Introduction

Law, Christianity, and Secularization in the Low Countries

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The present volume aims to reveal the impact of Christianity on the development of law and societal policies in the Low Countries over a period of ten centuries. It starts with the seminal contribution to the medieval *ius commune* by the canonist Alger de Liège (*c.* 1060–1132) at the end of the eleventh century and ends with Josse Mertens de Wilmars's (1912–2002) protagonist role as a judge in the creation of a European *ius commune* in the second half of the twentieth century. The impact of Christianity on thinking and making the law is shown through essays on twenty Christian legal scholars and legal practitioners from the Low Countries. Historically speaking, the Low Countries cover a region which, today, corresponds more or less to Belgium, the Netherlands, Luxembourg, and parts of Northern France. Through these biographies from jurists from the Southern and Northern Netherlands, developments that are more general in nature can be recognized and established, about the changing roles of Christianity and law in Western societies more generally. As a matter of fact, the gradual 'secularization' of legal culture in the Low Countries is used as a framework to describe the general evolution of the impact of Christianity on the lives and writings of the twenty selected jurists.

CHRISTIANITY, SECULARIZATION, AND LAW IN THE LOW COUNTRIES

The impact of the Christian faith on law critically depends on the more general role of Christianity in society as a whole, so much so that an assessment of the impact of Christianity on legal thinking in Europe before the French Revolution may seem almost nonsensical.[1] Until the end of the old

[1] F. Audren and P. Rolland, 'Juristes catholiques', *Revue Française d'Histoire des Idées Politiques* 28 (2008): 227–231.

regime, European societies were imbued with Christian thinking. However, the concrete role of Christianity in Western societies – including the Low Countries – took on different forms throughout the centuries, even before the period of the French Revolution. The process whereby Christian belief systems gradually lost their impact on the regulation of secular affairs – often labelled a process of 'secularization' – passed through several stages, not least in the Protestant Reformation. It led to the separation of the Low Countries in the first place, with the Northern provinces chiefly embracing the teachings of Martin Luther and John Calvin, and eventually adopting the Reformed religion as public religion, and the Southern Netherlands remaining predominantly Catholic, first under Spanish and later under Austrian rule. This gradual process of secularization, then, provides an adequate framework against which the twenty jurists from the Low Countries dealt with in this volume can be discussed.

Different, often conflicting, views on the meaning of 'secularization' circulate.[2] In his influential work *A Secular Age*, the Canadian philosopher Charles Taylor famously distinguished between three types of secularization: the secularization of public life, including a strict separation between church and state; the decline of belief and practice; and the questioning of the conditions of belief and the practice thereof – today, belief has become a human possibility, one among many others.[3] Clearly, the widespread decline of belief itself is a rather recent phenomenon in the Low Countries. The latter two types of secularization were clearly not accepted by large parts of the population until the end of the eighteenth century. Only during the last five decades did indifference toward the Christian faith accelerate dramatically in countries such as Belgium and the Netherlands. But when it comes to the first aspect of secularization as singled out by Taylor, the realities of the institutional relationship between ecclesiastical and civil authorities have been subject to change and variation from the very period that this volume opens with: the eleventh century. The tension between church(es) and state has marked the destiny and identity of the Low Countries as it has marked Western political culture in general from at least that period onwards, as political scientists such as Francis Fukuyama have not failed to note following the work of Harold Berman.[4]

[2] K. Dobbelaere, 'The Meaning and Scope of Secularization' in *The Oxford Handbook of the Sociology of Religion*, ed. Peter B. Clarke (Oxford: Oxford University Press, 2009), 599–615.

[3] C. Taylor, *A Secular Age* (Cambridge, MA and London: The Belknap Press of Harvard University Press, 2007), 14–22.

[4] F. Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (New York: Farrar, Straus and Giroux, 2011), 245–289.

