

SECRET COMPENSATION: A FRIENDLY AND LAWFUL ALTERNATIVE TO LIPSIUS'S POLITICAL THOUGHT

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Lipsian Literature—Lessian Law

Justus Lipsius (1547–1606) and Leonardus Lessius (1554–1623) were friends.² But from an intellectual historian's point of view, they were each of them steeped in a distinct strand of early modern practical philosophy. Hitherto, the movement usually called 'humanist', with its literary and philological orientation that Lipsius exemplifies, has taken the lion's share of scholarship in the history of political thought, as compared to the meagre attention paid to its much more down-to-earth and technical counterpart, represented by Lessius and often referred to in a slightly disdainful manner as 'scholastic'.³ This myopic approach tends to ignore the relevance of casuistic treatises as carriers of political thought in the early modern period. To be sure, there are striking differences between the two genres. Loathing the detailed

¹ I am grateful to Erik De Bom, Marijke Janssens, Jan Papy and Toon Van Houdt for having given me the opportunity to present a draft version of this paper at the Leuven Lipsius Conference. The contents as well as the English of this text greatly benefitted from Harro Höpfl's patient and pertinent remarks.

² Details of their intimate relationship are revealed by Van Sull K. in his *Léonard Lessius de la Compagnie de Jésus (1554–1623)*, Museum Lessianum, Section Théologique 21 (Louvain-Paris-Bruxelles: 1930) 158–177, and by Van Houdt T., "Gegraveerd portret van Leonardus Lessius", in Tournoy G. et alii (eds.), *Lipsius en Leuven. Catalogus van de tentoonstelling in de Centrale Bibliotheek te Leuven*, 18 september–17 oktober 1997, *Supplementa Humanistica Lovaniensia* 13 (Leuven: 1997) nr. 76, 245–249. Lessius as well as his colleague Martin Antonio del Rio S.J. (1551–1608) played a considerable part in bringing back Lipsius from Leiden to the University of Leuven; see a letter recently edited by Machielssen J. and De Landtsheer J., "Recommending Justus Lipsius: A Letter from Martinus Antonius Delrio to Leonardus Lessius", *Lias* 34 (2007) 272–282.

³ Recently, however, mind-expanding re-appraisals of 16th- and 17th-century scholasticism in the context of the history of moral philosophy have been produced by Sven Knebel and others. With regard to the history of both private and public law issues, the monographs by Grunert F. and Seelmann K., Gordley J., Hallebeek J., Maihold H., and Whitman J.Q. are indispensable (full references can be found in the bibliographic list at the end of this volume).

casuistry of the Justinian *Corpus Iuris Civilis*,⁴ Lipsius was rather dismissive of Roman law and its commentators, delighting instead in quoting belles-lettres and wisdom sources from Antiquity that stress the need for justice in a prince's policy,⁵ whereas Lessius would draw on precisely Roman and canon legal sources in order to tackle particular cases in which a prince might find himself obliged to apply and find the concrete meaning for the virtue of justice.⁶ True to the Jesuit spirit, Lessius attempted to reconcile faith and worldly business by establishing a court of conscience in which he and his colleagues would act as advocates of the souls. Lipsius for his part regarded conscience—in a Montaigne-like manner—as the divine yet highly personal voice of truth and comfort,⁷ while condemning the legal profession altogether as a species of permitted robbery.⁸ Yet however different in style and format the genres and traditions they belonged to may have been, as in all good friendships a similar spirit can nonetheless be felt to have pervaded the political thought of both. As will become apparent in this article, Lessius was equally at pains to reconcile the ideal of a Christian involved in worldly affairs with the power politics advocated by the Machiavellians, yet often found himself taking as ambiguous a stand as his friend in ethical matters, for instance with regard to fraud

⁴ See Lipsius J., *Monita et exempla politica libri duo, qui virtutes et vitia principum spectant* (Antverpiae: ex officina Plantiniana, 1613), lib. 2, cap. 10, p. 142: 'Obsecro, quae illa copia est, quae omnia comprehendat, aut distinguat? Ipsum Iustinianum ius vide: hic deficit, et multa ex similitudine, aut obscuris ex eo argumentis, iudicantur. Imo ubi copia, plus intricati erit, et semper argutia aut calumnia | in sinu aut recessu huius illiusque legis latebit, et se defendet.'

⁵ For example in Lipsius J., *Politica*, lib. 2, cap. 10, p. 10 (ed. J. Waszink): 'Poëtae [sc. Lucani] illud falsum et improbum: *sceptrorum vis tota perit, si pendere iusta* | *incipit*. Oratoris [sc. Ciceronis] hoc verius: *ius et aequitas, vincula civitatum*.'

⁶ The fascination with Roman law as a problem-solving tool is inherent to the Thomistic tradition, see Aubert J.M., *Le droit romain dans l'œuvre de Saint Thomas*, Bibliothèque Thomiste 30 (Paris: 1955).

⁷ Lipsius, *Monita et exempla politica*, lib. 1, cap. 4, pp. 44–45: 'Quid ea est? Ex religione et Dei metu animi iudicium ortum, bona approbans, mala abhorrens. | Omnes illuc vocamur ab interno isto iudice velut ad tribunal. Et homini formato indelebilem hunc characterem Deus impressit. (...) Mali doctores in Politicis, qui hanc seponunt aut calcant: qui externam vitutum speciem nobis ingerunt, ipsas admitti negant.'

