Wim Decock / Jordan J. Ballor / Michael Germann / Laurent Waelkens (ed.)

Law and Religion

The Legal Teachings of the Protestant and Catholic Reformations

Academic Studies 20

V&R

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

Refo500 Academic Studies

Edited by
Herman J. Selderhuis

In Co-operation with
Günter Frank (Bretten), Bruce Gordon (New Haven),
Ute Lotz-Heumann (Tucson), Mathijs Lamberigts (Leuven),
Barbara Mahlmann-Bauer (Bern), Tarald Rasmussen (Oslo),
Johannes Schilling (Kiel), Günther Wassilowsky (Linz),
Siegrid Westphal (Osnabrück), David M. Whitford (Trotwood)

Volume 20

Vandenhoeck & Ruprecht

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

Law and Religion

The Legal Teachings of the Protestant and Catholic Reformations

edited by
Wim Decock, Jordan J. Ballor, Michael Germann,
and Laurent Waelkens

Vandenhoeck & Ruprecht

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

Bibliographic information published by the Deutsche Nationalbibliothek
The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie;
detailed bibliographic data available online: http://dnb.d-nb.de.

ISBN 978-3-525-55074-8

You can find alternative editions of this book and additional material on our Website:
www.v-r.de

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen/
Vandenhoeck & Ruprecht LLC, Bristol, CT, U.S.A.
www.v-r.de
All rights reserved. No part of this work may be reproduced or utilized in any form
or by any means, electronic or mechanical, including photocopying, recording, or any
information storage and retrieval system, without prior written permission
from the publisher.
Typesetting by Konrad Triltsch GmbH, Ochsenfurt
Printed and bound in Germany by Hubert & Co, Göttingen

Printed on non-aging paper.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

Content

Wim Decock
Introduction 7

Jordan J. Ballor
1. A Society of Mutual Aid
Natural Law and Subsidiarity in Early Modern Reformed Perspective . 9

Wim Decock
2. The Catholic Spirit of Capitalism?
Contrasting Views on Profit-Making through Capital Investment in the Age of Reformations 22

Charles Donahue, Jr.
3. The Role of the Humanists and the Second Scholastic in the Development of European Marriage Law from the Sixteenth to the Nineteenth Centuries 45

Michael Germann
4. Das kanonische Recht in der protestantischen Kirchenrechtslehre an der Universität Halle zu Beginn des 18. Jahrhunderts 63

Richard H. Helmholz
5. Natural Law and Religion
Evidence from the Case Law 91

Mia Korpiola
6. Lutheran Marriage Law in Sixteenth- and Early Seventeenth-Century Sweden
Authorities and Sources of Law 107

Vincenzo Lavenia
7. The Catholic Theology of War: Law and Religion in an Eighteenth-Century Text 133

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

Harald Maihold
8. God's Wrath and Charity
Criminal Law in (Counter-)Reforming Discourse of Redemption and Retribution 149

Todd Rester
9. Roman Canon Law in Protestant Reformed Theologians as Both Touchstone and Foil 174

Mathias Schmoeckel
10. Das kanonische Zinsverbot und die Konfessionalisierung 186

Laurent Waelkens
11. Legal Transplant of Greek Caesaropapism in Early Modern Times . 213

John Witte, Jr.
12. 'The Law Written on the Heart': Natural Law and Equity in Early Lutheran Thought 231

Alain Wijffels
13. Law and Religion in Early-Modern Europe: Some Tentative Conclusions 266

About the Authors 276

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

Wim Decock

Introduction

This volume collects essays presented at a symposium about the role of religious reform movements in the transformation of the Western legal tradition in the early modern period (ca. 1500 – 1700). The conference was organized at KU Leuven from 6 through 9 May 2012 within the framework of Refo500, a celebration of five centuries of Reformation. It was made possible thanks to the combined efforts of the Division of Roman law and Legal History at the Faculty of Law of KU Leuven, the Leucorea Foundation of the Martin-Luther-University of Halle-Wittenberg, the Acton Institute, Grand Rapids MI, and the Joannes a Lasco Library in Emden. The symposium benefitted from generous support by the Flemish Research Foundation (FWO).

Through a collective effort by scholars from various academic and confessional backgrounds this volume intends to make a modest step toward the partial fulfillment of a wish expressed by the late Harold J. Berman in *Law and Revolution II*, namely that a book remains to be written on the similarities and differences between the legal writings of the Catholic and Protestant reformers, respectively.[1] A large consensus exists about the contribution of Lutheran and Calvinist theologians and jurists to the shaping of modern law. Moreover, the Reformation is generally said to have created the conditions that made the rise of the State and legal positivism possible. At the same time, there is increasing evidence that Catholic theologians and jurists, too, contributed to the transformation of Western the legal tradition in early modern times. It is the aim of this book to examine the Protestant and Catholic contributions to law simultaneously.

Recent scholarship has drawn a picture of pre-modern law that stands in marked contrast to the received wisdom of the nineteenth and twentieth centuries. Received wisdom has often suffered from a religious fallacy in addition to nationalist and positivist fallacies, particularly in assessing the impact of the Protestant and Catholic Reformations on the Western legal tradition. New scholarship expressly wants to overcome those fallacies. For instance, it stresses the continuity between the Catholic Middle Ages and post-Reformation European legal history, it stresses the ongoing conversation between Catholic and Protestant jurists in the early modern period, or it unmasks the modern biases that obscure our understanding of how law

1 Berman: 2003, 70.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

functioned in the pre-modern era. Those new approaches lie at the heart of the scholarly work undertaken by each of the contributors to this volume.

Institutional aspects of the Reformation are explored in *Michael Germann*'s article on the re-invention of canon law in the Reformed tradition at the University of Halle around 1700. Moreover, *Laurent Waelkens* raises the question whether institutional developments in the age of Reformations are a consequence of the reception of cesaropapist ideas from Constantinople. Equally challenging is *Richard H. Helmholz*'s investigation of the practical use of natural law as an argument in early modern courts. In light of the universal acceptance of natural law in both Protestant and Catholic lands, it is important to know what was meant by natural law. Therefore, *John Witte Jr.* analyzes the concepts of natural law and equity in the work of the early Lutherans.

