

## Johann Gerhard and the Good Use of Usury

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### **The History of Usury: Antique Aversion and Canon Law Prohibition**

Johann Gerhard remains one of the leading Lutheran theologians of all time. He was a great erudite who combined the different trends in theology, philosophy, law, and other fields to broaden the horizon of Lutherans of his time and to develop modern positions that were more favorable from an economic point of view.<sup>1</sup> The French bishop Jacques-Bénigne Bossuet (1627–1704) considered Gerhard to be the third most important theologian after Luther and Martin Chemnitz (1522–1586). His texts excel in endless citations, not only showing off his learning, but also his knowledge of all confessional and national traditions. Gerhard's treatment of usury, in particular, begins by tracing its history starting with the Old Testament.<sup>2</sup>

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<sup>1</sup> Jörg Baur, "Johann Gerhard," in *Gestalten der Kirchengeschichte*, ed. Martin Greschat, vol. 7 (Stuttgart: Kohlhammer, 1982), 99–111; Martin Honecker, "Johann Gerhard," in *Theologische Realenzyklopadie* [hereafter: *TRE*], ed. Gerhard Müller, vol. 12 (Berlin: De Gruyter, 1984), 448–53.

<sup>2</sup> General introductions include Wilhelm Endemann, *Studien in der romanisch-kanonistischen Wirtschafts- und Rechtslehre: bis gegen Ende des siebzehnten Jahrhunderts*, vol. 1 (Berlin: Guttentag, 1874), 9–10; August M. Knoll, *Der Zins in der Scholastik* (Innsbruck: Tyrolia, 1933); John T. Noonan, *The Scholastic Analysis of Usury* (Cambridge, MA: Harvard University Press, 1957); Bartolomé Clavero, *Usura: del uso económico de la religión en la historia* (Madrid: Tecnos, 1984); idem, "The Jurisprudence on

The Jewish tradition (Deut. 23:20) established the duty to lend money without interest rates to the members of one's family, to neighbors, and even to members of the Jewish people (Ex. 22:24–26). Foreigners, however, could be asked to pay interest rates (Deut. 23:21). The Gospels followed this tradition and encouraged Christians to lend money even without the hope of having the money returned (Luke 6:34ff.). While Greek and Roman moral philosophy developed similar ideas, the lending of money (*fenus* or *usura* in the terminology of Roman law) remained a common practice in the ancient world.<sup>3</sup>

The Synod of Arles in 314 (can. 13 [12]) and the first ecumenical Synod of Nicaea (can. 17) developed a prohibition for clerics to stipulate interest rates. The term *usura* became the technical term for all those contracts that were prohibited. Authors like Tertullian, Basil of Caesarea, and Ambrose of Milan spread this idea. The canons attributed to the Synod of Elvira (can. 20) extended this prohibition to laymen. Pope Leo I, the penitentiaries, and Charlemagne (*Admonitio generalis* of 789) propagated the extended prohibition. During the transition from antiquity to the early Middle Ages, prohibitions of usury became frequent both in secular and in ecclesiastical law.<sup>4</sup>

When wealth increased in Western Europe in the eleventh and twelfth century, these prohibitions acquired more relevance. The *Decretum Gratiani* discussed the legitimacy of profit and interest rates in the context of usury and *fenus* on different occasions.<sup>5</sup> The writings of the church fathers were cited now as sources of

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Usury as a Social Paradigma in the History of Europe,” in *Historische Soziologie der Rechtswissenschaft*, ed. Erk Heyen (Frankfurt am Main: Klostermann, 1986), 23–36; Reiner Franke, *Die Entwicklung des (Darlehens-) Zinses in Frankreich. Eine rechts- und wirtschaftsgeschichtliche Untersuchung von der kanonischen Usuralehre des 13. Jahrhunderts bis zur Französischen Revolution*, Schriften zur wirtschaftswissenschaftlichen Analyse des Rechts 25 (Berlin: Duncker, 1995); Eric Kerridge, *Usury, Interest and the Reformation* (Aldershot: Ashgate, 2002).

<sup>3</sup> Cf. Hans-Jürgen Becker, “Das Zinsverbot im lateinischen Mittelalter,” in *Was vom Wucher übrigbleibt: Zinsverbote im historischen und interkulturellen Vergleich*, ed. Matthias Casper et al. (Tübingen: Mohr Siebeck, 2014), 15–46; Jan Christian Gertz, “Zins II,” in *TRE*, vol. 36 (Berlin: De Gruyter, 2004), 668–91, 672–74; Rolf Sprandel, “Zins IV,” in *TRE*, vol. 36, 681–87; Hans Erich Troje, “Humanistische Kommentierungen klassischer Juristenschriften,” in *Humanistische Jurisprudenz. Studien zur europäischen Rechtswissenschaft unter dem Einfluss des Humanismus* (Goldbach: Keip, 1993), 143\*–72\*, 158\*ff.

<sup>4</sup> Harald Siems, *Handel und Wucher im Spiegel frühmittelalterlicher Rechtsquellen* (Hannover: Hahnsche, 1992).

<sup>5</sup> Becker, “Das Zinsverbot,” 21.

law. In contrast to Jews, Muslims, and in particular to the Catharists, who did not accept this interdiction, the medieval church insisted on the limitation of interest rates. In contrast to the prohibition of the *Decretum*, the *Glossa ordinaria* tried to establish legitimate exceptions.

