune*; a rule vested in the principle that an inferior cannot act contrary to his superiors. He could, however, enact laws that are *juxta ius commune* and so can permit or forbid that which the *ius commune* neither permits nor forbids. It is also held that a Bishop had the power to enact laws *praeter ius commune*: effectively for those points on which the *ius commune* is silent and could not have foreseen.

Bohier puts forward a series of arguments that clearly reveal the diagnostic quality of this *consilium*. It is evocative of the approach to the case that was discussed in *consilium* 8. Bohier dedicated a significant part of that to defining and distinguishing terms and sources of law, and this is replicated here where the focus is on establishing what a dispensation is and identifying its inherent characteristics. The main arguments demonstrating this reasoning will now be considered.

In terms of defining the general or special quality of a dispensation, Bohier sets out how such a matter is measured in *cons.* 26, para 4:

Lex quando possit casum specialem si adsignat rationem generalem, generaliter intelligenda est in omni casu, in quo potest eadem ratio reddi.

The law sets out a special case, if [the same law] gives a general rationale [to that special case], [the law] is usually to be understood [as applicable] to any case, in which it is possible to retrieve the same rationale.

Here, Bohier deals with the central question posed by this *consilium*: when does a dispensation become general in its application? He provides that the law, or a rule, is specific in nature but that a dispensation ought to be considered to have general validity when it appears to have characteristics that suggest it was issued with such an application in mind. Reference is made to a number of sources in support of this, including Bartolus, the Digest, Joannes Andreae (d.1348) and Philippus de

¹⁰⁴ Thomas Kuehn, *Illegitimacy in renaissance Florence*, (Michigan, 2002), p. 46.

¹⁰⁵ P. Scott (ed.), *Las siete partidas: The medieval church: the world of clerics and laymen*, (2001), p. 218. See also Helmholz, (n. 96), p. 349.

Franchis (d.1471). Bohier refers to the dispensation as “*stricti iuris*” at *cons.* 26, para 7. On this point, Bohier makes reference to a number of works, including the *Liber Sextus* VI.1.11 and Decretals X.4.14.

Shortly after,¹⁰⁶ Bohier states that dispensations are simply and strictly understood: “*Dispensationes simpliciter & stricte accipienda sunt*”. He continues this attempt to establish the perimeters of dispensations,¹⁰⁷ where he states: “*Causa limitata limitatum producit effectum*”. The idea that a limited cause produces a limited effect is an important one in the overall question of this *consilium*. Here, Bohier is reiterating the same basic sentiment seen earlier; namely that a dispensation’s purpose and application are limited to that extent where the purpose of its issue is met. In one of his concluding statements, Bohier states:¹⁰⁸

Legis ratio ubicunque cessat, cessat & ipsa lex, nisi remaneret causa finalis.

No matter where reason of the law ceases, the law itself ceases, unless it would remain the final cause.

This is a well-known *regula*: “*cessante ratione legis, cessat ipsa lex*”. It is likely that here Bohier is referring to the nature of a dispensation. He explains that it will not only exist to the extent that is needed: that the reason for granting the dispensation is still relevant and presumably the recipient is of the same class and circumstance as he was when it was originally issued. On this matter, reference is made to the relationship between different sources of law:

Pet. de Anar. in [d. consilio ccclxiii.] quam dicit procedere quando inhabilitas causatur a iure communi, secus si a consuetudine, vel statuto...

And Petrus de Ancharano narrows this common opinion in *consilium* 363 when he says that it applies when the inability derives from the *ius commune* but differently if from custom or statute...

4.2 Distinguishing *ius commune* from custom and statute

Depending on the manner of interpretation, namely the use of term “*secus*”, Bohier may be distinguishing *ius commune* from custom and statute. He refers to

¹⁰⁶ *Cons.* 26, para 10.

¹⁰⁷ *Ibid*, para 18.

¹⁰⁸ *Ibid*, para 21.

Petrus Ancharano's (1333-1416) *Consilia*.¹⁰⁹ Here, Petrus de Ancharano cites Joannes Andreae, with both Bohier and Ancharano making reference to the *Liber Sextus* VI.1.2.1 as authority for their statement. If Bohier is distinguishing *ius commune* from statute and custom, this is notable. In *consilium* 26, para 17, Bohier's explicit reference to the term *ius commune* shows its treatment has a distinguishable quality, albeit without accompanying citations. Similarly, in the current argument, we see that a reference to the term *ius commune* is perceived differently from other sources of law, and so is in line with Bohier's earlier treatment.

It seems that the decision is made against the holder of the dispensation, by ordering for the payment of a fine of “*quingenta ducatis*”.¹¹⁰ The role of the *ius commune* in this case is an important one. In establishing the extent and quality of the dispensation, Bohier needed to account for its nature and the relationship between it and other sources of law. At *cons.* 26, para 17, it is possible to interpret Bohier's argument as an equation of canon law with *ius commune*. Later, the reference to the *ius commune* being distinguished from custom and statute is significant; a meaning expressed in *consilium* 8 also. It is not possible to establish the extent to which the *ius commune* itself determined the outcome of the case. The crux of the argument seemed to rest with the terms and conditions of the content of the dispensation itself, which was most fully summarised in *cons.* 26, para 21 above. The value of the *ius commune* in this case then depends on the interpretation of the term at *cons.* 26, para 17 and the possible equation with canon law generally.

Unlike *consilium* 8, where a range of authorities were cited in support of Bohier's arguments related to the mention of the term *ius commune*, no citations accompany this statement. It could follow, therefore, that the *ius commune* is being mentioned in a general sense; Bohier's reference to it being an indication that the term had a looser meaning than that which was expressed in *consilium* 8, for example. The citation practices of Bohier are revealing of his legal thought and also his definition of the *ius commune*. The absence of citations here means it is unclear what guided his treatment of it in this instance. Instead, the value of this *consilium* rests in the role of

¹⁰⁹ Reference to this work shows his citation to be erroneous. The passage he mentions is actually to be found in the following case of 364, where the exact statement in his own *consilium* is found. Of course, given that texts were moveable, it is possible that the edition looked at by Bohier, if he consulted it, was a different one to those examined here.

¹¹⁰ *Cons.* 26, para 22.

the *ius commune* played in reaching his decision. In the case of *consilium* 26, it appears to have played a central part in his decision-making.

4.3 The Canon law and the *ius commune*

Half of those cases in the *Consilia* that mention the term *ius commune* deal with Canon law issues. Bohier's role as editor was considered earlier in this thesis,¹¹¹ and there it was revealed that the majority of those works he edited were of a Canon law nature; examples included Joannes Andreae's *Mercuriales domini* (Lyon, 1510), Dynus de Mugello's *Commentarius mirabilis super titulo de regulis iuris* (Lyon, 1530) and Juan de Torquemada's (1388-1468) *Commentaria reverendi in Christo Petris* (Lyon, 1519). Bohier was clearly interested in the Canon law and deemed it worthy of editing and of contemporary commentary. In this respect, we saw his professional interest in works that are more typically associated with the publishing pursuits of the university jurist, than the practitioner. There, those works edited by Bohier were examined so as to demonstrate his intellectual affiliations, or at the very least, his interests. These works were for the most part published within his lifetime and so his involvement in their compilation and release is certain.

Were these works published so as to better reflect those cases he considered in his *Consilia* and *Decisiones*? Or, were they instead an indication of what he deemed to be important works in their own right? Given that the compilation of the *Consilia* and *Decisiones* were posthumous efforts, the selection of those cases used would have been outwith Bohier's hands.¹¹² Either way, the *Consilia*, specifically here at *consilium* 26 and previously in *consilium* 8, has demonstrated that the Canon law was clearly important to Bohier as a practitioner, which is to be expected, and the fact that canon law cases represent half of those dealing with the *ius commune* in this source, mean that these cases cannot be excused as anomalies or exceptional. While the Canon law was such an important force in legal practice, those cases that dealt with matters pertaining to the church (whose power had a broad remit),¹¹³ had a central

¹¹¹ See chapter 2 of this thesis at 9.2, "Bohier as annotator and editor".

¹¹² Of course, Bohier may have left instructions for the publication of these works but there has so far been no trace of this.

¹¹³ On the particular history of Bordeaux religious orders and the prominence of the church see G. Guyon, "Les évêques de Bordeaux et les ordres religieux au Moyen Âge", in G. Guyon, *Le droit des bordelais dans tous ses états, les anciennes coutumes, les juristes et la justice, les institutions de l'Église locale*, (Limoges, 2012), pp. 315-332.

role generally and so the appearance of the *ius commune*, which had a strong stance in those of *consilium* 8 and 26, is of considerable importance.

5. Cons. 40: Marriage contract

Bohier considers a matter of appeal relating to a decision made by Judges de Brollio and Gentilis who absolved Guichard de Thou from the petition made by Anne de Ganay, deciding against her in the first instance. From later discussions therein, it is made apparent that the case considers alleged adultery, on the part of Guichard de Thou, and its implications for the marriage contract between the couple.

It is worth noting that Bohier would have been familiar with the family of Anne de Ganay, through her brother Jean de Ganay, First President of the Paris *parlement* and later Chancellor of France.¹¹⁴ He presided over the *Grand Conseil du Roi*, and personally appointed Bohier to the role of *conseiller* in 1508.¹¹⁵ Bohier's *Consuetudines Biturigium* was dedicated to the Chancellor and was issued privilege at Lyon in June 1509.¹¹⁶ The extent to which this will have had an influence on Bohier's reasoning is difficult to say. It is possible that Bohier's judgment was requested on this issue because of his relationship to Anne de Ganay. However, with Jean de Ganay's death in 1512, and no certain date for the composition of the *Consilia* (only posthumous publication dates are known), this cannot be stated with any certainty.

This case is a complex one. It appears to consider an annulment or divorce on the grounds of the husband's adultery but the specific details are difficult to establish. There are 134 points considered by Bohier, the majority of which deal with the formalities of marriage, including the rules surrounding its formation, in particular the provision of witnesses; as well as considering the defining qualities of the marital

¹¹⁴ There is a mention of Bohier's *consilium* 40 in a work detailing the history of the Ganay and Thou families. See J-A. Roucher, *Collection universelle des memoires particuliers relatifs a l'Histoire de France*, 53 (1789) p. 35. Further on the relationship between Anne de Ganay and Guichard de Thou, see F. L'Hermite, *Les éloges de tous les premiers présidents du parlement de Paris, depuis qu'il a été rendu sédentaire iusques à présent: ensemble leurs généalogies, épitaphes, armes et blazons*, (Paris, 1645), p. 76; and F. Lestringant, *Jacques-Auguste de Thou (1553-1617): écriture et condition robine*, (Paris, 2007), p. 28.

¹¹⁵ M. Pelletier, *Le grand conseil de Charles VIII a François I, (1483-1547)*, (Paris, 1960), (*D'école des chartres*), pp. 213-214. See also: C. Boscheron des Portes, *Histoire du parlement de Bordeaux (1451-1790)*, Volume 1, (Bordeaux, 1877), p. 40. On Jean de Ganay, see: F. Aubert, *Dictionnaire de la noblesse, Tome VIII*, (Paris, 1774). On Bohier's patronage network, see chapter 2, "Patronage".

¹¹⁶ E. Armstrong, *Before copyright: The French book-privilege system 1498-1526*, (1990), p. 75. Georges Calmon states the year as 1508. See *Le président Bohier*, (Bordeaux, 1880), p. 14.

union. An example of this can be seen where Bohier poses the question: “*matrimonium quid*”.¹¹⁷ He states:¹¹⁸

quod matrimonium est maris & foeminae coniunctio, ut institutio... et ideo dicitur maris & foeminae in singularii, & non marium & foeminarum in plurali: quia unus masculus plures foeminas, nec econtra...

that the union of marriage is a male and female, as is the institution... and therefore it is said in the singular as male and female, and not male female, in the plural: a single male, several females, nor vice versa.

Bohier states that the contractual formation of marriage is made when there is consensus by words and by facts – which could be taken to mean, an awareness of circumstances. In the case of adultery, the contract is null and void.

5.1 Procedural matters

Reference to the term *ius commune* is made at *cons.* 40, para 125. Here, Bohier states:

Foeminae sunt ab omnibus tam privatis, quam communibus officiis reiecte.

Women are rejected from all private and public proceedings.

Effectively, Bohier considers the rule that women are unable to bring proceedings to a court. The treatment of this issue in the body of the *consilium* reads:

quia est contra ius commune, quod presumitur contra allegantem: cum foeminae sint ab omnibus tam privatis, quam communibus officiis remotae.

because it is against the *ius commune*, that it is a presumption against those who argue: with women all such private and public proceedings are removed.

The position of *cons.* 40.125, sitting between a much larger discussion about witnesses and procedure, is noteworthy. The point containing a reference to the *ius commune* is not a stand-alone statement, but rather something more passive and rudimentary.

¹¹⁷ *Cons.* 40, para 52.

¹¹⁸ *Cons.* 40, para 52.

It is contended that the value of this reference to the *ius commune* for the purpose of understanding how it was understood at the time, rests in the citations used by Bohier. The substantive content does not seem to have the same quality as earlier uses in the *Consilia* do; namely that of an intermediary between competing sources. Bohier refers to Albericus de Rosate's (1290-1354) commentary on *de regulis iuris* (D.50.17) and also to "*l.foeminae*" (D.50.17.2). When Bohier refers to the *ius commune* here, he therefore has a commentator and the Digest in mind. The decision is made in favour of the pursuer in this appeal case, Anne de Ganay.

The extent to which the *ius commune* had a decisive role is difficult to estimate. Given that it is mentioned on one occasion out of a case with some 134 points of contention, it is unlikely that it was the prominent part in the reasoning and decision-making process conducted by Bohier. There does not appear to be any real focus on the *ius commune* in a substantive sense here, and Bohier does not refer to it again in his concluding remarks. It seems reasonable to speculate that where there is no conflict between sources, the value of the *ius commune*'s role in decision making is less obvious. This appears to be one of those cases.

6. Cons. 46: Usufruct

Bohier considers the issue of *usufruct*, with a focus on the question of hereditary rights between a mother and father and the effect of *iuramento* and *pactum*. The initial issue, and the underlying one in this *consilium* reads: "*Pactum de non succedendo patri & matri, interveniente iuramento.*"¹¹⁹ In short, Bohier is establishing the legitimacy of a *pactum de non succedendo* (a waiver of succession) between a wife and husband was affected by an intervening oath; an agreement to forfeit one's entitlement to an inheritance claim, for example. He states that it dies with the mother and father, in this instance, despite any intervening oath to the contrary.

Bohier introduces the case by saying: "*haec quaestio non videtur esse sine dubio*", and from the outset, it is made clear that this topic is a complex one. Of the ten arguments made by Bohier, two of them relate to the *ius commune*. Each reference to the term is important and underlies a crucial part of the case. Before its appearance,

¹¹⁹ Own translation: "Whether the *pactum de non succedendo* still applies in the case of a husband and wife where there is an intervening oath."

however, there is another point made that deserves attention here. In considering both the role of custom, statute and the validity of *pactum*, Bohier states:

etiam si esset consuetudo approbans tale pactum, quia ubi aliquid prohibetur fieri per pactum, quia contra bonos mores, ibi nihil potest consuetudo, aut statutum... even if it were the custom of approving such a *pactum*, because it is contrary to good morals, there can be no custom, or statute...

The custom referred to is the practice of upholding the value of *pactum*. The circumstances of the case, however, mean that to do so would be *contra bonos mores* and so custom is not to be upheld in this instance. Bohier considered the nature of custom as a source of law earlier, at *consilium* 8. There, he saw its defining quality resting in its introduction through tacit consent and frequent use of the people.¹²⁰ That custom's validity is dependent on something other than this stands to qualify its authority further. The weight of this statement, and its implications for the role of the *ius commune* in this case, are only fully realised later. What is immediately clear, however, is that the authority of custom is qualified here.

6.1 Customary law

The customary law referred to is "*Bituricensis consuetudo*". Bohier's authority on this particular set of customs would have been unparalleled at this time, his work, *Coutumes Biturigium* was first published in 1508.¹²¹ Bohier's statement on custom in this *consilium* can therefore be taken as highly authoritative, and in this sense, then his consideration of the *ius commune* in relation to customary law, equally so. Three references to the *ius commune* are made.¹²² The first mention of the *ius commune* is found in the introduction to the *consilium*:

Consuetudo ita accipienda est, ut quam minimum laedatur ius commune. Custom should have been accepted in such a way that it cause as little injury as

¹²⁰ *Cons* 8, para 3. Bohier considered the nature of custom as a source of law and saw the defining quality of *consuetudo* rested in the nature of its introduction: "*Sicut est consuetudo quae tacita voluntate et usu plurium inducitur, [quia] populi vel maioris eiusdem.*" Translation by Du Plessis, (n. 12): "Thus custom is that which has been introduced through tacit consent and the frequent use of the populace or the larger part of the populace."

¹²¹ Armstrong, (n. 116), p. 75. Note that Armstrong states that printing privilege for this work was granted later in 1509.

¹²² *Cons.* 46, *pr.* 8, para 8 and 9.

possible to the *ius commune*.

In the main body of the text, Bohier considers this point in greater detail. He continues with this statement that relies on the opinion of Raphael Fulgosius:¹²³

Tum, quia licet consuetudo praedicta debeat stricte interpretari: tamen verba sunt & extendenda & intelligenda, ut minus laedatur ius commune, quam sit possibile: ut voluit in simili Raphael [Fulgosius], in consilio XXX incip.

Then, because the custom should be strictly interpreted, but words should be interpreted and understood, where possible, so as to cause minimal harm to the *ius commune*, as suggested by Raphael Fulgosius in *Consilium* 30.

Following this statement on the relationship between the *ius commune* and custom, Bohier then looks at the place of statute and how it fits in to what increasingly resembles an established source hierarchy:

ut ibi per eum, quia hoc modo minus laedatur ius commune & eandem doctrinam tradidit Franciscus de Curte in consilio septimo...

this means [statute] is to cause little harm to the *ius commune* and [this is] according to the teaching by Franciscus de Curte in his *consilia* 7...

Other discussions of the *ius commune* and its relationship with other sources of law in this *Consilia* employed the same reasoning: where there is friction between a source and the *ius commune*, the interpretation of the former should be made so as to affect the operation of the latter as little as possible.

6.2 Source hierarchy

In considering the relationship between the *ius commune* and custom, Bohier sets out the need for interpretation of words or terms of a customary law to occur in the light of the *ius commune* as far as possible. He qualifies this statement here with “*quam sit possibile*”. Therefore, instead of an outright endorsement of the superiority of the *ius commune* as a source, Bohier recognises that custom can be contrary to the *ius commune* but that when it is possible to interpret the customary law so that it is in line with the *ius commune* position on an issue, that this approach be adopted. This could be an indication that Bohier saw the *ius commune* as a benchmark against

¹²³ *Ibid*, para 8.

which custom should be held. Presenting the relationship between the *ius commune* and custom in this way ought to be understood as a form of interpretative guidance issued by Bohier, so as to ensure harmony between the two sources existed wherever possible. This is to be distinguished from his take on statute that followed on from this discussion.

6.3 Authorities cited

In the *Consilia*, Bohier first considered the issue of statutes and their relationship with the *ius commune* in *consilium* 8. There, he relied on Alexander de Imola's *Consilia* and his statement therein that expressed the need to interpret statutes according to the *ius commune*. This is compatible with the treatment in *consilium* 46 and it is therefore possible to identify a pattern of interpretation emerging in the *Consilia* as a source. The *Consilia* saw six cases mention the *ius commune*, and Bohier followed this mention of interpretation in at least two instances. Unlike the treatment of custom, Bohier does not qualify the value of the *ius commune* in its relationship to statute. Instead, he offers what seems to be an affirmation of the former's superiority as a source of law.

Bohier cites two authorities in his discussion of the *ius commune*: the works of Raphael Fulgosius (1367-1427) and Franciscus Curtius (c.1495). Reference to Fulgosius' *consilium* 30 confirms that it does contain a discussion concerning usufruct and the term *ius commune* is mentioned on three occasions therein.¹²⁴ However, Fulgosius does not directly consider the matter of custom here, but instead looks at statute. It is possible that Bohier chose to refer to Fulgosius as an example of how to handle conflicting legal rules. It is also possible that this citation was borrowed and Bohier himself was not aware that Fulgosius was referring to statute. Bohier also cites Curtius' *Consilia*¹²⁵ as authority for his approach to statute. Reference to this source, however, shows that this is an erroneous citation, or indeed the result of a printing error. The part of the *consilium* relevant to his discussion is to be found at *consilium* 6 instead.

7. Conclusion

¹²⁴ Raphael Fulgosius, *Consilia*, (Mainz, 1521), *cons.* 30, para 4.

¹²⁵ Franciscus de Curte, *Consilia*, (Milan, 1496).

Bohier's *Consilia* reveals the treatment of competing legal orders of statute, custom and the *ius commune*. *Consilium* 8 is arguably the most valuable in this regard, and it has therefore enjoyed centre stage in this chapter. This chapter has sought to analyse the approach of Bohier, a practitioner, to legal texts and how the reading of such sources manifested into practice. The question whether there was a doctrinal meaning attached to the term *ius commune* remains unanswered for now, but the following chapters on the *Decisiones*, and further the *Consuetudines*, will bring us closer to an answer. However, there is a sense of continuity in his legal reasoning and it is possible to detect a pattern of approaches to the sources of law, as well as a preference for particular jurists and their works. Jurists from the School of Orléans feature prominently, as do the works of Alexander de Imola and Filippo Decio. The role of Bartolus is especially important. There is a tendency by Bohier to apply the *ius commune* in an interpretative sense, relying on it as a constructive aid, to manage competing sources of law such as statute and custom. The very nature of the *Consilia* as a source is an example of the meeting of legal practice with academic advice. University training in Roman law together with the demand for legal expertise in practice would have implications in the wider argument related to legal humanism. "Legal thinking along Roman lines" was in theory promoted by the *Consilia*; however, it is likely that the overwhelming motivation for the selection of a source was necessity of practical application, more than any overarching consideration to the juristic school to which the author belonged, or the desire to demonstrate an academic affiliation by the practising lawyer.

CHAPTER 4

DECISIONES BURDEGALENSIS

1. The *Decisiones* as a source

Traces of Bohier's activity as President of the Bordeaux *parlement* are scarce. A provision in his will reveals the fate of his written decisions:

*Item, je veux et ordonne que tous et chacuns mes livres et Decisions par moi faites, soient mises en une chambre du Palais, telle que ladite Cour sera ordonne, pour le perpetuel service de Messieurs le Presidents et Conseillers de la Cour.*¹

Compare this testamentary provision with Charles Dumoulin's statement that:

*Multa in dictis decisionibus ad augendum librum inserta sunt, quae non sunt e sententia Nicolai Boerii jam senio confecti, sed allegationes juvenum.*²

The authenticity and provenance of the *Decisiones* is of fundamental importance to the overall approach of this thesis. The Bordeaux magistrates were quick to publish the *Decisiones*, the first being printed in Lyon in 1547, some eight years after Bohier's death.³ While subsequent editions continued to be published until 1690, it is clear that the proximity of the first publication to Bohier's death and his testamentary provision serves to challenge Dumoulin's allegation as far as it is reasonably possible to do so.⁴

¹ *Archives départementales de la Gironde*, Bordeaux, H/2. 9-11. See discussion of this in G. Guyon, "Un arrêstiste bordelais: Nicolas Boerius: (1469-1539)", *Le droit Bordelais dans tous ses les états*, (Limoges, 2012), p. 133. Own translation: "I would like to see that all my books and decisions made by me, are put in the Palace chamber, and the said Court hereby orders that, for the perpetual service of the gentlemen, *Presidents* and *Conseillers* of the Court." The notion of perpetual service suggests Bohier believed that his books would remain to be of practical use.

² "Many things in these *Decisiones* have been invented to increase their volume; [they] do not come from the opinions of Nicolas Boyer, already well advanced in years, but are the allegations of young people". C. Dumoulin, *Tractatus dividui et individui, cum nova et analytica declaratione, compilatore Gasparo Baballino*, (Venice, 1576), p. 400. See also A. Boureau, *The lord's first night: the myth of the droit cuissage*, (Chicago, 1998), p. 99.

³ *Decisiones burdegalenses... Nicolaum Boerium, eiusdem curiae praesidem, summa diligentia, collectae, atque tractatae*, (Lyon, 1547).

⁴ Guyon recognises Dumoulin's view on the *Decisiones*, and argues that the work is that of Bohier, (n. 1), pp. 134-135.

Dumoulin's remark represents an attack on the practitioner. He may be referring to the fact that the *Decisiones* were only printed posthumously, after Bohier's death in 1539, and so the compilation was without Bohier's involvement. His reference to the "opinions of young people" implies that the quality of those cases included is below the standard expected from an experienced lawyer and judge. In the privilege at the beginning of the *Decisiones*, it is stated that the editor "*dresser, corriger, et mettre...par l'advis et meure deliberation de gens de grand sçavoir et experience.*"⁵ This does indicate that the editor of the work was assisted in its compilation.

However, it is also possible to interpret Dumoulin's allegation that the work is falsely attributed to Bohier and that they are invented as one motivated by a desire to undermine those works related to law in action.⁶ The under-representation of the likes of *Decisiones* and *Consilia* in the traditional narrative of European legal history is attributable, at least in part, to such attitudes.

Bohier's *Decisiones* were presented in a certain (and traditional) format: each individual *quaestio* is followed by the facts of the case, with a discussion of the points of law, and mentioning authorities in support and pointing out those Bohier finds controversial.⁷ The authorities are succinctly cited. This standard format is where a sense of order ends, however. The *Decisiones* are not systematically grouped according to any shared topic or point of law, like the convention of the Digest or Institutes. They are characterised by inconsistency in terms of the length of each decision and also the depth of analysis.

There are 357 decisions considered by Bohier in the book, and their themes vary. They have been grouped by Gerard Guyon in a conventional form as: succession (55 decisions), law of obligations (29), procedural matters (35), property law (20), *retrait lignager* (17), evidence (14), matrimonial law (22), and those concerning penal law and penal procedure (50).⁸

Bohier does not mention the specific reasons or grounds behind an individual decision in express terms. Instead, he often indicates that the court agrees with a particular common

⁵ *Decisiones Burdegalenses* (Lyon, 1544), "*Privilege du Roy pour six ans*". Translation: "[to] draw, correct, and put right...[the text] with the advice and deliberation of those with great knowledge and experience."

⁶ It is also worth recognising that this might have been a reflection of increased criticism of sources more generally rather than an attempt to undermine this specific genre of literature. A Scottish example can be seen in the case of Thomas Craig's rejection of *Regiam Majestatem* as fake. See C. Kidd, *Subverting Scotland's past: Scottish whig historians and the creation of an Anglo-British identity, 1689 - c.1830*, (Cambridge, 1993), p. 149.

⁷ G. Guyon, "*Les decisionnaires Bordelais, praticiens des deux droits*", in S. Dauchy & V. Demars-Sion (eds.), *Les recueils d'arrêts et dictionnaires de jurisprudence (XVIe-XVIIIe Siecles)*, (Lille, 2005), pp. 105-138 at p. 126.

⁸ *Ibid*, p. 127.

opinion of the “*Doctores*”. This distancing of the individual decision-maker from the outcome of the case further reinforces the portrayal of the judge as part of a greater institutional systematic application of law. It is equally possible that this represented a continuation of the medieval approach towards authority with a consensual underpinning; one rooted in the consent of the many.⁹ While the “*Doctores*” were not representatives of the *populus*, they still represented combined opinion, and consent to a particular stance, rather than the opinion of one individual.

It is worth considering whether Bohier would have been driven by a need to strike the right balance between unity and diversity in applying competing sources of law, or whether a casuistic approach to the sources prevailed. Patterns detected in this current examination of the *Decisiones* in the use of the term *ius commune* will serve as a starting point from which other comparative works could stem, and broader conclusions drawn.

1.1 Legal practice and political tensions

In a recent work on the “law in action” in the Low Countries, Alain Wijffels considered the importance of the *Decisiones* as a source for understanding the political tensions of the sixteenth and seventeenth centuries.¹⁰ He considers the change in the later half of this period as representing a “structural shift in thinking”,¹¹ where the Italian legal methods were eventually replaced by the *usus modernus*. In terms of the legal practice in the courts, he states, the authorities relied on were predominantly those of late-medieval and early sixteenth-century literature of the Italian method (*mos italicus*). The eventual demise of the *mos italicus*, Wijffels argues, takes place in the latter half of the sixteenth century, and thus after Bohier’s lifetime. It was related to increased tension between the balance of “the medieval legal concepts of ‘absolute’ supreme political power... and the ‘ordinary’ exercise of supreme political power”.¹² The century between 1550 and 1650 marks a so-called “fault line” in European legal history, where the old tradition and new political tendencies struggled to co-exist in terms of the law.¹³ Put simply, the old political environment was represented by

⁹ Earlier in this thesis, it has been recognised that the understanding of popular consent would have been with reference to what Ford has called learned opinion. See J. Ford, *Law and Opinion in Scotland During the Seventeenth Century* (Oxford, 2007), p. 268.

