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Roman Law in Early Enlightenment Germany:

The Case of Christian Thomasius' *De Aequitate Cerebrina Legis Secundae Codicis de Rescindenda Venditione* (1706)

The philosopher and jurist of the early Enlightenment in Germany Christian Thomasius (1655–1728) spent most of his career at the university of Halle, which had been founded in 1694. Throughout his life he was interested in the *Corpus Iuris Civilis*. In 1690 an edition of Ulrik Huber's *Praelectionum Juris Civilis Tomi Tres*¹ was published with notes by Thomasius. A piece on the faults of Roman jurisprudence, the *De Naevis Jurisprudentialiae Romanae*, followed in 1691. He also acted as *praeses* of a series of university disputations which dealt with various aspects of Roman Law.² The authority, utility and applicability of ancient Roman Law, compiled under the emperor Justinian in the sixth century AD, in the Holy Roman Empire of the seventeenth century had been a subject of debate among German jurists for some time before Thomasius and his writings on Roman Law are often placed in the context of these disputes. Contemporary authors on this subject were, for example, the Helmstedt philosopher Hermann Conring (*De Origine Iuris Germanici*, 1643),³ Johann Schilter (*Praxis Juris Romani in Foro*

¹ U. HUBER, *Praelectionum Juris Civilis Tomi Tres Secundum Institutiones & Digesta Justiniani*, Franeker 1690.

² Cf. for example *De Usu Actionum Poenaliurum Juris Romani in foris Germaniae*, Halle 1693; *An Doctrina juris Romani de Servis magnum habeat usum in servis nostris a Turcis captis*, Halle 1693; *De Aequitate Cerebrina Legis Secundae Codicis de Rescindenda Venditione*, Halle 1706; *Dissertatio Juridica de Aequitate Cerebrina et Exiguo Usu Practico Legis Anastasiana*, Occasione Juris Provincial. Prutenici, Lib. IV. Tit. VI. Art. V. § III, Halle 1717; *Dissertatio Inauguralis Juridica de Singulari Aequitate Legis Unicae Cod. Quando Imper. Inter Pupillos &c. Cognoscat, &c. Ejusque Usu Practico*, Halle 1725.

³ In the case of Conring the existing interpretation has been revised in an important respect by K. LUIG, in: *Hermann Conring (1606–1681)*, ed. M. STOLLEIS, Berlin 1983.

Germanico)⁴ and Johann Kulpis (*De Germanicarum Legum Veterum ... origine*).⁵ In this article I shall examine some aspects of Thomasius' attitude to Roman Law as they are reflected in a dissertation he published in Halle in 1706, the *De Aequitate Cerebrina Legis Secundae de Rescindenda Venditione* (*On the False Equity of the Second Law on the Rescission of Sales*), which dealt with a particular concept in Roman Law, the *laesio enormis*.⁶

I

The term *laesio enormis* was coined by the glossators, but the doctrine it embodied rested on two rescripts from the *Corpus Iuris Civilis*, one of which was the Second Law referred to in the title of Thomasius' disputation, the C. 4.44.2. The other was the eighth law in the same title (C. 4.44.8). Both were attributed to the emperor Diocletian and dated to the end of the third century AD. The two rescripts are worth quoting in full.

C. 4.44.2. Rem maioris pretii si tu vel pater tuus minoris pretii distraxit, humanum est, ut vel pretium te restituente emptoribus fundum venditum recipias auctoritate intercedente iudicis, vel, si emptor elegerit, quod deest iusto pretio recipies, minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit.

(If you or your father sold a thing of a higher price for a lower price it is equitable that you either recover the farm you have sold, after restoring the price to the buyers, with the assistance of the judge's authority or, if the buyer so chooses, you recover what is lacking from the just price. The price is considered too little if one half part of its true price was not paid.)

C. 4.44.8. Si voluntate tua fundum tuum filius tuus venundedit, dolus ex calliditate atque insidiis emptoris argui debet vel metus mortis vel cruciatus corporis imminens detegi, ne habeatur rata venditio, hoc enim solum, quod paulo minori pretio fundum venundatum significas, ad

⁴ An edition with a preface by Thomasius was published in 1713.

⁵ An edition with notes by Thomasius was published in 1708 in THOMASIUS' *Notae ad singulos Institutionum et Pandectarum titulos varias juris Romani antiquitates imprimis usum eorum hodiernum in foris Germaniae ostendentes*.

⁶ This was first published in Halle in 1706 and will be referred to as DAC. Although authorship of university dissertations in early modern Germany remains a difficult question it seems safe to attribute this piece to Thomasius himself, because he declared his intention of writing it in Book II, ch. XI, § 3 of his *Fundamenta Juris Naturae et Gentium*, first published one year before the *De Aequitate Cerebrina*. The edition of the *Fundamenta* used here is that of 1718.

rescindendam emptionem invalidum est. quod videlicet si contractus emptionis atque venditionis cogitasses substantiam et quod emptor viliori comparandi, venditor cariori distrahendi votum gerentes ad hunc contractum accedant vixque post multas contentiones, paulatim venditore de eo quod petierat detrahente, emptore autem huic quod obtulerat addente, ad certum consentiant pretium, profecto perspiceres neque bonam fidem, quae emptionis atque venditionis conventionem tuetur, pati neque ullam rationem concedere rescindi propter hoc consensu finitum contractum vel statim vel post pretii quantitatis disceptationem: nisi minus dimidia iusti pretii, quod fuerat tempore venditionis, datum est, electione iam emptori praestita servanda.