The synods of 1139 and 1179 in the Lateran palace denied Christian burial to moneylenders who practiced usury. Emperor Frederick II followed their opinion in his Constitutions of Melfi, while the merchant cities of the north did not accept it. Gregory IX (X 5.19.19 *Naviganti*) allowed certain interest rates for ship mortgage (*faenus nauticum*). In 1274 the Synod of Lyon even decreed that priests who gave the sacraments to moneylenders should be excommunicated. And in 1311 the Synod of Vienne considered all those who denied that usury was a sin to be heretics themselves.

This development did not preclude the establishment of the first banks (*montes pietatis*) and insurance companies, particularly in northern Italy, beginning in the fourteenth century. In contrast to canon law, medieval Roman law based on the law of Justinian provided for one of the most prominent legal distinctions of the time. It induced the authors of the time to find compromises. While the debate maintained its importance for European society, interest rates in general declined during the Middle Ages.<sup>6</sup>

While the medieval church established some moral principles for trade, which ensured some basic notions of justice and economic participation for everyone,<sup>7</sup> it reacted with utmost flexibility to the daily demands of the markets. This provided at the same time for some predictability in the law and the necessary suppleness in practice, but also for the social consent necessary to ensure public support for the enormous economic growth of the time and the social change that it implied.<sup>8</sup> In particular Franciscans like Peter John Olivi (1247/8–1296/8) accepted the necessity of money, the utility of interest rates, and the practicability of accepting

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<sup>6</sup> Sidney Homer and Richard Sylla, *A History of Interest Rates*, 4<sup>th</sup> ed. (Hoboken, NJ: Wiley, 2005), 132ff.

<sup>7</sup> E.g. the just price theory, cf. Jan de Vries, *The Price of Bread: Regulating the Market in the Dutch Republic* (Cambridge: Cambridge University Press, 2019), 18ff.; Raymond de Roover, “The Concept of Just Price: Theory and Economic Politics,” *Journal of Economic History* 18 (1958): 428; Luca Marazzi, *Das iustum pretium im Tractatus de emptionibus et venditionibus des Petrus Ioannis Olivi* (Zürich: Schulthess, 1990).

<sup>8</sup> In this regard, see Mathias Schmoeckel, “Die Kanonistik und der Anstieg des Handels vom 13. bis zum 15. Jahrhundert,” *VSWG: Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte* 104 (2017): 237–54.

the consent of the parties generally as a fair bargain.<sup>9</sup> But he could persuade neither his contemporaries nor those in following ages. But the understanding of the necessities of the market spread slowly. Thomas Aquinas developed criteria for the legality of interest rates in case of damages (*damnum emergens*) and lost chance of profit (*lucrum cessans*), and he stipulated penalties for breach of contract.<sup>10</sup> In the fourteenth century some prelates like Bernardino of Siena, OFM (1380–1444) and Antoninus of Florence, OP (1389–1459) developed a much greater understanding of the market.<sup>11</sup>

In the fifteenth century some German authors in particular developed a further understanding of the necessities of the market. They used their tracts to reconcile theology with public demands. Theologians and canonists like Matthias von Krakau (ca. 1335/40–1410)<sup>12</sup> and Johannes Nieder, OP (d. 1438),<sup>13</sup> with his *De contractibus mercatorum*, dealt with the issues of just sales contracts and just prices, rules for how merchants can behave justly in commerce, how to recognize legitimate and illicit contracts, and the origin of property and possession.

## Confessional Points of View in the Sixteenth Century

Johann Gerhard also drew heavily on the Protestant authors of his time, in particular on Luther and Chemnitz. On this question Luther followed the teaching of canon law.<sup>14</sup> The former student of canon law often chose such a conservative

<sup>9</sup> Cf. Petrus Johannes Olivi, *Traité des contrats*, ed. Sylvain Piron (Paris: Les Belles Lettres, 2012).

<sup>10</sup> Noonan, *Scholastic Analysis*, 51ff.

<sup>11</sup> Cf. Raymond de Roover, “The Scholastics, Usury, and Foreign Exchange,” *The Business History Review* 41, no. 3 (1967): 257–71.

<sup>12</sup> Matthias Nuding, “Geschäft und Moral: Schriften ‘De contractibus’ an mitteleuropäischen Universitäten im späten 14. und frühen 15. Jahrhundert,” in *Schriften im Umkreis mitteleuropäischer Universitäten um 1400*, ed. Fritz Peter Knapp et al. (Leiden: Brill, 2004), 40–62, 48, 53ff., 59–60.

<sup>13</sup> On Nieder and his work, cf. Winfried Trusen, “De contractibus mercatorum. Wirtschaftsethik und gelehrtes Recht im Traktat Johannes Niders (†1438),” in *Ius et commercium. Festschrift für Franz Laufer zum 70. Geburtstag am 20.6.1971*, ed. University of Würzburg (Würzburg: Holzner, 1971), 51–71; and earlier, in the same regard, Johannes Höffner, *Wirtschaftsethik und Monopole im fünfzehnten und sechzehnten Jahrhundert* (Jena: Fischer, 1941), 85ff.

