Ettore Majorana Foundation and
Centre for Scientific Culture

RIVISTA INTERNAZIONALE DI DIRITTO COMUNE

27

IL CIGNO G.G. EDIZIONI
Roma 2016 Erice

La *Rivista Internazionale di Diritto Comune* è pubblicata annualmente.

La pubblicazione di articoli e note proposti alla *Rivista* è subordinata alla valutazione positiva espressa (in forma anonima e nel rispetto dell'anonimato dell'autore) da due lettori scelti dal Direttore in primo luogo tra i componenti del Comitato Scientifico.

Gli autori sono invitati a inviare alla *Rivista*, insieme con il testo da pubblicare, due abstract, uno dei quali in lingua diversa da quella del contributo, e "parole chiave" nelle due lingue.

con il patrocinio del
Dipartimento di Giurisprudenza dell'Università di Catania

Indice

Saggi

Note e documenti

Orientamenti bibliografici

Rivista Internazionale di
Diritto Comune 27 (2016) 301-328

WIM DECOCK

Trust Beyond Faith
Re-Thinking Contracts With Heretics and Excommunicates in Times of Religious War

1. *Introduction: The plural meaning of "Fides"*

The starting point for reflection in this contribution is the plurality of meanings attached to the Latin word *fides*. It was not uncommon for early modern scholars to distinguish between at least four interpretations of the word: (a) "faith" in the religious sense, particularly the Catholic faith, (b) "faith" in the social sense of trust and confidence between human beings, (c) "faith" in the moral sense of either good or bad faith in situations of acquisitive prescription, and, lastly, (d), "faith" in the contractual sense of "fidelity in keeping promises and agreements" (*pro fidelitate in servandis promissis et conventis*)[1]. From these notions of "faith", I would like to select the first and the last one in order to investigate the relationship between the keeping of contractual faith, on the one hand, and heresy as a crime against the Catholic faith, on the one hand[2]. In the post-Reformation world, this relationship was

[*] Assistant Professor of Legal History – Universities of Leuven (KU Leuven, BOF) and Liège (ULg); Affiliate Researcher, Max Planck Institute for European Legal History, Frankfurt; Associate Fellow, Centre for the Study of Law and Religion, Emory University, Atlanta USA.

[**] A draft version of this text was presented as "Crimes Against Faith (*Fides*) and Contractual Confidence (*fides*)" at the International School of Ius Commune, Erice, 4-8 November 2015, which was dedicated to the relationship between criminal law, *ius civile* and canon law. The author would like to express his special thanks to Professor Giovanni Chiodi, the director of the course, and Professors Manlio Bellomo and Orazio Condorelli, directors of the school, for the invitation to present this paper and for their valuable comments during the discussion.

[1] M. Becanus, *Disputatio theologica an haereticis servanda sit fides?*, in *Opuscula theologica*, vol. 2 (Mainz 1614) nr. 1, p. 4.

[2] What this article will not do, is study excommunication as a sanction against bad debtors, which was an important, albeit largely late medieval phenomenon. For a study of that problem, see the fascinating case study by T. Lange,

definitely not of mere speculative interest. By the seventeenth century, large parts of Europe, especially the Low Countries, Germany and France, were torn apart by religious wars. Marketplaces around Europe were crowded with merchants who did not share the same faith in the religious sense. Some were considered heretics, others had been excommunicated. Still, merchants had to be able to trust in contractual faith, regardless of their divergents opinions on the right religious faith or the religious sanctions that a fellow businessman might have incurred.

This article will concentrate on the discussion of heresy, excommunication and contractual confidence in Francisco Suárez (1548-1617) and Martin Becanus (1563-1624), two protagonists of the early modern scholastic tradition in law and theology working during the time of the religious wars[3]. Suárez's work on criminal sanctions (*De censuris*, 1603) and Becanus's treatise on the faith that must be kept towards heretics (*De fide haeretics servanda*, 1608) have been singled out, in particular[4]. While this investigation started from a much broader selection of early modern scholastic sources, it soon appeared that these authors made an extraordinary contribution to the debate on heresy, excommunication and contractual debt. Both Becanus and Suárez happen to be members of the Jesuit order, even if that may not be a coincidence, after all[5]. As Harro Höpfl accurately noted, Becanus's work gives such a comprehensive account of the general position of the early seventeenth century Jesuits on faith and promises that there is almost

Excommunication for Debt in Late Medieval France. The Business of Salvation (Cambridge, Cambridge University Press, 2016) especially p. 66-75.

[3] These authors are, of course, but the top of the iceberg. For a plethora of other sources that are relevant for this discussion, see W. Decock and C. Birr, *Recht und Moral in der Scholastik der Frühen Neuzeit 1500-1750*, (methodica – Einführungen in die rechtshistorische Forschung, 1; Berlin, De Gruyter - Oldenbourg, 2016) 33-56.

[4] The following editions have been used: F. Suárez, *Disputationes de censuris in communi, excommunicatione, suspensione et interdicto itemque de irregularitate*, in *Opera omnia* (Paris, 1861 [ed. Vivès]), available online at https://books.google.be/books?id=9SYNAAAAYAAJ&printsec=frontcover&redir_esc=y&hl=nl#v=onepage&q&f=false; M. Becanus, *Disputatio theologica an haereticis servanda sit fides?*, in *Opuscula theologica*, vol. 2 (Mainz 1614), available online at http://www.mdz-nbn-resolving.de/urn/resolver.pl?urn=urn:nbn:de:bvb:12-bsb10772321-8.

[5] A. Brett, 'Human Freedom and Jesuit Moral Theology, in *Freedom and the Construction of Europe*, Vol. 2: *Free Persons and Free States*, eds. Q. Skinner and M. Van Gelderen (Cambridge, Cambridge University Press, 2013) 9-26; W. Decock, 'Jesuit Freedom of Contract', *Tijdschrift voor Rechtsgeschiedenis* 77 (2009) 423-458.

no need to look anywhere else. This article will nevertheless include Suárez's *De censuris* into this research, since it has largely been overlooked as a source for discussions on excommunication and debt. *De censuris* is also relevant because Suárez's discussion is about excommunicates, whereas Becanus's work specifically concentrates on heretics, whether they have been excommunicated or not. The boundaries between the two categories are nevertheless not always as neatly separated as we would expect, with arguments developed in the framework of the discussion on excommunication and debt being transferred more or less explicitly to the debate on heresy and debt, or the other way around.

The ambition of our Jesuit theologians was to adapt the traditional *ius commune* ideas on heresy, excommunication and contractual obligation to a new context of religious pluralism on the Iberian peninsula and within the Holy Roman Empire, respectively. In light of both the persistent influence and transformation of *ius commune* ideas in the work of Becanus and Suárez, this paper will begin with a brief exposition on the provisions from Roman and canon law that played a paramount role in the early modern discussions. It will also be shown that already in the later sixteenth century, when the first signs of the dire consequences of confessional strife and protracted wars of religion became clear, canonists and theologians such as Diego de Covarrubias y Leyva (1512-1577) and Leonardus Lessius (1554-1623) ushered in the new paradigm in thinking about the relationship between faith in the religious sense (*Fides*) and faith in the contractual sense (*fides*) to enable the creation of a transconfessional sphere of private law – years before Hugo Grotius (1583-1645) did a similar exercise in his *De iure belli ac pacis*.

2. *The* Ius Commune *Framework: from punishing to protecting heretical creditors*

2.1. *Roman law: heresy and proscription of goods*

The early modern scholastics displayed a fabulous knowledge of Roman law and canon law, so much so that Professor Bellomo has rightly considered them as one of the principal vehicles through which the *ius commune* survived and further developed, even in an age where national states and legal particularism came to dominate the scene[6]. It is

[6] M. Bellomo, *The Common Legal Past of Europe*, *1000-1800*, (Studies in Medieval and Early Modern Canon Law, 4; Washington DC, Catholic University

important, then, to give an overview, however succinct, of some of the provisions from Justinian's legislation that continued to play a role in discussions about contracts and heresy in the sixteenth and seventeenth centuries. It would fall outside the scope of this paper to present a comprehensive account of the debate on contractual faith and heresy in the *ius commune*, let alone the discussions on heresy and excommunication as such. Entire books could be written about those subjects in the late imperial Roman empire and in Justinian's Code (e.g. C. 1.5).[7] Therefore, the next paragraph will merely highlight some of the most frequently adduced passages from Justinian's *Corpus iuris civilis* imposing criminal sanctions on excommunicates and heretics with an effect on private law matters.

