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THE JESUITS OF THE LOW COUNTRIES: IDENTITY AND IMPACT (1540-1773)

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TOWARDS A JESUIT SCIENCE OF LAW

I. TENSIONS BETWEEN THE ACTIVE AND THE CONTEMPLATIVE LIFE

In 1606, Claudio Acquaviva received the results of an enquiry into the state of spiritual health of the Society of Jesus: the *De detrimentis Societatis*. It revealed the main threats and weaknesses to which the Jesuit order was exposed. Generally speaking, the report *De detrimentis Societatis* laid bare a Society suffering from a kind of pubertal crisis¹. True to its mission of reconciling the active and the contemplative life, the young Society now felt itself torn between the opposites of its ideal. Apart from tensions that stemmed from differences in nationalities and heavy work schedules, Claudio Acquaviva found that the overextension of the Jesuits' "out-reach" (*effusio ad exteriora*) was posing threats to the spiritual identity of the Society. They were kept so busy saying Masses and performing pastoral duties that their inner relationship to God actually began to suffer from it. It was being reported that in France some Jesuits were more eager to concentrate on studies necessary for success in the outer world than to contemplate true Christian doctrine. A lot of them had become experts, indeed, in legal, economic and political affairs, but their hearts often seemed to have turned away from God.

The early modern Jesuits' excellence in giving political advice and doing economic analysis has seen a remarkable interest in the last two decades among historians². The thoroughly legal framework in which

1. An account of this crisis has been given by Michel de Certeau in his *Histoire des Jésuites*, recently published anew in M. DE CERTEAU S.J., *Le lieu de l'autre: Histoire religieuse et mystique*, ed. L. GIARD (Hautes Études), Paris, Gallimard, 2005, pp. 155-194.

2. Amongst many other important studies dedicated, at least in part, to Jesuit political or economic thought, see R. BIRELEY S.J., *The Counter-Reformation Prince: Anti-Machiavellianism or Catholic Statecraft in Early Modern Europe*, Chapel Hill, NC, University of North Carolina, 1990; F. GÓMEZ CAMACHO S.J., *Economía y filosofía moral: La formación del pensamiento económico europeo en la Escolástica española* (Historia del pensamiento económico, 1), Madrid, Síntesis, 1998; R.W. TRUMAN, *Spanish Treatises on Government, Society and Religion in the Time of Philip II: The De regimine principum and Associated Traditions* (Brill's Studies in Intellectual History, 95), Boston, MA – Cologne – Leiden, Brill, 1999, pp. 253-360; T. VAN HOUTT, *Ethische Überlegungen und wirtschaftliche Analyse in Lessius' De iustitia et iure*, in B. SCHEFOLD (ed.), *Leonardus Lessius' De iustitia et iure: Vademecum zu einem Klassiker der Spätscholastischen Wirtschaftsanalyse* (Klassiker der Nationalökonomie), Düsseldorf, Wirtschaft und Finanzen, 1999, 63-80; R. BIRELEY S.J., *The Jesuits and the Thirty Years War: Kings, Courts, and Confessors*, Cambridge, Cambridge University Press, 2003; H. HÖPFL, *Jesuit Political Thought: The*

these practical aspects of Jesuit thought were couched, however, has drawn far less attention. Still, the Jesuits have made a most important contribution to the juridical turn witnessed in early modern catholic moral theology³. They are said to have borrowed even more extensively from the Roman and canon legal tradition than did the 16th-century Dominicans belonging to the so-called “School of Salamanca”⁴. What is more, from the end of the sixteenth century onwards the Jesuits played a crucial role in systematizing legal doctrine, eventually developing a real science of law by the mid-17th century. Avoiding technical details, it will be the aim of this paper to draw attention to the Jesuits’ major contribution to the development of a systematic body of legal thought, by explaining why they got so actively involved in legal studies and showing how they did so⁵. The Jesuits were well-known for their splendid poetry, emblem literature, and art⁶. Their reputation as preachers travelling

Society of Jesus and the State c. 1540-1630 (Ideas in Context, 70), Cambridge, Cambridge University Press, 2004; F. MOTTA, *Bellarmino: Una teologia politica della Controriforma*, Brescia, Morcelliana, 2005; E. NELSON, *The Jesuits and the Monarchy: Catholic Reform and Political Authority in France (1590-1615)*, Rome, Ashgate - Institutum Historicum Societatis Iesu, 2005; H.E. BRAUN, *Juan de Mariana and Early Modern Spanish Political Thought*, Aldershot, Ashgate, 2007; S.J. GRABILL (ed.), *Sourcebook in Late-Scholastic Monetary Theory: The Contributions of Martín de Azpilcueta, Luis de Molina, S.J., and Juan de Mariana, S.J.* (Studies in Ethics and Economics), Lanham, MD, Lexington, 2007.

3. With regard to the juridification of moral theology in early modern Catholicism, see J. THEINER, *Die Entwicklung der Moraltheologie zur eigenständigen Disziplin* (Studien zur Geschichte der katholischen Moraltheologie, 17), Regensburg, Pustet, 1970, pp. 298-310; S. PINCKAERS, *Les sources de la morale chrétienne: Sa méthode, son contenu, son histoire* (Studien zur Theologischen Ethik, 14), Fribourg, Éditions universitaires, 1985, pp. 258-282; J. MAHONEY, *The Making of Moral Theology*, Oxford, Clarendon, 1987, pp. 224-258; M. TURRINI, *La coscienza e le leggi: Morale e diritto nei testi per la confessione della prima Età moderna* (Annali dell’Istituto storico italo-germanico, 13), Bologna, Il Mulino, 1991; L. VEREECKE, *Théologie morale et magistère, avant et après le Concile de Trente*, in *Le Supplément. Revue d’Éthique et Théologie Morale* 177 (1991) 7-22; R. SCHÜSSLER, *Moral im Zweifel*. Band I: *Die scholastische Theorie des Entscheidens unter moralischer Unsicherheit*. Band II: *Die Herausforderung des Probabilismus*, Paderborn, Mentis, 2003, 2006.

4. See P. GROSSI, *La proprietà nel sistema privatistico della Seconda Scolastica*, in ID. (ed.), *La seconda scolastica nella formazione del diritto privato moderno* (Per la storia del pensiero giuridico moderno, 1), Milan, Giuffrè, 1973, 117-222; P. CAPPELLINI, *Sulla formazione del moderno concetto di ‘dottrina generale del diritto’*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno* 10 (1981) 323-354.

5. For a more technical analysis of some of the basic principles of Jesuit contract law and their connection with moral probabilism, see W. DECOCK, *Jesuit Freedom of Contract*, in *The Legal History Review* 77 (2009) 423-458.

6. See the other contributions in this volume, as well as the general overviews provided in J.W. O’MALLEY S.J. (ed.), *The Jesuits: Cultures, Sciences, and the Arts 1540-1773*, Toronto, Toronto University Press, 1999; J.W. O’MALLEY S.J. – G.A. BAILEY (eds.), *The Jesuits and the Arts, 1540-1773*, Philadelphia, PA, Saint Joseph’s University,

around the world, as prolific theologians and spiritual writers as well as dedicated scholars in natural sciences is remarkable. But they were equally memorable in producing legal literature of the finest quality.

II. MAKING JESUIT SPIRITUALITY WORK: THE NEED FOR LAW

The Jesuits' involvement in legal affairs can be considered a direct consequence of their charisma and spirituality. As depicted superbly by John O'Malley, the first Jesuits were driven by a ferocious desire to bring back the whole world to its Creator⁷. This zeal led them to reach out to people of all walks of life from all kinds of different cultures. Basically, the good news they preached was the following: through the sacrament of penance it is possible for man to find consolation and to be reconciled with God, if only he entrusts himself to the guidance of a Jesuit confessor⁸. For the Jesuits are the servants of God *par excellence* who on account of their intellectual capacities and practical mastery of the *Spiritual Exercises* have the knowledge and prudence to show each man how he must live his life in order to follow God's will⁹. To make this general claim applicable to concrete cases, however, a more sophisticated and operational device was needed. These practical tools the Jesuits found in the legal tradition.

Even if present day moral theological reasoning is sparing of legal references, historically speaking there has always been a very intense relationship between law and pastoral theology. During the Middle Ages, all monastic orders, even the most contemplative ones, got deeply involved with law. They were at once serving as confessors to those Christians trying to live a God-pleasing life in the secular world while simultaneously competing as major economic actors of their times. It is unwise for an historian to divide the flux of historical events in neatly

2005, and J.W. O'MALLEY S.J., *et al.* (eds.), *The Jesuits II: Cultures, Sciences, and the Arts 1540-1773*, Toronto, Toronto University Press, 2006.

7. J.W. O'MALLEY, *The First Jesuits*, Cambridge, MA – London, Harvard University Press, 1993.

8. Compare M. MAHER S.J., *Confession and Consolation: The Society of Jesus and Its Promotion of the General Confession*, in K. JACKSON LUALDI – A.T. THAYER (eds.), *Penitence in the Age of Reformation*, Aldershot, Ashgate, 2000, 184-200.