(If you or your son sold your farm on your instructions, fraud from the guile and ambushes of the buyer must be proved or fear of death or imminent torture of the body shown if the sale is not to be regarded as valid. The mere fact that you show the farm was sold for a slightly too low price has no force for setting aside the sale. Clearly, if you had considered the substance of the contract of buying and selling, and that the buyer comes to the contract hoping to buy more cheaply, and the seller to sell more dearly; and scarcely after much argument, with the seller reducing a little to what he offered, do they agree to a settled price; then you would truly see that neither good faith which protects the agreement of buying and selling nor any reason allows a contract definitely agreed on whether at once or after much haggling over the price to be set aside: unless less was given than half of the just price that was just at the time of the sale, when the choice previously given to the buyer must be observed.)

The *laesio enormis* as it was formulated in the *Corpus* granted the seller of a piece of land the right to rescind the contract of sale if the price for which the land had been sold was half or less of the just price. No definition of the just price was given and the general principles on which this remedy was supposed to rest were not expressed. Like almost all the laws collected in the *Corpus* the 1.2 and the 1.8 were very specific responses to particular appeals. Although the two laws referred only to the sale of land and permitted rescission only if the seller had sold for less than half of the just price, later commentators extended the laws to sales of moveables and granted the buyer the right to rescind a contract if the actual price exceeded the just price by a certain proportion.⁷

⁷ Cf. R. ZIMMERMANN, *The Roman Law of Obligations*, Cape Town 1990, pp. 259–270; A. WATSON, The Hidden Origins of Enorm Lesion, in: *The Journal of Legal History* 2/2 (1981).

II

In the *De Aequitate Cerebrina* Thomasius is strongly critical of the *laesio enormis*. There are two main interpretations of Thomasius' argument. The first sees it as part of an emancipation of German Law from Roman Law: jurists, it is argued, challenged the former absolute authority of Roman Law and began to regard it not as a *ratio scripta*, the embodiment of reason itself, but as a particular historical system of law, which in many instances was inapplicable to the present and was valid only insofar as it had been expressly adopted by the legislator.⁸ Thomasius' piece on the *Lex Secunda* comes to be interpreted as an example of this more independent, critical attitude towards the *Corpus Iuris Civilis*.

The second (which has also been combined with the first⁹) is that Thomasius is arguing against the *Lex Secunda* on the basis of his natural law theory. Luig has written a number of articles on this question,¹⁰ arguing that Thomasius' natural law theory, especially as it is formulated in his second work on natural law, the *Fundamenta* of 1705, requires him to reject the *Lex Secunda*, because this law, Luig argues, violates the individualistic freedom of contract, which is part of Thomasius' natural law theory. According to Luig, Thomasius considers the *Lex Secunda* an iniquity, because it permits one of the parties to a contract to annul the contract under certain circumstances, even if he or she entered into it freely and without fraud.

It can be argued, however, that neither interpretation fully explains Thomasius' reasoning behind his criticisms in the *De Aequitate Cerebrina*. There is little sign of an opposition to Roman Law as such in the *De Aequitate Cerebrina*. Thomasius refers to it to support his argu-

⁸ Cf. for example R. STINTZING, E. LANDSBERG, *Geschichte der deutschen Rechtswissenschaft*, Abt. III. 1, ch. III, Leipzig 1898.

⁹ W. EBNER, *Die Kritik des römischen Rechts bei Christian Thomasius*, PhD, Frankfurt am Main 1971; cf. also F. WIEACKER, *Privatrechtsgeschichte der Neuzeit*, Göttingen 1967, p. 317.

¹⁰ Bemerkungen zum Problem des gerechten Preises bei Christian Thomasius, in: *Tradition und Entwicklung*. Gedenkschrift für J. Riederer, ed. K.-H. POLLOK, Passau 1981; Der gerechte Preis in der Rechtstheorie und Rechtspraxis von Christian Thomasius (1655–1728), in: *Diritto e Potere*. Atti del 4. Congresso internazionale della Società Italiana di Storia del Diritto, Florence 1982; Das Privatrecht von Christian Thomasius zwischen Absolutismus und Liberalismus, in: *Christian Thomasius (1655–1728)*, ed. W. SCHNEIDERS, Hamburg 1989.

ment.¹¹ When, at one point, he maintains that the transition from the state of nature to civil society does not require the introduction of a law like the *Lex Secunda*, he appeals to the authority of Roman Law and Roman philosophers.¹² The very fact that Thomasius criticizes a law from the *Corpus Iuris Civilis* does, of course, indicate that he does not believe unconditionally in the rationality and equitability of Roman Law. But this is not sufficient to explain his decision to criticize the *Lex Secunda*.

Thomasius also does not consider the *laesio enormis* a violation of natural law. This becomes clear from his own definition of the term *aequitas cerebrina*. Luig equates this with iniquity¹³ and interprets Thomasius' appeal to natural law as an attempt to prove the iniquity of the *laesio enormis*. *Aequitas cerebrina* is, however, not identical with iniquity, as Thomasius' own definition of the term illustrates: "This false equity [*aequitas cerebrina*] differs from true equity, in that it is not equity, but pretends to be, or is an irrational equity; it differs from iniquity, in that not every iniquity is false equity [*aequitas cerebrina*], but only that iniquity, which has an appearance of equity."¹⁴ *Aequitas cerebrina* refers not to the iniquity of the *Lex Secunda*, though it does not exclude iniquity. It points to the speciousness of the law's claim to equity, and the purpose of Thomasius' argument from natural law is not to prove that the *laesio enormis* is contrary to natural law, but that its claim to be particularly equitable and to be based on natural law, must be either an error or a lie.¹⁵

Thomasius wrote that the doctrine of *laesio enormis* was incoherent, because prices depended on nothing but the free agreement of two parties to a contract of sale: "if you consider the origin of price, you will notice, wherever you look, that how high this price is depends entirely

¹¹ Cf. for example DAC, ch. II, p. 39.