A major part of the contributions to this volume concentrate on the development of doctrines of substantive law. The re-shaping of marriage in the wake of the Reformation is subject to thorough examination in the chapters by *Charles Donahue Jr.* and *Mia Korpiola*. The continuity and discontinuity between Medieval canon law and the Reformation is also at the heart of the contributions by *Mathias Schmoeckel*, *Todd Rester* and *Wim Decock* on the development of the usury doctrine in early modern Catholic and Protestant authors. *Harald Maihold* and *Vincenzo Lavenia* draw our attention to the development of systematic doctrines of criminal law and war, respectively, in Catholic theologians of the Early Modern period. Conversely, *Jordan J. Ballor* explores the roots of the subsidiarity principle, the Calvinist moorings of which have largely remained unexplored.

The present volume concludes with a bird's eye view on the early modern history of law and religion by *Alain Wijffels*, particularly from the perspective of governance in that period. Moreover, his synthesis includes references to papers delivered at the Leuven symposium by *Herman J. Selderhuis*, *Violet Soen* and *James Q. Whitman* which could not be included in this collection of essays.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

Jordan J. Ballor

1. A Society of Mutual Aid

Natural Law and Subsidiarity in Early Modern Reformed Perspective

The burden of this essay is to show that not merely one but indeed two ideas usually associated with Roman Catholicism have some foundations in the Reformed theological orbit of the sixteenth and seventeenth century. The first of these is *natural law*, considered to be characteristic of Roman Catholic ethical reflection, and which after a much-needed period of reexamination is receiving its due rehabilitation in the circles of Reformed, and more broadly Protestant, theology.[1] The second of these is the idea or principle of *subsidiarity*, which again receives its classic modern formulation in the context of Roman Catholic social teaching.[2] The purpose of this study is to show in both cases that there are important and largely neglected early modern Reformed backgrounds to these doctrines, and indeed, in the course of this argument to explore in preliminary fashion the way in which natural law and subsidiarity are linked *theologically*.

Since the Reformation it has of course been commonplace to juxtapose various Protestant and Roman Catholic perspectives on a range of doctrines and practices. In the cases of natural law and subsidiarity, however, narratives of contrast or disjunction threaten to overshadow the broad continuities, albeit amid diversity and variegation, between early modern Reformed and Roman Catholic theologies. We risk, quite frankly, importing later divisions and discontinuities, often arising out of historical contexts and circumstances of much later periods (such as the nineteenth or twentieth century), back into earlier periods, thereby reading into these periods disagreement where there was in fact large scale agreement, if not unanimity. The result would be a misunderstanding of the broadly catholic, universal, or at least trans-confessional, even ecumenical, character of theology, law, and ethics in the Reformation and post-Reformation eras.

With respect to natural law and subsidiarity, since at least the nineteenth

1 Notable examples include Grabill: 2006; Daryl Charles: 2008; and VanDrunen: 2010. For a survey of recent developments, see Ballor: 2012b, 193–209.

2 For an attempt to relate natural law and subsidiarity in the context of modern democratic pluralism, see Utz: 1958. For the principle as expressed in the context of Catholic social teaching, see John Paul II: 1991, 48, §4: 'A community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.'

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

century narratives of disagreement came to the fore, which emphasized natural law and subsidiarity as artifacts of Roman Catholic, and specifically Thomistically-inspired, social thought. By contrast, Reformed social thought had its own characteristic doctrines, particularly in the form of roughly analogous neo-Calvinist doctrines like *creation orders* and *sphere sovereignty*. This, for instance, is how James W. Skillen and Rockne M. McCarthy distinguish the traditions in their volume, *Political Order and the Plural Structure of Society*.[3] Likewise Johan van der Vyver contrasts subsidiarity and sphere sovereignty. 'Against the Scholastic notion of subsidiarity,' he says, sphere sovereignty 'stipulates that social entities of different kinds, including Church and State, do not derive their respective competencies from one another but are in each instance endowed with an internal enclave of domestic powers that emanate from the typical structure of the social entity concerned and as conditioned by the particular function that constitutes the special destiny of that social entity.'[4] An important word in this evaluation is that of *scholastic*, which often means essentially *Thomistic*, and which is thereby identified with the traditional teaching of the Roman Catholic Church.

But this relatively modern reading of discontinuity with scholasticism and Thomas Aquinas in general, and natural law and subsidiarity in particular, on the part of many Reformed thinkers must be challenged when seeking the early modern backgrounds of these contemporary social principles. Attentiveness to the variegated reception of traditions by the Reformers is all the more necessary to do justice to the actual historical situation given continuing historical accounts that confuse and caricature the real areas of agreement and disagreement between the Reformed and Roman Catholic churches.

In his recent work on the impact of the Reformation, Brad S. Gregory writes that the Protestant Reformation effectively abandoned the Aristotelian-Thomistic legacy of the medieval era, especially with respect to moral teaching. As Gregory puts it, 'Magisterial Protestant reformers rejected the Roman church's view of human nature, convinced that it was based on a misreading of scripture unadulterated by pagan philosophy.'[5] He continues to say that according to the Reformers, 'There was no positive remnant of the *imago Dei* in the human will, no "there" there onto which God's grace could be grafted, but only a bottomless cauldron gushing forth sin,' and that 'the magisterial Protestant reformers, despite creating their own versions of a Christian ethics of the good, not only separated themselves from the moral community of the Roman church but rejected its version of teleological Christian morality. They denied the free, rational exercise of the virtues in

3 Skillen/McCarthy: 1991, especially chapters 20 and 21, 377–417: 'Subsidiarity, Natural Law, and the Common Good: An Evaluation,' and, 'Sphere Sovereignty, Creation Order, and Public Justice: An Evaluation'. For a complementary typology of Christian social thought, see Ossewaarde: 2011.
4 van der Vyver: 2002, 220.
5 Gregory: 2012, 206–207.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

pursuit of the good any place in disciplining the passions and redirecting untutored human desires.'[6] For the Reformers, contends Gregory, 'Morality's natural law as traditionally conceived was therefore a category mistake, because sinful human beings were not free to pursue good and avoid evil.'[7] Gregory proceeds, citing the sometimes literally incendiary example of Luther, to assert the Reformers' wholesale rejection of canon law and Aristotle's *Ethics*, in addition to the aforementioned medieval legacies of natural law and the *imago Dei*, in their quest to return to the Bible alone.[8]

To Gregory's specific charges about the Reformation's abandonment of an Aristotelian-Thomistic synthesis, we might simply observe with David Steinmetz, that 'the story of Thomas Aquinas and Protestantism has yet to be written, and it is not identical with the story of Thomas and Luther, or Thomas and Calvin, for that matter.'[9] But such a response only points us in the proper direction of writing that broader story of Protestantism and Thomas Aquinas, or even more broadly, the development of Protestantism in relation to medieval Christianity.