⁸ Lipsius, *Politica*, lib. 2, cap. 11, p. 324 (ed. J. Waszink): 'Et cur dissimulem? Pestis Europae caninum hoc studium, quod haud temere quispiam [sc. Columella] *concessum latrocinium* dixit.' Since he had been trained as a lawyer himself, one might wonder if Lipsius, like other humanist authors, did not befoul his own nest in making legal studies the butt of his criticism. On Lipsius's legal studies, see De Landtsheer J., *Lieveling van de Latijnse taal. Justus Lipsius te Leiden herdacht bij zijn vierhonderdste sterfdag* (Leiden: 2006) 13–14.

and deceit. They also shared a commitment to creating economic prosperity and establishing peace beyond the confessional divide—the devastating effects of which they had seen ruining the Southern Netherlands—despite the official anti-heretical rhetoric. It is this same spirit which Hugo Grotius (1583–1645) was to continue to advocate in the Northern Netherlands and far beyond, not least through his fruitful combination in *De iure belli ac pacis* of the distinct intellectual traditions Lipsius and Lessius had bequeathed him.

In short, a journey to the unfamiliar realm of early modern scholastic philosophy, of which Lessius stands out as the most important representative in Lipsius's home-country, is a necessary complement to any adventure into early modern political thought. No less a scholar than Annabel Brett made a case, of late, for reintegrating scholastic and legal reasoning into the history of political thought.⁹ The usefulness of such an approach can easily be illustrated from her own contribution on the history of rights-talk, or Ian Maclean's study of Renaissance commentaries on the Justinian chapter on the meaning of words.¹⁰ Early modern scholastic political thought would need a much more balanced and colourful account, in the first place, according to Brett—an appeal which needs to be repeated here, if only because in their absolutely marvellous contributions on the subject Ronald W. Truman, Harro Höpfl, and Harald Braun wiped out the monolithic picture we usually have of one of its chief components, namely Jesuit political thought. For example, Pedro de Ribadeneyra displays much more discomfort in expounding his political beliefs within the mould of the pagan cardinal virtues than Juan de Torres does, Francisco Suárez's notion of the state of nature is not identical to Luís de Molina's, and Juan de Mariana proves to be much more king-friendly than he has traditionally been thought to be, and other Jesuits still are.¹¹

⁹ See Brett A.S., "Scholastic Political Thought and the Modern Concept of the State", in Brett A.S.—Tully J.—Hamilton-Bleakley H. (eds.), *Rethinking the Foundations of Modern Political Thought* (Cambridge: 2006) 136 and 141.

¹⁰ Brett A.S., *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*, Ideas in Context 44 (Cambridge: 1997); Maclean I., *Interpretation and Meaning in the Renaissance. The Case of Law*, Ideas in Context 21 (Cambridge: 1992).

¹¹ For a more nuanced exposition, see Truman R.W., *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 (Leiden-Boston-Köln: 1999) 253–360; Höpfl H., *Jesuit Political Thought. The Society of Jesus and the State c. 1540–1630*, Ideas in Context 70 (Cambridge: 2004); Braun H.E., *Juan de Mariana and Early Modern Spanish Political Thought* (Aldershot: 2007) respectively.

In an effort to start to fill this twofold gap in the historiography of political thought, that is with regard to private law and early modern scholasticism, I will set out to describe the discussion by 16th and early 17th century scholastics of ‘secret compensation’ (*occulta compensatio*) between a creditor and a debtor, a private law instrument with which, significantly, we do not seem to be familiar any more.¹² As I will try to demonstrate, it might well be the very moment this notion disappeared from property and contract law that constitutes the moment at which, in private law terms, the ‘absolutely’ sovereign and modern State was born—a modern state in the sense of a central power unchallenged by parallel and rival normative authorities and with an unconditional monopoly on conflict management between its citizens.

Private Law as a Carrier of Political Thought: Some Evidence

It is the absence of an elaborated ‘public law’ doctrine which made the scholastics think of politics in terms of what is now considered to be ‘private law’. Not only were prince-subject relationships described in terms of the feudal contract until late Medieval times, but Lessius explicitly describes the relationship between the prince and his citizens in terms of an employment contract, itself formulated in terms of a lease contract (*locatio-conductio*) until the 19th-century socialist upheavals.¹³ There is an urgent need, then, to reconsider contractualist theories of political power in early modern times from the viewpoint of

¹² Importantly, and as was sharply remarked by Domingo de Soto, we are talking here about taking the law into your own hands with regard to matters pertaining to the law of property and contracts (*ius externorum bonorum*), not in delictual or criminal affairs; cf. *De iustitia et iure*, lib. 5, quaest. 3, art. 3, dub. 3 (ed. fac. V.D. Carro—M. González Ordóñez), vol. 3, p. 423. Unfortunately, Whitman does not discuss ‘Selbsthilfe’ in matters pertaining to what would now be considered as ‘private law’ in his “Zum Thema der Selbsthilfe in der Rechtsgeschichte”, in Fikentscher W., *Begegnung und Konflikt: eine kulturanthropologische Bestandsaufnahme*, Bayerische Akademie der Wissenschaften, Philosophisch-historische Klasse, Neue folge 120 (München: 2001) 97–105. He does, however, offer an interesting critique of the traditional historiographical account of the movement from private to public punishment in matters criminal.