9. Accordingly, the first Jesuits were perceived as rivals to secular priests and the religious establishment. The expansion of the order in the Low Countries is a point in case. Cf. E. PUT, *De stichtingen in de Nederlanden en het Prinsbisdom Luik*, in E. PUT – M. WIJNANTS (eds.), *De Jezüieten in de Nederlanden en het Prinsbisdom Luik (1542-1773)* (Algemeen Rijksarchief en Rijksarchief in de Provinciën. Educatieve dienst. Dossiers, 2.5), Brussels, Algemeen Rijksarchief, 1991, p. 21.

distinguished epochs, or, worse still, to revise the existing *caesurae*. If it were not, however, then it would be tempting to re-consider the Middle Ages as a thousand year period beginning with Benedict of Nursia's famous maxim "Ora et labora" as expressed in his Rule around 547 AD and ending with the symbolic burning of Angelo Carletti de Chivasso's manual for confessors, the *Summa Angelica*, by Luther at Wittenberg in 1520 AD. Benedict's Rule had been an authentic exhortation to reconcile the active and the contemplative life. The tradition of manuals for confessors – which enjoyed a boom at least from the fourth Lateran Council (1215) onwards¹⁰ – had eventually tried to determine the practical consequences of that ideal by bringing Roman law and Canon law to bear on cases of conscience stemming from Christians' perceived tension between faith and secular life. Two thirds of the references contained in the *Summa Angelica* (1486) were taken from Roman law, canon law, and Medieval jurists. Angelo Carletti de Chivasso (ca. 1414-1495) himself was a former professor of theology and law at the university of Bologna and a magistrate who eventually became a Franciscan friar¹¹.

Martin Luther seems to have succeeded in his *damnatio memoriae* of 1520. Until fairly recently, little attention has been paid to the fact that the Catholic Church's reaction against the Protestant movement actually strengthened the very model of the combination of law and theology that had been condemned by Luther¹². Still, it is precisely on that account

10. See, *inter alios*, P. MICHAUD-QUANTIN, *Sommes de casuistique et manuels de confession au moyen âge (XII^e-XVI^e siècles)*, Louvain – Lille – Montreal, Nauwelaerts, 1962; J. GOERING, *The Scholastic Turn (1100-1500): Penitential Theology and Law in the Schools*, in A. FIREY (ed.), *A New History of Penance* (Brill's Companions to the Christian Tradition, 14), Leiden – Boston, MA, Brill, 2008, 219-238; J. GOERING, *The Internal Forum and the Literature of Penance and Confession*, in W. HARTMANN – K. PENNINGTON (eds.), *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, Washington, DC, Catholic University of America Press, 2008, 379-428.

11. For more biographical details, see S. PEZZELLA, in *Dizionario Biografico degli Italiani* 20 (1977) 136-138.

12. Still there are excellent studies by M. TURRINI, *La coscienza e le leggi: Morale e diritto nei testi per la confessione della prima età moderna*, Bologna, Il Mulino, 1991; A. PROSPERI, *Tribunali della coscienza: Inquisitori, confessori, missionari*, Turin, Einaudi, 1996; E. BRAMBILLA, *Giuristi, teologi e giustizia ecclesiastica dal '500 alla fine del '700*, in M.L. BETRI – A. PASTORE (eds.), *Avvocati, medici, ingegneri: Alle origini delle professioni moderne (secoli XVI-XIX)*, Bologna, Clueb, 1997, 169-206; P. PRODI, *Una storia della giustizia, dal pluralismo dei fori al moderno dualismo tra coscienza e diritto*, Bologna, Il Mulino, 2000; W. DE BOER, *The Conquest of the Soul: Confession, Discipline and Public Order in Counter Reformation Milan*, Leiden, Brill, 2001; R. RUSCONI, *L'ordine dei peccati: La confessione tra Medioevo ed età moderna*, Bologna, Il Mulino, 2002; V. LAVENIA, *L'infamia e il perdono: Tributi, pene e confessione nella teologia morale della prima età moderna*, Bologna, Il Mulino, 2004.

that there is a strong case for renaming Catholicism in the century after Trent as “Confessional Catholicism”¹³. The Jesuits, well-known supporters of the counter-reformation, challenged Luther’s heterodox view of morality by doing precisely what he had condemned. They gave spiritual advice to the flock by relying on secular philosophy and secular law. Luther thought that only personal faith, divine grace and the Bible could show man how to behave in order to attain spiritual salvation (*sola fide, sola gratia, sola scriptura*). The Jesuits, on the other hand, remained faithful to the adage of Thomas Aquinas that grace perfects nature provided that the potential of nature has been developed in the first place (*gratia naturam praesupponit et perficit*). Following the writers of the manuals for confessors in the Middle Ages, and again following in the footsteps of the “School of Salamanca”, the Jesuits thought that giving concrete advice to people who wanted to know exactly how to choose the course of action that pleases God in day-to-day life, required technical tools necessary to underpin the teachings of the Gospel. The Jesuits came to recognize that in order to make Christian spirituality operational, it is important to analyze relationships amongst men in a juridical manner. Typically, lawyers analyze social behaviour as consisting of mutual rights and obligations which derive from laws. As a result, Jesuit moral theology emerged from what is generally known amongst jurists as the “law of obligations”¹⁴.

Contrary to the Protestants, the Jesuits did not think that the ‘New Law’ (*Lex Nova*), that is the Gospel, was sufficient a law to decide what a man needs to do in a particular circumstance in order to please God. Therefore, they explicitly recognized the existence of other sources of law, next to the Bible. Jesuits like Leonardus Lessius (1554-1623) had a comprehensive and systematic view of the various bodies of law that rule human behaviour¹⁵. The main distinction Lessius makes is between natural law and positive law. Natural law (*ius naturale*) derives from rational

13. See J.W. O’MALLEY, *Trent and All That: Renaming Catholicism in the Early Modern Era*, Cambridge, MA, Harvard University Press, 2002, pp. 119-145.

14. Cf. T. VAN HOUDT, *Leonardus Lessius over lening, intrest en woeker: De iustitia et iure, lib. 2, cap. 20: editie, vertaling en commentaar* (Verhandelingen van de Koninklijke Academie voor Wetenschappen, Letteren en Schone Kunsten van België, 60), Brussels, Paleis der Academiën, 1998, p. xxx. A reference work on the history of the law of obligations is R. ZIMMERMANN, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford, Oxford University Press, 1996.

15. See L. LESSIUS, *De iustitia et iure ceterisque virtutibus cardinalibus libri quatuor*, Antverpiae, 1621, lib. 2, cap. 2, dub. 2, num. 9, p. 20: “Si [ius] accipiat secundum modo, pro lege, dividitur sicuti lex. Itaque *ius* aliud est naturale, aliud positivum; *ius positivum* aliud est divinum, aliud humanum. *Ius divinum* aliud est vetus, aliud novum. *Ius humanum* aliud est *ius gentium*, aliud *ius canonicum*, aliud *civile*”.

nature and the natural condition of things itself. Contrary to positive law, the rectitude of natural law is determined not by a human or divine voluntary disposition, but rather by the nature of things itself. Hence natural law is immutable – it cannot be altered even by God himself. Men would be subject to natural law even if God did not exist¹⁶. Positive law (*ius positivum*), however, being true to its etymological sense (< Lat. *ponere*), derives from a voluntary disposition. As Lessius explains, a positive law depends on the free will of God or mankind. Hence its changeable character, even if all circumstances that make up the nature of a case remain unaltered. Depending on whether a positive legal disposition stems from God or mankind, positive law subdivides into two main categories: divine law and human law. Divine law (*ius divinum*) itself is divisible into old divine law and new divine law. Whereas old divine law (*ius divinum vetus*) coincides with God’s legislation in the Old Testament, for example concerning rituals and governance, new divine law (*ius divinum novum*) encompasses the Gospel and, Lessius adds in a truly anti-protestant vein, the sacraments. Human positive law (*ius humanum*) subdivides into three categories. Apart from the laws that are common to all nations (*ius gentium*), there exist civil law (*ius civile*) as constituted by secular rulers, and canon law (*ius canonicum*), as issued by virtue of the authority of the Pope or the Council.

Not only did Jesuits like Lessius draw up a cartography of laws, they also found an important connection between objective laws and subjective rights – rights being defined in terms of power based on law (*potestas legitima*)¹⁷. Therefore, depending on whether they correspond to natural law or positive law, men dispose of natural rights (*ius naturale*) or positive rights (*ius positivum*). Conversely, Lessius and his colleagues also developed the important conceptual notion that a debt or an obligation (*debitum*) is just the other side of a right¹⁸. Importantly, then, the Jesuits arrived at a detailed and scientific analysis of the “system” of

16. On the (late) scholastic origins of the famous “impious hypothesis”, which is usually attributed to Hugo Grotius, see A. DUFOR, *Les “Magni Hispani” dans l’œuvre de Grotius*, in F. GRUNERT – K. SEELMANN (eds.), *Die Ordnung der Praxis: Neue Studien zur Spanischen Spätscholastik* (Frühe Neuzeit, 68), Tübingen, Niemeyer, 2001, 351-380.