<sup>14</sup> Cf. Benjamin Nelson, *The Idea of Usury: From Tribal Brotherhood to Universal Otherhood*, 2<sup>nd</sup> ed. (Chicago: University of Chicago Press, 1969); and briefly, Charles R.

position, with the exception of ecclesiastical and marital law. Surprisingly, therefore, he remained the most conservative author among the representatives of the confessional age.<sup>15</sup> He even adopted the idea developed by Johannes Eck in his Bolognese dissertation in 1505 of establishing the legality of a general 5 percent interest rate. But Luther was no economist and mainly reacted to public uproars in cases of market crises in his vicinity. Nevertheless he coined some strong words when he wrote against the crime of big business men acting as “huge world-mongers” in contrast to the “small usurer.”<sup>16</sup> Luther knew the Latin word for “interest,” but was not ready to distinguish this from usury categorically.<sup>17</sup> Authors like Wolfgang Musculus mirrored Luther’s position in agreeing on the general legality, but they still argued about its morality.<sup>18</sup> Melanchthon shared Luther’s prohibition of usury, but had more understanding of the necessities of trade and economy.<sup>19</sup>

A specialty in Gerhard’s text is his interest in the positions of other confessions as well. This shows his readiness to consider other traditions, but he also uses this device to demonstrate that most authors agree on some basic principles. Calvin, for example, allows for moneylending with some reservations. In his tract *De l’usure* written probably around 1545, the lawyer Calvin treated the question

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Geisst, *Beggar thy Neighbor* (Philadelphia: University of Pennsylvania Press, 2012), 75–76.

<sup>15</sup> Cf. Mathias Schmoeckel, “Das kanonische Zinsverbot und die Konfessionalisierung,” in *Law and Religion: The Legal Teachings of the Protestant and Catholic Reformations*, ed. Wim Decock et al. (Göttingen: Vandenhoeck & Ruprecht, 2014), 186–212.

<sup>16</sup> Martin Luther, *An die Pfarrherrn, wider den Wucher zu predigen* [1540], in *D. Martin Luthers Werke. Kritische Gesamtausgabe*, vol. 51, *Predigten 1545/46* (Weimar: H. Böhlhaus, 1914), 331–424 (here 369). On Luther’s economic positions, cf. the brief introduction by Ricardo Rieth, “Luther’s Treatment of Economic Life,” in *The Oxford Handbook of Martin Luther’s Theology*, ed. Robert Kolb, Irene Dingel, and Lubomir Batka (Oxford: Oxford University Press, 2014), 383–96.

<sup>17</sup> Kerridge, *Usury, Interest and the Reformation*, 29.

<sup>18</sup> Jordan J. Ballor, “Introduction: Wolfgang Musculus on Christian Righteousness, Oaths, and Usury,” *Journal of Markets & Morality* 11, no. 2 (2008): 353–77 (here 373); cf. the revised version of this introduction in Wolfgang Musculus, *On Righteousness, Oaths, and Usury: A Commentary on Psalm 15*, trans. Todd M. Rester (Grand Rapids, MI: CLP Academic, 2013), xix–xlvi.

<sup>19</sup> Kerridge, *Usury, Interest and the Reformation*, 29, 38–39, 43–44.

only as a moral question.<sup>20</sup> He argued not only that money was necessary for commerce, but also that for the necessities of trade merchants could make bargains about all goods, including gold and ivory. People had to demonstrate their industry in order to obtain success in this matter. He developed only seven moral rules in order to limit commerce. These include the following: Interest should not be taken from the poor or in a way to harm the other; the bargain should not contradict natural equity or enhance the iniquity of the world; every partner should obtain a proportionate profit; and the bargain had to respect the law of the land and take account of its effect on public interests.

In his *Institutes of the Christian Religion*, however, Calvin developed a more general economic theory. Life could be regarded as a test of every person's capacity to live according to the rules of his or her faith. Wealth in property and respect in state politics could be the signs of a successful life, but riches and honors imposed social duties at the same time to which it was difficult to live up. Hardly anybody would spend all he or she could to respond properly to the social demands of society. This meant that no prince was allowed to take away individual property or privileges because this would diminish the individual task. English Calvinists still held that money loans could be illegal usury, but rather emphasized the obligation of the individual to ensure the morality of the contract and its interest rate.<sup>21</sup> In the end, all Protestants agreed to condemn usury, but to allow rates for true and genuine interest.<sup>22</sup> Gerhard was even able to cite Catholic authors, while these authors themselves were not allowed to read Protestant authors whose works were on the list of prohibited books. Once again Gerhard used these authors as a proof of some common convictions of humankind. Especially in Spain lawyers became aware of the new economic problems caused by the discovery of the Americas. Here a great number of theologians and some lawyers used the traditional field of moral theology to establish new

<sup>20</sup> Jean Calvin, *De l'usure*, in *Ioannis Calvini opera selecta*, ed. Peter Barth and Wilhelm Niesel, vol. 2 (Munich: Kaiser, 1952), 391–96; on the influence of Luther and Martin Bucer, cf. Josef Bohatec, *Calvins Lehre von Staat und Kirche mit besonderer Berücksichtigung des Organismusgedankens* (repr., Aalen: Scientia, 1968), 716–19; Noonan, *Scholastic Analysis*, 365ff.; on Calvin, see Kerridge, *Usury, Interest and the Reformation*, 32ff.

<sup>21</sup> Charles H. George, "English Calvinists on Usury, 1600–1640," in *Journal of the History of Ideas* 18, no. 4 (1957): 455–74; John H. Munro, "Usury, Calvinism, and Credit in Protestant England: from the Sixteenth Century to the Industrial Revolution," University of Toronto, Department of Economics, Working Paper 439 (June 28, 2011), 14ff., <https://www.economics.utoronto.ca/public/workingPapers/tecipa-439.pdf>.

