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On the religious Origins of Capitalism*

Political theology's recent rise to academic prominence has, no doubt, been inspired by the sense of a certain staleness of standard (read: Anglo-American) analytical political and legal theory. Especially postcolonial and postmodern philosophy has resuscitated debates about the reality of secularization in Europe, pointing out that much of our shared political metaphysic is indeed that – a metaphysic – with close historical links to debates in theology. That should be no surprise. For almost half a millennium theology stood as the *primus inter pares* among the three »higher faculties« at European universities. The best minds at work in Europe explained the social and political changes to European audiences within a fully God-centric intellectual universe. Awareness of that fact, as Wim Decock points out in this massive and brilliant work, not only assists us in understanding the development of our political and legal vocabularies. It also enables us to grasp the contingency of our present debates, the way opposite standpoints on political and legal obligation refer back to assumptions about human nature, the roles of individual and society and the nature of »law« that are hard to detach from religious speculation.

Even such a quintessentially modern institution as »contract« carries a long pedigree of political theology. What is the role of human will in the creation of social relations? How to understand the freedom to dispose of what one owns and the character of the »fairness« we associate with a market society? The emergence of a wholly global network of mercantile relations in the sixteenth and early seventeenth centuries, the discovery of the »New World« and the Protestant rebellion destabilised the religious morality that once provided authoritative responses to such questions. Theologians had a great stake in reacting to what was happening. They did this with great energy, developing a massive literature the point of which

was to relate the individualization of social relations, especially apparent in a novel commercial ethic, to the theology of sin and redemption, the overall search for beatitude that for Christians provides the frame for understanding the world and living in it.

That it fell on the 16th and early 17th century Spanish theologians – the »Second scholastic« or the »Salamanca school« – to articulate the transformations into a new morality of law has long been known. In international law, for example, the Dominican scholar Francisco de Vitoria and the Jesuit Francisco Suárez have been heralded as producers of something like the first recognizably »modern« discourse of international legality – just war, »sovereignty« and treaty law as the heart of diplomacy. Their suggestion that legitimate political government was derived from the consent of the community has inspired much later political thought. To be sure, the debate about the degree of the »modernity« of the scholastics and whether Hugo Grotius should read among them, remains inconclusive. In Decock's view at least as far as the theory of contract is concerned, Grotius is best read as a loyal follower of the Spaniards. But if not much argument is today needed to highlight the significance of the early modern Spanish theologians, we still lack a good sense of what, specifically, made them so significant. Relevant scholarship tends to be hidden in specialist volumes, available only in the most well-resourced research libraries. Modern editions of the scholastics' works are still few, the texts remain in the original Latin, and most commentary – at least most *legal* commentary – is either in Spanish or in German. Basic questions about the scholastics still need to be posed. What was their principal intellectual contribution and how did it express itself in their extensive writings? What sources did they use and how was their contribution received? How

* WIM DECOCK, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500–1650)* (Legal History Library 9) Leiden, Boston: Nijhoff 2013, XVI, 723 p., ISBN 978-90-04-23284-6

united was the »school« in reality? We are speaking of three-four generations of intellectuals, initially located on the Iberian peninsula, later also in central and northern Europe. If the founding generation (Francisco de Vitoria, Domingo de Soto, Melchior Cano) were Dominicans, leadership in the school towards the late-sixteenth and early seventeenth century shifted decisively into the hands of the Jesuits.¹ How justifiable is it to separate those men from the intellectuals debating natural law and the reason of states around them?

Wim Decock's over 600-page work provides an extensive but engaging and readable discussion of one of the many fields in which the moral theologians of the second scholastic had a huge influence – the law of contracts. It is true, Decock reminds us, that Roman law already had a robust contracts doctrine and that this was part of the source material used by the theologians. But the latter were no civil lawyers. Roman doctrine tended to be too pragmatic and formalist for responding efficiently to the new problems of economic and political government; nor could it alleviate the attendant spiritual concerns. How to integrate Christian tradition in a profoundly transformed social and political world? *Bricolage* in Roman and Canon law was insufficient for the purpose of explaining the new practices in specifically Christian terms so that they would not challenge traditional authority but, if possible, strengthen it.