17. LESSIUS, *De iustitia et iure* (n. 15), lib. 2, cap. 2, dub. 2, num. 10, p. 20: “Si ius accipiat tertio modo, scilicet pro potestate legitima, dividi potest, primo ex parte principii, nempe secundum divisionem legum quibus oritur. Unde aliud est naturale, quod lege vel concessu naturae competit; aliud positivum, quod lege positiva vel concessione libera Dei vel hominum competit, et sic deinceps in aliis membris”.

18. LESSIUS, *De iustitia et iure* (n. 15), lib. 2, cap. 2, dub. 1, num. 7, p. 20: “Ex iure enim ipsius in me vel mea, nascitur in me debitum praestandi id, quod illud ius impleat et exhauriat”.

law¹⁹. Developing these highly influential theoretical observations on laws and rights at the outset of their manuals for confessors, they could then proceed to the question which concrete rights and which laws were at play in a particular case of conscience.

So the basic principle is simple: as theologians and confessors, the Jesuits wanted to give advice to Christians of all walks of life, particularly businessmen and princes, so that they would be able to save their souls on the day of Last Judgment. If we look at the historical context in which the Jesuits emerged, it is obvious that theirs was an age characterized by the explosion of global commercial activity in the wake of the discovery of the Americas. So there were quite a number of businessmen who suffered from qualms of conscience about the morality of new business and banking techniques. In the wake of Dominicans such as Tomas de Mercado, the Jesuits tried to be abreast of the new and complex challenges that merchants across the globe faced, as they felt themselves torn between the actual functioning of markets and the age-old condemnation of interest and speculation. In the mayhem of political affairs, too, the Jesuits tried to find a compromise between the complex reality of reason of state and the Christian dream of a non-Machiavellian way of doing politics. So even if the basic principle of guiding and confessing Christians was simple, confessional practice required much empathy, careful analysis, and the mastery of legal techniques intended to overcome the complexity of life.

In order to counsel and console Christians living a secular life, a Jesuit must be an excellent lawyer in the first place. He must have knowledge of the objective bodies of law that determine the subjective rights and obligations that constitute a particular person's legal and moral position. A Jesuit must know the civil law of a concrete city or state, because there are also obligations and rights that follow from those legislative bodies. Suárez's introduction to his highly influential work on *The Laws and God the Lawmaker (De legibus ac Deo legislatore)*, published in 1612, is telling in this respect. Theologians have a right and a duty to engage in civil law, according to Suárez, since all secular laws derive from God as from their first cause (*causa prima*) – the direct cause (*causa proxima*) of a law being the legislator, of course²⁰.

19. The same idea has been stressed, in the context of demonstrating the profound indebtedness of Hugo Grotius (1583-1645) to Jesuit moral theological thought, by P. HAGGENMACHER, *Droits subjectifs et système juridique chez Grotius*, in L. FOISNEAU (ed.), *Politique, droit et théologie chez Bodin, Grotius et Hobbes*, Paris, Kimé, 1997, 73-130; and by P. NEGRO, *Intorno alle fonti scolastiche in Hugo Grotius*, in *Divus Thomas* 27 (2000) 200-251.

20. FRANCISCO SUÁREZ, *De legibus ac Deo legislatore*, in *Opera Omnia*, editio nova a Carolo BERTON, Parisiis, (apud Vives), 1856, tom. 5, Prooemium, pp. ix-x; and *De defensione*

Laws derive from God as from their first cause, because legislative bodies come into being through a natural process. For there to be order and peace in a society, authority and power must exist out of necessity. From this “necessariness” of power and laws, Suárez derives their “naturalness”, and since nature has been created by God, their indirect “divineness”. All secular societies have been set up by their own members as a means of fulfilling purely human needs. The necessity and naturalness of political order is deduced by Francisco Suárez from an imagined “state of nature”²¹. Suárez is of the view that human beings will inevitably form a community given their intrinsically social and linguistic nature. Furthermore, in this state of nature, a legitimate form of political power comes into existence for the mere reason that it is necessary for the preservation of the social community. Mankind cannot uphold justice and peace unless it is ruled by an authority which cares for the common good by virtue of its office. Consequently, the legitimacy of political power is made dependent upon its necessity for the safeguarding of the community, even in the state of nature²². Put differently, positive legislation issued by a prince is binding in conscience because it indirectly derives from God. But, at the same time, these positive laws can only be binding in conscience on condition that they are not at variance with natural law.

The ambivalent nature of positive legislation which we find in Suárez’s political thought is a direct consequence of his intellectual battle against James I Stuart. The scope of one of Suárez’s main political treatises, the *Defense of the Catholic Faith (Defensio fidei catholicae)*, published seven years after the Gunpowder plot (1606), was, indeed, to “deconstruct”²³ the Protestant claim of the “divine right of kings”, as promoted by James I in particular. This political theory directly challenged

fidei catholicae, in *Opera Omnia*, editio nova a Carolo BERTON, Parisiis, (apud Vives), 1859, tom. 24, lib. 3, cap. 2, num. 1, p. 206.

21. The use of the concept of a “state of nature” as a method of considering the basis and necessity of political power first emerges with Suárez and Hobbes; cf. H. HÖPFL, *Scholasticism in Quentin Skinner’s Foundations*, in A. BRETT – J. TULLY – H. BLEAKLEY (eds.), *Rethinking the Foundations of Modern Political Thought*, Cambridge, Cambridge University Press, 2006, 113-139, pp. 127-128.

22. SUÁREZ, *De defensione fidei catholicae* (n. 20), lib. 3, cap. 1, num. 3, p. 203: “Ratio hujus veritatis, quae ex necessitate hujus principatus et potestatis ejus, et consequenter ex fine illius, qui est conservatio humanae ac civilis reipublicae, sumitur. Homo enim natura sua propensus est ad civilem societatem, eaque ad convenientem hujus vitae conservationem maxime indiget (...) Non potest autem communitas hominum sine justitia et pace conservari; neque justitia et pax sine gubernatore, qui potestatem praecipienda et coercendi habeat, servari possunt; ergo in humana civitate necessarius est princeps politicus, qui illam in officio contineat”.

23. This is the term used in J.-F. COURTINE, *Nature et empire de la loi: Études suarziennes*, Paris, Vrin, 1999, p. 22.

the divine power of the supreme pontiff and the Roman-Catholic Church. Hence, Suárez points out that the final conclusion to be drawn from his account of the constitutionalist nature of political power is that the power and ambitions of secular princes need to be restrained²⁴. Suárez insists that the idea that political power has a contractual basis must be regarded as an eminent “axiom of theology” (*egregium Theologiae axioma*)²⁵. Suárez stresses that political society is an invention of man himself and not a direct gift from God. In an immediate sense, secular princes derive their power from a contract, not from divine appointment. Subsequent to calculations of self-interest, a public authority is created whose duty it is to promote the common good. The legitimate way in which this happens, is through the establishment of a “social contract” between the ruler and the citizens.

Lessius, who took classes with Suárez at the *Collegio Romano*, describes the agreement between the citizens and public authority in terms of an employment contract²⁶. Commenting on the famous Roman “*lex regia*”²⁷ Suárez concludes that royal dignity must have been determined by a contract, in which the people transferred their power upon the prince on the condition and under the obligation that the ruler bears the responsibility for the republic and the administration of justice²⁸. The power of the ruler is limited and qualified by the conditions contained in the contract by which the people conferred their sovereignty upon him²⁹. Moreover, only in an indirect manner can secular power be called divine.

There are at least two practical conclusions to be drawn from this Suarezian political theory. Firstly, a confessor must take into account positive law as a binding source of normativity on account of its indirectly divine nature. Secondly, a confessor must enforce positive law in the court of conscience only to the extent that positive law is not at variance with natural law and if the public authorities remain within the boundaries of their legitimate power³⁰. To sum up then, a good Jesuit

24. SUÁREZ, *De defensione fidei catholicae* (n. 20), lib. 3, cap. 2, num. 10, p. 209: “Ex quibus tandem concluditur nullum regem vel monarcham habere vel habuisse (secundum ordinariam legem) immediate a Deo vel ex divina institutione politicum principatum, sed mediante humana voluntate et institutione. Hoc est *egregium Theologiae axioma*, sed vere, quia recte intellectum verissimum est, et ad intelligendos fines et limites civilis potestatis maxime necessarium”.

25. For further discussion, see W. DECOCK, *Counter-Reformation Diplomacy Behind Francisco Suárez's Constitutionalist Theory*, in *Ambiente Jurídico* 11 (2009) 68-92.