<sup>22</sup> Kerridge, *Usury, Interest and the Reformation*, 40.

rules for new issues. In the tradition of great medieval theologians like Thomas Aquinas they used moral concepts in order to change the law.<sup>23</sup> But unlike Protestant authors they wanted to achieve innovations within traditional canon law. The greatest canonist of the sixteenth century was Martín de Azpilcueta (1492–1586), also called “Doctor Navarrus,”<sup>24</sup> a cousin of the apostle of Asia, Francis Xavier (1506–1552). He obtained the most important chair for canonists in the University of Salamanca, but was transferred by the petition of the king of Portugal to the University of Coimbra. He spent his last years at Rome defending the archbishop of Toledo, who was accused of being a Lutheran. He can be regarded as the most prominent exponent of canon law in the Roman Catholic Church. He arrived at a new interpretation of usury by a revolutionary interpretation of the old canons and decretals.

Azpilcueta was also a skillful administrator of his family estate and aware of the new issues of the modern market, which was deeply affected by the great imports of gold and silver from the Americas. Thus Azpilcueta recognized why the price of these metals waned while the prices in France remained higher. He was just not capable of formulating a general rule for the interdependence of supply and demand as Adam Smith did much later.<sup>25</sup> Consequently, Azpilcueta argued that the value could differ for individuals according to their personal

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<sup>23</sup> Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius commune (ca. 1500–1650)* (Leiden: Brill, 2013); idem, “Katholische Moralthologie und Vertragsrecht. Die Umwandlung der Vertragslehre des Gemeinen Rechts (16./17. Jh.),” *Forum Historiae Iuris* (June 18, 2013), <https://forhistiur.de/2013-06-decock/>.

<sup>24</sup> See the essential works: Mariano Arigita y Lasa, *El Doctor Navarro Don Martin de Azpilcueta y sus obras: Estudio Histórico-crítico* (Pamplona: Ezquerro, 1895); Johann Friedrich von Schulte, *Geschichte der Quellen und Literatur des Canonischen Rechts*, vol. 3 (Stuttgart: Enke, 1880), 715–17.

<sup>25</sup> Marjorie Grice-Hutchinson, *Early Economic Thought in Spain, 1177–1740* (1978; repr., Indianapolis: Liberty Fund, 2015), 95–96; idem, “Martin de Azpilcuetas ‘Comentario resolutorio de Cambios,’” in *Martin de Azpilcuetas “Comentario resolutorio de Cambios” und Luis Ortiz’ “Memorial del Contador Luis Ortiz a Felipe II”*, ed. Marjorie Grice-Hutchinson et al. (Düsseldorf: Wirtschaft und Finanzen, 1998), 49–72 (here 67); Noonan, *Scholastic Analysis*, 323–24. For Luis de Molina, who followed Azpilcueta closely and only a few years later, cf. Rudolf Schuessler, introduction to *A Treatise on Money*, by Luis de Molina (Grand Rapids, MI: CLP Academic, 2015), xxiii–xxxii (here xxvi–xxvii); Diego Alonso-Lasheras, *Luis de Molina’s De iustitia et iure: Justice as Virtue in an Economic Context* (Leiden: Brill, 2011), 138ff.

use of the thing.<sup>26</sup> Even money could be more useful or profitable for one merchant than for the other. For this simple reason<sup>27</sup> usury could only be assumed if nothing was given in return at all, as long as this bargain was concluded for commercial reasons.<sup>28</sup> Another tract against usury of the same year (1556) was written as a commentary on the already mentioned canon *Naviganti* by Gregory IX (X 5.19.19).<sup>29</sup> It did not reflect transactions involving money alone, but any exchange (*cambio*). In order to determine its legality, you would have to consider the effort of the parties as well as the inner worth (*valor intrinsecus*) of money<sup>30</sup> for the contracting parties. The community was entitled principally, therefore, to determine if the exchange was just. In the end Azpilcueta destroyed the idea of fixed limits of illegal usury, and prepared the foundation for a new, more liberal use of interest rates. Leonard Lessius followed this strategy.<sup>31</sup>

This survey indicates that Spain in its Golden Age developed considerable new insight into the demands of the market. For some time Spain developed a serious understanding of the new demands of the economy, while the rest of Europe, in particular the Germans, had much less chance to gain such insight into the new developments. In the sixteenth century Spain started to become the leading merchant nation of Europe,<sup>32</sup> although the import of gold and silver later led Spain to a serious economic crisis and several state bankruptcies. But European

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<sup>26</sup> Martín de Azpilcueta, *Comentario resolutorio de usuras sobre el Capitula primero 14.a.3* (Salamanca: Iuan Stelsio, 1556), 12, para. 17.

<sup>27</sup> Azpilcueta, *Comentario*, 26 n.55.

<sup>28</sup> Azpilcueta, *Comentario*, 33 n.62: “Que pecan los que sin tener voluta de tratar ni comprar possessiones, o rentas, of faltar la venta dellas, prestan a interesse de ganancia....”

<sup>29</sup> Cf. also Valentin Vazquez de Prada, “Martín de Aspilcueta como economista: Su ‘Comentario Resolutorio de Cambios,’ in *Estudios sobre el Doctor Navarro*, ed. Ediciones Universidad de Navarra y Príncipe de Viana (Pamplona: Ezquerro, 1988), 349–66.

<sup>30</sup> Azpilcueta, *Comentario*, 66 n.20.

<sup>31</sup> Leonardus Lessius, *De iustitia et iure caeterisque Virtutibus Cardinalibus libri quatuor* (Antwerp: Rolini Theodorici, 1609), 2.20.5.35ff. For another strategy to distinguish usury and legitimate interest, cf. Bartolomé Clavero, *Antidora. Antropología católica de la economía moderna* (Mailand: Giuffre, 1991), 49–56, focusing on formal criteria to ascertain equivalence.

<sup>32</sup> The classic study of the Spanish contract and mercantile law is now Wim Decock, *Theologians and Contract Law*.



