

## Theologians and Contract Law: The Moral Transformation of the *Ius Commune* (ca. 1500–1650)

**Wim Decock**

Leiden/Boston: Martinus Nijhoff Publishers, 2013 (723 pages)

Scholastic thought has experienced a return in recent decades, not only in the fields of the history of theology and philosophy but also as an approach with contemporary relevance: to improve our understanding of the theory of law, of economic behavior and, indeed, of human rights. In fact, the premodern Scholastic authors (theologians, canonists, philosophers) generated a coherent structure encompassing a religious vision of the human being and his transcendental end, philosophical theories (mainly theories of justice and virtue), and a juridical *corpus* (canon and civil laws) that proved to be of remarkable significance for the history of private law but is still relevant and provides innovative insights in our current age. For example, as the author shows, there is a current preoccupation about fairness in contracts, or the moral value of economic facts and contractual tools, especially for their impact on social community. For this reason, there are currently external concepts that enable us to “control” contractual behavior (in effect controlling the freedom of how to make a contract) from an external moral point of view. To the contrary, the authors described here attempted a better comprehension of their new cultural, political, and economical situation and, at the same time, to delineate a relationship with natural law and moral principles; for them there was no opposition between law and morality, or economic behavior and morality, because these principles were considered complementary. (For example, freedom is the faculty to develop actions’ virtuousness and to express moral responsibility as well as to strengthen mutual trust among human beings; see page 5). They defend a symbiosis of freedom and morality that was destroyed in modern times (612) because the underlying philosophies changed (213).

Our approach to these authors can certainly be very fruitful but is full of difficulties: Sometimes, the similarities of words and specific concepts used then and now can hide very different meanings (because of the different anthropological basis that underlies their concepts), and our comprehension of these authors can fall into numerous misunderstandings. To avoid this problem, it is necessary to carefully approach the texts of the sixteenth- and seventeenth-century authors and have a working knowledge of the problems they were facing. This is one of the most interesting results of this book. The author (Doctor in Laws, KU Leuven and Rome; Researcher at the Max-Planck Institute for Legal History and at KU Leuven), with a deep knowledge of the texts and their backgrounds, manages to show the moral transformation of the common law between the sixteenth and seventeenth centuries, and how it contributed to the modern principle of “freedom of contract” as well as displaying the moral meaninglessness of this principle in modern law. To do this, he considers a wide number of writings on contracts or justice from juridical and theological perspectives (Almain, Aragón, Báñez, Cajetanus, Diana, Ledesma, Lessius, Lugo, Medina, Mercado, Molina, Navarra, Oñate, Pérez, Salas, Sánchez, Soto, Suárez, Summenhart, Valencia, Vitoria) and canon, civil, and natural law

(Adriano, Alciati, Azevedo, Azor, Azpilcueta, Angelo de Clavasio, Covarrubias, Doneau, Du Moulin, Everaerts, Forcadel, Fortunius Garcia, Gomez, Grotius, Lessius, Maine, Prieras, Solórzano, Thomasius, Tiraqueau, Vultejus, Zypaeus). The author offers readers solid arguments with an excellent and wide collection of texts from not only the most known but also from several less known but not less influential authors (e.g., Oñate).

The result of Decock's research is a very valuable text with a very interesting and comprehensive approach to the evolution of the general enforceability of willful agreements (the basis of the modern concept of "freedom of contract") as an expression of the freedom of the contracting parties, which with mutual consent alone are able to make a valid contract in civil and canon law (chapter 3). The author describes the *natural limitations* of these agreements (duress and mistake, the "vices of the will," chapter 4) as well as the *formal or political limitations* (to grant equity, to avoid fraud, protecting the parts involved and their interest, chapter 5) and also the *substantive or moral limitations* (i.e., what is naturally immoral or moral and legal worthlessness but that could have legal consequences, chapter 6). The end of every contract is commutative justice: justice or fairness in exchange because they were "introduced for the sake of the mutual benefit of the contracting parties" (619).

