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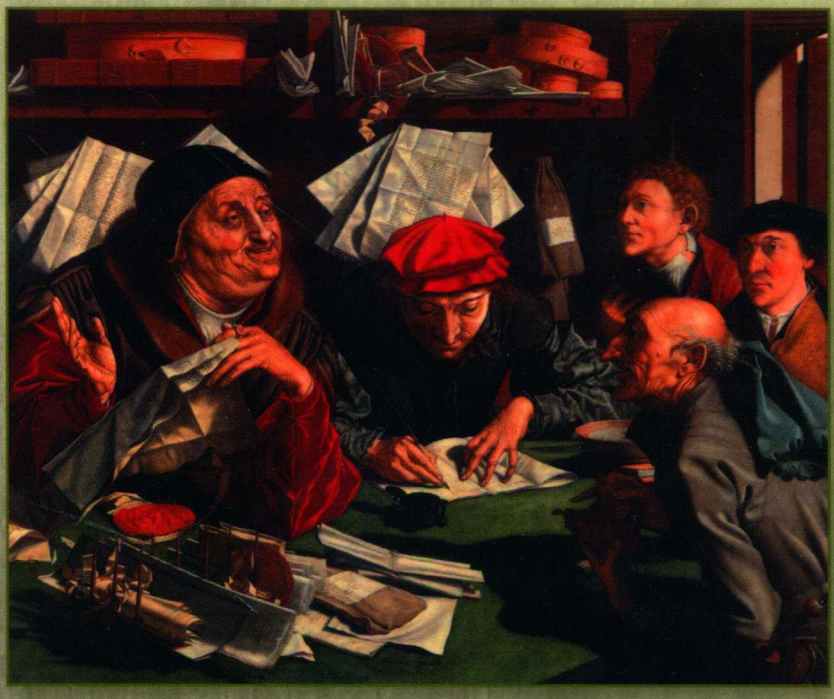
Theologians and Contract Law

The Moral Transformation of the Ius Commune *(ca. 1500-1650)*



By

Wim Decock

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Theologians and Contract Law

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That general aim of all law is simply referable to the moral destination of human nature, as it exhibits itself in the Christian view of life; then Christianity is not to be regarded merely as a rule of life for us but it has also in fact changed the world so that all our thoughts, however strange and even hostile they may appear to it, are nevertheless governed and penetrated by it.

Friedrich Carl von Savigny[1]

[1] *System of the modern Roman law*, Translated by W. Holloway, Madras 1867, vol. 1, p. 43.

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This book has grown out of a dissertation submitted with a view to obtaining the joint degree of Doctor in Laws (KU Leuven) and Dottore di ricerca in diritto europeo su base storico-comparatistica (Università Roma Tre). The research was initiated in the autumn of 2006 and the thesis was successfully defended in Leuven, Belgium, on 8 December 2011.

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PROLOGUE

Extremely vast. Extremely difficult. Extremely useful. These unambiguous adjectives prominently appear in the introduction to the Spanish Jesuit Pedro de Oñate's (1568–1646) four-volume treatise *On contracts*. They are meant to capture the essential features of contract law. The myriads of contracts concluded every day, Oñate warned his readership, make up an ocean that is deep, mysterious and capricious. Contracts are the inevitable means enabling man to navigate his way either to the salvation or to the destruction of his material goods—and of his soul. Therefore, he considered expert knowledge of the complex field of contract law to be indispensable for confessors who needed a nuanced solution to practical cases of conscience. Each contract was thought to express a moral choice for either virtue or vice, for avarice or liberality, for justice or fraud. To live is to enter into contracts, according to Oñate, and to live a God-pleasing life is to conclude contracts in a manner that is consistent with the imperatives of Christian morality. To help confessors decide how Christians of all trades, including princes and businessmen, have to live their lives, this Spanish Jesuit expounded what such a Christian view of contracts should look like.

Oñate's work stands at the end of a vibrant tradition of scholastic contract law, which will be subject to meticulous analysis in the chapters that follow. Scholastic contract law evolved all across Europe over a period of more than half a millenium. By the 1650s, it had come to fruition in the works of major theologians of the Spanish Golden Age, such as Domingo de Soto (ca. 1494–1560), Tomás Sánchez (1550–1610), and Leonardus Lessius (1554–1623). It had left its mark not only on the Catholic moral theological tradition, but also on canonists such as Diego de Covarruvias y Leyva (1512–1577), civilians such as Matthias van Wezenbeke (1531–1586) and natural lawyers such as Hugo Grotius (1583–1645). Slowly but effectively, the Roman law of the late medieval period used all across Europe, the *ius commune*, was transformed into the image of Christian morality. The consequence of this transformation, in Oñate's own words, was the restoration of 'freedom of contract' (*libertas contrahentibus restituta*). This 'freedom of contract' granted contracting parties the possibility to enter into whatever agreement they wanted on the basis of their mutual consent. They could then have their contract enforced before the tribunal of their choice. The following pages intend to analyze theologians' conception of this principle of 'freedom of contract' and its limits.

NOTES ON THE TEXT AND ITS MODES OF REFERENCE

We have followed the conventions for bibliographical reference as recommended by the *Tijdschrift voor Rechtsgeschiedenis* (*The Legal History Review*). References to modern journals or dictionaries have not been abbreviated so as to make sure that the text remains as accessible as possible to scholars coming from different academic backgrounds. The Latin and Greek are cited as they occur in the quotations, except for the punctuation, which has been slightly modernized. The most emblematic quotations have been translated into English, usually in a freer style than that used in the rendering of Latin texts in school exercises. For the form of names, the vernacular has been preferred to the Latinized forms unless the Latin name was more common. For example, Lenaert Leys is cited as Leonardus Lessius, while Charles Du Moulin is employed rather than Carolus Molinaeus. Sometimes both versions are used for stylistic purposes, particularly when the name is equally well-known in its vernacular as in its Latinized form, e.g. Martín de Azpilcueta besides Dr. Navarrus. The following abbreviations have been used for the citation of ancient and medieval legal texts:

D. 1,1,1	Digestum Justiniani, book 1, title 1, lex 1
C. 1,1,1	Codex Justiniani, book 1, title 1, lex 1
Inst. 1,1,1	Institutiones Justiniani, book 1, title 1, lex 1
Nov.	Novellae
Dist.1, c.1	Decretum Gratiani, Distinctio 1, canon 1
C.1, q.1, c.1	Decretum Gratiani, Causa 1, quaestio 1, canon 1
De pen.	Decretum Gratiani, De penitentia
X 1,1,1	Decretales Gregorii IX, book 1, title 1, canon 1
VI 1,1,1	Liber sextus Bonifatii VIII, book 1, title 1, canon 1
Clem.	Constitutiones Clementis V, book 1, title 1, canon 1

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