From a legal historical perspective, Berman's use of the term 'secularization' is particularly helpful.[5] Rather than concentrating on the loss of religious belief as such, Berman employed 'secularization' as a concept that designates the transfer of jurisdictional power from the church to worldly authorities in the age of Reformations in the sixteenth and seventeenth centuries. This transfer of power did not imply a loss of faith on the part of the majority of the population or its leaders, but did have major effects on the organization of law and society: the church lost its dominant role in the administration of justice, the regulation of the market, and the organization of charity. Martin Luther and John Calvin, who became very popular in the Netherlands, played a paramount role in this process. They undermined the jurisdictional power wielded by the church and denounced the clergy's involvement in legal and economic affairs. 'Luther emphasized that formal legal authority lay with the state, not with the church, with the magistrate, not with the cleric', as John Witte Jr aptly summarized this shift.[6] At the same time, the decline in the worldly power of clerics was accompanied by a process of 'spiritualization' of civil authority. Therefore, it would be misleading to think of 'secularization' in the early modern period in any of the senses that Taylor distinguished. As the example of many Dutch Reformed jurists in this volume will show, they did not ban religion from the public sphere, but rather conferred responsibilities in religious affairs to civil authorities. After all, civil authorities in the young Dutch republic were pictured after the model of leaders from the Old Testament like Moses, and they liked to think of themselves as governors of the new Israel.[7] Protestants urged the magistrate to lay down laws that were based on the Bible. Toward the mid-seventeenth century, the Dutch Calvinist jurist Anthonius Matthaeus II (1601–1645) based his treatise on criminal law decisively on the Decalogue.[8] Law and religion, then, continued to 'intertwine' in the Protestant territories that rejected the jurisdictional authority of

[5] H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 29.

[6] John Witte Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002), 8.

[7] Gordon Schochet, Fania Oz-Salzberger, and Meirav Jones, eds., *Political Hebraism: Judaic Sources in Early Modern Political Thought* (Jerusalem; New York: Shalem Press, 2008), M. Totzeck, *Die politischen Gesetze des Mose. Entstehung und Einflüsse der politia-judaica-Literatur in der Frühen Neuzeit* (Göttingen: V&R, 2019). See also e.g. Todd M. Rester and Andrew M. McGinnis, 'Introduction' in Franciscus Junius, *The Mosaic Polity*. Translated by Todd M. Rester; edited by Andrew M. McGinnis (Grand Rapids, MI: CLP Academic, 2015), xli–xlvii.

[8] Janwillem Oosterhuis, 'Roman–Dutch Criminal Law and Calvinism: Calvinist Morality in De criminibus (1644) of Antonius Matthaeus II' in *Criminal Law and Morality in the Age of Consent. Interdisciplinary Perspectives*, ed. Aniceto Masferrer (Cham: Springer, 2020), 67–95.

Rome.[9] In the Catholic Southern Netherlands, too, secular authorities drew inspiration from Christian sources, especially canon law and moral theology, while reducing the institutional power of clerics and ecclesiastical courts.[10] In any event, religion was certainly not banned from the public sphere until much later, with the advent of the modern Belgian and Dutch states in the first half of the nineteenth century.

Even in the modern period, the radicalization of the secularization process in Berman's sense – which led to the constitutionally guaranteed separation of church and state – did not necessarily go along with the demise of belief in the Christian faith. In Belgium, where liberal-secularists and Catholics fought for power in the nineteenth century, secularists were anti-clerical, but not automatically anti-religious.[11] A good case in point is François Laurent (1810–1887), arguably the most famous anti-clerical jurist in the second half of the nineteenth century in Belgium. Although he opposed the Roman Catholic Church as an institution – proposing a new Code of Civil Law that would take away legal capacity from religious associations – he was a profoundly religious man, rejecting atheism and believing that 'mankind would not survive for a long time without believing, since religion is life'.[12] It was not until the twentieth century, as Berman has pointed out, that 'secularism itself became secularized', that 'God was no longer thought to be hidden in the secular world', and that secularization started to refer not only to the emancipation of secular rule from ecclesiastical hegemony, but also to the loss of faith itself.[13]

MEDIEVAL REFORM OF CHURCH AND MORALITY: GREGORIAN REFORMS AND MODERN DEVOTION

The individual, intimate, and almost hidden character of the impact of Christian faith on legal developments in the Low Countries in the twentieth century stands in marked contrast, of course, to the public and self-evident nature of Christianity as a belief system in the Middle Ages. The

[9] Lisbet Christoffersen, 'Intertwinement: A new concept for understanding religion-law relations', *Nordic Journal of Religion and Society* 19 (2006): 107–126.