A great deal of significant and careful work has already been done on much of this, and especially on the specific elements of concern that Gregory highlights. Richard A. Muller has argued convincingly that there is no radical discontinuity between the scholastic methodological approaches of the medieval era and that of age of Reformed orthodoxy. As Muller has written of Protestant scholasticism, it is 'the technical and academic side of this process of the institutionalization and professionalization of Protestant doctrine in the universities of the late sixteenth and seventeenth century. If the doctrinal intention of this theology was confessional orthodoxy, its academic motivation was certainly intellectual adequacy.'[10] What this required was a learned and deep engagement with a variety of tools (e.g. linguistic, philosophical) and sources (e.g. biblical, patristic, and medieval). 'The theology of the great systems written in the late sixteenth and seventeenth centuries, like the theology of the thirteenth-century teachers,' writes Muller, 'is preeminently a school theology. It is a theology designed to develop system on a highly technical level and in an extremely precise manner by means of the careful identification of topics, division of these topics into their basic parts, definition of the parts, and doctrinal or logical argumentation concerning the divisions and definitions.' In this way scholasticism is best understood in the first place as 'a method and not a particular content.'[11]

This means that there is basically critical reception of a variety of medieval traditions and sources by Reformed theologians, characteristic of some of the

6 Gregory: 2012, 207.
7 Gregory: 2012, 208.
8 Gregory: 2012, 203 and 207.
9 Steinmetz: 2002, 58.
10 Muller: 2003a, 1:34.
11 Muller: 2003a, 1, 34–35.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

developments and modifications to scholasticism over its half-millennium dominance of European education, from the twelfth to the seventeenth century. What I have written elsewhere specifically in regard to the second-generation reformer Wolfgang Musculus (1497–1563) holds true more broadly, to a greater or lesser degree, for the bulk of the Reformed tradition:

> While Musculus is well-schooled in medieval scholastic theology, as is fitting for the purpose of his theological project, he does not attempt to simply reduplicate or reproduce a late-medieval theological system. Instead, Musculus' major medieval interlocutors are sources like Lombard's *Sentences* or Gratian's *Decretum*, which serve his purpose of transcending divisions that became progressively manifest in the move from the thirteenth through the fifteenth century. In dealing with these medieval sources, Musculus most often does not reject the scholastic tools and distinctions wholesale, but instead alters them and places them within the service of his own theological project.[12]

This assessment holds true for doctrinal matters as well as for legal and ethical considerations. With respect to the Protestant reception of canon law, for instance, we might note John Witte's essay, 'Loving thine enemy's law: The Evangelical conversion of Catholic canon law,' as representative of his broader and noteworthy contributions.[13] As for Protestant reception of Aristotle's *Nicomachaean Ethics*, we can point to the recent work of Luca Baschera on Peter Martyr Vermigli's (1499–1562) unfinished commentary on the *Ethics*.[14]

Vermigli's work in particular stands out as relevant to this larger discussion. Indeed, Steinmetz lists Vermigli, along with Martin Bucer (1491–1551) and Girolamo Zanchi (1516–1590), as one of a group of 'Thomists who were converted to the Protestant cause and who remained, to a greater or lesser degree, Thomists all their lives.'[15] Much other important work has in fact already been done to mine the historical antecedents and sources that develop and inform the modern principle of subsidiarity. Chantal Millon-Delsol traces the line from Aristotle to Aquinas, from the classical to the medieval era.[16] Johannes Althusius as well has been identified as a critically important figure in the development of Reformed social thought in this regard.[17]

At issue here, however, is the vital developmental generations between the inauguration of reform and its maturation in the thought of Althusius and others in the seventeenth century. To this end we will examine figures that have a formative influence on the succeeding generations of Reformed scholasticism: Wolfgang Musculus, Peter Martyr Vermigli, Girolamo Zanchi, and

12 Ballor: 2012a, 237–238.
13 Witte Jr.: 2002, 53–86.
14 Baschera: 2008.
15 Steinmetz: 2002, 58.
16 Millon-Delsol: 1992; and Estella: 2002, 77. See also Guitián: 2010, 281–83.
17 Hueglin: 1999; Endo: 1994; and more recently Lee: 2011, ch. 2: 'The Covenantal Federalism of Johannes Althusius,' 27–67.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

Franciscus Junius (1545 – 1602). Examining these Reformed theologians on questions of natural law and social order will provide some important theological background to illuminate the later legal and juridical thought of figures like Richard Hooker, Johannes Althusius, and Matthew Hale.[18] The purpose then is to complement in some way the significant historical work that has been done in legal history by focusing on questions of theological causality in the work of some representative Reformed theologians.

This approach is warranted in part because of the division of labor that was seen as operative at the time. The disputes over the jurisdictions, powers, and relative authority of the church and the state from the Middle Ages have already been well established in the secondary literature, and these general lines are borne out in the early modern sources themselves.[19] In Junius' view, the theologian functions analogously to the politician, in that the theologian's task is to work out the 'general and specific conclusions' and their relationship from the relevant legal grounding: natural law for the magistrate and divine law for the theologian. Thus, acknowledges Junius, 'The magistrates construct from the natural principles in the political science general and specific conclusions and appoint individual determinations adapted to human society and order, according to the reason of the eternal law that has been sketched in the nature of a human being.'[20] There is in this way a coordinated relationship between the civil and the ecclesiastical realms. As Junius writes, 'For both the magistrate in his own political order assists his own society [in] aspiring to the gate of eternal salvation, and so does the ecclesiastical minister, through the support of human society, and the influence of a good magistrate.' He concludes, 'The magistrate rules in this life, the minister directs through this one to the next. So then it happens that also of many of their actions there is some communication among their orders; there is not however any confusion.'[21] The civil magistrate and the church minister function in complementary ways to provide the necessary political and spiritual leadership.