¹³ Lessius L., *De iustitia et iure* (Antwerp, ex officina Plantiniana: 1626), lib. 2, cap. 1, dubit. 3, num. 13: ‘Tota respublica se habet ad principem sicut particularis persona ad custodem, quem stipendio ad se tuendum et custodiendum conduxit; et ob hanc causam maxime procuratio boni communis pertinet ad illum architektonikoos.’

general and particular contract doctrines, as formulated in theological treatises that served to solve moral problems in a juridical way before what was rightly called the *court* of conscience. It is no coincidence, for instance, to find that the doctrine of changed circumstances (*clausula rebus sic stantibus*) as it was developed in scholastic general contract doctrine, still lives on in international public law agreements between states. Neither should it come as a surprise that arguments in favour of political Machiavellianism were couched in Roman private law terms. Suárez lists Roman law texts on property and contract-related issues that Machiavellians employed to show that political authority primarily aims at the conservation and expansion of the State and, to this end, can and must legitimately make laws that, upon closer examination, prove to be at variance with moral principles.¹⁴ These Roman private law regulations range from the action for performance that lies in a contract despite the fraud and deceit employed by the plaintiff, to lawful fraudulent actions, to the acceptance of unlawful clauses to a contract and prescription in spite of bad faith.¹⁵

The twofold advantage of looking at how they dealt with private law issues rather than to study their immediate political writings, is that this approach, first, prevents us from being misled by the superficial and commonplace statements displayed in scholastic political writings for the sake of safety and traditional authority, and, secondly, that it allows us to make a much more precise and practical assessment of their lofty political theories. You might conclude from Leonardus Lessius's immediate political writings like *Defensio fidei ac potestatis summi pontificis* or his *De antichristo et eius praecursoribus* that they merely exemplify the traditional and unconditional Jesuit hostility to protestant movements and atheists. But reading his judgments in cases that deal with the law of inheritance and testamentary succession, may give us a much more accurate view of his real political theories. If you really want to discourage people—certainly the rich, aristocratic and influential ones—from adopting new beliefs, than you should

¹⁴ See Suárez F., *De legibus ac Deo legislatore. Tractatus de legibus utriusque fori hominibus utilis*, lib. 3, cap. 12, num. 2, in Suárez F., *Opera Omnia*, ed. C. Berton, tom. 5 (Paris, L. Vives: 1856) 215.

¹⁵ Cf. resp. C. 8, 38, 5; Inst. 4, 6, 4; Dig. 2, 14, 31; the bona fides requirement for prescription to take effect was only developed in classical canon law. See X 2, 26, 5 (Alexander III) and Lib. 6, reg. iur. 2 (possessor malae fidei ullo tempore non praescribit).

punish the decision to adhere to that heretical ideology by depriving its followers of the means to survive on a more material level of life. In terms of private law and the law of inheritance, in particular, this means that you simply bar heretics from lawfully inheriting: in that way, you cut off access to a large part, not to say the entirety, of their subsistence.

In effect, that is what Roman and canon law constitutions had ordained.¹⁶ Since a heretic is juridically incompetent to receive an inheritance, Catholic heirs of the body have a right of secret settlement (*occulta compensatio*) to deprive the heretic of the goods he inherited through a testament. But in addressing this very problem, Lessius mitigates the traditional anti-heretical aspect of inheritance law. Contrary to common doctrine, he contends that Catholics have no unconditional right to rob a heretic, or a protector of a heretic, of the goods he had inherited. No right of private justice on the grounds of natural law automatically comes into existence to give Catholics a right of immediate restitution. First a court must pronounce a sentence condemning the heretic. As long as this official judgment has not been pronounced, Catholics should leave the heretics in peace. For although heretics do have a duty to restitute the inheritance, and although Catholics do have a right of *occulta compensatio* which allows them to by-pass public authority, forcing them to restitute *ipso facto* would prove far too rigorous (*durum*) an arrangement, according to Lessius, and it does not even seem to be approved by customary law.¹⁷ Similarly, Lessius would not ban Anglicans or Lutherans from trading with Catholics in the Antwerp market.¹⁸ And, not wholly uninteresting in light of the academic peregrinations of his friend Justus Lipsius, Lessius estimated that sometimes a Catholic professor teaching at a non-Catholic (say Lutheran or Calvinist) university can lawfully confer an academic title on his students.¹⁹

¹⁶ See C. 1, 5, 22 (with a Medieval *authenticum* added by Frederik II); C. 1, 7, 3, pr.; X 5, 7, 13 (Innocentius III).

¹⁷ Lessius, *De iustitia et iure*, lib. 2, cap. 19, dubit. 5, num. 50–52.

¹⁸ Neither did his Jesuit colleague Carolus Scribani (1561–1629) oppose the immigration of Anglican textile workers to Antwerp in 1615. Cf. Bireley R., *The Counter-Reformation Prince. Anti-Machiavellianism or Catholic State-craft in Early modern Europe* (London: 1990) 179.

¹⁹ See *Leonardi Lessii (...) in D. Thomam de beatitudine, de actibus humanis, de incarnatione Verbi, de sacramentis et censuris praelectiones theologicae posthumae. Accesserunt eiusdem variorum casuum conscientiae resolutiones* (Louvain: 1645), ed.

The Problem with 'Occulta Compensatio'

The presence of the notion of secret compensation (*occulta compensatio*) in the case about testamentary succession of heretics is neither surprising nor irrelevant. The ubiquitousness of this notion in the treatises *De iustitia et iure* and manuals for confessors is a simple yet compelling testimony to the real life significance of the natural law based world view of the scholastics. Natural rights and natural duties exist wherever natural obligations have been created through contracts, or torts. Whenever a person fails to meet his natural obligations towards you, you have a right to restitution, that is, in its most generic sense, to the restoration of the equilibrium between rights and duties in terms of commutative justice. In other words, if you cannot attain your rights through a 'compensating' act of the person who has an obligation towards you, you have the right to seek restitution or compensation by other means. Ordinarily, you will take the non-performing counter-party to court to seek enforcement of your rights. But what if for some reason the worldly courts do not give you your due? In the eyes of the scholastics, the naturally ordained order behind any activity on earth must be sought to be upheld anyway. So the judge in the inner forum, that is the confessor in the court of conscience where natural law is the ultimate criterion, cannot but allow you, his confessant, to take the law into your own hands. In his hallmark terse and clear style, Lessius judges that as a matter of natural law and the law of nations any one is allowed to seek satisfaction from the goods of his debtor if he is left with no other way of obtaining payment.²⁰ Since this scholastic way of settling debts and duties entirely by-passes public authority, it is called hidden or secret: 'occulta'.