[10] Laurent Waelkens, *Amne adverso: Roman Legal Heritage in European Culture* (Leuven: University Press, 2015), 113.

[11] Dobbelaere, 'The Meaning and Scope of Secularization', 602.

[12] E. Bruyère, *Principes, esprit et controverses. L'Avant-Projet de Code civil de François Laurent ou l'œuvre séditieuse d'un libre penseur* (Ghent, 2019 (unpublished PhD thesis)), 3.

[13] Harold J. Berman, *The Interaction of Spiritual and Secular Law: The Sixteenth-Century and Today*. Fulton Lectures, 1997, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1008&context=fulton_lectures, 9. Also cited in W. Decock, 'Salamanca meets secularism. Clerics' role in the administration of justice and charity' (in press).

Low Countries harboured one of the great centres of religious life and learning in Europe, the prince-bishopric of Liège, which was integrated into the Holy Roman Empire by Emperor Otto III in 985. It was composed of territories that are now part of eastern Belgium and the southeast of the Netherlands. Alger de Liège was a major canon lawyer in the prince-bishopric at the turn of the twelfth century, and an advisor to prince-bishop Otbert. In his treatise *On Mercy and Justice* (*De misericordia et iustitia*), he captured the spirit of the Gregorian Reform and prefigured some of the ideas on ecclesiastical governance and criminal law in Gratian's *Decretum*.[14] The work of Alger de Liège underscores the common religious roots of the Low Countries, shared with large parts of Europe, and the struggle for 'ecclesiastical liberty' – that is the church's increasingly successful striving for independence from interference by worldly rulers in the eleventh and twelfth centuries. Ironically, Otbert, whom Alger counselled, was himself accused of simony.

Although the institutional church remained at the centre of jurisdictional power and organized life during the later Middle Ages, church and society witnessed already-important Reform movements that advocated a more spiritual, interiorized form of Christianity. A case in point is the Modern Devotion, a lay movement advocating the renewal of spiritual life, which took off in the Lowlands with reformers like Geert Groote (1340–1384) in the second half of the fourteenth century. It focused on the morality and holiness of individual Christian believers rather than the protection of jurisdictional interests of clerics and the church as an institution. Arnold Gheyloven van Rotterdam (*c.* 1375–1442), a canon lawyer and theologian, was influenced by the Modern Devotion. He came from the Northern Netherlands but settled in Groenendaal, near Brussels, in the Duchy of Brabant, where he prepared an influential manual for confessors and penitents (*Gnotosolitus parvus*) – featuring a synthesis of Roman law, canon law, and evangelical principles – for the advancement of the spiritual life of students at the newly founded University of Louvain (1425).[15] Gheyloven, as part of the Modern Devotion, made an important contribution to the emergence of a northern humanist culture. Also as a consequence of earlier medieval reform movements in the Low Countries, like the Modern Devotion, the Reformed religion would find many adherents in this region.

[14] See Chapter 1: Emmanuël Falzone, 'Alger of Liège', in this volume.
[15] See Chapter 2: Bram van Hofstraeten, 'Arnoldus Gheyloven', in this volume.