26. LESSIUS, *De iustitia et iure* (n. 15), lib. 2, cap. 1, dubit. 3, num. 13, p. 11.

27. Dig. 1, 4, 1 and Inst. 1, 2.

28. SUÁREZ, *De defensione fidei catholicae* (n. 20), lib. 3, cap. 1, num. 12, p. 210.

29. SUÁREZ, *De legibus ac Deo legislatore* (n. 20), lib. 3, cap. 9, num. 4, p. 202.

30. This is not the place, however, to delve into the well-worn subject of resistance theories in the reformation period. Two recent monographs highlighting the situation in

theologian needs to master the tool of law in order to implement spirituality in the ministry of confession. To sum up, then, in Suárez's words³¹:

The road to salvation passes through free actions and moral rectitude. Since moral rectitude strongly depends on law being, as it were, the rule of human actions, the study of law is a major part of theology. In treating of laws, the sacred doctrine of theology investigates nothing less than God himself in his function as a legislator. (...) It is the task of a theologian to care for the consciences of the pilgrims on earth. Yet the rectitude of consciences is dependent on observing the law just like moral pravity is dependent on breaking the law, since a law is every rule which leads to the gain of eternal salvation if observed – as it must be – and which leads to the loss of eternal salvation when it is broken. The study of law, then, pertains to theologians, to the extent that law binds conscience.

III. EVERY THEOLOGIAN A LAWYER: THE NEED FOR MANUALS AND LEGAL SCIENCE

The major awareness among early modern Catholic theologians, particularly the Jesuits, that spirituality and morality cannot be made operational unless they are articulated along legal lines, gave rise to a reinforcement of the synthesis of patristic-scholastic philosophy and Romano-canon law that had characterized the Medieval manuals for confessors. From relatively thin manuals of confessors, however, the Jesuit confessional literature increasingly became all-comprehensive, systematic and scientific in nature.

True enough, the first Jesuit manual for the sacrament of confession, the *Short Directory for Confessors and Confessants* (*Breve directorium ad confessarii ac confitentis munus recte obeundum*) published in 1554 by Juan Alfonso de Polanco (1517-1576), was still rather vague and prophetic

England at the time of Suárez include V. HOULISTON, *Catholic Resistance in Elizabethan England: Robert Persons's Jesuit Polemic, 1580-1610*, Aldershot, Ashgate; Rome, Institutum historicum Societatis Jesu, 2007 and S. TUTINO, *Law and Conscience: Catholicism in Early Modern England, 1570-1625*, Aldershot, Ashgate, 2007.

31. SUÁREZ, *De legibus ac Deo legislatore* (n. 20), Prooemium, pp. ix-x: "Quoniam igitur hujus salutis via in actionibus liberis morumque rectitudine posita est, quae morum rectitudo a lege tanquam ab humanarum actionum regula plurimum pendet; idcirco legum consideratio in magna theologiae partem cedit; et dum sacra doctrina de legibus tractat, nihil profecto aliud quam Deum ipsum ut legislatorem intuetur. (...) Deinde theologicum est negotium conscientiae prospicere viatorum; conscientiarum vero rectitudo stat legibus servandis, sicut et pravitatis violandis, cum lex quaelibet sit regula, si ut oportet servatur, aeternae salutis assequendae; si violetur, amittendae; ergo et legis inspectio, quatenus est conscientiae vinculum, ad theologum pertinebit".

in nature³². But soon, the Jesuits would find a more useful guide in the more extensive and technical manual for confessors written by Martin de Azpilcueta (1492-1586), a professor of canon law at Salamanca, better known as Dr. Navarrus. His *Enchiridion or Manual for Confessors and Confessants (Manuel de confesores y penitentes)* (1552), published in Latin only twenty one years later, was far more adapted to the changed socio-economic circumstances than was Polanco's *Directory*. Dr. Navarrus had taken Angelo Carletti da Chivasso's *Summa Angelica* as a model, thoroughly mixing theology and law, but he took an even more benign stand on many cases of conscience – which made his manual particularly appropriate for the confession of the masses.

Not surprisingly, Dr. Navarrus turned out to be very influential on Jesuit casuistry and moral theology³³. Francisco de Toledo (1532-1596), a former student of Domingo de Soto at Salamanca who was to become a professor at the *Collegio Romano*, drew inspiration from Dr. Navarrus' *Enchiridion or Manual for Confessors and Confessants* as he prepared his own *Instruction for Priests and Penitents (Instructio sacerdotum ac poenitentium)*. From its publication in 1596 it was to become an alternative to Polanco's *Directory* within the Jesuit order, along Valère Regnault's (1549-1623) *Praxis fori poenitentialis* (1616). Interestingly, Regnault expressly modelled his manual for confessors on the structure of Justinian's *Institutions*, the standard textbook on Roman law³⁴:

This manual subdivides into three pars according to the three basic elements of jurisprudence in the external courts: persons (*personae*), actions (*actiones*), and things (*res*). The first part concerns the persons in the court

32. It was even suggested that its spirit somehow prefigured Jansenist thought; cf. R.A. MARYKS, *Saint Cicero and the Jesuits: The Influence of the Liberal Arts on the Adoption of Moral Probabilism*, Aldershot, Ashgate; Rome, Institutum historicum Societatis Iesu, 2008, pp. 70-71.

33. On the good relationship between Dr. Navarrus and the Society of Jesus, see V. LAVENIA, *Martín de Azpilcueta (1492-1586): Un profilo*, in *Archivio Italiano per la storia della pietà* 16 (2003) 103-112.

34. V. REGNAULT, *Praxis fori poenitentialis ad directionem confessarii in usu sacri sui muneris. Opus tam poenitentibus quam confessariis utile*, Lugduni, 1616, pr.: "(...) Institutiones (...) digessi tripartitas, pro triplice genere attinentium ad iudiciale forum: personarum, inquam, actionum, et rerum, ita ut prima pars complectatur spectantia ad personas fori poenitentialis, tanquam eas ex quibus dependet sacramenti poenitentiae usus. Sunt autem confessarius, tanquam iudex legitimus in illo foro; et peccator poenitens, tanquam reus simul et testis, adeoque advocatus accusator sui, tanquam is qui a se offensi Dei causam agat contra semetipsum. Secunda vero pars contineat spectantia ad actiones, in quibus idem usus consistit; quae sunt, quoad poenitentem quidem, contritio cordis, confessio oris et satisfactio operis. Quoad confessarium vero, absolutio sacramentalis. Illaeque sacramenti poenitentiae materiam constituunt et haec formam. Tertia demum pars (...) sit de rebus, circa quas idem usus versatur. Eae autem sunt peccata poenitentis post Baptismum commissa (...)".

of conscience, namely those who participate in the sacrament of penance: the confessor, who is the legitimate judge in this court, and the penitent sinner, who is at the same time the guilty party and the witness, his own defendant and plaintiff, as if he were pleading the cause of God, who is offended by his acts, against himself. The second part concerns the actions that are used in the process of confession. For the penitent, those actions involve inner contrition, oral confession and satisfaction through works; for the confessor, performing the sacrament of absolution. The former constitute the material of the sacrament of penance, the latter its form. Lastly, the third part concerns the things which the practice of confession is about, namely the sins committed by the penitent after his baptism.

As is obvious from Regnault's far-reaching analogy with the civil courts, in early modern Catholicism conscience was truly thought of in terms of a tribunal. It should not be surprising, then, that references to Roman and canon law are abundant in Jesuit casuistical treatises and books on moral theology throughout the period. For example, Juan Azor (1536-1603) hastens to add to the very title of his famous *Moral Institutes*, that the material of his exposition is based not only on theology, but also on canon law, civil law, and history. He also pays attention not only to the interpretations by theologians, but also to commentaries by canonists, civilians, writers of manuals for confessors and historians³⁵. Rather than adding names to the extensive list of Jesuit manuals for confessors and casuistic treatises of moral theology, however, what matters here is to point out, albeit in a merely indicative way, the increasing systematization in the Jesuits' involvement with law³⁶.

Francisco Suárez (1548-1617) from Granada is a famous case in point, of course. In fact, he counts amongst those Jesuits who had not only been trained in philosophy and theology, but foremostly in (canon) law. Although he had almost been refused as a novice when he wanted to enter the Jesuit order in Salamanca, Suárez was to become its most renowned metaphysician. Yet it is worth stressing on this occasion that he also published several brilliant masterpieces on legal and political theory. The most juridical of his works is the aforementioned treatise on *The Laws and God the Legislator* (1612). It contains some of the most

35. Cf. J. AZOR, *Institutiones morales, in quibus universae quaestiones ad conscientiam recte aut prave factorum pertinentes breviter tractantur. Omnia sunt vel ex theologica doctrina, vel ex iure canonico vel civili, vel ex probata rerum gestarum narratione desumpta, et confirmata testimoniis vel theologorum, vel iuris canonici aut civilis interpretum, vel summistarum, vel denique historicorum*, Lugduni, 1612.