Unsurprisingly, this way of seeing law and order smells of subversiveness to any political authority aspiring to absolute power. It allows a rival source of norms and rules to regulate the exchange of patrimonial rights between the very citizens whom he alone wishes to govern and control. Conscience may well be a vague, impotent or even void

I. Wijns, s.v. *Haereticorum cum catholicis conversatio*, cas. II, num. 4–10 and cas. III, num. 11–12 resp.

²⁰ Lessius, *De iustitia et iure*, lib. 2, cap. 27, dubit. 4, num. 16: 'Iure enim naturae et gentium potest quis sibi ex qualibet re alterius satisfacere, quando aliter solutionem obtinere nequit.'

concept today, in its scholastic conception it is an irritatingly powerful and seditious weapon in the hands of the Catholic Church striving to establish what the Italian scholar Paolo Prodi describes as a normative universe parallel to the growing body of secular state legislation.²¹ As to the outcome of the power struggle between Church and State, Prodi notes that from the second half of the 17th century onwards the State would definitively claim the victory, while at the same time borrowing the very detailed normative regulations the Church had developed in its casuistical literature and present them in a secular form. Secret compensation, for its part, lives on in slightly secularized form in modern positive law through *ius retentionis*, the 'exceptio non adimpleti contractus' and the law of unjustified enrichment. To put it in a Horace-like phrase: 'Ecclesia capta ferum victorem cepit, et mores intulit agresti Stato'.²² What's more, the Catholic Church's very preoccupation with contracts and private law in the late medieval and early modern period may be the pre-eminent symptom of its guerilla-war against the increasingly absolutist aspirations of the secular State.²³ Through their networks and presence at the ground level of society, the Dominicans and Jesuits sought to mount a firm bottom-up response to top-down state legislation.²⁴ Did not contractual promises take the place of the law for those who had made them?²⁵ And was not the Church the institution which through its parish priests and religious orders in practice had a quasi-monopoly over customs and

²¹ Prodi P., *Eine Geschichte der Gerechtigkeit. Vom Recht Gottes zum modernen Rechtsstaat* (München: 2003) 270.

²² Cf. Hor., *Ep.* 2, 1, 156.

²³ Compare the concluding remarks of Paolo Prodi in Quagliani D.—Todeschini G.—Varanini G.M. (eds.), *Credito e usura fra teologia, diritto e amministrazione: linguaggi a confronto, sec. XII–XVI*, Collection de l'Ecole française de Rome 346 (Rome: 2005) 294: 'Conflitti e collaborazioni tra i diversi fori caratterizzano quindi i secoli successivi nella tendenza della Chiesa a mantenere la sua giurisdizione sul contratto mediante la difesa della superiorità del giuramento (...) e soprattutto (...) riaffermando la superiorità del contratto, regolato dalle superiori norme elaborate dai moralisti e dai casisti, sulla legge statale.'

²⁴ For an overview of the Europe-wide growing state-interventionism in the early modern period, see Stolleis M.—Härter K.—Schilling L. (eds.), *Policey im Europa der Frühen Neuzeit*, Ius Commune, Veröffentlichungen des Max-Planck-Instituts für europäische Rechtsgeschichte, Sonderhefte, Studien zur Europäischen Rechtsgeschichte 83 (Frankfurt am Main: 1996), including an excellent contribution by Van Peteghem P. on developments in the Low Countries: "Policeygesetzgebung in der Republik der Vereinigten Provinzen: Überblick über Lage und Entwicklung der Gesetzgebung im Ancien Regime" (457–488).

²⁵ See Dig. 50, 17, 23 and its reception in the Medieval *ius commune*.

morals ruling the conduct of individual contracting parties creating these laws for themselves?

*After Thomas: Cajetan and the Creation of Space for
'Occulta Compensatio'*

Given the state-challenging nature of *occulta compensatio*, it is not surprising to find that it required the authority of no less a luminary than Tomasso de Vio (1469–1534) Cajetanus to open up its working space. In his *Secunda Secundae*, Thomas Aquinas had carefully inhibited any attempt to thwart public authorities on the basis of secret compensation by nipping its evil in the bud. The most frequent instance of secret compensation was a contract of *depositum* in which the depositor secretly took back the good he had deposited with the depositary. It was even used to argue that theft was not always a sin. In refuting this view about the sinfulness of unlawful taking, Thomas rejected the secret compensation-based argument outright.²⁶ For if the depositary rightfully (*iuste*) possessed the good, say during the term of contract, the depositor who secretly took back his good sinned in unrightfully damaging the depositary. And more importantly, even if the depositary unrightly (*iniuste*) possessed the good, say after the depositor had served notice to him, the depositor employing secret compensation to get back his goods still sinned, according to Thomas. Why? Because he sinned against public order (*iustitia communis*) in usurping the role of judge in his own case (*usurpat suae rei iudicium*)—a way of proceeding condemned outright ever since Justinian's laws.²⁷

Thomas, then, explicitly interpreted secret compensation as constituting a danger to public authority and banned it accordingly. With both ancient legal and medieval scholastic authority resisting *occulta compensatio*, Cajetan's efforts to open up space for it when the Reformation was already in full flow, look all the more interesting. Though acknowledging Thomas's rejection as a general principle, he carefully introduces casuistry to single out some circumstances which may allow for an exceptional treatment. Cunningly, he already inserts these exceptional circumstances in the wording of his *quaestio*:²⁸ 'Is it a sin

²⁶ Thomas, *Summa Theologiae*, IIaIIae, quaest. 66, art. 5, ad 3.