AFTER THE REFORMATION: RETHINKING THE RELATION BETWEEN LAW, RELIGION, AND SOCIETY

As a result of the Reformation, the unity of faith and church in the Low Countries was lost. The ensuing religious and confessional controversies also lay at the basis of the Dutch Revolt, which resulted in a painful separation of the Low Countries into the northern Dutch Republic and the southern Spanish Habsburg Netherlands. Boëtius Epo (1529–1599) embodies this painful and radical religious and political separation of North and South. Born in Friesland, he made a career in the Southern Netherlands. Initially charmed by the Reformed religion, later in life he opposed the Protestant movement that came to dominate the Northern Netherlands, profiling himself clearly as a Catholic. Epo even chose to teach at Douai instead of Louvain when the Catholic University of Louvain was accused of Protestant tendencies. His career illustrates how legal teaching was affected by religious tensions in the early-modern Low Countries. Epo's writings are mainly on canon law, emphasizing the benevolent and necessary influence of the canon law for society.[16] He consciously chose to become a Roman Catholic and reject the Protestant view of the Christian faith despite his initial enthusiasm for the Reform movement. Importantly, then, with the Reformation, religion became more a matter of choice.

Louvain, meanwhile, became one of the leading centres for Catholic scholarship in Europe. It was the domicile of one of the greatest legal–theological scholars of the early-modern period, Leonardus Lessius (1554–1623). Lessius was a Catholic moral theologian from Antwerp in the Southern Netherlands. He taught at the Jesuit College in Louvain and played a major role in the moral transformation of the *ius commune*, as exemplified through his treatise *On Justice and Law* (*De iustitia et iure*). At the same time, he was a bridge figure between the School of Salamanca and the northern natural law school.[17] Although less well known outside the Low Countries, Franciscus Zypaeus (1580–1650) was one of the most eminent jurists in the Southern Netherlands after the factual separation with the North. After graduating in both laws from Louvain, he made a career in the church and published widely on the theory and practice of customary law, Roman law, and canon law in the Habsburg Low Countries. Importantly, Zypaeus reflected on the relation between ecclesiastical and secular authorities. He wanted to limit the influence of the Roman curia as well as the Habsburg rulers on the Netherlandish Catholic Church. Moreover,

[16] See Chapter 3: Hylkje de Jong, 'Boëtius Epo', in this volume.
[17] See Chapter 4: Toon Van Houdt, 'Leonardus Lessius', in this volume.

he wrote an important work on the ethics of public law (*Iudex, magistratus, senator*), containing deontological guidelines for Christian judges and administrators.[18]

In the Dutch Republic, jurists also pondered the relation between secular and ecclesiastical authorities, and, more generally, what role religion should have in public life. One of the first professors at the University of Leiden – founded in 1575, formally by Phillip II as sovereign, but, importantly, instituted by William of Orange as a Calvinist alternative to the Catholic Universities of Louvain and Douai – was Justus Lipsius (1547–1606), a jurist by training who promoted humanist learning and religious tolerance. According to Hugo Grotius (1583–1645), an alumnus of Leiden University, religious tolerance could be guaranteed by acknowledging that the civil magistrate held the highest authority in religious matters. Grotius belonged to the moderate current within the Reformed religion in Holland. In his view, the public religion should be limited to a kind of natural religion, that is, a few necessary, fundamental dogmas that could be rationally understood. These elements can be retrieved in *On the Right of War and Peace* (*De iure belli ac pacis*), in which he unfolds an all-encompassing description of law and society. Although Protestant, Grotius clearly stands in the main European Scholastic tradition, like Lessius in the Southern Netherlands – Lessius actually being one of Grotius's major sources.[19] This changes with Paulus Voet (1619–1667), a major jurist in the Northern Netherlands who stands in the Calvinist tradition of learning and who ostentatiously rejected the corrupt learning of the Roman Catholic theologians.