36. An excellent census of early modern Jesuit manuals for confessors is provided by R.A. MARYKS, *Census of the Books Written by Jesuits on Sacramental Confession (1554-1650)*, in *Annali di Storia moderna e contemporanea* 10 (2004) 415-519.

thorough and systematic discussions of the concept of “law” that have ever been written. A short overview of the titles of the ten books of *The Laws and God the Legislator* will make this abundantly clear³⁷:

- Book 1: On the nature of laws in general, their causes, and their effects
- Book 2: On eternal law, natural law, and the law of nations
- Book 3: On human positive law in itself (as it can be seen in the pure nature of man), also called civil law
- Book 4: On canon positive law
- Book 5: On the variety of human laws, particularly on criminal laws and laws that are being detested
- Book 6: On the interpretation of human laws, their changeability and ending
- Book 7: On the non-written laws, called custom
- Book 8: On favorable human law, viz. on privileges
- Book 9: On the old divine positive law
- Book 10: On the new divine law

Suárez’s philosophy of law had a big influence both in Catholic and Protestant countries right from his treatises’s inception. Because of his account of the law of nations (*ius gentium*), he ranks among the mythical founders of international law³⁸. He is still important to philosophers of law today³⁹. It is also easy to see how many of the ideas Suárez developed, are mirrored, albeit in a secularized form, in contemporary standard textbooks on law. For example, Suárez’s insistence on the territorial scope of laws, his theory of subjective rights, legal fictions, presumptions, the distinction between absolute and relative nullity of contracts, the need to promulgate a law in order for it to become binding, and so on, were well-regarded in legal circles. Suárez’s *The Laws and God the Legislator* displays a detailed analysis of a lot of the basic legal principles which we now take for granted, but which had not been fully developed until the early modern scholastic period. By the same token, Suárez’s thorough analysis of the contractual nature of political power and his methodological conception of the state of nature as developed in his *Defense of the Catholic Faith* (1613) – which

37. Cf. FRANCISCO SUÁREZ, *De legibus ac Deo legislatore* (n. 20), pp. v-vii (juncto tom. 6, pp. vi-vii).

38. See, *inter alios*, J.B. SCOTT, *Victoria et Suarez: Contribution des théologiens au droit international moderne*, Paris, Pedone, 1939; and J.P. DOYLE, *Francisco Suárez on the Law of Nations*, in M.W. JANIS – C. EVANS (eds.), *Religion and International Law*, London, Kluwer, 1999, 103-120. For recent bibliography on Suárez in general, see the section dedicated to him on Professor Jacob SCHMUTZ’s website: www.scholasticon.fr.

39. Cf. P.C. WESTERMAN, *Suárez and the Formality of Law*, in M. KAUFMANN – R. SCHNEPF (eds.), *Politische Metaphysik: Die Entstehung moderner Rechtskonzeptionen in der Spanischen Scholastik* (Treffpunkt Philosophie, 8), Frankfurt am Main, Peter Lang, 2007, 227-238; J.-F. SCHAUB, *Suárez. Les lois*, in O. CAYLA – J.-L. HALPÉRIN (eds.), *Dictionnaire des grandes œuvres juridiques*, Paris, Dalloz, 2008, 565-570.

was geared towards the rebuttal of the theory about the divine right of kings as advocated by James I Stuart – prefigures important strands in modern political theory⁴⁰.

Although Suárez is undoubtedly the Jesuit most widely known to have made a fundamental contribution to legal thinking, he is by no means the only one. Perhaps he even borrowed many ideas from his colleagues. This is hardly surprising. Back from a mission to China, François Noel composed a companion to Suárez's theology in which he pointed out that Suárez's mind may have been far too sublime and speculative to be able to dwell on rather vulgar and practical day-to-day affairs⁴¹. Consequently, he decided to add a summary of Tomas Sánchez's *On Marriage* and of Leonardus Lessius' *On Justice and Right* to the companion⁴². These additions were praised for being the most frequently studied authorities in Jesuit colleges on these practical matters worldwide.

The Jesuit and canon lawyer Thomas Sánchez (1550-1610) from Cordoba wrote an influential treatise *On Marriage (Disputationes de matrimonio)* amongst many other important moral-juridical treatises⁴³. Because of its vastness and detail, Sánchez's *On marriage* outshines the earlier and rather modest attempt by the Jesuit Enrique Henríquez (1546-1608) to treat the canon law of marriage. Henríquez had dedicated an entire book of his *Summa Theologiae Moralis* to marriage law, which was simply cited as his *On Marriage* by subsequent authors such as Sánchez⁴⁴. Sánchez's *On Marriage* would remain one of the reference works in post-Tridentine matrimonial law. At the beginning of the twentieth century, Pietro Gasparri

40. Among the major recent books on Suárez's political thought, see J.-F. COURTINE, *Nature et empire de la loi: Études suarésiennes*, Paris, Vrin, 1999.

41. Noel is known for his *Sinensis imperii libri classici sex*, Pragae, 1711, a Latin translation of classical Chinese philosophy which formed the basis for Christian Wolff's observations on Chinese culture. See East Asian Seminar @ University of Zurich (ed.), *Der Westen in China – China im Westen: Bibliography and Biography Database*, http://www.ostasien.uzh.ch/sinologie/forschung/chinaundderwesten_en.html, *passim* (visited on 15.04.2010).

42. Cf. F. NOEL, *Theologiae Francisci Suarez e Societate Jesu summa seu compendium in duas partes divisum, duobusque tractatibus adauctum; primo de justitia et jure, secundo de matrimonio*, Coloniae, 1732, *Appendix ad Suarez*, pp. 1-2. Curiously, the economic historian R. De Roover attributes the short discussion on bills of exchange which is included in this anthology to Suarez, while it is actually part of the supplement *On Justice and Right*, which is a summary of Lessius' legal and economic thought; cf. R. DE ROOVER, *L'Évolution de la lettre de change (14^e-18^e siècles)* (Affaires et gens d'affaires, 4), Paris, Armand Colin, 1953, p. 202.

43. On Sánchez, see J.M. VIEJO-HIMÉNEZ, s.v. *Sánchez*, in M.J. PELÁEZ (ed.), *Diccionario crítico de juristas españoles, portugueses y latinoamericanos (hispánicos, brasileños, quebequenses y restantes francófonos)*, 2.1, Zaragoza – Barcelona, 2006, 480-481.

44. In the Venice edition of 1600, the canon law of marriage is dealt with autonomously by Enrique Henríquez in book 11 of his *Summa theologiae moralis tomus primus*.

(1852-1934), the Secretary for the Commission for the Codification of Canon Law, heavily drew on Sánchez as he prepared the new Code of Canon Law (1917). This has been clearly demonstrated by Carlo Fantappiè in his important two-volume study *Chiesa Romana e modernità giuridica*, which is of great interest to anyone studying the Catholic Church's involvement with law in general, and (Jesuit) moral theologians in particular⁴⁵.

Studying Sánchez requires a certain amount of courage and perseverance, not in the least because his argument is often floating and self-contradictory, even if the general structure of his treatise is systematic and clear. Yet no one runs the risk of being disappointed by Sánchez's stimulating reasoning and prudent counsels in very concrete matters. The expressive terms in which he describes the casuistry surrounding certain impediments to a valid marriage have struck eminent historians of canon law as being almost tantamount to mild forms of pornographic literature⁴⁶. When it comes to the development of contract law, Sánchez's doctrine of the vices of the will, particularly mistake and duress, has been seminal. This is due to the fact that much of Sánchez's detailed analyses with regard to the validity of marital consent were then applied by other Jesuits like Lessius to other contracts. From his work *On Marriage* the table of contents gives a rough idea of Sánchez's systematic approach to marriage law and its relevance to other domains of contract law⁴⁷:

- Book 1: On engagement
- Book 2: On the essence of marriage and marital consent
- Book 3: On clandestine consent
- Book 4: On coerced consent
- Book 5: On conditional consent
- Book 6: On donations between spouses, premarital gifts, and jointures
- Book 7: On marital impediments
- Book 8: On dispensations
- Book 9: On marital obligations
- Book 10: On divorce

For historians of moral theology as well as philosophers of law it will be useful also to consider Sánchez's *Opus morale in praecepta Decalogi*,

45. C. FANTAPPIÈ, *Chiesa Romana e modernità giuridica*. Tom. 1: *L'edificazione del sistema canonistico (1563-1903)* (Per la storia del pensiero giuridico moderno, 76), Milan, Giuffrè, 2008, pp. 447-458.

46. See J. BRUNDAGE, *Law, Sex and Christian Society in Medieval Europe*, Chicago, IL – London, University of Chicago Press, 1990, pp. 564-567; M. MADERO, *Peritaje e impotencia sexual en el De Sancto Matrimonio de Tomás Sánchez*, in *Eadem utraque Europa* (2008) 105-136.

47. See T. SÁNCHEZ, *Disputationes de sancto matrimonio sacramento tomi tres*, Antverpiae, 1620, index.

but limited space urges us to resist the temptation in order to consider the other Jesuit whose work was thought to of such importance that it must be added to the anthology of Suarezian thought: Leonardus Lessius (1554-1623). Ever since the Renaissance of Thomism at the threshold of the 20th century, this renowned Jesuit from Antwerp has drawn much attention for his masterpiece *On Justice and Right and the other Cardinal Virtues* (*De iustitia et iure ceterisque virtutibus cardinalibus*) by historians of moral, economic, and legal thought⁴⁸. Impressed with Roberto Bellarmino's fiery sermons during his studies at the Arts faculty in Louvain, he entered the Society of Jesus in 1572 and soon became a teacher of Aristotelian philosophy at the College d'Anchin in Douai – a job which left him enough spare time to teach himself Roman and canon law. Upon finishing his theological studies at the *Collegio Romano*, where he studied with Suárez amongst other famous Jesuits, Lessius became a professor of moral theology at the Jesuit College of Louvain in 1585. For the exercises in practical ethics and casuistry, which he considered to be the hallmark of the Jesuit order, he made use of the Salamanca canonist Dr. Navarrus' *Manual for Confessors*. Even if Lessius is best known among theologians for his tenacious defence of molinism in the debate on grace and free will, his moral theological and juridical masterpiece is the treatise *On Justice and Right*. It enjoyed numerous re-editions across Europe until the 19th century⁴⁹.