Catholic authors studied their Spanish colleagues. Even German Jesuits learned about the necessity of money loans within the new European economy.<sup>33</sup>

## Gerhard's Argument for the Legality of Interest Rates

In the selection from his *Locorum theologicorum* that follows, Gerhard, having dealt with the church and its office in the previous locus, dedicates the next locus to the civil magistrates. It could have been a copious tract on the question if it had been published alone. It starts with the reason and origin of secular power and magistrates before discussing their duties and individual features of their government, such as the obligations derived from piety, like the correct comportment in jurisdiction, the determination of just punishments or of actions against enemies. It considers whether a Christian government may tolerate Jews, foreigners, and gypsies, and whether it must provide asylum for strangers. This is the place where the discussion of usury is situated.

Gerhard's argumentation is peculiar and intricate. His reasoning should be analyzed first. He starts with the clear prohibitions of usury in the Bible and in other authoritative texts. After this he presents his doubt that interest rates could be legitimate or even necessary in a state. He discovers that "usury" by definition means all forbidden interest rates in contrast to legitimate contracts and their rates according to the rules. It is only a "dispute about words," therefore, to look only at the term "usury" (§ 233). Instead he has to discover what kinds of contracts are allowed and which are forbidden. He indicates that most authorities—among them the theologians of Jena in their decision of July 17, 1594—accept the 5 percent interest rate.

But what about the annual taxes forbidden in the Old Testament (§ 234)? For the first time he refers to natural fairness and the Golden Rule of Matthew 7:12 and Luke 6:31. This rule shows Gerhard that creditors have a right to ask for profit. If they could have contracted another profitable contract, it is only fair to pay them their interest rate. This argument is backed up with arguments from Christian charity (§ 235) and from the authority of Christian magistrates (§ 236). The next arguments are taken from the nature of contracts, which Gerhard assumes, and in particular the parity of contracts (§ 237) and their freedom (§ 254). Not only contracts in general are useful for the human society, but also moneylending in particular (§ 238). People would die of hunger without them.

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<sup>33</sup> Klaus Hausen, "Petrus Canisius's Stand on Usury: An Example of Jesuit Tactics in the German Counter Reformation," *Archiv für Reformationsgeschichte* 55, no. 2 (1964): 192–204.

As God is the God of order (1 Cor. 14:33), the limits of this contract have to be established by the authorities.

The clarification of clear rules and limits to legitimate interest rates follows from the love of neighbor and the idea of charity. The profit in itself is legitimate, but must be kept in proportion by the contract and the partner of the contract. This helps Gerhard draw up a list of four criteria for the legality of money-lending: (1) The lender must be entitled to ask for interest. This is not allowed, for example, for clerics. (2) The interest rate depends on the borrowed sum and on the period for which it is given. (3) The interest rate should be moderate and determined by the law. (4) The legality should finally depend on the nature of the debtor: orphans, widows, the aged, and others, who are not suited to conduct business, should not be allowed to conclude such contracts (§ 239).

The next argument deals with the interdiction of annual interest payments in the Old Testament (§ 240). With great care Gerhard tries to understand and to translate these provisions. He finds here again his previously developed ideas of “consumer protection.” The contract itself might be necessary for the sake of natural and mutual love, but this dictates the limits of such a bargain as well. With regard to Deuteronomy 23:20 he discusses whether interest rates are excluded against one’s neighbor but permitted against the stranger (§ 247) and concludes that, as long as warfare is possible, interest rates are legitimate, too. The final argument concerns the nature of these provisions. The forensic or judicial laws of the Old Testament only regard the Jewish people and have now lost their binding power (§ 249). The provisions of moral and natural law, however, continue to be valid today. But civil law, on the other hand, does not necessarily concur with moral law (§ 250).

With regard to Luke 6:35 Gerhard next establishes four different kinds of loans (§ 253):

1. “The alms loan” means that the principal and the interest are forgiven; nothing has to be returned. This is the case of a charitable act.
2. “The free loan” is the case in which the principal is paid back, but without interest.
3. “The compensatory loan” is a loan with the stipulation that the principal is paid back with an annual payment of interest. This includes contracts among neighbors.
4. “The usurious loan” refers to all illicit, immoderate contracts with forbidden interest rates. These contracts are outlawed by divine and human laws.

Another set of arguments shows that Gerhard is aware of the new use of money not only to facilitate the exchange of goods, but also to express value and to store wealth. Although he still declares money to be sterile in itself, he demonstrates that by commerce it can bring wealth. He distinguishes between natural and civil fruits (e.g., interest rates). This is a new task of the magistrate to prevent even accidental abuses and to establish definite rules for the market.

The penultimate argument concerns canon law. In spite of Luther's aversion there is no doubt that there is a valid legal order, and Gerhard is eager to prove that his ideas agree with the old provisions (§ 255). Luther's writings thus are not regarded as binding law. They have to be mitigated so that they agree with our conscience and advance the public good (§ 256).

At the end of our text Gerhard sums up his legal observations, which he regards as principles derived from Luther:

1. All strict laws, such as the prohibition of usury, must be mitigated in special cases.
2. Widows, orphans, the aged, and others who are inexperienced in commerce, can receive interest rates from moneylenders, but not vice versa.
3. Everyone is entitled to consult his or her own conscience to decide whether the magistrate is acting according to the precepts of theology and law particularly with regard to the equity of usurious contracts.
4. Exceptions must be granted in cases of necessity.
5. The interest rate can differ according to the position of the moneylender. Professionals can take higher rates than ordinary people.
6. Gerhard admits that great profits can be achieved by moneylending.
7. Questions regarding usurious contracts should be sent by the church to lawyers, so that they can decide.