Three criminal sanctions from Justinian's Code were cited, in particular, to argue that there were civil consequences attached to punishment for heresy. First, law *Cuncti haeretici* (C. 1.5.3 *pr.*), in which the Eastern and Western Roman Emperors Arcadius (395-408) and Honorius (393-423), sons of Emperor Theodosius I, stipulated that houses and other places where heretics gathered became the property of the Catholic Church. This was undoubtedly the most important provision, applying the traditional Roman sanction of confiscation of goods (*publicatio bonorum*) to heretics[8]. Second, law *Manichaeos* (C. 1.5.4 *pr.*), issued by the same emperors Arcadius and Honorius, providing that heretics such as the Manicheans and Donatists were to be prosecuted severely and deprived from the moral and legal rules common to Roman citizens. Third, Emperor Theodosius I's (379-395) law *Ariani* (C. 1.5.5 *pr.*), containing a list of more than thirty Christian sects considered to be heretical, and forbidding them to worship on Roman soil, thus practically forcing heretics into exile.

of America Press, 1995) 226. This is the English translation of *L'Europa del diritto comune* (Roma, Il Cigno, 1989), of which an updated version recently appeared as *L'Europa del diritto comune. La memoria e la storia* (Leonforte, Euno, 2016).

[7] F. Zanchini di Castiglionchio, 'Sulla repressione dell'eresia in età tardoantica, *Crimina e delicta nel tardo antico*, ed. F. Lucrezi and G. Mancini (Milano, Giuffrè, 2003) 255-266; R. Maceratini, *Ricerche sullo status giuridico dell'eretico nel diritto romano-cristiano e nel diritto canonico classico (da Graziano ad Uguccione)* (Dipartimento di Scienze Giuridiche, Università di Trento, 19; Padova, CEDAM, 1994) 51-108.

[8] On the *publicatio bonorum* in Roman times, see C.H. Paulus, 'Publicatio bonorum', *Brill's New Pauly*, http://referenceworks.brillonline.com/entries/ brill-s-new-pauly/publicatio-bonorum-e1014070 (last visited 27 August 2015).

2.2. *Classical canon law: heresy, excommunication and loss of* dominium

Even more influential than the Roman laws were the late medieval decretals expounding the public and civil consequences of excommunication and punishment for heresy. It is not possible within this paper to fully explore the rich discussions on heresy and excommunication in Gratian's *Decretum* (e.g. *Causae* 4, 9, 23, 24, 26), in the decretals of the *Liber Extra* (e.g. X 5.7; X 5.27; X 5.39), the Sext (e.g. VI 5.2; VI 5.11), or the Clementines (e.g. Clem. 5.3; Clem. 5.10). Suffice it to draw attention to canon *Cum secundum leges* (VI 5.2.19). It stated that goods of heretics are confiscated automatically (*bona haereticorum ipso iure sunt confiscata*), considering that even lesser crimes such as incest were also sanctioned by immediate loss of lordship (*dominium*) or property (*proprietas*)[9]. In the standard gloss, Johannes Andreae (c. 1270-1348), the famous professor of canon law at Bologna, emphasized that secular authorities could not confiscate the goods of heretics until the competent ecclesiastical judge had found the defendant guilty of the crime of heresy and pronounced the sentence[10]. As a matter of fact, Pope Boniface VIII had specified this procedural guarantee against arbitrary confiscation by secular lords at the end of canon *Cum secundum leges*.

[9] VI 5.2.19 (ed. Gregoriana, vol. 3), cols. 642-643: "Cum secundum leges civiles, nefarias, naturae contrarias incestas nuptias contrahentes eo ipso suarum dominium rerum perdant; et mulier, humanam legem transgrediens et (praesertim parentibus suis non consentientibus) raptoris nuptias eligens, bona omnia, quae per legem sibi obvenerant a raptore ac aliis consortibus raptus ipso iure amittat, certoque casu deserantur in fiscum; ac etiam illicitas species transvehens; aut rerum vectarum professionem omittens, earundem specierum et rerum proprietate hoc ipso privetur, et fisco rerum et specierum dictarum proprietas acquiratur, bona haereticorum (qui gravius, horribilius ac detestabilius quam praedicti delinquunt) ipso iure de fratrum nostrorum consilio decernimus confiscata. Confiscationis tamen huiusmodi executio vel bonorum ipsorum occupatio fieri non debet per principes aut alios dominos temporales (iuxta Gregorii Papae praedecessoris nostri declarationem) antequam per episcopum loci vel aliam personam ecclesiasticam quae super hoc habeat potestatem sententia super eodem crimine fuerit promulgata".

[10] Johannes Andreae, Glossa ad VI 5.2.19 (ed. Gregoriana, vol. 3), col. 642: "Bona haereticorum ipso iure sunt confiscata, quod probatur triplici argumento legali. Sed apprehensio bonorum fieri non debet per dominum secularem, nisi prius pronuntiatum fuerit super crimine per iudicem ecclesiasticum, qui hoc possit".

The opinion that a judicial sentence was needed as a precondition for expropriation of heretics was actually already defended by Pope Alexander III, see W. Ullmann, *Medieval Papalism. The Political Theories of the Medieval Canonists* (Abingdon, Routledge, 2010 = 1949) 136.

Therefore, the heretic was nevertheless considered to be the true owner of his goods in the court of conscience until he was duly convicted[11]. In addition to this procedural guarantee, the canon law tradition also contained provisions on excommunication which allowed the "revival" of rights once the criminal sanction was lifted. Canon *Foelicis* (VI 5.9.5), for instance, held that, once absolved, the excommunicate should not be denied the recovery of his contractual claims[12].

The broad meaning of *dominium* in the *ius commune* tradition – including lordship both over goods and persons – signified that heresy was not only sanctioned by loss of property, but also by loss of political power. Especially upon excommunication of a heretic magnate, subjects were no longer expected to be faithful to their lord. This was confirmed by the famous canon *Nos sanctorum*, in which Pope Gregory VII released subjects from the oath of fidelity to their lord when the latter had been excommunicated (C.15 q.6 c.4). Moreover, Pope Gregory VII forbade subjects to remain faithful to excommunicates altogether (*ne eis fidelitatem observent prohibemus*)[13]. The dispute between Gregory VII and Emperor Henry IV over lay investiture, leading to excommunication of the leader of the Holy Roman Empire, bears witness to the historical reality of this sanction. There is a fourth canon which played an important role in future discussions, namely canon *Inter alia* from the *Liber Extra*, which incorporated canon *Quoniam multos*, an earlier canon by Pope Gregory VII that had been included in Gratian's *Decretum*[14]. This canon allowed the dependants and servants of an excommunicated lord to continue to serve him, while it forbade all other people to communicate with this lord except in cases of urgent necessity. The interpretation of this canon gave rise to debate, since some scholars argued that this canon meant to establish definitively that there is only one category of people who are still allowed to deal with excommunicates,

[11] In his work on the American Indians, Francisco de Vitoria claimed that this view had become predominant among the early modern doctors, see, A. Pagden and J. Lawrance (ed., transl.), *Vitoria: Political Writings* (Cambridge, Cambridge University Press, 1991) 245.

[12] VI 5.9.5, Ed. Friedberg, vol. 2, col. 1092: "Verum quum talis gratiam reconciliationis meruerit: beneficio absolutionis obtento indulgeatur ei licentia, ut suam et suorum iniuriam prosequatur et debitorum illorum, quae contracta fuerint, de postmodum acquisitis repetitio non negetur".

[13] C.15 q.6 c.4 (ed. Gregoriana, vol. 1), cols. 1443-1444: "Nos sanctorum praedecessorum nostrorum statuta tenentes, eos, qui excommunicatis fidelitate aut sacramento constricti sunt, apostolica authoritate a sacramento absolvimus, et ne eis fidelitatem observent, omnibus modis prohibemus".

[14] C. Jaser, 'Ritual Excommunication: An "Ars Oblivionalis"?', *Memory and Commemoration in Medieval Culture*, eds. E. Brenner, M. Cohen and M. Franklin-Brown (London - New York, Routledge, 2016 [=2013]) 131.

namely their personal servants, while others thought it left room for other exceptions. Further explanation of this canon will be provided below.

2.3. *Post-Classical Canon Law: no duty to pay during time of sanction*

A major late medieval commentary on the canon law of heresy and excommunication can be found in the work of Niccolò de' Tedeschi, a Benedictine monk and professor of canon law in Parma, Siena, Bologna and Florence. Niccolò de' Tedeschi is better known as Abbas Panormitanus (1386-1445) because he was elected as the abbot of the Abbey of Santa Maria di Maniace near Catania in 1425[15]. He strongly argued that excommunicated creditors cannot enforce their contractual claim as long as they have not been absolved from their punishment. Panormitanus's views on contracts and excommunication became a major starting point for reflection on the issue in the sixteenth century. That is not because his point of view was especially popular. On the contrary, the early modern scholastics and jurists increasingly criticized his viewpoint.

Panormitanus developed his thought on excommunication in his commentaries to canon *Inter alia* (X 5.39.31) and to canon *Veritatis* (X 2.14.8). As pointed out before, canon *Inter alia* stipulated just as the earlier canon *Quoniam multos* that servants of excommunicates were still obligated to converse with them, while other people were not under this obligation as a matter of necessity unless sometimes in cases of urgency. Based on a strict interpretation of Pope Gregory VII's list of exceptions to the prohibition on communication with excommunicates, viz. service personnel, Panormitanus argued that debtors should avoid excommunicated creditors. Therefore, a debtor should not pay back his debts to an excommunicated creditor during the time of excommunication. The debtor should rather leave the money in a sacred place, but he should not imperil his soul by paying directly to the creditor.[16] As will be shown later, Suárez expressly refuted Panormitanus's strict interpretation of canon *Inter alia*.