Lessius' *On Justice and Right* played a vital role in the history of the law of obligations. In his *On the Right of War and Peace* (*De iure belli ac pacis*) the alleged father of modern natural law, Hugo Grotius (1583-1645), frequently gives an elegant summary of the extensive arguments that were first developed by Lessius and other late scholastics. Embarrassingly, this often leads Grotius to copy the same incorrect references as did Lessius⁵⁰. One major significance of Lessius' juridical thought is that it constitutes a synthesis of the Roman and canon legal tradition on

48. For details on Lessius' life and times as well as references to secondary literature, see T. VAN HOUTD – W. DECOCK, *Leonardus Lessius: Traditie en vernieuwing*, Antwerp, Belpaire, 2005. Especially worthy of mentioning in this context are T. VAN HOUTD, *De economische ethiek van de Zuid-Nederlandse jezuit Leonardus Lessius (1554-1623): Een geval van jezuitisme?*, in *De zeventiende eeuw* 14 (1998) 27-37, and T. VAN HOUTD, in M. ROTSAERT S.J. – B. SEGAERT (eds.), *Markante Jezuiten uit de Lage Landen: Canisius, Verbiest, Lessius, Regout*, Leuven, Peeters, 2007, 39-54.

49. T. VAN HOUTD, *Leonardus Lessius over lening, intrest en woeker* (n. 14), pp. xviii-xxv.

50. See R. FEENSTRA, *L'influence de la Scolastique espagnole sur Grotius en droit privé: Quelques expériences dans des questions de fond et de forme, concernant notamment les doctrines de l'erreur et de l'enrichissement sans cause*, in P. GROSSI (ed.), *La seconda scolastica nella formazione del diritto privato moderno* (Per la storia del pensiero giuridico moderno, 1), Milan, Giuffrè, 1973, 377-402.

the one hand, and Aristotelian-Thomistic moral philosophy, on the other⁵¹. This synthesis lived on, albeit in a degenerate form, in the Codes that rule modern jurisdictions – thus a brief account of Gordley's thesis.

In any event, in Lessius's *On Justice and Right*, the casuistry of the legal and moral tradition is ordered within a systematic whole. We have already had the occasion to mention Lessius' elaborate concept of law. It should suffice here to point out a further element in the very construction of Lessius' book which is symptomatic of the shift towards systematic legal thinking. Before discussing the particulars of the law of property, Lessius gives an account of justice in general (*de iustitia in genere*) and right in general (*de iure in genere*). By the same token, his comprehensive analysis of illicit acts or torts is preceded by a chapter on injustice and restitution in general (*de iniuria et restitutione in genere*). Last but not least, his treatment of particular contracts follows his treatment of general contract law (*de contractibus in genere*). A quick look at the contents of the second book of Lessius' treatise shows us how thoroughly and systematically the law of property, torts and contracts were discussed by Lessius, next to selected topics in procedural law, tax law, and canon law⁵²:

Section I. On justice, right, and the specific types of right

1. On justice in general
2. On right in general
3. On dominion, usufruct, use and possession, which are specific types of right
4. On who is capable of having dominion and over what
5. On the mode of acquiring dominion over goods that belong to nobody or over goods which are common to all, particularly on servitudes, hunting, fishing, fowling, and treasures
6. On the mode of acquiring dominion over someone else's good, particularly on prescription

Section II. On injustice and damage in all kinds of human goods and their necessary restitution

7. On injustice and restitution (which is an act of justice) in general
8. On injustice against spiritual goods
9. On injustice against the body through homicide or mutilation
10. On injustice against the body through adultery and fornication

51. This has been convincingly argued by James GORDLEY in his *Philosophical Origins of Modern Contract Doctrine*, Oxford, Oxford University Press, 1991, and in his *Foundations of Private Law, Property, Tort, Contract, Unjust Enrichment*, Oxford, Oxford University Press, 2006.

52. LESSIUS, *De iustitia et iure* (n. 15), lib. 2, pp. 13-14.

11. On injustice against reputation and honour through detraction and defamation
12. On injustice against property through theft, robbery or damage.
13. On cooperating to theft or injury
14. On restitution by virtue of the good received, and the receiver of restitution
15. On the respective order and the way in which restitution has to be made, where restitution must be made and what to do with the expenses
16. On the factors which excuse from restitution

Section III. On contracts

17. On contracts in general
18. On promise and donation
19. On testaments and legacies
20. On loan for consumption and usury
21. On sale-purchase
22. On rents
23. On money-exchange
24. On lease-hire, emphyteusis and feudal contracts
25. On companies
26. On games and gambling
27. On deposit and loan
28. On suretyship, pawn, mortgage

Section IV. On injustice in judgments and courts

29. On judges
30. On plaintiffs and witnesses
31. On lawyers and defendants

Section V. On distributive justice

32. On favoritism in general
33. On levies and taxes
34. On benefices
35. On simony

Section VI. On religion, which is the first part of justice

36. On religion in general
37. On praying and praising God
38. On sacrifices and adoration
39. On tithes
40. On vows
41. On the religious state
42. On swearing and oaths
43. On superstition and its forms
44. On magic
45. On irreligiosity

Section VII. On virtues connected to justice

46. On the other virtue connected to justice in which there is legal debt
 47. On virtues connected to justice in which there is moral debt

Lessius' is a relatively concise treatise on legal and moral problems written in a crystal-clear and plain style. The six-volume treatise *On Justice and Right* published over the period 1593-1600 by his friend and colleague Luís de Molina (1535-1600), however, was far more detailed and voluminous⁵³. It is obvious from a quick glance at the sheer titles of the six volumes constituting Molina's impressive *On Justice and Right* that this is an extremely rich treatise that not only deals with vast areas of private law, but also of public law⁵⁴:

- Volume 1: On justice, rights, property law, family law, successions
- Volume 2: On contracts
- Volume 3 / 1: On primogeniture and taxes
- Volume 3 / 2: On delicts and quasi-delicts
- Volume 4: On commutative justice in corporeal goods and goods belonging to people connected to us
- Volume 5: On commutative justice in the goods of honour and reputation, and also in spiritual goods
- Volume 6: On judgment and the execution of justice by the public authorities

Molina had been the first Jesuit to adopt the type of moral theological literature known as *On Justice and Right* – the first work of its kind having been written by the Salamancan Dominican Domingo de Soto in 1553/6. These treatises had actually grown out of commentaries on Thomas Aquinas' *Secunda Secundae* which then became increasingly independent from their source. This eventually led to the creation of an autonomous genre of moral theological literature at the university of Salamanca, where an important renewal of theological thought took place in the course of the sixteenth century⁵⁵.

In contrast to Soto's work, the Jesuits' treatises *On Justice and Right* were far more systematic, voluminous, and technical. As has been pointed out before, the Jesuits were much more acquainted with the *ius commune* and the juridical thinking of their time. Molina's references to contemporary Portuguese and Spanish law or commercial practices are

53. On Molina, see F.B. COSTELLO S.J., *The Political Philosophy of Luís de Molina*, Rome, Institutum Historicum Societatis Iesu, 1974, and F. GÓMEZ CAMACHO S.J., *Luís de Molina: La teoría del justo precio*, Madrid, Editora Nacional, 1981.

54. L. MOLINA, *De iustitia et iure tomí sex*, Moguntiae, 1614.

55. See J. BELDA PLANS, *La escuela de Salamanca y la renovación de la teología en el siglo XVI* (Biblioteca de Autores Cristianos Maior, 63), Madrid, Biblioteca de Autores Cristianos, 2000.

even more abundant than Lessius' useful observations on contemporary law and commercial customs in the Low Countries. Molina's citations of scholastic authorities also outnumber those in Lessius. In this regard, Lessius appears to have integrated to a greater extent the humanist critique on scholastic methodology and also he seemed to have cared more about the reader-friendliness of his book. Yet the general scope of both treatises is the same, namely to give a systematic outline of law for the purpose of spiritual guidance. Directors who wanted to judge cases of conscience as adequately and effectively as possible could find an excellent tool in those manuals which had now turned into vast treatises.