¹⁰ A. Wijffels, “Early modern *consilia* and *decisiones* in the low countries: the lost legacy of the *mos italicus*”, in P. Maffei and G. Varanini (eds.), *Honos alit artes. Studi per il settantesimo compleanno di Mario Ascheri La formazione del diritto comune*, (Florence, 2014), p. 127.

¹¹ *Ibid*, p. 127.

¹² *Ibid*, p. 134.

¹³ *Ibid*, p. 127.

the *mos italicus* and a culture based on the rule of law. This was in contrast with an emerging absolutist power that came to mark the early modern period.¹⁴

Wijffels contends that the concept of “*utilitas publica*”, commonly recognised in *mos italicus* doctrines, was regularly adopted by legal practitioners “whenever it was in their clients’ interest to put forward a statute, grant or decision of the prince in order to override the private or particular interest of their opponent.”¹⁵ Elsewhere, Wijffels has also considered the role of the *mos italicus* in legal practice, and argued that its presence is found in the arguments made by practitioners during legal proceedings, and in fact, dominates court records.¹⁶ He argues “those political developments, the impact of which can be followed in contemporary legal practice of the higher courts, contributed to undermine, and eventually to discard, direct reliance on the *mos italicus* learning.”¹⁷ He concedes, however that “the legacy of the *mos italicus* was not entirely lost”.¹⁸

Bohier’s *Decisiones Burdegalenses* dates from the first half of the sixteenth century. Since Wijffels focused on the latter half of the century, this work will offer an insight into whether the effects of this political shift towards absolutist power that came to dominate the later sixteenth and seventeenth centuries, could be felt earlier on in the century.

Understanding Bohier’s citation practices will serve to establish whether he still relied on those sources that fell within the *mos italicus* tradition. Wijffels has recognised that a number of jurists at this time “were trying to hold a middle ground between the more radical agenda of legal humanism or the determinedly conservative positions of the ‘Bartolists.’”¹⁹ The *ius commune*, as a symbol of the old order, has a central role in this matter. On this issue, specifically the interpretative technique of the *ius commune* in relation to the *ius proprium*, Wijffels states: “the ability to restrict an enactment of the sovereign could no longer rely exclusively on *ius commune* authorities, but had to be underpinned by an argumentation which looked at the sovereign’s statute in its own right.”²⁰ Bohier’s approach to the *ius*

¹⁴ *Ibid*, p. 134.

¹⁵ *Ibid*, p. 135. Traces of this approach are visible as late as the nineteenth century. In a publication from 1836, after the *Code Civil des Français* (1804) was passed, there is mention of rules of legal interpretation. There is mention of “*interpretatio utilitati publicae*” in that work. See A. de Chassat, *Traité de l’interprétation des lois*, (Paris, 1836) [1822], p. 300. This is discussed in greater detail later in this chapter at 4.3.2.1, “Legacy of interpretation”.

¹⁶ A. Wijffels, “*Antiqui et recentiores*: Alberico Gentili – beyond *mos italicus* and legal humanism”, in P. Du Plessis and J. Cairns (eds.), *Reassessing legal humanism and its claims: petere fontes?*, (Edinburgh, 2016), pp. 11-40, at pp. 13-14.

¹⁷ Wijffels, (n. 10), p. 139.

¹⁸ *Ibid*.

¹⁹ Wijffels, (n. 16), p. 13.

²⁰ Wijffels, (n. 10), p. 138.

commune is therefore central to identifying and understanding the extent to which such practices can be seen in the first half of the early modern period.

1.2 Jacques Cujas: a practical comparison

Although written some time after Bohier's *Decisiones*, the practice-oriented works of Jacques Cujas (1522-1590), and his well-known humanist status, form an interesting point of comparison with Bohier. Cujas was first and foremost theoretical in his approach to the law but recent studies have confirmed that he was not confined to this approach.²¹ His roles included that of a *conseiller* both at the Grenoble *parlement* and at the *Presidial Court*²² of Bourges. The function of the judiciary naturally complemented that of the Doctors of Civil and Canon law, with the many judicial offices in the sixteenth century offering ample opportunity to exert their art of theory into practice. His *Consultations*, for example, consider cases and the law in practice. Legal practice meant that Cujas needed to appeal to all applicable sources in the Kingdom of France, and beyond.²³ The recent work of Xavier Prévost uses terms such as “hybrid”, “reconciliation” and “alternative” when discussing Cujas' use of sources, suggesting a compromise and the idea that there is plurality and a general willingness, or necessity, to appeal to all applicable laws. On this point, Prévost states:

*L'humaniste toulousain continue naturellement à accorder une rôle prépondérant au droit romain, mais sa vision ne se résume pas à celle d'une romaniste. Dans l'espèce étudiée la coutume du Berry occupe une place centrale aux côtés du corpus juris civilis; au sein d'autres consultations, c'est la législation royale qui ajoute ses mailles à l'ordre juridique.*²⁴

There are instances where there is competition between sources of law, in particular between customs and *droit Romain* (Roman law). Prévost has recently contended that in the case of conflict, Cujas often equates the two, and where the latter prevails it is because it is received by the customs of France.²⁵ In this sense, by evoking the reception of Roman law by custom, it demonstrates the strength of custom itself. This can be seen in the case of customs

²¹ X. Prévost, *Jacques Cujas (1522-1590): jurisconsulte humaniste*, (Geneva, 2015).

²² Created in 1552, by King Henry II. See E. Monter, *Judging the French reformation: heresy trials by sixteenth-century parlements*, (London, 1999), p. 132.

²³ Cujas is consulted on foreign affairs too. See Prévost, (n. 21), p. 395.

²⁴ *Ibid*, p. 400. Own translation: “The Toulouse humanist naturally continues to give a prominent role to Roman law, but his vision is not limited to that of a Romanist. In the works studied the custom of Bourges plays a central role alongside the *Corpus Juris Civilis*; in other consultations is royal legislation that adds and is part of the legal system.”

²⁵ *Ibid*.

on inheritance. There are those that are mandatory and do not bend even when faced with the will of the parties, who in one particular case which Prévost considers, would have liked to have used other provisions.²⁶

Interestingly, in what is arguably Cujas' most practice-oriented work, his *Consultations*, there is only one reference to the term *ius commune*.²⁷ There, Cujas considers the case of three brothers and the management of goods that had been received by the siblings through inheritance. Two of them sold their share of the property to a third party. The remaining brother wished to recover the family goods from the third party, on the belief that his brothers should have offered him first refusal. There was discussion of an appeal and one of the brothers is given a real action – the *retrait lignager* (considered a number of times by Bohier, and the *ius commune* features prominently in those cases also).²⁸ Cujas considers this “institutional regime” and the *ius commune* plays an important role. Cujas uses the term “*ius commune Biturigium*”. A possible interpretation here is that Cujas' conception of the *ius commune* is akin to custom, or that he is using the terminology interchangeably.²⁹ He is limiting the term, which is assumed to be non-regional and supranational, by classing it as being “of Bourges”. It may also be the case, and this seems most likely that, as noted above, Cujas is referring to the origins of *ius commune*'s authority stemming from a “reception” through customary usage, and therefore holding the term to have a general and broad meaning.

1.3 Legacy of interpretation

Traces of the *ius commune* and its relationship with statute and custom can be found as late as the nineteenth century in France. Published a short time after the *Code Civil* of 1804, the *Traité de l'interprétation des lois* offers an insight into the interpretation of the law. Here, the author, de Chassat, outlines an extensive list of historical rules of interpretation, the second of which mentions the *ius commune*. He states: “*Interpretatio illa capienda semper, per quam ad jus commune reducimur, quae juri communi convenit, et per quam juris communis correctio vitatur, et per quam jus commune minus offenditur, et per quam minime*

²⁶ *Ibid*, p. 395. This approach can be seen in Bohier's *Consuetudines*, in chapter 5, 4.2, “Guardianship: mother's rights over children”.

²⁷ J. Cujas, *Consultationes LX, consultatio VII, opera omnia*, (Paris, 1658).

²⁸ A privilege awarded to kin (extended family) where they held the first rights to buy lineage property. Such lineage would include houses and land rents. For Bohier's treatment of *retrait lignager*, see chapter 5, *consilium* 11 and *consilium* 56, where he mentions the term.

²⁹ Prévost, (n. 21), p. 400.

*receditur a jure communi...*³⁰ There is mention of passive interpretation, with a citation to Alexander de Imola's *Consilia*.³¹ On a related matter, he also states: "*interpretatio sic facienda eo casu, de quo jus commune nihil disponit, ut de similibus ad similia procedatur*".³² The concept of "*utilitas publica*" is also considered. Wijffels has acknowledged that this was commonly recognised in *mos italicus* doctrines, and regularly adopted by legal practitioners when wishing to put forward a statute.³³ Here, de Chassat states that interpretation of law that is adverse to public utility should not be admitted.

This work is mentioned here as it demonstrates that the term *ius commune* was still present in the intellectual climate of the early nineteenth century. Further, and more importantly, these rules distilled from the *ius commune* are reflected on a number of occasions in this chapter. Many were consistent with Bohier's sixteenth century position on the *ius commune*. The works cited by de Chassat include Bartolus,³⁴ Andrea Alciato,³⁵ and Baldus,³⁶ as representatives of these rules, are also familiar ones alongside the *ius commune*.³⁷ De Chassat also mentions Nicolas Bohier.³⁸ A significant number of citations made are to the genre of *Consilia* and *Decisiones*; so while underrepresented in contemporary works, they are still recognised in the nineteenth century as offering a valuable insight into the *ius commune* and its role in interpretation.

2. Outline: where the *ius commune* is mentioned

Fig. 1. Cases in the *Decisiones* where the *ius commune* is mentioned

<i>DECISIO</i>	<i>CASUS</i>
<i>Dec. 2</i>	Elections (ecclesiastical).
<i>Dec. 9</i>	Jurisdiction (rights of Barons to punish offenders).
<i>Dec. 42</i>	Possession.

³⁰ *Ibid*, p. 281, and citation: "*Hermenop. Pist. l. 2, quaest. 41.*"

³¹ *Ibid*, p. 294. This text is also cited by Bohier, shown below in 4.3.3, "Citations".

³² *Ibid*, p. 296, and citation: "*Innocent. in cap. si adversar. 4.*"

³³ Wijffels, (n. 10), p. 135.

³⁴ De Chassat, (n. 12), p. 285.

³⁵ *Ibid*, p. 290.

³⁶ *Ibid*, p. 287.

³⁷ There are also later authors and works mentioned, such as Barthelemy de Chasseneuz, Charles Dumoulin and Jacques Cujas.

³⁸ De Chassat, (n. 15), p. 297, where reference to Bohier's *consilium* 1, para 23 is made.

<i>Dec. 46</i>	Jurisdiction (divided jurisdiction).
<i>Dec. 68</i>	Procedural (sentencing).
<i>Dec. 69</i>	Evictions (ecclesiastical).
<i>Dec. 82</i>	Papal benefits (ecclesiastical)
<i>Dec. 113</i>	Marriage and dowry.
<i>Dec. 133</i>	Procedural (ecclesiastical).
<i>Dec. 141*</i>	Procedural (proclamations).
<i>Dec. 186</i>	Heritable rights.
<i>Dec. 188</i>	Heritable rights.
<i>Dec. 199</i>	Usufruct.
<i>Dec. 203</i>	Marriage and property rights of children.
<i>Dec. 221*</i>	Father giving surety for son.
<i>Dec. 225</i>	Procedural (ecclesiastical).
<i>Dec. 228</i>	Testamentary provision.
<i>Dec. 230</i>	Moveables and heritable property.
<i>Dec. 236</i>	Prescription.
<i>Dec. 238</i>	Ownership and possession.
<i>Dec. 239</i>	Possession.
<i>Dec. 240</i>	Testamentary provision.
<i>Dec. 244</i>	Marriage and testamentary provision.
<i>Dec. 262</i>	Punishment and clerical privilege.
<i>Dec. 263</i>	Feudal law.
<i>Dec. 284</i>	Arbitration.
<i>Dec. 295*</i>	Oath and confession.
<i>Dec. 297</i>	Procedural (cleric before a secular judge – ecclesiastical).
<i>Dec. 300</i>	Taxation.
<i>Dec. 322*</i>	Rights of neighbour/access rights.
<i>Dec. 328*</i>	Prescription.
<i>Dec. 346</i>	Procedural (ecclesiastical).

*indicates a case where *ius commune* has less significant role in the *ratio decidendi*.

At first glance, it is possible to make some initial observations on the kinds of cases that the term *ius commune* appeared in the *Decisiones*. Cases dealing with matrimonial matters, Canon law, and property rights make up the bulk of the list. An unsurprising finding perhaps, given the prominent role of Roman law in such issues.

It is not possible to examine in detail each of the above cases that were found to mention the *ius commune*. Instead, a select group of cases have been examined in the same manner as in the case of the *Consilia*. While general statements on the findings from each of the cases could be given in this chapter, this approach, where a single case is examined in detail, enables a more accurate analysis and ensures consistency with the *Consilia* and *Consuetudines* chapters.

This chapter is divided according to the main themes of matrimonial matters and those cases handling procedure (predominantly of a Canonical nature). Of course, these two categories cross over often, but this division enables a better examination of the court decisions and enable comparative study throughout; identifying themes within the two groupings, but also outwith.

3. Procedural matters

Questions of procedure make up the bulk of those cases in the *Decisiones* where *ius commune* is mentioned. It seems plausible that this is a reflection of the growth and expansion of regional courts in this period, and a desire to establish rules and procedures for them, but more work is needed on this point. Procedural matters have been defined here as those cases where the central question relates to the rules and formalities of a court or a process, as contrasted with matters dealing with substantive law. Of those cases considered, the majority are centred on ecclesiastical procedure; that is those points of law that emanate from the Canon law and of administrative concerns of the church.

The *Decisiones Burdegalenses* demonstrate the prevalence of ecclesiastical issues before the *parlement* of Bordeaux: they rank first along with matrimonial matters.³⁹ It has been argued that the day-to-day work of ecclesiastical administration was largely based on procedure rather than a scientific body of law.⁴⁰ The consideration of Canon law in the

³⁹ *Decisiones Burdegalenses* (1547). This is especially true of those cases including mention of the term *ius commune*. Examples include: *Decisio* II, 46; IX, 1; LXIX, 22; CXIX, 3; CXXXIII, 8.

⁴⁰ P. Stein, "Vacarius and the civil law", in C. Brooke, et al. (eds.), *Church and government in the middle ages: essays presented to C.R. Cheney on his 70th birthday*, (Cambridge, U.K., 2008), pp. 121-136, at p. 134.

parlement, however, would have brought it into the secular forum and although questions of procedure marked the basis of the disputes seen here, the application of the *ius commune* in these cases meant that there was a movement from strict procedure towards competition between sources of authority.

3.1 **Decisio 69: Eviction**

This case considers the rights of tenants on church land. At the centre of this *decisio* is the question of a real action whether authority should rest with a contemporary custom, or instead with an older, and more general rule. Bohier's reasoning is marked by competition: both in terms of the sources of law that appear in Bohier's reasoning, and also that of jurisdictional authority. In terms of the jurisdiction question, there is added contention between ecclesiastical and royal authority.

Super quaestione, an Episcopus possit cognoscere de causa garentigii seu evictionis attenta maxime submissione, & prorogatione expressa in ipsum Episcopum, & eius curiam per clericos facta, vel iudex secularis cognoscere debeat...

It was discussed / argued whether it is the Bishop or the secular judge who has jurisdiction on matters of guarantees and evictions, having paid most attention to the pleading and the extension made by the clerks to the same bishop and his court.

3.1.1 **Competition between contemporary custom and older rules**

The *ius commune* is mentioned at the part of the *Decisio* that is marked by this sense of competition.⁴¹ This section is abbreviated thus: "*clericus in reali actione respondere debet coram iudice seculari*".⁴² This is based on custom, and is to be followed in the case of real actions. Bohier states:

Pro quo dicit Bald. in leg. [observare proficisci colum 2 post princip. versic.] & quia hic congruem cadit [ff. de offic proconsu. respondendo ad iura supram, pro 1.] parte allegata, cognitionem & iurisdictionem Episcopis & praelatis concedentia, quod de generali consuetudine,

For what says Baldus ... the grant of jurisdiction to bishops and prelates, according to the general and reasonable custom, the jurisdiction of bishops was withdrawn from our courts [lit. from court before us] And it is surprising that I could not find anyone (from what I read) stating as

⁴¹ *Decisio* 69, para 20-22.

⁴² Own translation: "a cleric should respond in a real action in front of a secular judge."

& rationabili, iurisdictio Episcoporum apud nos recessit ab aula. & mirum quod hoc dictum non reperi aliquem (quod legerim) allegantem, [& pro dicto Ioan. Fab. Bal. & Offre. Allegavi gloss. in dicto cap. 1 de empt. & vend.] volentem quod hodie Episcopus de consuetudine non imponit precium rebus, prout vult [ibi text. & iura supram alleg.] Quamuis Host. Abb. Sicul. & Cardin. De Zaba. teneant ibi contrarium, & communiter Doctor. ut dixi tamen opi. gloss. in hoc regno servatur, quia per iudices, & reipubli. administratores hoc fieri solet, & pro maiori parte per Curias Supremas Parlamentorum Regni, & pro hac opi. Videtur [bon. text. in cap. cum venissent. de eo qui mitt. in possess. causa rei servan. ubi Bal. colum. 3. sic ait]: aliter tamen servatur in regno Franciae, quod in realibus actionibus respondere debet clericus coram iudice seculari, cum res sit de territorio Regis, iudicatur secundum constitutionem Regis. Tamen Guliel. de Cug. dicit ubi supram hodie esse ius commune, & pro eius dicto, dicit ibi Bal. videri quod casus illius c. loquitur in actione reali, dicens servandam esse consuetudinem populi, si talis consuetudo est laudabilis.

much, and according to the said Joannes Faber, Baldus and ... I invoked the gloss on the said chapter 1 on *emptio-venditio volentem*, according to which today the bishop customarily does not put a price on things, according to the text and the laws above invoked. Although Hostiensis, Parnomitanus (Abbas Siculus) and Cardinal Zabarella argue the opposite, and by and large the doctors [with them], as I said however the opinion of the gloss is kept in this kingdom which is what usually happens with judges and magistrates, and with the most part of the high judges of the Parliaments of the Kingdom ... and for this opinion see the sound text in ... where Baldus says so. But in the kingdom of France the use is different, for in real actions the cleric should respond before the secular judge, and since the matter pertains to the territory of the King, it ought to be judged today according to the laws of the King. However, Gulielmus de Cuneo says above, that this is the *ius commune*, and on his statement Baldus argues here that law refers to a case in a real action, and that law argues that the custom of the people is to be kept, if such a custom is to be praiseworthy.

Bohier sets out the circumstances in which a secular judge would handle an issue related to ecclesiastical administration. This could be symptomatic of the secular state of France growing at the expense of the traditional split between Canon and civil jurisdiction in certain cases. Here, it is in the case of a real action. In such circumstances, the *parlement* decides the case when the object in question is from the kingdom of France. He refers to a custom that provides for this, moving jurisdiction from Bishops to secular courts. Bohier's reference to the Kingdom of France is notable. By distinguishing the applicability of a particular rule he is identifying France as a single entity, aside from the distinct regional identity that the Bordeaux *parlement*, which this case emanates from, would have had. Further, Bohier is reinforcing the rule of the King and the secular court over that of Bishops and ecclesiastical jurisdiction.

One of the very first cases in the *Decisiones* looks to the rules dealing with elections in a number of religious orders. This was an area in which Bohier has particular professional competence, having published an edition of the *Tractatus de Electione*, the work by

Gulielmus de Mandagoto (d. 1312), in 1509.⁴³ Many offices in the Church were elected, and a procedural framework for electoral rules existed alongside these offices.⁴⁴ Bohier considered the rules regarding election to an office that had become vacant due to resignation. The topic of elections form the basis of the first seven cases examined by Bohier in the *Decisiones*. In *decisio 2*, the issue of “*Permutatio, cessio, translatio, & depositio a iure aequiparantur*” (exchange, concessions, and transfer can be equated in law) is discussed. Bohier states: “*Quia ista aequiparantur a iure, cessio, permutatio, & depositio, quae sunt reservationes in corpore iuris clausae, quarum solus Papa est iudex competens*”.⁴⁵ Bohier makes clear that this matter is one solely for the Pope to decide upon, thus clearly setting it within ecclesiastical jurisdiction where “only the Pope is the competent judge”.

The present case considers a real action and so the cleric should respond in front of a secular judge. *Decisio 2* has been mentioned here to demonstrate that in other areas of law, such as rules of election, authority remained with the Pope, who alone was vested with the power to decide on rules of election.

In terms of the *ius commune*, the term is used here so as to reflect the divergence of opinion that existed on this issue. Bohier argues that Gulielmo de Cuneo (d. 1335) states that this rule is the *ius commune*. Following this, reference is made to Baldus de Ubaldis (1327-1400) who states that this custom is to be followed in the case of real actions. Where the term *ius commune* is cited, a reference to Gulielmus de Cuneo is made, stating: “*Tamen Guliel. De Cug. dicit ubi supra hodie esse ius commune*”. No particular work is cited here. Gulielmus de Cuneo is cited elsewhere in this *Decisio*, just above this particular discussion, and here Bohier cites the commentary on the Codex at C.1.3.33 (a. 472) on both occasions. It is not clear whether Bohier was in fact referring to this text here, as he had done earlier, but it is likely. Proceeding on that assumption, and looking to this work, it is clear that Cuneo is not speaking specifically of custom, as Bohier does in the present case. Cuneo states: “*Nam coram iudice seculari debeat agitari talis questio non coram iudice canonico*.”⁴⁶ Bohier also mentions Baldus. His position on secular and ecclesiastical authority is well known. His general position is that “ecclesiastical jurisdiction being autonomous within a civil

⁴³ 1509 (Lyon) is the earliest known printing privilege granted for this work, as noted by E. Armstrong, *Before copyright: the French book-privilege system: 1498-1526*, (Cambridge, U.K., 1990), p. 210. Bohier also published a treatise on the powers of the Papal Legate in France, *Tractatus celebris de officio et potestate Georgii de Ambasia*, (Lyon, 1509). The printing privilege was granted at the same time for both.

⁴⁴ R. Helmholz, “Human rights in the canon law”, in J. Witte, Jr. & F. Alexander (eds.), *Christianity and human rights: an introduction*, (Cambridge, U.K, 2010), pp. 99-112 at p. 110.

⁴⁵ Own translation: “Because in law, concessions, exchange and transfer can be equated [to each other], which are reserved in real actions, where the Pope is the only competent judge.”

⁴⁶ Translation: Such a question ought to be placed before a secular judge, not an ecclesiastical one.

community exists in parallel with secular jurisdiction”, but that he does not consider them to enjoy equal status.⁴⁷

3.2 *Decisio* 228: Number of witnesses

Bohier considers the issue of whether in the time of plague, fewer witnesses were required for the creation of testaments. Bohier considers if a custom that provides for such cases, and allows for fewer witnesses, is permitted since it deviates from the *ius commune* rule. This is an interesting example of how Bohier contends with the old provision of the *ius commune*, and its operation in the turbulent circumstances of the sixteenth century, where plagues were a regular feature.⁴⁸ He opens the *decisio* with a question:

Testamentum tempore pestis factum cum quinque; testibus masculis, vel foeminis, aut alio minori testium numero, an valeat.

Whether a testament made in time of plague with five or fewer witnesses, either male or female, is valid.

Reference to the term *ius commune* is made early on in this decision. Bohier considers whether an exception to the *ius commune* rule on witnesses renders a testament invalid, or if such a deviation is permitted under these circumstances. The first statement follows a reference to Joannes Faber⁴⁹ and reads:

...vel quia per ipsius salutem rogatus quis diceretur, ut ob insignem quorundam & c. quod princeps potest ultra iuris communis dispositionem in eo...

...or because the health of anyone would be mentioned if requested, as a signal for some & that the prince/ruler can provide for more than the *ius commune* does here...

Shortly after this reference, another one is made, this time speaking of specific circumstances surrounding the nature of witnesses:⁵⁰

...& etiam sanum existente in loco contagioso posse testari cum duobus testibus rogatis. vero extra locum epidimiae, tunc teneatur iure communi testari, & istam opinionem tenet Geraldus Mulere in additio.

...and also a healthy person in a contagious environment may make a will with two witnesses. And Geraldus Mulere, in his addition to (commentary on) Rolandus’s treatise ... on last wills, in the title on

⁴⁷ J. Canning, *The political thought of Baldus de Ubaldis*, (Cambridge, U.K., 1987), p. 144.

⁴⁸ “*Pestis tempore testamentum valet cum pauca numero testium*”. *Decisio* 228, *pr.* 10. The first half of the sixteenth century was marked by plague and famine. France was experiencing outbreaks of disease in the 1520s in particular, accompanied by severe food shortages. See H. Heller, *Labour, science and technology in France, 1500-1620*, (Cambridge, U.K., 1996), p. 64.

⁴⁹ *Decisio* 228, para 7. “*Ioann. Fab. Instit. de fideicommiss. hare. in princ.*”

⁵⁰ *Ibid*, para 7.

ad Roland. in tract. Florum ultimarum voluntatum. titu. de testibus in testamento adhibendis. in prima additio. & Guid. Pap. [in quaest. 543. in fin.] dicens, se vidisse ita servari in testamento, in rure, vel alibi tempore pestis conditio, ubi non reperitur copia testium, quibus casibus talia testamenta coram curato.

The *ius commune* is then mentioned in a discussion about whether a specific locality, in this case a rural community, can have a custom that varies from the *ius commune* and is allowed to stand:⁵¹

Sed contrarium, quod non valeat testamentum tempore pestis conditum, nisi interveniant septem testes, prout in alio tempore requiruntur... [tenant Rapha. Fulgos. Paul. de Castr. Francisc. de Areti. Alexand. & Philip. Corne. in dicta lege fin. de testamen.] ubi patet, quod solennitas relaxatur rusticis tantum testantibus in rure. Sed aliis hoc de negatur, signanter secundum Bald. si locus iuris est prope locum iuris, [ut ipse voluit consilio 223. incipiente, mater. volumin. 4. per not. in dicta leg. finale] sed ipsemet Baldus in lege I. C. de summa Trinitate videtur velle oppositum, quae refert & sequitur Petrus de Anchara. [eius discipulus, in repetitio. capitul. Canonum statuta. quaestione 13. principal. versicu.] sed iuxta praedicta quaero. dicens, quod privilegium particulariter loquens, seu loco concessum, videtur non solum loco, sed etiam personis concessum... quod si speciale in rusticis, ergo in aliis contrarium est ius commune [l. ius singulare ff. de regulis iuris. & tenet Barto. in l. conficiuntur. codicilli. in prima quaestione], etiam si ibi per spacium temporis manserunt, sive rus vel villa sit prope vel longe, secundum communem sententiam Doctorum, ibi & tenet Matthaheus in decisione Neapolitana.

witnesses to employ in a testament, in the first addition, and Guidus Papae in the final part of *quaestio* 543, arguing that he had seen wills made this way in the countryside, or elsewhere in times of plague, where it is not possible to find many witnesses, in such cases wills [were made] before a curate.

But Raphael Fulgosius, Paulus de Castro, Franciscus Aretinus, Alexander and Philip Cornelius argue the contrary, that a testament made in a time of the plague is not valid, unless made with the intervention of seven witnesses, as required for other times... [lex fin. de testamen.] where it appears that a solemn requirement may be waived for peasants so long as they make their will in the countryside. But they deny [as much] to others, especially Baldus [does so, according to whom] if the legal rule is properly such, as he maintains at the beginning of [his] *consilium* 223... But the same Baldus seems to be arguing for {lit. to will} the opposite [solution] in... where he refers to and follows his disciple Petrus de Ancharano, in [Ancharano's] *repetitio* ... but according to the aforesaid *quaestio* [Baldus] argues that a particular privilege, or a privilege granted to a place, is not granted only to that place but also to those people ... for if there is a special privilege for farmers, so the *ius commune* is the opposite with [the] others... and Bartolus argues [the same]... even if they stayed there for some time, whether the farm or country estate is close-by or is remote, according to the common opinion of the Doctors, and this is held by Matthew in a Neapolitan decision.