²⁷ See C. 3, 5 (Ne quis in sua causa iudicet vel sibi ius dicat).

²⁸ Cf. Cajetanus T. de Vio, *Commentaria in IIaIIae (q. 57–122) Divi Thomae*, in *Thomae Aquinatis opera omnia cum commentariis Thomae de Vio Caietani* (ed.

against God to recover, without causing scandal, your own good, or a debt owed to you, through compensation, if you are unable to get it back by any legal means?' It is noteworthy, incidentally, that Cajetan expands the question to include relations of debt in general, reducing the deposit-contract to just one instance of it. As to the specific circumstances that may entitle a person to have recourse to what Cajetan himself calls secret acquisition (*occulta acceptatio*),²⁹ they necessarily include the absence of scandal and offence (*scandalum*) and the impossibility of resorting to an institutionalized legal remedy (*via juridica*). In particular, the lack of public legal remedies may be due to injustice on the part of the judge or the debtor, a lack of proof, or considerations of the greater damage that would follow from legal action on both a material (expenses) and social level (friendship and peace).

This list of exceptional cases was further developed and commented on by the theologians of the School of Salamanca and their inheritors all across the globe. For Cajetan had certainly not succeeded in settling the dispute once and for all. The convoluted expression of his refutation of Thomas's argument about the unlawfulness of taking the law in one's own hands is evidence enough of the difficulties involved in defending secret compensation on a theoretical level:³⁰ 'Properly speaking, your acquiring a good in these specific cases does not amount to judging your own case, but rather to executing your own right: for you do not replace any authority, but merely have recourse to secret acquisition.' On the other hand, Cajetan's intellectual offspring could derive encouragement for further deepening the breach he had made in public authority from his reassuring assertion that secret acquisition did not imply a violation of the order of law (*iuris ordo*) at all. For it pertains to law to give everyone his due and to guarantee the peace of the community, and according to Cajetan secret acquisition does exactly that.

Leonina, Rome: 1897), tom. 9, p. 91: 'An scilicet impotens recuperare rem suam aut aliquid sibi debitum, via iuris, accipiendo illam sine scandalo, peccet coram Deo.'

²⁹ In this context, translating 'acceptatio' in a wider sense of acquisition seems appropriate. Compare the notions 'restitutio ratione rei acceptae' and 'restitutio ratione iniustae acceptionis'.

³⁰ Cajetanus, *Commentaria*, p. 91: 'Nec in his casibus accipiens proprie dicit sibi ipsi ius, sed potius exequitur ius suum: cum non auctoritate aliqua utatur, sed sola occulta acceptione.'

Domingo de Soto fully endorsed this view in connection with the prohibition on unjustified enrichment included in classical canon law.³¹ From this general principle he infers the right to recover on one's own authority (*privata auctoritate*) any goods unlawfully under the control of a depositary or thief, provided that it is absolutely impossible to have recourse to public justice. As will be repeated by all other scholastics, the secret compensator still has a duty to inform the thief or the former debtor about the liquidation of his debt, once the compensation has taken place. If not, the debtor or his inheritor might pay the debt for a second time to their own damage. Furthermore, as long as a debtor thinks himself bound to pay his debts, he sins according to his own conscience. So the secret compensator should absolutely avoid these two risks. In the work of the Jesuit Gregorio de Valentia (1549–1603), whether the creditor intends to keep quiet (*animus tacendi*) or to tell the debtor (*animus manifestandi*) about the settlement becomes the ultimate criterion to judge the lawfulness of secret compensation.³² But to return to Soto and lawful *occulta compensatio* in the absence of a *via juridica*, he is reluctant to consider lack of proof as a sufficient ground to have recourse to secret compensation, though he finally allows it if it does not provoke any scandal or offence. On the same condition, but less reluctantly, he approves of secret compensation if it is impossible to get your due because of an iniquitous judge who refuses to judge your case. It is, moreover, indispensable to refrain from using violence and creating upheaval, since private interest is always inferior to the public interest. As a result, one should rather accept the loss of one's property than disturb the commonwealth. In interpreting the well-known Roman maxim that it is lawful to repel force with force (*vim vi repellere licet*)³³—which was also to play a considerable role in the development of resistance theory—Soto recalled that it only applied to cases where a thief was caught in the act.

³¹ Cf. Soto, *De iustitia et iure*, lib. 5, quaest. 3, art. 3, dub. 3, vol. 3, p. 420: 'Quid enim faciet miser qui nullatenus res suas via iuris recuperare potest? Est namque in regulis iuris lib. 6 quod nemo re aliena ditari debet.'

³² See Valentia G., *Commentaria theologica in Secundam Secundae D. Thomae* (Ingolstedt, apud Adam Sartorium: 1603), tom. 3, disp. 5, quaest. 10, punct. 5, litt. c-d, p. 1313.

³³ Dig. 43, 16, 1, 27.