This coordination of the church and the state in Reformed theological reflection is one of the critically important backgrounds to understanding how natural law functions and manifests in an ordering principle of society like subsidiarity. As the second, third, and succeeding generations of Reformed theologians struggled to work out the implications of the theological claims of earlier reformers, they faced a complex situation in which new institutions needed to be formed and reformed. The proper lines between the realms of church and state needed to be reexamined, as we see in the concrete case of Franciscus Junius, whose advice was sought by the civil

18 See for instance, Kirby: 1999; Witte Jr.: 2009; and Cromartie: 1995.
19 Watt: 1988, 367 – 424.
20 Junius/Rester: 2011, 17.
21 Junius/Rester: 2011, 18.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

authorities in Leiden on specific questions regarding the validity of the Mosaic legal system. There is an enormous struggle to come to grips with the variegated medieval traditions and test them against established Reformed principles. This is as true in the case of legal codes as it is with university curricula and church order, as the Reformed movements in various contexts sought to order society in accordance with God's will. In this way, a positive and critical appropriation of various types of law is characteristic of the increasingly developed and detailed work of Reformed theologians in the post-Reformation period.[22] These developments come to their fullest expression, perhaps, in a massive synthetic system like Althusius' *Dicaeologicae.*[23]

On the question of natural law, it has been long understood that there is a vertical as well as a horizontal axis in classical Christian understandings of the doctrine. That is, the natural law understood as moral obligation includes and comprehends the divine/human relationship (vertical) as well as that between human beings (horizontal). The vertical aspect of natural law includes within it elements that give rise to different emphases, or even forms, of subsidiarity. On the one hand, the vertical relationship between God and human beings implies a hierarchical relationship, a mediation of sorts between God and the individual. This mediation often occurs in the context of institutions like the church and the state. Thus, writes, Junius, 'The end that has been set forth for the Magistrate is so that he may look after human society and the common good according to a person in earthly and temporal affairs. However, the end set forth for a theologian is so that he may care for the society of the pious, which we have spoken of as the communion of saints, and for their salvation in heavenly and eternal things according to God.'[24] There is a kind of mediated sovereignty that God has communicated through the authorities he has established. It remains, however, God's providential prerogative to provide in his own ways and through his own means for the good of his creation. As Zanchi asks, 'In fact, whose responsibility is it to manage all things for the common good? Does it not belong to the fount of every blessing, the ruler of all?' He continues, asserting 'the goal of law is God's glory and the welfare of each person, the welfare of the church, and the entire human race.'[25] Junius likewise concurs, saying of the law, 'The end is the common good. For even if the law also orders concerning individual matters, yet the very individual

22 Muller: 2003a, 1, 37: 'Where the Reformers painted with a broad brush, their orthodox and scholastic successors strove to fill in the details of the picture. Whereas the Reformers were intent upon distancing themselves and their theology from problematic elements in medieval thought and, at the same time, remaining catholic in the broadest sense of that term, the Protestant orthodox were intent upon establishing systematically the normative, catholic character of institutionalized Protestantism, at times through the explicit use of those elements in patristic and medieval theology not at odds with the teachings of the Reformation.'

23 Witte Jr.: 2009, 252 and 256.

24 Junius/Rester: 2011, 18.

25 Zanchi/Veenstra: 2012, 5.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

formations of the law pertain to the common good. First, it is necessary to strive for a particular common good according to its own proper end. Then, in fact, because nature itself constantly teaches that all parts of one body are ordered to the whole; and the reason of one part separately constituted by the thing itself is imperfect, until it is called back to the rationale of the whole of which it is a part.'[26]

So these authorities that God has deigned to set up and to delegate a measure of responsibility to are not to tyrannize one another, but are to work in complementary and coordinated fashion, each to its own end, for the common good. Vermigli, for instance, describes the civil and the spiritual powers as 'in a certain way interchangeable,' and which 'deal with the same issues in various ways, and mutually reinforce each other.'[27] Wolfgang Musculus, writing of the authority vested in various civil and ecclesiastical structures, argued that 'such powers received from God, although they are subordinate one to another, still they do not mutually destroy one another, but to a greater extent support each other. By no means is the Emperor superior so that he might impede the lesser magistrate, who uses his lesser power legitimately to the good of his subjects and to the glory of God, but more to this, that he might aid and support them.'[28] Authority has been set into place by God for the good, the aid and the support, of those who are ruled.

At the same time, there are responsibilities and authority that accrue to each individual directly from God. These duties are those that higher authorities are bound to 'aid and support,' in Musculus' words. As Zanchi writes, one of the definitive aspects for natural law as it applies to human beings is that it is through it 'that we know and worship God and that we maintain a community among human beings.'[29] Again, Junius follows Zanchi's formulation, noting that the common notions held by human beings according to the natural law include those that are 'particular to a human being, according to the nature of [their] reason, by which they surpass other ensouled beings, by which a human being inclines first to the knowledge or cognition of God and of all things, then for establishing life with nature as their leader, so that one may achieve the good.'[30]

Thus, just as there are vertical and horizontal aspects to the natural law, there is an analogous movement between primary and secondary forms of causality. This movement has important implications for social order. Picking up on a line of thought expressed memorably by Aquinas, Blaise Pascal wrote that God instituted prayer to provide his creatures with the 'dignity of causality,' a wonderful phrase that captures the significance of the authority

26 Junius/Rester: 2011, 26.
27 Vermigli: 2007, 90.
28 Musculus: 1564, loc. 69, p. 637.
29 Zanchi/Veenstra: 2012, 16.
30 Junius/Rester: 2011, 30.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

and responsibility vested in creatures made in the image and likeness of God. To this Pascal also adds that the purpose of prayer is to 'teach us from whom we derive virtue' and to 'make us deserve other virtues through our work.'[31] These causal responsibilities accrue not only to institutions like the church or the state and their representative agents, but also to individual human beings in their own concrete circumstances. Aquinas put it this way: 'Therefore, since a created thing tends to the divine likeness in many ways, this one whereby it seeks the divine likeness by being the cause of others takes the ultimate place.'[32] This divine endowment of causal dignity as constitutive of the human person is the bridge from the vertical to the horizontal plane of human social life.