3.2.1 Baldus and the *ius commune*

⁵¹ *Ibid*, para 10.

Both references to the *ius commune* in this case appear to be in line with it, and do not offer much in the way of conflict or competition between laws. In this sense, then, they are atypical of most other uses of the term in the *Decisiones*. The use of the term here is not to mediate between sources; here the term is mentioned both as a clear statement that the *ius commune* is binding on the parties and also, later, that one of the circumstances outlined above would be contrary to the *ius commune*. Bohier states, through the words of Baldus, that there is an exception for farmers, and it is therefore reasonable to assume that the position of the *ius commune* is different towards non-farmers. Here, the *ius commune* is presented through the opinion of Baldus. It is therefore reasonable to interpret Bohier's reference to the term here as the Roman law as interpreted by Baldus given his reliance on the source.

Immediately following the *ius commune*, Bohier cites the Digest, D.1.3.16, D.50.17 and Bartolus de Saxoferrato on D.29.7.8. Shortly after, reference is then made to “*secundum communem sententiam Doctorum*”.⁵² There are no sources cited for these “*Doctores*”, which means that any effort to establish whether these were the same sources as those he used for his reference to the *ius commune*: possibly revealing that they were mutually the same, or similar, and representing something of a trend towards the use of certain jurists in his use of the term.⁵³ It is possible, and most likely, that Bohier was meaning those jurists mentioned earlier in the case. When considering the specific criteria in terms of witnesses at the time of the plague, Bohier states “*tunc teneatur iure communi testari*”, and alongside this cites Geraldus Muliere, Guido Pape (1402-1487), and Andreas Barbatius (1400-1479).⁵⁴ Two of these sources have not been cited in any of the other cases in association with the *ius commune* so far in this thesis.

3.3 *Decisio* 262: Punishment

This case is one of procedure, with specific reference to the question of sentencing and punishment. It considers the matter of a husband discovering his wife's adultery. The husband kills his wife and the man in question. Bohier asks whether he ought to be given the

⁵² Mentioned elsewhere alongside *ius commune*. See chapter 5 on the *Consuetudines*, at 7.1.3 where the customs on feoffments are considered.

⁵³ Reference to this term elsewhere in the *Decisiones* reveals a direct reference to a set of sources for this “*secundam communem sententiam Doctorum*”. At *Decisio* 262, para 2, he referred to Joannes Faber, Angelus de Aretinus, Bartolus, Philippus Decius.

⁵⁴ “*in prima additio. & Guid. Pap. [in quaest. 543. in fin. Dicens]... Et idem...Andr. Barba...*”

same punishment as a murderer. The discussion that follows has similarities with the Roman law position on the matter (D.48.5).

The *ius commune* appears in the part of the discussion that considers custom, and more specifically the question of: “*Consuetudo quod percutiens se ponat in manibus percussi, an valeat*”.⁵⁵

Sed quod offendens ponat se in manibus offensi, ut eum verberet, vel vulneret ad libitum suum, ut erat de more consuetudine Longobardorum & erat Romanorum, [ut dicunt Bart. & Angel. in l.1.usque adeo. ff. de iniuriis. & pariter Hispanorum, ut refert Ioan. de Nauiza in sua sylva. fol. 1.col.3. post prin. Versi] & in Hispania. dicens in Hispania esse Decreta, per quae mulier & adulter traduntur in manibus mariti, qui de eorum bonis potest facere quod vult. [allegat. Ioan. Lup. in Rubric. Praedicta], de donatio inter virum & uxorem charta [12 col. 1. versi. habeat aliu & quartum. & pro hoc text. in c. reum ad ecclesiam. 17. quaest. 4]. Tamen sunt directe contra ius commune [Bart. & Ang. in d.l.1 usque adeo & Alex in addi.] quia quis non est dominus membrorum suorum [l. liber. homo. ff. ad legem Aquil.] & talis consuetudo reprobatur...

But if the offender places himself in the hand of the offended party, so that the latter may flog him, or wound him at his pleasure, as it was the custom of the Lombards and of the Romans, as Bartolus [de Saxoferrato] and Angelus [Ubaldis] in ... and similarly [it was the custom] of the Spaniards, as refers Iohannis de Naviza... saying that in Spain there is a law, whereby wife and lover are to be delivered into the hands of the husband, who may do as he pleases with their assets, as states Johannes Lupus... However, [these customs] are directly against the *ius commune*... for no one is the owner of his own limbs... and that kind of custom be rejected...

3.3.1 “Directly against the *ius commune*”

In other cases, the relationship between custom and *ius commune* has typically taken on other forms, without reference to the specific nature of the contrasting provision: whether direct or indirect. This present interpretation therefore cannot be termed a uniform rule by any means. Typically, according to those other cases in the *Decisiones* and in the *Consilia*, a balance between the two sources of law has been sought. In those cases, it is shown that that custom can be contrary to the *ius commune*, and that custom should, where possible, be interpreted in a way so as to cause minimal harm to the *ius commune*. There is an assumed requirement that attention is still directed towards the *ius commune*, this effort to keep in line with it adding to the idea of *ius commune* as something existing above all sources of *ius*

⁵⁵ *Decisio* 262, pr. 4. Where Bohier states “*quia quis non est dominus membrorum suorum*”, it is likely that this is because it encourages self-help, which is not desired. There are links with the Roman law here, in terms of the *lex Aquilia*: D.9.2.13. pr.

proprium. In this present case, something was preventing Bohier from adopting this approach. Perhaps it was the nature of the custom itself which meant the act of interpreting the custom was not worthwhile, for he did not regard it equal to the *ius commune*, or even worthy of such interpretative attempts at harmonisation. If this was the case, this would suggest a fluid system where the relationship between competing authorities depended on the application of the lawyer, judge or jurist in question: that a custom was declared as being directly against the *ius commune* not necessarily because of its content, but the nature of the custom itself. There are other cases where *ius commune* is rejected. This is seen in the case of *decisio* 284, discussed in detail below, where custom is substituted in place of the *ius commune*; a stark contrast to the present outcome. From this variable stance on the relationship between the sources, it is therefore difficult to assess the extent to which, hypothetically, an indirect contrast with the *ius commune* in this case would have resulted in a different outcome. Because Bohier has not hesitated to demonstrate the superiority of customary law in other circumstances, it would seem that if this rule were one that transcended all cases, then it stands to reason that he could decide against the *ius commune*, in cases of direct and indirect conflict regardless of the facts of the case.

It is worth considering whether Bohier intended a contrast here between the position of the ancient world, such as the law of the Romans, and with the modern stance on the matter, which is represented in the form of the *ius commune*. In *decisio* 263, which is considered below, there is mention of *ius commune Romanorum*, which brings into question whether Bohier's use of the term *ius commune* was always one that was expressly with Roman law in mind, or whether this demonstrates his usual reference to the term is one with a *utrumque ius* meaning. If *decisio* 262 represents a distinction between the Romans and the *ius commune* being drawn, then this is notable as it serves to demonstrate that the *ius commune* as representing a modern position, as being in contrast to the ancient Roman stance. It is more likely that this is an example of the *ius commune* as a an authority lacking a fixed meaning and function, and being used as a repository of rules in order to deal with the legal matter at hand. In this current case, this is aimed at limiting the option of self-help for the husband in discovering his wife's adultery.

3.4 *Decisio* 284: Arbiter

This case refers back to an earlier question, and reference to the preceding *decisio* does reveal a related case. There, further information on the background to the *quaestio* is given.⁵⁶ It considers an agreement between parties and whether it is valid, where those parties involved do not have the authority, or capacity, to enter into such an agreement. It is an arbitration agreement, and Bohier asks that since the parties are not lawyers, does this represent an official agreement? He states:

De prorogatione compromisi, seu arbitragii, si procuratores, non habentes ad id speciale mandatum, vel etiam non procuratores, qui compromiserunt, vel prorogaverunt, intra tamen tempus, prout faciunt aliquando Clerici procuratorum, pro quibus comparent, licet per Curiam non admittatur, nisi substituti sint procuratores, & partes, aut altera ipsarum non approbaverint expresse, sed tacite procedendo coram tali, tanquam arbitro. Quaeritur, an valeat tale compromissum, & laudum inde sequutum.

As to the extension of the [arbitral] agreement / undertaking, if the counsels [for both parties] do not have a special mandate to [do] that, or if those who made the [arbitral] agreement / undertaking or extended [its validity] to a specific time were not lawyers, just as the clerks of counsel sometimes do, when they appear [in court] in their [master's] stead, although [this] is not allowed by the bench, unless the substitutes be a clerk of counsel, and the parties, or either of them did not approve [of that] expressly, but [approved] tacitly in continuing [the proceeding] with that person, as in the case. The question is, whether such an agreement / undertaking and the ensuing [arbitration] award are valid.

There is no reference to the term in this earlier decision. In *decisio* 284, however, the term *ius commune* appears on three occasions,⁵⁷ all of which appear in the same part of the case. The *summae* of the case is presented as:⁵⁸

Arbiter qui secundum ius dicere debet, an dicere possit secundum ius consuetudinis vel statuti...

Is the arbiter who has to decide according to the law allowed to decide according to the custom or statute...

This part of the case concerns local law provisions, of custom and statute, and the question of their relationship with the *ius commune* is specifically mentioned:

Tamen advertite ad dictum Alb. qui vult, quod si arbiter possit pronunciare secundum ius,

However, notice what Albericus said, according to whom if an arbiter may decide

⁵⁶ *Decisio* 283.

⁵⁷ The term “*ius commune*” strictly once, and “*iuris communis*” on the second, and “*iure communi*” on the third occasion.

⁵⁸ *Decisio* 284, pr. 6.

secundum quod, etiam si dictum non fuerit, tenetur lege qualem. & ibi [Bald. & Alber. de Rosa. in primo contrario. ff. de arbiter.] quod non poterit pronunciare de facto, id est, secundum ius consuetudinarium, vel statutarium. Dic tamen, quod poterit secundum ius consuetudinarium, aut statutarium (quod consistit in facto. [l. de quibus ff. de legibus.] pronunciare, ut singul. tenet. Bald. [in dict. l. qualem.] alias gravaret partem, ex quo illud statutum vel consuetudo servatur, & tollit ius commune in illo loco: ergo subrogatur loco iuris communis, quod pariter servari debeat...

according to the law, according to that, even if it was not said, he is bound by the law *qualem* and here Baldus and Albericus de Rosate ... [argue] that [the arbiter] may not decide on the facts / *de facto*, that is, according to the customary or statutory law. You should, however, say that [the arbiter] could [decide] according to the customary or statutory law (which consists of facts [according to the *l. de quibus ff. de legibus*], as per ... otherwise he would burden the party who relied on that statute or custom, and [so] [the custom / statute] displaces the *ius commune* in that instance, and so [the custom / statute] fills the place of the *ius commune*, and the custom / statute must be kept as the same...

3.4.1 “Custom fills the place of *ius commune*”

This passage offers a key insight in terms of judicial approaches to the *ius commune*. Here, the *ius commune* is set aside, with local custom taking its place. This replacement is also very much a conceptual one. Not only does Bohier state that it does away with the *ius commune* in this particular case, but further emphasises that it is substituted in its place. This means that the legal theory here is one based on the local rules prevailing over the *ius commune*. It is worth looking to the rest of the case more closely to try and establish further grounds for the judicial decision to not only ignore the *ius commune* here, but also take the dramatic step of substituting it with local law in a deliberate way.

Following a succession of citations that accompanied the second reference to the term *iuris communis*, it is then mentioned for a third time, still in the same part of the case. Here, Bohier states:

nisi tales compromittentes ignorarent verisimiliter consuetudines vel statuta, ut quia Papa, vel Imperator, aut forensis, qui censentur cogitare, & loqui de iure communi, & non de municipali, cuius notitiam non habent, quod intellige, ut ibi per eum. Ideo intelligendum est de mero facto, & de iure municipale consuetudinario non scripto, sive in scriptis redacto, secundum quod iudicare debet, sicut iudex. [l. iubemus. & ibi Bald. Paul de Castr. & Iason. C. de iudi. & in

those who made the arbitration clause might have ignored the customs or statutes, so that the Pope or the Emperor, or a legal professional / lawyer, who are considered to think and speak in terms of *ius commune* and not of municipal law, do not have knowledge of it for which you should think here of him? In the same way is to be understood a simple fact, and customary municipal law, either unwritten or written down, according to which it must be judged, ... here, according to

ca. cum venissent.] ibi, secundum ius, & bonam terrae consuetudinem, de eo, qui mitti, in possessio.

the law and the good custom of the land, about that who is placed in possession.

3.4.2 “Speak and think in terms of the *ius commune*”

This is a crucial passage. It directly continues on from the initial line of argument found with the first reference to the term. So, the *ius commune* is ignored and in its place customary law is followed. Yet, he carries on, defending his earlier argument, by saying that the Pope, Emperor, and the Forum, are expected to think and speak of the *ius commune*, as opposed to local law. This is understandable: it is unlikely that the Pope or Emperor (likely that Bohier means the King here), for example, would have known the law on the ground such as custom. The high level law appears to be in the form of the *ius commune*.

Bohier is referring to the court’s position on custom, where it is up to the party before the court to prove the custom and not for the court to assume its place. This “knowledge”, or lack of, is therefore used in a technical sense. It is for this reason, Bohier states, that the *ius commune*, according to some of those sources, would be the preferred source in this case. He then reiterates his earlier point by saying that custom is the decisive source here regardless of this.

The reason he gives for the general adherence to the *ius commune* is vital. Bohier is intentionally demarcating his sixteenth-century case and reasoning from that contained in the sources he cited. Bohier is referring to the Roman and Canon law as interpreted by those authors and works contained in the citations.

The idea of the *ius commune* as still the fall-back provision here is made clear by Bohier. The *ius commune* is assumed, and the court thinks along its lines. Custom intervenes only when raised by a party and then the role of the *ius commune* may change. The value of this particular passage can be summarised into three main parts. First, Bohier makes a clear statement on the general limits of certain kinds of citations, in that their value is compromised given that their contents handle Roman law, and so created without regard to customary law and contemporary local law provisions.

Secondly, that custom is not only followed instead of *ius commune*, but that it is substituted without any attempt to strike a compromise between the two. In terms of the second of these two findings, this is in stark contrast to the position found elsewhere in the *Decisiones* and earlier in the *Consilia* too. Elsewhere, the relationship between custom and

ius commune has followed a familiar course of compromise. The first of these findings, however, is equally, if not more important in terms of understanding Bohier's understanding of the term's meaning. Not only does Bohier demonstrate that he is willing to go against those sources that represent a field of common opinion in favour of customary law provisions, but he also offers a clear view of what the *ius commune* represents in this context.

Thirdly, the *ius commune* is the fall-back position of the court and that lawyers and judges "think and speak in terms of the *ius commune*". This is perhaps the most revealing of the three principal findings from this case. Custom intervenes and in this case, overrides the place of the *ius commune*, but it is brought to the court, whereas the *ius commune* is already in position and applies unless otherwise specified.

There is an extensive list of sources cited alongside the term *ius commune* in this case. The first and second references to the term are made alongside each other and so the sources likely represent both uses of the term or, more accurately, the statement within which the terms are located.

His first and main set of citations follow "*tollit ius commune in illo loco: ergo subrogatur loco iuris communis*".⁵⁹ There are over thirty different citations here. These include Baldus, Bartolus, Andreas Barbatius, Franciscus de Curte (d. 1495), Alexander de Imola, Angelus de Aretinus, Ludovici Pontano (1409-1439), Albericus de Rosate (1290-1354) and Guido de Suza (1225-1292). The references generally include the *Consilia* of those cited, and commentaries on the Digest and Codex. The first of the citations made is to that of C.8.10.3 and D.11.4 and then to Baldus on them.⁶⁰

The third reference to the *ius commune*, which is later in the discussion, does not have a set of citations directly accompanying Bohier's statement. Instead, they appear a little later, where Baldus, Paulus de Castro (1360-1441) and Jason de Mayno (1435-1519) are cited.⁶¹ Although there are no citations directly accompanying the *ius commune*, the use of Baldus is notable. Bohier's conception of custom was strongly linked with Baldus', and this is considered in detail in this thesis, in the chapter dealing with the *Consuetudines*.⁶² According to Baldus, the so-called "natural state" is that where the *ius commune* operates: it is an assumed authority. The common law, the *ius commune*, is the Roman law for Baldus. In terms of the relationship between the *ius commune* and custom, Baldus views the function of

⁵⁹ Translation: Do away with the *ius commune* in that place: therefore substitute in place of the *ius commune*.

⁶⁰ "[*an in totum. C. de aedifi. Priva*]. & not. Bald. in [*l. quicunque. col. 3. versi.*] sed pone, statuto cavetur. [*C. de servis fugitivis.*] idem Bald. in [*l. illa institutio. col. 1 versicu.*] sed pone."

⁶¹ "[*l. iubemus.*] & ibi Bald. Paul. de Castr. & Iason. [*C. de iudi. & in ca. cum venissent*]."

⁶² See chapter 5, 2.1.

Roman law as both to supplement it as well as providing a standard for interpretation.⁶³ In terms of Baldus' general position on Roman law, the *ius commune*, he holds it to be the fall-back position, and this is echoed here by Bohier.

4. Matrimonial matters

It was acknowledged above that many of the cases considering issues dealing with husband and wife, such as dowry and the rights of children, are procedural and so equally fitting in the preceding section of this chapter. However, for the purposes of the present study and in order to try and identify whether in certain kinds of cases the *ius commune* is treated differently than in other instances, and further to detect whether there are shared citations, those decisions are handled in this section only. In terms of defining matrimonial matters, for present purposes, such cases are distinguished by the nature of the parties to a case – husband and wife – and typically those decisions centred round matrimonial property, such as dowry or inheritance by a spouse. In the *Decisiones*, cases of this nature make up a significant proportion of those that have been found to mention the term *ius commune*.

4.1 *Decisio* 113: Dowry

The case considers the provision of a dowry in the case of a husband marrying for the second time, and specifically the issue of children and their entitlement to the dowry. From the outset, Bohier makes clear that the case concerns the customary law:

Stante consuetudine civitatis Burdegalae, quod maritus praemoriente vxore lucretur bona mobilia & dotem, vel alibi partem dotis. An habeat locum in marito stantibus liberis ad secunda vota transiente vel debeat intelligi non stantibus ex primo matrimonio.

According to the custom of the city of Bordeaux, [when] the wife predeceased her husband, the latter would gain her moveable property as well as the dowry, in full or part. Does the same apply to the husband who is going to remarry where there are children, or is the rule to be interpreted as [applicable only] without children from the first marriage?

⁶³ J. Canning, (n. 47), p. 149. Canning cites D.12.1.2, 3 as evidence for this.

It is a comparatively short case, with just seven central points outlined in the *quaestio*, but the part of the discussion that contains the term *ius commune* forms the bulk of this *decisio* and is a detailed one. Here, Bohier states:

[1] *quod quando consuetudo disponit idem quod ius commune, debeat aliquid ultra ius operari & idem... debet aliquid addere, & ultra operari, ut etiam intelligitur in marito habente liberos, & transeunte ad secundas nuptias.*

[1] when the custom provides the same as the *ius commune*, it should go beyond the law and similarly... it should add something, and be applicable beyond [the law], as it is the case with the husband having children [from the first marriage who] remarries.

In this same section, he continues with his treatment of the *ius commune*, but this time moving on to its relationship with statute.

[2] *Et hoc nisi statutum se referet ad ius commune, quia tunc debet intelligi secundum ius commune... quod statutum disponens idem quod ius commune intelligitur, secundum ius commune, quia satis est, quod producat novum remedium...*

[2] And unless that statute refers itself to the *ius commune*, for in that case it ought to be understood according to the *ius commune*...[and] what the statute provides is the same as what is understood the *ius commune* [to be], according to the *ius commune*, because it is enough that it produce a new remedy...

4.1.1 “Beyond the law”

When custom provides for the same as the *ius commune*, Bohier states, it is possible for the former to go beyond the law. Whether this “*ius*” is to be taken as meaning “*ius commune*”, or not, is not clear. Assuming it is, and this seems likely, then this is a statement outlining the ability of custom to go beyond the *ius commune*. A caveat is issued, with the acknowledgment by Bohier that custom says as much as the *ius commune*, implying a need for harmony between the two authorities in any case. Certainly, in this instance, it seems a condition for custom “going beyond” the *ius commune*. This is to be distinguished from custom going against *ius commune*, as in such cases there is rarely shared ground, nor is custom’s operation contingent on the *ius commune*.

4.1.2 “Understood according to the *ius commune*”

Looking to the second of the two main sections contained in this part of the *decisio*, Bohier handles the competing sources of statute and *ius commune*. He states that this case ought to be understood according to the *ius commune*, and accompanies this with a set of citations, the nature of which are considered in further detail below. Here, Bohier states that the case he is discussing be understood according to the *ius commune* and continues by saying that where a statute provides for the same as the *ius commune*, it is understood according to *ius commune* as it is sufficient to produce a new remedy. The first of these two statements is reminiscent of the approach seen in the *Consilia*: a seemingly straightforward restrictive approach to *ius proprium*, and more specifically, always statute. The *Consilia* showed that this outcome was reached by a variety of interpretative approaches carried out by Bohier. Navigating the line between statutory authority and the authority of *ius commune* is therefore a familiar task for him.

4.1.3 “Produces a new remedy”

Earlier, it was shown that interpretation was used to make sure a statute was in line with the *ius commune* and so could operate in a given case. Here, there is no mention of the need to interpret the statute in this way. Instead, Bohier states that statute provides for the same as the *ius commune*, and, according to the *ius commune*, this is enough for a new remedy to be made. No references are given in support of this statement. However, it is followed shortly after by references to Baldus’ *Lectura* on C.6.60 (a. 319), (*de Bonis maternis et materni generis*), as well as the jurist’s *Consilia*. Reference to Baldus’s *consilium* 12 reveals a case that reads: “*stante statuto quia filia dotata a patre no possit succedere patri extantibus fratribus si fuerit dotata a fratre post mortem patris possit succedere patri.*”⁶⁴ For Bohier then, the Roman rule of “*bona materna*” has relevance here. This referred to property that “a child-in-power had received from his or her mother at the latter's death.”⁶⁵ The question at the centre of this case is whether a father who has married for a second time, following the death of his first wife and mother to his children, is able to retain his first wife’s dowry and bring it to his new marriage, or whether it remains with the children. This mention of a “new remedy” therefore suggests that certain circumstances can provoke a change in normal practice. The extent to which the statute that stands against the *ius commune* overrides

⁶⁴ Translation: According to the statute, a daughter who has received a dowry may not succeed her father if there are brothers alive; if she received the dowry from her father after his death she may however succeed him.

⁶⁵ T. R fner, “Intestate succession in Roman law”, in K. Reid, at al (ed.), *Comparative succession law: Volume III: Intestate succession*, (Oxford, 2015), pp.1-32, at p. 23.

the latter or is overridden is not made clear. It therefore seems logical that this statement represents Bohier reaching a balance between the two, as a reflection of the complexities of family life.⁶⁶

4.1.4 Competing opinions on the applicability of the *ius commune*

The crux of this decision is to be found later, and the *ius commune* makes an appearance there also.⁶⁷ Bohier refers to the “*verba universalia*” of the statute, and whether it ought to be interpreted according to the *ius commune*. He argues this is not the case. This reasoning in the final part of the *decisio* demonstrates that the role of the *ius commune* was a crucial one to this case. Bohier shows that there is divergent opinion on the matter of statute being interpreted according to the *ius commune*.

Earlier, it was stated that the two were to be read harmoniously as the *ius commune* was sufficient to create a new remedy. Here, this straightforward approach is brought into question, with one side of the argument calling for statute not to be interpreted according to the *ius commune*, and the other, claiming that it ought to derogate as little as possible from it. Bohier cites a variety of sources in support of each argument. The call for interpretation away from the *ius commune* was backed by reference to one source – C.5.9.6 (a. 472). For his argument in favour of an alternative, pro-*ius commune*, reading, Bohier uses Jason de Mayno, but does not cite a particular work, referring only to the author’s argument that he outlines. Following this are some further citations, including the Gloss, and Baldus on C.4.47 (a. 229).

Essentially, this contentious part of the *decisio* is a split between a restrictive and expansive approach towards the *ius commune* and its relationship with the *ius proprium*, something that came to mark those opinions the term featured in the *Consilia* earlier. It has been recognised that any extensive interpretation of statute meant choosing “the legal mechanism prescribed by the statute in all conceivable constellations of cases”.⁶⁸ In contrast, opting for a restrictive interpretation of a statute in ambiguous cases, or “narrowing the legal consequences of a statute” was instead based on the intentions of the statute maker and so “limited the applicability of the statute to a few options.”⁶⁹ Bohier appears to have opted for

⁶⁶ At the beginning of this chapter, reference was made to de Chassat’s nineteenth-century work, *Traité de l’interprétation des lois*, (n. 15). There, it is provided that the interpretation of the *ius commune* should not introduce something new: “*nam interpretatio non debet aliquid novi inducere*” (p. 218).

⁶⁷ *Decisio* 113, para 7.

⁶⁸ S. Lepsius, “Paolo di Castro as consultant”, in A. Armstrong, et al. (eds.), *The politics of law in late medieval and renaissance Italy*, (Toronto, 2011), pp. 77-105, at p. 80.

⁶⁹ *Ibid.*

the latter, in accordance with Jason de Mayno, and in line with his earlier discussion at the start of this *Decisio*. There are many citations made by Bohier here. For the first part of the discussion, citations are made just before to the term *ius commune*'s appearance, where there is mention of Baldus' *Lectura* on C.6.60, which has been considered above.

The second set of citations is made directly after the reference to the *ius commune*, following Bohier's statement on "*quia tunc debet intelligi secundum ius commune*". The link of these sources to the term itself is arguably stronger given this proximity, as it is feasible that Bohier had these sources in mind when invoking the term and wished to insert them here as an indication of this. Here, he cites X.1.4.8, along with Baldus' *Consilia* (*consilium* 141), with Hostiensis and Joannes Andreas on the X.1.3.18. Specific reference is made to a section of Baldus' *consilium* that is not something Bohier always offers when citing this kind of source; suggesting an actual reference to the work, as far as is possible to do so in cases like these. The references in this part of the *consilium* that deals with the *ius commune* as a term are distinctively Canonist and are directly cited immediately following the term that, as just highlighted, adds to their value as indications. For the last part of this *decisio*, where Bohier states that a new remedy could be created in certain circumstances, no reference accompanies the term. However, in the last sentence from this part of the discussion, Bohier states "*Et ita videtur tenere*" and cites Giovanni Campeggi's (1474-1539) *Tractatus exquisitarum questionum super dote*, "*in 5. parte quaesti. 10*".

4.2 Decisio 186: Heritable rights: mother and father

The *Decisiones* were not organised according to any particular theme or method. Instead, the cases stood individually, their contents and nature of the legal problem at hand, independent of those immediately around it. This current case, however, was linked to another two, and in this sense, was an exception to this general rule of compilation. It appears that they all relate to the same case, and have been separated by Bohier, perhaps because of a desire to dedicate full discussion to each individual *quaestio*; a couple in particular, which he handled in depth. An alternative explanation for this grouping may be that the cases relate to multiple actions between the same parties, litigated in turn with new arguments being raised each time. The term *ius commune* appears in the first and the third of the cases considered by Bohier.

The *ius commune* is mentioned first in a case concerning: “*Quaestio alia ex praecedenti oritur*”.⁷⁰ The *ius commune* is mentioned once in this *decisio*, which belongs to the part of the *decisio* detailed in the *summae* as “*Mulier intra annum luctus nubens, an privetur haereditate a primo viro sibi relicta*”.⁷¹ The *ius commune* is mentioned:⁷²

<i>Quid si maritus instituerit vxorem haeredem suam, quae intra annum luctus accepit secundum virum, an privetur haereditate?</i>	What if the husband appoints his wife as heir, and within a year she takes a second husband, is she deprived of inheritance?
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The single reference to the *ius commune* is made here:⁷³

<i>Et sic proprie & vere secundum eum non vindicat sibi locum ius commune aut statutum...</i>	And so properly and correctly according to that, this is not the position of <i>ius commune</i> or statute...
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To accompany his statement, Bohier refers to D.5.2.8.5. He continues by putting forward another line of argument, with Baldus for support.⁷⁴ The term *ius commune* itself is used alongside statute, and no effort is made to distinguish the two, suggesting more a passive reference to the term than an indication of their mutuality. The *ius commune* often appears in this way, adding further to the argument that the term was in fact loose and general in nature. It has been included here so as to demonstrate that the term does not always have substantive role in the *ratio decidendi* of the case, and its appearance was at times more rudimentary in its nature.⁷⁵ What is notable, however, is the tendency of Bohier to refer to it in any case, alongside statute, so as to demonstrate convergent rules on the case at hand, even when it was not central to his decision.