[15] K. Pennington, "Nicolaus de Tudeschis (Panormitanus)", *Niccolò Tedeschi (Abbas Panormitanus) e i suoi Commentaria in Decretales*, ed. O. Condorelli (Roma, Il Cigno, 2000) 9-36.

[16] Abbas Panormitanus, *Commentaria*, Venice 1571 (digitalized by Harvard University Library), ad X 5.39.31: "Non teneor communicare excommunicato, nec debeo incurrere periculum animae ex facto suo (…) et debet fieri depositio in aedem sacram".

Interestingly, in his commentary on canon *Veritatis*, Panormitanus held that an excommunicate could lawfully enter into contracts[17]. He expressly refuted the contrary opinion held by Henricus de Segusio, better known as Cardinal Hostiensis (c. 1200-1271)[18]. Hostiensis had claimed that contracts with excommunicates remained valid but only in favor of the party who had not been excommunicated. He feared that, otherwise, the sanction would become futile. Panormitanus did not follow Hostiensis's reasoning. Instead, he adduced canon *Foelicis* (VI 5.9.5) to demonstrate that excommunicates, too, can enforce the contract, namely when the excommunication has been lifted[19]. That qualification, viz. "once the excommunication has been lifted", is important. It explains why in the early modern period, Panormitanus was associated with the opinion that no payment must be made to excommunicated creditors, since Panormitanus did not think that the excommuniced could enforce contractual debt as long as the sanction of excommunication applied.

2.4. *Early Modern Scholastics: contract law vs. political fidelity*

Half a century before Suárez and Becanus developed lengthy arguments to protect the interests of heretics and excommunicated creditors, the foundations for a profound overhaul of mainstream canon law on crimes against faith (*Fides*) and contractual faith (*fides*) was laid by Diego de Covarrubias y Leyva (1512-1577), undoubtedly the most influential Spanish canonist of the early modern period. Covarrubias was the bishop of Segovia, a judge in the royal court and an adviser to Philip II[20]. He firmly opposed Panormitanus's view, which in the meantime had gained support from scholastic theologians such as Adrian of Utrecht (1459-1523), the later Pope Adrian VI.

[17] Panormitanus, *Commentaria*, ad X 2.148, nr. 35, fol. 266r-v.

[18] K. Pennington, 'Henricus de Segusio (Hostiensis), in K. Pennington, *Popes, Canonists, and Texts 1150-1550* (Aldershot, Variorum, 1993) 1-12.

[19] Panormitanus, *Commentaria*, ad X 2.14.8, nr. 35, fol. 266v: "… etiam in favorem excommunicati tenent contractus, ut ex eis possit agere excommunicatus post absolutionem, in c. Felicis (…); quia excommunicatio fertur loco medicinae (…) durum et acerbum esset dicere quod tolleret ea quae dependent a iure naturali et inficeret obligationem naturalem".

[20] For biographical notes, see O. Condorelli, 'Norma giuridica e norma morale, giustizia e *salus animarum* secondo Diego de Covarrubias. Riflessioni a margine della Relectio super regula "Peccatum"', *Rivista internazionale di diritto comune* 19 (2008) 163-201, and I. Pérez Martín (ed.), *Diego de Covarrubias y Leyva. El humanista y sus libros* (Salamanca, Universidad de Salamanca, 2012).

Covarrubias held that a debtor could not be excused for not paying his debt to an excommunicated creditor, even during the time of excommunication, since the exchange (*communio*) required for paying debt was only superficial (*levis*), therefore not violating the prohibition on dealings with excommunicates[21]. Covarrubias did not give much in the way of substantial arguments to bolster his interpretation of canon *Inter alia*, but his authority was sufficient to bring about a major shift in the canon law of excommunication and contract law.

Covarrubias suggested that the case of private debt (*debitum aeris alieni*) differed in essence from the case in which subjects were absolved from their oath of fidelity (*iuramentum fidelitatis*) following the excommuniction of their prince[22]. This distinction led to a major distinction between the political effects of the criminal sanction of excommunication, on the one hand, and its civil effects, on the other.

Covarrubias's distinction became the starting point of Leonardus Lessius's (1554-1623) brilliant account of the subject in his *De iustitia et iure* (1605). Lessius was a Jesuit from Brecht, near Antwerp[23]. He studied at the *Collegio Romano* in Rome, where he became familiar with the renewal of theological thought in the tradition of the School of Salamanca. While being a counsellor to the merchants in the Antwerp marketplace, he also taught moral theology at the Jesuit College in Leuven. He played a major role in transmitting the *ius commune* and scholastic thought to Protestant natural lawyers from the Low Countries such as Hugo Grotius (1583-1645). Lessius delivered a concise, yet quite original defense of heretics' right to payment, even during the time of punishment[24].

[21] Diego de Covarrubias y Leyva, *Relectio in reg. Peccatum* (Venetiis 1568), part. 1, nr. 8, p. 37: 'Nos tamen contrariam opinionem absque ullo dubio tenendam esse censemus, existimantes minime excusari debitorem a restitutione ex eo, quod creditor sit excommunicatus, ea etenim communio, quae levis est et contingere potest in solutione aeris alieni nequaquam est prohibita, quemadmodum deducitur ex dict. c. inter alia (…)".

[22] Covarrubias, *Relectio in reg. Peccatum*, part. 1, nr. 8, p. 38: "Quibus non oberit textus in d.c. intelleximus, quia loquitur in iudiciali exactione, textus autem in d. c. iuratos et in d. c.. 5 ult. de haeret. tractavere tantum de iuramento fidelitatis: a quo ecclesia absolvit subditos propterea quod eorum princeps sit excommunicatus, unde non erit idem dicendum in debito aeris alieni, cuius solutio facillime creditori fieri potest absque ulla censurae ecclesiasticae laesione".

[23] T. Van Houdt, *Leonardus Lessius over lening, intrest en woeker: De iustitia et iure, lib. 2, cap. 20, editie, vertaling en studie* (Brussel, Paleis der Academiën, 1998).

[24] L. Lessius, *De iustitia et iure* (Antverpiae 1612) lib. 2, cap. 16, dub. 9, p. 193-194, available online on Google Books.

Lessius argued that no legitimate grounds could be derived from human or divine law that would liberate a debtor from paying what he owes to a heretic. First, as a matter of human law (*ius humanum*), a strict distinction needs to be made between the political debt of fidelity (*debitum fidelitatis*) owed by a citizen to a legitimate prince, on the one hand, and private debt (*debitum aeris alieni*), on the other. According to Lessius, the criminal sanctions imposed by civil and canon law on excommunicates and heretics have to be interpreted strictly, just as any other penal law, to the effect that they only concern the political debt of fidelity, not contractual debt. Second, as a matter of divine law (*ius divinum*), which is contained in the Bible, there are no provisions liberating debtors from their obligations towards heretics or excommunicated creditors. Moreover, Lessius pointed out that even heathen have a right to claim payment according to Paul's letter to the Romans.

The first edition of Lessius's *De iustitia et iure* was published in 1605, a couple of years before Becanus's *De fide haereticis servanda*, and one can sense the profound impact of Lessius's writings about debt, heresy and contracts on Becanus. But let us first turn to Suárez, whose work on ecclesiastical punishment predates Lessius's *De iustitia et iure*, even if no direct references to Suárez are made in Lessius's discussion on the crime of heresy and the law of obligations.

3. *Suárez's* De censuris *(1603)*

One of the most extended treatments of the early modern canon law of crime and punishment has undoubtedly been offered by Francisco Suárez in his *De censuris*, a treatise first published in 1603 at Coïmbra. After Portugal had been annexed to Spain in 1580, King Philip II had indeed sent Suárez to the University of Coïmbra to teach there[25]. Suárez's *De censuris* dealt extensively with ecclesiastical sanctions in general and excommunication, suspension, interdict and irregularity in particular. In the late nineteenth century Vivès-edition, the fifty-one disputations of *De censuris* comprise no less than 1285 pages. Despite its unparallelled depth and breadth, Suárez's contribution to criminal law and the penal law of the Church has received only limited scholarly interest[26]. In his own time, however, Suárez's treatment of

[25] For an overview of the abundant secondary literature on Francisco Suárez, see the website by Dr Sydney Penner, http://www.sydneypenner.ca.

[26] But see F. Grunert, 'Strafe als Pflicht – Zur Strafrechtslehre von Francisco Suárez (DL V)', *Francisco Suárez's De legibus zwischen Theologie, Philosophie und Jurisprudenz*, eds. O. Bach, N. Brieskorn and G. Stiening (Stuttgart - Bad

excommunication rapidly acquired reference status. Suárez argued that a debtor is always obliged to pay his debt to an excommunicated creditor, even before the excommunication has been lifted. Suárez fully recognized the validity of contracts concluded with excommunicated parties both before and after imposition of that sanction.