Paulus Voet was the son of the theologian Gijsbert Voet, also known as Gisbertus Voetius (1589–1676), who was a staunch Calvinist and a professor of theology. Gijsbert Voet delivered the inaugural speech on the occasion of the foundation of the University of Utrecht in 1636. Gijsbert Voet belonged to the movement of the Further Reformation (*Nadere Reformatie*, comparable with English Puritanism and German Pietism), which emphasized practising Christian ethics in everyday life, against a worldly life. Paulus followed his father's convictions, firmly opposing René Descartes's new philosophy of religion and knowledge. Although Paulus Voet is most well known for his works on international private law (e.g. *De statutis eorumque concursu liber singularis*, Amsterdam 1661), he has also written on the relation between law and religion (e.g. *Theologia naturalis reformata*, Utrecht 1656).[20] Moreover,

[18] See Chapter 5: Wouter Druwé, 'Franciscus Zypaeus', in this volume.
[19] See Chapter 6: Janwillem Oosterhuis, 'Hugo Grotius', in this volume.
[20] See Chapter 7: Johannes van Kralingen, 'Paulus Voet', in this volume.

his son Johannes Voet (1647–1713), author of a commentary on Justinian's *Pandects*, became one of the most influential jurists of the Roman–Dutch Elegant School – the influence of which is still palpable in the legal culture of countries such as South Africa. It has become increasingly clear that the Voet family played a major role in bringing a strict form of Calvinism to bear on societal and legal issues. It succeeded in convincing practising lawyers such as Johannes Andreas van der Meulen (1635–1702), a judge at the Court of Brabant in Den Haag, of the necessity to transform daily activities on the basis of lived Christian values. Van der Meulen even went as far as publishing a legal–theological treatise (*Forum conscientiae seu jus poli, hoc est tractatus theologico-juridicus*), which contemplated the differences between judging a case from the point of view of the law of God and the law of the land.

Another legal scholar whose life course was profoundly influenced by the Further Reformation was Ulrik Huber (1636–1694), an alumnus of the University of Franeker (the University had been founded in 1585 to promote a Calvinist approach to learning and science in the region of Frisia). Huber resolutely denounced Hobbes's pro-state standpoints, but also rejected the clerical struggles, observable on both Catholic and Protestant sides, for supremacy over the secular authority. Central to Huber's middle-of-the-road standpoint is a distinction between *necessaria* and other matters. God's explicit command and prohibition, comprising the revealed and natural laws of God, bind human conscience with necessity, allowing no deviation. In contrast, the matters about which no such will of God has been expressed can and do vary depending on time, place, and other circumstances. This distinction serves in turn as the boundary that limits the otherwise absolute power of the sovereign. Only God may rule and judge the *necessaria*, which pertain to questions of conscience, while the sovereign may exercise their legislative, executive, and judicial powers over other affairs. In this context, Huber defends *jus internum conscientiae*, a series of entitlements that are similar to liberty of conscience and free exercise of religion. Each individual may exercise this *jus*, even against the will of human authority, primarily secular, but also ecclesiastical. Although Huber was thus critical about theocratic Calvinist ministers, he decidedly defended the inviolability of the human conscience and the Divinity of Scripture. Building upon, but also nuancing the ideas of Reformers such as Theodore Beza (1519–1605) or his own grandfather-in-law, Johannes Althusius (1557–1638),[21] Huber

[21] See e.g. John Witte Jr, *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2008).

emphasized the individual's freedom to defend against tyranny, that is, the sovereignty of a Christian people.[22]

In the Southern Netherlands, one of the most famous jurists to contemplate the relationship between church and state was Zeger-Bernard van Espen (1646–1728), a professor at the University of Louvain. Like other Louvain jurists at the time, such as Pieter Stockmans (1608–1671), he sympathized with Jansenism, a current in Catholicism that promoted a less lax understanding of Christian morality and that took its name from Cornelius Jansenius (1585–1638), a professor of theology at the University of Louvain who had expounded St Augustine's doctrine of divine grace and was fiercely contested by the Jesuits. Van Espen's principal work on ecclesiastical law (*Jus ecclesiasticum universum*) was put on the index of forbidden books but remained a reference work for canon lawyers for centuries, both in the Southern and Northern Netherlands, and beyond. It offered a way of thinking of church–state relationships in an increasingly secular context, that is, where the state wields the highest jurisdictional power. As a staunch defender of royal power, he notably advocated the *ius placiti* of the sovereign and the so-called *recursus ad principem*.[23] Van Espen also emphasized the rights of the local church against excessive interference by Rome and sought to restrict the jurisdictional primacy of the Pope within the church. As a result, he became a major authority among the secular clerics of the Church of Utrecht, who refused to accept the papal Bull *Unigenitus*.