4.3 *Decisio 188: Heritable rights: mente capto*

⁷⁰ Translation: Another question arises from the preceding one.

⁷¹ Whether a woman who marries again during her mourning year is to be deprived of the inheritance that she received from her first husband.

⁷² *Decisio 186*, para 1.

⁷³ *Ibid*, para 2.

⁷⁴ “*ut ex facti narratione apparet, tamen videtur idem si intra annum secundo nupserit, cum videatur tanta licentia secundo nubenti sibi concessa, argument. a contrario sensu quod est validum in iure [leg. 1. & ibi Bartol. Bald. Alexand. & Modern. ff. de offic. eius eui manda...]*” Own translation: “And on this account, it appears that, within a year, it seems to be the same thing if they married a second time, since it is seen as the second marriage, [where] such a license has been granted, the opposite is argued, and it is a powerful one in law.”

⁷⁵ Examples in the *Consilia* include *Cons.* 40. 125.

Continuing on from the previous cases, this *decisio* relates to the specific issue of hereditary rights in relation to a *mente capto*, an insane person, and that individual's parents.

Et veniendo ad quaestionem nostrum, an pater vel mater ad secunda transiens vota, perdat facultatem faciendi substitutionem exemplarem filio furioso, vel mente capto.

The question is whether a father or mother who remarries loses the right to appoint a substitute as heir *in lieu* of the insane son.

The *ius commune* features prominently in this case. It is considered in the section noted in the *summae* as: “*Exemplaris facta ei cui minus legitima est relictum, non valet.*”⁷⁶ Here, the term is mentioned five times:⁷⁷

[1] *quia si aucta, ut inquit, fuerit legitima iuris communis, ex forma statutorum vel consue. secundum quam tenetur relinquere, ut hic. Tamen si minus legitima fuerit relictam, poterit agi ad supplementum. & idem Ioan. Calde. [consil. 32 tit. de testa. incip. an si statutum augeat legitimam.] volens quod si statutum augeat legitimam, habent tunc locum iura disponentia de legitima. Et istud in terminis sentit... quia si aucta, ut inquit, fuerit legitima iuris communis, ex forma statutorum vel consue. secundum quam tenetur relinquere, ut hic.*

[1] because, as it is said, if the legitimate portion [of the inheritance] [prescribed by the] *ius commune* was increased, then [the testator] would be required to leave it according to the provision of the statute or custom, as in the present case. But if it was left less than the legitimate portion [of the inheritance], then one could sue to increase it. and the same [says] Ioannes Calderinus in [cons. 32, tit. de testamentis, in the incipit "whether a statute increases the legitimate portion [of the inheritance]"], who had it that if the statute increases the legitimate [portion], then it is possible to dispose of it.

[2] *Unde hic concurrit consuetudo cum iure communi, concurrit quae debet aliquid ultra ius operari...*

[2] As here the custom agrees with the *ius commune*, it agrees that it should stretch the scope of the law...

[3] *Pro quo facit quod dicit dicit Bal. [in Rub. de causa possessionis & prop] quod ubi statutum venit ampliative ad ius commune, dicendum est idem esse in ampliante quod in ampliato...*

[3] From that follows what Baldus says that when a statute widens the scope [of a rule] of the *ius commune*, it should be said that the same applies to the statute that widens the scope as well as to the *ius commune* that is consequently broadened...

⁷⁶ Translation: An example where it is not valid to leave less than the legitimate portion.

⁷⁷ *Decisio* 188, para 5. The term “*ius commune*” mentioned three times and “*iure communi*” twice.

[4] *licet secus videatur esse, quando statutum dicit sufficere pro legitima quintam relinquere partem, etiam quoquo titulo, ut dicit Bald...*

[4] however, it is different when a statute provides that it is sufficient to leave a fifth part [of the inheritance] as legitimate quota, even on any basis, as says Baldus...

[5] *quoniam statutum derogans seu veniens derogative ad ius commune, non debet interpretari secundum ius commune, sed simpliciter.*

[5] because when statute derogates from the *ius commune*, it should not be interpreted according to the *ius commune*, but simply as it is.

[6] *statutum veniens derogative recipere interpretationem a iure communi passivam.*

[6] when statute derogates, it comes to receive interpretation passively by the *ius commune*.

The reasoning in this case is clear, and can be divided into three main arguments. First, that where *ius commune* provides for something that is similar to what is already provided by the statute, then it must be of the same idea; ultimately it must not exceed the limits of the existing rule in any material sense. Secondly, that where statute derogates from the *ius commune*, it is not to be interpreted according to the latter. Third, continuing from the second point made by Bohier, he makes reference to Baldus' position that the nature of the interpretation is of a passive nature.⁷⁸ It ought to be acknowledged that an alternative reading of this text is possible. This is one where Bohier explains that statute can be read in keeping with *the ius commune*, or can be interpreted as distinct from it, where there is evidence of a clear departure, but in that case, judges would still think in terms of the *ius commune*, which will therefore have an impact, however inadvertent. However, this interpretation is less convincing given that Bohier stresses to qualify statute's authority through a rebuttal of alternative interpretations that would otherwise suggest a harmonious reading. These three arguments have been outlined above, but can be summarised thus: where statute offers something different to the *ius commune*, it is invalid; statute needs to be interpreted according to the *ius commune*; and finally statute is automatically assumed to receive passive interpretation according to the *ius commune*. However, it is possible to identify a shared approach between this alternative interpretation and the one promoted here, in the sense of

⁷⁸ Baldus maintained that all statutes underwent a passive interpretation of the *ius commune*. See discussion by M. Bellomo, *The common legal past of Europe, 1000-1800*, (Washington, D.C., 1995), [translated from the original Italian] [1988], p. 193. This is considered below in the treatment of citations.

“passive interpretation” and the idea that judges would think in terms of the *ius commune* in any case, regardless of the manner of statute’s interpretation.

This case is an example of where the *ius commune* is mentioned, and here, a number of times, but it is not a chief component of the overall decision. Therefore, the extent to which the above three arguments are Bohier’s own, or whether they are only an effort by him to expose the different approaches to the case at hand, is not entirely known. This does not reduce their value. Bohier’s reference to them is indicative of his recognition that they are arguments bearing validity and whether they support or oppose his own concluding remarks or decisions (which much of the time remain off the page), or not, is not where the value of the reference lies.

4.3.1 When a statute widens the scope of the *ius commune*

Bohier first states that because custom agrees with the *ius commune*, it ought to stretch its scope - “*ultra ius operari*” - can also be seen at *decisio* 113. There, it was also in relation to custom, and so suggests consistency in terms of Bohier’s approach. In this present case, Bohier states that statute also has the ability to broaden the *ius commune*: more accurately one of its rules. It is seemingly the case that a rule of the *ius commune* is prone to being altered by *ius proprium*, and further that it is possible by way of statute. In the *Consilia*, there was a clear dominance of *ius commune* over statute, in contrast to the more even-keeled customary rules, and so this statement by Bohier is most notable.

Earlier, the occasional expansive role of the *ius commune* was considered, and a definition put forward. There, an expansive effect was defined as the need to interpret a source in this way could be conducted with the intention of enabling a more favourable conclusion for a legal matter, and to the benefit of those parties before a case. In the present decision, this expansive approach reappears, but with the *ius commune* serving as the subject. This is further revealing of how Bohier perceived the nature of the *ius commune*. If it were a loose collection of rules, then the need to broaden it, as Bohier claims statute is able to, would surely be unnecessary. When statute and custom are expanded in this way, through the *ius commune*, the content of the rule being broadened is, presumably, though less so in the case of custom perhaps, readily identifiable along with the rule’s boundaries. For the *ius commune* to be the subject of expansion, therefore, suggests one of two things. First, that the term was something particular, with a set meaning, at least set enough so as to warrant expansion when the need arose. Secondly, and more likely, that Bohier is avoiding the need to declare that

statute contravenes *ius commune* in this instance. Ordinarily in those circumstances where statute transcends *ius commune*, Bohier has proceeded by harmonising the former so that it is in line with the latter. This case therefore differs from the regular pattern that has been found elsewhere in the *Decisiones* and the *Consilia*.

4.3.2 Passive interpretation by the *ius commune*

Later, Bohier states that statute ought to undergo passive interpretation by the *ius commune*. The extension of a statute's words to include a situation not directly provided for was one approach of the commentators, known as "*interpretatio activa*".⁷⁹ However, they also dealt with a statute's restriction to "exclude cases which its general words seem to include."⁸⁰ This is referred to as "*interpretatio passiva*", and the issue raised here is not whether statute's words ought to be restricted, but whether *ius commune* will be read into statutes.⁸¹ It was deemed necessary to "read sound common law policy into loose and widely phrased statutory generalisations".⁸² On this matter, Baldus stated: "*Hoc est dicere, quod ius commune informat statuta et vestit, sed non informatur nec vestitur ab eis, et hoc propter virtutem attractivam, quam habet ius commune ad municipale, non e contra...*"⁸³ So, the *ius commune* is read into statutes, and similarly, only those statutes may be "freely extended beyond their literal word content that do not restrain the common law."⁸⁴

This example illustrates that there was a requirement, or tendency, to refer to the *ius commune* even where, as shown in the case above, the terms of the statute went beyond it, and so underwent an expansive, or passive, interpretation itself. Clearly, the *ius commune* was not a matter of "last resort"⁸⁵ in judicial practice to choose a rule that suited. If this were so, statute would surely have fitted well enough. Bohier refers to Bartolus and to the Digest directly, as authority for his statement on passive interpretation. He makes reference to Bartolus' commentary on D.35.2. For Bartolus, statutes underwent a passive interpretation

⁷⁹ S. Thorne, *Essays in English legal history*, (London, 1985), p. 9.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Baldus, c.1. X *de constitut.* 1, 2, 15. Translation: That is to say, that the *ius commune* informs statutes and give legal shape, but it is not informed, nor is given legal shape with them, and have been made for the sake of interest, which belongs to the *ius commune* of the town, and not to the contrary.

⁸⁴ *Ibid.*

⁸⁵ Bellomo, (n. 78), p. 194.

from the *ius commune*.⁸⁶ Bellomo has stated that this illustrates “that no norm on any level of the *ius proprium* (royal city, corporative, or other) could be applied without taking the accepted doctrines of the *ius commune* into account...”⁸⁷ In the present case, Bohier is making a clear link with his own attitude towards statute and the *ius commune*, with that of Bartolus’.

This *decisio* is marked by a considerable number of citations, many of which directly accompany the use of the term *ius commune*. For the first part of the discussion, namely that which prohibits statute from adding anything further to a rule that is already provided for by the *ius commune*, Bohier cites Baldus’ commentary on C.6.28.4 (a. 531). For the second part of his argument involving the term *ius commune*, Bohier cites Paulus Castrensis (1360-1441), Alexander de Imola (1424-1477), and Baldus.

4.4 **Decisio 244: Testamentary provision between husband and wife**

This case concerns testamentary provision and the rights and obligations of a husband in relation to the estate of his wife. Bohier’s *summae* informs us of the circumstances of the case:⁸⁸

<i>Maritus qui promisit exequi testamentum vxoris, non tenetur in eo quod ultra debitum ipsa relinquit.</i>	A husband that promises to carry out the will of his wife, is not liable beyond what she has left as [her] debt.
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The case also considers the Canon law, with reference to the issue of Papal privilege.⁸⁹ The *ius commune* is mentioned once in this decision. It is considered alongside statute and custom at a crucial part of Bohier’s reasoning.⁹⁰

<i>quod si vir ex statuto vel consuetudo debeat habere dimidiam partem in bonis vxoris, vel econtra vxor in bonis viri, & imperator concesserit viro vel vxori, ut possit libere testari & c. quod vir vel vxor debet testari secundum ius municipale seu consuetudo per id quod legitur in [l. Gallus. quidam recte ff. de</i>	For if the husband is entitled to half the wife's estate according to the statute or custom, or vice versa the wife to the husband's and the prince had granted the husband or the wife so to freely dispose [of their assets] by will etc. that the husband or the wife must make their will according to
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⁸⁶ M. Sbriccoli, *L'interpretazione dello statuto. Contributo allo studio della funzione dei giuristi nell'età comunale*, (Naples, 1974), pp. 440-441. Baldus recounts his master’s view: *Super decretalibus*, ad X.1.2.9, *De constitutionibus*, (Lyon, 1551).

⁸⁷ Bellomo, (n. 78), p. 193.

⁸⁸ *Decisio 244, pr. 3.*

⁸⁹ Discussed specifically at *Decisio 244, para 3.*

⁹⁰ *Ibid.*

liberis & posthu.] videlicet ut dimidiam teneatur relinquere viro vel vxori, & non ultra testari in praeiudicium partis & portionis viri: alias esset donare vxori, contra consuetudinem & ius commune, secundum quod debet regulari privilegium aut licentia data: [ut dixi in d.2 col.5 de consuetudi.mat.& pro hac Decis.facit quod dicit Alb. de Rosa] ...

the municipal law or [local] custom... it is clear that they are bound to leave half [of their asset] to the husband or the wife, and they cannot dispose [of their assets] by will beyond [that] in prejudice of the [legitimate] portion of the husband. Otherwise it would be making a donation to the wife against custom and *ius commune*, according to which the privilege or freedom [that was] granted as I said in ... and according to that *decisio* it's applicable as said Albericus de Rosate...

The *ius proprium*, in the form of both custom and statute, are set off against a specific individual privilege made by the Emperor. In turn, local law, in the form of this privilege, wins and seemingly trumps both statute and custom. The *ius commune* is mentioned in conjunction with custom; a possible nod to their equal, or at least, similar status. In this case, it appears that a specific privilege enjoys what custom typically has done in other cases; namely that where it trumps or at least is equal to *ius commune*. Like with other cases included in this study,⁹¹ this case can be reduced to a competition between the secular and ecclesiastical. In those other decisions, the *ius commune* was applied, but recourse was made to Papal authority to acknowledge it in a way that suggested a justification for the application of the *ius commune* was needed in those cases that touched on ecclesiastical jurisdiction or rules. This present case therefore goes further still by actively approving a Papal privilege over the provision of both *ius commune* and customary law. Just before the term, the Digest is cited, at D.28.2. Looking back to the start of the part of the *decisio* that deals with the *ius commune*, reference is made to Baldus, C.3.28.9 and C.6.42. Earlier still, in the preceding part of the case, Bohier cites Baldus again, together with Alexander de Imola, Angelus de Aretinus and Jason de Mayno on C.6.42.

5. Other matters

Some cases do not fit into either of the two categories of procedural or matrimonial issues presented here. These are included now, and include cases dealing with the sale of property⁹² and feudal law.⁹³ Despite falling outwith the two main categories that have tended to typify those decisions featuring the *ius commune*, these cases still have the familiar feature

⁹¹ *Decisio* 2 and 69.

⁹² *Decisio* 231.

⁹³ *Decisio* 263.

of competition, whether it was between the *ius commune* and statute, custom, or with feudal customary law. These are considered below.

5.1 **Decisio 230: Sale of property**

The *ius commune* is mentioned once here, as part of a discussion that also considers statute and custom:

Tamen quicquid sit de iure, ut inquit Alberic. in [d.l.] extat consuetudo, tamen servatur. & in [d. hoc senatusconsultum]. dicit ita servari Bononiae, & in Lombardia, & idem in [d. le nutu.fideicommissum] quia consuetudo vel statutum potest tollere in hoc ius commune [l.omnes populi.ff.de iustit.& iure.&l.de quibus.ff.de legibus].& maxime, ut delicta puniantur...

however, whatever is [the rule] according to the law / whatever it may be *de iure*, as Albericus argued in ... it is to be kept. [Albericus] says that, similarly, the [custom] of Bologna is observed, and [the same] in Lombardy... because a custom or a statute can derogate from the *ius commune* in this subject and above all so that delicts be punished...

5.1.1 “In hoc *ius commune*”

In this small section of the case where the term is mentioned, much is revealed. There are three main components to this discussion. First, the chief statement that custom or statute can derogate from the *ius commune* in this particular case. Here, custom and statute are used interchangeably to represent the *ius proprium*. This leads to the conclusion that *ius proprium*, generally, trumps *ius commune* in this case. Secondly, that this finding is applicable across Bologna, Lombardy and here. Thirdly, attention ought to be paid to the use of “in hoc” by Bohier when referring to the *ius commune*, as Bohier is either restricting or specifying the particular circumstances in which the *ius commune* can be removed in this way. However, is arguably this initial statement – the *ius commune* can be removed by statute and custom – that is most striking.

A number of the decisions represented in this study have involved the substitution of custom in the place of *ius commune*. Statute, however, has tended to be absent from such applications. For custom to replace *ius commune* then, although still notable, is in line with other cases. It is the equation of custom with statute, however, that is surprising, and with it, its ability to remove *ius commune*.

Bohier cites D.1.1.9 and D.1.3.32, together with D.9.2.51.⁹⁴ There is no juristic authority to accompany these references. The second of the three Digest citations is cited elsewhere in the *Decisiones* and in the *Consilia* alongside the term *ius commune*.

5.2 Decisio 263: Feudal matters

The specifics of this case decided by Bohier are complex. It concerns an area of feudal law, and more specifically that of custom. The *quaestio* at the start of the decision offers some context on the matter.⁹⁵ The *ius commune* is mentioned twice in this case. Both suggest the superiority of customary law over the *ius commune*. The first reference is found in a discussion about the custom of a court, and the practice of identifying the relevant custom (feudal and local) to apply in a case. It reads thus:

Et sic consuetudo Curiae... decidit hanc quaestionem, quae consuetud. in hoc attendi debet (refs.)... quod particularis & localis consuetudo est in causis feudalibus decidendis semper attendenda, ac etiam praefertur, & postea generalis constitutio feudorum, quib. deficientibus, ius commune Romanorum. Et ideo dicit ibi tex. strenuus legisperitus rigidas factorum consuetudines sic in suis retineat terminis, quod non egrediatur ulterius, sed ubi casus, qui consuetudine feudi non fuerit comprehensus, absque calumnia utatur lege scripta...

And thus the custom of the court ... decided [on] this issue, which should be decided according to the custom ... where it is said first, that local customs are always to be followed and take precedence when deciding on feudal matters, and then, general feudal law [must be followed], and in their absence the *ius commune* of the Romans. And so the text states here [that] a serious jurist [is to] uphold the strict customs of the facts on their own terms, so not to go beyond [them] but where a case is not included in feudal custom, that jurist should legitimately turn to the written law...

Bohier continues, referring again to the term. Here, he refers to the term in a way that has not been identified elsewhere in the *Decisiones* and *Consilia* also.⁹⁶

⁹⁴ “[l. omnes populi. ff. de iustit. & iure. & l. de quibus. ff. de legibus. & maxime, ut delicta puniantur. l. ita vulneratus. ff. ad l. Aquil...]”

⁹⁵ “*Quaestio* for this decision reads as: *Quid si per pactum investiturae dicatur vasallum tenere feudum ab aliquo domino ad fidem & homagium ligium, ac etiam deverium gratiae, seu de mercede alias appellatum... Et etiam recognitiones prestationes fidelitatis idem dicat, & vasallus permutet feudum, rachaptus [sic] visis verbis praedictae investiturae, ac recognitiones debeantur domino signanter, cum in una fidelitatis praestatione dicatur ultra praedicta verba ad mortuam manum alias appellatum rachaptum.*” Translation: “According to the terms of the enfeoffment, the vassal is considered as holding the fief from a lord to whom he owes homage, as well as the payment of the duties sometimes called *rachapt*. Homage is paid more than once and similarly is fealty pledged. The vassal exchanges fief. The *rachapt* and feudal duties, considering the wording of the said enfeoffment, are surely owed to the lord, for the fealty pledge encompasses the *mortmain* or *rachapt*.”

⁹⁶ *Decisio* 263, para 7.

quod in materia consuetudinis argui potest per similitudinem consuetudinis, id est, de similibus ad similia... quia consuetudines locales sunt, & dictuntur in eo loco ius commune.

That on the subject of custom, it is possible to argue by way of similar customs, that is, from similar to similar... since customs are local, and in that place they are said [to be] the *ius commune*.

No citations accompany Bohier's mention of the term *ius commune Romanorum* here. The second reference, however, features some familiar citations. Here, Bohier cites D.1.3.32 and Baldus.⁹⁷ The absence of any citations to accompany the first use of the term is nonetheless revealing of Bohier's mindset when using it. When citations do not accompany the term it is possible to deduce its mention as being general in nature: a loose term that would be immediately clear to both the reader and writer of the legal text.

The second use of the term reveals a reference to Baldus and it is an important one in terms of revealing Bohier's approach to custom. In his commentary on D.1.3.32, Baldus states that "*consuetudo extenditur de similibus ad similia*".⁹⁸ Here, in this case, Bohier makes a similar claim. This suggests that for Bohier, custom extends to similar cases by analogy.⁹⁹ He makes reference to this in other works also,¹⁰⁰ demonstrating a consistent approach, and adoption of Baldus' stance on this issue.

5.2.2 "*ius commune Romanorum*"

The addition of "*Romanorum*" makes it obvious that he is referring specifically to Roman law. Bohier's need to add this word to the term *ius commune* does however then suggest that the references to the term in all other cases are not strictly referring only to the Roman law, in this sense. It is worth considering whether this was a concerted effort by Bohier to demarcate between an idea of *ius commune* as showing that this is strictly Roman, in that it is purposively separate from any other notion of *ius commune* that includes Canon law, for example. Is this revealing of an otherwise *utrumque ius* version of *ius commune*? Is this the equivalent of *ius civile Romanorum*?¹⁰¹ Bohier has chosen to term it in this way and this is worthy of note.

⁹⁷ "[d. 1. de quibus de legi. & Bald. in c.1.Imperiales. versicu. quaero utrum. de pace Constan.] dicens, etiam unam quaque civitatem suas proprias habere consuetudines. [l. neminem]".

⁹⁸ The Venice edition (1599), reprinted in 2004 (8 volumes) was used here.

⁹⁹ Bartolus, ad D.1.3.32, pr. 5: "*Consuetudo extenditur de similibus ad similia*"

¹⁰⁰ For example, see *Consuetudines Biturigium*, (1547), folio 10, nu. 11. Discussed in this thesis at chapter 5 on the *Consuetudines*, at 2.1, "Baldus' understanding of *consuetudo*", and 4.3, "Guardianship: ward's estate".

¹⁰¹ W. Decock, *Theologians and contract Law*, (London, 2012), p. 32. "*Verbum illud ius commune de iure communi Romanorum intelligitur*" (Decius, *Consilia* II, 469, incip. "*Visa inquisitione*", para 12).

Let us assume that Bohier here is referring to the *ius commune* in this way with the “*Romanorum*” addition without any symbolic purpose; his interpretation of the *ius commune* here is the same as his usual reference and the addition is incidental. This is still important. This reveals that his conception of the *ius commune* generally rests with the Roman law. Alternatively, let it be argued that Bohier does mean to distinguish this reference to the term *ius commune* here from others he makes elsewhere; a more likely explanation. This suggests that the term encompasses a range of meanings, and therefore calls into question the meaning of the other mentions of the term. It leads to the question of whether in cases of a reference to the “*ius commune*” Bohier is typically referring to a *utrumque ius* understanding of the term. Clearly, Bohier felt motivated to distinguish the term and refer specifically to it as a representative of the Roman law. The lack of accompanying citations serves to portray the term as one of a general nature, representing the Roman law generally, and not necessarily through juristic commentaries.

5.2.3 “Customs are the *ius commune* in that place”

It is Bohier’s second use of the *ius commune* that is arguably most valuable in terms of its potential to reveal the meaning he attached to the term. Here, following on from his rejection of the *ius commune*, by favouring customary law, Bohier offers a justification for this earlier treatment. He equates custom with *ius commune*, arguing analogously with the two sources. He goes further by referring to customs as local in nature; that their origin and value relate to a specific place. In that case, then, he contends, customs are the *ius commune* of the local place within which they operate.

Elsewhere, when custom and *ius commune* have met in a source, Bohier has typically done one of two things. First, an attempt has been made to interpret in a way so that minimal harm is caused to the *ius commune*, achieving a balanced handling of sources. Or, as seen in two cases elsewhere in the *Decisiones*, delivering an outright statement of custom prevailing over the *ius commune*. Neither is done here. Instead, Bohier says that a type of *ius commune* does apply, but that it is a customary law one. Bohier therefore clearly still felt it was necessary to have a *ius commune* of sorts in existence, despite it being instead of a customary nature: by saying that customs are the *ius commune* of a specific place still acknowledges a need or desire for an over-arching authority, floating even, or recourse to something more than simply stating a custom applies in this place.

It is reasonable to interpret this equation of custom and *ius commune* here with the theory that Bohier saw the term as representing an overarching source of authority expanding beyond the specifics of regions and small localities, to which the likes of custom and statute applied, and so different to *ius proprium*. This is not surprising, and correlates with the traditional concept of the *ius commune* as a repository of ideas and concepts, resting somewhere above the *ius proprium*. Whatever Bohier's conception of the *ius commune* was, he is providing for custom to wield the same authority and bear the same nature. This suggests that the term was something more than just a representation of a collective group of authoritative citations, though some do appear more often alongside the term than others. For if that were the case, this statement of Bohier's would make little sense. Instead, it is likely that here he is alluding to the general assumed dominance of the *ius commune* which seems to have a presumed application in most cases. In this sense then Bohier is calling for the feudal customary law in this case to be regarded with the same authority as is typically given to the *ius commune* as standard.

6. Conclusion

The *Decisiones Burdegalenses* demonstrates that Bohier referred extensively to those jurists belonging to the *mos italicus* tradition. His reliance on Baldus, in particular, is notable, and consistent with the findings from the *Consilia*.¹⁰² This is consistent with Wijffels' contention that the eventual demise of the *mos italicus* took place in the sixteenth century.¹⁰³

The *ius commune* often performed the role of "benchmark" against which other sources stand. Often the relationship between *ius commune* and other sources of legal authority were varied. This is consistent with the idea of it as benchmark term, as it typically does not produce uniform results. Instead, its operation is very much dependent on the sources which are held up against it. According to this, then, it is entirely possible for *ius commune* to produce different results according to the individual circumstances of the case, and the role of, say, customary law.

This is also consistent with the idea of "interpretation according to the *ius commune*", a common approach seen in many cases, including that of passive interpretation.¹⁰⁴ The language used in such cases, which make up a significant proportion of those examined, adds

¹⁰² See chapter 3 of this thesis.

¹⁰³ A. Wijffels, (n. 10), p. 134. See earlier in this chapter at 1.1, "Legal practice and tensions".

¹⁰⁴ An example of passive interpretation is seen in *Decisio* 188.

further weight to this theory. Where Bohier states “*intelligitur secundum ius commune*”, “*interpretabitur secundum ius commune*”, or “*recipere interpretationem a iure communi passivam*”, each variation is compatible with the concept of the *ius commune* as a benchmark. Whether the source in question, such as custom or statute, is understood, interpreted or receives interpretation by the *ius commune*, each suggests something of an existing standard against which they are assessed before application. Assuming the *ratio legis* is conceived of as referring to the content of the law, the *ius commune*, it seeks out existing legal interests and takes into consideration the surrounding environment within which it is expected to operate.¹⁰⁵

The Canon law enjoys a prominent position among those cases considered. It is well represented in the citations used by Bohier, but also in the nature of the cases he considers that feature the term, namely those concerning matrimonial issues and procedure. Moreover, it arises particularly in those decisions where ecclesiastical and secular jurisdiction meet, especially where there is doubt over which of the two ought to handle a point of law. In these cases, the *ius commune* is applied in a delicate manner, with Bohier ensuring that recourse is made to Papal authority and it is possible to detect a real sense of effort in justifying its use. That the *ius commune* is found in such cases is revealing both in terms of the substantive meaning of the term to Bohier, but also what it possibly represented in a conceptual sense in legal practice.

¹⁰⁵ M. Tella, *Equity and the law*, (Leiden, 2008), p. 154.

CHAPTER 5

Consuetudines Biturigium

1. The *Consuetudines* as a source

Thus far we have only examined reported decisions and legal opinions. The *Consuetudines Biturigium* instead offers an example of a commentary on customary law, and a break from recounting decisions and opinions stemming from law in action. First published in 1508, the *Consuetudines Biturigium* is an early example of the many written customs ordered at this time.¹ Attempts have been made to categorise Bohier's position on custom and its relationship with other sources of law in this chapter.