3.1. *The excommunicated debtor is not liberated*

"Excommunication does not offer a favor to an excommunicate or alleviate his burdens", Suárez insisted[27], "and it does not deprive an innocent or non-excommunicate from his right and advantage". Hence, the innocent creditor was allowed to enter into business relations with the excommunicate, for instance to claim payment either in or outside of court. On the basis of an *a fortiori* argument, Suárez argued from canon *Intelleximus* (X 2.1.7) that if a formal legal action could be granted by the judge, then surely it was licit for the creditor to try to obtain payment from the excommunicate by extra-judicial means, such as writing a request for payment or talking to the the debtor in person. The exchange did not even have to be limited to those actions that were strictly needed for the purpose of receiving payment. In other words, the innocent creditor was allowed to engage in a normal transaction with the excommunicated debtor, even shake hands with him or have a friendly chat. When acting in a "human and political manner" (*humano et politico modo*), some actions cannot be avoided, even if they go beyond what is strictly necessary. That does not mean that the creditor engages in sinful behaviour[28].

Cannstatt, Frommann-Holzboog, 2013) 255-266. L.C. Amezúa Amezúa, 'Derecho de evasión y principio de humanidad. Notas de Francisco Suárez sobre la obligación penal y la fuga de presos', *Anuario de filosofía del derecho* 31 (2015) 103-136, including references to further literature.

[27] F. Suárez, *Disputationes de censuris in communi, excommunicatione, suspensione et interdicto itemque de irregularitate*, in *Opera omnia* (Paris, 1861 [Ed. Vivès]), tom. 23, part. 1, disp. 15, sect. 8, n. 2, p. 420: "Excommunicatio nullum favorem confert excommunicato aut ejus onera sublevat, neque alium innocentem et non excommunicatum privat jure aut commodo suo".

[28] Suárez, *Disputationes de censuris*, disp. 15, sect. 8, n. 2, p. 420: "Nam licet aliqua alia misceantur, quae (si humano et politico modo agendum sit), vix possunt vitari, non peccabitur, argument. Cap. Cum voluntate, de Sentent. Excommuni. [=X 5.39.54]".

3.2. *The excommunicated creditor does not lose his claim*

3.2.1. *Contracts concluded before excommunication*

Equally straightforward was Suárez's argumentation in favor of the validity of an excommunicated creditor's claim to payment, especially if the contract had been concluded before the moment of punishment. Suárez reasoned that the debtor remained obliged to pay, since the excommunicated party had not been deprived, impeded or even suspended from his right (*jure suo*). In this context, Suárez expressly refuted Panormitanus's strict interpretation of canon *Inter alia* (X 5.39.31). While acknowledging that debtors did not figure on the list of specific exceptions, Suárez argued that they were nevertheless exempted from the prohibition on communication. He construed this proposition from a wide interpretation of the said canon, maintaining that debtors fell within the scope of a general exception clause included in canon *Inter alia*, or, at least in the canon *Quoniam multos* on which it was based. According to this general exception clause, Pope Gregory VII did not forbid people from having contact with excommunicates when they intended to give them something for the sake of humanity (*humanitatis causa*)[29]. By virtue of an *a fortiori* argument, Suárez claimed that if charity was a good excuse, then the case for giving for the sake of debt or justice (*debiti vel justitiae causa*) was even more compelling[30]. As long as proportionality was respected, Suárez thought that the debtor should not be denied such access to the excommunicated creditor as is necessary for fulfilling his obligations[31].

According to Suárez, the equity of justice (*justitiae aequitas*) requires equality on both sides (*aequalitas ex utraque parte*). Not only an innocent creditor, but also an excommunicated creditor should be allowed to enforce his legal claim. Theoretically speaking, Suárez admitted, it would

[29] See C.11 q.3 c.103 (ed. Friedberg), 673: "Et si quis excommunicatis non in sustentatione superbiae, sed humanitatis causa dare aliquid voluerit, non prohibemus".

[30] Suárez, *Disputationes de censuris*, disp. 15, sect. 8, n. 5, p. 421: "Unde a fortiori posset etiam comprehendi sub illa generali clausula dicti ca. Quoniam multos, quia non prohibemur dare aliqua excommunicato humanitatis causa; ergo multo minus prohibemur dare debiti vel justitiae causa".

[31] Suárez, *Disputationes de censuris*, disp. 15, sect. 8, n. 5, p. 421: "In cap. vero Quoniam multos fit exceptio specialis aliquarum personarum inter quas fatemur non comprehendi debitorem (…) Nihilominus tamen proportionalis communicatio ei necessaria ad suam obligationem implendam non est deneganda, quia haec non ex speciali concessione aut exceptione sed ex generali ratione obligationis implendae derivatur".

have been possible to punish an excommunicate even more severely by depriving him from his contractual rights – but this is not what the law says[32]. An excommunicate fully retains his rights as a creditor (*jus suum integrum retinet*)[33]. However, Suárez acknowledged that, in practice, the excommunicated creditor could not take the debtor to court – because, according to standard canon law, the sanction of excommunication makes him juridically incapable of enforcing his contractual claims in court[34]. Therefore, Suárez submitted that the creditor was allowed to obtain payment in an extra-judicial manner. If necessary, the excommunicated creditor could even take the law in his own hands and have recourse to private justice.

3.2.2. *Contracts concluded after excommunication*

Concerning the question whether contracts concluded after the moment of excommunication are valid, Suárez's position was a bit more nuanced but nevertheless radically in favor of the recognition of the validity of such contracts. The fundamental legal argument for accepting the validity of contracts entered into with excommunicates, was the legal principle that the validity of agreements is essentially determined by mutual consent[35]. Once the radically consensualist nature of contractual obligation is accepted[36], the validity of a contract cannot be called into

[32] Suárez, *Disputationes de censuris*, disp. 15, sect. 8, n. 6, p. 422: "Et quamvis in poenam potuisset excommunicatus suo jure privari, per excommunicationem tamen id non fit, et ideo justitiae aequitas integra ex utraque parte perseverat".

[33] Suárez, *Disputationes de censuris*, disp. 15, sect. 8, n. 3, p. 421: "(…) cum excommunicatus jus suum integrum retineat; ergo alter etiam non peccabit hoc debitum petendo, et communicatione, quae ad hoc fuerit necessaria, utendo".

[34] This was universally acknowledged by the canonists, who granted the defendant the procedural right to employ an exception of excommunication against the plaintiff. For an extended treatment, see Suárez, *Disputationes de censuris*, disp. 16, sect. 3, p. 433-436.

[35] Suárez, *Disputationes de censuris*, disp. 15, sect. 8, n. 7, p. 422: "(…) contractus mutuo consensu verbis expresso perficitur, idque satis est ad ejus valorem, quamdiu per superiorem vel legem non irritatur, quod in praesenti nullibi factum legitur generaliter, sed specialiter in haereticis vel schismaticis id statutum est in c. Excommunicamus, par. Credentes, de Haereticis, juncta glossa ibi, verb. Intstabilis, et in l. Manichaeos, C. de Haereticis, et in l. Apostatarum, C. de Apost. (...)".

[36] The emphasis on consensualism is a basic feature of early modern scholastic contract law, see J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford, Clarendon, 1991) 69-111, and W. Decock, *Theologians*

question on account of the excommunication incurred by one of the contracting parties. Granted, the scholastic doctrine of contract allowed for statutory limitations on parties' natural freedom to contract[37], but, as Suárez pointed out, there are no laws specifically providing for the invalidation of agreements by virtue of excommunication. Such a sanction does exist, however, for heretics and apostates. While there are no laws invalidating contracts entered into by excommunicates, there are explicit provisions in both the civil and canon law tradition invalidating agreements concluded by heretics and apostates (e.g. C. 1.5.4 *pr*., C. 1.7.4 *pr*. and X 5.7.13.5 with glosses). Therefore, heretics and apostates will suffer invalidation of the contracts they have entered into, because there is a specific, additional sanction attached to the crimes of heresy and apostasy, which provides so. That additional sanction is not attached, however, to the censure of excommunication. Consequently, contracts concluded with excommunicates remain valid.

At this point, one can see while the viewpoints of Covarrubias and Lessius actually went further than that of Suárez. Covarrubias and Lessius not only recognized the validity of contracts with excommunicated people, but also with heretics – and they would be followed by Becanus.

3.3. *The execution of contracts with excommunicates*

Apart from recognizing that agreements could validly (*valide*) be concluded with excommunicated people, Suárez also argued that the contracts remained firm (*firme*) during the time of execution of the agreement. He insisted that both parties had to fulfill their obligation. Suárez emphasized that as a matter of conscience it would constitute a violation of equality in exchange (*aequalitas*) to liberate the innocent party from his contractual obligations, because then the excommunicated creditor would suffer, and this would be contrary to the principle of justice (*ratio justitiae*)[38]. No judge could justly dissolve the contract on account of the excommunication of one of the parties, because as a matter of nature (*ex natura rei*) excommunication is not a sufficient ground for

and Contract Law. The Moral Transformation of the Ius Commune (ca. 1500-1650) (Leiden - Boston, Brill / Nijhoff 2013) 142-161.

[37] On the power which both ecclesiastical and civil authorities have to limit freedom of contract, see Decock, *Theologians and Contract Law* 329-418.