We see, once again, that in spite of his long discussions, Gerhard is very keen to come to quite clear conclusions.

## **On Methods**

How could Gerhard ignore Luther's position, at times explicitly, while he still used the authority of canon law, which Luther had rejected? His erudition and his pacific nature inspired Gerhard to look for compromises and solutions that

could be accepted by most.<sup>34</sup> But we can also find in it a characteristic notion of Lutheran writings of this century. Epistemology and academic reasoning had been shaped in a revolutionary new way by Philipp Melanchthon. Luther rejected the authority of the church and its law, but Melanchthon developed a new coherent theory of how to establish human cognition. He based his theory on the individual act of recognition. Of course, the fall of Adam almost destroyed all human possibilities for understanding. In any case, there could be no absolute knowledge anymore. No authority in the world, not even the church and the pope, could teach verity. All human endeavors remained tainted by the fallibility of the human mind.

Reason and conscience, however, remain individual devices of knowledge, implanted in human nature, which can help to acquire some knowledge. Yet the true punishment of Adam is that these powers of understanding mainly teach him his own flaws. However, reason and conscience can be developed by erudition and experience. Scientific methods, furthermore, help to communicate such findings among men.<sup>35</sup> All knowledge rests, therefore, purely in the individual, but if many others ascertain these findings, human beings can hope to grow their intelligence slowly. If many confirm a certain finding, humanity can eventually hope to have established a true fact.

While Roman Catholics still focused on the verity of the doctrine established by the authority of the pope, Calvinists saw the Holy Spirit, not individual endeavor, as the origin of knowledge.<sup>36</sup> For Melanchthon, however, the fallibility of human knowledge after the fall of Adam led him to stress the individuality of knowledge. All human findings could only be provisory, therefore, but throughout the ages human beings could contribute their findings and extend their knowledge. Only erudition and individual cognition could make possible any progress in human knowledge. For this reason even Jews and Roman Catholics could make valid points and could hardly be rebuked simply on account of their faith.

The quantity of literature used by Gerhard is almost incredible. He demonstrates not only his sound knowledge of ecclesiastical history, but also of legal

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<sup>34</sup> For this description, cf. Mathias Schmoeckel, “Ein Denker des Ausgleichs. Die Rechtslehre des Johann Gerhard,” in *Konfession, Politik und Gelehrsamkeit: Der Jenaer Theologe Johann Gerhard (1582–1637)*, ed. Markus Friedrich (Gotha: Franz Steiner, 2016), 19–35.

<sup>35</sup> Cf. Mathias Schmoeckel, *Das Recht der Reformation* (Tübingen: Mohr Siebeck, 2015), 39ff.

<sup>36</sup> This has been established by Max Wundt in the early twentieth century, cf. Schmoeckel, *Das Recht der Reformation*, 39ff.

history. He cites the lawyers from antiquity, from the Middle Ages, and from his own time with accuracy, not according to a chronological or doctrinal, systematic order, but following his own argumentation. This includes Hebraic authors commenting on the Old Testament as well as the prominent Roman Catholic authors of the sixteenth century, or even the Qur'an. In contrast, Spanish authors had to adhere to the *Index librorum prohibitorum* and could refer to Protestant authors only in a very abstract way. Gerhard was not only essentially free to cite what seemed appropriate for him, but in doing so he could show off his erudition. If these authors helped to make his point, they proved that his rulings were generally applicable.<sup>37</sup> He did not even feel the need to contradict such authors in order to demonstrate the truth of his own confession. For this reason he could cite without any hesitation Nicolò de' Tudeschi, the great fifteenth-century canonist. Whoever had to say something on the matter had to be cited, in order to compare the findings, establish what could be considered as correct, and reject errors. Gerhard's method of reasoning, therefore, cannot be explained without the methodology developed by Melanchthon and his tradition that would extend to Georg Gutke (1589–1634), Abraham Calov (1612–1686), and others.

Melanchthon himself proposed three methods by which human knowledge could be established.<sup>38</sup> For his own manual of 1521 he used the classical *topica legalia* style. This is the same approach Gerhard used for his own text. The manual starts from general *axioma*, established knowledge, and tries to stretch these findings to their limits. But within Melanchthon's argumentation history also plays an important role as it demonstrates human experience for or against some assumptions. Good and bad experiences of the past can teach human beings to copy what is good, and to avoid errors. Natural law, finally, can be detected in God's creation as its main rules. This understanding helps to discover the world and even to develop more rules of human law.

Such ways to establish new wisdom depended for Melanchthon on the special interests and perspectives of each science. Each subject had its own perspective, methodology, and interest. No subject could presume to acquire knowledge, therefore, that the other fields have to follow. Each field had to follow its own perspective, and not even theology could claim to guide the other subjects any longer. Theologians could treat questions of morals, which is essentially what

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<sup>37</sup> Nils Jansen, *Theologie, Philosophie und Jurisprudenz in der spätscholastischen Lehre von der Restitution. Außervertragliche Ausgleichsansprüche im frühneuzeitlichen Naturrechtsdiskurs* (Tübingen: Mohr Siebeck, 2013), 203ff., for similar citations in the Protestant universities of Saxony.

<sup>38</sup> Cf. Schmoeckel, *Das Recht der Reformation*, 47ff.

Gerhard does in the selection here. But apart from the general question of the legality of usury, he does not treat more detailed legal questions. Gerhard discusses, therefore, the conformity of usury with the general provisions of the Bible.