¹² DAC, ch. II, § XXIX.

¹³ "Das als gemeines Recht im Reiche positiv geltende römische Recht hat also in diesem Punkte für Thomasius keine naturrechtliche Legitimation: es ist naturrechtswidrig", K. LUIG, Der gerechte Preis in der Rechtstheorie und Rechtspraxis von Christian Thomasius (1655–1728), in: *Diritto e Potere* (note 10), p. 782.

¹⁴ "Differt haec aequitas cerebrina a vera aequitate, quod ipsa plane non sit aequitas, sed aequitatem mentiatur, aut sit aequitas irrationalis, differt ab iniquitate, quod non omnis iniquitas, sit aequitas cerebrina, sed saltem ea, quae speciem aequitatis habet", DAC, ch. I, § IV.

¹⁵ Cf. also C. SCHOTT, *Aequitas cerebrina*, in: *Hans Thieme zum 70. Geburtstag* zugeeignet von seinen Schülern, Cologne, Vienna 1977.

on the free will [ab mero arbitrio] of humans".¹⁶ "And this is not based on any rules of justice, but is totally free, acknowledging no other basis than the will [i.e. of the contracting parties]".¹⁷ No just price outside that agreed on by the parties to the contract existed, and, therefore, there was no difference between actual price and just price: the actual price *was* the just price, unless the agreement came about either by fraud or by coercion. Were the *laesio enormis* to be plausible, prices would have to inhere in the objects of the transaction, independently of the will of the contracting parties. However, as Thomasius shows, nothing exists by which to determine an inherent price: neither the good's substance, essence or quantity will serve this purpose. Although scarcity has a certain influence on the formation of price, it does not determine the just price: even a plentiful good may command a high price, if someone freely agrees to pay it.¹⁸ A good, Thomasius writes, quoting a German proverb, is worth as much as a fool is willing to pay for it.

The scholastics' use of the *pretium commune* as just price is fraught with difficulties and, as Thomasius tries to show, the result of a misinterpretation of two laws in the *Corpus*.¹⁹ The *pretium commune* was the price based on the common opinion of buyers and sellers. It did not depend on the will of the contracting parties and there was no reason, therefore, to assume that it could be binding by virtue of natural law. In addition there were practical difficulties: the *pretium commune* was no specific price, but a range of prices. The upper and lower end of this range were not fixed, so that the calculation of a *laesio enormis*, a damage by half of the just price, became impossible.²⁰

The just price is not the price that will preserve equality in exchange. Thomasius rejects the Aristotelian concept of commutative justice which required this equality.²¹ The just price, to him, is just because it is legally binding after both parties to the contract have agreed to it freely.

A further incoherence in the concept of *laesio enormis*, Thomasius writes, is its claim to be particularly "humane": if it is "humane", that

¹⁶ "... si originem pretii consideres, quocumque te veritas, deprehendes, id totum, quantum quantum est, dependere ab arbitrio mero hominum" (DAC, ch. II, § XV).

¹⁷ DAC, ch. II, § XVI.

¹⁸ DAC, ch. II, § XV.

¹⁹ DAC, ch. II, p. 62.

²⁰ DAC, ch. II, § XXXIII. Contrary to Gordley's argument Thomasius does not appear to misunderstand the *pretium commune* of the scholastics (J. GORDLEY, *The Origins of Modern Contract Doctrine*, Oxford 1991, p. 95, 101).

²¹ DAC, ch. II, p. 64.

the difference between the just price and the actual price be paid to the damaged party then this is not required by justice, because the duties of humanity, Thomasius argues, do not produce an enforceable right; if it is unjust, rescission of the contract or compensation has nothing to do with humanity, but pertains to justice. The rules of humanity are distinct from those of justice and they concern not the exchange of goods, but beneficence and generosity: "He who refuses to fulfil the voluntary deeds of humanity towards another is inhuman. He who refuses deeds of kindness is hard and unsuited for friendship. But he who does not wish to exchange what is his for what is mine, or even refuses to exchange a possession of his for something I offer him instead, is not inhuman or hostile."²² Underlying this distinction between the duties of humanity and those of justice is Thomasius' distinction in his natural law theory between the *decorum* and the *iustum*.²³ The former comprehends the duties of benevolence towards fellow humans, the latter is summarized by the command not to violate a fellow human's rights. Because the possible acts of benevolence are limitless, to act according to the *decorum* cannot be an absolute principle: there can be no universal command to be benevolent. The injunction not to violate another's rights can, however, be universalized, because it is negative. The *Lex Secunda*, Thomasius argues, fails to keep the two apart.

These arguments refer to the state of nature, without a sovereign and a civil law, but there is no reason for this to change in the transition to civil society. The legislator can introduce the rescission of a contract in a case of *laesio enormis* but there is no particular reason why he should do so,²⁴ all the more as the most famous Roman orators and philosophers continually deny the existence of prices prior to contractual agreement, even in the *status civilis*. The legislator may set certain prices for the sake of *publica utilitas*, but this is a *pretium legitimum*, which differs fundamentally from the just price of the *laesio enormis*: it is a specific price imposed by the legislator, not a range of

²² "Inhumanus est qui gratuita humanitatis officia alteri denegat. Durus & ad amicitiam ineptus, qui beneficia. At non inhumanus est aut inimicus, qui rem suam cum re mea vel plane permutare non vult, vel pro re, quam ipsi contra affero permutare detrectat" (DAC, ch. II, § XXV).