[38] Suárez, *Disputationes de censuris*, disp. 15, sect. 8, n. 12, p. 424: "Sed haec doctrina mihi non placet, in foro conscientiae loquendo, quia haec inaequalitas per se considerata est contra rationem justitiae (…). Dico autem in foro conscientiae, quia in foro exteriori certum est non dari actionem excommunicato".

the dissolution of contract[39]. Suárez specified, though, as pointed out earlier, that in the external court the excommunicate would not be able to enforce the contractual promise made by the innocent party.

4. *Becanus's* De fide haereticis servanda *(1608)*

The debate on whether the valid conclusion of a contract is compromised by heresy, in particular, rather than by excommunication in general, received a full-blown, systematic treatment in the work of Martin Becanus (1563-1624). Becanus was born in Hilvarenbeek near Tilburg in the then Southern Netherlands[40]. He entered the Jesuit order in 1583 and went on to teach theology in Cologne, Würzburg and Vienna. During the final years of his life, from 1619 until 1624, he served as the confessor to Emperor Ferdinand II. It was on Becanus's recommendation that, in the midst of a period of religious war, the Emperor conceded toleration to the Protestant nobility in Lower Austria[41]. Scholars have noted that Becanus's propensity to tolerate Protestants as a way to avoid greater evil was remarkable, indeed[42]. It even attracted him the ire of Robert Bellarmine[43]. In 1608, Becanus published *De fide haereticis servanda*, a remarkable treatise on the impact of heresy on contractual faith. It counts a little less then one hundred pages in the second volume of his collected minor works published in Mainz in 1614. The scope of *De fide haereticis servanda* was unmistakably clear: to promote faith (*fides*) among contracting parties, even if one of them had been excommunicated or convicted with heresy. As the title of his work indicates, "contractual faith must be kept to the heretics". In other words, Becanus delivered an exceptional defence of a trans-confessional law of contract. The bindingness of agreements must prevail over religious divisions.

[39] Suárez, *Disputationes de censuris*, disp. 15, sect. 8, n. 14, p. 424: "Nullam rationabilem causam coram judice allegare potest, ut ipse juste dissolvat contractum; sola enim excommunicatio alterius contrahentis non est causa sufficiens; nullo enim jure id cautum est, et nisi jure statuatur, ex natura rei non habetur".

[40] 'Becanus, Martin, *Allgemeine Deutsche Biographie* 2 (1875) 199-200, https://www.deutsche-biographie.de/gnd12290141X.html#adbcontent.

[41] R. Bireley, *The Jesuits and the Thirty Years War: Kings, Courts, and Confessors* (Cambridge, Cambridge University Press, 2003) 39.

[42] H. Gabel, 'Glaube – Individuum – Reichsrecht. Toleranzdenken im Reich von Augsburg bis Münster', *Krieg und Kultur. Die Rezeption von Krieg und Frieden in der Niederländischen Republik und im Deutschen Reich 1568-1648*, eds. H. Lademacher and S. Groenveld (Münster, Waxmann, 1998) 157-178 (174).

[43] S. Tutino, *Empire of Souls. Robert Bellarmine and the Christian Commonwealth* (Oxford, Oxford University Press, 2010) 214-215.

4.1. *Restoring faith* (fides) *beyond the boundaries of faith* (Fides)

Becanus thought that it was absolutely necessary to demonstrate why promises to heretics had to be kept, especially by Catholic contracting parties, since rumours alleging the contrary abounded. The heretics themselves, in particular, claimed that the Catholics did not adhere to the principle that contracts with heretics should be honored. "They maintain that we teach that faith must not be kept to heretics", Becanus found[44], "but that is a blatant lie". Moreover, he accused the heretics of spreading this false rumour for their own sake, availing themselves of the alleged perfidy of the Catholics in order not to keep their own promises. "They abuse that lie as a pretext", Becanus observed, "as though they were allowed, unpunishedly, to rescind and violate agreements made with Catholics". In other words, even if Becanus was eventually going to argue that mutual trust in contracts should go beyond religious faith, he did not therefore become unfaithful to his own habit of reprehending non-Catholics. As a matter of fact, Becanus was one of the main Catholic polemicists of the early modern period and a favorite target of Protestant theologians in Wittenberg[45].

4.2. *Natural law and general contract doctrine*

In order to support the idea that promises made to heretics should be kept, Becanus started his treatise with a chapter on general principles of contract law. In his view, the answer to the controversy entirely depended on these universal legal principles derived from natural law. He saw an immediate connection between the general juridical analysis of contract and the specific moral question of whether Catholics should honor agreements made with, say, Calvinists[46]. That makes his treatise

[44] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, nr. 4, p. 5: "Aiunt nos docere non esse fidem haereticis servandam; quod est apertum mendacium".

[45] K.G. Appold, *Orthodoxie als Konsensbildung. Das theologische Disputationswesen an der Universität Wittenberg zwischen 1570 und 1710*, (Beiträge zur historischen Theologie, 127; Tübingen, Mohr, 2004) 99. Currently, Drs. Thomas Dienst (Lehrstuhl Prof. C. Strohm, University of Heidelberg) is investigating the theological controversies between Mainz and Heidelberg, also involving Martin Becanus.

[46] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, nr. 6, p. 5: "Sed ad rem. Tria hic praestanda sunt. Primo, praemittenda generalia quaedam documenta, e quibus pendet totius controversiae decisio. Secundo, ex iis generatim ostendam, non minus haereticis, quam Catholicis servandam esse

unique, certainly in comparison with earlier treatises on contractual confidence and heretical faith, such as the small treatise *De fide haereticis servanda* published in 1585 at Cologne by the Louvain theology professor Jan Vermeulen, better known as Johannes Molanus (1533-1585)[47]. While Molanus had also derived authoratitive support from the work of canon lawyers such as Diego de Covarrubias y Leyva in defending the proposition that promises to heretics should be kept, his argumentation was mostly informed by Biblical examples. In comparison, Becanus's treatise was much more juridical in nature.

Following the early modern scholastic tradition, Becanus analyzes binding agreements from the point of natural law as accepted promises, further subdividing them into gratuitous, onerous and sworn promises[48]. Of particular interest for present purposes is chapter five of his treatise in which he goes on to analyze the sources of the obligation produced by a valid promise (*unde oriatur obligatio validae promissionis*)[49]. The origins of the binding force of gratuitous promises are determined to be the virtues of truth (*veritas*) and fidelity (*fides/fidelitas*). The virtue of truth obliges people to do what they say and to say what they think, that is to achieve harmony between the mind, the words and the actions[50]. Otherwise they are liars. The virtue of fidelity is a bit more restricted in scope than truth in that it merely requires the unity of words and

fidem. Tertio, examinabo casus quosdam particulares, in quibus apparet specialis aliqua difficultas".

[47] "Molanus, Johannes", *Nationaal Biografisch Woordenboek*, vol. 2 (1966), cols. 580-581, available at http://resources.huygens.knaw.nl/retroboeken/nbwv/#source=2&page=299&view=pdfPane&accessor=accessor_index&size=884.9999389648438. Molanus's work on contractual faith has fallen into oblivion, even if Molanus is still remembered among theologians and art historians for his severe attitude towards art that did not respect the rules of decent morals, see D. Freedberg, 'Johannes Molanus on Provocative Paintings. De Historia sanctarum imaginum et picturarum, Book II, Chapter 42', *Journal of the Warburg and Courtauld Institutes* 34 (1971) 229-245.

[48] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 1, nr. 1, p. 7: "Theologi loquuntur, *pollicitatio est nuda promissio, nondum secuta acceptatione: pactum vero est promissio acceptata*". For the early modern scholastic analysis of contracts as a meeting of offer and acceptance, see Decock, *Theologians and Contract Law* 178-192.

[49] For a comparison with contemporary scholastic discussions on the extent and origin of contractual obligation, see Decock, *Theologians and Contract Law* 192-207.

[50] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 5, nr. 4, p. 21, citing Thomas Aquinas, *IIaIIae*, q. 80, ad 3 and Thomas Cajetanus, in *IIamIIae*, q. 113, art. 1.

actions, specifically with regards to promises[51]. However, it is more far-reaching than truth, because by virtue of fidelity a promise transfers a right to the promisee to enforce the promise[52].

Onerous promises are binding not only as a matter of truth and fidelity, but also by virtue of justice (*justitia*). They are "contracts" in the strict sense of the word[53]. Each party is under an obligation to perform something in an onerous contract, as is expressed in the well-known maxim of Ulpian, cited by Becanus, that "justice is the constant and perpetual will to give each one his right"[54]. When promises have been taken under oath, then they are binding by the virtue of religion (*religio*), too, meaning that breach of a sworn contract is tantamount to perjury[55].

Equally relevant is Becanus's exploration of the extent of promissory obligation in chapter six (*quanta sit obligatio validae promissionis?*). Starting from the virtue of truth, which cannot be violated without committing the mortal sin of lying, Becanus explained that no violation whatsoever was allowed of the virtues upon which the binding force of promises rested, since violating them was even worse than lying[56]: "Once it has been established that the truth always binds on pain of sin, so that lying is never allowed, it is easily established that fidelity, justice and religion are always binding, so that it is never allowed to commit perfidy, injustice or sacrilege".