According to John Ford, Bohier believed custom "should be treated as a statute in need of strict interpretation and that in dealing with issues left unresolved by the express provisions of the custom he should follow the common opinions of the schools."² Despite this emphatic statement, when compared with the likes of Charles Dumoulin (1500-1566),³ or Barthélemy de Chasseneuz,⁴ for example, Bohier's approach to custom has not received enough attention. This is particularly true in the case of understanding its relationship with other sources of law such as the *ius commune*. The position of Dumoulin, for instance, is known: he stated that in France, Roman law is followed out of choice, given that it is in line with equity and is relevant to the issue at hand, and not because they are bound to follow Justinian and his successors. Further, he states that citations are made to Roman law for annotation purposes but not in a significant sense.⁵ Dumoulin's attitude towards Bohier and his

¹ *Consuetudines inclite civitatis et septene Biturigensis* (Paris, 1508). See E. Armstrong, *Before Copyright: The French Book-Privilege System 1498-1526* (Cambridge, U.K., 1990), p. 75 for details of printing privilege for this work. The initiative for official reformation and recording of local customs came from the king. See below in this chapter at 1.2, and earlier in chapter 2, 9.1.1.

² J. Ford, *Law and Opinion in Scotland During the Seventeenth Century* (Oxford, 2007), p. 268.

³ On Charles Dumoulin generally see: J. Thireau, *Charles du Moulin, 1500-1566: étude sur les sources, la méthode, les idées politiques et économiques d'un juriste de la Renaissance*, Volume 1, (Geneva, 1980).

⁴ On Barthélemy de Chasseneuz generally see: J. Pignot, *Un jurisconsulte au seizième siècle: Barthelemy de Chasseneuz, premier commentateur de la coutume de Bourgogne et président du parlement de Provence; sa vie et ses oeuvres*, (Paris, 2008).

⁵ Ford, (n. 2), pp. 252-253.

works on law in action were considered earlier in this thesis.⁶ He was critical about their authenticity and sought to undermine their value. It is likely that this attitude to Bohier and his *Decisiones* have filtered through to his customary law work also. While better known than his other works, the role and meaning of the *ius commune* in the *Consuetudines* has not been the subject of a dedicated study.

Given the custom-centred nature of the *Consuetudines*, it is anticipated that where the *ius commune* is mentioned, it will be always regarding its relationship with custom, and in this sense, the findings from this work are to be received differently from those found in the *Consilia* and *Decisiones*, where there is no emphasis on a specific source, but only the circumstances of the legal issue or case before Bohier. This work is therefore very different to those that are practice-focused, and it is appropriate to treat it sensitively.

1.1 History of custom in France

The history of custom is the subject of much literature,⁷ and specifically the peculiar case of the French customs, which have their own unique history. This work will not attempt any great literature study of custom and its nature as it exceeds the remit of this thesis. Instead, a general history of custom in France will be given. It may be brief but will provide context for what follows; namely the treatment of custom and its relationship with *ius commune* in Bohier's *Consuetudines Biturigium*.

⁶ See chapter 4, *Decisiones Burdegalenses*, at 1.

⁷ For an overview of custom and its place in European history, see D. Bederman, *Custom as a source of law*, (Cambridge, U.K., 2010); A. Wijffels, "Ius commune, comparative law and public governance", in M. Adams and D. Heirbaut, (eds.), *The method and culture of comparative law: essays in honour of Mark Von Hoecke*, (Cambridge, U.K., 2014), pp. 147-160. On the *droit commun* and custom, see P. Petot, "Le droit commun en France selon les coutumiers", (1960) 38 *Revue Historique de Droit Français et Étranger* 412-429; G. Giordanengo, "Jus commune et 'droit commun' en France du XIIIe au XVe siècle", in J. Kyrnen (ed.), *Droit Romain, jus civile, et droit français*, (Paris, 2009), pp. 220-247. On the recording of customary law, see J. Dawson, "The codification of the French customs", (1940) 38 *Michigan Law Review* 765; R. Filhol, "L'unification des coutumes sous Louis XI", (1994) 194 *Revue Historique de Droit Français et Étranger* 317. For a comparative perspective, see M. Kim, *Law and custom in Korea: comparative legal history*, (Oxford, U.K., 2012), pp.13-20, and generally on this, see A. Perreau-Saussine, and J. Murphy, (eds.), *The nature of customary law: legal, historical and philosophical perspectives*, (Cambridge, U.K., 2007). For an overview of the vast range of customary works written throughout France, see J. Caswell and I. Sipkov, (eds.), *The coutumes of France in the library of congress: an annotated bibliography*, (Washington, D.C., 1977). On the later role of custom, see Z. Scheider, *The king's bench: bailiwick magistrates and local governance in Normandy 1670-1740*, (Rochester, 2008), pp. 95-123.

Treatises, *coutumiers*, form a genre of legal literature that first appeared in the twelfth century.⁸ They set the customs and usages of a region in writing, and were “the legal literature of the lay courts.”⁹ The size of such works would vary considerably, as did the use of authorities, with some texts making use of Roman or Canonic sources, and others little or none.¹⁰ The authors of these works were associated with the courts, often involved in court pleadings or in a judicial capacity.¹¹ To take an example from this period, one of the most notable and influential authors was Philippe de Beaumanoir (1250-1296), a jurist and royal official, whose *Coutumes de Beauvaisis* is “the longest and most significant work on customary law to survive from thirteenth-century France.”¹² His treatment of the common law, the *droit commun*, and its relationship with custom, is noteworthy. Since de Beaumanoir never explained what was meant by his reference to the *droit commun*, there has been debate on the meaning he attached to the term. Some argue he was alluding to the Roman law, as incorporated into custom, canon law and feudal law.¹³ Others, such as André Castaldo contend that the expression was linked with general customs, and when the term was used it was accompanying explicit references to issues of customary law and not learned law.¹⁴

In the *Coutumiers* of the early thirteenth century, then, it is possible that the *droit commun* was customary law.¹⁵ Some of the most significant influences in the customary law works came via the Canon law, with issues of marriage, dowry and inheritance being the most clearly affected.

By the late fifteenth century, customs, already influenced by the principles of the learned law and “reshaped by the decisions on appeal of royal courts, were altered by the assemblies of the three estates that approved them and by the royal

⁸ A-M. Kuskowski, “The development of written custom in England and in France”, in R. Kaeuper (ed.), *Law, governance, and justice: new views on medieval constitutionalism*, (Leiden, 2013), p. 103.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ E. Cohen, *The crossroads of justice: law and culture in late medieval France*, (Leiden, 1993), p. 32.

¹² F. Cheyette, *Dictionary of the middle ages*, (New York, 1982-89), p. 144. On Beaumanoir, see F. Akehurst, *The coutumes de Beauvaisis of Philippe de Beaumanoir*, (Philadelphia, 1992) and S. Heller, et al (eds.), *Essays on the poetic and legal writings of Philippe de Remy and his son Philippe de Beaumanoir of thirteenth century France*, (Lewiston, 2001).

¹³ Kuskowski, (n. 8), p. 109, and further P. van Wetter, “*Le droit romain et Beaumanoir*”, in H. Fitting (eds.), *Mélanges Fitting*, (Paris, 1908), 538.

¹⁴ A. Castaldo, “*Pouvoir royal, droit savant et droit commune coutumier dans le France du Moyen Âge. À de vues nouvelles II. Le droit romain est-il droit commun?*”, (2009) 47 *Droits: Revue Française de théorie, de philosophie et de cultures juridiques* 173.

¹⁵ Castaldo further contends that reference to the *ius commune* in other works, such as thirteenth century *parlement* records, also do not refer to Roman law, but to customary law. *Ibid.*, p. 221.

commissioners and the *parlements* that ratified them”.¹⁶ They became royal law, and as a result of the process of recording, homologation, became the collective “customary law”. The sixteenth century was marked by a period of homologation, with customs being reduced to writing and collated systematically *en masse*. This move by King Charles VII was motivated by a desire to increase monarchic control over local and regional laws and to promote unity amongst the regions of France. In 1454, the Edict *Montil-lez-Tours* required the reordering of customary law in this respect.¹⁷

This period of homologation renewed interest into the *ius proprium* and so “provided the reception of Roman law with fresh stimulus.”¹⁸ The study of customary law in this way hastened the fusion of this law with techniques and concepts that were of Roman law origin. Indeed, there are those who saw the Roman law “at least in a subsidiary capacity, within the *droit de coutumier*.”¹⁹ These homologated works were relied on and used by those in legal practice and were the product of customary law as selected, interpreted and recorded by those jurists like Bohier, and directly applied in legal practice. Homologation relates to the overarching issue of state-building and legal nationalism; both of which were key components of the early modern period, and touched upon at the start of this thesis in some detail.²⁰ It is likely that the use and meaning of the *ius commune* as a concept will have changed accordingly. Although the *Consuetudines Biturigium* is not a product of law in action like the *Consilia* and *Decisiones*, it is ultimately as important: the meaning of customary law and its contents had gone through a focused and deliberate movement that involved intensive analysis of their contents and scrutiny as to their application, which was then relied on in legal practice. Understanding the content of customary law provisions recorded in this way is therefore crucial to understanding the practical application of these laws in

¹⁶ T. Lange, *The first French reformation: church reform and the origins of the old regime* (New York, 2014), p. 56.

¹⁷ D. Margolf, *Religion and royal justice in early modern France: the Paris chambre de l'édit, 1598-1665*, (Kirkville, 2003), p. 15.

¹⁸ R. Lesaffer, *European legal history: a cultural and political perspective*, (Cambridge, U.K., 2009) [translated from the original Dutch] [2004], p. 364.

¹⁹ A. Tardif, *Histoire des Sources de Droit Français: Origines Romaines*, (Paris, 1890), p. 278.

²⁰ See chapter 1, “Bohier’s France: 1469-1539”.

practice, and to appreciating the role and meaning of the *ius commune* in a practical sense.²¹

2. Bohier's understanding of *consuetudo*

The early modern idea of custom as an “object of social and historical thinking”²² can be seen in the commentaries of François Connan (1508-1551)²³ who saw the *ius civile* as not only the particular tradition of Rome, but also generally to the customs and laws of modern nations, and to what Baldus calls the modern law of nations: *ius novissimum gentium*.²⁴ Therefore, custom was the ruler of society. Donald R. Kelley has stated that *consuetudo* could not be “identified with natural instinct or with universal reason; nor could it be investigated and understood in such naturalistic and super- or subhuman terms”.²⁵ This ties in with a definition of *consuetudo* found in the *repertorium* to Bohier's *Consuetudines*, where he states:

Consuetudo, maxima pars est iuris quo mundus regitur...

Custom is the main part of the law through which the world is governed...

This statement depicts *consuetudo* as something with broad application. This is mentioned here because of the link between the *ius civile*, *consuetudo* and *ius commune*. The *ius commune* is mentioned in the Digest at D.1.1.6 where it is stated that it is a larger body of law in which the *ius civile* is the subset, and so too is the likes of the *ius gentium*. If, as Connan says, the *ius civile* is to be thought of as encompassing *consuetudo*, then, according to the Digest, the *ius commune* ultimately encompasses *consuetudo* also, as it is the larger body of law within which these sit.²⁶ In basic terms, it is the idea of the written law at the centre, with *consuetudo* sitting in the middle, and the *ius commune* on the outer periphery that presents itself.

²¹ See generally: D. Kelley, “Second nature: the idea of custom in European law, society, and culture”, in A. Blair and A. Grafton (eds.), *The transmission of culture in early modern Europe*, (Philadelphia, 1990), pp. 131-172.

²² *Ibid*, p. 143.

²³ *Commentaria iuris civilis*, (Paris, 1557).

²⁴ Kelley, (n. 21), p. 143.

²⁵ *Ibid*, p. 145.

²⁶ *Commentaria iuris civilis* (Paris, 1557), fol. 43.

Consuetudo, according to Baldus, is used in order to interpret the written law, and in turn *ius commune* is used to interpret *consuetudo* and written law.²⁷

Looking to the *repertorium* of the *Consuetudines Biturigium*, there is a mention of the *ius commune* under the entry for *consuetudo*.²⁸

Ubi consuetudo se refert iuri communi, debet intelligi secundum ius commune. Where custom refers to the *ius commune* it ought to be understood according to the *ius commune*.

It is not known whether Bohier himself wrote this entry, or whether it is a later addition at the time of publication.²⁹ Given that this 1508 edition was published within Bohier's lifetime, it is likely that he had an influence in its preparation. This is therefore an example of his thinking in terms of the relationship between custom and *ius commune*. Alternatively, if it is the product of an editorial addition, it is still the result of a reference to the content of the work itself and thus a summary of what the general approach, or perceived approach, by Bohier was deemed to be. Other entries under *consuetudo* reveal further insights into terminological definitions.

On those occasions where statute is mentioned, it is done so alongside the term *consuetudo* in the form “*statutum vel consuetudo*” or “*consuetudo, statutum, vel lex*”. According to Ford, Bohier treated the local customs of France like “*statuta*”.³⁰ Further, that in his case, “consideration should be first given to the local custom, then to the written law of the *feus* and then to the civil law.”³¹ The Digest, D.1.3.32 states that custom was a possible source of *lex*, on the grounds that it expressed the will of the populace, like statute.³² Although written, statute does not derive its authority from its written status, but from the people's consent. Its position in relation to statute was therefore one of mutuality, at least in a conceptual sense. The practical application of this will be shown throughout this chapter when Bohier encounters the two alongside one another.

²⁷ Ad D.1.3.32 (fól. 16 v), *In primam digesti veteris partem commentaria*, (Venice, 1599).

²⁸ *Consuetudines inclite civitatis et septene Biturigensis*, (Paris, 1508).

²⁹ The first edition was published 1508 and is the edition consulted here.

³⁰ Ford, (n. 2), p. 252.

³¹ *Ibid.*

³² A. Cromartie, “The idea of common law as custom”, in A. Perreau-Saussine and J. Murphy (eds.), (n. 7), pp. 203-227 at p. 204.

2.1 Baldus' understanding of *consuetudo*

Any law student in the middle-ages would have been received an education based on the intensive study of the texts of Civil and Canon law.³³ This was considered in greater detail earlier in this thesis.³⁴ Among these, the likes of commentators such as Bartolus and Baldus would have featured prominently. Given Bohier's reliance on Baldus in particular, in the *Consuetudines*, it is possible to infer that his exposure to this jurist in his education would have informed his professional writing. It will be shown in this chapter that Bohier's understanding of *consuetudo* was medieval and heavily influenced by Baldus' own approach to the term.

Baldus' commentary on the Digest reveals a great deal about his own understanding of the term *consuetudo*.³⁵ His treatment of D.1.3.32 is especially illuminating. Here, Baldus outlines his position on "statutes, *senatus consulta*, and long-established custom", with some 141 individual points made by the jurist. He states that where *lex* (statute) is deficient, custom stands,³⁶ and further that custom extends to similar cases by analogy.³⁷ The use of custom takes place where there is no written law, either because there is none or it has fallen into desuetude.³⁸ He differentiates between custom and statute through the different nature of their forms: that statute is written and custom is not.³⁹ He further elucidates by stating that statute can be made at once, but that "*consuetudo similis est homini*", in the sense that it progresses through time and ages like a human.⁴⁰ He also states that the *communis opinio doctorum* should be enforced as if they were custom,⁴¹ and so demonstrating a

³³ Given Bohier's Montpellier legal education, it seems likely that he was influenced by the Italian approach to the law. See chapters 2 and 3 of this thesis for greater detail on University education of this period. Also: R. Helmholz, *Natural law in court: a history of legal theory in practice*, (Cambridge, MA., 2015), pp. 13-40; M. Bellomo, *The common legal past of Europe, 1000-1800*, (Washington, D.C., 1995), pp. 112-125; R. van Caenegem, *An historical introduction to private law*, (Cambridge, U.K., 1996), p. 80; J. Brundage, *The medieval origins of the legal profession*, Volume 1, (Chicago, 2008), pp. 323-325; J. Brundage, "The teaching and study of canon law in the law schools", in W. Hartmann, K. Pennington (eds.), *The history of medieval canon law in the classical period, 1140-1234: from Gratian to the decretals of Pope Gregory IX*, (Washington, D.C., 2008), pp. 98-120.

³⁴ See chapters 1 and 2 of this thesis.

³⁵ Edition used is 1599 (Lyon).

³⁶ Ad D.1.3.32, pr. 1: "*Lex ubi deficit, statutorum consuetudini*".

³⁷ Ad D.1.3.32, pr. 5: "*Consuetudo extenditur de similibus ad similia*".

³⁸ Ad D.1.3.32, pr. 3: "*In quibus causis est utendum consuetudine*".

³⁹ Ad D.1.3.32, pr. 7: "*Lex, & consuetudo quomodo differant*".

⁴⁰ Ad D.1.3.32, para 9.

⁴¹ Ad X.1.2.5, "*opinio communis habet vim consuetudinis*", *Syntagma communium opinionum*, (Lyon 1609), *Praefatio*, No. 33, cited by D. Ibbetson, "Custom in medieval law", in Perreau-Saussine and

further dimension to Baldus' understanding of the term *consuetudo* and it is possible to identify such an approach also being employed by Bohier in his *Consuetudines*.

David Ibbetson has highlighted the main elements of *consuetudo* as: longstanding nature of a practice (*inveterata*), stemming from the tacit consent of the people; being unwritten (as distinct from statute); may not prevail over a contrary *lex*; and must not be contrary to *ratio*.⁴² The issue of popular consent⁴³ in particular was vital to Baldus' approach to *consuetudo*, and his was marked by a distinctly pro-*populus* stance. The suggestion here was to "place the *populus* above the *princeps* as a source of law, but the more practical purpose was to reinforce the professional judicial monopoly over legal interpretation."⁴⁴ In short, authority over the interpretation of *consuetudo* was to be steered away from the sovereign. Indeed, we see this preference for *populus* over *princeps* in Baldus' treatment of D.1.3.32, where he outlines the view of Placentinus who states that only the *princeps* makes law and that as a result no custom can exist unless induced from the conscience of the *princeps*. In contrast, Baldus argues that this is not the case and that no such knowledge is needed.

Consent underpins *consuetudo*, according to Baldus. The role of consent in Bohier's understanding of *consuetudo*, and its similarity with D.1.3.32 was considered above. As will be shown in this chapter, Bohier relies on Baldus' commentary on this section of the Digest in the *Consuetudines* for a key part of his discussion.⁴⁵ The jurists needed a way to distinguish non-binding practices from binding customary law, and they found this in the interlocking criteria of duration, repetition, and *tacitus consensus*.⁴⁶ The extent to which this authority really stemmed from the people is debatable. It is perhaps more accurate to think of it as authority stemming from "the exercise of legislative sovereignty by the judges."⁴⁷ In this sense,

Murphy, (n. 7), p. 161. Now also see C. Humfress, "Law and custom under Rome" in A. Rio (ed.), *Law, custom, and justice*, (London, 2011), pp. 23-47.

⁴² *Ibid.*

⁴³ Ford, (n. 2), p. 268. Earlier in this thesis, it has been recognised that the understanding of popular consent would have been with reference to what Ford has called learned opinion. See J. Ford, *Law and Opinion in Scotland During the Seventeenth Century* (Oxford, 2007), p. 268.

⁴⁴ Kelley, (n. 21), p. 136. See further the recent work of D. Lee, *Popular sovereignty in early modern constitutional thought*, (Oxford, 2016), pp. 122-130.

⁴⁵ See below at 4.2.3.1. In the *Consilia*, it was shown that Bohier relied extensively on Bartolus and his approach to D.1.3.32. He relied on this for his treatment of *stylus*, and also for the concept of custom generally. See chapter 3 in this work for the study of the *Consilia*.

⁴⁶ E. Kadens and E.A. Young, "How customary is customary international law?", (2013) 54 *William and Mary Law Review* 885 at 889.

⁴⁷ Ford, (n. 2), p. 311.

then, consent may be thought of as representing the authority of judiciary over that of the *princeps*.

2.1.1 Baldus and the *ius commune*

Baldus views the function of Roman law as both to supplement the customs and statutes, as well as providing a standard for their interpretation.⁴⁸ He held that city customs and statutes were able to revoke provisions of Roman law in their own territory, in contrast to the position of local laws and canon law.⁴⁹ He states: “for the common law is like the genus and municipal like the species; and if the municipal were to be contrary to the common law, it revokes it, both because it is later in time, and because species modifies genus.”⁵⁰

Where a custom provides for a matter already provided for by the Roman law, it does not revoke it, but suspends it according to Baldus. In short, where a special custom or statute exists, it succeeds over the *ius commune*, for it is specific to the locality and not of general influence:

I say that local custom prevails there over the usage, that is the observance of Roman law; I do not however say that it would fundamentally eradicate the Roman law from that place, for these are two different things. For if it were completely to eradicate the Roman law from that place, and then, let us suppose, a statute were made annulling the custom, that place would be left without any law [D.1.2.2,1]. But because the Roman law has not been abolished, but only the effect of that law, when the custom has been annulled we remain within the common law, and this matter reverts to its natural state, because the law was not completely destroyed, only hidden.⁵¹

According to Baldus, the so-called “natural state” is that where the *ius commune* operates: it is an assumed authority. The common law, the *ius commune*, is Roman law for Baldus. If Bohier had relied on Baldus’ position on custom, it follows that a similar adoption may have been made for the *ius commune*. If this were the

⁴⁸ J. Canning, *The political thought of Baldus de Ubaldis*, (Cambridge, U.K., 2003), p. 149; Canning cites D.12.1.2, 3 as evidence for this.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 149. Canning notes that elsewhere, Baldus states that the *ius commune* can be revoked by custom and statute, by presenting it as a group of mutable enactments. (eg. Inst.1.2.1, n. 19).

⁵¹ Ad D.1.3.32 (fol. 16 v), translation by Canning, (n. 45), p. 150. For an example of this, see below in this chapter at 8.1.

case, Bohier's understanding of the *ius commune* would undoubtedly be linked with what is essentially the civilian idea of Roman law.

Elsewhere in his commentary on D.1.3.32, Baldus mentions the *ius commune*, and briefly considers the question of competition between it and *consuetudo*. He states that where the *ius commune* dictates that a woman inherits, but the *consuetudo* provides otherwise to the contrary, the woman does not inherit.⁵² The authority of *consuetudo* here is clear. In his commentary, Baldus refers to the interpretative quality of custom: "*consuetudo legem interpretatur*".⁵³ Custom is therefore used to interpret law.

It will be shown in this chapter that Bohier adopted many of Baldus' approaches to *consuetudo* and its relationship with other sources such as statute and the *ius commune*. This is not to say that he was fiercely loyal to Baldus, or even that this was a conscious adoption to demonstrate his approval or affiliation.⁵⁴ Instead, it seems likely that Bohier consulted it directly, as far as it is possible to tell, and this is significant. The extent to which this is a shared approach with the *Consilia* and *Decisiones* will be considered at the conclusion of this thesis. For now, however, it is stated here at the outset in recognition of how Bohier's perception and application of custom influenced his understanding of the *ius commune*.

3. Analysing the *Consuetudines*

Assessing the incidence and use of the term *ius commune* in the *Consuetudines Biturigium* enables a comparison to be drawn between this work and those that recorded the law in action, such as the *Consilia* and *Decisiones*. It will be investigated whether the term appears in the same kinds of cases and what citations accompany it. In the *Consilia* and *Decisiones*, as highlighted earlier, the key markers of the *ius commune-ius proprium* relationship, that of restrictive and expansive effects of the *ius commune*, were not specifically custom law-centred. By the very nature of

⁵² Ad D.1.3.32 (fol. 21 v).

⁵³ Ad D.1.3.32, pr. 32.

⁵⁴ Xavier Prévost has considered this in the case of Jacques Cujas. He states that Cujas referred to the likes of Baldus and Bartolus, but comments on the "uneven use" of their sources, with Cujas referring to them in an inconsistent manner. See X. Prévost, "Reassessing the influence of medieval jurisprudence on Jacques Cujas' (1522-1590) methods" in Du Plessis, P. and Cairns, J. (eds.), *Reassessing legal humanism and its claims: petere fontes?*, (Edinburgh, 2016), pp. 88-107, at pp. 100-104.

the *Consuetudines*, the focus is on custom, but this does not mean that statute is not considered; it features prominently alongside custom and is therefore considered also.

3.1 The language of custom

The *Consuetudines* is written in both Latin and French, the two appearing alongside each other throughout. French is used in the written version of the customs, which is then followed by comments in Latin, and which form the main body of the *Consuetudines*. The motivations behind the mass recording of custom into written collections have been considered already, but it relates also to the issue of language that was itself politicised. In 1539, the *Ordonnance de Villers-Cotterêt* officially removed remnants of written language rivalry between Latin and French when it provided for administration and court proceedings to be written only in French to the exclusion of the regional variations and Latin.⁵⁵ The use of both languages in the *Consuetudines*, therefore, can be seen as a balancing of the two languages and what they represented at this time in the legal sphere. Such harmonisation was not seen in the *Consilia* and *Decisiones*, which were both purely Latin-based and so it is immediately clear from the outset that the *Consuetudines* is a very different kind of source.

According to Lawrence M. Friedman, lawyers' legal thought is bound to its culture and this sets the parameters within which legal thought is able to change.⁵⁶ This has some relevance in the context of the language of custom. Friedman distinguishes between external and internal legal culture: the latter is the culture of the lawgiver and those involved in the administration of law.⁵⁷ The internal legal culture of the court in Bordeaux was one rooted in Latin. As the traditional language of the court, this is to be expected. However, the shift towards the inclusion of French language represented a change not seen in the *Consilia* and *Decisiones*, which were presented only in Latin. This suggests that the *Consuetudines* was written for a different audience; one that also included those out with legal practice.

⁵⁵ See J. Foyer, "L'ordonnance de Villers-Cotterêt", (1989) 133 *Comptes rendus des séances de l'academie des inscriptions et belles-lettres* 636; and further, L. Oakes, *Language and national identity: comparing France and Sweden*, (Amsterdam, 2001), pp. 55-56.

⁵⁶ L. Friedman, *The legal system*, (New York, 1975), p. 206.

⁵⁷ *Ibid.* Friedman, p. 223.

Immediate similarities between this text and the practice-oriented *Consilia* and *Decisiones* can still be drawn. As was the case with those two works, there is a visible pattern in terms of the areas of law in which the term *ius commune* is most commonly mentioned in the *Consuetudines*. It arises in those customs dealing with marriage (including the likes of dowry⁵⁸ and rights of married women⁵⁹), and property (such as prescription⁶⁰ and *retrait lignager*⁶¹). In addition to such matters, Bohier also considers questions of jurisdiction, such as the relationship between the customary law of Bourges and customs of neighbouring places.

Fig. 1: Where the term *ius commune* is mentioned in the *Consuetudines*

SOURCE	TOPIC
<i>Folio 4</i>	Contractual capacity of married women.
<i>Folio 6</i>	Fiefs and <i>cens</i> .
<i>Folio 9</i>	Guardianship.
<i>Folio 11</i>	<i>Retrait lignager</i> .
<i>Folio 21</i>	Judges and jurisdiction.
<i>Folio 33</i>	Prescription.
<i>Folio 48</i>	<i>Seigneurial</i> system.
<i>Folio 56</i>	<i>Retrait lignager</i> .
<i>Folio 61</i>	Marriage ceremony/donations between husband and wife.
<i>Folio 65</i>	Dowry on death.
<i>Folio 68/69</i>	Donations made during marriage.

3.2 Classifying custom

In terms of identifying where the *ius commune* is mentioned, the table above demonstrates the areas of customary law where it appears most often. However, in

⁵⁸ Folio 65.

⁵⁹ Folio 4.

⁶⁰ Folio 33.

⁶¹ Folio 56.

terms of presenting these findings, it is necessary to further categorise these customs. For the *Decisiones*, the study was divided between matrimonial and property matters. This classification is not as useful here, as, unlike the *Decisiones*, the customs are already categorised by Bohier into separate areas of law. It has been recognised already that the *Consuetudines* is a very different source from those practical law texts examined previously, and so it is therefore deserving of its own classification. Findings from the work will, however, be examined with the restrictive and expansive applicability test used in the *Consilia* and *Decisiones* in mind, and this will be considered throughout this chapter.

Bohier considers the following: marriage and dowry; use and law of the state of persons; donations; married women; fiefs and cens; prescription; *retrait lignager*; and judges and jurisdiction. These will be examined in turn. Like the approach towards the areas of law considered in the *Consilia* and *Decisiones*, it is not possible to go into significant detail on individual points of law that arise in each of the customs where the *ius commune* appears. As a terminological study, first and foremost, while this chapter will of course consider those kinds of cases that the term appears in, the focus that has been present throughout this thesis, on the specific use of the term *ius commune*, will remain. This is equally the case with citations: they are only considered where they are regarded as significant.