The third Jesuit who wrote a successful treatise *On Justice and Right* was Juan de Lugo (1583-1660), a canon lawyer by training, who went on to become a professor of theology at the Collegio Romano before being named a Cardinal by Pope Urban VIII in 1643, the year after the publication of his *Disputations on Justice and Right (Disputationes de iustitia et iure)*⁵⁶. With Molina and Lessius he shared a thorough understanding not only of different kinds of law and their application to qualms of conscience, but he also had a tremendous insight into the actual functioning of life, particularly with regard to business and economic affairs⁵⁷. In his *Notitia iuris belgici*, for instance, the jurist Zypaeus (1580-1650) from the Southern Netherlands recommends lawyers to read Lessius in order to get the best analysis of financial techniques used by merchants and bankers at the Antwerp Bourse⁵⁸. Both in regard to form and content, Lugo seems to be heavily indebted to Lessius, although he is certainly not a servile imitator. Lugo further developed the Jesuits' systematic approach to law and morality but sometimes could not avoid the pitfalls of casuistry.

Although the Jesuits displayed a terrific knowledge of the legal tradition, it is remarkable that only a few among them were actually jurists by training. Besides Francisco Suárez and Juan de Lugo, who had studied law in Salamanca, there is one Austrian Jesuit, however, who stands out for his achievements as a true canon lawyer, namely Paul Laymann (1574-1635) from Arzl near Innsbruck. As a professor of moral theology at the Jesuit college at Munich (1609-1625) he was the promotor of these

56. For further details, see E. OLIVARES, *Juan de Lugo (1583-1660): Datos biográficos, sus escritos, estudios sobre su doctrina y bibliografía*, in *Archivo Teológico Granadino* 47 (1984) 5-129.

57. F. MONSALVE SERRANO – O. DE JUÁN ASENJO, *Juan de Lugo y la libertad en economía: El análisis económico escolástico en transición*, in *Procesos de mercado: Revista europea de economía política* (2006) 217-243; W. DECOCK, *Lessius and the Breakdown of the Scholastic Paradigm*, in *Journal of the History of Economic Thought* 31 (2009) 57-78.

58. F. ZYPÆUS, *Notitia iuris belgici*, Antverpiae, 1675, lib. 4, p. 61.

on, say, the sale-purchase contract, or the fundamental difference between *ius* and *factum*⁵⁹. In Munich he also finished his monumental five books on *Moral Theology*. This is a systematic, methodic, and all-comprehensive overview of moral theology, full of references to Romano-canon law – certainly in the book *On Justice and Right*, which is highly reminiscent of Molina and Lessius' discussions on property, delicts, and contracts⁶⁰.

Laymann's *Moral Theology* is another testimony to the fact that it would be particularly temerarious to distinguish too sharply between law and morality in the Jesuit moral theological thinking of the early modern period. This symbiosis of law and ethics can also be seen in Jesuit treatises dedicated expressly to "morality", say Vincenzo Figliucci's (1566-1622) *Quaestiones morales* or Hermann Busenbaum's (1600-1668) *Medula theologiae moralis*. But to return to Paul Laymann, he not only wrote moral theological treatises that were heavily imbued with legal thought, he also dedicated himself to studying the canon legal tradition in a systematic way itself. After all, he had obtained a chair in canon law at the university of Dillingen and held it from 1625 onwards. In this period he undoubtedly started writing his commentaries on the *Decretales* of Pope Gregory IX (1234) and on Pope Boniface's VIII (1298) *Liber sextus*. They were published posthumously as *Canon law or Commentaries on the Decretals*⁶¹. The editor explained the design of the book as a commentary on the decretals, rather than as a systematic study obeying its own inner logic, by appealing to the jurists' ordinary habit to discuss canon law by following that pre-established pattern. He thus wanted to render Laymann's explanations more reader-friendly.

Laymann's attention to the canon law *per se* is significant for a growing trend among Jesuit scholars in the seventeenth century not only to study law primarily for the benefit of moral theology, but also for its own sake. Next to the treatises *On Justice and Right* or *Moral Theology*, by the mid-seventeenth century we witness the birth of vast, systematic, and influential books on various branches of law. An exciting example of this turn towards a Jesuit legal science, notably with regard to contract law, is the Spanish Jesuit Pedro de Oñate's (1568-1646) four-volume

59. *Assertiones theologicae de contractu emptionis et venditionis*, ad quas praeside Paulo Laymann publice respondebit Valentinus SCHUBIN, Monachii, 1616; *Assertiones ex theologia morali de vario discrimine iuris et facti*, ad quas praeside Paulo Laymann publice respondebit Johannes HICKEN, Monachii, 1619.

60. See P. LAYMANN, *Theologia moralis in quinque libros partita, quibus materiae omnes practicae, cum ad externum ecclesiasticum, tum internum conscientiae forum spectantes nova methodo explicantur*, lib. 3 (*De iustitia et iure ceterisque virtutibus cardinalibus*), Monachii, 1625.

61. P. LAYMANN, *Jus canonicum commentario perpetuo explicatum*, Dilingae, 1698.

treatise *On Contracts*, published posthumously in 1646 (*De contractibus*)⁶². Pedro de Oñate, who had been a student of Suárez at Alcalá de Henares, became provincial of the Jesuit order in Paraguay in 1615. By the end of his term, he had co-founded the University of Córdoba (Argentina) and eleven colleges. In 1624 he was designated professor of moral theology at the Colegio San Pablo in Lima (Peru). His treatise *On Contracts* is one of the most extensive treatises on both general and particular contract law that has ever been written. In it, Oñate discusses all contracts from the point of view of Aristotelian-Thomistic philosophy. He borrows extensively from the Romano-canon legal tradition, Molina, Sánchez and Lessius, but has the merit of giving an ultimate synthesis of all the problems pertaining to contract law. It is a three-volume testament to a five hundred year-old tradition in scholastic contract doctrine which is unparalleled in its comprehensiveness.

The first volume of Pedro de Oñate's *On Contracts* is a systematic account of general contract doctrine (*de contractibus in genere*), the second deals with gratuitous contracts (*de contractibus lucrativis*), e.g. donations, agency, dowry, etc., while the third offers a meticulous analysis of all onerous contracts (*de contractibus onerosis*), e.g. sale-purchase, rents, bills of exchange, etc. At the outset of his treatise, Oñate warns his reader that contract law is at the same time an extremely vast (*vastissimum*) and difficult (*difficillimum*) field of study. Distinguishing more than thirty particular contracts, he admits that contract law is an immense ocean, or rather, infinite chaos. Contract law is founded upon unstable ground which has prevented any scholar before him to treat it as thoroughly as he did. Moreover, contract law is very difficult. This has to do with the avarice of man, according to Oñate, which mostly expresses itself through the use of contracts, since contracts are the juridical means by which money and property are exchanged. On top of this, various legislators have tried to rule on the same matter in different ways and by issuing a plethora of different laws.

Yet it is worthwhile to note that Pedro de Oñate also points out that understanding contract law is extremely useful (*utilissimum*). Contract law is essential not only to businessmen, lawyers, judges, and public

62. See E. HOLTHÖFER, *Die Literatur zum gemeinen und partikularen Recht in Italien, Frankreich, Spanien und Portugal*, in H. COING (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, 2.1, Munich, C.H. Beck, 1977, p. 368 and p. 491; I. BIROCCHI, *Causa e categoria generale del contratto: Un problema dogmatico nella cultura privatistica dell'età moderna. I: Il cinquecento* (Il Diritto nella Storia, 5), Turin, Giappichelli, 1997, pp. 271-289; E. FERNÁNDEZ, s.v. *Oñate*, in C. O'NEILL – J. DOMÍNGUEZ (eds.), *Diccionario histórico de la Compañía de Jesús biográfico-temático*, vol. 3, Rome, Institutum Historicum; Madrid, Universidad Pontificia Comillas, 2001, 2870-2871.

officials, but to theologians as well. A sound knowledge of contract law is absolutely necessary for theologians, certainly for those who are involved in the sacrament of confession (*est materia haec theologis, iis maxime qui sacris aures confessionibus praebent, pernecessaria*)⁶³. The reason is simple: on the earthly pilgrimage towards God, it is impossible not to enter into contracts.

Not only was law increasingly studied for its own sake, in the second half of the seventeenth century, Jesuit legal scholarship evolved into a real science of law. This is obvious from the French Jesuit Joseph Gibalin's (1592-1671) systematic and universal treatises on various topics of the law. Gibalin was a professor of canon law and theology at the Jesuit college of Lyon and an occasional counsellor to Richelieu. But on top of that, he wrote voluminous treatises on the entire private and commercial law. The mere title of his works are significant of what I would call the turn towards a Jesuit science of law: *De universa rerum humanarum negotiatione tractatio scientifica* (1663): a scientific treatment of the whole of human business, focussing on commerce and contracts. Its extended title in the Lyon-edition of 1663 is even more emblematic of the fusion of the entire legal and theological tradition into a single legal science⁶⁴:

A scientific treatise (*tractatio scientifica*) on universal human business, to be used in both courts, and derived from natural law, church law, civil law, Roman law, and French law. In this book, equity in human business is explained in a scientific and solid manner (*scientificae et solide*), namely in all its causes and subjects, in the universal and particular forms of contracts, exchanges and the various kinds of synallagmatic relationships, and in the obligations that are created by them; this book also shows what the right and false use of human sciences and arts are, the essence of the various ranks, offices, and duties. Hence it treats of the whole of economics and politics.