[51] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 5, nr. 5, p. 21.

[52] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 5, nr. 5, p. 22: "Nam promissor non solum constituit se debitorem ut caveat mendacium, sed etiam tribuit alteri ius ad exigendum promissum". For the parallels with Lessius and Grotius, see Decock, *Theologians and Contract Law* 200 and 211.

[53] In fact, there was a debate going on about whether only onerous agreements or also gratuitous pacts could be considered as "contracts" in the strict sense of the word; see W. Decock, 'Donations, bonnes moeurs et droit naturel. Un débat théologico-politique dans la scolastique des temps modernes', *Droit et moeurs. Implication et influence des moeurs dans la configuration du droit*, ed. M. Chamocho Cantudo (Jaén, Universidad de Jaén, 2011) 182-197.

[54] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 5, nr. 6, p. 22.

[55] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 5, nr. 7, p. 22.

[56] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 6, nr. 13, p. 28: "Nam si semel constet, veritatem semper obligare sub peccato, ita ut nunquam liceat mentiri, facile etiam constabit, fidelitatem, iustitiam et religionem semper obligare, ita ut nunquam liceat esse perfidum, iniustum aut sacrilegum. Haec enim virtutes magis obligant, quam veritas et opposita earum vitia graviora sunt quam merum et simplex mendacium".

The foundations of the bindingness of promise, then, are absolute. They do not allow for exceptions. Drawing on the early modern scholastic tradition, Becanus argued that "the promisor does not merely affirm that he is going to give something, but he obliges himself towards the promisee, therefore conveying him a right to claim that which he promises"[57]. If the promisor does not keep his faith, then he violates the promisee's right, thereby committing a mortal sin. Moreover, accepted promises are enforceable not only in conscience but also in the external court, both on account of Spanish civil law and canon law, as Becanus rightly ponted out, relying on the work of Luis de Molina (1535-1600), the famous Jesuit moral theologian, and Antonio Gómez (1501-1561), the most influential professor of Roman law at the University of Salamanca in the sixteenth century[58].

4.3. *Contracts with heretics are binding*

Becanus's preliminary investigation of the foundations of contractual obligation had a direct impact on his response to the question of whether contractual confidence must be honored in dealing with heretics. While discouraging Catholics to engage in business with heretics in the first place, Becanus emphatically stated that once you had concluded a contract or treaty with a heretic, you had to fully and sincerely keep your faith, not less than if the agreement had been made with a Catholic. "The reason stems from what has been said earlier", Becanus explained[59], "since the virtues from which the obligation to keep faith in promises stems, are binding upon us in the same manner, whether we are dealing with Catholics or heretics". It is never allowed to

[57] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 6, nr. 14, p. 29: "Nam qui promittit alteri, se aliquid illi daturum, non tantum affirmat se daturum, sed etiam obliget se illi, et consequenter tribuit illi ius ad exigendum id, quod promittitur".

The parallel, both in substance and wording, with Lessius's earlier analysis of the juridical nature of contractual promises in his *De iustitia et iure* (1605) is striking, although no explicit mention of the theologian from Antwerp is made, see Decock, *Theologians and Contract Law* 200, fn. 710. A striking difference with Lessius, though, is that Becanus attributes to the force of the virtue of fidelity what Lessius had attributed to the virtue of justice.

[58] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 6, nr. 15, p. 29-30.

[59] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 7, nr. 8, p. 35: "Ratio sumitur ex dictis. Nam virtutes illae, ex quibus oritur obligatio servandae fidei in promissis, aeque nos obligant, sive apud Catholicos, sive apud haereticos versemur".

lie, to violate rights, to commit injustice or swear false oaths. What is intrinsically and naturally evil and illicit (*intrinsece et ex natura sua mala et illicita*) cannot be turned into good on any pretext[60]. Whether towards Catholics or heretics, if you are lying, unfaithful, causing injury or swearing false oaths, you are equally liable and criminal.

Becanus went on to adduce Biblical and historical examples to bolster his rational analysis with empirical evidence. For example, he recounted the Old Testament story of Joshua and the Gabaonites. In this Biblical story, Joshua had been rewarded by God for observing the treaty with this people of infidels, whereas Saul had been punished for breaking that pact later[61]. By the same token, Becanus recalled an episode from more recent times, in which Vladislaus, Jagiellon King of Poland (1434-1444) and King of Hungary-Croatia (1440-1444) had been ingloriously defeated at Varna by Murad II, Sultan of the Ottoman empire (1421-1451). The reason why Vladilaus had been defeated was that he had broken his promise to respect the treaty with the Ottomans. Hence, he had provoked the ire of God[62].

"Faith has to be kept to gentiles, idolaters and Turks, why not also to heretics?", Becanus concluded rhetorically[63], "The fact that heretics do not keep faith to God is not an obstacle, since that does not pertain to

[60] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 7, nr. 9, p. 36: "Quae intrinsece et ex natura sua sunt mala et illicita nunquam bene et licite fieri possunt, quocunque praetextu fiant. Atqui mendacium, violatio iuris alterius, iniustitia et periurium intrinsece et ex natura sua sunt mala et illicita. Ergo nunquam bene et licite fieri possunt, quocunque praetextu fiant. Ergo sive apud Catholicos sive apud haereticos sis mendax, perfidus, iniustus et periurus, aeque reus es, et aequali scelere te obstringis".

[61] See Joshua 10 and 2 Kings 21; cf. Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 7, nrs. 9-13, p. 36-37.

[62] The fact that Vladislaus had attacked the Ottomans at the instigation of Cardinal Cesarini, a legate of Pope Eugenius IV, was often cited by anti-papalist and Enlightened thinkers to demonstrate that the Catholics did not adhere to the principle that promises should be kept to heretics; e.g. Voltaire, *Annales de l'empire depuis Charlemagne*, in *Oeuvres complètes*, vol. 25 (s.l. 1784) 358: "Il était du devoir des catholiques de ne pas tenir foi aux hérétiques; donc c'était une plus grande vertu d'être perfide envers les musulmans, qui ne croient qu'en Dieu. Le pape Eugène IV, pressé par le légat [le cardinal Julien Césarini, homme fameux pour ses poursuites contre les partisans de Jean Hus], ordonna au roi de Hongrie Vladislas d'être chrétiennement parjure".

[63] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 7, nr. 17, p. 39: "Ex his concludo, gentilibus, idolatris et Turcis fides servanda est, cur non etiam haereticis? Nec obstat, quod haeretici fidem Deo non servent. Hoc enim non pertinet ad contractus humanos, de quibus hic agimus, sed divino iudicio relinquendum est".

contracts between human beings, which we are discussing here, but must be left to divine judgment". The realm of contractual confidence, then, has to be neatly separated from the realm of religious faith. God will judge the lack of faith on the part of heretics. It is not for human beings to punish heretics by violating agreements.

Becanus's plea for an autonomous realm of contract law, unaffected by inter-confessional strife and religious wars, should nonetheless be understood in context. While emphasizing the binding nature of agreements with heretics, the Jesuit from Hilvarenbeek admonished Catholics to remain vigilant and not to conclude contracts with heretics all too readily. They must pay attention to three dangers, in particular, namely overthrowing their faith (*subversio*), creating scandal (*scandalum*) and the improbity of heretics (*improbitas*)[64]. Becanus compared heresy to a contagious disease (*morbus contagiosus*), urging Catholics to be prudent and safeguard the health of their soul. From daily experience in Germany, France and the Netherlands he deduced that the danger of contagion and the risk of loss of faith or conversion to Lutheran or Calvinist sects were real[65]. Citing Paul's letter to Timothy he recommended Catholics to avoid heretics on account of their wicked behavior[66]. Moreover, men of power, wealth and influence had to be careful not to give simple people the impression that they approved of heretical ideas by doing business with them. Such scandal was to be avoided at all costs[67].

4.4. *Contracts with excommunicates are binding in Germany*

Subsequent to his treatment of contracts with heretics, Becanus addressed another view that circulated widely but which was entirely wrong in his opinion, namely that Catholics adhered to the principle that agreements with excommunicates are not to be honored. "Because Catholics teach that excommunicated heretics should be avoided and that no business should be done with them", Becanus explained the

[64] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 7, nr. 4, p. 33.

[65] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 7, nr. 5, p. 33-34.

[66] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 7, nr. 7, p. 35.

[67] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 7, nr. 6, p. 34.

confusion[68], "they are also thought to teach that faith must not be kept to them – but that is wrong". Since excommunication was a sanction typically inflicted upon heretics as a matter of canon law (see X 5.7.13), the question whether contracts with excommunicates are binding was of direct concern to Becanus's main argument.

Becanus first argued for a restrictive interpretation of the prohibition on communion with excommunicates and then advocated the bindingness of contracts with excommunicates in practice, at least in the German area.