In his own commentary on Thomas's *Secunda Secundae*, Gregorio de Valentia modified this somewhat blunt statement of Soto.³⁴ If the violence did not wound or kill, and was only inflicted upon the thief, Valentia approved of it, since the owner has a right to love his property (*ius amandi proprias res*) even if in doing so he harms the thief. For individuals have the right to prefer their own interest over that of another. However, since an individual has no right to love his property up to the point where it causes harm to the whole community, it is not permissible for him to use force if public upheaval would ensue. Valentia also stretched the application of the right of secret compensation in case of theft somewhat further. Soto had already pointed out that secret compensation cannot bring about a duty of restitution upon the secret compensator any more should he have gotten his goods back in an unlawful way. If there had been ways of recovering your good by legal remedies, for instance, but you had nevertheless preferred to take the law in your own hands, then you sinned, according to Soto. However, since commutative justice had been restored no further obligation existed to make restitution of the stolen good you just got back. Gregorio de Valentia first tried to refute the opinion that it is lawful to take the law in your own hands even though a legal remedy is still available. Actually he quoted two passages of Roman law³⁵ in favour of this rejection, only to go on and espouse the opposite view with a reference to custom (*consuetudo*). In the absence of scandal, Valentia saw no harm in taking the law in your own hands even though the court is still there for you to claim your rights. His argument runs as follows.³⁶ First, you exercise your own right without disturbing the commonwealth. Moreover, if the thief came to repent his theft, he could lawfully bring it back to you ignoring public justice. Third, in contractual exchanges you never have to wait for a public sentence to be able to receive what is due to you by virtue of that contract. Last but not least, you are allowed to take away your own good from a thief when he can see it, and so it is all the more lawful to go to him and get your goods back secretly, since that is less violent and easier.

³⁴ Valentia, *Commentaria*, tom. 3, disp. 5, quaest. 10, punct. 5, litt. a–c, p. 1315.

³⁵ Dig. 47, 2, 57, 2 and Dig. 47, 2, 60.

³⁶ Valentia, *Commentaria*, tom. 3, disp. 5, quaest. 10, punct. 5, litt. a–d, p. 1314.

Deepening the Breach: the Jesuits

Bolstered by the 16th-century Dominicans' attempt to legitimize what continued to be seen as potentially an infringement of public authority, in the first half of the 17th-century Jesuits set out to further develop the theory of secret compensation by enriching the debate with legal vocabulary and moral philosophical principles. Luís de Molina contributed to the formulation of a more general doctrine on *occulta compensatio* by expanding secret acquisition (*occulta acceptio*)—which we have so far seen at work in the deposit contract and theft—to encompass the private enforcement of any property right (*dominium*).³⁷ His explanation of the prohibition on compensation in a deposit-contract before the secular court even implies that he conceives of compensation in terms of set-off between mutual debts. According to Molina, contrary to the internal forum, where compensation in a deposit-contract is merely a particular instance of the generically allowed compensation between debts arising from whatever cause, it cannot be allowed in the external forum for practical reasons. For it would be to the detriment of the *bonum commune* that people are no longer prepared to deposit their goods with public institutions for fear of compensation.³⁸ The compensation envisaged here might well be the lien (*ius retentionis*), which is not discussed by Molina, unlike his Flemish colleague Lessius who designates lien as indirect compensation (*indirecta compensatio*) following the Dominican Silvestro da Prierio Mazzolini (1456–1523).³⁹ Lashing out at Cajetan's awkward way of presenting things, Molina makes a simple distinction later also adopted by Lessius⁴⁰ between those who hold another man's good by virtue of a lawful title (*iusto titulo*), as is the case during the term of a contract, and those who hold another man's property without a lawful title (*iniuste*), say after notice has been served upon the debtor or in case of theft.⁴¹ If the debtor

³⁷ Molina L., *De iustitia et iure* (Venice, apud Seffas: 1611), tom. 3, part. 2, disp. 690, num. 1, p. 652. Except where indicated otherwise, the Venice edition is the basis for this article.

³⁸ Molina L., *De iustitia et iure* (Conchae, ex officina M. Serrano de Vargas: 1597), tom. 2, disp. 560, num. 10, p. 2010.

³⁹ Lessius, *De iustitia et iure*, lib. 2, cap. 27, dubit. 4, num. 16, p. 350; and Mazzolini S. da Prierio, *Summa Sylvestrina quae Summa Summarum nuncupatur* (Lyon, sumptibus Petri Landry: 1593), part. 1, v. compensatio, num. 3, p. 149.

⁴⁰ Lessius, *De iustitia et iure*, lib. 2, cap. 12, dubit. 10, num. 56–57, p. 144.

⁴¹ Molina, *De iustitia et iure*, tom. 3, part. 2, disp. 690, num. 1–2, p. 652.

disposes of a licit title, no right to secret compensation exists on pain of restitution of the use value of the good, damages, and even cessant gain. Otherwise secret acquisition is allowed provided that the creditor takes into account a series of conditions.