Aquinas had followed Aristotle in defining the human person as inherently social, and Reformed theologians too followed this opinion. They also understood, along with the classical Christian tradition, that the moral law comprehended obligations both to God and to neighbor, as summarized by Jesus in the two great love commandments. 'Who is my neighbor?' (Luke 10:29) was the immediate question, and Jesus responded with the well-known parable of the Good Samaritan. Ever since that encounter the Christian church has been struggling to understand and apply Jesus' teaching about neighbor-love. The problem of the *proximus* (neighbor), of proximity and corresponding moral obligations, came to expression in various ways. Augustine, for example, opined that 'all people are to be loved equally; but since you cannot be of service to everyone, you have to take greater care of those who are more closely joined to you by a turn, so to say, of fortune's wheel, whether by occasion of place or time, or any other such circumstance.'[33] Subsidiarity is a way of rationalizing and expressing this principle of the natural moral law's obligation to be of 'service', in Augustine's words, to our neighbor. Our neighbors, as human beings, are of such a nature shared with us that their inherent dignity and moral agency must be respected and celebrated. Zanchi writes much later but in a similar way when he says that when the law 'commands first and foremost that we love our neighbor as we love ourselves, it teaches that whatever we do to our neighbor we ought to do in such a way that we benefit our neighbors and advance their well-being. If that is not possible, we should at least be concerned with the common good of the church and the human race.'[34]

Subsidiarity in its most basic sense must be understood as a form of help or assistance. The term comes from the Latin *subsidium*, referring originally to a Roman military unit held in reserve for a variety of purposes, including aid for

31 Pascal/Ariew: 2004, 281–282. See also Lewis: 1994, 106: 'Pascal said that God 'instituted prayer in order to allow His creatures the dignity of causality'. It would perhaps be truer to say that He invented both prayer and physical action for that purpose.'

32 Aquinas/Bourke: 1957, 83.

33 Augustine/Hill: 1996, 118. See also Ballor: 2012a, 235.

34 Zanchi/Veenstra: 2012, 4.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

other embattled, exhausted, or defeated units.[35] It came to mean over time more generally simply a 'help' or 'aid'. The link between natural law and the idea of subsidiarity in this early modern Reformed context, then, is in the affirmation of the natural moral obligation to help your neighbor, both at the individual as well as at the institutional level. Subsidiarity, in its most basic (if not yet principled) sense is in this way a corollary of natural law, in that it is an aspect of the rational ordering of society, including human individuals with a common nature (including dignity and relative autonomy) as well as a variety of institutions with different ends (natures). Subsidiarity is an answer to the question of ordering variegated social institutions and relating them to the individual, an answer which became increasingly developed as Reformed social thought progressed. As Ken Endo puts it, referring to the mature position developed by Althusius, his vision 'aspired to harmonise the graduated social order, namely amongst the levels of families, guilds, cities provinces, the universal empire.'[36] The result, we might say, is a vision of society as one of *mutual aid.*

With all this in view we can come to some preliminary conclusions and make some provisional observations about what might be characteristic of Reformed social thought on natural law and subsidiarity in the early modern era. First, given the explicit affirmation of natural law in a variety of Reformed thinkers, including notably Zanchi and Junius, Gregory's conclusions about the Reformed rejection of natural law must be rejected. As Zanchi states quite forthrightly, 'Natural law applies to all people. In fact, it is inscribed on every heart by God himself almost from birth.'[37] Indeed, God, 'because of his own goodness, inscribed it anew in the minds and hearts of human beings after the Fall, enough to preserve the common good and to convict people of sin.'[38] What is required here, then, is more careful attention to the sources themselves and an ongoing reassessment of the relationship between medieval trajectories of theology and those picked up critically and assimilated in various ways into and beyond the Reformation. Contrary to many modern accounts, the Reformed theological background of the early modern era fits well within a broader stream of catholicity with respect to teachings concerning natural law and social life.

Next, we should recognize that there are different possible lines of intellectual development concerning subsidiarity that are possible given the vertical/horizontal dynamic of order. One model could be called 'hierarchical,' depending on an ontological ordering of institutions. This seems to be one plausible construal of a specifically Thomistic rendering of natural law and

35 Thorn: 2011, 224: 'It was common practice for the general to hold a reserve (*subsidium*) either to relieve exhausted troops, to follow up a success, or '*ad improvisa*' (to meet unexpected contingencies).'
36 Endo: 2001, 10.
37 Zanchi/Veenstra: 2012, 7.
38 Zanchi/Veenstra: 2012, 12 – 13.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

subsidiarity, whether of the more contemporary Roman Catholic variety, which uses the language of 'higher' and 'lower' in referring to the relationship of institutions, or that of Thomistically-influenced Reformed, who affirm the common good as a *telos* for the social order and hold, as Junius puts it, that 'grace perfects nature' and with Zanchi account Thomas among the 'more devout Scholastics'.[39] As Jean Lee writes concerning Althusius and the medieval hierarchical perspective, 'Althusius takes this view further and traces the development of the family units to the city, province and state, through federal bonding.' Moreover, writes Lee, 'Mutual benevolence, compassion and loving-care are clearly depicted within the description of roles and ranks.'[40]

A second model is inductive rather than deductive, and takes its point of departure in the dignity and authority instilled in the individual person directly by God. As Endo puts it, this aspect of subsidiarity 'takes on a bottom-up character', and does not necessarily require a vision of society ordered along a hierarchy of being (although it may yet require a commitment to some form of philosophical realism).[41] Such a perspective may also allow for a functional, rather than ontological, hierarchy, and thus the hierarchical and the functional emphases of subsidiarity are not necessarily at odds and can be complementary rather than exclusive. It may well be, however, that in the intervening centuries the inductive/immediate model has appealed more to Reformed and the hierarchical/mediated model to Roman Catholic patterns of social thought.