²³ On Thomasius' distinction between *iustum*, *decorum* and *honestum* see W. SCHNEIDERS, *Naturrecht und Liebesethik. Zur Geschichte der praktischen Philosophie im Hinblick auf Christian Thomasius*, Hildesheim, New York 1971, pp. 268–273.

²⁴ DAC, ch. II, § XXIX.

prices based on the common opinion of buyers and sellers, and any deviation, however small, from the *pretium legitimum*, is illegal, whereas it is only a deviation by half from the just price, which counts as a *laesio enormis*.²⁵

The ability of the legislator to introduce the *laesio enormis* in civil society requires a short explanation. The validity of prices freely agreed on rests on the command of natural law to keep faith. This command is unalterable. It must, however, be distinguished from the natural *right*, which it produces in a person. This right is a moral quality, which its bearer can renounce. Natural right is what natural law permits humans to do, not what it commands them to do.²⁶ In the state of nature, for example, two parties to a contract may agree to submit themselves to the decision of an arbiter. In civil society they may subordinate themselves to the will of the legislator.

No precept of natural law, therefore, unconditionally *prohibits* the introduction of the *laesio enormis*, but its claim to embody a particular equity rests on misconceptions about the nature of justice and humanity. The *aequitas* of the *Lex Secunda* is *cerebrina*, false, not because it violates justice, but because there is no basis for a claim to a particular equitability.

III

Thomasius believes that the false claim to equity is no accident. It is a means to persuade the legislator and the legislator's subjects to accept a law, which is against their interest. Thomasius explains that three forms of *aequitas cerebrina* may be distinguished: *legislatoria*, *consultatoria* and *judicialis*. The last is not of interest in this case, because it concerns the application of laws by judges, whereas Thomasius' *De Aequitate cerebrina* criticizes the *Lex Secunda* itself. *Aequitas cerebrina legislatoria* is a false equity attached to a law by the legislator to disguise the harm this law will inflict on the commonwealth in his own interest. *Aequitas cerebrina consultatoria* is a false equity, which a counsellor has claimed for a particular proposal for a law, in order to persuade the legislator to adopt this law, although it serves the counsellor's self-interest and runs counter to that of the *respublica*.²⁷

²⁵ DAC, ch. II, § XXX.

²⁶ *Fundamenta Juris Naturae et Gentium*, I. V. 63/64.

²⁷ DAC, ch. I, § X.

This, I believe, is the central point of Thomasius' critique of the *laesio enormis*: he objects to it because its specious claim to equity conceals a self-interest harmful to the commonwealth.

The self-interest the *aequitas cerebrina* of the *laesio enormis* conceals is that of papalism. Thomasius considers *aequitas cerebrina* to be one of papalism's preferred instruments. On page 21 of the dissertation he lists twelve *arcana Papatus* ("secret tricks of the papacy"), designed to promote the rule of *aequitas cerebrina*. A little later Thomasius declares that he would be surprised if he "should not attribute the pillage, the destruction, in one word, the innumerable and unspeakable damages, which the Protestant commonwealths have been suffering for two centuries, if not totally, then at least in the first instance, to this false equity".²⁸ The "regicide in France" (Thomasius is probably referring to the assassination of Henri IV by Ravaillac in 1610, which was popularly ascribed to the Jesuits, acting on instructions from the pope) in his opinion is another example of *aequitas cerebrina*.

Although papalism is particularly characteristic of the Roman Catholic church, Thomasius does not restrict it to Roman Catholicism, but regards it as a broader phenomenon of clerical self-interest, which can be found among Protestants, too. Thomasius often attacks Protestant opponents as "papalists".²⁹ Papalism's most important means of influence is control of the educational system, through which it spreads false beliefs, like that on the equity of the *Lex Secunda*, which underpin its hold on the laity's minds. The *laesio enormis*, Thomasius writes, is taught at the universities, which, originally, were papal foundations and, even if they were reformed, have not always rid themselves of all remnants of papalism, yet: "Most Protestant academies were once papal, and they have not at the time of the Reformation been entirely cleansed from all ferment of papal doctrine. But it is known, that the tiniest piece of ferment can infect the rest".³⁰ The academies were instituted at the height of the investiture contest.

²⁸ "...rapinas, incendia, uno verbo, si innumera & ineffabilia damna, quae Protestantium republicae inde per duo secula passae sunt, si non unice, saltem praecipue huic aequitati cerebrinae & in thesi ejus fructibus adscribam" (DAC, ch. I, p. 24, footnote gg).

²⁹ After Thomasius' death the Hallensian jurisconsult J. P. Ludewig praised him for his struggle against Protestant papalism (J. P. LUDEWIG, *Consilia Hallensium Iureconsultorum*, vol. 1, Halle 1733, Preface, p. 39).

³⁰ "Pleraeque academiae Protestantium olim fuere pontificiae, neque reformationis tempore ab omni fermento pontificiae doctrinae fuere penitus purgatae. At notum est, vel minimam partem fermenti inficere massam reliquam" (DAC, ch. I, § XIX).