4. “Customs and uses, the laws of the state of persons”⁶²

4.1. Married women’s contractual capacity⁶³

As part of his treatment of “married women”, here Bohier discusses the rights of a married woman to sell or purchase property, in particular the power of her husband, and father, over her ability to do so. He states:

Consuetudo vel statutum civitatis, vel loci, quod vxor non possit esse in iudicio sine consensu mariti, valet...quia in iudiciis quasi contrahimus. Nam postquam in potestate mariti est,

The custom or statute of a city or a place, states that a wife cannot appear in court without the consent of her husband, is valid...since in court cases, it is as if we are contracting. From the moment the

⁶² “Des coutumes & usaiges, des droictz de l’estat des personnes.”

⁶³ Folio 4, nu. 4.

requiritur eius consensus & auctoritas.

wife becomes subject to the husband's *potestas*, his consent and authority are required.

The *ius commune* is then mentioned once. Following this introduction, Bohier enters into a broad discussion about the circumstances in which such a custom exists. In support of this, he cites Petrus de Ancharano, Signorollo Homodei, Baldus, and Franciscus Aretinus. All mention the prevalence of this custom in various places, such as Pavia, Siena and Tortona. Joannes Imola states that custom departs from the *ius commune* and should be interpreted strictly. Bohier disagrees with the grounds put forward for this departure, as he says that such a custom has not been introduced “*in favorem mulierum*”. He relies on Bartolus and Jason de Mayno in support of this statement.⁶⁴

4.1.1 A matter of interpretation

Reference is made to Petrus de Ancharano's *consilium*, and the discussion found there considers statute instead of custom: “*unde prohibitio statuti inhibentis mulieres maritatas contrahere vel aliquam obligationem inire super dote vel rebus aliis a marito possessis.*”⁶⁵ Bohier's reference to this source then, assuming he referred to it, indicates an equation of both custom and statute in terms of the standards of interpretation involved. This is different to what was seen elsewhere in his other works so far.

According to Bohier, Franciscus de Aretinus' *consilium* is identical to the discussion contained here in the *Consuetudines*. Reference to this source reveals a case that handles similar points of law, and Aretinus states: “*Secunda ratio fundatur quia statutum prohibet mulierem obligari sine consensu viri. Sed ubicunque mulier*

⁶⁴ “*Et etiam valet consuetudo non possit contrahere sine mariti auctoritate: [ut tenet Pet. de Ancha.consi.cccclxxxiiii. & Signo. de Hom. consil. clxvi. Bald. consil. cccclxiiii. li. iii.] ubi dicit similem consue. esse [Papiae. & Abb.Sic. consi.xl.vol.ii.] dicit pariter esse in civitate Senensi. Et illustr.doc.Franci.Areti. recitat [con. Liiii.] esse in civitate Tortonae: & est de verbo ad verbum huic similis, ubi eum vide, quando quidem Ioa Imol. [consil.lxxiiii.] dicit esse contra ius commune. [l.ii.C. de pact conven. &] est stricte intelligenda: tamen non est, quia non est introducta in favorem mulierum secundum Bart. & Ia...*”

⁶⁵ *Consilium 384, Consilia sive juris responsa*, (Venice, 1585). Own translation: “from the statutory prohibition forbidding married women to contract or enter into any commitment on her husband or other property.”

prohibetur obligari non videtur prohibita donare.”⁶⁶ Therefore, according to Aretinus, a woman is prohibited from binding herself, but this restriction does not apply in the case of giving gifts.⁶⁷

4.1.2 Custom and the *ius commune*

Here, custom stands and does not receive strict interpretation according to the *ius commune*. Bohier acknowledges the opposing view of Joannes de Imola’s *consilium*,⁶⁸ where the following statement is found: “*ius commune in interpretatione statutorum laedi non debet*”.⁶⁹ This citation, although rejected, is nevertheless revealing. It referred to statute, not custom. This suggests that here Bohier was making an equation between custom and statute. Or, perhaps he did not refer to the source himself. Further, Bohier cited this source as evidence of divergent opinion on the topic at hand, and not to support his own line of argument. Bohier follows this citation with the statement that this view is not to be adopted as this custom is not introduced in favour of women and cites Bartolus and Jason de Maino as evidence for this.

The mention of the term *ius commune* is not strictly by Bohier, but through Joannes de Imola. Here, this does not diminish its significance. Instead, it demonstrates Bohier’s willingness to go against the *ius commune* rule and instead follow a customary provision, without attempting a strict, and so harmonious, interpretation of it. This is in line with approaches to the relationship between the *ius commune* and custom elsewhere; where custom is paramount. However, in many of those cases, where a reading in line with the *ius commune* is possible, custom is interpreted in that manner. This is not the case here. While it is true that this mention of the term was not necessarily integral to the rule provided by Bohier here, it has been included because of the consequences of Bohier acting against the *ius commune*.

⁶⁶ *Consilium 54, Consilia Domini Francisci de Aretio* (Lyon, 1546). Own translation: “The second reason is based on the fact that the statute forbids the wife to bind herself without the consent of [her] husband. But wherever the wife is prohibited to bind herself she is not [also] forbidden from making gifts.”

⁶⁷ See folio 61. This is discussed below at 5.1.

⁶⁸ *Consilium 79, Consilia* (Venice, 1581).

⁶⁹ Own translation: “The *ius commune* ought not to be harmed by the interpretation of statutes.”

4.1.3 *Ius proprium* trumps *ius commune*

Bohier's treatment of *ius commune* in this custom is neither strictly restrictive nor expansive, but instead is an example of customary law's superiority over the *ius commune* in this case. As stated above, this contravention of the *ius commune* is really more an example of Bohier ignoring the opinion of Joannes de Imola who states that not following a strict interpretation of custom in this case would result in going against the *ius commune* rule. In this sense then, it could equally be an example of Bohier disagreeing with Joannes de Imola's belief that such a practice would be contrary to the *ius commune*, where he argues otherwise.

4.2 Guardianship: mother's rights over children⁷⁰

Bohier explains that the matter before him is specifically in the case of nobles: “*entre gens nobles*”. The custom in question provides that a father has the guardianship (put here as *baillistre*) of his children as minors.⁷¹ The second part goes on to provide that in the event of the father's death, the mother has guardianship but only where she is aged twenty-five years old or above.

There are a number of references to the *ius commune* here. It first appears when Bohier considers *consuetudo generalis*:

[1] *Haec consuetudo generalis est iuri communi consona non solum inter nobiles, sed etiam inter paganos seu ignobiles: ut patres habeant tutelam & administrationem corporum, & bonorum liberorum suorum de nobilibus. [l. fi. & ibi. doct. Alex. & Ia. C. de testa.mili. & l.cum filius fami.ff.eo.ti. & l.ii.ff.de test.tutel.]*

[1] This general custom is in accordance with the *ius commune* not only among the nobility, but also among pagans or men of lower orders: that fathers have the wardship and management of body and wealth [assets] of their children.

[2] *Sed consuetudo disponit, quod mater, vel pater succedat solum eius liberis in bonis mobilibus, quae plerumque; sunt modica, & alii agnati, & cognati in gradu re motiores contra ius commune in*

[2] But custom provides that a mother, or a father succeeds their children only for movable goods, which are typically of modest value. The same custom provides that other and more distant relatives may

⁷⁰ Folio 9, nu. 6.

⁷¹ On the issue of guardianship more generally, see: C. Corley, “Gender, kin and guardianship in early modern Burgundy”, in S. Desan and J. Merrick (eds.), *Family, gender and law in early modern France*, (Philadelphia, 2009), pp. 183-222.

melioribus fundis succedant.

inherit larger estates, contrary to the *ius commune*.

[3] *Imo secundo Bal. si consuetudo, vel statutum corrigat ius commune in successione, non corrigat in tutela, nec econtra, quia per similitudinem casuum non inducitur legum correctio, ut dicit glossa...*

[3] According to Baldus, if a custom or a statute correct the *ius commune* on matters of succession, it does not correct it on the law of tutelage, because the law cannot be amended according to analogous cases as the Gloss says...

4.2.1 *Ius proprium* corrects *ius commune*

The first three references to the term offer a valuable insight into Bohier's attitude towards the matter of competing authorities. In the first instance, he speaks of *consuetudo generalis* and acknowledges that it is consistent with the *ius commune* position on the matter of fathers' control over their children and their assets.⁷² He acknowledges that this custom and *ius commune* apply equally among nobles and pagans, emphasising the broad scope of this rule as a universal one. This statement of compatibility is followed by recognition of inconsistency between custom and *ius commune* in other aspects. While custom states that parents may succeed their children, they are only entitled to movables, the same custom provides that other relatives have the ability to inherit larger portions of the deceased's estate. This is against the *ius commune* according to Bohier. The final part of this trio of statements is the most important and he clearly sets out the parameters of custom and statute in relation to the *ius commune*: custom and statute can correct the *ius commune* in cases of succession, but not in guardianship. In terms of an explanation for this limited superiority of *ius proprium*, Bohier explains that *lex*, and here this is clearly meaning *ius commune*, cannot be corrected by mere analogy. So, while this case encompasses both succession and guardianship - the rules of which are not to be analogously extended to succession - custom provides for extended family to inherit immovables, contrary to *ius commune*.

Here, *ius proprium* effectively trumps *ius commune*, but it is also revealed that this is casuistic and so dependent on the nature of area of law that it features in. Of

⁷² This is consistent with the Roman law of *patria potestas*. Further on this, see L. Waelkens, *Amne adverso: Roman legal heritage in European culture*, (Leuven, 2015), pp. 194-195.

course, it does not necessarily follow that rules on guardianship specifically provide for the *ius commune* to apply, but rather because amendments to the law are not possible by way of analogous application, according to Baldus, there is no equivalent rule for cases of guardianship. This short statement reveals a great deal. Custom trumps *ius commune* here only because it expressly provided so. This implies that unless stated otherwise, *ius commune* applies.

4.2.2 According to the *ius commune*

Bohier continues to distinguish guardianship and sets out the *ius commune* position:

[4] *Et licet de iure requiratur quae? Mater sit maior. xxv. annis ut [no. d. auth. matri. & auth. sacramentum. c.ti. & insti. de fide tut.] & ibi Io. Fa. Christoph. Porc. & Ang. Areti... proxii. in gl. iii. tamen consuetudo potest etiam mater minor habere tutelam suorum liberorum, quae videlicet secundum Baldus consilia ci. lib. ii. pro qua secundum eum facit gloss quam sequitur ibi Bartolus & doc. [l. ii. ff. de eo. quod certo loco in glo. i.] quae dicit, quod lex statutum, vel consuetudo specialis alicuius dici potest habilitare minorem ad aliquem actum, quod non in alio loco. licet secus secundum Bal. [d. consi. ci]. si consuetudo vel statutum disponderet, quod in omnibus negociis contractibus, & iudiciis ac causis legitima aetas censeatur esse. xviii annorum, quod non extenderetur ad tutelam, ad quam de iure communi non admittitur minor xxv annis, ut probat per decem rationes singulares, ut ibi vide.*

[4] However, it is required by law that the mother achieves majority at 25 years... nevertheless the custom exists whereby a mother [who is still a] minor can also have guardianship of her children. For Baldus in his *consilium* 101 in book 2, interprets the gloss after Bartolus and the doctors, at some point in the gloss 1 it says that law, statute or some special custom can be said to empower a minor to do certain things which [the same minor] [could] not do in another place. Even if, according to Baldus's *consilium* 101, there is a custom or statute which says in all contractual matters or legal business one comes of age at 18, it does not extend to guardianship because the *ius commune* requires one to be over 25, which he [Baldus] proves with ten specific reasons, which you may see there.

4.2.3 Baldus

Bohier's use of the term *ius commune* here is closely linked with his reference to Baldus. He refers to the jurist for each of the main parts of his argument, while also

acknowledging the influence of Bartolus on his writing. The crux of Bohier's argument relies on Baldus' *consilium* 101. Reference to his *Consilia* reveals a detailed examination of the issue under discussion by Bohier. Here Baldus states that "*habeat locum in tutela ad quam de iure communi non admittitur minor xxv.*"⁷³ An observation of a terminological nature needs to be made at this point. Baldus' own reference to the term "*iure communi*" indicates that Bohier's citation of the jurist and this work was therefore referring to something beyond Baldus as representative of the term, rather than Baldus himself representing the *ius commune* per se. Bohier's reliance on this *consilium*, and it is contended that it was relied on here specifically, is in itself evidence of his acceptance of Baldus' own reliance on other sources. This is an obvious point, admittedly, but it is nevertheless important and needs to be stated here. So, in effect, when Bohier cites Baldus here, he is relying on the Gloss, for that it is what Baldus himself cites. As shown in the excerpt provided above, Bohier adds that this view takes after Bartolus' stance too. Among the ten points made by Baldus here, there is a further reference to the *ius commune*, where he repeats his position that it does not allow a minor under twenty-five years of age to have rights of guardianship.⁷⁴ In support of this, Baldus cites the Codex at C.5.30.1 (a. 290).⁷⁵

The Roman law position on guardianship was clear: under C.5.32.2 (a. 215), widowed mothers were able to ask to be appointed to manage the affairs of their children, before they could be legally appointed to perform such a duty, on the condition that they made a statement that they would not remarry.⁷⁶ The Canon law position similarly enabled guardianship of children in this way.⁷⁷ In Bohier's example, guardianship was clearly permitted, but the age at which the mother would be able to, was debated. This is acknowledged by Baldus in his *consilium* that Bohier cites. However, the caveat is made that the rules for contracting and business at the age of eighteen do not extend to guardianship. Bohier attaches significance to this exception. Looking to Bohier's later discussion within this part of the *Consuetudines*,

⁷³ Baldus, *Consilia*, Volume 2, *consilium* 101, *pr.*, (Venice, 1575). Translation: So here the *ius commune* requires one to be over 25 years old to become guardian.

⁷⁴ Baldus, *consilium* 101, "*loquendi de tutela sumus in iure communi quo iure minor xxv annis tutor esse non post.*"

⁷⁵ "*C. de legitima tutela.*"

⁷⁶ "*Matres, quae amissis viris tutelam administrandorum negotiorum in liberos postulant, priusquam confirmatio officii talis in eas iure ueniat, fateantur actis sacramento praestito ad alias se nuptias non venire.*" See further on this: Waelkens, (n. 69), pp. 240-242.

⁷⁷ T. Kuehn, "Daughters, mothers, wives and widows", in A. Schutte, et al. (eds.), *Time, space, and women's lives in early modern Europe*, (Kirksville, 2001), p. 100.

he does mention the rule as contained in C.5.32.2 (a. 215). However, it does not appear to be mentioned as part of the discussion as to the age of the mother. Assuming Bohier is making a statement generally about the age of a mother in relation to guardianship, then, it is possible to demonstrate a reliance on the interpretation of Baldus over the direct sources of Roman law, such as that shown in the Codex. This suggests that Bohier's perception of the *ius commune*, which here states a minor cannot be admitted to the role of guardianship, is one directly linked to Baldus, and by association Bartolus, whom he mentions here in relation to this point too.

4.2.3.1 ***Consuetudo generalis* and *consuetudo specialis***

Bohier refers to “*consuetudo generalis*”, and its application among the nobility and extending to pagans also. In his final mention of the *ius commune* he refers to “*consuetudo specialis*” alongside statute. He relies on Baldus' commentary on D.1.3.32 for this. As part of his commentary here, Baldus focuses on the relationship between *consuetudo generalis* and *consuetudo specialis*.⁷⁸ Here, he states that according to the glossators, custom is general and trumps *lex*. If it is a special custom, attached to a certain place, it then lifts the *lex* in that place. Bohier relies on this distinction between *generalis* and *specialis* and it is mentioned on two occasions. According to this, a general custom abrogates a law generally and a special custom abrogates a law specially. So, in theory, a special custom could not abrogate a law generally.⁷⁹

Baldus was interested in defining the relationship of custom to other sources of law and its validity as law itself. He emphasises the validity of custom, and this was undoubtedly motivated by practical considerations of his time, to “justify local self-regulation against the undesirable external controls of latter-day emperors and popes, but also to provide a basis for the reasonable interpretation and moderation of the local statutes in the light of the common law tradition.”⁸⁰ This conception of general and local custom is directly related, and Bohier's adoption of it is important.

⁷⁸ Ad D.1.3.32, pr. 19: “*Consuetudo quo casu tollat legem*”; pr. 26: “*Consuetudo specialis non tollitur per legem generalem sequentem.*”

⁷⁹ R. Simonds, *Rational individualism: the perennial philosophy of legal interpretation*, (Amsterdam, 1995) p. 81.

⁸⁰ *Ibid*, p. 106.

His reliance on this reveals the *ius commune* as representative of "fundamental components", stemming from entrenched Roman and Canon law. The modification of those principles – represented by the *ius commune* - was generally not possible, with some notable exceptions: in the case of those topics that were of a Canonic nature, such as guardianship and marriage, the Pope was historically vested with the right to alter such principles.⁸¹

The treatment of custom in this way related more generally to the division between written and unwritten law. Bohier wished to make clear that laws (including custom) could correct other laws, and that they existed in layers. In order to overcome the position of C.8.53.2 (a. 397) which held that custom cannot overcome reason or law (“*verum non usque adeo sui valitura momento, ut aut rationem vincat, aut legem*”), the approach of general and special customs operated.⁸² His adoption of the “general” and “special” split in custom then ultimately served to elevate custom’s authority and made it easier to set against the likes of the *ius commune*. However, it is equally possible to interpret this as enabling the overriding of custom in certain circumstances. In the case of guardianship discussed here, this second effect appears to have been the dominant one.

4.3 Guardianship: ward’s estate⁸³

Bohier begins with “*Licet de iure communi officium tutoris sit gratuitum*”, and states:

[1] *Nam requiritur quod tutor sit nobilis: quia si ignobilis habeat tutela, nobilis nihil tamen lucratur. [ut i. eo. pe.] cum talis tutela nobilis debeat in dicto casu regi secundum ius commune, ut ibi dicitur secundum quod nihil habere debet: ut supra dictum est.*

[1] Indeed it is required that the tutor be noble. For if a base person were to have guardianship, the noble would however gain nothing ... for such a guardianship has to follow the *ius commune*, as one should conclude that [the guardian] is not entitled to anything, as said above.

⁸¹ J. Brundage, “*E pluribus unum*”, in M. Korpiola (ed.), *Regional variations in matrimonial law and custom in Europe, 1150-1600*, (Leiden, 2011), p. 36. See Hostiensis on this: Brundage cites him and acknowledges that he distinguished between widespread customs, general customs that were observed throughout a whole province, and special customs that were limited to a single city or diocese. *Summa aurea* lib. 1, tit. *De consuetudine*, 11, fol. 15. Also to his *Lectura* X.1.4.8, 9-10, fol. 31. See elsewhere in this thesis, (Chapter 4, 3.1), where Bohier refers to the Pope as the “only competent judge” in certain cases: “*solus Papa est iudex competens*”. See *Decisio* 2, para 6.

⁸² Simonds, (n. 79), pp. 80-81.

⁸³ Folio 10, nu. 11.

[2] *De iure communi secus: quia non lucratur bona mobilia sui pupilli. [l. lex quae tutores & l. fi & ibi do. C. de adm. tuto.] tamen haec consuetudo servatur inter nobiles solum, ut supra dictum est, per quae deciditur illa vulgata quaestio, de paupere tutore, qui post finitam tutelam reperitur dives, an praesumatur de bonis pupilli: haec consuetudo facit quod sic cum fructus & mobilia lucretur.*

[2] It is different in the *ius commune*, because a noble person has nothing to gain financially from an ignoble person... But, that custom is kept only among noblemen, as said above. And this is the way to solve that common issue about the guardian of little means [lit. the poor guardian] who after the guardianship is over is found to be wealthy, on whether [those properties / assets / riches] are to be presumed [to come] from the ward's estate. According to this custom, the guardian acquires fruits and movables.

This is an example where two approaches to the *ius commune* and custom appear. In the first instance, Bohier adopts a restrictive application according to the *ius commune*, where in the case of a noble guardian, that individual would not be entitled to anything from their ward. However, Bohier then refers to the *ius commune* once again, stating: “it is different in the *ius commune*”. He explains that under the *ius commune*, the guardian does not gain the movables that belong to their ward. However, he qualifies this rule, claiming its application is only in the case of noblemen and that elsewhere, such as those involving a poor guardian, that it is presumed that their wealth has emanated from the ward's estate and so the custom applies, with the guardian acquiring fruits and movables.

4.3.1 Limited remit of the *ius commune*

This is not strictly an example of custom overriding *ius commune*. Instead, it is something more akin to custom operating and being applied freely, but still with recourse to the *ius commune* in order to ascertain where it applies. The *ius commune* is still considered, and only dismissed as having relevance in the case of a “poor guardian” because Bohier determines that its remit extends only to those of “noblemen”. This interpretation of the *ius commune* leaves him to determine that custom can apply without reference to it in other circumstances. In the case of noblemen, then, the *ius commune* has a restrictive application on custom, but in other cases, the rule in customary law applies. It is also equally valid to view this as a purposively strict interpretation of the *ius commune*, so as to enable a more expansive

application of custom in this case. What is clear, however is that the authority of the *ius commune* rule was such as to cause Bohier to still consider it, even if it was to determine its scope a limited one.

4.4 “Guardianship is governed by the *droit commun*”⁸⁴

In the introduction to the final part of the *Consuetudines* where the *ius commune* is mentioned in relation to guardianship, Bohier states that the *droit commun* governs guardianship.⁸⁵

quod haec consuetudo se refert iuri communi. Ideo secundum ius commune debet intelligi.

that this custom refers to the *ius commune*. So it is to be understood according to the *ius commune*.

In short, custom refers to the *ius commune* and is to be understood according to it as a result.⁸⁶ This is another example of interpretation according to the *ius commune*. Bohier states that were custom refers to the *ius commune* it is to be understood according to the *ius commune*. This use of “*refert*” is taken to mean where custom refers to an area of law that is already provided for by the *ius commune*. This statement corresponds with the other examples involving guardianship where custom and *ius commune* meet, and which have been considered above. There has therefore been a uniformity in approach towards the *ius commune* role in these customs. In this particular instance, Bohier cites Baldus’ *Consilia* again, this time referring to *consilium* 141.⁸⁷ Baldus has a prominent presence in Bohier’s treatment of those customs that handle guardianship.⁸⁸ His works have been used for each of the different customary provisions examined where the *ius commune* appears.

4.4.1 Casuistic application of the *ius commune*?

⁸⁴ Folio 11, nu. 13.

⁸⁵ (xiii) “*Item & sil [sic] ny [sic] a aucun parent ou lignaigier dudit mineur pupille capable davoit [sic] ledit [sic] bail: ou si le parent capable ne veult prendre & accepter ledit [sic] bail, ledit [sic] mineur doit [sic] estre gouverne en tutele selon le droit commun.*”

⁸⁶ This is consistent with the *repertorium* entry, as mentioned earlier in this chapter, at 2, “Bohier’s understanding of *consuetudo*”. There, it is stated that: “*Ubi de consuetudo se refert iuri communi, debet intelligi secundum ius commune.*”

⁸⁷ “*Bald. in consil. cxli. incipien. supposito statuto lib. i.*”

⁸⁸ Folio 9, nu. 6.

Bohier's take on the *ius commune-ius proprium* relationship in the context of guardianship is therefore one predicated on Baldus and is strictly protective of the *ius commune*. This leads to the conclusion that the relationship between the *ius commune* and *ius proprium* is one whose character depends on the kind of cases they appear in. In the case of guardianship, there have been three main approaches.

First, in the case of a mother's rights over her children.⁸⁹ Here, it was shown that the *ius commune* can be corrected by custom or statute. However, it was shown to be the case that it cannot be corrected in the case of guardianship. Further, the *ius commune* cannot be amended by way of analogy with other kinds of cases that may be similar.

Second, on the issue of a ward's estate, it was acknowledged by Bohier that cases related to guardianship have to follow the *ius commune*. However, it was argued that custom applies instead of the *ius commune* because the latter applies only in the case of nobility. It was suggested here that the outcome of strict compliance with the *ius commune* would not be favourable towards the guardian in this hypothetical case. It seems, therefore that the *ius commune* was given a restrictive reading by Bohier here. It is therefore reasonable to deduce that while guardianship is understood in accordance with those rules of the *ius commune*, it is still possible to follow custom, but only in those instances where the *ius commune* does not expressly provide for the circumstances at hand, and where custom offers a fairer alternative. However, this drive for fairness is clearly not a universal preoccupation, given the outcome in the case of guardianship for mothers under twenty-five where the *ius commune* position was interpreted strictly. Of course, enforcing the position of a woman at this time may not have motivated as it would have in other cases perhaps, but it is more likely that these two differed because there was a clearly defined rule on the issue of mothers' rights, as seen in the *consilium* of Baldus provided by Bohier.

The third reference to the term *ius commune* offered a seemingly straightforward statement on the issue; namely that where custom refers to the *ius commune* it ought to be understood according to it. This is consistent with the above approaches in the case of those customs that handle guardianship, except presumably with the added caveat that where the *ius commune* position is lacking, custom can apply.

⁸⁹ *Ibid.* See above at 4.2.

It is fair to state that where a custom deals with the issue of guardianship, the *ius commune* has a dominant role in its relationship with *ius proprium*. It is not, however, lacking limitations on its superiority. In contrast with other areas of law, though, this subject has a clearly defined role for the *ius commune*, and in this sense, then, it is possible to deduce that here the nature of the *ius commune* depends on the kinds of cases it is mentioned in. In terms of understanding what Bohier meant by the term, in the case of customs dealing with guardianship, it was very much a term that's definition and operation was rooted in the views of Baldus.

5. "Customs concerning marriage and dowry"⁹⁰

5.1 Donations between husband and wife⁹¹

Bohier considers the matter of donations between husband and wife. This takes place within a larger discussion about the procedures of marriage in terms of ceremony and consummation. The term *ius commune* is mentioned on three occasions here, and two incidences of *droit commun*, which have been included here as they are used alongside the *ius commune* twice.

5.1.1 Competing customs

Bohier considers the customs of Paris and Champagne, and the decision by the *parlement* of Paris on the matter at hand. He states:

[1] *Et similiter esset de consuetudine disponente (quae?) bona mobilia & conquaestus sint inter virum & vxorem communis. de qua in leg. quod habeat locum in sponsa de praesenti. & huic decisioni convenit haec consuetudo: tamen per curiam Parlamenti Parisius fuit in contrarium iudicatum contra quendam nobilem nomine Matthaenum sponsum de praesenti qui habere volebat ratione consuetudinis Campaniae bona*

[1] And the same is about custom providing that movables and what is acquired [during the marriage] as common [i.e. common ownership] among man and wife. And this custom is in agreement with this decision. However, the Parliament of Paris reached the opposite decision against some nobleman of the name of Mattheus, united in marriage *de praesenti*, who wanted [to follow] the custom of Champagne

⁹⁰ "Des coutumes concernans les mariaiges & douaires".

⁹¹ Folio 61, nu. 1.

mobilia quae lucrentur mariti nobiles. [ut infra eo. si.]

[where] the noble husband acquires the ownership of movables.

[2] *Sed si fiat pactum inter coniuges: ut plerunque nunc sit in contractum matrimonii: quod maritus sibi reservata quod poterit donare eius vxori constante matrimonio: vel in testamento: vel quod poterit eam in bonis suis pro cetera parte associare, & communem in bonis facere si marito placeret.*

[2] But if there is a pact between the spouses which is very common nowadays in matrimonial contracts, that the husband may donate the part of his assets that do not form part of the common asset to the wife during marriage, or in [his] will, he can create a common asset through a *pactum* and realise a full communion of assets if the husband so wishes.

Bohier states that common ownership, namely where movables and acquired assets during marriage are owned in common between husband and wife, is provided for in Bourges customary law. The Paris *parlement*, in contrast, decided in favour of a husband who sought exclusive ownership of movables under the custom of Champagne. Bohier continues by explaining that where a pact between the spouses which provides for some of the assets in common to be separate, then if he donates those parts to his wife in life, or through testamentary provision, they still amount to an asset held in common ownership. In another case concerning dowry later in the *Consuetudines*, Bohier again considers the divergence of opinion surrounding the intricacies of dowry provided for by different localities, and so this part of the discussion, which takes place shortly before the *ius commune* appears, is mentioned here now so as to demonstrate something of a consistency in the kinds of cases the term is mentioned: namely those involving competing customs in the case of dowry.