The first step in Becanus's argumentation was to limit the scope of the canonical rules on the social exclusion of excommunicates and the corresponding duty of Catholics to avoid them. He pointed out that the prohibition on conversation with excommunicates had been restricted to the case of nominally excommunicated people (*nominatim excommunicati*) and that of criminals who had notoriously beaten clergymen (*notorii clericorum percussores*). This restrictive interpretation had been introduced after the Council of Constance (1414-1418) by Pope Martin V's Bull *Ad evitanda scandala*[69]. It became standard doctrine among the early modern scholastics.

As a result of this restrictive interpretation, Becanus could put forward the conclusion that, practically speaking, in the Holy Roman Empire it was always allowed for the innocent to deal with excommunicates as a matter of common ecclesiastical law, since, to his knowledge, nobody had been nominally excommunicated and whether somebody was a notorious "clericorum percussor" could only be determined at the local level[70]. He admitted, though, that the *ius proprium*, that is particular ecclesiastical legislation in other regions, such as Italy and Spain, might nevertheless differ from the German canon law. Similarly, the conversation with heretics still involved dangers as a matter of natural and divine law, especially if the innocent

[68] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 8, nr. 2, p. 39: "Catholici, quia docent haereticos excommunicatos vitandos esse, nec cum illis habendum commercium, putantur etiam docere non esse illis fidem servandam. At non ita est".

[69] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 8, nr. 6, p. 41. On Martin V's Bull, see F.E. Hyland, *Excommunication. Its Nature, Historical Development and Effects* (Washington, CUA, 1928) 35-47.

[70] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 8, nr. 7, p. 41: "Hinc sequitur primo, passim in toto Imperio Germaniae et plerisque vicinis regnis, licitum esse Catholicis (quantum attinet ad ius Ecclesiasticum commune) conversari cum haereticis, quia nullus hoc tempore est, quod sciam, nominatim excommunicatus propter haeresin. An autem aliqui sint notorii clericorum percussores unicuique in sua civitate aut habitatione constare potest".

ran the risk of overthrowing his faith, of causing scandal or participating in ceremonies organized by Lutherans or Calvinists[71].

From his restrictive interpretation of the prohibition on dealings with excommunicates, Becanus went on to affirm that it was both allowed to enter into contracts with people sanctioned by a general excommunication and obligatory to honor those agreements. In words that recall Suárez's discussion, Becanus stated that excommunication was not a sufficient cause for a legitimate breach of contractual faith[72]. The case of nominally excommunicated people or *percussores clericorum* was a bit more nuanced, even if it was beyond doubt for Becanus that contracts concluded with these specific types of excommunicates were valid, whether concluded before or after the moment of excommunication. The innocent debtor remained under a duty to fulfill his obligation as a matter of conscience, because the heretical excommunicate retained the right acquired through contract[73]. Becanus adduced canon *Foelicis* (VI 5.9.5) to support this point. As mentioned before, canon *Foelicis* stipulated that, once absolved, the excommunicate should not be denied the recovery of his contractual claims[74]. In addition, while the innocent contracting party sinned in concluding a contract with this type of excommunicated people, the contract remained valid regardless[75]. Becanus generalized a number of specific canon law rules regarding

[71] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 8, nr. 2, p. 39.

[72] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 8, nr. 9, p. 42: "His positis, examinandum est, an teneamur servare fidem haereticis excommunicatis? Vel quod idem est, an sola excommunicatio sufficiens causa sit, propter quam non sit illis servanda fides? Res facilis est. Nam primo constat ex dictis, si non sint nominatim excommunicati vel notorii percussores clericorum, non esse vitandos ratione excommunicationis; ac proinde posse nos cum illis valide pacisci et contractus celebrare, non minus quam cum aliis, ideoque fidem servandam esse".

[73] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 8, nr. 10, p. 42: "Hinc infero, si haereticus excommunicatus retinet ius suum, quod accepit in contractu tecum inito, procul dubio te in conscientia manere obligatum ad praestandum id quod illi iure debetur".

[74] VI 5.9.5, Ed. Friedberg, vol. 2, col. 1092: "Verum quum talis gratiam reconciliationis meruerit: beneficio absolutionis obtento indulgeatur ei licentia, ut suam et suorum iniuriam prosequatur et debitorum illorum, quae contracta fuerint, de postmodum acquisitis repetitio non negetur."

[75] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 8, nr. 11, p. 43.

marriage, vows and donations to reach this conclusion[76]. Indeed, canon *Significasti* (X 4.7.6) and canon *Cum illorum* (X 5.39.32) were held to mean that excommunication was not an obstacle to the validity of marriage or religious vows, respectively[77]. Moreover, canon *Inter dilectos* (X 3.24.8) declared donations made by excommunicates valid[78].

A complication for Becanus's defence of contractual confidence beyond religious borders arose from the canon law provisions regarding the forfeiture of excommunicates' property, especially in canon *Cum secundum leges* (VI 5.2.19). As explained before, this canon held that the goods of heretics are automatically confiscated. Becanus attached great importance to the fact that Johannes Andreae had qualified the provision by saying that the secular lord could not forfeit the goods unless an ecclesiastical judge had previously established the crime through a judgment[79]. The threat of confiscation did by no means remain theoretical in countries such as Spain, Italy and England[80]. Forfeiture as a sanction on heresy was interpreted widely to signify the deprivation of any kind of lordship over goods (*privatio dominii in bona temporalia*), thus also including contractual claims[81]. Becanus, however, downplayed the practical relevance of this canon for the German regions "since it is not usual that the goods of heretics are taken away by the state treasury

[76] This inductive argument recalls Suárez's reasoning in *Disputationes de censuris*, disp. 15, sect. 8, n. 8, p. 422, but no explicit reference to Suárez occurs in Becanus's text.

[77] X 4.76, Ed. Friedberg, vol. 2, col. 689; X 5.39.32, Ed. Friedberg, vol. 2, cols 902-903.

[78] X 3.24.8, Ed. Friedberg, vol. 2, cols. 535-536.

[79] Gl. ad VI 5.2.19, Ed. Friedberg, vol. 2, col. 1077: "Bona haereticorum ipso iure sunt confiscata, quod probatur triplici argumento legali. Sed apprehensio bonorum fieri non debet per dominum saecularem, nisi prius pronunciatum fuerit super crimine per iudicem ecclesiasticum qui hoc possit".

[80] H. Kamen, 'Confiscations in the Economy of the Spanish Inquisition', *Economic History Review* 18 (1965) 511-525; M. Bellomo, 'Giuristi e inquisitori del Trecento. Ricerca su testi di Iacopo Belvisi, Taddeo Pepoli, Riccardo Malombra e Giovanni Calderini', *Per Francesco Calasso. Studi degli allievi* (Roma 1978) 9-57, now in Id., *Medioevo edito e inedito. III. Profili di giuristi* (Roma, Il Cigno, 1998); V. Lavenia, 'I beni dell'eretico, i conti dell'inquisitore. Confische, stati italiani, economia del Sant'Uffizio', *L'Inquisizione e gli storici: un cantiere aperto* (Atti dei convegni lincei, 162; Roma 2000) 47-94; A. Padovani, 'La repressione dell'eresia nei comuni dell'Italia settentrionale tra *ius proprium* e *ius commune* (secolo XIII)', *Rivista Internazionale di Diritto Comune* 22 (2011) 55-87; P.R. Cavill, 'Heresy, Law and the State: Forfeiture in Late Medieval and Early Modern England', *English Historical Review* (2014) 270-295.

[81] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 8, nr. 14, p. 44.

unless something else intervenes"[82]. Moreover, even on a more theoretical level he denied that canon *Cum secundum leges* (VI 5.2.19) was a threat to the stability of contracts with excommunicated heretics. To explain why, Becanus gave an account of the criminal sanctions on heresy according to the late medieval *ius commune* tradition. He concluded that forfeiture was just one sanction next to other sanctions such as excommunication. Importantly, then, excommunication and forfeiture were distinct punishments, according to Becanus, each imposed by different laws. So even if a heretic incurred the sanction of excommunication, he was not simultaneously deprived from his legal capacity to own and dispose of goods[83]. A separate judgment was needed for that.

Becanus thought that it was necessary to realize that the canon and civil laws imposing sanctions upon heretics, particularly those cited at the beginning of this paper, were of purely penal law (*leges mere poenales*)[84]. These laws, he argued, are not necessarily binding in conscience, and the punishment becomes not effective, until after the decision by the court[85]. Consequently, it was still allowed for heretics to keep their rights and goods until the moment of condemnation by the judge. Moreover, it pertained to the officers of justice to execute the judgment and deprive the heretic of his goods, so that the heretic did not have to abandon his goods spontaneously after judgment[86]. To bolster his interpretation, Becanus adduced support from custom and the early

[82] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 8, nr. 18, p. 46: "Id tamen raro accidit, praesertim in Germania et vicinis provinciis. Non enim est in usu, ut bona haereticorum rapiantur a fisco, nisi aliquid interveniat".

[83] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 8, nr. 16, p. 45: "Hinc iam facile apparet, haereticos ex eo praecise quod excommunicati sunt, non privari dominio et iurisdictione, sive in subditos, sive in bona temporalia; sed hanc privationem esse distinctam poenam ab excommunicatione et distincta lege irrogatam".