Their purpose was to persuade the laity, including rulers, of the "sanctity and equity of the church's canons and the law named after them" through false teaching. The law on the *laesio enormis* is part of Canon Law, as well as Civil Law: as Thomasius points out, it is included in Decretal. Gregor. IX. Lib. III. Tit. XVII, *De Emtione et Venditione*, cap. 3,³¹ and thereby belongs to a number of legal problems in which the clergy has arrogated to itself powers of secular jurisdiction, on the basis that they touch on the spiritual well-being of humans. Thomasius considers this a pretext to interfere in jurisdiction.³² In chapter 1 of the *De Aequitate Cerebrina Legis Secundae* Thomasius lists several other legal problems papalism has used to gain a foothold in the jurisdiction of the secular magistrate: prescription, usury and oaths.³³

The ability of the papalists at the academies to introduce their false doctrines into legislation rests on a confusion between the tasks of teachers, *doctores*, on the one hand, and legislators and counsellors on the other. The former give advice that persuades, the latter formulate laws that coerce. Failure to keep the two apart "has always thrown the republic into disarray".³⁴ It imposes a tyranny, which rests on the inculcation of false opinions, which make the laity look up to the clergy as an authority in questions of right and wrong.

Suspicion that the *laesio enormis* was a papal instrument to further its influence in secular jurisdiction was not new in Thomasius' time. More than thirty years before Thomasius' disputation C.-F. Jan published a treatise in Wittenberg³⁵ in which he argued that fraud and error were sufficient to repeal unjust contracts. The sole purpose of the *laesio enormis*, he maintained, was to legitimate clerical, especially papal, interference in secular jurisdiction. What is different in the *De Aequitate Cerebrina* is the concept of the *laesio enormis* as part of a systematic inculcation of false beliefs by papalists at the academies,

³¹ DAC, ch. II, p. 33.

³² Cf. *Fundamenta Juris Naturae et Gentium* I. IV. 18: "Meanwhile, although those rules concerning conscience are absurd, they were nevertheless useful to the clergy in tyrannizing the laity. . ." ("Interim, quamvis regulae illae de conscientia absurdae sint, utiles tamen fuere Clero ad acquirendam dominatum in Laicos. . .").

³³ DAC, ch. I, § XVII.

³⁴ "semper turbavit rempublicam" (DAC, ch. I, § XXIV). Thomasius makes the same point in I. IV. 84 of the *Fundamenta Juris Naturae et Gentium*.

³⁵ The *Tractatus Iuridicus Theoretico-Practicus de Denuntiatione Evangelica, in quo, de Aequitate Juris Canonici ex professo agitur. . .*, Wittenberg 1673.

designed to support their authority among the laity and the power this authority gives them over the laity. Also, whereas Jan sees the *laesio enormis* and other legal concepts as an attempt by the papacy to restore its hold on the Protestant territories,³⁶ Thomasius deplores papalism as a more general phenomenon of corrupt religion and philosophy, which causes harm within Protestant commonwealths, rather than as a threat of usurpation by the papacy from outside. According to Jan the purpose of doctrines like the *laesio enormis* in Protestant law is to prepare Protestants for the re-imposition of papal tyranny, because it is, in general, easier to subjugate those who have already adopted your law.³⁷

Another aspect, which has, to my knowledge, been treated separately from Thomasius' conceptual critique of the *laesio enormis*, seems to be an important component of this same critique: his suspicion that the textual basis of the *laesio enormis* in the *Code* is corrupt. Until now legal historical scholarship has treated Thomasius' argument for the corruption of the textual basis as a contribution to scholarship on classical Roman Law. Thomasius says that the two laws, on which the doctrine of the *laesio enormis* rests, the C.4.44.2 and the C.4.44.8, as they stand in the *Corpus*, were not formulated by the emperor Diocletian towards the end of the third century AD. Their present form is the product of an interpolation by the compilers of the *Corpus* under Justinian in the sixth century AD.

Thomasius' case is, in the first instance, philological. The end of the l.2 ("The price is considered too little if one half part of its true price was not paid."), Thomasius argues, is probably a gloss ("instar glossae"), a later addition, which changed the meaning of the original law. Whereas the original l.2, he believes, rescinded all contracts of sale, in which there was any deviation from the just price, the gloss restricted the rescission to cases in which the actual price was one half or less of the just price.

The end of the l.8 is also to be explained as a later addition, because it is an exception to the freedom of contract ("unless less was given than half of the price that was just at the time of the sale, when the choice

³⁶ *Tractatus...*, ch. III, §XI: nothing, Jan writes, is "more suited to re-impose the yoke of papal tyranny on our necks than the observance of papal law" ("magis aptae esse possunt ad imponendum denuo cervicibus nostris Pontificiae Tyrannidis jugum, quam illa ipsa Juris Pontificii observatio").

³⁷ *Ibid.*

previously given to the buyer must be observed") which contradicts the categorical assertion of precisely this freedom in the rest of the law. If this exception at the end is treated as a later addition, then the meaning of the original 1.8 is almost entirely opposite to that of the 1.8 in the *Corpus*: instead of limiting the freedom of contract to cases in which the actual price did not deviate by half or more from the just price, the original 1.8 would have asserted the validity of all contracts concluded without fraud or coercion.

The original 1.2 and 1.8, therefore, were, in Thomasius' opinion mutually contradictory: the original 1.2 allowed the rescission of contracts of sale for deviations from the just price, whereas the original 1.8 asserted the validity of all contracts of sale agreed to freely by the parties involved, whatever the price of the transaction. According to Thomasius, this is because Diocletian had intended to repeal the 1.2 with the 1.8, but the compilers of the *Corpus*, tried, instead, to reconcile the two laws by adding the glosses about the deviations by half or more of the just price at their end. This, to Thomasius, is the origin of the doctrine of a *laesio ultra dimidium* or *laesio enormis*, a damage by more than half of the just price.