Finally, we conclude with a provisional thought about the inherent logic of subsidiarity and its coherence with Reformed theology. There is, it seems, a kind of devolutionary logic inherent in the principle of subsidiarity, one which prefers simplicity to complexity. This fits well as a kind of application in social thought of the broad Reformed doctrinal impulse in the sixteenth century *contra vanam curiositatem*.[42] There is most certainly, at least among the early generations of the Reformed, an anti-speculative bent, a sense of the need for methodological humility. It may be too much to say that the principle of

39 Junius/Rester: 2011, 24; Zanchi/Veenstra: 2012, 14. In the context of discussing Vermigli's position, Kirby describes the different models of organization as Dionysian and Augustinian, respectively. See Kirby: 2007, 68: 'On this [Dionysian] account, the temporal authority cannot claim an 'immediate' relation to the divine source of power without violating the 'order of the universe,' for according to the *lex divinitatis* the due subordination of the lower things to the highest is nothing less than a cosmic law. For Vermigli, however, who follows a distinctly Augustinian logic, the first principle of order does not consist primarily in a gradual, hierarchical mediation but rather in a simple, binary distinction between two principle species of subjection, namely the political/external and the spiritual/internal.'

40 Lee: 2011, 50 and 52.

41 Endo: 1994, 630, n. 5. On the question of philosophical realism or 'essentialism' with respect to social institutions, see Echeverria: 2011.

42 On the anti-speculative bent of many Reformers, including Wolfgang Musculus, see Ballor: 2012a, 113 and 215; and Selderhuis: 1997, 329. See also Muller: 2003b, 75; and Oberman: 1974, 33.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

subsidiarity is an application of the principle of economy or parsimony (more popularly known in other forms as Occam's razor) to social philosophy. But there does seem to be some worth in exploring the connections between subsidiarity and the ancient idea that 'it is futile to do with more things that which can be done with fewer.'[43]

Literature

Aquinas, Thomas/Bourke, Vernon, J. (trans.) (1957), Summa Contra Gentiles, Notre Dame: University of Notre Dame Press.

Augustine/Hill, Edmund (trans.) (1996), Teaching Christianity: De Doctrina Christiana, part 1, in: The Works of Saint Augustine: A Translation for the 21st Century, vol. 11, New York: New City Press.

Ballor, Jordan J. (2012a), Covenant, Causality, and Law: A Study in the Theology of Wolfgang Musculus, Göttingen: Vandenhoeck & Ruprecht.

Ballor, Jordan J. (2012b), Natural Law and Protestantism – A Review Essay, Christian Scholar's Review 41, 193 – 209.

Baschera, Luca, (2008), Tugend und Rechtfertigung: Peter Martyr Vermiglis Kommentar zur Nikomachischen Ethik im Spannungsfeld von Philosophie und Theologie, Zürich: TVZ.

Cromartie, Alan (1995), Sir Matthew Hale, 1609 – 1676: Law, Religion, and Natural Philosophy, Cambridge: Cambridge University Press.

Daryl Charles, J. (2008), Retrieving the Natural Law: A Return to Moral First Things, Grand Rapids: Eerdmans.

Echeverria, Eduardo J. (2011), Review Essay: The Philosophical Foundations of Bavinck and Dooyeweerd, Journal of Markets & Morality 14, 463 – 83.

Endo, Ken (1994), The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors, Hokkaido Law Review 44, 553 – 652.

Endo, Ken (2001), Subsidiarity and its Enemies: To What Extent is Sovereignty Contested in the Mixed Commonwealth of Europe?, EUI Working Papers 24, 1 – 42.

Estella, Antonio (2002), The EU Principle of Subsidiarity and Its Critique, London: Oxford University Press.

Grabill, Stephen J. (2006), Rediscovering the Natural Law in Reformed Theological Ethics, Grand Rapids: Eerdmans.

Gregory, Brad S. (2012), The Unintended Reformation: How a Religious Revolution Secularized Society, Cambridge: Belknap Press.

Guitián, Gregorio (2010), Integral Subsidiarity and Economy of Communion: Two Challenges from 'Caritas in Veritate', Journal of Markets & Morality 13, 279 – 295.

Hueglin, Thomas O. (1999), Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism, Waterloo: Wilfrid Laurier University Press.

43 'Frustra fit per plura quod potest fieri per pauciora,' see Maurer: 1990, 431 – 433.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

John Paul II, Pope (1991), Encyclical Letter Centesimus Annus. Available at: http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html.

Junius, Franciscus/Rester, Todd M. (trans.) (2011), Selection from 'On the Observation of the Mosaic Polity', Journal of Markets & Morality 14, 245–291 (1–47).

Kirby, Torrance (1999), Richard Hooker's Theory of Natural Law in the Context of Reformation Theology, Sixteenth Century Journal 30, 681–703.

Kirby, Torrance (2007), The Zurich Connection and Tudor Political Theology, Leiden: Brill.

Lee, Jean (2011), The Two Pillars of the Market: A Paradigm for Dialogue between Theology and Economics, Bern: Peter Lang.

Lewis, Clive Staples (1994), Work and Prayer, in: God in the Dock: Essays on Theology and Ethics, Grand Rapids: Eerdmans.

Maurer, Armand A. (1990), Being and Knowing: Studies in Thomas Aquinas and Later Medieval Philosophers, Toronto: Pontifical Institute for Mediaeval Studies.

Millon-Delsol, Chantal (1992), L'Etat subsidiaire: Ingérence et non-ingérence de l'Etat aux fondements de l'histoire européenne, Paris: PUF.

Muller, Richard A. (2003a), Post-Reformation Reformed Dogmatics: The Rise and Development of Reformed Orthodoxy, 4 vols., Grand Rapids: Baker Academic.

Muller, Richard A. (2003b), After Calvin: Studies in the Development of a Theological Tradition New York: Oxford University Press.

Musculus, Wolfgang (1564), Loci communes, Basel.

Oberman, Heiko A. (1974), Contra vanam curiositatem. Ein Kapitel der Theologie zwischen Seelenwinkel und Weltall, Zurich: TVZ.

Ossewaarde, Marinus (2011), Settling the 'Social Question': Three Variants of Modern Christian Social Thought, Journal of Markets & Morality 14, 301–317.

Pascal, Blaise/Ariew, Roger (ed. and trans.) (2004), Pensées, Indianapolis: Hackett.