In developing their views of contract law the Dominican scholars from Vitoria, his students Soto, Cano and Tomas de Mercado, took their starting-point from the Thomistic metaphysics according to which human beings enjoyed *dominium in actionum suarum*, authority over their own acts. But although humans were »free« to construct the social and economic world in accordance with their »will«, the final goal of their freedom was still supernatural beatitude, the ability to see God »in the face«, as Soto put it. The metaphysical freedom that humans enjoyed and that corresponded to their biblical status as *imago Dei* now justified a general liberty of contract. Even »naked

pacts«, as Decock shows, agreements without a definite form, constituted simply of offer and acceptance, were binding for Christians. If a contract was the expression of a party's »will«, then it could be understood as a promise or an oath that could not be broken without sinning. For the scholastics, contractual freedom and the binding force of will were important aspects of moral anthropology. No argument is needed to demonstrate the huge importance of this doctrine to the commercial world of the 16th century, so well described by Fernand Braudel and his followers. Here was a way to justify the free determination of the conditions of economic exchange by the participants in those exchanges themselves. No surprise that much of the very ideological historiography produced at Austrian or United States universities in the twentieth century has interpreted the Spanish theologians as intellectual forebears of Adam Smith. Playing down the *theological* presuppositions of the tradition has seemed nicely to support (neo)liberalism's intellectual hegemony at the economics departments of Western universities.

Wim Decock's painstaking work should be warmly welcomed because it brings the biblical background and the teleology of beatitude back into our reading of these texts. Much of the work of the scholastics came about as instructions to young clerics on how to manage the sacrament of penance. The theologians insisted that in case a contractual exchange had been unfair – because the principles of commutative justice had not been respected – the duty of restitution was more than a mere legal duty. It was, at least equally importantly, a condition for receiving absolution. Soto, for one, always insisted on the parallelism between the *legal* principle of restitution, as developed under *Quaestio* 62 of the *secunda secundae* of Aquinas's *Summa theologiae* (the unvaried starting-point of the discussion) and the *religious* duties the sinner has to undergo in the process of penance. Decock reminds his readers over again that the scholastics operated in the worlds of *forum internum* and *forum*

1 A thorough overview on the three generations of the school and especially their theological views is BELDA PLANS, JUAN, *La escuela de Salamanca y la renovación de la teología en el siglo XVI*, Madrid: Biblioteca de autores cristianos 2000.

externum simultaneously. They were concerned *both* with the secular justice of contractual arrangements as well as their effect on the soul of the parties. The latter concern was not an add-on to problems of the emerging market economy but the very heart of the discourse being *theological*. The Christians' daily lives were increasingly lived under pressure from political authorities, demanding loyalty to secular rules of good government, and from conditions of economic exchange laid out by professional profit-seeking merchant communities. All of this was terribly problematic for traditional Christian morality and acerbated the conflict between secular and religious authority, feeding into the kinds of concerns that Protestant agitators often managed to turn into the benefit of a religious revolution.

The scholastics were, of course, no revolutionaries. But many of them were in the service of the internal reform movement within the Catholic church («counter-reformation»). The moral casuistry that emerged from their writings resulted from a search for a compromise between traditional Christian ethic and the new practices of political and economic governance. As Decock stresses, the objective was both social peace and the tranquillity of consciences. The moral theologians had great interest in the novel practices, not only in problems concerning the treatment of the Indians (for which they were well-known) but also in understanding the operations of the expanding economy that boomed as a result of the importation of New World silver to Europe and China. The boom led to the development of new trading practices, including bills of exchange, a variety of banking and insurance instruments, and other forms of commercial exchange that involved routine profit-seeking that flew in the face of the prohibition of usury and Aristotelian principles of justice. In this context Canon lawyers such as Martin Azpilcueta (Dr. Navarrus) or Diego Covarruvias y Leyva as well as Dominicans such as Soto and Tomas de Mercado, produced some of the best introductions on how, in practice, contractual and property relations and monetary policies organized early modern economic life. Their concern was not to produce an ethnography but to create a language of justification within which the tension between tradition and commerce could be managed, the internal and external forums brought together and the Christian struggle for supernatural beatitude won. It was not for nothing that much of their work was

written in confessors' manuals. The clerks of the Catholic church needed a realistic picture of the conditions in which their clients operated.