LAW, RELIGION, AND ENLIGHTENMENT

By the end of the seventeenth century, but particularly during the eighteenth century, the universe and society came to be increasingly regarded as a purely rational order in Western societies, devoid of references to an actively interfering divine being: the world became 'disenchanted'. For example, Balthasar Bekker (1634–1698), a Calvinist theologian from the University of Franeker and a preacher in Amsterdam, wrote *The Enchanted World* (*De betoverde Weereld*). In this book he made fun of Christians who believed in witches and evil spirits, and he even doubted that the devil truly existed. He adhered to Descartes's rationalist philosophy and combatted what he considered to be superstitious readings of the Christian faith. He anticipated Enlightenment philosophers and the rise of Deism, emphasizing the rationality of the Creation. Important parts of society, such as the economy and law, became

[22] See Chapter 8: Atsuko Fukuoka, 'Ulrik Huber', in this volume.
[23] See Chapter 9: Jan Hallebeek, 'Zeger-Bernard van Espen', in this volume.

more or less objectified and emptied of higher meaning, even in the work of theologians such as Bekker. This changing spirituality inevitably had consequences for the relation between religion and law in the Low Countries. However, despite a gradual and partial change in spirituality, no serious decline in belief and worship can be established in this period.[24]

The slowly changing role and character of religion in the legal realm can be witnessed in the lives and works of two jurists from the Dutch Republic. Dionysius Godefridus van der Keessel (1738–1816), who had been a professor of law in Groningen and Leiden, is mostly known for his update of Grotius's *Introduction to the Laws of Holland*, which has been particularly influential for Roman–Dutch law in South Africa. However, van der Keessel was also convinced that Christian beliefs had certain consequences for practising law, which he discussed in his *Oratio de advocato christiano* (1792), a work about the deontology of a Christian lawyer.[25] In van der Keessel's view, positive law was conceived of in a rational way, and devoid of religious notions. Where Lessius and Grotius produced all-encompassing theories, wherein divine and natural law, Christian morality, state and church were brought together in one coherent system, aimed at the advancement of a Christian society and eventually the eternal salvation of the individual, van der Keessel devoted his life and work to the study of Roman Law and the positive, customary Roman–Dutch law. But within a well-ordered society, professionally trained lawyers played an important role – and for van der Keessel this still obviously meant professionally trained *Christian* lawyers. That explains why he wanted those lawyers to follow ethical guidelines based on Christian principles. For van der Keessel, Christian faith was still embedded in law and society as a whole, as had been the case for the fifteenth-century moral admonitions of Gheyloven[26] or the seventeenth-century deontology of Zypaeus for those working in public functions.[27] This stands in marked contrast to the work – one generation later – of one of van der Keessel's pupils, Joannes van der Linden (1756–1835). His deontology for legal advisers and barristers, *De Ware Pleiter* (*The True Counsel*, 1827) was almost completely devoid of any reference to Christian notions.

Near the end of the eighteenth century, the Christian religion was still considered relevant for the ordering of Dutch society. Although, since the Enlightenment, orthodox Christianity and Biblical Revelation came to be

[24] Compare Taylor, *Secular*, 176–196, 221–295.
[25] See Chapter 10: Egbert Koops, 'Dionysius van Der Keessel', in this volume.
[26] See Chapter 2: Bram van Hofstraeten, 'Arnoldus Gheyloven', in this volume.
[27] See Chapter 5: Wouter Druwé, 'Franciscus Zypaeus', in this volume.