For this reason, Gerhard used a lot of legal texts, although strictly speaking he did not touch explicitly legal questions, but only the acceptability of money-lending and interest rates. Authors from another confession, in particular, could be used to prove that his ideas could be regarded as valid across the different religious confessions.<sup>39</sup> This explains his eagerness for citations, especially of sources from different fields and cultures.

## Magistrates

From the first moment on, either in Zwingli's Zurich or in Luther's Saxony, the Reformation was characteristically linked with the authority of the civil government.<sup>40</sup> Gerhard also had a great respect for the authority of the magistrates to pass clear and applicable laws. He was even ready to acknowledge that the discussions of the theologians cannot end debates about civil laws (§ 233). The topic of usury is only used as a device to discuss the relation of state and commerce. It is not an accident that the question of usury is treated in the context of Gerhard's discussion of the magistrates. After the treatment of Jews and gypsies, poverty and asylum, Gerhard tried to clarify the possibility of profit amid the necessity of charity, and he sought to harmonize both interests.

Following Luther's new ecclesiastical system, the magistrate had become the "guardian of both tables of the Law" (§ 236). The prime duty of the magistrate was to enact definite and convenient law. For Melancthon, the enacting of law not only published the knowledge of what was right or wrong, but could also help

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<sup>39</sup> Cf. the Catholic, or rather Jansenist, author Zeger Bernard van Espen, *Jus ecclesiasticum universum*, vol. 6 (Venice: Raimundi Ruiz, 1769), 114: "Calvinus, Carolus Molinaeus, Salmasius, docuerunt usuram, si moderata sit, & non a pauperibus aut indigentibus exigatur, honestam ac justam esse, neque cum lege divina, neque cum lege naturali pugnare" (Calvin, Dumoulin, Salmasius allow usury as long as it is moderate and not taken from the poor and indigent, is honest and just, not conflicting with divine or natural law). Also for van Espen the different traditions of confessions and countries came to similar conclusions.

<sup>40</sup> Jordan J. Ballor, "Discipline, Excommunication, and the Limits of Conscience: Magisterial Protestant Perspectives on Church and Civil Authority in the Era of the Reformation," in *Conscience in the Legal Teachings of the Protestant and Catholic Reformations*, ed. Michael Germann and Wim Decock (Leipzig: Evangelische Verlagsanstalt, 2017), 111–25.

to establish more knowledge in this area. It helps the individual to avoid evil, and it teaches society what can generally be accepted. Legal rules, therefore, can help human beings understand how good Christians ought to behave.

Gerhard, therefore, did not hesitate to establish for a second time the general principles for the use of usury. Not only did he set up four different kinds of usury contracts, but also four conditions in order to establish the legality of moneylending. They are meant as clear instructions for the public to avoid illegal contracts. In the same way Gerhard tried to establish the cases in which interest rates could be considered as licit and be exacted legally from debtors (§ 236). God is, in the end, as Gerhard underlined, a God of order, not of confusion (1 Cor. 14:33).

Civil law, however, cannot be confused with divine law, natural law, or morality. Although the public legislator should be aware of moral principles, he cannot avoid the fallibility of the human mind. Civil laws can conflict, therefore, with public morals even in spite of the best intentions of the legislator. If the law collides with principles of morality, nobody is entitled to deny the law's validity. After all, the stability of the civil order is more important, and nobody should be allowed to question the validity of the law so easily. This is rather the task of legal science, which can help to recognize better principles, which might lead to new legislation. After all, everyone must seek to ameliorate the knowledge of his or her time and its laws.

By their laws magistrates must ensure that the people do not act against the rules of piety, honor, public tranquility, or the well-being of the citizens (§ 230). In short, the civil authority has to establish laws with a medicinal effect for its people (§ 234).

## **Economic Concepts**

Law codes help citizens to know the law and to act as good Christians. They help to reveal the difference between illegal and legal contracts. But in any case trade and contracts are necessary for the maintenance of human life. The fallibility of human beings makes it difficult to ensure the necessities of daily life. Only cooperation and sharing of individual goods within society can help sustain life. If one person trades what he or she can spare to another who needs it, it helps to provide the population with those goods that they need for the preservation of their lives.

Every person has to decide what he or she needs, what he or she can spare, and how important a given transaction is.<sup>41</sup> The parties meet in a contract, by which they define the conditions of their business transactions. For Martin Chemnitz, as Gerhard tells us, the use of contracts in society is not only helpful for sustaining human life, but it is even a way of showing concern or even love for the other.

Gerhard sees merchants as inventors, as those who help to establish the contracts that are necessary for the traffic of goods. Sometimes they only try to avoid those kinds of contracts that are banned as immoral and illicit, but they remain experts regarding what can be sold and how these transactions can be realized. Merchants are not only useful, therefore, but even necessary for the continuation of human society (§ 238). Without moneylenders trade would be harmed, and thus people would die of hunger.

Gerhard even demonstrated some understanding of the new use of money. Unfortunately, however, he fails to hint at his sources in this instance, so that we do not know where he took his inspiration from. In a rather cautious way he preferred not to contradict the medieval authorities, such as Thomas Aquinas, and so he admitted in principle the sterile nature of money.<sup>42</sup> In order to harmonize this starting point with his modern insight, he set up the difference between natural and civil fruit.<sup>43</sup> Shut up in a box, money would not produce natural fruit, but used in commerce it could bring profit and this he called “civil fruits.” As long as tradesmen could achieve such profit, nobody could doubt the legality of interest rates. In the same way Gerhard distinguished between two uses of money: its necessary function in facilitating the exchange of goods and its use to store money or to express the value of a thing (§ 254).