In addition to the habitual prerequisite that no legal remedies should be left, two other conditions receive the customary attention: the absence of scandal or harm to others and the duty to care for the soul of the debtor or his successor by informing him about the liquidation of his debt and by informing him that he no longer has any obligation before the court of conscience. There would be nothing special about these conditions, if Molina had not indicated that they are due to be observed as a matter of charity (*lex charitatis propriae ac proximorum*) rather than as a matter of justice—a distinction typical of his classifying spirit.⁴² Equally emblematic is his general insistence on another condition, namely the absolute certainty of the debt (*debitum liquidum*). For unless there is no doubt about your property right with respect to a good, its actual possessor is the stronger according to the maxim that the position of the possessor is the stronger one: ‘*melior est conditio possidentis*’.⁴³ Molina as well as Lessius insisted firmly on this principle in their discussion of the lawfulness of secret compensation.⁴⁴ Borrowed from both *ius commune* property and procedural law, and further developed in the late scholastic tradition, the Jesuit Antonio Perez (1599–1649) in retrospect considered it to have been the single-most important cornerstone on which the whole building of Jesuit moral theology was erected.⁴⁵ It should not come as a surprise, as Rudolf Schüssler has recently demonstrated, that the Spanish Dominicans had already employed this legal principle in tackling the question, put forward by emperor Charles V *after* the conquest of the Americas, whether the Spanish could feel secure about their claimed ownership over the land previously belonging to the indigenous people.⁴⁶ This is yet another testimony to the extreme importance of private law in the political thought of the early modern period. A further

⁴² Molina, *De iustitia et iure*, tom. 3, disp. 691, num. 1, pp. 654–655.

⁴³ Dig. 43, 33, 1, 1: ‘*Melior est conditio possidentis*’ and Lib. 6, reg. iur. 65: ‘*In pari delicto vel causa potior est conditio possidentis.*’

⁴⁴ Lessius, *De iustitia et iure*, lib. 2, cap. 12, dub. 10, num. 58, p. 144.

⁴⁵ Perez A., *De iustitia et iure et de poenitentia opus posthumum* (Rome, ex typographia Varesii: 1668), tract. 2, disp. 2, cap. 4, p. 174.

⁴⁶ Cf. Schüssler R., ‘Moral Self-Ownership and Ius Possessionis in Late Scholastics’, in Mäkinen V.—Korkman P. (eds.), *Transformations in Medieval and Early Modern*

condition indicates once more the particularly juridical cast of the Jesuit order's casuistry: generally speaking only goods that were *consumptibiles* and belonged to the same *species* could form the object of *occulta compensatio* according to Molina. In a similarly juridical vein, Molina argues against Juan de Medina (1490–1546) that the *occultus compensator* effectively acquires the *dominium* over the goods from the debtor's property which he gets as a substitute for the performance the debtor owed to him. For taking into account the Roman principle that it is the owner who bears the risk of accidental loss or destruction (*res perit domino/casum sentit dominus*),⁴⁷ it would be absurd not to acknowledge that *dominium* passes over from the debtor to the compensator. Otherwise the debtor would for example be held to restitute a second time, in the event that the goods that were taken from him by virtue of *occulta compensatio* perished in the hands of his former creditor through an act of God.⁴⁸

There was no beating the Jesuits, then, in handling the power of legal techniques. That might have been one of the reasons why a Jesuit like Molina could self-confidently advocate *occulta compensatio* as a lawful and unproblematic means of maintaining the natural order without disturbing the public order.⁴⁹ Human positive law should simply not be presumed to go against secret compensation if it fulfills the conditions outlined above. However, in the event that human law still rejected *occulta compensatio* despite its accordance with these conditions, then human law was to be judged false. It is hard to imagine a clearer way of expressing one's belief in the existence, first, of two rival normative universes, and, second, of conceiving of these parallel normative orders as constituting a hierarchical relationship, with the natural order being superior to the human one. It is slightly mislead-

Rights Discourse, The New Synthese Historical Library. Texts and Studies in the History of Philosophy 59 (Dordrecht: 2006) 154–155.

⁴⁷ C. 4, 24, 9 and Dig. 50, 17, 23.

⁴⁸ Molina, *De iustitia et iure*, tom. 3, part. 2, disp. 691, num. 3, p. 657.

⁴⁹ Molina, *De iustitia et iure*, tom. 3, part. 2, disp. 691, num. 1, pp. 655–656: 'Ratio vero cur, servatis his conditionibus, fas sit occulta compensatio, haec est: Quoniam non est praesumendum ius humanum intendisse concurrentibus his conditionibus, nullaque occurrente via tuta qua is cui aliquid indubitate debet, | comparare id possit via iudicis, prohibere compensationem occultam neque si id intendisset iustum esset tale praeceptum: quo fit ut, concurrentibus his conditionibus, non faciat contra ordinem, sed praeter ordinem iuris, qui talem fecerit compensationem. Neque is dicit sibi ius, sed exequitur suum ius perspicuum ac manifestum, in defectum publicae potestatis, quae id velit aut possit exequi, in quo sane nullum intervenit peccatum.'

ing, then, to present *occulta compensatio* as merely existing along with the existing legal order established by the public authorities (*praeter ordinem iuris*), as Molina does. In his view, *veritas* clearly overrules *auctoritas* in case they conflict. The natural order does not merely fill in the gaps where there is no actual provision in the existing body of state law. He unmistakably demonstrates this in asserting that if you resort to secret compensation with respect to the conditions set by natural law, you have a right to disobey the sentence subsequently passed on you by a judge in a secular court.⁵⁰ For although a lawful presumption exists before that court that you have unlawfully obtained the good you took away as a matter of compensation, it remains a false presumption (*praesumptio falsa*). What is more, if the judge could easily have found that you had acted without neglecting the above-mentioned conditions, he would even be condemned himself by Molina to pay damages for the harm he had done to you in passing a judgment that was simply wrong.