5.1.2 According to the *ius commune*

Reference is made to the *ius commune*, in accordance with a provision of the Codex:

[3] *Et sic debet intelligi d. l. quod sponsae. Quia licet paria sint, aliquid fieri tempore prohibito, vel conferre in tempus prohibitum: ut ibi tamen morte & traditione rei confirmabitur secundum ius commune per illam reservationem factam animo donandi... Et maxime quando ille qui donat, vel qui reservavit posse*

[3] And the *l. quod sponsae* [C.5.3.4] must be interpreted this way. For although it is the same doing and conveying something during a time in which it is not permitted, here however [what was done] in time of death and for the conveyance is to be confirmed, according to the *ius commune*, on the

donare, erat inferior alio coniuge: quia non videtur donasse intuitu libidinis seu conjugalis affectu: sed ut acquireret sibi illum honorem & parentelam alterius, puta si plebeius dives accepisset nobilissimum am pauperem, vel senex adolescentulam: quia tunc non est simplex donatio, immo constant matrimonio facta valeret de iure: quia est remuneratoria. ideo valet [ut not. Bar. in l. si ita stipulatu...]

basis of that reservation made in the mind of the giver... And especially when he who makes the donation, or reserves the possibility to do so, was of an inferior [social] status in respect to the other spouse, for in such a case he may not be considered to have made the donation for lust or marital affection, but in order to acquire the status and the relatives of the other spouse, say, if a rich peasant took a very noble [but] poor woman [for wife], or if an old man [took] a teenager girl. For then it is not a simple donation, and so even if made during the marriage is valid in law, for it is “remunerated”...

The term appears again shortly after, as part of the same discussion:

[4] *Item haec consuetudo hoc sentit dum dicit. Et aultrement contracter selon disposition de droit commun. Igitur debet consuetudo ista regulari, & intelligi secundum ius commune...*

[4] Also this custom says this is the meaning. And otherwise to contract according to the provision of the common law. A custom therefore ought to be ruled by it, and understood according to the *ius commune*...

At the opening of this part of *Consuetudo Bohier* states: “*Et aultrement contracter selon disposition de droit commune*”.⁹² This line is repeated *verbatim* in the above part of the discussion, and addressed directly. Here, it is clear that Bohier provides for custom to be understood according to the *ius commune* in such circumstances. In the first mention of the term, Bohier states that the *ius commune* asks that the giver of donation adhere to the mental reservation made. He cites a provision of the Codex, C.5.3.4 (a. 239) and states that the custom be interpreted in a way that is in line with this rule, and then the *ius commune* as evidence for the same point. It is therefore possible to view this reference to the *ius commune* as shorthand, or representative of sorts, for the Codex rule just mentioned. Bohier makes one final reference to the term here:

[5] *Unde secundum hanc consuetudinem talis donatio reciproca facta in contractu matrimonii est valida & firma, cum haec*

[5] Hence according to the custom such a donation has become reciprocal in contracts of marriage that are strong and

⁹² Own translation: “And otherwise contract according to the provision of the common law.”

*consuetudo permittit ante
solennizationem [sic] matrimonii
secundum dispositionem iuris communis,
ut supram dictum est, donationes fieri
inter virum & vxorem.*

firm, since this custom permits the solemnisation of the marriage, it is according to the disposition of the *ius commune*, as mentioned above, [in the case of] donations between a man and his wife.

Here, again, custom is according to the *ius commune*. As is typical of many of the examples where custom and *ius commune* meet, there is the tacit, or sometimes express, sense that where custom is in line with the *ius commune* and is applied according to it, it is done as a matter of choice, rather than compliance with a mandatory rule. It is therefore more like a desire to follow “best practice” in many cases, and this seems to be the situation here.

5.2 Dowry on death⁹³

The issue of dowry, death and domicile are considered here. Bohier discusses what happens to the property of a married couple when either husband or wife dies. Where the *ius commune* is mentioned, he asks which custom ought to apply here: either where the contract of marriage was signed, or the domicile of the man. This question of domicile and competing customs was seen above in the case of donations.⁹⁴ The position of neighbouring localities in this case are mentioned, namely Orléans, Tours and Paris.⁹⁵ The *ius commune* is mentioned once here:

Nam hic debet dotari de consuetudine ubi alias in contractu matrimonii non fuerit dotata: solum de medietate usufructus haereditagiorum mariti, ut hic, & inter nobiles lucratur omnia mobilia post contractum vero matrimonii traducitur ad locum & domum viri ubi alia consuetudo vel statutum viget quod maius habeat doerium, vel lucretur: ut Parisius medietatem omnium bonorum que maritus tempore contractus matrimonii & durante matrimonio habuit... vel forte

Indeed here it ought to apply the custom to provide a dowry when it was not provided for in the contract of marriage. But this applies only to half of the husband's bequest. In the present case, among nobles, [the husband] acquires any mobile assets [of the dowry] and brings it to his household, where another custom or statute applies, and it allows to acquire a larger part of the dowry: so in Paris [the custom is of / for] half of all assets that the husband had both at the time of the

⁹³ Folio 65, nu. 5.

⁹⁴ Folio 61, nu. 1.

⁹⁵ The 1547 (Paris) edition of the *Consuetudines Biturigium* used here has the customary law works for Tours and Orléans bound together; Pyrrho Englebermeo, *Aurelianorum item consuetudines*, and Joanne Sainson, *Turonum item consuetudines*.

quod nihil lucretur, vel maritus possit donare vxori constante matrimonio, aut alias servatur ius commune. Quaeritur an consuetudo loci contractus matrimonii, aut loci domicilii viri debeat attendi.

contract of marriage and during the marriage... Or perhaps [we should conclude] the custom / statute of the region where the husband has his household could be that nothing is acquired, or [that] the husband is allowed to make donations to the wife during the marriage, or that elsewhere the *ius commune* applies. The question is whether the custom of the place of the contract of marriage, or of the place of the domicile of a man ought to be observed.

5.2.1 “Or that elsewhere the *ius commune* applies”

Baldus considered a similar case.⁹⁶ There, he “focused on the conflict of laws between local statutes and the *ius commune* rather than on the conflict between the two local jurisdictions.”⁹⁷ He stated that under the *ius commune*, the law of the place of the dowry payment took precedence, and in this case, it was the husband's domicile.⁹⁸ Julius Kirshner has considered this matter, and identifies the reference to the *ius commune* here as “synonymous with Justinian's *Corpus iuris* or Roman law, not the revisionist opinions of medieval jurists.”⁹⁹ Baldus' stance on the conflict of laws saw him develop a “multi lateral approach”,¹⁰⁰ based on his assumption that “law is made by different sovereign states, and the question is what to do when the laws of these states conflict.”¹⁰¹ Rules were developed in order to handle the conflict of laws,¹⁰² which “concerned the discrete and limited modifications that a principality or city might make to general rules of tort, contract or property.”¹⁰³

Bohier's stance in this case is clearly influenced by the medieval approach. He sets out the divergent approaches to the matter. Custom is to be applied in order to provide a dowry when not given in marriage, but only involves half of the husband's

⁹⁶ See J. Kirshner, *Marriage, dowry and citizenship in late medieval and renaissance Italy*, (Toronto, 2015), pp. 177-180.

⁹⁷ *Ibid*, p. 177.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*.

¹⁰⁰ J. Gordley, “Extra-territorial legal problems in a world without nations: what the medieval jurists could teach us”, in G. Handl (et al), (eds.), *Beyond territoriality: transnational legal authority in an age of globalization*, (Leiden, 2012), pp. 35-52. p. 41.

¹⁰¹ *Ibid*.

¹⁰² Perhaps most famous of these works is that of Bartolus' commentary, J. Beale (ed.), *Bartolus on the Conflict of laws*, (Cambridge, MA., 1914).

¹⁰³ Gordley, (n. 100), p. 44.

bequeath. The underlying problem is the question of which law ought to apply in order to ascertain the amount of assets due in the provision of dowry. This calculation, Bohier contends, depends on whether the place of the husband's household ought to be observed or the place of the contract of marriage. Hypothetical situations are outlined and the relationship between custom and the *ius commune* is brought up, albeit briefly. The matter of domicile versus place of contract is considered and Bohier proposes as an apparent alternative, the application of the *ius commune*. The term appears where Bohier considers the situation where a husband, according to the custom of his domicile, were to acquire nothing, perhaps as a result of no such custom existing which offers the provision of dowry where none existed in the marriage contract. In this circumstance, it seems that Bohier refers to the *ius commune* so as to offer an alternative to what would otherwise be a harsh situation. In this sense, the *ius commune* appears to be above, or at least not affected, by the rules of customary law localities and is able to be drawn upon to offer equitable outcomes in those cases where custom is silent, or indeed not favourable.

5.2.2 No Citations

No citations accompany this reference to the *ius commune*. Given the similarity between Bohier's approach and that of Baldus', in a similar case, it is surprising that no reference is made to the jurist. Perhaps it is because the work is so familiar that there is an assumed awareness for the reader, and that no reference is required.

This absence of authority in support of his use of the term is seen elsewhere in Bohier's works.¹⁰⁴ For the purposes of the present discussion, however, this lack of authority is rather problematic. For, if the *ius commune* were drawn upon in order to deliver some favourable outcome, in terms of a real and tangible solution, a reference to the terms of this alternative and possibly better rule would have been helpful. Ultimately, then, Bohier was referring to the term in a loose sense, rather than to a specific rule. Here, it seems that in the context of different regions and their divergent customary laws, Bohier's use of the *ius commune* here reveals its trans-regional nature and its potential for solving problems such as competing customary law rules.

¹⁰⁴ See for example in the *Decisiones*, at *Decio* 2, 113 & 263.

The extent to which the provision of the *ius commune* rule would have offered something different to that which was already given by the customs of different regions is unclear, but what is important is that it was still used by Bohier in this context as an alternative to custom in those situations where custom was not necessarily lacking in its provision, but where an alternative solution could be found in the *ius commune*.

6. “Customs that touch upon donations”¹⁰⁵

6.1 Donations made “*inter vivos*”¹⁰⁶

Bohier considers the matter of donations made *inter vivos*: a voluntary gift made during a person’s lifetime.¹⁰⁷ Although not a lengthy consideration of the topic, Bohier’s mention of the *ius commune* makes it worthy of inclusion here:

Item limita hanc consuetudinem non habere locum in donatione iuramento vallata: sed solum in donatione simpliciter facta: cum haec consuetudo simpliciter loquens, non intelligitur de donatione iurata, [ut tenet Io. de Imol. in tertio membro. versi. nunc pro declaratione materiae an per statutum possit prohiberi & c. in c. cum contingat. de iureiu.] quia consuetudo & statutum debet interpretari secundum ius commune. [ut l.ii & ibi doct. C. de noxa. acti & c. cum dilectus & ibi Abb. Sic. de consuetudi. & Bar. Sozi. defens. in l. fructus. co. ii. versi. confirmo. ff. solu. matrimo. &] hic in ii se refert etiam ad ius commune & dicti supra de prescrip. vi & de consuetudine retractus. i. sed de iure communi potentius cooperatur actus iuratus qua non iuratus. [ut l. cum pater. filius matrem ff. de lega ii. & d. c. um contingat. & c. quavis pactum. de pac. lib. iv. ita tenet Alex. in consi. cxxv. col. penul. versi.] Pro hoc etiam bene facit.

This custom does not apply to the case of a donation supported by an oath: but only if the donation is made simply: as this custom is not much elaborated / provides only for a basic case, it is not understood as [applicable to] a donation by oath... for / since the custom and statute should be interpreted in accordance with the *ius commune* ... According to the *ius commune* a sworn act is stronger than an unsworn act [or: an act without an accompanying oath], but only if the donation is made simply: with this custom it is said simply, and is not understood as a donation by oath... besides, statutes or customs do not provide for the case in which an oath has taken place...

¹⁰⁵ “Des coustumes [sic] touchant donations”.

¹⁰⁶ Folios 68 & 69, nu. 1.

¹⁰⁷ A. Berger, *Encyclopedic Dictionary of Roman Law*, (Philadelphia, 1953), p. 443.

Lib. i. preterea statutum vel consuetudo non intelligitur providere in casu, in quo iuramentum intervenit.

6.1.1 “Interpreted in accordance with the *ius commune*”

Interpretation according to the *ius commune* is a line seen throughout Bohier’s works.¹⁰⁸ Here, Bohier is referring to both custom and statute. He continues with an explanation of what the *ius commune* provides on this issue: that a sworn act is stronger than an unsworn one, but with the caveat that this is only the case where the donation is made simply. He continues by comparing the position of custom that provides that the oath is said simply and is not understood as a donation by oath.

Here, custom does not apply, because of two main reasons. First, this is due to the limits of the particular custom, which, according to Bohier, provides only for a basic case, presumably meaning it is either to be strictly interpreted or its content is limited, thus restricting its applicability. The call for the custom to be interpreted according to the *ius commune* comes after this statement of custom’s limited role, and so it is possible to interpret this as the *ius commune* coming into play because of this gap in custom’s function. A caveat is added which perhaps more accurately reveals the role of the *ius commune* here, and so stands as the second of Bohier’s two reasons for non-application of custom. He states that there is no statutory or customary law provision for those cases where an oath has taken place in donations. The role of the *ius commune* therefore appears to be predicated on the absence of satisfactory *ius proprium* provision.

7. “Customs that touch upon prescription”¹⁰⁹

7.1 “*Mala fide*” possession¹¹⁰

Where Bohier considers prescription, the *ius commune* has a crucial role. The term is mentioned, both directly and as part of citations, four times. In the passage preceding the term’s appearance, Bohier states that Canon law, which does not allow

¹⁰⁸ See, for example, *Decisio* 113 and 188.

¹⁰⁹ “*Des coutumes [sic] touchant prescription*”.

¹¹⁰ Folio 33 & 34, nu. 1.

positive prescription in bad faith, amends secular customs and statutes where they do permit this. If Canon law is an integral feature of the *ius commune*, which Bohier implies elsewhere, this therefore means that the *ius commune* does not allow positive prescription in bad faith. Later, in the same passage, it is made clear that good faith is a necessary prerequisite for positive prescription according to the *ius commune*. Bohier states:

[1] [Panormitanus, *Consilia, consilium* 76] *ubi dicit quod si consuetudo vel statutum permittat prescriptionem quod intelligatur secundum ius commune ut interveniat bona fides.*

[1] Where he says that if a custom or statute allows prescription that it ought to be understood in accordance with the *ius commune* so that [the requirement of] good faith be applied/so to apply good faith[‘s requirement].

Panormitanus’ *Consilium* 76 states the following: “*quia statutum loquens in materia iuris, debet intelligi secundum ius commune, scilicet ubi intervenit bona fides*”.¹¹¹ This is therefore clearly an example of Bohier demonstrating his support for Panormitanus’ position here. Nonetheless, it is revealing of Bohier’s own approach to the *ius commune* given that his reliance on Panormitanus here is clearly so strong given his almost *verbatim* application of his views, and so revealing of how he views the term himself.

7.1.1 Feoffments

The term appears again, twice where Bohier considers ecclesiastical estates:¹¹²

[2] *ideo infeudationes ipsorum non valent, unde consulo propter periculum animae novas infeudationes a papa obtineant, & erunt tuti adversus omnes. & ide dico in Cistercien. quando decimas habuerunt a laico quam non possunt contra curatos de iure communi fundatos.*

[2] As feoffments of ecclesiastical estates are invalid, to avoid putting the soul in danger, my advice is to let them obtain new feoffments from the pope, so that [their feoffment] will be fully safe. The same applies [towards] the Cistercians when they received the tithe from a layman, which they cannot exact from curates who base their rights on the *ius commune*.

¹¹¹ Own translation: “that statute speaking in this matter of law ought to be understood according to the *ius commune* where good faith intervenes.”

¹¹² Folio 34, nu.1.

[3] *nam certum est quod ei qui praescribit decimas in certa parrochia, non debentur decimae novalium quae in eadem parrochia insurgunt: sed ei ad que de iure communi pertinet in illa parrochia decimarum perceptio...*

[3] as it is clear that tithes for newly-enclosed fields are not due to that who has usucaped the right to collect them for a specific parish, but to that who has the right to collect the tithes in that parish according to the *ius commune*.

Where fields have been enclosed after the right to collect tithes has been usucaped, the right to collect the tithes in that particular parish falls to the individual whose right it is under the *ius commune*. Bohier is making a distinction here between the authority and right of the tithes collector according to the local parish rules, and that of the *ius commune*. Here, he states that regardless of what rights have been passed by way of agreement according to the order and arrangements of a specific local parish, the right remains with the *ius commune*. The right to collect tithes, then, according to this statement, is something that emanates from the *ius commune*. The authority of the individual parish clearly sits somewhere beneath that of the *ius commune*, and this sense of hierarchy is evocative of the relationship between other local law provisions and the *ius commune*; where interpretation ought to be made in accordance with the latter, for instance. Here, instead of a custom or statute, it relates to ecclesiastical administration, and more generally the rules of a local parish in relation to the *ius commune*. It is still, however, a story of the local rule versus the *ius commune*, and is a relationship that is immediately familiar from elsewhere in the *Consuetudines*.

The tithe was a controversial tax, historically assumed as the “most contested and hated asset of the Church”, and was the subject of protests and riots over the centuries that it existed.¹¹³ Among other concerns,¹¹⁴ such unrest came from the belief that the revenues from tithes were in practice not used for the benefit of local churches, but only for the benefit of those in positions of significant power in the ecclesiastical community such as Bishops and Abbots.¹¹⁵ Bohier’s approach to this issue, and opinion that the right to collect tithes rests with the *ius commune* and not the local parish, then, demonstrates that the *ius commune* is representative of the

¹¹³ J. Goldsmith, *Lordship in France: 1500-1789*, (New York, 2005), p. 60.

¹¹⁴ Periodic famine and the steady expansion of upper-class land ownership were some of the other motivations for revolt on this issue. *Ibid*, p. 60.

¹¹⁵ *Ibid*.

larger ecclesiastical orders and used here to enforce the authority of those orders over the rights of the local ones.

7.1.2 The “*droit escript [sic]*”¹¹⁶

In a later part of the treatment of prescription, the *ius commune* is mentioned again in a section entitled “*droit escript [sic]*”, written law:¹¹⁷

[4] *Consuetudo vel statutum referens se ad ius commune... statutum enim inquit loquens in materia iuris & per verba iuris omnes recipit interpretationes in materia illa a iure dictas.*

[4] Custom and statute refer to the *ius commune*... Statute is said to deal with the law and it is according to the law that it should be interpreted, according to the interpretation provided for that subject.

Custom and statute refer to the *ius commune*, and on this matter, statute “deals with the law”, and so is to be interpreted “according to the law”. Here, it is possible to interpret the references to “*iuris*” as meaning the *ius commune*, which was mentioned just above. Bohier provides that such interpretation should follow that which is provided for the area of law. It is not immediately clear to what interpretative guidance Bohier is referring to here. In this case, attention ought to turn to Bohier’s citations in support of this statement. They include D.35.2.1 (on the the *Lex Falcidia*), and Decretals III.4.6 and 2.14.2. If “*iuris*” is to be understood as a general reference to the *ius commune*, which is quite possible, then in this case, it is to these texts that Bohier finds the authority of the *ius commune*.

7.1.3 Statute and *ius commune*

It is possible to interpret this treatment of the *ius commune* as meaning that all jurists’ interpretations, more specifically that of the *communis opinio doctorum*, of the *ius commune*, of its terms, rules and provisions are applicable to this statute. This is an important point made by Bohier. Earlier in this chapter, it was shown that Baldus regarded the *communis opinio doctorum* as a custom of sorts. Perhaps here too Bohier is applying this logic, and so using the set of opinions as a custom and in turn an

¹¹⁶ “*Ser [sic] a garde droit escript [sic]*”. Folio 37, nu. 6.

¹¹⁷ Folio 37, nu. 6.

interpretative aide by which he assesses the statute. It demonstrates the central role of the *ius commune* in relation to the interpretation of statute. Elsewhere in Bohier's handling of statute and *ius commune*, a pattern of interpretation is visible. In the *Consilia*, it was shown that statutes needed to be interpreted according to the *ius commune*.¹¹⁸ In the *Decisiones*, however, a less uniform approach to the relationship was revealed.¹¹⁹

Bohier does not include custom in this statement, having just mentioned custom and statute together shortly before. Therefore, this ought to be read as an intentional separation of the two and an effort by Bohier to demonstrate this particular aspect of the statute-*ius commune* relationship.

8. "Customs concerning judges and their jurisdiction"¹²⁰

In a departure from the majority of instances where the *ius commune* appears, here the term arises in the part of the *Consuetudines* that considers "*les juges & leur jurisdiction*".¹²¹ Bohier addresses the issue of penalties for heresy or crimes against the King. He refers to the rule that existed in the town of Bourges, where he states that residents who commit a crime would lose their heritable and moveable property. The customary law of the region is considered together with other laws of neighbouring areas and the relationship between the two, with specific reference to customary law being considered in addition to the law of high treason. He states:

*an deficiens speciali consuetudo loci sit
recurrendum ad consuetudinem
vicinorum locorum, vel ad ius
commune...*

whether in the absence of a special local
custom, recourse ought to be made to
neighbouring customs or to the *ius
commune...*

8.1 Neighbouring customs or the *ius commune*

This is a crucial passage in Bohier's *Consuetudines*. Here, emphasis ought to be placed on two main points. First, that it appears, in this case certainly, that

¹¹⁸ See *consilium* 8 and *consilium* 46.

¹¹⁹ See *decisio* 188 in particular.

¹²⁰ "*Des coustumes [sic] concernans les Iuges & leur jurisdiction.*"

¹²¹ Folio 21, 10.

neighbouring customs or the *ius commune* are referred to only for the purposes of standing in for local custom of the region because it is lacking on a particular matter. Second, that both neighbouring customary law provision and the *ius commune* are being referred to here as equally valid alternatives, and in this sense, almost interchangeable.

Indeed, if a *ius commune* rule existed already for this situation, then why would it not be a case of the *ius commune* automatically applying, instead of this almost last resort to invoke it? Certainly, in other cases where the *ius commune* is mentioned, Bohier typically recognises its use, either as a restrictive or expansive influence on the *ius proprium*. Here, it stands as something different. Together with customs of neighbouring regions, it represents more a repository of alternative solutions rather than something that already stands as a rule alongside this custom that needs to be followed, or at least acknowledged. This different treatment, almost as a last resort, along with other customs, is perhaps attributable to the fact that it is a matter of criminal law being considered.

The role of neighbouring customs as sources of alternative authority is considered elsewhere in the *Consuetudines*, where the *ius commune* is mentioned, and Bohier looks at the issue of dowry on death.¹²² There, however, such customs are examined because there was a question of whether the customs of the marriage contract, or the domicile of the husband ought to apply. Here, in contrast, reference is made to the customs as a source of authority and in this case, their mention along with the *ius commune* implies that there is either equal choice between the two alternatives. There is no further explanation on this issue, other than a set of citations following this point, and so it is not possible to conclude which of the two ought to be chosen here. Accompanying this statement is a set of citations, including Baldus' and Panormitanus' (1386-1445) commentary on the Decretals, X.1.31.11 and X.1.4.6, as well as Luca de Penna's (1325-1390) commentary on the Codex, C.11.15.1 (a. 391). Further, mention is made of Joannes Faber on I.1.2.9.

The role of the *ius commune* here, then, is as a substitute of sorts, equal to other customs. The impact of the *ius commune*, though not specified, is therefore one of an expansive nature, since custom is lacking, but one that differs from its relationship with local law elsewhere.

¹²² Folio 65, nu. 5. See above at 5.2.

9. “Retrait Lignager”

9.1 Custom provides the *retrait lignager*

Bohier considers the right of *retrait lignager*: a privilege awarded to extended family (kin).¹²³ It appears relatively late in French law (thirteenth century), and is a successor to the custom known as *laudatio parentum* of the Franks (a. 820), where heirs agreed in writing to the alienation of property.¹²⁴ Known as a "lineal repurchase right",¹²⁵ the *retrait lignager* represented the right of first refusal of lands belonging to kin. As standard, such lineage would include houses and land rents.¹²⁶

9.1.1 “In accordance with *ius commune* and divine law”¹²⁷

Et maxime quia haec consuetudo retractus est favorabilis. & secundum ius commune & divinum...

And especially because the *retrait lignager* provided for by that custom is favourable, and is in accordance with the *ius commune* and divine law...

Custom provides the foundation for the *retrait lignager* rule here, and Bohier refers to it providing a favourable outcome in this case. This does, however, suggest that this custom, if it were to offer a less favourable result, would not necessarily apply. Further, listing the other merits of this custom, Bohier states that it is “in accordance with the *ius commune* and divine law.” The extent to which it needs to be in line with both is unclear, but it is clear that when a custom is in accordance with the *ius commune* it adds to the custom’s authority and its application.

9.1.2 “statute or custom that does not deviate from the *ius commune*”

¹²³ For a definition of family and terms of “kinship” in early modern France, see J-L. Flandrin, *Familles: parenté, maison, sexualité dans l'ancienne société*, (Paris, 1976), pp. 17-21. An example of the *retrait lignager* in action can be seen in chapter 4 of this thesis, where Jacques Cujas considers the matter. See 1.2, “Jacques Cujas: a practical comparison”.

¹²⁴ J. Goody, *The development of the family and marriage in Europe*, (Cambridge, U.K., 1983), p. 230.

¹²⁵ *Ibid.*

¹²⁶ It excluded usufruct and furniture. On *retrait lignager*, see L. Falletti, *Le retrait lignager en droit coutumier Français*, (Paris, 1923); P. Ourliac, “*Le retrait lignager dans le sud-ouest de la France*”, (1952) 30 *Revue Historique de Droit Français et Étranger* 328.

¹²⁷ Folio 56, nu. 3.

The term is mentioned for a second time, together with the *datio in solutum*: namely the payment of a thing other than that which originally was due to the creditor which is accepted as a discharge of the original obligation.¹²⁸

Praeterea statutum vel consuetudo quae non est exorbitans a iure communi disponens de venditione habet locum in datione insolutum...

Besides, a statute or a custom that is not exorbitant and does not dispose of the *ius commune* on the issue of sale is applicable in the *datio in solutum*...

9.1.3 Central or incidental?

It is clear that compliance with the *ius commune*, for both statute and custom, is important in this case. In both mentions of the term, Bohier acknowledges that it is this harmonious relationship between *ius commune* and the local law that enables either statute or custom to apply in this case. It is not clear what would have happened if the sources of law were not agreeable. Elsewhere in the *Consuetudines*, as well as the *Consilia* and *Decisiones*, expansive and restrictive approaches dominate the findings. There are those incidences, however, where *ius proprium*, more specifically that of custom, trump *ius commune*.¹²⁹

In the present case, on this issue of *retrait lignager*, which has not been considered previously in this way, it is not possible to speculate on the outcome. It is, however, possible to suggest that here the *ius commune*, in the first mention of the term and the pairing with “divine law”, may be thought of more as an added weight to the authority of custom. The use of the term “*maxime*” is suggestive of an afterthought in terms of custom’s apparent compliance with the *ius commune* on this matter. It is further aided by the fact that it is “*favorabilis*” and so implies an element of choice in terms of custom’s application here. The pairing with divine law is worthy of note also. The two are cited in a way that suggests an equivalence, at least in terms of their status: “*secundum ius commune et divinum*”. The *ius divinum*, a positive legal disposition stemming from God,¹³⁰ is perhaps most typically paired with *ius humanum*, and so while it is not being suggested that this coupling with *ius commune*

¹²⁸ A. Berger, *Encyclopedic dictionary of Roman law*, (New Jersey, 2004), p. 424.

¹²⁹ An example in the *Consuetudines* is found above at 4.1.3. In the *Decisiones*, see 6.1 (*Decisio* 230).

¹³⁰ W. Decock, *Theologians and contract law: the moral transformation of the ius commune* (ca. 1500-1650), (Leiden, 2012), p. 83.

symbolises Bohier’s sense of mutuality between these two terms, it is still nonetheless indicative of his conception of *ius commune* as being something of a loose, general, but of a powerful nature, such as these terms, and more akin to a category of rules. This idea is further bolstered by the lack of accompanying citations to specific jurists or works.

The second reference to the term *ius commune* here suggests a greater need for compliance between it and local law; something more than an incidental acknowledgement and booster to custom’s application. In this case, custom and statute are paired together, and Bohier states that their non-deviation from the *ius commune* enables the *datio in solutum* rule to apply.¹³¹ Bohier cites Franciscus de Aretinus’ *Consilia* in support of this statement. Reference to the *consilium* mentioned reveals a case handling an issue of contractual agreements in death and the rights of heirs.¹³² There is no express mention of the term *ius commune* in this *consilium*, and so the citation does not represent this specific reference to the term by Bohier, or, indeed perhaps is indicative of the kind of jurist and work Bohier had in mind when referring to the term: Aretinus as a representative of the *ius commune* in this case.