Wim Decock demonstrates how it is indeed right to think of the moral theologians as the first theorists of the economic market in which the will of the buyers and sellers provides the basic criterion for assessing the moral justification – and hence the legality, the two being completely intermingled – of the transactions. The criterion of just price is the «common estimation» (*communis aestimatio*) of the public at large. But the scholastic writers were aware that the conditions of the formation of a common view might not always be present owing to the scarcity of the commodities or monopolistic practices fore example. If the scholastics were no Marxists, they were no Friedmannites either. There were many reasons for the prince to set a «legal price». This might be needed to relieve the poor or to fight monopolies but also to see to it that the conditions of the market were such as to contribute to domestic peace and spiritual tranquillity. Despite their insistence that the authority of the prince came from the people (and not directly from God), theologians such as Vitoria, Soto and Francisco Suárez, for example, were keen to stress the authority of the prince and to grant a strong preference to formal laws over considerations regarding the justice of particular types of exchange. That they did not encourage subjects to think for themselves but accepted the king's law as almost unexceptionally binding is easy to understand from the perspective of their political project. Vitoria's famous *relectio* on civil government (1528), for example, emerged as a defence of royal power in a situation where Castile had just experienced a series of urban revolts (the «Comuneros» rebellion, 1520–1521). It is a measure of the flexibility of their political assumptions that they were able to ground absolutism on the view of the «consent of the governed» by the Hobbesian view for which it sufficed that the consent was merely hypothetical or tacit. Moreover, obedience to positive law was also an obligation of conscience. Decock does not engage with such notorious outliers among the later Jesuits as Juan de Mariana who did argue for an extensive right of resistance against a heretical ruler. Nor does he belabour Suárez' encouragement for right-thinking rulers to assist oppressed Catholics such as the English recusants compelled to swear their loyalty to the king. These were religiously motivated exceptions

in an otherwise authoritarian discourse. The main thrust lies with peace and stability that, in the mind of the renaissance thinkers, required accepting that government was to be kept firmly in the hands of the ruler, best placed to operate the *arcana* of enlightened rulership.

This was also visible in their economic views. If the moral theologians agreed on contractual freedom as the core of contracts theory, they also agreed that this freedom was by no means unlimited. The writers disagreed on the number and nature of the limitations. Decock distinguishes between formal limits that had to do with *vices de consentment*, cases where the contract did not emerge from free will (fraud, coercion, error), and substantive limits where will collided with imperative moral requirements. Most of this book has to do with the way in which the moral theologians conceived of those limits, obviously important in today's contract law as well. Yet there are differences, too. In the discussion of the »natural limits« on the contractual freedom, Decock expounds the scholastic views on duress and mistake, neither one of which followed automatically from their voluntarism. »Duress« for example, operated as an independent violation of a duty of justice, coercion of a contract-partner belonging to torts rather than contracts – a construction that allowed thinking of a contract made under duress as not automatically void but *voidable* in accordance with the wish of the coerced party. Yet here and elsewhere the views of the scholastics were as varied as those of today's experts. Scholars moved as freely in the consensual and non-consensual, »subjective« and »objective« ends of the spectrum as they do today, illustrating thus the persistence of a discourse of justification that tried to accommodate the individual and the social, reluctant to finally privilege either one. That the result was casuistry, and one that eventually received a bad name is hardly surprising.

The chapters on »formal« and »substantive« limits to the freedom of contract strengthen the reader's sense that the scholastic discourse is both fluid, in constant motion between opposing principles and considerations, and rather fixed in what it is able to bring forth as substantive normative resolutions. Freedom of contract is relativized by the argument that subjects have a religious duty to obey positive laws limiting it and that the considerations of justice that go to assess the substantive validity of contracts have their predominant sphere of operation in the court of conscience. On the

other hand, the issue of contract for prostitution, at least as presented here, suggests both the difficulty of any general resolution of the dilemmas affected and the reasonableness of the scholastics dealing with them: that the prostitute may keep the money she has received, independently of the injustice of the exchange, is surely something modern readers will find admirable, however contrived the casuistry that explains the result.