Now that we have entered the courtroom, let me just add a little illustration of what Harro Höpfl has noted to be the strange phenomenon whereby Jesuits argued *ad hoc* that private or public interest were not incompatible with the dictates of morality, whereas Machiavelli had argued equally *ad hoc* that they were.⁵¹ The question at hand is whether it is lawful for you to lie if you are questioned by the judge about the unlawful and secret compensation of which you are suspected. Unsurprisingly, we find Lessius dealing with this qualm of conscience borrowing from Martin de Azpilcueta, Dr. Navarrus.⁵² The latter had already concluded that if you had lawfully compensated your right and were subsequently brought to court and forced to tell under oath whether you knew who had taken away the goods of the debtor or not, you could lawfully resort to mental reservation (*reservatio mentalis*). Consequently, you could lawfully say that you did not know, provided that you completed the phrase in your own mind with 'who has unlawfully compensated'. Lessius attests to his quite relaxed position on lying in addressing the same case with the sole modification that now the *occulta compensatio* took place unlawfully, given

⁵⁰ Molina, *De iustitia et iure*, tom. 3, part. 2, disp. 691, num. 2, p. 656.

⁵¹ Cf. Höpfl, *Jesuit Political Thought* 96–97.

⁵² Azpilcueta M. (Dr. Navarrus), *Enchiridion sive manuale confessoriorum et poenitentium* (Paris, apud viduam Guilielmi de la Nouë: 1602), cap. 17, num. 116, p. 449.

that there were still public legal remedies at your disposal.⁵³ First, Lessius opposes your obligation to speak the truth to the judge's claim to question you, which is rightful given that you acted unlawfully, only to conclude that it is not improbable that you still have a right to use what he calls himself the 'trick' (*artificium*) of mental reservation. For the question as the judge understands it pertains to the unlawfulness of the compensation as to its substance (*substantia*) rather than to its mode (*modus*). And though the *modus compensationis* was improper, given that you should have taken the debtor to court, the compensation as such was still lawful in order to get your due. As a result, you can lawfully have recourse to mental reservation by interiorly adding 'as to its substance' to your outward declaration that you do not know who committed unlawful secret compensation.

*Innocent XI's Rejection of 'Occulta Compensatio' and the
Triumph of the Absolutist State*

It is a well-established fact that it was not in the least due to their doubtful reputation of being all too indulgent confessors that the Jesuits eventually had the book of true Catholic rules thrown at them by the very Popes they had committed themselves to. Subsequent to Pope Alexander VII Chigi's (1655–1667) condemnation of the arbitrary right of disobedience as advocated by some lax or benign moral theologians,⁵⁴ Pope Innocent XI Odescalchi (1676–1689) added to the triumph of the absolutist state by putting on his list of prohibited moral propositions the right to secret compensation for wage workers who considered themselves to be underpaid.⁵⁵ The fact that this prohibition was meant to be generic can be derived from a PhD thesis defended

⁵³ Lessius, *De iustitia et iure*, lib. 2, cap. 12, dub. 10, num. 62, p. 144–145.

⁵⁴ Denzinger H.—Schönmetzer A., *Enchiridion symbolorum, definitionum et declarationum de rebus fidei et morum* (Freiburg im Breisgau et al.: 1963³²) 453, num. 2048: *Alexandri VII propositiones doctrinae moralis laxioris 1–28 damnatae in Decretis S. Officii 24. Sept. 1665*, prop. 28: 'Populus non peccat, etiamsi absque ulla causa non recipiat legem a principe promulgatum.'

⁵⁵ Denzinger—Schönmetzer, *Enchiridion* 462, num. 2137: *Innocentii XI propositiones lxv damnatae in Decretis S. Officii 2. Mart. 1679*, prop. 37: 'Famuli et famulae domesticae possunt occulte heris suis surripere ad compensandum operam suam, quam maiorem iudicant salario, quod recipiunt.' In a footnote to num. 2137, the editors ascribe this proposition to Leonardus Lessius, *De iustitia et iure* 2, 12, 10. Along with Molina, however, Lessius firmly denies the right of servants to secret compensation on the basis of their own judgment in *l.c.*, num. 10, p. 145.

at the University of Leuven shortly afterwards by Thisius, a theology student coming from Maastricht.⁵⁶ It is indicative of its widespread acceptance until its condemnation in 1679 that we find Thisius berating from the outset the large number of theologians and confessors who had made of *occulta compensatio* a universally received doctrine, much to the spiritual detriment of all employers and servants. He was then careful to extend the prohibition to any form of compensation in any contract or debtor-creditor relationship whatsoever, while at the same time pointing to the crux of the matter by stating that taking the law in your own hands fundamentally and unlawfully makes you escape the jurisdictional power of the wordly court.⁵⁷ The political odds at stake in the defence or rejection of this seemingly insignificant private law institution were evidently very high. Trying to retain the Church's power to regulate human behaviour in light of the growing dispute settling power of the secular authorities, Cajetan inspired the Dominicans and Jesuits of the early modern period to create a black hole of *occulta compensatio* in the legal order to let off as much regulatory activity as possible from an increasingly positivist universe. By the end of the 17th century, however, the Counter-Reformation Church had eventually to take the honourable way out of this struggle for normative dominance.

⁵⁶ See Thisius L.I., *Theses theologicae quibus exhibentur quaedam observationes circa aliquot propositiones de furto, compensatione occulta, et restitutione inter lxxv a Innocentio XI condemnatas* [praeses: Gummarus Huygens Lyranus; defensio in collegio Adriani VI die 7 decembris 1684] (Louvain, Typis Guilielmi Stryckwant: 1684).

⁵⁷ Thisius L.I., *Theses theologicae*, concl. 2, par. 2, [s.p.]: 'existimo inquam quod illi nollent se subicere tribunali cui veluti iudices in propria causa adversus se sederent famuli et ancillae, conductores rerum suarum aut quicumque alii secum contrahentes.'