This evolution is also a result of the encounter between the legal and the moral theological tradition (with which the author deals in chapter 2). Roman law was reworked during the Middle Ages according to the needs of medieval society. It is the source of the two best edifices of law: the civil law corpus and the canon law corpus. These *corpi* were not developed in isolation: One rules the external action; the other rules and disciplines the soul, *foro conscientiae sive animae sive internum*. In fact, the variety of particular tribunals and legal spaces enforced them to provide a *ius commune*. This *ius* derives from the interpretation of the Roman legal text collected by Justinian (30), the local law tradition (also inspired in Roman law) and was combined with Aristotelian-Thomistic philosophy (32). The porous boundaries between legal and canonical disciplines helped the studied authors to build a symbiosis (and a cross-fertilization) of their disciplines because of an inner principle—the "place for determining the rights and obligations a person had in the light of truth and justice" (79)—with which he acts in *foro externo*. This evolution is contrary to the neat Lutheran separation (49).

Within this *ius commune*, Scholastic theologians were able to formulate the principles for contract law in general and to develop a general law of contract (with relevant economical and juridical consequences). The author explores the roads "that led to the consensualist approach to contractual obligation" (sec. 3.2, 107–62), and the "elaboration of a voluntaristic and general law of contract" in the early modern period (sec. 3.3, 162–208).

The elaboration of the concept of contract "as a mutually accepted promise that takes the place of law for the contracting parties" (its substance and natural, political and moral limitations, 215) is illustrated by Wim Decock through the analysis of several problems (in a historical and systematical approach). Through the text we see the scholastic discussion about the role of promise (proposal, assertion about the future, resolution, 176), changed circumstances (204), freedom (168, 507), possession (353), equity and fairness (chap. 7),

fear and duress (216), mistake and good faith (*bonae fidei*) contracts (276), the model of constant and prudent man (236), legal and moral debt (388), immoral objects and motifs (420), restitution (514), unjust enrichment (561), just price (509); and also the way these authors solve the central legal concepts in contracts such as marriage (193, 234), invalid contracts by duress (226), formalism versus consensualism in the insolemn testament (330), and how contracts for sex and usury are immoral but can have legal consequences (419).

In conclusion, this is a useful guide for those who want a systematic and historical approach to the beginnings of modern common law and theory of contracts, with a deep study of the topics and a good comprehension of the relationships and different approaches to this subject (theological, philosophical, juridical, historical, and economic). It is also a very good contribution to the studies of this amazing and suggestive historical moment.

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## Loving the Poor, Saving the Rich: Wealth, Poverty, and Early Christian Formation

**Helen Rhee**

Grand Rapids, Michigan: Baker Academic, 2012 (279 pages)

Helen Rhee's *Loving the Poor, Saving the Rich* offers a historical study of ancient (mostly pre-Constantinian) Christian engagement with the moral and spiritual weight of wealth and poverty. With adept and thorough engagement of primary and secondary sources, she expertly situates the moral teaching of the primitive Church on such matters as avarice, luxury, almsgiving, simplicity, wealth, social status, patronage, and poverty in their proper historical and social contexts. For those who hope to ground their economic ethics in the Christian tradition, particularly the early Church, *Loving the Poor, Saving the Rich* is an invaluable resource that sets a high bar for any future study.

Rhee's first chapter lays the groundwork of the social, economic, and theological context of early Christianity regarding wealth and poverty. It divides into four major sections, examining the economy and social structures of the Greco-Roman world, Judaic paradigms of wealth and poverty, New Testament practices and teachings, and the spread and developing social diversity of Christian communities in the pre-Constantinian era. Rhee summarizes that as numbers increased and Christianity penetrated the "upper echelon" of Roman society, Christians "dealt with growing social gaps within their local communities as they struggled to keep the eschatological hope alive and relevant to the changing reality" (48).

Her second chapter addresses wealth and poverty through the lens of Christian eschatology. She helpfully distinguishes between millennial and amillennial eschatologies, though her description of each seems a bit oversimplified. This, however, does not detract from her analysis: "Regardless of the varieties of the eschatological vision, it created an alternative reality by which the present world should be perceived and understood,