Before the compilation of the *Corpus* under Justinian none of the imperial rescripts repealing Dicoletian's rescript on the just price mention the distinction between a *laesio* higher than half of the just price. This confirms that the *laesio* above half of the just price was unknown as a legal concept before Justinian.³⁸

Thomasius' textual and philological criticism is inseparable from his criticism of clerical self-interest. The interpolation of Diocletian's two laws, which produced the incoherent doctrine of a *laesio enormis*, is part of "priestcraft". It could occur only because of the "infelicitas seculi", the "unfortunate condition of the age", in which Tribonian compiled the *Corpus* under the direction of the emperor Justinian. Already at that time the false opinions which sustained the hold of the clergy on the laity's mind had established themselves: "... ignorance of justice and equity reigned, and everywhere the clergy appropriated this doctrine and put it forward not according to the rules of right reason", but as their self-interest dictated them to do. To persuade the laity of their authority in matters of justice, they claimed that correct knowledge of the laws of morality required a knowledge of Scripture,

³⁸ DAC, ch. II, p. 44/45.

which they alone were entitled to interpret. The laity dared not protest, because "they had in the course of several centuries been led in part by fear, in part by the insidious inculcation of blind obedience to believe, that credulity was the highest of the laity's virtues, and that the teachers inculcating these beliefs were infallible."³⁹ The *infelicitas seculi* is a general principle in the interpretation of the *Corpus Iuris Civilis*, as a quotation from a piece by Thomasius on another passage from the *Corpus*, the title *de Summa Trinitate* in the *Code*, will make clear: "I [Thomasius writes] know of no one among us, who examines the Justinianic law in the light of religion, although the reign of Anti-Christ had almost attained maturity at the time of Justinian". Thomasius declares that he does not know, why no one has made an attempt to demonstrate the "fruits of Papist religion, in which our *Corpus Iuris* abounds" to the "university students, who otherwise are too beholden to the authority of Justinianic law".⁴⁰

The importance of the *infelicitas seculi* to Thomasius' analysis of papalism is also apparent from his commentary on Pufendorf's history

³⁹ "infelicitas seculi, in quo Justinianus & ejus ministri operam dederunt emendandae jurisprudentiae. Regnabat jam tum vera barbaries, hoc est ignorantia justī & aequi, & ubique clerus hanc doctrinam ad se rapuerat, non proponens eam secundum regulas rectae rationis, sed secundum principia ethicae monachicae, laqueos ponentis consensu laicorum, prout interesse auctoritatis clericalis modo sic, modo aliter suaderet. Ne vero fraus sentiretur, si rationibus disceptatum fuisset, hoc artificio utebatur clerus, ut, cum Deus omnium gentium & hominum cordibus semina doctrinae justī & aequi, seu legis naturalis, inscripsisset, ipsis ante omnia persuaderet, rationem rectam ad doctrinam morum esse insufficientem, sed eam unice petendam esse ex scriptura sacra, potissimum ex legibus Mosaicis. Ita vero solus clerus regnabat in doctrina morum, cum ipse explicationem scripturae sibi soli vindicaret, & leges Mosaicas illas omnes pro legibus moralibus vendicaret, quae facerent ad stabiliendam auctoritatem & imperium cleri in laicos. Quin & ubi deficerent leges Mosaicae, alia loca sacrarum literarum pro auctoritate misere torquebantur, ut nulla sententia in doctrina justī & aequi tam absurda esset, quae non hoc modo defendi potuerit, non audentibus contra vel hiscere saltem laicis, qui jam per aliquot secula partim metu, partim dolosa persuasione coeca obedientiae eo perducti erant, ut putarent, credulitatem esse summam virtutum laicorum, & doctores ista inculcantes esse infallibiles" (DAC, ch. II, p. 42).

⁴⁰ "Ast qui Ius Iustinianum ad amussim religionis examinaverit, neminem ex nostris scio, cum tamen Iustiniani tempore regnum Antichristi prope virilem aetatem attigerit. Et nescio qui factum sit, ut ex nostris ... nemo aggressus sit laborem, studiosae juventuti, Iustinianae auctoritati alias nimium adhaerenti, fructus religionis Papisticae, quibus Corpus Iuris nostrum ubivis abundat, ostendendi..." (*Observatio VIII, Fundamenta Historica in Expositione Tituli Codicis de Summa Trinitate etc. Supponenda*, § II, in: C. THOMASII, *Observationum Selectarum ad Rem Litterariam Spectantium*, Tom. II, Halle 1700).

of the rise of the papal monarchy, the *Politische Betrachtung der Geistlichen Monarchie des Stuhls zu Rom* (*Political Consideration of the Spiritual Monarchy of the See of Rome*) of 1714. The commentary is similar in length to Pufendorf's text and contains substantial arguments, so that it can almost be classified as a treatise. It is particularly interesting for the points in which Thomasius diverges from Pufendorf, because these consistently stress the role of the corrupt philosophy and religion of late antiquity in the emergence of the papal monarchy. This has important implications for the point in time, from which Thomasius dates the corruption of the church, and for the cause, to which he traces it.