The same turn towards a scientific and all-comprehensive treatment of legal affairs can be witnessed in Joseph Gibalin's systematic treatise on canon law, the title of which is equally indicative of the turn towards legal science: *Scientia canonica et hieropolitica*⁶⁵. Again, the full title of

63. Cf. P. DE OÑATE, *De contractibus tomi tres*, Romae, 1646, tom. 1, tract. 1, pr., num. 3, p. 1.

64. J. GIBALIN, *De universa rerum humanarum negotiatione tractatio scientifica, utriusque foro perutilis, ex iure naturali, ecclesiastico, civili, romano, et gallico. In qua negotiorum humanorum aequitas per omnes negotiationis causas, materias, formas universales ac singulares contractuum, commerciorum, atque synallagmaticoona diversa genera, ex iisque ortas obligationes, scientificae et solide explicatur, humanarum scientiarum et artium rectus ac pravus usus demonstratur, singulorum statuum, officiorum ac munerum rationes, atque adeo universa oeconomica et politica traduntur*, Lugduni, 1663.

65. J. GIBALIN, *Scientia canonica et hieropolitica opus novum, in tres tomos partitum. In quo singula, quae toto corpore iuris Pontificii sparsa sunt, ad certa, et indubitata*

this scientific treatise as can be found in the Lyon-edition of 1670 is telling enough:

A new treatise on the science (*scientia*) of canon law and hieropolitics. It reduces all singular rules that are scattered over the body of pontifical law to certain and indubitable principles. On the basis of these principles, innumerable questions are solved, albeit not always in a necessarily conformist way, which concern both the internal and the external fore. In this book French private morals are reconciled with Roman morality. Last but not least, universal moral theology is taught on the basis of certain and constant academic principles, the teachings of the Fathers and the law of the Church.

In summation, there hardly seems to be any place which is better suited for concluding this brief “tour d’horizon” of some major Jesuit works on law in the early modern period than Joseph Gibalin’s epitome of Jesuit legal science. Of course, further examples of Jesuit experts in legal affairs could be cited. For example, Martín Antonio Delrío’s (1551-1608), Joannes David’s (1546-1613) and Friedrich Spee’s (1591-1635) contributions to the early modern debate on criminal law, particularly on witchcraft and magic⁶⁶. Although the seventeenth century was undoubtedly the golden age of Jesuit moral and legal thinking, Jesuits around the world continued to excel in legal studies during the subsequent ages until today. For example, in 1741, of worthy mention would be the Jesuit historian Ignaz Schwarz (1690-1763) from Münckhausen who published his *Institutions of Universal Public Law* (*Institutiones iuris publici*

principia reducuntur; et ex illis innumerae quaestiones, ad forum tum internum, tum externum pertinentes, facile et solide, quamvis non semper ex vulgi sensu, explicantur. Privati Galliae mores, ac iura cum Romanis conciliantur: universa denique moralis Theologia, ex certis, et constantibus scholasticae principiiis, Patrum sensu, et ecclesiasticis legibus docetur, Lugduni, 1670. It should be noted that C. SOMMERVOGEL, *Bibliothèque de la Compagnie de Jésus*, Brussels – Paris, 1892, tom. 3, col. 1401, num. 7 wrongfully made reference to the title of this work as being “Sententia canonica et hieropolitica, etc.” – a mistake copied by P. DUCLOS, s.v. *Gibalin*, in C. O’NEILL – J. DOMÍNGUEZ (eds.), *Diccionario histórico de la Compañía de Jesús biográfico-temático*, vol. 2, Rome, Institutum Historicum; Madrid, Universidad Pontificia Comillas, 2001, 1727, and by B. BASDEVANT-GAUDEMET, s.v. *Gibalin*, in P. ARABEYRE – J.L. HALPÉRIN – J. KRYNEN (eds.), *Dictionnaire historique des juristes français XII^e-XX^e siècle*, Paris, PUF, 2007, 365.

66. Cf. G. JEROSCHKEK, *Für und wider der Hexenverfolgung: Zu Heinrich Kramers Maleus Maleficarum und Friedrich Spees Cautio Criminalis*, in H.G. KIPPENBERG – J. RÜPKE – K. VON STUCKRAD (eds.), *Europäische Religionsgeschichte: Ein mehrfacher Pluralismus*, Göttingen, Vandenhoeck & Ruprecht, 2009, 253-287; D. VANYSACKER, *Un point de vue de juriste, de théologien ou plutôt de jésuite au service de la Contre-Réforme? L’attitude de Martín Antonio Delrío (1551-1608) et Joannes David (1546-1613) envers la sorcellerie et le mal parmi nous*, in D. VANYSACKER – P. DELSAERDT – J.-P. DELVILLE – H. SCHWALL (eds.), *The Quintessence of Lives: Intellectual Biographies in the Low Countries Presented to Jan Roegiers*, Turnhout, Brepols; Louvain-la-Neuve – Leuven, Bibliothèque de la Revue d’histoire ecclésiastique, 2010, 63-82.

universalis) as a reply to the natural law treatises of Grotius, Pufendorf, Thomasius, Vitriarius and Heineccius⁶⁷. In international law, too, Jesuit legal scholarship kept on shining, notably in the debates on international law and the law of war and peace. Jesuits like Yves de la Brière (1877-1941) and Robert Regout (1896-1942) are worthy of investigation in this respect⁶⁸.

IV. BACK TO THE SPIRITUAL ROOTS OF JESUIT LEGAL SCIENCE

Joseph Gibalin's attempt to encapsulate the entire human life into scientific legal structures is nothing less than the pinnacle of a century of Jesuit involvement in legal and moral theological studies. Starting with rather traditional manuals for confessors, the Jesuits gradually felt the need to invest themselves more deeply into the universe of law composed of natural law, the Romano-canon legal tradition, and even contemporary positive law. Instead of interpreting this remarkable phenomenon as an omen of the pernicious *effusio ad exteriora* which Acquaviva had already signalled as a threat to the authentic Christian spirit at the threshold of the seventeenth century – a warning the Jansenists would not cease to repeat afterwards – it may be useful to recall the truly spiritual roots of the Jesuits' involvement in legal scholarship.

The Jesuits wanted to bring back as many people as possible to their Creator. As consultants to people of all walks of life, they tried to give concrete answers on how they needed to act in specific circumstances of life without losing the hope of gaining salvation at the Last Judgment. Put differently, the scientific legal scholarship of the Jesuits was a handmaiden of their pastoral activity and spiritual ministry: *ad maiorem Dei gloriam*. As was beautifully explained by Suárez, law was considered to be an indispensable tool to any theologian, confessant, and spiritual guide with an honest concern to radically solve the most diverse cases of

67. Biographical details on Ignaz Schwarz, who served as a history professor at the University of Ingolstadt, are provided by C. SOMMERVOGEL, *Bibliothèque de la Compagnie de Jésus*, tom. 7, Brussels – Paris, 1896, col. 946-949, and in H. DICKERHOF, *Land, Reich, Kirche im historischen Lehrbetrieb an der Universität Ingolstadt: Ignaz Schwarz 1690-1763* (Ludovico Maximilianeae: Forschungen, 2), Berlin, Duncker & Humblot, 1971.

68. On Regout, see H. DE WAELE, *Regout als jurist*, in M.J.F. LINDEJER S.J. – A. WELLE (eds.), *Robert Regout: Maastricht 1896 – Dachau 1942*, Drachten, Omnia-Fausta, 2004, 103-123; and H. DE WAELE, *Over de grenzen van het volkenrecht: Robert Regout, zijn tijd en de rechtsgeleerdheid*, in ROTSAERT – SEGAERT (eds.), *Markante jezuïeten uit de lage landen* (n. 48), 71-83. It is no coincidence, of course, that a couple of years before De la Brière and Regout published their writings on the just war, J.M. BITTREMIEUX had just re-edited Lessius' lectures on law and peace in *Lessius et le droit de guerre: Contribution à l'histoire des doctrines théologiques sur la guerre*, Brussels, Dewit, 1920.

conscience. A sound knowledge of law was deemed necessary for the practical purpose of determining the subjective rights and duties of people of all walks of life in day-to-day practice.

The pronounced legal outlook of Jesuit moral thinking is not an exception in the rich field of early modern Catholic ethics. With Dominicans, Franciscans, Augustinians, Carthusians and other religious orders the Jesuits shared the view that making Christian spirituality operational in day-to-day life requires the tool of law. Still, the depth of legal analysis attained by Jesuits such as Suárez, Sánchez, Molina, Lessius, Lugo, Laymann, Oñate, and Gibalin remains unparalleled. Accordingly, it left its imprint on the subsequent legal tradition, in jurists such as Sigismondo Scaccia (ca. 1564-1634), Hugo Grotius (1583-1645), and Giovanni Battista de Luca (1613-1683). It should not come as a surprise that Alphonso de Liguorio (1696-1787), the patron saint of the moral theologians, heavily drew on Jesuit legal analysis. Contrary to the protestant Reformers, there was a large feeling amongst Catholics in the post-Tridentine Church, particularly among the Jesuits, that however essential the Gospel (*lex nova*) may be, it is not a sufficient guideline for those who wish to know precisely where to find the path that leads to salvation.

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