[84] W. Daniel, *The Purely Penal Law Theory in the Spanish Theologians from Vitoria to Suárez* (Roma, Gregorian University Press, 1968). See also O. Condorelli, 'Le origini teologico-canonistiche della teoria delle leges mere poenales (secoli XIII-XVI)', *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, Bd. 3: *Straf- und Strafprozesrecht*, eds. M. Schmoeckel, O. Condorelli and F. Roumy (Köln e.a., Böhlau, 2012) 55-98.

[85] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 8, nr. 16, p. 45.

[86] Becanus, *Disputatio theologica an haereticis servanda sit fides?*, cap. 8, nr. 17, p. 45: "Nec post sententiam iudicis tenentur sua bona tradere aut offerre fisco, quia executio paenae non spectat ad ipsos, sed ad ministros iudicis vel fisci".

modern scholastic tradition, particularly from the Jesuit theologian Juan Azor (1535-1603). In practice, then, contracts with heretics had to be kept at least until there had been a real execution of the judgment imposing the specific sanction of forfeiture – but, certainly in the German region, this hardly occurred.

5. *Conclusion: towards a trans-confessional law of contract*

This article started with the question whether faith in the religious sense of the word (*Fides*) can be an obstacle to faith in the contractual sense of the word (*fides*). Put differently, can people with false beliefs or violating religious norms, such as heretics or excommunicates, still enforce a contract? Does the innocent debtor remain bound to a heretical creditor? Conversely, does the innocent creditor have the right to go and meet the heretical debtor to obtain payment? The early modern jurists and theologians dealing with these questions had inherited a tradition that seriously impaired the power of people sanctioned with excommunication or convicted as heretics to retain, let alone claim their rights in the private sphere. For fear of contamination, contacts with excommunicates and heretics were to be avoided altogether. The criminal sanction of excommunication had profound effects on an individual's capacity to move freely in the civil sphere. Both the civilian and the canon law tradition, the lungs of the late medieval *ius commune*, contained provisions that left excommunicates and heretics in a position of weakness in relation to their contracting parties. They could not enforce contractual rights.

If we were to believe the opinion of influential thinkers such as the French Enlightenment philosopher Voltaire, the Catholic jurists and theologians in the Post-Reformation world did not change that *ius commune* position, but rather reinforced the sanctions on morally and religiously deviant behavior. Allegedly, the scholastics were the incarnation of intolerance, promoting violation of contractual promises towards heretics: "It was a duty for Catholics not to keep their agreements with heretics" (*Il était du devoir des catholiques de ne pas tenir foi aux hérétiques*), Voltaire maintained[87]. As is often the case, Voltaire and other Enlightenment thinkers have handed down to modern man a picture of scholasticism which is biased, at best, and false, at

[87] Voltaire, *Annales de l'empire depuis Charlemagne*, in *Oeuvres complètes*, vol. 25 (s.l. 1784) 358, cited above, fn 62.

worst[88]. A close reading of primary sources that have suffered from neglect for far too many centuries shows an entirely different picture. Early modern Catholic thinkers can be found to emphasize that it is the duty of Catholics to keep agreements with heretics, as the very title of Martin Becanus's work indicates (*fides haereticis servanda*). Francisco Suárez, for his part, did not want the sanction of excommunication to have an effect on contracts.

This transformation of *ius commune* views about the relationship between contractual obligation, excommunication and heresy in the work of Becanus and Suárez was a continuation of changes that occurred already in late sixteenth century canon law and theology, most probably as a reaction to profoundly changed external historical circumstances. Traditional *ius commune* provisions on heresy and contract had gradually been adapted, especially by Diego de Covarrubias y Leyva and Leonardus Lessius. Both scholars witnessed the devastating consequences of confessional strife within the Spanish-Habsburg Empire. They saw the necessity to separate the realms of politics and religion, on the one hand, and private law, on the other. Even a heretical creditor should be able to recover his claims, because that is part of the system of *ius naturae*. The religiously and politically informed *leges* punishing excommunicates and heretics should not interfere with that natural order of things. The effects of sanctions deriving from the violation of religious norms should be mitigated. Suárez and Becanus completed the transformation of the *ius commune*, erecting a trans-confessional law of contractual obligation rooted in general scholastic contract doctrine as developed in the early modern period. They strongly affirmed that promises need to be kept towards heretics and excommunicates. They delivered an obstinate defence of the inviolability of trust beyond the boundaries of faith.

Summary: The starting point for reflection in this contribution is the plurality of meanings attached to the Latin word *fides* in the late medieval and early modern legal and theological traditions. *Fides* can denote both the Catholic faith and the trust or confidence that promises will be kept and contracts enforced. But what happens when these two notions of *fides* enter into conflict, as when an agreement has been made with a heretic: can the heretical creditor enforce the promise made by the debtor? Can he count on faith in the contractual

[88] U. Leinsle, *Introduction to Scholastic Theology* (Washington, Catholic University of America, 2010) 4; A. de Libera, *Où va la philosophie médiévale?*, Leçon inaugurale, Collège de France, Paris, 13 février 2014, §§ 2-6, available online at http://books.openedition.org/cdf/3634#ftn1. Decock - Birr, *Recht und Moral in der Scholastik der Frühen Neuzeit* 4-5.

sense, even if he has lost the right faith? Traditionally, the *ius commune* was adduced to argue that an excommunicated or heretical creditor forfeited his rights, including the right to enforce promises. However, against the background of confessional strife and religious wars, a seminal effort was made by Catholic canon lawyers and scholastic theologians to adapt the *ius commune* to the new historical realities. This article will concentrate on the early seventeenth century contributions by Francisco Suárez (1548-1617) and Martin Becanus (1563-1624) to this debate. They were two major Jesuit scholastic thinkers working in Spain and the Holy Roman Empire, respectively, who transformed the traditional teachings on religious faith and contractual confidence to establish a trans-confessional doctrine of contract.

Sommario: Il punto d'inizio delle riflessioni di questo contributo è la pluralità dei significati connessi alla parola latina *fides* nelle tradizioni giuridica e teologica del tardo medioevo e della prima età moderna. *Fides* può significare sia la fede cattolica che la fiducia o affidamento che le promesse saranno mantenute e i contratti portati a esecuzione. Ma cosa succede quando queste due nozioni di *fides* entrano in conflitto, come quando un accordo è stato fatto con un eretico? Può il debitore eretico fare rispettare la promessa fatta dal debitore? Può contare sulla fede nel senso contrattuale, anche se ha perso la retta fede religiosa? Tradizionalmente il *ius commune* era addotto per sostenere che un creditore scomunicato o eretico perde i suoi diritti, compreso quello di fare rispettare le promesse. Tuttavia, sullo sfondo dei conflitti confessionali e delle guerre di religione, uno sforzo determinante fu compiuto dai canonisti cattolici e dai teologi scolastici per adattare il *ius commune* alle nuove realtà storiche. Questo articolo si concentrerà sui contributi che, all'inizio del sec. XVII, Francisco Suárez (1548-1617) e Martin Becanus (1563-1624) diedero a tale dibattito. Essi furono due fra i maggiori pensatori scolastici gesuiti operanti, rispettivamente, in Spagna e nel Sacro Romano Impero, che trasformarono gli insegnamenti tradizionali sulle relazioni tra fede religiosa e fede contrattuale in modo da stabilire una dottrina trans-confessionale del contratto.

Key Words: Contract law; faith; excommunication; heresy; *ius commune*, scholasticism.

Parole chiave: Diritto dei contratti; fede; scomunica; eresia; *ius commune*; Scolastica.

Direttore responsabile: Manlio Bellomo.
Sede della Redazione: via Nicola Fabrizi 21, 95128 Catania.
Registrazione del Tribunale di Catania n. 22 del 13.8.1990.
Casa Editrice: Il Cigno Galileo Galilei, Roma.
La corrispondenza va indirizzata a Manlio Bellomo, via Gallo 24, I-95124 Catania.
La Rivista esce una volta l'anno.

***L'abbonamento (subscription) deve essere richiesto a**:* Euno Edizioni, via Mercede 25, I-94013 Leonforte (En). *L'abbonamento non disdetto entro il 31 dicembre si intende rinnovato per l'anno successivo.*
L'abbonamento può essere richiesto anche per internet:
amministrazione@eunoedizioni.it
Abbonamento annuo (standing subscription) per l'Italia e per l'Estero: Euro 80.
Fascicoli singoli e arretrati: Euro 90.
Modalità di pagamento: bonifico bancario (senza spese per il beneficiario) intestato a "Debole Maria", su Poste Italiane filiale di Leonforte, c.c. 8575188 [Paese: IT; CIN: Q; ABI: 07601; CAB: 16800 – IBAN completo IT85Q0760116800000008575188 – CODICE BIC/SWIFT: BPPIITRRXXX]
È escluso il pagamento tramite assegno.

ISSN 1120-5695

Piazza S. Salvatore in Lauro 15, I - 00186 Roma
Stampa, distribuzione e abbonamenti a cura di Euno edizioni – Via Mercede 25 – 94013 Leonforte (En) – www.eunoedizioni.it - info@eunoedizioni.it