Pufendorf believed that the rise of the papal monarchy began, when the early Christian emperors failed to assume certain powers the Christian clergy had arrogated itself in pagan times. Under the pagan emperors the Christian church had administered itself, because the external direction of its affairs, which pertains to the civil sovereign, was neglected. This external direction concerns all matters of church government, which are important for political society and, therefore, fall within the purview of the civil sovereign:

we understand by the external direction or regiment of Christian religion a power which is exercised in the selection of certain people for the practice of public religious service and in the supreme supervision and jurisdiction over the same persons; in the supreme inspection and administration of the goods intended for religious service; in giving laws which can be considered conducive to the external well-being of religion and their application in the last instance to resolve disputes.⁴¹

Although the church never possessed coercive powers of jurisdiction it began to settle disputes among its members, in order to avoid a reputation for greed and litigiousness, which Christians feared they

⁴¹ "Wir verstehen aber durch die aeußerliche Direction oder Regiment der Christlichen Religion eine sothane Gewalt/die sich erweist in Bestellung gewisser Personen zu der Uebung des oeffentlichen Gottesdiensts/und in der hoechsten Aufsicht und Jurisdiction ueber selbige Personen; in hoechster Inspection und Verwaltung dero zum Gottesdienst gewidmeten Guetern; in Gebung der Gesetze/so zum aeußerlichen Wohlstand der Religion dienlich koennen geachtet werden/und dero hoechsten Handhabung in Entscheidung der Streitigkeiten" (CHRISTIAN THOMASIUS, *Politische Betrachtung der Geistlichen Monarchie des Stuhls zu Rom*, Halle 1714, p. 20/21; cf. M. HONECKER, *Cura religionis magistratus Christiani*, Munich 1968, p. 106 and M. HECKEL, *Staat und Kirche nach den Lehren der evangelischen Juristen in der ersten Hälfte des 17. Jahrhunderts*, Munich 1968, Zweiter Teil, V,2 for background in Lutheran writings.

would acquire if they appealed to pagan judges. The Christian church also exercised certain disciplinary powers over its members, because the moral standards of pagan courts were considered too lax for Christians. This correction of deviant members of the congregation never went beyond admonishment and, at most, expulsion from the congregation. To inflict any civil punishment would have encroached on the pagan ruler's sovereignty. But it is these disciplinary powers of the church under pagan rule that are the seeds of the later usurpation of secular jurisdictional power by the clergy and the papacy.⁴²

The Christian church's self-government under pagan rule was provisional. Under a Christian sovereign ("Obrigkeit") this self-administration became superfluous, because the Christian sovereign took an interest in the external government of the Christian church and could enforce the stricter moral and legal standards pagan jurisdiction had lacked.⁴³ Nevertheless, when Constantine adopted Christianity⁴⁴ the clergy could not be dislodged from the administrative functions it had assumed. Pufendorf writes that the Christian emperors were *novitii*, "novices", and could not deprive the bishops of their power, all the more so, as the majority of the population was Christian and sympathized with the bishops.⁴⁵ The Christian emperors failed to realize that the primitive church's direction by itself was provisional and ought to wither away under a Christian *Obrigkeit*.

Thomasius disagrees. Pufendorf, he writes, traces the origins of the papal tyranny to the rise of the papacy after the emperors' conversion to Christianity. It originates, however, in the corruption of learning and religion before the conversion of the emperors. Self-administration of the church under the pagan emperors is a reflection of this corruption. It is no acceptable provisional arrangement, which becomes a problem only when it does not cease under a Christian sovereign. It is more than potentially dangerous, as Pufendorf had maintained. Self-administration itself represented a misconception of the purpose and nature of Christian faith. It introduced the separation of the priesthood from the

⁴² *Politische Betrachtung* (note 41), p. 51; cf. also S. PUFENDORF'S *De Habitu Religionis Christianae ad Vitam Civilem*, Bremen 1687, § 47.

⁴³ *Politische Betrachtung* (note 41), p. 58.

⁴⁴ The question whether Constantine had been Christian was fiercely debated (cf. the *Observatio* XXII, "Fabulae de Constantino M. et Potissimum de Eius Christianismo" in THOMASII'S *Observationum Selectarum ad Rem Litterariam Spectantium*, vol. 1, Halle 1700); Pufendorf treats him as the first Christian emperor.

⁴⁵ *Politische Betrachtung* (note 41), p. 60/61.

laity and established the authority of the former over the latter. This is the true origin of papalism. While Pufendorf observes that the early Christians preferred not to bring their disputes before the pagan courts, but to seek arbitration by their bishop, and approves of this practice, Thomasius condemns it and claims that the whole *Gemeine*, that is, the congregation, or its oldest and most experienced members should fulfil this task.⁴⁶ In Pufendorf's opinion, the problem with excommunication was that, although a Christian *Obrigkeit* was preferable to church government, "in order that this kind of sacred punishment is not abused by private passion and interest"⁴⁷ its use as a punishment did not come under the control of the Christian emperors. Instead, the pope tried to usurp it, excommunicating kings, emperors, and entire commonwealths to make them "dance to his own tune". To Thomasius, by contrast, excommunication itself is an aberration. Thomasius points out in a footnote that exclusion from the church became a punishment only in the third century: "Before that time exclusion from the congregation was regarded not as punishment, but occurred according to the nature of each *Collegium*".⁴⁸

The corruption of the church is conditioned on the corruption of Christian doctrine, to which the decline in learning is inextricably linked: on more than one occasion Thomasius stresses that true religion is the precondition of sound learning.⁴⁹

In Pufendorf's account Constantine appears as the victim of the clergy's desire for power: he should have taken on the external direction of the church, but was prevented by his inexperience and the clergy, entrenched in the positions they had occupied in the pagan era. Thomasius takes a very different view of Constantine: Constantine helped to continue the corruption of the church out of self-interest. In the commentary on Pufendorf Thomasius accuses Constantine of using the church to disguise his ambition.⁵⁰ In a later disputation Thomasius describes Constantine as a "disgraceful emperor" ("*Imperatorem flagitiosum*").⁵¹ In volume I of Thomasius' *Observationum Selectarum ad*

⁴⁶ *Politische Betrachtung* (note 41), p. 71.