Perhaps the most interesting chapter is the one of »fairness on exchange« that deals with the scholastics' theory of the just price that comes about as a combination of concerns of »common estimation« and legitimate public intervention for the common good. That the matter has been governed by a search for commutative justice since Aquinas explains much about the enthusiasm with which historians committed to a view of liberal progress have heralded scholasticism. It also explains why it is so easy to see Grotius as a continuator of tradition rather than innovator. For the scholastics, it is obvious that no other principle should govern labour relations, either. Grotius would later go as far as to argue that *any* considerations of justice that are extrinsic to commutative, contractual justice are valid predominantly in the court of conscience. In a world where religious institutions have been deprived of enforcement powers, that is as good as throwing distributive considerations overboard. This was not yet the situation when the scholastics were writing. Ecclesiastical courts could, Decock explains, take into account a *laesio enormis* that was less than half the price of the good – in this way reaching from the pragmatic ethics of the market-place to the moral sensibility of market actors. Concerns about need or merit might still be handled by theological authority. This of course was no longer the case when Grotius wrote. What Decock writes of as »Grotius' elegant synthesis« (601) was, it seems to me, the product of a somewhat truncated view of his sources; the scholastics would hardly have recognized themselves as the origin of the law/morality distinction into which the Protestant jurists turned the theory of the »*forum internum*«.

Wim Decock's extensive study of the 16th and early 17th century moral theologians' discussions of contract law provides a wholly convincing demonstration of the interest the second scholastic has for the history of legal and political thought. The casuistry of the moral theologians emerged as a reaction by the best minds of the period to the

crisis inside the church and to such secular developments as the expansion of the Habsburg empire into a new world with an infidel population the very existence of which had earlier escaped the contemporaries and the massive expansion of international commerce that was infecting many kinds of human relations with a predominantly secular mercantile ethics. The doctrine of freedom of contract, accompanied by an elaborate casuistry of exceptions was one of the doctrines that sought to accommodate such developments in the traditional world-view. But although Decock calls for a contextual reading of the scholastics, his own work is more concerned with the internal coherence and argumentative structures of their discourse. The author does occasionally point to how a doctrine or an exception was intended to respond to this or that challenge, but he refrains from a more detailed discussion of the operation of the contextual determinants. There is, for example, no discussion of the pressures inside the Catholic church that led to the Council of Trent where many of the scholastics played a leading role.

Yet contextualization may also be taken too far – turning even into a »positivism« that reduces intellectual life to a mechanistic superstructure. Perhaps it is in any case more for *economic* historians to situate these casuistries in the novel commercial practices. For *legal* historians, rules and arguments time-travel more freely. My main critical comment has to do with the decision not to identify specific streams or »tendencies« among the scholastics. Individual theologians make their appearance in this book in a somewhat random or fortuitous way, representing, it seems, only themselves. The reader encounters a huge number of authors (the bibliography lists altogether ninety-six of them) most of whom are either part of the second scholastic or react to their writings. It would have facilitated the grasp of this literature had the author grouped the scholars as representatives of definable tendencies or idioms, seeking to develop the discourse in specific ways. Why did a particular author espouse a position while another took the opposite one? Could one delineate attitudes that could be labelled, for example, »conservative«, »radical«, or »moderate«? Was there a more or less clear mainstream, what were its elements and the main challengers to it? How did religious views link with views in the many controversies concerning the nature of the free-

dom to contract or the power of the ruler to limit it? The difficulties of such a task would of course be great. It was not usual to flag one's affiliations in this way. The danger of anachronism might well loom large. For the reader, however, called upon to navigate in the thicket of alien or half-familiar names the effort to remember who wrote what in which context will inevitably fail, with the result that the tensions internal to this discourse remain difficult to grasp.

Which is not to say that this would not be a wonderful book. Though extremely erudite and knowledgeable about the world it examines, it is written with a light pen and is full of insights and arguments that link the debates from four-five centuries ago to present concerns. The law of contracts becomes alive as a set of problems and solutions that are as plausible or implausible now as they were when the scholastics wrote. It is striking for example, how the scholastics begin to accept that a mercantile ethic may deviate from the morality applicable to ordinary Christians. The book does a marvellous job in showing the relevance of religious views for taking a position not only in regard to specific aspects of contract law but also to the very business of governing a society in which the »spiritual« and the »economic« have begun to take separate paths. It brings theology closer to life (and the other way around), by showing how the best theologians sought to manage concerns raised by the predominance of economic values in a post-traditional society. Whatever one thinks of their suggested principles and solutions, one cannot avoid admiring the scholastics as intellectuals *engagés*. If only the academy would today produce similar forces! Could theology provide such? Perhaps not, or at least not university theology. We may have to content ourselves with the heterodox group of political theorists and jurists commenting on the successive European »crises« from their tenured positions as experts in some rather narrow technical vocabulary. Having put this book down, one is left with a powerful sense that however intractable our present economic and political problems, there is nothing intrinsic in the academy that prevents its engagement in their resolution with an orientation towards political effect and spiritual renewal.