Selderhuis, Herman J. (1997), Die Loci Communes des Wolfgang Musculus: Reformierte Dogmatik anno 1560, in: Rudolf Dellsperger/Rudolf Freudenberger/Wolfgang Weber (ed.), Wolfgang Musculus (1497–1563) und die oberdeutsche Reformation, Berlin: Akademie Verlag.

Skillen, James W./McCarthy, Rockne M. (ed.) (1991), Political Order and the Plural Structure of Society, Atlanta: Scholars Press.

Steinmetz, David C. (2002), Luther in Context, Grand Rapids: Baker Academic.

Thorn, James (2011), Battle, Tactics, and the 'Limites' in the West, in: Paul Erdkamp (ed.), A Companion to the Roman Army, Malden, MA: Wiley-Blackwell.

Utz, Arthur (1958), The Principle of Subsidiarity and Contemporary Natural Law, Natural Law Forum 3, 170–183.

van der Vyver, Johan (2002), The Jurisprudential Legacy of Abraham Kuyper and Leo XIII, Journal of Markets & Morality 5, 211–249.

VanDrunen, David (2010), Natural Law and the Two Kingdoms: A Study in the Development of Reformed Social Thought, Grand Rapids: Eerdmans.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

Vermigli, Peter Martyr (2007), Of Ciuill and Ecclesiasticall Power (1561), in: Torrance Kirby, The Zurich Connection and Tudor Political Theology, Leiden: Brill.
Watt, John A. (1988), Spiritual and Temporal Powers, in: James H. Burns, The Cambridge History of Medieval Political Thought c. 350–1450, Cambridge: Cambridge University Press, 367–424.
Witte Jr., John (2002), Law and Protestantism: The Legal Teachings of the Lutheran Reformation, New York: Cambridge University Press.
Witte Jr., John (2009), A Demonstrative Theory of Natural Law: Johannes Althusius and the Rise of Calvinist Jurisprudence, Ecclesiastical Law Journal 11, 248–265.
Zanchi, Jerome/Veenstra, Jeffrey J. (trans.) (2012), On the Law in General, Grand Rapids: CLP Academic.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

Wim Decock

2. The Catholic Spirit of Capitalism?

Contrasting Views on Profit-Making through Capital Investment in the Age of Reformations

2.1 Introduction: The Triple Contract[1]

This paper intends to shed light on the attitude of Reformed and Counter-Reformed theologians, respectively, towards the rise of commercial capitalism in the early modern period. Particularly, the views of the Reformed theologian Wolfgang Musculus (1497 – 1563) will be contrasted with those of the Jesuit theologian Leonardus Lessius (1554 – 1623). Since those theologians did not write separate essays in which they revealed their opinion on the rise of a culture of financial investment strategies, the answer to the initial question must be obtained in an indirect way. Theologians in the sixteenth and seventeenth century, such as Musculus and Lessius, may not have produced manifests in favor of or against capitalism, but their writings on legal and moral problems abound with statements which reveal their approval or disapproval of the juridical devices and moral principles that form the legal backbone of a capitalistic economy. One such device is the triple contract (*contractus triplex* or *contractus trinus*). By means of a triple contract, which could be analyzed as a combination of a partnership (*societas*), an insurance (*assecuratio*) and a sale contract (*emptio-venditio*), capitalists could safely invest their money in commercial enterprises at a fixed annual profit rate. The triple contract developed into the juridical backbone of 'commercial capitalism' in the literal sense of the word: the investment of capital in commercial activities for the sake of making profit.

In addition to the usual partnership contract, in a triple contract the working partners stipulate that they guarantee the capital and that they will return a small but fixed amount of profits to the capital investors every year in exchange for keeping the remainder of the future and uncertain gains for themselves.[2] In other words, the *contractus trinus* allows providers of funds to invest their money with a capital guarantee and a fixed rate of return. Conversely, working partners, particularly merchants, can raise liquidity in a way that is technically different from a simple money loan and with the

1 For a more detailed investigation of the triple contract including references to secondary literature, see Decock: 2012. The following paragraphs rely for the greater part on Decock: 2012, 15 – 22.

2 Lessius: 1621, lib. 2, cap. 25, dub. 3, p. 337.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

prospect of making almost unlimited profits. The contracts that make up a *contractus trinus* can be concluded between four different parties or between the capitalist and the entrepreneur alone. In the first case, investor A concludes a *societas* with entrepreneur B, then insures his capital with C and eventually sells his hope of making profits to D.[3] In the second case, investor A concludes the partnership contract, the insurance contract and the sale contract with entrepreneur B. The result of this transaction for A remains unchanged: his capital is guaranteed and he will receive a fixed annual return. B gets the funding to undertake his enterprise. He receives a premium to insure A's capital, which exposes him to a potential loss of 100 guilders, but at the same time he buys A's hope of making profits, thus gaining the prospect of making unlimited profits.

The practical result of the triple contract was not very different from a money deposit or a loan for consumption. This was recognized by the theologians and the major reason why they were so concerned about it. Until the beginning of the sixteenth century the triple contract met with universal resistance from both theologians and jurists, because it was said to be an implicit loan at interest. However, the first defence of this legal construction was famously put forward by Johann Eck (1486 – 1543).[4] Eck defended the triple contract in 1515 in Bologna during a meeting convened by the Fugger banking family. He advocated the triple contract on the grounds that the 'profit-loss-sharing-principle' (*utrumque debere poni sub fortuna*) was not an essential element of partnership contracts. Eck admitted that the aleatoric element was natural to a partnership contract, but he affirmed that natural elements of a contract which are not essential could be changed by virtue of voluntary consent between the parties. According to Eck, the only essential feature of a partnership is that parties agree to contribute something for the sake of a common goal. The natural elements of a contract, such as the exposure of all parties to both profits and losses, can be altered by agreement (*fateor naturalia posse pacto mutari*).[5] Hence, it is possible for parties to reach an agreement about a safe partnership with a fixed gain for the capitalist.