⁴⁷ *Politische Betrachtung* (note 41), p. 76.

⁴⁸ "Vor dem wurde die Ausschliessung aus der Gemeinde nicht als Straffe angesehen, sondern geschah nach der Natur eines jedweden Collegii", *Politische Betrachtung* (note 41), p. 75.

⁴⁹ Cf. for example Thomasius' Preface to the *Politische Betrachtung*.

⁵⁰ *Politische Betrachtung* (note 41), footnote, p. 60.

⁵¹ *Dissertatio Inauguralis Juridica de Singulari Aequitate Legis Unicae Cod. Quando Imper. Inter Pupillos &c. Cognoscat, &c. Ejusque Usu Practico*, Halle 1725, p. 41.

Rem Litterariam Spectantium (Halle 1700) there are three essays aimed at subverting the image of Constantine as the first Christian emperor and pious nursing father of the church.⁵² His reign does not mark the turning-point, which led to the emergence of papal power, as it did to Pufendorf, but an alliance between secular rule and a corrupt church.

The importance Thomasius attributes to the corruption of religion and learning becomes particularly clear when he dates its origins to the time before the conversion of Constantine. Pufendorf observed that the decline of learning helped the papacy to find acceptance for its false doctrines, but he treats this decline as an effect of the barbarian invasions of the fifth century, a hundred years after the failure of Constantine to reclaim the powers the church had appropriated under pagan rule. The decline in learning, therefore, became no more than a subsidiary cause of the rise of the papacy. Thomasius claims that the decline could not be a consequence of the barbarian invasions, because it predated even Constantine.⁵³ To Thomasius the corruption of learning and religion was the necessary precondition of the emergence of papalism.

IV

Thomasius' argument in the *De Aequitate Cerebrina* represents a critique of "papalism", the systematic use of false opinions by clerical self-interest to inveigle the laity into submission: "Here lies concealed a trick of papalism, not of that theological papalism, from which the Protestant reformers liberated the church, but of political papalism; its rot corrupts the fruits of public improvement among us, too."⁵⁴ Though Thomasius perceives this phenomenon at the heart of the rise of the papal monarchy, "papalism" is not restricted to the Roman Catholic church. It is a broader problem of corrupt thinking and philosophy, which Protestantism and especially the Protestant academies have inherited from Roman Catholicism. It is this critique of

⁵² "Fides Scriptorum Vitae Constantini Magni" (*Observatio* XXII), "Fabulae de Parentibus Constantini Magni" (*Observatio* XXIII), "Fabulae de Constantino Magno et Potissimum de Ejus Christianismo" (*Observatio* XXIII).

⁵³ *Politische Betrachtung* (note 41), footnote, p. 79/80.

⁵⁴ "Latet hic arcanum Papismi, non illius theologici, a quo ecclesiam liberarunt reformatores evangelici, sed papismi politici, cujus zizania subinde & apud nos supprimunt egregios fructus emendationis publicae." (DAC, ch. I, § XXIV).

papalism which underlies Thomasius' attack on the educational system of his day. Rather than seeing his hostility towards contemporary education as a harbinger of rational, secular and practical thinking considered typical of the Enlightenment, it would, it seems, be worthwhile to explore its confessional and religious dimensions.

The importance of Thomasius' particular conception of the rise of papalism in late antiquity for his criticism of the *laesio enormis* also suggests that church history plays a hitherto underestimated role in Thomasius' thought. Bienert⁵⁵ and other authors briefly touch on it in their works on Thomasius, but its precise importance for his thought has, to my knowledge, not been examined, yet,⁵⁶ despite the undeniable prominence of church history in confessional dispute in the late seventeenth and early eighteenth century.⁵⁷ The revocation of the Edict of Nantes in 1685 and William of Orange's invasion of England in 1689 inspired confessional polemics, which took the shape of disputes over church history. Appeals to historical "fact" became means to support or attack a position on religious questions.

Thomasius' critique of Roman Law, at least in the case of the *De Aequitate Cerebrina Legis Secundae Codicis de Rescindenda Venditione*, reflects neither a predilection for native German law, nor his natural law theory alone. Thomasius' historical analysis of the textual corruption of the *Lex Secunda* by the compilers of the *Corpus* and of the historical circumstances of that time are inextricably linked to his conceptual critique of the *Lex Secunda* as an example of clerical self-interest and the "papalism" underpinning it in Protestant learning.

⁵⁵ W. BIENERT, *Der Anbruch der christlichen deutschen Neuzeit dargestellt an Wissenschaft und Glauben des Christian Thomasius*, Halle 1934, p. 446.

⁵⁶ An article by ST. BUCHHOLZ comparing Thomasius' and Gottfried Arnold's church history is forthcoming in: *Christian Thomasius*, ed. F. VOLLHARDT.

⁵⁷ On the use of church history in debates over the Anglican church cf. J. CHAMPION, *The Pillars of Priestcraft Shaken*, Cambridge 1992.