10. “Customs of fiefs and cens”

10.1 Seigneurial system¹³³

The fiscal and jurisdictional network of lordship encompassed the entire landmass of France, and those lands that were subject to *droits seigneuriaux* underwent expansion in the early modern period.¹³⁴ Bohier considers the matter of land ownership, and makes this succinct yet clear statement on the compatibility of the rule in question with the *ius commune*:

non est exorbitans a iure communi, sed est profecto secundum ius commune.

is not a deviation from the *ius commune* but rather its implementation.

¹³¹ D.12.1.2.1 and Inst. 3.29, *pr.*

¹³² Franciscus de Aretinus, *Consilia* (Lyon, 1546), *consilium* 124.

¹³³ Folio 48, nu. 18.

¹³⁴ Goldsmith, (n. 113), p. 14.

Citations here include Franciscus de Aretinus' *consilium* 124, which Bohier also refers to in relation to the *ius commune* elsewhere in the *Consuetudines*.¹³⁵ Reference is made to Aretinus again, and also to Baldus, both on D.2.15.8.

10.2 The division of land¹³⁶

This part of Bohier's *Consuetudines* is a crucial exposition of the *ius commune*. In three sections, he mentions the rights of the King, Temporal Lords, Bishops and Archbishops, and that these rights are based on the *ius commune*. Each mention of the term will now be considered. The first reference to the *ius commune* appears underneath the title of "*est fonde de droit commun*", namely that this "is based on the common law". He states:

[1] *An rex & alii domini temporales fundent eorum intentionem de iure communi super dominio rerum infra suos limites constitutarium...*

[1] Whether the king and other temporal lords derive their claim in *ius commune* on the ownership of things within the constituted boundaries [i.e. its proper limits]...

[2] *Et etiam fallit in episcopis & archiepiscopis, qui de iure communi habent intentionem fundatum. [ut. xvi. q. vii. omnes Basilicae.] & est bona ratio secundum docto. ubi supra, quia fines episcopatum stabiles sunt nec mutantur. [ut ca. quod supra his de voto.] ideo iudices ecclesiastici super limitatione finium episcopatum non currunt ad laicorum divisiones. [ut. c. i. de religiosis.] licet Ioan. Andr. post Inno. in [c. nimis. de iure iuran.] dicat quod dominus terrae qui habet iurisdictionem de iure communi. hoc verum secundum Anto. de But. si constat de dominio eius ab imperatore concessio. alias non...*

[2] And the same applies to bishops and archbishops, who according to / by the *ius commune* have a grounded claim [i.e. on ownership of things], and the doctors agree, as [said] above, for the boundaries of archbishoprics are stable and do not change... and so ecclesiastical judges do not hasten to the divisions of secular people.... although Joannes Andreae following Innocent IV ... says that [it is] the lord of the land who has jurisdiction according to the *ius commune*. That is true according to Antonio de Butrio if it appears that his *dominium* was granted by the emperor, otherwise not. And Abbas Siculus holds the same.

In the second of the sections handling the *ius commune*, Bohier claims that the *ius commune* provides that the "*dominus terrae*" has jurisdiction. The basis of this claim rests with Joannes Andreae, who follows Innocent IV on this matter, and that is

¹³⁵ See above at 9.1, where Bohier considers the issue of *retrait lignager*, in Folio 56, nu. 3.

¹³⁶ Folio 50, nu. 24.

further supported by Antonio de Butrio. Bohier's rationale for the "grounded claim" on the ownership of land by bishops and archbishops is that it is not only rooted in the *ius commune*, but also that the boundaries of archbishoprics are stable and unlikely to change. He mentions ecclesiastical judges and notes that they are not occupied by the needs, and presumably the rules, that determine the land divisions for secular people, or perhaps more generally those who are not belonging to an ecclesiastical order. It is not clear what is meant here, but it is likely Bohier is making a clear distinction between the rights pertaining to land and boundaries that apply to certain individuals, in this case bishops and archbishops, from those of lesser status.

[3] *Et idem dico in christianissimo domino nostro Francorum rege, quod in imperatore ut habeat intentionem de iure communi fundatam. unde dicit Bald.*

[3] And I say the same about our most Christian French king, that for the *ius commune* his claim derives from the emperor, according to Baldus.

According to Baldus, the claim of the French King under the *ius commune* derives from the Emperor. For Bohier then, it is Baldus that provides this particular rule, through his *lectura* on C.7.16. It is reasonable to suggest that this reference to Baldus is in fact indicative of who and what he has in mind when using the term *ius commune* here. Baldus is also referred to, along with Joannes Andreae and Antonio de Butrio, who were mentioned above, in the second reference to the term also.¹³⁷

This practice of equating contemporary individuals and procedures with Roman ones was in no way unusual.¹³⁸ Bohier has previously equated the Roman praetorian *praefect* with the French magistrate or judge.¹³⁹ It seems likely that Bohier is stating that the authority of the *ius commune* derives from the Roman law, which was represented by "*imperatore*". This ultimately relates to split jurisdiction, between secular and ecclesiastical. For Bohier, the "*imperatore*" symbolises the former and it is there that the authority of the king stems from.

11. Conclusion

¹³⁷ Citation reads: "*Bald. in c. significavit. de rescript.*"

¹³⁸ Considered in greater detail in this thesis at chapter 3, 3.2.6, "Conflict and competing sources: *stylus, custom and ius commune*".

¹³⁹ *Ibid.*, on *consilium* 8.

In the final conclusion, I will bring out broader lines of sight, but for now I will highlight three of the main findings from the *Consuetudines Biturigium*. The relationship between custom and the *ius commune* appears to have varied, with the latter having both an expansive and restrictive effect on local law. There are three main findings from the study of the *Consuetudines Biturigium*.

First, Bohier made a distinction between *consuetudo generalis* and *consuetudo specialis*, where he relied on Baldus' commentary on the Digest (D.1.3.32).¹⁴⁰ Here, he states that according to the glossators, custom is general and trumps *lex*. If it is a special custom, attached to a certain place, it then lifts the *lex* in that place. Bohier relies on this distinction between *generalis* and *specialis* and it is mentioned on two occasions. According to this, a general custom abrogates a law generally and a special custom abrogates a law specially. This general custom would have represented a regional rule with broad application, in contrast to a special custom that was even more specific in its scope, such as applying only in a particular town. In theory, a special custom could not abrogate a law generally.¹⁴¹ His adoption of the “general” and “special” split in custom then ultimately served to elevate custom's authority and made it easier to set against the likes of the *ius commune*. However, it is equally possible to interpret this as enabling the overriding of custom in certain circumstances.

Secondly, Bohier relied heavily on Baldus as a source of authority, which was also shown in the preceding chapters of this thesis. The jurist is a prominent feature of Bohier's *Consuetudines*, and his role is a significant one, with citations to his work appearing at crucial points of discussion. For Baldus, the *ius commune* is Roman law, and the “natural state”¹⁴² of things is where Roman law operates, and is used as a supplement for custom and a standard for their interpretation.¹⁴³ Adopting Baldus' position on a number of key issues suggests an adoption of the jurist's approach to custom, at least in terms of its defining characteristics and relationship with other sources; set out in his commentary on D.1.3.32.¹⁴⁴

Finally, examples of expansive application can be found where Bohier considers dowry and that of judges and jurisdiction. These two topics are united by

¹⁴⁰ See above at 4.2.3.1.

¹⁴¹ Simonds, (n. 79), p. 81.

¹⁴² Ad D.1.3.32. See above at 2.1.1.

¹⁴³ Canning, (n. 48), p. 149.

¹⁴⁴ See above at 2.1.

the particular context within which the term *ius commune* arose: both involved a jurisdictional question. In the case of dowry, the question was which of the two laws (custom and *ius commune*) ought to apply in order to ascertain the amount of assets due under a dowry; on the matter of judges and jurisdiction, it was considered whether neighbouring customs or the *ius commune* ought to apply. In each of these cases, the *ius commune* is offered as an alternative outcome, and as a contender for filling a legal gap alongside regional customs of neighbouring localities.

CONCLUSION

In this work, I have examined the life and publications of a sixteenth-century French legal practitioner, Nicolas Bohier, using the principles of a microhistory. As an object of study, Bohier is particularly important for at least two reasons. First, he left a considerable oeuvre of written legal opinions, law reports and work on customary law. This sets him apart from many of his contemporaries. In second place, compared to the academic jurist teaching at a university in the early modern period and producing academic works based on Roman or Canon law, the traditional focus of legal historical studies, the legal practitioner and their works have long been overlooked in traditional accounts of legal history.¹ This thesis, therefore, aims to provide a more balanced picture that also takes legal practice into account. The role of the practitioner has been singled out as important here, not only because of the potential to provide a more nuanced picture regarding the narratives of European legal history, but also because of his potential to reveal the meaning of the term *ius commune* in legal practice, through an examination of its relationship with the *ius proprium*, one of the most nebulous and understudied aspects of the development of national legal orders in the early modern period in Europe.

Calls for a dedicated work into the relationship between *ius proprium* and *ius commune* in the early-modern period have been made on a number of occasions. In 2000, for example, Paul Hyams stated that the apparent dissonance between usage in the *ius commune* and customs “set the scene for further and more profound assimilation of learned legal concepts into local law”.² He spoke of the need for an inquiry to test this view.³ This is exactly what this thesis aimed to do. Bohier was chosen, not only because of the reasons outlined above, but also because he stood

¹ See for instance F. Wieacker, *A history of private law in Europe, with particular reference to Germany*, (Oxford, 1996); R. Lesaffer, *European legal history: A cultural and political perspective*, (Cambridge, U.K., 2009) [translated from the original Dutch] [2004]; P. Stein, *Roman law in European history*, (Cambridge, U.K, 1999).

² P. Hyams, “Due process versus the maintenance of order in European law: the contribution of the *ius commune*”, *The moral word of law*, (2000), pp. 62-90, at pp. 64-65, n. 5. Hyam refers to R. Aubenas, “*Quelques réflexions sur le problème de la pénétration du droit romain dans le midi de la France au moyen âge*”, (1964) 76 *Annales du Midi* 371, who shares the view that more work is needed on this topic. See also D. Heirbaut, “Who were the makers of customary law in medieval Europe? Some answers on sources about the spokesmen of Flemish feudal courts”, (2007) 75 *The Legal History Review* 257 at 273-274. There, Heirbaut recognises that the legal practitioner is key to understanding the customary law and that further research is required on his role.

³ Hyams, (n. 2).

somewhat apart (though not totally removed) from those traditional representatives of the “torch of learning”. His education at Montpellier, a university synonymous with the *Ultramontani*, informed his understanding and approach to the law. The *Ultramontani* of the twelfth century, were inspired by Italian scholarship, and this would have had an impact on the education the university's students received, even into the late fifteenth century, which is when Bohier attended.

France was not yet fully developed as a nation state by the beginning of the sixteenth century, and was without a comprehensive state bureaucracy. This would have undoubtedly had consequences for the law and for the legal practitioner. Legally speaking, the territory of France was a proverbial mosaic of different laws and customs. Its legal system was therefore fragmented, with a diversity of legal regimes from region to region and a division between the Northern customary law (*pays de coutumes*) and the Southern version of written law regions (*pays de droit écrit*), which relied more heavily on Roman law.⁴ Therefore, given the role of custom in France, the potential for investigation into its relationship with *ius commune* has been considerable. This has been a central aim of this thesis.

Bohier’s role, first as legal practitioner and later as judge, would not only have been to ascertain which law applied to a particular case, but also to grapple with the question of source competition. No fixed hierarchy of legal sources existed in France during this period. As Bohier’s oeuvre clearly shows, apart from sources familiar to contemporary lawyers such as statute (*statutum*) and custom (*consuetudo*), *ius commune*, whatever this term means, was clearly also a source of law. The fact that the term is used in practitioner literature such as records of decisions and legal opinions, demonstrates that the term *ius commune* clearly also had a role to play in legal practice. Therefore, its relationship with other sources will have been the key to its survival in this period.

The vantage point that a microhistory of a lawyer and his works offers is a valuable one. Legal humanism, the intellectual movement synonymous with sixteenth-century France is a much-contested topic, and its influence in the early modern period has recently formed the subject of systematic debate.⁵ It has, for example, been suggested that while legal humanism was a largely academic exercise,

⁴ M. Bellomo, *The common legal past of Europe, 1000-1800*, (Washington, D.C. 1995) [translated from the original Italian] [1988], p. 102.

⁵ P. du Plessis and J. Cairns (eds.), *Reassessing legal humanism and its claims: petere fontes?*, (Edinburgh, 2016).

legal practice continued to remain under the influence of late-medieval legal practice using the works of the Italian commentators such as Bartolus and Baldus.⁶ Looking to a legal practitioner in the courts from the first half of the early modern period, then, shifts the central point of enquiry from legal humanism visible in the studies of jurists teaching at the universities, to legal practice. Owing to the problems with classifying a jurist from this period as “humanist” or “other” recently highlighted by Alain Wijffels,⁷ attempts to categorise Bohier as belonging to a particular school of thought have been avoided. My thesis reveals, instead, that Bohier’s priority, as a practitioner, was to resolve the legal issue before him. He did not select authorities as symbols of an underlying intellectual affiliation, although there are certainly patterns in his citation practices, which will be outlined below.

The merits of a microhistory have been set out in the introduction to this work. It is characterised by a focus on certain cases, persons and circumstances, which allows an intensive historical study of the subject, giving a different picture of the past from investigations about “nations, states, or social groupings”.⁸ The microhistory has an objective that is more far-reaching than that of a case study: microhistorians typically look for answers to “great historical questions”, when studying small objects, even if this process is not always successful.⁹ Looking to the legal practitioner instead of those academic jurists traditionally affiliated with the university offers a different perspective on the relationship between the *ius commune* and *ius proprium* in France. This study has sought to better inform the doctrinal history on this period, as it is not possible to show the complexities of the law of early modern France with dogmatic approaches alone.

Law in action is best demonstrated through a microhistory as it provides a still picture of a person and their actions. While the merits of a microhistory are clear, certain caveats are required. The findings from this thesis do not represent a comprehensive account of the role of the *ius commune* in early modern France. A study of this kind falls well outside the boundaries (not to mention word-limits) of a thesis. It would require a much more extensive study of all of the records of the *parlements* together with a comparison of academic writing from the same period.

⁶ A. Wijffels, “*Antiqui et recentiores: Alberico Gentili – beyond mos italicus and legal humanism*”, in *ibid.*, pp. 11-40.

⁷ *Ibid.*

⁸ S. Magnússon & I. Sziujártó (eds.), *What is microhistory?*, (London, 2013), p. 5.

⁹ *Ibid.*

Instead, by providing a microhistory on the relationship between the *ius commune* and *ius proprium* in the case of Bohier and his works, this is an attempt to start this conversation.

The *ius commune* has been a term without a definition fit for its early modern operation. The traditional narrative of legal history in this regard has tended to reach for the medieval meaning as equally applicable for the early modern period. This thesis has shown that while there is some merit in this, given that there is a reliance on those jurists of the *mos italicus*, such an assumption ultimately neglects legal practice.

This thesis has three key conclusions. First, for Bohier, the term *ius commune* did not have one single function in reaching legal decisions. His approach to the function of the *ius commune* varied from case to case. Bohier regularly calls for an interpretation according to the *ius commune*, where the *ius proprium* derogates from it. He sets out the need for the interpretation of words or terms of law to occur in the light of the *ius commune*, and acknowledges that it can be contrary to the *ius proprium*. The term is used so as to harmonise a custom, or statute, so that it is possible to apply the *ius commune*. This can be restrictive and expansive in its approach. The restrictive approach is where the role of the *ius proprium* is limited by Bohier's invocation of the *ius commune*. The expansive approach is more complex. An example of this can be seen where Bohier states that recourse ought to be made to neighbouring customs or the *ius commune* where a local custom is silent.¹⁰ There, it served as a repository of alternative solutions. There are also instances where the *ius proprium* trumps *ius commune*. While an effort is typically made to make custom fit in line with *ius commune* provision in such cases, if custom were to fail, it could theoretically remain valid and in operation regardless of its incompatibility.

In second place, for Bohier, the term *ius commune* did not have a fixed meaning, although Roman law clearly plays a significant role. Its appearances in the *Consilia*, *Decisiones* and *Consuetudines* were not joined by an underlying theme or approach to the term. There were patterns, such as restrictive and expansive applications of the term, as shown above. However, these were not uniform and the outcome of a case could not be predicted according to the role of the *ius commune* in Bohier's reasoning. Bohier used the term in an interpretative sense, relying on it as a constructive aid, to manage competing sources of law such as custom and statute. A

¹⁰ See Chapter 5 of this thesis, at 8.1 where Fol. 21, 10 of the *Consuetudines Biturigium* is considered.

good example of this can be seen in one instance where Bohier referred to the *ius commune Romanorum* in the *Decisiones*.¹¹ This is evidence of an attempt to distinguish this particular reference to the term from others elsewhere. The addition of *Romanorum* suggests a departure from a *utrumque ius* meaning of the *ius commune*, and instead demonstrates a specifically Roman meaning. Bohier was dealing with feudal law here. He provided an overview of how competing sources ought to be handled: first, local customs are followed and take precedence in feudal matters; then, where no custom is found, the *ius commune Romanorum*.¹² This shows that the term *ius commune* encompasses a range of meanings. Bohier makes a conscious effort to distinguish this example from the other occasions that he uses it. This also suggests that in those other instances the term encompasses more than just the Roman law.

Finally, for Bohier, the *ius commune* was a floating authority in the sense that its role as a repository of rules could be drawn on as authority for a range of legal issues, and served as an omnipresent authority. Its influence spanned beyond small localities and regions. The *ius commune* served as a benchmark for Bohier. It was the fall-back provision alongside which other sources operated. In the *Decisiones*, Bohier stated that in a real action, a cleric is bound to respond before a secular judge. Further, that the court, Pope and Emperor “think and speak in terms of the *ius commune*”¹³ and had no knowledge of custom. According to Bohier, the *ius commune* was the assumed authority and the court thought along its lines. Custom therefore only intervenes when brought by a party and the role of the *ius commune* may change in response to this. The *ius commune* was the high level law. Custom, in contrast, worked from the ground-up.

In identifying these three key elements of functionality, meaning and authority, this thesis has offered something new to the field of European legal history. There has not, until now, been a study dedicated to understanding the role of the *ius commune* in legal practice. While the results of this work cannot be generalised too far, they offer a new picture of the *ius commune*, through a new kind of study. Bohier’s understanding of the *ius commune* as not having one single function and no fixed meaning, offers a firm outline of a term that had certain place in legal practice,

¹¹ *Decisio* 263.

¹² See Chapter 4, at 6.2.

¹³ *Decisio* 284. See Chapter 4, at 4.5.

but its form was a loose one, and its mode of operation responsive to the facts of the case before the *parlement*.

Any study of Bohier's understanding of the term *ius commune* also has to take account of his use of sources. Sources from the *mos italicus* had a clear role in the work of the legal practitioner; and this is a view supported by the likes of Wijffels.¹⁴ Bohier cited Baldus and Bartolus in particular, extensively and consistently across the three works examined. In the chapter dedicated to the *Consilia*, *consilium* 8 was considered in detail. It was singled out as a particularly good example of Bohier's approach to custom, statute and *stylus* and demonstrated his handling of those competing sources, setting the tone for the rest of this thesis. Bohier's understanding of custom in this case was an approach echoed throughout the rest of his works. He held custom according to Baldus and Bartolus, whose understanding of D.1.3.32 and C.8.52.2 was predicated on "consent" and "frequent use", and treated these parts of the *Corpus iuris civilis* as problem-solving texts that aided legal interpretation. This *consilium* revealed that for Bohier, the main reason for reducing court decisions to writing is for instruction for a judge, and that judges do not have the power to introduce by way of *stylus* something contrary to the *ius commune*.

Bohier's understanding of custom was predicated on the notion of consent. He habitually referred to Baldus and Bartolus when considering custom. For Bartolus, consent was paramount in law making and could override the will of a superior force. Custom and statute shared a consensual underpinning that was rooted in the consent of the people (the former tacit and the latter express) and so did not require superior consent for their authority. This was Bohier's approach. He relied on the jurist to handle competing laws and remedy their conflicts by reference to their underlying nature. He adopted the commentator-stance on custom. This is clearly seen in his use of the *consuetudo generalis* and *consuetudo specialis* distinction, as well as the analogous application of customs.

The competition between *ius commune* and *ius proprium*, especially custom, was equally a contest between the *princeps* and the *populus*. It marked a tension between the exercise of legislative sovereignty and the rule of law and the emerging absolutist power that came to mark the early modern period. Wijffels pointed to a

¹⁴ A. Wijffels, "Early modern *consilia* and *decisiones* in the low countries: the lost legacy of the *mos italicus*", in Maffei, P. and Varanini, G., (eds.), *Honos alit artes. Studi per il settantesimo compleanno di Mario Ascheri La formazione del diritto comune*, (Florence, 2014), 127-142.

“structural shift in thinking” in the mid to late sixteenth century, where Italian methods would eventually be replaced by the *usus modernus*. He acknowledged that the authorities relied on in courts, however, still belonged to the *mos italicus*.¹⁵ My findings are consistent with those of Wijffels. Bohier referred extensively to those sources that represented the old tradition. The so-called “fault line”¹⁶ in the middle of the sixteenth century fell after Bohier’s lifetime. His reliance on sources belonging to the late medieval period demonstrates that at the brink of this shift, lawyers were still referring to such material. The use of Baldus in particular cannot be excused as merely routine or a nod to the old ways. Bohier relied on him directly, and his understanding of custom was based on his.

While it is accepted that it cannot be known for sure whether Bohier actually referred to the sources he cited,¹⁷ there were instances where a *verbatim* reproduction of a jurist’s work appeared in his writings.¹⁸ In such circumstances, it is highly likely that he did refer to the source cited. Bohier had a preference for particular jurists and their works. Those from the School of Orléans feature prominently, as do the works of Alexander de Imola and Filippo Decio.

Throughout the textual chapters of this work, there emerged a pattern of citation borrowing by Bohier, who relied on certain jurists’ citations for Roman law (including the Digest and Codex) as well as medieval juristic opinion. Most notable among these is the case of Alexander de Imola, who featured prominently along with the citations he used in his own work, in Bohier’s *Consilia*, in particular *consilium* 8.¹⁹ Recent studies on this practice by other jurists are worth a comparative glance. An example can be seen in the case of Scotland, where Adelyn Wilson has demonstrated that there was a distinctive pattern of citation borrowing in the case of Stair, who regularly relied on the citations of Gudelinus for citations of Roman law and continental jurists, and Vinnius for Roman law also.²⁰

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ M. van Ittersum, “The working methods of Hugo Grotius: Which sources did he use and how did he use them in his early writings on natural law theory?”, du Plessis and Cairns, (n. 5), pp. 154-193.

¹⁸ See chapter 3, at 3.2.5.1, where it is shown that Bohier copied part of Alexander de Imola’s *consilium*.

¹⁹ See chapter 3, at 3.2.6.1.

²⁰ A. Wilson, *Sources and method of the institutions of the law of Scotland by Sir James Dalrymple, 1st Viscount Stair, with specific reference to the law of obligations*, (Doctoral thesis, University of Edinburgh) (2011), pp. 169, 172, 254. Wilson also demonstrated that Stair did not always check the accuracy of the citations he borrowed. On this point, see Wilson at p. 168 for an example in the case of borrowing a citation from Grotius.

The overwhelming motivation for the selection of a source was necessity of practical application, more than any overarching consideration to the juristic school to which the author belonged, or a desire to demonstrate an academic affiliation by the practising lawyer. Certainly, Bohier had preferences for certain jurists and their works: Baldus, in particular, but this regular reliance is equally likely to have been out of convenience than a deep personal loyalty to the commentator. Bohier's view of the *ius commune* was one of a repository of authoritative sources, and he used it in a pragmatic sense. For Bohier, the *ius commune* was therefore a source of authority that was utilised for professional necessity, to handle contemporary cases with the ability to refer to a selection of texts and jurists that were deemed reputable in legal practice.

Baldus and others like him would have featured prominently in Bohier's legal education, and his works were widely available.²¹ Further, their contents were likely to have been second nature to Bohier, especially Baldus' commentary on the Digest, which is peppered throughout all of the works examined. That works such as Baldus and Bartolus' commentaries on the *Corpus iuris civilis* were still being printed and widely circulated long into the early modern period, it is fair to assume that as a practitioner, Bohier's adoption of their stance on a range of topics was rooted in a combination of familiarity and search for comprehensiveness on issues such as handling competing laws (Baldus in particular). Bohier stated that the court thought "in terms of the *ius commune*".²² In this case, those based in the court would have reached for those jurists that represented the old tradition.

This tells us that the legal practitioner was relying on the jurists of the *mos italicus* in the first half of the sixteenth century. Bohier's professional life was split between the north and south of France, spending time in Paris as well as Bordeaux and so this finding has relevance for all of France. His reliance on these sources calls into question the traditional preoccupation with legal humanism and the desire to categorise those in the law into humanist and "other".

The kinds of cases where the term *ius commune* most frequently appear in, is noteworthy. Those focusing on marriage-related issues such as dowry and contractual capacity of a wife, feature prominently as well as guardianship. Procedural matters and jurisdiction also make up a significant proportion of those considered.

²¹ J. Canning, *The political thought of Baldus de Ubaldis*, (Cambridge, U.K., 1987), p. 228.

²² *Decisio* 284. See Chapter 4, at 4.5.

The term *ius commune* often appears in ecclesiastical matters. These include clerical privilege, papal benefits and evictions. The term's role in such cases varies. There are those where it is a crucial part of Bohier's reasoning. This can be seen where Bohier sets out the circumstances in which a secular judge would handle an issue related to ecclesiastical administration. There, it was stated that for a real action, the *parlement* hears and decides the case when the thing in question is from the *territorio Regis*.²³ The treatment of the *ius commune* reveals Bohier negotiating a careful balance between Papal authority and that of the *parlement*. In terms of understanding why so many examples of Canon law issues were included in the *Decisiones*, it is likely that Bohier wished to reflect the significant number of cases of this nature that appeared before the *parlement* in his reported decisions. It was just considered that in certain instances a secular judge would handle a matter of an ecclesiastical nature, and so this probably reflects this.

The *ius commune* also appears in questions of jurisdiction. In such instances, the role of the *ius commune* was to offer an alternative source of authority. The position of neighbouring localities and their value on those occasions where the custom of the region is lacking, features in both the *Consuetudines* and the *Decisiones*. On the question of domicile, where Bohier deliberates which ought to apply – that of the marriage contract or of the husband – the role of the *ius commune* is clear.²⁴ There, it is offered by Bohier as an alternative solution, much like recourse to the neighbouring customs would also be.

While there are patterns in terms of where the term appears, with those of an ecclesiastical nature and matrimonial matters at the forefront, there is no rigid pattern in terms of how the *ius commune* operates in these cases, certainly not one that suggests a strict source hierarchy in any case. The fact that there are certain cases where the term has a more prominent role than others demonstrates two main things. First, that the legal issue at hand was one that traditionally relied on the rules and provisions of the *ius commune*, perhaps stemming from the Roman law. Secondly, that Bohier used the term as a tool in order to balance competing authorities and interests, and that these areas of law were characterised by plurality of sources. There was a need to refer to the *ius commune* as a repository of ideas, alternative solutions and an interpretative aid, for certain kinds of cases more than others.

²³ *Decisio* 69. See Chapter 4.

²⁴ Fol. 65, nu. 5. See Chapter 5, at 5.2.

I am not claiming the final word on Nicolas Bohier. A more comprehensive study of other lawyers in other *parlements* during this period is needed, and I hope to revisit this. A history of lawyers and practice in early modern France and their relationship with the *ius commune* and *ius proprium* still needs to be written, and this is the start of that conversation. Douglas Osler asked why the sixteenth-century was overwhelmingly associated with legal humanists and not “the collections of legal opinions of contemporary jurists, the *Consilia*, or the *Decisiones* of the great regional and national supreme courts”.²⁵ This work ought to be read as an attempt to redress this imbalance, even if on a microhistorical scale.

²⁵ D. Osler, “Images of legal humanism”, (2001) 9 *Surfaces* 101.

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¹ Following the convention in medieval and early modern studies, I am citing these works by the author's forename first, whereas elsewhere it is by surname.

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