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<sup>41</sup> Mathias Schmoeckel, “Melanchthons Konzept der Verträge. Archäologie der Privatautonomie,” in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* 104 (2018): 304–45.

<sup>42</sup> Cf. Fabian Wittreck, “§ 4. Money in Medieval Philosophy,” in *Money in the Western Legal Tradition: Middle Ages to Bretton Woods*, ed. David Fox and Wolfgang Ernst (Oxford: Oxford University Press, 2016), 53–70; Andreas Thier, “§ 8. Money in Medieval Canon law,” in *Money in the Western Legal Tradition*, 136–66.

<sup>43</sup> This can be compared to the Protestant German tradition, described by Clausdieter Schott, “§ 15. German Law Faculties and Benches of Jurymen (Schöffenstühle on Loans and Inflation: Legal Doctrine and Seventeenth-Century Legal Practice),” in *Money in the Western Legal Tradition*, 284–94; and Wim Decock, “§ 14. Spanish Scholastics on Money and Credit,” in *Money in the Western Legal Tradition*, 267–83.



## Conceptions of Contract Law

In this instance in particular, Gerhard was able to draw on modern economic insights. The Old Testament can bind Christians only on rare occasions. Generally, its forensic and civil laws were valid only in the period of the ancient Jews. Already Luther and his contemporaries were persuaded that civil law would change in the course of time, so that the Saxon territory was no longer bound by the old provisions, but could seek to adopt more adequate rules for their time.

For Gerhard, merchants were the specialists who helped the market develop new forms of contracts. Although occasionally these only tried to circumvent banned contracts, their contracts should be regarded as valid as long as the violation of basic principles has not been established. The practice indicates special interests of the trade, which have to be taken into account.

Merchants, therefore, have the freedom to develop their contracts. On several occasions Gerhard underlines the freedom of the market in general and money-lending in particular. Thus, for instance, usury is seen as free according to its nature (§ 254). In commerce a person has to know what he or she can sell and buy. Gerhard suggests that individuals have to assess their own risks in the market. Liberty in the market means that people have to ascertain the profit of their trade.

On the whole the law of contracts is marked by two principles—namely, the parity of contracts (§ 237) and the freedom of contracts. This is true both in general for commerce and for moneylending in particular. The freedom of usury is the twofold freedom of the trade to conceive such contracts in general as well as the freedom of the particular parties to draft the individual contract by which they want to be bound.

This freedom could not be possible without the principle of equality: equity and Christian charity require that equality and reciprocity are realized. Individuals may ask to be treated like they themselves want to be treated (Matt. 7:12; Luke 6:31). The freedom to set up contracts requires the parties to stick to their consent; normally nobody can individually overturn the contract on his or her own. Already Melanchthon assumed that the exchange of goods “in reciprocal exchange relations” (ἐν τοῖς συναλλάγμασι διορθωτικόν) was marked by its inherent principle of reciprocity or, as Aristotle put it in his *Nicomachean Ethics*, by its own principle of justice, which Aristotle called commutative justice.<sup>44</sup> Gerhard himself called upon the authority of the theologian Martin Chemnitz, who had argued that the contracting parties set up a society, which required the general equality of the parties. Neither party could demand to be better or more important than the other; *pleonexia* (πλεονεξία), therefore, was a crucial vice that had to be avoided (§ 239).

<sup>44</sup> Cf. Schmoeckel, “Melanchthons Konzept der Verträge.”

This leads Gerhard to make a serious exception for those who are not experienced enough in the market. If there is no equality of the parties, there cannot be a contract. This “logic of parity” (§ 245) entails that for the want of equality, the contract cannot be valid. The contract cannot be valid if it involves orphans, widows, the aged, or anyone else who is not “well suited for conducting business” (§ 239). Whoever is inexpert in the matter, therefore, has no legal capacity to consent to contracts. This has the same root as the idea of consumer protection (cf. § 242), but derives a different result from it: the contracts of trade are not fitted to the capacity of the consumer, but rather the weak are generally kept out of business. Gerhard, in the end, only allows adults and trained parties to enter into a moneylending contract.

## Conclusion

Gerhard reveals his openness to a society that is both dominated by the central secular authority and that gives plenty of room for the free development of the market. As far as tradesmen are concerned, the law of contracts is governed by the principles of freedom of contract and the equality of parties. Gerhard’s theology in the end questions neither the power of states nor the independence of the trades, but rather accentuates their necessity.

Gerhard’s God is a God of order, not of confusion (1 Cor. 14:33), which for him means that people must respect the different spheres of expertise and command. The world needs the sovereignty of the magistrate, which enacts clear laws and provides for civil order. At the same time the preservation of the society needs the trades to accumulate all the goods necessary for human life. Tradesmen are the experts, who in most cases determine what contracts are suitable. Only the free exchange of goods, based on the principles of free contracts and equality, provide for the necessary supply of goods for society. These principles are only denied to the weak, inexperienced members of society. They cannot conclude such contracts for themselves, but necessarily become dependent on others.

Gerhard underlined the importance of the Golden Rule as the central principle in state and commerce. It reminds us of the later philosophy of Immanuel Kant, whom we know to be heavily influenced by Melancthon. Kant’s emphasis on the Golden Rule should not be surprising, therefore. Gerhard, however, still could not attribute a free and equal position to every member of the society. The moral obligation to protect the weak allows economic freedom only for the experienced and wealthy parts of the state. Unlike the English canonists, who argued more for individual responsibility and contractual liberty, Gerhard argued for a magistrate that retained great power to protect the citizens against “immoral” contracts.