Not surprisingly, Eck drew heavy criticism for his straightforward way of reasoning, mostly by the humanist jurists of this time. But he seems to have had a very clear aim in mind: to legitimize the commercial and financial practices in Augsburg and in other German cities of his day.[6] Nevertheless, doubts remained as to the lawfulness of this rather clever way of circumventing the usury prohibition. These doubts stemmed from secular and ecclesiastical legislation that sought to ban the triple contract from the market, as well as from theological authorities such as Domingo de Soto (ca. 1494 –

3 Löber: 1965, 39.
4 Birocchi: 1990, 280 – 304.
5 Birocchi: 1990, 293.
6 Birocchi: 1990, 303 – 304.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

1560). However, it appears that the Catholic moral theologians gradually adopted Eck's defence of the triple contract. As the Reformed theologian Gijsbert Voet (Voetius) (1589 – 1676) rightly remarked in his *Theological Disputations*, the common opinion of the 'papalists' eventually approved of the triple contract.[7] To this effect, Voetius quoted Juan Azor (Azorius) (1535 – 1603), a Jesuit famous for his massive *Moral Institutes*, allegedly the first full-blown treatise on moral theology, and Johan Van Malderen (Malderus) (1563 – 1633), the bishop of Antwerp and author of a treatise *On Justice and Right* after the model of Leonardus Lessius' work with the same title.

Leonardus Lessius was one of the most important theologians from the Low Countries and he is famous for his economic thought.[8] In his *On Justice and Right*, concrete moral and legal problems are discussed in the framework of a systematic exposition on property, torts, and contract law. As we will see below, his remarkable cost-benefit analysis of the triple contract developed into a startling defense of commercial capitalism, indeed. On the basis of moral, legal, and economic policy arguments, Lessius promoted the investment of private wealth in safe commercial credit contracts. In this paper, Lessius' radical defense of the triple contract will be contrasted with Wolfgang Musculus' more skeptical assessment of investors who transfer their money to an entrepreneur or a prince on the twin condition that they receive an annual dividend and that their capital is insured. Musculus was a Reformed theologian who studied under Martin Bucer and became a professor at the University of Bern. Recent years have seen a revival of interest in the work of Wolfgang Musculus.[9] Musculus' economic thought is also the subject of a paper by Todd Rester contained in this volume. Musculus' essay on usury remained a reference point for other Reformed thinkers, such as the jurist and theologian Lambert Daneau (Danaeus) (1530 – 1595).[10]

7 Voetius: 1667, vol. 4, p. 558: 'Adhaec contractus assecurationis sortis, contractus societatis et lucri seu venditiones lucri incerti pro certo omnes liciti sunt in Papatu, et a conscientiae magistris ex communi sententia ibi defenduntur Maldero in 2.2., tract. 5, cap. 3, Azorio, tom. 3, lib. 7, c. 7.8.9. et lib. 9, c.2.3.4. Si ergo simplices illi contractus liciti, quidni contractus usurae, qui ex illis mixtus et compositus est?'

8 For biographical information about Lessius, see Van Houdt/Decock: 2005, 11 – 54 and Decock (2007), 439 – 443.

9 See Ballor: 2012 and the works he mentions.

10 To our knowledge, Daneau did not go into the details of the triple contract, even if his famous work *On Christian Ethics* includes a brief discussion of the partnership contract (*societas*); cf. Daneau: 1582, lib. 3, cap. 15, f. 254b. On Daneau, see Strohm: 1996.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749

2.2 The Catholic tradition: Leonardus Lessius[11]

The thrust of Lessius' exposition on the *contractus trinus* was to defend it as a just means for providing guaranteed commercial credit with a fixed annual dividend. In many respects, Lessius' project was a late echo of Eck's endeavor to defend the triple contract. As moral theologians they were both highly sensitive to the needs of business practice and defended contractual freedom against unduly restrictive moral and legal obligations. Lessius was perhaps just a bit more prudent than Eck. Accordingly, at the outset of his dubitation on the *contractus trinus* Lessius produced a list of no less than fifteen canonists and theologians who had already defended the triple contract.[12] He highlighted and interpreted some of the most relevant passages in their work 'for the sake of those who are convinced by the number of authorities more than by the weight of argument'. From this overview it appears that Lessius knew Eck's work merely indirectly, mainly through the Scotsman John Mair's (1467–1550) discussion of the subject. Lessius also recognized that the theologians had hitherto been more favorable toward the *contractus trinus* than the jurists.[13] Yet, what is really interesting about Lessius' argumentation is that he invited his readers to leave aside the arguments from authority.

Besides the sheer length of his argumentation, Lessius' dig at those scholars who relied more eagerly on authorities than on the voice of reason indicated what really mattered to him: the rational analysis and the defence on rational grounds of the triple contract. According to Lessius, assessing the inequity (*iniquitas*) of a safe investment with a guaranteed annual income requires a thorough analysis of three possible sources of inequity in that kind of contracts[14]: 1) an uneven or unequal relationship between the contributions of the partners (*non servetur aequalitas inter ea quae commutantur*); 2) a violation of the nature of the contract because the working partner is overburdened (*mercator obligetur ad aliquid supra naturam contractus*); 3) the transformation of the triple contract into an implicit money-loan on account of the merchant's obligation to insure the capital, so that the fixed annual profit is tantamount to usury (*ratione assecurationis praestandae a mercatore fit implicitum mutuum ex quo non licet lucrum captare*). The upshot

11 The following paragraphs are borrowed from Decock: 2012, 22–34.

12 Lessius: 1621, lib. 2, cap. 25, dub. 3, num. 23, p. 337: 'Verum contraria sententia est multo probabilior et verior, nimirum haec pacta in societatis contractu esse licita, sive simul fiant cum sociis, sive successive, modo prudentis arbitrio servetur aequalitas. Hanc expresse multi viri doctissimi et religiosissimi tenent, quorum verba breviter adducam, ut maiorem fidem faciant apud eos qui vel aliter sentiunt, vel rem non penetrant et magis auctorum numero quam rationum pondere moventur.'

13 Lessius: 1621, lib. 2, cap. 25, dub. 3, num. 23, p. 337: 'Etsi iuristae forum externum spectantes et praesumptioni innixi contrarium tenerent.'

14 Lessius: 1621, lib. 2, cap. 25, dub. 3, num. 25, p. 338–339.

© 2014, Vandenhoeck & Ruprecht GmbH & Co. KG, Göttingen
ISBN Print: 9783525550748 — ISBN E-Book: 9783647550749